

60 Days to Freedom - The Release and Repatriation of Mohammad Jawad

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“Peace cannot be kept by force...it can only be achieved by understanding.”¹
 “While some delay in fashioning new procedures is unavoidable, the cost of delay can no longer be borne by those who are held in custody.”²

I. Introduction

After the 11 September 2001 terrorist attacks upon the United States, the U.S. Congress passed a “Use of Force” Resolution on 14 September 2001, that authorized President Bush to “use all necessary and appropriate force against those nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks on 11 September 2001, or harbored such organizations or persons”.³

Pursuant to the Authorization for Use of Military Force (AUMF), the United States commenced military operations against the Taliban and al Qaeda targets in Afghanistan on or about 7 October 2001.⁴ United States forces began ground operations on 19 October 2001.⁵ U.S. military operations involved a small number of Special Forces personnel operating on the ground in Afghanistan, and working in cooperation with the forces of the Northern Alliance, a coalition of armed and organized Afghan groups that opposed the Taliban. Over the course of the conflict, Special Force teams from other countries joined U.S. forces and the Northern Alliance against the Taliban and al Qaeda. On 13 November 2001, President Bush issued an Executive Order⁶ authorizing the Secretary of Defense to detain indefinitely anyone President Bush has “reason to believe”:

- i. is or was a member of the organization known as al Qaeda;
- ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

¹ Albert Einstein.

² *Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008).

³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“AUMF”).

⁴ [http://en.wikipedia.org/wiki/War_in_Afghanistan_\(2001%E2%80%93present\)](http://en.wikipedia.org/wiki/War_in_Afghanistan_(2001%E2%80%93present)).

⁵ *Id.*

⁶ Through this Executive Order, President Bush asserted complete discretion to identify the individuals that fall within its scope. The EO contained no provision for even the most basic requirements of due process, including notice or a hearing. It authorizes indefinite and unreviewable detention based on nothing more than the President’s delegated written determination that an individual is subject to its terms without review by any independent court.

- iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).⁷

Afghanistan's capital, Kabul, was captured by Northern Alliance forces on or about 13 November 2001, and the Taliban government was essentially ousted by the end of that month.⁸ On 5 December 2001, the "Bonn Agreement" was concluded which provided guidance regarding the interim Afghan governmental structure.⁹ Specifically, the agreement provided under the "Interim Authority" provisions, subsection II titled "legal framework and judicial system," that the Afghan Constitution of 1964 would be applicable until the new Constitution is drafted and ratified. This agreement was then incorporated by reference and adopted in United Nations Resolution 1383 (2001) *unanimously* by the Security Council.¹⁰

On 22 December 2001, Afghan sovereign power was transferred to an Interim Authority chaired by His Excellency Hamid Karzai. The Bonn Agreement was reaffirmed by the Security Council during the 4560th meeting conducted on 26 June 2002 which addressed, *inter alia*, the successful conduct of an emergency Loya Jirga¹¹ by the transitional

⁷ Exec. Order, 66 Fed. Reg. 57,833 (13 November 2001) (the "Military Order").

⁸ [http://en.wikipedia.org/wiki/War_in_Afghanistan_\(2001%E2%80%93present\)](http://en.wikipedia.org/wiki/War_in_Afghanistan_(2001%E2%80%93present)).

⁹ <http://www.afghangovernment.com/AfghanAgreementBonn.htm>.

¹⁰ The United States, per Article 23 United Nations Charter, is a permanent voting member of the Security Council.

¹¹ Hundreds of Afghans - political and tribal leaders and other representatives from across Afghan society - took part in a loya jirga, or grand council, in June 2002 which chose the new transitional government for the country. A loya jirga is a forum unique to Afghanistan in which, traditionally, tribal elders - Pashtuns, Tajiks, Hazaras and Uzbeks - have come together to settle affairs of the nation or rally behind a cause. The phrase loya jirga is Pashto and means "grand council". The institution, which is centuries old, is a similar idea to the Islamic "shura", or consultative assembly. Historically it has been used to settle inter-tribal disputes, discuss social reforms and approve a new constitution. About 1500 delegates from all over Afghanistan took part in the loya jirga in Kabul. More than 1000 were elected in a two-stage process. Each district elected 20 people, who then held a secret vote to select one person to represent the whole district. Each of the country's 362 districts had at least one seat, with further seats allotted for every 22,000 people. No group was excluded from the assembly, but anyone alleged to have committed acts of terrorism or suspected of involvement in drugs, human rights abuses, war crimes, plunder or theft of public property is barred from attending. Of the remainder of the seats, a total of 160 were given to women. Nomads, refugees, academics, cultural institutions, social organizations and religious scholars were also represented. The Taleban movement was not represented, but groups who share their political, social and cultural views sent representatives. A loya jirga is seen as an essential process - one that is wholly Afghan. It is also seen as an inclusive institution. Women attended for the first

authority of Afghanistan. It was at this meeting that His Excellency, Hamid Karzai was inaugurated as President of the transitional administration of Afghanistan. The Taliban has struggled to regain power since its removal.¹²

On or about 17 December 2002, a grenade attack shook downtown Kabul.¹³ The Afghan and U.S. government each reacted to the event in different and troubling ways. Several persons were detained on that day in connection to the attack including Mohammad Jawad.¹⁴ This article addresses some of the legal and moral issues associated with the capture, detention, and eventual release of one of the youngest Guantanamo detainees. It will first introduce you to Mohammad Jawad, then address various U.S. Constitutional due process concerns and his defunct or absent repatriation plan.

II. Mohammad Jawad – The “Minor Petitioner”

In 1991 the reign of the Soviet Union through the communist Government of Afghanistan led by President Mohammad Najibullah Ahmedzai was coming to the end.¹⁵ General Wardak, the current Minister of Defense of Afghanistan led the Mujahedeen charge to take Khowst.¹⁶ One of his subordinate commanders was Commandant Sher Khan, the current tribal leader of the Kochi Tribe.¹⁷ Jawad is a member of that tribe, and his father fought and died in that very battle to take Khowst in the winter of 1991.¹⁸ At the time, Jawad’s mother had fled the fighting to the Miran Shah refugee camp just over the border in the out skirts of Peshawar, Pakistan. She was three months pregnant with Jawad when his father was slain in battle. This obviously made it impossible for Jawad to ever know much less meet his father.¹⁹

At that point, Jawad and his mother remained in the refugee camp

time. It is an institution favored by the Pashtuns in the south of the country, who believe they lost out during the Bonn political talks at the end of 2001. See http://news.bbc.co.uk/1/low/world/south_asia/1782079.stm (1 July 2002).

¹² <http://en.wikipedia.org/wiki/Taliban>.

¹³ <http://www.eurasianet.org/departments/insightb/articles/eav062309.shtml>

¹⁴ *Id.*

¹⁵ <http://www.afghanland.com/history/najib.html>.

¹⁶ Based on interviews in person interviews with General Wardak and defense counsel.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ AIHRC family investigation; Interview of General Wardak, Afghanistan Minister of Defense; Interview of Commandant Sher Kan, Couchi Tribal Leader.

to avoid the violence as the Taliban ousted the Najib Government and killed Najibullah in 1996.²⁰ During this time, Jawad did not have access to any education and was functionally illiterate. All he had was his native language of Poshtu. Jawad never had any siblings and his mother never remarried.²¹

Some time prior to December 2002, Jawad, barely 12 years old, moved to Kabul with his uncle Abdul Ghazi in the Darwaz-e Lahori area of Kabul. Jawad's family, especially his mother, needed him to make a living to slowly begin the process of reestablishing in Afghanistan. Jawad and his uncle would search daily for work that consisted of difficult manual labor. During this time, they found work with a contractor digging wells for Government buildings.²²

Sometime during the afternoon of 17 December 2002, a Soviet style Jeep without a hard top was positioned south on Jade Nader Pashto ("Electric Street") appearing to be making a left hand turn on the street prior to the Polesheki Bridge that crosses the Kabul River.²³ The Jeep was either parked or trying to make a turn while stuck in traffic, when someone threw a grenade into the Jeep. The occupants of the Jeep included two United States service members and an Afghan interpreter. Although no one died, all three suffered serious injuries.²⁴ Jawad and his uncle resided a few hundred meters away from this attack.²⁵

Several varying accounts exist about who was actually at the scene, who apprehended the individuals involved and how it all happened. One consistent fact is that at least three people were detained for some period of time, including Jawad.²⁶ However, Jawad and only Jawad, was arrested and taken from the scene. One of those released, Amin Tarzi, even confessed to a role in the attack.²⁷

Jawad was taken to the District 2 Police Headquarters and in-processed

²⁰ 'Biography of Dr. Najibullah Ahmadzai', <http://www.afghanland.com/history/najib.html>.

²¹ UNICEF family social worker interview, May 2009.

²² *Id.*

²³ Criminal Investigation Task Force Witness Statements, February 2002-February 2009.

²⁴ Criminal Investigation Task Force Statement of Faiz Mohammad, 27 February 2009.

²⁵ UNICEF family social worker interview, May 2009.

²⁶ Criminal Investigation Task Force Witness Statements, February 2002 - February 2009.

²⁷ *Perpetrators of Attacks against U.S. Troops in Kabul Arrested*, Afghanistan

for allegedly playing a role in the attack.²⁸ Afghan officials made no attempt to contact Jawad's parents or any social service agencies within the Afghan Government responsible for the well-being of juveniles.²⁹ No counsel or any adult responsible for Jawad's well-being and interests was present during the interrogation.³⁰ Afghan authorities failed to provide Jawad anything to eat or drink during the approximately nine hours that he was in their custody. At that time, things began to drastically deteriorate for young Jawad, just a 12-year-old boy tramped in life-changing predicament.³¹ Over the course of the next several weeks, Jawad would be tortured and abused.

Jawad was subjected to cruel, intimidating and abusive treatment in the custody of the Afghan authorities, including being struck on the bridge of his nose and being subjected to threats.³² Specifically, Jawad was told that he would be killed if he did not confess to the grenade attack. He was also told that his family members would be arrested and killed if he did not confess. Both the police and the other high-level officials conducting the interrogation were armed, and Jawad had a credible fear that they were capable of carrying out their threats.

During the interrogation, Jawad allegedly made incriminating statements and a document, purporting to be a confession, was prepared for him to "sign" with his thumbprint. This "statement" conflicts with all other accounts by the Afghan police. Jawad did not know what the document was, did not read it, and was told he needed to put his thumb print on it to be released. The written statement allegedly containing Jawad's confession and thumbprint is in Dari. Jawad does not read, write, or speak Dari. There are several factual assertions in the statement that are false, including Jawad's name, his father's name, his grandfather's name, his uncle's name, his residence, his current residence, his age, and an assertion that he speaks English. Yet, it was this statement that the U.S. government relied on as a basis for Jawad's detention for so many years and the charges brought against him in the Guantánamo Military Commissions. Afghan police abuse and corruption during this period is well documented and was a finding of fact by the Military

Report (20 December 2002), <http://www.globalsecurity.org/military/library/news/2002/12/4-201202.htm>.

²⁸ Mandozai Majaz interview, Afghan Police, November 2008.

²⁹ *Id.*

³⁰ General Asefi interview, Afghanistan National Director of Police and Security.

³¹ Mandozai Majaz interview, Afghan Police, November 2008.

³² Reflected in Jawad Bagram intake medical reports, December 2002.

Commissions resulting in the suppression of any statements made by Jawad to the Afghan authorities due to a lack of reliability and torture.³³

No formal police investigation of the attack was conducted by the Afghan police, and no civilian eyewitnesses were identified or questioned by the Afghans. Three different Afghan policemen have provided statements regarding the attack, resulting in nine drastically different factual accounts taken over the course of the several years since the incident, all of which conflict with the supposed confession by Jawad.³⁴ The varying accounts of the grenade attack - the responsibility for which the statements ascribe solely to Jawad - conflicts with the eyewitness accounts of those who felt the repercussions of the attack first hand: the American victims.

After the grenade attack, U.S. personnel demanded that the perpetrators of the crime be turned over to the United States for questioning. Afghan officials on the highest levels were reluctant to do so and desired to investigate the matter according to accounts of General Asefi, Afghanistan National Director of Police and Security. Jawad had been promised by the Minister of Interior that he would not be turned over to the Americans in the presence of General Asefi. Unfortunately that promise was soon broken.³⁵

U.S. Forces apparently stormed the Minister of Interior's office demanding that the Afghan Government turn over whoever had been detained in connection with the crime. Jawad was transferred to U.S. custody at approximately 10:00 p.m. on 17 December 2002, and taken to Forward Operating Base ("FOB") 195 for further interrogation. He remained there overnight.³⁶

During the interrogation, U.S. interrogators observed Jawad to be drugged. Of course, this may have been symptomatic of the dehydration and mal-treatment of a 12-year-old boy being subjected to harsh interrogation tactics and fatigue. They observed him to be suffering, tired, hungry and visibly afraid. U.S. interrogators recognized immediately that Jawad was a juvenile.³⁷

³³ Military Judge Rulings D-008, D-021, D-022 *U.S. v. Jawad*.

³⁴ Criminal Investigation Task Force Witness Statements, February 2002-February 2009.

³⁵ General Asefi interview, Afghanistan National Director of Police and Security.

³⁶ *Id.*

³⁷ Statement of Lieutenant Colonel Darrel Vandeveld, former prosecutor, *U.S. v. Jawad*; Authenticated Military Commission Transcript, 25 September 2008;

Just as with the Afghan authorities, no U.S. personnel made any attempt to contact Jawad's parents, another relative, friend, a social worker, social service agency, or non-Governmental organization with expertise in the care of juveniles. Jawad was not informed at any time that he had the right to remain silent, that he had the right to consult with counsel, or that any statements he made would potentially be used against him in criminal proceedings. Jawad was not given the opportunity to make a telephone call or contact his parents or a guardian.³⁸

The inhuman and degrading treatment of Jawad continued at FOB 195. He was ordered to remove all his clothing, strip-searched, and directed to pose for nude photographs in front of several witnesses. Jawad was also subjected to coercive interrogation while at FOB 195. U.S. officials blindfolded and hooded Jawad, and subjected him to interrogation techniques designed to "shock" him into the extremely fearful state associated with his initial arrest. Interrogators also told Jawad that if he wanted to see his family again, he should cooperate and confess. After initially denying his involvement, under extreme stress, Jawad allegedly then confessed to the attack.³⁹

On 18 December 2002, after U.S. forces at FOB 195 completed their interrogation of Jawad, he was transported to the U.S. prison at Bagram, Afghanistan. Just days before Jawad arrived at Bagram, on December 4 and 10, 2002, two detainees held there were beaten to death by U.S. Forces.⁴⁰ While in the custody of these same U.S. Forces at Bagram for approximately 49 days, Jawad was also subjected to severe abuse, maltreatment, and torture. U.S. personnel subjected Jawad to beatings, forced him into so-called "stress positions," forcibly hooded him, placed him in physical and linguistic isolation, pushed him down stairs, chained him to a wall for prolonged periods, and subjected him to threats, including threats to kill him, and other intimidation. U.S. forces also subjected Jawad to sleep deprivation; interrogators' notes indicate that Jawad was so disoriented at one point that he did not know whether it was day or night. Jawad was also intimidated, frightened and deeply disturbed by the sounds of screams from other prisoners and rumors of other prisoners being beaten to death. Jawad was subjected to at

Military Judge Rulings D-008, D-021, D-022 *U.S. v. Jawad*.

³⁸ Statement of Lieutenant Colonel Darrel Vandeveld, former prosecutor, *U.S. v. Jawad*.

³⁹ *Id.*

⁴⁰ Tim Golden, 'In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths', *New York Times*, 20 May 2005.

least eleven interrogations at Bagram. An interrogator's notes from the first interrogation at Bagram indicate that Jawad fell asleep during interviews because he was so tired and appeared to be suffering from drug withdrawal that caused him to fidget and lose focus.⁴¹

There is no question Jawad was subjected to coercive treatment during the interrogations at Bagram. Interrogators played on fears and longings to which a juvenile would be particularly susceptible. Interrogators used Jawad's feelings of longing for his mother to gain his cooperation; an interrogator's report states that Jawad became overwhelmed with excitement when interrogators offered him the opportunity to write to his mother. Interrogators also found Jawad feared his family's reaction to his arrest, feared being turned over to the Taliban (because, he told interrogators, his cousin was tortured by the Taliban), and used these fears to coerce Jawad. Jawad grew so desperate during the interrogations that he eventually told interrogators he was contemplating suicide. Interrogator reports purporting to summarize Jawad's interrogations at Bagram indicate that he repeatedly denied throwing the hand grenade.⁴²

Jawad was held in custody at Bagram until on or about 6 February 2003, when he was transported to Guantánamo. Before he was transported to Guantánamo, Jawad was intentionally starved for three days, and given only sips of water. This treatment was standard operating procedure at the time to ensure detainees would not soil themselves during the 17-hour flight from Bagram to Guantánamo.⁴³

Upon arrival at Guantánamo, on or about 6 February 2003, Jawad was subjected to 30 days of physical and linguistic isolation. During this period, his only significant human contact was with interrogators. Throughout Jawad's incarceration at Guantánamo, he was treated as an adult and housed with adults, although other juvenile detainees were housed in separate facilities. At no time during his entire period of incarceration at Guantánamo has Jawad receive any rehabilitation treatment, special education, or other rights in recognition of his juvenile status.⁴⁴

Military records from throughout 2003 indicate that Jawad repeatedly cried and asked for his mother during interrogation. Upon information

⁴¹ Statement of Lieutenant Colonel Darrel Vandeveld, former prosecutor, *U.S. v. Jawad*; Military Judge Rulings D-008, D-021, D-022 *U.S. v. Jawad*.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

and belief, before one interrogation, Jawad fainted, complained of dizziness and stomach pain, but was given an IV and forced to go through with interrogation. One interrogator was sufficiently concerned about Jawad's mental stability that he requested an assessment from the Behavioral Science Consultation Team ("BSCT") stationed at Guantánamo. However, the psychological assessment that resulted was not performed for the purpose of treatment, but "instead was conducted to assist the interrogators in extracting information from Mr. Jawad, even exploiting his mental vulnerabilities to do so."⁴⁵

Per the recommendation of the BSCT psychologist, intelligence officials subjected Jawad, still a teenager at the time, to social, physical and linguistic isolation for another 30-day period, in order to create complete dependence on his interrogator. This period of segregation occurred from 17 September to 16 October 2003, and was specifically intended to break Jawad's will and to devastate him emotionally. The period of extreme isolation failed in its purpose of persuading Jawad to admit throwing the hand grenade, and he continued to assert his innocence. On 25 December 2003, according to official prison logs, Jawad tried to commit suicide by banging his head against one of his cell walls repeatedly.⁴⁶

Jawad was subjected to more cruelty in the months after his suicide attempt. As early as November 2003, Joint Task Force-GTMO ("JTF-GTMO") personnel used sleep deprivation to disorient specific detainees for intelligence purposes. Pursuant to this technique, euphemistically referred to as the "frequent flyer" program, a detainee would be repeatedly moved from one cell to another in quick intervals, throughout the day and night, to disrupt sleep cycles. Military records show that Jawad was subjected to the "frequent flyer" program from 7 May to 20 May 2004. Over that fourteen-day period, Jawad was forcibly moved from cell to cell 112 times, on an average of about once every three hours, and prevented from sleeping. Jawad's medical records indicate that significant health effects he suffered during this time include blood in his urine, bodily pain, and a weight loss of 10% from April 2004 to May 2004.⁴⁷

Jawad was subjected to the "frequent flyer" program even though the then-Commander of JTF-GTMO, who was responsible for all detainee

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

operations, had ordered the program to be stopped in March 2004. That Commander has since stated that he did not authorize and would not have authorized the program to be administered to Jawad. At the time Jawad was subjected to the “frequent flyer” program, the policy of the U.S. Southern Command, to which the Commander of JTF-GTMO reported, required prior approval for sleep deprivation of a detainee and limited the deprivation period to four days. No prior approval was requested or provided for Jawad’s sleep deprivation for 14 days. In addition to the “frequent flyer” program used as an interrogation tool, there was also a second, unauthorized, “frequent flyer” program that was used as a disciplinary tool by the Guantánamo Joint Detention Operation Group, the military unit directly responsible for the treatment detainees receive while in detention. Jawad was also subjected to sleep deprivation under this second program.⁴⁸

Other kinds of cruel and inhuman treatment Jawad suffered during his incarceration at Guantánamo include excessive cold, loud noise, prolonged linguistic isolation (separating him from the only other prisoners who speak his language, Pashto), and prolonged exposure to excessively bright lights. As recently as on or about 2 June 2008, Jawad was beaten, kicked, and pepper-sprayed while he was on the ground with his feet and hands in shackles for allegedly not complying with guards’ instructions. Fifteen days later, there were still visible marks consistent with physical abuse on his body, including his arms, knees, shoulder, forehead, and ribs. The torture, cruelty, and harsh treatment to which Jawad has been subjected throughout his over six years in U.S. custody have resulted in severe and ongoing psychological harm.⁴⁹

Jawad was not arraigned with detailed defense counsel under the current Military Commissions Act until May 2008.⁵⁰ In November 2008, two Marine Corps Judge Advocate trial defense counsels, Major Eric S. Montalvo and Captain Christopher L. Kannady traveled to Afghanistan to investigate the case. During that time in Afghanistan, Major Montalvo and Captain Kannady were able to uncover a great deal of the corruption fueling Jawad’s case. In addition, a great deal of potentially exculpatory evidence was uncovered that either the U.S. Government had no knowledge of or chose not to turn over.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Lieutenant Colonel Darrel Vandeveld, former prosecutor - Affidavit in support of Habeas petition, *U.S. v. Jawad*.

In December 2008, the defense team was granted an unprecedented series of rulings by the military judge that severely hampered the Government's ability to prosecute the case. The Commission's judge held that any statements taken by the Afghan and U.S. authorities would be suppressed due to lack of reliability and torture. The Government appealed the order as it related to the American statements to the Court of Military Commission Review. A few weeks before the trial was to commence oral argument was held on the appeal.⁵¹ Within days of the oral argument at the Court of Military Commission Review, newly elected President Obama ordered a 120-day stay of all commissions.⁵² In May 2009, President Obama again ordered an additional 120-day stay for further evaluation of the Commissions cases and the current form of the Military Commissions Act.⁵³ As will be discussed *infra*, in May 2009, Major Montalvo and Captain Kannady headed back to Afghanistan to employ a new strategy in an effort to overcome the impasse that became this case. Little did they know, this trip would spark the beginning of the end for the Government's case.

III. Due Process Without a Process

1. Combatant Status Review Tribunal and Administrative Review Boards

After the Supreme Court held in *Rasul v. Bush*,⁵⁴ that Guantánamo prisoners were entitled to judicial review of the basis for their detention, the U.S. military established Combatant Status Review Tribunals ("CSRT") at Guantánamo to determine whether prisoners were subject to detention as "enemy combatants." A CSRT is a non-adversarial hearing conducted pursuant to rules and procedures that are unfair in design and biased in practice, and violate the Constitution, laws and treaties of the United States.⁵⁵

The CSRT process denied detainees, *inter alia*, access to counsel; the right to see evidence against him; the right to confront, or even know the identity of, his accusers; the right to call witnesses; the right

⁵¹ *U.S. v. Jawad*, Military Judge Rulings D-008, D-0021, D-0022.

⁵² <http://www.foxnews.com/politics/2009/05/14/obama-restart-terror-tribunals-guantanamo-bay-detainees/>.

⁵³ *U.S. v. Jawad*, Military Judge Ruling, 120-Day Stay.

⁵⁴ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁵⁵ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (12 June 2008) (finding that CSRTs were not an adequate substitute for *habeas* because their procedural flaws created a considerable risk of error).

to present evidence; and, the right to know how the military and/or other agencies collected evidence against him.⁵⁶ The CSRT rules and procedures mandated that the evidence used against a detainee be presumed genuine and accurate. This included evidence obtained by torture⁵⁷ or coercion and a presumption of reliability accorded to hearsay evidence regardless of its source.

Jawad was determined to be an “enemy combatant” for purposes of detention by a CSRT on 4 November 2004. This decision was reaffirmed in two annual Administrative Review Boards (“ARB”) conducted by the Office of Administrative Review for Detained Enemy Combatants held on 8 December 2005, and 8 November 2006, respectively.⁵⁸

Jawad’s CSRT was conducted after he met with his personal representative twice for a total of two hours. No documents were submitted on his behalf and no witnesses were called. Jawad’s personal representative declined the opportunity to offer comments or objections to the report that unanimously concluded Jawad was an “enemy combatant”. The evidence relied upon by the CSRT and the ARBs which formed the bases for Jawad’s initial and on-going detention, has been conclusively undermined by new exculpatory or extenuating evidence.

In reaching their decisions justifying Respondents’ continued detention of Jawad, the CSRT and the ARBs each relied, in significant part, on a document purported to be a written confession by Jawad, and allegedly signed by him and marked with his thumbprint. For example, in the Unclassified Summary of Evidence for Administrative Review Board dated 7 November 2005, the government indicated that it was relying on “Detainee Action and Statements” and that “The detainee made a written confession to this attack, signed it and marked it with his fingerprint”.

This purported confession was Jawad’s forced thumbprint on a blank second page of a document written in Dari (Jawad is illiterate and speaks Pashto), after being subjected to torture and cruel treatment in Afghan custody and was suppressed by the Military Commission’s

⁵⁶ *Id.*

⁵⁷ After Jawad’s CSRT and his first ARB were held, the U.S. State Department formally acknowledged to the United Nations Committee against Torture that evidence obtained from torture should not be used in CSRT and ARB proceedings. John Bellinger, Legal Advisor to the State Department, United States Response to the Questions Asked by the Committee Against Torture, Question No. 42 (5 May 2006), <http://www.state.gov/g/drl/rls/68561.htm>.

⁵⁸ <http://projects.nytimes.com/guantanamo/detainees/900-mohamed-jawad>.

judge.⁵⁹ The government subsequently determined and admitted that the “confession” previously offered to the CSRT and the ARBs to establish Jawad’s status as an “enemy combatant” was false and not made by him. The government has admitted that it has no other written confessions made by Jawad.⁶⁰

According to the publicly available CSRT transcript, the government also relied on a purported connection between Jawad and the group Hezb-I Islami Gulbuddin (“HIG”), a State Department “group of concern”. This was based on a document which allegedly bore Jawad’s finger print. A forensic examination by the U.S. Army Criminal Investigation Laboratory concluded that the thumbprint on the document was not, in fact, Jawad’s.⁶¹ Neither the CSRT nor the ARBs considered Jawad’s age at the time of his alleged wrongdoing, nor were they made aware that Jawad had been subjected to any abusive treatment.

Jawad was finally charged in 2007. The relevant ARB procedures provide that the ARB will be suspended for any detainee who is charged before the commissions. Jawad was consequently denied his 2007 and 2008 annual ARBs which eliminated the possibility that exculpatory information would have been considered and/ or the realization that his charges were totally baseless.

⁵⁹ See *United States v. Jawad* – D-022 Ruling (Suppress Statements to Afghan Officials).

⁶⁰ Statement Of Lieutenant Colonel Darrel Vandeveld, §§ 5, 21, and 30; Apart from the “confession” statement now admitted to be false, the CSRT and the ARBs considered alleged oral confessions by Jawad to Afghan officials and to U.S. interrogators within 24 hours of his arrest on 17 December 2002. A U.S. military judge found on 28 October 2008, however, that all of the alleged statements made by Jawad to Afghan authorities and U.S. authorities on 17 and 18 December 2002, were the product of torture (specifically, “physical intimidation” and death threats against Jawad and threats to kill his family). See D-022 Ruling on Defense Motion to Suppress Out of Court Statements of the Accused to Afghan Authorities (Military Commission, Guantánamo Bay, Cuba filed 28 October 2008), <http://www.defenselink.mil/news/d20081104JawadD022Suppress.pdf>; D-021 Ruling on Defense Motion to Suppress Out of Court Statements Made By the Accused While in U.S. Custody (Military Commission, Guantánamo Bay, Cuba filed 19 November 2008), <http://www.defenselink.mil/news/d20081223Jawadexhibitsa-h.pdf>. As described below, the government has appealed the military judge’s 19 November suppression decision.

⁶¹ Statement Of Lieutenant Colonel Darrel Vandeveld, §§ 4 and 31.

2. The Military Commissions

On 9 October 2007, pursuant to the Military Commissions Act of 2006,⁶² charges were sworn against Jawad, accusing him of attempted murder in violation of the law of war and of intentionally causing serious bodily harm (the latter charge was dismissed on 19 June 2008). The charges all arose out of the alleged grenade attack. These charges were referred for trial by military commission on 30 January 2008.⁶³ Jawad is not charged with any acts of terrorism or material support for terrorism. Noteworthy is that he was not charged as having an affiliation with any terrorist group. The United States has admitted that at the time of the charged offenses, Jawad was less than 18 years old, and that he is one of only two juveniles facing trial by military commission under the MCA.⁶⁴

The military commission system established under the MCA violates the Constitution and the laws⁶⁵ and treaties of the United States and

⁶² 10 U.S.C. 948a.

⁶³ Referred Charge Sheet, *U.S. v. Jawad*.

⁶⁴ See United States Bureau of Democracy, Human Rights and Labor, United States Written Response to Questions Asked by the Committee on the Rights of the Child (13 May 2008), <http://www.state.gov/g/drl/rls/105435.htm>.

⁶⁵ In early October 2009, the US House of Representatives passed a bill [HR 2647 materials] that amends the Military Commissions Act of 2006 to provide suspected terrorists with greater due process rights. The Military Commissions Act of 2009 was approved by a vote of 281-146 [roll call] as part of the National Defense Authorization Act granting \$681 billion in military appropriations for the 2010 fiscal year. Among the bill's provisions are limitations on the use of hearsay or coerced evidence and greater defense access to witnesses and evidence. The American Civil Liberties Union (ACLU) said that while the bill represents an improvement over the current system, it still contains unconstitutional provisions: "While this bill contains substantial improvements to the current military commissions, the system remains fatally flawed and contrary to basic principles of American justice. While the bill takes positive steps by restricting coerced and hearsay evidence and providing greater defense counsel resources, it still falls short of providing the due process required by the Constitution. The military commissions were created to circumvent the Constitution and result in quick convictions, not to achieve real justice."

Human Rights Watch (HRW) said that the amendments "fail to remedy the system's serious flaws". Also included in this bill were provisions expanding the definition of federal hate crimes to include crimes motivated by gender, sexual orientation, gender identity, or disability. The bill must now be approved by the Senate. The use of military commissions to try suspected terrorists remains controversial. In September 2008, the government sought additional delays in the proceedings against several Guantanamo detainees. Earlier in September 2009, military lawyers for Guantanamo detainee and alleged 9/11 co-conspirator Ramzi bin al-Shibh asked the US Court of Appeals for the District of Columbia Circuit to declare the Military Commissions Act of 2006 unconstitutional. In July 2009, a

customary international law, both in the specifics of its jurisdictional, procedural and evidentiary provisions, and as a whole, as discussed *infra*.⁶⁶

The MCA has permitted, and the Commissions have subjected civilian defendants, including Jawad, to unlawful detention for trial as an “alien unlawful enemy combatant” even if no legally constituted tribunal has found the defendant carries such a status and even though the status does not exist under the law of war.⁶⁷ The MCA prohibits defendants from pursuing their right not to be tried in a military system that has no jurisdiction over them until after the trial has occurred and it is too late, by prohibiting interlocutory appeals by defendants.⁶⁸

The Commissions have subjected defendants, including Jawad, to unlawful detention for trial for alleged war crimes even though the defendant was a juvenile at the time of his alleged wrongful acts and even though military trial of juveniles, purely for the purpose of punishment and without any provision for rehabilitation and reintegration into society, is a violation of the laws and treaties of the United States.⁶⁹ Additionally, the Commissions have subjected defendants, including Jawad, to unlawful detention for trial for offenses that were created after the time they were allegedly committed, in violation of the *Ex Post Facto* Clause of the U.S. Constitution⁷⁰ As in the case of *Jawad*,

former prosecutor at Guantanamo testified before the House Judiciary Committee that the military commission system is “broken beyond repair”. See, with further links, <http://jurist.law.pitt.edu/paperchase/2009/10/house-passes-amendments-to-military.php#>.

⁶⁶ See generally for discussion about current amendments to the Act. http://rpc.senate.gov/public/_files/L19Section1031MilitaryCommissionsActofS1390DefenseAuth071409ms.pdf.

⁶⁷ MCA § 948d

⁶⁸ MCA § 950d

⁶⁹ As discussed below under § 2.g *infra*.

⁷⁰ An ex post facto law (from the Latin for “after the fact”) or retroactive law, is a law that retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law. In reference to criminal law, it may criminalize actions that were legal when committed; or it may aggravate a crime by bringing it into a more severe category than it was in at the time it was committed; or it may change or increase the punishment prescribed for a crime, such as by adding new penalties or extending terms; or it may alter the rules of evidence in order to make conviction for a crime more likely than it would have been at the time of the action for which a defendant is prosecuted. See http://en.wikipedia.org/wiki/Ex_post_facto_law. The United States, the federal government is prohibited from passing ex post facto laws by Article I, section 9 of the U.S. Constitution and the states are prohibited

the Commissions have subjected defendants to detention and trial for offenses that are not even violations of the laws of war. In this case, Jawad was alleged to have thrown a grenade at U.S. soldiers. While this may be in some context to be construed as a crime it has never been a “war crime” to throw a grenade at a uniformed soldier.

The Commissions may rely upon information and evidence produced through cruel, inhuman, degrading treatment and, although the MCA purports to prohibit evidence obtained through torture, it does not prohibit evidence derived from torture statements, unlike the Uniform Code of Military Justice (“UCMJ”), which contains a specific prohibition against such derivative evidence.⁷¹ The Commissions may also rely on, hearsay evidence in violation of the Due Process and Confrontation Clauses.⁷²

Since their inception, the Commissions have subjected defendants, including Jawad, to unlawful detention for trial by a tribunal manipulated

from the same by clause 1 of section 10. This is one of the very few restrictions that the United States Constitution made to both the power of the federal and state governments prior to amendment. See also Article 15 of the International Covenant on Civil and Political Rights.

⁷¹ MCA § 948r(c)-(d)

⁷² The Sixth Amendment of the United States Constitution also restricts the introduction of hearsay against a criminal defendant. The Confrontation Clause is admitted “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” FED. R. EVID. 804(b)(1). provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him”. As recently reinterpreted in *Crawford v. Washington*, the right of confrontation requires that “testimonial” hearsay be excluded unless the adverse party has had a previous opportunity to cross-examine the declarant and the declarant is unavailable. Although the Court has not yet definitively defined the term “testimonial,” generally includes statements that “declarants would reasonably expect to be used prosecutorially”. The Confrontation Clause, as construed in *Crawford*, ensures that the reliability of statements by “witnesses *against*” the criminal defendant, whose statements are particularly susceptible to bias and self interested deception, be evaluated through the adversarial process. The Confrontation Clause thus identifies a particular kind of hearsay and denies it an exception from the hearsay rule on the grounds that it is insufficiently reliable and its introduction violates the constitutional right of an accused to test its reliability through cross-examination. And, at least in the Court’s view, the centrality of the right of confrontation to a fair trial cannot be overstated. The Confrontation Clause of the Sixth Amendment thus further compliments the protections offered by traditional hearsay law, together ensuring the reliability of evidence introduced at trial. M.A. Hewett, ‘Hearsay at Guantanamo: A “Fundamental Value Determination”’, Vol. 96 *The Georgetown Law Journal* 2008, p. 1376. <http://www.georgetownlawjournal.com/issues/pdf/96-4/Hewett.PDF>.

by unlawful command influence and political considerations.⁷³ Moreover, the Commissions have subjected Jawad to unlawful detention for trial even though he was illegally extradited from Afghanistan⁷⁴

⁷³ While an often misunderstood issue, our legal system lays out a clear definition of what constitutes unlawful command influence. Convening authorities and commanders are governed by Rule 104 of *The Manual for Courts-Martial* which outlines the provisions of Article 37 of the UCMJ. The document states that they may not “censure, reprimand, or admonish a court-martial or other military tribunal, with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings”. Further, it restricts all persons subject to the code from attempting “to coerce or, by any unauthorized means, influence the action of a courts-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority’s judicial acts.” It is the defendants’ responsibility to raise the charge of unlawful command influence. To do so, the defense must present some evidence which, if true, meets the definition of unlawful command influence prescribed in *The Manual for Courts Martial*. Once this is accomplished, the burden shifts to the government to prove whether unlawful command influence exists. If it does, the government must then determine if its existence will produce any unfairness in court proceedings (either current or on appeal). See S.L. Wheeler, *Unlawful Command Influence. A Commander’s Perspective*, April 2004, AU/ACSC/5823/2006-04, https://www.afresearch.org/skins/rims/q_mod_be0e99f3-fc56-4ccb-8dfe-670c0822a153/q_act_downloadpaper/q_obj_698e837d-4b33-4491-a7f8-f865d2acac62/display.aspx?rs=enginespage. The Pentagon transferred a controversial senior official involved in overseeing the war-crimes trials at Guantanamo Bay into a new position in September 2008, a move that was anticipated after military judges in three separate cases barred Air Force Brig. Gen. Thomas W. Hartmann from further participation in various aspects of the military commissions. Defense officials, who would discuss the reassignment only on the condition of anonymity, said Hartmann’s position became untenable after judges ruled that he improperly influenced prosecutors by pressing them to move to trial quickly and, over their objections, used evidence obtained from interrogations that involved coercive techniques. The Defense Department said that Hartmann will remain involved as director of operations, planning and development for military commissions. His deputy, Michael Chapman, will become the new legal adviser. Hartmann was the legal adviser to the Convening Authority, a Pentagon office that is required to exercise a neutral role in the commissions, overseeing but not dictating the work of prosecutors and allocating resources to both the prosecution and defense. Military defense lawyers, human rights groups and a former lead prosecutor expressed dismay that Hartmann will remain in a position that they say will allow him to continue influencing cases. Hartmann said the recent court rulings forced him and others at the Pentagon to think about his role at the commissions, but he said they were not the reason for his new assignment. See P. Finn, ‘Guantanamo Trials’ Overseer Reassigned. Many Angry That He Remains at All’, *Washington Post*, 20 September 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/19/AR2008091903507.html>.

⁷⁴ See E.2.A *infra*. But see *Male captus, bene detentus* (wrongly captured, properly

As a result of the foregoing provisions, among others, which violate the U.S. Constitution, the Constitution of Afghanistan, various domestic laws and treaties of both Afghanistan and the United States, and which depart significantly from the standards applicable in federal criminal trials or courts-martial under the UCMJ, the Commissions are fundamentally unfair on their face.⁷⁵

A. The Indefinite Stay

Trial by the Guantánamo Military Commissions does not present defendants with a meaningful opportunity to challenge the basis for their detention. Even a determination by a Guantánamo Military Commission that it does not have personal jurisdiction over a defendant, or, after trial, that the defendant should be acquitted, does not have a binding effect. The Bush Administration policy maintained a policy of indefinite detention regardless of the outcome as described by the Pentagon Press Secretary Geoff Morrell whereby he stated at a news conference, “even if he were acquitted of the charges that are before him, he would still be considered an enemy combatant and therefore would continue to be subjected to - subject to continued detention”.⁷⁶

The Rules for Military Commissions (R.M.C.) provide the procedural structure and serve as implementing instructions regarding the MCA. Pursuant to R.M.C. 707, “within 120 days of the service of charges, the military judge shall announce the assembly of the military commission, in accordance with R.M.C. 911. Charges were preferred in October 2007. The charges were referred to trial on 30 January 2008, and Mr. Jawad was arraigned in March 2008.⁷⁷ At the time the Government’s notice of appeal was filed on 24 November 2008, an “alien unlawful enemy combatant hearing” to determine whether the government could

detained) is a controversial legal doctrine, according to which the fact that a person may have been wrongly or unfairly arrested, will not prejudice a rightful detention or trial under due process. There is state practice in support of the doctrine, as well as contrary state practice. See http://en.wikipedia.org/wiki/Male_captus_bene_detentus. In one of its cases the U.S. Supreme Court held that where a person from another country is apprehended by irregular means, the right to set up as defense the unlawful manner by which he was brought to a court belongs “to the Government from whose territory he was wrongfully taken”. *Ker v. Illinois*, 119 U.S. 436 (1886).

⁷⁵ *Id.*

⁷⁶ Geoff Morrell, Press Secretary, Pentagon, Department of Defense News Briefing (5 August 2008), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4270>.

⁷⁷ Referred Charge Sheet, *U.S. v. Jawad*.

establish personal jurisdiction over the accused was scheduled for 8-12 December 2008 and, assuming the government could establish jurisdiction, trial on the merits was scheduled to commence on 5 January 2009.⁷⁸ Pursuant to the President of the United States in Executive Order 13492, issued on 22 January 2009,⁷⁹ the United States requested a 120-day delay in order to participate in the review of the status of Guantanamo Bay detainees, and military commission process.

As recently as 14 May 2009 the Obama administration announced that they are considering moving the remaining detainees at Guantanamo Bay to US soil and **holding them in prisons indefinitely without trial**, the *Wall Street Journal* reports. The proposal would take place under the authority of a new national-security court, according to Republican Sen. Lindsey Graham, who has met with White House officials to discuss the plan.⁸⁰

On 15 May 2009, President Obama directed that the Commissions continue to be stayed for an additional 120 days for the purpose of revamping the Military Commissions.⁸¹ This is a complete reversal of

⁷⁸ Government Notice of Appeal, *U.S. v. Jawad*.

⁷⁹ CMCR CASE NO. 08-004 (4 February 2009). “We turn now to consideration of whether the requested delay is in the interests of justice. In doing so, we note that the reason for the delay is to allow the Department of Defense to participate in an Interagency review, not only of the military commission process, but also the status of those apprehended and presently detained at Guantanamo Bay - including the Appellee - their conditions, and the factual and legal bases for their apprehension and detention, all in the context of the national security and foreign policy interests of the United States. It is the latter, broad context which lends the most weight to the Appellant’s request for delay. Indeed, the U.S. Supreme Court has often recognized that the President has the principal constitutional responsibility for national security and foreign policy. *See e.g., Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)) (citing “the generally accepted view that foreign policy was the province and responsibility of the Executive”); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n. 19 (1982) (national security and foreign policy are “‘central’ Presidential domains”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (stating the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”). We, thus, accord great deference to the President in his determination that the Interagency review is required – now – in the interests of national security and foreign policy. Against the weight of the President’s stated need for a 120-day delay we still must balance the objections and prejudice asserted by the Appellee.”

⁸⁰ R. Quinn, ‘Gitmo Inmates May Be Held Indefinitely in US’, 14 May 2009, <http://www.newser.com/story/58928/gitmo-inmates-may-be-held-indefinitely-in-us.html>.

⁸¹ L. Jakes, ‘Obama to Revive Military Tribunals for GITMO Detainees with More

President Obama's original position.

Some of the changes proffered by the White House included: 1) restrictions on hearsay evidence that can be used in court against the detainees; 2) a ban on all evidence obtained through cruel, inhuman or degrading treatment; 3) enhanced rights in choosing their own military counsel; and 4) protecting detainees who refuse to testify from legal sanctions or other court prejudices.⁸²

President Obama allowed the second stay period to abate and ordered an additional stay until November 2009. But for his ordered release through the habeas process Jawad would be weeks away from what would have been a full acquittal before the Commission.

Detainees will now be faced with a modified set of rules which purport to provide more enhanced rights. These modified commissions will require a tremendous amount of re-litigation of the Commission's process particularly given the fundamental tenants of the system are still in tact.⁸³ A new set of challenges will likely rise due to the disparate treatment that will be borne from the projected course of prosecutions. It has been intimated that the Commissions will prosecute a certain class of detainees while the remainder will proceed to U.S. Federal Court. The obvious reasons for this are the rules of evidence that will be encountered in Federal court and the dearth of prosecutorial competence within the Commission system. What will play out is those cases which can sustain American jurisprudence in Federal court will have a fair trial and likely result in conviction due to the vetting process and judicial and prosecutorial competence. Another class of "misfits" will be suffering through the maze of incompetence and illegitimacy resulting in questionable verdicts and then be reviewed for indefinite detention out of concern for the competency of evidence available. This is a false choice and a terrible expenditure of U.S. tax payer dollars which will result in fraud, waste and abuse. The average prosecution will result in several hundreds thousand dollars in expenditures and the costs to the legitimacy of the U.S. legal system will be untold. This second class of detainees will tumble around in a military centric system and draw into question the whole system of U.S. military justice which has struggled for legitimacy since its inception.

Rights', 14 May 2009, http://www.huffingtonpost.com/2009/05/14/obama-to-revive-military-_n_203783.html.

⁸² See *supra* notes 66-68.

⁸³ http://rpc.senate.gov/public/_files/L19Section1031MilitaryCommissionsActofS1390DefenseAuth071409ms.pdf.

B. Defense Response - Earning Membership in the Kochi Tribe

On 13 January 2009 an Amended Habeas petition was filed in the United States District Court for the District of Columbia with a scheduling conference set for 19 June 2009. The habeas proceedings have been fraught with the same rhetoric and misinformation that the Commissions have suffered from since the beginning. Most remarkable is the U.S. Government's insistence on using long established unreliable facts and circumstances to justify his continued detention. This development reinforced the notion that there was no end in sight for Jawad's unlawful incarceration.

In anticipation of a second stay and movements by the U.S. Government which indicated that there would be no short term relief for Jawad, a trip to Afghanistan was planned and executed. The goals of the trip were twofold - 1) case preparation and 2) obtain a political foothold within the Afghanistan Government such that they would support and argue for Jawad's immediate return. Shortly after entry into Afghanistan the Jawad team received word that the U.S. Government had just dumped a healthy chunk of exculpatory evidence upon the defense team. This prosecutorial misconduct would have been addressed if Jawad endured in the new commission system. The fact that the prosecution would hold onto exculpatory evidence beyond the President's first 120 day stay effectively depriving the defense team from including it in its submission to the review team and frustrating any motions practice during this period demonstrated the lack of professionalism of the military prosecution bar and offend the rule of law at its core. The combination of prosecutorial incompetence, lack of ethical conduct, and the almost insurmountable legal tsunami of injustice which the commissions system represents is a travesty and an embarrassment to the American legal system. The convening authority system which the military commission are founded upon fosters an incestuous cross pollination of senior legal officers who have come to know each other during their tenures as career uniformed personnel. The military practice, particularly with regard to the prosecution and judiciary is simply not "deep enough" to handle the issues presented by the commissions paradigm and any "successful" prosecution is destined for years of appellate review and further embarrassment of our justice system – particularly the military justice practice.

Given the stark outlook for Jawad it was incumbent upon the team to chart a course that would break through this never ending impasse and

injustice. While researching and drafting the successful suppression motion of the Afghan statement, a jurisdictional issue revealed itself—the wrongful extradition from Afghanistan of an accused child by the U.S government. A review of original jurisdiction held by the Supreme Court of Afghanistan revealed that extradition issues were a proper basis of challenge. While it was recognized that the Afghan Supreme Court did not hold the same weight as the American Supreme Court within the Afghan branches of government, a legal petition was drafted and filed with the Court on 25 May 2009. This petition allowed for the various legal organizations to rally behind what was a clear miscarriage of justice on the part of this child of Afghanistan. The timing of the filing was also critical given the impending elections and the political wherewithal of a number of government officials. It was also fortunate that the various organizations had recently acquired the capacity and ability to rally around a cause and engage a maturing media base. It was during the drafting of the petition, in which the primary arguments are reproduced in large part and discussed *infra*, and intense follow-up with the family that the team became an honorary Kochi tribal members.

IV. The Petition⁸⁴

1. Overview

On 25 May 2009, a joint petition with the Afghan Independent Human Rights Commission, The Legal Aide Organization of Afghanistan, and the Afghan Independent Bar Association was delivered to the Court. It was delivered in both Dari as well as English. It was anticipated that this would be a ministerial filing of the petition with the clerk of court. Instead the acting Chief Justice invited the petitioner's into his chambers to determine the purpose behind the filing.⁸⁵ The Chief Justice reviewed the petition and advised us as to the proper course of action and granted one form of relief on the spot which was to direct an investigation be

⁸⁴ Given that Jawad was released the petition would be considered moot. The procedural posture in May 2009 was that the Court granted relief in the form of referring the case to the Afghan Attorney General for investigation and assessment. If the Attorney General was able to determine that the issues were credible the Court gave leave to return for final adjudication. The Attorney General subsequently authored a letter to the U.S. Embassy demanding immediate return of Jawad which was submitted to the habeas court for consideration. As discussed, Jawad's release was effected so there was no need to readdress the matter before the Afghan Supreme Court.

⁸⁵ See <http://www.france24.com/en/20090526-us-lawyers-petition-afghan-court-detainee-guantanamo-bay-jawad>.

conducted into the illegal removal of this child from Afghanistan. This meeting would have been viewed as an *ex parte* meeting with the judge in the United States and consider to be wholly improper – this was not the United States.

The petition was submitted pursuant to the Afghan Constitution of 1964; the Afghan Constitution of 2004; the Bonn Agreement (5 December 2001); Article 23 of the United Nations Charter; United Nations Resolutions 1383 (6 December 2001) and 1419 (26 June 2002); Common Article 3 of the Geneva Conventions, *Jus Cogens*;⁸⁶ the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Protocol);⁸⁷ and persuasive case law moving for appropriate relief in the nature of the Court issuing a writ of mandamus to the Afghanistan President requiring him to pursue by all means necessary for the immediate repatriation of Jawad with a course of rehabilitation.

We asserted jurisdiction pursuant to the Afghanistan Constitution and the laws governing the original jurisdiction of the court, raising the following claims of review: 1) that the minor Petitioner has suffered an illegal extradition to the United States; 2) that the minor Petitioner is suffering from an illegal and illegitimate foreign exile; 3) that the minor Petitioner has been tortured, abused, and deprived of all Afghanistan Constitutional and International Due Process and Human Rights resulting in an offensive measure of disparate judicial treatment of an Afghan citizen who has been a minor during the majority of his seven years of captivity without adjudication.⁸⁸

2. The Arguments – What Laws Weren't Broken?

A. Violation of National Sovereignty Deprives the U.S. of Jurisdiction

Under U.S. law, a foreign defendant generally may not challenge the jurisdiction of a court simply because he was improperly brought before it. However, there are specific factual circumstances where a criminal court will be deprived of jurisdiction. The controlling precedent in this

⁸⁶ A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another: *Black's Law Dictionary* 864 (7th ed., 1999).

⁸⁷ GA Res. 54/263, Annex (25 May 2000) (entered into force 12 February 2002); Treaty Doc. No. 106-37A, ratified with the advice and consent of the Senate in Executive Session, 18 June 2002, Cong. Rec. S5716-17.

⁸⁸ See e.g. *Omar Ahmed Khadr and the Prime Minister of Canada, et al.* 2009 FC 405 (23 April 2009).

area is the so-called *Ker-Frisbie* doctrine, developed in *Ker v. Illinois*,⁸⁹ and *Frisbie, Warden v. Collins*.⁹⁰ Two clear exceptions to the *Ker-Frisbie* doctrine have emerged in the fifty-five years since *Frisbie* was decided. These exceptions are 1) that explicit violation of an extradition treaty does dissolve jurisdiction;⁹¹ and 2) proven acts by the abductors which “shock the conscience” may also require dismissal.⁹² Both exceptions apply in this case.

The first exception to the *Ker-Frisbie* doctrine is well-established and applicable to Mr. Jawad’s case. Clear violations of foreign sovereignty in the extradition process deprive U.S. criminal courts of jurisdiction over foreign nationals. There has and is currently no formal extradition treaty between the United States and Afghanistan. In fact, the Afghan Constitution of 1964, (which was in effect at the time Mr. Jawad was transferred by Afghan authorities to the U.S. on 17 December 2002, and on 6 February 2003, when Mr. Jawad was forcibly removed from Afghanistan) expressly prohibits the extradition of Afghan citizens to a foreign state. The *Ker-Frisbie* doctrine is recognition of the United States’ solemn obligation to respect the sovereignty of other nations. The U.S. is obliged to respect Afghanistan’s Constitution. In official correspondence by the Afghan Attorney General submitted as a habeas exhibit, it was stated that Jawad’s removal was wrongful and a breach of the country’s sovereignty. Where that duty is breached in brazen defiance of the rights of a sovereign nation by extraditing a foreign citizen outside the international legal process, then the United States forfeits its right to prosecute the individual.⁹³

i. Afghan Constitutional (1964) Rights Were in Effect on 17 December 2002

On 5 December 2001, the “Bonn Agreement” was signed which provided guidance regarding the interim Afghan governmental structure.⁹⁴ Specifically, the agreement provided under the “Interim Authority” provisions, subsection II titled “legal framework and judicial system,” that the Afghan Constitution of 1964 would be applicable until the new Constitution is drafted and ratified. This agreement was

⁸⁹ 119 U.S. 436 (1886).

⁹⁰ 342 U.S. 519 (1952).

⁹¹ *Ker*, 119 U.S. at 436.

⁹² *United States v. Francisco Toscanino*, 500 F.2d 267 (2nd Cir. 1974).

⁹³ Letter of Afghanistan Attorney General to the United States, May 2009.

⁹⁴ <http://www.afghangovernment.com/AfghanAgreementBonn.htm>.

then incorporated by reference and adopted in United Nations Security Council Resolution 1383 (6 December 2001) unanimously by the Security Council. The United States, per Article 23 United Nations Charter, is a permanent voting member of the Security Council. The Bonn Agreement was reaffirmed in Security Council Resolution 1419 (26 June 2002), which addressed, *inter alia*, the successful conduct of an emergency Loya Jirga⁹⁵ by the transitional authority of Afghanistan.

Accordingly, the Afghan Constitution of 1964 was in effect at the time of the alleged incident on 17 December 2002. Title III of the Afghan Constitution of 1964, “Basic Rights and Duties of the People” Article 26, states the following:

Liberty is the natural right of the human being. This right has no limitations except the liberty of others and public interest as defined by the law. The liberty and dignity of the human being are inviolable and inalienable. **The state has the duty to respect and protect the liberty and dignity of the individual.** No deed is considered a crime except by virtue of a law in force before its commission. No one may be punished except by the order of a competent court rendered after an open trial held in the presence of the accused. No one may be punished except under the provisions of a law that has come into effect before the commission of the offense with which the accused is charged. No one may be pursued or arrested except in accordance with the provisions of the law. No one may be detained except on order of a competent court, in accordance with the provisions of law. **Innocence is the original state; the accused is considered innocent unless found guilty by a final judgment of a court of law.** Crime is a personal deed. Pursuit, arrest, or detention of the accused and the execution of sentence against him does not affect any other person. Torturing a human being is not permissible. No one can torture or issues orders to torture a person even for the sake of discovering facts, even if the person involved is under pursuit, arrest, or detention, or is condemned to a sentence. Imposing punishment incompatible with human dignity is not permissible. **A statement obtained from an accused or any other person by compulsion is not valid.** Confession of a crime means the admission made by the accused **willingly and in full possession of his senses** before a competent court with regard to the commission of a crime legally attributed to him. **Every person has the right to appoint defense counsel for the removal of a charge legally attributed to him.** (emphasis added)

Under Article 27 of the Constitution of Afghanistan of 1964, in effect at the time of Mr. Jawad’s extradition, “[n]o Afghan accused of a crime can be extradited to a foreign state” to face charges.⁹⁶ The 1964 Constitution remained in effect until a new Constitution was adopted in early 2004.⁹⁷ The canons of statutory interpretation require that the

⁹⁵ See *supra* note 11.

⁹⁶ <http://www.afghan-web.com/history/const/const1964.html>

⁹⁷ Under the new Afghan Constitution, which took effect on 4 January 2004,

text first be reviewed.⁹⁸ If the text is clear then it must be applied.⁹⁹ The text in this case is without need for further interpretation.

Mr. Jawad was a person subject to Article 27 at the time that he has was transferred. He is an Afghan citizen. He was a minor of approximately 12 years of age. He was arrested for a crime by the Afghan police and may have faced juvenile criminal charges in Afghanistan. He was turned over to the U.S. authorities for questioning at U.S run facilities within Afghanistan. Mr. Jawad was then removed from Afghanistan, apparently without even notification to the Afghan government. On 6 February 2003, there were **no exceptions** under the Afghan Constitution which would permit the removal of a citizen accused of a crime from the sovereign territory of Afghanistan. Even if the Afghan government in power in February 2003 somehow could have authorized the extradition

Afghan citizens can be extradited if there is an extradition agreement: “No citizen of Afghanistan accused of a crime can be extradited to a foreign state unless according to mutual agreement and international conventions that Afghanistan has joined”. Article Twenty-Eight, Ch. 2, Art. 7, <http://unpan1.un.org/intrdoc/groups/public/documents/APCITY/UNPAN015879.pdf>.

⁹⁸ It is important to note that the current state of Afghanistan and its fledgling judicial system does not operate anywhere close to developed nation’s standards in turn depriving it the ability to establish credible jurisprudence. E.g., rule of law efforts are being undertaken by the NATO coalition to address the concerns. See ‘Judges Strive to Restore Rule of Law in Afghanistan’s Provinces’, <http://afghanistan.usaid.gov/en/Article.564.aspx>.

⁹⁹ In all cases involving statutory construction, the starting point must be the language employed by Congress and courts may assume that the legislative purpose is expressed by the ordinary meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). In the absence of a definition, courts construe a statutory term in accordance with its ordinary or natural meaning. *FDIC v. Meyer*, 510 U.S. 471 (1994). Courts are to presume that a legislature says in a statute what it means and means in a statute what it says. See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249 (1992). The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. See *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). ‘If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. See *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. See *United Savings Assoc. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988). See also, regarding the Afghan system of justice being trained in U.S. jurisprudence and statutory interpretation, *Special Report Kapisa Provincial Justice Conference 27-28 January 2008*, http://www.jssp-afghanistan.com/Reports%20and%20Publications/Special_Report_Kapisa_PJC_2008.pdf.

of Mr. Jawad to Guantanamo, no evidence has been provided that the United States bothered to ask for such permission. The United States utterly disregarded the sovereignty of Afghanistan and the rights of Mr. Jawad, an Afghan citizen.

As the U.S. Supreme Court noted in *United States v. Alvarez-Machain*,¹⁰⁰ “In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution”.¹⁰¹ The new Afghan Constitution, enacted in January 2004, does authorize the Afghan government to enter into extradition treaties with other states.¹⁰² The United States began to focus on trying Mr. Jawad in a military tribunal as early as 2003 and had clearly determined that Mr. Jawad was likely to be subject to trial by military commission by early 2004. The United States had over four years to formalize an extradition

¹⁰⁰ *United States v. Alvarez-Machain*, 504 U.S. 655, (1992) (Citing, *United States v. Rauscher*, 119 U.S. 40, at 411-12 (1886); *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); and *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, at 8-9 (1936). (United States may not extradite a citizen in the absence of a statute or treaty obligation).

¹⁰¹ Currently there is no extradition treaty between the United States and Afghanistan. See e.g. ‘Extradition from Afghanistan to the United States - Haji Baz Jawad Update’, http://www.uslaw.com/library/International_Law/Extradition_Afghanistan_United_States_Haji_Baz_Jawad_Update.php?item=6837. Haji Baz Jawad, an international heroin kingpin and the first person extradited from Afghanistan to the United States, was sentenced in early October 2007 to more than fifteen years in federal prison. Jawad pled guilty to charges of conspiracy to transport over \$25 million worth of heroin into the U.S. and other places from his illicit drug ring based in Afghanistan and neighboring Pakistan. Jawad admitted in his indictment that his drug enterprise was a form of jihad, or holy war, on the American people, because it traded American dollars for drugs that could possibly kill their buyers. Jawad’s organization was closely tied to the Taliban of Afghanistan, exchanging financial support for protection for its opium crops, heroin laboratories and drug transportation routes. The two nations do not currently share a bilateral extradition treaty. In the absence of such a treaty, U.S. Prosecutors were forced to utilize the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Convention allows for the a party requesting extradition from a party which does not share an extradition agreement, and yet requires one, to consider the Convention itself as a legal basis for extradition of any offense proscribed therein. Growing opium poppies and drug trafficking, both of which Jawad is guilty, are offenses against Article 3 of the Convention. Thus, U.S. and Afghani officials properly used the Convention as a basis for Jawad’s extradition.

¹⁰² Afghanistan Constitution Article 28 states that “[n]o citizen of Afghanistan accused of a crime shall be extradited to a foreign state without reciprocal arrangements as well as international treaties to which Afghanistan has joined. No Afghan shall be deprived of citizenship or sentenced to domestic or foreign exile”.

treaty with Afghanistan and to then obtain permission from the Afghan government to try Mr. Jawad. The United States did not do so.

ii. The Afghanistan Government Failed to Prevent This Illegal Extradition and Has Failed to Protect This Child of Afghanistan

Jawad acknowledges that leading up and during his encounter with the Afghanistan Police the country was in transition and corruption was rampant. Given the transitional governments challenges in building a stronger and prosperous Afghanistan post-Taliban rule it is hard to imagine that the petitioner's circumstances and plight would have revealed themselves to government officials with the capability to protect this child and ensure the appropriate result occurred. That is exactly what happened however. The former Minister of Interior Wardak¹⁰³ was on full notice of Jawad's juvenile status. The former Minister first assured Jawad that no harm would come to him and then he was summarily turned over to U.S. Forces like a useless piece of property. No demands were made for his welfare. No notifications were made to his family regarding his detention or custody. No concern was expressed whether he may be removed from the country. The political expediency of this Minister and his willingness to turn a blind eye to the rule of law resulted in a child spending seven years of his life deprived of his family in virtual isolation. The following discussion centers on the numerous ways that the Afghanistan government has failed to protect this child for the purpose of supporting the immediate return of Jawad to his mother and to reflect upon these failures in order to avoid their reoccurrence in the future.

iii. Violations of the Afghan Constitutions of 1964 and 2004

Despite the lofty rhetoric of the Afghan Constitution, the rights of criminal suspects in Afghanistan were not recognized in this case. All Afghan's would have been well aware, as any citizen of the region would, of the reputation of the Afghan police for corruption and brutality. Indeed, during this period of time the Afghan police were notorious for their endemic disregard of human rights and pervasive corruption. The time frame is important to note in that the Taliban had recently been routed, U.S. Forces were in and around the country, and the government was operating under transitional authority in an effort to build solidarity. These behaviors are well documented by journalists,

¹⁰³ Note: the former Interior Minister Wardak and the currently Defense Minister Wardak are NOT the same individual.

NGOs and government agencies.¹⁰⁴

The preamble of the Afghan Constitution of 2004 highlights some of the goals and reasons why adhering to the rule of law is so important.¹⁰⁵ Article 24 states that, “Liberty and human dignity are inviolable... and [t]he state shall respect and protect liberty as well as human dignity”. Article 39 states that, “The state shall protect the rights of the citizens of Afghanistan outside the country”. A quick survey of the facts in the case reveals that Jawad’s human dignity was soiled and no hand of Afghanistan reached across the ocean to offer protection or concern for his welfare even after abuses by both the Afghan police and the U.S. Government became public.

iv. Violations of the Afghanistan Criminal Code

Articles IV and V of the Afghanistan Criminal Code detail fundamental rights of an accused upon which a legal system cannot function without. Specifically the presumption of innocence, the right to remain silent, that an accused should not undergo intimidations or any form of physical or psychological pressure, and the right to a defense counsel. A cursory review of the factual circumstances *supra* reveals that every one of these tenants of justice was violated. This is even more remarkable

¹⁰⁴ See, e.g. CNN video ‘Grenade Attack’, 17 December 2002. *Reforming Afghanistan’s Police*, Asia Report 138, 30 August 2007 (www.crisisgroup.org/home/index.cfm?id=5052&l=1); ‘Afghan Police Sentenced for Sex Abuse of Boy, Father’, *The Associated Press*, published 23 February 2008 (<http://www.iht.com/articles/ap/2008/02/23/asia/AS-GENAfghan-Sex-Abuse.php>); ‘Afghan Politician Rejects Prison Abuse Claims’, updated 1 May 2007, CTV.ca News Staff (http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070430/afghan_det_ainees_070430/20070430?hub=TopStories); *Afghan Beat Students*, New York, 14 November 2002 (<http://www.hrw.org/press/2002/11/afghan1114.htm>); *Arms Further Abuse*, AI Public Briefing - AI Index: ASA 11/004/2008, 3 April 2008 (<http://www.amnestyusa.org/document.php?lang=e&id=ENGASA110042008>); D. Rhode, ‘Overhaul of Afghan Police is New Priority’, *New York Times*, 18 October 2007 (http://www.nytimes.com/2007/10/18/world/asia/18afghan.html?_l&oref=slogin).

¹⁰⁵ The preamble states, *inter alia*, “We the people...Realizing the previous injustices, miseries and innumerable disasters which have befallen our country; Appreciating the sacrifices, historical struggles, jihad and just resistance of all the peoples of Afghanistan, admiring the supreme position of the martyr’s of the country’s freedom; Observing the United Nations Charter as well as the Universal Declaration of Human Rights; And in order to: Form a civil society void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining peoples’ freedoms and fundamental rights;...And, eventually, regain Afghanistan’s appropriate place in the international family”.

given that the adults in charge were presiding over what was an 11 or 12 year old boy who they observed to be fearful and disoriented without an interested adult figure present. The actions of government officials in this capacity can only be described as a “lynch mob” on a mission.

*v. Violation of the Afghanistan Juvenile Law (Juvenile Code)*¹⁰⁶

One of the most disturbing issues surrounding this case is this blatant disregard for the welfare of this minor by both governments. The juvenile code in both countries and around the world is established because juveniles do not maintain the same level of culpability and sophistication as adults given developmental and environmental circumstances.

Juveniles’ susceptibility to suggestion, coupled with their inherent naiveties and immature thought processes, raise considerable doubt as to their ability to understand and exercise their Fifth Amendment right against self-incrimination. Furthermore, they are extremely vulnerable to over implicating themselves in crimes or, even more unfortunate for all involved, confessing to crimes they did not even commit.¹⁰⁷

This recognition is codified in the Afghanistan Juvenile Law. Article X provides that children in detention should be kept separately from adults. Instead, Jawad was physically and verbally tortured and then turned over to U.S. Forces to undergo a journey which almost ended in his death through suicide. Article XI provides that the police notify the child’s legal representative and social services institutions within **24 hours from the time of arrest**. The first government contact occurred after close to **six years after incarceration**. Article XXII states that, “[i]n all stages of investigation and trial, the child shall have the right to a defense counsel and interpreter”. This issue was not even contemplated.

Given the strong possibility that Jawad was 11 years old at the time of this incident, regardless if *arguendo* he had done everything the

¹⁰⁶ *Official Gazette* No. 846, published on 23 March 2005 (1384/01/03 A.P.).

¹⁰⁷ Lisa M. Krzewinski, ‘But I didn’t do it: Protecting the Rights of Juveniles During Interrogation’, 22 *B.C. Third World L.J.* 355 Spring, 2002. See also E.S. Scott & L. Steinberg, *Rethinking Juvenile Justice* (Cambridge, Harvard University Press, 2008) (Only in recent years has scientific interest focused intensely on the psychological transition between adolescence and adulthood, largely in response to new research showing continued brain maturation through the end of the adolescent period. Until this research began to appear in scientific journals and the popular press, the line between adolescence and adulthood was seen primarily as a legal or sociological boundary, rather than a psychological one).

government has alleged, he is not criminally responsible. Article VIII dictates that “confinement of a child is considered to be the last resort for rehabilitation and re-education of the child”. In this instance Jawad has not only been confined, he has been housed with persons whom the United States has called the worst of the worst throughout his formative years. Again, the pressure, torture, abuse, and humiliation drove this child to want to take his own life out of desperation. He has recently expressed a hopeful attitude and wishes to become a doctor to help people.

V. Treaty Violations and How They Relate to Potential Civil Liability

While none of the treaties discussed *supra* are self executing they are binding upon the United States pursuant to their respective ratifications and demonstrate the international commitments and standards of conduct which the United States has agreed to abide. The duties, actions and demonstrated gross negligence on the part of federal investigators and law enforcement related to this case combined with the international legal obligations may also provide a means of civil relief to Jawad upon his release. The Federal Tort Claims Act is the statute by which the United States authorizes tort suits to be brought against itself. With exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment, in accordance with the law of the state where the act or omission occurred.

Three major exceptions, under which the United States may not be held liable, even in circumstances where a private person could be held liable under state law, are the *Feres* doctrine, which prohibits suits by military personnel for injuries sustained incident to service; the discretionary function exception, which immunizes the United States for acts or omissions of its employees that involve policy decisions; and the intentional tort exception, which precludes suits against the United States for assault and battery, among some other intentional torts, **unless** they are committed by ***federal law enforcement or investigative officials*** (emphasis added).¹⁰⁸ Thus we believe that the following instruments

¹⁰⁸ The FTCA provides a limited waiver of the federal government’s sovereign immunity when its employees are negligent within the scope of their employment. Under the FTCA, the government can only be sued ‘under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. S1346(b).

provide authority for Jawad's release and may also provide a basis in tort law within the United States for Jawad to pursue a cause of action seeking pecuniary relief. The violations of national and international law provide context and support the theories of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

1. Violation of the International Covenant on Civil and Political Rights (ICCPR)¹⁰⁹

For reasons apparent and discussed in depth the following articles of ICCPR have been blatantly violated:

Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Jawad's exposure to the sleep deprivation program in and of itself violates this provision. Again, the military commission's judge has held that the Afghan police abused and tortured Jawad. Given that Jawad was arrested and interrogated before being turned over to U.S. officials, the reliability of the evidence was immediately called into question. U.S. officials, hopefully maintaining higher standards of ethics and investigative expertise could have conducted a more thorough investigation instead of accepting Jawad's guilt at face value. This is particularly disturbing given that several others suspects were detained by the Afghans. Jawad's detention and incarceration were violative of American jurisprudential standards from the moment American officials entered the process.

Article 9. 1. Everyone has the right to liberty and security of person. No one shall be subjected to **arbitrary arrest** or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law... 5. Anyone who has been the victim of unlawful arrest or detention **shall have an enforceable right to compensation.** (emphasis added)

Thus, the FTCA does not apply to conduct that is uniquely governmental, that is, incapable of performance by a private individual. 28 U.S.C. S 2680(h) provides that the government is not liable when any of its agents commits the torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. **However, it also provides an exception. The government is liable if a law enforcement officer commits assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.** The government is not liable if the claim against law enforcement officers is for libel, slander, misrepresentation, deceit, or interference with contract. Congress has not waived the government's sovereign immunity against all law enforcement acts or omissions.

¹⁰⁹ <http://www2.ohchr.org/english/law/ccpr.htm>.

A close scrutiny of the basis for arrest and total lack of investigation coupled by Jawad's age define the word "arbitrary."

Article 9. 2. Anyone arrested or detained on a criminal charge **shall be brought promptly before a judge** or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

3. **Anyone** who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide **without delay** on the lawfulness of his detention and **order his release if the detention is not lawful.** (emphasis added)

It should be emphasized that this was not a battlefield detention. Jawad was arrested and processed as an alleged "criminal". This is buttressed by the arrest documents associated with his detention and the assertions made by all of the Afghan police officials connected with the incident. In short, U.S. officials could care less. By some accounts the U.S. military almost shot their way into the police district to obtain custody of the alleged suspects. Jawad's turnover was a backroom deal between a corrupt Afghan official and a State Department official manipulating circumstances for their vantage.¹¹⁰ This provision provides an additional basis under international law for this petition.

2. Violation of The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT)

Article 1 CAT defines torture as follows:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, **whether physical or mental, is intentionally inflicted** on a person for such **purposes as obtaining from him or a third person information or a confession**, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of **or with the consent or acquiescence of a public official or other person acting in an official capacity.** It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (emphasis added)

As stated previously the U.S. Military Commission judge ruled that the Afghan police tortured and abused Jawad during the police interrogation and suppressed the statement. No investigation was conducted regarding his facial laceration or clearly disheveled under the influence of drugs

¹¹⁰ Based in part upon interviews conducted with relevant persons by defense counsel.

appearance as described by Afghan authorities. One of the Afghan police remarkably boasts that he used “kung foo” to subdue the suspect.¹¹¹ Whether this claim is true is another matter. Let us remember that this boy weighed about 70lbs and this officer weighs around 200 lbs. Once again the acquiescence in the total disregard for a minor petitioner’s rights is alarming. This extradition was executed in clear violation of Afghan sovereignty, Afghan Constitutional law, Afghan Domestic Criminal law, American Constitutional law, and numerous international instruments.

3. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Protocol on Child Soldiers”)

The world’s condemnation of the use of child soldiers resulted in the treaty entitled the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”) which was adopted by the General Assembly of the United Nations and opened for signature, ratification, and accession on 25 May 2000.¹¹² The United States is a signatory to the Optional Protocol which entered into force internationally on 12 February 2002, several months before the alleged crime of Mohammad Jawad. The treaty went into effect for the United States on 23 January 2003, before the United States transferred Mr. Jawad out of his home country of Afghanistan on or about 6 February 2003. The United States signed and ratified the Optional Protocol to the Convention on the Rights of the Child (“CRC”) on the Involvement of Children in Armed Conflict (“Protocol on Child Soldiers”) on 23 January 2003. The treaty went into effect and became a binding legal obligation of the United States before U.S. forces transferred Jawad out of Afghanistan, on or about 6 February 2003. According to the Protocol on Child Soldiers, children who were recruited or used in armed conflict should be considered *primarily as victims*.

The Protocol on Child Soldiers requires that the United States provide any child soldier under its jurisdiction with rehabilitation and social reintegration services. There are no procedures for juvenile rehabilitation and reintegration in the MCA or its implementing regulations, and Jawad has received no such services at Guantánamo. This Optional Protocol to the CRC not only prohibits the recruitment of children into

¹¹¹ Mandozai Majaz Deposition, Kabul, Afghanistan.

¹¹² <http://www2.ohchr.org/english/law/crc-conflict.htm>.

armed conflict, it also places obligations on State Parties, including the United States, which take child soldiers into custody, to reintegrate and rehabilitate. Article VII of the Optional Protocol, for example, imposes the following obligation on states parties:

States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol *and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol*, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties concerned and the relevant international organizations. (Emphasis added.)

Jawad was never treated or segregated as a juvenile while in Afghan or American custody despite numerous others receiving such benefits.¹¹³ This has likely caused irreparable harm to Jawad. He was not only deprived of these services he was isolated and abused – the antithesis of why the U.S. entered into this treaty. These issues were raised before the judiciary and to several members of the executive branch to no avail. Notice was also provided to the Afghan Ambassador during the Fall of 2008. Despite numerous petitions and admonitions by mental health professionals, the judiciary and U.S. Government disregarded Jawad’s juvenile status and deprived him of treatment and support that was made available to other children.

VI. Repatriation

On 24 August, Mohammed Jawad, an Afghan prisoner who was, perhaps, as young as 12 when he was seized after a grenade attack in Kabul in December 2002 and transported to Guantánamo, was finally freed after his habeas corpus petition was granted.¹¹⁴

Major Montalvo was determined to be present when Jawad arrived in Afghanistan and had promised him that he would be there, even at his own expense. In anticipation that the official DoD travel request would be denied, he had obtained a civilian visa for himself to enter Afghanistan. Major Montalvo had been approved to retire from the U.S. Marine Corps after 21 years of service and was in “terminal leave” status, in which one is still technically in the service, but is using up accumulated leave prior to the official retirement date. During terminal

¹¹³ *Supra* note 44.

¹¹⁴ ‘As Judge Orders Release of Tortured Guantánamo Prisoner, Government Refuses to Concede Defeat’, <http://www.andyworthington.co.uk/2009/07/31/as-judge-orders-release-of-tortured-guantanamo-prisoner-government-refuses-to-concede-defeat/>.

leave, retiring officers are authorized to work for other employers and Maj. Montalvo had already begun work for a private law firm, Tully Rinckey, in Washington D.C. The ethic's concern was that U.S. military attorneys cannot work in any civilian capacity unless approved by higher authority. This is a particularly acute issue when the matters involve actions against the United States government which is generally a prohibited activity. Capt. Kannady, still on active duty, was denied permission to go by higher authority based upon the pretext that the issues involved were beyond the scope of representation.¹¹⁵

Major Montalvo through the support of his fellow defense counsel and various NGO's was able to be present in Kabul within an hour of Jawad's arrival. The original plan for Jawad, however, was to bring him to Afghanistan's Pul-e-Charkhi jail, notorious for the murder and torture of thousands during the Communist era. Sitting in the Office of the Afghan Attorney General with his eminently qualified translator and country expert Major Montalvo negotiated an alternative release plan and the helicopter was diverted to the Defense Ministry where he was immediately driven to the Attorney General's office for a meeting with Major Montalvo.

Jawad was then prepared for a meeting with President Hamid Karzai. After this meeting the Attorney General, himself, drove Jawad to his tribal leader's house.

While this was one of the happiest moments for Jawad, his family, and the defense team, Major Montalvo quickly discerned that there was no repatriation plan in place. This reality raised significant concerns for Jawad's personal welfare as well as the strategic interests of the U.S. given the Afghanistan's current state of instability. Major Montalvo endeavored to craft an ad hoc rehabilitation and reintegration plan for Jawad in coordination with the Afghan government, the U.S. State Department, UNICEF, and various other intergovernmental organizations and NGOs.

The plan has been a partial success. Jawad's health is in a fragile state and no housing has been provided or funds for food or clothing. The U.S. State Department has apparently reneged on its previous commitment for support and the Karzai government is in disarray due to recent

¹¹⁵ J.S. Landay & C. Rosenberg, 'Young Afghan Sent Home from Guantánamo', 24 April 2009, <http://www.webcitation.org/query?url=http%3A%2F%2Fwww.miamiherald.com%2Fnews%2Fmiami-dade%2Fbreaking-news%2Fstory%2F1199863.html&date=2009-08-24>.

developments in the election process. Herculean efforts are being made by non profits in Kabul to assist in anyway they can, but resources are limited and Jawad's plight is unfortunately more common than one could believe. This has motivated Major Montalvo to aggressively pursue civil litigation against the United States to secure monetary support for Jawad to have some semblance of a life that to this point has been stolen by irresponsible Afghan and U.S. Government actors.

VII. Conclusion

The United States leadership in the world as it relates to democracy and the rule of law are no more in question here than in any other case. This case exemplifies all that is wrong with the Military Commissions system. It also serves to injure the reputation of the system of Military Justice which has historically struggled for credibility within the American psyche. As we move forward within the Military Commissions the world will closely scrutinize whether true justice can be borne from a system so enmeshed in achieving a certain end state instead of focusing on protecting the basic rights all persons deserve.

From a defense counsel perspective the Military Commissions are the perfect storm. It is an attempt between numerous government agencies to organize, coordinate, and successfully prosecute some of the most difficult and important cases in our history through prosecutors who are unfamiliar and unable to deal with the U.S. intelligence establishment. The charges are *ex post facto* and almost every judicial decision is of precedential value making it ripe for review and error. These cases were built upon intelligence gather methodologies and not through a law enforcement model. The fisher of experience and available reliable evidence is deep and long. Thus the system has been and will continue to be put on trial - not the client. Meanwhile human beings are being caged indefinitely while men in suits walk the streets of the U.S. Capital and wonder what to do with this mess.

In the case at bar, the United States has improperly violated the sovereignty of Afghanistan and the rights of a child who has suffered at the hands of an overzealous U.S. Government. While the U.S. Government's zeal to protect and defend its citizens against enemies both foreign and domestic is squarely within the fundamental obligations of a government, they cannot be allowed to achieve this end through a blatant disregard for the laws it has committed itself to follow, the laws of other nations, and the humane treatment of children. Moreover, this

case demonstrates what can happen when governmental entities, such as the Afghan police, and government officials, such as the former Interior Minister of Afghanistan, blatantly disregard the rule of law. The Afghan people express in the preamble of their Constitution that they “aspire to regain Afghanistan’s appropriate place in the international family”. The complete and utter failure of Afghanistan’s institutions to protect its citizens is inconsistent with its obligations under international law and will serve only to prolong the desire for stability and respect among the world’s nations. Unfortunately the United States is not doing much better in this regard and the window to correct the course is quickly closing. The United States Constitution, a model for the world, states in the Fifth Amendment that “*no person*...shall be deprived of life, liberty, or property, without due process of law...”. One hopes that the United States will recede from their abandonment of this principle and finally seize the opportunity to put these words into deliberate action. In the meantime, Jawad continues to struggling on the streets of Kabul with his mother to regain a basic sense of humanity and survive through the impending winter in a worn torn country with no assistance from either government.

Summary – Résumé – Samenvatting – Zusammenfassung – Riassunto – Resumen

Summary – 60 Days to Freedom – The Release and Repatriation of Mohammad Jawad

On August 24, 2009 a young Afghan detainee was ordered released by U.S. District Court Judge Ellen Huvelle after nearly seven years of detention at Guantanamo Bay, Cuba. The detainee, Mohammed Jawad, was a young boy when he was apprehended following a grenade attack in Kabul, Afghanistan on December 17, 2002. This is the story of his apprehension, interrogation and illegal detention—the cruel and inhuman treatment that filled his days and nights for over six years. After years of inadequate “legal” review consisting of CSRTs and ARBs, Mohammed Jawad became one of only two juveniles facing charges before a military commission. In a legal system created to convict, Jawad prevailed on a number of key issues – most importantly judicial findings of torture and cruel, inhuman and degrading conduct. After these key victories, the military commissions came to a screeching halt when President Obama issued an executive order resulting in a stay of proceedings. Given the stark outlook for Jawad it was incumbent upon his legal team to chart a new course in the constant search for an end to the injustice. Taking the theory of wrongful extradition to the next level, the team coordinated the filing of a petition with the Supreme Court of Afghanistan. In addition to violations of the Afghan constitutions of 1964 and 2004, the petition also cited violations of the Afghan criminal code, violation of the Afghan Juvenile Code, Violation of the International Covenant on Civil and Political Rights (ICCPR), Violation of the Convention against Torture and Other Cruel, Inhumane, and Degrading Treatment of Punishment (CAT), violation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. This article explores the case of Mohammed Jawad which illustrates what happens when governmental entities such as police and government officials blatantly disregard the rule of law.

Résumé – 60 jours jusqu’à la libération. La libération et le rapatriement de Mohammad Jawad

Le 24 août 2009 la Juge Ellen Huvelle du “U.S. District Court” ordonna la relaxation d’un jeune détenu afghan après près de sept ans de détention à Guantanamo Bay (Cuba). Le détenu, Mohammed Jawad, était un jeune garçon lorsqu’il fut appréhendé après une attaque à la grenade à Kaboul en Afghanistan, le 17 décembre 2002. Cet article relate son arrestation,

interrogation et détention illégale et le traitement cruel et inhumain qui fut son quotidien pendant plus de six ans. Après des années de révisions “légales” sans succès auprès des “Combatant Status Review Tribunals” et des “Administrative Review Boards”, Mohammed Jawad fut un des deux seuls mineurs renvoyés devant une commission militaire. Dans un système légal créé pour condamner, Jawad obtint gain de cause sur un nombre de questions importantes, la plus importante étant celle du constat judiciaire de la torture et des traitements cruels, inhumains et dégradants. Après ces victoires importantes, les activités des commissions militaires furent soudainement interrompues lorsque le Président Obama décréta un ordre suspendant les procédures. Vu les perspectives prometteuses pour Jawad, ses conseillers juridiques définirent une nouvelle orientation à leur stratégie pour mettre fin à cette injustice. Ils introduirent une requête auprès de la Cour suprême d’Afghanistan, fondée sur la théorie de l’extradition illégale. Outre les violations des Constitutions afghanes de 1964 et de 2004, la requête fit également état de violations du code pénal afghan, du code de la jeunesse afghan, du Pacte international relatif aux droits civils et politiques, de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants et du Protocole facultatif se rapportant à la Convention relative aux droits de l’enfant concernant l’implication d’enfants dans les conflits armés. Cet article décrit le cas de Mohammed Jawad, qui illustre ce qui arrive lorsque des instances officielles telles que la police et des fonctionnaires violent de façon flagrante la règle de droit.

Samenvatting – 60 dagen tot de vrijheid – De vrijlating en repatriëring van Mohammad Jawad

Op 24 augustus 2009 beval U.S. District Court rechter Ellen Huvelle de vrijlating van een jonge Afgaanse gevangene na bijna zeven jaar vrijheidsberoving in Guantanamo Bay (Cuba). De gevangene, Mohammed Jawad, was nog een jongen toen hij op 17 december 2002 werd opgepakt na een granaataanval in Kaboel (Afghanistan). Dit artikel bevat het relaas van zijn aanhouding, ondervraging en onwettige hechtenis en de wrede en onmenselijke behandeling die zijn dagelijkse leven uitmaakten gedurende meer dan zes jaar. Na jaren vruchteloze herzieningspogingen bij “Combatants Status Review Tribunals” en “Administrative Review Boards” werd Mohammed Jawad één van enige twee minderjarigen die vervolgd werden voor een militaire commissie. In een rechtssysteem dat opgericht werd om te veroordelen kreeg Jawad gelijk op een aantal belangrijke punten, het belangrijkste dat van gerechtelijke vaststellingen van foltering en wrede, onmenselijke en

onterende behandeling. Na deze belangrijke overwinningen werden de activiteiten van de militaire commissies plots stopgezet toen President Obama een beslissing uitvaardigde die de procedure opschortte. Gezien de goede vooruitzichten voor Jawad zochten zijn raadslieden naar een nieuwe oriëntatie in hun zoektocht naar het beëindigen van het onrecht. Op grond van de theorie van de onwettige uitlevering legden zij een verzoekschrift neer bij het Hooggerechtshof van Afghanistan. Naast de schendingen van de Afghaanse grondwetten van 1964 en 2004 vermeldde het verzoekschrift ook schendingen van het Afghaanse strafwetboek, van het Afghaanse jeugdwetboek, van het Internationaal Verdrag over Burgerlijke en Politieke Rechten, van het Verdrag tegen foltering en andere wrede, onmenselijke of vernederende behandelingen of straffen, van het Facultatief Protocol bij het Verdrag inzake de rechten van het kind inzake de betrokkenheid van kinderen bij gewapende conflicten. Dit artikel behandelt het geval van Mohammed Jawad dat illustreert wat er gebeurt wanneer officiële instanties zoals de politie en ambtenaren flagrant de rechtsregels miskennen.

Zusammenfassung – 60 Tage bis zur Freiheit – Die Freilassung und Repatriierung von Mohammad Jawad

Am 24. August 2009 befahl der U.S. District Court Richter Ellen Huvelle die Freilassung eines jungen afghanischen Gefangenen nach einer fast siebenjährigen Freiheitsberaubung in Guantanamo Bay (Kuba). Der Gefangene, Mohammed Jawad, war noch ein Junge, wenn er am 17. Dezember 2002 nach einem Granatangriff in Kabul (Afghanistan) festgenommen wurde. Dieser Artikel berichtet von seiner Festnahme, seinem Verhör und seiner widergesetzlichen Haft, und von der grausamen und menschenunwürdigen Behandlung, die sein Leben während mehr als sechs Jahren bestimmt hat. Nach Jahren von vergeblichen Revisionsversuchen bei den "Combatants Status Review Tribunals" und "Administrative Review Boards" war Mohammed Jawad ein der zwei einzigen Minderjährigen, die vor einer Militärkommission verfolgt wurden. In einem auf der Verurteilung gezielten Rechtssystem, hat Jawad auf einige wichtigen Punkte – der wichtigste war die gerichtliche Feststellung von Folterung und grausamer, unmenschlicher und entehrender Behandlung - Recht bekommen. Nach diesen wichtigen Siegen wurden die Aktivitäten der Militärkommissionen plötzlich eingestellt, wenn der Präsident Obama eine Entscheidung, die das Verfahren aussetzte, ausgestellt hat. Da Jawad gute Aussichten hatte, suchten seine Rechtsberater nach einer neuen Orientierung in ihrer Suche zur Beendigung des Unrechts. Auf

Grund der Theorie der widergesetzlichen Auslieferung, deponierten sie einen Antrag beim obersten Gerichtshof in Afghanistan. Außer den Verletzungen der afghanischen Konstitutionen von 1964 und 2004 erwähnte der Antrag auch Verletzungen des afghanischen Strafgesetzbuches, des afghanischen Jugendgesetzbuches, des internationalen Pakts über bürgerliche und politische Rechte, des Übereinkommens gegen Folter und andere grausame, unmenschliche und erniedrigende Behandlung oder Strafe, des Fakultativprotokolls zum Übereinkommen über die Rechte des Kindes betreffend die Beteiligung von Kindern an bewaffneten Konflikten. Dieser Artikel bespricht den Fall von Mohammed Jawad, der illustriert, was passiert wenn offizielle Instanzen wie die Polizei und Beamte die Rechtsregeln grob verkennen.

Riassunto – 60 giorni per la libertà – La scarcerazione e il rimpatrio di Mohammad Jawad

Il 24 agosto 2009, un giovane cittadino afgano detenuto a Guantanamo Bay, Cuba, è stato rilasciato dopo quasi sette anni di prigionia per ordine del giudice distrettuale Ellen Huvelle. Il detenuto, Mohammed Jawad, era ancora molto giovane quando fu arrestato a Kabul, Afghanistan, il 17 dicembre 2002, a seguito di un attentato eseguito a colpi di granate. Questa è la storia del suo arresto, interrogatorio ed illegita reclusione e dei trattamenti crudeli e inumani che hanno riempito i suoi giorni e le sue notti per oltre sei anni. Dopo anni di inadeguato controllo “giurisdizionale”, ad opera di *Combatant Status Review Tribunals* (CSRTs) e *Administrative Review Boards* (ARB), Mohammed Jawad è divenuto uno dei due soli minorenni imputati innanzi una Commissione militare. In un sistema giuridico creato appositamente per condannare gli imputati, Jawad è riuscito alla fine a prevalere sui suoi accusatori sulla base di diverse argomentazioni – le più importanti delle quali concernono l'accertamento, in sede giudiziaria, di torture e condotte crudeli, inumane e degradanti. A seguito di tali vittorie chiave, le Commissioni militari hanno immediatamente fermato i propri lavori, in concomitanza con l'ordine esecutivo del Presidente Obama che imponeva la sospensione dei relativi procedimenti. Vista la desolante prospettiva che attendeva Jawad, per i suoi difensori risultava obbligatorio trovare una via d'uscita, allo scopo di porre fine alle ingiustizie patite dall'interessato. Con l'obiettivo di sollevare la questione dell'originaria illegita estradizione dell'imputato al più alto livello, i legali di Jawad hanno fatto ricorso alla Corte Suprema dell'Afghanistan. Nel ricorso è stato evidenziato come la consegna

dell'imputato fosse stata, non solo contraria alle Costituzioni del 1964 e 2004, ma anche al Codice penale e al Codice minorile afgano, al Patto sui diritti civili e politici, alla Convenzione internazionale contro la tortura, alla violazione del Protocollo opzionale sui bambini soldato della Convenzione internazionale sui diritti del fanciullo. Il caso di Mohammed Jawad mostra cosa può accadere quando le pubbliche Autorità, come la polizia ed altri pubblici ufficiali, operano ignorando sfacciatamente lo stato di diritto.

Resumen – 60 días hasta la liberación – La liberación y la repatriación de Mohammed Jawad

El 24 de agosto del 2009, la juez Ellen Huvelle del “*US District Court*” ordenó la liberación del joven detenido Afgano tras de siete años de encarcelamiento en Guantánamo Bay (Cuba). El preso, Mohammed Jawad, estaba un joven muchacho cuando fue arrestado tras un ataque a la bomba en Kabul (Afganistán), el 17 de diciembre del 2002. Este artículo relata su detención, interrogación y encarcelamiento ilegal y el tratamiento cruel e inhumano que sufrió diariamente y durante seis años. Después de tantos años de revisiones “legales” sin éxito ante de “*Combatant Status Review Tribunals*” y de “*Administrative Review Boards*”, Mohamed Jawad fue uno de los únicos menores remetido ante una comisión militar. En un sistema legal creado para condenar, Jawad ganó un número de importantes preguntas, cuya la más famosa fue ella del acta judicial de la tortura y los tratamientos crueles, inhumanos y humillantes. Después de estas importantes victorias, las actividades de las comisiones militares fueron, repentinamente interrumpidas cuando el Presidente Obama decretó un orden suspendiendo los enjuiciamientos. Visto las perspectivas prometedoras de Jawad, sus consejeros jurídicos establecieron una nueva estrategia para poner fin a esta injusticia. Se trata de la introducción de una petición ante el Tribunal supremo de Afganistán, fundada sobre la teoría de la extradición ilegal. Además de las violaciones des las Constituciones afganis de 1964 y del 2004, la petición describió también violaciones: del código penal afgani, del código de la Juventud afgani, del Pacto internacional relativo a los derechos civiles y políticos, de la Convención contra la tortura y otras condenas o tratamientos crueles, inhumanos o humillantes así que del violaciones del Protocolo facultativo que se refiere a la Convención relativa a los derechos de los niños en cuanto a su implicación en los conflictos armados. Este artículo describe el caso de Mohamed Jawad, ilustrando lo que ocurre cuando los organismos oficiales cómo la policía y los funcionarios violan, de manera grotesca, la norma del derecho.

