

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-008
RULING ON DEFENSE MOTION
TO DISMISS --
TORTURE OF THE DETAINEE**

1. The defense asserts the Accused was subjected to an intentional sleep deprivation program and other abusive treatment while detained in U.S. custody which constitutes torture in violation of the law of war, U.S. law and DOD regulations and policy¹ and moves to dismiss the Charge and specifications with prejudice. The government opposes the motion, submitting that, even if the allegations are true, dismissal of charges is not the appropriate remedy, if one exists at all.

2. On or about December 17, 2002, in Kabul, Afghanistan, the Accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Accused was immediately apprehended by Afghan police and transferred to U.S. custody the next day. He remained in continuous U.S. custody until his transfer to Guantanamo Bay, Cuba on or about February 6, 2003.

3. On December 25, 2003, the accused attempted suicide.

¹ The President directed in Military Order 1, dated November 13, 2001, that detainees would be treated humanely. A February 7, 2002 White House memo reaffirmed this order and stated further they would be treated, "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

4. As early as November 2003, Joint Task Force-Guantanamo Bay personnel (JTF-GTMO) used a sleep deprivation measure to disorient selected detainees thought to have important intelligence data, disrupt their sleep cycles and biorhythms, make them more compliant and break down their resistance to interrogation. Pursuant to this technique, euphemistically referred to as the “frequent flyer” program, a detainee would be repeatedly moved from one detention cell to another in quick intervals, usually at night.

5. Shortly after assuming command of JTF-GTMO in March 2004, Major General (MG) Jay Hood ordered the “frequent flyer” program discontinued. Apparently unknown to MG Hood, the accused was subjected to the frequent flyer program and moved from cell to cell 112 times from 7 May 2004 to 20 May 2004, on average of about once every three hours. The accused was shackled and unshackled as he was moved from cell to cell. The Accused was not interrogated and the scheme was calculated to profoundly disrupt the his mental senses.

6. While the “frequent flyer” program was intended to create a feeling of hopelessness and despair in the detainee and set the stage for successful interrogations, by March 2004 the accused was of no intelligence value to any government agency. The infliction of the “frequent flyer” technique upon the Accused thus had no legitimate interrogation purpose.

7. On or about June 2, 2008, the Accused was beaten, kicked, and pepper sprayed for not complying with a guard's instructions. He suffered, among other injuries, a broken nose.

8. The conditions experienced by the Accused while confined at Guantanamo Bay include excessive heat, constant lighting, loud noise, linguistic isolation (separating the accused from other Pashto² speakers), and, on at least two separate occasions, 30 days physical isolation.

9. The Accused has not apparently suffered any permanent physical injuries as a result of his detention in U.S. custody. While the long term psychological impact of the Accused's detention is unclear, the Rule for Military Commission (RMC) 706 board concluded the Accused is "not currently suffering from a mental disease or defect," "does have sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding" and "does have sufficient mental capacity to understand the nature of the proceedings against him and cooperate intelligently in his defense."³ Additionally, the Accused does not require immediate medical or psychological treatment. See Appellate Exhibit 72.

² Pashto is one of two national languages of Afghanistan.

³ After referral of charges, an inquiry into the mental capacity of the accused may be ordered by the military judge. When a mental examination is ordered, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. See RMC 706.

10. The Military Commissions Act prohibits both the torture⁴ and cruel and inhuman treatment⁵ of detainees. Any degrading treatment carries a presumption it was imposed as a punitive not preventative measure.

11. The defense asserts that the government's conduct amounts to torture and violates the principles of due process of such a magnitude that dismissal of the charges is the only acceptable remedy.⁶

12. This Commission finds that, under the circumstances, subjecting this Accused to the "frequent flyer" program from May 7-20, 2004 constitutes abusive

⁴ "Torture" under 18 U.S.C. § 2441(d)(1)(A) means "an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, or punishment, intimidation, coercion, or any reason based on discrimination of any kind." "[S]evere mental pain or suffering" means the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality." See 18 U.S.C. § 2340(2) (internal marks omitted).

Article I of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

"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. "

See United Nations General Assembly Resolution 39/46 of 10 December 1984.

⁵ "Cruel or inhuman treatment" under 18 U.S.C. § 2441(d)(1)(B) means "an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions), including serious physical abuse upon another within his custody or control."

⁶ *United States v. Barrero-Moreno*, 951 F2d 1089, 1092 (9th Cir. 1991) (dismissal appropriate when prosecutorial process violated a constitutional or statutory right and no lesser remedial action available).

conduct and cruel and inhuman treatment. Further, it came at least two months after the JTF-GTMO commander had ordered the program stopped. Its continuation was not simple negligence but flagrant misbehavior. Those responsible should face appropriate disciplinary action, if warranted under the circumstances.

13. That being said, the narrow issue before this Military Commission is whether dismissal of the charges against this Accused is appropriate for the conduct of an apparent few government agents. Answering this question does not require the Military Commission to decide as fact that this Accused was tortured. Assuming, but not deciding, that the government's actions against this Accused produced the pain and suffering of the requisite physical and/or mental intensity and of such duration to rise to the level of "torture", this Military Commission finds that the remedy sought by the defense is not warranted under the circumstances.

14. It is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused.⁷ However, when other remedies are available to adequately address the wrong, dismissal should be the last of an escalating list of options. Here, the Commission finds other remedies are available to adequately address the wrong inflicted upon the Accused, including,

⁷ See, e.g., *United States v. Fulton*, 55 M.J. 88 (2001) (analyzing Rule for Courts-Martial (RCM) 907 and finding list of grounds for dismissal at RCM 907(b) non-exclusive). As RMC 103(26) states that the definitions in 10 U.S.C. § 101 shall apply, and 10 U.S.C. § 101(13) states that "includes" means "includes but is not limited to," the *Fulton* court's analysis applies to RMC 907(b) as well. While 10 U.S.C. § 948(c) provides that case interpreting the UCMJ are not binding on military commissions, they can nevertheless be persuasive authority in appropriate circumstances.

but not limited to, sentence credit towards any approved period of confinement, excluding statements and any evidence derived from the abusive treatment, and prohibiting persons who may have been involved in any improper actions against the Accused from testifying at trial. The Military Commission will rule upon the appropriate application of these, and other proposed remedies, as dictated by developments in this case.

15. Accordingly, the defense motion to dismiss based on torture of the Accused is DENIED.

So ordered this 24th day of September 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge