

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-022
RULING ON DEFENSE MOTION
TO SUPPRESS OUT-OF-COURT
STATEMENTS OF THE ACCUSED TO
AFGHAN AUTHORITIES**

1. 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, at the time under the age of 18 years,¹ was subsequently apprehended by Afghan police and transported to an Afghan police station for interrogation. The Accused appeared to be under the influence of drugs. Present at the police station were several high-ranking Afghan government officials, including the Interior Minister, the Police and Security Commander, and the Criminal Investigations Director. Most, if not all, present were carrying firearms, which were visible to the Accused. During the interrogation, someone told the Accused, “You will be killed if you do not confess to the grenade attack,” and, “We will arrest your family and kill them if you do not confess,” or words to that effect.² The speaker meant what he said; it was a credible threat. The

¹ The government has implicitly conceded that, at the time of the charged offenses, the Accused was less than 18 years old. Specifically, the United States has stated: “At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006.” See United States Written Response to Questions Asked by the Committee on the Rights of the Child, 13 May 2008, available at: <http://www.state.gov/g/drl/rls/105437.htm> (last visited 16 September 2008). The results of a bone scan analysis submitted by the trial counsel are consistent with this statement, as the analysis indicated that the Accused was approximately 18 years old as of October 26, 2003. This would mean the Accused was approximately 17 years old as of the date of the charged offenses.

² These findings of fact come primarily from the Accused’s September 26, 2008 declaration which the Military Commission admitted into evidence as a remedy for the Government’s inability to provide timely discovery to the Defense.

Accused subsequently admitted to throwing a grenade into the vehicle, he was happy if it caused the Americans to die and he would do it again. Several hours later, the Accused was turned over to U.S. military custody³ and eventually transferred to Guantanamo Bay, Cuba, on or about February 6, 2003.

2. The Accused now moves this Military Commission to suppress all statements he made to Afghan government authorities on December 17, 2002 because they were obtained by the use of torture, as that term is defined in the Military Commission Rules of Evidence (MCRE).

3. A statement obtained by the use of torture⁴ shall not be admitted into evidence. See MCRE 304(3). “Torture” includes statements obtained by use of death threats to the speaker or his family; the actual infliction of physical or mental injury is not required. Instead, the relevant inquiry is whether the threat was specifically intended to inflict severe physical or mental pain or suffering upon another person within the interrogator’s custody or control. In this case, the Afghan government and police authorities told the Accused he and his family would be killed if he did not confess to throwing the grenade. The interrogators were armed. There is no evidence the threats were made in jest or intended as a joke. Given the Accused’s age and the then reputation of the Afghan police as corrupt and violent, the Commission specifically finds these threats credible.

³ The Accused also made several incriminating statements to U.S. interrogators, which are the subject of an additional defense motion to suppress, See D-023, Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody.

⁴ “Torture” is defined as “an act specifically intended to inflict severe physical or mental pain or suffering ... upon another person within the actor’s custody or physical control. MCRE 304(3). “Severe mental pain or suffering” includes mental harm caused by or resulting from the threat of imminent death. MCRE 304(3)(C).

Evidence that someone died or suffered severe injury is not required for the Commission to determine that the threat to kill the Accused and his family was intended to inflict severe physical or mental pain or suffering. On this point, the Commission can not envision a situation where a credible threat to kill someone unless they confess would not satisfy the “act specifically intended to inflict severe physical or mental pain or suffering” requirement in the MCRE definition of torture.

4. While the torture threshold is admittedly high, it is met in this case. The Military Commission concludes that the Accused's statements to the Afghan authorities were obtained by physical intimidation and threats of death which, under the circumstances, constitute torture within the meaning of MCRE 304. Consequently, the government cannot use any statements made by the Accused to Afghan authorities on or about December 17, 2002 to secure a conviction.

5. The defense motion to suppress all oral and written statements of the Accused made to any Afghan police and government authority on December 17, 2002 is GRANTED.

So ordered at 1000 hours this 28th day of October 2008:

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