

USA, Jawad v. Gates

INTRODUCTORY TEXT: *This case presents issues relating to minors in combat and detention.*

N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Background Note: This note is intended to provide domestic legal context to allow the reader to better extract the IHL principles found in this case. This note does not provide US legal advice.

US law can be unofficially grouped into two broad categories: civil (tort, contracts, commercial, family, administrative, estate law, etc.) and criminal. Depending on the relevant law, the nature of the parties, and the location of the parties, a person or entity may file a lawsuit in a state district court or federal district court. The Alien Tort Statute ("ATS") allows a non-US national ("alien") to bring a lawsuit in a federal district court

when the alien claims he or she suffered damages in tort from a violation of international law. The Federal Tort Claims Act ("FTCA") allows an individual to bring a lawsuit against the US or its agencies for torts committed on behalf of the government. Here, Jawad brought a civil lawsuit under the ATS and FTCA against Robert Gates, the former US Secretary of Defense, claiming tort damages for torture and other mistreatment incurred while detained in Guantanamo.

While Jawad was detained, Congress established military tribunals through which Guantanamo detainees could be tried for violations of international humanitarian law through the Military Commissions Act of 2006 ("MCA"). The MCA also created an exception to the ATS and FTCA. Under the MCA, federal district courts no longer had jurisdiction over tort cases brought by enemy combatant detainees regarding their detention. In this opinion, the appellate court affirmed the district court's lack of jurisdiction because Jawad was found to be an enemy combatant and his claim arises from treatment during detention. This case will focus on the determination Jawad was an enemy combatant and his treatment in Guantanamo.

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JAWAD V. GATES

[Source: United States Court of Appeals, District of Columbia Circuit, *Jawad v. Gates*, 832 F.3d 364, 12 August 2016, available at <https://www.cadc.uscourts.gov/internet/opinions.nsf/BAEC4EEE781518DE8525805250-1630003.pdf> ^[2]

[...]

Griffith, Circuit Judge:

[...]

[1] In December 2002, when Jawad was about 15 years old, Afghan authorities captured him following a grenade attack that badly injured two U.S. soldiers and their Afghan interpreter. The Afghan officials subjected Jawad to cruel and abusive treatment and forced him to sign a prepared confession. They gave the coerced confession to American military authorities in Afghanistan, who detained Jawad. While in their custody, Jawad was abused by American military authorities. Under intense and prolonged questioning, Jawad initially denied responsibility for the grenade attack, but later he confessed. Later still, he recanted his confession.

[2] In February 2003, Jawad was transferred to Guantanamo Bay Naval Base, where the cruel treatment continued. Despite his age, he was not housed in a facility for juveniles. He spent the majority of his first year at Guantanamo “in social, physical, and linguistic isolation,” and even attempted suicide. For two weeks in May 2004, Jawad was “repeatedly mov[ed] ... from one cell to another in quick intervals throughout the night to disrupt sleep cycles, on average every three hours.” [...] Over the course of his detention at Guantanamo, he was interrogated more than 60 times, even after the government decided he had no useful intelligence. These interrogations included “various forms of cruel treatment such as excessive cold, loud noise, beatings, pepper-spray, and being shackled for prolonged periods.” [...]

[3][...] In 2004, a [Combatant Status Review Tribunal] determined that Jawad was properly detained as an enemy combatant. In 2005 and again in 2006, Administrative Review Boards (ARBs) concluded that there was sufficient reason to continue his detention. In rendering its decision, each tribunal “relied heavily” on Jawad's “alleged confessions.” [...]

[4] In 2007, the United States charged Jawad under the Military Commissions Act (MCA) of 2006 with three counts of attempted murder in violation of the law of war and three counts of intentionally causing serious bodily injury. [...] In September 2008, after

prosecutors expressed their intent to use Jawad's confessions, his counsel moved to suppress them as the product of torture. In November 2008, the military commission judge agreed and suppressed the confessions. The judge also found that the repeated movement of Jawad at night throughout May 2004 was “abusive conduct and cruel and inhuman treatment.” [...]

[5] While a prisoner at Guantanamo, Jawad challenged his continued detention in 2005 with a petition for a writ of habeas corpus in district court. He amended his habeas petition in 2009 and asked the district court to do what the military commission judge had done: suppress his previous confessions on the ground that they were the result of coercion and torture. The United States did not oppose the motion, and the district court granted it as conceded. In July 2009, the United States filed a notice in the district court, explaining that “[i]n light of the evidence that remains in the record [... the United States] will no longer treat petitioner as detainable under the [AUMF].” [...] The district court granted Jawad's habeas petition on July 30, 2009, and the United States repatriated Jawad to Afghanistan.

[6] In 2014, Jawad filed a complaint in district court seeking damages from the United States and various federal officials arising out of his alleged mistreatment while in detention. His complaint [... alleges] Jawad was subjected to torture and inhumane treatment at the hands of his American captors in violation of the law of nations, the Third and Fourth Geneva Conventions, Articles 6 and 7 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and the Torture Victim Protection Act. [...]

[7] The district court dismissed Jawad's complaint, holding that section 7(a) of the 2006 MCA bars the court from hearing any claims arising out of Jawad's detention. [...]

II

[...]

[8] [... Jawad] asserts that his lawsuit escapes the statute's jurisdictional bar because he has not “been determined by the United States to have been properly detained as an enemy

combatant.” [...]

[9] Jawad concedes that a CSRT found that he was an “enemy combatant.” [...]

[10] Jawad first points to the government notice, filed in the habeas action, that it would “no longer treat” Jawad as “detainable.” This statement, Jawad contends, was a “determination [that] he was not properly detained.” [...]

[11] We assume that Jawad is right, as a matter of law, that the government could override a prior determination that an alien had been “properly detained” by issuing a new determination to the contrary in habeas litigation. But, as a matter of fact, the government did not do so here. It never said that Jawad was not properly detained, only that the United States would no longer treat him as such. [...]

[12] Jawad also argues that the initial CSRT determination that he was properly detained was “illegal and void” because “his capture, torture, and detention[] violated domestic and international law concerning treatment of juveniles accused of a crime.” [...]

[13] [...]Jawad has not shown that his CSRT determination ran afoul of any domestic or international law. He does not cite any provision in the Uniform Code of Military Justice or other domestic law that prohibits the detention of juvenile enemy combatants pursuant to the AUMF, much less explain how violations of any such provisions would “void” the CSRT's determination. Nor does Jawad show how any alleged failure of the United States to comply with its treaty obligations would do so. In particular, Jawad relies on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which the United States ratified in 2002. That treaty requires signatories to “take all feasible measures to ensure” that child soldiers “recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service” and to provide, “when necessary, ... all appropriate assistance for their physical and psychological recovery and their social reintegration.” Optional Protocol, art. 6(3) Jawad argues that the United States violated the Protocol's requirement to provide rehabilitation and reintegration to detained juveniles. But Jawad never explains how these provisions would render his initial detention improper under the treaty, let alone why a violation of the

treaty would “void” the CSRT's determination.

[14] [...] According to Jawad, it is “well-established that military tribunals lack jurisdiction over minors below the age of consent.” [...] But Jawad again sidesteps the relevant question. Nothing in those sources of law bears on whether Congress, through section 7(a), barred courts from hearing damages actions brought by juveniles determined to be properly detained as enemy combatants. [...]

[15] Jawad next argues that section 7(a) is inapplicable here because the United States never determined that he was an unlawful enemy combatant. Although Jawad agrees that his CSRT and ARB determinations found him to be an enemy combatant, he maintains that section 7(a) should apply only to detainees who are determined to be unlawful enemy combatants because the 2006 MCA provides that military commissions have jurisdiction only over such combatants. [...]

[16] But the plain language of section 7(a) does not require a finding of unlawfulness. Rather, the jurisdictional bar applies where a detainee has been determined to be an “enemy combatant.” [...]

III

[17] We affirm the district court's dismissal of Jawad's complaint for lack of subject matter jurisdiction.

Discussion

I. Classification of the Situation and Applicable Law

1. (*Paras [1]-[2], [6]*)

- a. How would you classify the situation in Afghanistan in December 2002? What law was applicable to Jawad’s detention, transfer and treatment? If you lack the necessary information, what would you need to know? (GC I-IV, Common Arts. 2^[3] and 3^[4])
- b. Given that he was first apprehended by Afghan forces, do you think his transfer

to the U.S. military was in compliance with IHL? What of his subsequent transfer to Guantanamo Bay? Does your answer depend on whether the conflict is international or non-international in character? (GC I-IV, Common Art. 3 [4]; GC III, Arts 12 [5], 46-48 [6]; GC IV, Art. 49 [7])

2. (*Paras [3] and [6]*) From the information in the case, do you think the U.S. detained Jawad according to the law of IACs or NIACs? Both? Neither? (GC I-IV, Common Art. 3 [4]; GC III, Art. 4 [8]; GC IV, Art. 79 [9])

II. Classification of Persons

3. (*Paras [1]-[6], [14]-[15]*)

a. Under IHL, how may one classify persons deprived of their liberty in IAC? In NIAC? (GC I-IV, Common Art. 3 [4]; GC III, Art. 4 [8]; GC IV, Art. 4 [10])

b. Who is a "combatant" in an IAC? How does one qualify as a combatant in an IAC? Is combatant status dependent upon age? May a child be a combatant? Once captured, is a child combatant entitled to prisoner of war status? Why or why not? (GC III, Art. 4 [8], 45 [11]; P I, Art. 44 [12] and 77 [13]; CIHL, Rule 3; [14] CIHL, Rule 106 [15])

c. Are there combatants in NIACs? If not, how does one classify those who fight in NIAC? Is this classification dependent on age? May a child be classified as a fighter for an armed group, and be targeted/detained on this basis? Why or why not? (GC I-IV, Common Art. 3 [4]; CIHL, Rules 3 [14], 5 [16] and 6 [17])

d. Does the term "unlawful combatant" exist in IHL? Is every member of an armed opposition group in a NIC an "unlawful combatant"? Can children be "unlawful combatants"? Why or why not? (GC I-IV, Common Art. 3 [4]; CIHL, Rules 3 [14], 5 [16] and 6 [17])

e. Based on the facts, can Jawad be classified as a combatant in an IAC? Why or why not? What additional facts, if any, are needed to determine if Jawad was a combatant? (GC III, Art. 4 [8], 45; P I Art. 44 [12]; CIHL, Rules 3 [14], 5 [16] and 6 [17])

f. Based on the facts, can Jawad be classified as a fighter in a NIAC? Why or why not? What additional facts, if any, are needed to determine if Jawad is fighter or a civilian? (GC I-IV, Common Art. 3 [4]; CIHL, Rules 3 [14], 5 [16] and 6 [17])

g. What protections are children afforded in IAC? NIAC? Are there any differences? What protections are afforded to combatants/fighters? What

protections do children lose when they take part in hostilities? What protections do children retain regardless of their participation in hostilities? (GC I-IV, Common Art. 3 ^[4]; GC III, Arts 13 ^[18], 45 ^[19]; GC IV, Arts 24 ^[20], 50 ^[21]; P I, Art. 77 ^[13]; P II, Art. 4 (3); ^[22] CIHL Rules 120 ^[23], 135-137 ^[24])

III. Detention

4. (*Paras [1]-[6], [12]-[14]*)

- a. May children be detained in IAC? NIAC? On what basis? Is the age of a child relevant in answering this question?
- b. What specific protections are children afforded as POWs? As civilian detainees in IACs? When detained in NIACs? (GC I-IV, Common Art. 3 ^[4]; GC III, Arts 13 ^[18], 45 ^[19]; GC IV, Arts. 24 ^[20], 50 ^[21]; P I, Art. 77 ^[13]; P II, Art. 4 (3); ^[22] CIHL, Rules 120 ^[23], 135 ^[24])
- c. May a child be tried for crimes? As a POW? As a civilian? Where may they be tried? What protections are afforded to children being tried as detainees? Which protections, if any, are dependent on age? Does IHL require the same or similar protections described in para. [13]? Why or why not? If not, does the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict apply and prevail? (GC I-IV, Common Art. 3 ^[4]; GC III, Arts. 84 ^[25], 99 ^[26]; GC IV, Art. 68 ^[27]; P I, Art. 77 ^[13]; P II, Art 6(4); ^[28] CIHL, Rule 135 ^[24])
- d. Was Jawad's detention lawful under IHL? Why or why not? Were the conditions of his detention lawful? Why or why not? Were Jawad's interrogation and trial by military commission lawful? Why or why not? Are any violations of IHL committed in Jawad's detention or trial dependent upon his age? (GC I-IV, Common Art. 3 ^[4]; CIHL, Rules 120 ^[23], 135 ^[24])

IV. Implementation of IHL

5. (*Para. [13]*) Who may seek remedies for violations of IHL? How may individuals seek redress as victims of IHL violations? Does IHL prescribe compensation for its violations? Does it give the individual a right to seek compensation? In your opinion, is it appropriate for Jawad to seek civil judicial remedies for violations of IHL committed by the US? What are the pros and cons to this approach? (Hague Convention IV, Art. 3

; P I, Art. 91 ^[30]; CIHL, Rules 150 ^[31] and 158 ^[32])

6. (*Paras [7], [14]-[17]*) Would you agree or disagree with a claim that the jurisdictional bar that Congress has placed on U.S. Courts is in violation of the U.S.' IHL obligations to respect IHL, and to ensure that breaches of IHL are effectively repressed? (GC I-IV, Common Art 1 ^[33]; CIHL, Rule 150 ^[31])

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