

- *Moore v. Fordice*: In 1999, the ACLU agreed to represent all Mississippi prisoners with HIV who were held in a segregated unit at Parchman and who were dying in great numbers as they were being denied the HIV “cocktail” (triple-drug therapy including a protease inhibitor). Following an evidentiary hearing, the district court found that the medical care was grossly defective, and entered an injunction requiring the State to provide HIV care consistent with Center of Disease Control guidelines, including triple-drug therapy. The district court nevertheless rejected the prisoners’ request to make the ACLU National Prison Project their class counsel, and shortly thereafter issued a gag order prohibiting the ACLU from communicating with any Mississippi prisoner about medical care or any other conditions of confinement. In November 2000, the U.S. Court of Appeals for the Fifth Circuit reversed the trial court, lifted the gag order, and ordered the ACLU substituted as counsel.³⁶⁸ The district court later granted the plaintiffs’ motion to bar the State’s long-standing policy of excluding all prisoners with HIV from work release and other programs, and eventually found that HIV care for the plaintiffs had been transformed as a result of the litigation.

The ACLU believes that the absence of independent monitoring bodies to oversee federal, state, and local, prisons and jails, and the lack of enforceable nationwide standards on conditions of confinement, contribute directly to the ongoing abuse and mistreatment of prisoners.

I. Limitations on the Rights of Redress and Remedy (Articles 13, 14)

1. Redress for Violations Outside the United States

Victims of torture by U.S. officials outside the United States in the “global war on terrorism” face significant legal hurdles to redress in U.S. courts. Most victims from Afghanistan and Iraq have no remedy in their home countries or countries of residence, and the U.S. government continues to argue that they have no remedy in United States’ courts. For instance, Iraqi victims of torture cannot seek redress in Iraqi courts against U.S. personnel. A blanket immunity agreement, Coalition Provisional Authority (“CPA”) Order 17, issued June 27, 2003, covers all foreign personnel in the U.S.-led CPA grants immunity for “local courts and any form of arrest or detention other than by persons acting on behalf of their parent states.”³⁶⁹ The immunity agreement will continue in effect after transfer of political power to the Iraqi government.

Victims who have accessed U.S. courts to date have not prevailed in legal actions before lower U.S. federal courts, although these cases are subject to appeal to higher courts. In February 2006, for instance, in a case brought by former Guantánamo detainees against Secretary of Defense Rumsfeld and other members of the U.S. military seeking redress from torture, a federal court held that the proper defendant to the suit is the United States

³⁶⁸ *Gates v. Cook*, 234 F.3d 221 (5th Cir. 2000).

³⁶⁹ State Dept. Washington File, *Immunity For Coalition Personnel To Be Extended*, June 24, 2004, available at <http://www.defendamerica.mil/articles/jun2004/a062504d.html>; see also Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004.

because the defendants were acting within the scope of their employment in authorizing or condoning “aggressive interrogation techniques.”³⁷⁰

Clients in these suits have brought claims on several legal grounds, including the U.S. Constitution and international law. The U.S. government has taken the position that in these suits that the Federal Tort Claims Act (“FTCA”) provides the exclusive remedy for all suits alleging “wrongful or negligent” acts performed by U.S. officials acting within the scope of their employment. Under this law the United States Attorney General or a designee, subject to limited judicial review, is authorized to determine whether a government official was acting within the scope of their employment when the act occurred. If the Attorney General so determines, a certifying letter is filed with the court and the United States is substituted for the individual official. The case then proceeds against the United States under the FTCA. Incorporated in the FTCA, however, is a list of twelve explicit exceptions as to when the United States can be sued. For example, suits for injuries sustained in a foreign country and in the course of combatant activities cannot be brought under the FTCA.³⁷¹

With regard to the plaintiffs’ constitutional claims, the lower court also held that at the time of the alleged torture, under U.S. case law in effect at the time of the alleged torture and inhuman treatment, it was not clear whether plaintiffs—because they were foreign nationals detained at Guantánamo—had a clearly established right not to be tortured. Specifically, the court noted that it was “not until the Supreme Court decision in *Hamdi v. Rumsfeld* . . . and *Rasul v. Bush* . . . , [that] military personnel [were] provided their first indication that detainees may be afforded a degree of constitutional protection.”³⁷² Plaintiffs have appealed the court’s decision.

In another recent case involving the rendition to Syria of Canadian citizen Maher Arar, a federal court in New York held that national security and foreign policy considerations precluded the court from evaluating the actions of federal officials.³⁷³ The court concluded that adjudicating Arar’s claim would improperly interfere with “policy-making” by the political branches and might produce “embarrassment of our government abroad.” The court found that “in the international realm . . . judges have neither the experience nor the background to adequately and competently define and adjudge the rights of an individual vis-à-vis the needs of officials acting to defend the sovereign interests of the United States.”³⁷⁴ In the course of his ruling, the judge also suggested that it may be an open question as to whether the U.S. Constitution protects individuals from torture under all circumstances, and especially in the context of the war on terrorism.³⁷⁵

³⁷⁰ *Rasul v. Rumsfeld*, 414 F.Supp.2d 26 (D.D.C. Feb. 6. 2006).

³⁷¹ *Id.* at 31-33.

³⁷² *Id.* at 44.

³⁷³ *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D.N.Y. Feb. 16, 2006) (Arar had sued the former attorney general, the former commissioner of the Immigration and Naturalization Service, the former secretary for homeland security, the director of the Federal Bureau of Investigation, and other U.S. officials for detaining him incommunicado at the U.S. border for thirteen days and for ordering his deportation to Syria for the express purpose of detention and interrogation under torture by Syrian officials).

³⁷⁴ *Id.* at 281-282.

³⁷⁵ *Id.*

2. Redress for Violations Inside the United States

The right of redress for prisoners subjected to torture and abuse in facilities inside the United States has been weakened significantly by the Prison Litigation Reform Act of 1996. The PLRA makes it harder for prisoners to file cases, find lawyers, and obtain meaningful redress. Originally intended to prevent frivolous lawsuits from congesting the U.S. court system, it has created unintended obstacles which make it more difficult to protect prisoners from psychological and sexual abuse, and from torture.

One provision of the PLRA, 42 U.S.C. § 1997e(e), bars prisoners from filing federal civil claims seeking damages for mental or emotional injury suffered while in custody without a prior showing of physical injury. The following cases illustrate that the courts have narrowly interpreted the “mental or emotional injury” requirement and thwarted congressional intent in passing the PLRA—to preserve the rights of prisoners to bring serious claims.

- A prisoner sued for damages based on the claim that he was kept in solitary confinement with hands and feet shackled, was subjected to body cavity strip searches, and allowed out of his cell only three hours a week. The court dismissed the claim on the basis that the plaintiff did not allege physical injury.³⁷⁶
- A district court dismissed a claim by two female prisoners that they were strip-searched by male guards because they did not explicitly claim physical injury. (One of the women had subsequently attempted suicide as a result of the strip search and had to have her stomach pumped.)³⁷⁷
- A district court dismissed a complaint, under the mental or emotional injury provision, that a prisoner was routinely viewed in the nude by opposite-sex staff. The court dismissed the action despite a finding by the court that the complaint involved a violation of clearly established constitutional rights sufficient to defeat the qualified immunity defense being argued by the government.³⁷⁸
- A district court dismissed a complaint, under the mental or emotional injury provision, by prisoners who claimed that they were subjected to retaliatory strip and body cavity searches, and verbally harassed by guards.³⁷⁹

Another provision of the PLRA, 42 U.S.C. § 1997e(a), prevents prisoners from seeking the protection of the federal courts without exhausting available prison grievance systems. Since such systems typically have short deadlines, and require multiple appeals,

³⁷⁶ *Adnan v. Santa Clara County Department of Corrections*, No. 4:02-CV-03451, 2002 WL 32058464 at *3 (N.D. Cal., Aug. 15, 2002).

³⁷⁷ Memorandum Opinion and Order, *Moya v. City of Albuquerque*, No. 96-1257 DJS/RLP (D.N.M., Nov. 17, 1997).

³⁷⁸ *Ashann Ra v. Commonwealth of Virginia*, 112 F. Supp. 2d 559, 566 (E.D. Va. 2000).

³⁷⁹ *Seaver v. Manduco*, 178 F. Supp. 2d 30 (D. Mass. 2002).

they are difficult for poorly educated prisoners to navigate, yet a mistake may forever bar the prisoner from federal court.

Another common feature of prison grievance systems is a requirement that, before the prisoner can file a formal grievance, the prisoner must attempt to resolve the complaint informally with the staff member who caused the problem. In the case of a prisoner who has been sexually assaulted by a staff member, this provision may require the victim of the assault to confront her assailant, and exposes her to the possibility of serious reprisals for reporting the assault before she can seek the protection of the federal courts. Below are some examples of claims that have been barred by this provision:

- A district court dismissed a case challenging the strip search of female prisoners by male guards on the ground that the prisoners had failed to exhaust the grievance system, even though the prisoners had given written complaints about the searches to prison officials.³⁸⁰
- A district court dismissed a prisoner lawsuit alleging excessive force by a correctional officer resulting in injury because the prisoner had missed a five-day deadline in the grievance system.³⁸¹
- A court of appeals affirmed the dismissal of a prisoner's case for failure to exhaust when the prisoner had been told by the warden that he would "take care" of the prisoner's medical problem, leading the prisoner not to file a formal grievance.³⁸²
- A court of appeals threw out a prisoner's claim that he had suffered an unprovoked, brutal beating by staff and had been denied medical care for his injuries when, after six months of waiting for a decision from the prison grievance system, the prisoner attempted to file in court.³⁸³
- A court of appeals held that the prisoner's near-blindness did not excuse his failure to exhaust.³⁸⁴

U.S. courts have also repeatedly made factual findings that prisoners who attempted to use the grievance system have suffered retaliation from prison officials. *See, e.g., Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001) (court of appeals decision noting jury verdict for prisoner whose property was confiscated in retaliation for filing grievances); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (court of appeals decision affirming injunction for prisoners who were the subject of staff retaliation for filing grievances and for litigation); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (court of appeals decision directing award of compensatory damages for prisoner who was placed in isolation for filing

³⁸⁰ Memorandum Opinion and Order, *Moya v. City of Albuquerque*, *supra* note 377.

³⁸¹ *Gauntt v. Miracle*, No. 3:01CV7492, 2002 WL 1465763 (N.D. Ohio June 10, 2002).

³⁸² *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000).

³⁸³ *Ford v. Johnson*, 362 F.3d 395 (7th Cir. 2004).

³⁸⁴ *Ferrington v. Louisiana Department of Corrections*, 315 F.3d 529 (5th Cir. 2002).

grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for prisoner subjected to retaliation for filing grievances).

J. Admission of Coerced Testimony (Article 15)

1. Admission of Coerced Testimony in Combatant Status Review Tribunals and Military Commissions

In violation of Article 15 of the Convention, the Combatant Status Review Tribunals and the Administrative Review Board rules do not bar the admission of statements coerced torture and abuse. The government contends that that the CSRTs and ARBs are informal review mechanisms and not legal proceedings even though they determine whether a detainee will remain incarcerated indefinitely.

On March 24, 2006, just days before the Supreme Court argument in *Hamdan v. Rumsfeld*, the Department of Defense issued a new instruction for the military commissions that would purportedly prevent the admission of evidence obtained under torture. But the rule contains few safeguards to make the prohibition meaningful and fails to exclude evidence exorted under coercive interrogation techniques that fall short of torture but are prohibited under the Convention. Under military commission rules, the standard for admission of evidence is simply whether, in the opinion of the Presiding Officer, the evidence “would have probative value to a reasonable person.”³⁸⁵

Despite evidence that the U.S. has approved and used coercive interrogation tactics on detainees at Guantánamo and elsewhere, it is far from clear whether defendants will be able to prevent consideration by military commissions of evidence gathered through such methods. Additionally, the defense is unlikely to learn whether evidence was obtained from coercive interrogation of other detainees held either at Guantánamo, or elsewhere, because the witness need not be brought before the commission; a hearsay account of what was said could be introduced into the evidence instead.

Finally, the Detainee Treatment Act authorizes the Department of Defense to consider evidence obtained through torture or other inhuman treatment in assessing the enemy combatant status of detainees held in Guantánamo, in violation of Article 15 of the Convention. The law allows the admission of statements derived though coercive methods to be admitted in proceedings of the Combatant Status Review Tribunal or Administrative Review Board or a similar successor board or tribunal if there is “probative value (if any) of any such statement.”³⁸⁶

³⁸⁵ Military Commission Order No. 1, *supra* note 109, at 1, 6(D)(1).

³⁸⁶ Detainee Treatment Act, *supra* note 5, § 1005. *See also* Letter from the ACLU to Congress, *Re: Proposed Changes to the McCain Anti-Torture Amendment and the Graham Court-Stripping Amendment to the DOD Authorization Bill Jeopardize Protections Against Torture and Abuse* (Dec. 14, 2005), available at <http://www.aclu.org/natsec/gen/23028leg20051214.html>.