

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 exhorted 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.”<sup>385</sup>

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 through 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.”<sup>386</sup>

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

<sup>386</sup> 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>.

## 2. Admission of Coerced Testimony in Criminal Cases in the United States

In November 2005, a U.S. citizen, Ahmed Abu Ali, was convicted by a federal jury of nine counts of conspiracy to commit acts of terrorism, including plotting with al-Qaeda operatives to assassinate President Bush.<sup>387</sup> Abu Ali claimed that his confession was coerced during interrogation by Saudi Arabian security forces. Abu Ali had been living and studying in Saudi Arabia. According to Abu Ali, Saudi security forces arrested him on June 8, 2003. During the first three days of interrogation, he was punched, kicked in the stomach, struck with a hard object more than ten times, whipped while he was chained to the floor, and threatened with amputation or beheading. After three days of interrogation, he confessed to being a member of al-Qaeda. Abu Ali was interrogated for a month, held incommunicado in solitary confinement without judicial review. On July 8, 2003 Abu Ali received a visit from the U.S. embassy. Abu Ali confessed on July 24, 2003.<sup>388</sup>

During pre-trial proceedings, the defense sought to have Abu Ali's videotaped confession suppressed. The defense's motions were denied by the judge on the grounds that the U.S. government had shown by a "preponderance of evidence" that the statements made by Abu Ali were "voluntary" and not a result of "gross abuse" or "inherently coercive conditions," and thereby should be considered in the jury trial.<sup>389</sup>

During the jury trial, the defense was not permitted to submit evidence pertaining to Saudi Arabia's record on torture, including U.S. Department of State reports documenting the use of abuse and torture by Saudi security forces to coerce confessions. Conversely, the court admitted statements by Saudi Arabian officials that torture in general is prohibited and that Saudi forces do not engage in torture.

### K. Inadequacy of United States Laws Criminalizing Torture (Articles 4, 5)

U.S. statutes and regulations enacted following ratification of the treaty are limited to specific contexts such as refugee claims, extradition of foreign fugitives, criminalizing acts of torture committed by U.S. officials outside of U.S. territory, providing compensation to U.S. citizens tortured by a foreign nation, and providing a civil remedy non-citizens for torture violations.<sup>390</sup> The United States has yet to fully comply with its obligations under the Convention to adequately prevent U.S. officials and individuals

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<sup>387</sup> *U.S. Man Guilty of Bush Death Plot*, BBC WORLD SERVICE, Nov. 22, 2005.

<sup>388</sup> *United States v. Ahmed Omar Abu Ali*, 395 F.Supp.2d 338 (E.D. Va. Oct. 25, 2005).

<sup>389</sup> *Id.* at 341-42.

<sup>390</sup> *See, e.g.*, Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 1242(a) (1998) (prohibiting *refoulement*); Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (2004); Implementation of Torture Convention in Extradition Cases, 22 C.F.R. § 95 (2004); 18 U.S.C. § 2340 and 2340A (defining and prohibiting torture by U.S. officials overseas); Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (providing civil remedy for U.S. citizen); and Alien Tort Claims Act, 28 U.S.C. § 1350 (civil remedy for non-citizens).