

## **Barriers To Challenging Torture**

by Josephine Weinberg

On July 1, 2011, prisoners in the “supermax” facility- Pelican Bay State Prison- began a hunger strike to bring attention to the inhumane conditions in the Security Housing Units (the SHU) and Administrative Segregation Units (ASU) of the California Department of Corrections. It is not surprising that these prisoners took matters into their own hands given that they face numerous legal barriers to challenging the conditions of their confinement. These barriers make it almost impossible for individual prisoners to use U.S. domestic law or international law to obtain relief.

Before the hunger strike began, the prisoners released a “Formal Complaint” citing the human rights violations in the SHU: extreme sensory deprivation;, physical isolation;, denial of adequate medical care;, coercion to become informants in order to be released from the SHU and numerous other policies that lead prisoners to deteriorate mentally. Many prisoners are placed in the SHU based on false allegations of prison gang affiliation and can languish there for decades with no constructive programming and with little hope of getting out. In their Complaint, the prisoners call for a “...formal investigation, official international condemnation of said policies and practices, as well as direct action by those affected, as deemed warranted, just and necessary to right these wrongs.”<sup>1</sup>

The prisoners write that the inhumane conditions that exist in the SHU are in violation of the U.S. Constitution and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The U.S. ratified CAT, but it has significantly restricted the use of this tool for SHU prisoners to challenge the conditions of their confinement to an outside body.<sup>2</sup> Moreover, U.S. domestic law, in the form of the Prison Litigation Reform Act (PLRA),<sup>3</sup> has made it effectively impossible for prisoners to challenge conditions of their confinement in U.S. courts.

### **I. Barriers to using International Law: The Convention Against Torture**

The prisoners cite the CAT’s definition of torture in their Complaint:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose 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,...when such pain or suffering is inflicted by or at the instigation of or with the consent acquiescence of Public Official or other person acting in Official Capacity”<sup>4</sup>

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<sup>1</sup> To read the Complaint and learn more regarding the conditions in the SHU at Pelican Bay State Prison go to California Prison Focus at <http://prisons.org/>.

<sup>2</sup> E.g. the U.S. defines torture... “an act must be *specifically intended* to inflict severe physical or mental pain or suffering.”[Emphasis added]. (Implementation of the Convention Against Torture, 8 C.F.R. §1208.18).

<sup>3</sup> Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (Apr. 26, 1996) (codified as amended at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997–1997h).

<sup>4</sup> (CAT, art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, ratified by U.S. (1994).)

The U.S. has refused to recognize CAT Art. 22. This crucial section of the treaty allows individual prisoners to communicate directly to the Committee Against Torture to ask for relief.<sup>6</sup> To comply with Art. 22, the U.S. must report in writing to the Committee whether any action was taken. While the U.S. has ratified the CAT, making the treaty binding law, refusing to recognize Art. 22 precludes anyone in the U.S. from invoking their rights under the treaty and seeking oversight from the Committee.<sup>7</sup> Article 22 is a key part of the CAT because it allows an individual a way to use international law to bind his or her country to the law of that treaty when the domestic law of that country has not afforded needed relief.

If the U.S. recognized all of CAT, the prisoners in the Pelican Bay SHU could appeal to the Committee Against Torture for intervention. Absent this recognition, the prisoners cited CAT and called for “official international condemnation” of the practices in the SHU.

The prohibition against torture is considered a principle that is fundamental to customary international law. Such fundamental principles are binding on all states and are known as “preemptory norms.” Whether or not a nation has even ratified the CAT, they are bound to respect the prohibition against torture.<sup>8</sup> Thus, while the U.S. has limited the definition of what constitutes torture under the CAT as well as the ability of individuals to invoke the treaty at all, recognition by the SHU prisoners of its fundamental principles must be respected.

## **II. Barriers to Using Domestic Law- The Prison Litigation Reform Act**

Perhaps the larger barrier for prisoners challenging conditions of confinement is the Prison Litigation Reform Act passed by Congress in 1996. The PLRA places numerous burdens and restrictions on individual prisoners seeking to file federal lawsuits challenging the dangerous or unhealthy conditions they might be facing in prison. One of the restrictions under the PLRA is an exhaustion of remedies requirement. This requirement requires a prisoner to exhaust all levels of a prison’s complex internal grievance system before filing a lawsuit. Failing to follow all the technical requirements of the internal prison system or missing an arbitrarily short deadline can result in the loss of one’s right to sue forever.

Another major barrier under the PLRA is the physical injury requirement. This requirement precludes a prisoner from seeking compensation in court for “mental or emotional injury” unless he or she has demonstrated a “prior showing of physical injury.” Many abuses happening in prison, therefore, are simply not compensable. For example,

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<sup>6</sup> Art. 22: “A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.”

<sup>7</sup> See [www.aclu.org/files/safefree/torture/A.pdf](http://www.aclu.org/files/safefree/torture/A.pdf) “The Failure Of The United States to Comply With The Convention Against Torture.”

<sup>8</sup> See Human Rights Watch, "Summary of International and U.S. Law Prohibiting Torture and Other Ill-treatment of Persons in Custody," A Human Rights Watch Backgrounder, May 24, 2004 [online], <http://www.hrw.org/english/docs/2004/05/24/usint8614.htm>.

the mental health deterioration that can result from sexual assault or from physical isolation and sensory deprivation would simply not be a basis upon which to seek recovery.

Human Rights Watch has concluded that the PLRA violates human rights law: A bedrock principle of international human rights law is the equality of all person before the law....The ICCPR<sup>9</sup> specifically provides that “[a]ll persons shall be equal before the courts and tribunals.”[Citations omitted]. The PLRA’s restrictions on court access, which apply only to prisoners, are fundamentally at odds with these requirements.<sup>10</sup>

A ray of hope in this legal landscape was the Prison Abuse Remedies Act of 2009, “PARA” (H.R. 4335). This bill would have remedied some of the major problems with the PLRA. The Act sought to “eliminate the requirement of a prior showing of physical injury before a prisoner may bring a claim for mental or emotional injury suffered while in custody.” The act also sought to “expand the discretionary authority of judges in awarding relief in actions involving prison conditions” and would have amended the “exhaustion requirement” which often blocked legitimate claims from reaching court. While PARA never became law, this bill could still be reintroduced.<sup>11</sup> Today, the PLRA effectively makes our justice system inaccessible to individual prisoners seeking to advocate for themselves.

Despite these legal barriers, the prisoners at Pelican Bay State Prison succeeded at getting the CDCR to verbally commit to changing certain policies. Accordingly, the hunger strike has ended to see if these changes are instituted (see the prisoners’ latest public statement within this edition of *Human Right Now!*). These prisoners have asked for public support in their continued struggle to bring attention to what is happening in the SHUs and ASUs. On August 23, 2011 a public legislative hearing will be held at the State Capitol in Sacramento addressing SHU conditions.<sup>12</sup> The importance of this hearing and the need for public support cannot be overstated given the legal barriers faced by these prisoners in their fight to remedy the inhumane conditions at Pelican Bay and other prisons throughout California.

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<sup>9</sup> The International Covenant on Civil and Political Rights (signed Oct. 5, 1977; ratified Jun. 8, 1992)

<sup>10</sup> *No Equal Justice, The Prison Litigation Reform Act in the United States*, Human Right Watch, 2009, available at [www.hrw.org/sites/default/files/reports/us0609web.pdf](http://www.hrw.org/sites/default/files/reports/us0609web.pdf).

<sup>11</sup> <http://www.govtrack.us/congress/bill.xpd?bill=h111-4335&tab=summary>

<sup>12</sup> For more information go to <http://prisonerhungerstrikesolidarity.wordpress.com/>