



Small Group: Protection Against Return to Persecution Under the UN Refugee Convention and the Torture Convention

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Overview

I. Persecution

A. International Law Framework

1. The 1951 Refugee Convention

a. Article 1 A: Refugee Definition

[T]he term “refugee” shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . .

b. Article 33: Non-refoulement

(1) No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

2. The 1967 Protocol

States that ratified the 1967 Protocol agreed that the refugee definition should apply to all refugee-producing situations. The United States ratified the 1967 Protocol in 1968 and thus became derivatively bound by all the substantive provisions of the 1951 Convention.

B. United States Law

1. The Refugee Act of 1980

a. Refugee Definition

The term “refugee” means (A) any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person’s nationality . . . and is persecuted or has a well-founded fear of persecution The term

“refugee” does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of [the five specified grounds]. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion [and a person who fears that he or she will face this type of coercion will be considered to have a well-founded fear of persecution based on political opinion]. INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).

b. Asylum

Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum . . .

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General . . . if . . . such alien is a refugee within the meaning of section 101(a)(42)(A). INA § 208, 8 U.S.C. § 1158.

c. Withholding of Removal (Non-refoulement)

[T]he Attorney General may not remove an alien to a country if . . . the alien's life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

Exceptions: the alien (1) persecuted others, (2) has been convicted of a particularly serious crime and is a danger to the U.S., (3) committed a serious nonpolitical crime outside the U.S. before he arrived, or (4) is a security danger to the U.S. INA § 241(b)(3), 8 U.S.C. § 1231 (b)(3).

2. The REAL ID Act of 2005

This legislation broadened the standard for assessing credibility and heightened the importance of corroboration in asylum and withholding cases. These are often key issues as the applicant has the burden of proving that one of the five specified grounds "was or will be at least one central reason for persecuting the applicant." INA § 208(b)(1)(B).

a. Credibility

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements . . . , the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the

reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. . . . [I]f no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. INA § 208(b)(1)(B)(iii); 8 U.S.C. § 1158(b)(1)(B)(iii).

b. Corroboration

The testimony of the applicant may be sufficient . . . without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. . . . Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. INA § 208(b)(1)(B)(ii); 8 U.S.C. § 1158(b)(1)(B)(ii).

c. Scope and Standard of Review

[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. INA 242 § (b)(4)(B). . . .

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is

compelled to conclude that such corroborating evidence is unavailable. INA 242 § (b)(4); 8 U.S.C. § 1252(b)(4).

II. Torture

A. International Law Framework

1. The Convention Against Torture

a. Article 1: Torture Definition

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes 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, or for any reason based on discrimination of any kind when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

b. Article 3: Non-refoulement

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

B. United States Law

1. Ratifying Resolution

The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention.

In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . .

The term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity. . . .

The United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

Key Issues

1. What is Persecution?
2. What degree of threat or level of risk must an applicant face?
3. How should a “particular social group” be defined?
4. Does private violence against a group that the government fails to protect constitute persecution based on membership in a social group?
5. When do prison conditions constitute torture?
6. What level of government activity is sufficient to demonstrate acquiescence: actual knowledge, awareness, willful blindness, willful acceptance?