

## 5. THE NEW REMEDIES OF WITHHOLDING AND DEFERRAL OF DEPORTATION UNDER THE TORTURE CONVENTION

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In 1985, the United Nations promulgated the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. <http://hrweb.org/legal/cat.html> The Torture Convention defines the offense of torture, Torture Convention, Art. 1 ¶ 1., and requires, among other things, that state parties take effective steps to prevent torture from occurring, Torture Convention, Art. 2., criminalize torture with appropriate penalties that take into account the gravity of the offense, Torture Convention, Art. 4., and permit torture victims to sue the perpetrator. Torture Convention Art. 14. One of the most important provisions of the Convention is Article 3, which prohibits state parties from returning a person to another state where there are substantial grounds for believing that he or she will be tortured. Torture Convention, Art. 3 (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.”).

The United States ratified the Torture Convention in 1995. In 1998, implementing legislation was passed, and pursuant to the implementing legislation, in 1999 the INS promulgated regulations to implement Article 3. 8 C.F.R. §§ 208.16-208.18. These regulations created a new and important remedy for aliens who face the threat of harm upon removal from

the United States, a remedy that supplements the traditional avenue of asylum.

The INS regulations provide that an otherwise deportable alien may seek withholding of removal based on a claim that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal”. 8 C.F.R. § 208.16(c)(2). The testimony of the applicant, if credible, is sufficient to make the required showing, and all relevant evidence should be considered. 8 C.F.R. § 208.16(c)(2) & 208.16(c)(3). Aliens convicted of “aggravated felonies”, who are barred from seeking withholding of removal, may seek deferral of removal under the same standard of proof. 8 C.F.R. §§ 208.16(c)(4) & 208.17(a). Deferral of removal is temporary, subject to review, and does not confer any right on the alien to remain in the United States. 8 C.F.R. § 208.17(b).

The standard for withholding or deferring removal is at once broader and narrower than a traditional asylum claim. Whereas an asylum claimant must prove a “credible fear” of “persecution”, the Torture Convention claimant must meet the more exacting standard that it is “more likely than not” that he or she will not just be persecuted, but tortured. On the other hand, asylum is not available unless the persecution is based on the applicant’s membership in some protected group (such as race, religion, or political affiliation). In contrast, if the likelihood of torture is established under the Torture Convention, the reason for torture is irrelevant. *Efe v. Ashcroft*, 293 F.3d 899, 907 (5th Cir. 2002).

### *Defining Torture*

The Convention’s long definition of torture, Torture Convention Art. 1 ¶ 1, contains three elements: “severe pain or suffering, whether physical or mental”, “intentionally inflicted”, “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

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“Severe pain or suffering” is an elastic standard that connotes conduct that is sufficiently extreme and outrageous to fall within the scope of universal condemnation by the international community. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002). The more intense, lasting, or heinous the injury, the more likely that it will constitute torture. *Price*, 294 F.3d at 92.

It is clearly a fact specific inquiry. One court has indicated that “ordinary police brutality” is not torture. *Price*, 294 F.3d at 92; *accord Sevoian v. Ashcroft*, 290 F.3d 166, 176-77 (3d Cir. 2002) (police officer’s punching applicant in the face does not constitute torture). This proposition seems debatable, considering that there’s no doubt that police brutality, such as the beating of Rodney King, inflicts severe physical pain and suffering. Another court has indicated that multiple unjustified arrests, along with deliberately crashing another car into the applicant’s car, does not constitute torture. *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002). Again, this case seems questionable given the broad definition of torture in the Convention, which applies to mental as well as physical pain and suffering. Repeated beatings of the applicant, along with burning him with cigarettes, *was* held to constitute torture. *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001). Severe domestic violence may also constitute torture. *Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001) (dictum). A change in a foreign state’s government may show that past torture will not recur and thus permit denial of the application. *Kourteva v. INS*, 151 F. Supp. 2d 1126, 1129 (N.D. Cal. 2001).

The Convention extends both to torture by state actors, and by private actors when a public official consents or acquiesces to the torture. Torture Convention, Art. 1 ¶ 1. The regulations clarify that “[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach

his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 208.18(a)(7). The Board of Immigration Appeals has held that a “willful blindness” standard is appropriate for determining acquiescence. *In re S-V-*, 2000 WL 562836 (BIA 2000) (en banc). The Fifth Circuit rejected a claim of acquiescence where the Honduran was tortured by landowners and the police and justice system did not prosecute or punish them. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002). The Third Circuit has also rejected a similar claim, holding that only the state’s actions *before* the torture may be looked to in determining acquiescence. *Sevoian*, 290 F.3d at 176. Conversely, when the foreign government *does* arrest and investigate, that has been held to bar a claim of acquiescence. *Ali*, 237 F.3d at 598.

The Convention’s definition of torture contains an exception for “pain and suffering arising only from, inherent in or incidental to lawful sanctions”. Torture Convention Art. 1 ¶ 1. The reason for this is obvious; serving a jail sentence may well inflict severe mental suffering, yet the state’s power to incarcerate criminals is unquestioned and is not thought to be torture. A troubling case, however, concerns a policy that Nigeria apparently has of inflicting additional punishment on drug convicts who are deported from the US, on the ground that they “dishonored” Nigeria. A District Court found that such sanctions were lawful and could not give rise to a Torture Convention claim. *McDaniel v. INS*, 142 F. Supp. 2d 219, 223 (D. Conn. 2001). The “lawful sanctions” provision surely exempts ordinary incarceration, but it could not have been intended as a blanket exemption of incarceration; after all, imprisonment can certainly be used as a form of torture, and *McDaniel* should have left open the possibility of such a claim in the proper case.

### ***Burden of Proof***

As noted above, the regulations set forth that the applicant has the burden of proof and

that his or her oral testimony may establish the right to relief. 8 C.F.R. § 208.16(c)(2) & 208.16(c)(3). Such oral testimony, however, may be rejected as not credible. *Efe*, 293 F.3d at 907-08. The State Department report on the country at issue is also of crucial importance in the proceeding; indeed, it is reversible error for the BIA not to consider it. *Abassi v. INS*, 2002 WL 31103027 (9th Cir. Sep. 23); *Efe*, 293 F.3d at 907-08; *Sevoian*, 290 F.3d at 175; *Al-Safer*, 268 F.3d at 1147. Evidence of any past torture of the applicant must also be considered. *Sevoian*, 290 F.3d at 175.

### **Judicial Review**

The Torture Convention claim must first be brought before the INS (an immigration judge, and then the Board of Immigration Appeals), before a claim may be brought in court. *Cruz-Navarro v. INS*, 232 F.3d 1024, 1031 n. 9 (9th Cir. 2000); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000); *Ortiz v. INS*, 179 F.3d 1148, 1152-53 (9th Cir. 1999). Once brought to court, the claim will generally be reviewed for abuse of discretion. *Ontunez-Tursios*, 303 F.3d at 353; *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1301-02 (11th Cir. 2001); *Ali*, 237 F.3d at 596; *Mansour v. INS*, 230 F.3d 902, 906 (7th Cir. 2000). However, aggravated felons are cut off from ordinary judicial review of their deportations under the 1996 immigration statute; they are required to bring a petition for habeas corpus, and they are limited to challenges based on misapplication of the law, *Millian-Zamora v. Ashcroft*, 2002 WL 31408906 at \*1 (E.D.N.Y. Oct. 23); *Sulaiman v. Attorney General*, 212 F. Supp. 2d 413 (E.D.Pa. 2002); *McDaniel*, 142 F. Supp. 2d at 223., and in some courts, a challenge to the factual findings under a deferential “substantial evidence” standard. *Anotine v. United States*, 204 F. Supp. 2d 115, 118-19 (D. Mass. 2002); *Kourteva*, 151 F. Supp. 2d at 1129.

Article 3 of the Convention applies not only to deportations and exclusions, but also to extraditions of persons for trial in a foreign jurisdiction. Thus, the Secretary of State must evaluate any claim under the Convention before authorizing extradition. Normally, executive decisions as to whether to extradite are subject to extremely limited judicial review. However, the Ninth Circuit, in a 2-1 decision, indicated in dicta that such claims would be allowed under the Administrative Procedure Act. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016-17 (9th Cir. 2000).

Under any of these standards, it is difficult to overturn the BIA’s determination. *E.g.*, *Sulaiman*, 212 F. Supp. 2d 413, 416; *Julmiste v. Ashcroft*, 212 F. Supp. 2d 341, 348 (D.N.J. 2002); *Kourteva*, 151 F. Supp. 2d at 1129. However, it is clear that if the BIA fails to consider relevant evidence, *Mansour*, 230 F.3d at 908; *Al-Safer*, 268 F.3d at 1147., or relies on a prior asylum determination that applied a different standard, *Kamalthas v. INS*, 251 F.3d 1279, 1282-83 (9th Cir. 2001), reversal is warranted.

### **Conclusion**

The regulations implementing the Torture Convention are an important tool to protect the victims and potential victims of torture. Perhaps because of the trepidation with which courts enter the area of immigration law, judicial review has so far been relatively narrow in scope, focusing on process errors like the failure to take the applicable State Department reports into account, rather than the substantive claims of applicants. Nonetheless, the Torture Convention remedy represents another means of protecting deportable aliens from grave harm that might be visited upon them if they return to their countries of origin.