

#### 4. RECENT INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS IN IMMIGRATION LAW

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The past year has seen the federal courts continue to deal with the changing laws, governmental policies, and public attitudes as a result of the terrorist attacks of September 11, 2001. As a result, there have been a number of new developments concerning the interaction of immigration and international law.

The Convention Against Torture, <http://www.hrweb.org/legal/cat.html>, and the implementing statute, 8 U.S.C. § 1231 note, and regulations, 8 C.F.R. §§ 208.16-208.18, continued to raise major issues in immigration litigation in the past year.<sup>1</sup>

In *El Himri v. Ashcroft*, 2003 WL 22158791 at \*2 (9th Cir. Sep. 19), the Ninth Circuit held that an alien was entitled to a stay of his deadline to voluntarily depart from the United States, while his claim under the Torture Convention was considered by the courts.<sup>2</sup>

In *Ogbudimkpa v. Ashcroft*, 2003 WL 20995303 (3d Cir. Aug. 22), the Third Circuit found that despite the fact that a statute precluded federal court jurisdiction over withholding of deportation claims under the Torture Convention except in a proceeding challenging a final order of deportation, 28 U.S.C. § 2242(d), an alien could bring his Torture Convention claim on habeas corpus. The court applied the U.S. Supreme Court's holding in *INS v. St. Cyr*, 533 U.S. 289, 299 (2001), which holds that only the clearest statement of Congress can preclude habeas review. The importance of this holding can be

seen in *Ogbudimkpa* itself— there, the government argued a jurisdictional bar to the alien's raising of his torture convention claim in his appeal from the deportation order; leaving open the habeas corpus option ensures that any alien facing deportation will have some forum to raise his claim. *Ogbudimkpa* is consistent with the holdings of other courts to consider this question.<sup>3</sup>

*Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003), is an important decision confirming that rape can fall within the definition of "torture" for purposes of Torture Convention protection. *Zubeda* recognizes the reality of rape as a common and brutally effective means of torturing women and girls, especially during times of civil war and insurgency. (The case arose out of a gang rape by soldiers in the Democratic Republic of the Congo.)<sup>4</sup>

Another important Torture Convention decision is *Zheng v. Ashcroft*, 332 F.3d 1186, 1188-89 (9th Cir. 2003), which announced that an alien petitioner may show foreign government "acquiescence" to torture (which is a required showing in cases where a private party, rather than a governmental official, was responsible for the torture) so long as the government was generally aware of the prevalence of torture. *Id.* at 1194. (The INS had argued for a more specific showing of actual knowledge of the specific torture alleged by foreign government officials.) As it is often difficult for alien petitioners to show what a foreign government does and does not know about specific acts of torture, this standard is more realistic in allowing meritorious claims for relief.<sup>5</sup>

Given the concerns over the government's use of secret evidence in proceedings in the wake of the September 11 tragedy and the USA PATRIOT Act, the Ninth Circuit's short per curiam order in *Singh v. INS*, 328 F.3d 1205, 1206 (9th Cir. 2003), is of significance. In *Singh*, a Torture Convention claim was rejected by an Immigration Judge

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