

FACT SHEET

03/1/99

DOJ Rule for Claims Under United Nations Torture Convention

■ Background

The U.S. Department of Justice published a rule on February 19, 1999 to formally implement, as directed by Congress, U.S. obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The interim rule becomes effective March 22, 1999. Under Article 3 of the Convention Against Torture, the United States agrees not to “expel, return (‘refoule’) or extradite” a person to another state where he or she would likely be tortured. Although there are significant differences in standards of eligibility, the nature of this obligation is similar to the U.S. obligation under Article 33 of the United Nations 1951 Convention relating to the Status of Refugees, which has long been implemented in U.S. law through the withholding of removal provision, currently at Section 241(b)(3) of the Immigration and Nationality Act.

U.S. obligations under the Convention Against Torture have been in effect since November 20, 1994. Until this rule was issued, the Immigration and Naturalization Service has considered Article 3 claims by an administrative process which will remain in place until March 22. Under that process, claims can be raised only at the end of the removal process and after all appeals have been resolved. After initial consideration by INS asylum officers, the INS Office of General Counsel confers with the Department of State and makes the final decision as to whether a claimant requires Article 3 protection.

■ How the New Procedures Work in General

Under the new regulations, claims for Article 3 protection generally will be determined by Immigration Judges (IJs) of the Executive Office For Immigration Review (EOIR). The regulations will permit aliens to raise Article 3 claims during the course of regular immigration removal proceedings, giving them the opportunity for prompt and fair consideration. Decisions about eligibility by the IJs are subject to review by the Board of Immigration Appeals, also a part of EOIR.

■ Types of Protection Under Article 3

The new rule creates two separate types of Article 3 protection. The first protection is a new form of an existing remedy called withholding of removal. The second protection is deferral of removal, a more temporary form of protection. Deferral of removal will be granted to aliens who would likely face torture but who are ineligible for withholding of removal—for example, certain criminals, terrorists and persecutors. Deferral of removal is more easily and quickly terminated if the individual is no longer likely to be tortured in the country of removal. A deferral order would not alter INS authority to detain an individual subject to detention. Neither provision alters the government’s ability to remove the individual to a third country where he or she would not be tortured. Both, however, would ensure compliance with the cardinal obligation of Article 3, not to return a person to torture.

■ Transition from Administrative Process to Formal Implementation

The new regulations will not apply to cases where INS has made a final decision under the existing procedures. Those already granted protection will be given either withholding or deferral of removal. Persons who have been ordered removed by an IJ and who have Article 3 claims pending with INS will be sent notices that the interim process is ending and that they must file a motion to reopen with EOIR to seek consideration of the claim. These motions will be granted automatically. To provide a reasonable opportunity to file such a motion, the notice will also provide an automatic 30-day stay of removal.

Those who do not have Article 3 claims pending with INS and who have been ordered removed before the effective date of the new regulations will not receive an automatic stay. However, they will have a 90-day window to file a motion to reopen with EOIR. During this 90-day period, such motions will be exempt from the usual requirement that a motion to reopen be supported by previously unavailable evidence.

■ Special Cases

For certain persons, such as those arriving at ports of entry, those who illegally re-enter the United States after being ordered removed and certain criminal aliens, Congress has established special, streamlined removal procedures. These special procedures operate outside the normal immigration judge hearing process. In these special cases, the regulations provide for screening of individuals who claim they would be tortured to quickly identify and adjudicate meritorious claims and to weed out clearly non-meritorious and frivolous claims. People who meet the screening standard will have their claims considered by an IJ, while people who do not will be removed expeditiously, as Congress intended. Aliens who are removed as terrorists or because of certain security-related grounds are also subject to special removal procedures. Any Article 3 claim by such an alien will be considered through the administrative process in which INS issues and executes the removal order.

The rule also provides for the possibility that, in rare cases, the United States may seek a diplomatic solution to an Article 3 claim by negotiating assurances against torture from the government in question. It is anticipated that such an approach would be taken only in unusual cases. The nature and reliability of any such assurances would be carefully assessed by the Attorney General in consultation with the Secretary of State.

■ **Forms of Protection Available Under U.S. Law**

Article 3 protection is not the same as withholding under the Immigration and Nationality Act, which implements Article 33 under the 1951 Refugee Convention, or asylum:

Asylum Claims	Article 33 Withholding	Article 3 Claims
<ul style="list-style-type: none"> • Not a treaty obligation 	<ul style="list-style-type: none"> • A treaty obligation 	<ul style="list-style-type: none"> • A treaty obligation
<ul style="list-style-type: none"> • Discretionary 	<ul style="list-style-type: none"> • Mandatory 	<ul style="list-style-type: none"> • Mandatory
<ul style="list-style-type: none"> • One-year filing deadline 	<ul style="list-style-type: none"> • No filing deadline 	<ul style="list-style-type: none"> • No filing deadline
<ul style="list-style-type: none"> • Standard requires a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, political opinion in the country in question • Harm feared must be on account of a protected ground 	<ul style="list-style-type: none"> • Standard requires that it is more likely than not that the person would be persecuted on account of race, religion, nationality, membership in a particular social group or political opinion in the country in question • Harm feared must be on account of a protected ground. 	<ul style="list-style-type: none"> • Standard requires that the person is more likely than not to be tortured in the country in question • Harm feared need not be on account of a protected ground.
<ul style="list-style-type: none"> • Persons ineligible for protection include certain criminals, terrorists, persecutors 	<ul style="list-style-type: none"> • Persons ineligible for protection include certain criminals, terrorists, persecutors 	<ul style="list-style-type: none"> • No bars to protection
<ul style="list-style-type: none"> • Basis for adjustment to legal permanent resident status 	<ul style="list-style-type: none"> • Not basis for adjustment to legal permanent resident status 	<ul style="list-style-type: none"> • Not basis for adjustment to legal permanent resident status
<ul style="list-style-type: none"> • Immediate family members may be granted same status derivatively 	<ul style="list-style-type: none"> • Family members may not be granted derivative status 	<ul style="list-style-type: none"> • Family members may not be granted derivative status
<ul style="list-style-type: none"> • Grant confers permission to remain in U.S. 	<ul style="list-style-type: none"> • Grant prohibits only removal to country of risk, does not prohibit removal to non-risk country 	<ul style="list-style-type: none"> • Grant prohibits only removal to country of risk, does not prohibit removal to non-risk country

■ **Definition of Torture**

The Convention, as ratified by the U.S. Senate, provides that torture is an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. In order to constitute torture, an act must be:

- An extreme form of cruel and inhuman treatment, which does not include lesser forms of cruel, inhuman or degrading treatment or punishment.
- 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, i.e. *only* acts that occur in the context of government authority. Acquiescence requires prior awareness of such activity and the breaching of legal responsibility to intervene to prevent it.
- Specifically intended to inflict severe pain or suffering—an act that results in unanticipated or unintended severity of pain or suffering is not torture.
- Directed against a person in the offender’s custody or physical control.

The Convention provides that severe mental pain or suffering is torture only if it is prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or the threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; the threat of imminent death; the threat that another person will be imminently 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.

Torture does not include pain and suffering arising from lawful sanctions such as legitimately-imposed punishment for violations of the law or legitimate law enforcement actions.

■ Raising a Claim

Form I-589, Application for Asylum and for Withholding of Removal, will serve as an application form for Article 3 protection. Supplemental instructions will be issued to accompany the forms, explaining how to use them to raise an Article 3 claim.