

## *Lesson Plan Overview*

<b>Course</b>	Asylum Officer Basic Training Course
<b>Lesson</b>	<b><i>Reasonable Fear of Persecution and Torture Determinations</i></b>
<b>Rev. Date</b>	August 6, 2008
<b>Lesson Description</b>	The purpose of this lesson is to explain when reasonable fear screenings are conducted and how to determine whether the alien has a reasonable fear of persecution or torture using the appropriate standard.
<b>Field Performance Objective</b>	When a case is referred to an asylum officer to make a “reasonable fear” determination, the asylum officer will correctly determine whether the applicant has established a reasonable fear of persecution or a reasonable fear of torture.
<b>Academy Training Performance Objective</b>	Given a written scenario, the trainee will correctly identify when a reasonable fear screening interview will be conducted and properly determine whether the applicant has a reasonable fear of persecution or torture.
<b>Interim (Training) Performance Objectives</b>	<ol style="list-style-type: none"> <li>1. Identify the elements of “torture” as defined in the <i>Convention against Torture</i> and the regulations.</li> <li>2. Identify the type of harm that constitutes “torture” as defined in the <i>Convention against Torture</i> and the regulations.</li> <li>3. Identify the circumstances in which a reasonable fear screening is conducted.</li> <li>4. Identify the standard of proof required to establish a reasonable fear of torture.</li> <li>5. Identify the standard of proof required to establish a reasonable fear of persecution.</li> <li>6. Identify the applicability of bars to asylum and withholding of removal in the reasonable fear context.</li> </ol>
<b>Instructional Methods</b>	Lecture, practical exercises
<b>Student Materials/References</b>	Participant Workbook; United Nations. <i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> (found in lesson, <i>International Human Rights Law</i> ); Reasonable Fear forms and templates (attached); <i>Al-Saher v. INS</i> ; <i>Ali v. Reno</i> ; <i>Mansour v. INS</i> ; <i>Matter of S-V-</i> ; <i>Matter of G-A-</i> ; <i>Sevoian v. INS</i> ; <i>Matter of J-E-</i> ; <i>Matter of Y-L-</i> ; <i>Jian Chen v. Ashcroft</i> ; <i>Auguste v. Ridge</i>
<b>Method of Evaluation</b>	Written test

**Background Reading**

1. Langlois, Joseph E. INS Office of International Affairs. *Implementation of Amendments to Asylum and Withholding of Removal Regulations, Effective March 22, 1999*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, D.C.: 18 March 1999), 16 p. plus attachments (attached)
2. Langlois, Joseph E. Asylum Division, Office of International Affairs. *Withdrawal of Request of Reasonable Fear Determination*, Memorandum to Asylum Office Directors, et al. (Washington, DC: May 25, 1999), 1 p. plus attachment (attached, including updated version of Withdrawal of Request of Reasonable Fear Determination form, 6/13/02 version)
3. Langlois, Joseph E. Asylum Division, Office of International Affairs. *International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures*, Memorandum for Asylum Office Directors, et al. (Washington, DC: 15 April 2002), 3p. (attached)
4. Martin, David A. Office of the General Counsel. *Compliance with Article 3 of the Convention against Torture in the cases of removable aliens*, Memorandum to Regional Counsel, District Counsel, All Headquarters Attorneys (Washington, DC: May 14, 1997), 5 p.

**CRITICAL TASKS**

SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001

<b>Task/ Skill #</b>	<b>Task Description</b>
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
005	Determine jurisdiction.
007	Determine date, place and manner of entry and current immigration status.
012	Identify issues of claim.
055	Determine whether applicant has established reasonable fear of persecution or torture and serve documents in accordance with current Service policies, procedure and guidelines.
065	Identify if any bars may apply.
SS 8	Ability to read and interpret statutes, precedent decisions and regulations.
SS 13	Ability to analyze complex issues.

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b> .....	<b>5</b>
<b>II.</b>	<b>BACKGROUND</b> .....	<b>5</b>
<b>III.</b>	<b>APPLICABILITY</b> .....	<b>6</b>
	<b>A. Reinstatement under Section 241(a)(5) of the INA</b> .....	<b>6</b>
	<b>B. Removal Orders under Section 238(b) of the INA (based on aggravated felony conviction)</b> .....	<b>7</b>
	<b>C. Country of Removal</b> .....	<b>7</b>
<b>IV.</b>	<b>DEFINITION OF “REASONABLE FEAR”</b> .....	<b>7</b>
<b>V.</b>	<b>STANDARD OF PROOF</b> .....	<b>8</b>
<b>VI.</b>	<b>CREDIBILITY</b> .....	<b>9</b>
	<b>A. Credibility Finding</b> .....	<b>9</b>
	<b>Relevance</b> .....	<b>9</b>
	<b>C. Opportunity to Address Inconsistencies and Discrepancies</b> .....	<b>9</b>
	<b>D. Prior Credibility Determinations</b> .....	<b>10</b>
<b>VII.</b>	<b>ESTABLISHING REASONABLE FEAR OF PERSECUTION</b> .....	<b>10</b>
	<b>A. Persecution</b> .....	<b>11</b>
	<b>B. Nexus to a Protected Characteristic</b> .....	<b>11</b>
	<b>C. Past Persecution</b> .....	<b>11</b>
	<b>D. Internal Relocation</b> .....	<b>12</b>
	<b>E. Mandatory Bars</b> .....	<b>12</b>
<b>VIII.</b>	<b>CONVENTION AGAINST TORTURE – BACKGROUND</b> .....	<b>13</b>
	<b>A. U.S. Ratification of the Convention and Implementing Legislation</b> .....	<b>13</b>
	<b>B. Article 3</b> .....	<b>14</b>
<b>IX.</b>	<b>DEFINITION OF TORTURE</b> .....	<b>14</b>
	<b>A. Identity of Torturer</b> .....	<b>15</b>
	<b>B. Torturer’s Custody or Control over Individual</b> .....	<b>18</b>
	<b>C. Motive of Torturer</b> .....	<b>19</b>
	<b>D. Degree of Harm</b> .....	<b>20</b>
	<b>E. Mental Pain or Suffering</b> .....	<b>21</b>
	<b>F. Lawful Sanctions</b> .....	<b>22</b>
<b>X.</b>	<b>ESTABLISHING REASONABLE FEAR OF TORTURE</b> .....	<b>23</b>
	<b>A. Torture</b> .....	<b>24</b>
	<b>B. No Nexus Requirement</b> .....	<b>25</b>
	<b>C. Past Torture</b> .....	<b>25</b>
	<b>D. Internal Relocation</b> .....	<b>26</b>
	<b>E. Mandatory Bars</b> .....	<b>26</b>
<b>XI.</b>	<b>EVIDENCE</b> .....	<b>27</b>
	<b>A. Credible Testimony</b> .....	<b>27</b>
	<b>B. Country Conditions</b> .....	<b>27</b>
<b>XII.</b>	<b>INTERVIEWS</b> .....	<b>29</b>
	<b>A. General Considerations</b> .....	<b>29</b>
	<b>B. Confidentiality</b> .....	<b>29</b>
	<b>C. Interpretation</b> .....	<b>29</b>
	<b>D. Note Taking</b> .....	<b>29</b>
	<b>E. Representation</b> .....	<b>30</b>
	<b>F. Eliciting Information</b> .....	<b>30</b>
<b>XIII.</b>	<b>WITHDRAWALS</b> .....	<b>32</b>
<b>XIV.</b>	<b>SUMMARY</b> .....	<b>32</b>
	<b>A. Applicability</b> .....	<b>32</b>
	<b>B. Definition of Reasonable Fear of Persecution</b> .....	<b>33</b>
	<b>C. Definition of Reasonable Fear of Torture</b> .....	<b>33</b>

**D. Bars.....33**  
**E. Credibility .....33**  
**F. Effect of Past Persecution or Torture.....33**  
**G. Internal Relocation.....34**  
**H. Elements of the Definition of Torture.....34**  
**I. Evidence .....35**  
**J. Interviews.....35**

**Presentation****References****I. INTRODUCTION**

This lesson instructs asylum officers on the substantive elements required to establish a reasonable fear of persecution or torture. More detailed instruction on procedures for conducting interviews and processing cases referred for reasonable fear determinations are provided in separate procedural memos. For guidance on interviewing techniques to elicit information in a non-adversarial manner, asylum officers should review the interviewing lessons in the Asylum Office Basic Training Course.

**II. BACKGROUND**

Interim regulations require asylum officers to make reasonable fear determinations in two types of cases referred by other DHS officers after a final order has been issued or reinstated. These are cases in which an individual ordinarily is removed without being placed in removal proceedings before an immigration judge.

8 C.F.R. 208.31;  
64 Fed. Reg. 8478 (February 19, 1999)

Congress has provided for special removal processes for certain aliens who are not eligible for any form of relief from removal. At the same time, however, obligations under Article 33 of the *Refugee Convention relating to the Status of Refugees* and Article 3 of the *United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (“*Convention against Torture*” or “the Convention”) still apply in these cases. Therefore, withholding of removal under either section 241(b)(3) of the INA or under the *Convention against Torture* may still be available in these cases. Withholding of removal is not considered to be a form of relief from removal, because it is specifically limited to the country where the individual is at risk and does not prohibit the individual’s removal from the United States.

The purpose of the reasonable fear determination is to ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person’s life or freedom would be threatened on account of a protected characteristic in the refugee definition and, at the same time, to adhere to Congressional directives to subject certain categories of aliens to streamlined removal proceedings.

These treaty obligations are based on Article 33 of the *1951 Convention relating to the Status of Refugees*; and Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Similar to credible fear determinations in expedited removal proceedings, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further

consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly unmeritorious or frivolous claims.

### III. APPLICABILITY

#### A. Reinstatement under Section 241(a)(5) of the INA

##### 1. Reinstatement of Prior Order

Section 241(a)(5) of the INA requires DHS to reinstate a prior order of exclusion, deportation, or removal, if a person enters the United States illegally after having been removed, or after having left the United States voluntarily while under an order of exclusion, deportation, or removal.

INA § 241(a)(5); 8 C.F.R. § 241.8

Section 241(a)(5) applies retroactively to all prior removals, regardless of the date of the alien's illegal reentry. There are other issues that may affect the validity of a reinstated prior order, such as questions concerning whether the applicant voluntarily departed under the prior order. An officer who is unsure about the validity of a reinstated prior order should consult with a supervisor and/or Headquarters Quality Assurance.

*Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (2006)

##### 2. Referral to asylum officer

Once a prior order has been reinstated under this provision, the individual is not permitted to apply for asylum or any other relief under the INA, but is still eligible to apply for withholding of removal under section 241(b)(3) of the INA (based on a threat to life or freedom on account of a protected characteristic in the refugee definition) and withholding or deferral of removal under the *Convention against Torture*.

8 C.F.R. §§ 208.31, 241.8(d)

This is because those provisions are based on treaty obligations and are mandatory prohibitions on removal to a country where an individual is at risk of certain types of harm, but do not necessarily result in relief from removal, because they do not prohibit removal to another country where the individual is not at risk of such harm.

If a person subject to reinstatement of a prior order expresses a fear of return to the country to which the person

8 C.F.R. § 208.31(a) & (b); 241.8(d)

has been ordered removed, the DHS officer must refer the case to an asylum officer for a reasonable fear determination, after the prior order has been reinstated.

## **B. Removal Orders under Section 238(b) of the INA (based on aggravated felony conviction)**

### 1. DHS removal order

Under certain circumstances, DHS may issue an order of removal if DHS determines that a person is deportable under section 237(a)(2)(A)(iii) of the INA (convicted of an aggravated felony after admission). This means that the person may be removed without removal proceedings before the immigration judge.

INA § 238(b)

### 2. Referral to an asylum officer

If a person who has been ordered removed by DHS pursuant to section 238(b) of the INA expresses a fear of persecution or torture, the person must be referred to an asylum officer for a reasonable fear determination.

8 C.F.R. §§ 208.31(a) & (b); 238.1(f)(3). Note that regulations require the DHS to give notice of the right to request withholding of removal to a particular country, if the person ordered removed fears persecution or torture in that country. 8 C.F.R. § 238.1(b)(2)(i)

## **C. Country of Removal**

The removal order that is being reinstated under Section 241(a)(5) or issued under Section 238(b) should designate a country of removal, and in some cases, will designate an alternative country. The asylum officer need only explore the person's fear with respect to the countries designated or another country to which DHS is contemplating removal. If the person expresses a fear of return to any other country, the officer should memorialize that in the file to ensure that the fear is explored should DHS ever contemplate removing the person to that other country.

NOTE: Procedures are currently being developed for referring a person back to the asylum office when DHS decides to disregard a country of removal designation and the person expresses a fear of return to the new country of removal.

## **IV. DEFINITION OF “REASONABLE FEAR”**

Regulations define “reasonable fear of persecution or torture” as follows:

8 C.F.R. § 208.31(c)

The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of

his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

A few points to note, which are discussed in greater detail later in the lesson, are the following:

1. The “reasonable possibility” standard is the same standard required to establish eligibility for asylum (the “well-founded fear” standard).
2. Like asylum, there is an “on account of” requirement necessary to establish reasonable fear of persecution.

The persecution must be on account of a protected characteristic in the refugee definition.

3. There is no “on account of” requirement necessary to establish a reasonable fear of torture.
4. There are no mandatory bars to establishing a reasonable fear of persecution or torture.

## V. STANDARD OF PROOF

The standard of proof to establish “reasonable fear of persecution or torture” is the “reasonable possibility” standard. This is the same standard required to establish a “well-founded fear” of persecution in the asylum context. The “reasonable possibility” standard is lower than the “more likely than not standard” required to establish eligibility for withholding of removal. It is higher than the standard of proof required to establish a “credible fear” of persecution.

*See, lessons, Asylum Eligibility Part II: Well-Founded Fear, and Asylum Eligibility Part IV: Burden of Proof and Evidence*

## VI. CREDIBILITY

### A. Credibility Finding

To determine whether an applicant has a reasonable fear of persecution or torture, the asylum officer must evaluate whether the applicant's claim is credible. In contrast to the credible fear determination, where the asylum officer determines only whether there is a significant possibility the applicant may establish a credible claim, the asylum officer must make a finding as to whether the claim is or is not credible.

In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the AOBTC lesson, *Credibility*. The asylum officer should evaluate the consistency, detail, and plausibility of the testimony, in light of country conditions and other documentary evidence. The asylum officer must also take into account factors that may impede clear communication or lead to misunderstandings, such as effects of trauma, cultural factors, and use of an interpreter.

*See lessons, Interviewing Part IV, Inter-Cultural Communication and other Factors that May Impede Communication at an Asylum Interview, and Interviewing Part V, Interviewing Survivors*

### B. Relevance

If parts of the testimony are found not credible, the asylum officer must determine whether those parts of the testimony are relevant to the applicant's claim. Only if the aspects of the testimony found not credible are relevant to the applicant's claim may the asylum officer base an adverse reasonable fear determination on the applicant's lack of credibility.

For discussion on what constitutes a "relevant" inconsistency or discrepancy, see lesson, *Credibility*.

### C. Opportunity to Address Inconsistencies and Discrepancies

The asylum officer must afford the applicant the opportunity to explain any apparent relevant inconsistencies and discrepancies. This opportunity to respond must be documented in the sworn statement. This is particularly important in the reasonable fear process, because the interview may be the applicant's only opportunity to explain perceived discrepancies.

The individual previously may have provided testimony regarding his or her claim in the context of an asylum or withholding of removal application. It is important that the asylum officer review all prior testimony before the interview in order to ask the individual about any inconsistencies between prior testimony and the testimony provided at the reasonable

fear interview. If the individual is not given such an opportunity at the reasonable fear interview, and inconsistencies are discovered at a later date, it may be necessary to conduct a second interview to give the individual an opportunity to explain.

#### D. Prior Credibility Determinations

An adjudicator previously may have made a determination on the credibility of the individual's assertions regarding facts that form the basis of the claim, particularly in the case of an applicant who is subject to reinstatement of a prior order. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination that the claim was or was not credible.

See *Mansour v. INS*, 230 F.3d 902 (7<sup>th</sup> Cir. 2000) (Where the basis for an applicant's asylum and torture claims differ, individualized treatment is warranted to ensure a thorough exploration of the torture claim)

The asylum officer should accord deference to previous credibility determinations made on the same facts alleged in support of the reasonable fear claim. However, the asylum officer is not strictly bound by prior credibility determinations – whether the determination was that the assertions were credible or not credible. The evidence presented to the asylum officer may be different than that presented to the previous adjudicator, either because the individual has obtained additional information since the previous adjudication, or because of the difference in the nature of the claim for protection from removal. (For example, the applicant may not previously have been able to present a claim based on fear of torture.)

See *Efe v. Ashcroft*, 293 F.3d 899 (5<sup>th</sup> Cir. 2002)

In any case in which the asylum officer's credibility determination differs from a credibility determination previously reached by another adjudicator on the same allegations, the asylum officer must provide a sound explanation and support for the different finding.

### VII. ESTABLISHING REASONABLE FEAR OF PERSECUTION

To establish a reasonable fear of persecution, the applicant must show that there is a reasonable possibility he or she will suffer persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. As explained above, this is the same standard asylum officers use in evaluating whether an applicant is eligible for asylum. However, the reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish eligibility for withholding of

removal in Immigration Court.

In contrast to an asylum adjudication, the asylum officer may not exercise discretion in making a positive or negative reasonable fear determination and may not consider the applicability of any mandatory bars that may apply if the applicant is permitted to apply for withholding of removal before the immigration judge.

### A. Persecution

The harm the applicant fears must constitute persecution. The determination of whether the harm constitutes persecution for purposes of the reasonable fear determination is no different from the determination in the affirmative asylum context. This means that the harm must be serious enough to be considered persecution, as described in case law, the *UNHCR Handbook*, and BCIS policy guidance. Note that this is different from the evaluation of persecution in the credible fear context, where the applicant need only demonstrate a significant possibility that he or she could establish that the feared harm is serious enough to constitute persecution.

See discussion of “persecution” in lesson, *Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution*.

### B. Nexus to a Protected Characteristic

As in the asylum context, the applicant must establish that the feared harm is on account of a protected characteristic in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion). This means the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or more of the protected characteristics in the refugee definition.

8 C.F.R. § 208.31(c). See lesson, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics*

### C. Past Persecution

#### 1. Presumption of future persecution

If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of persecution in the future on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

See, 8 C.F.R. § 208.13(b)(1) and discussion of presumption in lesson, *Asylum Eligibility Part II: Well-Founded Fear*

- a. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

- b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

## 2. Severe past persecution

A finding of reasonable fear of persecution cannot be based on past persecution alone, in the absence of a reasonable possibility of future persecution. A reasonable fear of persecution may be found only if there is a reasonable possibility the applicant will be persecuted in the future, regardless of the severity of the past persecution. This is because withholding of removal is accorded only to provide protection against future persecution and may not be granted without a likelihood of future persecution.

As noted above, a finding of past persecution raises the presumption that the applicant's fear of future persecution is reasonable.

In contrast, a grant of asylum may be based on the finding that there are compelling reasons for the applicant's unwillingness to return arising from the severity of past persecution, even if there is no longer a reasonable possibility the applicant would be persecuted in the future.

## D. Internal Relocation

As in the asylum context, the evidence must establish that the applicant could not avoid future persecution by relocating within the country of feared persecution or that, under all the circumstances, it would be unreasonable to expect him or her to do so. In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

See discussion of internal relocation in lesson, *Asylum Eligibility Part II: Well-Founded Fear*; See also, 8 CFR 208.13(b)(3)

## E. Mandatory Bars

Asylum officers may not take into consideration mandatory bars to withholding of removal when making reasonable fear of persecution determinations.

8 C.F.R. § 208.31(c)

If the asylum officer finds that there is a reasonable possibility the applicant would suffer persecution on account of a protected characteristic, the asylum officer must refer the case to the immigration judge, regardless of whether the person has committed an aggravated felony, has persecuted others, or is subject to any other mandatory bars to withholding of removal.

The immigration judge will consider mandatory bars in deciding whether the applicant is eligible for withholding of removal under section 241(b)(3) of the Act.

8 C.F.R. § 208.16(c)(4)

## VIII. CONVENTION AGAINST TORTURE – BACKGROUND

This section contains a background discussion of the *Convention against Torture*, to provide context to the reasonable fear of torture determinations. An overview of the *Convention against Torture* may be found in the AOBTC lesson, *International Human Rights Law*.

### A. U.S. Ratification of the Convention and Implementing Legislation

The United States Senate ratified the *Convention against Torture* on October 27, 1990. President Clinton then deposited the United States instrument of ratification with the United Nations Secretary General on October 21, 1994, and the Convention entered into force for the United States thirty days later, on November 20, 1994.

Recognizing that a treaty is considered “law of the land” under the United States Constitution, the Executive Branch took steps to ensure that the United States was in compliance with its treaty obligations, even though Congress had not yet enacted implementing legislation. The INS adopted an informal process to evaluate whether a person who feared torture and was subject to a final order of deportation, exclusion, or removal would be tortured in the country to which the person would be removed.

Similarly, the Department of State considered whether a person would be subject to torture when addressing requests for extradition.

On October 21, 1998, President Clinton signed legislation that required the Department of Justice to promulgate regulations to implement the United States’ obligations under Article 3 of the *Convention against Torture*, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution to ratify the Convention.

Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21, 1998)

Pursuant to the statutory directive, the Department of Justice regulations provide a mechanism for individuals fearing torture to seek protection under Article 3 of the Convention. One of the mechanisms for protection provided in the regulations, effective March 22, 1999, is the “reasonable fear” screening process.

See 8 CFR 208.16-208.18

## B. Article 3

### 1. *Non-Refoulement*

Article 3 of the Convention provides:

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.

This provision does not prevent the removal of a person to a country where he or she would not be in danger of being subjected to torture. Like withholding of removal under section 241(b)(3) of the INA, which is based on Article 33 of the *Convention relating to the Status of Refugees*, protection under Article 3 of the *Convention against Torture* is country-specific.

In addition, this obligation does not prevent the United States from removing a person to a country at any time if conditions have changed such that it no longer is likely that the individual would be tortured there.

See 8 CFR 208.17(d),(e),(f) and 208.24 for procedures for terminating withholding and deferral of removal.

### 2. U.S. Ratification Document

When ratifying the *Convention against Torture*, the U.S. Senate adopted a series of reservations, understandings and declarations, which modify the U.S. obligations under Article 3, as described in the section below on the Convention definition of torture. These reservations, understandings, and declarations are part of the substantive standards that are binding on the United States and are reflected in the implementing regulations.

## IX. DEFINITION OF TORTURE

Torture has been defined in a variety of documents and in legislation unrelated to the *Convention against Torture*. However, only an act that falls within the definition described in Article 1 of the Convention, as modified by the U.S. ratification document, may be considered “torture” for purposes of making a reasonable fear of torture determination. These substantive standards are incorporated in the regulations at 8 C.F.R. § 208.18(a) (1999).

See, lesson, *Interviewing Part V: Interviewing Survivors*, background reading associated with that lesson, and the Alien Tort Claims Act, 28 U.S.C. § 1350 (1997)

Article 1 of the Convention defines torture as:

See also, 8 C.F.R. § 208.18(a)(1) & (3)

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 or 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.

The Senate adopted several important “understandings” regarding the definition of torture, which are included in the implementing regulations and are discussed below. These “understandings” are binding on adjudicators interpreting the definition of torture.

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990). 8 C.F.R. § 208.18(a)

#### A. Identity of Torturer

The torture must be “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.”

*Convention against Torture*, Article 1.

##### 1. Public official

The torturer must be a public official or other person acting in an official capacity in order to invoke Article 3 *Convention against Torture* protection. A non-governmental actor could be found to have committed torture within the meaning of the Convention *only if* that person inflicts the torture (1) at the instigation of, (2) with the consent of, or (3) with the acquiescence of a public official or other person acting in official capacity.

*Convention against Torture*, Article 1. See also, Committee on Foreign Relations Report, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Exec. Report 101-30, August 30, 1990 (hereinafter “Committee Report”), p. 14; Regulations Concerning the Convention Against Torture, 64 FR 8478, 8483 (1999); *Ali v. Reno*, 237 F.3d 591, 597 (6<sup>th</sup> Cir. 2001)

Note that this requirement that the torture be 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

is distinct from the “unable or unwilling” to protect standard used in the definition of a refugee.

The phrase “acting in an official capacity” modifies both “public official” and “other person,” such that a public official must be “acting in an official capacity” to satisfy the state action element of the torture definition. Thus, when a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition is not satisfied.

*Matter of Y-L-, A-G-, R-S-R* 23 I&N Dec. 270 (BIA 2002); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002)

It is unsettled whether an organization that exercises power on behalf of the people subjected to its jurisdiction, as in the case of a rebel force which controls a sizable portion of a country, would be viewed as a “government actor.” It would be necessary to look at factors such as how much of the country is under the control of the rebel force and the level of that control.

See *Matter of S-V-*, Int. Dec. 3430 (BIA 2000), concurring opinion; *see also Habtemichael v. Ashcroft*, 370 F.3d 774 (8<sup>th</sup> Cir. 2004) (remanding for agency determination as to the extent of the Eritrean People’s Liberation Front’s (EPLF) control over parts of Ethiopia during the period when the applicant was conscripted by the EPLF); *D-Muhumed v. U.S. Atty. Gen.*, 388 F.3d 814 (11<sup>th</sup> Cir. 2004) (denying protection under CAT because “Somalia currently has no central government, and the clans who control various sections of the country do so through continued warfare and not through official power.”)

## 2. Acquiescence

A public official cannot be said to have “acquiesced” in torture unless, prior to the activity constituting torture, the official was “aware” of such activity and thereafter breached a legal responsibility to intervene to prevent the activity.

8 C.F.R. § 208.18(a)(7)

The Senate ratification history explains that the term “awareness” was used to clarify that government acquiescence may be established by evidence of *either* actual knowledge *or* willful blindness. “Willful blindness” imputes knowledge to a government official who has a duty to prevent misconduct and “deliberately closes his eyes to what would otherwise have been obvious to him.”

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); Committee Report (Aug. 30, 1990), p. 9; *see also* S. Hrg 101-718 (July 30, 1990), *Statement of Mark Richard, Dep. Asst. Attorney General, DOJ*

In addressing the meaning of acquiescence as it relates to fear of Colombian guerrillas, paramilitaries and narco-traffickers who were not attached to the government, the Board of Immigration Appeals (BIA) indicated that more than awareness or inability to control is required. The BIA held that for acquiescence to take place the government officials must be “willfully accepting” of the torturous activity of the non-governmental actor.

Several federal circuit courts of appeals have rejected the BIA’s “willful acceptance” phrase in favor of the more precise “willful blindness” language that appears in the Senate’s ratification history. For purposes of threshold reasonable fear screenings, asylum officers should use the willful blindness standard.

The United States Circuit Court of Appeals for the Ninth Circuit ruled that the correct inquiry concerning the acquiescence of a state actor is “whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens.” The court rejected the notion that acquiescence requires a public official’s “actual knowledge” and “willful acceptance.” The Ninth Circuit subsequently reaffirmed that the state actor’s acquiescence to the torture must be “knowing,” whether through actual knowledge or imputed knowledge (“willful blindness”). Both forms of knowledge constitute “awareness.”

The United States Circuit Court of Appeals for the Second Circuit agreed with the Ninth Circuit approach on the issue of acquiescence of government officials, stating “torture requires only that government officials know of or remain willfully blind to act and thereafter breach their legal responsibility to prevent it.”

*Criminal Division*, at 14.  
*Matter of S-V*, Int. Dec. 3430 (BIA 2000)

*Ontunez-Turcios v. Ashcroft*, 303 F.3d 341, 354-55 (5<sup>th</sup> Cir. 2002); *Ali v. Reno*, 237 F.3d 591, 597 (6<sup>th</sup> Cir. 2001); *Zheng v. INS*, 332 F.3d 1186 (9<sup>th</sup> Cir. 2003); *Khouzam v. Ashcroft*, 361 F.3d 161 (2<sup>nd</sup> Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013 (9<sup>th</sup> Cir. 2004); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240 (4<sup>th</sup> Cir. 2004).

*Zheng v. INS*, 332 F.3d 1186 (9<sup>th</sup> Cir. 2003)

*Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9<sup>th</sup> Cir. 2004)

*Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2<sup>nd</sup> Cir. 2004) (finding that even if the Egyptian police who would carry out the abuse were not acting in an official capacity, “the ‘routine’ nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it.”)

Evidence that private actors have general support in some sectors of the government is insufficient to establish that the officials would acquiesce to torture by the private actors. Thus, an Honduran peasant and land reform activist who testified to fearing severe harm by a group of landowners did not demonstrate that government officials would turn a blind eye if he were tortured simply because they had ties to the landowners.

*Ontunez-Tursios*; 303 F.3d 341 (5<sup>th</sup> Cir. 2002)

When police, at the request of the victim, do not intervene to punish the perpetrator of violence, there is no acquiescence to the violence and the victim is not entitled to Convention protection.

*Ali v. Reno*, 237 F.3d 591, 598 (6<sup>th</sup> Cir. 2001)

If authorities have made “best efforts” to address problems of isolated misconduct by “rogue agents” of the government, the authorities cannot be said to have acquiesced to that misconduct.

*Matter of Y-L-, A-G-, R-S-R*, 23 I&N Dec. 270, 283 (AG 2002)

The *Convention against Torture* is designed to protect against future instances of torture. Therefore, the asylum officer should consider whether there is a reasonable possibility that:

See *Sevoian v. Ashcroft*, 290 F.3d 166 (3<sup>rd</sup> Cir. 2002) (finding that there is no “acquiescence” to torture unless officials know about the torture before it occurs)

1. A public official would have prior knowledge or would willfully turn a blind eye to avoid gaining knowledge of the potential activity constituting torture; and
2. The public official would breach a legal duty to intervene to prevent such activity.

Evidence of how an official or officials have acted in the past (toward the applicant or others similarly situated) may shed light on how the official or officials may act in the future.

## B. Torturer’s Custody or Control over Individual

The definition of torture applies only to acts directed against persons in the offender's custody or physical control.

8 C.F.R. § 208.18(a)(6); Committee Report, p. 9 (Aug. 30, 1990); *see also Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9<sup>th</sup> Cir. 2004) (alien need not demonstrate that he or she would likely face torture while under public officials' custody or physical control; it is enough that alien would likely face torture while under private

For example, pre-custodial police operations or military combat operations are outside the scope of Convention protection. In addition, drive-by shootings or bombs planted in cars probably do not meet the Convention definition of torture.

individuals' custody or control if such torture was with consent or acquiescence of public officials)

## C. Motive of Torturer

### 1. Specific intent required

For an act to constitute torture, it must be specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain is not torture under the Convention definition.

8 CFR § 208.18(a)(1), (5); *Auguste v. Ridge*, 395 F.3d 123, 146 (3<sup>rd</sup> Cir. 2005); 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990). See Committee Report, pp 14, 16.

For example, an act of legitimate self-defense or defense of others would not constitute torture.

Harm resulting from poor prison conditions will not constitute torture when such conditions were not intended to inflict severe physical or mental pain or suffering.

*Matter of J-E-*, 23 I&N Dec. 291, 300-301 (BIA 2002); *but see Matter of G-A-*, 23 I&N Dec. 366, 372 (BIA 2002) (finding that where deliberate acts of torture are pervasive and widespread and where authorities use torture as a matter of policy, the specific intent requirement can be satisfied); *see also Settenda v. Ashcroft*, 377 F.3d 89 (1<sup>st</sup> Cir. 2004); *Elien v. Ashcroft*, 364 F.3d 392 (1<sup>st</sup> Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173 (11<sup>th</sup> Cir. 2004)

For example, in *Matter of J-E-* the BIA considered a request for protection under the *Convention Against Torture* by a Haitian national who claimed that upon his removal to Haiti, as a criminal deportee, he would be detained indefinitely in substandard prison conditions by Haitian authorities. The BIA found that such treatment does not amount to torture where there is no evidence that the authorities are “intentionally and deliberately maintaining such prison conditions in order to inflict torture.”

Note that, in contrast, when determining asylum eligibility there is no requirement of specific intent to inflict harm to establish that an act constitutes persecution.

*See, Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9<sup>th</sup> Cir. 1997)

### 2. Reasons torture is inflicted

The Convention definition provides a **non-exhaustive** list of possible reasons the torture may be inflicted. The definition states that torture is an act that inflicts the severe pain or suffering on a person *for such purposes as*:

8 C.F.R. § 208.18(a)(1)

- a. obtaining from him or a third person information or a confession,
- b. punishing him for an act he or a third person has committed or is suspected of having committed,

- c. intimidating or coercing him or a third person, or
- d. for any reason based on discrimination of any kind

Note: All discrimination is not torture.

3. No nexus to protected characteristic required

Unlike the non-return (*non-refoulement*) obligation in the *Convention relating to the Status of Refugees*, the *Convention against Torture* does not require that the threat of torture be connected to any of the five protected characteristics identified in the refugee definition, or any other characteristic the individual possesses or is perceived to possess.

#### D. Degree of Harm

“Torture” is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

8 C.F.R. § 208.18(a)(2)

See *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), citing to *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978) discussing the severe nature of torture.

The Report of the Committee on Foreign Relations, accompanying the transmission of the Convention to the Senate for ratification, explained:

Committee Report, p. 13.

The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . .” The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.

Therefore, certain harm that may be considered persecution may not be considered severe enough to amount to torture.

Types of harm that may be considered torture include, but are not limited to, the following:

1. rape and other severe sexual violence;
2. application of electric shocks to sensitive parts of the body;
3. sustained, systematic beating;
4. burning;
5. forcing the body into positions that cause extreme pain, such as contorted positions, hanging, or stretching the body beyond normal capacity; and
6. forced non-therapeutic administration of drugs.

*See, lesson, Interviewing Part V: Interviewing Survivors, section V., Forms of Torture*

*Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3<sup>rd</sup> Cir. 2003)

*Matter of G-A-*, 23 I&N Dec. 366, 372 (BIA 2002)

Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. In some cases, whether the harm above constitutes torture will depend upon its severity and cumulative effect.

The BIA in *Matter of G-A-* held that treatment that included “suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and ... severe and repeated beatings with cables or other instruments on the back and on the soles of the feet ... beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness” when intentionally and deliberately inflicted constitutes torture.

*Matter of G-A-*, 23 I&N Dec. 366, 370 (BIA 2002)

## **E. Mental Pain or Suffering**

For mental pain or suffering to constitute torture, the mental pain must be 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;

8 C.F.R. § 208.18(a)(4). 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990).

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.

## F. Lawful Sanctions

Article 1 of the Convention provides that pain or suffering “arising only from, inherent in or incidental to lawful sanctions” does not constitute torture. 8 C.F.R. § 208.18(a)(3)

### 1. Definition of “lawful sanctions.”

“Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the *Convention against Torture* to prohibit torture.” 8 C.F.R. § 208.18(a)(3)

The supplementary information published with the implementing regulations explains that this provision “does not require that, in order to come within the exception, an action must be one that would be authorized by United States law. It must, however, be legitimate, in the sense that a State cannot defeat the purpose of the Convention to prohibit torture.” 64 Fed. Reg. 8478, 8482 (February 19, 1999)

Note that “lawful sanctions” do not include the intentional infliction of severe mental or physical pain during interrogation or incarceration after an arrest that is otherwise based upon legitimate law enforcement considerations. 8 CFR §208.18; *Khouzam v. Ashcroft*, 361 F.3d 161 (2d. Cir. 2004).

### 2. Sanctions cannot be used to circumvent the Convention

A State Party cannot through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. In other words, the fact that a country’s law allows a particular act does not preclude a finding that the act constitutes torture. 8 C.F.R. § 208.18(a)(3); 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990).

**Example:** A State Party’s law permits use of electric shocks to elicit information during interrogation. The fact

that such treatment is formally permitted by law does not exclude it from the definition of torture.

3. Failure to comply with legal procedures

Failure to comply with applicable legal procedural rules in imposing sanctions does not *per se* amount to torture.

8 C.F.R. § 208.18(a)(8)

4. Death penalty

The Senate’s ratification resolution expresses the “understanding” that the *Convention against Torture* does not prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution.

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990).

The supplementary information to the implementing regulations explains,

64 Fed. Reg. 8478, 8482-83 (February 19, 1999)

“The understanding does not mean . . . that any imposition of the death penalty by a foreign state that fails to satisfy United States constitutional requirements constitutes torture. Any analysis of whether the death penalty is torture in a specific case would be subject to all requirements of the Convention's definition, the Senate's reservations, understandings, and declarations, and the regulatory definitions. Thus, even if imposition of the death penalty would be inconsistent with United States constitutional standards, it would not be torture if it were imposed in a legitimate manner to punish t failed to meet any other element of the definition of torture.”

## X. ESTABLISHING REASONABLE FEAR OF TORTURE

To establish a reasonable fear of torture, the applicant must show that there is a reasonable possibility the applicant would be subject to torture, as defined in the *Convention against Torture*, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

8 C.F.R. §§ 208.31(c); 208.18(a)

## A. Torture

In evaluating whether an applicant has established a reasonable fear of torture, the asylum officer must address each of the elements in the torture definition and determine whether there is a *reasonable possibility* that each element is satisfied.

### 1. Severity of feared harm

Is there a reasonable possibility the applicant will suffer severe pain and suffering?

If the feared harm is mental suffering, does it meet each of the requirements listed in the Senate “understandings,” as reflected in the regulations?

### 2. State action

Is there a reasonable possibility the pain or suffering would be inflicted by or at the instigation of a public official or other person acting in an official capacity?

If not, is there a reasonable possibility the pain or suffering would be inflicted with the consent or acquiescence of a public official or other person acting in an official capacity?

### 3. Custody or physical control

Is there a reasonable possibility the feared harm would be inflicted while the applicant is in the custody or physical control of the offender?

### 4. Specific intent

Is there a reasonable possibility the feared harm would be specifically intended by the offender to inflict severe physical or mental pain or suffering?

### 5. Lawful sanctions

Is there a reasonable possibility the feared harm would not arise only from, or be inherent in or incidental to lawful sanctions?

If the feared harm arises from, is inherent in, or is incidental to, lawful sanctions, is there a reasonable

possibility the sanctions would defeat the object and purpose of the Convention?

## B. No Nexus Requirement

There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition. While there is a “specific intent” requirement that the harm be intended to inflict severe pain or suffering, the reasons motivating the offender to inflict such pain or suffering need not be on account of a protected characteristic of the victim.

Rather, the Convention definition provides a non-exhaustive list of possible reasons the torture may be inflicted, as described in section IX.C. above. The use of the modifier “for such purposes” indicates that this is a non-exhaustive list, and that severe pain and suffering inflicted for other reasons may also constitute torture.

See Committee Report, page 14.

Note that the reasons for which a government has inflicted torture on individuals in the past may be important in determining whether the government is likely to torture the applicant.

See *Sevoian v. Ashcroft*, 290 F.3d 166 (3<sup>rd</sup> Cir. 2002) (finding that the BIA did not abuse its discretion in denying a motion to reopen to consider a Convention claim when country conditions indicate that the government in question usually uses torture to extract confessions or in politically-sensitive cases and there is no reason to believe that the applicant falls into either category)

## C. Past Torture

Unlike a finding of past persecution, a finding that an applicant suffered torture in the past does not raise a *presumption* that it is *more likely than not* the applicant will be subject to torture in the future. However, regulations require that any past torture be *considered* in evaluating whether the applicant is likely to be tortured, because an applicant’s experience of past torture may be *probative* of whether the applicant would be subject to torture in the future.

64 Fed. Reg. 8478, 8480 (February 19, 1999); 8 C.F.R. § 208.16(c)(3)

For purposes of the reasonable fear screening, which requires a lower standard of proof than is required for withholding of removal, asylum officers should generally find that there is a reasonable possibility an applicant who has been tortured in the past would be tortured in the future, unless a preponderance of

This approach governs only the reasonable fear screening and is not applicable to the actual eligibility

the evidence establishes that there is no reasonable possibility the applicant would be tortured in the future.

determination for withholding under the *Convention against Torture*.

#### D. Internal Relocation

Regulations require the immigration judge to consider evidence that the applicant could relocate to another part of the country of feared torture, in assessing whether the applicant is eligible for withholding of removal under the *Convention against Torture*.

8 C.F.R. § 208.16(c)(3)(ii)

However, for purposes of the reasonable fear of torture determination, the asylum officer should not consider whether the applicant could relocate to another part of his or her country. In light of the lower standard applied in the reasonable fear screening process, asylum officers should find a reasonable fear of torture if the applicant establishes a reasonable possibility of torture in any part of the country to which the applicant has been ordered removed.

Again, this approach governs only the reasonable fear screening and is not applicable to the actual eligibility determination for withholding under the *Convention against Torture*.

#### E. Mandatory Bars

Although certain mandatory bars apply to a grant of withholding of removal under the *Convention against Torture*, no mandatory bars may be considered in making a reasonable fear of torture determination.

8 C.F.R. §§ 208.16(d)(2); 208.31(c)

Because there are *no* bars to protection under Article 3, an immigration judge must grant deferral of removal to an applicant who is barred from a grant of withholding of removal, but who is likely to be tortured in the country to which the applicant has been ordered removed. Therefore, the reasonable fear screening process must identify and refer to the immigration judge aliens who have a reasonable fear of torture, but who would be barred from withholding of removal, so that an immigration judge can determine whether the alien should be granted deferral of removal.

8 C.F.R. § 208.17(a)

However, asylum officer should still elicit information regarding any potential bars to withholding of removal and document such information in the sworn statement.

## XI. EVIDENCE

### A. Credible Testimony

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or the *Convention against Torture*, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. §§ 208.16(b);  
208.16(c)(2)

As in the asylum context, there may be cases where lack of corroboration, without reasonable explanation, casts doubt on the credibility of the claim or otherwise affects the applicant's ability to meet the requisite burden of proof. Asylum officers should follow the guidance in the AOBTC lessons, *Credibility*, and *Asylum Eligibility Part IV: Burden of Proof and Evidence*, and HQASY memos on this issue in evaluating whether lack of corroboration affects the applicant's ability to establish a reasonable fear of persecution or torture.

### B. Country Conditions

Country conditions information is integral to most reasonable fear determinations, whether the asylum officer is evaluating reasonable fear of persecution or reasonable fear of torture.

See lesson, *Country Conditions Research and the Resource Information Center (RIC)*.

The *Convention against Torture* specifically requires State Parties to take country conditions information into account, where applicable, in evaluating whether a person would be subject to torture in a particular country.

“[T]he competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

*Convention against Torture*,  
Article 3, para. 2.

The implementing regulations reflect this treaty provision by providing that all evidence relevant to the possibility of future torture must be considered, including, but not limited to, evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal.

8 C.F.R. § 208.16(c)(3)(iii),  
(iv)

As discussed in the supplementary information to the regulations, “the words ‘where applicable’ indicate that, in each case, the adjudicator will determine whether and to what extent

64 Fed. Reg. 8478, 8480  
(Feb. 19, 1999)

evidence of human rights violations in a given country is in fact a relevant factor in the case at hand. Evidence of the gross and flagrant denial of freedom of the press, for example, may not tend to show that an alien would be tortured if referred to that country.”

Analysis of country conditions requires an examination into the likelihood that the applicant will be persecuted or tortured upon return. Some evidence indicating that the feared harm or penalty would be enforced against the applicant should be cited in support of a positive reasonable fear determination.

In *Matter of G-A-*, the BIA found that an Iranian Christian of Armenian descent who lived in the U.S. for more than 25 years and who had been convicted of a drug-related crime is likely to be subjected to torture if returned to Iran. The BIA considered the combination of the harsh and discriminatory treatment of ethnic and religious minorities in Iran, the severe punishment of those associated with narcotics trafficking, and the perception that those who have spent an extensive amount of time in the U.S. are opponents of the Iranian government or even U.S. spies to determine that, in light of country conditions information, the individual was entitled to relief under the Convention against Torture.

In *Matter of J-F-F-*, the Attorney General held that the applicant failed to meet his evidentiary burden for deferral of removal to the Dominican Republic under the Conventions Against Torture. Here, the IJ improperly “...strung together [the following] series of suppositions: that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result respondent would fail to control himself and become ‘rowdy’; that this behavior would lead the police to incarcerate him; and that the police would torture him while he was incarcerated.” The Attorney General determined that this hypothetical chain of events was insufficient to meet the applicant’s burden of proof. In addition to considering the likelihood of each step in the hypothetical chain of events, the adjudicator must also consider whether the entire chain of events will come together to result in the probability of torture of the applicant.

*See Matter of M-B-A-*, 23 I&N Dec. 474, 478-479 (BIA 2002) (finding that a Nigerian woman convicted of a drug offense in the United States was ineligible for protection under the Convention where she provided no evidence that a Nigerian law criminalizing certain drug offenses committed outside Nigeria would be enforced against her)

*Matter of G-A-*, 23 I&N Dec. 366, 368 (BIA 2002)

*Matter of J-F-F-*, 23 I&N Dec. 912, 917 n.4 (A.G. 2006) (“An alien will never be able to show that he faces a more likely than not chance of torture if one link in the chain cannot be shown to be more likely than not to occur.” Rather, it “is the likelihood of all necessary events coming together that must more likely than not lead to torture, and a chain of events cannot be more likely than its least likely link.”) (*citing Matter of Y-L-*, 23 I&N Dec. 270, 282 (A.G. 2002)).

## XII. INTERVIEWS

### A. General Considerations

Interviews for reasonable fear determinations should generally be conducted in the same manner as asylum interviews. They should be conducted in a non-adversarial manner, separate from the public and consistent with the guidance in the AOBTC lessons regarding interviewing. 8 C.F.R. § 208.31(c)

At the beginning of the interview, the asylum officer should determine whether the applicant has an understanding of the reasonable fear process and answer any questions the applicant may have about the process. 8 C.F.R. § 208.31(c)

### B. Confidentiality

The information regarding the applicant's fear of persecution and/or fear of torture is confidential and cannot be disclosed without the applicant's written consent, unless one of the exceptions in the regulations regarding the confidentiality of the asylum process apply. At the beginning of the interview, the asylum officer should explain to the applicant the confidential nature of the interview. 8 C.F.R. § 208.6.

### C. Interpretation

If the applicant is unable to proceed effectively in English, the asylum officer must arrange for the assistance of an interpreter in conducting the interview. 8 C.F.R. § 208.31(c)

The interpreter may not be a representative or employee of the applicant's country of nationality, or if the applicant is stateless, the applicant's country of last habitual residence. Asylum officers may conduct interviews in the applicant's preferred language provided that the officer has been certified by the State Department, and that local office policy permits asylum officers to conduct interviews in languages other than English.

If the applicant requests to use a relative, friend, NGO or other source as an interpreter, the asylum officer should proceed with the interview using the applicant's interpreter. However, asylum officers are required to use a commercial interpreter with which the BCIS has an agreement to verify that the applicant's interpreter is accurate and neutral while interpreting.

### D. Note Taking

Notes must be taken in the Question and Answer format and recorded on a sworn statement. The asylum officer must read the sworn statement to the applicant (unless the applicant is able to 8 C.F.R. § 208.31(c)

Note that the signatures on

read it, in which case the applicant may read the sworn statement to make any corrections), and allow the applicant to make any corrections before signing it.

the sworn statement must be witnessed by a third party. See Draft Reasonable Fear Procedures Manual (Jan. 2003), 4. Note Taking and Sworn Statement, P.21

## E. Representation

The applicant may be represented by counsel or by an accredited representative at the interview. The representative submits a signed form G-28. The role of the representative in the reasonable fear interview is the same as the role of the representative in the asylum interview.

8 C.F.R. § 208.31(c); *see* discussion on role of the representative in, lesson, *Interviewing Part I: Overview of Nonadversarial Asylum Interview*.

The representative may present a statement at the end of the interview and, where appropriate, should be allowed to make clarifying statements in the course of the interview, so long as the representative is not disruptive. The asylum officer, in his or her discretion, may place reasonable limits on the length of the statement.

## F. Eliciting Information

The asylum officer should elicit all information relating both to fear of persecution and fear of torture, even if the asylum officer determines early in the interview that the applicant has established a reasonable fear of either.

Specifically, the asylum officer should explore each of the following areas of inquiry, where applicable:

1. What the applicant fears would happen to him/her if returned to a country (elicit details regarding the specific type of harm the applicant fears)
2. Whom the applicant fears
3. The relationship of the feared persecutor or torturer to the government or government officials
4. If a potential torturer is not a public official or someone acting in official capacity, whether there is evidence that a public official or other person acting in official capacity would have prior knowledge of the torture and would breach a legal duty to prevent the torture.
5. The reason(s) someone would want to harm the applicant

The list of areas of inquiry is not exhaustive. There may be other areas of inquiry that arise in the course of the interview. Also, the asylum officer is not required to explore the areas of inquiry in the sequence listed below. As in an asylum interview, each interview has a flow of information unique to the applicant.

6. Whether the applicant has been and/or would be in the feared offender's custody or control
7. Whether the harm the applicant fears may be pursuant to legitimate sanctions
8. Information about any individuals similarly situated to the applicant, including family members or others closely associated with the applicant, who have been threatened, persecuted, tortured, or otherwise harmed
9. Any groups or organizations the applicant is associated with that would place him/her at risk of persecution or torture, in light of country conditions information
10. Any actions the applicant has taken in the past (either in the country of feared persecution or another country, including the U.S.) that would place him/her at risk of persecution or torture, in light of country conditions information
11. Any harm the applicant has experienced in the past:
  - a. a description of the type of harm
  - b. identification of who harmed the applicant
  - c. the reason the applicant was harmed
  - d. the relationship between the person(s) who harmed the applicant and the government
  - e. whether the applicant was in that person(s) custody or control
  - f. whether the harm was in accordance with legitimate sanctions

When probing into a particular line of questioning, it is important to keep asking questions that elicit details so that information relating to the issues above is thoroughly elicited. It is also important to ask the application questions such as, "Is there anyone else or anything else you are afraid of, other than what we've already discussed?" until the applicant has been given an opportunity to present his or her entire claim.

The asylum officer should also elicit information relating to bars

to withholding of removal, if it appears that a bar may apply. This information may not be considered in evaluating whether the applicant has a reasonable fear, but should be included in the sworn statement, where applicable.

### **XIII. REQUESTS TO WITHDRAW THE CLAIM FOR PROTECTION**

An applicant may withdraw his or her request for protection from removal at any time during the reasonable fear process. When an applicant expresses a desire to withdraw the request for protection, the asylum officer must conduct an interview to determine whether the decision to withdraw is entered into knowingly and willingly. The asylum officer should ask sufficient questions to determine the following:

- The nature of the fear that the applicant originally expressed to the DHS officer,
- Why the applicant no longer wishes to seek protection and whether there are any particular facts that led the applicant to change his or her mind,
- Whether any coercion or pressure was brought to bear on the applicant in order to have him or her withdraw the request, and
- Whether the applicant clearly understands the consequences of withdrawal, including that he or she will be barred from any legal entry into the United States for a period that may run from 5 years to life.

An elicitation of the nature of the fear that the applicant originally expressed does not require a full elicitation of the facts of the applicant's case. Rather, information regarding whether the request to withdraw is knowing and voluntary is central to determining whether processing the withdrawal of the claim for protection is appropriate. The determination as to whether the request to withdraw is knowing and voluntary is unrelated to whether the applicant has a fear of future harm. Processing the withdrawal of the claim for protection is appropriate when the decision was made knowingly and voluntarily even when the applicant still fears harm.

### **XIV. SUMMARY**

#### **A. Applicability**

Asylum officers conduct reasonable fear of persecution or torture screenings in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

## **B. Definition of Reasonable Fear of Persecution**

A reasonable fear of persecution must be found if the applicant establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

## **C. Definition of Reasonable Fear of Torture**

A reasonable fear of torture must be found if the applicant establishes there is a reasonable possibility he or she will be tortured.

## **D. Bars**

No mandatory bars may be considered in determining whether an individual has established a reasonable fear of persecution or torture.

## **E. Credibility**

The same factors apply in evaluating whether an applicant's claim is credible as apply in the asylum adjudication context. Only if the aspects of a claim found not credible are material to the claim may the asylum officer base an adverse determination on lack of credibility. The applicant must be given the opportunity to address any inconsistencies and discrepancies.

## **F. Effect of Past Persecution or Torture**

1. If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of future persecution on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,
  - a. due to a fundamental change in circumstances, the fear is no longer well-founded, or
  - b. the applicant could avoid future persecution by

relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. If the applicant establishes past torture, it may be presumed that the applicant has a reasonable fear of future torture, unless a preponderance of the evidence establishes that there is no reasonable possibility the applicant would be tortured in the future.

### **G. Internal Relocation**

To establish a reasonable fear of persecution, the applicant must establish that it would be unreasonable for the applicant to relocate. If the government is the feared offender, it shall be presumed that internal relocation would not be reasonable, unless a preponderance of the evidence establishes that, under all the circumstances, internal relocation would be reasonable.

For purposes of reasonable fear of torture determinations, the asylum officer does not need to consider whether the threat of torture exists country-wide.

### **H. Elements of the Definition of Torture**

1. The torturer must be a public official or other person acting in an official capacity, or someone acting with the consent or acquiescence of a public official or someone acting in official capacity.
2. The applicant must be in the torturer's control or custody.
3. The torturer must specifically intend to inflict severe physical or mental pain or suffering.
4. The harm must constitute severe pain or suffering.
5. If the harm is mental suffering, it must meet the requirements listed in the regulations, based on the "understanding" in the ratification instrument.
6. Harm arising only from, inherent in, or incidental to lawful sanctions generally is not torture. However, sanctions that defeat the object and purpose of the Torture Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

7. There is no requirement that the harm be inflicted “on account” of any ground.

**I. Evidence**

Credible testimony may be sufficient to sustain the burden of proof, without corroboration. However, there may be cases where a lack of corroboration affects the applicant’s credibility and ability to establish the requisite burden of proof. Country conditions information, where applicable, must be considered.

**J. Interviews**

Reasonable fear screening interviews generally should be conducted in the same manner as interviews in the affirmative asylum process, except DHS is responsible for providing the interpreter and the interview notes must be recorded in Question and Answer format in a sworn statement. The asylum officer must elicit all relevant information.