REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
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Unit 12: The Convention against Torture

Relief under the Convention against Torture

Refugee Law

Protection Under the UN Convention against Torture

- DHS prohibited from returning person to country where person would be subjected to torture
- CAT - 8 CFR §§ 1208.16, 17, and 18
- Apply before IJ
- Form I-589 (same as for asylum and withholding)
- Applicant must prove more likely than not would be tortured if returned.

ELEMENTS OF CAT CLAIM

- Nature of harm: infliction of torture (intentional acts that cause severe physical or mental pain)
- Motivation to harm: for an impermissible purpose (i.e., coercion, intimidation, or discrimination) as opposed to lawful sanction.
- Agent of harm: with the involvement (instigation, consent, or acquiescence0 of public authority.

Elements of CAT claim as implemented by the United States:

- Applicant must prove more likely than not would be tortured if returned.
- Not all physical and mental mistreatment amounts to torture; extreme form of cruel and inhuman treatment.

Assessing the CAT claim

- All evidence relevant to the possibility of future torture shall be considered, including, but not limited to:
- Evidence of past torture inflicted upon the applicant;
- Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- Evidence of gross, flagrant, or mass violations of human rights within the country of removal; and
- Other relevant information regarding conditions in the country of removal.
- 8 C.F.R. §§ 208.16(c)(2) and (3).

Mental pain or suffering can result from:

- Intentional infliction or threatened infliction of severe physical pain or suffering;
- Administration or threatened administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;
- Threats of imminent death;
- Threats to another person.

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For CAT, torture must be:

- Specifically intended to cause severe paln or suffering.
- By, at Instigation of or with acquiescence of person acting in official capacity who has custody or control of victim. In Ninth Circuit, acquiescence includes situations in which the governmetn is unable or unwilling to oppose the crime, following awareness or wilful blindness.
- Not arising out of lawful sanctions, such as death penalty
- Inflicted for purpose of obtaining information, punishing, intimidating, coercing person or third person.
- Need not be on account of one of the Convention grounds.

Two types of relief under CAT

- Article 3 withholding of removal
- Deferral for persons who fall under one of mandatory bars
  - Persecutors of others
  - Conviction of particularly serious crime
  - National security risks
- Neither gives permanent residence, neither provides for family members.

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EXCERPTS FROM THE
CONVENTION AGAINST TORTURE
and Other Cruel, Inhuman or Degrading
Treatment or Punishment

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

Part I
Article 1
1. For the purposes of this Convention, torture means 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. 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.

2. For the purpose of determining whether there are such grounds, the 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.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
2. When the alleged offender is a national of that State;
3. When the victim was a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

....

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

....

23 I. & N. Dec. 291 (BIA), Interim Decision 3466, 2002 WL 481156

United States Department of Justice

Board of Immigration Appeals

IN RE J-E-, RESPONDENT

Decided March 22, 2002

*292 BEFORE: Board En Banc: SCIALABBA, Acting Chairman; DUNNE, Vice Chairman; HOLMES, HURWITZ, VILLAGELIU, FILPPU, COLE, GRANT, MOSCATO, MILLER, OHLSON, HESS, and PAULEY, Board Members. Dissenting Opinions: SCHMIDT, Board Member, joined by GUENDELSBERGER, BRENNAN, ESPENOZA, and OSUNA, Board Members; ROSENBERG, Board Member, joined by ESPENOZA, Board Member.
**2 GRANT, Board Member:

In a decision dated July 2, 2001, an Immigration Judge found the respondent removable as an alien convicted of a controlled substance violation and as an alien present in the United States without being admitted or paroled. The Immigration Judge denied the respondent's applications for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) (2000), and protection under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture" or "Convention"). The respondent has appealed from the Immigration Judge's decision. The appeal will be dismissed. The respondent's request for oral argument is denied, and the request for a fee waiver is granted. *See* C.F.R. §§ 3.1(e), 3.8(c) (2001).

I. ISSUE

The issue before us is whether the respondent is eligible for protection under Article 3 of the Convention Against Torture. To decide this issue, we must address two questions in particular: first, whether any actions by the Haitian authorities–indefinite detention, inhuman prison conditions, and police mistreatment–constitute torturous acts within the definition of torture at 8 C.F.R. § 208.18(a) (2001); and, if so, whether the respondent has established that it is more likely than not that he will be tortured if removed to Haiti. *See* 8 C.F.R. § 208.16(c) (2001).

II. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Haiti. He entered the United States without inspection at an unknown time and place.[1] On June 22, 2000, the respondent was convicted of sale of cocaine, a second degree felony under Florida law.

*293 At a continued removal hearing on July 2, 2001, the respondent testified that upon his return to Haiti he will be persecuted and tortured by Haitian authorities. He related that he left Haiti in 1990, and that his mother was killed in 1990 and his grandfather in 1995, each as a result of a property dispute. The respondent's father, who testified on his son's behalf, explained that his family had never had any problems with the Haitian Government, only property disputes with neighbors. His testimony differed from the respondent's regarding his last trip to Haiti.

In further support of his claim, the respondent submitted five recent newspaper articles addressing Haitian prison conditions, as well as a set of photographs of malnourished, dying Haitian inmates. He also submitted the Department of State's *Background Note: Haiti*, dated April 2001. Bureau of Western Hemisphere Affairs, U.S. Dep't of State, *Background Note: Haiti* (Apr. 2001), *available at* http://www.state.gov/r/pa/bgn/index.htm ("Background Note"). All of the articles confirm the Department of State's assessment of the inhuman prison conditions in Haiti. Only one article, written by a *Miami Herald*

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reporter in 2001, references police mistreatment. The reporter spoke with two inmates at the Penitentier National prison, who stated that they had been abused by the authorities. One male inmate had burn marks on his chest and arm, and one female inmate claimed that the guard beat her. When confronted with these accusations, the prison warden's response was equivocal. He intimated that prisoners are beaten, but not severely.

3 * [In a letter dated April 12, 2001, to the IJ, William E. Dilday, Director of the Office of Country Reports and Asylum Affairs at the Department of State's Bureau of Democracy, Human Rights and Labor,] reports that Haitians deported from the United States on criminal grounds will be detained in Haiti until a commission determines a release date. *** According to Haitian authorities, criminal detainees are temporarily detained to deter criminal activity in Haiti. The State Department also reports that prison facilities are overcrowded and inadequate. Haitian prisoners are deprived of adequate food, water, medical care, sanitation, and exercise. Many prisoners are malnourished. According to prison officials, in November 2000, 5 of the 10 prison deaths were attributable to malnutrition. At the conclusion of the respondent's hearing, the Immigration Judge found him removable as charged; statutorily ineligible for asylum because of his aggravated felony conviction; ineligible for withholding of removal; and ineligible for protection under Article 3 of the Convention Against Torture because of his failure to establish that it is more likely than not that he will be tortured if returned to Haiti. Accordingly, he ordered the respondent deported to Haiti.

*294 On appeal, the respondent claims that he will be persecuted and tortured if returned to Haiti because he will be subject to indefinite detention as a repatriated Haitian convict.[2] The Immigration and Naturalization Service filed a memorandum adopting the decision of the Immigration Judge and requesting that his decision be affirmed. For the reasons set forth below, the appeal will be dismissed.

III. ANALYSIS

A. Convention Against Torture

Article 3 of the Convention Against Torture precludes the United States from returning an alien to a state where there are substantial grounds for believing that he would be subjected to torture.[3] To ascertain the nature and extent of the protection afforded by the United States under Article 3, we must examine the history of the negotiations, ratification, and implementation of the Convention in the United States.

*** On December 10, 1984, the General Assembly unanimously adopted the Convention Against Torture, which entered into force on June 26, 1987. *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 1, 2 (1990) ("Senate Report"). The purpose of the Convention is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." Convention Against Torture, *supra*, pmbl.

4 *295 *[A] central issue for the drafters of the Convention Against Torture was whether the definition of "torture" should include solely acts of torture or also "other acts of cruel, inhuman, and degrading treatment or punishment." *See* Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* 5 (1999) (citing U.N. Doc. E/CN.4/1314 (1978)). The United States took the position that "torture" is limited to extreme forms of cruel, inhuman, or degrading treatment or punishment. *Id.*; *see also* Senate Report, *supra*, at 2-3. The definition of torture ultimately adopted by the General Assembly and set forth in Article 1 of the Convention Against Torture does not include "other acts of cruel, inhuman or degrading treatment or punishment."[4]

Instead, "other acts of cruel, inhuman or degrading treatment or punishment" are prohibited under Article 16 of the Convention. Article 16.1 obligates Convention signatories to prevent in any territory under their jurisdiction
other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Thus, the Convention Against Torture draws a clear distinction between torturous acts as defined in Article 1 and acts not

involving torture referenced in Article 16. The severity of the pain and suffering inflicted is a distinguishing characteristic of torture.[5] This distinction is further emphasized by the different obligations that attach to each. The obligations undertaken by a State Party regarding acts of torture are far more comprehensive than those regarding nontorturous acts.[6] Notably, the protection afforded under *296 Article 3 extends only to acts of torture as defined in Article 1 of the Convention.

On April 18, 1988, President Reagan signed the Convention Against Torture and transmitted it to the Senate the following month with 17 conditions, which were later revised by the Bush Administration. On October 27, 1990, the Senate adopted its resolution of advice and consent to ratification. The treaty became effectively binding on the United States on November 20, 1994.

The Senate ratified the Convention subject to two reservations, five understandings, two declarations, and a proviso. *See* 136 Cong. Rec. S17,486, S17,491-92 (daily ed. Oct. 27, 1990) ("Senate Resolution"). Two of the Senate's understandings directly relate to Article 3 of the Convention and, consequently, to this case in particular.[7] These understandings, which have been incorporated in the implementing regulations, are critical to comprehending the United States' obligations under Article 3. Notably, the Senate ratified the Convention subject to an understanding that refines the definition of torture contained in Article 1 of the Convention. *See* Senate Resolution, *supra*, II.(1)(a)-(e). As detailed below, this understanding is incorporated into the federal regulations at 8 C.F.R. § 208.18(a).

**5 Another of the Senate's understandings provides that "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, means "if it is more likely than not that he would be tortured." Senate Resolution, *supra*, II.(2). The ratification history reveals that the standard of proof for protection under Article 3 is the same as the standard of proof for withholding of removal under section 241(b)(3) of the Act. *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 30, 101st Cong., 2d Sess., 16-17 (1990) ("Senate Report"). This understanding is incorporated in the federal regulations at 8 C.F.R. § 208.16(c)(2).

B. Regulatory Definition of Torture

On October 21, 1998, the President signed into law the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-761, 2681-822, which authorized the implementation of Article 3 of the Convention Against Torture and required that implementing *297 regulations be promulgated by the interested agencies within 120 days.[8] As directed, the Service promulgated interim regulations implementing Article 3 of the Convention in the context of the removal of aliens by the Attorney General. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (effective Mar. 22, 1999).

These federal regulations govern our decision in this case. ***

Instead of categorizing acts that constitute torture, the regulatory definition of torture sets forth criteria that must be applied in determining whether a given act amounts to torture. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8482. For an act to constitute torture it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. 8 C.F.R. § 208.18(a).

**6 First, the act must cause *severe* pain or suffering, physical or mental. It must be an *extreme* form of cruel and inhuman treatment, *not* lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture. 8 C.F.R. §§ 208.18(a)(1), (2). Mental pain or suffering may constitute torture if it falls within the regulatory definition at 8 C.F.R. § 208.18(a)(4). *See* Senate Resolution, *supra*, II.(1)(a).

While the Convention Against Torture makes a clear distinction between torturous and nontorturous acts, actually differentiating between acts of torture and other bad acts is not so obvious. ***

In *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978), the European Court struggled to determine whether the acts complained of constituted torture or other, lesser forms of cruel or inhuman treatment. It observed that torture is an aggravated and deliberate form of cruel, inhuman, or degrading treatment resulting in intense suffering. Degrading treatment is characterized by gross humiliation of an individual. In that case, the court held that suspected terrorists who were detained and subjected to wall standing, hooding, and constant loud, hissing noise, and who were deprived of sleep, food, and drink by the British Army had been subjected to inhuman and degrading treatment, but not torture.

Second, the act must be *specifically intended* to inflict severe physical or mental pain or suffering. 8 C.F.R. § 208.18(a)(5). This specific intent requirement is taken directly from the understanding contained in the Senate's ratification resolution. Senate Resolution, *supra*, II.(1)(a). Thus, an act that results in unanticipated or unintended severity of pain or suffering does not constitute torture. In view of the specific intent requirement, the Senate Foreign Relations Committee noted that rough and deplorable treatment, such as police brutality, does *not* amount to torture. *See* Senate Report, *supra*, at 13-14.[11]

**7 Third, the act must have an illicit purpose. The definition of torture illustrates, but does not define, what constitutes a proscribed or prohibited purpose. Examples of such purposes include the following: obtaining information or a confession; punishment for a victim's or another's act; intimidating or coercing a victim or another; or any discriminatory purpose. The Foreign Relations Committee noted that these listed purposes indicate the type of motivation that typically underlies torture, and it recognized that the illicit purpose requirement emphasizes the specific intent requirement. *Id.* at 14.

*299 Fourth, torture covers intentional governmental acts, not negligent acts or acts by private individuals not acting on behalf of the government. The regulations require that the harm 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." 8 C.F.R. § 208.18(a)(1); *see also Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *Matter of S-V-*, Interim Decision 3430 (BIA 2000).

To constitute torture, an act must be directed against a person in the offender's custody or control. 8 C.F.R. § 208.18(a)(6). The term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity. 8 C.F.R. § 208.18(a)(7). These federal regulations are taken directly from the Senate's understandings upon which ratification was conditioned. *See* Senate Resolution, *supra*, II.(1)(b), (d); *see also Matter of Y-L-, A-G- & R-S-R-, supra*; *Matter of S-V-, supra.*

Finally, the regulations incorporate the second sentence of Article 1 of the Convention Against Torture, which states that torture "does *not include* pain or suffering *arising only from, inherent in or incidental to lawful sanctions.*" 8 C.F.R. § 208.18(a)(3) (emphasis added). "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." *Id.*; *see also* Senate Resolution, *supra*, II.(1)(c), (e).

C. Treatment of Deportees to Haiti

In the case before us, the respondent asserts that he will be tortured in Haiti by the Government because Haitians deported from the United States on criminal grounds are detained indefinitely in prison facilities where prisoners are subjected to inhuman conditions and police mistreatment. We must determine whether any of these state actions–indefinite detention, inhuman prison conditions, and police mistreatment–constitute torturous acts within the meaning of the regulatory definition of torture.

8 First, the respondent asserts that he will be tortured if returned to Haiti because he will be indefinitely detained by the Haitian authorities. It is undisputed that the respondent will be subject to detention of an indeterminate length on his return to Haiti. * According to the State Department, criminal deportees were once processed and released within 1 week. *Country Reports, supra*, at 2630. Now, due to irregular commission meetings, deportees are held for weeks in police holding cells prior to their release. Dilday letter, *supra.*

We recognize that Haiti has a legitimate national interest in protecting its citizens from increased criminal activity. According

to the *Country Reports*, this detention procedure is designed "to prevent the 'bandits' from increasing the level of insecurity and crime in the country." *Country Reports*, *supra*, at 2630. This confirms Mr. Dilday's report that Haitian authorities detain criminal deportees "as a warning and deterrent not to commit crimes in Haiti." Dilday letter, *supra*. Thus, Haiti's detention policy in itself appears to be a lawful enforcement sanction designed by the Haitian Ministry of Justice to protect the populace from criminal acts committed by Haitians who are forced to return to the country after having been convicted of crimes abroad. We find that this policy is a lawful sanction and, therefore, does not constitute torture. *See* 8 C.F.R. § 208.18(a)(3). Additionally, there is no evidence that Haiti's detention policy is intended to defeat the purpose of the Convention to prohibit torture.

Notwithstanding, the United States has condemned the manner in which Haiti is implementing its detention policy, that is, by detaining deportees for an indeterminate period. Although this practice is unacceptable and must be discontinued, there is no evidence that Haitian authorities are detaining criminal deportees with the specific intent to inflict severe physical or mental pain or suffering. 8 C.F.R. § 208.18(a)(5). Nor is there any evidence that Haiti's detention procedure is inflicted on criminal deportees for a proscribed purpose, such as obtaining information or a confession; punishment for a victim's or another's act; intimidating or coercing a victim or another; or any discriminatory purpose. 8 C.F.R. § 208.18(a)(1). Based on the foregoing, we find that Haiti's detention practice alone does not constitute torture within the meaning of the regulations.

9 The respondent asserts that such indefinite detention, coupled with inhuman prison conditions, amounts to torture. In order to constitute torture, the act must be *specifically intended* to inflict severe pain or suffering. The ***301 ratification documents make it clear that this is a "specific intent" requirement, not a "general intent" requirement. Senate Report, *supra*, at 14; *see also* Senate Resolution, *supra*, II.(a)(1). "Specific intent" is defined as the "intent to accomplish the precise criminal act that one is later charged with" while "general intent" commonly "takes the form of recklessness . . . or negligence." *Black's Law Dictionary* 813-14 (7th ed. 1999).

Although Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard, there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture. *See* 8 C.F.R. §§ 208.18(a)(1), (5). ***

The record establishes that Haitian prison conditions are the result of budgetary and management problems as well as the country's severe economic difficulties. Two thirds of the country's population live in extreme poverty. *Country Reports*, *supra*, at 2626. According to the Department of State, even when the prison authorities purchase adequate food, there is no effective delivery system. *Id.* at 2630. Individual prison officials come to the warehouse, traveling by bus or taxi, and carry away as much food as they can. There is evidence that, although lacking in resources and effective management, the Haitian Government is attempting to improve its prison system.

Additionally, the *Country Reports* state that the Haitian Government "freely permitted the ICRC [International Committee of the Red Cross], the Haitian Red Cross, MICAH [International Civilian Mission for Support in Haiti], and other human rights groups to enter prisons and police stations, monitor conditions, and assist prisoners with medical care, food, and legal aid." *Country Reports*, *supra*, at 2630. The ICRC funds and manages its own programs within the prison system. *Id.* at 2629. Moreover, as evidenced by the respondent's documentary submissions, a reporter and a photographer from the *Miami Herald* were recently given access to Haiti's prisons. For these reasons, we cannot find that these inexcusable prison conditions constitute torture within the meaning of the regulatory definition.

10 Finally, the respondent bases his torture claim on the likelihood that he will be mistreated by the Haitian authorities while indefinitely detained. The *Country Reports* describe incidents of deliberate mistreatment of detainees: Police mistreatment of suspects at both the time of arrest and during detention remains pervasive in all parts of the country. Beating with the fists, sticks, and belts is by far the most common form of abuse. However, international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooding, and kalot marassa (severe boxing of the ears, which can result in eardrum damage). Those who reported such ***302 abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates. Police almost never are prosecuted for the abuse of detainees.

Country Reports, supra, at 2629.

This single paragraph in a 15-page report documents many forms of mistreatment which can be categorized as either torturous or nontorturous acts. Instances of police brutality do not necessarily rise to the level of torture, whereas deliberate vicious acts such as burning with cigarettes, choking, hooding, kalot marassa, and electric shock may constitute acts of torture. As noted above, the distinguishing characteristic of torture is the severity of the pain and suffering inflicted. The record reflects that there are isolated instances of mistreatment in Haitian prisons that rise to the level of torture within the meaning of 8 C.F.R. § 208.18(a).

....
The evidence establishes that isolated acts of torture occur in Haitian detention facilities. However, this evidence is insufficient to establish that it is more likely than not that the respondent will be subject to torture if he is removed to Haiti. For example, there is no evidence that deliberately inflicted acts of torture are pervasive and widespread; that the Haitian authorities use torture as a matter of policy; or that meaningful international oversight or intervention is lacking. Additionally, the United States has urged the Aristide administration to discontinue this detention practice.

**12 *304 On the basis of this evidence, we find that the respondent has failed to establish that these severe instances of mistreatment are so pervasive as to establish a probability that a person detained in a Haitian prison will be subject to torture, as opposed to other acts of cruel, inhuman, or degrading punishment or treatment. *See, e.g., Al-Saher v. INS,* 268 F.3d 1143 (9th Cir. 2001) (finding an Iraqi national eligible for protection under Article 3 of the Convention where he established that he was likely to be detained by the Iraqi authorities, and the record indicated that the security services *routinely* tortured detainees and that Iraqi refugees *often reported* instances of torture).

As we read the State Department *Country Reports* in their entirety, it is clear that most of the range of mistreatment described therein falls outside the scope of Article 1 of the Convention, while fitting squarely within Article 16 of the Convention. Nothing could be clearer from the language of the Convention, the Senate ratification documents, and the implementing regulations than that the nonrefoulement obligation of Article 3 does not apply to most of the abysmal conditions described in the *Country Reports.* It bears repeating that although these prison conditions do not rise to the level of torture, every effort must be made to improve such conditions.

IV. CONCLUSION

As the foregoing discussion demonstrates, the regulations implementing the Convention Against Torture, drawn directly from the language of the Convention and the Senate's resolution of ratification, govern our analysis and decision regarding Article 3 claims for protection. In applying these regulatory standards to the evidence before us, we cannot find that the respondent has established that it is more likely than not that he will be tortured if he is returned to Haiti. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

**13 *DISSENTING OPINION:* Paul Wickham Schmidt, Board Member, in which John W. Guendelsberger, Noel Ann Brennan, Cecelia M. Espenoza, and Juan P. Osuna, Board Members, joined

I respectfully dissent.

The respondent more likely than not will be tortured upon return to Haiti. Therefore, we should sustain his appeal and grant him deferral of removal under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture" or *305 "Convention"), and the implementing regulations. *See* 8 C.F.R. §§ 208.16-208.18 (2001).

....

II. DEFINITION OF TORTURE

....

**14 The reasoning behind this absolute prohibition is plain: torture is so abhorrent that it can never be justified, and its application is "outside the domain of a criminal justice system." *Suresh v. Canada*, [2002] S.C.R. 1, 12 (noting that "[t]orture is an instrument of terror and not of justice"). This *306 prohibition on torture is a principle that has attained the status of a peremptory norm in international law. *Id.* at 13. The corollary of that principle is that removal of an individual to a country where he or she would be tortured can never be justified. *See* 8 C.F.R. § 208.17(a)....

Therefore, if we conclude that the conditions in Haiti to which the respondent would be returned constitute torture, and if the respondent establishes that it is more likely than not that he would be subjected to that torture, we must defer his removal, despite his serious criminal record.

....

The *Country Reports* further describe how detainees are mistreated:

Police mistreatment of suspects at both the time of arrest and during detention remains pervasive in all parts of the country. Beating with the fists, sticks, and belts is by far the most common form of abuse. However, international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooding, and kalot marassa (severe boxing of the ears, which can result in eardrum damage). Those who reported such abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates. Police almost never are prosecuted for the abuse of detainees.

**15 *Country Reports*, *supra*, at 2629.

....

Inmates receive "insufficient calories to sustain life." "Corruption, not just malnutrition, is killing inmates," bluntly states one report. Another article tells of a returnee from the United States who was dumped in a police substation detention cell "unfit for human habitation." She was denied food and potable water and died after 4 days. Overall, these squalid, inhuman conditions describe an atmosphere in which unchecked, officially sanctioned abuse of the type highlighted in the State Department *Country Reports* is likely to be the rule, not the exception.

....

IV. ANALYSIS

....

This is not a case where the authorities merely are being negligent. *See* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture* 118 (1988) (noting that where the pain or suffering is the result of an accident or mere negligence, it is not torture). Rather, it is an instance of a government deliberately continuing a policy that leads directly to torturous acts.

*308 The Government of Haiti cannot claim that it does not know what happens to detainees in its prisons. Therefore, its conduct falls squarely within the meaning of 8 C.F.R. § 208.18(a)(1).

**16 Beatings with sticks, fists, and belts have no legitimate purpose and obviously are specifically intended to inflict extreme pain and suffering upon the victims. Burning with cigarettes, choking, hooding, and kalot marassa are not accidental

occurrences, nor are they the result of lack of resources or mere mismanagement in a poor country's prison system. Rather, they are well-recognized ways in which torturers torment their victims. Electric shock, in this case, is intentionally applied to cause excruciating pain and prolonged physical and mental anguish.

....

*309 In essence, the majority errs by looking at the various factors that contribute to the abuse of Haitian returnees in isolation, and not as a whole. Generally, deplorable prison conditions, by themselves, do not rise to the level of torture, although they can rise to the level of cruel, inhuman, and degrading treatment. *See* Amnesty International, *Haiti: Unfinished Business: justice and liberties at risk,* AI Index: AMR 36/01/00, at 9 (Mar. 21, 2000) (noting that the physical conditions in Haitian prisons give rise to cruel, inhuman, and degrading instances).[1]

**17 In this case, however, we must examine not only the prison conditions, but also the effect on someone who, while having to endure those deplorable conditions, has to endure various forms of physical abuse, including beatings, electric shock, burning with cigarettes, choking, and other forms of mistreatment, as well as the withholding of food and medical treatment, in an atmosphere where his abusers act with almost complete impunity. It is only by looking at this entire picture that we can be faithful to the mandate in the regulations that we consider "all evidence relevant to the possibility of future torture." 8 C.F.R. § 208.16(c)(3).

....

conclude that the respondent is more likely than not to face officially sanctioned torture if returned to Haiti. Therefore, I would grant his application for deferral of removal under the Convention Against Torture and the implementing regulations. Consequently, I respectfully dissent.

**18 *DISSENTING OPINION*: Lory Diana Rosenberg, Board Member, in which Cecelia M. Espenoza, Board Member, joined, omitted.

251 F.3d 1279
United States Court of Appeals,
Ninth Circuit.

Navaratwam KAMALTHAS, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Filed June 5, 2001

Before: HUG and B. FLETCHER, Circuit Judges, and KING, District Judge.[1]

BETTY B. FLETCHER, Circuit Judge:

Petitioner seeks review of a decision of the Board of Immigration Appeals ("BIA") denying his motion to reopen his exclusion proceedings under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "Convention"). We are asked to decide an issue of first impression in this circuit: whether an alien who has been found ineligible for political asylum necessarily fails to qualify for relief under the Convention Against Torture. The petitioner, Navaratwam Kamalthas, a 25 year-old Sri Lankan national, claims that as a Tamil male, he would face a substantial risk of torture if he were sent back to Sri Lanka. The BIA, which had previously found Kamalthas's account of past persecution to lack credibility in the context of his asylum application, denied the motion to reopen on the ground that Kamalthas submitted no new evidence to rebut the prior credibility determination, and that he thereby failed to present a prima facie case for relief under the Convention.

We find that in ruling as it did, the BIA impermissibly conflated the standards for granting relief in asylum and Convention cases. In particular, we find that the Board abused its discretion in failing to recognize that country conditions alone can play a decisive role in granting relief under the Convention, and that under a plain reading of the relevant statutory and regulatory language, relief under the Convention does not require that the prospective risk of torture be on account of certain protected grounds. We therefore conclude that the inability to state a cognizable asylum claim does not necessarily preclude relief under the Convention Against Torture.

I.

*** At his hearing before the Immigration Judge ("IJ"), Kamalthas testified that after graduating from college in Jaffna, Sri Lanka, Tamil Tiger rebels attempted to recruit him and then beat him for refusing to join them. Subsequently, as a Tamil male, he was captured and subjected to torture over five days by the Sri Lankan police. The IJ found Kamalthas's testimony to be not credible and denied his applications for asylum and withholding of deportation, based in part on his "wooden manner of speech," the fact that others had told "the exact same story," and the fact that upon his arrival Kamalthas had told an INS airport inspector that he had never experienced problems with the Sri Lankan police. The BIA upheld the IJ's adverse credibility finding and denial of asylum and withholding of deportation. On October 7, 1999, a panel of this circuit affirmed the BIA's decision (including the adverse credibility determination), but stayed the mandate to permit Kamalthas to file a motion to reopen his exclusion proceedings with the BIA to consider the applicability of the Convention Against Torture.***

The BIA subsequently rejected Kamalthas's motion to reopen***[finding that] because Kamalthas "state[d] no new facts that he would prove at a new hearing," his motion failed to make out a prima facie case in that it "does not demonstrate that it is more likely than not that he will be tortured if deported to Sri Lanka," as required under the applicable regulations.

Kamalthas timely filed a petition for review of the BIA's decision by our court.

II.

We have jurisdiction under § 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), the Convention's implementing legislation. ***

III.

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[2] [3] Kamalthas's central argument is that the BIA abused its discretion in ruling that his failure to submit additional facts to rebut the Board's earlier adverse credibility determination precluded the establishment of a prima facie case for relief under the Convention Against Torture. We agree.

Under the implementing regulations for the Convention, "[t]orture is defined as 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 her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her 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." 8 C.F.R. § 208.18(a)(1) (2000). Pursuant to these regulations:

> • The burden of proof is on the applicant ... to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.
>
> • In assessing whether it is more likely than not that an applicant would be tortured ... *all evidence relevant to the possibility of future torture shall be considered,* including, but not limited to:
>
> > • Evidence of past torture inflicted upon the applicant;
> >
> > • Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
> >
> > • *Evidence of gross, flagrant or mass violations of human rights within the country of removal;* and
> >
> > • *Other relevant information regarding conditions in the country of removal.*

8 C.F.R. §§ 208.16(c)(2) and (3) (2000) (emphases added).

***

In its decision denying Kamalthas's motion, the BIA concluded that an "applicant [fails] to satisfy his burden of presenting a prima facie case for relief under the Convention ***1283** where he merely restates facts that have already been deemed incredible at a prior [asylum] hearing." However, in so holding, the Board conflated the burden of proof for an asylum claim with that for relief under the Convention. As noted above, pursuant to 8 C.F.R. § 208.16(c)(3), "all evidence relevant to the possibility of future torture shall be considered," even apart from any prior findings in the asylum context. In particular, nowhere in its opinion did the BIA consider the documented country conditions in Sri Lanka which corroborate the widespread practice of torture against Tamil males.

Furthermore, and more generally, the Board failed to recognize the central distinction that claims for relief under the Convention are analytically separate from claims for asylum under INA § 208 and for withholding of removal under INA § 241(b)(3). Put another way, a claim under the Convention is not merely a subset of claims for either asylum or withholding of removal. To be eligible for asylum, a petitioner must demonstrate "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (2000). Similarly, to be eligible for withholding of removal under INA § 241(b)(3), a petitioner must show that "it is more likely than not" that his or her life or freedom would be threatened by persecution on account of these same protected grounds. 8 C.F.R. § 208.16(b)(1). By contrast, to be eligible for relief under the Convention, a petitioner must show "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." *Id.* § 208.16(c)(2). In an important sense, then, the Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured "on account of" a protected ground; it is narrower, however, because the petitioner must show that it is "more likely than not" that he or she will be tortured, and not simply persecuted upon removal to a given country.

***

Like the *Mansour* court, "[w]e are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim; especially when the prior adverse credibility determination is not necessarily significant in this situation." *Id.* at 908. Indeed, proper attention to relevant country conditions

might lend credence to Kamalthas's assertions of torture and cause the BIA to view them in a different light. Although we are cognizant of the high bar to obtaining relief under the Convention on the merits, the BIA cannot deny a motion to reopen without recognizing the proper standard for establishing a prima facie case and giving weight to relevant country conditions.

In sum, in order to present a prima facie case for relief under the Convention, the burden of proof is on the petitioner "to establish 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). We hold that a petitioner carries this burden whenever he or she presents evidence establishing "substantial grounds for believing that he [or she] would be in danger of being subjected to torture" in the country of removal, *U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. 3, para. 1, including (but not limited to) evidence of "past torture inflicted upon the applicant"; "gross, flagrant or mass violations of human rights within the country of removal"; and "[o]ther relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3); *cf. Mansour,* 230 F.3d at 908-09. In this case, the BIA failed to consider probative evidence in the record of country conditions which confirm that Tamil males have been subjected to widespread torture in Sri Lanka. Accordingly, we vacate the Board's decision on the ground that "[t]he BIA abuse[d] its discretion when it fail[ed] to state its reasons and show proper consideration of all factors when weighing equities and denying relief," *Arrozal v. INS,* 159 F.3d 429, 432 (9th Cir.1998), and remand for further proceedings consistent with this opinion.

VACATED and **REMANDED.**

All Citations

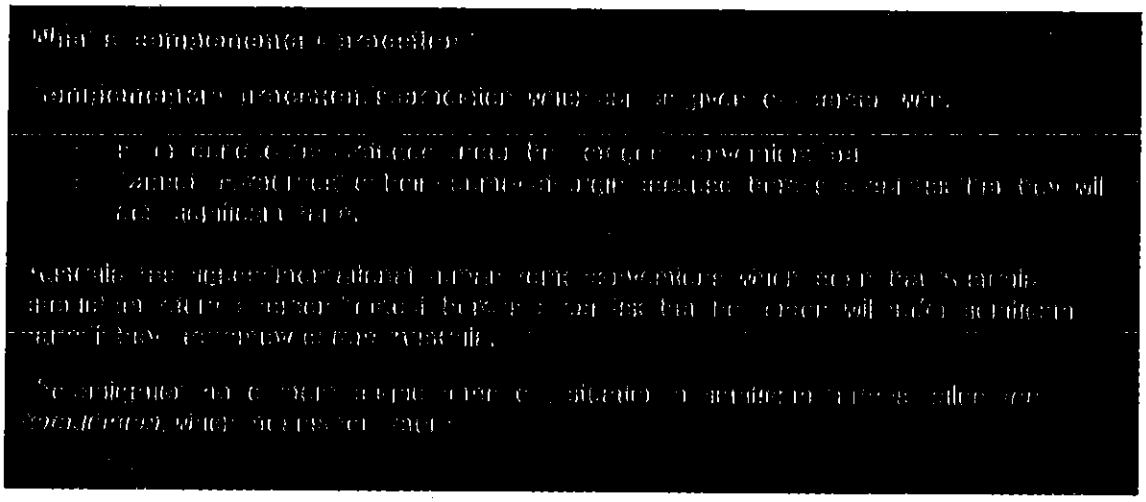
251 F.3d 1279, 01 Cal. Daily Op. Serv. 4552, 2001 Daily Journal D.A.R. 5601

End of Document

Fact Sheet 10

Complementary protection

On the 24 March 2012 complementary protection was introduced into Australian migration law. The DIAC and the RRT must now consider the Refugee Convention along with obligations which come from other international human rights conventions when they decide whether to grant you a Protection visa. This fact sheet is about complementary protection.



What International conventions can be considered for my case?

Australia's obligation not to return a person to a situation where they will suffer significant harm exists because Australia has signed these two international agreements:

- *International Covenant on Civil and Political Rights (ICCPR)*
- *Convention Against Torture (CAT)*

The introduction of complementary protection means that Australia's obligations under these two agreements as well as the Refugee Convention can be considered by the DIAC and the RRT when they decide whether or not to grant a Protection visa.

What is significant harm?

Complementary protection is a new law so it is still not clear exactly how the decision makers will interpret it in practice. However under the new law significant harm has been clearly defined.

Complementary protection can only be granted when you will face significant harm if you are returned home. Under the complementary protection law significant harm must be one of the following things:

- **Arbitrary deprivation of life**

You cannot be returned home if it means you will be killed by others for no good reason if you go home.

- **Death penalty**

You cannot be returned home if you will face the death penalty for a crime you have been charged with in your home country.

- **Torture**

You cannot be returned home if you will face an act that causes you severe physical or mental pain and suffering and this pain and suffering will be intentionally inflicted on you to get a confession, to get information or to intimidate you.

- **Cruel or inhuman treatment or punishment**

You cannot be returned home if you will face severe pain and suffering, whether physical or mental, and it could be considered cruel or inhuman.

- **Degrading treatment or punishment**

You can not be returned home if you will face an act that causes extreme humiliation to you that is unreasonable and degrading.

What does the change to the law mean?

Before the law changed the Minister did consider these international agreements when he decided whether or not to intervene in people's cases to grant a visa.

The new law means that Australia's obligations under these international conventions can now be considered at the beginning of the process when you apply for a Protection visa at the DIAC stage and also at the RRT. You will not have to wait for your case to get to the Minister to have complementary protection considered in your case.

Do I need to make a separate application for complementary protection?

You do not need to make a separate application for complementary protection. When you apply for a Protection visa the decision maker will first consider whether you are a refugee under the Refugee Convention. If you are a refugee then you can be granted a protection visa.

If you are not a refugee under the Refugee Convention then the decision maker will think about whether complementary protection applies to you. If they decide that

complementary protection does apply to you then they can give you a Protection visa.

What if I am found to be a refugee?

The DIAC and RRT decision makers will now go through a two step process when deciding whether to grant you a Protection visa. The decision maker only has to consider complementary protection if they decide that you are not a refugee.

If the decision maker decides that you are a refugee then Australia has an obligation to protect you under the Refugee Convention and the decision maker will usually grant you a visa. They will not need to consider whether complementary protection applies to you.

What if I applied for a protection visa before the 24 March 2012?

I applied before 24 March 2012 and my case is at DIAC.

If you applied for a Protection visa, and DIAC did not make a decision about your case, before 24 March 2012, then the case officer must consider whether complementary protection applies to your case before they make their decision.

I applied before 24 March 2012 and my case is at the RRT.

If your case is at the RRT and a decision was not made before 24 March 2012 then the RRT must consider whether complementary protection applies to your case before they make a decision.

I applied before 24 March 2012 and my case is at Court.

If your case is at Court for Judicial review, the Court cannot consider whether complementary protection applies in your case. The Court can only consider the original decision. The Court cannot consider the new law.

If your case is successful at Court then it will be sent back to the RRT for another hearing. The RRT will then be able to consider complementary protection when making its decision.

For more information about Judicial review please see: fact sheet 7 Judicial review (Federal Magistrates Court).

I applied before 24 March 2012 and have asked the Minister to intervene in my case.

The Minister has certain guidelines which he will consider when he decides whether or not to intervene in your case. See fact sheet 8: Ministerial Intervention for more information about these guidelines and about applying to the Minister.

These guidelines already include Australia's complementary protection obligations. If your case is with the Minister then you can ask the Minister to consider complementary protection when he decides whether to intervene to either grant you a visa or give you a chance to apply for a Protection visa again.

What visa will I receive if I am granted complementary protection?

If you are granted protection as a result of complementary protection you will receive a Protection visa. This is the same visa you would be granted if you were found to be a refugee. This visa will give you access to social security, Medicare and English classes.

Disclaimer: This fact sheet provides general information to people seeking asylum in Australia through the onshore visa application process. We have tried to make sure that this fact sheet contains correct information and has not left out anything important. However, we cannot guarantee this because immigration law is complex and changes regularly. This fact sheet is not legal advice. You should not rely on this fact sheet to make decisions about your immigration matter. We strongly recommend that you get independent advice from a registered Migration Agent. For information about registered migration agents please visit: https://www.mara.gov.au. **Date: April 2012**