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#### **d. *Non-refoulement* in U.S. Litigation**

*Non-refoulement* typically arises in asylum and extradition cases, although invocation in other detention contexts is possible.

#### **i. *Non-Refoulement* in Processes of Deportation and Removal**

Individuals who are found present in the United States unlawfully, for example when they enter illegally or overstay a visa, are subject to removal pursuant to 8 U.S.C. § 1227 (2006). People fleeing persecution who have been ordered removed from the United States may raise *non-refoulement* claims under two statutes: the Refugee Act of 1980 and FARRA.

##### **i.1. Withholding of Removal Under The Refugee Act of 1980**

Judicial review of a final order of removal is authorized by 8 U.S.C. § 1252(a)(1) (2006). Individuals denied withholding of removal by the Board of Immigration Appeals must file a petition for review with a federal appeals court no later than 30 days after the date of the final order of removal. 8 U.S.C. § 1252 (b)(1)-(2). Absent an order from the court, a petition for review does not stay the alien's removal pending the court's decision; therefore, an applicant may concurrently file for a stay. 8 U.S.C. § 1252(b)(3)(B).

A court reviewing a final order of removal is limited to reviewing the administrative record on which the order is based. 8 U.S.C. § 1252(b)(4)(A). The Supreme Court held in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987), that the Refugee Act of 1980 “removed the Attorney General’s discretion” in withholding of removal proceedings, so that decisions regarding withholding of removal are reviewable. This ruling rendered 8 U.S.C. § 1252(b)(4)(D) – which states that “the Attorney General’s discretionary judgment whether to grant relief under Section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion” – inapplicable in review of withholding of removal cases. “[T]he administrative findings of fact are conclusive,” however, “unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B).

The process of *non-refoulement* begins at the administrative level, at the moment that an individual subject to removal invokes the nonreturn right provided for in the Refugee Act of 1980 by seeking withholding of removal. This claim for nonreturn is typically, though not necessarily, advanced in tandem with a request for a grant of asylum at a deportation or exclusion hearing. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159 (1993). While both the Refugee Act and FARRA are only available to aliens who reside in or have arrived at the border of the United States, as detailed in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999),

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Refoulement: Opinion,” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 141, ¶¶ 196-253 (Erika Feller, Volker Türk & Frances Nicholson eds. 2003) (discussing principle as customary international law), with James C. Hathaway, *Leveraging Asylum*, 45 *Texas Int’l L.J.* 503 (2010) (challenging contentions that *non-refoulement* is even a norm of customary international law, let alone a nonderogable *jus cogens* norm).

withholding of removal and asylum are distinct forms of relief:

- Withholding bars the deportation of an alien only to a particular country or countries. If the requirements are met, a grant of withholding is mandatory unless one of the exceptions discussed *infra* § III.E.4.d.i.1. applies.
- Asylum permits an alien to remain in the United States and to apply for permanent residency after one year and citizenship after five years. Asylum also enables successful applicants to provide derivative asylum status to their spouse and minor children. The decision to grant asylum is not mandatory; rather, it falls within the discretion of the Attorney General.

An applicant for withholding of removal, the mandatory *non-refoulement* remedy, must establish that:

- The applicant's life or freedom would be threatened because of race, religion, nationality, membership in a particular social group, or political opinion, pursuant to 8 U.S.C. § 1231(b)(3) (2006); and

The burden of showing that life or freedom is “more likely than not” to be threatened if the applicant is removed to a third country rests with the applicant. 8 U.S.C § 1231(b)(3)(C) (2006), *explained in INS v. Stevic*, 467 U.S. 407, 422, 429-30 (1984). This standard may be met by the applicant's own, uncorroborated, credible testimony. 8 U.S.C. § 1158(b)(1)(B)(ii). Credibility is to be judged based on the totality of the circumstances, taking into account the “demeanor, candor, or responsiveness of the applicant,” the plausibility of the applicant's account, and the consistency of all written and oral statements. *Id.* § 1158(b)(1)(B)(iii). Although there is no presumption of credibility, a finding of past persecution (for instance, in an earlier asylum determination) gives rise to a rebuttable presumption of a future threat. 8 C.F.R. § 208.16(b)(1).

Even if an applicant otherwise meets this burden, withholding of removal is unavailable if the applicant falls within one of the “mandatory denial” categories, for the reason that the applicant:

- “Participated in Nazi persecution, genocide, or any act of torture or extrajudicial killing.” 8 U.S.C. § 1231(b)(3)(B) (referring to 8 U.S.C. § 1227(a)(4)(D)).
- “[O]rdered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(B)(i).
- Constitutes a danger to the community of the United States, given that the person was “convicted by a final judgment of a particularly serious crime.” *Id.* § 1231(b)(3)(B)(ii).
- Committed, it is believed, a “serious nonpolitical crime outside the United States” before arriving in the United States. *Id.* § 1231(b)(3)(B)(iii).

- Poses, it is reasonably believed, a “danger to the security of the United States.” *Id.* § 1231(b)(3)(B)(iv).
- Endorsed or espoused terrorist activity or persuaded others to support terrorist activity. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001), codified at 8 U.S.C. § 1182 (2006).

Individuals who are barred from relief via withholding of removal may also pursue a claim for deferral of removal under the Convention Against Torture, discussed *infra* § III.E.4.d.i.3.

### **i.2. Withholding of Removal Under FARRA, the Foreign Affairs Reform and Restructuring Act of 1998 (CAT Withholding)**

As discussed *supra* § III.E.4.b.ii, FARRA implemented the Convention Against Torture. Federal courts thus encounter the Convention Against Torture in situations in which an individual seeks relief following a final order of removal under Section 242 of the Immigration and Nationality Act, as authorized by Section 2242(d) of FARRA.

Section 2242(d) may only be used as a measure of last resort – it constitutes a form of relief for which applicants may apply only after all other forms of relief have been denied.

Moreover, although questions of law under the Convention Against Torture may be appealed, judicial review “shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the” Immigration and Nationality Act. 8 C.F.R. 208.18(e)(1).

#### **i.2.a. Overall Procedure**

The U.S. courts of appeals are “the sole and exclusive means” for review of any Convention Against Torture claim. 8 U.S.C. § 1252(a)(4) (codifying a provision in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231).<sup>82</sup> This appellate jurisdiction includes review of constitutional claims or questions of law. *Id.* § 1252(a)(2)(D).

What constitutes a question of law appropriate for review is unsettled in the circuits. *Cf. Jean-Pierre v. U.S. Att’y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007) (in decision treating meaning of “torture” as mixed question, writings that courts must “apply a legal definition to a set of undisputed or adjudicated historical facts”); *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir.) (declining to “stretch reason” to find a question of law, in what the court held to be a factual question), *cert. denied*, 555 U.S. 1031 (2008).

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<sup>82</sup> Codified in scattered sections of Title 8 of the U.S. Code, the 2005 REAL ID Act modified existing law regarding the standards for security, authentication, and issuance of drivers’ licenses and identification cards. The Act also addressed certain immigration issues pertaining to terrorism.

Individuals subject to removal who believe they will be tortured upon their return normally raise the Convention Against Torture during removal proceedings. The treaty can be invoked either explicitly, when the individual requests relief from an Immigration Judge, or implicitly, when the individual presents evidence indicating that the individual may be tortured in the country of removal. 8 C.F.R. § 208.13(c)(1). A *non-refoulement* claim under the Convention hinges on the definition of “torture.” The federal law implementing this treaty defines torture 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).

The burden of proof lies with the applicant for withholding of removal; the applicant must show that it is more likely than not, based on consideration of all evidence “relevant to the possibility of future torture,” that the applicant would be tortured if removed to the proposed country of removal. *Id.* § 208.16(c)(2)-(3). The pertinent federal regulation states that this burden can be met by the uncorroborated testimony of the applicant. *Id.* § 208.16(c)(2). At least one federal appellate court has held, however, that such testimony must offer “specific objective evidence” demonstrating that the applicant will be subject to torture. *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004).

On satisfying this burden, the applicant is entitled to protection under the Convention Against Torture, and withholding of removal must be granted, 8 C.F.R. § 208.16(d), unless one of the “mandatory denials,” as listed *supra* § III.E.4.d.i.1, applies. 8 C.F.R. § 208.16 (d)(2). In such case, applicants are eligible only for deferral of removal, as detailed *infra* § III.E.4.d.i.3.

### **i.2.b. Diplomatic Assurances**

During an immigration removal process involving a Convention Against Torture claim, the pertinent federal regulation permits the Secretary of State to intervene and forward to the Attorney General diplomatic assurances from the government of a specific country that “an alien would not be tortured there if the alien were removed to that country.” *Id.* § 208.18(c)(1). The Attorney General, in consultation with the Secretary of State, determines whether the assurances are “reliable.” *Id.* § 208.18(c)(2). If assurances are found to be reliable, the removal may proceed, and the alien’s claim for protection under the Convention Against Torture may not be considered further by an immigration judge, by the Board of Immigration Appeals, or by an asylum officer. *Id.* § 208.18(c)(3).

One court of appeals has ruled that this regulation does not preclude judicial review of removal based on diplomatic assurances. *Khouzam v. Att’y Gen. of the United States*, 549 F.3d 235 (3d Cir. 2008). It reasoned that an applicant must be afforded “an opportunity to test the reliability of diplomatic assurances” that a foreign state has made. *Id.* at 259.

### **i.3. Deferral of Removal Under the Foreign Affairs Reform and Restructuring Act of 1998**

Federal judges also may hear challenges to terminations of deferral-of-removal orders.

#### **i.3.a. Overview**

Under the Convention Against Torture, FARRA, and accompanying federal regulations, an alien who has been ordered removed but has met the burden of showing likelihood of torture on removal is entitled to protection under the Convention; specifically, to the mandatory accompanying remedy, deferral of removal. The alien remains subject to the mandatory categories for denial of withholding of removal, described *supra* § III.E.4.d.i.1. 8 C.F.R. § 1208.17(a).

A deferral may be terminated: either the Immigration and Customs Enforcement, or the original applicant, may file a motion to terminate in the immigration court that ordered the deferral of removal. *Id.* § 1208.17(d)(1) & (e)(1). When brought by Immigrations and Customs Enforcement, the motion should be supported by evidence – not presented at the previous hearing – relevant to the possibility that the alien would be tortured in the country to which removal has been deferred. *Id.* § 1208.17(d). The applicant bears the burden of showing that it is still more likely than not that the applicant will be tortured in the country to which removal has been deferred. *Id.* § 1208.17(d)(3). The judge should make a *de novo* determination. The hearing will have one of two results:

- Deferral will remain in place, or
- Having failed to meet the requisite burden, the applicant will be returned to the country at issue.

The applicant has a right to appeal the termination of deferral to the Board of Immigration Appeals. *Id.* § 1208.17(d)(4). The applicant also may appeal to the federal courts, although at least one court of appeals held that the determination by an immigration judge that a Convention Against Torture deferral of removal claim was not supported by substantial evidence is a factual determination “outside the jurisdictional purview” of the courts. *Bushati v. Gonzales*, 214 Fed. Appx. 556, 558-59 (6th Cir. 2007).

#### **i.3.b. Diplomatic Assurances**

As in the case of withholding of removal, discussed *supra* § III.E.4.d.i.2.b., a deferral of removal also may be terminated if the U.S. Secretary of State forwards adequate diplomatic assurances. 8 C.F.R. § 1208.17(f).

## ii. *Non-refoulement* in the Context of Extradition

Judges also may be asked to consider *non-refoulement* in the context of extradition. Extradition is the judicial process by which a foreign country requests the transfer of a fugitive who has been found in the United States, in order that the fugitive may face criminal proceedings in the requesting country. This process occurs pursuant to two sources of law:

- Federal statutes, found at 18 U.S.C. §§ 3184-3196 (2006), that detail procedures for extradition; and
- The treaty applicable between the specific requesting country and the United States.

A person may seek to block extradition from the United States by raising claims about what might happen following transfer to the requesting country. Typically federal courts will apply what is known as the rule of non-inquiry, and so decline to examine the procedures or treatment awaiting a person in another country. See *Ahmad v. Wigen*, 910 F.2d 1063, 1066-67 (2d Cir. 1990); John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. Rev. 1973 (2010).

In dicta, one court reserved a possible exception to the rule of non-inquiry, if there were proof that the procedures or punishments that a detainee might experience on surrender would be “so antipathetic to a federal court’s sense of decency as to require re-examination of the principle . . . .” *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). Despite the fact that a number of cases refer to this passage in *Gallina*, no authority exists for successfully invoking it to bar extradition. See *Cornejo-Barreto v. W.H. Siefert*, 379 F.3d 1075, 1088, *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004).

Should the person make the precise claim that he or she would suffer torture after transfer, that claim also invokes the *non-refoulement* provision of the Convention Against Torture, as discussed *supra* § III.E.4.b.ii. Pursuant to 22 C.F.R. § 95.2 (2012), the Secretary of State must consider whether a person is more likely than not to be tortured in the state requesting extradition when making the determination to extradite.

Whether the federal courts can review the determination of the Secretary of State is an open question. FARRA provides, in Section 2242(d), as reprinted in the notes following 8 U.S.C. § 1231 (2006):

Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252).

Moreover, although a 2005 statute has not yet been addressed by the Supreme Court, lower courts have also cited the REAL ID Act of 2005, codified at 8 U.S.C. § 1252(a)(4). This legislation, which was directed at streamlining review in immigration cases, provides in part:

Notwithstanding any other provision of law . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture . . . .

Writing for a unanimous Supreme Court in *Munaf v. Geren*, 553 U.S. 674, 703 n.6 (2008), Chief Justice John G. Roberts, Jr., acknowledged that “claims under the FARR Act may be limited to certain immigration proceedings.” The Court did not reach the question of whether FARRA prohibited petitioners’ transfer, holding that litigants had not properly raised that claim.

U.S. courts of appeals are divided on the issue of reviewing the likelihood of torture:

- The District of Columbia and the Fourth Circuits have held that the statute bars courts from reviewing *non-refoulement* claims made under the Convention and FARRA when extradition is at issue. See *Kiyemba v. Obama*, 561 F.3d 509, 514-15 (D.C. Cir. 2009) (in the context of detention), *cert. denied*, 559 U.S. 1005 (2010); *Mironescu v. Costner*, 480 F.3d 664, 673-77 (4th Cir. 2007), *cert. dismissed*, 552 U.S. 1135 (2008).
- The Ninth Circuit, sitting *en banc*, held that FARRA and the REAL ID Act do not affect federal habeas corpus jurisdiction over *non-refoulement* claims. *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (per curiam), *cert. denied*, 113 S. Ct. 845 (2013). The court further held: that the rule of non-inquiry has no impact on federal habeas jurisdiction; and, on the merits, that the Secretary of State must make the determination contemplated by 22 C.F.R. § 95.2. But once the Secretary demonstrates compliance with this obligation, the court wrote, no further review is available: “The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary’s declaration.” 683 F.3d at 957.
- The Third Circuit noted the possibility of Administrative Procedure Act review, but did not explicitly hold that it is available. *Hoxha v. Levi*, 465 F.3d 554, 565 (3d Cir. 2006).

### **iii. Non-Refoulement in Other Detention Contexts**

*Non-refoulement*, and particularly claims regarding torture under FARRA, may arise in a range of circumstances related to detention. In particular, individuals held in U.S. custody in the wake of the September 11, 2001, terrorist attacks have invoked *non-refoulement* in an effort to avoid being transferred to another state, including their state of nationality.

In the context of extradition, in 2008, the Supreme Court rejected a *habeas* claim brought by U.S. citizens detained by coalition forces in Iraq. *Munaf v. Geren*, 553 U.S. 674, 703 (2008). The Court based its ruling on grounds other than FARRA. To be precise, the Court concluded

that the detainees had failed to raise a proper claim for relief under that statute: “Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court.” *Munaf*, 553 U.S. at 703. Even if the claim properly had been raised, the Court wrote that it might have been barred on the grounds that: first, transferring someone already in Iraq to Iraq’s government might not qualify on the ground that “such an individual is not being ‘returned’ to ‘a country’”; and second, “claims under the FARR Act may be limited to certain immigration proceedings.” *Id.* at 702-03 n.6.

In 2010, the Supreme Court declined to hear the case of a Guantánamo detainee who claimed that if he were returned to his native Algeria, he would be tortured. *Naji v. Obama*, 131 S. Ct. 32 (2010) (Roberts, C.J., denying stay). The detainee reportedly was returned despite this contention. Peter Finn, “Guantanamo detainee Naji sent back to Algeria against his will,” *Wash. Post*, July 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/19/AR2010071904922.html>.

Two U.S. courts of appeals have given limited application to the FARR Act:

- The District of Columbia Circuits stated that “the FARR Act and the REAL ID Act do not give military transferees . . . a right to judicial review of their likely treatment in the receiving country.” *Omar v. McHugh*, 646 F.3d 13, 15 (D.C. Cir. 2011). Interpreting the plain language of Real ID Act (as quoted *supra* § III.E.4.d.ii.), the court concluded that “only immigration transferees have a right to judicial review of conditions in the receiving country, during a court’s review of a final order of removal.” *Id.* at 18.

The Fourth Circuit held that FARR Act allows claims only for immigration detainees facing removal. *Mironescu v. Costner*, 480 F.3d 664, 674-77 (4th Cir. 2007), *cert. denied*, 552 U.S. 1135 (2008).