

## Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk

The Trump Administration's November 9, 2018 order bars refugees who have not entered the United States at an official border crossing point from receiving asylum in the United States. This move violates U.S. law and treaty obligations and puts refugees with well-founded fears of persecution at risk of return to persecution.

This factsheet explains withholding of removal and U.N. Convention Against Torture (CAT) protection, why these very limited forms of protection from deportation are no substitute for asylum, and how the asylum ban violates U.S. law and treaty obligations.

### Asylum, Withholding of Removal, and U.N. Convention Against Torture Protection

Under U.S. immigration law, refugees who fear harm in their home country can request asylum as well as two other related forms of protection from an immigration judge: withholding of removal (INA § 241(b)(3)) or protection under the U.N. Convention Against Torture (8 C.F.R. §§ 208.16–208.18)—an international treaty banning torture, which the U.S. ratified in 1994.

- ☑ **Asylum:** To be granted asylum in the United States, an applicant must show that he or she meets the definition of a “refugee” under the Immigration and Nationality Act (INA) and that none of the bars to asylum in U.S. law apply. A refugee is defined as a person outside of his or her country who cannot return home because that person was persecuted or fears persecution because on account of his or her race, religion, nationality, political opinion, or membership in a particular social group. The U.S. Supreme Court has said that this fear may be well-founded where there is as little as a 10% chance of persecution.
- ☑ **Withholding of Removal:** This form of protection has stricter requirements than asylum. Withholding of removal protects only those refugees who can show that they would face a more than 50% chance of persecution on account of one of the protected grounds (race, religion, nationality, political opinion or group membership) if returned to their country. While some of the bars to asylum, such as the one-year-filing deadline, do not apply to withholding of removal claims, the standard to qualify is more stringent.
- ☑ **Convention Against Torture:** Protection from deportation under CAT is limited because it protects only people who fear torture—an even more severe harm than persecution. A person seeking CAT protection must establish a more than 50% chance that he or she would be tortured if returned to their home country. The applicant does not have to show the torture would be on account of a protected ground but must prove that government authorities would be responsible for the torture or would know about the torture and allow others to carry it out.

## With the Asylum Ban, Refugees with Well-Founded Fears of Persecution Might be Deported

Barring refugees from asylum places them at risk of deportation to persecution. A refugee subject to the ban who can establish a well-founded fear of persecution (the standard for asylum) but who cannot meet the stringent requirements for withholding of removal or CAT protection would not receive fear-based protection from deportation. For instance, an immigration judge who finds that a refugee subject to the president's order faces a one-in-three chance of persecution could not receive asylum and would not qualify for withholding or CAT protection. Yet, the United States joined the Refugee Protocol, and Congress adopted the Refugee Act, to ensure that refugees with well-founded fears of persecution would not be deported. Further, refugees who have suffered severe past persecution, including torture, will not qualify for protection under the ban unless they show that they fear future harm that is more likely than not to occur—a high standard that not all will be able to meet. Indeed, immigration courts grant withholding of removal and CAT protection in limited circumstances. In fiscal year 2016, the immigration courts granted only 6% of withholding applications and less than 5% of adjudicated CAT cases.

Those refugees granted withholding and CAT protection are left in long-term legal limbo. In fact, the immigration judge enters an order of removal but simultaneously freezes the deportation by granting withholding of removal or CAT protection. While the refugee cannot be returned to the country where the immigration judge has found he or she is more likely than not to be persecuted or tortured, the refugee has not been granted any immigration status. The government sometimes continues to detain these refugees and can try to remove them to another country.

## Withholding of Removal and U.N. Convention Against Torture Protection are Inadequate Substitutes for Asylum

Even the small number of refugees who might meet the high standard for withholding or CAT protection would be left unable to stabilize their stay through asylum, potentially subject to continued detention or removal to a third country, prevented from bringing children and spouses to safety in the U.S., and impeded in their ability to integrate due to barriers to education, secure employment, and other essential services.

### Family separation and danger

One of the most damaging consequences of extending only withholding of removal or CAT protection to refugees is the potential for permanent family separation. Because these limited forms of relief apply only to the applicant, refugees cannot include spouses and children under their applications. As a result, an immigration judge may grant protection to a refugee parent but order a child deported. Similarly, these refugees cannot petition to bring their children and spouses to safety in the United States as refugees granted asylum or resettled from other countries can. A refugee's children and spouse may be left stranded in dangerous or even life-threatening situations abroad. These refugees cannot even visit family abroad since neither withholding nor CAT protection entitles a refugee to a travel document. Restoring the unity of refugee families benefits not only refugees and their families, but also the United States. Refugees who are reunited with their families are in a better position to recover from their trauma, rebuild their lives, and contribute to their communities economically and socially.

### Barriers to education and work

As Human Rights First has documented, refugees extended only withholding of removal or CAT protection also face significant hurdles in pursuing education—as they do not qualify for federal-government student loans—and often face difficulties obtaining stable employment since their status is not a permanent one, and they have to regularly renew their work authorization.

## No stable and lasting legal status

The ability of these refugees to integrate into the community in the United States is further undermined because, unlike asylees, they are not allowed to file for lawful permanent resident status, which would provide them more stability in the United States and allow them to later apply for U.S. citizenship.

## Restricting Access to Asylum Violates U.S. Law and is Inconsistent with U.S. Obligations under International Law

The Immigration and Nationality Act specifically provides that any person physically present inside the United States or who arrives in the United States “whether or not at a designated port of arrival” may apply for asylum. The administration cannot rewrite law enacted by Congress by issuing regulations, executive orders, or proclamations.

As a party to the Protocol Relating to Status of Refugees, the United States bound itself to comply with the U.N. Refugee Convention. When Congress enacted the Refugee Act, its purpose was to ensure United States’ compliance with the Refugee Convention and Protocol. Article 31 of the Convention prohibits the United States from penalizing refugees for their illegal entry or presence, such as crossing into the country outside of an official border post. The Executive Committee of the UN High Commissioner for Refugees (UNHCR), of which the United States is a member, has made clear that asylum seekers “should not be penalized or exposed to any unfavorable treatment” due to their “unlawful” presence.

Article 28 of the Refugee Convention guarantees refugees access to a document for travel outside of the country of refuge. Article 34 also calls on signatories to facilitate the “assimilation” and “naturalization” of refugees. Finally, the UNHCR Executive Committee has repeatedly emphasized the importance of ensuring the unity of refugee families and has urged states to adopt legislation protecting family unity. In fact, Article 23 of the International Covenant on Civil and Political Rights (ICCPR)—to which the United States is party—provides that “[t]he family is the fundamental and natural group unit of society and is entitled to protection by society and the State.”

Yet, refugees granted only withholding of removal or CAT protection in the United States are not entitled to travel documents, cannot become U.S. permanent residents or naturalize, and cannot reunite with family members stranded abroad.

## A Way Forward

As Human Rights First and the Office of Inspector General for the Department of Justice have documented, U.S. policies restricting access to asylum at ports of entry push some refugees to cross the border between official entry points. Rather than block, prosecute, and penalize refugees seeking protection at the southern border, the United States should strengthen its capacity to process asylum requests, parole asylum seekers who meet the legal criteria for release under U.S. law, and launch case management programs and support for legal representation to assure asylum seekers appear in immigration court and for other immigration appointments.