INSTITUTE FOR THE ADVANCEMENT OF JUSTICE & HUMAN RIGHTS

ADVISORY OPINION

Third-Country Removal Without a Destination-Specific Determination

The 2025 DHS Guidance and the non-refoulement obligations of the United States

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> **Determination (§ 7.01).** The IAJ determines that the Guidance, in permitting the removal of a person to a third country without effective notice and a meaningful opportunity to present a destination-specific fear to a competent authority able to act before removal, fails to fulfill the non-refoulement obligations of the United States under the Convention against Torture, the Refugee Convention, and the International Covenant on Civil and Political Rights.

1. The question

Three treaties forbid the United States, each on its own conditions, to send a person to a place of danger: the Convention against Torture, as to torture; the International Covenant on Civil and Political Rights, as to torture, cruel, inhuman or degrading treatment or punishment (CIDT), and other irreparable harm; and the Refugee Convention, as to persecution, subject to the exceptions it states. As to torture and CIDT the prohibition admits no exception. On March 30 and July 9, 2025, the Department of Homeland Security issued guidance on the removal of persons with final orders of removal to countries that were not designated in their removal proceedings (the Guidance).[1] The question before the IAJ is whether the Guidance fulfills the non-refoulement obligations of the United States under those treaties: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention), Article 33 of the Convention Relating to the Status of Refugees as assumed through the 1967 Protocol (the Refugee Convention), and the Covenant.

The IAJ answers by applying its equivalence analysis: the five-step method set out in *The Completion of the Non-Self-Execution Analysis*, § 8.03. That method is the IAJ's own proposal. No court or treaty body has adopted it in this form, and it creates no jurisdiction, cause of action, or remedy. *Id.* §§ 8.01, 8.03, 8.07.

2. The measure under review

The Guidance applies to persons who have "no ongoing proceeding in which to raise" a claim to protection as to the newly selected country. J.A. 307 n.2. It does not address expedited removal under section 235(b)(1) of the Immigration and Nationality Act. J.A. 307 n.1, 310. It provides two tracks.

[1] The Guidance is reproduced in the Joint Appendix in *Department of Homeland Security* v. *D.V.D.*, No. 26-426 (U.S.), at 306-313 (J.A.). References to the Government's position are to the Brief for the Petitioners in that case (Pet. Br.).

The assurance track. Where the Department of State considers credible a country's general assurance that persons removed there will not be persecuted or tortured, "the alien may be removed without the need for further procedures." J.A. 307, 311. Immigration and Customs Enforcement (ICE) "will seek written confirmation from the Department of State that such diplomatic assurances were received and determined to be credible." J.A. 311.

The notice track. Where there is no such assurance, the person receives a notice naming the country, read in a language he or she understands, generally at least 24 hours before removal. In "exigent circumstances" removal may follow after as few as six hours, if the person "is provided reasonable means and opportunity to speak with an attorney" and the General Counsel of the Department, or in his absence the Principal Legal Advisor, approves. J.A. 311-312. Officers "will not affirmatively ask whether the alien is afraid of being removed to that country." J.A. 307, 311. A person who does not state a fear within 24 hours may be removed. J.A. 312. One who does is screened, generally within 24 hours and possibly remotely, under the ultimate "more likely than not" standard, and a person who fails the screening "will be removed." J.A. 308, 312. After a positive screening the matter is referred to the immigration court or, for a person previously in proceedings, to ICE. The March memorandum says that ICE counsel "may file a motion to reopen." J.A. 308-309. The July memorandum directs the removal office to alert ICE counsel "to file a motion to reopen." J.A. 312-313. Under both, a positive screening does not guarantee adjudication: "Alternatively, ICE may choose to designate another country for removal." J.A. 309, 313.

United Nations Special Procedures mandate-holders stated on September 28, 2026, that under third-country removal arrangements the United States "has already sent at least 23,000 third country nationals to 29 countries and territories." Press Release, Office of the U.N. High Comm'r for Hum. Rts., US Migration Externalization Scheme Mires Over 35 Other States, Triggering Cascade of Human Rights Violations Including Torture: Human Rights Experts (Sept. 28, 2026); see *State of Human Rights in the United States of America* 54. Those figures describe third-country transfers as a whole. They do not show how many removals used either track of the Guidance.

3. Scope

This Opinion examines the design of the Guidance. It does not determine that any particular person was denied a hearing or was exposed to torture, CIDT, or persecution. It does not address the jurisdiction of any court or the availability of classwide relief, which the IAJ has not examined. It does not question the authority of the United States to remove persons with final orders to third countries. Non-refoulement forbids removal to danger, not removal.

4. The equivalence analysis applied

Step 1. The obligation

Article 3(1) of the Convention forbids a State Party to "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." The obligation runs to "another State," which is any State, and so attaches afresh to each destination. It admits no exception. Convention art. 2(2); Comm. against Torture, General Comment No. 4, ¶ 9, U.N. Doc. CAT/C/GC/4 (2018) (GC 4). The Committee against Torture has called on the United States to ensure that no individual "who is expelled, returned, extradited or deported, is exposed to the danger of torture or other cruel, inhuman or degrading treatment or punishment." Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, ¶ 16, U.N. Doc. CAT/C/USA/CO/3-5 (2014) (2014 Concluding Observations). The obligation reaches onward removal: a person at risk "should never be deported to another State from which the person may subsequently face deportation to a third State" of danger. GC 4 ¶ 12.

Articles 6 and 7 of the Covenant forbid removal "where there are substantial grounds for believing that there is a real risk of irreparable harm," including torture and CIDT, "either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." Hum. Rts. Comm., General Comment No. 31, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). Article 33(1) of the Refugee Convention forbids return "in any manner whatsoever" to territories where life or freedom would be threatened on a protected ground, subject to the exceptions in Article 33(2).

The prohibition of torture is a peremptory norm of general international law. Int'l Law Comm'n, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), concl. 23 & annex (g), U.N. Doc. A/77/10 (2022). The IAJ's determination is that "the peremptory character extends across the whole continuum" of torture and other CIDT. *UNCAT and jus cogens: A contemporary perspective* 93 & n.180. The object of each obligation is prevention. A removal to danger cannot be undone.

Step 2. The route

The United States declared Articles 1 through 16 of the Convention not self-executing. Resolution of Advice and Consent to Ratification, decl. III(1), 136 Cong. Rec. S17,486-92 (daily ed. Oct. 27, 1990). Article 3 has domestic effect through the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-822 (FARRA), and its regulations. Article 33 of the Refugee Convention has domestic effect through 8 U.S.C. 1231(b)(3), which "parallels Article 33." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). The Covenant's substantive provisions were also declared not self-executing. For the removals covered by the Guidance, the IAJ has identified no separate procedure that assesses the full range of risks covered by the Covenant's non-refoulement obligation. In practice that obligation depends on the same two routes.

Step 3. The mechanism named

At ratification the United States named the mechanism that would perform Article 3: "the competent administrative authorities who make the determination whether to extradite, expel, or return." S. Exec. Rep. No. 101-30, at 17 (1990). Congress enacted that design in FARRA, which directs regulations "to implement the obligations of the United States under Article 3." § 2242(b). The regulations of 1999 built it: an individual determination, by an identified decision-maker, of whether torture is more likely than not in "the proposed country of removal," on "all evidence relevant to the possibility of future torture." 8 C.F.R. 208.16(c)(2)-(3); see *id.* 208.16-208.18, 1208.16-1208.18. The IAJ has described the 1990 statement, the 1998 statute, and the 1999 regulations as "one continuous design." *The Completion of the Non-Self-Execution Analysis* § 2.04. This is the equivalence representation applied to removal: the United States would perform Article 3 through an individual administrative determination made before the person is sent. Under the regulations that determination belongs to an immigration judge, with review by the Board of Immigration Appeals. Under the Guidance, the authority able to prevent a removal in time is the Department of Homeland Security itself, which designates the country, schedules the removal, conducts the screening, and decides whether to seek reopening. An immigration judge, the Board, or a reviewing court may order a stay where the applicable procedure permits, but a pending motion to reopen or petition for review ordinarily does not by itself secure one. 8 C.F.R. 1003.2(f), 1003.23(b)(1)(v); 8 U.S.C. 1252(b)(3)(B). The equivalence question is whether the person can obtain an effective decision in time.

Step 4. The test of equivalence

The IAJ tests the named mechanism on three conditions and four dimensions. *Id.* §§ 8.04, 8.05.

Present. The mechanism exists in law. The regulations make no exception for third countries.

Applied. On the assurance track it is not applied to anyone. On the notice track it is applied only to a person who, unasked, states a fear within hours, and then only as a screening under the ultimate

standard of proof, with no review by an immigration judge of a negative result. On the ordinary timeline the person has about 24 hours from learning the destination. On the exigent timeline the person has as few as six, with an opportunity to speak with an attorney and the approval of a senior Department lawyer. Neither addition supplies time to gather evidence about a country named that day, and approval by the department carrying out the removal is not a determination of risk. The Government's position is that the statutes and regulations set forth no "specific procedures for third-country removals at all." Pet. Br. 14.

Systemically possible. The persons affected are those for whom the destination was never examined. For that class the Guidance removes the determination by policy. No diligence by the individual can restore it on the assurance track.

Legal reach. The regulations reach every "proposed country of removal." The Guidance withdraws that reach for the destinations where the risk is newest and least examined. A general assurance about treatment inside the receiving country does not reach onward removal at all.

Institutional operation. The regulations provide for assurances "from the government of a specific country that an alien would not be tortured there." 8 C.F.R. 208.18(c)(1). When the Secretary of State forwards such assurances, the Attorney General "shall determine" whether they are "sufficiently reliable to allow the alien's removal to that country consistent with Article 3." *Id.* 208.18(c)(2). Under the Guidance, a general judgment by the Department of State that a government's promise about all removed persons is credible is used to dispense with further process. That judgment is not a determination about any person, and it cannot substitute for the individual determination. No institution performs the individual function.

Timely prevention. Removal may precede any determination. A petition for review "does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. 1252(b)(3)(B). The IAJ has determined that a preventive treaty framework "is not satisfied by … remedies that depend for their operation on the harm having already occurred." *Quia Timet and the Prevention of Threatened Torture and Cruel, Inhuman or Degrading Treatment by Domestic Authorities* § 3.02. That holds with greater force for Article 3, whose only office is prevention. The Guidance itself anticipates that motions may be pending when removal takes place: officers "should check all systems for motions as close in time as possible to removal." J.A. 312.

Individual accessibility. The person is in custody, is told of the destination hours before departure, is not asked whether he or she fears it, and often has no counsel. Access depends on the person knowing, without being told, that a fear of the new country is legally relevant. The Government answers that affirmative questioning invites false claims, J.A. 307-308, and that persons with final orders are "familiar with those modes of protection," Pet. Br. 44. Familiarity with the procedure supplies no information about a destination first disclosed hours before departure.

Parity of outcome. The measure is what Article 3 would require if it operated of itself. The Committee against Torture states that "[e]ach case should be examined individually," that the person "should be informed of the intended deportation in a timely manner," and that removal "without an objective examination of the individual cases with regard to personal risk" violates non-refoulement. GC 4 ¶ 13. Review must be available "prior to expulsion, in order to avoid irreparable harm." *Alzery* v. *Sweden*, Comm. No. 1416/2005, ¶ 11.8, U.N. Doc. CCPR/C/88/D/1416/2005 (Hum. Rts. Comm. 2006); see *Agiza* v. *Sweden*, Comm. No. 233/2003, ¶ 13.7, U.N. Doc. CAT/C/34/D/233/2003 (Comm. against Torture 2005). The Guidance does not deliver that outcome. On the assurance track the mechanism is bypassed. On the notice track it can be foreclosed. Equivalence fails.

Step 5. The consequence

On the plane of international obligation, non-self-execution "has failed to route performance to an effective domestic mechanism; it has not extinguished the obligation." *The Completion of the Non-Self-Execution Analysis* § 8.06. The obligation remains, and responsibility for performing it rests with every institution competent to act. On the domestic plane, this conclusion does not make the Convention self-executing or create a claim. *Id.* § 8.07. Its domestic consequence is interpretive: FARRA, Section 1231(b)(3), and the regulations are to be read, where their text permits, so that the United States is not placed in breach. *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). "The represented execution architecture must not be construed unnecessarily narrowly in a way that turns the assurance of equivalence into impunity." *The Completion of the Non-Self-Execution Analysis* § 8.07.

5. Assurances are tested by performance

The assurance track rests on a proposition: that a government's general promise is enough. The record of the Convention does not support it.

The United States has itself given such an assurance. It told the Committee against Torture: "Torture is prohibited by law throughout the United States. … Every act constituting torture under the Convention constitutes a criminal offence under the law of the United States." Initial Report of the United States of America, ¶ 6, U.N. Doc. CAT/C/28/Add.5 (2000). The Committee did not accept that statement at face value. It tested it against performance. "Notwithstanding the State party's statement," it recorded that it "regrets that the specific offence of torture has not yet been introduced at the federal level," and it expressed "concern over the ongoing failure … to fully investigate allegations of torture and ill-treatment of suspects held in United States custody abroad." 2014 Concluding Observations ¶¶ 9, 12. A federal offense of torture exists, but it reaches only torture committed "outside the United States." 18 U.S.C. 2340A(a). The Committee's concern was the absence of an offense "in full conformity with article 1 of the Convention." 2014 Concluding Observations ¶ 9. On assurances received by the United States from other governments, it "remains disturbed by reports … that some former Guantanamo Bay detainees have experienced abuse during post-release treatment," and it urged the United States "to refrain from seeking and relying on diplomatic assurances" where there are substantial grounds for believing a person would be in danger of torture. *Id.* ¶ 16.

The principle is the one the equivalence analysis applies throughout. A representation by a State, whether made by a foreign government to the United States or by the United States to the Committee, is evidence. It is not performance. It is measured by whether the mechanism behind it works for the person concerned. The treaty bodies have found assurances about a named individual insufficient where they "provided no mechanism for their enforcement." *Agiza* ¶ 13.4; see *Alzery* ¶ 11.5. A country-wide assurance, unmonitored and addressed to no one in particular, is weaker still.

The regulation on which the assurance track relies has a precondition. An assurance ends consideration of "the alien's claim" only after the Attorney General has determined, on assurances forwarded by the Secretary of State, that it is sufficiently reliable to allow that person's removal consistent with Article 3. 8 C.F.R. 208.18(c)(2)-(3). The Guidance omits that determination. The Third Circuit has held that, where the Government relied on assurances to terminate a deferral of removal already granted, due process required "an opportunity to present, before a neutral and impartial decisionmaker, evidence and arguments challenging the reliability of diplomatic assurances." *Khouzam* v. *Attorney General*, 549 F.3d 235, 259-260 (3d Cir. 2008). An assurance may be evidence in the individual determination. It cannot replace it.

6. Residual-gap determination

As *The Completion of the Non-Self-Execution Analysis* § 8.05B requires, the IAJ records:

Duty not delivered. Assessment of the risk in the actual destination, including the risk of onward removal, before the person is removed.

Mechanism and manner of failure. The individual determination under 8 C.F.R. 208.16-208.18 and 1208.16-1208.18, and the decision 8 U.S.C. 1231(b)(3) contemplates. It is bypassed on the assurance track and can be foreclosed on the notice track.

Character of the failure. The IAJ distinguishes three kinds. On the assurance track the failure is built into the policy. On the notice track there is a risk of foreclosure in operation, which is structural. As to failure in an individual case, this Opinion makes no finding. The court of appeals recorded the account of one named plaintiff, granted withholding of removal as to Guatemala, removed to Mexico, and deported by Mexico to Guatemala, as an example of onward removal. J.A. 5-6 & n.2.

Institutions able to correct it. The Department of Homeland Security, which controls the designation of the country and the timing of removal; the Attorney General and the Secretary of State, to whom the regulations assign the assessment of assurances; Congress; and the courts within their jurisdiction.

Residual obligation. The United States remains bound by Article 3 of the Convention, Articles 6 and 7 of the Covenant, and Article 33 of the Refugee Convention, and remains responsible for each removal carried out in breach of them. Two treaty-body complaint procedures are unavailable to the person concerned: the United States has not accepted the competence of the Committee against Torture to receive individual communications under Article 22 of the Convention, and it is not a party to the Covenant's First Optional Protocol.

Measures required. Those in Part 8, and continued documentation and reporting by the IAJ to the treaty bodies until equivalent performance is shown.

7. Determination

> **7.01** The IAJ determines that the Guidance, in permitting the removal of a person to a third country without effective notice and a meaningful opportunity to present a destination-specific fear to a competent authority able to act before removal, fails to fulfill the non-refoulement obligations of the United States under the Convention against Torture, the Refugee Convention, and the International Covenant on Civil and Political Rights.

7.02 Relation to the IAJ's earlier determination. The IAJ has determined that removal of a person where there are substantial grounds for believing he or she would be in danger of torture, or where there is a real risk of irreparable harm, "breaches a peremptory norm," and has graded it Grave "whatever the domestic legal characterization of the removals." *State of Human Rights in the United States of America* 31 (Determination 8). That determination concerns removal where the danger exists. The present determination is distinct. It concerns the process: whether the United States provides a procedure capable of identifying that danger and preventing the transfer in time. It does not depend on showing that any particular person removed under the Guidance faced that danger. A process that cannot identify the danger is one under which the breach described in Determination 8 can occur undetected.

8. What performance requires

Domestic requirements

The court of appeals held that the governing statutes and regulations require effective notice and a meaningful opportunity to present a fear claim before removal to a third country: under Section 1231(b)(3) and its regulations as to fear of persecution, for persons eligible for statutory withholding, and under FARRA

and its regulations as to fear of torture. J.A. 37-42. The IAJ concludes that the law of the United States already requires:

- Notice of the destination, in a language the person understands, in time to act on it.
- A meaningful opportunity to present a fear of that destination, and an individual determination by the competent authority before removal. 8 C.F.R. 208.16(c)(2)-(3), 208.17(b)(2). That the determination must also reach the risk of onward removal is the IAJ's application of those standards.
- Where assurances forwarded by the Secretary of State are relied on, a determination by the Attorney General of their reliability for that person's removal. 8 C.F.R. 208.18(c)(2).

Khouzam addressed the termination of an existing deferral of removal under the Convention, and it rests on the Due Process Clause, not on the regulation. The IAJ concludes that the same due-process reasoning applies when the Department of Homeland Security relies on diplomatic assurances to remove a person to a newly designated country without a meaningful opportunity to challenge their reliability. In both settings an assurance is used to end consideration of the person's risk, and the reliability of that assurance for that person is the fact on which the removal depends.

International safeguards the IAJ concludes are required

- Individual, impartial, and independent examination of each case, with timely information to the person concerned. GC 4 ¶ 13.
- Review of the decision by an independent body before removal, with suspensive effect. GC 4 ¶¶ 13, 18(e); *Agiza* ¶ 13.7; *Alzery* ¶ 11.8.
- Where a State relies on assurances, "adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards." Hum. Rts. Comm., General Comment No. 36, ¶ 30, U.N. Doc. CCPR/C/GC/36 (2019). Assurances "should not be used as a loophole to undermine the principle of non-refoulement." GC 4 ¶ 20.

Recommended implementation measures

- That officers ask each person whether he or she fears removal to the named country, and explain how to raise that fear.
- Review of a negative screening by an immigration judge, with removal stayed until the determination and any review are complete.
- Where an assurance is relied on: a written determination of its reliability for the individual, an opportunity for the person to contest it before a neutral decision-maker, and monitoring of each person removed in reliance on it.

The IAJ has recommended that the United States "[h]alt third-country expulsions without individualized assessment and judicial review." *State of Human Rights in the United States of America* 96. It repeats that recommendation.

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