

# Refugee Definition and Persecution

RAIO Training

1



# Agenda for Today

## 4 SiMPLe Components of the Legal Definition of Persecution

### Seriousness

Why does this component matter?

Harm must be sufficiently serious to rise to the level of persecution- not mere harassment or discrimination.

What was the harm?

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Ask yourself:

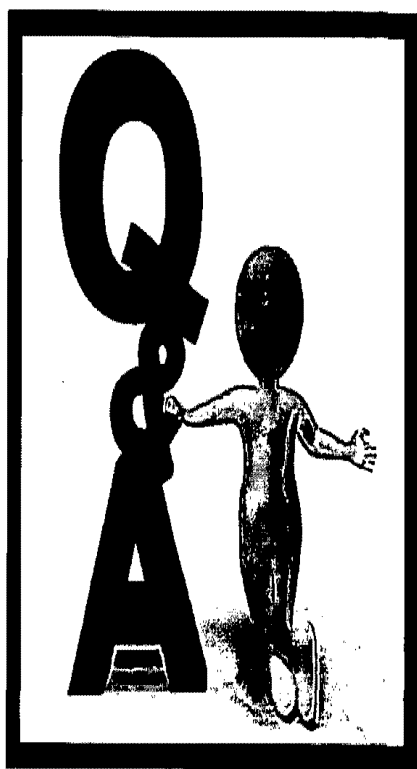
Cumulatively and taking into consideration the applicant's individual circumstances, was the harm suffered serious enough to rise to the level of persecution?

Yes  No

### Motivation



# Agenda for Today



❖ Type answer into Q and A box

# Definition of Refugee



[www.google.com](http://www.google.com)

**Search: Refugee vs.  
Migrant**



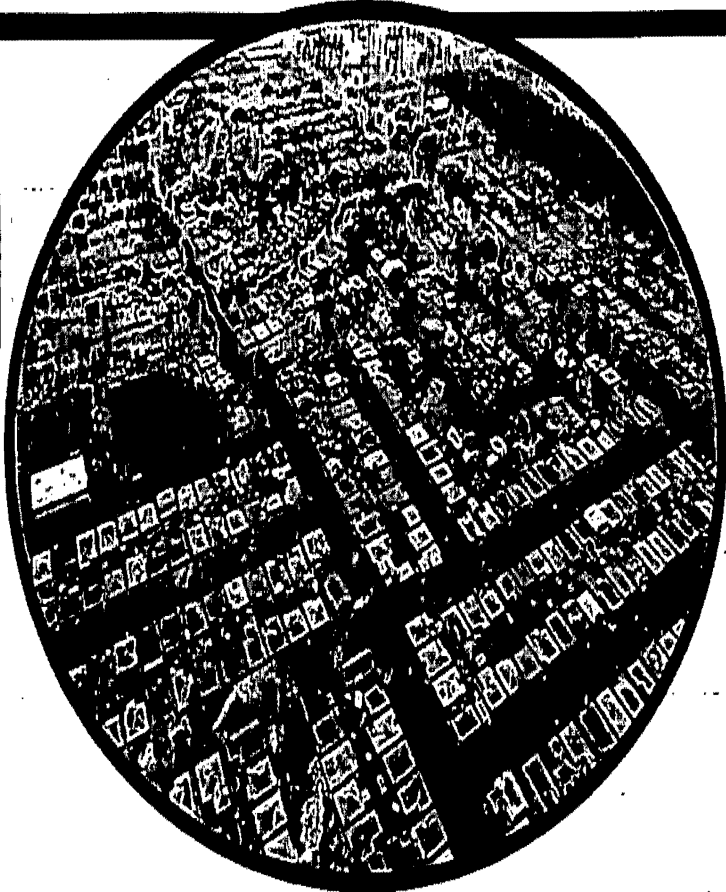
# Definition of Refugee



Compare Search terms ▾

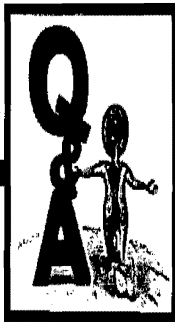
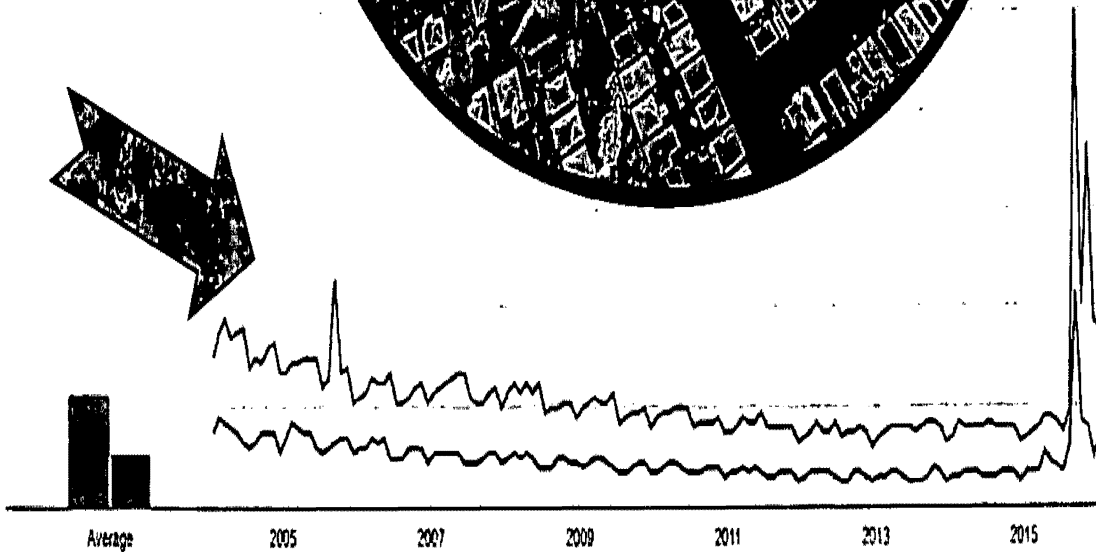
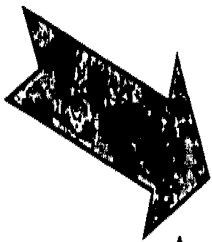
refugee  
Search term

migrant  
Search term



Interest over time ⓘ

Forecast ⓘ



What event caused this spike in searches for "refugee" in Sept. 2005 ?

# Definition of Refugee



# 1951 Convention Definition

- As a result of events occurring before 1 January 1951
- and owing to a well-founded fear of being persecuted
- for reasons of race, religion, nationality, membership of a particular social group or political opinion
- is outside the country of his nationality
- and is unable, or owing to such fear is unwilling to avail himself of the protection of that country



# 1951 Convention Definition

- States may interpret “events after 1 January 1951” to apply only in Europe



# 1967 Protocol

Removed the time and geographic limitations from Article 1

Incorporated articles 2 to 34 of Convention into Protocol



# U.S. Definition



## INA § 101(a)(42)

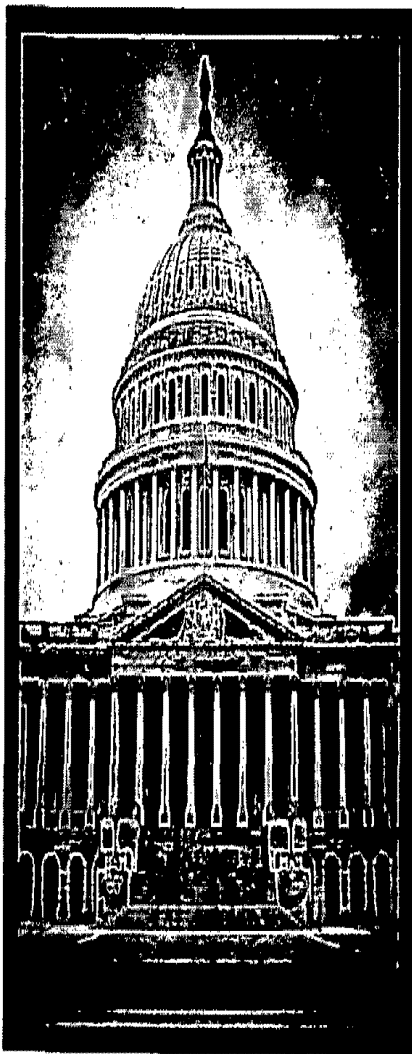
Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

# Plain Language Version

Any person who:

- ✓ is outside his or her country of nationality or, if stateless, his or her country of last habitual residence
- ✓ is unable or unwilling to return
- ✓ because of persecution or a well-founded fear of persecution
- ✓ on account of
- ✓ race, religion, nationality, membership in a particular social group or political opinion.

# US Additions to Refugee Definition



- Past Persecution
- Location
- Coercive  
Population Control
- Persecution of  
Others Bar

# Coercive Population Control

1. A person who has been forced to:
  - ✓ abort a pregnancy
  - ✓ undergo involuntary sterilization
  
2. A person who has been persecuted for:
  - ✓ failure or refusal to undergo such a procedure
  - ✓ for other resistance to a coercive population control program

Shall be deemed to have been persecuted on account of ?

# Coercive Population Control

1. A person who has been forced to:

- ✓ abort a pregnancy
- ✓ undergo involuntary sterilization

2. A person who has been persecuted for:

- ✓ failure or refusal to undergo such a procedure
- ✓ for other resistance to a coercive population control program

Shall be deemed to have been persecuted on account of **political opinion**.

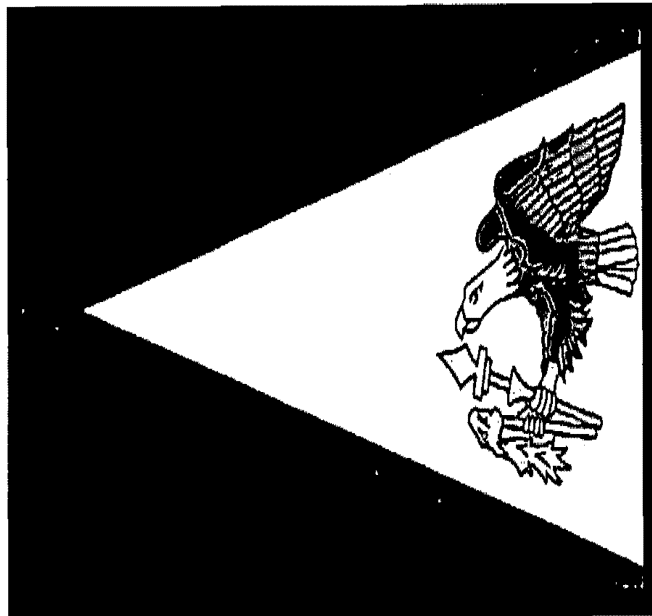
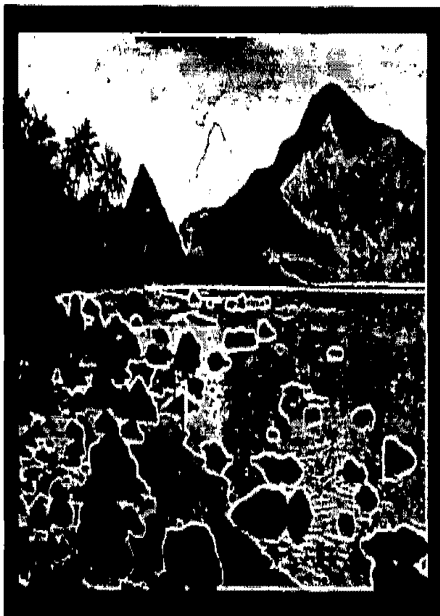


# Nationality

particular persecution  
 herself  
 INA § 101(a)(42) Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided...  
 group  
 founded well  
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 or  
 person's  
 a particular social group or political opinion.  
 account INA § 101(a)(42): "...on account of race, religion, nationality, membership in  
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 fear  
 avian  
 political  
 opinion

# Definition of "National" INA 101(a)(21)

"The term 'national' means a person owing a permanent allegiance to a state."

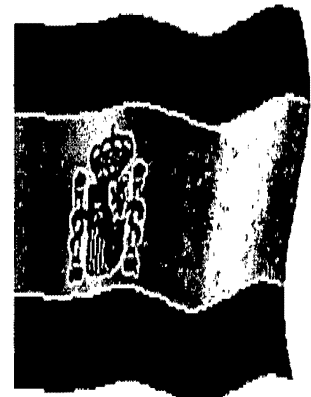


# Matter of B-R-

26 I&N Dec 119 (BIA, May 3, 2013)



- o On appeal **Applicant** did not contest that he **was a native and citizen of Venezuela and a citizen of Spain** by virtue of his father's Spanish citizenship.
- o **Applicant argued** that he **only** needed to show a well-founded fear in **Venezuela**.
- o **BIA held** that refugee definition requires that applicant have a fear of persecution in **each country of citizenship or nationality**.



# North Koreans



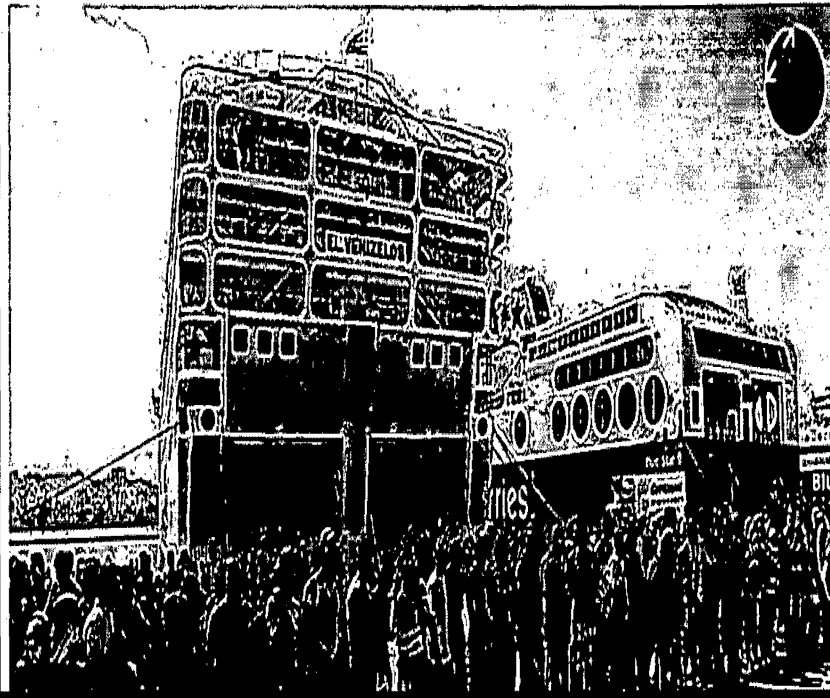
- o Even though **North Koreans** might be entitled to South Korean citizenship do **not** treat as a **dual national unless** the individual already availed himself or herself of the rights of citizenship in South Korea



# Concern over burgeoning trade in fake and stolen Syrian passports

Preferential treatment Syrians receive in Germany and Sweden has turned their passports into desired documents

Det  
Pas



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When Mohamed paid an Afghan smuggler several hundred euros to drive him and his friends from Thessaloniki to the Greek-Macedonian border in July, he thought the money was all the smuggler would want. Instead, once on road the driver feigned a problem with the engine and persuaded the Syrians to leave the car on the pretext of avoiding detection by the police. "And then he stole our passports," said Mohamed.

Mohamed and his friends are the latest victims of a burgeoning trade in Syrian identity documents. Though most European nations have been slow to welcome more than a few Syrian refugees, the well-known preferential treatment Syrians receive within the German and Swedish asylum system has turned their passports into desired accessories for other immigrants who otherwise would not be likely qualify as refugees.

The head of the European border agency, Frontex, said this week that Arabs from outside Syria were buying counterfeit Syrian passports. Fabrice Leggeri told a French television channel that the appeal to buyers lay in how "they know Syrians get the right to asylum in all the member states of the European Union".

- o Firm Resettlement

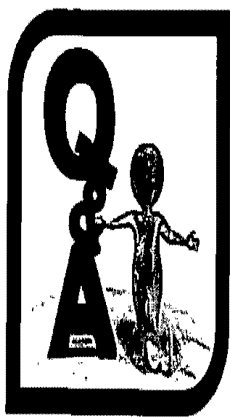
- o Citizenship

**Permanent residence** in a country does not necessarily confer citizenship. But firm resettlement bar may apply.

**Citizenship** requires applicant to demonstrate persecution or well-founded fear.

# Statelessness

- Definition – “a person who is **not considered a national by any State** under the operation of its law.” – Convention on Status of Stateless Persons
- Contrast with US definition of national – person owing a **permanent allegiance** to a State.



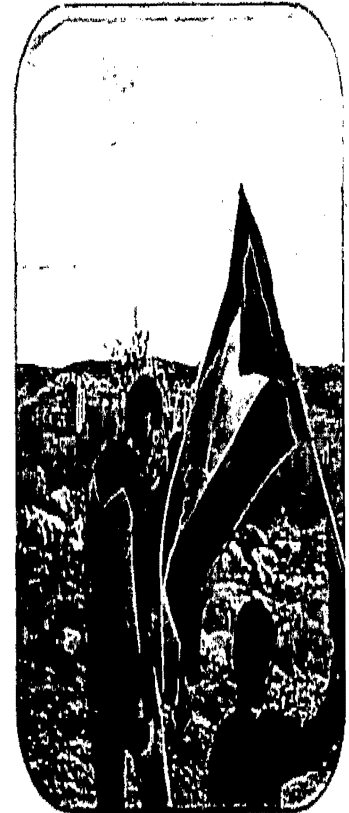
Approximately how many people worldwide are stateless?

# Statelessness



Approximately how many people worldwide are stateless?

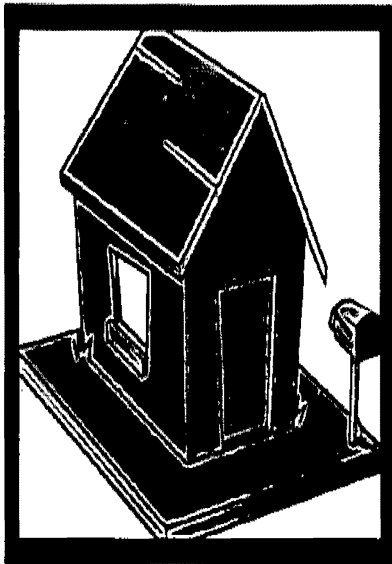
UNHCR cannot provide definitive statistics on the number of stateless people around the world, but we estimate that **the total was up to at least 10 million.** That included 3.5 million in the 64 countries for which there were reliable statistics.





# "Last Habitual Residence"

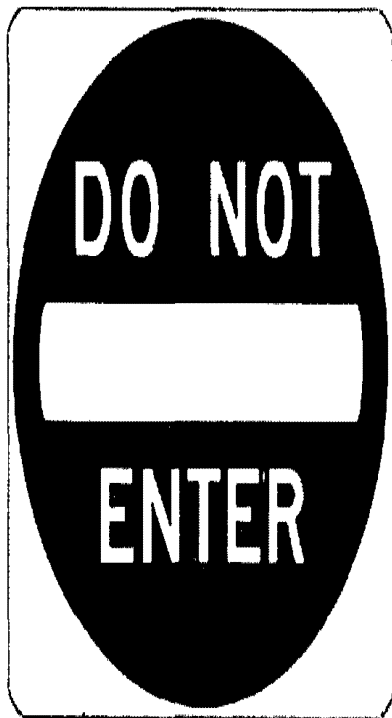
## Place of General Abode



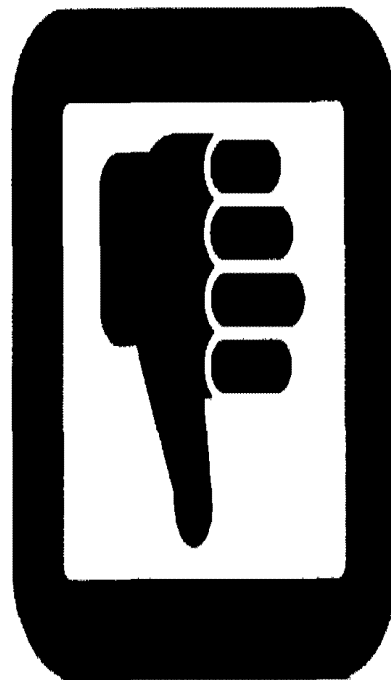
- **Principal, actual, dwelling place** in fact, without regard to intent
- Length of **time** can be a factor (*Paripovic v. Gonzales*)
- Can habitually reside somewhere even though **not** firmly resettled
- There is **only one country of last habitual residence** in your adjudication of a claim

# Unable or Unwilling to Return

**Unable**



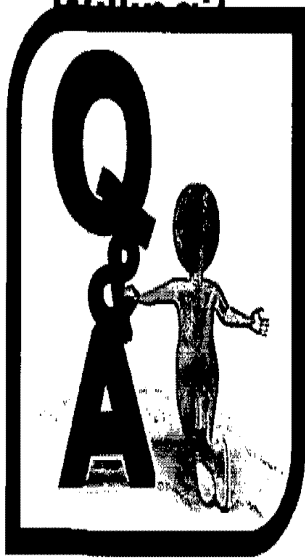
**Unwilling**



# Return to Home Country

o Able and

unwilling



Consider –

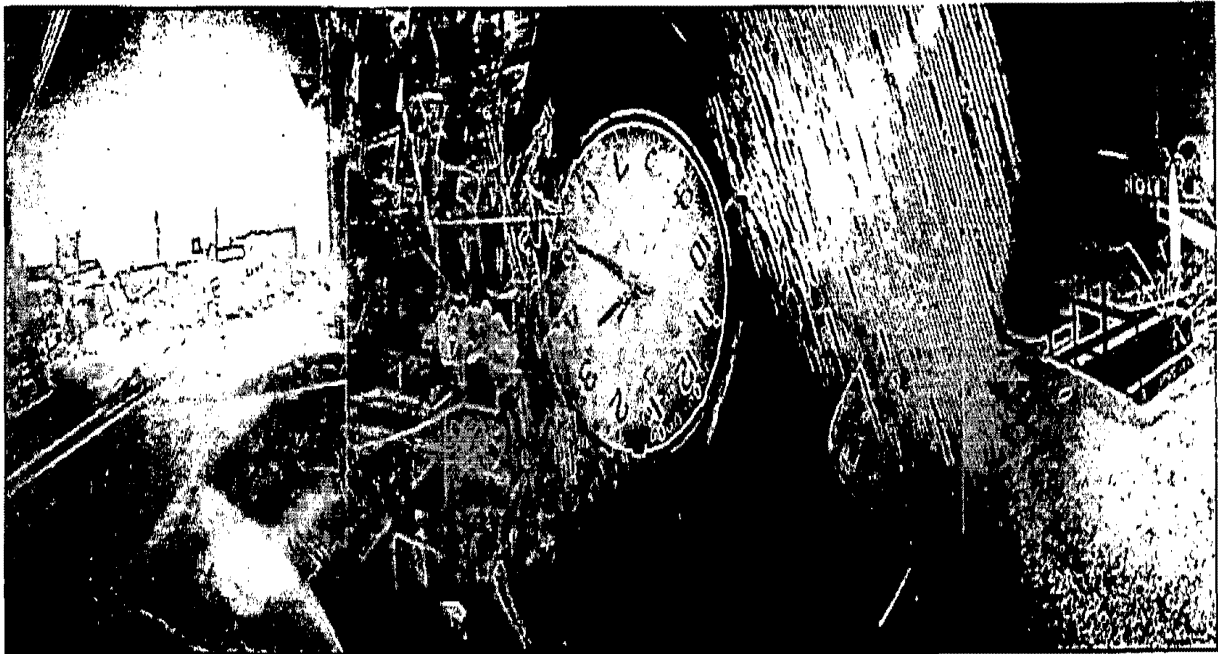
If the applicant has **left and then**

1. **returned** to his or her home country, does this return **automatically** mean the applicant does **not** meet the part of the **refugee definition** that requires an applicant to be **unwilling or unable to return?**
2. **What happened to applicant, if anything**
3. **Reasons for return**
4. **Precautions taken upon return**

# Unable or Unwilling to Avail Oneself of Protection of Home Country

- Usually refugee request or asylum application alone is proof of being unable or unwilling

# Persecution - Term of Art



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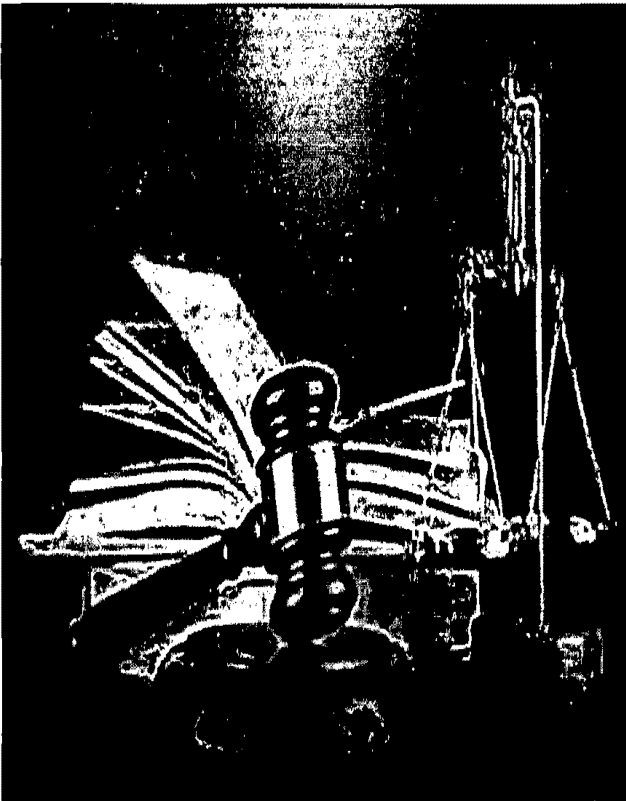
# Oxford English Dictionary

## *persecute*, v

**trans.** To seek out and subject (a person, group, organization, etc.) to hostility or ill-treatment, esp. on grounds of religious faith, political belief, race, etc.; to torment; to oppress

**Etymology** – from classical Latin *persequi* to seek out, to pursue, to follow with hostility or malignity, **to harass**, to chase, hunt, to examine, follow up, to go through with or persist in . . .

# Legal Definition



## Four Components

- Seriousness
- Motivation
- Persecutor
- Location

# A Mnemonic Device – “Simple”

**S** *i* **M** **P** **L** *e*

Seriousness

Motivation

Persecutor

Location



# Seriousness



# Motivation

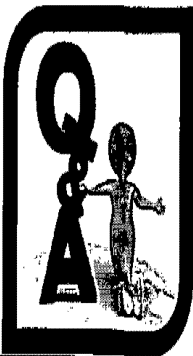


**What must be motivating the persecutor?**

# Mixed Motivation

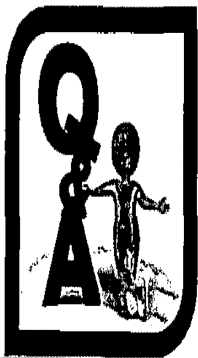
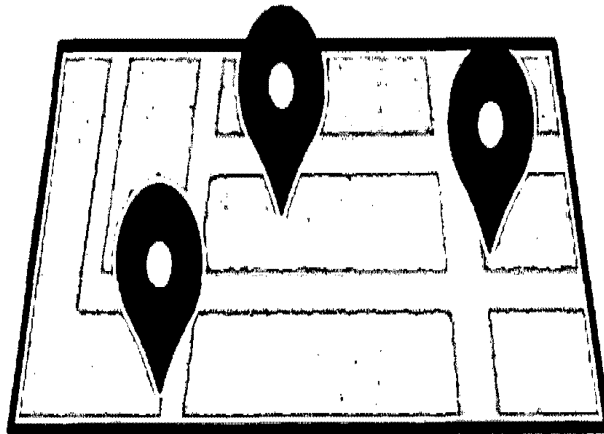


# Persecutors



Who must the persecutor be?

# Location



**Where must the harm be suffered or feared?**

# Practical Exercise

- More than a decade ago, Akbar Gholami, 42, was imprisoned for 45 days in his native Iran for his political activities on behalf of Kurdish rights. Mr. Gholami has been living in Athens since 2004.
- <https://www.youtube.com/watch?v=r24q2W5yW28&index=12&list=PLD11D1DD6D2DF49F9>

# Practical Exercise

- **S** – 45 day detention, beatings with heavy stick leading to a broken rib, broken skull and cut finger, psychological harm from being held in a colorless room, placed in coffin (implied death threat)
- **M** – not explicit but he states he's a member of a democratic political party. I've given it to you in the description that he was imprisoned on account of his political activities on behalf of Kurdish rights. **Nexus: Political opinion**
- **P** – Iranian government
- **L** – Iran (place of nationality)



# Practical Exercise

Any person who:

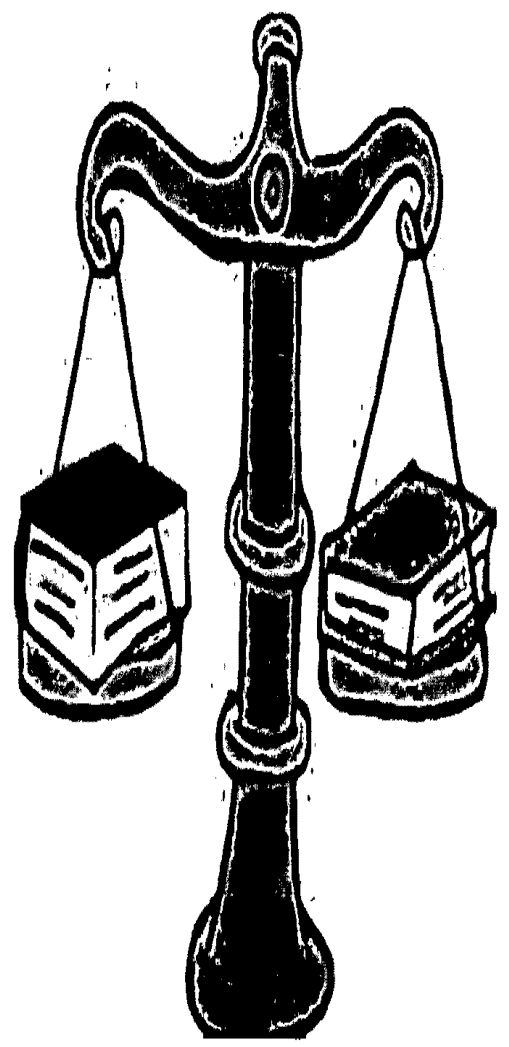
- ✓ is outside his or her country of nationality or, if stateless, his or her country of last habitual residence
- ✓ is unable or unwilling to return
- ✓ because of persecution or a well-founded fear of persecution
- ✓ on account of
- ✓ race, religion, nationality, membership in a particular social group or political opinion.



# Definition of Persecution

Not defined in statute: INA

Not defined in regulations:  
8 CFR



**Where do we find the  
definition of persecution?**

# Definition of Persecution

- Supreme Court
- Federal Appellate Court Decisions
- Board of Immigration (BIA) Appeals Decisions
- Agency Guidance
- UNHCR Handbook

**Matter of Acosta** – “harm or suffering inflicted in order to

**punish** an individual for possessing a belief or characteristic.”

# No Intent to Harm Needed

- *Kasinga* – FGM – punitive or malignant intent not required
- *Pitcherskaia* – Electroshock treatments

**“Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as ‘curing’ or ‘treating’ the victims.”**

# A sampling

- A threat to life or freedom or other serious violation of human rights (*UNHCR Handbook*).
- "Infliction of harm or suffering upon those who differ in a way regarded as offensive" (9th Cir., *Kovac*)
- "The use of significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force, or nonphysical harm of equal gravity" (7th Cir., *Stanojkova*)

# No Set Number of Acts or Incidents Needed

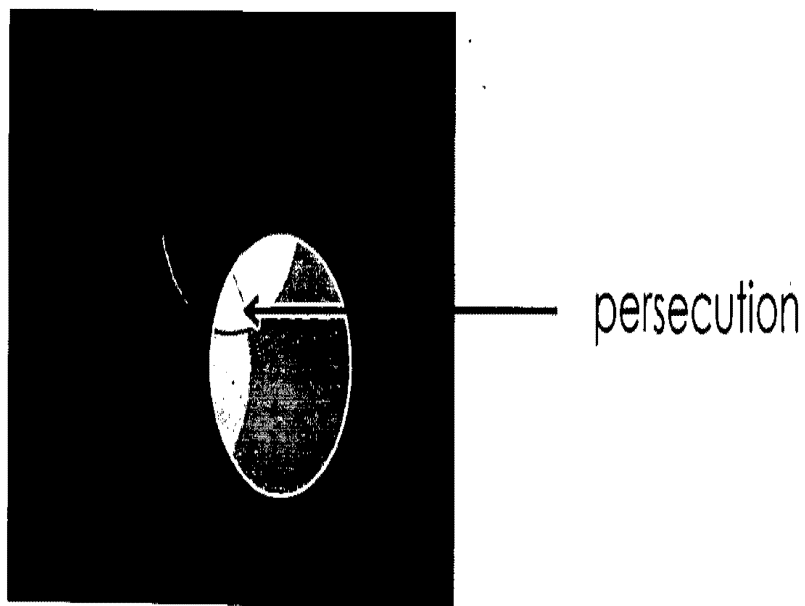
- o **One** act alone may be enough



# Cumulative Effect

- Acts which separately  $\neq$  persecution, cumulatively may = persecution

(UNHCR Handbook and *Matter of O-Z- & I-Z-*)



# Non-Physical Harm Can Amount to Persecution

- Severe economic disadvantage
- Deprivation of essentials of life, such as
  - Liberty
  - Food
  - Housing
  - Employment
- Psychological harm
- Inability to practice religion

# Economic Harm=Persecution if

- Deliberately imposed
- Severe
- Economic disadvantage or deprivation of essentials of life
- Factors considered in *Matter of T-Z-*, included:
  - Loss of housing
  - Loss of health benefits
  - Loss of food rations
  - Confiscation of property



# Psychological Harm

- Alone, may amount to persecution
- Look at psychological characteristics of applicant
- Age and past trauma suffered are relevant

# Examples of mental harm amounting to torture – if caused by

- Infliction or threatened infliction of severe physical pain
- Administration or threatened administration of mind altering substances
- Threat of imminent death (e.g. mock execution = torture)
- Threat that another person will be subjected to death or physical pain or suffering / mind altering substances

# Harm to a Third Person

- Harm to a third party may be intended to harm applicant emotionally
- Look to intent of persecutor

<https://www.youtube.com/watch?v=6vgVfqSHqQ>



**What was the harm suffered?**

# Threats Alone

To Determine if a Threat or Threats Rise to Level of Persecution, ask about:

- Nature of threat
- Attempts to act on threat
- Attempts to harm in other ways
- Harm to family or others similarly situated
- Emotional harm suffered from threats

## Example

"Notice - In 48 hours all Jewish men and women must wear on the left side of their chest the Jewish star (two superimposed triangles) made of yellow cloth, each side to be 6 cm. long. Only those who don the military uniform in the service of the army are exempt./Those who are not in compliance after this date will be arrested and turned over to the police and the military command./ July 4, 1941/Police chief/Sub-inspector I. Cuptor."

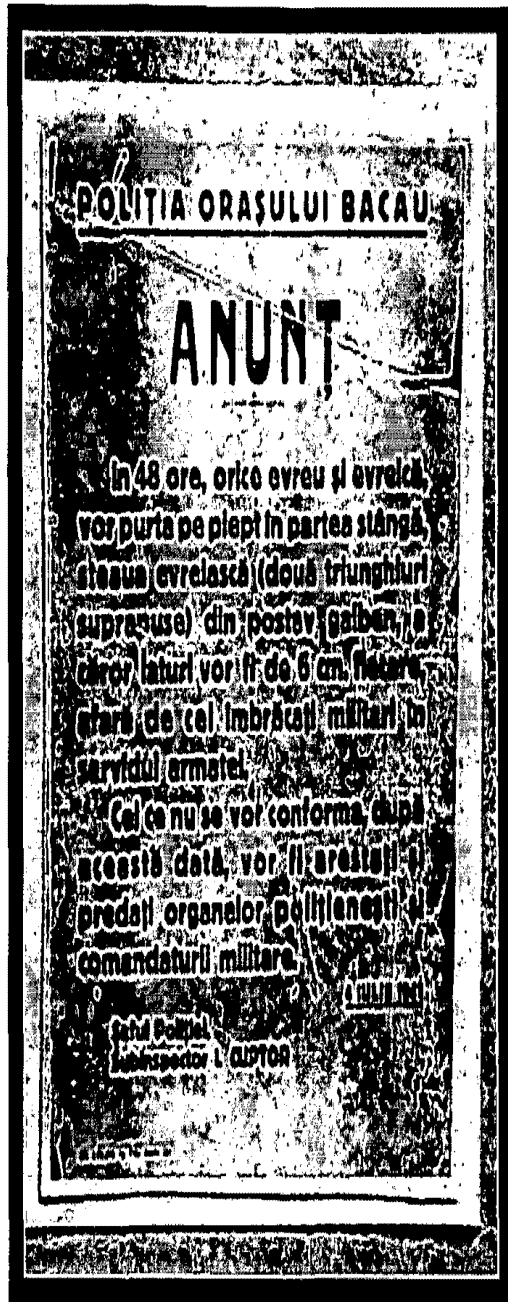


Photo Credit: US Holocaust Memorial Museum



Photo Credit: US Holocaust Memorial Museum



Photo Credit: Shah Mirai/AFP

## Department of State Report, Taliban's War on Women (2001)

- "The Taliban enforced the wearing of the burqa with threats, fines, and on-the-spot beatings. Even the accidental showing of the feet or ankles was severely punished. No exceptions were allowed."



# Individual Circumstances

- Age
- Feelings
- Opinions
- Physical Characteristics
- Psychological Characteristics



Photo Credit: Gabriel Galwak/IRIN

# Fundamental Human Rights Violations

- Arbitrary deprivation of life
- Slavery
- Torture
- Prolonged detention without opportunity to contest grounds for detention
- Rape and other forms of severe sexual violence



# Sexual Harm

- Rape
- Other Severe Forms Sexual Abuse
- Female Genital Mutilation (FGM)

# Discrimination / Harassment

- May rise to level of persecution if they accumulate or increase in severity
- Consider –
  - ✓ how long did the harassment or discrimination last?
  - ✓ which human rights were affected?
  - ✓ how was the applicant affected?
  - ✓ what was the cumulative effect?
  - ✓ was there an escalation over time?

# Acts of Discrimination which May Amount, Cumulatively, to Persecution

- Restrictions on right to earn livelihood
- Restrictions on education
- Interference with privacy, family, home, correspondence
- Substandard housing
- Passport denial
- Constant surveillance
- Pressure to become informer
- Confiscation of property



Photo Credit: US Holocaust Memorial Museum

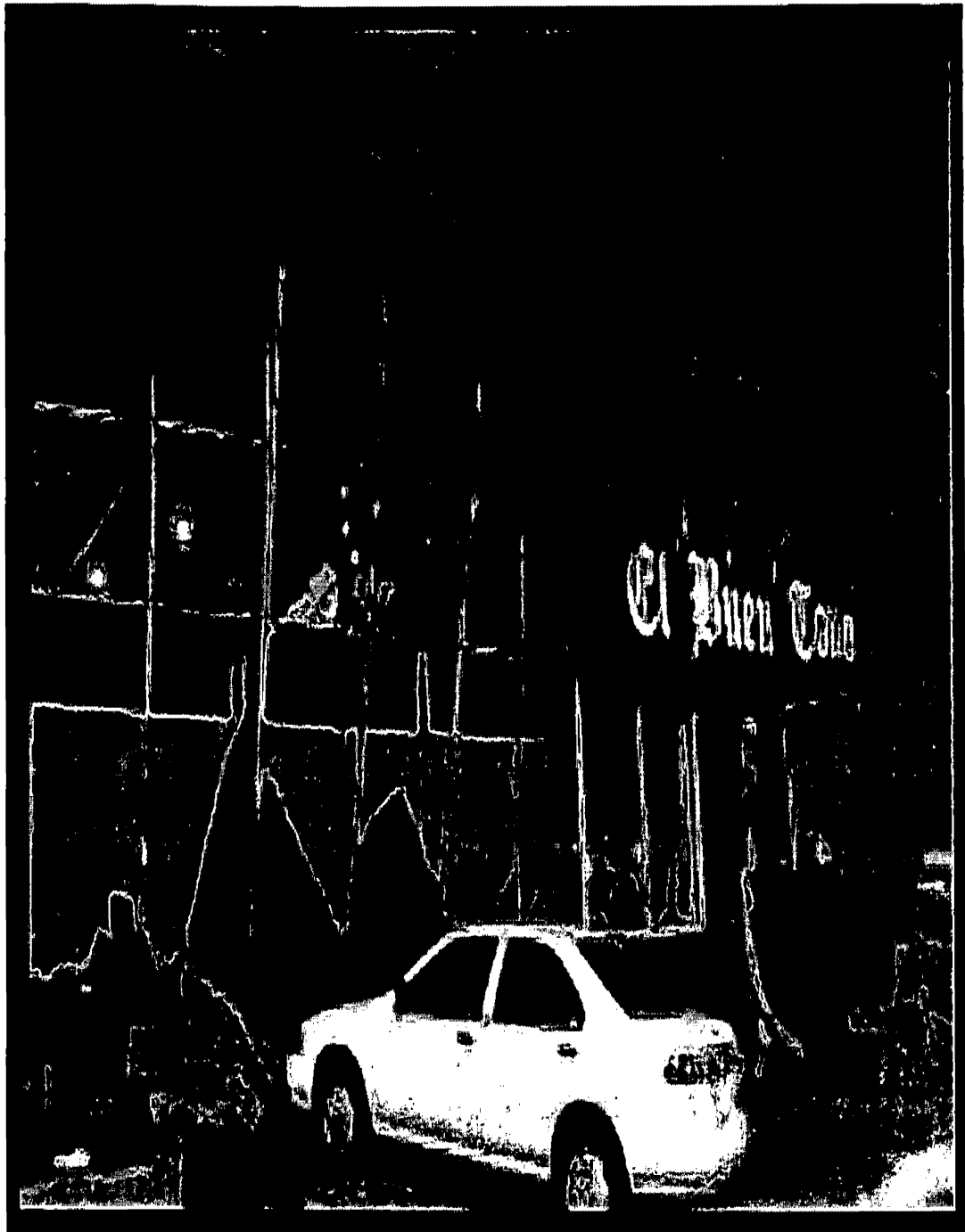


Photo Credit: Reuters



# Arrests and Detention - factors

- Length of detention
- Legitimacy of government action
- Mistreatment during detention
- Judicial processes or due process rights accorded

# Phommasoukha v. Gonzales

## (8th Cir. 2005)

Applicant served in the Laotian Royal Armed Forces from 1960 until the overthrow of the U.S.-backed Laotian government in 1975. During his service, he worked with the CIA to locate and monitor the Vietnamese.

After the overthrow, the applicant was sent to a "reeducation" camp where he was held in an underground cell, subjected to political indoctrination, required to perform forced labor, and denied contact with family or other prisoners. He was held for approximately 6 years.

# Identifying the Persecutor

- Government actors
  - Must show on account of protected ground
  - Harm must rise to level of persecution
  - No need to inquire whether applicant sought protection from police
- Non-government actors
  - Gov't unable or unwilling to control
  - Look at country conditions / applicant's circumstances

# Unable or Unwilling?

- Does government instigate acts?
  - Does government condone acts?
  - Is government helpless to stop acts?
- Look at –
- How widespread the actions are?
  - Any actions by law enforcement to stop the harm?

# Past Persecution in Nutshell

Past persecution is a basis for asylum and refugee status – INA § 101(a)(42):

"The term "refugee" means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of **persecution** or a **well-founded fear of persecution** on account of race, religion, nationality, membership in a particular social group, or political opinion . . ."

# Past Persecution

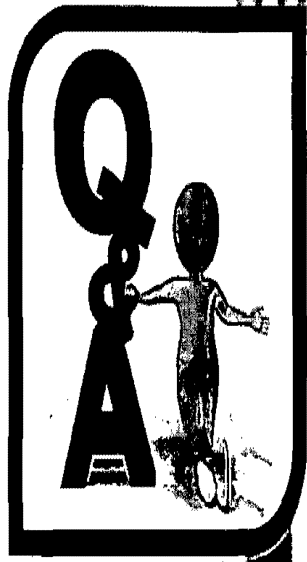
- o In **asylum** context – **rebuttable presumption of well-founded fear** – can be rebutted by **(1)** changed circumstances or **(2)** internal relocation

If no well-founded fear, exercise of discretion if

- Compelling reasons based on severity of past persecution
- Reasonable possibility of other serious harm

- o In **refugee** context – **no rebuttable presumption**, past persecution alone enough

# Questions?



Please give at least one reason why people forced from their homes by Hurricane Katrina do not meet the refugee definition.

# Writing Assignment – is this persecution?

- Due COB last day of RAIO CT Distance Training