

**Analysis of the Legal Basis for Eligibility Determinations for  
Torture Rehabilitation Programs in the United States  
The Center for Victims of Torture  
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**INTRODUCTION**

The prohibition against torture is a *jus cogens* norm under international law, meaning that it is a fundamental principle from which no nation may derogate or waiver.<sup>1</sup> The strength of this prohibition carries with it special legal weight: no excuse justifies an act of torture.<sup>2</sup> But what is “torture”? The definition of torture varies across countries, even as most have ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>3</sup>

The CAT was adopted by the UN General Assembly in 1984 and currently has 115 State Parties.<sup>4</sup> The United States ratified the CAT in 1994 upon passing legislation criminalizing torture abroad and submitting instruments of ratification.<sup>5</sup> However, in the United States, the definition of torture is particularly complex, as legal statutes and regulations define torture with significant differences. Because funding requirements through the Survivors of Torture program within the Department of Health and Human Services’ Office of Refugee Resettlement are tied to each client’s individual classification as a survivor of “torture,” these statutes and the jurisprudence flowing from the courts interpreting them also have a fundamental effect on the national capacity to provide mental health, legal, social, and medical services to those fleeing war, violence and oppression.

***How Does the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Define “Torture”?***

CAT defines torture as:

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<sup>1</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/25/60, ¶ 40, Apr. 10, 2014 *available at* <http://www.ohchr.org/en/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, Reporters note 5(d) (1987); Report by the Special Rapporteur, Mr. P. Kooijmans, E/CN.4/1986/15, ¶ 3, Feb. 19, 1986 *available at* [http://ap.ohchr.org/documents/E/CHR/report/E-CN\\_4-1986-15.pdf](http://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf) (“Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war.”).

<sup>2</sup> Gail H. Miller, *Defining Torture*, Benjamin N. Cardozo School of Law Floersheimer Center for Constitutional Democracy, at 10 (2005) *available at* <http://www.cardozo.yu.edu/sites/default/files/Defining%20Torture.pdf> [hereinafter: Cardozo Paper].

<sup>3</sup> Convention Against Torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/39/5 (1984), 1465 U.N.T.S. 85, *entered into force* June 26, 1987 [hereinafter: CAT].

<sup>4</sup> Status of Ratifications of the Convention Against Torture and other cruel, inhuman or degrading treatment or punishment, status at Jan. 6, 2015, *available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) [hereinafter: CAT Ratification].

<sup>5</sup> Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, CAT/C/28/Add. 5, Feb. 9, 2000, ¶ 3 *available at* <http://www.state.gov/documents/organization/100296.pdf>

- “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 or incidental to lawful sanctions.”<sup>6</sup>

To comply with the requirements of the CAT, articles 2, 4, and 5 require states to take “effective legislative, administrative, judicial or other measures” to criminalize and prevent torture and to ensure that their judicial systems have jurisdiction to try acts of torture wherever they occur. Article 4 further requires states to make criminal any “attempt to commit torture” as well as “complicity or participation in torture.”<sup>7</sup>

The United States was instrumental in negotiating the CAT<sup>8</sup> and has since taken several steps to implement its provisions. UN treaty ratification generally requires a state to sign the treaty and deposit instruments of ratification or accession with the Secretary-General, indicating that it will carry out the obligations in the treaty. In the United States, the Executive Branch may sign a treaty, but can only submit articles of ratification upon the advice and consent of two-thirds of the Senate. In addition, states may ratify a treaty subject to reservations, understandings, and declarations (RUDs), which allow the state to apply its own interpretations to certain provisions. The United States Senate approved the CAT for ratification on October 27, 1990, with the declaration that Articles 1-16 of the Convention are non-self-executing.<sup>9</sup> In other words, the provisions of the treaty could not be judicially enforced in U.S. courts without legislation implementing those provisions. The United States took steps to implement specific articles of the CAT in 1994 and again in 1998.

### ***What is the Torture Victim Protection Act (TVPA) and how does its Definition of Torture Differ from the CAT?***

To provide for the right to redress,<sup>10</sup> Congress enacted the Torture Victim Protection Act (TVPA) in 1992. The TVPA was passed for humanitarian purposes, namely to allow American victims of torture the same

<sup>6</sup> CAT, *supra* note 3, art. 1.

<sup>7</sup> CAT, *supra* note 3, arts. 2, 4, 5.

<sup>8</sup> See Exec. Rep. 101-30, 101st Cong. 2d Sess., 2, available at <http://detaineeataskforce.org/wp-content/uploads/2013/04/S.-Comm.-on-Foreign-Relations-Report-on-Convention-Against-Torture-and-Other-Cruel-Inhuman-or-Degrading-Treatment-or-Punishment-S.-Exec.-Rep.-No .pdf> (“The Convention itself was the product of 7 years of intense negotiations, in which the United States played an active part. The United States helped to focus the Convention on torture rather than other less abhorrent practices and to strengthen the effectiveness of the Convention by pressing for provisions that would ensure that torture is a punishable offense.”) [hereinafter: SFRC Report]. U.N. Eco. and Soc. C., Report of the Working Group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (Mar. 9, 1984), E/CN.4/1984/72 ¶ 24, 47-48.

<sup>9</sup> CAT Ratification, *supra* note 4.

<sup>10</sup> Article 14 of the Convention Against Torture requires states to provide the right to redress, which includes “full and adequate compensation” and “as full rehabilitation as possible.”

privilege of bringing a civil lawsuit in U.S. federal courts against their torturers that the Alien Torture Statute (ATS)<sup>11</sup> provides to foreign victims.<sup>12</sup> The TVPA states that individuals who acted “under actual or apparent authority, or color of law, of any foreign nation” may be liable to their U.S. citizen torture victims in U.S. courts. It defines torture as:

- “any act,
- directed against an individual in the offender’s custody or physical control,
- by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental,
- is intentionally inflicted on that individual
- for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.”

The TVPA allows victims to collect money damages from their torturers when they are sued in U.S. courts.

### ***How did the U.S. Criminalize Torture as Required by the CAT? How were the Definitions of “Torture” Adopted by the United States Different than CAT itself?***

Although passed to fulfill its obligations under the CAT and ratify the treaty, the Torture Convention Implementation Act of 1994, 18 U.S.C. § 2340A (hereinafter the Torture Act), has a modified version of the definition of torture found in both the CAT and the TVPA.<sup>13</sup> The Torture Act defines torture as:

- “an act committed by a person acting under the color of law
- specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person
- within his custody or physical control.”<sup>14</sup>

An element-by-element comparison of the definition of torture in CAT verses the Torture Act makes clear that the Torture Act – and thus the controlling definition of “torture” in U.S. law – modified important elements of the CAT and UN definition. Key differences that will be discussed in further detail in the memo, include:

- Government acquiescence in the harmful acts is a key component of the UN definition of torture while the U.S. definition seemingly heightened the standard for government involvement, requiring the act to be committed “under the color of law;” rather than merely requiring official “acquiescence;”
- The U.S. requires specific intent to bring about the severe pain or suffering inflicted, not merely the general intent to commit the act, seemingly required in the CAT;

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<sup>11</sup> 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>12</sup> S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991) (describing the TVPA as a means to “enhance the remedy already available under” the ATS). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (recognizing that the TVPA supplements but does not replace the ATS).

<sup>13</sup> 18 U.S.C. § 2340A (1994).

<sup>14</sup> 18 U.S.C. § 2340 (1994).

- The U.S. definition includes the additional element of “custody or physical control” of the actor over the victim, a requirement absent from the UN definition; and
- The U.S. definition removed the requirements that torture be carried out for one of the various enumerated purposes.

While the distinctions between the U.S. and the UN definitions have had little practical effect on criminal prosecutions, as there has only been one under this act,<sup>15</sup> they have impacted how torture treatment centers receiving funding from the U.S. Office of Refugee Resettlement (ORR) classify torture survivors and determine eligibility for services.<sup>16</sup>

### ***Eligibility for Services Authorized by the Torture Victims Relief Act***

The Torture Victims Relief Act (TVRA), first passed in 1999, authorizes the executive branch to provide up to \$25 million in grants to U.S. and foreign treatment centers and programs providing direct services, whether rehabilitative, social, or legal, to victims of torture or providing research and training for such services.<sup>17</sup> This act, passed for humanitarian purposes, provided that torture is defined in accordance with the criminal definition in the Torture Act. Under guidance issued in 2008 by ORR, service providers receiving ORR funding under the TVRA must assess whether prospective clients fit the legal definition of survivors of torture.<sup>18</sup> The ORR guidance is largely based on a 2004 memo issued by the Department of Justice’s Office of Legal Counsel interpreting the Torture Act.<sup>19</sup> In addition, ORR provides a Torture Service Provider Screening Checklist with questions that providers may use to determine whether a potential client fits in with the legal definition of a torture survivor.

This framework has produced a peculiar situation in which a rarely utilized penal statute and its legal interpretations guide a clinical determination to provide services. Thus, torture treatment centers, in addition to assessing eligibility based on symptoms and clinical needs, must grapple with making legal determinations as to whether a prospective client has been victimized by an act that was (a) sufficiently severe, (b) inflicted under the color of law, (c) motivated by the perpetrator’s specific intent to cause the severe pain or suffering, and (d) committed under the offender’s custody or physical control. Confounding the issue, “two thirds of the medical and psychological research on torture fails to even

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<sup>15</sup> Committee Against Torture, Periodic Reports 3 through 5 of the United States of America, ¶ 126 *available at* <http://www.state.gov/documents/organization/213267.pdf> (“The United States has investigated and prosecuted allegations of extraterritorial torture over which it has jurisdiction. On October 30, 2008, Roy M. Belfast, Jr., son of Charles G. Taylor, former president of Liberia, was convicted of crimes related to torture in Liberia between April 1999 and July 2003 under the U.S. extraterritorial torture statute, 18 U.S.C. 2340A. On January 9, 2009, he was sentenced to 97 years in prison. The prosecution of these torture claims was the first under the Torture Convention Implementation Act, 18 U.S.C. 2340A et seq.”) [hereinafter U.S. CAT Report 3-5].

<sup>16</sup> Andrew Rasmussen, Mia Crager, Eva Keatley, Allen S. Keller, & Barry Rosenfeld, “Screening for Torture: A Narrative Checklist Comparing Legal Definitions in a Torture Treatment Clinic,” 219 (3) *Z Psychol.* 143 (2011) [hereinafter: Rasmussen].

<sup>17</sup> Torture Victims Relief Act of 1998, § 2-4 Pub. L. No. 106-87, 113 Stat. 1301 (1999).

<sup>18</sup> U.S. Dep’t. of Health and Human Services Office of Refugee Resettlement, “Torture Survivors Program Eligibility Determination Guidance,” (2008) *available at* <http://www.healtorture.org/sites/healtorture.org/files/Eligibility%20guidelines%20-%20ORR%20-%202010.pdf> [hereinafter: ORR Guidance].

<sup>19</sup> This memo remains the only public DOJ guidance on the definition of 18 U.S.C. § 2340 that has not been revoked.

define what is meant by the term “torture.”<sup>20</sup> Thus, practitioners that are not legally trained are left to make complicated legal determinations without any relevant guidance. As one study found, “[t]he lack of rigor applied to definitions of torture has resulted in confusion, contradiction, and inconsistency among clinicians, researchers, and policy makers with regard to what constitutes torture.”<sup>21</sup>

The reasons the TVRA is tied to a penal statute are not clear from the TVRA’s legislative history.<sup>22</sup> Presumably, it was used because it was the only definition of torture available in the U.S. Code at the time the legislation was passed. In addition to providing funding to support rehabilitation of torture victims, the “bill contains an expression of the sense of Congress that the United States shall use its voice and vote in the United Nations to support the investigation and elimination of the practices prohibited by the Convention Against Torture.”<sup>23</sup>

### ***What are the Requirements for Non-Refoulement Protections under CAT and U.S. law?***

Although as described above, the TVPA and Torture Act adopted definitions of torture that differ substantially from the definition in CAT, there is one significant area of U.S. law that incorporated CAT’s definition word-for-word and element-by-element: the definition used in determining eligibility for non-refoulement protection. In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA). The legislation implemented U.S. obligations under Article 3 of the CAT,<sup>24</sup> which prohibits States Parties from the expulsion, return (*refoulement*), or extradition of someone to “another State where there are substantial grounds for believing the person would be in danger of being subjected to torture.”<sup>25</sup> In determining whether an applicant is entitled to withholding or deferral of removal from the United States under CAT Article 3, U.S. immigration courts and federal courts apply the UN CAT definition of torture subject to several regulations.<sup>26</sup> Throwing one final wrinkle into how U.S. law defines torture, this is also, by far, the most common context in which the definition of torture is argued and analyzed in U.S. courts.

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<sup>20</sup> Rasmussen, *supra* note 16.

<sup>21</sup> *Id.* (“Our experience is that classifying potential clients’ experiences as torture or not is a frequent source of frustration for torture treatment professionals[.]”).

<sup>22</sup> In H.R. Report 105-709 a section by section analysis of the bill provides only that “This section defines ‘torture’ as having the meaning given in the Federal statute criminalizing torture (18 U.S.C. 2340) and as including the use of rape and other forms of sexual violence by a person acting under the color of law. The definition of ‘torture’ applies only for purposes of this Act, and does not amend, alter, or expand the international obligations of the United States under the Convention Against Torture or other instruments.”

<sup>23</sup> H.R. Report 105-709 available at [http://thomas.loc.gov/cgi-bin/cpquery/1?cp105:/temp/~TSOPKY3r9&sid=TSOPKY3r9&item=1&sel=TOCLIST&hd\\_count=36&xform\\_type=3&n=hr709p1.105&dbname=cp105&&refer=&&w\\_p=torture&attr=603&&](http://thomas.loc.gov/cgi-bin/cpquery/1?cp105:/temp/~TSOPKY3r9&sid=TSOPKY3r9&item=1&sel=TOCLIST&hd_count=36&xform_type=3&n=hr709p1.105&dbname=cp105&&refer=&&w_p=torture&attr=603&&).

<sup>24</sup> Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, 112 Stat. 2681, 2681-821, Sec. 2442(a-b) [hereinafter FARRA].

<sup>25</sup> CAT, *supra* note 3, art. 3

<sup>26</sup> FARRA, *supra* note 24, § 2442(f); 8 C.F.R. § 208.18(a) (“The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture.”). The U.S. interpretations of CAT provisions were submitted as reservations, declarations, and understandings to the United Nations by the United States upon ratifying the CAT. After FARRA was passed, they were promulgated as regulations and came into effect in March 1999 as guidance for implementing Article 3 protection under FARRA. At times, these regulations have made a significant difference in whether someone receives CAT protection in the United States.

## ***What Has Been the Impact of These Different Definitions of Torture?***

These different iterations of specific elements of the torture definition have led to a strange dichotomy in U.S. jurisprudence on the definition of torture and have had the effect of narrowing the protection afforded to victims to an extent unintended upon ratification.<sup>27</sup> For purposes of providing protection to (potential) torture victims, immigration and federal courts have long applied the UN definition as provided for in statute and federal regulations. However, to provide rehabilitative services to refugees and other survivors of torture, treatment centers are directed to apply the more restrictive criminal definition provided for in the U.S. Code, despite the absence of any penological goals in the TVRA. However, as described in detail below, based upon an analysis of CAT implementing regulations and precedent established by U.S. Courts, there is no indication that an application of the less restrictive CAT definition will result in more clarity or flexibility for torture treatment centers, as U.S. regulations and jurisprudence interpreting CAT would still apply in a strictly legal context.

The primary purpose of this memorandum is to compare and contrast U.S. jurisprudence on the definition of torture in the UN CAT and the U.S. criminal definition in the Torture Act. Because U.S. courts have had only one opportunity to interpret the Torture Act, to the extent that it can be read consistently with the TVPA and its jurisprudence, the TVPA will be used below to clarify certain provisions. The similarities and differences between the two definitions will be highlighted below, with particular attention on the question of the meaning of “color of law” in the Torture Act and whether there is a meaningful difference under U.S. law between “color of law” and “acquiescence,” as provided in the CAT. The memo will attempt to address how the differences between the UN CAT and the U.S. definition of torture affect torture treatment programs’ evaluation of clients for eligibility for services.

### **PROCESS USED BY TORTURE TREATMENT CENTERS TO DETERMINE ELIGIBILITY**

Each torture treatment center and service provider has its own methods of making eligibility determinations. For The Center for Victims of Torture (CVT), it is a multilayered process. Clients seeking services fill out a request form that includes a description of the events that led to their seeking out CVT’s services. After an initial intake with the client, a team of clinicians assembles to determine whether each client is eligible for services.

Clinicians make eligibility determinations on two levels. First, they must determine whether the client’s symptoms make them eligible for services (a clinical determination). Second, they must determine whether the client was in fact tortured and meets the legal definition provided in the Torture Victim Relief Act. This is a legal determination. CVT utilizes a checklist provided by Bellevue Hospital. The questions on the checklist ask clinicians to determine whether the potential client was specifically targeted, the level of state action involved, where the acts took place, and whether the act was intentional. Depending on the answers to these questions, the team of clinicians determines whether

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<sup>27</sup> Teresa Donovan, “The Convention Against Torture: When does a Public Official Acquiesce to Torture Committed by a Third Party?” IMMIGRATION LAW ADVISOR, U.S. DEPARTMENT OF JUSTICE, Mar. 2007 (citing S. Treaty Doc. No. 100-20, *reprinted* in 13857 U.S. Cong. Serial Set at 3 (1990) (State Department Summary)) [hereinafter: Donovan] (explaining that upon transmitting the CAT for ratification to the Senate, the State Department observed that the CAT “protects against torture inflicted ‘under color of law’” to which the Senate responded that its understanding of the term acquiescence constituted “both actual knowledge and willful blindness” and further clarified that the “Convention deals only with torture committed in the *context* of governmental authority.”).

the acts fit within either the UN or the U.S. definitions of torture. No lawyers or persons specifically trained in the law in this area are present for the eligibility determinations.

The questions on the checklist are — to some extent — problematic for treatment centers providing mental health and psychosocial support services. They are rather invasive and personal for an initial meeting with a potential client, when trust between the client and service provider has not yet been established.

## **ELEMENTAL ANALYSIS AND COMPARISON OF DEFINITIONS OF TORTURE UNDER UN CAT AND THE TORTURE ACT**

### **A. WHAT IS ‘AN ACT’**

Under both the U.S. definition of torture as well as the UN definition, either acts or omissions may constitute torture. That an omission may constitute torture originates with a case in the European Commission of Human Rights in 1969 holding that deprivation of food and other necessities may give rise to a finding of torture.<sup>28</sup> Interpreting the UN definition of torture in the CAT, the U.S. Court of Appeals for the Third Circuit held that an HIV-positive individual was entitled to CAT protection and could not be returned to Haiti because he would not receive anti-retroviral treatment in prison.<sup>29</sup> Thus an omission may constitute an “act” of torture according to the U.S. interpretation of the CAT, so long as the alleged torturers meet the requisite intent requirements outlined in federal regulations (to be discussed further below). Across the board, upon implementing the CAT and defining torture, most countries agree that omissions as well as acts may constitute torture, with some countries using terms such as “subject,” “inflict,” or “cause” instead of “act” to implicitly include omissions in the definition.<sup>30</sup>

### **B. SEVERE MENTAL OR PHYSICAL PAIN OR SUFFERING**

#### **1. SEVERITY**

Determining the severity of physical or mental pain or suffering is a key element in evaluating whether torture occurred.<sup>31</sup> In the United States, the Torture Act describes it as “severe physical or mental pain or suffering.” As the U.S. Department of Justice’s Office of Legal Counsel explains, the severity of the pain and suffering that amounts to torture “is usually reserved for extreme, deliberate and unusually cruel practices.”<sup>32</sup> This is distinguished from cruel, inhuman or degrading treatment or punishment

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<sup>28</sup> Office of the High Comm’r for Hum. Rts., “Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies,” 3-4, *available at* [http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation\\_torture\\_2011\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf) [hereinafter: OHCHR Memo].

<sup>29</sup> Sarah Cade, “Recent Developments in the Specific Intent Standard in Convention Against Torture Cases,” IMMIGRATION LAW ADVISORY, U.S. DEP’T OF JUSTICE, Jan. 2009 (citing *Lavira v. Att’y Gen. of U.S.*, 478 F.3d 58, 7 (3d Cir. 2007)).

<sup>30</sup> Cardozo Paper, *supra* note 2, at 7-8

<sup>31</sup> HUMAN RIGHTS FIRST & PHYSICIANS FOR HUMAN RIGHTS, “Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality,” (August 2007) *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/07801-etn-leave-no-marks.pdf> [hereinafter: Leave No Marks].

<sup>32</sup> Dep’t of Justice Office of the Legal Counsel, “Definition of Torture Under 18 U.S.C. §§ 2340–2340A,” Dec. 30, 2004, at 302 (citing S. Exec. Rep. No. 101-30, at 13-14) *available at*

(CIDT), which is likewise prohibited by the CAT. CIDT is defined as “an act intended to inflict severe or serious physical or mental pain or suffering.”<sup>33</sup> The United States submitted a reservation upon CAT ratification that CIDT constitutes such acts already prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.<sup>34</sup> Thus, CIDT is distinguished from torture based on the level of severity.<sup>35</sup> “There are no precise, objective, scientific criteria for measuring pain. The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim.”<sup>36</sup> According to the current ORR eligibility guidelines, “the more intense, lasting, or heinous the agony, the more likely it is to have been torture.”<sup>37</sup>

The definition provided by the CAT likewise requires severe treatment to amount to torture. The CAT defines torture as “severe pain or suffering.” In determining whether individuals qualify for withholding or deferral of removal under the CAT, U.S. immigration and federal courts interpret the CAT definition incorporating the federal regulations.<sup>38</sup> As the Board of Immigration Appeals notes in determining whether torture occurred or is more likely than not to occur,<sup>39</sup> “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 [prohibiting CIDT]. The severity of the pain and suffering inflicted is a distinguishing characteristic of torture.”<sup>40</sup>

Whether an act amounts to torture under the UN definition is a fact-specific question of severity. In some cases, “because of the specific intensity or nature of certain acts, the qualification of torture may be easily granted[.]”<sup>41</sup> However, in other instances, “the vulnerability of the victim (age, gender, status, etc), as well as the environment and the cumulative effect of various factors, should be taken into account to determine whether the case amounts to torture[.]”<sup>42</sup> Among the factors that may distinguish CIDT from torture are: powerlessness of the victim;<sup>43</sup> severity of treatment: duration of treatment, physical effects of treatment, mental effects of treatment, and sex, age, and state of health of the victim; and purposes of the ill-treatment.<sup>44</sup>

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<http://www.justice.gov/sites/default/files/olc/opinions/2004/12/31/op-olc-v028-p0297.pdf> [hereinafter: OLC Memo].

<sup>33</sup> 18 U.S.C. § 2441 (d)(1)(B).

<sup>34</sup> CAT Ratification, *supra* note 4, US CAT Reservations (1)

<sup>35</sup> It may also be distinguishable based on the lack of intent required. See e.g., Juan Méndez, Special Rapporteur on Torture, “Intent of course is not necessary, for CIDT, CIDT can actually happen by negligence, for example prison conditions. Nobody is directly responsible, but neglect by state authorities renders those prisons inhumane.” (30.20) <http://ummedia05.miserver.it.umich.edu/itsComm/ii/ii012315.html>.

<sup>36</sup> ORR Guidance, *supra* note 18, at 2-3.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *In re J-E-*, 23 I&N Dec. 291, 300 (BIA 2002).

<sup>39</sup> 8 C.F.R. § 208.16(c)(2).

<sup>40</sup> *In re J-E-* at 295 (BIA 2002).

<sup>41</sup> OHCHR Memo, *supra* note 28, at 2.

<sup>42</sup> *Id.*

<sup>43</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2006/6, ¶ 39 (“[T]he decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.”)

<sup>44</sup> OHCHR Memo, *supra* note 28, at 6-7 (stating that ECtHR has held that certain methods of interrogation, while normally may amount to ill-treatment rather than torture, when carried out for particular purposes, the conduct amounted to torture).



Individuals that face CIDT do not receive protection under Article 3 of the CAT's *non-refoulement* provision. Therefore, immigration courts do not have the opportunity to address the seriousness of treatment that constitutes CIDT. However, to the extent that the prohibition of CIDT is coextensive with the prohibitions of ill treatment in the U.S. Constitution and under U.S. laws, CIDT is illegal.<sup>45</sup> Whether there is a meaningful difference between CIDT and the prohibition against cruel and unusual treatment in the Fifth, Eighth, and Fourteenth Amendments has not been clearly delineated and is not the subject of this memorandum because torture treatment centers must make a determination of severity amounting to torture before providing care.

Because CIDT differs from torture in severity and is not specifically criminalized in the Torture Act nor provided for in the TVRA, torture treatment centers receiving funding from ORR cannot treat victims, who, based on their assessments, suffered from CIDT, not torture. Thus, the determination of severity is the first important step for torture treatment centers in assessing a client's eligibility for services. It is within the discretion of torture treatment centers to exercise their expertise to determine whether an act is sufficiently severe to amount to torture. They are guided simply by the generally accepted acknowledgement that torture is an "aggravated form of inhuman treatment."<sup>46</sup>

## 2. MENTAL OR PHYSICAL PAIN OR SUFFERING

While acknowledging that either mental or physical pain or suffering may constitute torture, both the U.S. definition and the CAT do not draw boundaries or delineate between the two.<sup>47</sup> A single act may constitute both physical and mental harm. Although physical suffering, often manifesting in scars, lesions, and other discernible remnants on the human body, is more readily identifiable as torture, both the CAT and the Torture Act make clear that pain and suffering may be either physical or mental. Furthermore, physical suffering may not necessarily leave behind scars, even if it causes pain. Importantly, physical suffering may be experienced without physical pain. "Although pain and suffering will often be experienced together, physical "suffering" is a distinct route to eligibility, as it is possible that an individual may have experienced physical distress of sufficient intensity and duration to constitute torture, without having at any particular moment during this time experienced pain or anguish that is "severe." For example, forced medical procedures resulting in lasting injury could qualify, even if anesthetics were used in the procedure."<sup>48</sup> In an attempt to distinguish between "pain" and "suffering," the U.S. Department of Justice notes that "suffering" must be extended in duration and intensity, whereas pain need only be extended in intensity.<sup>49</sup> It does not, however, clarify the distinction, but provides some examples of what constitutes mental suffering.<sup>50</sup>

In the United States, both the Torture Act and regulations implementing CAT define "severe mental pain or suffering" as "the prolonged mental harm caused by or resulting from" several acts: intentional or threatened infliction of severe physical pain or suffering to the victim or a third person; administration or application or threatened administration or application of mind-altering substances or "other

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<sup>45</sup> Military Commissions Act of 2006, 18 U.S.C. § 2441 (2008) (prohibiting "grave breaches" of CA3 of the Geneva Conventions, which includes torture and CIDT).

<sup>46</sup> Cardozo Paper, *supra* note 2, at 9 (quoting Eur. Ct. H.R., *The Greek Case*, YEAR BOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 186 (1969)).

<sup>47</sup> Cardozo Paper, *supra* note 2 at 11-12

<sup>48</sup> ORR Guidance, *supra* note 18.

<sup>49</sup> OLC Memo, *supra* note 28, at 309.

<sup>50</sup> *Id.* at 312-313 (providing case examples whereby long-term psychological effects lasting several years constituted mental torture).

procedures calculated to disrupt profoundly the senses or personality” to the victim or a third person; the threat of imminent death to the victim or a third person.<sup>51</sup> Unlike physical pain or suffering, mental harm must be “prolonged,” the definition of which is unclear. The only requirement is that it be of “lasting duration.”<sup>52</sup> ORR guidance explains that the “duration of time to be assessed is that of the trauma to the victim, rather than the period of time over which the acts occurred.”<sup>53</sup> However, many note that by defining mental harm as a specific set of circumstances and requiring that it be prolonged, the United States excludes a significant subset of mental torture.<sup>54</sup> Recently, the Committee Against Torture criticized the United States’ “restrictive interpretation” of mental torture requiring “prolonged mental harm.” It noted that such an interpretation “introduces a subjective non-measurable element which undermines the application of the treaty.” The Committee called on the United States to consider withdrawing this understanding drawing attention to the fact that “reservations contrary to the object and purpose of a treaty are impermissible” under international law.<sup>55</sup>

The narrowed definition of mental harm in the United States gives rise to the question of whether mental harm should be presumed in cases where an individual has been subject to ill treatment, particularly because of the difficulty in immediately determining its existence.

Unlike the Torture Act, the CAT does not separately define mental harm. Studies acknowledge that “the significance of the harm caused by non-physical, psychological abuse is virtually identical to the significance of the harm caused by physical abuse.”<sup>56</sup> International bodies elaborating what constitutes mental harm have used a flexible definition that allows for including acts that are later identified as torture. The Inter-American Court of Human Rights, for example, defines mental harm as “acts prepared and carried out deliberately against the victim in order to suppress their psychic resistance and force him to incriminate himself or confess certain criminal behaviours or to submit him to punishment modalities additional to deprivation of liberty itself.”<sup>57</sup> Threats of torture or mock executions are included within the concept of mental suffering.<sup>58</sup> Forcing persons to watch others being tortured may also constitute mental pain or suffering rising to the level of torture.<sup>59</sup>

### C. INTENT: GENERAL v. SPECIFIC

Both the CAT and the Torture Act require intent on the part of the perpetrator to commit the act that constitutes torture and intent to inflict severe pain or suffering. Mere negligence will not suffice in either instance.<sup>60</sup> Although, recklessness may suffice under the UN definition,<sup>61</sup> the United States requires specific intent to bring about the severe pain or suffering.<sup>62</sup> The CAT does not clarify whether

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<sup>51</sup> 18 U.S.C. § 2340(2).

<sup>52</sup> OLC Memo, *supra* note 32, at 309-13.

<sup>53</sup> ORR Guidance, *supra* note 18.

<sup>54</sup> David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823 (2011-2012); Cardozo Paper, *supra* note 2, at 12.

<sup>55</sup> Committee Against Torture, Concluding Observations on the U.S.’s Third – fifth periodic reports, CAT/C/USA/CO/3-5 ¶ 9.

<sup>56</sup> Leave No Marks, *supra* note 31, at 3 (citing M. Basoglu, et. al. *Torture vs Other Cruel Inhuman, and Degrading Treatment: Is the Distinction Real of Apparent?* 64 ARCHIVES GEN. PSYCHIATRY 277 (2007)).

<sup>57</sup> OHCHR Memo, *supra* note 28, at 22 (citing *Tibi v. Ecuador*, Inter-Am. Ct. H.R., 7 Sept. 2004, Ser. C No. 114 ¶ 146).

<sup>58</sup> *Id.* at 4.

<sup>59</sup> *Maritza Urrutia v. Guatemala*, Inter-Am. Ct. H.R., 27 Nov. 2003, Ser. C No. 103.

<sup>60</sup> OHCHR Memo, *supra* note 28, at 4.

<sup>61</sup> *Id.*

<sup>62</sup> 8 C.F.R. § 208.18(a)(5).

under its definition specific or general intent is required.<sup>63</sup> Experts argue that a general intent requirement is consistent with the purpose of the CAT.<sup>64</sup> A study of the jurisprudence shows that both the Committee Against Torture and U.S. courts have taken a practical approach to the intent requirement that takes into account the all of the surrounding circumstances to determine the perpetrator's intent.

## 1. THE TORTURE ACT AND THE TORTURE VICTIMS RELIEF ACT REQUIRE SPECIFIC INTENT

In providing advice and consent regarding ratification of the CAT, the U.S. Senate attached an understanding stating "in order to constitute torture, an act must be *specifically* intended to inflict severe physical or mental pain or suffering."<sup>65</sup> This understanding was then codified in the Torture Act, which, in pertinent part, states that torture is defined as "an act...specifically intended to inflict severe...pain or suffering."<sup>66</sup> The Department of Justice clarifies that the specific intent requirement is met if it is the individual's "conscious desire" to inflict severe mental pain or suffering.<sup>67</sup> The specific intent standard would not be met, however, if the individual performed "reasonable investigation" to establish that his conduct would not cause severe pain or suffering.<sup>68</sup> The standard would also likely not be met if the "torturer's intent is to inflict pain just short of torture, but in fact, he crosses the line."<sup>69</sup>

From a criminal law perspective, specific intent is an important element of establishing that the crime of torture was committed. In a criminal prosecution, an individual's liberty is at stake and the government may not deprive someone of that liberty without the due process of law, which includes determining whether the person committed the act in question with the appropriate mental state. Therefore, whether the accused had the appropriate state of mind to carry out the act of torture is very relevant to the deprivation of liberty. However, because the United States has extended the specific intent requirement to determine CAT Article 3 protection and TVRA-authorized rehabilitative services, a bizarre scenario is established where a victim's eligibility for protection or services may depend upon the intent of the perpetrator—an intent that is not always clear or knowable to the victim.

Screening forms provided by ORR to determine whether a potential client has been tortured reflect a flexible understanding of specific intent. The guidance asks whether "the acts experienced by the

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<sup>63</sup> Cardozo Paper, *supra* note 2, at 14. But see Penny M. Venetis, "Unless the U.S. Fully Implements the Convention Against Torture, We Will Continue to Dispute Whether Waterboarding is Legal," Human Rights At Home Blog, Dec. 18, 2014, [http://lawprofessors.typepad.com/human\\_rights/2014/12/unless-the-us-fully-implements-the-convention-against-torturewe-will-continue-to-dispute-whether-wat.html](http://lawprofessors.typepad.com/human_rights/2014/12/unless-the-us-fully-implements-the-convention-against-torturewe-will-continue-to-dispute-whether-wat.html) ("CAT requires the torturer to have "general intent" to harm, whereas the U.S. requires 'specific intent.'").

<sup>64</sup> Alyssa Bell & Julie Dona, "Torturous Intent: Refoulement of Haitian Nationals and U.S. Obligations Under the Convention Against Torture," 35 N.Y.U. Rev. L. & Soc. Change 707, *available at* <http://socialchangenyu.files.wordpress.com/2012/08/35-4belldonatorture.pdf> [hereinafter: Bell].

<sup>65</sup> OLC Memo, *supra* note 28, at 301 (citing S. Exec. Rep. No. 10-30, at 36 (1990)) (emphasis added).

<sup>66</sup> 18 U.S.C § 2340

<sup>67</sup> OLC Memo, *supra* note 32, at 314.

<sup>68</sup> OLC Memo, *supra* note 32, at 314-15.

<sup>69</sup> Gabor Rona, "Obama Administration's Position on Torture: New? Yes. Significant? No.," Just Security, <http://justsecurity.org/17558/obama-administrations-position-torture-convention-new-yes-significant/>

applicant [were] intended by the perpetrator to result in severe physical or mental pain or suffering.”<sup>70</sup> Recognizing that “it is not possible to fully reconstruct the state of mind of the individual inflicting the harm,” ORR clarifies that determining eligibility requires a showing that the “client’s pain or suffering [did not] arise from accidental or random causes.”<sup>71</sup> In determining whether torture occurred, “it should be apparent that the perpetrator must have either wanted the pain or suffering to occur, or would had to have known, given the acts involved, that severe pain or suffering was the likely consequence of these acts.”<sup>72</sup> The guidance, though somewhat easing the requirement of specific intent, still necessitates a determination of the perpetrator’s intent by both the survivor of torture and the provider.

The particular difficulty of defining specific intent is reiterated by the Department of Justice in its memo clarifying the definition of torture under the Torture Act. In relevant part it notes, “[w]e do not believe it is useful to try to define the precise meaning of “specific intent” in [the Torture Act]. In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.” Furthermore, in cases under the TVPA, U.S. courts tend to infer intent to torture from the totality of the circumstances.<sup>73</sup> In other words, the courts assessing civil claims “presume[] intent based on the facts and circumstances of the complaint.”<sup>74</sup>

## 2. U.S. REGULATIONS AND COURT INTERPRETATIONS HAVE NARROWED THE INTENT REQUIREMENT IN CAT

In interpreting the UN definition of torture in an immigration context, U.S. courts also require that the perpetrator display specific intent to inflict severe pain or suffering.<sup>75</sup> U.S. regulations implementing Article 3 of the CAT require an act to be “specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.”<sup>76</sup> Courts have clarified that this means “the actor must intend the actual consequences of his conduct, as distinguished from the act that causes the consequences.”<sup>77</sup> The BIA and all federal circuit courts in the United States require specific intent on the part of the perpetrator and hold that mere knowledge or willful blindness are insufficient.<sup>78</sup> The boundaries of specific intent, however, are difficult to draw. For example, the Board of Immigration Appeals has held that a diabetic dependent on insulin and three medications could not be returned to Haiti where he would be imprisoned because he suffered from a psychotic condition would be unlikely to receive treatment or medication and would

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<sup>70</sup> Dep’t. of Health and Human Services Office of Refugee Resettlement, Final TSP Eligibility Form, Sep. 17, 2010 available at <http://www.healtorture.org/content/office-refugee-resettlement> [hereinafter: ORR TSP Eligibility Form].

<sup>71</sup> ORR Guidance, *supra* note 18.

<sup>72</sup> *Id.*

<sup>73</sup> Oona A. Hathaway, Aileen Nowlan, & Julia Spiegel, “Tortured Reasoning: The Intent to Torture under Domestic and International Law,” 52 VA. J. INT’L L. 791, 795, available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5735&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5735&context=fss_papers) [hereinafter: Hathaway].

<sup>74</sup> *Id.*

<sup>75</sup> *Al Safer v. INS*, 268 F.3d 1143 (9th Cir. 2001).

<sup>76</sup> 8 C.F.R. § 1208.18(a)(5).

<sup>77</sup> *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008).

<sup>78</sup> Regina Germain, *Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure*, 297 (2010) [hereinafter: Germain].

suffer intentionally severe abuse in prison.<sup>79</sup> Thus, in certain circumstances, specific intent may be inferred from omission of a duty to provide certain necessities.

The U.S. inclusion of specific intent in the torture definition creates a slightly different standard from that applied by the Committee against Torture<sup>80</sup> in determining whether the perpetrator had the intent to commit torture. However, this may be mostly semantics, as demonstrated above, because intent is usually inferred from the surrounding circumstances. Similarly, under the UN definition, the inclusion of the purposes in the CAT definition negates a need to determine whether a perpetrator had the specific intent to inflict the severe pain or suffering required to amount to torture.<sup>81</sup> In other words, a torturer has committed torture by intending to perpetrate the act against the victim for one of several purposes (e.g., to extract a confession, punishment, coercion, or discrimination).

As long as these elements are fulfilled, the perpetrator need not *specifically* intend to cause the severe pain and suffering the victim experiences. The Committee against Torture has never “considered it necessary to conduct an intent analysis separate from its examination of these facts and circumstances.”<sup>82</sup> To establish intent, the Committee does not inquire “into the motivations of the perpetrators, rather it requires “objective determinations under the circumstances.”<sup>83</sup> Thus, while the specific intent included in all iterations of the torture definition in the United States, intent is determined in a flexible manner for protection purposes.

#### D. PURPOSES

Both the CAT and the TVPA provide that to constitute torture an act must be carried out for one of the enumerated purposes. These are: extracting a confession, obtaining information from the victim or a third person, punishment, intimidation or coercion, or discrimination.<sup>84</sup> This list is not exhaustive<sup>85</sup> and the enumerated purposes are so broad, it is rarely an obstacle in determining whether torture occurred.<sup>86</sup> For the purpose requirement to be met, generally, a prohibited purpose must merely be part of the motivation behind the act of torture and need not be the sole or central purpose.<sup>87</sup>

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<sup>79</sup> *Matter of B-B-*, (BIA unpublished, Mar. 10, 2009) available at <http://www.caircoalition.org/wp-content/uploads/2009/09/Matter-of-BB-BIA-February-2-2010.pdf>.

<sup>80</sup> The Committee Against Torture is a body of independent experts that monitors the implementation of the CAT by States Parties and may also interpret specific provisions of the CAT through general comments or, where its jurisdiction is recognized, through individual complaints. See generally Committee Against Torture, “Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment,” <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx>.

<sup>81</sup> Hathaway, *supra* note 73, at 795.

<sup>82</sup> *Id.* at 796.

<sup>83</sup> *Id.* at 802 (citing U.N. Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by State Parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008))

<sup>84</sup> OHCHR Memo, *supra* note 28, at 4.

<sup>85</sup> CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW ANTI-TORTURE INITIATIVE, “Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report,” (2014) at xvi available at [http://antitorture.org/wp-content/uploads/2014/03/PDF\\_Torture\\_in\\_Healthcare\\_Publication.pdf](http://antitorture.org/wp-content/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf).

<sup>86</sup> Kristen Rosati, Finally! U.S. Law Implements Article 3 of the U.N. CAT: An Analysis of the Legislation and Interim Regulations,” 2 Immigration and Nationality Handbook 517, 526 (AILA 1999-2000 Ed.) [hereinafter: Rosati].

<sup>87</sup> Cardozo Paper, *supra* note 2, at 16.

The U.S. Torture Act does not limit the scope of torture “based on why the harms were inflicted (i.e. to extract a confession or prevent political dissent).”<sup>88</sup> Thus, for criminal prosecutions, the motives of the torturer are irrelevant. Similarly for purposes of the TVRA and determining whether a victim is eligible for treatment based on ORR guidelines, “[t]he reason or motive behind this abhorrent conduct is not relevant to eligibility determination.”<sup>89</sup> In practice, however, the exclusion of purposes from the U.S. definition is mostly semantic. Eligibility for torture treatment does not usually depend on the perpetrator’s motivation.<sup>90</sup>

### 1. THE PURPOSES ENUMERATED IN THE CAT AND TVPA ARE NOT TO BE CONFUSED WITH THE PROTECTED GROUNDS IN THE REFUGEE DEFINITION

In contrast, eligibility for asylum or refugee status depends very significantly on several enumerated grounds, including the motive of the perpetrator and the reason or reasons why the individual or group was targeted for persecution. Although the definition of “refugee” and the definition of “torture” are separate and do not overlap, there is often overlap within the protected population as survivors of torture may also be refugees. The conflation of elements seems to be a source of confusion among torture treatment providers. Under the 1951 Convention Relating to the Status of Refugees, a person is a refugee if:

- “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.”<sup>91</sup>

Thus, to qualify for refugee status, there is a nexus requirement that one of the five grounds (race, religion, nationality, membership in a particular social group, or political opinion) is at least one central reason motivating the persecutor. The Supreme Court has clarified that although an applicant for asylum need not “provide direct proof of his persecutors’ motives” one “must provide *some* evidence of it, direct or circumstantial.”<sup>92</sup> By contrast, to qualify as torture survivors, applicants do not need to show that their torturer was motivated by religious, political, or any other grounds, unlike refugees.

Although some refugees are torture survivors, many are not. And while many torture survivors have sought international protection as refugees, there are also many who have never fled their home

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<sup>88</sup> ORR Guidance, *supra* note 18.

<sup>89</sup> *Id.*

<sup>90</sup> See e.g. *Camara v. Ashcroft*, 378 F.3d 361, 371 (4<sup>th</sup> Cir. 2004) (“applicant need not prove the *reason* for torture”) (emphasis in original).

<sup>91</sup> 1951 Convention Relating to the Status of Refugees, U.N. Doc. Art. 1A(2) available at U.N. Doc. A/1775 (1951), 189 U.N.T.S. 137, entered into force Apr. 22, 1954, available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter: Refugee Convention]. U.S. law adopts a nearly identical definition of ‘refugee’: “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 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.” 8 U.S.C. § 1101(a)(42)(A).

<sup>92</sup> *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (emphasis in original).

countries or were not tortured on account of the enumerated grounds and therefore would not qualify as refugees. Often survivors of torture are present in the United States because they were granted refugee status or asylum owing to a genuine fear of persecution on account of one of the protected grounds. However, recognizing that some survivors of torture may not qualify for refugee status, but still require protection, the United States has both international and domestic obligations not to return people to countries where they have “substantial grounds” to believe that they would be in danger of torture.<sup>93</sup>

## E. STATE ACTION REQUIREMENT

Often the most challenging and contentious issue in determining whether an act intended to inflict severe pain or suffering constitutes “torture,” hinges upon classifying the individual who perpetrated or acquiesced in the torture as a public official. As one commentator notes, it “is perhaps the most significant limitation on the Convention Against Torture relief, particularly when private groups such as organized private militias or ‘death squads’ are engaged in torture as a political weapon.”<sup>94</sup> There is little dispute that acts carried out by public officials that misuse the power granted to them by the cloak of authority constitute torture.<sup>95</sup> However, dispute arises when non-state actors are involved and the government has either condoned the actions or is aware of the actions and has failed to carry out its legal obligations to investigate, prosecute, and prevent them. Because the Torture Act and the CAT use different standards for state action, this section will take each definition in turn.

### 1. COLOR OF LAW

The U.S. criminal definition (the Torture Act) requires that to constitute torture, the act must have been committed under “the color of law.”<sup>96</sup> A plain reading of legislative history indicates that Congress intended “color of law” to be synonymous with the requirement for government involvement in the CAT, namely, awareness of—or, acquiescence in—such activity. Upon transmitting the CAT for ratification to the Senate, the State Department observed that the CAT “protects against torture inflicted ‘under color of law.’”<sup>97</sup> In 1990, the Senate provided its consent to the treaty and clarified that its understanding of the term acquiescence constituted “both actual knowledge and willful blindness” and further clarified that the “Convention deals only with torture committed in the *context* of governmental authority.”<sup>98</sup> Thus, as the Senate understood it at the time of ratifying the CAT, for torture to occur under “color of law,” or in the context of governmental authority, included official tacit acceptance of such acts.

Despite its seeming origins in the term “acquiescence,” the requirement that an act be committed under “color of law” in order to constitute torture within the meaning of the various U.S. definitions has led to a strict requirement that the acts be perpetrated by or at the instigation of government officials. Although no courts have interpreted “color of law” as defined in the Torture Act (and thus as applied by

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<sup>93</sup> FARRA, *supra* note 24; CAT, *supra* note 3, Art. 3.

<sup>94</sup> Germain, *supra* note 78, at 301 (quoting K. Rosati, “Finally! U.S. Law Implements Article 3 of the U.N. Convention Against Torture: An Analysis of the Legislation and Interim Regulations,” 2 *Immigration & Nationality Law Handbook* 517, 522 (AILA 1999-2000 Ed.)).

<sup>95</sup> Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009).

<sup>96</sup> 18 U.S.C. § 2340.

<sup>97</sup> Teresa Donovan, “The Convention Against Torture: When does a Public Official Acquiesce to Torture Committed by a Third Party?” IMMIGRATION LAW ADVISOR, U.S. DEPARTMENT OF JUSTICE, Mar. 2007 (citing S. Treaty Doc. No. 100-20, *reprinted* in 13857 U.S. Cong. Serial Set at 3 (1990) (State Department Summary)) [hereinafter: Donovan].

<sup>98</sup> *Id.* (citing S. Exec. Rep. No. 101-30 at 6, 9 (1990) (emphasis added)).

torture treatment centers through the TVRA), extensive jurisprudence under the TVPA has set out the parameters for the meaning of “actual or apparent authority or color of law.” Furthermore, ORR guidance, interpreting the definition found in the Torture Act, provides the basic parameters within which treatment centers are to determine whether an act was perpetrated under color of law.

ORR guidance notes that for torture to arise under color of law, “there must be at a minimum some connection between the act and the official authority in the location where the act occurred.”<sup>99</sup> It provides examples of possible torturers to include: “agent of a government whose acts arise out of his “official” duties (including de facto governments, military authorities, militias and like entities where there is no formal recognized government)” or someone purporting to be such an agent, such as a “member of the police, secret police, security or similar official, but it may also involve medical personnel or even private persons, if these purport to operate according to some form of state sanction.”<sup>100</sup> Purely private conduct does not constitute torture; however, consent or acquiescence by government officials may give rise to torture. Also incorporating and clarifying the meaning of “acquiescence,” the guidance provides: “[I]f the government or related entity is unwilling or unable to punish the acts that have caused harm, and this appears to be *generally* true (not just in the particular instance of the client) as to these type of acts (and the pain and suffering they entail) may be considered as “officially” tolerated, and is covered under most interpretations of the term “color of law,” as the products of “deliberate indifference” on the part of the governing authority.”<sup>101</sup>

Thus, the ORR guidance seemingly adopts the definition of “acquiescence” that most circuit courts have elaborated on in interpreting the CAT. ORR is interpreting “color of law” to include the term “acquiescence” as used in the CAT and interpreted by U.S. courts. Its Torture Survivors Program (TSP) Eligibility Screening Form is reflective of this understanding, including questions such as asking whether law enforcement authorities were aware of the particular acts, whether they took actions to stop or investigate and whether they were unwilling or unable to do so. However, despite this guidance, torture treatment centers acknowledge that they are “struggling most with creating a method of ensuring that the referred individuals meet the “color of law” requirement.”<sup>102</sup>

To determine the meaning of “color of law,” the state action requirement under the TVPA, which tracks the language of the Torture Act almost identically, has been interpreted by courts to require a “symbiotic relationship” between the state and the non-state actor that involves the torture.<sup>103</sup> Thus, the relationship between the government actor and the non-state actor must involve the specific conduct in question, and cannot merely be a general relationship.<sup>104</sup> The relationship may be proven by presenting evidence of the active participation of a single individual.<sup>105</sup>

In further interpreting the TVPA “color of law” requirement, courts have held that “color of law” is synonymous with the “state-action” requirement.<sup>106</sup> Thus, “private activity will generally not be deemed ‘state action’ unless the state has so dominated such activity as to convert it to state action.”<sup>107</sup> The

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<sup>99</sup> ORR Guidance, *supra*, note 18.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> From service provider discussion.

<sup>103</sup> *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1264 (11<sup>th</sup> Cir. 2009)

<sup>104</sup> *Sinaltrainal* at 1264; *Romero v. Drummond* 552 F.3d 1303, 1317 (11<sup>th</sup> Cir. 2008).

<sup>105</sup> *Romero* at 1317.

<sup>106</sup> *Estate of Manook v. Research Triangle Inst.*, 759 F. Supp. 2d 674, 679 (E.D.N.C. 2010)

<sup>107</sup> *Id.* (quoting *Philips v. Pitt County Mem'l Hosp.*, 572 F.3d 176, 181 (4<sup>th</sup> Cir.2009)).



Fourth Circuit has done away with any potential that acquiescence may constitute color of law stating “mere approval or acquiescence in the initiatives of a private party is insufficient.”<sup>108</sup> Thus, a “totality of the circumstances” test is used to determine whether the non-state actor’s actions may be fairly attributable to the state.<sup>109</sup> Among the factors used to determine whether state action may be derived are: whether the state used its coercive power, state provided significant encouragement, joint activity between the state and the private actor, private actor is controlled by the state or its agency, private actor was delegated a public function, entwinement between the state and the private actor.<sup>110</sup> State action requires finding a “close nexus between the state and the challenged action.”<sup>111</sup>

Situations in which this requirement has been satisfied:

- *State Official Participation in a Paramilitary Force’s Armed Aggression against a Union.* Fresh Del Monte Produce, Inc. and its Guatemalan subsidiary had an agency relationship with a private paramilitary security force to eradicate the local union. State action was satisfied because a mayor was alleged to have participated in the paramilitary force’s armed aggression. (*Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d at 1242, 1245-49 (11<sup>th</sup> Cir. 2005)).
- *Active Working Relationship between Military and non-State Group in Terrorizing and Repressing Civilians.* Sufficient evidence to show that an individual involved with a group working with the Haitian military to terrorize and repress civilians acted under color of law. Members of the group received weapons, training, and financial support from the Haitian military and defendant exercised command and control over the group, operating as an extension of the Haitian armed forces and under the auspices of Haitian political police. (*Doe v. Constant*, 354 Fed. Appx. 543 (2d Cir. 2009))
- *Knowledge of and Direct Participation of Army Officer in Massacres.* Allegation that former Peruvian Army officer had knowledge of, and participated directly in, the human rights violations arising out of massacres of residents in Peruvian town were sufficient to state cause of action for aiding and abetting under TVPA. The officer took part in a meeting in which the planned operation was discussed, and his troops took part in facilitating the massacre. (*Lizarbe v. Rondon*, 642 F. Supp. 2d 473 (D.Md. Feb. 26, 2009)).

Situations in which this requirement has not been satisfied:

- *Actions of Private Government Subcontractor.* No state action where a private subcontractor fired weapons injuring and killing Iraqi civilians while providing support to Iraqi government pursuant to a contract with USAID. (*Estate of Manook v. Research Triangle Inst.*, 759 F. Supp. 2d 674 (E.D.N.C. 2010)).
- *Crimes of Paramilitary without Direct Government Involvement.* Insufficient evidence to find that the Colombian Defense Forces were engaged in the particular crimes of an associated Colombian paramilitary force. (*Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1303 (11<sup>th</sup> Cir. 2008)).
- *Crimes Committed by Paramilitary Forces without Government Awareness or Action.* Paramilitary forces did not act under color of law because there is no allegation that

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<sup>108</sup> *Id.* (quoting *Philips* at 181 (4th Cir.2009)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (citing *Brentwood Acad. V. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001)).

<sup>111</sup> *Id.* (citing *Brentwood* at 295).

the Colombian government was aware of or complicit in the torture and no allegation that the defendants conspired with local police in carrying out torture. (*Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1270 (11<sup>th</sup> Cir. 2009))

## 2. CONSENT OR ACQUIESCENCE OF A PUBLIC OFFICIAL OR PERSON ACTING IN OFFICIAL CAPACITY

The definition of torture under the CAT (and consequently under U.S. immigration law) provides a more permissive role for the involvement of government officials for the act to constitute torture. The UN definition requires that the “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.”<sup>112</sup> Whether an act is inflicted by or at the instigation of a public official is relatively clear.<sup>113</sup> However, much controversy has arisen over the definition of acquiescence.<sup>114</sup>

States often grapple with whether in specific instances government officials acquiesced to a third party’s activities. International tribunals and quasi-judicial mechanisms have adopted flexible definitions of acquiescence finding that states have the obligations to protect against and investigate acts of torture committed by non-state actors as well. Failure to do so, when states knew or should have known of the torturous acts, would constitute acquiescence.<sup>115</sup> The UN Human Rights Committee elaborated that states must protect everyone from torture “whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”<sup>116</sup> Elaborating what it means for a state to provide protection, the UN Committee Against Torture, charged with interpreting and implementing the CAT, has clarified that “where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise their due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility[.]”<sup>117</sup> It reasons that a state’s failure to “exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilities and enables non-State actors to commit” such acts.<sup>118</sup> Therefore, “the State’s indifference or inaction provides a form of encouragement and/or de facto permission.”<sup>119</sup>

In particular, in cases of domestic violence, the Committee Against Torture has found acquiescence where states fail to prevent, investigate, or prosecute acts of torture by a non-state actor who knew or could have known of the severe ill-treatment.<sup>120</sup> The UN Special Rapporteur on Torture, Juan Méndez has noted in the context of sexual and gender-based violence that “if a country knows or ought to have known that violence was occurring and fails to comply with their due diligence obligations to prevent, investigate, prosecute and punish, then there is state responsibility. In other words, if the country is

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<sup>112</sup> CAT, *supra* note 3.

<sup>113</sup> OHCHR Memo, *supra* note 28, at 4.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 5.

<sup>116</sup> U.N. Hum. Rts. Comm., Gen. Comment No. 20 U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) available at <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>.

<sup>117</sup> Committee Against Torture, General Comment 2, CAT/C/GC/2 (Jan. 24, 2008) ¶ 8, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> OHCHR Memo, *supra* note 28, at 16-17.

negligent in letting a private actor perpetuate torture or cruel, inhuman and degrading treatment – for our purposes that person is a state agent.”<sup>121</sup> He has also stated that “it’s important that we start considering some forms of actions by non-state actors properly under the prohibition of torture. At the very least when the state knows or ought to know that some persons run the risk of very serious mistreatment. I’m talking mostly about domestic violence against women or against children. The line between the private and the public is appropriately blurred. We – by we, I mean also tribunals and treaty organ, not just the special rapporteurship – under the appropriate circumstances do hold states responsible for cases of domestic violence that do engage the responsibility of the state.”<sup>122</sup> Likewise where states fail to outlaw female genital mutilation, state agents are considered to have acquiesced in the practice.<sup>123</sup> Where states are “unable or unwilling” to provide effective protection from torture by non-state actors, the state action requirement may be met according to the CAT.<sup>124</sup>

U.S. federal regulations implementing Article 3 of the CAT state that acquiescence “requires that that public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”<sup>125</sup> Upon approving the CAT for ratification, the Senate Foreign Relations Committee noted that the Convention only deals with “torture committed in the *context* of governmental authority.”<sup>126</sup> The Senate accepted the proposed understanding by the Bush administration that a public official must have prior awareness of the act and breach the legal responsibility to prevent it. This proposal had done away with a requirement that acquiescence means the public official must have prior knowledge of the act.<sup>127</sup> In approving the new proposals, the Committee stated that this understanding made “clear that both actual knowledge and “willful blindness” fall within the definition of the term “acquiescence” in article 1.”<sup>128</sup> Therefore, the Senate understood acquiescence to include situations where the public officials were not carrying out the torturous acts, but knew, or had reason to know, of such acts and were turning a blind eye.

The U.S. immigration courts and federal courts have sought to clarify these regulations in various fact patterns. To constitute acquiescence, the Board of Immigration Appeals requires that the government demonstrate “willful blindness” to the activities of private individuals or groups.<sup>129</sup> In *Matter of S-V-* the BIA narrowed this understanding stating that the inability to control a group does not necessarily constitute acquiescence.<sup>130</sup> In accepting the standard, some courts have stated that the CAT requires “some volitional act or inaction by the government.”<sup>131</sup> The BIA states that the government officials

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<sup>121</sup> HUM. RTS. LAW CTR., Interview with Juan Méndez, the UN’s Special Rapporteur on Torture, Jul. 19, 2014, <http://hrlc.org.au/interview-with-juan-mendez-the-uns-special-rapporteur-on-torture/>.

<sup>122</sup> Juan Méndez, UN Special Rapporteur on Torture, Univ. of Michigan, <http://ummedia05.miserver.it.umich.edu/itsComm/ii/ii012315.html> at 15.49

<sup>123</sup> OHCHR Memo, *supra* note 28, at 17

<sup>124</sup> Cardozo Paper, *supra* note 2, at 18.

<sup>125</sup> 8 C.F.R. § 1208.18(a)(7).

<sup>126</sup> SFRC Report, *supra* note 8, at 6 (emphasis added).

<sup>127</sup> *Zheng v. Ashcroft*, 332 F.3d 1186, 1192 (9th Cir. 2003).

<sup>128</sup> SFRC Report, *supra* note 8, at 9.

<sup>129</sup> Donovan, *supra* note 97 (noting that eight circuit courts have adopted the “willful blindness” or “willful acceptance” standard to determine acquiescence).

<sup>130</sup> *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000) (holding that the Colombian government’s failure to protect its citizens did not amount to acquiescence to the activities of guerilla groups absent deliberate acceptance of such activities).

<sup>131</sup> Donovan, *supra* note 97.

must “willfully accept” the torturous acts of non-state actors to find government acquiescence.<sup>132</sup> Federal courts, however, have increasingly rejected this standard. A number of U.S. federal circuit courts hold that actions by non-state actors need not be “willfully accepted” by the government to constitute acquiescence. Merely turning a blind eye to torture may be sufficient to find government acquiescence in an act of torture.<sup>133</sup> Some scholars argue that a government that is “unable or unwilling to control” non-state actors may be acquiescing to torture.<sup>134</sup>

Such a reading is in line with the U.S. intention when adopting the CAT. In CAT negotiations, the United States originally proposed the definition of torture as adopted by the committee drafting the CAT, which included the requirement that the act be “inflicted on a person by or with the consent or acquiescence of a public official.” The United States further proposed defining a public official in part as “one who fails to take appropriate measures to prevent or suppress torture when such a person has knowledge or should have knowledge that torture has or is being committed and has the authority or is in a position to take such measures.”<sup>135</sup> This proposed clarification indicates U.S. intent for a flexible level of government involvement in torture upon adoption of the CAT.

Furthermore, in international interpretation of the CAT definition of torture, persons, other than government officials, acting in official capacity may carry out torture, provided that it exercises “effective authority” over a particular territory.<sup>136</sup> Whether non-state actors are exercising “effective authority” is a fact-specific determination.<sup>137</sup> The United States immigration courts have not explicitly adopted such a reading of the CAT, however in an unpublished BIA opinion, the BIA remanded a CAT claim from Mexico directing the IJ to determine whether public officials who may commit the alleged harm would be acting under “color of law” because of the high level of corruption in the government.<sup>138</sup>

To help illustrate whether a meaningful difference exists between “acquiescence” as interpreted by U.S. courts and “color of law,” the following are some fact patterns where courts have found insufficient government involvement to constitute “acquiescence.”

- *Actions of Private Landlords Escorted by Police.* Finding insufficient government acquiescence to the actions of private landlords that were escorted by police to the site of a confrontation with “peasants.” Because the police arrested a private

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<sup>132</sup> *Matter of S-V-*, *supra* note 130 (unlike refugee protection, CAT protection does not extend to those fleeing non-state actors that the government is unable to control).

<sup>133</sup> *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9<sup>th</sup> Cir. 2003); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 355 (5<sup>th</sup> Cir. 2002); *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240 (4<sup>th</sup> Cir. 2004); *Miah v. Mukasey*, 519 F.3d 784, 788 (8th Cir. 2008); *Gomez-Zuluaga v. Att’y Gen. of the U.S.*, 527 F.3d 330 (3d Cir. 2008); *Silvia-Rengifo v. Att’y Gen.*, 473 F.3d 58, 70 (“We are persuaded both by the foregoing history of the Convention’s implementing legislation, and the sound logic of our sister circuit courts of appeals, that the definition of “acquiescence” adopted in *Matter of S-V-* was the wrong legal standard to apply.”); *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (holding that willful acceptance is not required to find acquiescence); *Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001).

<sup>134</sup> Rosati, *supra* note 86, at 521-22.

<sup>135</sup> Donovan, *supra* note 97 (citing J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture* 32, 41-42 (1988).)

<sup>136</sup> OHCHR Memo, *supra* note 28, at 5 (Human Rights Committee finds that a Somali clan was exercising de facto authority over a particular territory comparable to prerogative exercised by legitimate governments, *Elmi v. Australia*, Communication 120/1998, 14 May 1999).

<sup>137</sup> *Id.*

<sup>138</sup> *Matter of X-* (BIA unpublished decision, Dec. 23, 2008).

individual with the landlords who killed the applicant's friend, there is no complicity, even though none of the landlords were arrested. (*Ontunez-Tursios v. Ashcroft*, 303 F.3d 341 (5th Cir. 2002)).

- *Actions of Rogue Elected Officials Acting Outside Official Duties*. No government acquiescence where a rogue elected official acts outside of his official duties (or even in official capacity) just because government fails to investigate. Bangladeshi officials have been "unable" to control the activities of the official's criminal gang, but that does not prove "willful blindness" by the government. (*Miah v. Mukasey*, 519 F.3d 784 (8th Cir. 2008)).

Situations with sufficient government involvement to constitute acquiescence:

- *Ignore or Consent to Domestic Violence*. Although the court found that in that particular case there was insufficient government acquiescence, in its non-binding analysis the court suggested that in some circumstances, "such as where the authorities ignore or consent to severe domestic violence, the [CAT] appears to compel protection for the victim." (*Ali v. Reno*, 22 F.3d 442 (2d Cir. 1994)).
- *Government Representatives Aware of Direct Threats and Dangers*. Although this case was remanded to the BIA to determine under the correct legal standard whether there was sufficient government involvement, it says: "The BIA should consider that the record contains evidence that both the police officer and the military officer that Petitioner had been dating were aware of the fact that she had been kidnapped and threatened, and even though both were government representatives, each told her that there was nothing they could do to protect her. Although these statements are different than filing an official police report without response, these men essentially told her that if they went to the proper authorities, these authorities would do nothing to stop it. This may be circumstantial evidence that the Colombia government was willfully blind to such treatment and that to pursue official assistance would have been futile." (*Gomez-Zuluaga v. Att'y Gen*, 527 F.3d 330 (3d Cir. 2008))
- *Police Ignoring Reports of Threats and Violence*. Finding that the police ignored five filed reports about threats and violence by gang members could arguably constitute "acquiescence." (*Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 293 (3d Cir. 2007))

### 3. UNWILLING OR UNABLE (REFUGEE CONVENTION)

To a less stringent degree than the Convention Against Torture, the Refugee Convention and U.S. refugee law, require some level of state action or inaction to grant an individual refugee status. A refugee is defined as someone who is unwilling or unable to return to their country of origin due to a well-founded fear of persecution based on one of five protected grounds.<sup>139</sup> The fact that one is unable to avail oneself of the protection of one's country of nationality "implies circumstances that are beyond the will of the person concerned."<sup>140</sup> For example "a state of war, civil war or other grave disturbance" would make protection "ineffective."<sup>141</sup> Furthermore, a denial of protection by the state of nationality would also indicate state action as would an individual's unwillingness to receive a country's protection

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<sup>139</sup> 8 U.S.C. § 1101(a)(42)(A); Refugee Convention, *supra* note 91, Art. 1.

<sup>140</sup> U.N. High. Comm'r for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, Dec. 2011, ¶ 98 available at <http://www.unhcr.org/3d58e13b4.html> [hereinafter: UNHCR Handbook].

<sup>141</sup> *Id.*

due to a well-founded fear of persecution.<sup>142</sup> It goes to follow that “whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.”

Thus, refugee status is generally only granted when a state cannot grant protection to an individual based on a well-founded fear of persecution. The state may not have to be the persecutor, but must fail to grant protection from the persecutor. In contrast, the state action requirement under the Convention Against Torture and U.S. anti-torture laws, require some deliberate or willful conduct by the state to either carry out the torturous act or to knowingly and purposefully ignore it and allow it to continue. As described by one U.S. Court of Appeals, government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it, but it does cross the line into acquiescence when it shows willful blindness toward the torture of citizens by third parties.<sup>143</sup> It is important not to conflate the definitions of refugee and torture by importing one element of one legal term and analyzing it in the context of the other.

## F. CUSTODY OR PHYSICAL CONTROL

Under U.S. law, custody is a central element of torture; however it is excluded from the UN definition. Regardless of whether custody is a necessary element of the crime, persons in detention facilities are particularly vulnerable to ill-treatment because of their powerlessness.<sup>144</sup> Certain acts of torture arise mainly in detention centers or when the victim is under the exclusive control of the custodian.<sup>145</sup> However, treatment providers understand custody and physical control to be broader than contexts of imprisonment. Service providers often make factual determinations as to whether the perpetrator asserted physical control over the victim. Particular fact patterns present difficult questions about whether a perpetrator exercised custody or control in a situation.<sup>146</sup>

The Department of Justice’s memo interpreting the U.S. definition of torture under the Torture Act does not address the issue of custody, likely because, for its purposes, custody is presumed. As the only guidance from the U.S. government explaining the torture definition, the memo was written for a specific purpose—to guide U.S. interrogators on the legal limits of detainee interrogations.<sup>147</sup> In such instances, the detainee would be in U.S. custody. Thus, a determination of custody need not be made. However, because all definitions of torture in the United States require that the victim was in “the offender’s custody or physical control,”<sup>148</sup> torture treatment programs must interpret the provision to

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<sup>142</sup> *Id.* at ¶ 98, 100.

<sup>143</sup> *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir.2007).

<sup>144</sup> OHCHR Memo, *supra* note 28, at 9.

<sup>145</sup> *Id.* at 13 (identifying several hanging methods arising mainly in detention centers that are considered constitutive of torture; identifying acts of torture likely to arise in jail settings: systematic beating on certain sensitive body parts with a metal bar or baseball bat; electric shocks on different body parts; long nail technique, violent shackles; pressure on sensitive body parts; immersion in water or other liquids to simulate drowning; deprivation of basic necessities).

<sup>146</sup> See next section on impact on torture treatment centers.

<sup>147</sup> OLC Memo, *supra* note 32, at 314 (“We do not believe it is useful to try to define the precise meaning of “specific intent” in section 2340.27 In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.”).

<sup>148</sup> 18 U.S.C. § 2340; Torture Victim Protection Act, Pub.L. 102–256, H.R. 2092, 106 Stat. 73 (1992); 8 C.F.R. § 1208.18(a)(6) (“act must be directed against a person in the offender’s custody or physical control”).

provide services. The Office of Refugee Resettlement’s guidance attempts to provide further clarity regarding “custody or physical control.” It states, “The requirement of custody or lawful control will ordinarily be met if perpetrators are acting under “color of law” and under such pretext, seize the individual for the time necessary for him to suffer, against his will, the various heinous and adverse acts constituting torture.” In other words, as long as “color of law” and “severity” elements are met and the individual is held long enough to suffer, then custody or physical control element will likely be present.

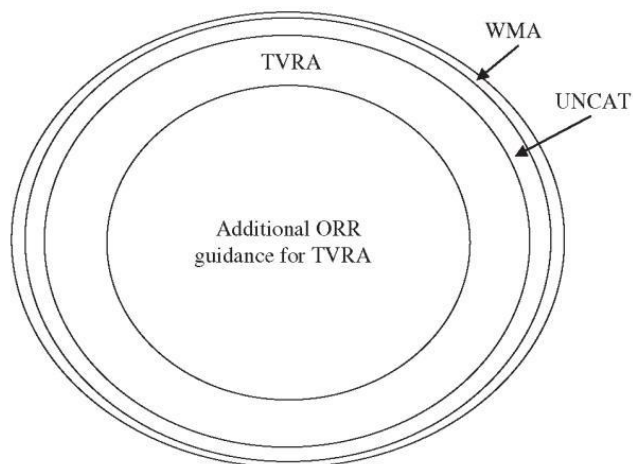


Figure 1.0: In a study conducted by researchers, they saw a 24.8% decrease in persons who could be classified as torture survivors when ORR guidance for the TVRA was applied, as opposed to other international definitions of torture.

A screening form provided by ORR to torture treatment providers sets examples of scenarios under which an offender is likely to exercise custody or control. Question 3 on that form asks, “At the time the acts were committed, was the applicant under the custody or control of the perpetrator (i.e., prison, holding facility, compound, camp, hospital or school)?”<sup>149</sup> Essentially, the ORR screening form provides examples of locations where custody and control may be presumed, but the list cannot reasonably be exhaustive.<sup>150</sup> A study by several researchers found that the inclusion of these locations had a profound effect on eligibility for torture treatment. Of the 124 cases that qualified as torture under the TVRA only 92 of those qualified when narrowed to the specific locations in the ORR screening form. (see chart in Figure 1.0)<sup>151</sup> In explaining the discrepancy, the study finds that “the ORR settings criterion essentially asks those making decisions at torture treatment centers to evaluate the criterial features of a textual definition of torture using a criterion external to the definition itself.”<sup>152</sup> Thus, the ORR checklist adds an element to determining eligibility that may at best be unnecessary as a clarifier and at worst be confusing and exclude torture survivors from accessing services.

<sup>149</sup> ORR TSP Eligibility Form, *supra* note 70.

<sup>150</sup> In situations of domestic violence, for example, people may be tortured in their own home.

<sup>151</sup> Rasmussen, *supra* note 16 (“132 of 160 cases met the criterion of “a history of abuse perpetrated by someone acting as an authority” (no idea what constitutes ‘authority’); of those 132, 97% met the criteria for UNCAT and 93.9% met the criteria for TVRA; only 69.7% met the criteria for torture when ORR guidance was applied – a 24.8% reduction from the TVRA”).

<sup>152</sup> *Id.*

## G. INHERENT IN OR INCIDENTAL TO LAWFUL SANCTION

Both the CAT and the various US torture statutes require that the acts complained of do not stem from lawful sanctions. U.S. regulations implementing CAT specifically state that “torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>153</sup> In general terms, actions that are conducted with a specific intent to inflict severe pain or suffering cannot stem from lawful sanctions. Therefore, a finding of specific intent to inflict such pain or suffering necessitates a finding that such actions are not lawfully sanctioned. Furthermore, states have not defended accusations of torture on the grounds that the acts were incidental to lawful sanctions.<sup>154</sup> Therefore, this exception remains largely hypothetical. This provision has, however, precluded the formation of an international consensus deeming the death penalty torture.<sup>155</sup> Acts that are outside of lawful sanctions, even though permitted by the laws of a country include: imprisonment in a prison notorious for cruel and prolonged torture against political opponents, sustained beatings for a month, being burned with cigarettes repeatedly.<sup>156</sup>

### IMPACT ON TORTURE TREATMENT CENTERS

The right to rehabilitation and the provision of rehabilitative services to survivors of torture stem directly from obligations under the CAT. Article 14 of the CAT requires the legal systems of States Parties to provide for the right to redress, which includes “as full rehabilitation as possible.”<sup>157</sup> The Committee Against Torture clarifies that this right includes medical and psychological care as well as legal and social services.<sup>158</sup> This right applies regardless of the pursuit of judicial remedies and should be enshrined in law according to the Committee.<sup>159</sup> It is in the spirit of this obligation, and the recognition that by taking steps to heal torture it can also be prevented that the United States enacted the Torture Victims Relief Act.

The divergent reasons for adopting and implementing each of the different torture statutes in U.S. law provides insight into why torture treatment centers may have some difficulty determining whether torture occurred in a particular case and why some bona fide torture survivors may be turned away for rehabilitative services. The concerns that arise in the context of criminal prosecution, legal liability, and providing CAT Article 3 protection to individuals are not present in the context of torture treatment and provision of medical, legal, social, or psychological services.

A 2012 study found that torture treatment centers in the United States did not exhibit any particular difficulty in classifying someone as a torture victim when determining eligibility. The “gateway criterion” of the study was whether the client had experienced “abuse by an authority.” According to an exchange with one of the study’s authors, the clinicians did not have difficulty determining whether people fit into

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<sup>153</sup> 8 C.F.R. § 1208.18(a)(3).

<sup>154</sup> Cardozo Paper, *supra* note 2 at 20.

<sup>155</sup> *Id.*

<sup>156</sup> *Al Saher* at 1145; *Hosseini v. Gonzales*, 471 F.3d 953, 960 (9<sup>th</sup> Cir. 2006).

<sup>157</sup> CAT, *supra* note 3, Art. 14.

<sup>158</sup> Committee Against Torture, General Comment 3, CAT/C/GC/3, ¶¶ 11, 20 (“To give effect to article 14, States parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible.”) *available at*

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11).

<sup>159</sup> *Id.* at ¶¶ 15, 20.



this category.<sup>160</sup> However, treatment centers have demonstrated increasing difficulty in determining whether there was sufficient state action to find torture. In particular, determining whether treatment centers may provide rehabilitative services to persons fleeing violence perpetrated by non-state actors can prove to be a challenging case-by-case basis decision. The difficulty stems from the fact that “penal codes of various countries are well outside the scope of mental health professionals’ training, being largely irrelevant for treatment. However, given that they are [key] criteria of UNCAT and TVRA definitions, they are not irrelevant for funding treatment, and thus must be considered by torture treatment staff.”<sup>161</sup>

Furthermore, because DOJ guidance on the definition of torture was adopted for purposes of ensuring U.S. interrogations are in line with U.S. legal standards, it leaves out key elements of the definition that are relevant to torture treatment centers – in particular, custody or control, specific intent and government involvement – all of which service providers struggle with determining. ORR guidance to torture treatment centers is based off of this memorandum and does not sufficiently reflect the specific challenges of torture treatment providers, leaving many to grapple with legal conclusions to determine eligibility.

Although some elements of the definition of torture are relatively straightforward for treatment centers (e.g., severity, specific intent), centers grapple with several elements of the torture definition when determining eligibility. Taking the U.S. definition first, treatment centers struggle with several aspects: what constitutes “color of law” or “custody or control.” Similarly under the UN definition, centers struggle to define “acquiescence,” all the while recognizing it is a more flexible standard than “color of law.” For torture treatment centers, however, the different tests that the courts have articulated to attempt to clarify what constitutes “acquiescence” are merely semantic, providing no structured or helpful guidance when faced with real fact patterns.

Some examples of specific scenarios that service providers struggle with include:

- Whether tribal leaders or other “official” entities are acting under color of law, in particular in situations where the central or local governments have little or no power over the region. In these circumstances national governments are usually irrelevant and one cannot go to national or local police to stop intimidation, harassment or abuse by tribal leaders.
- In regions where a government can barely operate because it has been overrun by non-state militias, do actions by those militias constitute either acquiescence or color of law? What if the armed groups have overrun an area and are seeking to assert control as a governmental entity as in Boko Haram in Northern Cameroon?
- What level of harassment without physical confinement to a particular space is sufficient to show custody and control? For example, would a situation where a survivor is being stalked and constantly watched constitute custody? Would pillaging one’s home constitute custody? Would attempting to assassinate someone by trying to run them over repeatedly constitute custody or control?

For torture treatment centers, determining whether an individual is eligible for services is not the only difficulty that accompanies having to make a complex legal determination upon initial intake. The added

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<sup>160</sup> Email from Andrew Rasmussen, Assoc. Professor of Psychology, Fordham University (Oct. 28, 2014) (on file with author).

<sup>161</sup> Rasmussen, *supra* note 16.

requirements during the intake process may force treatment centers to ask too many details of the client too early in the recovery process, usually at a time when the necessary trust has not been established between client and provider. This can be a hindrance to recovery and is not in the best interest of the client as it may invalidate the client's own suffering. It puts the clinician into the unnatural role of an investigator. Having to make a legal determination only adds to the difficulty of establishing a trusting relationship. Thus, clarifying and simplifying the eligibility process for the service providers will facilitate the work of providing important services.

## **CONCLUSION**

This memo offered a legal analysis of the following questions: (a) What are the meaningful differences between the U.S. definition of torture under the Torture Act and the UN CAT? (b) How does this affect torture treatment programs' evaluation of clients for eligibility for services? (c) Specifically, in the Torture Act what does "color of law" mean in comparison to government "acquiescence" required by the UN CAT? (d) Does the requirement of specific intent in the United States make a significant difference in what qualifies as torture?

After a thorough review of each element of the definitions of torture in the Torture Act, the TVPA, the UN CAT and the refugee definition, the Center for Victims of Torture (CVT) has found that the various iterations of the torture definition under U.S. law have become conflated. There is little meaningful difference between the CAT definition as interpreted by U.S. regulations and courts and the definition under the Torture Act. Although semantically different, "acquiescence" under the UN definition has been interpreted by U.S. courts to be almost coextensive with "color of law" provided in the TVPA and the Torture Act. This narrows the concept of government acquiescence significantly from the UN Committee Against Torture's understanding of the concept of acquiescence.

This memo does not seek to make a specific recommendation to ORR regarding clarifying its eligibility guidance. Rather, it highlighted the difficulties that treatment providers are facing amid the muddled definitions of torture in U.S. law. Thus, it is recommended that ORR work with service providers to issue new eligibility guidance that takes into consideration the main eligibility challenges for which providers struggle.

## ANNEX 1: DEFINITIONS

UN Definition of Torture: Article 1: “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.”

US Regulations Implementing Article 3 of the CAT: (8 C.F.R. § 1208.18)

(a) **Definitions**. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, and declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture 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, or 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.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 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.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

US Definition of Torture (Torture Convention Implementation Act): 18 U.S.C. § 2340

- (1) “torture” means **an act** committed by a person acting **under the color of law specifically intended** to inflict **severe physical or mental pain or suffering** (other than pain or suffering incidental to lawful sanctions) upon another person **within his custody or physical control**;
- (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from –
  - a. (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - b. (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - c. (C) the threat of imminent death; or
  - d. (D) the threat that another person will immediately be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

US Definition of Torture: Torture Victim Protection Act (1994) 28 U.S.C. § 1350:

Liability: An individual who, under **actual or apparent authority, or color of law**, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . .

Torture – for purposes of this act – (1) the term ‘torture’ means any act, directed against an individual in the **offender’s custody or physical control**, by which **severe pain or suffering** (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is **intentionally inflicted** on that individual for such **purposes** as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and (2) mental pain and suffering refers to prolonged mental harm caused by or resulting from – (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the sense or personality; (C) the threat of imminent death; or (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.