



**Practitioners' Guide  
to the Convention Against Torture  
January 2017**

**Center for Human Rights and Constitutional Law**

[www.centerforhumanrights.org](http://www.centerforhumanrights.org)

## I. Summary

This guide to the Convention Against Torture is intended as a tool for immigration attorneys, BIA-accredited representatives, and other advocates interested or already engaged in the representation of non-citizens who fear return to their home countries. These, like all other training materials prepared by the Center for Human Rights and Constitutional Law (CHRCL), are non-exhaustive and subject to continuous update to reflect the rapidly changing context of immigration law and policy in which we work and live.

For over thirty years, CHRCL has been at the forefront of the battle for the rights of immigrants and refugees in the United States. In that time immigration law has undergone significant changes, not only in terminology, but also in the substantive standards and procedures that affect the ability of non-citizens to remain in the United States. These materials focus on the United States' application of the United Nations Convention Against Torture, including particularly in two separate but related forms of relief from removal: withholding of removal and deferral of removal. While the parameters of these forms of protection are defined by regulation, case law from the Board of Immigration Appeals and the various circuit courts of appeals provide important interpretive guidance delineating the contours of CAT relief.

We invite readers to not only review these materials and consider them as a guidepost when approaching the case of a person seeking relief under the Convention Against Torture, but also to consider opportunities for strategic litigation in this field. As always, CHRCL and its staff remain available to provide technical assistance on these and other immigrants' rights issues. Please contact Peter Schey, Executive Director, at [pschey@centerforhumanrights.org](mailto:pschey@centerforhumanrights.org) should you want to discuss potential cases in greater detail. We look forward to the opportunity to support you in your professional growth and to collaborate to promote the rights of non-citizens in our country.

## II. Background

The United States ratified the Convention against Torture (“CAT”) in October 1994, and the Convention entered into force for the United States on 20 November 1994.

In Congressional Research Service provides the following overview:

“The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires signatory parties to take measures to end torture within their territorial jurisdictions. For purposes of the Convention, torture is defined as an *extreme* form of cruel and inhuman punishment committed under the color of law. The Convention allows for no circumstances or emergencies where torture could be permitted. Additionally, CAT Article 3 requires that no state party expel, return, or extradite a person to another country where there are substantial grounds to believe he would be subjected to torture. CAT Article 3 does not expressly prohibit persons from being removed to countries where they would face cruel, inhuman, or degrading treatment not rising to the level of torture.

The United States ratified CAT subject to certain declarations, reservations, and understandings, including that the Convention was not self-executing, and therefore required domestic implementing legislation to take effect. In accordance with CAT Article 3, the United States enacted statutes and regulations to prohibit the transfer of aliens to countries where they would be tortured, including the Foreign Affairs Reform and Restructuring Act of 1998, chapter 113C of the United States Criminal Code, and certain regulations implemented and enforced by the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of State. These authorities, which require the withholding or deferral of the removal of an alien to a country where he is more likely than not to be tortured, generally provide aliens already residing within the United States a greater degree of protection than aliens arriving to the United States who are deemed inadmissible on security- or terrorism-related grounds. Further, in deciding whether or not to remove an alien to a particular country, these rules permit the consideration of diplomatic assurances that an alien will not be tortured there. Nevertheless, under U.S. law, the removal or extradition of all aliens from the United States must be consistent with U.S. obligations under CAT.

CAT obligations concerning alien removal have additional implications in cases of criminal and other deportable aliens. The Supreme Court’s ruling in *Zadvydas v. Davis* suggests that certain aliens receiving protection under CAT cannot be indefinitely detained, raising the possibility that certain otherwise-deportable aliens could be released into the United States if CAT protections make their removal impossible. CAT obligations also have implications for the practice of “extraordinary renditions,” by which the U.S. purportedly has transferred aliens

suspected of terrorist activity to countries that possibly employ torture as a means of interrogation.”

Congressional Research Service published “The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens,” January 2009

“The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) announced the policy of the United States not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. FARRA also required relevant agencies to promulgate and enforce regulations to implement CAT, subject to the understandings, declarations, and reservations made by the Senate resolution of ratification.” *Id.*

“The requirements of CAT Article 3 take the form of a two-track system requiring the withholding or deferral of an alien’s removal to a proposed receiving state if it is more likely than not that he would be tortured there. CAT-implementing regulations concerning the removal of aliens from the United States are primarily covered under §§ 208.16-208.18 and 1208.16-1208.18 of title 8 of the Code of Federal Regulations (C.F.R.), and prohibit the removal of aliens to countries where they would more likely than not be subjected to torture. DHS has primary day-to-day authority to implement and enforce these regulations, with the DOJ, through the Executive Office of Immigration Review (EOIR), having adjudicative authority over detention and removal. For purposes of these regulations, “torture” is understood to have the meaning prescribed in CAT Article 1, subject to the reservations and understandings, declarations, and provisos contained in the Senate’s resolution of ratification of the Convention.” *Id.*

### III. Seeking Relief Under the Convention Against Torture

#### *Filing the Application*

To apply for CAT, the individual must check off the box on the first page of the I-589 Form indicating that the person intends to apply for CAT. Notably, relief under the CAT is available only to persons who are already in removal proceedings as a defense to removability, and is not available as an affirmative process leading to any particular immigration benefit or status. Indeed, even persons granted relief under the CAT are ordered removed, with the removal order qualified by language either withholding or deferring that removal.

#### *Distinctions from Asylum*

Certain individuals are legally ineligible for both asylum with withholding of removal, and relief under the Convention against Torture (“CAT”) is the only chance they have to remain in this country. Most commonly, this occurs when an individual has been convicted of a “particularly serious crime” in the United States. People who have been sentenced to a combined total of 5 or more years of imprisonment for convictions for “aggravated felonies,” and people who have criminal convictions related to selling drugs are almost always considered to have committed a particularly serious crime. Other types of criminal convictions that may be considered “particularly serious crimes” are those that involve significant violence, harm, or a serious risk of injury to others. Other factors that may make a person eligible only for CAT include commission of a “serious nonpolitical crime” outside of the United States, persecution of others, or participation or support of terrorist groups.

Almost all people who qualify only for CAT are subject to mandatory detention during the course of their removal proceedings, meaning that they do not qualify to be released from immigration detention on parole or after paying a bond. In some instances, the U.S. government will continue to detain an individual even after they have been granted CAT if the government consider them to be a danger to the community.

Most individuals who apply for asylum and withholding apply for CAT at the same time. Once they are determined to be ineligible for asylum or withholding of removal under the statute, their application for CAT can be considered.

#### *Legal Standards*

The Convention Against Torture and its implementing regulations provide that no person may be removed to a country where it is “more likely than not” that such person will be subject to torture. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Pub. L. 105-277 (1998); 8 C.F.R. §§ 1208.16, 1208.17, 1208.18; see also Matter of M-B-A-, 23 I&N Dec. 474, 477-478 (BIA 2002).

“Torture” is defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. § 1208.18(a)(1). It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions, unless such sanctions defeat the purpose of the CAT. 8 C.F.R. § 1208.18(a)(3). For an act to constitute torture, it must be directed against a person. Acquiescence of a public official requires that the official have awareness of or remain “willfully blind” to the activity constituting torture, prior to its commission, and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7).

The applicant for CAT relief bears the burden of proof. 8 C.F.R. § 1208.16(c)(2). As with asylum adjudications, the applicant’s testimony, if credible, may be sufficient to sustain the burden of proof without corroboration. Id., see also Matter of Y-B-, 21 I&N Dec. at 1139. However, if the applicant’s testimony is the primary basis for the CAT claim and it is found not to be credible, that adverse credibility finding may provide a sufficient basis for denial of CAT relief. In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including evidence that the applicant has suffered torture in the past; evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information on country conditions. 8 C.F.R. § 1208.16(c)(3). A pattern of human rights violations alone is not sufficient to show that a particular person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist to indicate that the applicant will be personally at risk of torture. Matter of S-V-, 22 I&N Dec. at 1313. To meet his burden of proof, an applicant for CAT relief must establish that someone in his particular alleged circumstances is more likely than not to be tortured in the country designated for removal. Matter of J-E-, 23 I&N Dec. 291, 303-304 (BIA 2002); Matter of G-A-, 23 I&N Dec. 366, 371-72 (BIA 2002); Matter of M-B-A-, 23 I&N Dec. at 478-79. Eligibility for CAT relief cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen. Matter of J-F-F-, 23 I&N Dec. 912, 917-918 (A.G. 2006). There is no statutory time limit for filing a claim under the Convention Against Torture.

An applicant who establishes that he or she is entitled to CAT protection shall be granted withholding of removal unless he or she is subject to mandatory denial of that relief, in which case he or she shall be granted deferral of removal. 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a); An applicant is subject to mandatory denial of withholding of removal under CAT if he or she participated in the persecution of others, if he or she was convicted of a particularly serious crime, if there are serious reasons to believe he or she committed a serious nonpolitical crime outside of the United States, or if there are reasonable grounds to believe he or she is a danger to the security of the United States. 8 C.F.R. § 1208.16(d)(2); see also INA § 241(b)(3)(B). Yet, an alien’s criminal convictions, no matter how serious, are not a bar to deferral of removal under the Convention Against Torture. See 8 C.F.R. § 1208.17(a); Matter of G-A-, 23 I&N Dec. at 368.

When an Immigration Judge grants deferral of removal under the Convention Against Torture, he or she must first issue an explicit order of removal. The regulations at 8 C.F.R. § 1208.17(b) require that when the Immigration Judge grants deferral of removal to an alien the judge must inform the alien that the alien's removal to the country where the alien is more likely than not to be tortured shall be deferred until such time as the deferral is terminated. The Immigration Judge shall further inform the alien that the grant of deferral of removal:

1. Does not confer upon the alien any lawful or permanent immigration status in the United States;
2. Will not necessarily result in the alien being released from the custody of the DHS if the alien is subject to such custody;
3. Is effective only until terminated;
4. Is subject to review and termination based on a DHS motion if the Immigration Judge determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or upon the alien's request; and
5. Defers removal only to the country where it has been determined that the alien is likely to be tortured and does not preclude the DHS from removing the alien to another country where it is not likely the alien would be tortured.

#### IV. Withholding versus Deferral of Removal

CAT provides two types of protections, "withholding of removal (under CAT)" and "deferral of removal." Both protections ensure that aliens are not returned to a country where they would face torture.

- **Withholding of Removal (Under CAT)**

Withholding of removal (under CAT) prohibits returning aliens to a specific country where they would face torture. It is a more secure form of protection than deferral of removal. It can be terminated only if DHS establishes that an alien is not likely to be tortured in that country.

- **Deferral of Removal**

Deferral of removal also prohibits returning aliens to a specific country where they would face torture. However, deferral of removal is granted to aliens who likely would face torture but who are ineligible for withholding of removal (under CAT), for example, certain criminals and persecutors.

Deferral of removal is a more temporary form of protection. It can be terminated more quickly and easily if an alien no longer is likely to be tortured in the country of removal, or if the U.S. government receives assurances that the alien will not be tortured if returned.

Deferral of removal is a lesser protection than withholding of removal, and arguably reflects Congress's intent that aliens falling under a category established by INA § 241(b)(3)(B), "to the maximum extent possible," be excluded from protections afforded to other classes of aliens under regulations implementing CAT requirements. Aliens granted deferral of removal to a country where they would likely face torture may instead be removed at any time to another country where they would not likely face torture. *See* 8 C.F.R. § 208.17(b)(2). Further, such aliens are subject to post-removal order detention for such periods as prescribed by regulation. *See* 8 C.F.R. § 241.13-14. Deferral may be terminated either (1) at the request of the alien; (2) following a determination by an immigration judge that the alien would no longer likely be tortured in the country to which removal had been deferred; or (3) following a determination by the Attorney General that deferral should be terminated on the basis of diplomatic assurances forwarded by the Secretary of State that indicate that the alien would not be tortured in the receiving country. *See* 8 C.F.R. § 208.17(d)-(f).

### *Appeals*

CAT claims are adjudicated in the first instance by EOIR immigration judges during regular removal proceedings. Immigration judge decisions may be appealed to the BIA. If the alien disagrees with the BIA's ruling, the alien may file a petition for review (an appeal) with the federal courts of appeal.

### V. Elements of CAT Relief

As recognized by the BIA, under the Convention Against Torture, "torture" means: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. Matter of J-E-, 23 I. & N. Dec. 291, 297 (BIA 2002); see also 8 C.F.R. § 1208.18(a) (2013).

#### Intent

CAT: "any act by which severe pain or suffering... 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"

8 CFR § 1208.18(a)(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."

Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008) : “we hold that to establish a likelihood of torture for purposes of the CAT, a petitioner must show that severe pain or suffering was specifically intended—that is, that the actor intend the actual consequences of his conduct, as distinguished from the act that causes these consequences.”

### Custody or physical control

### Not lawful sanctions

Torturer is a public official acting in an official capacity OR torture is inflicted at the instigation of or with the consent or acquiescence of a public official acting in an official capacity

The torturer must be a public official or other person acting in an official capacity in order to invoke Article 3 *Convention against Torture* protection. A non- governmental actor could be found to have committed torture within the meaning of the Convention *only if* that person inflicts the torture (1) at the instigation of, (2) with the consent of, or (3) with the acquiescence of a public official or other person acting in official capacity.

The phrase “acting in an official capacity” modifies both “public official” and “other person,” such that a public official must be “acting in an official capacity” to satisfy the state action element of the torture definition. Thus, when a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition is not satisfied.

It is unsettled whether an organization that exercises power on behalf of the people subjected to its jurisdiction, as in the case of a rebel force which controls a sizable portion of a country, would be viewed as a "government actor." It would be necessary to look at factors such as how much of the country is under the control of the rebel force and the level of that control.

The torture must be “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.”

A public official cannot be said to have "acquiesced" in torture unless, prior to the activity constituting torture, the official was “aware” of such activity and thereafter breached a legal responsibility to intervene to prevent the activity.

The Senate ratification history explains that the term “awareness” was used to clarify that government acquiescence may be established by evidence of *either* actual knowledge *or* willful blindness. “Willful blindness” imputes knowledge to a government official who has a duty to prevent misconduct and “deliberately closes his eyes to what would otherwise have been obvious to him.”

In addressing the meaning of acquiescence as it relates to fear of Colombian guerrillas, paramilitaries and narco- traffickers who were not attached to the government, the Board

of Immigration Appeals (BIA) indicated that more than awareness or inability to control is required. The BIA held that for acquiescence to take place the government officials must be “willfully accepting” of the torturous activity of the non-governmental actor.

Several federal circuit courts of appeals have rejected the BIA’s “willful acceptance” phrase in favor of the more precise “willful blindness” language that appears in the Senate’s ratification history. For purposes of threshold reasonable fear screenings, asylum officers should use the willful blindness standard.

The United States Circuit Court of Appeals for the Ninth Circuit ruled that the correct inquiry concerning the acquiescence of a state actor is “whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens.” The court rejected the notion that acquiescence requires a public official’s “actual knowledge” and “willful acceptance.” The Ninth Circuit subsequently reaffirmed that the state actor’s acquiescence to the torture must be “knowing,” whether through actual knowledge or imputed knowledge (“willful blindness”). Both forms of knowledge constitute “awareness.”

The United States Circuit Court of Appeals for the Second Circuit agreed with the Ninth Circuit approach on the issue of acquiescence of government officials, stating “torture requires only that government officials know of or remain willfully blind to act and thereafter breach their legal responsibility to prevent it.”

Evidence that private actors have general support in some sectors of the government is insufficient to establish that the officials would acquiesce to torture by the private actors. Thus, an Honduran peasant and land reform activist who testified to fearing severe harm by a group of landowners did not demonstrate that government officials would turn a blind eye if he were tortured simply because they had ties to the landowners.

When police, at the request of the victim, do not intervene to punish the perpetrator of violence, there is no acquiescence to the violence and the victim is not entitled to Convention protection.

If authorities have made “best efforts” to address problems of isolated misconduct by “rogue agents” of the government, the authorities cannot be said to have acquiesced to that misconduct.

The *Convention against Torture* is designed to protect against future instances of torture. Therefore, the asylum officer should consider whether there is a reasonable possibility that:

1. A public official would have prior knowledge or would willfully turn a blind eye to avoid gaining knowledge of the potential activity constituting torture; and
2. The public official would breach a legal duty to intervene to prevent such activity.

Evidence of how an official or officials have acted in the past (toward the applicant or others similarly situated) may shed light on how the official or officials may act in the future.

### Benefits of CAT Protection

A grant of relief under the Convention Against Torture results in the following benefits:

- Allow the detention of CAT recipients, where appropriate,
- Allow the removal of CAT recipients to a third country where they would not be tortured,
- Allow eligible CAT recipients, but not their family members, to apply (with USCIS) for work authorization,
- Do not provide for CAT recipients to become lawful permanent residents, and
- Do not provide for CAT recipients to bring family members to the United States.

### Important Case Law

#### **Consideration of All Relevant Evidence**

*Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015): internal relocation must be considered, but it is neither the applicant's burden to prove it is impossible, nor does the burden shift to the government.

*Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015): BIA must consider all relevant evidence of risk of torture, including family affiliation.

*Andrade v. Lynch*, 798 F.3d 1242 (9th Cir. 2015)

- Affirming denial of CAT where BIA took note of tattoos, petitioner was not a former gang member, and tattoos were not gang-related.
- Contrasting with *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011), where expert witness testified that Honduran former Crips member had 75% chance of being killed by police or vigilantes because of his gang-related tattoos

*Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015)

- BIA erroneously concluded that petitioner had not suffered past torture
- BIA misapplied country conditions evidence of legislation affecting gay men and lesbians and failed to consider evidence of violence against transgender women
- BIA misread the record in concluding that police abuses against transgender women only occurred in the context of drug trafficking
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#### **Role of Circumstantial Evidence**

*Madrigal v. Holder*, 716 F.3d 499 (9<sup>th</sup> Cir. 2013)

- “Viewed in context, [the petitioner]’s belief that the... incidents are attributable to Los Zetas is more than pure speculation.”

- “Because his explanation for the... events is plausible and supported by circumstantial evidence, it must be credited in the absence of an explanation that is at least as plausible”

*Garcia v. Holder*, 756 F.3d 885, 887-88 (5th Cir. 2014)

- “Based on the sequence of events, one possible conclusion is that the men who threatened and beat Garcia on each occasion were either police officers or other men working in concert with some other government source... If there were public officials supplying the perpetrators with information that they obtained as part of their official duties, government acquiescence could be shown.”
- “the alleged active involvement of public officials acting in their official capacity and the close temporal proximity between Garcia's contact with public officials and the subsequent threats and beatings support his assertions and warrant further review.”

### **Custody or Physical Control**

*Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (no need to show that torture would be under public officials' custody or physical control; a petitioner may qualify by showing that he would suffer torture while under *private parties'* custody or physical control)

What is custody or physical control?

- Not being gassed by fumigants targeting drug crops *Arias v. Dyncorp*, 517 F.Supp.2d 221 (D.D.C. 2007)
- Not being subjected to Agent Orange in Vietnam *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 112 (E.D.N.Y. 2005)
- *Comollari v. Ashcroft*, 378 F.3d 694, 697 (7th Cir. 2004): “Probably more often that not the victim of a murderer is within the murderer's physical control for at least a short time before the actual killing, but that would not be true if for example the murderer were a sniper or a car bomber.”
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### **Lawful Sanctions**

*Habtemicael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004)

- IJ should have considered whether the sanctions imposed on military deserter were imposed by a legitimate government authority

### **Torturer is a Public Official Acting in an Official Capacity**

*Rodriguez-Molinero v. Lynch*, N. 15-1860, A075-614-869, (7th Cir December 17, 2015)

- IJ erred in considering whether police officers who torture the petitioner were “rogue officers.”
- “It is irrelevant whether the police were rogue (in the sense of not serving the interests of the Mexican government) or not. The petitioner did not have to show that the entire Mexican government is complicit in the misconduct of individual police officers.”

### **Instigation, Consent, or Acquiescence**

*Madrigal v. Holder*, 716 F.3d 499, 509 (9<sup>th</sup> Cir. 2013).

- “Although the public official must have awareness of the torturous activity, he need not have actual knowledge of the specific incident of torture. Acquiescence also does not require that the public official approve of the torture, even implicitly. It is sufficient that the public official be aware that torture of the sort feared by the applicant occurs and remain willfully blind to it”
- “Importantly, an applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture. He need show only that ‘a public official’ would so acquiesce.”

## VI. Regulation Text

“8 C.F.R. § 208.18 Implementation of the Convention Against Torture.

(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, 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, 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.”