



QUALIFYING FOR PROTECTION UNDER THE CONVENTION AGAINST TORTURE

By Aruna Sury

According to international and U.S. law, a person cannot be returned to a country where they are likely to face torture. The United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT” or “the Convention”), requires countries that sign-on, to condemn and prohibit torture.¹ Article III of the Convention states that a signatory nation must not “expel, return . . . or extradite” a person to a country where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”

The United States became a signatory to CAT in 1988 and Congress ratified the treaty in 1994. In 1998, as part of the Foreign Affairs Reform and Restructuring Act (“FARRA”), the U.S. officially announced its plan to implement CAT.² The former Immigration and Naturalization Service promulgated regulations in 1999, which set out the standards and procedures for protection under the Convention. The regulations can be found at 8 C.F.R. §§ [1]208.16 to [1]208.18.

Protection under Article III of the Convention is an important option for noncitizens who do not meet the requirements for asylum, but can show that they will be tortured if they return to their home country. Relief under the Convention is not discretionary, so for those that meet the eligibility requirements, the immigration judge (IJ) must grant protection.

This advisory provides guidance to practitioners on when and where to present a CAT claim on behalf of a client and explains the eligibility criteria for CAT relief. It also references key Board of Immigration Appeals (BIA) and federal court decisions that have addressed important issues that often come up in CAT cases. The end of this advisory contains a chart, which compares asylum, withholding of removal, and CAT for easy reference.

I. Overview

The regulations implementing the U.S.’s obligations under the Convention provide a specific legal standard for adjudicators to decide whether someone warrants protection under Article III. By regulation, a person seeking protection under the Convention must show that it is more likely than not that they would be tortured if removed to the country of removal.³ To qualify for relief, the applicant must demonstrate that they will likely

suffer the intentional infliction of severe pain and suffering, committed by, or at the acquiescence of, the government in the country of removal.⁴ In the next few sections, we will break down this legal standard.

There are two types of CAT protection, both of which can only be pursued in Immigration Court: withholding of removal under CAT and deferral of removal under CAT. Both forms of relief rely on the same general legal standard above, but withholding of removal under CAT is only available to those who are not barred from withholding of removal under the Immigration and Nationality Act (INA). CAT withholding of removal⁵ under 8 CFR § 1208.16 is only available to individuals who have not: been convicted of a “particularly serious crime” or an aggravated felony for which the term of imprisonment was five years or more; engaged in the persecution of others; committed a serious non-political crime outside of the U.S.; and/or been deemed a danger to the security of the United States.⁶

The second type of CAT protection, deferral of removal under 8 CFR § 1208.17(a), offers protection under CAT for those individuals who are ineligible for withholding due to one or more grounds for mandatory denial. The only difference in the benefits conferred by withholding under CAT versus deferral under CAT is that the procedures for terminating deferral of removal benefits is easier for the government than terminating withholding under CAT. Otherwise, as you will see in the next section, both allow the individual to stay in the United States and apply for work authorization.

CAT protection can never be denied as a matter of discretion.⁷ 8 C.F.R. § 1208.16(c)(2) provides that to prove eligibility for CAT protection, “[t]he burden of proof is on the applicant . . . to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” If that standard is met, the IJ must grant withholding of removal if one of the mandatory denial grounds listed above do not apply. If one of the mandatory denial grounds applies, the IJ must grant deferral of removal.

An IJ can consider a CAT application in two contexts: (1) removal proceedings (or old deportation or exclusion proceedings that are still pending); and (2) withholding-only proceedings where the government seeks to reinstate a prior removal order⁸ or seeks to enter an administrative order of removal against a noncitizen who has been convicted of an aggravated felony.⁹ In removal proceedings, a respondent’s intent to apply for CAT relief should be stated at the master calendar hearing when pleadings are entered.¹⁰ In withholding-only proceedings, the respondent’s options for relief will be limited to withholding of removal under the INA and/or CAT relief, and only with respect to the country or countries previously designated in the original removal order if a prior removal order is being reinstated.¹¹

II. Benefits Conferred by CAT Relief

CAT relief does not confer lawful immigration status or a path to permanent residency. Rather, it will only prevent deportation of the applicant to the specific country or countries to which removal has been withheld or deferred.¹² So after a CAT grant, if a different country will accept the person, they can be deported to that country.

A person granted CAT protection can qualify for a work permit. A separate work authorization category exists for those granted withholding of removal under CAT.¹³ Those granted deferral of removal under CAT can apply for a work permit once released from DHS custody, under the same category used by individuals with final removal orders released on an order of supervision.¹⁴ While CAT protection allows the foreign national to live

lawfully in the United States, it does not provide any avenue for family members to obtain lawful status or other benefits through the CAT grant.

III. What is Torture?

The regulations contain a definition of torture and list the types of acts that constitute torture.

8 CFR § 1208.18(a)(1) provides:

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.

According to this definition, torture has three essential elements: (1) the intentional infliction, (2) of severe pain and suffering (physical or mental), (3) committed by or at the acquiescence of the government.

The regulation goes on to provide the following limitations to the definition:

- 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.
- 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.
- In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:¹⁵
 - 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.
- The act of torture “must be specifically intended to inflict severe physical or mental pain or suffering” and “an act that results in unanticipated or unintended severity of pain and suffering is not torture.”

- In order to constitute torture an act must be directed against a person in the offender's custody or physical control.
- Noncompliance with applicable legal procedural standards does not per se constitute torture.

PRACTICE TIP: Although in specific situations there can be an overlap, torture is not the same as persecution as defined in the asylum context and persecution is not always torture.¹⁶ In presenting a CAT claim, keep in mind that it is a distinct form of relief that will require you to highlight specific facts and country conditions evidence that may be less relevant for asylum or withholding of removal. Having a clear and separate strategy for CAT relief is particularly important where asylum and withholding of removal may be denied on grounds that don't apply to CAT relief such as proving that the harm feared will be on account of a protected ground.

Example: Mohamed is a Shi'a Muslim from Iraq. When he applied to serve in the Iraqi Military in the early 1980's, Saddam Hussein was in power. Under Saddam Hussein's rule, Shi'a Muslims were mistreated and severely discriminated against. So in his military application forms, Mohamed listed himself as a Sunni Muslim. Thirteen years later, when the Iraqi government learned about this misrepresentation, Mohamed was arrested. For the next one month, officers detained, interrogated, and beat Mohamed. The mistreatment he suffered included being kicked and beaten with electrical cables while being blindfolded and tied up. Officers also repeatedly burned him with cigarettes. Before releasing him, they warned Mohamed that he will face even worse treatment if he told anyone about his time in detention. Soon after that, Mohamed fled Iraq and came to the United States. He fears that if he is forced to return to Iraq, he will be arrested again and tortured because he has talked to others about his experiences in police custody against the officers' warnings. Because of the severity of the harm over a protracted period of time, Mohamed can likely prove that the harm he suffered was torture.¹⁷

Example: Fatoumata is citizen of Mali, where female genital mutilation (FGM) is a painful and invasive procedure commonly and forcibly performed on girls. When Fatoumata was five years old, she underwent FGM, which she remembers as being extremely painful and traumatic. Then, after Fatoumata's own daughter turned two years old, village elders snatched her from Fatoumata's arms and performed FGM on her even though Fatoumata and her husband were against the practice. After the family fled Mali and arrived in the United States, Fatoumata and her husband had another daughter, Mariam. Fatoumata now fears for Mariam if the family is forced to return to Mali since she will almost certainly be subjected to FGM. In fact, Fatoumata's and her husband's opposition to the practice will likely motivate their tribe's elders to punish them by performing the procedure on Mariam. Fatoumata could qualify for CAT protection because the psychological harm she would suffer if Mariam is forcibly subjected to FGM would amount to torture. A few courts and the BIA have recognized that the practice of forced FGM on an applicant's child can constitute torture of the parent due to the extreme mental harm it can cause the parent.¹⁸

Other examples of torture include rape, assassination, deprivation of water, sleep, or other essentials for a prolonged period, forcible performance of FGM, and threats intended to inflict severe mental anguish or harm.

IV. Intentional Infliction

The regulations state that to qualify for protection under CAT, the torture must be “specifically intended to inflict severe physical or mental pain or suffering.”¹⁹

In *Matter of J-E*,²⁰ the BIA held that “negligent acts” or harm resulting from a lack of resources cannot form a basis for CAT relief. In that case, the Board rejected a claim by a Haitian applicant who feared torture as a criminal deportee, finding that “there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture.”²¹ Rather, according to the Board, the substandard prison conditions were a result of a lack of resources and “management problems” and were an inadequate basis for granting CAT relief even though there was evidence of torture occurring in the prisons. The majority of circuits have deferred to *Matter of J-E*’s interpretation of the intentional infliction requirement.²²

In *Matter of J-R-G-P*,²³ the BIA held that it was not erroneous for an immigration judge to deny CAT relief where the evidence “plausibly establishes that abusive or squalid conditions in pretrial detention facilities, prisons, or mental health institutions in the country of removal are the result of neglect, a lack of resources, or insufficient training and education, rather than a specific intent to cause severe pain and suffering.” In that case, the BIA concluded that the applicant, who feared being tortured after being imprisoned or hospitalized in Mexico due to his mental illness, could not meet his burden of proving that the torture he would suffer would be intentionally inflicted.²⁴

Recently, the Ninth Circuit rejected the BIA’s finding in a different case, that the harm inflicted by Mexican officials and with government acquiescence would not be intentionally inflicted against a mentally ill applicant.²⁵ The BIA had reasoned, similarly to *Matter of J-R-G-P*, that the mistreatment of mentally ill persons in Mexico was part of a generalized lack of proper care for mentally ill persons resulting from a lack of knowledge of mental illness and a lack of resources, not due to an intention to inflict harm. In rejecting this reasoning, the Ninth Circuit pointed out that this particular applicant was at risk of being targeted for intentional harm and torture due to several factors: the applicant’s diagnosis of schizophrenia and seizure disorder that made him particularly vulnerable to the negative attention of police, evidence establishing that the applicant was unable to care for himself and therefore would likely be homeless in Mexico, country conditions evidence showing that homeless and mentally ill persons are much more likely to be detained by Mexican police, and evidence that police target such persons for harm.

In presenting theories on intentional infliction of harm, advocates should differentiate the facts of their case from *Matter of J-R-G-P* and instead, highlight similarities with the Ninth Circuit’s decision in *Guerra v. Barr*.

V. Official Act or Government Acquiescence

Applicants for CAT relief must prove that the torture they are likely to suffer will 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.”²⁶ If an official governmental policy or a pattern of practice shows that the torturer is acting in his official capacity, that would be a clear case of an official act.²⁷ But sometimes, a low-level government

employee may engage in torture without government authorization. Or private individuals, such as members of a criminal gang, may be the torturers. In these situations, how can an applicant prove that the tortuous act was committed in an “official capacity” or with government acquiescence?

Do you need to prove acquiescence if the torture is committed by low-level employees of the government? In *Matter of Y-L-, A-G- & R-S-R-*,²⁸ the Attorney General stated that torture is considered to have been committed by a government official if the official acts under “color of law.” According to the Attorney General, the “color of law” standard requires the applicant to prove that the tortuous acts were committed with the “consent or approval of *authoritative government officials acting in an official capacity.*”

The BIA recently held, in *Matter of O-F-A-S-*, that “[r]ogue officers’ or ‘rogue officials’ are public officials who act outside of their official capacity, or, in other words, not under color of law.”²⁹ A few relevant considerations in determining whether an officer has acted in an official capacity are whether the officer was wearing an official uniform and was on duty, whether the officer had a higher level position, whether the official’s position provided access to the victim, and whether the officer threatened to retaliate through official channels. If officially issued equipment was used to conduct the torture, the Board stated that it is not dispositive that the officer was acting in an official capacity. Rather, according to the Board, an IJ should consider whether a private citizen could obtain the same weapons or restrain the victim in the same manner.

Ultimately, in *Matter of O-F-A-S-*, the Board concluded that the officers who abused the applicant did not necessarily act in their official capacities even though they were wearing law enforcement uniforms and carried high-caliber weapons and handcuffs. The Board upheld the IJ’s finding that the uniforms and equipment could have been “fake” and that what was more determinative was that the men did not arrive in police vehicles, and fled when they learned that police were on their way to the scene of the incident. The Board further found it significant that the applicant-victim did not report the incident to the police, thus making it impossible to know whether police would have investigated the matter.

The First Circuit has similarly found in a case where there was evidence that the police regularly abuse private citizens with impunity, that the applicant failed to establish government acquiescence since the officers were acting without government authorization and the government was making efforts to address police misconduct.³⁰

However, the Second, Fifth, Eighth, and Ninth Circuits have departed from this approach. The Second Circuit found in a case involving police misconduct, “[t]o the extent that these police are acting in their purely private capacities, then the ‘routine’ nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it.”³¹

Similarly, the Fifth Circuit has held that where corrupt officials operated “under color of law” with the support of private actors, government participation or acquiescence may be established.³² “Under this standard, the government acquiescence need not necessarily be an officially sanctioned state action; instead, an act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” The Eighth and Ninth Circuits have applied a similar approach.³³

Example: Shiwen is an independent journalist from China who has reported on police abuses in rural localities in western China. Due to her national and international influence through western media, Chinese authorities were unable to openly arrest her. One early morning, while Shiwen was asleep, an unmarked vehicle with four ununiformed men raided her apartment and transported her to a jail three hours away. There, Shiwen was interrogated regarding the sources for her articles, severely beaten, and threatened with retribution against her and her family members. Although Shiwen’s kidnappers were not wearing uniforms, had arrived in unmarked cars, and did not identify themselves, other circumstances tend to indicate that Shiwen’s detention and torture were officially authorized and therefore occurred under “color of law.” She was taken to an official jail that was three hours away, she was interrogated regarding her articles expressing dissidence against police abuses, which shows a governmental motivation, and there wasn’t evidence of any motivation by private or criminal actors.

Does acquiescence mean public officials affirmatively approve of the private misconduct or is it enough that officials are willfully blind? “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.”³⁴

The issue of whether an applicant has proven government acquiescence would generally arise where they seek protection from being tortured by an individual or group of individuals not officially part of the government. The other scenario would be where the torture is conducted by low-level employees who are deemed to have not acted in an “official capacity.” The question of whether a government acquiesces in the practice of torture often overlaps with the issue of whether it intends to perpetuate the practice rather than being unable to control tortuous acts due to a lack of resources or mere negligence.

In half of the federal circuits, acquiescence does not require actual knowledge or willful acceptance. The Ninth Circuit was the first to hold that awareness and “willful blindness” by government officials is sufficient to prove acquiescence.³⁵ Additionally, acquiescence by “local officials” rather than “the entire foreign government” can satisfy the acquiescence requirement.³⁶ The acquiescence requirement can be met even if the victim would face torture while in the custody or physical control of a private party.³⁷ But the Ninth Circuit has also held that “a general ineffectiveness on the government’s part to investigate and prevent crime will not suffice to show acquiescence” and neither will an “inability to bring the criminals to justice.”³⁸

The BIA has rejected the concept of “willful blindness.”³⁹ Rather, it has stated that an applicant for CAT protection “must do more than show that the officials are aware of the activity but are powerless to stop it. He must demonstrate that . . . officials are willfully accepting of the . . . torturous activities.”⁴⁰ The Second, Third, Fifth, Sixth, and Ninth Circuits have explicitly rejected this approach, however.⁴¹ The Fourth Circuit has indicated, without explicitly deciding, that it would also apply a willful blindness standard.⁴² Given the widespread rejection of the Board’s position in *Matter of S-V-*, advocates should continue arguing in support of the willful blindness standard even in circuits that have not yet explicitly rejected the willful acceptance standard.

Example: Jorge is from El Salvador. He witnessed a brutal shootout between police and gang members in his neighborhood and testified against the gang members in court, after being promised protection by police. However, within three months of his testimony, Jorge was forcibly taken from his home by gang members who told him that he would pay for what he had done. They took him to their leader, who ordered that Jorge be kept in a warehouse where he could receive a “proper repayment.” For the next three days, Jorge endured severe torture which included beatings, deprivation of food, water, and sleep, being forced to stand for hours, and threats against his family. Gang members released Jorge after warning that now that he had seen what they are capable of, they would be expecting him to show them his loyalty. Fearing for his life, Jorge went to the police station to report the incident since he was promised protection. Police promised to surveil his home and visit him frequently, but failed to do so. Jorge saw the same gang members a few weeks later outside his home and concluded that the police were not willing to protect him as they had promised. Although they knew about the harm Jorge had suffered and would likely suffer, they turned a blind eye. Jorge would have a strong argument based on his own experiences and country conditions evidence showing similar experiences of court witnesses, that the Salvadoran government would be willfully blind to Jorge’s re-detention and torture if he were to be returned to El Salvador.

What if the government is taking steps to address torture committed by private actors, such as criminal gangs, but has so far been unsuccessful? The BIA has held that “a government’s inability to control a group ought not lead to the conclusion that the government acquiesced to the group’s activities” or was willfully blind to the tortuous acts.⁴³ There is a circuit split with regards to this question, however. So, whether an applicant loses her CAT case because a government has taken efforts to curb private actors depends on which circuit’s jurisdiction the case arises.

The First, Fourth, Fifth, Eighth, and Eleventh Circuits have held that a government’s inability to control tortuous acts by private actors does not amount to acquiescence if the government is making efforts to address the problem.⁴⁴

The Second, Third, Seventh and Ninth Circuits have found that a government’s efforts to address the problem of private actors employing torture was not necessarily an indication that the government does not acquiesce in the torture.⁴⁵

VI. Relocation

Unlike the asylum and withholding of removal regulations, the CAT regulations do not state that the applicant must only prove that internal relocation would not be reasonable. At the same time, the regulations do not require a showing that the applicant could not live safely elsewhere in the country. The Ninth Circuit has clarified that an applicant for CAT need not prove that relocation within the country of removal is “impossible.”⁴⁶ Instead, “the IJ must consider all relevant evidence” and “no one factor is determinative.”⁴⁷ But it is the applicant’s burden to prove a likelihood that they will be tortured if removed, so whether internal relocation is a possibility is part of that inquiry. The Second Circuit recently took the same position, pointing out that the regulations “do not require an applicant to prove that it is not possible to relocate to a different area of the country in order to evade torture.”⁴⁸ Other circuits have not addressed the issue of internal

relocation in the context of CAT relief. But practitioners can cite to the reasoning employed by the Second and Ninth Circuit in *Maldonado* and *Manning*.

Example: Delphine is a citizen of Cameroon who fled to the United States after enduring severe physical and sexual violence by a family friend for twenty-six years. Her family had sent her to live with the man when Delphine was 12 years old in order to help her escape the traditional practice of FGM. Although she avoided forced FGM, Delphine was denied the ability to attend school, regularly beaten and raped, and was impregnated twice by the man. The family friend used threats against their shared children to wield control over Delphine and once, when she successfully left the country and then relocated to a different town within Cameroon, he tracked her down due to his business connections. He attempted to rape her when he found her, but she managed to escape. She then fled Cameroon and eventually made it to the United States. In a case with similar facts, the Ninth Circuit concluded that although internal relocation had not been proven as impossible, the evidence demonstrated that Delphine had been tracked down by her abuser once when she tried to relocate due to his business connections. The court stated that no evidence was presented by DHS to suggest that it would not happen again if she were to attempt to relocate again.⁴⁹ Therefore, Delphine had proven that relocation would not change the fact that she would likely face torture upon return to Cameroon.

VII. How to Apply and Present a CAT Claim

Asylum applications filed after April 1, 1997 “shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.”⁵⁰ The same form used for asylum and withholding of removal, the I-589, is also used for CAT relief. It is possible to only apply for CAT using the Form I-589, but usually, unless there is an obvious crime bar to asylum and withholding, applicants would use the form to apply for all three forms of relief. An applicant will be considered for CAT relief if the box for “Torture Convention” is checked in the I-589.

As discussed previously, an applicant for CAT relief must prove that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”⁵¹ This has been defined as “a chance greater than fifty percent.”⁵² “The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”⁵³ At the same time, country conditions evidence can also be sufficient to meet an applicant’s burden of proof, even where the applicant isn’t found to be credible.⁵⁴

The regulations require the immigration judge to consider “all evidence relevant to the possibility of future torture.”⁵⁵ Unlike asylum and withholding of removal, an applicant for CAT protection need not package their evidence in terms of separate grounds for CAT relief because “CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible CAT claims.”⁵⁶ Where torture is likely to occur for several reasons, the applicant must prove that each link in a “hypothetical chain of events is more likely than not to happen.”⁵⁷

The IJ must consider the following when determining the possibility of future torture:

- Evidence of past torture but unlike with persecution in the asylum and withholding of removal contexts, past torture doesn't give a presumption of future torture.;⁵⁸
- Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- Other relevant information regarding conditions in the country of removal.

8 CFR §§ 1208.16(c)(3)(i) – (iv).

As with asylum and withholding of removal, credible testimony alone can be sufficient to prove eligibility for CAT. However, all available corroboration should be submitted in order to prove all elements of the claim as well as to boost credibility. So, in addition to the I-589 form and a detailed declaration, applicants should submit identity documents from their native country, any proof of harm including witness statements and medical records, and country conditions evidence.

VIII. After CAT Protection is Granted

Once a grant of CAT protection becomes final, either because DHS does not appeal the IJ's decision or because the BIA grants or affirms CAT protection, the benefit to the applicant is that they will be protected from deportation to the country or countries that the grant specifically pertains to. Unlike asylum, a CAT grant, as with withholding of removal under the INA, pertains only to the specific countries designated as countries of removal. So, for example, if a person who is ordered removed to Honduras is granted CAT protection, DHS would be permitted to deport them to Mexico if legally possible, since the removal order did not pertain to Mexico.

As with withholding of removal under the INA, relief under CAT requires the immigration judge to first enter an order of removal to a specific country or countries. So a person granted CAT relief has a final order of removal against them, thus subjecting them to a mandatory 90-day post-removal detention period while DHS figures out whether the person can be removed to a third country.⁵⁹ After the 90 days has elapsed, the person must be released on an order of supervision unless they are inadmissible, deportable for having overstayed a nonimmigrant visa, deportable on the basis of a criminal conviction, or deportable on national security and related grounds. DHS' power to detain beyond the 90-day removal period, however, has been limited by the Supreme Court to cases where removal can be effectuated in the "reasonably foreseeable future." The Court has deemed six months to be a presumptively reasonable period, after which DHS would need to prove that there is a "significant likelihood of removal in the reasonably foreseeable future."⁶⁰ In practice, if a person is not otherwise subject to mandatory detention and their removal to a third country is not reasonably foreseeable, DHS does not detain individuals during the 90-day removal period. But for those granted deferral of removal, mandatory detention is often applicable so DHS may choose to detain such individuals during the 90-day period.

DHS can file a motion to reopen at any time to seek termination of deferral of removal.⁶¹ When considering whether the evidence is sufficient to warrant a de novo hearing on termination of deferral of removal, the

inquiry is whether the evidence that was not previously considered is “relevant to the possibility” that the respondent would be tortured in the country of removal.⁶² Once reopened, the IJ must provide notice of the time and place of the hearing, and must inform respondents that they may supplement the information in their initial application within 10 days (or 13 days if service of notice was by mail).⁶³ The IJ will then conduct a brand new hearing on whether the respondent is eligible for deferral of removal.

By contrast, to terminate withholding of removal under CAT, the burden is on the government to prove by a preponderance of the evidence that one of the mandatory denial grounds applies to the respondent, that there was fraud in the initial application, or that there has been a fundamental change in circumstances such that the respondent is no longer eligible for CAT relief.⁶⁴ So termination of withholding of removal under CAT is more difficult than termination of deferral of removal.

IX. Comparison Chart

	Asylum	Withholding of Removal under INA	Withholding of Removal under CAT	Deferral of Removal Under CAT
What must the applicant prove?	Reasonable possibility of future persecution	Life or freedom will more likely than not be threatened	More likely than not to be tortured	More likely than not to be tortured
On account of a protected ground?	Yes – harm must be on account of race, religion, nationality, political opinion or membership in a particular social group	Yes – harm must be on account of race, religion, nationality, political opinion or membership in a particular social group	No	No
Filing deadline?	Yes – one-year filing deadline	No	No	No
Must be filed in immigration court?	No, can be filed affirmatively with USCIS	Yes	Yes	Yes
Criminal and Security Bars?	Yes	Yes	Yes	No
Discretionary?	Yes	No	No	No
Can be removed to a different country?	No	Yes	Yes	Yes
Immigration Detention possible after grant?	No	Yes	Yes	Yes
Path to Permanent Residence?	Yes – can apply for LPR status after one year	No	No	No
Can get status for spouse and children?	Yes	No	No	No

End Notes

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). CAT also requires countries to extradite torturers that are found within their territories.

² Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681-822 (codified as Note to 8 U.S.C. § 1231).

³ 8 CFR 1208.16(c)(2).

⁴ 8 CFR § 1208.18(a)(1).

⁵ Withholding of removal under CAT is distinct from the relief option typically referred to as “withholding of removal” by the courts and practitioners. “Withholding of removal” when used outside the CAT context is a statutory relief option whose eligibility criteria are more similar to asylum, especially the requirement of proving a nexus between persecution and a protected ground. See INA 241(b)(3). CAT, on the other hand, is not a relief directly provided for by the Immigration and Nationality Act. Rather, FARRA announced U.S. policy to abstain from deporting individuals to countries they will suffer torture and provided for the publication of regulations to implement the United States’ treaty obligation under CAT.

⁶ 8 CFR § 1208.16(d)(2); INA § 241(b)(3)(B).

⁷ 8 CFR § 1208.16(c)(4).

⁸ Where a noncitizen has entered the United States illegally after having been previously deported pursuant to a removal order, DHS has discretion to reinstate that order. INA § 241(a)(5). But if the noncitizen indicates a fear of return, DHS must refer the noncitizen to an asylum officer for a reasonable fear determination. See 8 CFR § 241.8(e). If the noncitizen credibly establishes a reasonable fear of return, DHS must refer the noncitizen to the immigration court for withholding-only proceedings. 8 CFR § 208.31(e).

⁹ DHS can issue a Final Administrative Removal Order to a noncitizen who has a final conviction for an aggravated felony. INA § 238(b). But if the noncitizen expresses a fear of return, DHS must perform a reasonable fear interview and if a positive finding is made, refer the individual to an IJ for withholding-only proceedings. 8 CFR § 208.31(e).

¹⁰ See ILRC Practice Advisory, “Representing Clients at the Master Calendar Hearing,” Dec. 2018, for guidance on entering pleadings and stating relief that will be sought by the respondent. See:

https://www.ilrc.org/sites/default/files/resources/rep_clnts_mstr_cal_hearing-20181220.pdf

¹¹ 8 CFR § 1208.2(c)(3)(i) (IJ’s scope of review in withholding-only proceedings is “limited to a determination of whether the alien is eligible for withholding or deferral of removal” to the country designated in the removal order and “all parties are prohibited from raising or considering any other issues.” See also INA § 241(a)(5); 8 CFR § 1241.8(e).

¹² 8 CFR § 1208.16(f).

¹³ 8 CFR § 274a.12(a)(10).

¹⁴ 8 CFR § 274a.12 (c)(18).

¹⁵ The regulation’s specific limitations on what constitutes “mental pain or suffering” were included during the ratification process by the United States. These limitations are not part of the original Convention, which did not narrow the definition.

¹⁶ *Singh v. Whitaker*, 914 F.3d 654 (9th Cir. 2019) (“That Singh suffered persecution in the past does not necessarily mean he will be tortured in the future.”).

¹⁷ The facts of Mohamed’s case roughly resemble the facts of *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001), in which the court found that Mr. Al-Saher was the victim of torture and would likely again be tortured if returned to Iraq.

¹⁸ Fatoumata’s case was the subject of a 7th Circuit decision finding that a parent can suffer direct and severe psychological harm from the practice of FGM against their child. See *Kone v. Holder*, 620 F.3d 760 (7th Cir. 2010). See also *Kone v. Holder*, 596 F.3d 141 (2d Cir. 2010) (no relation to 7th Cir. Case).

¹⁹ 8 CFR § 1208.18(a)(5).

²⁰ 23 I&N Dec. 291 (BIA 2002).

²¹ *Id.* at 301.

²² See *Oxygene v. Lynch*, 813 F.3d 541 (4th Cir. 2016) (listing circuit court decisions deferring to *Matter of J-E*).

²³ 27 I&N Dec. 482 (BIA 2018).

²⁴ *Id.* at 486-87.

²⁵ *Guerra v. Barr*, 951 F.3d 1128 (9th Cir. 2020). But see *Jima v. Barr*, 942 F.3d 468 (8th Cir. 2019) (finding citizen of South Sudan failed to show torture would be intentionally inflicted on him where he relied on a “string of assumptions” that were “plausible,” but failed to establish the likelihood that he would be targeted).

²⁶ 8 CFR § 1208.18(a)(1).

- ²⁷ But if there are laws that would subject the applicant to detention and torture “simply to cite the existence” of the laws is not enough. Rather, the applicant “must provide some current evidence, or at least more meaningful historical evidence, regarding the manner of enforcement of the provisions . . . on individuals similarly situated to herself.” *Matter of M-B-A*, 23 I&N Dec. 474, 479 (BIA 2002).
- ²⁸ 23 I&N Dec. 270, 283 (A.G. 2002).
- ²⁹ 27 I&N Dec. 709, 713–14 (BIA 2019).
- ³⁰ *Costa v. Holder*, 733 F.3d 13 (1st Cir. 2013).
- ³¹ *Khouzam v. Ashcroft*, 361 F.3d 171 (2d Cir. 2004).
- ³² *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014).
- ³³ *Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009) (showing government involvement in torture “does not require that the public official be executing official state policy or that the public official be the nation's president or some other official at the upper echelons of power. Rather . . . the use of official authority by low-level officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction.” Distinguishing this situation from cases in which there is an isolated incident of harm by someone who just happens to be a public official); *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017) (“The statute and regulations do not establish a ‘rogue official’ exception to CAT relief The four policemen were “public officials,” even though they were local police and state or federal authorities might not similarly acquiesce. Since the officers were apparently off-duty when they tortured Barajas-Romero, they were evidently not acting ‘in an official capacity,’ but the regulation does not require that the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts.”).
- ³⁴ 8 CFR § 1208.18(a)(8).
- ³⁵ *Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003). An applicant need not prove that she reported past torture to public officials or that public officials were specifically aware of her torture. *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006).
- ³⁶ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015).
- ³⁷ *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004).
- ³⁸ *Andrade-Garcia v. Lynch*, 828 F.3d 829, 836 (9th Cir. 2016).
- ³⁹ *Matter of S-V*, 22 I&N Dec. 1306, 1312 (BIA 2000).
- ⁴⁰ *Id.* At 1312.
- ⁴¹ *Zheng v. Ashcroft*, 332 F.3d 1186, 1188–89 (9th Cir.2003); *Khouzam v. Ashcroft*, 361 F.3d 161, 170–71 (2d Cir. 2004); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006); *Silva-Rengifo v. Attorney General*, 473 F.3d 58 (3d Cir. 2007); *Hakim v. Holder*, 628 F.3d 151, 157 (5th Cir. 2010).
- ⁴² *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 247 (4th Cir. 2013).
- ⁴³ *Matter of S-V*, 22 I&N Dec. 1306, 1312 (BIA 2000).
- ⁴⁴ *Amilcar-Orellana v. Mukasey*, 551F.3d 86, 92 (1st Cir. 2008) (no acquiescence where country conditions evidence showed the Salvadoran government’s efforts to address the problem of gang violence); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (no acquiescence where State Department’s Country Report showed that the government of El Salvador was taking steps to curb gang violence against former members of Mara Salvatrucha); *Chen v. Gonzales*, 470 F.3d 1131 (5th Cir. 2006) (finding that the BIA did not err in considering whether the government of China had taken steps to address corruption and third party abuse in deciding that the government would not acquiesce to the applicant’s torture); *Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014) (no acquiescence where government of Guatemala had arrested the applicant’s attacker, and even though the attacker was released a week later, the arrest showed there was no “willful blindness” to the problem of violence by the gang); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007) (“A 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 towards the torture of citizens by third parties.”); *Reyes-Sanchez v. U.S. Att’y Gen.*, 369 F.3d 1239 (11th Cir. 2004) (no acquiescence where Peruvian government was fighting against armed terrorist group which often used torture, “albeit not entirely successfully”).
- ⁴⁵ *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (“In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.”); *De La Rosa v. Holder*, 598 F.3d 103 (2d Cir. 2010) (recognizing that some government officials’ efforts to curb torture is not necessarily inconsistent with government acquiescence through certain other officials); *Pieschacon-Villegas v. Att’y Gen. of U.S.*, 671 F.3d 303 (3d Cir. 2011) (applicant who feared drug cartel after being an FBI informant could prove government acquiescence even though the Columbian government claimed that all paramilitary groups had been demobilized and the government had made some efforts in opposing torture); *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011) (Jordanian government’s ineffective methods in stopping honor killings constituted acquiescence because ineffectiveness doesn’t satisfy obligation under CAT); *Garcia-Milan v. Holder*, 755 F.3d 1026 (9th Cir. 2014) (where there is “evidence of corruption or other inability or unwillingness to oppose criminal organizations” on the part of a government, there is acquiescence despite the government’s general intent to stop torture by private actors).

⁴⁶ *Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015) (en banc).

⁴⁷ *Id.*

⁴⁸ *Manning v. Barr*, — F.3d —, 2020 WL 1522821, at *7 (2d Cir. Mar. 31, 2020).

⁴⁹ *Arrey v. Barr*, 916 F.3d 1149 (9th Cir. 2019).

⁵⁰ 8 CFR 1208.13(c)(1). See also *Pirir-Boc v. Holder*, 750 F.3d 1077, 1086 n.9 (9th Cir. 2014) (“[A] CAT claim is sufficiently raised when an alien declares his fear of future torture on his asylum application and provides supporting evidence during the removal hearing.”). The regulations also provided that individuals who had a final order of removal from before March 22, 1999 could move to reopen their proceedings in order to present their CAT claim if they filed the motion and proved prima facie eligibility by June 21, 1999. 8 CFR § 1208.18(b)(2).

⁵¹ 8 CFR § 1208.16(c)(2).

⁵² *Hamoui v. Ashcroft*, 389 F.3d 821 (9th Cir. 2004).

⁵³ 8 CFR 1208.16(c)(2).

⁵⁴ *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (“a CAT applicant may satisfy his burden with evidence of country conditions alone”).

⁵⁵ 8 CFR 1208.16(c)(3).

⁵⁶ *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1308 (9th Cir. 2015).

⁵⁷ *Matter of J-F-F*, 23 I&N Dec. 912, 917 (AG 2006).

⁵⁸ “[T]he evidence of past torture is ordinarily the principal factor on which [the court relies].” *Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010).

⁵⁹ INA § 241(a)(1).

⁶⁰ *Zadvydas v. Davis*, 533 U.S. 678 (2001). Soon after *Zadvydas*, Congress passed section 412 of the USA Patriot Act, which expressly authorized indefinite detention of noncitizens who have engaged in activities that threaten the national security of the United States. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (“USA PATRIOT Act”), Pub. L. No. 107-56, § 412, 115 Stat. 272 (Oct. 26, 2001). These limitations, however, have not been tested to date due to the very low number of cases in which national security-related detention has been publicly applied by the U.S. government under section 412.

⁶¹ See 8 C.F.R. §§ 1003.11, 1208.17(d)(1).

⁶² *Matter of C-C-I*, 26 I&N Dec. 375 (BIA 2014).

⁶³ 8 CFR 1208.17(d)(2).

⁶⁴ 8 CFR 1208.24(f).



San Francisco

1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C.

1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin

6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio

500 6th Street
Suite 204
San Antonio, TX 78215
t: 210.760.7368

About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the fundamental rights of immigrant families and communities.