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In this issue...

The Immigration Law Advisor is a professional newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

In Memoriam
Juan P. Osuna

by Renâ Cutlip-Mason

Compassionate, gentle, kind, modest, a consensus builder, a leader, a mentor, a dedicated public servant, an immigration expert…these words and more have been used to describe Juan in numerous previous tributes. They are all true, but I will remember these three little words when I think of Juan, "Hi, I'm Juan." Juan never labeled himself. He disregarded titles in order to know the person behind the label. He loved nothing more than to walk the halls of EOIR or visit the Immigration Courts getting to know the people of EOIR. In the Immigration Courts, he would sit down in cubicles, offices, or conference rooms to not only hear from but hear about each person. For anyone who had the courage to walk up to his office door, you found it open with Juan's friendly ear ready to listen and his signature bowl of Hershey's Kisses waiting for you.

Juan had recently left the Department of Justice after nearly two decades of distinguished government service and his accolades are well documented. He was appointed as Director of EOIR in May 2011 after serving as Acting Director for six months. From June 2010 until December 2010, Juan served the Department of Justice as an Associate Deputy Attorney General working on immigration policy, Indian country matters, pardons and commutations, and other issues. From May 2009 to June 2010, he was a Deputy Assistant Attorney General in the Civil Division, Office of Immigration Litigation, where, in addition to handling immigration policy, he oversaw civil immigration-related litigation in the Federal courts. From September 2008 until May 2009, Juan served as Chairman of the Board of Immigration Appeals. From August 2000 to September 2008, he was a Board Member, serving as both Acting Chairman and Acting Vice Chairman.

What is not as well-documented was his passion and respect for the work of the Department of Justice. Anyone who had the privilege of

visiting the Main DOJ building with Juan knows his pride of government service. He truly enjoyed introducing the DOJ "newbies" to the Department and the building's history. When walking the halls with you, he would explain the history of each of the murals. Juan sought each day to live up to the responsibility bestowed upon him by the public and to create a government that was easily accessible and responded to its constituent, the public.

Juan was the most gracious person I have ever met. He never failed to recognize the contributions of others and to acknowledge how important each person's view point was to accomplishing any job. I will never forget that once he said to me, "You are probably getting tired of me thanking you." I retorted, "If you stop, then I will be expecting my pink slip." He was quick to laugh and never stopped expressing his gratitude.

Above all else, Juan was one of those truly genuine people who lived his beliefs. Juan touched many lives in big and small ways. His legacy will endure through each person who encountered him and had the chance to learn from him. For me, I will strive to emulate him every day. Although the world will not be the same without him, the bright light that was Juan was not extinguished with his passing, rather it will live on through each of us who were privileged enough to have known him.

A few years ago Juan wrote a tribute to Lauri Filppu, a former Board member, in which he said, "Someone once said that the true measure of a person's wealth is how much he is loved by others." As with Lauri, no truer words could be said of Juan himself; he was truly a wealthy man.

FEATURE ARTICLE

Off-Duty Officers, Rogue Actors, and Low-Level Officials: Whose Conduct Establishes Official Involvement under the Convention Against Torture?

by Vy Thuy Nguyen

The commission of torture without sufficient state involvement, whether by act or omission, was not contemplated within the meaning of torture under the Convention Against Torture ("Convention")[1] because the Convention is an agreement to impose international obligations on state parties, not individuals, to prevent and punish acts of torture in their territory.[2] The definition of torture contained in Article 1 of the Convention reflects this requirement, which the United States subsequently incorporated into Federal regulations governing the removal context, subject to certain understandings.[3] Specifically, 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*." 8 C.F.R. § 1208.18(a)(1) (2017) (emphasis added). Thus, Federal immigration regulations deliberately limit the scope of its protections to acts of torture that are fairly attributed to the state.

However, despite prior extensive negotiation and drafting processes, the regulations do not define the term "public official" in their text. Thus, the requirements for state involvement have proven susceptible to varying interpretations arising from ambiguity in the text and differing interpretations of the phrase "acting in an official capacity." Moreover, the analysis for whether a public official is "acting in an official capacity" is often conflated with the issue of whether torture would be inflicted "with the . . . acquiescence of" that public official.[4]

This article primarily considers the phrase "public official or other person acting in an official capacity" by providing an overview of (1) the phrase's legislative history, (2) agency and Federal court interpretations of the text, and (3) developments in case law, including the application of civil rights jurisprudence in removal proceedings when assessing what constitutes official misuse of power. This article will focus on the acts of a "public official," rather than "other person(s)" acting in an official capacity. It also will not address cases where questions arise as to the status of an entity as an official "state" or where a state lacks effective control over a particular territory.[5]

Historical and Legislative Background

The international legal prohibition of torture appeared in a number of instruments prior to the international adoption of the Convention, including those related to the laws of war and more general human rights instruments.[6] Beginning in the 1970s and culminating in the Convention's adoption in 1984, a process of standard setting was initiated to eliminate globally the practice of torture, particularly with regard to acts of law enforcement officers and the medical profession.[7]

The United States played an active role throughout the seven-year negotiation period leading up to the Convention's adoption.[8] Thereafter, Congress passed a joint resolution, reaffirming the United States' opposition to torture, its commitment to combat the practice of torture, and support for continued involvement in formulating international standards and implementing mechanisms against torture.[9] Yet, the ratification process within the United States lasted for ten years and spanned the course of three administrations as debate persisted over what contexts properly implicated state involvement in torture.

Ratification in the United States

On April 18, 1988, President Ronald Reagan signed the Convention and transmitted it to the Senate for its advice and consent, along with a package of proposed conditions (declarations, understandings, and reservations) to be incorporated in the instrument of ratification. The Reagan Administration explained that the Convention "applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted 'under color of law.'"[10] Thereafter, in response to Congressional and public concern about the impact of other matters on the international effort to eliminate torture, President George H. W. Bush submitted a condensed package of conditions that revised, among other items, the proposal regarding the context of acquiescence. Specifically, the Bush Administration changed the language of "knowledge" to "awareness" to clarify that both actual knowledge and willful blindness fell within the definition of acquiescence.[11] Notably, the Bush Administration retained the language requiring custody and control.[12] These proposals reflected both administrations' concerns that the Convention would extend too broadly and render enforcement officers liable in the execution of their lawful duties.[13]

The Senate Committee on Foreign Relations held a public hearing on January 30, 1990, which provided an opportunity for stakeholders to debate the proposed language. One public witness submitted an appraisal of torture in international law and practice in which he found that out of a sample of 83 countries, most had laws to protect detained persons from "any torture under any circumstances" and for punishment "of any official engaging in acts of torture."[14] Other nongovernmental witnesses cautioned that protections under the Convention would be curtailed because narrowing the applicability of the Convention to situations involving custody and control necessarily excluded acts that would have been deemed torture in other contexts.[15] Witnesses representing the Department of State and Department of Justice advocated for the need for the Convention but expressed concerns about such scenarios as the use of force in effecting an arrest and in self-defense.[16]

Ultimately, the August 30, 1990, Senate resolution and the package of conditions incorporated into the instrument of ratification reflected the administration's concerns by distinguishing between the lawful and unlawful acts of a public official. Specifically, upon ratification on October 21, 1994, the United States understood that torture excluded acts that were (i) directed against persons outside the offender's custody or physical control (ii) where the official had no prior "awareness" of such activity or where the official did not breach his or her legal responsibility to intervene to prevent such activity.[17]

Periodic Reports to the U.N. Committee Against Torture

Upon ratification, the United States recognized the competence of the U.N. Committee Against Torture as the monitoring body established in Article 17 of the Convention.[18] In 1997, the Committee Against Torture began to publish its interpretation of the provisions of the Convention, also known as its general comments on thematic issues, to provide guidance on issues arising from persons under orders of expulsion, return, or extradition. The United States considered the Committee Against Torture's opinions to be advisory only, not binding.[19] In 1998, the Committee Against Torture elaborated upon the scope of state parties' obligations as extending to

locations of custody or control such as "prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions" and to persons who act "de jure or de facto, in the name of, in conjunction with, or at the behest of the State party."[20]

The United States also accepted the obligation to periodically report on the status of its implementation and observance of the Convention to the Committee Against Torture.[21] In 1999, the United States submitted its initial report, the primary authors of which were the Department of State and Department of Justice. The United States explained therein that "[c]onduct falling within the scope of the Convention will often constitute criminal violations of the [F]ederal civil rights statutes," which have long been recognized as applying to "official misuse of authority and force."[22] During the May 19, 2000, initial in-person meeting with the Committee Against Torture, the United States delegation explained its understandings regarding official custody and control and prior awareness in the context of police abuse, brutality, and use of force to mean that the obligations under the Convention "clearly applied to torture committed in the context of governmental authority, and excluded torture as a private act."[23]

Domestic Implementation of the Convention

Promulgating the Relevant Regulations

As the provisions of the Convention were not self-executing upon ratification, the United States required domestic implementing legislation to effectuate them. Thus, Congress enacted and President Bill Clinton signed into law the Foreign Affairs Reform and Restructuring Act on October 21, 1998, directing the heads of agencies to promulgate regulations to comply with the United States' obligations under the Convention, subject to the package of conditions. Accordingly, various laws and regulations were enacted to combat torture prospectively and retrospectively.

In particular, the Article 3 obligation not to return any person to a country where there is substantial reason to believe they might be tortured implicated the Department of Justice in removal proceedings and the Department of State in extradition proceedings.[24] Thus, both agencies promulgated regulations within a week of each other that mirrored the other's definition of torture and mirrored Article 1 of the Convention.[25] These regulations specifically reference the offender's official capacity by defining torture, in relevant part, as: "any act by which severe pain or suffering . . . 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*." 8 C.F.R. § 1208.18(a)(1) (emphasis added); 22 C.F.R. § 95.1(b)(1).

In comparison, additional legislation promulgated pursuant to obligations under other articles of the Convention contain the state involvement requirement more explicitly. Section (2)(a) of the Torture Victim Protection Act of 1991 ("TVPA") along with the Alien Tort Claims Act ("ATCA")[26] (a jurisdictional statute) provide a civil cause of action for survivors and victims of torture against a foreign "individual who, *under actual or apparent authority, or color of law*" subjects that individual to torture.[27] The Torture Act enacted in 1994 criminalized torture "by a person *acting under the color of law*." 18 U.S.C. §§ 2340–40A (emphasis added). Section (a)(1) of the 2008 Foreign Sovereign Immunity Act ("FSIA") created an exception to the jurisdictional immunity of a foreign state in any case "for personal injury or death that was caused by an act of torture . . . if such act . . . is engaged in by an official, employee, or agent of such foreign state *while acting within the scope of his or her office, employment, or agency*." 28 U.S.C. § 1605A(a)(1) (emphasis added). Each law is differently constructed, but in comparison to Federal regulations, the TVPA, ATCA, and FSIA unambiguously require the context of torture to bear some relation to the offender's official duties.

Inconsistent Circuit Court Interpretation of the Regulatory Text

Recently, the Federal circuit courts have rendered inconsistent interpretations of the clause referring to "a public official or other person acting in an official capacity." Depending on whether a court understood the clause as functioning as a noun or an adjective in the sentence and, if the latter, whether the clause is applied conjunctively or disjunctively, the resulting interpretations are either: (1) the public official must be acting in an official capacity (conjunctive), or (2) the public official is *not* required to be acting in an official capacity (disjunctive).

Five circuits, the First, Second, Fifth, Sixth, and Eighth, have interpreted the phrase as being conjunctive, thereby explicitly covering acts committed by public

officials acting in their official capacity.[28] *See Garcia v. Holder*, 756 F.3d 885, 891 n.2 (5th Cir. 2014) (adopting the reasoning in *Marmorato v. Holder*, 376 F. App'x 380, 385 (5th Cir. 2010)); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 899–900 (8th Cir. 2009); *Romilus v. Ashcroft*, 385 F.3d 1 (1st Cir. 2004); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001) (discussing the issue in dicta). To that end, the Fifth Circuit further requires a bifurcated analysis that considers whether (i) it is more likely than not that the applicant will be tortured upon removal, and then whether (ii) there is sufficient state action involved in that torture. *See Garcia*, 756 F.3d at 891.

Recently, however, the Ninth Circuit held that the regulations contain disjunctive language and therefore do not require that a public official inflict torture in an official capacity. *See Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). In a case involving off-duty police officers, the court explained that "the regulation uses the word 'or' between the phrases 'inflicted by . . . a public official' and 'acting in an official capacity[,]'" and "[t]he word 'or' can only mean that either one suffices, so the torture need not be both by a public official and also that the official is acting in his official capacity." *Id.* at 362. The court further noted that "[a]n 'and' construction would require that the conjunction be 'and.'" *Id.* Stated differently, conjunctive text would have required torture be "inflicted by . . . a public official *and* . . . acting in an official capacity." *See id.*

The relevant language 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." 8 C.F.R. § 1208.18(a)(1). As an illustration, the plain language of the regulation could contain two interpretations, which are indicated below using brackets to denote items:

(1) **[public official or other person]** acting in an official capacity

(2) **[public official]** or **[other person acting in an official capacity]**

The first interpretation creates a conjunctive reading, while the second interpretation creates a disjunctive reading. The first interpretation identifies the items as "public official" and "other person," inclusive of each other. Thus, the reader may reasonably interpret "acting in an official capacity" as describing the only item immediately preceding it: in this case, "public official or other person." Stated differently the phrase modifies both "public official" and "other person." Accordingly, the reader would reasonably conclude that the "other person" or the "public official" is required to be acting in an official capacity (conjunctive). The second interpretation identifies the items as "public official" and "other person acting in an official capacity" to be exclusive of each other. Within the phrase "other person acting in an official capacity" only one item immediately precedes "acting in an official capacity": i.e., "other person." Therefore, the reader would reasonably conclude that the "other person," not the "public official," is required to be acting in an official capacity (a disjunctive reading).

Developments in Judicial Interpretation

There is general agreement that "acting in an official capacity" means "under color of law." However, the application of this standard diverges where a circuit's interpretation of the clause has included the misuse of official power.

Attorney General Interpretation: Acting without Authority

In *Matter of Y-L-, A-G- & R-S-R-*, the Attorney General interpreted the phrase "acting in an official capacity" to mean "under color of law." 23 I&N Dec. 270, 285 (A.G. 2002). The Attorney General explained that "relief is available only if the torture would 'occur[] in the context of governmental authority,' not 'as a wholly private act.'" *Id.* at 283 (alteration in original) (citing *Ali*, 237 F.3d at 597). Therefore, "evidence of *isolated rogue agents* engaging in extrajudicial acts of brutality, which are not only *in contravention of the jurisdiction's laws and policies*, but are *committed despite authorities' best efforts* to root out such misconduct" is insufficient. *Id.* (emphasis added). The Attorney General found that one of the applicants failed to demonstrate that torture would be inflicted upon him with the consent or approval of "*authoritative government officials acting in an official capacity*." *Id.* at 285. The Attorney General further concluded that evidence relating to "two corrupt, low-level agents" seeking to "exact personal vengeance . . . for personal reasons" is private conduct that falls far short of demonstrating "*government-sanctioned* atrocities." *Id.* (emphasis added).

continued on page 9

CIRCUIT COURT DECISIONS FOR JULY 2017

by John Guendelsberger

The United States courts of appeals issued 133 decisions in July 2017 in cases appealed from the Board. The courts affirmed the Board in 113 cases and reversed or remanded in 20, for an overall reversal rate of 15.0%, compared to last month's 12.4%. There were no reversals from the Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for July 2017 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	2	1	33.3
Second	16	15	1	6.3
Third	5	4	1	20.0
Fourth	11	10	1	9.1
Fifth	13	10	3	23.1
Sixth	6	6	0	0.0
Seventh	4	2	2	50.0
Eighth	9	9	0	0.0
Ninth	53	44	9	17.0
Tenth	1	1	0	0.0
Eleventh	12	10	2	16.7
All	133	113	20	15.0

The 133 decisions included 75 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 31 direct appeals from denials of other forms of relief from removal or from findings of removal; and 27 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	75	67	8	10.7
Other Relief	31	26	5	16.1
Motions	27	20	7	26.0

The eight reversals or remands in asylum cases involved credibility (two cases), protection under the Convention Against Torture (two cases), corroboration (two cases), particular social group, and the "on account of" showing for withholding of removal. The five reversals or remands in the "other relief" category addressed divisibility in applying the categorical approach (three cases), small amount of marijuana for drug trafficking aggravated felony, and adjustment of status. The seven motions cases involved changed country conditions (three cases), equitable tolling (two cases), and ineffective assistance of counsel (two cases).

The chart below shows the combined numbers for January through July 2017 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	29	22	7	24.1
Second	167	143	24	14.4
First	15	13	2	13.3
Third	48	42	6	12.5
Ninth	390	343	47	12.1
Eleventh	51	45	6	11.8
Fourth	68	61	7	10.3
Fifth	87	79	8	9.2
Tenth	11	10	1	9.1
Sixth	29	27	2	6.9
Eighth	43	43	0	0.0
All	938	828	110	11.7

Last year's reversal rate at this point (January through July 2016) was 11.1%, with 1,240 total decisions and 138 reversals or remands.

The numbers by type of case on appeal for the first seven months of 2017 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	479	421	58	12.1
Other Relief	246	216	30	12.2
Motions	213	191	22	10.3

CIRCUIT COURT DECISIONS FOR AUGUST 2017

by John Guendelsberger

The United States courts of appeals issued 144 decisions in August 2017 in cases appealed from the Board. The courts affirmed the Board in 115 cases and reversed or remanded in 29, for an overall reversal rate of 20.1%, compared to last month's 15.0%. There were no reversals from the First, Fourth, Fifth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for August 2017 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	1	0	0.0
Second	23	21	2	8.7
Third	11	4	7	63.6
Fourth	9	9	0	0.0
Fifth	13	13	0	0.0
Sixth	4	3	1	25.0
Seventh	1	0	1	100.0
Eighth	9	8	1	11.1
Ninth	66	49	17	25.8
Tenth	2	2	0	0.0
Eleventh	5	5	0	0.0
All	144	115	29	20.1

The 144 decisions included 70 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 34 direct appeals from denials of other forms of relief from removal or from findings of removal; and 40 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	70	55	15	21.4
Other Relief	34	26	8	23.5
Motions	40	34	6	15.0

The 15 reversals or remands in asylum cases involved protection under the Convention Against Torture (5 cases), credibility (3 cases), particular social group, nexus, withholding of removal, past persecution, frivolous filing, competency, and whether a government was "unable or unwilling" to protect an applicant.

The eight reversals or remands in the "other relief" category addressed crimes involving moral turpitude (three cases), aggravated felony obstruction of justice, sexual abuse of a minor aggravated felony, exclusion of evidence for egregious Fourth Amendment violation, adjustment of status, and removal of conditional permanent resident status under section 216 of the Act.

The six motions cases involved changed country conditions (four cases), ineffective assistance of counsel, and assessment of prima facie eligibility for relief.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	30	22	8	26.7
Third	59	46	13	22.0
Ninth	456	392	64	14.0
Second	190	164	26	13.7
First	16	14	2	12.5
Eleventh	56	50	6	10.7
Fourth	77	70	7	9.1
Sixth	33	30	3	9.1
Fifth	100	92	8	8.0
Tenth	13	12	1	7.7
Eighth	52	51	1	1.9
All	1082	943	139	12.8

Last year's reversal rate at this point (January through August 2016) was 11.5%, with 1,461 total decisions and 168 reversals or remands.

The numbers by type of case on appeal for the first 8 months of 2017 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	549	476	73	13.3
Other Relief	280	242	38	13.6
Motions	253	225	28	11.1

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

First Circuit:

De Lima v. Sessions, No. 15-2453, 2017 WL 3499207 (1st Cir. Aug. 16, 2017): The petitioner challenged the Board's determination that his conviction under Conn. Gen. Stat. § 53a-124 categorically qualifies as an aggravated felony theft offense. The court dismissed the petitioner's arguments that the Board erred in finding his conviction constituted a theft offense even though: 1) a permanent taking is not necessarily required and 2) the statute punishes the theft of services. Because the petitioner did not properly exhaust his remaining argument before the Board, the court did not reach the petitioner's argument that his offense may have been a "fraud" rather than a "theft" offense.

Third Circuit:

Ildefonso-Candelario v. Att'y Gen. of U.S., 866 F.3d 102 (3d Cir. 2017): The court granted the petition for review and reversed the Board's determination that a violation of 18 Pa. Cons. Stat. § 5101, which prohibits obstructing the administration of law or other governmental function, categorically constitutes a crime involving moral turpitude. Rather, the Third Circuit concluded that the statute reaches offenses that do not involve moral turpitude, noting the case of an individual who was involved in an illegal, but nonviolent, protest.

Fourth Circuit:

United States v. Diaz, 865 F.3d 168 (4th Cir. 2017): In a sentencing case, the court concluded that the Federal offense of interference with a flight crew is not categorically a crime of violence as defined by the "force clause" of 18 U.S.C. § 16(a). The court reached this conclusion because the offense can be committed through intimidation or a simple assault (which can involve a simple touching and therefore does not entail the use of violence). The court was unpersuaded that the statute was divisible between discrete "intimidation" or "assault" offenses.

Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017): The Fourth Circuit agreed with the Board that an intra-family dispute did not involve persecution on account of the petitioner's membership in a particular social group composed of her nuclear family. The court did not discern error in the agency's conclusion that this was a personal dispute revolving around child custody without a nexus to a protected ground.

Seventh Circuit:

Ming Wei Chen v. Sessions, 864 F.3d 536 (7th Cir. 2017): The Seventh Circuit concluded that a conviction for possession with intent to distribute more than 30 grams but less than 500 grams of marijuana, in violation of 720 ILCS § 550/5(d), does not categorically constitute a drug-trafficking aggravated felony. The court stated that the Board misinterpreted the Supreme Court's holding in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), as holding that an amount over 30 grams would necessarily constitute more than a "small amount of marijuana" (distribution of a "small amount" of marijuana is punishable as a misdemeanor, rather than a felony, offense). The decision noted that the Supreme Court had reserved this determination and while the Seventh Circuit also reserved this legal question, the court concluded that an amount just over 30 grams, the smallest amount punishable under the statute, does not categorically qualify as more than a "small amount."

Orellana-Arias v. Sessions, 865 F.3d 476 (7th Cir. 2017): The Seventh Circuit concluded that the asylum applicant did not establish that he was targeted because of membership in a proposed particular social group of people perceived to be wealthy because they are returning from the United States. The court concluded that the applicant did not show that he was at greater risk because of his return from the United States rather than based on the general perception of perceived wealth, which the court has held is not a basis for asylum.

Ninth Circuit:

Lozano-Arredondo v. Sessions, 866 F.3d 1082 (9th Cir. 2017): The Ninth Circuit declined to give deference to the Board's holding in *Matter of Cortez Canales*, 25 I&N Dec. 301 (BIA 2010), that a crime involving moral turpitude committed outside of the 5-year period described in section 237(a)(2)(A)(i) of the Act is still a disqualifying offense for section 240A(b) cancellation. The court found that the provision is ambiguous and requires the Board to conduct its analysis under the rubric set forth in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In *Matter of N-A-I-*, 27 I&N Dec. 72 (BIA 2017), the Board concluded that an alien who was granted asylum but subsequently adjusted his or her status to that of an alien lawfully admitted for permanent residence under section 209(b) of the Immigration and Nationality Act, 8 U.S.C. § 1159(b), does not retain asylee status and is therefore no longer protected by the restrictions on the removal of asylees set forth in section 208(c)(1)(A) of the Act, 8 U.S.C. § 1158(c)(1)(A). Additionally, the Board clarified *Matter of C-J-H-*, 26 I&N Dec. 284 (BIA 2014), explaining that adjustment of status under section 209(b) changes the status of an alien granted asylum to that of an alien lawfully admitted for permanent residence, thereby terminating the alien's asylum status. The Board therefore held that the respondent's asylee status was terminated when he adjusted his status to lawful permanent resident pursuant to section 209(b) of the Act, making him amenable to removal.

In reaching this conclusion, the Board found guidance in *Mahmood v. Sessions*, 849 F.3d 187 (4th Cir. 2017), agreeing with that court that the language in section 209(b) of the Act indicates "a change to and not an accretion of" asylee status. Additionally, the Board found support for its conclusion in section 209(b)'s provision that an alien must voluntarily seek adjustment of status in order for his or her asylee status to be terminated. Further, an alien who is placed in removal proceedings after adjusting status under section 209(b) of the Act may seek asylum by filing a new application. Examining the legislative history, the Board discerned no Congressional intent for an alien who voluntarily adjusted his or her status to retain the protections provided asylees under section 208(c)(1)(A) of the Act.

Based on this analysis, the Board concluded that the termination of the respondent's asylee status rendered him removable. The appeal was dismissed.

In *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017), the Board held that burglary of a regularly or intermittently occupied dwelling under section 164.225 of the Oregon Revised Statutes is a crime involving moral turpitude, irrespective of whether a person was actually present at the time of the offense. The Board therefore concluded that the respondent's conviction under that statute renders him removable pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), and ineligible for cancellation of removal pursuant to section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C).

Applying the categorical analysis outlined in *Escobar v. Lynch*, 846 F.3d 1019, 1024 (9th Cir. 2017), the Board determined that section 164.225 was divisible and approved of the Immigration Judge's application of the modified categorical approach to conclude that the respondent's conviction was under the prong of the statute that criminalizes the entry or unlawful remaining in a dwelling with the intent to commit a crime.

Next, the Board reviewed its jurisprudence regarding burglary as a turpitudinous offense and observed that in *Matter of Louissant*, 24 I&N Dec. 754, 758 (BIA 2009), it held that burglary of an occupied dwelling is a categorical crime involving moral turpitude because "the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently 'reprehensible conduct' committed with some form of scienter." In that case the Board noted that burglary of an occupied dwelling violates the resident's "justifiable expectation of privacy and personal security," and may lead to a violent response by the resident. Reasoning that the expectation of privacy and personal security exists when it is probable that a person will be present at the time of the burglary, the Board extended the holding in *Matter of Louissant* to the respondent's Oregon burglary offense, regardless of whether the dwelling was actually occupied at the time of the offense. The Board affirmed the Immigration Judge's determination that the respondent was ineligible for section 240A(b) cancellation of removal and dismissed the appeal.

Off-Duty Officers, Rogue Actors, and Low-Level Officials: *continued*

Thus, under the Attorney General's interpretation, "a public official" means "an authoritative government official." *Id.* (emphasis omitted). Authoritative government officials are those acting with official authorization or government sanction. *See id.* To determine whether an

act has official authorization, its scope may be evidenced by laws, policies, and implementing actions. Acts outside the scope of official authorization are, necessarily, not within the scope. Hence, "wholly private acts" refer to conduct falling outside the ambit of governmental authority. *Id.* at 283. Acts not within the bounds of government authority are not government sanctioned and thus are acts motivated by personal reasons and carried out in a personal capacity. Hence, under *Matter of Y-L-*, such persons are "rogue agents," and their actions cannot be said to have been committed "under color of law." *Id.*

Federal Circuit Court Interpretations: Misuse of Power

Two circuits adopted the interpretation from *Matter of Y-L-* that "acting in an official capacity" is synonymous with "under color of law," but have applied their own civil rights jurisprudence to analyze cases. *See Garcia*, 756 F.3d at 891–92; *Ramirez-Peyro*, 574 F.3d at 900–01.

In civil rights cases, jurisprudence arising out of section 1983, Title 42 of the United States Code ("Civil action for deprivation of rights") is authoritative. In *West v. Atkins*, the Supreme Court explained that the "traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) (discussing 42 U.S.C. § 1983). Consequently, Federal circuit courts consider the question of "under color of law" as whether the perpetrator would misuse their official power.

The fundamental inquiry in these cases turns on a showing of "nexus": does the conduct relate to the perpetrator's official duties? *See Garcia*, 756 F.3d at 891–92; *Ramirez-Peyro*, 574 F.3d at 901; *Romilus*, 385 F.3d at 9. The nexus test is necessarily fact-intensive. *Ramirez-Peyro*, 574 F.3d at 901. The Eighth Circuit in *Ramirez-Peyro* elaborated that "color" means "pretense," which required a showing that the official "abuses the position given to him by the State." 574 F.3d at 900 (quoting *West*, 487 U.S. at 50). Without "any actual or purported relationship between the officer's conduct and his duties as a police officer, the officer cannot be acting under color of state law." *Id.* at 901 (citation omitted). In a case involving police officials, for instance, factors to consider include: (1) whether the officers were on duty and in uniform, (2) "the motivation behind the officers' actions," and (3) "whether the officers had access to the victim because of their positions." *Id.*[29]

The applicant in *Ramirez-Peyro* was a former drug informant who had assisted the United States in prosecuting several high-profile Mexican drug traffickers. *Id.* at 895. The applicant alleged that all levels of the Mexican police have illicit connections to drug trafficking and that Mexican authorities regularly reveal the identities of informants to the drug cartels. *Id.* at 896. The Board "determined that, even assuming public-official involvement in [the applicant's] almost-certain torture and assassination, the officials would 'lack the pretense of authority' to torture or . . . [to] acquiesce in the torture." *Id.* at 898 (quoting the underlying Board decision). The Board reasoned that because of a promised immunity in Mexico, there could be no legal basis under which police officers could detain him. *Id.* at 898–99. However, the Eighth Circuit vacated the Board's decision, finding that it had applied the "under color of law" standard too narrowly by improperly focusing on the likelihood of the applicant's lawful arrest. *Id.* at 902. A lesser nexus between a public official's position and the harm inflicted was sufficient:

> [I]t is not contrary to the purposes of the [Convention] and the under-color-of-law standard to hold Mexico responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation's will and despite the fact that the actions may take place in circumstances where the officials should be acting on behalf of the state in another, legitimate, way.

Id. at 901. Thus, the nexus test did not require "the public official be executing official state policy or 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." *Id.*

Similarly, the Second Circuit in *Khouzam* disagreed with the Board's conclusion that the acts likely to be inflicted on the respondent would not be inflicted

by authorities acting in their official capacities. 361 F.3d at 170–71. Based on the finding that the Egyptian police's goal would be to extract confessions from the respondent and the evidence of routine commission of torture by the police in that context, the Second Circuit concluded that the respondent would more likely than not be tortured by Egyptian police acting in their official capacities. *Id.* at 171. Citing two of the Convention's drafters, the Second Circuit further remarked that "when it is a public official who inflicts severe pain or suffering, it is only in *exceptional cases* that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons." *Id.* at 171 (emphasis added).

In comparison, the First Circuit has found that acts arising from personal disputes may not be sufficiently related to official duties. In *Romilus*, the applicant described two physical confrontations during which a military officer initiated physical contact following a dispute over the proceeds from the sale of a cow. 385 F.3d at 3. The First Circuit affirmed the Board and Immigration Judge's finding that the applicant did not meet his burden of proving sufficient state involvement in relevant part because the context in which the officer assaulted the applicant "sprang from a personal dispute." *Id.* at 9. Absent further evidence, the Court's review of nexus ended.

Courts with more substantial records have found that public officials motivated by personal reasons, nonetheless, could be acting in their official capacity because they use their authority in the course of their acts. For instance, in *Garcia*, the Fifth Circuit stated that "acts motivated by an officer's personal objectives are 'under color of law' when the officer *uses his official capacity to further those objectives*." 756 F.3d at 892 (emphasis added). Quoting the Eighth Circuit in *Ramirez-Peyro*, the court stated that "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." *Id.* (alteration in original) (citation omitted).

Garcia involved incidents with plain-clothed individuals who may have been working in concert with some government source. *Id.* The court explained that "potential instances of violence committed by non-governmental actors against citizens, together with speculation that the police might not prevent that violence, are generally insufficient to prove government acquiescence, especially if there is evidence that the government prosecutes rogue or corrupt public officials." *Id.* However, the applicant based his claim on government officials who "were previously actually involved in or enabled the extortion and beating and are likely to be involved again in the future." *Id.* at 893. The facts included "alleged active involvement of public officials acting in their official capacity and close temporal proximity between [the applicant's] contact with public officials and the subsequent threats and beatings." *Id.* Therefore, the court found that the facts warranted further review to determine whether the perpetrators could have received their information from public officials or other persons acting in an official capacity.

Additionally, in a case involving the TVPA, the Eleventh Circuit stated that there was "no distinction between the meaning of the phrases 'under color of law' [contained in the TVPA] and 'in an official capacity'" contained in the Convention. *United States v. Belfast*, 611 F.3d 783, 808–09 (11th Cir. 2010). The Second Circuit, also in the TVPA context, stated that "color of law" requires a two-part showing that defendants have (i) possessed power under the law and (ii) that the offending actions be "derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power." *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009). The court remarked that "[a] *[F]ederal* officer who conspires with a state officer may act under color of *state* law." *Id.* (emphasis added).

Though cases arising out of the TVPA are not binding in removal proceedings, they may be persuasive because both Federal immigration regulations and the TVPA are derived from the Convention. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005) (stating that Federal immigration law "relie[d] on the Convention"). However, unlike in the removal context, the Second and Eleventh Circuits, pursuant to legislative intent, apply their civil rights jurisprudence when seeking guidance on official involvement in the TVPA and ACTA. *See, e.g.*, *Aldana*, 416 F.3d at 1247–48; *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (citing H.R. Rep. No. 102-367, at 5 (1991)) (explaining that "courts are instructed to look . . . to jurisprudence under 42 U.S.C. § 1983" to interpret the term "color of law" under the TVPA).

Federal Circuit Court Review: Evidence of Rank and Tiers of Power in Considering Acquiescence under Color of Law

Circuit courts have rejected the Board and Immigration Judges' conclusions that official involvement was not implicated in the commission of torture where their conclusions were primarily based on general country conditions, evidence of higher-level government actions to combat torture, or evidence of national policies prohibiting torture. *See, e.g.*, *Iruegas-Valdez v. Yates*, 846 F.3d 806, 812–13 (5th Cir. 2017); *Barajas-Romero*, 846 F.3d at 362–63; *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138–40 (7th Cir. 2015); *Ramirez-Peyro*, 574 F.3d at 904–06; *Khouzam*, 361 F.3d at 170–71. Because whether the perpetrator would be abusing their power while engaging in torture does not necessarily address whether said perpetrator would breach their legal duty to intervene in such activities, these courts require the Board and Immigration Judges to consider "acquiescence" and "acting in an official capacity" separately. The exception to this two-part analysis may be in cases involving police officers. *See Ramirez-Peyro*, 574 F.3d at 905.

Public Officials Generally

In *Iruegas-Valdez*, the Fifth Circuit considered the case of an applicant who feared return to Mexico because two of his cousins betrayed the Zetas, a Mexican drug cartel. 846 F.3d at 809. In response, the Zetas executed at least 200 people associated with them. The applicant claimed that local police participated in this massacre and he provided evidence that a governor, who was a close ally of the Zetas, specifically allowed the attack. *Id.* at 813. The Immigration Judge found that the applicant failed to prove *government* acquiescence because the Mexican government had taken steps to "stamp out the Zetas and their government lackeys" by "increasing the number of federal troops, dismissing the entire municipal police force, and arresting two local police officers for their alleged involvement in the attack." *Id.* at 812. However, the Fifth Circuit vacated the decision and remanded the record to the Board for the agency to apply the color of law analysis in considering whether the evidence of the police officers' active participation in the massacre and the governor's allowance of it established that the respondent was more likely than not to be tortured by or with the consent of government officials. *Id.* at 813. In this case, the Fifth Circuit declined to accept evidence of high-level government policy to fight the Zetas as a definitive demonstration that a public official would not commit or acquiesce to torture.

Similarly, the Second Circuit in *Khouzam* rejected *Matter of Y-L-* insofar as the Attorney General and Board required government officials acting in an official capacity consent or approve of torture to prove sufficient state acquiescence. 361 F.3d at 170. Instead, the court explained that "torture requires only that government officials know or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it." *Id.* at 171. The court stated that "[t]o the extent that . . . police [officers] are acting in their purely private capacities, then the 'routine' nature of the torture and its connection to the criminal justice system [provides] 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." *Id.*

Likewise, in light of evidence of local government complicity, the Seventh Circuit in *Rodriguez-Molinero* noted that whether "the Mexican government may be trying . . . to prevent police from torturing citizens at the behest of drug gangs is irrelevant." 808 F.3d at 1139. Specifically, because local police officers had inflicted harm on the applicant in the past (and caused the death of the applicant's great uncle), he did not need to show that (i) multiple government officials or (ii) a higher member of government would be complicit to establish acquiescence. *Id.* at 1138–39. Instead, evidence that either (i) a local, state, or Federal public official would acquiesce in torture or (ii) that the government was unsuccessful in trying to prevent torture by police officers working for non-official entities would be sufficient to demonstrate acquiescence. *See id.* at 1139; *see also Gutierrez v. Lynch*, 834 F.3d 800, 804, 806 (7th Cir. 2016). The basis for the applicant in *Rodriguez-Molinero* to request protection under the Convention was evidence that he had previously been tortured by police at the behest of the Zetas, that he owed money to the Zetas and had informed against them, and that his uncle had been brutally murdered after the Zetas came to his uncle's home several times, asking for information about the applicant. *Rodriguez-Molinero*, 808 F.3d at 1136–37. The court reversed and remanded the Board's decision.

Police Officers in Particular

Where the public official committing torture and other criminal acts was a police officer, two circuit courts

found sufficient state involvement in the torture. *See Barajas-Romero*, 846 F.3d at 362–63; *Ramirez-Peyro*, 574 F.3d at 904–05.

In *Ramirez-Peyro*, the Board had found that the applicant failed to establish nexus because no actual or purported relationship existed between the officer's collusion with a drug cartel and the officer's duties as a police officer. 574 F.3d at 898. However, the Eighth Circuit explained that because "the essence of law-enforcement officials' jobs is to prevent the precise type of harm that [the applicant] fears, a failure to act in response to that impending harm almost necessarily implies that the acquiescence will occur in an official capacity." *Id.* at 905. The court found record evidence of wide-scale police participation in harmful actions on behalf of the cartel and of the government's general knowledge of the activity. Thus, the facts were distinguishable from cases "where a government is merely unable to control third-party torturers despite concerted attempts." *Id.* Unlike in *Miah v. Mukasey*, 519 F.3d 784, 788 (8th Cir. 2008), where it had affirmed the Board's "rogue efforts" determination, the facts in *Ramirez-Peyro* were not merely an isolated incident of abuse by someone who happened to be a public official. *Ramirez-Peyro*, 574 F.3d at 903–04. Addressing the issue of acquiescence, the court concluded that if the Board found that the police officers were *not* acting under the color of law because they were observing torture, then the Board must consider whether the officers would be breaching their legal responsibility to intervene when they "fail to arrest themselves, their co-workers, or others assaulting [the applicant]." *Id.* at 905–06. Thus, by virtue of their occupation, when police officers commit torture, they may necessarily be contravening their legal duty to intervene.

The Ninth Circuit, in *Barajas-Romero*, took a different approach. The court held that the Board's "rogue official" rationale was inconsistent with its circuit law and explained:

> The statute and regulations do not establish a "rogue official" exception [in the Convention Against Torture] . . . . 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 [the applicant], 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.

846 F.3d at 362 (footnote omitted). Instead, acquiescence may be established "where police officials were corrupt [or working] on behalf of criminals or gangs[]." *Id.* at 363. Evidence of state or local acquiescence was sufficient to show acquiescence under the Convention, depending on an inquiry into the efficacy of the government's efforts to stop the drug cartels' violence and not just the willingness of the national government to do so. *Id.*

Conclusion

Ambiguity in Federal immigration regulations implementing the Convention has resulted in courts reasonably arriving at contrary interpretations of the phrase "acting in an official capacity." Specifically, though many courts have understood the regulation as limiting the scope of torture to public officials acting in such capacity, the Ninth Circuit has found that the applicant need only prove that a public official was the actor. Nevertheless, although circuits have generally agreed that "acting in an official capacity" means "under color of law," they apply their civil rights jurisprudence to interpret "under color of law" as "misuse of power" and have not followed the narrower construction in *Matter of Y-L-* to limit their understanding of torture as an act falling squarely within the scope of authorization. As a result, circuit courts have expanded the scope of conduct to include private acts, illegal acts, or acts outside the scope of authorization so long as the acts bear some relation to the offender's official duties.

This broader range of conduct affects the analysis for acquiescence. While the Attorney General and the Board have considered acquiescence as a linear extension and logical continuation of the "under color of law" analysis, some circuit courts consider the questions to be related but separate. Improper exercises of authority, such as corruption, necessarily fall outside the scope of official duties and within the scope of private acts. Accordingly, acquiescence would only occur where a public official fails to meet an affirmative duty to intervene. In contrast, under the circuit court analysis, the misuse of power assumes that the relevant conduct may not be in accordance with authorization and thus, whether that official also breached their duty to intervene is another matter. Therefore,

evidence that a public official held a low rank or acted in contravention of national policy is not determinative to the issue of whether that public official breached his or her legal duty to intervene. In particular, unlike in cases involving a single or random incident, general evidence distinguishing authorized conduct from private conduct does not directly refute evidence of a public official's misuse of power where there is also evidence of routine complicity to such acts at any level of government.

An exception to this two-part analysis exists in the case of police officers in circuits that have held that an officer's private acts of torture almost necessarily establish a breach of the officer's legal duty to intervene (i.e., the officer acquiesced). Therefore, a showing that the private act of torture is related to the officer's duties, specifically the duty to intervene, may be sufficient to find that the officer also acquiesced, regardless of rank, policy, or nature of the act inflicted.

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1. *See Convention Against Torture: Hearing before the S. Comm. on Foreign Relations*, 101st Cong. 16, 69, 71, 94, 159 (1990) [hereinafter 1990 Senate Hearing]; Committee Against Torture, General Comment No. 2, ¶ 15, CAT/C/GC/2 (2008) [hereinafter Gen. Comment 2]; *see also Negusie v. Holder*, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., concurring).

2. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) [hereinafter Convention].

3. 8 C.F.R. § 1208.18(a); 3 C.F.R. § 13118 (Executive Order 13118 of March 31, 1999); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681-822, (codified at section 241, note 2 of the Immigration and Nationality Act, 8 U.S.C. § 1231) [hereinafter FARRA]; *see* S. Exec. Rep. No. 101-30, at 14–15 (1990) [hereinafter 1990 Senate Report]; *see generally* Convention, Preamble ("Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms, ...").

4. Prior *Immigration Law Advisor* articles provide detailed discussions on acquiescence. *See* Lissette Eusebio, *The Convention Against Torture and Third Party-Abuse, When Does a Government Breach Its Duty Through Acquiescence?*, Immigration Law Advisor, Vol. 9, No. 5 (May 2015); Brea C. Burgie, *The Convention Against Torture and Acquiescence: Willful Blindness or Willful Awareness?*, Immigration Law Advisor, Vol. 5, No. 4 (Apr. 2011); Teresa Donovan, *The Convention Against Torture*: *When does a Public Official Acquiesce to Torture Committed by a Third Party?*, Immigration Law Advisor, Vol. 1, No. 3 (Mar. 2007).

5. *See, e.g.*, *Kamara v. U.S. Att'y Gen.*, 420 F.3d 202, 213, 215 (3d Cir. 2005) (remanding to address whether the Revolutionary United Front should be deemed a "public official" in Sierra Leone and referring to the UN Committee Against Torture's determination in another case that a rebel group was not a public official because it was neither the government nor did it act with the government's acquiescence); *Kadic v. Karadzic*, 70 F.3d 232, 244–45 (2d Cir. 1995) (discussing the "Bosnian-Serb entity" vis-à-vis the formal requirements for statehood); *see generally* Convention (referring to territories under a state's jurisdiction).

6. *See, e.g.,* Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907; Geneva Convention Relative to the Treatment of Prisoners of War art. 87, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 31–32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; G.A. Res. 217A (III), Universal Declaration of Human Rights, U.N. Doc. A/810 art. 5 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 art. 7; *see also* American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143 art. 5(2); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217; *see generally* 1990 Senate Report at 12 (recalling that the Convention is modeled after various multilateral conventions against terrorist acts which establishes a regime for international cooperation in the criminal prosecution of persons committing the specific offenses covered, relying on universal jurisdiction, and on the obligation to extradite offenders or prosecute them).

7. 1990 Senate Hearing at 52 (Letter from Amnesty International USA submitted by Winston P. Nagan, Chairman of the Board of Directors) (referring to the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter Declaration], the Code of Conduct for Law Enforcement Officials, and the Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); *see also* 1990 Senate Report at 2–3 (citing to UN General Assembly Resolution No. 3059 and the Declaration); *see generally* United Nations Economic and Social Council, "Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," U.N. Doc. E/CN.4/1984/72 (1984) [hereinafter 1984 Working Group Draft].

8. *See* 1990 Senate Report at 2–3; *see generally* 1984 Working Group Draft at 2, 5, 9, 12–13.

9. 1990 Senate Report at 2–3.

10. *Id.* at 14.

11. *Id.* at 9.

12. *Id.* at 6–9.

13. *See* 1990 Senate Hearing at 8, 16 (statements of Abraham D. Sofaer, Legal Advisor, Department of State, and Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

14. 1990 Senate Hearing at 159 (statement of Professor M. Cherif Bassiouni).

15. *Id.* at 94 (prepared statement of Human Rights Watch) ("In 1986[,] soldiers in Chile threw gasoline and then a lighted match onto two teenagers who were participating in a demonstration. One died; the other was severely burned. There is little doubt that if faced with a comparable case[,] the Committee Against Torture would find that such conduct constitutes torture. Yet the administration's 'custody or physical control' understanding would seem to deprive it of that authority with respect to future acts by U.S. police or military officials.").

16. *See id.* at 8 (prepared statement of Abraham D. Sofaer, Legal Advisor, Department of State) ("Mr. Chairman, some may feel the United States has no need for the legal protections of the Convention Against Torture. Existing U.S. law makes any acts falling within the Convention's definition of torture a criminal offense, as well as a violation of various civil statutes . . . . Any Public official in the United States, at any level of government, who inflicts torture (or instigates, consents to, acquiesces in, or tolerates torture) would be subject to an effective system of control and punishment in the U.S. legal system. This administration nonetheless believes, Mr. Chairman, that, as a member of the international community, we must stand with other nations in pledging to bring to justice those who engaged in torture, whether in U.S. territory or in the territory of other countries.").

17. *See* 1990 Senate Report at 29–31.

18. *See* Convention, art. 17 ("There shall be established a Committee against Torture . . . which shall carry out the function hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity."); *id*. art. 19 ("The State Parties shall submit to the Committee . . . reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the State Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.").

19. *Matter of S-V-*, 22 I&N Dec. 1306, 1313 n.1 (BIA 2000).

20. Gen. Comment 2, ¶¶ 7, 15, 17 (explaining also that "other persons acting in an official capacity" included those responsible for "carrying out the State function," such as "agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law").

21. The United States is currently in its sixth reporting cycle and its next State party periodic report is due November 28, 2018. *See* U.N. Committee Against Torture, Reporting Status for the United States of America, *available at* http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=USA&Lang=EN (last accessed July 17, 2017).

22. Comm. Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Initial Reports of States Parties Due in 1995, Addendum, United States of America*, ¶¶ 180–81, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

23. Comm. Against Torture, *Summary Record of the First Part (Public) of the 427th Meeting*, ¶ 10, U.N. Doc. CAT/C/SR.427 (May 19, 2000).

24. Convention, art. 3(1) ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."); *see generally id.* at art. 8.

25. *Compare* 8 C.F.R. § 1208.18(a)(2) (enacted Feb. 19, 1999) *and* 22 C.F.R. § 95.1(b)(1) (enacted Feb. 26, 1999), *with* Convention, art. 1; *see also* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999).

26. Also known as the Alien Tort Statute.

27. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 1992); *see* 28 U.S.C. § 1350(2)(a); *see also* ATCA (1948) ("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."); *see generally* Convention, art. 5, 7.

28. The Third Circuit also appears to interpret the phrase conjunctively. In an unpublished decision, the court reversed the Board's decision, noting the Immigration Judge's finding that the Jamaican government officers frequently inflict severe pain or suffering upon mentally ill detainees and prisoners in the performance of their official duties. *Johnson v. Att'y Gen. of United States*, 380 F. App'x 225 (3d Cir. May 20, 2010); *see also He Qin Qiu v. Att'y Gen. of United States*, 165 F. App'x 148 (3d Cir. 2006) (noting the Immigration Judge's consideration of whether the government actor was acting within the scope of his official duties).

29. Citing *United States v. Colbert*, 172 F.3d 594, 597 (8th Cir. 1999); *Roe v. Humke*, 128 F.3d 1213, 1216 (8th Cir. 1997); and *United States v. Christian*, 342 F.3d 744, 751–52 (7th Cir. 2003).

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