

New Cases on Convention Against Torture Analysis

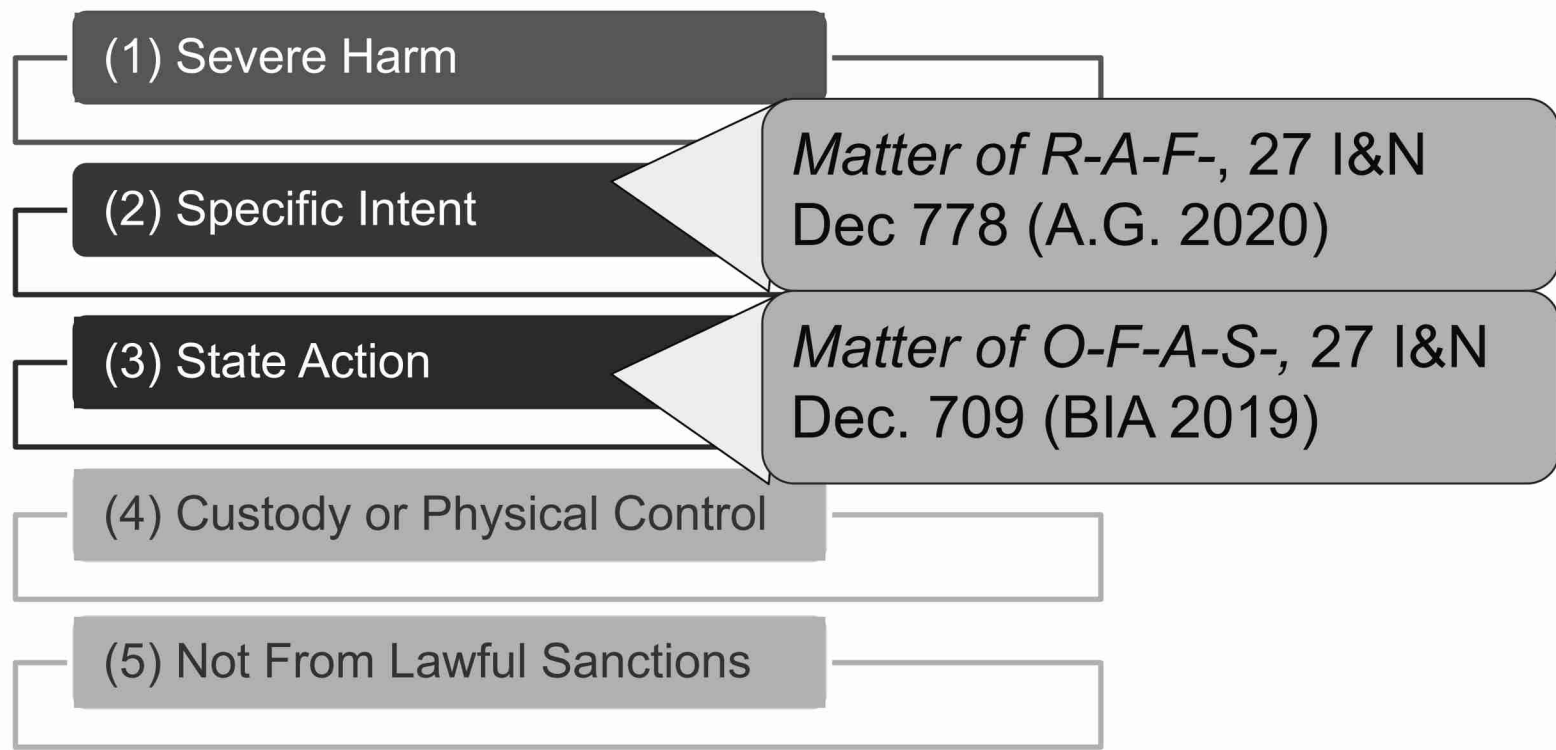
May 2020



U.S. Citizenship
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Recent Published Case Clarifies Two Elements of the Definition:

Torture Definition Recap:



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MATTER OF R-A-F-,
27 I&N DEC 778 (A.G. 2020)



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Specific Intent: Regulatory Framework

To constitute torture, an act must:

- ✓ “be **specifically intended** to inflict severe physical or mental pain or suffering” (8 C.F.R. § 1208.18(a)(5))
- ✓ “for **such purposes** as obtaining from [the victim] 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.” (8 C.F.R. § 1208.18(a)(1))



Specific Intent: Case Law

R-A-F- instructs that torture does NOT include harm resulting from:

➤ Negligence or recklessness

citing *Oxygene v. Lynch*, 813 F.3d 541, 548 (4th Cir. 2016)
(applying *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002))

➤ Lack of resources

➤ Insufficient training and education

quoting *Matter of J-R-G-P-*, 27 I&N Dec. 482, 484, 487 (BIA 2018) (citing *Matter of J-E-* at 299)



Specific Intent: Examples

Circuit Court examples cited by R-A-F-

- “terrible squalor” of a Mexican mental health facility “did not evince the kind of specific intent to cause pain and suffering” to constitute torture

Villegas v. Mukasey, 523 F.3d 984 (9th Cir. 2008)

- deplorable conditions of Haitian prisons result from country’s economic and social ills, not any intent to inflict severe pain and suffering

Auguste v. Ridge, 395 F.3d 123, 153 (3d Cir. 2005)

- failure to maintain standards of diet, hygiene, and living space in prison does not constitute torture unless sufficiently extreme and intentionally inflicted

Pierre v. Gonzales, 502 F.3d 109, 111 (2d Cir. 2007)



MATTER OF O-F-A-S-,
27 I&N DEC. 709 (BIA 2019)



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State Action: Regulatory Framework

- ✓ To constitute torture, an act 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 CFR §§ 1208.18 (a)(1); 208.18(a)(1).



State Action: Case Law

O-F-A-S- instructs that CAT protection includes “torturous conduct committed by a public official who is acting ‘in an **official capacity,**’ that is ‘**under color of law**’”

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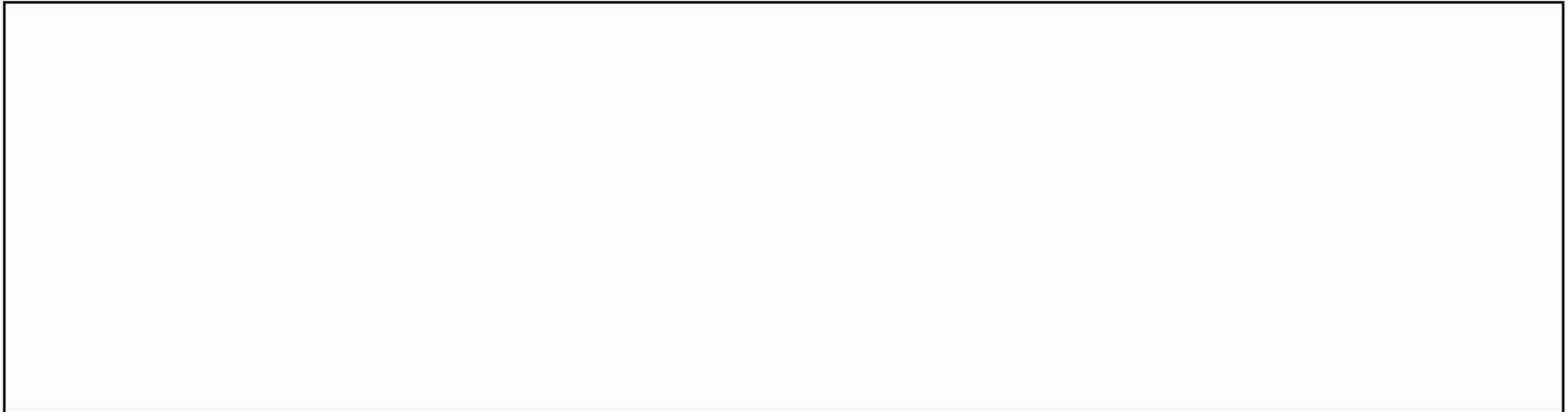


State Action: “Under Color of Law”

Key Consideration: Whether perpetrator was (or will be) able to engage in torture because of his/ her government position or if he could have done so without any connection to the government.

O-F-A-S- at 718

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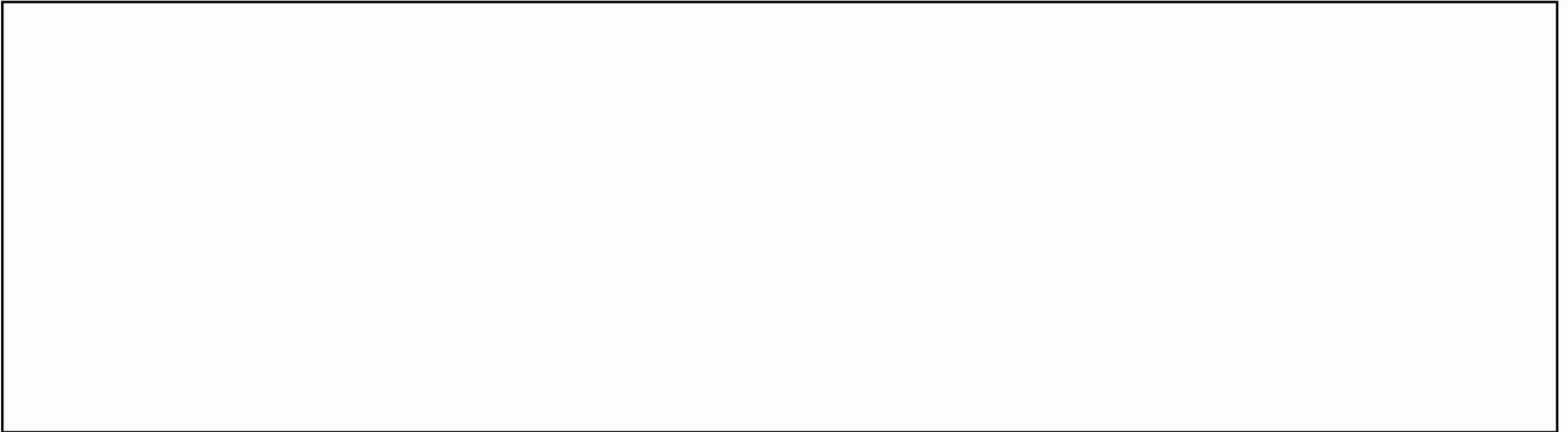
State Action: Relevant Factors

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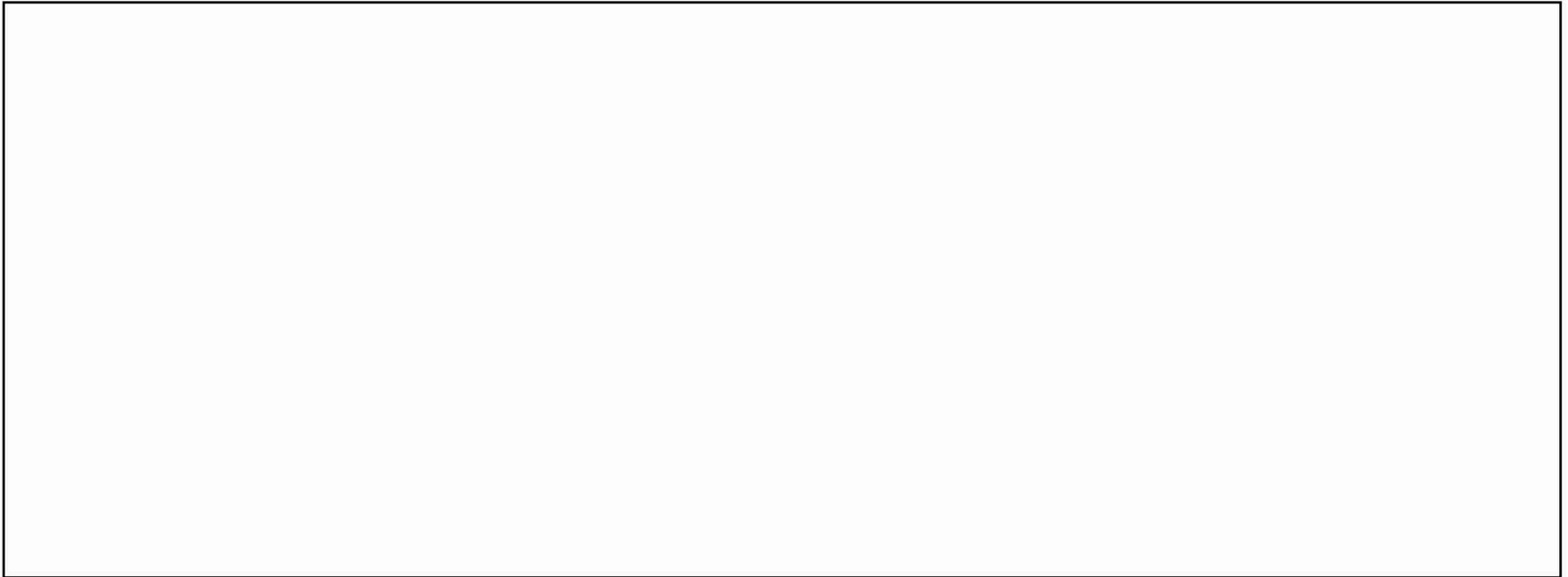
State Action: Relevant Factors (cont'd)

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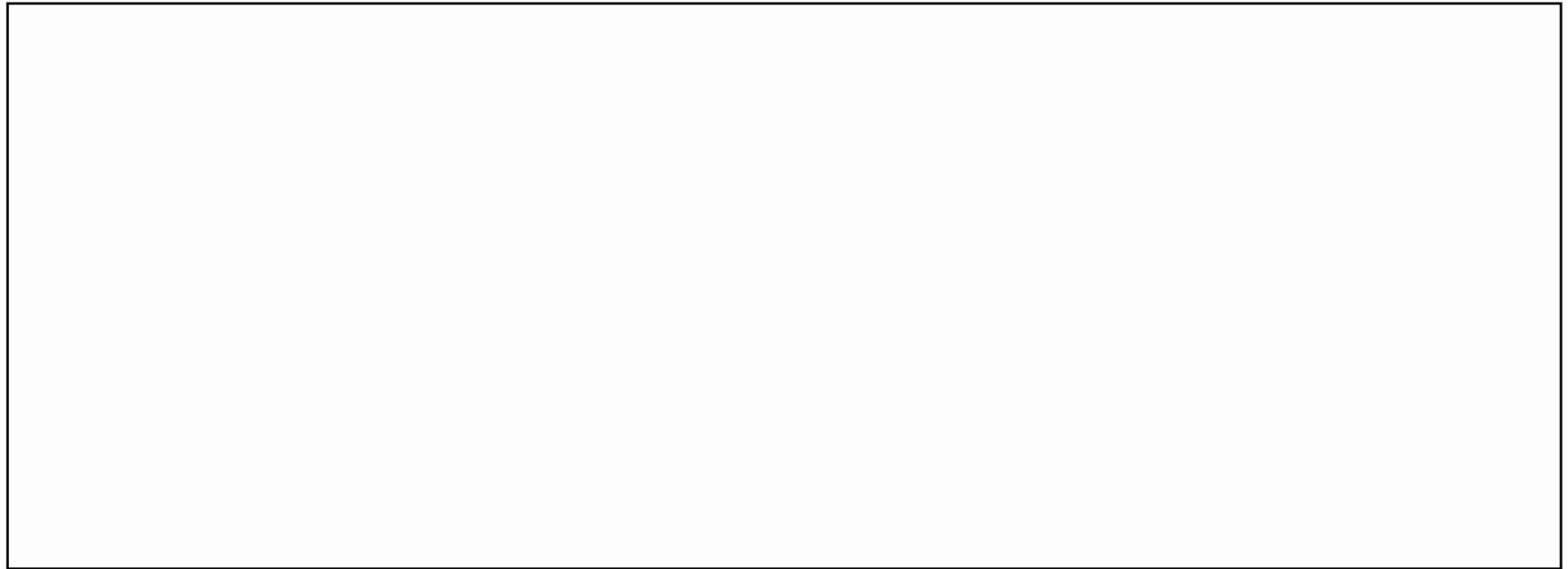
State Action: Relevant Factors (cont'd)

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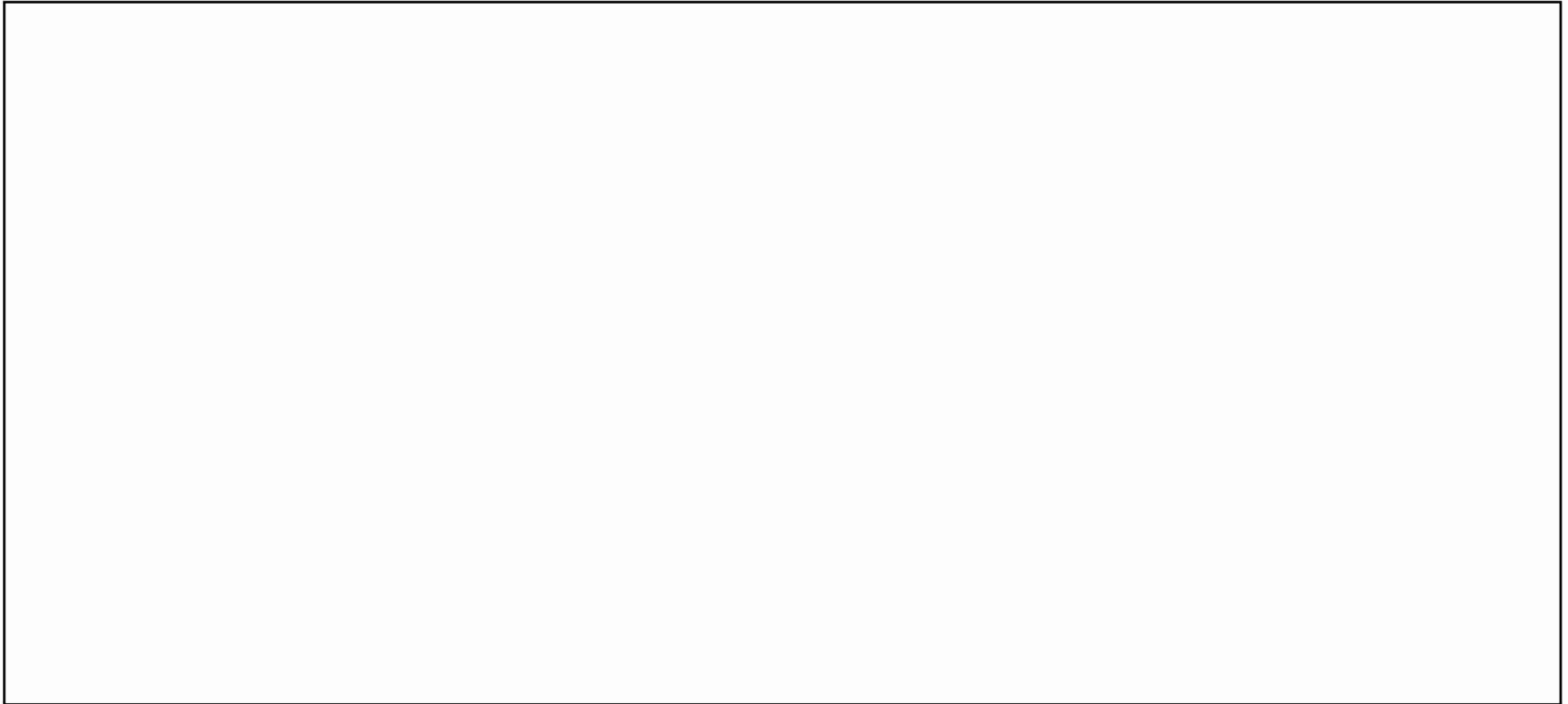
State Action: Relevant Factors (cont'd)

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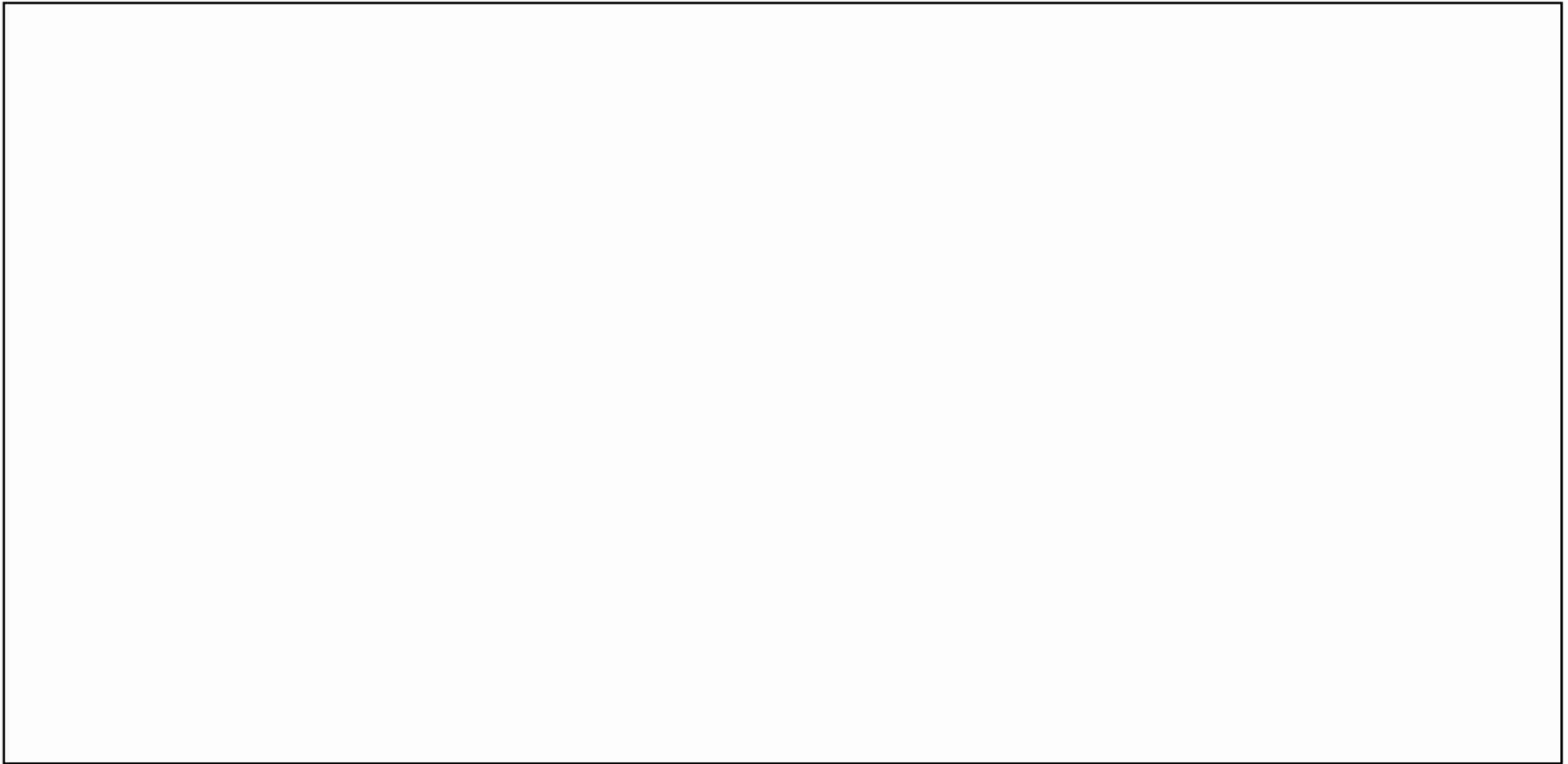
State Action: Relevant Factors (cont'd)

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State Action: Application in O-F-A-S-

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CAT Third-Country-Transit-Bar Case Review



Review Takeaways

January 2020

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Roadmap



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- Overview of review
- Overview of findings
- Internal Relocation
- Consent/acquiescence
- Likelihood of future torture
- Awareness

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Overview of Review

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Overview of findings



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Internal Relocation

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Internal relocation: CAT



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- CAT regulations state that IR is relevant evidence that should be considered when assessing the likelihood of torture. (b)(7)(e)
- 8 CFR 208.16(c)(3): In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal,

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Internal relocation: CAT

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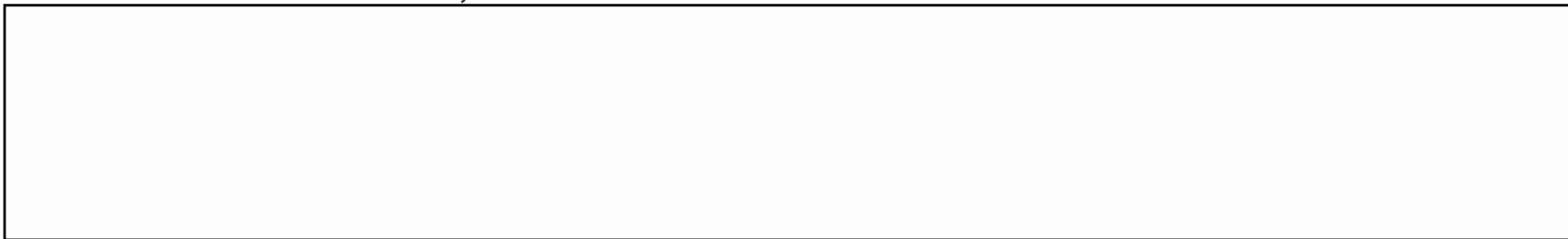
Internal relocation: CAT



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- The persecution reasonableness factors are relevant to CAT as they may affect the likelihood that applicant would actually relocate. Those factors listed at 8 C.F.R. 208.16(b)(3) are:
 - whether the applicant would face other serious harm in the place of suggested relocation;
 - any ongoing civil strife within the country;
 - administrative, economic, or judicial infrastructure;
 - geographical limitations; and
 - social and cultural constraints, such as age, gender, health, and social and familial ties.
- In addition to these factors, other relevant evidence includes:

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IR: No Presumption in CAT

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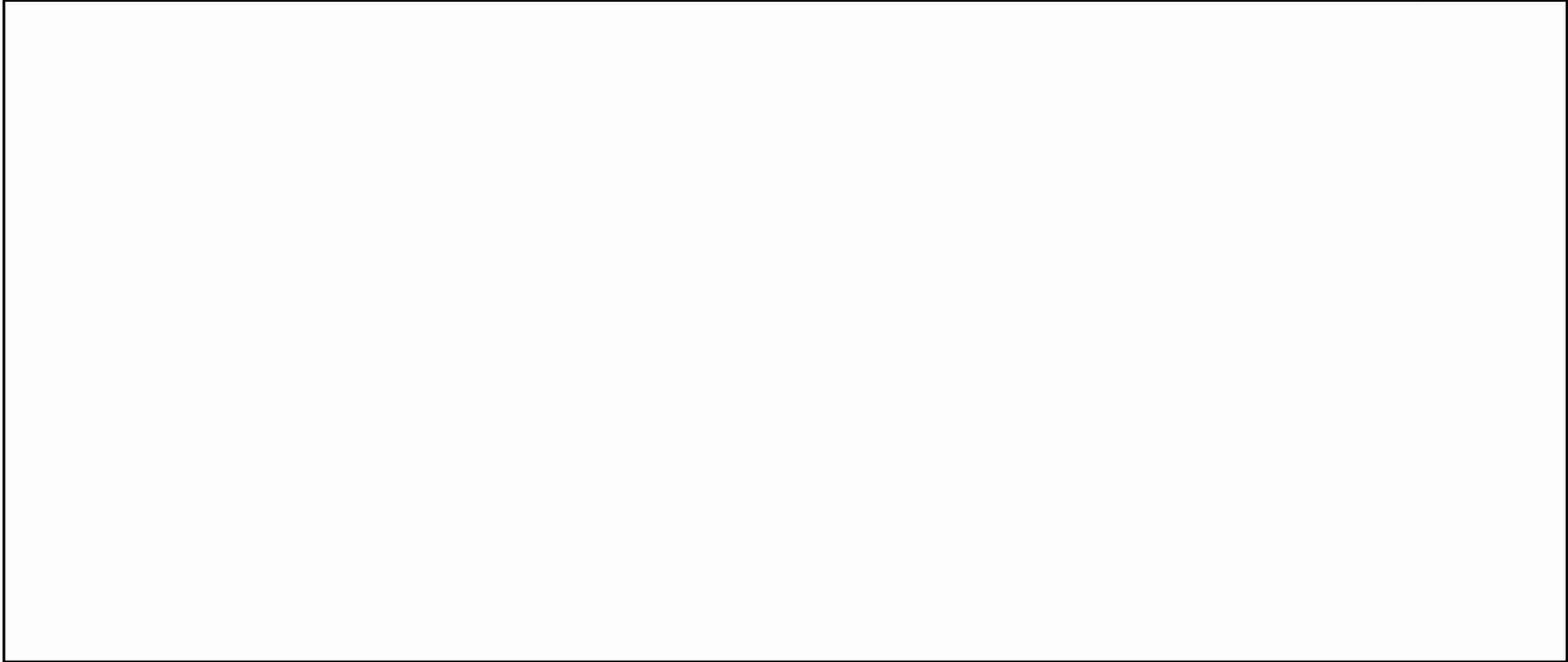
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Internal relocation: eliciting testimony

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Internal relocation: eliciting testimony

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Internal relocation: lines of inquiry



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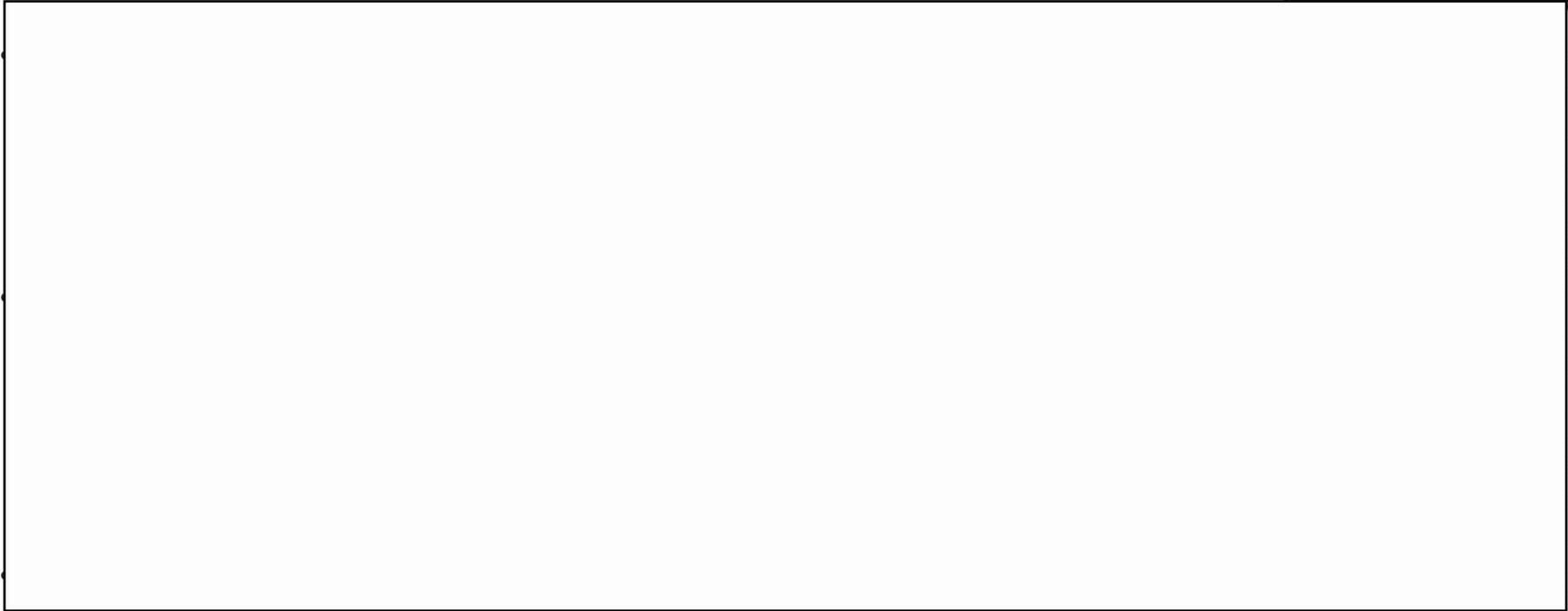
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Internal relocation: checklist reminders



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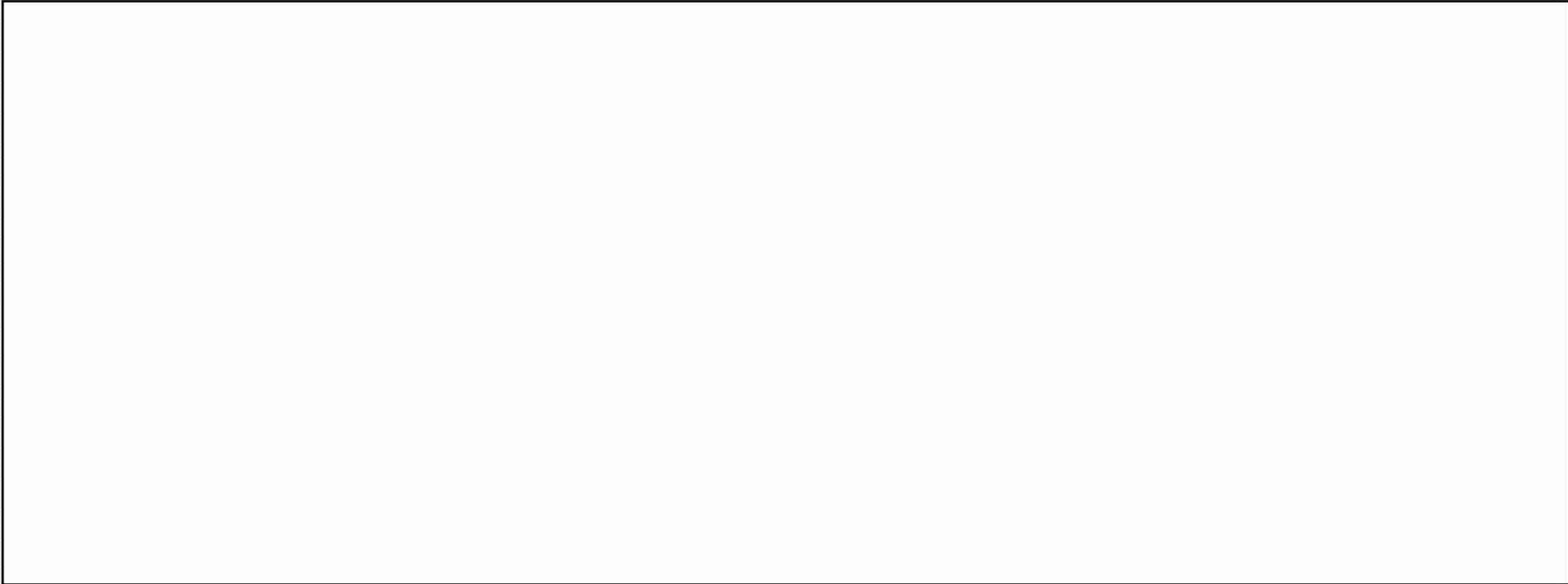


Example

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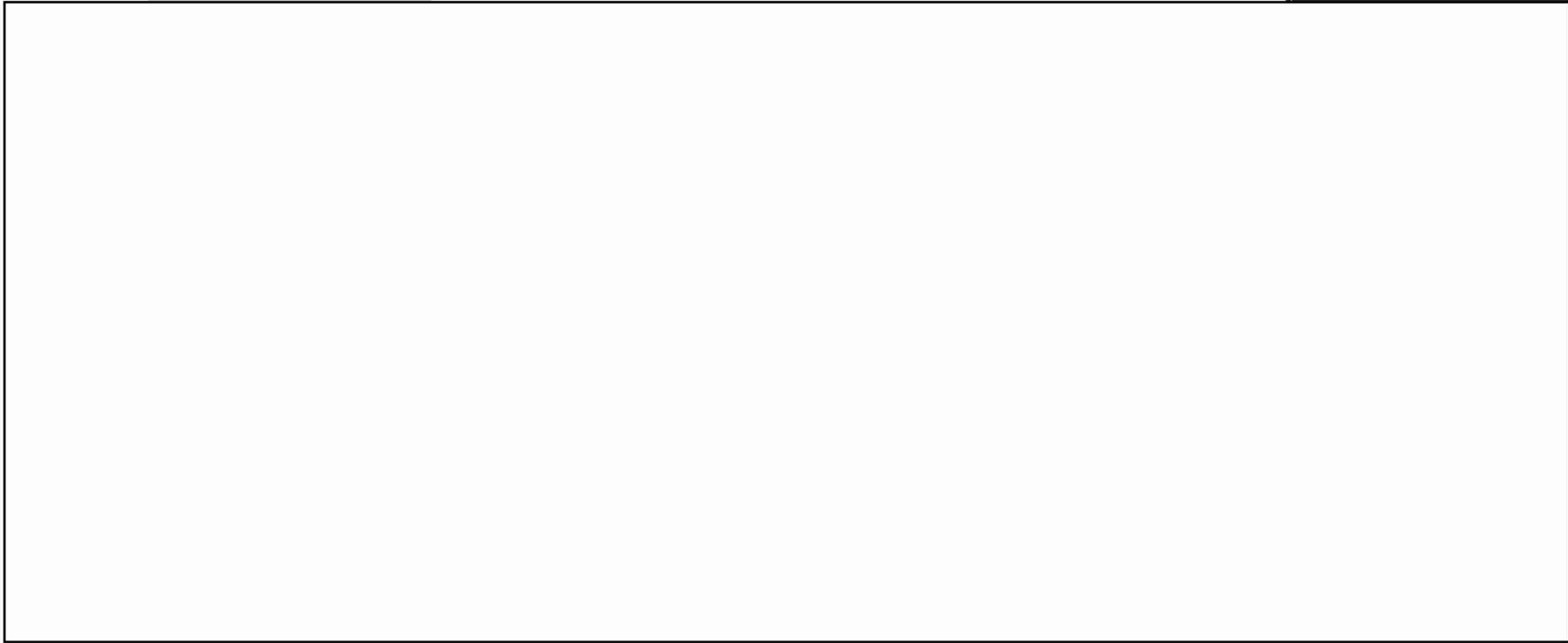


Example

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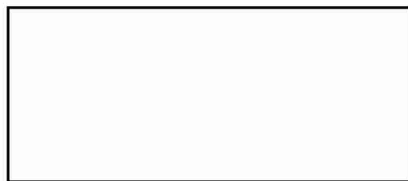
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consent/acquiescence

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consent/acquiescence

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consent/acquiescence

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consent/acquiescence (b)(7)(e)



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Likelihood of future torture

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Likelihood of future torture

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Likelihood of future torture

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Likelihood of future torture

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likelihood

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Awareness

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Awareness

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Awareness:



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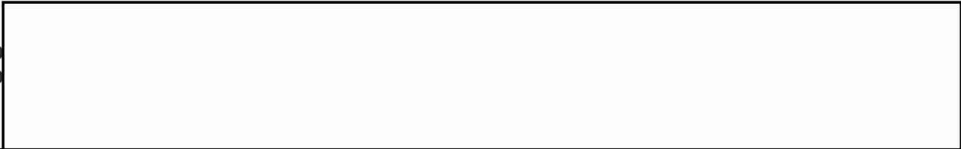


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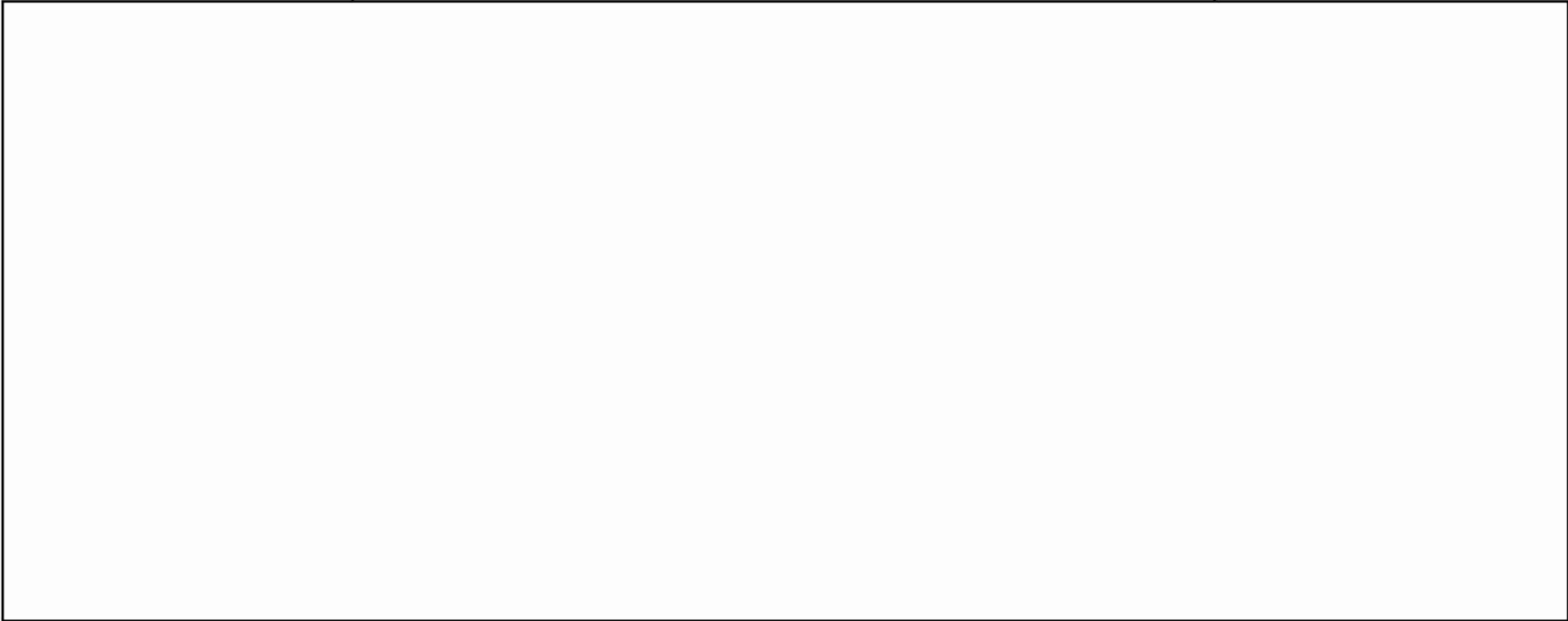
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Example 1:



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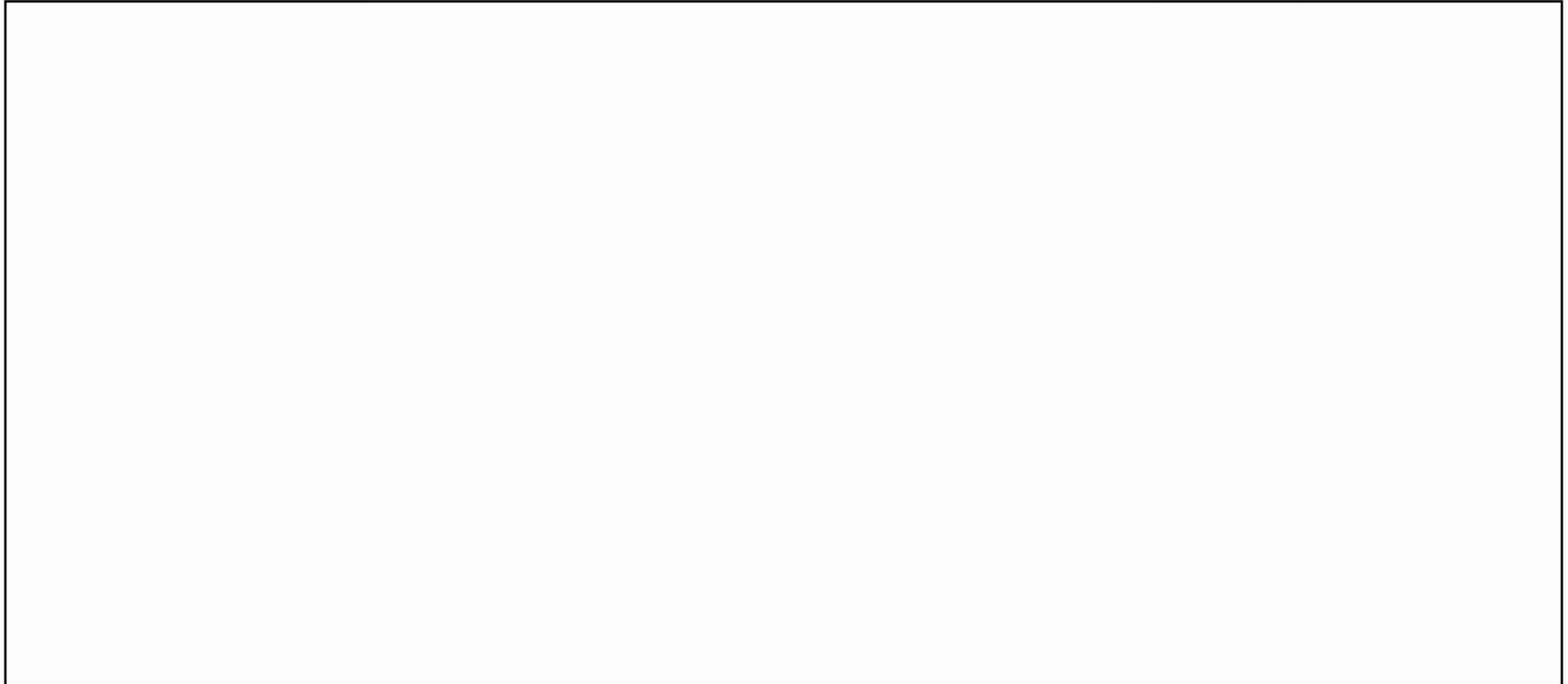
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Example 2:



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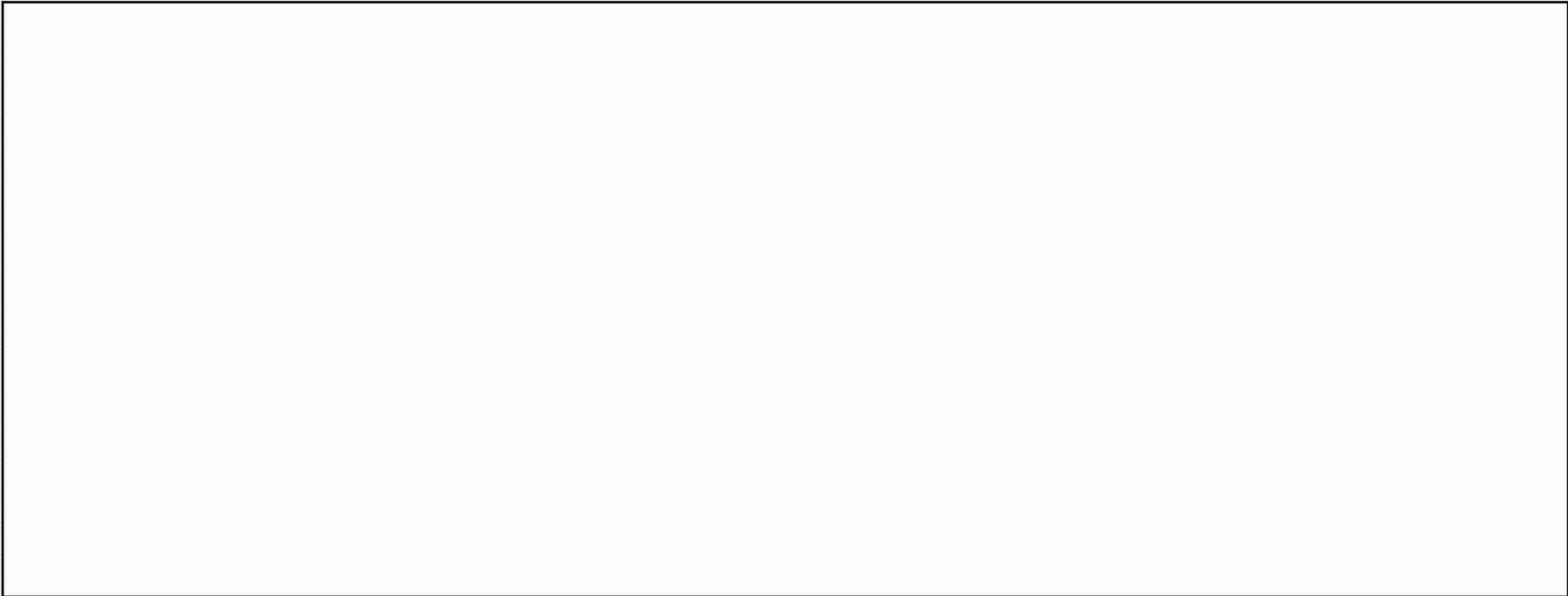


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Example 2:



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Roadmap



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- Overview of review
- Overview of findings
- Internal Relocation
- Consent/acquiescence
- Likelihood of future torture
- Awareness

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Thank you



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Internal Relocation Determinations in Convention Against Torture (CAT) Screenings

June 2020

Learning Objectives



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As an adjudicator, using the appropriate prescreening checklist:

- ✓ Explain how to assess the reasonableness of internal relocation in a CAT screening with accuracy;
- ✓ Recognize when to make internal relocation determinations in CAT in accordance with regulations; and
- ✓ Analyze all relevant evidence to assess the likelihood of future torture in the totality of the circumstances.

Overview of Internal Relocation



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- Relates to an applicant's ability to avoid future harm by relocating within the country in question
- Considered in the screenings of eligibility for:
 - asylum,
 - withholding of removal, and
 - Convention Against Torture (CAT) protections.

Internal Relocation: CAT vs. Asylum



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Asylum/
Withholding

Convention
Against Torture

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Regulatory Requirements for CAT



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INQUIRY: Whether applicant has met the *applicable standard* to show that s/he is more likely than not to be tortured given the *totality of the circumstances*

DETERMINATION: 8 C.F.R. § 208.16(c)(3) requires consideration of ALL relevant evidence

—includes the **possibility of internal relocation**

(“Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured”)

Internal Relocation Determination



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Internal relocation is considered in the totality of the circumstances

Step 1. Develop the record about the possibility of avoiding future torture by relocating internally

Step 2. Consider the impact of that evidence on the likelihood of future torture

Internal Relocation Determination:

Step 1. Developing the Record



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Consider any evidence that other areas of the country are generally safe.

If yes: Same reasonableness factors used in the asylum context may inform this inquiry in the CAT context, including where applicable— (b)(7)(e)

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Internal Relocation Determination: Step 1. Developing the Record (cont'd)



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Also, consider —

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Internal Relocation Determination:

Step 2. Analyzing the Impact



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Consider any evidence related to **possibility of internal relocation** in conjunction with ALL other relevant evidence

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Internal Relocation Determination:

Step 2. Analyzing the Impact



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Consider any evidence related to **possibility of internal relocation** in conjunction with ALL other relevant evidence



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Likelihood of Future Torture: Applicable Standards of Proof



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Consider the evidence in determining:

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