# ARTICLES

## THE CONVENTION AGAINST TORTURE AND *NON-REFOULEMENT* IN U.S. COURTS

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ABSTRACT

*In 1999, the United States implemented domestic regulations to fulfill its* non-refoulement *obligations under Article 3 of the Convention Against Torture (CAT). Since then, the U.S. domestic definition of torture may have become one of the most litigated treaty provisions in U.S. courts. In 2019 alone, U.S. immigration judges adjudicated over 25,000 CAT claims and in the past four years nearly every federal circuit court has grappled with the CAT regulations. Yet, differences remain. Two circuit splits have emerged regarding the CAT definition of torture: one examining government involvement and an implied "rogue officer" exception and another considering the "consent or acquiescence" required for non-State actors. Most recently, in June 2020, the Trump administration proposed a significant alteration of the CAT regulations that would require taking a side in both circuit splits.*

*This Article aims to recontextualize U.S. circuit court interpretation of CAT provisions from what now exists as a merely domestic immigration process to one that uses an international law framework. This Article examines how U.S. application of CAT compares to the treaty's drafting history and the practice of international bodies and courts. This Article shows how the CAT drafting history and interpretation by international bodies consistently frame the public official nexus requirement contained in the CAT definition of torture as part of a State responsibility analysis. Understanding this State*

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*responsibility context and its application to* refoulement *cases can help U.S. courts harmonize their divergent interpretations of torture under CAT.*

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## INTRODUCTION

In 2006, Raul Barajas-Romero was at his home in Santa Clara, Mexico when he opened his door to find four off-duty police officers.[1] The officers pushed him inside and demanded money.[2] When Raul refused, the officers locked him in his own bathroom for two days, burned him with cigarettes, beat him with the blunt side of a machete, sliced his leg with the same machete, and placed two scorpions down his pants, causing a fever, swelling, and breathing problems.[3] The officers also rubbed a dried corncob on his forehead in order to leave a scar where they threatened to place a bullet if Raul ever reported them.[4] However, when the officers eventually left, Raul reported the incident to other local police, but the officer immediately stopped taking notes when Raul implicated other police officers.[5] Raul then fled Mexico and sought refuge by unlawfully entering the United States.[6] When he was eventually detained by U.S. immigration authorities, Raul applied for protection from being returned to Mexico under the Convention Against Torture (CAT).[7]

Because Raul was detained in California, he received relief under CAT. But had he been detained in Texas, Maine, Georgia, or Missouri—for example—he likely would have been denied CAT relief and immediately returned to Mexico to face the same men who brutalized him for days and a government that failed to protect him. Why did geography matter? Because a significant circuit split exists among U.S. federal circuit courts as to how to apply and interpret regulations implementing U.S. obligations under the Convention Against Torture. As a State Party to the Convention, the United States is both bound by the definition of torture in Article 1 and the obligation under Article 3 not to return (*refouler*) a migrant to a country where there are substantial grounds for believing he or she would be subjected to torture.[8] However, two major cleavages have emerged among federal circuit courts over the years concerning the "public official" requirement in the CAT Article 1 definition of torture: (1) whether a "rogue officer" exception exists

1. *See* Barajas-Romero v. Lynch, 846 F.3d 351, 354 (9th Cir. 2017).
2. *See id.*
3. *See id.* at 354–55.
4. *See id.* at 355.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. art. 1, 3, Dec. 10, 1984, 1465 U.N.T.S. 113, 113–114 [hereinafter CAT].

within the Convention; and (2) whether a migrant is precluded from protection when the receiving State has made some efforts, although unsuccessful, to control a feared non-State actor. Additionally, in June 2020, the Trump administration proposed major changes to the CAT implementing regulations, essentially taking a side in both circuit splits.

This Article aims to bring clarity to these two contested issues within the CAT Article 1 definition of torture by recontextualizing the U.S. implementing regulations and federal circuit splits to place them in an international legal framework. Tens of thousands of migrants seek CAT *non-refoulement* protection in the United States each year, and nearly every federal circuit court has opined on the State actor requirements in regulations pursuant to CAT Article 1.[9] Those decisions interpret regulations specifically intended to give effect to, and mirror, U.S. obligations under CAT. Yet, only a single court opinion examines the Convention itself.[10] Similarly, little scholarship has been devoted to the Article 1 State actor circuit splits[11] and even less has examined U.S. *non-refoulement* obligations in light of international treaty law.[12] This Article seeks to examine why and how international legal tools can help ensure U.S. court interpretations of CAT Article 1 are consistent with the text, history, and application of the treaty.

Part I begins with an exploration of the history behind U.S. ratification and implementation of CAT. This covers U.S. signature in 1988, the record behind the Senate's advice and consent in 1990, U.S. ratification in 1994, implementing legislation in 1998, and finally implementing regulations in 1999. This history will demonstrate how each stage was tied to international legal principles and how the Senate understood that its ratification of CAT was inexorably tied to international antecedents, including international and regional human rights instruments.

Part II of this Article explores the emergence of two splits among federal circuit courts involving the CAT Article 1 requirement that torture be committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[13] This Part aims to both explain the factual circumstances surrounding many CAT *non-*

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9. *See infra* Part II.

10. *See* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004).

11. *See, e.g.*, Vy Thuy Nguyen, *Off-Duty Officers, Rogue Actors, and Low-Level Officials: Whose Conduct Establishes Official Involvement under the Convention Against Torture?*, 11 IMMIGR. L. ADVISOR, Aug,–Sept. 2017, at 2–3; Aruna Sury, *Qualify for Protection Under the Convention Against Torture*, IMMIGR. LEGAL RESOURCE CENTER PRACTICE ADVISORY (2020), https://www.ilrc.org/sites/default/files/resources/cat_advisory-04.2020.pdf.

12. *See, e.g.*, Lori A. Nessel, *"Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 82–83 (2004); Ellen Chung, *A Double-Edged Sword: Reconciling the United States' International Obligations Under the Convention Against Torture*, 51 EMORY L.J. 355, 365–66 (2002); Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty that Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENVER J. INT'L L. & POL'Y 533, 553 (1998).

13. CAT, *supra* note 9, at art. 1.

*refoulement* claims and how courts have arrived at such different interpretations without relying on the treaty itself. Part III briefly makes the case for why and how U.S. courts should use international legal tools to interpret the U.S. CAT implementing regulations. Namely, using the framework of "incorporative"[14] statutes or regulations, Part III demonstrates that the CAT regulations were intended to directly implement U.S. treaty obligations, and therefore, courts should turn to the treaty itself, along with canons of treaty interpretation, to interpret the regulations. This approach also comports with prior U.S. Supreme Court analysis of the *non-refoulement* corollary to CAT under the 1951 Convention Relating to the Status of Refugees (Refugee Convention).

Next, Part IV examines the text of CAT Article 1 using methods of treaty interpretation from international law. First, the Part explores the *travaux préparatoires* around the Article 1 State actor requirement, with particular focus on the drafters' understanding—at the suggestion of the United States—that the acts of public officials should cover commission, instigation, consent, and acquiescence in order to align with international law on State responsibility. Second, Part IV considers the work of the Committee Against Torture in its understanding of CAT Article 1, which similarly applies concepts of State responsibility and due diligence. Part IV also discusses the decisions of human rights bodies within the United Nations (U.N.) system; the Inter-American, European, and African human rights systems; and international criminal tribunals that have each interpreted the international definition of torture.

Finally, this Article concludes that the treaty text, the drafting history, and the work of international bodies and courts clearly frame the CAT Article 1 public official nexus within the context of State responsibility. Thus, the drafters intended that only in exceptional circumstances would a public official who commits torturous conduct not do so in an official capacity, counseling against a "rogue officer" exception. Also, within the State responsibility context, every international body and court employs a due diligence standard to interpret a State's responsibility related to torture committed by non-State actors. Both of these concepts could help U.S. courts resolve their interpretative differences, ensure that the United States remains consistent in its treaty obligations, and promote consistency in the tens of thousands of life or death CAT *non-refoulement* decisions made every year. The analysis within this Article also demonstrates that the Trump administration's recent efforts to change the CAT regulations would significantly alter U.S. treaty implementation and place the United States out of step with its obligations under international law.

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14. *See* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 664 (2010).

## I. CAT AND *NON-REFOULEMENT* OBLIGATIONS IN U.S. LAW

On December 10, 1984, on the thirty-sixth anniversary of the Universal Declaration of Human Rights (UDHR),[15] the U.N. General Assembly unanimously adopted the Convention Against Torture.[16] From its inception in the 1970's to the final text adopted in 1984,[17] the United States played an active role in the Convention's drafting.[18] However, the U.S. Senate did not vote to ratify CAT until 1990,[19] the United States did not submit its instrument of ratification until 1994,[20] the Senate only passed implementing legislation in 1998,[21] and the executive branch did not promulgate implementing regulations until 1999.[22] The following Sections examine the long road to U.S. implementation of CAT, and in particular, its *non-refoulement* obligations.

### A. *A Brief History of CAT in the United States*

Shortly after CAT entered into force, U.S. President Reagan signed the Convention on April 18, 1988.[23] Until ratification, the United States was only obligated to refrain from defeating the object and purpose of the treaty and was not fully bound by its terms.[24] Thus, on May 20, 1988, President Reagan transmitted the Convention to the U.S. Senate for its advice and consent to ratification.[25] Noting that "it was not possible to negotiate a treaty that was acceptable to the United States in all respects," President Reagan's transmittal included a number of proposed reservations, understandings, and

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15. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

16. *See* G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (Dec. 10, 1984). Pursuant to its terms, the Convention entered into force on June 26, 1987, thirty days after the deposit of the twentieth instrument of ratification. *See* OXFORD COMMENTARIES ON INT'L LAW, THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 5 (2d ed. 2019) (citing CAT art. 27) [hereinafter CAT COMMENTARY].

17. *See infra* Section IV.A for a discussion of the Convention's drafting history.

18. President Reagan informed the Senate that the United States "participated actively and effectively in the negotiation of the Convention." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, at iii (May 23, 1988) (containing President Ronald Reagan, *Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment* (May 20, 1988)). [hereinafter "Reagan Letter"]. Then-Secretary of State George Schultz noted that the United States "contributed significantly to the development of the final Convention, especially in proposing that [it] focus on torture, rather than on other relatively less abhorrent practices." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, at v (May 23, 1988)*; see also* CLAIBORNE PELL, S. COMM. ON FOREIGN REL., REPORT ON CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. DOC. NO. 101-30 (1990) [hereinafter SFRC REPORT].

19. *See* 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990); *see also* Rosati, *supra* note 13, at 553.

20. *See* Oona A. Hathaway, Aileen Nowlan, & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 807 (2012).

21. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, 112 Stat. 2681–761 (1998) [hereinafter FARRA].

22. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (to be codified at 8 C.F.R. pt. 3, 103, 208, 235, 238, 240, 241, 253, 507).

23. *See* Reagan Letter, *supra* note 19.

24. v Vienna Convention on the Law of Treaties, art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

25. *See* Reagan Letter, *supra* note 19.

declarations (RUDs).[26] As noted in the Senate's record related to the Convention, the Reagan administration's nineteen proposed RUDs caused significant concerns for human rights groups and the American Bar Association.[27] After a change of administration and extensive back-and-forth with the Senate Foreign Relations Committee, the George H.W. Bush administration reduced and revised the proposed RUDs.[28]

In its consideration of the Convention, the Senate Foreign Relations Committee observed that CAT was a "major step forward in the international community's efforts to eliminate torture" and "codifie[d] international law as it has evolved, particularly in the 1970's."[29] Of note, the Committee recognized the long line of international legal antecedents to the Convention, including the:

- 1907 Hague Convention on the Laws and Customs of War on Land, Article 4;
- Third Geneva Convention, Article 87;
- Fourth Geneva Convention, Articles. 31 and 32;
- UDHR, Article 5;
- International Covenant on Civil and Political Rights, Article 7 (along with Article 4, which provides for no derogation from Article 7);
- American Convention on Human Rights, Article 5(2);
- European Convention on Human Rights, Article 3;
- African Charter on Human and Peoples' Rights, Article 5; and
- 1975 U.N. General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[30]

On October 27, 1990, two-thirds of the Senate provided advice and consent to the ratification of CAT, subject to specific RUDs.[31] Relevant to the instant discussion, the Senate provided the following understanding with respect to the public official requirement in CAT Article 1:

> [W]ith reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such

26. *See id.*
27. *See* 136 CONG. REC. S36,193 (daily ed. Oct. 27, 1990)) (remarks of Senator Pell).
28. v *See id.; see also* SFRC REPORT, *supra* note 19 (containing the series of letters between the Committee and the U.S. Department of State concerning the RUD's).
29. *See* SFRC REPORT, *supra* note 19, at 3.
30. v *See id.* at 11–12. The Committee also acknowledged that the Convention's structure was modelled after four terrorism-related conventions to which the United States was party: the 1970 Hague Convention on the Suppression of Unlawful Seizure of Aircraft; the 1971 Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the 1973 United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; and the 1979 International Convention Against the Taking of Hostages. *Id.* at 12.
31. *See* 136 CONG. REC. S36,196 (1990).

> activity and thereafter breach his legal responsibility to intervene to prevent such activity.[32]

The purpose of articulating this understanding was to make it clear that both actual knowledge and willful blindness fall within the Article 1 description of "acquiescence."[33]

Regarding its *non-refoulement* obligations in CAT Article 3, the United States also submitted the following understanding:

> [T]he United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."[34]

This understanding was added because the Senate and executive branch intended the Article 3 *non-refoulement* obligation to mirror the *non-refoulement* obligation in the Refugee Convention, and because the U.S. Supreme Court had recently determined that a "more likely than not standard" applies in the refugee *non-refoulement* context.[35] Finally, and most importantly with respect to U.S. implementation, the Senate made clear that it viewed Articles 1 through 16 of CAT as non-self-executing,[36] meaning they would require further legislation to become binding.[37]

It took another four years after Senate ratification for the President to ratify the treaty and for the United States to deposit its instrument of ratification with the United Nations.[38] Although under the Convention's terms it entered into force with respect to the United States on November 20, 1994,[39] consistent with the U.S. declaration regarding the Convention's non-self-executing

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32. *Id*. at 36193*; see also* SFRC REPORT, *supra* note 19 ("Thus 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 inflict 'under color of law.' In addition, in our view, a public official may be deemed to 'acquiesce' in a private act or torture only if the act is performed with his knowledge and the public official has a legal duty to intervene to prevent such activity.").

33. SFRC REPORT, *supra* note 19, at 9. This was also intended to reflect the Department of State's 1989 letter to the Committee explaining its revisions to the Reagan-era proposed RUD's. *Id*. at 36. (reprinting letter).

34. 136 CONG. REC. S36,193 (1990).

35. SFRC REPORT, *supra* note 19, at 10 (citing INS v. Stevic, 467 U.S. 407 (1984)). However, the Seventh Circuit has held that despite this understanding (and subsequent implemented regulations) the more-likely-than-not standard should not be interpreted literally because to do so would be contrary to CAT itself. *See* Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1135 (7th Cir. 2015); *see also* Gutierrez v. Lynch, 834 F.3d 800, 806 (7th Cir. 2016) (confirming the holding in *Rodriguez-Molinero*).

36. 136 CONG. REC. S36,193 (1990). *But see* Rosati, *supra* note 13 (arguing the Convention is self-executing).

37. 136 CONG. REC. S36,193 (1990).

38. *See* U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE AGAINST TORTURE (1999), https://1997-2001.state.gov/www/global/human_rights/torture_intro.html; *see also* Hathaway et al., *supra* note 21, at 807.

39. This occurred thirty days after President Clinton deposited the U.S. instrument of ratification with the Convention depositary. *See* CAT, *supra* note 9, art. 27; *see also* U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE AGAINST TORTURE (1999), https://1997-2001.state.gov/www/global/human_rights/torture_intro.html.

nature, the Convention required domestic implementation before it could be applied and enforced within the United States.[40]

### B. *Implementing* Non-refoulement *Obligations*

Another four years passed before the United States implemented CAT domestically. With the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Congress sought to implement the U.S. ratification of CAT.[41] Specifically, Section 2242 of FARRA set out the United States policy regarding *non-refoulement* under CAT.[42] Under Section 2242(a), "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."[43] The legislation itself did not define torture, nor did it expressly prohibit *refoulement* or any other acts prohibited by CAT. Rather, the legislation called on executive branch agencies to prescribe regulations to implement U.S. obligations under CAT Article 3, subject to the RUDs contained in the Senate resolution of ratification.[44]

#### 1. *Withholding and Deferral of Removal*

In February 1999, the U.S. Department of Justice (DOJ) promulgated a series of regulations implementing FARRA Section 2242, meant to "implement[] United States obligations under the United Nations Convention Against Torture."[45] In particular, the regulations codified U.S. obligations under Article 3 regarding *non-refoulement*.[46] The regulations also sought to marry new regulations with the existing system of implementing the United States' similar *non-refoulement* obligation under Article 33 of the Refugee Convention[47] and its 1967 Protocol.[48] The United States had implemented

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40. In practice, during the interim period between ratification and domestic implementation, the Immigration & Naturalization Service adopted a pre-regulatory administrative process to assess CAT *non-refoulement* cases. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8479 ("Until the October 21, 1998 legislation, there was no statutory provision to implement Article 3 of the Convention Against Torture in United States domestic law. When the United States Senate gave advice and consent to ratification of the Convention Against Torture, it made a declaration that Articles 1 through 16 were not self-executing. Recognizing, however, that ratification of the Convention represented a statement by the United States to the international community of its commitment to comply with the Convention's provisions to the extent permissible under the Constitution and existing federal statutes, the Department of Justice sought to conform its practices to the Convention by ensuring compliance with Article 3 in the case of aliens who are subject to removal from the United States.").

41. *See* FARRA, *supra* note 22.

42. *See* Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a), 112 Stat. 2681–822, note following 8 U. S. C. § 1231, p. 263 (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture (hereinafter CAT Policy)).

43. *Id.*

44. *See id.* § 2242(b).

45. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8478 (1999).

46. *Id.* ("This rule is published pursuant to this mandate to implement United States obligations under Article 3. . . .").

47. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6529, 189 U.N.T.S. 267.

48. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

those corollary obligations through a process known as "withholding of removal" if the alien could show that it was more likely than not that their "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[49] The key distinction between the Refugee Convention and CAT *non-refoulement* obligations, however, is that the Refugee Convention requires harm on account of a protected ground and provides certain exceptions to eligibility, but CAT requires no such nexus and contains no exceptions.[50] Withholding of removal, as applied to asylum applicants, was created as essentially a last stop before removal; if eligible, withholding is mandatory (rather than discretionary like affirmative asylum)[51] and merely prevents removal to a single country of fear and does not grant benefits like derivative withholding for a spouse or child, work authorization, or a path to permanent residency or citizenship.[52]

In 1999, the CAT regulations added a claim for torture to withholding as a way of directly implementing CAT Article 3.[53] However, because withholding—created to prevent refugee *refoulement*—contained built-in exceptions (known as mandatory bars) that were not applicable to CAT, the U.S. government needed to create an additional process known as "deferral of removal" for those who were barred from withholding, but otherwise could not be returned to a country because of CAT.[54] Deferral of removal thus provided even less than withholding, conferring neither lawful immigration status nor guaranteeing release from detention.[55] It was created expressly as the bare minimum to meet CAT Article 3.[56]

### 2. *Defining Torture*

Importantly, the 1999 regulations also codified the baseline definition of "torture" a migrant must prove in order to be eligible for either form of relief outlined above.[57] In promulgating this definition, DOJ noted that its terms were "drawn directly from the language of the Convention, the language of the reservations, understandings and declarations contained in the Senate resolution ratifying the Convention, and from ratification history."[58] The

49. *See* 8 U.S.C. § 1231(b)(3)(A) (2018); INS v. Stevic, 467 U.S. 407, 429–30 (1984).
50. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8478–79.
51. *See* Nessel, *supra* note 13, at 82–83.
52. *See id.*
53. *See* 8 C.F.R. § 208.16(c) (2020); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8480–81.
54. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8480.
55. *See* Chung, *supra* note 13, at 365–66 (citing 8 C.F.R. § 208.17(b)(i) (2020); 8 C.F.R. § 208.17(b)(ii)(2020)).
56. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 at 8481 ("Thus, while this rule does not extend the advantages associated with a grant of withholding of removal to aliens barred under section 241(b)(3)(B) of the [Immigration & Nationality] Act, it does ensure that they are not returned to a country where they would be tortured.").
57. *Id.* at 8482.
58. *Id.*

implementing regulation itself also states that all definitions "incorporate the definition of torture contained in Article 1 of the Convention Against Torture."[59] The definition reads as follows:

> 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*.[60]

Consistent with the United States' RUDs, the regulations also specify that "[a]cquiescence 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."[61]

This definition varies slightly from other definitions of torture found within U.S. law. For example, 18 U.S.C. § 2340(1) provides for criminal punishment of torture, but does not use the Article 1 phrase "instigation of or with the consent or acquiescence of a public official" and instead uses the formulation "person acting under the color of law." This is notable, since that section was added to the federal criminal code expressly for the purpose of implementing CAT.[62] Furthermore, Congress did not include a public official or color of law requirement in the definition of torture in the Torture Victim Protection Act.[63]

It is precisely these concepts of "official capacity" and "acquiescence" that U.S. immigration courts and federal circuit courts have struggled to interpret.

### 3. *How CAT Claims Come Before Federal Circuit Courts*

Because U.S. *non-refoulement* obligations are implemented through withholding and deferral of removal, the migrant must first be subject to an order of removal from the United States.[64] In practice, this typically occurs in one of two ways: expedited removal or the "reasonable fear" process.

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59. 8 C.F.R. § 208.18(a) (2020).
60. 8 C.F.R. § 208.18(a)(1) (2020) (emphasis added).
61. *Id*. at § 208.18(a)(7).
62. Foreign Relations Authorization Act Fiscal Years 1994 and 1995, H.R. 2333, 113th Cong. § 506 (1994); *see also* Hathaway et al., *supra* note 21, at 809–810 (discussing the single federal criminal case charging the crime of torture).
63. Torture Victim Protection Act of 1991, H.R. 2092, 102nd Cong. (1992).
64. *See* 8 C.F.R. § 208.16, 208.17 (2020).

First, since the 1996 overhaul of the U.S. immigration system, the majority of migrants who are not admissible at a U.S. port of entry[65] or are found without lawful presence within the United States are subject to "expedited removal."[66] Expedited removal results in immediate return of the migrant to her country of nationality, unless she expresses a fear of persecution or torture.[67] By regulation, an immigration officer must both explain that U.S. law protects those who fear persecution or torture and ask each person detained mandatory fear questions.[68] However, there is significant doubt as to whether this routinely happens or is accurately reported in sworn statements for each migrant.[69] If the individual expresses a fear of return, he or she is referred to an asylum officer who conducts a "credible fear" screening interview to determine whether there is a significant possibility he or she could establish eligibility for asylum, withholding of removal, or deferral of removal.[70] A "positive" credible fear screening results in referral to an immigration judge

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65. Meaning, the migrants are approaching a U.S. inspection station at the U.S.- Mexico border without a proper visa or other document allowing lawful admission to the United States.

66. *See* Nessel, *supra* note 13, at 89 (citing 8 U.S.C. § 1158 (2018); 8 C.F.R. § 235.3(b)).

67. *See* 8 C.F.R. § 235.3 (2020).

68. *See id*. at § 235.3(b)(2)(i) (stating that if an immigration officer determines that an alien is inadmissible and subject to expedited removal, the officer must prepare a Record of Sworn Statement in Proceedings (Form I-867), which contains the facts of the case and any statements made by the alien, and requiring the officer to read "all information contain[ed] on Form I-867A" and record the alien's responses). Note that the U.S. Department of Homeland Security does not make copies of Form I-867 publicly available, but several sources note the four "fear questions" contained therein. *See* Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 178 (2006); U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS AND RECOMMENDATIONS VOL. 1 53–54 (2005) [hereinafter USCIRF REPORT vol. 1]. Form I-867A also contains language that the officer must read to the migrant:

> "U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear."

U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, EVALUATION OF CREDIBLE FEAR REFERRAL IN EXPEDITED REMOVAL AT PORTS OF ENTRY IN THE UNITED STATES 13 (2005).

69. *See, e.g*., USCIRF REPORT vol. 1, *supra* note 69, at 54 (noting that the Committee observed that not all aliens were asked these questions and that even if asked, not all answers were recorded or referred to an asylum officer if a fear was expressed); EVALUATION OF CREDIBLE FEAR REFERRAL IN EXPEDITED REMOVAL AT PORTS OF ENTRY IN THE UNITED STATES, *supra* note 69, at 14-15 (2005) (finding aliens were only read the paragraph on U.S. law protecting persons who fear persecution or torture in one out of ten cases, and describing significant discrepancies in what observers heard/saw officers ask and what was recorded by the officer); U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 19 (2016); Pistone & Hoeffner, *supra* note 69, at 178–79; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-521, UNACCOMPANIED ALIEN CHILDREN: ACTION NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 27–29 (2015).

70. *See* 8 U.S.C. § 1225(b)(1)(B)(v) (2018); 8 C.F.R. § 208.30(e)(2)–(3) (2020). In its 1997 interim regulations implementing the credible fear process, the Department of Justice described the "significant possibility" standard as one that sets "a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10320 (1997).

(IJ) for a full proceeding, where the judge determines removability, and any other immigration eligibility, and may also withhold or defer removal.[71] Data from the U.S. Department of Homeland Security (DHS) shows that the need for these screenings nearly doubled between 2015 and 2016, and has remained the same since.[72]

The second typical method of referral is known as the "reasonable fear" process. A reasonable fear screening occurs if an individual being removed is subject to reinstatement of a prior removal order or was convicted of an aggravated felony in the United States.[73] A reasonable fear screening determines whether the applicant can establish that there is a "reasonable possibility" of persecution or torture upon return to their country of nationality.[74] Again, a "positive" screening results in referral to review before a federal IJ.

Statistics from DHS show that in 2018 there were over 96,000 claims of fear raised in these processes, resulting in over 74,000 positive cases[75] where the applicant showed credible fear of persecution or torture.[76] In total, 71% of credible fear and reasonable fear screenings between 2014 and 2019 resulted in positive determinations.[77] For each of those years, the vast majority of cases arose from migrants from Honduras, El Salvador, and Guatemala.[78] There is also a continued rise in cases despite the Trump administration's efforts to curb migration and successful asylum or torture claims.[79]

After referral to an IJ, the two processes merge in federal immigration court, which falls under the U.S. Department of Justice. Since multiple forms of relief or benefits are then available in a full hearing before an IJ, not all credible and reasonable fear screenings result in asylum, withholding, or deferral applications.[80] DOJ reports that in FY2018—the last year reported as of this writing—IJs granted CAT relief in only 1,334 cases and denied over

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71. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8479.

72. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-250, ACTIONS NEEDED TO STRENGTHEN USCIS'S OVERSIGHT AND DATA QUALITY OF CREDIBLE AND REASONABLE FEAR SCREENINGS 3 (2020) [hereinafter GAO USCIS REPORT].

73. 8 C.F.R. § 208.31 (a)–(b) (2020); 8 C.F.R. § 241.8(e) (2020); 8 C.F.R. § 238.1 (f)(3) (2020).

74. *See* 8 C.F.R. § 208.31(c) (2020). The "reasonable possibility" standard is the same as that for establishing a well-founded fear of persecution in the asylum context. The U.S. Supreme Court has determined that in the persecution context, a reasonable possibility would include a one-in-ten chance of harm. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

75. Note that U.S. Department of Homeland Security does not provide statistics breaking down credible fear by persecution or torture, likely because for purposes of the interview and adjudication, USCIS officers need only find one basis for referral to an immigration judge and an applicant could have multiple claims.

76. *See* U.S. Dep't of Homeland Sec., *Credible Fear Cases Completed and Referral for Credible Fear Interview*, *Total Credible Fear Cases Completed Fiscal Years 2007-2018*, https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview (last updated Dec. 2018).

77. *See* GAO USCIS REPORT, *supra* note 73, at 13.

78. *See id.* at 96.

79. *See id.* at 12; Press Release, U.S. Customs & Border Protection, Claims at Ports of Entry Increased by 121 Percent in FY2018, (Dec. 10, 2018), https://www.cbp.gov/newsroom/national-media-release/claims-credible-fear-increase-fiscal-year-2018. *But see CBP's Credible Fear Figures are Out of Context and Inaccurate*, Human Rights First (Dec. 11, 2018), https://www.humanrightsfirst.org/blog/cbp-s-credible-fear-figures-are-out-context-and-inaccurate.

80. *See* GAO USCIS REPORT, *supra* note 73, at 20.

25,000 claims.[81] In FY2017, IJs granted relief under CAT in 935 cases and denied over 17,000 claims.[82] Finally in FY2016, IJs granted CAT in 631 cases and denied over 12,000 claims.[83] This illustrates both the large workload faced by IJs and the large number of CAT *non-refoulement* claims adjudicated every year.

Decisions by IJs may be appealed to the Board of Immigration Appeals (BIA), which is also located within the Department of Justice.[84] In turn, the BIA's decisions may be appealed directly to a federal circuit court.[85] On July 6, 2020, the U.S. Supreme Court confirmed that federal circuit courts may review factual determinations in CAT appeals.[86]

## II. TWO CIRCUIT SPLITS REGARDING PUBLIC ACTORS IN THE TORTURE DEFINITION

Nearly every circuit in the last five years has opined on the CAT definition of torture.[87] Particularly within the last few years, every circuit except the D.C. Circuit[88] has interpreted the term "public official" or "consent or acquiescence" within the CAT Article 1 definition of torture.[89] Given the frequency with which immigration courts adjudicate CAT claims—between 26,000 and 18,000 per year—as well as the proliferation of circuit court decisions interpreting CAT regulations, the Convention is likely one of the more litigated international instruments in U.S. courts.

Yet, significant divisions remain. With the proliferation of federal circuit court considerations of the CAT Article 1 definition of torture, so too have divisions emerged among the circuit courts. The following sections will examine two key circuit splits emerging from Article 1's requirement that the harm the migrant fears 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

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81. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2018 30 (2018), https://www.justice.gov/eoir/file/1198896/download.

82. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2017 30 (2017), https://www.justice.gov/eoir/page/file/1107056/download.

83. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2016 M1 (2016), https://www.justice.gov/eoir/page/file/fysb16/download.

84. *See* 8 C.F.R. § 1003.1(b) (2020).

85. *See, e.g.*, 8 U.S.C. § 1252(a)(1) (2018) (final orders of removal); 8 U.S.C. § 242(a)(2)(B)(ii) (2018) (asylum claims); 8 U.S.C. § 1252(a)(4) (2018) (allowing for judicial review of "any cause or claim under the United Nations Convention Against Torture.").

86. *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1687 (2020).

87. *See, e.g.*, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385, § 4.5 (2003) (compiling cases from the circuit courts).

88. The D.C. Circuit is unlikely to have these sorts of cases since immigration claims by D.C. residents are adjudicated by the immigration court in Arlington, VA, meaning any appeals would be heard by the Fourth Circuit.

89. *See Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385, § 19 (2003) (compiling 203 published opinions from eleven circuits related to definition of "acquiescence" of a "public official" or government in torture).

capacity"[90]; the recognition of a "rogue officer" exception; and a finding of acquiescence when the State has taken some preventative steps.

This is not to say there is agreement on the other requirements within the torture definition. Indeed, there are also notable divergences in other elements of the definition, including specific intent,[91] acts that constitute severe pain or suffering,[92] internal relocation alternatives,[93] and the use of evidence showing widespread human rights abuses in the country of origin.[94] The

90. *See* CAT, *supra* note 9, at art. 1; 8 C.F.R. § 208.18(a)(1) (2020).

91. *Compare In re* J-E-, 23 I. & N. Dec. 291 (B.I.A. 2002) (en banc) (holding that negligent acts or harm resulting from lack of resources for the care of Haitian deportees automatically detained upon return to Haiti could not constitute intentional infliction) *and* Elien v. Ashcroft, 364 F.3d 392, 399 (1st Cir. 2004) (reiterating the *Matter of J-E-* conclusion regarding a Haitian criminal deportee) *and* Pierre v. Gonzales, 502 F.3d 109 (2d Cir. 2007) (deferring to the BIA's intent standard in *Matter of J-E-* for case concerning automatic indefinite detention of Haitian criminal deportee) *and* Cadet v. Bulger, 377 F.3d 1173, 1194 (11th Cir. 2004) ("In sum, we accept, and do not review, the administrative fact findings that Haitian prison conditions are universal, not directed at criminal deportees, and due to Haiti's severely depressed economy, rather than any intent to inflict pain and suffering"). *Compare* Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005) *with* Ridore v. Holder, 696 F.3d 907, 917 (9th Cir. 2007) ("If it is true that the Haitian government has a policy of placing accused human rights violators in charge of prisoners, . . . then there is nothing illogical in inferring the government intends to put those prisoners at risk of cruel, abusive treatment that would qualify as severe suffering or torture") *and* Jean-Pierre v. U.S. Att'y Gen., 500 F.3d 1315 (11th Cir. 2007) (directing the BIA to consider whether a Haitian criminal deportee, who was mentally ill and HIV-positive satisfied the specific intent element where there was evidence that mentally ill detainees with HIV are singled out for forms of punishment that included ear-boxing (being slapped simultaneously on both ears), beatings with metal rods, and confinement to crawl spaces where detainees cannot). *Compare In re* J-R-G-P-, 27 I. & N. Dec. 482, 486-87 (B.I.A. 2018) (noting "the evidence "plausibly establishes that abusive or squalid conditions in [Mexican] 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") *with* Guerra v. Barr, 951 F.3d 1128 (9th Cir. 2020) (rejecting the BIA's finding that general lack of proper care for mentally ill persons resulting from a lack of knowledge of mental illness and a lack of resources in Mexico rather than intentional infliction of harm); *see also* Deborah E. Anker, *Understanding "Suffering" Yet Misconstruing Intentionality: U.S. Compliance and Non-Compliance with the Convention against Torture*, REFLAW (Aug. 6, 2017), http://www.reflaw.org/understanding-suffering-yet-misconstruing-intentionality-u-s-compliance-and-non-compliance-with-the-convention-against-torture/ (discussing how U.S. court interpretation of intent under CAT diverges from interpretations of international and domestic courts).

92. For example, case law varies on whether rape and sexual abuse can constitute torture. *Compare* Haider v. Holder, 595 F.3d 276, 289 (6th Cir. 2010) (holding that sexual abuse and humiliation at the hands of the police, twice occurring in public places, did not rise to torture) *with* Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) ("Rape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity."), and Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) ("Rape and sexual abuse due to a person's gender identity or sexual orientation, whether perceived or actual, certainly rises to the level of torture for CAT purposes.").

93. *Compare* Maldonado v. Lynch, 786 F.3d 1155 (9th Cir. 2015) (holding that alien seeking deferral of removal under CAT is not required to prove that internal relocation was impossible) (overruling Hasan v. Ashcroft, 380 F.3d 1114 (9th Cir. 2004*) and* Lemus–Galvan v. Mukasey, 518 F.3d 1081 (9th Cir. 2008) *and* Singh v. Gonzales, 439 F.3d 1100 (9th Cir. 2006)) *with* Suarez-Valenzuela v. Holder, 714 F.3d 241, 248 (4th Cir. 2013) ("In the CAT context, applicants bear the burden of presenting evidence to show that relocation within the country of removal is not possible") *and* Bathula v. Holder, 723 F.3d 889, 904 (7th Cir. 2013) (shifting burden on alien to demonstrate that internal relocation is impossible) *and* Hincapie v. Gonzales, 494 F.3d 213, 221 (1st Cir. 2007) (citing the since-overturned *Hasan* relocation analysis).

94. *See, e.g.*, Cabrera Vasquez v. Barr, 919 F.3d 218 (4th Cir. 2019) (remanding to the BIA for BIA's wholesale failure to fully consider country conditions evidence alien presented to show government acquiescence in her torture); Mutuku v. Holder, 600 F.3d 1210 (9th Cir. 2010); Nuru v. Gonzalez, 404 F.3d 1207 (9th Cir. 2005) (evidence of gross, flagrant, or mass violations of human rights within that country and to any other relevant information regarding current country conditions); Kamalthas v. INS, 251 F.3d 1279, 1280 (9th Cir. 2001) ("country conditions alone can play a decisive role in granting relief under the Convention."); Zubeda v. Ashcroft, 333 F.3d 463 (3rd Cir. 2003) ("[G]ross, flagrant or mass

following sections focus on the nexus to a State actor for two principal reasons: first, because nearly every federal circuit has had occasion to interpret this requirement;[95] and second, because as of June 2020, the Trump administration had proposed to regulate around these very circuit splits by changing the CAT implementing regulations.[96]

### A. *A Rogue Officer Exception?*

It is clear from the terms of CAT Article 1 and its implementing regulations that severe harm intentionally inflicted "by" a public official falls within the torture definition.[97] Indeed, this is the quintessential example of torture[98] and U.S. courts do not differ in this respect. However, differences have emerged when circuits have interpreted the torture definition's inclusion of "in an official capacity," and thus, whether the definition covers the acts of extrajudicial or "rogue" public officials.[99] Several commentators describe the split as essentially two-sided.[100] However, as explained below, the split truly involves three sides: (1) the First Circuit, BIA, and U.S. Attorney General have held that there is essentially a "rogue officer" exception in CAT Article 1; (2) the Second, Fourth, Fifth, and Eighth Circuits apply a middle-ground approach using "color of law" analysis with differing factual results; and (3) the Seventh and Ninth Circuits have held that what may be characterized as the "private" act of a public official may nonetheless fall under CAT.

#### 1. *The First Circuit, BIA, and U.S. Attorney General*

At one end of the spectrum are the First Circuit, BIA, and U.S. Attorney General. Their interpretation of "by" a public official stems from statements made during the Senate consideration of CAT—that "official capacity" in CAT Article 1 was understood to mirror the existing domestic law considerations of "color of law" in civil rights cases involving law enforcement officials.[101] The First Circuit and BIA have taken this one step further, however,

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violations of human rights within the country of removal . . . can corroborate an alien's claim that he/she will be subjected to torture upon return; thus allowing the alien to present the proof necessary for establishing a claim under the Convention Against Torture.") (internal quotations omitted).

95. *See Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, *supra* note 90.

96. *See infra* Sections II.A–B.

97. *See* CAT, *supra* note 9, art. 1(1); 8 C.F.R. § 208.18(a)(1) (2020).

98. *See* CAT COMMENTARY, *supra* note 17, at 34.

99. *See In re* O-F-A-S-, 28 I. & N. Dec. 35, 37 (B.I.A. 2020) (explaining divergence); *see also* Nguyen, *supra* note 12, at 5.

100. *See, e.g.*, Nguyen, *supra* note 12, at 13; Sury, *supra* note 12, at 7.

101. *See* SFRC REPORT, *supra* note 19, at 14 ("[T]he 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.'"); *see also* U.N. Comm'n 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, U.N. Doc. CAT/C/28/Add.5 at ¶ 180 (2000) ("Conduct falling within the scope of the Convention will often constitute criminal violations of the federal civil rights statutes.").

concluding that the Convention does not apply to the acts of so-called "rogue officers."

The First Circuit considered this issue in a case in which a Brazilian woman feared torture at the hands of Brazilian officials in retribution for her work as a criminal informant for the U.S. government.[102] Her fear of torture was founded in threats she received from Brazil while in the United States—requiring her to move three times and change her phone number—and two instances in which police officers confronted her mother in Brazil warning they would find her daughter if she returned to Brazil.[103] One of the officers was the brother of a woman about whom the petitioner had provided incriminating information, but the officer also warned petitioner's mother to inform "the police" when petitioner returned to Brazil.[104] The First Circuit characterized the connection between the officers' official positions and their projection of "an air of official authority" as resting on unproven assumptions,[105] and thus affirmed lower courts' conclusions that "[t]he action of two rogue police officers does not constitute government action."[106] The First Circuit held this despite evidence in the record of "a high level of police abuse and impunity" in Brazil.[107] Finally, in a surprisingly fatalistic conclusion, the First Circuit noted that "[t]hus, like Socrates, all we know for certain is that we don't know what will happen"[108]—leaving the petitioner to find out for herself when she was returned.

The BIA and U.S. Attorney General (AG)[109] have similarly narrowed the public official requirement. In *Matter of Y-L-*, the AG found that "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," are not covered by the torture definition.[110] In that decision, the AG sought to draw a distinction between "low-level" officials and what it called "authoritative government officials acting in an official capacity."[111] Even though one of the applicants presented testimony that he would be killed by two law enforcement officials in the Dominican Republic who had delivered death threats to him, the AG concluded that "two corrupt, low-level agents may seek to exact personal vengeance on him for personal reasons," rather than official reasons.[112]

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102. Costa v. Holder, 733 F.3d 13, 13–14 (1st Cir. 2013).
103. *Id.* at 15.
104. *See id.*
105. *Id.* at 18.
106. *Id.*
107. *See id.*
108. *Id.* This is surprising since the very purpose of a CAT *non-refoulement* claim is forward-looking, and it is the fact-finder's duty to determine whether it is likely that the individual will be subject to torture upon being returned. *See* CAT, *supra* note 9, at art. 3; SFRC REPORT, *supra* note 19.
109. In rare circumstances, the Attorney General may exercise her right to have cases referred to her by the BIA. *See* 8 C.F.R. § 1003.1(h)(1)(i). (2020)
110. *In re* Y-L-, A-G- & R-S-R-, 23 I. & N. Dec. 270, 283 (B.I.A. 2002).
111. *See id.* at 285
112. *Id.*

In 2020, the BIA sought to solidify this "rogue officer" torture exception in *Matter of O-F-A-S-*. In that case, a Guatemalan man presented evidence that while in Guatemala he was handcuffed, beaten, and threatened in his home by five members of the federal police.[113] The officers threatened to cut off the applicant's fingers if he did not pay them, and then they fled after a neighbor called local police.[114] The BIA held that CAT Article 1 did not cover rogue officers because "[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."[115] The BIA used U.S. civil rights cases to conclude that the key consideration is whether the officer was "only able to accomplish the acts of torture by virtue of his official status."[116] Applying this standard to the applicant's case, the BIA found that "[t]he fact that the men wore shirts bearing the insignia of a government law enforcement agency and carried high-caliber weapons and handcuffs did not prove that they were actually police officers," and the fact that the applicant did not report the incident to the police meant there was no way to evaluate whether they were bona fide officers.[117]

Taken together, the First Circuit, AG, and BIA appear to not only consider whether the alleged acts were "under the color of law," but also the officer's motive to harm or threaten the victim.[118] In each case, the officer's personal motivation—be it revenge or money—was key to this determination.

### 2. *The U.S. Attorney General (Again) and the Second, Fourth, Fifth, and Eighth Circuits*

In contrast, a second line of cases has adopted the same first step of understanding "official capacity" as "under color of law," but eschewed consideration of motive for a more fact-specific inquiry into the indicia of official authority. On July 14, 2020, the AG took the unusual step of vacating the BIA's decision in *Matter of O-F-A-S-*.[119] In doing so, the AG sought to clarify the role of "rogue officers" in the CAT analysis.[120] First, the AG agreed with

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113. *See In re* O-F-A-S-, 27 I. & N. Dec. 709, 710 (B.I.A. 2019), *vacated* 28 I. & N. Dec. 35 (B.I.A. 2020) [hereinafter *Matter of O-F-A-S-* BIA Decision].

114. *See id.*

115. *Id.* at 713–14 (internal quotations omitted).

116. *Id.* at 715 (citing United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991)).

117. *See id.* at 719–20.

118. This is not the first time the BIA or Attorney General has attempted to add or change the legal interpretation of the torture definition. In 2000 and 2002, the BIA and Attorney General interpreted "consent of acquiescence" in the torture definition as requiring "willful acceptance" by public officials. *In re* Y-L-, 23 I. & N. Dec. 270 (A.G. 2002); *In re* S-V-, 22 I. & N. Dec. 1306, 1311–13 (2000). That interpretation was roundly rejected by every circuit court that reviewed it. *See, e.g.*, Zheng v. Ashcroft, 332 F.3d 1186, 1194 (9th Cir. 2003); Pieschacon-Villegas v. Att'y Gen. of U.S., 671 F.3d 303, 309–12 (3d Cir. 2011); Hakim v. Holder, 628 F. 3d 151, 155 (5th Cir. 2010); Aguilar-Ramos v. Holder, 594 F.3d 701, 706 (9th Cir. 2010); Diaz v. Holder, 501 Fed. Appx. 734, 740 (10th Cir. 2012); Silva-Rengifo v. Atty. Gen. of U.S., 473 F.3d 58, 70 (3d Cir. 2007); Valdiviezo-Galdamez v. U.S. Att'y Gen., 502 F.3d 285, 293 (3d Cir. 2007); Khouzam v. Ashcroft, 361 F.3d 161, 170–71 (2d Cir. 2004); Lopez-Soto v. Ashcroft, 383 F.3d 228, 240 (4th Cir. 2004); Azanor v. Aschcroft, 364 F.3d 1013, 1020–21 (9th Cir. 2004); Amir v. Gonzales, 467 F.3d 921, 922 (6th Cir. 2006); Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001).

119. *See In re* O-F-A-S-, 28 I. & N. Dec. 35 (A.G. 2020).

120. *See id.* at 36.

the BIA and several circuit courts that harm by government officials should be examined to determine whether the official was "acting in an official capacity," which in turn should be seen as synonymous with civil rights cases analyzing "under color of law."[121] Second, the AG clarified that contrary to the BIA's decision, this analysis did not exclude low-level officers, thus rejecting a "freestanding rogue official rule."[122] Third, the AG clarified that he viewed the relevant test for "color of law" to be whether the official's misuse of authority was made possible because they were cloaked in authority.[123] However, the AG did not address his previous decision in *Matter of Y-L-* and the role of the perpetrator's personal motives in committing the harm, thus leaving some ambiguity.

The Second Circuit has generally followed similar logic, but has expressly emphasized how rarely a "rogue officer" analysis would apply. In *Khouzam v. Ashcroft*, the court rejected the BIA's imposition of a government "consent or approval" element to official capacity and found that the petitioner's claim that he would be intentionally harmed by Egyptian police during interrogation along with the goal of extracting a confession would be in their official capacity.[124] The court also used the CAT drafting history to show,

> To 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.[125]

The results of other Second Circuit cases, however, have been mixed. For example, in one instance, the court found that a Costa Rican gay man's rape by an on-duty police officer was merely "an isolated attack by a corrupt official" and that another instance in which the man was detained by police who yelled homophobic epithets at him was a "brief" detention "without harm."[126] In another case, the Second Circuit appears to have placed the burden on the applicant to show that the harm was not committed by rogue officers, finding that he "failed to establish that his alleged previous beating was anything more than a deviant practice carried out by one rogue military official."[127]

Similarly, the Fourth Circuit, while not directly addressing the legal standards for "official capacity," upheld a BIA decision characterizing the petitioner's fear as involving "rogue officers."[128] In that case, the petitioner and

121. *Id.* at 37–39.
122. *Id.* at 41 (internal quotations omitted).
123. *See id.*
124. *See* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004).
125. *Id.* (citing BURGERS & DANELIUS, *infra* note 202, at 119).
126. Joaquin-Porras v. Gonzales, 435 F.3d 172, 181–82 (2d Cir. 2006).
127. Wang v. Ashcroft, 320 F.3d 130, 144 (2d Cir. 2003).
128. *See* Suarez-Valenzuela v. Holder, 714 F.3d 241, 248 (4th Cir. 2013).

his friend were threatened by four men wearing police uniforms and who petitioner recognized as police.[129] After the friend was killed by the officers, petitioner was later visited by police who offered him money in exchange for his silence.[130] Yet, another segment of the police asked the petitioner to testify against one of the officers, which petitioner did.[131] One officer was convicted and sentenced to fifteen years in prison, but only served three months, and upon his release he immediately sought to find and threaten the petitioner.[132] Considering this evidence, the Fourth Circuit found it reasonable to conclude that the perpetrator-officers were "rogue" when the government adequately prosecuted one of them.[133] Like other courts, the Fourth Circuit also considered the officer's personal motive for vengeance when finding that it had no nexus to their official capacity.[134] Notably, though, the court did not emphasize motive as heavily as the First Circuit and BIA.

The Fifth Circuit, on the other hand, has applied an interpretation using "color of law" analysis more akin to the Second Circuit in *Khouzam*. In *Garcia v. Holder*, the court emphasized that even low-level officials motivated by economic gain may be acting under the color of law when they "misuse . . . power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[135] In that case, the petitioner was threatened multiple times by four officers in police uniforms who were carrying weapons.[136] Even though the officers were extorting the petitioner, the court found that "[t]he alleged active involvement of public officials acting in their official capacity and the close temporal proximity between Garcia's contact with public officials and the subsequent threats and beatings" supported his CAT claim.[137]

The Eighth Circuit has followed a similar approach. In *Ramirez–Peyro*, a case involving a Mexican former cocaine distributer who became a government informant, the petitioner presented evidence that his work led to two attempted assassinations along with extensive evidence that Mexican authorities at various levels had illicit connections to drug cartels.[138] The court emphasized that "the use of official authority by low-level officials, such a police officers, [could] work to place actions under the color of law even where they act without state sanction"[139] and reversed the BIA's findings

129. *See id.* at 243.
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.* at 248 n.1.
134. *See id.* at 248.
135. *See* Garcia v. Holder, 756 F.3d 885, 891 (5th Cir. 2014) (citation omitted); *See also* Iruegas-Valdez v. Yates, 846 F.3d 806, 812–13 (5th Cir. 2017) ("Nor does our precedent require that the public official in question "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.").
136. *See Garcia v. Holder*, 756 F.3d at 887–88.
137. *Id.* at 894.
138. *See* Ramirez–Peyro v. Holder, 574 F.3d 893, 895–96 (8th Cir. 2009).
139. *Id.* at 901.

with respect to CAT.[140] This directly contrasted with cases in which a single public official happened to be the perpetrator.[141] However, the court also seems to have left room for a "rogue officer" exception and considerations of private motive.[142]

In all, the Second, Fourth, Fifth, and Eight Circuit cases provide little coherence besides the beginning of a color of law framework. While each circuit starts with the same reading of the CAT regulations with respect to color of law and official capacity, they vary—even within the same circuit—as to what factors to consider in that analysis.

### 3. *The Seventh and Ninth Circuits*

In contrast to other circuits, the Seventh and Ninth Circuits have found rogue officer analyses to be contrary to CAT and have thus declined to recognize this exception. In 2015, the Ninth Circuit laid the groundwork for rejecting a "rogue officer" exception. In *Avendano-Hernandez*, the court considered the CAT claim of a Mexican transgender woman who presented evidence that she was beaten and sexually assaulted by Mexican officials on at least two occasions.[143] In the first instance, four uniformed police officers forced her into their truck and drove her to an unknown location where they beat her, forced her to perform oral sex, and raped her.[144] Later, in her attempt to reach the U.S. border, a group of uniformed Mexican military officers harassed her and separated her from other migrants; one officer sexually assaulted her while other officers watched and laughed.[145] The IJ and BIA denied her CAT claim, describing the officers in both instances as "rogue or corrupt officials."[146] The Ninth Circuit rejected that characterization and held that the on-duty uniformed officers were clearly public officials and that the petitioner need not show harm by officials above low-level officers.[147]

Later, in 2017, the Ninth Circuit definitively shut the door on any possible rogue officer exception, specifically holding that "[t]he statute and regulations do not establish a 'rogue official' exception to CAT relief."[148] In that

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140. *Id.* at 903–04.

141. *See id.* at 903 (citing Miah v. Mukasey, 519 F.3d 784, 788 (8th Cir. 2008)). In Miah, the petitioner feared harm by a local Bangladeshi ward commissioner who sought land from petitioner's family, but the U.S. Department of State also specifically identified the offender as a current government official, a "very influential person involved as the head of a criminal gang," and an "active leader" of the now-ruling BNP party. *See Miah*, 519 F.3d at 786–87.

142. *See Ramirez–Peyro*, 574 F.3d at 904 ("In contrast, Ramirez Peyro is not alleging that he fears isolated harm stemming from a personal dispute or harm from a single rogue officer.").

143. *See* Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1076–77 (9th Cir. 2015). This Article only examines the evidence related to public officials in this case; however, Avendano-Hernandez presented evidence of additional harm based on her status as a transgender woman relevant to the analysis of whether the Mexican government would consent or acquiesce to violence by private actors. *Id.* at 1075–76.

144. *See id.* at 1077.

145. *Id.* at 1076–77.

146. *Id.* at 1080.

147. *Id.* at 1079–80.

148. Barajas-Romero v. Lynch, 846 F.3d 351, 362 (9th Cir. 2017).

case, Barajas-Romero was attacked in his home by four men he knew to be police officers; the policemen then locked Barajas-Romero in his own bathroom for two days, burned him with cigarettes, repeatedly hit him with the blunt side of a machete, cut him with the machete, and put two scorpions down his pants, which stung him and resulted in fever, swelling, and trouble breathing.[149] After two days of captivity, the men left, but when Barajas-Romero reported the incident to other local police, the officer stopped taking notes once he learned his colleagues were accused.[150] Rejecting lower decisions that emphasized that the officers were off-duty, the Ninth Circuit found that to be irrelevant, reasoning that the phrase "by a public official *or* other official acting in an official capacity" is disjunctive, meaning only one part of the phrase must be proved.[151] Considering the record evidence, the court concluded that there was "no room for doubt that the four policemen were public officials who themselves inflicted the torture."[152]

In a similar line of cases, the Seventh Circuit issued two opinions in 2015 finding against a rogue officer exception. In both cases, the petitioners were former participants in the illegal drug trade who feared retribution from Mexican drug cartels if removed to Mexico.[153] Both petitioners presented evidence of the widespread infiltration of, and direct assistance to, cartels by Mexican authorities.[154] In one case, the petitioner was attacked by Mexican police when they entered his hotel room, burned with cigarettes, beat him, and stabbed him with an ice pick—all at the behest of a cartel member.[155] Even after the petitioner went to the United States, Mexican police officers sought out his family and took his great-uncle away in a police car, after which he was found dead.[156] Upon considering these facts, the court rejected the lower courts' reliance on a rogue officer theory:

> It is irrelevant whether the police were rogue (in the sense of not serving the interests of the Mexican government) or not. The petitioner did not have to show that the entire Mexican government is complicit in the misconduct of individual police officers.[157]

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149. *See id.* at 354–55. The officers also "rubbed a dried corncob back and forth on his forehead to make him bleed and cause a permanent scar. They told him that if he told anyone what happened, they would put a bullet through his permanent scar." *Id.* at 355.

150. *Id.*

151. *Id.* at 362.

152. *Id.* at 363.

153. *See* Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1137 (7th Cir. 2015); Mendoza-Sanchez v. Lynch, 808 F.3d 1182, 1183 (7th Cir. 2015)

154. *See Rodriguez-Molinero*, 808 F.3d at 1137–38; *Mendoza-Sanchez*, 808 F.3d at 1184.

155. *See Rodriguez-Molinero,* 808 F.3d at 1137.

156. *See id.* at 1138.

157. *See id.* at 1139; *see also Mendoza-Sanchez*, 808 F.3d at 1185 ("Nor does it matter if the police officers who will torture Mendoza–Sanchez if he's forced to return to Mexico are "rogue officers individually compensated by [a gang member] to engage in isolated incidents of retaliatory brutality, rather than evidence of a broader pattern of governmental acquiescence in torture.").

The Seventh Circuit concluded that whether a public authority is rogue is "irrelevant" to the CAT analysis.[158]

### 4. *Coda: U.S. Proposed Regulations*

On June 15, 2020, the U.S. Departments of Justice and Homeland Security published a joint notice of proposed rulemaking for new regulations regarding asylum, CAT, and the credible and reasonable fear processes. These regulations would mark the most significant change to the CAT implementing regulations since 1999. Wading into the circuit split noted above, the proposed regulations would amend the existing CAT regulations to add:

> [P]ain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law (i.e., a "rogue official") does not constitute a "pain or suffering 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," even if such actions cause pain and suffering that could rise to the severity of torture.[159]

The proposed rule cited the BIA decision in *Matter of O-F-A-S-* for support[160]—the same decision the AG had vacated a month later. As reflected in Part I above, unlike the 1999 implementing regulations, these additions are not based on the language of the treaty itself or the United States' RUDs. Appearing to course-correct, the Trump administration's final version of the rule was issued on December 11, 2020, striking the term "rogue official" and referring to the AG's opinion in *Matter of O-F-A-S-*.[161] However, the Final Rule simultaneously suggested that any reference to "public official who is not acting under color of law'' was the definition "rogue official,"[162] thus muddying the waters even further and casting doubt on any reference to color of law.[163]

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158. *Mendoza-Sanchez*, 808 F.3d at 1185.

159. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,287 (June 15, 2020).

160. *See id.*

161. *See* Procedure for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274, 90,283 (Dec. 11, 2020).

162. *See id.* at 80,275 ("they are replacing the remaining uses of the phrase 'rogue official' in 8 CFR 208.16(b)(3)(iv), 208.18(a)(1), and 1208.18(a)(1) with its definition, 'public official who is not acting under color of law.'").

163. On January 8, 2021, a judge in the Northern District of California granted a preliminary injunction enjoining implementation of the Final Rule, and President Biden's Executive Order 14010 calls on the Attorney General and Secretary of Homeland Security to promptly review and determine whether to rescind the rule. *See* Order Re Preliminary Injunction, Pangea Legal Servs., et al. v. Dep't Homeland Sec., Case No. 20-cv-09253-JD, (N.D. Cal. Jan. 8, 2021); *See* Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

### B. *Acquiescence When the State Takes Some Preventative Steps*

The next significant circuit split related to the State actor requirement in CAT Article 1 occurs within the analysis of a public official's "consent or acquiescence" to torture committed by a non-State actor. U.S. RUDs for CAT and the 1999 implementing regulations made clear that "acquiescence requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity."[164] This language covers both actual knowledge and willful blindness. However, federal courts are split on how to address cases in which there is evidence that the national government has taken steps to combat the threat posed by non-State actors, but the steps are either incomplete or ineffective.

This is a more straight-forward circuit split: on one side, the First, Fourth, Fifth, Eighth, and Eleventh Circuits take the position that the foreign government does not acquiesce to private acts of torture if it has made an effort to control the non-State actor; and on the other side, the Second, Third, Seventh, and Ninth Circuits have held that such national-level efforts are not dispositive when showing acquiescence.[165] As with the rogue officer exception, the Trump administration proposed regulations to incorporate the position of the first group of circuits into federal law.

#### 1. *The First, Fourth, Fifth, Eighth, and Eleventh Circuits*

On one side of the split are circuits holding that the definition of torture in CAT Article 1 is not met where the national government is attempting, even unsuccessfully, to control the feared private actor. Most of the precedential cases in this vein involve a migrant's fear of torture at the hands of transnational gangs or cartels. For example, in *Amilcar-Orellana*, the First Circuit considered the CAT claim of a Salvadoran man who testified in U.S. courts against two members of a notorious Salvadoran gang.[166] While the court considered evidence of the Salvadoran government's incapability of protecting its citizens from the gang and even participation in gang-related crimes, the court found that was outweighed by substantial evidence showing "the government in El Salvador is trying as best it can[] to control the gangs," through national-level efforts to combat gang violence and root out police corruption.[167]

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164. *See* 136 CONG. REC. S17,486 (1990); 8 C.F.R. § 208.18(a)(1) (2020).

165. *See* Sury, *supra* note 12, at 8. *See also* Daniel J. Van Lehman & Estelle M. McKee, *Removals to Somalia in Light of the Convention Against Torture: Recent Evidence from Somali Bantu Deportees*, 33 GEO. IMMIGR. L.J. 357, 387 (2019).

166. *See* Amilcar-Orellana v. Mukasey, 551 F.3d 86 (1st Cir. 2008).

167. *See id.* at 92. *See also* Flores-Coreas v. Mukasey, 261 Fed. Appx. 287, 292 (1st Cir.2008) (per curiam) ("[T]here is evidence that gang violence constitutes a serious problem in El Salvador, but that the police attempt with some success to prevent that activity. While that sort of stand-off may be of scant solace to the citizenry, it plainly supports an inference that the government neither condones gang violence nor is helpless in the face of it.").

Opinions from the Fourth and Eighth circuits have followed a similar track in cases involving fear of Central American gangs, finding that where the government has made efforts to combat the gangs, the government cannot be said to have "acquiesced" to torture.[168] For example, the Eighth Circuit affirmed the BIA's denial of a petitioner's CAT claim, concluding,

> While the evidence may support the conclusion that the Guatemalan government is less than successful at preventing the torture of its citizens by gang members, the record does not compel the conclusion that the government is willfully blind toward it.[169]

This is in spite of evidence presented by the petitioner that his positive identification of a gang member lead to the gang member's arrest, followed by his release a week later after the police received a bribe from MS-13, as well as country conditions reports showing that two-thirds of Guatemalan police districts were understaffed and unlikely to protect citizens from gangs.[170]

The Eleventh Circuit likewise addressed this issue in the case of a man who had previously been threatened at gunpoint by a Peruvian terrorist organization and the police were unable to apprehend the culprits.[171] The court found that the police's inability to bring the culprits to justice did not amount to acquiescence and that country conditions reports showed that the Peruvian government "actively, albeit not entirely successfully, combats" the terrorist group.[172]

### 2. *The Second, Third, Seventh, and Ninth Circuits*

Four circuits have taken a more nuanced approach, holding that national government efforts to combat a non-State actor should not preclude a finding of government acquiescence to torture. This line of cases began with the Second Circuit's 2004 decision in *Khouzam,* rejecting the BIA's reframing of acquiescence as governmental "approval" and holding that "[i]n 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

168. *See* Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014) (the government of El Salvador did not acquiesce to torture by the MS-13 gang since the government had attempted to control gang violence); Lopez-Soto v. Ashcroft, 2004, 383 F.3d 228, 241 (4th Cir. 2004) (finding that the Guatemalan government did not acquiesce to torture by the gang Mara 18); Samoza Garcia v. Holder, 746 F.3d 869 (8th Cir. 2014) (finding that the government of Guatemala did not acquiesce to gang violence because it had attempted to control the gangs); Garcia v. Holder, 746 F.3d 869 (8th Cir. 2014) (finding that the Guatemalan government did not acquiesce to torture by the gang MS-13 where the government was aware of gang violence but ineffective at combatting it).

169. *Garcia v. Holder*, 746 F.3d at 873; *see also* 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 toward the torture of citizens by third parties.") (internal quotations omitted).

170. *See id.* at 872-83.

171. *See* Reyes-Sanchez v. U.S. Att'y Gen., 369 F.3d 1239 (11th Cir. 2004).

172. *See id.* at 1243.

prevent it."[173] Six years later, the Second Circuit took up a case in which the petitioner feared returning to the Dominican Republic and presented evidence of threats by a drug trafficker on whom he informed, that trafficker's connections within the Dominican government, and the "pattern of Dominican government involvement in unlawful killings."[174] The Second Circuit held that "[w]here a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture" would not preclude a finding of government acquiescence.[175]

The Third Circuit has followed a similar approach, finding that even where the national government is in an armed conflict with a non-State group, that resistance does not necessarily preclude a petitioner from showing that the government would be willfully blind to their torture by the non-State group.[176] The Third Circuit has extended this reasoning to analyzing Central American governments' efforts to control transnational gangs,[177] therefore coming to a different conclusion from the previously discussed circuits in similar gang-related cases.

The Seventh and Ninth Circuits have likewise directly rejected the reasoning adopted by the first line of circuit court cases.[178] In a set of three cases involving fear of Mexican drug cartels, the Seventh and Ninth Circuits found that efforts of the Mexican government to generally combat cartels could not foreclose a petitioner from showing acquiescence, especially since the efforts of national and local officials may vary drastically.[179]

### 3. *Coda: U.S. Proposed Regulations*

As with the rogue officer exception examined above, on June 15, 2020, DOJ and DHS published a joint notice of proposed rulemaking for new regulations that would essentially take a side in this circuit split. Specifically, the proposed regulation would add the following to the current CAT regulations:

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173. *See* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004).

174. De La Rosa v. Holder, 598 F.3d 103, 106 (2d Cir. 2010).

175. *Id.* at 110.

176. *See* Pieschacon-Villegas v. U.S. Att'y Gen., 671 F.3d 303, 312 (3d Cir. 2011), *abrogated by* Nasrallah v. Barr, 140 S. Ct. 1683 (2020).

177. *See* Quinteros v. U.S. Att'y Gen., 945 F.3d 772, 788 (3d Cir. 2019).

178. *See, e.g.*, Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011) ("Attempts to amend laws to help curb violence against women are welcome steps, but they are not evidence that the government of Jordan has the power or the desire to protect a woman in [petitioner's] position" from an honor killing by her family); W.G.A. v. Sessions, 900 F.3d 957, 968 (7th Cir. 2018); *see also* Garcia-Milan v. Holder, 755 F.3d 1026 (9th Cir. 2014) ("Evidence that the police were aware of a particular crime, but failed to bring the perpetrators to justice, is not in itself sufficient to establish acquiescence in the crime" even though police in that specific case were unable to find petitioner's two rapists).

179. *See* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1185 (9th Cir. 2020); Rodriguez-Molinero v. Lynch, 808 F.3d 1134 (7th Cir. 2015); Mendoza-Sanchez v. Lynch, 808 F.3d 1182 (7th Cir. 2015); Madrigal v. Holder, 716 F.3d 499 (9th Cir. 2013)*; see also* Barajas-Romero v. Lynch, 846 F.3d 351, 363-64 (9th Cir. 2017); Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1080 (9th Cir. 2015).

> "[W]illful blindness" means that the public official or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.[180]

In doing so, the agencies' express intent was to inject the first line of circuit opinions directly into the regulations and block future opinions like those from the Second, Third, Seventh, and Ninth Circuits.[181] The Trump administration's Final Rule adopted the same text.[182] However, the rule appears to go far beyond even the First, Fourth, Fifth, Eighth, and Eleventh Circuits' holdings, whose caselaw contains no limitations like requiring that the public official be "aware of a high probability" of torture and "deliberately avoid[] learning the truth."[183] Such additions do not exist in any circuit caselaw or the CAT ratification history and would mark a significant change to the U.S. implementation of the CAT *non-refoulement* obligation.

## III. CAT AS AN INCORPORATIVE TEXT: WHY U.S. COURTS SHOULD TURN TO INTERNATIONAL LAW

Ultimately, both circuit splits examined above leave migrants in a precarious situation: the outcome of their CAT *non-refoulement* claims could depend on where their case is heard. As explained above, these protections were specifically created to implement United States obligations under CAT Article 3. These obligations are often forms of "last resort" protection, meaning a finding on CAT relief is often the last thing standing between a migrant's return to a country where she fears torture and remaining in the United States. Withholding and deferral of removal decisions exist for this very purpose: they are quite literally life or death decisions. For such important decisions to be based on a matter of geography is antithetical to the Convention and U.S. obligations thereto.[184]

Although many courts acknowledge CAT Articles 1 and 3 in their analysis of the U.S. implementing regulations and examine the Senate ratification history,[185] only a single opinion examines the Convention itself. In that instance, the Second Circuit specifically turned to the CAT drafting history to find that the "consent or approval" formulation adopted by the BIA was akin to the

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180. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36287 (June 15, 2020) (to be codified at 8 C.F.R. pt. 1003, 1208, 1235).

181. *See id.* at 36,288.

182. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,284 (Dec. 11, 2020) (to be codified at 8 C.F.R. pt. 208, 235, 1003, 1208, 1235).

183. *Id.* at 36,287.

184. *See* CAT, *supra* note 9, at pmbl.

185. *See, e.g.*, Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1075 (9th Cir. 2015); De La Rosa v. Holder, 598 F.3d 103, 106 (2d Cir. 2010).

original Swedish text rejected by the CAT drafters in favor of "consent or acquiescence." The court also found that the drafters intended that only in exceptional circumstances would a public official not be responsible for torture.[186] No other opinion examines the Convention, its drafting history, or international legal guideposts in this way; however, such an approach could help resolve the significant circuit splits regarding the Article 1 definition of torture.

This Article does not aim to retrace the well-trodden discussion around the role of international law in U.S. domestic courts.[187] Indeed, there has been significant scholarly discussion over the past three decades devoted in particular to debates surrounding how, and whether, U.S. courts should rely on international sources in light of *Charming Betsy*.[188] Rather, this Article will employ the helpful framework elucidated by Professor John F. Coyle for "incorporative statutes," which examines statutes that incorporate language or concepts derived from an international treaty.[189] As Professor Coyle points out, a number of statutes and regulations incorporate treaties by directly mirroring the treaty text or are drafted with the intention of giving effect to a treaty obligation.[190] Yet, even if a court recognizes that a statute or regulation is incorporative—which is not always the case—courts often pay little attention to international and foreign law sources, thus creating a risk that U.S. courts will interpret the statute or regulation inconsistently with the text of the treaty.[191] However, as Professor Coyle demonstrates, there is both a practice among U.S. courts to support turning to international sources behind an incorporative text, and a structural case for doing so, since the text itself stems from international law.[192] In such cases, the treaty itself should be at the center of the inquiry into the meaning of the implementation statute or regulation,[193] and "when a court is called upon to interpret a statute that copies language from a treaty, that court should seek, whenever possible, to conform its interpretation of that language to its reading of the incorporated treaty."[194]

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186. *See* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004).

187. For an overview of these debates, *see* Coyle, *supra* note 15, at 699.

188. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (2nd ed. 2003); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 526 (1998); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation in the Supreme Court Of India*, 98 AM. J. INT'L L. 82, 90 (2004); Ralph Steinhardt, *The Role of International Law as a Canon of Domestic Construction*, 43 VAND. L. REV. 1103 (1990); Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729 (1987).

189. *See* Coyle, *supra* note 15, at 664–65.

190. *See id.*

191. *See id.* at 669.

192. *See id.* at 674–75.

193. *See id.* This is underlined by the fact that the statutes and/or regulations directly implement a non-self-executing treaty, which essentially makes them indistinguishable from a self-executing treaty, in which case U.S. courts regularly refer to the treaty itself and its history. *See id.* at 676.

194. *See id.* at 676. Professor Coyle frames his approach as the "borrowed treaty rule" whereby "that a court called upon to interpret an incorporative statute should first review the text of the treaty from which the statutory provisions are derived. If the text of the treaty is clear, then the court should read the

This approach is supported in particular by two Supreme Court precedents examining CAT's international legal counterpart—the Refugee Convention. In *Cardoza-Fonseca*, the Supreme Court sought to interpret a statute that borrowed language from Article 1 of the Refugee Convention's[195] definition of "refugee."[196] To understand the terms in the statute, the Supreme Court conducted an extensive review of the treaty text, drafting history, and international materials from the Office of the U.N. High Commissioner for Refugees.[197] In another case, the Supreme Court sought to interpret statutes implementing the Refugee Protocol obligations concerning *non-refoulement*.[198] The Court specifically turned to the negotiating history of Article 33 of the Refugee Convention, which imposes the prohibition on *refoulement* of refugees, as well as a number of international sources in order to square its interpretation of the statute with the treaty.[199]

Outside of the migration context, the Supreme Court has also interpreted incorporative statutes and regulations by looking at the treaty giving rise to that text.[200] When interpreting those treaties, as well as incorporative texts, the Supreme Court, and lower courts, regularly employ what international law scholars recognize as the tools of treaty interpretation: considering the ordinary meaning of the text, the object and purpose of the treaty, the treaty's drafting history, and related decisions from international bodies.[201]

When it comes to CAT, there can be little doubt that the regulations are incorporative. The regulations were promulgated pursuant to the FARRA in 1998, which unmistakably called on executive branch agencies to implement the U.S. obligations under CAT Article 3.[202] Moreover, DOJ repeatedly made clear in publishing the regulations that they were not only intended to implement CAT obligations, but also designed to mirror the Convention as

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incorporative statute to conform to the borrowed treaty text unless there is compelling evidence that Congress intended a different result. Alternatively, if there is any ambiguity in the text of the treaty, the court should, as necessary, resort to those special canons of construction that have customarily been used to resolve such ambiguities in treaties." *Id*. at 680 (internal citations omitted).

195. The United States acceded to the U.N. Protocol Relating to the Status of Refugees in 1968. The Protocol incorporates by reference obligations under the Convention on the Status of Refugees (Refugee Convention), including the Article 1 definition of "refugee" and the Article 33 prohibition on *refoulement*.

196. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

197. *See id*. at 437–40.

198. *See* Sale v. Haitian Centers Council, 509 U.S. 155 (1993).

199. *See id*. at 179–87.

200. For example, in interpreting a statute implementing the Hague Convention on the Civil Aspects of International Child Abduction, the Court examined the treaty text, its object and purpose, its drafting history, and the decisions of other States Parties. *See* Abbott v. Abbott, 560 U.S. 1, 8, 16, 17, 20 (2010).

201. *See* Coyle, *supra* note 15, at 680; Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 445, 448 (2004); Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT'L L. & POL. 391, 405 (2013) ("The U.S. Supreme Court's approach to treaty interpretation generally reflects the same factors set forth in the [Vienna Convention on the Law of Treaties]—including the text, context, object, and purpose of the treaty.").

202. *See supra* note 43.

closely as possible.[203] In fact, the regulation prescribing the relevant definition of torture states in its text that it is pursuant to CAT Article 1.[204] U.S. courts, therefore, should look to the Convention itself and accompanying international legal tools when examining the definition of torture.

## IV. INTERNATIONAL LAW RELEVANT TO CAT AND PUBLIC ACTORS

Treaty interpretation should always begin with the ordinary meaning of the text in light of the treaty's object and purpose.[205] As relevant to the Convention, the phrase "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" is identical in both CAT Article 1 and the U.S. implementing regulation. Because of this similarity, the circuit courts have themselves struggled to interpret the "ordinary meaning" of the text. However, use of the Convention's object and purpose—though seldom undertaken by U.S. courts—remains an important tool in understanding the context of both the definition of torture and the Article 3 *non-refoulement* obligation. Thus, the text itself, accompanied by its object and purpose, could aid courts in seeking to understand the foundations for the U.S. implementing regulations of CAT Articles 1 and 3.

Importantly, the drafters of the Convention intended its preamble to articulate an intent to underscore the absolute prohibition on torture by reminding States of existing obligations prohibiting torture under the UDHR and International Covenant on Civil and Political Rights (ICCPR).[206] Additionally, the drafters viewed *non-refoulement* as vital to achieving the Convention's object and purpose, and intentionally articulated the prohibition as absolute in order to reflect what was viewed as an existing norm of customary international law.[207] While many circuit court discussions revolve around the torture definition in Article 1, it is equally important to remember

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203. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8482 (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507).

204. 8 C.F.R. § 208.18(a) (2020) ("The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."). That section of regulations is even titled "Implementation of the Convention Against Torture." *See* 8 C.F.R. § 208.18 (2020).

205. *See* VCLT, *supra* note 25, art. 31(1); *see also* Abbott v. Abbott, 560 U.S. 1, 20 (2010) (examining the text of the treaty in light of its object and purpose); Medellín v. Texas, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

206. *See* CAT, *supra* note 9, at pmbl.*; see also* CAT COMMENTARY, *supra* note 17, at 20.

207. *See* CAT COMMENTARY, *supra* note 17, at 114; J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (Martinus Nijhoff Publishers ed. 1988) ("[T]he Convention is based upon the recognition that the above-mentioned practices [torture] are already outlawed under international law. The principal aim of the Convention is to *strengthen* the existing prohibition of such practices by a number of supportive measures.") (emphasis original)*; see also* Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 44, ¶ 99 (July 20, 2012) ("In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).").

that the court is only examining the claim because of the Article 3 *non-refoulement* obligation. For example, although the First Circuit concluded a key CAT case with a rhetorical throwing up of hands because of their perceived inability to predict the petitioner's future torture,[208] that is the precise purpose of Article 3: to protect an individual from future harm where the risk of torture is reasonable.[209] The following sections explore CAT's object and purpose in more detail, by examining its drafting history as well as interpretations by international bodies and courts.

## A. *Travaux Préparatoires*

Because ambiguity remains regarding what level of State involvement is required under CAT Article 1, the treaty's *travaux préparatoires*—drafting history—is important in understanding the intent and context of the provision.[210]

### 1. *The Convention as a Whole*

Like many human rights treaties, CAT draws its antecedents from the aftermath of World War II. Following the War, States sought to codify norms of humane treatment in a number of documents, including UDHR Article 5 in 1948, Common Article 3 of the 1949 Geneva Conventions, Article 3 of the European Convention on Human Rights (ECHR) in 1950, Article 7 of the ICCPR in 1966, and Article 5 of the American Convention on Human Rights (ACHR) in 1969.[211] However, as explained in greater detail in Part IV(B) below, each of those conventions did not fully address issues of torture and inhumane or degrading treatment. By the 1970s the international community—led by both States and non-governmental organizations like Amnesty International—sought to highlight the prevention and punishment of torture as a stand-alone issue.[212] This development was inextricably tied to the public attention at the time brought to State-sponsored torture and disappearances in Latin American countries.[213] For example, the September 1973 overthrow of the Chilean military junta under Augusto Pinochet brought new attention to the well-documented use of torture and enforced disappearances by the Pinochet regime, setting in motion a series

208. *See* Costa v. Holder, 733 F.3d 13, 18 (1st Cir. 2013) ("Thus, like Socrates, all we know for certain is that we don't know what will happen.").

209. *See* CAT COMMENTARY, *supra* note 17, at 100. The French term "*refouler*" was intentionally included in the English version to emphasize the existing humanitarian nature of nonrefoulement in international law. *Id*. at 104.

210. *See* VCLT, *supra* note 25, at art. 32; Coyle, *supra* note 15, at 680*; see also* Abbott v. Abbott, 560 U.S. 1, 8-10 (2010); INS v. Cardoza-Fonseca, 480 U.S. 421, 438 (1987).

211. *See* CAT COMMENTARY, *supra* note 17, at 2; *see also* David Weissbrodt et al., *Prospects for U.S. Ratification of the Convention Against Torture*, 83 AM. SOC'Y INT'L L. PROC. 529, 530 (1989).

212. *See* Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275, 294–98 (1994).

213. *See* CAT COMMENTARY, *supra* note 17, at 3–4; Lippman, *supra* note 213, at 304-06.

of international measures to combat torture.[214] This period also saw a focus on revelations about the techniques of Brazilian authorities in the 1960s and 1970s and Argentinean forces during the "dirty war," including widespread use of enforced disappearance, torture, and extrajudicial killing, to not only gain information, but also to break the spirit and humanity of the victims.[215]

By November 1973, the U.N. General Assembly placed the question of torture and cruel, inhuman or degrading treatment or punishment as a standing item on its agenda.[216] This led to the General Assembly's adoption of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975 Declaration).[217] A non-binding document, the 1975 Declaration set the stage for the drafting of a binding treaty, and in 1977, the General Assembly requested that the Human Rights Commission draft a binding torture convention.[218] This began a seven-year drafting process, led principally by draft texts first introduced by Sweden and through the stewardship of Dutch diplomat Herman Burgers.[219] The drafters of the Convention sought to ensure widespread prohibition and punishment for torture through three principal pillars: prohibiting the practice of torture, requiring States to investigate and punish torture domestically, and embedding the principle of *aut dedere aut judicare*—prosecute or extradite—to ensure a form of universal jurisdiction over those who violated the Convention.[220] The introduction of a *non-refoulement* obligation was intimately tied to fulfilling these purposes.[221]

### 2. *CAT Article 1*

CAT Article 1 is the first provision in a treaty to define torture.[222] The final text adopted by the drafters reflects four key elements: involvement of a public official; infliction of severe pain or suffering; intent; and purpose.[223] Regarding the State actor requirement, the 1975 Declaration defined torture to include acts "inflicted by or at the instigation of a public official."[224] The first convention text proposed by Sweden borrowed this formulation from the 1975 Declaration and only contemplated torture "by or at the instigation of a

214. *See* CAT COMMENTARY, *supra* note 17, at 3–4.
215. *See* Lippman, *supra* note 213, at 304–05.
216. U.N. GAOR, 28th Sess., 2163rd plen. mtg. at 3059, U.N. Doc. A/RES/3059 (XXVIII) (Nov. 2, 1973).
217. U.N. GAOR, 38th Sess., 2433rd plen. mtg. at 91, U.N. Doc. A/RES/3452(XXX) (Dec. 9, 1975) [hereinafter 1975 Declaration].
218. U.N. GAOR, 32nd Sess., 98th plen. mtg. at 137, U.N. Doc. A/RES/32/62 (Dec. 8, 1977)*; see also* Weissbrodt et al., *supra* note 212, at 530.
219. *See* CAT COMMENTARY, *supra* note 17, at 4; Weissbrodt, et al., *supra* note 212, at 530.
220. *See* SFRC REPORT, *supra* note 19, at 2; CAT COMMENTARY, *supra* note 17, at 4; Chung, *supra* note 13, at 370; *see also* Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 44, ¶¶ 74–75, 99–100 (July 20, 2012); M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE*: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).
221. *See* CAT COMMENTARY, *supra* note 17, at 8.
222. *See id*. at 27.
223. *See id*. at 27.
224. *See* 1975 Declaration, *supra* note 218.

public official."[225] This changed, however, only a year later in Sweden's second draft, adding for the first time the phrase "or with the consent or acquiescence of a public official or other person acting in an official capacity."[226] This change between the 1978 and 1979 drafts was largely due to the United States.[227] In its 1978 written comments on the draft treaty text, the United States proposed the addition of "consent or acquiescence" in an effort to cover forms of State responsibility.[228] This arose in a debate surrounding what should constitute a "public official" under the original Declaration and Swedish text.[229] Many States expressed a view that the definition should include torture by persons other than public officials.[230] At the same time, there were lengthy discussions about whether "public official" should be defined in the Convention; this included proposals by the United States and Austria to define "public official."[231] The United States proposed the most detailed definition, seeking to clarify that torture should cover the following:

> [A]ny public official who a) consents to an act of torture, b) assists, incites, solicits, commands, or conspires with others to commit torture, or c) fails to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has authority or is in a position to take such measures, also commits the offence of torture within the meaning of this convention.[232]

Thus, from the outset, the United States—while seeking to tie the treaty obligations back to a State-centric model followed in previous human rights conventions—also proposed that the definition cover indirect acts and omissions by State actors.[233] The debate over the coverage of public officials continued through several sessions, where some States continued to push a text that would cover all individuals, not just public officials, and others emphasized that the international nature of the treaty should involve a nexus to State action.[234] Ultimately, a textual compromise was reached in 1980 to cover both harm by a public official and harm with the consent or acquiescence of a

225. *See* CAT COMMENTARY, *supra* note 17, at 25.
226. *See id.*
227. *See* BURGERS & DANELIUS, *supra* note 208, at 42.
228. *See* CAT COMMENTARY, *supra* note 17, at 25, 27, 32 (citing U.N. Secretary-General, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Commission on Human Rights, Thirty-Fifth Session, Item 10 of the Provisional Agenda, ¶ 27, U.N. Doc E/CN.4/1314 (Dec. 19, 1978)).
229. *See* U.N. Secretary-General *supra* 229, at ¶ 43.
230. *See, e.g., id.* at ¶ 34.
231. *See id.* at ¶ 43, 45.
232. *Id.* at ¶ 45.
233. *See* BURGERS & DANELIUS, *supra* note 208, at 42.
234. *See* CAT COMMENTARY, *supra* note 17, at 35.

public official or any other person acting in an official capacity.[235] This wording was adopted by the Working Group in 1980 and received little attention in debates among the drafters thereafter.[236]

Two principal drafters of the Convention have commented on the importance of the compromise, noting that the Convention's intent and structure emphasize that torture by private actors is expected to be addressed through the "normal machinery of justice" domestically, but that consent or acquiescence covers situations where States fail to perform this duty.[237] The *travaux préparatoires,* thus, shows a clear intent to cover not only acts by State actors, but also, acts and omissions for which the State could be found responsible, including those by private actors.[238] This concept was also recognized as according with the concept of State responsibility in international law, which includes acts and omissions of a State's organs or officials.[239] "Consent or acquiescence" was also intended to mirror the "unwilling or unable to protect" standard for governments in the Refugee Convention, meaning it was intended to cover instances where the harm is "knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."[240] This intent can be closely tied to the circuit split examined above involving the State's inability to control acts of private actors through its normal domestic system.

Similarly, the drafters also emphasized that a public official who inflicts severe pain or suffering would fall within the definition unless exceptional circumstances were present where the official acted in a purely private capacity.[241] Thus, it appears the drafters never contemplated a "rogue officer"

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235. *See* Nina Sibal (Chairman-Rapporteur), Comm'n on Human Rights, *Rep. of the Working Grp. on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at ¶ 17, U.N. Doc E/CN.4/L.1470 (Mar. 12, 1979); CAT COMMENTARY, *supra* note 17, at 59 ("Since other Governments, including the United States, United Kingdom, Morocco, and Austria, insisted on a traditional State-centered definition, the Working Group finally agreed on a US compromise proposal which extended State responsibility to the consent or acquiescence of a public official. Since the delegations could not agree on a definition of the term 'public official', the Austrian proposal to add the phrase 'or other person acting in an official capacity' was adopted."); *see also* BURGERS & DANELIUS, *supra* note 208, at 42.

236. *See* CAT COMMENTARY, *supra* note 17, at 36.

237. *See* BURGERS & DANELIUS, *supra* note 208, at 119–20*; see also* C.W. WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT: A LEGAL ANALYSIS OF THE PROHIBITIONS ON REFOULEMENT CONTAINED IN THE REFUGEE CONVENTION, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE CONVENTION AGAINST TORTURE 445 (Intersentia ed. 2009).

238. *See* WOUTERS, *supra* note 7, at 446–47.

239. *See id.* at 447 (citing Int'l Law Comm'n, Draft Articles on Responsibilities of States for Internationally Wrongful Acts, art. 2, 53rd session, U.N. Doc. A/56/10, art. 2 (May 31, 2001)).

240. David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against T Against Torture and Other Cruel, Inhuman or Degrading and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 51 (1999) (citing U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 65 (1992)).

241. *See* BURGERS & DANELIUS, *supra* note 208, at 119.

exception to the public official requirement, and similarly, did not consider the public official's motive when determining whether Article 1 applies.

### B. *International Bodies and Courts*

Next, to further understand the public actor component of CAT Article 1, it is important to examine the other international bodies and courts charged with interpreting torture under international law.[242] There are especially strong reasons for U.S. courts to turn to these sources, since the Convention's preamble recognizes that it is built on prior human rights instruments and since the U.S. Senate record makes clear that the obligations under the Convention are borne from international legal antecedents, including international and regional human rights treaties.[243]

#### 1. *The Committee Against Torture*

Where an independent body is established specifically to supervise the application of that treaty, courts generally ascribe great weight to that body's decisions interpreting its specialized treaty.[244] In the case of CAT, the Convention created the Committee Against Torture to monitor implementation of the Convention through periodic reports, publication of General Comments on the interpretation and application of the treaty, and if a State opts in, a mechanism for assessing individual complaints.[245] In its General Comment 1, the Committee made clear that it viewed the obligations under the Convention, particularly in Article 1, through the lens of State responsibility, noting that "[t]he Convention imposes obligations on States parties and not on individuals."[246] To this end, however, the Committee has framed "official capacity" similar to U.S. courts, as involving the color of law and "contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm."[247] To determine State responsibility for acquiescence, the Committee expressly adopted a due diligence standard,[248] highlighting the application of this standard in States' failures to control non-State actors from committing "gender-based violence, such as

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242. *See, e.g.*, Hathaway et al., *supra* note 21, at 823–35 (examining the decisions of international bodies, courts, and tribunals to understand the intent requirement in CAT Article 1); Marouf, *supra* note 196, at 421–79 (conducting a comparative analysis of foreign and international law interpretations of "member of a particular social group" within the Refugee Convention).

243. *See* 136 CONG. REC. 17,486 (1990).

244. *See* Ahmadou Sadio Diallo (Guinea v. D.R.C.), Merits, 2010 I.C.J. 639, ¶ 66 (Nov. 30, 2010).

245. CAT, *supra* note 9, at arts. 17–23.

246. U.N. Comm. Against Torture, General Comment No. 1: Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2, ¶ 15 (Jan. 24, 2008) [hereinafter CAT General Comment 1].

247. *See id.*

248. *See id.* at ¶ 18 ("[T]he State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission.").

rape, domestic violence, female genital mutilation, and trafficking."[249] Furthermore, in its General Comment 4, explaining States Parties' *non-refoulement* obligations, the Committee highlighted that the obligation includes refraining from returning an individual to a State where she is in danger of severe pain or suffering at the hands of a non-State actor "whose acts it is unable to prevent or whose impunity it is unable to counter."[250] Thus, the Committee appears to adopt an understanding of "consent or acquiescence" akin to the willful blindness analysis conducted by the Second, Third, Seventh, and Ninth Circuits.

The Committee's interpretive guidance in its General Comments is further supported by its findings in individual complaints. First, the Committee has addressed cases in which the State alleged that although its officials inflicted the harm, the officials did so extra-judicially (i.e., "rogue"). In *EN v. Burundi*, for example, Burundi argued that the actions of its police officers did not fall under Article 1 because they were unplanned and the officers were not acting on official orders.[251] The Committee rejected that argument, finding that because the officers were uniformed, armed, and interrogating the victim, they were clearly acting in an official capacity.[252] The Committee has also found a reasonable risk of *refoulement* where a complainant presented evidence that he primarily feared a single, political actor in Sri Lanka.[253] This underscores that a public official's acts are only found to be outside of the Convention in limited circumstances.

The Committee has even more extensive jurisprudence related to States' duties to control private actors, including in the *refoulement* context. The Committee has repeatedly interpreted "consent or acquiescence" in CAT Article 1 as an obligation to act with due diligence.[254] In one extreme case, the Committee found the Yugoslav government acquiesced to a mob of private citizens burning down a Romani settlement and attacking its residents when the police knew ahead of time about the planned violence, told the Roma inhabitants that the police could not guarantee their safety, and literally

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249. *See id.*

250. U.N. Comm. Against Torture, General Comment No. 4 On the Implementation of Article 3 of the Convention in the Context of Article 22, U.N. Doc. CAT/C/GC/4, ¶ 30 (Sept. 4, 2018) (*citing* S.S. Elmi v. Australia, U.N. Doc. CAT/C/22/D/120/1998, ¶¶ 6.8, 6.9 (1999); Committee Against Torture [CAT], M.K.M. v. Australia, Communication 681/2015, ¶ 8.9 (2017), U.N. Doc. CAT/C/60/D/681/2015, http://www.worldcourts.com/cat/eng/decisions/2017.05.10_MKM_v_Australia.pdf.

251. EN v. Burundi, U.N. Doc. CAT/C/56/D/578/2013, at ¶ 7.3 (2015), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/016/39/PDF/G1601639.pdf?OpenElement.

*See id.*

252. *See id.*

253. *See* U.N. Comm. Against Torture, Dewage v. Australia, Communication 387/2009, ¶ 10.5 (2013), U.N. Doc. CAT/C/51/D/387/2009, https://digitallibrary.un.org/record/772617?ln=en.

254. *See, e.g.*, *id.* at ¶ 10.9; U.N. Comm. Against Torture, Njamba & Balikosa v. Sweden, Communication 322/200, U.N. Doc. CAT/C/44/D/322/2007, at ¶ 9.5 (2010), https://www.refworld.org/cases,CAT,4eeb34202.html; U.N. Comm. Against Torture, Dzemajl et al. v. Yugoslavia, Complaint 161/200, U.N. Doc. CAT/C/29/D/161/2000, at ¶ 8.10 (Nov. 21, 2002)

stood by and watched as the settlement burned.[255] However, the Committee did not need this much evidence to find acquiescence; they have also found acquiescence where the local police told a man they could not protect him from repeated personal death threats[256] and where country reports showed the government was unable to stop widespread gender-based violence.[257] The Committee thus interprets acquiescence as a due diligence standard under which the State is implicated in the torturous conduct of a non-State actor when the State fails to act with due diligence to intervene or when the State is incapable of intervening.[258]

### 2. *ICCPR and the Human Rights Committee*

The CAT preamble recognizes both the UDHR and ICCPR as its primary antecedents.[259] UDHR Article 5 and ICCPR Article 7 both state that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[260] However, neither document defines "torture," and the Human Rights Committee (HRC) has found it unnecessary to draw up a list of acts constituting torture.[261] Additionally, while the ICCPR contains no public official requirement for torture, because the obligation itself is tied to a State's responsibility as a party to the treaty,[262] Article 7 still contains a State-actor gloss.[263] In particular, the HRC's General Comment on torture specifies that "[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, *whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*."[264] The

255. *Dzemajl et al*., U.N. Doc. CAT/C/29/D/161/2000, at ¶ 9.2 ("Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.").

256. *See* Committee Against Torture [CAT], R.S. et al. v. Switzerland, Communication 482/201 (2014), U.N. Doc. CAT/C/53/D/482/2011, http://www.worldcourts.com/cat/eng/decisions/2014.11.21_RS_v_Switzerland.htm.

257. *See* U.N. Comm. Against Torture, EKW v. Finland, Communication 490/2012 (May 4, 2015), U.N. Doc CAT/C/54/D/490/2012, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/54/D/490/2012&Lang=en; U.N. Comm. Against Torture, *Bakatu-Bia v. Sweden*, Communication 379/2009, Committee Against Torture [CAT], (June 3, 2011), U.N. Doc. CAT/C/46/D/379/2009, https://www.refworld.org/pdfid/4eeb21d22.pdf; *Njamba & Balikos*, Communication 322/200, U.N. Doc. CAT/C/44/D/322/2007, at ¶ 9.5.

258. *See* CAT COMMENTARY, *supra* note 17, at 132.

259. *See* CAT, *supra* note 9, at pmbl.*; see also* CAT COMMENTARY, *supra* note 17, at 19–20.

260. UDHR, *supra* note 16, at art. 5; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 80 Stat. 271, 999 U.N.T.S. 171 [hereinafter ICCPR].

261. *See* U.N. Human Rights Comm., General Comment No. 20: Article 7, 44th Sess., U.N. Doc. HRI/GEN/1/Rev.9, ¶ 4 (Mar. 10, 1992) [hereinafter HRC General Comment 20].

262. *See* ICCPR, *supra* note 254, art. 2.

263. *See, e.g*., U.N. Human Rights Comm., A.R.J. v. Australia, HRC Comm'n No. 692/1996, U.N. Doc. CCPR/C/60/D/692/1996, ¶¶ 6.8-6.9. (1996).

264. HRC General Comment 20, *supra* note 262, at ¶ 2 (emphasis added).

Committee has also extended this prohibition to include *refoulement*, even though it is not expressly within the Covenant.[265]

The HRC's decisions in individual complaints also help in understanding a State's obligations under ICCPR Article 7 related to State and non-State actors. In an analogous circumstance, the Committee rejected an argument from France that the prohibition on persecution under the Refugee Convention did not extend to harm emanating from non-State actors and recommended that France incorporate non-State actors into its domestic legislation.[266] The HRC has similarly found that States Parties have a positive obligation, stemming from Article 2(1) of the ICCPR, to guarantee the rights of persons within to their jurisdiction, and thus, the State bears responsibility where a violation of an individual's rights is a "necessary and foreseeable consequence" of State action, including *refoulement*.[267] This standard mirrors both the CAT Committee's application of CAT Article 3,[268] as well as the duty of due diligence in the human rights context.[269]

### 3. *The Inter-American Human Rights System*

U.S. courts should also look to the specific experience of the Inter-American human rights system in applying and interpreting the torture prohibition because (1) as explained above, CAT's development is inexorably linked to the experience of Latin American States;[270] (2) the region's jurisprudence was the first to explain the concepts of State responsibility for non-State actors who commit torture;[271] and (3) the vast majority of migrants seeking CAT relief in the United States immigrate from Central and South America.[272] Even though the United States has not ratified the American Convention on Human Rights, the U.S. Senate specifically recognized the

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265. *See id.* ¶ 9; *see also A.R.J.*, U.N. Doc. CCPR/C/60/D/692/1996, ¶¶ 6.8-6.9, at ¶¶ 3.3, 6.9; Human Rights Comm., G.T. v. Australia, HRC Comm'n No. 706/1996, U.N. Doc. CCPR/C/61/D/706/1996, ¶¶ 8.1, 8.6 (1997), http://hrlibrary.umn.edu/undocs/session61/vws706.htm.

266. U.N. Human Rights Comm., *Concluding Observations on France,* ¶ 21, U.N. doc. CCPR/C/79/Add.80 (Aug. 4, 1997).

267. *See A.R.J.*, U.N. Doc. CCPR/C/60/D/692/1996, ¶¶ 6.2, 14.2*; see also* Human Rights Comm., Ng v. Canada, HRC Comm'n No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991, ¶ 189 (Nov. 5, 1993).

268. *See* U.N. Comm. Against Torture, A.R. v. the Netherlands, CAT/C/31/D/203/2002, Nov. 21, 2003, at ¶ 7.3.

269. *See* Velásquez-Rodríguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (Inter-Am. Ct. H.R. July 29, 1988); Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELBOURNE J. INT'L L. 1, 14–15 (2004).

270. *See supra* Section IV.A.1.

271. *See generally Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4.

272. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR CASES COMPLETED AND REFERRAL FOR CREDIBLE FEAR INTERVIEW (2018), https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview (last accessed Apr. 7, 2021); U.N. HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 2 (2015); TAMARYN NELSON & HAJAR HABBACH, "IF I WENT BACK, I WOULD NOT SURVIVE." ASYLUM SEEKERS FLEEING VIOLENCE IN MEXICO AND CENTRAL AMERICA (Physicians for Human Rights ed. 2019), https://phr.org/our-work/resources/asylum-seekers-fleeing-violence-in-mexico-and-central-america/.

importance of the American Convention in its CAT ratification history,[273] and the Inter-American Commission on Human Rights and Inter-American Court on Human Rights (IACtHR) generally use the Convention to understand the human rights corpus juris applicable to the United States through its membership in the Organization of American States and as a signatory to the 1948 American Declaration of the Rights and Duties of Man.[274]

Article 5(2) of the American Convention prohibits torture.[275] While the American Convention does not define torture, the IACtHR uses the definitions in the Inter-American Convention to Prevent and Punish Torture (IACPPT)[276] to understand States' responsibilities in both the American Declaration and American Convention.[277] Article 2(1) of the IACCPT largely mirrors CAT Article 1, but contains no public official requirement.[278] Still, Article 3 limits who may be "held guilty" of torture, to a "public servant or employee . . . acting in that capacity" who directly commits it or, "being able to prevent it, fails to do so."[279] In application, this mirrors the CAT Article 1 "consent or acquiescence" standard.[280]

These instruments should also be read in light of other Inter-American conventions covering State responsibility for private acts. For example, the Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women, also known as the Convention of Belém do Pará, defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, *whether in the public or the private sphere*"[281] and applies to violence "that is perpetrated or condoned by the state or its agents regardless of where it occurs."[282] Article 7 of the Convention of Belém do Pará further lays out State duties, including to "apply due diligence to prevent, investigate and impose penalties for violence against women."[283] This is particularly important given the

273. *See* SFRC REPORT, *supra* note 19, at 11–12.

274. *See* Inter-American Comm'n H.R., Djamel Ameziane, Case 12.865, Report No. 29/20, OEA/Ser.L/V/II, ¶¶ 111–13 n. 190 (2020).

275. American Convention on Human Rights art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 144.

276. Note that while the IACPPT does not have a dispute-settlement mechanism, the IACtHR has extended its jurisdiction to cover the IACPPT. *See* Villagrán Morales et al. v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 247 (Nov. 19, 1999).

277. *See* Tibi v. Ecuador, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 145 (Sept. 7, 2004).

278. *See* Organization of American States, Inter-American Convention to Prevent and Punish Torture art. 2(1), Dec. 9, 1985, O.A.S.T.S. No. 67, 1465 U.N.T.S. 85.

279. *See id*. at art. 3. Article 3 also covers such an individual who "orders, instigates or induces the use of torture" as well as an accomplice to torture.

280. While the IACtHR has not applied or interpreted these obligations in the *non-refoulement* context, the Inter-American Commission has repeatedly applied them in cases where *refoulement* would threaten the life or safety of a migrant. *See* Inter-American Comm'n H.R., Djamel Ameziane, Case 12.865, Report No. 29/20, OEA/Ser.L/V/II, ¶¶ ¶ 259 (2020).

281. Organization of American States, Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women art. 1, June 9, 1994, 33 I.L.M. 1534 (emphasis added).

282. *Id*. at art. 2(c).

283. *Id*. at art. 7(b).

context of mass migration from Central America involving victims of gender-based violence.[284]

Like the Human Rights Committee, the IACtHR and Inter-American Commission have interpreted Inter-American human rights instruments to impose both negative obligations on States to refrain for torture, and positive obligations to prevent human rights abuses even at the hands of private actors.[285] In its seminal judgment in *Velásquez-Rodríguez*, the IACtHR held Honduras responsible for the enforced disappearance of Manfredo Velásquez "at the hands of or with the acquiescence of [State] officials."[286] The court also interpreted a State's obligations under the Convention—including the Article 5 prohibition against torture—in light of concepts of State responsibility, like imputation and due diligence.[287] In particular, the IACtHR held that a State may be held responsible for human rights abuses committed by private actors where the State failed to exercise due diligence in controlling, preventing, or punishing the private actor.[288] In a holding strikingly similar to both U.S. circuit splits examined above, the IACtHR concluded:

> The Court is convinced, and has so found, the disappearance of Manfredo Velásquez was carried out *by agents who acted under cover of public authority*. However, even had that fact not been proven, *the failure of the State apparatus to act*, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention.[289]

The IACtHR has repeatedly reaffirmed the duty of States to exercise due diligence in their control and punishment of non-State actors.[290]

In the *Pueblo Bello Massacre* decision, the IACtHR clarified that this duty to prevent and protect against private acts or omissions is limited to situations in which the State is aware of the existence of an actual and immediate risk to an individual or group and where the State has a reasonable opportunity to

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284. *See, e.g.*, U.N. HIGH COMM'R FOR REFUGEES, *supra* note 273; Nelson & Habbach, *supra* note 273.

285. *See* The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 21 (May 9, 1986); *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4., at ¶ 165; Bamaca-Velásquez v. Guatemala, Judgement Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 210 (Nov. 25, 2000).

286. *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4., at ¶ 148.

287. *See id.* at ¶¶ 164, 171–72.

288. *See id.* at ¶ 172.

289. *Id.* at ¶ 182 (emphasis added).

290. *See, e.g.*, González et al. v. Mexico ["Cotton Field"], Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C), at ¶¶ 282, 284-286 (Nov. 16, 2009); Pueblo Bello Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, at ¶ 113 (Jan. 31, 2006); Mapiripán Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 122, at ¶ 111 (Sept. 15, 2005); Villagrán Morales *supra* note 277, ¶¶ 107-08*; see also* Inter-Am. Comm'n H.R., da Penha v. Brazil, Case 12.051, Report No. 54/01, OEA/Ser.L/V/ II.111 doc. 20 rev. ¶¶ 43-44, 55-57 (2000) (Inter-American Commission explaining due diligence in the domestic violence context).

prevent or avoid that risk.[291] It thus mirrors the "willful blindness" approach to interpreting "consent or acquiescence" in CAT Article 1. The IACtHR's analysis could also be instructive related to the "acquiescence" circuit split detailed above, since it found that the Colombian government's initial steps to combat private paramilitary groups showed that the government had prior knowledge of the specific danger posed by the groups.[292] The court found a violation of ACHR Article 5, among others, because of this knowledge and the subsequent failure to protect citizens from paramilitary attacks.[293] Similarly, in the *Cotton Fields* case, the IACtHR found the Mexican government responsible for widespread gender-based violence in Ciudad Juárez because it failed to exercise due diligence once it became aware of the disappearances of women throughout the region.[294]

The Inter-American Court also seems to have rejected the concept of what U.S. courts have called "rogue officers." The Court has applied traditional international law on State responsibility to find that a State is not immunized from responsibility simply because an officer acted beyond his or her authority or without permission.[295] Similarly, the IACtHR has found that States can be responsible for the acts of a low-level official even when the national government may not otherwise approve of those acts.[296]

### 4. *The European Human Rights System*

Article 3 of the European Convention on Human Rights (ECHR) categorically prohibits torture and inhuman or degrading treatment or punishment.[297] Similar to other human rights conventions, the ECHR does not define torture; however, the European Court of Human Rights (ECtHR) has interpreted the Article 1 responsibility of States Parties to "secure to everyone within their jurisdiction" the rights within the Convention to mean that Article 3's prohibition against torture extends to State responsibility for non-State actors,[298]

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291. Pueblo Bello Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, at ¶ 123 (Jan. 31, 2006).

292. *See id*. at ¶ 125.

293. *See id*. at ¶ 140; *see also* Mapiripán Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 122, at ¶ 111 (Sept. 15, 2005) (finding State liability where authorities aware of paramilitary attacks against civilians and did not take step to protect individuals from the paramilitary).

294. González et al. v. Mexico ["Cotton Field"], Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C), at ¶¶ 282, 284–86 (Nov. 16, 2009)

295. *See, e.g*., "Five Pensioners" v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 163 (Feb. 28, 2003); *Velásquez-Rodríguez*, supra note 263, ¶ 170; Godínez Cruz Case, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 5, ¶¶ 178-180 (Jan. 20, 1989).

296. *See* Inter-Am. Comm'n H.R., Canuto De Oliveira v. Brazil, Case 11.287, Report No. 24/98, OEA/Ser.L/V/II.95 doc. 7 ¶¶ 41, 43–44 (1997).

297. European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 2889.

298. *See, e.g*., 97 Members of the Gldani Congregation of Jehovah's Witnesses v. Georgia, Eur. Ct. H.R., App. no. 71156/01, ¶ 96 (2007); Mayeka & Mitunga v. Belgium, 2006-XI Eur. Ct. H.R., App. no. 13178/03, ¶ 53 (2006); Z et al. v. United Kingdom, 2001-V Eur. Ct. H.R., App. no. 29392/95, ¶ 73 (2001); A v. United Kingdom, 1996-VI Eur. Ct. H.R., App. no. 25599/94, ¶ 22 (1998); H.L.R. v France, 1997-III Eur. Ct. H.R., App. no. 24573/94, ¶ 40 (1997).

and implies a prohibition against *refoulement*.[299] The ECtHR has relied on references to CAT to understand these obligations,[300] further showing the interrelatedness of these conventions. The Court has also applied State responsibility to prevent *refoulement* where an individual fears torture by a non-State actor.[301]

Like the Inter-American Court, the ECtHR weighs the risk of torture by non-State actors through a due diligence standard. For example, the court has issued a number of decisions arising from instances of child abuse; while such matters may normally be considered issues for domestic family law, the ECtHR has found that it implicates a State's responsibility under ECHR Article 3, where the State fails to take "reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[302] The Court similarly found State responsibility in cases in which the State made some efforts to protect the victim from a non-State actor, but failed to take enough steps to prevent ill-treatment contravening Article 3.[303] To that end, the Court has expressly rejected equating this standard of acquiescence to a gross negligence or willful disregard standard.[304] This appears at odds with U.S. circuit courts like the First, Fourth, Fifth, Eighth, and Eleventh Circuits, which have found that State acquiescence cannot be shown in cases where the national government makes ineffective efforts to control a non-State actor, and more directly refutes the new standards in the proposed U.S. regulations importing new, more stringent standards for acquiescence resembling a gross negligence standard.

Regarding more straight-forward attribution of torturous conduct to State officials, the ECtHR has found direct responsibility where police officers were acting in their official capacities.[305] The court has also applied what resembles a burden-shifting scheme, finding that where a victim makes a *prima facie* showing that the harm was committed by a public official, the

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299. *See, e.g.*, Sheekh v. Netherlands, Eur. Ct. H.R., App. no. 1948/04, ¶ 137 (2007); Cruz Varas et al. v. Sweden, 201 Eur. Ct. H.R. (ser. A), App. No. 15576/89 (1991); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), App. no. 14038/88 (1989).

300. *See, e.g.*, Selmouni v. France, 1999-V Eur. Ct. H.R. 66, App. no. 25803/94, ¶¶ 96, 100 (1999); Ilhan v. Turkey, 2000-VII Eur. Ct. H.R. 354, App. no. 22277/93, ¶ 85 (2000).

301. *See H.L.R.*, 1997-III Eur. Ct. H.R., App. no. 24573/94 at ¶ 40; Kaya v. Turkey, 2000 Eur. Ct. H. R. 129, App. no. 22535/93, ¶ 115 (2000).

302. *See* Z et al. v. United Kingdom, 2001-V Eur. Ct. H.R., App. no. 29392/95, ¶ 73 (2001); *see also* A v. United Kingdom, 1996-VI Eur. Ct. H.R., App. no. 25599/94, ¶ 22 (1998); Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. 101, App. no. 23452/94, ¶ 116 (1998) ("[I]t is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.").

303. *See* Z et al. v. United Kingdom, *supra* note 299, at ¶ 74; *see also* D.P. & J.C. v. United Kingdom, 36 E.H.R.R. 14, Eur. Ct. H.R., App. no. 38719/97, ¶ 114 (2002) (finding that it had not been shown that the local authorities should have been aware of the sexual abuse inflicted on the applicants in their homes and that in those circumstances the authorities could not be regarded as having failed in any positive obligation to take steps to protect them from abuse).

304. *See Osman,* 1998-VIII Eur. Ct. H.R. 101, App. no. 23452 at ¶ 116.

305. *See* Dikme v. Turkey, 2000-VIII Eur. Ct. H.R., App. No. 20869/92, ¶ 95 (1995).

burden shifts to the government to rebut that presumption.[306] This further emphasizes the rare circumstances in which a public official who commits torturous conduct will not be found to have done so in an official capacity, as well as the absence of a "rogue officer" exception.

### 5. *The African Human Rights System*

Article 5 of the African Charter on Human and Peoples' Rights (African Charter) similarly codifies the prohibition against torture, but also lists it among *jus cogens* prohibitions on slavery and the slave trade.[307] While the African Charter does not define torture, the African Commission on Human and Peoples' Rights has called on States Parties to adopt the definition of torture in CAT Article 1.[308] Accordingly, the African Commission has directly applied the CAT requirement that torture must be committed by or with the consent or acquiescence of a public official.[309] As a complement to Article 5, the Maputo Protocol on the Rights of Women (Maputo Protocol) in Africa addresses torturous conduct specific to women, including the right to dignity, the prohibition of harmful traditional practices, and the prohibition of violence against women.[310] The Maputo Protocol defines "violence against women" as including acts committed "in private or public life,"[311] thus extending to both State and non-State actors.

As with the Inter-American and European courts, the African Commission has held that because the African Charter directs States to ensure the rights contained therein,[312] States Parties are responsible for acts and omissions related to non-State actors.[313] In doing so, the Commission explicitly adopted the due diligence standard expressed by the IACtHR in *Velásquez-Rodríguez*, finding States responsible for acts of private actors where States fail to "prevent the violation" or does not take "the necessary steps to provide the victims with reparation."[314] The Commission, however, has applied this

306. *See also* Michael K. Addo & Nicholas Grief, *Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?*, 9 EUR. J. INT'L L. 510, 524 (1998) (citing Tomasi v. France, 241 Eur. Ct. H.R. (ser. A), App. no. 12850/87 (1992)).

307. *See* African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 11520 U.N.T.S. 217.

308. *See* Afr. Comm'n H.R., Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), 32d Sess. (2002); Afr. Comm'n H.R., Resolution on the Prevention and Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ACHPR/Res.105 (XXXXI) (May 30, 2007).

309. *See* Afr. Comm'n H.R., Zimbabwe Human Rights NGO Forum v. Zimbabwe, Commc'n No. 245/2002, IT 137–41 ¶ 180 (2006).

310. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa arts. III–V, July 1, 2003, CAB/LEG/66.6.

311. *Id.* art. I(j).

312. *See* African Charter on Human and Peoples' Rights, *supra* note 308, at art. 1.

313. *See* Afr. Comm'n H.R., Commission Nationale des Droits de l'Homme et des Libertes v. Chad, Commc'n No. 74/1992, decision, ¶¶ 20-22 (1995) (finding a violation of Article 5 for the Chadian government's failure to protect its citizens from non-State actors); *see also* Afr. Comm'n H.R., Purohit & Moore v. The Gambia, Commc'n No. 241/2001, decision, ¶ 61 (2003); Afr. Comm'n H.R., Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso, Commc'n No. 204/1997, decision, ¶ 42 (2001).

314. *Zimbabwe Human Rights NGO Forum*, Commc'n No. 245/2002, at ¶¶ 143–46.

standard narrowly, finding that "[a] single violation of human rights or just one investigation with an ineffective result does not establish a lack of due diligence by a State"[315] and instead, "[r]esponsibility must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action."[316] In the case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, for example, the Commission applied this standard and found that Zimbabwe could not be held responsible for failing to control the group ZANU PF because the State presented evidence of new legislation, investigations into alleged violations, the arrest and prosecution of alleged perpetrators, and compensation paid to victims.[317]

### 6. *International Criminal Tribunals*

Although the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) derived their authority and statutes from the U.N. Security Council and were concerned with individual criminal responsibility, both considered the issue of State officials' roles in the crime of torture. In interpreting torture, the ICTR wholly adopted the CAT Article 1 definition.[318] In doing so, the ICTR applied the public official requirement, finding a former Rwandan politician responsible for both direct acts of torture as well as instigation and acquiescence.[319] The ICTY, however, took a different approach. Although early decisions from the trial and appeals chambers included all of the CAT Article 1 elements in their definition of torture,[320] later decisions expressly found that a nexus to a public official was not required.[321] The Appeals Chamber adopted this approach in *Kunarac*, holding that based on the tribunal's purview over international humanitarian law rather than international human rights law, a public official requirement was not necessary.[322] The Appeals Chamber did so by examining the role of State responsibility in CAT, stating that CAT, unlike the ICTY Statute, was "addressed to States and sought to regulate their conduct, and it is only for

315. *Id.* at ¶ 158.
316. *Id.* at ¶ 160.
317. *See id.* at ¶¶ 161, 163–64.
318. *See* Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 285 (2000); Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶¶ 593-94 (1998).
319. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶¶ 676-80, 682.
320. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1, Appeals Chamber Judgement. ¶ 111 (Int'l Crim. Trib. fFor the Former Yugoslavia July 21, 2000); Prosecutor v. Furundzija, IT-95-17/1-T, Trial Chamber Judgment, para. ¶ 162 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Delalic et al., IT-96-21-T, Trial Chamber Judgment, ¶ 494 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).
321. *See* Prosecutor v. Kunarac et al., IT-96-23-T& IT-96-23/1-T, Trial Chamber Judgment, ¶ 496 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 22, 2001) ("[T]he definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.").
322. *See* Prosecutor v. Kunarac et al., Case Nos. IT-96-23 and IT-96-23/1, Appeals Chamber Judgement, ¶ 146 (Int'l Crim. Trib. For the Former Yugoslavia June 12, 2002).

that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity."[323] This further confirms the importance of State responsibility to CAT's inclusion of a public official requirement and how the concepts of commission, instigation, consent, and acquiescence—as expressed in CAT Article 1—should be viewed under international law.

## CONCLUSION

The CAT *travaux préparatoires* and the interpretation of torture by international bodies and courts are consistent in interpreting the public official requirement in CAT Article 1 as an expression of State responsibility. This is precisely why the United States proposed that Article 1 contain the concepts of direct commission as well as instigation, consent, and acquiescence. The drafters understood these acts to be closely tied to the international legal concept of State responsibility since it was States who undertook obligations by ratifying the Convention. Likewise, nearly every international body to interpret CAT and other expressions of the torture prohibition in international law—from the CAT Committee to the Human Rights Committee to regional human rights courts—have interpreted the public official factors within the State responsibility framework, including due diligence.

While State responsibility is well-trodden territory for international lawyers, it is less so for U.S. courts. This Article does not propose that U.S. courts should regularly engage in State responsibility analyses in adjudicating CAT *non-refoulement* claims, but rather posits that the State responsibility principle, as expressed specifically in the torture context by various human rights bodies, could be particularly helpful in resolving significant federal circuit splits related to the interpretation of CAT Article 1.

Because the Senate ratification record, as well as the regulatory promulgation record, make clear that U.S. regulations were intended to directly implement U.S. *non-refoulement* obligations under CAT Article 3 using the definition of torture in CAT Article 1, the regulations should be interpreted by U.S. courts as incorporative of U.S. treaty obligations. That is, courts can and should turn to international legal sources to interpret the CAT regulations and ensure domestic implementation is consistent with interpretation of the Convention itself. This approach has previously been used by the Supreme Court in interpreting U.S. refugee *non-refoulement* incorporative statutes and could likewise be extended to the CAT incorporative regulations.

Regarding the current federal circuit split on whether a "rogue officer" exception should be read into CAT Article 1, the drafting history and subsequent application of Article 1 make clear that a public official who causes harm sufficiently severe to constitute torture should only be found not to be acting in an official capacity in exceptional circumstances. This is further

323. *Id.*

confirmed by the interpretations by bodies like the Committee Against Torture and Inter-American Human Rights Court, which have emphasized the exceptional nature of finding a public official to be acting in a private capacity. The European Court of Human Rights has implied a further step, such that in cases where a public official commits a torturous act, the burden shifts to the State to demonstrate that it was *not* done in an official capacity. Thus, to incorporate a "rogue officer" exception into the U.S. regulation itself—as the Trump administration proposed—or through jurisprudence would be contrary to the text, history, and application of CAT Article 1.

Regarding the current federal circuit split on whether a migrant is precluded from showing government acquiescence to torture when the State has made some efforts to control a feared non-State actor, nearly every international body and regional human rights court has interpreted "acquiescence" and/or State responsibility for torture according to a due diligence standard. In the human rights context, due diligence requires the State to take reasonable steps to prevent and punish non-State actors for human rights abuses when the States knowns or should know the abuses have, or will, occur. While mere inability to control the non-State actor may not be enough for acquiescence under CAT Article 1, the State must still exercise due diligence in preventing non-State actors from committing torture, using all means at its disposal to ensure the rights of individuals within its jurisdiction.

A due diligence analysis would counsel against a bright-line rule as applied by the First, Fourth, Fifth, Eighth, and Eleventh Circuits, finding no acquiescence when the national-level government has made some efforts to combat non-State actors. Instead, where the harm by non-State actors is well-known, widespread, or unchecked, the State likely fails the due diligence standard. Thus, national-level efforts to combat transnational gangs in Central America, for example, should not be dispositive since those non-State actors continue to wield tremendous power, are intertwined with and often protected by local authorities, and commit widespread human rights abuses with impunity. To this end, the Trump administration's proposed federal regulations, containing new standards to narrow the scope of acquiescence, would not only conflict with the international consensus on due diligence, but would also likely conflict with U.S. obligations to abide by CAT in good faith and to refrain from invoking domestic law as means of narrowing U.S. obligations.[324] The proposed new standards requiring the public official to be "aware of a high probability" of torture and to "deliberately avoid[] learning the truth," are invented from whole cloth and inconsistent with the text, drafting history, and international consensus on the meaning of CAT Article 1. As the Biden administration considers rescinding the new regulations,[325] it should consider the international law foundations of

324. *See* VCLT, *supra* note 25, at arts. 26–27.
325. *See* Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

the CAT regulations and ensure any revision is guided by the United States' obligations thereto, and accord with consistent international interpretation of CAT Article 1.

In sum, U.S. courts can and should turn to the CAT drafting history and the interpretation and application of international bodies when interpreting U.S. regulations implementing CAT Articles 1 and 3. This approach would help ensure both consistency among U.S. courts and between U.S. interpretation and its international obligations.