

THE U.S. CAT-ASTROPHE: THE UNITED STATES' NEED FOR CONSISTENCY IN ITS INTERPRETATION OF THE NON-REFOULEMENT PROVISION OF THE CONVENTION AGAINST TORTURE

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ABSTRACT

In a time where an individual's immigration status is uncertain, it is necessary to afford refugees and immigrants proper protections from torture they may face if deported and returned to their home country. Despite the US condemning all forms of torture, it has not adequately implemented the United Nations (UN) Convention Against Torture and has failed to fulfill its obligations thereunder. This failure by the US has left many immigrants vulnerable to the unpredictability of the court system when determining the likelihood of torture upon return to their home country. This Comment analyzes the refoulement provision of the UN Convention Against Torture and the proper interpretation of the terms "public official" and "consent or acquiesce." This comment ultimately concludes the US should adopt a broad definition of these terms, following the standards of various international bodies, affording immigrants greater protection from harm and torture.

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INTRODUCTION

The word “refouler” was adopted from the French and means to “drive back” or “repel.”¹ Under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Convention), legal protection exists for individuals who are at risk of being forcibly returned to their home country but fear persecution upon their return.² Refoulement claims brought under the Convention require torture to be inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³ Currently, there is no uniform standard applied in refoulement cases in the US. Rather, circuit courts and other judicial bodies grant relief under the

¹ David Weissbrodt & Isabel Hörteiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture 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, 2 n.4 (1999).

² *Id.* at 2.

³ Anthony Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights*, 34 CAL. W. INT’L L.J. 29, 31 (2003).

Convention based on varying litigation requirements. This lack of agreement among courts and other bodies creates inconsistencies throughout the country, thus leaving the decision of which standard to apply up to the discretion of the presiding judge. Therefore, it is necessary to establish a common definition for the requisite elements of a refoulement claim, and for those definitions to be broad in scope.

The Convention was created by the UN to globally address the issue of torture and require state parties to prevent criminal torturous acts within their jurisdiction.⁴ The Convention not only provides a common definition of which acts qualify as torture, but also includes a cause of action for individuals facing extradition or deportation who fear they will be tortured upon return to their home country.⁵ This is known as the non-refoulement provision, found in Article 3 of the Convention.⁶ Article 3 specifically requires that “no state party expel, return, or extradite a person to another country where there are substantial grounds to believe that he would be subjected to torture.”⁷

This Comment aims to provide clarity and a common approach to the standard applied in refoulement cases in the US by comparing the standards other international bodies and courts apply in these cases. This Comment argues that the US should adopt a definition of “public official” and “acquiesce” consistent with that of other international bodies. Doing so would ensure the lenient standards created internationally would also be applied in US cases concerning the Convention, thereby creating consistency for all claimants.

This Comment proceeds in three parts. Part I provides relevant drafting and ratification history of the Convention and the process through which the US adopted the Convention.⁸ Additionally, Part I will discuss relevant Articles in the Convention, including Article 1 providing a definition of torture and Article 3 discussing refoulement.⁹ Part II of this Comment discusses the requirement that torture be inflicted by a public

⁴ Alyssa Bell & Julie Dona, *Torturous Intent: Refoulement of Haitian Nationals and US Obligations under the Convention Against Torture*, 35 N.Y.U. REV. L. & SOC. CHANGE 707, 715 (2011).

⁵ See Cullen, *supra* note 3, at 31; MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL32276, *The U.N. Convention Against Torture: Overview of the US Implementation Policy Concerning the Removal of Aliens* 1, 3 (2007) [hereinafter CRS Report for Congress].

⁶ Weissbrodt & Hörtreiter, *supra* note 1, at 3.

⁷ *Id.* at 4.

⁸ See generally Henry Mascia, *A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 PACE INT'L L. REV. 288, 294 (2007).

⁹ See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, T.I.A.S. No. 94-1120, 1465 U.N.T.S. 85.

official, whom is encompassed by the term “public official,” and how its interpretation varies across the US and other international bodies and courts. Part III focuses on the acquiescence requirement of refoulement claims and different jurisdictions’ interpretations of when torture has been inflicted with consent of a public official.

The Comment concludes that the US needs to adopt a single standard and definition to apply in all refoulement cases because a commonly-used definition does not currently exist. The definitions US courts and judicial bodies apply to the terms “consent or acquiescence of a public official” and “person acting in an official capacity” remain inconsistent in the US without applying a uniform definition in refoulement cases under the Convention, many applicants are unsure of their burden of proof to secure protection. Furthermore, the various standards used by the US to interpret both “public official” and “acquiesce” are too restrictive and allow for very few applicants to succeed in their claims.¹⁰ As a result, many applicants do not receive the protection they are entitled to under the Convention.

Following other international bodies’ standards benefits those seeking protection from torture under the Convention and provides common definition that is urgently needed in the US Courts. Courts across the US apply a definition and understanding of the Convention that does not account for groups outside a formal government structure, like gangs, terrorist organizations, vigilante groups, or quasi-governments that can inflict torture on private individuals. Looking to international court decisions can provide guidance on the proper standard to be implemented in the US. Therefore, it is necessary to re-examine and expand upon the standards currently used so the US can fulfill its obligations as a signing party to the Convention.

I. BACKGROUND

A. CREATION OF THE CONVENTION AGAINST TORTURE

Prohibition against torture is generally considered *jus cogens*, or an inherent and essential peremptory norm in international law.¹¹ These types of norms are necessary for peaceful coexistence in the international

¹⁰ See generally Jon Bauer, *Obscured by “Willful Blindness”: States’ Preventative Obligations Under the Convention Against Torture*, 52 COLUM. HUM. RTS. L. REV. 738, 801 (2021).

¹¹ Bell & Dona, *supra* note 4, at 714.

community and domestic constitutional order of democratic states.¹² The *jus cogens* norm prohibiting torture applies to state parties during times of war and peace.¹³ However, torture has historically been used for numerous reasons including: intimidation, punishment, extraction of confessions, political repression, and control.¹⁴

In response to the prevalent use of torture, various international human rights documents were drafted with an explicit provision prohibiting torture by state parties.¹⁵ For example, the Universal Declaration of Human Rights, adopted in December 1948.¹⁶ However, since The Universal Declaration of Human Rights is only a declaration, it is not legally binding on any of the state parties.¹⁷ Thus the UN General Assembly sought to reinforce the goal of *jus cogens* by creating a single, legally binding document further defining states' obligations to criminalize and prevent torture within their jurisdiction.¹⁸

With this goal in mind, the Convention was adopted by the UN General Assembly in December of 1984.¹⁹ The Convention contains thirty-three articles primarily addressing parties' responsibilities and obligations to prevent torture within their territorial jurisdiction and has since been ratified by 147 nations, including the United States.²⁰ The Convention strengthened and codified the prohibitions of torture already existing in international law, and created a system for international

¹² Rebecca Lilla Hassanova, *The Prohibition of Torture and Its Implications in the European Legal Sphere*, 4 CENT. EUR. J. COMPAR. L., 53, 54 (2023).

¹³ ASS'N BAR CITY N.Y. & CTR. FOR HUM. RTS. & GLOB. JUST., TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS," 66 (ABCNY & NYU School of Law, 2004) [hereinafter TORTURE BY PROXY]; see Basak Cali, Cathryn Costello & Steward Cunningham, *Hard Protection through Soft Courts? Non-Refoulement Before the United Nations Treaty Bodies*, 21 GER. L.J. 355, 356 (2020).

¹⁴ 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, 332 (1994).

¹⁵ Bell & Dona, *supra* note 4, at 714 (noting that other human rights documents with such a provision include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Geneva Convention).

¹⁶ Malcolm McDermond, *When Non-State Actors Commit "Torture" Under the United Nations Convention Against Torture: An Overview of Current Perspectives*, 2 RUTGERS INT'L L. & HUM. RTS. J. 1, 6 (2021).

¹⁷ *Id.*

¹⁸ Bell & Dona, *supra* note 4, at 715.

¹⁹ Lippman, *supra* note 14, at 312.

²⁰ Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of Its Citizens*, 19 GEO. IMMIGR. L.J. 585, 586 (2005); David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343, 354 (2011).

cooperation by prosecuting torturous acts.²¹ Article 1 of the Convention defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and 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.²²

The definition of torture in the Convention clarifies that the prohibition on torture includes conduct that is intended to obtain information by state actors or individuals acting with the consent or acquiescence of a state actor.²³ The Convention also requires each state party to take legislative, administrative, judicial, or other measures to prevent torture within their jurisdiction.²⁴ However, state government officials are not required to investigate every allegation of torture.²⁵ Officials are only required to act when, after examining the information made available to them, they are satisfied the circumstances warrant intervention, however what circumstances warrant intervention remain unclear.²⁶

The US signed the Convention on April 18, 1988, and on May 20, 1988, President Ronald Reagan gave the Convention to the Senate for consent to its ratification.²⁷ On October 27, 1990, the US Senate provided its advice and consent to ratification, subject to certain reservations, understandings, and declarations.²⁸ First, the Senate stated that it would

²¹ Isaac A. Linnartz, *The Siren Song of Interrogational Torture: Evaluating the US Implementation of the U.N. Convention Against Torture*, 57 DUKE L.J. 1485, 1491 (2008); Bell & Dona, *supra* note 4, at 715.

²² Cullen, *supra* note 3, at 31.

²³ Hassanova, *supra* note 12, at 54.

²⁴ James Park Taylor, *Dancing with the Scavenger's Daughter: Torture, Rendition & the United States*, 30 MONT. LAW. 10, 11 (2005).

²⁵ Richard P. Shafer, Annotation, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385, at 2 (2003).

²⁶ *Id.*

²⁷ Trent Buatte, *The Convention Against Torture and Non-refoulement in US Courts*, 35 GEO. IMMIGR. L.J. 701, 706 (2021); James Feroli, *Trends in Decisions Under the Convention Against Torture*, 05-05 Immigration Briefings, May 2005 1, 1.

²⁸ Mascia, *supra* note 8, at 294; Feroli, *supra* note 27, at 2.

not be bound by the jurisdiction of the International Court of Justice.²⁹ Second, the Senate determined Articles 1 through 16 of the Convention were non-self-executing, and would require additional legislation to become binding domestically.³⁰ Finally, in defining cruel, inhuman, or degrading treatment or punishment under the Convention, the Senate created a reservation interpreting acts of torture consistent with the “cruel, unusual, and inhuman treatment or punishment” already prohibited under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.³¹

The Senate also clarified the standard to claims of refoulement under Article 3 of the Convention.³² The Senate submitted in its reservations and understandings that the US would interpret the phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture” to require a showing that an individual would more likely than not be tortured if returned to their home country.³³ This standard is also commonly used in determining whether to withhold the extradition of an individual due to fear of persecution in their home country.³⁴ The Senate defined acquiescence in the proposed regulations by requiring a public official to have knowledge of torturous activity and breach their “legal responsibility to intervene to prevent such activity.”³⁵ Eventually, the Convention entered into force on November 20, 1994, subject to all of the Senate’s reservations and understandings.³⁶

With the Convention in full force, its drafters created a body to enforce and monitor state parties’ actions, ensuring compliance with the requirements and obligations of the Convention. The Convention established the Committee Against Torture (the Committee) under Article 17 and Article 24 of the Convention.³⁷ The Committee is part of the UN Office of High Commissioner for Human Rights³⁸ and was created to monitor states’ implementation of the Convention through required

²⁹ Feroli, *supra* note 27, at 2.

³⁰ Taylor, *supra* note 24, at 11.

³¹ Weissbrodt & Heilman, *supra* note 20, at 366–67.

³² Buatte, *supra* note 27, at 708.

³³ *Id.*

³⁴ CRS Report for Congress, *supra* note 5, at 5.

³⁵ Bauer, *supra* note 10, at 747.

³⁶ Feroli, *supra* note 27, at 2.

³⁷ Hassanova, *supra* note 12, at 55.

³⁸ Anna Welch & Sang Yeob Kim, *Non-State Actors “Under the Color of Law”: Closing a Gap in Protection Under the Convention Against Torture*, 3 HARV. HUM. RTS. J. 117, 135 (2022).

periodic reports.³⁹ Ten independent experts make up the Committee, who are nominated, elected, and financed by state parties, make up the Committee.⁴⁰ These members meet twice a year in Geneva, Switzerland, to review the measures taken by states to properly implement the Convention.⁴¹ In confidential proceedings, the members consider claims made by victims alleging state violations of the Convention's provisions.⁴²

The Committee may investigate three types of complaints. First, they may investigate reports of torture by state parties when the Committee receives reliable information that torture is systematically being practiced within a state.⁴³ Second, they may investigate complaints by one state party that another state party is not fulfilling their obligations under the Convention and both parties have acknowledged the Committee's ability to investigate.⁴⁴ Finally, the Committee may investigate complaints from individuals claiming to be victims of torture by a state party.⁴⁵ The Committee also has the power to comment on the reports submitted annually by state parties.⁴⁶ It may also, on its own initiative, visit the territory of a state party to investigate potential allegations or acts of torture.⁴⁷ The Committee's findings of any ill-treatment within a state or violations of the Convention may then be included in their annual report to the UN General Assembly.⁴⁸

B. US IMPLEMENTATION OF THE CONVENTION

Over the years, the US has maintained a pronounced stance against the use of torture. President George W. Bush said, "The United States does not torture. It's against our laws, and it's against our values."⁴⁹ Numerous public statements by government officials have addressed the CIA's interrogation program at Guantanamo Bay and have found this program does not violate the convention because it does not take place on

³⁹ Buatte, *supra* note 27, at 735.

⁴⁰ Lippman, *supra* note 14, at 320; Hassanova, *supra* note 12, at 55.

⁴¹ Weissbrodt & Heilman, *supra* note 20, at 354; Hassanova, *supra* note 12, at 55.

⁴² Weissbrodt & Heilman, *supra* note 20, at 354.

⁴³ David P. Stewart, *The Torture Convention and the Reception of International Criminal Law within the United States*, 15 NOVA L. REV. 449, 468 (1991).

⁴⁴ *Id.* at 468–69.

⁴⁵ *Id.* at 469.

⁴⁶ Lippman, *supra* note 14, at 320.

⁴⁷ *Id.* at 321.

⁴⁸ Hassanova, *supra* note 12, at 55.

⁴⁹ Linnartz, *supra* note 21, at 1493.

a territory under the jurisdiction of the United States.⁵⁰ As required by Article 19 of the Convention, the US submitted a report to the Committee Against Torture in 2014.⁵¹ The report highlighted measures the US undertook to give effect to its obligations under the Convention.⁵² In the report, the US “affirms that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times and in all places,” not only in territory under US jurisdiction.⁵³

The US, in addition to their obligations under the Convention, has passed federal anti-torture statutes. The numerous statutes passed by Congress provide individuals who already residing in the US with greater protections than those who are deemed inadmissible on security-related grounds.⁵⁴ For example 18 USC. §2340, commonly known as the Torture Statute, criminally prohibits and defines torture consistent with the Senate’s reservations, and proposed declarations when it adopted the Convention.⁵⁵ This federal statute defines torture as “an act committed by a person acting under the color of the law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”⁵⁶ The Torture Victim Act and the Alien Tort Claims Act also allows civil suits to be brought for a claim of torture.⁵⁷

In 1998 Congress passed the Foreign Affair Reform and Restructuring Act (FARRA) which implemented the Convention domestically and required US agencies to create regulations for proper implementation.⁵⁸ Despite numerous legislative acts passed in the US codifying the provisions of the Convention, these laws have created an illusory commitment to ban all domestic torture. These legislative acts

⁵⁰ Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AM. J. INT’L L. 191, 192 (2015) (noting that Mary McLeod, former legal adviser of the U.S. Department of State, has stated that the United States “affirms that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times and in all places”).

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.* at 192.

⁵⁴ CRS Report for Congress, *supra* note 5, at 10.

⁵⁵ Weissbrodt & Heilman, *supra* note 20, at 363; Taylor, *supra* note 24, at 12.

⁵⁶ 18 U.S.C. § 2340.

⁵⁷ Weissbrodt & Heilman, *supra* note 20, at 364–65. Section 2 of the Torture Victim Act allows individuals to bring claims of torture if they were inflicted by public officials. The Act defines a public official as an individual who acts under actual or apparent authority, or color of law. *Id.*

⁵⁸ Buatte, *supra* note 27, at 709; Weissbrodt & Heilman, *supra* note 20, at 363.

ultimately fell short of the goals of the Convention to criminalize all torture within its jurisdiction and control.⁵⁹

C. REFOULEMENT CATEGORIES UNDER THE CONVENTION

The US and the Convention differ in the types of situations that they aim to protect individuals from. Article 3 of the Convention requires that “no state party expel, return, or extradite a person to another country where there are substantial grounds to believe that he would be subjected to torture.”⁶⁰ The drafting committee of the Convention was concerned that the definition they provided for torture lacked precision.⁶¹ The Committee intended to create a legally binding definition capable of implementation with respect to individual state parties’ domestic legal systems.⁶² The scope of protection against torture under the Convention was intended to be broad and applicable in three different types of situations. These three different types of situations include: (1) transfers of an individual to any state where that individual is in danger of torture, (2) all individuals in danger of torture upon transfer and (3) all types of transfers (including deportations and transfers pursuant to extradition treaties).⁶³

In contrast, the US has three different categories of protection, under the Convention, for those claiming they would be subject to torture if sent back to their home country. These three categories include: (1) asylum, (2) statutory withholding of removal and (3) protection under the Convention, resulting in withholding or deferral of removal.⁶⁴ Individuals may apply for asylum within one year of arriving in the United States.⁶⁵ This is a discretionary form of relief, subject to approval by an immigration judge.⁶⁶ If approved, the applicant is granted a legal immigration status.⁶⁷ The individual must qualify as a refugee to obtain asylum status, and doing so requires a “well-founded fear of persecution”

⁵⁹ See Buatte, *supra* note 27, at 709.

⁶⁰ CRS Report for Congress, *supra* note 5, at 3.

⁶¹ Weissbrodt & Hörtreiter, *supra* note 1, at 9.

⁶² *Id.*

⁶³ TORTURE BY PROXY, *supra* note 13, at 36–37 (emphasis added).

⁶⁴ Lexie M. Ford, *A Reasonable Possibility of Refoulement: The Inadequacies of Procedures to Protect Vulnerable Noncitizens from Return to Persecution, Torture or Death*, 9 TEX. A&M L. REV. 209, 218 (2021).

⁶⁵ See Freshwater, *supra* note 20, at 589.

⁶⁶ *Id.*

⁶⁷ *Id.*

on account of their “race, religion, nationality, membership of a particular social group, or their political opinion.”⁶⁸

If an individual doesn’t qualify for asylum they may apply for the second category of protection: statutory withholding of removal. Applicants must show they would “more likely than not” face persecution if sent back to their home country, and unlike asylum, withholding of removal is mandatory, not discretionary.⁶⁹ The applicant’s “life or freedom [must] be threatened in that country” due to their membership in a protected group, similar to asylum seekers.⁷⁰ Withholding of removal is described as a last resort before removal proceedings are initiated and allows the US government to revoke this protection status if conditions improve in their home country, rendering it less likely the applicant would face torture upon their return.⁷¹

For individuals denied asylum due to statutory or regulatory bars and fear returning to their home country, relief may be granted pursuant to the Convention.⁷² The aforementioned remedies—asylum and withholding—are only available to those who face persecution in another country on account of their race, nationality, religion, membership in a particular group, or political opinion.⁷³ In contrast to the US requirements for asylum and withholding of removal, the Convention doesn’t require there to be a connection between the persecution an individual faces and the individual’s affiliation with a protected group.⁷⁴ The individual must show that it is more likely than not that they will be subjected to torture when returned to their home country and that the torture would be inflicted with the “consent or acquiescence” of a public official.⁷⁵ However, protection under the Convention does not require a showing that torture would be inflicted based on one of the aforementioned grounds; instead it

⁶⁸ *Id.*

⁶⁹ Buatte, *supra* note 27, at 710.

⁷⁰ Freshwater, *supra* note 20, at 589–90. An applicant must show that they would more likely than not be persecuted on account of their race, religion, nationality, membership in a particular social group, or due to their political opinion; *Id.*

⁷¹ Welch & Kim, *supra* note 38, at 132.

⁷² Ford, *supra* note 64, at 218.

⁷³ Bauer, *supra* note 10, at 742.

⁷⁴ Alexander Breaux, *Tabora Gutierrez v. Garland: Fifth Circuit Panel Adopts Narrowed “State Acquiescence” Definition Limiting Convention Against Torture Relief*, 96 TUL. L. REV. 1033, 1035 (2002). Protected groups include race, religion, nationality, membership of a particular social group, or political opinion held by the individual seeking relief under the Convention, *id.*

⁷⁵ Monica Fanesi, *Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the “Consent or Acquiescence” Requirement*, 13 ROGER WILLIAMS U. L. REV. 308, 320 (2008).

must be more likely than not the individual would be tortured if returned to their home country, regardless of the reason for the torturing.⁷⁶ There are two exceptions to the non-refoulement clause in the Convention that provide (1) an individual is not protected if they are a danger to the security of the country or (2) a danger to the community of that country due to a “conviction of a particularly serious crime.”⁷⁷

To determine whether an individual would be subject to torture if extradited, states are required to take into account “a consistent pattern of gross, flagrant or mass violations of human rights” in the concerned state.⁷⁸ When Congress codified Article 3 of the Convention, it excluded those with past criminal convictions from receiving full protection.⁷⁹ Congress created “deferral of removal,” intended to be a lower standard of relief for those who have a criminal record that ultimately afforded different levels of protections to potential victims of torture depending on who is deemed desirable.⁸⁰ Deferral of removal is typically available to those who were denied withholding, but denies a lawful immigration status and does not guarantee release from detention for the individual.⁸¹

One additional criteria for those seeking protection under the Convention’s refoulement provision requires the claimant to show government acquiescence.⁸² Article 3 of the Convention requires that torture be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁸³ US regulations state that, for a public official to acquiesce in torture, they must, “prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene and prevent such activity.”⁸⁴

The awareness element in the definition of “acquiescence” was previously interpreted to include either actual knowledge or “willful blindness” such that the public official was aware of a high probability of

⁷⁶ Freshwater, *supra* note 20, at 590.

⁷⁷ Ford, *supra* note 64, at 215.

⁷⁸ CRS Report for Congress, *supra* note 5, at 3.

⁷⁹ 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, 94 (2004).

⁸⁰ *Id.* at 94.

⁸¹ Buatte, *supra* note 27, at 710.

⁸² Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 303 (2003).

⁸³ Bauer, *supra* note 10, at 745–46.

⁸⁴ *Id.* at 747.

torture and “deliberately avoided learning the truth.”⁸⁵ Individuals submitting claims under the Convention are generally not protected from refoulement if they are at risk of being subject to torture by a private actor, unless a government official consented to that action.⁸⁶

Since the Convention’s articles are not self-executing, and therefore require enacting legislation to become binding, the US has legislated to fulfill their obligations under the Convention. For example, the Foreign Affairs Reform and Restructuring Act established a policy under which the US implements its obligations and further required the US to adopt regulations explicitly prohibiting refoulement.⁸⁷ This act focused on the US’s obligations regarding the deportation of individuals in cases with substantial grounds to believe the individual would be subject to torture if removed.⁸⁸ Current Department of Justice regulations allow protection from removal if the individual would more likely than not be tortured if sent to the proposed country, a burden that the Committee places on the applicant.⁸⁹

The Department of Justice regulations define torture in accordance with Article 1 of the Convention stating that, in order to constitute torture “an act must be specifically intended to inflict severe physical or mental pain or suffering...an act that results in unanticipated or unintended severity of pain and suffering is not torture.”⁹⁰ The applicant may then testify and if deemed credible by the Board of Immigration Appeals, may have satisfied the burden without any further inquiry.⁹¹ The applicant must also present documents, articles, or reports detailing what type of torture they would fear if returned to their home country.⁹² The evidence that may be presented includes evidence of past torture inflicted upon the applicant, the proposed country’s history or pattern of gross human rights violations or other relevant information about the conditions of the proposed country.⁹³

⁸⁵ Breaux, *supra* note 74, at 1036.

⁸⁶ Weissbrodt & Heilman, *supra* note 20, at 9 n.34.

⁸⁷ Taylor, *supra* note 24, at 12.

⁸⁸ Weissbrodt & Heilman, *supra* note 20, at 365–66.

⁸⁹ CRS Report for Congress, *supra* note 5, at 4.

⁹⁰ Bell & Dona, *supra* note 4, at 718.

⁹¹ CRS Report for Congress, *supra* note 5, at 8.

⁹² Nicole M. Hogan, *Arbitration and Protection under the UN Convention Against Torture and Other Cruel, Degrading Treatment, or Punishment*, 18 PEPP. DISP. RESOL. L.J. 1, 20 (2018).

⁹³ CRS Report for Congress, *supra* note 5, at 9.

If the individual is granted protection under the Convention, the proceedings will likely result in withholding or deferring removal.⁹⁴ Protection under the Convention may be temporary if the Department of Homeland Security determines it is likely the individual would no longer be tortured when returned to their home country.⁹⁵ However, these types of claims are typically unsuccessful; in 2016 immigration courts granted less than 5% of applications for relief under the Convention.⁹⁶

II. ARGUMENT

A. PUBLIC OFFICIAL AND NON-STATE ACTORS

Article 1 of the Convention allows a claimant to seek relief if torture is intentionally 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.”⁹⁷ The drafting committee of the Convention stated that the term “public official” was necessary to include because the Convention would otherwise interfere with states’ criminal laws.⁹⁸ If a claimant would be at risk of torture, but a connection between the person inflicting the torture and an official role is absent, the claimant would fail to meet the requirements for relief. Some scholars claim the wording of this Article is sufficiently broad to include actions by private individuals in the scope of protection under the Convention.⁹⁹ The US, however, has taken a narrower approach to defining the “public official in an official capacity” requirement of Article 3. Resultantly, it is more difficult for claimants to obtain relief when making a claim under Article 3.

i. US Interpretation

The US has narrowly construed the refoulement provision in Article 3 – particularly the proper definitions of “public official” and

⁹⁴ *Id.*

⁹⁵ Ford, *supra* note 64, at 219.

⁹⁶ *Fact Sheet: Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk*, HUM. RTS. FIRST (Nov. 2018), https://humanrightsfirst.org/wp-content/uploads/2019/08/CAT_Withholding.pdf [<https://perma.cc/U38T-YVQT>].

⁹⁷ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁹⁸ McDermond, *supra* note 16, at 16. The drafting committee of the convention believed that states would already have domestic laws that banned torture by private individuals. *Id.*

⁹⁹ Cullen, *supra* note 3, at 34.

“other person acting in an official capacity.” This narrow construction is the result of numerous decisions by federal circuits, the Board of Immigration Appeals, and the US Attorney General. These standards create barriers for those seeking relief and relying on the Convention to protect them against torture.¹⁰⁰ Narrow readings of Article 3 fail to adequately protect claimants who risk actual danger to their life from torture and violence at the hands of non-traditional state actors. These narrow interpretations also fail to recognize individual circumstances that may change the analysis of a claimant’s case.

Numerous courts have attempted to interpret the Convention’s use of “public official” and “official capacity,” however, these same courts are in disagreement about what distinguishes a public official from an individual acting in an official capacity. The lack of a common definition for these terms creates confusion amongst claimants and makes success unlikely under the Convention. Some of the varying interpretations by courts and other judicial bodies across the country are detailed below.

The Board of Immigration Appeals (the Board) has weighed in on the refoulement provision of the Convention and provided a narrow interpretation for the “person acting in an official capacity” term used in Article 1. The Board is the highest administrative body in the US interpreting and applying immigration laws to cases regarding claimants seeking admission into the US.¹⁰¹ The Board imposes fines for violations of immigration laws and hears motions for reconsideration of previous decisions.¹⁰²

The Board first interpreted “official capacity” in *In re S-V-*, and found that Article 3 doesn’t extend protection to claimants who fear torture at the hands of an individual or “entity that a government is unable to control.”¹⁰³ The claimant at issue in this case was a Colombian native living in the US who feared that, after being deported, he would be subject to torture by Colombia’s guerrilla forces¹⁰⁴ due to his ties with the United States.¹⁰⁵ The Board found that the claimant had failed to show that the Colombian officials would acquiesce the torture being inflicted at the

¹⁰⁰ Samuel L. David, *A Foul Immigration Policy: US Misinterpretation of the Non-Refoulement Obligation Under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUM. RTS. 769, 770–71 (2003).

¹⁰¹ Bell & Dona, *supra* note 4, at 710.

¹⁰² *Id.*

¹⁰³ David, *supra* note 100, at 779.

¹⁰⁴ *Id.*

¹⁰⁵ Nessel, *supra* note 79, at 120.

hands of the guerrillas; however, it failed to consider whether the guerrillas constituted individuals acting in an official capacity under the Colombian government.¹⁰⁶ The holding in *In re S-V* clarified that the Board requires a non-state actor to be under government control in order to amount to an individual acting in an official capacity.¹⁰⁷

The term “official capacity” was narrowed further when the First Circuit found that the Convention does not apply to “rogue officers.”¹⁰⁸ In *Costa v. Holder*, a Brazilian woman feared torture due to her work as a criminal informant for the US government.¹⁰⁹ She received threats from Brazilian officers while in the US, forcing her to move multiple times and even change her phone number.¹¹⁰ The First Circuit ruled that the action of these two “rogue officers” did not amount to government action, as the claimant did not present specific evidence that the Brazilian government acquiesced to the actions of these officers.¹¹¹ Due to this lack of evidence, the court held that the claimant could not be afforded protection under the Convention.¹¹²

In line with the First Circuit, the Ninth Circuit has expressed a dissatisfaction for the rogue officer exception and believes it to be contrary to the provisions of the Convention.¹¹³ In *Barajas-Romero v. Lynch*, the claimant alleged that four police officers attacked him in his home, burned him with cigarettes, cut him with a machete, and put scorpions in his pants.¹¹⁴ The court specifically stated in their holding that the statutes do not establish a “rogue officer” exception to Convention relief and that in this case the officers were public officials who themselves inflicted the torture.¹¹⁵ The court emphasized that the text of the Convention states “by a public official *or* other official acting in an official capacity” and therefore a claimant must prove only one part of the phrase.¹¹⁶

The Second Circuit also weighed in on the “rogue officer” exception in *Khouzam v. Ashcroft*.¹¹⁷ In this case, a man claimed, if

¹⁰⁶ David, *supra* note 100, at 779.

¹⁰⁷ *Id.* at 780.

¹⁰⁸ Buatte, *supra* note 27, at 716–17.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Shafer, *supra* note 25, §21[b].

¹¹² Buatte, *supra* note 27, at 717.

¹¹³ *Id.* at 721.

¹¹⁴ *Id.* at 703.

¹¹⁵ *Id.* at 721–22.

¹¹⁶ *Id.* at 722.

¹¹⁷ Bauer, *supra* note 10, at 764.

returned to Egypt he would face extreme physical abuse while in police custody.¹¹⁸ Khouzam claimed that it was "routine in nature" for the Egyptian police to use torture to extract confessions.¹¹⁹ The court held that even if the officers were acting in a non-official capacity, torture was routinely used, showing that higher-level Egyptian officials knew of the torture, and this could be imputed to the lower level officers.¹²⁰

The Eleventh Circuit restricted the definition of "public official" even further.¹²¹ In *D-Muhumed v. U.S. Attorney General* the court held that a claim for relief under the Convention could not be granted because the claimant failed to show the existence of a functioning government in Somalia.¹²² The court reasoned that the claimant failed to show that the harm he would suffer would be at the hands of a public official because the country lacked a central government and instead clans controlled sections of Somalia through warfare rather than official power.¹²³ Therefore, the claimant failed to show that he would, more likely than not, be tortured by a public official or an individual who was acting in an official capacity upon his return to Somalia.¹²⁴

Some courts look for a functioning central government; some courts apply the "rogue officer" exception. Each court reviewing claims of refoulement is focusing on a unique aspect of the behavior of the claimant's home country. There is no prevailing US Supreme Court ruling to provide guidance or a clear definition as to who qualifies as a public official of a state, or the circumstances in which someone is acting in an official capacity. The lack of agreement creates inconsistencies among cases throughout the US and results in different outcomes based solely on the circuit or other judicial body hearing the case.

ii. *International Interpretations*

While the US lacks a consistent interpretation of the "public official" requirement in refoulement cases, international courts can provide guidance as to the proper interpretation to adopt. International interpretations of Article 3's refoulement provision show that a broad

¹¹⁸ *Id.*

¹¹⁹ Shafer, *supra* note 25, at 110.

¹²⁰ Bauer, *supra* note 10, at 764.

¹²¹ Feroli, *supra* note 27, at 7.

¹²² *Id.*

¹²³ Welch & Kim, *supra* note 38, at 152.

¹²⁴ Shafer, *supra* note 25, at 385.

interpretation is common. In jurisdictions interpreting the provision broadly, a greater number of claimants to be afforded protection under the Convention, thereby protecting them from potential torture when returned home.

a. Committee Against Torture

The Committee has developed its own body of case law from hearing the complaints of individuals alleging violations of the Convention.¹²⁵ The Committee's decisions provide guidance into the proper interpretation of Article 3, however, Committee decisions are not binding on the US.¹²⁶ The Committee's decisions have varied over time, but they currently take a broader view of the "official capacity" language in the Convention.

In the earliest case considered by the Committee, *G.R.B. v. Sweden*, the claimant alleged that, if deported, she would be subjected to torture by both the Peruvian government and the Sendero Luminoso, a rebel group operating in Peru at the time.¹²⁷ The Committee rejected her claim, stating that refouling an individual facing torture inflicted by a non-governmental entity, like the Sendero Luminoso, without the state's acquiescence, is outside the scope and protection of Article 3.¹²⁸ A claim will fail if it cannot be shown that the torture will be inflicted by a government entity or public official.

One year after their decision in *G.R.B. v. Sweden*, the Committee issued a decision in *Elmi v. Australia*.¹²⁹ There, the claimant asserted that, if deported from Australia, back to Somalia, he would be subject to torture at the hands of members of the Hawiye clan,¹³⁰ rivals of his own clan.¹³¹ Members of this clan occupied and controlled territory in Somalia, creating and enforcing their own laws.¹³² The Committee found that although Somalia lacked a central government, quasi-governmental

¹²⁵ See Stewart, *supra* note 43, at 468; David, *supra* note 100, at 773.

¹²⁶ David, *supra* note 100, at 774; MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL32890, *Renditions: Constraints Imposed by Laws on Torture* 1, 22 (2009).

¹²⁷ Josephine A. Vining, *Providing Protection from Torture by Unofficial Actors—A New Approach to the State Actions Requirement of the Convention Against Torture*, 70 BROOK. L. REV. 331, 347 (2004).

¹²⁸ *Id.*

¹²⁹ David, *supra* note 100, at 775.

¹³⁰ Robert McCorquodale & Rebecca LaForgia, *Taking off the Blindfolds: Torture by Non-State Actors*, 1 HUM. RTS. L. REV. 189, 194 (2001).

¹³¹ McDermond, *supra* note 16, at 19.

¹³² *Id.*

institutions are comparable to “legitimate governments.”¹³³ Therefore the factions in Somalia, and more specifically the members of the claimant’s own clan, met the requirement of a public official.¹³⁴ This was a much broader reading of the Convention by the Committee, expanding on what kind of organized groups can be considered to be government entities, and public officials under the Convention.

In their ruling, the Committee rejected Australia’s argument that the drafting history of the Convention reflects that protection was not intended to extend to private individuals.¹³⁵ Instead the Committee reasoned that when private individuals exercise a de facto government function, like a state actor, they can be considered a public official acting in an official capacity with regard to the Convention.¹³⁶ When members of the de facto government exercise “certain prerogatives that are comparable” to those that a legitimate government would normally engage in, they can be treated as a “public official” for the purposes of the Convention.¹³⁷ The Committee was presented with “abundant evidence” that the clans exercised authority comparable to that of a legitimate government.¹³⁸ The Committee held that the clans, although non-state actors, exercised “prerogatives comparable to those normally exercised by legitimate governments” and therefore those actions would be treated the same as torture occurring directly at the hands of a state official.¹³⁹ This expansive reading is beneficial to claimants from countries lacking an organized or official government structure.

The Committee refined its interpretation of the Convention when they decided the case *S.V. v. Canada*.¹⁴⁰ The complainant alleged fear of torture not only from the authorities in Sri Lanka but also from the Liberation Tigers of Tamil Eelam, an ethnic Tamil group that gained control over parts of northern Sri Lanka.¹⁴¹ However, the Committee denied relief stating the basis of the claim is that the individual would suffer torture by the Liberation Tigers of Tamil Eelam, which is a non-governmental entity falling outside the Committee’s jurisdiction.¹⁴² This

¹³³ Feroli, *supra* note 27, at 8.

¹³⁴ *Id.*

¹³⁵ David, *supra* note 100, at 776.

¹³⁶ *Id.*; Welch & Kim, *supra* note 38, at 122.

¹³⁷ Feroli, *supra* note 27, at 8.

¹³⁸ Welch & Kim, *supra* note 38, at 148.

¹³⁹ *Id.* at 140; Cali et al., *supra* note 13, at 371.

¹⁴⁰ David, *supra* note 100, at 777.

¹⁴¹ *Id.*

¹⁴² *Id.*; Vining, *supra* note 127, at 348.

ruling highlighted the conflict amongst the Committee compared to their previous holding in *Elmi v. Australia*. The ruling in *S.V. v. Canada* gave the impression that the Committee considered the existence of a central government a crucial factor in deciding whether a non-state actor could act in an “official capacity.”¹⁴³

These various decisions by the Committee show the discrepancy in the true meaning of the term “official actors” and “official capacity.” While there have been changes in the Committee’s rulings, they have generally been more flexible in providing protection under the Convention.

b. The United Kingdom and the European Court of Human Rights

The European Court of Human Rights (ECtHR) has adopted a burden-shifting scheme when analyzing whether torture will be inflicted by a public official.¹⁴⁴ A claimant first makes a *prima facie* showing that the torture they would face will be committed by a public official.¹⁴⁵ The burden then shifts to the government of that country to rebut this presumption.¹⁴⁶ This framework increases claimant’s likelihood of success by limiting the circumstances under which they fail to show a risk of torture by an individual acting in an official capacity.¹⁴⁷

The ECtHR also takes a broad view of the meaning of “official capacity” as it is used in Article 3. The ECtHR adopted a view taken by the Convention on Refugees that protection from the threat of torture should include acts stemming from private groups when the government is unable to suppress such acts.¹⁴⁸ In *HLR v. France*, the ECtHR determined that the threat of torture by a structured criminal organization and drug trafficking group in Colombia was sufficient to afford the claimant protection under Article 3 because it was unlikely that the government would have been able to adequately protect the claimant upon return.¹⁴⁹ The court required there to be “substantial grounds” for believing that a claimant faces a “real risk” of being tortured if returned to their home

¹⁴³ David, *supra* note 100, at 777.

¹⁴⁴ Buatte, *supra* note 27, at 742–43.

¹⁴⁵ *Id.* at 742.

¹⁴⁶ *Id.* at 743.

¹⁴⁷ *Id.*

¹⁴⁸ Weissbrodt & Hörtreiter, *supra* note 1, at 33.

¹⁴⁹ *Id.* at 51.

country.¹⁵⁰ The court ultimately found that danger of torture may stem from “persons or groups of persons who are not public officials.”¹⁵¹ Thus, it was sufficient that the claimant risked torture by drug traffickers rather than Colombian authorities to qualify for relief under the Convention.¹⁵²

The United Kingdom Supreme Court has also weighed in on who qualifies as a public official and whether non-state actors could fall into this category under the Convention. In *R. v. Reeves Taylor*, the court determined that an individual is acting in an official capacity when they hold an “official position or acts in an official capacity in an entity exercising governmental control over a civilian population in a territory in which it holds de facto control.”¹⁵³ In coming to its decision, the court addressed other international court rulings, recognizing that the Committee’s rulings have been inconsistent.¹⁵⁴

However, the court’s analysis of previous decisions of the Committee ultimately led to its conclusion that non-state actors exercising quasi-governmental authority over a territory fall within the scope of an official actor under Article 1, keeping in line with the Committee’s ruling in *G.R.B. v. Sweden*.¹⁵⁵ The court clarified that there must be an exercise of a government function and such functions that must: (1) be distinguished from purely military activity; and (2) should be assessed by examining “whether the entity has established a sufficient degree of control, authority or organization to become an authority exercising official or quasi-official powers.”¹⁵⁶

The broad readings by the ECtHR and the United Kingdom Supreme Court remain consistent with the rulings of the Committee, allowing for more claimants to receive protection under the Convention. International courts have routinely upheld broad interpretations of the public official requirements under the Convention. The broad international rulings provide guidance on the proper interpretation that the US should adopt and apply in refolement cases.

¹⁵⁰ Helene Lambert, *Protection Against Refoulement From Europe: Human Rights Law Comes to the Rescue*, 48 INT’L COMPAR. L.Q. 515, 538 (1999).

¹⁵¹ McCorquodale & LaForgia, *supra* note 130, at 201–02.

¹⁵² *Id.*

¹⁵³ McDermond, *supra* note 16, at 30–31.

¹⁵⁴ *Id.* at 31.

¹⁵⁵ *Id.*

¹⁵⁶ Ginevra Le Moli, *Torture by Non-State Actors: Four Inquiries*, 19 J. INT’L CRIM. JUST. 363, 366 (2021).

B. CONSENT OR ACQUIESCENCE

To have a valid claim under the Convention, a claimant must show that if returned to their home country they would face torture “with the consent or acquiescence” of a public official.¹⁵⁷ Even if an individual faces torture at the hands of a private party, the Convention’s nonrefoulement provision will protect the claimant if they can prove a state actor or official would acquiesce to it.¹⁵⁸ US courts and various international bodies have adopted varying interpretations of when a public official has acquiesced in torture, leading to multiple standards.

i. *US Interpretation*

The Convention allows relief when the claimant has shown they will be subject to torture inflicted with the consent or acquiescence of a public official.¹⁵⁹ When Congress enacted the Foreign Affairs Reform and Restructuring Act, implementing Article 3 of the Convention, they conditioned ratification on their own understanding of acquiescence.¹⁶⁰ Congress defines acquiescence, as used in Article 3 of the Convention, to require a public official to have awareness of the torture before it occurs and to subsequently breach their legal responsibility to intervene and prevent such activity from occurring.¹⁶¹ Typically, the acquiescence element of a refoulement claim under the Convention is not met when the government is aware of torture inflicted at the hands of a third-party but is unable to stop or prevent it.¹⁶²

The US Supreme Court has not yet weighed in on the proper interpretation of “consent or acquiescence,” but this issue has been considered by federal circuit courts and other judicial bodies.¹⁶³ The lack of a consistent interpretation of the term “acquiescence” has created confusion and circuit splits throughout the US. Existing interpretations of acquiescence by lower courts differ between using an “actual knowledge”

¹⁵⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁵⁸ Welch & Kim, *supra* note 38, at 120.

¹⁵⁹ Nessel, *supra* note 79, at 116.

¹⁶⁰ *Id.* at 93–94.

¹⁶¹ David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT’L L. 585, 605 (2006); Stewart, *supra* note 43, at 456.

¹⁶² Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of US Interrogation Policy*, 41 TOL. L. REV. 40 (2009).

¹⁶³ Fanesi, *supra* note 75, at 322.

or “willful blindness” standard to analyze whether a public official has acquiesced to torturous activity.¹⁶⁴

For example, the Board of Immigration Appeals (BIA) construes “acquiescence” narrowly, making it difficult for claimants to succeed.¹⁶⁵ In *In re S-V*-, the BIA stated that acquiescence requires a public official’s awareness, prior to the act constituting torture, and for the public official to subsequently breach their legal responsibility to prevent such acts.¹⁶⁶ The BIA required the claimant to show a government official’s “willful acceptance” of the torture, a high bar for claimants to meet.¹⁶⁷ This “willful acceptance” standard requires awareness rather than knowledge of torture.¹⁶⁸ Additionally, the BIA interpreted acquiescence using the dictionary definition, meaning “silent or passive assent” as opposed to relying on the definition provided by the Senate in their reservation.¹⁶⁹ This standard does not extend protection to those facing torture from individuals the state’s government would be unable to control.¹⁷⁰ The willful acceptance standard is extremely difficult to satisfy for claimants seeking protection under the Convention.¹⁷¹

Shortly after the BIA ruled in *In re S-V*, Attorney General John Ashcroft affirmed the “willful acceptance” standard as the appropriate test of acquiescence for refoulement claims under the Convention.¹⁷² In *Matter of Y-L* the Attorney General determined that the willful acceptance test requires a claimant to show there are “government-sanctioned atrocities” occurring with the “tacit support” or consent or approval of government authorities to fulfill the acquiescence requirement.¹⁷³ This standard imposed by the board and affirmed by the Attorney General disregards the definition of acquiescence adopted by the Senate during the ratification and implementation of the Convention.¹⁷⁴

Federal circuit courts broadly interpret the “consent or acquiescence” clause by only requiring “willful blindness” to alleged acts of torture. Contrary to *In re S-V*, the Ninth Circuit rejected the willful

¹⁶⁴ Welch & Kim, *supra* note 38, at 142.

¹⁶⁵ Nessel, *supra* note 79, at 119.

¹⁶⁶ Fanesi, *supra* note 75, at 320.

¹⁶⁷ *Id.*

¹⁶⁸ Nessel, *supra* note 79, at 120.

¹⁶⁹ Bauer, *supra* note 10, at 758.

¹⁷⁰ Freshwater, *supra* note 20, at 594.

¹⁷¹ Welch & Kim, *supra* note 38, at 144.

¹⁷² Bauer, *supra* note 10, at 759.

¹⁷³ *Id.* at 759–80.

¹⁷⁴ Bauer, *supra* note 10, at 759.

acceptance standard and instead implemented a “blind eye” requirement.¹⁷⁵ *Zheng v. Ashcroft*, decided by the Ninth Circuit took a broad reading of the meaning of “consent or acquiescence.”¹⁷⁶ As a result, the case became one of the first federal appeals cases to reject the willful acceptance test previously endorsed by the BIA and Attorney General.¹⁷⁷ The claimant in *Zheng* was a Chinese teenager smuggled into the US by the “snakeheads,” a powerful organization in China who use torture, including dismembering individuals who fail to pay their debts.¹⁷⁸ He alleged that if returned to China he would face torture from the snakeheads because of his cooperation with and aid to the American police.¹⁷⁹ *Zheng* further alleged that the Chinese government would not adequately protect him from the snakeheads.¹⁸⁰ In granting *Zheng* relief under the Convention, the court found the willful acceptance requirement adopted in *In re S-V-* was too restrictive.¹⁸¹

The court found the BIA’s interpretation requiring “willful acceptance” was contrary to the legislative intent of the Convention, which only requires awareness and not actual knowledge of torture.¹⁸² Instead, the court concluded that Congress, by ratifying the Convention, intended to afford protection to those facing torture by non-state actors when the state governments are unwilling or unable to provide protection themselves.¹⁸³ The Ninth Circuit subsequently remanded the case to the BIA to determine if acquiescence could be proved using the willful blindness test instead.¹⁸⁴ Many other circuits have since adopted a “willful blindness” standard, analyzing whether public officials “turn a blind eye” to torture when determining whether the acquiescence requirement of a refoulement claim is met.¹⁸⁵

Additionally, the First Circuit in *Perez-Trujillo v. Garland* denied protection to a claimant alleging that MS-13 gang members in El Salvador

¹⁷⁵ Vining, *supra* note 127, at 352.

¹⁷⁶ Fanesi, *supra* note 75, at 321–22.

¹⁷⁷ *Id.*

¹⁷⁸ Vining, *supra* note 127, at 352.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 353.

¹⁸⁴ Bauer, *supra* note 10, at 763.

¹⁸⁵ *Id.* (The Second, Fourth, and Fifth Circuits have accepted the Ninth Circuit’s approach to the “acquiescence” requirement.); Freshwater, *supra* note 20, at 598.

would beat and kill him if he were to be deported from the US.¹⁸⁶ The claimant alleged that sending him back to El Salvador was essentially a “death sentence” but the court denied him relief because he was unable to prove that the government in El Salvador would acquiesce in this behavior.¹⁸⁷ The court stated that the government in El Salvador had made an effort to combat and reduce gang violence and that even unsuccessful or ineffective efforts do not provide sufficient evidence that a government is acquiescing in the behavior under the Convention.¹⁸⁸

Lastly, the Second Circuit has agreed with the Ninth Circuit regarding the impropriety of applying the “willful acceptance” to Article 3 refolement claims under the Convention. In *Khouzam v. Ashcroft*, the Second Circuit relied on both congressional intent and the actual language of the Convention.¹⁸⁹ The court, in line with the Ninth Circuit’s perspective, ruled that acquiescence to torture only required government officials know of or be willfully blind to a torturous act and subsequently breach their legal duty to prevent such acts.¹⁹⁰

As discussed, various circuit courts have defined and applied acquiescence quite differently when making these determinations under the Convention. This lack of consistency is an urgent problem because claimants across the country are being held to different standards when making their refolement claims.

On June 15, 2020, the Department of Justice and the Department of Homeland Security proposed a regulation that would have ended the circuit split and established a standard for courts to use when determining if an actor would have acquiesced in torture.¹⁹¹ The regulation would have provided a definition of willful blindness:

“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.”¹⁹²

¹⁸⁶ Welch & Kim, *supra* note 38, at 144.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Nessel, *supra* note 79, at 122.

¹⁹⁰ *Id.*

¹⁹¹ Buatte, *supra* note 27, at 726.

¹⁹² *Id.* at 727.

The proposed regulation went beyond what the circuits have held and would have made proving acquiescence a much higher burden for claimants, as they would have had to show a deliberate act by a public official.¹⁹³ The regulation, however, was not adopted, and differing standards continued to be used across the circuits.¹⁹⁴

ii. International Interpretations

Many international human rights courts and UN bodies follow a “due diligence” standard when interpreting “acquiescence” under the Convention. This standard requires states to prevent, investigate, prosecute and punish torture inflicted at the hands of non-state actors.¹⁹⁵ Further, the due diligence standard, in comparison to the willful blindness approach, encompasses situations where officials fail to do all that can be reasonably done to protect victims.¹⁹⁶ This standard provides more protection to claimants than an analysis under the “willful blindness” standard typically used in US courts because of the breadth of situations to which it applies.¹⁹⁷ This standard has widespread acceptance among international courts because they believe it aligns with the goals and text of the Convention.¹⁹⁸

a. Committee Against Torture

In 2007, the Committee released General Comment No. 2 discussing Article 2 of the Convention requiring states to take effective measures to prevent acts of torture.¹⁹⁹ In Comment No. 2, the Committee expressly endorsed the due diligence standard, stating that the failure of state officials to diligently prevent, investigate, punish, and remedy torturous acts satisfies the acquiescence requirement under Article 2 of the Convention.²⁰⁰ The Committee declared that a state acquiesces in torture when it “knows or has reasonable grounds to believe that the torture is occurring and fails to exercise due diligence to intervene to stop, sanction,

¹⁹³ *See id.*

¹⁹⁴ *Id.*

¹⁹⁵ Bauer, *supra* note 10, at 750.

¹⁹⁶ *Id.* at 819.

¹⁹⁷ *See generally id.* at 750.

¹⁹⁸ *Id.* at 802.

¹⁹⁹ *Id.* at 785.

²⁰⁰ *Id.*

and provide remedies to victims.”²⁰¹ Due diligence requires officials to engage in reasonable preventative and remedial measures that are likely to be effective in producing positive results.²⁰² Acquiescence is defined more broadly under international law ensuring that states properly fulfill their obligations under the Convention and protect individuals facing torture.²⁰³

The Committee has since applied the due diligence standard to complaints of torture and breaches of the Convention.²⁰⁴ The Committee applied the due diligence standard in *Njamba and Balikosa v. Sweden* and considered whether the complainants would be subject to sexual violence by both public officials and private citizens in the Democratic Republic of Congo.²⁰⁵ The Committee relied on evidence that the country had an “alarming number of cases of rape and sexual violence throughout the country” and that authorities in Sweden were not taking action to mitigate this issue.²⁰⁶ The Committee held that the government’s failure to exercise due diligence to intervene and mitigate the risk of torture violated the Convention’s non-refoulement obligation under the due diligence standard.²⁰⁷

b. Other International Bodies

Many other international courts and judicial bodies have expressed support for the due diligence standard. The ECtHR, for example, supports the due diligence standard which requires states to take steps to prevent and punish torture by private actors.²⁰⁸ The ECtHR considered *Opuz v. Turkey* where a husband domestically abused and tortured his wife with the state’s alleged knowledge.²⁰⁹ The husband was arrested several times, but authorities repeatedly released him with little to no punishment and failed to protect the wife.²¹⁰

The ECtHR ruled that the state failed to meet the due diligence standard to protect women against violence, constituting acquiescence to

²⁰¹ Welch & Kim, *supra* note 38, at 141.

²⁰² *Id.*

²⁰³ *See generally id.*

²⁰⁴ Bauer, *supra* note 10, at 786.

²⁰⁵ *Id.* at 786–87.

²⁰⁶ *Id.* at 787.

²⁰⁷ Welch & Kim, *supra* note 38, at 141.

²⁰⁸ Bauer, *supra* note 10, at 780.

²⁰⁹ Kidus Meskele, *Interpretation of Article One of the Convention Against Torture in Light of the Practice and Jurisprudence of International Bodies*, 54 BEIJING L. REV. 49, 54 (2014).

²¹⁰ Bauer, *supra* note 10, at 779–80.

the behavior.²¹¹ Although the court held that authorities were not “totally passive” their response was nonetheless “manifestly inadequate” and failed to take reasonable measures to prevent future harm to this woman.²¹² This was a landmark case for the ECtHR in which the court first articulated the obligation of states to prevent abuse and torture in relation to domestic violence and private relationships.²¹³ The court did provide caveat that due diligence doesn’t impose a “disproportionate burden on the authorities.”²¹⁴ However, when they know or should know about violence that places someone in immediate risk, they must do what is “reasonably expected of them to avoid or mitigate that risk.”²¹⁵

Additionally, the Human Rights Committee has addressed the issue of acquiescence in relation to the International Covenant on Civil and Political Rights and taken a stance on the proper standard to be applied. The International Covenant on Civil and Political Rights, similarly to the language of the Convention, requires states to not “extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm.”²¹⁶ In *Ahani v. Canada*, the Human Rights Committee explained how the due diligence standard acknowledges an individual’s “right to be free from torture,” and it specifically referred to this standard in the context of the principle of non-refoulement.²¹⁷ The Human Rights Committee stated that the due diligence standard requires (1) that the state refrain from torture and (2) “[take] steps of due diligence to avoid a threat to an individual of torture from third parties.”²¹⁸

The due diligence standard is widely applied by the Committee, the ECtHR, and the Human Rights Committee and adequately holds state parties to the Convention accountable for those who acquiesce in torture. The US should adopt the due diligence standard, not only to establish a consistent interpretation of the Convention’s refoulement provision, but

²¹¹ Meskele, *supra* note 209, at 54.

²¹² Bauer, *supra* note 10, at 780.

²¹³ Kerstin Schinnerl, Violence Against Women as Torture and Positive State Obligations to Prevent-How Much Due Diligence is Due? (2014) (M.A. thesis, University of Nottingham) (on file with Global Campus of Human Rights) <https://repository.gchumanrights.org/server/api/core/bitstreams/690e0d42-ee4e-4427-99c0-a4c7b528a08f/content> [https://perma.cc/JMA9-L7T9].

²¹⁴ Bauer, *supra* note 10, at 780.

²¹⁵ *Id.*

²¹⁶ Anja Seibert-Fohr, *From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?*, 60 GER. Y.B. INT’L L. 667, 686 (2017).

²¹⁷ *Id.*

²¹⁸ *Id.*

also to remain consistent with international interpretations. By adopting this more lenient standard, the US would be following the intentions of the drafters of the Convention and upholding their obligations under the Convention, thereby protecting a greater number of claimants.

III. CONCLUSION

International law and its standards display the need for a clear and uniform interpretation of the non-refoulement provisions of the Convention applied in US cases. The purpose of Article 3 of the Convention is to protect individuals from “every conceivable type of physical transfer between states,” taking into account individual circumstances of the applicant.²¹⁹ Without a broad reading of this provision, applicants seeking protection under the Convention are at risk of being tortured—in direct violation of the Convention and its goals.

Despite inconsistent rulings throughout the US by both circuits courts and BIA, the US Supreme Court and Congress have failed to step in to provide guidance. Some of the rulings are irreconcilable, taking opposing views on the extent of control a government must have over an individual and what must be shown for an individual to acquiesce in torture. Additionally, by limiting the “public official” definition to countries with a “functioning government,” US courts do not account for quasi-governments or other groups acting with nearly equal power as “established” governments. Under the current definitions provided for the refoulement provision of the Convention, there is lack of protection for those claiming that they would be tortured by gangs, terrorist organizations, or other dangerous groups wielding power in the jurisdiction. There is a need for an overarching standard to apply to all applicants, otherwise decisions are made on a case-by-case basis resulting in unpredictability as to whether someone will be afforded protection.

Although international judicial bodies lack a consistent standard, these courts can provide guidance on the proper standard that the US should adopt and apply in refoulement cases. For example, adhering to the views of the Committee in their ruling of *Elmi v. Australia*, it would be proper for the US to adopt and implement the standard that when an individual is acting in a *de facto* government function, they are considered

²¹⁹ Evan King, *The Effect of the United Nations Convention Against Torture on the Scope of Habeas Review in the Context of International Extradition*, 38 FORDHAM INT'L L.J. 788, 788 (2015).

to be acting in an official capacity.²²⁰ This reading of the *refoulement* provision of the Convention would allow claimants protection in a wider array of situations.

Lastly, regarding “acquiescence,” this Comment suggests that the US adopt a broad view as well, in line with the perspectives of various international bodies such as the Committee Against Torture and the ECtHR. These international bodies use a due diligence standard requiring state parties to exercise due diligence in sanctioning and stopping torture when they have a reasonable belief that it is occurring.²²¹ The US has not considered utilizing a due diligence standard to hold state actors and officials accountable for acts of non-state actors when the state fails to prevent an individual from being tortured. These broad standards are necessary to hold state actors accountable for their failure to protect those at risk of being tortured.

To adhere to the goals of the Convention and reinforce the *jus cogens* norm of prohibiting torture, it is necessary that the US adopt a broad interpretation of the *refoulement* provision. At a time when the number of executive orders targeting immigration continues to rise, it is vital for the US to provide individuals a form of protection from the torture they may likely face when returned to their home country.²²² Failing to prioritize this kind of bodily safety contradicts all of the US’s prior statements about torture being “against our values”—thereby, essentially invalidating the numerous legislative acts passed to implement the Convention and its goals of safety.²²³

²²⁰ David, *supra* note 100, at 776–77.

²²¹ Welch & Kim, *supra* note 38, at 141.

²²² Monica Iyer, “*Prefoulement*” is *Still Refoulement*, OPEN GLOB. RTS., March 3, 2025, <https://www.openglobalrights.org/prefoulement-is-still-refoulement/> [https://perma.cc/73KH-7B9E].

²²³ Linnartz, *supra* note 21, at 1493.