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Non-State Actors "Under Color of Law": Closing a Gap in Protection Under the Convention Against Torture

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ABSTRACT

The world is experiencing a global restructuring that poses a serious threat to international efforts to prevent and protect against torture. The rise of powerful transnational non-state actors such as gangs, drug cartels, militias, and terrorist organizations is challenging states' authority to control and govern torture committed within their territory.

In the United States, those seeking protection against deportation under the Convention Against Torture ("CAT") must establish a likelihood of torture at the instigation of or by consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity. However, what is meant by "other person acting in an official capacity" such that torturous acts by non-state actors fall under U.N. Torture Convention protection remains unclear under U.S. CAT jurisprudence. While many aspects of the CAT have been litigated, clarified, and developed through case law since the United States ratified the CAT, the question of whether and when a non-state actor can be deemed an "other person acting in an official capacity" under the CAT within U.S. jurisprudence lacks scholarship or case law. We make the novel argument that courts and agencies should apply factors employed in civil rights claims (also known as § 1983 claims) to assess whether a non-state actor can act in an official capacity or under color of law. Doing so will help fill a critical gap in U.S. CAT protections.

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Introduction

The prohibition against torture is one of the most universally accepted principles of international law.[1] Yet, the world is experiencing a global restructuring of power that poses a serious threat to international efforts to prevent and protect against torture.[2] The rise of powerful transnational non-state actors such as gangs, drug cartels, militias, and terrorist organizations is challenging states' authority to control and govern their territory.[3] Many of these non-state actors commit torture with alarming impunity. This global power restructuring is testing the ability of U.S. laws to protect those fleeing torture, especially in light of the fact that state actors (as opposed to private or non-state actors) are the primary subject of most international and domestic torture jurisprudence.

In 1984, the General Assembly of the United Nations adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"), with the aim of eradicating torture through "supporting measures" and related protections.[4] Whereas prior international instruments, such as the 1948 Universal Declaration of Human Rights, prohibited torture, the Torture Convention is the only international instrument to provide a universal definition of torture.[5] Among its numerous obligations, a signatory state to the Torture

1. *See* Deborah E. Anker, Law of Asylum in the United States §7:1 (Thomson Reuters ed., 2020); *see also* 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 Law & Pol'y, 533, 549–51 (1998) ("[T]he prohibition against torture is one of the handful of norms of international law that have attained the status of *jus cogens* ("compelling law"), and from which *no derogation is permitted* by any country, regardless of its domestic law . . . . In fact, there is an emerging consensus that this principle has achieved the status of *jus cogens*, as well, so that international law creates a binding obligation with which every country must comply, regardless of its domestic law. This is particularly true when a country seeks to return a person to a nation with a record of egregious human rights violations."); Nils Melzer (Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Hum. Rts. Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 18–19, U.N. Doc. A/HRC/34/54 (Feb. 14, 2017) (explaining that the prohibition against torture "is a core principle of international law").

2. *See* Yakin Ertürk (Special Rapporteur on Violence against Women, Its Causes and Consequences), U.N. Comm'n on Hum. Rts., *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women: Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, ¶¶ 56–73, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

3. *See* Nat'l Sec. Council, *Transnational Organized Crime: A Growing Threat to National and International Security* (July 25, 2011), https://perma.cc/5JMJ-5LW9 ("Transnational organized crime (TOC) poses a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe.").

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1456 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

5. *See* Lene Wendland, Ass'n for the Prevention of Torture, A Handbook on State Obligations under the UN Convention against Torture 7 (Cecilia Jimenez ed., 2002); *see also* Anker, *supra* note 1, § 7:16 (noting that "the prohibition on torture as a norm of international human rights is so established that it predates any formal attempts to define it. International instruments proscribing torture, which preceded the United Nations Convention Against Torture, state the prohibition against torture without defining the term 'torture' . . . ."); Stephen H. Legomsky & Cristina M.

Convention must prevent torture not only in its own territory, but also must prevent acts constituting torture outside its territory by all persons, whether or not they are its nationals.[6]

Moreover, Article 3 of the Torture Convention created a "non-refoulement" obligation, which requires that signatory states not "expel, return . . . or extradite" a person to a country where there are "substantial grounds for believing that he would be in danger of being subjected to torture."[7] Following the United States' signing of the Torture Convention in 1988, and congressional ratification in 1994, the United States implemented the treaty by codifying it in domestic law with the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA").[8] For ease of understanding, this Article will use the term Torture Convention when referring to the international treaty and will use the term "the CAT" when referring to U.S. laws implementing the treaty.

In the United States, noncitizens who fear return to their home country can apply for asylum, withholding of removal, and CAT as forms of protection (also referred to as "relief") from deportation (or "removal").[9] However, for many fearing torture, CAT relief may be an individual's *only* option to remain in the United States. Those fleeing persecution face numerous legal and procedural barriers to asylum, resulting in what many scholars and commentators refer to as the "end of asylum."[10]

To qualify for CAT relief, individuals must demonstrate that they are more likely than not to face torture if returned to the designated country of removal.[11] Under the CAT, the non-refoulement obligation is established if a person faces a likelihood of torture that is "inflicted by, or at the instigation of, or with the consent or acquiescence of, a *public official acting in an official capacity*[12] or *other person acting in an official capacity*."[13] For example, if

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Rodríguez, Immigration and Refugee Law and Policy 1120 (6th ed. 2015) ("[The Torture Convention] is the first worldwide convention targeted specifically at torture and related cruelties").

6. Hans Danelius, *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Audiovisual Libr. Int'l L. (Dec. 10, 1984), https://perma.cc/L6YD-ELX5.

7. Torture Convention, *supra* note 4, at art. 3(1).

8. Omar v. McHugh, 646 F.3d 13, 17 (D.C. Cir. 2011).

9. This Article uses the term "deportation" to refer to expulsion from the United States. Under modern U.S. immigration laws, exclusion and deportation proceedings are now part of "removal" proceedings. 8 U.S.C. § 1229a(a)(1). *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L. J. 1635, 1641 (2010) ("Removal proceedings are the forum for determining whether noncitizens should be removed from the United States, either upon seeking admission (formerly called exclusion hearings) or after admission (formerly called deportation hearings).").

10. Andrew I. Schoenholtz et al., The End of Asylum 2 (2021) (stating that the United States is experiencing an "end of asylum" through "twisting statutory language beyond recognition through adjudicatory rulings, procedural changes, regulations of dubious legality, new fees, and even changes in forms and how they are processed").

11. 8 C.F.R. §§ 1208.17(a), 1208.18(a)(1).

12. The Authors acknowledge that the Ninth Circuit in *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017) held that there is no "acting in an official capacity" or "color of law" requirement for a public official under CAT. For this conclusion, the Ninth Circuit interpreted the plain meaning of the governing regulation and explained that the regulatory language does not require both "public official" and "in an official capacity." *Id.* Thus, the court concluded that there is no requirement that

an individual faces torture by a police officer or other government official for non-lawful purposes in their designated country of removal, the individual must not be returned to that country.[14] Even if the individual faces likely torture from a *private* actor (such as a gang member), the CAT's non-refoulement obligation will still apply as long as the torture is done with the actual knowledge, consent, or acquiescence of a state actor.[15]

However, the meaning of "other person acting in an official capacity" remains unclear under U.S. CAT jurisprudence. To what extent might torturous actions by non-state actors become "state-like" such that the CAT should apply? What if private actors have *de facto* control over certain areas untouchable by state actors?[16] Alternatively, what if non-state actors' authority and presence are so intertwined with state authority that torture is occurring with impunity? Indeed, for the latter scenario, the applicant may establish CAT eligibility by showing a state actor's acquiescence or consent. However, such cases are difficult to prove if the state excuses its inaction using its inability to protect victims from harm perpetrated by private actors. This is particularly true under the current U.S. jurisprudence on government acquiescence, in which some federal courts have found that a mere inability to protect victims is not enough to meet "acquiescence" to the torture.[17]

Therefore, given the difficulty many CAT applicants face in establishing government "acquiescence," this Article suggests a new approach to determine whether non-state actors performing state functions should be per-

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"the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts." *Id.* The BIA in the now-vacated case *Matter of O-F-A-S-*, 27 I. & N. Dec. 709, 713-14 n.4 (BIA 2019) rejected *Barajas-Romero* because they found the Ninth Circuit's reasoning to be inconsistent with congressional intent. On this point, the BIA may well be correct because, as the Senate Report indicates, Congress clearly understood and explained that torture under CAT "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.'" S. Exec. Rep. No. 101-30, at 14 [hereinafter Senate Report]. Indeed, in the civil rights jurisprudence, an official's act must be under color of law to be attributable to state action. *See West v. Atkins*, 487 U.S. 42, 49–50 (1988). However, this Article does not discuss this question. The Authors also wish to point out that the Ninth Circuit's ultimate conclusion may well be correct despite these police officers being off-duty. *See Barajas-Romero*, 846 F.3d at 362–63. In civil rights jurisprudence, "[t]he fact that a police officer is on or off duty, or in or out of uniform is not controlling." *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975). Instead, the focus of the inquiry is on "the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law." *Id.* (internal quotations omitted).

13. 8 C.F.R. § 1208.18(a)(1).

14. *Id.*

15. *Id.* §§ 1208.18(a)(1), (a)(7).

16. Comm. Against Torture, Decision, Elmi v. Australia, Commc'n No. 120/1998, ¶ 6.5, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999) (finding that certain factions in Somalia operated as *de facto* state actors for purposes of CAT applicability due to their functioning as quasi-governmental organizations).

17. Martinez Manzanares v. Barr, 925 F.3d 222, 229 (5th Cir. 2019) (explaining that "a government's inability to protect its citizens does not amount to acquiescence") (quoting Qorane v. Barr, 919 F.3d 904, 911 (5th Cir. 2019)); Zaldana Menijar v. Lynch, 812 F.3d 491, 502 (6th Cir. 2015) ("That the Salvadoran government is unable to control the gangs does not constitute acquiescence.").

ceived as "other person[s] acting in an official capacity." This additional approach can serve as a valuable safety net, as immigration agencies and federal courts often find, in denying CAT applications, that foreign governments' limited (albeit not meaningful) efforts against private torturers fail to rise to the level of government "acquiescence."[18] This Article's suggested approach would require immigration agencies and federal courts to consider not only government "acquiescence" but also the separate question of whether the status of private torturers and their relationship with government officials in furtherance of committing torture can be construed under color of law.[19]

While many aspects of the CAT have been litigated, clarified, and developed through case law since U.S. ratification,[20] the question of whether and when a non-state actor can be deemed an "other person acting in an official capacity" is less well-developed.[21] There are only five cases on this issue from federal courts in the context of defensive CAT claims against deportation, none of which provide guidance on what factors courts and the immigration agency should consider in assessing whether a non-state actor can be considered an "other person acting in an official capacity."[22] Nor has the

18. *E.g.*, Perez-Trujillo v. Garland, 3 F.4th 10, 21 (1st Cir. 2021) (denying acquiescence because "the government of El Salvador has made efforts to crack down on gang violence").

19. Florer v. Congregation Pidyon Shevuyim, N.A., 639 F.3d 916, 924 (9th Cir. 2011) (emphasizing that the color of law question is a "fact-intensive . . . inquiry") (quoting Carr v. Katz, 276 F.3d 550, 554 (9th Cir. 2002)).

20. *E.g.*, Jon Bauer, *Obscured by "Willful Blindness:" States' Preventive Obligations and the Meaning of Acquiescence Under the Convention Against Torture*, 52 Colum. Hum. Rts. L. Rev. 738, 756–65 (2021) (development of acquiescence's meaning through precedents); Oxygene v. Lynch, 813 F.3d 541, 548–49 (4th Cir. 2016) (holding that the requisite mens rea of torture by public officials is specific intent, which is "akin to purport of desire"); Pierre v. U.S. Att'y Gen., 528 F.3d 180, 190 (3d Cir. 2008) (en banc) (holding the same).

21. The Authors are aware of one article proposing to adopt the public function test of civil rights jurisprudence for the U.S. CAT. *See* Samuel David, *A Foul Immigration Policy: U.S. Misinterpretation of the Nonrefoulement Obligation Under the Convention Against Torture*, 19 N.Y. L. Sch. J. Hum. Rts. 769, 801–04 (2003). While David proposed to apply the color of law test in a similar way as that proposed in this Article, the arguments are distinguishable for two reasons. First, while David's article focused on the Senate's adoption of color of law as the basis to apply the public function test, this Article also relies on the Department of Justice's position to explicitly adopt the civil rights definition of color of law for CAT. *See* Matter of O-F-A-S-, 28 I. & N. Dec. 35 (A.G. 2020). This adoption is critical for legal analysis. The Executive's CAT jurisprudence is entitled to deference. *See* Pierre v. Gonzales, 502 F.3d 109, 116 (2d Cir. 2007). Such deference is more significant when the Executive's understanding is in line with congressional intent. *Id.* As explained in this Part, the explicit adoption of the civil rights jurisprudence for CAT is unquestionably reasonable when the former Attorney General relied on the Supreme Court's civil rights precedent, which involved the question of whether a private physician's conduct was attributable to state action, as the basis for the same definition of "color of law" for "official capacity" under CAT. Second, David's article does not discuss how the entanglement test of the civil rights jurisprudence can be applied to CAT cases. As discussed in more detail below, this Article, again, emphasizes that the entanglement test can serve as an important safety net for CAT applications because agencies and courts applying the entanglement framework proposed here cannot simply rely on a foreign government's limited (and often woefully inadequate) efforts to address the private actors' torture, as courts and agencies often do when analyzing the question of government acquiescence.

22. *See, e.g.*, Hernandez-Hernandez v. Barr, 789 F. App'x 898, 902 (2d Cir. 2019) (unpublished); Gomez-Beleno v. Mukasey, 291 Fed. App'x 411, 414 (2d Cir. 2008) (unpublished); Saraj v. Gonzales,

highest immigration adjudicating agency—the Board of Immigration Appeals ("BIA")—addressed this issue.[23] Former Attorney General William Barr clarified the meaning of "acting in an official capacity" by applying the "color of law" definition from civil rights.[24] In rejecting the BIA's exclusion of corrupt or rogue officers' actions from the scope of actions under "color of law," Barr interpreted "color of law" to align with the civil rights jurisprudence.[25] This interpretation had already found expression by the Senate, former Attorney General John Ashcroft, and some federal courts.[26] But Barr's approach was limited to the general meaning of color of law, and did not address when non-state actions could be perceived as under color of law.[27]

The United Nations Committee Against Torture, on the other hand, has addressed this issue. In interpreting the Torture Convention, the Committee noted that a non-state actor *de facto* functioning like a state actor can be considered "a person acting in an official capacity" in certain circumstances.[28] Without giving a precise definition, the Committee loosely described "*de facto*" to cover non-state actors who "exercise certain prerogatives that are comparable to those normally exercised by legitimate governments."[29] Hence, the remaining question is what factors courts and agencies should adopt to determine when non-state actors should be considered officials under color of law under the CAT.

This Article identifies a major chasm in U.S. CAT jurisprudence that allows individuals to be deported back to countries where they face likely torture. This Article argues that resolving failures in current CAT acquies-

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203 F. App'x 99, 10 (9th Cir. 2006) (unpublished). *But see* D-Muhumed v. U.S. Atty. Gen., 388 F.3d 814, 820 (11th Cir. 2004); Qorane v. Barr, 919 F.3d 904, 909 (5th Cir. 2019).

23. Matter of O-F-A-S-, 28 I. & N. Dec. at 35 (A.G. 2020) (addressing only the question of when public officials are acting under color of law).

24. *Id.*

25. *Id.*

26. Senate Report, *supra* note 12, at 14 ("[The CAT 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.'"); Matter of Y-L-, A-G-, & R-S-R-, 23 I&N Dec. 270, 285 (A.G. 2002) ("The scope of the Convention is confined to torture that is inflicted under color of law. It extends to neither wholly private acts nor acts inflicted or approved in other than 'an official capacity.'") (citing Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001)).

27. Matter of O-F-A-S-, 28 I. & N. Dec. 35 (A.G. 2020).

28. *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5

29. The question of non-state action under color of law is certainly not a foreclosed issue: Congress meant to adopt terms of the Torture Convention definition subject to any explicit "reservations, understandings, declarations, and provisos" contained in the Senate resolution of the ratification. *Id.* ¶ 6.5. *See also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242(b), 112, Stat. 2681-822 (codified at 8 U.S.C. § 1231); FARRA § 2242(f)(2) ("SAME TERMS AS IN THE CONVENTION.—Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention"). And the regulation governing CAT allows non-public officials to be under color of law. FARRA § 2242(f)(2) ("the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States resolution of ratification of the Convention").

cence jurisprudence addresses only half of the chasm. Bridging the other half requires determining when non-state actors are acting *state-like* such that they should fall within the separate CAT provision of "other person acting in an official capacity." With this clarification, agencies and courts will not be able to readily deport CAT applicants who would likely be tortured by private torturers.[30]

This Article makes the novel argument that courts and agencies should apply factors employed in civil rights claims (also known as § 1983 claims) to assess whether a non-state actor can act "under color of law."[31] When the Senate ratified the Torture Convention, it defined the meaning of "acting in an official capacity" as "under color of law."[32] In civil rights jurisprudence, the color of law inquiry is critical to assessing whether a public official or other person can be held accountable because their action was attributable to the state.[33] Former Attorney General Barr in *Matter of O-F-A-S-* explained that "color of law" means an "exercise [of] power 'possessed by virtue of . . . law and made possible only because clothed with the authority of . . . law.'"[34] Importantly, Barr relies on "precedents under 42 U.S.C. § 1983" to assess whether the torturer's action was or would be "under color of law" under the CAT.[35] Even though this definition is in the context of civil rights actions, federal courts and immigration agencies have applied it for the CAT.[36]

In the context of civil rights claims, courts employ two tests to determine whether a private person or entity's action can be perceived under color of law: the entanglement test and the public function test.[37] Federal

30. *Cf.* Perez-Trujillo v. Garland, 3 F.4th 10, 19–21 (1st Cir. 2021) (denying the petitioner's CAT application because of public official acquiescence, notwithstanding the court's agreement that he "would suffer harm sufficiently severe to constitute torture [by gangs] if he were to return to El Salvador").

31. 8 C.F.R. § 1208.18 ("Torture is defined as any act . . . when [it] is inflicted by . . . other person[s] acting in an official capacity.").

32. Senate Report, *supra* note 26, at 14. ("[The CAT] 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.'").

33. *See* Monroe v. Pape, 365 U.S. 167, 184 (1961) (defining an "action taken under color of state law" as a "[m]isuse of power, possessed by virtue of state law, and made possible only because the wrongdoer is clothed with the authority of state law"). Thus, as an example, an officer's personal "pursuits are plainly excluded." *Screws v. United States*, 325 U.S. 91, 111 (1945). This color of law inquiry is essential for civil rights claims because the governing statute only permits lawsuits against persons "under color of any statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983.

34. West v. Atkins, 487 U.S. 42, 47 (1998).

35. O-F-A-S-, 28 I. & N. Dec. at 37.

36. Garcia v. Holder, 756 F.3d 885, 891 (5th Cir. 2014) (holding that an act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law) (quoting United States v. Causey, 185 F.3d 407, 442 (5th Cir. 1999)); Ramirez-Peyro v. Holder, 574 F.3d 893, 900 (8th Cir. 2009) (citing West v. Atkins, 487 U.S. 42, 49 (1988)); Matter of Y-L-, A-G-, & R-S-R-, 23 I. & N. Dec. 270, 285 (A.G. 2002) ("The scope of the Convention is confined to torture that is inflicted under color of law. It extends to neither wholly private acts nor acts inflicted or approved in other than 'an official capacity.'") (citing Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001)).

37. Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 502, 508 (1985).

courts and government agencies can and should apply these tests developed in the context of civil rights claims to determine whether a private actor should be perceived under color of law.

Part I provides a brief overview of the rise of transnational criminal and terrorist organizations that commit torture with impunity, before turning to the various treaty-based forms of protection available to those fleeing persecution or torture. Part I then concludes by discussing the growing importance of CAT protections in light of systematic efforts to restrict access to asylum and withholding of removal protections. Part II discusses the grave gap created in U.S. CAT jurisprudence as it relates to torture perpetrated by non-state actors at the "consent or acquiescence" of state actors. Part III then reviews the treatment of the *de facto* state actor issue under international and U.S. torture jurisprudence. Following an overview of the meaning of "other person acting in an official capacity" or "color of law" in U.S. torture jurisprudence, Part IV proposes a novel framework applying § 1983 civil rights jurisprudence to analyze torture perpetrated by non-state actors who perform state-like functions. Part IV then examines the two tests in the context of § 1983 civil rights claims and applies these tests to several CAT cases denied by federal courts, highlighting how § 1983 could help fill a critical gap in U.S. CAT protections, and thereby prevent the refoulement of individuals facing likely torture.

I. The Rise in Transnational Criminal and Terrorist Organizations and the Role of The CAT as a "Powerful Tool" in Protecting Against Torture

The rise in transnational criminal organizations, including international gangs and terrorist organizations, has led to millions of individuals fleeing their home countries in search of refuge elsewhere. Under international and U.S. domestic law, those present in the United States fleeing serious harm may be eligible for three treaty-based forms of protection: asylum, withholding of removal, or protection under the CAT.[38] While the requirements for each overlap to some extent, they vary significantly in terms of the burden of proof required to establish one's eligibility and the benefits that flow from a grant of protection. Asylum and withholding of removal protections are often unavailable for those seeking protection in the United States—either because they do not fit within the narrow definition of a "refugee" for purposes of asylum and withholding of removal or because they fall within one of the ever-expanding barriers to eligibility. As a result,

38. *See* Anker, *supra* note 1, at 4.

for many fleeing torture, protection under the CAT may be their only option.[39]

A. A Global Restructuring: The Rise in Transnational Criminal and Terrorist Organizations

In July 2017, UN Deputy Secretary-General Amina Mohammed stated that the rise of transnational criminal and terrorist organizations is a "growing threat[]" to global stability.[40] She explained that "[v]igilante justice has replaced State authority" where criminal and terrorist organizations are now "competing to buy ungoverned spaces that are growing in size as Governments retreat."[41] Whereas criminal and terrorist organizations previously operated regionally, they now operate transnationally, forming international alliances and networks as they exploit countries with weak or failing governance,[42] and frequently forge relationships with corrupt government officials, further destabilizing fragile states.[43] These non-state actors arise in "power vacuums," resulting in their authority rivaling or even taking the place of state authority.[44] Indeed, many transnational criminal and terrorist organizations take on a quasi-government role, assuming power and control traditionally held by state actors and often providing

39. *See* Legomsky & Rodríguez, *supra* note 5, at 1121 (noting that the CAT's non-refoulement provision "promises hope for some people who for various reasons are unable to procure nonrefoulement under the 1951 Convention").

40. Press Release, U.N. Deputy Secretary-General, Good Governance Key to Addressing Causes of Instability in Sahel, Deputy Secretary-General Tells Joint Meeting of Major Organs, U.N. Press Release DSG/SM/1067-ECOSOC/6850-PBC/123 (June 28, 2017).

41. *Id.*; *see also* Etienne Rosas, *Fulfilling Clandestiny: Reframing the* "*Crime-Terror Nexus*" *by Exploring Conditions of Insurgent and Criminal Organizations' Origins, Incentives, and Strategic Pivots*, at 15 (Rand Corporation 2020), https://www.rand.org/pubs/rgs_dissertations/RGSDA506-1.html. [https://perma.cc/Y78C-4YP4] (explaining that violent non-state actors "tend to naturally converge, or indeed are born, in environments of weak or faulty governance and of high marginalization— slums, prisons, war zones—where influence is readily attainable through ideological mobilization or criminal ventures, both of which capitalize on failures of governance"); Nat'l Sec. Council, *Strategy to Combat Transnational Organized Crime* (July, 25, 2011) [hereinafter *NSC Strategies for TOCs*], https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat. [https://perma.cc/86CH-FWM4]; Ramon Blecua & Douglas A. Ollivant, *A More Crowded Stage: America and the Emergence of Non-State Actors in the Middle East*, 17 Horizons: J. Int'l Rels. & Sustainable Dev. (Special Elections Issue) 94, 100 (2020) ("Non-state actors are claiming the space left vacant in the political, security, and social arenas, creating parallel structures and organizations that can claim more effectiveness than the state.").

42. *See* U.N. High Comm'r for Refugees, *State of the World's Refugees: A Humanitarian Agenda*, ch. 1, U.N. Doc ST/HCR(058)/S7/1997-98 (1997) (describing the "failed state syndrome" wherein "[o]n the one hand, they are symptomatic of a state's inability (or unwillingness) to protect its citizens . . . [and] [o]n the other hand, by exploiting these conditions, armed groups, warlords and corrupt government officials deprive the state of revenuer and legitimacy, thereby reinforcing its disintegration").

43. *See NSC Strategies for TOCs, supra* note 41. *See* Press Release, U.N. Deputy Secretary-General, *supra* note 40 ("Today, violent extremism and terrorism are global phenomena that do not recognize borders.").

44. *See* Etienne Rosas, *supra* note 41. *See NSC Strategies for TOCs, supra* note 41 ("[T]errorist and criminal groups use failed and fragile states as launching pads, since they can recruit more easily from suffering populations that lack supportive communities and reliable institutions.") (internal citations omitted); Blecua & Ollivant, *supra* note 41, at 26.

state-like services such as schools, medical clinics, utilities, and security.[45] Once these non-state actors establish a foothold, it becomes that much more difficult for states to regain legitimacy and control.[46] A state need not necessarily be failing for a non-state actor to gain this foothold. Rather, "[i]t only takes the state to be dysfunctional in one area—or to underserve one vulnerable segment of the population,"[47] the result of which is a "hybrid" state, wherein no one actor has a monopoly over force and security.[48]

Hezbollah in Lebanon, the Taliban in Afghanistan (prior to obtaining full control in August 2021), and armed gangs in Central America are some of the many examples of the threats posed by these international non-state actors. Hezbollah, a Shiite Muslim political party and militant group, operates what many refer to as a "state within a state."[49] Headquartered in Lebanon, the group has, in many respects, displaced the Lebanese government with both its military might (surpassing that of the Lebanese government) and its role as the social-welfare provider for a significant number of Lebanese people.[50] Hezbollah manages a large network of social services throughout Lebanon such as medical facilities, schools, youth programs, and infrastructure.[51] Hezbollah also has its own military presence, including military forces that work alongside the Lebanese government to patrol Lebanon's borders.[52] Hezbollah maintains control of Lebanon's Shiite-majority areas (including parts of Beirut, southern Lebanon, and the eastern

45. Blecua & Ollivant, *supra* note 41, at 109; *see also* Lindsey Kennedy & Nathan Paul Southern, *The Pandemic is Putting Gangsters in Power*, Foreign Pol'y (Feb. 15, 2021), https://foreignpolicy.com/2021/02/15/the-pandemic-is-putting-gangsters-in-power/# [https://perma.cc/D7YT-MQ34]; Ivan Brisco & David Keseberg, *Only Connect: The Survival and Spread of Organized Crime in Latin America*, 8 Prism 1 114, 116 (2019) (noting that "[a]side from the insecurity and violence they generate, armed criminal groups exert demonstrable political, social, and even electoral influence over certain circumscribed territories, both rural and urban").

46. *See* José Miguel Cruz & Brian Fonseca, *How Transnational Crime is Mutating in the Age of COVID-19 in Latin America*, Ams. Q. (Jan. 26, 2021), https://americasquarterly.org/article/the-other-mutating-virus-the-pandemic-and-organized-crime/ [https://perma.cc/9AY6-R9W7]; *see also* Brisco & Keseberg, *supra* note 45, at 119 ("[A] pronounced shift towards criminal rackets operating within clearly defined territorial limits, and the failure or inability of state authorities to provide basic services, have provided criminal groups with opportunities to shore up a social support base, and fertile ground to undermine, contest, and to a certain degree, erode state authority and legitimacy.").

47. Kennedy & Southern, *supra* note 45.

48. Blecua & Ollivant, *supra* note 41, at 109

49. Kali Robinson, *What Is Hezbollah?*, Council on Foreign Rels. (Sep. 1, 2020), https://www.cfr.org/backgrounder/what-hezbollah [https://perma.cc/B7VY-ZVVQ]; *see also* Daniel Byman & Bilal Y. Saab, *Hezbollah In a Time of Transition*, Ctr. for Middle East Pol'y at Brookings 1, 1 (Nov. 17, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Hezbollah-in-a-Time-of-Transition.pdf [https://perma.cc/6KMC-RZ24].

50. Bryan R. Early, "*Larger than a Party, yet Smaller than a State*"*: Locating Hezbollah's Place within Lebanon's State and Society*, 168 World Affs. 115, 121 (2006), https://www.jstor.org/stable/20672740?refreqid=excelsior%3Ad3be6a1fdebc20b789fa4a0c67cb6baa [https://perma.cc/NPX2-582L].

51. *See* Robinson, *supra* note 49. *See also* Early, *supra* note 50 (explaining that Hezbollah "is Lebanon's largest non-state provider of healthcare and social services and operates schools of such high quality that even non-Muslims send their children to them").

52. *See* Byman & Saab, *supra* note 49.

Bekaa Valley region) but its operations continue to expand across borders into parts of Africa, the Americas, and Asia.[53] Designated as a terrorist group by the United States and several other countries, Hezbollah has a history of carrying out global terrorist attacks with impunity, including car bombings, kidnappings, and other deadly attacks.[54]

Similarly, before the fall of Afghanistan to the Taliban in August 2021, the Taliban had taken control of or had "significant influence" over many regions throughout the country.[55] In the early 2000s, the absence of local infrastructure, security, and law enforcement provided breeding grounds for the Taliban to expand their territorial control. The Taliban usurped government authority district by district, establishing its own laws under Sharia law, its own judicial system with Taliban courts, and its own prisons.[56] They levied taxes (*ushr* or harvest taxes) on citizens[57] and ran schools and hospitals.[58] As a quasi-government actor, the Taliban also engaged in power-sharing negotiations with the Afghan government and international actors.[59] Additionally, their operations extended beyond Afghanistan's borders into Pakistan. To maintain and expand control, the Taliban used (and continues to use) strategies of repression and violence, including torture.[60]

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53. *See* Robinson, *supra* note 49.

54. *Id.*; *Lebanon: Ensure Justice for Hezbollah Critic's Murder,* Hum. Rts. Watch (Feb. 4, 2021), https://www.hrw.org/news/2021/02/04/lebanon-ensure-justice-hezbollah-critics-murder [https://perma.cc/48ZN-EUXP].

55. *See* "*You Have No Right to Complain*" *Education, Social Restrictions, and Justice in Taliban-Held Afghanistan,* Hum. Rts. Watch (June 30, 2020), https://www.hrw.org/report/2020/06/30/you-have-no-right-complain/education-social-restrictions-and-justice-taliban-held [https://perma.cc/FDY3-9H8K] (describing how residents face parallel systems of law, Afghan government laws and Taliban-imposed regulations, and how in districts controlled by the Taliban, the Afghan government funds many of the social services but Taliban leaders run these services and impose their own operating regulations); *see also* Eric Schmitt, *U.S. Military Official Says a* '*Complete Taliban Takeover*" *is Possible in Afghanistan*, N.Y. Times (July 21, 2021), https://www.nytimes.com/2021/07/21/us/politics/afghanistan-taliban.html [https://perma.cc/DZ92-4VBV] ("The Taliban have taken control of more than 210 of Afghanistan's roughly 420 districts in recent months, General Milley told reporters at a Pentagon news conference. They are also pressuring half of the country's 34 provincial centers and are aiming to isolate Kabul and other major cities, he said."); *see also* Lindsay Maizland, *The Taliban in Afghanistan*, Council on Foreign Rels. (Mar. 15, 2021), https://www.cfr.org/backgrounder/taliban-afghanistan [https://perma.cc/YFT3-W5SW] (noting how the Taliban is the strongest it has ever been than at any point since 2001); *see also* Gilles Dorronsoro, *The Taliban's Winning Strategy in* Afghanistan, Carnegie Endowment For Int'l Peace 1, 17 (June 29, 2009) https://carnegieendowment.org/files/taliban_winning_strategy.pdf [https://perma.cc/AS8R-V46K] (explaining that "[o]ne of the major factors behind the success of the insurgency is the absence of administration at a district level (*uluswali*) and the acceleration of political fragmentation in the past few years").

56. *See* Dorronsoro, *supra* note 55, at 19–26.

57. *Id.* at 26 (reporting that taxes are a means for the Taliban to build control).

58. *Taliban Territory: Life in Afghanistan Under the Militants*, BBC News (June 8, 2017), https://www.bbc.com/news/world-asia-40171379 [https://perma.cc/8DGZ-C93T].

59. Shanthie Mariet D'Souza, *Taliban*, 3 J. of Asian Sec. & Int'l Affs. 20, 34 (April 2016), https://www.jstor.org/stable/pdf/48602132.pdf?refreqid=excelsior%3A8e074ee71c14a74792ca8574e246db27 [https://perma.cc/BDS6-DMML].

60. Adam Nossiter, "*I Wake Up and Scream*"*: Secret Taliban Prisons Terrorize Thousands*, N.Y. Times (Feb. 27, 2021), https://www.nytimes.com/2021/02/27/world/asia/afghanistan-taliban-prison.html [https://perma.cc/7YWH-AFNJ].

Amnesty International reported that violence in areas under Taliban control occurred with impunity, including violent punishment for those deemed in violation of the group's version of Sharia law.[61]

Finally, in the Northern Triangle of Central America, including El Salvador, Honduras, and Guatemala, international gangs such as the Mara Salvatrucha ("MS-13") and the 18th Street gang ("Barrio 18") control significant swaths of territory, either displacing state authority or working in collusion with corrupt state actors to control millions of residents through violence and terror.[62] Both MS-13 and Barrio 18 initially emerged as "small-time" rival street gangs in Los Angeles, California, composed of disenfranchised youth who had fled Central America as refugees during civil wars that ravaged their home countries.[63] For example, during El Salvador's civil war, also referred to as the "dirty war," the U.S.-backed government of El Salvador notoriously committed mass human rights violations against its citizens.[64] Many of the youth who fled this violence later joined MS-13 or Barrio 18 in the United States, and were subsequently deported back to Central America. They returned to unstable countries with weak or non-existent infrastructure and governance, which provided fertile grounds for the gangs to expand their territorial reach, transforming these gangs from small-time street gangs into sophisticated state-like entities.[65] Today, MS-13 has operations that span from El Salvador, across Central America and Mexico, to Los Angeles and the Washing-

61. *Amnesty International Report 2020/21: The State of the World's Human Rights* 58–61 (2021), https://www.amnesty.org/en/countries/asia-and-the-pacific/afghanistan/report-afghanistan/ [https://perma.cc/LW7Y-PZ5T].

62. *See* Azam Ahmed, *Inside Gang Territory in Honduras: 'Either They Kill Us or We Kill Them'*, N.Y. Times (May 13, 2019), https://www.nytimes.com/interactive/2019/05/04/world/americas/honduras-gang-violence.html [https://perma.cc/XW9D-9UJQ] (observing generally that in the Northern Triangle countries, "governments hollowed out by corruption are either incapable or unwilling to apply the rule of law, enabling criminal networks to dictate the lives of millions"); *see also* Alex J. Rouhandeh, *Central American Refugees Fleeing Gang-run China-style Surveillance State*, Newsweek (Mar. 24, 2021), https://www.newsweek.com/central-american-refugees-fleeing-gang-run-china-style-surveillance-state-1578377 [https://perma.cc/4KNZ-KX7M] ("Police forces across the region are understaffed, underfinanced and undertrained. Many are corrupt, with some officers working with the gangs to augment their low wages."); *see also* Victoria Dittmar, *MS13 Infiltrates Local Government in El Salvador Once Again*, Insight Crime (Dec. 18, 2020), https://insightcrime.org/news/analysis/ms13-has-infiltrated-local-government-in-el-salvador-once-again/ [https://perma.cc/RX35-E8YB] ("The MS13 has near total dominance of San Miguel's capital and neighboring areas," and "[i]n some cases, municipal authorities allegedly pay a quota to the gangs in order to carry out infrastructure projects in these neighborhoods[.]").

63. Daniel Denvir, *Deporting People Made Central America's Gangs. More Deportation Won't Help*, Wash. Post (June 20, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/07/20/deporting-people-made-central-americas-gangs-more-deportation-wont-help/ [https://perma.cc/FXK4-NLY6].

64. *Id.*

65. *Id.*; *see* Dree K. Collopy, *The Gang Phenomenon and Persecution on Account of Political Opinion in Central America—Part I*, 17–20 Immigr. Briefings 1 (2017) (describing the variety of factors that have allowed these formerly small "street gangs" to evolve into transnational organizations, including weak or failing security and policing systems, limited protection by the State of crime victims, and weak or non-existing political and justice systems).

ton D.C. area.[66] Similarly, Barrio-18 operates throughout Central America up into Canada, with an even larger presence in the United States than the MS-13 gang.[67] Areas of the Northern Triangle under gang control are far from "lawless" or "ungoverned"—rather, much like state actors, these gangs have developed into "highly sophisticated political organizations" with a "unified code of conduct," violations of which are met with unrelenting violence, including assassinations, torture, and kidnappings.[68] As one human rights activist commented, those living in gang territory live within "authoritarian structures," wherein the gangs consider themselves as "an alternate state."[69] Indeed, gangs have taken on quasi-government roles throughout the Northern Triangle, levying taxes or *renta*, controlling their own borders, operating their own policing units, and, in some instances, providing protection from corrupt police.[70]

Gangs also establish and maintain control through collusion with corrupt state actors, including the police, members of the judiciary, and local officials.[71] In fact, gangs are so embedded in local and national government that an estimated forty to seventy percent of government officials in the Northern Triangle are on the payroll of a transnational gang, including MS-13 and Barrio 18.[72] In many instances, government officials and gang members are so entangled that residents are unable to discern the two, further exacerbating the culture of impunity that pervades the region.[73] Given the extreme violence residents in the Northern Triangle face, many have few options other than to flee to the United States in search of refuge. Since 2014, more than two million people have left El Salvador, Guatemala, and Honduras for the United States, many fleeing endemic violence.[74] However, once in the United States, the options available to those fleeing from non-state actors like Hezbollah, the Taliban, and MS-13 and Barrio 18 remain limited at best.

66. Denvir, *supra* note 63.

67. *See* Dittmar, *supra* note 62.

68. Collopy, *supra* note 65, at 6 (explaining that "'[t]o dominate a physical territory requires a sophisticated organizational structure, agreed-upon codes of conduct and methods of communication, and the ability to create and enforce rules against the general populace.' Not only do [Transnational Criminal Organizations] govern geographic areas in the same way that legitimate states do, but also they are motivated to continue such geographic governance and political control in the same way that legitimate political parties are").

69. *Id.* (internal citation omitted).

70. Life Under Gang Rule in El Salvador, Int'l Crisis Grp. (Nov. 26, 2018), https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador [https://perma.cc/C6WG-P3WQ].

71. Collopy, *supra* note 65, at 6.

72. *Id.*

73. *Id.*

74. Amelia Cheatham, *Central America's Turbulent Northern Triangle,* Council on Foreign Rels. (July 1, 2021), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle [https://perma.cc/C8D5-WFEV].

B. CAT Protection is Often the Only Form of Protection Available to Many Individuals Fleeing Torture

1. *Asylum and Withholding of Removal*

Asylum and withholding of removal protection derive from two primary international instruments: the United Nations Convention Relating to the Status of Refugees 1951 ("the Refugee Convention")[75] and the 1967 United Nations Protocol Relating to the Status of Refugees ("the Protocol").[76] Article 33 of the 1951 Refugee Convention includes a non-refoulement obligation, which provides that "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[77] The 1951 Convention is binding on the United States, following its ratification of the Protocol in 1968.[78] The United States then enacted domestic law implementing the Convention and Protocol through the 1980 Refugee Act, which incorporates U.S. international treaty obligations, including the definition of a refugee as well as the non-refoulement obligation.[79]

To qualify for asylum and withholding of removal, an applicant present in the United States must meet the rather narrow definition of a "refugee." A refugee is defined as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[80]

In other words, an applicant must have (1) suffered past persecution or have a well-founded fear of persecution that is (2) on account of one of the five above-mentioned protected grounds and (3) must be unable or unwill-

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75. Convention Relating to the Status of Refugees, Jul. 25, 1951, 189 U.N.T.S. 2545 [hereinafter Refugee Convention].

76. Protocol Relating to the Status of Refugees, Nov. 6, 1967, 19 U.S.T. 6223 [hereinafter Refugee Protocol].

77. Refugee Convention, *supra* note 75, at art. 31.

78. Refugee Protocol, *supra* note 76.

79. ANKER, *supra* note 1, § 1:6; 8 U.S.C. 1231(b)(3)(A) (implementing the non-refoulement obligation of the Refugee Protocol).

80. Immigration and Nationality Act (INA), § 101(a)(42), 8 U.S.C. §1101(a)(42). *See* ANKER, *supra* note 1, § 1:2 ("The U.S. statute tracks [the 1951 Convention's definition of a refugee] and expands upon it by including persons who not only fear future persecution but also are victims or survivors of past persecution for the designated reasons of race, religion, nationality, membership in a particular social group, and political opinion.").

ing to return to her country of nationality because of that past persecution or well-founded fear of future persecution.[81] Courts have interpreted persecution to mean "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[82] This definition includes both physical and psychological harm as well as the threat of severe harm.[83] In considering whether the harm constitutes persecution, courts look to the cumulative effect on the applicant.[84] Moreover, evidence of past persecution gives rise to a presumption of future persecution. The government can rebut this presumption by showing, by a preponderance of the evidence, that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear," or that she can reasonably relocate within her designated country of removal.[85] Finally, as provided in the definition of a refugee, those fleeing generalized harm are ineligible for asylum and withholding of removal. The applicant must establish a "nexus" between the harm suffered or feared and one of the five protected grounds.[86]

Although those seeking asylum must meet this narrow definition of a refugee, the benefits that flow from a grant of asylum are generous.[87] Those granted asylum may remain in the United States indefinitely. They are eligible to work, may request permission to travel abroad, and can petition for certain family members to obtain derivative asylum status.[88] An individual with asylum status may apply to adjust their status to that of a lawful permanent resident no earlier than one year after a grant of asylum, and four years later, they may apply for U.S. citizenship.[89]

However, even those who meet the above-mentioned requirements may not be eligible for asylum. Asylum in the United States is a form of *discretionary* protection, meaning that certain individuals are ineligible for asylum even if they satisfy the requirements.[90] Moreover, individuals who do not apply for asylum within one year of entry into the United States, indi-

81. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1).

82. Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

83. *See, e.g.*, Stanojkova v. Holder, 645 F.3d 943, 947–48 (7th Cir. 2011) (explaining that discrimination or harassment does not rise to the level of "persecution" where "persecution" requires a higher level of severity); Nelson v. INS, 232 F.3d 258, 263–64 (1st Cir. 2000) (noting that an applicant's harm must be sufficiently severe to rise to the level of "persecution").

84. Ahmed v. Keisler, 504 F.3d 1183, 1194 (9th Cir. 2007).

85. 8 C.F.R. §§ 208.13(b)(1)(i)(A), 1208.13(b)(1)(i))A).

86. 8 U.S.C. § 1101(a)(42); INS v. Elias-Zacarias, 502 U.S. 478 (1992).

87. *See* Elizabeth Keyes, *Unconventional Refugees*, 67 Am. U. L. Rev. 89, 139 (2017) (explaining that "[t]he path to the status is . . . constrained by the very specific definition of a 'refugee,' by evidentiary burdens, and by the complexity of the process. The reward for obtaining the status, on the other hand, is excellent, with its path to citizenship within approximately five years of being granted asylum").

88. *See* Anker, *supra* note 1, § 1:7 (describing the benefits that flow from an asylum grant).

89. *Id.*

90. INA § 208(b)(1)(A), 8 U.S.C. § 1158(a)(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum . . . .") (emphasis added); *See generally* Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1, (1987) (exploring the evolution of discretionary asylum jurisprudence).

viduals who have firmly resettled in another country, and individuals who have traveled through a "safe third country" are barred from asylum.[91]

Those ineligible for asylum may apply for "withholding of removal," which is a *mandatory* form of relief from removal, meaning that if the applicant meets the eligibility requirements for withholding of removal and is not otherwise barred, the United States is prohibited under domestic and international law from returning the individual to the designated country of removal.[92] This non-refoulement obligation is based upon the United States' obligations under Article 33 of the Refugee Convention, which prohibits the return of individuals to a country where their "life or freedom would be threatened" on account of a protected ground.[93]

Although asylum and withholding of removal share the same substantive requirements, those seeking withholding of removal have a higher burden of proof. Asylum applicants must show a "well-founded fear" of persecution on account of a protected ground, which courts have interpreted as requiring a "reasonable possibility" of persecution—encompassing a less than fifty percent chance, or even a one-in-ten chance, of being persecuted.[94] Applicants for withholding of removal, on the other hand, must demonstrate that they are "more likely than not" to face persecution, which requires a greater than fifty percent likelihood of persecution.[95] This means that those who are unable to prove a well-founded fear of persecution for purposes of asylum eligibility will necessarily be unable to meet the higher burden of proof required for withholding of removal.

Even if they satisfy this higher burden of proof, those granted withholding of removal receive far fewer benefits: they are protected from removal from the United States, but they are not afforded any legal status. They are permitted to work, but they are unable to petition for family members, they cannot leave the United States without executing their removal order, and there is no pathway to U.S. citizenship.[96] Moreover, should conditions improve in an individual's home country, the U.S. government can revoke withholding of removal and attempt to remove the individual.[97]

A number of bars apply to those seeking asylum and withholding of removal, including bars against "persecutors," individuals convicted of "particularly serious" crimes, those who have committed serious non-political crimes, and individuals who are a danger to society.[98] Over the last

91. *See* KAREN MUSALO ET AL., REFUGEE LAW AND POLICY, A COMPARATIVE AND INTERNATIONAL APPROACH, 821–22 (4th ed. 2011) (describing the various bars and exceptions to asylum eligibility).

92. INA § 241(b)(3;, 8 U.S.C. § 1231(b)(3).

93. *Id.*

94. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

95. *Id.* at 438–41.

96. 8 C.F.R. § 208.16(f). *See* ANKER, *supra* note 1, § 1:7 (noting that those granted withholding of removal have "no status *per se* . . . they are only protected from return to the persecuting country").

97. LEGOMSKY & RODRÍGUEZ, *supra* note 5, at 920 (noting that asylum is "further-reaching than withholding; it results in permission to remain, not just non-return to the country of persecution").

98. INA § 208(a)(2), 241(b)(3); 8 U.S.C. § 1231(b)(3).

several years, federal courts and immigration agencies have applied these bars to a growing class of individuals—including those who have committed relatively minor crimes like filing a false tax return or mail fraud[99]—such that an increasing number of individuals fleeing persecution are barred from eligibility for asylum and withholding of removal.[100]

Scholars and commentators have gone so far as to argue that courts and immigration agencies have "systematically demolished" asylum.[101] Although prior administrations undertook measures to limit access to asylum (whether through increased immigration detention or through policies that criminalized those seeking to enter the United States for protection),[102] the Trump Administration was the most vocal and systematic in its efforts to demolish asylum. The Trump Administration implemented measures such as family separation and zero-tolerance,[103] metering of asylum seekers at the border,[104] asylum bans,[105] the Migrant Protection Protocols (MPP or "Remain in Mexico" policy),[106] as well as a number of adjudicatory rulings that further narrowed the definition of a "refugee" for purposes of gaining asy-

99. *See Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom Is Threatened*, The Immigrant Def. Project & The Harv. Immigr. and Refugee Clinical Program, 3–4 (Fall 2018) (arguing that the U.S. implementation and interpretation of the "particularly serious crime" bar "sweeps much more broadly than originally intended" under international law).

100. *See generally* Evangeline G. Abriel, *The Effect of Criminal Conduct upon Refugee and Asylum Status*, 3 Sw. J. L. & Trade Am. 359 (1996) (explaining that the asylum bars are interpreted broadly to preclude asylum and withholding of removal access to a large number of individuals, many of whom have committed relatively minor crimes); Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. Mich. J. L. & Reform 595 (2012) (arguing that even if an asylum applicant has not triggered a mandatory bar to asylum, the discretionary nature of asylum renders many individuals with criminal convictions ineligible for asylum protection).

101. Andrew I. Schoenholtz et al., The End of Asylum 2 (2021) (stating that the United States is experiencing an "end to asylum" through "twisting statutory language beyond recognition through adjudicatory rulings, procedural changes, regulations of dubious legality, new fees, and even changes in forms and how they are processed").

102. *Id.* at 20–30.

103. *Q&A: Trump Administration's 'Zero-Tolerance' Immigration Policy*, Hum. Rts. Watch (Aug. 16, 2018), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy# [https://perma.cc/PFE4-9YEX]. ("On April 6, 2018, U.S. Attorney General Jeff Sessions announced a new 'zero-tolerance' policy intended to ramp-up criminal prosecution of people caught entering the United States illegally," which led to thousands of children being separated from their parents.).

104. Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 Loy. L. Rev. 121, 130–33 (2020) (describing the "metering" of asylum seekers at U.S. borders, a program that began under the Obama administration and continued into the Trump administration). Metering refers to the Customs and Border Protection practice of processing a limited number of asylum seekers at U.S. ports of entry on any given day, creating lengthy (up to 6-12 months) waitlists for entry into the United States. *Id.* Although the Biden Administration indicated he would end the metering practice, as of August 2021 he had not.

105. *Id.* at 156–60 (describing the various asylum bans issued by the Trump Administration, which sought to bar certain categories of asylum seekers from accessing asylum protections).

106. *Fact Sheet: The "Migrant Protection Protocols"*, American Immgr. Council (Jan. 22, 2021), https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols [https://perma.cc/JAV8-GEH3] (describing the MPP program which mandated upwards of seventy thousand people to wait outside the United States while their asylum applications were processed).

lum.[107] These measures essentially cut off asylum and withholding of removal access to thousands of individuals fleeing violence and related harms in direct contravention of United States domestic and international laws. In fiscal year 2020, asylum denial rates soared to a record high of 71.6 percent, a substantial increase from a denial rate of 54.6 percent during the last year of the Obama Administration.[108] Although asylum denial rates decreased in the next year under President Biden, they remained high with 63 percent of cases denied.[109] Many of the restrictions on asylum access, such as the one-year filing deadline and the statutory bars, existed well before the Trump Administration and continue under the Biden Administration.[110] These various measures have led scholars to argue that the United States is experiencing "the end of asylum."[111] In light of these measures—in particular the broadening of categories of individuals who fall within the bars to asylum and withholding of removal as well as the adjudicatory rulings that constrict the definition of a refugee—relief under the CAT is a "powerful tool," and often the *only* tool, available to those fleeing torture.[112]

2. *The Convention Against Torture: Its Obligations and Requirements*

The Convention Against Torture ("the Torture Convention") is a multinational treaty adopted by the UN General Assembly in 1984 that seeks to prevent and punish all forms of torture.[113] The prohibition against torture has attained *jus cogens* ("compelling law") status, meaning the Torture Convention's prohibition against torture applies to all governments regard-

107. *See* Harris, *supra* note 104, at 160–170 (describing the various administrative decisions that severely curtailed asylum access including, *e.g.*, Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (A-B-I), Matter of A-B-, 28 I. & N. Dec. 199 (A.G. 2021) (A-B- II), which undermined asylum access for those fleeing gender-based violence, and Matter of L-E-A-, 27 I. & N. Dec. 581 (A.G. 2019) (L-E-A-II), which limited asylum protection for those fleeing persecution on account of their membership in a family group). These decisions have since been vacated by Attorney General Garland, *see* Matter of A-B-, 28 I. & N. Dec. 307 (A.G. 2021) and Matter of L-E-A-, 28 I. & N. Dec. 304 (A.G. 2021).

108. *Asylum Denial Rates Continue to Climb*, TRAC Immigr. (Oct. 28 2020), https://trac.syr.edu/immigration/reports/630/ [https://perma.cc/22VX-BW5K].

109. *Asylum Denial Rates Climb Under Biden*, TRAC Immigr. (Nov. 10, 2021), https://trac.syr.edu/immigration/reports/667/ [https://perma.cc/MB2S-MS7Z].

110. *See generally* Roy Xiao, *Refuge from Time: How the One-Year Filing Deadline Unfairly Frustrates Valid Asylum Claims*, 95 N.C. L. Rev. 523 (2017) (describing the grave impact of the one-year filing deadline on those fleeing persecution); *see also* Abriel, *supra* note 100, at 366–70 (explaining that the asylum bars are interpreted broadly to preclude asylum and withholding of removal access to a large number of individuals, many of whom have committed relatively minor crimes).

111. Andrew I. Schoenholtz et al., The End of Asylum 2 (2021)

112. *See* Rosati, *supra* note 1, at 540 ("Article 3 of the Torture Convention is a powerful tool for immigration advocates, because there are no exceptions to granting relief under the Convention if a person can show that it is more likely than not that he or she would be subjected to torture."); *see also* Bauer, *supra* note 20, at 744; Legomsky & Rodríguez, *supra* note 5, at 1121 ("Article 3.1 promises hope for some people who for various reasons are unable to procedure nonrefoulement under the 1951 Convention. Some are individuals who cannot satisfy the substantive criteria for asylum because the harm they fear is not persecution or because the persecution is not on account of any of the five protected grounds."); Charles Gordon Et Al., Immigration Law and Procedure (2020 rev'd edition).

113. Torture Convention, *supra* note 7.

less of domestic law, and the prohibition is absolute, meaning that no exceptional circumstances may be invoked to justify torture, whether in the name of war or national security.[114] Moreover, the Torture Convention obligates states to take legislative, administrative, judicial, or other measures to prevent, punish, deter, and redress torture, obligations from which states cannot derogate under any circumstances.[115]

The Torture Convention established the UN Committee Against Torture, which is part of the UN Office of High Commissioner for Human Rights.[116] The Committee is comprised of ten independent experts in the field of human rights, and is charged with interpreting the Torture Convention and monitoring implementation and state party compliance.[117] The Committee investigates and hears complaints brought by individuals who allege state failure to comply with the Convention.[118] Committee opinions are not binding precedent in the United States, but they do serve an advisory purpose.[119]

Included within the Torture Convention is the bedrock principle that obliges countries to not return ("*refouler*") any individual to a country where they are likely to face torture:

> 1. No State Party shall expel, return (refouler) or extradite a person to another state where there are *substantial grounds for believing* that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall *take into account all relevant considerations* including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[120]

As made clear by the plain language of the Torture Convention, the treaty is to be broadly interpreted, taking into account "all relevant considerations." In keeping with this broad interpretation, the Committee

114. *See* Rosati, *supra* note 1, at 550; *see also* Robert McCorquodale & Rebecca LaForgia, *Taking off the Blindfolds: Torture by Non-State Actors*, 1 Hum. Rts. L. Rev. 189, 190 (2001) (explaining that the prohibition against torture is now a *jus cogens* rule, meaning a norm that ranks higher in the international hierarchy than even treaty law or customary rules).

115. Torture Convention, *supra* note 7, art. 2; *see* Melzer, *supra* note 1, at ¶19; *see also* Deborah M. Weissman et al., *Understanding Accountability for Torture: The Domestic Enforcement of International Human Rights Treaties*, U.N.C. Sch. L., Hum. Rts. Pol'y Lab, 19 (2016–17), https://law.unc.edu/wp-content/uploads/2019/10/understanding-accountability-for-torture.pdf (noting that the CAT "creates an obligation for member state to do more than just abstain from torturing people, but must actually take steps to *prevent* torture").

116. Torture Convention, *supra* note 7, art. 17.

117. *Id.*

118. Gordon et. al., *supra* note 123, § 33.10[2]

119. Torture Convention, *supra* note 7, art. 30. Article 30 "opt-out" provision enables States, including the United States to declare that they are not bound by Committee decisions. *Id.*

120. Torture Convention, *supra* note 7, art. 3 (emphasis added).

Against Torture clarified in a 2010 decision that "substantial grounds for believing" did not require that the risk of torture be "highly probable," but rather "foreseeable, real, and personal."[121]

The United States ratified the Torture Convention in 1994, and in 1998 the U.S. Congress directed through the FARRA that regulations be promulgated to implement the obligations of the CAT.[122] The non-refoulement language of FARRA comports with the CAT's language and intent, providing that "[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 that person would be in danger of being subjected to torture."[123] The Attorney General promulgated the relevant implementing regulations in 1999, which further clarified this non-refoulement obligation.[124]

Although asylum law is broader than the CAT in a number of respects, unlike the Refugee Convention, the principle of non-refoulement found in the CAT is absolute, meaning that it is non-derogable and there are *no* exceptions.[125] Indeed, the obligation to not return someone to a country where they are likely to face torture is stronger in the context of the Torture Convention than the 1951 Refugee Convention.[126] This means that an individual eligible for relief under the Torture Convention may not be refouled even if that individual is unable to establish that they qualify for refugee status under the Refugee Convention.[127] Moreover, the mandatory nature of the Torture Convention means that an individual may not be returned to a country where they are likely to be subjected to torture—even where they may be otherwise barred from applying for asylum or withholding of removal, and even in the face of national emergencies or conflict.[128] As the availability of asylum and withholding of removal increasingly shrinks, the CAT's promise of heightened protection is critical to those fleeing severe harm who are unable to access other forms of protection.

Although the CAT prevents the removal of an individual who is likely to be subjected to torture, this form of immigration relief offers little else. CAT protection comes in two forms: (1) withholding of removal, and (2) deferral of removal for individuals who face a mandatory bar to withholding

121. Comm. Against Torture, Decision, Njamba & Balikosa v. Sweden, Commc'n No. 322/2007, ¶ 9.6, U.N. Doc. CAT/C/44/D/322/2007 (Jun. 3, 2010) (finding that substantial grounds exist for believing a complainant under the Torture Convention is in danger of being subject to torture if returned to the Democratic Republic of Congo after balancing "*all* of the [relevant] factors . . . and assessing the legal consequences") (emphasis added).

122. FARRA § 2242.

123. FARRA § 2442(a).

124. 8 C.F.R. § 208.16(c)(2).

125. Melzer, *supra* note 1, at ¶ 19.

126. *Id.* at ¶ 38.

127. *Id.*

128. Kees Wouters, International Legal Standards for the Protection from Refoulement 563 (2009).

of removal under CAT.[129] Neither protection confers any official immigration status (although individuals are entitled to work authorization), and there is no right to petition for family members, nor is the protection necessarily permanent.[130] In both instances, the government may return the person to their home country or to a designated "safe third country" should conditions improve such that the individual can no longer meet the requirements of the CAT.[131] Indeed, the CAT is intended as a temporary protection granted for as long as necessary to ensure the person is not returned to a place where they will likely face torture.

To establish a *prima facie* case for protection under the CAT, an applicant must prove through specific objective evidence that she is more likely than not to face "torture" that is "inflicted by or at the instigation of or with the consent or acquiescence of a public officials or other person acting in an official capacity."[132] In assessing whether to grant CAT protection, courts consider all evidence relevant to the possibility of future torture, including, but not limited to:

> (i) Evidence of past torture inflicted upon the applicant;
> (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
> (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
> (iv) Other relevant information regarding conditions in the country of removal.[133]

CAT eligibility is in one respect broader than asylum and withholding of removal in that eligibility for the CAT does not require establishing a "nexus" between the torture feared and a protected ground. This is significant for individuals fleeing severe harm who are unable to establish a "nexus," and are thus barred from asylum and withholding of removal, as

129. The primary difference between withholding and deferral under the CAT is the manner in which the government can seek to later terminate the protection. To terminate withholding of removal under CAT, the U.S. government must undergo a more arduous process through the filing of a motion to reopen the individual's removal proceedings in immigration court and produce new evidence that was previously unavailable. The government also bears the burden, by a preponderance of the evidence, that the individual no longer meets the requirements under the CAT. On the other hand, to terminate deferral of removal, the government need simply move for an expedited *de novo* hearing and produce relevant evidence not previously considered. The burden in this context is on the CAT applicant. 8 C.F.R. §§ 1208.16(c), 1208.17(a).

130. 8 C.F.R. § 274a.12(a)(10).

131. 8 C.F.R. § 208.16(f).

132. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).

133. 8 C.F.R. § 208.16(c)(3)(i-iv).

an individual who is likely to face torture may nonetheless be eligible for CAT relief.[134]

However, CAT protection is narrower than protection under both asylum and withholding of removal in two respects: (1) the harm feared, and (2) who must perpetrate the harm. Under the CAT, "torture" is defined as "any act by which severe pain or suffering, whether physical or mental, intentionally inflicted on a person" for an impermissible purpose (such as to secure a confession or for any discriminatory reason).[135] The infliction of *severe* pain or suffering, whether mental or physical, is critical in meeting this definition and includes the threat of imminent death, severe physical pain or suffering, the administration or application of mind-altering substances, or other procedures that aim to disrupt profoundly the senses or the personality, among other harmful acts.[136] The implementing regulations clarify that torture is an "extreme form of cruel and inhuman treatment," and it excludes "lesser forms of cruel, inhuman or degrading treatment or punishment."[137] "Torture" also excludes pain or suffering arising only from, inherent in, or incidental to lawful sanctions.[138] Further, the CAT requires the torturers' "specific intent" to cause severe pain or suffering.[139] The definition of torture under the CAT is thus more restrictive than the definition of persecution under U.S. asylum and withholding of removal laws,[140] such that an individual may fear severe harm rising to the level of persecution, but not satisfy the CAT's narrower definition of torture. Moreover, the CAT requires a higher risk of harm feared than asylum, with the former requiring, like withholding of removal, that the risk be "more likely than not." As discussed earlier, the "more likely than not" standard requires a higher probability than asylum's "reasonable possibility" standard. This higher burden under U.S. CAT jurisprudence differs from that under international law, which, as noted earlier, requires that the risk be "foreseeable" and "need not be highly probable."[141]

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134. *See generally*, Walter H. Ruehle, *Into the Heart of Darkness: The Nexus Factor in Asylum Cases*, 14-11 Immigr. Briefings 1 (2014) (describing the obstacles asylum applicants face in proving the nexus requirement).

135. Torture Convention, *supra* note 7, art. 1; 8 C.F.R. § 208.18(a)(1).

136. 8 C.F.R. § 208.18(a); *see also* Rosati, *supra* note 1, at 537.

137. 8 C.F.R. § 208.18(a)(2).

138. 8 C.F.R. § 208.18(a)(3).

139. Pierre v. Att'y Gen. of U.S., 528 F.3d 180, 190 (3d Cir. 2008) (en banc); Oxygene v. Lynch, 813 F.3d 541, 548–49 (4th Cir. 2016) (holding that the requisite mens rea of torture by public officials is specific intent, which is "akin to purpose or desire").

140. 8 C.F.R. § 208.18(a). The CAT defines torture as an act that inflicts "severe physical or mental pain or suffering," defined as "prolonged mental harm caused by or resulting from . . . [among other things] the threat that another person will imminently be subjected to death, [or] severe physical pain or suffering." 18 U.S.C.A. § 2340. Persecution under U.S. asylum laws does not necessarily need to rise to this level of severity. Persecution encompasses more than threats to life or freedom but must rise to a level of severity beyond harassment. *See* INS v. Stevic, 467 U.S. 407, 428 (1984); Balazoski v. INS, 932 F.2d 638, 642 (7th Cir. 1991).

141. Njamba & Balikosa v. Sweden, U.N. Doc. CAT/C/44/D/322/2007, at ¶ 9.4.

Most importantly for purposes of this Article, in contrast to asylum and withholding of removal, the torture feared under the CAT must involve a public official.[142] Under U.S. asylum and withholding of removal laws, those fleeing persecution at the hands of private actors may qualify for protection provided they demonstrate that their government is unable or unwilling to protect them from the harm feared.[143] On the other hand, as discussed in detail below, the CAT's narrower requirement that the torture be inflicted at the hands of a public official is often the "biggest obstacle" in securing CAT protection in the United States.[144]

II. The Torture Convention Protects Against Torture Perpetrated by State and Non-State Actors

The language of U.S. regulations implementing CAT confirm that for "torture" to have occurred under the Torture Convention, it must be (1) at the hands of a "public official acting in an official capacity," or (2) "other person acting in an official capacity," or (3) should the torture feared be at the hands of a person not acting in an official capacity ("private actor"), the applicant must show government "acquiescence."[145] In considering the scope of the Torture Convention, the drafters debated whether the Convention should apply only to state actors or whether it should extend to non-state actors.[146] During discussions on the term "public official," a representative from the then Federal Republic of Germany commented as follows:

> The term 'public official' refer[s] not only to persons who, regardless of their legal status, have been assigned public authority by State organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, *actually hold and exercise authority over others and whose authority is comparable to government authority* or—be it only temporarily—ha[ve] *replaced government authority or whose authority has been derived from such persons.*[147]

In light of these discussions, all signatory states agreed to extend the scope of the Torture Convention beyond "public officials" to include "other person acting in an official capacity."[148] Subsequently, the Committee

142. *See* Anker, *supra* note 1, at § 7:28 ("[T]he Torture Convention defines torture to exclude criminal acts committed by private persons 'without any involvement by the state.'").

143. *See* INA § 101(a)(42); Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1061 (9th Cir. 2017) (en banc) (discussing the development of the "unable or unwilling" standard in the context of "private persecution" under U.S. asylum law).

144. *See* Bauer, *supra* note 20, at 747.

145. 8 C.F.R. § 208.18(a)(1).

146. McCorquodale & LaForgia, *supra* note 114, at 196.

147. *Id.* (emphasis added).

148. *Id.*

Against Torture applied the Torture Convention to non-state actors who "exercise certain prerogatives that are comparable to those normally exercised by legitimate governments."[149]

The torture definition under the Convention, however, does not include torturous acts perpetrated by individuals acting in a purely private capacity. The drafters rationalized this limitation because they assumed a state's domestic legal system would operate through its "normal machinery of justice" to prosecute and punish private actors who commit acts of torture.[150] This does not mean that the Torture Convention absolves states from responsibility when it comes to private actors' torturous activities. At least under international law, states who fail to exercise due diligence to prevent and protect against torture "acquiesce" to the torture, and are therefore responsible under the Torture Convention.[151] However, U.S. courts have yet to apply this due diligence test to the government acquiescence standard, which means that individuals fleeing torture at the hands of private actors are left with little, if any, protection under U.S. CAT jurisprudence.

This Part first discusses international and U.S. jurisprudence with respect to government "acquiescence" to torture at the hands of private actors. This Part then discusses a troubling gap in U.S. CAT protections for those who establish that they are likely to face torture as defined under the CAT, but are unable to meet the demanding requirements of government "acquiescence."

A. Government "Acquiescence" Under International Law

Article 1 of the Torture Convention protects against torture perpetrated by non-state actors when it occurs with "the consent or acquiescence of a public official or other person acting in an official capacity."[152] Although this definition requires some state involvement, states that fail to take appropriate measures to prohibit and protect against torture perpetrated by *private actors* are still responsible under the Torture Convention.[153] As the UN Special Rapporteur stated in a 2017 Report, "[f]or the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment to retain its practical relevance . . . it must also provide for practical protection against violations on the part of non-State

149. *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5.

150. 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 119–20 (1988); *see also Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 5.2 ("The assumption underlying [the limiting definition of torture to the acts of public officials or other persons acting in an official capacity] was that, in all other cases, States were under the obligation by customary international law to punish acts of torture by 'non-public officials.'").

151. *See* Bauer, *supra* note 20, at 750.

152. Torture Convention, *supra* note 7, art. 16.

153. *See generally* Anker, *supra* note 1, § 7:28; Bauer, *supra* note 20, at 755.

actors."[154] Similarly, a 1997 Report of the Special Rapporteur on Violence Against Women recognized the importance of state protection against violations by "non-State actors such as paramilitary troops and guerilla organizations" where they are becoming "increasingly . . . important actors in the internal affairs of States."[155]

The Committee Against Torture has clarified that a state "acquiesces" to torture committed by non-state actors when it "know[s] or [has] reasonable grounds to believe" that the torture is occurring *and* it fails to "exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture."[156] Under international law, due diligence requires "a duty to engage in serious and reasonable preventative and remedial measures that are proportional to the problem and likely to be effective in producing results."[157] States must enact affirmative legislative and related measures to prevent torture, whether "inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[158]

State "acquiescence" under international law is defined broadly to ensure states fulfill their non-refoulement obligation.[159] Indeed, where the non-refoulement obligation under the Torture Convention is absolute, states are to "take into account *all relevant considerations*" in determining an individual's eligibility for torture protection.[160]

In *Njamba and Balikosa v. Sweden*, the Committee Against Torture applied the due diligence standard in considering whether the Democratic Republic of Congo ("DRC") "acquiesced" to torture committed by civilian actors. The complainants argued that, if returned to the DRC, they would be subject to sexual violence by both public officials and civilians.[161] In considering the threat posed by the private actors, the Committee explained that a government's failure "to exercise due diligence to intervene to stop, sanction and provide remedies to victims facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity . . . ."[162] After balancing "all of the factors in [the] particular case," including the risk of being subjected to sexual violence throughout the country and the government's failure to mitigate this risk, the Committee found

154. Melzer, *supra* note 1, at 12.

155. Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1997/47 (Feb. 12, 1997).

156. U.N. Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter General Comment No. 2]; Njamba & Balikosa v. Sweden, U.N. Doc. CAT/C/44/D/322/2007, ¶ 9.5 (applying the due diligence standard).

157. Bauer, *supra* note 20, at 776.

158. U.N. Hum. Rts. Comm., General Comment No. 20: Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), ¶ 2, U.N. Doc. CPPR 03/10/1992 (Oct. 3, 1992).

159. Torture Convention, *supra* note 4, art. 3; General Comment No. 2, *supra* note 156, ¶ 18.

160. Torture Convention, *supra* note 4, art. 3 (emphasis added).

161. Comm. Against Torture, Decision, Njamba & Balikosa v. Sweden, Commc'n No. 322/2007, ¶ 9.6, U.N. Doc.CAT/C/44/D/322/2007 (Jun. 3, 2010).

162. *Id.* ¶ 9.5.

that deportation to the DRC would amount to a breach of the Torture Convention's non-refoulement obligation.[163]

Thus, due diligence under international law holds state actors accountable for acts of non-state actors where the state fails to enact legislative and other measures to prevent and protect individuals from torture.[164]

B. Government "Acquiescence" Under U.S. Jurisprudence

U.S. CAT eligibility is met when an applicant can prove that a person acting in an official capacity or under color of law will more likely than not intentionally cause severe pain or suffering on an applicant for one or more unlawful purposes.[165] Should such harm be caused by a private actor or otherwise be not under color of law, the applicant must prove that the harm would be done at the consent of or acquiescence by a public official or person acting in an official capacity.[166] Yet, as Professor Jon Bauer aptly noted in his analysis of "acquiescence" under the CAT, U.S. jurisprudence on when a public official "acquiesces" to torture perpetrated by non-state actors is, "put simply, a mess."[167]

Under U.S. regulations implementing the CAT, "acquiescence" of a public official "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."[168] The language of the CAT, and the Senate's understanding of the CAT in ratifying the treaty, envisions a two-part test when analyzing government acquiescence, considering whether (1) the government was "aware" of the tortuous activity and (2) thereafter breached a legal duty. However, U.S. courts have consistently merged the two.

To satisfy "acquiescence," nine of the U.S. circuit courts that have considered the issue have held that a government official must either have *actual knowledge* of the tortuous activity *or* remain *willfully blind* to the torture.[169] Several courts have interpreted the "awareness" element as in-

163. *Id.* ¶¶ 9.6, 10.

164. Bauer, *supra* note 20, at 776.

165. *See* Part IV, *infra*, analyzing torture at the hands of public officials or those acting under color of law.

166. 8 C.F.R. § 1208.18(a)(1) (clarifying that the CAT applies to applicants likely to suffer torture provided the torture "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").

167. Bauer, *supra* note 20, at 747.

168. 8 C.F.R. § 1208.18(a)(7). This comports with the Senate's understanding when it ratified the CAT as well as with one of the Reagan Administration's original proposed conditions on U.S. ratification, which provided: "The United States understands that the public official, prior to the activity constituting torture, have knowledge of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." S. TREATY DOC. NO. 100-20, 5 (1988) (Message from the President of the United States Transmitting the Convention Against Torture).

169. *See* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2nd Cir. 2004); *see also* Silva-Rengifo v. Att'y Gen. of U.S., 473 F.3d 58, 70 (3rd Cir. 2007); Suarez-Valenzuela v. Holder, 714 F.3d 241, 245 (4th Cir. 2013); Hakim v. Holder, 628 F.3d 151, 155 (5th Cir. 2010); Ali v. Reno, 237 F.3d 591, 597 (6th

cluding both actual knowledge and willful blindness.[170] However, the majority of courts disregard the "breach [of] legal responsibility" language in the Senate understanding and conflate actual knowledge or willful blindness with breach of a legal duty.[171]

The Second Circuit is the only federal court to explicitly recognize the two separate elements of acquiescence under the CAT. In *De La Rosa v. Holder*, the Second Circuit interpreted the CAT as clearly expressing congressional intent that "torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it."[172] The court ultimately remanded the case back to BIA to determine whether a government acquiesces to torture, as a matter of law, "where (1) some officials attempt to prevent that torture (2) while other officials are complicit, and (3) the government is admittedly unable to actually prevent the torture from taking place."[173] Although the Second Circuit acknowledged that acquiescence requires a two-part analysis, the court did not provide any guidance on how a government might breach its legal duty.[174]

Professor Bauer argues that, for purposes of satisfying "acquiescence," once the "awareness" element is established through showing actual knowledge or willful blindness, courts should apply international law's due diligence standard in answering the question of whether the public official is likely to "breach his or her legal responsibility to intervene to prevent such activity."[175] Professor Bauer argues that this is important because in many instances, governments are aware of the torturous activity committed by non-state actors within their borders, but they fail to take the necessary

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Cir. 2001); Mouawad v. Gonzales, 479 F.3d 589, 596 (8th Cir. 2007); Zheng v. Aschroft, 332 F.3d 1186, 1194 (9th Cir. 2003); Cruz-Funez v. Gonzales, 406 F.3d 1187, 1192 (10th Cir. 2005); Perez-Trujillo v. Garland, 3 F.4th 10, 18 (1st Cir. 2021). *But see* Matter of S-V-, 22 I. & N. Dec. 1306, 1312 (BIA 2000) (adopting the heightened "willful acceptance" standard, holding that mere awareness of the torture is insufficient to satisfy acquiescence but rather the applicant must "demonstrate that [the public] officials are willfully accepting of the . . . torturous activities [inflicted by private actors]"). However, every U.S. circuit court to address this issue has rejected the willful acceptance standard and instead has applied the lesser "willful blindness" standard. The Senate endorsed this reading in ratifying the CAT. The Senate Foreign Relations Committee Report clarified that "awareness" was added to make clear that "willful blindness" satisfies the acquiescence requirement. S. Comm. on Foreign Rels., *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. No. 101-30, at 30 (1999). *See generally* Bauer, *supra* note 20, at 748.

170. *See* Bauer, *supra* note 20, at 766 ("Opinions routinely characterize willful blindness as the test for acquiescence as a whole. Even after reciting the two-part regulatory definition, decisions go on to state, or assume in their reasoning, that officials do not breach their legal responsibility unless they willfully ignore torturous conduct.").

171. *Id.* at 763; Zheng v. Ashcroft, 332 F.3d 1186, 1194 (9th Cir. 2003).

172. De La Rosa v. Holder, 598 F.3d 103, 109 (2nd Cir. 2010).

173. *Id.* at 110–11; Several years later, the Second Circuit, citing *De La Rosa v. Holder*, remanded a CAT case back to the Board of Immigration Appeals to consider "how the 'unable' prong of the unwilling-or-unable standard, as applicable to withholding claims, might translate to identifying government acquiescence in torture under the CAT." Scarlett v. Barr, 957 F.3d 316, 336 (2nd Cir. 2020).

174. *De La Rosa*, 598 F.3d at 109.

175. *See* Bauer, *supra* note 20, at 748.

steps to protect victims from such activities.[176] Indeed, a government could hardly argue it is unaware of the torturous activities of a major terrorist organization that has taken over large swaths of its territory or a gang that commits gruesome acts of violence against innocent civilians and operates transnationally. As described in more detail below, states in many instances have even taken some action to try to prevent torturous activities from occurring within their borders. However, under the willful blindness standard, establishing CAT eligibility is difficult, if not impossible, as a number of U.S. courts hold that a mere inability to protect victims is not enough to meet "acquiescence" to torture.[177]

For example, in *Perez-Trujillo v. Garland*, the First Circuit denied protection under the CAT to Mr. Perez-Trujillo, who came to the United States from El Salvador at age thirteen fleeing the MS-13 gang, which he alleged had beaten him violently on various occasions in its effort to recruit him into the gang. He feared death at the hands of MS-13 gang members after he deserted the gang and fled to the United States. In defending against his deportation, Mr. Perez-Trujillo requested asylum, withholding of removal, and protection under the CAT. The First Circuit denied Mr. Perez-Trujillo's request for asylum and withholding of removal for failure to establish that the harm he feared was on account of a protected ground.[178] Additionally, although the court found that Mr. Perez-Trujillo would likely face torture should he return to El Salvador—noting that deserting a gang was a "death sentence" in El Salvador—the court denied relief under the CAT for failure to establish government "acquiescence."[179] The court found that while El Salvador had difficulty controlling the gangs, the government had not "acquiesced" to the torturous activities, as it had made some effort to combat gang violence, including investigating gang activity and taking a "hard-line" approach to incarcerating gang members involved in criminal activity.[180] The court noted that "even where 'efforts at managing gang activity [are not] completely effectual,' such efforts are insufficient to sustain a CAT

176. *Id.* at 749.

177. 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."); *see also* Tamara-Gomez v. Gonzales, 447 F.3d 343, 351 (5th Cir. 2006) (holding that "neither the failure to apprehend the persons threatening the alien, nor the lack of financial resources to eradicate the threat or risk of torture constitute state action for purposes of the Convention Against Torture"); Zaldana Menijar v. Lynch, 812 F.3d 491, 501-02 (6th Cir. 2015) (explaining that a government's inability to protect its citizens does not amount to acquiescence).

178. Perez-Trujillo v. Garland, 3 F.4th 10, 17 (1st Cir. 2021) (holding that Mr. Perez-Trujillo's proposed particular social group for purposes of both asylum and withholding of removal protection—"young, male, Salvadoran students who are forcibly recruited into gangs, refuse gang orders, and desert the gang"—does not meet the social visibility requirement necessary to fall within a particular social group for purposes of asylum and withholding of removal).

179. *Id.* at 19 (noting that desertion from MS-13 was "punishable by death" according to a report in the record and citing another report where an individual recounted that "'killing people who left the gang was part of the initiation for new gang members'") (internal citations omitted).

180. *Id.* at 20.

claim unless the record 'compel[s] a conclusion that the government has acquiesced in gang activities.'"[181]

Similarly, in *Garcia-Milian v. Holder*, the Ninth Circuit denied CAT relief for failure to establish government "acquiescence" in a case involving a Guatemalan woman who feared torture at the hands of non-state actors who had previously beaten and raped her.[182] She reported the crime to the Guatemalan police, who refused to investigate the crime.[183] The court held that she was ineligible for relief under the CAT because the Guatemalan government had taken steps "to combat violence against women," including "hefty penalties for the crime of rape," establishing a special unit for sex crimes, and prosecuting crimes against women.[184] This did not amount to "acquiescence," despite persuasive evidence in the record, including a U.S. State Department report indicating that the Guatemalan government had been "ineffective in investigating violence against women and homicides generally, due to weaknesses through their criminal justice and law enforcement system."[185]

In another case involving torture at the hands of non-state actors, the Eighth Circuit in *Pena De Rivas v. Sessions*, held that a woman beaten and threatened by a gang in El Salvador was ineligible for CAT protection.[186] The court acknowledged the existence of police corruption and the fact that El Salvador had "struggled to protect against gang violence," but found that the El Salvadoran government did not "acquiesce" to gang violence where it had "taken steps" to combat the gang violence.[187] What steps the El Salvadoran government had taken is unclear from the decision. Similarly, in *Burbiene v. Holder*, the First Circuit denied CAT relief to a woman fearing trafficking in the sex trade, as the Lithuanian government had taken steps to try to punish sex traffickers, including increased criminal sentences for traffickers, as well as funding for day centers and other organizations that assisted sex trafficking victims.[188] Because of these efforts, the First Circuit held that the government did not acquiesce to the torture.[189] Several courts have found similarly: that as long as the government takes *any* action to either prohibit or protect against torture, that is enough to find that the government did not "acquiesce" to the torture.[190]

181. *Id.* at 21 (internal citation omitted).
182. Garcia-Milian v. Holder, 755 F.3d 1026, 1030 (9th Cir. 2015).
183. *Id.*
184. *Id.* at 1035.
185. *Id.* at 1030.
186. Pena De Rivas v. Sessions, 899 F.3d 537, 543. (8th Cir. 2018).
187. *Id.*
188. Burbiene v. Holder, 568 F.3d 251, 256 (1st Cir. 2009).
189. *Id.*
190. *See* Bauer, *supra* note 20, at 769 (citing several cases finding the same). *But see* Bauer *supra* note 20, at 771-72 (citing several circuits that have "endorsed the idea that it is enough to show that a low-level official will likely acquiesce or participate in the feared torture, even if other government actors actively oppose the torturous activity").

The current interpretation of "acquiescence" has created a gap in CAT eligibility, refusing protection to those who face a likelihood of torture at the hands of non-state actors and where government action is "woefully insufficient or largely ineffectual."[191] Professor Bauer argues that applying the due diligence obligation under international law to the second prong of the "acquiescence" test (namely, whether the government breached its legal responsibility) would help close this gap in CAT eligibility. Applying the due diligence standard would provide for protection under the CAT where states fail to take *reasonable* measures to prevent the torture feared and appropriate steps to investigate, prosecute, and punish perpetrators of torture when torture occurs.[192] However, to date, no U.S. court has applied this standard.

This Article agrees that the United States should apply the due diligence standard of international law to U.S. CAT claims as it relates to government acquiescence. However, this Article builds on Bauer's approach, proposing a novel approach that looks at the separate question of whether the non-state actor is operating in an "official capacity" or "under the color of law." This additional approach is essential to close potential gaps within the CAT jurisprudence in the United States. Under international law, the Committee Against Torture has adopted a similar *de facto* state actor doctrine for cases that are not fully covered by the due diligence standard.[193] As noted earlier, the CAT applies to applicants in the United States who are likely to suffer torture, provided the torture "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*."[194] But what happens when a state no longer has control of its territory and is therefore no longer able to protect against torture by non-state actors who have assumed control? Or what happens when non-state actors are acting in concert with a state actor for mutual benefits? CAT protections—specifically, the non-refoulement obligation—should apply to these circumstances without requiring acquiescence. Instead, they should construe these non-state actor activities under color of law.

191. *Id.* at 749.

192. *Id.* at 816 (noting that "due diligence is an obligation of means, not results . . . requiring officials to take measures within their power and authority that are reasonably calculated to be effective in preventing and redressing acts of torture"). Bauer goes on to note that "the fact that officials prove unable to prevent torture from occurring does not necessarily mean they breached a legal duty. Nonetheless, results are relevant as a benchmark." *Id.*

193. *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5.

194. 8 C.F.R. § 1208.18(a)(1) (emphasis added).

III. Filling a Gap in U.S. Torture Jurisprudence on Non-State Actors with Civil Rights Jurisprudence on Color of Law

This Part argues for a new approach to analyzing CAT claims involving fear of torture at the hands of non-state actors. This new approach considers whether the non-state actor is acting under color of law such that the CAT protections apply without the need to prove the acquiescence element. This Part begins with a discussion of how international law jurisprudence approaches *de facto* state actors who function like governments—for example, by controlling territory and populations, and by engaging in diplomatic relations with other recognized state actors. Next, this Part discusses a gap in U.S. CAT jurisprudence regarding *de facto* state actors or those acting in concert with government officials. Finally, this Part explains how the application of civil rights jurisprudence can be utilized to close this gap, providing a necessary safety net to ensure the United States meets its obligations under the Torture Convention to not refoul individuals to countries where they face likely torture.

A. *International Law's Approach to* De Facto *State Actors under the Torture Convention*

The Torture Convention protects against torture committed by *de facto* state actors. In a 2017 Report to the UN General Assembly, the Special Rapporteur stated that in situations where state territory is no longer in their control and instead is controlled by non-state actors, "governments are not absolved from doing everything feasible in the circumstances to protect their citizens from torture and ill-treatment."[195] As discussed in detail above, the Committee Against Torture applies the broad due diligence standard to determine whether states have breached their legal responsibilities in prohibiting and protecting against torture within their territory.[196] Under this standard, a government's mere excuse that it cannot control private torturers is insufficient to satisfy its obligation under the Convention.[197] Rather, the government must discharge its due diligence duty to protect potential victims and hold private torturers accountable.[198] Notwithstanding this broad and flexible approach, the Committee flagged certain circumstances that fall outside of this approach, including torture by

195. Melzer, *supra* note 1, ¶ 46 ("As far as the due diligence of territorial States is concerned, the Special Rapporteur is of the view that the exercise of control by an organized armed group as de facto authority over the population of a State does not deprive the people living in this territory of their rights."); *see generally* Anker, *supra* note 1, § 7:28.

196. Bauer, *supra* note 20, at 816 (noting that "due diligence is an obligation of means, not results . . . requir[ing] officials to take measures within their power and authority that are reasonably calculated to be effective in preventing and redressing acts of torture").

197. *See id*.

198. *See id*. at 817.

non-state actors who *de facto* control territories and function like official governments, commenting:

> States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control.[199]

The Committee previously addressed *de facto* state actor claims in three cases: *Elmi v. Australia*, *H.M.H.I. v. Australia*, and *S.S. v. Netherlands*. In the first case, *Elmi v. Australia*, Mr. Elmi argued that he would be subject to torture at the hands of the dominant Hawiye clan, which controlled several territories within Somalia.[200] He alleged that several of his family members had already suffered torture—his father and brother were killed, and his sister had committed suicide following multiple rapes.[201] The Australian government argued that the Torture Convention was inapplicable where members of the Somali clan were not "public officials" and were not acting in an "official capacity" as required under the treaty.[202] In considering whether the Torture Convention covered torturous acts by non-state actors who wholly controlled territory within Somalia, the Committee Against Torture explained the underlying assumption in limiting the treaty to torture by "public officials" or those acting in "an official capacity."[203] The Committee clarified that, in those circumstances involving torture by private actors, "the State would normally be expected to take action, in accordance with its criminal law, against private persons having committed acts of torture against other persons."[204] However, since the state lacked effective control over its territory, the Committee noted that the requirement of acquiescence was inapplicable.[205]

With respect to Somalia, the Committee in *Elmi* found that there was "abundant evidence" that the clans exercised authority comparable to that of the government. The clans had established their own quasi-governmental institutions, including laws and law enforcement mechanisms, education,

199. U.N. Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶ 30 U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018) [hereinafter General Comment No. 4].

200. *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 4.9.

201. *Id.* ¶¶ 4.14, 5.9.

202. *See id.* ¶ 4.8.

203. *Id.* ¶ 5.2.

204. *Id.*

205. *Id.* (distinguishing *Elmi* from *G.R.B. v. Sweden*, where *Elmi* "concerns return to a territory where non-governmental entities themselves are in effective control in the absence of a central government, from which protection cannot be sought")

health, and taxation systems, and had engaged in negotiations with the international community.[206] Accordingly, the Committee held in favor of Mr. Elmi, finding that warring clans in Somalia exercised control "comparable to those normally exercised by legitimate governments" and therefore "the members of those factions can fall, for purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in Article 1."[207] In reaching this conclusion, the Committee emphasized that "a general principle of international law and international public policy" instructs that "international and national courts and human rights supervisory bodies should give effect to the *realities* of administrative actions in a territory, no matter what may be the strict legal position, where those actions affect the everyday activities of private citizens."[208] By referring to the "*realities*," the Committee acknowledged how the clan functions like a government authority.[209]

Importantly, the Committee in *Elmi* did not apply the formal international law test under the Montevideo Convention defining statehood.[210] Under the Montevideo Convention, an entity claiming to be a state must possess a permanent population, a defined territory, a government, and capacity to enter into relations with other states.[211] The *Elmi* decision did not apply these elements, but instead only applied the Montevideo Convention's *principle* and *spirit*.[212] Thus, while the Committee did not explicitly define the meaning of *de facto* state actors, its decision loosely described them as entities fully controlling their territories and functioning as quasi-governmental organizations.[213]

206. *Id.* ¶ 5.5.
207. *Id.* ¶ 6.5.
208. *Id.* ¶ 5.4.
209. *Id.* ¶ 5.3-5.4.
210. *See* Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].
211. *Id.* at art. 1.
212. *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 5.4. (explaining that "a general principle of international law and international public policy" does not apply "the strict legal position" but rather considers the actual impact on "everyday activities of private citizens").
213. Interestingly, this lens of inquiry is not foreign in the domestic context. The Second Circuit, in *Kadic v. Karadzic*, applied a similar standard for the issue of when a group can be considered as a recognized state. Kadic v. Karadzic 70 F.3d 232 (2nd Cir. 1995). In this case, some citizens of Bosnia-Herzegovina filed a lawsuit against Radovan Karadžić, the president of Bosnian-Serb Republic of Srpska that committed mass killing of Muslims and Croats during the Bosnian War, under the Torture Victim Prevention Act ("TVPA") and the Alien Tort Statute ("ATS"). The district court below held that the court had no jurisdiction over the lawsuit partly because Karadžić was not a person under color of law. *Id.* The Second Circuit rejected this argument because Srpska controlled territory and population under its own governance. *Id.* In addition, the Second Circuit noted that "the state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists." *Id.* at 245. This analysis is essentially the same approach that the Committee has taken in interpreting the Convention.

Three years after *Elmi*, the Committee considered its second case involving *de facto* state actors. In *H.M.H.I. v. Australia*, like in *Elmi*, the complainant alleged he would likely be subject to torture in Somalia by members of the Hawiye clan.[214] However, in *H.M.H.I.*, the Committee emphasized that its decision in *Elmi* applies only "in the exceptional circumstance of State authority that [is] wholly lacking."[215] In the three years that had lapsed since *Elmi*, Somalia had regained "State authority in the form of the Transitional National Government, which [had] relations with the international community in its capacity as central government."[216] Accordingly, the Committee found the complainant ineligible for protection under the Torture Convention, explaining that the complainant could choose an area of Somalia where he would not be personally at risk of being subjected to torture by non-state actors.[217]

Although *H.M.H.I*, appears to limit *Elmi*'s expansive interpretation of the Torture Convention to "exceptional circumstances" where state authority is "wholly lacking," international law's due diligence standard is still available fill the gap for individuals who are unable to meet the demanding requirements necessary to establish *de facto* control. For example, in *S.S. v. Netherlands*, the third case before the Committee, the complainant alleged in part a fear of torture at the hands of the Liberation Tigers of Tamil Eelam ("LTTE"), a non-state actor that controlled certain territory within Sri Lanka.[218] The Committee ruled against the complainant on this point, as the LTTE only controlled portions of Sri Lanka, and therefore the complainant could relocate to Sri Lankan territory outside LTTE control. Moreover, the Committee found that the Sri Lankan government was making efforts to prevent torture, and that the practice of torture was not "systematic" in Sri Lanka, evidenced, in part, by the return of refugees to Sri Lanka in recent years.[219] Ultimately, the Committee observed that "the issue whether the state party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, *without the consent or acquiescence of the Government*, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority *over the territory to which the complainant would be returned*."[220]

Accordingly, the *de facto* government analysis in *Elmi* appears only to apply where a non-state actor occupies and exercises quasi-governmental

214. Comm. Against Torture, Decision, H.M.H.I v. Australia, Commc'n No. 177/201, ¶ 7, U.N. Doc. CAT/C/28/D/177/2001 (May 1, 2002).

215. *Id.*

216. *Id.*

217. *Id.*

218. Comm. Against Torture, Decision, S.S. v. Netherlands, Commc'n No. 191/2001, U.N. Doc. CAT/C/30/D/191/2001 (May 19, 2003).

219. *Id.* ¶ 10.

220. *Id.* ¶ 11.

authority and control over territory to which the individual seeking protection would be returned. However, in the absence of non-state quasi-governmental authority and control over territory, the focus under international law is instead on whether the government consented to or acquiesced to the torture occurring within its jurisdiction, through application of the due diligence standard. Should neither be present, the claim under the Torture Convention must fail in instances where the complainant could conceivably relocate to an area of the country under effective control of the state as the Committee found in *S.S. v. Netherlands*.[221]

In sum, although torture jurisprudence in international law continues to evolve, the common factor that drives the *de facto* state actor doctrine is the "realities" facing those likely to be subject to torture. In other words, the critical inquiry is not only about analyzing the facts based on the doctrine, but rather applying a flexible approach to ensure that no torture victims are left behind and torturers are held accountable.[222] This broad approach provides for more robust protections than U.S. CAT jurisprudence, which has yet to apply the due diligence standard.

B. A Gap in Domestic CAT Jurisprudence on De Facto *State Actors*

Unlike the approach to torture in international law, the U.S. CAT protection does not appear to extend, or has not yet been sufficiently developed to extend, to cases in which non-state torturers possess significant authority over partial territories that state actors can hardly control. This creates a large chasm for CAT protection, including for applicants in two important scenarios.

The first scenario is a case where a *de facto* state actor controls partial territories of a *de jure* government, similar to *Elmi*. In this scenario, the *de jure* government does not collude with the *de facto* state actor but has no ability to protect the CAT applicants from these *de facto* state actors who are committing torture with impunity. Two decisions out of the Fifth and Eleventh Circuits illustrate this gap in protection.[223] In *Qorane v. Barr*, the Fifth Circuit considered a case involving a Somali citizen seeking CAT protection from fear of torture at the hands of the dominant Ayr clan in

221. It is worth noting that the International Criminal Tribunal for Former Yugoslavia ("ICTY") in the context of international humanitarian law did not limit the scope of criminal torture liability to officials of recognized states but also non-State party officials. The ICTY did so in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities. *See* Prosecutor v. Delalič and Others (the Čelebići case), op. cit., § 473 (1998).

222. *See* David, *supra* note 21, at 784 ("What . . . flows from the [Torture Convention's] purpose is an interpretative approach with an eye toward construing CAT's provisions in a manner that renders them the most efficacious, consistent with the CAT's actual language, . . . [and] the analytic stance [the CAT] commends militates for an expansive construction of 'other person acting in an official capacity' given contemporary trends in international relations and the nature of state power.").

223. Qorane v. Barr, 919 F.3d 904 (5th Cir. 2019); D-Muhumed v. U.S. Att'y Gen., 388 F.3d 814, 820 (11th Cir. 2004).

Somalia.[224] Mr. Qorane had to pay taxes to the local militia who had threatened and forced him to take their orders.[225] Because this local militia was "the only authority" in his region, Mr. Qorane advanced a CAT argument that the Ayr clan in Somalia was considered to be qualifying governmental persons because this group functions as a *de facto* government.[226] The Fifth Circuit rejected this argument, stating that "a power vacuum does not make private conduct public because warring clans do not exercise 'official power.'"[227] Similarly, in *D-Muhumed*, the Eleventh Circuit held that "the clans who control various sections of the country do so through continued warfare and not through official power."[228] In failing to categorically recognize the "color of law" approach, the applicants were forced to rely on the "acquiescence" element to obtain the CAT protection, an element that many courts have found was not met by a state's mere inability to protect.[229] Thus, these applicants lack CAT protection, even if no one disputes that they will be tortured or killed.

The second scenario concerns when *de facto* torturers harm CAT applicants within their territories in concert with a *de jure* government, by virtue of their silent cohabiting and mutually interdependent relationships. As detailed above, in El Salvador and Honduras, gangs such as MS-13 have significantly expanded their capacity to use violence to the extent that they can engage in secret negotiation with local governments and politicians.[230] For example, the current President of El Salvador, Nayib Bukele, allegedly worked closely with the gangs when he was the Mayor of San Salvador to

224. *Qorane*, 919 F.3d at 910–11.

225. *Id.*

226. *Id.* at 911.

227. *Id.*

228. *D-Muhumed*, 388 F.3d at 820.

229. *See, e.g.*, Martinez Manzanares v. Barr, 925 F.3d 222, 229 (5th Cir. 2019) (explaining that "a government's inability to protect its citizens does not amount to acquiescence"); Zaldana Menijar v. Lynch, 812 F.3d 491, 502 (6th Cir. 2015) ("That the Salvadoran government is unable to control the gangs does not constitute acquiescence."); Menjivar v. Gonzales, 416 F.3d 918, 923 (8th Cir. 2005) (evidence that a government "has a problem controlling gang activity of which it is aware" is insufficient to compel a finding of acquiescence in torturous acts); Hernandez-Ortiz v. Barr, 791 F. App'x 758, 762 (10th Cir. 2019) ("To the extent the Guatemalan government's efforts have fallen short with regard to gang activity, we have not required evidence that policing efforts be successful to conclude that a government would not be willfully blind to criminal activity that could constitute torture.").

230. John P. Sullivan and Robert J. Bunker, *Third Generation Gang Studies: An Introduction*, 14.4 J. Gang Rsch. 1 (2007) (predicting that gangs in Central America would assume state functions in their territories); Felipe Puerta et al., *Symbiosis: Gangs and Municipal Power in Apopa, El Salvador,* Insight Crime, (Nov. 2, 2017), https://insightcrime.org/investigations/symbiosis-gangs-municipal-power-apopa-el-salvador; Héctor Silva Ávalos, *El Salvador Gangs Influence Local Politics in the Capital: Report,* InSight Crime (July 9, 2018), https://www.insightcrime.org/news/analysis/el-salvador-gangs-influence-local-politics-capital-report/; *De Salvador Ruano a Carlos Molina: la historia de alcaldes vinculados a pandillas*, La Prensa Gráfica (Sept. 5, 2018), https://www.laprensagrafica.com/elsalvador/De-Salvador-Ruano-a-Carlos-Molina-la-historia-de-alcaldes-vinculados-a-pandillas-20180905-0082.html [hereinafter *Gang Mayors*] (detailinbg how several mayors were arrested and charged with their collusion with gangs).

reduce violence, including homicide rates, for political reasons.[231] In these cases, it is almost impossible to tease apart the actions of the gangs and the government because one cannot function without the other. Unlike the first *de facto* state actor scenario, the CAT applicants may have a shot at establishing "acquiescence" by state actors, since they can argue that these officials would turn a blind eye to torturous acts inflicted by gangs, thereafter breaching their legal responsibility to intervene.[232] Nonetheless, as noted above, courts and agencies may still reject a finding of "acquiescence" because the *de jure* government has still fought—albeit, not meaningfully—against the gangs. As a result, courts and agencies may hold that CAT applicants failed to establish the *de jure* government's willful intent of the acquiescence (the requisite mens rea for the willful blindness standard) to protect them from torture.[233]

Indeed, applicants for the CAT often find it impossible to meet the willful blindness standard for many reasons. For one, state actors, especially state leaders, likely would not publicly concede that the state cohabits with the gangs, no matter how powerful these gangs are. Further, as the State Department's human rights reports are often heavily affected by U.S. foreign policy interests, it is unlikely that the State Department would paint a picture of cohabitation between its state allies and private criminal organizations as a matter of U.S. foreign policy.[234]

More importantly, the contradictory image presented by state actors—as facially fighting against non-state torturers, but silently cohabiting and depending on them behind the scenes—puts the CAT applicants in a challenging position to prevail before U.S. federal courts. At the petition-for-review stage of judicial review, federal courts review the immigration agencies' factual conclusions under the substantial evidence standard, under which courts reverse agencies' factual conclusions only if no reasonable fact finder would agree with the agencies' conclusions.[235] This standard is a higher burden than the clear error standard of review that federal appellate courts typically apply in civil cases. Because of this high bar, courts have

231. Carlos Martinez, *Nayib Bukele También Pactó con Pandillas*, El Faro (June 29, 2018), https://elfaro.net/es/201806/el_salvador/22148/Nayib-Bukele-también-pactó-con-pandillas.htm.

232. Khouzam v. Ashcroft, 361 F.3d 161, 171 (2nd Cir. 2004) (clarifying that acquiescence is met when "[public] officials know of or remain willfully blind to an act [of torture] and thereafter breach their legal responsibility to prevent it").

233. *See*, *e.g.*, Garcia-Millian v. Holder, 730 F.3d 996, 1004 (9th Cir. 2013) (rejecting acquiescence because the petitioner's "evidence did not compel a finding that the police acquiesced, or would acquiesce in the future, to gang members' criminal activities"); Menjivar v. Gonzales, 416 F.3d 918, 923 (8th Cir. 2005) (same).

234. Gailius v. INS, 147 F.3d 34, 46 (1st Cir. 1998) (noting that "there is perennial concern that the [State] Department oft-pedals human rights violations by countries that the United States wants to have good relations with") (internal quotations omitted); Andrew I. Schoenholtz et al., The End of Asylum, 46 (1st ed. 2021) (noting that the Trump Administration "severely downplayed human rights violations in certain countries").

235. 8 U.S.C. § 1252(b)(4)(B) ("the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary").

routinely affirmed the BIA's factual conclusion that CAT applicants failed to establish acquiescence under the willful blindness standard.[236] For example, in denying Mr. Perez-Trujillo's contention that the BIA made an incorrect finding on acquiescence, the First Circuit in *Perez-Trujillo* did not find that there was no evidence. Rather, the court held that the evidence in the record was insufficient to "compel a conclusion as to governmental acquiescence contrary to the one that the BIA reached."[237]

Both of the scenarios described above raise grave concerns that current U.S. CAT jurisprudence is detached from the purpose of the Torture Convention. The Torture Convention is intended to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment.[238] Under this bedrock principle, the Torture Convention must be interpreted broadly if the CAT applicants would be personally at risk from torture regardless of the sources of torture.[239] This is why the Committee Against Torture applies the due diligence standard, which is designed to protect potential victims of torture broadly.[240] Moreover, as noted above, to prevent any potential victims from falling through the cracks, the Committee has recognized that *de facto* state actors can be persons acting in an official capacity.[241]

U.S. CAT jurisprudence should follow this principle of international law. To honor and implement the international bedrock principle prohibiting torture, Congress passed FARRA, which states that

> [i]t shall be the policy of the U.S. 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, regardless of whether the person is physically present in the United States.[242]

Moreover, Congress specifically intended to define the meaning of the CAT to be in line with "the meanings given those terms in the Conven-

236. *See, e.g.*, *Garcia-Millian*, 730 F.3d at 1004; *Menjivar*, 416 F.3d at 923.

237. *Perez-Trujillo*, 3 F.4th at 21. This standard of review is a highly deferential one that would only permit federal courts to reverse or vacate the BIA's factual conclusion if "the evidence points unerringly in the opposite direction." Ruiz-Escobar v. Sessions, 881 F.3d 252, 259 (1st Cir. 2018).

238. FARRA, § 2242(a); *see also* Moncrieffe v. Holder, 569 U.S. 184, 187 n.1 (2013) (recognizing that even the Attorney General "has no discretion to deny relief to a noncitizen who establishes [CAT] eligibility").

239. General Comment No. 4, *supra* note 199 ("Equally, States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter.").

240. General Comment No. 2, *supra* note 156, ¶ 18; *Njamba & Balikosa*, *supra* note 121, ¶ 9.5.

241. *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5.

242. FARRA § 2242(a).

tion."[243] Accordingly, government agencies and courts must not forget the fundamental purpose of the CAT when they develop their jurisprudence.

Under this principle, agencies and courts can and should explicitly recognize that non-state actors who perform "state-like" functions can be considered persons acting in an official capacity, as in *Elmi*.[244] Despite the failure of the Fifth Circuit and Eleventh Circuit to take this approach,[245] such a failure is irreconcilable with CAT and the Torture Convention jurisprudence in international law.[246] On the contrary, the CAT recognizes that non-state actors performing functions traditionally reserved for the state can be under color of law.[247] Moreover, unlike the Fifth Circuit and Eleventh Circuit, the Second Circuit and Ninth Circuit have similarly held that this question is not foreclosed, even though these courts sparsely provided their reasoning.[248] Thus, to fill this gap of the jurisprudence, the following Sections survey and apply valuable tools that already exist in U.S. jurisprudence to determine whether non-state actors' actions can be considered within the meaning of "official capacity" or under "color of law" for CAT purposes.

IV. Civil Rights Jurisprudence for the Meaning of "Official Capacity" or "Color of Law" under the CAT

Civil rights jurisprudence is an instructive and valuable tool in thinking about additional avenues for U.S. CAT protection. When the United States ratified the Torture Convention and the Senate passed FARRA to create domestic regulations in line with the Torture Convention, the Senate limited CAT's scope to torture "in the context of governmental authority."[249] More specifically, the Senate understood the meaning of "official capacity" for the requisite governmental authority as "under color of law" in the U.S. jurisprudence.[250] Though the Senate did not explicitly indicate that this

243. FARRA § 2242(f)(2).

244. Rachel Lord, *The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 4 Melbourne J. Int'l L. 112 (2003) (arguing that article 1 of the Torture Convention should "encompass acts of state-like non-state actors" but acknowledging that the application of the Torture Convention "is still restricted to acts committed by officials, be they of state or non-state entities").

245. *Qorane*, 919 F.3d at 911; *D-Muhumed*, 388 F.3d at 820.

246. *Cf.* 8 C.F.R. § 1208.18(a)(1) (requiring "the . . . acquiescence of, . . . *other person* acting in an official capacity") (emphasis added); *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5.

247. 8 C.F.R. § 1208.18(a)(1).

248. Hernandez-Hernandez v. Barr, 789 F. App'x 898, 902 (2nd Cir. 2019); Gomez-Beleno v. Mukasey, 291 F. App'x 411, 414 (2nd Cir. 2008); Saraj v. Gonzales, 203 F. App'x 99, 101 (9th Cir. 2006).

249. Senate Report, at 14.

250. *Id.*

concept of "color of law" was based on civil rights jurisprudence, this concept has been historically and widely employed in that area.[251]

Indeed, the executive and judiciary have both subsequently construed the meaning of "official capacity" as "under color of law" in the civil rights jurisprudence.[252] In 2002, then-Attorney General John Ashcroft defined "official capacity" as "under color of law."[253] For this conclusion, Ashcroft relied on the Sixth Circuit's *Ali v. Reno,* which adopted the same definition.[254]

In 2020, then-Attorney General William Barr more explicitly endorsed this adoption in a published decision, *Matter of O-F-A-S*.[255] He believed that this explanation was necessary because immigration adjudicators had used the confusing concept of a "rogue official" instead of a clearer definition drawn from civil rights jurisprudence. As an example, the first *Matter of O-F-A-S-* decision, written by the BIA, employed the concept of rogue officials to determine whether torture by government officials "fell outside of [their] official duties."[256] Because this "rogue official" concept was unclear, Attorney General Barr instead explicitly applied the definition of "color of law" in civil rights jurisprudence, citing *West v. Atkins*.[257] In *West*, the Supreme Court considered whether a physician's contract with state officials placed his conduct "under color of law."[258] Though Attorney General Barr did not clarify how and when private actors can be construed "under color of law,"[259] the Court in *West* found that the state's delegation

251. *Id.* (acknowledging that courts addressed this color of law concept in various contexts even before 1990 when the Senate created the report on the CAT); *see, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 924, 929–32 (1982) (addressing the color of law because the Fourteenth Amendment of the Constitution can only be violated "by conduct that may be fairly characterized as 'state action'"); Dennis v. Sparks, 449 U.S. 24, 28 (1980) (same).

252. Matter of O-F-A-S-, 28 I. & N. Dec. 35, 35, 39–40 (A.G. 2020); Ramirez-Peyro v. Holder, 574 F.3d 893, 900 (8th Cir. 2009).

253. Matter of Y-L-, 23 I. & N. Dec. 270, 279, 285 (A.G. 2002) (explaining that "to secure such [CAT] relief, the respondents must demonstrate that, if removed to their country of origin, *it is more likely than not* they would be tortured by, or with the acquiescence of, government officials acting *under color of law*") (emphasis added).

254. *Id*. at 283, 285 (citing Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001) (quoting Message from the President of the United States Transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 4 (1988))).

255. Matter of O-F-A-S-, 28 I. & N. Dec. 35, 35, 39-40 (A.G. 2020).

256. Matter of O-F-A-S-, 27 I. & N. Dec. 709, 709 (BIA 2019).

257. Matter of O-F-A-S-, 28 I. & N. Dec. 35, 38 (A.G. 2020) (acknowledging that although the use of "rogue official" by the BIA "as shorthand for someone not acting in an official capacity" is not erroneous, "continued used of this [term and concept] going forward risks confusion . . . because 'rogue official' has been interpreted to have multiple meanings"). *Compare* Matter of O-F-A-S-, 27 I. & N. Dec. 709, 713–14 (BIA 2019) (interpreting "rogue official" to mean an actor acting outside of an official duty) *with* Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1139 (7th Cir. 2015) (interpreting "rogue official" to mean one "not serving the interests of the [entire] government").

258. West v. Atkins, 487 U.S. 42, 47 (1988); Matter of O-F-A-S-, 28 I. & N. Dec. 35, 35, 39–40 (A.G. 2020) (relying on *West*, 487 U.S. at 47 to define the color of law as "power 'possessed by virtue of . . . law and made possible only because [he was] clothed with the authority of . . . law'").

259. *Id*. at 35 (applying to "five men wearing police uniforms and wielding high-caliber handguns").

of a public function to a private actor rendered the private actor's conduct "under color of law."[260]

Matter of O-F-A-S-'s reliance on *West* is critical to understanding how non-state actors' actions can be under color of law in certain circumstances.[261] When a precedential immigration decision or regulation issued by the Department of Justice relies on non-immigration case law for the specific meaning of the regulation, that non-immigration case law serves as an important tool to interpret the meaning of the legal standard in question. For example, regulation provides that the BIA reviews an immigration judge's factual findings under a clearly erroneous standard instead of *de novo* review.[262] For the precise meaning of the clear error standard, the Department of Justice explicitly relied on the Supreme Court civil case law.[263] Because of this explicit reliance, federal courts have construed the meaning of this clear error standard as the same standard federal appellate courts apply to review district courts' factual findings.[264] Against this backdrop, it is safe to interpret that *O-F-A-S-* implicitly found that a private actor may be considered under color of law in certain circumstances. This is more so when the regulation itself does not only recognize a torturer that is a "public official" but includes any "other person" as long as they are acting under color of law.[265]

The civil rights statute, 42 U.S.C. § 1983, enables lawsuits against persons under color of law for civil rights violations.[266] This statute was initially enacted as part of the Ku Klux Klan Act of 1871,[267] with the purpose of holding individuals, including Klan members and public officials, accountable and punishable under federal law after the Civil War.[268] In 1952,

260. *West*, 487 U.S. at 56.

261. Matter of O-F-A-S-, 28 I. & N. Dec. 35, 39–40 (A.G. 2020).

262. 8 C.F.R. § 1003.1(d)(3)(i).

263. Zhu v. U.S. Att'y Gen., 703 F.3d 1303, 1309 (11th Cir. 2013) (explaining that the Department adopted the meaning of clear error from *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)).

264. *Id.*; Rosiles-Camarena v. Holder, 735 F.3d 534, 538 (7th Cir. 2013).

265. 8 C.F.R. § 1208.18(a)(1) ("Torture is defined . . . when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or *other person* acting in an official capacity.") (emphasis added).

266. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

267. Ku Klux Klan Act of April 20, 1871, Pub. L. 42-22, § 1, 17 Stat. 13 (1871); Examining Bd. Of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 581–83 (1976); Richard H.W. Maloy, "*Under Color of*" – *What Does It Mean?*, 56 Mercer L. Rev. 565, 574 (2005).

268. Maloy, *supra* note 267, at 574; Berry v. City of Muskogee, 900 F.2d 1489, 1501 (10th Cir. 1990) (holding Congress intended to provide monetary remedies to victims of constitutional violations under the Klan Act).

this part of the statute was reenacted as the modern § 1983 statute.[269] However, the statute was effectively dormant until 1961, when the Supreme Court explicitly held that private individuals could pursue their civil lawsuits against thirteen police officers in Chicago who broke into a home without any warrant.[270] Since then, courts have entertained civil lawsuits against state officials or other persons under color of law under § 1983 because their actions deprived private victims of their constitutional rights. Indeed, the scope of this civil rights statute is not limited to public officials under color of law, but also applies to private wrong-doers in certain circumstances.[271] Courts have adopted two tests in determining whether a private person acts under the color of law: the entanglement and public function tests.[272]

A. The Entanglement Test

The entanglement test requires the private actor's conduct to be *entangled* with public officials. The rationale is to hold the wrong-doers accountable even if the conduct was not technically done by state actors because there is a nexus between the state actors and the private actors' conduct. This entanglement can occur when the state "exercise[s] such coercive power or provides such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state."[273]

For instance, the First Circuit in *Sanchez* applied this test to conclude that a *private* physician's action was under color of law because a correctional officer pressured and encouraged the physician to provide medical care to the complainant.[274] In *Sanchez*, an inmate filed suit against various personnel at a correctional facility, including a private physician who performed

269. Maloy, *supra* note 267, at 574.

270. Monroe v. Pape, 365 U.S. 167, 187 (1961) (holding that the individuals' complaint against individual police officers had valid causes of action).

271. *See, e.g.*, *West*, 487 U.S. at 56 (finding a private physician's function within the state system in which the state affirmatively delegated the medical care responsibility to the physician a state action under color of law).

272. Chemerinsky, *supra* note 37; Marsh v. Alabama, 326 U.S. 501, 506–08 (1946) (operating town; public function); Terry v. Adams, 345 U.S. 461, 469 (1953) (management of an election for public office; public function); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (judicial enforcement of private decision; entanglement); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-26 (1961) (private activities on governmental property; entanglement); Reitman v. Mulkey, 387 U.S. 369, 376 (1967) (encouragement or compulsion by government); *see also* Martin S. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 Touro L. Rev. 775, 799–800 (2000) (noting that while courts and scholars have labeled these tests differently—such as nexus/joint, state compulsion, symbiotic—this labeling does not matter much and there are essentially two broad tests: entanglement and public function tests).

273. Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992); Reitman v. Mulkey, 387 U.S. 369, 376, 378–79 (1967); Benn v. Universal Health Sys., Inc., 371 F.3d 165, 171 (3rd Cir. 2004) (describing how entanglement "results from the States's exercise of coercive power" or "significant encouragement, either overt or covert") (internal quotations omitted).

274. Sanchez v. Pereira-Castillo, 590 F.3d 31, 51–52 (1st Cir. 2009).

exploratory surgery on him.[275] The private physician was not an employee of the correctional facility, but rather a private medical center that had a contract with the facility.[276] After the correctional officials accused the inmate of concealing a cellphone in his rectum, they forced him to undergo several tests, including forced bowel movements and an x-ray.[277] When they could not find the cellphone, they decided to perform exploratory surgery to find and eliminate the alleged cellphone.[278] Dr. Deniz, the private physician, received the inmate's consent—albeit under pressure and insistence from a correctional officer—to perform an emergency exploratory surgery, but with the promise that the doctor would perform another non-invasive rectal examination before the surgery.[279] Despite this promise, the examination did not occur.[280] Instead, Dr. Deniz performed the planned surgery.[281] The First Circuit overruled the district court's determination that Dr. Deniz was not acting under color of law, and found instead that the description of the complaint sufficiently established that Dr. Deniz's surgery was under color of law through the lens of the entanglement test.[282] For this conclusion, the First Circuit relied on its precedent in which the court held that "a private doctor was a state actor when he was conscripted by the police to conduct a search of a suspect's vagina pursuant to a warrant."[283]

Under the entanglement test, "a private party can [also] be held to be a state actor where an examination of the totality of the circumstances reveals that the state has 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity].'"[284] For example, the Tenth Circuit in *Anaya* held that a private detox company was under color of law because its advisory board was almost completely composed of state actors.[285] In *Anaya*, an arrestee filed a lawsuit against several individuals and entities, including Crossroads Managed Care Systems, a private company owning and operating the private detox facility.[286] The district court found that Crossroads was not a state actor,[287] but the Tenth Circuit reversed, applying the entanglement test to find that that the alleged facts were sufficient to construe Crossroads as a

275. *Id.* at 37–38.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 38.
280. *Id.*
281. *Id.*
282. *Id.* at 52.
283. *Id.* (citing Rodriques v. Furtado, 950 F.2d 805, 814 (1st Cir. 1991)).
284. Estades-Negroni v. CPC Hosp. San Juan Capestrano, 412 F.3d 1, 5 (1st Cir. 2005); NCAA v. Tarkanian, 488 U.S. 179, 192 (1988); McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 524 (3rd Cir. 1994).
285. Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 596 (10th Cir. 1999).
286. *Id.* at 587–89.
287. *Id.* at 590.

state actor.[288] The court focused on the composition and purpose of the advisory board, which existed to reestablish detox services in the area.[289] For that purpose, the board "was composed almost exclusively by the state-actor defendants in this lawsuit who had the power to implement policies making reopening of detox services in [the local town] a possibility."[290] Further, the court noted that state actors provided the major source of Crossroads' compensation.[291] In short, other than the minor role of the private operating entity, state actors controlled all of the functioning and management, for the benefit of both state and private actors.[292] With this evidence, the court concluded that Crossroads Managed Care Systems was acting under color of law.[293]

B. The Public Function Test

Civil rights jurisprudence also permits an otherwise non-state actor to be under color of law through the public function test. This test focuses on the nature and type of a private actor's action—i.e., whether it is *traditionally exclusive* to state actors. If an otherwise private actor conducts a function that is ordinarily reserved to state actors, such action may be under color of law. Examples of such functions include "the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and in at least limited circumstances, the operation of a municipal park."[294] For example, in *Marsh v. Alabama*, the Supreme Court held that the mere fact that the town was owned and operated by a private company did not automatically foreclose its actions from being under color of law.[295] The Court determined that the company-owned town's action—requesting that the state government criminalize the distribution of religious literature—was effectively an act of public function, and thus it satisfied the public function test.[296]

Similarly, in *Terry v. Adams*, the Supreme Court found that a private entity's governing of a local election for public office was under color of law.[297] In *Terry*, a private white election committee managed the elections

288. *Id.* at 596–97.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. Santiago v. Puerto Rico, 655 F.3d 61, 69 (1st Cir. 2011) (quoting Perkins v. Londonderry Basketball Club, 196 F.3d 13, 19 (1st Cir. 1999)); *see e.g.,* Nixon v. Condon, 286 U.S. 73, 84 (1932); Terry v. Adams, 345 U.S. 461, 461 (1953); Marsh v. Alabama, 326 U.S. 501, 501–08 (1946); Evans v. Newton, 382 U.S. 296, 296 (1966); Smith v. Allwright, 321 U.S. 649, 649 (1944); U.S. v. Classic, 313 U.S. 299, 299 (1941); Lee v. Katz, 276 F.3d 550, 556 (9th Cir. 2002) (holding that "the regulation of speech in [a public forum] is a public function"). *But see* Jackson v. Metro. Edison Co., 419 U.S. 345, 352–53 (1974); Reguli v. Guffee, 371 F. App'x 590, 600 (6th Cir. 2010) (unpublished).
295. *Marsh*, 326 U.S. at 501–08.
296. *Id.*
297. *Terry*, 345 U.S. at 466.

for public office and prohibited Black voters from attending them.[298] This satisfied the public function test because the private election committee's function was evidently public in nature.[299]

However, as courts continued to develop the public function test, they narrowed its scope by limiting the covered actions to those traditionally exclusive to the state.[300] In *Jackson*, the Supreme Court rejected the argument that a private power company's monopoly of electricity services was effectively a state action because such services were not traditionally exclusive public functions like election or town management.[301] Moreover, the Court held that, in addition to the public function, there must be an affirmative delegation from the state actor to the private actor to meet the public function test.[302] This requirement seems to conflict with earlier cases like *Marsh* and *Terry*, neither of which had entanglement between states and the private actions.[303]

Indeed, scholars have criticized the trend of courts requiring entanglement between state and non-state actors to satisfy the public function test. They argue that non-state actors should also fall under color of law without showing entanglement in some instances.[304] Prior to the birth of the state action doctrine, common law permitted lawsuits against private actors for the deprivation of natural rights. Thus, the development of the state action doctrine was merely additional protection for citizens against state actors.[305] With this background, Professor Chemerinsky argues that a state's failure "to fulfill its responsibility to provide redress for rights violations" renders "private action depriving a person of constitutionally protected freedoms" accountable under natural law theories.[306]

The state action doctrine must also be re-evaluated in light of private actors' assumption of the role of governmental entities, functioning as a *de*

298. *Id.*

299. *Id.*

300. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 153–57 (1978).

301. Jackson v. Metro. Edison Co., 419 U.S. 345, 352–53 (1974).

302. Williams v. City of St. Louis, 783 F.2d 114, 117 (8th Cir. 1986) (holding a private corporation was a state actor because "the delegation under state law of powers possessed by virtue of state law and traditionally exercised by the City satisfies us that the City's action here is under color of law"); Cornish v. Corr. Servs. Corp., 402 F.3d 545, 550 (5th Cir. 2005) (holding the corporation was a state actor for its juvenile correctional services in the county under the public function test); Romanski v. Detroit Ent., L.L.C., 428 F.3d 629, 632 (6th Cir. 2005) (holding a casino security officer's arrest was attributable to the state because the officer was licensed under the state law and had plenary arresting authority); Woodward & Lothrop v. Hillary, 598 A.2d 1142, 1143 (D.C. Cir. 1991) (same); Payton v. Rush-Presbyterian-St. Luke's Med. Ctr., 184 F.3d 623, 625 (7th Cir. 1999) (same).

303. *Marsh*, 66 S. Ct. at 277–80; *Terry*, 345 U.S. at 466.

304. Chemerinsky, *supra* note 37, at 503; David M. Howard, *Rethinking State Inaction: An In-Depth Look At The State Action Doctrine In State and Lower Federal Courts*, 16 Conn. Pub. Int. L. J. 221 (2017); Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, Sup. Ct. Rev. 39, 55 (1967).

305. Chemerinsky, 80 Nw. U. L. Rev. 503, 511.

306. *Id.* at 531.

facto government.[307] Professor Metzger points out that the current state action doctrine is not well suited to ensure "constitutional accountability in a world of privatized government" because "it ignores the way that privatization gives private actors control over government programs and resources, focusing instead on identifying government involvement in specific private acts."[308] For instance, courts reject state action when "a broad delegation of power" exists for which private actors can exercise their "independent judgment and discretion."[309]

Most significantly, the public function test of the state action doctrine is a flexible and case-by-case test.[310] There is no bright line rule categorically excluding entire classes of private action from color of law solely because no nexus exists between the state and private action. Take the Supreme Court's holding in *Terry*, for example. In *Terry*, the state did not expressly delegate management of the public election.[311] Instead, the state merely "permit[ted]" private actors to manage the election process.[312] Nevertheless, the Supreme Court found that the management of the election was state action.[313] Thus, this holding leaves open the possibility for private actors acting upon little or no affirmative delegation to meet the public function test.

Moreover, the fact that the Supreme Court previously recognized the legitimacy of an unrecognized but *de facto* government—the Confederacy—demonstrates that the public function test can apply more flexibly in extraordinary circumstances. During the Civil War, although the United States government did not recognize the seceded states, the Supreme Court gave legitimacy to the unrecognized states' law and activities.[314] In *Ford v. Surget*, the plaintiff filed a lawsuit against a Confederate officer for burning cotton during the war. The Court held that the officer was not liable because he merely followed an order issued by a *de facto* government, even though the Confederacy was not recognized as a valid state.[315] In his concurrence, Judge Clifford noted that "any government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people

307. *Id.* at 510–11 (1985) (noting that "the concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct"); Gillian E. Metzger, *Privatization As Delegation*, 103 COLUM. L. REV. 1367, 1367 (2003) (noting that expansions in privatization of governmental programs renders the existing state action doctrine inadequate to hold wrong-doers accountable).

308. Metzger, *supra* note 307, at 1411.

309. *Id.* at 1419.

310. Weaver v. James Bonding Co., 442 F. Supp. 2d 1219, 1223 (S.D. Ala. 2006) (explaining that "[t]he 'state actor' determination must be made on a case-by-case basis").

311. *Terry*, 345 U.S. at 469–70.

312. *Id.*

313. *Id.*

314. Stanley Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275, 292–93 (1962).

315. Ford v. Surget, 97 U.S. 584, 584 (1878).

large enough for a nation."[316] In addition to *Ford*, the Court recognized the private actions within the Confederacy as enforceable in other cases dealing with contracts, creation of a corporation, and issuing bills for tax payments.[317]

The Supreme Court made clear that it chose this flexible approach to avoid social disruption after the Civil War.[318] Hence, one could argue that these post-Civil War cases offer limited support for this Article's position that the public function test should not require an affirmative or sufficient nexus between state and private actors. Nonetheless, these cases, along with early public function cases like *Marsh* and *Terry*, demonstrate that the state action doctrine can be flexible in extraordinary circumstances.

This flexible approach is not foreign to the Torture Convention. As addressed above, international law construes private actors under color of law, even without any nexus with the *de jure* state, when they have assumed a traditionally exclusive public function. Accordingly, the nexus requirement is not mandatory when applying the *spirit* and *principle* of the public function test to domestic CAT cases. This is especially important given that many courts have categorically rejected acquiescence when state actors lack the ability to intervene to protect the applicants from non-state actors. The Torture Convention was not designed to exclude victims who are likely to be subjected to torture by non-state actors.[319] This absolute prohibition of torture focuses not only on the states' responsibility to prevent, but also the recognition that all human beings have "equal and inalienable rights . . . deriv[ing] from the inherent dignity of the human person" not to be tortured.[320] Indeed, the Torture Convention imposes the burden on the state parties through the due diligence standard because they have the responsibility and capacity to prevent torture. However, where the "realities" of the country render such state capacity impossible, it makes sense to construe the untouchable non-state actors under color of law, and protect the potential victims from torture.[321]

316. *Id.* at 620 (Clifford, J., concurring).

317. Keith v. Clark, 97 U.S. 454, 454 (1878).

318. Lubman, *supra* note 336, at 293 ([T]he Court was sensitive to the problem of reintegrating into the Union the states that had attempted to secede."); *Ford*, 97 U.S. at 623 ("Unless the Confederate States may be regarded as having constituted a de facto government for the time or as the supreme controlling power within the limits of their exclusive military sway, then the officers and seamen of their privateers and the officers and soldiers of their army were mere pirates and insurgents, and every officer, seaman, or soldier who killed a Federal officer or soldier in battle, whether on land or the high seas, is liable to indictment, conviction, and sentence for the crime of murder, subject of course to the right to plead amnesty or pardon, if they can make good that defence. Once enter that domain of strife, and countless litigations of endless duration may arise to review old animosities and to renew and inflame domestic discord, without any public necessity or individual advantage.").

319. General Comment No. 2, *supra* note 156, ¶ 1.

320. Torture Convention, *supra* note 4, at 113.

321. *Elmi*, U.N. Doc. CAT/C/22/D/120/1998, ¶ 5.5.

C. Application of Tests to Case Studies

The two civil rights tests—the entanglement and public function tests—can be valuably applied to the CAT, as the following three case studies demonstrate. The first involves instances where *de facto* non-state actors control part of state territory, and state actors lack the ability to control or intervene to protect potential torture victims from being harmed by the *de facto* non-state actors. In this scenario, the applicant can apply the public function test to determine whether the *de facto* non-state actors have assumed roles that are traditionally exclusive to states. The second scenario examines cases in which non-state actors control their territory and cohabit with state actors. The third and final case study applies the entanglement test to cases in which non-state actors are encouraged by state actors to harm torture victims.

1. *Torture by* De Facto *Non-State Actors who Control their own Territory and Cannot be Controlled by State Actors*

This first case study involves situations where *de facto* state actors control partial territories and state actors are unable to assert control in those partial territories. Applying the public function test to such situations, the dispositive inquiry asks whether country conditions demonstrate that the non-state actors have assumed traditionally exclusive public functions. For example, in *D-Muhumed*, discussed above, the Eleventh Circuit categorically rejected a *de facto* state actor claim for Somalia because "[t]he objective evidence indicates that Somalia currently has no central government, and the clans who control various sections of the country do so through continued warfare and not through official power."[322] Though it is unclear how these clans functioned as *de facto* governmental entities within their controlled territories, an applicant could submit additional information to show how the clans controlling Somalia functioned as *de facto* governmental entities, including by holding their own elections or managing towns.[323]

Applicants could also use the public function test to argue that the Taliban is acting under color of law. Following the collapse of the Afghan government, the Taliban now controls and provides its own security service for the population, and runs its own elections.[324] Moreover, they have had

322. *D-Muhumed*, 388 F.3d at 820.

323. *See* David, *supra* note 21, at 806 (proposing additional factors courts might consider when deciding whether a non-state actor is performing a public function, such as whether the private actor engages in detention and prisons operations, whether they administer a penal system and punishment, and whether they provide "police" protection).

324. Lindsay Maizland, *the Taliban in Afghanistan*, Council for Foreign Rels. (Sept. 15, 2021), https://www.cfr.org/backgrounder/taliban-afghanistan. Even before the collapse of the Afghan government, The Taliban functioned as a *de facto* government within its controlled territory. *See* Selim Öztürk, *The Taliban Regime in Afghanistan: En Route to International Recognition?*, 26 Middle East Pol'y Council, 102, 109 (2019) (explaining that the Taliban has functioned as a parallel administration in its controlled area to the extent that they require taxation and provide jobs, security, justice, and welfare).

the capacity to engage in diplomatic relations for several years now.[325] However, the legitimacy of the Taliban has been officially recognized by few governments.[326] In *Tanin v. Whitaker*, the Ninth Circuit denied the petitioner's CAT claim "because the Afghan government is not acquiescing to any torture of its citizens by the Taliban."[327] Yet, based on these facts, applicants may be able to advance an additional claim without needing to prove acquiescence. The BIA and the courts have yet to address whether the Taliban can be construed under color of law. Thus, the *de facto* state actor claim could be a potential means to apply for the CAT protection, without requiring applicants to establish the Afghan officials' acquiescence.

2. *Torture by* De Facto *State Actors Who Control their own Territory and Cohabit with State Actors*

In this second case study, non-state actors *de facto* control their own territory and cohabitate with state actors. Importantly, this scenario differs from the first by virtue of the entanglement between non-state and state actors, as illustrated by the relationship between MS-13 and the governments in El Salvador and Honduras, for example.[328] In *Mayorga-Vidal v. Holder*, the First Circuit found the Salvadoran government's fight against MS-13 to be dispositive in defeating the petitioner's argument that the record compelled "a conclusion that the [Salvadoran] government ha[d] acquiesced in gang activities."[329] However, the court acknowledged that "there was evidence some police officers have engaged in gang-related activity."[330]

With additional evidence, the petitioner could have advanced a *de facto* state actor argument under the entanglement test to construe MS-13 members' actions as attributable, or at least closely related to, the Salvadoran government.[331] Again, under this test, "a private party can be held to be a state actor where an examination of the totality of the circumstances reveals

325. Selim Öztürk, *The Taliban Regime in Afghanistan: En Route to International Recognition?*, 26 Middle East Pol'y Council, 102, 108 (2019) (noting that the Taliban engaged in diplomatic affairs with the U.N., the United States, and other Western nations).

326. Gibran Peshimam, *Taliban says failure to recognise their government could have global effects*, Reuters (Oct. 30, 2021), https://www.reuters.com/world/asia-pacific/taliban-says-failure-recognise-their-government-could-have-global-effects-2021-10-30/, [https://perma.cc/5XWF-GMRT] ("No country has formally recognised the Taliban government since the insurgents took over the country in August. . .").

327. Tanin v. Whitaker, 743 F. App'x 132, 134 (9th Cir. 2018) (unpublished).

328. *See* Collopy, *supra* note 65, at 7 ("When [Transnational Criminal Organizations] have overwhelmed the state with their illicit activities, gained significant control over geographic territory, are closely entangled with legitimate government institutions, and are able to exert direct and indirect control as a governing political force, it can and should be argued that they act as de facto governments.").

329. Mayorga-Vidal v. Holder, 675 F.3d 9, 20 (1st Cir. 2012).

330. *Id.*

331. *See* Brisco & Keseberg, *supra* note 45, at 121 (explaining that "[t]he perpetration of such large-scale human rights violations would certainly not have been possible without multiple links between state and non-state agents, which have created a permissive environment for state-criminal collusion").

that the state has 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity].'"[332] The petitioner could have presented additional evidence showing how the Salvadoran officials received benefits by cohabitating with MS-13.[333] To show sufficient entanglement, the petitioner could point to how senior Salvadoran leadership, including the current President, worked with MS-13 to victimize the petitioner.[334]

The public function test can readily apply as well. MS-13's presence and power are so significant that they function as a small government in El Salvador.[335] MS-13 provides its plenary security services for residents of their controlled territory, and as reciprocity, residents pay taxes.[336] MS-13 also controls the election campaigns in their areas.[337] These facts support the public function test.

3. *Torture by Non-State Actors who are Encouraged by State Actors*

The third case study concerns instances where non-state actors kill or harm victims with significant encouragement by state actors. The CAT applicants can establish the likelihood of torture by private torturers by demonstrating state actors' instigation, consent, or acquiescence. Nonetheless, an application of the entanglement test may provide an additional theory for CAT eligibility. Consider, for example, the Rwandan genocide, during which a Rwandan national radio station, Radio Télévision Libre des Mille Collines ("RTLM"), encouraged Hutu militias and ordinary Hutu people to kill Tutsi Rwandans.[338] As the RTLM aired extreme hate messages, many private actors participated in killing Tutsis.[339] The RTLM's activities would easily satisfy the entanglement test of state compulsion or encouragement, which requires that "the state significantly encouraged . . . the private [ac-

332. *Estades-Negroni*, 412 F.3d at 5.

333. *NCAA*, 488 U.S. at 192.

334. Martinez, *supra* note 231 (showing how President Bukele previously worked with MS-13 when he was the mayor of San Salvador for political purposes); *Gang Mayors*, *supra* note 230 (describing how several mayors were arrested and charged with collaborating with gangs); Puerta et al., *supra* note 230.

335. Sharyn Alfonsi, "*Our Whole Economy Is In Shatters*": *El Salvador's President Nayib Bukele On The Problems Facing His Country*, CBS News (Dec. 15, 2019) (describing President Bukele's concession that MS-13 has "a *de facto* power"), https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/ [https://perma.cc/TGB5-NAPA].

336. *Id*. (describing how MS-13 "charge[s] taxes").

337. Douglas Farah & Kathryn Babineau, *The Evolution of MS-13 in El Salvador and Honduras*, 7 Prism 64 (Sept. 2017), https://www.ibiconsultants.net/_upload/mediaandpublications/document/the-rapid-evolution-of-the-ms-13-march-23-2018-final.pdf [https://perma.cc/5Y3W-HXQP]; Tristan Clavel, *Honduras Trial Alleges Frightening First: MS13 Campaign Funding*, InSight Crime (June 15, 2018), https://www.insightcrime.org/news/analysis/honduras-trial-ties-between-mayor-ms13-first-time/ [https://perma.cc/P5FF-B4HJ].

338. David Yanagizawa-Drott, *Propaganda and Conflict: Evidence from the Rwandan Genocide*, 129 Q. J. Econ. 7, 7–8 (Aug. 21, 2014).

339. *Id*. at 29 (concluding that the anti-Tutsi radio propaganda during the genocide "significantly increased participation in the violence against Tutsis").

tor], either overtly or covertly, to take a particular action so that the choice is really that of the state."[340] Just as a private physician's provision of medical service to a detainee upon encouragement by a correctional officer constituted a state action,[341] private torturers' killing or severely harming upon encouragement by state propaganda can provide a potentially useful avenue for CAT protection.

Conclusion

CAT claims, when considered through the lens of the color of law tests from civil rights jurisprudence, can provide an additional safety net for applicants seeking protection from torture. This is especially important given recent developments in the law. Prior to 2020, CAT applicants who had certain criminal convictions could not challenge factual disputes in most federal courts because of the jurisdiction stripping provision of 8 U.S.C. § 1252(a)(2)(C).[342] Because the likelihood of torture is a factual question,[343] CAT applicants with certain criminal convictions could not appear before a federal court, regardless of how wrongful the BIA's decision was.[344] In June 2020, the Supreme Court held in *Nasrallah v. Barr* that the statutory jurisdiction-stripping provision does not apply to CAT relief.[345] In light of this holding, all CAT applicants can now ask federal courts to review the BIA's factual conclusion of the CAT denial. This is critical for the *de facto* CAT claim. Akin to the factual nature of the likelihood of torture, the question of whether an actor's conduct was under color of law in the civil rights jurisprudence is a "fact-bound inquiry."[346]

This additional avenue for CAT protection is also important because it is rare for a national government to publicly admit to a policy of harming certain groups of the population directly or by being willfully blind to private actors' torture. As a result, in removal proceedings, immigration

340. Ellison v. Garbarino, 48 F.3d 192, 195 (6th Cir. 1995).

341. *Sanchez*, 590 F.3d at 52.

342. *Compare* Gourdet v. Holder, 587 F.3d 1, 5 (1st Cir. 2009), Ortiz-Franco v. Holder, 782 F.3d 81, 88 (2nd Cir. 2015), Pieschacon-Villegas v. Att'y Gen. of the United States, 671 F.3d 303, 309-310 (3d Cir. 2011), Oxygene v. Lynch, 813 F.3d 541, 545 (4th Cir. 2016), Escudero-Arciniega v. Holder, 702 F.3d 781, 785 (5th Cir. 2012); Tran v. Gonzales, 447 F.3d 937, 943 (6th Cir. 2006), Lovan v. Holder, 574 F.3d 990, 998 (8th Cir. 2009), *and* Cole v. United States Att'y Gen., 712 F.3d 517, 532 (11th Cir. 2013), *with* Wanjiru v. Holder, 705 F.3d 258, 264 (7th Cir. 2013), Vinh Tan Nguyen v. Holder, 763 F.3d 1022, 1029 (9th Cir. 2014).

343. *Matter of Z-Z-O-*, 26 I. & N. Dec. 586 (BIA 2015) (clarifying that Immigration Judge's findings on predictive events are factual conclusions); Huang v. Holder, 677 F.3d 130, 134 (2nd Cir. 2012) ("A determination of what will occur in the future and the degree of likelihood of the occurrence has been regularly regarded as fact-finding subject to only clear error review.").

344. Kaplun v. Att'y Gen. of the United States, 602 F.3d 260, 271 (3rd Cir. 2010) (clarifying that "what is likely to happen to the petitioner if removed" is a factual inquiry outside of the scope of [the court's] review" because of the criminal convictions).

345. Nasrallah v. Barr, 140 S. Ct. 1683 (2020).

346. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

judges may interpret the evidence to shift the blame of torture and acquiescence to certain "rogue" officials and private citizens. Even after *Nasrallah*, such findings are challenging to reverse under the highly deferential substantial evidence standard. Unlike national governments, *de facto* state actors such as the Taliban and MS-13 do not hide their specific intent to harm potential victims. Thus, these additional CAT claims can serve as an important safety mechanism for applicants.

To be sure, notwithstanding these additional and alternative CAT claims, CAT still requires a high burden for applicants. For example, MS-13 pursues any young man in El Salvador as a target for potential extortion and forced recruitment. Under the *de facto* CAT theory, it may appear that any young man can receive the CAT protection. Yet, the applicants still bear the burden of proving the likelihood of future torture under the "more likely than not" standard, as well as proving how non-state actors have either entangled with state actors, or have assumed traditionally exclusive public roles.

The BIA and courts should recognize and provide useful guidelines on when the CAT should protect applicants from torture at the hands of non-state actors. This is to ensure that no persons would face torture upon deportation, regardless of the source of the torture. Additionally, the BIA and courts should heed Professor Bauer's suggestion that they apply the due diligence standard as it relates to the acquiescence element to determine whether states have breached their duty to protect their citizens from torture by private actors.

Where non-state actors are performing state-like functions, this Article argues that civil rights jurisprudence tests provide a critical avenue for CAT protection. Individuals fleeing torture should not fall between the cracks of CAT protection and face deportation to places they are likely to suffer torture simply because the state no longer has effective control over their territory. The Torture Convention codifies the *jus cogens* norm of the prohibition against torture. To honor, respect, and adopt this fundamental principle of international law, the Senate ratified the Convention and directed the government to promulgate the CAT regulations to implement the Convention. Against this backdrop, the application of the civil rights jurisprudence tests and due diligence standard would further assist the United States' obligation to comply with the Convention: to refrain from deporting people to countries where they will suffer torture.