

# OBSCURED BY “WILLFUL BLINDNESS”: STATES’ PREVENTIVE OBLIGATIONS AND THE MEANING OF ACQUIESCENCE UNDER THE CONVENTION AGAINST TORTURE

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## ABSTRACT

As U.S. asylum law becomes more restrictive, relief under the U.N. Convention Against Torture (CAT) has become the last hope for safety for many asylum seekers. But for those who face torture at the hands of non-State actors, CAT relief has proven extraordinarily hard to win. The CAT’s torture definition encompasses privately-inflicted harm only when it occurs with the consent or acquiescence of a public official. Agency decisions initially took this to mean that officials must willfully accept or tacitly approve the private party’s actions. Courts have rejected that approach as overly restrictive. But what they have adopted in its place—a “willful blindness” test under which CAT applicants must show that officials would turn a blind eye to the torture they face—is also problematic. Under this standard, even where government officials take only half-hearted or patently inadequate steps to combat acts of privately-inflicted torture such as domestic violence, honor killings, gang violence, or mob attacks on LGBTQI people, courts frequently conclude that acquiescence has not been shown. As long as officials are doing something, the decisions reason, they are not willfully blind.

This Article argues that willful blindness should not be the test for acquiescence. The term “acquiescence” is defined in a Senate

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ratification understanding to require that a public official have awareness of the torturous activity and breach a legal responsibility to intervene to prevent it. This definition, which has been incorporated into U.S. law, makes clear that when officials are aware of torturous activity—and in most cases there is no doubt that a country’s government is aware of widespread patterns of abuse—what matters is whether they breach their legal responsibility to take preventive action.

Drawing on previously overlooked aspects of the history of the CAT’s drafting and U.S. ratification, this Article argues that officials acquiesce to torture if they fail to meet their legal responsibility under international law to take effective preventive measures. The State’s responsibility to exercise “due diligence” to prevent, investigate, prosecute, and punish acts of torture by non-State actors is widely recognized under the CAT and other human rights treaties. The U.N. Committee Against Torture has found that when States fail to exercise due diligence, they enable private parties to commit acts of torture with impunity, and thereby acquiesce. That approach accords with how the U.S., during the treaty negotiations, originally defined “acquiescence” when it proposed adding the term to the CAT’s torture definition. It also fits in comfortably with the text and purpose of the treaty and its U.S. ratification understandings.

The Article concludes by considering what a due diligence standard for acquiescence would look like in practice and addresses potential objections to its appropriateness and administrability. It also offers a proposal to amend the CAT regulations to clarify the acquiescence standard.

## TABLE OF CONTENTS

Introduction .....	741
I. The Travels and Travails of “Willful Blindness” as the Standard for Acquiescence in U.S. Interpretations of the CAT .....	751
A. How “Willful Blindness” Entered the Picture.....	751
B. The “Willful Acceptance” Standard Emerges .....	756
C. “Willful Blindness” Takes Over .....	762
D. The Incoherence of “Willful Blindness” as a Test for Acquiescence .....	765
II. Acquiescence and the Legal Responsibility to Prevent Torture Under the CAT.....	776
A. The Due Diligence Obligation to Prevent Torture in International Law .....	776
B. The Meaning of “Acquiescence” as a Matter of Treaty Interpretation .....	788
III. The United States’ Ratification Understanding: Incorporating State Preventive Responsibilities Under International Law’ .....	802
IV. Implementing a “Due Diligence” Standard .....	816
Conclusion.....	825

## INTRODUCTION

The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>1</sup> established an international regime designed to “make more effective the struggle against torture . . . throughout the world.”<sup>2</sup> One key strand in its web of preventive measures is Article 3’s requirement that “[n]o 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.”<sup>3</sup> The United States played an active role in the treaty’s drafting,<sup>4</sup> and, like most of the world’s countries, has ratified it.<sup>5</sup>

Since the 1990s, when the U.S. began applying Article 3 in immigration proceedings, the CAT has offered the possibility of protection for non-citizens who would face atrocious harm if deported but cannot qualify for asylum or withholding of removal, the forms of

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1. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

2. *Id.* pmbl.

3. *Id.* art. 3(1). The French term *refouler* means to repulse or repel. *See* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 180–82 (1993). In international refugee and human rights law, the term “non-refoulement” is frequently used to refer to the obligation of States not to return individuals to places where they will face danger. *See* T. ALEXANDER ALEINIKOFF & LEAH ZAMORE, THE ARC OF PROTECTION: REFORMING THE INTERNATIONAL REFUGEE REGIME 60–68 (2019) (discussing the origins and development of the non-refoulement principle).

4. *See* S. COMM. ON FOREIGN RELS., CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. No. 101-30, at 3 (1990) [hereinafter *Senate Report*] (“Ratification is a natural follow-on to the active role the United States played in the negotiating process for the Convention”); 136 CONG. REC. 36, 196 (1990) (reflecting Senator Moynihan’s statement prior to ratification vote that the U.S. “has invested enormous resources in this convention. For 7 years our diplomats labored . . . [to make] its obligations concrete, meaningful, and, as never before, enforceable.”); *see generally* J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK 31–107 (1988) (providing a detailed account of the CAT’s drafting history with many references to the U.S. role).

5. The U.S. is among 171 ratifying countries. *See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) [<https://perma.cc/6XHZ-HMU2>] (listing States parties).

relief the U.S. provides to comply with U.N. treaties on refugees.<sup>6</sup> Asylum and withholding are available only to persons who face persecution because of their race, nationality, religion, membership in a particular social group, or political opinion.<sup>7</sup> In addition, there are broad bars to asylum and (to a somewhat lesser degree) withholding that disqualify many otherwise eligible applicants based on criminal conduct, security risks, involvement in persecuting others, time spent in a third country, or applying more than a year after entry.<sup>8</sup>

Protection under the CAT, in contrast, is absolute. The United States can never send a person to a place where they would face torture.<sup>9</sup> It does not matter whether the torturer's motivations

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6. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, *adopted* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). In 1968, the U.S. ratified the Refugee Protocol, which incorporates and extends all the substantive provisions of the Convention. To bring U.S. law into conformity with these treaties, the Refugee Act of 1980 created a statutory mechanism for granting asylum and broadened the scope of an already-existing provision that allowed immigration judges to grant withholding of removal. *See* Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (relevant provisions codified as amended at 8 U.S.C. §§ 1101(a)(42), 1158, 1231(b)(3)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-41 (1987) (discussing Congress' intent to conform U.S. law to the Protocol). Asylum provides a path to lawful permanent residence and citizenship. Withholding of removal prevents deportation to a specified country but confers fewer benefits and does not lead to a permanent status. *See Garcia v. Sessions*, 856 F.3d 27, 30-32 (1st Cir. 2017) (detailing the differences). A grant of asylum is discretionary, however, in contrast with withholding, which must be awarded if the applicant meets the eligibility criteria. *See Cardoza-Fonseca*, 480 U.S. at 440-41, 443-44. Withholding requires proof that persecution is probable, while asylum requires only a showing of "well-founded fear"—a reasonable possibility of persecution. *Id.* at 423, 438-40.

7. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(B)(i), 1231(b)(3)(A), (C).

8. 8 U.S.C. §§ 1158(a)(2), (b)(2), 1231(b)(3)(B); 8 C.F.R. §§ 1208.13(c), 1208.4(a), 1208.16(d)(2).

9. International human rights law on torture allows no exceptions to the non-refoulement duty because torture "constitutes the most direct attack at the very essence of human dignity." Walter Suntinger, *The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?*, 49 AUSTRIAN J. PUB. INT'L L. 203, 204 (1995). All of the major international and regional human rights instruments, going back to the 1948 Universal Declaration of Human Rights, proscribe torture. The prohibition has become part of customary international law, and is widely recognized as one of the few norms, together with the prohibitions of slavery and genocide, that has attained *jus cogens* status—a peremptory norm that admits of no exceptions and is binding on States, regardless of their consent. *See* Juan E. Méndez & Andra Nicolescu, *Evolving Standards for Torture in International Law*, in TORTURE AND ITS DEFINITION IN

relate to any of the five protected grounds for asylum. Torture inflicted to coerce extortion payments, extract information, or punish actual or imagined misdeeds can provide a basis for CAT relief.<sup>10</sup> Nor do any eligibility bars apply.<sup>11</sup> The CAT entered the U.S. immigration system in the 1990s as Congress was expanding the bars to asylum and withholding,<sup>12</sup> and courts and agencies were restrictively interpreting the grounds on which those forms of relief could be

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INTERNATIONAL LAW: AN INTERDISCIPLINARY APPROACH 215, 217 (Metin Başoğlu ed., 2017).

10. See *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 350 (5th Cir. 2006) (“Significantly, relief under the [CAT] does not require a nexus to specific statutory grounds.”). The CAT’s torture definition does require that severe pain or suffering be inflicted “for such purposes as” those appearing on a list so broad that it would cover just about any reason for deliberately inflicting severe pain, aside from a doctor performing a painful but necessary medical procedure. CAT, *supra* note 1, art. 1(1); see *infra* text accompanying notes 224–27 (discussing the CAT’s purpose requirement).

11. See *Matter of G-A-*, 23 I. & N. Dec. 366, 368 (B.I.A. 2002) (“An alien’s criminal convictions . . . , however serious, are not a bar to deferral of removal under the [CAT].”). Persons with serious criminal convictions, however, receive a more tenuous form of protection. The U.S. regulations created two types of CAT relief: withholding of removal under the CAT and deferral of removal. The substantive eligibility standards are identical, and both protect against removal to the country where the person would face torture. CAT withholding is available to applicants not subject to any of the statutory bars to a grant of withholding of removal; if a bar applies, only CAT deferral is available. See 8 C.F.R. § 1208.16(c)(4). CAT deferral is more easily revoked if conditions in the applicant’s home country change, and in some circumstances, it allows for continued detention. See 8 C.F.R. § 1208.17(c), (d). This Article uses the term “CAT relief” to refer to both varieties.

12. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) expanded the list of “aggravated felonies” that bar a grant of asylum and frequently preclude withholding of removal as well. See 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 DENV. J. INT’L L. & POL’Y 533, 533–34 (1998) (giving examples of persons ineligible for asylum and withholding under IIRIRA for minor crimes, including a woman who forged a \$19.53 check). A sequence of statutory changes also expanded the reach of terrorism-related bars, making them so broad that “[l]ending a bicycle to Nelson Mandela when the African National Congress was an outlawed anti-apartheid organization would have constituted material support to a terrorist organization.” Maryellen Fullerton, *Terrorism, Torture, and Refugee Protection in the United States*, 29 REFUGEE SURV. Q. 4, 4, 16 (2011).

granted.<sup>13</sup> Advocates and commentators at the time hailed the CAT's bright promise as a viable alternative for asylum seekers.<sup>14</sup>

Recent immigration court statistics underscore the CAT's growing importance for those excluded by increasingly restrictive interpretations of asylum law. In response to a surge in Central American migrants fleeing gang violence, domestic violence, and femicide, the Board of Immigration Appeals (BIA) and U.S. Attorney General have issued a series of decisions making it harder for persons targeted by these types of violence to establish that their persecution fits into any of the five protected grounds.<sup>15</sup> This forces asylum seekers and their lawyers to more frequently bring arguments under the CAT.<sup>16</sup> The grant rate in immigration court for asylum and

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13. See, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478, 481–84 (1992) (rejecting a claim that forced recruitment by a guerilla group constituted persecution based on political opinion); *Matter of R-A-*, 22 I. & N. Dec. 906, 907 (B.I.A. 1999) (finding that severe spousal abuse did not amount to persecution based on membership in a particular social group), vacated, *id.* at 906 (A.G. 2001), effectively reinstated in *Matter of A-B-*, 27 I. & N. Dec. 316, 328–29 (A.G. 2018).

14. See, e.g., Kristen B. Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers*, 74 INTERPRETER RELEASES 1773, 1773 (1997) (discussing how the CAT provides a new alternative method of litigating asylum cases); Barbara Cochrane Alexander, *Convention Against Torture: A Viable Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895, 900, 914 (2000) (discussing the significant relief that the CAT will provide to victims of domestic violence).

15. See *Matter of W-G-R-*, 26 I. & N. Dec. 208, 221 (B.I.A. 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 252 (B.I.A. 2014) (both restrictively interpreting the “particular social group” ground in cases involving applicants facing retaliation for refusing to join or leaving a gang); *Matter of A-B-*, 27 I. & N. at 320 (stating that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”); *Matter of L-E-A-*, 27 I. & N. Dec. 581, 582 (A.G. 2019) (holding that harm inflicted based on the victim’s family ties, a common motivator for gang violence, generally will not amount to persecution based on social group membership).

16. See Jeffrey S. Chase, *The Real Message of R-A-F-*, OPINIONS/ANALYSIS ON IMMIGR. L. (Mar. 1, 2020), <https://www.jeffreyschase.com/blog/2020/3/1/the-real-message-of-matter-of-r-a-f-> [<https://perma.cc/V4JM-M7MJ>] (“CAT generally only comes into play where the applicant isn’t found eligible for asylum, something which is happening more frequently as the current administration churns out new bars and obstacles to eligibility.”); Steven H. Schulman, *Judge Posner’s Road Map for Convention Against Torture Claims When Central American Governments Cannot Protect Citizens Against Gang Violence*, 19 SCHOLAR: ST. MARY’S L. REV. RACE & SOC. JUST. 297, 298 (2017) (explaining that the CAT “has become an increasingly important avenue for Central Americans

withholding claims fell from 56% in 2014 to 28% in 2020.<sup>17</sup> For a growing proportion of asylum seekers, CAT relief provides the only path to protection.<sup>18</sup>

Nonetheless, CAT claims rarely succeed. Over the most recent five-year period, immigration judges granted only about 5% of CAT applications that were decided on the merits.<sup>19</sup>

The state responsibility requirement in the CAT’s definition of torture has been a major stumbling block for those seeking CAT protection. Article 1 of the CAT, which was carried over essentially verbatim into the U.S. regulations, defines torture as:

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

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seeking protection” as a result of decisions restricting asylum for those fleeing gangs).

17. All years referenced in this paragraph are fiscal years, not calendar years. The combined grant rate for asylum and withholding of removal claims (counting only cases that resulted in a decision on the merits) was 56% in 2014, 55% in 2015, 48% in 2016, 42% in 2017, 38% in 2018, 31% in 2019, and 28.4% in 2020. See U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOK FISCAL YEAR 2018, at 27 (2019) (displaying data for FY 2014 to FY 2018); *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020), <https://trac.syr.edu/immigration/reports/588/> [<https://perma.cc/JSM4-98FL>] (displaying data for FY 2019); *Asylum Denial Rates Continue to Climb*, TRAC IMMIGR. (Oct. 28, 2020), <https://trac.syr.edu/immigration/reports/630/> [<https://perma.cc/X5RF-N7WG>] (containing grant rate information for 2019 and 2020).

18. From 2014 to 2018 (the last year for which published data on CAT grants in immigration court are available), the vast majority of CAT grants (over 75%) were for CAT withholding rather than deferral of removal, which indicates that the bulk of those getting CAT relief were found ineligible for asylum and withholding of removal due to lack of nexus to a protected ground, and not because they were subject to one of the criminal, terrorist, or other bars to withholding. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOKS, FY 2018 at 30; FY 2017 at 30; FY 2016 at M1; Fiscal Year 2015 at M1; FY 2014 at M1; see also *supra* note 11 (explaining the withholding/deferral distinction in CAT relief).

19. The yearly figures (calculated from numbers of CAT grants and denials reported in EOIR’s Statistics Yearbooks, *supra* note 18) were 4.8% in 2014, 6.0% in 2015, 4.8% in 2016, 5.2% in 2017, and 4.8% in 2018.



based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*<sup>20</sup>

Non-refoulement protection under Article 3 depends on showing that a person “would be in danger of being subjected to torture” within the meaning of that Article 1 definition.<sup>21</sup>

Consider how the CAT’s torture definition applies to the kinds of cases most frequently heard in the immigration courts in recent years—those of individuals and families fleeing threats from gangs or drug cartels, domestic violence, or societal violence targeting women and LGBTQI people.<sup>22</sup> In most such cases there is little doubt that the harm the applicant fears—brutal beatings, even more gruesome mistreatment, or death—is severe enough to amount to torture.<sup>23</sup> Nor will it generally be a problem to establish that the pain or suffering will be inflicted intentionally and for a punitive, coercive, intimidating, information-extracting, or discriminatory purpose.<sup>24</sup>

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20. CAT, *supra* note 1, art. 1(1) (emphasis added and second sentence omitted); accord 8 C.F.R. § 1208.18(a)(1) (containing an essentially identical definition).

21. CAT, *supra* note 1, art. 3(1); see also 8 C.F.R. §§ 1208.16(c)(1)–(2), 1208.18(a) (further defining eligibility for CAT relief). The United States interprets that standard to require proof that torture is “more likely than not” to occur. See 8 C.F.R. § 1208.16(c)(2); see also Resolution of Ratification, § II(2), 136 CONG. REC. 36,198–99 (1990) (establishing the U.S. understanding). The “more likely than not” standard mirrors the U.S. standard for withholding of removal. *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

22. See, e.g., Laura Gottesdiener & John Washington, *They’re Refugees, Fleeing Gang Violence and Domestic Abuse. Why Won’t the Trump Administration Let Them In?*, THE NATION (Nov. 28, 2018), <https://www.thenation.com/article/archive/trump-asylum-gangs-domestic-violence/> [https://perma.cc/Y8EJ-QKJF].

23. See Monica Fonesi, *Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the “Consent or Acquiescence” Requirement*, 13 ROGER WILLIAMS U. L. REV. 308, 320 (2008) (noting that courts assessing CAT claims in gang-based cases have conceded the harm faced by applicants is severe enough to be considered torture). Some claims, of course, are denied because the adjudicator disbelieves the applicant’s story or finds the evidence insufficient to show that such harm is likely.

24. The intent requirement does stand as an obstacle to CAT relief in one class of cases: those involving people who would face imprisonment or institutionalization in their home country under atrocious conditions that result from lack of resources, poor management, or negligence. See *Matter of J-R-G-P-*,

The biggest obstacle, rather, is the torture definition’s requirement that pain or suffering be inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>25</sup>

For asylum and withholding, the refugee definition has long been interpreted to cover harms inflicted by private groups or individuals that a country’s government is unable or unwilling to control.<sup>26</sup> But for conduct by non-State actors to qualify as “torture” within the meaning of the CAT, it must be shown that a public official would, at a minimum, acquiesce to the torturous activity. The U.S. regulations that implement the CAT in immigration proceedings provide a specific definition for the term “acquiescence” which is taken from one of the ratification understandings on which the Senate conditioned its consent to the treaty:

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.<sup>27</sup>

The U.S. jurisprudence interpreting this standard is, put simply, a mess. The BIA and Attorney General, in early precedential decisions addressing torture inflicted by guerillas or criminal groups, held that “acquiescence” requires a showing that public officials are “willfully accepting” or providing “tacit support” to private actors’

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27 I. & N. Dec. 482, 484–87 (B.I.A. 2018) (finding that severe pain and suffering caused by such detention conditions does not meet the CAT’s specific intent requirement); Matter of J-E-, 23 I. & N. Dec. 291, 299–302 (B.I.A. 2002) (holding that substandard detention conditions due to budgetary and management problems do not amount to “torture”).

25. CAT, *supra* note 1, art. 1(1); *see also* 8 C.F.R. § 1208.18(a)(1) (defining torture under the CAT).

26. Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (defining persecution to include actions “either by the government . . . or by persons or an organization that the government was unable or unwilling to control.”); *see also* U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 65, U.N. Doc. HCR/1P/ENG/REV.4 (1979, reissued 2019) (stating that serious discriminatory mistreatment inflicted by the local populace “can be considered as persecution . . . if the authorities refuse, or prove unable, to offer effective protection”).

27. 8 C.F.R. § 1208.18(a)(7); *see also* Resolution of Ratification, § II(1)(d), 136 CONG. REC. 36,198 (1990) (establishing the U.S. understanding stating the same).

torturous activities.<sup>28</sup> Federal courts of appeals have uniformly rejected that interpretation, finding it contrary to clear indications in the drafting history of the U.S. acquiescence understanding that the word “awareness” was intended to encompass both actual knowledge and “willful blindness.”<sup>29</sup> Officials may turn a blind eye to torture even if they don’t approve of it, the courts reason.<sup>30</sup>

Most judicial decisions, however, either expressly or implicitly go a step further, treating “willful blindness” as the minimum necessary condition to establish acquiescence. In other words, unless an applicant can show that a public official is likely to be at least willfully blind to (even if not participating in, instigating, or consenting to) private acts of torture, courts will conclude that acquiescence has not been established, and the CAT claim must fail.<sup>31</sup>

This Article argues that courts have made a conceptual error by conflating willful blindness with acquiescence. The treaty’s U.S. ratification history shows that willful blindness was merely intended to be an alternative way to establish official awareness of torturous activity. Once “awareness” is established—whether through actual knowledge or willful blindness—the focus should turn to the next question posed by the Senate understanding and regulation: is it likely that a public official will “breach his or her legal responsibility to intervene to prevent such activity?”<sup>32</sup> While judicial opinions sometimes recite that language, they give it no content. None of the case law addresses where this legal responsibility comes from, or what it requires.<sup>33</sup> The decisions thus fail to consider whether officials

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28. Matter of S-V-, 22 I. & N. Dec. 1306, 1312 (B.I.A. 2000) (stating that to show acquiescence an applicant must demonstrate that officials are “willfully accepting” of the activity in question); Matter of Y-L-, 23 I. & N. Dec. 270, 280 (A.G. 2002) (denying CAT relief where there was no showing that the group the applicant feared had “tacit support” from the government).

29. *Senate Report*, *supra* note 4, at 9; *see also infra* Section I.A (tracing the construction of “willful blindness” in this context).

30. For discussion of this case law, *see infra* Section I.C.

31. *See infra* Section I.D.

32. 8 C.F.R. § 1208.18(a)(7). The regulation is awkwardly phrased in the present tense, but when the torture definition is applied in the context of removal proceedings, the inquiry will always be prospective, asking whether it is probable that a public official who has knowledge of, or is willfully blind to, the torturous activity the CAT applicant fears will breach a legal responsibility to take preventive action.

33. Even the Second Circuit, the only appellate tribunal that has been careful to emphasize that “willful blindness” bears only on awareness and breach

have legal obligations—whether imposed by the CAT and other international law or the domestic law of the officials’ own country—that extend beyond a duty not to be “willfully blind” to torture.

A common CAT scenario shows why it matters that courts have focused on “willful blindness” without considering other ways in which officials may breach their legal responsibility. A country’s government is aware—in fact, has actual knowledge of—a widespread problem of torturous activity by non-State actors.<sup>34</sup> It may be men domestically abusing their spouses or partners; drug cartels unleashing brutal violence on those who disobey them; families threatening women with honor killings; or mobs physically attacking LGBTQI people. The country’s government is not completely indifferent to the problem—it recognizes the need to protect at-risk groups and punish the perpetrators and has taken some preventive and remedial measures—but its actions are woefully insufficient and largely ineffectual. Corruption, indifference, or outright hostility by some law enforcement officials, as well as failures at higher levels of government to develop effective policies and allocate adequate resources all may contribute to effective impunity for perpetrators and an absence of effective protection for victims.<sup>35</sup>

When the State’s response to torturous conduct is assessed under a willful blindness standard, it is all too easy for immigration judges and reviewing courts to find no acquiescence in situations like these. Courts frequently conclude that officials’ willingness to do

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of legal responsibility is a distinct inquiry, fails to offer any guidance in its decisions on the source and scope of the legal responsibility to prevent torture. See *infra* notes 99–103, 122.

34. Courts generally agree that to establish “awareness,” it is not necessary to show that a public official has knowledge of the individual CAT applicant’s specific situation; “instead, it is sufficient that the public official is aware that torture of the sort feared by the applicant occurs.” *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1089 (9th Cir. 2020) (citing two earlier decisions in agreement); see also *Myrie v. Att’y Gen.*, 855 F.3d 509, 518 (3d Cir. 2017) (similar statement); *Matter of S-V-*, 22 I. & N. Dec. 1306, 1313 (B.I.A. 2000) (stating that the CAT applicant’s burden was to prove that “officials acquiesce to the types of activities that the respondent fears he would suffer at the hands of the guerillas”).

35. See, e.g., *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 816–18 (5th Cir. 2020) (describing the deterioration of protections against gender-based violence in Honduras since its 2009 coup, including governmental failure to effectively implement legislation and provide adequate resources for preventive and protective programs, and gender discrimination in the justice system, all of which contributed to a doubling of homicides of women).

*something* shows that they are not willfully blind to torture.<sup>36</sup> The negligence of public officials—the State’s failure to take necessary and reasonable steps to combat torture of the type the applicant faces—is hard to fit into the willful blindness box.

Shifting the focus away from “willful blindness” and toward the second part of the regulatory test—whether officials who are aware of the abuses “thereafter breach [their] legal responsibility to intervene to prevent such activity”—would, this Article contends, provide a path to a more coherent jurisprudence that is truer to the CAT’s purposes, and would also bring U.S. case law into harmony with the prevailing international understanding of the CAT and other treaties prohibiting torture. The legal responsibility of public officials to intervene to prevent torturous activity derives from international law as well as domestic legislation. U.N. treaty bodies and regional human rights courts have reached a strong consensus that, under the CAT and other human rights treaties, States have a legal responsibility to exercise “due diligence” to prevent, investigate, prosecute, and punish acts of torture by non-State actors.<sup>37</sup> The U.N. Committee Against Torture has found that when States fail to exercise due diligence, they enable private parties to commit acts of torture with impunity and thereby acquiesce, making the State responsible under the CAT’s torture definition.<sup>38</sup> A due diligence approach to CAT acquiescence does not sweep quite as broadly as the “unable or unwilling to control” standard, derived from refugee treaties, that is used for asylum and withholding of removal.<sup>39</sup> But it is considerably more protective than the current willful-blindness-based jurisprudence and provides an interpretation of acquiescence that accords with the CAT’s text and purpose and the U.S. ratification understandings.

In developing these ideas, this Article proceeds as follows. Part I traces the origins of the “willful blindness” approach and the path of agency and judicial interpretation that brought it to center stage. It then examines the incoherence of the CAT case law that

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36. *See infra* Section I.D.

37. *See infra* Section II.A.

38. 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 “Gen. Cmt. 2”]. The Committee Against Torture, which consists of ten human rights experts elected by the States parties to the CAT, is charged with monitoring compliance with the treaty. *See* CAT, *supra* note 1, arts. 17–24.

39. *See supra* note 26 and accompanying text.

rests on “willful blindness,” and its inadequacy in addressing situations where officials do little to protect a person at risk of torture, or systematically fail to take measures needed to curb a widespread problem of torturous violence.

Part II examines how international law has defined the scope of State officials’ legal responsibility to intervene to prevent torture. It traces the development of the “due diligence” standard and explains why this approach is warranted as a matter of treaty interpretation. This Part also considers evidence from the CAT’s drafting history, largely overlooked in prior scholarship, which shows that “acquiescence” made its way into the CAT via a U.S. proposal that expressly tied the concept to a treaty-based obligation on the part of officials to take all appropriate measures within their power to prevent torturous conduct.

Part III examines the CAT’s ratification and implementation history in the U.S. It concludes that the understanding of acquiescence adopted by the Senate when it ratified the treaty requires looking to all applicable sources of legal obligation, international as well as domestic, when assessing whether officials have breached their legal responsibility to prevent torture. Tellingly, when the immigration agencies began to apply the CAT in the 1990s, a memo from the INS General Counsel explained that the reference to “legal responsibility” in the Senate understanding included obligations under international law.

Part IV considers what a due diligence standard for acquiescence would look like in practice and addresses some potential objections to its appropriateness and administrability. It also contains a proposal to amend the CAT regulations to clarify the meaning of acquiescence.

## I. THE TRAVELS AND TRAVAILS OF “WILLFUL BLINDNESS” AS THE STANDARD FOR ACQUIESCENCE IN U.S. INTERPRETATIONS OF THE CAT

### A. How “Willful Blindness” Entered the Picture

The U.N. General Assembly adopted the CAT on December 10, 1984,<sup>40</sup> and the treaty entered into force in 1987, after twenty

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40. G.A. Res. 39/46, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984).

States had ratified it.<sup>41</sup> The United States initiated its ratification process in 1988, when President Reagan signed the CAT and forwarded it to the Senate for its advice and consent.<sup>42</sup> The Reagan Administration put forward nineteen proposed conditions on U.S. ratification, in the form of four reservations, nine understandings, and four declarations.<sup>43</sup> Five of the proposed understandings concerned the CAT's definition of "torture," and one specifically addressed the meaning of the term "acquiescence."<sup>44</sup>

The Reagan Administration's proposed conditions drew criticism from human rights groups, the American Bar Association, and members of the Senate Foreign Relations Committee for undermining the CAT's efficacy and sending a message that the United States was not seriously committed to the fight against torture. In 1989, the new George H.W. Bush Administration negotiated with those groups, and in December it submitted a smaller and revised package of conditions, which included a modified version of the "acquiescence" understanding.<sup>45</sup> In July 1990, the Senate

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41. See CAT, *supra* note 1, art. 27 (providing that the treaty would enter into force on the thirtieth day after the date of deposit of the twentieth State instrument of ratification or accession with the U.N. Secretary General); see also BURGERS & DANIELIUS, *supra* note 4, at 109–10 (listing the ratifications that led to the treaty's entry into force).

42. Message from the President of the United States Transmitting the Convention Against Torture, S. TREATY DOC. 100-20 (1988) [hereinafter *President's Transmittal*].

43. *Id.* at vi, 1–18; see also *Senate Report*, *supra* note 4, at 7, 11–28 (1990) (reprinting the summary and analysis transmitted by the Reagan Administration that contained its proposed conditions). Reservations are intended to alter and limit U.S. obligations under a treaty, while understandings announce how the U.S. intends to interpret a provision in a manner it views as consistent with treaty requirements. Declarations are statements of intention regarding general aspects of implementing the treaty. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 416–23, 430–32 (2000); see also David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 451–52 n.8 (1991) (explaining the distinctions of reservations, understandings, and declarations).

44. *President's Transmittal*, *supra* note 42, at 3–5; see also *Senate Report*, *supra* note 4, at 13–15 (reprinting the Reagan Administration's discussion of its "torture" understandings).

45. See 136 Cong. Rec. 36,193 (1990) (statement of Sen. Pell); *Senate Report*, *supra* note 4, at 4, 7–8, 35–38 (listing the Bush Administration conditions); *Convention Against Torture: Hearing Before the Comm. on Foreign Relations, United States Senate*, S. Hrg. 101-718, 101st Cong. (1990) [hereinafter

Foreign Relations Committee voted in favor of the treaty with the Bush Administration’s proposed conditions,<sup>46</sup> and the full Senate gave its advice and consent on October 30, 1990.<sup>47</sup> The CAT entered into force for the United States on November 20, 1994, thirty days after President Bill Clinton deposited an instrument of ratification with the U.N. Secretary-General.<sup>48</sup>

It took several more years to incorporate the CAT’s non-refoulement requirement into domestic U.S. law. As part of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Congress directed agency heads to “prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations and provisos” in the Senate ratification resolution.<sup>49</sup> In 1999, the Justice Department promulgated regulations establishing standards and procedures for the adjudication of CAT claims by immigration

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*Senate Hearing*], at 1 (statement of Sen. Pell), 8–9 (prepared statement of State Department Legal Advisor Abraham D. Sofaer), 45 (statement of Winston Nagan, Chair, Amnesty International USA); see also Peder van W. Magee, *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Bush Administration’s Stance on Torture*, 25 GEO. WASH. J. INT’L L. & ECON. 807, 816 n.80 (1992) (discussing Sen. Pell’s pivotal role in securing changes).

46. *Senate Report*, *supra* note 4, at 3, 29–31.

47. 136 Cong. Rec. 36,198–99 (1990). Some additional changes to the Bush conditions were made via a floor amendment were worked out between Senator Clairborne Pell, the Senate Foreign Relations Committee Chair, and Senator Jesse Helms, the ranking Republican member. No change was made to the “acquiescence” understanding. See 136 Cong. Rec. 36,195–96 (1990).

48. Declarations and Reservations Made Upon Ratification, Accession, or Succession [United States], 1830 U.N.T.S. 320 (Oct. 21, 1994); see also CAT, *supra* note 1, arts. 25(2), 27(2) (providing that the CAT enters into force for a country thirty days after depositing its instrument of ratification with the Secretary-General). When submitting the CAT to Congress, the Executive Branch made clear that it did not intend to deposit an instrument of ratification until legislation was enacted to implement Article 5, which required extending U.S. criminal jurisdiction to cover acts of torture committed by U.S. nationals abroad and acts of torture committed abroad by non-U.S. nationals later found in the United States. See *President’s Transmittal*, *supra* note 42, at 9–10; *Senate Hearing*, *supra* note 45, at 12, 40–41 (prepared statement and hearing testimony of Abraham D. Sofaer). That legislation, known as the Torture Act, was not enacted until 1994. Pub. L. 103-236, title V, § 506(a), 108 Stat. 463 (1994), codified as amended at 18 U.S.C. § 2340, 2340A.

49. FARRA, Pub. L. No. 105-277, div. G, tit. XXII, § 2242(b), 112 Stat. 2681-822 (1998) (codified as note to 8 U.S.C. § 1231).



judges.<sup>50</sup> The Senate's "acquiescence" understanding is included in the regulations' definition of torture.<sup>51</sup>

The acquiescence understanding in the Reagan Administration's original package of proposed conditions read as follows:

The United States understands that the term "acquiescence" requires 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.<sup>52</sup>

The State Department analysis that accompanied the President's transmittal of the treaty indicated that this understanding, along with several others relating to Article 1's torture definition, was "intended to guard against the improper application of the Convention" in ways that could threaten "U.S. law enforcement interests."<sup>53</sup> The concern, a State Department official later wrote, was that because the CAT contemplates criminal prosecution of those implicated in torture, the definition's terms needed to be delineated with "clarity and precision" to meet constitutional standards.<sup>54</sup>

With that concern in mind, the Administration's analysis stated: "[I]n our view, a public official may be deemed to 'acquiesce' in a private act of torture only if the act is performed with his knowledge and the public official has a legal duty to intervene to prevent such activity."<sup>55</sup> The Administration also justified its acquiescence understanding as consistent with the CAT's limitation of its scope to "torture that occurs in the context of governmental

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50. U.S. Dep't of Just., INS, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) [hereinafter *CAT Regulations*], now codified at 8 C.F.R. § 1208.16-18.

51. 8 C.F.R. § 1208.18(a)(7). The Justice Department's commentary notes that the regulatory definition of torture "is drawn directly from the language of the Convention, the language of the reservations, understandings and declarations contained in the Senate resolution ratifying the Convention, or from ratification history." *CAT Regulations*, *supra* note 50, at 8482.

52. *President's Transmittal*, *supra* note 42, at 5.

53. *Id.* at 4.

54. Stewart, *supra* note 43, at 449, 455-56; see also *Senate Hearing*, *supra* note 45, at 14 (testimony by Justice Department official Mark Richard explaining that the "acquiescence" understanding was "necessary to ensure that Article 1 complies with the due process requirements of the Constitution").

55. *President's Transmittal*, *supra* note 42, at 4.

authority, excluding torture that occurs as a wholly private act.”<sup>56</sup> But, the explicit reference to “private act[s]” of torture, as well as the wording of the understanding itself,<sup>57</sup> makes clear that this reference to the “context of governmental authority” was intended to include situations where private actors engage in torturous activity and an official who knows about it breaches a legal duty to take preventive action.

The Bush Administration’s revised reservations, understandings, and declarations package retained the Reagan “acquiescence” understanding with one modification: it changed the word “knowledge” to “awareness.” The State Department, in its letter transmitting the revised conditions to the Senate Foreign Relations Committee, explained that this change was made “to make it clearer that both actual knowledge and willful blindness fall within the meaning of acquiescence.”<sup>58</sup> As a Justice Department official testified at the Senate hearing on the CAT, the change reflected the fact that “knowledge under our law includes not only actual knowledge . . . but also willful blindness,” and was designed to ensure that an official with “a duty to prevent the misconduct” would not be able to evade

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56. *Id.* at 4. This language was later echoed in the Senate Foreign Relations Committee report approving the CAT, *see Senate Report, supra* note 4, at 6, and in the Justice Department’s commentary to the implementing regulations. *CAT Regulations, supra* note 50, at 8483. The Reagan State Department’s analysis went on to draw an analogy to the “under color of law” standard of civil rights statutes. The phrase “under color of law” was incorporated into two later statutes criminalizing and providing civil remedies for certain acts of torture but does not appear in the Senate CAT understandings or U.S. immigration regulations. *See infra* Part III.

57. The phrase “activity constituting torture” (both in the original Reagan Administration version and the revised version ultimately accepted by the Senate) must be understood as referring to the first part of the CAT Article 1 definition of torture, which defines the act—intentional infliction of severe pain or suffering for certain purposes—and not the definition’s final clause, which specifies the circumstances in which the State is deemed responsible for such an act (“when such pain or suffering is inflicted . . . with the consent or acquiescence of a public official”). Otherwise, the understanding would be circular; it would be saying that public officials cannot acquiesce to torturous activity unless they know the activity is occurring with the acquiescence of public officials.

58. Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Dep’t of State, to Sen. Pell (Dec. 10, 1989) (reprinted in *Senate Report, supra* note 4, at 35–36). The Senate Foreign Relations Committee, endorsing the revised understanding in its report, similarly stated that its purpose “is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence’ in article 1.” *Id.* at 9.

responsibility “by deliberately clos[ing] his eyes to what would otherwise have been obvious to him.”<sup>59</sup> When the Foreign Relations Committee favorably reported the treaty to the Senate, it endorsed the Administration’s explanation of the revised understanding’s objective.<sup>60</sup>

The phrase “willful blindness” thus made its way into the ratification history as a gloss on the meaning of the word “awareness.” Its function is to provide another way to show that public officials “have awareness” of activity amounting to torture, even if their actual knowledge cannot be established. In most cases involving private torture, however, establishing that officials have knowledge is not problematic: the authorities are well aware that violence of the sort the applicant fears—whether it be gender-based violence, genital cutting, anti-gay attacks, or violent retaliation by gangs, guerillas or cartels—is widespread and ongoing.<sup>61</sup>

Once it is shown that officials have the requisite awareness, the Senate understanding is clear that the test for “acquiescence” turns on how they respond. If officials “breach [their] legal responsibility to intervene to prevent such activity,”<sup>62</sup> they are acquiescing. Nothing in the ratification history suggests that a showing of “willful blindness” is needed to establish that officials have breached their legal responsibility.

## B. The “Willful Acceptance” Standard Emerges

The Board of Immigration Appeals (BIA), the tribunal established by the Attorney General to decide appeals from immigration judge decisions,<sup>63</sup> issued *Matter of S-V*,<sup>64</sup> its first

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59. *Senate Hearing*, *supra* note 45, at 14 (testimony by Mark Richard, Deputy Assistant Att’y Gen., Crim. Div., Dep’t of Just.).

60. *Senate Report*, *supra* note 4, at 9 (“The purpose of this condition is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence’ in [A]rticle 1.”).

61. Courts generally agree that “awareness” requires only a showing that public officials are aware that torture of the sort the applicant fears occurs; there is no need to show that an official is aware of the CAT applicant’s specific situation. *See supra* note 34 and accompanying text.

62. Resolution of Ratification, § II(1)(d), 136 CONG. REC. 36,198 (1990); *see also* 8 C.F.R. § 1208.18(a)(7) (incorporating the Senate understanding).

63. The Immigration and Nationality Act (INA) authorizes the Attorney General to issue regulations and make “controlling” rulings “with respect to all questions of law” arising under immigration statutes. 8 U.S.C. § 1103(a)(1), (g).

precedential opinion construing the CAT, in May 2000, about a year after the CAT immigration regulations went into effect.<sup>65</sup> The case reviewed a motion to reopen a removal order submitted by a man who contended that if removed to Colombia he would be kidnapped by guerillas and held in inhuman conditions amounting to torture.<sup>66</sup> The BIA began its analysis by quoting the U.S. definition of “acquiescence,” and noting that its drafting history indicates that either actual knowledge or willful blindness can suffice to establish officials’ “awareness” of torturous activity.<sup>67</sup> It then stressed that “[t]he Senate’s inclusion of this definition of acquiescence in its understandings” modified the legal effect of the treaty with regard to

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The Attorney General has delegated to the BIA the authority to issue legal rulings in appeals from immigration judge decisions and has authorized the BIA to designate selected decisions as precedents binding on immigration judges nationwide. The Attorney General, however, may review and modify or overrule any decision of the BIA. See 8 C.F.R. § 1003.1(d)(1), (d)(3)(ii), (g), (h). Under administrative law principles, courts generally accord deference to precedential decisions of the BIA and Attorney General interpreting ambiguous provisions in the statutes they administer, provided those interpretations are reasonable. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999) (holding that the BIA’s interpretation of an ambiguous provision in the asylum statute was entitled to judicial deference); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing the level of deference afforded to administrative interpretations of statutes, widely known as ‘*Chevron* deference’).

64. 22 I. & N. Dec. 1306 (B.I.A. 2000) (en banc).

65. Although the treaty took effect for the U.S. in November 1994, the BIA had found that the immigration courts lacked jurisdiction to award CAT relief until legislation implementing it in immigration proceedings was enacted. *Matter of H-M-V-*, 22 I. & N. Dec. 256, 257–60 (B.I.A. 1998). To avoid violating the treaty during this period, the INS (which functioned as prosecutor in removal cases) had adopted a “pre-regulatory administrative process” under which, after the completion of removal proceedings but prior to executing an order of removal, the agency would consider whether removing the person to a particular country would violate Article 3 of the CAT and refrain from removing the person if it concluded that was the case. See *CAT Regulations*, *supra* note 50, at 8479.

66. *Matter of S-V-*, 22 I. & N. Dec. at 1307. The respondent also raised a claim for withholding of removal, which the BIA rejected, finding he was disqualified by a robbery conviction that triggered the “particularly serious crime” bar to withholding, and also because he had not shown that he was likely to be harmed in Colombia on account of his political opinion, social group membership, or any other protected ground. *Id.* at 1308–10.

67. *Id.* at 1312. The BIA also drew a link between the Senate’s acquiescence understanding and statements in the ratification history that “only acts that occur in the context of governmental authority” fall within the CAT’s definition of torture. *Id.* The BIA appeared to accept that such a context is present if the requirements of the Senate understanding are met.

acquiescence, limiting it to the confines of that definition.<sup>68</sup> But then, inexplicably, rather than looking to the Senate's definition, the BIA proceeded to ignore it. Instead, relying on one dictionary definition, it found that acquiescence means "silent or passive assent."<sup>69</sup> From this it inferred that the respondent was required to "demonstrate that Colombian officials are willfully accepting of the guerillas' torturous activities."<sup>70</sup>

The BIA claimed to find support for this approach in the U.N. Committee Against Torture's interpretation of the CAT, citing its 1998 ruling in the case of a Peruvian national who objected to being deported from Sweden because she feared torture from both the Peruvian government and Sendero Luminoso, a terrorist group.<sup>71</sup> The Committee noted that Article 3 does not prohibit expelling a person who would face torture "inflicted by a non-governmental entity, without the consent or acquiescence of the Government."<sup>72</sup> This actually afforded no support for the BIA's interpretation of acquiescence, because the Committee's rationale for rejecting the claim was that the complainant had not established a "real and personal risk" of being tortured, and it never addressed whether the facts established "acquiescence" or what that term means.<sup>73</sup>

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68. *Id.* This was a puzzling statement, given that there is nothing in the U.S. "acquiescence" definition to suggest it is more restrictive than the meaning of the word as used in the treaty; if anything, it might be broader, as one of the dissenting BIA members pointed out. *Id.* at 1318 (Rosenberg, dissenting). The BIA's understanding of "understandings" was also off-base; an understanding, as opposed to a reservation, is viewed by the United States as consistent with, not modifying, its treaty obligations. See Stewart, *supra* note 43, at 451–52 n.8.

69. *Matter of S-V*, 22 I. & N. Dec. at 1312 (citing THE OXFORD UNIVERSAL DICTIONARY 17 (3d ed. 1955)).

70. *Id.* Interpreting the term otherwise, the BIA added, "would be to misconstrue the meaning of 'acquiescence.'" *Id.*

71. *Id.* at 1312–13 (citing *G.R.B. v. Sweden*, No. 83/1997, Committee Against Torture, U.N. Doc. CAT/C/20/D/83/1997 (1998)). In another section of its opinion the BIA also looked to the Committee's jurisprudence when addressing evidentiary standards for proving a person is in danger of torture. *Id.* at 1313.

72. *G.R.B.*, ¶ 6.5.

73. *Id.* ¶ 6.6. Sweden, in its submission to the Committee, argued that the complainant had not established a real risk of facing torture from Sendero Luminoso because any such risk would be "of local character and the [complainant] could therefore secure her safety by moving within the country." *Id.* ¶¶ 4.14–15. See Robert McCorquodale & Rebecca LaForgia, *Taking Off the Blindfolds: Torture by Non-State Actors*, 1 HUM. RTS. L. REV. 189, 209–10 (2001) (discussing *G.R.B.* and explaining that the Committee did not address whether State acquiescence had been shown).

The BIA contrasted its newly minted “willful acceptance” standard with the standard applied in asylum cases, where it is enough to demonstrate that the government is “unable to control” nongovernmental persecutors.<sup>74</sup> The acquiescence standard, it emphasized, requires the applicant to “do more than show that the officials are aware of the activity constituting torture but are powerless to stop it.”<sup>75</sup> The BIA concluded that the record showed the Colombian government “actively, although to date unsuccessfully, combats the guerillas” and thus failed to establish that the government’s “failure to protect its citizens is the result of deliberate acceptance of the guerillas’ activities.”<sup>76</sup>

Two years after *Matter of S-V*, Attorney General John Ashcroft issued a precedential opinion reaffirming “willful acceptance” as the test for acquiescence. The decision, *Matter of Y-L*,<sup>77</sup> was primarily aimed at overruling BIA precedents that found low-level drug offenders eligible for withholding of removal. After laying out a new standard ensuring that virtually all drug convictions, regardless of sentence, would trigger the “particularly serious crime” bar to withholding,<sup>78</sup> the remaining issue was whether the three respondents, who feared violent retaliation from Haitian death squads and Jamaican and Dominican drug trafficking groups, qualified for CAT deferral of removal.<sup>79</sup> In finding that none of them had shown that the harm they feared would occur with government acquiescence, the Attorney General explicitly endorsed *Matter of S-V*’s holding, characterizing its “willful acceptance” test as requiring a showing of “government-sanctioned atrocities” that occur with the

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74. *Matter of S-V*, 22 I. & N. Dec. at 1312–13.

75. *Id.* at 1312.

76. *Id.* at 1313. Four BIA members took issue with the majority’s approach in dissenting or concurring opinions. Two opinions argued that because the guerillas exercised political power and controlled territory, they might themselves qualify as “public official[s] or other persons acting in an official capacity” within the meaning of article 1 of the CAT. They pointed to a recent decision of the U.N. Committee Against Torture finding that warring factions in Somalia were *de facto* state actors for purposes of the torture definition. *Id.* at 1314–15 (Villageliu, concurring), 1316–17 (Schmidt, concurring and dissenting) (citing *Elmi v. Australia*, No. 120/1998, Committee Against Torture, U.N. Doc. CAT/C/22/D/120/1998 (1999)). Another dissenter pointed to “willful blindness” as a possible way to show that state officials acquiesce to torture even if they oppose it. *Id.* at 1318 (Rosenberg, dissenting).

77. *Matter of Y-L*, 23 I. & N. Dec. 270, 280 (A.G. 2002).

78. *Id.* at 273–78.

79. *Id.* at 279–85.

“tacit support” or “consent or approval” of authoritative government officials.<sup>80</sup>

The willful acceptance standard has two glaring logical flaws. The first is that it disregards the specific definition of acquiescence in the U.S. ratification understanding, which indicates that acquiescence exists if officials have actual or constructive knowledge of torturous conduct and thereafter breach a legal responsibility to intervene to prevent it. The mental stance of officials towards the torture—whether they approve, support, or accept it—has no intrinsic bearing on those questions. What really needed explication was the definition’s “legal responsibility” language: where does that legal duty come from, and what is its scope? The BIA and Attorney General evaded those key questions by reading “acquiescence” to conform to a dictionary definition rather than the definition laid out in the Senate understanding and U.S. regulation. As a matter of statutory construction, it is axiomatic that when a law expressly defines a term, the statutory definition takes precedence over the word’s “ordinary meaning.”<sup>81</sup>

A second problem is that even under an ordinary meaning approach, the word “acquiescence” has common meanings extending well beyond the BIA’s “silent or passive assent” definition.<sup>82</sup> Acquiescence also means to reluctantly give in to something, even if one opposes it.<sup>83</sup> In this sense, officials who fail to do what is legally

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80. See *id.* at 280, 283, 285.

81. See WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 74–75 (2016); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 225–33 (2012) (discussing the interpretive canon that a specific definition provided by the legislature takes precedence over dictionary definitions of a term). Although the acquiescence definition is contained in an agency regulation, it has the force of a statute. Congress, in FARRA, mandated that the agency adopt implementing regulations for the CAT that included the understandings and other conditions set out in the Senate’s resolution of ratification. See *supra* note 49 and accompanying text; see also *Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003) (holding that Congress clearly intended that agency regulations would apply the Senate acquiescence understanding).

82. Matter of S-V-, 22 I. & N. Dec. 1306, 1312 (B.I.A. 2000).

83. Dictionary definitions of acquiescence include: “passive assent because of inability or unwillingness to oppose; *I acquiesced in their decision despite my misgivings.*” *Zheng*, 332 F.3d at 1195 n.8 (quoting *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 2000)), and “[t]he quality or condition of accepting or complying with something passively or reluctantly;” *Acquiescence definition 2.b*, *OXFORD ENGLISH DICTIONARY*, <https://www.oed.com/>

required of them to prevent and suppress acts of torture can be said to acquiesce to that conduct.<sup>84</sup> Moreover, as Patricia Freshwater noted in an astute early commentary on the U.S. acquiescence standard, the CAT’s torture definition refers to the “consent or acquiescence” of a public official. Acquiescence therefore must be meant to cover something beyond what is conveyed by the word “consent.” The BIA’s standard for acquiescence, however, merely describes ways in which officials may consent to acts of torture, rendering the word “acquiescence” redundant.<sup>85</sup>

The problems with the BIA’s standard had nothing to do with the concept of willful blindness. The BIA understood that “awareness” included willful blindness as well as actual knowledge. It was setting out a test for acquiescence as a whole, for which, under the Senate understanding, “awareness” is only the first step. Where the BIA went astray was in disregarding the “breach [of] legal responsibility” language in the Senate understanding and conflating acquiescence with consent.

But as federal appeals courts began to review the agency’s approach, “willful blindness” took center stage.

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view/Entry/1718?redirectedFrom=acquiescence#eid [https://perma.cc/Y68A-UU7K].

84. See C.W. WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR PROTECTION FROM REFOULEMENT 446 (2009) (reviewing dictionary definitions of “acquiescence” and concluding that “[t]he ordinary meaning of the word implies the indirect involvement of the State in the act of torture, most likely in the form of an omission,” and therefore “when the State refrains from acting where it should have acted, it can be held responsible”).

85. Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of its Citizens?*, 19 GEO. IMMIGR. L.J. 585, 597–98 (2005); see also William Paul Simmons, *Liability of Secondary Actors Under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Juarez*, 10 YALE HUM. RTS. & DEV. L.J. 88, 124 (2007) (observing that the inclusion of both “consent” and “acquiescence” shows that the terms were not meant to be synonymous). The State Department’s Legal Advisor, testifying before the Senate in support of ratification, likewise indicated that acquiescence covers more than official support by referring to torture that occurs “with the support or acquiescence of government officials.” *Senate Hearing*, *supra* note 45, at 4, 7 (testimony and prepared statement of Abraham Sofaer).



### C. “Willful Blindness” Takes Over

The Ninth Circuit’s 2003 decision in *Zheng v. Ashcroft*<sup>86</sup> was the first and most influential in a series of federal appeals court decisions rejecting the “willful acceptance” test.<sup>87</sup> Zheng was smuggled into the United States by members of a Chinese criminal syndicate called “snakeheads.” He testified against his smugglers in a criminal proceeding and as a result feared that the organization would torture and kill him if he returned to China.<sup>88</sup> In his immigration proceedings, Zheng presented evidence that local officials in his province were connected to the smugglers and accepted bribes from them, and thus were unlikely to offer him any protection.<sup>89</sup> An immigration judge granted relief under the CAT,<sup>90</sup> but the BIA reversed. Relying on *Matter of S-V-*, the BIA ruled that the evidence, even if it showed that Chinese officials knew about and did not interfere with the snakeheads’ smuggling operations, failed to establish that officials willfully accepted their torturous activities.<sup>91</sup>

The Ninth Circuit opinion reviewed the drafting history of the Senate acquiescence understanding, emphasizing that “knowledge” was replaced with “awareness” to clarify that both actual knowledge and willful blindness are covered.<sup>92</sup> From this it reasoned that the BIA, in adding a requirement that officials willfully accept torture, contravened Congress’s clear intent.<sup>93</sup> Finding nothing in the ratification understandings “to suggest that anything more than awareness is required,” the court concluded that “[t]he correct inquiry as intended by the Senate is whether a respondent can show that public officials demonstrate ‘willful blindness’ to the torture of their

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86. 332 F.3d 1186 (9th Cir. 2003).

87. An earlier decision by the Fifth Circuit had stated that “willful blindness” was sufficient to prove acquiescence and upheld a denial of CAT relief because the applicant had not shown that officials “would turn a blind eye” to the torture he feared, but the court in that case saw no conflict with the BIA’s “willful acceptance” standard and cited *Matter of S-V-* approvingly. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354–55 (5th Cir. 2002).

88. *Zheng*, 332 F.3d at 1190.

89. *Id.* at 1188–91. There was also evidence that the Chinese government refused to acknowledge the snakeheads’ existence and would be unlikely to intercede because doing so would amount to an admission that they pose a problem. *Id.* at 1189 n.5.

90. *Id.* at 1192.

91. *Id.* at 1191–92.

92. *Id.* at 1192–93.

93. *Id.* at 1194–96.

citizens by third parties, or . . . would “turn a blind eye to torture.”<sup>94</sup> The Ninth Circuit remanded the case to the BIA to determine whether Zheng’s evidence established acquiescence under the willful blindness test.<sup>95</sup>

The Ninth Circuit was right to reject the BIA’s “willful acceptance” test as impermissibly restrictive. But there is a blind spot in *Zheng*’s reasoning that, ironically, mirrored a central flaw of the BIA’s approach by ignoring half of the Senate’s definition of acquiescence. Early in its opinion, the Ninth Circuit noted that the acquiescence regulation requires that an official “have awareness” of torturous activity and then breach a legal responsibility to intervene to prevent it.<sup>96</sup> But the rest of the opinion lost sight of the second part of that test entirely, stating repeatedly that awareness in the form of willful blindness is all that is required to establish acquiescence.<sup>97</sup>

It may be that the Ninth Circuit took the view that officials who turn a blind eye to torture not only “have awareness” but are also necessarily breaching a legal responsibility to take preventive action, without excluding the possibility that an inadequate (although not willfully blind) response could also constitute a breach of legal duty. But the court offered no explanation along these lines. In declaring that the “correct inquiry” for acquiescence is whether public officials turn a blind eye to torturous conduct,<sup>98</sup> *Zheng* suggested that willful blindness is not merely another way to establish the “awareness” element, but the test for acquiescence as a whole—and thus necessary in order to establish a breach of legal responsibility.

A year after *Zheng*, the Second Circuit, in *Khouzam v. Ashcroft*,<sup>99</sup> joined the Ninth Circuit in rejecting the agency’s “willful acceptance” standard. The Second Circuit fixated less on “willful blindness” and avoided suggesting that it is a stand-alone test for acquiescence. Instead, echoing the Senate understanding, the court held that “[i]n terms of state action, torture requires only that government officials know of or remain willfully blind to an act and

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94. *Id.* at 1196 (quoting *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 355 (5th Cir. 2002)).

95. *Id.* at 1197.

96. *Id.* at 1194 (quoting 8 C.F.R. § 208.18(a)(7)).

97. *Id.* at 1189, 1194, 1196.

98. *Id.* at 1196; *see also id.* at 1194–95 (citing *Ontunez-Tursios*, at 354–55).

99. 361 F.3d 161 (2d Cir. 2004).

thereafter breach their legal responsibility to prevent it.”<sup>100</sup> The BIA and Attorney General, the Second Circuit found, erred in creating an additional requirement of “consent or approval.”<sup>101</sup> It noted that such a requirement would have been consistent with the original Swedish draft of the CAT, which applied only to torture “by or at the instigation of” state officials, but the addition of the word “acquiescence” to the torture definition—a change made at the behest of the U.S. during the treaty negotiations—showed that official assent is not needed.<sup>102</sup>

Applying the Senate understanding’s two-part test, the Second Circuit held that the record compelled an acquiescence finding. The BIA had conceded that Khouzam, who was suspected of a murder in Egypt, would face extreme physical abuse in police custody, but deemed it not to be torture because it would be inflicted by rogue officers acting in a “private” capacity, without the approval of Egyptian officials. The Second Circuit found that even if the police officers could be said to be acting in a non-official capacity (which the court doubted), the evidence established that Egyptian police routinely tortured suspects to extract confessions, which “suppl[ie]d ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it.”<sup>103</sup> The *Khouzam* court did not comment on the source or scope of that legal responsibility, presumably finding it obvious that law enforcement officials have some sort of legal obligation not to allow their subordinates to engage in torture.

A third extensively reasoned opinion rejecting the agency standard was issued by the Third Circuit in 2007. *Silva-Rengifo v. Attorney General*<sup>104</sup> involved a CAT claim by a long-term U.S. resident facing removal for a drug conviction who alleged he would be tortured by criminal groups in Colombia. The Third Circuit recounted at length the analyses of the Ninth and Second Circuits and expressly agreed with *Zheng*’s conclusion that “willful blindness” is the correct legal standard for acquiescence.<sup>105</sup> It remanded the case to the agency

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100. *Id.* at 170–71.

101. *Id.* at 171.

102. *Id.* (citing BURGERS & DANIELIUS, *supra* note 4, at 119).

103. *Id.* at 171.

104. 473 F.3d 58 (3d Cir. 2007).

105. *Id.* at 65–67, 69–70. Like the Ninth Circuit in *Zheng*, the Third Circuit barely mentioned the breach of legal responsibility language in the Senate

to consider whether country evidence indicating that the Colombian government fails to prosecute groups committing abuses and has a collusive relationship with some of those groups sufficed to show that officials there “turn a blind eye” to torturous conduct.<sup>106</sup>

Nearly all the other federal appeals courts have agreed with these three decisions, rejecting the “willful acceptance” test and endorsing “willful blindness” as the proper standard.<sup>107</sup> The BIA appears to have thrown in the towel. While it has never expressly overruled *Matter of S-V-*, the BIA stated in a 2017 precedential decision that acquiescence “include[s] the concept of willful blindness.”<sup>108</sup>

#### D. The Incoherence of “Willful Blindness” as a Test for Acquiescence

The judicial focus on “willful blindness” as the central consideration in determining acquiescence has led to considerable confusion in the case law about what the concept means, what it takes to establish willfully blindness, and when, if ever, officials’ inability to prevent acts of torture can amount to willful blindness. At the same time, the courts’ fixation on willful blindness has led them to all but ignore the breach of legal responsibility element, developing

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understanding and agency regulation, and appeared to assume that “willful blindness” is what it takes to satisfy both parts of the regulatory test.

106. *Id.* at 69–70.

107. *See* *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017); *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245–47 (4th Cir. 2013); *Hakim v. Holder*, 628 F.3d 151, 155–57 (5th Cir. 2010); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006); *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005). The Seventh Circuit has used language suggesting that it applies a “willful blindness” standard. *See* *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015) (stating that a CAT applicant targeted by a Mexican drug cartel appears to have a strong case given evidence that he would face “torture . . . to which local public officials are willfully blind.”). The First and Eleventh Circuits, without reaching the issue, have noted other Circuits’ disapproval of the willful acceptance standard. *See* *Mayorga-Vidal v. Holder*, 675 F.3d 9, 19 n.6 (1st Cir. 2012); *Reyes-Sanchez v. Att’y Gen.*, 369 F.3d 1239, 1242 n.6 (11th Cir. 2004).

108. *Matter of J-G-D-F-*, 27 I. & N. Dec. 82, 90 (B.I.A. 2017); *see also* *Matter of W-G-R-*, 26 I. & N. Dec. 208, 226 (B.I.A. 2014) (citing *Zheng* as “defining acquiescence as willful blindness”); *Matter of G-K-*, 26 I. & N. Dec. 88, 98 (B.I.A. 2013) (stating the applicant failed to show that “the Ghanaian government would acquiesce in or turn a blind eye to torture”).

no doctrine aimed at explicating where that legal responsibility comes from or what it requires.

Most decisions endorsing a willful blindness test either state or assume that a showing of willful blindness is sufficient to establish acquiescence. Arguably, this has some support in legislative history. The Senate report on the CAT stated that the acquiescence understanding was meant “to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence’ in article 1.”<sup>109</sup> One might read that to mean that willful blindness satisfies both elements of the definition: awareness and breach of legal responsibility. But more likely, given the Bush Administration’s explanation that it changed “knowledge” to “awareness” to make clear that the term includes willful blindness, the Senate Committee simply meant that willful blindness falls within the definition because it satisfies the “awareness” component.<sup>110</sup> As Parts II and III will show, officials willfully blind to torture should be viewed as breaching their legal responsibility under the CAT and other international law to take diligent preventive measures. But the U.S. CAT case law has thus far failed to explain why willful blindness violates a legal duty.

More troublingly, courts have generally treated willful blindness as not only a sufficient condition, but also a necessary condition for acquiescence. Opinions routinely characterize willful blindness as the test for acquiescence as a whole.<sup>111</sup> 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.<sup>112</sup>

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109. *Senate Report, supra* note 4, at 9; *see also* *Roye v. Att’y Gen.*, 693 F.3d 333, 343 (3d Cir. 2012) (alluding to that legislative history and then stating that acquiescence “can be found when government officials remain willfully blind to torturous conduct and thereby breach their legal responsibility to prevent it”).

110. *See supra* notes 58–60 and accompanying text.

111. *See, e.g., Akosung v. Barr*, 970 F.3d 1095, 1104 (9th Cir. 2020) (stating that “official acquiescence . . . exists when government officials were aware of the torture but remained willfully blind to it, or simply stood by” (internal quotation marks omitted) (quoting *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2009))); *Roye*, 693 F.3d at 343 (3d Cir. 2012) (stating that willful blindness is “the minimum *mens rea* requirement pertaining to those who consent to or acquiesce in acts of torture committed by others”).

112. *See, e.g., Myrie v. Att’y Gen.*, 855 F.3d 509, 517–18 (3d Cir. 2013) (quoting the acquiescence regulation, then restating it as, “[i]n colloquial terms, . . . [i]s the official willfully blind?” and instructing the BIA to apply the

As a legal concept, willful blindness has its origins in criminal law, where it developed as a justification for finding defendants guilty of offenses that require “knowing” conduct in situations where the person consciously avoided finding out key facts that would render them culpable (for example, taking money from a known drug dealer to drive a car with something hidden in the trunk, without ever asking what the trunk contains).<sup>113</sup> The Supreme Court has described it as a state of mind that “surpasses recklessness and negligence” and requires “deliberate actions to avoid confirming a high probability of wrongdoing.”<sup>114</sup>

When willful blindness, designed to serve as a high-culpability form of constructive knowledge, is used in CAT cases not only to establish “awareness” (a purpose for which it is well-suited), but also to define the scope of officials’ legal responsibility to take preventive action (a purpose to which it bears no logical relation), the results are predictable. Any response that amounts to more than “turning a blind eye”—in other words, officials taking any steps at all to protect the victims or pursue the perpetrators—can easily be characterized as something better than willful blindness. When

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willful blindness test to determine whether the response to torture amounted to acquiescence); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007) (quoting the acquiescence regulation, then stating: “A government . . . cross[es] the line into acquiescence when it shows ‘willful blindness toward the torture of citizens by third parties.’” (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir. 2005))); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354–55 (5th Cir. 2002) (quoting the regulation, then upholding BIA’s finding of no acquiescence because the evidence failed to show Honduran officials “would turn a blind eye to torture”).

113. These were the facts in a seminal criminal “willful blindness” decision, *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc). See also Barry Gross & Stephen G. Stroup, *Has the Legal Threshold for ‘Willful Blindness’ Really Changed Since Global-Tech?*, 83 U.S.L.W. 1202, 1203 (2015) (discussing development of the concept in criminal case law).

114. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011); see also *Roye*, 693 F.3d at 343 n.13 (quoting *Global-Tech* to explain what “willful blindness” means for purposes of CAT acquiescence). Regulations issued in the waning days of the Trump Administration added to the CAT acquiescence regulation a statement that “awareness” includes both actual knowledge and willful blindness and a definition of “willful blindness” drawn from *Global-Tech*. Final Rule, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274, at 80,369, 80,398 (Dec. 11, 2020) [hereinafter *December 2020 Final Rule*] (discussing and setting forth text of amendment to 8 C.F.R. § 1208.18(a)(7)); see also Notice of Proposed Rulemaking, 85 Fed. Reg. 36,264, at 36,287 (June 15, 2020) [hereinafter *June 2020 Proposed Rule*] (citing *Global-Tech* as source of the rule’s definition of willful blindness).

governments take woefully inadequate, inept, or half-hearted measures to address known torturous activity, one could fairly call their response negligent or reckless, but it is hard to label it “willful blindness.”

As an example, take *Fuentes-Erao v. Sessions*, a 2017 Eighth Circuit decision.<sup>115</sup> The CAT applicant in that case was a woman from Honduras who suffered prolonged and severe physical, sexual, and psychological abuse from a domestic partner who she feared would kill her upon her return. The court noted that evidence in the record showed “domestic violence is a widespread problem in Honduras, . . . impunity for persecutors is common, and . . . the laws and institutions in place to assist victims are largely ineffectual,” and observed, “[i]t is evident that the Honduran government has fallen short in providing the necessary resources to address the issue.”<sup>116</sup> Nonetheless, applying the willful blindness test, the court upheld the BIA’s finding of no acquiescence, concluding that this evidence did not compel a conclusion that the “government generally consents or acquiesces in domestic violence.”<sup>117</sup>

Many cases involving applicants who fear torture from gangs or other non-State groups deploy similar reasoning. In one decision, a woman beaten and threatened by the M-18 gang in El Salvador was found not to have established acquiescence despite evidence of police corruption and the fact that an M-18 leader was able to call her from prison and offer to protect her from the gang if she visited and had sex with him at the prison, because “the record also show[ed] that El Salvador has taken steps to abate gang violence.”<sup>118</sup> Another court

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115. 848 F.3d 847 (8th Cir. 2017).

116. *Id.* at 854.

117. *Id.* at 852, 854. The court also noted that the applicant never reported her abuse to the police and thus “never gave the government the opportunity to protect her” from the torturous conduct. *Id.* at 852. However, it appeared to accept that this was not fatal to a finding of acquiescence, but could be overcome if the evidence showed the government’s overall response to domestic violence was willfully blind. *Id.* at 854.

118. *De Rivas v. Sessions*, 899 F.3d 537, 540, 543 (8th Cir. 2018); *see also* *Garcia-Milian v. Holder*, 755 F.3d 1026, 1029–30, 1033–35 (9th Cir. 2015) (in which a Guatemalan woman, after being beaten and raped by masked men, was told police would not investigate unless she identified the assailants; the court upheld a finding of no-acquiescence because Guatemala took “steps to combat violence against women,” despite evidence that its efforts were weak and ineffective); *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 609–12 (3d Cir. 2011) (upholding a BIA no-acquiescence finding because media reports showed

upheld the BIA’s no-acquiescence finding in the case of a defector from a gang who was beaten and threatened when he refused to engage in acts of violence. It concluded that “widespread evidence of corruption” in the government and police, and the fact that when one beating was reported the police took no action beyond filing a report, were insufficient to show acquiescence because there was also evidence that the Salvadoran government “is attempting to take steps and actions to deal with police corruption” and “is accepting the United States’ assistance in combating the country’s gang enterprises.”<sup>119</sup> Other cases find that as long as the police took any action when torturous activity or threats were reported to them—even if it was just gathering some evidence or temporarily increasing patrols in the victim’s neighborhood—that is enough to negate willful blindness and justify a finding of no acquiescence.<sup>120</sup>

Even the Second Circuit, the only Court of Appeals to consistently stress that awareness and breach of legal responsibility are distinct elements, has failed to offer a theory of what the second part of the acquiescence definition means. The Second Circuit has repeatedly stated that acquiescence can be shown by “evidence that

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that the Honduran government “seeks to combat the [gang] problem and protect its citizens,” despite applicant’s testimony that the five times he reported threats and violence to Honduran police they claimed they were investigating but there were no observable results).

119. *Zaldana Menijar v. Lynch*, 812 F.3d 491, 495–97, 501–02 (6th Cir. 2015); *see also Medina-Velasquez v. Sessions*, 680 Fed. App’x 744, 746–47, 753–54 (10th Cir. 2017) (upholding a BIA no-acquiescence finding despite a country expert’s testimony that the Honduran government fails to protect its citizens from gangs due to “lack of resources, corruption, and intimidation of prosecutors and judges,” because the expert conceded that Honduras “makes some attempt” to police gangs by imprisoning gang members).

120. *See Marroquin-Ochoma v. Holder*, 574 F.3d 574, 575, 579–80 (8th Cir. 2009) (affirming a no-acquiescence finding because when a Guatemalan woman reported death threats from the MS the police sent extra patrols to her neighborhood for a time, even though they took no further action and there was “evidence of general police reluctance to pursue gang members”); *Reyes-Sanchez v. U.S. Att’y Gen.*, 369 F.3d 1239, 1241–43 (11th Cir. 2004) (upholding the denial of a CAT claim because the evidence did not show police “did nothing” after a Peruvian man reported violent threats from a rebel group, although all they did was come to the scene and gather evidence); *Otunez-Turcios v. Ashcroft*, 303 F.3d 341, 345–47, 354 (5th Cir. 2002) (upholding a no-acquiescence finding in a case where Guatemalan police escorted landlords to a meeting where a campesino opposing the landlords was killed and the police later arrested the shooter but failed to take any action against the landlords, who were implicated by the shooter when he confessed).



officials knew of private parties' abusive actions and thereafter breached their legal responsibility to prevent such actions."<sup>121</sup> This at least opens up the possibility that acquiescence may exist where officials who know about torturous activity respond in a manner that is legally inadequate, even if not "willfully blind." In *Delgado v. Mukasey*, the Second Circuit vacated the BIA's denial of a CAT claim and remanded the case to the agency to consider whether the acquiescence standard was satisfied by evidence showing that local officials did little in response to a complaint the petitioner filed after she was kidnapped and threatened by FARC guerillas, and that Colombia's government, to promote peace talks, had allowed the FARC to maintain control over a "Switzerland-sized area" of the country.<sup>122</sup> But the court provided no guidance on how to determine whether those circumstances would amount to a legal breach, and if so, why.

When, if ever, a government's inability to prevent acts of torture by non-State actors can constitute "willful blindness" has also been a source of confusion in the case law.<sup>123</sup> Courts routinely state that acquiescence requires more than a showing that officials are "unable or unwilling" to provide protection, the standard applicable to

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121. *Delgado v. Mukasey*, 508 F.3d 702, 709 (2d Cir. 2007) (internal quotation marks and emendations omitted) (partially quoting *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004)); *see also* *De La Rosa v. Holder*, 598 F.3d 103, 109 (2d Cir. 2010) (characterizing the standard for acquiescence similarly).

122. *Delgado*, 508 F.3d at 709; *see also* *Scarlett v. Barr*, 957 F.3d 316, 335 (2d Cir. 2020) (remanding a CAT claim because the BIA failed to address the "legal responsibility" aspect of the acquiescence definition, and directing the agency to consider "what 'legal responsibility' Jamaican officials had to protect a serving police officer threatened with gang violence"). In one of the few decisions of other circuits to give distinct attention to the breach-of-legal-responsibility element, an Eighth Circuit panel instructed the BIA to address whether law enforcement officials who would not intervene to stop torture by rogue officers working for a drug cartel would be breaching their legal responsibility by failing to make arrests. *Ramirez-Peyro v. Holder*, 574 F.3d 893, 908 (8th Cir. 2009).

123. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 7:33 (2020) ("U.S. courts have not established a clear rule for determining whether a government's inability to stop torturous acts by a non-state actor manifests . . . its acquiescence"); James Feroli, *Developments Under the Convention Against Torture*, 19-03 IMMIGR. BRIEFINGS 1 (discussing the conflicting case law); *Scarlett v. Barr*, 957 F.3d 316, 335-36 (2d Cir. 2020) (noting uncertainty in the case law and remanding to the BIA to address how, if at all, authorities' inability to fulfill their legal obligations of protection should inform the acquiescence determination).

asylum and withholding of removal claims.<sup>124</sup> The willful blindness inquiry, as one court put it, “centers upon the willfulness of a government’s non-intervention.”<sup>125</sup> Thus, the decisions generally agree that an official’s unwillingness to take any protective action will constitute acquiescence.

Some courts have opened the door to considering a government’s inability to control private actors’ torturous conduct by reasoning that the CAT’s definition of torture requires only a showing that “a public official”<sup>126</sup> —not the government generally—will likely acquiesce (or collude or participate in) the feared acts of torture. A much-cited Ninth Circuit case, *Tapia Madrigal v. Holder*,<sup>127</sup> vacated a BIA ruling which denied CAT relief to a former member of the Mexican military who feared violent retaliation from the Los Zetas drug cartel. The Ninth Circuit found that the BIA erred by focusing on the Mexican government’s efforts to fight the Zetas as reason to conclude there would be no State acquiescence. Instead, the relevant question, based on evidence showing local police officers and prison officials frequently work for the cartels, was whether it was likely that the applicant, if he sought official help, would encounter at least one official who would turn a blind eye to the Zetas’ torturous activity. If so, the court reasoned, the Mexican government’s ability to control Los Zetas becomes highly relevant, because he is likely to face torture, with a public official’s acquiescence, unless the efforts of other government actors are efficacious enough to actually protect him from the Zetas’ violence.<sup>128</sup> The Second, Third, and Seventh

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124. See, e.g., *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 611 (3d Cir. 2011) (stating the “unable or unwilling” asylum standard “is not applicable to a claim for relief under the CAT”); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007) (“A government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it, but does cross the line into acquiescence when it shows willful blindness toward the torture of its citizens by third parties.”); *Azanor v. Ashcroft*, 384 F.3d 1013, 1019 (9th Cir. 2004) (holding that acquiescence requires more than a showing “that public officials would be merely unable or unwilling to prevent torture by private parties”).

125. *Mouawad*, 485 F.3d at 413.

126. Both the treaty’s torture definition and its implementing U.S. regulation use the singular: “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an official capacity.” CAT art. 1(1); 8 C.F.R. § 1208.18(a)(1) (emphasis added).

127. 716 F.3d 499 (9th Cir. 2013).

128. *Id.* at 509–10.

Circuits have issued opinions with similar reasoning,<sup>129</sup> and several other circuits 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.<sup>130</sup>

Although these cases have been celebrated by some advocates as providing a roadmap to winning CAT protection for persons fleeing gang and cartel violence,<sup>131</sup> their effect has been limited by the reluctance of many courts to infer from evidence of widespread official corruption that a particular CAT applicant is likely to be ignored or mistreated by the authorities when reporting a threat or incident.<sup>132</sup>

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129. See *De La Rosa v. Holder*, 598 F.3d 103, 110 (2d Cir. 2010) (“Where a government contains officials that would be complicit in torture, and the government . . . is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would [not seem to be] inconsistent with a finding of government acquiescence . . . .”); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138–40 (7th Cir. 2015) (finding that it was enough to show that corrupt local officers had colluded with the Zetas in torturing him, and that preventive efforts by other government actors were irrelevant unless “the Mexican government could be expected to [actually] protect the petitioner from the Zetas should he be returned to Mexico”). Similar reasoning appears to underlie, at least in part, statements by the Third Circuit that a government’s inability to control groups engaged in torture, while not dispositive, may in some circumstances be relevant to establishing acquiescence through willful blindness. See *Quinteros v. Att’y Gen.*, 945 F.3d 772, 788, 792–93 (3d Cir. 2019); *Pieschacon-Villegas v. Att’y Gen.*, 671 F.3d 303, 312 (3d Cir. 2011).

130. For examples of cases where courts have acknowledged that participation, collusion, or acquiescence in torture by low-level police officers is sufficient, see *Alvarez Lagos v. Barr*, 927 F.3d 236, 256 (4th Cir. 2019); *Ireguas-Valdez v. Yates*, 846 F.3d 806, 812–13 (5th Cir. 2017); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 905–06 (8th Cir. 2009).

131. Several articles have hailed this line of cases as portending a more generous application of the CAT to individuals fleeing gang or cartel violence. See Feroli, *supra* note 123, at 5; Schulman, *supra* note 16, at 299; Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates?: Refugee Law and Its Application to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135, 162–64 (2012).

132. See, e.g., *Zaldana Menijar v. Lynch*, 812 F.3d 491, 497, 501–02 (6th Cir. 2015) (upholding BIA decision that evidence of widespread corruption throughout the Salvadoran government was insufficient to prove that a public official is likely to acquiesce to any future harm the applicant may face from gangs); see also *supra* notes 115–120 and accompanying text (discussing other case examples); ANKER, *supra* note 123, § 7:33 n.24 (listing Court of Appeals decisions which suggest that “proof of widespread corruption within government is not sufficient by itself to meet the acquiescence requirement”); *Matter of G-K-*, 26 I. & N. Dec. 88, 98 (B.I.A. 2013) (upholding an immigration judge’s decision

If the person cannot point to past efforts to enlist official help that were met with willful blindness, or never went to the police because they believed it would do no good, the BIA and some reviewing courts seem particularly reluctant to conclude that there is a probability that officials will acquiesce to their torture.<sup>133</sup> But other appellate panels have overturned BIA decisions for giving insufficient attention to evidence of a widespread pattern of corrupt collusion with criminal organizations or a general failure to enforce laws that protect at-risk groups from harm.<sup>134</sup>

Another possible path to finding willful blindness in situations where a government, even if willing, lacks the ability to protect its citizens can be found in a few federal appeals court decisions holding that, to show acquiescence, “[i]t is enough that public officials remained willfully blind to [torturous conduct], or simply stood by because of their inability or unwillingness to oppose

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that “generalized evidence of government corruption” was insufficient to show a government would acquiesce to torture).

133. See *Matter of O-F-A-S-*, 27 I. & N. Dec. 709, 720 (B.I.A. 2019), *vacated on other grounds*, 28 I. & N. Dec. 35, 42 (A.G. 2020) (rejecting a CAT acquiescence claim because the applicant did not report the incident to the police and “[i]t is not sufficient to simply assume that the police would not have responded”); *Aldana-Ramos v. Holder*, 757 F.3d 9, 19 (1st Cir. 2014) (upholding no-acquiescence finding because police investigated and made an arrest when the applicants’ father was murdered by a Guatemalan gang; evidence that suspects were released after the judge was bribed did not suffice because “petitioners have made no showing that similar bribery would likely occur in a future case”). *But see Alvarez Lagos v. Barr*, 927 F.3d 236, 256 (4th Cir. 2019) (finding the BIA erred by failing to consider, in the case of a Honduran woman threatened by a gang who did not seek help from the police, her testimony about why she believed local police colluded with the gang and other evidence that the police and gang shared information).

134. See, e.g., *Quiroz Parada v. Sessions*, 902 F.3d 901, 916 (9th Cir. 2018) (stating that “[e]vidence showing widespread corruption of public officials . . . can be highly probative” in establishing that an applicant will encounter officials likely to acquiesce in their torture); *Sarhan v. Holder*, 658 F.3d 649, 657–60 (7th Cir. 2011) (holding, in the case of a woman who faced an honor killing in Jordan, that acquiescence was established by a pattern of lenient sentences imposed by the judiciary for honor killings and the fact that the government offered no protection for potential victims other than extended protective custody); *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008) (finding evidence that Jamaican police generally fail to investigate attacks on gay men probative of its acquiescence to anti-gay violence).

it.”<sup>135</sup> The Third Circuit applied this doctrine in the case of a Colombian woman who, when she reported to the police and the military that she had been kidnapped and threatened by FARC guerillas, was told there was nothing they could do to protect her. In essence, the court reasoned, the authorities indicated that “they would do nothing to stop” the torturous activities, which could support a finding of willful blindness—even if their reason for taking no action was that any steps they might try to take would be futile.<sup>136</sup> The Ninth Circuit similarly drew a distinction between officials’ “inability . . . to oppose criminal organizations,” which may suffice to establish acquiescence, and their “ineffective[ness] in preventing or investigating criminal activities,” which is insufficient.<sup>137</sup> The “unable to oppose” formulation, which so far has found little traction outside these two circuits, may help some CAT applicants show acquiescence in situations where governments have lost control so completely that officials cannot do anything to counter groups engaging in torture and do not even try.<sup>138</sup> But it leaves intact the willful blindness test for acquiescence, under which any enforcement efforts made by officials, no matter how inept, under-resourced, or ill-calculated to address the problem, will be viewed by most courts as sufficient to show that officials have not “turned a blind eye.”

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135. *Silva-Rengifo v. Att’y Gen.*, 473 F.3d 58, 65 n.6 (3d Cir. 2007) (quoting *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006)) (emphasis added).

136. *See Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 350–51 (3d Cir. 2008); *see also Pieschacon-Villegas v. Att’y Gen.*, 671 F.3d 303, 311 (3d Cir. 2011) (applying the same reasoning to a case involving government inability to control paramilitary and drug trafficking groups).

137. *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034–35 (9th Cir. 2014) (finding acquiescence was not established when Guatemalan police did not pursue an investigation because the victim could not identify her masked assailants, and country evidence showed that the Guatemalan government was taking some, albeit ineffective, steps to combat violence against women).

138. A December 2020 amendment to the CAT acquiescence regulation—part of an extensive Trump Administration package of asylum-restricting rules that may be overturned in court or rescinded under President Biden—adds a sentence providing that an official will not be deemed to have breached a legal responsibility to intervene “if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.” *December 2020 Final Rule*, *supra* note 114, at 80,398 (amending 8 C.F.R. § 1208.18(a)(7)). The commentary that accompanied the rule when it was proposed stated that it is meant to “supersede any judicial opinions that could be read to hold that an official actor could acquiesce to torturous activities [they are] unable to prevent.” *June 2020 Proposed Rule*, *supra* note 114, at 36,288.

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For nearly two decades, federal appeals courts have struggled to define the scope and meaning of official acquiescence under the CAT. While appropriately rejecting “willful acceptance” as the standard, the decisions have elevated “willful blindness”—a concept introduced in the legislative history to describe how officials may be aware of private actors’ torturous acts even if they lack actual knowledge—into a stand-alone test for acquiescence. But acquiescence, under the express terms of the Senate understanding, is defined by two elements: (1) awareness, followed by (2) a breach of legal responsibility. Willful blindness is often unnecessary for the first element, given that officials usually have actual knowledge that a particular sort of torturous violence is prevalent. And it is ill-suited as the measure for the second. Neither the treaty’s ratification history nor logic provides any basis for thinking that the only legal responsibility that public officials have in relation to torture is not to be willfully blind to it. When courts invoke willful blindness as the test for acquiescence, it is hard for them to avoid reaching the conclusion that any responsive action taken by officials, no matter how inadequate, shows they are not being willfully blind.<sup>139</sup>

In order to give real effect to the language of the Senate understanding, and greater coherence to the case law, courts must seriously examine issues that willful blindness has thus far obscured. What legal responsibility do public officials have to intervene to prevent acts of torture? What is its source, and what are its contours? The next Part examines international law, where the idea of a legal obligation of “due diligence” on the part of States to prevent acts of torture has gained wide acceptance. Part III then explores how that

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139. Some commentators have argued that under the “willful blindness” test, courts should find that officials acquiesce to domestic violence or other types of privately inflicted torture in situations where there has been some but inadequate action taken in response to a reported incident, or the government’s response to violence of that type is systemically deficient. See Freshwater, *supra* note 85, at 598–602; see also Lori A. Nessel, ‘Willful Blindness’ to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 143–49 (2004) (suggesting that States are willfully blind when they fail to take adequate measures to prevent domestic violence). But it strains the ordinary and legal meaning of “willful blindness” to read the term that broadly, and, as we have seen, few courts have done so.

approach comports with the United States' ratification and implementation of the CAT.

## II. ACQUIESCENCE AND THE LEGAL RESPONSIBILITY TO PREVENT TORTURE UNDER THE CAT

Given that the U.S., in ratifying the CAT, defined “acquiescence” by referencing the “legal responsibility” an official has to intervene to prevent torturous activity, it makes sense to look to the CAT itself as a source of legal responsibility.<sup>140</sup> If the treaty imposes a legal duty on State officials to respond in certain ways to acts of torture by non-State actors, a failure to meet those responsibilities should be considered acquiescence.

A broad consensus has emerged in the jurisprudence of U.N. treaty bodies and international human rights courts that States have an obligation to exercise “due diligence” to prevent acts of torture, whether inflicted by State officials or private parties—a duty to engage in serious and reasonable preventive and remedial measures that are proportional to the problem and likely to be effective in producing results.<sup>141</sup> This Part will discuss how the due diligence approach developed and gained wide acceptance, and why it is justified as a matter of treaty interpretation.

### A. The Due Diligence Obligation to Prevent Torture in International Law

The CAT was adopted not to outlaw torture, which was already illegal under international law, but to build a framework for more effective efforts by States to eradicate it.<sup>142</sup> The CAT's preamble

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140. See WOUTERS, *supra* note 84, at 446–47 (observing that although the U.S. understanding “did not further specify to what legal responsibilities it referred” both national and international obligations may apply, “in particular the obligations entailed in the Convention Against Torture”); Rosati, *supra* note 12, at 1775 (noting that legal duties to intervene to prevent acts of torture provided for in the CAT can give content to the “legal responsibility” referred to in the Senate understanding).

141. See Julie Goldscheid & Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, 48 CORNELL INT'L L.J. 301, 304–11, 317–20, 327–29 (2015); see also *infra* notes 290–98 and accompanying text (discussing the meaning of due diligence).

142. See *supra* note 9; BURGERS & DANIELIUS, *supra* note 4, at 1 (emphasizing the CAT did not outlaw torture but is aimed at strengthening its

specifically invokes Article 5 of the Universal Declaration of Human Rights (UDHR) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR), “both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>143</sup> Nearly identical prohibitions also appeared in two major regional human rights treaties, the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>144</sup> and the 1969 American Convention on Human Rights.<sup>145</sup>

The due diligence principle emerged as an interpretation of what those provisions require of States when torture is committed by non-State actors. The U.N. Human Rights Committee, in a 1982 General Comment on ICCPR Article 7, expressed the view that it is “the duty of public authorities to ensure protection by the law against such treatment even when committed by persons . . . without any official authority,” and that this duty required States to effectively investigate complaints, hold those found guilty responsible, and provide effective remedies to victims.<sup>146</sup> In subsequent general

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existing prohibition under international law); CAT, *supra* note 1, pml. (referencing existing prohibitions and then expressing the States parties’ desire to “make more effective the struggle against torture . . . throughout the world”).

143. CAT, *supra* note 1, pml., citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights, 71 (Dec. 10, 1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

144. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 3, Eur. T.S. No. 5, 213 U.N.T.S. 221, 224 (entered into force Sept. 3, 1953) (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

145. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 5(2), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 146 (entered into force July 18, 1978) (“No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment . . .”). The 1981 African Charter on Human Rights similarly outlaws all torture. African Charter on Human and Peoples’ Rights, adopted Jun. 27, 1981, art. 5, 21 I.L.M. 58, 60 (entered into force Oct. 21, 1986) (“All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”). International humanitarian law, since the 1949 Geneva Conventions and even earlier, has proscribed all use of torture in armed conflict. See Rachel Lord, *The Liability of Non-State Actors for Torture in Violation of International Humanitarian Law*, 4 MELBOURNE J. INT’L L. 112, 121–26, 129–33 (2003).

146. Rep. of the Human Rights Comm., Annex 5 at 94, General comment 7(16), ¶¶ 1–2, U.N. Doc. A/37/40 (Sep. 22, 1982). Employing similar reasoning in a 1987 ruling on an individual complaint, the Human Rights Committee found



comments, the Human Rights Committee elaborated on the State's obligation to "exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."<sup>147</sup>

The seminal statement of the principle appeared in the first decision issued by the Inter-American Court of Human Rights in the 1988 *Velásquez Rodríguez* case,<sup>148</sup> which involved the disappearance in Honduras of a politically active student amid a pattern of kidnappings, torture, and disappearances of suspected government opponents. The complaint alleged violations of several provisions of the American Convention, including Article 5's prohibition of torture.<sup>149</sup> Although there was strong reason to suspect direct government involvement, the court's opinion made it clear that the State's responsibility did not depend on this:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it . . . . The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation . . . , to identify those

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Colombia violated article 6 of the ICCPR (right to life) in a case of disappearance and death because the State failed in its duty to "take specific and effective measures to prevent" disappearances and failed to conduct a thorough investigation. *Herrera Rubio v. Colombia*, No. 161/1983, ¶ 10.3 (Hum. Rts. Comm. Dec. 1, 1987).

147. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); *see also* Human Rights Comm., General Comment 20: Article 7, ¶¶ 2, 8, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (discussing the duty of States parties to "afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7," including acts inflicted by persons acting "in a private capacity").

148. Inter-Am. Ct. H.R. (ser. C) No. 4 (1988); *see also* NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* vii (2d ed. 1999) (noting that "the *Velásquez Rodríguez* case has been influential beyond the region in clarifying the normative status and legal consequences of torture").

149. *Velásquez Rodríguez*, ¶¶ 1-3, 147-48.

responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>150</sup>

Honduras was found liable because its law enforcement officials did not conduct a “serious investigation” of Velásquez’s disappearance and its judges failed to act when writs were filed on his behalf.<sup>151</sup>

The European Court of Human Rights has also long interpreted the prohibition of torture and inhuman treatment in Article 3 of the European Convention as requiring States to take effective steps to prevent and punish private actors’ abuses.<sup>152</sup> It most fully articulated its due diligence doctrine in *Opuz v. Turkey*, which held that Turkish officials violated Article 3 by failing to protect a woman from severe domestic violence at the hands of her domestic partner.<sup>153</sup> The authorities arrested her partner several times, but repeatedly released him with little or no punishment, and did little to

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150. *Id.* ¶¶ 172, 174.

151. *Id.* ¶¶ 178–82. The African Commission on Human and Peoples’ Rights has also adopted *Velásquez Rodríguez’s* due diligence approach as its standard for assessing State responsibility for torture or other rights violations by private parties. See *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, No. 245/2002, Decision, African Comm’n on Human and Peoples’ Rights, ¶¶ 141–60 (May 2006).

152. See, e.g., *Z & Ors. v. The United Kingdom*, App. No. 29392/95, ¶¶ 69–75 (Eur. Ct. H.R. May 10, 2001), <http://hudoc.echr.coe.int/eng?i=001-59455> (on file with the *Columbia Human Rights Law Review*) (finding State responsible for parents’ acts of child abuse because Article 3 “requires States to take measures . . . to ensure that individuals within their jurisdiction are not subjected to torture,” and those measures should “provide effective protection . . . of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had . . . knowledge”); *X & Y v. The Netherlands*, App. No. 8978/80, ¶¶ 7–11, 21–27, 30, 33–34 (Eur. Ct. H.R. Mar. 26, 1985), <http://hudoc.echr.coe.int/eng?i=001-57603> (on file with the *Columbia Human Rights Law Review*) (finding State responsible for sexual assault of a mentally disabled 16-year old girl at a privately-run group home because it failed to pursue criminal proceedings and thus breached its duty to provide “effective deterrence” and “practical and effective protection”). As early as the 1970s, decisions of the European Commission had declared that States may be held responsible for rights violations by private actors if they fail to take appropriate measures to counter them. See Geraldine Van Bueren, *Opening Pandora’s Box: Protecting Children Against Torture or Cruel, Inhuman and Degrading Treatment or Punishment*, 17 L. & POL’Y 377, 383 (1995) (discussing Commission decisions).

153. *Opuz v. Turkey*, App. No. 33401/02, ¶ 176 (Eur. Ct. H.R. June 9, 2009), <http://hudoc.echr.coe.int/eng?i=001-92945> (on file with the *Columbia Human Rights Law Review*). The court also found violations of other provisions of the European Convention, including Article 2’s right to life due to the Turkish authorities’ failure to protect against the murder of the applicant’s mother.

protect the victim until his violence finally culminated in the murder of the woman's mother.<sup>154</sup> The European Court noted that while national authorities "did not remain totally passive" their response "was manifestly inadequate to the gravity of the offenses in question" and failed to meet their duty to take "all reasonable measures to prevent the recurrence of violent attacks."<sup>155</sup> It cautioned that due diligence must be interpreted in a way that "does not impose an impossible or disproportionate burden on the authorities" and takes into account the need to respect due process. But, where authorities know or ought to be aware of violent attacks or threats that place an individual at immediate risk, officials are obligated to do all that could reasonably be expected of them to avoid or mitigate that risk.<sup>156</sup>

The U.N. General Assembly's 1993 Declaration on the Elimination of Violence Against Women explicitly called on States to "[e]xercise due diligence to prevent, investigate and . . . punish acts of violence against women," whether by the State or private persons, and "[a]dopt all appropriate measures . . . to modify the social and cultural patterns of conduct" that foster such violence.<sup>157</sup> In 2006, the U.N. Special Rapporteur on Violence Against Women issued an extensive report on the due diligence standard, tracing its origins and concluding, in light of its broad acceptance by treaty bodies and human rights tribunals, that it had ripened into "a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence."<sup>158</sup>

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154. *Id.* ¶¶ 7–69.

155. *Id.* ¶¶ 162–70.

156. *Id.* ¶¶ 129–30. The Court also pointed to failures of due diligence at the systemic level, including a "culture of domestic violence" in Turkey, the general reluctance of police and prosecutors to intervene, and unwarranted leniency on the part of courts. *Id.* ¶¶ 91–99.

157. G.A. Res. 48/104, U.N. Doc. A/48/104, at art. 4(c), (j) (Dec. 20, 1993). A 1994 regional human rights treaty adopted similar wording, requiring States parties to "apply due diligence to prevent, investigate and impose penalties for violence against women" and pursue a range of other preventive and remedial policies, including taking "all appropriate measures" to modify "legal or customary practices which sustain the persistence and tolerance of violence against women." Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará), art. 7 (June 9, 1994).

158. Yakin Ertürk (Special Rapporteur on Violence Against Women, its Causes and Consequences), *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶¶ 19–29, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006). The report extensively discusses the preventive, protective, punitive, and remedial duties States may be held to under the due diligence

Given the CAT’s stated goal of making the already existing international law prohibition of torture more effective, a strong case exists for reading it to impose the same due diligence obligation on States that is widely accepted under the ICCPR and other international law instruments. The CAT does differ from other anti-torture treaties in that it contains its own, more State-focused definition of torture.<sup>159</sup> It also lacks language that appears in the ICCPR and regional treaties obligating States to “secure” or “ensure” the guaranteed rights to all persons in their territory, which courts and treaty bodies have pointed to as partial justification for a State duty of due diligence to protect against private violations.<sup>160</sup>

Those differences, however, need not mean that the CAT imposes a lesser duty to protect against private acts of torture. The presence of “acquiescence” in the CAT’s torture definition opens the door to a due diligence interpretation. Moreover, the CAT’s substantive Articles impose an array of affirmative duties on States to prevent, investigate, punish, and remedy acts of torture that fit in well with a due diligence approach. Article 2 mandates that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Subsequent Articles lay out more specific obligations,

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standard. *Id.* ¶¶ 30–55, 74–93; see also Rashida Manjoo, *Rep. of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, U.N. Doc. A/HRC/23/49 (May 14, 2013) (elaborating further on the due diligence standard).

159. CAT, *supra* note 1, art. 1(1) (limiting the definition of torture to situations “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”); see also Andrew Byrnes, *The Committee Against Torture, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 509, 509–13, 540 (Philip Alston ed., 1992) (discussing the desirability of interpreting the CAT in a manner consistent with other human rights instruments prohibiting torture, while at the same time grounding interpretation in the CAT’s particular text, purpose, and history).

160. See U.N. Human Rights Comm. Gen. Cmt. No. 31, *supra* note 147, ¶ 8 (deriving the due diligence duty from both ICCPR Article 7 and Article 2(1)’s requirement that States “ensure” the guaranteed rights); *Opuz v. Turkey*, App. No. 33401/02, ¶ 159 (Eur. Ct. H.R. June 9, 2009) (relying on both Article 3 of the European Convention and Article 1’s requirement that States “secure” rights to all within their jurisdiction); *Velásquez Rodríguez, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶¶ 166–75 (July 29, 1988) (relying on States’ obligation under Article 1(1) to “ensure” all rights protected by the American Convention); *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ¶¶ 142, 164 (2006) (relying on Article 1 of the African Charter requiring States to “adopt legislative or other measures to give effect” to the guaranteed rights).

including requirements that the State criminalize and appropriately punish acts of torture (Articles 4–9), promptly investigate whenever there is reasonable ground to believe an act of torture has been committed (Article 12), ensure that all complaints are promptly and impartially examined and that complainants and witnesses are protected against retaliation (Article 13), and ensure that the legal system provides redress and appropriate compensation to victims (Article 14).<sup>161</sup> A failure by State officials to take effective preventive measures against private acts of torture in accordance with these Articles can be regarded as a form of “acquiescence.”

The first report issued by the newly-created office of the U.N. Special Rapporteur on Torture in 1986 noted that, while the CAT did not cover acts of purely private brutality, the drafters’ decision to add “consent or acquiescence” to the treaty’s State responsibility language meant that when officials take a “passive attitude” toward practices like sexual mutilations, the State’s failure “to ensure protection by the law against such treatment” can be considered acquiescence.<sup>162</sup> Sir Nigel Rodley, the second U.N. Special Rapporteur, addressing racism and torture in one of his reports, noted that when minority groups face threat or attack from private citizens, the lack of “due prevention and diligence” by public officials “further encourages such private violence” and represents acquiescence.<sup>163</sup>

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161. CAT, *supra* note 1, arts. 2, 4–9, 12–14.

162. P. Kooijmans (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 38, 49, U.N. Doc E/CN.4/1986/15 (Feb. 19, 1986). The Special Rapporteur position was created in 1985 under a U.N. resolution that references the CAT and charges the Special Rapporteur with reporting annually to U.N. bodies on matters pertaining to torture. See ANKER, *supra* note 123, § 7:13; see also RODLEY, *supra* note 148, at 145–50 (discussing the origins and mandate of the office).

163. Sir Nigel Rodley (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Civil and Political Rights Including the Questions of Torture and Detention*, ¶ 9, U.N. Doc E/CN.4/2001/66 (Jan. 25, 2001). Rodley similarly wrote, in a report issued a few months earlier: “Under international law, [the “consent or acquiescence”] element of the [torture] definition makes the State responsible for acts committed by private individuals which it did not prevent from occurring or, if need be, for which it did not provide appropriate remedies.” Sir Nigel Rodley (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Civil and Political Rights, Including the Questions of Torture and Detention*, ¶ 73, U.N. Doc. E/CN.4/2001/66 (Nov. 14, 2000). The U.N. High Commissioner on Human Rights, in a 2002 report on torture, cited the Special Rapporteur’s view that States are

By 2001, the U.N. Committee Against Torture, in exercising its authority to comment on the periodic reports each State party is required to submit under the CAT,<sup>164</sup> regularly expressed concern about the failure of officials in various countries to adequately protect against, investigate, prosecute, and appropriately punish attacks against racial and religious minorities and violence against women.<sup>165</sup> Around the same time, the Committee began to draw on the international jurisprudence of due diligence in ruling on individual complaints.<sup>166</sup> In its 2002 *Dzemajl* decision, it found that Yugoslav authorities had acquiesced in a mob attack on a Roma settlement

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responsible under the CAT not only for torturous acts committed by officials or state-supported groups like paramilitaries, but also in situations where the authorities do not “provide effective protection from ill-treatment (i.e. fail to prevent or remedy such acts), including ill-treatment by non-State actors.” U.N. Office of the High Commissioner for Human Rights, Fact Sheet No. 4 (Rev. 1), Combating Torture 34 (2002) (on file with the *Columbia Human Rights Law Review*).

164. CAT, *supra* note 1, art. 19.

165. Rep. of the Comm. Against Torture: Twenty-Fifth Session (13–24 November 2000) Twenty-sixth session (30 Apr.–18 May 2001), GAOR, 56th Sess., Supp. No. 44 (A/56/44) (2001), at ¶ 81(d), 82(j) (expressing concern at mob violence against Jehovah’s Witnesses in Georgia “and the failure of the police to intervene and take appropriate action,” and recommending that “[e]ffective measures be taken to prosecute and punish violence against women . . . including adopting appropriate legislation, . . . raising awareness of the problem [and] including the issue in the training of law-enforcement officials”), ¶ 104(c), (d) (expressing concern at the failure of police in Slovakia to provide “adequate protection” against racially motivated attacks on Roma by extremists and authorities’ failure to “carry out prompt, impartial and thorough investigations . . . or to prosecute or punish those responsible”), ¶¶ 113(b), 114(a) (expressing concern to the Czech Republic about “continuing reports of violent attacks against Roma and the alleged failure on the part of police and judicial authorities to provide adequate protection and to investigate and prosecute such crimes, as well as the lenient treatment of offenders”); *see also* ALICE EDWARDS, VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL LAW 217–18 (2011) (describing other concluding observations issued by the Committee on gender violence by private actors).

166. The Committee is authorized to receive and issue its views on complaints filed by individuals who allege they have been subjected to a violation of the CAT by a State party, but only if the State in question has made a declaration that it recognizes the Committee’s competence to do so. CAT, *supra* note 1, art. 22. This is the only CAT mechanism the United States opted not to join. *See Senate Hearing, supra* note 45, at 6, 9. U.S. tribunals have nonetheless cited and relied on individual decisions issued by the Committee for their persuasive value as interpretations of the treaty. *See Matter of J-E-*, 23 I. & N. Dec. 291, 303 (B.I.A. 2002); *Matter of S-V-*, 22 I. & N. Dec. 1306, 1312–13 (B.I.A. 2000).

because they failed to take appropriate steps to protect residents during the attack and afterwards conducted an inadequate investigation that failed to bring any of the perpetrators to justice.<sup>167</sup> The Committee prefaced its finding of State responsibility with an extensive discussion of the due diligence standard as developed in the comments and case law of the Human Rights Committee and the Inter-American and European Courts of Human Rights.<sup>168</sup>

In May 2002, Canada's Immigration and Refugee Board issued guidance on applying legislation that incorporated the CAT's torture definition and non-refoulement requirement.<sup>169</sup> The guidelines expressly linked the concept of "acquiescence" to a State's failure to fulfill its duties under Articles 2 and 12–14 of the CAT.<sup>170</sup> Thus, adjudicators could infer acquiescence or "state approval" in circumstances where officials fail to take effective preventive measures or fail to properly investigate and prosecute acts of torture committed by private actors.<sup>171</sup> The guidelines endorsed the U.N. Special Rapporteur's reasoning that a lack of "due prevention and diligence" by State officials fosters further acts of private violence and therefore implies state responsibility through acquiescence.<sup>172</sup>

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167. *Dzemajl v. Yugoslavia*, No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002), ¶¶ 2.1–2.27, 9.1–9.5. Because it concluded that the harm suffered by the complainant did not rise to the level of torture, the Committee based its ruling on Article 16 of the CAT, which requires States to undertake to prevent acts of cruel, inhuman or degrading treatment, and includes language on acquiescence identical to that found in Article 1's definition of torture. *See id.* ¶¶ 9.2–9.3.

168. *See id.* at ¶¶ 8.5–8.14; *see also* *Osmani v. Serbia*, No. 261/2005, U.N. Doc. CAT/C/42/D/261/2005 (2009), ¶¶ 10.3–11 (finding that Serbia acquiesced in an anti-Roma attack based on reasoning similar to *Dzemajl*).

169. IMMIGR. & REFUGEE BD., CONSOLIDATED GROUNDS IN THE IMMIGRATION AND REFUGEE PROTECTION ACT—PERSONS IN NEED OF PROTECTION—DANGER OF TORTURE § 2.1 (2002) [hereinafter CANADIAN GUIDELINES] (explaining that Canada's Immigration and Refugee Protection Act § 97(1), S.C. 2001, c. 27, provides for a refugee-like status for a "person in need of protection," defined to include those whose removal would subject them to danger of torture within the meaning of Article 1 of the CAT).

170. *Id.* § 5.2.6, at 43–45.

171. *Id.* § 5.2.6, at 43. The guidelines added that even if a State has not formally ratified the CAT, its failure to follow the obligations set forth in the treaty should be considered a basis for finding acquiescence. *Id.*

172. *Id.* § 5.2.6 at 44–45 (discussing and quoting 2001 Special Rapporteur report, *supra* note 163). The guidelines went on to note that lack of success in preventing acts of torture is not necessarily indicative of acquiescence where the State has opposed the acts and attempted in good faith to prevent and protect against them. *Id.* at 45.

In November 2007, the U.N. Committee Against Torture issued the extensive and highly influential General Comment No. 2 explicating Article 2 of the CAT, which requires States parties to take effective measures to prevent acts of torture.<sup>173</sup> The Comment begins by noting that Article 2 sets out the core obligation of the treaty and encompasses, but is not limited to, the more specific duties listed in the provisions that follow.<sup>174</sup> The Committee expressly endorsed the “due diligence” standard and found that a failure by officials to act diligently to prevent, investigate, punish, and remedy torturous activity constitutes “acquiescence” under Article 1’s torture definition.<sup>175</sup> Here are some of its key passages:

States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture . . . [and] take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented . . . . If the measures adopted by the State party fail to accomplish the[ir] purpose . . . , the Convention requires that they be revised and/or that new, more effective measures be adopted. . . .

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173. CAT, *supra* note 1, art. 2(1) (“Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”); Gen. Cmt. 2, *supra* note 38; *see also* Lisa Davis, *Preventing Torture: An Introduction to the Symposium Issue*, 11 N.Y.C. L. REV. 179, 180 (2008) (describing the General Comment’s issuance and importance); Felice D. Gaer, *Opening Remarks: General Comment No. 2*, 11 N.Y.C. L. REV. 187, 188–90 (2008) (reflecting the perspective of Felice Gaer—who has served on the Committee since 2000 as an independent expert nominated by the United States—on the Comment’s significance and the process by which the Committee prepared it).

174. Gen. Cmt. 2, *supra* note 38, ¶¶ 1–3; *see also* MANFRED NOWAK, ET AL., *THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY* 79 (2d ed. 2019) (discussing article 2’s function as an umbrella clause that sets forth the basic obligation which is elaborated upon in the more specific articles that follow); CHRIS INGELSE, *THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT* 249 (2001) (discussing the same).

175. Gen. Cmt. 2, *supra* note 38, ¶18; *see also* Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y.C. L. REV. 229, 254–55 (2008) (discussing the importance of General Comment No. 2 in clarifying the meaning of acquiescence under the CAT and linking it to the due diligence obligation that had been developed in interpretations of the ICCPR and American Convention).



[W]here State authorities . . . know or have reasonable grounds to believe that acts of torture . . . are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish [them] . . . , the State bears responsibility and its officials should be considered as . . . responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission . . . .

The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment . . . . States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection . . . .<sup>176</sup>

The Committee Against Torture has applied the approach to acquiescence elaborated in General Comment No. 2 in its comments on States parties' reports and decisions on individual complaints.<sup>177</sup> In concluding observations on Greece's report in 2012, the Committee noted that despite some legislation and other measures taken to address domestic violence and trafficking, the persistence of these abuses and limited number of investigations and prosecutions indicated that the State needed to undertake further "effective preventive measures," including prompt and effective law enforcement response to allegations, awareness-raising campaigns aimed at prevention, and support services for victims.<sup>178</sup> In *Njamba and Balikosa v. Sweden*, the Committee ruled in favor of a Congolese

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176. Gen. Cmt. 2, *supra* note 38, ¶¶ 4, 18, 21.

177. See NOWAK, ET AL., *supra* note 174, at 87–88 (discussing the Committee's application of the due diligence principle).

178. U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶¶ 23–24, U.N. Doc. CAT/C/GRC/CO/5-6 (June 27, 2012).

mother and daughter who claimed that their deportation by Sweden would violate Article 3 by exposing them to a high risk of sexual violence in their home country. Relying primarily on country evidence showing an “alarming number of cases of rape and sexual violence throughout the country,” the Committee, sustaining the complaint, referred to General Comment No. 2 and found that the authorities in the Democratic Republic of Congo were not exercising due diligence to prevent this widespread torturous activity.<sup>179</sup> Reports by U.N. Special Rapporteurs on Torture Manfred Nowak (2008), Juan Méndez (2016), and Nils Melzer (2019) built upon General Comment No. 2 by applying the due diligence approach to analyze the ways in which States may acquiesce to torturous acts of “private” violence against women and LGBTQI people.<sup>180</sup>

The due diligence standard for holding States responsible for acts of torture committed by private actors has gained broad acceptance in international human rights law since its emergence in

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179. *Njamba and Balikosa v. Sweden*, No. 322/2007, ¶ 9.5, U.N. Doc. CAT/C/44/D/322/2007 (2010); *see also* *Bakatu-Bja v. Sweden*, ¶ 10.6, No. 279/2009, U.N. Doc. CAT/C/46/D/379/2009 (2011) (making similar findings in the case of another woman fearing sexual violence in the DRC, and noting that “despite efforts by authorities to combat it, this phenomenon is still widespread”); *Dewage v. Australia*, No. 387/2009, ¶10.9, U.N. Doc. CAT/C/51/387/2009 (2013) (referring to General Comment No. 2 and the duty “to exercise due diligence to intervene and stop the abuses” in discussing whether the Sri Lankan government would be responsible for risks the complainant faced from a non-State group).

180. For example, States may acquiesce through law enforcement officials’ failure to view offenses as serious and pursue them vigorously, undue leniency by judges, maintaining discriminatory laws that keep women trapped in abusive relationships, failing to take measures to address societal structures and values that perpetuate domestic violence, statements made by political leaders that dehumanize members of certain groups or defend practices like honor killings, and laws criminalizing same-sex relations that encourage anti-gay violence. *See* U.N. Secretary-General, Note to Members of the General Assembly on the Interim Rep. of Special Rapporteur Nils Melzer on the Relevance of the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Context of Domestic Violence, U.N. Doc. A/74/148 (July 12, 2019) [hereinafter 2019 SR Report] (discussing the CAT’s application to domestic violence); U.N. Secretariat, Note to the Human Rights Council on the Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016) [hereinafter 2016 SR Report] (discussing the CAT’s application to gender-based and sexuality-based violence); Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, to the Human Rights Council, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008) [hereinafter SR Report] (discussing torture faced by women in relation to the CAT).

the 1980s. First developed under ICCPR and regional treaties that prohibit all torture—a prohibition the CAT was designed to make more effective—it has become the prevailing interpretation of the meaning of “acquiescence” under the CAT, as reflected in the jurisprudence of the U.N. Committee Against Torture, successive U.N. Special Rapporteurs on Torture, and the Canadian guidelines. The Committee Against Torture’s interpretations of the treaty deserve particular weight because its ten independent experts are elected by all the States parties,<sup>181</sup> and the CAT expressly authorizes the Committee to comment on State reports, initiate investigations of systemic violations, and address complaints of violations made by States or individuals.<sup>182</sup>

### B. The Meaning of “Acquiescence” as a Matter of Treaty Interpretation

The existence of an international consensus in favor of a due diligence standard may not be sufficient by itself to convince U.S. courts that this is the correct interpretation of the treaty. This Section examines how this reading of acquiescence fares when the usual judicial tools for interpreting treaties are applied to the CAT.

In construing treaties, the Supreme Court has taken an approach generally consistent with that of the Vienna Convention on

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181. CAT, *supra* note 1, art. 17.

182. CAT, *supra* note 1, arts. 19–22. The Committee’s authority to issue general comments aimed at all States parties can be inferred from these provisions. *See* INGELSE, *supra* note 174, at 150–52 (identifying sources of the authority to issue general comments); Byrnes, *supra* note 159, at 529–30 (discussing the same). The BIA and courts have at times looked to the Committee’s jurisprudence for guidance in interpreting the CAT. *See supra* notes 71–72, 76, 166 and accompanying text (discussing BIA consideration of Committee’s interpretations); *Khouzam v. Hogan*, 529 F. Supp. 2d 543, 555–56 (M.D. Pa. 2008) (stating that although not binding the Committee’s “pronouncements . . . may afford significant guidance in interpreting the language of [the CAT]”), *vacated on other grounds*, *Khouzam v. Att’y Gen.*, 549 F.3d 235, 239 (3d Cir. 2008). In interpreting asylum law provisions that derive from refugee treaties, U.S. courts often look to the interpretations of the U.N. High Commissioner for Refugees, citing the significant implementing role the treaties confer on that office. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39, 439 n.22 (1987) (referencing such interpretations, including the UNHCR Handbook); *Doe v. Att’y Gen.*, 956 F.3d 135, 154 n.9 (3d Cir. 2020) (referencing the UNHCR’s Sexual Orientation Guidelines).

the Law of Treaties,<sup>183</sup> which calls for interpretation “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of [the treaty’s] object and purpose.”<sup>184</sup> Evidence of context and purpose can be found, inter alia, in a treaty’s preamble and in subsequent practice of the parties regarding the treaty’s interpretation.<sup>185</sup> The treaty’s negotiating history (*travaux préparatoires*) may be consulted as a supplemental source.<sup>186</sup> The Supreme Court has echoed the Vienna Convention in stating that “analysis must begin with the text of the treaty and the context in which the written words are used,” giving “significant weight” to the interpretations of “our sister signatories,” and referring to the treaty’s drafting and negotiation history when helpful in resolving textual ambiguities.<sup>187</sup>

Two things are worth noting at the outset. First, the interpretation of “acquiescence” reached by the Committee Against Torture, acting on behalf of all of the States parties, is evidence of subsequent State practice reflecting a shared view by the parties regarding the treaty’s meaning, and should receive significant weight

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183. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. Although the U.S. never ratified the Vienna Convention, the Executive Branch has long treated it as an authoritative guide to treaty interpretation, and the International Court of Justice has found that it reflects binding customary international law. See Harold Hongju Koh, Legal Advisor, U.S. Department of State, *Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict* (Jan. 21, 2013), at 7.

184. Vienna Convention, *supra* note 183, at art. 31(1).

185. *Id.* arts. 31(2)–(3) (providing that the “context” comprises “the text, including its preamble and annexes” as well as any related agreements or instruments made in connection with the treaty, and that “[t]here shall be taken into account, together with the context: . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

186. *Id.* art. 32 (providing that a treaty’s preparatory work may be consulted to confirm the meaning derived by applying article 31, to resolve ambiguities, or to avoid a result that is “manifestly absurd or unreasonable”).

187. *Air France v. Saks*, 470 U.S. 392, 397, 400, 404 (1985); see also *Olympic Airways v. Hussain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (discussing the importance of considering the interpretations of other States when construing a treaty); see also Fatma E. Marouf, *The Role of Foreign Authority in U.S. Asylum Adjudication*, 45 NYU J. INT’L L. & POL. 391, 405–20 (2013) (discussing the role of interpretations by States parties in construing statutes that incorporate treaty provisions).

when the United States interprets the treaty.<sup>188</sup> Second, as previously noted, the ordinary meaning of the word “acquiescence” is ambiguous. It has definitions that resonate with the idea of tacit consent or approval, but it can also connote a failure to engage in serious effort to stop something, even if one disapproves.<sup>189</sup> To ascertain its meaning in the CAT, we will need to look at the broader context of how the term fits into the structure and purposes of the treaty, and look for clues in the treaty’s drafting history. These travaux préparatoires can be found in various U.N. documents that report on the discussions and actions of the Working Group of the Commission on Human Rights that developed the treaty from 1978–1984 and in a 1988 handbook on the CAT written by two diplomats who played a central role in the drafting process, Herman Burgers of the Netherlands and Hans Danelius of Sweden, which gives a detailed account of its background and drafting.<sup>190</sup>

The treaty’s text provides some initial indications that the drafters intended acquiescence to have a broad meaning. The term appears in Article 1 as part of the phrase “consent or acquiescence,” suggesting that it is not limited to acceptance or tacit approval, which the word “consent” would have been adequate to cover.<sup>191</sup> In addition, Article 4 of the CAT requires States to criminalize not only acts of torture, but also “an act by any person which constitutes complicity or participation in torture,” without using the word “acquiescence.”<sup>192</sup> This further suggests that acquiescence is not synonymous with “complicity,” but has a broader scope.

The CAT’s preamble also provides relevant context for interpreting the treaty’s terms, and it supports reading “acquiescence” to encompass a due diligence obligation. The preamble states that the parties agree to the Convention’s terms “having

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188. Canada’s incorporation of the due diligence standard into its adjudicatory guidelines is further evidence of State practice. See CANADIAN GUIDELINES, *supra* note 169 and text accompanying notes 169–172.

189. See *Matter of S-V-*, 22 I. & N. Dec. 1306, 1312 (B.I.A. 2000) (citing one dictionary definition); *supra* notes 83–84 and accompanying text (discussing other dictionary definitions).

190. BURGERS & DANELIUS, *supra* note 4, at v–vi.

191. See *supra* note 85 and accompanying text.

192. CAT, *supra* note 1, art. 4(1) (“Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”)

regard to” and desiring to effectuate the ICCPR’s and UDHR’s prohibition of all torture.<sup>193</sup> The reference to the ICCPR is especially salient given that, by 1982, two years before the CAT was finalized, the U.N. Human Rights Committee had interpreted the ICCPR’s prohibition to entail a State duty to engage in effective preventive efforts against private acts of torture.<sup>194</sup>

On the other hand, the history and context of the treaty also reflects that the drafters were primarily focused on state-sponsored torture, particularly against persons held in official detention. The CAT developed from a declaration on torture adopted by the U.N. General Assembly in December 1975,<sup>195</sup> which is referenced in the CAT’s preamble.<sup>196</sup> The Declaration was a response to a campaign to abolish torture launched by Amnesty International in the early 1970s that focused on the use of torture by repressive regimes.<sup>197</sup> It was drawn up by a U.N. Congress on the Prevention of Crime and the Treatment of Offenders and it contained a definition of torture that only covered acts “inflicted by or at the instigation of a public official.”<sup>198</sup> Two years after adopting the Declaration, the General Assembly directed the Commission on Human Rights to draw up a draft convention “in light of” the Declaration’s principles.<sup>199</sup> The

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193. CAT, *supra* note 1, pmbl. ¶¶ 4, 6 (“The States parties to this Convention, . . . Having regard to article 5 of the [UDHR] and article 7 of the [ICCPR], both of which provide that no one shall be subjected to torture . . . Desiring to make more effective the struggle against torture . . . throughout the world, Have agreed as follows . . .”).

194. See *supra* note 146 and accompanying text. Article 17(2) of the CAT also suggests the drafters desired that the CAT be interpreted in harmony with the ICCPR. It provides that in nominating members of the Committee Against Torture, States parties “shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee,” the U.N. body that oversees compliance with the ICCPR. See Byrnes, *supra* note 159, at 510–11.

195. G.A. Res. 3452 (XXX) (Dec. 9, 1975) [hereinafter “Declaration”], reprinted in BURGERS & DANELIUS, *supra* note 4, at 191.

196. CAT, *supra* note 1, pmbl. ¶ 5 (“Having regard also to the [Declaration]”).

197. See Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT’L & COMPAR. L. REV. 275, 294–307 (1994).

198. Declaration, *supra* note 195, art. 1; see also BURGERS & DANELIUS, *supra* note 4, at 13–17, 120 (tracing the events surrounding the adoption of the Declaration in 1975).

199. BURGERS & DANELIUS, *supra* note 4, at 120; G.A. Res. 32/62 (Dec. 8, 1977), reprinted in *id.* at 196 (discussing and setting forth the text of the G.A. resolution). The resolution also invokes the ICCPR and UDHR provisions

Commission's working group significantly expanded the torture definition when it added the phrase "or with the consent or acquiescence of a public official."<sup>200</sup> Nonetheless, some CAT commentators, especially in the treaty's early years, emphasized the State-focused context of the treaty's drafting as reason to read the State responsibility language narrowly, viewing it as reaching private torturous conduct only when committed by persons who were acting in some sense as agents of the State, furthering its purposes.<sup>201</sup>

The crucial question, then, is whether the addition of "acquiescence" to the torture definition is best construed as expanding State responsibility to reflect an affirmative duty to take preventive action, or to have a narrower scope more akin to tacit acceptance. The drafting history sheds some light on differing views the amendment was meant to bridge. An initial draft prepared by the Swedish government contained a torture definition essentially identical to that of the U.N. Declaration, covering only acts "inflicted by or at the instigation of a public official."<sup>202</sup> Discussion of whether

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prohibiting all torture, as do the preambles of the Declaration and the CAT itself. *Id.*; compare with Declaration, *supra* note 195, pmb. ¶ 4, and CAT, *supra* note 1, pmb. ¶ 4.

200. CAT, *supra* note 1, art. 1(1).

201. See, e.g., Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Actors*, 31 COLUM. HUM. RTS. L. REV. 84, 93 (1999) (characterizing the CAT's torture definition as requiring "infliction of suffering by the state for particular ends"); Maxime E. Tardu, *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 56 NORDIC J. INT'L L. 303, 306 (1987) (stating that "acquiescence" was added to reach "do nothing" attitudes towards vigilante and 'death-squad' groups" but would not apply to other forms of private violence like severe domestic abuse); Natan Lerner, *The U.N. Convention on Torture*, 16 ISR. Y.B. ON HUM. RTS. 126, 134 (1986) (viewing CAT's torture definition as covering only acts "inflicted by, or with the agreement of, public officials"). Sir Nigel Rodley, whose statements as Special Rapporteur helped spur the development of the due diligence approach, on other occasions stressed that the CAT is primarily aimed at torture inflicted for State purposes and viewed acquiescence as implying official collusion. See Nigel S. Rodley, *The Definition(s) of Torture in International Law*, 55 CURRENT LEGAL PROBS. 467, 484-87 (2002).

202. Comm'n on Hum. Rts., Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), U.N. Doc. E/CN.4/1285 (Jan. 23, 1978), reprinted in BURGERS & DANIELIUS, *supra* note 4, at 203 [hereinafter Original Swedish Draft]. In addition to incorporating the Declaration's definition of torture, the substantive provisions of the original Swedish draft largely followed the Declaration, with the important

that approach was too limited began in the Working Group’s first session in 1978, and was taken up more intensively and resolved when the group met again in early 1979.<sup>203</sup> The canonical account of these discussions is given by Burgers and Danelius:

There were different opinions on the question as to whether or not the definition of torture in the convention should be limited to *acts of public officials*. It was pointed out by many States that the purpose of the convention was to provide protection against acts committed on behalf of, or at least tolerated by, the public authorities, whereas the State could normally be expected to take action according to its criminal law against private persons having committed acts of torture against other persons. However, France considered that the definition of the act of torture [focus on] the act of torture itself, irrespective of the status of the perpetrator.

Although there was little support for the French view on this matter, most States agreed that the convention should not only be applicable to acts committed by public officials, but also to acts for which the public authorities could otherwise be considered to have some responsibility. [In place of the language used in the original Swedish draft], the United States preferred the concept of “acquiescence of” rather than “instigation by” a public official. . . . In the end, it was generally agreed that the definition of acts committed by public officials should be expanded to cover acts committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity.<sup>204</sup>

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addition of a non-refoulement provision, which was inspired by the European case law. *Id.* at 35.

203. *Id.* at 38–46.

204. *Id.* at 45–46. To the extent Burgers and Danelius imply that only France favored covering private actors in all cases, their summary is inaccurate. The Working Group’s report notes that some delegates took the view that the definition of torture “should not be restricted to ‘public officials’ . . . [but] should be made applicable to all individuals under the jurisdiction of a contracting State,” while others expressed a contrasting view that torture by private actors “should be covered by existing or future national law, and that international action was primarily designed to cover situations where national action was otherwise least likely.” The report adds that the addition of “consent or acquiescence” was



The authors inferred from this drafting history that “the rather wide phrase” adopted in compromise should cover situations “where the responsibility of the authorities is somehow engaged” but not purely private actions where “it can be expected that the normal machinery of justice will operate and that prosecution and punishment will follow under the normal operation of the domestic legal system.”<sup>205</sup>

That, of course, raises the question of when the authorities should be regarded as “somehow” responsible for private parties’ torturous actions. The compromise language that was adopted left the answer unclear.<sup>206</sup> In a pathbreaking 1994 article on domestic violence as torture, Rhonda Copelon pointed out that where legal sanctions are absent or insufficiently enforced, the assumption the torture definition rests on—that it can be expected that a country’s domestic legal system will adequately deal with private criminal

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“designed to satisfy those delegates who sought a broad definition of torture, which covered both public and private individuals” as well as those in the other camp. Comm’n on Hum. Rts., Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 17–18, 23–25, U.N. Doc. E/CN.4/L.1470 (Mar. 12, 1979) [hereinafter 1979 Working Group Report]. In comments offered at various other times during the CAT’s drafting, a number of States expressed the view that torture should be defined to include private acts regardless of whether the State can be deemed responsible. See NOWAK ET AL., *supra* note 174, at 34–36.

205. BURGERS & DANIELIUS, *supra* note 4, at 119–20; see also *id.* at 1 (stating that the Convention “only relates to practices that occur under some sort of responsibility of public officials or other persons acting in an official capacity”). Other material in the *travaux* indicates that the addition of the phrase “or other person acting in an official capacity” similarly represented a compromise between those taking the view that “public official” should be broadened to include non-State actors who wield effective, government-like authority over others, and those who viewed the term more narrowly. *Id.* at 45–46; see also Samuel L. David, *A Foul Immigration Policy*, 19 N.Y.L. SCH. J. HUM. RTS. 769, 785–89 (2003) (discussing this aspect of the drafting history); Pnina Baruh Sharvit, *The Definition of Torture in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23 ISR. Y.B. ON HUM. RTS. 147, 166 (1993) (noting the Convention’s lack of clarity on whether it covers torture carried out by non-State political entities such as guerillas).

206. See Yuval Ginbar, *Making Human Rights Sense of the Torture Definition*, in TORTURE AND ITS DEFINITION IN INTERNATIONAL LAW, *supra* note 9, at 273, 281–82 (observing that even though the CAT’s drafters had the situation of state detention primarily in mind, they chose “quite wide” language on official responsibility that allowed for development of the due diligence approach); McCorquodale & La Forgia, *supra* note 73, at 206 (arguing that the absence of a clear definition of acquiescence under the CAT warrants adopting the approach to State responsibility developed under other human rights treaties).

acts—has not been fulfilled. The State thus bears some responsibility for the resulting impunity.<sup>207</sup> Other commentators have similarly noted that the drafters’ rationale for limiting the torture definition to situations where officials could be considered to bear some responsibility supports defining “acquiescence” with reference to whether officials properly fulfill the functions of a domestic legal system by taking all reasonable preventive and prosecutorial measures.<sup>208</sup> Even if a due diligence obligation was not expressly contemplated by the CAT’s drafters, it is consistent with the reasoning behind the compromise they reached.

But there is more. Prior scholarship and judicial discussions have overlooked important evidence from the CAT’s drafting history which shows that when the United States proposed adding “acquiescence” to the torture definition it expressly tied the concept to the idea that officials have a legal responsibility under the CAT to take appropriate preventive measures to counter all acts of torture of which they are aware, no matter who commits them.<sup>209</sup>

When the Working Group began meeting in 1978, it had before it two initial drafts, one submitted by the International

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207. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 299, 342–44, 355–56 (1994).

208. Commentators have linked acquiescence to a State’s failure to fulfill the drafters’ expectation that domestic legal systems will adequately deal with acts of private torture. See WOUTERS, *supra* note 84, at 446–47; INGELSE, *supra* note 174, at 225; Jane McAdam, *Part III—Rights and Remedies: The Convention Against Torture Alternative Asylum Mechanisms*, 27 INT’L J.L. & PSYCHIATRY 627, 630–31 (2004); Dawn J. Miller, *Holding States to their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 304 (2003); CAMILLE GIFFORD, HUM. RTS. CTR., UNIV. OF ESSEX, *THE TORTURE REPORTING HANDBOOK* 21 (2000); David Weissbrodt & Isabel Höreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 51–52 (1999).

209. The Third Circuit Court of Appeals, when it adopted the “willful blindness” standard, cited the original U.S. proposal to support its conclusion that acquiescence does not require actual knowledge of torturous activity. It did not address the aspect of the U.S. proposal discussed here—how it shows that acquiescence was meant to go beyond willful blindness and encompass failures by officials to take appropriate preventive measures. *Silva-Renfigo v. Att’y Gen.*, 473 F.3d 58, 68 n.8 (3d Cir. 2007).

Association of Penal Law (IAPL), and the other the previously-mentioned Swedish draft.<sup>210</sup> The IAPL draft contained a definition of torture that reached not only acts committed “by or at the instigation” of a public official, but also acts “for which a public official is responsible,” defined in a separate Article to include situations where an official who is aware of torturous activity “fails to take appropriate measures to prevent or suppress torture . . . and has the authority or is in a position to take such measures.”<sup>211</sup>

In comments submitted in advance of the Working Group’s 1979 session, the United States proposed modifying Sweden’s draft by adding “consent or acquiescence” to the torture definition. The purpose of this change, the United States explained, was “so that public officials have a clear duty to act to prevent torture.” It added that “[t]his duty is further elaborated in the new article 2 proposed by the United States.”<sup>212</sup> The United States’ proposed Article 2 was closely modeled on the IAPL’s article on official responsibility. It provided that any public official who “fails to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has the authority or is in the position to take such measures” is responsible within the meaning of the Convention.<sup>213</sup>

When the Working Group resumed its meetings in 1979, it had before it the United States’ written comments as well as two revised drafts prepared by Sweden and the International Commission

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210. See BURGERS & DANIELIUS, *supra* note 4, at 26, 31, 34–38; see also *id.* at 197 (reprinting the IAPL draft), 203 (reprinting the original Swedish draft). Some elements of the IAPL draft were later incorporated into the revised Swedish draft that became the basis for the Working Group’s deliberations on the treaty’s text. *Id.* at 26; see also RODLEY, *supra* note 148, at 48 (noting the IAPL draft may well have influenced Sweden’s proposals).

211. BURGERS & DANIELIUS, *supra* note 4, at 197. A regional Inter-American torture treaty finalized shortly after the CAT took an approach similar to the IAPL draft by including an Article that extended responsibility for torture to a public official who “being able to prevent it, fails to do so.” Inter-American Convention to Prevent and Punish Torture, *opened for signature* Dec. 9, 1985, art. 3(a), O.A.S.T.S. No. 67 (entered into force Feb. 28, 1987). It also defined torture without reference to any degree of State involvement, thereby obligating State parties to take “effective measures to prevent and punish” torturous acts committed by private parties. *Id.* arts. 2, 6.

212. Comm’n on Hum. Rts., Summary prepared by the Secretary-General in accordance with Commission resolution 18 (XXXIV), ¶ 29, U.N. Doc. E/CN.4/1314 (Dec. 19, 1978).

213. *Id.* ¶ 45.

of Jurists, both of which incorporated the United States’ proposed “consent or acquiescence” wording into their torture definitions, but did not include the additional U.S.-proposed article concerning the scope of officials’ responsibility.<sup>214</sup> The Working Group’s records offer no explanation for the failure to take up the additional provision on the scope of officials’ responsibility, but the decision could be explained by the fact that both the original and revised Swedish drafts already included, in Article 2, a broad requirement that States take effective measures to prevent acts of torture in their territories.<sup>215</sup> A separate article stating that officials are responsible if they fail to take appropriate preventive measures may have seemed redundant.

Another aspect of the drafting history, also overlooked in prior scholarship, lends additional support to reading “acquiescence” to encompass a duty of due diligence. The Committee Against Torture’s General Comment No. 2 defines acquiescence in relation to officials’ failure to fulfill Article 2’s duty to take effective measures to prevent acts of torture and/or some of the more specific obligations set out in subsequent articles.<sup>216</sup> The case for linking acquiescence to those duties is more convincing if those articles of the CAT can be fairly read to obligate States to take effective measures to prevent torturous activity by non-State actors, without regard to whether public officials acquiesce or are otherwise responsible. Otherwise, there is a certain circularity to tying acquiescence to the Article 2 requirement of effective measures to prevent acts of torture—it amounts to saying that in order to avoid acquiescing, the State must take effective measures to prevent acts to which its officials acquiesce.<sup>217</sup>

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214. See 1979 Working Group Report, *supra* note 204, ¶¶ 11–13, 16; see also BURGERS & DANIELIUS, *supra* note 4, at 39–44 (discussing the Working Group’s deliberations), 208 (reprinting the revised Swedish draft).

215. See 1979 Working Group Report, *supra* note 204, ¶¶ 17–18, 23–25, 30–36; see also Ahcene Boulesbaa, *Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the U.N. Convention on Torture*, 5 FLA. INT’L L.J. 293, 313–15 (1990) (suggesting that the IAPL’s provision on official responsibility may be helpful in interpreting the CAT’s ambiguous language regarding when torture by private actors is covered).

216. See *supra* notes 173–76 and accompanying text.

217. The duty can be conceived of in that way—one member of the Committee Against Torture has characterized Article 2 as creating an obligation to ensure that officials do not acquiesce to torture by failing to take effective measures to stop acts committed by non-State parties that, if acquiesced to by

There is, in fact, a basis in the CAT's text for reading the phrase "acts of torture," which is the phrase used (as opposed to simply "torture") in Article 2 and several other key articles that require preventive or remedial measures, to indicate that those duties extend to acts of torture by non-State actors, even in the absence of official acquiescence.<sup>218</sup> Article 1's definition of torture, as U.N. Special Rapporteur Nils Melzer observed, consists of a "substantive component" defining the conduct that amounts to torture followed by an "attributive component" that defines the level of State involvement needed to trigger the State's responsibility as a matter of international law.<sup>219</sup> The phrase "act of torture" can reasonably be read to refer only to the substantive component of Article 1's torture definition—the part defining the act—and not its final phrase, "when . . . inflicted by or . . . with the consent or acquiescence of a public official," which does not concern the act but rather when the State will be deemed responsible for it.<sup>220</sup>

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State officials, amount to torture. See Felice D. Gaer, *Rape as a Form of Torture: The Experience of the Committee Against Torture*, 15 CUNY L. REV. 293, 297–98 (2012). But that is a complex way of looking at it, and the link between acquiescence and State failure to fulfill Article 2's preventive duty is more intuitively appealing if Article 2 can be read to directly require officials to take effective measures against all known torturous activity, regardless of whether officials bear any responsibility for it.

218. The phrases "acts of torture" or "act of torture" are used in Article 2 (duty to take effective measures to prevent acts of torture in territories under the State's jurisdiction), Article 4 (duty to ensure all acts of torture are offenses under criminal law), Articles 12–13 (duties to promptly and impartially investigate and protect complainants and witnesses against retaliation), and Article 14 (duty to ensure the right to redress in the legal system). Certain other provisions instead refer to "torture": Article 3 (non-refoulement to another State where a person faces "danger of being subjected to torture"), and Article 15 (inadmissibility of statements made as a result of torture).

219. 2019 Special Rapporteur Rep., *supra* note 180, ¶¶ 5–6.

220. The Committee Against Torture, in its comments on State party reports, appears to read "acts of torture" in that manner when it faults countries for not criminalizing, investigating, or otherwise effectively countering torturous conduct by non-State actors. See, e.g., Conclusions and Recommendations of the Committee Against Torture—Albania, ¶¶ 7–8, U.N. Doc. CAT/C/CR/34/ALB (June 21, 2005) (criticizing authorities' reluctance to adopt measures to counter domestic and sexual violence and to promptly and impartially investigate such incidents); Conclusions and Recommendations of the Committee Against Torture—Cameroon, ¶¶ 7(b)–(c), 11(c)–(d), U.N. Doc. CAT/C/CR/31/6 (Feb. 11, 2004) (faulting the absence of legislation banning female genital mutilation and an exemption from punishment for rape if the rapist marries the victim); EDWARDS, *supra* note 165, at 218 (describing several other examples); see also

The evolution of the CAT’s text lends support to that reading. In the 1975 U.N. Declaration, every time the phrase “acts of torture” appeared, it was qualified with additional language (“acts of torture as defined in article 1” or “acts of torture . . . committed by or at the instigation of a public official”) to indicate that it referred only to those torturous acts for which the State was responsible.<sup>221</sup> Sweden’s initial 1978 draft of the treaty retained most of that qualifying language.<sup>222</sup> However, the revised Swedish draft of 1979, which incorporated the U.S.-proposed “consent or acquiescence” language, dropped all prior qualifiers that had restricted the meaning of “acts of torture.”<sup>223</sup> This was consistent with the tenor of the U.S. acquiescence proposal, which was predicated on the idea that officials have a duty to take appropriate preventive measures when they know or have reason to know of acts of torture by private parties.

Two other arguments that might be made in defense of restricting “acquiescence” to acts committed with the authorities’ tacit approval can be briefly disposed of. One concerns the fact that the torture definition covers only pain or suffering intentionally inflicted “for such purposes as” obtaining information or a confession, punishing for an actual or suspected act, intimidating or coercing the person or a third party, “or for any reason based on discrimination of

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Josephine A. Vining, *Providing Protection from Torture by “Unofficial” Actors*, 70 BROOK. L. REV. 331, 344–45 (2004) (noting that broad wording of Article 2 supports an official obligation to prevent and punish all acts of torture, including those by non-State actors). *But see* Paola Gaeta, *When is the Involvement of State Officials a Requirement for the Crime of Torture?*, 6 J. INT’L CRIM. JUST. 183, 190–91 (2008) (arguing the CAT requires countries to criminalize only torture that occurs with official involvement or acquiescence to avoid excessive international intrusion into domestic criminal matters).

221. Declaration, *supra* note 195, arts. 7, 9–11.

222. Original Swedish Draft, *supra* note 202, arts. 7, 9, 11.

223. Revised text of the substantive parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Sweden on 19 February 1979, U.N. Doc. E/CN.4/WG.1/WP.1, reprinted in BURGERS & DANIELIUS, *supra* note 4, at 208. The revised Swedish draft also introduced the phrase “prevent acts of torture” into Article 2. The predecessor Articles in the U.N. Declaration and the original Swedish draft spoke of a State duty to prevent “torture,” a term that would take its meaning from the entire torture definition, not just its substantive component. *Cf. id.* at 192 (arts. 3–4 of the Declaration), 203 (art. 2 of the Original Swedish Draft), 208 (art. 2 of the Revised Swedish Draft).

any kind.”<sup>224</sup> Burgers and Danelius viewed the listed purposes as having in common “the existence of some—even remote—connection with the interests or policies of the State and its organs.”<sup>225</sup> Private actors who inflict torture against the State’s wishes cannot be said to be acting to further the State’s policies or interests. But the CAT’s listing of purposes just as easily describes the motivations of private torture. Gangs employ violence to coerce, intimidate, or punish; attacks on racial minorities or LGBTQI people, and practices like female genital cutting and honor killings, are based on discrimination; and domestic violence and rape are inflicted to coerce, intimidate, and punish, in addition to being rooted in gender discrimination.<sup>226</sup> Privately-inflicted acts easily satisfy the torture definition’s purpose requirement.<sup>227</sup>

Another requirement often read into the CAT’s torture definition—although appearing nowhere in the treaty’s text—is that the victim must be detained or otherwise under the control of the

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224. CAT, *supra* note 1, art. 1. It is important to bear in mind that this purpose requirement applies to the person actually inflicting the pain or suffering. There is no requirement that a public official who acquiesces to the act of torture be motivated by one of these purposes. See *Walker v. Lynch*, 657 F. App’x. 45, 47–48 (2d Cir. 2016) (holding BIA erred in finding no acquiescence because Jamaican officials’ failure to investigate anti-gay attacks had not been shown to be purposeful and based on the victims’ sexuality); see also *Cherichel v. Holder*, 591 F.3d 1002, 1013 n.14 (8th Cir. 2010) (explaining that “it is the *torturer* who must possess the specific intent to inflict severe . . . pain or suffering, not necessarily the state actor”); *Roye v. Att’y Gen.*, 693 F.3d 333, 344 (3d Cir. 2012) (holding the same).

225. BURGERS & DANELIUS, *supra* note 4, at 118–19; see also Rodley, *supra* note 201, at 484–85 (stating that the list of purposes in the torture definition reflects “the purposes of an organized political entity exercising effective power” and indicates that the typical torturer will be an official or someone acting to further state purposes).

226. See Copelon, *supra* note 207, at 329–40.

227. The Canadian CAT guidelines point out that Burgers and Danelius’ view that the purpose element is linked to State interests or policies “is difficult to reconcile with the other purposes, which are not explicitly concerned with the maintenance and exercise of *state power*, but merely with the exercise of *power or control* over the victim.” CANADIAN GUIDELINES, *supra* note 169, at 45–46; see also Manfred Nowak, *What Practices Constitute Torture: US and UN Standards*, 28 HUM. RTS. Q. 809, 830–32 (2008) (accepting that the CAT’s purposes bear a relation to State interests but pointing out that at their core, the listed purposes presuppose a situation of a perpetrator exercising control over a powerless victim); Rosati, *supra* note 12, at 542–43 (noting that purposes such as “intimidation” and “coercion” are so broad “almost any reason for intentional torture would fall within” them).

person inflicting the harm. Burgers and Danelius saw this as a necessary corollary of the CAT’s purpose and drafting history; otherwise, they argued, coercive but legitimate uses of force by a nation’s police or military while making arrests, quelling violence, or defending the country could be considered acts of torture.<sup>228</sup> The U.S. ratification resolution explicitly provided that “the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender’s custody or physical control.”<sup>229</sup> If this limited the torture definition to persons in official custody, it would mean that few if any private acts, other than prisoner-on-prisoner violence, would be covered. But the restriction cannot be read in that way because the reference is not to an official’s custody or control, but rather to the offender’s.<sup>230</sup> Torturous acts, whether committed by an official or a non-State actor, and whether occurring within or outside a detention facility, nearly always take place while the victim is under the perpetrator’s physical control or custody and prevented from leaving by force or threats.<sup>231</sup>

The CAT’s text, context, purpose, and drafting history offer ample support for an interpretation that ties acquiescence to breach of officials’ duty to act diligently and take effective measures to prevent, investigate, punish, and remedy acts of torture, including

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228. BURGERS & DANELIUS, *supra* note 4, at 120–21; *see also* Nowak, *supra* note 227, at 832–33 (arguing that torture under the CAT “presupposes a situation of powerlessness of the victim” and does not include justifiable uses of force while making arrests or preventing escape).

229. 136 Cong. Rec. 36,198–99 (1990); *see also* 8 C.F.R. § 1208.18(a)(6) (2020) (codifying the Senate understanding in immigration regulations).

230. The BIA, in a decision that addressed whether atrocious detention conditions in Haiti amounted to torture, erroneously listed as one of the torture definition’s elements that the acts must be inflicted “by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim.” Matter of J-E-, 23 I. & N. Dec. 291, 297 (B.I.A. 2002). In the sole reported case where the BIA rejected a CAT claim on the ground that the feared conduct (genital cutting) would not occur under State officials’ custody or control, its decision was vacated by an appeals court because the Senate understanding and regulation are clearly satisfied where a person “would likely suffer torture while under *private parties’* exclusive custody or physical control.” *Azanor v. Ashcroft*, 364 F.3d 1013, 1019–20 (9th Cir. 2004).

231. *See, e.g.*, V.L. v. Switzerland, No. 262/2005, ¶ 8.10, U.N. Doc. CAT/C/37/D/262/2005 (Nov. 20, 2006) (finding that when the complainant was raped she clearly was under the physical control of her rapists—in this case police officers—even though the rapes occurred outside of detention facilities). One can imagine rare exceptions including, for example, a person shot at a distance by a sniper.



those committed by non-State actors. That reading is most consistent with the rationale behind the compromise reached by the drafters, which excluded purely private torture from the torture definition based on the assumption that “prosecution and punishment will follow under the normal operation of the domestic legal system.”<sup>232</sup> The due diligence approach identifies those circumstances in which that assumption is not fulfilled. The due diligence standard also accords with what the United States indicated it meant by acquiescence when it proposed adding the term to the CAT’s torture definition. Moreover, it has the virtue of making the CAT congruent with how private torture is treated under other human rights instruments, consistent with the CAT’s stated objective of making the enforcement of the already existing prohibition of torture in international law more effective.<sup>233</sup>

### III. THE UNITED STATES’ RATIFICATION UNDERSTANDING: INCORPORATING STATE PREVENTIVE RESPONSIBILITIES UNDER INTERNATIONAL LAW

The Senate’s ratification understanding, which, as Congress directed in FARRA, was incorporated into U.S. immigration regulations, defines acquiescence to require that an official have “awareness” of torturous activity and “thereafter breach his legal responsibility to intervene to prevent such activity.”<sup>234</sup> Although the legislative history addresses what was meant by “awareness,”<sup>235</sup> it does not discuss whether “legal responsibility” was meant to include

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232. BURGERS & DANIELIUS, *supra* note 4, at 119–20.

233. To the extent doubt remains, the protective purpose of Article 3 of the CAT, which is meant to safeguard against deporting people to places where they would face grievous harm, also counsels in favor of a broad construction of the term “acquiescence.” *Cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (discussing the “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,” especially where “death or persecution” is at stake); *see also* Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777, 801–05 (2009) (arguing that Article 3’s protective purpose warrants putting a greater focus on the harm faced by the individual than the government actor’s culpability).

234. 136 Cong. Rec. 36,198 (1990); 8 C.F.R. § 1208.18(a)(7) (2020) (worded identically except “his” was changed to “his or her”); *see generally supra* Section I.A.

235. As discussed in Section I.A, the drafters chose the word “awareness” to indicate that actual knowledge is not needed and willful blindness suffices.

obligations arising under international law or only duties imposed by the laws of the official’s country.<sup>236</sup> But, as this Part shows, a preponderance of the textual and contextual clues favor looking to international as well as domestic law. That is also how the INS, the agency charged with implementation, understood the acquiescence understanding in the first authoritative guidance it issued on the subject.<sup>237</sup>

When the text of a draft Convention was completed in 1984, the U.N. Secretary-General forwarded it to all governments to invite their comments in advance of the General Assembly vote.<sup>238</sup> The statement submitted by the United States made a point of standing by all the interpretive positions it had taken during the negotiations:

Representatives of the United States Government participated actively throughout the sessions of the Working Group . . . . During the course of these negotiations, [they] made a number of declarations and interpretive statements which are contained in the official records of the negotiations, a part of the legislative history of the convention. The United States, in expressing its support for the draft convention and for approval of it by the United Nations General Assembly, maintains all of the declarations and interpretive statements made on its behalf throughout the course of the negotiations.<sup>239</sup>

One of those interpretive positions, as we have seen, was that the phrase “consent or acquiescence” should be added to the torture definition “so that public officials have a clear duty to act to prevent torture” in accordance with an obligation arising under the CAT to take appropriate measures within their power to suppress any torture of which they become aware.<sup>240</sup>

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236. See WOUTERS, *supra* note 84, at 446 (noting that the U.S. understanding did not “specify to what legal responsibilities it referred”); Rosati, *supra* note 12, at 538 (same).

237. See *infra* notes 284–86 and accompanying text (discussing a 1997 memo issued by the agency’s General Counsel, David A. Martin).

238. See BURGERS & DANELIUS, *supra* note 4, at 99–102.

239. U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 20, ¶ 3, U.N. Doc. A/39/499 (Oct. 2, 1984) (containing replies received from governments, including the U.S., to comment on the draft Convention) [hereinafter 1984 U.S. Statement].

240. Comm’n on Hum. Rts., *Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV)*, ¶¶ 29, 45, U.N. Doc.

The 1984 statement went on to specifically mention, as an example of the interpretive stances maintained by the United States, its view that international law must be considered when interpreting another key phrase in the torture definition. Article 1 of the CAT includes a sentence providing that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>241</sup> The United States reminded other countries of its position that “[t]he reference to ‘lawful sanctions’ . . . must be understood to mean sanctions which are lawful under both national and international law.”<sup>242</sup>

When the State Department transmitted the CAT to the Senate in 1988, it backtracked on this issue, likely due to concerns expressed by the Justice Department.<sup>243</sup> The Reagan Administration package of ratification conditions included a number of understandings aimed at protecting law enforcement interests, among them one providing that “lawful sanctions” include “not only judicially-imposed sanctions but also other enforcement actions authorized by U.S. law or by judicial interpretations of such law.”<sup>244</sup> This implied that the question of whether a sanction is lawful, and

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E/CN.4/1314 (Dec. 19, 1978); see generally *supra* notes 209–15 and accompanying text.

241. CAT, *supra* note 1, art. 1(1).

242. 1984 U.S. Statement, *supra* note 239, at 21, ¶ 5. The CAT’s drafting history indicates that State parties could not agree on the “lawful sanctions” exception’s scope and therefore “left open whether this exception refers only to the contents of national law or whether a sanction, in order to be lawful, must also comply with certain international humanitarian standards.” BURGERS & DANIELIUS, *supra* note 4, at 47.

243. See *President’s Transmittal*, *supra* note 42, at v–vi (letter from Secretary of State George Shultz referencing the Department of Justice’s approval of the proposed ratification conditions); see also Stewart, *supra* note 43, at 453 (“Most of the problems [the CAT] posed with respect to U.S. ratification turned on the manner in which the Convention affected law enforcement interests.”).

244. *President’s Transmittal*, *supra* note 42, at 5. The package also contained provisions—later dropped or greatly modified by the Bush Administration—that would have limited the torture definition to “extremely cruel” acts “specifically intended to inflict excruciating and agonizing physical or mental pain or suffering,” allowed “relevant common law defenses” to charges of torture, and refused to recognize the Committee Against Torture’s competence to investigate charges of systematic torture in the United States or hear any complaints made against the United States by other countries or individuals. *Id.* at 4–7, 17; see also *Senate Report*, *supra* note 4, at 35–38 (reprinting 1989 State Department letter to Senator Pell containing the Bush Administration’s revised ratification conditions and explaining reasons for changes).

therefore exempt from the definition of torture, was to be determined solely by reference to domestic, not international law.

The proposed acquiescence understanding, in contrast, referred to an official’s “legal responsibility” with no qualifying language to suggest that the term was limited to domestic legal duties. The words chosen (“have knowledge of such activity and thereafter breach his legal responsibility to intervene to prevent such activity”<sup>245</sup>) also presuppose that an official has such a legal responsibility, the existence of which does not depend on the vagaries of any one country’s laws. This wording is consistent with the stance taken by the United States in the treaty negotiations that officials have a legal responsibility under the CAT to take appropriate measures to counter known acts of torture, and are deemed to acquiesce when they fail to do so.<sup>246</sup>

The subsequent history of the Reagan “lawful sanctions” proposal also points toward looking to the CAT and international law as sources of official obligation. The effort to exempt all enforcement actions authorized by U.S. law from the definition of torture drew criticism from human rights groups for creating a loophole that undermined the treaty. Its logic would have allowed States to impose torturous punishments like flogging or amputation so long as the country’s laws authorized them. The Bush Administration agreed with this critique and in its 1989 revised package of conditions added the phrase, “provided that such sanctions or actions are not clearly prohibited under international law.”<sup>247</sup> This was further amended on the Senate floor to read: “Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.”<sup>248</sup>

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245. *President’s Transmittal*, *supra* note 42, at 5; *see also supra* note 52 and accompanying text (reprinting complete text of the Reagan-proposed acquiescence understanding).

246. *See* WOUTERS, *supra* note 84, at 446 (noting that the U.S. ratification understanding reflected the way in which the U.S. had developed the term during the drafting of the Convention).

247. *See Senate Hearing*, *supra* note 45, at 10; *Senate Report*, *supra* note 4, at 5–6, 35–36; Stewart, *supra* note 43, at 457.

248. 136 Cong. Rec. 36,192–99 (1990). This amendment was facilitated by Senator Pell, who chaired the Senate Foreign Relations Committee, in consultation with the Bush Administration in order to placate Senator Jesse Helms, the Committee’s ranking Republican, who was averse to having U.S. legislation cite international law because of concerns about sovereignty and the primacy of the U.S. Constitution. *Id.* at 36,193–94; *Senate Hearing*, *supra* note 45,

The Bush Administration never altered the “legal responsibility to intervene to prevent torture” language of the proposed acquiescence understanding. The only change it made was to broaden it by changing the word “knowledge” to “awareness.”<sup>249</sup> The same concerns that led the Bush Administration to clarify that sanctions must be consistent with international law in order to be lawful would have counseled against limiting “legal responsibility” in the acquiescence understanding to domestic legal duties. Making acquiescence dependent on a violation of national law would allow countries to absolve themselves of all responsibility for acts of private torture simply by providing in their laws that officials have no legal obligation to intervene. And it would allow an individual to be deported to face torture in a country where officials would do nothing to prevent it, so long as that country’s laws do not require officials to do anything. Such an interpretation would undermine the CAT’s object and purpose, and render “acquiescence” all but meaningless.

When the Bush Administration presented its revised package of ratification conditions to Congress in late 1989, the State Department was undoubtedly aware that international law had been interpreted to impose duties on public officials to take effective measures to prevent private acts of torture. The U.N. Human Rights Committee’s 1982 general comment on the ICCPR and the much publicized 1988 decision of the Inter-American Court of Human Rights in *Velásquez Rodríguez* pointed strongly in the direction of a due diligence obligation.<sup>250</sup> The Bush Administration was attuned to the risk that international tribunals might interpret the CAT in a way unacceptable to the United States and sought safeguards where it had such concerns. The original Reagan Administration package included an understanding providing that Article 16’s prohibition of cruel, inhuman, or degrading treatment (CIDT) covered only cruel and unusual treatment prohibited by the U.S. Constitution.<sup>251</sup> The Bush Administration reclassified it as a formal reservation which, unlike an understanding, restricted the legal obligations that the U.S.

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at 42. It probably escaped Helms’s attention that the reference to “legal responsibility” in the acquiescence understanding was broad enough to cover international law; or perhaps he was willing to tolerate some ambiguity as long as the hated words were not used.

249. See *supra* notes 52–60 and accompanying text.

250. See *supra* notes 146–51 and accompanying text.

251. *President’s Transmittal*, *supra* note 42, at 15–16.

would assume in ratifying the treaty.<sup>252</sup> In testimony before the Senate Foreign Relations Committee, officials drew specific attention to decisions of human rights tribunals condemning treatment the United States considered constitutionally acceptable,<sup>253</sup> especially the European Court of Human Rights’ 1989 *Soering* decision, which blocked the extradition of a man charged with murder to the U.S. on the ground that he faced the prospect of years on death row, an inhuman or degrading treatment.<sup>254</sup>

By contrast, the Administration expressed no concerns about overbroad international interpretations of officials’ legal responsibility to prevent torturous activity, despite the prominent and recent international jurisprudence finding that officials had a legal duty to take effective measures against torture by non-State actors. Nor was the acquiescence understanding made into a reservation. This suggests that the Bush Administration viewed its approach to acquiescence as consistent with international law and had no objection to the emerging due diligence jurisprudence.<sup>255</sup> The

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252. *Senate Report*, *supra* note 4, at 8, 36; *see also* Stewart, *supra* note 43, at 460–61, n.40 (noting that the change was made because the “intended legal effect was in fact to restrict” U.S. obligations under the treaty).

253. *See Senate Hearing*, *supra* note 45, at 5–6, 11, 18, 39 (statements and testimony of State Dep’t Legal Advisor Abraham Sofaer and Deputy Assistant Att’y Gen. Mark Richard); *see also* Stewart, *supra* note 43, at 460–62 (discussing Administration concerns that broad international interpretations of CIDT would conflict with U.S. practices, such as death row and the death penalty).

254. *Soering v. United Kingdom*, App. No. 14038/88, ¶ 88 (Eur. Ct. H.R. July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> (on file with the *Columbia Human Rights Law Review*).

255. In 2008, years after the United States ratified the CAT, the George W. Bush Administration submitted a document to the Committee Against Torture that took issue with various aspects of the Committee’s recently issued General Comment No. 2, including its statement that failure to respond to private torture with due diligence constitutes “acquiescence.” Observations by the United States of America on Committee Against Torture General Comment No. 2: Implementation of Article 2 by States’ Parties ¶¶ 20–21 (Nov. 3, 2008). These comments came at a time of significant tension between the United States and the international community over the torture and mistreatment of detainees held by military and intelligence agencies at “black site” locations outside U.S. territory. *See id.* ¶¶ 26–28 (disagreeing with the Committee’s view that the CAT creates a duty to prevent torture in all places where a State exercises *de facto* control). Under the Obama Administration, the State Department’s Office of the Legal Adviser disavowed several of the prior Administration’s positions that purported to limit the scope of U.S. obligations under the CAT. *See Koh*, *supra* note 183, at 1–6, 43–56, 66–73, 85–90. In any event, the George W. Bush Administration’s

State and Justice Department officials who testified before the Senate stressed that most of the U.S. understandings furthered the CAT's aims and "will favorably affect the evolution of the concept of torture under international law."<sup>256</sup> When the United States deposited its instrument of ratification with the United Nations, several other countries that had ratified the treaty objected to the U.S. reservation on the scope of CIDT and to a U.S. understanding narrowly construing when mental pain and suffering amounts to torture, but none objected to the acquiescence understanding.<sup>257</sup> A number of commentators viewed it as taking a broad approach to acquiescence that would be helpful internationally in clarifying the meaning of the term.<sup>258</sup>

But even if the U.S. officials who proposed the acquiescence understanding did not anticipate that due diligence would become the international law standard for State responsibility, this ultimately should make no difference in how the unrestricted phrase "legal responsibility" in the acquiescence understanding is interpreted. Legal responsibilities exist under international law as well as domestic law and the Senate understanding did not exclude the former. As the Supreme Court recently noted in applying Title VII to

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positions shed no useful light on the intent of the George H.W. Bush Administration and the Senate at the time the United States ratified the CAT in 1990.

256. *Senate Hearing, supra* note 45, at 13, 16, 39 (testimony and prepared statement of Mark Richard, and testimony of Abraham Sofaer). The Justice Department's testimony was delivered by a Deputy Assistant Attorney General from the Criminal Division who explained that his agency's concerns all related to the need to clarify the torture definition so that the United States could meet its treaty obligation to make all acts of torture criminally punishable without running afoul of due process constraints. *Id.* at 1–16. With respect to acquiescence, that meant ensuring that officials could not be held accountable unless they had prior awareness of torturous activity (through actual knowledge or willful blindness) and breached a legal responsibility to intervene. *Id.* at 14, 17. The Justice Department did not express any concerns about the source or scope of that legal responsibility.

257. See Oona A. Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 807 (2012) (summarizing all objections made to the U.S. reservations and understandings).

258. For examples of scholars who regarded the U.S. acquiescence understanding as progressive, see WOUTERS, *supra* note 84, at 446; Alexander, *supra* note 14, at 937; Rosati, *supra* note 12, at 539; and Magee, *supra* note 45, at 830–31. *But see* NOWAK ET AL., *supra* note 174, at 40–41 (viewing all the U.S. understandings, including the one on acquiescence, as inappropriate efforts to limit the torture definition's scope).

sexual orientation discrimination, statutes are not limited to applications that were expected at the time of enactment and “[w]hen Congress chooses not to include any exceptions to a broad rule, courts should apply the broad rule.”<sup>259</sup>

The ratification history includes two statements that might be read to cut against a broad conception of the legal responsibilities referenced in the Senate understanding. Viewed in context, however, they do not support excluding obligations arising under international law. A prepared statement submitted by the Justice Department at the Senate hearing observed that the acquiescence understanding “reflects an intention that the criminal sanctions contained in the Convention for action constituting torture be focused on knowing misconduct as opposed to negligent inaction.”<sup>260</sup> That remark was consistent with the Department’s view that Article 4 of the CAT, which requires States to criminalize “complicity or participation in torture” as well as actual or attempted torturous acts, does not require criminalizing negligent inaction.<sup>261</sup> The Reagan and Bush Administrations repeatedly assured the Senate that existing state and federal criminal laws were sufficient to comply with Article 4 because they covered conspiracies as well as any actual or attempted acts of torture.<sup>262</sup> Whatever acquiescence means, it is clearly broader than conspiracy. The Reagan and Bush Administrations’ stance that existing criminal laws fulfilled U.S. obligations under Article 4 indicates that they viewed the treaty as requiring criminal sanctions

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259. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1736 (2020).

260. *Senate Hearing*, *supra* note 45, at 17 (prepared statement of Mark Richard). This may have been meant to refer to the “awareness” element of acquiescence, which can be established by willful blindness, a form of knowing misconduct, but not by a merely negligent lack of knowledge. *See supra* notes 58–59, 109 and accompanying text.

261. Article 4, paragraph 1 provides: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.” Paragraph 2 further requires that States “make these offences punishable by appropriate penalties which take into account their grave nature.” CAT, *supra* note 1, art. 4 ¶ 1.

262. *President’s Transmittal*, *supra* note 42, at 8–9 (State Department analysis of Article 4); *Senate Hearing*, *supra* note 45, at 15, 40 (prepared statement and testimony of Mark Richard). Although asserting that existing U.S. criminal laws sufficiently covered acts taking place on U.S. territory, the Administration acknowledged a new federal statute would be needed to cover some extraterritorial conduct, as required by Article 5 of the CAT. *President’s Transmittal*, *supra* note 42, at 10.



for “complicity” but not acquiescence.<sup>263</sup> It does not follow that officials’ negligent inaction could never breach a legal responsibility and amount to acquiescence.

Another statement, contained in the State Department analysis that accompanied the CAT’s transmittal to the Senate, makes reference to acts that occur “under color of law,” a term of art drawn from civil rights law that denotes action occurring with significant State involvement or aid.<sup>264</sup>

The scope of the Convention is limited to torture “inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.” Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted “under color of law.”<sup>265</sup>

Read in context, however, the “under color of law” analogy in this passage is used to explain what the phrase “acting in an official capacity” means and not as a definition of “acquiescence.” In other words, the person who inflicts, instigates, consents to, or acquiesces in the act of torture must be acting “under color of law.” If so, the requisite “context of governmental authority” is present. The Attorney General and courts have interpreted the torture definition in that way, treating “under color of law” as the operative test for determining whether someone is “acting in an official capacity.”<sup>266</sup> That is a distinct inquiry from whether that person’s response to the torturous conduct amounts to “consent or acquiescence.”

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263. Cf. Nigel Rodley & Matt Pollard, *Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2006 EUR. HUM. RTS. L. REV. 115, 124–25 (noting that Article 4 does not expressly link “complicity” with Article 1’s “consent or acquiescence” and it is unclear “whether every individual public official sufficiently involved under Art. 1 so as to make the state responsible would in all cases become *individually* criminally responsible”).

264. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (“A private individual acts under color of law . . . when he acts together with state officials or with significant state aid.” (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982))).

265. *President’s Transmittal*, *supra* note 42, at 4.

266. See *Matter of O-F-A-S-*, 28 I. & N. Dec. 35, 39, 41–42 (A.G. 2020); see also *id.* at 37, 39 (citing court decisions that equate “under color of law” with action “in an official capacity”).

Two statutes enacted after the Senate’s 1990 ratification of the CAT used the phrase “under color of law” in identifying extraterritorial acts of torture that would be criminally punishable or subject to civil damages. The Torture Victim Protection Act of 1991 (TVPA)<sup>267</sup> defined torture similarly to the CAT but omitted the CAT definition’s language on state responsibility.<sup>268</sup> However, in creating a cause of action, it restricted liability to acts of torture or extrajudicial killing committed “under actual or apparent authority, or color of law, of any foreign nation.”<sup>269</sup> The Senate Report on the TVPA explains that its damage remedy was meant to provide a clearer statutory foundation for the cause of action recognized under the Alien Tort Statute (ATS)<sup>270</sup> in the 1980 *Filartiga* decision, which allowed noncitizens to sue a former foreign police official in federal district court for torturing and killing a family member abroad because “customary international law provides individuals with the right to be free from torture by government officials.”<sup>271</sup> The bill was also designed to make the *Filartiga* cause of action available to U.S. citizens who suffer torture abroad.<sup>272</sup> Given these purposes, the limitation of the damage remedy for State-committed or State-abetted

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267. Pub. L. No. 102-256, 106 Stat. 73 (1991) (codified at 28 U.S.C. § 1350 note).

268. *Id.* § 3(b). The TVPA’s torture definition tracked Article 1 of the CAT except for the omission of the treaty language requiring some degree of connection to a public official or person acting in an official capacity. It also added in language from the Senate ratification understandings that qualified or clarified certain other aspects of the definition. *Id.*; see S. REP. NO. 102-249, at 6–7 (1991).

269. Pub. L. No. 102-256, § 2(a).

270. 28 U.S.C. § 1350.

271. S. REP. NO. 102-249, at 4 (1991) (discussing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)); see also *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247–49 (11th Cir. 2005) (holding that the ATS provides a cause of action only for state-sponsored torture and the text of the TVPA likewise “expressly requires the element of state action”).

272. See S. REP. NO. 102-249, at 5. Congress may also have viewed state-sponsored torture as particularly heinous and worthy of punishment. See *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigr. and Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 17 (1990) [hereinafter *TVPA Hearing*] (Senator Arlen Specter stating that he introduced the bill to provide a federal remedy “for this kind of outrageous and horrendous conduct”). There may also have been concerns that allowing suits for private torture in which officials acquiesced would have led to too many suits in U.S. courts based on extraterritorial conduct.

torture (as under the ATS) makes sense and does not suggest that Congress viewed “acquiescence” under the CAT in narrow terms.<sup>273</sup>

The phrase “under color of law” appeared again in the 1994 Torture Act,<sup>274</sup> which was enacted to implement the United States’ obligation under the CAT to criminalize all acts or attempted acts of torture and complicity or participation in such acts, not only within the United States, but also when committed abroad by a U.S. national or by a non-national offender present in the United States.<sup>275</sup> In defining “torture” for purposes of this offense, Congress roughly tracked the CAT definition but covered only torture “committed by a person acting under color of law,”<sup>276</sup> thereby excluding acts committed by someone acting in a private capacity but with a public official’s acquiescence. The Torture Act makes it a criminal offense to commit

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273. The TVPA’s failure to provide a civil damage remedy for some acts committed abroad that would fall within Article 1’s definition of torture did not violate U.S. obligations under the CAT. The treaty’s drafting history indicates that Article 14, on the victim’s right to compensation, was meant to apply only to torture occurring within a country’s territory. When the U.S. ratified the treaty, one of the Senate understandings made that limitation explicit. *See* Resolution of Ratification, § II(3), 136 CONG. REC. 36,198–99 (1990) (setting out the U.S. understanding that Article 14 requires providing “a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party”); *TVPA Hearing, supra* note 272, at 19 (testimony of David Stewart, State Dep’t Assistant Legal Adviser); *see also* Stewart, *supra* note 43, at 458–60 (discussing the Bush Administration’s view that the CAT did not require the United States to provide a civil remedy for any acts of torture committed abroad). The Senate report on the TVPA asserted that providing a damage remedy for some torture committed abroad would help to “carry out the intent” of the CAT but did not dispute the point, made by dissenting committee members, that the CAT did not require it. S. REP. NO. 102-249, at 3, 13 (1991); *see also* S. REP. NO. 103-107, at 59 (1993) (stating, in a Senate report on the later-passed Torture Act, that “[c]onsistent with the Senate’s understanding pertaining to Article 14 of the Convention, the legislation does not create any private right of action for acts of torture committed outside the territory of the United States”).

274. Pub. L. 103-236, Tit. V, § 506(a), 108 Stat. 463 (codified as amended at 18 U.S.C. §§ 2340 and 2340A). Congress later incorporated by reference the Torture Act’s definition of torture into a statute creating programs to assist victims of torture. Torture Victims Relief Act of 1998, Pub. L. 105-320, § 3, 112 Stat. 3016 (codified at 22 U.S.C. § 2152 note). The Congressional findings in that statute express a special concern with torture used by repressive governments to terrorize society as a weapon against democracy. *Id.* § 2(2)–(3).

275. CAT, *supra* note 1, arts. 4–5; *see also* United States v. Belfast, 611 F.3d 783, 802–03 (11th Cir. 2010) (explaining the relationship between the Torture Act and the CAT).

276. 18 U.S.C. § 2340.

or attempt to commit torture outside the United States or to conspire to do so.<sup>277</sup> The scope of criminal liability mirrored the view expressed by the Executive Branch at the time of ratification that criminalizing conspiracy along with actual or attempted acts of torture was enough to meet U.S. obligations under Article 4 of the CAT.<sup>278</sup> The only federal appeals court decision construing the Torture Act found that the statute’s “acting under color of law” requirement corresponds to and is synonymous with the CAT torture definition’s reference to a “person acting in an official capacity.”<sup>279</sup> Once again, Congress did not use the phrase to define or cabin the meaning of “acquiescence,” a concept that it simply chose to exclude from the extraterritorial criminal liability statute.

When Congress enacted FARRA in 1998 to implement Article 3’s non-refoulement requirement in U.S. immigration law, it did not repeat the TVPA and Torture Act’s “under color of law” formulation. Instead, it directed agencies to issue regulations giving “torture” and other terms the same meaning they hold in the CAT, subject to the reservations, understandings, and other provisions of the Senate ratification resolution.<sup>280</sup> The legislation thus mandated that for purposes of relief from removal, torturous conduct by private actors falls within the definition of torture if it occurs with the acquiescence of a public official or person acting in an official capacity, with the Senate’s understanding providing the definition for “acquiescence.”<sup>281</sup> Congress’ choice not to require a higher degree of state action through an “under color of law” standard makes sense both to ensure compliance with the treaty and to serve the distinctive purpose of Article 3. While the TVPA and Torture Act were designed to impose penalties on perpetrators, Congress’s purpose in FARRA was protective—to ensure that individuals are not sent to places where

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277. 18 U.S.C. § 2340A(a), (c).

278. See *supra* notes 260–63 and accompanying text; *Belfast*, 611 F.3d at 811–12 (finding Congress fulfilled Article 4’s obligation to criminalize “complicity or participation” in torture when it made conspiracy to commit torture abroad a crime).

279. *Belfast*, 611 F.3d at 808–09.

280. FARRA, *supra* note 49, §§ 1242(a), (b), (f)(2).

281. Following FARRA, the Justice Department’s CAT regulations incorporated the Senate understanding on acquiescence verbatim, except for making it gender-neutral by using “he or she.” Compare 8 C.F.R. § 1208.18(a)(7), with Resolution of Ratification, § II(3), 136 Cong. Rec. 36,198 (1990).

they face a danger of torture.<sup>282</sup> A victim-centered standard that focuses on the harm faced by the applicant and requires a lesser degree of active State involvement is appropriate to this context.

This tour of the history of U.S. ratification and subsequent legislation leads back to the basic point made earlier—that the U.S. acquiescence understanding should be given the reading most natural to its text. Acquiescence exists when a public official is aware of torturous activity and breaches a legal responsibility to intervene to prevent such activity. This legal responsibility can derive from any applicable law, international or domestic.<sup>283</sup>

The first authoritative agency interpretation of acquiescence concluded that the “legal responsibility” referred to in the Senate understanding included duties arising under international law. Because the United States treated the CAT as non-self-executing until FARRA and its regulations established procedures for immigration judges to decide CAT claims in removal proceedings, it was up to the INS, the agency then responsible for executing removals, to ensure compliance by not deporting individuals protected by the treaty.<sup>284</sup> In May 1997, the INS General Counsel, David A. Martin, issued a memorandum explaining the CAT’s requirements. In discussing the acquiescence understanding, the memo explained that a public official with knowledge of torture “must breach a legal duty to prevent the act. Such duty may arise under either domestic or international law but in no case shall it be less than what is required by international law.”<sup>285</sup> When the Justice

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282. FARRA begins by declaring, “It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . .” FARRA, *supra* note 49, § 1242(a).

283. See *supra* notes 245–59 and accompanying text.

284. See *supra* note 65; see also *Matter of H-M-V-*, 22 I. & N. Dec. 256, 259–60 (B.I.A. 1998) (holding immigration judges lacked authority to grant CAT relief because there was as yet no implementing legislation); *id.* at 261–64 (Schmidt, Chairman, dissenting) (describing INS policies aimed at avoiding violations of the treaty in the interim).

285. Office of the General Counsel, INS, U.S. Dep’t of Justice, *Compliance with Article 3 of the Convention Against Torture in the Cases of Removable Aliens* (May 14, 1997), at 4, reprinted in 75 INTERPRETER RELEASES, No. 10, Mar. 16, 1998, at 375. Martin also interpreted the understanding to require that an official “know about the specific act of torture before it occurs,” which was an unduly narrow reading given the understanding’s use of the broader term “awareness” and its reference to “activity constituting torture” rather than to a specific act. See

Department issued the CAT regulations in 1999, it simply incorporated the Senate understanding into the regulatory definition of torture without elaborating further on the meaning of “legal responsibility” in the regulation or official commentary.<sup>286</sup> However, it did not disavow the INS General Counsel’s interpretation of “legal responsibility” as including international law duties.

In conclusion, U.S. law calls for looking to applicable international law as well as the domestic law of the country in question to determine whether officials are abiding by their legal responsibility to intervene to prevent torture. As Part II explained, under the CAT, as well as the ICCPR and a number of regional human rights treaties, that legal responsibility is a duty of due diligence.<sup>287</sup> One question this raises is whether officials who fail to respond to torture with due diligence can be found to have violated a legal responsibility under international law if their nation is not a party to the CAT or any other treaty that imposes such a duty. That question will rarely arise given that 171 countries have ratified the CAT and 173 are parties to the ICCPR.<sup>288</sup> But at a minimum, all States should be held to the CAT’s obligations, regardless of whether they have ratified the treaty. Article 3’s non-refoulement requirement is designed to prevent persons from being sent to places where they

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Rosati, *supra* note 12, at 538 (“To the extent that the INS position excludes a public official’s willful blindness or actual knowledge of general torture practices by requiring a public official to have actual knowledge about a *specific* act of torture, the INS position is inconsistent with the Senate understanding of the treaty obligations.”).

286. CAT Regulations, *supra* note 50, 64 Fed. Reg. at 8483, 8491. The commentary’s only discussion of what acquiescence means was to repeat the observation made several times in the ratification history that “acquiescence includes only acts that occur in the context of governmental authority.” *Id.* at 8483; *see also supra* notes 56–57 and accompanying text (discussing textual evidence that this statement encompasses private torturous activity that occurs with an official’s awareness and breach of legal responsibility).

287. A legal responsibility could also exist under customary international law, but it is unclear whether an obligation of due diligence has been so universally accepted that it has assumed that status. The U.N. Special Rapporteur on Violence Against Women has asserted that, at least in the area of gender-motivated violence, a due diligence obligation has ripened into customary international law. *See supra* note 158 and accompanying text.

288. *See ICCPR*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND) [<https://perma.cc/5U3W-NFBZ>] (listing parties to the ICCPR). For the due diligence obligation to prevent torture under the ICCPR, *see supra* notes 143–47 and accompanying text.

are in danger of being tortured, and it would undermine the treaty's object and purpose to allow the return of an individual merely because of the receiving State's refusal to acknowledge the CAT's fundamental requirement that States take effective measures to prevent torture.<sup>289</sup> If a country's domestic law, or another treaty it is party to, imposes more stringent or specific duties, its officials should be held to those legal responsibilities as well.

#### IV. IMPLEMENTING A "DUE DILIGENCE" STANDARD

This final Part offers several observations on what a due diligence test for CAT acquiescence might look like in practice, and responds to some potential objections. Is it appropriate for U.S. courts to judge the adequacy of other countries' efforts? Is due diligence too vague to be workable? Why not just use the protection-focused standard of asylum and find acquiescence whenever the State is unable to prevent torture? This Part also includes a proposal for a regulatory amendment to help clarify the appropriate standard for acquiescence.

The general contours of the due diligence standard as developed by human rights courts and treaty bodies were described in Section II.A. Two points are particularly worth noting. First, due diligence is an obligation of means, not results. It requires officials to take measures within their power and authority that are reasonably calculated to be effective in preventing and redressing acts of torture.<sup>290</sup> The fact that officials prove unable to prevent torture from occurring does not necessarily mean they breached a legal duty.

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289. CAT, *supra* note 1, art. 2(1). Not making protection against removal depend on whether the receiving country has ratified the CAT is consistent with the approach taken in the U.S. "lawful sanctions" understanding, under which punishments authorized under another country's laws are not considered "lawful" if they undermine the object and purpose of the CAT. *See supra* note 248 and accompanying text.

290. Commentators broadly agree on this point. *See* 2019 SR Report, *supra* note 180, ¶ 23; Goldscheid & Liebowitz, *supra* note 141, at 310, 327–34; Lisa Grans, *The State Obligation to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Case of Honour-Related Violence*, 15 HUM. RTS. L. REV. 695, 705, 717–18 (2015); Patricia Tarre Moser, *The Duty to Ensure Human Rights and Its Evolution in the Inter-American System: Comparing Maria da Penha v. Brazil with Jessica Lenahan (Gonzales) v. United States*, 21 AM. U. J. GENDER SOC. POL'Y & L. 437, 444–45 (2012); Monika Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L., 341, 371–76 (2010).

Nonetheless, results are relevant as a benchmark. Article 2 of the CAT obliges States to take “*effective* legislative, administrative, judicial or other measures to prevent acts of torture” in their territory.<sup>291</sup> If the measures taken prove ineffective, the State may need to revise its approach and expand its efforts. The persistence of widespread abuses may be evidence that the State is not doing enough to address the problem.<sup>292</sup> For example, a persisting pattern of violence against women or LGBTQI people may reveal that changes in laws, police and judicial practices, protective services, and government messaging are needed in order to adequately investigate, prosecute, and punish acts of torture, enable victims to access protection, and address societal attitudes that fuel the violence. And while due diligence takes into account that there are limits—stemming both from resource constraints and the need for due process—on the ability of governmental actors to prevent acts of torture, the due diligence jurisprudence has been generally hostile to the idea that States lack the ability to make needed reforms.<sup>293</sup>

A second and related point is that due diligence operates on both individual and systemic levels. On the individual level, when officials become aware that a person faces an imminent risk of torture they must take reasonable measures to avert the harm and, if it occurs, take all appropriate steps to investigate, prosecute, and punish the offender.<sup>294</sup> At the systemic level, States have an

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291. CAT, *supra* note 1, art. 2(1) (emphasis added).

292. See Gen. Cmt. 2, *supra* note 38, ¶ 4 (“If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.”); see also Hakimi, *supra* note 290, at 373–74 (noting that “the reasonableness of the state’s measures depends on the scope of the problem” and persisting widespread abuse “is evidence that the state is not doing enough to satisfy its obligation”); Anhene Boulesbaa, *The Nature of the Obligations Incurred by States Under Article 2 of the UN Convention Against Torture*, 12 HUM. RTS. Q. 53, 62, 72–73, 80 (1990) (observing that the obligation to take effective measures carries with it an obligation to achieve reasonable results).

293. See Goldscheid & Liebowitz, *supra* note 141, at 327–33; Hakimi, *supra* note 290, at 374–76 (discussing constraints that may affect the measures taken to prevent human rights violations but observing that courts and treaty bodies generally expect States to develop the capacity needed to restrain abusers).

294. U.N. treaty bodies, special rapporteurs, and human rights courts have repeatedly endorsed this principle. See Hakimi, *supra* note 290, at 379–81; 2019 SR Report, *supra* note 180, ¶ 23(b); 2016 SR Report, *supra* note 180, ¶¶ 11–12; 2013 SR VAW Report, *supra* note 158, ¶ 70; Gen. Cmt. 2, *supra* note 38, ¶¶ 18, 21. These obligations are rooted not only in Article 2’s general requirement that



obligation to change laws or policies that contribute to a problem of widespread torturous violence or impede efforts to protect victims.<sup>295</sup> In *Opuz v. Turkey*, for example, the European Court of Human Rights found that the requirement of Turkish law that criminal charges be dropped if a victim withdraws her complaint was a contributing factor to the escalating violence the complainant suffered and that the law represented a failure by the State to exercise due diligence in preventing domestic violence.<sup>296</sup> In countries where anti-LGBTQI attacks occur regularly, enacting or failing to repeal legislation that criminalizes same-sex relationships violates the due diligence duty because such laws contribute to a climate of violence against LGBTQI people and have the predictable effect of deterring victims from seeking help from the authorities.<sup>297</sup> Statements by influential officials or state-endorsed leaders that encourage or condone violence against members of a societally-disfavored group can also represent a failure of due diligence that makes the State responsible when such attacks occur.<sup>298</sup>

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States take effective preventive measures, but also in the more specific requirements of Article 4 (duty to criminalize acts of torture and make them punishable by appropriate penalties), Article 6 (duty to take offenders into custody when the available information warrants), Articles 12–13 (duty to conduct a prompt and impartial investigation and protect complainant and witnesses from retaliation), and Article 14 (duty to provide access to avenues for redress).

295. Special rapporteurs and scholars have highlighted this aspect of due diligence. See 2019 SR Report, *supra* note 180, ¶ 23(a); 2013 SR VAW Report, *supra* note 158, ¶¶ 70–75; Grans, *supra* note 290, at 713–15; Goldscheid & Liebowitz, *supra* note 141, at 307–09; Hakimi, *supra* note 290, at 382–83.

296. *Opuz v. Turkey*, App. No. 33401/02, ¶¶ 137–46, 168 (Eur. Ct. H.R. June 9, 2009). For further discussion of this case, see *supra* notes 153–56 and accompanying text.

297. See 2016 SR Report, *supra* note 180, ¶ 15 (discussing the link between the criminalization of LGBTQI persons and violence against the LGBTQI community by both state and non-State actors); see also Human Rights Council, 19th Sess., Rep. of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/19/41, ¶ 42 (2011) (making similar observations).

298. A substantial body of social science research supports the conclusion that certain kinds of denigrating speech that dehumanizes members of an out-group have conditioning effects on listeners that can contribute to their willingness to tolerate or engage in violent attacks, especially when the speaker holds authority. See RICHARD ASHBY WILSON, INCITEMENT ON TRIAL 17–18, 223–47 (2017); Jonathan Leader Maynard & Susan Benesch, *Dangerous Speech and Dangerous Ideology: An Integrated Model for Monitoring and Prevention*, 9 GENOCIDE STUDS. & PREVENTION INT'L J. 70, 77–86 (2016); see also 2019 SR Report, *supra* note 180, ¶ 21 (finding that statements by political/religious leaders endorsing domestic or honor-based violence and discriminatory political

The due diligence standard differs from the “willful blindness” approach in two major respects. Officials who “turn a blind eye” to torturous activity are unquestionably not exercising due diligence and will be guilty of acquiescence under either approach. But due diligence also captures situations where officials, while not totally passive, fail to do all that can reasonably be expected of them to protect the victim and prosecute and appropriately punish the perpetrators. Cases in which appellate courts have upheld no-acquiescence findings in situations where the authorities responded in a half-hearted or pro forma way when a threat or act of torture was reported, or where country evidence shows that officials are likely to respond in a less-than-diligent way to the harm the applicant faces (for example, where there is a pattern of gang or cartel infiltration of police departments, or men committing serious acts of domestic violence are routinely only briefly detained and then released), should come out differently under a due diligence test.<sup>299</sup>

The willful blindness standard also does not easily accommodate viewing systemic failures that contribute to the perpetuation of torture as a form of acquiescence. Due diligence provides a framework for examining whether the measures taken by the State to address a problem of torturous violence are reasonable and proportional to the gravity of the situation, or conversely, whether its failures to take needed steps to address the problem contributes to the risk of torture the applicant faces.<sup>300</sup> For example, in *Fuentes-Erazo*, where the Eighth Circuit found no acquiescence even though it acknowledged that the record showed widespread impunity for domestic violence in Honduras, ineffectual laws and institutions to protect victims, and the government’s failure to provide necessary resources to address the problem,<sup>301</sup> a due diligence standard would have compelled a different outcome. And in those cases where appellate courts have found acquiescence based on

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narratives that encourage violence against marginalized groups may amount to incitement under the CAT’s torture definition).

299. For discussion of case examples, see *supra* notes 115–20, 132–33 and accompanying text.

300. As the Committee Against Torture explained in its General Comment No. 2, the State is responsible in “contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.” Gen. Cmt. 2, *supra* note 38, ¶ 15.

301. *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 850–54 (8th Cir. 2017). For further discussion of this case, see *supra* notes 115–17 and accompanying text.

systemic failures—as in a Seventh Circuit decision finding that Jordan acquiesces to honor killings, even though it prosecutes offenders, because it has not changed laws that enable men committing them to receive light sentences and offers no mechanism to protect targeted women besides protective custody<sup>302</sup>—the results make more sense when acquiescence is conceptualized as a failure to exercise due diligence, rather than as “willful blindness.”

One possible objection to using a due diligence standard is that it requires passing judgment on the adequacy of another State’s preventive efforts, which implicates sensitive foreign policy concerns. A government may be offended by the charge that it fails to act diligently to protect its citizens from torture. One might argue that if such accusations are to be made, they should come from foreign policy officials, not judges.<sup>303</sup> In actuality, it is rare that another country cares why the United States declines to deport someone; governments are usually happy not to be required to take back disgruntled citizens who have emigrated.<sup>304</sup> On occasion, though, another country may take offense if a court impugns the diligence of its anti-torture efforts. So what? That is precisely what the CAT calls for—the treaty requires all State parties to determine, before returning someone, whether that person would be in danger of being tortured by, or with the consent or acquiescence of, officials in another country.<sup>305</sup> To the

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302. Sarhan v. Holder, 658 F.3d 649, 659–60 (7th Cir. 2011).

303. Cf. Scarlett v. Barr, 957 F.3d 316, 332 (2d Cir. 2020) (finding that giving *Chevron* deference to the agency standard on whether a country’s government is responsible for persecution in asylum cases based on its inability to control the persecutors is particularly appropriate because it is “a matter of no small significance to foreign relations”).

304. See Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 174–75 (2019) (“And though immigration decisions are sometimes said to implicate delicate matters of foreign relations, the truth of the matter is that it is the very unusual case that affects anyone or anything other than the parties themselves.”).

305. Soering v. United Kingdom, App. No. 14038/88 ¶ 91 (Eur. Ct. H.R. July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619> (on file with the *Columbia Human Rights Law Review*) (explaining that the issue is whether the *sending* country is violating its own treaty obligation not to return a person to a place where that individual would face torture or inhumane treatment, which inescapably requires assessing conditions in the country of removal against the treaty’s standards); see also William M. Cohen, *Implementing the U.N. Torture Convention in Extradition Proceedings*, 26 DENV. J. INT’L L. & POL’Y 517, 531 (1998) (observing that the interests of comity have little weight as an objection to

extent that this involves calling out another country for failing to live up to its obligations under the treaty, calling attention to the problem serves the CAT’s purposes by providing feedback that may help to spur reforms.<sup>306</sup> Without a due diligence standard for acquiescence, courts would still be obliged to determine whether a CAT applicant faces likely torture at the hands of State officials, or with an official’s consent or willful blindness. Those higher levels of culpability, if anything, pose more sensitive foreign policy concerns than basing a CAT grant on the failure of officials to exercise due diligence to prevent privately inflicted torture.

Another difficulty posed by the due diligence standard is its imprecision. The standard assesses the reasonableness of measures taken to prevent torture and the seriousness of officials’ efforts to implement them. It does not offer clear benchmarks on exactly what measures are required or how much effort is enough.<sup>307</sup> But that hardly distinguishes it from other reasonableness standards in the law; adjudicators are accustomed to making fact- and context-specific judgments about what is reasonable in any given set of circumstances.

One might also be concerned with information deficits—will immigration judges have the necessary knowledge to accurately assess the adequacy of other States’ efforts? That problem, however, is endemic to asylum adjudication, in which judges must assess conditions in foreign countries in order to determine how likely it is an individual will face persecution and whether the applicant’s account of past events is credible.<sup>308</sup> Judges are able to make those determinations by examining evidence from reputable governmental, NGO and journalistic sources, often with the aid of expert testimony.<sup>309</sup> Applying a due diligence standard will certainly present

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courts determining whether extradition would violate the CAT, given that it is a treaty enforcing a universally recognized prohibition of torture).

306. Cf. MATTHEW E. PRICE, *RETHINKING ASYLUM* 24–26, 57–58, 69–81, 93–94 (2009) (discussing the condemnatory and expressive functions of States granting asylum to individuals persecuted by other countries).

307. See Goldscheid & Liebowitz, *supra* note 141, at 310–11, 322–23, 339–41; Edwards, *supra* note 165, at 215 (noting the difficulties of determining the precise measures States are required to take).

308. See David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1270–85 (1990).

309. See *Matter of J-G-T*, 28 I. & N. Dec. 97, 100 (B.I.A. 2020) (noting “Immigration Judges have long relied on expert testimony . . . to help them make factual determinations”); *Matter of S-M-J*, 21 I. & N. Dec. 722, 724–28, 732

some hard cases. But in most cases involving deportation to a country where privately-committed abuses such as domestic violence or torture by organized criminal entities are widespread, it should be relatively easy to identify, from readily available country evidence, whether there are serious deficiencies in the governmental response that allow abuses to continue unchecked.

A due diligence approach to acquiescence can also be criticized for not going far enough. It allows people to be deported to face torture by non-State actors in situations where officials, despite their diligent efforts, cannot provide protection. The standard used for asylum, which asks whether the government is unable or unwilling to control the persecutors, would be more protective and better serve the objective of preventing all torture.<sup>310</sup> It is difficult, however, to construe the CAT's torture definition and U.S. law as allowing an exclusive focus on the likelihood of torture without regard to whether public officials would be, at least to some degree, at fault. When Congress enacted FARRA, it required the immigration agencies to adopt the CAT's torture definition and the Senate understanding of "acquiescence."<sup>311</sup> If officials take all reasonable measures within their authority to prevent an act of torture but are

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(B.I.A. 1997) (discussing the important role of country background information in adjudicating asylum claims).

310. Some commentators have proposed interpreting acquiescence under the CAT as equivalent to the "unable or unwilling" standard applied under the Refugee Convention. See FANNY DE WECK, NON-REFOULEMENT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE UN CONVENTION AGAINST TORTURE 214, 225–27 (2017); Vining, *supra* note 220, at 355–60; McCorquodale & La Forgia, *supra* note 73, at 217; Weissbrodt & Höreiter, *supra* note 208, at 51–52. The Refugee Convention, however, differs from the CAT in that it includes no language requiring the State to bear responsibility for persecution, but instead focuses on whether an individual is "unable, or owing to such fear [of persecution], is unwilling to avail himself of the protection of that country." Refugee Convention, *supra* note 6, art. 1(A)(2). See Walter Kälin, *Non-State Agents of Persecution and the Inability of the State to Protect*, 15 GEO. IMMIGR. L.J. 415, 418, 423 (2001). Article 3 of the European Convention on Human Rights, which has been interpreted to bar refoulement if a person faces likely torture from private actors, regardless of whether the receiving country's authorities bear any responsibility for it, similarly lacks the limiting language of the CAT's torture definition. See Salah Sheekh v. The Netherlands, App. No. 1948/04 ¶¶ 135, 147 (Eur. Ct. H.R. Jan. 11, 2007), <http://hudoc.echr.coe.int/eng?i=001-78986> (on file with the *Columbia Human Rights Law Review*).

311. FARRA, *supra* note 49, § 1242(b), (f); 8 C.F.R. § 1208.18(a)(1), (a)(7).

still not able to stop it, it is simply implausible to say that they have breached their legal responsibility and acquiesced to the conduct.<sup>312</sup>

A due diligence standard provides the highest degree of protection against private torture that U.S. law and the CAT’s definition of torture will allow.<sup>313</sup> It is more protective than the current, willful-blindness-based jurisprudence. It is grounded in the core requirement of CAT Article 2 that States take effective measures to prevent acts of torture, and it accurately reflects what the United States understood acquiescence to mean when it proposed adding the term to the CAT’s torture definition during the treaty negotiations.

No change in the CAT regulations is needed for courts to conclude that when officials aware of torturous activity fail to

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312. See STEVEN DEWULF, *THE SIGNATURE OF EVIL: (RE)DEFINING TORTURE IN INTERNATIONAL LAW* 496 (2011) (explaining that human rights treaties cannot be plausibly construed to hold a State responsible for torture by private actors if the State has done all that can reasonably be expected of it to prevent such conduct).

313. Much of the gap in protection that remains for situations in which the State makes diligent efforts but cannot prevent torture could be filled if U.S. case law would recognize that non-State entities exercising effective control over territory, such as guerilla groups or gangs in some areas, are *de facto* public officials and should be treated as “person[s] acting in an official capacity” under the CAT. Under this analysis, any torturous acts they commit are “inflicted by” an official, and there is no need to consider whether the country’s government acquiesces. The U.N. Committee Against Torture has endorsed this approach. See 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. C/GC/2 (2018) (stating individuals should not be deported to places where they would be tortured “at the hands of non-State entities . . . over which the receiving State has no or only partial *de facto* control”); *S.S. v. Netherlands*, No. 191/2001, ¶ 6.4, U.N. Doc. CAT /C/30/D/191/2001 (2003) (stating Article 3 applies if a person faces torture from a “non-governmental entity [that] occupies and exercises quasi-governmental authority over the territory”); see also David, *supra* note 205, at 795 (arguing for this approach in U.S. implementation of the CAT). No precedential decision of the BIA or federal courts has yet adopted this approach, although the Second Circuit has invited the BIA to consider it. See *Hernandez-Hernandez v. Barr*, 789 Fed. App’x 898, 902 (2d Cir. 2019) (directing the BIA to give reasoned consideration to whether the MS-13 in El Salvador is a *de facto* state actor under the CAT); *Gomez-Beleno v. Mukasey*, 291 Fed. App’x 411, 414 (2d Cir. 2008) (remanding for consideration of whether the FARC should be treated as the *de facto* government of parts of Colombia). *But see* *D-Muhumed v. Att’y Gen.*, 388 F.3d 814, 815–16, 820 (11th Cir. 2004) (finding that harm inflicted by Somali clans could not meet the CAT’s torture definition because Somalia had no central government and “the clans who control various sections of the country do so through continued warfare and not official power”).

exercise due diligence to prevent it, they breach their responsibility under international law and thereby acquiesce. However, an amendment along the lines of the following could help to clarify the appropriate standard and shift adjudicators away from the prevailing misuse of “willful blindness” as a stand-in for acquiescence:

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. Such legal responsibility may arise under either domestic or international law but in no case shall it be less than what is required by international law. Acquiescence shall include any failure by a public official to act with due diligence by taking appropriate measures to prevent or suppress torturous activity when the official has awareness it has been or is being committed and has the authority or is in the position to take such measures.<sup>314</sup>

The first added sentence is drawn from the 1997 memorandum issued by the INS General Counsel when the agency began applying the CAT in removal proceedings,<sup>315</sup> and the second is based on the language U.S. diplomats used to explain the meaning of “acquiescence” when the United States proposed adding the term to the CAT’s torture definition.<sup>316</sup> The United States stated that in proposing the “acquiescence” concept, it sought to ensure that “public officials have a clear duty to act to prevent torture.”<sup>317</sup> The above amendment to the CAT regulations would effectuate that original intent.

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314. 8 C.F.R. § 1208.18(a)(7) (2020) (emphasis added). The first sentence is the current text of the acquiescence regulation, and the two underlined sentences that follow are proposed additions.

315. See *supra* note 285 and accompanying text.

316. Comm’n on Hum. Rts. Summary, *supra* note 212, ¶¶ 29, 45 (defining acquiescence in connection with the duty of a public official “to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has the authority or is in the position to take such measures”); see also *supra* notes 212–13, 238–40 and accompanying text (discussing the U.S. proposal).

317. See Comm’n on Hum. Rts. Summary, *supra* note 212, ¶ 29.

## CONCLUSION

This Article has shown that the U.S. CAT jurisprudence has taken a wrong turn by requiring applicants who face torture by non-State actors to prove that a public official is likely to respond with “willful blindness.” When public officials are aware that an individual is in danger of torture, or are aware of a pattern of torturous activity targeting similarly-situated people, the definition of “acquiescence” that the Senate adopted when the United States ratified the treaty makes it clear that the relevant question becomes: Is it likely that a public official will “breach his or her legal responsibility to intervene to prevent such activity”?<sup>318</sup>

“Willful blindness” may at times be germane to whether the awareness element of the acquiescence definition has been met, because, as legislative history emphasizes, officials who turn a blind eye to torture should not be let off the hook by consciously avoiding definite knowledge. But willful blindness was never designed to be the test for determining whether officials have breached a legal responsibility. As a result of the judicial fixation on willful blindness, many CAT applicants, including victims of severe gender-based or homophobic violence and persons targeted by gangs or drug cartels, face deportation and torture in countries where systemic deficiencies in laws, enforcement, and protective services deprive them of effective protection.

The CAT and other human rights treaties impose a legal obligation on public officials to exercise due diligence to prevent, investigate, punish, and remedy acts of torture, including those committed by private parties. Both the plain text of the U.S. acquiescence understanding and its history support looking to international law, as well as any applicable national law, to determine the scope of officials’ legal responsibility to intervene. Due diligence provides the appropriate standard, grounded in international law, for determining whether officials have lived up to that legal responsibility, or have breached it and thereby acquiesced to torture.

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318. 8 C.F.R. § 1208.18(a)(7); *see also* Resolution of Ratification, § II(1)(d), 136 CONG. REC. 36,198 (1990) (containing the Senate understanding that was incorporated in the regulation).