WHEN NON-STATE ACTORS COMMIT "TORTURE" UNDER THE UNITED NATIONS CONVENTION AGAINST TORTURE: AN OVERVIEW OF CURRENT PERSPECTIVES

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ABSTRACT

According to the United Nations Convention Against Torture (UNCAT) Article 1 definition of torture, torture must be committed by or acquiesced to by a public official or other person acting in an official capacity. Nevertheless, with the fragmentation of authority in war-torn states and the existence of regions controlled by insurgents or militia in opposition to a de jure authority, this reality of de facto regime control raises the question of whether these de facto regimes' agents are covered under the umbrella of the UNCAT's public official concept.

This article provides an overview of trends in international law pertaining to the UNCAT's coverage of these rogue regimes and demonstrates that the current trend is to broadly interpret the public official concept to include torturous acts by de facto regimes when such regimes exercise quasi-governmental functions and sufficient control over a territory. Further, this article argues that interpreting the public official concept broadly is not only supported by the drafting history of the UNCAT but also necessary to ensure that the universal prohibition of torture codified by the UNCAT is, in fact, universal.

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INTRODUCTION

Rebel Houthi security officials detained Yemeni medic Farouk Baakar for providing medical care to a patient they considered an enemy.[1] In the 18 months

[1] Maggie Michael, *Ex-inmates: Torture Rife in Prisons Run by Yemen Rebels*, ASSOCIATED PRESS (Dec. 7, 2018), https://apnews.com/article/e32442a4c8c24acd9d362c433d5cd10e.

following his arrest, the Houthi security forces controlling northern Yemen burned him, beat him, and suspended him from the ceiling by his wrists for days on end.[2] Unfortunately, his experience is not an isolated incident of torture by the Houthi regime. Since seizing power in 2015, the Houthi authorities frequently imprisoned and tortured those they suspect of being enemies of the regime, including sitting judges.[3]

Houthi rebel fighters took control of northern Yemen and its capital Sanaa, dissolving the parliament and installing a new governing council, on February 6, 2015.[4] Since this takeover and consolidation of power, the regime has established a system consisting of "supervisors" who manage day-to-day affairs of security and administrative operations.[5] Despite this attempt at governance, the international community still regards the Houthi regime as illegitimate, instead recognizing as legitimate the government of Mr. Abdrabbuh Mansour Hadi, which operates out of Adan in the south of Yemen.[6] The fact that Mr. Hadi's government, not the Houthi regime, is the *de jure* government of Yemen poses a problem for Houthi torture victims: does international law categorize their suffering as torture?

In 1984, the United Nations (U.N.) drafted the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (UNCAT), standardizing the definition of torture and imposing responsibilities on states parties to eliminate torture in their jurisdictions, prosecute torturers, and protect individuals from future acts of torture.[7] The UNCAT defines torture as the infliction of severe physical or mental pain or suffering by a "public official" or "someone acting in an

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[2] *Id*.

[3] *Id*.; Maggie Michael, *Yemeni Group: Houthi Rebels Hold, Torture Female Detainees*, ASSOCIATED PRESS (Jan. 17, 2019), https://apnews.com/article/0b4af81e4c1a4e5abce813d5eacdd975; *Yemen: Houthi Hostage-Taking, Arbitrary Detention, Torture, Enforced Disappearance Go Unpunished*, HUMAN RIGHTS WATCH (Sept. 25, 2018, 12:00 AM), https://www.hrw.org/news/2018/09/25/yemen-houthi-hostage-taking# (reporting Houthi torture of a sitting judge); *Lawyer Says Defendants Were Tortured by Houthi Captures*, ASSOCIATED PRESS (Apr. 2, 2019), https://apnews.com/article/af4b0a4bf3bd497daf3f160d1c0dd6c2..

[4] *Yemen's Houthis Form Own Government in Sanaa*, AL JAZEERA (Feb. 6, 2015), https://www.aljazeera.com/news/2015/2/6/yemens-houthis-form-own-government-in-sanaa.

[5] *Yemen's War: Four Years On, What Houthi Rule Looks Like*, AL JAZEERA (Mar. 26, 2019), https://www.aljazeera.com/news/2019/3/26/yemens-war-four-years-on-what-houthi-rule-looks-like.

[6] *Yemen Crisis: Why is there a War?*, BBC (June 19, 2020), https://www.bbc.com/news/world-middle-east-29319423.

[7] G.A. Res. 39/46 Annex, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) (hereinafter UNCAT).

official capacity."[8] Following its adoption, the vast majority of states ratified the UNCAT.[9] With this overwhelming display of consensus, the international community unequivocally declared torture a violation of international law.

Despite this consensus, questions of who constitutes a "public official" or "other person acting in an official capacity" persist. Can separatist governments, guerilla fighters, and organized criminal enterprises be considered public officials if they control territories within a state? If the public official concept only includes public officials of a *de jure* government, the *de facto* Houthi regime's torture victims would not be considered victims of torture, as defined in the UNCAT. Houthi torture victims would likely incredulously reject this conclusion, and they should.

This article contends that, given current trends in international law, the public official concept—the phrase "public official or other person acting in an official capacity"—in Article 1 of the UNCAT includes officials acting on behalf of a *de facto* regime, not only *de jure* governments. Trends in domestic courts, international tribunals, international legal bodies, and academic scholarship indicate that agents of *de facto* regimes can commit torture under the UNCAT. This culmination is best demonstrated by the United Kingdom Supreme Court's 2019 decision in *R v. Reeves Taylor*, which adopts some of the most concrete indicators for determining when a non-state actor is a *de facto* regime covered by the UNCAT.[10] While domestic courts and tribunals have been inching towards this understanding since the UNCAT's drafting, many jurisdictions have not yet wholly adopted this interpretation.[11] For example, in the related realm of immigration law

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[8] *Id*. Article 1 provides as follows: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain 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*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[9] *Ratification Status of U.N. Convention Against Torture*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en (last visited Nov. 4, 2021) (hereinafter Ratification Status).

[10] R v. Reeves Taylor [2019] UKSC 51, [1] (appeal taken from Eng.).

[11] *Compare id*. (holding *de facto* regimes' torturous acts covered by the UNCAT within U.K. jurisprudence), *with Hassan v. Rosen*, 985 F.3d 587, 590 n.1 (8th Cir. 2021) (declining to address whether UNCAT nonrefoulement obligation applies to *de facto* governments in U.S. law), *and Qorane v. Barr*, 919 F.3d 904, 911 (5th Cir. 2019) (same).

and the UNCAT's nonrefoulment obligation, the United States has not articulated a standard for when a *de facto* regime could commit torture, although the issue has at least been raised in some courts and immigration proceedings.[12] Ultimately, this trend of broadly interpreting the public official concept not only clarifies states' responsibilities under the treaty to victims of torture by *de facto* regimes, but also crucially fills a potentially wide gap in the UNCAT's application.

Part II of this article briefly discusses the history and crystallization of the prohibition of torture in international law. Part III, comprising the majority of this article, analyzes how domestic, foreign, and international courts, international entities, and scholars alike are all coming to agreement that *de facto* regimes can commit torture. Finally, Part IV draws the threads of these legal trends together to articulate a framework for determining when a non-state entity has become a *de facto* governmental entity such that its actions are covered under Article 1 of the UNCAT. Part V concludes by addressing potential criticisms of this proposed framework.

I. BACKGROUND

A. Crystallization of the Prohibition of Torture in International Law

1. From the Early Stages of the Prohibition of Torture to the Universal Acceptance of the U.N. Convention Against Torture

In the wake of Nazi Germany's widespread use of torture and inhuman practices during World War II, the international community took major steps to solidify the prohibition of torture in international law through both binding treaties and soft law

[12] *See, e.g.*, *Hernandez-Hernandez v. Barr*, 789 Fed. App'x 898, 902 (2d Cir. 2019). The U.S. Department of Justice's Executive Office for Immigration Review, the agency responsible for ensuring the United States abides by its nonrefoulement obligation, equates the UNCAT's "in an official capacity" language with the "under the color of law" standard applied in civil rights violation cases. *See Matter of O-F-A-S-*, 28 I&N Dec. 35 (2020). Under this standard, an act is under color of law when it constitutes a misuse of power possessed by virtue of law and made possible only because clothed with the authority of law. *Id.* While this standard considers under what authority a potential torturer claims to act, it does not address whether such authority can be derived from both *de facto* and *de jure* state authority.

declarations.[13] In December 1948, the U.N. adopted the momentous Universal Declaration of Human Rights (UDHR or the Declaration), which enshrined in international law the fundamental and universal rights of all human beings.[14] As a declaration, the UDHR is not legally binding on states. Rather, the UDHR is a normative document underpinning many binding treaties, customary international law, and domestic human rights bills.[15] One of the fundamental rights articulated in the UDHR is Article 5's right to be free from torture, providing that "[n]o-one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."[16]

The universal renunciation of torture continued to coalesce during the years and decades following the adoption of the UDHR. Within a year of the UDHR's adoption, the prohibition of torture found its way into the universally accepted Geneva Conventions regulating conduct during armed conflict.[17] Specifically, the Geneva Conventions prohibited the use of torture on captured enemy combatants as well as civilian populations subject to a state party's control.[18] The Geneva Conventions underscored the seriousness of this prohibition by describing the torture of civilians as not merely a breach of the treaty, but "a grave breach" for which an individual can incur criminal liability.[19]

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[13] DANIEL MOECKLI ET AL., INTERNATIONAL HUMAN RIGHTS LAW 175 (DAVID HARRIS ed., 2d ed. 2014). In international law, "soft law" is the general principles, agreements, and declarations between nations that are not legally binding but are often aspirational. A prime example of "soft law" is U.N. General Assembly Resolutions.

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

[15] *See* The Foundation of International Human Rights Law, U.N., https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law (last visited Nov. 9, 2021).

[16] UDHR, *supra* note 14, at 73.

[17] Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 32 & 147, Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter Geneva Convention IV). *See also Geneva Conventions: Even Wars have Limits*, ICRC (June 11, 2019), https://www.icrc.org/en/document/geneva-conventions-even-wars-have-limits. *See also* The Geneva Conventions of 1949 and Their Additional Protocols, ICRC (Jan. 1, 2014), https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols..

[18] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 12 & 50, Aug. 12, 1949, 75 U.N.T.S. 31 (hereinafter Geneva Convention I); Geneva Convention IV, *supra* note 17, 75 U.N.T.S. at 288, 388.

[19] Geneva Convention IV, *supra* note 17, 75 U.N.T.S. at 388. The Geneva Conventions themselves do not criminalize "grave breaches" but rather require states parties to adopt legislation criminalizing acts constituting "grave breaches" of the conventions. *See, e.g.*, Geneva Convention I, *supra* note 18, 75 U.N.T.S. at 62; Geneva Convention IV, *supra* note 17, 75 U.N.T.S. at 386 ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal

Regional and international treaties also codified Article 5's prohibition. In 1953, European states codified the prohibition of torture in Article 3 of the regional European Convention on Human Rights.[20] Similarly, in 1966, the International Covenant on Civil and Political Rights (ICCPR) prohibited torture in Article 7.[21] And, on November 22, 1969, the Inter-American Specialized Conference on Human Rights adopted the American Convention on Human Rights, which included Article 5(2) prohibiting torture.[22] African states followed suit in 1989, when they adopted the prohibition of torture in the African Charter on Human and Peoples' Rights, Article 5.[23] Significantly, these regional and international treaties all adopted language nearly identical to UDHR Article 5's prohibition.[24]

As regional organizations affirmed the prohibition of torture throughout the 1970s and 80s, the U.N. simultaneously continued to cement the universal prohibition of torture by adopting several nonbinding declarations and principles reaffirming the prohibition of torture in international law.[25] The most explicit of these declarations occurred in 1975, when the U.N. adopted the Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (U.N. Declaration Against Torture or UNDAT).[26] In this declaration, the international community reiterated that "any act of torture is an offence to human dignity" and a violation of the UDHR.[27] In a first attempt to establish a comprehensive definition of torture, the UNDAT provided the following definition:

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sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.").

[20] European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (hereinafter ECHR).

[21] International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 172 (hereinafter ICCPR).

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

[23] African Charter on Human and Peoples' Rights art. 5, Aug. 27, 1981, 1520 U.N.T.S. 218 (hereinafter ACHPR).

[24] *Compare* UDHR, *supra* note 14, at 73, *with* sources cited *supra* notes 20-23. *See also* INTERNATIONAL HUMAN RIGHTS LAW *supra* note 13, at 175.

[25] INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 13, at 176.

[26] G.A. Res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 9, 1975) (hereinafter UNDAT).

[27] *Id*. art. 2.

> [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.[28]

Additionally, under the UNDAT's definition, torture was now considered "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[29] Although the UNDAT's definition was not binding on the international community due to its declaratory nature, this definition nonetheless impacted international jurisprudence.

The most notorious example of the UNDAT's influence on the definition of torture in international law is the early interpretation that "torture" must be an aggravated and deliberate form of cruel and inhuman treatment, thereby limiting the scope of what conduct fell under the definition of torture. The 1978 European Court of Human Rights case of *Ireland v. United Kingdom* is the clearest example of how this aggravated element limited the scope of torture.[30] In *Ireland v. United Kingdom*, the European Court of Human Rights considered whether five interrogation techniques used by British security forces to interrogate suspected Irish Republican Army members constituted torture.[31] The five techniques in question were described as follows:

> (a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being 'spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';

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[28] *Id*. art. 1(1).
[29] *Id*. art. 1(2).
[30] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).
[31] *Id*. ¶¶ 92, 96.

> (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
> (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
> (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
> (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.[32]

The Court found that although these five techniques "undoubtedly amounted to inhuman and degrading treatment" prohibited under Article 3 of the European Convention on Human Rights, they were not considered torture.[33] The Court relied on the UNDAT's definition of torture to support their conclusion that these five techniques were not part of the aggravated category of treatment constituting torture, which required "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[34] Scholars and civil society quickly criticized this decision at the time and have continued to do so ever since.[35]

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[32] *Id*. ¶ 96.
[33] *Id*. ¶¶ 167-68.
[34] *Id*. This decision has continued to reverberate through international law long after it was decided. For example, the United States cited this opinion when it adopted these techniques and others in Afghanistan and Iraq as part of its infamous "enhanced interrogation techniques" program. *See* Jay Bybee, U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL COUNSEL, *Memorandum for Alberto R. Gonzales, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* 27-29 (Aug. 1, 2002), available at https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf (citing *Ireland v. United Kingdom*); Patrick Corrigan, *Paper Trail: From Northern Ireland's Hooded Men to CIA's Global Torture*, AMNESTY INTERNATIONAL (Dec. 9, 2014, 8:11 PM), https://www.amnesty.org.uk/blogs/belfast-and-beyond/paper-trail-northern-ireland%E2%80%99s-hooded-men-cia%E2%80%99s-global-torture.
[35] *See* David Bonner, *Ireland v. UK*, 27 INT'L & COMP. L. Q. 897, 897-907 (1978); *See also* Iulia Padeanu, *Why the ECHR Decided not to Revise its Judgment in the Ireland v. The United Kingdom Case*, EJIL:Talk! (April 5, 2018), https://www.ejiltalk.org/why-the-echr-decided-not-to-revise-its-judgment-in-the-ireland-v-the-united-kingdom-case/ (noting human rights lawyers' criticism of the original case and recognizing a good case exists to contend the court erred when it found the techniques were not torture).

Although these regional treaties, jurisprudence, and "soft law" declarations helped establish an international norm prohibiting torture, they fell short of a formal mechanism committing states to preventing and prosecuting torture within their territory and the broader international community. The U.N. provided such codification on June 26, 1987, with the establishment of the U.N. Convention Against Torture (UNCAT).[36]

2. The U.N. Convention Against Torture

The UNCAT epitomizes the prohibition of torture in international law. Since the U.N. adopted it on December 10, 1984, the vast majority of states—172 to be exact—have become parties to the UNCAT.[37] The Convention binds these states parties to criminalize torture under their domestic law, to take action to prohibit torture in their jurisdictions, to not return an individual to a country in which they will likely be tortured, and to ensure victims of torture have a right of redress for the torture they suffered.[38] Further, the UNCAT established the Committee Against Torture, an international body under U.N. auspices, that provides guidance to states and monitors their implementation of treaty obligations.[39]

In Article 1, the UNCAT established the present commonly accepted definition of torture. Under the UNCAT, torture consists of three elements: 1) severe physical or mental pain or suffering, 2) inflicted for a certain purpose, and 3) inflicted by a public official or someone acting in an official capacity.[40] Specifically, Article 1 of the Convention defines torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on 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 based on discrimination of any kind,

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[36] UNCAT, *supra* note 7, at 200.
[37] Ratification Status, *supra* note 9.
[38] *See generally* UNCAT, *supra* note 7.
[39] UNCAT, *supra* note 7, at 199.
[40] UNCAT, *supra* note 7, at 197.

> 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[41]

This definition does not include the UNDAT's element of aggravated conduct.[42] Additionally, unlike the UNDAT's definition, this definition expands the public official concept to include "other person acting in an official capacity."[43] Since the treaty's adoption, the UNCAT definition has not only been widely accepted as the authoritative definition of torture by states parties bound by the treaty, but also by other international bodies, including the International Criminal Tribunal for the Former Yugoslavia.[44] Similarly, U.S. courts have incorporated the UNCAT definition of torture for international law, creating avenues for criminal and civil liability for acts of torture, as well as provisions ensuring that a person is not deported to a country where torture is likely.[45]

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[41] *Id*.

[42] *Compare* UNCAT, *supra* note 7, at 197, *with* UNDAT, *supra* note 26, at 91.

[43] *Id*.

[44] *See* Selmouni v. France, 1999 Eur. Ct. H.R. 149, ¶ 97 (1999) (citing UNCAT art. 1); Prosecutor v. Furundžjia, Case No. IT-95-17/1-T, Judgment, ¶ 159 (Dec. 10, 1998) (citing UNCAT art. 1 as the definition of torture), *aff'd,* Prosecutor v. Furundžjia, Case No. IT-95-17/1-A, Judgment, ¶ 111 (July 21, 2000). While the UNCAT definition has been universally accepted regarding states' international responsibilities to prohibit torture, a parallel definition of torture as a discrete crime imposing individual criminal liability has developed in international criminal law (ICL). *See* Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶¶ 142-48 (June 12, 2002) (finding that the "public official requirement" is not an element of individual criminal responsibility in international law but rather is derived from states' responsibilities under the UNCAT); Rome Statute of the International Criminal Court art. 7(2)(e), July 17, 1998, 2187 U.N.T.S. 90; Paola Gaeta, *When is the Involvement of State Officials a Requirement for the Crime of Torture?* 6 J. INT'L CRIM. JUST. 183, 185-86 (2008). One major distinction between torture prohibited by the UNCAT and torture in ICL is that a torturer need not be acting in an official capacity under ICL. *See, e.g.,* Kunarac, Case No. IT-96/23/1-A, ¶¶142-48. This makes sense when one considers that ICL often covers areas of insurgencies and civil wars where clear demarcations of control are unclear and insurgent combatants might not exercise effective control sufficient to be considered a *de facto* authority.

[45] *See Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242, 1248-49, 1251 (11th Cir. 2005) (adopting the UNCAT definition as the definition of torture for claims under the Alien Tort Statute); *In re Estate of Ferdinand Marcos Human Rights Litig.,* 25 F.3d 1467, 1475 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 243–44 (2d Cir. 1995). U.S. immigration law also relies on the UNCAT's definition of torture in relation to its obligation of nonrefoulment. *See* 8 C.F.R. § 1208.18(a)("The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture[.]").

The third element, that the perpetrator be a public official or someone acting in an official capacity, is the focus of this article. International law undoubtedly considers a public official of a recognized *de jure* regime to be covered by this element.[46] However, since the adoption of the UNCAT, the international order has seen the rise of *de facto* regimes and quasi-states such as the Houthi regime, the Palestinian Authority, the Republic of Srpska, the Islamic State, and numerous

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This definition, however, is not the only definition of torture in U.S. law. The Torture Victim Protection Act (TVPA) provides a strikingly similar although not identical definition of torture. Congress passed the TVPA on March 12, 1992, after the United States' ratification of the UNCAT to satisfy the United States' obligations "under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as note following 28 U.S.C. § 1350). The TVPA provides the following definition of torture for purposes of a TVPA claim:

> (1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
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> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--
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> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
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> > (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
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> (C) the threat of imminent death; or
>
> > (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Id. § 3(b).

[46] *See* Andrew Clapham & Paola Gaeta, *Torture by Private Actors and 'Gold-Plating' the Offence in National Law*, ARCS OF GLOBAL JUSTICE 290-93 (Margaret M. deGuzman & Diane Marie Amann eds., 2018).

other insurgent groups. This reality poses an important question: does the public official concept in Article 1 cover acts by individuals purporting to act under the authority of these *de facto* regimes? To answer this, we must first briefly consider the nature of statehood in international law and the vital distinction between *de jure* and *de facto* regimes.

B. States, Governments, and De Facto and De Jure Regimes in International Law

While there are multiple theories of what defines a "state" in international law,[47] the most widely accepted definition of a state "is an entity that has a defined territory and permanent population, […] its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."[48] There are two types of states in international law: the commonly understood and internationally recognized *de jure* state, and the *de facto* state, which has all the features of a state under international law but is not recognized by the international community and thus remains an illegitimate entity.[49] Examples of *de facto* states include the Republic of Somaliland, the Republic of Kosovo, and the Turkish Republic of Northern Cyprus.[50] *De facto* states occasionally acquire *de jure* status after widespread international recognition, as in the case of Eritrea.[51]

A state, whether *de jure* or *de facto*, is distinct from a government which purports to represent the state.[52] The officially recognized government in control of a state is the *de jure* government, but when a *de jure* government cannot exercise

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[47] *See* John Knoblett, Note, *Mind the Gap: Ensuring That Quasi-State Actors are Held Liable for Human Rights Abuses*, 87 GEO. WASH. L. REV. 740, 758-59 (2019). A minority of scholars argue that statehood is based solely on recognition by other states. *Id*. This is called the "constitutive theory." *Id*. The "declaratory theory" above is more widely accepted. *Id*.

[48] *See Kadic*, 70 F.3d at 244 (citing Restatement (Third) § 201). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n.21 (D.C.Cir. 1984) (Edward, J., concurring); *Ford v. Surget*, 97 U.S. 594, 620 (1878) (Clifford, J., concurring); Daron Tan, *Filling the Lacuna: De Facto Regimes and Effective Power in International Human Rights Law*, 51 N.Y.U. J. INT'L. & POL. 435, 451 (2019); Knoblett, *supra* note 47, at 759.

[49] *See* Jonte van Essen, *De Facto Regimes in International Law*, 28 UTRECHT J. OF INT'L L. 31, 33 (2012).

[50] *Id*.

[51] *See* Eritrea, C.I.A. WORLD FACT BOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/er.html (Eritrea established independence from Ethiopia and self-rule in 1991 but did not receive international recognition as a state until 1993).

[52] *See* van Essen, *supra* note 49, at 32.

full control over its territory, another entity often fills the vacuum: a *de facto* regime.[53] A *de facto* regime is an entity "which exercises effective authority over some territory" of the state it claims to represent, "coupled with a certain degree of political and organizational capacity."[54] *De facto* regimes can range from minimally organized political groups or insurgents to quasi-governments effectively administering a portion of the state.[55] As a *de facto* regime establishes a greater degree of effective control over a territory, it can also become the *de facto* government.[56] However, no matter the degree of effective control it has over a territory, a *de facto* regime is generally not widely recognized by the international community as an independent state or the government of an existing state.[57]

This geopolitical reality has prompted debate amongst scholars and jurists about what rights and responsibilities a *de facto* state or *de facto* regime has in international law. There is consensus that, although lacking statehood and the full rights and obligations statehood entails, *de facto* regimes should have a degree of international legal personality and bear some human rights obligations to the people living under their authority.[58] In the context of torture, the question inevitably arises: is an individual acting on behalf of a *de facto* regime acting in an "official capacity" when committing torture? As this article contends in the next sections, there is growing consensus in international law that Article 1's public official concept includes individuals acting on behalf of *de facto* regimes with sufficient effective control over a state or portions of a state.

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[53] *See* Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations – The Twilight Zone of Public International Law*, 6 Austrian Rev. Int'l & Eur. L. 45, 50-51 (2001).
[54] *Id*. at 50; *see also* van Essen, *supra* note 49, at 32.
[55] Schoiswohl, *supra* note 53, at 50.
[56] Van Essen, *supra* note 49, at 33.
[57] *See* Schoiswohl, *supra* note 53, at 51.
[58] *See generally* Schoiswohl, *supra* note 53; van Essen, *supra* note 49; Tan, *supra* note 48. Schoiswohl contends that *de facto* regimes have an objective international legal personality and an "implied mandate" to observe and protect human rights derived from the failing or collapsed parent state. *See generally* Schoiswohl, *supra* note 53. Tan similarly contends that *de facto* regimes have a limited status as international legal personalities based on their conduct and obligations under international law. *See* Tan, *supra* note 48, at 458-59. Tan further contends that since international legal personality is best understood as a spectrum rather than a binary, the exact extent of a *de facto* regime's international obligations is determined by its place on the spectrum. *Id*. at 459.

II. OFFICIAL CAPACITY IN INTERNATIONAL LAW, DOMESTIC COURTS, AND SCHOLARSHIP

As the prohibition of torture solidified in international law, the exact contours of the UNCAT's application continued to be debated. When does pain and suffering become sufficiently severe to constitute torture? Are some sanctions universally unlawful, and thus beyond the lawful sanctions exception? And, of particular interest here, who exactly is a public official covered by the UNCAT?

To answer this last question, this section will analyze several key developments, including: the UNCAT's drafting and inclusion of broad language, as well as the jurisprudence of the Committee Against Torture, the International Criminal Tribunal for the Former Yugoslavia, and domestic courts. This section will also discuss the United Kingdom Supreme Court's recent decision in *R v. Reeves Taylor*, where the court adopted some of the most concrete indicators for determining when a non-state actor is a *de facto* regime covered by the UNCAT. By following this trajectory, this section attempts to trace a clear through-line from the early days of the UNCAT's drafting to the current emerging consensus.

Moreover, this section's overview highlights the essential legal and conceptual foundations underpinning why and to what extent the public official concept should be interpreted broadly to cover torturous acts by *de facto* regimes. Although many scholars agree that the UNCAT's definition of torture could cover such acts, as this section will demonstrate, most scholarship is conclusory and fails to explain why this broad interpretation is appropriate. Similarly, legal scholarship has not yet synthesized tribunals' approaches into a concise analytical framework with clear factors to consider when determining if a *de facto* regime's conduct falls within the UNCAT's definition of torture.

A. The UNCAT Drafting Committee and the Committee Against Torture

In considering whether the public official concept includes *de facto* regimes and quasi-governmental entities, the first source to consider should be the UNCAT itself. The intentions and debate of the drafting states, as well as the decisions of treaty monitoring bodies, provide strong indications of how broadly or narrowly the public official concept should be interpreted.

1. Drafting History of the UNCAT

The UNCAT's drafting history suggests that the public official concept was meant to be interpreted broadly. In 1978, at the behest of the U.N. General Assembly, the U.N. Commission on Human Rights developed a draft convention against torture.[59] During this drafting process, Sweden proposed an initial draft convention that was the template for the later adopted UNCAT.[60] This draft proposed the definition of torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a *public official* on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.[61]

The drafting committee noted that the draft included the "public official" element in order to broaden states' acceptance of the proposed convention "by dispelling fears of international criminal law attempting to encroach on traditionally domestic concerns."[62] The drafters stated that the "public official" concept was necessary because, absent this element, the treaty would impermissibly interfere in states' criminal law, where torture by private individuals would likely be adequately addressed by national domestic laws and prosecutions.[63]

Although this initial draft of Article 1 was a strong foundation for what would become the UNCAT's definition of torture, many states proposed changes or supplements. The United States proposed that the Convention define the term

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[59] *See* Comm. on Human Rights, Rep. on the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1314 (1978) (hereinafter "*UNCAT Drafting Committee Report*").
[60] *Id*. ¶ 10.
[61] *Id*. at 5. (emphasis added).
[62] *Id*. ¶ 29.
[63] *Id*. *See also* 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 AND COMP. L. REV. 275, 301 (1994).

"public official" as "any person vested with exercise of some official power of the state, either civil or military."[64] Austria sought to expand the public official concept by proposing the phrase "persons acting in an official capacity" replace "public official."[65] The United Kingdom similarly sought to expand the public official concept by proposing the insertion of "or any other agent of the State" after the initial phrase "public official."[66] As the final draft of the UNCAT indicates, the drafting committee did not adopt the United States' proposed definition of a public official but rather merged the proposed language of the Austrian's and United Kingdom's delegations to expand the public official concept to include "other persons acting in an official capacity."[67]

During the drafting process, the Federal Republic of Germany was the only country to address whether the "public official" concept includes those exercising *de facto* authority. Germany sought to clarify the broad scope of the concept to include *de facto* authorities when it stated:

> [T]he term "public official" contained in paragraph 1 refers not only to persons who, regardless of their legal status, have been assigned public authority by State organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority or - be it only temporarily - has replaced government authority or whose authority has been derived from the aforementioned, persons[.][68]

In other words, as far as the German delegation was concerned, an individual acting with *de facto* authority or on behalf of a *de facto* regime would be considered

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[64] *UNCAT Drafting Committee Report*, *supra* note 59, ¶ 45 (1978).
[65] *Id.* at 10.
[66] *See* Comm. on Human Rights, Rep. on the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Addendum, U.N. E/CN.4/1314/Add.1, at 2 (1979) (hereinafter "*UNCAT Drafting Committee Report Add. 1*").
[67] UNCAT art 1.
[68] Comm. on Human Rights, Rep. on the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Add. 2, U.N. E/CN.4/1314/Add.2, at 2 (1979) (hereinafter "*UNCAT Drafting Committee Report Add. 2*").

a public official. Unlike other states, Germany did not propose draft language codifying this understanding of the public official concept, because, as the German delegation understood the draft definition, the term "public official" already included *de facto* public officials.[69] Thus, as the drafting states solidified the final definition of torture in Article 1 of the UNCAT, they intended to broadly define the public official concept by declining to adopt the U.S. delegation's more narrow definition in favor of an expanded term, and at least one member state conceived that persons acting with the authority of *de facto* states or governments were included within the public official concept.[70]

2. The Committee Against Torture

The drafting states of the UNCAT also anticipated the need to further clarify and monitor the application of the Convention by drafting Article 17. Article 17 of the UNCAT establishes the Committee Against Torture (the Committee) to monitor states parties' implementation of the UNCAT.[71] One means by which the Committee monitors states parties is by considering an individual's claim that a state has violated the UNCAT.[72] Although the Committee is not a judicial organ, its responses to the formal communications address legal issues and interpretations of the UNCAT. Thus, as the treaty body tasked with monitoring the implementation of the UNCAT, the Committee's communications should serve as strong indications of the current norm of whether an individual is a public official when acting on behalf of *de facto* regimes.

The Committee first addressed the scope of the public official concept in *Elmi v. Australia* in 1998. In *Elmi*, Sadiq Shek Elmi, a Somali national, challenged Australia's decision to return him to Somalia.[73] Elmi entered Australia in 1997 and

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[69] *Id*. *See also* Robert McCorquodale & Rebecca La Forgia, *Taking Off the Blindfolds: Torture by Non-state Actors*, 1 HUMAN RIGHTS L. REV. 189, 196 (2001).
[70] McCorquodale & La Forgia, *supra* note 69, at 196. In fact, the Chairman-Rapporteur overseeing the UNCAT drafting process affirmed that the "public official" concept should be interpreted broadly when he noted that "'[a]ll such situations where the responsibility of the authorities is somehow engaged are supposed to be covered by [this] rather wide phrasing appearing in Article 1.'" *Id*. (edits in original).
[71] UNCAT art. 17.
[72] *See* UNCAT art. 22.
[73] *See* Comm. Against Torture, *Elmi v. Austl.*, U.N. Doc. CAT/C/22/D/120/1998, at ¶ 1 (1999) (hereinafter "*Elmi*").

sought asylum status, but Australia denied his request for asylum and attempted to remove him to Somalia.[74] Elmi filed a complaint with the Committee alleging that Australia would violate Article 3 of the UNCAT—the nonrefoulment obligation—by returning him to Somalia where he would be tortured by members of the Hawiye clan controlling Mogadishu, a rival clan to his own.[75] Australia contended that returning Elmi to Somalia did not violate its Article 3 obligations because the harm Elmi feared would not fall under the Article 1 definition of torture.[76] Australia argued that any harm Elmi faced at the hands of members of the Hawiye clan would not constitute torture because these clan members were not "public officials" and not acting in an "official capacity."

Elmi countered that members of the armed clans in Somalia that occupied and controlled certain territories in the absence of a central government were "public officials" and acting in an "official capacity."[77] Given that Somalia lacked a central government and that the armed clans controlling large swaths of the country proscribed and enforced their own laws, provided educational and health services, and enacted taxes, Elmi argued that these armed clans filled the vacuum of authority with their own *de facto* governmental authority.[78] Elmi also argued that, in the absence of a central government, other states and international organizations negotiated and engaged diplomatically with these Somali clans.[79] In the end, the Committee agreed with Elmi and rejected Australia's position.[80] The Committee stated that where no central government exists and armed groups exercise quasi-governmental authority over a territory, they are included in the public official concept.[81]

Four years later, however, the Committee appeared to contradict its ruling in *Elmi*, when it decided *H.M.H.I. v. Australia*. In *H.M.H.I.*, another Somali national sought asylum and protection under the UNCAT in Australia.[82] After an initial denial and many appeals, Australia ultimately rejected his application in 2001.[83] He

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[74] *Id*. ¶¶ 2.4-2.6.
[75] *Id*. ¶ 3.1.
[76] *Id*. ¶ 4.4.
[77] *Id*. ¶ 5.1.
[78] *Id*. ¶ 5.5.
[79] *Id*.
[80] *Id*. ¶ 6.5.
[81] *Id*.
[82] Comm. Against Torture, *HMHI v. Austl.: Views*, ¶ 2.3, U.N. Doc. CAT/C/28/D/177/2001, (May 1, 2002) [hereinafter "*HMHI*"].
[83] *Id*. ¶ 2.6.

then filed a complaint with the Committee alleging that its decision in *Elmi* prohibited Australia from returning him to Somalia and that Australia would violate its Article 3 obligation by doing so.[84] Australia argued that significantly changed circumstances in Somalia made the Committee's reasoning in *Elmi* no longer applicable.[85] Specifically, since the Committee's decision in *Elmi*, Somalia had established a functioning central government that replaced the quasi-governmental armed clans as the governing authority.[86] Thus, the harm the complainant feared would be purely private harm since the armed clan members no longer operated as a *de facto* government and therefore were no longer "public officials or acting in an official capacity."[87] The complainant disputed Australia's factual assertions about the extent of the Somali central government's control over the armed clans and argued that the armed clans still exercised quasi-governmental authority over parts of Somalia.[88] The complainant's submissions, however, did not persuade the Committee. The Committee acknowledged its reasoning in *Elmi* that when state authority is lacking in a territory "acts by groups exercising quasi-governmental authority could fall within the definition of article 1."[89] However, the Committee agreed with Australia that the establishment of a central government in Somalia was a significant factual development that meant members of the armed clans were no longer "public officials" or "acting in an official capacity" under Article 1.[90] The Committee's decision in *H.M.H.I.* implies that acts by a *de facto* regime fall under Article 1 only in the rare circumstance where legitimate state authority is utterly nonexistent. However, if a *de facto* regime controls territory in opposition to a legitimate state authority, the *de facto* regime would not trigger a states' Article 3 obligations. This key distinction has created confusion regarding the application of the standard articulated in *Elmi*.

Following the confusion created in *H.M.H.I.*, the Committee provided some clarification in a later decision. Within the year following the Committee's decision in *H.M.H.I.*, the Committee reiterated its understanding that *de facto* regimes can commit torture. For example, in *S.S. v. Netherlands*, the Committee considered a submission from a Sri Lankan Tamil complainant who fled both the Sri Lankan

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[84] *Id.* ¶¶ 1.1, 5.1.
[85] *Id.* ¶¶ 4.3, 4.5.
[86] *Id.* ¶ 4.5.
[87] *Id.* ¶¶ 4.3, 4.5.
[88] *Id.* ¶¶ 5.1, 5.2.
[89] *Id.* ¶ 6.4.
[90] *Id.*

army and the separatists Liberation Tigers of Tamil Eelam (LTTE), commonly known as the "Tamil Tigers."[91] The complainant lived in a region of Sri Lanka under the control of the LTTE.[92] In 1996, he fled LTTE controlled territory contrary to the established LTTE checkpoint system and in violation of the LTTE's rules.[93] He eventually traveled to the Netherlands and sought asylum.[94] The Netherlands denied his application and sought to remove him to Sri Lanka.[95] The complainant argued that if he were removed to LTTE controlled territory, the LTTE would torture him.[96] The Netherlands contended that such harm would not constitute torture because the LTTE was a non-state actor.[97]

The Committee ultimately agreed that the Netherlands would not violate its Article 3 obligations by removing the complainant, but on grounds different from those argued by the Netherlands. Rather than accept the Netherlands' argument that acts by the LTTE were not covered under Article 1 because it was a non-state actor, the Committee instead reasoned that since the Netherlands would remove the complainant to a part of Sri Lanka not under LTTE control, this issue was not appropriately before the Committee.[98] Thus, even though the Committee ultimately found in the Netherlands' favor, its finding in *Elmi* that Article 1's definition of torture includes acts by a "non-governmental entity [which] occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned" remained undisturbed.[99]

As the body overseeing the implementation of the UNCAT, the Committee's decisions reveal its prevailing understanding of torture by quasi-state actors: the UNCAT's definition of torture includes severe pain or suffering perpetrated by "a

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[91] Comm. Against Torture, *S.S. v. Neth.*, ¶¶ 2.1-2.5, U.N. Doc. CAT/C/30/D/191/2001, (May 19, 2003) [hereinafter "*S.S.*"].
[92] *Id*. ¶¶ 2.1, 2.2.
[93] *Id*. ¶ 2.2.
[94] *Id*. ¶ 2.5. The complainant suffered abuses at the hands of the Sri Lankan army because it perceived him as a LTTE sympathizer and he feared further torture if the Netherlands removed him to Sri Lanka. *Id*., ¶¶ 2.3, 2.4. Although the complainant alleged that the Sri Lankan government would torture him in addition to the LTTE, the Committee ultimately rejected this claim on the grounds that he did not provide sufficient supporting evidence he would be tortured and that the recent peace accords between the Sri Lankan government and the LTTE diminished any personal risk of torture he might have. *Id*. ¶ 6.7.
[95] *Id*. ¶¶ 1.1, 2.14.
[96] *Id*. ¶ 3.5.
[97] *Id*. ¶ 4.6.
[98] *Id*. ¶ 6.4.
[99] *Id*.

non-governmental entity [which] occupies and exercises quasi-governmental authority[.]"[100] However, although the Committee's decisions are helpful in interpreting the UNCAT, it is not a judicial body. To fully understand how courts have addressed this issue, this article now turns to the international tribunals' and domestic courts' jurisprudence on this issue.

B. International Criminal Tribunal for the Former Yugoslavia

One of the few international tribunals to address whether non-state actors can commit torture is the International Criminal Tribunal for the Former Yugoslavia (ICTY). The U.N. Security Council established the ICTY in 1993 to try individuals who committed crimes against humanity and serious violations of international humanitarian law as a response to the flagrant and widespread atrocities committed during the Yugoslav wars of the 1990s.[101] The ICTY had jurisdiction over international crimes committed in the territory of the former Yugoslavia since 1991, including grave breaches of the Geneva Conventions of 1949, violations of the laws of war, genocide, and crimes against humanity.[102] The statute expressly covered acts of torture in Article 2(b) and Article 5(f), as well as implicitly in Article 3.[103]

The ICTY's first case to consider torture by a non-state actor was *Prosecutor v. Furundžija*. The prosecutor charged Anto Furundžija with having committed torture in violation of Article 3 of the Tribunal's Statute, a grave breach of the 1949 Geneva Conventions.[104] During the time covered by the indictment, Furundžija was a commander of the elite military unit, called "the Jokers," part of the Croatian Community of Herzeg-Bosna's armed forces, known as the Croatian Defence Council (HVO).[105] In his role as a commander of the Jokers, Furundžija, in concert with another Jokers commander identified as Accused B, conducted the interrogation of a Muslim woman at the Jokers' headquarters in May 1993.[106]

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[100] *Id*.
[101] *See* S.C. Res. 827 (May 25, 1993).
[102] U.N. Rep. of the S.C., at 36-38, U.N. Doc. S/25704/Ann. (May 3, 1993).
[103] *Id.* at 37-38; *See also* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998), https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf [hereinafter "*Furundžija Trial Judgment*"].
[104] *Furundžija Trial Judgment*, ¶ 43.
[105] *Id*. ¶ 122; 2 (defining the HVO). The abbreviation HVO is derived from the original Croatian "Hrvatsko Vijeće Obrane."
[106] *Id*. ¶¶ 122-130.

During this interrogation, Accused B threatened, sexually assaulted, and raped the victim while Furundžija questioned her.[107]

The Trial Chamber found that Furundžija's interrogation, coupled with rape, constituted torture and a grave breach of the Geneva Conventions.[108] Reaching this conclusion, the Trial Chamber first noted that the UNCAT's definition of torture reflected the international consensus of the definition of torture.[109] Relying on the UNCAT's definition, the Trial Chamber articulated the elements of torture in the context of armed conflict as:

> [The crime of torture] (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) *at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity*.[110]

The Trial Chamber then found the Prosecutor had established each of these elements and that the interrogation Furundžija presided over constituted torture.[111] Importantly, the fact that Furundžija acted on behalf of a *de facto* entity, the HVO, and not a *de jure* government, was sufficient to establish the public official element of the crime of torture.

Furundžija appealed his conviction. On appeal, the Appellate Chamber affirmed the Trial Chamber's finding that the UNCAT Article 1 reflected the definition of torture in customary international law.[112] The Appellate Chamber also

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[107] *Id*.
[108] *Id*. ¶ 262-269.
[109] *Id*. ¶ 159-160.
[110] *Id*. ¶ 162 (emphasis added).
[111] *Id*. ¶ 262-269.
[112] Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 111 (July 21, 2000) (hereinafter "*Furundžija Appeals Judgment*").

affirmed the Trial Chamber's findings and Furundžija's conviction for torture as a grave breach of the Geneva Conventions.[113]

The *Furundžija* Court was not the only ICTY chamber to consider the definition of torture. The ICTY also considered the definition of torture in *Prosecutor v. Kunarac*. In *Kunarac,* decided two years after *Furundžija*, the Appellate Chamber distinguished between the definition of torture in customary international law regarding states and the definition in international law regarding individual criminal responsibility. The Appellate Chamber affirmed that the UNCAT's definition of torture reflected states' obligations under customary international law.[114] However, for the purposes of individual criminal responsibility under international criminal law, the Chamber found that the public official element was not a required element.[115] The Chamber reasoned that individual criminal responsibility for torture under customary international law cuts broader than states' responsibilities reflected in the UNCAT's Article 1 public official requirement.[116] Despite dispensing with the public official requirement in international criminal law, the *Kunarac* Court's reasoning did not dispute the *Furundžija* Court's interpretation that the public official concept includes *de facto* organs of a state or other authority wielding entities.[117] As such, the ICTY's earlier reasoning in *Furundžija* remains, nevertheless, instructive.

The ICTY's case law establishes two important concepts. First, the public official concept in the UNCAT's Article 1 includes *de facto* regimes exercising official authority. And second, international criminal law, as applied to individuals, defines the crime of torture more broadly than the UNCAT by discarding the public official element altogether.

C. Official Capacity in Domestic Courts

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[113] *Id*. ¶ 114.
[114] Prosecutor v. Kunarac, Case No. IT-96-23&IT-96-23/1-A, Judgment, ¶ 146 (June 12, 2002).
[115] *Id*. ¶ 148. Similarly, the public official concept is not an element of the crime of torture under the Rome Statute governing the International Criminal Court. *See* Rome Statute of the International Criminal Court art. 7(2)(e), July 17, 1998, 2187 U.N.T.S. 90.
[116] Prosecutor v. Kunarac, Case No. IT-96-23&IT-96-23/1-A, Judgment, ¶ 142-48. (June 12, 2002).
[117] *Id*.

In addition to the ICTY, domestic courts also have considered the contours of the public official concept in Article 1. Two jurisdictions, the United States and the United Kingdom, provide illuminating analyses of the issue.

1. The Public Official Concept in U.S. Courts

In U.S. jurisprudence, cases construing torture under the aegis of *de facto* regimes are limited. While some U.S circuit courts have articulated that a *de facto* regime controlling a *de facto* state can act in an "official capacity" when it tortures its citizens, other circuits decisions are more ambiguous.

Of the few appellate courts to consider whether an official acting on behalf of a *de facto* regime or state can commit torture, the Second Circuit's decision in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), is the clearest example that a *de facto* state official is not shielded from liability merely because the international community does not recognize the state on whose behalf he purports to act.

Like the ICTY's cases, the Second Circuit's opinion in *Kadic* involved crimes against humanity committed during the Yugoslav wars between 1991 to 2001. In *Kadic*, Croat and Muslim Bosnians brought suit against Radovan Karadžić, the president of the self-proclaimed Republic of Srpska in Bosnia-Herzegovina.[118] The Republic of Srpska was a Serbian ethnic *de facto* state that declared independence from Bosnia-Herzegovina during the dissolution of Yugoslavia and the subsequent wars among the former Yugoslav states. Although not a recognized state, the Republic of Srpska exercised control over large portions of Bosnia-Herzegovina and had its own organized military.[119] Significantly, the Republic of Srpska also established its own legislature and currency independent of Bosnia-Herzegovina.[120] As president, Karadžić exercised ultimate command authority over the Republic of Srpska's military forces.[121]

Throughout the Yugoslav wars, these forces perpetrated systematic human rights abuses, genocide, and torture on the Croat and Muslim citizens living under their regime.[122] The plaintiffs filed suit against Karadžić claiming subject matter

[118] *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995).
[119] *Id.* at 237.
[120] *Id.*
[121] *Id.*
[122] *Id.*

jurisdiction under the Alien Tort Statute (ATS) for the torture these forces committed.[123] Karadžić moved to dismiss the action, based in part on lack of subject matter jurisdiction.[124] The District Court granted Karadžić's motion. The District Court found that Karadžić and other Republic of Srpska officials were not state actors because the Republic of Srpska was not a recognized state.[125] Since torture requires some modicum of state action, the District Court reasoned, they could not commit torture in violation of international law.[126]

The United States Court of Appeals for the Second Circuit reversed, rejecting the District Court's reasoning.[127] The Court of Appeals first observed that, in international law, a "state" is defined as "'an entity that has a defined territory and permanent population, under the control of its own government, and that engages in, or has the capacity to engage in formal relations with other such entities.'"[128] The Court emphasized that statehood requires only the capacity to engage in formal relations with other states, not recognition by other states.[129] The Court found that the prohibition against torture in international law applies equally to recognized and unrecognized *de facto* states.[130] Further, the Court reasoned that if official recognition of a state was required for liability to attach, the United States' nonrecognition of a foreign regime engaged in human rights abuses would have the perverse effect of insulating those unrecognized regimes from violations of international law.[131]

Based on the record, the Court found that the Republic of Srpska satisfied all the criteria for statehood in international law—albeit *de facto* statehood—because it exercised control over a defined territory and a population, entered into agreements with other states, and had a president, a legislature, and even its own currency.[132] The Court then went as far to state that "it is likely that the state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority."[133]

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[123] *Id.* at 236-37.
[124] *Id.* at 237.
[125] *Id.*
[126] *Id.* at 244.
[127] *Id.* at 251.
[128] *Id.* (quoting *Restatement (Third)* § 201).
[129] *Id.*
[130] *Id.* at 245.
[131] *Id.*
[132] *Id.*
[133] *Id.*

The Second Circuit's holding in *Kadic* is significant in two ways. First, rather than finding the actions by Republic of Srpska officials to be private actions merely on the basis that the regime was unrecognized, the Court applied international law to conclude that the Republic of Srpska was, in fact, a state, albeit a *de facto* one. Second, the Court of Appeals highlighted the paradoxical result that would occur if the head of a *de facto* regime escaped liability based upon whether other countries recognized the regime, especially when the non-recognition stems from the *de facto* regime's human rights abuses.

Another jurisdiction to consider whether officials acting on behalf of unrecognized states can perpetrate torture is the Court of Appeals for the District of Columbia. Unlike the Second Circuit's clarity in *Kadic*, the D.C. Circuit's case law on the matter is less straightforward.

The D.C. Circuit first encountered the issue of *de facto* state torture in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), mere months before the UNCAT's adoption. Because the Court's decision predated the UNCAT, the *Tel-Oren* court does not directly address Article 1's definitions but nonetheless is instructive on the issue. Like the plaintiffs in *Kadic*, the plaintiffs in *Tel-Oren* sued under the ATS.[134] Here, the plaintiffs were the family members of the victims of a 1978 Palestinian Liberation Organization (PLO) terrorist attack who had brought suit against the PLO and Libya.[135] The District Court dismissed the action for lack of subject matter jurisdiction.[136] The Court of Appeals affirmed *per curium* but all three judges filed separate concurring opinions.[137] Of these three opinions, Judge Edwards' opinion alone addressed torture by non-state actors and is the most illuminating concerning whether *de facto* regimes can perpetrate torture.[138]

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[134] *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C.Cir. 1984).
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] Judge Bork's concurrence affirmed on the ground that although the ATS granted district court jurisdiction to hear claims in violation of international law it created no substantive causes of action and thus absent an explicit congressional grant of a cause of action the plaintiffs could not state a cause of action based on general international law. *Id.* at 798-801. (Bork, J. concurring). The Supreme Court rejected this reasoning in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), when it held that plaintiffs have a cause of action under the ATS if the cause of action is based on a sufficiently definite and universal international norm. Judge Robb's concurrence reasoned that the case was nonjusticiable because ruling on the PLO's liability, as an entity the executive branch did not recognize, would inevitably infringe on the executive's authority and impermissibly engage in a political question. *Tel-Oren*, at 823-27. (Robb, J. concurring).

In his concurrence, Judge Edwards reasoned that the PLO could not be liable for torture under international law because, as an unrecognized non-state entity in 1984, the perpetrators were not acting in an official capacity.[139] Under the ATS, Judge Edwards noted, only official state-sanctioned torture was clearly prohibited by international law, not private acts of torture.[140] Nor was there clear consensus that international law—which governs states not individuals—imposed any obligations on individuals who privately commit acts amounting to torture.[141]

Judge Edwards further reasoned that the Court was bound by the Executive's non-recognition of the PLO to find that the PLO could not be a *de jure* or *de facto* government.[142] However, Judge Edwards conceded the possibility that a *de facto* state not recognized by the United States could still be a state as defined in international law and therefore bound by international legal responsibilities.[143] In making this concession, Judge Edwards noted that all that is needed to be considered a state in international law is "a people, a territory, a government and a capacity to enter into relations with other states."[144] At the same time, he also noted that based on the record the PLO could not meet this statehood standard.[145] Thus, Judge Edwards did not find that the PLO, its officials, and any future *de facto* Palestinian state could always avoid liability for torture, but rather, he found that as the PLO then existed in 1984, it did not meet the definition of a *de facto* state bound by international law. This subtle nuance is important because 1) it left open the possibility that a later court could find the PLO is a *de facto* government of a *de facto* state and 2) it was limited to the historical facts before the court.[146]

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[139] *Tel-Oren*, at 791 (Edwards, J. concurring).
[140] *Id.* at 791-92.
[141] *Id.* at 792.
[142] *Id.* at 791.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Within a decade of the *Tel-Oren* decision, the PLO's status as a state-like entity coalesced significantly when Israel and the PLO signed the Oslo Accords, in which Israel officially recognized the PLO as the representative of the Palestinian people, and established the Palestinian National Authority (Palestinian Authority or PA) to govern the territories of the Gaza Strip and the West Bank. *See Palestinian Authority*, Encyclopedia Britannica https://www.britannica.com/topic/Palestinian-Authority (lasted visited Jan. 11, 2021). The Palestinian Authority subsequently held elections, issued passports for Palestinians living under its authority, and administered many other governmental functions in its territory. *Id.* And, in 2012, the U.N. officially recognized the Palestinian Authority as a non-member observer state. *See* G.A. Res. 67/19 (Nov. 29, 2012).

2. The Public Official Concept in British Courts

While the Committee Against Torture, the ICTY, and some U.S. Courts have determined that the public official concept includes non-state actors acting as *de facto* governments and states, by far the most in-depth and persuasive case law to address this issue has come out of the United Kingdom's Supreme Court. In *R. v. Reeves Taylor*, Reeves Taylor was charged with one count of conspiracy to commit torture and seven counts of torture in violation of section 134 of the United Kingdom's Criminal Justice Act 1988 (CJA).[147] Section 134 of the CJA provides that: "[a] public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."[148] In *Reeves Taylor*, the prosecution alleged that in early 1990 during the Liberian civil war, Ms. Reeves Taylor (an ex-wife of the well-known militia leader, ex-president, and war criminal Charles

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In 2011, the D.C. Court of Appeals revisited the issue of whether the Palestinian Authority and the PLO's officials could commit torture in *Ali Shafi v. Palestinian Authority*, but again did not consider if the PLO was a *de facto* regime. *See Ali Shafi v. Palestinian Authority*, 642 F.3d 1088 (D.C. Cir. 2011). In *Ali Shafi*, Ali Mahmud Ali Shafi brought suit under the ATS against the PLO and the Palestinian Authority for torturing him between 2001 and 2002 while visiting family in Palestine. *Id.* at 1089-90. Ali Shafi alleged that Palestinian Authority security officers detained him, severely beat him, and tortured him for several months. *Id.* The district court dismissed the case for lack of subject matter jurisdiction and failure to state a claim. *Id.*, at 1090. The Court of Appeals affirmed the dismissal for failure to state a claim under the ATS. *Id.* Relying on the concurring opinions in *Tel-Oren* that found torture claims against non-state actors were not within the ATS's jurisdictional grant and the Supreme Court's subsequent holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that actions under the ATS must be based on sufficiently definite international norms, the *Ali Shafi* Court reasoned that torture by non-state actors was not a sufficiently definite international norm to establish ATS jurisdiction. *Id.*, at 1091-94. Therefore, since the parties agreed the Palestinian Authority was a non-state actor, its officials could not commit torture. *Id.*

Considering that the *Ali Shafi* Court relied on Judge Edward's concurrence in *Tel-Orin* to dismiss the case, this begs the question: why did the Court not also consider whether the Palestinian Authority was a *de facto* state, and thus establishing ATS jurisdiction, as Judge Edwards noted? The answer is due in part to the procedural posture of the case. Crucially, at the district court, both Ali Shafi and the Palestinian Authority agreed that the Palestinian Authority is a non-state actor—not a *de jure* nor a *de facto* state. *See Ali Shafi v. Palestinian Authority*, 686 F.Supp.2d 23, 29 (D.D.C. 2010). Thus, the issue of whether the Palestinian Authority is a *de facto* state in international law was never appropriately before the Court of Appeals.

[147] R v. Reeves Taylor [2019] UKSC 51, [1] (appeal taken from Eng.).

[148] *Id.* at 14.

Taylor) committed torture in Nimba County, Liberia while acting on behalf of the National Patriotic Front of Liberia (NPFL), one of the armed groups in the Liberian civil war.[149] Ms. Reeves Taylor argued that she never acted in an "official capacity" for the NPFL, and even if she had, that the NPFL was not the *de facto* government authority over the territory where the torture purportedly took place.[150] She sought to dismiss the charges based on these contentions.[151] The trial judge and court of appeals both held that "official capacity" was not limited solely to states' agents but also included those purporting to act in a non-private capacity and on behalf of an authority-wielding government like entity.[152]

The U.K. Supreme Court accepted Ms. Reeves Taylor's appeal to address the specific issue of what "is the correct interpretation of the term 'person acting in an official capacity'" and whether this term includes "someone who acts otherwise than in a private and individual capacity for or on behalf of an [organization] or body which exercises or purports to exercise the functions of government over the civilian population in the territory which it controls and in which the relevant conduct occurs[.]"[153]

The Court first looked to section 134 of the CJA and noted that the crime of torture prohibited in that section codified the United Kingdom's international obligations under the UNCAT and incorporated the definition of torture contained in Article 1(1).[154] The Court then considered the parties' arguments. Ms. Reeves Taylor submitted that one can only act in an official capacity under the UNCAT and section 134 if that person is acting on behalf of a state.[155] In other words, individuals acting on behalf of entities that displace the *de jure* authorities would not be covered by the definition of torture no matter the degree of authority they wield. The prosecution contended to the contrary that the concept of official capacity under the UNCAT "covers all those who exercise a form of public authority over individuals in a manner which might be similar to the authority of a State."[156] The Court found that the concept of official capacity "include[s] someone who holds an official position or acts in an official capacity in an entity exercising

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[149] *Id.* at ¶ 4.
[150] *Id.* at ¶ 9.
[151] *Id.* ¶ 10.
[152] *Id.* ¶ 10-11.
[153] *Id.* ¶ 1.
[154] *Id.* ¶ 6.
[155] *Id.* ¶ 21.
[156] *Id.* ¶ 22.

governmental control over a civilian population in a territory over which it holds de facto control."[157]

In reaching this holding, the Court first considered the drafting process of the UNCAT. According to the Court, although the UNCAT drafting committee's *travaux préparatoires* did not directly address the issue, they did make two points clear.[158] First, the definition of torture in Article 1 is not meant to cover purely private acts completely lacking any official character.[159] Second, the draft primarily focuses on establishing universal jurisdiction to prosecute torture because of the inherent reluctance of states to prosecute torturers who act in an official capacity, especially if torture is state policy.[160]

The Court then surveyed practice in international law and domestic courts. It noted that the Committee Against Torture's own opinions in *Elmi* and *H.M.H.I.* were manifestly inconsistent.[161] Instead, it found that the *Elmi* decision established that a quasi-governmental entity that performs functions comparable to those performed by legitimate governments has sufficient *de facto* authority to bring its conduct under Article 1 of the UNCAT.[162] The Court also found that the Committee's ruling in *S.S.* reaffirmed the standard established in *Elmi* and that the Committee's decision in *H.M.H.I.* was ambiguous.[163] Taken together, the Court reasoned that the Committee Against Torture's line of decisions ultimately supported the proposition that conduct of non-state actors exercising *de facto* quasi-governmental authority over a territory falls within Article 1 of the UNCAT.[164]

The Court also considered U.S. case law on the issue, initially considering the Second Circuit's decision in *Kadic v. Karadzic*.[165] Although questioning the relevance of the opinion because it concerned tort liability under the ATS, the Court found that the Second Circuit's reasoning ultimately supported its finding that the conduct of a *de facto* governmental authority can constitute official torture under the UNCAT.[166] The U.K. Supreme Court considered, but gave limited weight to,

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[157] *Id.* at 25.
[158] *Id.* at 36.
[159] *Id.*
[160] *Id.* at 37.
[161] *Id.* at 52.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 66.
[166] *Id.* at 66-67.

the D.C. Circuit's opinion in *Tel-Oren* and other tangentially relevant decisions because, it reasoned, none of the cases directly addressed "the question [of] whether the conduct of an individual acting on behalf of a quasi-governmental entity which is in de facto control of territory may give rise to official torture under UNCAT."[167]

Finally, the Court relied on academics in the field who agree that the public official concept includes conduct by a *de facto* authority's agents. The Court cited the opinions of prominent legal scholars and treatises, including Paola Gaeta and the authoritative *Cassese's International Criminal Law*.[168]

Based on these sources and its analysis, the Court held that conduct is covered under Article 1 of the UNCAT if it is done by a person acting in an official capacity on behalf of a *de facto* authority exercising quasi-governmental authority over a territory[169] The Court also provided guidance to determine when a non-governmental entity exercises sufficient authority to be covered under the concept of "official capacity" in Article 1. The Court instructed that "it is necessary to look at the reality of any particular situation and to consider whether, at the relevant time, the entity in question had a sufficient degree of [organization] and actual control over an area and whether it exercised the type of functions which a government or governmental [organization] would exercise."[170] "[E]xercise of governmental functions[,]" the Court emphasized, "is a core requirement."[171] However, the Court took great pains to highlight that rebel military actions alone might not establish a sufficient degree of control, permanence, or organization for a rebel military to be considered a *de facto* authority over a territory.[172]

D. International Legal Scholarship

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[167] *Id*. at 69.
[168] *Id*. at 71-74.
[169] *Id*. at 76.
[170] *Id*. at 79.
[171] *Id*.
[172] *Id*. On remand, the lower court found that the NPFL was not exercising a governmental function over the territories where the purported torture occurred and dismissed the case against Ms. Reeves Taylor. *See* Elian Peltier, *U.K. Halts Torture Case Against Ex-Wife of Liberia's Charles Taylor*, N.Y. TIMES, (Dec. 9, 2019), https://www.nytimes.com/2019/12/07/world/europe/liberia-charles-taylor-wife-uk.html.

Finally, the research and opinions of legal scholars on the issue tend to support the conclusion that the public official concept includes those acting on behalf of *de facto* regimes.

Paola Gaeta has written that the "public official" requirement of the UNCAT is necessary to transform the criminal offence of inflicting severe pain or suffering for a discrete purpose into an international criminal offence.[173] Gaeta reasons that absent the element of a state or public official, such criminal activity is best dealt with by domestic criminal law instead of international law.[174] Consistent with concerns about international law overstepping domestic criminal law, Gaeta also accepts that the public official concept includes, "those who exercise quasi-state authority[.]"[175] Nonetheless, in her opinion, even though some non-state actors' conduct is covered under the public official concept, the definition of torture definitively excludes private acts for private purposes, like criminal activity by gangs and similar non-state entities that hold limited control over territories of a state.[176]

The argument that the public official concept includes *de facto* state authorities is also supported by the authoritative treatise *Cassese's International Law*. The treatise explains, without much elaboration, that the public official concept includes both acts by *de jure* and *de facto* state officials but acknowledges that the issue can be particularly thorny in contexts where official authority has been fragmented.[177]

The more recent treatise, *The United Nations Convention Against Torture and its Optional Protocols: A Commentary*, agrees that the public official concept covers actors beyond state officials.[178] In the section detailing the definition of torture in the convention, the treatise notes that the expansive phrase, "other person acting in an official capacity," was inserted into the definition of torture during the drafting process by the Austrian delegation in order to address Germany's concerns about ensuring that the definition covered actors exercising *de facto* governmental

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[173] Gaeta, *supra* note 44, at 190. Gaeta used the term "state official" and "public official" interchangeably in reference to the broader "public official" concept in the UNCAT. *Id.*
[174] *Id.*
[175] Clapham & Gaeta, *supra* note 46, at 294.
[176] *Id.*
[177] ANTONIO CASSESE ET AL., INTERNATIONAL CRIMINAL LAW 133 (3d ed. 2013).
[178] Gerrit Zach, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I Substantive Articles, Art.1 Definition of Torture, in* THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL (2ND EDITION): A COMMENTARY 60 (Manfred Nowak et al. eds. 2019).

authority.[179] According to the author, "rebel, guerrilla, or insurgent groups who exercise de facto authority in certain regions or … warring factions in so-called 'failing states'" are prime examples of the non-state actors included in the public official concept.[180]

As this overview of the current legal scholarship indicates, there is a general agreement amongst many scholars that the UNCAT's definition of torture could cover the acts of *de facto* regime actors. What is missing in the literature is a succinct framework for determining when the UNCAT should apply to *de facto* regimes.

III. THE EMERGING FRAMEWORK FOR WHEN *DE FACTO* REGIMES COMMIT TORTURE

Considering the trend in international law that acts by persons acting on behalf of non-state actors exercising *de facto* government authority over a territory are included in the public official concept, there is a distinct need to articulate a framework for determining when a *de facto* regime is appropriately included in the public official concept. The review of case law *supra* indicates that two analytical approaches have emerged for assessing whether a non-state actor qualifies as a public official capable of torture.

The first approach is whether the entity in question is a *de facto* state under international law. In other words, a non-state actor becomes a *de facto* state, and thus wields official capacity, when it "has a defined territory and permanent population, under the control of its own government, and that engages in, or has the capacity to engage in formal relations with other such entities."[181] This approach was first hinted at as early as 1984 in Judge Edward's concurrence in the D.C. Circuit's *Tel-Oren* opinion.[182] However, the clearest application of this reasoning is the Second Circuit's analysis in *Kadic v. Karadzic*. In considering whether agents of the secessionist Republic of Srpska during the Balkan wars exercised official power, the Second Circuit relied on the definition of a *de facto* state in international law to conclude that the unrecognized entity of the Republic of Srpska

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[179] *Id.*
[180] *Id.*
[181] *Kadic*, 70 F.3d at 244 (citing Restatement (Third) § 201).
[182] *Tel-Oren*, 726 F.2d at 791, n.21. (Edward, J. concurring).

was, in fact, a *de facto* state.[183] Due to this geopolitical reality, the proscription of torture applied.[184] The Republic of Srpska had crossed the threshold from a non-state entity to a *de facto* state because it exercised control over a defined territory and population, entered into agreements with other nations, and had its own legislature, president, and currency.[185] Thus, under this analytical approach, the acts of non-state entities come under the public official concept once the entity is a *de facto* state.

The second analytical approach to emerge is whether the non-state actor has stepped into the role of the government by exerting control over territories of a state and exercising quasi-governmental functions. The U.K. Supreme Court's decision in *Reeves Taylor* best illustrates this approach. As the Supreme Court held, an entity can exercise official power if it has a sufficient degree of organization, has actual control over an area, and exercises the functions of a traditional government.[186] Although the U.K. Supreme Court did not analyze whether the insurgent NPLF was at any time a *de facto* state, it did focus on whether the entity's actual exercise of authority was sufficiently an exercise of quasi-governmental authority. The Committee Against Torture's opinions similarly focused on the exercise of quasi-governmental authority by non-state actors. As the Committee reasoned in *Elmi*—and reaffirmed in *S.S.*—the official capacity concept includes the agents of entities that exercise quasi-governmental authority. As the Committee noted, proscribing laws, policing territory under its control, providing education and health services, and enacting taxes all exemplify the exercise of quasi-governmental authority.[187]

Tying these two approaches together, a framework emerges. The current trend in international law for a non-state actor to fall within the public official concept is for the tribunal to determine whether the entity: a) exercises actual and sustained control over a territory that is part of a state or is a *de facto* state and b) exercises some governmental functions like promulgating laws, policing its territory,

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[183] *Kadic*, 70 F.3d at 244-45.
[184] *Id*.
[185] *Id*. at 245.
[186] *Reeves Taylor*, [2019] UKSC 51, [39].
[187] *Elmi*, *supra* note 73, ¶¶ 5.5., 6.5. It should be noted that the Committee's method also implicates the *de facto* state analysis inasmuch as it gave weight to the fact that the Somali clans negotiated with foreign governments and international organizations—similar to the *de facto* state analysis's focus on the entity's capacity to engage in formal relations with other states. *Id*. ¶ 5.5. Similarly, the Second Circuit's analysis in *Kadic* also considered the Republic of Srpska's exercise of traditional government functions like establishing a legislature and adopting its own currency. *See Kadic*, 70 F.3d at 245.

providing educational or health services, implementing taxes, and engaging in international relations or has the potential to. The fact that an entity is not the *de jure* government or state is ultimately not determinative of whether the acts of its officials can constitute torture prohibited by international law.

This broad interpretation of the public official or other person acting in an official capacity concept is ultimately the best standard because of multiple compelling legal, humanitarian, and practical reasons. First, it ensures that victims of torture by *de facto* regimes are protected under the UNCAT. The importance of this protection should not be understated, especially since the UNCAT was drafted to comprehensively protect individuals from torture. A treaty purporting to solidify the universal prohibition of torture, that nonetheless excludes the countless acts of torture by unrecognized authorities because of semantics, would be a monumental failure.

Second, in interpreting the UNCAT's definition of torture broadly to cover *de facto* regimes that exercise sufficient control over a territory and quasi-governmental functions, the broad interpretation does not infringe states' prerogative and sovereignty to prosecute the crime of private torture because *de jure* authorities in this context have likely lost the capability to enforce their criminal laws on the antagonistic *de facto* regimes. Thus, the broad interpretation fills the legal vacuum this factual reality creates. Further, this broad interpretation makes practical sense and provides a meaningful approach to dealing with the fragmented authority that exists in these contexts while establishing some limitations on its expansive scope. For example, the broad interpretation does not cut so broadly as to cover acts of torture by powerful criminal organizations or gangs, which are best described as private non-state actors. Rather, the broad interpretation requires that an actor first take on some degree of official capacity before the UNCAT's definition covers its agents' acts of torture.

Finally, the broad interpretation supplements, rather than undermines, state-centric international law. The broad interpretation only covers conduct by *de facto* regimes that are either, in effect, laying a claim to representing the state or a portion of it. Once a regime has wrapped itself in the mantle of statehood and has taken on governmental functions, it can no longer claim to be a non-state actor outside the traditional focus of international law.

This last point is especially poignant in light of developing legal scholarship on the human rights obligations of *de facto* regimes. Seeing a gap in international human rights law in regards to non-state actors, scholars have articulated strong

rationales for why *de facto* regimes should bear human rights obligations.[188] As Schoiswohl contends, *de facto* regimes have some international legal personality triggered by their factual existence and exercise of authority over a territory.[189] He posits that the doctrine of the "implied mandate"—that as a *de jure* authority recedes and a *de facto* regime exerts control over a territory the *de facto* regime is vested with an implied mandate to function as an administrative organ—creates a continuity of human rights obligations in the territory now under the *de facto* regime's control.[190] By taking on the administrative functions and usurping power from the parent state it is at odds with, a *de facto* regime inherits the human rights obligations the *de jure* authority itself had as it exercised its administrative functions and powers.[191] In a similar vein, Tan contends that *de facto* regimes have human rights obligations when they exercise effective power over a territory.[192] Tan asserts that degrees of human rights obligations attach proportionally to *de facto* regimes' capacities to exercise control over a territory.[193] In other words, as a *de facto* regime exercises greater control and begins to more resemble a state its human rights obligations could shift from merely not infringing on individuals' human rights to actively ensuring them.[194]

Here, the analytical framework articulated parallels this developing scholarship. As a *de facto* regime exercises control over a territory and exercises state-like administrative functions, its conduct is akin to conduct scholars contend confers human rights obligations on non-state actors.[195] While this broad interpretation of the public official concept would not itself extend obligations to *de facto* regimes, it addresses states parties' obligations under the UNCAT vis-à-vis *de facto* regimes in a conceptually sound manner.

Despite the clear trend and compelling reasons for this legal framework's universal adoption, criticism is inevitable.

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[188] *See* Schoiswohl, *supra* note 53; *See* Tan, *supra* note 48.
[189] Schoiswohl, *supra* note 53, at 52-53.
[190] *Id*. at 76.
[191] Id. at 77.
[192] Tan, *supra* note 48, at 462.
[193] *Id*. at 484.
[194] *Id*. at 484-486.
[195] *Compare supra* Part IV., *with* Shoiswohl, *supra* note 53, at 76-76, Tan, *supra* note 48, at 484.

IV. ADDRESSING POTENTIAL CRITICISMS

Any potential critiques that this framework interprets the public official concept too broadly are undermined by the UNCAT's drafting history and subsequent academic discussions of the topic. The drafting history indicates that the definition of torture in Article 1 is meant to be read broadly. The initial draft definition proposed by Sweden included only the term "public official."[196] After much debate, the drafting committee intentionally expanded the concept to include public officials and "other persons acting in an official capacity."[197] Importantly, as it expanded this definition, the drafting committee also declined to adopt language explicitly referencing "state officials" (as proposed by the United Kingdom) or "state actor" (as proposed by the United States).[198] Expanding the concept to include any person acting in an official capacity, while declining to specifically define that further, shows that the drafters intended that the term be interpreted broadly.

Further, the public official concept reflects the traditional focus of international law on states, not individuals. The drafting committee notes indicate that the public official concept was included in the definition of torture so that international criminal law would not encroach upon the traditional domestic concern of prosecuting purely private acts of torture by private individuals.[199] Courts and academics agree that this dichotomy between purely private criminal conduct and internationally repugnant criminal conduct, by anyone exercising the semblance of official power, underlies the inclusion of the public official concept in the UNCAT's definition of torture.[200] Thus, once an entity no longer answers to domestic authorities, takes on the mantle of *de facto* authority, and purports to represent a state, that entity has crossed the threshold of purely private conduct into the realm of international concern that the public official concept was devised to cover.

Another likely criticism is that applying these frameworks will impermissibly infringe upon an executive branch's management of foreign affairs. Such criticism

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[196] *UNCAT Drafting Committee Report*, *supra* note 59, at 5.
[197] *See id.*; *see* UNCAT, *supra* note 7, art. 1.
[198] *UNCAT Drafting Committee Report*, *supra* note 59, at 10; *see UNCAT Drafting Committee Report Add. 1*, *supra* note 66, at 2.
[199] *UNCAT Drafting Committee Report*, *supra* note 59, at 6; s*ee* Gaeta, *supra* note 44, at 190.
[200] *See* Gaeta, *supra* note 44, at 190; *see Reeves Taylor*, [2019] UKSC 51, [36].

is likewise unpersuasive. Whether a *de facto* state or regime exists should ultimately be a legal question instead of a political one.[201] As international legal scholar Jonte van Essen contends, diplomatic recognition is a political act untethered from the reality of who in fact controls a given territory.[202] The factual existence of a *de facto* government is a matter courts can competently address. Given that many nations' executives participated in the drafting and ratification of the UNCAT, most states' foreign policy positions on torture are abundantly clear: torture in all its forms is prohibited. If the courts were to narrowly interpret the public official concept to exclude non-state actors exercising *de facto* control and quasi-governmental functions over territories, they would undermine their own nations' executive's decades old policy prohibiting torture.

Finally, adopting this logic creates perverse results. If courts are bound by an executive's diplomatic recognition or nonrecognition of a state or entity in applying the public official concept, the ultimate result is that the executive's nonrecognition of certain regimes would immunize these pariah regimes from accountability. As both the Second Circuit in *Kadic* and the U.K. Supreme Court in *Reeves Taylor* noted, absolute deference to the executive's diplomatic whims would mean that an official of such a regime could never commit torture as defined under the UNCAT.[203] This result would be especially paradoxical if the sole reason the executive does not recognize a regime is because of its human rights abuses.

Because the existence of a *de facto* state or regime is a legal question, not a political one, and because blind adherence to an executive's decision to recognize or not recognize certain regimes creates paradoxical results, this criticism should be unconvincing.

CONCLUSION

As this article has shown, there is a predominant trend in international law to broadly interpret the public official concept in the UNCAT's Article 1 definition of

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[201] *See Upright v. Mercury Bus. Machs. Co.*, 13 A.D.2d 36, 38 (1961) ("A foreign government, although not recognized by the political arm of the United States Government, may nevertheless have de facto existence which is juristically cognizable.").
[202] van Essen, *supra* note 49, at 41.
[203] *Kadic*, 70 F.3d at 245; *Reeves Taylor*, [2019] UKSC 51, [56]-[57]. Not to mention that states' recognition of authorities as the *de jure* authorities is inconsistent throughout the world. *Reeves Taylor*, [2019] UKSC 51, [58].

torture to include non-state actors who have taken on *de facto* authority of a state or territory. Courts, international tribunals, and the Committee Against Torture have generally found the public official concept covers the acts of individuals acting on behalf of *de facto* regimes that exercise quasi-governmental authority. This approach of broadly applying the public official concept leaves no legal loopholes for torturers. This broad approach is also necessary to fully vindicate the rights of individuals living under the control of insurgent groups, quasi-states, and *de facto* regimes that exist in the present international order. For individuals like Mr. Faarak and others tortured by Houthi security forces, this expansive understanding of the public official element of torture is essential to appropriately define the pain and suffering the Houthi regime inflicted on him as what it is: torture.