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## The Scholar: St. Mary's Law Review on Race and Social Justice

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Volume 19 | Number 3

Article 2


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5-1-2017

### Judge Posner's Road Map for Convention Against Torture Claims When Central American Governments Cannot Protect Citizens Against Gang Violence

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#### Recommended Citation

Steven H. Schulman, *Judge Posner's Road Map for Convention Against Torture Claims When Central American Governments Cannot Protect Citizens Against Gang Violence*, 19 THE SCHOLAR 297 (2017). Available at: <https://commons.stmarytx.edu/thescholar/vol19/iss3/2>

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**JUDGE POSNER’S ROAD MAP FOR CONVENTION AGAINST  
TORTURE CLAIMS WHEN CENTRAL AMERICAN  
GOVERNMENTS CANNOT PROTECT CITIZENS  
AGAINST GANG VIOLENCE**

**STEVEN H. SCHULMAN\***

I. Introduction.....	297
II. The Northern Triangle: The Problem Forcing Central Americans to Flee to the United States .....	299
III. Why CAT Relief Is Important for Central Americans Seeking U.S. Protection .....	303
IV. Judge Posner’s Road Map: Cat Protection for Central Americans Fleeing Gang Violence .....	309
V. Creating a Record to Support CAT Relief for Individuals Fleeing Gang-Based Violence in the Northern Triangle....	314
VI. Conclusion .....	318

I. INTRODUCTION

In the summer of 2014, a surge of unaccompanied minors and women with children arrived at the southern border of the United States seeking protection from the increasing gang violence in the “Northern Triangle” area of Guatemala, Honduras, and El Salvador.<sup>1</sup> Fortunately, many of

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1. See, e.g., DAN RESTREPO & ANN GARCIA, THE SURGE OF UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: ROOT CAUSES AND POLICY SOLUTIONS 1 (2014), <https://www.americanprogress.org/issues/immigration/report/2014/07/24/94396/the-surge-of-unaccompanied-children-from-central-america-root-causes-and-policy-solutions> [<https://perma.cc/VN92-Y47N>] (reporting the number of children and families arriving at the southern border of the United States to escape gang violence rose significantly in the months prior to July 2014).

these unaccompanied minors found themselves protected by various forms of relief, including asylum and Special Immigrant Juvenile Status.<sup>2</sup> Women and children fleeing domestic violence found a new asylum precedent recognizing their claims for protection.<sup>3</sup> Those seeking protection solely from gang violence, however, faced a more uncertain legal landscape, with limited avenues for asylum or other refugee protection.<sup>4</sup> Given the inherent limitations of asylum law, particularly for applicants fearing gang-based harm, the Convention Against Torture (CAT)<sup>5</sup> has become an increasingly important avenue for Central Americans seeking protection in the United States.

In December 2015, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit authored two decisions that provide a road map for CAT claims asserted by individuals fearfully fleeing gang violence in their home countries: *Rodriguez-Molinero v. Lynch*<sup>6</sup> and *Mendoza-Sanchez v. Lynch*.<sup>7</sup> These decisions, both of which were remanded to the Board of Immigration Appeals (BIA), dealt with the BIA's rejection of a Mexican national's CAT claims and built on prior precedent to demonstrate how an individual fearing gang violence could show the necessary element of "government acquiescence" to torture.<sup>8</sup> Unlike a claim for asylum, CAT does not require an applicant to show that the harm they fear is connected to a protected ground (such as political opinion or relig-

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2. Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POL'Y INST. (June 13, 2014), <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> [https://perma.cc/TD8X-W5NC].

3. See Emily Bazelon, *Who Gets to Stay?*, SLATE (Sept. 12, 2014, 6:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/09/immigrants\\_seeking\\_asylum\\_courts\\_say\\_yes\\_for\\_domestic\\_violence\\_no\\_for\\_gang.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/immigrants_seeking_asylum_courts_say_yes_for_domestic_violence_no_for_gang.html) [https://perma.cc/36PX-N7BA] ("So far, the prospects for asylum look better for women and children who are victims of domestic violence than for kids who enter the U.S. alone to escape the net of gang recruitment."). There was a ruling in August 2014 giving lawyers a "new tool" for domestic violence victims. *Id.*

4. See KATE M. MANUEL, *ASYLUM AND GANG VIOLENCE: LEGAL OVERVIEW* 1, 14 (2014), <https://fas.org/sgp/crs/homsec/R43716.pdf> [https://perma.cc/CV3K-57TE] (discussing the frequent failure of asylum claims for those fleeing gang related violence).

5. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Apr. 18, 1988, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

6. 808 F.3d 1134 (7th Cir. 2015).

7. 808 F.3d 1182 (7th Cir. 2015).

8. See *id.* at 1138–39 (concluding the immigration judge erred by focusing solely on the Mexican government and not considering how other Mexican public officials, such as police officers, may also be held to acquiesce in or commit torture); *Mendoza-Sanchez*, 808 F.3d at 1185 (emphasizing the court's previous holding in *Rodriguez-Molinero* and claiming the asylum applicant had a "strong case for deferral of removal" because there was no proof the Mexican government could "protect the citizen from torture at the hands of local public officials or to which local public officials are willfully blind[ ]").

ion); however, CAT requires the applicant to prove it is more likely than not he will be tortured if removed.<sup>9</sup> CAT defines torture as follows:

[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 her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed . . . when such pain or suffering is *inflicted by or at the instigation of or with the consent or acquiescence of a public official* or other person acting in an official capacity.<sup>10</sup>

The statute's language regarding governmental "consent or acquiescence" to torture has often been an insurmountable hurdle for those fleeing gang violence, but Judge Posner's decisions make clear that this element can be satisfied by the involvement or indifference of one rogue government official, even in the face of a government policy intended to prevent such violence.<sup>11</sup>

After providing a brief background on the gang violence propelling Central Americans to seek protection in the United States and the legal framework they face upon arrival, this article explores Judge Posner's Seventh Circuit opinions, as well as recent cases from other circuits that provide similar guidance. A skilled advocate can use these cases as guidance for building a record to demonstrate government acquiescence to gang violence in support of a claim for CAT relief.

## II. THE NORTHERN TRIANGLE: THE PROBLEM FORCING CENTRAL AMERICANS TO FLEE TO THE UNITED STATES

Between 2011 and 2013, nearly 50,000 people were murdered in the Northern Triangle region of Central America, making it one of the most dangerous areas in the world.<sup>12</sup> This bloodshed is not from war, but pri-

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9. Compare 8 C.F.R. § 208.13(b) (2013) (requiring asylum applicants to establish their burden of proof of persecution based on race, religion, nationality, membership in a social group, or political opinion), with 8 C.F.R. § 1208.16(c)(2) (2016) (listing the burden of proof as establishing "it is more likely than not that he or she would be tortured if removed to the proposed country of removal").

10. 8 C.F.R. § 1208.18 (a)(1) (2017) (emphasis added).

11. See *Mendoza-Sanchez*, 808 F.3d at 1185 ("A petitioner for deferral of removal under the Convention Against Torture need not prove that the Mexican government is complicit in the misconduct of its police officers."). Similarly, the Ninth Circuit has rejected the government's attempt to bar removal under CAT by characterizing police officers, who assaulted the petitioner, as mere "rogue officials." *Id.* (citing *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079–80 (9th Cir. 2015)).

12. Suchit Chavez & Jessica Avalos, *The Northern Triangle: The Countries That Don't Cry for Their Dead*, INSIGHT CRIME (Apr. 23, 2014), <http://www.insightcrime.org/news->

marily from violence perpetrated against civilians by gangs such as *Mara Salvatrucha* (MS-13) and the 18th Street Gang (also known as “Barrio 18” or “M18”).<sup>13</sup>

Victims of this violence have little hope for justice, as less than 5% of Northern Triangle murders resulted in convictions.<sup>14</sup> Given this impunity and the widespread corruption in these countries’ governments, particularly in their police forces,<sup>15</sup> it is hardly a surprise that many natives of the Northern Triangle region have decided to flee and in significant numbers—indeed, nearly one in ten residents of the region have left.<sup>16</sup> As the security situation became graver, families and unaccompanied children traveled through Mexico to arrive at the U.S. border in unprecedented numbers in 2014.<sup>17</sup> According to the Department of Homeland Security (DHS), during the 2014 fiscal year (which ended on September 30, 2014), 61,334 individuals in family units from Honduras, El Salvador, and Gua-

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analysis/the-northern-triangle-the-countries-that-dont-cry-for-their-dead [https://perma.cc/WQ9V-9K7Y].

13. See Arron Daugherty, *MS13, Barrio 18 Rivalry Increasing Violence in Guatemala: President*, INSIGHT CRIME (Feb. 4, 2015), <http://www.insightcrime.org/news-briefs/ms13-barrio-18-rivalry-increasing-violence-in-guatemala> [https://perma.cc/5A8Q-CVWD] (explaining how both MS-13 and Barrio 18 originated from Los Angeles but now operate in the Northern Triangle); Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286> [https://perma.cc/2ZYB-9QZ7] (last updated Jan. 19, 2016) (“The nature of violence is distinct in each country, but there are common threads: the proliferation of gangs, the region’s use as a transshipment point for U.S. bound narcotics, and high rates of impunity are major factors contributing to insecurity in the [Northern Triangle] region.”); see also *El Salvador Travel Warning*, U.S. DEP’T OF ST. (June 22, 2015), <http://travel.state.gov/content/passports/en/alertswarnings/el-salvador-travel-warning.html> [https://perma.cc/GWB9-9RTE] (warning that El Salvadorian gang members quickly engage in violence if resisted).

14. Chavez & Avalos, *supra* note 12.

15. See Ivan Briscoe, *Corruption in the Northern Triangle: The Siren Song of Crime*, CLINGENDEL (July 15, 2014) <http://www.clingendael.nl/publication/corruption-northern-triangle-siren-song-crime?lang^L> [https://perma.cc/LU3W-SNY7] (stating that scandals of deep collusion between officials and criminals are generally unpunished despite their seriousness); see also Mark Ungar, *In the Crossfire: Police Reform in Central America*, WORLD POL. REV., (May 28, 2013), <http://www.worldpoliticsreview.com/articles/12977/in-the-crossfire-police-reform-in-central-america> [https://perma.cc/FC4Q-4WQX] (discussing how drug cartels control six out of Honduras’s eighteen states, and further, that the cartel’s networks have infiltrated various key agencies).

16. Renwick, *supra* note 13.

17. See U.S. CUSTOMS & BORDER PROT., UNITED STATES BORDER PATROL: SOUTHWEST BORDER SECTORS, <https://www.cbp.gov/sites/default/files/documents/BP%20South%20west%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14.pdf> [https://perma.cc/NJ35-JHVF] (last visited Jan. 18, 2017) (reporting a more than 500% increase between 2013 and 2014 in the number of families and unaccompanied children apprehended along some sectors of the southwestern U.S. border).

temala were apprehended at the border, while another 51,705 unaccompanied minors came from those countries to the United States.<sup>18</sup>

In accordance with the landmark 1997 settlement in *Flores v. Meese*,<sup>19</sup> the Homeland Security Act of 2002,<sup>20</sup> and the Trafficking Victim Protection Reauthorization Act,<sup>21</sup> unaccompanied children who arrived at the border were placed in the custody of the Office of Refugee Resettlement.<sup>22</sup> Since 2005, more than 150,000 Central American children have been placed in removal proceedings in immigration court.<sup>23</sup> Those who applied for asylum had the opportunity to interview with U.S. Citizenship and Immigration Services (USCIS) rather than face an adversarial hearing in immigration court.<sup>24</sup> Others applied for Special Immigrant Juvenile status, which provides relief for minors who have been abused, abandoned, or neglected by at least one parent.<sup>25</sup>

18. *Id.*

19. *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), *rev'd*, *Reno v. Flores*, 507 U.S. 292 (1993).

20. Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (codified at 6 U.S.C. §§ 101–644).

21. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, § 235, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, 22, 28 and 42 U.S.C.).

22. *Unaccompanied Children Released to Sponsors by State*, OFF. REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/programs/ucs/state-by-state-uc-placed-sponsors> [<https://perma.cc/AXW6-2MKR>] (last visited Feb. 4, 2017).

23. *Juveniles—Immigration Court Deportation Proceedings Court Data*, TRAC IMMIGR., <http://trac.syr.edu/phptools/immigration/juvenile> [<https://perma.cc/YK87-LAUM>] (last visited Feb. 12, 2017).

24. *Minor Children Applying for Asylum by Themselves*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves> [<https://perma.cc/2ND6-74NG>] (last updated Jan. 13, 2016).

25. Immigration and Nationality Act of 1965 §§ 101(a)(27)(J), 203(b)(4), U.S.C. §§ 1101(a)(27)(J), 1153(b)(4) (2006). As of October 31, 2014, one study found that unaccompanied children were represented by counsel in roughly only one-third (32%) of 63,721 cases pending in immigration court. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT (2014), <http://trac.syr.edu/immigration/reports/371> [<https://perma.cc/NC3Q-TRQ3>] [hereinafter TRANSACTIONAL RECORDS]. For unaccompanied minors represented by counsel, the results have been generally favorable. For example, one study found represented children have a much higher appearance rate in immigration court—92.5%, versus 27.5% for unrepresented children. AM. IMMIGR. COUNCIL, TAKING ATTENDANCE: NEW DATA FINDS MAJORITY OF CHILDREN APPEAR IN IMMIGRATION COURT (2014), <http://www.immigrationpolicy.org/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court> [<https://perma.cc/U52G-D7UG>]. Moreover, studies show that represented children have a 73% success rate in immigration court, as opposed to only a 12% for unrepresented children. TRANSACTIONAL RECORDS, *supra*. Over the last decade only 6.1% of children with counsel received *in absentia* removal orders, compared with 64.2% of unrepresented children. LUTHERAN IMMIGR. AND REFUGEE SERV., AT THE CROSSROADS FOR UNACCOMPANIED MIGRANTS CHILDREN: POLICY, PRACTICE, & PROTECTION 19 (2015), <http://lirs.org/>

Another distinct population arriving from Central America consisted of mothers with minor children, also known as “family units.”<sup>26</sup> In a radical policy shift, the Obama Administration began detaining many of these family units in various locales.<sup>27</sup> Family units were initially detained in a temporary remote facility in Artesia, New Mexico in July 2014.<sup>28</sup> The Obama Administration then began transitioning family units to a more permanent detention facility in Karnes County, Texas in August 2014.<sup>29</sup> In December 2014, a second permanent family detention center was opened in Dilley, Texas.<sup>30</sup>

The problems with family detention have been widely documented elsewhere and are beyond the scope of this article;<sup>31</sup> however, the concentration of families in three discrete areas has given advocates the opportunity to work closely together in a tight timeframe to develop legal approaches toward obtaining relief for them through asylum, withholding of removal, and CAT relief. The next section briefly discusses these approaches.

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wp-content/uploads/2015/07/LIRS\_RoundtableReport\_WEB.pdf [https://perma.cc/7DCN-8ZZY].

26. See Stephen Dinan, *Illegal Immigrant Children Surge Across Border at Highest Rate Since Last Summer's Peak*, WASH. TIMES (Apr. 6, 2015), <http://www.washington-times.com/news/2015/apr/6/illegal-immigrant-children-surge-across-border-at-> [https://perma.cc/3GTF-K5XL] (describing “family units” as usually comprising of mothers with young children); Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [https://perma.cc/A2KC-ZZ4M] (stating that the DHS reported the number of Central American refugees escaping their countries has doubled in the past year, with more than 61,000 “family units” crossing into the U.S. border).

27. Hylton, *supra* note 26.

28. *Id.* The Artesia facility was closed in December 2014. Aaron Drawhorn, *Artesia Immigration Facility to Close*, KRQE NEWS (Nov. 18, 2014), <http://krqe.com/2014/11/18/artesia-immigration-facility-to-close> [https://perma.cc/3SP8-EZM4].

29. Hylton, *supra* note 26.

30. *Id.*; *Family Detention*, RAICES, <https://www.raicestexas.org/pages/karnes> [https://perma.cc/SA8D-HZY6] (last visited Feb. 4, 2017).

31. *E.g.*, ABA COMM’M ON IMMIGR., *FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE* (2015), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf) [https://perma.cc/Q6UA-SFU4]; Hylton, *supra* note 26; *New Report Shows Even Short Stays in Family Detention Harm Children's Health*, HUM. RTS. FIRST (Oct. 20, 2015), <http://www.humanrightsfirst.org/press-release/new-report-shows-even-short-stays-family-detention-harm-children-s-health> [https://perma.cc/B6MZ-Q7WF].

### III. WHY CAT RELIEF IS IMPORTANT FOR CENTRAL AMERICANS SEEKING U.S. PROTECTION

For a Central American fleeing gang-based violence, satisfying the elements of an asylum claim may be difficult, which leaves CAT as a lesser, but more likely, remedy.<sup>32</sup> As others have discussed, victims of gang violence have difficulty obtaining asylum—even though it is a preferable remedy to CAT for those seeking protection in the United States.<sup>33</sup> Once individuals are granted asylum, the government provides them with a pathway to citizenship, allows them to work, permits them to bring immediate family members to the United States (spouses and unmarried children under the age of twenty-one at the time the application was filed), and opens up the potential for them to reap substantial benefits from the Office of Refugee Resettlement.<sup>34</sup>

On the other hand, individuals granted withholding of removal relief under CAT are awarded just that: the suspension of a removal order entered by the immigration judge as part of the judgment.<sup>35</sup> Furthermore, CAT relief does not extend to family members, which, depending on if the CAT recipient's family is already in the United States, either forces those family members to prove their own claims for relief or keeps them from reuniting with the CAT applicant.<sup>36</sup> Finally, CAT applicants can work, but they are not given a pathway to permanent residency or citizenship.<sup>37</sup>

Given the benefits of asylum, why bother with a CAT claim for a Central American fleeing the violence of the Northern Triangle? Unfortunately, while the availability of asylum relief is based on individual's fear of harm on behalf of a government or a non-state actor that the government cannot or will not control,<sup>38</sup> it is granted only to those who can prove "one central reason" for the harm they fear is on account of at least one of five protected grounds: political opinion, religion, race, nationality,

32. Monica Fanesi, Comment, *Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the "Consent or Acquiescence" Requirement*, 13 ROGER WILLIAMS U. L. REV. 308, 309 (2008).

33. See, e.g., *id.* (explaining that the majority of asylum claims from victims of gang violence are denied, and the two major benefits of asylum are absent in CAT).

34. *Asylee Eligibility for Assistance and Services*, OFF. REFUGEE RESETTLEMENT (July 12, 2012), <http://www.acf.hhs.gov/programs/orr/resource/asylee-eligibility-for-assistance-and-services> [<https://perma.cc/P7SM-RVPP>].

35. 8 C.F.R. § 208.17 (2016).

36. U.S. DEP'T OF JUSTICE, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF, CONVENTION AGAINST TORTURE PROTECTIONS (2009), <http://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf> [<https://perma.cc/986S-DXPZ>] [hereinafter U.S. DEP'T OF JUSTICE].

37. *Id.*

38. *Adebisi v. I.N.S.*, 952 F.2d 910, 913–14 (5th Cir. 1992); 8 C.F.R. § 208.13(b) (2013).



or particular social group.<sup>39</sup> Central Americans fleeing threats from gang members—including extortion, coercive recruitment, and indiscriminate violence—have had difficulty showing the harm they fear fits into one of the five asylum grounds.<sup>40</sup> Moreover, asylum is also subject to mandatory bars from relief, including the one-year asylum filing deadline and criminal conduct.<sup>41</sup>

Nevertheless, advocates for Central Americans fleeing violence in the Northern Triangle have enjoyed some success fitting their claims into the asylum paradigm.<sup>42</sup> In a timely decision issued in August 2014, the BIA granted asylum to a victim of domestic violence from Guatemala, recognizing a social group of “married women in Guatemala who are unable to leave their relationship.”<sup>43</sup> Indeed, *Matter of A-R-C-G-* opened the door for similar asylum claims by victims of domestic violence from the Northern Triangle.<sup>44</sup>

Asylum relief has also been granted to individuals fleeing gang violence who claimed their family membership is a protected particular social group.<sup>45</sup> For example, in *Hernandez-Avalos v. Lynch*,<sup>46</sup> the Fourth Circuit reversed the BIA’s determination that, because the Mara 18 gang had threatened the applicant only after she prevented her son from engaging in criminal activity and not on account of any protected ground, the applicant’s asylum claim failed.<sup>47</sup> In fact, the Fourth Circuit described the BIA’s holding as

39. *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 348 (5th Cir. 2006); 8 C.F.R. § 1208.18 (a)(1) (2017).

40. *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 581, 588 (B.I.A. 2008) (holding that Salvadorian youth who were subject to recruitment efforts by Mara Salvatrucha, and who resisted gang membership “based on their own personal, moral and religious opposition to the gang’s values and activities,” did not constitute a “particular social group”); *see also Orellana-Monson v. Holder*, 685 F.3d 511, 519 (5th Cir. 2012) (citing and collecting cases in which the Fifth Circuit and other circuits have rejected claims involving arguments that the refusal to join gangs can define a particular social group).

41. Immigration and Nationality Act §§ 203(a)(2), 203(b)(3), 8 U.S.C. §§ 1158(a)(2), 1158(b)(2).

42. *E.g.*, *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392 (B.I.A. 2014).

43. *Id.*

44. *See id.* (recognizing domestic violence victims as a new social group for asylum purposes). *But see* Franco Ordoñez, *Landmark Asylum Ruling Has Helped Fewer Domestic Violence Victims Than Hoped*, MIAMI HERALD (Dec. 30, 2015, 1:00 AM), <http://www.miamiherald.com/news/nation-world/national/article52091630.html> [<https://perma.cc/98VN-VREG>] (estimating that 40% of similar claims by survivors of domestic violence have been denied since 2014).

45. *E.g.*, *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015).

46. *Id.*

47. *Id.* at 950.

an excessively narrow reading of the requirement that persecution be undertaken on account of membership in a nuclear family. Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities.<sup>48</sup>

Nonetheless, many Central Americans fearing gang violence may still have to rely solely on CAT protection rather than on asylum. Relief under the CAT neither requires the harm be connected to a protected ground, nor does it bar any other type of relief (though individuals deemed a threat to the safety or security of the United States may be detained even after CAT relief is granted).<sup>49</sup> Accordingly, the threat of serious harm or imminent death characterized as "torture" can be grounds for CAT relief, subject to the following two requirements: (1) the applicant must show that the probability of torture is "more likely than not;" and (2) the torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>50</sup>

The first element, of course, heavily depends on how convincing the factual record is with respect to the threat of harm in any individual case.<sup>51</sup> Accordingly, the case law on this element is fact-specific and not of much assistance in analyzing future cases. Notably, though not discussed further in this article, Judge Posner in *Rodriguez-Molinero* took issue with the "more likely than not" standard, pointing out that it "contradict[s] the [CAT] (which . . . requires only 'substantial grounds for be-

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48. *Id.* (internal quotations omitted). This reaffirmed the Fourth Circuit's prior conclusions in *Crespin-Valladares* that the family provides a "prototypical example of a particular social group." *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (internal quotations omitted).

49. *Doe v. Holder*, 651 F.3d 824, 829 (8th Cir. 2011); 8 C.F.R. § 1208.16 (2016). CAT provides for two possible forms of relief from removal. *Doe*, 651 F.3d at 829. Most CAT-eligible applicants also qualify for withholding of removal. 8 C.F.R. § 1208.16(c)(4) (2016). Other undocumented individuals, including those convicted of serious crimes or who pose a threat to national security, are eligible only for deferral of removal, which does not entitle the applicant to be released from detention. *Id.* §§ 1208.16(c)(4), 1208.17.

50. *Doe*, 651 F.3d at 828 (emphasis added); 8 C.F.R. §§ 1208.16(c)(4), 1208.18(a)(1) (2016).

51. *See Doe*, 651 F.3d at 830 (upholding the BIA's determination that CAT applicant provided unpersuasive testimony because he failed to include important details and dates). The BIA determined the applicant did not establish that Mexican authorities would "more likely than not" participate or acquiescence in a future attack on them. *Id.* at 828.

lieving that' if removed the alien 'would be *in danger* of being' tortured)."<sup>52</sup>

The second element, however, has been subject to much discussion over the past two decades, as federal circuit courts and the BIA have struggled to define the boundaries of "consent or acquiescence" of public officials in torture committed by non-state actors.<sup>53</sup> The CAT was unanimously adopted by the United Nations General Assembly in 1984, and signed for the United States by President Reagan in 1988.<sup>54</sup> Over the next several years, as the Senate and the Executive Branch negotiated conditions of approval, the contours of the term "acquiesce" were defined to include "both actual knowledge and willful blindness."<sup>55</sup> Although the CAT was ratified in 1990, it took nearly a decade for the U.S. Congress to implement it into legislation; such legislation, the Foreign Affairs Reform and Restructuring Act of 1998 prohibited the removal of "any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."<sup>56</sup>

The BIA's first decision using precedent to interpret the term "acquiesce," *Matter of S-V*,<sup>57</sup> backslid on this understanding of "willful blindness" and instead held that government officials must be "willfully accepting" of torture by non-state actors.<sup>58</sup> In 2002, Attorney General Ashcroft, after taking jurisdiction of three cases asserting CAT relief, explained the relevant inquiry should be "whether governmental authorities would . . . 'willfully accept' atrocities committed" by non-state actors.<sup>59</sup>

Circuit courts roundly rejected this formulation, referring back to the Senate's legislative history and the CAT itself to determine that acquiescence requires only "willful blindness."<sup>60</sup> For example, the Ninth Circuit declared that government acquiescence "does not require actual knowledge or willful[ ] accep[tance]."<sup>61</sup> Further, the Fifth Circuit held government acquiescence can be satisfied if the "government look[s] away and

52. *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135 (7th Cir. 2015) (emphasis in original).

53. *Doe*, 651 F.3d at 828; 8 C.F.R. §§ 1208.16(c)(4), 1208.18(a)(1) (2016).

54. *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Apr. 18, 1988, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

55. *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003) (internal quotations omitted).

56. *Id.*

57. 22 I. & N. Dec. 1306 (B.I.A. 2000).

58. *Id.* at 1312.

59. *Matter of Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 283 (A.G. 2002).

60. *Hakim v. Holder*, 628 F.3d 151, 156 (5th Cir. 2010) (showing the willful blindness standard is followed by the Fifth, Sixth, and Ninth Circuit Courts of Appeals).

61. *Zheng*, 332 F.3d at 1197. (internal quotations omitted).

[is] therefore at least complicit” in torture by non-state actors.<sup>62</sup> In short, *Matter of S-V-* was met with “disdainful treatment” by the courts,<sup>63</sup> and the BIA now acknowledges that a government’s “willful blindness” can satisfy the requirement of acquiescence, even if it has not expressly over-ruled *Matter of S-V-*.<sup>64</sup>

Still, this left open the question of the *extent* to which a government must show “willful blindness”<sup>65</sup> For a Central American fearing torture by MS-13, Mara 18, or other gangs, the government’s acquiescence to gang violence can be the critical element that makes the difference between receiving protection in the United States or being removed to Honduras, El Salvador or Guatemala. As discussed in the next section, Judge Posner’s December 2015 opinions, while decided in the context of claims by Mexican nationals fearing drug cartel violence, nevertheless provide a strong analytical framework to demonstrate how gangs in the Northern Triangle inflict torture with the “consent or acquiescence” of government officials, thus paving the way for vulnerable Central American populations to prove eligibility for CAT protection.

To summarize, the following chart compares the elements of asylum and CAT relief:

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62. Hakim, 628 F.3d at 156 (citing *Chen v. Gonzalez*, 470 F.3d 1131, 1141–42 (5th Cir. 2006)).

63. *Mayorga-Vidal v. Holder*, 675 F.3d 9, 19 n.6 (1st Cir. 2012) (citing cases from Fifth, Eighth, Second, Third, Sixth and Ninth Circuits).

64. See *Matter of W-G-R-*, 26 I & N Dec. 208, 226 (B.I.A. 2014) (noting that “willful blindness” is the threshold for CAT claims).

65. See Brea C. Burgie, *The Convention Against Torture and Acquiescence: Willful Blindness or Willful Awareness?*, EXEC. OFF. FOR IMMIGR. REV., 5 IMMIGR. L. ADVISOR 6, 9 (2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2011/05/06/vol5no4.pdf> [<https://perma.cc/42MD-HGFK>] (describing the range of government action required to determine whether or not the “willful blindness” standard will apply, indicating anything but certainty).

	Asylum	CAT
<b>Harm</b>	“Persecution” – defined broadly, encompassing more than “threats to life or freedom” <sup>66</sup>	Torture (including imminent threat of death) <sup>67</sup>
<b>Burden of Proof</b>	Proof of past persecution or a “well-founded fear” of future persecution <sup>68</sup>	“More likely than not” <sup>69</sup>
<b>Reason for Harm</b>	“On account of” political opinion, religion, race, nationality, particular social group <sup>70</sup>	None
<b>Perpetrator</b>	Government or entity government cannot or will not control <sup>71</sup>	A public official or other person acting in an official capacity, or by another individual with the “consent or acquiescence” of a public official <sup>72</sup>
<b>Bars to Relief</b>	Many, including failure to meet the one-year filing deadline, criminal activity, persecution of others. <sup>73</sup>	None. <sup>74</sup>

66. See, e.g., *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988) (“The statutory term ‘persecution’ or ‘well-founded fear of persecution’ has been defined in this Circuit as encompassing more than just restrictions or threats to life and liberty.”); *Lobo v. Holder*, 684 F.3d 11, 17 (1st Cir. 2012) (“We have held that the term [persecution] encompasses more than threats to life or freedom, but less than mere harassment or annoyance.”) (internal quotations omitted); *Vesga v. U.S. Atty. Gen.*, 200 F. App’x 935, 938 (11th Cir. 2006) (“[P]ersecution encompasses more than threats to life or freedom; non-life threatening violence and physical abuse also fall within this category.”) (quoting *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir.2000) (internal quotations omitted); see also *In re T-Z-*, 24 I. & N. Dec. 163, 169 (B.I.A. 2007) (“The term “persecution” is not limited to physical harm or threats of physical harm and may include threats of economic harm, so long as the threats, if carried out, would be of sufficient severity that they amount to past persecution.”).

67. 8 C.F.R. § 208.18(a) (2017). “Torture” is defined as the intentional infliction of “severe pain or suffering . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.* § 208.18(a)(1).

68. *Id.* § 208.13(b).

69. *Id.* § 208.16(c)(2).

70. *Id.* §§ 208.13(b)(1)–(2).

71. See e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011) (“[P]ersecution under the INA encompasses harm inflicted by either a government or an entity that the government cannot or will not control”).

72. 8 C.F.R. § 208.18(a)(1), (a)(7) (2012).

73. INA §§ 203(a)(2), 203(b)(3); 8 U.S.C. §§ 1158(a)(2), 1158(b)(2).

74. *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947, 950 (4th Cir. 2015).

#### IV. JUDGE POSNER'S ROAD MAP: CAT PROTECTION FOR CENTRAL AMERICANS FLEEING GANG VIOLENCE

In two opinions issued within six days in December 2015, Judge Posner analyzed the term “acquiescence” in CAT regulation, demonstrating how government complicity in gang violence can satisfy this element of a CAT claim.<sup>75</sup> In these two cases, the court found abundant “[e]vidence that Mexican police participate as well as acquiesce in torture.”<sup>76</sup> In so doing, Judge Posner made three key points about government involvement in torture by non-state actors: (1) the involvement of a single official is enough to satisfy “acquiescence”; (2) a “rogue” official can acquiesce in torture, even if the broader government is not complicit or even condemns torture; and (3) a government policy combatting torture by gangs or prohibiting participation by local government officials is not enough—only success rather than effort can support a finding of lack of acquiescence.<sup>77</sup>

The first decision, *Rodriguez-Molinero*, granted a petition for review of the BIA’s decision denying a Mexican national CAT relief based on his fear of the Zetas, a notoriously violent Mexican drug cartel.<sup>78</sup> Six days later, the court decided *Mendoza-Sanchez* and remanded to the BIA the case of a Mexican national fearing torture by La Linea, a Mexican drug cartel “known to be violent and to work with corrupt Mexican police officers.”<sup>79</sup> The discussion in *Mendoza-Sanchez* heavily relied upon *Rodriguez-Molinero* and stressed that the earlier case “[could] provide some useful guidance for the immigration judge and the [BIA] on remand of the present case.”<sup>80</sup> Accordingly, this section primarily focuses on *Rodriguez-Molinero*, using *Mendoza-Sanchez* to illustrate and expand on points made in the earlier decision.

Hair Rodriguez-Molinero was a lawful permanent resident of the United States for many years before his conviction for drug crimes, which prompted DHS to charge him with an aggravated felony and to attempt

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75. See *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1184–89 (7th Cir. 2015) (discussing how government involvement in drug cartels is sufficient to demonstrate acquiescence); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138–39 (7th Cir. 2015) (stating acquiescence by the Mexican police is evidenced by the torture that the police have inflicted on petitioner at the direction of a gang member, which is consistent with “the widespread understanding that many Mexican police are allied with the big drug cartels, such as the Zetas”)

76. *Mendoza-Sanchez*, 808 F.3d at 1185; accord *Rodriguez-Molinero*, 808 F.3d at 1138–39.

77. *Id.*

78. *Rodriguez-Molinero*, 808 F.3d at 1136.

79. *Mendoza-Sanchez*, 808 F.3d at 1182–83.

80. *Id.* at 1184.

terminating his perm[anent] residency status and remove him to Mexico.<sup>81</sup> Attempting to halt the removal process, Rodriguez-Molinero applied for deferral of removal under CAT, arguing that the Zetas would torture or kill him if he returned to Mexico.<sup>82</sup> Not only did Mexican police torture Rodriguez-Molinero at the behest of a Zeta member, but he feared even worse treatment if he was removed because he never repaid a \$30,000 debt to the Zetas and “reported his experiences with the Zetas to both the FBI and the DEA.”<sup>83</sup> An expert witness in his immigration court removal proceedings testified that “[a]s a deadbeat and informer, he is . . . ‘marked for death.’”<sup>84</sup> The expert witness further testified that Mexican cartels “have network[s] of employees and paid police and government officials’ throughout Mexico,” and opined that “[d]ue to corruption-induced short-comings and a general unwillingness to assist,” the Mexican government and police would be unable to protect Rodriguez-Molinero.<sup>85</sup> Indeed, the Zetas had kidnapped and killed Rodriguez-Molinero’s great-uncle after visiting the great-uncle’s home looking for Rodriguez-Molinero.<sup>86</sup>

Nonetheless, the immigration judge held Rodriguez-Molinero was not likely to be tortured in Mexico and failed to demonstrate that the Mexican government would “inflict or acquiesce” in his torture by the Zetas, whom the judge referred to as “a group of private actors.”<sup>87</sup> Accordingly, the immigration judge denied Rodriguez-Molinero’s application for deferral of removal under CAT, and ordered him removed to Mexico.<sup>88</sup> Rodriguez-Molinero appealed to the Seventh Circuit.<sup>89</sup>

Judge Posner took issue with three aspects of the immigration judge’s decision in *Rodriguez-Molinero* regarding to the extent to which the Mexican government’s acquiesced in torture by the Zetas: (1) the implication that “the infliction, instigation, consent or acquiescence in torture must be by the Mexican *government* rather than just by Mexican police officers or other government employees”; (2) the finding that the actions of “rogue officers individually compensated by” a gang member were insufficient to prove acquiescence; and (3) the determination that a Mexi-

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81. Rodriguez-Molinero, 808 F.3d at 1136.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1137 (internal quotations omitted).

86. *Id.*

87. *Id.* at 1138.

88. *Id.*

89. *Id.* at 1134.

can government policy “to prevent violence by drug cartels” indicated a lack of acquiescence in torture.<sup>90</sup>

First, Judge Posner made clear that acquiescence by a single government official is sufficient under CAT.<sup>91</sup> In contrast, the immigration judge held that Rodriguez-Molinero needed to show the Mexican government, not just police officers or individual government officials, acquiesced in the torture by the Zetas.<sup>92</sup> Citing the statutory language, which bars removal when “a public official” would acquiesce in torture, Judge Posner held that the complicity of only a single police officer—not “multiple government officials”—entitled Rodriguez-Molinero to relief.<sup>93</sup> In both *Rodriguez-Molinero* and *Mendoza-Sanchez*, the record demonstrated local police officers were more likely than not to participate or allow torture by the drug gangs, which is more than sufficient to satisfy the requirement that “a public official” acquiesce.<sup>94</sup>

This analysis is consistent with the reasoning of other circuit courts, such as the Ninth Circuit, which held that “an applicant for CAT relief need not show that the entire foreign government would consent or acquiesce in his torture. He need only show that ‘a public official’ would so acquiesce.”<sup>95</sup> Likewise, the Eighth Circuit opined that CAT does not require a high-level official to acquiesce in or ratify the conduct of a lower-level officer: neither “the nation’s president [nor] some other official at the upper echelons of power” need consent or acquiesce in torture.<sup>96</sup>

Second, Judge Posner rejected the argument that a “rogue official” is incapable of acquiescing to torture to satisfy a CAT claim.<sup>97</sup> The immigration judge grounded her decision to reject Rodriguez-Molinero’s CAT claim, in part, on her finding that the police officers who tortured him in the past “were rogue officers individually compensated by [a gang mem-

90. *Id.* at 1139.

91. *Id.*

92. *Id.*

93. *Id.* at 1138.

94. *See Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1184 (7th Cir. 2015) (discussing evidence that military was present in Matamoros because of local police corruption); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138–39 (7th Cir. 2015) (noting expert testimony of Mexican government corruption and “occasional police brutality,” as well as evidence that “Mexican police are allied with the big drug cartels”).

95. *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013).

96. *Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009); *see also Marmorato v. Holder*, 376 F. App’x 380, 386 (5th Cir. 2010) (“Public officials’ acquiescence to torture is not restricted to the upper tiers of government—it may be demonstrated by the corruption of the lower levels of government as well.”).

97. *See Rodriguez-Molinero*, 808 F.3d at 1139 (holding Rodriguez-Molinero did not have the burden of proving the entire Mexican government is involved in police misconduct).



ber] to engage in isolated instances of retaliatory brutality.”<sup>98</sup> Judge Posner countered, “[i]t is irrelevant whether the police were rogue (in the sense of not serving the interest of the Mexican government).”<sup>99</sup> In *Mendoza-Sanchez*, the court pointed to voluminous evidence of local Mexican police officers’ complicity in torture, leading Judge Posner to hold that a CAT applicant “need not prove that the Mexican government is complicit in the misconduct of its police officers.”<sup>100</sup>

It remains unclear how far the courts will take Seventh Circuit’s reasoning that the complicity of a “rogue officer” can satisfy the element of acquiescence under CAT. On one hand, in 2014 the Ninth Circuit remanded a case involving a Guatemalan CAT applicant and rejected a BIA decision that “the existence of rogue officials ‘cannot be used’ to demonstrate that government officials would acquiesce in torture.”<sup>101</sup> On the other, in 2013 the First Circuit agreed with the BIA’s conclusion that the “action of two rogue police officers does not constitute government action” because the “applicant did not present any specific evidence that the Brazilian government supported [these officers’] actions.”<sup>102</sup> Clearly then, if the government specifically condemns an officer’s conduct, a court will not find acquiescence. For instance, in a case where a police officer tortured a Peruvian national to prevent him from testifying, the Fourth Circuit held that the BIA properly found the officer to be “rogue”—and his actions therefore did not constitute government acquiescence—“because other government officials denounced [his] behavior by prosecuting, convicting and incarcerating him.”<sup>103</sup>

Third, the *Rodriguez-Molinero* decision clarified that the existence of a government policy intended to combat gang violence was not enough to rebut a claim of government acquiescence—only the success of any such policies should determine whether a government official will acquiesce in torture.<sup>104</sup> This portion of Judge Posner’s analysis began by criticizing the immigration judge (IJ) for “compound[ing] her errors by saying that because ‘the Mexican government has made efforts to prevent violence by drug cartels,’ it would ‘not participate in or acquiesce to torture.’”<sup>105</sup> As Judge Posner explained, “trying” is irrelevant; rather, for the purposes of

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98. *Id.*

99. *Id.*

100. *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015).

101. *Higueros v. Holder*, 582 F. App’x 692, 693 (9th Cir. 2014) (mem. op.).

102. *Costa v. Holder*, 733 F.3d 13, 18 (1st Cir. 2013).

103. *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 247 (4th Cir. 2013) (internal quotations omitted).

104. *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015).

105. *Id.*

CAT protection what matters is success in preventing torture.<sup>106</sup> He reiterated this point in *Mendoza-Sanchez*, noting “[i]t’s simply not enough to bar removal if the government may be trying, but without much success, to prevent police from torturing citizens at the behest of drug gangs.”<sup>107</sup> In that case, CAT relief appeared warranted to the court where “no evidence ha[d] been presented that the Mexican government can protect the citizen from torture at the hands of local public officials or to which local public officials are willfully blind.”<sup>108</sup>

To support his decision, Judge Posner cited *Madrigal v. Holder*,<sup>109</sup> in which the Ninth Circuit stressed that the important inquiry was “the efficacy of the [Mexican] government’s efforts to stop the drug cartel’s violence.”<sup>110</sup> In *Madrigal*, the Ninth Circuit cited the Eighth Circuit’s decision in *Ramirez-Peyro* at length for the holding that acquiescence of “low-level” officials could satisfy that element of CAT, “even when those officials act in contravention of the nation’s will.”<sup>111</sup> The Ninth Circuit noted “[t]he inquiry about whether Mexican officials would acquiesce in torture is related to the inquiry in the asylum context of whether the Mexican government is not just willing but also able to control Los Zetas, at least insofar as it would affect Tapia Madrigal.”<sup>112</sup> Actual knowledge is not required, held the Ninth Circuit, but “[i]t is sufficient that the public official be aware that torture *of the sort feared by the applicant* occurs and remain willfully blind to it.”<sup>113</sup>

Judge Posner’s analysis in these two cases echoed, but did not cite, a Third Circuit case issued just weeks earlier.<sup>114</sup> In *Torres-Escalantes v. AG of the United States*,<sup>115</sup> the immigration judge had found that “the Mexican government . . . attempts to curb unlawful activity by its officials,” but the Third Circuit faulted the BIA because it failed to consider that “though the Mexican government attempted to protect its citizens, it could still acquiesce to torture due its inability to actually protect its citizens from torture.”<sup>116</sup> The *Torres-Escalantes* decision was based on an

106. *Id.* at 1139–40 (emphasis omitted).

107. *Id.* at 1185.

108. *Id.*

109. 716 F.3d 499 (9th Cir. 2013).

110. *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013); *accord Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015).

111. *Id.* at 510 (citing *Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009)).

112. *Id.* at 509.

113. *Id.* (emphasis added).

114. *Mendoza-Sanchez*, 808 F.3d 1182 (lacking any citation to *Torres-Escalantes v. Att’y Gen. of U.S.*, 632 F. App’x 66 (3d Cir. 2015)); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134 (7th Cir. 2015) (doing the same).

115. 632 F. App’x 66, 69 (3d Cir. 2015).

116. *Torres-Escalantes v. Att’y Gen. of U.S.*, 632 F. App’x 66, 69 (3d Cir. 2015).

earlier Third Circuit precedent that also predated Judge Posner's reasoning in *Rodriguez-Molinero* and *Mendoza-Sanchez* and the Ninth Circuit's reasoning in *Madrigal*, but took such reasoning to its logical conclusion: "a government can be found to be willfully blind if it [i]s unable to control those engaged in tortuous activity."<sup>117</sup> The Second Circuit is in accord, questioning whether "the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT."<sup>118</sup> Thus, in a 2015 case, the Second Circuit remanded a CAT case involving a man fearing Honduran gangs so the BIA could consider whether the "prompt response of some police officers in arresting suspects for [murders of the applicant's relatives] was sufficient to overcome the fact (accepted by the IJ) that the Honduran government is unable to control gang violence."<sup>119</sup>

#### V. CREATING A RECORD TO SUPPORT CAT RELIEF FOR INDIVIDUALS FLEEING GANG-BASED VIOLENCE IN THE NORTHERN TRIANGLE

Using the road map provided by *Rodriguez-Molinero*, *Mendoza-Sanchez*, and other circuit court cases in accord, an advocate can create a strong record for CAT relief as an alternative to asylum for individuals fleeing gang violence in the Northern Triangle. Note that, unlike asylum claims, where immediate family members can derive status from a principal applicant, each individual in removal proceedings must separately prove a CAT claim.<sup>120</sup> Consequently, a record supporting CAT relief for such a claimant should include individual testimony concerning both the imminence of the threat (recall that the applicant has the burden to demonstrate that torture is "more likely than not" to occur) and the connection between local government officials and gang members.<sup>121</sup> A strong record should also include relevant expert or country condition evidence regarding government complicity or inefficacy in stopping gang

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117. *Torres-Escalantes v. Att'y Gen. of U.S.*, 632 F. App'x 66, 68 (3d Cir. 2015) (citing *Pieschacon-Villegas v. Att'y Gen. of U.S.*, 671 F.3d 303, 311 (3d Cir. 2011)) (internal quotations omitted).

118. *De La Rosa v. Holder*, 598 F.3d 103, 110 (2d Cir. 2010).

119. *Celedon-Herrera v. Lynch*, 627 F. App'x 6, 11 (2d Cir. 2015).

120. U.S. DEP'T OF JUSTICE, *supra* note 36.

121. 8 C.F.R. § 208.13(b) (2012). While this articulation of the standard is repeated often in case law, in *Rodriguez-Molinero* Judge Posner criticized the phrase's literal application noting that it "cannot be and is not taken literally," in part because that standard "would contradict the [CAT] (which . . . requires only 'substantial grounds for believing that' if removed the alien 'would be in danger of being' tortured.>"). *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135 (7th Cir. 2015) (emphasis omitted).

violence against civilians and the government's knowledge of tortuous gang activity.<sup>122</sup>

Any strong CAT claim typically starts with the applicant's testimony. In the experience of my colleagues representing Central American women detained at the Karnes Family Detention Center, victims of gang violence typically report that local police in the Northern Triangle do not conduct serious investigations of complaints involving gang threats. For example, one woman told us that a police officer stood idly by as gangs threatened her, pretending not to see or hear the intimidation.<sup>123</sup> Another woman reported that, after gang members seriously injured her partner and she rushed her partner to the hospital, police officers refused to intervene when gang members flashed their tattoos in an act of intimidation.

Other women have reported that some police inform gangs of any reported complaints, resulting in retribution against the person lodging the complaint for snitching.<sup>124</sup> For example, one woman seeking asylum testified that gang members regularly waited around police stations in an attempt to dissuade people from making reports. Another woman explained that in her neighborhood gang members sometimes dress in police uniforms, a story supported by country conditions reports.<sup>125</sup>

Of course, each CAT applicant's story will vary, but an advocate should develop, as much as possible, testimony related to how police and other government officials are no match for the gangs—a fact particularly important when the applicant has failed to report a gang has specifically threatened or acted violently toward them. DHS often argues that a fail-

122. See generally Rodriguez-Molinero, 808 F.3d at 1137–39 (discussing the strength of appellant's expert witness's testimony that described the likelihood appellant would be tortured upon return to Mexico and an annual human rights report by the U.S. State Department that reported a common belief that disappeared persons in Mexico are attributable to drug cartels).

123. Recall that participation or knowledge of a single corrupt official can be enough to demonstrate acquiescence. Rodriguez-Molinero, 808 F.3d at 1138–39.

124. This may be sufficient to show governmental acquiescence. See, e.g., Garcia v. Holder, 756 F.3d 885, 892 (5th Cir. 2014) (“If there were public officials supplying the perpetrators with information that they obtained as part of their official duties, government acquiescence could be shown.”).

125. See, e.g., U.S. DEP'T OF ST, GUATEMALA 2015 CRIME AND SAFETY REPORT 2 (2015), <https://www.osac.gov/pages/ContentReportPDF.aspx?cid=17785> [<https://perma.cc/S6UD-KF8S>] (stressing that some robberies have been carried out by individuals dressed as police officers); see also Randy Kreider, *Mexican Drug Cartels Make Fake Military Uniforms*, ABC NEWS (May 25, 2012), <http://abcnews.go.com/Blotter/mexican-drug-cartels-make-fake-military-uniforms/story?id=16431461> [<https://perma.cc/M3VD-5DMN>] (describing drug cartel efforts to produce military uniforms to impersonate government officials while carrying out criminal acts such as murder or hijacking).

ure to report a specific threat undermines the seriousness of the threat.<sup>126</sup> However, as some observers have noted, a lack of a police reporting can indicate a general futility of reporting to the police, or a fear of police involvement with the gangs.<sup>127</sup>

While evidence of the government's acquiescence to past torture or direct threats of future torture should figure prominently in a case for CAT,<sup>128</sup> an applicant should not overlook the claim that she may be tortured for the mere fact that she fled gang violence.<sup>129</sup> As stated by one expert who has provided written testimony in cases involving individuals fleeing gang violence in the Northern Triangle, it is "readily known when a person has fled to the [United States], and just as readily known when she returns following deportation," that "[t]hese people are broadly recognized as anti-gang."<sup>130</sup> This expert further notes that "if these individuals now return to their home countries, they will suffer violent reprisals by these gangs and criminal organizations because the fact and timing of their departure from their countries of origin marks them as resisters, dissenters and defectors."<sup>131</sup>

Moreover, this expert's findings are consistent with several accounts reported by women interviewed at the Karnes family detention center. For example, one woman reported that her cousin fled to the United States to escape gang recruitment and was subsequently removed; after her cousin returned to El Salvador, the gangs killed him, dismembered

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126. Cf. *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1067 (9th Cir. 2006) (O'Scannlain, J., dissenting) (discussing an immigration judge's lack of finding of past torture because Respondent Ornelas-Chaves did not report any abuse to the government).

127. See U.N. HUM. RTS. COUNCIL, *WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO* 4 (2015), <http://www.unhcr.org/5630f24c6.html> [<https://perma.cc/AR8Q-2LYM>] (reporting 40% of women, who are victims of domestic violence, interviewed did not report abuses to the police because they thought it would be useless).

128. See *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015) (describing evidence of past acts of torture by uniformed government officials as meeting the burden of proof to establish a claim under CAT). Past torture is ordinarily the principal factor on which courts rely when an applicant, who has been previously tortured, seeks relief under the Convention. *Id.*

129. Absent changed circumstances, "if an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffer." *Id.* at 1080 (citing *Nuru v. Gonzales*, 404 F.3d 1207, 1217–18 (9th Cir. 2005)).

130. Written Expert Immigration Court Testimony of Prof. Elliot Young, Chair of Department of History, Lewis & Clark College 5 (Aug. 4, 2014) (on file with author).

131. *Id.*

his body, and marked his body with the gang's name as a warning to others attempting to flee similar circumstances.<sup>132</sup>

The applicant's testimony should also be supplemented by expert or third-party country conditions reports to demonstrate at least some connection between government officials (even just one official) and the gangs; at the least, such testimony should show that government officials have knowledge of "torture of the sort feared by the applicant."<sup>133</sup> In both *Rodriguez-Molinero* and *Mendoza-Sanchez*, Judge Posner cited the U.S. State Department and other reports to support the proposition that the Mexican police were conspiring with gangs that threatened the petitioners.<sup>134</sup> The situation is no different in the Northern Triangle, for example:

- The Council on Foreign Relations states that in Honduras, Guatemala and El Salvador, "penetration of the state and so much criminal involvement in security forces" makes controlling the gangs nearly impossible.<sup>135</sup>
- According to the Center for Strategic and International Studies, gangs in the Northern Triangle "control large swaths of land, infiltrate municipal politics, raise large armies and police forces, provide basic public goods and services, direct the justice system, and monopolize the job market."<sup>136</sup>
- In Honduras, "[c]orruption within the police has reached such a significant point that Honduran president Juan Orlando Hernández has designed a controversial strategy (not unique to Honduras) of using the military for internal law enforcement missions, including the Military Police. The idea, according to senior Honduran officials interviewed, is to have a less corrupt force on the streets while the Honduran National Police are completely reconstituted."<sup>137</sup>

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132. When evaluating an application for CAT relief, the IJ and the BIA should consider "all evidence relevant to the possibility of future torture, including . . . [e]vidence of past torture inflicted upon the applicant." 8 C.F.R. § 1208.16(c)(3) (2016); *see also* *Nuru v. Gonzales*, 404 F.3d 1207, 1217–18 (9th Cir. 2005) (analyzing whether CAT applicant, *Nuru*, was a victim of past torture).

133. *See* *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013) (indicating a general awareness by a public official of the torturous activity is sufficient to show acquiescence).

134. *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1184 (7th Cir. 2015); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1137–38 (7th Cir. 2015).

135. *Renwick*, *supra* note 13.

136. DOUGLAS FARAH & CARL MEACHAM, *ALTERNATIVE GOVERNANCE IN THE NORTHERN TRIANGLE AND IMPLICATIONS FOR U.S. FOREIGN POLICY: FINDING LOGIC WITHIN CHAOS* 51 (2015), [http://csis.org/files/publication/150911\\_Farah\\_AlternativeGov\\_ernance\\_Web.pdf](http://csis.org/files/publication/150911_Farah_AlternativeGov_ernance_Web.pdf) [<https://perma.cc/A2G5-KAK8>]; *cf.* *Mendoza-Sanchez*, 808 F.3d at 1184 (noting that military presence in Matamoros was strong evidence of local police corruption, and supported rather than rebutted allegations of government acquiescence).

137. FARAH & MEACHAM, *supra* note 136, at 41.

- In Honduras, “in 2013, all 1,400 members of the elite police investigative unit—about 10 percent of the entire police force—were suspended simultaneously over alleged ties to corruption and drug trafficking.” Before the suspension, vice president of the National Congress publicly stated “40 percent of the police force was involved in organized crime.” It is estimated by senior police officials that “more than 20 percent of the national police on state payroll do not exist, but instead are phantoms put on the payroll so officers can collect an extra salary each month.”<sup>138</sup>
- In El Salvador, the “Defense Ministry has identified 91 cases of officials with ties to gangs, including active members and a couple of administrative personnel. Of these, 49 were related to the Barrio 18 gang and the rest to their rivals the Mara Salvatrucha (MS13).”<sup>139</sup>
- In Guatemala, the U.S. State Department reports, there is “widespread institutional corruption, particularly in the police and judicial sectors; police and military involvement in serious crimes, such as kidnapping, drug trafficking, trafficking in persons, and extortion; and societal violence, including often lethal violence against women.”<sup>140</sup>

These excerpts represent just a few examples from a growing body of literature from governments, non-profit organizations, and commentators showing that the Northern Triangle countries remain rife with gang violence and conflict—and that this violence and conflict is frequently facilitated or otherwise acquiesced to by public officials.

## VI. CONCLUSION

Given courts’ historical hostility toward gang-based asylum claims, the CAT has become an increasingly important avenue for Central Americans seeking protection in the United States. Practitioners and pro bono representatives alike should be cognizant of this important form of relief. While a CAT claim does not provide the full panoply of opportunities that a grant of asylum does, a grant under CAT is mandatory if the applicant has in fact proven each requirement, unlike asylum claims. Given the recent escalation of violence in the Northern Triangle countries, and the well-documented acquiescence of these governments to the repressive violent acts of gangs and transnational criminal organizations, a CAT

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138. *Id.* at 42.

139. Jaime Lopez et al., *Have the Maras Planted a ‘Trojan Horse’ Among El Salvador’s Security Forces?*, INsIGHT CRIME (May 13, 2014), <http://www.insightcrime.org/news-analysis/have-the-maras-planted-a-trojan-horse-amid-el-salvadors-security-forces> [https://perma.cc/ZDT3-L55V].

140. U.S. DEP’T OF ST., GUATEMALA 2014 HUMAN RIGHTS REPORT (2014), <http://photos.state.gov/libraries/guatemala/788/pdfs/HRRGuatemala2014e.pdf> [https://perma.cc/9PWU-CJRU].

2017]

*CONVENTION AGAINST TORTURE CLAIMS*

319

claim presents a viable option for refugees who are fleeing these countries on account of gang-based claims.