Human Rights Brief

Volume 24 | Issue 2 Article 4

2021

The Tortured Woman: Defying the Gendered Conventions of the Convention Against Torture

Linda Kelly

The Tortured Woman: Defying the Gendered Conventions of the Convention Against Torture

by Linda Kelly[*]

In the last few years, asylum advocacy for women has made some great strides — and has had some significant setbacks. Terrific attention has been paid to the ongoing, twenty-year struggle of domestic violence survivors to win asylum.[1] The hard-won victory of female genital mutilation (FGM) claims for asylees has also been widely celebrated.[2] However, little attention is paid to women's claims pursuant to the Convention against Torture (CAT).[3]

There are both practical and legal reasons for the difference in interest between asylum and CAT claims. As a practical matter, asylum has more benefits. Asylum puts the recipient on the road to residency and allows her to petition for family members. By contrast, CAT relief is a strictly limited benefit for the recipient, who can be subject to detention for the duration of status.[4] As a legal matter, asylum is also easier to win.[5] Asylum's "reasonable fear of

[*] *M. Dale Palmer Professor of Law, McKinney Law School, Indiana University. B.A. University of Virginia, 1988; J.D., University of Virginia, 1992.*

[1] *See* Matter of AB, 27 I. & N. Dec. 316, 317, 320, 340, 346 (2s018), https://www.justice.gov/eoir/page/file/1070866/download (vacating the matter of A-B-); *see also* Matter of A-R-C-G-, 26 I. & N. Dec. 388, 388, 395-96 (2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf (serving as the first published BIA decision acknowledging a viable asylum claim for domestic violence survivors, subsequently overruled by Matter of AB, 27 I. & N. Dec. 316 (2018)). To date, the First, Sixth and Ninth Circuits have severely rebuked or overruled *Matter of A-B-*. De Pena-Paniagua v. Barr, 957 F.3d 88, 93-94 (1st Cir. 2020) (concluding that *A-B-* should not be read as categorical); Juan Antonio v. Barr, 959 F.3d 778, 799 (6th Cir. 2020) (noting that *A-B-* has been ruled arbitrary and capricious by another court); Diaz-Reynoso v. Barr, 968 F.3d 1070, 1074, 1080 (9th Cir. 2020) (asserting *Matter of A-B-* did not announce a bright line rule for applications based on domestic violence but rather underscored the need for a case-by-case analysis). For the history and ongoing challenges of domestic violence asylum claims, *see generally*, Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 Geo. J. Gender & L. 541, 571-72 (2019) (discussing *A-B-* in the context of gender-based asylum claims); Linda Kelly, *The Ejusdem Generis of A-B-: Ongoing Asylum Advocacy for Domestic Violence Survivors*, 75 Nat'l L. Guild Rev. 65, 65, 74 (2018) (advocating for domestic violence asylum claims in the aftermath of *A-B-*).

[2] *See In re* Kasinga, 27 I. & N. Dec. 357, 368 (1996); *see also* Fauziya Kassindia & Layli Miller Bashir, Do They Hear You when You Cry (1998) (discussing Kasinga's story of flight and securing asylum); Karen Musalo, *In re Kasinga: A Big Step Forward for Gender-Based Asylum Claims*, 73 Interp. Rel. 853 (1996) (discussing *In re* Kasinga from the perspective of her lead attorney); Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 Hastings L.J. 557, 588-92 (2000) (discussing *In re* Kasinga in the context of other treatment of "good female victims" in immigration law).

[3] *See generally* Stephen H. Legomsky & David B. Thronson, Immigration and Refugee Law and Policy 1133-1374 (7th ed. 2018) (examining the history, elements, and process of refugee and asylum claims in the United States). By comparison, the text addresses the Convention against Torture in less than thirty pages. *Id.* at 1374-91.

[4] Aruna Sury, *Qualifying for Protection Under the Convention Against Torture*, Immigrant Legal Resource Center (April 2020), https://www.ilrc.org/sites/default/files/resources/cat_advisory-04.2020.pdf (explaining that asylees can apply for lawful permanent residency, petition for family members to become refugees or residents, and work, travel, and live in the United States without being detained, whereas CAT beneficiaries cannot apply for lawful permanent residency or confer benefits on other family members, and may be subject to detention).

[5] To qualify for asylum, one must meet the definition of a refugee pursuant to the Immigration and Nationality Act. 8 U.S.C. § 1158; 8 U.S.C. § 1101(a)(42) (defining a refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

persecution" is much lower than CAT's "would be tortured" analysis.[6]

The fights, wins, and losses of female asylees deserve all the support they get — and more. Nevertheless, CAT remains an important tool for women. There are many women who are not eligible for asylum due to prior criminal[7] or immigration[8] records. Ongoing challenges to what qualifies as a valid particular social group for gender violence asylum claims[9] and possible new, severe restrictions on all asylum claims[10] further contribute to the need to fully appreciate and litigate CAT claims.

CAT requires that a claimant prove she "will more likely than not be tortured with the consent or acquiescence of a public official if removed to her native country."[11] This standard breaks down in four significant criteria for the success of a CAT claim: torture, government action or acquiescence, relocation, and future harm.[12] This Article systematically evaluates the CAT standards from a gendered perspective. When they are put in context with the overarching historical struggle of women to fight gender violence, Professor Catherine MacKinnon's blunt question arises: "Are Women Human?"[13]

While gender challenges persist, existing CAT regulations can be tools to defy them. Uncovering CAT's gender conventions, this Article proposes a new perspective on CAT standards of torture, state acquiescence, and relocation. Such proposals rely on key, positive 2020 U.S. Circuit Court CAT decisions while remaining rooted in feminist norms.[14]

Part I of this Article introduces the basic definition of torture. Addressing the "what" and "why," it considers what acts of domestic violence, rape, and sexual assault qualify as torture and whether why they occur is being fully considered. Part II follows by critiquing whether "who" perpetrates such acts of torture can fit the standard of government actor or acquiescence. Part III then moves to relocation, proposing that the standard can readily encompass safety issues unique to gender violence. Finally, Part IV brings the variables together to properly calculate the risk a torture victim will face upon return and asks how gender violence changes the calculus.

[6] *See* 8 U.S.C. § 1231(b)(3); *see also* Sury, *supra* note 4 at 12 (comparing asylum with CAT). *Compare* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449-50 (1987) (setting asylum's reasonable possibility standard) *with* Perez v. Sessions, 889 F.3d 331, 331-32, 336 (7th Cir. 2018) (discussing CAT's "would be tortured" standard).

[7] 8 U.S.C. § 1158(b)(2)(A)(ii)-(iii) (stating that among other bars, an individual is prima facie ineligible for asylum if she has been convicted of a "particularly serious crime [and] constitutes a danger" or "there are serious reasons for believing" she has "committed serious nonpolitical crime outside the United States").

[8] 8 U.S.C. § 1231(a)(5) (providing that an individual who was previously subject to a removal order returns illegally and is subject to the reinstated removal order is unable to apply for any relief pursuant to the Immigration and Nationality Act, including asylum). Additionally, asylum's one-year filing requirement aggravates many would-be applications. *See* 8 U.S.C. § 1158(a)(2)(B). Individuals with "reinstatement orders" may seek CAT relief. Andrade-Garcia v. Lynch, 820 F.3d 1076, 1078-79 (9th Cir. 2016); *see* Sury *supra* note 4, at 9 (discussing the contexts in which an Immigration Judge may consider a CAT application).

[9] *See, e.g.*, Linda Kelly, *On Account of Private Violence: The Personal/Political Dichotomy of Asylum's Nexus*, 21 UCLA J. Int'l L. Foreign Aff. 98, 108-118 (2017) (discussing asylum's "on account of" criterion and the common reliance on the "particular social group" factor for gender violence claims).

[10] *See, e.g.*, Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (proposed June 15, 2020) (proposing greater limits on asylum for individuals who pass through third countries, live in the United States "illegally" and fail to pay taxes); *see also* Amanda Robert, *Trump Administration Attempts to Further Restrict Asylum Seekers Through New Rule*, ABA J. (June 12, 2020, 10:42 AM), https://www.abajournal.com/news/article/trump-administration-attempts-to-further-restrict-asylum-seekers-through-new-rule (criticizing the proposed regulations).

[11] Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1183 (9th Cir. 2020).

[12] *Id.* at 1183-88 (discussing at length what is necessary to meet three of the criteria).

[13] Catharine A. Mackinnon, Are Women Human? And Other International Dialogues (2007).

[14] For a discussion of the most noteworthy cases, *see* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1178 (9th Cir. 2020), *infra* text accompanying notes 107-117; Inestroza-Antonelli v. Barr, 954 F.3d 813 (5th Cir. 2020), *infra* text accompanying notes 57-60; De Artiga v. Barr, 961, F.3d 586 (2d Cir. 2020), *infra* text accompanying notes 129-130; and Lagos v. Barr, 927 F.3d 236 (4th Cir. 2019), *infra* text accompanying notes 61-62. Numerous other published and nonpublished cases are cited. The Author notes that all non-published cases are cited for purposes of illustration, not authority.

I. CAT: The Definition

According to the Convention, "[n]o State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."[15] To make this determination, the adjudicator "shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights."[16]

The Convention against Torture is not self-executing. However, in 1998, the U.S. Congress codified the treaty,[17] thereby allowing implementation through regulation.[18] CAT starts by defining torture:

> [T]orture 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 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, or intimidating or coercing him or her 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.[19]

This lengthy "torture" definition is multi-dimensional: (1) what is a qualifying "act" of torture?; (2) why is such harm being inflicted?; and (3) who is inflicting it? CAT's prospective "would be tortured"[20] requirement further implies showing (4) how likely are such acts to occur.

A. The Act: Severity of Harm

Contemplating that both "physical" and "mental" acts can qualify as torture, the regulations further explain that "[t]orture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment."[21] "Mental" acts cause "prolonged mental harm" due to subjecting the applicant or another to the infliction or threatened infliction of physical pain or threat of imminent death.[22] However, neither the Convention nor regulations provide a laundry list of qualifying acts. Case precedent provides further direction.

[15] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

[16] *Id.* at art. 3(2).

[17] CAT was enacted into U.S. law on October 21, 1998 by Fiscal Year 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act, PL 105-277, Div. G, Sub. B, Tit. XXI § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, 112 Stat. 2681-822, 105th Cong. 2d Sess. (1998) [hereinafter FARRA]; 144 Cong. Rec. H11044-03; 136 Cong. Rec. S17,486, 36,198 (1990); Committee on Foreign Relations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Ex. Rept. 101-30, 101st Cong. 2d Sess. (Aug. 30, 1990); *see also* 136 Cong. Rec. S17,486, S17,491-92 (daily ed. 1990) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

[18] 8 C.F.R. § 208.16-.18 (1999). For individuals in removal proceedings, the Department of Justice (DOJ) regulations provide the critical CAT standards. *Id.*; 64 Fed. Reg. 9,435-37 (Feb. 26, 1999) (to be codified at 22 C.F.R. pt. 95, 64). For individuals claiming CAT relief in extradition proceedings, the Department of State (DOS) regulations prevail, however they are not discussed herein. *See generally* Ira J. Kurzban, Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool 880-81 (discussing the DOS regulations' "more likely than not" standard).

[19] 8 C.F.R. § 1208.18(1); *see also* Convention against Torture *supra* note 15, art. 1(1) (stating same without including the "or she", "or her" references).

[20] *See* Convention against Torture, *supra* note 15.

[21] 8 C.F.R. § 1208.18(a)(2).

[22] *Id.* § 1208.18(a)(4)(i)-(iv) (explicitly referencing the administration or application of mind-altering substances or threat of same to oneself of another is explicitly referenced).

While the courts may recognize certain acts (or threats) of rape,[23] sexual assault,[24] FGM,[25] and domestic violence[26] as torture — this recognition is not unconditional. The CAT standards examine the degree of harm for each act while also requiring that the victim prove the perpetrator's motives. This what (degree of harm) and why (motive) pairing prevents many gender-based claims from going forward. It also evidences a naïve understanding of gender violence. Unpacking the what/why criteria is an important step towards advancing gender violence CAT claims.

1. Domestic violence

CAT's conventional severity of harm analysis is reminiscent of early understandings of gender violence. On the domestic violence front, there is an exclusive reliance on severe, physical acts. Acts of torture are credited in cases of "shocking domestic violence" — with years-long patterns of being choked, thrown, hit, and threatened with death at gunpoint.[27] Certainly, such horrific acts of domestic violence must be viewed as torture. However, these starkly physical illustrations return understandings of domestic violence to its rudimentary beginnings and do not realize the potential of the torture definition.

2. The developing domestic violence definition

Like CAT's current standards of domestic violence, the earliest definitions of domestic violence began with a simple recognition of the use of physical power by men against women.[28] However, as the early domestic violence definition evolved, physical violence came to be understood as only a part of a "cycle of violence" — which repeatedly moved through a pattern of tension building, acute battering, and batterer contrition.[29] The physical violence component was eventually viewed as secondary to the need to focus on the patriarchal dynamics surrounding the use of violence.[30] Gradually, the

[23] *See, e.g.*, Xochihua-Jaimes v. Barr, 962 F.3d 1175 (9th Cir. 2020) (rape and sexual assault); Zubeda v. Ashcroft, 333 F.3d 463, 472-73 (3d Cir. 2003) (rape); Lopez-Galarza v. I.N.S., 99 F.3d 954, 959 (9th Cir. 1996) (rape and sexual assault).

[24] *See e.g.*, Lopez-Galarza, 99 F.3d 954, 959 (rape and sexual assault); Xochihua-Jaimes, 962 F.3d 1175 (rape and sexual assault).

[25] Kone v. Holder, 620 F.3d 760, 765-66 (7th Cir. 2010) (threat of FGM to child); Tunis v. Gonzales, 447 F.3d 547, 550 (7th Cir. 2006) (FGM); Mohammed v. Gonzales, 400 F.3d 785, 802 (9th Cir. 2005) (FGM); Lagos v. Barr, 927 F.3d 236 (4th Cir. 2019) (genital mutilation threatened by Honduran gang).

[26] Ruiz-Guerrero v. Whitaker, 910 F.3d 572 (1st Cir. 2018) (domestic violence accepted as tortured, but CAT denied for lack of acquiescence); De Ayala v. Barr, 819 F. App'x 487 (9th Cir. 2020) (domestic violence).

[27] Orellana v. Barr, 925 F.3d 145 (4th Cir. 2019) (remanded on acquiescence); *see also* Bautista Lopez v. U.S. Att'y Gen., 813 F. App'x 430 (11th Cir. 2020) (acts of torture based on record of numerous death threats, drowning, bone fracturing and punching); Aguilar-Gonzalez v. Barr, 779 F. Appx. 354 (6th Cir. 2019) (acts of torture based on record of years of mistreatment, insults and beatings); Juarez-Coronado v. Barr, 919 F.3d 1085 (8th Cir. 2019) (domestic violence on five year relationship with record of fourteen beatings (including while pregnant) and strangulation (to the point of not breathing); Ruiz-Guerrero v. Whitaker, 910 F.3d 572 (1st Cir. 2018) (fifteen years of domestic abuse); De Ayala v. Barr, 819 F. App'x 487 (9th Cir. 2020) (strangled and repeatedly raped, hit, kicked, pushed spouse as well as physical and emotional abuse of children).

[28] R. Emerson Dobash & Russell Dobash, Violence Against Wives 1-3 (1979); Ellen Pence & Michael Paymar, Education Groups For Men Who Batter: The Duluth Model 173 (1993).

[29] Lenore E. A. Walker, The Battered Woman Syndrome xv (1979) ("A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.").

[30] Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 28-34 (1991) (criticizing the physical definition of domestic violence espoused by Lenore Walker and others); *id.* at 53-55 (criticizing legal literature's failure to focus on the "power and control, domination and subordination" dimensions of domestic violence); Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 Hofstra L. Rev. 1295, 1317-22 (1993) (acknowledging the patriarchal dynamics of domestic violence); G. Chezia Carraway, *Violence Against Women of Color*, 43 Stan. L. Rev. 1301, 1305-06 (1991) (using the patriarchal element of domestic violence as part of an overall definition of violence against women of color which includes "economic violence, cultural violence, legislative violence, medical violence, spiritual violence, emotional violence and educational violence").

"power and control"[31] wheel replaced the "cycle of violence." Through the power and control wheel, physical and sexual violence is seen only as a part, albeit an important one, of the overall effort to control women. Power and control are further solidified through such additional forces as using children, minimizing, denying, blaming, isolating, relying upon male privilege, coercing, threatening, intimidating, and emotionally abusing.[32] Today, domestic violence is largely understood as the male way of "'doing power' in a relationship; battering is power and control marked by violence and coercion. . . . A battered woman is a woman who experiences the violence against her as determining or controlling her thoughts, emotions, or actions, including her efforts to cope with the violence itself."[33]

To truly acknowledge domestic violence as torture, CAT's analysis must align with contemporary understandings of domestic violence. CAT's regulations already encourage consideration of both "physical" and "mental" acts.[34] Consequently, CAT can easily encompass the myriad of ways domestic violence is perpetrated. When torture is properly perceived as "doing power," CAT claims of domestic violence can be fully heard.

B. The Motive: A "Particularized Threat" of Torture

Regardless of the severity of the physical or mental act, it must also be perpetrated due to certain prescribed motives. As the CAT definition dictates, the act must be "intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing . . . intimidating or coercing . . . or for any reason based on discrimination."[35]

1. Domestic violence and motive

In domestic violence cases, the victim's burden to prove the torturer's motive also disregards the CAT's potential and evidences another traditional misconception regarding domestic violence. In *De Ayala v. Barr*, the Ninth Circuit recognized a domestic violence history of strangulation, rape, hitting, kicking, and child abuse as torture but only "because at least some of it was meted out as punishment."[36]

Domestic violence does not need to be proven or, for that matter, deemed "punishment" to qualify as torture. Domestic violence is more broadly about "power and control" and the CAT regulations allow for such a broader understanding of intent.[37] While CAT does recognize that torture can be inflicted to "punish," it also recognizes that torture can be inflicted for such other purposes as "intimidating or coercing" or "for any reason based on discrimination of any kind."[38] Domestic violence easily meets either criterion. Simply stated, domestic violence is torture because it is directed at "the spouse." Or it is directed at the "partner." This "discrimination" on account of the personal, patriarchal relation gets to the very root of domestic violence.[39] Domestic violence "is not gender neutral any more than the economic division of labor or the institution of marriage is gender neutral."[40] Contemporary understandings of domestic violence clearly recognize that domestic violence is intended to intimidate and coerce. The violence is

[31] Ellen Pence, *supra* note 28, at 3. From a central hub of power and control, the wheel's outer rim is formed by a circle of physical and sexual violence. The wheel's spokes are identified by the other means of exacting power. *Id.*

[32] *Id.*

[33] Mahoney, *supra* note 30, at 93.

[34] 8 C.F.R. § 1208.18.

[35] See CAT definition, supra note 15.

[36] De Ayala v. Barr, 819 F. App'x 487, 490 (9th Cir. 2020).

[37] *See supra* note 30 and accompanying text. (power and control dynamics of domestic violence).

[38] 8 C.F.R. § 1208.18(1); *see also* Convention against Torture, *supra* note 16 art. 1(1) (stating same without including the "or she" or "or her" references); *see also* Tun v. I.N.S., 445 F.3d 554, 571-72 (2d Cir. 2006) (reason for torture need not be political, basis of government torture not relevant).

[39] For a sampling of works devoted to the patriarchal or male use of domestic violence *see e.g.*, Dobash, *supra* note 28, at 1-13; Donald G. Dutton, The Domestic Assault Of Women: Psychological And Criminal Justice Perspectives (1995); Feminist Perspectives On Wife Abuse (Kersti Yllö & Michele Bograd eds., 1988); Catharine A. Mackinnon, Feminism Unmodified: Discourses On Life And Law 85-92 (1987); Pence, *supra* note 28; Walker, *supra* note 29; Mahoney, *supra* note 30; Elizabeth M. Schneider, *Making Reconceptualization of Violence Against Women Real*, 58 Alb. L. Rev. 1245 (1995); Malinda L. Seymore, *Isn't It A Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 N.W.U. L. REV. 1032 (1996); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996).

[40] Kersti A. Yllö, *Through a Feminist Lens: Gender, Power and Violence*, *in* Current Controversies On Family Violence 54 (Richard Gelles & Donileen R. Loseke eds., 1993).

simply a byproduct of the patriarchal dynamics of the relationship. The "battering is power and control marked by violence and coercion."[41]

2. Rape, sexual assault, and motive

In cases of rape and sexual assault, some motives can be easily established. *Avendano-Hernandez v. Lynch* relayed the tragic account of a Mexican transgender woman's years of being raped and sexually assaulted by family, teachers, and government officials.[42] Insults of "faggot," "queer," or "gay" were regularly associated with the abuse.[43] The Ninth Circuit (as well as the Board of Immigration Appeals (BIA) and the Immigration Judge (IJ)) were easily able to recognize that she had been tortured.[44] "Rape and sexual abuse due to person's gender identity or sexual orientation, whether perceived or actual, certainly rises to the level of torture for CAT purposes."[45] Indeed, the failure to acknowledge the motivation evident in such insults is reversible error. The Ninth Circuit had earlier reversed in *Godoy-Ramirez v. Lynch*, when the rapist "repeatedly used homophobic, derogatory language while raping [a Mexican transgender woman]. . . . Words used by a persecutor during an attack are highly indicative of a persecutor's motive, and such 'motivation should not be questioned when the persecutors specifically articulate their reason for attacking a victim.'"[46]

However, this need to prove both act and motive under the CAT often prevents even severe acts of rape and sexual assault from being recognized as torture. Victims of gender-based violence are often unable to satisfy the motivation standard. Words or other affirmative showings are either lacking or insufficient. For example, a Guatemalan woman and speaker of the indigenous Mam language could not establish her rape as torture because covering her mouth during the rape did not provide sufficient evidence that she was raped because of her "status as a native Mam speaker."[47]

Failure to prove motive is labeled as the lack of a "particularized threat" or no "individualized risk." The violence is simply deemed "general." As another example, a young girl in El Salvador was routinely harassed by gang members for two years on her way back and forth to school.[48] During the same time frame, a female classmate was threatened, raped, and killed by the gang.[49] Nevertheless, there was no "particularized threat of torture."[50] The petitioner did not establish "more than general allegations of a threat against a group that the applicant belongs to."[51] Likewise, there was no "individualized risk" for a Guatemalan female and native speaker of the Akateko dialect who was sexually assaulted at the age of twelve by a group of ten men outside her church.[52] "[The BIA] acknowledge[s] the general country conditions, including violence against women, in Guatemala, but this evidence does not indicate that the respondent faces an individualized risk of harm if she returns to the country."[53]

As such failed cases illustrate, violence perceived as general is never enough. But that is the misconception. How is the sexual violation of women "general"? Such neutral treatment of sexual violence willfully ignores the "male pursuit of control over women's sexuality."[54] As Catherine MacKinnon explained, sexuality is the "primary social sphere of male power."[55] Gender neutral laws, like the laws of torture, are simply the "consequence" of such power.[56]

These conventions can be defied. Recently, the Fifth Circuit, in *Inestroza-Antonelli v. Barr*, explicitly

[41] Mahoney, *supra* note 30, at 93.
[42] Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015).
[43] *Id.*
[44] *Id.* at 1078-1079 (reversing Board of Immigration Appeals' failure to find government acquiescence).
[45] *Id.*
[46] Godoy-Ramirez v. Lynch, 625 F. App'x 791 (9th Cir. 2015) (quoting Li v. Holder, 559 F.3d 1096, 1111-12 (9th Cir. 2009).
[47] Perez-Agustin v. U.S. Att'y Gen., 798 F. App'x. 608 (11th Cir. 2020).
[48] Villanueva-Leon v. Barr, No. 19-3741, 2020 U.S. App. LEXIS 24012 at 1 (6th Cir., Jul. 29, 2020).
[49] *Id.* at 2.
[50] *Id.* at 12.
[51] *Id.*
[52] Jose-Tomas v. Barr, No. 19-4157, 2020 U.S. App. LEXIS 24260 at 13 (6th Cir., July 31, 2020).
[53] *Id.*
[54] Catherine A. MacKinnon, Toward a Feminist Theory of the State 112 (1989).
[55] *Id.* at 109.
[56] *Id.*

recognized the potential of a gender-based torture claim.[57] Relying on changed country conditions in Honduras, *Inestroza-Antonelli v. Barr* rescinded an *in absentia* order, allowing a woman's CAT petition to go forward.[58] The Fifth Circuit in *Inestroza-Antonelli* saw the potential motive created in Honduras by the "dismantling of institutional protections for women against gender-based violence following a 2009 military coup."[59] The subsequent, dramatic increase in violence and murder of women in Honduras was deemed "because of their gender."[60]

Likewise, in the Fourth Circuit, when a Honduran woman reported threats of genital mutilation, gang rape, and death of herself and her child for not paying the extortion demands of the Barrio 18 gang, *Lagos v. Barr* made the link.[61] The Barrio 18 "would exact revenge, punishing her in an especially 'graphic' and visible manner for disobeying their demands."[62]

Inestroza-Antonelli's and *Lagos*' recognition of gender-based violence as potential torture is a critical turning point. Certainly, the recognition of gender violence in asylum and withholding of removal is also important.[63] In recent years, there have been some positive lower immigration court decisions.[64] However, the need in asylum and withholding of removal cases to prove persecution "on account of . . . particular social group" subjects such gender claims to the more exacting "particular social group" demands.[65] Moreover, for women who are statutorily barred from bringing asylum and withholding of removal claims, the Convention against Torture is their only recourse.[66]

II. Acquiescence

Per CAT, an act of torture must be "inflicted or instigated" by a foreign government public official or with an official's "consent or acquiescence."[67] Such person must also be "acting in their official capacity." Differences regarding the meaning of "acting in an official capacity" were recently resolved. In July 2020, Attorney General Barr ended the agency's use of "rogue official" exceptions — which had excluded torturous acts by public individuals for "personal reasons."[68] However, a government official must still be acting under "color of law."[69]

[57] Inestroza-Antonelli v. Barr, 954 F.3d 813 (5th Cir. 2020).
[58] *Id.* at 814 (granting a motion to reopen for the purpose of applying for asylum, withholding of removal or protection under the Convention against Torture based on evidence of a substantial change in country conditions).
[59] *Id.*
[60] *Id.* at 816.
[61] Lagos v. Barr, 927 F.3d 236, 256 (4th Cir. 2019).
[62] *Id.*
[63] *See* Linda Kelly, *The Ejusdem Generis of A-B-: Ongoing Asylum Advocacy for Domestic Violence Survivors*, 75 N.L.G. Rev. 65 (2018) (gender violence in asylum claims); Kelly, *supra* note 9, at 98.
[64] *See e.g.,* Matter of L–C–Y–G–, EOIR, Philadelphia (June 2019) (recognizing "Honduran females" as a cognizable social group for asylum) (on file with author); *Matter of Artiga de Arias*, EOIR, Chicago (March 2017) (recognizing as a particular social group "single women who have no familiar protection and who report gang crimes to the police in El Salvador") (on file with author).
[65] For domestic violence survivors, the "on account of membership in a particular social group" continues to be a long and twisted legal journey. In 2018, Attorney General Jeff Sessions issued *Matter of A–B–*, attempting to undo the ability of domestic violence survivors to claim asylum "on account of a particular social group." Matter of A–B–, 27 I. & N. Dec. 316 (2018). Several circuits have already explicitly criticized *Matter of A–B–*'s reasoning thereby effectively overlooking or overruling it. To date, the First, Sixth and Ninth Circuits have severely rebuked or overruled *Matter of A–B–*; *see* De Pena-Paniagua v. Barr, 957 F.3d 88, 93 (1st Cir. 2020); Antonio v. Barr, 959 F.3d 778 (6th Cir. 2020), Diaz-Reynoso v. Barr, 968 F.3d 1070 (9th Cir. 2020). However, in other circuits *Matter of A–B–*, continues to raise additional challenges in proving asylum's "on account of" criteria. For a review of the twenty-year struggle to bring domestic violence asylum claims and ongoing efforts *see e.g.*, Kelly, *supra* note 63, at 95.
[66] *See* 8 U.S.C. § 1231(a)(5) (outlining the statutory ineligibility standards of asylum and withholding of removal).
[67] 8 C.F.R. § 1208.18(1) ("Torture is defined as any act by which severe pain or suffering is inflicted . . . 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.").
[68] Matter of O-F-A-S-, 28 I. & N. Dec. (2020). For prior use of the "rogue official exception" *see* Matter of Y-L-, 23 I. & N. Dec. 270 (2002) (rejecting contention that government acquiescence could be shown "by evidence of isolated rogue agents engaging in extrajudicial acts of brutality"); *see, e.g.*, Garcia v. Holder, 756 F.3d 885, 891 (5th Cir. 2014) (rejecting, in certain circuits, the "rogue official" exception even prior to the Attorney General Barr's 2020 decision); United States v. Belfast, 611 F.3d 783, 808-09 (11th Cir. 2010); Ramirez-Peyro v. Holder, 574 F.3d 893, 900 (8th Cir. 2009); Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1139 (7th Cir. 2015).
[69] Matter of O-F-A-S-, 28 I. & N. Dec. (2020).

When the government directly inflicts or instigates torture, a victim does not also have to show acquiescence.[70] "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and therefore breach his or her legal responsibility to intervene to prevent such activity."[71] Acquiescence is interpreted as the government's "awareness and willful blindness."[72] "Willful blindness" does not require a showing that the "entire government" would acquiesce to the torture.[73] At the other extreme, "willful blindness" also does not encompass a government's "general ineffectiveness to investigate or stop a crime."[74]

A. Gender Violence and Acquiescence

For victims of gender violence, virtually any efforts by the government, regardless of degree of success, will defeat an acquiescence claim. A government which is "actively, albeit not entirely successfully" investigating claims of domestic violence and rape is not acquiescing.[75] Nor is there acquiescence if a government is issuing, despite not successfully enforcing, protective orders.[76] Reporting an act of gender violence and being told by the government that "we can't help you" still amounts to non-acquiescence on the part of the government.[77] And certainly, an individual who fails to report rape, despite threat of reprisal for doing so, is traditionally barred from showing acquiescence.[78] Simply put, a government seen as "doing something" defeats acquiescence.[79]

Unlike government ineptitude or indifference, government corruption can support an acquiescence argument. "[W]idespread corruption of public officials . . . can be highly probative," allowing

70 Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) (remanding CAT when both Board of Immigration Appeals and Immigration Judge required that CAT applicant must prove acquiescence in addition to credible evidence of multiple rapes by Mexican officials).

[71] 8 C.F.R. § 1208.18(7).

[72] Aguilar Ramos v. Holder, 594 F.3d 701, 705-06 (9th Cir. 2010) ("Acquiescence does not require actual knowledge or willful acceptance of torture; awareness and willful blindness will suffice."); *see also* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (discussing the legislative history and development in the "willfully blind" aspect of acquiescence) ("In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.").

[73] Xochihua-Jaimes v. Barr, 962 F.3d 1175 (9th Cir. 2020) (quoting Madrigal v. Holder, 716 F.3d 499, 509-510 (9th Cir. 2013)).

[74] Andrade Garcia v. Lynch, 820 F.3d 1076, 1082 (9th Cir. 2016); *see also* Garcia Milian v. Holder, 755 F.3d 1026, 1034 (9th Cir. 2014); Scarlett v. Barr, 957 F.3d 316, 335 (2d Cir. 2020) (quoting Quinteros v. Att'y Gen., 945 F.3d 772, 788 (3d Cir. 2019). However, if an applicant satisfies the asylum and withholding of removal standard that a foreign government be shown "unable or willing" to protect, it may still be shown that the government has acquiesced to torture "[a]lthough not dispositive of whether a government acquiesced in torture through willful blindness, [a CAT] applicant may be able to establish government acquiescence in some circumstances, even where the government is unable to protect its citizens from persecution." Scarlett v. Barr, 957 F.3d at 335.

[75] Bautista-Lopez v. United States Att'y Gen., 813 F. App'x 430, 436 (11th Cir. 2020) (citing Salvadoran government efforts to criminalize domestic violence, sponsor public awareness campaigns and provide shelters for domestic violence victims); Cano v. Sessions, 2018 U.S. App. LEXIS 56 3, 6 (6th Cir. 2018) (Guatemalan woman's failure to report rape and multiple threats prevented showing acquiescence).

[76] Juarez-Corado v. Barr, 919 F.3d 1085, 1089 (8th Cir. 2019) (no acquiescence when Guatemalan woman gets a temporary restraining order against her husband; police are unable to enforce and the husband continues to threaten); Aguilar-Gonzalez v. Barr, 779 F. App'x 354, 358-359 (6th Cir. 2019) (no acquiescence when abuse against a Guatemalan woman continues after her husband is summoned to court and a restraining order is issued).

[77] Gonzalez-Veliz v. Barr, 938 F.3d 219, 225 (5th Cir. 2019) (Honduran woman unable to get protection against her violent boyfriend shows "lack of resources and funding" is "not consent or acquiescence, on the part of the police force").

78 Cano v. Sessions, No. 17-3123, 2018 U.S. App. LEXIS 56, at *7 (6th Cir., Jan. 2, 2018) (finding no showing of acquiescence for Guatemalan woman raped and sexual assaulted and threatened with further violence if reported).

[79] Ruiz-Guerrero v. Whitaker, 910 F.3d 572 (1st Cir. 2019) (finding no acquiescence despite "troubling data regarding gender-based violence" in the Dominican Republic and applicant's testimony of a fifteen-year abusive relationship and multiple reports to the police proving "ineffective," citing country reports detailing government agencies established to protect women); *see also* Villanueva-Leon v. Barr, No. 19-3741, 2020 U.S. App. LEXIS 24012 at 1 (6th Cir., July 29, 2020) (finfing no acquiescence due to El Salvadoran government "efforts to combat [gang violence] and police corruption and applicant's failure to report gang assaults"); Munoz v. U.S. Att'y Gen., 786 F. App'x. 988 (11th Cir. 2019) (finding no acquiescence when Honduran government showing efforts at "making improvements").

acquiescence to be shown through corruption at "any level — even if not at the federal level."[80]

Yet for gender violence victims, the focus on corruption is superficial. Why is government indifference and the failure to prioritize the needs of half of its populace never seen as an active decision?[81] An active decision to do nothing is acquiescence.[82] The false line between indifference and corruption exists only because of the manner in which the issue is framed. The false line prevents asking the deeper questions of why a country has chosen not to act and what are the real implications of its patriarchal norms. CAT's fictional dichotomy is legal complicity.

CAT's "all evidence"[83] standard allows for the recognition of the broader implications of inaction as acquiescence. Adhering to CAT's demand that "all evidence" be evaluated, personal evidence and/or country conditions may prove corruption.[84] Courts cannot selectively choose from nor ignore evidence.[85] Consequently, *Lagos v. Barr* was remanded when a Honduran woman sought protection under CAT after being threatened with gang rape, genital mutilation, and murder for failure to pay the extortion fee.[86] Importantly, the Fourth Circuit excused the applicant's failure to report such threats to the police, relying upon expert testimony which "explained multiple connections between Barrio 18 and 'local police power,' including the sharing of information about neighborhood residents."[87]

III. Relocation

The consideration of whether internal relocation is possible exists in both asylum and CAT. In both, it serves to treat refuge in the United States as a last resort. However, the relocation standard for CAT is less than asylum's relocation standard. Asylum places the burden on the applicant to show that internal relocation is not possible.[88] By contrast, CAT regulations direct an "affirmative" consideration of "all evidence" relating to whether "the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured."[89] Stated in the negative, CAT applicants are not required to prove

[80] Parada v. Sessions, 902 F.3d 901, 916 (9th Cir. 2018) ("[C]ountry reports and exhibits evidence the acquiescence of the Salvadoran government (or at least parts of the Salvadoran government) in the rampant violence and murder perpetrated by the MS gang.") (internal quotations omitted); *see also* Lagos v. Barr, 927 F.3d 236, 256 (4th Cir. 2019) (finding that the Immigration Judge ignored the "extensive evidence of the specific conditions in her neighborhood" and omitting any mention of the substantial evidence marshalled to show that local government police officials acquiesce and indeed actively collude with Barrio 18 in her neighborhood).

[81] *See* MacKinnon, *supra* note 39, at 3-4 (stating that the rationale of state inaction is a device for perpetuating hierarchies based on gender, class and race); *see e.g.*, Mary Ann Glendon, Rights Talk: The Impoverishment Of Political Discourse (1991); Anita L. Allen, Uneasy Access: Privacy For Women In Free Society (1988). Feminism's "positive rights" approach has long demanded accountability for inaction. *Id.*

[82] Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 Pace Int'l L. Rev. 1, 65, 332 (1996) (arguing inaction as "acquiescence of a public official" under the Convention on the Elimination of all Forms of Discrimination against Women).

[83] 8 C.F.R. § 1208.16(c)(3).

[84] 8 C.F.R. § 1208.16(c)(3); *see also* Rivas-Pena v. Sessions, 900 F.3d 947 (7th Cir. 2018).

85 *See, e.g.*, Lagos v. Barr, 927 F.3d 236, 255-56 (4th Cir. 2019) (finding the Immigration Judge ignored the "extensive evidence of the specific conditions in her neighborhood . . . omitt[ing] any mention of the substantial evidence marshalled . . . to show that local government police officials acquiesce and indeed actively collude with Barrio 18 in her neighborhood).

[86] *Id.* at 256.

[87] *Id.*

[88] 8 C.F.R. § 1208.13(b)(3)(i).

[89] 8 CFR § 1208.16(c)(1); *see also* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1186 (9th Cir. 2020).

that internal relocation is "impossible."[90] They are also not actively required to evade future harm. CAT applicants are not required to hide their "fundamental identity,"[91] abandon their sexual orientation,"[92] or "live incommunicado and isolated from loved ones."[93] However, asylum applicants enjoy a presumption that internal relocation is not possible when government persecution or past persecution is established.[94] CAT applicants never enjoy a burden shift.[95] The CAT applicant always retains the "overall burden of proof."[96]

A. Consideration of "All Evidence"

Despite CAT's broad "all evidence . . . not likely to be tortured" relocation standard, CAT applicants fleeing gender violence are still being judged with a narrow view of the dangers they face. In *Garcia-Arce v. Barr*, a Mexican woman sold by her brother to a gang member who sexually assaulted her could not meet CAT's relocation burden.[97] Upholding the CAT denial, the Seventh Circuit agreed that she could safely relocate since she had avoided contact with her abuser and other gang members by living in another part of Mexico for four years. Sadly, such affirmation effectively endorses the agency's "cherry-picked"[98] assurances from U.S. State Department reports that Mexican women could be safe because "Mexican law imposes an 'absolute prohibition' on torture and that a new law 'adds higher penalties for conviction of torturing vulnerable classes of victims,[ ] including women."[99] It also ignores CAT's "all evidence" instruction. Why had the submitted reports regarding the prevalence of gang violence in Mexico — clearly contradicting the false assurances of protection for women — not been given greater weight?[100] While the opinion briefly notes she had been living with the father of her son,[101] why was there not a fuller discussion of the means by which Garcia-Barr lived? Did she effectively live in hiding? Had ties to other loved ones been severed?[102] Why did she ultimately leave Mexico? And, most importantly, given CAT's overarching "would be tortured" analysis, would she fear reprisal upon return?[103]

CAT applicants (and their attorneys) must raise such questions. The "all evidence . . . not likely to be tortured"[104] relocation standard demands any potential harm be evaluated. Domestic violence victims must educate courts on "separation assault" — the heightened risk of violence associated with

[90] For CAT applicants, "neither [§ 1208.16(c)(2)] nor § 1208.16(c)(3) requires the petitioner to prove anything as to internal relocation" (quoting Maldonado v. Lynch, 786 F.3d 1155, 1163 (9th Cir. 2015)). Recognizing such difference, the Ninth Circuit overruled three of its own precedential decisions for misinterpreting the CAT regulations and improperly equating the relocation burden of proof for asylum and CAT. Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015) (overruling Hasan v. Ashcroft, 380 F.3d 1114, 1123 (9th Cir. 2004); Lemus-Galvan v. Mukasey, 518 F.3d 1081, 1084 (9th Cir. 2008); Singh v. Gonzales, 439 F.3d 1100 (9th Cir. 2006) ("[T]o the extent that [they] conflict with the plain text of the regulations."); *see also* Manning v. Barr, 954 F.3d 477, 488 (2d Cir. 2020) ("The governing regulations to be sure, do not require an applicant to prove that it is not possible to relocate to a different area of the country in order to evade torture."); Perez v. Sessions, 889 F.3d. 331, 336 (7th Cir. 2018) (remanding where "the Board did not comply with 8 CFR § 1208.16(c)(3)(ii)'s requirement that it consider all evidence relating to whether a CAT applicant can relocate safely within the proposed country of removal").

[91] Xochihua-Jaimes v. Barr, 962 F3d 1175, 1187 (9th Cir. 2020) (relying on Edu v. Holder, 624 F.3d 1137, 1146 (9th Cir. 2010).

[92] Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000).

[93] Manning v. Barr, 954 F.3d 477, 488 (2d Cir. 2020).

[94] As the asylum regulations state: "In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service established by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii)).

[95] Maldonado v. Lynch, 786 F.3d 1155, 1164 (9th Cir. 2015) (overruling Perez-Ramirez v. Holder, 684 F.3d 953 (9th Cir. 2011)).

[96] Maldonado v. Lynch, 786 F.3d at 1164.

[97] Garcia-Arce v. Barr, 946 F.3d 371, 377 (7th Cir. 2019).

[98] *See infra* note 135 and accompanying text for further discussion of the impropriety of "cherry-picking" evidence.

[99] Garcia-Arce v. Barr, 946 F.3d 371, 375 (7th Cir. 2019).

[100] *Id.* (giving more weight to the State Department reports than general reports submitted by Garcia-Arce describing gang violence).

[101] *Id.*

[102] For CAT's acknowledgement that relocation does not require that one hide in order to evade torture, *see supra* note 90 and accompanying text.

103 For discussion of the prospective "would be tortured" criteria, *see infra* Part IV and accompanying text.

[104] 8 C.F.R. § 1208.16(c) (2020).

leaving an abusive partner.[105] And all victims of gender violence must consistently document the heightened risks associated with gender — emphasizing the real lack of protection for women.[106]

Following this regimen, *Xochihua-Jaimes v. Barr* reversed the agency finding that a Mexican lesbian woman could relocate.[107] After suffering years of rape by her family to "learn to be a woman," Xochihua-Jaimes fled to the United States.[108] To gain her family's approval, she resorted to living with Luna, an abusive member of the Los Zetas drug cartel.[109] She endured years of rape and abuse by Luna and his Zeta cartel family members in the United States and Mexico.[110] When Luna was imprisoned for the rape of Xochihua-Jaimes' eldest child in the United States, his family's attacks on Xochihua-Jaimes intensified in order to avenge.[111] Nevertheless, the IJ found the abuse connection to the Zetas "speculative" and accorded "little weight" to the "unsubstantiated opinion" that the Zetas were throughout Mexico.[112] Upholding the IJ, the BIA agreed that there was "an absence of evidence indicating that the applicant could not relocate."[113] Reversing, the Ninth Circuit corrected both the agency's misapplication of the relocation standard and its incomplete evaluation of evidence. The Ninth Circuit returned to the explicit, affirmative language of the regulations. "Neither the IJ nor the BIA cited any affirmative "[e]vidence that [Petitioner] could relocate to a part of [Mexico] where . . . she is not likely to be tortured."[114] And the Ninth Circuit considered "all evidence," relying upon "extensive record evidence" of the Zetas' operations throughout "many parts of Mexico."[115] Perhaps even more importantly, it saw the independent claim on account of sexual orientation. "Even if Los Zetas did not find her, Petitioner is at heightened risk throughout Mexico on account of her sexual orientation. Extensive record evidence demonstrated that LGBTQ individuals are at risk throughout Mexico."[116]

Xochihua-Jaimes v. Barr sets the bar for evaluating the true possibility of relocation within the CAT — particularly for gender based claims. When adjudicators affirmatively consider "all evidence," women can be heard.

IV. Would Be Tortured

"The ultimate inquiry" in qualifying for CAT relief is whether the applicant has shown she "would be tortured" upon being removed to her country.[117] Concededly, this prediction about what will happen is "speculation."[118] But, given the high stakes, numerous standards are built in. To make a CAT prediction, adjudicators must evaluate the probability, consider all the possible forms of torture, and weigh all the evidence.[119]

A. The Probability

Pursuant to CAT regulations, a CAT applicant must show "it is more likely than not that he or she would be tortured" upon removal.[120] While typically understood as a "more than 50%" likelihood,[121] adjudicators are expected to aggregate the risk of torture from all possible sources. For some circuits, the need to aggregate risks is taken literally. In those

[105] Mahoney, *supra* note 30, at 65-66 ("Separation assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.").

[106] *See e.g.*, Inestroza-Antonelli v. Barr, 954 F.3d 813, 816, 818 (5th Cir. 2020) (reversing BIA denial of motion to reopen for asylum, withholding of removal and CAT relief for Honduran woman based on "voluminous and uncontroverted evidence that regime established after the 2009 coup made changes that substantially reduced legal protections for women and dramatically impaired institutions within the government and civil society that protect women from gender-based violence. And the coup was accompanied by the rate of homicides of women doubling within a single year, which can hardly be described as incremental.").

[107] Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1178 (9th Cir. 2020) (deferring removal).

[108] *Id.* at 1179.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 1180.

[112] *Id.* at 1181.

[113] *Id.* at 1186.

[114] *Id.* (citing 8 C.F.R. § 1208.16(c)(3)(ii)).

[115] *Id.* at 1186-87.

[116] *Id.*

[117] *Id.* at 1188; Convention against Torture, *supra* note 15.

[118] Perez v. Sessions, 889 F.3d 331, 336 (7th Cir. 2018).

[119] 8 C.F.R. § 1208.16(c)(3)-(4), 1208.17(a) (2020).

[120] *Id.* § 1208.16(c)(2), 1208.17(a).

[121] Perez v. Sessions, 889 F.3d at 336.

courts, if an applicant, for example, fears being tortured by the police, gangs and anti-gang vigilante groups, the determined percentage possibilities are to be added together in order to see if the final number is greater than 50%.[122] Other courts forewarn against engaging in such "mathematical precision,"[123] calling instead to consider "a substantial risk that a given alien will be tortured if removed from the United States."[124]

Regardless of a circuit's aptitude or aversion to statistical probability, the common understanding is that there must be an "aggregate risk of torture from all sources, and not as separate divisible CAT claims." Reaching this cumulative determination requires considering "the evidence of record, when considered in the aggregate."[125] Regulations further direct that such a thorough evidentiary evaluation includes consideration of (1) past torture; (2) the possibility of relocation; (3) the country of removal's "flagrant or mass violations of human rights"; and (4) any other "relevant information."[126]

B. Past Torture

Of all the "would be tortured" considerations, past torture is "ordinarily the principal factor."[127] As the reasoning goes, "[i]f 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 suffering."[128]

The bias toward past torture does not, however, require individuals to "wait until they suffer physical harm or recurring threats" before leaving their countries.[129] Recently, CAT claims in both the Second and Seventh Circuits were remanded to reconsider whether applicants who fled after only isolated death threats "would be tortured" upon return.[130] Such "near misses" were not deemed past torture, despite torture's definition including "prolonged mental harm," caused by factors including the "imminent threat of death."[131] Nevertheless, it was found an "error of law" to "hold categorically that an applicant for CAT relief must be threatened more than once and that such a person must suffer physical harm before fleeing."[132]

Past instances of torture are to be evaluated with all other relevant evidence, including other personal events and country conditions.[133] Inasmuch as CAT adjudicators may not "arbitrarily ignore relevant

[122] Rodriguez Arias v. Whitaker, 915 F.3d 968 (4th Cir. 2019) (former gang member facing removal to El Salvador claimed likelihood of torture by police, opposition gangs and anti-gang vigilante groups); *see* Guerra v. Barr, 951 F.3d 1128 (9th Cir. 2020) (directing explicitly the percentages to be added, adding likelihood of harm from Mexican police combined with likelihood of torture by mental health facility workers); Kamara v. Att'y Gen., 420 F.3d 202, 213-14 (3d Cir. 2005) (finding the necessary greater than 50% by adding 27% likelihood from one entity with 28% likelihood of torture by another).

[123] Perez v Sessions, 889 F.3d 331, 334 (7th Cir. 2018).

[124] *Id.* (quoting Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1135-36 (7th Cir. 2015).

[125] *In re* G-A-, 23 I. & N. Dec. 366, 368 (2002) (emphasis added).

[126] 8 C.F.R. § 1208.16(c)(3)(i)-(iv) (2020).

[127] Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1080 (9th Cir. 2015) (quoting Nuru v. Gonzales, 404 F.3d 1207 (9th Cir. 2005).

[128] *Id.*

[129] De Artiga v. Barr, 961 F.3d 586, (2d Cir. 2020).

[130] *Id.* (Salvadoran mother flees with son after threatened once by MS-13 gang with death if son does not join them and brandishing a knife); Perez v. Sessions, 889 F.3d 331, 333 (7th Cir. 2018) (Honduran applicant with "narrow escape from torture" by gang whose multiple forcible recruitment efforts included being beaten and shot at on two separate occasions).

[131] Perez v. Sessions, 889 F.3d 331, 336 (7th Cir. 2018) (citing 8 C.F.R. § 1208.18(a)(4)(iii)) (holding that it did not "need to and [does] not literally equate a narrow escape from torture with actual torture . . . . The fact that Perez was the target to some near-misses, however, shows that MS-13 had Perez himself in his sights and was willing to take violence action against him. The threat of imminent death is one way in which torture by means of mental pain or suffering can be inflicted.").

[132] De Artiga v. Barr, 961 F.3d 586, 591 (2d Cir. 2020).

[133] "[A]n escape from torture at the hands of the state or someone who the state cannot or will not control is strong evidence supporting a prediction of torture should the target be returned to that country. Such evidence is particular to the petitioner; it indicates the methods likely to be used; it identifies who the perpetrator(s) will be; and it sheds light on the state of mind of the potential torturer." Perez v. Sessions, 889 F.3d 331, 335 (7th Cir. 2018); *see also* De Artiga, 961 F.3d 586 (2d Cir. 2020) (recognizing the need to evaluate the death threat directed at Petitioner with harms directed at other family and country conditions); Rodriguez-Arias v. Whitaker, 915 F.3d 968, 974-75 (4th Cir. 2019) (remanding CAT claim for failure to "meaningfully" address live testimony and country conditions).

evidence,"[134] they are also prevented from "cherry-picking"[135] evidence which suits their findings. "Catchall phrases" that the agency has considered all the evidence are also not sufficient.[136] To withstand judicial review, CAT decisions must be ground in "substantial evidence."[137] Such a standard necessitates that "the judge build a 'logical bridge from evidence to conclusion.'"[138] "Those who flee persecution and seek refuge under our laws have the right to know that the evidence they present of mistreatment in their home country will be fairly considered and weighed by those who decide their fate."[139]

Female CAT claims are especially vulnerable to judicial disconnect between evidence and conclusion. Complete failure to consider personal evidence and country reports in CAT claims involving female violence and government consent or acquiescence are commonplace.[140] In *Lagos v. Barr*, an Immigration Judge found a Honduran woman's claim of future torture to be an "unsupported assumption" despite having found her testimony credible.[141] She and her daughter were threatened with rape, genital mutilation, and murder if she did not pay the Barrio 18 gang's extortion tax.[142] Expert testimony and evidence regarding the acquiescence and collusion of local police with the gang is simply "omitted" from the IJ's decision, which relies instead on general country conditions and concludes that "generalized reporting" does not support her claim.[143]

V. Conclusion

At every turn, CAT presents significant hurdles for gender violence claims. Fortunately, in recent years, there is more sensitivity to the contours of women's torture claims. Amongst the many courageous published and unpublished opinions, a few lead the way. *De Artiga v. Barr* preserves the possibility of future torture in an isolated past threat.[144]

[134] *See* Rodriguez-Arias v. Whitaker, 915 F.3d at 974; *see also* Inestroza-Antonelli v. Barr, 954 F.3d 813, 816-18 (5th Cir. 2020) (holding the BIA's "complete failure" to address "uncontroverted evidence" of changes in the treatment of women since the 2009 coup amounted to abuse of discretion); Scarlett v. Barr, 957 F.3d 316, 226 (2d Cir. 2019) (remanding when BIA failed to give "reasoned consideration to all the relevant evidence of Jamaican authorities' inability to protect Scarlett from gang violence").

[135] *See* Inestroza-Antonelli, 954 F.3d at 816-17 (5th Cir. 2020) (describing Government (and dissents) as "cherry-picking" excerpts from the Respondent's evidence in order to argue Honduran government protecting women rather than acknowledging the documents' contrary conclusions).

[136] *See* Cole v. Holder, 659 F.3d 762, 771-72 (9th Cir. 2011) (holding that although the BIA need not discuss every piece of evidence, it cannot misstate or ignore highly probative or potentially dispositive evidence).

[137] *See e.g.*, Bernard v. Sessions, 881 F.3d 1042, 1047 (7th Cir. 2018) (holding that the "IJ exhaustively reviewed all of the evidence and explained why it did not establish a substantial likelihood Bernard would be tortured").

[138] *See* Riva-Pena v. Sessions, 900 F.3d 947, 950 (7th Cir. 2018) (quoting Cojocari v. Sessions, 863 F.3d 616, 626 (7th Cir. 2017)); *see also* Parada v. Sessions, 902 F.3d 901, 915 (9th Cir. 2018) (remanding CAT claim in part because the "significant and material disconnect between the IJ's quoted observations and his conclusions . . . indicate that the IJ did not properly consider all of the relevant evidence before him").

[139] Baharon v. Holder, 588 F.3d 228, 233 (4th Cir. 2009).

[140] *See e.g.*, Varela-Lopez v. Sessions, 695 F. App'x 1, 3-4 (2d Cir. 2017) (remanding CAT claim for complete failure to consider "testimony that gang members killed her father, uncle, and brother for failing to pay extortion, the death certificates supporting that testimony; her testimony that gang members assaulted her and her two living brothers; threatening letters from gang members; country reports reflecting increased murder rates of women between 2005 and 2012 (a large number of which were likely related to gangs); and reports that Honduran police are willfully blind to violence against women"); Jacobo-Melendres v. Sessions, 706 F. App'x 724, 727 (2d Cir. 2017) (remanding CAT claim as agency failed to analyze any of the material evidence including "Jacobo-Melendres's testimony that a gang member in Guatemala stalked and harassed her almost daily for four months and attempted to kidnap her on one occasion in 2012, her testimony that the gang member continues to call her cell phone (which she left with her mother in Guatemala); her testimony that she did not trust the police to help her; letters from her mother, sister, and sister's father-in-law corroborating her claim; and country reports reflecting that rape, sexual offenses, and femicide are serious problems in Guatemala and that impunity for the perpetrators of such crimes remains extremely high because police are not equipped to investigate or assist the victims"); Maldonado-Andrade v. Barr, 801 F. App'x 516, 517 (9th Cir. 2020) (remanding CAT claim for ignoring Honduran country reports regarding ties of cartel with corrupt government officials).

[141] *See* Lagos v. Barr, 927 F.3d 236, 256 (4th Cir. 2019).

[142] *Id.*

[143] *Id.*

[144] *See* De Artiga v. Barr, 961 F.3d 586, 591 (2d Cir. 2020).

Lagos v. Barr recognizes the many forms in which women can be tortured.[145] *Xochihua-Jaimes v. Barr* thoughtfully addresses more localized limits to relocation.[146] Finally, *Inestroza-Antonelli v. Barr* sees a threat of female torture in a country's changing political regime.[147]

With such appellate successes, one could dismiss systemic, administrative problems in immigration courts as easily addressed through the appellate process.[148] Circuit studies have shown "staggering" reversals of immigration agency decisions.[149] However, there is no right to free counsel in immigration proceedings.[150] Many refugees, who may be able to afford representation in the lower administrative proceedings, often do not have the wherewithal to continue the appellate process into the federal circuits.[151] Federal court appeals to the circuits may also not be treated fairly. The courts feel "overrun"[152] and hand-tied. "Our Nation's immigration policy is determined by the political branches, not the courts."[153]

Yet irrespective of the immigration courts' fundamental problems, for gender violence victims, a pattern emerges — from the refusal to unequivocally name every act of rape, sexual assault, and domestic violence as torture; to the failure to find government action or acquiescence in indifference; to the unreasonable expectation of relocation on poor women and children; and, most importantly, to the overall, superficial evaluation of claims. As Professor Catherine MacKinnon rhetorically responds:

> If women were human, would we have so little voice in public deliberations and in government in the countries where we live? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly to death, and to death, by men with whom we are close? Would we be sexually molested in our families? Would we be raped in genocide to terrorize and eject and destroy our

[145] *See* Lagos, 927 F.3d at 256.
[146] *See* Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1182, 1186-87 (9th Cir. 2020).
[147] *See* Inestroza-Antonelli v. Barr, 954 F.3d 813, 816-17 (5th Cir. 2020).
[148] *See also* Linda Kelly, *The Poetic Justice of Immigration Law*, 42 Ind. L. Rev. 1, 1-8 (2009) (discussing the Circuits' recognition of the intemperance and incompetence of the immigration courts).
[149] Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (disclosing that the 7th Circuit had reversed 40% of administrative immigration decisions in the preceding year); *see also* John R. Floss, *Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process*, 1 Seventh Cir. Rev. 216, 217-218 (2006) (reporting the Seventh Circuit granting two-thirds of the petitions for review filed by individuals seeking asylum in preceding five month period).
[150] 8 U.S.C. § 1362 ("In any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose.").
[151] *See* Irving A. Appleman, *Right to Counsel in Deportation Proceedings*, 14 San Diego L. Rev. 130 (1976) (demonstrating the need to have appointed counsel in immigration proceedings); Robert N. Black, *Due Process and Deportation — Is There a Right to Assigned Counsel?*, 8 U.C. Davis L. Rev. 289 (1975); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immig. L.J. 739 (2002) (reporting the vast statistical differences in success of represented versus non-represented individuals in immigration proceedings); Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 Univ. Mich. J.L. Reform 639 (1994) (highlighting the additional need for particularly vulnerable groups to have legal counsel); Linda Kelly, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. Third World L.J. 41 (2011) (proposing constitutional right to counsel for unaccompanied minors); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647 (1997) (promoting need for counsel for detained individuals).
[152] Inestroza-Antonelli v. Barr, 954 F.3d 813, 819 (5th Cir. 2020) (Jones, dissenting).
[153] Gjetani v. Barr, 968 F.3d 393 (5th Cir. 2020).

> ethnic communities, and raped again in that undeclared war that goes on every day in every country in the world in what is called peacetime? If women were human, would our violation be enjoyed by our violators? And, if we were human when these things happened, would virtually nothing be done about it?[154]

The Tortured Woman calls out to defy conventions.

[154] Mackinnon, *supra* note 13, at 41-42.