CHAPTER 8

Mexican Asylum Seekers and the Convention Against Torture

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Introduction

Over the past century, Mexicans have come to the United States for work, to unite with family members, to study, and—some—to seek refuge. Today more than eleven million Mexicans live in the United States, approximately half of them in undocumented status, the remainder as students, temporary workers, lawful residents, or naturalized U.S. citizens (Zong and Batalova 2016). A book on the state of human rights in Mexico is a logical place to explore one aspect of the situation of Mexicans abroad—whether Mexicans fleeing violence can find protection in the United States.

Asylum seekers can raise public awareness in the country of destination about human rights in their country of origin. Would publicity about Mexicans seeking asylum educate the American public about the human rights violations and threats of violence faced by ordinary Mexicans? Would public knowledge of the situation in Mexico counter the anti-Mexican and antirefugee attitudes of the Donald Trump administration or serve to fortify support for the proposed border wall and other exclusionist policies?

The reception of refugees is the ultimate test of the universality of human rights. Can people in danger whose nation-state cannot protect their human rights find refuge, respect for their rights, and safety in another country? As Hannah Arendt observed in 1950 about the widespread rejection of persecuted Jews in 1930s and 1940s Europe,

> The incredible plight of an ever-growing group of innocent people was like a practical demonstration of the totalitarian movements' cynical claims that no such thing as inalienable human rights existed and that affirmations of the democracies to the contrary were mere prejudice, hypocrisy, and cowardice. . . . The very phrase "human rights" became for all concerned—victims, persecutors, and onlookers alike—the evidence of hopeless idealism or fumbling feeble-minded hypocrisy. (Arendt 1976: 269)

In the six decades since Arendt wrote, there has been a proliferation of treaties, human rights bodies, and civil society organizations dedicated to their enforcement. The United States has adopted treaties and laws to protect migrants fleeing danger. Will this system protect the rights of Mexicans fleeing violence and threats?

Worldwide, asylum seekers are desperate to escape violence perpetrated by the state, by nonstate actors, and by criminal organizations. Hundreds of thousands flee civil wars, as governments attack their own civilian populations while fighting armed opposition groups. Many flee threats and violence from criminal gangs who have virtual control over their home communities. Others are desperate to escape catastrophic natural disasters and the longer-term impact of climate change, such as flooding and desertification. Many of these situations were not contemplated in the Refugee Convention promulgated in 1951 (Goodwin-Gil and McAdam 2007; McAdam 2012). The existing categories are delineated in Article 1 of the Convention and Protocol Relating to the Status of Refugees, which states,

> The term "refugee" shall apply to any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (United Nations General Assembly 1951, 1967)

The protection of Mexicans in the United States falls squarely within the ongoing global discussion of whether the "old" standards for refugee status found in

the Refugee Convention and Protocol, or even the newer commitments under the Convention Against Torture, can serve persons fleeing the wide variety of dangers today. At present, many states parties to these treaties seek to avoid their obligation of "non-refoulement"—the obligation not to return migrants to a country where they fear persecution or face a substantial risk of torture, the core protection of both treaties. Article 33 of the Convention and Protocol Relating to the Status of Refugees states, "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (United Nations General Assembly 1967). Similarly, Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (Convention Against Torture, or CAT) states, "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (United Nations General Assembly 1984).

International obligations are complicated by political realities in the case of Mexico and the United States.

International human rights monitoring bodies agree that the human rights situation in Mexico has deteriorated substantially in the last decade (Al Hussein 2015). Meanwhile, the United States and Mexico seek to maintain cordial diplomatic relations, as partners in antinarcotics efforts, trade, and migration control, among other issues. The U.S. Department of State Country Report on Mexico cites persistent human rights violations (U.S. Department of State 2015). U.S. human rights advocates criticize the failure of the U.S. government to exert more pressure on Mexico to investigate noted cases of violations (Washington Office on Latin America 2015). As in any bilateral relationship, a welcome by the United States to Mexican asylum seekers could be considered an explicit condemnation of the sending state—and a diplomatic tool to be used with caution. In earlier periods, the reverse was true as African Americans escaping slavery in the United States, as well as persecuted religious minorities practicing polygamy, fled to Mexico in the nineteenth century. In the 1940s and 1950s, U.S. citizens and lawful residents suspected of Communist ties fled to Mexico to escape aggressive government investigations.

The United States has ratified both the Refugee Convention and Protocol and the Convention Against Torture. As noted, both treaties—and U.S. laws and regulations enacted to implement the treaties—require the United

States not to return persons to countries where they would be subject to persecution or torture. This requires that the United States provide due-process safeguards for applicants, including considering the elements of qualification for asylum status. Over the past thirty-six years, U.S. administrative judges and federal courts have defined critical terms such as "persecution," "particular social group," "political opinion," and "consent or acquiescence [of the state]" to determine who are "deserving" of refuge among those in flight from violence or threats. That Mexico is in a human rights crisis is without doubt. However, the harm or threat that can qualify an applicant for refugee status does not include every possible violation of human rights. There is an ongoing debate about the extent to which "persecution" maps onto "human rights violations" (McAdam 2014).

Mexicans currently have an extremely low rate of acceptance in applications for political asylum or protection under CAT (Cabot 2014). Historically, agency and judicial decision-making in individual cases often follows the Executive's stated general policy with respect to asylum seekers. Salvadoran and Guatemalan asylum seekers successfully challenged biased decision-making in the 1980s, resulting in a settlement that ordered the reconsideration of their claims "without regard to foreign policy interests" (*American Baptist Churches v. Thornburgh* 1991). Of course, agency decision-makers can determine individual cases on humanitarian grounds, and independent federal judges reviewing agency decisions can insist on a reading of the law at odds with the view of executive branch officials.

Should the United States now provide protection to Mexicans fleeing violence? Given the large undocumented Mexican population in the United States, there is hardly the political will to welcome thousands more (Krogstad and Passel 2014). Would generous standards of even temporary shelter strain capacity and public acceptance? There are also moral questions to be considered. Must the United States offer shelter where the violence Mexicans flee is related to the market for illegal drugs in the United States? Does U.S. responsibility for the flow of guns into Mexico further obligate the United States to offer refuge?

This chapter explains the political and legal pathways through which Mexicans seek protection in the United States. The chapter considers, first, the barriers to seeking asylum under U.S. law, and then the possibility of seeking protection under CAT. A review of U.S. case law demonstrates the key issue of the Mexican state's "control and acquiescence" that applicants must prove to gain protection in the United States.

Mexicans and the U.S. Asylum Process

Despite consistently alarming reports from credible sources on the difficult human rights situation in Mexico, it is important to note that there are no "waves" of Mexican refugees coming to the United States at present. U.S. and Mexican scholars agree that, in the past few years, net Mexican migration to the United States has been reduced to zero due to difficult economic circumstances in the United States and increased border and interior enforcement (Gonzales-Barrera and Krogstad 2015). The Obama administration deported record numbers of Mexicans back to Mexico, and the Trump administration will match or exceed those totals. However, the thousands of Mexicans deported or leaving voluntarily are almost matched by thousands who successfully cross into the United States each year—despite the increased cost and danger of illegal crossing (Gonzales-Barrera and Krogstad 2015; U.S. Border Patrol 2015). Something is compelling Mexicans to leave home—and for at least some, the motive is fear.

Among the estimated five million undocumented Mexicans in the United States, relatively few have applied for protection under either political asylum or CAT. Some statistics are available concerning affirmative asylum applications filed with the Asylum Offices, Department of Homeland Security (DHS). A review of several DHS reports shows a slight rise from an average of 528 Mexicans per month affirmatively requesting political asylum in the first quarter of 2015 to 809 in June 2015, an increase of 53 percent per month (U.S. Citizenship and Immigration Services 2015a; U.S. Citizenship and Immigration Services 2015b). If one were to extrapolate from the available figures, assuming an average of around 600 per month, one could conclude that in 2015 approximately 7,200 Mexicans made affirmative applications for political asylum.

Political asylum in the United States leads to lawful permanent residence and ultimately to citizenship, but the path to approval has gotten more difficult even for seemingly worthy applicants. Mexicans may apply for political asylum for a variety of reasons, including threats based on gender identity or because of persistent domestic violence (UC Hastings 2016). Many applications from Mexican nationals involve threats or harm from criminal cartels or corrupt police. Can threats from criminal gangs constitute "persecution" within the meaning of refugee law?

Persecution by nonstate actors (guerrilla movements, political parties, death squads, for example) has long been recognized by U.S. agencies and

courts as an appropriate basis for asylum (Aleinikoff et al. 2012). However, the Board of Immigration Appeals (BIA) and the federal courts narrowly construe eligibility when claimants seek protection from retribution from criminal gangs. Courts have refused to recognize "political opinion" or "particular social group" membership, for example, when claimants argue that resistance to recruitment or to sex acts (with gang members) constitutes a political opinion—or that such resisters constitute a "particular social group."

For an applicant to qualify for political asylum, he or she must prove that the motives of criminal actors are not "merely personal" or mainly for illicit financial gain. The BIA and federal courts require that the successful asylum applicant present evidence that the persecutors' motive is based on one of the statutory grounds, most often the victim's membership "of a particular social group" or as having a disfavored "political opinion." The Immigration and Nationality Act (INA) of 1965 states, "To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant" (United States Congress 1965). The BIA has also set restrictive and complex standards of "social distinction" with respect to any claimed social-group membership, although some federal courts have discarded those standards.[1]

In addition, procedural obstacles put in place by U.S. law limit asylum eligibility. Applicants must comply with a one-year filing deadline after entry. For example, in a summary order (no precedential authority), the Second Circuit Court of Appeals upheld a decision by an immigration judge that "changed circumstances" did not justify the applicant's late filing of an asylum application even when "conditions in the relevant region of Mexico allegedly deteriorated" (*Cardona-Contreras v. Lynch* 2015). Advocates report that successful applications for political asylum from Mexicans are increasingly difficult to win (Cabot 2014).

Mexicans Seeking Protection Under the Convention Against Torture

The United States and Mexico are states parties to CAT and, therefore, have committed their governments not to torture persons within their respective territories, nor to send foreign nationals to places where they may be tortured ("non-refoulement"). Article 1 of CAT defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 3 of CAT explicitly and clearly forbids states parties to return persons to a state where they are likely to be tortured:

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

CAT provides an alternative to political-asylum status for Mexicans fleeing violence and threats of violence.

After the U.S. Senate ratified CAT in 1998, the Department of Justice promulgated regulations to make protection against torture available to applicants in hearings before immigration judges (8 C.F.R. §§ 208.16, 208.17). The immigration judge may grant protection under CAT as either "withholding of removal" or "deferral of removal." The BIA reviews denials of CAT protection by immigration judges. BIA denials of CAT protection are subject to review by the U.S. Courts of Appeals. A successful claim for protection under CAT does not lead to permanent residence or citizenship, as does political asylum. The remedy granted is only a promise not to deport the applicant, accompanied by authorization to work. The successful claimant has some security in the United States but continues in a liminal status.

Despite the lack of permanent status, CAT claims may prove a promising route for Mexican applicants for three reasons. First, unlike political-asylum claimants, CAT applicants need not prove a political or discriminatory motive

on the part of the feared perpetrators. A possibility that it is "more likely than not" that a person will be tortured is enough. Second, there is no one-year deadline after entry for filing CAT claims as there is for asylum claims—often a serious obstacle for traumatized asylum seekers. And third, even applicants with records of convictions for serious crimes are eligible for CAT relief.

As CAT protection is available to aliens regardless of any criminal record, many felons desperate to remain in the United States where their families reside resort to CAT claims as their only possibility to remain in the United States once they have completed their prison sentences. Given the undisputed evidence of the widespread use of torture by Mexican police and in Mexican prisons (see Introduction, this volume), it is quite possible that many of these returned criminals would present valid claims, but it is extremely difficult for incarcerated applicants to get assistance from lawyers.

While there are statistics about CAT applications before immigration judges, the available statistics do not classify them by nationality. In Fiscal Year 2014, 26,294 applications for deferral or withholding of removal under CAT were made to immigration courts by applicants of all nationalities, of which 536 were granted and 10,602 were denied. Of the remaining 15,156, 715 were "Abandoned," 5,203 were "Withdrawn," and 9,338 were classified as "Other" dispositions. Calculating a percentage of successful applications based on just the relative numbers of applications granted or denied, only 5 percent were granted (U.S. Department of Justice 2014). None of the available statistics disaggregates CAT applicants by nationality.

As noted in the Introduction to this volume, international human rights investigators studying Mexico in recent years have uniformly determined that torture and other human rights violations are widespread. Almost all of the acts perpetrated, including extrajudicial killings, enforced disappearances, the use of child soldiers, and systematic rape fit within the CAT definition of torture. The Office of the United Nations High Commissioner for Human Rights (OHCHR), among others, has noted that Mexico's internal failures to protect its citizens contrast with the government's enthusiastic support of human rights rhetoric in international fora (Al Hussein 2015). This basic ineffectiveness in protecting its citizens is increasingly evident even to U.S. federal courts, which are beginning to recognize that the Mexican state, including local officials, is responsible for many cases of torture. This is where the claims of those seeking protection from forced return to

Mexico coincide with those of protesters in the streets of Mexico: *"Fue el estado!"*—"It was the state!"

Procedurally, Mexican applicants for protection under CAT in the United States must meet certain standards. The applicant seeking withholding or deferral of removal under CAT bears the burden of proving that

- it is "more likely than not" that he or she would be
- "tortured," as defined in the regulations; and
- 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."

According to the applicable regulations, "acquiescence" requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity" (8 C.F.R. § 1208.16(c)(2); 8 C.F.R. § 1208.18(a)(1); 8 C.F.R. § 1208.18(a)(7)).

The issue of "consent or acquiescence" is, as our Mexican colleagues would say, the *"chiste"* or key to the matter. Once an applicant has proved that he or she is likely to be tortured, the question of state involvement becomes the central issue. Both CAT and U.S. regulations require that the torture 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."

Blaming the Mexican government for failing to protect its own citizens from torture is a very serious matter with implications for United States–Mexico diplomatic relations. Combined with implicit fears of numbers ("too many" qualifying), there are many incentives for U.S. decision-makers not to grant protection to Mexicans.

An overview of selected decisions from U.S. Courts of Appeals, later in this chapter, demonstrates judicial interest in the question of state involvement. Similar to U.S. jurisprudence in police-brutality cases brought under federal civil rights statutes,[2] the inquiry in these CAT cases, where police or law enforcement are involved, centers on whether the government employees were "rogue" officers acting without the knowledge of their superiors. To some judges, particularly in the Seventh and Ninth Circuits, the involvement or knowledge of higher-ranking officials or the central government is immaterial to whether there was state "consent or acquiescence": that local police were perpetrators is enough for accountability by the state.

The main challenge in understanding how Mexican applicants for CAT protection fare is that so few of the decisions are available for public scrutiny. Decisions by immigration judges are usually not reduced to writing. Decisions of the BIA are summary and not often published. The best available body of decisions that discuss the situation in Mexico and protection under CAT are those from the U.S. Circuit Courts of Appeals.

The Annual Report of the Executive Office of Immigration Review for 2014 (the most recent available) indicates that 8,840 applications for protection under the Convention Against Torture were filed by Mexicans before immigration judges in Fiscal Year 2014, with only 124 granted. That same year, 1,852 applications by Mexicans were denied, 218 were abandoned, 2,403 were withdrawn, and 3,088 were classified as "other" (U.S. Department of Justice 2014). Those figures account for 7,561 cases, adding 1,279 cases (just of Mexicans who have applied for CAT protection) to the already enormous backlog of cases before immigration judges, a backlog that results in delays of up to three years for applicants waiting for hearings.

Jurisprudence on CAT Within U.S. Immigration Cases

Immigration Judges

Immigration judges in the United States are administrative judges and employees of the Department of Justice, Executive Office for Immigration Review. Petitions for political asylum and protection under CAT are presented in written form and then in trial-type hearings before immigration judges. Applicants themselves testify and may present testimony of other witnesses and documentary evidence, as well as opinions by experts (in the form of testimony or in writing) (National Immigrant Justice Center 2016).

At the conclusion of the hearing, the immigration judge gives an oral decision, which is recorded but not usually transcribed. In certain exceptional cases, a judge may issue a written decision. This reliance on oral decisions significantly hampers research into trends in jurisprudence in the immigration courts (Ramji-Nogales, Schoenholtz, and Schrag 2007). A national survey of lawyers practicing immigration law would be necessary to produce any conclusions regarding what sorts of protection claims from Mexicans have been successful.

Board of Immigration Appeals

If the applicant loses before the immigration judge, he or she may appeal to the BIA, which bases its review only on the evidence submitted before the immigration judge. Not all decisions of the BIA are published, again hampering researchers. The BIA does publish some of its decisions and may designate a given decision as "precedential," that is, binding on all immigration judges.

In only two cases since 2000 has the BIA issued precedential cases to set out standards for CAT claims. Neither case involved a Mexican applicant. In *Matter of Y-L-A-G-*, 23 I&N Dec. 270 (A.G. 2002) and *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000), the BIA held that CAT applicants must show that it is "more likely than not" that they would be tortured and that the torture would be done with the "consent or acquiescence" of the state. Under these BIA decisions, the standard for "consent or acquiescence" requires that the applicant present evidence that state authorities actually knew that torture was likely in a particular case and were "willfully blind" to its happening.

Since *Matter of S-V-,* the BIA has followed that strict standard. Given that most human rights agencies agree that the violence and human rights violations in Mexico have increased substantially in the last five years, the author reviewed all twenty-one available BIA decisions on CAT protection claims by Mexican nationals made between 2011 and 2016. The decisions yielded little insight into the BIA's opinions on circumstances in Mexico. Almost none of the decisions addressed the merits of the cases, and none was designated as precedential. Fourteen of the appeals were denied for procedural reasons (failure to file an application, failure to allege a prima facie case to reopen an earlier decision, and so forth); two appeals were granted and remanded for new hearings on denial of the right to have counsel present before the immigration judge.

One case, *In re: Eber Salgado-Gutierres,* 2015 WL 1605446, BIA 2015, was remanded to the immigration judge for presentation of a full application for CAT protection. (After remand and presentation of a full application for CAT relief, the immigration judge and BIA denied the applications for political asylum and CAT relief on the facts, a decision upheld by the Court of Appeals [*Eber Salgado-Gutierrez v. Lynch*, No. 16-1534, 8/24/2016].) In another, *In re: Adrian de Alba Castrejon,* 2015 WL 1208207, BIA 2015, the BIA held that the applicant had not made out a prima facie case that handicapped persons would be tortured in Mexico. In the case of *In re: Federico Salas-Rocha,* 2015

WL 1208076, BIA 2015, the BIA held that an applicant had failed to make a case that he might be subject to torture because it would be known that he had been deported from the United States; and in only one case, *In re: Jose Manuel Bueno-Mercado,* 2010 WL 4509755, BIA 2010, did the BIA state that the applicant was ineligible because the Mexican government would be able to protect the applicant from the feared harm—a finding of no "consent or acquiescence" by the state.

United States Courts of Appeals

As set out in Article III of the U.S. Constitution and the Federal Judiciary Act of 1789, federal judges are lifetime tenured presidential appointments. This allows them to rule on cases without concern for reappointment or reelection. The U.S. Circuit Courts of Appeals have the power to review decisions by the BIA under 8 USC. Sec. 1252 (INA Sec. 242). As the Courts of Appeals issue written decisions, all of which are released to the public, one can observe trends in the jurisprudence in those decisions. The country is divided into twelve judicial circuits with courts having jurisdiction over cases in which the removal hearing was held in their circuit. U.S. Courts of Appeals' decisions are binding precedent on the BIA for cases that arise in the geographical jurisdiction of that particular circuit court. Circuit courts' decisions, particularly those issued by highly regarded judges, can be persuasive (if not precedential) to other Courts of Appeals as well.[3] When a Court of Appeals remands a case to the BIA, a BIA decision in line with the ruling of the court may be designated as precedential for all immigration judges and thereby have national influence on the interpretations of law. There have been some important recent Courts of Appeals opinions on the issue of "consent or acquiescence" (state accountability), which may eventually govern decisions by immigration judges nationwide.

The author reviewed recent trends in two of the most important Courts of Appeals (the Seventh and Ninth Circuits) regarding applications by Mexican nationals for protection under CAT. The Ninth Circuit (comprising Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington states) is particularly important with respect to standards for protection because it is the largest circuit, and its area has the largest population of immigrants and asylum seekers. The Seventh Circuit Court of Appeals (Illinois, Wisconsin, and Indiana) played an important role in the relevant jurisprudence in

part because of the eminence of Judge Richard Posner, often characterized as the most cited federal judge in the entire judicial system (Lattman 2006; Shulman 2017).

This overview does not aim to be the definitive word on the current state of the law in each of the twelve Circuit Courts of Appeals, but rather to spotlight interesting decisions and trends. The author reviewed decisions by these courts that involved Mexican applicants for protection under CAT, published from January 2010 to March 2016.

In the years since the precedential BIA decision in *Matter of S-V,* various Courts of Appeals have interpreted "consent or acquiescence" differently. In the last three years, both the Ninth and Seventh Circuit Courts have made important rulings on the "consent or acquiescence" issue.

The leading decision of the Ninth Circuit Court of Appeals is *Victor Hugo Tapia-Madrigal v. Holder,* 716 F.3d at 505 (2013). The applicant had been a member of the Mexican military who participated in an antinarcotics enforcement effort against the Zetas criminal organization in 2007. The applicant appeared in a nationally broadcast television report of the incidents, after which he was kidnapped and beaten by presumed members of the Zetas. The kidnappers released him with a warning that he tell his commander that the arrested Zetas must be released. At that point, Tapia-Madrigal left military service and heard a few months later that the commander had been killed. Following the commander's killing, Tapia-Madrigal was on the run in Mexico, while his family was visited by strangers asking about his whereabouts. In one instance, shots were fired at him from a passing car in the community where he had hidden. At that point, he left for the United States. Since his arrival in the United States, an anonymous written threat against him was left at his mother's home in Mexico.

In interpreting whether the Mexican government could protect Tapia-Madrigal as part of his claim for political asylum, the BIA relied on evidence that the national Mexican government was willing to control the Zetas. However, according to the Ninth Circuit, the BIA "did not examine the efficacy of those efforts" (*Tapia-Madrigal:* 13). The court went on to say with regard to Tapia-Madrigal's claim for political asylum, "Significant evidence . . . calls into doubt the Mexican government's ability to control Los Zetas. The available country conditions evidence demonstrates that violent crime traceable to drug cartels remains high despite the Mexican government's efforts to quell it. . . . Corruption at the state and local levels 'continues to be a problem' [citing a U.S. Department of State report] . . ." (14). Citing the same evidence with

respect to the request for CAT protection, the Ninth Circuit declared, "Both [a political asylum decision and a decision on CAT protection] require examining the efficacy of the government's efforts to stop the drug cartels' violence and both are affected by the degree of corruption that exists in Mexico's government" (19). The court went on to state that the successful CAT relief applicant need not prove that the "entire foreign government" would consent to or acquiesce in his torture, but that the acquiescing agent need only be "a public official" (20). Before ordering that the BIA reconsider Tapia-Madrigal's application, the court further found, "Voluminous evidence in the record explains that corruption of public officials in Mexico remains a problem, particularly at the state and local levels of government, with police officers and prison guards frequently working directly on behalf of drug cartels" (20).

In a later decision involving a transgender woman who presented evidence that she was beaten and tortured by local police in Mexico, *Avendano-Hernandez v. Lynch,* No. 13-73744 (9th Cir. 2015), a different panel of the Ninth Circuit followed the standard established in *Tapia-Madrigal*. This panel further elaborated, "We reject the [U.S.] government's attempts to characterize these police and military officers are merely rogue or corrupt officials. . . . It is enough for her to show that she was subject to torture at the hands of local officials" (*Avendano-Hernandez:* 14).

In two recent Seventh Circuit decisions, both authored by Judge Richard Posner (with four other judges on two separate panels), the court overturned findings by the BIA and also set a standard for "consent or acquiescence" that is more generous than that of the BIA. Posner ruled that the "substantial grounds for believing [that an applicant would face torture]" language in CAT required proof only of "likelihood," but not a greater than 50 percent probability, which is what the BIA's "more likely than not" standard requires.

In *Hair Rodriguez-Molinero,* No. 15-1860 (7th Cir. 2015), Judge Posner and two other judges considered the case of a Mexican citizen who had resided in the United States for many years. Involved in selling methamphetamines for the Zetas, he had been previously tortured in Mexico at the Zetas' behest ("to test his loyalty") and feared torture on return for several reasons. He owed the Zetas $30,000 for methamphetamines confiscated on his arrest; he had become an informant for the U.S. Drug Enforcement Administration and Federal Bureau of Investigation; and his uncle had been kidnapped and killed in Mexico by Zetas seeking information about Rodriguez-Molinero. Rodriguez-Molinero's application for CAT protection followed the completion of his sentence for federal drug crimes.

The court ruled that the "more likely than not" standard for CAT eligibility established in U.S. regulations "cannot be and is not taken literally," as it would contradict the CAT standard of "substantial grounds for believing that" the person "would be in danger of being tortured." Posner established a standard for judges to decide if "there is or is not a substantial risk," a more generous standard than "more likely than not" (*Rodriguez-Molinero:* 2). The court further found that "killing whether or not accompanied by torture" constituted torture under both CAT and U.S. regulations (3). Actions by local corrupt police are sufficient to establish government "consent or acquiescence" (8). On the last point, relying on the 2013 Department of State Human Rights Report, the testimony of an expert witness, and academic articles and books submitted by the applicant, Judge Posner found that the immigration judge had erred in her statement that "the infliction, instigation, or acquiescence in torture must be by the Mexican *government* rather than just Mexican police officers or other government employees" (emphasis in original).

In his usual frank language, Judge Posner said,

> Not the issue! . . . The alien need not show that multiple government officials are complicit. Nor is the issue . . . whether police officers who tortured the petitioner were rogue officers individually compensated by [the criminal cartel] to engage in isolated incidents of retaliatory brutality, rather than evidence of a broader pattern of governmental acquiescence in torture. It is irrelevant whether the police were rogue (in the sense of not serving the interests of the Mexican government) or not. The petitioner did not have to show that the entire Mexican government is complicit in the misconduct of individual police officers. (9)

Judge Posner discounted the position that efforts by the central Mexican government to combat cartels would nullify a claim that the government would "consent or acquiesce," saying, "That the Mexican government may be trying, though apparently without much success, to prevent police from torturing citizens at the behest of drug gangs is irrelevant to this case" (9).

A week later, on December 23, 2015, in *Martin Mendoza-Sanchez v. Loretta Lynch,* F.3d 1182, at 880 (7th Cir. 2015), Judge Posner explicitly directed the BIA to reconsider its standard for "acquiescence." Mendoza-Sanchez had been selling cocaine for a Mexican cartel known as "La Linea." Arrested and convicted of drug dealing in the United States, he was attacked and injured in prison by a member of La Linea who told him that the cartel

believed Mendoza-Sanchez had informed on other members and that they would kill him when he returned to Mexico.

The government had not questioned the credibility of the applicant, nor his story of likely killing or torture by a cartel. Rather, the immigration judge and the BIA found that he had not established that "'a Mexican public official would acquiesce (or be wilfully blind) to such harm'" (*Mendoza-Sanchez:* 2). Judge Posner went on to say, "The Board did this in the face of evidence . . . that police officers routinely collaborate with and protect drug cartels in Mexico" (4). The judge also quoted extensively from the U.S. Department of State 2013 Report on human rights in Mexico, which stated that there is widespread impunity among both the military and the police, that investigations are insufficient, and that there is police involvement in kidnapping and the torture of prisoners. Judge Posner also explicitly found that "contrary to what the Board thought, the presence of the Mexican army in Matamoros supports rather than undermines Mendoza Sanchez's claim that local police will acquiesce in his torture; had the police been protecting the city, the army would have no reason to be there" (5).

In *Mendoza-Sanchez,* Judge Posner urged that the BIA adopt a standard for CAT petitions that applicants "need not prove that the Mexican government is complicit in the misconduct of its police officers." With the agreement of the U.S. government attorneys, Judge Posner remanded the case to the BIA for reconsideration of its analysis of standards for CAT applications. Judge Posner urged the BIA "pay careful heed to the analysis in this opinion and in *Rodriguez-Molinero*" (8). In effect, Judge Posner urged the BIA to take the Seventh Circuit standard and make it the national rule for all immigration courts. It is important to note, however, that a subsequent decision by a panel of the Seventh Circuit, without Judge Posner's participation, denied a Mexican applicant for CAT relief, holding him to a very strict level of proof (*Lozano-Zuniga v. Lynch,* 832 F 3d 822 (7th Cir. 2016)).

Later in 2016, in yet another decision, Judge Posner reiterated his support of the standard above but held that the applicant in the case before the court had not met the factual burden of showing likely torture. (*Eber Salgado-Gutierrez v. Lynch,* No. 16-1534, 8/24/2016.) Judge Posner retired from the bench in September 2017.

Conclusions

The stories of Mexicans applying for protection in the United States are evidence of widespread torture and other human rights violations, of the

impunity that protects perpetrators, and of the inability of the government to control powerful criminal gangs or its own corrupt officials. Given the numbers of Mexicans impacted by such conduct—and Mexico's proximity to the United States—it is not surprising that many U.S. decision-makers may be reluctant to recognize eligibility for political asylum or protection under CAT. In the meantime, it is hoped that U.S. adjudicators will, in the words of Judge Posner, "pay careful heed" to both the applicable legal standards and the testimony of Mexican asylum seekers themselves.

Certainly, Mexicans seeking protection in the United States and their lawyers would benefit by increased access to Mexican analysts of the human rights situation in Mexico, as they prepare applications and seek to advance the U.S. jurisprudence to provide protection where needed. Cross-border communication and collaboration between human rights advocates will benefit individuals seeking protection and, hopefully, influence public policy on both sides of the border.

It is doubtful that the human rights situation in Mexico will improve in the near future, and the U.S. obligation to provide protection will continue. As the Mexican Nobel laureate Carlos Fuentes wrote,

> *Al norte del río grande*
> *al sur del río bravo,*
> *que vuelen las palabras,*
> *pobre México,*
> *pobre Estados Unidos,*
> *tan lejos de Dios,*
> *tan cerca el uno del otro*.
> (North of the Rio Grande
> South of the Rio Bravo [the Mexican name for the Rio Grande],
> the words fly,
> poor Mexico,
> poor United States,
> so far from God,
> so close to each other.)

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