

Winter 2008

Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the "Consent or Acquiescence" Requirement

Monica Fanesi

Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Fanesi, Monica (2008) "Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the "Consent or Acquiescence" Requirement," *Roger Williams University Law Review*: Vol. 13: Iss. 1, Article 10.

Available at: http://docs.rwu.edu/rwu_LR/vol13/iss1/10

This Notes and Comments is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the “Consent or Acquiescence” Requirement

I. INTRODUCTION

Maras¹ have challenged the stability of the post-conflict governments of El Salvador, Guatemala, and Honduras, and tormented the civilian population. Given its effect on U.S. immigration policies, the proliferation of gang violence in these nations has been at the focal point of U.S.-Central American relations.² In the past few years, the U.S. has experienced a sharp and unprecedented increase in the number of petitioners from these Central American nations who cite endemic gang violence as the basis for refugee status.³ These claims however, have been overwhelmingly denied, especially at the appellate level.⁴ Most petitioners seek relief through three separate remedies: asylum, withholding of deportation, and the Convention Against Torture (hereinafter “CAT” or “Convention”). This comment will argue

1. Mara is a Central American Spanish slang term for a gang. Throughout the comment the terms “mara(s)” and “gang(s)” will be used interchangeably.

2. See *L.A. Summit Seeks To Sever International Gang Ties*, ASSOCIATED PRESS, Feb. 7, 2007, available at <http://www.cnn.com/2007/US/02/07/gang.summit.ap/index.html>.

3. N.C. Aizenman, *More Immigrants Seeking Asylum Cite Gang Violence: Applications from Salvadorans, Hondurans, and Guatemalans Have Nearly Doubled*, WASH. POST, Nov. 15, 2006, at A8.

4. See *id.* The number of applications increased from 7,000 in 2004 to 13,000 in 2006, but only 721 were granted in 2005. *Id.*

CAT provides a potentially more successful alternative to asylum and withholding of deportation for Central American claimants seeking relief from gang violence in their home countries. This comment will further suggest a manner in which immigration judges and appellate courts should address these claims by considering relevant country conditions in these three nations, and how these conditions impact the individual claimant.

Part II will address the sources and effects of the problem of gang violence in El Salvador, Guatemala, and Honduras. Part III will describe two possible remedies, asylum and withholding of deportation, for claimants seeking relief from this rampant violence, and present the obstacles faced by Central American claimants in seeking these remedies. Part IV will describe relief pursuant to the Convention and present arguments as to why CAT may be a worthwhile alternative to both asylum and withholding of deportation. Part V will present portraits of both the claim of a Central American gang recruit and the claim of a former gang member, and suggest a manner in which immigration judges and reviewing appellate courts should assess these claims in light of the unique country conditions that exist in each of these three nations. Finally, Part VI will address additional policy considerations.

II. ENDEMIC GANG VIOLENCE IN EL SALVADOR, GUATEMALA, AND HONDURAS: ITS ROOTS AND EFFECTS

Undoubtedly, gang violence is one of the primary issues impeding social and economic growth in the post-conflict nations of El Salvador, Guatemala, and Honduras. This section will describe the problem of gang violence in each of these three nations.

A. El Salvador

El Salvador signed the Peace Accords⁵ in 1992, ending years

5. The Peace Accords were signed by the El Salvadoran Government and the Farabundo Marti National Liberation Front (FMLN), a guerilla organization. The Accords were brokered by the United States. See U.S. AGENCY FOR INT'L DEV., CENTRAL AMERICA AND MEXICO GANG ASSESSMENT ANNEX 1: EL SALVADOR PROFILE (2006) [hereinafter USAID STUDY: EL SALVADOR].

of civil war.⁶ Despite this remarkable landmark, violence, the majority of which is attributed to the dominance of maras, has emerged as an impediment to peace, stability, and the nation's prospects for economic and social recovery after years of civil conflict. Mara Salvatrucha 13 (also known as MS-13) and Mara 18, the two most prominent gangs in the nations profiled in this comment, have their roots in the streets of Los Angeles, California.⁷ Both of the gang names symbolize Los Angeles street names where the gangs originated, their ranks filled by Salvadorans that fled to the U.S. during the civil war.⁸

After the signing of the Peace Accords in 1992, the U.S. began a deportation policy that resulted in the return of thousands of Salvadorans to their homeland.⁹ The deportation of gang members, coupled with a government that had only just begun to recover from years of civil war, created an environment ripe for proliferation of the gang culture that developed from the streets of Los Angeles and the California prison system. One commentator writes:

The Central American republics are laden with poverty and have histories of armed conflict. The broken family structures, violent childhoods, abject poverty, and large black market of left over war caliber weapons which allow MS-13 to flourish in El Salvador exist throughout Central America. Deportation places Mara Salvatrucha in a position to arm itself, recruit thousands of new members, establish cells across international borders, and kill thousands of innocent victims. It should be no surprise that Mara Salvatrucha is now a threat in Honduras, Guatemala, Panama, Costa Rica, and Mexico.¹⁰

Several authors have been critical of the U.S.'s deportation policy, arguing that the U.S. is aggravating the problem in El Salvador.¹¹ Despite condemnation from human rights groups and

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See* Juan Fogelbach, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle To Reclaim Social Order*, 7 SAN DIEGO INT'L L.J. 223, 252 (2005).

11. *See, e.g.*, Fogelbach, *supra* note 10; Ellen Padilla, *Congress and Courts Challenged by Two-Way Flow of Gang Violence and Asylum Seekers*, 20 GEO. IMMIGR. L.J. 163 (2005). This issue will be addressed more

other activists, deportation of known Salvadoran gang members continues to be the U.S.'s policy.¹²

It is estimated there are as many as 40,000 members of MS-13 and Mara 18 in El Salvador.¹³ The homicide rate is 40 per 100,000, and the El Salvadoran Government attributes 40% of these homicides to gang-related killings.¹⁴ Gang recruitment is perpetuated by aggressive and often violent means and by the lure of the gang lifestyle in the face of disparate income inequality, lack of educational opportunities, and unemployment. Petitioners for asylum claim gang activities, and the threat of violence affects them everyday of their lives.¹⁵ Males as young as fifteen live in fear of recruitment techniques including threats to their families and physical violence.¹⁶ Also, gang members who seek to leave the gang are threatened with their lives.¹⁷ Finally, although the majority of petitioners are male, women too live in fear of rape and beatings at the hands of gang members that rule with impunity.¹⁸

Gang activities have consequences national in character. Rampant violence and upheaval caused by the dominance of the Maras has resulted in the deterrence of much needed foreign investment.¹⁹ Governmental responses to gang violence, including violent crackdowns and "dragnet" techniques, have led to a mistrust of the police force and government that threatens the nation's already fragile transition into democracy.²⁰ Thus, besides terrorizing the civilian population, gang activities have stifled the post-conflict transition of El Salvador into a politically and

comprehensively later in this comment.

12. See, e.g., Fogelbach, *supra* note 10, at 224-25.

13. See USAID STUDY: EL SALVADOR, *supra* note 5.

14. See *id.*; The homicide rate in the U.S. is 5.7 per 100,000. U.S. AGENCY FOR INT'L DEV., CENTRAL AMERICA AND MEXICO GANG ASSESSMENT ANNEX 2: GUATEMALA PROFILE (2006) [hereinafter USAID STUDY: GUATEMALA].

15. See, e.g., *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005); *Menjivar v. Gonzales*, 416 F.3d 918 (8th Cir. 2005); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004).

16. See, e.g., *Escobar*, 417 F.3d at 364; *Lopez-Soto*, 383 F.3d at 230.

17. See, e.g., *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003).

18. See, e.g., *Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005).

19. See USAID STUDY: EL SALVADOR, *supra* note 5.

20. See *id.* Criticisms of these governmental responses by international human rights groups will be addressed later in this comment *infra* Part VI.

economically stable democracy.

B. Guatemala

After thirty-six years of civil conflict, Guatemala signed the Peace Accords²¹ in 1996, but “the transition from war to peace has not been a painless passage and peace continues to remain elusive.”²² The homicide rate in Guatemala is 35 per 100,000, which is slightly but not significantly lower than that of El Salvador.²³ The country’s most notorious gang is MS-13. The emergence of MS-13 in Guatemala has been attributed to the spread of the gang culture from El Salvador to neighboring Guatemala and Honduras, and U.S. deportation policies.²⁴ While MS-13 boasts the largest gang membership in Guatemala, Mara 18 (called Barrio 18 in Guatemala) also has a presence in the nation.²⁵ The United States Agency for International Development Study (“USAID Study”) points to several factors which have contributed to the problem of gang proliferation in Guatemala: marginal urban enclaves; large numbers of uneducated and unemployed youth; poverty and income inequality; minimal state presence; drugs; U.S. deportation policies; and an ineffective judicial system.²⁶

The national effects of gang activities in Guatemala include: deterred trade and investment; privatization of security; stigmatization and victimization of youth; reduced faith in democracy; institutional and extra-judicial violence; and oversaturated, counter-productive prisons.²⁷

C. Honduras

While civil wars raged in El Salvador and Guatemala, Honduras was involved in civil strife with neighboring

21. USAID STUDY: GUATEMALA, *supra* note 14. The Peace Accords were signed by the Guatemalan Government and the Guatemalan National Revolutionary Unity (GNRU), a guerilla organization. These Accords, like those signed between the El Salvador Government and its guerilla opposition, were brokered by the United States. *Id.*

22. *Id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

Nicaragua.²⁸ The signing of the Peace Accords by Honduras' neighbors was viewed as a turning point for the Central American nation once considered a repressive government with a long history of human rights abuses.²⁹ Complete political and economic reformation, however, still seems to elude the nation. Honduras is one of the poorest nations in the region,³⁰ and thus, has become a fertile breeding ground for the gang violence that plagues its neighbors. In 1999, Honduras had a homicide rate of a shocking 154 per 100,000.³¹ In recent years this number has fallen, but the rate remains 46 in 100,000, higher than both El Salvador and Guatemala.³² Violence amongst youth in Honduras remains the worst in Central America. MS-13 and Mara 18 are both deeply entrenched in Honduran society, a problem exacerbated by U.S. deportation policies. Many of the causes and effects of gang violence felt in Honduras mirror those felt by its neighbors, Guatemala and El Salvador.

III. AVENUES OF RELIEF IN THE UNITED STATES

There are three remedies a petitioner may seek in applying for relief in the United States from conditions in their home country: (1) asylum; (2) withholding of deportation; and (3) relief pursuant to the Convention Against Torture. The first two remedies, and the challenges faced by petitioners seeking relief from gang violence in Central America through these remedies, will be discussed in this section.

A. Asylum: The Most Coveted Form of Relief

A petitioner granted asylum will receive benefits including legal immigration status,³³ work authorization,³⁴ the ability to bring a spouse or child into the country³⁵ and, after one year, the

28. See U.S. AGENCY FOR INT'L. DEV., CENTRAL AMERICA AND MEXICO GANG ASSESSMENT ANNEX 3: HONDURAS PROFILE (2006) [hereinafter USAID STUDY: HONDURAS].

29. *Id.*

30. *Id.* The per capita income is a mere 800 U.S. dollars. *Id.*

31. *Id.*

32. See *id.*

33. 8 U.S.C. § 1158(c)(1)(A) (2007).

34. *Id.* § 1158(c)(1)(B).

35. *Id.* § 1158(b)(3).

opportunity to change their status from refugee to permanent resident.³⁶ An asylum seeker must prove he is a refugee, defined as:

[A]ny 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.³⁷

Thus, an asylum applicant must demonstrate he is unable or unwilling to return to his home country because of a well-founded fear³⁸ of persecution on account of one of the five statutory grounds.³⁹

Meeting the asylum requirement has proven nearly insurmountable for petitioners from El Salvador, Guatemala, and Honduras who seek relief from gang violence.⁴⁰ Although asylum petitioners from these three nations can usually satisfy the requirement that their fear of persecution at the hands of gangs be "well-founded,"⁴¹ their claims have been denied because they do not fit comfortably into one of the five statutorily enumerated

36. *Id.* § 1159(a)(1).

37. *Id.* § 1101(42)(A); *see also* Immigration and Nationality Act, 8 U.S.C.A. § 101(42)(A) (2007).

38. There are four elements in evaluating the "well-founded fear": (1) the applicant possesses a characteristic or belief that a persecutor seeks to overcome in others through some form of punishment; (2) the persecutor is aware, or could be aware, that the applicant possesses this belief or characteristic; (3) the persecutor has the capability of punishing the applicant; and (4) the persecutor has an inclination to punish the applicant. *See In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987); *see also In re Acosta*, 19 I. & N. Dec. 211, 226 (B.I.A. 1985).

39. *See In re Sanchez*, 19 I. & N. 276, 283 (B.I.A. 1985); *see also* *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 423, 428 (1987).

40. *See, e.g.,* *Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005); *Menjivar v. Gonzales*, 416 F.3d 918 (8th Cir. 2005); *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004); *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003).

41. *See Lopez-Soto*, 383 F.3d at 234.

grounds.⁴²

Of the five statutorily protected grounds, petitioners from these three nations can automatically eliminate race and nationality from their argument for asylum, because gang members within their home country (in almost every instance) are members of the same race and nationality. Thus, petitioners are left to claim their persecution is based upon their political opinion(s), religion, or membership in a particular social group. An anti-gang stance has been accepted as a political opinion by the Ninth Circuit,⁴³ however, this basis has been unanimously rejected in the context of petitioners seeking asylum from gang violence in El Salvador, Guatemala, and Honduras.⁴⁴ Claims based upon religion have met similar obstacles.⁴⁵ Therefore, applicants from these three nations have relied upon their membership in a particular social group. Indeed, one commentator suggests membership in a particular social group is the easiest way for these claimants to break through the formidable asylum barrier erected by federal courts in this country.⁴⁶

Membership in a particular social group, however, poses its own set of problems for asylum seekers from El Salvador, Guatemala, and Honduras.⁴⁷ To prove membership in a particular social group, a claimant must show: the existence of a certain social group; their membership in this social group; and that they have a well-founded fear of persecution based upon their

42. See *id.* at 235-37.

43. *Nnachi-Anydiegwu v. Gonzales*, 134 Fed. App'x. 171, 173-74 (9th Cir. 2005).

44. See *Romero-Rodriguez v. U.S. Att'y Gen.*, 131 Fed. App'x. 203, 205-06 (11th Cir. 2005) (applicant argued he was eligible for asylum because of his political and religious anti-gang beliefs).

45. See *id.*

46. See Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 422 (2006). Corsetti's comment discusses reasons why claims based upon political opinion and religion have been denied, and argues membership in a particular social group is a worthwhile avenue for these claimants to pursue in seeking asylum.

47. See, e.g., Corsetti, *supra* note 46, at 422; Michele A. Voss, *Young and Marked for Death: Expanding the Definition of "Particular Social Group" in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235 (2005).

membership in this social group (known as the “nexus requirement”).⁴⁸ One of the immediate problems in this analysis is there is not a uniform definition of “particular social group” amongst the Circuits.⁴⁹ The First,⁵⁰ Third,⁵¹ Fourth,⁵² Fifth,⁵³ Sixth,⁵⁴ and Seventh⁵⁵ Circuits adopted the definition formulated by the Board of Immigration Appeals (B.I.A.) in *In re Acosta*⁵⁶:

[W]e interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.⁵⁷

The Ninth Circuit adopted a broader interpretation defining membership in a “particular social group” as a “voluntary associational relationship,”⁵⁸ but added in a preceding decision it may also be based upon an “innate characteristic that is so fundamental to the identities or consciences of its members that

48. *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (quoting *Sharif v. INS*, 87 F.3d 932, 936 (7th Cir. 1996)). This test was also adopted and applied by the Third and Fourth Circuits. See, e.g., *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1983).

49. This problem is at the core of Voss’ note. See Voss, *supra* note 47, at 252. She calls for a uniform definition of “particular social group” to ameliorate judicial review of asylum claimants seeking relief from gang violence in their home country. See *id.*

50. *Alvarez-Flores v. INS*, 909 F.2d 1, 7-8 (1st Cir. 1990).

51. *Fatin*, 12 F.3d at 1239-40.

52. *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

53. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002).

54. *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003).

55. *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998).

56. 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985).

57. *Id.*

58. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (this definition was meant to include former association).

members either cannot or should not be required to change it.”⁵⁹ The Second Circuit adopted the Ninth Circuit’s view that “particular social group” refers to “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest,” but has also noted members of a particular social group must be externally distinguishable.⁶⁰ One commentator suggests the absence of a uniform definition of “particular social group” poses an obstacle to gang violence asylum petitioners because the biases of immigration judges, arbitrariness in decisions, and an inefficient use of the appellate process are the natural results of this lack of uniformity.⁶¹

An alternative and yet equally formidable problem to claimants’ reliance on membership in a particular social group is that courts have been reluctant to grant asylum to claimants whose relied upon social group is overly broad. Thus, claims based upon membership in groups such as “tattooed youth,”⁶² “Honduran street children,”⁶³ and “young men from a small town in Guatemala where criminal gangs are present who refuse to join the gang”⁶⁴ have failed. A related problem is fulfillment of the “nexus requirement,” which requires the claimant to show their persecution is based upon one of the statutory grounds: even claimants that have presented a cognizable argument for their membership in a particular social group, the most accepted being membership in a nuclear family, may face denial if they cannot show they were targeted by the gang *because* of their family membership.⁶⁵ As the Fourth Circuit pointed out in *Lopez-Soto v. Ashcroft*, petitioner Lopez-Soto was not targeted because of his family, but rather because “he was a 16 year-old male living in . . .

59. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (the Eighth Circuit has adopted this definition as well).

60. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (quoting *Sanchez-Trujillo*, 801 F.2d at 1576). In a recent decision, however, the Second Circuit seems to repudiate its former interpretation of the scope of “particular social group” in favor of the *Acosta* test adopted by the majority of the Circuits. See *Gao v. Gonzales*, 440 F.3d 62, 69-70 (2d Cir. 2006).

61. See *Voss*, *supra* note 47, at 252-58.

62. *Castellano-Chacon*, 341 F.3d 533, 549 (6th Cir. 2003).

63. *Escobar v. Gonzales*, 417 F.3d 363, 367-68 (3d Cir. 2005).

64. *Santos-Davila v. Gonzales*, No. 05-74360, 2006 U.S. App. LEXIS 28040, at *2-3 (9th Cir. Nov. 6, 2006).

65. See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 234-39 (4th Cir. 2004).

Guatemala [where gang violence] has reached pandemic proportions”⁶⁶ The Fourth Circuit rejected the nexus between Lopez-Soto’s family and his persecution at the hands of gang members, instead favoring a large social group (young males in Guatemala) which other Courts have shown a predilection to reject.⁶⁷

Therefore, relief in the form of asylum has eluded petitioners from El Salvador, Guatemala, and Honduras because they do not fit comfortably into one of the five enumerated statutory grounds. Although “membership in a particular social group” seems to be the most promising avenue, interpretation disagreements amongst the Circuits, judicial rejection of social groups that are overly broad, and a petitioner’s inability to satisfy the nexus requirement have resulted in an overwhelming denial of these claims.

B. Withholding of Deportation

A grant of withholding of deportation and relief under Article 3 of CAT⁶⁸ differ from a grant of asylum in two major respects: (1) neither withholding of deportation nor relief pursuant to CAT entitles a petitioner to legal immigration status (and the coinciding opportunity to apply for permanent legal status within one year),⁶⁹ and (2) the court is not prohibited from deporting the petitioner to a third country where the threat of persecution or torture does not exist.⁷⁰ The Supreme Court has pointed out the standard for proving withholding of deportation is even more stringent than that which is required to prove a grant of asylum.⁷¹ A petitioner applying for withholding of deportation must show his “life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular

66. *Id.* at 237.

67. *See id.*; *See, e.g., Escobar*, 417 F.3d at 367-68; *Santos-Davila*, 2006 U.S. App. LEXIS 28040, at *2-3.

68. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Apr. 18, 1988, 1465 U.N.T.S. 114 [hereinafter CAT art. 3]. Although the burden of proof required for withholding of deportation and relief pursuant to Article 3 of CAT is different, both result in relief in the form of withholding of deportation. *Id.*

69. 8 C.F.R. § 208.17(b)(1)(i) (2007).

70. *Id.* § 208.16(f) (this relief is referred to as deferral of deportation).

71. *See INS v. Cardozo-Fonseca*, 480 U.S. 421, 449 (1987).

social group, or political opinion.”⁷² Thus, a reviewing court is required to make an *objective* finding that the alien will “more likely than not” be subject to persecution based upon one of the five statutory grounds if forced to return to his or her home country.⁷³ Furthermore, upon making this finding, a stop deportation order *must* be issued.⁷⁴ Because a petitioner need not show it is “more likely than not” he will be persecuted if forced to return to his home country when making an asylum claim, the Supreme Court has noted the Attorney General has more discretion in granting a claim of asylum than in granting a claim of withholding of deportation.⁷⁵

Since courts have interpreted the standard for a grant of withholding of deportation to be more stringent than that which is required for a grant of asylum, most petitioners who are denied a grant of asylum are subsequently denied a grant of withholding of deportation. This denial has been the trend in cases involving petitioners from El Salvador, Guatemala, and Honduras who seek relief from the gang violence that has overcome their home lands.⁷⁶

IV. THE CONVENTION AGAINST TORTURE: APPLICABLE STANDARDS AND CAT AS AN ALTERNATIVE FOR CENTRAL AMERICAN PETITIONERS

Article 3 of CAT states, “[n]o State Party shall expel, return 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.”⁷⁷ Courts have interpreted Article 3 of CAT to mean a claimant may not be deported to a country where it is “more likely than not” he would be tortured.⁷⁸ CAT, unlike asylum or withholding of deportation, does not require a petitioner

72. 8 U.S.C. § 1231(b)(3)(A) (2007).

73. See *Cardozo-Fonseca*, 480 U.S. at 430 (the reviewing court does not make a subjective inquiry when assessing eligibility for withholding of deportation, as it does for asylum in evaluating “well founded fear”).

74. See *id.* at 449-50 (a grant of withholding of deportation is not discretionary; it is mandatory if this objective finding is made).

75. See *id.*

76. See, e.g., *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 239 n.14 (4th Cir. 2004).

77. CAT art. 3, *supra* note 68, at 114.

78. 8 C.F.R. § 208.16(c)(2) (2007); see e.g., *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001).

to base his claim on one of the five enumerated statutory grounds. The Convention defines torture in the following manner:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷⁹

Thus, a cognizable CAT claim has two requirements. First, the claimant must show that if he is forced to return to his home country, then it is more likely than not that he will be subjected to activity considered "torture" under the Convention's definition, and second, that such "torture" would be inflicted "with the consent or acquiescence of a public official."⁸⁰

Interpretation of "consent or acquiescence" has been at the center of CAT jurisprudence.⁸¹ One interpretation of "consent or acquiescence" was offered by the B.I.A. in *In re S-V*.⁸² The B.I.A. noted, "[a] public official's acquiescence to torture 'requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.'"⁸³ The B.I.A. interpreted this provision to mean a petitioner must show government officials are "willfully accepting" of the torture.⁸⁴ The

79. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Apr. 18, 1988, 1465 U.N.T.S. 113-14 [hereinafter CAT art. 1]; see also 8 C.F.R. § 208.18(a)(1)-(7) (2007).

80. CAT art. 1, *supra* note 79, at 113-14; CAT art. 3, *supra* note 68, at 113-14; see also 8 C.F.R. § 208.18(a)(7) (2007).

81. See, e.g., *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *In re S-V*, 22 I. & N. Dec. 1306 (B.I.A. 2000).

82. 22 I. & N. Dec. 1306 (B.I.A. 2000).

83. *Id.* at 1311 (quoting 8 C.F.R. § 208.18(a)(7)).

84. *Id.* at 1312.

Court continued:

Article 3 of the Convention Against Torture does not extend protection to persons fearing entities that a government is unable to control. In fact, the United Nations Committee Against Torture stated that Article 3 does not provide protection in cases where pain or suffering is inflicted by a nongovernmental entity that is not acting by or at the instigation, consent, or acquiescence of a public official.⁸⁵

The standard of “willfully accepting” is a high bar for CAT claimants. Under this standard, a claimant must show his home government is both aware of the activity constituting torture, and tolerates its occurrence.⁸⁶ This interpretation represents a narrow construction of the Convention, which is detrimental to claimants in all contexts.

Fortunately, Circuit courts confronted with interpretation of “consent or acquiescence” have favored a broader and more inclusive definition.⁸⁷ In *Zheng v. Ashcroft*,⁸⁸ the Ninth Circuit rejected the B.I.A.’s interpretation of “consent or acquiescence,” and instead articulated a standard more encompassing of the plights of CAT claimants. The Court found the B.I.A.’s interpretation to be in contravention of the legislative intent and history of the Convention, stating, “B.I.A.’s interpretation of *acquiescence* to require that government officials ‘are willfully accepting’ of torture to their citizens by a third party is contrary to clearly expressed congressional intent to require only ‘awareness,’ and not to require ‘actual knowledge’ or ‘willful[] accept[ance]’ in the definition of acquiescence.”⁸⁹ Therefore, “[t]he correct inquiry as intended by the Senate is whether a respondent can show that public officials demonstrate ‘willful blindness’ to the torture of their citizens by third parties, or as stated by the Fifth Circuit,

85. *Id.* at 1312-13.

86. *Id.* at 1312.

87. *See, e.g.,* *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341 (5th Cir. 2002).

88. 332 F.3d 1186.

89. *Id.* at 1188-89.

whether public officials ‘would turn a blind eye to torture.’⁹⁰ The Second, Fourth, and Fifth Circuits were similarly persuaded by this interpretation and have adopted this standard for the evaluation of CAT Claims.⁹¹

Although the Supreme Court has not ruled on the definition of “consent or acquiescence” under CAT, the circuits uniformly accepted the “willful blindness” standard.⁹² Thus, it is entirely plausible for a CAT claimant to argue “willful blindness” is the applicable test for determination of whether or not his home government has consented or acquiesced to torture. One author on the subject writes:

Given that several circuits have . . . specifically endorsed a broader reading of the consent or acquiescence requirement than the B.I.A. or the Attorney General, and given that a broader reading is more in keeping with the intent of the Senate and the goals of the treaty . . . the appropriate standard under which to analyze the extent of government involvement is “willful blindness” and not “willful acceptance.”⁹³

Therefore, in addition to proving it is more likely than not he will be tortured, a CAT claimant need only prove his home government will demonstrate “willful blindness” to his torture.

Relief pursuant to CAT is a worthwhile alternative to asylum and withholding of deportation for a petitioner seeking relief from gang violence in Central America. As a preliminary matter, the U.S. is reluctant to label the activities of countries with which it maintains peaceful relations as “torture.”⁹⁴ This policy could create a problem for Central American gang members and gang recruits. U.S. courts should recognize this approach does not serve the interests of an individual CAT claimant and frustrates the very purpose for which Article 3 of the Convention was created: to prevent host countries from deporting claimants to a country where they are likely to be tortured.

Part III of this comment examined the challenges faced by

90. *Id.* at 1196 (quoting *Ontunez-Tursios*, 303 F.3d at 355).

91. *See Khouzam*, 361 F.3d at 170; *Lopez-Soto*, 383 F.3d at 240-41; *Ontunez-Tursios*, 303 F.3d at 355.

92. *See cases cited supra* note 91.

93. Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of Its Citizens?* 19 GEO. IMMIGR. L.J. 585, 598-99 (2005).

94. CAT art. 1, *supra* note 79, at 113-14; Corsetti, *supra* note 46, at 430.

these claimants in basing their claims upon one of the five statutorily enumerated grounds (race, religion, nationality, membership in a particular social group, and political opinion), as required for both a petition for asylum and withholding of deportation. Because CAT does not require claims to be based upon one of the five statutorily enumerated grounds, it provides an immediate advantage to Central American petitioners. Furthermore, the Convention provides a broad definition of torture.⁹⁵ This broad definition bodes in favor of petitioners who seek relief from gang violence in El Salvador, Guatemala, and Honduras. Petitioners from these three nations, whether they be gang recruits or former gang members, can demonstrate they were tortured and will likely be tortured if forced to return to their home country by showing evidence of either specific threats or physical violence at the hands of gang members or government officials.⁹⁶ Threats to the individual or the individual's family can certainly qualify as a "mental" act causing "severe pain and suffering."⁹⁷ Physical violence in the forms of beatings or even rape are almost certainly covered under Article 1's definition of torture.⁹⁸ In fact, courts assessing CAT claims have conceded petitioners from El Salvador, Guatemala, and Honduras, citing gang violence as the basis of their claims, fulfill the "torture" requirement.⁹⁹

Claimants, both from Central America and elsewhere, have experienced greater difficulty in their fulfillment of CAT's second requirement, proving their home governments "consent[ed] or acquiesce[d]" to the "torture."¹⁰⁰ Fortunately for CAT claimants, courts have agreed that a showing of "willful blindness" by the

95. CAT art. 1, *supra* note 79, at 113-14; *see also* 8 C.F.R. § 208.18(a)(1)-(6) (2007).

96. The claimant, however, needs to prove more than just country-wide torture. *See, e.g.,* Castellano-Chacon v. INS, 341 F.3d 533, 552 (6th Cir. 2003); Corsetti, *supra* note 46, at 434.

97. *See, e.g.,* Menjivar v. Gonzales, 416 F.3d 918 (8th Cir. 2005); Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004).

98. *See, e.g.,* Menjivar, 416 F.3d at 918; Lopez-Soto, 383 F.3d at 228.

99. The Fourth Court found it was not "disputed that it was more likely than not that [petitioner] Lopez-Soto would be tortured if removed." *See Lopez-Soto*, 383 F.3d at 240.

100. Menjivar, 416 F.3d at 923; Lopez-Soto, 383 F.3d at 240; CAT art. 3, *supra* note 68; *see also* 8 C.F.R. § 208.18(a)(7) (2007).

claimant's home government is sufficient to demonstrate governmental "consent or acquiescence" to their torture.¹⁰¹ An immigration judge's or an appellate court's understanding of the relevant country conditions in El Salvador, Guatemala, and Honduras is imperative for a proper determination of whether or not a CAT claimant seeking relief from gang violence in these nations has met the "willful blindness" standard. Part V of this comment will attempt to develop this framework.

V. THE CONVENTION AGAINST TORTURE: A FRAMEWORK FOR IMMIGRATION JUDGES AND APPELLATE COURTS TO ASSESS CENTRAL AMERICAN CLAIMANTS' FULFILLMENT OF "CONSENT OR ACQUIESCENCE"

This section will include the facts and holding of two U.S. Circuit Court opinions involving gang violence in Central America: *Lopez-Soto v. Ashcroft*,¹⁰² in which the claims of a gang recruit from Guatemala were denied, and *Castellano-Chacon v. INS*,¹⁰³ in which the claims of a former gang member from Honduras were denied. It will proceed by providing a framework for which CAT claimants from El Salvador, Guatemala, and Honduras may show their home governments demonstrated "willful blindness" to their torture at the hands of MS-13 or Mara 18. Although the analysis will be different for gang recruits and former gang members, the central theme is that judicial knowledge of relevant country conditions, and the degree of specificity to which the claimant is able to link his claim to these unique conditions, should be determinative of whether his CAT claim succeeds or fails.

A. Portrait of a Gang Recruit: *Lopez-Soto v. Ashcroft*

The story of Rutilio Lopez-Soto reflects the struggle a young man endured at the hands of MS-13 or Mara 18, when he refused to join their ranks. Lopez-Soto, a native of Guatemala, encountered Mara 18 when the gang recruited his two brothers, who both refused to join.¹⁰⁴ His brother, Edgar, was subsequently

101. See, e.g., *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Lopez-Soto*, 383 F.3d at 228; *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341 (5th Cir. 2002).

102. 383 F.3d 228 (4th Cir. 2004).

103. 341 F.3d 533 (6th Cir. 2003).

104. *Lopez-Soto*, 383 F.3d at 231.

stabbed to death by gang members, consistent with their “join or die” mentality.¹⁰⁵ A police report was filed by the family, complete with the names of the gang members who took part in the killing; however, the perpetrators were never apprehended.¹⁰⁶ When Lopez-Soto was sixteen he and his cousin were approached by members of Mara 18 in a park and were told that they too would be killed if they refused to join the gang.¹⁰⁷ After the incident in the park, threats continued in the form of letters mailed to his home.¹⁰⁸

In response, Lopez-Soto and his cousin, Elmer, decided to flee to the U.S.¹⁰⁹ Lopez-Soto was fortunate enough to make it into the U.S., his cousin however, was apprehended in Mexico and killed by Mara 18 within a short time of his return to Guatemala.¹¹⁰ Lopez-Soto was detained by Immigration and Naturalization Services, and at his deportation hearing, he requested relief in the form of asylum, withholding of deportation, and pursuant to CAT.¹¹¹ The immigration judge denied relief, which was affirmed upon appeal to the B.I.A., and later by the Fourth Circuit.¹¹²

With respect to Lopez-Soto’s CAT claim, the Fourth Circuit noted, “neither the IJ nor the B.I.A. disputed that it was more likely than not that Lopez-Soto would be tortured if removed.”¹¹³ Thus, the immigration judge and the B.I.A., with the Fourth Circuit affirming, conceded Lopez-Soto had met the first requirement of a cognizable CAT claim. The claim was denied because:

While the record may show that, in the abstract, government officials know of Mara 18’s activities, and are generally unable to stop them, it does not show - as Petitioner must - that local government officials demonstrate “willful blindness” to the torture of their citizens by third parties. Here, Lopez-Soto failed to make the appropriate showing that the local officials were aware of, let

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 232.

109. *Id.*

110. *Id.* Elmer’s brother was also killed by Mara 18. *See id.*

111. *Id.*

112. *Id.* at 233, 241.

113. *Id.* at 240.

alone willfully blind to, the harassment suffered by Petitioner, his cousin Elmer, or other family members.¹¹⁴

B. Framework for the Evaluation of a CAT Claimant Who is a Gang Recruit

The burden of proving “consent or acquiescence” by showing the government’s “willful blindness” to the torture inflicted by gangs is arguably more difficult for a gang recruit than it is for a former gang member because El Salvador, Guatemala, and Honduras have created national policies against gangs and gang violence.

In El Salvador, the Mano Dura (Firm Hand) and Super Mano Dura (Super Firm Hand) are law enforcement approaches used to curb gang violence in that nation.¹¹⁵ Mano Dura and Super Mano Dura allow the police to arbitrarily arrest youth suspected of being gang members and place them in prison.¹¹⁶ In Guatemala, political pressure to combat the gangs has forced the government to institute plans for joint police-military units to patrol and arbitrarily detain suspects in crime-ridden parts of the country.¹¹⁷ Unlike El Salvador and Honduras, Guatemala has not legitimated its activities through legislation.¹¹⁸ Like the Mano Dura and Super Mano Dura legislation passed in El Salvador, Honduras’ Ley Anti-Maras is a “zero tolerance campaign against the maras [which has] resonated with voters.”¹¹⁹ The legislation creates a low evidentiary standard for the conviction of suspected gang members rounded up by the police.¹²⁰

Thus, it may appear these three nations have acted in such a manner that proving “consent or acquiesce” of governmental officials by showing their “willful blindness” to the plight of gang recruits is virtually impossible. Courts confronted with CAT claimants seeking relief from private torture at the hands of a non-governmental party to which their home government is

114. *Id.* at 241.

115. See USAID STUDY: EL SALVADOR, *supra* note 5. Super Mano Dura resulted in the arrests of more than 11,000 gang members in just one year. *Id.*

116. *See id.*

117. See USAID STUDY: GUATEMALA, *supra* note 14.

118. *See id.*

119. See USAID STUDY: HONDURAS, *supra* note 28.

120. *See id.*

diametrically opposed have been denied relief under the Convention.¹²¹ A CAT claimant who can demonstrate the presence of relevant factors which negate the national policies of El Salvador, Guatemala, and Honduras may still, however, present a potentially successful claim. A showing of government inefficiency and police corruption resulting in the proliferation of gang violence in these nations, for example, might be a worthwhile avenue for these claimants to pursue.

In El Salvador, “[t]he hard-line enforcement approach has not had the desired effect of curbing gang violence. . . . [g]ang membership seems to be rising despite frequent round-ups of gang members.”¹²² The USAID Study found, “[t]here is a lack of national coordination among the country’s enforcement institutions. . . . [t]he judiciary and police systems are saturated, and there are not enough personnel in these systems to manage the problem of gangs.”¹²³ Similarly, the prison systems have done more to sophisticate the gang culture than to rehabilitate the gang members within its walls.¹²⁴ Gang violence has inundated the police force and forced the government to retreat from certain parts of the country. The USAID Study found, “[a]reas lacking in social services and security, gangs become bolder, and may take on roles normally reserved for the state.”¹²⁵ Furthermore, gangs are a main conduit of narcotics and arms trafficking in the region and thus, provide economic opportunities for police and other government officials to profit at the expense of a civilian population that longs for protection from the terror gangs inflict.¹²⁶ One commentator put the situation in El Salvador in harsh perspective:

121. See *Lukwago v. Ashcroft*, 329 F.3d 157, 183 (3d Cir. 2003) (“Lukwago has not only failed to demonstrate that the Ugandan government acquiesces in the Lord’s Resistance Army’s activities, but the evidence he submitted shows that the Ugandan government and the LRA are in continuous opposition”).

122. See USAID STUDY: EL SALVADOR, *supra* note 5.

123. See *id.*

124. See *id.* Salvadoran prisons are plagued with rampant violence and drug use. Similarly, the Salvadoran prison system is an institution that gangs use to coordinate their criminal enterprises. See *id.*

125. See *id.*

126. See *id.* The USAID Study reports, “[t]here are unsupported claims that the police are directly involved in illegal activities with gang members.” *Id.*

El Salvador is incapable of containing Mara Salvatrucha. Prisons are already overcrowded and rival gang members cannot be housed in separate facilities. The country lacks the financial resources and patience to do this. The police are overburdened with common crime and cannot contain the gang. The judicial system, with pressures from abroad, has not favored necessary legislation aimed to curtail gang activity.¹²⁷

The situation in Guatemala is similar.¹²⁸ The USAID Study notes, “[t]he justice and security sectors are weak, corrupt, overwhelmed, and neglected.”¹²⁹ Like El Salvadoran prisons, Guatemalan prisons are oversaturated and counter-productive: “[P]risons have evolved into graduate schools or training camps for gang members.”¹³⁰ There is widespread frustration with the Government’s inability to provide even the most basic social services, public security, and justice to its citizens given “Guatemala suffers from the region’s lowest public investment in social services and lowest tax collection base from which to fund these investments.”¹³¹ Furthermore, the corruption of government officials in Guatemala is so pervasive that there is a general sense of mistrust and fear of the police. In a 2004 survey, over 70% of Guatemalans believe the police are directly involved in criminal activity of some form or another.¹³² The International Criminal Investigative Training Assistance Program (ICITAP), a U.S. Department of Justice program aimed at training law enforcement officials in foreign nations¹³³ found, “[t]he major challenge to providing police development assistance in Guatemala is the widespread corruption throughout the government, including the police. Hand in hand with the corruption problem goes the serious lack of political will on the part of the Government of Guatemala.”¹³⁴ Corruption has

127. Fogelbach, *supra* note 10, at 253.

128. See USAID STUDY: GUATEMALA, *supra* note 14.

129. See *id.*

130. See *id.*

131. See *id.* The tax collection base in Guatemala is less than 10% of Gross Domestic Product. See *id.*

132. See *id.*

133. This program will be addressed more fully *infra* Part VI.

134. See Dep’t of Just., International Criminal Investigative Training Assistance Program (ICITAP), ICITAP Project Overviews: Guatemala,

naturally led to the under-reporting of gang violence in the forms of beatings, rapes, and even murder. In Honduras, “[t]he Leys Anti-Maras . . . has had mixed results.”¹³⁵ Like its Central American neighbors, the country’s national policy against gangs is plagued by inefficiency and corruption. The prisons are an especially serious problem for the Honduran government.¹³⁶

Therefore, a combination of widespread government corruption and inefficiency has fueled the rise of gangs as “de facto governments” of these three nations.¹³⁷ Patricia Freshwater¹³⁸ writes that there are three “factors . . . relevant to an analysis of the ‘consent or acquiescence’ prong of the Convention Against Torture.” These factors are: the presence of systematic deficiencies in the governmental response to private torture; the involvement of government officials in the torture; and whether or not the de jure government is the de facto government.¹³⁹ Freshwater’s approach to the “consent and acquiescence” requirement of CAT could be extremely useful to claimants from the nations of El Salvador, Guatemala, and Honduras. First, within these three nations, there are systematic deficiencies in the national policies against gang violence. These deficiencies include: a lack of coordination among law enforcement, a lack of law enforcement personnel, an inundated judiciary, and an oversaturated, counter-productive prison system. Furthermore, given the widespread corruption that exists in these three nations, there is evidence of direct governmental involvement in gang activities. Police are often involved in arms and narcotics trafficking and therefore, are more willing to consent to gang violence. Finally, because of the governments’ failures to provide basic social services, there is evidence gangs have assumed roles usually reserved for the state in certain parts of these countries. Therefore, it is arguable gangs are the de facto governments of certain regions.¹⁴⁰ It would be

<http://www.usdoj.gov/criminal/icitap/guatemala.html>.

135. USAID STUDY: HONDURAS, *supra* note 28.

136. *See id.*

137. *See Corsetti, supra* note 47, at 407.

138. *See Freshwater, supra* note 93, at 601.

139. *See id.* at 601-08.

140. Corsetti’s CAT analysis is also helpful, but he fails to take into account the national anti-gang policies present in each of these three nations. He argues a CAT claimant seeking relief from gang recruiting (he does not address the plight of a former gang member) could show “consent or

erroneous however, to infer proof of country-wide deficiencies and government corruption alone are sufficient in developing a cognizable CAT claim. Courts have also rejected CAT claims based solely upon a country's inability to combat violence because of widespread corruption and inefficiency.¹⁴¹ Thus, the challenge is for the claimant to demonstrate specifically how the presence of such factors affects his personal security.

A successful CAT claimant seeking relief from gang recruiting techniques might show that despite the national policy against gangs and gang violence he has been tortured by gangs for refusing to join their ranks and the government has exhibited "willful blindness" to this gang-inflicted torture. The claimant would have to present specific, corroborative¹⁴² evidence that one or more of the following factors are at work in his home country and especially, among local authorities: systematic deficiencies, government corruption, or gangs as de facto governments.¹⁴³ Thus, a claimant such as Lopez-Soto might argue that despite the national policy of Guatemala, he is likely to be tortured because local authorities, even when provided with the names of the culpable gang members, did not competently investigate the murder of his brother.¹⁴⁴ The claimant might show evidence of an

acquiescence" by (1) a showing of the inability of the national government to prevent acts of torture, and (2) a showing of the unwillingness of local officials to do the same. In fulfillment of the "inability" requirement, he points to several factors that contribute to the national problem of gang violence including: "gang infiltration of governmental institutions," underfunding of the criminal justice system, lack of a professional police force, and the presence of too few police officers. In regards to the unwillingness prong, he points to evidence of police corruption and police-gang collusion at the local level. See Corsetti, *supra* note 47, at 431-33.

141. See *Builes v. Nye*, 239 F. Supp. 2d 518, 525 (M.D. Pa. 2003) ("We do not believe that evidence of widespread bribery, corruption and intimidation of government officials, or of the government's powerlessness to prevent torture, satisfies Petitioner's burden of showing acquiescence by the government in torture").

142. Corroboration of claimant testimony may come in many forms. Of those specifically endorsed by the courts, are family affidavits, affidavits of expert witnesses, country and human rights reports, government documents, police reports, newspaper articles, and the testimonies of similarly situated persons. See, e.g., *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003).

143. Freshwater, *supra* note 93, at 601-08.

144. See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 231 (4th Cir. 2004).

insufficient number of law enforcement personnel, a lack of coordination between local law enforcement units, and other systematic deficiencies.¹⁴⁵

In addition, a claimant such as Lopez-Soto might show he and his family received specific threats from gang members and either reported them to the police with no avail or made a conscious decision not to report the incidents to the police because of the systematic deficiencies aforementioned or even because they fear police-gang collusion.¹⁴⁶ A great number of petitioners' claims are denied on the basis that the petitioners did not report instances of gang violence to the police.¹⁴⁷ Courts see this lack of reporting as evidence of either fabrication of claims or a failure to exhaust their home government of its modes of protection.¹⁴⁸ Courts, however, should take into account the individual's own sense of the government, combined with objective evidence of the pervasiveness of government corruption and inefficiency.¹⁴⁹ Thus, a determination of the claimant's fulfillment of the "consent or acquiescence" requirement of a CAT claim should not rest on whether or not the claimant reported the matter to the police, especially if the claimant can show there exists police-gang collusion or other factors present rendering such reporting futile. The court should be open to receiving testimony from the claimant himself about the prevalence of corruption among the authorities in his locality and his sense trust (or mistrust) of local law enforcement. Expert advice or government studies should corroborate such testimony.¹⁵⁰

145. See *id.* This may include evidence of the number of law enforcement personnel assigned to the case, the number of man hours worked, etc.

146. See *id.*

147. See, e.g., *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005); *Menjivar v. Gonzales*, 416 F.3d 918 (8th Cir. 2005); *Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004).

148. See cases cited *supra* note 147.

149. In *Escobar*, *Escobar*, a victim of gang recruitment techniques, claimed "that the Honduran police failed to offer protection to street children . . . like gang members, the police pressured him to steal on their behalf, and threatened him if he refused." See 417 F.3d at 364. Likewise in *Castro-Perez*, the claimant was raped by a notorious gang member and did not report the rape to the police because she believed the police would not investigate. See 409 F.3d at 1070.

150. Thus, I am suggesting that a subjective inquiry, corroborated by objective evidence, should be presented to the immigration judge.

Therefore, this comment urges that immigration judges take into account relevant factors¹⁵¹ present in these three nations that, in essence, negate the national policies against gangs and gang violence. So long as evidence of these factors is presented in a manner that is credible, corroborative, and specifically tailored in a way so it is representative of the claimant's individual bases for relief, the CAT claim should have a reasonable chance of success.

C. Portrait of a Former Gang Member: *Castellano-Chacon v. INS*

Rolando Augustine Castellano-Chacon, a native of Honduras, entered the U.S. illegally when he was sixteen-years-old.¹⁵² While living in New York at the age of eighteen, Castellano-Chacon became a member of MS-13 and, as part of his initiation, received tattoos on his chin, below his right eye, chest, back, both shoulders and arms, and hands.¹⁵³ Castellano-Chacon eventually decided to leave the gang "because of the violence of gang life and the fact that so many members were 'going to jail for life.'"¹⁵⁴ He relocated to Maryland and then to North Carolina in an effort to leave MS-13.¹⁵⁵ While living in Ohio, he was arrested for a minor infraction and served a 30-day jail term, during which he was served with a Notice to Appear before the immigration judge.¹⁵⁶

At his deportation hearing, Castellano-Chacon claimed asylum, withholding of deportation, and relief pursuant to CAT.¹⁵⁷ Castellano-Chacon argued if he was returned to Honduras, he would likely be tortured by the government because his tattoos were an indication of his membership in MS-13.¹⁵⁸ Castellano-Chacon presented an expert witness who explained to the immigration judge there had been a:

[S]teep increase in the number of extra-judicial murders

151. Including, but not limited to, the presence of systematic deficiencies, government corruption, and the rise of gangs as *de facto* governments. See Freshwater, *supra* note 93, at 601-08.

152. *Castellano-Chacon v. INS*, 341 F.3d 533, 538-39 (6th Cir. 2003).

153. *Id.* at 538-39. Castellano-Chacon received all of his tattoos within a one week period, receiving a few each day. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

committed by Honduran security forces and/or paramilitary groups, specifically targeting young men with tattoos, who were assumed to be gang members involved in criminal activities . . . [and] the targeting of gang members is seen by those in power in Honduras as a 'form of acceptable social cleansing.

...

Castellano faces the grave probability of death at the hands of government forces due to his previous gang affiliation and numerous tattoos.¹⁵⁹

The immigration judge denied Castellano-Chacon's claims stating, in regards to his CAT claim, "although Castellano had provided evidence of 'general violence,' he had not provided sufficient evidence to demonstrate he would, 'more likely than not,' be at risk of being tortured if he returned to Honduras."¹⁶⁰ The B.I.A. affirmed the decision of the immigration judge finding Castellano-Chacon was not entitled to relief under CAT because "general conditions of violence and gross human rights violations are not sufficient grounds for determining that a particular person would be subjected to torture."¹⁶¹ The Sixth Circuit subsequently affirmed this decision, denying his CAT claim because he failed to provide specific evidence showing the likelihood of his torture.¹⁶²

D. Framework for Evaluation of a CAT Claimant Who is a Former Gang Member

Article 3, § 2 of CAT provides that authorities assessing CAT claims "shall take into account all relevant considerations including . . . the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."¹⁶³ Thus, a CAT claimant who has attempted to leave the gang may have a stronger claim than that of the gang recruit, because there is documented and widely-reported evidence of the hard-line tactics the governments of El Salvador, Guatemala, and Honduras

159. *Id.* at 540.

160. *Id.* at 541.

161. *Id.*

162. *Id.* at 552, 554.

163. *See* CAT art. 3, *supra* note 68; *see also* 8 C.F.R. § 208.16(c)(3) (2007).

have used in their efforts to curb gang proliferation. These tactics, including arbitrary arrests and extra-judicial killings by government-sponsored death squads, have been criticized vehemently by the international community.¹⁶⁴

In El Salvador, human rights groups reported the “arbitrary detentions, torture, and extra-judicial executions” of suspected gang members.¹⁶⁵ Guatemala’s policies have come under even greater scrutiny given the absence of anti-mara legislation legitimating the law enforcement techniques used against gangs in that country.¹⁶⁶ Political pressure to stem the tide of gang violence has created “an enabling environment for increased institutional and extra-judicial violence.”¹⁶⁷ In 2000, corpses of gang members, identified as such by the presence of gang-related tattoos, were discovered near Guatemala City with signs of torture and violent death.¹⁶⁸ The government of Guatemala has been criticized by the international community for taking part in a “social cleansing operation” of suspected gang members.¹⁶⁹ Plans for a joint police-military campaign against gangs have only increased these concerns because such policies are reminiscent of the country’s years of civil war and government-sponsored torture and violence.¹⁷⁰ Under Honduras’ Ley Anti-Maras legislation, “[y]ouths with tattoos on their bodies can be detained and processed” on that basis alone.¹⁷¹ Anti-mara “death squads” have been known to patrol high crime neighborhoods at night, searching for and detaining gang members, and then taking them to the countryside where they are killed.¹⁷² Therefore, the implementation of Central American anti-gang policies constitutes in and of itself grave human rights violations. The USAID Study states, “[these governments have] received . . . accusations from

164. See, e.g., USAID STUDY: EL SALVADOR, *supra* note 5; USAID STUDY: GUATEMALA, *supra* note 14; USAID STUDY: HONDURAS, *supra* note 28.

165. See USAID STUDY: EL SALVADOR, *supra* note 5.

166. See USAID STUDY: GUATEMALA, *supra* note 14.

167. See *id.*

168. See *id.*

169. See *id.*

170. See *id.*

171. See USAID STUDY: HONDURAS, *supra* note 28.

172. See Manuel Bermudez, *Central America: Gang Violence and Anti-Gang Death Squads*, INTER PRESS NEWS SERVICE AGENCY, Sept. 6, 2006, <http://ipsnews.net/news.asp?idnews=30163>.

human rights organizations of using social cleansing tactics or of turning a *blind eye* to the use of such tactics by rogue elements in the police force.”¹⁷³

A former gang member, still covered in gang-related tattoos, is a walking target for arbitrary arrest, detention, or even torture and death. Thus, a claimant, such as Castellano-Chacon, who has vowed to denounce his gang lifestyle, but remains covered in tattoos, can plausibly demonstrate it is more likely than not he will be tortured if forced to return to his home country. Furthermore, the international community has noted the governments of these three nations readily “consent or acquiesce” to the torture of gang members.¹⁷⁴ Despite this showing, the B.I.A. found, and the Sixth Circuit agreed, “general conditions of violence and gross human rights violations are not sufficient grounds for determining that a particular person would be subjected to torture.”¹⁷⁵

This rationale comports with other CAT decisions in which the claimant was only able to show general country conditions without specific evidence of how his individual claims are related to these conditions.¹⁷⁶ Thus, courts require a more specific showing of the country conditions and its effect on the personal security of the claimant. If Castellano-Chacon was a former gang member who resided in Honduras and had previously been arrested, detained, or tortured by government officials his claim would have been more successful.¹⁷⁷ CAT however, does *not*

173. See USAID STUDY: GUATEMALA, *supra* note 14 (emphasis added); see, e.g., Fogelbach, *supra* note 10.

174. See USAID STUDY: EL SALVADOR, *supra* note 5; USAID STUDY: GUATEMALA, *supra* note 14; USAID STUDY: HONDURAS, *supra* note 28. The “willful blindness” standard is clearly met when the government is actively participating and sanctioning the torture.

175. Castellano-Chacon v. INS, 341 F.3d 533, 541 (6th Cir. 2003).

176. See, e.g., Perinpanathan v. INS, 310 F.3d 594 (8th Cir. 2002); Builes v. Nye, 239 F. Supp. 2d 518 (M.D. Pa. 2003); Velasquez-Velasquez v. INS, 53 Fed. App'x. 359 (6th Cir. 2002); Chinchilla-Jimenez v. INS, 226 F. Supp. 2d 680 (E.D. Pa. 2002). The claimants relied on general country conditions alone without showing specific harm.

177. See, e.g., Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004); Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003); Sackie v. Ashcroft, 270 F. Supp. 2d 596 (E.D. Pa. 2003). These claimants showed past persecution or presented more than just a generalized country claim in regards to the probability of them being tortured upon returning.

require a showing of past torture for a claimant to prove it is more likely than not they will be tortured in their home country with the consent and acquiescence of the home government.¹⁷⁸

The Court in *Castellano-Chacon* indicated, “[i]f Castellano had presented specific evidence in support of the contention that the majority of persons *similarly situated* in terms of gang status or tattoos were subject to torture, he might have made his case.”¹⁷⁹ Given Castellano-Chacon’s presentation of relevant country conditions corroborated by expert testimony it would appear as though he made this showing.¹⁸⁰ The Court however, indicated Castellano’s age (27) put him outside of the age range of youths (23 and younger) with tattoos and other suspected gang-related symbols who were arbitrarily arrested, detained, tortured, or even killed.¹⁸¹ The Court’s distinction between a 23 year-old with gang tattoos and a 27 year-old with tattoos seems attenuated given the pervasiveness and well-documented nature of the Honduran Government’s response to gangs.¹⁸² It is worth noting many commentators suggest reviewing courts are biased by petitioners who participate in criminal activity while in the United States.¹⁸³ Deportation of criminals is a well established

178. 8 C.F.R. § 208.16(c)(3) (2007). “In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to: (i) Evidence of past torture inflicted upon the applicant; (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and (iv) Other relevant information regarding conditions in the country of removal.” *Id.*

179. 341 F.3d at 552 (emphasis added).

180. *See id.* at 540-41.

181. *See id.* at 552.

182. The Court’s conclusion that the government would only target gang members under twenty-three is irrational and misplaced. Given the well-documented nature of the “drag-net” tactics used by governmental officials in these three nations, it defies logic to assert older gang members covered in gang-related tattoos will be consciously excluded from arbitrary governmental round-ups. Thus, putting aside the age distinction relied upon by the Sixth Circuit, I would argue Castellano-Chacon provided sufficient evidence that he was entitled to relief under CAT by showing that others “similarly situated” have been tortured by the Honduran government.

183. I suggest the courts reviewing Castellano-Chacon’s claims were biased by the fact Castellano-Chacon was a known member of MS-13 who had participated in criminal activity while in the United States. *See, e.g.,*

immigration policy, despite the criticism it has received.¹⁸⁴

In conclusion, former gang members, like gang recruits, cannot rely solely on a showing of general country conditions that might result in their torture. But by showing one's gang affiliation has put others "similarly situated" at risk of torture at the hands of the governments of El Salvador, Guatemala, and Honduras, a claimant should be able to prove both "torture" and the "consent and acquiescence" of his home government. Nevertheless, judicial bias, and U.S. immigration policies advocating deportation of criminals may still create an obstacle to such claims.

VI. POLICY CONCERNS: OTHER WAYS TO CURB GANG VIOLENCE IN CENTRAL AMERICA

A. Criticism of U.S. Deportation Policies

Many commentators on the subject of gang violence in Central America point to U.S. Deportation policies as being one of the root causes of the problem.¹⁸⁵ Juan Fogelbach argues U.S. Deportation of gang members is an "irrational policy," stating, "[t]he United States should no longer shift the burden of combating Mara Salvatrucha to El Salvador¹⁸⁶ [because]

Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999); Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293 (2003); Valerie Neal, *Slings and Arrows of Outrageous Fortune: The Deportation of "Aggravated Felons"*, 36 VAND. J. TRANSNAT'L L. 1619 (2003). Note: Castellano-Chacon was not convicted of an aggravated felony.

184. For more on deportation of criminals see, e.g., Bleichmar, *supra* note 183; Cook, *supra* note 183; Neal, *supra* note 183. For more on the deportation of gang members and the criticism this policy has received see, e.g., Fogelbach, *supra* note 10, at 252-54 (Fogelbach suggests it is in the interest of U.S. national security to keep gang members (including those with criminal records) in the U.S., rather than deport them, which has been the dominant policy of the U.S.); Padilla, *supra* note 11, at 164-65. This issue will be addressed more comprehensively *infra* Part VI.

185. See, e.g., USAID STUDY: EL SALVADOR, *supra* note 5; USAID STUDY: GUATEMALA, *supra* note 14; USAID STUDY: HONDURAS, *supra* note 28; Fogelbach, *supra* note 10; Padilla, *supra* note 11.

186. Fogelbach's article focuses on El Salvador, but his claims can certainly be applied to Guatemala and Honduras as well.

[c]ontinued deportation is a threat to hemispheric and national security.”¹⁸⁷ Fogelbach views the U.S. policy of deporting gang members as both an ineffective remedy to the U.S.’s own gang problem, and as an exacerbation of the threat of gang violence in Central America, which in turn could result in national security concerns for the U.S.¹⁸⁸ Thus, Fogelbach urges the U.S., “[a]s the leader of the War on Terror,” to “reconsider its flawed policy of exporting Salvadorian-American gangs outside its borders.”¹⁸⁹ Further, he advocates the U.S. take an “affirmative role” in Central America’s struggle to gain control over the problems caused by gangs and gang violence by providing financial aid, offering assistance in the training of Central America law enforcement officials, and fostering international cooperation.¹⁹⁰

U.S. Courts have shown apprehension in extending protection to claimants who have been gang members or taken part in other forms of criminal activity while in the United States.¹⁹¹ There is a tendency, when the opportunity presents itself, to deport a criminal without fully considering the strength of his claim¹⁹² or the pervasiveness of the human rights violations in existence in his home country.¹⁹³ In line with the arguments made by

187. Fogelbach, *supra* note 10, at 252.

188. He writes, “Deported gang members pose a greater threat to American national security than those confined within its borders. Mara Salvatrucha cannot be entirely deported because many members are either U.S. born Latinos, or African-American; this assures that Mara Salvatrucha will always exist in the United States. These members are often convicted of criminal charges that pose little or no risk to the American population at large. In contrast, deported MS-13 members established a network of gang cells stretching from Panama to the United States. This chain is a threat to national security because it can be used to smuggle automobiles, drugs, war caliber weapons, and humans via the Pacific and Atlantic Oceans. In fact, U.S. intelligence already believes that al Qaeda has met with Mara Salvatrucha. One concern is that al Qaeda may use MS-13 as a courier from Central America to the U.S.-Mexico border, where illegal entry into the United States will be inevitable.” *Id.* at 253.

189. *Id.*

190. *See id.* at 254.

191. *See, e.g.,* Bleichmar, *supra* note 183; Cook, *supra* note 183; Neal, *supra* note 183. *See also* Fogelbach, *supra* note 10, at 252-54; Padilla, *supra* note 11, at 164-65. I would argue this judicial apprehension is what occurred in *Castellano-Chacon*. *See* 341 F.3d 533 (6th Cir. 2003).

192. *See, e.g.,* 341 F.3d 533. I suspect this may be behind the arbitrary age distinction made by the Sixth Circuit in *Castellano-Chacon*.

193. *Id.*

commentators on the matter¹⁹⁴ this policy is irrational and dangerous to regional security. The U.S. may benefit from retaining claimants here who have made cognizable claims, rather than favoring deportation as a means to rid our streets of the problem given Central America's inability to deal with gangs such as MS-13 and Mara 18.

B. U.S. Responses to the Problem: ICITAP and the Los Angeles Summit

It would be inaccurate, however, to present criticisms of U.S. deportation policies without also pointing out the effort the United States has made in combating gangs and violent crime in Central America. The Department of Justice's International Criminal Investigative Training Assistance Program (ICITAP), created in 1986 to respond to requests for law enforcement training in Latin America, is a U.S. initiative that operates throughout the world.¹⁹⁵ "ICITAP'S mission is to serve as the source of support for U.S. criminal justice and foreign policy goals by assisting foreign government in developing the capacity to provide professional law enforcement services based on democratic principles and respect for human rights."¹⁹⁶ Among its main goals is "the enhancement of capabilities of existing police forces in emerging democracies . . . based on internationally recognized principles of human rights, rule of law and modern police practices,"¹⁹⁷ a service badly needed in Central America. ICITAP currently operates in both El Salvador and Guatemala; however,

194. See, e.g., Fogelbach, *supra* note 10; Padilla, *supra* note 11.

195. See Dep't of Just., ICITAP Home Page, <http://www.usdoj.gov/criminal/icitap/>.

196. See *id.*

197. See *id.* "ICITAP's training and assistance programs are intended to develop professional civilian-based law enforcement institutions. This assistance is designed to: (1) enhance professional capabilities to carry out investigative and forensic functions; (2) assist in the development of academic instruction and curricula for law enforcement personnel; (3) improve the administrative and management capabilities of law enforcement agencies, especially their capabilities relating to career development, personnel evaluation, and internal discipline procedures; (4) improve the relationship between the police and the community its [sic] serves; and (5) create or strengthen the capability to respond to new crime and criminal justice issues." See *id.*

ICITAP's success in these nations is unclear.¹⁹⁸ In regards to the El Salvador program, officials concede, "The most serious challenge now facing . . . the Government of El Salvador is the increasing incidents of violent crime and homicide related to street (youth) gang violence, which to date has been extremely difficult to reduce."¹⁹⁹

Similarly, in February 2007, U.S. and Central American officials met in Los Angeles to discuss the problem of gangs.²⁰⁰ The three-day summit promised to "reflect a new emphasis on international cooperation in fighting gangs" and "focus on sharing information to stop gang members from bringing weapons, criminal plots, and rivalries across borders."²⁰¹ U.S. officials acknowledged the criticism it has received in response to its deportation policies, and has agreed to reconsider these policies by creating a new policy fostering anti-gang cooperation between the U.S. and Central America.²⁰²

Therefore, ICITAP and the L.A. Summit reflect U.S. efforts to stem the tide of gang violence that has destabilized the nations of Central America.

VII. CONCLUSION

It should be acknowledged that grants of asylum, withholding of deportation, and relief pursuant to CAT are meant to provide relief to a finite number of individual claimants who demonstrate they are most deserving. These remedies, besides creating attention and interest among the judiciary and legal community, do little to solve the problem of gang violence in the nations of El Salvador, Guatemala, and Honduras. Similarly, ceasing the deportation of gang members, ICITAP, and U.S.-Central American cooperation represent only defensive measures taken to address the problem. In reality, only eradication of social and economic conditions within these three nations can end the dominance of

198. See ICITAP, Project Overviews: El Salvador, <http://www.usdoj.gov/criminal/icitap/elSalvador.html>; ICITAP, Project Overviews: Guatemala, <http://www.usdoj.gov/criminal/icitap/guatemala.html>.

199. See *id.*

200. See *L.A. Summit Seeks to Sever International Gang Ties*, ASSOCIATED PRESS Feb. 7, 2007, available at <http://www.cnn.com/2007/US/02/07/gang.summit.ap/index.html>.

201. See *id.*

202. See *id.*

the maras in Central America.²⁰³ These remedies however, can mean the difference between life and death for those who petition for them. Although petitioners have not had success with asylum or even withholding of deportation, this comment argues CAT may provide a worthwhile alternative. The Convention's broad definition of torture, judicial adoption and application of the "willful blindness" standard, and an understanding of relevant country conditions in these three nations could be a powerful formula for claimants seeking relief from gang violence in El Salvador, Guatemala, and Honduras.

Monica Fanesi*

203. The USAID Studies conclude with donor responses and international programs aimed at these goals. *See, e.g.*, USAID STUDY: EL SALVADOR, *supra* note 5; USAID STUDY: GUATEMALA, *supra* note 14; USAID STUDY: HONDURAS, *supra* note 28.

* Juris Doctor Candidate, Roger Williams University School of Law, 2008.

