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Problems Faced by Mexican Asylum Seekers in the United States

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Executive Summary

Violence in Mexico rose sharply in response to President Felipe Calderón's military campaign against drug cartels which began in late 2006. As a consequence, the number of Mexicans who have sought asylum in the United States has grown significantly. In 2013, Mexicans made up the second largest group of defensive asylum seekers (those in removal proceedings) in the United States, behind only China (EOIR 2014b). Yet between 2008 and 2013, the grant rate for Mexican asylum seekers in immigration court fell from 23 percent to nine percent (EOIR 2013, 2014b). This paper examines—from the perspective of an attorney who represented Mexican asylum seekers on the US-Mexico border in El Paso, Texas—the reasons for low asylum approval rates for Mexicans despite high levels of violence in and flight from Mexico from 2008 to 2013. It details the obstacles faced by Mexican asylum seekers along the US-Mexico border, including placement in removal proceedings, detention, evidentiary issues, narrow legal standards, and (effectively) judicial notice of country conditions in Mexico. The paper recommends that asylum seekers at the border be placed in affirmative proceedings (before immigration officials), making them eligible for bond. It also proposes increased oversight of immigration judges.

Introduction

Over the past seven years, Mexican citizens have faced escalating violence from organized-crime groups, military, and government officials. Many have fled to the United States seeking protection. In the United States, they frequently endure prolonged detention and an asylum system that is unresponsive to the danger they have escaped. This paper discusses specific barriers faced by Mexicans in the US asylum system from the perspective of an attorney who represented Mexican asylum seekers on the US-Mexico border in El Paso, Texas from 2011 to 2013. It addresses impediments to asylum at various stages of the process and makes recommendations on how the system can be reformed.

The Drug War in Mexico

When Felipe Calderón was elected President of Mexico in 2006, drug trafficking networks were well-established throughout the country (Bonner 2012). Almost immediately upon taking office Calderón initiated a war on drug trafficking and violence skyrocketed. Calderón's highly militarized offensive sought to target the leaders of drug trafficking organizations (DTOs) as a means to splinter these networks, which, in turn, created between 60 and 80 new DTOs (*The Guardian* 2012). The birth of new DTOs kindled succession struggles and battles for territory (Lee 2014). The DTOs expanded their reach into Central America, and branched out into extortion and kidnapping (Beittel 2013). It has been estimated that at least 120,000, and possibly more than 130,000, people were killed as a result of the drug war between 2007 and 2012 (Molloy 2013). Of these homicides, 11,400 took place in Ciudad Juárez. The Mexican government estimates that an additional 27,000 people have officially disappeared. The rate of homicide grew from 24 per day in 2007 to 75 per day in 2011 (ibid.).[1] In 2011, according to some reports, Mexican cities made up five of the top 10 most violent cities in the world, with Ciudad Juárez the highest at number two (*Seguridad, Justicia y Paz* 2012). Up to 220,000 people left their homes in Ciudad Juárez between 2007 and 2010, and some sources claim that 1.6 million people were internally displaced in Mexico as of 2011 (Internal Displacement Monitoring Centre 2011).

In addition to the violence perpetrated by organized-crime groups, there have been pervasive human rights violations committed by the military and police forces across Mexico. Complaints of torture and ill treatment by federal and military officers more than quadrupled between 2007 and 2011, according to the Mexican National Human Rights Commission (CNDH) which received a total of 4,841 complaints during this period (Amnesty International 2012). These reports do not account for offenses committed by municipal police for which there is no systematic data collected, though there are approximately three times more non-federal officers in the country. Widespread corruption amongst security forces and in the judicial sector, and the deference to military justice, has led to general impunity for human rights abuses (US Department of State 2012).

As early as 2008, media reports described Mexico as susceptible to becoming a failed state, and United States lawmakers had begun to question its integrity and viability (Abbott 2011). The United States has contributed to the Mexican conflict. Ninety percent of illegal firearms in Mexico come from the United States,[2] and Mexico is the United States' number one supplier of marijuana, methamphetamine and cocaine.[3] In June 2008 Congress passed the Mérida Initiative, a three-year, $1.4 billion security assistance program to stem drug trafficking and organized crime in Mexico, Central America and the Dominican Republic

1 The numbers are reported by the Mexican media and INEGI, Mexico's National Statistical Agency. According to the Justice in Mexico Project at the University of San Diego, the number of deaths reported is often politicized and difficult to accurately ascertain due to "empirical and methodological challenges in attempting to define and measure drug- and organized crime-related violence as a specific phenomenon" (Molzahn, Rodríguez Ferreira and Shirk 2013).

2 Ford, Jess T. Testimony before the Subcommittee on the Western Hemisphere, Committee on Foreign Affairs, House of Representatives. "Firearms Trafficking: US Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges," 19 June 2009. http://www.gao.gov/new.items/d09781t.pdf.

3 Perkins, Kevin L. and Anthony P. Placido. Testimony before the US Senate Caucus on International Narcotics Control, 5 May 2010. http://www.fbi.gov/news/testimony/drug-trafficking-violence-in-mexico-implications-for-the-united-states.

(Seelke and Beittel 2009). In 2011, the Obama Administration pledged an additional $500 million for that year (Office of National Drug Control Policy, n.d.). The priorities of the Mérida Initiative in Mexico, which include further securing the southern US border and supporting the militarization of the drug war in Mexico, have come under significant criticism because of their lack of any measures to reduce demand for drugs or supply of illegal weapons (Abbott 2011, 7). Furthermore, only 15 percent of the funding was dependent on Mexico meeting human rights standards (ibid., 8).

Despite the multi-year, multi-national and multi-billion dollar intervention to combat drug trafficking, violence in Mexico remains at a humanitarian crisis level. The number of homicides in 2012 was more than three times that of 2007. Following the succession of Enrique Peña Nieto as President of Mexico in December 2012, initial data indicated nearly the same level of violence in the first seven months of 2013 (Molloy 2013). The escalation of the drug war in Mexico has had a brutally predictable effect: Mexican people have fled the country and sought protection in the United States, Canada and elsewhere.

Asylum Claims Brought by Mexican Citizens in the United States

US asylum claims are considered in two different ways. An individual may apply for asylum affirmatively if they have never been apprehended by immigration officials. In this process, the claimant files an application with the US Citizenship and Immigration Services (USCIS) Asylum Office within one year of entry. Affirmative asylum seekers are given a non-adversarial interview with an asylum officer. Individuals who have been apprehended by immigration officials and placed in removal proceedings must apply "defensively." Under this process, the claimant files an application with an immigration court and has a hearing before an immigration judge.

The defensive process also applies to individuals who request asylum at or near a port of entry or border. Persons apprehended at or near the border or who are stopped at a port-of-entry face "expedited removal" unless they state an intention to apply for asylum or express a fear of return to their country or origin to a Customs and Border Protection (CBP) official. CBP must refer persons who satisfy this initial requirement to the Asylum Office for a "credible fear" interview. In this interview, an asylum officer determines whether there is a significant possibility that they could establish eligibility for asylum before an immigration judge. If the claimant meets the credible fear standard, the case proceeds to a removal hearing in immigration court where the claimant can apply for asylum.

Earlier studies have pointed out the low Mexican asylum filing numbers and approval rates during the early years of the drug war, as well as extremely high numbers of withdrawn asylum claims (Kerwin 2012, 25). In 2013, the rate at which all asylum seekers withdrew their cases was 17.5 percent, while the rate for Mexican asylum seekers was 30.8 percent (EOIR 2014a, 2014b). It is difficult to account for this discrepancy precisely, but it is likely that some of the difficulties (described below) which Mexican asylum seekers face in going through the system also function to pressure them to withdraw, including long and arbitrary periods of detention, lack of representation in high density areas and waiting years for hearings in non-detained courts due to backlogs. The withdrawal rate might also

be disproportionate for Mexican nationals for unrelated reasons like their ability to pursue immigration status through an alternative path.

In 2013 Mexico was the second highest asylum seeker producing country, behind only China (EOIR 2014b; UNHCR 2014). Some asylum denials can be attributed, in part, to narrow legal standards and the difficulty of sustaining claims based on the extortion, kidnapping, and homicides by criminal organizations (Buchanan 2010). Still, despite the dramatic increase in violence in Mexico, the grant rate for Mexican asylum claims adjudicated in immigration court plummeted from 23 percent to nine percent between 2008 and 2013, and these numbers were, in turn, dwarfed by the numbers who withdrew their claims (EOIR 2013, 2014b).[4]

Some commentators have attributed low approval rates to the political, military, and economic ties between the United States and Mexico, and what they view as bias against Mexican asylum seekers reflected in political discourse, public opinion and media reports (Campos and Friedland 2014; Burns 2011; LCCREF 2009). Asylum determinations are strongly influenced by country conditions and human rights violations in sending countries (Salehyan and Rosenblum 2008). The asylum claims of citizens of US allies have historically been more difficult to win than the claims of nationals from US government foes or ideological opponents (ibid., 106). Asylum seekers from US trading partners have also had lower grant rates historically.

Recent political attacks on asylum seekers, particularly those subject to "expedited removal," have focused on Mexicans and Central Americans (Campos and Friedland 2014). Politicians and media outlets have spoken out against Mexican asylum seekers, calling them criminals and their asylum claims fraudulent (La Jeunesse 2013). In response to a *Fox News* article in August 2013 claiming that Mexican asylum seekers are "gaming" the US immigration system, US Senator Jeff Sessions (R-AL) stated that the ability to seek asylum at the border was destroying border enforcement. He went on to say:

> [W]hat we should say is, "Mexico is not a country that is persecuting people." It's a democracy and if anybody claims they're being persecuted, we ought to call the Mexican government and have them come pick them up and protect them from persecution. How in the world can we determine if someone deep in Mexico has had a run-in with a drug cartel? (Poor 2013)

These viewpoints have no explicit or formal influence over the asylum system, but they may well influence immigration judges. Indeed, a growing body of empirical research on disparities in asylum grant rates has found strong evidence of country-specific adjudicator bias in the determinations of asylum officers and immigration judges (Rajmi-Nogales, Schoenholtz, and Schrag 2007).

4 A defensive asylum application is one that is filed with an immigration court after a noncitizen has been placed in removal proceedings. The immigration court grant rate presented in this paper is calculated as a percentage of all asylum claims decided in court for Mexican asylum seekers on the merits (i.e., grants and denials). Not all asylum cases decided in immigration court originated as defensive claims. If an affirmative claim for asylum is not granted, then the case is referred to the immigration court. The grant rate statistics do not reflect the high rate which Mexican asylum seekers withdraw their cases.

The Asylum Process

The following sections describe the experience of Mexican asylum seekers at various stages of the asylum process.

Entry

Recent focus on comprehensive immigration reform has cast renewed attention on unauthorized migration. Many asylum seekers from Mexico enter the United States without authorization, but an increasing number simply go to the nearest port of entry to ask for humanitarian protection. The Department of Homeland Security (DHS) reported that in the first three quarters of FY 2013 there were more than 14,000 credible fear claims at the border, in contrast to just under 7,000 for the whole of 2011 (Skoloff 2013). This section addresses how asylum procedures at the border disadvantage Mexican asylum seekers.

Defensive versus Affirmative Proceedings

A significant systemic problem that Mexican asylum seekers face at the border is that they are placed in defensive, and not affirmative, asylum proceedings even if they have no criminal or immigration history. This broad rule disproportionately affects Mexican asylum seekers because of the large numbers of Mexicans who seek asylum in this manner. Defensive proceedings take longer than affirmative ones. Defensive proceedings are more arduous and much more difficult to navigate without counsel. Defensive proceedings also expend more of the government's time and resources. A fairer, less burdensome process would simply place asylum seekers at the border in affirmative proceedings. Asylum seekers with criminal histories or other potential bars would be transferred to immigration courts regardless and there would be no greater risk of fraud than is already present in the system.

Interview Procedures

Persons seeking admission to the United States who express a fear of return to their country of origin are interviewed by CBP officers about their claim for asylum. Mexican asylum seekers in this situation are often fleeing recent, traumatic events. The humanitarian crisis in Mexico has hit the border areas particularly hard. The safest, closest place of refuge is often the United States for persons fleeing violence and many asylum seekers are able to reach the border within hours of experiencing violence and persecution. When an individual suffers trauma or violence, their ability to communicate and remember what happened to them is naturally interrupted (Chaudhary 2010). CBP interviews occur under oath, are documented and asylum seekers must attest to their accuracy. Once an asylum seeker has been released or detained, a USCIS asylum officer administers a credible fear interview usually via videoconference. Neither of these two interviews is recorded verbatim. They are both paraphrased or summarized by the officer who conducted the interview.

Interview procedures, which entail detailed statements, often lead to denied asylum claims based on credibility. This issue is discussed in more depth in the section on adjudication in

immigration court. While immigration officials need to secure information from persons seeking protection, the interview process often prejudices the asylum seeker without benefiting Immigration and Customs Enforcement (ICE) or CBP. Eliminating repetition, being more sensitive to the psychological state of the interviewee, and removing the pressure of attesting to the complete accuracy of the statement, would benefit the process and lead to fairer and more informed decisions under the law.

Language and Literacy

The interview procedures further jeopardize the rights of Mexican asylum seekers who are illiterate or whose first language is not Spanish. Written documents are a central part of the border procedure, and illiterate asylum seekers are frequently pressured to sign documents without receiving a full explanation. This includes notes documenting their own interviews which have not been read back to them and which they have not had the opportunity to correct.

Indigenous Mexican asylum seekers are at a significant disadvantage. Typically, members of indigenous groups in Mexico grow up speaking an indigenous language while only having a rudimentary understanding of Spanish. Many CBP officers speak Spanish, but often neglect to provide interpretation services, as required, for non-Spanish speakers. When indigenous Mexicans ask for asylum, CBP officers frequently interview them in Spanish, leading to miscommunication between the border official and the asylum seeker and inaccuracies in the recorded interview.

Asylum seeker R.M., for example, had the misfortune of being both illiterate and a non-native Spanish speaker. She crossed into the United States without documentation and was apprehended and interviewed by a CBP officer. Despite the extreme difficulty she had speaking and understanding Spanish, the officer did not secure an interpreter to conduct the interview in R.M.'s native language. Before the interview started, the officer failed to explain to R.M. her rights as required in a way she could understand. In the interview notes, the officer made significant mistakes, often using answers given by other members of the group with which R.M. was found, not her own group. At the end of the interview, the officer did not read the notes of the interview back to R.M., yet nonetheless made her attest to their accuracy. R.M. knew how to write her name, but not her initials, so the officer wrote her initials on a scrap of paper, and R.M. painstakingly wrote them at the bottom of each page of notes without knowing what the notes contained. At her immigration court proceedings, the government attorney raised the issue of inconsistencies between her testimony and the CBP transcript, leading the immigration judge to question her credibility. Providing interpretation services, greater oversight of CBP interviews, and verbatim transcripts of interviews would prevent *bona fide* refugees from being denied status.

Rights Violations

It is difficult to estimate the number of asylum seekers who have been illegally turned away at the border since this information has not been collected systematically. However, legal practitioners have reported that some asylum seekers have been threatened with

incarceration and separation from their family at the time they make a protection claim, while others have been turned away by CBP officers who have told them that "the United States is full." These responses highlight a disturbing fact: border agents have complete authority over asylum seekers at the point of entry, and violations are extremely difficult to remedy.

Detention

The *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA) created the "expedited removal" system, which provides immigration officials with the authority to remove summarily noncitizens who they encounter at or near the border who lack proper documents (Kerwin 2012; Keller et al. 2005). To prevent the summary removal of persons with *bona fide* protection claims, migrants who express a fear of returning to their country of origin are entitled to a credible fear interview.[5] During this interview, an asylum officer asks a set of questions to determine whether there is a "significant possibility" that the migrant can demonstrate a fear of persecution on account of one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group.[6] Immigrants in expedited removal proceedings are subject to mandatory detention, but those who are deemed to have a credible fear can be considered for release. A 1997 Immigration and Naturalization Service (INS) memorandum provides that "parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct."[7]

Although asylum seekers who are found to have a credible fear may be released from detention, the standards for release are unreviewable and discretionary. This means that if an immigration officer feels that an asylum seeker is a flight risk, he or she can continue to be detained and the decision is not appealable. Legal service providers on the border have observed the frequent practice of selective detention for Mexican families whose members meet the credible fear standard and have no immigration or criminal history. A common scenario is to detain the father, but to release the rest of the family, which makes it very difficult for many families to sustain themselves and remain intact throughout the asylum process. Though the non-detained adult family members may be able to secure work authorization, they frequently must care for young children and have fewer opportunities to secure employment than the detainee would.

Additionally, detained asylum seekers along the border are much less likely to be able to secure legal representation. Not only is it difficult to afford representation, but immigration attorneys and organizations on the border are flooded with far more asylum seekers than they can represent. As numerous studies have demonstrated, asylum seekers with legal counsel prevail in their claims at far higher rates than those without representation (Ramji-

5 8 USC 1225(b)(1)(B)(5) (2004).

6 Section 235(b)(1)(B)(v) of the Immigration and Nationality Act.

7 Immigration and Naturalization Service Memorandum from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, *Expedited Removal: Additional Policy Guidance*, 30 December 1997, reproduced in *Interpreter Releases* 75: 270 (1998).

Nogales, Schoenholtz, and Schrag 2007). The US Commission on International Religious Freedom, for example, found that 25 percent of represented asylum seekers over a four-year period who had been subject to expedited removal (arrested at or near the US-Mexico border) received asylum, versus just two percent in unrepresented cases (Kuck 2005, 239).[8] Thus, it might be more accurate to say that, without counsel, asylum seekers cannot craft viable "claims." Detention also negatively influences asylum approval rates (Kerwin 2004). Moreover, it concentrates asylum seekers in border communities. Families typically do not move away from the border when a relative is in detention there. Mexican asylum seekers, both detained and non-detained, are therefore heavily concentrated in the border region. Given all of these factors, asylum seekers often withdraw or abandon their claims and chose to return home even if they possess a genuine fear of return.

The United States should change its policy of discretionary release, and instead make release the norm and require justification to keep persons found to have a "credible fear" in detention. Problems associated with the standards for release from detention could also be addressed by greater training of immigration judges and judicial review of custody decisions in these cases.

Reasonable Fear Interview Procedures

If a noncitizen expresses a fear of persecution or torture but cannot apply for asylum due to a removal order or a prior removal, deportation, or exclusion order that is reinstated, they can apply for withholding of removal or relief under the Convention Against Torture (CAT). In these circumstances, they are entitled to a reasonable fear interview, which is a more rigorous standard but similar procedurally to a credible fear interview. However, the timeframes in which the two interviews are conducted vary substantially. In 2012, 97.99 percent of all credible fear decisions were completed within 14 days (USCIS Asylum Division 2012, *Credible Fear FY 2009-FY 2012*). Although the regulations require that reasonable fear determinations take place within 10 days,[9] the average time for a reasonable fear decision in 2012 was 113 days (USCIS Asylum Division 2012, *Questions and Answers*). Mexican nationals had the largest share of the reasonable fear decisions in every month of 2012 (USCIS Asylum Division 2012, *Credible Fear and Reasonable Fear Workloads*). The fact that Mexico and the United States share a border means that it is much more likely that people seeking asylum from Mexico may have had a prior removal.

Because of the reasonable fear procedures, many Mexican asylum seekers often spend months in detention before they appear before an immigration judge. During this time, individuals cannot request a bond from a judge because they are not yet in immigration court proceedings, and they have no avenue for discretionary release because they have not received a reasonable fear decision. Asylum seekers, especially those who have been persecuted or tortured by their own governments, often find detention to be intolerable. Many suffer from post-traumatic stress disorder and detention re-traumatizes them. This can lead asylum seekers to give up on a genuine claim. Furthermore, while asylum seekers

8 A 2008 study by the United States Government Accountability Office found that representation "generally doubled the likelihood of affirmative and defensive cases being granted asylum," after controlling for other effects like nationality and immigration court location (GAO 2008).

9 8 CFR § 208.31(b).

wait for a reasonable fear decision, they are not yet listed in the automated Executive Office for Immigration Review system, making it very difficult for legal service providers to locate and represent them.

Access to Counsel

Despite the potential dangers of being deported to a country where they fear persecution, indigent asylum seekers have not yet been determined to be categorically eligible for government-funded legal counsel (Kerwin 2005). Difficulty accessing counsel is exacerbated for asylum seekers in detention or expedited removal proceedings. Because of the shortage of legal counsel, Mexican asylum seekers experience *notario* fraud at high rates. In Mexico, a *notario* is a qualified attorney, whereas in the United States a notary public is empowered only to perform such duties as to verify identity, make certified copies, and administer oaths. The concentration of Mexican asylum seekers at and near the border and the lack of affordable counsel leave them vulnerable to notary publics passing themselves off as qualified attorneys. These *notarios* not only take money from Mexican asylum seekers under false pretenses, but often do harm to their asylum cases which cannot be remedied. Since *notarios* or people who claim to be notaries are not attorneys, they are not subject to sanction by a bar association. In addition, it is often very difficult to convince law enforcement to prioritize or even pursue any of these cases. Some jurisdictions have made efforts to educate asylum seekers and to encourage reporting and prosecuting these crimes, but these efforts need to be greatly increased. Additionally, the procedure for remedying the harm to the asylum seeker's case by filing a motion to reopen should be simplified and expanded. *Notario* fraud should also be added to the list of crimes for which an immigrant can get a "U" visa, a form of relief available for victims of criminal activity, considering the dire consequences that can arise from it.

Legal Issues

Among many problems in US asylum law, there are two legal issues that specifically affect Mexican asylum seekers: the particular social group standard for asylum claims and the meaning of "acquiescence to torture" in Torture Convention claims when government agencies and officials do not uniformly support torture.

Particular Social Group

The 1951 Convention relating to the Status of Refugees states that a refugee's well-founded fear of persecution must be for reasons of race, nationality, religion, political opinion or membership in a particular social group.[10] It is difficult for many Mexican asylum seekers to prove that the persecution they fear or suffered fits within one of the five grounds, though there are some cases, like those of human rights activists and journalists, which fit squarely into the refugee definition (Harville 2012; Garcia 2011; Buchanan 2010). However, a significant number of Mexicans seek protection because they resisted extortion or recruitment by gangs or cartels, and US asylum law can be unwelcoming to people in

10 1951 Convention Relating to the Status of Refugees, art. 1(a)(2).

these situations (Uchimiya 2013). Particular social group claims under US law now require particularity (a discrete, often smaller group) and social visibility to the wider community.[11] These standards, which do not apply to any of the other grounds, make it more difficult to prevail in these claims (Kerwin 2012).

Asylum seeker J.M. worked as an informant for the US Drug Enforcement Administration (DEA) in Ciudad Juárez. After many years, the Juárez cartel discovered he was an informant and he had to flee for his life. Despite his long service to them, DEA agents reneged on their promise to assist him with an "S" visa, and so he applied for asylum.[12] The immigration judge denied his request for asylum saying that the proposed social group of informants was not acceptable because the nature of an informant is to hide your identity and therefore the social group did not meet the visibility requirement.

Acquiescence to Torture

Immigration attorneys representing Mexican asylum seekers often look to the possibility of relief under CAT when asylum is not available to their client. Withholding or deferral of removal under the Convention requires a showing that a person will likely be tortured if returned to their country of origin. The torture need not be on account of one of the enumerated grounds of asylum. Asylum requires that the persecutor either be the government or an entity that the government is unwilling or unable to control. By contrast, eligibility for CAT relief requires that the "pain or suffering" be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity."[13]

The most substantial barrier to CAT relief stems from the fact that governments, especially in times of crisis, do not act monolithically. In Mexico, corruption is endemic and frequently government agencies and officials work across purposes. US asylum laws and regulations, however, do not explicitly instruct judges about how to address these situations. Immigration judges sometimes become confused when, for example, municipal police might be trying to prevent torture, but the army is perpetrating it. The situation can become more obscure if the municipal police are trying to prevent torture, but the army knows of torture and is acquiescing to it. In both of these situations, judges have denied CAT relief on the basis that there are elements of the Mexican government that are trying to prevent torture. Judges have said that because of the efforts of a discrete branch of government, the "government" (as a whole) cannot be acquiescing to torture. In addition, government perpetrators are often treated as "rogue officers." The idea of a rogue officer, in particular, is contrary to the US civil rights definition of acts "under color of law."

11 See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 2014 WL 524499 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec 208 2014 WL 524498 (B.I.A. 2014).

12 "S" visas are awarded to immigrants who work as informants for US law enforcement agencies.

13 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1., Dec.10 1984, 1465 U.N.T.S. 85, Art. 1., 8 C.F.R. § 208.18.

Adjudication in Immigration Court

Once Mexican asylum seekers reach immigration courts, they confront the additional barriers in the form of lack of procedural rules, credibility decisions, and judicial notice of country conditions in Mexico. Additionally, long delays in non-detained courts can push Mexicans who apply for asylum affirmatively beyond the one-year filing deadline, a procedural rule requiring that asylum seekers file their applications within one year of arriving in the United States unless extraordinary or changed circumstances can be found to warrant a delay.[14]

Lack of Procedural and Evidentiary Rules

Federal rules of evidence and procedure do not apply to the hearings of asylum seekers. Immigration courts are adjudicatory entities, but not independent courts constituted under article one of the US Constitution. Though the *Immigration Court Practice Manual* and the *Immigration Judge Benchbook* and other publications attempt to make procedure in immigration courts uniform and predictable, those guidelines are not binding. The *Immigration Court Practice Manual* says explicitly in the opening chapter that, "The requirements set forth in this manual are binding on the parties who appear before the Immigration Courts, *unless the Immigration Judge directs otherwise in a particular case* [emphasis added]" (Office of the Chief Immigration Judge 2013).

There is no coherent set of rules for immigration courts. Immigration courts are not bound by the strict code of evidence;[15] instead, relevance and fundamental fairness are the only bars to admissibility.[16] The *Immigration Court Practice Manual* also states that for detained individual hearings, filing deadlines are specified by the immigration court.[17] This procedural flexibility allows immigration judges to influence—for better or worse—the outcome of asylum hearings. Denial of asylum based on unfair procedures is very difficult to challenge at the appellate level.

Judicial Discretion Regarding Credibility Findings

In the wake of the REAL ID Act of 2005, the testimony of an asylum seeker "may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[18] The ability of an asylum seeker to corroborate a claim can be very difficult, especially if agents of that government were involved in the persecution or torture. In addition, securing affidavits in the mail from witnesses in war-torn countries can be extremely slow, if not impossible.

14 INA 208(a)(2)(B); 8 CFR 208.4(a)(2) and 1208(a)(2).
15 *Matter of Wadud*, 19 I&N 182 (BIA 1984).
16 *Matter of Ponce-Hernandez*, 22 I&N 784 (BIA 1999); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
17 *Immigration Court Practice Manual*, 3.1(b)(ii)(B); Perkins, Kevin L. and Anthony P. Placido. Testimony before the US Senate Caucus on International Narcotics Control, 5 May 2010. http://www.fbi.gov/news/testimony/drug-trafficking-violence-in-mexico-implications-for-the-united-states.
18 8 USC §1158(b)(1)(B)(ii).

An immigration judge may consider a variety of factors when making a credibility determination:

> [T]he demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.[19]

All of these factors can lead to denials. For example, the demeanor of an asylum seeker might be misjudged by an immigration judge because of cultural differences or trauma. In other cases, a judge might doubt the plausibility of particularly horrific treatment because they have not heard similar stories or entertained similar claims in the past.

Many Mexican asylum seekers are in defensive proceedings either because they asked for asylum at the border or asked for asylum after being apprehended in the United States without immigration status. These individuals have had either a credible fear or reasonable fear interview with an asylum officer, frequently by video conference. Almost all of them have also had a long in-depth interview with a CBP official, either at the border or when they were arrested. As noted previously, these first interviews frequently occur within days or hours of an initial trauma that causes the asylum seeker to flee his or her home. This means that there are two detailed accounts of what happened to the asylum seeker already on the record before the individual asylum hearing. Under the REAL ID Act credibility provisions, any inconsistencies between the statements, or the statements and the testimony provided in court, can legitimately be used by the immigration judge to make a negative credibility decision.

An applicant for CAT relief, D.T., fled from his home in Chihuahua with his family after being shot in the arm by a member of the military. His wife had been beaten so badly that she miscarried. The family fled to the US border and, from there, was taken directly to a hospital where D.T. was cleaned up and given strong pain medication. He was then returned to the border for his initial interview. In that interview he stated that the soldiers came to his house in black trucks. D.T. was detained and his family was released, a not uncommon outcome. He later received a reasonable fear interview where he said that he thought the trucks were dark green and dusty, but it was hard to make out their color. Despite all the other points of consistency in his statements and testimony, his medical records, and his traumatized state when he gave the first statement, the judge used this specific discrepancy to make a negative credibility determination and deny D.T. deferral of removal under CAT.

The CBP and USCIS practice of taking multiple detailed and sworn statements effectively gives immigration judges broad discretion to deny claims. Few people can tell a detailed story three times in the exact same way, especially when stressed, traumatized or injured, or if the recitations are months or years apart. Inconsistencies naturally occur and the REAL

19 8 USC §1158(b)(1)(B)(iii).

ID Act provisions give immigration judges free rein to use these inconsistencies if they are inclined to issue a negative decision.

In cases where an immigration judge's credibility decision seems unreasonable and derails a client's case, appealing to the Board of Immigration Appeals is not a viable solution. First, immigration judges have broad discretion on credibility decisions. Thus, the immigration judge in the case of D.T. was well within his rights to make that decision. Second, even if the asylum seeker can present other evidence that buttresses his or her testimony and can contradict a negative credibility decision, findings of fact (as on credibility) can "be reviewed only to determine whether [they] are clearly erroneous."[20] Immigration judges should be able to decide credibility based on a wide range of factors. However, the decision should be reasonable, justified and subject to meaningful review.

Judicial Bias in Country of Origin Information

Empirical research on disparities in asylum grant rates has found evidence of country-specific adjudicator bias (Rajmi-Nogales, Schoenholtz, and Schrag 2007). Country of origin bias can be a particular problem for Mexican asylum seekers when it comes to educating immigration judges about the situation in Mexico. Generally, it is difficult to educate an immigration judge on country conditions because of the limited amount of time that they have to commit to each case. However, asylum seekers from Mexico have a different problem. Immigration judges in US-Mexico border communities often think that they already know about conditions in Mexico because of its proximity. However, in reality, many have only a passing, informal knowledge of the country. Immigration judges need to be deliberately and thoughtfully educated about the situation in Mexico so that incomplete or inaccurate information gained from the media or other less reliable sources is not the context for their decision making.

Backlogged Immigration Courts

Another problem for defensive asylum seekers is the massive backlog of cases in immigration courts. According to the Transactional Records Access Clearinghouse, cases have been pending in immigration court for an average of more than 500 days (TRAC 2014). In El Paso, Texas, initial master calendar hearings—case status hearings which take place before the hearing on the merits—are being scheduled up to four years into the future. Though Mexican asylum seekers who are paroled into the United States can obtain work permits immediately under the "paroled in the public interest" category, those who are released on their own recognizance or are bonded out of detention have to wait for years without being able to file their asylum applications and start the clock for employment authorization as asylum seekers. Additionally, people have to live for years in limbo while they wait for their cases to lumber through the immigration courts.

20 8 C.F.R. § 1003.1(d)(3)(i) (2011)

Conclusion

Mexican asylum seekers on the border encounter procedural, practical, political and legal barriers to asylum from the time they encounter immigration officials until a determination is made on their claim. As a result, Mexican asylum claims are weeded out and few are granted. Low US asylum approval rates for Mexicans persist despite a significant quantity of filings from 2008 to 2013, over which time period an estimated 120,000, and possibly more than 130,000, people were killed as a result of the drug war (Molloy 2013). In the midst of a humanitarian crisis in Mexico, the United States should take particular care to live up to its obligations under international law and make its asylum procedures fair and consistent in these cases.

REFERENCES

Abbott, Philip K. 2011. "The Merida Initiative: A Flawed Counterdrug Policy?" *Small Wars Journal*, January 6. http://smallwarsjournal.com/jrnl/art/the-merida-initiative-a-flawed-counterdrug-policy

Amnesty International. 2012. *Known Abusers, But Victims Ignored: Torture and Ill-Treatment in Mexico*. London: Amnesty International. http://amnesty.org/en/library/asset/AMR41/063/2012/en/74354a01-4946-4301-b922-8d048782bfef/amr410632012en.pdf.

Beittel, June S. 2013. *Mexico's Drug Trafficking Organizations: Source and Scope of the Violence*. CRS Report for Congress R41576. Washington, DC: Congressional Research Service. http://www.fas.org/sgp/crs/row/R41576.pdf.

Bonner, Robert C. 2012. "The Cartel Crackdown." *Foreign Affairs* 91(3): 12-15.

Buchanan, Holly. 2010. "Fleeing the Drug War Next Door: Drug-Related Violence as Basis for Refugee Protection for Mexican Asylum-Seekers." *Merkourios* 27(72): 28-60.

Burns, Melinda. 2011. "Why Mexican Immigrants Can't Get Ahead." *Pacific Standard*, December 22. http://www.psmag.com/navigation/business-economics/why-mexican-immigrants-cant-get-ahead-38555/

Campos, Sara and Joan Friedland. 2014. *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*. Special Report. Washington, DC: American Immigration Council. http://www.immigrationpolicy.org/special-reports/mexican-and-central-american-asylum-and-credible-fear-claims-background-and-context.

Chaudhary, Jessica. 2010. "Memory and Its Implications for Asylum Decisions." *Journal of Health and Biomedical Law* 6: 37-63.

EOIR (Executive Office for Immigration Review). 2013. *FY 2012 Statistical Yearbook*. Prepared by the Office of Planning, Analysis, and Technology. Washington, DC: US Department of Justice. http://www.justice.gov/eoir/statspub/fy12syb.pdf

———. 2014a. *FY 2013 Statistical Yearbook*. Prepared by the Office of Planning, Analysis, and Technology. Washington, DC: US Department of Justice. http://www.justice.gov/eoir/statspub/fy13syb.pdf.

———. 2014b. *Immigration Courts Asylum Statistics FY 2009-2013*. Prepared by the Office of Planning, Analysis, and Technology. Washington, DC: US Department of Justice. http://www.justice.gov/eoir/efoia/FY2009-FY2013AsylumStatisticsbyNationality.pdf

Garcia, Sergio. 2011. "Asylum for Former Mexican Police Officers Persecuted by the Narcos." *Boston College Third World Law Journal* 31: 235-267.

GAO (Government Accountability Office). 2008. *Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*. Report to Congressional Requesters GAO-08-940. Washington, DC: Government Accountability Office. http://www.gao.gov/assets/290/281794.pdf.

The Guardian. 2012. "Mexico's War on Cartels Made Drug Crisis Worse, Says New Government," December 19, 2012. http://www.theguardian.com/world/2012/dec/19/mexico-government-condemns-calderon-war-drugs.

Harville, Benjamin H. 2012. "Ensuring Protection or Opening the Floodgates?: Refugee Law and Its Application to Those Fleeing Drug Violence in Mexico." *Georgetown Immigration Law Journal* 27: 135-185.

Internal Displacement Monitoring Centre. 2011. *Mexico: Displacement Due to Criminal and Communal Violence*. Geneva: Norwegian Refugee Council. http://www.internal-displacement.org/assets/library/Americas/Mexico/pdf/Mexico-November-2011.pdf.

Keller, Allen, Andrew Rasmussen, Kim Reeves and Barry Rosenfeld. 2005. "Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States." In *Report on Asylum Seekers in Expedited Removal*: *Volume II Expert Reports*, 1-44. Washington, DC: US Commission on International Religious Freedom. http://www.uscirf.gov/reports-briefs/special-reports/reportasylum-seekers-in-expedited-removal.

Kerwin, Donald. 2004. "Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded." *Immigration Briefings* no. 04-6:1-12.

_____. 2005. *Revisiting the Need for Appointed Counsel*. Washington, DC: Migration Policy Institute. http://www.migrationpolicy.org/sites/default/files/publications/Insight_Kerwin.pdf.

_____. 2012. "The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum-Seekers, and Others in Need of Protection." *Refugee Survey Quarterly* 31(1):1-33. http://dx.doi.org/10.1093/rsq/hdr019

Kuck, Charles. 2005. "Legal Assistance for Asylum Seekers in Expedited Removal:

A Survey of Alternative Practices." In *Report on Asylum Seekers in Expedited Removal: Volume II – Expert Reports*, 232-281. Washington, DC: US Commission on International Religious Freedom. http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf

La Jeunesse, William. 2013. "Agencies Buying Hotel Rooms for Surge of Mexican Illegal Immigrants, Others Released." *Fox News*, August 12. www.foxnews.com/us/2013/08/12/surge-mexican-illegal-immigrants-claiming-asylum-overwhelms-border-officials/.

LCCREF (The Leadership Conference on Civil Rights Education Fund (LCCREF). 2009. "The State of Hate: Escalating Hate Violence Against Immigrants." In *Confronting the New Faces of Hate: Hate Crimes in America*, 14-16. Washington, DC: The Leadership Conference on Civil Rights Education Fund. http://www.civilrights.org/publications/hatecrimes/escalating-violence.html.

Lee, Brianna. 2014. "Mexico's Drug War." *Backgrounders*. New York: Council on Foreign Relations. http://www.cfr.org/mexico/mexicos-drug-war/p13689#p3.

Molloy, Molly. 2013. "The Mexican Undead: Toward a New History of the 'Drug War' Killing Fields." *Small Wars Journal*, August 21. http://smallwarsjournal.com/jrnl/art/the-mexican-undead-toward-a-new-history-of-the-%E2%80%9Cdrug-war%E2%80%9D-killing-fields.

Molzahn, Cory, Octavia Rodriguez Ferreira and David A. Shirk. 2013. *Drug Violence in Mexico: Data and Analysis through 2012*. San Diego: Trans-Border Institute University of San Diego. http://justiceinmexico.files.wordpress.com/2013/02/130206-dvm-2013-final.pdf.

Office of the Chief Immigration Judge. 2013 [last revised]. *Immigration Court Practice Manual*. http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf#page=9.

Office of National Drug Control Policy. n.d."Mexico." http://www.whitehouse.gov/ondcp/mexico.

Poor, Jeff. 2013. "Jeff Sessions: US Policy Handling Asylum Seekers at Mexican border 'Unbelievable,' 'Mindless.'" *The Daily Caller*, August 13. http://dailycaller.com/2013/08/13/jeff-sessions-us-policy-handling-asylum-seekers-at-mexican-border-unbelievable-mindless/

Ramji-Nogales, Jaya, Andrew I. Schoenholtz and Philip G. Schrag. 2007. "Refugee Roulette: Disparities in Asylum Adjudication." *Stanford Law Review* 60 (2): 295-412.

Salehyan, Idean and Mark R. Rosenblum. 2008. "International Relations, Domestic Politics, and Asylum Admissions in the United States." *Political Research Quarterly* 61(1): 104-121. http://dx.doi.org/10.1177/1065912907306468

Seelke, Clare R. and June S. Beittel. 2009. *Merida Initiative for Mexico and Central America:*

Funding and Policy Issues. CRS Report for Congress R40135. Washington, DC: US Congressional Research Service.

Seguridad Justicia y Paz. 2012. "San Pedro Sula, la ciudad más violenta del mundo; Juárez, la segunda," January 11. http://www.seguridadjusticiaypaz.org.mx/sala-de-prensa/541-san-pedro-sula-la-ciudad-mas-violenta-del-mundo-juarez-la-segunda.

Skolof, Brian. 2013. "Asylum-Seekers at Southwest US Border Double." *Albuquerque Journal*, August 18. http://www.abqjournal.com/249170/news/asylumseekers-at-southwest-us-border-double.html.

TRAC (Transactional Records Clearing House). 2014. "Average Time Pending Cases Have Been Waiting in Immigration Courts." Syracuse, NY: Syracuse University. http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php

Uchimiya, Diane. 2013. "Falling through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence." *Berkeley La Raza Law Journal* 23: 109-162.

UNHCR (United Nations High Commissioner for Refugees). 2014. *UNHCR Asylum Trends 2013*. Geneva: UNHCR. http://www.unhcr.ch/fileadmin/user_upload/dokumente/06_service/zahlen_und_statistik/UNHCR_Asylum_Levels_and_Trends2013released.pdf.

USCIS Asylum Division. 2012. "Asylum Division Quarterly Stakeholder Meeting," December 6. Washington, DC: US Citizenship and Immigration Services (USCIS) Asylum Division. http://www.uscis.gov/outreach/notes-previous-engagements/asylum-division-quarterly-stakeholder-meeting-3.

US Department of State. 2012. *Mexico 2012 Human Rights Report*. Country Reports for Human Rights Practices. Washington, DC: US Department of State Bureau of Democracy, Human Rights and Labor. http://www.state.gov/documents/organization/204674.pdf.