WHEN THE LAST RESORT IS THE BEST RESORT:
Successful Convention Against Torture (CAT) Claims in 9th Circuit Removal Cases

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I. Introduction

Many noncitizens arriving in the United States invoke their legal right to apply for asylum protections according to international refugee law and related domestic statutes,[1] but the vast majority of those who apply for asylum have their cases denied.[2] The standard for asylum is high, and asylum applicants often fail to meet the required threshold of proving a "well-founded fear of persecution" based on one of the five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group.[3] In addition, even noncitizens who can prove a well-founded fear of persecution may be subject to one or more bars to asylum, such as the requirement to apply within one year of arrival in the United States and certain criminal convictions that can make an applicant ineligible for asylum.[4]

Persecution on a protected ground, however, is not the only serious harm a noncitizen may face if they are returned to their home country. For those noncitizens who cannot qualify for asylum but may face harm amounting to "torture" if deported, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT," "the Convention," or "The Convention Against Torture") provides an alternate path for relief from removal.[5] Immigration attorneys often request relief for their clients under the Convention Against Torture

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[1] *See, e.g.* Convention Relating to the Status of Refugees, art. 33, ¶ 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; 8 U.S.C. §1158(a)(1) (providing that "any alien who is physically present in the United States or who arrives in the United States…may apply for asylum…").
[2] *Asylum Grant Rates Climb Under Biden*, TRAC Immigration (Nov. 10, 2021), https://trac.syr.edu/immigration/reports/667/ (indicating a 71% denial rate in FY2020 and 63% denial rate in FY2021).
[3] *Id*.; 8 USC §1101(a)(42)(A refugee is a person "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.").
[4] 8 U.S.C. §1158(a)(2)(B (requirement to apply within one year of arrival in the U.S.); 8 U.S.C. §1158(b)(2)(A)(ineligibility for asylum for certain crimes).
[5] U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 [hereinafter "CAT" or "the Convention"].

simultaneously with submitted asylum claims, as an alternate form of relief should the asylum claim be denied. When CAT requests are combined with asylum requests, they are often tacked on almost as an afterthought, rather than presenting the torture claim as distinct from the asylum claim.[6] This paper seeks to assist legal practitioners in the Ninth Circuit to assert stronger, more successful CAT claims, both by familiarizing them with the Ninth Circuit's comparatively generous interpretation of the CAT and by incorporating arguments based in international law.

The United States ratified the Convention Against Torture on October 21, 1994, joining 172 other nations in its commitment to take measures to prevent "acts of torture."[7] Torture under CAT is defined as acts that involve extreme forms of coercion, punishment, or discrimination inflicted under the color of law or with the acquiescence of public officials.[8] Torture by public officials has been so widely condemned by the international community that for several decades now the United States has considered it to be prohibited by customary international law.[9] The Ninth Circuit has further identified the prohibition on torture be a *jus cogens* norm that applies universally to all states.[10] Jus cogens norms are legal norms recognized by the international community that prevail over any laws that conflict with them, and from which no derogation, or suspension, is permitted under any circumstances.[11]

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[6] Aruna Sury, *Qualifying for Protection Under the Convention Against Torture*, Immigrant Legal Resource Center 4 (April 2020), https://www.ilrc.org/sites/default/files/resources/cat_advisory-04.2020.pdf.
[7] CAT, *supra* note 5, at art. 3; U.N. Treaty Collection Depositary, Chapter IV Human Rights, 9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "United States of America," available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en.
[8] CAT, *supra* note 5, at art. 1 (Defining torture as "...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain and suffering arising only from, inherent in or incidental to lawful sanctions."
[9] *See* Restatement (Third) of Foreign Relations Law of the United States §702, Reporters Note 4(d)(1987).
[10] Nuru v Gonzales, 404 F.3d 1207 (9th Cir. 2005) (citing to Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992).
[11] Restatement (Third) of Foreign Relations Law of the United States § 102 (1987).

While most of the Convention is aimed at preventing torture within a signatory or ratifying nation's boundaries,[12] Article 3 forbids state parties from returning, or "refouling," a noncitizen to another state where there are "substantial grounds" to believe she would be in danger of torture.[13] Non-refoulement also constitutes a principle of customary international law, according to the United Nations.[14] Article 2 makes clear that there are no circumstances under which exceptions can be made to any part of the CAT, including public emergencies or a state of war.[15] In the United States, the protections of Article 3 are especially beneficial for noncitizens who do not qualify for asylum, but who are likely nonetheless to face harm that qualifies as "torture" if they are sent back to their home country. Unfortunately, U.S. immigration policies such as expedited removal[16] and recent asylum changes issued by the Biden administration[17] fail to comply with U.S. obligations under the CAT, and potentially subject noncitizens to acts of torture upon return to their home countries.

Although the burden of proof for torture in the context of the CAT is higher than that for asylum, certain noncitizens who do not qualify for asylum may find relief under the CAT as an alternate, and often final, avenue to avoid deportation to a place where they could face severe harm. Recent statistics suggest that in the U.S., CAT relief may be even harder to win than

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[12] CAT, *supra* note 5, at art 2 (Ratifying states are to prevent torture "...in any territory under its jurisdiction.").
[13] CAT, *supra* note 5, at art 3.
[14] *The principle of non-refoulement under international human rights law*, United Nations Human Rights Office of the High Commissioner, accessed Nov. 24, 2023 at https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.
[15] CAT, *supra* note 5, at art 2.
[16] 8 U.S.C. §1225 (Expedited removal procedures allow the Department of Homeland Security (DHS) to quickly remove a noncitizen without a hearing before an immigration judge or review by the Board of Immigration Appeals (BIA). Noncitizens who arrive at U.S. ports of entry without valid entry documents or with false entry documents are subject to expedited removal for up to two years, including if they are apprehended within the U.S. far from a port or border.).
[17] The Biden Administration's changes to asylum, called "Circumvention of Legal Pathways" and announced in the Federal Register on May 10, 2023, created a rebuttable presumption of ineligibility for asylum for noncitizens who did not enter the U.S. through a border checkpoint nor sought asylum through any third country through which they traveled on their way to the U.S. The full rule is available at https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways.

asylum. In FY 2018, the Executive Office for Immigration Review reported that just 2.5% of CAT claims were approved, although since asylum and CAT claims are often submitted together some of the CAT claims likely received asylum or other relief instead.[18] For the 1,334 noncitizens who did win CAT claims in FY2018, however, the protection was most welcome.

The Ninth Circuit is arguably the most expansive of the circuit courts in its interpretations of the CAT, but it still falls short in terms of the Article 3 standards international bodies have established apply to CAT member states, including the United States. This paper demonstrates how legal representatives can make the strongest possible CAT claims for their noncitizen clients in the Ninth Circuit, including how arguments based on international law and the persuasive guidance of international bodies may help bolster their claims. In doing so, this paper first provides an overview of the CAT as incorporated into U.S. law, both through legislation and as interpreted by federal courts. An in-depth analysis of the Ninth Circuit's interpretation of CAT follows. Finally, this paper shows how international bodies, such as the UN Committee on Torture and the Inter-American Commission on Human Rights, entreat the U.S. to modify its application of CAT, specifically within the context of expedited removal and the Biden administration's recent changes to the asylum rules.

II. The Convention Against Torture in U.S. Law

The Convention Against Torture is federal law because once the United States ratifies and becomes a party to a treaty, that treaty has "the force of federal legislation, forming part of what the Constitution calls 'the supreme Law of the Land.'"[19] However, the United States signed the CAT subject to several declarations, reservations, and resolutions. The Senate's consent to

[18] Executive Office for Immigration Review, *Statistics Yearbook FY2018* 30, https://www.justice.gov/eoir/file/1198896/download (indicating 1,334 CAT applications were approved in FY2018 out of 51,766 adjudicated, although some of those applications received some other form of relief instead).
[19] *See, e.g., About Treaties*, United States Senate, https://www.senate.gov/about/powers-procedures/treaties.htm (last visited Nov. 24, 2023).

CAT ratification was subject to the declaration that the Convention was not self-executing, and therefore only applied legally to the United States once it was enacted through domestic legislation.[20] In 1998, four years after ratifying CAT, Congress enacted statutes and regulations in compliance with Article 3 prohibiting "non-refoulement," or the removal of noncitizens to countries where they would be tortured.[21] In the years since, federal courts have interpreted various aspects of CAT legislation, creating some areas where the Convention is clearly settled in U.S. law and other areas where circuit court splits leave some uncertainty about interpretation and application of the Convention. Legal advocates need to know how the Convention has been applied in their specific circuit, but can also draw on holdings in other circuits to persuasively argue for different interpretations where applicable.

A. The CAT in U.S. Senate Resolutions and Treaty Reservations

Via a 1990 Resolution, the Senate confirmed that CAT requirements apply to "acts of torture committed by or at the acquiescence of a public official, or another person acting in an official capacity,"[22] a determination that closely mirrors the CAT Article 1's requirement for "official involvement" in the torture.[23] This Resolution affirms that the officials do not necessarily have to directly engage in torture to be responsible for the acts, but they must have "awareness of such activity and thereafter breach [their] legal responsibility to intervene to prevent such activity."[24] The Senate also defined the term "mental torture," which is not defined in the Convention, as "prolonged mental harm caused or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering, the administration or threatened

[20] *See* Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990) (hereinafter, Sen. Resolution).
[21] *See* Foreign Affairs Reform and Restructuring Act ("FARRA"), P.L.105-277 at §2442; *see also* 8 CFR 208.16-208.18 and 1208.16-1208.18.
[22] Sen. Resolution, *supra* note 20, at II.(1)(b).
[23] CAT, *supra* note 5, at art. 1 ("...when such pain and 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.")
[24] Sen. Resolution, *supra* note 20, at II.(1)(b).

administration…of mind-altering substances…, or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration…of mind-altering substances."[25]

B. Where the CAT Article 3 is Settled

This section discusses where the CAT Article 3 is settled in U.S. law, first as the Convention has been codified in U.S. laws and regulations and then where decisions by the U.S. Supreme Court have resolved how lower courts are to apply and interpret the Convention. This section ends with a brief discussion of the areas where the CAT interpretation still varies because the Supreme Court has not ruled and circuit courts do not agree. The circuit courts' disagreements set the stage for the analysis in the section that follows of the Ninth Circuit's more generous approach to the CAT, which can be helpful for legal practitioners representing clients in that circuit.

1. Settled CAT Law in Legislation and Regulations

Statutes and regulations incorporating the Convention into U.S. law followed soon after the 1998 passage of the Foreign Affairs Reform and Restructuring Act ("FARRA"), which required relevant agencies to promulgate regulations to implement the Convention.[26] In the CAT regulations, important caveats were introduced into the U.S. understanding of the Convention. First, the qualifying word "extreme" was added to the U.S. definition of torture, in place of the word "severe" found in the Convention's definition.[27] "Severe" is used elsewhere in the regulations when describing torture, but in a clause that already modifies the CAT by adding the requirement that the intent must be to inflict severe pain or suffering, rather that simply the intent

[25] *Id*.
[26] Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. 105-277, § 1242(b), [hereinafter FARRA], https://www.govinfo.gov/content/pkg/BILLS-105hr1757enr/pdf/BILLS-105hr1757enr.pdf.
[27] 8 C.F.R. §1208.18(a)(1)("Torture is an **extreme** form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that does not arise to torture.").

to do the act *per se*.[28] The definition of torture in the Convention requires that the harm be "intentionally inflicted on a person,"[29] and under U.S. regulations the act must be "specifically intended to inflict severe physical or mental pain or suffering."[30] This change alters the applicability of the Convention by narrowing the requisite *mens rea* to intent to inflict "severe pain" rather than intent to commit *the act* that caused severe pain as found in Article 1 of the Convention.[31]

In addition, the regulations made explicit what is only implicitly suggested in the CAT Article 3: that the U.S.'s non-refoulment obligation applies only to torture, not to cruel, inhuman or degrading treatment covered elsewhere in the Convention.[32] U.S. regulations also interpreted the "substantial grounds" standard from Article 3 as a higher "more likely than not" standard that the person would be tortured.[33] Consistent with the definition of torture in Article 1 of the Convention, torture under U.S. regulations does not include pain or suffering arising from or incidental to lawful sanctions,[34] nor does it include pain or suffering that results from unanticipated or unintended acts.[35]

FARRA excluded several narrow classes of people from full CAT protections who were already excluded from asylum protections, primarily on grounds related to terrorism, crimes, and national security.[36] For noncitizens who are not barred by any security or criminal grounds, the regulations following FARRA created "withholding of removal" under the CAT.[37] For

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[28] 8 C.F.R. §1208.18(a)(5) ("...an act must be specifically intended to inflict severe physical or mental pain or suffering…").
[29] CAT, *supra* note 5, at art. 1.
[30] 8 C.F.R. §1208.18(a)(5).
[31] CAT, *supra* note 5, at art. 1.
[32] *Id.*
[33] 8 C.F.R. §208.16(c)(2).
[34] 8 C.F.R. §208.18(a)(3).
[35] 8 C.F.R. §1208.18(a)(5).
[36] FARRA, *supra* note 26 at §2242(c); 8 U.S.C. §1231(b)(3)(B).
[37] 8 C.F.R.§1208.16.

noncitizens subject to security or criminal grounds, the regulations created "deferral of removal," an alternate form of CAT relief.[38] The primary difference between "withholding" vs "deferral" of removal is that the government can reopen a deferral of removal case for reconsideration at any time (and, therefore, more easily deport the noncitizen).[39] In contrast, to terminate withholding of removal the government has to prove "by a preponderance of the evidence" that the CAT is no longer applicable to the person, such as due to a "fundamental change in circumstances."[40]

One statutory benefit of a CAT claim is that, unlike an asylum request, it cannot be denied as a matter of judicial discretion. If an applicant proves her eligibility for the CAT, the immigration judge must grant her one of the two types of CAT protection.[41] Both allow the noncitizen to remain in the United States and apply for work authorization.[42] However, neither statutes nor regulations provide a path to permanent residency or citizenship for CAT recipients, and CAT protection can be revoked at any point in the future if an immigration judge determines circumstances have changed sufficiently in the noncitizen's home country.[43]

2. Settled CAT Law in Court Decisions

Since the promulgation of regulations following FARRA, federal courts and the Bureau of Immigration Appeals (BIA) have played a decisive role in the interpretation and application of the CAT to those applying for relief from within the United States. Courts have also added to the confusion surrounding the CAT when, as noted below, circuit courts fail to agree on key provisions. The Supreme Court has reviewed only a handful of CAT cases, leaving the circuits split in a number of areas.

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[38] 8 C.F.R.§1208.17
[39] Immigrant Legal Resource Center, *supra* note 6 at 2; 8 C.F.R.§§ 1003.11, 1208.17(d)(1).
[40] 8 C.F.R.1208.24(f).
[41] 8 C.F.R.§1208.16(c)(2).
[42] 8 C.F.R.§274a.12(a)(10); 8 CFR § 274a.12 (c)(18).
[43] 8 C.F.R. §1208.17(d)(1); 8 CFR 1208.24(f).

One area where the Supreme Court has clearly spoken is that the asylum standard of proof is lower than that for the Convention Against Torture. In several cases decided right before the ratification of the CAT, the Supreme Court rejected the suggestion that an asylum seeker must prove that they will "more likely than not" be persecuted if returned to their home country. Instead, the Supreme Court determined that applicants for asylum must only prove there is a "reasonable possibility" they would be persecuted, a standard the Ninth Circuit has interpreted to be as low as a 10% chance of persecution.[44] In contrast, following the ratification of the CAT the "more likely than not" standard was codified in torture-related regulations.[45] This burden of proof has subsequently been consistently interpreted as a higher standard than the "reasonable" standard required for asylum.[46]

Another area the Supreme Court has resolved the application of the CAT is by holding in 2020, in *Nasrallah v Barr*, that federal courts of appeals have jurisdiction to review the factual basis of Board of Immigration Appeals' denials of CAT claims.[47] A circuit court's review of the BIA's factfinding is still to be deferential under a "substantial evidence" standard, but until this 2020 decision the Ninth Circuit was one of only two circuits that allowed factual challenges to CAT orders at all.[48] Most other circuits before the decision in *Nasrallah* allowed no judicial review of factual challenges to CAT orders.[49] The Ninth Circuit's standard of review has now become the standard for all circuit courts and although the standard is highly deferential to the

[44] *See*, e.g., INS v. Stevic, 467 U.S. 407, 425 (1984) (To prove a well-founded fear of persecution, an applicant must have only a "reasonable possibility" of persecution); INS v Cardoza-Fonesca, 480 US 421, 440 (1987) (To prove a well-founded fear of persecution for asylum, an applicant's fear need only be "reasonable."); *see also* Al-Harbi v INS, 242 F.3d 882, 888 (9th Cir. 2001)("...even a ten percent chance of persecution may establish a well-founded fear.").
[45] 8 C.F.R. §208.16.
[46] Matthew John Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, Congressional Research Service 6 (April 4, 2006), https://trac.syr.edu/immigration/library/P1339.pdf.
[47] Nasrallah v Barr, 140 S.Ct. 1683 (2020); *see also* 8 U.S.C. § 1252(a)(4).
[48] *Nasrallah*, 140 S.Ct. at 1689.
[49] *Id.*, at 1692.

BIA's factual conclusions, it nevertheless provides a narrow door for practitioners to seek another chance for clients denied a CAT claim when the BIA misconstrues the facts.

In areas where the Supreme Court has not spoken, there is some agreement among circuits, and the Ninth Circuit has taken the lead in several broadly applied interpretations of CAT regulations. The Ninth Circuit's interpretation that "more likely than not" means there must be a greater than fifty percent chance of torture has been relied on by other circuits.[50] Other circuits have also applied the Ninth Circuit's interpretation of regulations requiring immigration judges to consider "all evidence relevant…to torture" to mean that the aggregate risk of all possible sources of torture must be considered, not each individual claim.[51] In other words, an applicant for CAT relief does not need to prove that each individual threat would be more likely than not to result in torture, but rather that "taking into account all possible sources of torture, he is more likely than not to be tortured…if returned."[52] Finally, there is widespread agreement among federal circuit courts that sexual crimes like rape and sexual abuse, as well as domestic violence, when permitted by law enforcement, may be torture.[53]

C. Where the CAT Article 3 Application Varies

Legal practitioners need to be aware how their client's circuit interprets the CAT, but arguments can still be made from other circuits as a persuasive reason for the court to rule differently in a particular case. This is especially true, as discussed below, when legal authority from international bodies provides additional weight to a particular interpretation of the CAT. Circuit courts do not universally agree, for example, on what constitutes "acquiescence" by government officials. Circuit courts also are split on whether rogue officers acting outside of

[50] *See* Hamoui v. Ashcroft, 389 F.3d 821 (9th Cir. 2004); *see also* Ibarra Chevez v. Garland, 31 F.4th 279, 289 (4th Cir. 2022); Marqus v. Barr, 968 F.3d 583, 589 (6th Cir. 2020).
[51] 8 C.F.R. §1208.16(c)(3); Quijada-Aguilar v Lynch, 799 F.3d 1303, 1308 (9th Cir. 2015); *see also* Ibarra Chevez v. Garland, 31 F.4th 279, 289 (4th Cir. 2022).
[52] Cole v. Holder, 659 F.3d 762, 775 (9th Cir. 2011).
[53] *See, e.g.,* Zubeda v. Ashcroft, 333 F.3d 463 (3rd Cir. 2003); Ali v. Reno, 237 F.3d 591 (6th Cir. 2001).

their official capacities are acting under "color of law."[54] The following section discusses how the Ninth Circuit has interpreted these areas of circuit disagreement.

III. The Convention Against Torture in the Ninth Circuit

The Ninth Circuit is arguably the most expansive of the federal appeals courts in interpreting and applying the Convention Against Torture in removal cases and, as noted above, some of its more liberal interpretations of the Convention have later become persuasive for Supreme Court decisions.[55] The following analysis covers the Ninth Circuit's approach to the three elements involved in a successful CAT claim: 1) intentional infliction, 2) severe pain and suffering, and 3) committed by or at the acquiescence of the government. The analysis in this section also includes the ability to relocate within an applicant's home country, which is often taken into consideration by courts even though it is not an explicit element of a CAT claim.

A. Specific Intent to Cause Harm

The definition of "torture" in Article 1 of the Convention Against Torture requires that the act "is intentionally inflicted…." U.S. regulations implementing the CAT further define "intentional" as "specifically intended."[56] The Ninth Circuit, along with most of the circuits, follows the BIA's general understanding that harm caused by a lack of resources or from negligent acts does not generally fulfill this "specific intent" required under U.S. regulations.[57]

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[54] *Compare* Costa v. Holder, 733 F.3d 13 (1st Cir. 2013) (finding the government had not acquiesced to the abuse because the officials were acting without government approval and some efforts had been made to address police misconduct) with Khouzam v. Ashcroft, 361 F.3d 171 (2d Cir. 2004) (finding government acquiescence to torture, even though the police were acting in a private capacity, because the government breached its responsibility to prevent the harm).

[55] *Nasrallah*, 140 S.Ct. at 1683.

[56] 8 C.F.R. §1208.18(a)(5).

[57] 8 C.F.R. §1208.18(a)(5); Oxygene v. Lynch, 813 F.3d 541, 550 (4th Cir. 2016)(listing the 9th, 2nd, 3rd, 11th, and 1st as other circuits that have found that "specific intent" to harm does not include negligent acts or lack of resources, following the BIA's holding in *Matter of J-E*, 23 I&N Dec. 291 (BIA 2002)).

This means that poverty or substandard prison conditions, for example, cannot be classified as "torture" when they are not the result of a specific intent to harm the person.[58]

However, the Ninth Circuit broke from the BIA in a pair of cases by finding that both harsh Mexican prison conditions and widespread abuse by police in Mexico can fulfill the specific harm requirement, when the petitioners' mental health conditions made them likely to attract the attention of police and end up in prison as a result.[59] In these recent cases, *Guerra v Barr* and *Coronel Resendiz v Barr*, the Ninth Circuit reasoned that the harm the mentally ill petitioners were likely to endure would not be simply the result of a general lack of prison resources or neglect, but would be because they were specifically targeted due to their mental conditions.[60] Advocates in the Ninth Circuit should thus differentiate their cases from the BIA's general prohibition against "lack of resources" or neglect as a lack of specific intent, and highlight parallels with the specific intent and targeting findings in *Guerra* and *Coronel Resendiz*, including evidence that their clients would be treated differently than the general population.

B. Severe Pain and Suffering

The Convention's definition of torture covers acts which involve "severe pain or suffering, whether physical or mental…"[61] Although pain and suffering arising from lawful punishment is not generally considered to be "torture" under the Convention or under U.S. regulations, the official sanctioning of acts that are otherwise torture does not render the acts exempt under the CAT.[62] Abuse that is legally sanctioned can still rise to "torture," as the Ninth Circuit found in *Nuru v. Gonzales* when the Applicant, as punishment for deserting the Eritrean

[58] *See, e.g.,* Konou v. Holder, 750 F.3d 1120, 1123 (9th Cir. 2014).
[59] Guerra v Barr, 974 F.3d 909, 916 (9th Cir. 2020); Coronel Resendiz v Barr, 810 Fed.Appx 538 (9th Cir. 2020).
[60] *Guerra*,, 974 F.3d at 909.
[61] CAT, *supra* note 5, at art. 1.
[62] Nuru v. Gonzales, 404 F.3d 1207 (9th Cir. 2005).

army, had been beaten and whipped daily, bound nude in the desert sun, and deprived of adequate food and water for 25 days.[63] The Ninth Circuit analyzes lawful sanctions under the object and purpose of the CAT, and has noted that a government cannot get around the Convention's prohibition on torture simply by legalizing a severe punishment.[64]

Other acts that the Ninth Circuit has specifically noted may arise to "severe pain and suffering" include the threat of imminent death, including a threat directed at someone the applicant knows;[65] rape or sexual assault;[66] sexual assault due to an applicant's sexual orientation;[67] intentional and repeated cigarette burns coupled with severe beatings;[68] attacks on the street by police;[69] beatings and electric shocks by police while in custody;[70] and attacks by gangs, including rape, brutal beatings, and shootings.[71] Therefore, whenever possible, practitioners seeking to prevent clients' refoulement should look for parallels to facts in their cases to those in cases where the Ninth Circuit has found that specific acts rise to the level of "severe pain and suffering. " Yet this list is far from exhaustive. Many additional types of "severe pain and suffering" can be brought in CAT claims, and practitioners should not limit themselves only to claims that are identical or similar to past cases. Where relevant, practitioners in the Ninth Circuit should rely on *Nuru* to show how in the facts of their case either 1) the acts were not lawfully sanctioned by the country, or 2) they were lawfully sanctioned but defeat the object and purpose of the CAT,[72] which is specifically forbidden by U.S. regulations.[73]

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[63] *Id*. at 1218.
[64] *Id*. at 1207.
[65] Xochihua-Jaimes v. Barr, 962 F.3d 1175, 1183 (9th Cir. 2020).
[66] *Id*.
[67] *Id*.
[68] Al-Shaer v. INS, 268 F.3d 1143 (9th Cir. 2001).
[69] De Leon v. Garland, 51 F.4th 992 (9th Cir. 2022).
[70] Vinh Tan Nguyen v. Holder, 763 F.3d 1022 (9th Cir. 2014).
[71] Coto Ortiz v. Barr, 812 Fed.Apx 615 (9th Cir. 2020).
[72] *Nuru*, 404 F.3d at 1221.
[73] 8 C.F.R. § 1208.18(a)(3).

C. Government Acquiescence

The definition of "torture" in Article 1 of the Convention Against Torture also includes the requirement that the government must be involved somehow in the torture.[74] The BIA and the U.S. Attorney General have long held that torture is committed by a government official when an official is acting under "color of law," that is, acting in an official capacity.[75] This holding has been narrowly applied by some circuits to determine that officials are not acting under the color of law if they are, for example, off duty or acting outside their official capacity, a so-called "rogue official" exception.[76] The BIA has also refused to find "acquiescence" by the government when the official committing the act is only a low-level employee.[77]

The Ninth Circuit, however, has rejected the BIA's "rogue official" exception and applies a broader approach to understanding when government officials have committed or acquiesced to torture.[78] Legal representatives must identify a connection between government officials and the torturous act, but that line does not have to be as direct as in some circuits. In the Ninth Circuit, a harmful act under the "color of law" is torture when it is made possible because the actor has the authority of state law, a standard which can include off-duty officers, local rather than state or federal officials, and even private parties working alongside the officials such as cartels.[79] In 2017, for example, the Ninth Circuit decided in *Barajas-Romero v Lynch* that government officials had acquiesced in torture when the wrongdoers were police officers knowingly carrying

[74] CAT, *supra* note 5, at art. 1 (the harm must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").
[75] Matter of Y-L-, A-G-, &R-S-R, 23 I&N Dec. 270, 283 (A.G. 2002).
[76] *Id*.; Matter of O-F-A-S-,27 I&N Dec. 709, 713–14 (BIA 2019).
[77] *O-F-A-S-*, 27 I&N Dec. at 713–14..
[78] *Xochihua-Jaimes*, 962 F.3d at 1184 ("...a rogue public official is still a 'public official' under CAT"); *see also* Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017)(Even if high level government officials are opposed to the harm, national efforts are not sufficient when local level officials are still involved in the torture).
[79] *See, e.g.*, Barajas-Romero v Lynch, 846 F.3d 351, 362 (9th Cir. 2017(off-duty police officers are still working "under the color of law"; Xochihua-Jaimes v Barr, 962 F.3d 1175, 1184 (9th Cir. 2020)(acts carried out by cartels can be "under the color of law" when officials work with the cartels).

out the acts, even though the officers were off-duty and they were acting outside of their official capacity at the time they held the Petitioner captive, repeatedly beat and burned him, and tried to extort money from him, following his vocal criticism of police corruption.[80] The court relied on the word "or" in the regulation to hold that *either* the act must be carried out by a public official *or* the person must be acting in an official capacity, but both do not have to be true to suffice for "government acquiescence."[81]

In addition, the Ninth Circuit was not persuaded in *Barajas-Romero* by evidence proffered by the government showing that Mexico had a national policy to root out corruption.[82] Instead, the court determined that actions of officials at the local level can indicate government acquiescence, even if the state or national government is making determined efforts to thwart corruption.[83] The holding in *Barajas-Romero* is extremely helpful as attorneys only have to demonstrate that the actor who caused or will cause harm to their clients is *either* employed as a public official, regardless of whether they are on the job at the time of the torture, *or* that the person is acting in an official capacity. Attorneys in the Ninth Circuit do not have to prove both.

For harm caused by private parties who are neither public officials nor acting in an official capacity, the torture can still be protected under the CAT if public officials remain wilfully blind to the torture. The Ninth Circuit was the first circuit court to recognize "willful blindness" by government officials as sufficient to prove acquiescence,[84] an approach the BIA and the Attorney General have rejected.[85] In *Garcia-Milian v. Holder*, the court defined acquiescence of public officials to torture as 1) having awareness of the activity or consciously

[80] *Barajas-Romero*, 846 F.3d at 362.
[81] *Id*.; *see also* 8 C.F.R. § 208.18(a)(1).
[82] *Barajas-Romero*, 846 F.3d at 363.
[83] *Id*.
[84] Zheng v. Ashcroft, 332 F.3d 1186, 1197 (9th Cir. 2003).
[85] Matter of S-V-, 22 I&N Dec. 1306, 1312 (BIA 2000); Matter of Y-L, A-G & R-S-R-, 23 I&N Dec. 270, 283 (A.G. 2002).

closing their eyes to it, and 2) breaching their legal responsibility to intervene to prevent the harm.[86] The government does not have to have actual knowledge of the specific act of torture, but it must be aware that the torturous activity exists and not intervene to stop it.[87] The Ninth Circuit has hedged its approach, however, to not include "general ineffectiveness" by the government to investigate or prevent crimes, or an inability to bring criminals to justice.[88] Government complicity through general, but not specific, knowledge is required,[89] not simply government incapacity.

D. Relocation

Although not a required element of adjudicating a CAT claim, as part of the CAT analysis courts often consider whether the person could safely relocate elsewhere within their home country.[90] Until *Maldonado v. Lynch* in 2015, the Ninth Circuit's position had been that an applicant for CAT relief must prove that internal relocation was *impossible*.[91] The Ninth Circuit, however, overruled its past cases when it held in *Maldonado* that noncitizens are not required to prove that internal relocation in their home country is "impossible,"[92] and that in fact the CAT does not require petitioners "to prove anything as to internal relocation."[93] The Ninth Circuit read the relevant regulation plainly to determine that evidence related to internal relocation, if it is relevant, must be considered along with all other evidence relevant to the probability of an applicant "more likely than not" being tortured in their home country.[94] Evidence of internal

[86] Garcia–Milian v. Holder, 755 F.3d 1026, 1033 (9th Cir. 2014).
[87] Afriyie v. Holder, 613 F.3d 924, 937 (9th Cir. 2010).
[88] Andrade-Garcia v. Lynch, 828 F.3d 829, 836 (9th Cir. 2016).
[89] *Id*.
[90] 8 U.S.C. §1208.16(c)(3).
[91] *See, e.g.,* Hasan v. Ashcroft, 380 F.3d 1114, 1123 (9th Cir. 2004)("...petitioners have the burden…to show that internal relocation is not a possibility")..
[92] Maldonado v. Lynch, 786 F.3d 1155 (9th Cir. 2015).
[93] *Id*. at 1163 (9th Cir. 2015).
[94] *Id*.

relocation can be a relevant part of a CAT applicant's case, and the burden remains with the petitioner to provide evidence that internal relocation is not an option.[95]

More recently, in *Tzompantzi-Salazar v. Garland*, the Ninth Circuit stated that the *possibility* of internal relocation must be considered in a CAT claim,[96] but the court did not disturb its holding in *Maldonado* that evidence of internal relocation, when relevant to a torture determination, is simply one factor among many. For CAT purposes, in the Ninth Circuit practitioners should consequently proffer evidence of a petitioner's inability to safely relocate internally as part of a totality-of-the-circumstances analysis, to show that the noncitizen is more likely than not to be tortured if returned to their home country. Practitioners should likewise point out that the inability to relocate is not an element the applicant has to prove beyond a shadow of a doubt.

IV. International Legal Arguments to Strengthen CAT Claims

While the United States Supreme Court has made clear that the opinions of international governmental and nongovernmental bodies are not binding in U.S. courts,[97] the opinions and guidance of both can be used instructively and persuasively for U.S. courts adjudicating CAT claims.[98] Several areas where international bodies have recently identified potential violations by the United States of its CAT non-refoulement obligations include recent changes to asylum rules by the Biden administration and expedited removal.

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[95] *Id*.
[96] Tzompantzi-Salazar v. Garland, 32 F.4th 696, 705 (9th Cir. 2022).
[97] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 576-77 (2005) (acknowledging "the overwhelming weight of international opinion" as "instructive" but "not controlling.").
[98] *See, e.g.*, E. Bay Sanctuary Covenant ("EBSC") v. Biden, 993 F.3d 640, 672 n.13 (9th Cir. 2021) (determining that an amicus brief from the UN on the Refugee Protocol was not binding on U.S. courts but provided "significant guidance" in construing the Protocol); Miguel-Miguel v. Gonzales, 500 F.3d 941, 949 (9th Cir. 2007) (viewing the UNHCR Handbook as "persuasive" authority in interpreting the scope of refugee status for asylum seekers); Matter of J-E-, 23 I. & N. Dec. 291, 297–98 (BIA 2002) (noting that opinions of the European Court of Human Rights on CAT claims are "instructive").

Legal practitioners should consider incorporating international law arguments as part of their CAT claims, especially during appeals following a denial of an asylum and/ or CAT claim. There is some limited precedent for the Ninth Circuit to be persuaded by international law arguments for removal-related claims. For example, the Ninth Circuit has relied on the United Nations High Commissioner of Refugees ("UNHCR") interpretation of the 1951 Convention Relating to the Status of Refugees in defining who is a refugee, calling the Handbook "persuasive authority."[99] The Ninth Circuit has also found decisions of foreign courts and Resolutions of the UN General Assembly to be "influential" in defining torture.[100] CAT claims are hard to win.[101] Nevertheless, in some situations, the added weight of international law as authority in a particular case could be the piece that turns the court to decide in a petitioner's favor.

A. Biden's Changes to Asylum Rules

With the official end of the covid-19 pandemic, the Biden administration sought to add restrictions to asylum rules in the hopes of curbing the surge in migration expected when the pandemic-era restrictions, Migrant Protection Protocols (MPP) and Title 42, were lifted.[102] The "Circumvention of Legal Pathways Final Rule" (hereinafter, "Final Rule" or "the Rule") was issued on May 16, 2023.[103] The Final Rule establishes a presumption of ineligibility for migrants who enter the United States illegally, rather than by applying at a port of entry via appointment made using the Customs and Border Control OneApp.[104] The presumption of ineligibility also

[99] Miguel-Miguel v. Gonzales, 500 F.3d 941, 949 (9th Cir. 2007)
[100] *See, e.g.*, Padilla v Yoo, 678 F.3d 748, 764 (9th Cir. 2012)(looking at decisions of the European Court of Human Rights, UN General Assembly Resolutions, and Israeli Supreme Court for assistance in defining "torture").
[101] Executive Office of Immigration Review, *supra* note 18.
[102] Circumvention of Legal Pathways, Final Rule, 88 Fed. Reg. 31314, May 11, 2023.
[103] *Id.*
[104] *Id.*; *See also* Dept. of Homeland Security, *Fact Sheet: Department of State and Department of Homeland Security Announce Additional Sweeping Measures to Humanely Manage Border through Deterrence, Enforcement, and Diplomacy* (May 10, 2023, https://www.dhs.gov/news/2023/05/10/fact-sheet-additional-sweeping-measures-humanely-manage-border

applies to migrants who passed through another country on their way to the U.S. but did not first apply for (and be denied) protection in that transit country. Those who violate these processes and are caught, including within the interior of the United States, will be denied asylum with only limited exceptions,[105] subject to expedited removal, and barred from reentry for at least five years.[106]

As of September 2023, only 12% of asylum seekers who sought an exception from the Final Rule had received it.[107] Although the Final Rule includes the provision that migrants will not be expelled if they can demonstrate eligibility under the Convention Against Torture,[108] the rules have been subject to international criticism because of the lack of meaningful procedures to ensure CAT claims are heard and protected.[109] Also, as discussed further below, using expedited removal as the mechanism to enforce the Final Rule brings its own set of concerns with violating the Convention Against Torture, because expedited removal does not always allow migrants sufficient means or time to assert CAT claims.[110] In addition to violating U.S. obligations under the CAT, immigration advocates have noted the new asylum rules violate the right to seek asylum in domestic U.S. law, which is a codification of U.S. obligations to the 1951 Refugee Convention of which it is a signatory.[111]

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[105] *See* 8 C.F.R. §208.33 (The Final Rule's only exceptions to the presumption of ineligibility are 1) for people who are allowed to travel to the U.S. under a parole process (limited to certain countries and numerical caps), 2) unable to access the scheduling app due to a serious obstacle such as language or technical issues, or 3) if the person sought asylum in another country en route to the U.S. and received a final denial decision).
[106] *See* Dept. of Homeland Security, *supra* note 104.
[107] Daniel Wiessner, *Biden administration urges US court to uphold asylum restrictions*, Reuters (Nov. 7, 2023), https://www.reuters.com/world/us/biden-administration-urges-us-court-uphold-asylum-restrictions-2023-11-08/.
[108] Circumvention of Legal Pathways, Final Rule, 88 Fed. Reg. 31314, May 11, 2023.
[109] *See, e.g.,* Organization of American States, *infra* note 118.
[110] *See, e.g.*, Inter-American Commission on Human Rights, *infra* note 135.
[111] 8 U.S.C. §1158(a)(1) provides that "any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival…)...may apply for asylum."; *See, e.g.*, Sergio Ortiz Borbolla, *Proposed Asylum 'Transit Ban' Rule Violates Law, Endangers the Vulnerable, and Undermines U.S. Interests*, Washington Office on Latin America (WOLA) (Mar. 33, 2023), https://www.wola.org/2023/03/transit-ban-violates-law-endangers-vulnerable-undermines-interests/.

The Final Rule was enjoined for a few weeks in the summer of 2023, but in August 2023 the Ninth Circuit allowed the Rule to go into effect pending an expedited hearing process.[112] The Ninth Circuit is set to rule on the Final Rule any day, as of the writing of this paper.[113] If upheld, the Rule has the potential to deny the vast majority of asylum claims, far beyond current denial rates, a possibility conceded by the federal government, which claims that the Final Rule is nevertheless justified.[114] In the district court's July 25, 2023 decision to enjoin the Final Rule, Judge Tigar held that the rule was "arbitrary and capricious" under the Administrative Procedure Act (APA) and that the exceptions to the rule were not meaningfully available to many noncitizens.[115] The promise by the government to "generally offer opportunities for those with valid claims to seek protection" was found by Judge Tigar to be insufficient because so many noncitizens could still lack protection.[116] Judge Tigar did not reference the CAT specifically in his decision, but he did rely in part on the United State's "international obligations" to maintain asylum protections, protections which the Final Rule fails to ensure.[117]

Several international bodies including the Inter-American Commission for Human Rights (IACHR) and the United Nations High Commissioner for Refugees (UNHCR) have spoken out against the Final Rule on numerous grounds, including the potential likelihood of it violating U.S. obligations under the CAT, providing international legal arguments immigration attorneys can use if the need arises. For example, the IACHR has noted with concern that, despite the

[112] *E. Bay Sanctuary Covenant v. Biden*, 2023 WL 4943384 (N.D. Cal. Aug. 1, 2023).
[113] Weissner, *supra* note 107.
[114] Circumvention of Legal Pathways, Final Rule, 88 Fed. Reg. 31314 at 31332 ("The Departments acknowledge that despite the protections preserved by the rule and the availability of lawful pathways, the rebuttable presumption adopted in the rule will result in the denial of some asylum claims that otherwise may have been granted…the Departments believe that the rule will generally offer opportunities for those with valid claims to seek protection through asylum, statutory withholding of removal, or protection under the CAT…the Departments have determined that the benefits to the overall functioning of the system…justify the rule.").
[115] E. Bay Sanctuary Covenant v. Biden, 2023 WL 4729278 at *2 (N.D. Cal. July 25, 2023) (enjoining the Final Rule pending appeal); *see also E. Bay Sanctuary Covenant*, 2023 WL 4943384 (denying government's request to stay the court's injunction pending appeal).
[116] *E. Bay Sanctuary Covenant*, 2023 WL 4729278 at *2.
[117] *Id.* at 1.

provision in the new rules to provide protection under the CAT, the increase in costs and the required burden of proof would make it impossible for many migrants to assert their legal rights under the Convention.[118] The IACHR also noted, consistent with Judge Tigar in his decision enjoining the Final Rule, that the new rules limit access of migrants to mechanisms that would help them gain legal immigration status in the U.S., which would increase their vulnerability and the likelihood of being returned to a place where they could face torture.[119]

In the current appeal to the Ninth Circuit for the asylum rules, *East Bay Sanctuary Covenant v Biden*, the UNHCR provided an amicus brief stating that the Final Rule is "fundamentally inconsistent with the international framework established in the 1951 Convention and the 1967 Protocol" for Refugees, primarily because of the risk of refoulement and the fact that the exceptions do not remedy the refoulement concerns.[120] The brief highlights the centrality of non-refoulement in international refugee law, both in the 1951 Refugee Convention and in customary international law.[121] Non-refoulement requires individualized examinations of whether each noncitizen meets the criteria for asylum, which the UNHCR notes is missing in the Final Rule because of the Rule's presumption of ineligibility.[122]

Noncitizens who are not individually screened for asylum will certainly not be screened effectively for the higher standard required for CAT protections. While the Final Rule does include the opportunity to rebut the presumption of ineligibility for protection due to an "imminent and extreme threat to life or safety," including torture, the UNHCR notes this rebuttal

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[118] Organization of American States, *End of Title 42: IACHR calls on United States to protect rights of migrants and refugees*, May 26, 2023, https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/099.asp.
[119] *Id*.
[120] United Nations High Commissioner for Refugees (UNHCR), *Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Plaintiffs-Appellees and Affirmance in the case of East Bay Sanctuary Covenant et al v. Joseph R. Biden* 8, 25, Oct. 5, 2023, available at: https://www.refworld.org/docid/652d5fc74.html [accessed 7 November 2023].
[121] *Id*. at 20.
[122] *Id*. at 18 (citing UNHCR Exec. Comm. Conclusion No. 8 (XXVIII)(1977)).

still places people at risk of refoulement because of the "high temporal and qualitative thresholds."[123] The CAT Article 3 does not require that the threat of torture be imminent, only that there are "substantial grounds" that the person would be tortured if removed.[124] The Final Rule places too high of a threshold on noncitizens to seek asylum or CAT protections.

B. Expedited Removal

Expedited removal is a process by which immigrants arriving in the U.S. without proper documentation are swiftly removed, often within the same day, without appearing before an immigration judge and with no right to appeal.[125] This method of removal is most often used at the border, but it can be used anywhere throughout the country and for up to two years after a noncitzen has arrived.[126] The law provides for a potential immigrant to avoid removal if they express a fear of persecution or torture,[127] but the safeguards in place are incredibly weak, and even the safeguards that exist are inadequately enforced. For example, most expedited removal cases are never given the opportunity to appeal. While expedited removal statutorily allows for "review by an immigration judge," a noncitizen must affirmatively request such review and there is no burden on the government to inform noncitizens of this right.[128] Nevertheless legal representatives in the Ninth Circuit, including those who practice far from borders, may end up representing clients with expedited removal claims because border regions are not the only area expedited removal is used.

The United Nations Committee Against Torture ("the Committee"), the body tasked by the UN with monitoring compliance with the Convention Against Torture, including by

[123] *Id*. at 35.
[124] CAT, *supra* note 5, at art. 3.
[125] 8 C.F.R. §235(b).
[126] 8 U.S.C. §1225(b)(1)(A)(II)(A noncitizen can be subject to expedited removal up until they have been present continuously in the United States or two years).
[127] Hillel R. Smith, Cong. Rsch. Serv., LSB10150, *Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border* 2 (2020).
[128] 8 U.S.C. §1225(b)(1)(B)(iii)(III).

providing guidance to signatory states, expressed concern in 2014 about U.S. expedited removal procedures in its *Concluding Observations on the Combined Third to Fifth Period Reports of the United States of America*. The Committee noted that U.S. expedited removal procedures "do not adequately take into account the special circumstances of asylum seekers and other persons in need of international protection."[129] The Committee also noted that a growing number of asylum seekers, including those also seeking CAT protection, were not being referred by U.S. Customs and Border Patrol for "credible fear" asylum-screening interviews at all. The Committee urged the U.S. to provide for special consideration for victims of torture. The Committee has also recommended, among other non-refoulement best practices, that signatories ensure access to legal counsel as well as the right to appeal a deportation order, neither of which are guaranteed in expedited removal proceedings.[130]

In 2014, the American Civil Liberties Union issued a report that indicated that 55% of deportees interviewed, all of whom had been removed via expedited removal, reported they had not been asked about fear of persecution or torture.[131] As a result, the practice of expedited removal has come under regular international criticism, especially in regards to concerns about non-refoulement, a violation of U.S. obligations under the CAT.[132] The IACHR has documented examples of how expedited removal can fail to give asylum seekers a true opportunity to present their credible fear claims, thereby also preventing consideration for non-refoulement under the CAT. For example, in issuing a Precautionary Measure in 2016, the IACHR urged the United

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[129] United Nations Committee Against Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America* 9 (Dec. 19, 2014).
[130] Committee Against Torture, Draft, *General Comment No. 1 on the Implementation of Article 3 of the Convention in the Context of Article 22*, U.N. Hum. Rts. 4 (Feb. 2, 2017).
[131] American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom* (Dec. 2014), https://www.aclu.org/wp-content/uploads/legal-documents/120214-expeditedremoval_0.pdf.
[132] *See, e.g.* Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* 40 (Dec. 30, 2010), https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf (expressing concern that the United States had failed to implement recommendations proposed by a bi-partisan organization to safeguard rights of migrants in expedited removal proceedings to avoid non-refoulement, among other violations).

States not to deport a mother and daughter from El Salvador who had been required to present their asylum claim together in a joint credible fear interview.[133] In her credible fear interview with a male Border Patrol agent, the mother was not able to discuss her rape by four gang members because of her trauma and also because her young daughter was present in the room with her. The pair were subsequently placed in expedited removal proceedings. By being denied the opportunity to fully present their asylum claim, they were also denied the opportunity to request CAT protections. In the Immigration Judge's denial of the pair's asylum claim, no mention is made at all of consideration of protection under the CAT in the alternative.[134]

Finally, the IACHR has consistently criticized the United States' use of expedited removal, especially for families, accusing the U.S. of not giving potential beneficiaries adequate opportunity for their claim to be heard by an immigration judge.[135] The IACHR does not consider the asylum officers who conduct "credible fear" interviews to be adequate to assess fear of persecution or torture, as they are not impartial adjudicators and they often lack sufficient training, especially in regards to screening credible fear in children.[136] Consistent with the IACHR's concerns, the United States' Government Accountability Office (GAO) noted in a 2020 report that the training of asylum officers who conduct credible fear interviews is "basic" and "inconsistent," and not all officers receive adequate training before they begin screening noncitizens seeking asylum.[137] In its report, the GAO noted that additional training was needed for asylum officers to be able to conduct "efficient and effective fear screenings for families."[138]

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[133] IAComm.HR, Precautionary Measures no 297/16, E.G.S. and A.E.S.G., United States of America, May 11, 2016, https://www.acnur.org/fileadmin/Documentos/BDL/2016/10455.pdf.
[134] *Id*. at 3.
[135] Inter-American Commission on Human Rights, *Refugees and Migrants in the United States: Families and Unaccompanied Children* 79 (July 24, 2015), https://www.oas.org/en/iachr/reports/pdfs/refugees-migrants-us.pdf
[136] *Id*. at 95.
[137] United States Government Accountability Office, *Immigration: Actions Needed to Strengthen USCIS's Oversight and Data* 26, 29 (Feb. 2020), https://www.gao.gov/assets/gao-20-250.pdf.
[138] *Id*. at 32.

Only noncitizens who establish a "reasonable fear" before the asylum officer get to then bring their claim before an immigration judge, leading to fears noted by the IACHR that many legitimate torture claims do not receive protection.[139]

V. Conclusion

Winning a Convention Against Torture claim is not easy in United States federal courts, but legal advocates bringing removal cases in the Ninth Circuit have a leg up from other circuits because of the Circuit's more generous interpretation of the Convention than any other circuit. Attorneys should maximize the Ninth Circuit's interpretations of the CAT to their clients' advantage by being intimately familiar with the holdings of relevant CAT cases, and demonstrating how the facts of their clients' cases align with the reasoning of the Ninth Circuit's CAT jurisprudence. In addition, legal advocates should not hesitate to add international legal arguments to add persuasiveness and weight to their clients' cases. For the foreseeable future, both expedited removal and the Biden asylum rule changes will remain areas where noncitizens facing torture in their home countries will be denied protection without strong advocacy demonstrating in court that the procedures violate international law. For noncitizens ineligible for or denied asylum or other removal relief, a successful CAT claim can be the difference between remaining safely in the United States and being returned to a dangerous situation in their home country.

[139] Inter-American Commission on Human Rights, *supra* note 135, at 103.