

**TESTING THE BOUNDARIES OF HUMANITARIAN RELIEF FROM REMOVAL:
A CASE STUDY OF CLAIMS BY MEXICAN LAW ENFORCEMENT OFFICERS
TARGETED BY NARCOTRAFFICKERS**

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ABSTRACT

This article examines the requests for humanitarian relief from removal (“deportation”) that are being made in Immigration Courts across the country by the latest wave of headline-making immigrants: Mexican law enforcement officers fleeing threats from the violent narcotraffickers that are engaged in a pitched battle for the U.S. drug market. A December 29, 2010 Immigration Judge (“IJ”) order denying former municipal police officer José Alarcón’s applications for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”) provides a useful framework for exploring this group of immigrants’ compelling claims. The article begins by placing the officers’ claims in context. It then considers the merits of Officer Alarcón’s case and the extent to which the recent IJ denial (the first known decision in this type of case) foretells obstacles to claims by similarly situated officers. The article urges not only that the lesser-known form of humanitarian relief available under CAT represents an appropriate mechanism for providing refuge in these cases, but also that the United States is obliged to extend CAT relief to Officer Alarcón and similarly situated Mexican law enforcement officers.

On December 29, 2010, an Immigration Judge in Dallas, Texas denied former Mexican police officer José Alarcón’s¹ request for asylum and related forms of relief from removal and ordered him deported, explaining that, because Officer Alarcón had “failed to carry the necessary burden of proof for any of his applications for relief, his applications must fail.”² Like tens of thousands of other Mexican nationals in recent

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¹ The author has no reason to believe that José Alarcón is in any way related to the judge for whom the author is a law clerk.

² *In re Alarcón*, No. ___, at 33 (Immigration Judge Order Dec. 29, 2010) (redacted version on file with author) [hereinafter *In re Alarcón*]. Immigration Judge rulings generally are not made available to the public, and the hearing on Officer Alarcón’s case was closed. Dianne Solis, *Judge in Dallas Denies Asylum Request from Ex-Police Officer in Mexico*, DALLAS MORNING NEWS, Jan. 6, 2011, <http://www.dallasnews.com/news/community->

years, Officer Alarcón fled Mexico to escape the rampant violence perpetrated by powerful drug traffickers in Mexico.³ He has been in hiding ever since.⁴ Prior to entering the United States, Officer Alarcón had served as a municipal police officer in Juarez, Mexico, a city overrun by narco-trafficking-fueled violence.⁵ He is not the only Mexican law enforcement official to seek asylum in the United States,⁶ but it appears that his case is the first to be adjudicated by an Immigration Judge.⁷ The result, despite the existence of the long-standing, oft-cited observation that, “in appropriate circumstances[,]” former law enforcement officials may qualify for asylum in the United States,⁸ does not bode well for the other officers with pending claims.

These Mexican police officers are not the “traditional” asylum applicants of decades past; they are not civilians fleeing oppression or torture carried out by government officials. Rather, they *were* the government officials charged with protecting civilians and maintaining law and order in Mexico. The narco-traffickers are their primary persecutors; the threats and torture they fear are being carried out by lawless non-state actors.⁹ The plight of these officers is compelling, but it is far from clear that they are

news/dallas/headlines/20110106-judge-in-dallas-denies-asylum-request-from-ex-police-officer-in-mexico.ece (“The case of José Alarcón was heard in late November in a closed hearing in a federal immigration court here.”).

An attorney associated with Officer Alarcón’s case provided a redacted copy of the Immigration Judge’s December 29, 2010 order to the author. E-mail from William Humble III, Esq. to author (Mar. 4, 2011, 09:38 PST) (on file with author).

³ James C. McKinley Jr., *Fleeing Drug Violence, Mexicans Pour into the U.S.*, N.Y. TIMES, Apr. 17, 2010, <http://www.nytimes.com/2010/04/18/us/18border.html> (“In El Paso alone, the police estimate that at least 30,000 Mexicans have moved across the border in the past two years because of the violence in Juárez and the river towns to the southeast.”).

⁴ See *In re Alarcón* at 16 (recounting Officer Alarcón’s testimony that he extracted promises from reporters that they would not disclose his location in Texas); see also Todd Bensman, *Can a Mexican Cop Find Asylum in North Texas?* D MAGAZINE, Nov. 2009, http://www.dmagazine.com/Home/D_Magazine/2009/November/Can_a_Mexican_Cop_Find_Asylum_in_North_Texas.aspx.

⁵ The term narco-trafficking refers to “[t]he smuggling and distribution of illegal drugs.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2009); see also *Mexican Police Officer Seeks Asylum in US*, ASSOCIATED PRESS, Nov. 23, 2010, <http://www.myfoxdfw.com/dpp/news/112310-mexican-police-officer-seeks-asylum-in-us> (“More than 4,000 people have been killed in Juárez, across the border from El Paso, in drug-related violence in the past two years. The city has one of the highest murder rates in the world.”); Susana Hayward, *No Escape*, TEX. OBSERVER, Aug. 6, 2010, available at 2010 WLNR 16780638 (“Juarez, the epicenter of Mexico’s drug war, has become one of the most dangerous cities in the world; El Paso remains one of the safest.”).

⁶ See, e.g., *3 Mexican Police Chiefs Seeking Political Asylum, DHS Official Says*, ASSOCIATED PRESS, May 14, 2008, available at <http://www.foxnews.com/story/0,2933,355570,00.html> (reporting that Jayson Ahern, deputy commissioner of Customs and Border Protection, told the Associated Press that, in the preceding months, three Mexican police chiefs fleeing the escalating violence of the Mexican drug wars had “shown up at the U.S. border, fearing for their lives” and requested asylum in the United States).

⁷ Dianne Sol[i]s, *Mexican Officer’s Bid to Escape Drug War*, DALLAS MORNING NEWS, Nov. 25, 2010, http://www.dallasnews.com/news/community-news/dallas/headlines/20101125-mexican-officer_s-bid-to-escape-drug-war-gain-asylum-to-be-heard-today-in-dallas.ece (“The Alarcón case is believed to be the first on the crowded court dockets here – one of the few nationally – involving a Mexican law enforcement officer.”).

⁸ *In re Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1998) (“It is possible that mistreatment occurring because of such a status [as a former member of the national police] in appropriate circumstances could be found to be persecution on account of political opinion or membership in a particular social group.”).

⁹ Susan Ginsburg, a nonresident fellow of the Migration Policy Institute, has been quoted summarizing the phenomenon as follows:

“We are used to seeing the need for protection from governments and states, and this (the migration we are seeing now) is a fear of persecution from nonstate actors, criminal gangs that have taken control of areas of the country.

“On the one hand, you do not want to provide a completely open door. On the other hand, the standards we have now reflect an older era.”

eligible for asylum in the United States. Realities on both sides of the border evince complex new pressures in U.S.-Mexico relations and strain existing frameworks for humanitarian efforts to respond effectively to cross-border tensions. Given the United States' close proximity to and the nature of its relationship with Mexico, asylum with the pathway to permanent resettlement in the United States is not the ideal option from a political perspective. On one hand, offering asylum to Mexican law enforcement officers would be inconsistent with this country's efforts to bolster the rule of law in Mexico.¹⁰ At the same time, it could serve to draw yet more attention to what some view as this country's complicity in the escalating cross-border violence.¹¹ The discussion, however, need not end there.

Considerations of "evolving standards of decency" have long played a role in evaluating claims of constitutional error in American jurisprudence.¹² U.S. immigration law and policy have also long recognized that, as conditions change in countries around the world placing individuals in peril, so must approaches to determining eligibility for humanitarian relief change.¹³ Developments in international humanitarian and refugee law reinforce this bedrock principle. This country's approach to the availability of asylum and related forms of relief from removal (formerly and more commonly referred

Jazmine Ulloa, *Border violence brings asylum policy into question*, BROWNSVILLE HERALD, Apr. 3, 2010, <http://www.brownsvilleherald.com/articles/journalist-110513-asylum-policy.html>.

¹⁰ See *infra* notes 42-44 and accompanying text.

¹¹ See *infra* note 41 and accompanying text; see also Brands, *infra* note 19, at 20 (footnotes omitted) ("[T]he United States acts as an inexhaustible arsenal for the cartels. While Mexico has very strict gun laws, the United States does not, and the vast majority of weaponry (90-95 percent) used by the traffickers originates north of the border.").

¹² Over fifty years ago, mindful of the implications of domestic policy for this country's role in the national and international political community, the United States Supreme Court determined that it was unconstitutional for the government to use the revocation of United States citizenship as a form of punishment. *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion). The Court explained:

We believe, . . . that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

Id. at 101-02 (footnotes omitted). Evaluating a claim that denaturalization violated the Eighth Amendment's protection against cruel and unusual punishment, the Court explained that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

¹³ For example, the Board of Immigration Appeals ("BIA") has acknowledged the flexibility permitted by the "membership in a particular social group" classification that provides the basis for certain asylum claims:

[W]e have recognized "particular social groups" in a number of cases. *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (young women of the Tchamba-Kunsuntu tribe of northern Togo who did not undergo female genital mutilation as practiced by that tribe and who opposed the practice); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996) (members of the Marehan subclan of Somalia who share ties of kinship and linguistic commonalities); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (persons identified as homosexuals by the Cuban Government); *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988) (former members of the national police of El Salvador).

In re C-A-, 23 I. & N. Dec. 951, 955 (BIA 2006).

to as “deportation”)¹⁴ must be responsive to the evolving social, economic, and political realities of narcotrafficking.¹⁵

This article discusses the types of relief sought by Officer Alarcón and similarly situated Mexican law enforcement officers who have fled to this country, and urges that the lesser-known and more limited form of humanitarian relief available under the Convention Against Torture (“CAT”)¹⁶ represents an appropriate remedy for these victims of the present narcotrafficking violence in Mexico. Part I provides a brief overview of the situation law enforcement officers face in Mexico today. Part II reviews the background of Officer Alarcón’s claim as established in his removal proceedings in the Immigration Court in Dallas, Texas in 2010. Part III provides a brief introduction to the forms of relief addressed in the Immigration Judge’s ruling on Officer Alarcón’s claim, and sets out his reasoning and conclusions regarding Officer Alarcón’s requests for asylum, withholding of removal, and relief under CAT.¹⁷ Part IV first examines Officer Alarcón’s asylum claim and considers the extent to which the recent denial of that claim foretells obstacles to claims by similarly situated officers. It also explains the scope of

¹⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996), merged proceedings to deport aliens from the United States with those to exclude aliens from admission to the United States under the singular process of “removal proceedings.” 8 U.S.C.A. § 1229a(a)(3) (“[A] proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”).

¹⁵ The Refugee Act of 1980 was enacted “to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees,” and this country’s courts are guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, U.N. Doc. HCR/IP/4/Eng./REV.2 (ed. 1992) (1979) (“UNHCR Handbook”). *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-39 (1987) (reviewing the legislative history of the resulting new definition of “refugee”). This article explores and applies relevant legal precedent in the United States: the law that has developed in decisions from the Board of Immigration Appeals (“BIA”) and United States Courts of Appeals. A recent article in the *Utrecht Journal of International and European Law* provides an overview of international refugee law and considers the application of international and U.S. refugee law to the plight of all Mexican nationals fleeing the drug-related violence in their country. Holly Buchanan, *Fleeing the Drug War Next Door: Drug-related Violence as a Basis for Refugee Protection for Mexican Asylum-Seekers*, 27:72 *Merkourios: UTRECHT J. OF INT’L AND EUROPEAN L.* 28-60 (2010), available at <http://www.merkourios.org/index.php/mj/article/view/21>; see also, e.g., Freddy Funes, Comment, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 *U. MIAMI L. REV.* 301, 303 (2008) (arguing that, although the United States is aware of growing ties between Central American and “homegrown” gangs, its law rendering ineligible for asylum aggravated felons with gang ties exacerbates the problem and reflects a refusal to mitigate the resulting damage); Elizabeth A. James, Comment, *Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 44 *N.C. J. INT’L L. & COM. REG.* 455, 459-60 (2008) (considering whether the United States’ approach to eligibility for asylum is insufficiently responsive to claims by victims from “any region where generalized violence, terrorism, civil war, and government impotency combine to create a mass forced migration”); Maria Stavroupoulou, *Indigenous Peoples Displaced from Their Environment: Is there Adequate Protection?*, 5 *COLO. J. INT’L ENVTL. L. & POL’Y* 105, 120-21 (1994) (arguing for a legal framework that would draw on existing refugee, humanitarian, and human rights law to afford protection to “environmental refugees,” indigenous peoples displaced from their lands).

¹⁶ The United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture” or “CAT”) in 1990. U.N.G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); 136 Cong. Rec. S17491-92 (Oct. 27, 1990) (ratifying the CAT). An applicant is entitled to relief under CAT if he or she is able “to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” 8 CFR § 208.16(c)(2) (2011).

¹⁷ An application for asylum is generally considered an application for withholding of removal, as well. 8 C.F.R. § 1208.3(b) (2011). Similarly, asylum applications filed on or after April 1, 1997, “shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.” 8 C.F.R. § 1208.13(c)(1) (2011). These alternative, more limited forms of relief are introduced in Section III(A) *infra*.

relief under CAT and analyzes the likelihood of CAT relief being granted in these cases. Part V proposes that, under the circumstances, CAT relief represents the appropriate mechanism to provide sanctuary to Officer Alarcón and similarly situated Mexican law enforcement officers.

I. *PLATA O PLOMO?*¹⁸ MEXICAN LAW ENFORCEMENT TRAPPED IN THE MIDDLE

In 2009, the U.S. Army War College Strategic Studies Institute published a comprehensive report on the state of the drug war being waged in Mexico and the role of related U.S. policy.¹⁹ The report opens with the following anecdote from the early days of the current wave of violence:

In April 2006, individuals linked to one of Mexico's powerful drug cartels left the severed heads of two police officers in front of the municipal building in the southern port city of Acapulco. The two officials were apparently abducted and killed in retaliation for their participation in a shootout with drug traffickers several days earlier. Their bloodied heads were accompanied by a hand-written note reading, "So that you learn some respect," a message meant to make clear that the cartel would brook no interference from the authorities.²⁰

As Mexico's drug war rages on,²¹ it is hardly surprising that Mexicans are fleeing the violence.²² The escalating drug violence in Mexico, with a death count now approaching 35,000 since 2006, has been well publicized.²³

¹⁸ This Spanish phrase is literally translated "silver or lead?" and reportedly was the message delivered to newly installed judges charged with fighting drug trafficking in Colombia to remind them that they could choose bribes over the risk of assassination by the cartels. Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L. J. 345, 36 (2000) ("Drug lords have long penetrated and corrupted the judicial authorities through coercion, threats, bribes, and blackmail. In the 1980s, Colombian judges were offered the choice of "plata o plomo" (silver or lead) by drug lords whose operations crossed international borders and invaded all levels of society and government." (footnote omitted)).

¹⁹ Hal Brands, *Mexico's Narco-Insurgency and U.S. Counterdrug Policy*, U.S. ARMY WAR COLLEGE STRATEGIC STUDIES INSTITUTE, at 1 (May 2009), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubid=918> (cataloging the problems – ranging from official corruption to U.S. domestic drug consumption – that frustrate Mexican attempts to regain control over the country, and concluding that U.S. programs to assist Mexican efforts, including the Merida Initiative, a 3-year \$1.4 billion counternarcotics assistance program, are inadequate).

²⁰ *Id.* at 1 (footnote omitted).

²¹ A comprehensive treatment of the origins and scope of Mexico's "war on drugs" is beyond the scope of this article. Colleen W. Cook, Analyst in Latin American Affairs, in the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service, prepared an excellent treatment of the origins and extent of the cartels' influence in Mexico for Congress in 2007. COLLEEN W. COOK, MEXICO'S DRUG CARTELS, CRS Report for Congress, RL34215 (Oct. 16, 2007), available at <http://www.fas.org/sgp/crs/row/RL34215.pdf>.

²² See, e.g., Hayward, *supra* note 5. (reporting that estimates of the number of Juarez residents that have fled the violence in that city range from 100,000 to 500,000); McKinley, *Fleeing Drug Violence, Mexicans Pour into U.S.*, N.Y. TIMES, Apr. 17, 2010, <http://www.nytimes.com/2010/04/18/us/18border.html> (reporting that local police estimate at least 30,000 Mexicans migrated in the two preceding years). It appears that the flight from border towns continues unabated:

A violence-ridden stretch of Mexico's border with the United States has become virtually deserted due to intimidation from violent drug cartels, which have killed hundreds in that area in recent years, scared away local law enforcement and forced countless businesses to close shop.

In sum, narcotraffickers in Mexico are engaged in a pitched battle for the U.S. drug market:

Today Mexico is a major producer and supplier to the U.S. market of heroin, methamphetamine, and marijuana and the major transit country for cocaine sold in the United States. According to the Department of State's 2009 International Narcotics Control Strategy Report, as much as 90% of the cocaine entering the United States now transits through Mexico. A small number of Mexican DTOs [Drug Trafficking Organizations] control the most significant drug distribution operations along the Southwest border. . . .

In the U.S. Justice Department's National Drug Threat Assessment 2009 (published in December 2008), Mexican drug trafficking organizations were identified as the greatest drug trafficking threat to the United States worldwide. Today's situation arose with the closing of the Caribbean route through which drugs, and particularly cocaine from Colombia, was channeled to the United States in an earlier era. With increased U.S. efforts to interdict narcotic smugglers in the Caribbean and Florida in the late 1980s and 1990s, the Colombian drug cartels began subcontracting with Mexican DTOs to smuggle cocaine into the United States across the Southwest border. By the late 1990s, Mexican DTOs had pushed aside the Colombians and gained greater control and market share of cocaine trafficking into the United States. Mexican DTOs now dominate the wholesale illicit market in the United States.

The Mexican DTOs, often referred to as "drug cartels," have become increasingly violent. The National Drug Threat Assessment states

Northern Mexico's Juarez Valley, a cotton-farming area located on the southern bank of the Rio Grande, has become increasingly desolate, with its three towns having lost between 30 percent and 45 percent of their residents since 2005, according to census figures.

Mexicans Flee Violence-Plagued Stretch of Border, FOX NEWS LATINO, Mar. 4, 2011, <http://latino.foxnews.com/latino/news/2011/03/04/mexicans-flee-violence-plagued-stretch-border/>.

²³ See, e.g., Juan Forero, *Colombia Shares Its Cartel-Fighting Expertise with Mexican Forces*, WASHINGTON POST, Jan. 22, 2011, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012107040.html> ("The violence in Mexico began to spike dramatically in 2006, when President Felipe Calderon deployed thousands of troops and federal police to combat drug cartels. The death count is now nearly 35,000, as the cartels have fought back ferociously to maintain their fiefdoms."); see also *Organised Crime in Mexico: Under the Volcano*, THE ECONOMIST, Oct. 16, 2010, available at 2010 WLNR 20679240 ("Since Felipe Calderón began his presidency in 2006 with a renewed effort against the drugs cartels, more than 28,000 people have been killed. Mr. Calderón has deployed 50,000 soldiers to fight the gangsters, whose inventories now include rocket-propelled grenades, helicopters and semi-submersible vessels. Pitched battles between the army and the traffickers have caused some of these casualties; more still have been caused by fighting among Mexico's half-dozen main trafficking organisations, engaged in a bloody struggle for the trade."); Elisabeth Malkin, *Lawmakers in Mexico to Debate Drug Fight*, N.Y. TIMES, Aug. 18, 2010, at A12, available at <http://www.nytimes.com/2010/08/19/world/americas/19mexico.html> ("The government said earlier this month that 28,228 people had been killed since the government began its crackdown on drug cartels at the end of 2006. Of those, 2,076 were local, state or federal police officers, according to the Public Security Ministry.").

that Mexico's DTOs now "control most of the U.S. drug market," with distribution capabilities in 230 U.S. cities.²⁴

The violence affects every sector of Mexican society, but government officials, including law enforcement officers, are particularly targeted.²⁵ Although narcotraffickers are the primary perpetrators of the violence, government, military, and other law enforcement officials have been implicated in attacks, as well.²⁶ This is the inevitable result of presenting public servants with a life-or-death choice between collaboration and resistance:

The large sums of cash generated by drug sales and smuggled back to Mexico is used to corrupt Mexican law enforcement and public officials to either ignore cartel activities or to actively support and protect them. Corruption of local, state and federal police has resulted in [President] Calderón's reliance on the military to combat DTOs, and remains a major challenge for U.S.-Mexican law enforcement cooperation. Corruption of government officials has also been a significant problem that has made the campaign against DTOs more difficult . . . In early December 2008, President Calderón stated that some 11,500 public employees had been sanctioned for corruption in the two years since he took office. In late May 2009, the federal government made its largest-ever arrest of politicians and senior officials in an anti-drug operation in the President's home state of Michoacan. Ten mayors and 18 other government and

²⁴ JUNE S. BEITTEL, MEXICO'S DRUG-RELATED VIOLENCE, CRS Report for Congress, R40582, at 1 (May 27, 2009), available at <http://www.fas.org/sgp/crs/row/R40582.pdf> (footnotes omitted). (quoting President Felipe Calderón noting that Mexico's problems are fueled by the fact that the United States "has the highest level of drug consumption in the world" and an El Paso immigration lawyer noting that "the violence escalated after the United States lifted a 10-year ban on 19 types of assault weapons in 2004," making large quantities of illicit weapons more readily available to the cartels); see also Brands, *supra* note 19, at 20 (footnotes omitted) ("[T]he United States acts as an inexhaustible arsenal for the cartels. While Mexico has very strict gun laws, the United States does not, and the vast majority of weaponry (90-95 percent) used by the traffickers originates north of the border.").

²⁵ see BEITTEL, *supra* note 24 at 8 ("The growth and dramatic character of the violence, the targeting of civil and law enforcement officials, and the direct battle with police and military units, have led some observers to question the strength of the Mexican government, even characterizing it as potentially a 'failing' state."); see also Diane Soll[i]s, *Mexican Officer's Bid to Escape Drug War, Gain Asylum to be Heard Today in Dallas*, DALLAS MORNING NEWS, Nov. 25, 2010, http://www.dallasnews.com/news/community-news/dallas/headlines/20101125-mexican-officer_s-bid-to-escape-drug-war-gain-asylum-to-be-heard-today-in-dallas.ece (reporting that in November 2010, "[t]he Mexican newspaper chain Grupo Reforma report[ed] that 637 police officers have been killed nationally in 2010, of more than 10,000 deaths for the year in the war 'against and among organized crime.'"); Dave Gibson, *Mexican Drug Cartels Have Declared Open-Season on Police Officers*, NATIONAL DRUG CARTEL EXAMINER, Jan. 20, 2011, <http://www.examiner.com/drug-cartel-in-national/mexican-drug-cartels-have-declared-open-season-on-police-officers?render=print> ("Since 2006, nearly 500 police officers, soldiers, and prosecutors have been killed by cartel gunmen.").

²⁶ See Philip Sherwell, *Mexican Drug Wars Force Police to Claim Asylum in US*, TELEGRAPH (London), Apr. 11, 2009, <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/5142045/Mexican-drug-wars-force-police-to-claim-asylum-in-US.html> (identifying an "an unprecedented new trend: Mexican police officers claiming safe haven across the border in America, because they claim their own colleagues cannot protect them – or might even be trying to kill them"); see also Andrew Becker, *Mexican Police Fleeing Cartels Find U.S. Reluctant to Grant Asylum*, L.A. TIMES, Jun. 15, 2009, <http://articles.latimes.com/2009/jun/15/local/me-mexico-police15> ("As drug violence has worsened in Mexico, businesspeople, journalists and other professionals have been seeking refuge in the U.S. But few have as much at stake as law enforcement figures who defy the cartels.").

police officials, including state prosecutors and the heads of state and municipal police, were detained for alleged ties to the drug gangs.²⁷

Early in 2010, statistics reflected that, after a spike in asylum applications by Mexican nationals in 2007 and 2008,²⁸ such applications were on the decline:

The number of asylum applications from Mexican nationals to the U.S. Citizenship and Immigration Services — a division of the Department of Homeland Security that governs lawful migration into the United States — fell by 27 percent in 2009, to 1,778 from 2,456 the previous year. Through the second quarter of 2010, the agency had received just 233 applications. Most are denied, federal officials said, though the USCIS did not immediately provide approval statistics on Thursday. In fact, Mexico does not even make the top 10 list of countries whose citizens are granted asylum. China, Ethiopia and Haiti hold the top three spots. One explanation could be the grit of Mexicans in border towns who, though forced to live their lives differently than they did just a few years ago, remain determined to ride out the current crime wave. Others believe, however, that applications have dropped because the U.S. laws governing refugee and asylum designations are too stringent.²⁹

Despite the fact that applications for asylum by Mexican nationals are granted at a rate of *less than 2%* each year, by late 2010, it became clear that the numbers, in fact, continued to climb.³⁰

There is no official count of the Mexican police officers that have applied for asylum in the United States, but indications are that the number is on the rise.³¹ In March 2008,

²⁷ BEITTEL, *supra* note 24, at 9 (footnotes omitted); see also Brands, *supra* note 19, at 16 (explaining that “local police [commonly] provide the cartels with early warning of impending government operations” so that, as one police official complained, “[e]veryone in the world knows we’re coming” (footnote omitted)); *id.* (“The scope of the corruption is difficult to overstate. In several instances, local police forces have become so thoroughly infested with informers that the federal government has been forced to disband them entirely.”).

²⁸ FY 2010 Statistical Yearbook, U.S. Department of Justice, Executive Office for Immigration Review, at 4 of Appendix of FY 2006 Asylum Statistics by Nationality, Jan. 2011, *available at* <http://www.justice.gov/eoir/statspub/fy10syb.pdf>. Asylum applications with the immigration courts decreased overall by a 42 percent from fiscal year 2006 to fiscal year 2010. *Id.* at A1.

²⁹ Julian Aguilar, *Despite Drug War, Mexican Asylum-Seekers Decrease*, TEX. TRIBUNE, Jun. 4, 2010, <http://www.texastribune.org/texas-mexico-border-news/texas-mexico-border/despite-drug-war-mexican-asylum-seekers-decrease/>. In fiscal year 2010, the Immigration Courts received 3,231 new asylum applications from Mexican nationals. Of those applications, 49 (approximately 1.5%) were granted. FY 2010 Statistical Yearbook, U.S. Department of Justice, Executive Office for Immigration Review, at 4 of Appendix of FY 2010 Asylum Statistics by Nationality. The overall grant rate for all asylum applications in fiscal year 2010 was 51%. *Id.* at K1.

³⁰ *Mexican Police Officer Seeks Asylum in US*, ASSOCIATED PRESS, Nov. 23, 2010, *available at* <http://www.myfoxdfw.com/dpp/news/112310-mexican-police-officer-seeks-asylum-in-us> (“Asylum applications from Mexicans before immigration judges jumped to nearly 3,800 in fiscal year 2010, up about 35 percent from the year earlier and the highest level in five years. But less than 2 percent of those who in 2010 applied ultimately were granted asylum, according to information obtained after Freedom of Information Act requests by Syracuse University’s Transactional Records Access Clearinghouse.”); see also Patrick Michels and Chris Vogel, *Asylum Denied: Unlike Refugees from Other Troubled Countries, Only a Fraction of Mexicans Seeking U.S. Asylum are Accepted – Not matter their Wounds or Stories*, PHOENIX NEW TIMES, Aug. 26, 2010, *available at* 2010 WLNR 17165654 (“The overall grant rate for asylum applications by Mexican nationals has hovered near 2%, while the grant rate for Colombian nationals is about 25%.”).

the police chief of Palomas, Mexico presented himself and applied for asylum at the Columbus, New Mexico border crossing “after his deputies abandoned him.”³² In May 2008, the Department of Homeland Security announced that three Mexican police chiefs were seeking asylum in the United States.³³ Former Deputy Commissioner of Customs and Border Protection, Jayson Ahern, confirmed that Mexican police officials “basically abandoned by their police officers or police departments in many cases” were seeking asylum in the United States.³⁴ In June 2009, a Los Angeles Times article reported the stories of three former Mexican police officers who fled death threats and violence from the drug cartels.³⁵ In March 2011, unconfirmed reports began to surface that Marisol Valles Garcia, the police chief of the city of Praxedis G. Guerrero, fled her post and was seeking asylum in the United States after receiving death threats from drug gangs.³⁶ U.S. and Mexican officials confirmed that Chief Garcia, whose predecessor was kidnapped and decapitated in July 2009, was in the United States and seeking asylum after receiving death threats.³⁷ If Officer Alarcón’s case is any indication of the outcomes these officers can expect, they are not likely to find themselves among the handful of Mexican national applicants granted asylum in the coming years.

“Narcotics-driven corruption is rampant, government control of large swaths of the country is tenuous at best, and predictions that Mexico is on the way to becoming a failed state are frequent.”³⁸ Beyond that, it is clear that “[t]he effects of th[e] violence are not limited to Mexico; cartel killings have already spilled over into the United States, and the potential destabilization of Mexico’s economy and political system presents a host of dangers to U.S. interests.”³⁹ On February 15, 2011, the killing of one United States Immigration and Customs Enforcement (“ICE”) officer, and the wounding of another, as they were driving to their post at the U.S. Embassy in Mexico City brought the urgency of addressing narco-trafficking violence back into the headlines in the United States.⁴⁰

³¹ Becker, *supra* note 26 (“No statistics are available on how many police officers have sought asylum in this country, but government sources and immigration attorneys suggest the number is increasing.”).

³² Mark Evans, *Mexican Police Chief Wants U.S. Asylum*, USA TODAY, Mar. 22, 2008, available at http://www.usatoday.com/news/nation/2008-03-22-asylumsought_N.htm

³³ Dave Gibson, *Mexican Drug Cartels Have Declared Open-Season on Police Officers*, NATIONAL DRUG CARTEL EXAMINER, Jan. 20, 2011, <http://www.examiner.com/drug-cartel-in-national/mexican-drug-cartels-have-declared-open-season-on-police-officers>.

³⁴ *Id.*; see also *Mexico: Police Force Quits After Officers Are Killed*, L.A. TIMES, Aug. 5, 2011, at A9 (explaining that the “entire 20-member police force in the northern city of Ascensión resigned Thursday [August 4, 2011] after a series of attacks killed three officers.”).

³⁵ Becker, *supra* note 26 (reporting that an officer Alvarez fled after receiving threats for refusing to cooperate with a cartel and receiving no assurance of support from his supervisor in the police department; another officer, identified only as Jesus, fled after his supervisor and a fellow officer were shot; and Julio Ledezma, the chief of police in the northern Mexican town of La Junta, refused a bribe offered by an aid to the mayor and subsequently fled after six armed gunmen threatened to kill him “no matter where he went in Mexico”).

³⁶ Garfield Miller, *Young Mexican Police Chief Marisol Valles Garcia May Seek US Asylum*, CHRISTIAN SCIENCE MONITOR, Mar. 5, 2011, <http://www.csmonitor.com/World/2011/0305/Young-Mexican-police-chief-Marisol-Valles-Garcia-may-seek-US-asylum>; *Mexico Chief Fired Amid Reports She Fled for Safety*, CNN.COM, Mar. 7, 2011, <http://edition.cnn.com/2011/WORLD/americas/03/07/mexico.female.police.chief/>.

³⁷ *Young Police Chief Seeks U.S. Asylum*, ASSOCIATED PRESS, Mar. 8, 2011, available at <http://content.usatoday.com/communities/ondeadline/post/2011/03/young-ex-mexican-police-chief-seeking-us-asylum/1>.

³⁸ Brands, *supra* note 19, at 5.

³⁹ *Id.* at 2.

⁴⁰ See e.g., *17 Booked in Mexico Drug Investigation: Alleged Cartel Finance Chief is Among the Suspects Detained*, BROWNSVILLE HERALD, Mar. 10, 2011, available at: <http://www.chron.com/disp/story.mpl/chroni>

Although some posit that the United States has a vested interest in maintaining the barely-controlled state of chaos in Mexico,⁴¹ there is no question that this country has made a major commitment to assisting Mexican authorities in the effort to quell the violence:

The Merida Initiative, signed into law by President George W. Bush on June 30, 2008, represents the U.S response to this situation . . . [T]he initiative is a 3-year, \$1.4 billion counternarcotics package destined for Mexico and Central America, with the former country set to receive the vast majority of these funds (\$400 million of the \$465 million to be disbursed in the first year, and similar proportions thereafter). U.S. counternarcotics aid to Mexico had previously hovered around \$55-60 million annually in the 7 years since 2000; the Merida Initiative thus represents a roughly sevenfold expansion of this assistance. For its part, the Calderon government has committed \$7 billion in counternarcotics funding over the next 3 years. Officials on both sides of the border have said that they envision the Merida Initiative as the first step in a long-term partnership between Washington and Mexico City.⁴²

The assistance the United States provides under the Mérida Initiative includes training of Mexican federal police to bolster their efforts to combat trafficking.⁴³ Unconfirmed reports in early March 2011 indicate that the Obama administration plans to speed up implementation of the Mérida Initiative, disbursing \$900 million by the end of the year.⁴⁴ It is clear, however, that even with this kind of support from the United States, it is not reasonable to expect the corruption and the cartel-fueled violence to resolve to the point that it will be safe for targeted Mexican police officers to return to their homes in the

cle/7465587.html (reporting that Mexican federal police had arrested members of the Zeta cartel believed to be responsible for the shooting of the two ICE officers, Special Agent Jaime Jorge Zapata and Special Agent Victor Avila).

⁴¹ See, e.g., Daniela Morales and Peter Watt, *Narcotrafficking in Mexico: Neoliberalism and a Militarized State*, UPSIDE DOWN WORLD, <http://upside-downworld.org/main/mexico-archives-79/2696-narcotrafficking-in-mexico-neoliberalism-and-a-militarized-state> (arguing “neoliberal policies and the war on Mexican drug cartels are part of the same project; to maintain a weak democracy and a militarized state with the purpose of preserving economic and political control of the United States in the region”).

⁴² Brands, *supra* note 19, at 21 (footnotes omitted).

⁴³ Tim Gaynor, *U.S. Border Police Train Mexicans for Drug Fight*, REUTERS, Apr. 23, 2010, <http://www.reuters.com/article/2010/04/24/us-usa-mexico-training-idUSTRE63M54T20100424?pageNumber=1> (describing training program in which U.S. Border Patrol agents train “carefully vetted Mexican federal police” as follows: “Aside from teaching police to enter buildings and fire assault rifles, the twice-monthly courses give first-aid training, teach patrolling in all-terrain vehicles and share tips for finding hidden vehicle compartments used to smuggle drugs north over the U.S. border, and illicit guns and bulk cash heading south to Mexico”).

⁴⁴ Julie Pace, *Obama, Calderon Pledge Cooperation on Drug Wars*, ASSOCIATED PRESS, Mar. 3, 2011, available at http://news.yahoo.com/s/ap/20110304/ap_on_re_us/us_obama_mexico (“In a show of confidence in Calderon’s efforts, the Obama administration said it would continue to send aid to support Mexico in the drug war. A senior administration official said the U.S. plans to speed up implementation of the \$1.4 billion Merida Initiative, with \$900 million to be doled out by the end of the year. The official, who spoke on the condition of anonymity, was not authorized to speak publicly about the agreement.”); but see also *McCaul Says Bill Would Stop Waste in U.S. Aid to Mexico*, BRENHAM BANNER-PRESS, July 21, 2011, available at <http://www.brenhambanner.com/articles/2011/07/21/news/news03.prt> (explaining criticism of “waste and mismanagement” in USAID-led efforts to implement training programs funded by the Mérida Initiative).

immediate future. The Immigration Courts, the Board of Immigration Appeals (“BIA”),⁴⁵ and more than one federal court of appeals are likely going to have to grapple with what this means for Officer Alarcón and his fellow expatriate officers.

II. OFFICER ALARCÓN’S PLIGHT AND FLIGHT

*The Respondent testified that he is asking for asylum because he had a confrontation with the Mexican drug cartels and they tried to kill him. He testified that he asked for help from his fellow policemen in Mexico but was denied.*⁴⁶

On April 25, 2008, 27-year-old José Alarcón, his wife, and their two minor children entered the United States at the El Paso, Texas port of entry, where Officer Alarcón notified the U.S. Customs and Border Patrol officials of his desire to apply for asylum.⁴⁷ He was taken into custody and held in a detention facility in Taylor, Texas, where an asylum officer conducted an initial interview and determined that Officer Alarcón had established a credible fear of persecution.⁴⁸ As a result, the asylum officer paroled Officer Alarcón into the country and referred his case to an immigration judge for adjudication in the context of removal proceedings.⁴⁹

Officer Alarcón was represented by counsel in his removal proceedings.⁵⁰ The Immigration Judge (“IJ”) admitted into evidence and considered supplemental documentation filed in support of Officer Alarcón’s claims.⁵¹ At the November 25, 2010 hearing in the Immigration Court in Dallas, Officer Alarcón was the sole witness.⁵² Prior to the hearing, he had “given his statement of events several times, including when he

⁴⁵ Immigration Judge decisions are appealable as of right to the BIA. 8 C.F.R. § 1003.1(b)(3) (2011).

⁴⁶ *In re Alarcón*, *supra* note 2, at 4

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* When a non-citizen makes the type of affirmative application (as opposed to a “defensive” application made by a non-citizen against whom removal proceedings have been instituted) for asylum that Officer Alarcón made, an asylum officer employed by the United States Citizenship and Immigration Services (“USCIS”) conducts a nonadversarial interview, commonly known as the “credible fear interview,” of the applicant. 8 C.F.R. § 208.30(d) (2011). If the asylum officer determines that the claimant has a credible fear, the officer refers the case to an immigration judge for full consideration. *Id.*

⁴⁹ Parole does not confer a lawful or permanent status. *See* 8 U.S.C. § 1182(5)(A) (2011) (“The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled. . .”); *see also* 8 C.F.R. § 212.5 (2011) (explaining the parole process).

⁵⁰ Alarcón’s spouse and two minor children applied for asylum solely on the basis of their eligibility as derivative immediate family members of the principal asylum claimant. *See* 8 U.S.C. § 1158(b)(3)(A) (2011).

⁵¹ *In re Alarcón*, *supra* note 2, at 3. Although the author was provided a redacted copy of the IJ’s order, neither the supporting documentation that was admitted into evidence nor a transcript of the November 23, 2010 removal proceedings in the Immigration Court is publically available. Accordingly, all descriptions of and quotations to the record, including Officer Alarcón’s testimony, derive solely from the IJ’s order.

⁵² Officer Alarcón’s wife was listed as potential witness, but it appears she was not called to testify. *In re Alarcón*, *supra* note 2, at 3. Additionally, Officer Alarcón sought to call an expert witness, but the IJ denied the request because the request to amend the potential witness list to add the expert did not include the witness’s resume or CV as required by the Immigration Court Practice Manual (“ICPM”). *Id.*; *see also* ICPM § 3.3(g), available at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

first entered the United States, when he filled out his application with his attorney,” and when he spoke to a reporter about his case.⁵³ A little over a month after the merits hearing, the IJ issued a 34-page order denying Officer Alarcón’s request for asylum,⁵⁴ withholding of removal,⁵⁵ and relief from removal under the Convention Against Torture (“CAT”).⁵⁶

According to Officer Alarcón’s testimony, which the IJ found to be “generally consistent, plausible, and otherwise believable,”⁵⁷ he had been a police officer in Ciudad Juarez, Mexico for four years before a series of events that occurred on April 21 and 22, 2008, precipitated his entry into the United States on April 25, 2008.⁵⁸ Officer Alarcón testified that, during his four years as a Juarez police officer, he was ordered not go into stores and other locations where he knew drugs were sold and arrest dealers. He was also ordered not to stop vehicles occupied by drug cartel members. If he did detain drug dealers, he was ordered not to make arrests.⁵⁹ However, because Officer Alarcón was opposed to drug trafficking and corruption in the police force, he did stop and arrest narcotraffickers.⁶⁰ When he made arrests, the suspects were immediately released.⁶¹ “[T]he largest seizure of drugs he ever performed was 120 kilograms of marijuana in a vehicle.”⁶²

As a result of Officer Alarcón’s refusal to follow orders, he had “a lot of problems within the police force,” including being forced to go on patrol without a partner, not being permitted to go on patrol, and being partnered with an officer known to take bribes from the cartels.⁶³ He learned that “there w[ere] only one or two of us that w[ere] against what was going on. We did not have any sort of support, and really, what happened is that you ended up risking your life and the life of your family.”⁶⁴ Other officers did not want to be his partner because he refused to follow the “rules,” and another officer once

⁵³ *In re Alarcón*, *supra* note 2, at 12.

⁵⁴ As explained in Section III(A) *infra*, asylum has the potential to provide a lasting form of relief for successful applicants. 8 U.S.C. § 1158(b)(1)(A), (c)(1)(B); 8 U.S.C. § 1159(b) (2011).

⁵⁵ As discussed in more detail in Sections III(A) and IV(A) *infra*, withholding of removal is a temporary form of relief from removal, without a path to a green card, that prohibits the removal of a non-U.S. citizen to a country where his or her life or freedom would be threatened. 8 U.S.C. § 1231(b)(3)(A) (2011) ; 8 C.F.R. § 1208.16(b) (2011).

⁵⁶ For purposes of this article, “relief under CAT,” III(A) and IV(B) *infra*, will refer to a specific form of withholding of removal that prohibits the removal of a non-U.S. citizen to a country in which it is more likely than not that he or she would be tortured. 8 C.F.R. § 1208.16(c).

⁵⁷ *In re Alarcón*, *supra* note 2, at 17. The IJ further noted that:

There were a few instances of inconsistency and/or equivocation in the Respondent’s testimony, but under the totality of the circumstances they were not enough to deem the whole of the Respondent’s testimony not credible. These areas of weakness in the Respondent’s testimony will be noted in the discussion of the merits of his claim below, and will be given their due weight as they relate to the Respondent’s burden of proof. However, considering the totality of the circumstances, the Court does hereby find that the Respondent was a credible witness.

Id. The “areas of weakness” identified by the IJ are discussed in Section IV(B)(2) *infra*.

⁵⁸ *Id.* at 2, 4.

⁵⁹ *Id.* at 9, 12-13; *see also id.* at 12 (characterizing as “common, daily problems” the “daily threats” that came with stopping a vehicle occupied by cartel members and being ordered to let them go).

⁶⁰ *Id.* at 9, 13.

⁶¹ *Id.* at 13.

⁶² *Id.* at 13.

⁶³ *Id.* at 9, 13.

⁶⁴ *Id.* at 10 (internal quotation marks omitted).

said to him, “look dude, if you insist [o]n doing things your own way, you’re going to get killed.”⁶⁵

On April 21, 2008, Officer Alarcón was on patrol with his partner.⁶⁶ Over their police radio, they received a report of armed individuals driving a truck in a nearby area.⁶⁷ Officer Alarcón and his partner responded to the call, and they located and stopped the truck, which they determined contained both drugs and weapons.⁶⁸ As they began to question the passengers (the “drug runners”)⁶⁹ in the truck, one of the drug runners was using a two-way radio.⁷⁰ The IJ summarized the ensuing interaction between law enforcement and the drug runners as follows:

The Respondent testified that after the questioning, “they called my [identity of officer redacted], through Nextel [two-way radio].” The Respondent testified that he and [fellow officer] were going to arrest these individuals, but ‘they gave him the order to let them go.’⁷¹ The Respondent testified that he and [fellow officer] released these individuals. The Respondent testified that later in the day, they received a call that there had been gunshots at an intersection, and “when we got there, we come to find out that those were the same individuals we had intercepted in the morning, the same people who were left lifeless inside the truck.”

The Respondent testified that [fellow officer] then received another call via Nextel, in which they were told they were “assholes and . . . cowards,” and that they had essentially been blamed for “turning them in.”[FN] The Respondent testified that “there was rumors of a war between supposedly the Juarez cartel and the cartel of Chapo Guzman. They were killing each other and we were stuck in the middle.”⁷²

Later the same day, through the police frequency on his radio, Officer Alarcón heard the following threat: “because you are loudmouths and because you told, we are going to kill you.”⁷³ On cross-examination, Officer Alarcón was asked if narcotraffickers had

⁶⁵ *Id.* at 13.

⁶⁶ The names of other officers, including Officer Alarcón’s partner, were redacted in the version of the IJ’s order provided to the author.

⁶⁷ *Id.* at 4, 14.

⁶⁸ *Id.* at 4-5, 14.

⁶⁹ The individuals in the truck stopped on April 21, 2008, are referred to here as the “drug runners” to distinguish them from another group of armed men Officer Alarcón encountered the following day.

⁷⁰ *In re Alarcón, supra* note 2, at 5.

⁷¹ Officer Alarcón testified that he had not want to let the vehicle’s occupants leave the scene because “we’re tired of this, we’re angry of having to see that these people are stronger than us, and . . . if you do not do what they tell you to do, they are going to kill you anyway.” *Id.* at 9. He explained the circumstances of being ordered to let drug dealers go free as a not uncommon experience:

“[W]hen one stops a vehicle that is driven by, let’s say, drug traffickers, they call or they speak to their bosses. They tell them that a police unit has just stopped them. As a matter of fact, they give them the patrol number. They in turn speak to the commander. Then the commander talks directly to the patrolman via Nextel radio, and they tell you right then and there to let them go or get out of there.”

Id. at 14.

⁷² *Id.* at 5. In an attendant footnote, the IJ explained: “The Respondent later clarified that he felt they had been blamed for pointing out the two cartel members they had intercepted that morning to a rival cartel.” *Id.* at 5 n.6.

⁷³ *Id.* at 9 (internal quotation marks omitted).

killed the drug runners in the truck. He responded, “I believe it could have been another cartel because they are disputing the land, that sector.”⁷⁴

The next morning, on April 22, 2008, Officer Alarcón went to work as usual. At the start of his shift, he joked with another officer and went about his daily routine.⁷⁵ Later the same day, a colleague asked Officer Alarcón and another officer, apparently Officer Alarcón’s partner,⁷⁶ to accompany him to an auto parts store to get some parts for a car he had recently purchased.⁷⁷ The officers drove to the auto parts store, with one officer driving, another officer in the middle of the back seat, and Officer Alarcón in the passenger seat:

[J]ust as [the fellow officer who drove] was parking the vehicle, a Jeep Cherokee with tinted windows pulled up and a man emerged from the back seat brandishing a rifle. . . [T]he man began shooting through the front windshield of the vehicle, and . . . the first shots hit [fellow officer] in the face and chest. . . [Officer Alarcón] and the other two officers still had their side arms with them, and . . . they always carried them around since several other officers had previously been killed. . . [Officer Alarcón] “shifted towards the door and seat,” and started shooting in the direction of the person who had been firing at them. . . [H]e fired all fifteen shots in his clip, and said to himself “well, I guess this is it” and then slumped in his seat. . . [H]e could still hear gunshots, but the person who had been firing at them was no longer there. . . [W]hen the gunfire ceased, he heard a voice say “Get him up! Get him up!” and . . . he thought this meant the assailants were coming for him. . . [H]e remained sitting there, and then saw that it was actually the initial shooter whom the other assailants “had come to pick up and got him in.” . . [W]hen they got the initial shooter [“cartel gunman”]⁷⁸ into their vehicle, their pickup left very quickly.⁷⁹

Officer Alarcón testified that one of the two other officers’ names was on “a list of ‘people that had been threatened by the cartels, who had told them to tone it down, or else they would be killed.’”⁸⁰ Officer Alarcón’s name was not on that list.⁸¹ He also testified

⁷⁴ *Id.* at 14 (internal quotations marks omitted).

⁷⁵ *Id.* at 5-6.

⁷⁶ Redactions make it impossible to be certain but, read in context, it seems clear that the invitation was extended to Officer Alarcón and his partner.

⁷⁷ *In re Alarcón, supra* note 2, at 6.

⁷⁸ The initial shooter on April 22, 2008, is referred to as the “cartel gunman” to distinguish him from the drug runners killed after their encounter with Officer Alarcón and his partner the previous day.

⁷⁹ *In re Alarcón, supra* note 2, at 6-7.

⁸⁰ *Id.* at 9 (quoting Officer Alarcón). On cross-examination, Officer Alarcón testified about “a cartel list entitled ‘For Those Who Do Not Believe[.]’” which “means ‘if you are working and you don’t do what we ask you to do, we will kill you.’” *Id.* at 15. When asked why a fellow officer whose name appeared on the list – apparently the one wounded in the shootout on April 22, 2008, who was subsequently shot to death – was killed “since he was apparently doing what the cartels wanted by looking the other way and letting people go[.]” Officer Alarcón testified that “when the cartel war started, ‘[i]f you did what you were asked to do from one end, you placed yourself against the other side. And if you did what the other side wanted you to do, you placed yourself in direct opposition to the former.’” *Id.* at 15-16.

⁸¹ *Id.* at 9.

that he did not know with which narco-trafficking organization the cartel gunman was affiliated.⁸²

Officer Alarcón sustained minor injuries in the shootout.⁸³ One of the officers in the car with him was killed; the other was wounded.⁸⁴ Once the gunfire ceased, Officer Alarcón saw that his fellow officer was bleeding and picked up the portable radio to call for an ambulance.⁸⁵ The radio operator asked him to identify himself. When he said his name, “through the same frequency ‘they said “we’re going to come back for you asshole. You’re going to get it.”’”⁸⁶ On cross-examination, Officer Alarcón was asked why he was targeted. He stated, “[m]aybe it’s because they believe we were the ones that pointed them out” to the other cartel.⁸⁷

Following the gun battle on April 22, 2008, Officer Alarcón was not able to start the car they had taken to the auto parts store, but a squad car arrived a few minutes later. He and the driver of the squad car put the wounded officer in the back seat of the squad car and took him to the hospital.⁸⁸ At the hospital, several other officers, including a commander, told Officer Alarcón “don’t worry about it, we’re going to get you out.” At the same time, Officer Alarcón realized that his gun was empty and asked several officers for ammunition, “but they all told him they had orders not to give him anything.”⁸⁹ Officer Alarcón testified:

[I] already knew from past experience that what they did was they would turn us over. So I knew what was coming. I knew if they were going to turn me over...what I wanted was to at least die defending myself with a firearm. They didn’t want to give me any ammunition.⁹⁰

Officer Alarcón explained that he thought his fellow officers refused to give him ammunition because they “were going to turn me over to be killed, or . . . they were just going to get me out of the hospital and leave me [o]n a street corner somewhere” to be killed by the cartel members.⁹¹ Although Officer Alarcón did not think his fellow officers would kill him themselves, he believed they would not protect him because “it doesn’t make any sense for them to risk their own li[v]e[s] to protect another person. They’re just not going to do it.”⁹²

Officer Alarcón felt desperate and began to plan an escape from the hospital. He kept another gun at home, so he called his brother-in-law and asked him to get the gun, bring it with him, and wait behind the hospital.⁹³ A guard at the hospital told Officer Alarcón how to leave the hospital through a back door, and he was able to meet his

⁸² *Id.* at 15.

⁸³ *Id.* at 8 (Officer Alarcón testified that he “had wounds on his face and arms from glass and lead fragments, and that his ‘flesh was open’ on his knee.”); *Id.* at 24 (characterizing Officer Alarcón’s injuries as “minor”).

⁸⁴ *Id.* at 24.

⁸⁵ *Id.* at 7.

⁸⁶ *Id.* at 7 (quoting Officer Alarcón’s recounting of what he heard).

⁸⁷ *Id.* at 14-15 (internal quotation marks omitted).

⁸⁸ *Id.* at 7.

⁸⁹ *Id.* at 7-8.

⁹⁰ *Id.* at 8 (quoting Officer Alarcón).

⁹¹ *Id.* at 10.

⁹² *Id.* at 10 (quoting Officer Alarcón).

⁹³ *Id.* at 8.

brother-in-law by that route and flee to his sister's house, where his wife later joined him.⁹⁴ Officer Alarcón testified that he believed a police commander told the hospital guard to help him find a way out of the hospital.⁹⁵

The next morning, April 23, 2008, Officer Alarcón called one of his commanders to ask about his job.

[T]he commander kept asking questions like “hey, where are you[,] man?” or “where are you dude?” The Respondent testified that the commander was “playing around with me like trying to find out where I was,” so the Respondent told him he was in El Paso. The Respondent testified that the commander said “well, come on over,” and then said “well, if you know what’s going to happen, then don’t come back.” The Respondent testified that he believes “as soon as they find out where I am, they are going to kill me.”⁹⁶

On cross-examination, Officer Alarcón reiterated that the commander told him “look, it is better for you not to return, because you know exactly what is going to happen to you.”⁹⁷

After the shooting, Officer Alarcón's wounded fellow officer stayed in the hospital for about a week-and-a-half. He relocated from Juarez to El Paso, Texas, but he would travel back to Juarez to gather paperwork in connection with his retirement. On one of those trips to Juarez, while his wife waited in their car outside a shopping mall, the officer was gunned down – riddled with 29 bullets – as he walked across the mall parking lot.⁹⁸

Officer Alarcón testified that he believed he was targeted for violence “because we defended ourselves and we were able to get one of them,”⁹⁹ and “because I believe in doing those things that are right.”¹⁰⁰ When asked whether he thought the army would protect him, Officer Alarcón responded, “[w]hy would they do this if I don’t have any money to pay them off with?”¹⁰¹ When asked whether he could relocate to a region within Mexico where he would be safe, he testified that he did not believe the Mexican government could protect him because any background check for future employment would reveal that he is a former police officer and give away his location.¹⁰²

⁹⁴ *Id.* at 8-9.

⁹⁵ *Id.* at 15.

⁹⁶ *Id.* at 10; *See also Id.* at 15 (noting that, in response to being reminded on cross-examination that his fellow officer had not, in fact, turned him over to the cartel, Officer Alarcón stated “they have not seen me. The date and time that they ever do see me, they are going to turn me over.”).

The IJ noted that, on cross examination, in response to questioning about why he had not been turned over to the cartels “because he is an honest officer who refuses to be corrupted[.]” Officer Alarcón replied, ““they do not turn you over, but they do not help you either. There’s no support, but they don’t help you either. If you don’t follow the system, you’re by yourself.” *Id.*

⁹⁷ *Id.* at 15 (internal quotation marks omitted).

⁹⁸ *Id.* at 12.

⁹⁹ This apparently is a reference to the fact that the cartel gunman was wounded in the shootout on April 22, 2008.

¹⁰⁰ *In re Alarcón, supra* note 2, at 12 (internal quotation marks omitted).

¹⁰¹ *Id.* at 11.

¹⁰² *Id.* at 11.

At the conclusion of questioning by counsel, the IJ asked Officer Alarcón about interviews he had given about his story.¹⁰³ The IJ explained:

The respondent testified that his attorney knew about the interview with [identity of interviewer or publication redacted] and was in fact present for it. The Respondent testified that he gave the interviews to the media because they told him the stories might help his case. The Respondent testified that the reporters promised only to say that he was in Texas, but not to say specifically where he was.¹⁰⁴

III. THE FATE OF OFFICER ALCARÓN'S CLAIM IN IMMIGRATION COURT

A brief overview of the contours of the relevant forms of humanitarian relief from removal is provided here as an introduction to the analysis and conclusions set out in the IJ's December 29, 2010 ruling on Officer Alarcón's claim comprising applications for asylum, withholding of removal, and relief under CAT.

A. *Relevant Forms of Humanitarian Relief from Removal*¹⁰⁵

Asylum is a discretionary form of relief that has the potential to accord successful applicants lasting protection by providing for employment authorization and a path to lawful permanent resident ("green card") status.¹⁰⁶ Both withholding of removal and relief under CAT are more limited, or temporary, forms of relief than asylum in that they do not provide a path to permanent resident status; rather, they merely prohibit the removal of successful applicants to any country in which their lives or freedom would be threatened or they would be subjected to torture.¹⁰⁷ Like asylum, both withholding of

¹⁰³ Since entering the United States in April 2008, Officer Alarcón has given interviews to the press, and local media have followed his story. See, e.g., Sol[i]s, *supra* note 7; *Mexican Police Officer Seek*, *supra* note 5; Bensman, *supra* note 4.

¹⁰⁴ *In re Alarcón*, *supra* note 2, at 16.

¹⁰⁵ Entire articles and books can be, and have been, written on the requirements for and myriad issues involved in the adjudication of claims for asylum, withholding of removal, and relief under CAT. For purposes of understanding the IJ's ruling on Officer Alarcón's claim, it is necessary only to appreciate a few key distinctions among the requirements for, and benefits of, these forms of humanitarian relief.

¹⁰⁶ 8 U.S.C. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section . . .") (emphasis added); 8 U.S.C. § 1158 (c)(1)(B) (providing that, when asylum is granted, "the Attorney General . . . shall authorize the alien to engage in employment in the United States"); 8 U.S.C. § 1159(b) (outlining the requirements for successful asylum applicants to apply to adjust their status to that of lawful permanent resident one year after being granted asylum); see also 8 C.F.R. § 274a.12(a)(5) (2011) (providing that "[a]n alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document, issued . . . to the alien.").

¹⁰⁷ 8 U.S.C. § 1231(b)(3)(A) (explaining regarding withholding of removal that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."); 8 C.F.R. § 1208.16(c) (2011) (explaining that, in order to qualify for relief under CAT, an applicant must "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal").

removal and relief under CAT render an applicant eligible for work authorization,¹⁰⁸ and individuals granted any of the three forms of relief are eligible for most federal welfare benefits for the first seven years and, subject to certain conditions, after ten years.¹⁰⁹ However, unlike the spouse and children of asylum applicants, who may be granted asylum on the basis of a grant of asylum to the principal applicant in their family,¹¹⁰ the immediate family members of individuals entitled to withholding of removal or relief under CAT are not eligible for a comparable derivative status.¹¹¹

An applicant for asylum must demonstrate “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹² Similar to the feared persecution required for asylum eligibility, the feared threat to life or freedom for purposes of withholding of removal must be “because of” one of the same enumerated grounds.¹¹³ However, to be eligible for relief under CAT, although an applicant must demonstrate that that it is “more likely than not” that he or she will be tortured (rather than merely persecuted or subjected to threats to “life or freedom”),¹¹⁴ there is no requirement that the likely torture would be inflicted “on account of” or “because of” a specified protected ground. For example, individuals fleeing police or other security forces that employ torture to extract confessions or to ensure obedience in their ranks do not fit comfortably within any of the enumerated protected grounds. In *Muradin v. Gonzales*,¹¹⁵ an Armenian man claimed that, as a soldier in the Armenian military, he had been tortured and that, as a former soldier, he would be tortured if removed to Armenia because he had escaped his persecutors.¹¹⁶ The Ninth Circuit affirmed the denial of Muradin’s applications for asylum and withholding of removal “because [he] . . . failed to show persecution on account of an imputed political opinion.”¹¹⁷ However, the court acknowledged that Muradin did not need to show that he would be tortured “on account of a protected ground” in order to qualify for relief under CAT.¹¹⁸ The court held that substantial evidence supported Muradin’s eligibility for relief under CAT because the record demonstrated that he had been abused and beaten in the past, and a State Department report demonstrated that Armenian security personnel were likely to torture conscripts, prisoners, and deserters.¹¹⁹

B. *The IJ’s Ruling on Officer Alarcón’s Claim*

¹⁰⁸ 8 C.F.R. § 274a.12(a)(10) (2011) (providing that employment authorization is available to “[a]n alien granted withholding of deportation or removal for the period of time in that status”).

¹⁰⁹ 8 U.S.C. § 1612(a)(2)(A) (2011).

¹¹⁰ 8 U.S.C. § 1158(b)(3)(A) (2011).

¹¹¹ See 8 C.F.R. § 208.16(e) (2011) (recognizing that the grant of withholding of removal or relief under CAT to a principal applicant “effectively preclud[es] admission of the applicant’s spouse or minor children following to join him or her”).

¹¹² 8 U.S.C. § 1101(a)(42)(A) (2011).

¹¹³ 8 U.S.C. § 1231(b)(3)(A) (2011).

¹¹⁴ 8 C.F.R. § 208.16(b)(1) (2011).

¹¹⁵ 494 F.3d 1208 (9th Cir. 2007).

¹¹⁶ *Id.* at 1209.

¹¹⁷ *Id.* at 1210 (affirming denial with respect to Muradin’s “political opinion” theory, but remanding his claim of persecution on account of his membership in a particular social group because the immigration judge did not address that aspect of his claim).

¹¹⁸ *Id.* at 1211.

¹¹⁹ *Id.*

Ruling on Officer Alarcón's requests for asylum, withholding of removal, and relief under CAT, the IJ framed the issues presented as reminiscent of those raised in *Matter of Fuentes*, by a former member of the national police in El Salvador who claimed that "he w[ould] be persecuted and harmed by leftist insurgents in El Salvador on account of his association with the Government of El Salvador."¹²⁰ In Officer Alarcón's case, the IJ characterized his claim as follows:

Much as in *Matter of Fuentes*, 19 I & N Dec. 658 (BIA 1998),^[121] there are essentially two related, but distinct, bases underlying the Respondent's claim. The first is his fear arising out of the events which occurred on April 21-22, 2008, while the Respondent was serving as a member of the Juarez police force, prior to his departure to the United States. The second, although Respondent's counsel failed to articulate it with much clarity, is the Respondent's fear that he will face persecution as a former police officer if returned to Mexico.¹²²

Analyzing Officer Alarcón's request for asylum on the basis of his encounters with narcotraffickers while he was still working as a police officer in Mexico, the IJ concluded that the BIA's decision in *Matter of Fuentes* precludes extending such relief to applicants claiming past persecution on account of their status as police officers.¹²³ As the BIA explained in *Matter of Fuentes*:

Policemen are by their very nature public servants who embody the authority of the state. As policemen around the world have found, they are often attacked either because they are (or are viewed as) extensions of the government's military forces or simply because they are highly visible embodiments of the power of the state. In such circumstances, the dangers the police face are no more related to their personal characteristics or political beliefs than are the dangers faced by military combatants. Such dangers are perils arising from the nature of their employment and domestic unrest rather than 'on account of' immutable characteristics or beliefs. . . .¹²⁴

Regarding Officer Alarcón's claim, based on his status as a former police officer, that he feared he would be persecuted in the future if returned to Mexico, the IJ noted that the

¹²⁰ *In re Fuentes*, *supra* note 8, at 659.

¹²¹ *In Fuentes*, the BIA characterized the basis for the respondent's application for asylum and withholding of removal as follows:

There are two related, but distinct, bases underlying this respondent's asylum claim. The first is his fear arising from the events that occurred while he was a policeman and guard in El Salvador prior to his departure in 1982. The second aspect of his claim is the fear that he will face persecution as a former national policeman if he returns to El Salvador.

Id. at 660-61.

¹²² *In re Alarcón*, *supra* note 2, at 19-20.

¹²³ *Id.* at 24 ("In *Matter of Fuentes*, the Board held that 'dangers faced by policemen as a result of that status alone are not ones faced on account of race, religion, nationality, membership in a particular social group, or political opinion.' 19 I. & N. Dec. 658, 661 (BIA 1988).").

¹²⁴ *In re Fuentes*, *supra* note 8, at 661.

BIA also concluded in *Matter of Fuentes* that “[i]t is possible that mistreatment occurring because of such a status in appropriate circumstances could be found to be persecution on account of political opinion or membership in a particular social group.”¹²⁵ The IJ identified a subsequent BIA decision, *Matter of C-A-*, in which the BIA explained the circumstances under which former police officers could (or could not) establish eligibility for asylum:

Were a situation to develop in which former police officers were targeted for persecution because of the fact of having served as police officers, a former police officer could conceivably demonstrate persecution based upon membership in a particular social group of former police officers. On the other hand, if a former police officer were singled out for reprisal, not because of his status as a former police officer, but because of his role in disrupting particular criminal activity, he would not be considered, without more, to have been targeted as a member of a particular social group.¹²⁶

For the IJ, the BIA precedent in *Matter of C-A-* sounded the death knell for Officer Alarcón’s request for asylum on the basis of his status as a former police officer.¹²⁷ The IJ acknowledged that Officer Alarcón’s former partner was killed, apparently by narcotraffickers, but he determined that “his death alone is not enough to establish a pattern or practice of persecution of persons similarly situated to the Respondent on account of a protected asylum ground.”¹²⁸ The IJ reasoned:

Even though the Respondent has established that [former partner] was killed, . . . the documentary evidence related to [his] murder does not establish *why* [he] was killed. According to the Respondent’s testimony, [former partner] had taken bribes and looked the other way when it came to drug trafficking. Thus, it is unclear why the cartels would want to kill him, although the record does establish that [his] name was on the “Those Who Still Do Not Believe” list. If, as the Respondent seemed to suggest on cross, it was because [former partner], like many other officers, was stuck between two warring drug cartels, then [his] death too was on account of an actual or perceived alignment with one cartel over another, and not because he was a former police officer or something similar.¹²⁹

¹²⁵ *Id.* at 662; *In re Alarcón*, *supra* note 2, at 25 (citing same).

¹²⁶ *In re C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006); *In re Alarcón*, *supra* note 2, at 25 (citing and partially quoting same).

¹²⁷ *In re Alarcón*, *supra* note 2, at 26 (“Respondent has provided no evidence that if he were to return to Mexico now, the cartel would pursue him for any other reasons other than the perception that he interfered with their operations by betraying them to another cartel, and simple vengeance for shooting their assassin on April 22, 2008.”); *id.* at 28 (“Respondent has also provided no evidence showing that former police officers are targeted as a group, and even if they were, that such targeting is on account of a protected asylum ground.”).

¹²⁸ *Id.* at 29.

¹²⁹ *Id.* at 28 (citations to evidence in the record omitted).

Applying the higher standard of proof required for the related form of more limited relief afforded by withholding of removal, the IJ concluded that “[s]ince the Respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard of eligibility required for withholding of removal.”¹³⁰

Denying Officer Alarcón’s request for relief from removal under CAT required more explanation. The IJ quoted the basis for Officer Alarcón’s request as he had expressed it in his application, and concluded that Officer Alarcón had not demonstrated that he was entitled to the relief on that basis.¹³¹ The IJ reasoned that, because relief under CAT extends only to individuals who fear torture inflicted by, or with the consent or acquiescence of, a governmental actor,¹³² Officer Alarcón did not qualify “[t]o the extent that [he] fears torture by the drug cartels independent of any connection to Mexican government officials” because

[T]he drug cartels operate outside the law in Mexico, as evidenced by the fact that the federal government of Mexico has taken major steps “to dismantle the country’s DTOs,” including deploying some 50,000 Mexican army troops,” and enacting legislation to vet all personnel in the country’s 2,600 police forces. It is clear from the country reports that the Mexican government is having difficulty controlling the drug cartels, but even if that is the case and the cartels are engaging in torture, CAT protection does not extend to persons who fear entities that a government is unable to control. *In Re S-V-*, 22 I. & N. [Dec.] 1306, 13 (BIA 2000)[;] *Hakim v. Holder*, [628 F.3d 151][,] [(5th Cir. Dec. 10, 2010)].¹³³

The IJ also concluded that Officer Alarcón was not entitled to relief under CAT based on the theory that his fellow police officers would turn him over to the cartels.¹³⁴ Officer Alarcón’s testimony that his fellow officers refused to provide him with ammunition after the shootout with the cartel gunman because they were going to turn him over to the drug cartels was, the IJ stated, “unsupported by anything in the record.”¹³⁵ The IJ continued, explaining that the other officers’ inability or unwillingness to help Officer Alarcón “does

¹³⁰ *Id.* at 29 (citing *INS v. Stevic*, 467 U.S. 407, 429-30 (1984)). In *INS v. Stevic*, the Supreme Court explained that, although an asylum applicant need only demonstrate a “well-founded fear,” an applicant for withholding of removal must satisfy a higher “clear probability” standard, which means that it is “more likely than not,” that his or her life or freedom would be threatened on account of a protected ground. 467 U.S. at 424-29.

¹³¹ *In re Alarcón*, *supra* note 2, at 30. The IJ stated:

The Respondent asserts in his I-589 [application form], under the question regarding torture, that he is “afraid of returning to Mexico and being victimized by the drug cartel and the police,” and he then proceeds to describe the various forms of torture he might be subjected to. After reviewing the country reports and other background material, the Court finds that the Respondent has not shown it is more likely than not that he would be “tortured” in Mexico as that term is defined in the regulations at 8 C.F.R. § 1208.18(a).

Id. (citation to evidence in the record omitted).

¹³² See 8 CFR § 1208.18(a)(7) (2011) (“Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”).

¹³³ *In re Alarcón*, *supra* note 2, at 30-31 (citation to evidence in the record omitted) (footnote omitted).

¹³⁴ *Id.* at 31-32.

¹³⁵ *Id.* at 32.

not establish their consent or acquiescence to torture by the DTOs; . . . there is a difference between official consent or acquiescence to torture (which requires awareness or “willful blindness” followed by a failure to intervene) and the inability of officials to control the entities engaged in such activity.”¹³⁶ The IJ also found that Officer Alarcón’s response, on cross examination, to questioning about why his fellow officers had not turned him over to the cartels prior to the April 22, 2008 shootout with the cartel gunman, made it “seem[] . . . that the Respondent started to backpedal on the issue of complicity of his fellow officers.”¹³⁷

In support of the conclusion that Officer Alarcón’s application for relief under CAT “must be denied[,]” the IJ again noted the role of drug cartels in Mexico:

Certainly the country conditions materials establish that corruption and protection of DTOs is an endemic problem in Mexico, especially amongst the state and local police forces. . . . However, . . . [n]either the Respondent’s own testimony nor the country reports included in the record establishes to any degree of certainty that Juarez police officers (or any other law enforcement officers) are *aware* of activity constituting torture and are breaching their legal responsibility to intervene to prevent such activity.¹³⁸

Finally, the IJ concluded that Officer Alarcón had “failed to carry the necessary burden of proof for any of his applications for relief.”¹³⁹ Accordingly, on December 29, 2010, the IJ denied all of Officer Alarcón’s applications for relief and ordered Officer Alarcón and, by extension, his dependent family members, removed from the United States to Mexico.¹⁴⁰ An attorney who worked on the case has confirmed that Officer Alarcón has appealed the IJ’s decision to the BIA.¹⁴¹ If he is unsuccessful before the BIA, Officer Alarcón will have the option to appeal his final order of removal to the United States Court of Appeals for the Fifth Circuit.¹⁴²

IV. JOSÉ ALARCÓN’S APPEAL FROM A DEATH SENTENCE¹⁴³

¹³⁶ *Id.* at 32-33 (citing 8 C.F.R. § 1208.18(a)(7)).

¹³⁷ *Id.* at 32 (finding that “such equivocation cuts against the Respondent’s burden of proof”).

¹³⁸ *In re Alarcón*, *supra* note 2, at 33.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 34.

¹⁴¹ E-mail from William Humble III, Esq. to author (Mar. 29, 2011, 10:04 PST) (on file with author); *see also* Melissa Del Bosque, *Juarez Police Officer Denied U.S. Asylum*, TEX. OBSERVER (Feb. 8, 2011), *available at* <http://www.texasobserver.org/lalineaj/quez-officer-denied-us-asylum> (stating that Officer Alarcón intended to appeal the IJ’s decision).

¹⁴² 8 U.S.C. § 1252(a)(5), (b)(1).

¹⁴³ *Cf.* Jennifer Ludden, *Immigration Crackdown Overwhelms Judges*, ALL THINGS CONSIDERED, (Nat’l Public Radio broadcast Feb. 9, 2009), *available at* <http://www.npr.org/templates/story/story.php?storyId=100420476> (quoting the head of the National Association of Immigration Judges as saying, “‘For some people, these [removal proceedings] are the equivalent of death penalty cases, and we are conducting these cases in a traffic court setting.’”); *see also* Stuart L. Lustig, M.D., et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 58 (2008) (reporting on a study of the enormous caseloads handled, and stressors faced, by immigration judges and noting that “[a]n order of deportation can effectively amount to a death sentence when an undocumented immigrant runs a significant risk of persecution upon return to his or her country”).

Officer Alarcón is now the object of a vendetta that arose out of his shooting of the cartel gunman on April 22, 2008. But for Officer Alarcón's role as a law enforcement official, and the fact that narcotrafficking violence presently has Mexico on the brink of becoming a failed state, he would not find himself in imminent fear for his life. The BIA can, and should, reverse the IJ's denial of his application for relief under CAT, and clear the way for similarly situated Mexican law enforcement officers to obtain that limited form of humanitarian relief from removal.¹⁴⁴

On appeal to the BIA, “[f]acts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.”¹⁴⁵ However, “questions of law, discretion, and judgment on all other issues in appeals from decisions of immigration judges” are reviewed de novo.¹⁴⁶

A. *Why Asylum and Withholding of Removal Are Likely to Elude Mexican Police Officers Fleeing Violence and Threats from Narcotraffickers*

Although he failed to appreciate that Officer Alarcón's situation was, and is, factually distinguishable from the one before the BIA in *Matter of Fuentes*,¹⁴⁷ the IJ did not err in relying on *Matter of Fuentes*, which represents binding precedent for immigration judges and is due deference from the federal courts,¹⁴⁸ to deny Officer Alarcón's requests for

¹⁴⁴ To the extent that BIA precedent does not clearly compel granting withholding of removal or relief under CAT in these cases, the job is likely to fall to the federal courts of appeals. As the BIA has explained the limitations on its role when it is presented with novel claims:

The Board certainly is not oblivious to immigration policy considerations in the disposition of cases falling within our jurisdiction. But *we are not fundamentally a policy-making body*. There may be some unsettling or unsatisfying aspects to the slower and less predictable development of legal guidelines that inures in the Board's case adjudication system. But there are alternatives if resort to the Board's issuance of precedent is not satisfactory in a particular context. The [Immigration] Service can seek to have the Attorney General issue regulations that comprehensively address competing concerns, or it can work within the Administration for appropriate legislative action by Congress. The Service should not, however, expect the Board to endorse a significant new framework for assessing asylum claims in the context of a single novel case, especially when that framework seems intended primarily to address cases that are not in fact before the Board yet.

In re Kasinga, 21 I. & N. Dec. 357, 372-73 (BIA 1996) (emphasis added) (footnote omitted).

¹⁴⁵ 8 C.F.R. § 1003.1(d)(3)(i) (2011).

¹⁴⁶ 8 C.F.R. § 1003.1(d)(3)(ii) (2011).

¹⁴⁷ At the most basic level, *Fuentes* dealt with a different situation on the ground. Officer Fuentes was fleeing political turmoil in El Salvador in the late 1980s. The BIA characterized the situation as follows: “There is presently a political struggle ongoing in El Salvador, the ultimate objective of which is supremacy of one side over the other. The guerrillas, whom the respondent fears, appear intent on overthrowing the government. The government's obvious intent is to thwart the guerrillas' objectives. Unfortunately, violence appears inherent to such revolutionary struggles.” *In re Fuentes*, *supra* note 8, at 661. Additionally, it is worth noting that the United States ratified CAT in 1990. *See* n.16 *supra*. The BIA considered Officer Fuentes's claim in 1988.

¹⁴⁸ A case must be decided by a three-member panel of the BIA if it presents “[t]he need to establish a precedent construing the meaning of laws, regulations, or procedures.” 8 C.F.R. § 1003.1(e)(6)(ii) (2011); *see also* 8 CFR § 1003.1(d)(1) (2011) (explaining that the BIA functions as the appellate body charged with review of IJ decisions and that “the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations”). If statutory provisions the BIA is charged with enforcing are ambiguous, courts will defer to the BIA's statutory interpretation if it is reasonable. *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,

asylum and withholding of removal. The asylum applicant has the burden of proving that one of the five enumerated protected grounds (race, religion, nationality, membership in a particular social group, or political opinion) “was or will be at least one central reason for persecuting the applicant.”¹⁴⁹ An applicant for the more limited, but mandatory, relief available through withholding of removal must similarly demonstrate that his or her life or freedom will be threatened “because of” one of the same enumerated grounds.¹⁵⁰ As the IJ presiding in Officer Alarcón’s case correctly concluded, an applicant unable to satisfy the “well-founded fear of persecution” standard for asylum will not be able to satisfy the higher “more likely than not” burden of proof to qualify for withholding of removal.¹⁵¹

The requirement that an applicant come within one of the five enumerated groups poses the most significant obstacle to Officer Alarcón’s claim and those of similarly situated Mexican police officers. The IJ identified and discussed as conceptually distinct two potential bases for relief: (1) past persecution based on activities as a current police officer during the events of April 21-23, 2008;¹⁵² and (2) well-founded fear of persecution as a former police officer.¹⁵³ Within his discussion of each basis for relief, the IJ considered the two protected groups in which Officer Alarcón asserted membership for purposes of obtaining asylum or withholding of removal: political opinion and membership in a particular social group.

1. Political Opinion

The IJ discounted Officer Alarcón’s assertion of persecution – past or future – on account of his political opinions, which were framed as “opposing DTOs” or “opposing the corruption within government and police officials.”¹⁵⁴ Regarding the persecution Officer Alarcón suffered in Mexico, the IJ concluded that a political opinion theory failed because “while it appears one of the cartels may have imputed responsibility [for the death of two of its drug runners] to the Respondent, there is insufficient evidence to establish that the cartel imputed a *political opinion* to him, or targeted him *because* he opposes DTOs and corruption in general.”¹⁵⁵ Reaching the conclusion that Officer Alarcón was similarly unable to establish the existence of a pattern or practice of persecution to support a determination that he had a well-founded fear of future persecution should he return to Mexico as a former police officer, the IJ explained that “[t]here [wa]s ample evidence in the record that the cartels do violence to those they perceive as interfering with their operations, but that violence is carried out *because* of

842-43 (1984) (requiring courts to defer to an agency’s interpretation, of an ambiguous statute it is charged with enforcing if the agency’s interpretation thereof is reasonable). *Matter of Fuentes* is among the decisions that the BIA has designated as having precedential value.

¹⁴⁹ 8 U.S.C. § 1158(b)(1)(B)(i) (2011).

¹⁵⁰ 8 U.S.C. § 1231(b)(3)(A) (2011).

¹⁵¹ *In re Alarcón*, *supra* note 2, at 29; *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (reviewing the legislative history indicating recognition that “there is a difference between the ‘well-founded fear’ standard and the clear probability standard” and reasoning that Congress intended the standard applied to applications for asylum to be lower than the one applied to applications for withholding of removal).

¹⁵² *In re Alarcón*, *supra* note 2, at 20-25.

¹⁵³ *Id.* at 25-29.

¹⁵⁴ *Id.* at 20 (internal quotation marks omitted).

¹⁵⁵ *Id.* at 23 (emphases in original).

the interference, not because the victim belongs to a particular social group or possesses a particular political opinion.”¹⁵⁶

As the Supreme Court has explained, the fact that the perpetrators of the feared persecution have political motives does not compel the conclusion that they have targeted, or will target, the victim because of political beliefs the *victim* holds:

The ordinary meaning of the phrase “persecution on account of . . . political opinion” in § 101(a)(42) [of the INA] is persecution on account of the *victim’s* political opinion, not the persecutor’s. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized “political” motive underlying the guerrillas’ forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that [the asylum applicant] fears persecution *on account of* political opinion, as § 101(a)(42) requires.¹⁵⁷

Stated otherwise, the inquiry in “political beliefs” claims is a highly fact-specific one.¹⁵⁸

Here, there is little, if any, question that the cartel to which the drug runners in the truck on April 21, 2008 belonged, and the cartel for which the gunman who opened fire outside the auto parts store on April 22, 2008 worked, were aware that Officer Alarcón was employed by the local police department. It does not, however, necessarily follow from Officer Alarcón’s account of his history of detaining and arresting drug dealers that he suddenly was in imminent fear for his life or safety because his actions on April 21 and 22, 2008 manifested or communicated political beliefs – his opposition to narcotrafficking and government corruption – of which the cartels or his fellow officers were not previously aware. He had held those beliefs throughout his tenure as a police

¹⁵⁶ *Id.* at 27 (emphasis in original).

¹⁵⁷ *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

¹⁵⁸ *See id.* at 579 (“[S]ince the statute makes motive critical, [the asylum applicant] must provide *some* evidence of it, direct or circumstantial. “). Various courts of appeals have addressed questions of whether and when employment by, affiliation with, or express or implicit supporting of a government constitutes a political opinion for asylum purposes. The results do not present clearly delineated answers. *See, e.g.,* *Espinosa-Cortez v. Att’y Gen. of U.S.*, 607 F.3d 101, 114 (3d Cir. 2010) (explaining that the court “[did] not hold that any person affiliated with a foreign government who is threatened by an anti-government organization has necessarily been threatened on the basis of imputed political opinion” but finding that BIA erred in concluding that the alleged persecution by anti-government forces was not motivated by a political opinion imputed to the victim with a long, close association with the Colombian government and military, who “[c]ame to the guerrillas’ attention [because of his relationship with the government and military]; *Martinez-Buendia v. Holder*, 616 F.3d 711, 718 (7th Cir. 2010) (“If political opposition is the reason an individual refuses to cooperate with a guerrilla group, and that individual is persecuted for his refusal to cooperate, logic dictates that the persecution is on account of the individual’s political opinion; if the refusal to cooperate is for a non-political reason, the persecution would not be on account of the individual’s political beliefs (unless the petitioner can show that the persecutor imputed a particularly political belief on him based on his refusal to cooperate.)”); *Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir.2007) (being pro-government and anti-FARC constitutes a political opinion); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (holding that “fear of reprisal from guerrillas on the part of an ex-soldier is a type of political persecution and that if such a soldier, on the basis of objective circumstances personally known to him, believes that he has at least a one in ten chance of being killed by the guerrillas, he meets the statutory test of eligibility”).

officer, but he had not previously been targeted by the cartels or faced the prospect of being turned over to the cartels by his fellow officers.

2. Membership in a Particular Social Group

Officer Alarcón's claim of persecution on account of his membership in a particular social group provides more fertile ground for creative arguments for asylum and withholding of removal.¹⁵⁹ Although it has been the subject of considerable debate, the BIA's "immutability" standard, as set out in *Matter of Acosta* in 1985, captures the core of the "particular social group" classification and has not been repudiated:

[W]e interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act.¹⁶⁰

As the IJ correctly noted in his analysis of Officer Alarcón's claim, binding BIA precedent distinguishes between claims based on membership in a social group that consists of *current* police officers and those based on the applicant's status as a *former* police officer. Neither the BIA nor any federal court of appeal has recognized "current police officers" as a particular social group.¹⁶¹ BIA precedent also supports the IJ's

¹⁵⁹ See, e.g., STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 93 (5th ed. 2009) ("Perhaps more so than any other categories of asylum claims, those based on social group raise the fundamental philosophical questions of why governments grant asylum and why they limit it. The term 'particular social group' is vague enough that recourse to the basic objectives of asylum is essential to any serious discussion of its meaning and its applicability."); Jeffrey D. Corsetti, Comment, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 420-21 (2006) (arguing that "particular social group" is the most malleable of the five enumerated protected groups and, therefore, offers the greatest likelihood of success: "The more particularized the social group with respect to the individual applicant, the more likely the IJ will be to accept the categorization as legitimate."); Ellen Vagelos, Comment, *The Social Group that Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status?*, 17 FORDHAM INT'L L.J. 229, 231-32 (arguing that homosexuals constitute a particular social group); see also *In re C-A-*, 23 I. & N. Dec. 951, 955 (BIA 2006) (collecting cases in which new "particular social groups" have been recognized).

¹⁶⁰ *In re Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985). The Fifth Circuit has adopted the BIA's definition. See *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002) ("To establish that he is a member of a 'particular social group,' [an applicant] must show that he was a member of a group of persons that share a common characteristic that they either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."). The BIA has since augmented the "social group" definition, adding a "social visibility" component to the concept: "the extent to which members of a society perceive those with the characteristic in question as members of a social group." *In re C-A-*, 23 I. & N. Dec. at 957.

¹⁶¹ See *In re Fuentes*, *supra* note 8, at 661 (concluding that current police officers in areas experiencing civil unrest do not constitute a particular social group because the dangers they face "ar[i]s[e] from the nature of their employment and domestic unrest rather than 'on account of' immutable characteristics or beliefs within the scope of [the statutory definition of refugees]").

determination that Officer Alarcón's claim could not succeed on the basis of his status as a former police officer. This is so because the record reflects that he was "singled out for reprisal, not because of his status as a former police officer, but because of his role in disrupting particular criminal activity"; accordingly, "he would not be considered, without more, to have been targeted as a member of a particular social group."¹⁶²

Although Officer Alarcón's claim is compelling, the BIA's precedent and the deference it is due from the federal courts represents a formidable hurdle that neither he nor similarly situated Mexican police officers can likely expect to clear in seeking asylum or withholding of removal.

B. Why Officer Alarcón and Similarly Situated Mexican Police Officers Are Entitled to Relief Under CAT

The IJ's ruling on Officer Alarcón's claim fails to recognize that the law governing humanitarian relief from deportation is sufficiently expansive to afford protection in cases involving (1) law enforcement officers from countries experiencing pervasive domestic unrest; (2) who have been, or will be, targeted for death; (3) by non-state actors with the tacit permission of, or in collusion with, government actors charged with enforcing the rule of law; (4) for actions taken by the officers in an effort to enforce the rule of law. That relief should take the form of withholding or deferral of removal under CAT,¹⁶³ which offers protection to victims who may be unable to demonstrate, or may not even know, the motivation of their torturers.¹⁶⁴ Stated otherwise, unlike asylum and

¹⁶² *In re C-A-*, 23 I. & N. Dec. at 959.

¹⁶³ The regulations governing CAT claims distinguish between two forms of relief. Withholding of removal under CAT ("CAT Withholding") is available to applicants who satisfy the CAT standard and are not subject to any of the statutory bars on eligibility for withholding of removal as set out in 8 U.S.C. § 1231(b)(3)(B), *i.e.* individuals who have participated in the persecution of members of protected groups, have been convicted of "a particularly serious crime," or represent a threat to national security. Deferral of Removal under CAT ("CAT Deferral") is available to applicants who come within one or more of the aforementioned statutory grounds of ineligibility for withholding of removal. 8 C.F.R. § 208.17(a) (2011). The status of those granted CAT Deferral is more easily terminated by the government. *Compare* 8 C.F.R. § 208.24(f) (2011) (requiring the government to file a motion to reopen and "establish, by a preponderance of evidence" that the applicant is no longer entitled to withholding of removal due to a change in circumstances, that the application for relief was fraudulent, or that the applicant committed an act that would have rendered him or her statutorily ineligible for withholding of removal), *with* 8 C.F.R. § 208.17(d) (2011) (requiring only that the government request a hearing to terminate CAT Deferral, at which point the burden of proof shifts to the non-U.S. citizen that his or her status should not be terminated). There is no indication in the IJ's December 29, 2010 Order that Officer Alarcón would not be eligible for CAT Withholding.

¹⁶⁴ *See* *Zubeda v. Ashcroft*, 333 F.3d 463, 474 (3d Cir. 2003) ("[R]equiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture."). The Fifth Circuit has recognized this distinguishing characteristic of relief under CAT:

Significantly, relief under the Convention Against Torture does not require a nexus to specific statutory grounds. *See e.g., Camara v. Ashcroft*, 378 F.3d 361 (4th Cir.2004) (holding that an alien need not prove the reason for the torture to be eligible for Convention Against Torture relief). Nor is the inability to establish asylum fatal to the pursuit of Convention Against Torture relief. *See, e.g., Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir.2004) (finding the Convention Against Torture inquiry to be independent of asylum analysis); *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir.2003) (holding that the failure to establish eligibility for asylum does not necessarily doom an application for Convention Against Torture relief).

Tamara-Gomez v. Gonzales, 447 F.3d 343, 350 (5th Cir. 2006).

withholding of removal, relief under CAT does not require a showing of a “nexus” between the feared persecution and a membership in a protected class.

1. Analysis of the Availability of Relief Under CAT

In reaching the conclusion that Officer Alarcón’s application for relief under CAT should be denied, the IJ correctly identified the applicable legal standard, but he erred both in his fact finding and his application of the law governing CAT relief to Officer Alarcón’s claim.

The availability of relief under CAT is specific to the individual applicant; it is not contingent on the applicant’s membership in a particular protected group. If an applicant demonstrates that it is more likely than not that he will be tortured in the country of removal, he *must* be granted relief under CAT.¹⁶⁵ For purposes of establishing eligibility for CAT relief, “torture” consists of: “(1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official [or other person acting in an official capacity] . . .;¹⁶⁶ and (5) not arising from lawful sanctions.”¹⁶⁷ The definition of “torture” for purposes of establishing entitlement to CAT relief includes “mental pain or suffering [that is] prolonged mental harm caused by or resulting from . . . [t]he threat of imminent death.”¹⁶⁸ “Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”¹⁶⁹ The Fifth Circuit has determined that the “acquiescence of a public official” requirement includes “willful blindness” or “willful acceptance.”¹⁷⁰

The IJ found Officer Alarcón credible, but noted “areas of weakness” in his testimony, which the IJ purported to “give due weight as they relate to [Officer Alarcón]’s burden of proof.”¹⁷¹ The IJ did not articulate the standard he employed for determining what weight the perceived areas of weakness were due, and it is far from clear that, absent an adverse credibility determination,¹⁷² any of Officer Alarcón’s testimony can be

¹⁶⁵ 8 C.F.R. § 1208.16(c)(4) (2011) (“If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is *entitled* to protection under the Convention Against Torture.”) (emphasis added).

¹⁶⁶ Quotation modified to mirror the cited regulatory language. See 8 C.F.R. § 208.18(a)(1) (2011).

¹⁶⁷ *In re J-E-*, 23 I. & N. Dec. 291, 297 (BIA) (citing 8 C.F.R. § 208.18(a)), *overruled on other grounds in* *Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004) (rejecting BIA’s requirement of custody or physical control of the victim by a public official).

¹⁶⁸ 8 CFR § 1208.18(a)(4)(iii) (2011).

¹⁶⁹ 8 C.F.R. § 208.18(a)(7) (2011).

¹⁷⁰ *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002); *accord* *Hakim v. Holder*, 628 F.3d 151, 155-57 (5th Cir. 2010) (clarifying that willful acceptance of torture by government officials is not *required* to satisfy the statutory standard); *see also, e.g.,* *Morales v. Gonzales*, 478 F.3d 972, 983-84 (9th Cir. 2007) (remanding CAT claim because IJ afforded no weight to instances of violence and rape not reported to authorities by petitioner because of willful blindness and/or outright acceptance by Mexican police officers).

¹⁷⁰ *In re Alarcón*, *supra* note 2, at 17.

¹⁷¹ *In re Alarcón*, *supra* note 2, at 17.

¹⁷² IJ credibility determinations related to applications for humanitarian relief from removal are governed by provisions added to the statute with the passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005):

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base an adverse credibility determination on the demeanor, candor, or responsiveness of the

disregarded or given less than its full weight.¹⁷³ Even without the benefit of the transcript of the proceedings and the documents the IJ admitted into evidence, it is possible to discern from the IJ's discussion of his concerns that he erred in discounting critical aspects of Officer Alarcón's testimony. That error resulted in the erroneous denial of Officer Alarcón's application for relief under CAT.

As a threshold matter, to the extent the "areas of weakness" identified by the IJ related to Officer Alarcón's eligibility for asylum and withholding of removal, they should not be permitted to overshadow or "wash over" a determination of his eligibility for relief under CAT.¹⁷⁴ The IJ's first three "areas of weakness" all relate to Officer Alarcón's application for asylum and withholding of removal.

First, the IJ noted that, although Officer Alarcón testified at his hearing that the cartel to which the drug runners belonged blamed him and his partner for "turning them in" to a rival cartel, he had not included that explanation of the cartel gunman's motive in his written asylum application.¹⁷⁵ Instead, in his asylum application, Officer Alarcón stated "[b]ecause I busted some of the drug dealers with drug[s] and money my family and I have been singled out . . ."¹⁷⁶ On this discrepancy, the IJ concluded, "[t]o the extent the Respondent's explanations for the shooting conflict, this ambiguity weighs against the Respondent's burden of proof, because it cuts against his ability to establish the reason he was targeted."¹⁷⁷ The fact that Officer Alarcón did not state in his asylum application that the April 21, 2008 stop of the drug runners provided the motivation for the cartel gunman's April 22, 2008 ambush does not compel the conclusion that his subsequent testimony on that topic gave rise to an "ambiguity." The statement on his asylum

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. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. §§ 1158(b)(1)(B)(iii) (asylum); 1231(b)(3)(C) (withholding of removal); 1229a(c)(4)(C) (other relief from removal).

¹⁷³ The Fifth Circuit has adopted the Second Circuit's standard that "an IJ may rely on *any* inconsistency or omission in making an adverse credibility determination as long as the 'totality of the circumstances' establishes that an asylum applicant is not credible." *Wang v. Holder*, 569 F.3d 531, 538 (5th Cir. 2009) (internal quotation marks omitted) (quoting *Lin v. Mukasey*, 534 F.3d 162, 167 (2d Cir.2008)). However, it bears repeating that the IJ did not make an adverse credibility determination in Officer Alarcón's case.

¹⁷⁴ See *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000) ("We are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim; especially when the prior adverse credibility determination is not necessarily significant in this situation."); accord *Kamalthas v. INS*, 251 F.3d 1279, 1283-84 (9th Cir. 2001) (applying the reasoning from *Mansour* "where the BIA has plainly overrelied [sic] on its prior adverse credibility finding against Kamalthas and failed to consider evidence of the relevant country conditions in the record"); but see also *Efe v. Ashcroft*, 293 F.3d 899, 907-08 (5th Cir. 2002) (recognizing *Mansour* and *Kamalthas* as decisions to "remand[] cases for further consideration of CAT claims due to overreliance on an adverse credibility ruling" but finding *Mansour* and *Kamalthas* inapplicable when the "credibility assessment . . . goes directly to the issue" of torture *vel non*).

¹⁷⁵ *In re Alarcón*, *supra* note 2, at 21-22 n.8 (noting that Officer Alarcón "focused much more in his testimony on the fact that he was viewed as having aligned himself with one cartel against another as the reason for the shooting on April 22, 2008" and did not testify that the shooting was motivated by the stop of the drug runners the previous day)

¹⁷⁶ *Id.* at 22 n.8.

¹⁷⁷ *In re Alarcón*, *supra* note 2, at 22 n.8.

application does not *conflict* with his hearing testimony; at most, it reflects a lack of detail that does not, on its own, support an adverse credibility determination.¹⁷⁸ Additionally, his testimony about the cartel gunman’s motivation most certainly does not conflict with the answer he provided in his application for relief under CAT: “that he is ‘afraid of returning to Mexico and being victimized by the drug cartel and the police.’”¹⁷⁹

Second, the IJ expressed concern that, although the name of Officer Alarcón’s partner appeared on the cartel’s hit list, Officer Alarcón’s name did not.¹⁸⁰ Documentary evidence submitted in support of his claim showed that people included on the hit list – including the two officers in the car with Officer Alarcón at the auto parts store when the cartel gunman opened fire (one of whom was killed on the scene, the other who was subsequently shot in a mall parking lot) – had been assassinated.¹⁸¹ Additionally, the IJ considered the fact that, during her interview with an asylum officer, Officer Alarcón’s wife had testified that the cartel gunman had “wanted to kill the other person but since my husband fired back at them they now want to kill him because they want revenge.”¹⁸² The IJ concluded that “[t]o the extent the Respondent failed to address th[e] possibility [that he “was not even the target of the shooting”], the Court must find that these facts weigh against a finding that the Respondent has met his burden of proof.”¹⁸³ Of course, as noted above, Officer Alarcón’s request for relief under CAT is premised on his fear that he will be victimized by narcotraffickers and the police. In light of all the circumstances, that fear can only reasonably be understood to flow from the events of April 22, 2008, when he returned the cartel gunman’s fire, identified himself by name while reporting the gun battle over the police radio, and subsequently received a death threat over the same radio.¹⁸⁴ Whether or not he was specifically targeted on April 21, 2008, he *was* by the afternoon of April 22, 2008.

Third, the IJ expressed concern that, “after being pressed on cross examination,” Officer Alarcón “eventually admitted that he did not know which cartel tried to kill him on April 22, 2008.”¹⁸⁵ Noting that “[t]he identity of the persecutor is a critical aspect of any claim of well-founded fear of persecution, because it speaks to the motivations of the persecutor, a critical fact in determining whether the nexus to a protected asylum ground is present[.]”¹⁸⁶ the IJ “[f]ound[] that such ambiguity cuts against a finding that the Respondent has a well-founded fear of persecution based on a protected asylum ground.”¹⁸⁷ To the extent this conclusion by the IJ reflects an adverse credibility determination, the IJ’s finding is irrelevant to a CAT claim because relief under CAT is

¹⁷⁸ See *Chun v. INS*, 40 F.3d 76, 78-79 (5th Cir. 1994) (affirming adverse credibility determination as supported by substantial evidence where the IJ identified five inconsistencies in the applicant’s story of persecution, including four inconsistencies between statements in her asylum application and her testimony at her removal hearing); see also, e.g., *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996), citing *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) (“It is well settled that an applicant’s testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application.”).

¹⁷⁹ *In re Alarcón*, *supra* note 2, at 30 (quoting from Officer Alarcón’s I-589 application).

¹⁸⁰ *Id.* at 22 n.9.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 24 (relating this series of events).

¹⁸⁵ *Id.* at 26 n.10.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

not tied to membership in a particular social group, political beliefs, or any other protected ground.

At best, the two remaining “areas of weakness,” those which the IJ specifically identified in connection with Officer Alarcón’s request for relief under CAT, reflect a misconstruction of the record and improper speculation and conjecture.¹⁸⁸

First, the IJ returned to the fact that Officer Alarcón’s written statements prior to the hearing did not include the detail that his fellow officers refused to provide him with ammunition when he sought to escape the hospital on April 22, 2010, after receiving a death threat from one of the cartels.¹⁸⁹ Based on this “omission,” the IJ concluded that “[g]iven that this detail seems to implicate other police officers in some kind of conspiracy to have the Respondent killed, it cannot but detract from the Respondent’s burden of proof for CAT that he failed to mention it prior to the day of his hearing.”¹⁹⁰ As noted above, Officer Alarcón *did* state in his written application for relief under CAT that he feared reprisal from his fellow police officers.¹⁹¹ The IJ could have found Officer Alarcón’s testimony on the topic not credible, or even implausible, but he failed to do so. Accordingly, Officer Alarcón’s testimony must be accepted as true.¹⁹²

Next, the IJ considered Officer Alarcón’s “equivocation” on the issue of the loyalty of his fellow officers.¹⁹³ Specifically, the IJ noted that, on direct examination, Officer Alarcón testified that “local police officers in Juarez and other parts of Mexico are in the habit of betraying one another to the drug cartels for the purpose of torture or execution.”¹⁹⁴ However, on cross-examination, Officer Alarcón testified that “at least one officer . . . helped [him] get out of the hospital through a back door.”¹⁹⁵ The IJ also observed that, on April 23, 2010, a police commander advised Officer Alarcón not to return “because you know exactly what will happen to you.” However, “when he was pressed on cross examination as to why none of his fellow officers had ever tried to turn him over to the cartels *prior to April 22, 2008*, [he] stated ‘[t]hey do not turn you over, but they do not help you either.’”¹⁹⁶ The IJ’s conclusion that “[i]t seems by this statement that the Respondent started to backpedal on the issue of complicity of his fellow officers, . . . such equivocation cuts against the Respondent’s burden of proof” borders on the absurd. Prior to April 22, 2008, Officer Alarcón had never engaged in a gun battle with, and wounded, a cartel member. Certainly, the record is reasonably read to indicate that Officer Alarcón’s receipt of a death threat after the shootout on April 22, 2008, affected his standing in the police department. Although his previous conduct (stopping and arresting drug dealers) may not have motivated his fellow officers to turn him over to the cartels, the fact that he had shot a cartel member could reasonably be expected to bring

¹⁸⁸ See, e.g., *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000) (“Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence.”).

¹⁸⁹ *Id.* at 32 n.13.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 30 (quoting from Officer Alarcón’s I-589 application).

¹⁹² *Zhao v. Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005) (“That the IJ did not doubt Zhao’s testimony is significant, because we must accept as true all the facts to which Zhao testified. The question is merely the interpretation and legal sufficiency of those facts.”).

¹⁹³ *In re Alarcón*, *supra* note 2, at 33.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (quoting Officer Alarcón) (emphasis added).

more pressure to bear on his fellow officers to turn him over to the cartels. The IJ's conclusion misapprehends the significance of the sequence of events of April 21 and 22, 2008, and the offer by *one* officer to assist Officer Alarcón in his escape from the hospital is not inconsistent with his testimony that most of his fellow officers were collaborating with the narcotraffickers. If anything, Officer Alarcón's admission that one officer helped him find an escape route bolsters his credibility and is consistent with his testimony that "there w[ere] only one or two of us against what was going on."¹⁹⁷

What remains for consideration in evaluating Officer Alarcón's eligibility for relief under CAT is his credible,¹⁹⁸ uncontroverted testimony that he received a death threat from a drug cartel, had reason to believe his fellow officers would surrender him to the cartel rather than protect him, and that he would not be able to relocate and avoid detection within Mexico.¹⁹⁹ Additionally, the record contains documentary evidence of conditions in Mexico that "establish[es] that corruption and protection of DTOs is an endemic problem in Mexico, especially amongst the state and local police officers."²⁰⁰ Taken together, the evidence establishes that, as a result of having shot and wounded a cartel member on April 22, 2008, Officer Alarcón received a death threat. Given the conditions in Mexico, including the targeting and killing of police officers who fail to cooperate with, or openly defy, the cartels, Officer Alarcón is entitled to a determination that it is more likely than not that he will be subjected to torture – an imminent fear that he will be killed – if he is removed to Mexico now.

The only open question is whether Officer Alarcón has established that it is more likely than not that the torture would 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."²⁰¹ The IJ concluded that he had not:

[E]ven if local police officers are corrupt and complicit in protecting DTOs, that does not, of necessity, establish that they are also aware of, consenting or acquiescing to torture of individuals by cartels or are "willfully blind" to such activities occurring. Neither the Respondent's own testimony nor the country reports included in the record establishes to any degree of certainty that Juarez police officers (or any other law enforcement officers) are *aware* of activity constituting torture and are breaching their legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7)²⁰²

Several problems with this reasoning and conclusion are readily apparent. For example, the burden of proof for CAT relief requires a "more likely than not" showing. The IJ identifies no basis in law for requiring that the evidence "of necessity, establish" that

¹⁹⁷ *In re Alarcón*, *supra* note 2, at 10 (quoting Officer Alarcón).

¹⁹⁸ "The respondent's testimony, if credible, may be sufficient to sustain the burden of proof without corroboration." *In re J-E-*, 23 I. & N. Dec. 291, 302 (BIA 2002) (citing 8 C.F.R. § 208.16(c)(2)).

¹⁹⁹ *In re Alarcón*, *supra* note 2, at 11 (recounting that Officer Alarcón testified that his prior employment as a police officer would come to light if he attempted to obtain a "letter of no previous criminal history" in order secure employment elsewhere in Mexico, and that process would reveal his location).

²⁰⁰ *Id.* at 34.

²⁰¹ 8 C.F.R. § 208.18(a)(1) (2011).

²⁰² *In re Alarcón*, *supra* note 2, at 33.

public officials are “aware of, consenting or acquiescing to” the feared torture. Additionally, the IJ’s statement that Officer Alarcón’s testimony does not “establish[] to any degree of certainty” that his fellow officers were aware of activity constituting torture mischaracterizes the record as it is laid out in the very same order. Officer Alarcón testified that he “already knew from past experience that what they did was they would turn us over.”²⁰³ His fellow officers did this because “it doesn’t make any sense for them to risk their own life to protect another person. They’re just not going to do it.”²⁰⁴ This admitted evidence suggests that Ciudad Juarez officers would knowingly turn an unarmed fellow officer under a death threat over to violent narcotraffickers. But somehow, the IJ didn’t think this established, “to any degree of certainty that Juarez police officers . . . are *aware* of activity constituting torture and are breaching their legal responsibility to intervene to prevent such activity.”²⁰⁵

Finally – although it has no precedential value – an unpublished BIA decision from December 24, 2008, provides some indication that the BIA is aware of the extent of police corruption in Mexico and willing to consider CAT claims asserting police participation in, or acquiescence to, torture perpetrated by narcotraffickers.²⁰⁶ In the unpublished decision, the BIA reviews a Texas IJ’s denial of an application for relief under CAT made by a 36-year-old man (“Mr. Doe”)²⁰⁷ who testified that he had lived next door to “one of the drug lords who control the mafia” in the Mexican border town Mr. Doe called home. After he “declined the drug lord’s request” that he store drugs and weapons in his home, Mr. Doe was repeatedly beaten and threatened by ministerial police.²⁰⁸ The IJ had found Mr. Doe not credible and concluded that he had not made a sufficient showing that he been tortured or would be tortured if removed to Mexico.²⁰⁹ Much like the IJ in Officer Alarcón’s case, the IJ in Mr. Doe’s case was leery of testimony about police involvement in torture. The BIA explained:

While the respondent testified that the police were complicit in the beatings of him, the Immigration Judge found that the respondent failed to demonstrate that the government was even aware of the beatings or was willfully blind to the alleged beatings. In addition, the Immigration Judge noted the lack of testimony or documentary evidence that the respondent sought protection from the government of Mexico or that seeking such protection would be futile.²¹⁰

²⁰³ *Id.* at 8.

²⁰⁴ *Id.* at 10.

²⁰⁵ *Id.* at 33.

²⁰⁶ *In re Doe*, No. ___, (BIA Dec. 24, 2008) [hereinafter *In re Doe*], available at <http://centerforinvestigativereporting.org/articles/mexico039sdrugwarcreatesnewclassofrefugees> (providing a access to a redacted version of *In re Doe* in text box entitled “*Mexico Torture Claim*” In Andrew, Becker, and Patrick J. McDonnell, *Mexico’s Drug War Creates New Class of Refugees*. *L.A. Times*, (March 4, 2009)

²⁰⁷ The applicant’s name is redacted in the only available version of the BIA opinion.

²⁰⁸ *In re Doe*, *supra* note 204 at 1.

²⁰⁹ *Id.* at 2 (noting that the IJ “found the evidence to be insufficient to show that the Mexican government would acquiesce in or would be willfully blind to any torture the respondent might experience upon his return”).

²¹⁰ *Id.*

The BIA agreed with Mr. Doe that the purported “discrepancies” identified by the IJ did not exist in the record, and the BIA concluded that the IJ’s adverse credibility determination was clearly erroneous.²¹¹ The IJ also summarized Mr. Doe’s evidence of “lawlessness in Mexico, particularly near the border” as follows:

According to the Country Reports on Human Rights Practices - 2007, while the Mexican government generally respected human rights at the national level, “impunity and corruption remained problems, particularly at the state and local level.” The report goes on to state that corruption remained a problem at all levels of government, “as many police were involved in kidnapping, extortion, or providing protection for, or acting directly on behalf of organized crime and drug traffickers. Impunity was pervasive to an extent that victims often refused to file complaints.” The respondent also submitted the September 17, 2007, report from the United States Department of State website, stating that local police have been ineffective in maintaining security in some regions along the border and that drug related violence has increased dramatically in recent months.²¹²

Addressing the legal standard to be applied in Mr. Doe’s case, the BIA cited the Attorney General’s explanation that, for purposes of considering CAT claims involving conduct by government actors, “acting in an official capacity” refers to “acting ‘under color of law.’”²¹³ Reviewing the Texas IJ’s ruling on Mr. Doe’s claim, the BIA looked to Eighth Circuit precedent on the issue of when a law enforcement officer is “acting under of color of law,”²¹⁴ explaining:

The [Eighth Circuit] noted that “acting under color of law” means under pretense of law, and acts of officers in the ambit of their personal pursuits are thus excluded. Furthermore, absent any actual or purported relationship between an officer’s conduct and duties as a police officer, he or she cannot be deemed to be “acting under color of state law.”²¹⁵

In light of Mr. Doe’s credible testimony and the documentation reflecting “the seemingly high level of penetration of corruption in Mexico, particularly along the border,” the BIA “f[ou]nd it necessary to determine whether the public officials who would harm the respondent or acquiesce in his harm would be acting ‘under color of law.’”²¹⁶ The Board remanded the matter to the IJ for that determination and also for consideration of whether Mr. Doe could reasonably relocate to safety within Mexico.²¹⁷

Although Officer Alarcón had not experienced a long period of torture at the hands of his fellow police officers prior to fleeing Mexico, he offered credible testimony that he

²¹¹ *Id.*

²¹² *Id.* (internal citations to the record omitted).

²¹³ *Id.* (quoting *In Re Y-L, A-G, & R-S-R-*, 23 I. & N. Dec. 270, 285 (AG 2002)).

²¹⁴ *Id.* at 2-3 (citing *Roe v. Humke*, 128 F.3d 1213 (8th Cir. 1997)).

²¹⁵ *Id.* at 3 (citing *Humke*, 128 F.3d at 1216).

²¹⁶ *Id.* at 3.

²¹⁷ *Id.*

feared then, and has reason to fear now, their ready acquiesce in efforts to harm or kill him. By virtue of their role as law enforcement officers, they are faced with the choice of plata over plomo, and their acquiescence to the will of the narcotraffickers is directly related to their conduct and duties as state actors. For this reason, and all those discussed above, the BIA should reverse the IJ's denial of Officer Alarcón's application for relief under CAT and either grant relief on the existing record or remand the matter to the IJ for reconsideration. On remand, the IJ should consider whether all the relevant evidence demonstrates that it is more likely than not that there is a cartel vendetta against Officer Alarcón, of which his fellow officers are aware and from which they will not endeavor to protect him.

2. Limitations of Relief Under CAT and Possible Alternatives

On a final note, it is important to appreciate that a grant of CAT relief to the principal Mexican law enforcement officer applicant will not confer any lawful status on his or her spouse and minor children. The resulting separation of family members, not to mention the risk of harm those family members might face from the same narcotraffickers that targeted the law enforcement officer, gives rise to a painful dilemma.²¹⁸ Assuming that United States immigration law and policy are not going to respond to this concern in the short term, two possible solutions exist to remedy the situation at present. First, if the family members can establish that they are likely to be under a threat of death by virtue of their familial relationship to the principal CAT applicant, they may qualify for CAT relief in their own right. Second, in cases in which the principal law enforcement officer applicant is granted CAT relief, family members might qualify for asylum or withholding of removal on the theory that they fear persecution in Mexico on account of their familial ties to a Mexican law enforcement officer targeted by narcotraffickers. The Fourth Circuit recently recognized an asylum applicant's membership in a social group "consisting of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses."²¹⁹ It is interesting to note that, rejecting the BIA's affirmance of the IJ's denial of relief, the Fourth Circuit appeared to recognize that, although *family members* of those who oppose gangs by testifying against them can constitute a particular social group, those who "merely testify" against the gangs do not.²²⁰ It seems to follow, rather paradoxically, that, even if family members of Mexican law enforcement officers like Officer Alarcón were able to qualify for asylum or withholding of removal on this theory, the officers themselves would not qualify for the same form of relief on the basis of their active opposition to, or defiance of, Mexican drug traffickers.²²¹

²¹⁸ Cf. Lori A. Nessel, *Forced to Choose: Torture, Family Unification, and United States Immigration Policy*, 78 *TEMPLE L. REV.* 897 (2005) (arguing that this type of limitation runs afoul of several norms of international human rights law).

²¹⁹ *Crespin-Valladares v. Holder*, 632 F.3d 117, 124 (4th Cir. Feb. 16, 2011) (reasoning that "*Acosta* itself identifies 'kinship ties' as paradigmatically immutable").

²²⁰ *Id.* at *6 ("[T]he BIA inaccurately characterized the Crespins' proposed social group. Indeed, the Crespins' proposed group *excludes* persons who *merely testify* against MS-13; the Crespins' group instead encompasses only the relatives of such witnesses, testifying against MS-13, who suffer persecution on account of their family ties.").

²²¹ Query whether, with *Crespin-Valladares*, the Fourth Circuit intended to permit individuals otherwise unlikely to qualify for asylum in their own right (e.g., those who testify against gangs, former police officers from areas

V. CONCLUSIONS AND RECOMMENDATIONS

*Look at situations as contingent, not as inevitable, look at them as the result of a series of historical choices made by men and women, as facts of society made by human beings, and not as natural or god-given, therefore unchangeable, permanent, irreversible.*²²²

Although accounts in the popular media focus on “asylum applications” by Mexican law enforcement officers, the best option – and the right option – for Officer Alarcón and similarly-situated officers is the more limited form of relief that CAT affords those fleeing torture in countries experiencing internal turmoil of the magnitude Mexico is facing presently. Relief under CAT offers the officers safe harbor in the United States and provides them with employment authorization so that they can continue to provide for their families. Although their family members cannot receive a derivative form of CAT relief, it may be possible to preserve family unity by having the officers’ spouses and minor children apply for CAT relief in their own right, or it is possible that they could qualify for asylum or withholding of removal on the theory that they have a well-founded fear of persecution in Mexico because of their familial ties to a Mexican law enforcement officer that has been targeted by narco-traffickers.

For the United States, too, extending CAT relief to these officers is the right thing to do. Their situation presents an opportunity for the United States to model immigration policy that “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”²²³ On a very practical level, granting these officers relief under CAT is consistent with this country’s commitment to bolster law enforcement efforts in Mexico, and its insistence that the “war on drugs” can be won. The United States cannot credibly, with one hand, send billions of dollars in aid and provide technical assistance to fight narco-trafficking violence in Mexico and, *at the same time* with the other hand, grant asylum, with its path to permanent resident status, to these officers and their family members. From a policy perspective, the temporary nature of CAT relief sends a message that there is hope for the rule of law in Mexico,²²⁴ and it acknowledges

experiencing pronounced civil unrest) to obtain “derivative” asylum status as an immediate family member of the principal applicant (the officer’s spouse or child), whose “kinship ties” back to the officer provide the definition of the “particular social group” of which the principal applicant must be a member.

²²² Edward Said, Palestinian-American literary theorist and political activist. Edward Said, *The Reith Lectures: Intellectual exile: expatriates and marginals: What is the proper role of the intellectual in today's world?*, INDEPENDENT (U.K.), July 8, 1993, <http://www.independent.co.uk/life-style/the-reith-lectures-intellectual-exile-expatriates-and-marginals-what-is-the-proper-role-of-the-intellectual-in-todays-world-in-the-third-of-his-1993-reith-lectures-a-series-entitled-representations-of-the-intellectual-edward-said-says-that-exile-serves-as-a-model-for-the-thinker-and-that-truth-inevitably-lies-at-the-margins-of-society-this-is-an-edited-text-of-last-nights-radio-4-broadcast-1483560.html> (edited text of radio broadcast of Said’s lecture for the 1993 Reith Lecture series for BBC radio).

²²³ Cf. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (evaluating a claim that denaturalization violated the Eighth Amendment’s protection against cruel and unusual punishment and explaining that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

²²⁴ A recent report indicates that the tide has begun to turn:

The number of Mexican migrants returning to their country – mainly from the United States – has increased dramatically in the last five years compared with the previous five years. According to the most recent numbers released by the Mexican census bureau, the increase was 31.9% in the period from 2005 to 2010, compared with 2000 to 2005 numbers. The

that these officers, and their families, will someday wish to return to the country they loved enough risk their lives in its service. Stated otherwise, extending the more limited form of humanitarian relief available under CAT to these officers will result in immigration policy that is in line with this country's foreign policy as it relates to Mexico's drug war.

From a humanitarian perspective, this country should recognize its obligation to offer some protection to Mexican policemen who have come into harm's way as a result of their efforts to enforce the rule of law in the midst of the violent drug war that is fueled by *this* country's creation of a steady demand for drugs and a reliable supply of weapons.

Mexican Institute of Statistics and Geography – INEGI by its Spanish acronym – says that during the last five years of the decade, 1.1 million Mexicans left their country. According to the government agency, by the time the national census was taken last summer, more than 351,000 Mexican migrants had returned to Mexico.

Rafael Romo, *Tide Turns: Sharp Increase in Number of Mexicans Returning Home*, CNN WORLD, Mar. 4, 2011, http://articles.cnn.com/2011-03-04/world/mexico.reverse.migration_1_mexican-migrants-border-patrol-agents-tucson-sector?_s=PM:WORLD.