USING COUNTRY CONDITIONS EVIDENCE TO IMPROVE APPELLATE REVIEW OF CONVENTION AGAINST TORTURE CASES

PHILLIP R. TAKHAR,[†] MICHAEL J.P. HAZEL,[††] & MAIREAD K. DOLAN[†††]

ABSTRACT

While the Trump Administration's transit ban was in force, many would-be asylum seekers had to turn to other forms of relief. In particular, many such individuals sought withholding of removal under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Those eligible for protection under the CAT are not deported because it is improper—both under U.S. and international law—to return an individual to a country where they are likely to be tortured. Several NGOs report high levels of torture occurring around the world, yet the United States consistently finds upwards of 96%–98% of CAT applicants ineligible for relief every year. The Tenth Circuit is no exception; a review of recent cases shows a reluctance by the court to reverse denials of CAT protection. However, an assessment of the Tenth Circuit's own precedent, the legislative intent behind the implementation of the CAT, and international norms demonstrates that the Tenth Circuit's reluctance is ill-placed. Further, the Supreme Court's ruling in *Nasrallah v. Barr* clarifies that circuit courts may review, under a "substantial evidence" standard, factual challenges to CAT orders in cases where the applicant has prior convictions. This decision provides an opportunity for the Tenth Circuit to clarify the CAT standard and to provide greater consistency among CAT determinations.

This Article proposes that country conditions evidence be accorded greater importance in conducting CAT determinations and reviews. In many cases, objective reporting regarding country conditions will provide a more reliable indication of an individual's likelihood of torture than will applicant testimony, which is often influenced by fear, a misunderstanding of the U.S. immigration system, a lack of representation, and cultural dissonance. Relying more heavily on country conditions will produce more consistent outcomes for CAT claims, particularly for

† Phillip Takhar is a lawyer at the law firm Wilmer Cutler Pickering Hale and Dorr. His practice focuses on intellectual property litigation and pro bono immigration matters.

†† Michael J.P. Hazel is a lawyer at the law firm Wilmer Cutler Pickering Hale and Dorr, where he counsels clients in connection with government inquiries, internal investigations, and high-stakes litigation. He has also handled multiple immigration-related pro bono matters.

††† Mairead K. Dolan is a lawyer at the law firm Wilmer Cutler Pickering Hale and Dorr. Her practice focuses on complex litigation and investigations, in addition to a substantial number of pro bono immigration matters.

claims brought by those from the most volatile regions of the world. This reliance on objective evidence will further enable the Tenth Circuit to review lower court decisions more effectively. Given the increased importance of CAT relief in a time when most immigrants are barred from seeking asylum, this would allow for a legal approach that meets the moral and legal obligations that require the United States to not deport individuals to great harm.

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INTRODUCTION

The CAT was conceived by the international community as one of many measures intended to avoid repetition of the horrors of World War II.[1] The United States became a signatory to the CAT and implemented a framework to allow arriving immigrants to apply for protections under it.[2] As the Trump Administration imposed new bars to obtaining relief under U.S. asylum laws,[3] protection under the CAT became one of the only feasible options for many refugees arriving in the United States. At this time, these bars have largely been enjoined by federal courts or re-

1. *See A Short History of Human Rights*, UNIV. OF MINN. HUM. RTS. RES. CTR., http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm (last visited Dec. 28, 2020).

2. *See* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 3 (2009).

3. *See* Michael D. Shear & Zolan Kanno-Youngs, *Most Migrants at Border with Mexico Would be Denied Asylum Protections Under New Trump Rule*, N.Y. TIMES (July 15, 2019), https://www.nytimes.com/2019/07/15/us/politics/trump-asylum-rule.html.

versed by the Biden Administration.[4] However, the actions by the Trump Administration highlighted the importance of the CAT as an alternative source of relief to asylum.

This Article considers the body of case law produced by the Tenth Circuit in reviewing CAT determinations by immigration judges and the Board of Immigration Appeals (BIA). A survey of every CAT appeal decided by the Tenth Circuit since the implementation of such judicial review reveals that immigrants are often deported to countries that have been found to regularly commit torture.[5] Further, analysis of a pair of factually similar cases demonstrates the inconsistency of evidentiary review of country conditions.[6]

Based on compelling data gleaned from the survey of Tenth Circuit cases and the disparate outcome of factually similar cases, this Article proposes that the Tenth Circuit accord greater weight to country conditions evidence during its review of CAT determinations.[7] Country conditions provide adjudicators with objective evidence to assess the likelihood that an individual will be tortured in the country of removal.[8] According greater weight to such evidence would lead to more consistent outcomes across factually similar cases and would also result in a body of case law more closely aligned with the United States' own recognition of the prevalence of torture around the world.

This Article considers the history of the CAT, from its formation by the United Nations to its ratification by the United States. The Article then considers the application of the CAT in the United States[9] and the inconsistency of CAT case resolutions in the Tenth Circuit.[10] The Article

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4. *See, e.g.*, Kelli Mejdrich, *Federal Court Strikes Down Trump's Asylum Ban*, POLITICO (July 1, 2020, 12:02 PM), https://www.politico.com/news/2020/07/01/federal-court-strikes-down-trumps-asylum-ban-346939; Camilo Montoya-Galvez, *Biden Moves to Reverse Trump's Immigration Agenda, Pausing Deportations and Safeguarding DACA*, CBS NEWS (Jan. 20, 2021, 6:25 AM), https://www.cbsnews.com/news/biden-immigration-executive-orders-daca-reverse-trump-policies/.

5. Phillip Takhar, Michael J.P. Hazel, & Mairead K. Dolan, 10th Circuit CAT Survey (2020) [hereinafter 10th Circuit CAT Survey] (on file with authors). This survey was conducted by the Authors and considers every CAT appeal decided by the Tenth Circuit available on Westlaw. The survey examined the outcome of each case along with the country of origin of the CAT applicant, the authority cited for the decision, and the issues considered by the court. While this survey considered every appealed CAT order in the Tenth Circuit, the data presented in this Article represents only those opinions that made a determination on the merits of the applicant's CAT case. The data therefore does not include those cases where the applicant's CAT claim was withdrawn or waived.

6. *See* discussion *infra* Section III.B.

7. In particular, "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal." 8 C.F.R. § 208.16(c)(3)(iii) (2020). Country conditions evidence is often developed by reference to reports by the U.S. government, foreign governments, and nongovernment organizations. *See, e.g.*, *Country Conditions Research*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/country-conditions-research (last visited Dec. 28, 2020).

8. Victoria Neilson, Elissa Steglich & Erin Harrist, *Asylum Manual: Corroborating Country Conditions*, IMMIGR. EQUAL., https://immigrationequality.org/asylum/asylum-manual/preparing-the-application-corroborating-country-conditions/ (last visited Dec. 28, 2020).

9. *See infra* Part II.

10. *See* discussion *infra* Sections III.A–B.

identifies a lack of consideration of country conditions evidence as the cause of this inconsistency and proposes that immigration judges be required to make explicit determinations on the country conditions in a given case.[11]

I. BACKGROUND

In the aftermath of World War II, numerous governments demanded institutional recognition and safeguarding of human rights on a global scale.[12] One manifestation of this demand was the United Nations (UN) General Assembly's adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[13] The UDHR proclaims that individuals shall not be subject to torture.[14] This paved the way for the eventual adoption of the CAT by the UN General Assembly on December 10, 1984.[15] President Reagan signed the CAT on April 18, 1988, and the Senate ratified it on October 27, 1990,[16] adopting the framework that would lead to the eventual provisions of withholding of removal and deferral of removal for immigrants eligible for these protections under 8 C.F.R. § 208.16(c)(4).[17]

Arriving immigrants may apply for CAT relief during removal proceedings, and if an immigration judge finds that a CAT applicant is more likely than not to be tortured, CAT relief must be granted (i.e., it is nondiscretionary).[18] An applicant may appeal a CAT denial to the BIA; a second denial may be further appealed to the circuit court in which the immigration judge sits.[19] Circuit courts will vacate or reverse decisions when the immigration judge and the BIA either fail to consider relevant evidence or come to a conclusion that has no reasonable basis in the presented evidence.[20] Executive action by the Trump Administration recently made asylum relief inaccessible to the vast majority of arriving immi-

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11. *See infra* Part IV.

12. *See A Short History of Human Rights*, *supra* note 1.

13. *History of the Document*, UNITED NATIONS., https://www.un.org/en/sections/universal-declaration/history-document/index.html (last visited Dec. 28, 2020).

14. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 5 (Dec. 10, 1948) [hereinafter UDHR].

15. Hans Danelius, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. AUDIOVISUAL LIBR. OF INT'L LAW, https://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf (last visited Dec. 28, 2020).

16. *See The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by Unanimous Agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988*, https://www.congress.gov/treaty-document/100th-congress/20/resolution-text (last visited Dec. 28, 2020).

17. *See* GARCIA, *supra* note 2, at 7–8.

18. 8 C.F.R. § 208.16(c)(4) (2020).

19. *See, e.g.*, Nasrallah v. Barr, 140 S. Ct. 1683, 1687–88 (2020).

20. *See, e.g.*, Espinosa-Cortez v. Att'y Gen. of U.S., 607 F.3d 101, 113 (3d Cir. 2010) ("[T]he BIA may not simply overlook evidence in the record that supports the applicant's case."); Uanreroro v. Gonzales, 443 F.3d 1197, 1204 (10th Cir. 2006) ("Although always deferential to agency fact-finding, we must ensure that BIA conclusions are sufficiently supported by the available evidence.").

grants;[21] however, protection under the CAT remains available, thus making it an even more important tool for protecting refugees.

A. The UN General Assembly's Enactment of the CAT

Article 5 of the UDHR states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[22] This strong, unequivocal statement was born out of the international community's horror from the practices of Nazi Germany that were broadly revealed at the conclusion of World War II.[23] Despite the absolutism of Article 5, however, many signatory countries continued to practice acts that are now considered torture.[24] It wasn't until the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration) that the UN formally defined torture.[25] Based in part on Article 5 of the UDHR, the Declaration defines torture as,

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.[26]

The Declaration embodies two important aspects of the eventual modern torture standard: (1) "severe pain or suffering," (2) "[caused or instigated by] a public official."[27] The Declaration goes on to state that under no circumstances—including times of war or emergency—may a State justify torture, and that States must take measures to prevent torture; ensure that law enforcement training takes the prohibition of torture into account; systematically review their interrogation practices to avoid torture; criminalize acts of torture; and provide impartial review of claims of torture (including investigating any reasonable ground to believe torture may have occurred).[28]

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21. *See* Shear & Kanno-Youngs, *supra* note 3.

22. UDHR, *supra* note 14, at art. 5.

23. *See The Universal Declaration of Human Rights at 70: Still Working to Ensure Freedom, Equality and Dignity for All: Article 5: Freedom from Torture*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.standup4humanrights.org/layout/files/30on30/UDHR70-30on30-article5-eng.pdf (last visited Dec. 28, 2020).

24. *See, e.g.*, Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L. & COMPAR. L. REV. 275, 290–96 (1994).

25. G.A. Res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1 (Dec. 9, 1975) [hereinafter Declaration].

26. *Id.*

27. *Id.*

28. *Id.* at art. 3–9.

Despite these robust (though perhaps lofty) proclamations of the responsibilities of Member States to prevent torture, the Declaration did not include specific metrics by which a State could determine whether any inflicted pain or suffering was sufficiently severe to constitute torture. Indeed, some amount of pain and suffering is explicitly permitted so long as it "aris[es] only from, [is] inherent in or [is] incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."[29]

This lack of clarity was not remedied when the General Assembly adopted the CAT and opened it for signature in December 1984.[30] The CAT did not define torture with any more particularity than did the Declaration. However, the CAT did insert important language into the definition expanding the scope of what constitutes torture:

> [A]ny act . . . intentionally inflicted on a person for such purposes as . . . *for any reason based on discrimination of any kind, when such pain or suffering is* inflicted by or at the instigation of *or with the consent or acquiescence* of a public official *or other person acting in an official capacity*.[31]

This expansion was intended to prevent state actors from skirting antitorture responsibilities by claiming that the pain or suffering was not tied to an interrogation, punishment, or intimidation.[32] Likewise, the actions of nongovernmental proxy actors (such as individuals with de facto governing power in a rural locale like terrorists, drug traffickers, or gangs) were also captured by this expanded definition.[33] So, while the precise boundary between pain incidental to necessary force and "severe pain or suffering" remained unclear under the CAT, the scope of actors who could be legally culpable for committing torture was comprehensive.[34] Crucially, the CAT also included the principal of "non-refoulement":

> No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, *the existence in the State con-*

29. *Id.* at art. 1. The Standard Minimum Rules for the Treatment of Prisoners state that "[o]fficers who have recourse to force must use no more than is strictly necessary." Economic and Social Council Res. 663 C (XXIV), Standard Minimum Rules for the Treatment of Prisoners, ¶ 54 (July 31, 1957).

30. *See* G.A. Res. 34/46, annex, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) [hereinafter CAT].

31. *Id.* at art. 1, ¶ 1 (emphasis added).

32. *See id.*

33. *See id.*

34. *See id.*

> *cerned of a consistent pattern of gross, flagrant or mass violations of human rights*.[35]

The CAT thus provided a mandate to signatory States that indicated (1) those who are in danger of being tortured may not be deported, and (2) evidence of the conditions in the country of origin of the individual seeking protection under the CAT must be taken into account when considering whether that individual is in danger of being tortured upon return.[36] As discussed in detail in the following Section, both of these components were to become important aspects of the United States' adoption of the CAT.

B. Ratification of the CAT by the United States

After signing the CAT in 1988, President Reagan transmitted the CAT to the Senate.[37] President Reagan noted that torture was "prevalent in the world" at the time and that he intended to ratify the Convention pending the legislative body's advice and consent.[38] However, this ratification would be subject to the reservation that the United States would not "recogniz[e] the competence of the Committee against Torture to receive and consider communications from States and individuals alleging that the United States is violating the Convention."[39]

The Senate sent the CAT to the Committee on Foreign Relations,[40] which returned a favorable report on the Convention to the Senate on July 19, 1990.[41] The report recommended a resolution of advice and consent to ratification subject to certain reservations, including (1) the federal government would exercise legislative and judicial jurisdiction over the subject matter of the CAT within the United States; (2) that the language "cruel, inhuman or degrading treatment or punishment" within the Convention would be understood in the United States to constitute the same "cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments"; and (3) that the United States would not be bound by arbitration as contemplated in the CAT.[42]

On October 27, 1990, the Senate considered several amendments to the American implementation of the CAT.[43] These amendments were primarily intended to clarify the interplay that implementation of the

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35. *Id.* at art. 3 (emphasis added).
36. *See id.*
37. *See U.S. Signs a U.N. Document That Seeks an End to Torture*, N.Y. TIMES, Apr. 19, 1988, at A12.
38. 134 CONG. REC. 12,025 (1988) (statement of President Ronald Reagan).
39. *Id.*
40. *See id.* at 12,024.
41. *See* 136 CONG. REC. 18,209 (1990).
42. *Id.* at 18,210.
43. 136 CONG. REC. 36,192–94 (1990).

Convention would take between the federal and state governments and to ensure the supremacy of the U.S. Constitution within American law.[44] Despite some debate over the recognition of the Committee on Torture's inclusion and the question of the relationship between sovereignty and human rights obligations, a resolution of advice and consent to the ratification of the CAT was passed on the same day.[45]

These debates also brought into focus conflicting views of the senators. Senator Helms, for example, argued that the "Convention is primarily symbolic" and "not necessary to engage in a superfluous debate [over],"[46] while Senator Kassebaum, in contrast, believed that "ratification of the [CAT] will, in itself, lead [the United States] closer to the goal [of eliminating torture]."[47] Another seeming disconnect existed in policymakers' perceptions of the prevalence of torture. The State Department believed that the definition of torture in the Convention would apply in a "relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned."[48] Notwithstanding this statement, however, on October 4, 1984, the U.S. Congress passed a joint resolution on the implementation of policy in opposition to torture that recognized torture as "all too frequent in many countries" and "practiced in countries in every region of the world."[49]

Despite the Senate giving its advice and consent on October 27, 1990, the United States did not ratify the CAT until October 21, 1994.[50] The Foreign Affairs Reform and Restructuring Act of 1998—passed as part of the country's implementation of the CAT—declared:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[51]

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44. *See id.* at 36,194–99.
45. *See id.* at 36,199.
46. *Id.* at 36,193–94 (statement of Sen. Jesse Helms).
47. *Id.* at 36,197–98 (statement of Sen. Nancy Kassebaum).
48. GARCIA, *supra* note 2, at 1 (quoting President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. TREATY DOC. NO. 100-20, *reprinted in* 13857 U.S. Cong. Serial Set at 3 (1990)).
49. H.R.J. Res. 605, 98th Cong., 98 Stat. 1721 (1984).
50. *Status of Treaties: 9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en#13 (last visited Dec. 28, 2020).
51. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681.

That act also called for regulations to implement the United States' non-refoulement obligations under the CAT.[52] These regulations were implemented through Title 8 of the Code of Federal Regulations at §§ 208.16-208.18 and 1208.16-1208.18,[53] which are discussed in detail in the following Part.

II. APPLICATION OF THE CAT IN THE UNITED STATES

The CAT contemplates protection from removal to a country where torture is likely for any individual who qualifies.[54] Unlike asylum and restriction on removal, CAT relief cannot be denied solely on the basis of certain prior criminal activity or other misconduct in the applicant's country of origin.[55] Additionally, unlike asylum, CAT relief is nondiscretionary: if an immigration judge determines that the applicant is more likely than not to be tortured in the country of removal, the applicant is entitled to CAT relief.[56]

U.S. regulations define torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . a confession, punishing . . . , intimidating or coercing [an individual], or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[57]

"The burden of proof is on the [applicant] . . . to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred."[58]

Importantly, "all evidence relevant to the possibility of future torture" must be considered.[59] When making a CAT claim, testimony from

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52. *See id.* § 2242(b).

53. 8 C.F.R. §§ 208.16–.18, 1208.16–.18 (2020).

54. *See id.* § 208.16.

55. Specifically, persons ineligible for asylum but who could still receive CAT relief include:

> [P]ersons who assisted in Nazi persecution or engaged in genocide, persons who have persecuted others, persons who have been convicted of particularly serious crimes, persons who are believed to have committed serious non-political crimes before arriving in the United States, and persons who pose a danger to the security of the United States.

Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478–79 (Feb. 19, 1999) (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507).

56. 8 C.F.R. § 208.16(c)(4).

57. *Id.* § 208.18(a)(1). The BIA has found that "deliberate vicious acts such as burning with cigarettes, choking, hooding, kalot marassa [severe boxing of the ears, which can result in eardrum damage], and electric shock may constitute acts of torture." Auguste v. Ridge, 395 F.3d 123, 136 (3d Cir. 2005) (quoting *In re* J-E-, 23 I. & N. Dec. 291 (B.I.A. Mar. 22, 2002)). Other acts that may constitute torture include "rape, electric shock, being forced to take drugs or other substances, being deprived of food or water, physical beatings, and threats of such harm." Dagmar R. Myslinska, *How to Apply for Convention Against Torture Protection*, NOLO, https://www.nolo.com/legal-encyclopedia/how-apply-convention-against-torture-protection.html (last visited Dec. 28, 2020).

58. 8 C.F.R. § 208.17(d)(3).

the applicant can be sufficient to meet the evidentiary burden if that testimony is credible.[60] Additionally, "[b]ecause an alien's testimony alone may support an application for withholding of removal or asylum, the [immigration judge] must give 'specific, cogent reasons' for disbelieving it."[61] Exemplary "evidence relevant to the possibility of future torture" that the immigration judge must consider includes:

> (i) Evidence of past torture inflicted upon the applicant;
>
> (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
>
> (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
>
> (iv) Other relevant information regarding conditions in the country of removal.[62]

These evidentiary factors are not dispositive; for example, evidence of past torture does not necessarily entitle an applicant to a presumption of future torture,[63] and the ability to relocate within the country of removal can be weighed strongly against a finding of a probability of torture.[64]

The last two factors—evidence of human rights violations and relevant country conditions—are often referred to collectively as "country conditions evidence" and echo the mandate of CAT itself, which requires consideration of "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[65] These factors can be particularly useful in determining whether the CAT applicant is likely to be tortured by or with the acquiescence of a public official,[66] specifically where a public official is not likely to explicitly commit or acquiesce to the torture of an individual and yet is likely to be

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59. *Id.* § 208.16(c)(3).

60. *Id.* § 208.16(c)(2).

61. Sviridov v. Ashcroft, 358 F.3d 722, 727 (10th Cir. 2004) (citation omitted) (quoting Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003)).

62. 8 C.F.R. § 208.16(c)(3).

63. *See* Niang v. Gonzales, 422 F.3d 1187, 1202 (10th Cir. 2005) ("[U]nder the CAT a petitioner is not entitled to a presumption of future torture based on evidence of past torture . . . .").

64. *See* Hernandez-Torres v. Lynch, 642 F. App'x 814, 818–21 (10th Cir. 2016) (emphasizing that a failure to "show that [the CAT applicant] could not relocate to a part of Mexico where he is unlikely to be tortured" weighed against granting CAT relief).

65. CAT, *supra* note 30, at art. 3.

66. *See* Karki v. Holder, 715 F.3d 792, 806–07 (10th Cir. 2013) (discussing the use of country conditions evidence, such as a State Department report, to show the likelihood of torture at the hands of government officials).

willfully blind to severe harm that will befall that individual.[67] Such willful blindness falls within the definition of torture.[68]

8 U.S.C. § 1252(a)(2)(C) precludes factual review of final orders of removal instituted against immigrants convicted of certain crimes.[69] Prior to the Supreme Court's ruling in *Nasrallah v. Barr*,[70] most circuit courts found that the statute also precluded factual review of CAT orders that coincided with a final order of removal.[71] However, *Nasrallah* clarified that factual review of CAT orders is not precluded by 8 U.S.C. § 1252(a)(2)(C) and that circuit courts are to use the substantial evidence standard in reviewing factual challenges.[72] Given that immigrants who are ineligible for asylum or restriction on removal may find relief exclusively through CAT,[73] *Nasrallah* has the potential to impact the outcome for many CAT applicants who previously may not have thought to appeal decisions by immigration judges and the BIA due to potentially unfavorable fact finding by these administrative bodies.

III. PROBLEM

Protection under the CAT became particularly crucial under the Trump Administration, which imposed increasingly stringent rules on asylum seekers.[74] In July 2019, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) adopted an interim final rule barring asylum eligibility for asylum seekers arriving via the southern land border who did not apply for protection in another country first (Asylum Transit Ban).[75] The Asylum Transit Ban rendered it nearly impossible for non-Mexican nationals seeking refuge at the southern U.S. border to obtain asylum.[76] Since most arriving undocumented immigrants are non-Mexican nationals who approach the southern U.S. border, the Asylum Transit Ban impacts the majority of potential asylum seekers.[77] Given that many would-be asylum seekers will no longer be eligible for

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67. *See id.*

68. *See* Cruz-Funez v. Gonzales, 406 F.3d 1187, 1192 (10th Cir. 2005) ("[W]illful blindness suffices to prove acquiescence." (internal quotations omitted) (quoting Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354 (5th Cir. 2002))).

69. 8 U.S.C. § 1252(a)(2)(C) (2018).

70. 140 S. Ct. 1683 (2020).

71. *See id.* at 1689.

72. *See id.* at 1690–92.

73. *See, e.g.*, Hernandez-Torres v. Lynch, 642 F. App'x 814, 816–18 (10th Cir. 2016).

74. *See* Shear & Kanno-Youngs, *supra* note 3.

75. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,829–30 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

76. *See* Lauren Carasik, *Trump's Asylum Ban Will Worsen a Crisis the US Helped Create*, ALJAZEERA (Sept. 19, 2019), https://www.aljazeera.com/opinions/2019/9/19/trumps-asylum-ban-will-worsen-a-crisis-the-us-helped-create/.

77. According to statistics produced by the U.S. Customs and Border Protection (CBP), 396,579 of the 404,142 apprehensions (98%) of arriving immigrants occurred at the southern border in the fiscal year of 2018. U.S. BORDER PATROL, U.S. BORDER PATROL NATIONWIDE APPREHENSIONS BY CITIZENSHIP AND SECTOR (FY07-19) at 36 (2019). In the same year, Mexican nationals accounted for 152,257 of the 396,579 apprehensions (38%). *Id.* at 35.

asylum relief, CAT protection is a crucial option for refugees seeking safety in the United States.

While CAT has become an increasingly important tool for immigrants seeking refuge in the United States, there is marked inconsistency among CAT awards.[78] Opinions from both immigration judges and the BIA suggest that adjudicators rely heavily on testimonial evidence, while paying little, if any, attention to country conditions evidence that would provide a clear, objective indication of the likelihood of torture and, therefore, eligibility for CAT.[79] Overreliance on subjective "credibility" determinations prevents applicants, attorneys, and judges from preparing for and adjudicating CAT claims with predictability and consistency. A high-level review of CAT claims in the Tenth Circuit and a closer case study of two of these decisions demonstrate needed reform to ensure more consistent, predictable outcomes. After all, it is a fundamental precept of justice that like cases be treated alike.[80]

A. Overview of CAT Determinations in the Tenth Circuit

A review of CAT claims in the Tenth Circuit reveals that country conditions evidence is rarely considered by adjudicators considering CAT claims.[81] When determining whether an individual has established a likelihood of torture, immigration judges are more likely to focus on the perceived credibility of an applicant's testimony than on the actual conditions in the country from which the applicant fled.[82] Indeed, more than a quarter of CAT appeals in the Tenth Circuit were resolved based on the credibility determinations of the immigration judge, while only 7% involved a substantive discussion of country conditions.[83]

78. *See* 10th Circuit CAT Survey, *supra* note 5.

79. *See id.*

80. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) ("The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike."); Vacco v. Quill, 521 U.S. 793, 799 (1997) ("[The Equal Protection Clause] embodies a general rule that States must treat like cases alike . . . ." (citing Plyler v. Doe, 457 U.S. 202, 216 (1982))).

81. *See* 10th Circuit CAT Survey, *supra* note 5.

82. *See id.*

83. *See id.*

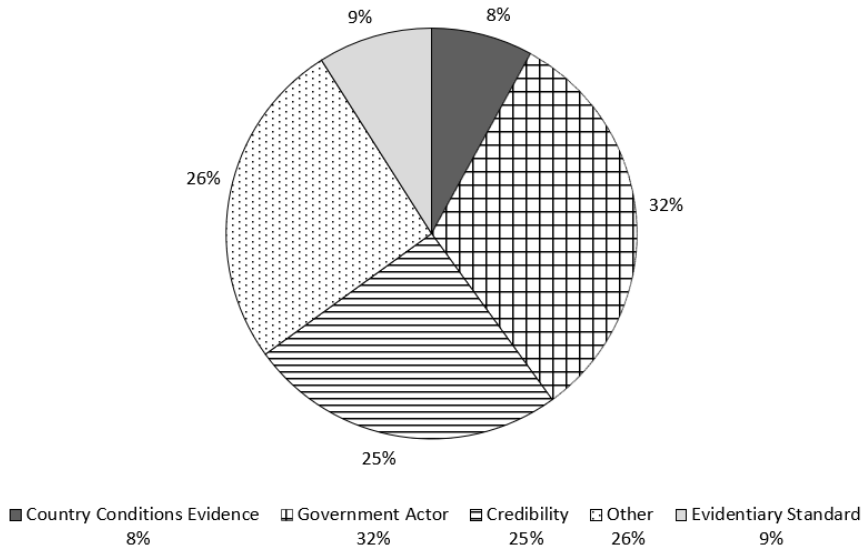

FIGURE 1. *CAT Considerations in the Tenth Circuit: Dispositive Factors from 194 Cases*[84]

In the Tenth Circuit, country conditions evidence was not a dispositive factor in many cases where the U.S. State Department reported torture in an applicant's country of origin.[85] Indeed, in numerous cases, country conditions evidence was not considered at all.[86] This limited use of country conditions evidence also coincides with (and perhaps partially explains) the unexpected mass denial of CAT relief for petitioners from countries that report high levels of government violence.[87] For example, the Tenth Circuit has denied review for 100% of cases brought by refugees from Indonesia[88]—65% of which were brought from 2007 to 2009, a time during which the U.S. State Department reported that there was "evidence of torture in many police detention facilities," with torture "common in certain jails" and "typically occur[ing] soon after detention."[89] The prevalence of torture is not surprising when one considers that the Indonesian Criminal Procedure Code at the time allowed evi-

84. *See id.* The "other" category is primarily made up of cases wherein the Tenth Circuit affirmed without analysis the BIA's finding that the applicant was not likely to be tortured. Additionally, about 2% of cases were also resolved based on the ability of the applicant to relocate.

85. *See supra* FIGURE 1.

86. *See* 10th Circuit CAT Survey, *supra* note 5.

87. *See id.*

88. *See id.*

89. *2007 Country Reports on Human Rights Practices: Indonesia*, U.S. DEP'T OF STATE (Mar. 11, 2008), https://2009-2017.state.gov/j/drl/rls/hrrpt/2007/100521.htm; *2008 Country Reports on Human Rights Practices: Indonesia*, U.S. DEP'T OF STATE (Feb. 25, 2009), https://2009-2017.state.gov/j/drl/rls/hrrpt/2008/eap/119040.htm; *2009 Country Reports on Human Rights Practices: Indonesia*, U.S. DEP'T OF STATE (Mar. 11, 2010), https://2009-2017.state.gov/j/drl/rls/hrrpt/2009/eap/135992.htm.

dence obtained as a result of torture to be used in judicial proceedings.[90] Further, during this time period the U.S. State Department reported that Indonesian police "fail[ed] to respond to mob or vigilante violence."[91] This evidence is highly relevant to CAT claims based on willful blindness, where the inaction of government actors in past incidents supports the possibility that those government actors will fail to act in the future.[92] Notwithstanding the State Department's findings, few of the CAT claims involving Indonesian applicants considered during this time referenced the U.S. government reports at all.[93]

The rejections of appeals from Indonesian applicants is not unique. The Tenth Circuit also denied review in each of the eight cases from India, eight cases from Guatemala, and seven cases from Uganda that have been brought since the implementation of the CAT.[94] In India, the U.S. State Department reported that "authorities used torture to coerce confessions" that were "[i]n some instances . . . submitted . . . as evidence in capital cases" between the years 2012–2016,[95] the time during which the majority of Indian CAT-seekers had their petitions denied in the Tenth Circuit.[96] In Guatemala, similar instances of torture committed by the National Civil Police were reported by the U.S. State Department in 2013 and 2015, accounting for the time period during which a plurality of the CAT applications by Guatemalan refugee seekers were denied.[97] And the State Department reports in Uganda from 2005 to 2007 also included reports of torture by security forces throughout the country.[98] These State Department reports were paid little-to-no attention in the adjudication of these cases, despite the fact that each of the CAT applicants made a claim that they were fearful of torture.[99] The CAT requirement that an adjudicator consider "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights"[100] might or might not have been met in these cases; the lack of

90. *See* AMNESTY INT'L, INDONESIA: BRIEFING TO THE UN COMMITTEE AGAINST TORTURE 12 (2008).

91. *See* sources cited *supra* note 89.

92. *See* 10th Circuit CAT Survey, *supra* note 5.

93. *See id.*

94. *See id.*

95. BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, INDIA 2012 HUMAN RIGHTS REPORT 8 (2013); BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, INDIA 2014 HUMAN RIGHTS REPORT 6 (2015); BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, INDIA 2015 HUMAN RIGHTS REPORT 6 (2016); BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, INDIA 2016 HUMAN RIGHTS REPORT 5 (2017).

96. *See* 10th Circuit CAT Survey, *supra* note 5.

97. *See* BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, GUATEMALA 2013 HUMAN RIGHTS REPORT 1 (2014); BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, GUATEMALA 2015 HUMAN RIGHTS REPORT 1 (2016).

98. *See 2005 Country Reports on Human Rights Practices: Uganda*, U.S. DEP'T OF STATE (Mar. 8, 2006), https://2009-2017.state.gov/j/drl/rls/hrrpt/2005/61598.htm; *2007 Country Reports on Human Rights Practices: Uganda*, U.S. DEP'T OF STATE (Mar. 11, 2008), https://2009-2017.state.gov/j/drl/rls/hrrpt/2007/100510.htm.

99. *See* 10th Circuit CAT Survey, *supra* note 5.

100. CAT, *supra* note 30, at art. 3, ¶ 2.

robust discussion of country conditions evidence in the record makes it difficult to assess whether, and to what extent, the immigration judges in those cases assessed this evidence.

B. Case Study: Bhattarai v. Holder *and* Karki v. Holder

This survey of all Tenth Circuit CAT cases establishes that country conditions evidence is not regularly, let alone uniformly, considered. Why does that matter? A detailed review of individual cases highlights that a failure to consider such evidence leads to illogical and legally inconsistent results.

In *Bhattarai v. Holder*[101] and *Karki v. Holder*,[102] the Tenth Circuit considered nearly identical requests for CAT relief but ultimately came to different conclusions.[103] Both Mr. Bhattarai and Mr. Karki were academics from Nepal who sought CAT protection in the United States in the early 2010s.[104] While in Nepal, both men were initially members of the Nepali Student Union, a Nepalese political organization.[105] Later, both men joined the Nepali Congress Party.[106]

After joining the Nepali Congress Party, Mr. Bhattarai began receiving demands for money from the Communist Party of Nepal (Maoists).[107] Mr. Bhattarai refused to pay them.[108] "[T]he Maoists denounced [Mr. Bhattarai] as an enemy of the war" and informed him that the lives of him and his family "were at risk."[109] The Maoists then took control of Mr. Bhattarai's father's land, demanding 50,000 rupees to get it back.[110] Shortly thereafter, Maoists firebombed Mr. Bhattarai's apartment.[111]

Mr. Karki, also a member of the Nepali Congress Party, was similarly threatened by the Maoists.[112] The Maoists demanded money, and Mr. Karki refused.[113] In response, the Maoists then took control of Mr. Karki's father's land and demanded 50,000 rupees to get it back.[114] The Maoists then exploded a bomb at Mr. Karki's aunt and uncle's house—killing his aunt—and called his home to tell him that his life and the rest of his family's lives were in danger.[115]

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101. 408 F. App'x 212 (10th Cir. 2011).
102. 715 F.3d 792 (10th Cir. 2013).
103. *Compare Karki*, 715 F.3d at 795, 807, *with Bhattarai*, 408 F. App'x at 213, 219.
104. *Karki*, 715 F.3d at 795–96; *Bhattarai*, 408 F. App'x at 213.
105. *Karki*, 715 F.3d at 796; *Bhattarai*, 408 F. App'x at 213.
106. *Karki*, 715 F.3d at 796; *Bhattarai*, 408 F. App'x at 213.
107. *Bhattarai*, 408 F. App'x at 213.
108. *See id.*
109. *Id.*
110. *See id.*
111. *See id.* at 213–14.
112. *See* Karki v. Holder, 715 F.3d 792, 797 (10th Cir. 2013).
113. *Id.*
114. *See id.*
115. *Id.*

Notwithstanding these near mirror claims, the Tenth Circuit granted Mr. Karki's petition for review but denied Mr. Bhattarai's.[116] Mr. Bhattarai was deported back to Nepal.[117]

In *Karki*, the Tenth Circuit reasoned that the immigration judge and BIA had failed to specifically consider a State Department report produced by Mr. Karki detailing the country conditions in Nepal, which stated that the Maoists had won a plurality of seats in the 2008 election and installed a Maoist Prime Minister.[118] The Tenth Circuit pointed out that the report indicated that "Maoists frequently employed arbitrary and unlawful use of lethal force, including torture and abduction."[119]

> Furthermore, "[d]uring [2008] Maoists committed 141 acts of torture, according to [the Center for Victims of Torture, Advocacy Forum–Nepal]. The government failed to conduct thorough and independent investigations of reports of security force or Maoist/[Maoist-affiliated Youth Communist League] brutality and generally did not take significant disciplinary action against those involved."[120]

Given this evidence, the Tenth Circuit determined that the record did not support the immigration judge's and BIA's findings that Mr. Karki failed to show that public officials in Nepal would likely acquiesce to his torture.[121]

Mr. Bhattarai produced similar evidence concerning the Maoist election victory and the installation of a Maoist Prime Minister.[122] Yet the Tenth Circuit affirmed the BIA's denial of Mr. Bhattarai's CAT claim.[123] While the country conditions and risks faced by Mr. Karki and Mr. Bhattarai were virtually identical, the Tenth Circuit refused to overturn the BIA's decision in the latter's case, opining that the BIA's cursory reference to "the Government of Nepal as presently constituted" demonstrated that the BIA had actually considered Mr. Bhattarai's evidence of country conditions.[124]

The court's divergent results in those two cases highlight the significance of meaningful country conditions review. If the immigration judge and BIA had been required to describe and analyze the country conditions evidence that it received in its opinion, the Tenth Circuit could have reviewed those underlying facts as well. Had the Tenth Circuit reviewed those facts, it is likely that the court in *Bhattarai* would have found, as in

116. *Karki*, 715 F.3d at 807; *Bhattarai*, 408 F. App'x at 219.
117. *See Bhattarai*, 408 F. App'x at 219.
118. *Karki*, 715 F.3d at 806–07.
119. *Id.* at 806 (quoting the record).
120. *Id.* (quoting the record).
121. *Id.* at 807.
122. *See Bhattarai*, 408 F. App'x at 214.
123. *Id.* at 219.
124. *Id.* at 217.

Karki, that the record did not support the immigration judge's finding of ineligibility. Mr. Bhattarai's claim was therefore denied not because he did not present evidence to support it, but because the lower courts' opinions did not substantively analyze the country conditions evidence in sufficient detail to allow for proper appellate review.[125] The lack of clarity with regard to consideration of country conditions is evident from the *Bhattarai* opinion itself. There, Judge Lucero states in his dissent that the BIA in fact failed to analyze the country conditions evidence and therefore abused its discretion.[126]

Karki also demonstrates the folly of overreliance on credibility concerns and testimonial evidence without substantive consideration of country conditions evidence. The record demonstrates that the immigration judge in *Karki* "found that Petitioner was 'not a completely credible witness' because he had embellished his testimony by stating he was a member of the Nepali Congress Party, when he was actually just a supporter."[127] This finding was based on the fact that Mr. Karki had not maintained formal membership in the Congress Party due to a formality based on his work with the UN Development Program.[128] However, Mr. Karki was still a "regular supporter" of the party and clearly identified as being part of the party;[129] the legalistic distinction between being a "member" of the party as opposed to being a "supporter" of the party was important to the immigration judge, but for an immigrant whose native language is not English, such distinctions can be difficult to parse. Indeed, Mr. Karki explained that he may have misunderstood a question on his asylum application related to his family's involvement in political parties; he noted his father's involvement in the Congress Party but failed to identify himself as a member.[130] When asked why he had failed to do so, he stated that "he thought the statement about his father would cover the whole family because his father was the head of the family."[131] Such differences in cultural understanding can make reliance on testimonial evidence a poor measure for determining the merits of a CAT petition in the absence of serious consideration of country conditions evidence.[132]

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125. Indeed, the immigration judge's decision in *Bhattarai* was based on outdated information (namely, that the Maoist party did not yet have control of the Nepali government). *Id.* at 220, 222.

126. *Id.* at 221–24.

127. Karki v. Holder, 715 F.3d 792, 799 (10th Cir. 2013).

128. *Id.* at 796–97.

129. *Id.*

130. *See id.* at 798.

131. *Id.*

132. While these aspects of the petitioner's testimony were considered in the context of his asylum application, they also bore relevance to his CAT claim as his theory of the likelihood of his torture was based on him being targeted for his (and his family's) political beliefs. Oftentimes there will be heavy overlap between the fact development of an asylum claim and a CAT claim, but due to the distinct legal requirements of the two forms of relief it is important that considerations in the asylum context (e.g., nexus) do not contaminate consideration of the CAT claim.

IV. ARGUMENT

By their plain language, the CAT regulations require adjudicators to consider the conditions in the CAT applicant's country of origin.[133] A failure to appropriately consider such factors has led to an overreliance on testimonial evidence and credibility determinations, leading to inconsistent results in otherwise factually similar cases.[134]

A. The Regulatory Plain Language Requires Consideration of Country Conditions Evidence

As discussed in Part II, 8 C.F.R. § 208.16(c)(3)(iii–iv) specifically mandates that country conditions evidence be considered when assessing the likelihood of torture.[135] The regulation requires that "all evidence," including "relevant information regarding conditions in the country of removal" "*shall be considered*."[136] The text of the CAT itself provides further clarity, instructing that "the competent authorities *shall take into account* all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."[137] The inclusion of the term "shall" in both 8 C.F.R. § 208.16 and the CAT reflects an unequivocal intention that adjudicators be required to consider country conditions evidence.[138]

The language "where applicable" has been similarly interpreted by the U.S. State Department "to indicate that competent authorities *must decide* whether and to what extent these considerations are a relevant factor in a particular case."[139] This is in line with guidance from the BIA, which has explicitly stated that "all evidence relevant to the possibility of future torture *must* be considered, including . . . evidence of gross, flagrant, or mass violations of human rights within the country of removal, where applicable."[140] In many CAT cases, evidence of human rights conditions will be relevant. In fact, outside of cases where a CAT applicant has been targeted by government officials for a very specific and particular reason (such as a fleeing high-profile political dissident), country conditions will almost certainly be probative on the issues of likelihood

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133. *See* discussion *infra* Section IV.A.

134. *See* discussion *supra* Section III.B; *see also* 10th Circuit CAT Survey, *supra* note 5.

135. 8 C.F.R. § 208.16(c)(3)(iii–iv) (2020).

136. *Id.* § 208.16(c)(3) (emphasis added).

137. CAT, *supra* note 30, at art. 3, ¶ 2 (emphasis added).

138. *See, e.g.*, United States v. Monsanto, 491 U.S. 600, 607 (1989) (where the statute included the language "shall forfeit," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory"); United States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997) ("It is a basic canon of statutory construction that use of the word 'shall' indicates a mandatory intent."); Jewell v. United States, 749 F.3d 1295, 1298 (10th Cir. 2014) ("[The] term [shall] indicates a mandatory intent."); Ausmus v. Perdue, 908 F.3d 1248, 1253 (10th Cir. 2018) ("[The] term ['shall'] indicates a mandatory intent." (quoting *Jewell*, 749 F.3d at 1298)).

139. GARCIA, *supra* note 2, at 3 (emphasis added).

140. *In re* J-E-, 23 I. & N. Dec. 291, 291 (B.I.A. Mar. 22, 2002) (emphasis added) (citing 8 C.F.R. § 208.16(c)(3) (2020)).

of torture and government acquiescence.[141] Country conditions evidence will be particularly relevant to CAT applications based on a theory of willful blindness;[142] unless the applicant is uniquely situated (such as in the political dissident scenario), they will likely be unable to testify directly to the motivation of government actors who willfully ignore harm that may befall the applicant. Such willful blindness is most appropriately assessed by objective evidence of previous failure to act when citizens have been tortured by nongovernment actors. Country conditions evidence can demonstrate these patterns (or lack thereof), and the tendency of government officials to consistently fail to act in the past is certainly probative to the issue of whether those officials will fail to act in the future.[143]

The regulatory implementation of the CAT, the CAT itself, and guidance by the U.S. Department of State and the BIA requires adjudicators to consider country conditions evidence.[144] The difficulty lies in the fact that there is not a consistent metric by which it can be determined whether this consideration has been properly made. As demonstrated in Part III, Tenth Circuit judges come to different conclusions regarding whether country conditions evidence has been considered in a given case.[145] Further, the large majority of cases that arrive at the Tenth Circuit contain little-to-no discussion of country conditions whatsoever.[146] While it is possible that immigration judges considered country conditions evidence in every instance in which there was clear evidence of gross, flagrant, and mass violations of human rights, the fact that these considerations failed to merit discussion in the decision itself is problematic from a judicial-review perspective.

B. Immigration Judges Must Articulate Their Country Conditions Determinations

While there is a procedural necessity for immigration judges to consider country conditions evidence, there is not currently a standard to determine whether that necessity has been met. Thus, the Tenth Circuit is placed in the difficult position of evaluating whether a procedural deficiency has occurred in a fact-intensive manner on a case-by-case basis. As discussed in the case study of *Karki* and *Bhattarai*, this approach leads to inconsistent and unpredictable results. In order to remedy this

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141. *See* ARUNA SURY, IMMIGRANT LEGAL RES. CTR., QUALIFYING FOR PROTECTION UNDER THE CONVENTION AGAINST TORTURE 4 (2020).

142. *See id.* at 6.

143. *See id.*

144. *See, e.g.*, *In re* O-F-A-S-, 27 I. & N. Dec. 709, 718 (B.I.A. Dec. 6, 2019); *In re J-E-*, 23 I. & N. Dec. at 291 ("[I]n adjudicating a claim for protection under Article 3 of the Convention Against Torture . . . information regarding conditions in the country of removal [is relevant].").

145. *See* 10th Circuit CAT Survey, *supra* note 5; *see also* discussion *supra* Section III.B.

146. *See, e.g.*, Uanreroro v. Gonzales, 443 F.3d 1197, 1201 (10th Cir. 2006); Niang v. Gonzales, 422 F.3d 1187, 1191–93 (10th Cir. 2005).

situation, this Article proposes that immigration judges make an affirmative determination in every case (1) whether there exists "a consistent pattern of gross, flagrant or mass violations of human rights"[147] in the country of removal, and (2) whether such evidence suggests the applicant is likely to be tortured (i.e., whether the evidence is "applicable"[148] in the case at hand). Such affirmative determinations would ensure that country conditions evidence is properly evaluated in every case, meeting the procedural requirement of the regulations and the obligations of the United States under the CAT. This determination would also provide the Tenth Circuit a clear perspective on the reasoning the immigration judge used in evaluating country conditions evidence, providing more consistency and predictability for judges and practitioners alike.

Whether "a consistent pattern of gross, flagrant or mass violations of human rights"[149] exists is a question of fact to be decided by the adjudicator before making any decision with regard to CAT eligibility.[150] This determination does not require testimonial evidence from the applicant, as the U.S. government regularly releases reports on human rights practices across the globe.[151] Pursuant to its obligations under the CAT, an adjudicator must, as a matter of course, consider the relevant human rights report.[152] Indeed, the DOJ itself acknowledges the "relevance [of these reports] in removal hearings before Immigration Judges and the Board of Immigration Appeals."[153] Thus, it may be appropriate for the immigration judge in the first instance to take administrative notice of this country conditions evidence cited as relevant by the DOJ.[154]

An adjudicator's obligation, however, is not merely to "consider" such a pattern of human rights violations.[155] Its obligation is to "take [it]

147. CAT, *supra* note 30, at art. 3, ¶ 2.

148. 8 C.F.R. § 208.16(c)(3)(iii) (2020).

149. CAT, *supra* note 30, at art. 3, ¶ 2.

150. *See, e.g.*, Karki v. Holder, 715 F.3d 792, 800 (10th Cir. 2013) (discussing agency fact-finding in the context of a country condition assessment by the BIA).

151. *See Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE, https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/ (last visited Dec. 28, 2020).

152. *See* CAT, *supra* note 30, at art. 3.

153. *Country Conditions Research*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/country-conditions-research (last visited Dec. 28, 2020).

154. The BIA may take "administrative notice of commonly known facts such as current events or the contents of official documents." 8 C.F.R. § 1003.1(d)(3)(iv) (2020). Circuit Courts routinely recognize the power of immigration judges to also take administrative notice. *See, e.g.*, Medhin v. Ashcroft, 350 F.3d 685, 690 (7th Cir. 2003) ("[An] Immigration Judge may take administrative notice of changed conditions in the alien's country of origin." (citing Useinovic v. INS, 313 F.3d 1025, 1030 (7th Cir. 2002))); Vasha v. Gonzales, 410 F.3d 863, 874 n.5 (6th Cir. 2005) (discussing the appropriate scope of an immigration judge's administrative notice). In *Vasha*, the Sixth Circuit notes that case law from other circuits made clear that it was appropriate for an agency to take administrative notice of facts within that "agency's expertise[, such as] accumulated knowledge of past persecution techniques in [the country of removal.]" *Id.* Thus, there is likely support for the Tenth Circuit allowing immigration judges to take judicial notice of country conditions reports created by the Department of State.

155. *See* 8 C.F.R. § 208.16(c)(3) (2020).

into account."[156] Thus, whether or not a pattern of human rights violations exists must play a factor in the ultimate CAT determination where applicable.[157] Where it does not exist, this, of course, would make certain CAT claims less plausible. For example, an immigration judge assessing an application claiming that the government of a country with no record of willful blindness to torture will be willfully blind to the applicant's torture may properly weigh this absence of evidence against the applicant. Conversely, where a pattern of human rights violations does exist, the immigration judge must determine whether this evidence renders the claim more plausible. This will not always be the case—an applicant might claim she or he will be tortured due to circumstances wholly irrelevant to the evidence of human rights violations. And even if there is a connection between the applicant's claim for relief and the evidence of human rights violations, the immigration judge may still find that the applicant is not likely to be tortured. But as noted above, the consideration of this evidence is a procedural necessity, and an affirmative determination of whether the evidence applies to the particular CAT case provides a strong safeguard to ensure that this procedural necessity has been properly applied.

C. Tenth Circuit Case Law Requires Adjudicators to Clearly Set Forth Their Reasoning

Consistency will follow only if lower courts adhere to their obligations to properly set forth their reasons for granting or denying relief. Pursuant to the Tenth Circuit's own precedent, the adjudicator must "articulate its reasons for denying relief."[158] It thus follows that any denial of CAT protection must include the judge's consideration of and findings regarding country conditions. In all but the rarest of cases, a petition for review of any decision that does not include such an articulation should be granted. If the immigration judge has not determined whether a pattern of human rights violations exists, the immigration judge necessarily has not considered the required evidence.[159]

Of course, there is a question of who bears the burden of presenting such evidence. Typically, if country conditions are to be considered, CAT applicants will offer the evidence when moving for relief during removal proceedings.[160] Applicants who do not offer any such evidence have arguably waived their procedural right to have the immigration judge make a determination regarding the existence and relevance of any

156. CAT, *supra* note 30, at art. 3, ¶ 2.
157. *See id.*; *see also* 8 C.F.R. § 208.16(c)(3)(iii).
158. Turri v. INS, 997 F.2d 1306, 1309 (10th Cir. 1993).
159. *See id.*
160. *See* 10th Circuit CAT Survey, *supra* note 5.

human rights violations.[161] At the same time, it is within the immigration judge's power to consider the evidence *sua sponte*;[162] as noted in the previous section, it may be appropriate for the judge to take administrative notice of this evidence, which is readily available in the form of annual U.S. State Department Human Rights Reports. This would certainly align with the focus of the CAT, which obligates the State to consider country conditions evidence in making its determinations.[163] Placing the burden to present this evidence on immigrants who have recently arrived in the United States, and who usually do not have counsel, seems a less certain measure to ensure that this evidence is considered in every case.

As explained *supra*, evidence suggests not only that immigration judges and the BIA are giving insufficient weight to country conditions evidence, they are often failing to give any consideration to such evidence—in direct contravention of the requirements of 8 C.F.R. § 208.16 and the CAT.[164] This is particularly problematic in cases where CAT relief is denied on the basis that the government has not acquiesced to the torture. The Tenth Circuit has specifically instructed that a government's willful blindness rises to the level of acquiescence.[165] Given the probative value of country conditions evidence to this issue, if an immigration judge makes a finding that an applicant has not demonstrated acquiescence without also explicitly finding that the country conditions do not suggest willful blindness to torture in the applicant's case, a petition for review of that decision should be granted absent truly unusual circumstances.

Not only does Tenth Circuit precedent require adjudicators to articulate reasons for denying relief, such articulation is necessary for reviewing courts to adequately consider the issues raised and considered.[166] As the Tenth Circuit has stated, "the [BIA] must articulate its reasons for denying relief sufficiently for us, as the reviewing court, to be able to see that the [BIA] considered all the relevant factors."[167] As a procedural matter, decisions by immigration judges are reviewed by the BIA before they reach the Tenth Circuit.[168] Thus, where the immigration judge fails to articulate whether there is a pattern of human rights abuses applicable to the case at hand, the BIA is positioned to remand the case. Failing

161. *See* 8 C.F.R. § 208.31(g) (providing that immigration judges only receive "[t]he record of determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based").

162. *See* sources cited *supra* note 154.

163. *See* CAT, *supra* note 30, at art. 3.

164. *See supra* Part III.

165. Cruz-Funez v. Gonzales, 406 F.3d 1187, 1192 (10th Cir. 2005) ("[W]illful blindness suffices to prove acquiescence." (internal quotations omitted) (quoting Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354 (5th Cir. 2002))).

166. Turri v. INS, 997 F.2d 1306, 1309 (10th Cir. 1993).

167. *Id.*

168. *See* 8 U.S.C. § 1252(a)(4) (2018); 8 C.F.R. § 1003.1(b)(3)(i), (d)(3)(ii) (2020).

such a remand, the Tenth Circuit will thus need to remand the case in order for the procedural defect to be remedied.

As recently described in the Supreme Court's decision in *Nasrallah*, the Tenth Circuit is endowed with the authority to factually review CAT determinations.[169] Such review is only effective where the reasoning by the lower courts have been sufficiently articulated.[170] In order to facilitate greater consistency and predictability (as well as to preserve judicial resources), immigration judges should make affirmative determinations regarding the existence and applicability of patterns of human rights abuses. Not only would this meet the procedural necessity required by the CAT, it would also provide the Tenth Circuit with a clear record to review.

CONCLUSION

The CAT was intended to protect the most vulnerable individuals from torture and oppression at the hands of their own government.[171] Requiring robust consideration of country conditions is not only required by the CAT itself but also furthers those objectives.[172] Many individuals seeking refuge in the United States face linguistic, cultural, and legal-knowledge barriers that can prevent them from fully advocating for CAT relief.[173] Allowing for denial of CAT claims based on technicalities (such as a cultural misunderstanding) in the face of robust country conditions evidence establishing a likelihood of torture directly contravenes the spirit of CAT. As noted *supra*, individuals are frequently denied CAT relief and removed to countries that, by the United States' own admission, have records of gross, flagrant, and mass violations of human rights.[174] And while the immigration judges who instituted these removals might have considered the country conditions in these cases, such consideration is often not reflected in the judges' opinions and therefore could not meaningfully be considered on appeal.[175] Requiring affirmative determinations regarding country conditions will ensure that CAT claims are considered with all relevant information and that those applicants who were intended to fall under CAT protections are indeed protected notwithstanding a misunderstanding of the United States' legal system or culture.

The unacceptable reality that the power of a state will be used to torture citizenry moved the international community to adopt the CAT. The United States was also moved by the ideal of a world where the most

169. *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020).
170. *See Turri*, 997 F.2d at 1309.
171. *See* CAT, *supra* note 30, at art. 1, ¶ 1.
172. *See id.* at art. 3.
173. *See supra* text accompanying notes 127–32.
174. *See* discussion *supra* Section III.A.
175. *See* discussion *supra* Section III.A.

oppressed had an opportunity to seek refuge.[176] The denial of asylum to Jewish refugees fleeing the Holocaust was a haunting lesson of the importance of providing safety to those in need.[177] But this lesson is not heeded where a refugee is denied protection without due consideration of the circumstances they are fleeing, especially when one considers that countries that engage in torture tend to deny such atrocities and commit them only in secret.[178] The Tenth Circuit should ensure that such consideration is given and require immigration judges to make affirmative findings in order to ensure that every refugee is provided with a consistent and fair process.

176. *See* 134 CONG. REC. 12,025 (1988) (statement of President Ronald Reagan).

177. Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies*, SMITHSONIAN MAG. (Nov. 18, 2015), https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/.

178. *See, e.g.*, Edward Schumacher, *An Age-Old (but Still Common) Horror*, N.Y. TIMES, Dec. 2, 1984, at E4.