Rethinking Removal: The *Wani Site* Case and the Independence of Newly Established Countries

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I. INTRODUCTION

Refugees and asylees occupy a peculiar position, not only in the domestic laws of the country where they seek refuge, but also in the broader scope of international law: "Persecuted, generally homeless, and by definition unable to turn to their own governments for protections, refugees are utterly dependent on the good will of the people and the government of foreign lands."[1] This small but desperate group of people must meet a high burden to show that they are qualified to remain in the country of refuge.[2]

Under U.S. law, the remedy of asylum refers to the granting of permission to enter or remain in the United States if the applicant has met a certain set of criteria. However, the focus of this Note is a discussion of the more specific remedy of not being removed to the country of persecution,[3] in light of the fact that the area from which the refugee came from has since become a separate bona fide country, formally recognized internationally and by the United States.

The history of the world and the division of countries as we know them today has been a result of thousands of years of empires, secessions, reunifications, and acts of self-determination. Today, 195 states are recognized by the U.S. State Department as independent and sovereign.[4] Many times, new states are born out of conflict: World War II saw the division of Germany,[5] the end of the Cold War saw the dissolution of the

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[1] STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 869 (5th ed. 2009).

[2] *See infra* Part II.

[3] Immigration and Nationality Act § 241(b)(3)(A)(2), 8 U.S.C. § 1231(b)(3)(A)(2) (2012) [hereinafter INA].

[4] U.S. DEP'T OF ST. BUREAU OF INTELLIGENCE & RES., INDEPENDENT STATES IN THE WORLD (2012), *available at* http://www.state.gov/s/inr/rls/4250.htm.

[5] FED. RESEARCH DIV. LIBR., OF CONG., GERMANY: A COUNTRY STUDY 73–4 (Eric Solsten, ed., 1995).

Soviet Union into fifteen republics,[6] and colonial wars in Africa and Asia, primarily in the post-war years of the 20th century, have exponentially increased the number of independent countries in each, respectively.[7]

These turbulent times of unrest will inevitably displace many inhabitants of various states, forcing them to live in refugee camps, in different countries, or even to seek refuge from the fighting abroad.[8] What happens if the state they leave ceases to exist after they have fled or if it has transformed into a completely different country? What should happen when those people who have sought refuge in the United States are placed in removal proceedings to be returned to a newly created country that, discounting geography, they have never actually lived?

Part II gives a history of asylum and refugee law in the United States, discusses the implementation of both domestic[9] and international law,[10] and outlines the requirements for withholding of removal. Part III will provide an overview of what a refugee is required to show to prove a persecution claim under both the Refugee Act and the Convention against Torture. Part IV will discuss how to assess a claim for withholding of removal when the applicant could be considered a citizen of a newly recognized State, propelled by a recent decision of the Seventh Circuit.[11] Finally, Part V will give recommendations regarding country conditions and the applicant's citizenship with respect to newly recognized states.

II. HISTORY OF REFUGEE LAW IN THE UNITED STATES

The common cliché describing the diversity of the U.S. population is that this country is a "melting pot," comprised of generations of immigrants who came here for opportunity. This idea has been etched symbolically and concretely in the words of Emma Lazarus' poem inscribed on the Statue of Liberty: "Give me your tired, your poor, Your huddled masses yearning to breathe free."[12] Despite this idealistic conception, not every person who ends up in the United States arrives

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[6] FED. RESEARCH DIV., LIBR. OF CONG., RUSSIA: A COUNTRY STUDY 117–19 (Glenn E. Curtis, ed., 1996).

[7] *Decolonization of Asia and Africa, 1945–1960*, U.S. DEP'T OF ST. OFFICE OF THE HISTORIAN (Jan. 28, 2013), http://history.state.gov/milestones/1945-1952/AsiaandAfrica.

[8] One of the most current examples of citizens seeking safety beyond their borders due to turbulence is the ongoing conflict in Syria, where over 250,000 people have turned to neighboring Jordan and Turkey. *See* Nick Cumming-Bruce & Neil MacFarquhar, *Relief Crisis Grows as Refugees Stream out of Syria*, N.Y. TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/12/world/middleeast/relief-crisis-grows-as-refugees-stream-out-of-syria.html?_r=0.

[9] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[10] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1468 U.N.T.S. 85, pmbl., pt. I, arts. 1, 16–17 [hereinafter CAT].

[11] *See* Wani Site v. Holder, 656 F.3d 590, 591–93 (7th Cir. 2011).

[12] Emma Lazarus, *The New Colossus*, POETRY FOUNDATION, http://www.poetryfoundation.org/poem/175887 (last accessed Apr. 9, 2013).

willingly. Sometimes they are forced to seek refuge outside of their home country because of threats to themselves or their beliefs: a Coptic Christian fleeing Egypt because of harassment due to his faith,[13] a Chinese citizen coming to the United States allegedly on account of her opposition to China's one child policy,[14] and a member of the Hindu Indian minority group from Fiji.[15] Both domestic and international laws have created a category of protection for this group. In the United States, successfully petitioning for asylum or refugee status allows an alien to enter or remain in the United States because they have sufficiently proved their claim of persecution.[16]

The first real effort to protect refugees and their fragile status was in 1951, when the United Nations published the Convention Relating to the Status of Refugees ("Convention").[17] Sixteen years later, the 1967 Protocol was issued.[18] The U.N. High Commissioner for Refugees (UNHCR) was created to provide necessary legal protection and assistance for refugees, with the overarching purpose of seeking permanent solutions to the plight of refugees fleeing from domestic terrors. Initially, the purpose was merely to relocate refugees, but as the world has become more globalized and countries have tackled humanitarian issues within their own borders, the UNHCR focused more on returning refugees to their countries of origin.[19] The first paragraph of the preamble of the Convention calls for the protection of "fundamental rights and freedoms without discrimination."[20] The Convention imposes obligations on the contracting States to provide refugees with the same opportunities and protections as its own citizens while in the country. These include non-discrimination,[21] religious freedom,[22] access to courts,[23] work permits,[24]

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[13] Barsoum v. Holder, 617 F.3d 73, 76–78 (1st Cir. 2010).

[14] Hua Zheng v. Holder, 666 F.3d 1064, 1067 (7th Cir. 2012).

[15] Chand v. Immigration & Naturalization Service, 222 F.3d 1066, 1069 (9th Cir. 2000).

[16] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW 5, 10–11 (2d ed. 1991).

[17] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter CRSR].

[18] Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

[19] *See* Frederick B. Baer, *International Refugees as Political Weapons*, 37 HARV. INT'L L.J. 243, 245–46 (1996).

[20] CRSR, *supra* note 17, at 71.

[21] *Id*. at ch. I, art. 3 ("The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin.").

[22] *Id*. at ch. I, art. 4 ("The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.").

[23] *Id*. at ch. II, art. 16 ("A refugee shall have free access to the courts of law on the territory of all Contracting States . . . ").

[24] *Id*. at ch. III, art. 17 ("The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment . . . ").

access to public education,[25] and freedom of movement,[26] among others.[27]

The definition of refugee is lengthy and rests heavily on the characteristics and actions of the country from which the refugee came. Article I defines these people for purposes of the Convention and Protocol, later adopted into American law and other international human rights instruments:

> As a result of events . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[28]

The 1967 Protocol expanded this definition, not with regard to expanding the classifications for which asylees can seek refuge, but by eliminating the requirement that events must have occurred before 1951, and by qualifying that the person's fear of persecution need not to have derived from any event at all.[29]

A. Refugee Act of 1980

In 1980, the United States adopted new procedures regarding the status and treatment of refugees entering and living within the United States, which was given the title of Refugee Act of 1980.[30] These provisions were added to the Immigration and Nationality Act ("INA") and amended the Migration and Refugee Assistance Act of 1962.[31] The definition set out by the Act closely echoes that of the 1951 U.N. Convention and was codified

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[25] *Id*. at ch. IV, art. 22 ("The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education . . . ").

[26] CRSR, *supra* note 17, at ch. V, art. 26 ("Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.").

[27] *See* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 426–27 (3d ed. 2007).

[28] CRSR, *supra* note 17, at ch. I, art. I, ¶ A(2).

[29] 1967 Protocol, *supra* note 18, at art. I (2) ("For purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of article I of the Convention as if the words 'As a result of events occurring before 1 January 1951 and . . .' and the words . . . 'a result of such events,' in article I A(2) were omitted.").

[30] Refugee Act of 1980, *supra* note 9.

[31] For background information and other provisions regarding the Refugee Act of 1980, see *id. See also* S. Rep. No. 96-256, at 1 (1979) and H.R. Rep. No. 96-781, at 1 (1980).

in §101(a)(42) of the INA.[32] The 1980 Act made two changes to previous refugee and immigration policy that are pertinent for purposes of this Note.

The first key change was that the Act created statutory procedures for aliens living within the United States or arriving at the border to apply for asylum if they meet the definition of refugee.[33] This provision also gave the Attorney General (AG) authority to eliminate an alien's asylum status if he determines that there has been "a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided."[34] This second clause may appear to narrow the alien's ability to remain in the United States due to circumstances beyond her control. However, the second key change implemented by the Act was that withholding of deportation (now, removal) became mandatory rather than discretionary.[35]

B. Withholding of Removal

In 1980, the notion of refusing to return a person to a place where they are likely to be harmed was not a new idea, in either domestic or international law; in fact, the first reference to it in the United States appeared in the Internal Security Act of 1950.[36] This concept, termed *nonrefoulement* throughout international laws and treaties, was present in the 1951 U.N. Convention;[37] the United States acceded to the Protocol in 1968.[38] With the establishment of asylum procedures in the 1980 Act, an application for asylum was automatically considered an application for withholding removal.[39]

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[32] INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). ("Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of *persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion*.") (emphasis added).

[33] INA § 208(a), 8 U.S.C. § 1158(a) (2006).

[34] *Id*. at § 1158(c).

[35] INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006). ("[T]he 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.") (emphasis added).

[36] Internal Security Act of 1950, Pub. L. No. 831, ch. 1024, § 23, 64 Stat. 987, 1010 (1950) (imposing a prohibition on removal "to any country in which the AG shall find that such alien would be subjected to physical persecution.").

[37] CRSR, *supra* note 17, at art. 33(1) ("No Contracting Sate shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

[38] U.N. High Commissioner Report, Protocol Relating to the Status of Refugees (Jan. 31, 1967), http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?reldoc=y&docid=50518a982.

[39] INA § 241(b)(3)(b), 8 U.S.C. § 1231(b)(3)(b) (2006).

This provision did not come without its own stringent specifications about countries from which a refugee may and may not be removed. The definition of "refugee" specifies two potential places that a person may be returned to in the event that he or she faces removal, either because the individual has violated the terms of their status[40] or because there has been a change in circumstances that renders his or her asylum status obsolete.[41] The first is the country of the refugee's nationality, and the second is the country where the alien "last habitually resided" before seeking refuge in the United States.[42]

Moreover, the INA specifies the countries to which an alien is to be removed, notwithstanding the provision of *nonrefoulement*.[43] The first classification is for aliens who have arrived but nonetheless face removal based on inadmissibility or deportability charges.[44] Under the statute, an alien will generally be returned to the country, territory, or island from which he or she departed to come to the United States.[45] This removal requires cooperation from the country or territory's government that is supposed to receive the dispelled alien. If the country does not agree to accept the person, the Attorney General (AG) can then designate alternative countries.[46] These options, at the direction of the AG, are:

> (i) the country of which the alien is a citizen, subject, or national; (ii) the country in which the alien was born; (iii) the country in which the alien has a residence; (iv) a country with a government that will accept the alien into the country's territory if removal to each country described . . . is impracticable, inadvisable, or impossible.[47]

More relevant is the second classification of aliens, namely, all those other than arriving aliens.[48] Refugees or asylees present in the United States will almost always fall within this second category due to their placement in removal proceedings as a result of applying for asylum status.[49] The procedure for deciding the destination country is outlined in INA §241(b)(2). First, the alien is allowed to designate a country to which

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[40] INA § 237, 8 U.S.C. § 1227 (2006).
[41] INA § 208(c)(2)(A), 8 U.S.C. § 1158(c)(2)(A) (2006).
[42] *Id*.
[43] INA § 241(b)(1), 8 U.S.C. §1231(b)(1) (2006).
[44] *Id.* For inadmissibility and deportability grounds, *see* INA §§ 212, 237, 8 U.S.C. §§ 1182, 1227 (2006). *See also* LEGOMSKY & RODRÍGUEZ, *supra* note 1, at 10, 21, 514.
[45] INA §§ 241 (b)(1)(A), (B), 8 U.S.C. § 1231 (b)(1)(A), (B) (2006).
[46] INA § 241(b)(1)(C), 8 U.S.C. § 1231 (b)(1)(C) (2006).
[47] *Id.*
[48] INA § 241(b)(2), 8 U.S.C. § 1231(b)(2) (2006).
[49] *Id.* ("Other aliens" under this section are all those not considered to be an arriving alien under INA § 241(b)(1), 8 U.S.C. § 1231(b)(1) (2006), and who have been placed in proceedings due to their inadmissibility or removability under either INA § 212(a), 8 U.S.C. § 1182(a) (2006) or INA § 237, 8 U.S.C. § 1227 (2006)).

he or she wishes to be removed. Although the alien is given wide latitude in this decision, there are some limitations.[50] For instance, an alien is barred from designating a country, territory, or island that is contiguous or adjacent to the United States *unless* the alien is a native, subject, or national of the territory.[51] The decision also hinges on the reception of the designated country's government: if the government does not respond to the request within thirty days or refuses the alien's admittance, the AG may disregard the alien's choice.[52] National security concerns may also trump the alien's choice because it remains at the discretion of the AG to determine whether such removal would be "prejudicial to the United States."[53]

If the alien is unable to designate a country that passes the above criteria, the AG has the authority to decide whether to remove the alien to the country where he or she is a national, subject, or citizen so long as the country acquiesces to the alien's return.[54] If all of the above attempts to return the alien fail, the AG has the option of returning them to: (1) the country that the alien came from when admitted to the United States; (2) the country that hosts the port from which the alien departed for the United States; (3) the country where the alien resided prior to arriving in the United States; (4) the country of the alien's birth; (5) the country that has sovereignty over the alien's birthplace; (6) the country where the birthplace is located when the alien is ordered removed; or (7) another country who will accept the alien if all other options are "impracticable, inadvisable, or impossible."[55]

This plethora of choices may seem fairly straightforward, but certain questions arise when faced with situations involving shifting borders and recognition of new countries. There must be additional criteria to consider when changed circumstances surrounding an alien's removal to a different country than that from which he came are likely to threaten his life or freedom.

C. United Nations Convention against Torture (CAT)

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") was drafted in December 1984 and came into force on June 26, 1987.[56] It contains a provision about not returning a person to a country where he will be in

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[50] INA § 241(b)(2)(B), 8 U.S.C. §1231(b)(2)(B) (2006).
[51] *Id.*
[52] INA §§ 241(b)(2)(C)(ii)–(iii), 8 U.S.C. §§ 1231(b)(2)(C)(ii)–(iii) (2006).
[53] *Id.* § 241(b)(2)(C)(iv).
[54] INA § 241(b)(2)(D), 8 U.S.C. § 1231(b)(2)(D) (2006).
[55] INA § 241(b)(2)(E)(i)–(vii), 8 U.S.C. § 1231(b)(2)(E)(i)–(vii) (2006).
[56] CAT, *supra* note 10.

danger of torture.[57] Torture is defined by the Convention to mean:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing him . . . or intimidating or coercing . . . or for any reason based on discrimination of any kind . . . with the consent or acquiescence of a public official.[58]

In 1990, CAT was ratified into law,[59] with the provision that Articles 1 through 16 were not self-executing.[60] Of particular importance and concern was Article 3, the text of which states:

> 1. 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.
>
> 2. 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 concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[61]

It was not until 1998 that President Clinton signed legislation that would enter Article 3 into force in domestic law.[62]

CAT is both a higher and lower threshold than the well-founded fear of persecution requirement for *nonrefoulement* and asylum, respectively. Individuals who do not qualify for asylum because their fear does not constitute persecution in the eyes of the law or because they do not fall within one of the five enumerated groups protected by asylum under CAT: race, religion, nationality, membership of a particular social group, or political opinion.[63] This protection also extends to refugees and aliens who

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[57] *See* Dawn J. Miller, *Holding States to their Convention Obligations: The United Nations Convention against Torture and the Need for Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 300 (2003).

[58] CAT, *supra* note 10, at pt. I, art. 1.

[59] 136 CONG. REC. S17491 (Oct. 27, 1990).

[60] United States of America, Addendum, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/28/Add.5 (Feb. 9, 2000).

[61] CAT, *supra* note 10, at pt. I, art. 3.

[62] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 (1998).

[63] CAT, *supra* note 10, at pt. I, art. 3. The Convention does not articulate that a person will qualify for relief only if they endured torture because of any particular reason or enumerated characteristic. Rather, the Convention only requires that a person has been subjected to torture as defined in the document. *See also* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999) ("[S]ection 241(b)(3) applies only to aliens whose life or freedom

are not eligible for asylum and withholding of removal under U.S. law.[64] These include aliens who have: 1) persecuted other groups on the basis of race, religion, nationality, social group, or political opinion; 2) committed a particularly serious crime and as such are characterized as a danger to society; 3) committed or believed to have committed a serious nonpolitical crime before coming to the United States; or 4) is a danger to national security.[65] In addition, the treatment feared by the alien must be particularly severe to fall within the ambit of the definition of torture.[66] For instance, torture requires there to be some action, or inaction and thus implied consent, by a government actor in order for certain behavior to qualify as torture.[67] There is no similar requirement for persecution-based asylum and *nonrefoulement* claims.

It is important to briefly take note of the varying interpretations that the United States has held with regards to CAT because it sheds light on the decision whether or not to send a person back to a certain country.[68] If the United States decides to remove a person, these understandings likely weigh on the decision of where to send the person back. For instance, the Senate required that an essential element of torture was that the action was formally known or acquiesced to by the country's government.[69] This interpretation has been criticized as a shortcoming because it only addresses violations committed by state actors and does not account for actions of non-state actors.[70] This definition was interpreted by the Board of Immigration Appeals (BIA) to include neither a state's inability to control non-state actors nor the presence of a de facto government.[71]

The United States issued an understanding with regards to the basic

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would be threatened on account of race, religion, nationality, and membership in a particular social group or political opinion. Article 3 covers persons who fear torture that may not be motivated by one of those five grounds.").

[64] 8 C.F.R. § 1208.16(a) (2012) ("An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld . . .").

[65] INA § 241 (b)(3)(B)(i)–(iv), 8 U.S.C. § 1231(b)(3)(B)(i)–(iv) (2012).

[66] *See* Nuru v. Gonzales, 404 F.3d 1207, 1218 (9th Cir. 2005) (Treatment towards the plaintiff wherein he was "beaten and whipped 'almost daily,' bound nude in the desert sun in a most painful position, and deprived of adequate food and water, for 25 consecutive days . . . falls well within the definition of torture set forth in the Convention.").

[67] CAT, *supra* note 10, at pt. I, art. 16.

[68] *See* U.S. Reservations, Declarations, and Understandings: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CONG. REC. S17486-01 (Oct. 27, 1990), *available at* http://www1.umn.edu/humanrts/usdocs/tortres.html.

[69] Article 1 is intended to apply only to "acts directed against persons in the offender's custody or physical control." 18 U.S.C. § 2340 *et seq*. (extending US criminal jurisdiction over any act constituting, or attempt to commit, torture outside of the U.S. by a U.S. national or alleged offender in the US).

[70] This idea seems perverse to the American conception of threat. However, the adoption of CAT was before the attacks of September 11, 2001, which radically altered the focus of the international enemy from a state to group or groups of non-state actors. *See* Miller, *supra* note 57, at 306.

[71] *In re* S-V-, 22 I. & N. Dec. 1306, 1316–17 (B.I.A. 2001).

definition of torture. When the Convention Against Torture was ratified, the United States stipulated that torture would be recognized and prosecuted only when an act is "specifically intended to inflict severe physical or mental pain or suffering."[72] This definition is qualified further by specifying that the mental pain or suffering be caused by one of four instances.[73] The first instance is "the intentional infliction or threatened infliction of severe physical pain or suffering."[74] Second, "the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality."[75] Third is "the threat of imminent death."[76] Fourth is "the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality."[77]

With regards to the *nonrefoulement* provision of Article 3, the United States has adopted a "more likely than not" standard in lieu of the "substantial ground" standard as established by the Convention, when considering whether to return a person to a country where it is possible he or she will be subjected to torture.[78] After President Clinton signed Article 3 in 1998, the Department of Justice ("DOJ") issued an interim rule to implement CAT.[79] This rule gives authority to Immigration Judges ("IJs") to make the decision about whether an alien's case comes within the purview of Article 3 protection.[80] These decisions are subject to appeal to the Board of Immigration Appeals, part of the Executive Office of Immigration Review.[81]

III. PROVING A PERSECUTION CLAIM

To fully understand how country conditions impact the IJ's decision about whether an alien will be returned to a certain country, it is first important to outline how a persecution claim is presented and what circumstances are considered. Although claims under the Refugee Act and

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[72] Addendum of United States to the Committee Against Torture, CAT/C/28/Add.5, p. 25, ¶95 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] INS v. Stevic, 467 U.S. 407 (1984).

[79] Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478,01 (Feb. 19, 1999).

[80] 8 C.F.R. §§ 3, 103, 208, 235, 238, 240–241, 253 (2011).

[81] 8 C.F.R. § 1003.38(a) (2011).

CAT are similar in some ways, they diverge at some points and are subject to different standards.

A. Refugee Act

There are two preliminary matters that the alien must consider when deciding to pursue a claim for asylum and withholding of removal under the Refugee Act. First and foremost, the burden of proof is always on the applicant.[82] Second, the applicant *must* fit within the classification of a refugee as defined by the Immigration Naturalization Act.[83] The INA's definition provides two methods to satisfy an alien's claim of persecution: evidence of past persecution and a well-founded fear of future persecution.[84] Interestingly, if the alien claims and can prove past persecution by the government of the country in question, a rebuttable presumption is created that the alien has reason to fear future persecution.[85] It then becomes the province of the Department of Homeland Security to rebut this presumption.[86]

The standard of proof is framed in the seminal case of *INS v. Cardoza-Fonseca*.[87] This case built upon the BIA's decision in *Matter of Acosta*[88] to articulate that an alien need not prove that it is "more likely than not" that he will be persecuted in his country in order to show a well-founded fear.[89] Instead, he need only introduce enough evidence to show that "persecution is a reasonable possibility."[90] As evidenced in comparison to the "more likely than not" standard for withholding of removal, Congress intended to make it more difficult to establish an absolute entitlement to withholding of removal rather than asylum, since an application for asylum is now automatically considered to also be a claim for withholding for removal.[91] This standard was further refined in *Matter of Mogharrabi*,[92] as the BIA adopted a "common sense" framework to assess applicant's claims. Under this model, an alien establishes a well-founded fear if a reasonable person in his circumstances would fear persecution.[93]

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[82] 8 C.F.R. § 208.13(a) (2011).

[83] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

[84] INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2012).

[85] *Id.*

[86] *Id.*

[87] INS v. Cardoza-Fonseca, 480 U.S. 421, 425 (1987).

[88] Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985) (holding that an alien did not demonstrate that his fear of persecution was "well-founded," and therefore, he did not establish by "clear probability" that he would be subject to persecution if returned to El Salvador).

[89] *Id.*

[90] *Cardoza-Fonseca*, 480 U.S. at 425.

[91] Regulations Concerning the Convention Against Torture, *supra* note 79, at 8480.

[92] Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) (holding that once an applicant is found eligible for asylum, there may be no need to establish that a clear probability of persecution exists).

[93] *Id.* (adopting the Fifth Circuit's interpretation in Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986)).

Perhaps the most important aspect of the entire claim is what circumstances and events will be considered persecution for purposes of a successful asylum claim, and in turn, withholding of removal. In an early case, *Kovac v. INS*, persecution was defined to involve "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a matter regarded as offensive."[94] With the proliferation of the 1951 UN Convention and 1967 Protocol, respectively, persecution has grown to encompass numerous other circumstances. Included (subject to a sufficient showing by the applicant) are substantial economic deprivation that threatens the alien's life or freedom[95] and rape or sexual assault.[96] In *Matter of Acosta*, the BIA outlined four "guidelines" that are persuasive in assessing whether an alien has shown a well-founded fear of persecution.[97] They are:

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses the belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.[98]

Moreover, as previously mentioned, persecution must be at the hands of the government in power unless the government does not effectively control the territory, or is either unable or unwilling to protect the alien.[99]

B. Convention Against Torture

The starting place for an alien seeking refuge under CAT is the same as under the Refugee Act: he must qualify under the definition of "refugee" within the Immigration and Nationality Act.[100] Also, as under the Refugee Act, the alien can pursue either or both evidence of past persecution or a well-founded fear of future persecution if returned to a certain country.[101]

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[94] Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969). *See also Acosta,* 19 I. & N. Dec. at 211; Montoya-Ulloa v. INS, 79 F.3d 930 (9th Cir. 1996).

[95] Borca v. INS, 77 F.3d 210, 215–17 (7th Cir. 1996).

[96] *See* Shoafera v. INS, 228 F.3d 1070 (9th Cir. 2000). *But see* Ochave v. INS, 254 F.3d 859 (9th Cir. 2001) (holding that there must be a significant nexus between the sexual assault and one of the enumerated characteristics). For a more detailed explanation of what comprises persecution, see IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK, 292–94 (8th ed. 2002).

[97] *Acosta*, 19 I. & N. Dec. at 211 (Initially, these four characteristics were requirements. After the decision in INS v. Cardoza-Fonseca, 480 U.S. 421, 425 (1987), these elements became guidelines to consider rather than hard and fast criteria.).

[98] *Cardoza-Fonseca*, 480 U.S. at 457.

[99] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

[100] 8 C.F.R. § 1208.13(a) (2008).

[101] INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2012).

When an alien chooses to pursue protection under CAT based on the former, they are also implicitly assumed to have a well-founded fear of future persecution.[102] However, when an applicant pursues protection based on this qualification, the asylum officer or Immigration Judge hearing their case may rebut this presumption in two ways. The first is if the officer or IJ finds that there has been a "fundamental change in circumstances" that eliminates the applicant's fear of persecution.[103] The second is if the official determines that the applicant can avoid future persecution by relocating to another part of the country.[104]

On the other hand, an applicant qualifies for protection based on a well-founded fear of future persecution so long as she comes within the purview of one of the enumerated grounds, she has a "reasonable possibility of suffering such persecution" and is unable or unwilling to return to the country.[105]

An Immigration Judge considering an application for protection under CAT (and likely under an application for asylum and withholding of removal) is obliged to consider four pieces of evidence, although IJs are permitted, and often do, consider other factors. The required elements are: (i) past torture inflicted on the applicant; (ii) whether relocation to another part of the state would mitigate the future prospect of torture; (iii) the presence of "gross, flagrant or mass violations of human rights" in the country; and (iv) any other relevant country conditions.[106]

Although this discussion of CAT is fairly brief, it highlights the factors that an Immigration Judge considers when determining not only an alien's eligibility, but also which country the refugee can be sent to if he does not qualify for protection. These considerations set the stage for analysis of an alien's withholding of removal claim when the alien's home is now located in a different country than when he or she left to come to the United States.

IV. DISCUSSION

Many of the factors in determining whether returning an alien in removal proceedings to a certain country would violate the international commitment to *nonrefoulement* are deeply couched in the conditions of the country in question.[107] Although each of the above forms of relief have different requirements as to what the alien must show in order to be granted either asylum, withholding of removal, or protection under CAT, they all rest heavily on the national dynamics of the proposed removal

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[102] 8 C.F.R. § 1208.13(b) (2008).
[103] *Id.*at §1208.13(b)(1)(i)(A).
[104] *Id.* at §1208.13(b)(1)(i)(B).
[105] *Id.* at §1208.13(b)(2)(A)–(C).
[106] 8 C.F.R. § 1208.16(c)(3) (2008).
[107] CAT, *supra* note 10, at Part I, art. 3, ¶ 2.

country. For instance, an alien applying for relief under CAT must show that either there has not been a fundamental change of circumstances, which has created a safe environment for him to return to, or that relocation to another part of the country would not alleviate the pervasive threat of torture that he alleges.[108]

This discussion will center primarily on the burdens placed on the alien in applying for withholding of removal. A majority of these conditions are cemented in the idea of nationality or country of birth, presenting a perplexing question in the context of a state that has just been born into an independent sovereign. It is impossible to simply declare that because the alien's place of birth is now in a newly formed country that he or she will not face the persecution or torture that he or she sought from the predecessor country. Any pupil of international politics, sociology, or law is forced to consider the socio-political effects that sedition and independence have on not only the former country, but, perhaps to a more severe degree, on the new country. These considerations become a pertinent focal point in assessing an alien's claim for withholding of removal.

A. South Sudan and the Wani Site Case

On July 9, 2011, President Barack Obama formally recognized the independence of South Sudan from Sudan, making it the newest country in the world:

> Today is a reminder that after the darkness of war, the light of a new dawn is possible. A proud flag flies over Juba and the map of the world has been redrawn. These symbols speak to the blood that has been spilled, the tears that have been shed, the ballots that have been cast, and the hopes that have been realized by so many millions of people. The eyes of the world are on the Republic of South Sudan. And we know that southern Sudanese have claimed their sovereignty, and shown that neither their dignity nor their dream of self-determination can be denied.[109]

This statement came during the midst of the Seventh Circuit's consideration of an appeal by a Sudanese man seeking protection by way of deferral of removal under CAT.[110] Zakaria Bullen Wani Site based his claim on the premise that, because he was a draft evader and failed asylum

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[108] 8 C.F.R. § 1208.13(b)(1)(i) (2008).

[109] Presidential Statement Recognizing South Sudan as an Independent and Sovereign State, 2011 DAILY COMP. PRES. DOC. 497 (July 9, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/09/statement-president-barack-obama-recognition-republic-south-sudan.

[110] Wani Site, 656 F.3d 590, 590 (7th Cir.2011).

seeker, he would face torture at the hands of the Sudanese government.[111]

Wani Site came to the United States as a refugee in 2001 and became a lawful permanent resident in 2007.[112] After being convicted of aggravated criminal sexual abuse, he was placed in removal proceedings.[113] Although the IJ found Wani Site credible and acknowledged that there was sufficient evidence of past persecution, the claim for deferral of removal was nonetheless denied because Wani Site had "failed to prove that it was more likely than not that he would be tortured if returned to Sudan."[114] Wani Site appealed to the Board of Immigration Appeals, which affirmed the IJ's order, and issued an order of removal to Sudan.[115]

The case was appealed to the Seventh Circuit, which summarily remanded the case for further proceedings.[116] The Court heavily based its decision to remand on the government's insistence that it no longer planned to remove Wani Site to Sudan.[117] Wani Site's birthplace was Juba, the capital of the newly formed Republic of South Sudan.[118] In the mind of the Court, this change of circumstances was probative of the need for the decision to be reconsidered by the BIA in light of the conditions of South Sudan.[119]

After addressing the alleged legal errors, the court turned to a discussion of why the government did not remand the case once it decided not to remove Wani Site to Sudan.[120] The court balked at the government's contention presented at oral argument that "once South Sudan declared its independence, it may remove him to that country,"[121] instead appearing to chastise the government for asserting its authority to remove an alien to a particular country, albeit rightfully, without first assessing the proposed country through proper procedures.[122] The Court also identified that deferral of removal is, by definition, dependent on the specific country.[123]

While the Seventh Circuit recognized that it does not have the authority to decide how the case should proceed with South Sudan

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[111] *Id.*

[112] *Id.* at 592.

[113] *Id.*

[114] *Id.*

[115] *Id. See also* 8 C.F.R. § 1208.16(c)(2) (2008) (establishing that the test is a more likely than not burden).

[116] The government argued that the case could not be appealed to the Circuit court, based on the contention that 8 U.S.C. § 1252(a)(2)(C) (2006) does not confer jurisdiction to the federal courts of appeals to review decisions of the BIA. The Seventh Circuit acknowledged this argument, but noted that it does have jurisdiction to review legal errors committed by the BIA, to which Wani Site alleged there to be three.

[117] Wani Site, 656 F.3d 590, 590–91 (7th Cir.2011).

[118] *Id.*

[119] *Id.* at 593.

[120] *Id.* at 594.

[121] *Id.*

[122] *Id.*

[123] *Wani Site*, 656 F.3d at 594.

designated as the country of removal,[124] it is important to pick up from where the opinion ends, highlighting the relevant considerations that were raised throughout the opinion. Three significant issues emanate from the opinion: nationality and/or place of birth, fundamental change in circumstances, and government's discretion to remove an alien to a certain country.[125]

B. Nationality and/or Place of Birth

There are numerous provisions for countries of removal in the context of withholding of removal that relate to either the alien's nationality or place of birth.[126] Specifically, they are the alien's country of birth, the country that has sovereignty over the alien's birthplace, and where the alien's birthplace was located when the removal order was issued.[127] The government's rash decision to remove Wani Site to South Sudan as opposed to Sudan was most likely based on the fact that Juba, his birthplace, is the newly named capital city of South Sudan.[128] However, this should not automatically categorize Wani Site as a South Sudanese citizen. It is necessary to research whether citizenship would be defined geographically once South Sudan became independent.

Moreover, even if this were the case, Wani Site was born in what was then-Sudan and when he left to come to the United States, he was departing Sudan; therefore, it is probable that he holds a Sudanese passport. Aside from geography, Wani Site has no formal connection to the newly independent state. He has not returned to the country since he came to the United States as a refugee in 2001.[129] For all intents and purposes, if the government were to remove Wani Site to South Sudan because Juba was the location of his birth, he would effectively be torn between two nationalities: on paper, he is a citizen of Sudan, but in the eyes of the United States government, he is a citizen of South Sudan.

Even though this determination is important to the decision about whether to grant withholding of removal, the Tenth Circuit has held that an

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[124] *Id.* ("We are in no position to comment on a plan to remove Wani Site to the new nation of South Sudan before the Board has considered the issue.").

[125] *See generally* Wani Site v. Holder, 656 F.3d 590 (7th Cir. 2011).

[126] Immigration and Nationality Act §§ 241(b)(2)(E)(i) – (vii), 8 U.S.C. §§ 1231(b)(2)(E)(i)–(vii) (2006).

[127] The last presents a particularly interesting challenge in the *Wani Site* case: at the time the final removal order was issued, South Sudan was not a formally independent country. President Obama's recognition came one month after the Seventh Circuit heard oral arguments on the appeal. It was only after July 2011 that Wani Site's birthplace, Juba, was considered to formally be part of South Sudan.

[128] *Wani Site*, 656 F.3d at 591 ("We point this out because Wani Site's hometown, Juba, is now the capital of South Sudan, and so the geopolitical circumstances framing his petition have changed fundamentally.").

[129] The facts of the case stipulate that Wani Site and his family fled Sudan in 1996 for Egypt, where they remained until being admitted to the U.S. in 2001. *See Wani Site*, 656 F.3d at 592.

alien cannot be denied asylum or refugee status solely on the grounds that he is unable to establish his nationality.[130] Nationality or place of birth should not be probative of where the alien will or will not encounter the persecution and/or torture from which he is seeking relief.[131] Substantially more weight should be accorded to whether or not the circumstances of the newly formed country have fundamentally changed so as to lessen or even eliminate the conditions from which the alien originally fled.

C. Fundamental Change of Circumstances

If geography, consisting of nationality, place of birth, or last habitual residence, were to dictate the country an alien was going to be removed to, the alien may be walking right back into the lion's den. For instance, in the Wani Site case, even though South Sudan has separated from Sudan, the political ties may be sufficiently close enough that the fear of persecution has not been eliminated. The Seventh Circuit briefly touches on some of these concerns.

First, Wani Site and his family are practicing Christians.[132] Although a U.S. State Department Human Rights Report has not been issued since South Sudan became independent, the 2010 Report showed that the North (now Sudan) is predominantly Muslim, while the South (now South Sudan) is comprised of both Christians and indigenous religions.[133] However, another report shows that Christians are still a minority in the South.[134] Due to these inconsistencies, there is no dispositive assurance that removing Wani Site to South Sudan would eliminate the threat of persecution or torture based upon his Christian beliefs.

Second, the danger that Wani Site allegedly suffered based on his involvement with the Sudanese People's Liberation Movement (SPLM) cannot be considered obsolete once South Sudan became independent. While it is true that the SPLM was instrumental in pursuing the referendum that led to the ultimate separation of the two countries, Wani Site's association with the organization jeopardized the well-being of many of his family members.[135] Due to the close proximity of the two countries, as

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[130] Dulane v. INS, 46 F.3d 988, 997 (10th Cir. 1995) (stateless Palestinian can establish eligibility for asylum if 1) expulsion or denial of re-entry are violations of basic human rights so serious as to constitute persecution, and 2) he suffered these violations on account of one of the enumerated grounds in the refugee definition).

[131] *Id.*

[132] *Wani Site,* 656 F.3d at 592.

[133] U.S. DEP'T OF ST. BUREAU OF DEMOCRACY, HUM. RTS. & LAB., 2010 HUMAN RIGHTS REPORT: SUDAN (2011), *available at* http://www.state.gov/j/drl/rls/hrrpt/2010/af/154371.htm.

[134] U.S. DEP'T OF ST. BUREAU OF DEMOCRACY, HUM. RTS. & LAB., INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2011: SUDAN (2011).

[135] Wani Site, 656 F.3d 590, 592 (7th Cir.2011) (discussing that his father was arrested and never heard from again; his uncle was arrested and never heard from again; his brother was arrested; one of his sisters was raped).

well as the numerous rebellions that have caused unrest in not only South Sudan, but other African countries,[136] the removal of Wani Site could have potentially volatile consequences based on his past political involvement.

The Seventh Circuit also called attention to Wani Site's concern that he evaded the draft, referencing a UNHCR Report on Sudanese Asylum Seekers, which made clear that a forced return to Sudan is risky regardless of where the person is originally from; returning as a known draft-evader is particularly dangerous.[137] This cuts directly against the government's rationale that because he is from Juba, his return to South Sudan will be without consequence.[138] It is necessary to know more about the political climate and whether there have been any forced returns or removals to South Sudan.

D. Government Discretion

As discussed previously, the government retains broad discretion to designate a country of removal.[139] However, this discretion ought to be exercised according to the diplomatic relations that the United States has established with South Sudan. Since South Sudan has become independent, an in-depth analysis is needed to determine whether Sudan still has a substantial impact on the policies or economy of South Sudan. This problem of effective control presents an issue when one country secedes from another. President Obama spoke directly to the potential friction between Sudan and South Sudan when he congratulated the new Republic:

> As today also marks the creation of two new neighbors, South Sudan and Sudan, both peoples must recognize that they will be more secure and prosperous if they move beyond a bitter past and resolve differences peacefully. Lasting peace will only be realized if all sides fulfill their responsibilities. The Comprehensive Peace Agreement must be fully implemented, the status of Abyei must be resolved through negotiations, and violence and intimidation in Southern Kordofan, especially by the Government of Sudan, must end. The safety of all Sudanese, especially minorities, must be protected. Through courage and hard choices, this can be the beginning of a new chapter of greater peace and

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[136] Johnnie Carson, Assistant Secretary, U.S. Dep't of St. Bureau of African Aff., U.S. Efforts to Counter the Lord's Resistance Army, Remarks at United States Institute of Peace (Dec. 7, 2011), *available at* http://www.state.gov/p/af/rls/rm/2011/178501.htm.

[137] U.N. High Commissioner's Position on Sudanese Asylum-Seekers from Darfur (Feb. 10, 2006), *available at* http://www.unhcr.org/refworld/docid/43f5dea84.html.

[138] *See supra* text accompanying note 128.

[139] INA § 241(b), 8 U.S.C. § 1231(b)(2006).

justice for all of the Sudanese people.[140]

South Sudan has formally existed since July 2011.[141] Although its independence was anticipated, based on the decades of civil wars that raged in Sudan,[142] it is too soon to tell whether removing Wani Site to South Sudan would be any less detrimental to his fear of persecution than removal to Sudan. Recently, the State Department's Special Envoy to Sudan published a report regarding ongoing issues within, and between, the two neighboring countries.[143] Although the U.S. government does retain discretion to remove Wani Site to a country that it chooses (so long as removal does not violate the principle of *nonrefoulement*), there must be some guidelines in place when the government considers removal to a newly independent country.

V. RECOMMENDATIONS AND CONCLUSION

The *Wani Site* case illustrates the difficulties in not only determining a country of removal for asylum, withholding of removal, and CAT, but introduces the added complexities of what can happen when a relevant country comes into being during the removal proceedings. The creation of new standards with regards to these countries is essential if U.S. refugee and asylum law are going to continue functioning effectively, rather than as a mere culmination of blind decisions. If these matters are not given considerable study, the United States risks running afoul of its international commitments under the UN Charter and CAT, as well as its individual diplomatic relations with countries of the world. The Seventh Circuit held the U.S. government accountable for its disregard for Wani Site's future, and now the ball is in the government's court to define a new set of standards to look at refugee and asylum cases involving new countries.

An essential element of this proposed analysis is a closer look at the nationality and citizenship of the alien. In instances of new states, removal to the country of citizenship cannot be a fallback provision. Instead, the United States must identify the terms of secession or independence of the states involved to determine if any consideration was given as to who would be a citizen of which state. If the governments of the countries involved have not defined a policy along these lines, the United States

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[140] Presidential Statement Recognizing South Sudan as an Independent and Sovereign State, *supra* note 109.

[141] Jeffrey Gettleman, *After Years of Struggle, South Sudan Becomes a New Nation,* N.Y. TIMES, July 9, 2011, http://www.nytimes.com/2011/07/10/world/africa/10sudan.html?pagewanted=all&_r=0.

[142] FED. RESEARCH DIV. LIBR. OF CONGRESS, SUDAN: A COUNTRY STUDY 30–32 (Helen Chapin Metz, ed., 1991).

[143] Princeton Lyman, Ambassador, U.S. Dep't of St. Special Envoy for Sudan, Briefing on Issues of Ongoing Concern in Sudan and South Sudan (Jan. 25, 2012), *available at* http://www.state.gov/p/af/rls/rm/2012/182488.htm.

should consider the alien's application for relief from removal under the presumption that the alien is still a citizen of whichever country he was when he entered the United States. If the state is very young, as is the case of South Sudan, it is likely that any human rights abuses that occurred were not completely resolved. Even though disagreement may be at a simmer rather than a rolling boil, this elevated temperature of the socio-political climate must be taken into account.

If there has been a formalized agreement as to which individuals are citizens of which state, and the alien is determined to be a citizen of the new state, the relevant question then becomes whether the parent country has oversight, control or influence over the new country. Although things may appear to be diplomatically partitioned on paper, skeptics will advocate the notion that appearances can be deceiving. In these circumstances, cynicism should triumph over optimism. The State Department brief regarding the issues in Sudan and South Sudan identifies the fact that both states are extremely dependent on one another for fuel, and disagreements have led to the diversion of pipelines.[144] The climate between the states is already volatile after years of civil war and the immaturity of South Sudan has the potential to erupt into a situation not dissimilar from the one that Wani Site fled.

The execution of this more intensive analysis would hardly be any more burdensome to the government than the current research required by asylum claims. Political relations with the United States and the new country and/or parent country should be considerations in the decision, as should country reports. These should come not only from the U.S. Department of State, but also from other credible sources, such as NGOs or international organizations, such as the United Nations, that may have more in-depth information about the daily events in the country in question.[145] If they exist, case studies from other countries regarding their diplomatic relations with the new country may also be helpful, as well as whether they have determined whether any alien has been removed to that country since its inception. The beauty of the U.S. ratification of the UN Refugee Convention and Protocol, as well as CAT, is that every country that has signed on to it has the same obligations under international law; the United States should use the resources of these other countries as extensively as it can with respect to refugees and asylum-seekers.

Another option, which is unlikely to come to fruition but is worthy of mention, is for the United States to consider lowering the burden of proof placed on aliens in this rather unique predicament. It is hard enough for an

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[144] *Id.*

[145] *See* Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 208 (2000).

alien to corroborate their claims of persecution and torture under normal circumstances, but when the partitioning and creation of states becomes involved, the threshold becomes that much wider. The bar should be lowered across the board for any alien seeking refuge in the United States, but the stringent "more likely than not" standard that is currently in place would seem to be almost unattainable for any alien who fled as a citizen of one state and is now being told by the U.S. government that he is a citizen of a different state.

The threshold to asylum and withholding of removal in the United States is already high for aliens who wish to pursue it. The government cannot make this unachievable based on an unwillingness to look more closely at an alien's situation because it involves a newly recognized state. The alien's fears of persecution and torture will not disappear with changing geographic boundaries; in some cases, it is likely that those fears will be exacerbated. It is imperative for the government to match its efforts to the high burden already placed on the alien so that the United States can uphold its commitments not only under international human rights agreements, but also its obligations to the alien that seeks refuge within its borders.