THIRD COUNTRY DEPORTATION

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The large-scale deportation of noncitizens from the United States is not new. However, the speed, and secrecy, by which many of these deportations are carried out is unprecedented. Deportations are, increasingly, executed not through a legal court process, but rather, extrajudicially—in detention centers and at border crossings, outside the purview of judges or neutral adjudicators. One kind of this "shadow deportation" is what I term "third country deportation"—the removal of noncitizens to a country other than that designated by an Immigration Judge, after relief to the designated country has been granted, and after the court proceeding has concluded.

This article builds upon the work of other scholars who have illuminated deportations that occur in the shadows—including expedited removal, administrative removal and reinstatement of removal—all of which happen quickly, and largely without judicial review. This article argues that "third country deportations" are not only part of this growing, and dangerous, trend toward deportations that happen outside the courtroom, but that they are in direct violation of both our domestic and international legal obligations. In fact, third country deportations place already vulnerable noncitizens at risk of being removed to countries where they face persecution and torture, without the process and judicial oversight that a court proceeding provides. In order to comply with our legal obligations, this article contends that notice, burden shifting, and a full evidentiary hearing are required when the government seeks to remove a noncitizen to a country other than that designated by an Immigration Judge.

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"Peter"[1] was born in Khartoum, Sudan, in the midst of the second Sudanese civil war. Following the murder of his father and kidnapping of his mother, Peter and his family were brought to the United States as refugees. Soon after, trouble with the law landed Peter in immigration detention and facing deportation to Sudan. After he was granted relief under the Convention Against Torture ("CAT"), Peter was released from immigration detention and spent the next seven years living and working in New England. Then, in 2018, Peter was arrested by immigration officials, detained, and told he would be removed to South Sudan, a country to which he had no connection. In fact, the Department of Homeland Security ("DHS") intended to carry out his deportation without notice, a hearing, or process of any kind.

To place Peter's story in context, several trends in immigration detention and the number of people seeking humanitarian protection, including relief under CAT, should be noted. Like Peter, a record number of more than 54,000 people are currently being held in ICE custody across the United States.[2] Thousands of these detainees are torture survivors or likely to face torture if removed to their countries of origin.[3] Fiscal Year 2018 showed a 40-percent jump in the number of decisions made by immigration judges regarding fear-based relief,[4] which includes asylum, withholding of removal, and relief under CAT.[5] This spike in

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1. "Peter" is a pseudonym for one of the author's clients. Identifying details have been slightly altered here to protect his identity. Additional background on Peter is provided, *infra*, in Part I.

2. Yuki Noguchi, *'No Meaningful Oversight': ICE Contractor Overlooked Problems at Detention Centers*, NPR (July 17, 2019, 5:48 PM), https://www.npr.org/2019/07/17/741181529/no-meaningful-oversight-ice-contractor-overlooked-problems-at-detention-centers [https://perma.cc/A43J-6T7G].

3. While definitive numbers are difficult to ascertain, estimates include more than 6,000 victims of torture in ICE detention, and approximately 1.3 million survivors of torture living in the United States. Annie Sovcik, *Tortured & Detained: Survivor Stories of U.S. Immigration Detention*, CTR. FOR VICTIMS OF TORTURE 5 (Nov. 2, 2013), https://www.cvt.org/sites/default/files/Report_TorturedAndDetained_Nov2013.pdf [https://perma.cc/M7VX-VDLS] (From FY2010 to FY2013 the Center for Victims of Torture ("CVT") estimates that the U.S. detained over 6,000 victims of torture); Craig Higson-Smith, *Updating the Number of Refugees Resettled in the United States Who Have Suffered Torture*, CTR. FOR VICTIMS OF TORTURE (Sept. 2015), https://www.cvt.org/sites/default/files/SurvivorNumberMetaAnalysis_Sept2015_0.pdf [https://perma.cc/C7QU-NMYY] (According to a meta-data study from CVT, there are an estimated 1.3 million survivors of torture living in the United States.).

4. *See* 8 U.S.C. § 1158 (2012) (asylum statute); 8 C.F.R. § 208.13 (2019) (asylum regulations); 8 U.S.C. § 1231(b)(3)(B) (2018) (withholding of removal statute); *see also* 8 C.F.R. §208.16 (2019) (regulations concerning withholding of removal under 8 U.S.C. §1231(b)(3)(B) and the Convention Against Torture); 8 C.F.R. § 208.17 (2019) (regulations concerning Deferral of Removal under the Convention Against Torture).

5. TRANSACTIONAL RECORDS CLEARINGHOUSE IMMIGRATION PROJECT, *Asylum Decisions and Denials Jump in 2018*, (Nov. 29, 2018), https://trac.syr.edu/immigration/reports/539/ [https://perma.cc/9NP9-BX9J] [hereinafter TRACIMMIGRATION].

the number of immigration judge decisions regarding fear-based relief was a more than 89-percent increase from two years ago.[6] Fear-based relief, including relief under CAT, is increasingly sought, and meaningful when received, hypothetically ensuring that recipients are not removed to countries where they will be persecuted, harmed, tortured, or killed. Over the last several years, however, there has been a slow, but steady, erosion of basic protections under our asylum laws.[7] What's more, noncitizens facing deportation are not entitled to a lawyer except at their own expense[8]—which means that many noncitizens seeking fear-based protection in U.S. immigration courts are unrepresented.[9] With asylum under

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6. *Id*.

7. *See* Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. 104-208, §302(b)(1)(B)(iii)(IV), 110 Stat. 3009-582 (codified as amended in scattered sections of 8 U.S.C.) (1996); Exec. Order No. 13,841, 83 Fed. Reg. 29,435, *Affording Congress an Opportunity to Address Family Separation*, § 3 (June 20, 2018), https://www.whitehouse.gov/presidential-actions/affordingcongress-opportunity-address-family-separation [https://perma.cc/2E7R-524K]; Matter of M-S-, 27 I. & N. 509 (A.G. 2019) (overruling Matter of X-K-, 23 I. & N. 731 (BIA 2005), and holding that asylum seekers who have established a credible fear of persecution are ineligible for bond); Matter of A-B-, 27 I. & N. 316 (A.G. 2018) (overturning Matter of A-R-C-G-, 26 I. & N. 338 (BIA 2014)); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg.115 (proposed Jun. 15, 2020) (to be codified at 8 C.F.R. §§ 1003, 1208, 1235); Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567 (proposed Mar. 24, 2020) (to be codified at 42 C.F.R. 71); Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 223 (to be codified at 8 C.F.R. §§ 1003, 1208, and 1240); Migrant Protection Protocols, INA § 235(b)(2)(C) (Jan. 29, 2019)*;* Safe Third Country interim final rule 8 C.F.R. 208 (2019); Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, to Fed. Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download [https://perma.cc/AF4U-2CNT]; WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY (2019), https://fas.org/sgp/crs/homesec/R45266.pdf [https://perma.cc/8SAE-4X7Z. *See also* U.S. DEP'T OF HOMELAND SEC., POLICY GUIDANCE FOR THE IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (2018); Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System, 2019 DAILY COMP. PRES. DOC. 1 (Apr. 29, 2019).

8. Immigration and Nationality Act § 240, 8 U.S.C. § 1229a (b)(4)(A) (2012) ("the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings") [hereinafter INA].

9. Notably, this varies greatly by whether or not the Respondent is detained at the time he seeks fear-based relief. For example, nationwide in 2019, 38,652 of those seeking asylum were represented by counsel (out of 45,322). But looking at detained cases—rather than a combination of detained and non-detained cases—reveals a grimmer portrait. For example, nearly half of the more than 6,000 asylum cases presented by Respondents at the Krome Detention Center in Miami were unrepresented. Of those unrepresented, nearly all were denied relief from deportation. TRACIMMIGRATION, *Asylum Decisions*, https://trac.syr.edu/phptools/immigration/asylum/ (last

threat, relief under CAT—which, in contrast to a discretionary grant of asylum, is a mandatory form of relief not so easily undermined—has become increasingly relevant and important. Indeed, CAT is now more vital than ever as a safeguard for noncitizens fleeing, or fearing, harm.

But what happens to individuals granted relief under the Convention Against Torture? This Article explores the precarious legal landscape facing noncitizens, and the troubling implications for domestic and international law. Part I provides a case study of "Peter"—one noncitizen subject to third country deportation[10] and one story of a client represented by the author. Part I situates Peter's story in the larger context of third country removal and relief under CAT. Part II describes the laws governing cases of noncitizens like Peter. It explains that those granted protection under CAT face the prospect of a swift, and nearly secret, deportation to a third country without judicial review. Part III argues that U.S. immigration courts must interpret our domestic immigration statute in light of international legal obligations under CAT to ensure that noncitizens are protected from third country deportation, to a country where they risk harm or torture. To conform with domestic and international legal obligations, noncitizens must be afforded notice, the burden of proof must be shifted to the government, and noncitizens must be granted a full evidentiary hearing before an immigration judge when DHS seeks to remove a noncitizen to a third country.

An examination of this phenomena is especially important in the current era. The sitting president, Donald Trump, has called for the mass deportation of noncitizens: A Presidential tweet, published in July 2019, promised: "[n]ext week ICE will begin the process of removing the millions of illegal aliens who have illicitly found their way into the United States. They will be removed as fast as they come in."[11] The U.S. government's removal of noncitizens without process is a real possibility, as many argue that executive power is at its zenith in the context of immigration and the rights of noncitizens.[12] What's more, President Trump has been consistent in his desire to conduct mass deportations, outside the purview of the court, proclaiming in a series of tweets in the summer of 2018,

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updated June 30, 2019) [https://perma.cc/58PC-GXDQ].

10. A brief note about language. Until April 1997, deportation and exclusion were separate removal procedures. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 consolidated these procedures. After April 1, 1997, noncitizens in and admitted to the United States may be subject to removal based on deportability. Now called "removal," this function is managed by U.S. Immigration and Customs Enforcement. In this article, for ease of reading, I tend to use the more colloquial term "deportation" to cover any removal, by the U.S. Government, of a noncitizen from the United States.

11. Donald J. Trump (@realDonaldTrump), TWITTER (June 17, 2019, 6:20 PM), https://twitter.com/realDonaldTrump/status/1140791400658870274 [https://perma.cc/FC43-HDHX].

12. *See generally* Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, (1889); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law,* 119 YALE L.J. 458 (2010); *see also* Jill E. Family, *Threats to the Future of the Immigration Class Action,* 27 WASH. U. J.L. & POL'Y 71, 95-101 (2008) (discussing the plenary power doctrine).

"when somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[13] This increased appetite for mass enforcement, detention and deportation has now extended to some of the nation's most vulnerable, including those with CAT relief. Third country deportation, in its current form, threatens to remove exceptionally vulnerable noncitizens without the protection of either judges or courts. But third country deportation flouts both domestic and international law.

CAT is a 35-year-old watershed international human rights treaty, negotiated and ratified by the United States, which exists to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment across the globe.[14] In addition to prohibiting states from committing acts of torture and cruel, inhuman, and degrading treatment, CAT also includes provisions that seek to protect individuals from being sent to face potential torture in other countries, or in their home country. For those noncitizens facing deportation, CAT prohibits states from deporting noncitizens who can demonstrate that it is "more likely than not" that they will be tortured if removed to their home country.[15] Where a noncitizen can demonstrate that it is more likely than not that she will be tortured, her removal must be withheld or deferred—allowing her to remain, at least for a time, in the United States.[16] This avenue of immigration relief is significant for those who receive it, allowing them to avoid deportation and, in many cases, allowing for release from immigration detention. But the U.S. regulations also allow the state an alternative avenue—that when removal is withheld or deferred,[17] the government may seek removal to a *third* country.[18] The regulation states: "Nothing in this section or § 208.17 [deferral of removal] shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred."[19] This article asks plainly, what happens then?

This article builds upon the scholarship of others who have written on the history and implementation of CAT in the context of U.S. immigration law. That literature is rich, including incisive critiques of the "specific intent" requirement—that is, that in order to constitute torture, an act must be "specifically intended to inflict severe physical or mental pain or suffering."[20]

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13. Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018 11:02 AM), https://twitter.com/realdonaldtrump/status/1010900865602019329?lang=en [https://perma.cc/2KTT-BBPF].

14. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100–20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

15. 8 C.F.R. § 208.16(c)(2) (2019).

16. 8 C.F.R. § 208.16(c)(4) (2019).

17. *See* discussion *infra* Part I (discussing the distinctions between withholding of removal under CAT and deferral of removal under CAT).

18. *See* 8 C.F.R. § 208.16(f) (2019).

19. *Id.*

20. 8 C.F.R. § 208.18(a)(5) (2019); Mary Holper, *Specific Intent and the Purposeful*

Other pieces question the restrictive definition of torture in CAT and make the argument for so-called "immigration lenity"[21]—a kinder, gentler approach to application of CAT, so as to ensure that we do not send noncitizens back to places where they may face harm. Still other articles note the limits of CAT in protecting specific, and especially vulnerable, noncitizens,[22] and others question the limits on family reunification for recipients of relief under CAT.[23] Finally, scholars have also investigated the practice of seeking "diplomatic assurances" that a noncitizen will not be tortured if removed to her home country. Specifically, scholars have contested the constitutionality of diplomatic assurances in the third country removal context,[24] suggesting that assurances not to torture from a foreign government still may run afoul of our legal obligations.

Furthermore, this article builds upon the work of other scholars who have examined the increasingly popular means by which removals are effected outside of the courtroom, namely "shadow removal"[25] and "speed deportation,"[26] including the increased use of "expedited removal."[27] These are removals from the United States of noncitizens outside the court system, and without judicial review—removals that scholars like Mary Holper have likened to an "unreasonable seizure."[28] Jill Family has characterized these kinds of shadow or

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Narrowing of Victim Protection Under the Convention Against Torture, 88 OR. L. REV. 777, 779 (2009) (arguing that the Board's narrow interpretation of "specific intent" impermissibly shifts the focus off protecting the victim and onto the alleged torturer's acts); s*ee also* Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791 (2012).

21. Irene Scharf, *Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1 (2013).

22. *See, e.g.*, Alyssa Bell & Julie Dona, *Torturous Intent: Refoulement of Haitian Nationals and U.S. Obligations Under the Convention Against Torture*, 35 N.Y.U. REV. L. & SOC. CHANGE 707 (2011).

23. Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897 (2005).

24. *See, e.g.*, Jane C. Kim, Note, *Nonrefoulement Under the Convention Against Torture: How U.S. Allowances for Diplomatic Assurances Contravene Treaty Obligations and Federal Law*, 32 BROOK. J. INT'L L. 1227 (2007).

25. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 185, 206-07 (2017) (Arguing that "the proliferation of procedures that lead to the formal removal of noncitizens with no or minimal immigration court involvement warrants a level of attention that does not yet match the scale of the practice.").

26. Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6-7, 22-25 (2014) (discussing expedited removal, reinstatement of removal, and administrative removal through the lens of prosecutorial discretion).

27. Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 5 (2019) (explaining that CBP increasingly acts to "short-circuit the checks and balances prescribed by U.S. and international law to protect refugees from being returned to harm" by carrying out expedited removal and greater numbers).

28. Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV.

speed removals as "diversions" from the typical removal procedure, and critiqued them through an administrative law lens.[29] Still others have pointed out that such removals are more likely when low level administrators lacking training and oversight are asked to carry out complex removal procedures.[30] Needless to say, such removals have dramatically increased in recent years.[31] Similarly, third country deportation—as it currently operates—exists both in the shadows, and at a pace that often eludes judicial review. Although an initial court hearing is held in the context of what later becomes a third country deportation—in contrast to expedited removal, for example—such a hearing is ultimately a charade if DHS can, at any time thereafter, simply remove a CAT recipient to a third country absent any formal proceeding. In building upon current scholarship in this arena, this article extends the conversation, for the first time including a deep examination of "third country deportations," and situating them amidst the "bewildering array of . . . fast-track mechanisms"[32] that have led to a "deformalization"[33] of immigration law, allowing an increasing number of removals to proceed outside the purview of a courtroom.

This article fills a void in the scholarship by examining what I have termed "third country deportation"—when the government seeks to remove noncitizens to a third country without judicial process, though courts previously refused to remove them to their country of origin[34] due to the threat of torture. This article will illuminate the tensions between domestic procedural rules and our international legal obligations to understand what happens when DHS attempts to remove noncitizens to a third country outside of court proceedings. Using Peter as a case study, this article asks, what obligations does the United States have under CAT to someone like Peter? What kind of notice must be provided when the United States intends to remove a noncitizen to a third country? At the same

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923, 924 (2018).

29. *See* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009).

30. *See* Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769, 769 (2015).

31. ALISON SISKIN, CONG. RESEARCH SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 8 (2015) ("In recent years, these streamlined removal processes [including expedited removal, reinstatement, and administrative removal] have accounted for a higher percentage of total removals than standard removals, and are responsible for most of the growth in the overall number of removals.").

32. DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 52, 65-67 (2012) (describing reinstatement of removal, expedited removal, administrative removal, stipulated removal, and voluntary departure as examples of the de-formalization of immigration law) https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199742721.001.0001/acprof-9780199742721-chapter-3 [https://perma.cc/K2DV-MSK4].

33. *Id.* (emphasis in original).

34. It's worth noting that the country of origin, citizenship, and nationality may be different. In "Peter's" case, Sudan is his country of origin, citizenship, and nationality—though that will not always be the case.

time, what obligations might domestic courts have, and what, if any, domestic procedural rules might require reopening in this case to allow Peter, or someone like him, to defend against deportation to a third country? This article situates itself at the intersections of domestic and international law, asking what our obligations are under each, as well as when and whether they are in conflict. The United States' ability to potentially flout both domestic legal requirements and international obligations when it comes to protecting actual and potential victims of torture, like Peter, matters—it threatens to expand the means by which noncitizens are removed without a court proceeding in instances where the stakes are the highest—where possible torture is at stake. Ultimately, in making recommendations, this article also builds upon the work of scholars who have used international law and legal standards to inform their interpretation of the U.S. Constitution and relevant U.S. statutes and regulations in the immigration context, as well as those who have recognized the limits of such application.[35]

I. THIRD COUNTRY DEPORTATION IN CONTEXT

This Part begins by returning briefly to "Peter," to illustrate both the legal and humanitarian impact of third country deportation on vulnerable noncitizens. This Part asks, who are those subject to third country deportation, and what law or laws protect them?

A. Peter's Story

In Sudan in the 1990s, Peter's family was Christian, active in the Christian aid community, and opposed to the repressive government of President Omar al-Bashir. At the age of seven, Peter's father was shot and killed by government military officials. Shortly thereafter, his mother was kidnapped, detained and beaten, also by Sudanese military officials who returned her to her home "unable to walk." The family—Peter, his mother and his two younger siblings—fled Sudan to the neighboring country of Egypt. Once there, Peter and his family were designated as refugees, but life remained difficult. On one occasion, Peter witnessed a horrific stampede by police in a refugee camp that left many around him injured or dead. Finally, when Peter was 15 years old, he and his family were

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35. *See* Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 287 (2013); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 700-05 (2007); David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 645-49 (2006); Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004); *see also* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 118 (2006) ("[T]he fact that a treaty is not self-executing does not qualify the United States' international obligations under the treaty."); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 88 (2004) (noting that international human rights norms and decisions "cannot control constitutional interpretation, but they may inform it" and may prove helpful in requiring reexamination of long-standing doctrinal structures).

brought to the United States.

But in the United States, Peter struggled. Violent nightmares left him reliving the traumas of his childhood. He found himself on edge, hyper vigilant, and mistrustful of those around him. To quiet these symptoms and to help himself sleep, Peter turned to alcohol in high school. At 19 years old, while drunk, Peter was arrested for theft and assault. He pled guilty and was detained by Immigration and Customs Enforcement ("ICE") and placed in immigration removal proceedings.

In removal proceedings, Peter, through counsel, sought several defenses to deportation. And, after nearly one year in detention, he was ultimately granted relief under CAT, when the Immigration Judge found that he would face torture by the Sudanese government if removed there. His removal to Sudan was thus "deferred" and his removal proceedings were closed.

Just prior to his final removal hearing, in July of 2011, South Sudan was granted independence and became a separate, sovereign nation. Peter was born in Khartoum, and a citizen of Sudan. South Sudan was neither suggested nor designated as a country of removal during his removal proceedings. Nevertheless, in dicta, the Immigration judge offered that he was "not sanguine"[36] that Peter would even be safe in South Sudan. As such, the issue was not explored further.

Peter, relieved, was released from ICE custody and returned to his life and home in New England. Peter still struggled with substance abuse and had trouble with the law. But with Peter now the eldest of eight siblings, his family relied on him to help care for his diabetic mother and to help with cooking and cleaning around the house. In his mid-20s, Peter met Emily, a U.S. Citizen, and together they had two sons. While Emily worked, Peter relished being a stay at home father, caring for their two young boys.

One evening, as Peter was taking out the trash at his home, four ICE officers surrounded him. It had been nearly seven years since he was granted relief under CAT, and he didn't expect to encounter ICE again. Surprised, he asked why he was being detained. "We're sending you to South Sudan, now!" several of them retorted, laughing. After nearly 18 months in a New England Jail, Peter was finally released, and reunited with his two young children. This article is, in part, the story of how that happened–and why he should never have been at risk of removal to South Sudan in the first place.

B. The Convention against Torture (CAT) Article 3.1 and U.S. Implementation

Under international and domestic law, a person may not be removed to a country where she will be tortured. CAT was adopted "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[37] CAT is multifaceted, including requirements

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36. Copy of Immigration Judge's decision on file with author. (Mar. 13, 2012).

37. Convention Against Torture, *supra* note 14, at ANNEX. *See generally* Pnina Baruh Sharvit, *The Definition of Torture in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 23 ISR. Y.B. HUM. RTS. 147, 147 (1994)

that participating states work to prevent torture within their own borders, and to take other measures to protect actual or potential victims of torture. Most relevant to this article, CAT includes Article 3.1 which reads, "[n]o 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."[38]

Movement toward this international treaty began in 1974, when the United Nations (UN) General Assembly directed the Fifth United Nations Congress "to give urgent attention to the question of the development of an international code of ethics for police and related law enforcement agencies" and "to include, in the elaboration of the *Standard Minimum Rules for the Treatment of Prisoners*, rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment."[39] Thereafter, CAT was drafted by several bodies working within the UN framework and adopted by the UN General Assembly on December 10, 1984.[40]

In 1988, the United States signed CAT, and following the advice and consent of the Senate, revisions were made and the Senate adopted CAT in August of 1990.[41] The United States ultimately ratified CAT in 1994.[42] Still, advocates made little use of CAT until 1999, largely because, until then, the domestic legal machinery for implementing CAT had not yet been established.[43]

In 1990, the Senate held that CAT was not self-executing; thus, Congress needed to pass implementing legislation. Finally, in 1998, Congress implemented CAT through the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"),[44] though many have argued that given the content and text of the implementing statute, the implementing statute "arguably falls short" of meeting

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("The prohibition of torture . . . is one of the most basic principles of human rights, and is compared to the most fundamental rights, such as the right to life or the prohibition of slavery."); CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 33.10 (rev. ed. 2014).

38. Convention Against Torture, *supra* note 14, at art. 3.1 (emphasis in original).

39. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 14-15 (1988) (quoting a draft resolution of the 1974 UN General Assembly) (emphasis in original).

40. *Id.*

41. S. COMM. ON FOREIGN RELATIONS, REPORT ON CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 101-30, at 9 (1990).

42. *See* U.N. Doc. 571 Leg/SER.E/13.IV.9 (1995).

43. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1120 (6th ed. 2015).

44. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G. Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) [hereinafter FARRA].

our domestic obligations under CAT.[45]

CAT was adopted to ensure that no individual is subjected to torture in their own country or returned to a country where they will be subject to torture. Because of the universal condemnation of torture, there are no exceptions to this prohibition, not even for individuals with serious criminal convictions.[46] That is, relief under CAT is mandatory.[47] By contrast, many, if not most, other forms of immigration relief, including asylum,[48] cancellation of removal,[49] voluntary departure[50] and various waivers,[51] are discretionary, and decision making is guided by case law rather than by statute or regulation.[52] Because the United States may not return an individual to a country where they may be tortured, all noncitizens facing removal from the United States are eligible to apply for deferral of removal under CAT, and if the statutory criteria are satisfied, CAT relief will be granted.[53] Moreover, because CAT is mandatory, it is generally understood that the attendant procedural protections will be greater.[54] As this article explains, that does not hold true in the context of third country deportation.

The Committee Against Torture, the monitoring body created by the parties

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45. LEGOMSKY &. RODRIGUEZ, *supra* note 43, at 1123.

46. *See* 8 C.F.R. § 1208.17 (2019); Aksoy v. Turkey, 23 Eur. H.R. Rep. 553, 585 (1996) ("Article 3 makes no provision for exceptions and no derogation from it is permissible . . . even in the event of a public emergency threatening the life of the nation."); *see also, e.g.*, Moncrieffe v. Holder, 569 U.S. 184, 187 n.1 (2013) (noting that "[a] conviction of an aggravated felony has no effect on CAT eligibility.").

47. 8 C.F.R. § 1208.17(a) (2019) ("An alien who: has been ordered removed; has been found under §1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under §1208.16(d)(2) org(d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.").

48. 8 U.S.C. § 1158 (2012), Immigration and Nationality Act § 208 [hereinafter INA].

49. 8 U.S.C. § 1229a (2012), INA § 240A.

50. 8 U.S.C. § 1229c (2012), INA § 240B.

51. 8 U.S.C. § 1182 (Supp. V 2017), INA § 212.

52. For example, by case law, when deciding whether or not to grant adjustment of status, "factors relevant to determining whether a favorable exercise of discretion is warranted include, but are not limited to: the existence of family ties in the United States; the length of the respondent's residence in the United States; the hardship of traveling abroad; and the respondent's immigration history, including any preconceived intent to immigrate at the time of entering as a nonimmigrant. A respondent's criminal history is an additional consideration." Matter of Hashmi, 24 I. & N. Dec. 785, 793 (BIA 2009) (citing Matter of Blas, 15 I. & N. Dec. 626 (BIA 1974; A.G. 1976)); Abu-Khaliel v. Gonzales, 436 F.3d 627, 634 (6th Cir. 2006); *see also Oluyemi v. INS*, 902 F.2d 1032, 1033-34 (1st Cir. 1990) (stating that an alien must establish that adjustment is warranted as a matter of discretion); Matter of Arai, 13 I. & N. Dec. 494 (BIA 1970).

53. 8 C.F.R. §§ 208.16-18, 1208.16-18 (2019).

54. *See, e.g.*, Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621 (2006) ("[T]he discretionary character of a decision may be used to justify less formal procedures and to avoid judicial review.").

to the Convention to monitor interpretation and compliance by member states, has interpreted the obligations of Article 3 of CAT as placing the burden of proof on the noncitizen applicant to demonstrate that there are substantial grounds to believe that she would be subjected to torture if removed to the proposed country.[55] Further, the Committee has interpreted the non-removal provisions of Article 3 to refer to both direct and indirect removal to a state where the individual concerned would likely be tortured, meaning that a state cannot remove a person to a third country when it knows he would subsequently be removed to a country where he would likely face torture.[56]

There are two distinct types of relief under CAT: (1) withholding of removal under CAT;[57] and (2) deferral of removal under CAT.[58] While both prohibit the removal of a noncitizen to a country where she would face torture, the latter is reserved for those noncitizens who are ineligible for withholding as the result of, for example, criminal or prosecutor bars.[59] Moreover, the ways in which each form of relief may be terminated by the Department of Homeland Security are distinct. Noncitizens granted withholding of removal under CAT may have such relief terminated if DHS establishes that the noncitizen is no longer likely to be tortured in the country of removal.[60] By contrast, deferral under CAT may, in addition, be terminated at any time based on "diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in § 208.18(c)," assuring the Department that the noncitizen will not, in fact, face torture in the country of removal.[61] In a sense then, both forms of relief under CAT are "temporary."[62] While the exact number of CAT cases that have been reopened and/or terminated is not known, it is contemplated by the statute, which outlines a two-step process for doing so,[63] and some case law, and anecdotal evidence, suggests it is a

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55. U. N. Office of the High Commissioner for Human Rights, Committee Against Torture, *Implementation of Article 3 of the Convention in the Context of Article 22, CAT General Comment No. 1*, ¶ 5, U.N. Doc. A/53/44, annex IX (Nov. 21, 1997) [hereinafter CAT General Comment No. 1] (The Committee's interpretation as to the scope of Article 3 was made in the context of CAT Article 22, which permits the Committee, upon recognition by a state party, to receive communications from individuals subject to the state's jurisdiction who claim to be victims of a CAT violation by a state party.).

56. *Id.* at ¶ 2.

57. 8 C.F.R. § 208.16 (2019).

58. 8 C.F.R. § 208.17 (2019).

59. 8 C.F.R. §§ 208.16(d)(2), 208.17 (2019).

60. 8 C.F.R. § 208.17(d) (2019) (outlining the process for the termination of deferral of removal).

61. 8 C.F.R. § 208.17(f) (2019).

62. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8,478, 8,480-82 (Feb. 19, 1999) (to be codified at 8 C.F.R. pt. 3, 103, 208, 235, 238, 240, 241, 253, and 507) (noting that both deferral of removal and withholding of removal can be terminated, though the process differs for each).

63. 8 C.F.R. § 1208.17(d)(1)-(4) (2019).

periodic occurrence.[64] Similarly, while statistics are inconsistently reported, cases involving diplomatic assurances appear to be few.[65]

To establish a claim for CAT relief, the noncitizen must show that it is "more likely than not" that she will be tortured if removed and that the torture will occur at the hands of the government, or with the acquiescence of the government, in the country of removal.[66] If the noncitizen makes this showing, then relief is mandatory and the individual cannot be removed to a country where she faces such likelihood of torture.[67] Torture is defined 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 from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind. . . .[68]

In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from one of a list of enumerated grounds.[69] Moreover, "torture does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions."[70] For the purposes of CAT however, this

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64. *See, e.g.*, Matter of C-C-I-, 26 I. & N. Dec. 376 (BIA 2014).

65. *Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Advisor, Hearing Before the Subcomm. on Int'l Orgs., Human Rights, and Oversight of the H. Comm. On Foreign Affairs*, 110th Cong. 11-12 (2008) (statement of John B. Bellinger, III, Legal Advisor, U.S. Dep't of State) (Bellinger is inconsistent in his testimony, saying that there are a "handful of cases where diplomatic assurances have been sought" in the immigration removal context, and later that there are "less than 20 cases overall since CAT was ratified," while in yet another instance he refers to a "dozen" cases in immigration *or extradition* where diplomatic assurances have been sought.); *see* Karake v. United States Dept. of Homeland Sec., 672 F. Supp. 2d 49 (D.D.C. 2009); Khouzam v. Attorney Gen. of the United States, 549 F.3d 235 (3d Cir. 2008); Yusupov v. Attorney Gen. of the United States, 518 F.3d 185 (3d Cir. 2008); Soliman v. United States ex. rel. INS, 296 F.3d 1237 (11th Cir. 2002).

66. 8 C.F.R. §§ 208.17(a), 1208.19(a)(1) (2019); *see* Negusie v. Holder, 555 U.S. 511, 536 n.6 (2009).

67. 8 C.F.R. § 208.17(a) (explaining that a noncitizen who satisfies the CAT standard "*shall* be granted deferral of removal") (emphasis added).

68. 8 C.F.R. §§ 208.18(a)(1), 1208.18(a)(1) (2019).

69. 8 C.F.R. §§ 208.18(a)(4), 1208.18(a)(4) (2019) (stating that "[i]n order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from: (i) The intentional infliction or threatened infliction of severe physical pain or suffering; (ii) 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; (iii) The threat of imminent death; or (iv) 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 sense or personality.").

70. 8 C.F.R. §§ 208.18(a)(3), 1208.18(a)(3) (2019).

definition excludes any "sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture."[71]

Since the adoption of CAT, U.S. courts have struggled to give meaning to the text of the treaty and its implementing statute and regulations. A lack of clarity on third country removal is just one ambiguity in treaty interpretation. For example, in defining what it means to be "acting in an official capacity," the Board of Immigration Appeals has looked to those acting "under color of law" in civil rights cases and held that a CAT claim will only arise in those cases in which a "public official" or person "acting in an official capacity" acquiesces to the torture.[72] Courts have differed on what this means, for instance, when a public official goes rogue or commits acts of torture while off duty, finding in some instances that this may,[73] or may not,[74] satisfy the regulation. Relatedly, courts have held that physical custody and control are not required.[75]

With regard to designation of the country to which removal under CAT will be deferred or withheld, CAT bars return only to that country specifically designated in the removal proceeding.[76] And an immigration judge may not grant CAT relief until the noncitizen has first received a final order of removal under the INA.[77] Thus, the immigration judge must initially determine that the noncitizen is subject to removal and that no other form of immigration relief is available. If the noncitizen is ordered removed, the immigration judge may *at that point* grant CAT relief, which effectively stays the removal order.[78] However, a grant of CAT relief does not eliminate the order of removal, which remains in place.[79]

Nevertheless, once CAT has been granted, the regulations permit the Government to remove a noncitizen to a third country. The regulations state: "(f) *Removal to third country.* Nothing in this section or § 208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred."[80]

The regulations do not outline any procedure or protocol for carrying out this option.[81] Moreover, a defense to third country removal at the time of the initial hearing could not logistically be raised before the proceedings are concluded—that is, in practice, an order of removal will be issued, CAT relief

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71. 8 C.F.R. §§ 208.18(a)(3), 1208.18(a)(3) (2019).

72. In re Y-L-, 23 I. & N. Dec. 270, 285 (A.G. 2002).

73. *See, e.g.*, Barajas-Romero v. Lynch, 846 F.3d 351, 361-63 (9th Cir. 2017).

74. *See, e.g.*, Costa v. Holder, 733 F.3d 13, 17-18 (1st Cir. 2013).

75. *See, e.g.*, Reyes-Reyes v. Ashcroft, 384 F.3d 782, 788 (9th Cir. 2004).

76. Silva-Pereira v. Lynch, 827 F.3d 1176, 1191-92 (9th Cir. 2016).

77. 8 C.F.R. § 208.17(a) (2019) (providing for grant of CAT deferral only if the applicant "has been ordered removed"); *see also* 8 C.F.R. § 208.17(b)(1) (stating that an applicant will be notified of her grant of CAT deferral after an Immigration Judge orders the applicant's removal).

78. 8 C.F.R. § 208.17(a) (2019).

79. *See* 8 C.F.R. §§ 208.16(f), 208.17(b)(1), 208.17(d) (2019).

80. 8 C.F.R. § 208.16(f).

81. *Cf.* 8 C.F.R. § 208.17(d).

will be granted, and the record will then be closed. In practice, DHS does not seek third country removal until after the close of proceedings and thus any evidence offered by the noncitizen during the hearing—about a hypothetical, as yet unknown, removal to a yet-to-be-named country—would almost certainly be characterized as irrelevant and, therefore, inadmissible, as evidence in a court proceeding.[82]

Just as the regulation fails to outline a procedure or protocol for carrying out third country deportation, the regulation fails to comply with our CAT obligations in other ways, too. For example, Deborah Anker has argued that the "purposeful intent" required by the U.S. definition of torture fails to comply and is inconsistent with the purpose of CAT.[83] John Parry goes further, exploring the ways in which U.S. implementation of CAT violates the principles of the Convention, while at the same time enabling the U.S. to engage in torture and to send noncitizens back to countries where they face the risk of torture. For instance, Parry explains that the U.S. interpretation of CAT does not protect persons against "cruel, inhuman, or degrading treatment or punishment" (CIDT), which Parry argues is inconsistent with our obligations under CAT.[84]

II. THE PROCESS OF THIRD COUNTRY DEPORTATION

A. Limited Statutory and Regulatory Guidance

This Part will identify which avenues are currently available to challenge third country deportation and what protections may currently exist to protect a noncitizens' rights. The removal statute sets out the process by which DHS may select a country of removal for a noncitizen facing deportation, including that DHS may remove the noncitizen to the country from which the noncitizen was admitted, born, or the port from which she came.[85] Where none of those options

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82. 8 C.F.R. §§ 1240.7(a), 1240.46(b) (providing that an Immigration Judge may only "receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial"); *see also* Andriasian v. Immigration & Naturalization Serv., 180 F.3d 1033, 1041 (9th Cir. 1999) (in which the Respondent was not informed of the newly designated country of removal until the end of his asylum hearing, after the close of evidence. The Court held that this "violated a basic tenet of constitutional due process: that individuals whose rights are being determined are entitled to notice of the issues to be adjudicated, so that they will have the opportunity to prepare and present relevant arguments and evidence.").

83. Deborah E. Anker, *Understanding "Suffering", Yet Misconstruing Intentionality: U.S. Compliance and Non-compliance with the Convention against Torture*, REFLAW (Aug. 6, 2017), http://www.reflaw.org/understanding-suffering-yet-misconstruing-intentionality-u-s-compliance-and-non-compliance-with-the-convention-against-torture/ [https://perma.cc/9KAP-P8RR].

84. John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1049-50 (2009).

85. 8 U.S.C. §1231(b)(2)(E) (2012) ("[T]he [Secretary] shall remove the alien to any of the following countries: (i) The country from which the alien was admitted to the United States. (ii) The country in which is located the foreign port from which the alien left for the United States . . . (iv)

are possible or practical, a third country whose government will accept the noncitizen may be chosen.[86] Very little has been written about so-called "third country deportation."[87] Though the issue has arisen in several circuit court cases,[88] and though the Supreme Court has confronted similar issues in designation of a country in removal proceedings—namely, removal to a country that lacks a receiving or accepting government[89]—neither scholarship on the topic nor the legislative history of 8 C.F.R. 208.16(f) shed significant light on how removal to a third country *not* named in the removal proceeding should be carried out, or what protections must be necessary in order for the process to accord with CAT.

The regulations governing deferral of removal under CAT provide, "[t]he immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country *where he or she is not likely to be tortured*."[90] As well, the legislation and regulations implementing CAT require that noncitizens be afforded the opportunity to apply for relief under the Convention *with respect to any country to which they may be removed*.[91] Taken together, this language all but requires a hearing—at which

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The country in which the alien was born . . . (vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country."); *see also* Jennifer E. Richter, *Return to Sender: Supreme Court Authorizes Removal of Aliens Without Prior Consent from the Destination Country in Jama v. Ice*, 57 MERCER L. REV. 953, 956–57 (2006) ("If, after this designation, the alien cannot be removed, then the alien must either be detained or released in accordance with other statutory provisions.").

86. *But see* Jama v. Immigration & Customs Enf't, 543 U.S. 335, 335 (2005) (8 U.S.C. § 1231(b)(2)(E)(iv) (permitting a noncitizen to be removed to a country without the advance consent of that country's government).

87. Not to be confused with the safe third country agreement or firm resettlement in a third country, each of which are distinct aspects of US immigration law. *See* 8 U.S.C. § 1158(a)(2)(A) (2019), INA § 208(a)(2)(A) (safe third country); 8 U.S.C. § 1158(a)(2)(A) (2012), INA § 208(b)(2)(A)(vi) (firm resettlement); Agreement between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, Treaties and Other International Acts Series No. 04-1229 (safe third country agreement with Canada, signed Dec. 5, 2002, effective Dec. 29, 2004), https://2009-2017.state.gov/documents/organization/178473.pdf [https://perma.cc/RE3U-VFN5]; 8 C.F.R. § 208.4(a)(6) (safe third country regulations).

88. *See* Wani Site v. Holder, 656 F.3d 590 (7th Cir. 2011); Kuhai v. Immigration & Naturalization Serv., 199 F.3d 909, 913 (7th Cir. 1999); Andriasian v. Immigration & Naturalization Serv., 180 F.3d 1033 (9th Cir. 1999); Kossov v. Immigration & Naturalization Serv., 132 F.3d 405 (7th Cir. 1998); Ademi v. INS, 31 F.3d 517 (7th Cir. 1994).

89. *Jama*, 543 U.S. at 335 (§ 1231(b)(2)(E)(iv) permits a noncitizen to be removed to a country without the advance consent of that country's government.).

90. 8 C.F.R § 208.17(b)(2) (2019) (emphasis added).

91. *See* 8 C.F.R. § 208.16(c)(4) (2019); FARRA, Pub. L. No. 105-277, Div. G. Title XXII, § 2242(a), 112 Stat. 2681, 2681-822 (1998).

time the applicant can learn which country has been designated for removal and, if they wish, seek protection. This is intuitive—an applicant cannot seek protection from harm or torture without knowing to where she will be removed. Neither an immigration judge nor anyone else can determine whether the applicant is more likely than not to be harmed or tortured in the country of removal absent designation of such country and a hearing at which testimony and evidence are received.

Moreover, though the Convention was ratified on October 21, 1994, it was subject to certain limitations, including a declaration that CAT Articles 1 through 16 were not self-executing, and therefore required domestic implementing legislation.[92] The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") made clear that, henceforth, the United States would not expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[93]

What does this mean in the context of third country removal? FARRA Section 2242(d) provides for judicial review of all CAT claims arising in the removal context. But such review would be almost meaningless if the reviewing court could not address the risk of torture in the destination country. Similarly, the notice accompanying the regulations presupposes that the opportunity to apply for protection will be country-specific, as it contemplates that a noncitizen "will have the opportunity to apply for protection as appropriate from any of the countries that are identified as potential countries of removal."[94]

B. When the Courts Weigh In

Courts have considered whether, and when, noncitizens must be notified of removal to a third country and the process by which they may be permitted to present a request for relief from removal to that third country. For example, in *Andriasian v. INS*, an immigration judge told a *pro se* asylum-seeker at an initial hearing that Azerbaijan was one of the countries designated for removal.[95] At the hearing itself, however, the judge added Armenia to the list of possible countries of deportation.[96] The Ninth Circuit held that the "last minute designation" of a new country of removal was impermissible.[97] Indeed, such designation foreclosed the opportunity to present evidence in support of Andriasian's claim for relief and

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92. *See generally* Resolution of Advice and Consent to Ratification, S. EXEC. RPT. 101-30 (1990) [hereinafter Sen. Resolution].

93. FARRA, Pub. L. No. 105-277, Div. G. Title XXII, § 2242(a), 112 Stat. 2681, 2681-822 (1998).

94. *See* Execution of Removal Orders; Countries to Which Aliens May Be Removed, 70 FR 661, 671 (Jan. 5, 2005) (to be codified at 8 C.F.R. pt. 241, 1240-1241) (Supplementary Information, clarifying without amending language used in the final rule).

95. Andriasian v. Immigration & Naturalization Serv., 180 F.3d at 1038 (9th Cir. 1999).

96. *Id.* at 1039.

97. *Id.* at 1041.

violated a basic tenet of due process—namely, that "individuals whose rights are being determined are entitled to notice of the issues to be adjudicated, so that they will have the opportunity to prepare and present relevant arguments and evidence."[98]

In the Seventh Circuit, the Kossov family faced similar due process violations. The Kossovs, a husband and wife who arrived in the United States on tourist visas from what was then the Soviet Union, filed for asylum and were placed in removal proceedings.[99] Their asylum application, with Mrs. Kossov as the lead, ultimately claimed fear of persecution in Latvia on account of her religion and ethnicity.[100] During the hearing, at which the Kossovs appeared *pro se*, Mrs. Kossov argued that she was in fact stateless following the dissolution of the Soviet Union, at which time the government asked the Immigration Judge to designate Russia as the country of removal.[101] The Immigration Judge complied.[102] And yet, the bulk of the testimony concerned persecution in the country of Latvia—not Russia. The Seventh Circuit, referring to a "fundamental failure of due process," held that an immigration judge must affirmatively notify *pro se* asylum applicants that removal to each specific country designated is a possibility, and must then advise them of the availability of relief as to each one.[103]

Over a decade later, in the case of Sudanese national Zakaria Bullen Wani Site, the Seventh Circuit went further.[104] Mr. Wani Site had been ordered removed to Sudan when, at the petition for review stage, the government, for the first time, asserted that it may remove Mr. Wani Site to South Sudan, instead.[105] The Seventh Circuit rejected that assertion, holding that the Government may not initiate removal proceedings to remove a noncitizen to South Sudan at such a late stage in the proceedings, even if South Sudan did not exist at the time of the noncitizen's initial removal proceedings.[106]

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98. *Id.*; *see also* Castillo-Villagra v. INS, 972 F.2d 1017, 1029 (9th Cir. 1992) (taking administrative notice of changed country conditions without providing opportunity to rebut violates due process but overruled on other grounds).

99. Kossov v. Immigration & Naturalization Serv., 132 F.3d 405 at 406 (7th Cir. 1998).

100. *Id.*

101. *Id.* at 407.

102. *Id.*

103. *See Kossov*, 132 F.3d at 408 (holding that because "the IJ never informed the Kossovs, who at the time were without counsel, that they had the right to . . . introduce evidence specifically directed against deportability to Russia," they could not be deported to Russia); *see also Kuhai*, 199 F.3d at 913 (reversing deportation order where BIA had *sua sponte* altered the country of deportation from Uzbekistan to Ukraine, thereby denying petitioner the opportunity to apply for asylum and withholding relief with respect to that country); 8 C.F.R. § 240.49(c)(2) (2001) (requiring that IJ provide notification of right to apply for asylum or withholding of deportation to the country of deportation and forms for such application).

104. *Wani Site*, 656 F.3d at 595.

105. *Id.* at 594.

106. *See id.* at 595 (remanding to the immigration judge to determine whether the designated

Importantly though, the cases of Andriasian, Kossov, and Wani Site involve respondents in active removal proceedings, prior to the issuing of a final order of removal. In these cases, there are eyes on the Respondent; that is, their cases are "open," and they have the procedural ability to appeal adverse decisions, shedding light on substantive and procedural due process violations, as well as other violations of domestic and international law. Conversely, the reality faced by respondents like Peter is bleak—with no judicial review, they languish in the shadows, often in immigration detention, with very limited recourse or protection available to them. In this way, in cases like Peter's, whether intentionally or not, the government is doing a sort of "end run" around the law—waiting to raise the prospect of third country removal until the noncitizen has no process by which to contest it.

C. Existing Law and Remedies: Limited Recourse for Respondents

What mechanisms are currently available in the case of third country deportation to—at least hypothetically—protect the rights of noncitizens? This section explores the potential avenues for protection, including motions to reopen and habeas relief, available to noncitizens facing the prospect of third country removal. More concretely, the foregoing examines the limitations on those protections.

The protections available to Respondents subject to third country deportation are scant. In fact, the only available mechanism provided by the regulations to apply for protection with respect to a third country appears to be reopening the proceedings. Reopening the case allows the immigration judge to hear new facts and evidence in a proceeding. Motions to reopen and to reconsider ("MTRs") provide an important means of correcting errors in removal proceedings, and the only available means of taking into account changed circumstances or new legal precedent.[107] While motions to reconsider address legal or factual errors,[108] motions to reopen address new facts that were previously unavailable.[109] Indeed,

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country of removal could be changed from Sudan to South Sudan).

107. Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 153 (2010); 8 U.S.C. §§ 1229a(c)(6)-(7) (2012); U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGRATION REV., IMMIGRATION CT. PRAC. MANUAL 102-107 (2018).

108. *In re* Ramos, 23 I. & N. Dec. 336, 338 (BIA 2002) (ruling that a motion to reconsider asks that a decision be reexamined "in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier," including errors of law or fact in the previous order); *see also* 8 U.S.C. § 1229a(c)(6)(C) (2012); 8 C.F.R. § 1003.2(b)(1) (2019); INA § 240(c)(6)(C).

109. A motion to reopen is based on "facts or evidence not available at the time of the original decision." Patel v. Ashcroft, 378 F.3d 610, 612 (7th Cir. 2004). It must be supported by affidavits or other evidence, and must establish that the evidence is material, was unavailable at the time of the original hearing, and could not have been discovered or presented at the original hearing. *See* 8 U.S.C. § 1229a(c)(7) (2012); 8 C.F.R. § 1003.2(c)(1) (2019); INA § 240(c)(7); *see also* Kaur v.

the Supreme Court has noted that motions to reopen are "an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings."[110] This part will focus on motions to reopen, rather than motions to reconsider, as they are most likely to be relevant in the third country removal context—that is, the possibility of removal to a third country, and torture or persecution in that country, is a new, previously unavailable fact which requires, I argue, notice and a new hearing.

By statute, a motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."[111] A motion to reopen presented to the immigration judge or Board of Immigration Appeals must show that the new, proposed evidence is: (1) material; (2) was unavailable at the time of the original hearing; and (3) could not have been discovered or presented at the original hearing.[112]

Responding to the concerns of courts and Congress that motions to reopen could lead to abuse and delay,[113] regulations were promulgated imposing both time and number limits on such motions,[114] limits that were later incorporated into the statute.[115] Today, following the issuance of a final order of removal,

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BIA, 413 F.3d 232, 234 (2d Cir. 2005).

110. Kucana v. Holder, 130 S. Ct. 827, 834 (2010) (quoting Dada v. Mukasey, 554 U.S. 1, 18 (2008)) (internal quotation marks omitted).

111. 8 U.S.C. § 1229a(c)(7)(B) (2012), INA § 240(c)(7)(B).

112. 8 C.F.R. § 1003.2(c)(1).

113. *See* Immigration & Naturalization Serv. v. Abudu, 485 U.S. 94, 107 (1988) ("There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases."); Immigration & Naturalization Serv. v. Doherty, 502 U.S. 314, 323 (1992) ("This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.") (citing Immigration & Naturalization Serv. v. Rios-Pineda, 471 U.S. 444, 450 (1985)). In the Immigration Act of 1990, Congress directed the Attorney General to "issue regulations with respect to . . . the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations [should] include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions." Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 4978, 5066 (1990). Congress issued this directive in order to "reduce or eliminate . . . abuses" of regulations that, at that time, permitted respondents to file an unlimited number of motions to reopen without any limitations period. *See* Stone v. Immigration & Naturalization Serv., 514 U.S. 386, 400 (1995). There is evidence that the agency did not share this concern. *See* Zhang v. Holder, 617 F.3d 650, 657 (2d Cir. 2010) (quoting Dada v. Mukasey, 554 U.S. 1, 13 (2008)) ("Although the Attorney General expressed doubt about the need to impose such limitations because there was 'little evidence of abuse,' she ultimately promulgated regulations that, subject to certain exceptions, permitted an alien to 'file one motion to reopen within 90 days.'").

114. *See Stone*, 514 U.S. at 400 (discussing congressional directive to agency to promulgate regulations).

115. *See* 8 U.S.C. § 1229a(c)(6)(B) (2012), INA § 240(c)(6)(B) (motion to reconsider); 8

noncitizen respondents have the legal right to file one motion to reopen within ninety days of the immigration judge's decision.[116] Nonetheless, there are some available exceptions created by statute or regulation,[117] as well as *sua sponte* authority available to immigration judges and the BIA to reopen cases in which they have made a decision "at any time."[118] Among the exceptions are those pertaining to fear-based protection based on changed country conditions arising *in the country to which removal has been ordered*—in such cases, no restrictions apply.[119] In addition, some courts of appeal have held that the deadline for filing a motion to reopen may be tolled.[120] Importantly, the Government's ability to file a motion to reopen is not subject to any of the time and numerical limitations.[121]

Peter's case illustrates both the value of, and limitations on, a motion to reopen in the third country deportation setting. Following his arrest by ICE nearly seven years after his original grant of relief under CAT, Peter was arrested and detained in immigration custody in New England. Through counsel, Peter filed an emergency motion to reopen his removal proceedings, citing new facts and providing new evidence that he would be tortured or killed if removed to South Sudan. Peter argued that this evidence was material and previously unavailable—after all, South Sudan had only recently become a sovereign nation.[122] Moreover, conditions in South Sudan had deteriorated significantly during the past several years, and there was ample evidence that those like Peter are targeted by the South Sudanese government for harm, torture and death.[123] Finally, Peter could not have filed this motion at an earlier date as he had no way

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U.S.C. § 1229a(c)(7)(C)(i) (2012), INA § 240(c)(7)(C)(i) (motion to reopen).

116. 8 U.S.C. § 1229a(c)(7)(C)(i), INA § 240(c)(7)(C)(i) (establishing ninety-day deadline for motion to reopen).

117. 8 U.S.C. § 1229a(c)(7)(C)(ii) (2012), INA § 240(c)(7)(C)(ii); 8 U.S.C. § 1229a(c)(7)(C)(iv) (2012), INA § 240(c)(7)(C)(iv).

118. *See* 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1) (2019). Sua sponte reopening is subject to certain limitations regarding judicial review and application of 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) that are generally not applicable to statutory motions.

119. *See* 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.23(b)(4)(i) (2019); 8 C.F.R. § 1003.2(c)(3)(ii) (2019).

120. *See e.g.*, Kuusk v. Holder, 732 F.3d 302, 305 (4th Cir. 2013) (collecting equitable tolling cases).

121. *See* 8 C.F.R. § 1003.23(b)(1) (2019).

122. South Sudan became a sovereign nation when it declared its independence on July 9, 2011. *See* Jeffrey Gettleman, *After Years of Struggle, South Sudan Becomes a New Nation*, N.Y. TIMES (July 9, 2011), https://www.nytimes.com/2011/07/10/world/africa/10sudan.html [https://perma.cc/B94S-K3UR].

123. *See* U.S. DEP'T OF STATE, SOUTH SUDAN 2017 HUM. RTS. REPORT 2 (2018); *Soldiers Assume We Are Rebels: Escalating Violence in South Sudan's Equatorias*, HUM. RTS. WATCH (Aug. 1, 2017), https://www.hrw.org/report/2017/08/01/soldiers-assume-we-are-rebels/escalating-violence-and-abuses-south-sudans [https://perma.cc/S7EE-UDKH]; *South Sudan: Army Abuses Spread West*, HUM. RTS. WATCH (Mar. 8, 2016), https://www.hrw.org/news/2016/03/06/south-sudan-army-abuses-spread-west# [https://perma.cc/8QGV-UE63].

of knowing that DHS would take the step of attempting to remove him, without a hearing, to a newly created country where he faces likely torture and death.

Though the new evidence that Peter sought to present was material, previously unavailable, and could not have been discovered or presented at the original hearing,[124] the Immigration Judge denied his request to reopen his removal proceedings.[125]

Notwithstanding an appeal on the denial of his motion to reopen, what other options are available for a noncitizen Respondent in this situation? A second possibility would be a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Historically, habeas corpus has been used to challenge the legality of deportation.[126] Federal District Courts have jurisdiction to hear habeas claims by noncitizens contesting the lawfulness of their immigration detention.[127] As described below, a habeas claim in this context might allege violations of FARRA, due process, the INA and applicable regulations, and/or the Administrative Procedures Act ("APA"), and seek, as relief, that the court enjoin the government from removing the noncitizen to the proposed third country until she has an opportunity to apply for a defense to deportation.[128] A habeas in this context might also seek release from custody and/or an individualized custody determination to give the noncitizen an opportunity to request release from

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124. 8 C.F.R. § 1003.2(c)(1) (2019).

125. That decision was subsequently appealed to the Board of Immigration Appeals and is now pending. *See* copy of decision on file with author. (Feb. 12, 2019).

126. *See, e.g.*, United States *ex rel.* Mensevich v. Tod, 264 U.S. 134, 135 (1924) (exercising habeas jurisdiction over challenge to country selected for deportation during the period when applicable habeas review was reduced to the constitutional minimum); United States *ex rel.* Di Felice v. Shaughnessy, 114 F. Supp. 791, 793 (S.D.N.Y. 1953) (recognizing that "[i]t has long been held" that noncitizen could challenge the lawfulness of the place of deportation on habeas); United States *ex rel.* Chen Ping Zee v. Shaughnessy, 107 F. Supp. 607, 609 (S.D.N.Y. 1952) (same).

127. *See, e.g.*, Aguilar v. Immigration & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 11 (1st Cir. 2007) (citing Demore v. Kim, 538 U.S. 510, 516 (2003)); Federal Courts still have jurisdiction over habeas claims notwithstanding certain "jurisdiction-stripping provisions" present in the REAL ID Act of 2005 and set forth in 8 U.S.C. § 1252. Indeed, even if the jurisdiction-stripping provisions applied here, to foreclose habeas relief for a noncitizen Respondent facing potential torture or death in the country of removal would present a violation of the Suspension Clause. Compere v. Nielsen, 358 F. Supp. 3d 170, 179 (D. N.H. 2019) (quoting Boumediene v. Bush, 553 U.S. 723, 792 (2008)); *see also* Hussein v. Brackett, No. 18–cv–273–JL, 2018 WL 2248513 *1 at *4-5 (D. N.H. May 16, 2018); *see also* Devitri v. Cronen, 290 F. Supp. 3d 86, 93 (D. Mass. 2017) ("*Devitri I*") (concluding that "[i]f the jurisdictional bar in 8 U.S.C. § 1252(g) prevented the Court from giving Petitioners an opportunity to raise their claims [for post-order of removal Motions to Reopen based on changed circumstances] through fair and effective administrative procedures, the statute would violate the Suspension Clause as applied"). *But see* Hamama v. Adducci, 912 F.3d 869, 876-77 (6th Cir. 2018) (holding that the district court lacked jurisdiction to entertain the Suspension Clause stay of deportation habeas claim, and even if the district court had jurisdiction, 8 U.S.C. § 1252(g) provided an adequate substitute for habeas).

128. *See, e.g.*, *Compere*, 358 F. Supp. 3d at 176.

custody from an immigration or federal court judge.[129]

Ultimately, both motions to reopen and habeas are inadequate and ineffective solutions. To begin, both of these mechanisms place the burden unfairly on the Respondent. Not only may the government reopen a case at any time, subject neither to restrictions on time nor number of motions,[130] but in this case, to place the burden of reopening on the Respondent violates both domestic procedural rules and our international obligations.

And this burden, it should be noted, is heavy. Noncitizens in removal proceedings are not entitled to counsel, except at their own expense.[131] The government, then, has no obligation to provide an attorney for those noncitizens unable to afford one.[132] As a result, for noncitizens who are detained during their removal proceedings, the average rate of representation during 2016-2017 was just about 30 percent.[133] Unfortunately for *pro se* respondents seeking relief from removal, immigration law is notoriously complex—alternately described as "labyrinthine, " "hyper-technical," and known to cause "waste, delay, and confusion for the Government and petitioners alike."[134] Add to this calculus that noncitizens are likely to be attempting to navigate this complicated body of law in a language they do not understand, and in a judicial system where they are dramatically out-resourced by well-equipped government prosecutors.[135] On top

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129. *Id.*

130. *See* 8 C.F.R. § 1003.23(b)(1) (2019).

131. INA § 240; 8 U.S.C. § 1229a(b)(4)(A) (2012) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.").

132. The only exception is in the case of noncitizens found to be mentally incompetent. *See* Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010); *see also* U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (2013); Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787 (2017); Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1023 (2016).

133. *Who is Represented in Immigration Court?*, TRACIMMIGRATION (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/ [https://perma.cc/26ML-NQYB].

134. Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (describing "the labyrinthine character of modern immigration law" as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike"); *see also* Filja v. Gonzales, 447 F.3d 241, 253 (3d Cir. 2006) (characterizing the immigration regulations as "labyrinthine"); Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004) ("It is no wonder we have observed '[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.'") (quoting Castro-O'Ryan v. Immigration & Naturalization Serv., 847 F.2d 1307, 1312 (9th Cir. 1987)).

135. *See generally* Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1 (2014) (highlighting the inequalities faced by noncitizens in

of that, many noncitizen Respondents will litigate their cases while recovering from significant trauma and persecution, further challenges to their success.[136] It is no surprise then that a national study of access to counsel in immigration court found that the odds were "fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal."[137] For detained noncitizens, the statistics are devastating. The study found that "detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts."[138]

Considering the inequity between noncitizen Respondents and government prosecutors, and the high stakes involved in potentially removing a noncitizen to a country where she faces harm, this article starts from the premise that "third-country removal would require additional proceedings" and that, at the very least, "DHS would be required to give petitioners notice and the opportunity for a hearing."[139]

And finally, a note about discretion and finality. Even if the above weren't inadequate and ineffective solutions, there is a serious question as to whether, even if legally justified, third country deportations are a worthwhile expenditure of the government's limited resources. Moreover, taking into account factors like family or community ties to the United States, victim status, and other humanitarian considerations, though outside the scope of this paper, there is a strong argument to be made that prosecutorial discretion is warranted here.[140] That is, even if third country deportation were legally permissible, that in many cases, on balance, these noncitizens—often victims or would-be victims of torture and persecution—are entitled to discretion. Moreover, in light of the government's limited resources to pursue deportation efforts—and the already enormous backlog of cases present in the immigration courts[141]—finality is desirable. Indeed, finality has historically accompanied adjudicative

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immigration proceedings due to DHS attorneys' almost unchecked level of discretion on how to conduct the proceedings and little to no disclosure requirements).

136. *See, e.g.*, Jennifer Umberg, *Trauma and the Paradox of Asylum Seekers' Credibility* 11 (Jan. 10, 2018) (published M.A. Thesis, Columbia University), https://academiccommons.columbia.edu/doi/10.7916/D8DZ1RWJ/download [https://perma.cc/S66J-A6MY] ("Studies estimate that PTSD among refugees range from 30-80 percent").

137. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9 (2015).

138. *Id.*

139. Diaz v. Hott, 297 F. Supp. 3d 618, 625 (E.D. Va. 2018) (*cf. Kossov*, 132 F.3d at 408–09).

140. For a further discussion of the role of prosecutorial discretion in the immigration removal context, *see* Shoba Sivaprasad Wadhia, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015).

141. *Immigration Court Backlog Tool*, TRACIMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/ (last updated June 30, 2019) [https://perma.cc/3KNZ-YGDF].

relief—providing some semblance of permanence in status.[142] Granting relief to a noncitizen only to leave him in limbo, and with the possibility of deportation to a third, not-yet-named country in the future, is antithetical to the principles of finality, discretion, and administrative efficiency.

III. OUR DOMESTIC AND INTERNATIONAL LEGAL OBLIGATIONS REQUIRE MORE

This article contends that we have specific requirements domestically, as well as unique requirements as a state party to CAT, to ensure that there are procedural protections for any noncitizen who may be removed to countries where they face torture. To begin with, on a domestic level, we have substantive norms that require certain procedural protections to ensure "fundamental fairness" in removal proceedings.[143] These include both Due Process requirements and protections under the APA. Similarly, our obligations under CAT and the FARRA statute—which implemented our treaty obligations under the non-self-executing CAT—all require that someone in Peter's situation be given an affirmative opportunity by an immigration judge to present evidence in support of a claim for relief prior to removal to a third country. In the event that there is any question as to the force of our domestic procedural rules, they must be interpreted in a way that conforms to our international obligations. In short, even if our domestic law is ambiguous, we must read it not to undermine our clear international obligations under CAT.[144]

A. Due Process and the APA

Though not subject to the full range of constitutional protections, immigration proceedings "must conform to the Fifth Amendment's requirement of due process."[145] Due process requires that the government be constrained before it

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142. Jason A. Cade, *Enforcing Immigration Equity,* 84 FORDHAM L. REV. 661, 668 (2015).

143. *See, e.g.*, Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause."); Dakane v. United States Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2005) ("It is well established in this Circuit that an alien in civil deportation proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause . . . to a fundamentally fair hearing."); Borges v. Gonzales, 402 F.3d 398, 408 (3d Cir. 2005) ("[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings." (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)(internal quotations omitted)); Rosales v. Bureau of Immigration & Customs Enf't, 426 F.3d 733, 736 (5th Cir. 2005) ("[D]ue process requires that [deportation] hearings be fundamentally fair . . ."); Brown v. Ashcroft, 360 F.3d 346, 350 (2d Cir. 2004) ("The right . . . under the Fifth Amendment to due process of law in deportation proceedings is well established.").

144. Murray v. The Charming Betsy, 6 U.S. 64 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

145. Salgado-Diaz v. Gonzales, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended); *see also* Gonzaga-Ortega v. Holder, 736 F.3d 795, 804 (9th Cir. 2013) (as amended); Vilchez v. Holder, 682 F.3d 1195, 1199 (9th Cir. 2012); United States v. Reyes-Bonilla, 671 F.3d 1036, 1045 (9th Cir. 2012); Lacsina Pangilinan v. Holder, 568 F.3d 708, 709 (9th Cir. 2009) (order)*; see also* Gutierrez

acts in a way that deprives individuals of life or liberty interests protected under the Due Process Clause of the Fifth Amendment.[146] Of course, removal without a formal hearing is tolerated in certain contexts—Jill Family has categorized myriad ways in which noncitizens are "diverted" from the immigration adjudication process, including explicit and implicit waivers, in which certain visa holders, for example, waive their rights to access trial-level administrative adjudication, administrative review, and judicial review in exchange for the benefits of a visa.[147] Similarly, in the context of expedited removal, DHS can, and does, remove certain noncitizens at ports of entry without a hearing.[148] One notable exception in both of these "diversionary" situations is in the case of a noncitizen who fears a threat to her life—by claiming fear, at least hypothetically, noncitizens can get into court, and in front of an immigration judge, in order to make a claim for relief. Though even this supposed failsafe has been challenged as inadequate protection, in which poorly trained officers "act as investigator, judge, and jury, with the immigration courts completely uninvolved in the removability determination."[149] Outside of these contexts, at a minimum, removing a noncitizen from the United States without the procedural safeguards of a formal hearing may result in a due process violation.[150]

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v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings . . . . A court will grant a petition on due process grounds only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.") (citations and quotation marks omitted).

146. Colmenar v. Immigration & Naturalization Serv., 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.").

147. Family, *supra* note 29, at 612.

148. *Id.* at 624; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., *Annual Report, Immigration Enforcement Actions: 2016*, at 8 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf [https://perma.cc/VS94-FN23] (reporting that of 340,056 removals in 2016, 141,518 were expedited removal orders and 143,003 were reinstatements, totaling 284,521, or 83.6 percent). At the time of this writing, the United States Government has initiated yet another way to remove noncitizens at ports of entry, summarily expelling noncitizens at the border in the name of public health. Order Suspending Introduction of Persons From a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567 (proposed Mar. 24, 2020) (to be codified at 42 C.F.R 71), https://www.cdc.gov/quarantine/order-suspending-introduction-certain-persons.html.

149. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193 (2017).

150. *See Salgado-Diaz*, 395 F.3d at 1162–63 ("[F]ailing to afford petitioner an evidentiary hearing on his serious allegations of having been unlawfully stopped and expelled from the United States, aborting his pending immigration proceedings and the relief available to him at the time, violated his right to due process of law."); United States v. Raya-Vaca, 771 F.3d 1195, 1204 (9th Cir. 2014) (failure to inform petitioner of the charge against him and to provide him with the opportunity to review the sworn statement constituted a violation of petitioner's due process rights) ("Due process always requires, at a minimum, notice and an opportunity to respond.").

And in a case where DHS seeks to remove a noncitizen to a third country where she may be tortured, this article argues that the noncitizen must have a chance to present her claim for relief, including a hearing and the opportunity to present evidence on her behalf, *before* she is removed from the United States to that country.[151] For Respondents in this particular procedural posture, the Court has previously granted them relief—the Court has affirmatively recognized their unique vulnerability as survivors of torture, or as someone likely to be tortured in the future—and accorded them protection under CAT as a result.[152] Such persons warrant extra protections. Further still, for those who are detained and facing removal to a third country, there are potential violations of the due process clause of the Fifth Amendment, as it regards the noncitizen's liberty interests and freedom from imprisonment.[153] Specifically, due process requires that, in these cases, deprivation of the noncitizen's liberty be narrowly tailored to serve a compelling government interest.[154] Where, instead, a noncitizen is detained, pending removal to a country that has not been formally designated, continued detention is not in service of any permissible government objective and is, therefore, unlawful.[155] In short, due process is violated when a noncitizen is summarily removed to a third country absent an opportunity to be heard.[156]

In addition, removal to a third country of a noncitizen absent notice and a hearing violates the APA. Though an exhaustive analysis is outside the scope of this article, the APA may be a mechanism to challenge third country deportation. The APA prohibits agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[157] In conformity with this standard, when reviewing agency actions, courts "must assess, among other

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151. "A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings. . . . A court will grant a petition on due process grounds only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) (citations and quotation marks omitted); *see also* Cano-Merida v. Immigration & Naturalization Serv., 311 F.3d 960, 964 (9th Cir. 2002); Colmenar v. Immigration & Naturalization Serv., 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.").

152. 8 C.F.R. § 208.16(c)(2) (2019).

153. "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V; Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.").

154. *See Zadvydas*, 533 U.S. at 695-696 (discussing how courts' interference with "'sensitive' repatriation negotiations" does not entitle the government to heightened deference).

155. *Id.* at 695-96, 699.

156. *See, e.g.*, *Andriasian*,180 F.3d at 1041 (9th Cir. 1999) (failing to provide notice to a noncitizen of the country to which he would be removed violates due process); *see also* Castillo-Villagra v. Immigration & Naturalization Serv., 972 F.2d 1017, 1029 (9th Cir. 1992) (taking administrative notice of changed country conditions without providing opportunity to rebut violates due process) (overruled on other grounds).

157. 5 U.S.C. § 706 (2)(B).

matters, whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[158] This assessment "involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons."[159] Thus, courts have the important role of "ensuring that agencies have engaged in reasoned decision making."[160] In these cases, agency action may be arbitrary, capricious and an abuse of discretion, when taken without providing notice or a hearing to the noncitizen.[161] In accordance with the APA and the requirements of due process, a noncitizen facing removal to a third country is entitled to both notice that a third country has been designated, and a hearing at which she can present evidence that she would not be safe there.

B. CAT and FARRA

Pursuant to FARRA and the regulations, and to ensure compliance with international treaties to which it is a signatory, the Government is prohibited from removing any noncitizen to a country where she will more likely than not face torture.[162] Article 3.1 of CAT is clear, "[n]o 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."[163] There is no provision or exception for a "third country" or alternate country, that may be designated following the close of proceedings and without additional judicial review.

As mentioned, CAT is definitively interpreted through the opinions of the Committee Against Torture, a panel of independent experts charged with monitoring implementation and state party compliance with CAT.[164] And, in fact, a review of the cases from the Committee reveals not a single case in which a country has asserted authority to remove someone to a country without providing her the opportunity to apply for relief under CAT specifically with respect to that country.[165] This kind of affirmation by omission suggests that nations that commit

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158. Judalang v. Holder, 565 U.S. 42, 53 (2011) (internal quotations omitted).

159. *Id.*

160. *Id.*

161. *See* 8 U.S.C. § 1231(a)(4) (2012).

162. *See* FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 (1998); 8 C.F.R. §§ 208.16, 208.17 (2019).

163. Convention Against Torture, *supra* note 14, at art. 3.1.

164. U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (OHCHR), *Committee Against Torture*, https://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx [https://perma.cc/3JML-QWAH] (last visited Jan. 10, 2020).

165. *See* UNIV. OF MINN. HUM. RTS. LIBR., *Decisions and Views of the Committee Against Torture Under Article 22 of the Convention*, http://hrlibrary.umn.edu/cat/decisions/cat-decisions.html [https://perma.cc/5JDL-HHQP] (last visited Feb. 18, 2019); *see also* OHCHR, *Jurisprudence* (CAT and nonrefoulement), http://juris.ohchr.org/en/search/results/3?typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0 [https://perma.cc/3H2Y-6V2L] (last visited Feb. 18, 2019) (reporting several dozen cases, none of which involve a state asserting that

themselves to the Convention Against Torture, like the United States, do not remove noncitizens to countries without giving them the opportunity to apply for country-specific relief.

C. Ambiguity Requires That We Interpret Statutes in Light of Our International Legal Obligations

In immigration litigation, international human rights law has been invoked, "primarily as a guide to the interpretation of immigration statutes and of constitutional protections for foreign nationals."[166] So too here, we can—and should—examine the immigration statute and regulations through the lens of international human rights law to ensure that the rights of noncitizens like Peter are adequately protected.

Indeed, courts have been somewhat hospitable to arguments that international human rights norms are an appropriate guide for statutory or constitutional interpretation in the immigration context.[167] For example, in 1987, in interpreting the "withholding of removal" provision in the Immigration and Nationality Act, the Supreme Court relied on our obligations under the Refugee Convention.[168] Thereafter, in *Ma v. Reno*, the Ninth Circuit invoked international law limits on arbitrary detention to prohibit the indefinite detention of immigrants following a final order of removal.[169] Indeed, following Chief Justice John Marshall's famous proclamation in *The Charming Betsy*,[170] we now know that "absent a clear conflict, courts should interpret federal statutes to conform to international law obligations. To do so, the courts must by necessity take account of and interpret applicable international law norms."[171]

CAT provides that, "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture."[172] With this in mind, we can turn to interpreting the statute and regulations to be in conformity with this obligation.

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it can deport someone without allowing them to apply for relief specific to the country of deportation).

166. Cole, *supra* note 35, at 644.

167. Cole, *supra* note 35, at 645. *But see* Susan Akram, *The Past as Present, Unlearned Lessons and the (Non-)Utility of International Law*, 44 N.C. J. INT'L L. 389, 417 (2019) (noting that there are "significant barriers to the use of international legal strategies in refugee and immigration-related cases").

168. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987). *But see* Akram, *supra* note 167, at 407 (Despite a favorable outcome for the Respondent noncitizen in this case, Akram notes that the court's legal reasoning was "deeply flawed," and moved "U.S. refugee jurisprudence farther away from international practice.").

169. Ma v. Reno, 208 F.3d 815, 818-20, 829-31 (9th Cir. 2000), *vacated and remanded on other grounds*, 257 F.3d 1095 (2001); *see also* Zadvydas v. Davis, 533 U.S. 678 (2002).

170. Murray v. The Charming Betsy, 6 U.S. 64 at 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains[.]").

171. Cole, *supra* note 35, at 646.

172. Convention Against Torture, *supra* note 14, at art. 2.

Invoking international law in this way—indirectly, as an aid to statutory construction—obviates many of the concerns raised when advocates pursue more direct reliance on international human rights principles, including the problem of non-self-executing treaties and "generating common law through customary international law."[173]

And, precisely because the section of the regulations that contemplates third country deportation outlines no process for doing so,[174] we are well served to use international human rights law here as a "guide." Similarly, the Board of Immigration Appeals has recognized that additional procedural protections are warranted when imposing a bar on asylum relief. For example, in determining whether or not to allow a duress exception to the "persecutor bar"—which bars applicants from receiving asylum if they are found to have persecuted others—the Board considered both our domestic and international legal obligations, as well as the potential resultant harm in foreclosing a duress exception.[175] That is, because the stakes are so high when it comes to the possibility of persecution—that is to say nothing of *torture*—additional care must be given so as not to "shut off a life line in a compelling case" for relief in the refugee context.[176] So, too, here we must be mindful of the high stakes involved—that, absent additional procedure, a noncitizen may be removed to a country in which she will be tortured. And, she risks being removed there without due process or judicial review.

Finally, the risk that third country removal becomes simply another mechanism for "speed" or "shadow" deportation is real and threatens the due process rights of noncitizens and the integrity and fairness of the legal system, as well as our obligations under domestic and international law. What remedies exist, then, for a proceeding in which DHS seeks to remove a noncitizen to a third country?

Other scholars to confront so-called "speed" or "shadow" deportations have posited various suggestions for reform. Jennifer Lee Koh has argued that shadow deportations must necessarily be part of a larger conversation around immigration court and removal proceedings reform;[177] and that shadow deportations are just one way in which the executive branch is inhibiting noncitizens' access to

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173. Cole, *supra* note 35, at 646 (explaining that, for example, statutory construction arguments "avoid the problem of non-self-executing treaties" as well as the dangers articulated in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) about "generating common law through customary international law").

174. 8 C.F.R. § 208.16(f) (2019).

175. Matter of Negusie, 27 I. & N. Dec. 347 (BIA 2018).

176. *Id.* at 361; *see also* Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar Analysis*, 33 GEO. IMMIGR. L. J. 213, 238 (2019) ("First, the proposed procedural safeguards must be crafted in a manner that recognizes the severe consequences that adhere in application of the bar in the worst-case-scenario.").

177. Koh, *supra* note 149, at 231 ("This Article advocates incorporating summary removals and the peripheries of immigration court more comprehensively into conversations over immigration adjudication.").

immigration courts altogether.[178] Situating her analysis within a *Mathews* framework, Shoba Sivaprasad Wadhia has argued that DHS should "provide a fair day in court for those who qualify for relief from removal or whom the administration has determined warrant protection from removal based on individual equities," including eligibility for relief from removal, longtime residents, survivors of violence, and individuals with serious medical or mental health conditions.[179] Whereas Lindsay Harris, in the context of increasing expedited removals occurring in the shadows, advocates the use of body-worn cameras by CBP officers to ensure that refugees are not illegally returned to harm through expedited removal.[180]

Recipients of CAT are, by definition, vulnerable—an immigration judge has previously determined that they have been and/or will more than likely be victims of torture—the most severe form of harm short of death. It is in this vein that this article argues for more robust and automatic protections for this vulnerable group that do not depend on individual equities, and go further than the exceptions set forth by statute and regulation.[181] For this group of especially vulnerable noncitizens, this article argues for (1) adequate notice, (2) burden shifting, and (3) an evidentiary hearing before removal to a third country can be carried out.

1. Adequate Notice.—Peter's notice of removal to South Sudan consisted of a verbal taunt by immigration enforcement officers at the time of his arrest—"We're sending you to South Sudan, now!"[182]—followed by one letter, summarily informing him that "[his] case is under current review by South Sudan for the issuance of a travel document."[183] This notice was informal, at best.[184] More importantly, missing from this notice was any process by which Peter could contest the basis of his removal or mount a defense to deportation based on his fear of return to South Sudan. In fact, during his arrest by ICE officers outside his family home in December of 2018, Peter was told to sign the papers ICE handed him "or else" he would be "prosecuted and sent to federal prison."[185] Nervous, and unsure what he was signing, Peter ultimately relented. Though he was also terrified of being removed to South Sudan, a country in which he has never

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178. Jennifer L. Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48-74 (2020).

179. Wadhia, *supra* note 26, at 25-26.

180. Harris, *supra* note 27, at 5.

181. *See e.g.*, 8 U.S.C. § 1229a(c)(7)(C)(iv) (2012), INA § 240(c)(7)(C)(iv); 8 U.S.C. § 1229a(c)(7)(C)(ii) (2012), INA § 240(c)(7)(C)(ii).

182. Telephone conversation with "Peter" (Dec. 6, 2018) (notes on file with author).

183. "Notice of Revocation of Release" (Dec. 4, 2018) (copy of notice on file with author).

184. In this instance, a lack of adequate notice and process seems the proverbial feature, rather than the bug. But, perhaps, it is the latter—yet another example of the challenges of automated government decisions that create a crisis for the administrative state. *See e.g.*, Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1281 (2008) (explaining how automated government decisions "often deprive individuals of their liberty and property, triggering the safeguards of the Due Process Clauses of the Fifth and Fourteenth Amendments.").

185. Telephone conversation with "Peter" (Dec. 6, 2018) (notes on file with author).

stepped foot and where he believes he will be tortured or killed.[186]

Due Process requires the government to provide adequate notice before it acts in any way that deprives a person—regardless of immigration status—of life or liberty interests protected under the Fifth Amendment. Typically, when the government wishes to remove a noncitizen, they must first issue a "Notice to Appear" ("NTA") and file it with the immigration court.[187] The NTA must contain the nature of the proceedings, the legal authority under which proceedings are conducted, the factual allegations and identification of the provisions of the INA alleged to have been violated, as well as the noncitizens' rights.[188] In the case of third country deportation, this article proposes similar notice in writing that clearly outlines (1) the nature of proceedings, (2) the charges against the noncitizen, and (3) the process by which a noncitizen can contest third-country removal in the ways described below.

2. Burden Shifting.—To read our domestic procedural rules in conformity with our obligations under CAT requires that we shift the burden to DHS to reopen an immigration removal proceeding in the case of third country deportation.

The statute and regulations related to motions to reopen set clear time and number limits on such motions—time and number limits to which DHS is not subject.[189] And while fear-based protection, such as CAT, is not subject to these limitations, it is only fear-based protection related to country conditions *in the country to which removal has been ordered*.[190] Where, as here, a new third country is sought by DHS—a country to which the Respondent has not previously been ordered removed—this supposed protective failsafe is moot. These limits on the Respondent's ability to motion to reopen her case —coupled with the extraordinary burdens of appearing, often *pro se*, in immigration court—require nothing less than burden shifting in the third country removal context.

Placing the burden on DHS in removal proceedings is not unprecedented. For example, for persons who are charged with not being admitted or paroled into the United States, the burden of proof is now statutory. If the person is not an applicant for admission, DHS must first establish "alienage."[191] Similarly, DHS bears the burden of establishing deportability by evidence which is "clear, unequivocal, and convincing."[192] Where DHS seeks to rescind a grant of lawful

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186. *Id.*

187. 8 U.S.C. § 1229(a)(1) (2012), INA § 239(a).

188. 8 U.S.C. § 1229(a)(1) (2012), INA § 239(a).

189. *See* 8 C.F.R. §§ 1003.2(a); 1003.23(b)(1) (2019). *Sua sponte* reopening is subject to certain limitations regarding judicial review and application of 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) that are generally not applicable to statutory motions.

190. *See* 8 U.S.C. § 1229a(c)(7)(C)(2) (2012); 8 C.F.R. § 1003.23(b)(4)(i); 8 C.F.R. § 1003.2(c)(3)(ii) (emphasis added).

191. 8 C.F.R. § 1240.8(c) (2019).

192. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 277 (1966). Though once alienage is established, the burden is on the respondent to show the time, place, and manner of

permanent resident status, it again bears the burden and must provide evidence that is "clear, unequivocal, and convincing."[193] Most recently, the U.S District Court for the District of New Hampshire held that, in certain bond proceedings, placing the burden on noncitizen detainees is, in fact, unconstitutional.[194] Other courts have gone further, recognizing that "due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake are both particularly important and more substantial than loss of money"[195] and that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[196] These courts and others have held that due process requires the government to bear the burden of justifying detention by clear and convincing evidence.[197]

Similarly, keeping the burden on vulnerable, and likely unrepresented, Respondents to claim relief in the case of removal to a third country cannot be squared with our legal obligations. If the burden is not shifted to DHS, then the onus remains on noncitizens to articulate their fear in legally cognizable terms. Currently, for noncitizens who fear return, they may be able to seek protection following a "credible" or "reasonable" fear interview (CFI, or RFI, respectively), depending on the particular procedural posture of the case.[198] All first-time border crossers must be asked a series of four fear-related questions, by regulation, in an effort to protect against removal of a noncitizen to a country where she fears harm, but the same does not apply to someone previously granted relief who DHS intends to remove to a third country.[199] Typically, for any noncitizen who

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entry. 8 U.S.C. § 1361 (2012), INA § 291.

193. Matter of Vilanova-Gonzalez, 13 I. & N. Dec. 399, 399 (BIA 1969); Waziri v. Immigration & Naturalization Serv., 392 F.2d 55, 57 (9th Cir. 1968).

194. *See* Hernandez-Lara v. Immigration & Customs Enf't, No. 19-cv-394-LM, 2019 WL 3340697, at *4-7 (D.N.H. July 25, 2019) ("[T]he court holds that, in a § 1226(a) bond hearing, due process requires that the government bear the burden of justifying detention by clear and convincing evidence.").

195. Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) (internal quotation marks and ellipses omitted).

196. Addington v. Texas, 441 U.S. 418, 425 (1979).

197. *See* Aparicio-Larin v. Barr, No. 6:19-cv-06293-MAT, 2019 WL 3252915, at *6 (W.D.N.Y. July 20, 2019); Nzemba v. Barr, No. 6:19-cv-06299-MAT, 2019 WL 3219317, at *1, *7 (W.D.N.Y. July 17, 2019); Velasco Lopez v. Decker, No. 19-cv-2912, 2019 WL 2655806, at *1, *3 (S.D.N.Y. May 15, 2019); Linares Martinez v. Decker, No. 18-CV-6527, 2018 WL 5023946, at *1, *5 (S.D.N.Y. Oct. 17, 2018); Darko v. Sessions, 342 F. Supp. 3d 429, 435-36 (S.D.N.Y. 2018).

198. *A Primer on Expedited Removal*, AMERICAN IMMIGRATION COUNCIL (July 22, 2019), https://www.americanimmigrationcouncil.org/research/primer-expedited-removal [https://perma.cc/P5ZF-8J4P].

199. 8 C.F.R. § 235.3(b)(2) (2019); *see* Form I-867A & B, Record of Sworn Statement in Proceedings (requiring officers to ask these four questions: (1) Why did you leave your home country or country of last residence? (2) Do you have any fear or concern about being returned to your home country or being removed from the United States? (3) Would you be harmed if you are

"indicates either an intention to apply for asylum . . . or a fear of persecution," CBP must refer her to the asylum office for a credible fear interview.[200] If she can demonstrate a "significant possibility" that she will ultimately establish eligibility for asylum at a full hearing, she is then "detained for further consideration of application for asylum."[201] By contrast, a noncitizen who previously had a removal order and is attempting to reenter the United States and facing "reinstatement" of her original removal order must pass through a "reasonable" fear interview.[202] In a reasonable-fear interview, the burden is higher—the noncitizen must establish a "reasonable possibility" that she would be persecuted on account of one of five protected grounds, or that "she would be tortured in the country of removal."[203] If she is successful, she is placed in "withholding only" proceedings where she may make her case for withholding of removal—a lesser form of protection—in front of an immigration judge.[204]

But there is significant, and mounting, evidence that CFI/RFI determinations are fraught—often overlooking bona fide claims for relief from removal.[205]As such, a CFI/RFI or similar process cannot be relied upon as a viable solution for noncitizens subject to third-country removal. For example, beginning in 2005, at the request of Congress, the U.S. Commission on International Religious Freedom ("USCIRF") released three reports detailing the realities of noncitizens facing removal at the border.[206] The results were alarming. One study revealed that in 50 percent of interviews, border officials failed to inform noncitizens that they could seek protection if they feared return.[207] What's worse, in 15 percent of the interviews observed, asylum seekers who expressed fear were deported without a fear interview.[208] Subsequent studies and reports have confirmed that immigration officers "seemed singularly focused on removing [noncitizens] from the United States, which impeded their ability to make their fears known."[209]

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returned to your home country or country of last residence? (4) Do you have any questions or is there anything you would like to add?).

200. 8 U.S.C. § 1225(b)(1)(A)(ii) (2012), INA § 235(b)(1)(A)(ii).

201. 8 U.S.C. § 1225(b)(1)(B)(v) (2012), INA § 235(b)(1)(B)(v).

202. 8 C.F.R. § 208.31 (2020).

203. 8 C.F.R. § 208.31(c) (2019).

204. *See* 8 U.S.C. § 1231(b)(3) (2012), INA § 241(b)(3); *see* Harris, *supra* note 27, at 22-37 (providing a more thorough inventory of the differences between these two processes).

205. *American Exile: Rapid Deportations That Bypass The Courtroom*, AMERICAN CIVIL LIBERTIES UNION 20-22 (2014), https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom [https://perma.cc/Y49M-AH2S] [hereinafter ACLU, *American Exile Report*].

206. *Id.* at 17-18.

207. *See American Exile: Rapid Deportations That Bypass The Courtroom*, AMERICAN CIVIL LIBERTIES UNION 43, 99-100 (2014) (explaining the right to apply for asylum and for protection from persecution under international law and norms), https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom [https://perma.cc/Y49M-AH2S] [hereinafter ACLU, *American Exile Report*].

208. *Id.* at 43.

209. *"You Don't Have Rights Here": US Border Screening And Returns Of Central Americans*

Indeed, what's clear from reports over more than a decade is that immigration officials routinely provide unreliable accounts of migrants' testimony, summarily deport asylum-seeking migrants, and create a culture of outright hostility toward those seeking asylum.[210]

It is in this climate that we must consider the rights of noncitizens who have been granted a review under CAT and who are, by definition, exceptionally vulnerable,[211] having established that it is more likely than not that they will be tortured in the previously designated country of removal. This article argues that in lieu of some initial showing by the noncitizen—whether through a CFI/RFI or other process—the burden should be placed squarely on the shoulders of DHS to automatically re-open the Respondent's removal proceeding in cases where DHS wishes to seek removal to a third country.

3. Evidentiary Hearing.—Where DHS bears the burden of reopening the Respondent's proceedings prior to removal to a third, newly designated country, there must also be a full evidentiary hearing. Indeed, as cases like Peter's have percolated up through the circuit courts, it appears that some judges have, at least indirectly, contemplated an actual, evidentiary hearing when a third-country designation is sought by DHS. For example, in the case of Mr. Wani Site, the Seventh Circuit noted that if DHS wanted to remove him to a third country other than the country designated during the initial removal proceeding, then "the government still could have *initiated proceedings* to remove him to a country other than Sudan, presumably including South Sudan once diplomatic relations were established."[212]

Pursuant to Section 240 of the INA, a noncitizen shall have a "reasonable opportunity to examine the evidence against [her], to present evidence on [her] own behalf, and to cross-examine witnesses presented by the Government."[213] Here, too, a Respondent like Peter should have the right to a hearing at which he can present evidence in support of a request for relief from removal to the newly designated country. For example, in Peter's case, he was prepared to offer

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To Risk Of Serious Harm, HUMAN RIGHTS WATCH 6, 8 (2014), http://www.hrw.org/sites/default/files/reports/us1014_web_0.pdf [https://perma.cc/A28B-QW87] [hereinafter HRW, *You Don't Have Rights Here Report*].

210. *See id*; *see* ACLU, *American Exile Report*, *supra* note 205; *see also* Harris, *supra* note 27, at 77; *see also e.g.,* Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585 (2019) (documenting legacies of hostility toward asylum claims from Central Americans in particular).

211. *See* Amanda C de C Williams & Jannie van der Merwe, *The Psychological Impact of Torture*, 7 BR. J. PAIN 2, 101 (2013) (discussing how survivors of torture experience complex trauma beyond PTSD and have increased susceptibility to chronic pain conditions); *see also* Zachary Steel et al., *Association of Torture and Other Potentially Traumatic Events with Mental Health Outcomes Among Populations Exposed to Mass Conflict and Displacement*, 302 J. AM. MED. ASS'N 5, 537, 548 (2009) (concluding that experiencing torture is the "strongest [substantive] factor associated with PTSD").

212. Wani Site v. Holder, 656 F.3d 590, 595 (7th Cir. 2011) (emphasis added).

213. 8 U.S.C. § 1229a(b)(4)(B) (2012), INA § 240.

evidence including his own testimony and the expert testimony of a South Sudanese human rights researcher, as well as numerous governmental and non-governmental reports corroborating the torture and violence faced by Peter's ethnic group in South Sudan. However, in the absence of an evidentiary hearing, such evidence can be neither presented nor fully considered.

This article acknowledges the enormous backlog faced by immigration courts—a record 945,711 pending cases nationwide as of June 2019[214]--and recognizes that providing evidentiary hearings to noncitizen detainees like Peter would add to that backlog. Notwithstanding the backlog, however, in order to comply with our domestic and international legal obligations, we must provide evidentiary hearings in this context. Abridging the rights of noncitizen detainees like Peter is not excused in times of judicial delay or because of a shortage of resources to address our immigration crisis. Instead, this article urges fixes as have been proposed by others[215] to alleviate the burden on immigration courts, rather than violation of the rights of some of the most vulnerable.

CONCLUSION

Noncitizens' rights in removal proceedings are already, and increasingly, limited. For those noncitizens who face the prospect of removal outside the courtroom, those rights are all but absent. For these noncitizens, who are unrepresented, often using a language not their own to navigate a complex body of law, and acting from behind bars in a detention center, the prospect of fighting their removal to a third country they likely have never known is daunting. This article calls for both an acknowledgement of this deprivation of rights, as well as for a meaningful solution—namely, adequate notice, burden shifting, and a full evidentiary hearing during which time the noncitizen can present her claim for relief from deportation to a country where she faces harm or torture.

In March 2020, after nearly 18 months in immigration custody, Peter was granted relief under CAT from South Sudan, following a hearing at which testimony was taken from both Peter and a South Sudan country expert. At that point – and in the midst of the Covid-19 pandemic – ICE indicated their intention to seek Peter's removal to yet *another*, as yet unnamed, country. At this point,

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214. *Immigration Court Backlog Tool*, TRACIMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/ (last updated June 30, 2019).

215. *See Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, AM. BAR ASS'N 2-29, 31 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [https://perma.cc/ZUR5-2VES]; Elizabeth J. Stevens, *Making our 'Immigration Courts' Courts*, FED. LAWYER (Mar. 2018), https://www.naij-usa.org/images/uploads/publications/Federal_Bar_Magazine%2C_Marking_Our_Immigration_Courts_Court_%28March_2018%29.pdf [https://perma.cc/KHW7-JLRL]; *Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AM. IMMIGRATION COUNCIL 1 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/empty_benches_underfunding_of_immigration_courts_undermines_justice.pdf [https://perma.cc/JFJ7-6SP5].

Peter's case had wound its way through the immigration court, the Board of Immigration Appeals, district court and the First Circuit Court of Appeals. Following the prospect of continued litigation, ICE ultimately agreed to release Peter on an order of supervision. In March 2020, Peter finally returned home to his family in New England.

In the current era, asylum law is undergoing significant change, and protections afforded to asylum seekers and refugees are being systematically eroded. The prospect of continuing third country deportations should frighten us all; not only do they add to the growing list of ways in which noncitizens face "speed" or "shadow" deportation from the United States, but such removals run afoul of both our domestic and international legal obligations.