HUMAN DIGNITY AND THE CONVENTION AGAINST TORTURE: HAS THE BURDEN OF PROOF BECOME HEAVIER THAN ORIGINALLY INTENDED?

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I. INTRODUCTION

Claims of human dignity are frequently weighed against the sovereignty afforded to states in the application of their laws, especially when they involve balancing national immigration policy against the claims of human rights.¹ Today, modern treaty agreements have created protections for victims of state sponsored torture that in earlier times were nonexistent.

In the United States, the Judeo-Christian principles on which this nation was founded reinforce the idea that man deserves protection because of an inherent human dignity.² Since God is the author of human rights, He calls all nations to “exercise justice and righteousness.”³ Thus, the importance of protecting the rights of individuals goes beyond our call to honor our treaty obligations. To respect the inherent dignity of humans created in God’s image remains our higher obligation. Human rights belong to man not only because of his place

¹ CHRIS INGESE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 1 (2001). The tension that exists between both of these competing interests when determining what kinds of laws should be made and enforced regarding treatment of citizens and noncitizens, often works to limit states’ sovereignty due, in part, to the desire of these nations to have positive relationships with each other through treaty agreements.

² Id. at 28.

³ Jeremiah 22:16.
in nature, but also by virtue of his nature. As one author suggests, "[h]uman rights are worth only as much as it is worth to be human."

Torture, as a violation of human rights, not only destroys individuals who are victims to it, but it also does harm to the societies that tolerate the practice. Unfortunately, not every society considers the worth of every individual to be the basis for protecting human rights. For example, societies that have elevated the "legitimate rights" of people, as a collective whole, have also been known for violating the human rights of individuals. "Human rights, like other moral ideals, make apparent the emptiness and even hypocrisy of what is often only a lip service."

In the United States, though torture violations are non-existent compared with other nations, frustration comes from the enactment or misapplication of domestic immigration law that seems to diverge from our international commitments. Due to the close relationship between immigration issues and human rights, the divergence between stated commitment and actual practice seems to demonstrate that, when it concerns illegal immigrants, the United States views them as possessing a lesser degree of human worth.

Adoption of the Convention Against Torture (CAT) was a significant move forward in affirming the goal of nations to eradicate torture, and requiring nations not to deport individuals that face state-sponsored torture in their own nation. The United States adopted the CAT in 1988, however, despite the United States' commitment to ef-

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5 Id. at 54. This belief comes from the proposition that man is created in the divine image as stated in Genesis 1:27, a belief of both Jewish and Christian religions that has greatly influenced American society. Id.; see also Psalm 8:5.
6 Id.
7 Id.
8 Id. at 84.
9 Laura S. Adams, Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights, 51 EMORY L.J. 983 (2002). The divergence between treaty and political commitments and actual practice becomes evident when the solid commitment to protect individuals from human rights violations is seriously relaxed regarding individuals that are not entitled to be in the United States. Id. at 987. As a nation, we devote increased attention to the protection of human rights through the ratification of treaties, while passing domestic immigration legislation that undermines and impedes application of treaty goals. Id. at 992. The result is an intolerable and unjust double standard. Id. at 994.
fectuate the goals of the CAT, problems remain in its application. The main issue contended here is that the courts have interpreted the burden of proof necessary to establish a claim under the CAT in a way contrary to legislative intent, causing individuals who will certainly face torture to be deported.11

This note analyzes an evidentiary problem that arises in applying the CAT in the United States. Specifically, it addresses the application of the burden of proof in cases arising under the CAT, and suggests that its current application is inadequate to protect individuals facing torture. Section II provides a brief general history of torture leading up to the CAT to illuminate that, although state-sponsored torture is not as widespread as it once was, some nations continue to view human beings as having little inherent dignity, and will use torture as a means to govern. Section III gives a brief overview of the adoption of the CAT and the general provisions at issue in this article. This section also explains the connection between immigration law and the CAT as it pertains to the burden of proof by dealing with its application and the resulting problems. Section IV analyzes the problems the courts application and interpretation of the burden of proof, and discusses whether such application reflects the legislative intent and purposes of the CAT. The need for better application of the burden of proof for those seeking CAT relief is important, especially because the lives and dignity of individuals are concerned.

II. HISTORY AND PRACTICE OF TORTURE

The practice of torture has long been a part of human history, and many recognize that "[i]t is associated with some of the darkest moments in human history . . . " Torture, in general, has been described as "[t]he use of physical coercion by officers of the state in order to gather evidence for judicial proceedings." Some of the most egregious examples of torture in modern times are those that have occurred under the direction of totalitarian regimes. The regimes of Hitler and Stalin, for example, relied heavily on the practice of torture as a tool to keep the people under their authoritarian rule. Their well-documented acts display a complete disregard for human worth. Hitler's acts, in particular, so defied a collective sense of human worth and dignity that, at the end of the WWII, torture was declared "morally unacceptable" and contrary to international law. No national policy or law could any longer be a basis for rationalizing the

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12 For example, in Roman culture torture was used to extract information in circumstances not directly related to judicial proceedings. INGESE, supra note 1, at 24. The Romans used the practice of torture to bring about confessions from slaves, and even used it on their own citizens in cases involving treason. Id. (emphasis added) Many tortured for treason also included a wide variety of religious and political dissenters. Id. Eventually, the decline of the Roman Empire, and subsequently the Roman law, gave individuals respite from state-approved torture until the twelfth century. Id. at 25. During this time, torture continued, but without sanction by the state. Id. State-sponsored torture reemerged when confessions became a prominent evidentiary technique. Id. at 26. Finally, during the enlightenment era, torture subsided because it became more difficult to reconcile the practice of torture with the humanitarian ideals of that period. Id. at 28. Indeed, the law began to reflect the belief that individuals possess inherent dignity and value. Id. Also, the law of evidence began to emphasize reason and common sense; and, as a result of these factors, the use of torture to obtain confessions was no longer viewed as a just or valuable technique. Id. Following the French Revolution, all European states had outlawed torture as a legal tool. Id. at 29-30. However, despite such progress, the practice of torture has continued to the present time; and, where it has, devaluation of human dignity can be identified, such as where certain groups like slaves or prisoners of war are freely tortured. Id.

13 See, e.g., Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004).


15 INGESE, supra note 1, at 30.

16 Id.


18 PETERS, supra note 14, at 30.
use of torture.19 The import of the international reaction is that symbolized the unified commitment by nations to prevent the atrocities of WWII from ever reoccurring.20

In the past several decades, there have been many international instruments expressing the international community’s censure of torture by the hands of public officials.21 The Third and Fourth Geneva Conventions, for example, to which virtually all countries are parties, “forbid any form of torture or cruelty.”22 This general principle has been established as the standard of protection for all persons, “in time of peace as well as of war.”23 Today, by way of treaty and largely as a result of the U.N. Declaration of Human Rights, many nations have committed themselves to ending the practice of torture, including the United States.24

III. THE CONVENTION AGAINST TORTURE

A. The CAT’s Background

The United Nations adopted the CAT by unanimous agreement on December 10, 1984.25 The United States signed the CAT on April 18, 1988.26 Its purpose was to establish “a regime for international cooperation in the criminal prosecution of torturers . . . .”27 Article 2 of the

19 Id. This global reaction is the predecessor to the modern phenomenon of prosecuting individuals for committing war crimes.
20 Id. at 31.
22 See President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, reprinted in 13857 U.S. Cong. Serial Set (i), 3 (May 23, 1988) [hereinafter PRESIDENT’S MESSAGE].
23 Id. at 3.
26 PRESIDENT’S MESSAGE, supra note 22, at v.
27 SEN. RESOLUTION, supra note 25, at 2.
CAT, for example, requires that “signatory parties take measures to end torture within their territorial jurisdiction.”

President Reagan’s message is chiefly important in construing the Convention’s terms, especially regarding the definition of torture and the degree to which it would become part of United States domestic law. With regard to the definition, the President’s message suggested that the definition was meant to “include torture of extreme acts.” According to the President, torture should be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment. Though the letter did not delineate these lower forms, they are those that are “not so universally or categorically condemned such that the protection of the Convention should come into play.” The President’s message concentrated instead on what acts should be considered: “For an act to constitute torture, it must be an extreme form of cruel and inhuman treatment, it must cause severe pain and suffering, and it must be intended to cause severe pain and suffering.”

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28 CONVENTION AGAINST TORTURE, supra note 10, art. 2. Article 2 states that: (1) “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction;” (2) no exceptional circumstances, whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture; (3) an order from a superior officer or a public authority may not be invoked as a justification of torture. Id.

29 Id. According to the committee comments, “[t]he strength of the Convention lies in the obligation of States Parties to make torture a crime and to prosecute or extradite alleged torturers found in their territory.” SEN. RESOLUTION, supra note 25, at 3. Also, the committee stated that “[r]atification of the Convention Against Torture will demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it. Id. “Ratification is a natural follow-on to the active role that the United States played in the negotiation process for the Convention and is consistent with longstanding U.S. efforts to promote and protect basic human rights and fundamental freedoms throughout the world.” Id.

30 PRESIDENT’S MESSAGE, supra note 22, at 3.

31 Id.

32 Id.

33 Id. An important aspect of this definition is the consideration that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment. Id. Article 1, which includes the definition of torture, emphasizes the severe nature by underscoring torture’s key ingredients: severe pain and suffering. Id. This construction includes severe pain and suffering that is both mental and physical. Id. Also, the objective element of intent under the convention is noted in the requirement that the purpose must be to obtain information of a confession, intimidation and coercion, or any reason based on discrimination of any kind. Id. at 3-4. Some of the examples given include sustained systematic beatings, application of electric currents to sensitive parts, and tying up or hanging in positions that cause extreme pain. Id. at 4.
plicate the Convention, the definition of torture assumes that the activity will take place "in the context of governmental authority," thus excluding torture that occurs in the private context. The full definition given in Article 1 became:

[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 a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The President also recommended that the provisions in the Convention should not be "self-executing so that the provisions of the declaration would not in and of themselves become effective as domestic law." This was emphasized so that when the United States became a party to the Convention, "improper application of it to legitimate law enforcement actions and interests domestically would not result." For example, regarding Article 1, the following was also added: "The act of torture must be a deliberate and calculated act of an extremely cruel and inhuman in nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering." Thus, an effective tool of limitation to the Convention was added in order to protect interpretation and application of U.S. law, which may have conflicting Constitutional standards.

What the convention does not include are acts that are "inherent or incidental to lawful sanctions. Id.

34 Id. at 4.


36 PRESIDENT'S MESSAGE, supra note 22, at 2. These reservations declare that Articles 1-16 of the Convention are not self-executing. Id.

37 Id. at 6.

38 Id. at 4-5. Again, the act was to apply against "persons in the offender's custody or physical control." Id. Furthermore, the United States added the provision that "noncompliance with applicable legal procedural standards does not per se constitute torture." Id.
B. Burden of Proof under the CAT and U.S. Case Law

Article 3(1) of the CAT provides that "[n]o state party shall expel, return, 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." The CAT discusses the necessary elements to adjudicate a claim under its provisions, including the mandatory prohibition on extradition of someone likely to be tortured in the demanding country, the standard of proof to establish such a claim, the definition of torture, and the scope of the inquiry. Under the CAT, a signatory "would violate international law by encouraging or condoning torture in other countries if it should send someone back to a country where he or she would likely be tortured." The burden as established under the CAT for "substantial grounds" is "more likely than not," the same standard used under U.S. immigration law for withholding of deportation, a remedy typically sought alongside asylum. Thus, one must resort to current U.S. immigration law to understand what torture victims have to prove to take advantage of the CAT's protection.

Since 1980 the Immigration and Nationality Act (INA) has provided withholding of deportation and asylum as typical remedies given to deportable aliens who fear persecution. To qualify for asylum an individual must meet the definition of a refugee. A refugee is a person who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Withholding of deportation, on the other hand requires that the "Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." In INS v. Stevic, the Supreme Court had held that the standard for withholding deportation was that there must be a
“clear probability that the individual would be persecuted if extra-
dited.”

Stevic involved a Yugoslavian citizen (respondent) who entered the United States to visit his sister, an alien residing in Chicago, in 1976. The respondent overstayed his period of admission and voluntarily agreed to depart by February of 1977. But, before respondent was to leave, he married a United States citizen who obtained a visa approval on his behalf, allowing him to stay. The respondent’s wife died in an automobile accident shortly after his visa approval, and, as a result, his visa was revoked and he had to surrender himself for deporta-
tion to Yugoslavia.

The respondent then moved to reopen his deportation proceedings, asking for relief under § 243(h) of the INA. The respondent claimed that he feared imprisonment if returned to Yugoslavia because of his recent involvement in an anti-Communist organization and because his father-in-law had been imprisoned in Yugoslavia due to membership in the same organization. The INS in that case denied the respondent’s motion after applying the “clear probability” burden of proof to the respondent’s asylum and withholding of deportation requests; the Board of Immigration Appeals (BIA) agreed.

On appeal, the Second Circuit reversed and remanded, after applying the less-restrictive “well-founded fear” burden of proof. The court did so because it believed a 1980 amendment to § 243(h) re-
quired the court to “abandon the ‘clear probability’ standard to a ‘well-
founded fear’ standard” for withholding of deportation.

The Supreme Court ultimately reversed the Second Circuit court’s decision and held that for § 243(h) withholding of deportation claims,

46  Stevic, 467 U.S. at 413.
47  Id. at 409.
48  Id.
49  Id.
50  Id. at 409-10.
51  Stevic, 467 U.S. at 410. The act provides that:
[i]the attorney general is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Id. (quoting 8 U.S.C. § 1253(h) (1976)).
52  Id. at 410.
53  Id. at 411-12.
54  Id. at 412.
55  Id.
the "clear probability of persecution" standard will be applied for withholding cases.\textsuperscript{56} The Court viewed the legislative history differently than the Second Circuit, recognizing the long standing availability of withholding of deportation to individuals who were already in the United States, although unlawfully and subject to deportation, but not for those at the border seeking refuge due to persecution.\textsuperscript{57} The Court pointed to the Second Circuit's faulty notion that every alien who qualifies as a refugee is entitled to withholding of deportation, and concluded that this was not so.\textsuperscript{58}

Accordingly, the Court held that the 1980 amendment did not change the standard required for withholding of deportation.\textsuperscript{59} The Court also defined the "clear-probability" standard as requiring proof that an individual would be "more likely than not" persecuted on one of the statutorily specified grounds.\textsuperscript{60} In this case the Court declined to define the terms "well-founded fear," however, which is the standard required for asylum claims.\textsuperscript{61} This would later cause confusion to those relying on Stevic to decide asylum and withholding of deportation cases. The confusion would come from the fact that, while the statutory burden of proof had been established for a claim for withholding of deportation, the burden of proof for asylum had not been defined, nor had the court given any guidance regarding the burden of persuasion to be applied to the facts brought forth to establish a claim for asylum or withholding of deportation.

The lack of clear definition in Stevic caused confusion regarding the burden of proof and burden of persuasion in the area of asylum and withholding of deportation.\textsuperscript{62} An example of this confusion, and a case helpful in seeing some of the underlying problems, was Matter of

\textsuperscript{56} Id. at 429-30. This clear probability is also called the "more likely than not" standard of probability in later cases. This note will use "more likely than not" to express the standard because it is the phrase that later cases use more often.

\textsuperscript{57} Id. at 415.

\textsuperscript{58} Id. at 428.

\textsuperscript{59} Id. at 429-30.

\textsuperscript{60} Id. at 429-30.

\textsuperscript{61} Id. at 430.

\textsuperscript{62} See, e.g., Sotto v. INS, 748 F.2d 832, 836 (3d Cir. 1984) (holding that there is no difference between the standards for asylum and withholding of deportation); Matter of Lam, 18 I. & N. Dec. 15 (BIA 1981) (finding no significant difference showings required for asylum and withholding of deportation); Carvajal-Mujoz v. INS, 749 F.2d 360, 362 (7th Cir. 1984) (finding standards for asylum and withholding of deportation to be "very similar"); Bolanos-Hernandez v. INS, 749 F.2d 1316, 1321 (9th Cir. 1984) (holding that the well-founded fear standard for asylum is more generous).
Acosta. The case involved a 36-year-old citizen of El Salvador (respondent) who had entered the United States without inspection. The respondent applied, initially, for asylum under 8 U.S.C. 1158 "and for mandatory withholding of deportation . . . pursuant to . . . 8 U.S.C. § 1253(h)." The BIA applied the general statutory standard, that, in order to qualify for asylum, an alien must show that he or she is a refugee. To prove this an applicant must show that (1) he has a fear of persecution; (2) that the fear is "well-founded; (3) the allegedly feared persecution must be on account of race, religion, nationality, membership in a particular social group, or political opinion; and (4) the alien must not be willing to return.

The BIA in Acosta began its discussion by talking about what an applicant for asylum and deportation must show. According to the court, an alien must "[f]irst . . . go forward with his evidence and initially persuade the immigration judge that the facts alleged to be the basis of the claim for asylum or withholding of deportation are true." Secondly, an alien must meet the previously mentioned requirements of the relief sought. In the court's words, "the alien must demonstrate that the facts found to be true meet the test of eligibility for asylum or withholding of deportation . . . ."

Recognizing the fact that the respondent bore the burden of proof in this case, the court moved to a discussion of the necessary burden of persuasion necessary to prove the truth of the facts put forth to establish a claim for asylum or withholding of deportation. Initially, the court emphasized that the law required a burden of persuasion of "preponderance" to be applied to the allegations by which an applicant sought to establish a claim. According to the court, "[t]o determine whether a preponderance of the evidence supports an alien's allegations, it is necessary to assess the credibility and probative force of the evidence put forward by the alien."

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64 Id. at 213.
65 Id.
66 Id. at 219.
68 Id. at 214.
69 Id. at 215.
70 Id.
71 Id. at 215-16.
72 Id. at 216.
73 Id.
The respondent in Acosta presented a variety of evidence which the court found unbelievable in that case because it was "self-serving."74 The respondent presented a letter stating that he had been an administrator and a taxi driver in an organization to which the government of El Salvador and guerillas were hostile.75 He also testified that he had been threatened and assaulted by others who had previously killed some of his friends that worked for the company.76 He left the country and entered the United States because he feared he would also be killed.77 Despite the Immigration Judge's (II) findings, the court found that the respondent did present sufficient objective evidence to show the truthfulness of the facts put forth by preponderance.78

The court next went on to analysis of the statutory requirements of an asylum claim. I deal here only with the aspect of the "well-founded" fear requirement under the statute. The question here was whether the claimant's testimony, if accepted as true, would render the fear of persecution well-founded. To determine this, the court required objective evidence that showed likelihood of persecution.79 The objective element was simply to avoid basing such claims on the subjective impressions of the applicants. For the likelihood aspect, however, the court was careful to mention that an alien does not have to prove the requirement "to a particular degree of certainty or even probability."80 Indeed the court explained that a combination of four elements could meet the likelihood requirement: First, the alien must have some characteristic or belief which renders him a target; second, the persecutor must have or be able to become aware of such characteristic or belief; third, the persecutor must be able to punish the alien; and fourth, the persecutor must be inclined to punish.81 The court also mentioned that, in determining whether such elements are established, a case by case analysis was best.82

Lastly, the court went on to compare the "well-founded" fear requirement for asylum with the "clear probability" requirement of withholding of deportation under title eight. According to the court,

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74 Id. at 218.
75 Id. at 216-17.
76 Id.
77 Id.
78 Id. at 232.
79 Id. at 224.
80 Id. at 226.
81 Id.
82 Id. at 227.
the "likely" requirement for asylum and the "more likely than not" requirement for withholding of deportation was problematic. Indeed "as a practical matter . . . the facts in asylum and withholding cases do not produce such clear-cut instances in which such fine distinctions can be made."\textsuperscript{83} What the court meant is that statistical discernment of such differences was not practical.\textsuperscript{84} The court suggested that, instead of looking at some quantitative measure of difference between the two standards, a look at the quality of the evidence could better serve the court's inquiry as to the likelihood of persecution.\textsuperscript{85} Thus, for both asylum and withholding of deportation, an alien's facts must support the required four elements to meet the necessary statutory burden.\textsuperscript{86}

In this case, the BIA concluded that the standards of "likely" and "more likely than not" had no significant distinction.\textsuperscript{87} Since the court held that the respondent failed to meet the required standard for granting asylum, he also failed on his withholding of deportation claim.

The problems regarding the burden of proof and the burden of persuasion that this decision highlights are not insignificant when dealing with human rights issues. The three main problems are as follows: (1) the Court's failure in Stevic to articulate a definition for well-founded fear allowed courts to render meaningless the holding that well-founded fear applied to asylum and clear probability applied to withholding of deportation (i.e., if they converge, then the distinction serves no purpose); (2) the line between the burden of persuasion necessary to establish the truthfulness of the facts and the statutory burden of proof necessary to establish a claim often becomes clouded; and (3) the facts brought forth to establish a claim, whose truthfulness may be determined by a lower standard, may be the same facts which later are rendered dispositive by a higher standard under the statutory requirement. As we will see, the first issue was resolved soon after in INS v. Cardoza-Fonseca, however, the others still remain a problem under immigration law and in cases involving the CAT.

The lack of definition which allowed some courts to construe the statutory well-founded fear and clear probability requirements as similar was resolved in Cardoza-Fonseca. That case involved a Nicaraguan citizen (respondent) who entered the United States as a visitor in

\textsuperscript{83} Id. at 229.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 231.
1979. She remained in the country longer than allowed and did not take advantage of the INS' grant of voluntary departure. The respondent requested both asylum as a refugee pursuant to § 208(a) and withholding of deportation pursuant to § 243(h). The respondent presented evidence of her brother's torture and imprisonment in Nicaragua due to his political beliefs to show that her "life and freedom would be threatened" and that she had a "well-founded fear" of persecution upon her return. Even though respondent had never been politically active, she contended that she would be interrogated about her brother's location and activities.

The IJ applied the "clear probability" standard in evaluating both the respondent's claim for asylum and withholding of deportation, finding that the respondent had not established a clear probability of persecution. The BIA agreed with the decision and upheld the ruling, largely under the same rationale applied by the IJ. On appeal, the respondent claimed that the IJ erred in applying the same standard to both claims and Ninth Circuit agreed that the IJ erred in applying the "clear probability" standard to the applicant's asylum claim.

The Supreme Court began its analysis in by highlighting the fact that aliens may adjust their illegal status in the United States under Title II of the Immigration Reform and Control Act of 1986. This ability, however, did not render moot the request for asylum since the time period to adjust her status to a permanent resident could be achieved in a shorter amount of time through asylum than through Title II. Thus, under the Refugee Act of 1980, a statutory procedure for granting of asylum was established.

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General.

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88 Cardoza-Fonseca, 480 U.S. at 424.
89 Id.
90 Id.
91 Id.
92 Id. at 424-25. She contended that, because of her brother's activities, her own opposition to the Sandinista government's activities would be brought to their attention. Id. at 425.
93 Id.
94 Id.
95 Id.
96 Id. at 426.
97 Id. at 427.
of the Attorney General if the Attorney General determines that such alien in a refugee within the meaning of section 1101(a)(42) (A) of this title.98

Important to the power granted to the Attorney General in such cases was the understanding that it is not mandatory for the Attorney General to grant asylum to every person who meets the definition of a refugee.99 This, again, is a major difference between asylum and withholding of deportation, the latter being the same standard used for CAT claims; under articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees there is a mandatory duty on contracting states not to return an alien to a country where his life or freedom would be threatened on account of one of the enumerated grounds.100 According to the Court, asylum and withholding of deportation are two different forms of relief, wherein the former affords broader benefits and the latter has a more stringent “clear probability” requirement.101 The “clear probability” requirement has a clear objective requirement, and no subjective component, which is why the “more likely than not” language is used.102 The “well-founded” requirement of asylum, however, suggests that the determination of eligibility turns somewhat on the subjective mental state of the applicant.103 The word would in the “would be threatened” requirement of withholding deportation excludes a might or could aspect that a well-

98 Id. The title referred to is 8 U.S.C. § 1158(a) (2004). The term refugee means:

[any person who is outside of any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.


101 Stevic, 467 U.S. at 429.

102 Id. at 420.

103 Id. at 429-30.
founded standard permits. This case demonstrates that the standards are not identical, and that for asylum, the well-founded standard governs. ¹⁰⁴

Lastly, in dicta, the court mentions that a person can have a well-founded fear of an occurrence even if it is less than fifty percent certain to occur. ¹⁰⁵ Furthermore, the well-founded fear requirement keeps the focus on the person’s subjective belief and does not turn it into a “more likely than not” requirement. ¹⁰⁶ This language, though unnecessary, has been used by many to conclude that individuals, to meet the “more likely than not” requirement, must prove by a fifty percent mathematical certainty that they will be persecuted. ¹⁰⁷

IV. ANALYSIS OF THE BURDEN OF PROOF

This difficult area of evidentiary law has caused much confusion. Confusion remains as to where to draw the line between the burden of persuasion necessary to establish the truthfulness of the facts and the statutory burden of proof necessary to establish a claim. Confusion also remains because the facts brought forth to establish a claim, whose truthfulness may be determined by a lower standard, may be the same facts which later are rendered dispositive by a higher standard under the statutory requirement. The resolution given the Court’s failure in Stevic to articulate a definition for well-founded fear has been complicated by the dicta given in the decision because it has shed confusion on how to properly determine the actual difference in probability between likely and more likely than not. The court fails to explain why this approach, given the difficulties arising with these issues, is the best. The court’s dicta also complicates the matter for those seeking CAT relief because no consideration is given to how the goals of the treaty are affected by the decision since judges apply the burden for withholding case similarly in CAT cases. Though this article mainly deals directly with the affects of such dicta, the subtle influence of the other problems can also be seen in CAT cases.

¹⁰⁴ Id. at 431 (citations omitted).
¹⁰⁵ Id.
¹⁰⁶ Id. at 429-430.
¹⁰⁷ See, e.g., Guo v. Ashcroft, 386 F.3d 556, 563 (2004) (holding that the court had abused its discretion in “deeming evidence insufficient” to meet the more likely than not standard); Mikhael v. INS, 115 F.3d 299 (5th Cir. 2002) (holding that because petitioner fell short of the amount of evidence needed to establish and asylum claim, by default, a withholding of deportation claim would fail).
A. Subtle Differences in the Burdens of Proof

In *Lukwago v. Ashcroft*, a case involving a former child soldier from Uganda, the BIA analyzed the *Cardoza-Fonseca* dicta in the following way.109

In [*Cardoza-Fonseca*], the Court compared the standard in § 243(h) of the INA for withholding of deportation ("it is more likely than not that the alien would be subjected to persecution" in the country to which he would be returned) with the standard for asylum in § 208(a) ("well-founded fear of persecution") . . . . The Court rejected the INS' position that § 208(a) requires a showing that persecution would be more likely than not . . . . In that connection, the Court analyzed the § 208(a) standard and stated that "the reference to 'fear' in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien" . . . . The Court provided some additional guidance when it explained that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."110

*Lukwago*’s discussion of *Cardoza-Fonseca* demonstrates that courts are required to evaluate asylum cases and withholding of deportation cases at two different levels of probability. In evaluating asylum cases, the evidence may demonstrate less than a fifty percent likelihood, whereas, under the more likely than not standard of withholding of deportation cases, courts require a probable likelihood of over fifty percent.

This subtle distinction in the burden of proof is certain to create evidentiary difficulties for an individual seeking withholding of deportation using the same facts that would be sufficient to prove an asylum claim. This is especially burdensome when making a claim under the CAT. As noted above, evidence available to demonstrate the likelihood of torture is concentrated on a macro-level—provided primarily by the State Department and human rights organizations that evaluate a nation’s reputation, practices, and trends. Even if an individual faces deportation to a nation with a documented history for torture, that

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109 See *Cardoza-Fonseca*, 480 U.S. at 423.
110 *Lukwago*, 329 F.3d at 177 (citations omitted).
alone would not be enough.\textsuperscript{111} It would seem that the individual would have to provide more specific facts, demonstrating some personal imminence, in order to demonstrate a greater than fifty percent likelihood of torture.

Because of these evidentiary difficulties of probability testing, this note will discuss their impact in more depth in an effort to determine whether the court's interpretations are in line with the legislature's purposes in employing the CAT.

\textit{B. Probability Testing—How It Really Works and Why It Really Matters in CAT Cases}

Much has been written on the limits of evaluating a claim based on probabilities; however, it will be sufficient to mention a few principles to highlight some of the difficulties that arise in these types of cases. "An axiom of conventional probability is that the probability of any fact plus the probability of its negation must equal 1.0."\textsuperscript{112} Thus, in such a case, "if the probability of the plaintiff's case being factually true is .500001, the probability of the defendant's case being true, which is the negation of the plaintiffs, must equal \textit{.499999}."\textsuperscript{113} Because perfect mathematical certainty about past and future events is not possible to attain, conclusions about such events will inevitably be grounded in conjecture and not in factual certainty.\textsuperscript{114} Stated in simpler terms, "because the trier of fact can never be absolutely certain that a particular fact is true, the parties can only persuade him to a particular degree of certainty that the fact is probably true."\textsuperscript{115}

\textsuperscript{111} Note, however, that in evaluating whether an applicant for CAT relief satisfies the requisite burden of proof, the CAT requires the nation to "take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights." Cardoza-Fonseca, 480 U.S. at 423 (emphasis added). Such inquiries, of course, require many sources of information. For example, U.S. State Dept. reports and those provided by human rights organizations may be helpful. They could supply important information about the conditions of particular countries that could prove useful in determining the likelihood of an individual being tortured should he be deported. Cohen, supra note 35, at 518.


\textsuperscript{113} \textit{Id.}

\textsuperscript{114} C.M.A. McCauliff, \textit{Burden of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?}, 35 \textit{VAND. L. REV.} 1293, 1295 (1982).

\textsuperscript{115} Id. at 1295-96.
Burdens of proof are not levels of certainty that must be reached; they are descriptive of the persuasive impact that the evidence has on the fact-finder. Thus, “preponderance of evidence does not signify the greater number of witnesses or the larger volume of testimony but denotes, rather, evidence of greater convincing force.” The focus of the inquiry, then, is the impact of the evidence but not the inevitability of a particular outcome. Put another way, it is the difference between establishing another element to bring a CAT claim and establishing simply the burden of proof. This significant distinction demonstrates a weakness in the perspective of the probabilist in that he endows “metaphors such as ‘preponderance of the evidence’ with reality and utilize[s] the analogy as a literal, comprehensive description of reality.” Indeed “the fundamental task for the fact-finder, on this conception, is to discover the truth of the events being disputed.”

However, making decisions based on subtle levels of persuasion is problematic for CAT cases, even where orthodox methods are employed. The distinction missed in most CAT cases is that the probability of a particular type of evidence being true is different than the probability that the overall impact of the evidence will persuade the trier-of-fact as to the likelihood that the alien will be tortured. Thus, when evaluating expert or organizational evidence, the inquiry should be whether the evidence demonstrates at least a fifty percent likelihood that what the evidence establishes is true, not whether it is fifty percent likely that this person will be tortured.

Thus, while the overall evidence of torture in the alien’s nation should be evaluated as “more likely than not” that it is true, the alien’s personal facts should be evaluated according to whether or not he or she has a “well-founded fear.” This note acknowledges that this is a very unorthodox approach to probability testing and would result in a much lower standard in evaluating the alien’s personal facts. However, this note asserts that this is proper in light of the possibility that the alien could face horrific, inhumane acts.

\[\text{116} \quad \text{Id. at 1296.}\]
\[\text{117} \quad \text{Id.}\]
\[\text{118} \quad \text{Id. at 1298.}\]
\[\text{119} \quad \text{Vern R. Walker, Preponderance, Probability and Warranted Factfinding, 62 Brook. L. Rev. 1075, 1081 (1996).}\]
C. The Standard Is Not in Line With Legislative Intent

The problems that probability testing presents when dealing with cases involving the CAT are varied, however, this subsection discusses whether the Stevic-Cardoza-Fonseca standard for evaluating withholding of deportation cases is in line with what the legislators had in mind when ratifying the CAT.\footnote{120}{See generally Sen. Resolution, supra note 25.} When Congress approved the CAT, the legislative history does not indicate that torture cases should be evaluated under a “more likely than not” burden of proof interpreted to require a certain mathematical quantum of certain torture.\footnote{121}{Id.}

Article 3 of the CAT specifies that

in determining whether grounds exist to believe that an individual would be in danger of being subject to torture, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.\footnote{122}{Convention Against Torture, supra note 10, art. 3.}

As noted above, this provision is not self-executing and courts must necessarily develop standards of proof to evaluate claim. However, the trouble with the courts’ applications of this statute is that, despite the requirement that all relevant considerations be taken into account, some require that these considerations also provide an objective certainty that something will occur. To prove that there is a “more likely than not” probability that a particular individual would be tortured upon return could become problematic some cases because highly specific, verifiable, personal data does not exist or cannot be produced. Thus, the strongest evidence that an individual would be able to produce to fortify a claim of probable torture would be based on personal testimony, which is inherently better suited to the “well-grounded fear” standard.

The Lukwago decision does not offer much relief, except to suggest that the “testimonial and . . . expert evidence may have been helpful in meeting the necessary burden on proof.”\footnote{123}{Lukwago, 329 F.3d at 177.} A more serious concern is that those who seek to maintain a CAT claim often do so the same facts as their claims for asylum or withholding of deportation. For many, this means that if they can not prove asylum, the possibility
of overcoming the higher standard under the CAT is completely foreclosed—an issue with much graver and more important implications. The applications of these standards are on their head and should be reversed.

Given the mandate of the CAT not to deport a person where "substantial grounds" that he will be tortured exist, it is proper to evaluate a CAT claim according to a standard that measures a nation’s reputation for torture. Concern for human life and dignity requires that courts carefully evaluate the practices of a nation as to all of its citizens, and not just the alien in question. As noted above, individuals face an almost impossible task of producing concrete information that they, personally, are "more likely than not" to be tortured, although they would be able to show a "well-grounded fear" of torture when the evidence demonstrates to a probable likelihood that the nation targets citizens in the individual’s situation for torture.

However, under the current application of the CAT standard, how will an individual be able to demonstrate the imminence of torture as to their person situation? Will they be able to subpoena friends and family? Will they produce depositions from their enemies? Unlike the adversarial model of civil litigation, where the preponderance standard is appropriate, the evidence that is producible here is wholly inadequate to engage in the kind of balancing that evaluates well-founded evidence gathered from both sides. Here, we look to statistics, trends, reputations and practices; and while the personal testimony of the individual is persuasive it will not likely be enough to tip the scale, given the current standard. It seems much more appropriate to test the expert and organizational evidence with the "more likely than not" standard, since they have expended the effort and resources to produce the information.

The better standard, articulated as follows, is closer to the purpose of the CAT. The alien must demonstrate 1) that, based on expert and organizational evidence, it is "more likely than not" that the nation would target an individual in the alien’s situation for torture; and 2) the alien demonstrates a "well-grounded fear," through personal testimony, that torture would occur.

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124 See, e.g., id. at 183.
D. Other Cases Evaluated to Compare Both Standards

*In re M-B-A* was a CAT claim case involving a 40-year old native of Nigeria.\(^{125}\) The young woman entered the United States as a non-immigrant visitor on January 16, 1981, and it was not until December of 1989 that she changed her status to a lawful permanent resident.\(^{126}\) In January of 1995, she was convicted in the United States District Court, District of Massachusetts, of "importation of a controlled substance and possession of heroin with intent to distribute."\(^{127}\) She was also charged with a deportable status "as an alien convicted of an aggravated felony and a controlled substance violation."\(^{128}\) The Immigration Judge found that her conviction rendered her removable and barred her from any relief except for deferral of removal under Article 3 of the CAT.\(^{129}\)

The respondent tried to argue that if she were returned to Nigeria she would be targeted for torture because of her drug conviction in the United States.\(^{130}\) In support of this contention, she "submitted a detailed affidavit, evidence of country conditions in Nigeria, and a copy of a 1990 Nigerian federal military government decree (Decree #33) which in part criminalized the conduct of Nigerians who [were] convicted of narcotics drug offenses in a foreign country . . . ."\(^{131}\) The respondent also testified that in 1993, she had returned to Nigeria to visit her then fiancé's relatives who had used her, without her knowledge, to bring drugs back into the United States.\(^{132}\) The respondent suggested that, if returned to Nigeria, her convictions would give cause to the authorities to take her into custody and subject her to a mandatory 5-year prison term and would torture her while in prison.\(^{133}\)

The issue on appeal was whether she met the "more likely than not" burden of proof to be eligible for deferral of removal.\(^{134}\) The Board in this case spent most of its time evaluating whether Decree #33 would "more likely than not" result in detention and torture of the


\(^{126}\) *Id.* at 474.

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 475.

\(^{129}\) *Id.*

\(^{130}\) *In re M-B-A*, 23 I. & N. Dec. at 475.

\(^{131}\) *Id.* The decree (Decree #33) considered such convictions as bringing dispute on the country. *Id.*

\(^{132}\) *Id.*

\(^{133}\) *Id.*

\(^{134}\) *Id.* at 477. The requirement remains that torture must occur "by a public official, or at the instigation or with the acquiescence of such an official." *Id.*
respondent, rather than looking at all of the evidence as a whole.\textsuperscript{135} Though the BIA admitted that "there is little evidence of record on which to base any meaningful conclusion" regarding the enforcement of this matter, it still found the evidence insufficient to conclude that there was a probable likelihood of detention and torture.\textsuperscript{136} The BIA also admitted that Nigeria has "chronic problems with drug trafficking and has been a country with a poor human rights record and endemic corruption in its judicial system."\textsuperscript{137} Yet, despite these observations, the BIA seemed determined to exact more specific proof that this particular individual would be tortured, leaving one to query whether any facts would have satisfied the court.

The Board's treatment of this type of situation is not uncommon and, unfortunately, little more explanation is given as to how individuals in certain cases can prove the likelihood of torture when the courts do not give enough weight to the detailed evidence of treatment of certain kinds of individuals in countries with deplorable human rights records. This decision demonstrates that the "more likely than not" burden of proof is overly burdensome as applied to the unique evidentiary difficulties in establishing a CAT claim. Further, it is inappropriate considering the gravity of possible torture.

The following case demonstrates that the Board's application of the standard is highly isolated to the individual's personal experience, even when persuasive personal testimony of torture is established. In \textit{Al-Saher v. INS}, the Ninth Circuit dealt with a case involving a native of Iraq whose appeal to the BIA had been dismissed.\textsuperscript{138} The BIA dismissed the appeal from the Immigration Judge's decision denying his application for asylum, withholding of deportation, and protection under the CAT.\textsuperscript{139} Al-Saher presented testimony of his involvement in the Iraqi military from 1984 to 1992.\textsuperscript{140} When he initially applied for military service, he misrepresented that he was a Sunni Muslim from Baghdad, when he was in-fact a Shiite Muslim from Al-Bashra.\textsuperscript{141} Later the truth was revealed by his father through a 1997 census.\textsuperscript{142}

\textsuperscript{135} \textit{In re M-B-A}, 23 I. & N. Dec. at 478-79.
\textsuperscript{136} \textit{Id.} at 478.
\textsuperscript{137} \textit{Id.} at 479.
\textsuperscript{138} \textit{Al-Saher v. INS}, 268 F.3d 1143 (9th Cir. 2001).
\textsuperscript{139} \textit{Id.} at 1144.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.} He misrepresented his religion and birthplace because of the discrimination going on against Shiite Muslims. \textit{Id.} at 1144-45.
\textsuperscript{142} \textit{Id.} at 1145.
He was arrested by authorities because of the misrepresentation and was “detained, interrogated, and beaten for one month.”\textsuperscript{143} He testified that he was blindfolded, had his hands tied behind his back, and was then beaten with an electrical cord to a point where he could no longer stand on his legs and fell flat on the floor.\textsuperscript{144} His father had to pay money to have him released.\textsuperscript{145} He was later arrested again when he asked questions regarding the exact location of a fence that he was to build for his job near a sensitive government location.\textsuperscript{146} This time, in addition to being beaten, he was burned with cigarettes.\textsuperscript{147} It took his father eight to ten days to obtain his release.\textsuperscript{148} He was arrested a third time when he was heard talking to friends about how “elite Iraqi eat well while the poor go hungry.”\textsuperscript{149} He was detained by the government, and later managed to escape the country.\textsuperscript{150}

The BIA accepted his testimony as credible, but nevertheless concluded that he was not persecuted on one of the five protected grounds for asylum: race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{151} Although it was clear his “statements regarding the unfair distribution of food in Iraq resulted in the Iraqi officials imputing [to him] an anti-government political opinion,” bringing him within the ambit of the political opinion grounds, the BIA concluded that since nothing happened that constituted torture during his detention, no CAT protection would be available since he did not satisfy the burden of proof as to that particular occurrence.\textsuperscript{152}

It seems unbelievable that in the face of such testimony, a court would apply the standard with such a high degree of strictness, thereby precluding him from desperately needed protection. On appeal, the Ninth Circuit agreed in part. First, the court correctly noted that, unlike asylum and withholding of deportation cases, for CAT protection the petitioner did not need to show that the torture was on account of one of the five grounds.\textsuperscript{153} Also, the court did not agree that severe beatings geared to inflict severe pain on Al-Saher were merely “incidental

\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 1145-46.
\textsuperscript{153} Id. at 1147.
to lawful sanctions." In fact, country reports substantiated Al-Saher's testimony regarding the torture inflicted by the Iraqi government on prisoners. This type of focused analysis is not uncommon in the lower courts when dealing with similar cases. Although the court employed the Cardoza-Fonseca standard, fortunately for Al-Saher, the court concluded that Al-Saher's personal facts demonstrated that if he was returned to Iraq it was "more likely than not" that he would be tortured.

A good example of a proper application of the standards, where the BIA relied on organizational country reports to inform its analysis, is In re G-A. This case involved a native and citizen of Iran who entered the United States as a lawful permanent resident in 1976. He was an Iranian Christian who had fled Iran due to the persecution against Christians. He was convicted in the United States District Court of the Southern District of New York of conspiracy to "intentionally and knowingly possess [a controlled substance] with intent to distribute cocaine." As a result of his conviction, he was found to be removable. The Immigration Judge initially concluded that the respondent had established that he would likely be tortured if returned to Iran and granted him CAT protection from which the INS appealed. The BIA noted that some, though not exclusively, relevant factors in the evaluation of the possibility of a deportee being tortured are: any evidence of past torture endured by the applicant, the feasibility of the applicant going to a different country or a different region of the home country where there would be a lessened risk of torture, and how flagrant the violations are in the country of deportation. According to the BIA in this case, a criminal conviction is taken into serious consideration, but is not an automatic bar to the protections under the CAT.

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154 Id. (quoting Kalmathas v. INS, 251 F.3d 1279, 1282-83 (9th Cir. 2001)).
155 Id. The court took issue with this because the requirement that all of this must be taken into consideration to determine whether an applicant qualifies for CAT protection was not done. Id.
156 Id. at 1148.
158 Id. at 366.
159 Id.
160 Id.
161 Id. at 367.
162 Id.
163 Id. at 368.
164 Id.
The BIA believed that the following personal factors demonstrated probable likelihood of torture: the applicant was an Armenian Christian which subjected him to discriminatory treatment, had a drug trafficking conviction which subjected him to harsh penalties, and had lived in the United States for a considerable length of time. The court notes that “Iranians who have spent an extensive amount of time in the United States are perceived to be opponents of the Iranian Government, and these combinations of traits make it apparent that an individual may be subject to torture if returned to Iran.” The BIA in this case took special care to highlight how the traits of this particular individual coupled with country reports would make torture a likelihood.

In particular, the 1999 Country Reports on Human Rights Practices, which are released by the United States Department of State, indicate that “systematic abuses include extrajudicial killings and summary executions; disappearances; widespread use of torture and other degrading treatment, reportedly including rape; harsh prison conditions; arbitrary arrest and detention, and prolonged use of incommunicado detention.”

Here, it was significant that the respondent would be identifiable by government authorities “as a non-Muslim ethnic minority” upon arrival in Iran, and that he would come to the officials’ attention because of his many years in the United States. His criminal history would also come to light if he were investigated. It was a known fact that the Iranian government has even executed those who had found asylum elsewhere and then been deported back to Iran. The BIA eventually concluded that his personal facts, coupled with Iran’s record of human rights violations and instances of pervasive mistreatment in prisons, there was a high probability that the respondent would be tortured if returned to Iran. The BIA actually stated: “having ex-
aminaed all the evidence presented, we conclude that the respondent has demonstrated that he is likely to be tortured in his homeland based on the combination of factors presented, including his religion, his ethnicity, the duration of his residence in the United States, and his drug-related convictions in this country.”

V. CONCLUSION

While some of the more positive case outcomes demonstrate an accurate reflection of congressional intent, the prevailing standard articulated by Cardoza-Fonseca and applied in later cases lead to inconsistent, imprudent, and unjust results. The “more likely than not” burden of proof often presents an insurmountable burden for the individual to establish a CAT claim, because the focus is isolated on their ability to demonstrate from their own experience that there is a greater than fifty percent likelihood they will be tortured.

Because we are concerned with protecting the lives and bodily integrity of humans, our commitment to human dignity should provide better protections than the current standard provides. Without providing a standard that employs the purpose and intent of the CAT, the United States leaves itself open to criticism for pursuing national policy goals that serve to undermine and even contradict the very purpose of its treaty agreements. The protections promised by the CAT are a pretense when courts may insert evidentiary standards that do not reflect the reality of the victim’s situation.

The burden of proof as established by Congress was not such that an individual seeking our protection would have to establish a virtually impossible level of certainty in order to provide protection. Instead, Congress directed courts to look at all circumstances and look to experts to tell us what is occurring in other countries. Thus, courts should adopt a better standard that is closer to the purposes of the CAT and better equipped to administer justice. The proper standard should require the alien to demonstrate 1) that, based on expert and organizational evidence, it is “more likely than not” that the nation would target an individual in the alien’s situation for torture; and 2) the alien demonstrates a “well-grounded fear,” through personal testimony, that torture would occur.

Our commitment to ending torture worldwide is questioned when we construe our own laws in ways that make it overly burdensome for individuals to prevail in CAT claims. Judges should adjudicate CAT

172 Id.
cases less stringently than other immigration matters because we are dealing with human life and bodily integrity. Judges should carefully look at all the evidence and not pre-determine an outcome based on an individual's personal experience in isolation from the nation's reputation as a whole.