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Indiana Journal of Global Legal Studies

Volume 8 | Issue 1 Article 12

Fall 2000

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INTRODUCTION

Documentation related to a country's political situation and human rights record is relevant, and often crucial, evidence regarding the objective reasonableness of an asylum seeker's subjective fear of persecution.[1] Immigration decision-makers in the United States may rely on a variety of sources for such "country conditions" evidence.[2] No mechanism exists, however, to assure fundamental fairness in how country conditions information is utilized in the decision-making process.[3]

United States immigration courts have tended to rely selectively, without reasoned analysis, on information bits that are decontextualized from what is known about a country of origin from the record as a whole.[4] In extreme cases, asylum has been denied by the Immigration Judge (IJ) and Board of Immigration Appeals (BIA) on the basis of U.S. State Department assessments that are conclusory, driven by foreign policy concerns, and contradicted by information appearing in the State Department's own reports.[5]

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1. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. Doc. HCR/IP/4/Eng/Rev.1, ¶ 42 (1992) [hereinafter UNHCR HANDBOOK]; DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 107-08 (3d ed. 1999).

2. *See* 8 C.F.R. § 208.12(a) (2000) (identifying permissible sources to include the State Department, Office of International Affairs, the Immigration and Naturalization Service (INS), as well as "other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions"); *In re* S-M-J-, Interim Dec. 3303, 1997 WL 80984, at *7 (B.I.A. Jan. 31, 1997), *disapproved of on other grounds by*, Ladha v. INS, 215 F.3d 889, 901 (9th Cir. 2000) (quoting the INS Basic Law Manual that "[t]he asylum officer should be fully familiar with the reports and country profiles developed by the INS Resource Information Center, with the Department of State's Country Reports of Human Rights Practices for the country being considered and with reports from Amnesty International and other reputable organizations, including academic institutions").

3. *See* ANKER, *supra* note 1, at 108-09.

4. *See* Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3 (2000).

5. *See id. See, e.g.*, Marcu v. INS, 147 F.3d 1078, 1086 (9th Cir. 1998) (Hawkins, J., dissenting).

Such distortions of the evidentiary record go unchecked by an extraordinarily deferential standard of judicial review.[6] In this manner, an applicant's burden of proof is effectively raised notwithstanding contrary statutes and Supreme Court precedents.[7] Additionally, the risk of erroneous return of bona fide refugees is increased in violation of international obligations.[8]

Administrative and judicial practices must be changed to promote fairness in the use of country conditions information and to reduce the risk of erroneous return.[9] First, regulatory guidelines should be adopted that ensure that only reliable country conditions evidence is used to evaluate the reasonableness of an applicant's fear of persecution. Specifically, administrative adjudicators should be required to account for the nature of country conditions information relied upon and how that information related to the record as a whole. Second, the scope and standard of review by the federal courts of appeals must be modified to provide a meaningful check on

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6. *See* INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (construing the old substantial evidence standard of review extremely narrowly to require upholding BIA determinations unless evidence in the record compels reversal); Margulies, *supra* note 4, at 17. This extremely deferential standard of review was codified as part of the 1996 amendments to Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). *See* 8 U.S.C. § 1252(b)(4)(B) (2000) (Administrative findings of fact must be conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary.").

7. *See* 8 U.S.C. § 1158(b) (1994 & Supp. 1999); 8 C.F.R. § 208.13(a) (2000); INS v. Cardoza-Fonseca, 480 U.S. 421, 450 (1987); *In re* Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987); Margulies, *supra* note 4, at 18 ("The trend in proof of changed country conditions is to require greater specificity and certainty of the asylum-seeker, and less specificity and certainty of the government. The problem is that this trend ignores the values underlying crucial precedents such as *Cardoza-Fonseca* and *Mogharrabi*.").

8. *See* UNHCR HANDBOOK, *supra* note 1, ¶ 196. Asylum decisions are also made vulnerable to politicization despite recognition that asylum determinations are to be "ideologically and geographically neutral." Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751, 752 (1992). *See* American Baptist Churches v. Thornburgh, 760 F.Supp. 796, 799 (N.D. Cal. 1991) (stating the acknowledgment by INS that foreign policy considerations are not relevant to the well-founded fear question); *In re* Pula, 19 I. & N. Dec. 467, 476 (B.I.A. 1987) (Heilman, J., concurring) ("The asylum provisions are humanitarian in their essence and indeed recognize that the forces which impel persons to seek refuge may be so overwhelming that the 'normal' immigration laws cannot be applied in their usual manner.") (citing the United Nations Convention relating to the Status of Refugees, entered into force April 22, 1954, 189 U.N.T.S. 137, as incorporated into the Protocol relating to the Status of Refugees, entered into force October 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter Convention]).

9. Country conditions evidence is also relevant to applications for restriction on removal (formerly withholding of deportation) or relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S 85 [hereinafter Torture Convention]. However, the focus of this paper is on ordinary asylum claims where the burden of proof is lowest and the greatest number of applicants have the opportunity to receive both refugee status and an opportunity to later apply for permanent residence. For a discussion of evidentiary issues related to restriction on removal and the Torture Convention, see ANKER, *supra* note 1, at 77-86, 513-18.

administrative action. Judicial review should return to a "substantial evidence" standard as interpreted by "normal principles of administrative law governing the role of courts of appeals when reviewing agency decisions"[10] to help ensure that protection is extended to bona fide refugees.

I. COUNTRY CONDITIONS EVIDENCE IN U.S. ASYLUM CASES

Applicants for asylum in the United States must prove either that they have a well-founded fear of future persecution in their country of origin or that they are victims of past persecution.[11] In the latter situation, applicants may also have to rebut a showing by the government that conditions in their country of origin have changed such that a well-founded fear of persecution no longer exists.[12] A "well-founded fear" is one that is both subjectively genuine and objectively reasonable.[13] Thus, applicants' claims "cannot . . . be considered in the abstract, and must be viewed in the context of the relevant background situation."[14] This section explores how country conditions information informs the contextual assessment of asylum claims throughout the formal adjudicatory process.

A. Immigration Court Adjudication

Applicant testimony alone is ostensibly sufficient to establish a "well-founded fear of persecution." (i.e., that a reasonable person in the applicant's circumstances would fear persecution on account of his or her race, religion, nationality, political opinion, or membership in a particular

10. Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994).

11. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158(b) (1994 & Supp. 1999). For a discussion of what actions may constitute persecution, see ANKER, *supra* note 1, at 171-266.

12. *See* 8 C.F.R. §§ 208.13(b)(1)(i), 208.16(b)(2) (2000). Applicants who can establish that actual persecution occurred in the past on account of race, religion, nationality, political opinion, or membership in a particular social group are presumed to have a well-founded fear of future persecution. *See* 8 C.F.R. § 208.13(b)(1) (2000). To defeat asylum eligibility, the INS must show by a preponderance of the evidence that country conditions have changed such that there is no longer a well-founded fear of return. *See* 8 C.F.R. § 208.13(b)(1)(i) (2000).

13. *See In re* Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) (holding that an asylum applicant has established "a well-founded fear . . . if a reasonable person in his circumstances would fear persecution"); UNHCR HANDBOOK, *supra* note 1, ¶ 38 (noting that the applicant's subjective state of mind must be supported by an objective situation).

14. UNHCR HANDBOOK, *supra* note 1, ¶ 42.

social group).[15] Moreover, applicant testimony is not presumed to be unreliable[16] and is capable of proving the objective facts necessary to meet the burden of proof.[17] Corroboration, however, is required for any part of the asylum claim that can reasonably be verified using external evidence, including general background information about a country's political situation and human rights record.[18] Country conditions evidence must be included in the record, or its absence must reasonably be explained, when those conditions are central to the claim.[19] Information about country conditions principally affects asylum claims in the assessment of credibility and the sufficiency of proof of asylum eligibility.[20]

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15. *See In re Mogharrabi*, 19 I. & N. Dec. at 445 ("The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear."); 8 C.F.R. § 208.13(a) (2000) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). *See generally* ANKER, *supra* note 1, at 95-96 nn.48-50 (detailing BIA and federal court affirmations of the general rule that applicant testimony need not be corroborated if it meets the criteria identified in *In re* Mogharrabi).

16. *See* Figeroa v. INS, 886 F.2d 76, 79 (4th Cir. 1989); *In re* S-M-J-, 1997 WL 80984, at *11 (B.I.A. Jan. 31, 1997) (Rosenberg, Bd. Member, concurring), *disapproved of on other grounds by*, Ladha v. INS, 215 F.3d 889, 901 (9th Cir. 2000); UNHCR HANDBOOK, *supra* note 1, ¶¶ 199, 203.

17. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (ruling that the applicant's burden of proof is more generous than a clear probability standard, and indicating with approval a one in ten chance of persecution might be sufficient to establish reasonable fear); 8 C.F.R. § 208.13(b)(2) (2000) (requiring the applicant to demonstrate a "reasonable possibility of suffering such persecution if he or she were to return to that country"). *See also* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984) (recognizing that an applicant's testimony is capable of proving objective facts). *See generally* ANKER, *supra* note 1, at 98-99 nn.63-65 (discussing the sufficiency of applicant testimony).

18. *See In re S-M-J-*, 1997 WL 80984, at *1, *4-*5; *In re* Dass, 20 I. & N. Dec. 120, 126 (B.I.A. 1989). Given the availability of country reports from the State Department and a number of well-respected nongovernmental sources on the Internet, arguments as to why no such information is submitted may not be convincing–particularly for applicants who are represented by counsel. *Cf. In re* B-B-, Interim Dec. 3367, 1998 WL 694640, at *3 (B.I.A. Sept. 24, 1998) (holding that an applicant's attorney's refusal to submit an asylum claim without corroboration did not constitute ineffective assistance of counsel because of the attorney's obligation not to bring frivolous claims). *But see* Ladha v. INS, 215 F.3d at 901 (disapproving of *In re* S-M-J- to the extent it establishes a corroboration requirement for credible applicant testimony in the 9th Circuit).

19. *See In re S-M-J-*, 1997 WL 80984, at *3.

20. The line between credibility and sufficiency of proof is not always clear. Often a determination that an applicant's proof was insufficient to establish asylum eligibility seems to stem from credibility concerns. *See, e.g., In re* Y-B-, Interim Dec. 3337, 1998 WL 99554, at *9 (B.I.A. Feb. 19, 1998) (Rosenberg, Bd. Member, dissenting) (taking issue with a denied claim of African-Mauritanian for failure to document a two-year stay in a Sengalese refugee camp despite evidence of U.N. problems providing such documentation, strong supportive country conditions evidence, and no adverse credibility finding); *In re* M-D-, Interim Dec. 3339, 1998 WL 127881, at *8 (B.I.A. Mar. 13, 1998) (Schmidt, Bd. Chairman, dissenting) (alleging majority denied claim with same findings as *In re* Y-B- because it was really concerned that the applicant was Senegalese posing as a Mauritanian refugee). *See also* Cordon-Garcia v. INS, 204 F.3d 985, 993-94 (9th Cir. 2000) (remanding claim because applicant's evidence was discounted

1. Credibility Determinations

Both the subjective and objective components of the well-founded fear determination "depend heavily on the credibility of the applicant and the applicant's evidence."[21] Although the regulations no longer specifically address the credibility assessment of an applicant's testimony against general country conditions,[22] the BIA requires the IJ to explain what background information factored into the decision or how testimony credibility was ascertained apart from such information.[23] Country conditions evidence that conflicts with applicant testimony can support an adverse credibility finding.[24]

2. Sufficiency of Proof

Evidence of generally oppressive conditions in the country of origin is by itself insufficient to show that the individual applicant is at particular risk on account of a protected characteristic or belief.[25] Country conditions

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without an adverse credibility finding).

21. Gailius v. INS, 147 F.3d 34, 43 (1st Cir. 1998). *See* ANKER, *supra* note 1, at 151 ("To the extent it is available, country condition[s] evidence is relevant to the credibility assessment; it can provide context for the applicant's testimony regarding specific events, harm that she suffered, or the reasons for her particular fear of return.").

22. *See* 8 C.F.R. § 208.13(a)(2000). *Cf.* 8 C.F.R. § 208.13(a)(1995) ("[T]he testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration.").

23. *See In re S-M-J-*, 1997 WL 80984, at *6. Inconsistencies in the applicant's testimony alone may be sufficient for an adverse credibility finding. *See, e.g.*, Kabanova v. INS, 189 F.3d 461, 1999 WL 709329, at *2-*3 (2d Cir. Aug. 30, 1999) (unpublished table opinion). Such inconsistencies also may be sufficient to support an adverse credibility finding in spite of strongly supportive country conditions evidence. *See, e.g.*, Malek v. INS, 198 F.3d 1016, 1018-21 (7th Cir. 2000); Bojorques-Villanueva v. INS, 194 F.3d 14, 17-18 (1st Cir. 1999).

24. *See In re S-M-J-*, 1997 WL 80984, at *6-*7 ("Adverse credibility determinations are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony; and where these circumstances exist in view of the background evidence on country conditions, it is appropriate for an [IJ] to make an adverse credibility determination on such a basis."); UNHCR HANDBOOK, *supra* note 1, ¶ 204 ("The applicant's statement must be coherent and plausible, and must not run counter to generally known facts.").

25. *See* Petrovic v. INS, 198 F.3d 1034, 1037 (7th Cir. 2000); *In re S-M-J-*, 1997 WL 80984, at *7 ("[I]t may be that an applicant's testimony is plausible in light of general country conditions information, but that it is overly general. In such a case, we would find that the applicant had failed to meet the required burden of proof, but an adverse credibility determination would not be appropriate."); UNHCR HANDBOOK, *supra* note 1, ¶ 43; 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §§ 34.02[10][c], [10][f], at 34-50 (2000) (noting that the general nature of the applicant's proof will consist of two elements:

documentation nonetheless helps applicants establish that certain protected characteristics or beliefs are targeted by a persecutor. Such documentation also helps demonstrate how the persecutor can become aware of and punish persons with such characteristics or beliefs.[26]

> [Moreover,] when the basis of an asylum claim becomes less focused on specific events involving the [applicant] personally and instead is more directed to broad allegations regarding general conditions in the . . . country of origin, corroborative background evidence that establishes a plausible context for the persecution claim (or an explanation for the absence of such evidence) may well be essential.[27]

Country conditions information is particularly important in cases where the government contends that relocation within the country of origin is feasible,[28] or where changes in country conditions precipitate an asylum claim[29] or occur during the processing of an asylum claim.[30] These cases

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evidence of generally oppressive characteristics of the country of origin and the specific basis for the applicant's fear).

26. *See In re* Mogharrabi, 19 I. & N. Dec. 439, 446-47 (B.I.A. 1987); *In re S-M-J-*, 1997 WL 80984, at *4 ("Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's . . . we also expect general corroborating evidence, from a reliable source, of persecution of persons in circumstances similar to an applicant where such information is reasonably available."); 8 C.F.R. § 208.13(b)(2)(ii) (2000) (allowing for similarly situated claims).

27. *In re* Dass, 20 I. & N. Dec. 120, 125 (B.I.A. 1989).

28. *See, e.g.*, Singh v. Ilchert, 69 F.3d 375, 380 (9th Cir. 1995) (holding that the possibility of internal relocation weighs against a discretionary grant of asylum to an otherwise eligible applicant). *See generally* ANKER, *supra* note 1, at 55-67 (discussing a requirement of countrywide threat where the persecution appears highly localized or the agent of persecution is nongovernmental).

29. Persons who do not flee the country of origin in fear of persecution may become refugees *sur place* because of events occurring in the country of origin after their departure. *See* UNHCR HANDBOOK, *supra* note 1, ¶ 94; ANKER, *supra* note 1, at 35-40.

30. "[T]iming of the changes with respect to the claim process can have a significant impact on the success of a claimant's application. If the change occurs during the initial evaluation of the claim, the applicant has the opportunity to present evidence to show that the changes have not negated his or her claim to refugee status. . . . [I]f changes in country conditions occur after a refugee has been granted asylum, the government must hold a hearing before it may conclude that circumstances have changed significantly enough that the refugee no longer needs asylum protection and may be sent home. If, however, the changes . . . occur after the initial hearing, but while a claim is still pending on appeal . . . , the [BIA may] . . . simply [ ] take 'official notice' of the change in country conditions as a basis for denying the appeal. . . . Once denied asylum, the claimant's only recourse is to file a 'motion to reopen' the case before the BIA. However, these motions are granted at the BIA's discretion and denials are afforded highly deferential judicial review." Katherine J. Strandburg, *Official Notice of Changed Country Conditions in Asylum Adjudication: Lessons from International Refugee Law*, 11 GEO. IMMIGR. L.J. 45, 45-46 (1996) (footnotes

often involve past persecution claims where the government attempts to demonstrate by a preponderance of the evidence that conditions in the country of origin have sufficiently changed so that the adjudicator can no longer presume that the applicant has a well-founded fear of persecution.[31]

Although applicants bear the burden of proof, asylum law recognizes the unique difficulties of proof associated with "the circumstances of refugee flight, exile, and trauma."[32] This recognition not only translates into a "unique and reduced standard of proof,"[33] but also into what has been described as a "duty to inquire."[34] The BIA has interpreted this duty to mean that both the Immigration and Naturalization Service (INS) and IJ share responsibility with the applicant for creating a record that affords an adequate basis of review for the BIA and federal courts of appeals.[35] This shared responsibility extends to the introduction of current country conditions evidence given that such information represents a "reasonable adjudicatory aid intended to facilitate a reasoned and fair decision."[36] As a general matter, this responsibility appears to be satisfied merely by INS submission of current country reports and advisory opinions from the State Department.[37] While the

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omitted). *See generally* ANKER, *supra* note 1, at 137-150 (discussing substantive criteria for analyzing changes in country conditions and noting that the BIA has not adopted a systematic approach to evaluating such changes).

31. *See* 8 C.F.R. §§ 208.13(b)(1), (b)(1)(i) (2000); 8 C.F.R. § 208.16(b)(2) (2000).

32. ANKER, *supra* note 1, at 20.

33. *Id. See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

34. Strandburg, *supra* note 30, at 47. *See* UNHCR HANDBOOK, *supra* note 1, ¶¶ 196, 205(b)(i).

35. *See In re* S-M-J-, Interim Dec. 3303, 1997 WL 80984, at *7, *10 (B.I.A. Jan. 31, 1997), *disapproved of on other grounds by*, Ladha v. INS, 215 F.3d 889, 901 (9th Cir. 2000).

36. *Id.* at *13 (Rosenberg, Bd. Mem., concurring) (noting also that such shared obligations are particularly appropriate in "asylum adjudications, where we are carrying out international obligations, as codified by Congress, to provide refuge to those facing actual or feared persecution"). *See also* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1284-85 (1990) (noting that an adjudicator's knowledge of country conditions can play a useful role in developing and assessing applicant testimony). "[It] is not just a device for spotting weaknesses or magnifying contradictions. Properly applied, it can also assist confused or inarticulate applicants in presenting fully the particularized information that will cast positive light on their claims." *Id.*

37. *See In re S-M-J-*, 1997 WL 80984, at *5. Regulations require the INS to forward asylum applications to the State Department for its input on the claim, and asylum officers or IJs may request specific comment on a pending claim. *See* 8 C.F.R. § 208.11(a), (c) (2000). The State Department has the option of providing any information it deems relevant, including general country conditions information and a particularized assessment of the applicant's claim. *See* 8 C.F.R. § 208.11(b)(1)-(3). BIA Board Member Rosenberg would envision the government's responsibility more broadly in light of international obligations under the Refugee Convention: "I view the Service's responsibility in these proceedings to require not only the production of evidence pertaining to general country conditions, but to require that the Service provide any other evidence, either within its possession or readily accessible, which supports the contentions made by the applicant." *In re S-M-J-*, 1997 WL 80984, at *15 (Rosenberg, Bd. Member,

IJ may bear some responsibility in helping the applicant understand what additional evidence would be necessary to support the claim, in practice the IJ need only "to explain assumptions or conclusions regarding such conditions that form the basis of his decision" so that the BIA can conduct a meaningful review.[38]

B. Administrative Review

The BIA has the authority to exercise independent judgment in a *de novo* review of IJ decisions.[39] In practice, BIA review is often narrowly restricted to the record created by the IJ.[40] Immigration Judge findings are often upheld even when "another outcome might have been justified on the record,"[41] particularly with regard to credibility findings.[42] Moreover, reviews are approached in such a case-specific manner that little guidance exists as to what applicants must do to establish a successful claim.[43] Decisions by the BIA where country conditions evidence was a decisive issue similarly provide little concrete guidance as to its use in asylum claims. The Board has only established that reliable country conditions evidence is often a necessary adjunct to credibility assessments and establishment of "similarly situated" claims.[44] If conditions in the country of origin have changed after the initial hearing, the BIA may take official notice of such changes and use those changes as the basis for denying the appeal.[45]

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concurring).

38. ANKER, *supra* note 1, at 159; *See In re S-M-J--*, 1997 WL 80984, at *6.

39. *See* 8 C.F.R. § 3.1 (d)(1) (2000); *see also In re* A-S-, Interim Dec. 3336, 1998 WL 99553, at * 3 (B.I.A. 1998) (Schmidt, Bd. Chairman, dissenting) ("It is axiomatic that the Board has the authority to employ a de novo standard of appellate review in deciding the ultimate disposition of a case.").

40. *See e.g., In re* Godfrey, 13 I. & N. Dec. 790 (B.I.A. 1971); "The Board hears no testimony and ordinarily limits its review to matters developed in the record. In some exceptional cases the Board has accepted and considered additional affidavits or other documents." GORDON ET AL., *supra* note 25, § 3.05[5][b], at 54-55. *See* Strandburg, *infra* note 45 (discussing the practice of "official notice").

41. *In re A-S-*, 1998 WL 99553, at *8,* 9 (Schmidt, Bd. Chairman, dissenting).

42. *See id.* at *3.

43. ANKER, *supra* note 1, at 8 (noting also that BIA issues only a small proportion of precedent opinions, the majority of which are denials).

44. *See In re* S-M-J-, Interim Dec. 3303, 1997 WL 80984, at *10 (B.I.A. Jan. 31, 1997), *disapproved of on other grounds by*, Ladha v. INS, 215 F.3d 889, 901 (9th Cir. 2000) (holding that the IJ could not rely on assumptions about the applicant's country of origin where the only country conditions evidence in the record was a State Department country report for the wrong country); *In re* Dass, *In re* Dass, 20 I. & N. Dec. 120, 125 (B.I.A. 1989) (holding that country conditions evidence may be essential for claims rooted less in individual experience than the general human rights record of the country of origin).

45. "Official notice" (also called "administrative notice") is similar to "judicial notice," and "is a

The BIA has provided no explicit guidance for assessing the evidentiary weight of differing pieces of country conditions information, even though these "pieces" may appear in a single document or several documents, be derived from one or more sources, and vary in degrees of specificity and reliability.[46] While assumptions about the background conditions of the country of origin cannot be made without pointing to some country conditions evidence from a reliable source in the record,[47] other arguably material country conditions evidence can be ignored without reason.[48] Additionally, reliance on conclusory assessments of the risk of persecution may be sufficient evidence to support a denial of asylum eligibility without any requirement that such assessments be evaluated within the context of country conditions evidence taken as a whole.[49]

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procedure the BIA uses to bring changed country conditions into its deliberations without the adversarial presentation of evidence on the subject." Strandburg, *supra* note 30, at 45. Noticed facts are supposed to be matters of public knowledge from reliable sources that will not deny individual adjudication. *See* 8 C.F.R. § 208.13(b)(1)(i) (2000). However, the BIA not only takes official notice of facts like the establishment of a new government, but it also takes notice of more sweeping judgments about the implications of a change in power without giving the applicant an opportunity to rebut. *See* ANKER, *supra* note 1, at 112 & n.135, 118. The constitutionality of administrative notice has not been resolved by the Supreme Court, but it has been approved by several courts which view the discretionary motion to reopen as sufficient opportunity for the applicant to rebut. *Compare* Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir. 1991), *with* Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992). However, "the filing of a motion to reopen does not automatically stay the deportation process.... Thus, there is no assurance that a claimant's valid objections to the BIA's interpretation of events in his or her native land will be heard in time to prevent deportation." Strandburg, *supra* note 30, at 45-46. For a thorough discussion of official notice of country conditions information, see ANKER, *supra* note 1, at 112-50.

46. *See* Margulies, *supra* note 4, at 34 ("State Department reports are wholly unsystematic in their approach. At best, these reports amount to a grab bag of facts offering little insight into the risks faced by returning refugees. At worst, they offer an apologia for human rights abuses that is driven by U.S. foreign policy concerns rather than the safety of refugees.").

47. *See, e.g., In re* C-Y-Z-, Interim Dec. 3319, 1997 WL 353222, at *5 (B.I.A. June 4, 1997) (holding that INS must submit evidence of changed country conditions to rebut presumption of future persecution where past persecution has been proven by the applicant).

48. *See, e.g.*, Petrovic v. INS, 198 F.3d 1034, 1038 (7th Cir. 2000) ("The BIA is not required to independently specify its reasons for rejecting every piece of evidence it is offered."); *In re* E-P-, Interim Dec. 3311, 1997 WL 123905, at *3-*4 (B.I.A. Mar. 14, 1997) (relying on a State Department assessment that the Haitian government is becoming "increasingly stable" to support a denial of a claim and to ignore other State Department and nongovernmental evidence of continuing threats from paramilitary structures). *But see* Gailius v. INS, 147 F.3d 34, 46 (1st Cir. 1998) (remanding under a substantial evidence standard of review for the BIA to adequately explain why countervailing information that goes to the heart of an asylum claim was not credible or persuasive); *In re* O-Z- & I-Z-, Interim Dec. 3346, 1998 WL 177674, at *4 (B.I.A. Apr. 2, 1998) (three member panel holding that a statement in a State Department country report that anti-Semitism ceased to be government policy was insufficient in a past persecution case when the report contained other statements about local authorities remaining unresponsive to ethnic violence).

49. *See, e.g.*, Kumar v. INS, 204 F.3d 931, 934 (9th Cir. 2000) (affirming a denial of asylum under the compelling evidence standard where the BIA and IJ relied on a State Department conclusion that human

C. Federal Court Review

Appeals of BIA decisions may be heard by the federal courts of appeals,[50] which historically "review the administrative decisions under varying standards for issues of law, fact and discretion."[51] As a general rule, however, BIA findings that asylum applicants have not established a well-founded fear of persecution are reviewed by the federal courts of appeals with extreme deference.[52] The administrative record provides the sole basis on which review is conducted,[53] and the ineligibility determination is "conclusive unless manifestly contrary to law."[54] Moreover, underlying findings of fact, such as the objective reasonableness of the applicant's fears in light of country conditions, "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[55] This extremely narrow scope of

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rights abuses were no longer widespread and ignored countervailing country conditions evidence in the record); *In re* A-E-M-, Interim Dec. 3338, 1998 WL 99555, at *4 (B.I.A. Feb. 20, 1998) (relying on an estimate of a fifty percent reduction in murders by a paramilitary group and ignoring evidence of specific incidents of persons being targeted for violence by the group); *In re* T-M-B-, Interim Dec. 3307, 1997 WL 80988, at *4-*5 (B.I.A. Feb. 20, 1997) (relying on an estimate that guerrillas controlled only two percent of provinces while ignoring evidence that this area included the country's only major population center). *But see* Duarte De Guinac v. INS, 179 F.3d 1156, 1163 (9th Cir. 1999) ("Had the Board engaged in the 'individualized analysis' of country-conditions . . . it would have been compelled to find [that] . . . the INS's evidence, taken as a whole, supports, rather than controverts, Guinac's application for asylum.").

50. The availability of judicial review for asylum claims by some applicants has been significantly eroded since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. *See* 8 U.S.C. §§ 1158(b)(2)(D), 1252(a)(2)(c) (1994 & Supp. 1999) (barring judicial review of administrative determinations of asylum ineligibility due to suspected terrorist activities and commission of certain criminal offenses).

51. ANKER, *supra* note 1, at 8.

52. The current statute governing the scope and standard of review, *see infra* notes 54-55 and accompanying text, reflects the extremely narrow construction of 8 U.S.C. § 1105a(a)(4) (1990) (articulating the standard as "reasonable, substantial, and probative evidence on the record considered as a whole"). *See* INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). 8 U.S.C. § 1105a(a)(4) still applies to cases initiated prior to the 1996 amendments to the Immigration and Nationality Act (INA), codified in Title 8 of the United States Code.

53. *See* 8 U.S.C. § 1252(b)(4)(A) (1994 & Supp. 1999) (allowing remand for a defective or incomplete record). Many commentators question the adequacy of the administrative record for judicial review where official notice has been taken of changed country conditions. *See* Strandburg, *supra* note 30, at 68. In those cases, the record is devoid of the applicant's perspective of the effect of changes on his refugee status. *See id.* This inadequacy also can be seen to represent a breach of the adjudicator's duty to assist applicants in establishing their cases. *See id.* at 69.

54. 8 U.S.C. § 1252 (b)(4)(C) (1994 & Supp. 1999). The Attorney General's discretion to deny asylum to an otherwise eligible applicant is reversed only upon a finding that the refusal is manifestly contrary to law and an abuse of discretion. *See* 8 U.S.C. § 1252(b)(4)(D) (1994 & Supp. 1999).

55. 8 U.S.C. § 1252(b)(4)(B) (1994 & Supp. 1999). *See* Marcu v. INS, 147 F.3d 1078, 1082 (9th

review forecloses virtually any evaluation of the agency's treatment of country conditions evidence.[56]

II. WHAT'S WRONG WITH THIS PICTURE? ABDICATION OF ADJUDICATORY RESPONSIBILITY AND INCREASED RISK OF ERRONEOUS RETURN OF BONA FIDE REFUGEES

United States asylum law codifies an international obligation to ensure that bona fide refugees are not returned to a country where they might suffer persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.[57] Undoubtedly, adjudicators face a formidible task when assessing the validity of claims for asylum and predicting the possible consequences of returning applicants to their country of origin.[58] These cases are typically rife with uncertainty—key events are removed in time, geography, and culture; information about what has occurred is limited and possibly distorted by the different social norms of adjudicators and asylum-seekers; and, any evidence put forth by applicants may appear self-serving given their obvious desire to remain in the United States.[59] Uncertainty also plagues the issue of country conditions. The future course of political and social events is far from certain, and the complex interplay of formal and informal societal processes may give rise to both an improved human rights record and, yet, a continuing risk of persecution for a particular individual.[60] Additionally, interpretations of events in the country

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Cir. 1998) ("Our task is to determine whether there was substantial evidence to support the BIA's finding, not to substitute an analysis of which side in the factual debate we find more persuasive.").

56. *See, e.g., Petrovic*, 198 F.3d at 1037; *Kumar*, 204 F.3d at 934. Courts have occasionally taken issue with the selective use of country conditions evidence to deny asylum claims. These cases, however, generally involved past persecutions where the burden of proof was on the government, and less deferential constructions of the pre-1996 "substantial evidence" standard of review were used rather than the Elias-Zacarias (and now statutory) standard of "compelling evidence." *See, e.g., Duarte De Guinac*, 179 F.3d at 1163; *Gailius*, 147 F.3d at 44; Ghebllawi v. INS, 28 F.3d 83, 85 (9th Cir. 1994).

57. *See In re* S-M-J-, Interim Dec. 3303, 1997 WL 80984, at *2 (B.I.A. Jan. 31, 1997) (observing that the B.I.A., IJ, and INS all bear the responsibility of ensuring that refugee protection is provided to applicants who meet the lesser standard of proof established for asylum eligibility in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of Title 8 of the United States Code)); ANKER, *supra* note 1, at 2-3.

58. Martin, *supra* note 36, at 1280 (noting that asylum adjudication requires a sophisticated and difficult inquiry involving both retrospective factfinding and informed prediction).

59. *See In re S-M-J-*, 1997 WL 80984, at *11 (Rosenberg, Bd. Member, concurring); Margulies, *supra* note 4, at 12-13.

60. *See* Margulies, *supra* note 4, at 12-13.

of origin by governmental and nongovernmental organizations may be influenced by broader political considerations.[61]

Asylum determinations thus inherently depend on largely unverifiable assertions, and asylum seekers face enormous problems of proof when substantiating their claims.[62] Acknowledging that these difficulties could lead to the erroneous return of bona fide refugees, asylum law doctrines were developed which differ significantly from general immigration law. Decisions are supposed to be insulated from foreign policy considerations, presumptions of credibility and sufficiency are to be applied to applicant testimony, and a uniquely low burden of proof is to be required of applicants.[63] This Part explores how these unique protections for asylum applicants are eroded by administrative adjudications, unchecked by the federal judiciary, that uncritically and selectively rely on country conditions information.

A. Administrative Abdication of Factfinding -- Distorting the Evidentiary Record and Raising Applicants' Burden of Proof.

Asylum claims require adjudicators to make three distinct, but interrelated, determinations.[64] Retrospective factfinding about past events specific to the claimant are combined with broader determinations about current country conditions to make an informed prediction about the type and degree of danger an applicant might face if returned to the country of origin.[65]

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61. *See, e.g.*, Gramatikov v. INS, 128 F.3d 619, 620 (7th Cir. 1997) (noting concerns that the State Department downplays human rights violations by governments with which it wants to have friendly relations); M.A. A26851062 v. INS, 899 F.2d 304, 313 (4th Cir. 1990) ("[W]e do not wish to disparage the work of private investigative bodies in exposing inhumane practices, [but] these organizations may have their own agendas and concerns, and their condemnations are virtually omnipresent."). *See generally* GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 68-101 (1986) (discussing the historical influence of foreign policy in asylum determinations).

62. *See In re S-M-J-*, 1997 WL 80984, at *14-*15 (Rosenberg, Bd. Member, concurring); UNHCR HANDBOOK, *supra* note 1, ¶¶ 196-97, 203.

63. *See* discussion *infra* Part II(A) and accompanying notes; Fitzpatrick & Pauw, *supra* note 8, at 758 (noting several changes in asylum practice that were expected to reduce the role of ideology in asylum determinations, including: professionalizing asylum officers, creating the Resource Information Center, allowing the INS and the State Department to rely on nongovernmental sources of country conditions information, and making State Department comments on individual applications optional rather than mandatory).

64. *See* Martin, *supra* note 36, at 1280-85.

65. *See id.*

To make these determinations, the adjudicator must conscientiously assess the facts developed at the hearing—facts that may be characterized as either adjudicative or legislative in nature.[66] For the purposes of this analysis, facts can be considered "adjudicatory" in nature if they relate to the parties and disputed issues to be resolved by the adjudicator. Examples of adjudicatory facts include what happened to the applicant while living in the country of origin, and what will likely happen to him if he is returned.[67] General or specific facts regarding country conditions not directly in dispute may be considered legislative in nature. Examples of these facts include current laws on the books in the country of origin, recent election results, and reported numbers and types of human rights abuses.[68] Accordingly, legislative facts in this analysis are essential to the evaluation and understanding of adjudicative facts regarding country conditions, and neither can be considered in isolation from the particulars of an individual's situation.[69]

Frequently, the dominant source of legislative facts about a country of origin is a country report or profile from the State Department.[70] These

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66. *See* Zamora v. INS, 534 F.2d 1055, 1062-63 (2d Cir. 1976); 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.5, at 140-41 (3d ed. 1994); Martin, *supra* note 36, at 1285. The adjudicatory-legislative distinction is utilized in this paper purely as an analytical device. The construction of these concepts varies somewhat from traditional formulations. *See infra* notes 67-68 and accompanying text.

67. "Adjudicative facts" are construed somewhat more broadly here to include not only individual facts about the applicant and his situation, but also debatable facts about country conditions closely related to the merits of the claim. *Compare Zamora*, 534 F.2d at 1062 n.4 (citing a 1958 version of the ADMINISTRATIVE LAW TREATISE that "[a]djudicative facts are the facts about the parties and their activities, businesses, and properties"), *and* Martin, *supra* note 36, at 1280 (construing adjudicative facts as relating to past events specific to the claimant), *with* 2 DAVIS & PIERCE, *supra* note 66, § 10.5, at 140-41, *and* ANKER, *supra* note 1, at 122 ("Adjudicative facts . . . directly concern the parties and may determine the outcome of the proceeding.").

68. "Legislative facts" are construed narrowly here to include only relatively provable propositions that are almost entirely factual in nature. Excluded are propositions that are mixed with opinion, judgment, policy or political preferences. *Cf.* ANKER, *supra* note 1, at 122 n.175 (discussing Davis' broad categorization of legislative facts to include "facts that are debatable or closely related to the merits and particulars of the applicant's claim"); Martin, *supra* note 36, at 1282 (describing legislative facts as broad determinations about a government or other alleged persecutions in a country of origin).

69. *See In re* S-M-J-, Interim Dec. 3303, 1997 WL 80984, at *4 (B.I.A. Jan. 31, 1997) ("The situation of each person, however, must be assessed on its own merits." (quoting UNHCR HANDBOOK ¶ 43)); UNHCR HANDBOOK, *supra* note 1, ¶ 37 ("Determinations of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.").

70. *See* Marcu v. INS, 147 F.3d 1078, 1082 (9th Cir. 1998) (Hawkins, J., dissenting) ("[W]e have already held that the country report from our Department of State is 'the most appropriate' and 'perhaps the best resource'. . ."); *Zamora*, 534 F.2d at 1062 ("The obvious source of information on general conditions in the foreign country is the Department of State which has diplomatic and consular

documents alone may provide sufficiently varied and reliable legislative facts derived from diverse sources to adequately inform the adjudicator about general background conditions in the country of origin and provide substantial support to an applicant's claim.[71] Along with legislative facts, however, these documents frequently include broad generalizations or summary assessments of country conditions that relate to the danger of particular forms of persecution.[72] Such statements are essentially more adjudicatory than legislative in nature because they project or speculate about the implications of broad legislative facts (e.g., that a reduced number of overall murders by a paramilitary group is sufficient evidence to eliminate the risk that a particular person or group of persons will be attacked). As such, these statements require a vigorous evaluation that considers all the legislative facts known about the country (e.g., the number of violent incidents reportedly perpetrated by the military in the last several years).[73] Some documents, such as State Department advisory opinions, contain assessments and conclusions about a particular applicant's risk of persecution. These assessments influence the adjudicator's "informed prediction"[74] and are at the heart of the asylum determination. They are also, however, often conclusory in nature and are accordingly problematic because they prove "both too little and too much."[75] In the absence of expert rebuttal opinion,[76] such conclusory

representatives throughout the world."); *In re* T-M-B-, Interim Dec. 3307, 1997 WL 80988, at *1 (B.I.A. Feb. 20, 1997) ("Country profiles submitted by the Department of State . . . are entitled to considerable deference.").

71. *See, e.g., Marcu*, 147 F.3d at 1086 (Hawkins, J., dissenting) (quoting portions of a State Department country report that significantly reinforced the applicant's claim); *In re T-M-B-*, 1997 WL 80988, at *11 (Rosenberg, Bd. Member, dissenting) (pointing out that the State Department country profile did not deny the ability of an urban guerrilla group to engage in persecution on account of a victim's political opinion). State Department country reports now routinely incorporate information derived from nongovernmental sources. *See* ANKER, *supra* note 1, at 111 n.129 (noting also that the INS and its Resource Information Center consider sources like Amnesty International, Human Rights Watch, and the Lawyer's Committee for Human Rights as credible as the State Department or U.N. Special Rapporteur).

72. *See, e.g.*, Margulies, *supra* note 4, at 19-20.

73. *See, e.g.*, Mugesera v. Minister of Citizenship and Immigration, Nos. M96-10465, M96-10466, Immigration and Refugee Board (Appeal Division) of Canada. Nov. 6, 1998 (requiring closer scrutiny of *generalizations* or *conclusions* drawn by credible reports on human rights conditions for use in judicial factfinding than for those reports' documentation of political *events* or *incidents* of human rights abuses) (unpublished opinion on file with author & available at the Immigration and Refugee Board of Canada).

74. *See* Martin, *supra* note 36, at 1280.

75. *Zamora*, 534 F.2d at 1063 (noting also that such assessments tend to "give little or nothing in the way of useful information about conditions in the foreign country. What they do is to recommend how . . . the particular petitioner's request for asylum [should be decided].").

76. *See, e.g.*, Gramatikov v. INS, 128 F.3d 619, 620 (7th Cir. 1997) (holding that an asylum applicant "had better be able to point to a highly credible independent source of expert knowledge if he

statements risk carrying "a weight they do not deserve"[77] because they may oversimplify the relationship between political conditions, human rights abuses, and the particular situation of the applicant.[78]

Given the ambiguity and complexity inherent in asylum claims, adjudicators are understandably prone to confusion regarding the natures and purposes of various facts. An unnecessarily narrow scope of BIA review only perpetuates the confusion.[79] The ability of the IJ and BIA to "pluck sweeping generalizations from State Department reports to support [their] conclusions, while ignoring specific statements in those reports that support an asylum seekers's petition"[80] confuses adjudicative facts with legislative facts. The use of generalizations also fails to acknowledge the different roles these facts play when making an informed prediction about the danger of persecution. Additionally, administrative adjudicators frequently fail to evaluate "adjudicative" generalizations in light of all the specific legislative facts known about the country of origin.[81] In so doing, these adjudicators abdicate their fact-finding responsibilities.[82] Moreover, when adjudicators rely on

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wants to contradict the State Department's evaluation of the likelihood of his being persecuted if he is forced to return home"). This kind of deference to State Department assessments requires a type and quality of proof unavailable to the significant numbers of applicants who are either unrepresented or represented only in a "marginal fashion." *In re* A-S-, Interim Dec. 3336, 1998 WL 99553, at *8 (B.I.A. Feb. 19, 1998) (Schmidt, Bd. Chairman, dissenting).

77. *Zamora*, 534 F.2d at 1063.

78. *See* Margulies, *supra* note 4, at 6 ("The State Department's bias on human rights issues is simply more difficult for an adjudicator to discern behind the veneer of governmental legitimacy, authority, and competence."); Martin, *supra* note 36, at 1279 ("Obviously, an important relationship exists between human rights abuses in the home country and the merits of asylum claims by that country's nationals. But it is hardly a one-to-one correlation. . . . Return pronounces no blessing on the home government's overall practices. . . . Similarly, granting asylum is not inconsistent with a policy of alliance and support for a democratically elected government.").

79. *See In re A-S-*, 1998 WL 99553, at *19 (Rosenberg, Bd. Member, dissenting).

80. *Marcu*, 147 F.3d at 1086 (Hawkins, J., dissenting).

81. Another practical effect of this failure is the implicit devaluing of nongovernmental sources, including those sources widely recognized as credible and reliable that are utilized within government reports. *See* Margulies, *supra* note 4, at 3 (discussing the traditional view of governmental sources as inherently more "objective" and reliable sources of country conditions information). This devaluing increases the politicization of the asylum determination. *See* ANKER, *supra* note 1, at 110 n.128 and accompanying text; Fitzpatrick & Pauw, *supra* note 8, at 765-68.

82. *See Marcu*, 147 F.3d at 1086; *In re A-S-*, 1998 WL 99553, at *13 (Rosenberg, Bd. Member, dissenting). Reliance on State Department generalizations and persecution assessments represents a failure to fulfill the adjudicator's duty to assist applicants in establishing their cases according to UNHCR HANDBOOK ¶ 196. *See id.* at *19. This abdication is most dramatic in cases where the BIA has taken official notice of changed country conditions. "BIA opinions taking official notice of changed country conditions are usually cursory, often consisting almost entirely of boilerplate language, and displaying little, if any, reasoned consideration of the relevance of the change in country conditions to the specific

conclusions about country conditions (even if well-supported by legislative facts) without rigorous analysis of their relation to the specific facts presented by the applicant's testimony and other evidence, they implicitly presume that both the applicant's credibility and the sufficiency of his or her evidence is lacking.[83] Together, these practices distort the evidentiary record and effectively raise the applicant's burden of proof.[84]

B. Judicial Abdication of Meaningful Review of Administrative Agency Actions – Increasing the Risk of Erroneous Return.

Abdication of adjudicatory responsibility and erosion of evidentiary protections for asylum seekers go virtually unchecked by an overly deferential standard of judicial review. The *Elias-Zacarias* "compelling evidence"[85] standard significantly narrowed the role of judicial review in asylum determinations, and thus made the asylum review standard considerably more narrow than the kind of review available in other administrative contexts.[86] This "hyper-deferential approach"[87] effectively ratifies selective use of country conditions evidence, ignores the unique interests and obligations at stake in asylum determinations, and creates a formidable barrier to correcting any erroneous denials of asylum eligibility.[88]

The "compelling evidence" standard of review represents an unnecessarily rigid construction of the "substantial evidence" standard normally applied to agency decisions involving formal hearings conducted on record.[89] "Substantial evidence" review is deferential, and courts cannot

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individual's case." Strandburg, *supra* note 30, at 45-46.

83. *See In re A-S-*, 1998 WL 99553, at *17 (Rosenberg, Bd. Member, dissenting) ("As a practical matter, a presumption, at worst of fraud and at best of inadequacy, has insinuated its way into all asylum adjudications made by the Board. I venture to guess that such a presumption exists in many adjudications of asylum claims conducted by Immigration Judges.").

84. *Id.* at *15. *See In re M-D-*, Interim Dec. 3339, 1998 WL 127881, at *5 (B.I.A. Mar. 13, 1998) (Schmidt, Bd. Chairman, dissenting). *See also* Margulies, *supra* note 4, at 19, 24 (discussing how State Department conclusions tend "to outweigh all but the most copiously corroborated refugee testimony. . . [This] results in resolving uncertainty *against* the asylum-seeker, thereby creating a *de facto* 'likelihood of persecution' standard, in direct contravention of *Cardoza-Fonseca*.").

85. *See supra* notes 52-54 and accompanying text.

86. *See infra* notes 89-97 and accompanying text.

87. Margulies, *supra* note 4, at 17.

88. *See* Marcu v. INS, 147 F.3d 1078, 1088-89 (9th Cir. 1998) (Hawkins, J., dissenting).

89. *See* 5 U.S.C. § 706(2)(E) (1994 & Supp. 1998); 6 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 51.02[1], at 51-91 (1999). *But see* 8 U.S.C. § 1229a(a)(3) (1994 & Supp. 1998) (declaring INA removal procedures to be the "sole and exclusive procedure[s]" unless otherwise specified, thereby making

reject agency decisions because they might have come to a different conclusion.[90] The *Elias-Zacarias* Court, however, applied the "substantial evidence" standard to asylum decisions in a manner that significantly enhanced that deference. The Court interpreted traditional administrative law doctrine as allowing federal court rejection of agency findings *only if* a reasonable factfinder would *have* to reach a different conclusion.[91] It also ignored reference to consideration of the "record as a whole" before determining if a factfinder would reasonably have to reach a different conclusion.[92] Furthermore, the *Elias-Zacarias* Court ignored the precedent that the courts are responsible for providing a "thorough, probing, in-depth review" of agency decisions even under a more lenient arbitrary and capricious standard of review.[93] Thus, in asylum determinations, the *Elias-Zacarias* decision represents an abdication of the judiciary's responsibility to evaluate the nature of the evidence before the agency when determining if, as a whole, it was of sufficient "relevant probative force" that a reasonable mind could accept it as adequate support of the agency's conclusions.[94]

The *Elias-Zacarias* Court also failed to consider that the degree of deference required by the "substantial evidence" standard varies with the standard of proof for a particular action.[95] The nature of a given action, as

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procedures under the Administrative Procedures Act inapplicable).

90. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); STEIN ET AL, *supra* note 89, § 51.02[1], at 51-94, 51-96. Deference to agency determinations is said "to protect the integrity and autonomy of the administrative process as well as [acknowledge] the agency's expertise and experience." *Id.* § 51.01[2], at 51-79, 51-81.

91. *See* INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). *Cf. Universal Camera Corp.*, 340 U.S. at 477, *quoting* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

92. *See Universal Camera Corp.*, 340 U.S. at 448 ("[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in light that the record *in its entirety* furnishes, including the body of evidence opposed to the Board's view.") (emphasis added); STEIN ET AL, *supra* note 89, § 51.02[1], at 51-119 ("A view of the entire record means that the court must take into account evidence in the record which detracts from evidence relied on by the agency.").

93. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

94. *See Universal Camera Corp.*, 340 U.S. at 487-88 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

95. *See* Steadman v. SEC, 450 U.S. 91, 96-102 (1981) (interpreting 5 U.S.C. § 706(2)(E) to be subject to 5 U.S.C. §§ 556 and 557, thereby affecting the quantity of proof necessary to demonstrate that agency action was supported by reliable, probative, and substantial evidence).

expressed explicitly by statute or inherently in the overall purpose of a statutory scheme, may require that an administrative decision be supported by more than a "scintilla of evidence."[96] Indeed, "substantial evidence," in some actions, requires "a *preponderance* of such reliable and probative evidence as a reasonable mind would accept as adequate to support the conclusion."[97]

One would expect, therefore, that the asylum law standard of review would be a less deferential construction of the "substantial evidence" standard, given the applicant's low burden of proof and the presumptions of credibility and sufficiency. Yet, the *Elias-Zacarias* Court (and, subsequently, Congress) ignored the unique obligations and interests at stake in asylum determinations. The "compelling evidence" construction allows BIA denials of asylum eligibility to rest on mere conclusory statements about country conditions -- findings that neither fairly recognize countervailing country conditions evidence,[98] nor fairly assess the implications of those findings for the particular situation of an individual applicant.[99] Thus, the risk of erroneous return is increased because the standard of judicial review does not assure that asylum law evidentiary protections have been properly applied.

III. LEVELING THE EVIDENTIARY PLAYING FIELD: PROPOSALS FOR FAIR USE OF COUNTRY-CONDITIONS EVIDENCE

No official barrier prevents the use of diverse sources and types of country conditions information in asylum claim adjudications -- a prerequisite to reliable decision-making in this context.[100] Regulations permit admission

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96. STEIN ET AL., *supra* note 89, § 51.02[1], at 51-111, 51-112.

97. *Id.* at 51-112 (emphasis added). Moreover, under some constructions of the substantial evidence standard, such evidence adequate to support a conclusion cannot include testimony that has been impeached or contradicted. *See* Dickson v. United States, 346 U.S. 389, 396-97 (1953); Hartooni v. INS, 21 F.3d 336, 342 (9th Cir. 1994).

98. "Countervailing country conditions evidence" can exist *within* a report on which an IJ relies, or that evidence can exist *outside* that report in other reports prepared by either governmental or nongovernmental organizations. *See supra* notes 2, 46 and accompanying text.

99. *See* Marcu v. INS, 147 F.3d 1078, 1088 (9th Cir. 1998) (Hawkins, J., dissenting) (arguing that the compelling evidence standard applied by the majority allowed "the cursory letter of a government bureaucrat" to defeat the presumption of well-founded fear in a past persecution case). *Cf.* Gailius v. INS, 147 F.3d 34, 46-47 (1st Cir. 1998) (finding that a State Department advisory opinion did not constitute "substantial evidence").

100. Many scholars agree that the best way to prevent against potential biases in this process is to use diverse sources of country conditions information. *See* ANKER, *supra* note 1, at 110 n.126 and accompanying text; Margulies, *supra* note 4, at 6-7.

and reliance on multiple sources of information,[101] and the BIA itself has noted that "[t]he more background information the Service has about the applicant's country, the more thorough and intelligent the examination will be."[102] The problem for applicants, however, is not in the admissibility of diverse sources of country conditions evidence. Rather, the problem is that the IJs and BIA selectively use individual pieces of country conditions information without regard to the nature of that information or how those "pieces" relate to the record as a whole.[103]

Disregard for relevant evidence, without analysis, distorts the adjudicatory process. Reform is needed at both the administrative and judicial levels of asylum adjudication to "level the evidentiary playing field" and reduce the risk that bona fide refugees will be erroneously returned to their country of origin. Towards this end, guidelines must be developed that govern the use of country conditions information and promote fairness in how such information informs the evaluative and predictive aspects of decision-making.[104] Additionally, federal courts of appeals must employ a "substantial evidence" standard of review that ensures agency conclusions are reasonably grounded in the record and based on substantial evidence that relates to the record as a whole.

A. Administrative Reform

Decisions which rely on decontextualized bits of information risk distorting or misapprehending the evidentiary record and thereby increase the risk that asylum will be denied to bona fide refugees. To reduce this risk of error, the IJs and BIA must demonstrate that their decisions represent a truly individualized assessment of the applicant's claim on its own merits, and that their conclusions have more than just a peripheral basis in the record.[105] Administrative adjudicators must engage in explicit factfinding that accounts

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101. *See* 8 C.F.R. § 208.12(a) (1999).

102. *In re* S-M-J-, Interim Dec. 3303, 1997 WL 80984, at *5 (B.I.A. Jan. 31, 1997).

103. *See In re* A-S-, Interim Dec. 3336, 1998 WL 99553, at *18 (B.I.A. Feb. 19, 1998) (Rosenberg, Bd. Member, dissenting).

104. One commentator has recommended the creation of a new Asylum Board. *See* Martin, *supra* note 36, at 1358. Such a Board would be composed of attorneys and would constitute a separate appellate body to allow the development of greater expertise in both asylum law and knowledge of country conditions. *Id.*

105. *See In re A-S-*, 1998 WL 99553, at *9 (Schmidt, Bd. Chairman, dissenting) (arguing that "reasonable results are not necessarily correct results in individual cases").

for the differences between adjudicatory facts related to disputed issues and legislative facts about the country of origin. Moreover, the administrative decision must reflect a conscientious application of the two kinds of facts in its predictive assessment about the reasonableness of an individual applicant's fear of persecution. Proposed regulatory guidelines for achieving these ends are discussed in turn.

1. Distinguish between legislative and adjudicatory facts, and accord presumptive evidentiary reliability only to legislative facts emanating from credible sources.

The country conditions information from any one source may include statistics, explanations of formal government structures, recitation of policies and laws on the books, reports of particular practices "on the ground" (including detailed descriptions of particular incidents of persecution), and conclusory statements and sweeping generalizations -- none of which can be fully understood apart from the context of the country conditions evidence as a whole.[106] Rejecting or assigning less probative weight to some of these pieces may be justifiable; however, articulating a basis for doing so is a necessary factfinding function that protects against distorting the record and skewing the evidentiary burdens.[107]

The credibility of a source should not be confused with the evaluation of the individual pieces of information that are derived from that source. The nature of particular pieces of information and how those individual pieces inform the decision-making process are separate considerations. Although adjudicators cannot independently verify the accuracy of information reported by governmental or nongovernmental sources, the credibility of the source alone does not warrant giving dispositive weight to any individual piece of information within a given document.[108] Identifying the nature of individual pieces of information is a simple, but crucial, first step in the fair use of

106. *See* Margulies, *supra* note 4, at 34.

107. *See id.* at 36 ("[B]urdens of proof make little difference if asylum adjudicators are free to defer, without analysis, to State Department conclusions.").

108. This issue is particularly acute when the BIA takes official notice of changed country conditions, where applicants rarely have the opportunity to present evidence on how those changes affect their individual situation. *See supra* note 45 and accompanying text. For a discussion of potential procedures to minimize the due process concerns associated with official notice of changed country conditions, see Martin, *supra* note 36, at 1354.

country conditions evidence in asylum determinations. Distinguishing between adjudicatory and legislative facts assists the adjudicator in determining which facts require additional scrutiny before making a predictive assessment of the danger of persecution for the applicant in the country of origin.[109] In the analysis proposed here, the credibility of a source accords presumptive evidentiary reliability only to legislative facts such as reports of specific incidents of human rights abuses or political events.[110] Additional evaluation of adjudicatory facts (e.g., sweeping generalizations about the threat posed by a guerrilla group or the reasonableness of an applicant's fear in light of a current democratic regime) is required before reliance upon them is warranted.

2. Explicitly evaluate the evidentiary reliability of adjudicatory facts regarding country conditions.

Adjudicatory facts that make broad generalizations or sweeping conclusions about country conditions are most vulnerable to bias. The evidentiary reliability of such facts must be evaluated against what is known about the country of origin from legislative facts in the record. A recent decision by the Canadian Immigration Appeals Division (the Division), the functional equivalent of the BIA, illustrates the nature of such an evaluation.[111] The Division explicitly assessed the evidentiary reliability of generalizations and conclusions drawn by human rights reports.[112] Significant to its analysis was the degree to which such statements were supported by specific information in the record as a whole, and the degree to which the

109. *See supra* Part II.

110. Extending presumptive evidentiary reliability to legislative facts from those organizations relied on by the State Department and the INS Resource Information Center for human rights and country conditions information would allow adjudicators to identify credible nongovernmental sources efficiently, while maintaining deference to the expertise of government entities whose business it is to provide such information. *See, e.g.*, ANKER, *supra* note 1, at 111 n.129 (noting that the INS and its Resource Information Center consider sources like Amnesty International, Human Rights Watch, and the Lawyer's Committee for Human Rights as credible as the State Department or U.N. Special Rapporteur). Challenges to this presumption or assessing the reliability of information from other sources could be based on what is known about valid methods of producing the kind of document or type of information in question. For example, before accepting a particular human rights report as reliable evidence, the Canadian Immigration Appeals Division considered whether the reporting organization followed methodologies recognized by scholarly literature and expert testimony. *See* Mugesera v. Minister of Citizenship and Immigration, Nos. M96-10465, M96-10466 (Immigration and Refugee Board (Appeal Division) of Canada, Nov. 6, 1998).

111. *See* Mugesera, *supra* note 110.

112. *See id.* at 36-45.

source acknowledged the possible limitations of its own conclusions (e.g., lack of access to certain territories or groups).[113] The Division accepted generalizations that were well-supported by specific facts and conclusions that had been reasonably qualified by the issuing agency.[114] Unqualified conclusory statements, however, were rejected.[115] A similar evaluative process should be incorporated into asylum determinations by IJs and the BIA to ensure that the information used in administrative decision-making is trustworthy.

3. Discuss the "on the ground" implications of all reliable facts about the country of origin for the individual applicant's situation.

Formal structures, particular national leaders, and "on the books" policies do not necessarily provide an accurate reflection of the actual "on the ground" conditions under which people live in different segments of a given society.[116] Excessive reliance on formal conditions for decision-making "oversimplifies the complex trajectory of transitions from dictatorship to democracy" in transitional countries generally ignores that "[t]he subordination of particular groups often depends less on formal government action than a complex network of practices and institutions, shaped by all-pervasive influences and convictions," none of which are effectively neutralized by "official faces, laws, and policy."[117]

Thus, the informed prediction about the danger an applicant might face if returned to the country of origin requires the adjudicator to consider what country conditions information reveals about "on the ground" practices that

113. *See id.* at 43.

114. *See id.* at 44-45.

115. *See id.* at 43.

116. *See In re* Chen, 20 I. & N. Dec. 16, 19 (B.I.A. 1989) (distinguishing between governmental formalities and the underlying human rights conditions in a country of origin); ANKER, *supra* note 1, at 144-45 (emphasizing that changes alleviating one form of abuse may give rise to new forms of persecution, new changes may stir up old animosities between factions, and nongovernmental persecutors may continue to operate regardless of government formalities); Strandburg, *supra* note 30, at 61 (emphasizing that adjudicators cannot assume formal policies and government structures are uniformly effective throughout all sectors of society).

117. Margulies, *supra* note 4, at 21-22 (internal citations omitted). *See, e.g., In re* R-, 20 I. & N. Dec. 621, 630-31 (B.I.A. 1992) (Dunne, Bd. Member, concurring in part, dissenting in part) (criticizing the majority for assuming that the democratic nature of the Indian government eliminated a Sikh applicant's reasonable fear despite State Department reports that similarly situated persons had been killed).

relate to the individual's situation.[118] Such a determination is necessarily a fact-specific, case-by-case determination.[119] However, the individualized determination will be more reasonably grounded in the record if the adjudicator rigorously compares supportive and countervailing information about country conditions factors that are closely linked with the persecution risk generally.[120] Among these factors are: (1) the fundamental nature of the country of origin's power structure, including its history and relative stability; (2) the extent to which political participation is encouraged or allowed for diverse segments of the society; (3) how dissent is responded to at national, regional, and local levels; and (4) what specific incidents of persecution are known to have occurred, and how those incidents have been responded to at national, regional, and local levels.[121] With country conditions so analyzed, the adjudicator is in a better position to determine whether a reasonable person with the applicant's experiences faces at least a fair possibility of persecution.[122]

Accounting for the nature of the information relied upon, and its relation to the record as a whole, would ensure that eligibility denials are supported by an explicit discussion of the specifics of the applicant's situation relative to conclusions about country conditions. Thus, the record would reflect greater clarity as to how "reasonable fear" was assessed and whether the appropriate presumptions and burdens of proof were applied. The resulting particularized findings would create an administrative record that is adequate

118. *See In re* E-P-, Interim Dec. 3311, 1997 WL 123905 at *6 (B.I.A. Mar. 14, 1997) (Schmidt, Bd. Chairman, dissenting) (emphasizing that general country conditions must be connected to the specific conditions giving rise to the individual's fear); ANKER, *supra* note 1, at 141 (discussing how "adjudicators should not make broad judgments about changed circumstances without relating those changes to the applicant's specific circumstances").

119. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).

120. *See* ANKER, *supra* note 1, at 137-50; Margulies, *supra* note 4, at 28; Strandburg, *supra* note 30, at 60.

121. *See* sources cited *supra* note 120.

122. *See Cardoza-Fonseca*, 480 U.S. at 440 (indicating that a one in ten chance of persecution could establish reasonable fear); 8 C.F.R. § 208.13(b)(2) (1999) (requiring the applicant to demonstrate a "reasonable possibility of suffering such persecution if he or she were to return . . . or avail himself or herself of the protection of that country"). *See also* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (emphasizing that the basis of administrative action "must be set forth with such clarity as to be understandable").

for meaningful judicial review.[123]

B. Judicial Reform

Judicial review of administrative determinations does not allow the court to substitute its judgment for that of the agency.[124] However, the role of the court is "to act as both supervisor and partner of the administrative agencies in furtherance of the public interest,"[125] and to intervene when the record reflects unfairness.[126] The federal judiciary abdicates this responsibility when it allows "deference" to become perfunctory "rubber stamping" of administrative decisions.[127] Moreover, the international obligations and humanitarian aims of asylum law indicate "no reason to treat the [BIA] as a unique kind of administrative agency entitled to extreme deference"[128] in which the asylum-seeker is forced to show that only one possible conclusion could be drawn from the evidence. A standard of review that requires asylum determinations to be reasonably grounded on substantial evidence, as related to the record as a whole, would not result in the federal courts of appeals reweighing evidence or resolving factual disputes.[129] Rather, such a standard would allow the courts to verify that the administrative agency has engaged in neutral factfinding and applied appropriate evidentiary protections.[130] Thus, a return to a "substantial evidence" standard, as interpreted by normal administrative law principles, is warranted.

A decision is not supported by substantial evidence if it rests on "faulty assumptions or factual foundations."[131] With regard to country conditions

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123. *See* Gailius v. INS, 147 F.3d 34, 44 (1st Cir. 1998) (arguing that "the need for clear administrative findings is implicit" in asylum law); Coriolan v. INS, 559 F.2d 993, 999 (5th Cir. 1977) (holding under the substantial evidence standard that "the reviewing court will not supply a reasoned basis for agency action that the agency itself did not articulate"). *See also* cases cited *supra* note 122.

124. *See* STEIN, ET AL, *supra* note 89, § 51.01[2], at 51-79 to 51-81.

125. *Id.*, § 51.01[2], at 51-87.

126. *See* 8 GORDON ET AL., *supra* note 25, § 104.07[2], at 104-95.

127. *See* Marcu v. INS, 147 F.3d 1078, 1086 (9th Cir. 1998) (Hawkins, J., dissenting).

128. Ghebllawi v. INS, 28 F.3d 83, 85 (9th Cir. 1994). *But see* Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995) (holding that *Elias-Zacarias*' construction of the substantial evidence standard was the definitive interpretation of the standard of review for BIA fact findings).

129. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951); Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994).

130. *See Marcu*, 147 F.3d at 1089 (Hawkins, J., dissenting).

131. Color Pigments Mfrs. Ass'n v. OSHA, 16 F.3d 1157, 1160 (11th Cir. 1994) (differentiating the "substantial evidence" review from the less deferential "arbitrary and capricious" standard and the more stringent "preponderance of the evidence test").

evidence, a denial of eligibility could be deemed to rest on a faulty assumption if the adjudicator gave dispositive weight to evidence of formal aspects of a country of origin's government without analyzing its "on the ground" practices.[132] Similarly, the factual foundation for a denial of eligibility would be faulty where the nature of individual facts has been misapprehended (e.g., where conclusory statements or broad generalizations have been relied on without rigorous comparisons of specific supportive and countervailing information to assess their evidentiary reliability).[133] In both instances, the agency fails to provide a well-reasoned basis for finding why an applicant did not demonstrate a "reasonable possibility of suffering such persecution if he or she were to return . . . or avail himself or herself of the protection of that country[.]"[134] Thus, such denials of asylum eligibility are not supported by substantial evidence and the courts should be responsible for remanding the case for correction.[135] Anything less would effectively raise the applicant's burden of proof or undermine the credibility of the process by an appearance of arbitrariness.[136]

CONCLUSION

Selective use of decontextualized country conditions information in asylum determinations distorts the adjudicatory process, undermines respect for the fairness of decision-makers, and increases the risk that asylum will be denied in violation of international obligations. To remedy this situation, administrative adjudicators must account for both the nature and context of

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132. *See* Margulies, *supra* note 4, at 17 (arguing that the practice of "citing the results of single elections or changes in law 'on the books' as proof that refugees have nothing to fear" to defeat an otherwise valid claim represents a demise of U.S. commitment to the protections of refugees).

133. *See Universal Camera Corp.*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). *See also* discussion *supra* Part III.A.2.

134. 8 C.F.R. § 208.13(b)(2) (2000).

135. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) (noting that remand is the preferred course when the administrative agency fails to offer legally sufficient reasons for its decision); *See generally,* Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87 (1968) (holding that deference to the discretion an agency is entitled to is not a substitute for evidence in the record).

136. *See e.g.*, Marguiles, *supra* note 4, at 36-40 (arguing that explicit factfinding regarding changed country conditions is necessary to preserve an applicant's low burden of proof); *see also* Martin, *supra* note 36, at 1280-85 (emphasizing the relationship between the process by which asylum decisions are made and the perceived fairness of decision-makers).

country conditions information used. Additionally, decisions to deny asylum must be supported by a detailed analysis of the "on the ground" implications of country conditions information for an individual applicant's situation. Moreover, the federal courts of appeals must play an active role in evaluating the factual foundation for the agency's decisions to ensure that asylum applicants are not made to prove more than the law requires.