Asylum seekers often escape their home countries under precarious circumstances without the time or capacity to gather documentary evidence of the harms that they suffered or fear. The main source of evidence in an asylum case is, therefore, an applicant's own testimony. Although this testimony may alone be sufficient to establish asylum eligibility, U.S. adjudicators usually expect corroboration of the applicant's claim, including documentation regarding human rights conditions in the applicant's home country. This Briefing addresses the role of such country condition evidence, and particularly country expert affidavits and testimony, in asylum proceedings.

The Refugee Act of 1980 and current regulations mandate individualized determinations of asylum claims, including meaningful consideration by adjudicators of all reliable sources of country condition information, such as governmental and non-governmental reports, reports from news organizations, and other credible evidence. Prior to the passage of the Refugee Act and promulgation of these regulations, asylum decisions in the United States were, however, largely controlled by U.S. foreign policy interests. The State Department submitted advisory opinions recommending grants or denials of asylum, which Justice Department adjudicators routinely adopted. The Refugee Act and final regulations issued by the Justice Department in 1990 sought to establish a more objective and human-rights based system of decision-making in asylum cases.

Some adjudicators have, nonetheless, continued to improperly privilege State Department assessments of country conditions over other evidence in the record in asylum adjudication. The Board of Immigration Appeals, for example, has asserted that State Department reports “are usually the best source of information on conditions in foreign nations” and should be accorded “special weight.” Although some federal courts have also found State Department reports to be “high[ly] probative,” other federal courts have repeatedly condemned adjudicators’ “chronic overreliance” on the “generalized statements of country conditions” in State Department reports, noting that the government's foreign policy objectives may influence the information presented in the reports. Indeed, commentators have emphasized that State Department reports may be highly biased, outdated, and inadequate in their coverage of human rights abuses.

Country condition evidence and expert testimony serve an important function where adverse information in a State Department report conflicts with an asylum applicant's claim. When human rights violations suffered or feared have not been widely documented, the State Department may only indicate that there are no reports of violence. Reports and articles written by nongovernmental organizations (NGOs), academics, and news agencies along with testimony from country experts can help fill these evidentiary gaps. Such country condition information and expert testimony is often valuable to providing adjudicators with relevant context for the applicant's claim.
Country expert testimony should not, however, be necessary where applicants' testimony is credible, specific, and detailed. Applicants who are detained, or unrepresented or who have limited financial resources may not be able to present expert evidence to support their claims. Country experts can be difficult to find, and, although some may donate their time to nonprofits, experts are often prohibitively expensive to retain. Adjudicators must not impose unreasonable corroboration requirements. Rather, asylum officers, immigration judges (IJs), government attorneys, and immigration advocates alike must remember that “the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.”

The first part of this Briefing explores the evolving evidentiary issues in U.S. asylum law and the impact of recent statutory and caselaw developments, focusing on the role of expert evidence. The Briefing then addresses the historic context for the use of country condition evidence and, particularly, expert testimony in asylum cases. The third part of this Briefing highlights the importance of country condition evidence and expert testimony, drawing on specific case examples from the work of the Harvard Immigration and Refugee Clinical Program. Finally, the Briefing concludes with a brief discussion of some of the challenges that attorneys may face in working with country experts in asylum cases.

OVERVIEW OF U.S. ASYLUM LAW: EVIDENTIARY RULES AND EXPERT TESTIMONY

The “Refugee” Definition
Refugee law provides surrogate protection to a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” where the person's own home country either cannot or will not offer the person protection.

Under U.S. law, a refugee is defined as: “[A]ny person who is outside any country of such person's nationality … and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion … .”

This definition is comprised of five distinct elements:

- **Well-founded fear**: the standard of risk or likelihood that harm will be inflicted;
- **Persecution**: serious harm, including emotional, psychological, physical, and/or economic harm, and the failure of state protection;
- **Nexus**: the causal link between the grounds and the harm or the failure of state protection and the grounds;
- **Grounds**: race, religion, nationality, political opinion, membership in a particular social group; and
- **Bars**: one-year filing deadline, criminal bars, firm resettlement, etc.

Country conditions evidence and country experts can address and help corroborate each of these elements, but expert affidavits may be particularly useful to adjudicators in assessing an applicant’s well-founded fear, the persecution suffered or feared, the failure of state protection, and the linkage between the grounds and the serious harm and/or the failure of state protection.
Under U.S. law, unreasonable corroboration demands must not be placed on asylum seekers, many of whom flee their home countries “with the barest necessities and very frequently even without personal documents.” Given these circumstances, “[t]he most common form of evidence … is the applicant's own testimony,” and this testimony should be accorded the benefit of the doubt. The REAL ID Act of 2005 underscores that an asylum applicant's testimony alone “may be sufficient to sustain the applicant's burden without corroboration” if the applicant's testimony “is credible, is persuasive, and refers to specific facts … .”

Although adjudicators, practitioners, and scholars alike have (mis)interpreted the REAL ID Act as imposing heightened corroboration requirements, the Act itself only codifies the corroboration rule previously articulated by the Board of Immigration Appeals in its 1997 decision In re S-M-J-. In S-M-J-, the Board emphasized that “[u]nreasonable demands” should not be “placed on an asylum applicant to present evidence to corroborate particular experiences.” Rather, an applicant should focus on corroborating “material facts which are central; to his or her claim and easily subject to verification.” The Board explained that an applicant should provide “general corroborating evidence … where such information is reasonably available.” The Board also noted that “specific documentary corroboration of an applicant's particular experiences is not required unless the supporting documentation is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers.”

As Board Member Lory Rosenberg observed in her concurrence in S-M-J-, “[o]ur opinion should not be read to impose upon the individual asylum applicant the necessity of providing more than her credible testimony to satisfy her burden, if that is all that is available.” Rosenberg added that, for detained applicants, the “rules of the institution” may not allow the applicant “to make an overseas telephone call without money, on credit,” and the applicant may not be able to “contact her family by letter and manage to receive a response before her hearing.” As a result, adjudicators must especially consider “when impediments attendant to the asylum applicant's situation have prevented the orderly or even the timely presentation of evidence that would corroborate the material facts which may be central to a specific claim.”

REAL ID echoed the S-M-J- standard, noting that, “[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” Although applicants bear the burden of establishing eligibility for asylum, asylum officers, immigration judges, and trial attorneys share the responsibility with the applicant of developing the record and should “ascertain and evaluate all the relevant facts” to determine whether the applicant has met his or her burden.

In practice, however, adjudicators often expect corroboration of asylum applicants' claims and, in some instances, demand extensive documentation. In order to meet these heightened corroboration demands, competent immigration attorneys may submit country condition evidence as well as expert affidavits and testimony, when possible, some of which may verify or support specific factual allegations in the applicant's claim. Country condition evidence and country expert testimony may also be relevant to the adjudicator's credibility assessment of the applicant; “[s]uch evidence serves as both an objective basis for assessing a claim and as a background against which an adjudicator may evaluate the credibility of testimony.”

Country experts may be professors, scholars, human rights researchers, anthropologists, and others whose testimony can help explain why an applicant's fears of return to his or her home country are reasonable given the expert's knowledge of the current human rights conditions in the applicant's home country. Experts can thereby provide adjudicators with an independent, objective basis for their decision to grant asylum. Experts may also be able to corroborate specific portions of the applicant's
claim and may have knowledge of, or be able to obtain, information directly related to the applicant's fear of return through sources on the ground in the applicant's home country.

**Country Condition Evidence and Expert Testimony—Admissibility and Due Process**

Immigration judges are not strictly bound by formal evidentiary rules, and a wide range of country condition evidence, expert testimony, and reports should generally be allowed in immigration proceedings. As the Board has explained, “[i]n immigration proceedings, the 'sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.” Yet, some adjudicators have applied more stringent evidentiary requirements in assessing who qualifies as an expert and what weight to accord expert testimony. Where immigration judges have failed to admit relevant expert evidence and/or have refused to give the evidence adequate weight, circuit courts have remanded and ordered adjudicators to review their decisions in light of the expert evidence.

For example, in *Tun v. Gonzales*, the Eighth Circuit concluded that an immigration judge's “election to exclude the report of a facially unobjectionable expert without any explanation as to why cross-examination was needed is unfair and unsupportable.” In *Niam v. Ashcroft*, the Seventh Circuit found that “nothing in [the expert's affidavit] or in her curriculum vitae showed that she was unqualified to give expert evidence in this case.” In another case, the Seventh Circuit similarly found that the immigration judge had erred in excluding the testimony of the petitioners' expert and in privileging State Department reports over expert evidence. The court noted that, by refusing expert testimony, the immigration judge had “prevented the petitioners from showing that the broad assertions of the country report were indeed subject to qualification—a qualification that might well have made a difference in [the case].”

Circuit courts have, however, declined to remand cases for reconsideration by the Board and immigration judge where the expert was found to lack the qualifications necessary to speak to the specific applicant's claim. In *Diop v. Holder*, for example, the Eighth Circuit concluded that the immigration judge's refusal to allow expert testimony in a case involving female genital mutilation did not violate due process because the expert had not been to Senegal or researched the asylum applicant's specific tribe. Country experts, and expert witnesses generally, are “broadly defined as someone who is ‘qualified as an expert by knowledge, skill, experience, training, or education’” and who “has ‘scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.’” Expert testimony and affidavits “may include reasonable inferences that the expert draws from the available facts and data.” Such country expert testimony, as well as country condition evidence, may help substantiate the causal link between the harm an applicant suffered or fears and the protected grounds and/or failure of state protection.

In order to prove that an immigration judge has violated an applicant's due process by excluding expert testimony, an applicant must show that (1) the immigration judge's decision to exclude expert testimony deprived the applicant of “a meaningful opportunity to be heard” and (2) “the deprivation was prejudicial—that is, the disallowed testimony would have potentially affected the outcome of the case.” The Seventh Circuit in *Hamid v. Gonzales* articulated three instances where the exclusion of expert testimony may be particularly prejudicial: the first, where the expert can offer “corroboration of facts rejected by the [immigration judge] as uncorroborated”; the second, where the expert can provide evidence of persecution the applicant suffered in the past; and the third, where the expert can offer “facts contrary to the conclusions of the State Department's country report.” This latter circumstance is addressed in greater detail in the sections that follow.
Given the “special weight” that some adjudicators have placed on State Department reports in asylum proceedings, expert testimony and country condition evidence may be particularly important to rebutting State Department reports that do not support an applicant's claim and to corroborating an applicant's claim when a State Department report does not address the particular circumstances that the applicant fled or fears.

**HISTORICAL CONTEXT FOR USE OF COUNTRY CONDITION EVIDENCE IN ASYLUM CASES**

The evolution of asylum adjudication over the past several decades—from a system largely controlled by U.S. foreign policy interests to a more independent and objective decision-making process—informs the role of country condition evidence and expert testimony in asylum proceedings today. This section explores the politicized nature of State Department reports and opinions during the Cold War, the statutory and regulatory changes implemented to address overreliance on such politicized evidence in asylum cases, and the regulatory recognition of the need for objective, independent country condition information from nongovernmental organizations, news agencies, and other sources. The Board's recent decision in *Matter of H-L-H* and its privileging of State Department reports over other evidence underscores the continued need for country condition evidence and expert testimony to rebut the reports where they conflict with or contradict applicants' accounts of their experiences and to fill in gaps where the State Department reports do not provide adequate corroboration of the harms that applicants allege that they have suffered or fear.

**Foreign Policy and Ideology from Refugee Determinations and the 1980 Refugee Act**

Prior to the 1980 Refugee Act, geographical and ideological preferences dictated who the United States admitted as a refugee. During this period, U.S. law required refugees to show that they had fled a Communist country or a country in the Middle East in order to be admitted into the United States.

This pre-1980 definition of refugee stood in stark contrast to the ideologically neutral refugee definition set forth in the 1951 U.N. Refugee Convention, which provides protection based on an assessment of the human rights violations that the applicant feared if returned to his or her home country, the reasons for the harms feared, and the failure of the applicant's home country to protect the applicant against these harms.

In 1980, the United States changed its law, deleting the ideological definition of “refugee” and adopting instead a definition that conformed to the Refugee Convention and 1967 Protocol to which the United States acceded in 1968. The purpose of the Refugee Act of 1980 was to eliminate both the appearance and reality of political or foreign policy influence over asylum decisions. The Refugee Act of 1980 aimed to reform the ad hoc and discriminatory approach that the United States had taken to refugee admissions and mandated more equitable, non-ideological, and neutral decision-making in order to “establish a more uniform basis for the provision of assistance to refugees.”

Despite the Refugee Act's mandate, political and foreign policy considerations continued to have significant influence over asylum decisions during the Cold War. Adjudicators often overlooked their obligation of individualized determinations in asylum cases and instead delegated decision-making authority to the State Department, whose conclusions were based on its own foreign policy and political perspectives. Under interim regulations promulgated in 1980, adjudicators were required to adjourn proceedings and request an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs before reaching a determination regarding an applicant's eligibility for asylum.

The 1980 interim regulations remained in effect for 10 years, and, throughout this Cold War period, political and foreign policy considerations continued to have substantial influence over asylum decisions. However, given the mandate of the
Refugee Act of 1980 and U.S. treaty obligations, courts and commentators, alike, criticized the role of the State Department in asylum decisions. Indeed, studies conducted during this time revealed that adjudicators essentially rubber-stamped State Department opinions when these were made available. In addition, immigration judges often required “evidence of direct visual observation of persecutory events” because applicants' testimony was considered “inherently unreliable and insufficient to establish a claim.”

1990 Regulations and a Neutral Definition of Refugee

Final regulations issued in 1990 radically changed this landscape. The 1990 regulations sought to insulate asylum adjudication from foreign policy considerations and eliminated mandatory State Department consultation, recognizing that the State Department's influence over asylum decisions should be reduced. These final regulations provided for the non-hierarchical consideration of a wide range of country condition information, including State Department reports and reports of nongovernmental organizations, by adjudicators.

The new regulatory provision, making State Department commentary optional instead of mandatory, reflected a consensus among government policymakers, as well as among practitioners and nongovernmental organizations, that the State Department's influence over asylum adjudication should be cabined given the limits inherent in the State Department's perspective and governmental role. The 1991 settlement in American Baptist Churches v. Thornburgh highlighted these regulatory changes and, in signing the settlement agreement, the Department of Justice and legacy Immigration and Naturalization Service (INS) agreed that, under both the statute and the regulations, “foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.”

The 1990 regulations made clear that asylum decision-makers could rely on a range of country condition information, including “material provided by the Department of State … or other credible sources, such as international organizations, private voluntary agencies, or academic institutions,” in reaching their determinations. The regulations responded to concerns that adjudicators consider “information concerning foreign country conditions that is as accurate and complete as possible, derived from a wide variety of sources, both to help dislodge any preconceptions and to foster systematic expertise for use in developing the record and making the ultimate judgment on the claim.”

In developing the final regulations, the Department of Justice rejected a 1987 regulatory proposal identifying the State Department Country Reports on Human Rights Practices as “the principal source” of information distributed to asylum officers concerning country conditions. Instead, as noted, the final 1990 regulations specifically set forth a non-hierarchical list of potential sources of information for adjudicators to consider, which is included in the regulatory scheme today.


Despite long-standing statutory and regulatory changes implemented to insulate asylum decisions from foreign policy, the Board of Immigration Appeals in its 2010 H-L-H- decision improperly asserted that State Department country reports should be accorded “special weight.” The Board's characterization of the State Department reports in H-L-H- as “highly probative evidence” and “usually the best source of information on conditions in foreign nations” violates the spirit, and even the direct language, of the regulations. The H-L-H- decision harkens back to the period prior to 1990 when selective use of State Department information and political concerns distorted asylum decisions and violated obligations under the Refugee Convention, the Refugee Act, and attendant regulations.
Furthermore, the Board's assertion in *H-L-H-* that the State Department reports should be accorded “special weight” is at odds with the general purpose of State Department country information and fails to account for the limitations inherent in such reports. 74 Congress mandated publication of country reports by the State Department in order to support the political objectives of the President of the United States, to aid in diplomacy, and to inform the allocation of military assistance to foreign countries. 75 State Department reports are intended as “a resource for shaping policy; conducting diplomacy; and making assistance, training, and other resource allocations.” 76

Indeed, Congress recognized these limitations in adopting the International Religious Freedom Act of 1998 (IRFA) 77 to address inter alia bias, lack of training, and “diminished attention to the problems of religious persecution” in the State Department and legacy INS. 78 Under the IRFA, annual reports on religious freedom in specific countries “together with other relevant documentation” “serve as a resource for immigration judges and consular, refugee, and asylum officers in cases involving claims of persecution on grounds of religion.” 79

Courts have recognized that “the State Department's reports are sometimes skewed toward the governing administration's foreign policy goals and concerns” 80 and should not be treated as “Holy Writ.” 81 As the Second Circuit observed in *Chen v. U.S. I.N.S.*, “the immigration court cannot assume that a report produced by the State Department—an agency of the Executive Branch of Government that is necessarily bound to be concerned to avoid abrading relations with other countries, especially other major world powers—presents the most accurate picture of human rights in the country at issue.” 82 Other circuit courts of appeal have similarly noted that “there is perennial concern that the Department softpedals human rights violations by countries that the United States wants to have good relations with.” 83

State Department country profiles, like the 2007 profile relied on by the Board in *H-L-H-* may be even more problematic as they are produced solely for the asylum office and the immigration courts and are not generally publically available. 84 As one court observed, “[i]t stands to reason that [such] a report produced by one executive department to aid the litigation of another executive department would often support the second department's point of view...” 85 Such country profiles and issue papers, discussed further below, include sweeping assertions regarding the validity of certain types of asylum applications.

Country expert testimony, as well as other evidence presented by applicants to address the applicant's circumstances and the harm that the applicant would likely face if forced to return to his or her home country, can rebut the generalized information in State Department reports and substantiate the reasonableness of the applicant's fears of return to the home country. As the Second Circuit has noted, “where a [State Department] report suggests that, in general, an individual in the applicant's circumstances would not suffer or reasonably fear persecution in a particular country, the immigration court may consider that evidence, but it is obligated to consider also any contrary or countervailing evidence with which it is presented, as well as the particular circumstances of the applicant's case demonstrated by testimony and other evidence.” 86

**IMPORTANCE OF COUNTRY CONDITION EVIDENCE AND EXPERT TESTIMONY: SPECIFIC CASE EXAMPLES**

The examples below illustrate the ways in which country condition evidence and expert testimony can help contextualize applicants' claims by rebutting State Department reports, country profiles, and issues papers and by providing a more nuanced picture of the harm that an applicant would likely face if forced to return to his or her home country. Such evidence and expert testimony can corroborate that the harm suffered in the past and/or feared by the applicant is consistent with human rights conditions in the applicant's home country. Country experts and evidence can also help adjudicators understand why authorities
in the home country cannot or will not protect the applicant and why the harm faced by the applicant is related to one or more of the protected grounds—race, religion, nationality, political opinion, or membership in a particular social group.

**Gang-Based Asylum Claims**

The 2007 State Department Issue Paper on Youth Gang Organizations in El Salvador, which describes random gang violence in El Salvador, stands in stark contrast to reports, books, and articles written on the politicized nature of Salvadoran gangs by nongovernmental organizations and country experts, including a report written by the Harvard International Human Rights Clinic based on extensive, on-the-ground research in El Salvador. Yet, government attorneys and adjudicators alike have cited the State Department's Issue Paper, which was specifically drafted “for use by the Executive Office of Immigration Review and the Department of Homeland Security in assessing asylum claims,” to counter applicants' arguments regarding their fear of return to El Salvador and the failure of state protection in El Salvador.

For example, in *Lizama v. Holder*, the Fourth Circuit cited the Issue Paper's statement “that the Salvadoran government's 'strong-hand law enforcement policy' is having a 'noticeable effect,' at least in the short term, of curbing gang violence” in support of its conclusion that the applicant had “failed to establish he will 'more likely than not' be tortured if removed to El Salvador.” In *Cisneros-Diaz v. Holder*, the Tenth Circuit concluded that the asylum applicant had failed to establish that the Salvadoran government was unwilling or unable to protect him where “the IJ reasonably read the authoritative reports on El Salvador” and relied on those reports in denying the applicant's claim. The Tenth Circuit noted that the State Department Issue Paper, cited by the immigration judge, stated:

> [T]he Salvadoran government does not have a policy or practice of refusing assistance to persons who receive threats or are otherwise victims of gang violence. Additionally, the U.S. Embassy in San Salvador has no information to suggest that persons have been denied assistance from police authorities in relation to complaints they have made relating to gang violence or threats from gang members … . The Salvadoran government treats gang violence as a high priority, has expended considerable sums to address the issue, and has received technical assistance from the U.S. and other countries to improve its law enforcement capabilities.

The Tenth Circuit concluded that “[a] reasonable adjudicator presented with the evidence at Mr. Cisneros-Diaz's hearing would not be compelled to reach a conclusion contrary to the IJ's.”

The Issue Paper, however, fails to acknowledge the well-documented and politicized power of the gangs in El Salvador and improperly dismisses concerns regarding the Salvadoran state's ability to control and prevent violent attacks by gangs. Under asylum law, a state's good faith, but futile, efforts to protect its citizens do not constitute meaningful state protection. Rather, adjudicators must make an individualized determination regarding each applicant's well-founded fear, and states must “reduce the risk of claimed harm below the well-founded fear threshold.”

As the International Human Rights Clinic at Harvard Law School explained in a letter to former Assistant Secretary of State Michael Posner, the Issue Paper “misstates the reality of the police role in protecting citizens from gang violence and coercion. … Although the Salvadoran police do not have an official policy of refusing assistance, '[a]ctual and threatened victims of violence interviewed by our researchers in El Salvador … reported that Salvadoran police were unwilling or incapable of providing citizen protection.’”
Given this disparity between the situation described in the State Department Issue Paper and the country conditions documented by NGOs, country expert affidavits and testimony may assist adjudicators in fully understanding the fears of an asylum applicant fleeing gang violence in El Salvador and the reasons that the applicant's fears are well-founded. 96 For example, in an expert affidavit submitted by the Harvard Immigration and Refugee Clinic in support of a successful asylum claim by a Salvadoran family fleeing gang violence, the expert opined that the applicants would not receive “adequate protection from the Salvadoran State if forced to return to El Salvador” and concluded, based on the facts presented, that “it is highly likely that [the applicants] will be found and again targeted for serious harm, killed, and possibly tortured if they are forced to return to El Salvador.” 97 In that case, the family had strong ties to members of the Salvadoran police who had tried but failed to protect the family, and the family obtained a letter from the police indicating that they could not protect the family. The expert was also able to explain why the applicants' fear of being identified and again targeted if forced to return was well-founded particularly given “the increased organization and coordination within the gang, and the small size of the country (roughly the size of Massachusetts).” 98

**LGBT Asylum Claims**

Country expert affidavits and country condition information from NGOs and other sources have been important in rebutting State Department information in asylum cases involving lesbian, gay, bisexual, and transgender (LGBT) individuals. The State Department country reports include a section specifically addressing discrimination and violence against LGBT individuals. Unfortunately, however, attacks on LGBT individuals are rarely well-documented or extensively reported; as a result, the State Department sometimes indicates that “there were no reports of” violence or discrimination against LGBT individuals. In such cases, expert affidavits can help clarify why the State Department has not received any relevant reports and what the country expert’s research reveals about the situation of LGBT individuals in that particular country.

This issue specifically arose in a Clinic case involving a gay man from the Democratic Republic of Congo (DRC). The case was before an immigration judge, and the Department of Homeland Security (DHS) trial attorney attempted to use the language in the 2009 DRC State Department Country Report to disprove the client's claim. At the time, the State Department Country Report for the DRC stated: “[T]here were no reports during the year of police harassing homosexuals or perpetrating or condoning violence against them. There were no reports during the year of official or societal discrimination based on sexual orientation in employment, housing, education, or health care.” 99

The DHS attorney asserted that the fact that there were “no reports” of violence or discrimination against LGBT individuals meant that LGBT individuals did not in fact face violence or discrimination in the DRC. In citing this language (and the Board's *Matter of H-L-H-* decision), the government attorney argued that the State Department report supported the government's position that the applicant's fear of return to the DRC was not well-founded.

In doing so, the DHS attorney ignored the fact that most, if not virtually all, LGBT individuals who are attacked or who face discrimination may be too frightened to come forward, local groups may be too afraid or homophobic to document such abuses, and national and international human rights organizations may not prioritize coverage of violations of LGBT rights in countries where the general human rights situation requires significant attention. 100

In this case, the Clinic submitted country condition evidence as well as an affidavit and testimony by a country expert on the Democratic Republic of Congo to explain why the applicant's fear was well-founded and why the State Department report had failed to note discrimination against or attacks on LGBT individuals. The immigration judge recounted in her decision that the country expert was “not surprised that the State Department indicates that there were no reported attacks against homosexuals in the DRC, because gay rights is ‘not an issue’ for the human rights activists there.” 101 The immigration judge drew on the expert's testimony in reasoning that the absence of reporting "does not mean that such acts do not occur since there are no
avenues through which a person could report an incident.” 102 In support of her conclusion that the applicant had a well-founded fear, the immigration judge cited other country condition evidence in the record documenting arbitrary arrests of gay men in the DRC and describing the strong social stigma against homosexuality in the DRC as well as the impunity of perpetrators of violence generally in the DRC. 103

Although the DRC State Department report has since been revised, 104 State Department reports for other countries still include similar language. 105 NGOs, including Human Rights Watch, The International Gay and Lesbian Human Rights Commission, the Council for Global Equality, Organization for Refuge Asylum & Migration (ORAM), and Immigration Equality, have advocated for more sensitive treatment of LGBT asylum claims and more thorough documentation of human rights abuses suffered by LGBT individuals, but there is still a dearth of country condition information, and particularly U.S. government information, on treatment of LGBT individuals in many countries. 106 It is, therefore, particularly helpful for LGBT asylum applicants from such countries to find experts who can corroborate the human rights violations that the applicants experienced and fear to rebut arguments by DHS that “no reports” mean that no attacks are occurring.

Indigenous Guatemalan Asylum Claims
Country condition evidence and expert affidavits have also proven useful in Harvard Immigration and Refugee Clinic cases involving indigenous Guatemalan asylum claims since adjudicators were initially largely unfamiliar with the extensive human rights violations and ongoing and severe discrimination suffered by indigenous Guatemalans.

These Clinic cases arose from a raid in New Bedford, Massachusetts, in 2007, which led to a large number of indigenous Guatemalans being placed in removal proceedings and the Clinic taking on their cases. Although their asylum claims were not immediately apparent, John Willshire Carrera and Nancy Kelly, co-managing directors of the Harvard Immigration and Refugee Clinic at Greater Boston Legal Services (GBLS), worked patiently with these clients, building trust, so that the clients could start to open up about the rampant racial discrimination and horrific violence that they faced in their home countries. Their claims often involved complicated past persecution involving severe psychological and physical harm suffered by both the applicants and their families, including during the notorious Guatemalan civil war. 107 The Clinic attorneys at GBLS worked tirelessly to develop these asylum claims (which had previously not been fully understood) based on information that they were able to gather through extensive and in-depth client interviews and country condition research.

These asylum claims required a deep understanding of the social and political history of Guatemala, a context that the State Department Country Report on Guatemala did not provide. In order to educate adjudicators and explain these claims, the Clinic submitted detailed client affidavits and extensive country condition documentation as well as expert and supporting affidavits. By repeatedly presenting compelling testimony of indigenous Guatemalan applicants and submitting country condition and country expert evidence, Clinic attorneys at GBLS have raised awareness among adjudicators and advocates alike about the political history of Guatemala. Through meticulous documentation of the continued violence and discrimination against indigenous Guatemalans, Clinic attorneys laid the groundwork for the successful litigation of these cases. 108

Asylum Claims Based on Gender Violence, including Domestic Violence and FGM
In domestic violence cases and cases involving female genital mutilation (FGM), country condition evidence and expert testimony has proven invaluable to presenting a nuanced picture of the circumstances surrounding the applicant's claim. Such evidence and testimony may be especially important for applicants from countries that have passed laws against domestic violence and/or outlawed FGM, but where these laws are not enforced.
In many countries, national laws may have little effect at the local level. Local police and other authorities may consider domestic violence a private matter and FGM a cultural tradition in which they will not intervene. While an applicant's testimony about the failure of state protection in such cases should be sufficient, country condition evidence and expert affidavits can provide useful corroboration. Such evidence can explain why an applicant cannot obtain protection from local authorities despite laws documented in the State Department reports criminalizing such gender-based violence.

DIFFERING PERSPECTIVES OF COUNTRY EXPERTS AND STATE DEPARTMENT REPORTS

Attorneys may face challenges in working with some country experts who, despite their vast knowledge, have political agendas, which may shape their perspectives. For example, someone who has worked closely with NGOs in a country to reform state institutions may not want to criticize those NGOs and state institutions even though they may not yet be effective in protecting individuals from persecution. The Board itself has noted the humanitarian, rather than political, purposes of asylum law and has emphasized that asylum law's main goal is to protect people who have suffered past persecution or have a well-founded fear of persecution on account of one of the protected grounds.

Expert Affidavits and the Theory of the Case

Country experts may be academics, scholars, professors, or human rights researchers who are not generally familiar with asylum and refugee law. As a result, it may be necessary for immigration attorneys to work closely with country experts to explain the law and the various possible theories of the case as well as the nature of immigration proceedings. As one commentator has noted, “[g]iven the seriousness of the issues at stake …, victims of persecution can only benefit from any attempt by lawyers and experts to understand one another's thinking processes better, and thereby enhance their mutual working relationship.”

In order to best support an applicant's asylum claim, experts should understand the subtleties of the asylum claim and theory of the case and, especially, the purpose and context of the expert testimony. Country expert affidavits that directly address the harm that an applicant suffered or fears, and that can link the harm and/or the state's failure to protect the applicant to one of the five protected grounds, are often the most useful.

Inconsistencies Between Expert Affidavits and Other Information in the Record

Under the REAL ID Act, “a trier of fact may base a credibility determination on … [inter alia] the consistency between the applicant's or witness's written and oral statements … [and] the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions).” Critically, however, any inconsistencies must be considered in light of the “totality of the circumstances” and “all relevant factors.”

If an expert's affidavit and testimony calls into question or conflicts with other country condition evidence in the record, including, for example, a State Department report, the expert should explain the reason for these apparent differences. In some instances, as discussed above, the expert's affidavit may contain more current or more accurate information than a State Department report or issue paper. As the legacy INS noted in its asylum officer training manual:

In some instances, the asylum officer may be the first to learn about human rights abuses or other developments in another country. In some refugee producing countries, freedom of expression and association is non-existent, and human rights monitors are prevented from visiting. … Even where human rights monitors have access to a country, they are not able to document every human rights abuse that occurs.
Adjudicators should take these factors into consideration in evaluating inconsistencies between the country condition evidence, including expert evidence, submitted by asylum applicants and the State Department reports, which are also part of the record.

CONCLUSION
Submission of country condition evidence as well as detailed client, country expert, and supporting affidavits may help move the law forward by educating adjudicators about different types of asylum claims. Adjudicators may then draw on this knowledge when deciding cases brought by pro se applicants and others who may not have the benefit of expert testimony. At the same time, regular use of expert testimony may raise the bar in a way that inadvertently disadvantages pro se applicants, applicants in detention, and applicants without extensive resources who are unable to obtain and submit expert testimony.

Country condition evidence and expert affidavits and testimony are often valuable in addressing issues of credibility and corroboration in asylum cases and in responding to adjudicators’ growing demands for corroboration as coverage of fraud in asylum applications gains traction in the press. Yet, as noted above, an applicant’s credible testimony alone should suffice to establish eligibility for asylum. Adjudicators may not impose unreasonable demands for corroboration on applicants, many of whom may be detained and/or unrepresented or under-resourced. Indeed, demands for excessive corroboration violate a fundamental precept of asylum law—that adjudicators and applicants alike share the burden of developing the record to determine whether an applicant has established eligibility for asylum.119

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Footnotes
2 See In re S-M-J-, 21 I. & N. Dec. 722, 724 (B.I.A. 1997). Asylum applicants who have witnessed and experienced human rights abuses first-hand are often the best source of information about conditions in the countries that they fled. See, e.g., France Houle, The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience, 6 Intl J. Refugee L. 6, 28 (1994) (“Evidence of what is happening [in a refugee’s home country] hundreds of kilometres from Canada and of which the [Documentation] Centre is not aware, may simply be unavailable otherwise than by the claimant's testimony. But if there is already a doubt in the mind of both Board Members as to the truthfulness of the claimant's testimony, will he or she be able to convince them by more testimonial evidence? … In recent cases, Board Members have decided to give greater probative value to documentary evidence than the claimant's testimony.”); Deborah Anker and Sabi Ardalan, Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law, 44 N.Y.U. J. Int'l L. & Pol. 529, 555 (Winter 2012) (“[As]ylum seekers themselves may be one of the best sources of country condition information, but their testimony is often not given weight without the imprimatur of a recognized expert or NGO [nongovernmental organization].”).
3 Asylum claims in the United States are presented either affirmatively in non-adversarial interviews with asylum officers, who are part of the U.S. Citizenship and Immigration Services (USCIS) Asylum Office under the Department of Homeland Security (DHS) or defensively before immigration judges in immigration court, which is part of the Department of Justice's Executive Office for Immigration Review. The Board of Immigration Appeals (BIA or Board) is the administrative agency charged with reviewing appeals of decisions issued by immigration judges in asylum cases. See 8 C.F.R. §§ 208.2, 208.9, 208.14, 1208.2, 1208.9, 1208.14. See also Anker, Law of Asylum in the United States §§ 1:6 to 1:9; National Immigrant Justice Center, Basic

See 8 C.F.R. §§ 208.12(a), 1208.12(a) (“In deciding an asylum application, … the asylum officer may rely on material provided by the Department of State, other USCIS offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.”). See also Asylum Officer Basic Training Course, Country Conditions Research and the Country of Origin Information Research Section (COIRS) 6-15 (Mar. 23, 2009), available at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Country-Conditions-Research-COIRS-31aug10.pdf (hereinafter AOBTC, Country Conditions Research and COIRS) (instructing asylum officers to consider “a wide variety of sources,” including “[m]aterials gathered and prepared by the [Country of Origin Information Research Section], available through the Intranet and in each [asylum office's] library” as well as sources publicly available on the Internet, through the UNHCR, from news sources, and from NGOs).


9 Gomes v. Gonzales, 473 F.3d 746, 756 (7th Cir. 2007) (warning against “chronic overreliance” on and expressing “healthy skepticism” of State Department reports (internal quotation marks omitted)).

10 Lin v. Holder, 656 F.3d 605, 609 (7th Cir. 2011) (noting that the Seventh Circuit has “repeatedly condemned … over-reliance on generalized statements of country conditions” found in State Department reports).


12 See, e.g., Ashleigh Reif Kasper, Helping the Helpless: The Foreign Policy Strategies Underlying Humanitarian Rhetoric in American Refugee Law and Policy, 32 J. Nat'l Ass'n Admin. L. Judiciary 309, 359-60 (2012) (critiquing the role of foreign policy in refugee admissions and noting the “link between the status of a country as an enemy or ally [to the United States] and the accuracy of the State Department reports”); Eliot Walker, Asylees in Wonderland: A New Procedural Perspective on America's Asylum System, 2 NW J. L. & Soc. Pol'y 1, 8-12 (2007) (observing that circuit courts and academics alike were challenged “[t]he substantive reliability of State Department reports” and emphasizing that, because “State Department reports are, by nature, only generalized summaries of recent country conditions,” “[r]eclassifying particularized fact-finding with generalized reports puts the reports to a task they are poorly suited for, regardless of their veracity, and further implicitly presumes that the applicant's testimony is not credible”); Richard K. Preston, Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations? 45 Md. L. Rev. 91, 116-22 (1986) (commenting that a survey of State Department reports by independent NGOs found the reports “somewhat slanted” and “political[ly] biased”). Cf. Anthony Good, Expert Evidence in Asylum and Human Rights Appeals: An Expert's View, 16 Int'l J. Refugee L. 358, 360 (2004) (noting that “State Department reports … tend to repeat themselves year after year, and are not sourced”).

13 UNHCR Handbook, supra note 1, ¶42 (explaining that “[t]he applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility.”). See also In re S-M-J-, 21 I. & N. Dec. 722, 724 (B.I.A. 1997) (noting that adjudicators “must understand the general country conditions” in order to evaluate an applicant's claim; “[t]herefore, general background information about a country, where available, must be included in the record as a foundation for the applicant's claim”).

14 REAL ID Act § 101(a)(3)(B)(ii) (“The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”); 8 U.S.C.A. § 1158(b)(1)(B)(ii).

15 See, e.g., Anthony Good, Expert Evidence In Asylum and Human Rights Appeals: An Expert's View, 16 Int'l J. Refugee L. 358, 363 (2004) (observing that attorneys in the United Kingdom only “supplement the general country evidence by commissioning reports by experts” “in a small minority of instances” and usually only do so if “the case involves an unusual issue on which existing documentation is silent, or to obtain an independent assessment of the plausibility of particular sequences of events”).

16 In re S-M-J-, 21 I. & N. Dec. 722, 727-29 (B.I.A. 1997) (quoting the UNHCR Handbook and noting that “the government wins when justice is done … . As a general matter, therefore, we expect the Service to introduce into evidence current country reports, advisory opinions, or other information readily available from the Resource Information Center.”).
This Briefing does not address in detail sources of or challenges in presenting country condition documentary evidence. There are many credible sources of such country condition information. For an extensive list of these resources, see Anker, Law of Asylum in the United States, Appendix A.

The 1951 United Nations Convention relating to the Status of Refugees defines a refugee as a person who is outside his or her country of nationality or habitual residence, who has a well-founded fear of persecution because of his or her race, religion, nationality, particular social group membership, or political opinion, and who is unable or unwilling to avail himself or herself of the protection of that country, or to return there, for fear of persecution. United Nations Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, Art. 1; United Nations Protocol relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.


For in-depth treatment of each of these elements of the refugee definition, see Anker, Law of Asylum in the United States §§ 2:1 et seq. to 7:1 et seq.

Whereas most state parties directly incorporate the definition of refugee set forth in the Convention and consider past persecution as evidence of a well-founded fear, the U.S. statute adds past persecution as a separate basis for eligibility. INA § 101(a)(42)(A) [8 U.S.C.A. § 1101(a)(42)(A)]; Asylum Officer Basic Training Course, History of the Affirmative Asylum Program 8 (Jan. 9, 2006) (“In fact, the U.S. definition of a refugee codified in the INA is broader than the Convention definition in that under United States law an individual can meet the refugee definition based on past persecution on account of one of the protected characteristics, even if he or she does not have a well-founded fear of future persecution.”) (on file with author). Under U.S. regulations, past persecution gives rise to a presumption of future persecution, which the government can rebut either by showing that country conditions have changed and the applicant can safely return to his or her home country or by demonstrating that it would be reasonable for the applicant to relocate within his or her home country and the applicant could live safely in the home country by relocating. 8 C.F.R. §§ 208.13(b)(1)(i)(B), (b)(2)(ii), 1208.13(b)(1)(i)(B), (b)(2)(ii).


As the UNHCR Handbook emphasizes, “if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.” UNHCR Handbook, supra note 1, ¶196. See also In re S-M-J-, 21 I. & N. Dec. 722, 725 (B.I.A. 1997).

In re S-M-J-, 21 I. & N. Dec. 722, 725 (B.I.A. 1997). See also Dia v. Ashcroft, 353 F.3d 228, 253 (3d Cir. 2003) (“At most, an applicant must provide corroborating evidence only when it would be reasonably expected.”).


32 S-M-J-, 21 I. & N. Dec. at 736-38 (Rosenberg, Bd. Mem., concurring) (“I recall a time, when I was a lawyer in pro bono practice, when long after I submitted his application, my client finally received information on tissue-thin paper, tucked into a false front of an international air letter which his co-worker had unsealed and re-glued to protect it from being intercepted by the authorities of his country.”).


35 In re S-M-J-, 21 I. & N. Dec. 722, 729 (B.I.A. 1997) (“[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.” (quoting the UNHCR Handbook, supra note 1, ¶196)). See also Uanreroro v. Gonzales, 443 F.3d 1197, 1208 (10th Cir. 2006) (noting that “[t]he BIA itself has indicated that, in immigration proceedings, it expects the government's counsel to introduce into evidence ‘current country reports, advisory opinions, or other information readily available from the Resource Information Center’”).

36 In one of the Harvard Immigration and Refugee Clinical Program (Clinic) cases, for example, an immigration judge insisted that a gay client's mother fly to the United States to testify rather than accepting telephonic testimony.

37 Under the Act, “[c]onsidering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on … [inter alia] the consistency between the applicant's or witness's, written and oral statements … [and] the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions) ….” REAL ID Act § 101; INA § 208(b)(1)(B)(iii) [8 U.S.C.A. § 1158(b)(1)(B)(iii)].

38 Anker, Law of Asylum in the United States § 3:26; see In re S-M-J-, 21 I. & N. Dec. 722, 724 (B.I.A. 1997) (noting that adjudicators must “have some background information against which to measure an applicant's claim”). See also Anthony Good, “Undoubtedly an Expert”? Anthropologists in British Asylum Courts, 10 J. Roy. Anthropol. Inst. 113, 117-22 (2004); AOBTC, Country Conditions Research and COIRS, supra note 5, at 9-10 (“Country conditions information may play a critical role in evaluating: Credibility, Objective basis for fear (e.g., reasonable possibility), Nexus to a protected ground, Availability of internal relocation, Application of mandatory bars”).

39 See Anthony Good, “Undoubtedly an Expert”? Anthropologists in British Asylum Courts, 10 J. Roy. Anthropol. Inst. 113, 120 (2004) (noting that “opinions as to what is likely to happen to [an asylum applicant] … are precisely what solicitors seek when commissioning expert reports, and if experts could not ‘extrapolate’ in this way the value of their reports would be greatly reduced”).

40 See, e.g., Matter of D-R-, 25 I. & N. Dec. 445, 458 (B.I.A. 2011) (“It is well settled that the Federal Rules of Evidence are not binding in immigration proceedings and that Immigration Judges have broad discretion to admit and consider relevant and probative evidence.”). See also Tassi v. Holder, 660 F.3d 710, 721 (4th Cir. 2011) (finding that the immigration judge “erroneously rejected” portions of the expert testimony as hearsay, explaining that “an expert is entitled to rely on factual underpinnings—including those
based on hearsay—that are ‘of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon
proceedings, and evidentiary determinations are limited only by due process considerations.”); *Zolotukhin v. Gonzales*, 417 F.3d
1073, 1076-77 (9th Cir. 2005) (finding a due process violation where the cumulative effect of the immigration judge excluding
testimony of multiple witnesses, including a country expert, may have been prejudicial); *Lopez-Chavez v. I.N.S.*, 259 F.3d 1176,
1181 (9th Cir. 2001) (“An Immigration Judge is not bound by the strict rules of evidence at a deportation hearing. What matters
is that the alien is accorded due process.”). For an overview of evidentiary rules and corroboration in asylum cases, see *Anker, Law
of Asylum in the United States §§ 3:1 et seq.*

use of internet sources in immigration proceedings and noting that “[t]he Federal Rules of Evidence do not apply in immigration
proceedings” and “hearsay and authentication do not necessarily exclude evidence”).

Baldini-Potermin, *Immigration Trial Handbook § 7:18* (explaining that immigration judges must follow “the spirit of” the rule for
qualifying experts in federal court). See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d
469 (1993) (discussing Fed. R. Evid. 702); *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004) (“[I]t would be odd for an agency
to adopt an even more stringent filter for expert testimony than that used by the courts for judicial proceedings, and there is no
indication that the immigration judge has done so. It would be particularly odd for that service to do so given the great weight
that the immigration judges and the Board of Immigration Appeals give to the anonymous country and asylum reports.”). See also
Dorothy A. Harbeck and Yooji Kim, *Is the Internet “Voodoo”? Evidentiary Weight of Internet-Based Material in Immigration Court,*
10 Conn. Pub. Int. L. J. 1, 3-4 (Winter 2010) (noting that “[i]mmigration judges possess broad discretion during hearings, and a
‘due process violation occurs only when the proceeding was so fundamentally unfair that the alien was prevented from reasonably
presenting his case’” (quoting *Lin v. Holder*, 565 F.3d 971, 979 (6th Cir. 2009))).

See, e.g., *Tadesse v. Gonzales*, 492 F.3d 905 911 (7th Cir. 2007) (remanding where the immigration judge did not hear the testimony
of a torture counselor who had evaluated petitioner and identified petitioner's symptoms as “characteristic of survivors of rape and
torture”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1050-51 (9th Cir. 2005) (remanding where “the IJ refused to allow Petitioner
to present relevant expert testimony that bore on Petitioner's credibility, relying instead on his own stereotypical assumptions about
domestic violence”).

*Tun v. Gonzales*, 485 F.3d 1014, 1028-29 (8th Cir. 2007).

*Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004).

*Koval v. Gonzales*, 418 F.3d 798 (7th Cir. 2005).

*Koval*, 418 F.3d at 808-09.

*Diop v. Holder*, 586 F.3d 587, 592 (8th Cir. 2009) (“The IJ found that Lightfoot-Klein would not be qualified as an expert on the
Toucouleur tribe in Senegal and therefore excluded her testimony. The IJ nevertheless included Lightfoot-Klein's affidavit as part
of the record. We agree with the BIA that Diop failed to demonstrate that Lightfoot-Klein could have added relevant information
beyond that set forth in the affidavit.”). See also *Hang Chen v. Holder*, 675 F.3d 100, 108-09 (1st Cir. 2012) (“Regarding Dr. Sapio's
[country expert] affidavit, the record shows that the BIA did not prevent Chen from offering Dr. Sapio's report into evidence; instead,
it reviewed Dr. Sapio's affidavit and credentials and simply determined that it was “unpersuaded” that she was qualified as an expert
as to the 2007 Department of State-generated report or its alleged unreliability, for which her expertise was specifically offered …. Stated simply, the BIA weighed the 2007 Country Profile against Dr. Sapio's report and found the former to be more compelling. We
find no error in the BIA's consideration and rejection of Dr. Sapio's proffered opinion and report.”).

“[a]n Immigration Judge who finds an expert witness qualified to testify may give different weight to the testimony, depending on
the extent of the expert's qualifications or based on other issues regarding the relevance, reliability, and overall probative value of
the testimony as to the specific facts in the case”).
D-R-, 25 I. & N. Dec. at 460-61 (citing Fed. R. Evid. 703 and observing that “[a]n expert is permitted to base his opinion on hearsay evidence and need not have personal knowledge of the facts underlying his opinion”).

The link between the harm and the protected ground and/or the failure of state protection can be proven by direct or circumstantial evidence. I.N.S. v. Elias-Zacarias, 502 U.S. 478, 483, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). The inferences that a country expert draws from the facts surrounding the asylum applicant’s claim can assist the adjudicator in understanding the relationship between the protected grounds, the harm, and the failure of state protection. Asylum Officer Basic Training Course, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics, 7, 13 (Mar. 12, 2009), available at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf (explaining that to determine whether nexus has been established, “the adjudicator should consider all relevant direct or circumstantial evidence” and noting that “[c]ountry conditions reports may also provide circumstantial evidence”).

Hamid v. Gonzales, 417 F.3d 642, 645-46 (7th Cir. 2005); see also Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1058 (9th Cir. 2005) ("For us to grant the petition for review on due process grounds, Petitioner must show prejudice ‘which means that the outcome of the proceeding may have been affected by the alleged violation.’” (emphasis in original)). Cf. Castro-Pu v. Mukasey, 540 F.3d 864, 869 (8th Cir. 2008) (finding that exclusion of expert testimony by the immigration judge was not a due process violation because the expert testimony would not have added much substantive information regarding changed country conditions).

Hamid, 417 F.3d at 646.


Compare Act of Oct. 3, 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913: [A]ll persons who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion.


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


Under interim regulations promulgated with the 1980 Act, adjudicators were required to consult with the State Department in all asylum cases. Before ruling on an applicant's eligibility for asylum, adjudicators adjourned proceedings and requested an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs. 8 C.F.R. § 208.7 (1980); 8 C.F.R. § 208.10(b) (1980). See Helton, “Final Asylum Rules: Finally,” 67 Interpreter Releases 789, 792-93 (July 23, 1990) (explaining that “[t]he State Department's participation in the asylum process has been a recurring issue in inter-agency deliberations”); see also Deborah Anker, Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment, 19 NYU J. of L. & Soc. Change 433 (1992).


68 See Recs. & Stat' of Admin. Conf. of the United States, 54 Fed. Reg. 28970 at 28971 (codified at 1 C.F.R. § 305.89-4) (“[A] healthy asylum adjudication process must foster … public confidence that decisions are rigorous, professional, and unbiased. Reliance on a specialized adjudicative board without routine reference of applications to the State Department would serve these ends and minimize any perception that asylum decisions are influenced by political considerations.” (emphasis added)).

69 American Baptist Churches, 760 F. Supp. at 799. The Settlement also emphasized that:

- the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution;
- whether or not the United States Government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution … ; and
- the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities …

70 8 C.F.R. § 208.12(a) (1990).

71 Recs. & Stat' of Admin. Conf., 54 Fed. Reg. at 28971 (emphasis added). The 1990 final rule also mandated the creation of a “documentation center with information on human rights conditions” to assist adjudicators in determining asylum claims. 8 C.F.R. § 208.1(c) (1990); 55 Fed. Reg. at 30676 (noting that this documentation center was “a very positive development in aiding Asylum Officers to maintain current knowledge of conditions around the world”). The center collected documentation from many nongovernmental sources, news media, and periodicals, and produced its own summaries and analysis to assist asylum officers in accurately assessing applicants' eligibility for asylum. See Gregg Beyer, Establishing the United States Asylum Officer Corps: A First Report, 4 Int'l J. Refugee L. 455, 472-74 (1992); Arthur C. Helton, The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects, 10 N.Y.L. Sch. J. Hum. Rts. 325, 335 (1993) (explaining that the center “was designed to reduce reliance on State Department foreign policy preferences … [and] to achieve the objective insulation from foreign policy and immigration enforcement considerations contemplated in the issuance of the 1990 rules”).


73 8 C.F.R. § 208.12(a) (noting that adjudicators “may rely on material provided by the Department of State, other USCIS offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions”).
8 C.F.R. § 1208.12(a) ("[T]he asylum officer may rely on material provided by the Department of State, the Office of International Affairs, other Service offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions."). State Department opinions are no longer binding or required. Under the current regulations, adjudicators “may request … specific comments from the Department of State regarding individual cases or types of claims,” but applicants “shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application.” 8 C.F.R. §§ 208.11, 1208.11. The provisions set forth in these sections apply both to immigration judges and asylum officers. 8 C.F.R. §§ 208.1, 1208.1 ("Unless otherwise provided …, this subpart A shall apply to all applications for asylum under section 208 of the Act or for withholding of deportation or withholding of removal under section 241(b)(3) of the Act, or under the Convention Against Torture, whether before an asylum officer or an immigration judge.").

74 U.S. State Department, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2012, Appendix A: Notes on Preparation of Report, available at http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper (noting that “[m]ost governments and opposition groups deny that they commit human rights abuses and sometimes go to great lengths to conceal evidence of such acts. There may be few eyewitnesses to specific abuses. Frequently, eyewitnesses are intimidated or prevented from reporting what they know. … Many governments that profess to oppose human rights abuses in principle may in fact secretly order or tacitly condone abuses or may lack the will or ability to control those responsible for abuses.”).


80 Chen v. U.S. I.N.S., 359 F.3d 121, 130 (2d Cir. 2004). See also Eliot Walker, Asylees in Wonderland: A New Procedural Perspective on America's Asylum System, 2 NW J. L. & Soc. Pol'y 1 (2007) (observing that “[r]eplacing particularized fact-finding with generalized reports puts the reports to a task they are poorly suited for, regardless of their veracity”).

81 Galina v. I.N.S., 213 F.3d 955, 959 (7th Cir. 2000) (“The country report is evidence and sometimes the only evidence available, but the Board should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ.”)

82 Chen v. U.S. I.N.S., 359 F.3d 121, 130 (2d Cir. 2004); Alibasic v. Mukasey, 547 F.3d 78, 87 n. 6 (2d Cir. 2008).

83 Gramatikov v. I.N.S., 128 F.3d 619, 620 (7th Cir. 1997); Shah v. I.N.S., 220 F.3d 1062, 1069-70 (9th Cir. 2000) (same); Gailiu v. I.N.S., 147 F.3d 34, 46 (1st Cir. 1998) (same). But see Hang Chen v. Holder, 675 F.3d 100, 108 (1st Cir. 2012) (noting the “high probative value” of State Department reports and citing decisions from other circuits in support of its assessment of the importance of the reports). The First Circuit in Hang Chen added that, “while the BIA may ‘rely on the State Department's country reports as proof of country conditions described therein, … it must also consider evidence in the record that contradicts the State Department's descriptions and conclusions’” and concluded that “[a] review of the record shows that the BIA did just that.” 675 F.3d at 108 (quoting Waweru v. Gonzales, 437 F.3d 199, 202 n. 1 (1st Cir. 2006)).

submitted numerous governmental and non-governmental reports, news articles, relevant and qualified expert affidavits and supporting affidavits, and other documentation of China’s forced family planning policies, the Board dismissed this evidence of forced sterilization and improperly privileged information in the State Department Profile obtained from self-serving officials in China. 25 I. & N. Dec. at 214 (citing the State Department's 2007 Profile of Asylum Claims and Country Conditions in China and noting that, “[a]ccording to the Fujian Provincial Birth Planning Committee, there have been no cases of forced abortion or sterilization in Fujian in the last 10 years”). See Alibasic v. Mukasey, 547 F.3d 78, 87 n. 6 (2d Cir. 2008) (“caution[ing] against ‘excessive reliance’ upon State Department reports”). The Board cannot selectively rely on portions of a State Department report; rather the Board must give “meaningful consideration” to “the record as a whole.” Huang v. Attorney General of U.S., 620 F.3d 372, 387-88 (3d Cir. 2010) (criticizing the Board for “cherry-pick[ing] a few pieces of evidence” in denying petitioner's forced sterilization claim).

Commentators have criticized decision-makers' reliance on selective information in such country profiles. See, e.g., Diane Uchimiya, A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers, 26 Penn. St. Int'l L. Rev. 383, 404-10 (2007) (underscoring the propensity of some decision-makers to “cite only to portions of the [State Department country] profile that weigh against the asylum claim rather than considering all of the information” and explaining that the China country profiles contain “information that both supports asylum claims based on coercive population control, and that may disprove those same asylum claims”).

Chen v. U.S. I.N.S., 359 F.3d 121, 130 (2d Cir. 2004) (remanding for the immigration judge to “consider whether the particular circumstances asserted by Chen establish eligibility for asylum or withholding of deportation” (emphasis in original)); see also Tambadou v. Gonzales, 446 F.3d 298, 302 (2d Cir. 2006) (“We have provided guidance on how State Department country reports should be utilized, emphasizing that ‘the immigration court should be careful not to place excessive reliance’ on them.”). Cf. Ji Cheng Ni v. Holder, 715 F.3d 620, 625 (7th Cir. 2013) (noting that State Department reports are “entitled to deference” and “are accorded special weight, because they are based on the collective expertise and experience of the Department of State which has diplomatic and consular representatives throughout the world” but finding “troubling” the Board's failure to identify “what ‘conclusions’ and ‘highly probative evidence’ from the 2007 Country Profile it actually was crediting”); Hui Lin Huang v. Holder, 677 F.3d 130 (2d Cir. 2012) (abrogating on other grounds Matter of H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209 (B.I.A. 2010)) (observing that “State Department reports are ‘probative,’ and are ‘usually the best available source of information on country conditions’” and noting that “the BIA is entitled to ‘accord greater weight’ to State Department reports in the record than to countervailing documentary evidence, and that the weight afforded to the evidence, including State Department reports, lies largely within the discretion of the [agency]” (internal citations and quotation marks omitted)).


Lizama, 629 F.3d at 449-50.


Letter from Harvard Law School, International Human Rights Clinic to Michael Posner, Assistant Secretary of State, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, July 2, 2010 (advocating that the State Department update its research on gangs in El Salvador) (on file with author). See also Thomas Boerman, Youth Gangs in El Salvador: Unpacking the State Department 2007 Issue Paper, available at http://www.ilw.com/articles/2010,1117-boerman.shtml (describing the failure of the Salvadoran government and authorities to protect against gang violence); Juan J. Fogelbach, Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras, 12 San Diego Int'l L.J. 417, 455-56 (2011) (explaining that “[t]wo major problems hinder the security forces' ability to control gangs: (1) a lack of resources and (2) corruption” and highlighting the public's lack of confidence in “the government's ability to protect them from criminals and gangs”).


Declaration of Professor James Louis Cavallaro, In the Matter of —, —, and — (Boston Immigration Court) (IJ Gagnon) (2009) (on file with author). The expert also noted that, “[b]ased on our research findings about the targeting of people who have ‘crossed’ gangs, particularly those who have worked with the police, it is my opinion that the [applicants] are viewed by the local and possibly national MS-13 as enemies.” Id.


See Deborah Anker and Sabi Ardalan, Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law, 44 N.Y.U. J. Int'l L. & Pol. 529, 554-55 and nn. 68-72 (Winter 2012). See also AOBTC, Country Conditions Research and COIRS, supra note 5, at 21 (“The asylum officer may be the first to hear about human rights abuses or other developments in a country. In many countries, reporters and human rights monitors may be impeded from gathering up-to-date information or practice self-censorship. Human rights monitors, if there are any, may be paying attention to areas where violations are more widespread.”).


See, e.g., U.S. State Department, Bureau of Democracy, Human Rights, and Labor, 2012 Human Rights Report: Benin, available at http://www.state.gov/documents/organization/204301.pdf (“There were no reports of criminal or civil cases involving same-sex sexual conduct or reports of societal discrimination or violence based on a person's sexual orientation.”).

Claims on behalf of indigenous Guatemalans are now being brought and won across the country. The Ninth Circuit recently addressed a claim by an indigenous Guatemalan in Mendoza-Pablo v. Holder and reversed the Board of Immigration Appeals' denial of asylum, finding that, “where a pregnant mother is persecuted in a manner that materially impedes her ability to provide for the basic needs of her child, where that child's family has undisputedly suffered severe persecution, and where the newborn child suffers serious deprivations directly attributable not only to those facts, but also to the material ongoing threat of continued persecution of the child and the child's family, that child may be said to have suffered persecution and therefore be eligible for asylum under the INA.” Mendoza-Pablo v. Holder, 667 F.3d 1308, 1315 (9th Cir. 2012).


As the Tenth Circuit in Uanreroro emphasized: “Given that a petitioner's testimony alone may suffice to establish her claims for relief, 8 U.S.C. 1158(b)(1)(B)(ii), the [State Department] reports need not contain detailed information corroborating Uanreroro's account of the practice [of FGM] within her ethnic group.” Uanreroro v. Gonzales, 443 F.3d 1197, 1209 (10th Cir. 2006) (noting that the immigration judge erroneously relied on the portion of the State Department country report that indicated that the practice of FGM had been banned in the region the applicant was from even though “a closer reading of the report indicates that, although [the region] had banned FGM, the law may not be enforced”).


See, e.g., Robert Thomas, Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom, 20 Int'l J. Refugee L. 489, 507 (2008) (observing that adjudicators may consider country expert evidence “tendentious, that is, the perception is that some country experts have acted more as advocates than as impartial witnesses, that not all individuals who have presented themselves as country experts have possessed sufficient objectivity in their views, and that some experts have made sweeping generalizations as to country conditions in the absence of adequate empirical support”); Anthony Good, “Undoubtedly an Expert”? Anthropologists in British Asylum Courts, 10 J. Roy. Anthrop. Inst. 113, 123 (2004) (noting that experts may bring specific biases to bear on their analyses of cases and adjudicators may hold these biases against experts in deciding what weight to accord their testimony). Good also notes that adjudicators may suffer from “expert fatigue” when the same expert repeatedly submits affidavits in similar asylum cases. Anthony Good, “Undoubtedly an Expert”? Anthropologists in British Asylum Courts, 10 J. Roy. Anthrop. Inst. 113, 121 n. 8 (2004) (internal quotation marks omitted). Regardless of how strong a country expert's testimony is, it may therefore be important for experts to individualize each affidavit even though many valid asylum claims may be similar in nature. See, e.g., Ji Cheng Ni v. Holder, 715 F.3d 620, 625 (7th Cir. 2013) (“the BIA's rejection of Dr. Sapio's critique has been discussed in at least nineteen appellate cases from six circuits”); Hang Chen v. Holder, 675 F.3d 100, 108-09 (1st Cir. 2012). Some commentators have suggested that court-appointed country experts might be more impartial and of more assistance in adjudicating asylum claims. See, e.g., Bruce J. Einhorn, The Gift of Understanding, 3 Alb. Gov't L. Rev. 149, 164-65 (2010) (emphasizing that “court-appointed experts [would have] ‘no dog in the fight,’ no vested interests, financial or otherwise, in the outcome of asylum litigation”); John Barnes, Expert Evidence-The Judicial Perception in Asylum and Human Rights Appeals Prepared for the Joint ILPA/IARLJ Conference, 16 Int'l J. Refugee L. 349, 354 (2004).

In re S-P-, 21 I. & N. Dec. 486, 492-93 (B.I.A. 1996) (“[A] grant of political asylum is a benefit to an individual under asylum law, not a judgment against the country in question … . This distinction between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies) should not be confused … .”).

See Baldini-Potermin, Immigration Trial Handbook § 6:14 (“What may seem to be basic and therefore assumed information to an expert witness may need to be laid out in detail before the immigration judge to create the record and allow the connections between the information provided through the expert witness and the application for relief to be drawn by the immigration judge. Where an expert witness has not previously testified before an immigration court, counsel should explain how the individual removal hearing will proceed.”).

In one Board case, an expert testified about country conditions in all of their complexity and the Board, affirming the immigration judge's denial of asylum, relied only on part of the expert's testimony and seemed to overlook the fact that family and land divisions within a society can reflect political divisions in power and among groups, not just personal conflicts. In re J-B-N- & S-M-, 24 I. & N. Dec. 208, 215-16 (B.I.A. 2007). The Board noted that “the opinion of the expert witness … confirms the conclusion of the Immigration Judge, in that he observed that ‘Rwanda has a long tradition of family violence which is common and often extreme’” and “background evidence confirms that Rwanda itself ‘identified land as ranking highest among potential sources of conflict’ between its citizens.” J-B-N- & S-M-, 24 I. & N. Dec. at 215-16. The Board concluded that, “even if we accept the expert witness's testimony that the respondents' status as outsiders from Burundi meant that they did not have access to institutions that they could turn to for help, we still find that this claim is fundamentally a personal dispute, not one that is on account of the respondents' imputed nationality.” J-B-N- & S-M-, 24 I. & N. Dec. at 215-16.


REAL ID Act § 101; INA § 208(b)(1)(B)(iii) [8 U.S.C.A. § 1158(b)(1)(B)(iii)] (“Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.”).


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