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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	File No. A- ***-***-***
******, ******	
In Removal Proceedings	

RESPONDENT'S BRIEF IN SUPPORT OF APPEAL

AND MOTION TO DISMISS THE NOTICE TO APPEAR

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INTRODUCTION

Respondent ****** ("******") appeals the June 14, 2019 decision by the Immigration Judge to deny his application for asylum under INA § 208, for withholding of removal under INA § 241(b)(3) and for deferral of Removal under the Convention against Torture, art. 3 ("CAT") which resulted in an order to remove ****** to the Republic of Congo. I.J. at 1, 11.

The proceedings against ****** were tainted from the beginning by a critical error: ****** is not from the Republic of Congo (also known as "Congo-Brazaville"), but from the Democratic Republic of Congo, a different country. The Notice to Appear, which alleges that ****** is "a native of the Republic of Congo and a citizen of the Republic of Congo," is therefore facially deficient. The Board should dismiss the Notice to Appear and terminate the proceedings against Mr. ****** on this basis alone.

In the alternative, the Board should reverse Immigration Judge and grant relief, or remand for further proceedings. The record shows that ****** suffered severe persecution on the basis of political opinion, and so is entitled to asylum. ******, a nurse, defied an order by the Provincial Minister of ****** to conceal the fact that the Minister impregnated his own daughter, and instead exposed the Minister's incest by transferring the ill daughter to a hospital. He credibly testified to his persecution and torture by multiple government officials -- including the Minister, the local prosecutor, and uniformed police officers and militia members -- because he had ruined the Minister's reputation, "and, by extension, the government's reputation." IJ at 6-7, 9. In the political context of the Democratic Republic of Congo (which the Immigration Judge failed to fully consider, as only the human rights report of the wrong country was in evidence), ******'s perceived opposition to the Minister's corruption was tantamount to political opposition to the government itself.

****** also showed he is entitled to relief under the Convention Against Torture. Likely future torture, by government officials, is all that the CAT requires. Although the Immigration Judge acknowledged ****** was tortured by government officials, he instead required ****** to show that the government as a whole would "acquiesce" in torture. IJ at 9-10. He concluded ****** was harmed because of a personal vendetta, and that the government would not acquiesce because the human rights report for *the Republic of Congo* (the wrong country) showed "civilian authorities generally maintained effective control over the security forces." The record contains sufficient evidence for the Board to grant CAT relief; or, at the least, to remand for further proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. ****** Fled the Democratic Republic of Congo After the Provincial Minister of ******, the Local Prosecutor, and Multiple Police and Military Officers Detained and Tortured Him; Robbed, Beat, and Threatened to Kill Him, Raped and Burned His Wife, and Kidnapped His Colleague

Mr. ****** is a 34 year old native and citizen of the Democratic Republic of Congo[1] ("the DRC"). Exh. 2 at 1. He fled the DRC on April 2, 2018, and arrived in the United States on January 1, 2019. *Id*; RT at 4. His wife, who fled with him, is detained in ****** Texas; his three children remain in the DRC. RT at 27-28.

****** is a nurse who owned and operated a private medical clinic in the DRC. IJ at 3, RT at 29. The night of November 20, 2017, a young woman arrived at the clinic complaining of fever and pain. RT at 33. ****** examined her when he arrived the next morning, and determined she had been pregnant and had induced abortion. IJ at 6, RT at 33, 35.

[1] More facts relating to Mr. ******'s country of origin are set out in pages 6-7 below.

The young woman explained she had tried to abort the baby because the father of the child was her own father. IJ 6, RT 35. The father, ******,[2] was the Minister of ****** for ******'s province. IJ at 9, RT at 38, 107.

****** recorded information about both the induced abortion and the paternity in the clinic's pre-registration sheet. RT at 41; Declaration of ****** ****** in Support of Motion to Dismiss ("****** Decl.") ¶ 15 and Exh. F (pre-registration and translation).

DRC law required Mr. ****** to transfer the patient to the general hospital in such cases. IJ at 6, RT at 35. ****** informed ****** by telephone that he would have to transfer the daughter. RT at 37. To preserve his own reputation, ****** instructed ****** not to transfer her, and tried to bribe ****** to treat his daughter at the clinic. IJ at 6, RT at 37, 39. ****** told him "I'm following the rules, and … what I need to do is transfer her so that her life can be saved." RT at 37.

According to protocol, a nurse, ******, accompanied the daughter to the general hospital to explain her condition. RT at 43-45, 86. He brought a transfer letter, which explained the daughter was "in the process of having an abortion." RT at 37. As the daughter was being admitted at the general hospital, she told the hospital staff and the nurse who accompanied her that her own father was the father of her baby. RT at 44-45.[3]

Soon thereafter, ****** began a campaign of threats and physical harm against Mr. ****** and his family, "because he had ruined Mr. ******'s and, by extension, the government's reputation by allowing Mr. ******'s daughter to be treated at his clinic and then transferred to the general hospital, all the while making it known that Mr. ****** had impregnated his daughter." IJ at 6-7.

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[2] For consistency, this brief will use the spelling of the IJ's decision, where applicable.
[3] The daughter died two days later of complications. RT 105.

First, on November 25, 2017, a group of men, including police officers, wreaked havoc in the clinic, demolishing the windows and chairs. RT 42, 49, IJ at 6. When ****** approached them, one of the police officers punched him in the face, saying that ****** was being attacked because he "destroyed the reputation of the minister." RT at 49-50.

The same day, an employee of the main prison visited him and said that the prosecutor, ******, wanted him to come to a meeting and bring all the clinic's documents. RT 50, 107-08. ****** thought that because the district attorney had contacted him, he "was going to get some type of assurance or some type of protection." RT at 50. When he arrived, "judges" told him that the prosecutor was busy, and asked him to wait. RT at 51. Once the Ndume arrived, he asked ******:

> [D]idn't you hear the instruction not to transfer the minister's daughter to the hospital? …This province belong[s] to the minister. So one does destroy the reputation of the – one of the political family member, so you destroy the reputation of all the members of the political family.

RT at 51.

****** called two police officers, and told them to "keep him 50." *Id.* The police officers stripped ****** to his boxers and tied him up. They gave him 50 lashes with a rope with a wire coming out of it. IJ at 6; RT at 52, 56. He was detained for three days, each day receiving 50 lashes. RT at 53. He was tied with his hands behind his back for each whipping; then retied with his hands in front of him. RT at 53-54. He slept tied. *Id.* He was given no food or water for three days, and was forced to urinate in his underwear. *Id.*

After three days, he escaped by convincing one of the police officers to leave the cell door open by promising him payment and giving him his home address. RT at 91-93. When he left, he was in so much pain he could hardly walk. RT at 93. He sought medical treatment at his clinic, and still has permanent marks from the whipping. RT at 54.

On December 1, 2017, three men—two of them in military uniforms, with military weapons, RT 60 -- came to ******'s home when he was not there. RT at 57-58. They asked where ****** was. RT at 58. When they learned he was not there, they plugged in an iron, and burned his wife, giving her third degree burns on her leg. RT at 58-59. Two of the men raped ******'s wife, and another raped his wife's ******. *Id.* at 58-59; Exh. 2 Supp. B; IJ at 6, *see also* ****** Decl. ¶ 14 and Exh. E.(letter from *****). ****** did not report the attack to anyone, because "in the Congo, when you have a problem with the authorities, there's nothing you can do about it." RT at 60.

****** understood that the rapes were connected to his treatment of the Minister's daughter only after another home invasion on December 25, 2017. RT at 61, 63-64. In the middle of the night, three masked men invaded the home. RT at 61-63. One put a gun to his face and punched him. They tied him up and demanded money, *id.*, saying, "the minister and the district attorney… gave us orders to kill you, because you destroyed his reputation and the entire province [knows] that the minister messed up his daughter." RT at 63; IJ at 6. They told him to leave the city, or his life would be in danger. *Id.*

Next, ****** learned that the nurse who had accompanied ******'s daughter to the hospital had been kidnapped. RT at 47. A group of men demanded money, announced he would be "massacred" for transferring the minister's child and destroying his reputation, and took him away. IJ at 6; RT at 6, 89. The nurse is still missing. RT at 110.

After that attack, ****** and his wife fled their province December 30, 2017, staying with friends in another city, **********. RT at 64-66, 68. But even there, he was threatened by unidentified men. IJ at 6. He received three calls from men who said his mother in law had told them he was in *******, and even knew the address where he was staying. RT at 66-69. Because the men were able to learn where he was in hiding, ******

understood there was no part of the country where he could be safe. RT at 71-72. ****** and his wife fled the country in March, 2018. RT at 70.

II. Mr. ******'s Country Of Origin Was Mistakenly Designated "Republic of Congo"

DHS mistakenly alleged Mr. ****** is a native and citizen of the "Republic of Congo." He is from the Democratic Republic of Congo, a different country.

Mr. ******'s first language is Lingala, and his second language is French. RT at 16. Nonetheless, when he arrived at the border, a Customs and Border Patrol Officer interviewed him in Spanish, which he speaks only "very little." RT at 100-101, 105; I-213 at 2. ****** referred to his country as "Congo." ****** Decl. ¶ 3, 7, 8. The I-213 listed his country of birth and citizenship as "Congo," called him a "Congolese citizen," and referred to "his native country of Congo." Exh. 5 at 1, 2.

The Notice to Appear, however, dated March 14, 2019, alleged "You are a native of the Republic of Congo and a citizen of the Republic of Congo." Exh. 1 at 1.

At the first hearing, March 27, 2019, the Judge asked: "The notice states you're a native and citizen of the Republic of Congo. Is that correct?" ****** answered "Exactly so, yes." RT at 4. Later, his expression of fear was translated as "if I were to go back to the Republic of Congo, my life will be in danger." RT at 6. The Department designated "Congo" as the country of removal. *Id.*

******'s asylum application stated he was born in "*** Republique Democratique of Congo." Exh. 5 at 1. ******'s diploma and marriage certificate clearly showed he was from the Democratic Republic of Congo. Exh. 3; ****** Decl. Exh. A, B (translated into English). His documents were from the province of Bandundu, *id.*, RT at 20, and he testified that he fled to ********, RT 47-48, 64, both in the DRC.

During the final hearing, held June 5, 2019, DHS submitted "the Department of State Report" for the Republic of Congo and served it – in English only - on Mr. ******. RT at 24-25. The Immigration Judge concluded that ****** was a "native and citizen of the Republic of Congo (Congo)." IJ at 1.

III. The Immigration Judge Found Mr. **** Credible, But Denied Relief**

Mr. ****** was not represented at any proceeding. He appeared *pro se* before Judge ******* in *****, Colorado.

The Immigration Judge found Mr. ****** credible. IJ at 3. He found ******'s testimony was plausible, internally consistent, and significantly detailed, and his demeanor and other nonverbal indicators showed his testimony was authentic and genuinely based in fact; IJ at 3; despite some discrepancies, his testimony was credible viewing the totality of the circumstances. IJ at 4.

The Immigration Judge denied Mr. ******'s application for asylum and withholding of removal as a refugee. IJ at 4. While he agreed that ****** had been targeted for harm, IJ at 7, he found that ****** had not shown past or fear of future harm on account of his membership in any particular social group. IJ at 6, 7. Instead, the harm arose from a "private dispute" between ****** and the Minister of ******, because he had "cared for Mr. ******'s daughter and exposed Mr. ******." IJ at 7-8.

The Immigration Judge also denied ******'s request for relief under the CAT. IJ at 11. Even though the Judge acknowledged that the harm ****** suffered was carried out by government officials, including security forces, IJ at 9, he analyzed solely whether ****** had shown the Congolese government would *acquiesce* in the harm. IJ at 9-10. Echoing his earlier "particular social group" analysis, the Judge found the officials were acting to "carry[] out Mr. ******'s will to enact revenge," rather than in an official capacity. IJ at 9. He also relied on the State Department report for the Republic of Congo, which provided that "civilian

authorities generally maintained effective control over the security forces," IJ at 10, to hold ****** had not established eligibility for protection under the CAT.

****** was ordered removed to the Republic of Congo. IJ at 11.

The appeal of Mr. ******'s wife, **********, detained at *******, is pending separately.

ISSUES PRESENTED FOR REVIEW

1. Whether the Notice to Appear should be dismissed because its fundamental allegations – that Mr. ****** is a native and citizen of the Republic of Congo – is false.

2. Whether the Immigration Judge erred by failing to consider whether ****** was persecuted and has a well-founded fear of future persecution on account of his political opinion, and whether ****** is in fact eligible for asylum.

3. Whether the Immigration Judge erred by failing to consider whether ****** was persecuted on account of his membership in the particular social group of "witnesses to the crime of the Minister of ******" and whether this issue should be remanded.

4. Whether the Immigration Judge erred by requiring ****** to show the government would "acquiesce" in future harm to get relief under the CAT, when ****** testified he was tortured directly by public officials.

5. Whether the immigration judge erred by relying on the State Department human rights report of the wrong country.

6. Whether ****** is in fact eligible for relief under the CAT.

STANDARD OF REVIEW

The Board " . . . review[s] questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*." 8 C.F.R. § 1003.1(d)(3)(ii). Mixed questions of law and fact are also reviewed *de novo*. *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 700 (BIA 2012). The Board reviews findings of fact, including findings as to the credibility of testimony, only to determine if they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(1).

ARGUMENT

I. ****** Qualifies for Asylum Because He Suffered Severe Past Persecution On Account of His Political Opinion and Membership in the Particular Social Group of Witnesses to the Minister's Crime

****** Meets the statutory definition for "refugee" under INA §§ 101(a)(42)(A) and 208(b)(1)(B), because he suffered past persecution and fears future persecution on account of 1) his political opinion, and 2) his membership in a particular social group. To establish he is a refugee, ****** must show that the level of harm he suffered was "severe," that the harm was "inflicted either by the government … or by persons or an organization that the government was unable or unwilling to control," and that the persecution was intended "to target a belief or characteristic." *Matter of A-B-,* 27 I&N Dec. 316, 337 (A.G. 2018).[4]

A. ****** Suffered Past Persecution

The harm ****** suffered was severe. *See* A-B-, 27 I&N Dec. at 337. As set out more fully in pages 24-25 below, he was physically tortured: repeatedly beaten, bound and denied food and water, and whipped. Other harms he endured are well-recognized as forms of persecution. *See, e.g., Precetaj v. Holder,* No. 10-1109, *8-9 (1st Cir. Aug. 11, 2011)(rape of relative can constitute persecution); *Karki v. Holer,* 715 F.3d 792, 805 (10th Cir. 2013) (confiscation of property can constitute persecution). Taken collectively, these acts compel the conclusion that ****** suffered past persecution, and are sufficiently severe to give rise to a rebuttable presumption of persecution. *Karki*, 715 F.3d at 801.[5]

B. The Persecution Was Not a Mere "Private Dispute," Because It was Carried Out by Multiple Government Officials

The Immigration Judge erred by finding that ******'s "victimization was the unfortunate result of a private dispute." IJ at 7-8. As the Immigration Judge acknowledged,

[4] There is no dispute that Mr. ****** meets the first element of the statutory definition of "refugee," as he is outside his country of nationality. *See* I.J. 1-2.

[5] ******'s experiences meet the standard for withholding of removal as well, showing that his life or freedom would be threatened were he to return. 8 C.F.R. § 1208.16(b)(1).

the Minister "threatened and harmed Respondent because he had ruined… the government's reputation" as well as his own, IJ at 6, which is retribution for more than just a personal dispute. The Minister turned the power of the state against ****** because he had sullied the reputation of the government and reigning political family with his insistence on upholding the law. *Id.;* RT at 51. He involved the prosecutor, police, and militia. At that point, when multiple branches of government were involved in doing the Minister's bidding, the persecution transcended the realm of "private dispute" and became government action.

Hayrapetyan v. Mukasey, 534 F.3d 1330, 1333, 1337-38 (10th Cir. 2008) is instructive. Hayrapetyan was threatened by a Minister and the chief of police, beaten by supporters of a politician, jailed for two days, and hit by a car; her husband was beaten and her child nearly kidnapped. The Tenth Circuit found the IJ had applied the wrong legal standard by finding these were merely "hostile actions" by people "adversely affected" by the respondent's reporting. *Id.* at 1337. The Court found sufficient evidence to conclude *the government* had persecuted her, not "mere civilians." *Id.* at 1338. The same analysis applies here.

Every case cited by the Immigration Judge involved either "mere civilians," or utterly apolitical quarrels -- not multiple, high-ranking government officials backed by the police protecting the reputation of the government. *See Seka v. Sessions* 714 F.App'x 901, *6, *9 fn.4. (10th Cir. 2019)(threats by alien's father in law); *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994)(altercations with a soldier "stemmed from their relationship with a girl"). Nor was this a vendetta in which one person coincidentally happened to be a government official. *Cf. Matter of C-T-L*, 25 I&N Dec. 341, 349 (BIA 2010)("the fact that respondent's employer

happened to be a politician is merely incidental. The Minister leveraged his official status to cause government persecution.[6]

C. ****** Was Persecuted For His Political Opinion

As the Immigration Judge explicitly acknowledged, ****** was persecuted for ruining the Minister's reputation, "and, by extension, the government's reputation." IJ at 6. As ****** testified and the facts show, the Minister was practically synonymous with the government. RT at 51 (province belongs to the Minister); 63 (destroyed reputation of Minister and "entire province"). The Minister imputed to ****** a desire to ruin the reputation of the provincial government and ruling family – simply and plainly, an imputed political opinion.

****** was persecuted for his political opinion in a second sense as well. As the Immigration Judge found, "Mr. ****** attempted to bribe Respondent to treat his daughter at his clinic; however, Respondent refused as Congolese law requires that such cases be transferred…" IJ at 6. ****** refused to help cover up the Provincial Minister of ******'s rape and impregnation of his own daughter, and instead insisted on following the law. He was persecuted because he opposed the Minister's corrupt attempted bribery, and instead obeyed his legal and medical obligations to include the medical history accurately in records, and to transfer abortion-related cases.

Opposing such corruption by government officials can amount to persecution on account of political opinion. As the Tenth Circuit has held, "threatened exposure of government corruption … alone can support a claim of political persecution." *Hayrapetyan,* 534 F.3d at 1336; *Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010)(collecting cases that "opposition to government corruption may constitute a political opinion"). In *Matter of N-M,*

[6] Even if the persecution was not by "the government" as a whole, it was certainly carried out by persons or an organization that the government was unwilling or unable to control. *See Matter of A-B*, 27 I&N Dec 316, 337 (A.G. 2018)

25 I&N Dec. 526 (BIA 2011), for example, the respondent worked at a state-run medical service. *Id.* at 527. She was pressured to hire contactors outside the official process, and to falsify statistical information. When she refused, she was retaliated against with overwork and forced transfer, although her continued concerns about corruption were honored, as the internal audit department did not accept contracts she opposed. *Id.* Later, she received threatening anonymous phone calls threatening to kill her and her son. *Id.* The immigration judge found that the Respondent's refusal to falsify data, and opposition to improper payments and contract awards were evidence she held a political opinion. *Id.* at 529. The BIA observed:

> We agree that, in some circumstances, opposition to state corruption may provide evidence of an alien's political opinion or give a persecutor reason to impute such beliefs to an alien. *See Zhang v. Gonzales*, 426 F.3d 540, 547 (2d Cir. 2005) (rejecting "any categorical distinction between opposition to extortion and corruption and other disputes with government policy or practice"); *Black's Law Dictionary* 1196 (8th ed. 2004) (defining "political" as "[p]ertaining to politics; of or relating to the conduct of government"). Campaigning against state corruption through classic political activities … [would likely constitute expression of political opinion.] It is also possible that exposing or threatening to expose government corruption to higher government authorities, the media, or nongovernmental watchdog organizations could constitute the expression of a political opinion.

Id. at 528. To determine whether the persecutor was motivated by the whistleblower's "perceived or actual anticorruption beliefs," *id.* at 532, the Immigration Judge should consider "whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs," "any direct or circumstantial evidence that the alleged persecutor was motivated" by the alien's actual or imputed beliefs, and "evidence regarding the pervasiveness of government corruption, as well as whether there are direct ties between the corrupt elements and higher level officials." *Id.* at 532-33. "Whether the governing regime, and not just the corrupt individuals, retaliates against an alien for expression anticorruption beliefs is also relevant to this inquiry." *Id.* at 533.

Under these standards, ****** demonstrated that a central reason for his persecution was that he insisted on following the law and transferring a case involving abortion. ****** defied the Minister and announced he would follow the rules. RT at 37. The persecutors, at least, believed he had done so to "expose" the Minister's incest. IJ at 7; RT at 51 (prosecutor berated ****** for "destroy[ing] the reputation of a political personality" by defying instruction not to transfer the Minister's daughter); RT at 63. In the context of DRC politics to which ****** testified, the Minister is tantamount to the provincial government itself, and he moved the machinery of multiple branches of government – the entire "regime" - to retaliate.

Moreover, "evidence regarding the pervasiveness of government corruption" is relevant, *Matter of N-M,* 25 I&N Dec. at 532, and "an applicant statements … must be viewed in the context of the relevant background situation." *Matter of S-M-J-,* 21 I&N Dec. 722, 724-25 (BIA 1997)(*en banc)*. But here, the Immigration Judge didn't take such evidence into account because he was relying on reports corruption *of the wrong country*. The human rights report included in the record and considered by the judge was for the Republic of Congo, also known as Congo-Brazzaville. Exh. 4. Mr. ****** is from the Democratic Republic of Congo. Exh. 2 at 1; ****** Decl. ¶¶ 1-5.[7] The Board must, at the very least, remand for further proceedings on the asylum application for this reason alone. *Matter of S-M-J-,* 21 I&N Dec. at 724-25 ("[W]here the only country report in the record is for the wrong country, we will remand the record for further proceedings at which these deficiencies can be corrected and the application for asylum further considered."); *see also* pages 22-23 below.

Here, the error is crucial. The correct country report shows pervasive government corruption and almost complete absence of the rule of law. Dept. of State, 2018 Human

[7] The cities and provinces in ******'s application are in the DRC; the Board can take notice of these geographical facts. *Pahl v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013).

Rights Report: Democratic Republic of Congo at 31-34, *passim*.[8] Conditions in the DRC support ******'s testimony that there is little distinction, if any, between the power and will of the individual politician and that of the government. *See, e.g., id.* at 9 (arrest of those who criticize government) 10 (officials subject judges to coercion) 20-21 (government pressure, including criminal defamation actions, against those who criticized corrupt officials).

The fact that ****** was persecuted for taking a stand against the Minister's misuse of authority – and for allegedly discrediting the Minister's leadership -- is sufficient to create the required nexus, even if the Minister was also motivated in part by personal revenge. As the Seventh Circuit explained in *Mustafa v. Holder*, 707 F.3d 743 (7th Cir. 2013), the political context in which persecution occurs is a critical, relevant fact. In *Mustafa*, the immigration judge erred by finding that a political party leader's threats and violence were mere personal revenge after Mustafa exposed the leader's corrupt financial dealings. *Id.* at 750. The court found that the IJ had ignored crucial factual context: testimony showed that such abuse was used to control political opposition in Pakistan; in that milieu, turning against the leader "for the purpose of an investigation was equivalent to turning against the party itself..."; Mustafa had been called a "traitor"; his persecutor "emphasized his political power in delivering a threat"; and attackers "explicitly stated they were carrying out their attack on behalf of a high-ranking" leader. *Id.* at 751-52, 754. This constituted evidence of mixed motives, and the court remanded for further consideration.

The same context is present here. ****** repeatedly testified about the Minister's political clout, and how virtually every attacker explicitly blamed him for his insistence on transferring the daughter and ruining the reputation of the political family. *See* IJ at 6; RT at

[8] The Board should take administrative notice of the report and its contents. *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010)(official documents prepared by the Department of State); 8 C.F.R. § 1003.1(c)(3)(iv)(commonly known facts, such the contents of official documents). The report is available at https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/democratic-republic-of-the-congo/ , and is attached hereto as an appendix.

49 ("spoiled the reputation of the Minister"), 51 (defying instruction not to transfer, destroying reputation, province belongs to the minister), 60, 63 (ordered to kill ****** because he "destroyed his reputation and the entire province"). In the DRC, the perceived challenge to the Minister was indistinguishable from political opinion. The record shows ****** is eligible for asylum.

D. The Immigration Judge Failed to Analyze Whether ****** Was Persecuted Because He Is Part of A Particular Social Group: Witnesses to the Minister's Incest And His Daughter's Pregnancy And Abortion.

The Immigration Judge found that that at the hearing, ****** "was unable to identify or articulate a proposed particular social group, nor was the Court able to discern one." IJ at 5. This was clear error. ******, though unrepresented by counsel, articulated a social group: he was one of the medical professionals who had knowledge of the Minister's sexual abuse of his daughter and the abortion, and played a role in making it known to the community. ****** testified, "all the nurses who were working with me were persecuted for the same situation" – the Minister believed they knew he was the father of the baby and disclosed that fact. RT 46. *See also* RT at 32-33 (staff afraid to go back to work after clinic was wrecked). The judge's failure to analyze this group is grounds for remand.

II. ****** Qualifies For Relief Under The Convention Against Torture Because He Credibly Testified to His Past Torture at the Hands of Government Officials, and Showed It Is More Likely Than Not He Will Suffer Further Torture

Mr. ****** is eligible for deferral of removal under the CAT because he has established he will be tortured "**by or at the instigation of** or with the consent or acquiescence of **a public official** or other person acting in an official capacity" if he is removed to his country of origin. 8 C.F.R. § 1208.16(c)(2), 1208.18(a)(emphasis added)

"Article 3 of the Convention Against Torture prohibits the [return] of an alien to a country where it is more likely than not that he will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *Matter of G-A-,* 23 I.&N.

Dec. 366, 367 (BIA 2002) (*en banc*) (*citations omitted*). An applicant's credible testimony, standing alone, can be sufficient to sustain the burden of proof. 8 C.F.R. § 1208.16(c)(2). To receive the protections of the CAT, ****** "need not show that torture will occur on account of a statutorily protected ground." *Ritonga v. Holder*, 633 F.3d 971, 978 (10th Cir. 2011); *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005). He must only show that he is more likely than not to suffer torture, as defined in 8 C.F.R. § 1208.18(a), "by a public official, or at the instigation or with the acquiescence of such an official." *Kharki v. Holder,* 715 F.3d 792, 806 (10th Cir. 2013), *citing Cruz-Funez v. Gonzales, supra*; *Sidabutar v. Gonzales,* 503 F.3d 1116, 1125 *(*10th Cir. 2007). "Relief under the CAT is mandatory if the convention's criteria are satisfied." *Witjaksono v. Holder*, 573 F.3d 968, 978 (10th Cir. 2009) *quoting Ismaiel v. Mukasey*, 516 F.3d 1198, 1204 (10th Cir. 2008).

The Immigration Judge erred by requiring "acquiescence," by relying on the country report of the wrong country, and by requiring ****** to report abuse outside his province.

A. The Immigration Judge Erred By Requiring ****** To Show Government "Acquiescence" When His Persecutors Are Government Officials Themselves

1. Action by a "Public Official" Suffices

The Immigration Judge explicitly acknowledged that the harm ****** suffered was

> **carried out at the direction of Mr. ******, a government official** in the ****** sector representing Respondent's province. It is also noteworthy that **there were a number of other government officials, including security forces, who appear to have been working for Mr. ****** and harmed Respondent**.

I.J. at 9 (*emphasis added*). These facts constitute a finding that Mr. ****** fears harm "**by or at the instigation of … a public offici**al…**"** 8 C.F.R. § 1208.18(a)(1)(*emphasis added)*. The analysis should have ended there. But the judge required Mr. ****** to prove something more: that "the Congolese government would be acquiescent in any harm he fears." IJ at 9. This was a reversible error of law.

The regulations implementing the CAT do not require ****** to show *both* that he is likely to be tortured by a government official *and* that the government as a whole would acquiesce; the requirements are disjunctive. Even in the case relied upon by the IJ, in *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000)(*en banc*), the BIA reasoned that "respondent … *does not allege* that he fears *torture inflicted by a government official. He therefore must provide* evidence that the torture he fears … would be at the instigation of or with the consent or acquiescence of Columbian officials…" *Id.* at 1311 (*emphasis added, internal quotation omitted*). If the torture is to be inflicted by government officials themselves, a showing of acquiescence is unnecessary.

The Ninth Circuit's reasoning in *Avendano-Hernandez v. Lynch,* 800 F.3d 1072 (9th Cir. 2015) is instructive. There, the BIA held that the respondent was not entitled to relief under the CAT because she had not shown "that any Mexican public official has consented to or acquiesced in prior acts of torture… ." *Id.* at 1078. However, the respondent had shown torture "'by … public official[s]' – an alternative way of showing government involvement in a CAT applicant's torture." *Id.* at 1079. The court held it was error to require the respondent "to also show the 'acquiescence' of the government when her torture was inflicted *by* public officials themselves, as a plain reading of the regulating demonstrates." *Id., citing* 8 C.F.R. § 1208.18(a)(1)(*emphasis in original)*.

The Fifth Circuit similarly explained that acquiescence is "not the only way to prove sufficient state action" for purposes of the CAT. *Iruegas-Valdez v. Yates*, 846 F.3d806, 812 (5th Cir. Jan. 23, 2017). Action by a public official acting under color of law suffices:

> The regulations specifically list a number of different avenues which the BIA failed to consider: torture occurs whenever severe physical or mental pain is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). Government acquiescence need not necessarily be an officially sanctioned state action; instead, an act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority

> of state law. Acts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives." Nor does our precedent require that the public official in question "be the nation's president or some other official at the upper echelons of power. Rather . . . the use of official authority by low-level officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction."

Id. at 812-13 (*internal citations and quotations omitted).* "As two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons." *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2nd Cir. 2004)(*citation omitted)*.

Here, the Immigration Judge squarely found that ****** was harmed by multiple "government officials, including security forces," acting in concert. Yet he found that "without more, this is insufficient" to establish the official action required by 8 C.F.R. § 1208.18(a)(1). IJ at 9. This was reversible error.

2. **** Was Tortured By Public Officials Acting In An Official Capacity**

******'s testimony in fact showed that he was harmed by multiple government officials acting in their official capacities. To the extent that the Immigration Judge found otherwise, he was wrong as a matter of fact and law.

To define the requirement that torture be inflicted by an official acting in his or her "official capacity," the Attorney General has looked to civil rights case law defining action "under color of law." *See Matter of Y-L-*, 23 I. N. Dec. 270, 285 (AG 2002). The Eighth Circuit explained how this test applies under the CAT in *Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009). Determining whether a public official has "abuse[d] the position given to him by the State" involves a careful factual inquiry into the connection between the "official's public position and the official's harmful conduct." 574 F.3d at 900. For police officers, for example, factors to consider include whether the officers are on duty and in

uniform, the motivation behind the officers' actions, whether the officers had access to the victim because of their positions, whether they were in a place where only officers had authority to be, or threatened to use official authority in the future. *Id.* at 900-901, 903.[9]

While the Tenth Circuit has not formally adopted "under color of law" analysis, its standards under civil rights cases are similar. *See, e.g., Schaffer v. Salt Lake City Corp*., 814 F. 3d 1151, 1156 (10th Cir. 2016)(state employee acts under "color of law" by exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" (*quotations and citation omitted*); nexus between misuse of authority and wrongdoing is required).

Here, there is no doubt that ******'s abusers were acting in their official capacities. ****** testified he was harmed at the instigation of a Minister of ******, RT at 46, 49, 63, on the express authority of the local prosecutor, RT at 52, 63, and directly by multiple groups of uniformed police. RT 28, 51. The Immigration Judge noted that "authorities" beat him. IJ at 7. The prosecutor summoned ****** to the correctional center, RT 50, and detained him in jail, IJ at 7, both quintessentially governmental acts. The officers who vandalized his clinic, raped his wife, and beat him were in uniform or military garb. RT at 49, 51, 60. *See Avendano-Hernandez*, 800 F.3d at 13 (on-duty police officers and members of the military are public officials). ****** was beaten in jail, where only authorized officials would have physical access to him. *Cf. Ramirez-Peyro,* 574 F.3d at 901.

These were not "rogue" actors. Different branches of government cooperated to persecute ******. No government official tried to protect him or punish those threatening him – not even the prosecutor, who personally ordered the whipping. *Cf. Hernandez-Torres v. Lynch,* 642 Fed.Appx. 814 at *7, *10 (10th Cir. 2016)(officers threatening alien were

[9] *See also Garcia v. Holder*, 756 F.3d 885, 891-93 (5th Cir. 2014)(state action where people dressed in police uniforms came to applicant's house after he gave his address to government officials, extorted, beat and pursued him, and sequence and proximity of events indicates connection). *Cf.* RT at 93 (****** gave guard address).

"rogue" because no superior officers participated, government attempted to protect him and prosecuted criminal officers). The persecution came from the highest level. RT at 51 (province "belong[s] to the Minister").

The Immigration Judge reasoned that government officials were not acting in their official capacity because they were "carrying out Mr. ******'s will to enact revenge" (apparently importing his earlier conclusion that Mr. ****** was being persecuted for a "personal dispute" rather for membership in a particular social group). IJ at 9. But this is the wrong test to determine if a public official is involved for the purposes of 8 C.F.R. § 1208.18(a)(1). An applicant can be tortured by a "public official" acting under color of law, even if that official is motivated by personal animus. *See, e.g., Iruegas-Valdez v. Yates*, 846 F.3d 806, 812-13 (5th Cir. 2017)(acts motivated by "personal objectives" can still constitute misuse of official power); *U.S. v. Christian*, 342 F.3d 744, 750-52 (7th Cir. 2003)(surveying cases where officials motivated by jealousy, anger, or personal grudges acted under color of law because, *inter alia*, they had access to the victim because of their positions or enlisted the help of other officers).

Moreover, nearly every case the Immigration Judge relied upon examined whether the government would sanction or acquiesce in the conduct of *private* individuals. *See* IJ at 8-9. *Cruz Funez v. Gonzales*, 406 F.3d 1187, 1189 (10th Cir. 2005) found no connection between the acts of an "unscrupulous" private creditor and the government, or any awareness by any public official of the creditor's threats; here, various government officials did the direct bidding of the Minister of ****** and the prosecutor. In *Guru v. Lynch*, the persecutors were religious leaders, not government actors, and the applicant "ha[d] not identified a public official involved with his past mistreatment," or any "evidence showing any public official ratified or knew about" the acts of those private parties. 637 F.3d. App'x 501, *4, *11 (10th Cir. 2016)(unpublished). In *Witjasono v Holder*, 573 F.3d 968 (10th Cir. 2009), a remote

incident where a soldier punched and insulted the applicant, who had honked at the soldier's car, was "isolated and not demonstrative of official behavior." *Id*. at 972, 978. [10]

B. Even The Immigration Judge's "Acquiescence" Analysis Was Fatally Flawed

Even if "acquiescence" were required, ****** showed government acquiescence in his torture. "Acquiescence of a public official requires that the public official, prior to the activity constituting the torture, have awareness of such activity and thereafter breach his or her legal responsibility to prevent such activity." *Kharki v. Holder*, 715 F.3d 792, *806 (10th Cir. 2013), *citing* 8 C.F.R. § 1208.18(a)(7). "Willful blindness" constitutes acquiescence. *Id.*

1. It was Error to Require **** to Report Torture, and Show The Entire Government Would Sanction It**

****** did not need to show the "Congolese government" as a whole would sanction torture. *See Rodriguez-Moliero v. Lynch*, 808 F.3d 1134, 1138 (7th Cir. 2015)(error to require that the entire government, rather than just police officers or other government employees, would acquiesce in torture); *Cf.* IJ at 9. In each of ******'s past episodes of harm, officials from multiple branches of government knew of the ongoing persecution, but failed to prevent harm. Ironically, ****** answered the prosecutor's summons believing the prosecutor would protect him after the attack on the clinic; RT at 50; instead, he was detained and beaten because "this province belong[s] to the minister." RT at 51. The masked military men who invaded his home promised the next group would kill him at the direction of the minister and prosecutor. RT at 63. *Cf. Zelaya v. Holder*, 668 F.3d 159, 167-68 (4th Cir. 2012)(proof that local police are aware of torture but refuse to help can satisfy the showing that police have breached their responsibility to intervene).

[10] The AG observed in *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002), that potential "vengeance" by "two corrupt, low-level agents" might not suffice. However, the comment was purely hypothetical and dictum, as the AG had already found the applicant was not credible, torture claim was "wholly unpersuasive," and he had not even testified to any particularized facts for the AG to analyze under the (since-rejected) "willful acceptance" standard for acquiescence. *See Karki*, 715 F.3d at 806-07 ((only "willful blindness" required).

The judge also erred by requiring ****** to show he reported the torture outside his province. IJ at 10. As the Tenth Circuit explained in *Kharki v. Holder*, requiring ****** to show he informed government authorities of specific threats improperly "transforms the willful blindness standard into an actual knowledge requirement." *Kharki*, 715 F.3d at 806-07.

2. The Immigration Judge Based His Decision On the State Department Report of the Wrong Country

The Immigration Judge explicitly relied on the State Department Report of the wrong "Congo" to find that "civilian authorities generally maintained effective control over the security forces," IJ at 10, *quoting* Exh. 4, and deny CAT relief. This was prejudicial error.

The onus was on both the BIA and the Immigration Judge to rely on the correct country report, particularly because Mr. ****** does not speak English and was not represented by counsel.[11] The Immigration Judge must consider all evidence relevant to a CAT claim, including evidence of human rights violations and other relevant conditions in the country of removal. 8 C.F.R. § 1208.16(c)(2)(iii) and (iv). Relying on the wrong country report is reversible error. *Matter of S-M-J-*, 21 I&N Dec. at 732-33; *see also Habtemicael v. Ashcroft,* 370 F.3d 774, 781 (8th Cir. 2004)(failure to engage in appropriate factfinding is reversible error); *Zubeda v. Ashcroft*, 333 F.3d 463, 477–79 (3d Cir. 2003)(remand where BIA did not sufficiently consider country reports and human rights reports from Democratic Republic of Congo).

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[11] ****** was not required to attach a document that was readily available to the BIA. *Abassi v. INS*, 305 F.3d 1028, 1031 (9th Cir. 2002)(pro se litigant not required to produce country reports readily available to the BIA). This Board has held that "we expect the Service to introduce into evidence current country reports, advisory opinions, or other information readily available from the Resource Information Center," and Immigration Judges "should place general country condition information into evidence." *Matter of S-M-J* , 21 I&N Dec. 722, 727 (BIA 1997) (*en banc*). Immigration judges should help develop the record, particularly where alien appears *pro se*. *Matter of J-F-F-,* 23 I&N Dec. 912, 922 (A.G. 2006), *citing* INA § 240(b)(1), 8 C.F.R. § 1240.11(a)(2) (2006), and *Agyeman v. INS* , 296 F.3d 871, 884 (9th Cir. 2002); *see also Al Khouri v. Ashcroft,* 362 F.3d 461, 465 (8th Cir. 2004) (IJs maintain an affirmative duty to develop the record); *Hasnaj v. Ashcroft,* 385 F.3d 780, 783 (7th Cir. 2004) (same); *Richardson v. Perales,* 402 U.S. 389, 410 (1971) (finding that an ALJ "acts as an examiner charged with developing the facts").

3. The Correct Country Report Supports ******'s Claim

While the report the IJ relied upon included "mixed evidence regarding law enforcement and security," and noted the new President's calls to end corruption, IJ at 10, the report for the Democratic Republic of Congo weighs heavily in favor of a finding that ****** will face torture if he returns there. Even a cursory comparison of the two reports show that while civilian forces may control security forces in the Republic of Congo, security forces/police in the Democratic Republic of Congo are corrupt, operate with impunity, and inflict torture and the government is involved in killings, disappearances, and beating and torture of detainees:

Democratic Republic of Congo	page	**Republic of Congo**	Page
Elements in the security forces are corrupt, state agents were responsible for 61% of documented human rights abuses, and "impunity remained a serious problem."	7	Civilian authorities generally maintained effective control over security forces.	1, 6
Credible reports that state security forces torture civilians, particularly detainees and prisoners; hundreds of reports listed in a report that concludes "torture is used predominantly as a form of punishment…and as a deterrent"	1, 4	No mention of torture	3
Numerous reports of killings by government; hundreds confirmed.	1-3	Reports of killings by government not confirmed	2
Reports of disappearances due to state security forces	3	No reports of politically motivated disappearances	2
"Authorities often arbitrarily beat or tortured detainees," some allegedly whipped and beaten	6	No report of torture or beatings in detention	4-6
Authorities "routinely arrested or detained persons arbitrarily";	7	Arbitrary arrest "continued to be a problem"	6
Numerous reports of political prisoners and detainees, charges with offenses including offending the person of the head of state or spreading false rumors	12	Discusses only release of prisoners	10
Security forces harassed and robbed civilians, entered homes without warrants, and looted business and homes	13	Reports of authorities entering homes without judicial or other appropriate authorization	11
Government discourages investigation of corruption with intimidation and other means	34	Investigations of corruption are ongoing	20-21

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C. The Record Contains Sufficient Evidence For The Board To Find ****** Entitled To Relief Under the CAT

1. ****** Suffered Torture

The physical and mental abuse ****** suffered was severe enough to meet the CAT's definition of "torture":

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person…

Id. § 1208.18(a)(1).; *Matter of J-E-*, 23 I&N Dec. 291, 297–99 (BIA 2002)(extreme form of cruel and unusual treatment, severe pain and suffering, intentionally inflicted, for an illicit purpose). For conduct involving mental pain or suffering by to be considered torture, the relevant criteria are that it must be caused by intentional or threatened infliction of severe physical pain or suffering, threat of imminent death, or threat that another will be subjected to threat of imminent death. 8 CFR §§208.18(a)(4), 1208.18(a)(4).

****** suffered severe mental and physical pain and suffering. He was detained and bound for three days without food or water, and was forced to urinate on himself. RT at 53-54. *Cf. Tchemkou v. Gonzales*, 495 F.3d 785, 787, 795 (7th Cir. 2007)(three day incarceration with nothing to eat or drink and no sanitation facilities, coupled with beating constitute torture). He was whipped with a rope and wire during that detention. RT at 54-56; *Cf. Zewdie v. Ashcroft*, 381 F.3d 804 (8th Cir. 2004) (individual beaten repeatedly over 26 days with wire whips and sticks by government officials suffered torture). His wife and sister in law were raped. RT at 58-59. *Cf. Namo v. Gonzales*, 401 F.3d 453, 455, 457-58 (6th Cir. 2005)(applicant suffered torture when he was beaten, detained, forced to witness a rape, and threatened with rape of his wife). Military men threatened to kill him while holding a gun to his head. RT at 61. *Cf.* 8 C.F.R. § 1208.18(a)(4)(iii)(death threat can constitute torture).

The very nature of the conduct shows ******'s tormentors intentionally and deliberately inflicted pain on him. *See Matter of J-R-G-P-,* 27 I&N Dec. 482 (BIA 2018)(describing specific intent required). His tormentors' impermissible purpose was clear – to punish him for his alleged disclosure of ******'s incest and his daughter's attempted abortion, to punish him for refusing to treat her in violation of the law, and to coerce him to leave the country. IJ at 7; RT at 51, 63, 89.

2. Other Evidence Supports Relief.

****** testified there is no place in the country that he could be safe, given the power of the government officials persecuting him ("if you are an authority in Congo, so all the provinces belong to you"), and the fact that he was tracked to a different province. RT at 71-72, 51, 60. *Cf.* 8 C.F.R. § 206.16(c)(3)(ii)(ability to relocate). As set out above, the country report for the Democratic Republic of Congo chronicles flagrant, mass human rights violations. *Cf. id.* § (c)(3)(iii). The threat to ****** is ongoing: his nurse colleague was threatened and kidnapped for the same reasons and is still missing, RT at 46-48, and he received threatening calls even after he had fled his province. RT at 64-69.

CONCLUSION

Because of the country error in the Notice to Appear, Respondent respectfully requests that the Board dismiss the Notice to Appear and the proceedings against him. In the alternative, Respondent respectfully submits that he is entitled to both asylum and withholding of removal under the Convention Against Torture, art. 3. Respondent requests the Board grant his requests for asylum and relief under the Convention Against Torture or, in the alternative, that it remand these proceedings for further consideration of his requests for asylum, withholding of removal, and relief under the CAT.

Dated: September 23, 2019

Respectfully submitted,

Elizabeth Letcher

PROOF OF SERVICE

On September 23, 2019, I, Elizabeth S. Letcher, mailed a copy of this Appeal and Motion to Dismiss, along with the Appendix and Declaration of ***** ****** in Support of Motion to Dismiss, to DHS Assistant Chief Counsel at the following address:

Elanie Cintron, Assistant Chief Counsel
DHS/ICE Office of Chief Counsel
12445 East Caley Avenue
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_____ _____
Elizabeth S. Letcher Date