

*Avendano-Hernandez v. Lynch*: Twenty-First-Century Values and Transgender Communities’ Impact on Immigration Policy and Foreign Relations

I. OVERVIEW ..... 391  
II. BACKGROUND ..... 393  
    A. *Withholding of Removal* ..... 393  
    B. *Convention Against Torture* ..... 394  
        1. Past Torture ..... 395  
        2. Likelihood of Future Torture ..... 396  
III. THE COURT’S DECISION ..... 397  
IV. ANALYSIS ..... 401  
V. CONCLUSION ..... 404

I. OVERVIEW

Edin Avendano-Hernandez is a transgender woman and convicted felon.<sup>1</sup> A native and citizen of Mexico, she first illegally entered the United States in 2000 at the age of twenty, ultimately settling in Fresno, California.<sup>2</sup> Growing up in Mexico, Avendano-Hernandez was sexually abused by her older brothers and cousins, who often forced her to perform oral sex, beat her, and raped her.<sup>3</sup> She was physically assaulted by her classmates and family for being “gay” and a “faggot.”<sup>4</sup> At sixteen, Avendano-Hernandez dropped out of high school and moved to Mexico City to work at a nightclub where she was also harassed and, on one occasion, physically assaulted.<sup>5</sup> She returned home to help care for her mother, who had cancer, but her older brother—who raped her as a child—threatened to kill her if she did not leave.<sup>6</sup> After her mother’s death in 2000, Avendano-Hernandez unlawfully entered the United States and in 2005, began taking female hormones and living openly as a woman for the first time.<sup>7</sup> While in the United States, Avendano-Hernandez was twice convicted of driving under the influence (DUI).<sup>8</sup>

---

1. *Avendano-Hernandez v. Lynch*, 800 F.3d 1075, 1075-76 (9th Cir. 2015).  
2. *Id.* at 1076.  
3. *Id.* at 1075.  
4. *Id.* at 1075-76.  
5. *Id.* at 1076.  
6. *Id.* at 1076.  
7. *Id.*  
8. *Id.*

The first offense resulted in a misdemeanor conviction, and her second offense, which caused injuries to both parties, resulted in a felony conviction.<sup>9</sup> Avendano-Hernandez was sentenced to 364 days incarceration, three years probation, and was deported to Mexico in March 2007.<sup>10</sup> Upon returning to Mexico, Avendano-Hernandez was met again with harassment.<sup>11</sup> She was assaulted by a group of armed, uniformed police officers, forcibly placed into the bed of a truck and driven to an unknown location, and was beaten, forced to perform oral sex, and raped by the officers.<sup>12</sup> The officers then threatened her and her family if she told anyone about the attack.<sup>13</sup> Avendano-Hernandez immediately fled from Mexico.<sup>14</sup> In an attempt to illegally cross the border, she encountered uniformed Mexican military officers who identified her as transgender and separated her from the group with which she was traveling.<sup>15</sup> The officers then verbally assaulted her and forced her to perform oral sex on one officer while the rest watched and laughed.<sup>16</sup>

In May 2008, Avendano-Hernandez unlawfully reentered the United States and returned to Fresno, where she was arrested in 2011 for violating her probation.<sup>17</sup> Fearful of returning to the continuous harassment, abuse, and sexual assaults she faced in Mexico, Avendano-Hernandez applied for relief under a withholding of removal claim and a separate claim for relief under article 3 of the United Nations Convention Against Torture (CAT).<sup>18</sup> The Board of Immigration Appeals (BIA) concluded Avendano-Hernandez's 2006 felony conviction constituted a particularly serious crime and denied her application for withholding of removal.<sup>19</sup> The BIA additionally denied her CAT claim on the grounds that she failed to show Mexican public officials approved of or acquiesced in prior acts of torture committed against transgender people or homosexuals.<sup>20</sup> The United States Court of Appeals for the Ninth Circuit *held*, although Avendano-Hernandez was ineligible for withholding of removal because a DUI offense was a particularly serious crime, CAT relief was appropriate as she was tortured in the past and

---

9. *Id.*

10. *Id.*

11. *See id.* at 1076-77.

12. *Id.* at 1076.

13. *Id.*

14. *Id.*

15. *Id.* at 1076-77.

16. *Id.* at 1077.

17. *Id.*

18. *Id.* at 1075.

19. *Id.*

20. *Id.* at 1077.

likely to be subject to future torture if returned to Mexico and the case was remanded to the BIA with instructions to grant CAT relief for Avendano-Hernandez. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015).

## II. BACKGROUND

### A. *Withholding of Removal*

In response to an influx of immigration, the United States Congress in 1952 first outlined procedures for the detention and removal of aliens who illegally come within the jurisdiction of the United States.<sup>21</sup> The first step in the removal proceedings is for the alien to appear before an immigration judge (IJ), who determines whether that particular alien is removable from the United States.<sup>22</sup> If an IJ finds the alien removable, the alien can apply for relief from removal, and bears the burden of proof to establish that he or she meets all eligibility requirements.<sup>23</sup> Aliens were first given the statutory right to request asylum and withholding of removal in 1968, when Congress aligned U.S. refugee laws with the recently enacted 1967 United Nations Protocol Relating to the Status of Refugees.<sup>24</sup>

Congress granted the Attorney General the power to remove an alien from the United States within a period of ninety days.<sup>25</sup> Once an alien is removed, he or she must return to the foreign nation in which he or she is a lawful citizen, or the nation from which he or she entered the United States.<sup>26</sup> However, if the Attorney General decides that “the alien’s life or freedom” may be endangered due to “membership in a particular social group,” she is not allowed to remove the alien from the United States.<sup>27</sup> An exception applies if the alien has been “convicted by a final judgment of a particularly serious crime” and is thus “a danger to the community of the United States.”<sup>28</sup>

The BIA acts as a delegate for the Attorney General and has authority to determine whether the alien’s crime was particularly serious

---

21. See 8 U.S.C. § 1231 (2015). Detention is the act or fact of detaining or holding back, especially, holding in custody. Removal is the act of moving or taking someone away from a place, and in immigration is equivalent to deportation to the alien’s home country.

22. *Id.* § 1229a(a)(1).

23. *Id.* § 1229a(c)(4)(A)(i).

24. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 19.5 U.S.T. 6223; *Delgado v. Holder*, 648 F.3d 1095, 1100 (9th Cir. 2011).

25. 8 U.S.C. § 1231(a)(1)(A).

26. *Id.* § 1231(b)(1)(A).

27. *Id.* § 1231(a)(3)(A).

28. *Id.* § 1231(b)(3)(B)(ii).

and if the alien is a danger to the community of the United States for asylum purposes.<sup>29</sup> Any aggravated felony that results in at least five years imprisonment constitutes a per se particularly serious crime.<sup>30</sup> However, the term “particularly serious crime” is not otherwise defined by statute, and therefore is determined on a case-by-case basis.<sup>31</sup> In order to determine if the crime is particularly serious, the BIA considers the factors outlined in the case *In re Frentescu*.<sup>32</sup> There are five *Frentescu* factors which include: the (1) nature, (2) circumstances, (3) facts of the conviction, (4) type of sentence imposed, and (5) whether the type and circumstances of the crime indicate the alien will be a danger to the community.<sup>33</sup> This is a holistic balancing test, and the BIA has discretion on whether or not a crime will ultimately be classified as particularly serious.<sup>34</sup> The court’s review is limited to ensuring that the BIA relied on the appropriate factors and proper evidence to reach this conclusion.<sup>35</sup> The Ninth Circuit previously reviewed a similar fact pattern to *Avendano-Hernandez*’s in *Anaya-Ortiz v. Holder*, where the court upheld a BIA determination that a felony DUI conviction that caused serious injury constituted a particularly serious crime and found the alien to be a danger to the community.<sup>36</sup>

### B. *Convention Against Torture*

The United Nations adopted the CAT in 1984 with the purpose of preventing torture, degrading, and other inhuman and cruel treatment, and the treaty was ratified in the United States in 1994.<sup>37</sup> Similar to a claim for withholding of removal, authority to defer removal is granted by the Attorney General.<sup>38</sup> The BIA acts as the Attorney General’s agent to determine if an alien is subject to asylum deferral relief under the CAT.<sup>39</sup> Aliens are allowed to file a petition for review with a court of appeals as the sole means of judicial review for any cause of action under

---

29. *Delgado*, 648 F.3d at 1098.

30. 8 U.S.C. § 1231(b)(3)(B)(2015).

31. *Delgado*, 648 F.3d at 1098.

32. *In re Frentescu*, 18 I&N Dec. 244(4) (BIA 1982).

33. *Id.*

34. *Delgado*, 648 F.3d at 1104.

35. *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006), *overruled in part on other grounds by Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 n.15 (9th Cir. 2008) (en banc).

36. *See Anaya-Ortiz v. Holder*, 594 F.3d 673, 679-80 (9th Cir. 2010).

37. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, S. TREATY DOC. NO. 100-200 [hereinafter *Convention Against Torture*].

38. *Id.*

39. 8 U.S.C. § 1231(a)(1)(A) (2015).

the CAT.<sup>40</sup> The court has authority to review the factual findings for substantive evidence behind the BIA's conclusion.<sup>41</sup>

### 1. Past Torture

To receive deferral of removal under the CAT, an alien must show that, upon returning to his or her home country, they are “more likely than not to be tortured.”<sup>42</sup> Crucially, this torture must be instigated or approved by a public official or someone “acting in an official capacity.”<sup>43</sup> The alien applying for CAT deferral relief bears the burden of proof but is not required to prove the entirety of his or her home country's government would consent or acquiesce to his or her torture.<sup>44</sup> One way to show public approval or government involvement in past torture is to prove public officials themselves performed the torture.<sup>45</sup> Uniformed, on-duty police officers are the “prototypical state actor[s] for asylum purposes.”<sup>46</sup> The United States has also recognized that nonstate actors may be agents of persecution as long as the state is unable or unwilling to provide protection.<sup>47</sup> The IJ and BIA evaluate evidence of past torture dispensed upon the applicant as relevant to the possibility of future torture.<sup>48</sup>

Any act that causes excruciating pain or suffering that is intentionally inflicted for any discriminatory reason constitutes torture, whether that suffering is physical or mental.<sup>49</sup> Multiple jurisdictions have found rape and sexual assault to be included in the definition of torture, and in *Edu v. Holder*, the court granted CAT relief to an applicant who had been detained, harassed, and raped by the police and military in her home country.<sup>50</sup> Further, because the transgender community is often the target of discrimination, any act of rape or sexual assault that is expressly motivated by the transgender person's gender identity, whether perceived

---

40. *Id.* § 1252(a)(4).

41. *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003).

42. 8 C.F.R. § 1208.17(a) (2015).

43. *Id.* § 1208.18(a)(1).

44. *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013).

45. *Id.*; *see also* *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (establishing public involvement where the perpetrators of the petitioner's torture were government actors).

46. *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005).

47. *See, e.g., In re Acosta*, 19 I&N Dec. 211, 222 (B.I.A. 1985) (recognizing that suffering inflicted by either government actors, persons, or organizations, which the government is unable or unwilling to control, are both agents of persecution).

48. 8 C.F.R. § 1208.16(c)(3)(2015).

49. *Boer-Sedano*, 418 F.3d at 1088-89.

50. *Edu v. Holder*, 624 F.3d 1137, 1139 (9th Cir. 2000).

or actual, is classified as torture.<sup>51</sup> More specifically, gay men with female sexual identities in Mexico are seen as social pariahs, constituting their own “particular social group” that is often subject to police brutality, persecution, and ostracism by society.<sup>52</sup> In Mexico, “57% of transgender migrants who did not stay in a shelter reported experiencing violence,” and “nearly 36% of transgender migrants who stayed in a migrant shelter reported experiencing some form of violence.”<sup>53</sup> Additionally, 78% of the globally reported murders of transgender people occurred in Central and South America.<sup>54</sup>

## 2. Likelihood of Future Torture

Past torture is the first factor courts examine when determining the likelihood of future torture an alien might face if removed when reviewing an applicant who has been previously tortured.<sup>55</sup> Absent dramatic changes in circumstances,<sup>56</sup> if an alien has previously been tortured in his or her home country and escaped, there is a high likelihood that he or she will be tortured again.<sup>57</sup> In addition to past torture, the court examines the current conditions within the alien’s home country for flagrant or gross violations of human rights, and evaluates whether or not the evidence illustrates the alien could safely return to a different location within that country.<sup>58</sup> In *Nuru v. Gonzales*, the Ninth Circuit granted CAT relief where the conditions of the country depicted

---

51. *Hernandez–Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (finding that sexual assaults perpetrated against a transgender woman “undoubtedly constitute persecution”), *overruled on other grounds by* *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005).

52. *Id.* at 1095. Additionally, transgender people in the United States are subject to similar persecution and violence. See Katy Steinmetz, *Why Transgender People Are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), <http://time.com/3999348/transgender-murders-2015/>; *Victims of Crime for the Office of Justice Programs*, OFF. FOR VICTIMS CRIME, [http://www.ovc.gov/pubs/forge/sexual\\_numbers.html](http://www.ovc.gov/pubs/forge/sexual_numbers.html) (last visited Apr. 19, 2016).

53. Amy Lieberman, *Gay and Transgender Migrants Face Staggering Violence in Mexico*, ATLANTIC (July 18, 2013), <http://www.theatlantic.com/international/archive/2013/07/gay-and-transgender-migrants-face-staggering-violence-in-mexico/277915/>.

54. *Alarming Figures: Over 1,700 Trans People Killed in the Last 7 Years*, TRANS RESPECT VERSUS TRANSPHOBIA (May 8, 2015), [http://www.transrespect-transphobia.org/en\\_US/tvt-project/tmm-results/idahot-2015.html](http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/idahot-2015.html).

55. *Nuru v. Gonzales*, 404 F.3d 1207, 1217-18 (9th Cir. 2005).

56. *Vitug v. Holder*, 723 F.3d 1056, 1066 (9th Cir. 2013) (establishing examples of dramatic changes in circumstances include instances, such as a sudden change in the system of governance, or passage of new laws, that illustrate the alien will no longer face a threat to his life or freedom).

57. *Nuru*, 404 F.3d at 1217-18.

58. *Id.* at 1218-19.

egregious human rights violations committed by officials of the state.<sup>59</sup> The conditions of the country by themselves can “play a decisive role in granting relief under [the] CAT.”<sup>60</sup> Furthermore, if a country has lawfully sanctioned torture, the alien is still subject to CAT protection as long as he or she is likely to suffer torture that is either unlawful according to his or her home country, or is lawfully sanctioned in the alien’s home country, “but defeats the object and purpose of the CAT.”<sup>61</sup>

The lesbian, gay, bisexual, queer, and transgender community (LGBTQ)<sup>62</sup> is often the target of social and state discrimination and exclusion because many societies do not approve of their deviation from gender-based expectations and traditional values.<sup>63</sup> The conditions of the country are a factor courts use to measure and determine a country’s societal values and its treatment towards these minority groups, and these are a more accurate and in-depth measure than simple deference to whether that country enacted legislation aimed at protecting the LGBTQ community.<sup>64</sup> For example, in *Vitug v. Holder*, the court held gay rights activism in the Philippines, coupled with a local ordinance that protected gays and lesbians from employment discrimination, was neither indicative of lessened violence directed at gay men nor of police becoming more responsive to hate crimes against these groups.<sup>65</sup> If an alien that applies for CAT protection can demonstrate that he or she is likely to face torture if returned to his or her home country, and that public officials either condone or acquiesce in their torture, they are entitled to protection under CAT.<sup>66</sup>

### III. THE COURT’S DECISION

In the noted case, the Ninth Circuit determined the BIA correctly found Avendano-Hernandez ineligible for withholding of removal due to her prior felony conviction of a particularly serious crime, a DUI, but that the BIA erred in denying Avendano-Hernandez CAT relief.<sup>67</sup> Consequently, the court found the rapes and sexual assaults inflicted upon

---

59. *Id.* at 1213-19 (finding past torture where Eritrean military official tied up alien with his hands behind his back, naked, in the desert for almost a month, and routinely beat, whipped and deprived him of food or water, and also denied him from seeking medical attention).

60. *Id.* at 1219 (quoting *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001)).

61. *Wang v. Ashcroft*, 320 F.3d 130, 134 (2d Cir. 2003).

62. LGBTQ stands for lesbian, gay, bisexual, transgender, and queer.

63. *Latta v. Otter*, 771 F.3d 456, 495 (9th Cir. 2014) (Berzon, J., concurring).

64. *Vitug*, 723 F.3d at 1066.

65. *Id.*

66. 8 C.F.R. § 1208.17(a) (2015); *id.* § 1208.18(a)(1).

67. *Avendano-Hernandez v. Lynch*, 800 F.3d 1075, 1082 (9th Cir. 2015).

Avendano-Hernandez by uniformed, on-duty Mexican police officers and military officials constituted past torture.<sup>68</sup> Further, if Avendano-Hernandez was deported to Mexico it was likely she would be subject to future torture and the Mexican government would, more likely than not, consent to her torture.<sup>69</sup> Therefore, the court remanded the case to the BIA to grant relief under the protections granted by the CAT.<sup>70</sup>

First, the court upheld the BIA's judgment that Avendano-Hernandez was ineligible for withholding of removal on the grounds that her DUI felony constituted a particularly serious crime.<sup>71</sup> According to 8 U.S.C. § 1231(b)(3)(B)(ii), Avendano-Hernandez could not be eligible for withholding of removal if she had been convicted of a "particularly serious crime" and was deemed a danger to the community.<sup>72</sup> Any aggravated felony resulting in at least five years imprisonment is the *per se* rule constituting a particularly serious crime, but the Attorney General may designate offenses as such on a case-by-case basis.<sup>73</sup> The BIA determined Avendano-Hernandez's offense had the potential to cause great harm, not only to the driver, but to others Avendano-Hernandez possibly could have encountered, thus deeming her prior felony conviction a particularly serious crime.<sup>74</sup>

The court reviewed the BIA's conclusion under the abuse of discretion standard and determined the BIA correctly applied the proper legal standard.<sup>75</sup> The court rejected Avendano-Hernandez's contention that the BIA mischaracterized the facts and refused to overturn the BIA's conclusion, dismissing the minor factual distinctions in prior cases as immaterial because the court did not have the authority to do so under the abuse of discretion standard.<sup>76</sup> The BIA has the authority to determine which offenses constitute a "particularly serious crime" on a case-by-case basis, and the court found the agency appropriately deemed

---

68. *Id.* at 1080.

69. *Id.* at 1082.

70. *Id.*

71. *Id.* at 1078.

72. *Id.* at 1077 (citing 8 U.S.C. § 1231(b)(3)(B)(ii) (2015)).

73. 8 U.S.C. § 1231(b)(3)(B); *Delgado v. Holder*, 648 F.3d 1095, 1098 (9th Cir. 2011); *Avendano-Hernandez*, 800 F.3d at 1077.

74. 8 U.S.C. § 1231(b)(3)(B); *Avendano-Hernandez*, 800 F.3d at 1077; *Delgado v. Holder*, 648 F.3d 1095, 1098 (9th Cir. 2011).

75. *Avendano-Hernandez*, 800 F.3d at 1077; *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012).

76. *Id.*; *see, e.g.*, *Konou v. Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014); *Avendano-Hernandez*, 800 F.3d at 1078.



Avendano-Hernandez's felony conviction an inherently dangerous activity.<sup>77</sup>

Second, the court reversed the BIA's denial of Avendano-Hernandez's request for CAT deferral of removal.<sup>78</sup> To show deferral of removal should be granted, Avendano-Hernandez had to illustrate that if she returned to Mexico, "she [is] more likely than not to be tortured," either "by or at the instigation of or with the consent or acquiescence of a public official or someone acting in an official capacity."<sup>79</sup> The court defined torture as any intentional infliction of severe pain or suffering on a person that is based on discrimination.<sup>80</sup> As a deplorable violation of humanity, rape can be categorized as torture.<sup>81</sup> While in Mexico, Avendano-Hernandez was raped, severely beaten, forced to perform oral sex, and threatened multiple times by on-duty, uniformed military and police officers.<sup>82</sup> Rape due to a person's gender identity, "whether perceived or actual, certainly rises to the level of torture for CAT purposes," and Avendano-Hernandez was singled out for assault because she was a transgender woman.<sup>83</sup> The BIA correctly found the assaults and rapes of Avendano-Hernandez constituted torture, but incorrectly concluded there was not sufficient evidence to show Mexican public officials consented to the past torture of Avendano-Hernandez and members of the Mexican transgender community.<sup>84</sup>

The court rejected the BIA's conclusion that Avendano-Hernandez must show "acquiescence" of the Mexican government because Mexico's public officials themselves inflicted the torture.<sup>85</sup> The government argued that these police and military officers were rogue or corrupt officials, but the court rejected this argument as both groups of officers were uniformed, on the job, and acting in their official capacity when the assaults occurred.<sup>86</sup> Further, Avendano-Hernandez was not required to

---

77. *Avendano-Hernandez*, 800 F.3d at 1078; *Arbid*, 700 F.3d at 383; *see, e.g.*, *Konou v. Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014).

78. *Avendano-Hernandez*, 800 F.3d at 1082.

79. *Id.* at 1079 (quoting 8 C.F.R. §§ 1028.17(a)-1208.18(a)(1) (2015)).

80. 8 C.F.R. § 1208.18(a)(1)(2015).

81. *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003); *see also* *Edu v. Holder*, 624 F.3d 1137, 1147 (9th Cir. 2010) (remanding for the BIA to grant CAT relief to a petitioner who had been raped).

82. *Avendano-Hernandez*, 800 F.3d at 1079.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1080.

demonstrate the entirety of the Mexican government would consent or acquiesce to her torture.<sup>87</sup>

Past torture is the principal factor the court relies on when evaluating whether there is a likelihood of future torture of an alien who is seeking relief under the CAT.<sup>88</sup> If that alien has been tortured in the past and escaped, it is likely that individual will be tortured again if he or she is returned back to the country, absent a dramatic change in circumstances.<sup>89</sup> In finding no likelihood of future torture for Avendano-Hernandez, the BIA relied upon Mexican laws aimed at protecting the gay and lesbian communities and concluded that police corruption was only relevant in drug trafficking matters and thus were unrelated to Avendano-Hernandez's fear of future torture.<sup>90</sup> The court found clear and convincing evidence that Avendano-Hernandez had been tortured in the past.<sup>91</sup>

The court found the BIA's focus on drug-related corruption "inexplicable."<sup>92</sup> Additionally, the BIA conflated the transgender community with the gay and lesbian population, and the court noted both the inaccuracy and danger in this, finding the BIA's reasoning reflective of how Avendano-Hernandez and other transgender persons "are caught in the crosshairs of both generalized homophobia" and violence aimed specifically at the transgender community.<sup>93</sup> The court found that the BIA did not apply an erroneous legal standard, but rather came to an erroneous conclusion that there was no evidence Mexican public officials consented to previous acts of torture against the transgender community based on the BIA's conflation of gay and transgender identity.<sup>94</sup> Accordingly, the court stipulated it is imperative to consider the vulnerabilities and challenges faced by transgender people when evaluating a transgender applicant's CAT claim.<sup>95</sup> Avendano-Hernandez's petition was granted in part and remanded for a grant of CAT relief.<sup>96</sup>

---

87. *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013).

88. *Nuru v. Gonzales*, 404 F.3d 1207, 1217-18 (9th Cir. 2005).

89. *Id.*

90. *Id.* at 1080-81.

91. *See Avendano-Hernandez*, 800 F.3d at 1075-79.

92. *Id.* at 1082.

93. *Id.* at 1081.

94. *Id.* at 1082.

95. *Id.* at 1081.

96. *Id.* at 1082.

## IV. ANALYSIS

The decision by the Ninth Circuit in *Avendano-Hernandez* is consistent with recent jurisprudence in granting CAT relief for individuals who are likely to face torture upon deportation.<sup>97</sup> The decision also does not deviate from jurisprudence denying an alien's request for withholding of removal when the alien was convicted of a particularly serious crime.<sup>98</sup> The de facto consequence of the decision is that an illegal immigrant and convicted felon has been granted asylum.<sup>99</sup> Opponents of the decision critique the court for providing no guidelines or limits to the types of particularly serious convictions that will bar deportation relief and worry this decision opens the floodgates to other felons convicted of even more serious or violent crimes to be granted asylum.<sup>100</sup> Assuredly, this has charged a heated domestic dispute within the United States over illegal immigration and immigration reform. However, the larger takeaway from the court's ruling is the protections carved out specifically for the transgender community and the broader effect this will have on immigration policy and foreign relations. The court recognized the unique vulnerabilities and dangers transgender individuals endure.<sup>101</sup> In holding that courts must consider these particularities in evaluating a transgender applicant's CAT, asylum, or request for withholding of removal claim, the court not only differentiated the transgender population from the gay and lesbian communities, but also strengthened protection for the group and drew attention to the unique challenges exclusively pertinent to transgender people.<sup>102</sup> For example, now courts must look narrowly at the conditions for the transgender population in the applicant's home country and must also view any past torture or possibility of future torture through the specific lens of a transgender individual.<sup>103</sup> In granting *Avendano-Hernandez's* CAT application, the court repeatedly pointed to the BIA's conflation of transgender and gay identities as a critical error when the fact pattern clearly illustrated that *Avendano-Hernandez* would likely face torture upon removal to Mexico because of her status as a

---

97. *Id.*; see, e.g., *Edu v. Holder*, 624 F.3d 1137, 1147 (9th Cir. 2010).

98. *E.g.*, *Arbid v. Holder*, 648 F.3d 1095, 1095 (9th Cir. 2014).

99. *Avendano-Hernandez*, 800 F.3d at 1082.

100. *Id.* at 1072.

101. *Id.*

102. *Id.* at 1082.

103. *Id.*

transgender woman and the previous harassment and rape by Mexican government officials.<sup>104</sup>

The BIA's argument that Avendano-Hernandez would be protected by Mexico's extension of some legal protections to gay and lesbian persons is irreparably flawed because Avendano-Hernandez is a transgender woman, a distinctly separate identity from a gay identity. The court differentiated the two groups by deftly pointing out Mexico City's legalization of gay marriage did not mean Avendano-Hernandez and other members of the transgender population are now protected from violence, discrimination, and harassment from the police or other state officials.<sup>105</sup> The conditions in the alien's home country and whether there are "gross, flagrant, or mass violations of human rights,"<sup>106</sup> is a critical factor in determining whether relief is granted under the CAT. The court found that police in Mexico routinely extort the transgender community for sexual favors and acknowledged rampant police corruption and an increase in violence against the gay, lesbian, and transgender communities.<sup>107</sup> Avendano-Hernandez was systematically brutalized, sodomized, harassed, raped, and humiliated in Mexico, even after attempting to hide her identity as a transgender woman.<sup>108</sup> Further, by granting CAT relief in part because Mexico suffers from "an epidemic" of violent crime targeting transgender people that goes unsolved and is one of the world leaders in transgender murders, the court is stating to Mexico that the United States does not believe it is doing an adequate job of protecting its transgender citizens.<sup>109</sup> Countries could potentially see this decision as another attempt by the United States to impose its values, morality, or beliefs on other countries, akin to the United States' decision to often tie foreign aid money to specific reforms, or its past efforts to increase democratization in Iraq and capitalism in the third world during the Cold War.

By allowing Avendano-Hernandez, a Mexican citizen, relief under the CAT, a U.S. federal court is stating that a particular social group in Mexico is subject to state sanctioned systematic discrimination, brutality, violence, and corruption, which rises to a level constituting government

---

104. *Id.*

105. *Id.* at 1080.

106. *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (quoting *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001)).

107. *Avendano-Hernandez*, 800 F.3d at 1081.

108. *See generally id.* at 1075-77.

109. *Id.* at 1081.

backed torture under a U.N. Treaty.<sup>110</sup> The Ninth Circuit took a similar stance towards the Philippines in 2013, finding the recent emergence of activism around the rights of the gay and lesbian communities in that country and new ordinance aimed at protecting that group from employment discrimination did not provide evidence illustrating police had become more responsive to anti-gay hate crimes or that less violence occurred against the gay and lesbian communities.<sup>111</sup> Even though greater legal protection has been extended towards the LGBTQ community in Mexico, evidence shows an increase in violence against these communities.<sup>112</sup>

It is peculiar that the court took this position when the United States is also experiencing the same phenomena. In 2015, the Supreme Court in *Obergefell v. Hodges* held that same-sex couples had a fundamental right to marriage,<sup>113</sup> and many states have recently enacted laws that prohibit discrimination against the LGBTQ community.<sup>114</sup> Yet, the transgender community in the United States, even with heightened visibility and acceptance, still faces staggering obstacles. One in two transgender individuals in the United States is sexually assaulted or abused during their lifetime.<sup>115</sup> Transgender people are four times more likely than the general population to live in extreme poverty,<sup>116</sup> 80% of transgender people reported that they were harassed growing up,<sup>117</sup> and in 2015, the number of transgender murders in the United States hit a historic high.<sup>118</sup>

Legal protection and legislation has positively impacted LGBTQ citizens in the United States, yet it is ironic that the court's holding granted greater protection of transgender aliens applying for deportation relief when the United States has not yet enacted specific legislation to address the problem of protecting U.S. transgender citizens from violence. Nonetheless, this decision illustrates that, even though a country may have laws meant to protect the LGBTQ community, federal courts must still analyze the status of specific social groups within that

---

110. Convention Against Torture, *supra* note 37; *see Avendano-Hernandez*, 800 F.3d at 1080-82.

111. *Vitug v. Holder*, 723 F.3d 1056, 1066 (9th Cir. 2013).

112. *Avendano-Hernandez*, 800 F.3d at 1081.

113. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

114. *ACLU Non-Discrimination Laws: State by State Information-Map*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Mar. 8, 2016).

115. *Responding to Transgender Victims of Sexual Assault*, OFF. FOR VICTIMS CRIME (June 2014), [http://www.ovc.gov/pubs/forge/sexual\\_numbers.html](http://www.ovc.gov/pubs/forge/sexual_numbers.html).

116. Extreme poverty in the United States is defined as making less than \$10,000 per year.

117. Steinmetz, *supra* note 52.

118. *Id.*

country when examining CAT claims.<sup>119</sup> This gives federal courts great power to judge other countries' societies and culture, not just laws and government, through the prism of America's twenty-first-century values and ideologies. Although the Constitution imbued the judicial branch authority over cases involving both treaties and controversies to which the United States is a party, it has traditionally been the executive branch that has yielded power in foreign affairs and dictated foreign policy, yet this decision enhances the ability of federal courts to at least be a cog in the United States' foreign relations machine.<sup>120</sup>

This decision mandates that a transgender applicant for removal status must be given special consideration.<sup>121</sup> This is a strong victory for transgender rights in the United States, and this ruling may also have a broader effect as a surfeit of other international and foreign courts also grapple with the up-and-coming challenges and laws that have accompanied a growing acceptance of the LGBTQ community. Although it has not been ratified by the United States, The Vienna Convention on the Law of Treaties (Vienna Convention) has broad support among the international community as customary international law.<sup>122</sup> The Vienna Convention stipulates that subsequent practice in treaty interpretation is of vital importance, including judicial decisions such as those made in *Avendano-Hernandez*.<sup>123</sup> The Ninth Circuit was one of the first courts to tackle this issue under the CAT, and does so realistically and perspicaciously in a new era for transgender and LGBTQ rights. By mandating transgender applicants for CAT claims be given unique and specific consideration, other CAT signatories of the Vienna Convention may follow the court's lead, adhering to the criteria of subsequent practice in treaty interpretation laid out in the Vienna convention.<sup>124</sup> This would provide yet another example of how evolving twenty-first-century values would have a direct effect on immigration policy and foreign relations.

## V. CONCLUSION

There is significant evidence that suggests transgender persons are especially visible and vulnerable to harassment and persecution due to

---

119. *Avendano-Hernandez v. Lynch*, 800 F.3d 1075, 1082 (9th Cir. 2015).

120. U.S. CONST. art. I, § 2, cl. 1.

121. *Avendano-Hernandez*, 800 F.3d at 1082.

122. Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, N.Y.U. J. INT'L & POL. 391, 401 (2013).

123. *Id.*

124. *Id.*; *Avendano-Hernandez*, 800 F.3d at 1082.

their often public nonconformance with normative gender roles.<sup>125</sup> The immigration policies of the United States were written first to protect U.S. citizens, and the Ninth Circuit's decision to grant deferral relief under the CAT still granted a felon, convicted of a particularly dangerous crime, asylum in the United States.<sup>126</sup> In order to address this issue, the court should have laid out more criteria regarding the withholding of removal request and placed restrictions on when CAT relief would be granted to felons convicted of particularly dangerous crimes to the public. The withholding of removal and application for CAT relief are treated as distinct claims, and should be, but directly conflict, as granting one negates the practical value of ruling on the other. The court left little guidance on how to balance the desire of the United States to remove aliens who commit particularly serious crimes against the motivation to protect aliens from torture.

This decision challenges the Mexican government's human rights record and sends a direct message that the United States believes the Mexican transgender community is subject to systematic violence and harassment by public officials.<sup>127</sup> Most importantly, by mandating that a transgender person's status is unique and must be given special consideration, the court acknowledges the generalized hatred and homophobia aimed at the entire LGBTQ community, but also the transgender specific violence and discrimination that occurs. Until now, the distinction had not been made, and the court's decision to differentiate the groups and strengthen the protection for transgender asylum seekers is a step in the right direction for the civil rights of the transgender community and is bound to have ripple effects on immigration policy and foreign relations.

Benjamin Rumph\*

---

125. *Avendano-Hernandez*, 800 F.3d at 1081.

126. *Id.* at 1082.

127. *Id.* at 1080-82.

\* © 2016 Benjamin D. Rumph. J.D. candidate 2017, Tulane University Law School; B.S. 2013, *cum laude*, Texas Christian University. I would like to thank my parents, Robert and Johnny Rumph, for their guidance and unconditional love and support.