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THE IMPORTANCE OF MEDICAL TESTIMONY IN REMOVAL HEARINGS FOR TORTURE VICTIMS

Katherine J. Eder*

I. INTRODUCTION

Freedom from torture is a fundamental human right; however, each year the United States turns away asylum applicants that have been victims of torture. Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention") prohibits member nations from returning or extraditing any person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act ("FARR Act"), implementing Article 3 of the Torture Convention in immigration and extradition contexts in the United States.2

There are no specific statistics regarding torture victims seeking asylum in the United States: "[p]olitical repression around the world influences the flow of U.S. immigration patterns, but no information is routinely collected on the number of persons seeking political asylum (or permanent residence) whose application includes a history of torture." What is known is that new immigration standards place a stringent burden on applicants applying for asylum. This burden is particularly increased by the fact that new laws prescribe that torture victims must talk about their persecution upon entry and inspections officers may not be adequately trained in the effects of torture.3


5In 1997, the New York Times reported that the United States Immigration and Naturalization Service, in a pilot program, had hired doctors, psychologists and even Broadway
Immigration inspectors have replaced trained asylum officers or judges to determine who may stay to make a formal asylum claim. The result is that many applicants face immediate removal. As a last resort, the protection under Article 3 of the Torture Convention may be invoked in removal proceedings before an immigration judge. Consequently, in removal proceedings there is a substantial need for corroboration in claims for torture victims.

This article will discuss the necessity of medical health professionals’ testimony in removal hearings for torture victims. Part II provides background information on the definition of torture. Part III discusses the Torture Convention. Part IV provides a brief overview of the asylum process in the United States, and the impact the Torture Convention has on the process. Part V will turn to the weight of medical and mental health care workers’ testimony in removal hearing for torture victims. The relevance of such testimony will be discussed as well as the necessity of professional testimony to corroborate the victim’s own personal testimony.

II. TORTURE

A. Torture

Torture is the intentional infliction of severe pain or suffering for a specific purpose. Torture is used to obtain information, to punish, to take revenge, or to intimidate within a population. The aim of torture is not to destroy the victim, but to break the victim’s personality. According to the Torture Convention, torture is:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information...
or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.\footnote{12}

It is important to note that this definition does not include pain or suffering arising only from inherent or incidental lawful sanctions.\footnote{13}

\section*{B. Types of Torture and the Effects}

Physical and psychological methods of torture are similar worldwide.\footnote{14} Torture techniques seek to prolong the victims’ pain and fear without leaving visible evidence.\footnote{15} Some of the most common methods of physical torture include suspension, beatings, electric shock, deprivation of food and water, submersion, suffocation, and burns.\footnote{16} Common threats of psychological torture include isolation, threats, humiliation, sham executions, and witnessing the torture of others.\footnote{17} Rape and sexual assault are also forms of torture commonly practiced during arrest or imprisonment or during conflicts.\footnote{18}

Torture causes physical, psychological and social effects.\footnote{19} Such effects include physical effects such as broken bones or muscle swelling and physiological effects including flashbacks, severe anxiety, insomnia, nightmares, depression, memory lapses, and a breakdown in social relations.\footnote{20}
C. The Prohibition of Torture

The prohibition of torture is universal. The Universal Declaration of Human Rights Article 5 states: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This sentiment is echoed throughout other international instruments, including: Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 5 of the African Charter on Human and Peoples' Rights; Article 7 of the International Covenant on Political and Civil Rights; Article 5 of the American Convention on Human Rights; and Article 99 of the 1949 Geneva Convention. The Declaration on the Protection of All Persons from

The right to be free from torture is a jus cogens norm. See M. Cherif Bassiouni, Accountability For International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 68 (1996). Transposed, torture is also a jus cogens international crime. M. Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 VA. J. INT'L L. 81, 123 (2001). See also M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 489 (1992) (stating that torture is an act violating international law and a jus cogens norm). The term jus cogens, "refers to a body of overriding or 'peremptory' norms of such paramount importance that they cannot be set aside by acquiescence or agreement of the parties to a treaty; rather, a treaty will be void if it conflicts with a peremptory norm 'from which no derogation is permitted.'" Edward M. Wise, Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite, in INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 28 (M. Cherif Bassiouni ed., 2d ed., 1999) (internal citations omitted). Professor Bassiouni has found that freedom from torture and cruel, inhuman, and degrading punishment is a more exact interpretation of the broader right to life, liberty and the security of the person. This right established itself in the English Bill of Rights of 1688 and in the Eighth Amendment of the United States Constitution. The right is found in at least eighty-one national constitutions. M. Cherif Bassiouni, Human Rights in the Context Of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 DUKE J. COMP. & INT'L L. 235, 262 (citing 1 Wm. & M. Sess. 2, c.2 (1688) (Eng.); U.S. Const. amend. VIII).


See European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Apr. 11, 1950, art. 3, 213 U.N.T.S. 222, (stating "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment").


See American Convention on Human Rights, Nov. 22, 1969, art. 5(2) 1144 U.N.T.S. 123 (stating "[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment").

See Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (stating, [n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused").
TORTURE VICTIMS

Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment declares that the prohibition of torture may not be distorted in times of war or war or internal political instability.28

The Second Circuit held in 1980 that “the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.”29 In another Second Circuit case, Filartiga v. Pena-Irala, Judge Kaufman stated:

> In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights...30

It is a fundamental human right to be free from torture.

III. THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

On December 10, 1984 the U.N. General Assembly adopted the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Torture Convention”). The Torture Convention itself was not designed to prohibit torture, but to protect and promote adherence to the preexisting declarations against torture.31 Several human conventions already recognize this

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28See Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment, G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, art. 1(2), Annex, U.N. Doc. A/10034 (1975) (stating “exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment”).


30Filartiga, 630 F.2d at 880.

31Torture Convention, supra note 1, at pmbl. The following portions of the preamble demonstrate the Convention’s purpose to protect and promote adherence to the preexisting declaration against torture:

> Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,
prohibition. Specifically the Torture Convention prohibits countries from returning individuals to a state where he or she would likely be tortured.

The Torture Convention is a multilateral United Nations treaty and 134 nations are a party to it. However, torture continues to be practiced regularly in up to 100 countries, including parties to the Torture Convention. Although difficult to estimate, the Center for

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world...”

Id. 32


34 AMNESTY INTERNATIONAL, FACTS AND FIGURES: THE WORK OF AMNESTY INTERNATIONAL, at http://web.amnesty.org/pages/aboutai-facts-eng (last visited Apr. 5, 2004). Amnesty International’s Annual Report 2003 reports that individuals were tortured or ill-treated by security forces, police, or other states authorities in 2002 in the following 106 countries: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, CAR, Chad, Chile, China, Colombia, Democratic Republic of Congo, Dominican Republic, Ecuador, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Federal Republic of Yugoslavia, Fiji, France, Georgia, Germany, Greece, Guatemala, Guyana, Haiti, Hungary, India, Indonesia, Iran, Iraq, Israel/OT, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea (North), Korea (South), Kuwait, Laos, Lebanon, Liberia, Libya, Macedonia, Madagascar, Malaysia, Mauritania, Mauritius, Mexico, Moldova,
Victims of Torture in Minneapolis, Minnesota has estimated the number of persons nationwide that have experienced torture-related traumas at 200,000.\textsuperscript{35}

The United States signed the Torture Convention on April 18, 1988 and on October 27, 1990 the Senate gave its advice and consent to the Convention, subject to various reservations, understandings, and declarations.\textsuperscript{36} The United States became full party to the treaty November 1994, one month after President Clinton gave the ratification to the United Nations Secretary General.\textsuperscript{37} In March of 1999, the Torture Convention was formally made available as a source of relief in the United States.\textsuperscript{38}

Article 3 of the Torture Convention is the non-refoulement provision. It is argued that the duty of non-refoulement is so widely accepted within international law as to achieve the status of customary international law.\textsuperscript{39} This is demonstrated through its appearance in several different international agreements.\textsuperscript{40} Currently almost all countries are party to at least one international agreement that includes the duty of non-refoulement.\textsuperscript{41}

Article 3 expressly prohibits a State from deporting or extraditing any person to another State where there are “substantial grounds” for believing that he or she would be in danger of being tortured.\textsuperscript{42} The

Morocco/Western Sahara, Mozambique, Myanmar, Nepal, Nigeria, Pakistan, Palestinian Authority, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Qatar, Romania, Russian Federation, Rwanda, Saudi Arabia, South Africa, Spain, Sri Lanka, St. Lucia, Sudan, Switzerland, Syria, Tajikistan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, United Arab Emirates, USA, Uzbekistan, Venezuela, Yemen and Zimbabwe. Id.

\textsuperscript{35}Shenson & Silver, supra note 3, at 80.
\textsuperscript{38}Although the United States signed the Torture Convention on April 18, 1988; it had no domestic effect and granted no enforceable right until 1999. See Ellen Y. Chung, \textit{A Double Edged Sword: Reconciling the United States’ International Obligation Under the Convention Against Torture}, 51 EMORY L.J. 355, 362 (2002).
\textsuperscript{40}Id. The author lists: The Refugee Convention art. 3; The Fourth Geneva Convention of 1949 art. 45 which prohibits refoulement to a country where there are ‘grave breaches’ of the Geneva Convention; Article 3 of the Torture Convention (discussed supra); Article 3 of the European Convention on Human Rights which the European Commission on Human Rights has interpreted to provide a right of non-refoulement to any country where the person would be subjected to torture or inhuman or degrading treatment. Id.
\textsuperscript{41}David Weissbrodt & Isabel Hortreiter, \textit{The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties}, 5 BUFF. HUM. RTS. L. REV. 1, 2 (1999).
\textsuperscript{42}Torture Convention, supra note 1, at art. 3. The United Nations organization, the Committee against Torture, that monitors compliance with the Torture Convention has found
Article is known as the Torture Convention's central enforcement and relief mechanism. The Torture Convention, however, is silent as to how a nation must structure its laws to comply with this obligation.

Simply stated, Article 3 prohibits the return of applicants to countries where there are substantial grounds to believe that person would be in danger of being subjected to torture. Specifically, the Torture Convention forbids the expulsion, return (refoulement), or extradition of an individual who faces the danger of torture. The wording of Article 3 is based upon a similar provision in the Convention Relating to the Status of Refugees, Article 33. Article 33(1) reads: "[n]o Contracting States shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." In contrast with the Torture Convention which prohibits return, expulsion, or extradition, the Convention on Refugees only addressed expulsion or return.

Article 3 of the Torture Convention states:

(1) No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture; (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

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Torture Convention, supra note 1, at art. 3(1).


Convention on Refugees, supra note 44, at art. 33(1).

Weissbrodt & Hortreiter, supra note 41, at 7.

Torture Convention, supra note 1, at art. 3(2).
Under Article 3(1) there must be substantial grounds for believing the individual will be subjected to torture. Both subjective and objective factors are considered. Under Article 3(2) objective factors are considered, including country conditions, ethnic background, political affiliation, and the individual's history of past detention or torture. The state should consider all of the relevant information and circumstances which include patterns of human rights violations of a gross and flagrant nature.

According to the interpretation given in the United States, there are several elements to a Torture Convention claim. The U.S. Senate has stated of the Torture Convention that "substantial grounds for believing" means that a person must demonstrate that it is "more likely than not that he would be tortured." Anticipation of cruel, inhuman or degrading treatment does not apply. It is only where an individual is likely to be tortured that the claim is acceptable. In providing the likelihood of torture for an Article 3 claim, the applicant must satisfy four stringent elements mentioned here and described below.

First, the definition of torture is very specific and limited. There must be an extreme form of cruel, inhuman, or degrading treatment entailing mental or physical pain or suffering. Second, the perpetrator must have had specific intent to inflict torture intentionally upon the victim. Third, torture occurs only if inflicted by a public official or with the consent or acquiescence of a public official. Lastly, torture does not include pain or suffering arising solely from legal sanctions. "The important points to note about the definition are that the pain or suffering must be severe and may be either physical or mental; the act

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48 Weissbrodt & Hortreiter, supra note 41, at 12.
49 Torture Convention, supra note 1, at art. 3(2).
50 Id.
53 Torture Convention, supra note 1, at art. 1(1).
54 Id.
55 Id.
56 Id.
must be intentional; it must involve direct or indirect participation of public officials; and it must have a purpose."

As to the first element, in interpreting the infliction of severe pain or suffering, either physical or mental, the U.S. Senate provided:

[M]ental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; (4) the threat that another person will imminently be subjected to death, severe physical pain of suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

The inclusion of mental pain in the definition is critical because many of the most barbaric and damaging tortures are psychological. Many new techniques of torture leave no physical scars. In China, for example, authorities take vials of blood from imprisoned Tibetan monks and carelessly discard it, thus violating the monks’ strict religious doctrine regarding disposal of bodily fluids. Another example of such torture is the use of a cell with racks of 500-watt light bulbs left on constantly, therefore depriving the victim of sleep. These types of torture leave no physical scars, so the inclusion of mental pain broadens the definition of torture to encompass these examples.

The second element is that the perpetrator must have had specific intent to inflict torture intentionally upon the victim. Acts that result in unanticipated or unintended pain or suffering are not torture. The third element is that the torture must involve a public official. The torture must be inflicted "by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official

57 AMNESTY INTERNATIONAL, A GLIMPSE OF HELL 3 (Duncan Forest ed., Amnesty International UK 1996) [hereinafter AMNESTY - GLIMPSE OF HELL].
60 See Schmitt, supra note 5.
61 Id.
capacity.” Only acts that occur in the context of government authority are acknowledged. Governments have both a duty to refrain from violating human rights and a duty to protect citizens from this type of treatment by other citizens. According to a U.S. Senate Resolution, “in order for an act to be taken with the ‘acquiescence’ of a public official, the public official must, ‘prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.’”

The following cases provide some insight as to the level of state action required. In Kadic v. Karadzic, the Appellate Court held that the level of “state action” required for “official” torture was present when mass rape and forced prostitution involved not actual authority but the “semblance of official authority.” In Ortiz v. Gramajo, the District Court of Massachusetts held an official act was determined not by direct custody over the victim, but with the “consent or acquiescence of a public official.”

Lastly, the Torture Convention provides that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” This provision thus removes any argument that the death penalty in the U.S. constitutes torture under the Torture Convention.

IV. ASYLUM

A. Eligibility for Asylum in the United States—A General Overview

A person who is not a United States citizen, but who is in the United States, is eligible for a grant of asylum if he or she qualifies as a
The asylum procedure may be different for different applicants depending on when the individual applied for asylum and whether or not the individual was apprehended. Affirmative application procedures occur when the individual applies for asylum prior to removal procedures. Once the removal procedures are begun, defensive procedures, or withholding of removal apply. Article 3 of the Torture Convention is a defense in removal proceedings. There are two types of defenses, withholding of removal and deferral of removal, both discussed below.

B. Past Persecution, Well Founded Fear of Persecution, and Countrywide Persecution

A person can qualify for asylum either on the basis of past persecution or a well-founded fear of persecution or a combination of both. A finding of past persecution may result in a presumption of a well-founded fear of persecution. In contrast, withholding of removal
requires a showing of a clear probability of persecution. Similarly, applicants who are torture victims must prove a reasonable fear of persecution. The grant of asylum is discretionary; relief from withholding of removal is mandatory should the Attorney General find the individual’s life or freedom would be threatened, however, the individual may be removed to a third country.

C. Burden of Proof and Standard of Persuasion

The difference between affirmative asylum and the proceedings for removable aliens is relevant to the burden of proof and discretionary relief. In asylum cases, the burden of proof rests with the applicant to prove his or her claim by a preponderance of the evidence. Thus, the asylum applicant has the burden of proving eligibility for asylum or withholding and establishing that the grounds for denial do not apply. An asylum seeker must establish that he has a “well founded fear,” a “reasonable possibility” of persecution, and meet the “credible subjective evidence” standard. Under withholding of removal, the burden of proof is on the applicant to establish that it is more likely than not that he or she would be tortured if removed. If the testimony of the applicant is deemed credible, it may be sufficient to sustain the

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7See Von Sternberg, supra note 72, at 242. Von Sternberg explains the difference stating, “Clear probability is an objective test; the alien has to show a greater than 50% likelihood of persecution. On the other hand, well-founded fear has a subjective feature; the objective factor is satisfied if there is as little as 10% chance of persecution. Id. (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).


10In re S-M-J-, Int. Dec. 3303, at 724 (BIA 1997). The Board of Immigration Appeals (“BIA”) issues appellate administrative decisions that are binding on the Department of Homeland Security (“DHS”) Bureaus and Immigration Judges unless modified or overruled by the Attorney General of a Federal Court. The BIA is not a Federal Court, but its decisions are subject to review in Federal Courts. The BIA is given nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges and DHS Bureau offices. See generally BIA Decisions—By Volume and Interim Decision Number, at http://www.usdoj.gov/eoir/vll/intdec/lib indecnet_vol.html.

8 CFR § 208.13(a), 208.16(b), 240.33(c)(3), 240.49(c)(4)(iii).

11INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987). C F R § 1101(a)(42)(A). The U.S. application under the Convention on Refugees, supra note 43, at art. 33 is applied as “a well founded fear of persecution.” The United States Supreme Court has interpreted this to require less than a probability of persecution. Cardoza-Fonseca, 489 U.S. at 431 (stating, “one can certainly have a well-founded fear of an event happening when there is less than a 50% change of the occurrence taking place”).

12C.F.R. § 208.16(c)(2).
burden of proof without corroboration. Credibility is judged according to consistency, specificity, and detail, which lend support to the believability and plausibility of the facts related. Credibility determinations are "inextricably tied to the [applicant’s] burden of proof and can make or break a claim."Regardless, the Board of Immigration Appeals ("BIA") may still require the applicant to corroborate material facts of the applicant’s claim where reasonable. The BIA in In re S-M-J has held that where an alien fails to provide corroborate evidence or reasonably explain why such evidence is not available, the court may find the burden of proof was not met for asylum or withholding of removal. In Ladha v. INS, the Ninth Circuit held that where an applicant’s testimony is credible and specific, if unrefuted, it is sufficient to establish a claim without the need for corroboration. In contrast, the Second and Third

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81§ C.F.R. § 208.16(b).
82In re Mogharrabi, 19 Int. Dec. 439 (BIA 1987). See generally In re O-D-, Int. Dec. 3334 (BIA 1998) (noting that the inconsistencies between the respondent’s second I-589 and his testimony regarding his alleged torture and beatings were taken into account). Of the Mogharrabi rule it has been stated:

The Mogharrabi rule...is one practical dimension of a far-reaching seminal decision that brought the Board into compliance with the U.S. Supreme Court’s ruling in INS v. Cardoza-Fonseca...[T]he Mogharrabi rule define the evidentiary foundation in all types of asylum decisions. Even though the rule was originally crafted in the context of a burden of proof deposition the applicability of the rule is not exclusive to burden of proof issues. Most notable here is the rule’s pertinence to issues of credibility. The applicability of the Mogharrabi rule to both burden of proof and credibility issues is evident in the very terms employed in the Mogharrabi rule. The very essence of the rule is that burden of proof and credibility, which are not identical, are closely related in the asylum context because credible testimony may be the only proof available to the applicant.

Margaret Kuehne Taylor, The Mogharrabi Rule in 1998: A Review of Recent BIA Asylum Decisions, 75 NO. 25 INTERPRETER RELEASES 901, 902 (1998). Arthur Helton explains that the BIA has stressed that "corroborating evidence must be provided, where it is reasonable to expect that such evidence exists. Courts, however, have not insisted on such an unyielding standard." Arthur C. Helton, Criteria and Procedures for Refugee Protection in the United States, 1340 PLI/Corp 221, 230 (2002) (citing In re Y-B-, Int. Dec. 3337 (BIA 1998) (applicant’s general and vague testimony not remedied by specific and detailed corroborative evidence); In re A-S-, Int. Dec. 3336 (BIA 1998) (deference given to negative credibility determination by an immigration judge where key discrepancies and omissions by the applicant were not explained) and; In re O-D-, Int. Dec. 3334 (BIA 1998) (entire asylum claim tainted by counterfeit identity care and birth certificate unconnected to escape from persecution).
Circuits have held that it may be permissible to require an applicant to corroborate his or her testimony where such request is reasonable.\textsuperscript{87}

**D. Affirmative Asylum**

An applicant is eligible for affirmative asylum if he or she is in the U.S., is not in removal proceedings, and has filed within one year of his or her arrival.\textsuperscript{88} Once the affirmative application is made, a non-adversarial interview is scheduled with an asylum officer.\textsuperscript{89} If the claim is not recommended for approval or approved, it will be “referred” to the immigration court for removal proceedings.\textsuperscript{90} The applicant will then have the opportunity to renew his or her request for asylum before the immigration judge.\textsuperscript{91}

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")\textsuperscript{92} placed additional barriers on asylum seekers. According to the IIRIRA, applicants arriving in the United States seeking asylum have one year to file.\textsuperscript{93} An asylum applicant is ineligible for asylum if the applicant may be returned to a “safe” country other than their country of nationality.\textsuperscript{94} Applicants arriving with false documents or no passport must demonstrate a credible fear of persecution, based on race, religion, nationality, membership in a

\textsuperscript{87}See Abdulai v. Ashcroft, 239 F.3d 542 (3d Cir. 2001); Diallo v. INS, 232 F.3d 279 (2d Cir. 2000). The court in Diallo v. INS fashioned a two-part test under which the BIA must first determine whether the applicant’s testimony is credible based on consistency and corroboration, although a lack of corroboration may not be the sole basis for an adverse credibility finding. \textit{Id.} at 290. Secondly, should the applicant’s testimony be found credible the BIA must determine whether corroboration of the testimony is necessary to meet the burden of proof. If it is necessary and the applicant fails to provide it, the BIA must articulate why it reasonably found corroboration necessary and why the applicant’s explanation for lack of corroboration was insufficient. \textit{Id.} In Abdulai v. Ashcroft the court articulated a three-part inquiry: First, under which parts of applicant’s testimony is the expectation of corroboration reasonable; Second, did the applicant provide the corroboration; Lastly, if such corroboration was lacking, was there a reasonable expectation. \textit{Abdulai}, 239 F.3d at 554.

\textsuperscript{88}See WEISSBRODT—IMMIGRATION, supra note 76, at 85.

\textsuperscript{89}Id.

\textsuperscript{90}Id.

\textsuperscript{91}Id.

\textsuperscript{92}See INA § 240.


\textsuperscript{94}Exceptions may be granted to applicants who can demonstrate changed circumstances that materially affect eligibility for asylum or extraordinary circumstances for failing to apply for asylum within one year. See Bureau of Citizenship and Immigration Services, \textit{Frequently Asked Questions About Asylum}, at http://www.immigration.gov/graphics/services/asylum/faq.htm (last visited Apr. 8, 2003) [hereinafter BCIS ASYLUM].

\textsuperscript{95}A “safe” country is one that has a bilateral or multilateral agreement with the United States that guarantees the applicant’s life and freedom will not be threatened, and where the applicant will have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection. \textit{Id.}
particular social group, or political opinion, during the interview with the inspectors officer or face immediate deportation.  

If the inspectors officer finds the applicant demonstrated a fear of returning to the country of origin, the applicant will be placed in detention pending a “credible fear” interview with an asylum officer. The alien must prove his or her credible fear to the officer based on the above factors with the option of review by an immigration judge. Should the asylum officer find the fear credible, the alien’s claims will be considered in the context of the removal proceeding. If the fear is reasonable, the applicant is placed in a detention center, often in a county jail, until an Immigration Judge processes his or her asylum claims. The conditions of the imprisonment may place an additional stress on asylum seekers.

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95 See WEISSBRODT—IMMIGRATION, supra note 76, at 194. Weissbrodt writes of the changes implemented through the IIRIRA. “If an immigration officer determines that an alien is inadmissible, the officer should order the alien removed without further hearing or review unless the alien indicates a fear of persecution of an intention to apply for asylum.” Id. citing INA § 235(b)(1)(A). “Since April 1997 a single immigration officer can remove non-citizens who arrive at the border in the same situation form the United States, pursuant to the expedited removal law, within hours of their arrival.” Michele R. Pistone, Assessing the Proposed Refugee Protection Act: One Step in the Right Direction, 14 GEO. IMMIGR. L.J. 815, 820 (2000); INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225 (b)(1)(A)(i) (Supp. II 1996). Professor Pistone states: Asylum seekers are often compelled to come to the United States without travel documents or with documents that were procured through fraud. In many cases their governments, which would normally grant them such documents, many also be their persecutors. It is unrealistic to expect these individuals to ask their government for travel documents so that they can flee the country or to require them to show their own passports to their persecutor upon fleeing. Simply having such documents with them could put their lives in danger. In addition, many asylum seekers are fleeing imminent harm. Consequently they do not have the time to obtain travel documents before they flee. 

See Pistone, supra note 95, at 820 n.44.

96 See WEISSBRODT—IMMIGRATION, supra note 76, at 195. 

97 Id.

98 Id. The removal proceeding will take place under INA § 240. Id.

99 See Caitriona Palmer and Kerri Sherlock, Doctors and Lawyers: Fighting for Immigrant Human Rights, 25 FALL HUM. RTS. 23, 23 (1998). See also Somini Sengupta, Immigrants Settle Lawsuit Over Jail Beatings for $1.5 Million, N.Y. TIMES, Sept. 21, 1998, at B2; Dan Mallone, 851 Detained for Year in INS Centers – Many are Pursuing Asylum, DALLAS MORNING STAR NEWS, Apr. 1, 2001. The World Organization Against Torture has reported: Mr. Ejibe Otoh Oko has been held in a governmental prison along with convicted criminals for two years, despite the fact that he has not committed any crime...Mr. Oko originally came to the United States to obtain asylum because he was subjected to torture in his country...Mr. Oko has filed a petition for protection under Article 3 of the Convention Against Torture, but the final decision from the Immigration and Naturalization Service could take up to a year.

INS Case Number A74 208 270 Ejibe Otoh Oko. Sen. Edward M. Kennedy, D-Mass., has introduced a bill to end mandatory detention for asylum seekers who are not considered a flight risk or danger. The legislation would also allow the courts to order INS to parole certain
Obviously, the increased pressure on asylum seekers to prove their right to remain has grave psychological ill-effects, and this is most marked if the applicant has been imprisoned and tortured in his or her own country. Even more psychologically disturbing is the situation if [sic] the applicant is held in the country of refuge.¹⁰⁰

If the asylum officer finds otherwise, the applicant must affirmatively request a review by an immigration judge or be subject to immediate removal.¹⁰¹

E. Defensive Asylum—Withholding of Removal and Deferral of Removal

Defensive applications are filed with an immigration judge by aliens in removal proceedings.¹⁰² Under the Immigration and Nationality Act there are six broad categories of aliens subject to removal: (1) inadmissibility at the time of entry or adjustment of status; (2) commission of criminal offenses; (3) failure to register or falsification of a registration; (4) commission of a removable offense; (5) ineligibility for admission; and (6) failure to perform contracts of service.


More than three years after a group of immigrants seeking political asylum in the United States were beaten and tortured by guards at a jail in Elizabeth, N.J., county officials there have agreed to pay $1.5 million to settle a Federal civil rights lawsuit brought by 21 of the immigrants...The settlement caps a long and difficult journey for many of the immigrants, who came to this country seeking asylum and were held at a Federal detention center run by a private corporation, Esmor...They testified that the guards beat and punched them, knocked them to the ground and used pliers to pull the hairs around their genitals.


¹⁰³ See INA § 240. In discussing removal Weissbrodt states, ‘[T]he consequences of removal are drastic...a removed alien is barred for five years from entering the United States unless s/he obtains special permission from the Immigration Service to re-enter.” WEISSBRODT—IMMIGRATION, supra note 76, at 176 citing INA § 212. Aliens may apply for asylum after the completion of removal hearings, but must reasonably explain his or her failure to apply during the hearing. See id. at 239 citing 8 C.F.R. § 208.4.
of documents; (4) subjection to security and related grounds; (5) becoming a public charge; (6) unlawfully voting. Appeals may be made to the BIA and then the federal court of appeals. However, review by the federal courts is limited to determining whether the proceeding was conducted arbitrarily, capriciously or illegally, and whether it complied with due process requirements.

If the case is referred to removal proceedings, and the basis of the referral is credibility, it becomes a more challenging case. The BIA’s majority decisions appear to reflect a presumption that an asylum applicant is lying or committing fraud. Credibility is the key to the burden of establishing a well-founded fear of persecution. Expert witnesses, to bolster credibility, may include psychologists or doctors. Such experts need to provide their credentials as well as be available to testify.

Additional documentation should be obtained to address the problem created by referral. In Matter of M-D-, the Board demonstrated its reliance on corroborating evidence finding the applicant failed to meet his burden of proof resulting from a “complete lack of evidence corroborating the specifics of the respondent’s claim.” If credibility is an issue, the solution is to corroborate all aspects of the claim.

Even if the Immigration Judge grants the applicant’s case, if the immigration official does not agree, the applicant’s case will be on appeal for several years, with no possibility of filing an application for family members overseas. A long pending appeal could also result in

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103 Id. at 177 citing INA § 237.
104 Id. at 85–6.
105 Id. at 223.
106 Id. at 238.
107 Schlenger, supra note 72, at 237. Also persons claiming a defense against removal may be detained if in the United States illegally until the immigration judge rules on the asylum claim.
108 Id. at 238 (citing BIA Member Lory Rosenberg’s note in her dissent in In re A-S-, Int. Dec. 3336 (BIA 1998)). The majority of the appeals to the BIA are from immigration judges’ decisions regarding removal. See WEISSBRODT—IMMIGRATION, supra note 76, at 84.
109 Schlenger, supra note 72, at 242.
110 Id. at 243.
111 In re M-D-, Int. Dec. 3339 (BIA 1998). However, in terms of requiring corroborative evidence the court in Ladha v. INS, 215 F.3d 889 (9th Cir.2000), stated, “To the extent that decisions such as In re S-M-J- and In re M-D- establish a corroboration requirement for credible testimony, they are disapproved.” Id. at 901.
112 See Schlenger, supra note 72, at 239. For example, a psychological evaluation regarding whether the client suffers from Post Traumatic Stress Syndrome may be obtained if the applicant has trouble articulating his claim. Id.
a BIA finding of changed country conditions while the case is on appeal.\textsuperscript{113}

**F. The Torture Convention**

Several articles of the Torture Convention, both implicitly and explicitly, require each State party to take effective legislative, administrative and judicial measures to ensure prevention and punishment of torture within its jurisdiction. The United States has agreed to be bound by the provisions of the Torture Convention and specifically has incorporated them into United States law. The United States Department of State has stated:

\begin{quote}
Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority... The United States is committed to the full and effective implementation of its obligations under the Convention [against Torture] throughout its territory.\textsuperscript{114}
\end{quote}

Bo Cooper, General Counsel for the former United States Immigration and Naturalization Service has stated:

\begin{quote}
The United Nations Convention Against Torture is, from our perspective at the INS, the most important human right instrument to which the U.S. has recently become a party. In our view, the cardinal obligation under the Convention is contained in article three, and under article three, the U.S. has agreed not to expel, return, or extradite a person to another state where he or she would be tortured.\textsuperscript{115}
\end{quote}

The United States signed the Torture Convention in 1988, and in 1990 the Senate gave its advice and consent to the Convention, subject to various reservations, understandings, and declarations. One such declaration was that the Convention is not self-executing.\textsuperscript{116} In

\textsuperscript{113}Id.


\textsuperscript{116}Jacques Semmelman, International Decision: Cornejo v. Seifert, 218 F.3d 1004 (9th Cir. 2000), 95 A.J.I.L. 435 (2001). In 1829, the Supreme Court established a distinction between self-executing and non-self-executing treaties in Foster v. Neilson, 27 U.S. 253 (1829). The court determined that only self-executing treaties were immediately enforceable in United States courts. The U.S. Senate conditioned its consent to the Torture Convention on the declaration that Articles 1 through 16 were not deemed to be self-executing, which conflicts with the language of Article 3 of the Torture Convention. See Kristen B. Rosati, The United
November 1994, the United States became a full party subject to these reservations, understandings and declarations. However, it was not until October 21, 1998, under the Foreign Affairs Reform and Restructuring Act ("FARR Act"), that Congress implemented Article 3 of the Torture Convention in the immigration and extradition contexts.

Under the FARR Act, the protections of Article 3 were required to be implemented into U.S. policy through appropriate regulations by the corresponding agencies. Specifically, the FARR Act directed the heads of the appropriate U.S. agencies to "prescribe regulations to implement obligations of the United States under Article 3, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." The Justice Department adopted regulations to comply with the Article 3 requirement. Beginning in March of 1999, claims for Article 3 protection of the Torture Convention were and continue to be determined by Immigration Judges of the Executive Office for Immigration Review. Decisions regarding eligibility are subject to review by the Board of Immigration Appeals. To bring a Torture Convention claim in Immigration Court the applicant alleges past torture in the political asylum application. The Torture Convention enabled two forms of protection under Article 3: withholding of removal and deferral of removal. Under these regulations,

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11 See FARR Act, supra note 2.

12 Whether or not the FARR Act "executed" or "implemented" the treaty is debatable. The statute merely states that it is "the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Id. at § 2242(a).

13 Id.

14 Id. at § 2242(b).

15 These regulations were adopted pursuant to the FARR Act. See 8 C.F.R. §§ 3, 103, 208, 235, 238, 240, 241, 253 (2002).


17 Id.

18 8 C.F.R. § 208.16(c), 208.18 (2000).

19 8 C.F.R. § § 207.17(a), 208.18 (2000).
individuals are allowed to raise an Article 3 claim in removal proceedings.\(^{127}\)

According to the Torture Convention, the government must grant, without exception, the torture victim withholding of removal (non-refoulement) if that individual qualifies.\(^{128}\) The applicant, under the Torture Convention, does not have to prove the torture was on account of race, religion, nationality, membership in a particular social group or political opinion, but that it will be more likely than not that they will be tortured on their return.\(^{129}\) If an applicant successfully demonstrates this, there are no exclusions to the granting of relief as there are for withholding of removal.\(^{130}\) There is also no one-year filing deadline under the Torture Convention.\(^{131}\)

In withholding of removal, the applicant bears the burden of “establish[ing] that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”\(^{132}\) In assessing whether an applicant would be tortured in the proposed country of removal, the regulations list the following criteria for consideration:

(1) Evidence of past torture inflicted upon the applicant; (2) evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (3) evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and (4) other relevant information regarding conditions in the country of removal.\(^{133}\)

The second protection, deferral of removal, is a more temporary form of removal. Deferral of removal is available for claimants using the Torture Convention, who are subject to exclusion for asylum claims.\(^{134}\) The U.S. Department of Justice explains the differences as:

\(^{127}\)See, e.g., Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001); Al-Saher v. INS, 268 F.3d 1143 (9th Cir. 2001).

\(^{128}\)See 64 Fed. Reg. at 8480 (Feb. 19, 1999). The “without exception” provision of the Torture Convention provides more protection than previously granted under the Refugee Convention or U.S. asylum law.

\(^{129}\)136 Cong. Rec. S17486-92 (daily ed., Oct. 27, 1990). This is a higher standard to establish, than under asylum, that it is “more likely than not” that the individual would be tortured if removed to a certain country.


\(^{132}\)8 C.F.R. § 208.16(c)(2) (2000).

\(^{133}\)8 C.F.R. 208.16(c)(3).

\(^{134}\)See Von Sternberg, *supra* note 72, at 271.
“deferral of removal will be granted to aliens who would likely face torture but are ineligible for withholding of removal—for example, certain criminals, terrorists and persecutors.”\footnote{U.S. DEPARTMENT OF JUSTICE, supra note 62, at 1.} Deferral is quickly terminated if the individual is no longer likely to be tortured in the country of removal.\footnote{Id.; 8 C.F.R. § 208.17(b)(iii) (2000). Deferral of Removal may be terminated at any time when the risk of torture has been diminished.} Neither provision alters the ability to remove the individual to a third country where he or she would not be tortured.\footnote{U.S. DEPARTMENT OF JUSTICE, supra note 62, at 1.}

In cases of either withholding or deferring removal, the Secretary of State may forward to the Attorney General assurances obtained from the government of a specific country that an individual would not be tortured if removed to that country.\footnote{Id.; 208.18(c).} The Attorney General must consider whether these assurances are sufficiently reliable to allow the individual's removal to that country.\footnote{Id. 208.18(c)(2). The Court in INS v. St. Cyr, 533 U.S. 289 (2001), found that the Attorney's General discretionary power to grant relief from deportation is subject to review. Id. It did so under the reasoning that absent a sufficiently clear statement from Congress to the contrary, the strong presumption in favor of allowing habeas corpus review of administrative actions combined with independent jurisdiction available in the habeas statute, was enough to allow the Court to exercise habeas jurisdiction in the case. Id. Some commentators have argued that the legislative history of the Senate ratification does not support an interpretation that would reserve the exclusive decision of whether or not an individual facing extradition would likely be tortured to the Secretary of State (or the Attorney General). William M. Cohen, Article: Implementing the U.N. Torture Convention in U.S. Extradition Cases, 26 DENY. J. INT'L L. & POL'Y 517, 522 (1998). These commentators point out that when the Torture Convention was transmitted to the Senate for its advice and consent, President Reagan recommended that "the United States declare[ ] that the phrase 'competent authorities,' as used in Article 3 of Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases." Id., quoting J. Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings, 76 CORNELL L. REV. 1198, 1225 n.203 (1991). Article 3.2 of the Torture Convention further sets forth the scope of the inquiry by the "competent authorities" necessary to determine whether an individual is likely to be tortured if he or she is extradited to the demanding country. Torture Convention, supra note1, at art. 3(2). In resubmitting the Torture Convention for ratification, the first Bush Administration excluded this recommendation because the administration considered it "not necessary to include...in the formal instrument of ratification." Cohen, supra note 139, at 522, quoting Sen. Exec. Rep. 101-30, App. A, at 35, 37. Therefore, it is argued that the grant of exclusive discretion to the Secretary of State (or Attorney General) was intentionally avoided.}

V. EXAMINING ASYLUM SEEKERS

Granville Densousa has a remarkable scar on his finger, old cuts on his knees, lesions on his limbs and chronic stomach problem. The man's body, his doctor says, is evidence. It supports Mr. Desousa's claim that he was tortured in an
underground military jail in Togo, where he says his captors sliced him with a knife, forced him to kneel for hours on gravel, sleep in unsanitary bedding that caused a skin disease, and drink water so dirty he had to filter it through a handkerchief.140

Mr. Densousa's case is not typical. Most asylum applicants have little evidence to demonstrate a reasonable fear of persecution. If an applicant's claim cannot be demonstrated from objective circumstances, credibility becomes an issue.141 Many times, as discussed below, the effects of torture, culture, and environment prevent the applicant from relaying sufficient testimony to establish this.

Judges and attorneys are, or should be, well aware that every well-told narration of events relies on the 'who, what, where, when, and how.' The demand for specificity and detail as a measure of credibility, therefore, should be a relatively straightforward and comprehensive requirement. In the asylum context, this requirement may be tempered by individual considerations such as the length and atmosphere of the hearing and the experiential, educational, and cultural factors particular to the individual respondent.142

Applicants face numerous obstacles to providing clear, consistent testimony regarding their torture experiences. The Human Rights Clinic in the Bronx documented some of the initial difficulties for survivors of torture navigating the system in the United States.143 The first 89 patients of the clinic represented 33 countries.144 A majority of the individuals came from places where abuse was routine.145 Many did not speak English and arrived in the U.S. alone.146 Almost all were without financial resources and had difficulty utilizing the city's public health and social services.147

Additionally, it is rare that torture victims applying for relief under the Torture Convention will have had the foresight to gather objective evidence before departing their country. In many cases, the applicants

141 See Helton, supra note 130, at 229.
143 Shenson & Silver, supra note 3, at 80.
144 Id.
145 Id.
146 Id.
147 Id.
arrive instead with false papers or documents. Regardless, applicants must still meet the burden of proof to successfully gain relief under the Torture Convention. This is where the necessity for corroborating evidence becomes clear. Medical and psychological evidence may corroborate the applicant's claim where other evidence is unavailable.

As discussed above, in Ladha v. INS, the court held that where an applicant's testimony is credible and specific, if unrefuted, it is sufficient to establish a claim without the need for corroboration. However, authorities place great weight upon inconsistencies in an applicant's claim. An applicant's vague testimony, though, may be remedied by specific and detailed corroborative evidence. Lory D. Rosenberg, BIA member writes:

[T]o corroborate your (the applicant's) claims, obtain and submit official documents or other evidence such as affidavits, letter, lab reports, certificates, and any other document that verifies your identity, your membership or affiliation, your beliefs, and any harm or threat of harm you experienced. This should include verification of your shock, terror, panic, fear, depression, sorrow, or grief, and your medical or hospital reports made at the time of any incidents involving arrest or physical harm, or other evidence that supports your story.

148 The use of false documents is a federal offense.
149 See Ladha v. INS, 215 F. 3d 889 (9th Cir. 2000).
150 See In re Y-B-, Int. Dec. 3337 (BIA 1998) (holding: (1) an asylum applicant does not meet his or her burden of proof by general and meager testimony; (2) specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum; (3) the weaker an applicant's testimony, the greater the need for corroborative evidence). It is necessary to attempt to obtain whatever evidence is available to support various elements of the claim. Objective country conditions may bolster the applicant's claim. These may be accessed at http://www.state.gov/countries/. Although the Department of State minimizes the severity of the human rights conditions the State Department Country Reports or its Bureau of Democracy, Human Rights and Labor Country Profile will be submitted in most cases. See Schlenger, supra note 72, at 215. Objective documentation also includes country conditions issued by Amnesty International Reports, at http://www.amnesty.org/ailib/aireport/index.html; Human Rights Watch Reports, at http://www.hrw.org/research/nations.html. Subjective documents, though, may harm the applicant's claim. In many countries ruled by repressive regimes, using false documents and obtaining government documents by bribe are a way of life. Yet false documents can ruin an otherwise valid claim for asylum. See Schlenger, supra note 72, at 216. Physicians for Human Rights reports:

[A]fter her client was granted asylum, one lawyer from Washington, D.C. wrote, "I believe that not only was [the medical evaluation] very valuable to the Court, but it also provided greatly needed reassurances to our client that the full extent of his past suffering would be made known."

Discrepancies and inconsistencies will destroy the applicant’s credibility. Still, applicants being held by the U.S. can be visited by a physician for an interview and physical examination at the place of incarceration. The emphasis should be on relating the details of the examination to the history of torture.

A. Expert Testimony
It has been argued that BIA majority decisions appear to reflect a presumption that the asylum applicant is lying. Health professionals can provide expert testimony on behalf of asylum seekers to validate testimony by showing that the applicant’s symptoms are consistent with the claims. According to the Human Rights Clinic in the Bronx, it is not necessary for a physician in the United States to have previously treated or examined torture survivors to qualify as an expert.

None of the Human Rights Clinic residents who have submitted affidavits to immigration Court have been turned away as unqualified experts. Experience in related fields, such as training in the recognition of sexual abuse, rape counseling, or work in the trauma room of an emergency department, adds to the interviewers’ qualifications. Even providing a single previous medical assessment of a torture survivor gives the physician more clinical experience in this area than most other practitioners.

Physician testimony does not guarantee the applicant asylum, but it does give the applicant added credibility, especially where inconsistencies in dates and facts may threaten the applicant’s credibility. “Attorneys and judges alike frequently feel unable to distinguish defensiveness based on protecting fraudulent claims from the inability to confront memories of persecution and torture in front of authorities.”

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152 See Shenson & Silver, supra note 3, at 80.
153 Id.
154 See Schlenger, supra note 72, at 238 (explaining that BIA Member Lory Rosenberg has noted this apparent presumption in her dissents).
155 See Shenson & Silver, supra note 3, at 81. However, adequate training may allow a physician to be qualified to give expert testimony on both physical and psychological evidence. See PHYSICIANS FOR HUMAN RIGHTS, EXAMINING ASYLUM SEEKERS 20 (2001).
156 Shenson & Silver, supra note 3, at 81.
157 Uwe Jacobs, Psycho-political Challenges in the Forensic Documentation of Torture, TORTURE: 10 Q. J. ON REHABILITATION OF TORTURE VICTIMS & PREVENTION OF TORTURE 69 (2000) [hereinafter Jacobs, Psycho-political Challenges].
An example of the weight of a medical professional's testimony is as follows. In *Obianuju Ezeagwuna v. Ashcroft*, the judge recounted:

David S. Kang, M.D., a family medicine practitioner, who has examined numerous asylum applicants, conducted a physical examination of Ms. Obianuju while she was in detention. His examination report, as well as his testimony before the IJ (immigration judge), was powerful evidence in Ms. Obianuju's favor. He recounted her version of the events surrounding her torture in Cameroon, and described the scars that she had on her body and her explanation of how they occurred. He concluded: 'It is my assessment that Miss Obianuju has been a victim of torture. Her explanations of scars and injury are consistent with the physical findings. Her explanation of the events as well as the mechanism is consistent and leads me to believe that she is most likely telling me the truth.'

The decision demonstrates the strength of objective medical corroboration. It is typical that different actors put different emphases on the aspects of the torture. It is important for the testifying physician to provide the judge with the same perspective as that of the victim.

A complete medical affidavit includes: biographical statement establishing the physician's competence; a review of the patient's narrative of persecution, including methods of torture; a description of injuries, reactions, and symptoms immediately after torture; a review of symptoms at the time of the examination; and a physical examination and detailed mental health assessment. "Like any medico-legal report, these must be factual, unbiased and authoritative. They should be prepared by doctors who have knowledge of the local conditions in the country of origin and are aware of the appearances of accidental, deliberate, tribal and self-inflicted wounds."

In weighing the evidence that the individual presents, three elements need to be considered. These elements are the history, the

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161 *AMNESTY - GLIMPSE OF HELL*, *supra* note 57, at 186.

162 Id. at 175.
physical evidence, and the psychological demeanor. There are also general interview considerations that apply to all health professionals: medical doctors, psychologists, or other clinicians. Foremost, it is important to remember that the applicant may have difficulty with the concepts of time or place, or may have poor memories of torture events. In addition, there is a tendency for neutralization and repression. “The same repression also took place during the persecution of the Jews, when the Holocaust was possible only as long as it was not discussed.”

The purpose of the inquiry, examination and documentation is to establish facts that corroborate physical and psychological evidence. The process should be objective and impartial. During the interview process the applicant may feel he or she is being interrogated, similar to interrogation used during torture. In some countries health care professionals may even have participated in the torture. Trust is essential: “Clinicians must have the capacity to create a climate of trust in which disclosure of crucial, though perhaps very painful or shameful, facts can occur.”

Primary symptoms may be determined by a medical doctor, and/or mental health professional. Whenever possible the health care professional should have training in forensic documentation of torture and abuse. The health care professional should also be familiar with regional practices of torture in order to pick up on other forms of torture that may have been used, but were not reported by the victim. When complete, the expert testimony effectively communicates the applicant’s allegation and corroboration through the clinician’s medical findings to the judiciary or authority.

B. Initial Concerns and Symptoms
Generally, asylum seekers share some common characteristics. Most migrate to a host country looking for safe haven because of fear of

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163 Id.
164 See Physicians for Human Rights, supra note 155, at 19.
165 Id.
166 See Id.
167 See Elsass, supra note 159, at 19.
169 Id. at 24.
170 Id. at 25.
171 Id. at 24.
172 Id. at 20.
174 Id. at 28.
175 Id. at 20.
176 Id. at 21.
arrest, persecution, torture, or death. There may be a history of discrimination based on poverty, illness, etc. Many asylum seekers face additional trauma during the emigration process, especially if they enter unlawfully. Also, asylum seekers who have been tortured may experience the Torture Syndrome which is distinguishable from other severe traumatic situations by its pain and threat to life.

In any case, it is important to remember that Posttraumatic Stress Disorder may cause the victim to experience the fear he or she felt during the torture. The victim should be forewarned of the possibility of this occurring, prior to the questioning. The questioning should consist of open-ended questions with few interruptions. If interpreters are used, the interviewer should make sure to observe the victim's body language, facial expressions, tone of voice, gestures and use eye contact to fully understand the interviewee.

C. The Asylum Seeker's History
The applicant's history should be explored on several levels. First the psychosocial history should be reviewed. The examiner should ask the asylum seeker about friends, family, daily life and use of drugs. Questions should also be raised regarding the individual's fear or harassment since the torture.

The past medical history should be completely explored. "The importance of expert testimony is further underscored by the fact that in many cases, the torture survivor has no medical records of the injuries he or she has suffered, either because of having to flee without them, or because no medical treatment was ever given."

A detailed account of detention and abuse is also necessary. Details of detention should include access to drink and food, toilet, lighting, temperature, other detainees, and contact with family and lawyers. It is importance to elicit specific facts concerning abuse.

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176 Id.
177 See Physicians for Human Rights, supra note 155, at 21.
178 Id.
179 See Elsass, supra note 159, at 35.
180 See Physicians for Human Rights, supra note 155, at 34. For the DSM-IV, American Psychiatric Association (1994) definition of Post-Traumatic Stress Disorder see Elsass, supra note 159, at 31.
181 See Physicians for Human Rights, supra note 155, at 34-5.
182 Id. at 25.
183 Id. at 33.
184 Id. at 25-26.
185 Id. at 31.
188 See Physicians for Human Rights, supra note 155, at 27.
However, there may be difficulty for the applicant in recounting specific details. Regardless, such details should include blindfolding, drugging, lapses of consciousness, lack of trust, psychological impact and memory impairment caused by beatings on the head, suffocation, etc. Details also include body position, bleeding, trauma, condition immediately after the torture, length of the torture sessions, and what was said. "A network of consistent supporting details can corroborate and clarify the person’s story." For example, details of positional torture should include dates, duration, and how often. Suspension torture details should include the material used specifically because different types of material leave different marks. The list of specific types of torture is broad and the details that should be solicited differ with each.

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189 Id. at 31.
190 Id. at 27-9.
191 Id. at 28.
192 Id. at 31.
193 See Physicians for Human Rights, supra note 155, at 28.
194 Id.
195 Id. at 29. Physicians for Human Rights published a non-exhaustive list of torture methods:

1. Blunt trauma: punch, kick, slap, whips, wires, truncheons, falling down
2. Positional torture: suspension, stretching limbs apart, prolonged constraint of movement, forced positioning
3. Burns: cigarettes, heated instrument, scalding liquid, caustic substance
4. Electric shock
5. Asphyxiation: wet and dry methods, drowning, smothering, choking, chemicals
6. Crush injuries: smashing fingers, heavy roller to thighs/back
7. Penetrating injuries: stab and gunshot wounds, wires under nails
8. Chemical exposures: salt, chili, gasoline (in wounds, body cavities)
9. Sexual: violence to genitals molestation, instrumentation, rape
10. Traumatic removal of digits and limbs
11. Medical: amputation of digits or limbs, surgical removal of organs
12. Pharmacologic torture: toxic doses of sedatives, neuroleptics, paralytics, etc.
13. Conditions of detention
   a. Small or overcrowded cell
   b. Solitary confinement
   c. Unhygienic conditions
   d. No access to toilet facilities
   e. Irregular and/or contaminated food and water
   f. Exposure to extreme temperatures
   g. Denial of privacy
   h. Forced nakedness
14. Deprivations
   a. Of normal sensory stimulation, such as sound, light or sense of time via hooding, isolation, manipulating brightness of the cell
   b. Of physiological needs: restriction of sleep, food, water, toilet facilities, bathing, motor activities, medical care
   c. Of social contacts: isolation within prison, loss of contact with outside world
15. Humiliations: verbal abuse, performance of humiliating acts
D. Physical Evidence of Torture

Particular evidence may prove "almost certain evidence of torture" because it rules out ordinary wear and tear of manual labor or rheumatic or neurological disease. Such evidence includes musculoskeletal abnormalities, where there is no history of previous illness or injury, the aftermath of *falaka* (beating of the soles of the feet), or evidence of suspension, such as Palestinian hanging.

Detail is particularly important when providing documentation of abuse. It is necessary to clarify the exact nature of the injuries described, and therefore, a recognized classification of recent injuries should be adhered to, such as abrasions, contusions, lacerations,

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1. Threats: death, harm to family, further torture and/or imprisonment, mock executions
2. Threats of, or arranging conditions for attacks by animals such as gods, cats, rats, and scorpions

16. Psychological techniques to break down the individual: forced "betrayals," learned helplessness, exposure to ambiguous situations and/or contradictory messages, etc.
   a. Violation of taboos (e.g., forced sexual intercourse between family members, forced removal of one or more articles of clothing, cutting of a Sikh man's hair)

17. Behavioral coercion
   a. Forced to engage in practices against one's religion (e.g., forcing Muslims to eat pork)
   b. Forced to harm others: e.g., the torture of others or other abuses
   c. Forced to destroy property
   d. Forced to betray someone by placing him/her at risk for harm
   e. Forced to witness torture of atrocities being inflicted on others

*Id.* at 29-30.

196 AMNESTY - GLIMPSE OF HELL, *supra* note 57, at 177.
197 *Id.*
198 *Id.*
199 *Id.*

200 *Id.* at 171. An examination of the skin should include entire body surface for generalized skin disease, pre-torture lesions, and lesions inflicted by torture. AMNESTY - GLIMPSE OF HELL, *supra* note 57, at 40. Examination of the face should include looking for fractures, swelling or pain, and a computerized tomography (CT). *Id.* Trauma to the eyes should be noted as well. *Id.* This includes the breakage of the vessels in the whites of the eyes, lens dislocation, hemorrhages behind the eyes, retinal hemorrhage, and visual field loss. *Id.* The use of instruments that may be associated with torture devices should be limited or explained thoroughly to the individual. Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, *Handling Torture in the Medical Perspective: Standards for General Practitioner (GP) Management of Patients Who May Have Suffered Torture and Trauma*, 8 TORTURE: Q. J. ON REHABILITATION OF TORTURE VICTIMS & PREVENTION OF TORTURE 51, 53 (1998). Such items include tweezers, EEG machines, and instruments used for a pap smear. *Id.* Similar instruments may have been used on the victims, by their torturers, and may induce fright. Photographs of any physical marks should be taken as soon as possible. See Physicians for Human Rights, *supra* note 155, at 34. A scale should be shown in the photographs, and the more professional the photos are the better. *Id.* The chain of custody of the film, negatives, and prints must also be documented. *Id.*
incised wounds, gunshot wounds, burns and electrical injuries. Acute symptoms should be described including frequency and duration. Chronic symptoms of physical ailments should be noted in terms of severity, frequency and duration, including headaches, back pain, sexual dysfunction, gastrointestinal symptoms, muscle pain, and psychological symptoms such as anxiety, insomnia, nightmares, and memory difficulties.

It must be stressed that the absence of physical evidence should not lead to the assumption that torture did not exist. As mentioned above, new techniques of torture are psychological. In many cases there may be little or no physical evidence of torture. This, however, does not mean, absent certain symptoms, that torture should not be considered.

E. Psychological Assessment and Evidence of Torture
For asylum applicants, the whole person should be evaluated, which includes evaluation by psychiatrists and psychologists. “The overall goal is to assess the degree of consistency between an individual’s account of torture and the psychological findings.” Torture causes psychological symptoms as well as physical. Today, torture methods are often designed to leave no physical evidence. Physical methods of torture may also leave physical evidence that lack specificity. Effective documentation can “significantly increase the likelihood of

\[201\text{AMNESTY - GLIMPSE OF HELL, supra note 57, at 171. Torturers often make cigarette burns in regular patterns and can be corroborated with the victim’s supposed posture when burnt. Id.}
\[202\text{Id. at 37.}
\[203\text{See Physicians for Human Rights, supra note 155, at 38. This includes injuries such as bleeding, bruising, swelling, open wounds, lacerations, fractures, dislocations, joint stress, coughing up blood, collapsed lung, perforated ear drums, genitourinary system injuries, burns, electrical injuries, chemical injuries, pain, numbness, constipation, and vomiting. Id.}
\[204\text{Id. at 37.}
\[205\text{See Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, supra note 200, at 53. The Service reports:}
\[206\text{Id. at 64.}
\[207\text{See Jacobs, Psycho-political Challenges, supra note 157, at 68.}
\[208\text{Physicians for Human Rights, supra note 155, at 63.}
\[209\text{Id.}
\[210\text{Id. at 64.}
helping asylum seekers, whose torture history cannot be documented through collecting physical evidence.”

"[P]sychological evidence of torture suffers from the perception that physical evidence is objective in nature while psychological evidence is subjective.” However, the court has determined that an ongoing disability requirement is “unreasonable because it treats two applicants who are tortured alike differently if one has the good fortune to fully recover from his injuries and the other does not.”

A psychological assessment looks for the “common sequelae” of torture including Posttraumatic Stress Disorder (PTSD). The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) is the recognized professional standard for psychiatric diagnosis in the United States, and therefore it is important to use it in immigration courts. Specifically it is emphasized in cases where the torture history cannot be documented through physical evidence.

The interpretation of data is gathered from four different sources: behavioral observations, mental status examinations, reported symptomatology via structured interviews and questionnaires, and psychological test results.


212 Id.

213 LAL v. INS, 255 F.3d 998, 1004 (9th Cir. 1999).


216 Behavioral observations provide a foundation for reaching conclusions. See Jacobs, Principles, supra note 211, at 100 (citing HN Garb, Studying the clinician: judgment research and psychological assessment, AM. PSYCHOL. ASSN., 1998). Such observations should not be limited to psychological distress; the focus should also be the way it is revealed. Id.

Examinees may, for example, describe situations of detention and torture with pronounced bodily expressions and gesticulations. In more than one such evaluation, the authors have seen torture victims describe their torment by lying down on the office floor, demonstrating the torture technique to the examiner, accompanied by significant affect. Conversely, a detached and potentially rehearsed rendition of limited facts, accompanied by an unwillingness to elaborate, does not help a claim, unless substantial evidence of dissociation or avoidance/numbing symptoms can be proven.

217 Mental status examinations include observation of dress, behavior, cooperation, attitude, eye contact, grooming, speech, mood, affect, thought process, thought content, memory and concentration. In mental status examinations, the level of education, language and culture are important factors in determining what questions to ask or tasks to assign. See Jacobs, Principles, supra note 211, at 100. “The mental status examination of torture survivors requires flexibility on the part of the examiner, who must have a good understanding of the client’s cultural, linguistic, and educational background before attempting any formal assessment.” Id.

218 Caution should be used in deciding to utilize reported symptomatology through structured interviews and questionnaires because of language and cross-cultural limitations on
After finding a history consistent to the claims or a psychological finding that suggests trauma with no evidence of deception, the examiner must then ask what other causes could account for the findings. "Asylum applicants who have suffered torture typically also suffer additional significant stress, related to immigration and exile." Asylum seekers are also often poor and suffer from cultural alienation and isolation. The process of seeking asylum may lead to aggravation of symptoms and to retraumatization. Symptoms of high trauma should not be confused with the struggles of refugee life and

norms. *Id.* The Posttraumatic Symptoms Scale Interview Version and the Beck Depression Inventory may be a reasonable compromise to gather objective information for the court as long as, "the examiner can explain the rationale for use with a populations for whom specific norms do not exist." *Id.* at 100-01 (citing EB Foa et al., *Reliability and validity for a brief instrument for assessing post-traumatic stress disorder*, 6 J. OF TRAUMATIC STRESS 459, 459-73 (1993) and AT Beck et al., *Screening for major depression disorders in medical inpatients with the Beck Depression Inventory for Primary Care*, 35 BEHAV. RES. & THERAPY 785, 785-91 (1997)).

*Id.* Psychological test results have become more universal. The Minnesota Multiphasic Personality Inventory ("MMPI-2") has been translated into a number of different languages. See Jacobs, *Principles*, supra note 211, at 101 (citing Butcher J, William C, Graham J, Tellegen A, Kaemmer B. MMPI-2: manual for administration and scoring. Minneapolis: University of Minnesota, 1989). It is the most commonly used personality test in forensic psychological assessment. *Id.* The Trauma Symptom Inventory (TSI) may also be helpful, although similar translations for it do not exist. *Id.* (citing J. Briere et al., *Trauma symptom inventory: psychometrics and association with childhood and adult victimization in clinical samples*, 10 J. OF INTERPERSONAL VIOLENCE 387, 387-401 (1995)). Other tests that may pose particular problems; for example, the Rorschach Inkblot Method:

[T]he test itself may be too reminiscent of the interrogation and torture experience. Many torture victims were exposed to situations in which they were presented with questions they could not answer factually and were subsequently severely punished for any answer they would give...only evaluators who are highly experienced in its administration with traumatized populations should consider it.

*Id.*

*Id.*


*Id.*

Angelika Birk, *Contents of Psychotherapy with Asylum Seeking Torture Victims*, 9 TORTURE: Q. J. ON REHABILITATION OF TORTURE VICTIMS & PREVENTION OF TORTURE 115 (1999) (defining aggravation of symptoms as a worsening of already improved symptoms, often caused by reminders or stressful events and retraumatization as aggravation of symptomatology caused by extremely stressful incidents that involve a threat to self or others, associated with feelings of helplessness and anxiety, often with an intrapsychic connection to the traumatic events of the past). This was based on a sampling of 20 formers patients in Germany treated by eight different psychotherapists, so due to the small number of participants the possibility of generalizing the result is limited. *Id.* at 117 (stating, "The frequency of aggravations of symptoms and retraumatization in the sample, caused by conditions related to the process of seeking asylum and conditions in exile, shows clearly that refugees seeking asylum who survived persecution and torture in their home country are deeply stressed by the legal situation in Germany."). See also Jacobs, *Principles*, supra note 211, at 101 (stating "[a]sylum applicants who have suffered torture typically also suffer additional significant stress, related to immigration and exile.").
exile. The discussion of these additional factors will “strengthen the assertion of having performed a complete and independent examination and demonstrate sensitivity to the court’s requirement to draw the nexus between psychological maltreatment and persecution.”

VI. CONCLUSION

Although freedom from torture is a universal right, torture victims continue to face new hurdles to find protection in the United States. The United States is obligated under the Torture Convention not to remove or extradite any person to another State where there are substantial grounds for believing that he or she would be in danger of being tortured. However, each year victims of torture are being turned away from the U.S.

As the burden of proof placed on applicants becomes more stringent, reactively the community dedicated to helping such individuals must step up the level of support. Asylum claims should be accompanied by corroborating evidence to ensure that individuals are provided with their fundamental right to be free from torture. Applicants should have expert witnesses testify to confirm past tortures and documents to corroborate their stories. Medical testimony, both physical and psychological, may provide the necessary evidence to adequately corroborate an applicant’s claim. One advocate has accurately noted:

While recognizing that the system in which we have to operate is frequently repressive, we cannot remain solely in opposition to the legal standards set forth by governments who want to return refugees to their countries of origin. In the interest of torture survivors, we must strive to maintain the highest standards of quality and objectivity possible.

Torture is not an isolated problem; it reflects the society that surrounds us. A United States Congressional Resolution properly states: “When one individual is tortured, the scars inflicted by such horrific treatment are not only found in the victim but in the global system, as the use of torture undermines, debilitates, and erodes the very essence of that system.” Article 3 claims for protection from torture must be recognized.

224 See Jacobs, Principles, supra note 211, at 101.
225 Id.
226 Id.