Legal Practitioners’ Perspective on Effective and Ethical Representation of Torture Survivors, Asylum Seekers, and Refugees

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Overview of Presentation

- Brief Asylum Overview
- Audience input:
  - Where can the effects of torture and trauma particularly affect the legal asylum process?
- Role play
- Specific effects of torture/trauma on the asylum process.
- Models for collaboration
- Dialogue and discussion
An individual is eligible for asylum if she meets the definition of a refugee. Immigration & Nationality Act (INA) § 208(b)(1)(A).

A refugee is “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A)

- Definition based on international law: UN Convention Relating to the Status of Refugees, Art I(2)
Asylum: Elements

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
5. a protected ground:
   • Race
   • Religion
   • Nationality
   • Political Opinion
   • Membership in a Particular Social Group
Well-founded fear

- **Subjective:** genuine fear of harm
- **Objective:** fear must be reasonable (i.e., well-founded)

   - What is a “reasonable” possibility? An appx “one in ten” chance of persecution (INS v Cardonza-Fonseca, 480 U.S. 421 at 431).
Well-Founded Fear established two ways:

   • DHS can only rebut with proof of changed circumstances or reasonableness of safe internal relocation.

2. Fear of future persecution.
Of persecution

- Physical (e.g. beatings)
- Sexual (e.g. rape)
- Emotional/Psychological (e.g. death threats, forced to witness murder of family member)
- May include even “severe economic deprivation” among other less traditional harms
Perpetrated by the government or an entity the government cannot/will not control

Persecution suffered or feared must be inflicted

• **By the government** (police, soldiers, broadly interpreted)

OR

• **By an entity the government cannot/will not control** (gangs, abusive spouses, guerrilla groups)
On Account Of

- Must establish nexus between the persecution suffered/feared and...
- At least one of the five protected grounds
Protected Grounds

- A protected ground
  - Race: broad meaning (Congolese Tutsis)
  - Religion: affirmative or negative belief (Christian, Atheist)
  - Nationality: broad; includes ethnic or linguistic group; may overlap with race
  - Political Opinion: actual or imputed (e.g. child of a political activist, woman who criticizes male system of family inheritance)
  - Membership in a Particular Social Group: legally complex, but examples include “gay Honduran men;” “unmarried Malian women;” “former government employees;” or “immediate family members of the X family.”
“Humanitarian Asylum:” If applicant proves past persecution & all of the other elements of asylum, but the future fear has been rebutted, the applicant may still be eligible for humanitarian asylum based on:

- Severity of past harm
- Other serious harm
The government must RECEIVE an application for asylum within one year of most recent arrival to be eligible for asylum. (Does not apply to UACs.)

- Limited exceptions
How does trauma effect people?

How can this effect what happens in their legal case?
ROLE PLAY
How Trauma Can Impact the Asylum Case

- Applicant misses one year deadline to apply for asylum
- Impacts the attorney client relationship - applicant misses meetings, does not open up to attorney etc...
- Asylum applicant cannot tell a coherent consistent story to adjudicator
- Diagnosis of trauma may help prove elements of asylum claim
How can psychological assistance and/or evaluations aid in this process?
The government must RECEIVE an application for asylum within one year of most recent arrival to be eligible for asylum. (Does not apply to UACs.)

Limited exceptions for all:

• Changed circumstances
• Extraordinary circumstances (e.g. mental or physical illness, incapacity, lawful status)

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)
The applicant has the burden of proof to show eligibility for relief.

The applicant must be able to provide objective evidence (such as government records or media reports) or credible testimony to support his or her claim.
Credibility is a key element and a negative credibility finding can be fatal to the claim.

Questions about credibility – inconsistencies even about facts that are not central to the claim – can be taken into account to determine that the applicant is not credible.

Expert affidavit or testimony can explain inconsistencies, inability to recall etc.
Why is proving past persecution so important?

- Rebuttable presumption of future persecution if all asylum elements established for past persecution.
- “Humanitarian Asylum:” If past persecution elements are met, but the future fear has been rebutted, the applicant may still be eligible for humanitarian asylum.

Diagnosis of PTSD or other symptoms of trauma can provide corroboration.
Applicant must demonstrate:

- Compelling reasons for being unable/unwilling to return due to the severity of the past persecution
- “A reasonable possibility of other serious harm”
  - No nexus required
  - “Other serious harm” = persecution

Diagnosis of PTSD or other psychological symptoms of trauma can help prove severity of harm and/or reasonable possibility of other serious harm.
Practice Tip:

- It is extremely important that the mental health and/or medical evaluation is consistent with the asylum application.

- Note: There will be a panel tomorrow morning on the issues related to providing support, documentation, and expert testimony in a survivor’s asylum process. They will cover additional aspects.
Unlike affirmative processes, clients who are apprehended and facing removal from the United States undergo a different process with significant additional stressors and barriers.
• Clients may be detained
  • Detention exacerbates symptoms
  • Lack of access/worry about family
  • Difficulty getting an attorney
  • Difficulty accessing mental health care or expert affidavits/testimony (even with an attorney)
• Proceedings are adversarial
• Clients have to testify and face cross-examination
Models for Collaboration

- Importance of having a client receiving therapeutic services and ensuring they are able to give a credible description and testimony.
- Underscores need for partnerships in the legal and mental health services communities.
University of Miami School of Law Clinics (Human Rights, Immigration, Health Rights, and Children & Youth Law) have several collaborations:

- **University of Miami Medical Human Rights Clinic**
  - Doctors at UM medical school provide assistance with individual cases of UM clinic clients, including expert evaluations for survivors facing asylum or other legal proceedings.

- **Barry University School of Clinical Social Work**
  - Social work interns working directly with clients of the UM clinics while receiving support and feedback from supervisors at UM and Barry.
Americans for Immigrant Justice (AI Justice) has an ongoing collaboration with Trauma Resolution Center (TRC) in Miami.
Questions?
Other models?
Thank you!