Articles

Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals

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Abstract

Although credibility determinations rest at the core of refugee protection, international refugee law has failed to develop a body of evidentiary principles that is tailored to the unique dimensions of the testimony of those seeking asylum. This article examines recent developments in assessing oral testimony in international criminal law. International criminal law judges, like national asylum adjudicators, must transcend geographic, linguistic, cultural, educational and psychological barriers in order to assess the credibility of testimony. As a result, these new international courts have developed a body of principles of international evidence law for assessing the testimony of alleged victims of, and witnesses to, human rights abuses. Current social science research on the asylum procedures in several jurisdictions reveals that asylum decision makers often fail to adapt the determination process to account for the realities of refugees presenting their cases in legal fora, directing proceedings with a ‘presumptive skepticism’ of claims. It is argued that the nuanced and rigorous model for the assessment of the testimonial evidence of alleged victims and witnesses of human rights abuses in war crimes trials introduces effective international norms for the assessment of credibility in asylum proceedings.

1. Introduction

The work of the nascent international criminal justice system is increasingly becoming relevant for refugee law and asylum seekers. Attention, however, has almost exclusively been focussed on the normative development of international humanitarian law. This article argues that a fundamental, and perhaps more immediate, contribution to refugee protection by international war crimes courts lies in the evidentiary process that directs their findings. For in every international criminal trial, victims and witnesses of alleged human rights abuses are brought before the court,

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which must hear, elucidate and assess their testimony. International
criminal law judges, like national asylum adjudicators, must transcend
geographic, linguistic, cultural, educational and psychological barriers in
order to assess the credibility of testimony. Unlike many asylum
adjudicators, they provide detailed explanations for conclusions on the
credibility of individual testimony. This process has led to a body of
general international legal evidentiary principles for assessing the unique
testimony of alleged victims of, and witnesses to, human rights abuses.

Significant distinctions between international criminal and asylum pro-
ceedings notwithstanding, there are several reasons why asylum adjudica-
tion should look to the international criminal tribunals for a model
framework for the evidentiary assessment of testimony. Traditionally, the
predominantly ‘soft’ body of international refugee law has abandoned the
mechanics of refugee protection to the vagaries and vacillations of domestic
legislation. Accurate assessment of testimonial evidence in the transjuris-
dictional, multi-lingual and cross-cultural context of asylum proceedings is
a prerequisite to effective protection. However, UNHCR has yet to develop
a body of principles to direct this process. While disappointing, this is per-
haps not surprising. Rather it is a symptom of the thwarted protection
potential of an international body that must operate within the political
constraints imposed by donor and host governments, as well as the vast
range of legal regimes to which its work is targeted. Instead, it is the expe-
rience of those seeking international justice, rather than international pro-
tection, that has driven human rights law to produce principles for the
evidentiary assessment of the testimony of victims and witnesses of human
rights abuses. Refugees can look now to international human rights law for
evidentiary standards, by-passing the limitations that have prevented
UNHCR from advancing in this crucial component of protection.

With individual criminal responsibility as the international community’s
legal response to extreme cases of the breakdown of human rights protec-
tion, the international war crimes courts are, in essence, human rights tri-
bunals. The core evidentiary challenge for international criminal and
asylum fora is to overcome the complexities in the assessment of the testi-
ominal evidence of witnesses and victims of human rights abuses. The
trials underway at the international criminal courts are occurring at a time
where there is a marked convergence between human rights law and the
cutting edge of criminology, with its deepened understanding of the cir-
cumstances and rights of victims and witnesses.\(^1\) Created in the spotlight

\(^1\) J. Doak, ‘The Victim in the Criminal Process: an analysis of recent trends in regional and inter-
national tribunals’, (2003) 23 Legal Studies 1-32, 5; P.M. Tobolowsky, ‘Victim Participation in the Crim-
inal Justice Process: Fifteen Years after the President’s Task Force on Victims of Crime’ (1999) 25 New
Eng. J. on Crim. & Civ. Confinement 2-105. For a discussion of the striking absence of legal, policy or
advocacy attention to victim’s rights within the context of the US legal system in the 1970’s, see M.
of the international community, the international criminal courts are not only positioned, but expected, to be informed and inspired by progressive national practices and international research. In turn, the courts have the capacity to provide human rights based models for domestic legal proceedings, as is now the case with the principles that govern the approach to victims, and the evidentiary process of assessing their testimony.

That improved evidentiary assessment is needed in asylum procedures is not only evident in the wide variations across states in refugee recognition rates of similarly profiled asylum seekers, but in the wide variations between individual decision makers within the same national asylum systems. A striking indication of the frailties of the evidentiary approach within national asylum regimes is the high percentage of all grants of asylum in European Union Member States being rendered only on appeal, following a rejection of the asylum claim in the first instance. Although there has been an absence of work that systematically examines the role of credibility in asylum determinations, existing studies indicate that somewhere between 48 and 90 per cent of all asylum claims are rejected on findings of adverse credibility in regions as diverse as North America and Northern Africa. Because of the core role of credibility in protection decisions, ambiguities surrounding the interpretive approach of authorities towards the assessment of oral testimony remains a central barrier to more effective and efficient asylum determinations.

In spite of the fact that accurate credibility determination is essential for international refugee protection, UNHCR has not developed guidelines on credibility assessment. Efforts in this area have been scattered, with the dominant emphasis being on addressing the complexities of credibility determinations through the training of decision makers. With respect to developing international principles for assessing the testimony of victims of human rights abuses, this leaves, to date, the few, but important, principles set out in decisions by the Committee Against Torture. Even in jurisdictions such as the United States, Canada and Australia, where judicial review has rendered a substantial body of asylum case law, the collection of rulings that address aspects of credibility determinations

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still fall well short of offering a transferable framework for evidentiary assessment.\textsuperscript{4} This mirrors the current situation for most of the administrative determination systems in Europe. Recent guidelines promulgated by the Canadian Refugee Protection Division and the Australian Refugee Review Tribunal on assessing credibility offer notable examples of national steps to improve the quality of refugee status determinations.\textsuperscript{5}

This is alongside a somewhat paradoxical trend. On the one hand, there is a growing international awareness among authorities of the need to take into consideration the vulnerabilities of refugees in the process of interviews. On the other hand, waves of domestic legal reforms abridge and accelerate refugee asylum procedures, introducing concepts such as ‘manifestly unfounded’ claims in attempts to administratively short circuit the assessment of applicant credibility. The minimum standards set forth in the EU Procedures Directive illustrate this phenomenon well.\textsuperscript{6} Reflecting the discourse of international protection, under the legislation states are obliged to ensure that an interviewer is ‘sufficiently competent to take into consideration the personal or general circumstances surrounding the application, including the applicant’s cultural origin and vulnerability, in so far as it is possible to do so’.\textsuperscript{7} More strongly defined, however, are the broad criteria by which states may deny a protection seeker access to a full interview and an effective review of an adverse decision.\textsuperscript{8} So while formulaic references to the challenges of eliciting and interpreting asylum testimony have become somewhat mainstream within policy and practice, this has been accompanied by procedural barriers that deny the fundamental conditions for an adequate assessment of an applicant’s oral evidence.\textsuperscript{9}

Advances in the field of criminology have influenced the nuanced approach of international criminal judges in assessing the credibility of alleged victims and witnesses of human rights abuses. These advances have the potential to inform asylum adjudication as well, and yet have had a very limited impact. The ambiguities surrounding the criteria for assessing


\textsuperscript{7} Ibid., Art. 13 (3) (b).

\textsuperscript{8} Ibid., Art. 11(2)(f); Art. 12 (2) (b) (c); Art. 39.

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credibility may be attributable, specifically, to the absence of focussed guidelines, and, more generally, to an apprehension about protection oriented asylum reforms within the context of national policy debates. In such debates, reforms that are aimed at recognizing the complications confronting the victims of human rights abuses seeking asylum are considered to demand less rigour and more resources in the system – attractive for advocates, but not for policy makers, nor for the voting public. There are benefits of looking towards the practice of the international criminal courts. Firstly, it is firmly grounded and clearly articulated through jurisprudence in international human rights law. Secondly, pragmatic and clearly framed evidentiary principles for assessing testimony are set forward in the extensive presentation of principles, facts and legal reasoning in judgements. Thirdly, the evidentiary principles were developed to assess the credibility of testimony that must meet a much higher burden of proof. Importantly, while the resources required for the operation of international trials are notoriously great, the application of their principles for the assessment of witness and victim testimony would demand no additional expenditure for overextended and underfunded national asylum systems. Hence, should national asylum adjudicators adapt their approach to assessing evidence in line with international human rights practice as developed by the international criminal courts, it would be at the expense of neither legal rigour nor public coffers.

This article examines the interpretive template for testimonial evidence created by the international criminal trials and considers why, and how, it should be transposed onto national refugee status determination procedures. Section two explores the role of testimonial evidence within the frameworks of international criminal and refugee law and then discusses the implications of the significant systemic distinctions in the adjudicative processes of these two legal areas. Section three looks at current research that has explored the role of credibility decisions in refugee determination procedures, focussing on the common barriers that exist in national procedures in the assessment of the credibility of the testimonial evidence of asylum seekers. Section four analyses the jurisprudence and practice of the international criminal tribunals, focussing, in particular, on the evidentiary template used by the Trial Chambers of the International Criminal Tribunal for Rwanda to govern the treatment and evaluation of testimonial evidence from witnesses and victims. The Conclusion considers how a framework for assessing testimonial evidence in asylum proceedings could lead towards greater effectiveness and fairness in refugee determination procedures.

2. From international criminal trials to national refugee procedures

Given that the task of establishing the veracity of witness testimony is as old as the legal process itself, it may be queried as to why the strikingly
few trials undertaken by the ad hoc international criminal tribunals over the past decade should have anything new to contribute to the discussion of assessing the credibility of testimonial evidence. What distinguishes this experiment in international justice from domestic legal systems is that their mandate deals exclusively with the prosecution of international crimes within the context of the widespread commission of atrocities recognized by the international community. International criminal trials, like asylum proceedings, are specialized fora that deal with allegations of human rights abuses. While the Nuremberg and subsequent Holocaust trials offer little guidance for methods of assessing the oral testimony of victims of extreme human rights abuses, the evidentiary reasons justifying their absence is instructive. In Nuremberg, the prosecution chose to build their case around the documentary evidence that the axis powers had left in such great abundance to record their policies and, indeed, their crimes. The means adopted in the trial to establish, what Nuremburg Prosecutor Justice Robert Jackson, famously described as ‘incredible events, with credible evidence’ reflected a probative hierarchy between the hard evidence of documents and that of oral testimony, as well as that between the testimony of various types of witnesses. In his analysis of the Nuremberg trials, Lawrence Douglas identifies this evidentiary logic ‘that assumed that proof of extreme crimes became less credible and more impeachable as one moved from perpetrator to bystander to victim’.

2.1 Oral testimonial evidence

The central reality for many of the prosecutors in the international criminal courts is the same as that for advocates representing refugees in domestic asylum proceedings. They must build their cases around the least credible and most impeachable form of evidence – the testimony of witnesses and victims of extreme crimes. The converse reality for judges and decision makers is that they must assess cases that are constructed upon the frail foundation of human descriptions of extreme experiences.

In the first instance, it is the proximity of the witness or victim to the experience of a serious human rights violation that is seen to distort the

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10 For an historical overview of the challenges of assessing oral testimony in criminal procedures see M. Damaška, Evidence Law Adrift (New Haven, 1997), 20-5.


presentation of evidence through oral testimony. The implication that such evidence is destined to be misrepresented was most recently echoed in the Stakic decision of the ICTY, where the Trial Chamber set forth its views on the probative value of oral testimony:

Apart from the fact that much time has passed since 1992, the Trial Chamber is aware of the limited value of witness testimony in general. Special caution is warranted in cases like this one which have both a highly political, ethnic and religious element and a complex historical background. The Judges are convinced that for the most part, most witnesses sought to tell the Chamber what they believed to be the truth. However, the personal involvement in tragedies like the one in the former Yugoslavia often consciously or unconsciously shapes a testimony.\textsuperscript{13}

While physical and emotional proximity of the human experience of the testifier to the alleged event undermines testimony, so does the geographical, cultural and temporal distance between the occurrence of the alleged event and the jurisdiction and time in which the testimony is delivered. Take the instance of corroboration, which is the most effective means of strengthening the evidentiary weaknesses of the oral testimony of witnesses and victims. Indeed, in the civil tradition, sole witness testimony was perceived to be so unreliable that corroboration was required under the now moribund principle of \textit{unis testis, nullus testis}.\textsuperscript{14} It is not uncommon in international criminal trials, and to a far greater extent in domestic asylum proceedings, for there to be no corroborating evidence to add credence to oral testimony about specific atrocities. Hence, the Rules of Procedure and Evidence of both ICTR and ICTY do not require corroboration of witness testimony generally and, specifically, not for the crime of rape, an important milestone in the development of human rights norms.\textsuperscript{15}

In the context of asylum, the absence of a corroboration requirement reflects the realities of examining the occurrence of extreme crimes in distant jurisdictions. The UNHCR Handbook highlights that the very circumstances of uncorroborated testimony that would deem a normal legal case weak, may, in asylum cases, be the indicator of the most genuine of

\textsuperscript{13} Prosecutor v. Strakic, ICTY Trial Chamber Judgment, 31 July 2003.
\textsuperscript{14} Above n. 2.
claims. The adaptation of the international criminal system to this reality has required rigorous assessment of the testimonial evidence in order to balance the rights of the accused.

In international criminal proceedings, uncorroborated testimony is examined with considerable caution, as it is in domestic asylum claims. Rigorous examination of testimony by trial chambers in international courts, as articulated in *Stakic*, is premised upon the inevitability of distortions in testimony, attributed to the proximity of the testifier to the events about which he or she is speaking. This distortion of presentation, written upon extensively in the field of psychology, does not necessarily impair the credibility of the witness testifying, although it may affect the reliability of the evidence he or she is presenting.

The Trial Chamber in *Stakic* emphasized the inevitable distortion of witness testimony because of the closeness of the testifier to the events at hand. Other trial chambers have recognized the converse, and no less inevitable, distortion of the process of assessing testimony because of the distance between the judge and the alleged events. Once identifying the specific factors that have the potential to distort testimony in a judicial context, the judgements of the international criminal trial chambers develop and adapt specific evidentiary principles as a corrective mechanism in the process of assessment.

### 2.2 Challenges to transposing evidentiary principles

The nexus between international criminal trials and asylum adjudication involves not only a reliance upon the weakest form of oral testimony that recalls violations of human rights *per se*. It is the particular challenges of assessing this testimony that is shared by these two legal processes. But do the divergent objectives of determining international criminal responsibility as compared with deciding eligibility for refugee protection prevent a viable transfer of principles from one legal process to another?

Whether a framework of evidentiary principles from international criminal law can be effectively transposed onto the methods of assessing asylum claims requires a preliminary consideration of the central distinctions between the processes. While the ultimate objectives of the proceedings over which international judges and asylum adjudicators preside are significantly different, the preliminary task of assessing the credibility of alleged victims or witnesses of human rights violations is identical, regardless of the subsequent legal significance of the testimony. Before determining

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16 ‘… often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which the applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents’. Office of the United Nations High Commissioner for Refugees (UNHCR) *Handbook on Determining Refugee Status* (1992), para. 196 [emphasis added].
whether testimony offers sufficient evidence to establish guilt in a trial, or whether it establishes the occurrence of past events that give rise to ‘future risk’ of persecution in an asylum hearing, the credibility of the testimony must first be established. Credibility assessment is, therefore, critical to both types of proceedings.

In international criminal cases, the ‘beyond a reasonable doubt’ standard for establishing individual responsibility is substantially higher than the ‘benefit of the doubt’ standard that is recommended for asylum adjudications by the United Nations High Commissioner for Refugees. Although many jurisdictions formally, and in practice, adopt a standard higher than the ‘benefit of the doubt’, the standard for granting refugee status still remains lower than the standard for establishing international criminal responsibility.

While this highlights the rigour that international criminal judges adopt in their assessment of testimony, it can be argued that this is counterbalanced by the likelihood that the preliminary selection of witnesses by the parties in adversarial criminal proceedings creates a greater likelihood of more credible testimony, in contrast to the broad range of testimony by applicants motivated by the desire to support their asylum claims. The self-interest of an asylum seeker can be contrasted with the purported unbiased motivation of witnesses appearing in international war crimes trials. Stover’s seminal work on witnesses appearing before the International Criminal Tribunal for the Former Yugoslavia found that most of the trial witnesses interviewed in his study, regardless of national origin, identified a ‘moral duty’ as a motivation for agreeing to testify before the Court. It is undisputed that the vast majority of witnesses and victims undergo the often traumatic experience of testifying before the Tribunals in good faith. This notwithstanding, it is not infrequent for the testimony of witnesses appearing for both parties before the international criminal tribunals to be found by the bench not to be credible. As in national court rooms, accusations of ill inspired motives of witnesses are common in international trial chambers. There is also a prevalent recognition that politicized post conflict contexts may influence memory and testimony. While different in

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17 Ibid., paras. 196-7; 203-4.
18 For a discussion of standards in the context of US asylum adjudication, see J. Ruppel, above n. 4.
20 In 2007, following a guilty plea by a former witness to giving false testimony, ICTR will conduct its first trial for interference in the administration of justice related to the remaining charges of accepting and offering bribes for false testimony. ‘ICTR Witness Pleads Guilty to Giving False Testimony’, ICTR Press Release, 10 Aug. 2007 (available at <http://www.ictr.org> last visited 4 Sept. 2007). For instance, claims that false testimony was inspired by political, financial or legal motives, and/or influenced by NGOs or ‘syndicates of informers’, or the current RPF regime, have been made by defense counsel to attack the credibility of prosecution witnesses. See Akayesu Judgment, above n. 15, paras. 33, 46-7; Defense Appeal Brief to the Appeals Chamber, Rutaganda v. Prosecutor (2001), para. 102. Likewise, the Prosecution routinely challenges the credibility of defense witnesses questioning personal, political and legal motivations for testifying. Ndindabahizi Judgment, ICTR Trial Judgment, 15 July 2004, sec. 3.5.
nature, matters of motive can be as significant for international criminal trials as they are for asylum proceedings.

The way in which scrutiny is exercised in both international criminal and asylum processes is critical to the evidentiary approach in both forms of adjudication. One of the hallmarks of the international criminal legal system is its procedural and evidentiary flexibility. As international criminal law combines both common and civil traditions, the Rules of Evidence and Procedure accord the judge an expanded discretion in his or her role as fact finder.21 There are significant variations in national administrative asylum procedures. Even in common law jurisdictions, the proceedings are not strictly ‘adversarial’. While the adjudicator will undertake the examination of the asylum seeker where there is no legal representation, even with the presence of counsel decision makers frequently assist in eliciting, and challenging, the presentation of the testimonial evidence of the claimant. Although there are broader debates over what the optimal system should be for asylum hearings, regardless of the formal administrative system,22 the UNHCR Handbook states that while the burden of proof ‘in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application’.23

In spite of the discretion afforded to fact finders, with the assessment of credibility often at the core of the undertaking in asylum proceedings, how decision makers should approach testimonial evidence, specifically, is not clearly defined. While the UNHCR Handbook argues for a benefit of the doubt standard ‘where the applicant’s account appears credible’, it does not provide direction as to which, and how, factors should be weighed when determining whether an account ‘appears credible’.24 There has been, however, an evolution in recent times in the pronouncements of UNHCR towards a more nuanced understanding of the elements required to render effective and fair credibility determinations. In its 1998 ‘Note on the Burden and Standard of Proof in Refugee Claims’ UNHCR states that ‘Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts,

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23 UNHCR Handbook, above n. 16, para. 196.

24 Ibid., paras. 196-7.
and therefore is, on balance, capable of being believed.25 Kagan contrasts this approach to that taken by UNHCR in earlier training manuals from 1989 and 1995. Whereas the former, remarkably, advised decision makers that ‘the credibility of the case before you will be a matter of personal judgement’, the later edition more cautiously directs adjudicators that ‘…the actual determination cannot be arbitrarily made on the basis of the interviewer’s intuitive or ‘gut’ feeling for the case’.26

Without the obligation for UNHCR decision makers to explain the reasoning for their determination in a written and reasoned decision, it is difficult to determine how credibility determinations are made by the refugee agency. In UNHCR’s emerging role in carrying out status determinations in over sixty-four countries, the institution is faced with the challenge of promoting best practice for governments, as well as implementing such practice itself in a wide range of protection contexts.27 The absence of clearly defined evidentiary principles for refugee decision makers on an international level is mirrored by its failure to require its own staff to provide denied claimants with written reasons for the rejection of their claim. This has been one of the many unifying critiques of UNHCR status determination procedures across field offices emerging from studies carried out by Harrell-Bond and Verdirame on Kenya, Uganda and Egypt, by Alexander on Turkey and Southeast Asia, by Human Rights Watch on Malaysia and by Kagan on Cairo.28 The gap between UNHCR’s protection mandate, training standards and actual field practice raises the question as to whether the burden of proof can be effectively shared, as envisioned by the Handbook, between the refugee determination authority and the asylum seeker, if this is not accompanied by an implicit burden of explanation.29 Even in the final controversial drafts of the EU Procedures Directive, the Ministers of the European Council were in agreement that written and reasoned asylum decisions should be a minimum standard in all Member States of the European Union.30

In its consideration of individual claims, the Committee against Torture has set forth useful principles, discussed further below, on the effects of

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28 UNHCR RSD standards direct staff to notify claimants of the reasons for negative decisions in writing ‘wherever possible’, UNHCR, ibid., 6.2; M. Alexander, ‘Refugee Status Determination Conducted by UNHCR’, 15 IJRL 251 (1999); B. Harrell Bond, G. Verdirame, ibid.
29 Harrell-Bond and Verdirame, above n. 27.
30 ‘Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing’. EU Procedures Directive, above n. 6, Art. 9, para. 2.
torture and post-traumatic stress on the presentation of testimony.\textsuperscript{31} In spite of the considerable weight that the body accords to findings of fact made by State Parties, it has pronounced a range of important principles in the area of credibility determination through the exercise of its powers under Article 22 (4) to assess the full circumstances of every case before it.\textsuperscript{32} However, its capacity to provide directing principles in the area of assessing credibility in testimony is limited by the fact that the Committee does not hear oral evidence, and that it is a treaty monitoring body with only declaratory powers. Its mandate to address violations of acts that fall under Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\textsuperscript{33} means that the Committee considers a narrower scope of forms of maltreatment than that of either the international criminal judges or national asylum adjudicators.\textsuperscript{34} The regional human rights courts, likewise, offer little guidance for the assessment of credibility. The European Court of Human Rights rarely hears the testimony of victims, and in asylum cases generally defers to the expertise of national authorities in assessing the credibility of oral testimony. Even where the Court has arrived at different findings of fact than that of a State Party, these decisions do not set forth anything nearing guiding principles or standards for the process of assessing credibility in an asylum hearing.\textsuperscript{35} Although the assessment of witness and victim credibility is undertaken in cases before the Inter-American Court, the judgements are sufficiently vague regarding the directing factors or principles that are employed in assessing oral testimony as to offer little meaningful guidance.


\textsuperscript{33} 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Resolution 39/46, 10 Dec. 1984.

\textsuperscript{34} Article 1 of the CAT84, defines an act falling under the scope of the treaty as: ... any 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. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions.

for assessing the credibility of alleged victims of serious human rights violations.\textsuperscript{36}

The heightened political pressures to maintain an effectively stringent asylum procedure jeopardizes the effective translation of research and advocacy recommendations on the treatment of asylum testimony into national practice. Turning to the international criminal courts for human rights standards brings with it two benefits. Not only is it a system constructed upon the foundations of advanced human rights standards that benefits from the transparency of international scrutiny, but the scrutiny accorded to the testimony of alleged victims must meet with the very high standard required for a conviction. Moreover, the process must not only be fair, but efficient. So while the evidentiary principles for assessing oral testimony from the international criminal tribunals promise the universality and legitimacy attached to international human norms, they do not threaten to water down standards of scrutiny in national decision making procedures. The implementation of international evidentiary principles merely requires that the hearing and assessment process is more finely tailored to critically respond to the testimony of alleged victims and witnesses.

3. Credibility assessment in refugee determination procedures

As a significant proportion of asylum determinations will be rendered, either directly or indirectly, on the outcome of credibility assessments, it warrants noting that there is a striking sparsity of research on the subject. Generally, the criteria for assessing credibility in asylum proceedings centre upon the standard indices of demeanor, consistency, accuracy and corroboration.\textsuperscript{37} While the central obstacles to assessing the testimonial evidence in asylum proceedings are widely acknowledged in the literature on decision making, the substantive discussion often remains anecdotal and impressionistic. There are several notable exceptions. In the late 1980s, there were two major studies addressing the challenges of credibility assessment in determination procedures. Anker carried out a path-breaking empirical examination of US asylum procedures, complemented by Kalin’s multidisciplinary analysis of barriers to transcultural communication in the Swiss asylum determination system.\textsuperscript{38} This was followed


\textsuperscript{37} Kagan, above n. 2.

a decade later by the multidisciplinary empirical research of Rousseau, Crépeau, Foxen and Houle on the process of decision-making in the Canadian Immigration and Refugee Board. In this same period, Kagan produced a comparative examination of credibility assessment, considering North American, Australian, New Zealand and UNHCR practice in the Regional Office in Cairo, and Harrell-Bond and Verdirame examined national and UNHCR policy and procedures in East Africa. Empirical research carried out on the Dutch asylum system has expanded the empirical foundations for critically reassessing evidentiary process, with Spijkerboer’s work on gender and Doornbos’ sociological analysis of asylum interviews. Other recent research by Scragg and Herlihy consider the effects of post traumatic stress on victim testimony, as well as the impact of the asylum system and detention on mental disorders suffered by applicants. These studies consistently identify the same barriers to communication that impede effective determinations of credibility. Kalin discusses a range of factors affecting asylum seekers that render certain cues used to assess credibility ineffective in the context of asylum proceedings. His conclusions are supported by the empirical findings of Anker, and Rousseau et al. What is important about the identification of the evidentiary barriers that are unique to the testimony of asylum seekers is that they challenge the conventional legal approaches to assessing credibility in asylum adjudications. These features of asylum testimony subvert the traditional

39 C. Rousseau et al, above n. 2.
43 Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, From Persecution to Prison: The Health Consequences for Detention for Asylum Seekers, (<http://www.phrusa.org/campaigns/asylum_network/detention>)(June 2003). Research on refugees in Australia found the long term impact of detention to extend well beyond the period of release into the Australian community. Refugees who had been detained were found to have twice the risk of depression and three times the risk of traumatic stress compared to those who had not been in detention. The risk for depression was found to increase by 17 % each month. See ‘Temporary protection visas compromise refugees health: new research’, University of New South Wales, (<http://www.unsw.edu.au/news/pad/articles/2004/jan/TPV_Health.html>) 30 Jan. 2004.
44 The primary barriers to communication identified by Kalin are an asylum seeker’s manner of expression, the role and quality of the interpreter, cultural relativity of the concepts, including that of ‘lie’ and ‘truth’, and perceptions of time. Kalin above n. 38, 230-2. Anker, above n. 2, 505-27; Rousseau, above n. 2, 13, 18-22.

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indices for credibility assessment, namely: demeanor, consistency, accuracy and corroboration. Although these are the central criteria relied upon for determining credibility in national criminal proceedings, advances in scientific research now challenge the probative weight accorded to some of these traditional indices, such as demeanor and consistent recall.45

There are a range of technical complications in asylum proceedings that create considerable risk for flawed credibility assessments. These include factors arising from errors in translation, interpretation in an oral hearing, and mistakes in the transcription of serial interviews. Applying social science methods to examine legal process, both Anker and Rousseau et al document extensive problems with interpretation, technical and cultural, that substantially affected the accuracy of the record and, hence, the capacity of the decision makers to render fully informed and fair determinations. 46

The structure of the system itself exacerbates this process, as it allows for considerable weight to be accorded to preliminary interviews and subsequent variations in recall by applicants. Asylum testimony is often discredited on account of inconsistencies between prior statements provided at first instance interviews and later testimony before asylum adjudicators. As in court proceedings, testimony that contradicts prior statements is considered to be an adverse indicator of credibility. The probative weight accorded to consistent recall from serial interviews is challenged in the substantial literature that examines the intersection between psychology, law and criminal justice.47 Aside from the scientific challenge to the link between credibility and accurate recall of traumatic experiences, as discussed by Herlihy et al,48 the range of technical complications inherent in asylum proceedings offers a strong and simple justification for there not to be an extensive reliance on accuracy and reproduction of prior statements. Notwithstanding, research demonstrates that this remains a key factor for decision makers in assessing an asylum seekers’ credibility. Both Anker and Rousseau et al highlight the extent to which misunderstandings and technical errors are accorded undue probative weight in asylum proceedings. In asylum hearings, these studies document that this error is further exaggerated when issues pertaining to consistency with prior statements dominate the focus of proceedings. The consequence is that the record is not fully or – in the view of Anker and Rousseau et al – fairly developed. Hence, the focus of the determination process shifts from the testimony of the full oral hearing to deliberations over records of earlier meetings.49

45 See discussion below, Section 4.2.
46 Anker, above n. 2; Rousseau et al, above n. 2.
47 J. Cohen, above n. 42.
48 Herlihy et al, above n. 42.
49 Anker, above n. 2, 487-8; Rousseau et al, above n. 2, 13-14.
An adherence to an untailored application of the criteria of demeanor and accuracy in the context of asylum testimony gives rise to further communication barriers. While in a cross-cultural and psychologically complex context, demeanor and manner of expression offer unreliable subjective indicators of credibility determination, in determination procedures, modes of communication, and the strong assumptions that govern their interpretation, are accorded significant weight. Harrell-Bond and Verdirame highlight cases within the UNHCR determination procedures in East Africa in the context of what they considered to be ‘thorough’ training of decision makers from NGO implementing partners. They demonstrate that, even with this background training, decision makers focussed on demeanor, allowing for subjective bias to override information on country of origin or in-depth knowledge of the cultures of applicants. Not only are such factors relied upon in justifying adverse conclusions on credibility in national determination procedures, but they are also a dominant reason for providing only an abridged review of findings of fact on asylum cases on appeal. For reviewing authorities are generally reluctant to overturn the credibility determinations of fact finders without having heard and, importantly, witnessed the testimony of the asylum seeker.

Cultural and educational factors also obscure the clear presentation of evidence in a judicial context. What is notable in the two empirical studies, carried out in different jurisdictions across a span of over a decade, is that they echo the same findings; namely, that adverse credibility determinations are made by decision makers using traditional indices for credibility determination which allow for the application of blanket political and cultural assumptions that are not adapted to account for distinctive circumstances.

These barriers of culture, education and distance frustrate clear communication and understanding. The required response from the decision maker is sophisticated and active engagement in the fact-finding process. Although the UNHCR Handbook notes that the burden may indeed rest with the adjudicator to discover the facts in the often complex process of hearing, eliciting and assessing testimony, both Anker and Rousseau et al highlight the failure of some decision makers to take adequate account of expert testimony. Even with the guidelines of the Canadian Immigration and Refugee Board and judicial precedent on the need to assess claims in

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51 Anker, above n. 2, 515-27; Pfeiffer, above n. 40.
52 Harrell-Bond and Verdirame, above n. 27.
53 Ruppell, above n. 4, 3.
55 Anker, above n. 2, 505-27; Rousseau et al above n. 2, 22.
the appropriate political, cultural and sociological context, Rousseau et al found evidence of a lack of understanding of these factors in 72 per cent of the cases they observed.56

This was made worse by the approach taken by examiners towards the applicant, in terms of adapting the framework of questions to be more culturally accessible, and/or reframing or following up on questions where vague or irresponsible answers may be more the result of culture and education than an indicator of truthfulness. These studies revealed that credibility assessment was further frustrated by the nature of the examination process.57 The guidelines for assessing credibility by the Canadian Refugee Protection Division instruct that when decision makers assess credibility they ‘must take into account the “unusual” characteristics that may affect the claimant’s ability to observe and recall events in the course of a hearing’. In spite of this, decision makers are not required to question the applicant further, in order to obtain a clearer or more detailed understanding of the facts presented. Following the rulings of the Canadian Federal Court, the Immigration and Refugee Board is not even required ‘to confront a claimant with the vagueness of his or her evidence’.58

One of the most central challenges of assessing credibility of asylum seekers rests with the complications that may arise from the mental state of the asylum seeker that will affect their capacity to recall and recount, particularly with regard to traumatic events. The clearest international standards for assessing the credibility of asylum seekers who may be victims of torture has been set forth by the Committee against Torture (‘CATC’). In the expression of views of the Committee exercised under Article 22 of the Convention against Torture, principles to be applied in assessing the testimony of victims have been established in cases where State Parties have denied asylum claims on grounds of adverse credibility because of inconsistencies in a claimant’s testimony. The opinions of CATC adopt the standard approach to fact-finding in domestic law, distinguishing between inconsistencies and inaccuracies in testimony relating to core and peripheral facts. Inaccurate testimony relating to core facts generally leads towards adverse findings on grounds of credibility, whereas those pertaining to peripheral details should be accorded less probative weight. CATC opinions also render distinctions between past torture and future risk, assessing each independently. While the Committee often defers to the findings of credibility by State Parties,59 in select cases inaccuracies or inconsistencies

56 Rousseau et al, above n. 2, 22.
in claimants’ stories have been examined closely by the Committee and found not to impair the general truthfulness or veracity of a claim. With particular reference to the dynamics of the testimony of victims of human rights abuses, CATC has consistently noted ‘that complete accuracy is seldom to be expected in victims of torture, especially when a victim suffers from post-traumatic stress syndrome; it also notes that the principle of strict accuracy does not necessarily apply even when the inconsistencies are of a material nature’.  

The Committee has recently examined the specific impact of sexual abuse and rape on the assessment of the credibility of a victim by asylum authorities. In *V.L. v. Switzerland*, CATC rejected the finding by the Swiss government that the claim by an asylum seeker of having been subject to multiple rapes by authorities in Belarus was not credible because the allegation and supporting medical records were submitted at a late stage in the determination process. Late disclosure of rape was found by CATC not to impair the credibility of the applicant given the reasonableness of the explanation. The assessment of ‘reasonableness’ is contextualized in light of the psychological and sociological realities that affect the capacity of victims of sexual violence to effectively present their asylum claims. The Committee provided the following analysis of late disclosure and credibility in the case of rape in an asylum proceeding:

> It is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members. Here the complainant’s allegation that her husband reacted to the complainant’s admission of rape by humiliating her and forbidding her to mention it in their asylum proceedings adds credibility to her claim. The Committee notes that as soon as her husband left her, the complainant who was then freed from his influence immediately mentioned the rapes to the national authorities in her request for revision of 11 October 2004. Further evidence of her psychological state or psychological ‘obstacles’, as called for by the State party, is unnecessary. The State party’s assertion that the complainant should have raised and substantiated the issue of sexual abuse earlier in the revision proceedings is insufficient basis upon which to find that her allegations of sexual abuse lack credibility, particularly in view of the fact that she was not represented in the proceedings.

The Committee’s general approach to inaccuracies in testimony relating to allegations of torture falls in line with the scientific research on the
decline of autobiographical memory of asylum seekers. The importance of not deriving adverse credibility conclusions from inconsistencies with respect to peripheral versus core details is supported by current research that examines autobiographical recall in relationship to the passage of time, and to mental disorders related to the experience underlying their claim.\footnote{Herlihy \textit{et al.}, above n. 42.} If one considers further the role of the asylum system and the adverse impact of detention on worsening the mental health of asylum seekers, there is a heightened need for the careful adaptation of evidentiary procedures to the effects of psychological conditions on oral testimony. A study carried out by Physicians for Human Rights of mental health in US detention facilities found that 90 per cent of the detainees surveyed were symptomatic of at least one of three psychological problems: anxiety, depression, and PTSD. Clinically significant depressions were present in 86 per cent of survey respondents, and PTSD symptoms in 50 per cent.\footnote{Physicians for Human Rights, above n. 43, ch. 5.} The implications of detention for the mental health of asylum seekers has been recognized by the Australian Refugee Review Tribunal in their document, ‘Guidance on the Assessment of Credibility’. The guidelines state, ‘If a person is in immigration detention, the Tribunal should be aware of the effect immigration detention may have on the mental and emotional state of such a person, and the impact that this may have on their ability to give evidence at a hearing.’\footnote{Refugee Review Tribunal (Australia), above n. 5, para. 4.4.}

As a specialist human rights body, the Committee Against Torture affirms the research findings on memory and trauma. CATC asserts that the traditional criteria for discrediting testimony, such as inaccuracies and inconsistencies, may merely be a symptom of the legitimacy, rather than the dishonesty, of a claim. While breaking important ground, the limitations of the Committee’s mandate constrains the degree to which it can elaborate principles that are operational in a domestic context. This is because the Committee does not directly hear the oral evidence of asylum seekers and its dicta have been limited to claims of individuals having suffered, or fearing that they will suffer, from torture.

The potential for the mental state of the asylum seeker to obscure testimony and frustrate its effective assessment is focussed in a number of areas. In systems where a strong emphasis is placed on consistency in testimony between subsequent interviews, the result is a weakened focus on the narrative of the asylum seeker at an oral hearing. Where absolute accuracy and consistency is required for an affirmative credibility finding, or the decision maker fails to make distinctions between the accuracy of core and peripheral facts, the risk of erroneous determinations increases. The extent to which decision makers engage in this process is often obscured by the
fact that UNHCR field offices, and many national authorities, offer standardized rejection letters with no specific details as to why the claim was denied.

The mechanical application of the four traditional criteria of credibility (demeanor, corroboration, consistency and accuracy) to asylum proceedings will inevitably misguide the fact-finding process. In the context of asylum, corroboration is often absent, and demeanor is often misleading. The remaining two criteria, consistency and accuracy, remain important determinants of the credibility of testimony. Yet they also can easily lead to an inaccurate evidentiary record depending upon the fact-finding approach and skills of the interviewer. In order for the credibility of the uncorroborated oral narrative of an asylum seeker to be assessed, the method of engagement with the claimant needs to be informed by current research advances. This requires that conventional criteria are adapted to account for the distinctive modes of communication, methods of presentation and psychological conditions of refugees, witnesses and victims of human rights abuses.

A dominant feature of asylum hearings described by Anker in her study was the prevailing approach taken by the immigration judges that viewed claims with a ‘presumptive skepticism’. This preliminary view towards asylum applications – and their claimants – is observed in different capacities by all of the field studies discussed above. The impact of this is important, not simply for the potential prejudice, but for the effectiveness of the hearing itself. Within the constraints of time and the context of asylum hearings, when preliminary skepticism is confused, or seen as a component of, rigorous scrutiny by decision makers, it is far less likely that the methods of eliciting and assessing oral testimony of asylum seekers can be applied effectively to address the evidentiary barriers that arise in the oral testimony of alleged victims and witnesses of human rights abuses.

The body of research exploring the relationship of these factors to the conduct and outcome of asylum procedures is small. However, the conclusions from different decades and different systems have been consistent, namely, that credibility assessment is flawed because of the failure to adapt the process to address the realities of asylum testimony. In order to establish and accurately interpret a thorough record of evidence, the decision maker must carefully tailor his or her approach to address the evidentiary barriers intrinsic to the testimony of alleged victims of human rights abuses seeking asylum.

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67 Anker, above n. 2, 451.
What is surprising about the outcome of the field research on the UNHCR and Canadian processes is also instructive. In the former case, it can be accepted that its officers should be receiving excellent training and are well informed on current developments in relation to aspects of the oral testimony of asylum seekers. Likewise the Canadian decision makers that Rousseau et al studied would have had a significant amount of judicial precedent to inform their work, albeit scattered, embracing advanced principles on credibility and asylum determination in close to 300 Canadian cases and decisions. Progressive guidelines for refugee decision makers on the issue of credibility would have also been in force at the time of the Canadian field study. And yet, in both the international and national decision making systems, there is an incongruity between the content of training and the strength of case law, on the one hand, and their translation into the actual conduct and assessment of an asylum hearing, on the other.

In the first instance, for national jurisdictions, the research on refugee protection determinations indicates that there is clearly a need for the refugee determination processes to be adapted more appropriately for the dynamics of human rights testimony in a transjurisdictional, multilingual and cross-cultural context. Where these principles are generally supported by the decision making body, as with UNHCR, both the interests of legal rigour and the capacity for effective review would mandate that decision makers carry a burden of explanation – as a corollary to the widely recognized right to receive written reasons for one’s asylum denial. This burden is neither explicitly imposed by international refugee law, nor implicitly implemented in the practice of UNHCR and that of many national authorities. Clearly, written reasoned judgements move towards imposing a higher degree of rigour and transparency in decision making. It is unlikely, however, that the requirement for written and reasoned denials for refugee status required under the EU Procedures Directive will sufficiently safeguard against the role of adverse assumptions in asylum proceedings. As the work of Rousseau et al observes, even with a clear burden of explanation, as in Canada, the obligation to provide detailed decisions fails to eliminate the influence of unstated assumptions. These findings suggest that the ‘presumptive skepticism’ that directs asylum hearings requires a counterbalance that extends beyond the duty to provide written decisions of legal reasoning and findings of fact.

68 The 2002 principles and observations were preceded by internal guidelines in 1999. The Canadian caselaw and decisions form the basis of the 2002 Canadian credibility guidelines. Immigration and Refugee Board (Canada), above, n. 5.
69 Alexander, above n. 27.
4. International criminal law: evidentiary principles for assessing the evidence of alleged human rights victims and witnesses

The most striking aspect of the approach to testimonial evidence by the international criminal tribunals is the extent to which it directly addresses the challenges affecting credibility determinations in the asylum process. It is also consistent. The jurisprudence of all of the trial chambers of ICTR and ICTY follow the same evidentiary principles relating to the testimony of alleged victims of human rights abuses.\(^70\) For asylum determinations, the approach of Trial Chamber I of the ICTR offers the most useful model for practice and assessment. In almost all of its judgements, there is a preliminary presentation of ‘Evidentiary Matters’ that presents the directing principles and standards for the assessment of the credibility of testimonial evidence given by witnesses and victims. This approach has been upheld by the Appeals Chamber and is mirrored in substance in the jurisprudence of the ICTY.\(^71\) In Trial Chamber I the consistent declaration of the distinctive considerations for assessing the credibility of human rights testimony is accompanied by a significantly more engaged role of the judges in the examination process. It is not clear whether the juristic emphasis on tailored evidentiary principles for assessing testimonial evidence of victims and witnesses indirectly reflects, or directly affects, the role of adjudicators in the Trial Chamber. Nonetheless, empirical work examining the interaction between judges and witness testimony over a two year period found that in select trials in Trial Chamber I there was up to 25 times more questions put to the witness by the presiding judge than by the bench of the other two Trial Chambers of the ICTR.\(^72\)

The nature of the questioning from the bench in Trial Chamber I is instructive in the context of asylum proceedings. Court room examinations in war crimes trials may often produce elements of testimony that are unclear, conflicting, vague or incomplete. This can be attributed, in part, to the many issues discussed at length in this article about human rights

\(^{70}\) In its first judgment, the Special Court for Sierra Leone adopts a more traditional approach to credibility criteria, as distinguished from that of the ICTs. Prosecutor v. Moinina Fifana and Allieu Konfow \(\text{SCSL Trial Chamber Judgment, 2 Aug. 2007, paras. 277-87.}\)


\(^{72}\) These findings are based upon a empirical study by the author on witness examinations in seven trials across the three Trial Chambers of the International Criminal Tribunal for Rwanda carried out between Oct. 2000 and May 2002. R. Byrne, ‘Hidden Art of International Trial Practice’ (2007) in progress (on file with author).
testimony. It is also a consequence of the varying skill and experience level of many counsel appearing before the Tribunal. As a profession in its early stage of development, many lawyers that examine witnesses in the international courts will have had very limited exposure to international trials generally, and the testimony of human rights victims, specifically. While the presentation of evidence in the \textit{ad hoc} Tribunals is broadly based upon a common law adversarial system, the bench enjoys wide powers to both control and engage in questioning. Lines of examination are commonly frustrated by an advocates’ inability to frame questions in an appropriate way that will elicit clear testimony from a witness. Standard strategies of common law cross-examination, that are honed by advocates in their domestic jurisdictions over decades, rely upon the factors of linguistic nuance and pace. Nuance and pace are the first casualties of the multilingual process of court room translation. Furthermore, when aggressive techniques of cross-examination are used reflexively by a lawyer in the context of a human rights victim, they are unlikely to facilitate the constructive development of an evidentiary record. The result is that elements of oral testimony on the record appear to be either not credible or not reliable. While there is considerable controversy regarding the appropriateness of adversarial methods for the examination of victims of serious abuses, common law trials offer insights into assessing credibility because of the serious attention that is paid to the form and substance of questioning. In practice, the consistent response of the bench in Trial Chamber I when confronted with unclear, incomplete or inconsistent testimony by witnesses of both parties, has been to return to the core elements of the examination of a witness. Where necessary, questions of counsel are reframed or followed up, serving as a corrective mechanism for the barriers to the effective examination of witnesses of international crimes. This practice highlights the extent to which the quality of credibility assessment of human rights testimony relies as much upon the skills for eliciting testimony, as it does upon the adapted criteria for assessing it.\footnote{Ibid.}

The approach of the international criminal tribunals could be labelled as a ‘presumptive affirmation’ of the experiences of victims and witnesses, in contrast to the ‘presumptive skepticism’ of adjudicators in many asylum proceedings. As in asylum proceedings, the barriers to effective examination in international courts range from technical complications to the cultural, educational, linguistic and psychological factors \textit{inter alia} that affect how alleged victims or witnesses communicate their past experiences in official fora. A ‘presumptive affirmation’ of the potential consequences of having experienced or witnessed extreme crimes notwithstanding, the criteria and rigour applied in assessing oral testimony of victims is similar to
that in national criminal proceedings. The standard indices of credibility assessment employed are internal consistency of the testimony upon direct and cross-examination, consistency measured against prior pre-trial statements and other evidence, oral and documentary evidence submitted in the course of the trial, along with evidence of other possible motives. While the indices may be the same, assumptions about how their probative value should be weighed are not. The international tribunals adapt these criteria to account for complicating factors that affect testimonial evidence.

4.1 Treatment of inconsistencies in prior statements

Discrepancies between prior statements and current testimony commonly form a central focal point for testing credibility in international criminal trials, as is the case in many asylum hearings. This can risk the placement of undue probative weight on earlier statements and the diminished opportunity for current testimony to be properly heard and assessed. Highlighting inconsistencies between prior statements given by witnesses to investigators and their subsequent courtroom testimony in trial is a core strategy in impeaching witness credibility. Like asylum proceedings, the evidentiary challenge is to achieve an equilibrium that allows for a balanced exploration into inconsistencies, while not sidelining current in-court testimony.

Trial Chambers take a restrained approach to attaching significant probative weight on inconsistencies from prior statements. The rationale for this is based upon the same set of circumstances that affect asylum proceedings: lapses in time between earlier and later statements, the language barriers in interviews, absence of clarity regarding the original questions put to witnesses, risk of errors in interpretation and transcription, and the potential impact of trauma. While the identification of these factors

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75 The approach to such discrepancies was set forth in *Kayishema and Ruzindana*, where the Trial Chamber stated: ‘Whether or not the explanation by the witness is enough to remove the doubt is determined on a case-by-case basis considering the circumstances surrounding the inconsistency and the subsequent explanation. However, to be released from doubt the Trial Chamber generally demands an explanation of substance rather than mere procedure. E.g., a common explanation provided by witnesses was that the interviewing investigator did not accurately reflect in the written statement what the witness said. Although such an explanation may well be true, particularly considering the translation difficulties, in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution’s investigative process … Conversely, where the witness provides a convincing explanation of substance, perhaps relating to the substance of the investigator’s question, then this may be sufficient to remove the doubt raised’. *Kayishema and Ruzindana*, ICTR Trial Chamber Judgment and Sentence, 21 May 1999, paras. 78-9.
76 *Prosecutor v. Laurent Semanza*, Trial Chamber Judgment and Sentence, 15 May 2003, para. 36. See also *Célebici*, above n. 16, where the ICTY Trial Chamber stated that considered inconsistencies or inaccuracies in the prior statements and oral testimony of a witness, or between different witnesses, were ‘relevant factors in judging weight but need not be, of themselves, a basis to find the whole of a witness testimony unreliable.’
provides a useful caution, Trial Chamber I in *Musema* offers a more detailed presentation of principles, establishing that the main factor for assessing the probative weight of conflicts between prior statements and court room testimony is the bench’s access to transcripts of testimony and earlier interviews in order to scrutinize the nature of the questions and the quality of translation and interpretation.\footnote{*Musema*, above n. 71, para. 85; *Celebici* Judgment, above n. 15. *Prosecutor v. Bagilishema*, above n. 71, para. 2.4.} The evidentiary consequence is that the Chamber considers the court room testimony as its point of departure. This allows for the development of narrative testimony independent of the confines of the content and scope of prior statements.

Inconsistencies between past and present recall were found in some cases in the field studies to create a premature presumption of adverse credibility, as well as of adverse character. Trial Chamber I in *Akayesu* addresses this issue in its analysis of the implications of discrepancies in testimony for the finding of ill motives in the context of ‘false testimony’. The Trial Chamber stated:

Testimony is based mainly on memory and sight, two human characteristics which often deceive the individual … Hence testimony is rarely exact as to the events experienced. To deduce from any resultant contradictions and inaccuracies that there were false testimony would be akin to criminalizing frailties in human perceptions.

Implicit in this approach is a benefit of the doubt standard that shifts the presumption from more subjective conclusions on the frailties of human character, to more objective understandings of the frailties of human perceptions.

The international criminal tribunals begin the formal assessment of credibility by identifying all of the potential factors that may render the traditional indices of credibility determination ineffective. Account is taken of the particular circumstances of the nature of interviews, translation, interpretation, recording, and trauma. Consequently, the frequent absence of consistency between prior statements and court room testimony may, but does not necessarily, impugn credibility. It triggers, instead, a separate line of inquiry regarding the reasons for discrepancies. Most importantly, the direct emphasis is on the court room testimony.

### 4.2 Modes and methods of communication

The Tribunals have adapted their approach to evidentiary assessment to account for the modes and methods of the presentation of testimony by alleged victims. This reflects a progressive understanding of contemporary research on linguistics and cultural context and the psychological impact of trauma.
4.2.1 Language in context

In multicultural and multilingual proceedings, there is an obligation for decision makers to interpret testimony so that language is placed contextually in order to establish meaning. For instance, the Trial Chamber in Akayesu relied upon the expert testimony of a linguist to understand the obfuscations around the terminology for ‘rape’ used by witnesses and victims. The questions to the expert from the judges illustrate how the responsibility for clarifying the nuances of language that affect witness testimony was clearly assumed by the bench.

Related to this, and of particular relevance to asylum decision makers, is the acknowledgement that answers will often have to be ‘decoded’ to be understood correctly. In Akayesu, the Trial Chamber stated that in light of expert testimony, ‘… [t]he Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous answers to questions’. It noted expert testimony that described the cultural trait of Rwandans not to answer questions directly, particularly when concerning delicate matters. Likewise, the difficulty of specifying dates, times, distances and locations, as well as the inexperience of witnesses with maps, film and graphic representations, were noted as not being construed as necessarily having an adverse affect on credibility.78 How this approach is constructively adapted in assessing less precise testimony still remains controversial within Chambers.79

The challenge of facing questioning in a judicial context and the cultural and educational factors that affect the capacity of witnesses and victims to respond to questions have also been addressed with expert testimony at ICTY. In Kupreškić, the Trial Chamber exercised its authority to call its own witnesses, which allowed for the testimony of an anthropologist to be entered into the trial record. With the expert testimony of this witness, a range of cultural and linguistic issues were addressed which would enhance the capacity of the Trial Chamber to assess evidence. Hence, expert evidence was entered into the record as a result of questions from the presiding judge on the symbolic and cultural significance of the destruction of the homes of Muslims. The transcripts reveal that in follow-up questions posed by the Prosecutor, evidence on the impact of propaganda and subjective fears of persecution was also introduced, as well as explanations for the difficulties that rural peasants confront when required to give direct answers to direct questions and confusions over verb tenses.80

78 Ibid.
79 See dissenting opinion of Judge M. Ramarson, in Prosecutor v. Kajelijeli, arguing that acquittal of the accused on charges of rape was wrongly decided by the Majority as they placed undue probative weight on the victim’s vague descriptions of time and distance. Prosecutor v. Kajelijeli, above n. 71.
4.2.2 *Evasive testimony*

Because of the linguistic, cultural and psychological barriers discussed above, evasive or vague answers to testimony may not automatically discredit the credibility of testimony. Rather, the Trial Chambers, through the recognition of the dilemmas and limitations of court room translation and interpretation, have relied both upon expert testimony on sociolinguistics and, in instances, engaged in direct questioning of the witness to elicit, and at times test, testimony that may not be apparently clear from the direct or cross-examination carried out by counsel. While evasive and vague testimony may prove to be an adverse indicator of credibility, the absence of a tailored approach to questioning, or the obligation for decision makers to make known to the claimant that their answers are insufficiently detailed, as directed by the Canadian guidelines, prevents an effective assessment of testimonial evidence.\(^{81}\)

4.2.3 *Psychological conditions*

The overarching feature of the testimony of victims before both trials is the likelihood that many of those testifying may be suffering from trauma-related stress as a consequence of their experiences. In *Akayesu*, the first judgement of the ICTR, the Chamber acknowledged that it was ‘unable to exclude the possibility that some or all of these witnesses did actually suffer from post traumatic or extreme stress disorders’. The Trial Chamber ‘carefully perused the witness testimonies, those of the Prosecutor as well as those of the Defence’ in light of this assumption and assessed inconsistencies or imprecisions in the testimonies accordingly, taking into consideration personal background and the atrocities that witnesses may have experienced or have been subjected to.\(^{82}\) A more developed explanation of the impact of trauma on testimony was presented in the *Musema* judgement, where the same Trial Chamber stated:

Many of the witnesses who testified before the Chamber in this case have seen or have experienced terrible atrocities. They, their family or their friends have, in many cases, been the victims of such atrocities. The trauma that may have arisen, and may continue to arise, from such experiences is a matter of grave concern to the Chamber. The Chamber notes that recounting and revisiting such painful experiences is likely to be a source of great pain to the witness, and may also affect her or his ability fully or adequately, to recount the relevant events in a judicial context. The Chamber has, accordingly, considered the testimony of those witnesses in this light.

The Chamber also notes that some of the witnesses who testified before it may, in its opinion, have suffered, or may continue to suffer stress-related disorders. The

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\(^{81}\) Immigration and Refugee Board (Canada), above n. 5.

\(^{82}\) *Akayesu*, above n. 15, para. 143.
Chamber has assessed the testimonies of such witnesses, in light of this possibility, and has taken into account their personal background and the nature of the atrocities to which they may have been subjected.\textsuperscript{83}

This approach is articulated as a standard for evidentiary assessment in the case law of both Tribunals. There are several aspects of this approach, however, that warrant noting. The most striking aspect is that, in virtually all of the cases, it was adopted by the Trial Chambers in the absence of expert testimony introduced by either of the parties to establish whether an individual witness testifying directly suffered from post-traumatic stress.\textsuperscript{84} The significance of the general avoidance of expert testimony on PTSD being brought before the international criminal tribunals is in the underlying presupposition that PTSD and other stress-related disorders are an expected dimension of the testimony of victims and witnesses of widespread human rights abuses. Mirroring the approach of the Committee Against Torture, this can in turn require that there be a modified approach to assessing all testimony where the witness \textit{alleges} that they have seen or experienced serious human rights violations.

Is this an overly broad presumption to apply in the context of domestic asylum procedures? Undoubtedly in asylum determination procedures there are claims submitted by individuals from countries of origin with less widespread and systematic rights abuses than in the context of the Former Yugoslavia and Rwanda. The implication, however, is that the method adopted by the international criminal tribunals offers a lesser degree of rigorous scrutiny and caution in assessing the oral testimony of victims and witnesses. Defense counsel have often argued on Appeal that the approach to victims by the Trial Chambers, particularly with respect to consideration of the impact of trauma on testimony, erodes the rights of the defendant to a fair trial. The Appeals Chamber has repeatedly rejected this argument, and has also highlighted that issues related to trauma apply to defense as well as prosecution witnesses.\textsuperscript{85}

\textsuperscript{83} Musema, above n. 71, paras. 100-1.

\textsuperscript{84} ‘The Chamber is aware of the impact of trauma on the testimony of witnesses. However, the testimonies cannot be simply disregarded because they describe traumatic and horrific realities’. Kayishema and Ruzindana, above n. 71, para. 75; ‘Even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness’. In the Furundzija trial at ICTY, where the defence counsel challenged the admission of oral testimony from a rape victim, introducing expert testimony on PTSD, along with that on memory recall, it was with the intent of impeaching the credibility of victims of rape by highlighting the effect the PTSD may have on their ability to provide reliable recall of the incidents charged. After hearing the expert testimony introduced by both sides, the Trial Chamber concluded that witnesses may suffer the effects of PTSD and be reliable witnesses nonetheless. Furundzija Judgment, above n. 15, para. 109.

\textsuperscript{85} Musema challenged the Trial Chamber’s approach to the impact of trauma on witnesses, arguing that it was applied preferentially to Prosecution witnesses. The Appeals Chamber upheld the Trial Chamber’s evidentiary approach, finding that Musema had failed to present any evidence to support his argument. Musema, above n. 71, paras. 58-63. See also Prosecutor v. Kupreskic and Prosecutor v. Delalic et al, above n. 71.
Under this modified approach to evaluating testimonial evidence, the Trial Chambers assess the witness testimony, allowing for lapses in memory and distinguishing between marginal and substantial discrepancies in testimony. The presumption is that individuals may have suffered the abuses they allege, and consequently testimony may still be credible even if not adequate or complete in the typical judicial context. Cohen argues that findings of adverse credibility based upon inconsistencies between present and past testimonies by asylum seekers amounts to an immoral approach to evidentiary assessment in asylum proceedings based on the scientific evidence of the frailties of testimony. The evidentiary principles of the international criminal tribunals give due consideration to the factors Cohen identifies, while allowing for the possibility that the probative value of affected oral evidence may be diminished.

If in international refugee law, the burden of proof should be shared between the claimant and the decision maker, as the UNHCR Handbook sets forth, then, when coupled with a commitment to reasoned explanation, there are ramifications not just for the final decision, but for the decision maker. Within Trial Chamber I of ICTR, where the most developed set of evidentiary principles for the oral testimony of witnesses and victims has emerged, there has been a concurrent evolution in the role of the bench. The presiding judge actively exercises his or her discretion to redress the potential distortions in testimony that arise from cultural, psychological, educational and distance barriers over time. Where testimony is not narrated in a manner appropriate for the judicial context, the responsibility is taken by the bench to reframe questions and adopt alternative mechanisms for extracting the required information. The proactive role of the judge serves as a corrective mechanism for the modes and methods of communication that characterize human rights testimony.

5. Conclusion

Given that international criminal law is informed by progressive developments within national jurisdictions, it is logical that its development should inspire advances at the critical intersection between domestic and human rights law, where the realm of refugee protection lies. With the advent of international criminal justice, new challenges have been placed upon the criminal legal process to deal with violations of international human rights norms. Many of the challenges that are faced in the assessment of the oral testimony of victims are not new. The complex assessment of testimony about human rights violations has long created particular evidentiary burdens for those responsible for refugee status determination. The call for an interdisciplinary, human rights based approach to this burden has not, however, been met in national asylum procedures. Under the gaze of world scrutiny, it is the international criminal process that has
developed a holistic, inter-disciplinary approach to adapting evidentiary assessment to respond to the realities of victims of extreme crimes. As an emerging body of international law, it brings the process of evidentiary assessment into the framework of the international human rights system. Now that many constitutions and treaties commit national authorities to the principles of international law, the evidentiary rulings of the international criminal courts should assume an influential role in the development of national practice. The spotlight this casts on the potential for reforms to improve the legal treatment of alleged victims and witnesses of human rights abuses should be focussed as much on the asylum hearing as on the criminal trial.