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Proof, Evidentiary Assessment and Credibility in Asylum Procedures

Edited by
Gregor Noll

Martinus Nijhoff Publishers

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VOLUME 16

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VOLUME 16

MARTINUS NIJHOFF PUBLISHERS
LEIDEN/BOSTON
2005

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper.

ISBN 90 04 14065 4

Koninklijke Brill NV incorporates the imprints Brill Academic Publishers,
Martinus Nijhoff Publishers and VSP.

http://www.brill.nl

Printed and bound in The Netherlands.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ACT	Advisory Commission on Aliens Affairs (the Netherlands)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CATC	Committee established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CSR	Convention on the Status of Refugees
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
IAT	Immigration Appeal Tribunal
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IJRL	International Journal of Refugee Law
ILM	International Legal Materials
IND	Immigration and Naturalization Department of the Ministry of Justice (the Netherlands)
INS	Immigration and Naturalization Service (US)
IRB	Immigration and Refugee Board (Canada)
OAU	Organization of African Unity
PD	EU Draft Directive on Asylum Procedures
PTSD	Post Traumatic Stress Disorder
QD	EU Qualification Directive
RSD	Refugee status determination
UNHCR	Office of the United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series

ACKNOWLEDGEMENTS

This book emerges from a sequence of collaborative efforts under the umbrella of the Refugee Research Programme. Without the generous support of the United Nations High Commissioner for Refugees (UNHCR), our work on evidentiary issues in the asylum procedure would never have taken place. UNHCR generously funded academic background research for a period of two years as well as a number of workshops and meetings, from the inception of the project in 2001 to the final authors' workshop in 2003. In particular, we would like to thank Damtew Dessalegne, Jean-François Durieux, Walpurga Englbrecht and Bo Schack for their dedicated support and material advice.

We would also like to acknowledge the catalytic role played by the Institute for International Integration Studies (IIIS), Trinity College, Dublin, in bringing together a multidisciplinary group of academic experts with judges, international lawyers and other practitioners from Europe and North America during a two-day conference hosted by the IIIS in September 2003. The texts of this volume emerged from the presentations and discussions at this conference. In particular, we would like to thank Dr. Rosemary Byrne, who transformed the IIIS conference into a reality and a success. The assistance of Ms. Gail Weadick is gratefully acknowledged. Also, the IIIS hosted and supervised Fulbright Scholar Ivy Wong, whose background research on common law practices provided valuable input into our work.

Thanks are also due to the Faculty of Law, Lund University, for hosting the 2003 authors' workshop and for offering bridging funds in various phases of the project. The Faculty provided a platform for two guest researchers and allowed us to link the thesis work of four law students to our project. The Faculty's continued engagement in the topic of our research is *inter alia* reflected by the recent appointment of a doctoral candidate, carrying out research on evidentiary issues in the asylum procedure.

In addition, the Danish Institute for Human Rights has provided and continues to provide a collaborative platform for the Refugee Research Programme, and therewith the present project. In 2001, it hosted a planning meeting which brought together key actors and resulted in the formulation of many questions now broached in the contributions of this volume.

We are grateful to Professor Gudmundur Alfredsson, Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, for accepting this volume for publication in the Raoul Wallenberg Institute Human Rights Library Series. The unrelenting work of Carin Laurin in managing the editorial process and of language editors Miles Hogan and Jason Naum is gratefully acknowledged.

Finally, thanks are due to the Swedish Research Council (*Vetenskapsrådet*) for funding the work of the editor on this volume.

Lund, February 2005

Gregor Noll

CHAPTER 1

INTRODUCTION: RE-MAPPING EVIDENTIARY ASSESSMENT IN ASYLUM PROCEDURES

Gregor Noll

1.1. WHAT MAKES ASYLUM ADJUDICATION SPECIAL?

The law is expected to treat like cases alike. In asylum law, this poses veritable challenges. Today, an important fraction of applications are arguably decided on the basis of evidentiary assessment rather than on legal issues. In particular, the credibility of the applicant's account plays a central role. This moves decisions into a domain characterised by the discretion of the person who assesses the accounts, and raises the issue where its limits are – or ought to be.

As recognition rates diverge within and among states,[1] any observer would concede that excessive discretion[2] risks cancelling the harmonising effects of international and supranational legislation. For one, instruments such as the 1951 Refugee Convention and the 1967 Protocol[3] were adopted to coordinate the

[1] A 2004 study on recognition rates concludes that the variance among destination in granting refugee or humanitarian status can hardly be explained by the merit of each asylum-seeker's claim. The findings suggest that the recognition-rate of destination-countries is relatively impervious to refugee-generating conditions in countries of origin, that destination-countries 'peg' recognition-rates at a level they deem acceptable, and that fluctuations occur as a response to perceived threats to national interests, such as increasing asylum applications or a growing numbers of foreigners. Humanitarian recognition-rates appear particularly susceptible to factors unrelated to merit, including diplomatic relationships and economic conditions in the destination-countries. Mary-Anne Kate, *On What Basis Do Destination-Countries Provide Refugee and Humanitarian Protection to Asylum-Seekers?* Unpublished MSc. dissertation (University of Edinburgh, Edinburgh 2004).

[2] The term 'excessive discretion' can relate both to the domestic and the international level, and draw on the interpretation of law as well as on the evaluation of facts. First, a decision-taker can trespass the limits to discretion set by domestic legislation, which would typically bring the case under some form of judicial review (the Danish context provides a pertinent example, as reflected in Chapter 4.3 below). Second, excessive discretion can also emerge at the level of international law. A typical example would be a domestic practice corresponding to a misinterpretation of state obligations flowing from a material or procedural international legal norm. By contrast, there is a domain where discretion is legitimately exercised, and the evaluative freedom of the decision-taker is honoured by a limited or non-existing judiciability of her/his decision. *See* Chapter 4.3, note 12.

[3] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 [hereinafter 1951 Refugee Convention, abbreviated CSR]. In the following, reference to the 1951

behaviour of states. Continuously, their proper interpretation is discussed in ministries, courts, tribunals as well as diplomatic and academic gatherings. These efforts of coordination are threatened if evidentiary assessment would provide a back door for unfettered discretion.

The fact that regional harmonisation across the European Union has not aligned recognition rates might suggest that the rapprochement of formal rules only plays a limited role in remedying divergences in results.[4] At the same time, states increasingly designate each other as safe third countries, and refer asylum seekers back to those through which they have transited. This gives rise to a paradox. States would need to argue that those states with higher recognition rates are more generous and exceed what international law demands of them. At a time where there is political agreement in the North that the inflow of asylum seekers should be reduced, such generosity would appear to be a contradiction in terms. Or is formal harmonisation and informal divergence happily tolerated, because it makes asylum in Europe less calculable for prospective claimants, and thus less attractive?

But how do we know whether or not discretion is correctly used? How can we ourselves avoid subjectivity when judging that of others? Given that asylum and other forms of protection are granted as a matter of law, we would hardly accept if single decisions were taken on grounds of, say, the adjudicator's personal preferences. To verify this, an observer would need to have access to precisely the same data as were underlying the decision. In practice, this would mean following the case during processing. Those who do cannot rid themselves of partiality: the applicant's lawyer or support person. Why should their subjective evaluation be any better than that of the adjudicator? It is rare that researchers follow a larger sample of cases through the procedure. Where they do, they need to apply a yardstick, indicating when use of discretion is up to standard. But, as we will soon see, there is no single, straightforward and generally accepted yardstick. This provides governments and adjudicators with insulation against critique – an insulation that is deeply problematic, as it allows segments of the public to retain doubts on the legitimacy of asylum adjudication. At stake is not only the credibility of the single asylum seeker, but that as well of the state adjudicating the claim.

Now, one could argue, such concerns are familiar to the legal profession at large. After all, areas of law other than asylum pivot on evidentiary issues, criminal law being only the tip of the iceberg. Why should we accept asylum law as being so extraordinary, worthy of our heightened attention? Because the distribution of roles, the production of proof, the assessment of credibility and the weighing of evidence in asylum cases raises a cluster of very specific issues and concerns, which we will briefly outline in the following. The argument is, first, that the issues related to

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Convention covers the Convention as modified by the Protocol relating to the Status of Refugees, 31 Jan. 1967, 606 UNTS 267.

[4] Divergences in recognition rates need not indicate possible excesses in discretion. In theory, it is fully conceivable that such divergences could be explained by differences in caseloads and in the characteristics of individual cases. However, statistical studies suggest that this is not the case (*see* Kate, *supra* note 1, with further references).

evidentiary assessment in asylum cases are exposed to a higher degree of fragmentation and indeterminacy than what applies to other areas of adjudication, and, second that this fragmentation and indeterminacy is reproduced rather than remedied in international law and scientific research.

1.2. DETERMINING MEMBERSHIP IN HYBRID PROCEDURES

Asylum adjudication is about membership in a protective community. It is located at the threshold of, rather than within, the domestic legal system. This sets it out from other areas of law, which are typically dealing with intra-community claims, juxtaposing and balancing the interests of persons already members. Questions on membership are different from questions on rights and obligations following from membership. The idea of equality in arms – a central tenet of intra-community adversarial procedures – is hard to apply to the asymmetric setting of asylum law. Yet, this principal difference must not be misunderstood to open up for a total politicisation of asylum. After all, states consciously made the grant of asylum into a legal issue, and concurrently subjected it to demands on predictability, impartiality and due process. But what these demands mean in the asylum context may be different from what they mean in the intra-community setting of penal, administrative or civil procedure.

The special nature of the membership claim might explain why the asylum procedure is a double hybrid. First, its design incorporates traits from both inquisitorial and adversarial models. Second, it features elements and concepts derived from administrative and penal procedure. Apparently, no single procedural model has come to dominate asylum adjudication in industrialized countries, and can now serve as a yardstick for evaluating outcomes. If we explain asylum procedures as a *sui generis* phenomenon, we are compelled to note the absence of theoretical underpinnings explaining its characteristic features.[5] In a worst-case scenario, such hybridisation risks to eliminate all safeguards for the individual claimant. What does legal coherence mean in a hybrid setting? Are we left with a haphazard choice of yardsticks? Faced with such questions, it is perhaps unsurprising that an intergovernmental consensus on guiding principles governing evidentiary assessment is lacking.

While evidentiary assessment is strongly affected by the design of asylum procedures, it is not exhaustively predetermined by procedures. There is always a supplement of subjectivity. In other areas of law, rules on evidence constrain this subjectivity. By way of example, there are rigid rules on the admissibility of

[5] This should not surprise us. Democracy theory is faced with very similar problems when confronted with the establishment of a citizenry in a democratic state. The moment of personal constitution seems to be a 'moment of closure', a black box which cannot be explained but by reference to concrete historical processes. *See* Chantal Mouffe, 'Carl Schmitt and the Paradox of Liberal Democracy', in D. Dyzenhaus (ed.), *Law as Politics. Carl Schmitt's Critique of Liberalism* (Duke University Press, Durham and London, 1998) p. 162, *at* p. 164.

evidence in U.S. civil and criminal procedures.[6] In U.S. asylum law, they are absent. In addition, the hybrid nature of asylum procedures boost the subjective margin further, as there is no single set of traditions or values providing guidance to adjudicators.

1.3. COMMUNICATING AND PROCEDURALIZING EVIL

Asylum procedures are both marked by paucity and richness at the same time. Their paucity is due to the predominant role of a single means of proof, namely the applicant's account. In this account, however, an overwhelming richness may be embedded. In quite a number of cases, the adjudicator is asked to give credence to the incredibility of evil, which poses challenges in its own right.[7] There are others, easier to rationalize perhaps: the account of the applicant emerges from a foreign context, is told in a foreign language and accompanied by demeanour and other cultural attributes which are not familiar to the adjudicator. In some cases, the effects of trauma, depression or other medical impairments need to be added to the list of impediments. The adjudicator must feel compelled to reduced this richness and complexity by resorting to stereotyping, presumptions, eventually reducing the monstrosity of the account.

What else is there to counter the applicant's narrative? The growing body of information on countries of origin introduces a second, far more general account. A database versus a personal testimony – these are the poles between which the adjudicator finds herself in most cases. Unlike in other cross-border legal relations, the authorities of the country of origin cannot be involved, given that they might indeed be persecutors. Moreover, in contrast to intra-community claims, witnesses and case-specific documents are rarely available. Where the applicant indeed introduces documents into the procedure, the assessment of their authenticity and significance might prove more difficult than they would be in the domestic domain. At times, expert testimonials in medical or linguistic issues or embassy reports on the existence of specific risks add further elements.

This cluster of communicative challenges will put significant obstacles between applicant and adjudicator, with the latter not always fully conscious of their existence. Translators, interpreters, medical and other experts acquire critical importance as mediators, while the quality of their work is usually beyond the scope of review mechanisms. The bridging of the distance between applicant and

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[6] U.S. Federal Rules of Evidence, codified at 28 U.S.C. 2075.

[7] The recounting of traumatic events also indirectly transmits trauma from the claimant to the decision maker or to other professionals involved in the decision-making process. This form of transfer has been termed 'vicarious traumatization' and can also provoke symptoms of post-traumatic stress disorder. In an institutional setting, avoidance reactions may imply dismissal or demonization of the 'other', in this case, the asylum seeker. *See* C. Rousseau, F. Crépeau, P. Foxen and F. Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' 15 *Journal of Refugee Studies* (2002) p. 49.

adjudicator and the overcoming nature of the enumerated obstacles requires effort and expertise beyond what is demanded in adjudication exclusively turning on domestic claims. Simultaneously, decision-takers build up their horizon of expectations along domestic analogies ('what would a reasonable person do?'). This might imply that they use standards of what is deemed credible, plausible and probable which are inappropriate in the alienated setting of asylum adjudication.

These obstructions are amplified by others, and brought about by the legal system itself. As a rule, access to the territory of putative asylum countries is unavailable by legal means. Most applicants have used the services of a human smuggler, who might have advised clients to destroy travel and identity documents, to use forgeries and to give a prefabricated and standardized account of persecution. It is laborious for decision-takers to reach beyond this veil of misinformation. Additionally, the elapsing of time brought about by the asylum procedure itself wears down the memory of crucial events in the narrative of the applicant. In both types of cases, adjudicators often find altered stories to lack credibility. Ultimately, the design of migration and asylum law distorts the production and availability of proof and could, in extreme cases, produce rejections by design.

1.4. INTERNATIONAL AND SUPRANATIONAL NORMS CANNOT MITIGATE INDETERMINACY IN EVIDENTIARY ASSESSMENT

To be sure, international law obliges states to protect refugees and other classes of protection seekers. While its material protection norms allow for a limited number of inferences on procedural issues, precise rules governing the design of procedures or the assessment of evidence are largely missing. Their doubtful authority aside, soft law norms provide only limited assistance; the freedom of states to choose a procedural system of their liking is taken as a basis, the core issues of evidentiary assessment are sparingly addressed. In all, the indeterminacy at the level of domestic law remains unchecked at the international level. This is understandable perhaps, as international law has to accommodate the diversity between common law systems and civil law systems at large, and the variegated legal cultures of contracting states in an abstract and adaptable set of norms.

Interestingly, a number of individual complaints before monitoring bodies, such as the CAT Committee and the European Court of Human Rights, have pivoted on evidentiary assessment and enriched the debate. Whether they can be extrapolated into a general rule is an altogether different matter, given that their binding force, if any, is limited to the case decided, and does not purport to be norm-creating.

At the supranational level, a development towards greater determination and predictability seems to take place. With the emergence of a Common European Asylum System (CEAS), a denser mesh of material and procedural norms is woven. Given the slow pace of negotiations, however, variations in domestic procedures will persist for still some time to come. As a consequence, it is unlikely that the domain of evidentiary assessment will be affected by the CEAS in the short to medium term.

Rather than reducing it, the emerging procedural regime of the CEAS could be seen to boost indeterminacy in evidentiary assessment. Member States apparently seek each other's consensus for an ever more wide-ranging acceleration of asylum procedures at the domestic level and the limitation of depth of scrutiny and review, which is reflected in the negotiations on the EU Asylum Procedure Directive. Obviously, the opportunities to explore the evidentiary dimensions of a claim are severely reduced by such measures. This, in turn, widens the margins of subjectivity and irrationality.

1.5. RESEARCH REPRODUCES FRAGMENTATION

Hitherto, research has not addressed issues of proof and credibility in the asylum procedure to an extent reflecting its practical importance for applicants and decision-takers. To the extent it has taken place, it has reproduced the fragmentation accounted for above.

First, refugee law research has concentrated on legislation and its interpretation by courts and tribunals. Lawyers have written surprisingly little on issues of proof, evidence and credibility, perhaps because they are comparatively complex and lack agreed and unambiguous standards. Beyond law, other social science disciplines have inquired into asylum adjudication, as did representatives for the medical disciplines. Integrating their knowledge and that of the lawyers' remains difficult, as important differences in language, concepts and standards persist. Interdisciplinary projects have been rare, and much of our knowledge in the field remains as fragmented as the object of study.

Secondly, evidentiary theorists have typically drawn on criminal law or other areas within the domestic domain, which begs the question to what extent these findings can be transposed to the atypical setting of asylum law. The fragmentation of research will do little to alleviate the sense of disorientation and indeterminacy, which the lack of tangible norms and the relatively large margins of subjective discretion have brought about.

1.6. RE-MAPPING EVIDENTIARY ASSESSMENT

Can we at all find a way back from fragmentation and indeterminacy and break down the complexity of asylum adjudication into a common terminology and methodology? This is the question at the core of the present volume. The prospects for any supranational or even international harmonisation of recognition practices would seem to depend on the possibility of such a common understanding. And so would a scientifically founded rejection or justification of existing state practices.

More specifically, this book seeks to pursue three interrelated objectives:

- to counter conceptual and terminological confusion and fragmentation through a rigorous comparison of evidentiary assessment across different areas of law and different legal traditions;
- to identify and analyse empirical problem zones in the practice of evidentiary assessment; and

- to normatively resolve indeterminacy by applying the full potential of international and supranational law to it.

With a certain measure of cross-fertilization, each objective corresponds to a part in this volume.

The first part offers theoretical exploration of different approaches to asylum adjudication and how those impact the meaning of concepts and procedural obligations.

In particular, it asks to what extent concepts used in general legal terminology fit the specific context of asylum law. In the opening contribution (Chapter 2: 'Competing Patterns for Evidentiary Assessments') Henrik Zahle explains how evidentiary assessment in asylum law is related to that in criminal or civil law. He identifies the special traits of asylum cases and distinguishes three dominant approaches: the stochastic, focussing on probability, the communicative, pivoting on credibility and the normative, seeking the correction of unwanted behaviour. He casts credibility as a delegation of the decision on certain facts to the applicant, and therewith to the local environment from which the claim emerges. Credibility is thus part of the communicative approach, which builds on the emergence of trust between adjudicator and applicant. Henrik Zahle reinterprets the 'benefit of the doubt' to mean a benefit in the communicative dimension of a case, with the adjudicator to display greater preparedness to trust what he terms "surprising statements", even if those are not free from contradiction. His contribution concludes with an analysis of why it is so difficult to interpret and allocate the burden of proof within the asylum procedure, and argues that the subjective element of fear should not be rejected from the framework of adjudication, not at least because it implies an element of personal recognition of the applicant, regardless of the decision taken.

From the vantage point of logical coherence inherent in all legal systems, Aleksandra Popovic attempts a reconstruction of evidentiary assessment in asylum systems (Chapter 3: 'Evidentiary Assessment and *Non-Refoulement*: Insights from Criminal Procedure'). She illustrates why it makes a difference if procedures are designed for the grant of asylum (which they usually are in industrialised countries) or for the grant of *non-refoulement*. A focus on asylum puts the applicant in a less favourable procedural position than a focus on *non-refoulement*. Also, by analogising to criminal procedure, she is able to show that the asylum procedure structurally resembles a criminal procedure, albeit one featuring a presumption of guilt. Popovic also specifies precise meanings of the terms 'burden of proof' and 'benefit of the doubt' for the purpose of a procedure pivoting on non-refoulement.

The second part is based on empirical explorations of specific domestic practices and their analysis against the backdrop of legal, sociological and psychological methodologies. This part makes idiosyncrasies in domestic adjudication visible and signposts potential remedies.

In many states, appellate courts or authorities do not subject evidentiary assessment to scrutiny, and focus exclusively on the tenability of legal

interpretations. But what is a question of fact, and what is a question of law? If the dividing line is not drawn or administered properly, Jens Vedsted-Hansen argues, asylum seekers will de facto be deprived of the legal remedy they are entitled to, which he labels as 'procedural deflection' (Chapter 4: 'The Borderline Between Questions of Fact and Questions of Law'). In particular, procedural standards closely related to the assessment of proof, risk falling victim to an erroneous drawing of this divide, and to be excluded from review. Jens Vedsted-Hansen argues that the adjudicator is under a procedural obligation to provide for the identification of separable legal elements in the decision, which can then be subjected to judicial review in their own quality (as the question of burden and standard of proof, as well as the granting of a benefit of the doubt).

The following chapter pursues the issue of procedural deflection from a different angle. On the basis of a sample of Dutch asylum cases, Thomas Spijkerboer captures the traces of stereotyping in decisions, and shows how gender, ethnicity, and emotionality interact in the mind frame of adjudicators (Chapter 5: 'Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalized Judicial Review in the Dutch Asylum System'). Credibility might very well hinge on a display of emotions in a way corresponding to the adjudicator's gendered expectations. Against the backdrop of a massive acceleration of procedures in the Netherlands, he argues that we may expect a surge in stereotyping. This acceleration is problematic in its own right, as a marginalized form of judicial review accompanies it. Thomas Spijkerboer believes that this runs counter to obligations under the ECHR, as explicated in the case law of the ECtHR, and underscores the importance of a critical space for reconsidering evidentiary assessment.

Effectively, both Jens Vedsted-Hansen and Thomas Spijkerboer confirm the importance of a judicial review, based on rather different experiences from different jurisdictions. In particular, the misguided usage of inarticulate presumptions or the relabeling of legal questions into evidentiary ones could be addressed and corrected in such a space.

Whatever the importance of review, there is widespread consensus that the applicant's hearing at first instance is of paramount importance for the quality of procedures. Nienke Doornbos explores the core of first instance proceedings in her ethnographic study of verbal communication between applicant, adjudicator and interpreter (Chapter 6: 'On Being Heard in Asylum Cases. Evidentiary Assessment through Asylum Interviews'). In more than half of the 90 interviews attended between 1991 and 2001, serious communication problems arose, affecting the fact-finding process. In particular, the role of the interpreter was found to be critical. Ranging from translation errors and omissions to taking over the initiative in the interview and providing the officer with country information. Officers placed great emphasis on temporal consistency and demanded the provision of peripheral details as a means of corroboration, which at times impacted disturbingly on applicants. As a reversal of the stereotyping Thomas Spijkerboer describes, Nienke Doornbos encountered applicants who attempted to fulfil the role of the 'good client' rather than to assertively state their case. The contributions to and distortions of the

applicant's claim by interpreters and interviewers cannot be identified in the dossier, and the adjudicator believes them to be the applicant's own claim, which is inherently problematic. Nienke Doornbos believes that a good part of the stated problems can be alleviated by training interview officers, but warns that time might prove to be the most important resource: accelerated procedures risk wiping out any investment into training and improved interpretation.

Nienke Doornbos, and, to some extent, even Thomas Spijkerboer, looked at how the narrative of the applicant is received by interviewing officers. Jane Herlihy shift focus towards the applicant's capability to present her asylum claim, and elaborates the impact of psychological and psychiatric difficulties (Chapter 7: 'Evidentiary Assessment and Psychological Difficulties'). In particular, she exposes the differences between traumatic and non-traumatic memory. Jane Herlihy effectively dismantles the myth that consistency in an account is an indicator for general credibility. A study based on repeated interviews within a group of Kosovar and Bosnian refugees permitted to stay in the UK revealed that up to 65 per cent of the details provided by refugees changed between interviews. Amongst refugees with PTSD, the degree to which details changed increased in proportion to the length of time between interviews. Another issue highlighted by Jane Herlihy is avoidance. One of the diagnostic features of PTSD is that the individual makes an effort not to have conversations about the trauma, which also negatively affects her willingness to contribute relevant data in the asylum procedure. Beyond PTSD, adjudicators should also be aware of how depression and other disorders may affect the stating of a claim. Jane Herlihy fears that torture victims and persons suffering psychological disorders in general might be discriminated against in the present setting of asylum procedures. She calls for intensified research on the discord between the procedural assumptions and medical and psychological knowledge. As a practical measure, the usage of support persons in interviews and oral hearings is suggested.

The third part specifies what norms and guidance international law has to offer in addressing the apparent indeterminacy in domestic practices, and looks at the practice of international criminal tribunals from a *de lege ferenda* perspective.

Evidentiary assessment related to inclusion into refugee status is the subject of Gregor Noll's contribution (Chapter 8: 'Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear'). With regard to the 1951 Refugee Convention, he subjects core provisions to a close reading and refutes that refugee determination is driven by an 'objective' risk assessment by the decision-taker. Rather, he argues, contracting states are obliged to provide room for the emergence of the applicant's risk assessment and to include it into the evidence. The EC Qualification Directive indirectly acknowledges the autonomous role of the applicant by providing a rather far-reaching state obligation to communicate evidence used by the authorities.

In the subsequent chapter, Geoff Gilbert approaches evidentiary aspects related to exclusion from refugee status under Article 1F of the 1951 Refugee Convention – an issue which has attracted increasing interest by states and their asylum authorities

(Chapter 9: 'Exclusion and Evidentiary Assessment'). On the basis of an extensive analysis of the convention itself, other human rights instruments, as well as international and domestic case law, Geoff Gilbert seeks to set out the procedural ramifications for evidentiary assessment in 1F-cases. He argues *inter alia* that applicants must be informed of the fact that there is an exclusion case against them, the burden of proving the facts leading to exclusion rests on the state, and that the applicant enjoys a presumption of innocence given the crime-related nature of exclusion. Yet, Geoff Gilbert underscores that the standard of proof suggested by the wording of the exclusion provision is rather low, and dwells on the consequences with regard to the applicant's right to remain silent and the problem of whether membership in an organisation committing excludable acts is sufficient. The final section of Geoff Gilbert's chapter dwells on the exception to the prohibition of refoulement in Article 33(2) of the Convention and elaborates on how the standards of proof used in it differ from that employed in the exclusion context.

In the final chapter of this part, Rosemary Byrne attempts to break new ground by importing the approach towards testimonial assessment developed in international criminal law into the asylum field (Chapter 10: 'Credibility in Changing Contexts: International Justice and International Protection'). Byrne's chapter critiques EU regional standards in light of the emerging principles and practices regarding human rights testimony from the International Criminal Tribunals. Her argument is based on the shared experiences of Rwandans seeking justice from the Rwanda Tribunal and those seeking protection in countries of asylum. Byrne argues that in light of the features of their testimony, asylum testimony should be appropriately classified, and hence treated, as 'human rights testimony'. In the era of international criminal law this has evidentiary consequences in terms of approaching credibility, and this should be, but is not, reflected in the approach to credibility in the EU Directive prescribing minimum standards for asylum procedures. Byrne concludes that the Common European Asylum System should take into account the progress made with regard to 'human rights testimony' and incorporate it into its approach to asylum testimony and its assessment.

These three parts certainly do not cover evidentiary assessment in its totality, and do not purport to overcome the indeterminacy and fragmentation haunting the subject. In particular, the limited resources of the present project excluded a thorough analysis of how evidentiary assessment is impacted by its institutionalisation. In the **epilogue** of this volume, Gregor Noll outlines a tentative explicatory model for the idiosyncrasies of credibility assessment (Chapter 11: 'Salvation by the Grace of State? Explaining Credibility Assessment in the Asylum Procedure'). The core argument is that asylum procedures inherit a strong focus on the 'perpetrator-sinner' from criminal procedure as well as the Christian practice of confession. The emphasis on general credibility assessments reveals an unhappy kinship with the examination of penitents' moral condition before absolution. Casting asylum adjudication in such terms might allow one to capture a reality that the book has only begun to address, but which should be considered by contemporary decision-takers and researchers alike.

A – DISCOURSES, PROCEDURES AND CONCEPTS

CHAPTER 2

COMPETING PATTERNS FOR EVIDENTIARY ASSESSMENTS

Henrik Zahle

2.1. INTRODUCTION

Refugee law is a legal discipline, a discipline of tragic practical importance, evoking intense political interest and weighty cultural consequences. The main topic of political controversy has concerned the substantive or legal conditions for obtaining asylum, but in many states these legal conditions are bound to criteria following from national legislation or international treaties which are difficult to change. It is therefore understandable that the focus may be directed towards evidentiary assessments in which the substantive criteria are taken for granted. The question of evidence and proof thereby becomes battleground for dispute.

Questions of evidence and proof are not a speciality of asylum law. They arise in connection with each legal, substantive criterion or condition – in civil, criminal and administrative cases, and they are to be decided not only by courts, but also by administrative agencies and private decision makers. Evidence is therefore (especially in the UK and the US) an advanced legal discipline which basically relates to the general human condition that we take decisions based on facts about which we cannot be completely sure, *i.e.* decision making under uncertainty or under risk. From the perspective of the law of evidence, refugee law is one among many other areas of substantive law. Bringing the evidentiary problems of asylum into this broader context is not meant to imply that asylum law is not something special when it comes to the evidence and proof. Quite the contrary, the broader context makes special elements of the discipline visible.[1]

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[1] The text is based on following studies on evidentiary problems in refugee law: *Asylum in Europe: Strategies, Problems and Solutions*, Report from the Nordic Refugee Seminar in Lund (Lund 2002); J.-Y. Carlier et al., *Who is a refugee?* (Kluwer, The Hague, 1997); B.S. Chimini (ed.), *International Refugee Law. A Reader* (Sage, New Delhi, 2000); C. Douzinas and R. Warrington, 'A Well-founded Fear of Justice: Law and Ethics in Postmodernity', in L. Jarry and M. Ashe (eds.), *Legal Studies As Cultural Studies: A Reader in (Post) Modern Critical Theory*, (Albany State University of New York Press, New York, 1995) p. 209; T. Einarsen, *Retten til Vern som Flyktning* (Cicero, Bergen, 2000); G.S. Goodwin-Gill, *The Refugee in International Law* (Clarendon, Oxford, 1996); B. Gorlick, Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status, *UNCHR Working Paper No. 68* (Geneva, October 2002); J.C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991); and G. Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection* (Nijhoff, The Hague, 2000).

Let me mention some specific traits of the evidence which characterizes the evidentiary situation of refugee cases:

1. The national authority, being administrative or judicial, which handles the basic problem of determining who is a refugee is confronting and controlling an individual who is isolated from her/his original context and often with very limited resources in every sense of the word.

2. The asylum applicant may testify about her/his situation but for various reasons will rarely be in a position to substantiate her/his statements with documents or be able to produce other evidence to corroborate these statements.

3. Much of the evaluation of evidence that is supposed to be concrete and individual might as well be seen as part of a sort of 'evidence-policy', which may be as important as the asylum granting policy.

4. The very specific types of evidence that are at hand in asylum cases call for an acceptance of various patterns or models of fact-evaluation. Three competing approaches should be mentioned: The *stochastic* or statistical approach which seeks to integrate the legal evidentiary assessment into a scientific probability model, a *communicative* approach which focuses on trust or credibility, and a *normative* approach which reflects the possible culpability of one or more of the involved parties.

5. The asylum question should be seen as individual and private in the sense that it is to be decided on the basis of the information at hand in the individual case. At the same time such decisions may be considered and evaluated politically from a broader, foreign policy oriented perspective in which national authorities may be engaged and which even relates to questions of evidence and proof. This implies that there is a political focus on the evidentiary assessments of refugee status which the judicial and administrative authorities must be careful to preserve a distance to.

Summarizing these points, the social and political reality of refugee law may depend on the claims raised by the law of evidence. On the other hand the law of evidence may be questioned on the basis of the experiences stemming from refugee law.

2.2. CREDIBILITY

In criminal cases the confession of the accused is sometimes termed the queen of proof. By confessing the accused admits to the acts and facts s/he is ascribed, and although the prosecutor and the court must control the veracity of the confession, the evidentiary problem of the trial is normally solved if the accused confesses.

In refugee law a special position may be ascribed to the statement made by the asylum applicant on the basis of her/his fear of prosecution, his situation in her/his homeland in general and her/his travel to the state where the asylum application is filed. But there is an important difference in that the facts admitted by the *accused* are used to her/his disadvantage while the statement made by the *applicant* is supposed to advance the application. By the expression 'statement of the applicant' I

refer to the sum of reports, explanations and interviews deriving from the applicant (and her/his family).

With the term 'credibility' (or trustworthiness or veracity) I characterize a statement that is an oral or a written text. The statement or the text comes from a person, *i.e.* from the applicant as a 'witness'. If I choose to ascribe credibility to that person (note however that some comments on credibility specifically stress that the credibility of a statement is of relevance, and not that of a person), I assume that a person, or group of persons, is the author of the text. The statement is thereby considered as part of a *communication*. Acknowledging this communication implies an element of *recognition*: one cannot communicate without recognizing the person with whom one communicates. A judge acknowledges and recognises the accused even in cases where the judge may end up deciding to send the accused to prison for 10 years. The judge lets the accused talk and thereby allows her/him to take part in his interpretation of the case (which does not imply that the judge consents to the interpretation of the accused). Of course, this relationship is asymmetrical since the judge is in control of the accused.

I propose that the concept of credibility has a natural place in a procedural framework where the asylum applicant and the decision-making authority are communicating. This approach may be seen as an *alternative* to a dominant approach in evidence law. According to that approach, the question of evidence is seen as a question of *probability* where probability is understood as an objective relationship between the data found in the case and the fact or theme which is supposed to be either assumed or rejected.

When we focus on credibility – as has been the tradition in refugee law – we look for the personal and situational facts which may influence our assumptions on the credibility of the individual person. This means that we ask questions such as: 'Can we trust the applicant's statement to the effect that the applicant has a well founded fear of persecution?' When we ask questions about credibility or trust we are posing these questions from our own position, our belonging to a culture and tradition where we are well aware that we may trust some people, and not others; that some statements are trustworthy, others not. The teacher listens with patience to the student's explanation why he has not finished the assigned paper. And he reflects: 'Can I trust him?' Only an intimate knowledge of the student's personality, former experiences with his homework, his relations with family and classmates allow a well-founded answer.

Although the evaluation of trustworthiness is concrete and individualised, practice reveals some recurrent elements in the evaluation.

The first issue I will mention concerns the question of handling *'contradictions'* in the statement of the applicant. The evaluation of contradictory statements is, unfortunately, not unique to asylum law. In adjudication at large, it is debated how much weight contradictory elements should be given when assessing the credibility of a statement. A general answer is not possible to such a broad question, but some observers may be more *critical*, some more *tolerant* and open to accept a more chaotic statement. Contradictions or, at least, variations in statements of this

character should not in themselves be surprising, without denying that some discrepancies may be considered suspicious. Contradictions are well known from qualitative interviews where respondents have no intention of cheating.[2]

Beside this debate between the claim for unconditional consistency and the tolerant acceptance of inconsistencies, there is a third position which brings the applicant into a 'Catch 22': In one case the judge comments 'If your statements are in total harmony, they must be arranged strategically to convince me', but in the next case he may say: 'The discrepancies arouse my strongest suspicions'.

Perhaps a similar problem may be found in the evaluation of the circumstances under which the applicant claims to have left his/her home country. If the applicant emigrated with an exit permit, it is difficult to accept that s/he was at risk of persecution. If s/he presents himself with no official papers, s/he may seem dubious as well although for other reasons.

I am not arguing for a simple one-way evaluation of situations like these. Quite the opposite, I stress the need for a close and individual assessment of the trustworthiness with a critical dissociation from standardized prejudice. Of course, this is easier to ask for than to comply with.

How are we to decide on the credibility of a statement?

1. Often credibility is based on repetitive experiences with the person at hand. A basis for ascribing credibility to a person may be the fact that similar situations involving the same person have been repeated many times, and one's experiences from these former occasions determine the assessment. This approach is of no help to the refugee.

2. Credibility may be based on the fact that the person at hand is perceived in a broader context, *e.g.* 'I don't know you but I know your father'. This is rarely relevant in refugee law.

3. The situation (threat, travel route, type of fear etc.) is well known to me – not personally, but from many former cases. The case at hand follows the pattern of other cases and may affirm credibility, or it deviates from a known pattern and creates suspicion. This approach is probably important but evidently dangerous as well. After all, we rarely know whether our trust or mistrust was entitled. It favours the refugee who has been affiliated with local organisations that are known and has followed routes (in travel and thought) which are in harmony with what we have experienced many times.

4. The difficulties I have sketched make it tempting to concentrate on the statement of the applicant. This focus may be an explanation why contradictions have attracted such interest in the practice of refugee law.

As already mentioned, the term credibility may be seen as a concept signalling a position in a general debate in the law of evidence. Since the classical debate between professors Tribe[3] and Finkelstein and Fairley[4], on the mathematization of

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[2] *Cp.* Jane Herlihy, Proof and Credibility in Asylum Law, Evidentiary Assessments and Psychological Difficulties*, infra* Chapter 7, in particular Section 7.3.

[3] L. Tribe, 'Trial by Mathematics: Precision and Ritual in the Legal Process' 84 *Harvard Law Review* (1971) p. 1329 and 1810.

the law of evidence, the dominant science-oriented approach to the law of evidence focusing on some sort of stochastic or mathematical probability has been complemented by an alternative effort. Adherents of the alternative approach attempt to establish a foundation of the law of evidence in a way which recognises the specific legal practical situation as different from the situations where the mathematical probability is appropriate. The concept of credibility may be 'translated' to concepts derived from the calculus of probability or statistics. According to this view, a statement considered to be credible may be understood as a statement considered more probable than its negation. Beyond that, a quantifier (for instance a percentage) might be attached to it. Such precision is normally completely unrealistic and unfounded.

Alternatively a focus on credibility could be understood in a context such as the following:

1. Credibility is normally ascribed to a person, sometimes only to some specific statements of that person. Hence, to base a legal decision on credibility is to base the decision on another person or on statements deriving from that person.

2. By ascribing credibility to a person, the judge delegates the decision to this person, and such delegation lightens the judge's burden of claiming a fact about which s/he has no (personal) knowledge.

3. It locates the responsibility of the decision in the local environment of the conflict and thereby recognises the responsibility of the involved persons instead of taking the decision away from the local environment.

4. In short it gives a specific legitimacy to the process of establishing facts.

An evidentiary approach which includes credibility as described here may only be realized if the decision makers (judges) have some familiarity with the elements on which a credibility assessment may be built. This claim is especially important in refugee cases where the claimant normally comes from a culture (including language, religion, education, economy etc.) which is very different from that of the decision maker.

2.3. ABSENCE OF CORROBORATION OR 'THE BENEFIT OF DOUBT'

Faced with the task to decide on a relevant fact one will often be in a position where *more* evidence is needed. The prosecutor asks the police to investigate an obscure point in the account of the accused, or the debtor is asked whether s/he can present a receipt to show that s/he really paid his/her debt. If such evidence is presented, the position of the party asking for evidence may be weakened in relation to his evidentiary position. That is, the absence of corroboration somehow supports the alternative assumption of the facts of the case. Such requests for specific pieces of evidence may be explicit (as in the examples I just mentioned) or they may be implied and tacit. To wit, it is well known that a relevant fact, *e.g.* a contract, a payment or a complaint will not be acknowledged if denied by the other party unless

[4] M.O. Finkelstein and W.B. Fairley, 'A Bayesian Approach to Identification Evidence', 83 *Harvard Law Review* (1970) p. 489, (1971) p. 1801.

it is demonstrated by means of a written contract, a receipt or the statement of a witness.

Commentators in refugee law often consider it a special trait that such corroborating documentation is not necessary to consider the conditions for the grant of asylum proven. A reliable statement of the asylum applicant may be sufficient as proof. This rule is sometimes described as a concession of the 'benefit of doubt'.[5]

Normally the 'benefit of doubt' is used in criminal cases to express a burden of proof, i.e. the burden lies with the prosecutor, which implies that if there is reasonable doubt about the guilt of the accused, the accused has to be acquitted. In refugee cases, we are not talking of a burden of proof in this context, and we are not supposing that there is any reasonable doubt.[6] We are only commenting on the evidentiary law stating that, when a credible statement has been made, such a statement may be sufficient proof and will be sufficient if not disproved. Basically it is very misleading to identify to the two understandings of 'benefit of doubt': In criminal cases the 'doubt' (about the guilt of the defendant) is *not* to be accepted, *i.e.* the 'benefit' consists in the judge's *rejection* of the evidence which has been presented to prove the defendant's guilt but does not succeed to remove doubt, while in refugee cases the 'benefit' consists in the *acceptance* of an applicant's statement about which you might under other conditions raise doubt.[7]

In civil disputes about payments, a statement from the debtor will usually be available. The debtor may be credible, but the judge will regularly demand some evidence that the disputed payment actually took place. Credibility is not enough. This difference should not be surprising . In civil cases the explicit or implicit requests for evidence are widespread and form the basis for most of the evidentiary activity.

It may be more informative to consider criminal cases where only the victim is available for a statement (apart from the account of the accused). In cases of rape or incest the evidence consists of the statement of the accused on one side, and the statement of the supposed victim on the other. Often, there is no possibility for the judge to request further information. In such cases credibility is certainly in focus, and if the judge would not convict on the basis of a trustworthy account alone, s/he would seldom be able to convict in practice. If there is a witness who has observed the events, the judge would probably not convict without hearing that witness (unless the judge has received a very good explanation why the witness was not called). An omission to call the witness may be as damaging as forgetting to save a receipt for the payment of a written debt. But while the debtor will not be in a better position if the debtor explains that s/he did not ask for a receipt, the prosecutor has a

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[5] On the benefit of doubt in refugee law *see* B. Gorlick, Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status, in *Asylum in Europe: Stategies, Problems and Solutions*, *supra* note 1, p. 15 *at* p. 25 ff; UNCHR, *Handbook on Procedures and Criteria Determining Refugee Status* (Geneva, 1992) §§ 203–204.

[6] On burden of proof in criminal law *see e.g.* A.A.S. Zuckerman, *The Principles of Criminal Evidence* (Clarendon, Oxford, 1989) p. 105 ff.

[7] *Cp.* Geoff Gilbert, Exclusion and Evidentiary Assessment, *infra* Chapter 9.2.

much better case if it is possible to demonstrate that there was no witness to the criminal acts. In such a situation we would probably not talk about any benefit of doubt since the accused can only be convicted if her/his guilt is beyond reasonable doubt.

What is important to note then is that the asylum applicant may be requested to state her/his history entitling him/her to asylum, but the applicant cannot be expected to be in a position to prove the statement, or rather the proof is in the statement. As is the case for the victim of rape or incest, a credible statement may put others under heavy charges and provide a basis for far-reaching decisions.

In assessing whether to trust a statement of an applicant, the court normally has no knowledge of the applicant. This does not distinguish refugee cases from civil or criminal cases where parties and witnesses are normally unknown to the court. But, as already mentioned, there is an important difference in the fact that the applicant usually comes from a culture very different from that of the judge. This problem is not easy to resolve. It may best be handled in the light of some 'benefit of doubt' in the sense that the court should be open to trust not only tragic but even surprising statements that are not without discrepancies.

Which statements should be trusted depends not only on the credibility of the applicant but on the information produced by the administrative authorities as well. This is the theme of the following section.

2.4. BURDEN OF INFORMATION ON THE AUTHORITIES

Credibility or trust can only be found in a context of some interpersonal understanding, where the court perceives and is able to interpret statements of the applicant in a cultural setting which is within reach. In hermeneutics this is referred to as a fusion of horizons of understanding. To talk of 'understanding' does not imply that the statement of the applicant is accepted. When a judge concludes 'we do not trust your explanation', it is based on listening, interpretation and – in this case – rejection. To establish an understanding of this character demands more than technical listening. Asylum cases demonstrate knowledge, assumptions or prejudices on the general conditions that are to be assessed concretely in each case. This includes *inter alia* the political and religious situation in the country of origin, the manner by which forbidden political opposition or suppressed religious activity expresses itself, the organisation of membership and the conditions of emigration and travel in general.

It is a common feature in national practice to establish a duty for the authorities to assist in the decision-making. The duty of the authorities is to forward information, which may correct, question or even refute information coming from the applicant, *e.g*. reports from the relevant embassy or locally active NGOs. Absence of such information implies that credibility is not doubted. It is not the duty of the applicant to produce material that confirms her/his statement. But the authorities are to forward information, irrespective of whether it corroborates, that is

they are not parties which can take a partisan position selecting only such information which may cause rejection and thus limit immigration.

If or when information such as embassy reports are produced, the applicant is advised to then produce evidence to invalidate those reports or other information from the authorities. The applicant cannot be content with her/his statement alone. If the applicant claimed to have been persecuted for a certain political activity, and the local embassy has made an official report to the effect that political opposition is tolerated, it will be necessary for the applicant to furnish supplementary information. Such sequences of alternating evidential burdens of information are well known in civil and criminal cases. The change of the burden is based on an assumption or prognosis about how the court will evaluate the evidence so far at hand. It is immaterial that such an assumption is often uncertain or even erroneous.

The information produced by the authorities naturally varies depending on the situation. The example I hinted at may nevertheless be characteristic: An uncorroborated statement from the applicant is opposed with an official report by the embassy. It must be stressed that such conflicts are not reserved for refugee cases, but are well known in civil, administrative and criminal cases where courts have to consider and decide on conflicts between private and official propositions on facts, or even conflicts between several, conflicting official statements, with the court's statement being the final one.

Those taking part in such decisions have to be aware of the perspective and focus of each author of the various statements, the type of information on which they are based, and the organisational context in which the authors work and obtain their recognition. Compare a judge and a historian looking at events which materialised a decade earlier – this might illustrate the need to maintain a critical perspective.

If we return to the initial situation after the presentation of a credible statement, the legal position of the authorities may be provisionally described as entailing a burden of producing information, or simply an evidential burden. This burden is normally conditioned by the presentation of a credible statement from the applicant. The relationship between this statement and the authorities' burden may nevertheless be more complicated since doubts as to the credibility of the statement are often based on supplementary information from the authorities. It is not easy to distinguish sharply between what should be a condition (credibility) and what is a consequence (burden).

We claim that a credible statement may be sufficient proof. This principle implies that the court enters into an individual assessment, reaches a concrete understanding of the statement and involves itself in a communication process. The result may be acceptance or rejection. But the important element is the accepted absence of confirmatory evidence. The court is expected to trust. Drawing on an earlier example, it will eventually trust a statement that is not confirmed as a debtor confirms his payment not only by telling s/he has paid but by producing a receipt to confirm his story. The court has to be prepared and willing to trust a story, which may not even be very probable – but which is told in a credible way.

This principle is challenged in so far as one integrates contradictory evidence which challenges the credibility of the statement. Theoretically, a distinction cannot be made since all knowledge – the prejudices (to use a hermeneutical term) – of the court is involved in assessing credibility. And how can it be persuasively argued that the authorities may not supplement or correct such knowledge before the court finally maintains that the statement is credible? My conclusion is that the intertwinement of credibility and contradictory evidence is not only unavoidable but may be relevant as a source for reflection over the prejudices of the court, a way of debating the prejudices with which the court encounters the case.

To be sure, an important rationale for the weight put on credibility of the applicant's statement is the absence of any demand that it is corroborated. As a matter of consequence, a court wondering whether some element in an applicant's statement deserves trust should not reproach the applicant that does not bring with him evidentiary documentation to confirm his story. Since this observation is relevant to the part of the statement about which the applicant may have exclusive knowledge, and not to the part of the statement or its presuppositions which concern the general conditions in the homeland, I will elaborate a little on the character of the disputed facts.

2.5. TWO TYPES OF RISK

Two questions are regularly used to explore the evidentiary aspects of a refugee case:

1. With which probability or certainty may we assume that various groups in State X risk being persecuted? Are homosexuals really persecuted in State X and if so which risk does a homosexual living in State X run of actually being persecuted? This may be termed the question of *'risk-group existence'*.

2. With which probability or certainty does A (the asylum applicant) belong to a risk-group? The question focuses on A's belonging to a certain group to which s/he claims to belong, and which we suppose to be a risk group. By way of example, the question may be whether A really is homosexual or whether A positively has taken part in a certain religious activity. This may be termed the question of *'risk-group affiliation'*.[8]

The first question forms part of a general description of the living conditions in the applicant's country of origin, while the second question concerns the applicant as an individual. The two questions do not only concern the specific situation as it is, but they also demand an answer to supplementary questions about which degree of probability or which type of certainty is necessary or sufficient. Questions of the latter – normative – type may be answered very differently.

[8] It is not always possible to distinguish the two questions *e.g.* the applicant who does not know why he has been persecuted, may have a well-founded fear of continued persecution, but the fear cannot be analysed from these two aspects.

Interpreting the treaty-based protection of refugees from specific types of persecutory risk, the level of risk may certainly be less than 50 per cent[9], whatever that may mean, and as far as I understand it is actually much less than that. To assume that the applicant actually belongs to such a group, that is a group whose members may have a well-founded fear of persecution, demands more than showing that it is a *possibility*. It is in this area of factual dispute that supplementary information from *e.g*. embassies or local NGOs may be especially helpful.

I do not find much guidance in percentages. Rather, I would return to the credibility test according to which the question is the following: does the explanation given by the applicant seem reliable or trustworthy?

In cases where it is possible to distinguish between the *existence* of and the *affiliation* to a risk group, the difference in focus and in the types of information asked for reasonably demand a distinction to be made when assessing the evidence in the case. I would not recommend the procedure proposed by Carlier[10] to *integrate* these two aspects of the risk with the level of possible persecution in an all-encompassing probability calculation, since I consider these elements very different in character.[11]

Moreover, I would not recommend, where a risk group with a sufficiently high risk for persecution *exists,* and the problem is whether or not the applicant *belongs* to that group, to reduce the level of required proof of *affiliation* only because the level of risk for persecution was higher than what is otherwise deemed sufficient. Sometimes the two aspects are not independent of each other (information from asylum applicants contribute to the asylum adjudicator's knowledge of the applicant's country of origin and is integrated into its 'experience'), and statisticians would be unhappy with a simple multiplication of the probabilities.

2.6. BURDEN OF PROOF AND CREDIBILITY

In practice and in the literature, there seem to be various positions on the question with whom the *burden of proof* rests. If these differences were taken seriously we would have enormous variations in national regulations. If criminal law had featured similar variations in answers to a question whether it is the accused or the prosecutor who bears the burden of proof, we would be astonished. When it comes to refugee law, I think that the variations may not reflect differences in the national law systems but variations in the suppositions and applied concepts.

I have mentioned the *burden of producing evidence* (or the evidential burden) in a specific situation, namely after the presentation of a credible statement from the applicant. We may generally talk of a burden of producing evidence which points out the party (or the position) who has to (is under the burden to) present some further evidence to avoid losing the case as a consequence of the court finding the

[9] *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) U.S. Supreme Court, 9 March 1987.
[10] J.-Y. Carlier et al., *supra* note 1.
[11] *Cp*. Jens Vedsted-Hansen, The Borderline Between Questions of Fact and Questions of Law, *infra* Chapter 4.2.

facts as claimed by the other party. This burden of producing evidence is dependant on the evidence at hand, so if the evidence at hand changes, the burden may change as well.

Considering the applicant's statement as a piece of evidence and seeing this evidence as normally necessary to reach a result favourable to the applicant, we may say that the asylum applicant has the burden of producing evidence.

At this point I have claimed that under some conditions the burden of producing evidence rests with the applicant, under some other conditions it rests with the authorities. These statements are both correct and illustrate the specific character used to describe burdens of *producing* evidence.

The burden of producing evidence is one way of interpreting burden of proof. So if you consider the burden of producing evidence as equivalent to the burden of proof we have an easy and probably partly quite correct explanation of some of the variations. When talking of the burden of proof (understood as the burden of producing evidence) we are talking about various procedural conditions, and different descriptions are not necessarily contradictory.

The concept of the burden of proof may be understood in a different way. It could be framed as a concept which refers to the assumptions or perceptions of the court at the point of time when the final decision on the facts of the case are to be made. This understanding is often expressed as the *burden of persuasion* (or the legal burden). The burden of persuasion in criminal cases regularly rests with the prosecutor. This implies that the court will not convict the accused unless it is convinced beyond reasonable doubt that the facts of the case are as claimed by the prosecutor. The conviction may be based on information forwarded by the prosecutor, *e.g.* the testimony of policemen, but may as well be based on contributions from the defence, *e.g.* a confession. Discussing issues related to 'conviction' is part of a psychological discourse. Some may prefer to talk about the necessity of a high probability, in civil cases at least a probability higher than 50 per cent.

This is a difficult question: With whom rests the burden of proof on conditions for granting asylum where the burden of proof is understood in the latter sense, *i.e.* meaning burden of persuasion?

Let me mention some points, which make it difficult to answer the question. When it is claimed that this burden rests with the applicant it is frequently mentioned in the context of demands that the applicant presents a credible or trustworthy statement. Such reasoning may often be seen as a comment on the burden of *producing* evidence and is to an extent not relevant here. Nevertheless, there may be some connection: if the applicant gives a trustworthy statement (which is not invalidated by information from the authorities) the court will grant asylum. I would then assume that the court is convinced that the conditions are fulfilled. This supports a description that the burden of proof even as a burden of *conviction* rests with the applicant. But this reasoning has important limitations since it does not give us any guidance when the authorities try to invalidate: do we continue to demand some form of conviction that the asylum conditions are satisfied? Yes, basically I

think we do, although this brings the burden of proof outside the legitimacy with which it is often supported (the statement of the applicant).

At this point we are close to maintaining that the burden of persuasion rests with the applicant. This may not be completely false since the level of proof associated with the credible statement is a level that may guide us in other situations. On the other side we do not want to end up with a regulation of the burden of proof similar to what is valid in criminal law, implying that the country of origin is a sort of accused entity, so the applicant cannot get asylum unless the court is convinced about the unhappy state of affairs there. This would be quite misleading. Unfortunately, it is a reflection that sometimes may have some influence.

The act of granting asylum is basically linked to a perception of the situation that the applicant faces in her/his country of origin, since the condition of granting asylum is that the applicant would be exposed to a risk of persecution. If the fear was to be expressed quantitatively it would not need to be higher than 50 per cent.[12] This seems to entitle us to claim that the authorities must prove that a persecution will not take place, but at the same time one may as well claim that the applicant has to prove that s/he has a well-founded fear of persecution.

These difficulties seem to be connected with the nature of the theme or fact – what is the character of the 'fact' we are addressing?

2.7. SUBSTANTIVE THEME AND EVIDENCE: FEAR OR RISK – CREDIBILITY OR PROBABILITY?

The 1951 Refugee Convention requires the existence of a 'a well founded fear'. I started out by mentioning the importance that domestic practices give to the statement of the applicant and its credibility. These concepts refer to psychological and communicative aspects of a lawsuit. We may term it a subjective approach. When we are studying the practice of the court, we would look for conviction or trust as corresponding concepts. We may establish a corresponding series of concepts: Fear, credibility, trust (or conviction) as concepts with which we describe the substantive fact, the focus of the evidentiary assessment and the standard of decision.

A dominant approach in the theory of evidence is the science-oriented theory which instead of fear focuses on risk as an objective analysis of the situation in the country of origin. The risk at hand is the basis for a prediction, the evidence in the case is assessed by focussing on the probability of the fact that the asylum applicant will be persecuted in the future, and the standard of proof is some degree of probability. Hence, the relevant concepts are risk and probability. This objective approach is most clearly expressed by Lord Keith in the House of Lords decision in Sivakumaran (1988): 'The question is what might happen if he were to return to the country of his nationality. He fears that he might be persecuted there. Whether that might happen can only be determined by examining the actual state of affairs in that

[12] *See supra* note 8.

country.'[13] Goodwin-Gill states that 'the debate regarding the standard of proof reveals some of the inherent weakness of a system of protection founded upon essays in prediction'.[14] I make use of these citations because of their specific wording which focuses on the future and its probable character, but without claiming that the authors would subscribe to the interpretation I make here.

By such descriptions the question of granting asylum seems to be cast in the language of modern natural sciences. More specifically, it is framed according to the model of the well-known risk evaluations used in many social contexts. The asylum applicant is regarded as a sort of informer, an object or a set of data, which is integrated into the informational basis for a determining prediction to be made. The position may be taken to the extreme where questions of personal credibility and trust loose their relevance. You may ask – as the post-modern authors Douzinas and Warrington[15] have done – whether such data places the court in a better position to evaluate whether there is a well-founded fear.

In favour of a communicative approach I focus on 1) the wording of the 1951 Refugee Convention, 2) the traditional and widespread focus on credibility, 3) the inherent recognition of the asylum applicant, and 4) the lack of reality in trying to establish various quantified levels of risk. The communicative approach should not exclude an objective possibility of correction. This seems to be the harmonising position of UNHCR since according to the Handbook the term 'well-founded fear' contains a subjective and objective element and requires that both elements be taken in consideration.[16]

This approach supports the weight placed on *credibility* and gives the supplementary and eventually counter proving information from the authorities a *corrective* status.

2.8. CONCLUSION

A pluralistic approach to the evidence law in refugee law has proven to be fruitful in the sense that it has been possible to perceive the different types of evidence that are at hand, and the theory has offered a language which has made it possible to discuss the character, quality and practical implications of the various types of evidence.

When it comes to the more practical level of decision making it has to be emphasised that a reliable statement by the asylum applicant may be sufficient proof that the asylum conditions are met. An accurate and free statement of the applicant as early as possible is therefore crucial to a correct handling of the application. This type of evidence reflects the relevance of credibility in the evidentiary assessments.

The authorities have a burden to contribute to the information of the case. They are not entitled to be one-sided or biased in the sense that they are more eager to

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[13] *Sivakumaran* [1988] AC 958, House of Lords, 16 December 1987.
[14] G.S. Goodwin-Gill, *supra* note 1, p. 39.
[15] C. Douzinas and R. Warrington, *supra* note 1.
[16] UNCHR, *Handbook on Procedures and Criteria Determining Refugee Status* (Geneva, 1992) p. 38.

present negative evidence, which undermines the statement of the applicant, than to provide corroborative or otherwise negative evidence which tends to support the application. The authorities have a burden to produce corroborative as well as negative evidence. If this burden is not met it may be relevant in the evidentiary assessment, and such lack of relevant and accessible evidence reflects the corrective approach to evidence.

The statement of the applicant is not only important, but often the only evidence providing the concrete circumstances of the applicant's country of origin. This focus may explain that an analysis of the statement is an important method to reach a decision in the case. What is termed here as a contradiction may be an internal self-contradiction or part of a statement that is contradicted by external evidence, *e.g.* official reports about specific local roads and buildings. The relevance of contradictions should not be exaggerated. Contradictions do not necessarily imply that the conditions for granting asylum are not fulfilled.

CHAPTER 3

EVIDENTIARY ASSESSMENT AND *NON-REFOULEMENT*: INSIGHTS FROM CRIMINAL PROCEDURE

Aleksandra Popovic

3.1. INTRODUCTION

Domestic practices of refugee law borrow elements from civil as well as administrative law and procedures. In addition, terminology drawn from criminal law is involved, as reflected in references to the "benefit of the doubt". This chapter assumes a top down perspective in search for a common meaning of the terminology and a first survey of possible steps towards the harmonization of domestic practices. Even if effective protection does not impose a single and uniform procedure, it does put some general requirements on any procedure that the Contracting States may choose for the adjudication of the *non-refoulement* rule. This chapter is therefore devoted to the following objectives:

1. To show that a good decision in which *non-refoulement* is adjudicated essentially consists of the same components as good decisions in criminal procedures;
2. To provide examples on how states have incorporated these components into their practices;
3. To argue that the following three frequent statements about asylum procedures actually are normative misconceptions:
    A. Asylum seekers should provide an asylum claim;
    B. Domestic asylum procedures allow officials to make objective assessments of questions of law and facts in their adjudication of refugee status and *non-refoulement*; and
    C. The applicant has part of the burden of production (assertion of evidence) and burden of persuasion (evaluation of evidence) for establishing refugee status and *non-refoulement*;
4. To provide examples on how these misconceptions have influenced state practices and to describe the effects this has on the quality of the decisions;
5. To carve out concepts of "burden of proof", "standard of proof" and "benefit of the doubt" in a way that makes semantics comparable in different domestic procedures.

Section 3.2 and its sub-sections shall identify the normative requirements for a proper asylum procedure drawn from the construction of the *non-refoulement* rule in Article 33 of the 1951 Refugee Convention and deviations from this standard in

domestic asylum procedures. In Section 3.3, it will be shown that there is a normative requirement on evidentiary assessment in refugee status determination and the adjudication of the *non-refoulement* rule. This standard and deviations from it in domestic practices will be further developed in Sections 3.3.1 to 3.3.3.2. The body text is devoted to a generalized description of normative and practiced standards of evidentiary assessment and procedure in the field of asylum in industrialized countries. Where appropriate, examples of state practice will be referenced in the footnotes of this chapter. Section 3.4 will offer a set of conclusions.

3.2. DESCRIBING THE PROCEDURAL STANDARD OF ARTICLE 33 CSR

The refugee definition in Article 1A(2) of the 1951 Refugee Convention offers a perfect example of a vague norm, remaining tacit on exactly how to reach its aims and to identify the point at which these are satisfactorily fulfilled. It contains a terminology that indicates that the "hows" and "whens" of fulfilling the aim widely exceeds not only the knowledge of the drafters but also ready-to-use scientific knowledge. To define the type of situations in which someone is *unable or unwilling to avail her/himself of the protection of the country of origin owing to a well-founded fear of being persecuted on account of any of the five convention grounds,* we would have to make complex analyses of human dignity and human nature, as well as risk analyses based on probabilities or notions on causality.[1] These are fields in which our knowledge continuously develops and which raise notions of humanity and social interests that are under continuous re-evaluation.[2] The refugee definition must therefore be interpreted to make the 1951 Refugee Convention into a living

[1] In C. Rousseau, F. Crépeau, P. Foxen and F. Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board', Vol. 15, No. 1 *Journal of Refugee Studies* (2002) pp. 43–70, the adjudication of refugee claims is described as the single most complex adjudication function in contemporary Western societies (p. 43).

[2] When a shaman puts a death spell on victims, anthropologists have seen them die within short delays. While natural scientists would say that there is no risk of a person dying from a magical spell, anthropologists have actually observed such risks and can explain them from a psychosocial perspective. The subjective beliefs of the individuals in the tribe observably and objectively do lead to death. If we take into account the scientific knowledge of the anthropologists, we would come to the conclusion that there is a well-founded fear and a clear threat on the victim's life in this situation. If we limit the perspective to natural science, we would find the beliefs behind the fear objectively unjustifiable. Natural science would however not be able to disprove the well-foundedness of the fear. If we say that the fear is not well-founded we would perforce imply that the well-founded fear is self-inflicted or culturally inflicted and therefore does not justify protection. Because the Convention uses the term "well-founded fear", and not "objective risk", the refugee definition cannot be interpreted to be limited to situations that can be explained by natural science or abstract statistics. In this respect fear is something inherently subjective.

instrument, the effective protection standard of which, in the absence of a supra-national organ, is developed at the domestic level with the support of the UNHCR.

In this endeavour the Contracting States face the same problems that the ECtHR has faced in developing its case law under Article 13 of the ECHR, providing for the right to an effective remedy. The situation of a refugee in an immigration case resembles the situations described in the ECtHR case law on the existence of a duty of investigation in cases of alleged violations of *inter alia* the prohibition of torture or inhuman or degrading treatment or punishment, the right to life and unlawful detention.[3] In these cases, the effectiveness of a remedy includes a positive obligation to *learn more* about factors that may raise issues under these rights. Article 33 of the 1951 Refugee Convention expressly extends this interest of preventing the effects of serious human rights violations to be taken into account when Contracting States decide on the removal of immigrants. It is thus not surprising that the terminology used in immigration procedures represents a mixture of criminal, civil and administrative procedures. The following section will seek to explain why criminal law terminology is applicable in the refugee law context, and Section 3.2.2 will give some examples of where the terminological mix in domestic asylum and *non-refoulement* procedures reveal misconstructions in the procedures of domestic asylum systems.

3.2.1. Non-Refoulement *and Criminal Procedures*

Whenever a refugee is sent to a country where her/his life or freedom would be threatened on account of her/his race, religion, nationality, membership of a particular social group or political opinion, the removing country has wronged not only the refugee but also the other Contracting States, because the host-state has overstepped its competence under international law.

In the best of worlds, fulfilment of the *non-refoulement* rule would work as a chain-reaction from the breakdown of domestic protection, via flight and the reaching out for protection, to sanctuary in another country. In reality sanctuary in another country does not follow automatically on the asylum seeker's fulfilment of the criteria in the refugee definition. Instead, domestic asylum and *non-refoulement* procedures require active deliberations by host-country officials. A host-country wishing to remove an immigrant thus has to *justify this action by determining whether the particular immigrant is a refugee or not.* What the officials should look for is stipulated in the refugee definition.

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[3] *See inter alia* the Case of *Keenan* v. *the United Kingdom*, Application no. 27229/95, Judgement of 3 April 2001, Reports of Judgments and Decisions 2001-III, and The Case of *Assenov and others* v. *Bulgaria*, Application no 24760/94, Judgement of 28 October 1998, Reports 1998-VIII; for a review of the case law *see* Jacobs and White, *European Convention on Human Rights*, third ed., (Oxford, 2002) pp 386–395 and Alastair Mowbray, 'Duties of Investigation Under the European Convention on Human Rights', Volume 51, Issue 2 *International and Comparative Law Quarterly*, (2002) pp. 437–448.

According to the refugee definition, the asylum seeker has to provide a reaction to the protection motives: *fear***.** Reactions of fear can manifest themselves in different ways, but the refugee definition stipulates one particular manifestation of fear as decisive for activating the *non-refoulement* rule, i.e. *the inability or unwillingness to avail oneself of the protection of the country of origin*. In reality, domestic asylum procedures have added an additional requirement of an action to manifest fear by requesting the submission of an application form.[4] Normatively, the *non-refoulement* rule is a prohibition on the state. Therefore, it has to ensure that the immigrant is not a refugee before executing removal, if that immigrant is unable, or, owing to such fear, unwilling to avail her/himself of the *protection* of the country of origin. This rule applies regardless of whether or not this reaction has been declared in a particular medium like an application form.

Before the state can legitimize the removal of an asylum seeker it has to ensure that the applicant's fear of persecution is *not well-founded* **,** i.e. that inability or *unwillingness to avail her/himself of the protection of the country of origin is not a justified reaction to the particular situation that the individual actually is in*. In order for the state to recognize a well-founded fear of persecution the state would have to *know or learn to know* what a well-founded fear of being persecuted is and that such fear is absent in the particular case.

The reason why I use the terminology of "knowledge" and "learning" is because defining "well-founded fear of being persecuted" is, first, a question of *interpretation of the law* and, second, an expression which is vague enough to encompass many different situations in a fast changing reality. It is very difficult to define this expression in an exact as well as all encompassing manner. Still it is not a question of evidence but of evolving legal knowledge.

Before officials can learn whether the situation of the applicant corresponds to the criteria in the refugee definition, they have to know whose strategies and evaluations are supposed to form the starting point for the assessment. If it is that of the parties, it is usually submitted in the form of a claim. If it is that of the officials themselves, it would take the form of one or several working hypotheses in their minds.

As the *non-refoulement* rule is a prohibition, there is no support in the structure of the norm that the starting point for the decision should be a claim for *non-refoulement*. Just as a rape victim does not have to present a claim before, or after, s/he is raped in order for the rape to be prohibited as such, the state cannot require the asylum seeker to present a claim for *non-refoulement* before, or after, the deportation in order for the deportation to be prohibited, if it in fact is prohibited according to the law.

Both criminal procedures and procedures in which *non-refoulement* is adjudicated could be described as procedures *legitimizing state action against an individual's integrity* – in the case of the former it is in the way of punishment for a

[4] *See, e.g.,* US Code of Federal Regulations, 8CFR208.3.

crime committed and in the latter it is in the way of removal from the territory against the will or ability of the asylum seeker.

When an asylum case is initiated and there is a suspicion that the immigrant could be a refugee, the starting point of the assessment of the case should be *non-refoulement*. *The host-country* (as the body that supervises that its own actions are in conformity with international refugee law) *ought to assume the whole burden of production and of persuasion to prove that the action is legal before it is executed against the will and integrity of the individual*. The starting point of the assessment in an asylum or *non-refoulement* procedure should thus be a hypothesis of *non-refoulement* and a duty of (objective) investigation.

The host-country could detect a refugee in the same way that the state learns whether a person held to be a rape victim is a real rape victim: *by employing a procedure guaranteeing that decisions are based on a high degree of legal certainty about the facts in the case and a continuous development of coherent case law*. Criminal procedures are constructed to promote the maintaining of norms within a society and to "check and control" whether the norms are upheld. Solving a crime starts out with clues from which one or more hypotheses are constructed, continues with a test of the truth value of the hypotheses, and ends with a conclusion about the relationship between the hypotheses. In the subsequent trial, this conclusion is checked, controlled and explained. Criminal procedures mirror the way the human mind attains and shares knowledge. This is also the way the mind of asylum determination officials should work and the way the asylum procedure should allow the minds of asylum determination officials to work. Nothing less would be acceptable when implementing an individual right as in the case of the *non-refoulement* rule in Article 33 of the 1951 Refugee Convention.

A criminal procedure starts long before the actual criminal trial. The criminal trial is a reconstruction and a test of the prosecutor's decision to prosecute a particular suspect. From a methodological perspective, *a negative first instance decision* in an asylum case can be compared to the prosecutor's decision to prosecute a suspect.[5] The decision equals that of a decision to prosecute in a criminal procedure rather than that of an administrative sanction, because the "crime" of the asylum seeker that is implied in a negative asylum decision is not an administrative misdemeanour. Instead, it very much resembles *false incrimination* of the government (or other agents of persecution) in the country of origin and the "*sanction*" is (if the asylum seeker actually is a refugee) per definition substantial as it means being eligible for removal against her/his own will to a country where s/he risks persecution.[6]

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[5] For the purpose of this chapter "a negative decision" encompasses any decision (whether made in "affirmative", "defensive" or accelerated asylum proceedings) that has the effect of denying the asylum seeker the right to *non-refoulement* and that thereby makes the asylum seeker eligible for deportation. The definition includes negative decisions on asylum or subsidiary protection.

[6] The ECtHR has in its case law maintained that it is not the will of the Contracting States that decides on what constitutes a criminal charge. In the case of Engel and Others v the

Within this analogy, the roles of *police/border control agents and first instance officials* correspond to the roles of the police and prosecution in the criminal procedure. The *asylum seeker's* role can fluctuate between the role of the alleged victim in a criminal procedure and the role of someone accused of false incrimination. Ultimately, this will depend on whether the decision maker is leaning towards a positive or negative decision.[7] The similarities with the case of an alleged rape victim are apparent. If the asylum seeker is a refugee s/he cannot be punished with deportation for "false incrimination", and if the alleged rape victim is an actual rape victim s/he cannot be charged for false incrimination.[8] In addition, the focus in evidentiary assessment in rape cases is often on the statements of the alleged victim. Correspondingly, in refugee status determination, the same focus is on the statements of the asylum seeker.[9]

As stated earlier, the right to *non-refoulement* may in practice be contingent on submitting an application.[10] However, host state officials have a responsibility not to execute a deportation order if they suspect that the immigrant is a refugee.[11]

Netherlands (judgement of 8 June 1976, A 22, §§ 81-82) the ECtHR established that there are three criteria against which the existence of a criminal charge in the ECHR meaning should be assessed – the so called Engel criteria: whether the provisions defining the offence also belongs to criminal law in the particular Contracting State, the nature of the offence (i.e. an offence that is criminalized in other countries) and the degree of severity of the penalty. I would like to underline that the purpose of this analogy is *not* to prove that negative asylum decisions should constitute criminal charges according to the case law of the ECtHR but to show that there are enough similarities between these two types of cases to justify an analogy when it comes to evidentiary assessment.

[7] With positive asylum decision I mean any decision that makes the asylum seeker ineligible for deportation, on the definition of the negative asylum decision *see* note 5 *supra*.

[8] The US can provide an example of procedures acknowledging that there is a difference between the adjudication of the positive and the negative first instance decision. In USA there are two different procedures: the "affirmative" and the "defensive" asylum proceedings (see US 8CFR208.1). Withholding of removal is adjudicated in the defensive proceedings before an immigration judge and the role of the applicant in this predominantly adversarial procedure (court-room-like procedure between two adversaries – the host-country government and the applicant) is equivalent to that used for charges of false incrimination.

[9] Most mainstream asylum interviews include questions about identity, travel route and entry if there are such issues in the case, and only subsequent developing of the applicant's flight reasons; *see, e.g.*, Article 4 (2) Council Directive 2004/83/EC (29 April 2004) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive). The Qualification Directive reflects a minimum standard in 25 European countries.

[10] *See* note 4 *supra*.

[11] Removal may not be executed if there is reason to believe that the immigrant is a refugee, *see, e.g.*, Fact sheet on 'Obtaining Asylum in the United States: Two Paths to Asylum' under the heading: 'Asylum-Seekers and Expedited Removal' at <http://uscis.gov/graphics/services/asylum/paths.htm>, viewed on 2005-01-03. In recognition of the fact that some refugees may be hesitant to come forward with a request for protection at the time of arrival, immigration

Similarly, in most cases the rape victim will have to report the crime to the police in order to initiate a criminal procedure.

Finally, there is a resemblance between the alleged rape victim and the asylum seeker in that the suspect in a criminal investigation is protected by procedural rights, and the potential persecutor is protected by a sovereign state.[12] *Both the accused and the presumptive persecutor are thereby typically off limits for investigating officials.*

The adjudication of an *appeal* corresponds to the criminal trial itself. The role of the adjudicators in the appellate body matches that of the judge (and jury) in the criminal trial. The first instance authority corresponds to the prosecution. The asylum seeker plays a part that corresponds to that of the alleged offender in the criminal trial, with the apparatus of the state pitched against her/him. In reality, however s/he lacks the full protection of procedural rights and still carries the burden of asserting and evaluating evidence. Hence, in the adjudication of the appeal the position of the applicant has visibly changed from an alleged victim of anticipated persecution to an alleged "incriminator". *The position of the country of origin has de facto changed from the position of an accomplice in acts that anticipate persecution, to the position of the alleged victim of false incrimination.*[13] The two roles played by the country of origin must be included in the analysis of evidentiary assessment in asylum determination. This is the only way to explain the otherwise disproportionately high reliance on general statements in country of origin reports.[14] Just as in the play *Waiting for Godot* the main character never enters the stage: in the case of refugee status determination, it is the country of origin. As in Beckett's play, refugee status determination procedures and rape cases have a role composition in which the actors are performing a balancing act that can easily slip into a gap of senselessness and absurdity.

Refugee status determination is thus fully comparable to the procedure in criminal cases.[15] Looking at refugee law and procedures from this perspective gives

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policy and procedures in the USA require Inspectors to ask each individual who may be subject to expedited removal a series of "protection questions" to identify anyone who is afraid of return.

[12] Where the source of persecution is a non-state agent or the country of origin a failed state, this statement must be modified accordingly.

[13] I am well aware of the fact that asylum determination is considered a depoliticized area and that a decision of a host-country to give an individual asylum does not reflect a negative judgment by the host-country on the country of origin.

[14] Article 4 (3) of the Qualification Directive (*supra* note 9) elevates relevant facts relating to the country of origin to at least the same level as relevant facts relating to indications of previous or future subjection to persecution (country of origin information tops the list of facts to be taken into account). This does not seem to be a coincidence. It could be an indication that EU Member States apply an "objective approach".

[15] The reluctance to accept an analogy between asylum and criminal procedures is typically based on a reduced perception of the criminal procedure. If the entire process of solving a crime is taken into account, evidentiary assessment in criminal cases is fully comparable to that in asylum cases.

a very useful frame of reference. The "machinery" of refugee determination procedures is not nearly as well developed as that of criminal law procedures. It would be foolish not to draw on the structures of criminal law to the extent they are comparable to asylum law in order to describe the evidentiary practices of asylum determination. While lawyers, criminologists, psychologists, sociologist and social psychologists have worked for decades and centuries trying to determine why people choose to uphold or break the law, as well as the characteristics of witnesses and of victims of crime, modern asylum law has only been around for some fifty years.

3.2.2. Deviations from the Procedural Standard: Hunt for the Lost Claim

Just like the victim is a victim by virtue of a crime being committed against her/him, whether this is recognised by anyone or not, the refugee is a refugee by virtue of fulfilling the criteria in the refugee definition.[16] Consequently, *non-refoulement* is not constructed as a claim-right. Rather, it is a prohibition binding the host-country *eo ipso*. If refugee status has not been adjudicated and acknowledged in such a way that it immediately gives the refugee protection that corresponds to the rights enumerated in the 1951 Refugee Convention, this status would have to be adjudicated every time the protection standard is questioned in an individual case. Almost all countries have avoided this situation by introducing a right to asylum for refugees in their domestic legislation.[17] This right to asylum is supposed to implement all the enumerated rights in the 1951 Refugee Convention. Asylum is roughly constructed as what could be termed a claim-right: if the asylum seeker can prove that s/he is a refugee, the host-state is at best obligated to provide her/him asylum.[18]

Through this construction the role of the asylum seeker becomes more burdensome than that of the prosecutor in most criminal cases. The weight of the additional onus depends on the inclination of the examiners and the information gathered by the asylum procedure officials. After all, the asylum seeker not only has to prove a hypothetical risk for persecution (which *per se* is more complex than proving attempt because it is not clearly defined in case law and doctrine) but also that this risk is attributable to a relatively abstract establishment – agents of

[16] UNHCR, *Handbook on Procedures and Criteria Determining Refugee Status*, Geneva, 1992 (UNHCR Handbook) § 28, concurs with that the status is declaratory. § 14 of the Preamble of the Qualification Directive (*supra* note 9) also notes that the status is declaratory.

[17] *See, e.g.,* Chapter VII of the Qualification Directive (*supra* note 9) and Article 3 (b) of the Amended proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status 8771/04 [Asylum Procedures Directive] on which political agreement was reached at the Council meeting on 29 April 2004.

[18] *See, e.g.,* Article 4 (1) of the Qualification Directive (*supra* note 9): 'Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection', and US 8CFR208.13 and 8CFR208.16: the burden of proof for both asylum and withholding of removal in the USA is on the applicant.

persecution in the country of origin – as well as the nexus of this risk with one of the five convention grounds. The role of the asylum seeker in domestic asylum procedures may also change, depending on the changing perception of the applicant's character by the officials. As a rational actor, the asylum seeker has a burden of production and a burden of persuasion (corresponding to the role of the prosecutor). If the asylum seeker is a real refugee – a helpless victim – s/he is the main provider of (objective) facts. But the asylum seeker does not have the full protection of the procedural guarantees enjoyed by the accused even though the procedure at any stage, and definitely in the appeal, can turn into an adjudication of something that resembles a case on "punishment for false incrimination". *An asylum seeker is in the same position that a person presumed guilty of a crime until proven innocent would be in, provided that the state was generally willing to punish everyone that the government does not fancy*. Imagine the integrity required of state prosecutors deciding on applications for "non-punishment" in such a system – this is exactly the position of authorities determining refugee status.

One "special feature" about asylum procedures – implementing the *non-refoulement* rule – is thus that the burden of production and burden of persuasion are placed on the wrong actor, i.e. the asylum seeker.[19] This is a deviation from logic. The central act that is at stake in refugee status determination is return against the will of the individual asylum seeker. To legitimate such action, reasons are required. The actor that thereby should provide reasons for its actions in asylum cases is the host-country.

In reality, asylum procedures deviate from this norm. According to domestic law, the asylum seeker has the burden of proof for establishing the right to asylum, which implements a set of other rights, of which the right to *non-refoulement* is only one. The focus is shifted from *non-refoulement* to asylum. To be sure, asylum is at best a claim right. The asylum seeker thus has to prove a claim which does not exist under international law.

What is more, domestic procedures are constructed without any guarantee that there will ever be a possibility for the applicant to present a claim of her/his own. The first instance procedure has an inquisitorial setting, where the applicant is asked questions based on what the official perceives as relevant to ask rather than what the applicant wants to focus on and present as a claim.[20] Furthermore, asylum

[19] The Handbook observes very vaguely that the burdens for assertion (corresponding to a burden of production) and for evaluation (corresponding to a burden of persuasion) are shared; UNHCR Handbook § 196 (*supra* note 16). Evidently it is not entirely clear what is meant with the burden of proof being on the asylum seeker.

[20] Even in the predominantly adversarial "defensive" asylum proceedings in the USA, the evaluation of facts is made in an inquisitorial manner, because the procedures do not necessarily allow the applicant to present a proper claim of her/his own and relevance of the argumentation and the evidence is not restricted to what is relevant for proving the claim or for proving any particular counterclaim. Any information from subsequent or previous, investigations as well as general country of origin information is instead entered into the record. In addition, the adjudicators are allowed to produce and evaluate evidence based on

procedures do allow for the adjudicators to request that information both in favour and against the asylum seeker's case be added to the record. Reasonably, this means that relevance is not assessed exclusively with regard to the claim of the applicant. *The burden of assertion and evaluation of evidence is thus shared.*[21] *The way it is shared gives the domestic asylum procedures a structure that, first, may indeed hinder the applicant from providing facts needed in order for the officials to determine whether or not the applicant has a right to non-refoulement, and, second, it allows the officials to require the applicant to prove a claim which s/he may be hindered from presenting.*

The claim is identified only at the end of the procedure, when the record already contains information that has been influenced by the officials.[22] When we look for a claim in a record where the information has been compiled or influenced by someone other than the prospective claimant, the hypothesis we are likely to find is instead the hypothesis of the person who has compiled or influenced the information. At the same time the burden of proof is on the asylum seeker, in the sense that the asylum seeker bears the risk of loosing the case if the evidence is insufficient to prove her/his claim. In this construction, officials may not even be able to see the claim if the record is compiled based on another hypothesis.[23] We are faced with two effects. First, the system does not necessarily produce well-founded assessments of fact and, second, it does not necessarily produce a case law that could provide the feedback needed in order for the refugee definition and *non-refoulement* rule to be developed and harmonised in a coherent manner. The outcome is totally dependent on the inclination, skill and integrity of the official.

It is of primary importance to ensure that those having access to the right feedback – the asylum determination officials – also have the burden of seeking

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their own hypotheses (*see, e.g.,* US 8CFR208.11-12). When one has to prove a claim in an inquisitorial setting the standard of proof automatically becomes very high, because what the applicant needs to prove is that her/his claim (as it is perceived to be before the questioning and in particular after the questioning) is basically the only hypothesis consistent with all the information provided in the case (*see, e.g.,* Article 4 (5) c of the Qualification Directive which states that the applicant does not have to corroborate her/his claim when – among other criteria – 'the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case'). This is actually the same standard as "beyond reasonable doubt" and how heavy the burden is in the individual case depends on the doubts the adjudicators have. The doubts would be by persons who may not even share the same sense of rationality, map of the world, culture, experiences etc. This is in most cases not an assessment made by peers. For a more detailed discussion about how relevance is assessed *see* Section 3.3.1.3. Deviations from the Normative Evidentiary Standard: An Unwavering Map of the World.

[21] This is observed in the UNHCR Handbook as well, *see* note 19 *supra*.

[22] There is a very good reason for why one would want to look for a hypothesis at the end of the examination, *see* Section 3.3.2.3. Ending the Inquiry – A Hypothesis of No Other Hypotheses.

[23] The case of double rejection will be further analysed in Section 3.3.1.3. Deviations from the Normative Evidentiary Standard: An Unwavering Map of the World.

information and expressing the hypotheses that can provide possible rational descriptions of the situation of the applicant. Thus, to obtain a true picture of the first instance adjudication, we must look at it through the eyes of an objective official, because it is the officials who direct the procedure after the submission of the application form. Therefore, the following sections will describe how evidentiary assessment ought to be constructed in asylum procedures in order for the system to ensure the production of well-founded assessments of fact as well as a coherent case law.

3.3. EVIDENCE AND EFFECTIVE PROTECTION FOR REFUGEES

Evidentiary assessment constitutes the glue that keeps procedural and substantive law together. As a consequence of this correlation, assessment of fact must be in correspondence with both the type of procedure and the substantive law if the procedure is to provide with an effective protection. It is not enough for evidentiary standards to be terminologically agreed upon, because a standard of proof of 51 per cent may actually mean different things in different countries and contexts. The terminology used in evidentiary assessment in the adjudication of *non-refoulement* for refugees must be defined in a way that ensures comparability in all of the relevant domestic procedures and evidentiary practices. The requirements stipulated in the convention taken together with the overarching structure of domestic asylum procedures described in Section 3.2.1 seem to convey one particular method of decision making and assessment of facts.

3.3.1. Seeking Clues: The Asylum Seeker as an Informant

Seeking information constitutes the first stage in making a well-informed decision.[24] Even before any particular criminal investigation is initiated police officers keep their eyes open for information indicating that a crime has been, or is on the way of being, committed. Know-how, background knowledge and technical support useful for the detection and resolution of a crime are built up. The organisation also allows for the general public, witnesses or victims to report an offence or suspicion. Most rape cases start with the victim reporting the crime to the police and being heard in an initial interview. Similarly, most asylum cases start with the asylum seeker being interviewed by a police or border control officer and the filing of an application form.[25]

In the asylum procedure, the normative process of looking for further clues and providing the necessary reasoning around the clues shall enable the official to

[24] J.F. Nijboer and A. Sennef, 'Justification', in M. Malsch and J.F. Nijboer (eds.), *Complex Cases: Perspectives on the Netherlands Criminal Justice System*, Series 'Criminal Sciences', Amsterdam: Thela Thesis, 1999, pp. 11–26 at p. 15 *et seq*.

[25] *See*, *supra* note 4 and, e.g., Canadian Immigration and Refugee Board (IRB), *Process for making a claim for refugee protection*, at <http://www.irb-cisr.gc.ca/en/about/process/rpdp_e.htm>, viewed on 2005-01-03.

propose a *hypothesis of victimization*, resting on the elements of the refugee definition.

To see clues one has to be looking for clues. It is therefore important that the officials working with immigrants are trained to pick up these clues and that they have been given instruction to do so.[26] It is equally important to underline that the immigrant does not have to say or claim something in particular if there are other indications that s/he is a refugee. What triggers the *non-refoulement* procedure is that the removal is against the will of an immigrant that possibly might be a refugee. Clues do not come in any *a priori* specified shapes. A good place to start looking for clues that may raise a suspicion that the immigrant is a refugee is the statements or (re)actions provided by the immigrant her/himself.

3.3.1.1. The Application and the Statements of the Asylum Seeker – A First Clue

The UNHCR Handbook is correct when it states that the burden of proof is on the asylum seeker – but not for actively proving that s/he is a refugee. The asylum seeker should have the burden of proof in the sense that s/he bears the risk of loosing the case if the value of the evidence does not reach the standard of proof. This is an incitement, rather than a burden, for the asylum seeker to be active in the inquiry.

To satisfy her/his role in the asylum procedure the asylum seeker has an incitement – or an obligation to her/himself if you will – to *communicate her/his experiences and perceptions to the official appointed by law*. However, if the immigrant succeeds in raising a suspicion that there is something to be afraid of in the country of origin, then other state officials have to transfer the immigrant to the first instance asylum determination authority, where s/he can submit an application.[27] The more clues an applicant can provide, the more likely it is that the officials will construct the right hypothesis from the beginning. Because the asylum seeker is not required to be acquainted with the law s/he can logically not be expected to know what parts of her/his situation are relevant in the context of providing the officials with the right clues.

To some extent this information is provided by the state in the form of the application form and the guidelines on how to fill out and submit the form. The application form communicates what is relevant for an asylum claim and the guidelines communicate what to do with the form. However, linguistic and cognitive hurdles may persist. Accordingly, there should be an opportunity to supplement the form orally.[28]

It must be emphasized that a rational understanding of what exactly the triggering occurrences of the applicant's fear are and what the feared outcome is

[26] *See, supra* note 11.
[27] *See, e.g.,* US 8CFR208.5.
[28] Article 10(1) of the Asylum Procedures Directive (*supra* note 17) stipulates that the applicant shall be given the opportunity of a personal interview before the decision is taken by the competent authority. *See also*, *e.g.,* IRB, Process for making a claim for refugee protection *(supra* note 25).

may be lacking at this stage. The subjective perception that the applicant has on her/his fears may not be the most rational explanation of these fears. The first instance adjudications are therefore inquisitorial, giving the official an opportunity to help the applicant describe her/his situation. The information seeking dialogue should be lead in a way that promotes understanding between the official and the asylum seeker. The official ensures through communication that the asylum seeker is given the opportunity to present all of her/his experiences and perceptions which are capable of satisfying the conditions for asylum. If the host-country also provides free legal counsel and appoints an interpreter for the asylum seeker, the asylum seeker will be in a position to present her/his subjective perceptions in a way that can be immediately rational and relevant to the official. This will ultimately help the officials in expressing a hypothesis.

3.3.1.2. Suspicion of Fear of Persecution – A Hypothesis

In the information seeking stage the focus should to be on the perceptions of the asylum seeker as a possible state of the world that leads to the feared persecution. The interesting question is *why the asylum seeker thinks the way s/he does*. The official must ensure that s/he has understood the statements of the asylum seeker correctly before the hypothesis is formed. Consider the following example. The asylum seeker believes it to be possible that creatures from Mars operate in her/his country of origin and kill all persons belonging to a certain political group of which s/he is a member. Now, host-country officials learn that the asylum seeker is suffering from a psychological condition that distorts her/his perceptions in a certain way. Or alternatively, the official gathers that "little green men from the planet Mars" is a code word for state agents used in the political group to which the applicant belongs. If the official understands that what the asylum seeker is actually afraid of are state agents from his country of origin, then the claim should be based on those *objectively (inter-subjectively) described* states of nature. The inability to describe her/his perceptions in a rational way should not be to the detriment of the asylum seeker.

Another example of the difficulty that arises in the identification of possible states of the world in refugee status determination is that individuals have different perceptions of relevance based on what knowledge they do have *a priori*. For some individuals, the fact that a prison guard is in possession of a rope when visiting a prisoner automatically leads to the conclusion that the prisoner must have been tortured, because of earlier experiences of cases where prisoners have been tortured with ropes, while others with no such knowledge – for example a first instance asylum official – need to have the chain of reasoning explained in further detail in order to understand.

There is nothing in the 1951 Refugee Convention that indicates that the asylum seeker should have the burden of presenting a claim and facts previously asserted and evaluated by her/him. On the contrary, the construction of the *non-refoulement* rule as a prohibition on the state suggests that there has to be an objective

assessment before the asylum seeker can be disqualified from the right to *non-refoulement*. To built up and maintain this high standard would require the stability provided by an organisation with continuously available resources. In this system the applicant would do best by giving the asylum determination officials reasons to start looking for clues that will ultimately add the facts to the case. If this is not done, the asylum determination officers will probably have very little material to rely on. Their information and thereby also their hypotheses will be circumstantial or generalized. This means that asylum determination officials have to ensure that their *decisions are based not only on clues provided by the applicant but also on all of the relevant information available. Relevance should be assessed in relation to the elements of the refugee definition and the non-refoulement rule in view of the individual situation of the applicant*.

The hypothesis of victimization can thus be based on other clues than those provided by the applicant. If there are any clues raising a suspicion that the immigrant is a refugee, the official cannot ignore these clues but must express and disprove the hypothesis raised by them before the application can be rejected. This does however not detract from the responsibility to provide the applicant with the environment and time needed to be able to share her/his experiences. *The officials must ask the applicant questions that provide the basis for expressing a hypothesis of victimization, before they can ask questions that may disprove the hypothesis*.[29]

Just as the police in a rape case, the first instance authority has to gather know-how, background knowledge and technical support before exercising its decision making powers. As earlier stated, the task is not fully realized unless decisions are made on a relatively high degree of certainty about the situation of the applicant. If there are clues indicating that the applicant is a refugee, the officials have to seek out the information needed in order to express this hypothesis in rational and legal terms. When this hypothesis is constructed the case can move forward trough the initiation of an individualized investigation with the aim of testing the truth value of the hypothesis. The next section shall reflect the negative effects of perceiving an application form and other statements provided by the applicant as containing a claim and not as containing clues that the officials have to structure into hypotheses.

3.3.1.3. Deviations from the Normative Evidentiary Standard: An Unwavering Map of the World

In whatever procedure *non-refoulement* is adjudicated – predominantly inquisitorial or predominantly adversarial; at first instance or on appeal – the relevance of the information brought into adjudication is not assessed exclusively with regard to any claim of the applicant or any specific counterclaim.[30] Adjudicators and examiners

[29] In this respect, training officials in communication and psychology would evidently be of great value.

[30] *See supra* note 20. For an example of how asylum seekers may be restricted in presenting their cases freely *see cf* Nienke Dornboos, 'On Being Heard in Asylum Cases. Evidentiary

may compile, evaluate and influence the information in the record. On the other hand, no domestic asylum procedure requires the officials to distinguish between collecting information in order to construct hypotheses and collecting information to test the constructed hypotheses. General information of different kinds is therefore often perceived as objective knowledge with almost universal – or at least *a priori* established – relevance.[31]

In asylum and *non-refoulement* procedures the problems related to the assessment of the applicability of the *non-refoulement* rule, due to its generality and vagueness as well as the problematic nature of it being imbedded in the asylum and immigration context, seems to have been circumvented by the investigative practice. The difficulties of providing a coherent system of legal knowledge are evaded by the establishment of a coherent perception on what is happening in the world and how the world functions – an unwavering map of the world if you will.

The applicant's statements and other means of proof that the applicant brings are essentially used to identify identity and country of origin and thereby isolate a position in the officials' map of the world, which is based on different country of origin reports, embassy reports, fact finding missions or other *a priori* gathered information.[32] Instead of testing a claim or hypothesis against the evidence in the case, the statements of the asylum seeker – a substantial part of what normally could be the evidence in the case – is filtered through the policies on which the unwavering map of the world is constructed. This means that it is possible that the claim of the applicant actually could be perceived as factually irrelevant when it is, as stated earlier, assembled at the end of the procedure.[33]

The only way to avoid this unsatisfactory situation is to face the difficulties of providing a coherent system of legal knowledge around the *non-refoulement* rule by assessing relevance against the criteria provided in the substantive law. Ultimately the law should be coherently systemized and the map of the world should be constantly revised and well-founded. Requiring that facts (in themselves not relevant for the application of the right to *non-refoulement*) must be proven before asylum can be granted can effectively cut off the individual from any possibility to represent

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Assessment through Asylum Interviews', *infra* Chapter 6, text accompanying note 2 and Chapter 6.4.

[31] *See, e.g.*, Canadian Immigration and Refugee Board, Policy (No. 2003-08) for Producing Country of Origin National Documentation Packages, Effective Date: 1 December 2003.

[32] The expression "identity" is in this context used to denote an extensive meaning which includes ethnicity, characteristics, as well as legal identity or any other fact about the person that, in combination to establishment of country of origin, would affiliate the applicant to any of the *a priori* established risk-groups in the officials' map of the world. Henrik Zahle gives a description of the two types of risk that the officials seem to be in their practice reducing the assessment of the applicability of the *non-refoulement* rule to, Henrik Zahle, 'Competing Patterns for Evidentiary Assessment', *supra* Chapter 2.5.

[33] This possibility explains why some asylum claims are being rejected both because the applicant is not found to be credible *and* because – even if s/he had been credible – the claim is not enough to make the right of asylum or *non-refoulement* applicable. This concept of "double rejection" is analyzed in Section 3.3.2.5.

her/his situation in a correct manner. Cases where clues were insufficient to form a suspicion of victimization are an entirely different matter. Such cases should be rejected because the right to asylum or *non-refoulement* was never invoked in the first place. *By contrast, if there have been enough clues to raise a suspicion that the applicant was a refugee then there would have been no turning back for the officials. There has to be an inquiry guided by this hypothesis into the situation of the applicant. The only thing that can absolve the officials from their responsibility to investigate whether the prohibition of* refoulement *is applicable in the particular situation is if the asylum seeker voluntarily withdraws her/his application.*

3.3.2. Inquiry – In Pursuit of the Truth

Once police investigators have enough information to suspect that a crime has been committed an investigation into the case is initiated. Correspondingly, as soon as officials have enough information to suspect that removal may turn into refoulement, an investigation should be initiated. *Investigations are contextual:* the extent of the inquiry depends on the situation in the case. By way of example, some cases may be manifestly unfounded or manifestly well founded. In such cases there is already enough information to dismiss a claim upon the merits or to grant a request, without any further investigation. By contrast, where doubt persists about the truth-value of the hypothesis of victimization – i.e. there are still some relevant facts that are unclear – the investigation must continue until the doubt is satisfactorily cleared or the asylum seeker should be given *the benefit of the doubt* and win the case.[34]

The asylum seeker, as the alleged rape victim, is in most cases the main means of proving the case. However, the hypotheses based on her/his story need to be supported or disproved, and this is done through the investigation. In most cases only the victim and the perpetrator have first hand information on what has actually happened. And the perpetrator may remain silent, so the one that the officials can turn to for answers is the asylum seeker. The focal point of the asylum investigation is thus an interview with the applicant by an examiner at the first instance. The purpose of the inquiry is to test if the original suspicion that the asylum seeker risks persecution in the country of origin is supported by evidence. In the inquiry, the original hypothesis is tested and new information may require that the suspicions be adjusted. Perhaps, entirely new hypotheses may emerge. In most cases the applicant would have to provide the information that keeps the investigation going in the right direction. This implies an investigation of a suspicion that the applicant is being persecuted in her/his country of origin, until the evidence has enough weight to reach the standard of proof. The asylum seeker bears the risk of losing the case if s/he does not provide enough credible statements to cover the facts in issue. On the

[34] The concept of the "benefit of the doubt" is described in §§ 203–204 in the UNHCR Handbook (*supra* note 16) and this also follows from the fact that the *non-refoulement* rule is a prohibition on the host state. The analysis of the concept of the benefit of the doubt is further developed in Sections 3.3.2.3 and 3.3.3.

other hand a credible statement is enough.[35] *If there ever has been a suspicion that the applicant is a refugee, the applicant may not be returned unless the investigation is so comprehensive that there are no doubts about the applicant not being a refugee.*

In order to find out if the investigation is satisfactory we would have to answer at least six questions:

1. What type of information do we need to be justifiably persuaded of any of the hypotheses that describe the situation of the applicant?[36]
2. What relevant information do we have today?
3. What relevant information can we get today?
4. What relevant information can we get in an ideal world?
5. What are the obstacles that hinder the information from reaching the decision maker today?
6. Is there any legal and legitimate way of removing, limiting or circumventing the obstacles to collect further information?[37]

As more and more information is gathered, the plausible hypotheses become fewer and fewer. Every criminal investigator understands how important, and difficult, it is to keep an open mind. Asylum officials are constantly faced with expectations by their governments, citizens, and asylum seekers who all have an interest in the outcome of asylum cases. To maintain the credibility of the asylum system, it is imperative for officials to show that they maintain open minds in their investigations, and that no interests are given disproportionate weight.

3.3.2.1. The Statements of the Asylum Seeker – A Means of Proof

In the information seeking dialogue, officials should seek to eliminate inconsistencies in the statements of the asylum seeker by trying to understand what the asylum seeker wants to represent. By contrast, the inquiry aims at testing the truth-value of those representations. Here credibility and reliability play a part. If an official does not find the asylum seeker credible the inquiry will probably be more thorough than if there is immediate trust between both parties. Obviously, a sense that somebody is not trustworthy means that the official has certain doubts about certain statements made by the asylum seeker. Those doubts need to be cleared by

[35] UNHCR Handbook § 196 (*supra* note 16); *see also, e.g.*, US 8CFR208.13 and 16.

[36] Asylum case law ought to provide guidelines to answer this question. In criminal cases there would be a prosecutor to provide with this feedback to the investigators.

[37] Police investigators may indeed go too far in their endeavour to collect information in a criminal case. By contrast, the asylum investigations pose two types of risk. First, officials will have a tough task in maintaining their integrity in relation to the host-country government and therefore being politically biased in the assertion and evaluation of facts. Second, they might compromise the integrity of the asylum seeker by leaking information to the country of origin in the course of the investigation. It is not uncommon with rules on the latter*, see, e.g.,* US 8CFR208.6.

the investigation. In an inquiry that aims at reaching a high degree of certainty, *the concept of reliability is more important than that of credibility, because reliability implies credibility, but credibility is not sufficient for determining reliability*.[38] The important conclusion in an asylum investigation is not whether the applicant is credible or not, but whether there are parts of the applicants statements that raise reasonable doubts for the officials and how those doubts can be cleared up. The ultimate goal is to resolve all doubts until there is just one plausible representation of the applicant's situation that is consistent with all the information available to the officials.

3.3.2.2. Determining Relevance and Value – Other Hypotheses?

Asylum officials should look for the strongest hypothesis that is both consistent with all the information available to the authorities and best describes the situation of the applicant without bias to set perceptions on the state of the world. Because the aim of the inquiry is to provide a high degree of legal certainty, officials must take into account factors that weaken the suspicion of the applicant being a refugee as well as those that strengthen that suspicion. As more and more information is gathered the original hypotheses may have to be adjusted or maybe even change entirely during the course of the investigation – and so must the map of the world. It is one thing to use presumptions to create hypotheses that are later tested. It is quite a different matter to base once view of the state of the world on generalized information in the form of presumptions that in principle can only be rebutted by other generalized statements from specific sources such as governmental country of origin reports. By way of example, a person originally thought to be a Somali may be suspected to be Sudanese and reveal an entirely different story which nevertheless still raises suspicions that the person is a refugee. These new suspicions must of course also be investigated – with a further effort than a new glance at the generalized and unwavering map of the world – if one is to arrive at a high degree of certainty regarding the situation of the applicant.

3.3.2.3. Ending the Inquiry – A Hypothesis of No Other Hypotheses

Once the inquiry is over the adjudicator has to make sense of it. The prosecutor and the first instance asylum adjudicator have to deal with the same problems. In order to make sense of the investigation, they have to reconstruct the available information

[38] With the expression "credibility of the applicant" I refer to the impression the applicant conveys on the official about the veracity of her/his statement. Credibility is thus a characteristic of the person as perceived by others in a particular communicative context. In asylum practice it is however not uncommon that decisions refer to credibility as a quality of the statement. The perceived veracity of the statement should be termed "reliability". It is important to distinguish between the two *inter alia* because credibility is an all or nothing characteristic: "I either believe you or I don't"; while reliability comes in degrees: "X's statement that s/he comes from Somalia is more reliable than her/his statement that s/he comes from Sudan, because s/he speaks Somali".

from different sources into the hypothesis that is most coherently supported by the investigation. They should also be able to persuade others that the hypothesis, on which their decision is based, is the one most coherently supported by the facts. When all reliable sources of information are exhausted and the applicant does not bring any new information, the examiner has to persuade her/himself or a decision maker that there is no more relevant information available that can be brought into the case and that the investigation should end.

If the investigation leaves doubts – i.e. there is not one single, strongest hypothesis, but there are several plausible hypotheses – the asylum seeker should be given the benefit of the doubt – i.e. it is enough that one of these hypotheses lead to the conclusion that there is "fear of persecution". Where no doubts persist, or where existing doubts do not provide with enough clues to form any other hypothesis, there is a subjective conviction on the part of the officials as to what has actually happened to the asylum seeker. If this subjective conviction is that the asylum seeker is a refugee, then the 1951 Refugee Convention itself does not require the officials to provide with any further testing of their decision. It follows from the *non-refoulement* rule that the host-country may not remove a refugee, while at the same time it does not preclude the host-country from applying the same rule to other categories of immigrants. However, if this subjective conviction is that the asylum seeker is not a refugee, then the officials' subjective conviction is not enough to justify removal. The following section shall expound why that is so.

3.3.2.4. A Well-Founded Decision

At a certain point in the resolution of a case, police investigators arrive at a hypothesis that is consistent with all known facts about the investigated occurrence. There is no more available information. In the alternative, all potential new information will merely confirm the hypothesis and is therefore a waste of resources to gather. At this point, the police investigators have the burden of persuading the prosecutor that the hypothesis is proven by the available information and that there is no need to continue with the investigation. Once the prosecutor is persuaded, s/he has the burden of persuading a judge or jury of the very same thing. The corresponding stage in the asylum procedure is that of the first instance decision (corresponding to the persuasion of the prosecutor) and the appeal (corresponding to the criminal trial). First instance decisions reveal what facts are considered relevant (evidence) and how they are valued. There is no primary need to distribute risk in the first instance. Neither is there a need for terminology as "burden of proof", "burden of persuasion" or "burden of production".[39] The main aim of the decision is not to resolve a conflict. It is to communicate a subjective belief, to suggest a course

[39] Of course, the normative standards behind such terminology affects the decisions, as the officials have to take these standards into account when they make the decisions – or the motivations will not be perceived as persuasive to others.

of action and to persuade others of its correctness.[40] If the decision raises a conflict – which it presumably does in negative decisions – then there is a need to resolve this conflict before a neutral authority with a conflict solving function. For two reasons, the existence of an opportunity to appeal is very important in asylum and *non-refoulement* cases. First, the execution of decisions in cases of disagreement requires the officials to act against the will and integrity of the individual. Second, the act of *refoulement* puts the individual at risk of serious harm. However, the more persuasive the decision is the higher the chance that there never will be disagreement about the execution of the decision.

If we wish to persuade someone else of something, we would have to communicate the following:

1. A hypothesis of a legitimate representation of reality: a chain of reason that bridges the gap between facts that makes the representation and the conclusion legitimate, and
2. Means of proof (sources of information) that convey those facts (evidence) needed in order to justifiably persuade someone else of the validity of the hypothesis.

Let us translate this to the asylum procedure. First instance adjudication ends with the production of a subjective conviction in the decision-maker, which represents the asylum seeker as either a refugee (and thereby has value as an informant) or possibly a simple "incriminator". This decision must hold information about:

1. Which set of facts constitute a legitimate representation of the applicant's situation (a hypothesis),
2. What type of information (means of proof) is needed in order to justifiably persuade of the veracity of the hypothesis (an inquiry),
3. A chain of reason that bridges the gap between the proven facts and the representation of the applicant's situation that is found to be legitimate (a persuasive reasoning of questions of fact),
4. A chain of reasons that bridges any gap between the situation of the applicant and the strongest hypothesis of victimization (a persuasive reasoning of questions of law on the applicability of the refugee definition), and
5. A chain of reason that bridges any gap between the representation of the applicant's situation and grounds for the applicability of the *non-*

[40] With the expression "subjective belief", I refer to a belief which has not yet been tested in an inter-subjective context – it is still a product of someone's own thoughts. The subjective belief still must be based on an objective inquiry. Here the expression "inter-subjective context" refers to a context where different opinions and interest are represented. A discussion between an examiner and a decision maker is thus not enough to constitute an inter-subjective context in relation to the adjudication of *non-refoulement* as they are part of the same authority and represent the same interests.

refoulement rule (a persuasive reasoning of questions of law – is the *non-refoulement* rule applicable?).

In order for a decision to remove an immigrant to be self-legitimizing before an appellate authority it would have to contain these five points or it would be perceived as poorly motivated and this means that the activity not provided in the decision would have to be compensated before the appellate body in case of disagreement between the officials and the applicant.

3.3.2.5. Deviations from the Normative Evidentiary Standard: The Case of Double Rejection

In real-world asylum procedures, the statement and evidence of the applicant is tested, rather than the hypotheses of the investigative authorities.[41] What the asylum seeker needs to do is to convince the officials that her/his statements about identity and country of origin are true and thereby place her/himself on the officials' map of the world.[42] Officials can choose to actively work on disproving the statements of the applicant without first reassuring themselves that they actually are contesting facts that have relevance for the applicability of the rights to asylum or *non-refoulement*. This process puts the whole focus on the credibility of the applicant and the authenticity of the documents that the applicant brings and effectively blocks any continuous development of legal coherence in the applicability of the substantive rules.[43]

A linguistically "well-founded" and consistent statement of the applicant is usually required (with a reservation for cases where the "objective knowledge" already supports a claim for protection).[44] The applicant thus has to provide a

[41] The expression "statement of the applicant" refers to the sum of information in reports, explanations and interviews deriving from the applicant (and her/his family).

[42] Here I would like to underline that, contrary to what seems to be a common belief in the refugee law context, the existence of risk and the standard of proof are different concepts. Risk is a construct describing danger (whether defined in English or mathematical terms or any other language) – the existence of the elements of the construct (risk factors) still need to be proven in individual cases with a certain degree of certainty (the standard of proof). If the majority in *INS* v *Cardoza-Fonseca* (*INS* v *Cardoza-Fonseca*, 480 U.S. 421 (1987) U.S. Supreme Court, 9 March 1987) states that fear is well-founded where there is a statistical risk of death that may be as low as 10 per cent, the existence of risk factors that the statistical risk is calculated on still have to be proven in the individual case by a standard of proof which has not yet been defined in detail.

[43] For definitions of the expressions "credibility" and "reliability" *see supra* note 38. With the expression "authenticity" I refer to the quality of real evidence (a fact which is relevant in it self without need for argumentation) or the medium in which a statement is presented or corroborated by.

[44] Thomas Spijkerboer gives an example of the impact "objective knowledge" can have in refugee cases. In the cases studied by him the Bosnians were never even asked for their flight reasons apparently because they were considered self-evident; Thomas Spijkerboer,

statement that holds few generalisations, blanks and distortions and which corresponds to prejudices or hypotheses inside the investigator's mind in order to be able to prove the claim. To an individual isolated from her/his original context, this is virtually impossible without the aid of highly skilled legal representatives and interpreters. A further requirement would be that the case is processed in a procedure adapted to the circumstances of the case without strict time limits. In itself, the appointment of legal representatives or the extension of time limits is no solution. The truth is that there is no way of identifying a well-founded representation of fear of persecution unless there has been a thorough investigation first.

Because the officials expect a claim to be delivered by the applicant and the procedure does not necessarily provide the possibility for the applicant to do this, most decisions are probably based on the hypothesis of whichever person or groups of persons that have influenced or compiled the information in the record. Decisions in those cases are composed of two parts. The first part of the decision is that the claim of the applicant is not true because the applicant is not credible (i.e. the statement is not based on the – conscious or unconscious – hypothesis about the applicant's position on the "map of the world" that the officials have found to be true) and the second part is that even if the statement was true it would still not constitute a legitimate asylum claim. The second part of this double rejection thus fills the function of directing the adjudication of the case back to substantive asylum or *non-refoulement* rules, but unfortunately this does not provide the most important information and that is *why* these statements do not make the refugee definition applicable.

Hence, the asylum seeker has to describe her/his situation in a way that s/he thinks the officials are inclined to perceive a well-founded claim. Because the officials do not have a burden to declare the exact hypothesis that the decision and compilation of information has been based on, the only help an asylum seeker can receive from legal representatives is a summary of applications that have been perceived as well-founded before together with their own guesses of what has made the officials perceive these as well-founded.[45] This system necessarily acknowledges

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'stereotyping and Acceleration – Gender, Procedural Acceleration and Marginalized Judicial Review in the Dutch Asylum System', Chapter 5.1.5.1.

[45] The officials lead the dialogue in the interview. Even if there has been a claim presented before the interview, the questions will be based on the hypotheses in the officials' minds. If an official immediately tries to disprove the claim, we have an adversarial trial in an inquisitorial setting, where the official also is the adversary. This will probably communicate an invitation to the asylum seeker to participate in a negotiation, deliberation or eristic dialogue, but not an information seeking or even inquiry or persuasion dialogue. The requirement of relevance (which makes the questioning party have to declare the hypothesis the line of questioning is based on) and the prohibition of asking leading questions and other procedural and evidential rules in adversarial common law procedures are not a coincidence. Here the system actually incites asylum seekers to do their best to bend their statements in a way that makes them fit the image of what they think that the officials perceive as an *a priori*

one kind of refugee: the *a priori* refugee, who immediately fits the image of a refugee that the officials have in their heads. And in any procedure that provides the asylum seekers with time to adjust, there is also an acknowledgement of the "well-founded asylum seeker" who outsmarts the interviewer and always gives the most favourable answer to the questions.[46]

It will be hard to legitimise a system that spends a lot of resources on examining claims to find most of them to be irrelevant. It is thus not particularly surprising that accelerated procedures of different kinds are becoming more and more common in industrialized countries.[47] In such procedures, the applicant is in a situation that is even more difficult; providing good support for the applicant's claim to "non-return" (the equivalent to a claim of non-punishment") when the immigration authorities have already indicated that there is a presumption of return in the individual case. This presumption is the equivalent of an indication that the prosecutor does not fancy the accused and is inclined to punish her or him – in a criminal trial where the prosecutor also happens to be the adjudicator. In this trial, the burden of proof for not being punished is still on the accused and the time and resources to present a defence against the unknown reason for the prosecutors dislike against her/him is extremely limited. Furthermore, there may not be any possibility to appeal the decision. This sheds some light on what a heavy burden of proof the applicant must bear in an accelerated procedure for manifestly unfounded cases. This kind of procedure cuts off the asylum seeker from every kind of procedural or evidentiary guarantees.

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refugee and then punishes the asylum seeker because every deviation could be perceived as a distortion which automatically disqualifies well-foundedness.

[46] Because this is the only way to succeed, one would imagine that most asylum seekers try to outsmart the interviewer – whether truthful or not. This is probably the way asylum seekers, who are not *a priori* refugees, are perceived by the officials. The interview situation is in such cases uncomfortable for both the officials and the asylum seekers. The play between liars and the people who want to expose them may very well be provoked by this uncomfortable atmosphere of distrust. See the description by Nienke Doornbos, 'On Being Heard in Asylum Cases - Evidentiary Assessment through Asylum Interviews', Chapter 6.1.

[47] The 48 hour accelerated procedure applied in the Netherlands described by both Nienke Doornbos (Nienke Doornbos, 'On Being Heard in Asylum Cases - Evidentiary Assessment through Asylum Interviews', Chapter 6.7, and Thomas Spijkerboer (Thomas Spijkerboer, 'stereotyping and Acceleration – Gender, Procedural Acceleration and Marginalized Judicial Review in the Dutch Asylum System', Chapter 5.2.1.1, is in conformity with the Asylum Procedure Directive (*supra* note 17); There are no guarantees that the countries within the EU will not try to keep the lowest standard possible, so these kind of procedures may very well be the future trend. *See also* ECRE (European Council on Refugees and Exiles), *Guidelines on fair and efficient procedures for determining refugee status*, September 1999, §§ 20, 54–59 and 118–119, available at <www.ecre.org/positions/guides.shtml>, viewed on 2003-08-12, and the use of a safe country of origin concept in the Asylum Procedures Directive (Article 30–30 B).

3.3.3. Persuasion – Justifying a Reached Decision

The phrase "benefit of the doubt", closely associated with the criminal procedure, has its place in refugee status determination as well.[48] If the prosecutor makes a decision to charge a particular individual with a particular crime s/he has to defend that decision in a criminal trial. This means that the prosecutor has to prove first of all that the investigation has been so comprehensive that it does not leave any reasonable doubt about the reality of the relevant circumstances. No stone has been left unturned unless it would be unreasonable to turn it. If s/he cannot prove this, the defendant goes free. In a criminal case, the defendant has the benefit of the doubt and the prosecution has the entire burden of production. Second, if the prosecutor has shown that the investigation does not leave any reasonable doubt about the relevant reality, s/he still has to show that the charge is based on the only hypothesis that is consistent with the evidence. The prosecutor thus has the burden of persuasion as well. For the prosecutor to win the case the decision to charge the defendant has to be the only decision that is consistent with the evidence in the eyes of the judge or jury. These characteristics of the decision have to be beyond reasonable doubt.

If the decision maker in an asylum case decides that the asylum seeker shall be returned to the country of origin, s/he also has to defend that decision. However, this is not primarily or necessarily done in a trial, but already through the motivation of the decision.[49] Also, the official is responsible for ensuring that no stone has been left unturned unless this would be an unreasonable requirement and that the host-country abstains from removing an immigrant where there are reasonable doubts about the legitimacy of the removal. Here, the analogy between asylum law and criminal law visibly breaks down in state practice.

3.3.3.1. Certifying Truth through Appellate Review

The adjudication of an asylum case in the appellate body serves to produce an image of the subjective conviction of the first instance adjudicator as either inter-subjectively justified or flawed. In the first instance, an imagined objective observer sees the "production" of the case through the scrutinizing eyes of the first instance officials. In the second act – the appeal – the objective observer, guided by the appellate adjudicator, sees the first act though the eyes of all of the involved actors and makes up her/his own mind. The decisions form customs, which then guide how future cases are handled.

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[48] *See supra* note 34.

[49] Punishment in the form of deprivation of liberty may not be performed against an individual without due process even if there is a confession on the part of the accused and s/he accepts the punishment. In contrast, the way the *non-refoulement* rule is constructed indicates that removal may be executed if the applicant is willing and able to avail her/himself of the protection of the country of origin. First instance decisions thus should be constructed to promote voluntary return by persuasive motivations.

The adjudication in appellate bodies does not resemble a criminal trial in a rape case. The prosecutor in a rape trial has the entire burden of both *producing the evidence* and *persuading the judge or jury*, with her/his arguments, that the defendant should be found guilty as charged. In addition, the rule of law is protected by the presumption of innocence and the principles of immediateness, orality and concentration. These principles secure that the facts are presented in a sequence, that all actors involved in the trial can perceive the presented facts at the same time and that the decision follows immediately after the presentation of the facts (while the facts are still fresh in the memory of the judge or the jurors). The most cost-effective way of providing the necessary feedback is thus to have public rules and decisions that convey *all* necessary information for the continued production of rules, strategies and values within the system.

3.3.3.2. Deviations from the Normative Standard: The Process of Certifying Policies

In practice, appeals are not constructed as a truth certifying procedure. Instead, the same first instance structure of searching for a lost asylum claim is repeated in the appellate body.[50] And when you look for a claim you will still find the investigative hypotheses according to which the information is gathered. What asylum and *non-refoulement* appellate procedures thus certify are those policies that the unwavering map of the world is built on. This not only leads to decisions being made on a low degree of certainty and to poorly motivated decisions (in the sense that they do not contain all the necessary parts of a persuasive legal argumentation), but it also leads to a backlash against the authorities. The repercussions are twofold.

First, this kind of world mapping policy-making is closely associated with democratic procedures. A legal judge would normally try to persuade others by using legal argumentation that is part of a coherent perception on the law. Therefore, in highly controversial situations there is always the possibility of at some point shifting the responsibility back to the politicians by asserting that the decision taken was the best possible decision that the law would allow. If, however, the decisions are based on the *knowledge* of facts (as opposed to evaluations of evidence), the perceived weaknesses of the knowledge by others affects the credibility of the officials directly. People do not share the same map of the world, not even on shared experiences, so there is an *a priori* high risk for controversy. On one hand, the legislator cannot change the world to fit the officials' unwavering map of the world; on the other hand, immigration authorities are not the competent democratic forums in which this kind of policy-making issues could be justifiably resolved.[51] Even if

[50] The adjudication on appeal is at best a *de novo* standard of review and it may even be restricted to for instance 'clearly erroneous' standard or even delimited to judicial review; *see, e.g.*, US Department of Justice, *Fact Sheet. Board of Immigration Appeals: Final Rule*, 23 August 2002, p. 3, available at the Executive Office for Immigration Review (EOIR) homepage: <www.usdoj.gov/eoir.htm>, viewed on 2005-01-03.

[51] Placing politicians among the decision-makers in, *e.g.,* the Swedish Alien Appeals Board, does not solve this issue, because the politicians still have the responsibility to abide by the

there was domestic competence to make policies in this area of law the *non-refoulement* rule presupposes a high degree of certainty *in the individual case*. Any domestic policy determining *non-refoulement* for an asylum seeker would still have to guarantee compliance with that norm.

Second, how can credibility and legitimacy be maintained, when the execution of a decision presumes that asylum seekers and the public can be convinced with the following argument: We (the host-country officials) *know* where you (the asylum seekers) come from. We also know better than you what is happening there. Executing decisions based on that argument will always prove to be difficult.

3.4. CONCLUSION

An asylum decision that is in conformity with the requirements flowing from the construction of Article 33(1) of the 1951 Refugee Convention must be based on the following principles:

A. The applicant should not have to provide an asylum claim, s/he should be treated as an informant providing clues.

B. The applicant has the burden of proof for establishing a right to asylum only in the sense that s/he bears the risk of losing the case if the *non-refoulement* rule is found to be inapplicable.

C. If there is doubt about the applicability of the *non-refoulement* rule it should be applied. When in doubt, abstain from removal! This is the proper meaning of the term "benefit of the doubt" in the asylum context.

D. The first instance decisions should contain a line of reasoning that is persuasive in its argumentation both as to questions of law and questions of fact. It is important that the decisions convey the strongest hypothesis describing the situation of the applicant that the officials could find during investigations and *why* this situation makes the *non-refoulement* rule applicable/inapplicable.

E. Appeals should function as a conflict solving institution that resolves conflicts by certifying that the first instance decision has been based on a high degree of certainty and to provide a coherent case law. Focus at the appellate level is thus not on any claim of the applicant, but on testing the legitimacy of a particular state action directed against the will and integrity of a particular individual.

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law and to make individual assessments on a high degree of certainty in the individual case according to the principle of officiality (applicable according to Section 7 of the Swedish Administrative Act, 1986:223), and thus do not have a policy-making function at all.

Applying these insights while in the context of criminal procedures gives the host-country officials a more convincing argument when it comes to the legitimacy and execution of their decisions: We (the officials) did our best to assess your (the asylum seeker's) situation and we present to you this hypothesis that is coherent with all the available information possibly relevant for establishing the applicability of the *non-refoulement* rule. We also *know* that the evidence does not leave room for any other hypothesis and that the hypothesis does not make the *non-refoulement* rule applicable because we have tested it in an inter-subjective context surrounded by procedural guarantees.

B – LESSONS LEARNT ON THE BASIS OF DOMESTIC EXPERIENCES

CHAPTER 4

THE BORDERLINE BETWEEN QUESTIONS OF FACT AND QUESTIONS OF LAW

Jens Vedsted-Hansen[1]

4.1. JUSTICIABILITY AND ASSESSMENT OF PROOF

One of the characteristics in refugee status determination procedures within a number of European states in recent years seems to be the emergence of *procedural deflection* of asylum seekers. Here I am not referring to the 'protection elsewhere' type of deflection,[2] but rather to the tendency towards reduction of procedural safeguards by means of either barring access to certain legal remedies against negative decisions, introducing accelerated procedures with no or only limited review facilities, or limiting the scope or intensity of judicial review of such decisions. In this connection, the distinction between facts and law has a relatively significant impact, insofar as issues of fact tend to be subject to limited scrutiny under the various review mechanisms. This may place the assessment of proof in a rather precarious position as regards the accessibility of effective judicial review.

In analysing the possibilities for review of the assessment of proof in refugee status determination cases, my point of departure will be the criteria for *justiciability*, as developed by the Danish Supreme Court in recent years. The relevant case law concerns the interpretation and application of the finality clause in Section 56(8) of the Danish Aliens Act,[3] pursuant paper to which the decisions made by the Refugee Appeals Board cannot be subject to judicial review. Neither the problems pertaining to the background and constitutionality of this finality clause, nor its impact on the level of procedural protection of asylum seekers in Denmark, shall be the subject of discussion in this chapter. Instead, the *modifications* of the finality effect according to this provision, as they have evolved through the Supreme Court's interpretation essentially based on the traditional criteria for justiciability in administrative law, will serve to elucidate certain concepts that are relevant to the

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[1] Professor of law, Aarhus University Law School, Denmark. The author is grateful for the comments at the IIIS Conference on Proof and Credibility in Asylum Procedures, Dublin, September 2003, and for inspiration from Danish colleagues and practitioners.

[2] *See*, for example, R. Byrne, G. Noll and J. Vedsted-Hansen, 'Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics' in R. Byrne, G. Noll and J. Vedsted-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer Law International, The Hague, 2002) pp. 5–28.

[3] Aliens Act, Consolidation Act No. 685 of 24 July 2003.

distinction between issues of fact and issues of law, beyond the procedural particularities of the Danish asylum system.

The scope of application of the finality clause in Section 56(8) of the Aliens Act has been most explicitly pronounced in three Supreme Court judgments from 2001 and 2003.[4] By significantly modifying the finality effect under this provision, the Supreme Court appears to be well in accordance with the general assumptions in legal theory and practice pertaining to the impact of such clauses, now very rare in Danish administrative law. In these judgments, the Supreme Court identified certain elements of the asylum decisions, which can be subject to judicial review notwithstanding the apparently general exclusion from such review that is indicated by the wording of Section 56(8):

> 'Judicial review of the decisions taken by the Refugee Appeals Board is limited to the review of *issues of law*, including deficiencies relating to the *basis of the decision-making*, *procedural errors* and *unlawful exercise of discretion* . . . If no such circumstances are existing, there will be no basis for dispensing with the finality clause in Section 56 . . .'

In two of these cases the Supreme Court held that the contested element of the Refugee Appeals Board's decision was to be considered a part of the *assessment of proof*. Hence, the objections raised against the decisions could not be characterized as relating to procedural errors, as had been asserted by the asylum applicants, and consequently the two cases were rejected from judicial review proceedings. This obviously does not imply that the assessment of proof is considered non-justiciable in general, but merely results from the particularities of the finality clause in the Danish Aliens Act. The assessment of proof, which is carried out by the Danish Immigration Service as the first instance in determining refugee status, undergoes *full review* by the Refugee Appeals Board, having the benefit of direct contact with the asylum applicant who can be examined by the representative of the Immigration Service, by a lawyer acting on his behalf, as well as by the Appeals Board members if they deem it necessary. Against this background, the assessment of proof, in particular as far as the credibility of the individual applicant is concerned, would in any case not be rigorously scrutinized by the courts if ordinary judicial review were accessible.

Despite the particularities of the Danish asylum appeal system and the Supreme Court judgments, they may serve to elucidate certain legal concepts and elements in determining refugee status and the problems inherent in distinguishing between them. Hence, the following Section 2 will elaborate on the delimitation between the assessment of proof and those procedural standards that are supposed to safeguard the decision-making which leads to assessing evidentiary material. Section 3 discusses the distinction between issues of law and the exercise of discretion which

[4] Supreme Court judgments of 26 January 2001, 28 November 2001, and 29 August 2003, reported in *Ugeskrift for Retsvæsen* [Weekly Legal Magazine] 2001 p. 861, 2002 p. 406, and 2003 p. 2405, respectively (my translation, italics added).

is often claimed to be beyond judicial review. Here my point of departure will still be Danish case law, however I include a rather strong focus on the corresponding concepts and norms in international refugee law. In Section 4, I suggest certain preliminary conclusions and issues for further discussion, in particular pertaining to the question/problem of which elements in determining refugee status can be characterized as issues of law, and to what extent the distinction between law and facts is adequate at all.

4.2. PROCEDURAL STANDARDS VERSUS ASSESSMENT OF PROOF

While the assessment of proof would normally in principle be subject to review as an element of an administrative decision brought before the courts, certain restrictions or modifications of the intensity of such review may occur, depending on the principles for review in the concrete national jurisdiction. Even if such modifications apply, some issues pertaining to the assessment of proof can be separated from the question of individual credibility and the weighing of often differing general background information. Such separable issues may be legally regulated in a manner that would seem to allow for full or even intensified review of the asylum authorities' compliance with the relevant rules, usually being of a procedural nature.

From the case law of the Danish Supreme Court – dealing with possible exemptions from the finality clause of the Aliens Act (see Section 1 above), but nonetheless relevant to the identification of such *justiciable elements* of asylum decisions – there appears to be a kind of grey area of certain procedural standards that are very closely linked to the assessment of proof. For example, the Supreme Court rejected the review of a case in which the asylum applicant alleged an error of fact stemming from the asylum authorities' establishment of his nationality by means of presenting him a collection of photographs from his claimed country of origin. According to the Refugee Appeals Board, whose decision was on this point upheld by the Supreme Court, the alleged error concerned the evidentiary assessment of the information in the individual case and could therefore not be characterized as a failure to comply with procedural standards.[5] In another case the asylum applicants objected to the method applied in the language test that had been utilized as part of the basis of the decision, in which the Refugee Appeals Board rejected the explanation provided by the applicants in the case. Since this was a matter of the applicants' individual credibility, the Supreme Court considered the objections as concerning the assessment of proof and, again here, would not characterize them as a matter of procedural error.[6]

It may seem understandable that the objections raised in these two cases were considered inseparable from the assessment of proof. The language test is indeed a

[5] Supreme Court judgment of 29 April 1999, *Ugeskrift for Retsvæsen* [Weekly Legal Magazine] 1999 p. 1243.

[6] Supreme Court judgment of 26 January 2001, *Ugeskrift for Retsvæsen* [Weekly Legal Magazine] 2001 p. 861.

method of trying out the credibility of an asylum applicant, in particular as regards the claimed affiliation with a certain cultural or ethnic group of society in her/his country of origin. Similarly, the collection of photographs can reasonably be seen as a method of empirical verification of the asylum applicant's assertions concerning her/his country of origin, thereby establishing the nationality of the applicant. Already here, however, it seems that certain standards could be developed as to the *methodological reliability* of such credibility tests utilized by the authorities determining refugee status. Even if this is considered primarily a methodological issue, there may be established scientific standards for the methodology of these tests. The proper application of such standards is a procedural issue, and thus susceptible to judicial review on par with the compliance with other procedural standards for refugee status determination.

The likelihood of justiciability would seem to increase if the objection raised by the asylum applicant does not concern the reliability of a specific evidentiary test in itself, but rather its very relevance or possible necessity as a basis for the decision to be made. Thus, in a recent Danish case the asylum applicant asserted to have presented all relevant information to the authorities, as required under Section 40(1) of the Aliens Act. In addition, he had requested the Refugee Appeals Board to provide certain specific information about his potential risk of punishment in his country of origin, since he was unable to access the information had proven unaccessible by himself. The applicant had already approached the Danish Embassy in Teheran in order to obtain information concerning concrete questions relating to the factual basis for his application for asylum, yet the Embassy advised him to present his questions through the Danish asylum authorities, including the Refugee Appeals Board. Against this background the High Court observed that the Refugee Appeals Board, without stating any specific reason, had rejected the applicant's request for deferral of the case which had been submitted to the Appeals Board together with his request to have the aforementioned questions forwarded to the Danish Embassy in Teheran. The High Court therefore held that the objections raised against the Refugee Appeals Board's rejection of the applicant's request would be subject to judicial review despite the finality clause. It appears from the context that the High Court considered these objections as concerning a failure by the Refugee Appeals Board to provide the necessary concrete information in order to be able to carry out an *adequate assessment* of the risk of persecution in the applicant's country of origin. Given the rather laconic way in which the Refugee Appeals Board had pronounced its rejection to follow the applicant's request, as well as the fact that the Refugee Appeals Board had been asserting to be under no obligation to provide information when examining asylum cases,[7] it was quite understandable that the High Court considered it appropriate to scrutinize the case irrespective of the finality clause.

[7] Notably, this assertion was contrasting the express obligation of *ex officio* examination, incumbent on the Refugee Appeals Board according to Section 54(1) of the Aliens Act.

Nonetheless, this decision was overruled by the Supreme Court which considered the objections raised by the asylum applicant, claiming the insufficiency of the information existing before the Refugee Appeals Board, so narrowly and necessarily connected to the proof assessment as such, that they were part and parcel of the assessment of evidence carried out by the Refugee Appeals Board. The alleged failure in providing information as requested by the applicant could therefore not, according to the Supreme Court, be characterized as a matter of disregard of procedural standards.[8] Although there may have been good reasons, given the circumstances of this concrete case, to consider the information issue narrowly connected to the Refugee Appeals Board's assessment of the applicant's individual credibility, the approach taken by the Supreme Court is not particularly helpful in attempting to delimit the scope of justiciability. The judgment may even raise new questions in this regard, especially concerning the distinction between the requirements pertaining to the basis of decision-making and the very assessment of the evidence provided. Thus, it can still be argued that the authorities determining refugee status are under such procedural obligations that may allow for identifying legal elements of the decisions which are separable from the evidence assessment proper, and which can therefore become subject to judicial review in their own quality.

More clearly, separable issues in the assessment of proof can be established by reference to the rules concerning burden of proof and standard of proof, as well as the specific rules on *ex officio* examination by the asylum authorities of general background material pertaining to the applicants' countries of origin. Whereas the assessment of proof may, at least in civil law systems, often be presented as a kind of subjective discretion, the gross result of concrete considerations based on a rather unstructured mental confrontation between the individual applicant's credibility and the reliability of various sources of background information, both international refugee law and domestic standards of administrative procedure provide certain legal standards for such decision-making considerations. In other words, rephrasing the Danish Supreme Court, to some extent the assessment of proof is necessarily connected to generally recognized procedural standards, the observance of which must therefore be justiciable.

This is particularly relevant as regards compliance with the rules concerning *burden of proof* in the narrow sense, *i.e.* those legal standards that guide the distribution of risk as to the absence of information or the lack of certainty, not least concerning general background issues.[9] Reflecting the application of the principle of the *benefit of the doubt*, this must generally be considered an issue of law. The legal nature of questions concerning the *standard of proof* may be more difficult to characterize in this respect, and there seem to be rather significant differences between the various jurisdictions as to the specification of the evidentiary standard

[8] Supreme Court judgment of 28 November 2001, *Ugeskrift for Retsvæsen* [Weekly Legal Magazine] 2002 p. 406.

[9] Cf. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979), paras. 203–205.

applicable in refugee status determination cases. In principle, however, this standard has to be seen as an issue of law as well.

The complexity in determining refugee status may be seen as both a complication and facilitation in the identification of such legal elements of these decisions, which can be subject to judicial review. In contradistinction to the traditional decision-making model in which facts of the *past* are to be subsumed under the relevant norm, refugee status decisions have to be based on the additional – and indeed central – assessment of the *future* risk of persecution. According to the theoretical distinction between proof and risk, both of which being elements of the gross assessment of applications for asylum, it is therefore possible to specify in legal terms the conditions for recognition of refugee status in a manner taking the level of risk and the intensity of persecution into account when fixing the required standard of proof.[10] The principled interrelatedness between these elements of the decisions seems clear, even if it may be inadequate or impossible to define them in precise quantitative terms.[11]

Such specification of the assessment of proof and the calculation of risk may facilitate the separation of those elements of decisions that can be subject to judicial review proceedings. Thus, the *prognostic considerations* inherent in the assessment of risk are in principle and in practice separable from the assessment of proof concerning past events, and risk calculation has to be based on an objective yardstick. In the Danish context utilized here as a reference framework, this might leave the core of risk prognosis in asylum decisions within the scope of judicial review, as opposed to proof assessment which is excluded from review under the finality clause of the Aliens Act. More generally, while the expertise presumed to lie with the authorities determining refugee status may often be an incentive for courts to scrutinize both the factual and the prognostic elements of asylum decisions less rigorously, it should be possible to identify and challenge the legal standards that have been applied in the risk prognosis underlying a refusal of refugee status, thereby increasing the likelihood of justiciability of such decisions.

4.3. ISSUES OF LAW VERSUS EXERCISE OF DISCRETION

The extent to which access to refugee protection has been expressed in domestic legislation in terms of a legal entitlement for the individual asylum applicant, or the granting of asylum rather depends on the exercise of discretion[12] by the domestic authorities, may obviously have ramifications on the justiciability of individual decisions on asylum. Thus, in accordance with the rules governing judicial review in

[10] Cf. J.-Y. Carlier *et al.* (eds.), *Who is a Refugee. A Comparative Case Law Study* (Kluwer Law International, The Hague, 1997) pp. 708–711, and T. Einarsen, *Retten til vern som flyktning* [The Right to Protection as a Refugee] (Cicero Publisher, Bergen, 2000) pp. 497–499.

[11] *See* H. Zahle, *supra* Chapter 2.5, for a critical analysis of the quantitative three-scale approach.

[12] 'Exercise of discretion' is here utilized as a legal-technical concept of administrative law, normally implying non-justiciability or limited judicial scrutiny.

the various jurisdictions, the exercise of discretionary competences is likely to be subject to limited judicial review, or no scrutiny at all. Irrespective of the degree of discretion in determining refugee status and granting asylum under domestic law, such legislation often includes explicit or implicit reference to the international norms defining the category/ies of persons in need of protection; first and foremost the refugee definition in Article 1A(2) of the 1951 Refugee Convention and the *non-refoulement* provisions in human rights treaties such as Article 3 ECHR. Although some of the concepts in these treaty provisions may appear vaguely phrased, and can thus be seen as allowing for indefinite or discretionary competences at the domestic level, the main definitional concepts are subject to ordinary canons of treaty interpretation. As a consequence, the interpretation and application of these treaty provisions is an issue of law which is to be considered justiciable at the domestic level.

As regards the Convention refugee definition, the core concept of *persecution*, as well as the requirement of certain *reasons* for the prospective risk of persecution, are undoubtedly legal concepts that can be delimited by way of interpretation based on the internationally recognized sources of treaty law. Hence, disputes over the interpretation and application of these definitional concepts by domestic authorities concern legal matters that are subject to judicial review in most legal systems. In addition to the delimitation of the types of infringement constituting persecution, this assumed justiciability includes such issues as the concept of *agents of persecution*, the relationship between persecution and the availability of *internal protection alternatives*, the delimitation between the five concepts referred to in the reasons for persecution, and the question of required interconnection between persecution and its reasons. Similarly, the application of the main concepts in the exclusion and cessation clauses in Articles 1F and 1C of the 1951 Refugee Convention must be considered justiciable.

In practice, however, some domestic courts appear disinclined to acknowledge this legal nature of refugee status determination and its implications for judicial review proceedings. A rather striking example is a Danish High Court judgment rejecting review on the basis of the assumption that the contested asylum decision did not raise any issue of law. The case concerns an asylum applicant who has been sentenced two years of imprisonment for the evasion of military service during the period in which the Federal Republic of Yugoslavia was in a declared state of war during the Kosovo conflict in 1999. Since this punishment was not considered disproportionately severe as compared to Danish legal tradition – in itself a quite remarkable basis of reference, given the historical and legal context of the case – the Refugee Appeals Board held that it was not comparable to persecution, and so the Appeals Board upheld the decision to refuse asylum. Contesting this decision before the High Court, the asylum applicant argued that it was based on an incorrect application of the law, whereas the Refugee Appeals Board defended its decision by suggesting that the applicant's objection concerned the *evidentiary assessment* of whether the applicant would be exposed to persecution or similar measures.

The High Court expressed the opinion that the finding by the Refugee Appeals Board, according to which two years of imprisonment for evasion of military service under the aforementioned circumstances did not constitute persecution or equivalent measures, was to be considered an *assessment of the factual circumstances* which was not an issue of law. Instead, the High Court held that the Refugee Appeals Board had been exercising its *discretionary competence* to decide on asylum applications. Specifically, the weight to be attributed to the opinions expressed at international level regarding the Serbian warfare in Kosovo, was found by the High Court to belong to this discretionary competence. The High Court therefore rejected any judicial review of the case brought before it.[13]

Since this judgment is apparently based on serious misconceptions of both domestic and international refugee law, it is to be welcomed that the Supreme Court has subsequently set aside the High Court's decision. Referring to the general criteria of justiciability that allow for dispensing with the finality clause, the Supreme Court held that review of the applicant's objections involve scrutinizing issues of law. The Supreme Court found no basis for considering the objections raised against the reasons stated in the Refugee Appeals Board's decision, including the lacking consideration of the applicant's motivation for evading military service, to be merely an expression of disagreement with the proof assessment and discretion exercised by the Appeals Board. Consequently, the High Court judgment was quashed, and the case was referred back to the High Court for review in substance.[14]

Again here, the case quoted was formally dealing with the scope of application, and the possible modifications, of the finality clause of the Danish Aliens Act. Notwithstanding this domestic framing of the case, it can be illustrative of the more general question of how to distinguish between issues of law and matters of discretion in determining refugee status, relevant far beyond the particular Danish context. In a wider perspective, it is inevitable to speculate whether the approach taken by the High Court in the aforementioned case on military evasion might be indicative of a predisposition on the part of certain domestic courts to evade reviewing refugee status determinations and other asylum decisions to the extent that could be legally possible.[15] As an interesting comparison, the Norwegian Supreme Court approached the question of justiciability of the Convention refugee definition in a partly similar way in a 1991 judgment. The majority of the Supreme Court demonstrated a notable leniency in reviewing a quite central issue concerning the asylum authorities' interpretation of Article 1A(2) of the 1951 Refugee Convention, pronouncing itself in terms demonstrating that the contested treaty interpretation was considered injusticiable in a manner comparable to judicial review of administrative discretion.[16] While this is indeed a misguided approach to

[13] *I.I.* v. *Refugee Appeals Board*, High Court for Eastern Denmark, judgment of 10 December 2002 (unreported).
[14] *I.I.* v. *Refugee Appeals Board*, Supreme Court judgment of 2 December 2003 (unreported).
[15] Cf. T. P. Spijkerboer, *infra* Chapter 5.2.
[16] *Abdi* v. *The State*, Norwegian Supreme Court judgment of 30 May 1991, *Rettstidende* [Norwegian Legal Magazine] 1991 p. 586.

the legal issues concerning treaty interpretation, the implicit deference to the administrative authorities' prerogative of special expertise may be even more tempting in review cases apparently dealing with the subjective assessment of evidence.

4.4. CONCLUDING REMARKS

Based on a number of examples from Danish case law concerning the finality clause in the Aliens Act, and the modifications of the finality effect referring to the criteria for justiciability, the above discussion has attempted to identify a number of concepts and distinctions that are central to the question of judicial review in cases concerning the determination of refugee status and granting of asylum. Depending on the various jurisdictions and their different asylum appeal systems, the criteria for justiciability may coincide with the identification of legal elements in the contested decisions and the procedures from which they result. Thus, the scope of judicial review depends on the existence of separable issues of law, reflecting the distinction between issues of law and issues of fact in connection with the examination of asylum applications.

Although the distinction between facts and law may in principle be relatively clear, its implications as to the question of justiciability are probably less certain. In particular, taking into account that the procedure leading to the assessment of proof, as well as proof assessment as such, is structured by often specific legal standards, the delimitation of the assessment of proof, and its impact with regard to the accessibility and the intensity of judicial review, becomes notably less decisive. These legal standards for asylum procedures and for the assessment of proof in such procedures are continuously evolving, partly as a result of judicial scrutiny, thereby increasing the scope of separable legal issues that can in turn be considered justiciable.

Importantly, however, justiciability cannot be perceived as being merely a question of the existence of legal standards for the examination of asylum applications, such as rules concerning the burden and standard of proof in determining refugee status. In addition, it will often be a matter of the status determination authorities' preparedness and ability to set out the details of their interpretation and application of the substantive and procedural rules in asylum decisions, as well their assessment of both the general and the individual elements of proof. On the basis of an adequate statement of reasons in the concrete decisions, including the specific standards against which the decisive elements of proof have been assessed in the individual risk prognosis, a considerable proportion of asylum decisions are likely to be susceptible to scrutiny in judicial review proceedings.

CHAPTER 5

STEREOTYPING AND ACCELERATION

GENDER, PROCEDURAL ACCELERATION AND MARGINALISED JUDICIAL REVIEW IN THE DUTCH ASYLUM SYSTEM

Thomas Spijkerboer[*]

When deciding which statements need to be proven, and when proof has been delivered; and when deciding which statements and which behaviour are considered credible, it is necessary to use certain normative standards. These standards are hard to make explicit, and most often they are not. In the first section of this chapter, I will show the subtle and blatant ways in which evidence assessment is shaped by gendered notions of interview officials, decision makers, and legal representatives of asylum seekers.

The slippery nature of evidence assessment makes review and appeal procedures very important. Precisely because the issue is so problematic, the precise nature of the review or appeal procedure available to asylum seekers may well be decisive for the outcome of their procedure. In the second section, I will describe recent Dutch case law on proof and credibility, which allows for a considerable expansion of the use of the accelerated asylum procedure, and argue that this body of case law is at considerable tension with the European Convention on Human Rights. In a final section, I will draw the two strings of this chapter together. The stereotyping described in paragraph 1 will probably increase in the new Dutch asylum system, which makes the 'exceptional' accelerated procedure into the normal procedure. Because of time pressure, interviewers, decision makers and lawyers will be more prone to have recourse to stereotypes because stereotyping is helpful in allowing for quick decisions. Also, time pressure will make effective judicial control less likely.

Abstracted from the particularities of the Dutch context, the main propositions of this chapter concern the necessarily constructed nature of flight motives; the contested nature of that construction; and the influence of the law on proof and credibility on the contested construction of flight motives. When discussing law on proof and credibility, I will address both Dutch domestic law and case law of the European Court of Human Rights. One aspect of the review of case law from the European Court will be a new reading of its decisions regarding Article 13 ECHR.

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5.1. GENDER

First, I want to emphasise that evidence assessment is thoroughly gendered, by presenting a piece of research from my book *Gender and Refugee Status*.[1] In doing research for that book, one of the things I did was to select 252 files of single female asylum applicants from six countries. The women concerned applied for asylum in 1994, and I collected the files in 1996. Hence, the cases are quite old. However, there is no reason to presume that the phenomenon I want to describe here, the gendered nature of credibility assessment, has changed significantly over time. The text was written in 1999, and has not been updated with more recent data. The presentation in this chapter summarises the main findings set out on pages 45–106 of my book.[2]

In legal practice, the cases of women are presumed to be different from those of men. Their motives for undertaking activities or for refraining from them, their motives for leaving the country, the motives of the people maltreating them - all are portrayed as specific for women in interview reports, decisions, and in documents by the legal representatives of female asylum applicants. The special nature of women's cases is constructed along the lines of three dichotomies which are interrelated. These dichotomies oppose the following terms:

emotions ⇔ ideas
family ⇔ public sphere
body ⇔ mind

I will analyse the role of these dichotomies on three levels. First, I will see which role they play in ascertaining the *credibility* of the applicant's statements. A preliminary issue in the asylum procedure is the labelling of an applicant as credible or not. For a statement to be credible, it must first of all not be inconsistent. Applicants may provide conflicting statements about dates, places and persons. Such inconsistency is subject to a familiar critique, namely that asylum applicants may be afraid of officials or simply nervous. In addition, some inconsistencies may be the result of cross-cultural miscommunication. An entire body of literature has grown up around the issue of how these problems are further complicated by the issue of gender.[3] These issues nevertheless fall outside the scope of this chapter, as I have not observed the interviews.[4] I analysed only written documents and will therefore investigate how credibility is constructed within these documents.

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[1] T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, 2000).
[2] For a comparable analysis *see* H. Crawley, *Refugees and Gender. Law and Process* (Jordans, Bristol, 2001) pp. 201–233.
[3] For an overview, *see ibid*., pp. 201–209.
[4] For an extensive analysis of Dutch interview practice, *see* the contribution of Doornbos to this collection, *infra* Chapter 6.

Second, I will address the role the dichotomies play in establishing whether the applicant engaged in a *politically relevant act* in the country of origin. The persecution ground 'political opinion' was of central importance in the cases in my sample (and in Dutch practice more generally).[5] The idea of refugees as 'political refugees' is nevertheless nowhere expressed in the form of a requirement in policy documents or individual decisions. Despite this lack of explicitness, it is the persecution ground which the vast majority of the cases turn on, which makes the meaning of the term 'political' crucial for the determination of asylum claims. Moreover, the content of the persecution ground 'political opinion' is not identified in a positive manner in asylum decisions. In order to delineate the concept, thus, we must focus on cases in which it is articulated what does not count as a political opinion.

And third, I will investigate the role these dichotomies play in establishing whether the threat the applicant faces in her/his home country is to be considered as *persecution*. Something can only constitute persecution if it is sufficiently serious. But it turns out that acts which in themselves are serious enough are not considered to be persecution because they are either too general, and belong to the general situation in the country of origin, or they are too specific, and constitute personal harm. Especially with regard to sexual violence and violence in the family which are considered as private, hence in principle outside the realm of persecution.

It should be noted that the dichotomies overlap (for example, emotions and family overlap, while mind and ideas do as well). Also, not all three dichotomies have effects on all three levels.

5.1.1. Emotions vs. Ideas

The first dichotomy I will address is the emotions/ideas distinction. Women are associated with emotionality, men with rationality. However, this association at times takes on the form of a normative assumption about the way in which women (and men) display emotions. As we will see, credibility is established in part on the basis of rather precise notions about how a credible women deals with her emotions during the asylum interview. Also, things women do are presumed to be driven primarily by emotions, not ideas. For example, women who express emotions related to the violent death of their sons, brothers or husbands are considered as grieving mothers, not as human rights activists.

5.1.2. Credibility

Emotions play an important role in ascertaining the credibility of an applicant. In order to be considered credible, applicants must show the appropriate emotions at the appropriate moments. An applicant who does not show any emotion when speaking of sexual violence is deemed incredible; a restrained display of emotions is

[5] T.P. Spijkerboer and B.P. Vermeulen, *Vluchtelingenrecht* (Nederlands Centrum Buitenlanders, Utrecht, 1995/1997/1999) p. 152.

deemed eminently credible; and showing an excess of emotions is seen as play acting. In the following section, three examples of just how precise the expectations of interview officials are on this point will be presented.

> A Zairian woman says she was arrested together with her one-year-old son on account of both distributing pamphlets and because her husband was active for the opposition party PDSC. She was detained for four days and raped by five soldiers. She was released after the intervention of a doctor, because her baby was ill. In the passage of the interview where she describes in short and factual words that she was raped, the interview official notes: 'The applicant showed no sign of any emotion'. The flight story is considered incredible.
>
> One of the few cases in which a Zairian applicant was found credible concerns a market vendor who was arrested together with her husband because she refused to accept a new bank note. In prison, her husband was shot in front of her eyes, and the applicant was tortured and raped. At two points, the statement of the applicant is interrupted by a remark of the interview official. When she tells about the death of her husband, he writes:
>
> > When the applicant tells about the murder of her husband, she cries in a composed way. The crying has something apathetic, as if something in her is dead.
>
> When the applicant describes the rapes, the interview official notes:
>
> > The translator found it hard to give a good and literal translation.
>
> The applicant was granted a humanitarian residence permit.
>
> In the case of a Turkish Kurdish applicant born in 1950, the interview report is of a kind that I have never seen before. It is atypical in its (seemingly) literal rendering of the applicant's words, and in the scarcely veiled mocking of the applicant. The flight story is about her problems as a result of the activities of her sons. The report is interspersed with remarks of the interview official, such as:
>
> > Remark interview official:
> >
> > to the translator she puts the question: Can't you help me?
>
> or
>
> > Remark interview official:
> >
> > to the translator she said the following: Tell her that I do not tell lies and that I never will.
>
> Then this passage follows:

> Remark interview official:
>
> the applicant at this moment – 10.55 hours – goes into a kind of epileptic fit and falls from her chair immediately onto the ground. Before lying still on her side, she makes jerky movements. From this moment on, she is not approachable. At 11.08 hours, the applicant slowly regains consciousness. She says she has a headache and swallows a painkiller she brought herself. Her scarf is now tied around her head to combat the headache.
>
> She states:
>
> I now have pain in my shoulder.
>
> Remark interview official:
>
> at about 11.12 hours, the applicant has yet another comparable fit after which, sitting on the ground, she falls sideways. At 11.30, telephone contact is sought with the medical service of the refugee centre. The doctor of the centre, *, says that in the case of Ms. * there is no physical ailment but an experience which can be expressed in a serious form of hysteria. Therefore, as a doctor, he found it necessary to be present at the remainder of the interview, as a rare exception.
>
> Remark counsel [a refugee council worker, TS]:
>
> The applicant becomes emotional and regularly has fits when she speaks of her two sons, * and *. Such a talk is a relief, on the one hand, but afterwards she has attacks like this which may last as much as 20 minutes.

When, two weeks later, the interview is resumed in the presence of a doctor, things don't go smoothly. The applicant repeatedly and emphatically criticises the interview official. Apparently, the translator translates literally, which has a 'comic' effect. Examples are:

> To your question of how he [i.e. one of the applicant's sons] knew about the whereabouts of his brother, I answer you, that you don't give your ear to me!
>
> Remark interview official:
>
> the applicant intends to say with this that I, the interview official, do not listen.

or

> Give me ears!!

> Forget about the door. [The applicant has mentioned a door being kicked in by soldiers eight lines earlier.] I am going to speak about wheat and butter!

or

> Give me your ear; I have become an actress and I should in fact be on TV. What I have experienced even a cooked chicken hasn't experienced.

> The applicant has one more fit that lasts about 10 minutes. The flight motives are deemed incredible.

In sum, applicants should display emotion but not too much. The evocative formulation which the interview official uses in the case of the Zairian woman considered credible is informative in this respect. She believed this applicant because she was almost overwhelmed by her emotions but made an effort to control them. What makes the other Zairian applicant incredible is her complete lack of (recognisable) emotion, while the Turkish applicant is simply seen as (over-)acting.

5.1.2.1. What is Political?

Emotions are also crucial in distinguishing political acts from non-political acts. The most prominent category of motives considered non-political are motives involving emotions or mere personal preferences.

Women who have tried to trace *missing relatives* (sons, husbands) or protested against their disappearance are portrayed as people inspired by grief or by a longing to be reunited with their beloved ones.

> A widowed Sri Lankan Tamil based her claim on the fact that she had publicly protested against the execution (by the LTTE) of her only child, a son. The decision does not consider her protest political activity, hence it is implicitly seen as an expression of personal grief:

> > The applicant, who has stated that she has never been a member or sympathiser of an organisation which opposed the government in the country of origin, personally never experienced problems from the side of the Tamil Tigers. She has declared that her son was killed by the Tamil Tigers, but it has not been established that as a result of this the applicant has personally experienced problems. The circumstance that the applicant says she was visited by Tamil Tigers does not change this, as this statement is based solely on presumption and has not been substantiated in any way.

In cases of missing relatives, the dominant perception is that this is a personal problem and thus, as a consequence, not political. This emphasis on personal tragedy clearly has a depoliticising effect: it zooms in on suffering and not

resistance. Yet the Tamil mother just mentioned can easily be perceived as a protester. In fact, one Zairian case shows the transformation of such a 'mater dolorosa' into a character we can and do recognise as a political activist: The crazy mother from Plaza Del Mayo in the 1970s. Initially, the application was rejected because the applicant had not been politically active; after review she was granted a refugee status.

The interview reports of Iranian applicants show that interview officials are keenly aware of problems surrounding *improper dressing*. The issue is apparently addressed in a standard question, as many of the applicants mention such problems (including being lashed) in isolated passages after the immediate flight motives have been dealt with. The only case in which dress was considered the expression of a political opinion concerned a Turkish Kurdish protest singer who wore a coloured scarf during a concert.

> I wore a shawl with the colours green, yellow and red. The police, who supervised us, came to me and confiscated my shawl and ID card. They thought that the colours of the shawl symbolised the Kurdish community. I wore this shawl as an accessory, but of course I also wore it because I am proud to be Kurdish.

As this event was not the cause of her flight, which occurred years later, the issue was not thematized in the procedure.

The only example of a case in which the imposition of a dress code is not portrayed as irrelevant is a Bosnian case.

> A woman of Croat ethnic background living in an area dominated by Muslim troops receives anonymous telephone calls.
>
> > 'In an angry tone, they told me I didn't belong here and had to leave. Either I had to dress like a Muslim woman, with a scarf, long sleeves and a skirt down to my ankles, or I had to leave. I was very afraid when they called and I hung up quickly. They threatened to rape me if I wouldn't listen.'
>
> These facts are followed by more examples of ethnic cleansing of which the applicant was a victim.

Transgression of a dress code is not seen as a conscious act of defiance. At most, a dress code is seen as a discriminatory practice (which may then be dismissed as related to a law of general application). As in the cases of relatives who have disappeared, the sympathetic view focuses on the victimisation of the women and not on their disobedience. The case of the Kurdish woman wearing a scarf with the Kurdish colours is depicted as a different case altogether. She is not transgressing a dress code; she is wearing a clearly delineated political symbol. Transgression of dress codes other than by wearing something like a party scarf is seen as whimsical, careless or a matter of a mere preference for one kind of clothes over another. In the

interview report of the Bosnian claimant, however, the imposition of dress codes is depicted as consistent with the other forms of ethnic cleansing.

The Case of Betty

A final example of flight motives being considered emotional and not political consists of cases pertaining to the Chinese *one-child policy*. I will extensively describe one case which represents many aspects of other Chinese one-child cases. The particular combination of factors makes the case atypical but nevertheless illustrative of how the Dutch authorities reacted to one child cases in the sample.

The applicant, whom I will call Betty, was born in 1963. In 1985, she married to a man five years her senior. Her first child, a son, was born in 1985 and was followed by a daughter in 1987. The children are still in China with a brother-in-law. In mid-1992, Betty was eight months pregnant with her third child. When three women and two men from the Bureau for family planning entered Betty's house for inspection, Betty's husband pushed one of the civil servants from the stairs. The man had to be brought to the hospital; Betty later learned that the man's legs were permanently paralysed. Betty was taken to the hospital and given an injection. An hour later, she experienced pains in her stomach. After 24 hours, the baby had still not come out and Betty lost consciousness. When she regained consciousness, the abortion had taken place and Betty had been sterilised. A week later, she was allowed to leave the hospital.

During her stay in the hospital, her husband had fled. Betty cannot explain why he wasn't arrested immediately after he had pushed the civil servant from the stairs. A few days after coming home from the hospital, the Security Service handed her an arrest warrant for her husband. He was charged, Betty says, with deliberately acting against the family planning policy and assaulting a Family Planning executive. Betty was repeatedly visited by a son of the injured man; the son said he would take revenge if she did not tell him where her husband was. On one occasion, he wrecked the furniture; on another occasion, he threatened her with a knife. An acquaintance who had received a letter from Betty's husband told her that he was in Hong Kong and would probably go to The Netherlands. When, shortly after, a Security Service official visited her and said that she would be prosecuted as an accomplice to her husband if she didn't say where he was, Betty fled. After applying for asylum, she asked a social worker in the refugee camp in The Netherlands to help her find her husband, but he has not been found.

After a negative initial decision, the case was brought before an independent advisory board. An extended quote from the interview report provides insight into how the board views the issue of forced abortion.

> In China, it was no problem that she [Betty] had two children. In 1987 that was still allowed. It is not allowed to have a third child. To the question of why she got pregnant under these circumstances, the applicant replies that she loves children and that she got pregnant by coincidence. She hoped to be able to have the baby and to be able to pay money to the

> authorities in order to keep it. A mother does not want her child to be removed. To the question of whether she knew that this would lead to problems, the applicant answers that it is hard to say. Sometimes it is possible to ask the authorities for permission to have a third child. She had not asked for permission. In her village, one could wait until after the birth of the child. After that, one just had to wait and see. The authorities do not use fixed rules.
>
> The applicant is confronted with the fact that the Chinese authorities do use fixed rules. This has happened for a long time. The applicant then says that such rules may exist, but at a local level one is dependent on whether or not the rules are applied by the authorities. This depends on the situation.
>
> She did not request permission to have the baby during the pregnancy, because the family planning people hold a campaign once or twice a year in China. She had hoped that such a campaign would not occur during her pregnancy. If that should happen, she hoped she would still be able to keep the child in one way or another. To the question of what was the problem with asking permission to keep the child before the child was born, the applicant replied that she could not do that because she would not have received permission to keep the child. She is sure of that, as she was breaking the rules. The child would have been removed. She had hoped that she would be lucky and be able to have the baby with help of her friends. She didn't dare to report herself.

The board's opinion, which was adopted by the State Secretary, motivates the rejection of Betty's application in the following manner.

> [I]t is taken into consideration that the statement that she has been forced to undergo an abortion and been sterilised, even if one can presume her statements to be correct, is no ground for refugee status, if only because the abortion and sterilisation cannot be related to one or more of the grounds mentioned in Article 1(A) of the Convention. In addition, the applicant was conscious of the policy – which is identical for everybody – on family planning in China and she consciously took the risk of not being allowed to keep the child. In so far as she fears being punished by the authorities in China on account of that, it is remarked that these sanctions, as is clear from the statements of the representative of the Minister of Foreign Affairs during the hearing, are primarily of an economic nature.
>
> In so far as the applicant fears persecution because of her husband's problems with the authorities, his act is considered a civil offence (injury) not based on political motives and no clues can be found in the statement of the applicant that the authorities attribute to him [the husband] a political opinion they find disfavourable. As a consequence, it is not plausible that the applicant will be attributed a political opinion which the authorities find disfavourable and will lead to acts of persecution. That the son of the civil servant involved purportedly threatened her (and her

> husband) does not change this, if only because it cannot be understood why the applicant could not reasonably have invoked the help of the Chinese authorities to deal with the postulated threat which has not been established to rest on political motives ...
>
> [...]
>
> With regard to the postulated abortion and sterilisation, it is considered that it has not been established that she was traumatised thereby to such an extent that a residence permit on humanitarian grounds could not reasonably be denied.
>
> The State Secretary's decision to adopt the board's reasoning adds that the arrest warrant for her husband, which Betty's lawyer submitted during the review procedure, does not change the fact that 'this case concerns prosecution for a civil offence'.

The complex manner in which pregnancy is portrayed should be noted. The first thing to note in this respect is that the report pays attention to Betty's reason for wanting to get pregnant and remain pregnant. The issue might have been considered as trivial but in Betty's case, wanting (or wanting to keep) a child while knowing that this can lead to problems is portrayed as stupid. The board speaks of a risk of forced abortion being consciously taken.

The manner in which the problems of Betty's husband are addressed should also be noted. Betty says her husband injured a civil servant in a conflict over the implementation of the one child policy. The fight is nevertheless not portrayed as the expression of a political or religious opinion but as an emotional reaction. The punishment that the husband can expect is normal prosecution and not persecution. A remarkable aspect of Betty's case is that the Chinese authorities charge her husband with more than just the 'civil offence'. According to the arrest warrant, he is also charged with 'serious sabotage of family planning' and not just the injury of a civil servant. Nevertheless, this is also construed as a civil offence.

An essential element in the negative attitude towards cases relating to the one child-policy cases is that a violation of demographic policies is *not* construed as the exercise of a human right or the expression of a political opinion; rather, the violation of demographic policies is seen as governed by emotions and intimate desires: the wish for a child, objections to abortion and protective male rage against the one child authorities. There are also hardly any signs of other participants (particularly refugee lawyers) trying to reconceive these matters in terms of conscience or politics.

5.1.3. Family vs. Public Sphere

The second dichotomy I want to address is the distinction between the family and the public sphere. The family is considered to be a sphere of freedom from State intervention. That is the way the right to family life is constructed in, for example, human rights provisions such as Article 8 ECHR. However, the legal institution of

the family is a creation of the State, and it is the subject of detailed regulation in family legislation. The way in which the family is regulated makes a difference. In very rough terms, regulation which will be labelled as non intervention in mainstream legal thought (such as no penalisation of sexual violence between spouses, or not granting rights to children vis-à-vis their parents) will be beneficial to the stronger party in family relations, generally the husbands and the parents. The grounds on which divorce can be granted, and the regulation of custody rights, will be of crucial importance for the decisions women can or cannot make when they want to leave a marital relationship. Although the desire to keep the State out of the family makes sense in some contexts, it may easily obscure the fact that the regulation of the family by (State created) law has power effects, and may be the subject of contestation.[6] As we will see, legal practice sticks to the mainstream view about the private nature of the family, and labels things that occur within the family as per se outside the realm of refugee law.

5.1.3.1. Credibility

When a female applicant has a family, the interview report devotes attention to the applicant's behaviour towards her husband and children before, during and after flight. If the behaviour of the applicant is considered inappropriate, this is taken as an indicator of incredibility. The behaviour used as the norm may be specifically Western and is often traditional by any standard. Female claimants leaving their families behind are considered incredible. Such an assumption is often only clear from the interview report and simply remains unmentioned in the decision. On occasion, however, the issue may be mentioned in the decision, as in the following decision in a Turkish case.

> It is surprising that the applicant has left her children behind in Turkey, as she has stated she left Turkey partly out of concern for the well-being of her children. It is not deemed probable that the children of the applicant will benefit from the departure of their mother abroad. This damages the statements of the applicant.
>
> Later, the applicant was caught smuggling her children into The Netherlands illegally. Subsequently, she was admitted as a refugee.

In exceptional cases, unbecoming behaviour may play a central role in arguing that the applicant has other motives for leaving her country than the ones she pretends to have.

> In an Iranian case, the applicant based her claim on fear of persecution for keeping a human rights record. The State attorney argues:

[6] This point has been made in the classical articles of Frances Olsen, *see* her The Family and the Market: A Study of Ideology and Legal Reform, 96 *Harvard Law Review* (1983) pp. 1497–1528, and The Myth of State Intervention in the Family, 18 *University of Michigan Journal of Law Reform* (1985) pp. 835–864.

> It seems more likely that the applicant left her country because of the personal problems with her husband and the reunification she desired with her old love *, whom the applicant's father forbade her to marry. The applicant indicates in the interview that she is not particularly interested in whether her husband is still alive.
>
> The Court dismissed the claim and found it probable that the applicant left the country because of 'problems in her private life'.

Conversely, 'proper' behaviour is typically rewarded with credibility and vivid descriptions of the behaviour. Most notable are the portrayals of women grieving the death of a husband or a son, where interview officials often display almost literary skills.

5.1.3.2. What is Political?

Refugee claims in which *problems with husbands or fiancés* play a central role or claims in which an applicant has refused to start a relationship with a man are always dismissed as being about 'problems of a personal nature' or 'personal problems'. In the words of one decision: 'The Refugee Convention is not intended to provide protection in such a situation'. The idea that private problems cannot lead to refugee status is very apparent. In several cases, the interview reports show the interview official saying this to the applicant and suggesting in so many words that she withdraw her application.

Cases with 'personal problems' standing central are thus routinely dismissed. In most cases, the statements of the applicants noted in the interview report also do not refer to their refusal to marry, remain married, or stay in an abusive relationship in political terms. Interview officials do not see the conflicts which the applicants are part of as potentially of a political nature. Nevertheless, in Iranian cases, a humanitarian permit may be granted.

> In one Iranian case, concerning a woman born in 1956, the interview report was lively and dramatic. The applicant and her husband chose each other for marriage and were married in the early 1980s. The husband, an engineer, did very well and became quite successful. Because of this, he also relied more and more on his prestigious and very religious family living in the holy city of Qom. The applicant, who by then had a daughter, was completely absorbed by her in-laws. She could hardly bear it. Her husband refused a divorce. She established contact with an opposition group and acted as an informer and courier. Her husband found out and, in order to prevent embarrassment, had his wife supervised all day. Shortly thereafter, he divorced her. He was appointed custodian of the child and, after a transitional period, the applicant was denied any contact. When she was caught secretly visiting her child at school, she was followed by the local Komiteh. She escaped arrest by fleeing over the rooftops. She then abducted her child and fled. With regard to refugee status, the decision argues:

> It is noted that the problems the applicant has invoked, which are characterised by problems in the private sphere, cannot lead to refugee status as the aforementioned does not fall under one of the grounds mentioned in the Convention.
>
> Dissatisfaction with the general situation in Iran does not lead to refugee status.
>
> The applicant is granted a residence permit on humanitarian grounds without further motivation.

Problems labelled as private are seen as too general (family law is a law of general application) or too specific (personal problems). A case like that of the Iranian woman described above is not viewed as one in which the family constitutes the site of a conflict about politics and religion in which the man's position of superior power was created by (State made) family law.

In the literature, persecution on account of the activities of *male relatives* is often found characteristic for the flight motives of women. Although I initially shared this idea, my material suggests that such a flight motive is at least partly the result of the problems of male relatives being privileged over those of the applicants themselves. The sample contains quite a few examples of women with flight motives perceived as being inspired (in part) by the problems of their male relatives. In the case of a Zairian applicant, moreover, the facts are explicitly conceptualised as being about persecution on account of kinship *instead* of political activities.

> According to the interview report, the woman said that her husband was active for the opposition party PDSC. As a part of this, the couple made a day trip to Brazzaville, the capital of Congo Brazzaville which is located on the Congo River opposite Kinshasa. The applicant had a film with photographs of tortured prisoners in her handbag. They were arrested, the film was found and the applicant was interrogated, tortured and raped.
>
> The decision argues among other things that, as far as they are credible, the flight motives suggest that the attention of the authorities was directed more towards her husband than herself, so she has no personal fear of persecution.

The perception of the facts in this case focuses on the husband at the expense of the applicant herself. It was the applicant who smuggled the film, and the imposition of the kinship perspective in the decision goes against the facts. Such a perspective simply blocks the case as being seen as about the applicant's own activities. This tendency has also been noted in a study from the Research Centre of the Dutch Ministry of Justice. When interview officials and decision makers from the Immigration and Naturalisation Service were asked if it made a difference whether an asylum applicant was male or female, they initially responded that it should not make a difference. Later, however, they added that 'With women I go into the husband's problems more thoroughly, because these are mostly the reason for

departure', or 'With women I mainly look if she has left the country on account of problems of her own or only on account of problems of her husband'.[7] The researchers argue that this idea is confirmed by their research, which shows fear of persecution on account of the activities of male relatives to be a frequent flight motive in their sample.[8] This conclusion is flawed, however, as it is based on the flight motives reported in the interview report. In other words, the reported frequency of this flight motive may simply reflect the preconceived opinions of interview officials.

Something comparable occurs in cases of relatives of disappeared male family members, as we saw earlier. Because these women's activities focus on missing relatives, they are presumed to be about the family, hence not public activities.

5.1.3.3. What Constitutes Persecution?

> In a case concerning a woman who considers herself a Bosnian national but has a Croatian passport and is married to a Croat, sexual violence in their relationship stands central to the claim. The couple are from Vukovar, where the parents of the woman moved from Bosnia-Herzegovina. The husband started to rape her and to cut her with a knife while they were staying in a refugee camp in Germany. After their return to Croatia, they stayed in a refugee camp. The abuse became worse. The applicant didn't dare to report the abuse to the police, and says: 'I think the war has made my husband crazy'. The initial decision argues that the applicant could have sought protection against the abuse from the Croatian authorities.

This case looks very much like cases of inter-ethnic violence or ethnic cleansing (which have led many Muslims to leave Croatia). In cases of applicants from former Yugoslavia, this was sufficient ground for granting refugee status. Given that, in this case, the perpetrator (an 'ethnic Croat') and the victim are married, however, the woman is constructed as a victim of private violence. In fact, political, religious and ethnic conflicts like the one described here are seen as merely personal precisely *because* they occur in the context of the family. The family is apparently only personal, only private, only emotional.

5.1.4. Body vs. Mind

Another dichotomy at work in asylum practice is the distinction between body and mind. This one is relevant in particular in cases concerning sexual violence. Sexual violence against women is considered to be a physical act of the perpetrator directed against a woman's body. The woman is considered to be a random victim of male lust, unless it can be established that is was directed specifically against her. Sexual

[7] J. van Wetten, N. Dijkhoff and F. Heide, *De positie van de vrouw in de asielprocedure* (WODC, Den Haag, 1998) pp. 28–29; *cf.. ibid.* pp. 38–39
[8] *Ibid.*, p. 63.

violence only becomes persecution if it can be established that is was used as a means for a particular goal. Thus, the burden of proof in cases concerning sexual violence tends to be higher than in cases of other forms of torture, because in those cases the presumption of lust directed at a body is absent.

There are many examples of cases in which sexual violence is viewed as the act of a private person, and not the police officer or soldier involved. This line of reasoning can take several forms. It may remain implicit altogether; it may be vaguely formulated as 'The applicant has become the victim of acts of aggression based on arbitrariness' (as in a Zairian case in which a market vendor said she was raped and had an abortion as a result); or it may be formulated explicitly and take the following form:

> In so far as the applicant has nevertheless been the victim of rape, it is considered that in and of itself this is no ground for the opinion that she has a well-founded fear of persecution in the sense of the aforementioned Convention. After all, in light of everything that has been considered above, it is not probable that this has been a consequence of negative attention directed at her personally by the Zairian authorities and that it has occurred on account of political reasons. More likely, the applicant has become the victim of a civil offence, which cannot be a ground for refugee status.

This argument is most frequent in Zairian cases. Whether it is related to the fact that reports of rape were most frequent in the Zairian cases is hard to say. We can conclude, however, that there is a strong and general (although possibly variable) tendency to consider sexual violence a private act related to phenomena on the side of the perpetrator (such as drunkenness or lust) and not the setting (such as detention, interrogation, suspicions regarding the victim's political loyalties). This conclusion is even more striking in light of the Bosnian cases, where (the threat of) rape is unflinchingly viewed as part of ethnic cleansing.

The way in which cases related to the one child-policy are dealt with shows a comparable notion that a physical act like getting pregnant excludes conscious motivation required for relevance in the sphere of asylum law. Forced abortion and sterilisation are not considered as possibly retaliation for the enjoyment of human rights, but as administrative acts enforcing existing norms. This may well be linked to the perception of childbearing as merely physical. It is remarkable that the idea that the State should not interfere in the family, prevalent in the family/public sphere dichotomy, is absent here.

5.1.5. Ethnicity

Ethnicity is a theme of a different nature than the dichotomies dealt with above. Gender and ethnicity are mutually constitutive, *i.e.* what is means to be male/female is in part defined in ethnic terms, and what it means to be white, black, Asian, Muslim and so on is in part defined by gender. In this section, I will limit myself to showing that gendered constructions work differently if asylum applicants are from different countries.

5.1.5.1. Credibility

There seems to be a relation between ethnicity and credibility. Bosnians were often not asked about their flight motives apparently because they were considered self-evident. When Bosnian applicants were interviewed, credibility was not raised. In Zairian cases, incredibility is routinely invoked against applicants; in 23 of the 37 Zairian cases in the sample, credibility was a central argument given for rejecting the claim. The cases of Turkish, Iranian, Chinese and Sri Lankan applicants fall somewhere in between. In these cases, incredibility is regularly invoked but is not a standard issue.

A quantitative indication of the generally negative attitude towards Zairian applicants is the frequency of standard text blocks in the male form in interview reports concerning female applicants (see Table 1). This is actually inconsequential and merely a matter of pressing the wrong buttons, but it is nevertheless interesting to see that it occurs more frequently with respect to some nationalities than others. The fact that such gender errors occur in Zairian cases confirms my impression that these reports tend to be sloppy. The finding that Iranian interview reports contain numerous gender errors initially came as a surprise. Such sloppiness, nevertheless, seems to fit with the claims of those who criticised the Dutch policy on Iranian claimants; they argued that the procedure as a whole was sloppy because Iranian applicants were not returned up until 1995. This meant that both civil servants and lawyers found little was at stake in such cases and thus became careless.[9]

Table 1 Gender errors in interview reports

Country of origin	Relevant cases	Gender errors
Bosnia-H	14	0 (0%)
China	75	0 (0%)
Iran	39	6 (15%)
Sri Lanka	16	0 (0%)
Turkey	22	0 (0%)
Zaire	36	8 (19%)

A factor that may further complicate things is language. All of the applicants with the exception of the Zairians were interviewed in their mother tongue. Most of the Zairians (29) were interviewed in French, which is the official language in Zaire. Going by the names of the translators (which is an unreliable source, but the only one I have), in only four cases was the translator a Zairian; in the other 25 cases, the translator had a Dutch or a French name. In the only case where the interview report provides fully coherent flight motives, the French translator was probably Zairian. In seven other cases, Lingala was the interview language. In five of these cases, the translator appears to be a native speaker. In the two other cases, the translator was a

[9] Spijkerboer, *supra* note 1, pp. 32–33.

man with a Dutch name. Finally, in one case, with the interview in Swahili, the translator was probably a native speaker (see Table 2).

Table 2 Interview language in Zairian cases

language	Zairian translator	non Zairian translator	Total
French	4	25	29
Lingala	5	2	7
Swahili	1	0	1
total	10	27	37

My thesis is that, especially in Zairian cases, interview officials *expect* incoherent flight motives. For this reason, they do not normally try to clarify problematic statements. Quite to the contrary, when confronted with the incoherent flight motives of a Zairian applicant, they consider this as typical for the unreliability of Zairian applicants. I would illustrate this with one case, in which the interview report fits the general picture of the Zairian cases. What makes the case interesting in the present context is the submission of a medical report from Amnesty International with perfectly coherent flight motives which are not so much in contradiction with those recorded in the interview report but, rather, a consistent version of them.

The Case of Karen

In the case of an unmarried woman born in 1967, whom I will call Karen, the name of the Lingala-Dutch translator suggests a Zairian background. The interview report of four pages begins with half a page of standard text in the male form. This is followed by the text below (with punctuation and capitals as in the original):

> Reason for asylum application
>
> I was arrested on * At a prayer service. I lead the choir. After the service I brought the girls outside to hold a meeting. It was about 9 PM. We saw range rovers driving they came from the direction of *. They surrounded us. We were with 15 girls. There were about 10 range rovers. About 20 soldiers were in them. We were put in the cars and taken to the town of *. There we were brought to a military camp and put up in a large hall.
>
> The next morning on * [date, one day after the arrest] we were called into a little office one by one. Our identity papers were asked for. My father is village chief. He is a member of the party Abaco. This party is for the tribe Bacongo This party is against Mobutu. It was said that Mobutu is not to be made fun of by my father and that they would teach him a lesson. I would never see him again. For the rest nothing was said or asked.

> I was raped on the nights of * and * [the first nights of her detention] by 05 soldiers. I was blindfolded. Both nights by 05 soldiers. For the rest I don't know who they are.
>
> The next day on * [date, two days after the arrest] I was brought to the zone * in Bas-Zaire, to the prison there. I was brought there alone. I do not know where the other 15 girls are.
>
> In this prison I was beaten with a thread that soldiers use as belt and in order to descend of a thread (a cordelet). This was on * [date, two days after the arrest] at the moment that my identity was passed on in the prison. And that was told about my father. I have a scar of this on my left shoulder. (seen by the interview official, A dark spot the size of a quarter with a T-shaped scar in it) I was put in a small cell alone.
>
> Now and then I was interrogated. About five times. I was then beaten and kicked but that was not so terribly hard. I was questioned about
>
> - What was said at the meetings of my father.
>
> - If he was against Mobutu
>
> - If during my arrestation I wanted to organise something against Mobutu.
>
> I tried to explain that I only wanted to hold a meeting for the church and not for something else. I was not able to see the prison well because I was put in the cell and taken out of the cell in the dark. There was illumination with candles.
>
> I was helped to flee on * [about 2 months after the arrest]. A soldier helped me escape at 07.00 hours. He released me because we both spoke kigongo. He had pity on me, in view of my situation. He thought that maybe I might be murdered in that prison. As far as I know there were no other reasons to release him.

The remainder of the interview report is taken up by formalities (family, documents) and by the travel route of the applicant. Towards the end, the following standard text block is included.

> I have nothing to add to the statement I have given. I have told everything that can be relevant for the determination of my claim. I have had sufficient opportunity to tell my story. I have told the truth. I have understood and comprehended the translator well. The questions were also clear to me.

This interview report is remarkable on several points. The punctuation is sloppy. When Karen speaks in full sentences, if at all, they are suggestive of the composition of a young child. Almost every other sentence contains linguistic oddities (which I have tried to translate). What Karen was beaten with is obscure until one consults the entry *cordelette* in a French dictionary; the word means little cord. And, of course, the last word of the extended quote should be 'me' instead of 'him'. These language oddities suggest that the translator did not speak Dutch very well, or that

the interview official was not very accurate. Nevertheless, the interview official (and, as we will see, the decision maker) did not conclude that there was a language problem but a credibility problem.

Due to the sloppiness of the interview report, the flight story went largely unresolved. Karen was arrested with her choir after a service. Did the soldiers only arrest the choir? If so, what might have been their motive for, apparently, directing ten Range Rovers to a church choir? Might they indeed have thought that this was a political gathering? And: If the aim of the soldiers was to intimidate her father, why didn't they arrest her father? Finally, just how Karen escaped, what the motive of the soldier who helped her was and what risks she faced in prison remain unclear.

The corrections submitted by a Refugee Council worker clarify these issues. The thing Karen was beaten with is a torture instrument, a kind of whip. The soldier who released her is the son of a close friend of her father. He knew that the soldiers in the prison had decided Karen had to be killed for agitating against Mobutu. Karen's father, a village chief in the region 'Bas-Kongo', was a member of a group that stands up for the interests of the region. Other village chiefs regularly met at the house of the family, and Karen had attended these meetings. And finally: Meetings of more than, say, five people and hence meetings such as that of the choir are seen as a threat to the regime.

Although noting that corrections had been submitted, the decision is based on the disorganised flight motives provided in the interview report. Karen was arrested along with fourteen others, it says, and there was therefore no action directed against her personally. The statements about her escape are incredible; it is incomprehensible that a single soldier could get her out and unlikely that he should take such a risk solely because he spoke the same language and pitied her. Karen only undertook minor activities, so her fear of being persecuted on account of them is not well-founded. And it is strange that while she was arrested for organising a religious gathering, she was interrogated about her father's political activities. Finally, her statements about her father's activities are insufficiently concrete.

In the review application, a doctor from the Medical Examination Group of Amnesty International gives a lengthy (1½ page single spaced) version of the flight motives, which I will summarise. Karen's father was a village chief and the leader of the entire region of Bas-Zaire. He was harassed by the Zairian authorities because of his political activities; the Mobutu regime wanted to keep the region in its sphere of influence because of its natural resources. The father was regularly arrested, beaten and released shortly after. Two of Karen's brothers had been arrested several times as well. Karen was arrested after directing her choir and talking with the choir outside the church. Soldiers accused them of holding a meeting in order to prepare a march against Mobutu. After initial interrogation in a camp and the soldiers found out who she was, only Karen was transferred to a prison. Here she was interrogated and tortured. Karen was raped in the camp during three nights by several men. The police officer who helped her escape was the son of a friend of her father and held a senior position. Karen got pregnant as a result of the rapes (which was her first sexual contact) and has the child with her.

The case was referred to the ACV and was still pending when I saw the file. The point in this case is that coherent and compelling flight motives existed, as shown by the medical report. However, the interview report is so sloppy that the attitude of the interview official is very plausibly a cause of the incoherent flight motives in the report, regardless of actual incoherence of Karen's account. The Amnesty report contains a completely coherent version of the same facts. The incredulous attitude of the interview official and the decision maker in Karen's case are indicative of the attitude encountered in the great majority of the Zairian cases which were part of the sample.

5.1.5.2. What is Political?

In some cases, applicants are assumed to have left the country of origin because of *discontent with the general situation*. This attribution was particularly frequent in Iranian cases, but also found in two Turkish cases and one Zairian case.

The idea that applicants have fled the general situation in Iran is almost routinely invoked in cases where women have problems presumably caused by their improper behaviour.

> An Iranian applicant who, according to the interview report, was tortured, raped and condemned to death by lapidation on account of working late at night together with a male colleague is first confronted with the argument that she has not substantiated her flight story. Then the decision goes on:
>
> But whatever one may conclude about the detention and the sentence, this cannot lead to the conclusion that the applicant is a refugee in the sense of the Convention, as there is no persecution on account of one of the enumerated grounds. The incidents are a consequence of legislation in force in Iran, and therefore the applicant bases her case on the general situation in the country of origin. This in itself is insufficient for a well-founded appeal to refugee status.
>
> In such a manner, the argument that what happened to the applicant is part of the general situation and the attribution of the general situation as a flight motive coincide.

The two Turkish cases in which attribution of flight motives occurs are both about women who, according to the interview report, claim persecution on account of the activities of their husbands. One example follows.

> An illiterate Kurdish woman born in 1971 was investigated several times in a hospital in order to determine whether she had recently had intercourse with her husband who had gone to northern Iraq to fight for the PKK. The decision argues:
>
> The problems that the applicant, according to her own statements, has experienced are related to the general situation in Eastern Turkey, which is characterised by conflicts between the Turkish authorities and Kurdish resistance fighters. In this respect it has not been established that the

> Turkish authorities pay specific attention to the particulars of the applicant.
>
> Dissatisfaction with the general situation in the country of origin in itself is insufficient grounds for a well-founded fear of persecution in the sense of the Convention.

In the Zairian case, the flight motives are clearly political but still attributed to dissatisfaction with the general situation in the country of origin.

> According to the interview report, the applicant has said she was arrested and detained for one and a half months following a UDPS (an opposition party) manifestation. The initial decision finds the story incredible because the applicant says she was released in exchange for sex with a guard. The Court finds that it appears from what the applicant has stated that her application 'is based primarily on the general situation in Zaire which, the applicant says, is characterised by total arbitrariness of the authorities, of which she has become the victim'.

These examples illustrate how flexible the 'general situation' argument is. Analytically, the attribution consists of two steps. The first step is to characterise a phenomenon as part of the general situation. 'Total arbitrariness of the authorities' in Zaire, harassment of the relatives of political activists in Turkey, discrimination of women in Iran are construed by decision makers as part of the general situation; in other words: as normal there. The second step is to decide that, having found no other compelling reason for the applicant to leave the country, the reason must have been the general situation. The question is why, in these cases, the decision makers do not simply limit themselves to rejection of the flight motives as insufficient but add an argument on the 'general situation'. My tentative conclusion is that the additional argument is intended to provide some minimal recognition of the fact that the applicant indeed had a problem in her country of origin – an insufficient problem, but nevertheless a problem. This seems to be the predominant characterisation of the flight motives of Iranian women fleeing problems on account of improper behaviour. In the other cases, the argument seems to be applied at random.

5.1.5.3. What Constitutes Persecution?

The idea that the acts of violence undergone by the applicant are random acts and therefore lack the discriminatory character required by the refugee definition was routine in Sri Lankan and Zairian cases. In these cases, the interview reports construct the acts of violence as random in part because the applicant is simply not asked about the possible causes of the acts. Constructing the acts of violence or fears that the applicant has experienced as random lends a character of irrationality or naturalness to them. The applicant is seen as just fearing the lack of good order, the Hobbesian state of nature.

In the Sri Lankan cases examined, the majority of the acts of violence are presented as happening out of the blue, with no clear cause and simply being part of what happens in civil wars. The interview reports show no indications of specific questions on how the rapes or assassinations came to happen. It may very well be that in some or many of the cases, the violence indeed occurred out of the blue. But the interview reports also show the interview officials to expect this. In many cases, the acts of violence are rather extreme and it is not at all obvious that they were random. Nevertheless, the acts are treated as random in the interview reports; no further questions are asked; and both the decision makers and many of the lawyers appear to accept this. It is not just a matter of the technical skills of the interview official, as illustrated by the case of Anne, because the interview report was of a very high quality in that case. A comparable 'randomisation' of the violence occurs in Zairian cases. In the cases from the other countries in the sample, the argument that the acts of violence were random acts occurs but not as routinely as in the Zairian and Sri Lankan cases. We may conclude that the 'randomisation' of violence (*i.e.*, acts of violence interpreted as random without consideration of a realistic alternative) is specific to particular countries. Zaire and Sri Lanka are considered countries with a weak State and resulting chaos.

There is a stark contrast between the perceived random nature of acts of violence in Zairian and Sri Lankan cases and, on the other hand, the perceived systematic nature of comparable acts in Bosnian cases. Although of course one may argue that this is due to the different nature of the respective conflicts, it is remarkable that especially in the Sri Lankan context violence which took place in a civil war along ethnic lines was never considered as directed at anybody in particular, while in Bosnian cases the directed nature of the violence was taken for granted.

5.1.6. Conclusion

It should be noted that the way in which the dichotomies operate are not compelling in any way. In passing, I remarked that the family is considered a natural site of non-intervention by the State when family conflicts are considered as inherently private, while State intervention in Chinese one child cases is considered equally as obvious. Also, at times applicants may succeed in changing the perspective on their cases. Thus, a Zairian woman who was at first considered as a grieving woman was recognised as a refugee once she was perceived as an activist relative of a disappeared person. Comparably, the Turkish woman whose credibility was damaged by the fact that she had left behind her children was considered credible when she was caught smuggling her children into The Netherlands. Credibility, political activities and persecution are constructed in part by gendered and ethnic notions. They do not per se work against women. They work to the benefit of women who succeed in fitting the mould, and to the detriment of women who don't. It seems that for Zairian women it was particularly difficult (but not impossible) to do so, and for Bosnian women it was relatively easy. However, the use of

(sometimes blatant) stereotypes turns out to be crucial in fact finding, credibility assessment and deciding what has been proven.

5.2. LIMITING JUDICIAL SCRUTINY OF CREDIBILITY ASSESSMENT[10]

Since 1 April 2001, the highest Dutch court in immigration appeal cases, the Council of State, has developed a jurisprudence that subjects administrative acts to minimal judicial scrutiny in immigration matters. One of the instruments to this end concerns evidence. The relevant practice consists of a combination of very restrictive lines of case law on (a) the accelerated procedure, (b) undocumented asylum seekers, (c) the possibility to submit statements or evidence after the initial decision, and (d) a restricted judicial scrutiny. My guess is that comparable strategies exist in other countries as well, although I expect that the Dutch Council of State case law is a rather comprehensive version. In my analysis, this practice is contrary to basic human rights standards. I will first describe this practice, and then sketch ways of challenging it.

5.2.1. Dutch Practice

5.2.1.1. Accelerated Procedure

The jurisprudence of the Council of State can only be assessed fully when one is aware that about 50 per cent of all asylum applications are now being processed in the accelerated procedure, which takes 48 working hours (*i.e.* hours between 8 AM and 10 PM). In practice, these applications are turned down in three to five days after they have been submitted. Asylum applicants get two hours to prepare for the interview with a legal counsel, and three hours to discuss the report of the interview with their counsel, as well as the document in which the arguments are given on the basis of which the administration intends to turn down the application. Translators are consulted by telephone, and they are replaced regularly (I have understood this happens every 45 minutes). The lawyers work in shifts (two shifts per day). As a consequence, the asylum seeker will not be assisted by one single counsel. The Council of State has held that the accelerated procedure can be used for any asylum application; it is not only fit for manifestly unfounded or clearly abusive applications, but for any application which the administration can reject within the relevant time limit.[11] Of course, the risk of accelerated procedures is that applicants

[10] This paragraph reflects my research about the case law of the Council of State, *see* my *Het hoger beroep in vreemdelingenzaken* (Sdu, Den Haag 2002) and De Afdeling en de rechtsstaat. Het hoger beroep in vreemdelingenzaken, 77 *Nederlands Juristenblad* (2002) p. 2082–2088.

[11] Afdeling bestuursrechtspraak van de Raad van State 7 August 2001, *Jurisprudentie Vreemdelingenrecht* 2001/259. This is contrary to case law from before 1 April 2001, *see* Rechtbank 's-Gravenhage (rechtseenheidskamer) 2 June 1999, *Jurisprudentie Vreemdelingenrecht* 1999/164. Additionally, it is contrary to ExCom Conclusion 30 (XXXIV, 1983). The European Commission proposal for a Directive on minimum norms for asylum

may have insufficient time to come forward with their statements, and may have insufficient time to collect evidence. This risk is exacerbated by the absence of a criterion that limits the application of the accelerated procedure to manifestly unfounded cases. Even with such a criterion, an accelerated procedure is problematic from a human rights perspective, but an accelerated procedure without such a criterion does not have any guarantees to prevent rejection of applications which have not been substantiated as a result of trauma or lack of time to collect evidence. The enormous time pressure, combined with the lack of a possibility to build a confidential relation with a legal counsel, makes it quite possible that (especially in 'deserving' cases) essential elements of the flight motives will not be put forward.

5.2.1.2. Undocumented Asylum Seekers

Since 1999, the Dutch legislation on aliens contains a provision concerning undocumented asylum seekers. It initially held that an application would be considered as manifestly unfounded if an applicant has not submitted relevant documents, unless the applicant can establish that the he/she cannot be blamed for this.[12] The apparent strictness of this provision was mitigated during the legislative process, because under heavy pressure from parliament the Government repeatedly and unambiguously stated that, even when the requirements for the application of this provision were fulfilled, the flight motives of the applicant would still be examined substantively as well. This led to a practice in which incorrect application of the provision could lead to annulment of a negative decision, while correct application did not bar access to a meaningful examination of the asylum claim. In other words: the legislation backfired, and led to a better procedural position of applicants than they had before.[13] In the new Aliens Act 2000, basically the same provision appeared, making a lack of documents a circumstance to be taken into account in the assessment of an asylum claim.[14] This more careful reformulation seemed an improvement compared to the 1999 formulation, because it obviously is a relevant factor whether or not an applicant has documents.

5.2.1.3. Marginal Scrutiny

However, combined with the marginal scrutiny introduced by the Council of State, this provision turns out to be fatal for a substantial share of asylum applications submitted in The Netherlands. In Dutch administrative law, a distinction is made

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procedures formally does not allow the application of the accelerated procedure to any asylum application, but makes it applicable on so many grounds that it does not meaningfully restrict its application, COM (2002) 326.

[12] Article 15c sub f Vreemdelingenwet.

[13] *See* Pres. Rb. 's-Gravenhage 31 March 1999, *Rechtspraak Vreemdelingenrecht* 1999, 13, with my comments giving an overview of practice and case law.

[14] Article 31 para. 2 sub f Vreemdelingenwet 2000.

between full and marginal judicial scrutiny of administrative acts.[15] Full scrutiny implies that the court can basically replace the decision of the administration by its own. The classical example of an issue subject to full scrutiny is the interpretation of the law. Marginal scrutiny implies that the court will only annul an administrative act if it is unreasonable. Classical examples of administrative acts subject to a marginal scrutiny are acts based on 'policy freedom' (*e.g.*, the law says that the administration *may* give a permit in a certain situation) or acts based on 'evaluation freedom' (*e.g.*, the law says that the administration may give a permit if *in its opinion* not giving an opinion would be unduly harsh). The Council of State has argued that the decision of the Minister of Aliens Affairs that flight motives are not credible is to be subject to a marginal scrutiny. At first sight, this seems an unlikely position. The statements of an applicant are true, or not; the administration's decision that they are not credible can be correct, or not. Did the Council of State adopt a thoroughly post-modern position, holding that veracity is a matter of perspective?

The Council itself has argued that, normally, in asylum cases the question is not whether or not the facts the asylum seeker has stated have been established; normally, there will be no evidence, and evidence cannot reasonably be required, on crucial aspects of the statements. So if normal rules were to be applied, in the overwhelming majority of cases the outcome would be that the flight story is considered as not credible, because the applicant has not established its veracity. The Council maintains that in order to assist the asylum applicant on this point, policy guidelines have been developed. They hold that the statements of the applicant will be held to be true,

- if the applicant has fully answered the questions, and
- if the statements are consistent on main points, and
- if the statements are not unlikely, and
- if the statements are in conformity with what is generally known about the situation in the country of origin.

If the applicant is undocumented and can be blamed for this, the statements should, in addition, also

- not contain gaps, obscurities, unlikely turns and inconsistencies on relevant details; and
- the flight motives must be positively convincing.

[15] There is debate as to whether more and less marginal varieties of marginal scrutiny can be distinguished. This is an extremely exciting debate, however I will omit it here, as it is not relevant in our context.

In applying this policy, the administration has 'evaluation space'.[16] The administration is better equipped to evaluate the credibility of unsubstantiated flight motives, because it has much more experience in this than the judiciary.[17]

The Council of State has given concrete indications about the effects of the marginal scrutiny in combination with the fact that the applicant was undocumented. It held that, if the negative decision is not based on one of the factors mentioned in Article 31 para. 2 Vw 2000 (which are factors discrediting the asylum applicant), the issue to be addressed by the Minister is whether the flight motives are consistent on main points, not improbable, and in accordance with what is generally known about the country of origin.[18] However, if the negative decision is based on one of these factors, of which being undocumented is the main one, this has as an effect that the determination that the applicant's flight motives are not credible is hardly subject to meaningful judicial scrutiny.

It has to be noted that, in principle, asylum seekers are required to have documents on four points: identity, nationality, travel route and flight motives.[19] The Council of State has ruled that it is up to the Minister to decide which documents should have been submitted in the particular case.[20] This means that, even when an asylum seeker has submitted documents testifying to her/his identity, the lack of travel documents may be held against her/him.[21]

In fact, it seems that the lack of documentation has become an independent ground for rejecting asylum applications. I am inclined to think that the role of documentation in the Dutch asylum procedure is not part of a communicative discourse, in which the question would be whether the lack of documentation damages the credibility of the applicant. It seems more likely that the issue of documentation is addressed in a corrective discourse. The overarching aim is to give future applicants an incentive not to destroy their documents, and to get the message to smugglers that if they advise or force their clients to do so, their applications will

[16] This term is usually used for evaluations of a factual nature about which debate is possible between reasonable persons, but which are nevertheless subject to a full judicial scrutiny. Apparently, the Council of State here holds that administrative acts deploying 'evaluation space' can be subject to a marginal scrutiny.

[17] Afdeling bestuursrechtspraak van de Raad van State 27 January 2003, *Jurisprudentie Vreemdelingenrecht* 2003/103.

[18] Afdeling bestuursrechtspraak van de Raad van State 22 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/451; vgl. Afdeling bestuursrechtspraak van de Raad van State 25 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/454.

[19] *Vreemdelingencirculaire* 2000, C1/5.8.2.

[20] Afdeling bestuursrechtspraak van de Raad van State 31 October 2002, *Jurisprudentie Vreemdelingenrecht* 2003/2; Afdeling bestuursrechtspraak van de Raad van State 16 May 2003, *Jurisprudentie Vreemdelingenrecht* 2003/293.

[21] Afdeling bestuursrechtspraak van de Raad van State 23 September 2003, *Jurisprudentie Vreemdelingenrecht* 2003/406.

be rejected. In such a discourse, individual asylum seekers are sacrificed at the altar of general policy aims.[22]

5.2.1.4. Freezing the Case

The final element is the introduction of a formal blockade to introduce further statements or evidence after the initial decision has been taken, even if it has been taken in the accelerated procedure. In this way, the case is 'frozen' at the moment the applicant is interviewed; after that moment, it is only possible to introduce further facts or evidence if it was impossible to introduce them at an earlier moment, most notably because the fact had not yet occurred or the evidence did not yet exist. Central in this respect is the Council's interpretation of Article 4:6 of the General act on administrative law (Awb), which holds (a) that a person applying for the same thing for the second time must submit new facts, and (b) that, if he fails to do so, the administration may dismiss the second application out of hand.

The Council of State holds that if the administration dismisses a second application out of hand, the court can only examine whether or not the applicant has submitted new facts. If the court concludes that no new facts have been submitted, the appeal must be rejected by the court. This means that the court is precluded from examining whether the administration could reasonably dismiss the application out of hand, notwithstanding the fact that Article 4:6 Awb stipulates that the administration *may* do so in the absence of new facts, and not that it *must* do so. This must be so, the Council argues, because if the court would examine whether it was reasonable to reject a second application in the absence of new facts, it would in fact examine the validity of the decision taken on the first application, and this first decision has already become final.[23]

The crucial question then is: what is new? The answer the Council gives is an extremely restrictive one. It qualifies as 'new' only such facts that have occurred or evidence that has been produced after the first decision was taken, or if they could not possibly have been introduced before the first decision. If a woman does not dare to disclose immediately that she has been the victim of sexual violence, or if an applicant has arrived without an arrest warrant, this fact or document may be taken into account by the administration later on during the procedure (or during a second procedure), but regardless of whether the administration does so, the court can only

[22] For the differences between communicative and normative approaches, *see* Zahle's contribution in this volume, supra Chapter 2.1.

[23] Afdeling bestuursrechtspraak van de Raad van State 4 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/219. The Council of State applies a further procedural rule in such a way that even during the appeal procedure against the first negative decision, the applicant cannot submit additional statements or evidence, unless they are new, *e.g.* Afdeling bestuursrechtspraak van de Raad van State 3 August 2001, *Jurisprudentie Vreemdelingenrecht* 2001/258. Yet another procedural rule is applied in such a way that, in fact, after an applicant has been interviewed, no additional statements or evidence can be submitted, unless they are new, Afdeling bestuursrechtspraak van de Raad van State 22 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/452.

examine whether new facts were submitted, and in the absence of new facts, must reject the appeal. This means that the administration has a discretionary power (will a fact or document that was submitted too late, and which does not constitute a new fact in the formal sense, be taken into account?) which is not subject to judicial review.

The Council has made two openings. First, if an applicant during the interview preceding the first decision mentions there are things she cannot express, or if an applicant mentions that evidence is underway, it may be unreasonable to take a first decision without waiting for further statements or evidence.[24] Second, the Council has held that under special, individual circumstances it may be necessary not to apply the rules freezing the case after the asylum interview.[25] It remains to be seen to what extent these openings can in the future substantially mitigate the effects of the general line of the Council. By the time of writing, the Council had not used these openings to mitigate the harshness of its line of case law.

5.2.1.5. Summing up

In an ultra-quick asylum procedure, in which the fact that an applicant is undocumented weights heavily, it is quite conceivable that three kinds of substantive mistakes occur more often than would be the case in a normal procedure:

1. The asylum applicant does not (fully) disclose relevant facts, due to trauma, disorientation or related factors;[26]
2. The asylum applicant does not submit documents, because they were either left at home (it was risky to bring them, or the applicant could not foresee that a birth certificate might come in handy) or were destroyed or handed over to the smuggler (my impression is that smugglers put pressure on applicants in order to leave no trace of the travel route);
3. The administration makes mistakes due to temporal pressure.

It is less likely that errors on these points will be corrected by the judiciary if the decision of the administration on credibility is subject to a marginal (instead of a full) scrutiny. Thus, both the administrative and the judicial phase of the asylum procedure risk being flawed. If the asylum procedure contains a formal blockade against introducing facts and evidence in later stages of the procedure (when the applicant has recovered a bit, or when s/he has succeeded in obtaining evidence

[24] Afdeling bestuursrechtspraak van de Raad van State 28 June 2002, *Jurisprudentie Vreemdelingenrecht* 2002/294.

[25] Afdeling bestuursrechtspraak van de Raad van State 5 March 2002, *Jurisprudentie Vreemdelingenrecht* 2002/125; Afdeling bestuursrechtspraak van de Raad van State 6 November 2002, *Jurisprudentie Vreemdelingenrecht* 2002/448. The Council may have applied this exception once, in Afdeling bestuursrechtspraak van de Raad van State 24 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/280, which however is so obscurely motivated that is does not give certainty about this.

[26] Compare the contribution of Herhily to this volume, *infra* Chapter 7.

from the country of origin), this minimises the possibilities of repairing mistakes made in the initial procedure.

5.2.2. An Excursion: It's a thin line[27] *. . . between fact and law*

The case law of the Council of State is based, on some points, on the distinction between fact and law. In light of Vedsted-Hansen's contribution to this volume,[28] I will summarily address this distinction.

The Council of State has held that the administration's assessment of credibility (*i.e.* about the facts submitted by the applicant) is subject to a marginal scrutiny.[29] This implies that the administration's decision about the interpretation of the refugee definition in general (when does discrimination constitute persecution)[30] and the application of the refugee definition to the established facts of a particular case (given these facts, does the applicant have a well-founded fear of being persecuted?) are subject of full scrutiny.[31] Of course, this gives rise to the question where the line between facts and the law has to be drawn. Because of the substantial effects of labelling something as fact or law, this has become subject of debate.

In the Dutch asylum procedure, the applicant gets the opportunity to submit corrections and additions to the interview report. The question whether the administration should have accepted these as true is subject to marginal scrutiny.[32] If an asylum seeker has established that there have been acts of persecution (*i.e.* the applicant has been shot at) and that there is a persecution ground (*i.e.* the applicant has refused to co-operate with the Pasdaran), it also has to be established that there is a link between the persecution and the ground. On the issue of whether there is such a link, the administration's decision is subject to marginal scrutiny.[33]

A rather puzzling decision holds that the interpretation of the statements of the asylum seeker (also formulated as the way in which the administration has understood the statements) is subject to marginal scrutiny.[34] In the context of the – sparse – argumentation in the rest of the decision, the question at stake seems to be what is the essence of the applicant's flight motives.

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[27] Words and Music by Richard Poindexter / Robert Poindexter / Jackie Members.
[28] *See* Chapter 4 *supra*.
[29] Afdeling bestuursrechtspraak van de Raad van State 9 July 2002, *Jurisprudentie Vreemdelingenrecht* 2002/275.
[30] Afdeling bestuursrechtspraak van de Raad van State 4 September 2002, *Jurisprudentie Vreemdelingenrecht* 2002/359.
[31] Afdeling bestuursrechtspraak van de Raad van State 15 November 2002, *Jurisprudentie Vreemdelingenrecht* 2002/469.
[32] Afdeling bestuursrechtspraak van de Raad van State 28 August 2002, *Jurisprudentie Vreemdelingenrecht* 2002/355.
[33] Afdeling bestuursrechtspraak van de Raad van State 28 June 2002, *Jurisprudentie Vreemdelingenrecht* 2002/293.
[34] Afdeling bestuursrechtspraak van de Raad van State 21 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/448.

The Council has quite often quashed a decision of the District Court because it had applied a full instead of a marginal scrutiny.[35] For example, the District Court had stated that the administration had *incorrectly* held the flight story not to be true, while it should have applied the test whether the administration could *not reasonably* hold the flight story not to be true. Only recently the Council had to deal with cases in which the District Court did use the right formulation.

The Council elaborated its decision of 27 January 2003, and distinguishes between the situations in which the administration has applied article 31 para. 2 Aliens Act 2000 (esp. the fact that the applicant is undocumented), and situations in which it has not done so (see above, text accompanying fn. 15).

If the applicant was not undocumented, it is not sufficient if the negative decision contains scattered remarks mentioning that elements of the flight story are surprising or remarkable while these remarks are not combined into a conclusion about the incredibility of the flight story.[36] In this situation, the negative decision must contain an explicit reaction to precise, detailed and documented statements of an applicant countering the administration's initial conclusion that the flight motives were not true.[37]

However, if the decision holds that Article 31 para. 2 Aliens Act 2000 is applicable (and if this is accepted by the court), less is required of the decision, and there is less scope for the court to examine the arguments given in the negative decision.[38]

In sum, the Council of State considers quite a few aspects of decisions as being in the domain of facts, subject to a marginal scrutiny. Moreover, what is especially unclear, is the line between, on one hand, the application of the refugee definition to the individual case (full scrutiny) and, on the other hand, the interpretation of facts and the existence of a nexus between persecution and persecution grounds (both marginal scrutiny). The set of decisions of August 2003 strongly suggests that, if one of the elements mentioned in Article 31 para. 2 Aliens Act 2000 applies (as will be the case in the overwhelming majority of the cases), findings of fact by the administration can hardly ever be touched by the judiciary.

[35] E.g. Afdeling bestuursrechtspraak van de Raad van State 15 April 2003, *Jurisprudentie Vreemdelingenrecht* 2003/249.
[36] Afdeling bestuursrechtspraak van de Raad van State 22 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/451.
[37] Afdeling bestuursrechtspraak van de Raad van State 25 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/454.
[38] Afdeling bestuursrechtspraak van de Raad van State 11 August 2003, *Jurisprudentie Vreemdelingenrecht* 2003/441.

5.2.3. Compatibility with the ECHR

It is debatable whether the present-day Dutch asylum procedure is compatibility with human rights standards.[39] I will shortly summarise the arguments raised until now.

5.2.3.1. Rigorous Scrutiny; Undocumented Asylum Applicants

When evaluating claims holding that expulsion would be a violation of Article 3 ECHR, the European Court of Human Rights (hereinafter the 'Court') has held ever since the *Vilvarajah* decision that

> The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.[40]

In its *Jabari* decision, the Court went one step further and held that it is not only the Court's examination that must necessarily be a rigorous one, but that the State party's examination of a claim also must be a rigorous one:

> The court further observes that, having regard to the fact that article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by article 3.[41]

At first sight, this seems contrary to the Court's case law on Article 13 ECHR in British immigration cases. In the *Soering* decision, the Court accepted the British judicial review procedure as an effective remedy in the sense of Article 13, although the applicable criteria in that procedure suggest a marginal scrutiny of acts of the administration. But, using a phrase which has been repeated in all of the later cases on the point, the Court took into consideration that

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[39] *See* for comparable criticism Human Rights Watch: *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, Vol 15, No. 3 (D), April 2003, and UNHCR: *Implementation of the Aliens Act 2000: UNHCR's Observations and Recommendations*, July 2003, available *at* <www.vluchtweb.nl>, not on UNHCR's website.
[40] ECtHR 30 October 1991, *Soering* v. *United Kingdom*, A 161; comparable passages can be found in ECtHR 15 November 1996, *Chahal* v. *United Kingdom*, Reports 1996-V, para. 96; ECtHR 2 May 1997, *D.* v *United Kingdom*, Reports 1997-III, para. 49; ECtHR 7 March 2000, *T.I.* v. *United Kingdom*, application 43844/98; ECtHR 6 February 2001, *Bensaid* v. *United Kingdom*, Reports 2001-I, para. 34.
[41] ECtHR 7 July 2000, *Jabari* v. *Turkey*, application 40035/98.

> According to the United Kingdom Government, a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.[42]

The Court added that in the judicial review procedure, Soering's claim under Article 3 would have been given the most anxious scrutiny in view of the fundamental nature of the human right at stake.[43] In fact, the Court's position is not that a marginal scrutiny of a claim under Article 3 is acceptable under Article 13 ECHR, but it accepts the construction that no reasonable State Secretary could decide to deport someone if it has been established before a national court that the deportation would be a violation of Article 3 ECHR. Thus, a rigorous scrutiny cloaked in marginal terms is acceptable because of the substance of this test. It comes as no surprise then that in the *Jabari* decision the Court ruled that

> given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.[44]

There is no tension between, on the one hand, the Court's standing case law holding that a rigorous scrutiny must be applied on the basis of Article 3, and its considerations about Article 13 in the *Jabari* decision, and on the other hand its case law on Article 13 in British asylum cases, if one accepts that it requires a rigorous scrutiny there as well, but does not find it problematic that it takes place in the framework of something that in the domestic legal setting is considered to be a marginal scrutiny.

In sum, it is clear from the case law of the European Court of Human Rights that the claim by an alien that her/his deportation would result in a violation of Article 3 ECHR must be given a rigorous scrutiny by the domestic courts (or the quasi judicial body constituting the effective remedy). The Court has not excepted the issue of credibility in this respect. I think it is obvious that a marginal scrutiny of

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[42] ECtHR 7 July 1989, *Soering* v. *United Kingdom*, A 161, para. 121. This phrase was repeated in ECtHR 30 October 1991, *Vilvarajah and others* v. *United Kingdom*, A 215, para. 123; ECtHR 15 November 1996, *Chahal* v. *United Kingdom*, Reports 1996-V, para. 148; ECtHR 2 May 1997, *D.* v *United Kingdom*, Reports 1997-III, para. 70; ECtHR 6 February 2001, *Bensaid* v. *United Kingdom*, Reports 2001-I, para. 55; ECtHR 6 March 2001, *Hilal* v. *United Kingdom*, Reports 2001-II, para. 77.

[43] This phrase was repeated in *Vilvarajah*, para. 125, and in *D*. para. 71.

[44] ECtHR 11 July 2000, *Jabari* v. *Turkey*, Reports 2000-VIII, para. 50.

the kind practiced in the Netherlands cannot be considered a rigorous scrutiny.[45] Hence, as a result of the case law of the Council of State on this point the Dutch asylum procedure is in violation of Article 13 ECHR.

Obviously, it is relevant whether an applicant has documents, if so which ones, and if not whether s/he has an explanation for this. However, especially the quoted passage from *Bahaddar*, suggests that in the Court's view this can only play a role of some importance if an applicant has been granted a realistic opportunity to submit evidence. *Hilal* is an example of how relaxed the Court reacts to an applicant submitting pieces of evidence one by one at considerable intervals. In addition, a main requirement in Dutch practice is that the applicant submits documents concerning her/his travel to The Netherlands. Obviously, this is of great importance for the authorities (application of the Dublin system and of safe third country rules), but may well be immaterial to the asylum claim. The crux of the undocumented issue in Dutch law however seems to be that it leads to an even more marginal judicial scrutiny of the administration's decision on credibility.

5.2.3.2. Accelerated Procedures and Freezing

The massive use of the accelerated procedure with its strict time limits creates tension with the European Convention on Human Rights. In its *Bahaddar* decision, the Court ruled that applicants in principle must comply with domestic procedural rules, because these enable the national jurisdictions to discharge their case-load in an orderly manner. But the Court added:

> It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.[46]

In the *Jabari* decision, the Court ruled about the Turkish regulation requiring asylum applicants to submit their claim within five days after entering the country:

> In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be

[45] The Council of State, however, has recently argued precisely that: the marginal scrutiny on the point of credibility is part of a judicial scrutiny that, taken as a whole, is to be considered as a rigorous one, Afdeling bestuursrechtspraak van de Raad van State 11 December 2003, *Jurisprudentie Vreemdelingenrecht* 2004/52.

[46] ECtHR 19 February 1998, *Bahaddar* v. *The Netherlands*, Reports 1998-I.

> considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.[47]

Although these decisions are not about an accelerated procedure, one can draw the conclusion that it should not be a priori fatal to an asylum claim if an applicant has not come forward with a complete statement due to trauma or stress, or if s/he has not succeeded in collecting all evidence before the end of the accelerated procedure. However, in the Dutch context, such delay is usually fatal due to the case law of the Council of State on freezing. It should be noted that, in fact, the phenomenon of freezing in effect means the introduction of a concealed time limit for submitting facts. In the Turkish context of the *Jabari* decision, the application had to be made within five days after entry, but once that had been done facts could be introduced during a longer period of time. In the Dutch context, there is no formal time limit for submitting an asylum claim, but once it has been submitted there is a strict (and in 50 per cent of all asylum cases: very short) time limit for submitting facts.

Domestic rules excluding subsequent statements and subsequent evidence are rules about the relevant moment in time for judicial assessment. On this point, the Court has been consistent and emphatic. In Article 3 cases, the relevant moment in time is the moment of expulsion or, if expulsion has not yet taken place, the moment of the Court's examination. The Court *will assess all the material placed before it and, if necessary, material obtained of its own motion*.[48] The argument that evidence has only been submitted in the procedure before the Court itself while it could have been produced earlier (medical statements of Amnesty International) has been rejected.[49] Therefore, it is clear that the European Court of Human Rights will take into account later statements and later evidence (provided, of course, that they are considered credible) even when a domestic court does not.

However, it would be inconsistent with the mechanisms of the European Convention on Human Rights if the Court were to be a court of first instance. This would be the case if the Court would accept that domestic courts do not take into account statements and evidence that the Court itself does have to take into account. However, it emerges from the Court's case law that it does require domestic courts to take into account later statements and evidence. This is clear in particular from the Court's *Jabari* judgement, where it held the automatic and mechanical application of formal procedural rules at variance with Article 3 ECHR. In the same judgement, the Court held that a procedure in which such procedural rules were applied to the expense of a substantive examination of the claim under Article 3 was not an effective remedy in the sense of Article 13 ECHR. In the *Hilal* decision, the Court had to decide about a case in which a domestic 'freezing' provision had been

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[47] ECtHR 11 July 2000, *Jabari* v. *Turkey*, Reports 2000-VIII.

[48] *E.g.* ECtHR 20 March 1991, *Cruz Varas* v. *Sweden*, A 201; ECtHR 30 October 1991, *Vilvarajah and others* v. *United Kingdom*, A 215; ECtHR 15 November 1996, *Chahal* v. *United Kingom*, Reports 1996-V; ECtHR 29 April 1997, *H.L.R.* v. *France*, Reports 1997-III; ECtHR 6 March 2001, *Hilal* v. *United Kingdom*, Reports 2001-II.

[49] ECtHR 9 July 2002, *Venkadajalasarma* v *The Netherlands,* application 58510/00.

applied; it basically disregarded the freezing rule, examined evidence that had been submitted too late by domestic standards, and concluded that Hilal's expulsion would be a violation of Article 3.[50]

5.3. CONCLUSION

On the basis of the above, I think it is crucial that the appeal procedure provides for a critical space that enables the courts to evaluate the way in which the administration has dealt with proof and credibility. No matter how well the interview was done, no matter how understanding the decision maker has been, stereotypes may have played a crucial role in the procedure. The appeal procedure should be the occasion to scrutinise this, and it should not be watered down on the assumption that the administration has developed such expertise that the courts cannot match it. Also, it is crucial to be acutely aware that the asylum seeker, even in a very sensitive procedure, is the *object* of the procedure. The interviewer and interpreter have considerable power over the applicant, the use of which must be the subject of close scrutiny. The inequality in power cannot be done away with by a sensitive and sensible asylum procedure.[51]

This suggests that the first part of the procedure, in which the administration seeks to establish the facts of the case, should be inquisitory in nature. It should be characterised by informality and a quest for material truth. An effort should be made to win the trust of the applicant.[52] However, in the ideal typical version of this kind of procedure, there is no one looking for reasons to dismiss the application. This may well undermine the role of the investigator and/or the decision maker, who may be seduced into acting as the adversary of the applicant. Although this formulation is too strong, something like it can be seen in first instance decision making in The Netherlands, as the above has shown.[53] A thorough, inquisitory first instance procedure can be brought about by the training of civil servants and by soft law guidelines for conducting interviews, and for collecting and assessing evidence.

The second part of the procedure, to the contrary, should be adversarial in nature, because this maximises the space for a critical examination of both the applicant's statements and the administration's way of dealing with them. It is not necessary for the applicant to trust the representative of the administration in the appeal phase of the procedure. The two sides will each argue for their position, and

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[50] *See* more extensively J. van Rooij, *Procedure versus Human Rights* (Vrije Universiteit Amsterdam, 2004, also available at www.rechten.vu.nl/documenten.

[51] *See* more generally on this issue Spijkerboer, *supra* note 1, pp. 45–55, and R.F. Barsky, *Constructing a Productive Other. Discourse Theory and the Convention Refugee Hearing* (John Benjamins, Amsterdam and Philadelphia, 1994).

[52] *See* the contributions of Byrne (*infra* Chapter 10) and Noll (*infra* Chapter 8) to this volume.

[53] *See* more extensively C. Rousseau, F. Crépeau, P. Foxen and F. Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' 15 *Journal of Refugee Studies* (2002) 1.

thus enable the judge to remain impartial.[54] A problematic aspect of the adversarial model is that it requires formal procedural rules. The case law of the Dutch Council of State shows that such formal procedural rules may be made to work in such a way that they prevent the courts from effectively scrutinising administrative decisions in asylum cases, as I have shown in section 2 of this chapter.

[54] *Ibid.*

CHAPTER 6

ON BEING HEARD IN ASYLUM CASES

EVIDENTIARY ASSESSMENT THROUGH ASYLUM INTERVIEWS

Nienke Doornbos[1]

The increasing number of asylum seekers arriving at the end of the 1980s has placed many western countries with the difficult task of distinguishing between people who genuinely fear persecution and people who merely want to improve their life conditions. Empirical studies from the United States,[2] Canada,[3] Germany,[4] Switzerland,[5] the United Kingdom,[6] and the Netherlands[7] have shown that refugee status determination is a highly complex adjudication process in which legal, as well as psychological, linguistic and cultural factors must be taken into account. In addition, a thorough knowledge of the political context in the different countries of origin is required. Since there is often little documentary evidence about individual circumstances, immigration officers carefully scrutinize the oral testimony of asylum applicants. In recent years, some forensic methods, like language analysis have been developed and put in practice to examine the age or origin of asylum claimants. The main source of information, however, remains the applicant. It is up to her/him to provide as much information as possible about the basis of her/his claim. The applicant, as well as the written report of her/his testimony will circulate

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[2] D. Anker, 'Determining Asylum Claims in the United States' XIX *Review of Law and Social Change* (1992) pp. 433–528.

[3] R.F. Barsky, *Constructing a Productive Other. Discourse Theory and the Convention Refugee Hearing* (John Benjamins Publishing Company, Amsterdam/Philadelphia, 1994); C. Rousseau, F. Crépeau, P. Foxen and F. Houle 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' 15/1 *Journal of Refugee Studies* (2002) pp. 43–70.

[4] T. Scheffer, *Fallherstellung und Darstellungsmacht, eine Ethnographische Studie des Deutschen Asylverfahrens* (Universität Bielefeld 1998).

[5] M.-A. Monnier, 'The Hidden Part of Asylum Seekers' Interviews in Geneva, Switzerland: Some Observations about the Socio-Political Construction of Interviews between Gatekeepers and the Powerless' 8/3 *Journal of Refugee Studies* (1995) pp. 305–325.

[6] H. Crawley, *Breaking Down the Barriers, a Report on the Conduct of Asylum Interviews at Ports* (Immigration Law Practitioners' Association, London, 1999).

[7] T.P. Spijkerboer, Gender and Refugee Status (Aldershot, Ashgate 2000). N. Doornbos, De papieren asielzoeker, institutionele interactie in de asielprocedure (The Paper Asylum Seeker, Institutional Interaction in the Asylum Procedure) (Nijmegen: GNI, 2003).

through various organizations. Not just immigration officers, but also judges, legal representatives and Refugee Council workers will use the report of the asylum interview as a starting point for their own contacts with the applicant.

Given the central role of asylum claimants' statements, it is of crucial importance that interviews with asylum seekers are conducted in a profound, patient and objective manner. As Anker and Rousseau *et al.* have already pointed out, special attention must be paid to the vulnerable situation in which most asylum applicants find themselves when being interviewed by immigration officers. This is also recognized in the Handbook of the United Nations High Commissioner for Refugees, which states for example:

> 'It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.'[8]

The UNHCR Handbook also acknowledges that some asylum seekers might feel reluctance towards officials due to their experiences in their home country. Many are tired, anxious or feel inhibited during the interview.[9] On the one hand, immigration officers have to bear in mind that such conditions may lead to inconsistencies and contradictions in asylum seekers' accounts. On the other hand, officers have to identify those who fabricate their personal history or who have been instructed by traffickers to withhold information. Officers thus have the difficult task to distinguish facts from fiction. In one of the first empirical studies on the asylum determination process, Anker found a considerable disparity between 'the law in the books' and 'the law in practice'. At the end of the 1980s, the adjudicatory system in the United States was still one of *ad hoc* rules and standards. Despite Supreme Court's decisions, which emphasize for instance the sufficiency of the applicant's own testimony, immigration judges often expected applicants to produce documentary proof. They also applied informal procedural rules. For example, they denounced hearsay evidence, directed applicants to provide short 'yes or no' answers, and refused to allow narrative answers. Many judges tended to assess the applications with 'presumptive scepticism' and used the hearings primarily as an opportunity to test the applicant's credibility. This attitude undermined the appearance of impartiality. Furthermore, Anker found that ideological preferences and unreasoned and uninvestigated political judgements influenced the determination process. She also highlighted several other problematic factors, such as bureaucratic inefficiencies and problems in foreign language interpretation.[10]

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[8] Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, paragraph 190.
[9] *Ibid.*, paragraph 198 and 199.
[10] D. Anker, *supra* note 2.

Anker's findings show many similarities with later findings of researchers in other countries. According to Crawley, who observed interviews at ports in the United Kingdom, many of the communication problems in the interviews stem from a lack of clarity about whether the purpose of the asylum interviews is to gather information or to test the credibility of the applicant's claim for asylum. Immigration officers often have presumptive ideas that most applicants do not meet the criteria for well-founded fear of persecution. Their attitude influences the way they conduct interviews and their willingness to pose the appropriate questions. Crawley also criticizes the linguistic skills and the conduct or role interpreters have in the asylum process.[11] Many asylum seekers feel that they do not have sufficient time and room to fully present their case. The interviews usually take only two or three hours. While it is assumed that the interviews are conducted by experienced and professional officers, this expectation was generally not fulfilled by the research findings. It is too easily assumed that 'genuine refugees' are able to present all relevant details at once, while in fact they lack knowledge about the relevance of details for the decision.[12]

In Canada, Rousseau *et al.* have conducted an interdisciplinary study that documents the influence of legal, psychological and cultural factors on the process of refugee determination. The authors focussed on the decision-making process at the Immigration and Refugee Board (IRB), which is the second deciding instance in Canada. The results indicate numerous problems affecting the role and behaviour of all actors: difficulties in evaluating evidence, assessing credibility, and conducting hearings; problems in coping with vicarious traumatization and uncontrolled emotional reactions; poor knowledge of the political context, false representations of war, and cultural misunderstandings or insensitivity . There is a major overlap in the legal, psychological and cultural problems observed. In more than half of the cases there were problems in all three fields, while the other cases showed problems in one or two of the areas. These conclusions were based on forty problematic cases, referred to the researchers by lawyers and health and community workers. All the files had a negative decision that was based on the non-credibility of the claimant.[13]

Although there is an increasing number of studies which point to communication and language problems within the asylum determination process, there are only a few that actually give insight into the way asylum interviews are being conducted.[14] In this chapter, I will present the findings of a Dutch case study that is entirely focussed on the communication between applicants, immigration officers, and interpreters. As there is a growing emphasis on 'front-loading' and accelerating asylum procedures, I decided to focus on the initial stage of the decision-making process when asylum seekers present their case for the first time. In which manner and under which circumstances do immigration officers conduct

[11] *See also* M. Inghilleri, *Translation, Interpretation and Asylum Adjudication* (Economic and Social Research Council, London, 2004).
[12] H. Crawley, *supra* note 6, pp. 59-82.
[13] C. Rousseau *et al., supra* note 3.
[14] Exceptions are T. Scheffer, *supra* note 4 and R.F. Barsky, *supra* note 3.

interviews? How do they ascertain credibility in encounters with asylum applicants? These and other questions will be addressed. Drawing on observations of the communication between immigration officers and asylum applicants, this chapter discusses the way the Dutch Immigration and Naturalization Department of the Ministry of Justice (hereinafter the IND) deals with questions of credibility and trust. First, I will outline some theoretical and methodological notions and give some background information on interviewing procedures in the Netherlands. Then I will present two illustrative fragments from asylum interviews. This will be followed by an overview of communication problems connected to evidentiary assessment. The findings will then be summarized and discussed in the final section.

6.1. SOME THEORETICAL NOTIONS

My research focuses on the communication between asylum claimants and interviewing officers. By communication, I mean the exchange of information between people who are conscious of each other's presence or intermediary presence (such as presence by telephone or, as is often the case in asylum interviews, communication through an interpreter). A distinction can be made between verbal and non-verbal communication. Literature on non-verbal communication acknowledges that there are very few objective cues for truth and deception.[15] People generally assume that eye contact physical movement and facial expression reveal hidden motives underlying the content of the conversation. However, since these cues have different meanings in different cultures, they can easily be misjudged in intercultural interview settings. Moreover, people are able to control their movements and expressions to a certain extent. Deception is therefore more likely to manifest itself in a lack of movements. There are many lay misconceptions about the nature of truthful communication. Liars and the people who want to expose them are easily caught up in a play in which they try to restrain or reveal *perceived* suspicious behaviour.[16] In an experimental study, researchers showed IND officers video fragments of an actor playing an asylum seeker. They asked the officers to assess his reliability on the basis of body language. The findings showed that officers were neither uniform nor consistent in their assessment. Immigration officers stressed that they were reluctant to draw any firm conclusions based on non-verbal behaviour.[17]

The present study focuses on verbal communication. I did find, however, that emotions, whether expressed verbally or non-verbally by asylum applicants, do play a role in the assessment of credibility. In some cases, the IND officers considered the applicant's emotional reactions to be a sign of veracity, whereas in other cases,

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[15] B.M. DePaulo, B.E. Malone, J.J. Lindsay, L. Muhlenbruck, K. Charlton and H. Cooper, 'Cues to Deception' 129 *Psychological Bulletin* (2003) pp. 74–118.
[16] *Ibid.*
[17] H. Korzilius and D. Springorum 'De betekenis van lichaamstaal in een gehoorsituatie' ('The Meaning of Body Language in an Interview Setting'). In: E. Huls and B. Weltens, Artikelen van de Derde Sociolinguïstische Conferentie. (Delft: Eburon, 1999 pp. 275–286).

in which officers expected emotions to appear, they perceived the *absence* of emotions as a sign of incredibility. During an emotional outburst, the officers usually introduced an extra break to calm down the applicant. Some officers added a comment to the interview report that the applicant showed emotions. How such notes affect the judgement of adjudicators is hard to say. In the Netherlands, officers other than those who interview the claimants decide about asylum requests. This division of tasks aims at the increase of the objectiveness of the assessment. It underlines the impersonal character of the proceedings and also reflects the idea that decisions should not be influenced by emotions or subjective interpretations.

In all situations, whether in asylum interviews or in normal life, communication requires a continuous interpretation of meanings in which language differences, (sub)cultural differences as well as class and gender differences play a role. These differences become even more apparent in legal settings, in which all participants have pre-defined roles and are expected to behave according to specific rules of interaction and politeness.[18] Communication in asylum interviews is different from everyday conversation due to at least three factors. First, the interlocutors often do not speak the same language. In the vast majority of cases, the officer conducts the interview with the assistance of an interpreter, employed by the Ministry of Justice on a session basis. An interpreter is indispensable in bridging the linguistic gap between the interviewer and the interviewee. Nevertheless, the presence of a third person can also complicate communication, as the interlocutors depend on the translator's interpretation of the questions and replies. Furthermore, this triadic relation may result in the forming of coalitions or in processes of inclusion and exclusion.[19] The IND code of conduct stresses that interpreters are impartial. Their task is to bridge the linguistic gap between the applicant and the interviewing officer, no more. Interpreters may not interfere in the interview or give background information concerning the applicant or his country of origin.[20]

Secondly, communication in asylum cases is a form of intercultural communication.[21] Not just the language, but also the total frame of reference is different or perceived to be different. People tend to judge one another on group characteristics, such as profession, residence, gender, religion, ethnicity, lineage, language, and age. Perceived differences often result in prejudices. The subjective perception of 'otherness' plays a dominant role in intercultural communication rather than the actual differences. Literature on intercultural communication often stresses that intercultural encounters gain significance when interlocutors attempt to

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[18] J. Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Blackwell, Malden, 2003) pp. 76–84.

[19] Cf. C. Wadensjö, *Interpreting as Interaction: On Dialogue-Interpreting in Immigration Hearings and Medical Encounters.* (Linköping University, 1992).

[20] Code of Conduct Interpreters and Translators, Immigration and Naturalization Department, The Netherlands, November 2001.

[21] W. Kälin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing' (1986) *International Migration Review* XX2, pp. 230–241.

improve their 'intercultural communicative competence'.[22] In this view, one's own cultural background or the cultural background of the 'other' does not have to be the starting point for the interpretations of behaviour, but a 'third perspective'. By adopting a 'third perspective', people are receptive to new ideas and experiences. They are able to better understand the other's position and may try to describe incomprehensible behaviour instead of automatically judging it negatively. Furthermore, they are less ethnocentric; meaning that they are less inclined to value their own culture as superior. Empathy and role taking are considered important methods to improve intercultural competence.[23]

Thirdly, communication in asylum cases is a form of institutional interaction: communication within a strictly organized, often bureaucratic context.[24] The context structures the content, the duration, and the type of interaction. Institutional communication usually has a question-answer structure. The interviewers are generally professionals, or semi-professionals. They control the topics and determine when applicants may speak. They also structure the report of the encounter. The interviewees, however, are mostly laymen regarding the procedures. For them, the procedure is a once-only experience in which decisions directly affect their personal lives and futures.

6.2. METHODOLOGY

The objective of this study is to offer insights into the everyday practice of the interviewing of asylum claimants. That is why I adopted ethnographic methods. Between October 1999 and July 2001, two researchers (Khalil Shalmashi and I) attended ninety interviews held by immigration officers with asylum seekers. Apart from just a few exceptions, most participants consented to cooperate with the research project, once we had explained to them the aim of the research and had guaranteed their anonymity. It was a well-considered choice to recruit a researcher with a refugee background. As we had expected, it facilitated the contacts with asylum applicants and it enabled us to understand conversations in multiple languages. Shalmashi attended most of the interviews in Arabic, Kurdish and Persian while I attended most of the sessions conducted in English and French. In total, we were able to follow the conversation between the asylum applicant and the interpreter in 41 per cent of the interviews attended. We had access to all the interview sessions and were able to speak informally and at length with immigration officers. We decided not to audiotape the hearings, since a pilot on audio taping substantive interviews had caused a great commotion among IND officers and interpreters in the year before. Many interpreters refused to cooperate in that

[22] R.L. Wiseman and J. Koester (eds.), 'Intercultural Communication Competence' XVII *International and Intercultural Communication Annual* (1993) (Newbury Park, Sage).
[23] W.B. Gudykunst and Y.Y. Kim, *Communicating with Strangers; an Approach to Intercultural Communication* (Mc Graw Hill, Boston etc., 2003, fourth edition).
[24] P. Drew and J. Heritage (eds.), *Talk at Work. Interaction in Institutional Settings* (Cambridge University Press, Cambridge, 1992).

experiment, because they felt that colleagues were assessing them on arbitrary grounds.[25] The present study draws therefore solely on our own observation reports and the IND reports. The criteria for the observations included the timing and circumstances of the session; the conduct of those present (the applicant, the interviewing officer, the interpreter, and, in some cases, a representative of the Refugee Council); the content of the interview; the appropriateness of the questions asked; interviewing techniques; and the reporting of the encounter.

The presence of a researcher might have influenced the conduct of the interview and the behaviour of some of the interlocutors. We tried to avoid this by keeping quiet and refraining from behaviour likely to distract people. Nevertheless, interviewing officers and interpreters might have made a special effort to perform well in line with professional standards and applicants might have felt somewhat more uncomfortable with an extra person present.

We observed 56 first interviews and 7 substantive interviews at 3 reception centres and 27 substantive interviews at 2 regular asylum centres (a total of 90). The reason we attended more first interviews was that we planned to follow some cases throughout the asylum process, as we did with fourteen applicants.[26] For the same reason, we selected a relatively high percentage of asylum applicants from the Middle East, because it was easier to gain access to this group because of language. The study involved 24 different nationalities, including Iraqis, Iranians, Sudanese, Somali, Turks, Afghans, and Syrians (63 male, 27 female). This observational study is part of a broader research project, which also involves the contacts between applicants and their legal representatives. The overall project involves 138 observations and 31 different nationalities.[27]

6.3. INTERVIEWING PROCEDURES IN THE NETHERLANDS

The Netherlands is a country of destination for many asylum seekers, though the numbers of applications show some remarkable peaks and troughs. At the end of the 1980s, the numbers increased from a couple of thousand to about 20,000 in the early 1990s, with 1994 as the highest year on record with over 50,000 applications. By 2001, this figure had dropped to about 30,000. In 2002, less than 19,000 entrants lodged an asylum claim. In 2003, it concerned 13,400 applications.[28] Officers of the Immigration and Naturalization Department assess the applications. Most asylum applicants are interrogated twice. These interviews are not audiotaped. The initial interview takes place immediately upon arrival and concerns their identity, nationality, and travel route. In this first interview, officers place a strong emphasis on dates, time, places, and names. Questions concerning these matters also serve as a check on the identity and nationality when the applicant fails to produce evidence. During the

[25] Aron, U. and F. Heide, *Bandopname van het nader gehoor* (*Audio Taping the Substantive Interview)* (WODC, Den Haag, 1999).
[26] Publication forthcoming.
[27] N. Doornbos, *supra* note 7.
[28] IND Annual Reports.

initial interview, officers are strictly forbidden to probe on circumstances that might have led to the asylum request since that is the subject of the second interview. If the applicant spontaneously explains why s/he left his/her country, the officer has to refer her/him to the second interview. Whereas professionals, like IND officers, lawyers and judges generally perceive the first interview as a short intake concerning mere formalities, in practice it plays an important role in assessing credibility. Decisions on asylum claims often refer to statements in the first interview. Some of the first interviews take more time and are more extensive than some of the substantive second interviews.

The second session is generally more open in character. In this substantive interview *(nader gehoor)*, the IND expects asylum claimants to elaborate on the problems they encountered and the reasons why they left their country. The information forms the basis of the initial decision and subsequent stages of the asylum process. The IND most commonly examines the account's plausibility in two ways. A probing interrogation and confrontations with contradictions or omissions in the applicant's testimony, is a first commonly used method to assess credibility. With the second, the emphasis is on detailed information, which IND officers will verify with country information. The officers draw their questions from a database with questions about, for instance, geographical aspects, and habits and rituals of specific communities. Since the end of the 1990s, the IND has also paid attention to the everyday surroundings of applicants, with questions about local buildings, such as mosques, churches, and hospitals, or questions about local food and cooking. This method of examining credibility is more reliable, but requires detailed country information.

Children from the age of 15 are interviewed separately from their parents; children aged 12–15 only on exceptional occasions with the permission of their parents. Unaccompanied refugee children, however, have been interviewed from the age of four.[29] The practice of interviewing minors, sometimes in an adversarial atmosphere without the presence of a legal representative, has recently been subject to criticism by Human Rights Watch.[30]

In the standard asylum procedure, the substantive interview is conducted after a rest period of at least six days after arrival. In the majority of cases, an IND officer interviews the applicant after about two months. Yet, the IND examines a considerable number of cases in an accelerated procedure at reception centres (*aanmeldcentra*). In 2002, 45 per cent of all asylum claims were rejected within four or five days (48 working hours[31]). In 2001, the accelerated procedure involved 22

[29] M. Reneman 'Kinderen in procedure. Over de behandeling van asielverzoeken van alleenstaande minderjarigen' ('Children in the Asylum Procedure, On the Processing of Unaccompanied Minors' Asylum Claims') 2003 *Nieuwsbrief Asiel- en Vluchtelingenrecht*, no. 2, pp. 76–87.

[30] Human Rights Watch 'Fleeting Refuge. The Triumph of Efficiency over Protection in Dutch Asylum Policy' 2003 HRW 15/3.

[31] This excludes hours from 10 pm to 8 am.

per cent of the applications while the previous year it concerned 16 per cent.[32] The standard period of rest does not apply to these cases. In the reception centres, the IND makes a preliminary selection of cases based on country policy, an assessment of the statements in the first interview and information gathered otherwise. Asylum seekers with claims that the IND can probably reject without extensive research are interviewed at reception centres. Asylum seekers with more complex claims are transferred to regular asylum centres. The IND takes the procedural decision to process the case either in the short procedure or in the standard procedure before the applicant has even been interviewed about the reasons for his flight. The accelerated procedure was designed in 1994 to reject manifestly unfounded and fraudulent claims. Since the Aliens Act 2000 has come into force, the only criterion for dealing with cases in the accelerated procedure is whether the claims can be rejected within 48 processing hours without time-consuming investigations.[33] Many scholars, like Spijkerboer in this volume, and human rights organizations[34] have recently criticized the use of this broad definition.

In the Netherlands, all applicants have access to free legal aid, whether they are in the accelerated or in the normal determination procedure. However, the lawyer-client contacts in the reception centres are restricted to a maximum duration of two hours for the preparation of the interview and three hours for the evaluation. In most cases, different lawyers conduct these consultations, as lawyers work in shifts. Legal representatives and Refugee Council workers may attend asylum interviews, but cannot question the applicant or interfere during the meeting. In our research group, Refugee Council representatives attended only eleven of the ninety interviews observed and lawyers did not attend any. Most applicants therefore come to the interviews unattended. Legal representatives, assisted by interpreters will translate the IND interview report and discuss it with the client. The applicant has the opportunity to produce comments and corrections to the IND record.

6.4. ASYLUM INTERVIEWS IN PRACTICE

The best way to show how asylum seekers are being heard is by describing and analyzing some particularly illustrative cases. In this section, I will discuss fragments from two interview sessions. In the first case of a minor from Guinea, the officer did not overtly question the credibility of the child's version, though it is obvious that he was not impressed with his statements. In the second case of a young Somali man, both the contents of his statements and the language he spoke during the interview casted doubt on his testimony. During the interview, the officer confronted the applicant with these supposed inconsistencies. I have shortened the

[32] *Parliamentary notes*, 19 637, Nos. 484, 559, 652 and 731.
[33] Council of State *(Raad van State)* decisions No. 200103491/1 of 27 August 2002, *Rechtspraak Vreemdelingenrecht* 2001/20.
[34] *See e.g.*, Human Rights Watch, *supra* note 30, and the comments of UNHCR, Amnesty International and the Dutch Refugee Council brought forward during a round-table discussion meeting with politicians of 25 September 2003.

interview fragments and changed or omitted some details, like names, dates, and places, for privacy reasons.

Case 1: Excerpt from an Interview with a Minor from Guinea

[Half-way through the substantive interview]:

> Officer: 'Now I would like to request that you provide the reasons why you left your country. I also would like to request that you demonstrate your account as concrete as possible with dates and names. In chronological order, please.'
>
> Applicant (through interpreter): [Asks permission to use the toilet. The officer introduces a five minutes break. Then the interview resumes:] 'I live in [town X] at the border between Liberia and Sierra Leone. Very long ago, a spontaneous attack of rebels . . .'
>
> Officer: 'May I interrupt you for one moment. This is your story. We are aware of the general situation, right?'
>
> Applicant (through interpreter): 'Okay. In December 2000, when the last attack took place, everybody fled. I was not there that day. I left with other friends . . . When we arrived at [town Y], we were afraid for the rebels as well as for the authorities.'
>
> Officer: 'May I go back to your residence [X] for one moment. You were not at home. But did you see any rebels at the time you left with those friends?'
>
> Applicant (through interpreter): We saw armed people and red fire. The whole block had been set to fire.
>
> Officer: 'Okay. Then you arrived in [town Y].'
>
> Applicant (through interpreter): 'That was on the 17th. We thought we had come across rebels, but . . . they turned out to be militiamen who wanted to talk to us. They took us to their post . . .'

[The officer poses some specific questions for clarification, for instance about the names of his friends, whether the applicant had to identify himself to the militiamen, and what rank they had. The applicant relates in detail how he was assaulted. He says for instance]:

> Applicant (through interpreter): 'They also broke my arm . . . I had to lie down on the ground and they stepped on my back with their feet. He asked me to look at him and he slapped me if I did so. He said that if I would move, he would shoot me.'
>
> Officer: 'Do you know the rank of this man?'

Applicant (through interpreter): ‘He had one stripe.’

Officer: ‘Do you know his name?’

Applicant (through interpreter): ‘No. They held me from behind and said: “You will see, you are all rebels. We will kill you one after the other”.’

Officer: ‘I do not need to hear all this word for word. The broad outlines will do for me. I do not have to hear every word they were saying.’

Applicant (through interpreter): ‘They put us in a military van.’

Officer: ‘Who “us”?’

Applicant (through interpreter): ‘I saw other people in the van. He told us he would bring us to [town S.]. We left on the 8th and arrived on the 10th. They brought us to a large square, the square of [camp A.].’

Officer: ‘Okay, we go back to the essence of the story.’

Applicant (through interpreter): ‘They took me to the building and said: “You are finished” . . .’

[On maltreatment the applicant somewhat later says:] ‘During my detention, they tortured and assaulted me. But I do not talk about this, because you told me you do not need to hear about it.’

Officer: ‘I find it very important that you report this, but I do not have to hear every blow.’

Applicant (through interpreter): ‘At Schiphol [airport, N.D.] the police told me I had red eyes.’

Officer: ‘Have you also been tortured in your cell?’

Applicant (through interpreter): ‘Yes. We had to walk on our knees and look directly into the sun.’

Officer: ‘Okay, so this is your story.’

Applicant (through interpreter): ‘Yes.’

Officer: ‘In a moment, I will ask you some more questions on things that are not yet clear to me. But for now, this is the essence of your story. Have I given you the room to tell me all what you wanted to say?’

Applicant (through interpreter): ‘Yes.’

Comments

The guidelines state that interviewing officers first have to give the applicant the opportunity to speak freely about his asylum motives and to withhold interrupting questions as much as possible. After this so-called 'free reproduction', the officer may investigate the different aspects of the claim.[35] In practice, this 'free reproduction' is not as free as the guidelines suggest. Usually the substantive interview begins with a repetition of questions from the first interview or a confrontation with presupposed contradictory or vague statements. This part of the interview takes place under strict direction of the official and continues in most cases for about an hour. The applicant will be careful in his formulations, since it is obvious that the IND may regard his utterances as being not plausible or contradictory. By the time the 'free reproduction' begins, the atmosphere is often characterized by distrust on both sides. Furthermore, as this example shows, this part of the interview is restricted to the personal reasons for leaving the country that were the immediate cause for the flight.

It is rather easy to criticize the way in which the officer conducted this interview. He strictly controlled the applicant's narration. There was no 'free reproduction' in the sense that the applicant first had the opportunity to relate his own story. He restricted the applicant in providing background information, which might be important for a good understanding of his case. In his formulations, he showed little consideration for the minor age of the applicant, as he gave the applicant confusing and contradictory instructions. For instance, he stated that he is mainly just interested in the 'broad outlines', whereas he himself posed some detailed questions. He also remarked that 'the essence of the story' had already been told, while in fact the claimant had been given little opportunity to elaborate on his detention and flight reasons. Consequently, his testimony remains superficial. Fragments like the one above are written in the report as a continuing statement, followed by the standard note: 'This statement has been given by Mr. [name] almost without interrupting questions.' The questions following the 'free reproduction', on the contrary, are in most cases written literally.

Without trivializing this criticism, it is also important to bear in mind that officers do face a difficult task. They have to guide the conversation and control the communication between the interpreter and the applicant. The reporting of the session demands special attention. After getting an answer to one question, the official already poses the next question, meanwhile writing down the reply to the first question. If, at times like this, the meeting is disturbed by a telephone call or a request from a colleague, the reporting demands even more concentration. It requires a sound knowledge of the situation in the country of origin and concentration on the applicant's personal problems to come up with relevant questions, which are not part of the standard questionnaire. The officer has to complete the interview within the available time. In the Netherlands, interviewing officers have to interview two

[35] Aliens Circular C 12/4.2.

applicants per day, although they can deviate from this rule and make another appointment. These are just some aspects of the tension between the organizational demands on efficient interviewing conduct on the one hand, and a profound and complete discussion of the asylum account on the other.

The circumstances are also demanding, because the officer is confronted every day with tragic testimonies, which can cause an emotional response in the claimant as well as in the interpreter or himself. As Rousseau *et al.* have pointed out, many actors involved in interviewing asylum applicants unconsciously try to protect themselves from being exposed to traumatic stories. In the case mentioned above, the officer's interventions stating that he does not 'have to hear every blow' and that 'the broad outlines will do', might be considered as such an avoidance mechanism. Direct avoidance is often manifested by an expressed wish not to hear the traumatic events. Indirect avoidance can also become apparent by ignoring or trivializing horrific events or by uncontrolled emotional reactions. Other defensive reactions are cynicism and lack of empathy. These psychological mechanisms affect the communication process.[36]

As already stated, the interviewing officer in the case mentioned above did not openly question the credibility of the asylum seeker's account. However, since the applicant's account remains shallow, the deciding officer might as well find the statements vague or incomplete and turn down the claim on the grounds of this interview. In the next case, the officer confronted the claimant with his own statements, which he (and the interpreter) did not find convincing. The officer doubted whether the man had the Somali nationality, as he had stated, since he did not speak the Somali language (but Swahili instead). The man recounted that he was born in Kismayo, Somalia, but had lived in Kenya since he was a child.

Case 2: Excerpt from a First Interview with a Somali Man

[The interpreter has not translated the italicised statements for the asylum applicant] [translation]

> Officer: 'Is your father still alive?'
>
> Applicant: (through Swahili interpreter): 'I left my father in Kismayo.'
>
> Officer: 'Sir, is your father alive?'
>
> Applicant: [speaks at considerable length; but the interpreter translates only the following:] 'Yes, I certainly left the country.'
>
> Officer: [turns to the interpreter:] *'How is the communication going?'*
>
> Interpreter: *'It is going well. He speaks Swahili very well. In fact, too well for someone from Kismayo. He speaks classical Swahili, which is real Swahili.'*

[36] C. Rousseau *et al.*, *supra* note 3, pp. 15–18.

Officer: *'People from Kismayo can't speak Swahili that well.'*

Interpreter: *'Well, I don't know.'*

Officer: 'You left your father. Where were you going next? [The interpreter only translates one short sentence. Judging from the following answer it was probably only the first sentence]

Applicant: (through interpreter): 'Yes.'

Officer: '"Yes" is no answer to my question. Where were you going?'

Applicant: (through interpreter): 'I went to Mombassa.'

Officer: (turns to interpreter:) *'He doesn't want to answer.'*. . .'How long did your journey by lorry take?'

Applicant: (through interpreter) 'One day.'

Officer: (turns to interpreter:) *'Is that possible one day between Mombassa and Tanzania?'*

Interpreter: *'No, it is far. It is not possible in one day.'*

Officer: 'Hamid, you are sleepy, are you not? Do not fall asleep. You travelled by lorry. After one day you arrived somewhere, and from there you took a plane to the Netherlands.'

Applicant: (through interpreter) 'No, we didn't go directly to the airport.'

Officer: 'But you travelled by lorry to Dar es Salaam.'

Applicant: (through interpreter) 'Yes.'

Officer: 'Hamid, Dar es Salaam and Mombassa are far apart. May be you took other means of transportation?'

Applicant: (through interpreter) 'To me, it is hard to remember whether it was Dar es Salaam or another place. In any case I went from Mombassa to an unknown place and that was the end of my journey.'

[translation]

The officer has summarized this entire fragment in the report:

From Dar es Salaam, you took a plane, how long did your journey by lorry take?

I travelled by lorry for one day. I came to Dar es Salaam by lorry.

But that is far away, it cannot be reached in one day?

> For me it is hard to remember, but I came to an unknown place by lorry and that was the end of my journey.

Comments

Let us look at the input of the three participants: the applicant, the official, and the interpreter. The applicants' contribution is rather vague, as his answers do not correspond with the questions. The first question – whether his father is alive or not – is not answered at all. We learn very little from his report of his journey. The IND officer blames the asylum seeker for his shallow statement; in his view, the applicant is not willing to answer the questions. That, of course, is one possibility: the claimant does not want to answer the questions, because he does not come from Kismayo.

However, when looking at the officer's contribution, it is obvious that he could have put his questions more clearly, step by step, and be somewhat more patient with the applicant. Not all Africans have the same discursive strategies as we have, and as we *expect* them to have.[37] The formulations in the report are also ambiguous. The officer did not write all questions and replies down. For instance, in the actual interview he did not ask the first question stated in the report: 'From Dar es Salaam you took *a plane*, how long did your journey *by lorry* take?' To wit, this question is formulated rather ambiguously.

The role of the interpreter also raises question marks. He appears to make a selection of the questions and answers he translates. If he is making selections, that also can explain why the questions and answers do not correspond. Interpreters often play different roles in asylum hearings: the role of neutral intermediary (the role they are supposed to have), the role of adviser, the role of substitute for the officer, the role of ally of the asylum seeker, and the role of informant or expert. In this fragment, we see the interpreter in the role of informant and expert. He provides the officer with background information on the applicant. This information confirms the officers' idea that the man is lying about his nationality: after all, he speaks Swahili too well and he travelled from Mombassa to Tanzania too quickly.] Note that the distance from Mombassa to Dar es Salaam is in fact about 500 kilometres. It may not be impossible to travel this far in one day. By giving this sort of information, the interpreter acts contrary to the code of conduct of his profession. Nevertheless, this fragment shows the interplay between the officer and the interpreter, as the officer actually invites the interpreter to provide this information and uses it immediately to confront the applicant.

A researcher too does not know what is true and false in interactions like this. It is clear though, that all three participants had their impact on the communication. The report very much reflects the view the officer has of the asylum seeker. His own contribution to the interaction, as well as the contribution of the interpreter, is not visible in the report. In all stages of the asylum process, adjudicators examine the

[37] J. Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' 12/4 *Discourse & Society* (2001) pp. 413–449.

applicant's statements, sometimes given just a few days after arrival, under a magnifying glass. Just as Blommaert has described for the Belgium situation, there is an extensive circulation of discourse throughout the different stages based on the reports of asylum interviews. Most decision-making officers and judges regard the reports as fixed texts, because they were compiled according to legitimate procedures.[38] Though the reports may not reflect the truth, they become a truth by themselves. A drawback of the division of tasks between interviewing and deciding officers in the Netherlands is that even in the initial stage of the procedure, decisions are entirely based on the written reports of interviews (interviews which are not being audio-taped). There is a strong belief that the actual asylum motives can be derived from the reports, while in fact the reports are compiled according to specific standard questions and reflect the views of the interviewing officers.

6.5. TWO ASSUMPTIONS UNDERLYING CREDIBILITY TESTING

Two assumptions underlie the evidentiary assessment through credibility testing. The first supposition is that a 'genuine' refugee is able to present his case without any inconsistencies and can reproduce his account at any time during the asylum process. There are some psychological and medical studies however, that contradict this ubiquitous assumption. Cohen, for example, refers to several studies that demonstrate that even under normal conditions, people have great difficulty in repeatedly reporting events in a consistent manner. The problems enlarge when people are traumatized, depressed or suffer from insomnia or malnutrition. Such conditions can lead to severe long-term memory defects and loss of concentration, because of which people can become inhibited or inconsistent in their statements. Discrepancies and omissions in statements therefore do not necessarily imply that the applicant is unreliable.[39] Herlihy, Scragg and Turner also stress that discrepancies between an individual's accounts are common. Discrepancies are more likely to arise when the details required are peripheral to the interviewee's experience and when the content is traumatic. The number of discrepancies increases with length of time between interviews. Herlihy, Scragg and Turner conclude that inconsistent recall does not necessarily imply that asylum seekers are fabricating their accounts (see also Herlihy in this volume).[40] In an experimental study with students, Granhag and Strömwall found that truthful and deceptive statements were equally (in)consistent over time. Truthful statements did not contain richer details, as expert lie-catchers, such as judges and police officers, often

[38] *Ibid.*

[39] J. Cohen 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' 13/3 *International Journal of Refugee Law* (2002) pp. 293–309. *See also* C. Rousseau *et al., supra* note 3, pp. 6–7.

[40] J. Herlihy, P. Scragg and S. Turner 'Discrepancies in autobiographical memories; implications for the assessment of asylum seekers: repeated interviews study' 324 *British Medical Journal* (2002) pp. 324–327.

suppose.[41] According to Vrij and Winkel who examined police interrogations, people find it easier to lie by simply denying or withholding information rather than by inventing their own story. This is an important argument for giving people the chance to relate their account in their own manner.[42] Some assistance might be needed though to structure the testimony in a chronological manner.

The second assumption is that the IND conducts asylum interviews under the same conditions and in more or less comparable ways. Only then, discrepancies and omissions in statements are to a certain extent attributable to the input of applicants. The findings of this research differentiate this supposition. As already mentioned, the interview conditions as well as the access to legal representatives is different in the accelerated procedure in the reception centres from the normal procedure in regular asylum seekers centres. In addition, the observations of asylum interviews reveal that while some applicants were allowed more latitude, others were cut short from the start. Some officers treated the applicants patiently and with respect. Others already assumed that the applicant was a liar or an economic migrant before the interview had even started. They sometimes based their assumption solely on a few characteristics derived from the dossier such as sex, age, and country of origin. Some officers confronted applicants with inappropriate or ambiguous questions. In one case, for example, the applicant was asked when he last saw his deceased brother. When the applicant asked whether the officer meant dead or alive, this was considered to be a sign of incredibility and evading the issue. Despite the fact that the officer did not translate the report of the first interview, he constantly told the applicant that his statements were inconsistent. In another case, an applicant's story was disputed because she had said that she had often purchased dried fish at a market while she lived hundreds of miles from the sea. It had not occurred to the official that fish might also be caught in lakes or rivers.

6.6. PROBLEMATIC COMMUNICATION

In more than half of the interviews observed (30 first interviews and 17 substantive interviews) serious communication problems were documented. The researcher regarded the communication process as problematic or very problematic in the light of the objective of the interviews, *viz.* fact-finding, and in the light of the guidelines in the UNHCR Handbook mentioned in the introduction of this chapter. Four interrogations were intimidating in character. Most commonly, there was a conjunction of problems affecting the role and behaviour of all actors. For instance, some officers lacked experience or cultural or political knowledge. Their questions did not connect to the knowledge or understanding of asylum claimants. Their speed of questioning was often too fast or they jumped from one subject to the other. Some

[41] P.A. Granhag and L.A. Strömwall 'Repeated Interrogations: Verbal and Non-verbal Cues to Deception' 16 *Applied Cognitive Psychology* (2002) pp. 243–257.

[42] A. Vrij and F.W. Winkel, 'Liegen en bedrogen worden' ('Lying and being lied to') in P.J. Van Koppen, D.J. Hessing and H.F.M. Crombag (eds.), *Het hart van de zaak. Psychologie van het recht* (Deventer, Gouda Quint, 1997, pp. 429–449).

let the interpreter take control over the meeting. Some showed prejudiced behaviour, for instance, they assumed that the applicant was unreliable before they had even spoken to them. A few interpreters lacked fluency in one of their languages. They regularly did not translate what the other participants said, but what was a relevant answer to the question according to them. They sometimes interfered in the interview and posed questions themselves. Some of them displayed prejudiced behaviour and talked about applicants in a negative way. In ten out of the ninety interviews attended, interpreters, contrary to their code of conduct, provided the officer with background information on the applicant that heightened the impression that the applicant was unreliable. Some asylum claimants had great difficulty with the emphasis on facts, names, places, and dates. Some did not feel well or were too emotional to speak. Some were reluctant to show that they could not sufficiently understand the questions or the translation, or they were inhibited and suspicious of the interpreter or official.; emotional difficulties] Some appeared to conceal some facts in order to improve their chances. Most of them however, tried to fulfil the image of 'a good client' and co-operated despite language or health problems, while in fact they probably would have gained more from active and assertive behaviour. In twenty-four of the ninety interviews attended, the researchers noticed serious language problems, for instance caused by the use of different dialects. In some cases, neither the applicant nor the interpreter spoke in his/her mother tongue. Only in a few cases were the problems mentioned in the report or was the interview resumed in another language. If applicants do not explicitly mention the problems and make sure themselves that the problems are noted, adjudicators and judges will assume from the report that the communication process went smoothly.

From this enumeration of communication problems, it becomes apparent that not all problems can be solved easily. Given the complex character of the hearings (multilingual, intercultural, and conducted within a strictly institutional context), it is not surprising that communication problems emerge. The way in which officers and interpreters dealt with communication problems however, was remarkable. In most cases, they (sometimes unconsciously) attributed breakdowns in communication to the applicant, trivializing their own role in the communication process. Their own contributions remained unclear from the interview reports. Consequently, future users of the dossiers, such as decision making officers, judges or legal representatives, will regard the content of the report as 'the applicant's own words'.

6.7. CONCLUSIONS

In examining asylum requests, credibility testing has become a routine assessment. Yet testing credibility based on an examination of consistency in asylum accounts can only be effective when a neutral and patient conduct of interviewing is adopted. Even then, prudence is in order, as inconsistencies are common, and more likely to arise, when the events were traumatic to the interviewee. Before an officer can conclude that statements are inconsistent or that the applicant is not willing to comply with the procedure, he has to consider a number of alternative explanations.

Has the applicant been given sufficient time and opportunity to give all the relevant information? Could the way in which the interviewing officer put the questions, a fast speed of questioning, or a quick change of subjects, have caused the (alleged) contradictions? Has the interpreter properly translated all the utterances made by of the officer and the asylum seeker? Have the different cultural backgrounds of the participants been a barrier in understanding each other? Have the officer and interpreter been objective and neutral? Is the country information used by the IND to compare the statements reliable and up-to-date? Have the applicants been sufficiently informed in advance about the asylum procedure and do they understand which elements in their account are relevant to the decision-making process? The list of questions could be prolonged.

Adjudicators generally regard the communication process as unproblematic unless claimants lodge serious complaints. In fact, as this Dutch case study shows, in more than half of the interviews, communication problems affect the fact-finding process. The contribution of interviewing officers and interpreters to the interaction remains largely invisible in the written reports; communication breakdowns are usually attributed to 'unwilling' or 'non-responsive' asylum seekers. The mutual distrust and adversarial atmosphere in which officers conducted some interviews could have adverse effects upon the fact-finding process and the assessment of credibility. The communication problems observed in this research are not just found in the Dutch situation. The results are consistent with research findings in other western countries discussed in the introduction of this chapter.

The training of officers and interpreters on subjects like interview techniques and intercultural communication can improve the interview practice. Almost every research study in this field points at the importance of a proper selection and training of immigration workers.[43] However, as the Dutch example shows, a more fundamental discussion regarding fast-track procedures might be needed. The findings of this research give rise to a discussion about whether asylum interviews – given their complex multilingual, intercultural and institutional character – are suitable for an examination within just a few days. In the Netherlands, the accelerated asylum procedure is no longer restricted to just fraudulent or manifestly unfounded claims. All claims that according to the Minister of Integration and Aliens Affairs can be properly declined within 48 hours can be handled using this succinct procedure. Since the Aliens Act 2000 has come into force, there is more emphasis on the first stage of the asylum process. The substantive interview is currently the main opportunity for applicants to present their claims. Asylum claimants are rarely being heard in the subsequent stages. The chances of raising new arguments or providing new evidence in the judicial procedure are very small (see Spijkerboer in this volume). Although 'front-loading' and accelerating asylum procedures reduce uncertainty for claimants and might be efficient ways for dealing

[43] *See e.g.* C. Rousseau *et al.*, *supra* note 3, p. 24–25.

with large numbers of asylum applications, they limit the opportunity for claimants to fully present their claim within a safe and patient atmosphere. The asylum seeker needs time to produce testimonial and corroborative evidence and to elucidate his case with the help of a legal representative. When more time is available for examining asylum claims, a more thorough assessment of the asylum motives and reasons for the flight can be made. That will reduce the possibility of either illegitimate claims being erroneously granted, or genuine claims being erroneously rejected.

CHAPTER 7

EVIDENTIARY ASSESSMENT AND PSYCHOLOGICAL DIFFICULTIES

Jane Herlihy[1]

7.1. INTRODUCTION

This chapter will outline some of the effects that psychological and psychiatric difficulties can have on individuals' abilities to present their case for asylum.

It will briefly outline a number of aspects of the asylum seeker's experience in the host country from a psychological perspective, considering the issues of migration into a new culture and some of the ways in which the legal process of seeking asylum can impact on the individual. However, the main focus of this chapter is on asylum seekers with mental health problems.

As will be shown many asylum seekers and refugees have no significant mental health problems and do not seek or require professional psychological or psychiatric help. However, a significant number do, and it is crucial that the judicial system take this into account. Given the nature of the mental health problems that do occur, to ignore this group would be to systematically discriminate against them.[2]

There is a large body of evidence that suggests that memories of traumatic events are initially held in a significantly different form from our normal memories of past events. Most refugees are by definition likely to have had experiences that would be defined as traumatic. This has serious implications for asylum seekers whose ability to accurately and consistently recall autobiographical memories is seminal to the outcome of their case. These problems are most likely to appear in individuals diagnosed with Post Traumatic Stress Disorder (PTSD), but may not be exclusive to them and this issue will be discussed first.

The two most common diagnoses noted in refugees and asylum seekers are Post Traumatic Stress Disorder (PTSD) and Depression. These two diagnoses will be briefly discussed – outlining what is meant by them and how common they are amongst asylum seeker populations. Most importantly, the effects that the symptoms of PTSD and depression can have on the individual's ability to present a case for asylum will be examined. It will be argued that, in the search for valid methods of

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The author is grateful for detailed input from Dr. Stuart Turner, Honorary Senior Lecturer, University College London.

[2] Asylum procedures which put persons with a mental health condition into a disadvantageous position when presenting their claim may bring about violations of international law. Typically, issues might be raised under article 3 (freedom from torture and other forms of ill-treatment), article 13 ECHR (right to a remedy) and article 14 ECHR (non-discrimination with regard to rights guaranteed by the ECHR).

assessing asylum claims, PTSD has been pressed into service as an indicator of the truth of a claim, as it includes an assumption that the origin of the disorder lies in a traumatic event, whereas the symptoms of PTSD also have wide-ranging implications for judgements of credibility.

A further possible effect of extremely traumatic experiences is dissociation, which will be described.

The chapter will also briefly mention a number of other issues that always need to be considered when interviewing and assessing individuals who may have a history of torture or violence. This is not intended to be a comprehensive list, but rather to give an indication of the main groups of people who may not be receiving equitable justice due to unidentified or misunderstood psychological or mental difficulties.

7.2. THE EXPERIENCE OF SEEKING ASYLUM

7.2.1. Systems and Officials

For the majority of asylum seekers, their arrival in a host country means entering a culture about which they may know a little, but are likely to understand less. Upon arrival they enter into legal and bureaucratic systems which are likely to not only work differently but that are underpinned by different attitudes and assumptions from those with which they are familiar. A recent example emerged from a discussion with a group of Kosovan Albanians who explained that for them, the correct response to not getting what one needs from an official is to show that one is angry: shouting and behaving aggressively means that you are serious, and are more likely to be taken seriously and attended to, whereas if you remain quiet and meek you will be ignored. In the UK, where politeness with calm persistence are more the cultural norm, it is easy to see where this group of people might alienate themselves from the officials with whom they are interacting. This example may or may not rest on a valid generalisation – so often generalisations are misleading – but it does give a glimpse of some of the more subtle learning that asylum seekers are faced with if they are to make their way successfully into host cultures. This learning is of course particularly crucial in interacting with the judicial system.

Refugees, by definition, have a well-founded fear of persecution, persecution that has been allowed, if not sanctioned by the state in which they lived. Whether such tolerance is by weakness or intent on the part of the state, a degree of mistrust of, or at least a marked ambivalence of feeling towards state officials of whatever origin would be entirely understandable. Guidelines for immigration interviews in the UK recommend that assurance is given that all material disclosed is confidential. Nonetheless, for many people, and understandably, given their experience, this is hard to believe completely. This would lead to a reluctance to give a complete disclosure and may lead some people to gloss over parts of their story. It is often the experience of clinicians that one meeting is insufficient time for an individual to be able to consider whether s/he can take the risk of trusting his/her interviewer. Where

an individual has been submitted to torture, which directly or indirectly targets the breaking down of trust in others, this effect can be significantly stronger.

7.2.2. Contexts

We also need to take into serious consideration the context in which asylum seekers disclose details of their experiences. Clients report immigration interviews which have been conducted in a small, bare room sometimes with the same number of people in attendance as were in the small, bare room in which they were tortured. Highly vivid memories of traumatic experiences can very easily be evoked by such a context. As will be shown later, such memories can be experienced as the event happening again in the present. Clearly this would impede one's ability to give accurate and coherent responses to questions.

One women, when asked to describe her immigration interview could describe only the shoes of the three men in the room with her. Sexual torture (the use of sexual assaults, rape, violence to the genital area, as methods of torture) is typically associated with high levels of shame, making disclosure extremely difficult.[3] Despite UNHCR guidelines, women are still interviewed by male immigration officers, sometimes with the assistance of male interpreters, and are expected to disclose having been raped. Men also have to disclose being raped.

7.2.3. Interviewing Skills

In order to arrive at information that is both accurate and complete, it is important to understand and implement the principles of interviewing. In the medical field, as one example, an initial open question will be followed up by focused and then closed questions to go into more details. However, the clinician will then return to another open question to ask if there is any other problem. We see examples of immigration interviews where details have been elicited about one period of detention, but the individual was not then asked if there were any other detentions. Consequently later interviews would appear to be uncovering further material – thus producing discrepancies or new disclosures – whereas the interviewee may be giving details of a different period of detention to the one first described.

The above considerations will be true for many asylum seekers arriving in a host country – they arise largely from the situation of the individual interacting with a foreign culture, bringing with her/him, as everyone must, the assumptions of their own experience. These issues are discussed more comprehensively in Chapters 5 and 6 above. However, for some people, there will be more particular psychological and emotional difficulties that will need special attention.

[3] C. Van-Velsen, C. Gorst-Unsworth & S. Turner, 'survivors of Torture and Organized Violence: Demography and Diagnosis' [1996] *Journal of Traumatic Stress*, 9(2).

7.3. TRAUMATIC MEMORY

The process of presenting a case for asylum rests heavily on each individual claimant's memory. Autobiographical memory is, as the name suggests, the recall of events in one's personal history. We know that the recall of normal memory involves the relatively easy construction of a verbal narrative – we can produce a story of what happened to us yesterday, or last year on holiday; a story with a beginning, a middle and an end. There is now a substantial body of evidence showing that when we experience something traumatic (threatening to our life or our physical integrity, or that of someone close to us) the memories of that experience are of a very different nature.

The characteristic of traumatic memories is that they are fragments, usually sensory impressions; they may be images, sensations, smells or emotional states.[4] Importantly, probably because of the nature of the memory store in which they are held, they do not seem to carry a 'time-stamp' so they are often experienced as if they were not memories of the past at all, but current experiences. These types of memories are usually not evoked at will, as a normal memory can be searched for and produced, but they are provoked by triggers, or reminders of the event.[5]

This means that when someone is interviewed and asked about an experience that was traumatic, and has only, or largely memories of this fragmentary type, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative of their experience exists. S/he will have only fragments and impressions, which are likely, incidentally, to evoke the feelings that were felt at the time of the original experience – which may be fear, distress, shame, humiliation, guilt or anger.

This distinction between traumatic and non-traumatic memory is a highly significant factor to be taken into account when making judgements regarding discrepancies in asylum claims.

Another area of memory research, which is particularly pertinent to asylum law, is work examining the testimony of eye-witnesses. A classic experiment demonstrated how the type of details recalled of an event can depend on how distressing the event is to the witness. Loftus and Burns[6] asked participants in their study to watch one of two video recordings of a simulated armed bank robbery, at the end of which the robbers run away past a young boy with a rugby shirt with a number on the back. The recordings were identical except that in one version one of the robbers turns and shoots the boy in the face. In the other the robbers merely run away. The experimenters found that the participants who watched the video with the

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[4] B. van der Kolk, 'Trauma and Memory' in B.v.d. Kolk, A.C. MacFarlane and L. Weisaeth (eds.), *Traumatic Stress : The Effects of Overwhelming Experiences on Mind, Body and Society* (Guilford Press, New York, 1996).

[5] C. Brewin, T. Dalgleish, and S. Joseph, 'A Dual Representation Theory of Posttraumatic Stress Disorder' [1996] *Psychological Review*, 103(4).

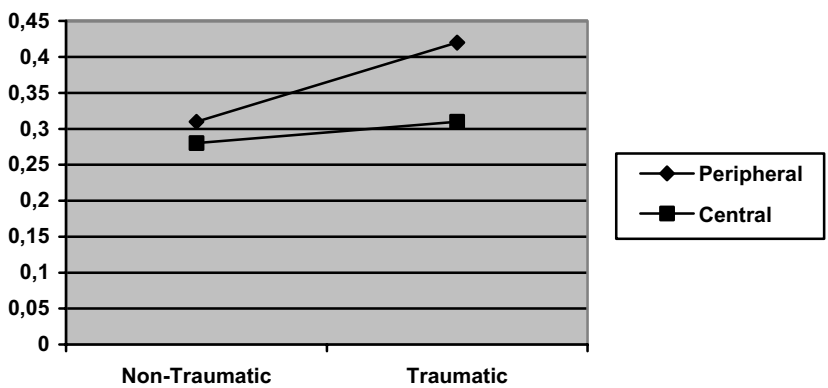
[6] E. Loftus, & T. Burns, 'Mental shock can produce retrograde amnesia' [1982] *Memory and Cognition*, 10.

shooting were less likely to be able to recall the number on the boy's back, compared to those who had watched the 'non-traumatic' video. Note that the participants were not people with PTSD, and it is arguable as to whether viewing a distressing video of such an event would necessarily be 'traumatic' by the definition used for the diagnosis of PTSD (see below). Nonetheless, this effect has been replicated and a distinction is now made when talking about disturbing or distressing memories, between 'central' details of a story – that is what is important to the gist of the narrative or the emotional content of the account – and 'peripheral' details, such as the number on a boy's rugby shirt.

This distinction was investigated in the particular context of asylum seekers' accounts of their experience in the study examining discrepancies in asylum claims. Herlihy, Scragg and Turner performed repeated interviews with refugees from Bosnia and Kosovo who had permission to stay in the UK.[7] The interviews were from four to thirty weeks apart. Interviewees were asked to recall one incident where they felt that their life was in danger and one neutral, or happy event. They were then asked, for each event, a set of fifteen pre-defined questions (*e.g.* who was with you?, what was the weather? what was the date?). They were asked to rate each question as to whether it was central to the story, or peripheral.

Up to 65 per cent of the details provided by the refugees changed between interviews. For the traumatic events, the details rated as peripheral were more likely to change than the details rated as central. For many interviewees the date, and the day of the week, for example, were not central details. (Although note that for some stories these details were rated as central). See figure 1.

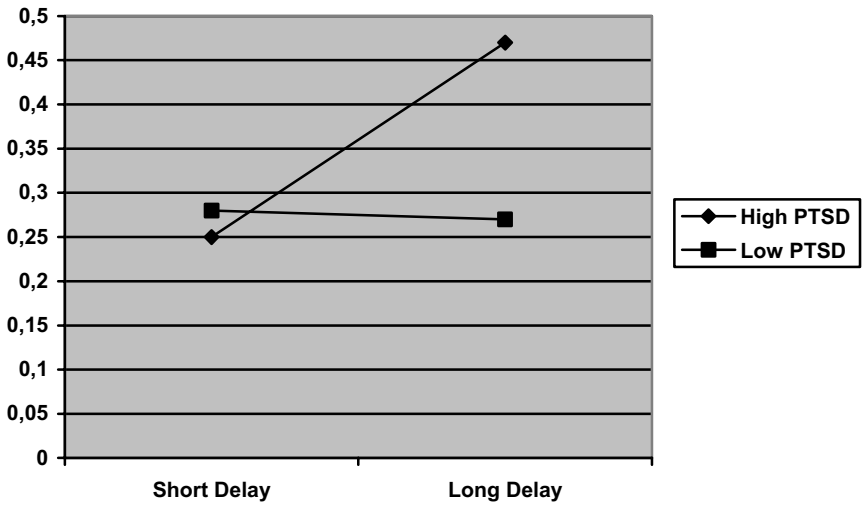
Figure 1 Discrepancies in peripheral and central rated details of traumatic and non-traumatic events



[7] J. Herlihy, P. Scragg and S. Turner, 'Discrepancies in Autobiographical Memories: Implications for the Assessment of Asylum Seekers: repeated interviews study' [2002] *British Medical Journal*, 324.

Furthermore, the longer the time between interviews, the more the details changed for those who had high levels of PTSD symptoms suggesting perversely that the group with high trauma scores may be more likely to be refused asylum on the basis of discrepancies. See figure 2.

Figure 2 Discrepancies in high and low levels of PTSD, by length of delay between interviews



More recent research has examined the effect of highly stressful conditions – interrogation – on individuals' ability to later recognise the face of their interrogator. Forty-eight hours after a stressful interrogation, Morgan III and his colleagues asked U.S. army personnel to look at pictures of 10 interrogators, one of which had interrogated them as part of their training.[8] Thirty-eight per cent of these healthy highly trained military subjects could not identify their interrogator. The researchers' findings showed that general ability to remember faces may be the important factor, but a related study showed that the confidence of the subject in their identification of the interrogators was a poor indication of whether or not they were accurate.[9] It is perhaps worth noting that memory by recognition is generally considered to be an easier task than the more effortful recall of information, as is generally required by the asylum process.

[8] G. Hazlett, C. Morgan III and S. Southwick, 'Predicting Accuracy of Eyewitness Memory' Paper presented at the 19th Annual Meeting: Fragmentation and Integration in the Wake of Psychological Trauma, Chicago, Illinois USA, 2003.

[9] C. Morgan-III, S. Southwick and G. Hazlett, 'Accuracy of Eyewitness Memory During Acute Stress'. Paper presented at the 19th Annual Meeting: Fragmentation and Integration in the Wake of Psychological Trauma, Chicago, Illinois USA, 2003.

7.4. EPIDEMIOLOGY – COMMON MENTAL HEALTH DIAGNOSES IN ASYLUM SEEKERS AND REFUGEES

In a review of the refugee literature, Silove *et al.*[10] found a range of reported prevalence of 42–89 per cent for depressive disorders and over 50 per cent for PTSD across studies of people seeking clinical help. In community based studies lower rates were found in some samples, but the higher levels found were very similar to the clinical samples – between 15 per cent and 80 per cent prevalence of depression and between 3.5 per cent and 86 per cent of PTSD.

A recent study explored a concern that the methodology used in epidemiological studies was causing an over-estimation of prevalence.[11] In particular they were concerned with the use of self-report measures (standardised questionnaires filled in by each participant). Turner, Bowie *et al.* surveyed a sample of 842 Kosovan Albanian programme refugees in the UK, using self-report measures, and then interviewed a subset of the participants (120) to validate the results. They did indeed find that the percentage of cases of PTSD found was lower in the group who were interviewed and they adjusted the results for the whole sample on this basis. Their adjusted figures showed that the proportion of people with a diagnosis of PTSD in the whole sample (842) was just under 50 per cent. The researchers also measured the incidence of depression in the same group, using the same methodology and found that approximately 16 per cent of the sample met diagnostic criteria for Depression.

Only one study has been identified that specifically focuses on long term adjustment in refugees. This study compared the levels of psychopathology of 34 Bosnian refugees upon resettlement in the USA and twelve months later.[12] Weine *et al.* found that twenty-five individuals reported a decrease in severity of PTSD symptoms, eight an increase and one remained stable. Of the 25 cases of PTSD at the time of resettlement, fourteen still met the diagnostic criteria and one new case arose.

It is important to note that not everyone who experiences a traumatic incident will go on to develop PTSD. In the non-asylum seeking British population up to 20 per cent of those who have a traumatic experience later receive a diagnosis of PTSD. The implication of this is that not having a diagnosis of PTSD does not mean that there was no trauma. If PTSD continues to be an important factor in asylum claims, then there is a danger that the 50 per cent of asylum seekers with traumatic

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[10] D. Silove, I. Sinnerbrink, A. Field, V.Manicavasagar and Z.Steel, 'Anxiety, depression and PTSD in asylum-seekers: associations with pre-migration trauma and post-migration stressors' [1997] *British Journal of Psychiatry*, 170.

[11] S. Turner, C. Bowie, L. Shapo and W. Yule, 'Mental health of Kosovan Albanian refugees in the UK' [2003] *British Journal of Psychiatry*, 182.

[12] S.M. Weine, D.F. Becker, D. Vojvoda, E. Hodzic, M. Sawyer, L. Hyman, D. Laub and T.H. McGlashan, 'Individual Change After Genocide in Bosnian Survivors of "Ethnic Cleansing": Assessing Personality Dysfunction' [1998] *Journal of Traumatic Stress*, 11(1).

experiences but who do not meet the full criteria for a diagnosis of PTSD have a lower chance of their story being believed.

It is also important to note that individuals are diagnosed by meeting cut-off criteria for a particular disorder. It is possible to have many of the symptoms of a disorder without meeting those cut-off levels. Diagnosis is a categorical assessment, but this should not be allowed to mask the effects that may be seen in individuals with different patterns of presentation.

7.5. POST TRAUMATIC STRESS DISORDER (PTSD)

Before discussing the effects of Post Traumatic Stress Disorder, we should be clear what is meant by this psychiatric diagnosis. It consists of six sets of criteria. The first is a definition of a traumatic event; the next three are groups of symptoms – intrusions, avoidance and hyperarousal; the final two relate to duration and disability. Italics are used to indicate extracts from the Diagnostic and Statistical Manual of Mental Disorders.[13] To be diagnosed with PTSD, the individual must meet the first criterion and have at least two intrusion symptoms, at least one avoidance symptom and at least three hyperarousal symptoms.

The first criterion is that the individual has been subject to a traumatic event, which is defined as an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others. This criterion also stipulates that the person's response involved intense fear, helplessness or horror.

7.5.1. Intrusions

Someone diagnosed with PTSD will have at least some form of uncontrollable, recurrent and intrusive memories – in the form of *recollections . . . images, thoughts, or perceptions, nightmares, acting or feeling as if the traumatic event were recurring (flashbacks).* They are likely to experience *intense psychological distress* and/or *physiological reactivity at cues that symbolise or resemble an aspect of the traumatic event* – also known as triggers.

7.5.2. Avoidance

They will also make strenuous efforts to avoid having to revisit memories of the trauma – whether by *avoiding thoughts or conversations* to do with the events, or by *avoiding places, people or activities* which remind them. They may be unable to recall important aspects of the traumatic event.

[13] American Psychiatric Association (1994) *Diagnostic and Statistical Manual of mental disorders.* (Washington DC, American Psychiatric Association).

7.5.3. Hyperarousal

Finally, someone with a diagnosis of PTSD is likely to have difficulties sleeping, outbursts of anger, difficulty concentrating and fearful reactions, such as being hypervigilant and very easily startled.

These symptoms will have lasted more than one month (a duration of more than three months is defined as Chronic PTSD), and be severe enough to be causing *significant impairment in social, occupational, or other important areas of functioning*, such as interpersonal relationships.

7.5.4. What is PTSD?

Briefly, the latest understanding of PTSD is that these symptoms are a result of the way in which memories of a traumatic event are processed. Unlike a normal event, as has been seen, a traumatic event is often held in memory in fragments, and these fragments of the experience are 're-experienced' in an unpredictable way, causing extreme distress to the individual. The individual's response, quite reasonably, is to make strenuous efforts to put it out of their mind and 'forget all about it'. This fails, and the continued repetition of these memories keeps alive a sense for the individual that they are still in danger. This can also re-evoke any emotions that they may have felt at the time of the trauma, such as fear, shame, humiliation, anger or guilt.

7.5.5. PTSD Symptoms and Giving Evidence

Where PTSD has been diagnosed, it is likely to be significantly more difficult for individuals to talk about their experiences. One of the diagnostic features of PTSD is that the individual makes efforts not to have conversations associated with the trauma. Factors in the interview or hearing that increase the triggering of memories and feelings will make it more likely that the individual will switche into an avoidance response. Many people find that talking about the situation in their country causes them extreme distress and they will consequently avoid talking to compatriots, including interpreters. Adopting an approach in an immigration interview or in an oral hearing that does not take account of this phenomenon stands to make it less likely that justice will be served.

The avoidance response in people with PTSD has been shown to be even stronger with respect to certain types of trauma experienced. Van-Velsen, Gorst-Unsworth and Turner analysed the symptoms of 60 survivors of torture referred to the Medical Foundation for the Care of Victims of Torture in London.[14] They found that there were significant differences in the number of avoidance symptoms between people who had been sexually tortured and those who hadn't: People who had been subject to sexual torture were significantly more likely to make efforts to avoid any reminders of their experiences.

[14] Van Velsen *et al.*, *supra* note 3.

The hyperarousal symptoms of PTSD are also particularly pertinent to the ability of the individual to engage in the legal process. S/he is likely to have extremely impaired concentration and very likely, also due to hyperarousal, to be getting insufficient sleep. We find clinically that people with PTSD have sleep problems due to three inter-related factors: a/ they have nightmares which wake them up in an extremely distressed state and it may take a considerable time before they feel calm enough to sleep again; b/ many people try to avoid sleeping, due to the distress that their nightmares cause them; c/ high levels of anxiety and worry keeps them from being able to fall asleep. The effects of even moderate sleep deprivation may include fatigue, confusion, loss of motivation and loss of concentration, amongst others.

7.6. DEPRESSION SYMPTOMS AND GIVING EVIDENCE

Depression is another diagnosis that is found relatively commonly in asylum seekers. It is linked with post-migration factors, notably isolation from family or friends, poor accommodation and other social difficulties.[1516] It is very often co-morbid with PTSD.

A diagnosis of Depression means that the individual has persistent feelings of low mood and/or an inability to enjoy previously pleasurable activities. Other symptoms include feelings of guilt, worthlessness, weight change, sleep disruption, suicidality and a '*diminished ability to think or concentrate, or indecisiveness'*.[17] This last item is emphasised, as it is clearly likely to have an impact on the quality of an individual's legal evidence.

A further effect that has been robustly associated with Depression is the inability to recall specific autobiographical memories. Experimenters have found that, when asked to provide a specific memory in response to a cue word – for example 'happy', people with depression tend to give a general response – such as 'I used to be happy when my Dad was alive', whereas people without depression would recall a specific event, such as 'when I went to the seaside with my Dad last year'.[18] There is also some evidence that this effect is found in people with PTSD.[19]

Again, as with PTSD, it should not be assumed that only the people with a full diagnosis of Depression might be subject to some of the symptoms or effects of chronic low mood. Low concentration is associated with both PTSD and

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[15] C. Gorst-Unsworth and E. Goldenberg, 'Psychological sequelae of torture and organised violence suffered by refugees from Iraq: trauma related factors compared with social factors in exile' [1998] *British Journal of Psychiatry*, 172.

[16] Van Velsen *et al*., *supra* note 3.

[17] American Psychiatric Association, *supra* note 13.

[18] J.M.G. Williams, 'Autobiographical Memory and Emotional Disorders' in S.A. Christianson (ed.), *The Handbook of Emotion and Memory* (Lawrence Erlbaum Associates Inc., Hillsdale, New Jersey.1992).

[19] R.J. McNally, N.B. Lasko, M.L. Macklin and R.K. Pitman, 'Autobiographical memory disturbance in combat-related posttraumatic stress disorder' [1995] *Behaviour Research and Therapy,* 33(6).

Depression, but may be present despite the individual not meeting full diagnostic criteria for either diagnosis.

Suicidal thoughts, plans and, in severe cases, attempts to commit suicide, are often associated with Depression. The beliefs that the future is hopeless and the self is worthless, characteristic of Depression, combine to make suicide more likely. There is also evidence that for people with Depression and PTSD, there is an increased risk of suicide.[20]

Some people awaiting asylum decisions describe plans that they perceive as a rational response to deportation – they will kill themselves rather than return to the situations in their home country.

7.7. DISSOCIATION AND GIVING EVIDENCE

Dissociation is described in the Diagnostic and Statistical Manual of Mental Disorders as a 'disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment'.[21]

This disturbance of awareness is a common effect of past trauma experience.[22] It is sometimes experienced by the individual as a 'spacing out'. They may look like someone who is deep in thought or day-dreaming. Entering this state is not under the individual's control. It is often triggered by memories of the traumatic event – which may be unpredicted, sudden and intrusive memories.

An individual may have frequent dissociative episodes – every few minutes. When spoken to directly, using her/his name, s/he will look slightly startled and try to re-engage in the conversations. This phenomenon clearly will have a very detrimental effect on her/his ability to concentrate or follow the line of a conversation. S/he may not be able to understand questions, and s/he may lose track of the answer s/he is trying to give. Because s/he is not always attending, s/he does not learn new information well, which manifests as very poor memory.

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[20] M. Oquendo, J. Friend, B. Halberstam, B. Brodsky, A. Burke, M. Grunebaum, F. Michael, K. Malone and J. Mann, 'Association of Comorbid Posttraumatic Stress Disorder and Major Depression With Greater Risk for Suicidal Behavior' [2003] *American Journal of Psychiatry*, 160(3).

[21] American Psychiatric Association, *supra* note 13.

[22] B. van der Kolk, O. van der Hart and C.R. Marmar, 'Dissociation and Information Processing in Posttraumatic Stress Disorder' in B.v.d. Kolk, A.C. MacFarlane and L. Weisaeth (eds.), *Traumatic Stress: The Effects of Overwhelming Experiences on Mind, Body and Society* (Guilford Press, New York, 1996).

7.8. OTHER CONSIDERATIONS

7.8.1. Head injury

A common phenomenon experienced in torture is repeated blows to the head.[23] In extreme cases, recurrent blows to the head may cause a dementia such as is seen in boxers. However, there may also be other forms of less severe organic brain damage. This possibility needs to be taken into account and questions should be asked about head injury particularly where there has been either a significant duration of loss of consciousness, or there is a loss of memory for events immediately surrounding the time of a serious head injury, or where blows to the head have been frequent and might have had a cumulative effect.

7.8.2. Psychosis

Where there is a psychotic disorder, it may be necessary to undertake assessments differently or to advise that they should be delayed until an active psychosis has been treated. Here clinicians should be asked to advise on standard treatment approaches and timescales for recovery.

Difficulties may arise where there are delusions of persecution. Of course, an individual may have both genuine and delusional beliefs about persecution. There is the aphorism, 'Just because you are paranoid, it does not mean that they are out to get you'. Indeed, the fact is that some people who are deluded are more likely than others to be persecuted. They are more likely to have difficulties appraising threat appropriately and may lay themselves at increased risk of persecution. Delusions may lead them to challenge people in authority or to pester security forces, both potentially dangerous actions in some settings.

It is possible that some have been given refugee status on the basis of entirely delusional persecution histories. However, equally, some may have been rejected on the grounds that they had some delusions – when the experience of persecution was, in fact, accurate. Great care is needed in this setting and experienced clinical input into the legal process is essential.

Delusions may not only be relevant to understanding past experiences. They may represent a risk factor for future persecution. Probably the most obvious example of this is in people who have manic episodes. Grandiose delusions of a political or religious nature may, in some countries, lay the individual open to some of the most serious consequences. A common grandiose delusion would involve a belief that the individual was destined to be a religious leader – the next Pope, Ayatollah *etc*. Their behaviour is often disinhibited and risk-taking. To express such ideas or to behave in this way in some countries would be to court persecution, especially if there was limited knowledge of mental health issues.

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[23] A.E. Goldfeld, R.F. Mollica, B.V. Pesavento *et al.* 'The physical and psychological sequelae of torture' [1988] *Journal of the American Medical Association,* 259.

7.8.3. Learning disabilities

People with learning difficulties may also present special issues in assessment. In safe countries, there are often special mechanisms to protect vulnerable adults who are being interviewed in connection with criminal allegations. They may be more vulnerable to pressure to conform or agree with the interviewer. There may be an over-reliance on factual material – going beyond what is safe in the context of their intellectual ability. It is seldom that people are even asked about basic literacy and yet this may be crucial to understanding their appraisal of factual evidence.

7.8.4. Chronic pain

Pain is likely to be highly common in survivors of torture, where the infliction of pain and damage to the body has been used as a means of coercion, often over a prolonged period.[2425] Chronic pain is recognised to have a considerable impact on the individual in terms of concentration, fatigue, and irritability.

7.9. CONCLUSIONS AND RECOMMENDATIONS

One of the conclusions of this article is that some individuals may be either too afraid or unable to reveal a coherent or complete history of persecution when they first present. It has been shown that autobiographical memory is susceptible to distortion, most particularly when the events to be recalled were traumatic. This may affect the ability of the individual to present a coherent narrative, and it may mean that details, which are not core to the experience of the event (peripheral details), are forgotten or confused. If the experience has had a serious psychological impact (and van Velsen *et al*.[26] argue that torture always targets psychological effects) or includes significant sexual assault, this is more likely to be the case. If a successful application for asylum is to rest on the individual disclosing a *coherent* history of torture, then those individuals who are suffering some of the more disruptive psychological sequelae of their torture are being discriminated against.

7.9.1. Research

More research is needed to explore the issue of discrepancies and other assumptions made in the course of asylum decision-making. Decisions on refugee status are made based on assumptions about how individuals present themselves and their histories. We must be sure that these assumptions are valid in order to ensure that the system is making the right decisions.

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[24] J. Cohen, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably Be Said to Undermine Credibility of Testimony' [2001] *Medico-Legal Journal*, 69(1).
[25] M. Peel, G. Hinshelwood and D. Forrest, 'The Physical and Psychological Findings Following the Late Examination of Victims of Torture' [2000] *Torture*, 10(1).
[26] Van Velsen *et al*., *supra* note 3.

Research investigations could establish whether there are other reasons for discrepancies between accounts. We know for example that people select different details of memory according to their mood at the time of asking. In the study into discrepancies one participant answered the same question with 'we were badly beaten' on one occasion and 'we were slapped around a bit' on another occasion.[27] Was he in a different mood state on each occasion?

7.9.2. Support in Interviews and Oral Hearings

Some of the psychological difficulties described may manifest in quite subtle ways in oral hearings. Furthermore, it has been shown how such difficulties can impact on the claimant's ability to perform in these settings. Having support in these unfamiliar, stressful situations, which may be triggering memories or otherwise impeding the claimant could be crucial in obtaining a fair hearing. One way to improve such a situation would be for the individual to be accompanied by someone who knows them closely enough to recognise the incipient signs of anxiety, panic attacks or dissociation and be able to say the person's name, or use pre-arranged strategies for gently bringing them back to their present surroundings. When someone dissociates, for example, it is often not noticeable – or s/he may appear to be day-dreaming. Someone who did not know such a claimant might conclude that s/he was not paying attention, by choice.

Of course such an individual would have to be able to stay close by the claimant, and have the permission to speak up whenever s/he felt that the claimant needed them. S/he would need to be given sufficient permission by the court to play this role, and be sufficiently assertive to carry it out.

A better solution might be possible if claimants' legal representatives had sufficient time to get to know their client and to understand any such difficulties, and thus to be able to recognise when s/he is distressed or dissociated.

7.9.3. Mental Health

An assessment of the mental health of asylum claimants can be crucial in understanding their presentation and hence in making judgements of credibility.

This paper has argued that a categorical diagnosis of PTSD has been increasingly relied upon in recent years as an indicator of the truth of asylum claims, or at least to add weight to a history of trauma, as it includes an assumption that the origin of the disorder lies in a traumatic event. Similarly, psychiatrists and clinical psychologists have been turned to as experts to declare whether an individual 'has' or 'doesn't have' PTSD, in order that conclusions may be drawn about the reliability of their statement. This paper has suggested that, even falling below the diagnostic criteria, people who have witnessed or experienced traumatic events may bear psychological difficulties as a result. Indeed, Byrne describes international legal

[27] Herlihy *et al*., *supra* note 7.

arenas where an assumption of suffering is made without recourse to diagnosis.[28] The importance of our understanding of PTSD and Depression and other mental difficulties goes beyond factual evidence to raise important factors in the individual's ability to present themselves in a way that is seen by decision makers as credible.

Mental health problems do not by any means affect all asylum seekers or refugees. However, for those who are affected, there are a number of important ways in which their difficulties interact with the needs of the legal process, in such a way that they may be less likely to receive fair and valid treatment and judgements. This chapter has begun to suggest some of the ways in which psychological and psychiatric factors – whether giving rise to psychiatric diagnosis or not – can impede asylum seekers' access to justice in the legal systems of host countries.

[28] *See infra* Chapter 10, text accompanying note 29.

C – THE GUIDING POTENTIAL OF INTERNATIONAL LAW

CHAPTER 8

EVIDENTIARY ASSESSMENT UNDER THE REFUGEE CONVENTION: RISK, PAIN AND THE INTERSUBJECTIVITY OF FEAR

Gregor Noll

8.1. INTRODUCTION

Should refugee determination procedures be imagined as a machine processing relevant data, an intersubjective exchange between rational actors, or a process of confession and absolution? Is it possible to cast procedures as a composite of all these imaginations, and, if so, which of the underlying paradigms should dominate? For many years, there has been a vigorous debate on how the phrase 'well-founded fear' should be properly understood. In its essence, this debate is a procedural one, and it has prominent repercussions on evidentiary assessment.

One of the objectives being pursued in the research project behind this volume is to identify international norms that have a bearing on evidentiary assessment in the procedures employed to identify refugees and persons benefiting from subsidiary protection under international law. This chapter shall focus on the 1951 Refugee Convention and whether or not it contains implicit procedural obligations impacting on evidentiary assessment.

Why 'implicit'? It is evident that the 1951 Refugee Convention[1] does not contain explicit norms governing the status determination procedure at large, or evidentiary assessment in particular. Obviously, this does not mean that contracting states enjoy unfettered discretion in the framing and operation of procedures. It is common ground that a state's desire to expel an alien claiming to be a refugee presupposes some form of procedure, if that state is to respect obligations under Article 33(1) CSR. This is perhaps the most prominent example of an implied obligation, and one of fundamental character. If a state wishes to remove a person who claims to be a refugee, it has to assess whether or not the conditions of Article 33(1) CSR are satisfied (and Article 33(2) CSR is not applicable to the claimant). As a rule, this will lead to an assessment of whether or not the claimant falls within the refugee definition in Article 1 CSR.

[1] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 [hereinafter 1951 Refugee Convention, abbreviated CSR]. In the following, reference to the 1951 Convention covers the Convention as modified by the Protocol relating to the Status of Refugees, 31 Jan. 1967, 606 UNTS 267.

8.2. ASSESSMENT UNDER ARTICLES 1A(2) AND 33(1) OF THE GENEVA CONVENTION

There are good reasons to make Article 33 CSR a starting point in the quest for procedural implications of the Convention. After all, it is rightly considered the bottom-line obligation in international refugee law, given the serious consequences an individual might face as a result of being *refouled*. Usually, asylum claims in the North are defenses against impending removal, and thus related to prohibitions of *refoulement*. Certain themes of proof emerge from article 33 CSR, *inter alia* the following:

- Is the claimant a 'refugee' in the technical sense, entitled to the benefit of article 33(1) CSR, without falling under the sub-category defined in Article 33(2) CSR, by which the benefit of *non-refoulement* 'may not . . . be claimed'?
- Does state action or omission amount to expulsion, return or *refoulement* in the sense of Article 33(1) CSR?
- In particular: would the claimant's life or freedom 'be threatened on account of' one of the five enumerated grounds?

The first theme makes it very clear that any consideration of a claim under Article 33 CSR entails a concomitant obligation to consider Article 1 CSR. However, the language employed in the two named provisions is not congruent. While Article 1A(2) CSR relates to a 'well-founded fear of being persecuted for reasons of' one of the five grounds, Article 33(1) CSR chooses different solutions: it demands the existence of a *threat* rather than that of *fear*, and the nexus requirement is described by employing the wording 'on account of' rather than 'for reasons of'.[2]

Some would perhaps discount such differences as inattentive drafting. Still, the wording of a treaty is of primary importance under prevailing canons of interpretation in international law. The parallel occurrence of related, yet incongruent concepts seems to support the idea that a multitude of approaches were present in the considerations of the drafters, and that they found their way into the letter of the convention. Logically, any assessment of 'fear' will involve the claimant to a higher degree than the assessment of a 'threat' directed against her or

[2] On the difference between 'on account of' and 'for reasons of', *see* G. Goodwin-Gill, *The Refugee in International Law* (OUP, Oxford 1996), p. 51, suggesting that the former implies an element of conscious, individualized direction which is often conspicuously absent in the practices of mass persecution. However, he wipes out the difference in wording emerging from a comparison between Article 1 CSR and Article 33 CSR with a reference to state practice, which, to his understanding, had practically equated the scope and standard of proof of the two provisions (*ibid*., p. 138–9). The present author doubts whether this is tenable. German legislation provides a counterexample. The protective scope of the right to asylum in Article 16a of the German Basic Law and the protection from *refoulement* in Article 51 of the German Aliens Act is certainly not identical.

him (to wit, Article 33 CSR does not require that the claimant would *feel* threatened). Then again, the assessment of 'risk' (a term not employed in the Convention, but by commentators as well as in decisions and judgments) could be, but need not be, a different matter altogether.

Let us then move to Article 1A(2) CSR with its threefold occurrence of the term 'fear':

- In any case, there must be a 'well-founded fear' of being persecuted for one or more of the enumerated reasons.
- In cases where status is based on the claimant's unwillingness to avail oneself of protection by the country of origin, such unwillingness must be 'owing to such fear'.
- In cases where the applicant possesses multiple nationalities, there must be a 'valid reason based on well-founded fear' for the claimant not to avail herself of the protection by the relevant countries.

To be sure, the three occurrences of 'fear' in Article 1A(2) CSR cannot be discarded as a legislative mistake. True to the maxim *ut res magis valeat quam pereat,* a norm must be interpreted in a manner giving meaning to each single word in it.[3] What, then, could the meaning of 'fear' be? To our understanding, the occurrences of the term fear, as well as the explicit linkage between fear and unwillingness, suggest that refugee status determination under Article 1A(2) CSR involves the applicant's own assessment of her situation upon return to a higher degree than the determination of a claim under Article 33(1) CSR.

Interestingly, the language of 'threat' employed by Article 33(1) CSR is rather close to the language employed in Article 3 CAT ('danger') and to the formulations by the ECtHR when identifying obligations of *non-refoulement* implied in Article 3 ECHR ('real risk'). At face value, the applicant is given an important role in the assessment of whether s/he belongs to the class of refugees at all, and the criterion of 'fear' obliges states to adapt asylum procedures to identify it. Simply put, 'well-founded fear' cannot be assessed without hearing the applicant in an appropriate manner, allowing her or him to communicate 'fear' in the Convention sense.[4] Once this step is completed, and a state moves on to assess whether or not s/he benefits from *non-refoulement,* this changes. The interplay between Article 1A(2) CSR and Article 33(1) CSR must not incite us to let the assessment of any 'threat' under Article 33(1) CSR replace the assessment of 'well-founded fear' under Article 1A(2) CSR. Following the logic of the 1951 Refugee Convention, the assessment of 'well-founded fear' comes first, and is followed by an assessment of any 'threat' linked to removal. By consequence, the Convention accords the refugee a greater role in

[3] M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités', *Receuil des Cours* 151[III] (1976), p. 71; R. Bernhardt, 'Interpretation in International Law', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* (North Holland, Amsterdam, 1992) p. 1420.

[4] It shall be argued below that such 'fear' must not be misunderstood as trepidation.

contributing to the assessment of a *general* risk of persecution by stating her fear, while any consecutive assessment of *specific* threats to her 'life or freedom' under Article 33(1) CSR is put into the hands of the determining state.

Why is such precision needed in reading the quoted norms important at all? The Refugee Convention is an instrument of international law lacking individual monitoring mechanisms at the international level. It emerged from a regulatory context, which cast human beings as objects rather than emerging subjects of international law. This would offer states complete freedom in how to comply with the 'obligations of result' under the Convention. Were it not for the mentioning of 'fear', emphasising the importance of a refugee's own assessment, determination procedures could cast claimants as mere objects to be dissected by an impersonal machinery of assessment. Now, the drafters inserted certain signals to the contrary, incongruent perhaps, and, as any linguistic expression, open to misconception and abuse. This we have to live with.

These signals tell states that the presumptive refugee is more than an actor merely triggering a determination procedure. Quite to the contrary: s/he retains a form of agency within that procedure. This agency is anchored in the state obligation to assess 'fear'. Otherwise put, the element of 'fear' contains a procedural obligation. Tentatively, we would suggest that the content of this obligation is to design procedures in such a manner that the applicant is given the possibility to communicate 'fear' as a personal risk assessment. Where procedures disallow for this communication to take place, for whatever reason, a state cannot claim to have fully complied with the 1951 Refugee Convention when removing a failed applicant. 'Fear' translates into a procedural standard.

8.3. THE CONVENTION CONTAINS NEITHER AN 'OBJECTIVE' NOR A 'SUBJECTIVE' ELEMENT

We have established a reading of the term 'fear' as implying a procedural standard and shall now seek to refine it further. We have chosen a method that will contrast this reading with other readings of 'well-founded fear'. As much of this debate employs the term 'subjective element' to describe fear and 'objective element' to describe well-foundedness, we are compelled to insert and motivate a caveat on the risks and confusion caused by this language.

An obvious risk is that we loose focus of the definition's wording, which makes no mention whatsoever of 'objective' or 'subjective' elements, but simply speaks of 'well-founded fear' as a qualified factor inhibiting return. To start with, a move from 'fear' to 'subjectivity' and from 'well-foundedness' to 'objectivity' invariably adds things to the Convention definition that are simply not there. These additions take on a life of their own, leading to misperceptions and unwarranted conclusions.

What, then, is added? First, an 'objective element' suggests that there are 'facts or conditions as perceived without distortion by personal feelings, prejudices, or

interpretations'.[5] Irrespective of what one chooses to believe about the separation of perception and interpretation at large, it should be common grounds that an assessment of the well-foundedness of fear is based on predictions. These are necessarily personal interpretations of reality.[6] The emphasis on objectivity presses us to do something we cannot do within the framework of the asylum procedure: to assess a case without recourse to evaluation.[7] The example of domestic databases containing information on protection seekers' countries of origin is instructive. Intuitively, we might approach such databases with the belief that they contain 'hard' data, duly filtered and authoritatively approved, and somehow representing 'objective' information. The technological presentation of data by a computer terminal might work to further reinforce this impression. Yet any country of origin data ultimately depends on the judgements made by its author, and is thus *a priori* no less subjective than, say, an account by the protection seeker. In the asylum procedure, there is no such thing as well-foundedness pure and simple, that is, beyond the actors involved in it.

A second danger is that any talk of *a* 'subjective element' (in singularis) really colludes a plurality of subjective elements present in any asylum case. If we follow the dictionaries, a 'subjective singularis element' could be seen as 'characteristic of or belonging to reality as perceived rather than as independent of mind'.[8] Who is perceiving the reality at stake? The protection seeker is one candidate, another one the decision-taker. This setting is further complicated through the intermediary roles played by the legal representative of the applicant or interviewing officers entering data into the file on which another person takes a decision. Any of these four could

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[5] *Merriam-Webster's Online Dictionary*, available at <www.m-w.com/cgi-bin/dictionary>, accessed on 15 January 2005.

[6] This would be true even if we were to rely on a stochastic form of determination. Someone would need to assign probability to the different conceivable outcomes, which necessarily implies an interpretation of reality.

[7] Blommaerts reminder fits well in here: 'To put it simply, "truth" does not "drop off" texts, it is a metadiscursive qualification that needs to be established by interlocutors, and for which interlocutors apply textual and interactional criteria such as: absence of contradiction, neat sequentiality of narrative events and episodes, precision, possibility for accurate replication (being able to tell the same story in exactly the same way on different occasions), even-mindedness in the act of telling (*cf.* the famous "lie-detector", an instrument registering emotions during narration), the possibility to substantiate statements with other textual or non-textual evidence, etc. [reference omitted, GN]. In our legal procedures, such criteria are crucial in determining the 'truthfulness' and 'reliability' of utterances (statements and testimony). The point, however, is that the criteria used in such acts of evaluation are derived from a strongly literacy-based European understanding of textuality and coherence . . . and that these criteria may clash with the criteria of -- text-based – "truthfulness" and "reliability" used in societies different from ours.' J. Blommaerts, 'Analyzing African Asylum Seekers' Stories: Scratching the Surface', Working Paper available at <//africana.rug.ac.be/texts/research-publications/publications_on-line/asylum_seekers.htm>, accessed on 3 November 2004.

[8] *Merriam-Webster's Online Dictionary*, available at <www.m-w.com/cgi-bin/dictionary>, accessed on 15 January 2005.

provide their version of a subjective element. Each will have perceptions: of a personal state (I have a feeling of uneasiness, which I interpret to be fear), of external reality (this trustworthy newspaper article relates frightening facts), of representations made by any of the other actors (this statement is meant to deceive me). If we combine this with the impossibility of complete objectivity, it leaves us with the conclusion that even 'hard data' arguments demonstrating 'well-foundedness' must necessarily be perceived in order to play a role in the procedure. Hence, the objective-subjective dichotomy opens a Pandora's box of references, and its users are usually not very precise on exactly what they are referring to. 'Fear' pure and simple is inaccessible in the procedure.

The third addition embedded in the subjective-objective dichotomy risks prejudicing and truncating procedural roles. To understand this risk, we need to separate two types of obligation emerging from the refugee definition. One is a state obligation under international law. It is about providing a certain outcome to beneficiaries. When states act upon that obligation, they usually impose another type of obligation on persons claiming to be beneficiaries. The source of this second obligation is not international law, as the 1951 Refugee Convention in no way binds individuals. Rather, it reflects the contours of the first obligation. Often, the debate on the definition neglects the first obligation and rushes to the second one, transforming the wording of the definition into requirements to be met by the protection seeker. In its most extreme distortion, the 'subjective' input of the protection seeker is neatly opposed against the 'objective' assessment of well-foundedness by the decision-taker.

When the protection seeker is mistaken as the agent behind the subjective element, and the decision-taker is misperceived as having to make or endorse an objective assessment, we actually have merged these two obligations into one, truncating both. Correctly, the protection seeker will provide evidence on his or her 'well-founded fear' as a totality; the authorities might add evidence of their own, while the decision-taker will assess this evidence in the end. This understanding neither disenfranchises the protection seeker nor exaggerates the capabilities of the decision-taker. Moreover, the terms 'objective' and 'subjective' can be reserved for more precise expressions of meaning.

Ultimately, the debate on the roles of any objective or subjective element is about the power to define identity. Similar discussions take place in other areas, as in nationality law[9] and minority law[10]. The technicalities of legal language are but a

[9] Joppke and Roshenhek describe the central role accorded to a subjective criterion of self-identification in German immigration and naturalization processes for 'ethnic Germans' from Eastern Europe: 'The overarching idea, however, was Germanness as essentially a matter of subjective "confession to German peoplehood" (*Bekenntnis zum deutschen Volkstum*) with objective markers only as "affirmation" (*Bestaetigung*) of subjective Germanness. This recognition practice sits oddly with the stereotypical view, shared in much of the academic literature [reference omitted, GN] of Germanness as constituted by objective blood ties. However, the subjective confession test had from the start a rather objective tilt, epitomized by the strange legal construction that a confession could be inherited across generations.

tip of the iceberg of discourses on community membership, juxtaposing the definitional powers of individuals and states. This should be kept in mind when discussing their proper meaning.

8.4. FOUR ATTEMPTS TO UNDERSTAND WELL-FOUNDED FEAR

In the following, we shall look at four different positions in order to refine the one taken in this chapter. First out is the sequence of subjective and objective assessment proposed by the UNHCR Handbook,[11] presenting what is essentially a mixed position. Second is Professor Hathaway's intervention into the debate, putting a strong emphasis on the objective character of status determination. Third, we find Professor Tuitt, who points out a number of losses related to the increasing objectification of procedures. Fourth is the question of whether fear can be expressed at all within determination procedures, put forward by Professors Douzinas and Warrington.

8.4.1. Making Sense of the UNHCR Handbook: Subjectivity, Objectivity and Credibility

It is no exaggeration to say that the UNHCR Handbook puts a strong emphasis on fear in its presentation of refugee status determination. In the very first paragraph exploring the meaning of a 'well-founded fear of being persecuted', the Handbook introduces a linkage between the subjectivity of fear and an obligation to focus on the applicant's statements in the assessment of a claim:

Moreover, ironically to redress discrimination against Jewish claimants for ethnic German status, the weight shifted over time from subjective to objective criteria, whereby the latter were taken as "indicative" for the existence of subjective Germanness.' C. Joppke and Z. Roshenhek, *Ethnic-Priority Immigration in Israel and Germany: Resilience Versus Demise*, Center for Comparative Immigration Studies Working Paper No. 45, 2001, available at <//www.ccis-ucsd.org/PUBLICATIONS/wrkg45.PDF> , accessed on 15 January 2004, p 21.

[10] Minority law holds a similar composite of objective and subjective elements. While there is no comprehensive legal definition of the term 'minority' in international law, Alfredsson holds that the 'necessary elements' of a definition emerge quite clearly in national and international practices. These would contain *inter alia* certain 'objective characteristics' as well as 'self-identification' (corresponding to a subjective element). G. Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definition of Terms as a Matter of International Law', in N. Ghanea and. A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Brill, Leiden, 2005) pp. 163–172, at 165–166. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries expressly stipulates that self-identification shall be regarded as a fundamental criterion for determining the groups to which the Convention applies. Without suggesting further analogies between refugees and minorities, the parallel to refugee law should be clear. The term 'fear' in the refugee definition entails an indirect process of self-identification.

[11] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Geneva, January 1992 [hereinafter UNHCR Handbook].

> Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.[12]

In the subsequent paragraph, the Handbook takes a problematic step when it juxtaposes subjectivity with objectivity:

> To the element of fear – a state of mind and a subjective condition – is added the qualification 'well-founded' This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.[13]

Why is this problematic? Especially in adversarial settings, the subjective-objective dichotomy risks promoting the most astonishing misreadings of the definition. In *Civil* v. *INS*, the US Court of Appeals (First Circuit) provided a telling example, when it reiterated that

> In order to establish a well-founded fear of future persecution, a petitioner must have shown both a genuine subjective fear and an objectively reasonable fear of persecution on a protected ground.[14]

What the Court did was to break up an integrated theme of proof (well-founded fear) into two separate themes, demanding indications of both 'subjective fear' and 'objectively reasonable fear'. This is no singular aberration. Adversarial procedures in certain common law systems seem to have a tendency of splitting up the Convention definition and to turn its bits and pieces into separate themes of proof.[15] This fragmentation augments the total burden of proof and burden of persuasion.

Under the 1951 Refugee Convention, 'fear' is not a separate theme of proof. The applicant's decision to seek asylum is a decision of unwillingness to avail oneself of protection or return on the basis of a very personal assessment of dangers

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[12] UNHCR Handbook, para. 37.

[13] *Ibid.*, para. 38.

[14] *Civil* v. *INS*, 5/15/1998, No 97-1836, US Court of Appeals, First Circuit, with further references.

[15] Another example is a peculiar version of the so-called nexus requirement set out in the U.S. Supreme Court's judgment in *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992). According to the Court, an applicant for asylum must present 'some evidence', direct or circumstantial, that the harm s/he fears is 'on account of' political opinion or another of the enumerated grounds. It is evident that this problematic approach is imputable to an adversarial understanding of refugee determination. For an attempt to address the harm done, *see* J. Hathaway, 'The Causal Nexus in International Refugee Law' 23 *Michigan Journal of International Law* (2002) pp. 207–221, with further references.

connected to it. This is within the realm of the claimant, and by making it a theme of proof, the authority or court actually appropriates the claim and usurps the role of the claimant. It is only when the dimension of well-foundedness is added that a singular and integrated theme of proof emerges: that of well-founded fear.

Let us revert to the Handbook. Following the paragraph quoted above, it spends two paragraphs on the subjective element and another two on the objective element. These paragraphs meander back and forth between factors internal and external to the applicant, blurring the dichotomy of objective and subjective, and allowing for no clear inferences on how a decision-taker should proceed in reality. Perhaps most confusing is the introduction of the concept of credibility.

In a sentence which is not easy to grasp, the Handbook links subjectivity to credibility: 'Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record'.[16] To assess credibility, the decision-taker is invited to take into account the applicant's 'personal and family background, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation and his personal experiences – in other words, everything that may serve to indicate that the predominant motive for his application is fear'.[17] Then again, the Handbook adds that '[f]ear must be reasonable',[18] which begs the question of well-foundedness. Later on, in a paragraph dealing with the objective element, the Handbook states that a 'knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility'. What does this all amount to? Not much: where the facts on record are insufficient, the decision-maker will need to seek more facts, all kinds of facts can be used to assess credibility, ranging from personal evaluations by the applicant to general information of legislation in her country of origin. These are facts generally used in the asylum procedure. This boils down to a rule of thumb: when in doubt, do more of the same, and call it credibility assessment. It remains unclear what added value such a credibility assessment will provide, apart from augmenting the personal discretion of the decision-taker and messing up the precise content of a decision's motivation.

Credibility, that is, the subjective capacity to inspire belief, could relate to two objects of belief in the asylum procedure. Credibility can either relate to the belief in the applicant's fear, or to the belief in the well-foundedness of that fear. For the decision-taker, this implies a choice. One of those choices may involve the decision-taker assuming that any conclusion on the existence of a 'credible fear' with the applicant will also automatically endorse the truthfulness of the 'objective elements'. If the applicant is really afraid, the adjudicator could reason, there must indeed be good cause for her fear being well-founded. This shortcut would vest a good deal of control with the applicant, and tilt the procedure towards an exercise of confession and absolution. At any rate, this understanding of a credibility

[16] UNHCR Handbook, para. 41.
[17] *Ibid.*
[18] *Ibid.*

assessment really provides added value, as it fills in the gaps in the evidence by using something different than just a continuing inquiry.

In the alternative, the decision-taker resolutely separates the credibility of fear from the credibility of its well-foundedness. This allows for a distinct credibility assessment of the environmental facts put on record by the applicant, excluding her subjective fear, and therewith the applicant's own assessment of these facts. Ultimately, this will lead the decision-taker to sources other than the applicant herself. This is really part and parcel of any asylum procedure worth its name; calling it credibility assessment is however confusing. In its essence, it is atomistic, and allows merely for a credibility assessment of one fact at a time,[19] disallowing inferences and analogies ('if she lied about participating in the demonstration, her other claims will also be untrue'). In principle, we are faced with a situation where the decision-taker has determined that there is too little information to decide the case, and that the gathering of evidence must go on. This has nothing to do with credibility in any distinct sense of the word, and we should stop using the term in that manner. Also, we should note that the separation of 'subjective' and 'objective' credibility transforms the assessment of fear into an assessment of trepidation. This will typically lead to an exercise of parapsychology, and trepidation assessment has been rightly criticised.[20]

By contrast, credibility of fear is a based on the assumption of the general truthfulness of a source (that is, the applicant). Source credibility allows for inferences about the truthfulness of all data emanating from it. It is about trusting the applicant's own evaluation, where further verification of facts is deemed impossible for one reason or another. Source credibility might be what the Handbook's authors really had in mind when they speak of a 'benefit of the doubt' to be given when evidence is lacking.[21]

The critique of the Handbook formulations allows us to develop a simple guideline for the decision-taker. There are but two alternatives in a situation where doubts in a case remain:

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[19] 'An adverse finding against credibility on a material aspect of [the applicants'] claims does not relieve the RRT from making its findings in respect of each material aspect of their claims.' Federal Court of Australia, *Emiantor and Okah* v. *Federal Ministry of Immigration*, 3 December 1997, p. 18.

[20] An excellent account for reasons militating against trepidation assessment can be found with J. C. Hathaway and W. S. Hicks, 'Is There a Subjective Element in "Well-Founded Fear"?', forthcoming in *Michigan Journal of International Law*.

[21] 'In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt'. UNHCR Handbook, para 196. *See* also paras. 203–204, dealing specifically with the benefit of the doubt. Zahle questions the outright import of the concept from criminal to asylum law, *see* Zahle, *supra* Chapter 2.3. For an attempt to clarify its content, *see* Popovic, *supra* Chapter 3.3.

1. to decide that the gathering of evidence must continue; or
2. to decide that the gathering of evidence shall stop, to decide the case, and to motivate why there was sufficient evidence to decide the case.

If the latter alternative is chosen, the decision-taker has two options:

> 2. a) To endorse the risk assessment of the applicant on the basis of a source credibility assessment, allowing for a positive decision of the case; or
> 2. b) To reject the risk assessment by the applicant and to replace it by that of the decision-taker, motivated in its own terms (and *not* by the lacking credibility of the applicant).

In the practice of asylum states, credibility language is frequently used to motivate rejections.[22] There is a considerable risk that decision-takers discharge their motivational burden[23] merely by relating to the lacking credibility of the applicant. No further reasons are added, which violates the implicit obligation to motivate the risk assessment of the decision-taker. In jurisdictions where evidentiary assessment is excluded in judicial review of asylum decisions, this makes a large fraction of rejections watertight. The UNHCR Handbook is part of that problem, as its lofty credibility language in conjunction with the dichotomy of subjective and objective elements seems to authorise overbroad usage by domestic decision-takers as a rejection device. In an effort to serve all types of jurisdictions, it succeeds merely in augmenting the range of state discretion rather than the force of law.

8.4.2. An 'Inherently Objective' Assessment?

Within doctrinal debate, some writers have been sceptical about the term 'fear'. This tradition is closely associated to the name of Atle Grahl Madsen,[24] one of the formative authorities of refugee law. In the 1990s, James Hathaway commented on his understanding of the UNHCR Handbook and criticised its two-pronged approach of first assessing fear and testing objective risk thereafter for being 'neither

[22] *See* M. Kagan, 'Is Truth In The Eye Of The Beholder? Objective Credibility Assessment in Refugee Status Determination' 17 *Georgetown Immigration Law Journal* (2003) pp. 367–414, notes 6–8, offering evidence from UNHCR refugee status determination and from certain jurisdictions in the North to illustrate that credibility findings were decisive for a substantial portion, if not majority of rejections.

[23] Council of the European Union, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, ASILE 64, Annex I, 9 November 2004 [hereinafter Draft Directive on Asylum Procedures, abbreviated PD], Art. 8.2, stipulating an obligation to motivate rejection decisions as to fact and to law.

[24] 'In fact . . . the frame of mind of the individual hardly matters at all.' A. Grahl-Madsen, *The Status of Refugees in International Law* (Sijthoff, Leiden, 1966) p. 174.

historically defensible nor practically meaningful'.[25] Hathaway has described the concept of well-founded fear as 'inherently objective', and seeks support for this contention in the Conventions' drafting history as well as in case law (as evidence of practicability).[26]

This position is further elaborated and considerably refined in a piece by Hathaway and Hicks, which is currently under publication.[27] In that text, the authors argue that there is no subjective element in the 'well-founded fear' standard. Rather than predicating access to protection on the existence of 'fear' in the sense of trepidation, they hold, the Convention refugee definition requires only the demonstration of 'fear' in the sense of a forward-looking expectation of risk. 'Once fear so conceived is voiced by the act of seeking protection, it falls to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case.'[28]

It should be recalled that the term 'fear' has been increasingly interpreted as an independent requirement on the applicant to offer evidence for trepidation within certain common law jurisdictions.[29] There are all reasons to reject an understanding of 'fear' as trepidation, and the authors' intention to counter this aberration must be fully endorsed. However, there are a number of problems with the approach taken by Hathaway and Hicks. First, it replicates the fragmentation of the definition into 'fear' and 'well-foundedness', rather than reading the terms as an inseparable unit.[30] What is more, the cases from common law jurisdictions which they adduce to illustrate the fatal effects of the 'subjective element' all rest on the misunderstanding of fear as a requirement for evidence of trepidation.[31] In this author's opinion, it would have been sufficient to denounce this misunderstanding.

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[25] J. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) p. 74.

[26] In his analysis of the 1988 decision of *Sivakumaran* by the UK House of Lords, Hathaway overstates support in this case when claiming that Lord Keith 'refutes the notions that the appropriate test is anything other than objective' (*Ibid.,* p. 74). Indeed, Hathaway's own quotes from Sivakumaran shuttle back and forth between mentioning fear and alluding to well-foundedness, and are far from supporting an outright rejection of any subjective element as such.

[27] Hathaway and Hicks, *supra* note 20.

[28] *Ibid.*, text accompanying notes 18 and 19.

[29] In an adversarial setting, the wording of the Convention will typically be transformed into a catalogue of requirements to which the applicant will need to respond item by item. The dynamics are different in systems where inquisitorial elements dominate, because the responsibility for lacking information is not as clearly allocated. Hence, inquisitorial systems would tend towards holistic rejection grounds as lacking overall credibility, while adversarial systems would tend towards atomistic rejection grounds as the inability to prove fear, or the lacking nexus between persecution and a ground.

[30] *See* Section 3 above.

[31] In support of Hathaway and Hicks' thesis that fear should be interpreted as an objectivist 'forward-looking expectation of risk', French case law is adduced. Strikingly, the authors do not reflect on whether the differences in handling the term 'fear' are really vested in the differences between common law and civil law.

Yet, as the authors acknowledge, the term 'fear' it can also denote apprehension of some future evil.[32] Apparently, Hathaway and Hicks believe that this apprehension is exhaustively expressed in the mere act of seeking protection. What remains is the 'objective assessment' by the authorities. This interpretation overlooks the fact that the three occurrences of the term 'fear' in the Convention definition actually accord a role to the applicant's will-formation on the basis of the apprehension felt by her or him. If the translation of the term 'fear' into a 'forward-looking expectation of risk' shall be deemed acceptable, then it presupposes that the ownership of the expectation is vested in the refugee. A primary consideration of refugee status determination is to give the applicant a sufficient opportunity to formulate her or his assessment of future risks as part of the claim.

Hathaway and Hicks' analysis pushes refugee status determination in a direction where this procedural standard that is implied in the definition is lost. Particularly within continental jurisdictions, an emphasis on any 'objective character' of the definition diminishes the applicant's procedural standing. Let us develop two conceivable counterarguments to indicate that the issue is far from being exhausted. One argument is formal, the other practical.

At first sight, the formal counterargument is perhaps not very exciting. In his 1991 monograph, Hathaway invoked the drafting history of the Convention in support of his reading.[33] However, the drafting history of a treaty is a supplementary means of interpretation and remains irrelevant in cases where an interpretation, according to Article 31 of the Vienna Treaty Convention,[34] [hereinafter VTC] renders a clear meaning.

We would argue that a clear meaning can be identified, if the methodology laid down in the VTC is applied. Article 31 VTC offers recourse to the wording, context and *telos*, and excludes other means. To start with the wording, there is nothing unclear about the term 'fear', and anyone would agree that it contains an emotive dimension, which is necessarily subjective. The context of Article 33 CSR makes it

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[32] The noun fear also denotes 'an unpleasant often strong emotion caused by anticipation or awareness of danger'. *Merriam-Webster's Online Dictionary*, available at <www.m-w.com/cgi-bin/dictionary> , accessed on 15 January 2005.

[33] Indeed, there is another clash between subjective and objective approaches hidden here – interestingly, defenders of the objective approach to refugee status determination draw on a subjective approach to treaty interpretation, giving prevalence to reconstructions of the original drafter's will. In treaty interpretation, the objectivists have persevered, as reflected in Articles 31–32 VTC. Without entering that debate, it is worth recalling that an overwhelming majority of states presently party to the 1951 Refugee Convention have not been represented in the drafting process, yet signed, ratified or acceded on the basis of the wording only. To favour the subjectivity of drafting over the objectivity of the text in conjunction while preferring the objectivity of the decision-takers assessment over the subjectivity of the applicant indeed resurrects a state sovereign to a degree unwarranted by the system of modern international law.

[34] Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 *UNTS* 331, entry into force on 27 January 1980. For a comprehensive analysis of treaty interpretation under Arts. 31–3 VTC, *see* U. Linderfalk, *Om tolkning av traktater* (Lund University, Lund, 2001).

clear that the drafters had other more objectively inclined formulations at their fingertips, yet refrained from bringing the language of Article 1A(2) CSR in line with that used in Article 33(1) CSR. Although we remain sceptical to the open-ended structure of teleological argumentation, it lends itself to confirm the outcome of textual and contextual interpretation. To wit, it can be argued that the inclusion of the term 'fear' *includes a reference to the emotive repercussion of risks in the individual*. This vests ownership with the individual, and goes well together with the promotion of human dignity, indirectly endorsed by the reference to the Universal Declaration of Human Rights in the preamble of the Refugee Convention. Dignity is a concept the exigencies of which are hardly exhausted by objectivist risk calculations in this particular case (following the Kantian maxim that dignity implies the treatment of human beings as ends, rather than as means).[35] By conclusion, the wording, context and *telos* of Article 1A(2) CSR render sufficient guidance to conclude interpretation. Otherwise put, it is hard to argue that the term 'fear' is so vague to render an interpretive outcome 'ambiguous or obscure' or to lead to a result 'which is manifestly absurd or unreasonable', both of which would have opened access to historical means of interpretation according to Article 32 VTC.

Finally, we should be respectful of the fact that the wording of a treaty may not be brought to vanish through interpretation, however benevolent its intentions. *Interpretatio contra legem* is a remedy for extreme situations, and brings us back to the threshold described in Article 32 VTC. What remains are the formal channels: a subsequent agreement or the development of subsequent practice amongst *all* parties to the CSR replacing the term 'fear' with 'risk'.[36] It is not very likely that such unanimity exists today, or will come about tomorrow. In that respect, a recent piece of EU legislation is instructive. While a 2001 proposal by the European Commission for the EU Qualification Directive emphasised the objective establishment of the applicant's fear,[37] this language was purged in Council deliberations.[38] The final

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[35] Hathaway and Hicks succeed in countering the disenfranchising interpretations of the term 'fear' in certain common law systems at the price of another disenfranchisement: that of the individual applicant's power over her or his claim, and therewith the procedure.

[36] Art. 31.3.a and 31.3.b VTC. The second alternative would be a revision of the CSR according to its Art. 45. Without doubt, a revision would be a risky enterprise, and any gains of clarity need to be weighed against presumptive losses in the scope of protection.

[37] Commission of the European Communities, *Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection (COM(2001)510)*, 12 September 2001, Arts. 7.1 and 11.1. For a critique of this emphasis, *see* ILPA, *ILPA's submission on the Commission's Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection (COM(2001)510)*, para 17: 'Indeed ILPA is concerned that Article 7 as a whole does not reflect the substantive consideration which should be given to statements made by the applicant himself and that there may be an over-emphasis on an assessment of "objective"

version of the Qualification Directive does not lend itself to support a shift towards an 'inherently objective' assessment. The *opinio iuris* of the old Member States is unequivocally expressed in the Directive.

There is a practical counterargument as well. We hold that the word 'fear' in Article 1A(2) CSR obliges the authorities to include the *risk assessment of the applicant* into the evidence. There are imperative reasons for doing so. Take the case of a torture victim. Conditions in her country have radically improved during the procedure, yet adequate resources for healthcare are not available in her country of origin. In such cases, knowledge of the mental condition of the applicant is decisive for the rendering of a correct decision, taking into account the possibility for retraumatization upon return, and therewith the prolongation of the original persecution.[39] An objective criterion of 'risk' would neglect this condition.[40]

With full respect for the quoted authors' critique of the UNHCR Handbook and elements of state practice, we find an understanding of determination procedures as 'inherently objective' to be equally problematic. True enough, there is a very real risk that decision takers abuse 'fear' as a standalone criterion to exclude cases displaying the 'wrong' emotionality.[41] Discarding an assessment of 'fear' altogether would bereave the applicant of presenting her or his claim. This would throw out the baby with the bath water.

8.4.3. 'Subjective Approaches' and the Visibility of the Applicant

When the authors of the Handbook discuss the subjective element, they state bluntly that '[f]ear must be reasonable'.[42] This raises a number of questions, amongst them

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evidence concerning the applicant's country of origin, which may be difficult to obtain and may in any event be out of date or inaccurate.'

[38] *Council Directive 2004/83/EC (29 April 2004) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* [hereinafter Qualification Directive, abbreviated QD], Arts. 4 and 9, modifying the wording of the Proposal quoted in the preceding note.

[39] In such cases, one should be aware of the fact that the effects of past persecution persist and extend into the future regardless of a change in regime and the amelioration of circumstances in general. Retraumatization equals future persecution. The group of victims is not necessarily coextensive with the beneficiaries of the of the so-called 'Holocaust clause' in the refugee definition. This clause can be found in Article 1C(5) and 6 CSR, and exempts refugees under Article 1A(1) CSR from cessation where 'compelling reasons arising out of previous persecution'.

[40] There is a counter-argument looming here, which merits detailed exploration. While Article 1A(2) CSR would include retraumatization cases (provided our argumentation above is accepted), Article 33(1) CSR does not necessarily entitle them to non-refoulement. A non-refoulement entitlement would presuppose a life-threatening form of retraumatization, e.g. bringing about a suicidal condition.

[41] For poignant examples on the normative construction of fear and emotionality in the Dutch asylum procedures, *see* Spijkerboer, *supra* Chapter 5.

[42] UNHCR Handbook, para. 41.

what are the standards of reason to be employed, or perhaps, whose standards of reason are employed.[43] More challenging, it raises the question whether fear and reason are commensurable in any meaningful way.

In her contribution to the debate on subjective versus objective approaches, Patricia Tuitt suggests that a gradual shift from a subjectively tilted test towards an ever more objectively determined test has taken place in the past decades, and she sees this change to work against the refugee.[44] She asserts that 'an objective test would not per se result in the refugee's disenfranchisement within the determination process', but goes on to argue 'that this has been the practical effect of the test'. As one of the reasons, she states that 'in case-by-case individualistic inquiries into well-founded fear, the concept of reasonableness, the basis upon which an objective evaluation of the refugee's circumstances is made, is tainted with local perceptions and thus often fails to be context-sensitive'.[45] On the level of principle, she concludes that the subjective fears approach, while not unproblematic, 'did allow the refugee her highest point of visibility within the process of determination'.[46]

Indeed, if an overemphasis on 'fear' risks corrupting the adjudicator's competence to judge its well-foundedness, the reverse is true as well. The total subjugation of fear to reason disenfranchises the refugee, while framing the Northern adjudicator as a gnostic agent, capable of better understanding reality in the South or the East through its Northern institutions.

We also believe that the argument on visibility is valid, and that any downgrading of the applicant's visibility means a concomitant disappearance of alternative accounts of the magnitude of risk, of causation, or, in short, of reasonableness in determination procedures. From a policy perspective, there is logic in all this: restrictive policymaking will necessarily seek to render the refugee invisible, so that procedures merely confirm the absence of the refugee by rejecting a claim. In this text, however, we are not seized with a critique of policy, but with the exploration of criteria for a proper determination procedure.

The UNHCR Handbook as well as Tuitt's writings point us to the concept of 'reasonableness' and emphasise its importance, albeit in differing ways. This presupposes an understanding of fear, both subjective and intersubjective. However, the very possibility of a true intersubjectivity of fear has been questioned.

8.4.4. The Singularity of Pain and the Intersubjectivity of Fear

Costas Douzinas and Ronnie Warrington have mounted a theoretically informed critique of the objective approach, drawing *inter alia* on the same case that James Hathaway relied on to support his critique of the Handbook: the 1988 House of Lords decision in *Sivakumaran*. Essentially, it centres on the question of whether the

[43] *See also* Popovic, *supra* Chapter 3.
[44] P. Tuitt, *False Images – Law's Construction of the Refugee* (Pluto Press, London, 1996) p. 80–3.
[45] *Ibid.,* p. 86.
[46] *Ibid.*

'fear' of the Tamil applicant or the 'reason' of the UK Home Secretary shall prevail in the assessment of risks upon return to a civil war zone. Douzinas and Warrington conclude:

> In the idiom of cognition, fear is either reasonable and can be understood by the judge or is unreasonable and therefore non-existent. In the first instance it is the excess of knowledge and reason on the part of the judge that disqualifies the fear, in the second it is the excess of fear that disqualifies itself. But this translation of fear into knowledge and of the style into reasons and causes assumes that the judge can occupy the place of the refugee and share his pain. Fear, pain and death, however, are radically singular; they resist and at the limit destroy language and its ability to construct shared worlds.[47]

To support their argument, Douzinas and Warrington quote Scarry's contention that pain will bring about absolute certainty with its bearer and absolute doubt with any other person.[48] They extend this statement to the fear of pain.[49] This may open doors for further insights into the dynamics between subjective and objective assessment. If Douzinas and Warrington are right,[50] if it is indeed impossible for the adjudicator to 'share the fear' of the applicant through language, then 'fear' cannot be more than an empty phrase, waiting to be colonised by the adjudicator's 'objective' assessment of risk. Or, to revert to our metaphor at the beginning of this chapter, there is confession, yet there cannot be absolution, unless the fear confessed can be absorbed in its entirety into the gnostic objectivism of the adjudicator.[51]

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[47] C. Douzinas and R. Warrington, 'A Well-founded Fear of Justice: Law and Ethics in Postmodernity', in L. Jarry and M. Ashe (eds.), *Legal Studies As Cultural Studies: A Reader in (Post) Modern Critical Theory*, (Albany State University of New York Press, New York, 1995) p. 209.

[48] 'For the person in pain [or fear of pain], so incontestably and unnegotiably present is it that "having pain [or fear of pain]" may come to be thought as the most vibrant example of what it is "to have certainty" while for the other person it is so elusive that hearing about pain [or its fear] may exist as the primary model of what it is to "have doubt"'. E. Scarry, *The Body in Pain*, 1987, as quoted by Douzinas/Warrington, p. 208 [additions in square brackets by Douzinas/Warrington].

[49] *Ibid.* Against this backdrop, if the 'credible fear' assessment in the US procedure would indeed only be about the establishment of credible fear, its rejection rate would be 100 per cent.

[50] The debate on the objective/subjective divide in 'well-founded fear' is not singular – a variation of it can be found in the contemporary discussion on human rights. Compare the contributions of K. Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture', in Philip Alston et al. (eds.), *The EU and Human Rights* (OUP, Oxford, 1999) pp. 117–146; and M. Koskenniemi, 'The Effects of Rights on Political Culture', in Philip Alston et al. (eds.), *The EU and Human Rights* (OUP, Oxford, 1999) pp. 99–116. Günther's insistence on the capability of human rights to bring out the 'voice of the suffering' is juxtaposed with Koskenniemi's doubts and a critique of the indeterminacy of human rights language and institutions.

[51] *See* Noll, Chapter 11 below.

However, I fail to be convinced by this argument. First, on a principled level, I remain doubtful whether pain and linguistic expression are indeed absolutely antithetical as suggested by the Scarry quote. The role of torture as a means to extort confession in the history of inquisition as well as in contemporary practices could be considered. We cannot pursue this line of thought here, but believe that doing so would be crucial for any exploration of the role played by violence in law and language. Secondly, and more practically oriented, it is not quite plausible to equate 'pain' with 'fear of pain'. When fearing pain, one is precisely not certain that pain will materialise, but apprehends the sensation of pain. Hence, the fear of pain points to something which may be beyond language, but there I remain unconvinced that the very pointing cannot be communicated.

Warner's intellectual roller-coaster ride in 'We are all refugees' sits well in this dialogue. Drawing on Nietzsche and Connolly, he sees the possibility of the refugee and the adjudicator sharing one aspect of the human condition, namely the 'psychic disturbance which wells up when the conventional character of socially established identities, implicit standards and explicit norms is exposed'.[52] This insight into contingency is at issue in determination procedures, and could provide the platform for an emphatic meeting between adjudicator and applicant. What would be shared in that communication? Not an identical fear, to be sure. After all, the adjudicator is not threatened with removal. Perhaps, it would be a general fear, evoked by the insight of contingency. If this is so (something this text cannot assess), the criterion of 'fear' in Article 1A(2) CSR would request intersubjectivity in both directions, and a risk-taking in conversation on both sides.

8.5. CONCLUSIONS

The term 'fear' in Article 1A(2) CSR imposes an obligation on states to include the applicant's own risk assessment into the evidence. From a strictly legal-formalist perspective, procedures *solely* focusing on non-refoulement (and not dealing with the status question) may neglect this assessment, a notion which emerges from the language employed by Article 33 CSR. However, to identify the beneficiaries of non-refoulement, their 'well-founded fear' needs to be assessed.

In framing procedures, it is important to provide an applicant with the opportunity to present her or his risk assessment in its entirety as part of the claim. Care must be taken not to colonise the individualist-subjectivist risk assessment by the risk assessment of the authorities. In addition, a procedure that merely lets the claimant express her fear in a truncated and fragmented form (e.g. as fear being the sense of trepidation only) fails to meet this standard.

When the decision-taker has determined that the gathering of evidence shall stop, and approaches a decision, s/he has two options. S/he can either endorse the risk evaluation of the applicant on the basis of a source credibility assessment,

[52] D. Warner, 'We are all refugees', 4 *IJRL* (1992) p. 367, with further references.

allowing for a positive decision of the case. Or, as an alternative, s/he can reject the risk assessment by the applicant and to replace it by that of the decision-taker, motivated in its own terms (and *not* by the lacking 'general credibility' of the applicant).

CHAPTER 9

EXCLUSION AND EVIDENTIARY ASSESSMENT

Geoff Gilbert[1]

9.1. INTRODUCTION

While the Convention Relating to the Status of Refugees 1951[2] provides a high degree of detail regarding who qualifies as a refugee and the rights that flow therefrom, it is practically silent on the procedure for refugee status determination. As stated at paragraph 189 of the UNHCR Handbook:[3]

> 'It is . . . left to each Contracting State to establish the procedure that it considers the most appropriate, having regard to its particular constitutional and administrative structure.'[4]

When it is also noted that there is no supra-national tribunal to oversee State practice, the extent of the autonomy possessed by national regimes with respect to refugee status determination becomes clear.[5] When considering exclusion, the lack of any supra-national body to review State practice with respect to the application of

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[1] The author is grateful for the detailed comments he received from Professor Boldiszar Nagy and Walpurga Engelbrecht (UNHCR, DIP) in relation to an earlier draft of this chapter.

[2] 189 UNTS 150. As amended by the 1967 Protocol, 606 UNTS 267. *See also*, 1950 Statute of the United Nations High Commissioner for Refugees, UNGA Res.428(V) Annex, UNGAOR Supp. (No.20) 46, UN Doc.A/1775, 14 December 1950. Exclusion is dealt with in Para. 7(d):

> 'Provided that the competence of the High Commissioner as defined in para. 6 above shall not extend to a person:
> (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, para. 2, of the Universal Declaration of Human Rights.'

The OAU Convention on the Specific Aspects of Refugee Problems in Africa 1969, 1000 UNTS 46, provides similarly in Article I.5 – the OAU Convention also includes serious non-political crimes as a ground for cessation in Article I.4(f).

[3] 1979 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*.

[4] *See for example*, *European Roma Rights Centre et al.* v. *Immigration Officer at Prague Airport and Secretary of State for the Home Department*, (Admin Ct) 8 October 2002, at para. 10. *N.B*. Article 32 dealing with expulsion does provide some procedural guarantees.

[5] *N.B.* Within the European Union, the European Court of Justice will in future be able to deal with cases referred thereto on refugee law by domestic courts.

the 1951 Refugees Convention is even more apparent. Exclusion cases demand high quality decision-making.[6] Being a limitation on access to the rights in the 1951 Refugees Convention, the exclusion clause should be interpreted restrictively.[7]

Another issue, which is specific to exclusion, concerns the domestic implementation of the State's obligations under the 1951 Refugees Convention. Exclusion proper is defined in Article 1F:

> '1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

Article 1F deal with crimes that have occurred before entry. This is explicit in Article 1F(b), but applies equally to 1F(a) and (c). Refugee status is declaratory of a situation at a particular time and subsequent actions that would fall within Article 1F(a) or (c) should lead to investigation, prosecution and, where appropriate, conviction without exclusion – Article 1F does not refer to revocation.[8] However, a

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[6] *Kaddari* v. *Minister for Immigration and Multicultural Affairs*, (Fed Ct Australia) FCA 659, 18 May 2000, *at* para. 28. *See also* the New Zealand case, *Refugee Appeal No. 74540 (Zaoui)*, 1 August 2003, where the Refugee Status Appeals Authority engaged in a very lengthy examination of the sources of evidence, some of which were extremely dubious and some of which came from the state security services.

[7] *See* Article 31 Vienna Convention on the Law of Treaties 1969, (1969) 8 ILM 679:

> 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

The object of the 1951 Refugees Convention is to provide international protection to refugees, so clauses excluding applicants from refugee status should be considered restrictively. *See also*, *Gurung* v. *Secretary of State for the Home Department* [2002] UKIAT 04870 HX34452-2001, 15 October 2002, *at* para. 36. *N.B*. Although only Article 1 refugees are protected from *refoulement* under Article 33, *non-refoulement* is customary international law and, in the European context, the excluded applicant could still rely on Article 3 ECHR, *infra note* 12.

[8] *Cf*. UNHCR Guidelines on International Protection: Application of the Exclusion Clauses, HCR/GIP/03/05, 4 September 2003, §D, para. 6, and Background Note, issued at the same time, para. 17. If the state of refuge no longer wishes to harbour the refugee, then Articles 32 or 33(2) are available in appropriate circumstances – on grounds of national security, where there are reasonable grounds for regarding the refugee as a danger to security of the country in which s/he is, or where s/he has been convicted of a particularly serious crime (such as those mentioned in Article 1F(a)) and constitutes a danger to the community of that country.

refugee can lose the 1951 Refugees Convention guarantee against *non-refoulement* under Article 33.2[9] as a consequence of factors akin to those found in Article 1F. In incorporating the 1951 Refugees Convention through domestic legislation, States have fused or confused Articles 1F and 33.2 even though their elements and the standard of proof in each differ.[10] Thus, cases from different jurisdictions cannot easily be directly compared.

9.2. ARTICLE 1F, PROCEDURAL GUARANTEES AND EVIDENCE[11]

As indicated, there is no procedure provided in the 1951 Refugees Convention with respect to how Article 1F cases should be determined, nor for that matter Article 33(2) cases. Considered below, Article 32 dealing with expulsion does lay down some procedural guarantees. Furthermore, while the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, would apply to States parties to the 1951 Refugees Convention within the Council of Europe, the Strasbourg organs have repeatedly held that the fair trial provisions in Article 6[12] do

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[9] Article 33 – Prohibition of expulsion or return ('refoulement')

> '1. No Contracting State 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.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

[10] *Eg*. Canada and Germany.

[11] *See generally*, M. Bliss, '"Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses', 12 *IJRL* (2000) *(Special Supp)* 92.

[12] ECHR, ETS 5, 1950

> 'Article 6 – Right to a fair trial
>
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3 Everyone charged with a criminal offence has the following minimum rights:
>
> a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b to have adequate time and facilities for the preparation of his defence;

not apply to applications for refugee status: such hearings determine neither 'civil rights and obligations [nor] . . . any criminal charge'.[13] The language of Article 14 of the International Covenant on Civil and Political Rights is broader, referring to 'his rights and obligations in a suit at law' and may afford fair trial guarantees in cases dealing with refugee status.[14] In *Kwame Williams Adu* v. *Canada*,[15] the Human Rights Committee found the communication inadmissible for non-exhaustion of domestic remedies and that it therefore did not have to decide if Article 14 applied. From *Mahmoud* v. *Slovak Republic*,[16] it can be inferred that Article 14 would apply to a determination relating to a residence permit, a claim not too far removed from an application for refugee status. In addition, the applicant for refugee status can try to rely on Article 13 of the International Covenant on Civil and Political Rights (ICCPR):

> 'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of

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> c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

[13] In relation to an application for refugee status, *see Kruetzi* v. *Austria*, 23830/94, European Commission of Human Rights, 2 September 1994. § The Law at para. 2:

> '2. The applicant complains further under Article 6 para. 1 (Art. 6–1) of the Convention that the Administrative Court's decision to discontinue proceedings and not to deal with his complaint in substance had violated his right to a fair trial.
> The Commission recalls that a decision as to whether an alien should be allowed to stay in a country does not involve the determination of civil rights or of a criminal charge within the meaning of Article 6 (Art. 6) of the Convention (No. 8118/77, D.R. 25 p. 105, at 119).
> It follows that Article 6 para. 1 (Art. 6–1) of the Convention is not applicable in the present case.'

The European Court of Human Rights endorsed this general approach to Article 6 and the expulsion of aliens in *Maaouia* v. *France* 39652/98, 5 October 2000, *at* para. 40.

[14] International Covenant on Civil and Political Rights, UNGA Res.2200A(XXI), UNGAOR, 21st Sess., Supp.No.16, 52 (1966); 999 UNTS 171; (1967) 6 ILM 368; (1967) 61 AJIL 870: hereinafter, ICCPR.

> 'Article 14
> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . .'

[15] CCPR/C/60/D/654/1995, 18 July 1997, *at* para. 6.3.

[16] CCPR/C/72/D/935/2000, 25 July 2001, *at* para. 6.3.

> national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

Someone applying for refugee status must be presumed to be lawfully in the territory of the state since refugee status determination is declaratory and not constitutive. As such, it can only be after a finding that the applicant falls within the scope of Article 1F, that the lawfulness of her/his presence comes into question – unless there are 'compelling reasons of national security', therefore, s/he shall be allowed to submit reasons against expulsion and to have a review of the decision at which s/he shall be represented.[17]

On the other hand, while fair trial guarantees may not be applicable under the ECHR in cases involving the expulsion of aliens,[18] it would seem that an argument could be made about the need for an effective remedy under Article 13:

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[17] Even if the declaratory nature of refugee status is not taken to be sufficient to render the alien's presence lawful, the fact s/he is being processed through the legal system of the State must mean that s/he is 'lawfully in the territory' subject to any prior express decision to the contrary. The stance of the Human Rights Committee on this aspect of Article 13 is less than clear. In General Comment 15(27) 1986, the Committee explained it as follows:

> '9. . . . The particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (art. 26).'

The jurisprudence of the Committee is not conclusive. Where permanent residence had been granted to a refugee, then Article 13 was subsequently applicable – *Anna Maroufdou* v. *Sweden* Communication No. 58/1979 (5 September 1979), U.N. Doc. CCPR/C/OP/1 *at* 80 (1985), *at* para.9.2; equally, where an exclusion order from two years before already existed with respect to the applicant that required him to obtain permission to re-enter, then he could not lawfully be in the territory – *VMRB* v. *Canada* Communication No. 236/1987 (25 June 1987), CCPR/C/33/D/236/1987, *at* para.6.3; on the other hand, in *Kindler* v. *Canada* Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993), the Committee held at para.6.6 that Article 13 was applicable to someone undergoing extradition for murder. UNHCR hold that lawful requires the applicant's presence to be known and not prohibited – *Lawfully Staying – A Note on Interpretation* 1988, p. 9.

Article 1, Protocol 7 to the ECHR (ETS 117, 1984) is in very similar terms. However, of the fifteen European Union States, Belgium and the United Kingdom have not signed, while Germany, the Netherlands and Spain have not ratified the seventh protocol.

[18] *Quaere* whether someone already properly granted refugee status should be treated as an alien – Article 33(2) deals with the *refoulement* of refugees.

> 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

Conka v. *Belgium*[19] concerned the collective expulsion of Roma back to the Slovak Republic, contrary to Article 4 of Protocol 4.[20] The Court found at paragraph 85 that Belgium was in violation of Article 4, Protocol 4, and that the restricted access to the Belgian courts for an effective remedy against that breach meant there was also a violation of Article 13. Nevertheless, the Court also made clear that Article 13 depends on their being a violation of a substantive right,[21] so the fact that Article 6 does not govern the proceedings means that another breach of the ECHR must be found. Given, however, that refugee applicants will be alleging persecution, it should then follow that an Article 13 claim could be joined to one based on Article 3.[22]

Additionally, a further argument can be made specific to Articles 1F and 33.2 of the 1951 Refugees Convention and Article 6 of the ECHR. The European Court of Human Rights has repeatedly held that the way a hearing is designated under domestic law is not conclusive for Strasbourg.[23] The Court will decide whether the proceedings in question, although not designated criminal, could be seen to have the characteristics of a criminal hearing, having particular regard to penalties. As was stated in *Engel* at paragraph 82, the Court's

> 'supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring'.

Where an applicant for refugee status can be excluded and potentially returned to a State where her/his life or freedom would be threatened because there are serious reasons for considering that s/he has committed a war crime, a crime against peace, a crimes against humanity, a serious non-political crime or is guilty of acts contrary to the purposes and principles of the United Nations, then there is a strong argument that the refugee status determination proceeding should be treated as a 'criminal charge against him' – unlike extradition law, *refoulement* would not necessarily result in a trial to determine whether s/he has committed a crime under Article 1F(a) or (b) or is guilty of 1F(c) acts, so status determination is much closer to a criminal

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[19] 51564/99, European Court of Human Rights (Third Section), 5 February 2002.
[20] ETS 46 (1968).
[21] *See* para. 76.
[22] *See Chahal* v. *United Kingdom*, (70/1995/576/662) 15 November 1996. While the refugee would receive primary protection through Article 3, the opportunity for the European Court of Human Rights to review the refugee status determination procedures of the respondent State through Article 13 should not be summarily dismissed.
[23] *See Engel* v. *The Netherlands*, Series A, vol.22, *at* para. 81, European Court of Human Rights, 18 June 1976.

trial with the possibility of the most serious of consequences.[24] On that basis, it is suggested that Article 6 of the ECHR should properly be engaged in cases where someone is excluded from refugee status.

While it may be that because of the specific wording of Article 6 of the ECHR, it is not possible to challenge refugee status determination proceedings before the European Court of Human Rights, that does not mean that when deciding on Article 1F a tribunal can ignore all aspects of fair trial – it only goes to how one might challenge a failure to provide due process. The fundamental principles of natural justice demand that certain aspects of a fair trial are applied to hearings relating to the exclusion of applicants for refugee status. The opening paragraph of the preamble to the 1951 Refugees Convention is highly persuasive in this regard:

> 'Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . .'

Refugees should be treated no less favourably than anyone else unless circumstances clearly demand a difference in treatment.

Before an applicant can be excluded, s/he must be informed of the Article 1F case against her/him. In *Malouf* v. *Canada,*[25] the Federal Court (Trial Division) held that the Convention Refugee Determination Division (CRDD) 'failed to observe a principle of procedural fairness in not notifying the applicant in an effective and timely way of the fact that it was proposing to rely on Article 1F(b) and providing an opportunity to respond' such that '[in] effect, the applicant herein was ambushed as to the basis for the CRDD's determination against him'. However, there need not be an oral hearing for the applicant. The case can be dealt with solely through written submissions as long as the applicant knows the case s/he has to answer and has a right to respond.[26] Nevertheless, an oral hearing at which the applicant is at least represented ought to be seen as the norm. Most cases dealing with Article 1F will arise in the context of an application for refugee status under Article 1A(2) where oral hearings are standard. Further, due process under customary international law would require an oral hearing whenever the consequences of any decision are serious and exclusion under Article 1F would surely meet that criterion.

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[24] On the relationship between Article 1F and extradition law, *see* G.S. Gilbert, 'Current Issues in the Application of the Exclusion Clauses', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (CUP, Cambridge, 2003) p. 425 *at* pp. 446–449. *Cf.* The concurring opinion of Bratza J in *Maaouia*, *supra* note 13.

[25] IMM-2186-94, <reports.fja.gc.ca/fc/src/shtml/1995/pub/v1/1995fca0219.shtml>.

[26] *See Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at para. 123. *See also*, *McAllister* v. *Canada (Minister of Citizenship and Immigration)* (TD) IMM-4348-94, <reports.fja.gc.ca/fc/src/shtml/1996/pub/v2/1996fca0106.shtml>.

The burden of proof that the refugee is excluded under Article 1F, lies on the State.[27] This applies to all elements of Article 1F, so it ought to be for the State to show that the crime is serious and non-political,[28] not for the applicant to prove its political character.[29] Nevertheless, if the facts proving the applicant has committed a crime were to reveal its common characteristics, particularly if civilians were killed or injured, then the evidential burden might shift to the applicant to produce evidence to show the political characteristics predominated.[30] Given the crime-related nature of Article 1F, it is not unreasonable to expect the decision-maker to presume the applicant is innocent. These linkages with the criminal process also suggest that with respect to exclusion, the applicant should be given the benefit of the doubt before the decision-maker finds that there are serious reasons for considering that s/he falls within Article 1F.[31] The applicant should also have the option to remain silent with regards to any allegation of prior criminal activity – there should be no need for the applicant to help the State construct a case under Article 1F against her/him. Moreover, it is questionable how far a right to remain silent is secured where the decision-maker can draw inferences from the silence. Given that the standard of proof is lower than the ordinary criminal standard, allowing inferences from silence is tantamount to forcing the refugee to prove s/he does not fall within Article 1F. Nevertheless, according to paragraph 35 of the 2003 Guidelines on the Application of the Exclusion Clauses,[32] UNHCR is prepared to

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[27] In common law jurisdictions, the burden of proof comes in two forms: the legal burden/ burden of persuasion and the evidential burden/ burden of production. The legal burden lays down which party has to prove which elements, while the evidential burden relates to how a legal burden may be proven. Once the party bearing the legal burden on an issue has produced sufficient evidence to show a *prima facie* case, then an evidential burden is imposed on the other party to raise some evidence casting doubt on the former party's claims lest the trier of fact accept the *prima facie* case as persuasive. In *Gurung*, *supra* note 7, *at* paras. 93–94, it was held the Secretary of State only has an evidential burden, but the comparison was being drawn with the prosecution in a criminal case, not necessarily the most appropriate analogy because there the law imposes the heaviest of responsibilities – *Woolmington* v *DPP* [1935] AC 462 *per* Viscount Sankey *at* 481–482:

> 'Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception . . . No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law . . . and no attempt to whittle it down can be entertained.'

The legal burden in civil cases moves more readily with specific issues and the fact that the standard is 'on the balance of probabilities' makes distinguishing between legal and evidential burdens less dramatic.

[28] *See Thayabaran*, IAT, 9 October 1998.

[29] *See Refugee Appeal No. 70656/97 Re KB*, NZ RSAA, 10 September 1997.

[30] *See T* v. *Secretary of State for the Home Department* [1996] 2 All ER 865.

[31] *See also*, *Raya* 11290, IAT, 18 August 1994. *See also*, para. 34 of the UNHCR Guidelines, *supra* note 8.

[32] *Supra* note 8.

countenance non-cooperation as a factor for the status determination body to take into account in its overall decision.

> 'Lack of cooperation by the applicant does not in itself establish guilt for the excludable act in the absence of clear and convincing evidence. Consideration of exclusion may, however, be irrelevant if non-cooperation means that the basics of an asylum claim cannot be established.'[33]

At what point does an applicant for refugee status become complicit in an Article 1F crime? Mere presence at the time a crime is committed should not be enough, but aiding, abetting or inciting ought to suffice in most cases. Other inchoate crimes, *e.g.* conspiracy or attempt, are even more obviously sufficient to meet the standard of proof.[34]

Even if the State proves a *prima facie* case that Article 1F has been met, the return of an applicant could still be refused if the applicant can show the treatment s/he would receive on return would be disproportionate to the offence.[35] In this case, the burden of proof is then on the applicant to produce evidence of such disproportionate treatment so that s/he should not be *refouled*.

> 'It is for the refugee to establish a threshold showing that a risk of torture or similar abuse exists before the Minister is obliged to consider fully the possibility. This showing need not be proof of the risk of torture to that person, but the individual must make out a prima facie case that there may be a risk of torture upon deportation. If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons. This is the minimum required to meet the duty of fairness . . .'[36]

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[33] *See also*, para. 111 of the Background Note, *supra* note 8:

> '111. In establishing whether the standard of proof has been met in a particular case, lack of cooperation by the individual concerned may raise difficulties, although noncooperation in itself does not establish guilt in the absence of clear and credible evidence of individual responsibility. On the other hand, an applicant's refusal to cooperate with the determination procedure may lead to non-inclusion in some cases. It should also not be a bar to establishing that sufficient evidence, as outlined in paras. 105 and 106, exists for Article 1F to apply. Nevertheless, it is always important to assess the reasons for the individual's non-cooperation as it may be due to problems of understanding (for example, due to poor interpretation), to trauma, mental capacity, fear, or other factors.' (footnotes omitted)

[34] *See Ramirez* v. *Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (CA); *Sivakumar* v. *Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 (CA).

[35] On double balancing, *see* Gilbert, *supra* note 24, *at* pp. 450 *et seq*.

[36] *Suresh*, *supra* note 26, *at* para. 127.

The standard of proof for Article 1F is that the decision-maker must find there are serious reasons for considering that the applicant falls within Article 1F(a), (b) or (c).[37] 'Serious reasons' is a non-standard standard of proof. As Bliss notes, it does not provide a 'clear and precise test'.[38] UNHCR has opined that 'even though exclusion proceedings do not equate with a full criminal trial, the standard of proof . . . has to be a higher threshold than a mere "reasonable suspicion"'.[39] The difficult cases concern involvement with 'terrorism' and membership of terrorist groups, both of which overlap. The first, terrorism *per se*, flows from the lack of a definition in international law. Its vagueness means that trying to base exclusion on an allegation of terrorism against the applicant necessarily leads to questions about whether the standard of proof with respect to Article 1F(a), (b) or (c) has been met.[40] There is no crime of terrorism in international law and there is no agreed upon definition accepted by States. Labelling something as terrorism is a political choice and one that taints the impartiality of any determination that someone should be excluded under Article 1F.[41] It should also be noted that in the aftermath of September 11th, the Security Council only declared international terrorism as contrary to the purposes and principles of the United Nations if it constituted 'a threat to international peace and security'.[42]

At first glance, one might imagine that the standard of proof would demand at the very least evidence of involvement in a particular crime. However, although there have to be 'serious reasons for considering that' the applicant has committed a war *crime*, a *crime* against peace, a *crime* against humanity or a serious non-political *crime*, or that s/he is *guilty* of an act contrary to the purposes and principles of the United Nations, this test can be met through showing that s/he is a member of an

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[37] *See* Gilbert, *supra* note 24, *at* pp. 470 *et seq*.

[38] *Supra* note 11, *at* p. 115; Bliss goes on to provide the clearest analysis of the standard.

[39] UNHCR, Addressing Security Concerns without Undermining Refugee Protection, 29 November 2001, *at* para. 17. *See now*, UNHCR, Background Note to the 2003 Guidelines on the Exclusion Clauses, *supra* note 8, *at* para. 107, where it is opined that the 'balance of probabilities' is too low a threshold. *See also*, *Gurung*, *supra* note 7, *at* para. 95, holding that serious reasons 'implied something less than' the criminal or civil standards.

[40] *See Gurung*, *supra* note 7, *at* para. 98. *Cf. McAllister*, *supra* note 26.

[41] On the amorphous nature of terrorism, *see* G.S. Gilbert, 'The "Law" and "Transnational Terrorism"', (1995) 26 *Neth.Yb.Int'l L* 3, and *Transnational Fugitive Offenders in International Law* (Kluwer Law International, The Hague, 1998), esp. pp. 251–261. *See also*, *T*, *supra* note 30. Recent United Nations attempts in treaties to provide a definition are mere descriptions of they type of behaviour that would be included within the idea of terrorism, but they are not intended to be exhaustive (the International Convention for the Suppression of Terrorist Bombings, 1998, (1998) 37 ILM 249; the International Convention for the Suppression of the Financing of Terrorism, Annex to UNGA Res.54/109, 25 February 2000. *See also*, the Draft comprehensive convention on international terrorism, UN Doc. A/C.6/55/1, 28 August 2000). Nor are the similar attempts in the domestic law of various states – a legal definition of terrorism would defeat the purpose, the ability of states to take political decisions wherever necessary for their own ends.

[42] UNSC Res.1377 (2001), 12 November 2001.

organization involved in the commission of such activities.[43] The Supreme Court of Canada accepted in *Suresh* that membership alone would not necessarily suffice:[44]

> 'We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes 'persons who have satisfied the Minister that their admission would not be detrimental to the national interest'. Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.'

Comparison should be drawn, however, with the decision of the New Zealand Refugee Status Appeals Authority (RSAA) in Refugee Appeal No.70405/97:[45]

> 'Because the appellant has freely admitted to active involvement in the Sendero Luminoso from May 1992 to February 1995 and to having taken part in armed attacks against innocent civilians, the Authority is duty-bound to consider whether Article 1F (a) operates to exclude the appellant from the Refugee Convention. A brief description of the Sendero Luminoso is required. . .
>
> The significance of this information is that when the appellant joined the Sendero Luminoso in May 1992 he could have been in no doubt whatsoever of its then 12-year history of violence, terror, human rights abuses and glorification of violence. Thereafter, the appellant's willing, active and armed involvement in the intimidation of civilians and theft of property is the clearest evidence of his knowledge of and deep complicity in the activities of the Sendero Luminoso. *In short, there was personal and knowing participation in an organization principally directed to a limited, brutal purpose and the wholesale breach of Common Article 3 of the four Geneva Conventions of 1949.* We are satisfied on the facts therefore that there are serious reasons for considering that the appellant has committed crimes against humanity, as defined in the International Instruments drawn up to make provision in respect of such crimes and as interpreted and applied by the principal decisions of the Canadian Federal

[43] *See In the Matter of B*, [1997] E.W.J. No. 700 (English Court of Appeal). There may be a distinction to be drawn here between cases under Articles 1F and 33.2 - see *McAllister*, *supra* note 26, distinguishing *Al Yamani* v. *The Solicitor General for Canada* 129 D.L.R. (4th) 226, (1995), a case dealing with a permanent resident.
[44] *Supra* note 26, *at* para. 110.
[45] 29 May 1997.

> Court of Appeal, namely *Ramirez* v. *Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (FC:CA); *Moreno* v. *Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (FC:CA) and *Sivakumar* v. *Canada (Minister of Employment and Immigration)* [1994] 1 FC 433 (FC:CA).' (emphasis added)

The Swedish authorities have equally held that membership of Sendero Luminoso was enough to exclude.[46] As *Zrig*[47] makes clear, if the applicant has a sufficiently high status in the organization and does not leave when s/he becomes aware of 1F crimes being perpetrated, that can indicate a sufficient degree of complicity.[48] UNHCR has recommended that association with a proscribed terrorist organization could lead to a consideration of the exclusion clauses, but that exclusion should not be a foregone conclusion.[49] If membership is accepted to be a relevant criterion in Article 1F determinations, then membership *per se* cannot be adequate on its own.[50]

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[46] *See Paez* v. *Sweden*, 29482/95, European Commission of Human Rights 18 April 1996.

[47] *Mohamed Zrig* v. *The Minister of Citizenship and Immigration*, [2003] FCA 178, 7 April 2003.

[48] *Zrig*, *supra* note 47, *at* para. 55 quoting from *Sivakumar* v. *Canada (Minister of Citizenship and Immigration)*, [1994] 1 F.C. 433

> '55. . . . In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity . . . In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization . . .'

[49] Background Note to the Application of the Exclusion Clauses, *supra* note 8, *at* para. 80.

> 'In each and every case, individual responsibility must be established, that is, the individual must have committed the act of terrorism or knowingly made a substantial contribution to it. This remains the case even when membership of the organisation in question is itself unlawful in the country of origin or refuge. The fact that an individual may be on a list of terrorist suspects or associated with a proscribed terrorist organisation should trigger consideration of the exclusion clauses. Depending on the organisation, exclusion may be presumed but it does not mean exclusion is inevitable.' (*see* para.. 106)

See also, UNHCR, *Security Concerns*, *supra* note 39, *at* para. 18 and the EU anti-terrorism measures of 27 December 2001, 2001/931/CFSP, Annex §2.

[50] *See* the Amsterdam Seminar, 8–9 June 2000, *Article 1F and Afghan Asylum Seekers: towards a Common Strategy*, organised by the Dutch Immigration and Naturalization Service on behalf of a High Level Working Group of the EU, *Conclusions and Recommendations*, §2 *Burden of Proof*, para. III. *N.B*. Singling out a group of persons because of their race, religion or country of origin would be discriminatory and contrary to Article 3 of the 1951 Refugees Convention; *see also*, UNHCR *Security Concerns*, *supra* note 39, *at* para. 2.

The Background Note to the 2003 Guidelines on the Application of the Exclusion Clauses is inconclusive on the effect of membership of internationally proscribed organizations.[51] Ordinarily, mere membership is inadequate.

> '106. In the context of action against terrorism, lists established by the international community of terrorist suspects and organisations should not generally be treated as reversing the burden of proof. Unlike ICTY/ICTR indictments, such lists would be drawn up in a political, rather than a judicial, process and so the evidentiary threshold for inclusion is likely to be much lower. Moreover, the criteria for inclusion on a list may be much broader than those relevant to the test for exclusion under Article 1F.'

Nevertheless, while paragraph 109 reiterates those concerns about international lists and casts even stronger doubt on national lists, it does provide that,

> 'Exceptionally, where the criteria governing the list are such that the designated organisations, including its members, can reliably be considered to be heavily involved in violent crime, a presumption of individual responsibility for an excludable act may arise . . .'

Such a stance is unnecessary, potentially ambiguous and difficult to justify when one is looking at a restriction on human rights. In *Ramirez*,[52] it was held by the Canadian Federal Court of Appeal that one needs 'personal and knowing participation'. If such principles were upheld, there would be fewer concerns about the misuse of Article 1F.[53]

Turning to the rules of evidence, refugee status determination proceedings in general apply a liberal approach because of the difficulties in obtaining eyewitness statements from persons who can attend the hearing.[54] UNHCR has claimed that an indictment issued by any of the international criminal tribunals would suffice to provide serious reasons.[55] One issue of concern is the use of anonymous evidence. In certain circumstances it is necessary for the source of the evidence against the applicant to remain anonymous.[56] Bliss, relying on the practice and procedure before the ICTY, ICTR and that proposed for the International Criminal Court, suggests that anonymous evidence should be used sparingly and not if it would be

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[51] *Supra* note 8, *at* paras. 106 and 109.
[52] *Supra* note 34. *See* s19(1)(e)(iv), (f)(iii) and (g) Immigration Act.
[53] For careful analysis of all the evidence in an Article 1F case, *see Zaoui*, *supra* note 6.
[54] *N.B.* By way of analogy, hearsay was accepted by the International Criminal Tribunal for the former Yugoslavia in *Tadic*, Trial Chamber 1996, *at* para. 555.
[55] *Viz*. the case of the 20 Rwandans – UNHCR *Security Concerns*, *supra* note 39, *at* para. 17, and Background Note to the 2003 Guidelines on Exclusion Clauses, *supra* note 8, *at* para. 106 (to be read with para. 107). *N.B.* For this to apply, the indictment must have been issued, investigation by either of the tribunals ought not to suffice.
[56] In *Kaddari*, *supra* note 6, *at* para. 13, the evidence against the accused came from the Australian Security and Intelligence Organization.

'prejudicial to the right of the [applicant] to a fair trial'.[57] Since credibility plays such a large part in all refugee status determination proceedings, not knowing the source of the evidence would ordinarily put the applicant at a significant disadvantage.

Connected with the issue of evidence, but one step further on, it is arguable that where a person is excludable, s/he should still not be returned taking into account the treatment s/he will receive on such return.[58] While the International Criminal Court provides a novel solution to dealing with persons falling within Article 1F(a) and some 1F(b) and (c) cases, it is arguably justified under customary international law for the State of refuge to prosecute for such serious crimes if return is refused on the basis of double balancing. In *The Universal Jurisdiction (Austria) Case*,[59] the Supreme Court of Austria held that it could assume jurisdiction in a representational capacity.

> 'The extraditing State also has the right, in the cases where extradition for whatever reason is not possible, although according to the nature of the offence it would be permissible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting State.'

The Hungarian Deserter (Austria) Case[60] involved the shooting of a border guard by an Hungarian soldier deserting to the West. Again, the Austrian Supreme Court exercised jurisdiction over the fugitive, extradition having been refused partly because he would be in danger of life and liberty if surrendered after having fled for political reasons. Such logic would apply to cases where someone excludable was not returned. Nevertheless, the difficulties, particularly the evidential ones, of carrying out a prosecution away from the *locus delicti* should not be underestimated, especially for common law jurisdictions.

Finally on procedural matters, in the light of the attacks of 11th September 2001 UNHCR has been prepared to consider specialized exclusion units. However:

> '[such a] unit would have expertise in relevant areas of refugee law and criminal law, specialist knowledge of terrorist organizations, and clear communications links with intelligence services and criminal enforcement agencies. Specialist expertise and clearly focused resources would enable prompt and quality decision-making.'[61]

It is hoped that the emphasis would be on quality and not expedience.

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[57] *Supra* note 11, *at* pp. 121–123. *See also*, Background Note to the 2003 Guidelines on the Application of the Exclusion Clauses, *supra* note 8, *at* paras. 112 and 113, and *In re R-S-H- et al.* (2003) 23 I&N Dec. 629 (BIA), 4 August 2003.
[58] In Europe at least, Article 3 ECHR will provide subsidiary protection – *Chahal*, *supra* note 22.
[59] 28 INT'L L REP.341 at 342 (1958).
[60] 28 INT'L L REP.343 (1959).
[61] UNHCR, *Security Concerns*, *supra* note 39, *at* para. 7.

Article 33(2)[62]

Effectively, the same fate befalls a refugee who loses *non-refoulement* protection as someone excluded under Article 1F. Nevertheless, there are significant differences in the elements of those provisions and in the standard of proof under each.[63]

> 'Article 33 – Prohibition of expulsion or return ('refoulement')
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are *reasonable grounds* for regarding as *a danger to the security of the country* in which he is, or who, *having been convicted by a final judgment of a particularly serious crime*, constitutes a *danger to the community of that country*.' (emphasis added)

There is no prescribed method for determining whether *non-refoulement* protection can be withdrawn under Article 33(2). This position contrasts with Article 32.

> 'Article 32 – Expulsion
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.'

Given that national security is a broader concept than 'danger to the security of the country [of refuge]',[64] and that loss of *non-refoulement* protection is more far-reaching and dangerous than expulsion, it is clearly justifiable to require that determinations with respect to Article 33(2) apply not only the procedural safeguards of Article 32, but do so with heightened care.[65] Further, due process

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[62] *See generally*, Gilbert, *supra* note 24, *at* pp.457 *et seq*., esp. pp. 460–461 from which some of this text is taken.

[63] *See Kaddari*, *supra* note 6, *at* paras. 23–25. *See also*, *Zadvydas* v. *INS*, (2001) 533 US 678.

[64] On the meaning of national security, *see* L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon, Oxford, 1994).

[65] *See also*, *Chahal*, *supra* note 22.

> '153. In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security (see para. 41 above). It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 complaint for the purposes of Article 13 of the Convention.'

demands that the refugee should have access to the evidence against her/him. Although the State may well argue that national security issues require that its evidence should be withheld on the basis of public policy, it cannot be proper or in keeping with human rights standards[66] that a person's life or freedom could be threatened without a chance to challenge the evidence produced by the State.[67] The Supreme Court of Canada in *Suresh*, though, also held that the courts must accord deference to the decisions of a minister to deport.[68] In sum, however, if Article 32 procedures were adopted with respect to Article 33(2) , then its application would be less problematic.

Additionally, although domestic courts have spoken in terms of 'national security', it is Article 32 that deals with national security, while Article 33(2) deals with the more demanding idea of a 'danger to the security of the country' or 'a danger to the community of that country'. While it would mark a change in the jurisprudence relating to Article 33(2) , it is undoubtedly arguable that rather than the presence of the refugee giving rise to an issue of national security, a broad concept, loss of *non-refoulement* protection should only arise where the refugee represents a danger to the security of the country of refuge, a concept more akin to

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Access to legal advice is also of importance from the very earliest stages of the applicant entering the status determination process – M. Timmer, M. Soffers and J. Handmaker, *Perspectives on the legal basis and practice of the Netherlands government regarding exclusion of refugees in terms of s.1F of the 1951 United Nations Convention Relating to the Status of Refugees*, written submission to UNHCR Global Consultations on Refugee Protection, 2001, §3 – *Access to Legal Advice*.

[66] Obviously, the fair trial standards referred to above, Article 1F, Procedural Guarantees and Evidence, would apply to Article 33(2) as well. However, given that Article 1F simply excludes from refugee status whereas Article 33(2) permits a state to send back a Convention refugee to a country where his life or freedom would be threatened, it is arguable that upholding the right to life and to be free from torture, inhuman or degrading treatment or punishment, non-derogable rights, demands that the refugee has the right to challenge all significant evidence – *see Chahal*, *supra* note 22.

[67] In Canada, a summary of the evidence has to be prepared for the refugee. However, in the United States the refugee has no right of access: *Avila* v. *Rivkind* (1989) 724 F. Supp. 945 *at* 947–950 – 'An alien who is found by the Attorney-General to be a threat to national security is not entitled to an asylum hearing' (950); *Ali* v. *Reno* (1993) 829 F. Supp. 1415 *at* 1434 *et seq*. – although the agency supplying the classified information can make a summary available to the applicant/ petitioner (1436); *Azzouka* v. *Meese* (1987) 820 F.2d 585 *at* 586–587, where a member of the PLO was denied asylum on the basis he presented a danger to the people and security of the United States, based in part on 'confidential information, the disclosure of which would be prejudicial to the public interest, safety, and security of the United States' (587). *See also*, Bliss, *supra* note 11, *at* pp. 101 and 120 *et seq*.

[68] *Supra* note 26, *at* paras. 29, 39 and 40.

'29. [The Court] should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.'

the threshold necessary to derogate from human rights obligations.[69] Furthermore, derogation is only permitted to meet the exigencies of the situation and is monitored by the relevant human rights body in order to see if it exceeds what is necessary. Given the nature of the effect of Article 33(2) of the 1951 Refugees Convention, where a norm of customary international law is being restricted, such a construction would be fitting and appropriate in the circumstances. A strict view on the use of Article 33.2 would better reflect the idea that the refugee is a danger to the security of the country.[70]

9.3. CONCLUSION

Evidentiary assessment with respect to exclusion is different from that for inclusion: the burden of proof is on the State; the linkages with criminality and the serious consequences that might follow demand that the applicant is given the benefit of the doubt before the decision-maker finds there are serious reasons to consider that s/he falls within Article 1F; and while some sources of evidence may need protection given the nature of the crimes in Article 1F, exclusion based principally on secret evidence alone would be a grave injustice. There are grounds, as well, to suggest that Article 6 ECHR should apply to a status determination hearing considering exclusion because of its close relationship to a criminal charge; equally, the requirements of Article 32 of the 1951 Refugees Convention should be used before removing protection from *refoulement* under Article 33(2).

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[69] *See* Article 4 ICCPR.

'In time of public emergency which threatens the life of the nation . . .'

See equally, Article 15 ECHR

'In time of war or other public emergency threatening the life of the nation . . .'

It is possible that derogation is only permissible where the State is required to implement Common Article 3 of the four Geneva Conventions because the level of violence has reached a certain minimum, so that although human rights standards are derogated from, the Common Article 3 guarantees provide an alternative means of protection.

[70] For further analysis, *see* Gilbert, *supra* note 24, *at* pp. 457–464.

CHAPTER 10

CREDIBILITY IN CHANGING CONTEXTS: INTERNATIONAL JUSTICE AND INTERNATIONAL PROTECTION

Rosemary Byrne[*]

Across continents and cultures, periods of mass human rights abuses have generated an experimental evolution in the responses and responsibility of local, national and international societies.[1] The international community has long recognised the minimal obligation to provide protection for victims who are refugees, and has recently established the ambitious potential to offer justice for victims before international tribunals.[2] All of these responses acknowledge in varying ways the central importance of victims and the narratives that they tell. Victims seeking justice or protection will tell their stories, and be heard, but they must also be believed. They must deliver their testimony credibly, and must be found credible in differing contexts. In this period of concentrated developments in human rights law, there have been significant advances in how the contexts for hearing and understanding human rights testimony should be adapted in a multi-lingual, cross-cultural and trans-jurisdictional forum. In spite of their institutional youth, through the process of delivering justice the international criminal tribunals have made significant strides in enhancing their capacity to hear, understand and assess the testimony of alleged victims and witnesses of human rights abuses. As international justice has fine-tuned the trial process to accommodate this unique testimony, the European Union has put together structures that will shape the context for assessing the credibility of those seeking protection from *refoulement* in the Member States.

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[*] Work for this chapter was carried out while the author was a Government of Ireland Research Fellow. She would like to thank the Irish Research Council for Humanities and Social Sciences for their generous research funding.

[1] M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon, Boston, 1998); P. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge, London, 2002); S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International* Law (OUP, Oxford, 2001, 2nd ed.) .

[2] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 23 May 1993, reprinted in (1993) *32 ILM 1192*; Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 Jan. 1994 and 31 Dec. 1994, available at <www.ictr.org.>.

This chapter explores the extent to which the principles that have emerged from the experience of assessing the testimony of those seeking international justice are being implemented in the context of the pan-European system for asylum procedures.

This discussion of the legal contexts for victims and witnesses of human rights abuses is set against the backdrop of several major transformations in the international legal environment. The radical period of transformation in human rights law that has led to the erosion of legal impunity for perpetrators of widespread human rights has also created multiple fora for victims and witnesses to deliver their testimony. The shared challenges of these fora have fostered a transfer of legal norms and practices across jurisdictions. This has, in turn, led to a rapid advance in the expertise pertaining to the unique dimensions of victim and witness testimony. In the past decade, international criminal law has gradually developed a more robust and refined body of principles and forms of practice in this area, drawing upon, and in turn inspiring, a vertical integration of norms and practices from national and regional human rights law.[3] During this same period, in the aftermath of the Amsterdam Treaty, the horizontal integration towards a common asylum policy intensified in EU regional law. The asylum system that is now emerging in serial Council Directives sets the protection standard for 25 Member States of the European Union. It is the forthcoming Directive on Minimum Standards on Procedures, agreed by the then Justice and Home Affairs Council on 29 April 2004, that serves as the most broad-reaching international instrument to establish and define the minimum norms for processes which determine refugee status.[4]

As the contributions to this volume highlight, the assessment of credibility is at the core of any refugee determination process. Turning to international criminal law to inform and enhance approaches to how credibility is assessed is a logical continuation of the widespread adoption of credibility criteria from criminal law within national asylum assessment procedures. More importantly, it continues the evolution of refugee protection standards in light of universal and human rights norms. With the advent of international criminal law, international judges have identified the dominant features of human rights testimony, features that have been long recognized as traits of the oral submissions of asylum seekers. It is correct to argue that asylum testimony has always been 'human rights testimony'. Yet to recognize it as such in this era of international law carries with it evidentiary consequences. International jurisprudence has now developed practical evidentiary principles specifically tailored to the features of human rights testimony that should

[3] S. Zappala, *Human Rights in International Criminal Proceedings* (OUP, Oxford, 2003). D.M. Amman, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context,' 75 *ILJ* 809.

[4] Amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 8771/04, 30 April 2004. As the final amended proposal for the Directive will soon enter into force, the Amended Proposal is referred to throughout this chapter as the forthcoming EU Directive on Minimum Standards on Procedures.

be reflected in the minimum standards of the Common European Asylum System developed by the EU.

This book offers a substantial contribution to the limited literature on the challenges of credibility assessment in asylum law. Alongside the important earlier work of Anker, Rousseau *et al*., Harrell-Bond and Verdirame, Kagan and Kälin, in this collection Doornboos, Herlihy and Spijkerboer all address aspects of the failure of asylum authorities to accommodate the unique dynamics of human rights testimony in a multi-lingual, cross-cultural and trans-jurisdictional context.[5] Many of the features of human rights testimony and the barriers to accurate credibility assessment that are identified by these scholars are echoed, and legitimated, in the jurisprudence, pronouncements and daily practice of the international criminal tribunals. I have written in a separate article on the need for asylum procedures to incorporate the principles of assessing credibility that have emerged from the international criminal tribunals. These principles progressively develop a comprehensive body of international norms for tailoring the evidentiary assessment of oral testimony to meet the challenges of effectively hearing and understanding the unique experience of victims and witnesses of human rights abuses.[6] This chapter concerns a practical question that follows, namely: are these progressive principles on credibility in a human rights context being effectively transferred into the current context of asylum systems. The focal point for this discussion is the most significant supra-national framework for assessing claims, which is currently being constructed by the European Union. In the first section I will trace the shared features between justice and protection seekers and their human rights testimony, and then consider the evidentiary approach to assessing human rights testimony in international criminal law. The strong evidentiary parallels between human rights testimony in international criminal and national asylum hearings will serve as the foundation for the discussion in the second section, which considers the extent to which the approaches to credibility assessment for human rights testimony established by the

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[5] D. Anker, 'Determining Asylum Claims in the United States: An Empirical Case Study', 19 *N. Y. U. J. L. & Soc. Change* (1992) 433; C. Rousseau *et al*, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board', 15 *J. Ref. Studies* (2002).1; M. Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination', 17 *Geo. Immigr. L. J* (2003) 367; W. Kälin, 'Troubled Communication: Cross Cultural Misunderstanding in the Asylum Hearing,' 20 *Int'l Migration Review* (1986) 230; *See also*, J. Herlihy, P. Scragg, and P. Turner, 'Discrepancies in Autobiographical Memories-Implications for the Assessment of Asylum Seekers: Repeated Interview Study', 324 *BMJ* (2002) pp. 324–327. J. Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall,' 13 *IJRL* 3 (2002). 293; Q. Dignam, 'The Burden and the Proof: Torture and Testimony in the Determination of Refugee Status in Australia,' 3 (1992) 4 *IJRL* 343; N. Pfeiffer, 'Credibility Findings in the INS Asylum Adjudications: A Realistic Assessment', 23 *Tex. Int'L L. J.* (1992) *139*.

[6] R. Byrne 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' *mimeo*, on file with author*,* Law School, Trinity College Dublin.

ad hoc international criminal tribunals are being channelled through the structures for the evaluation of asylum claims established by the newly constructed EU framework for the granting of refugee status.

10.1. APPROACHING CREDIBILITY ASSESSMENT FOR HUMAN RIGHTS TESTIMONY

There are four preliminary issues that should be addressed prior to a discussion of the compatibility of asylum structures in Europe and advanced human rights principles for hearing and assessing oral testimony. Because this discussion cuts across international, regional and national systems, as well as criminal and refugee law, the scope of the proposal to transpose principles from one realm to another needs to be clarified, as does the linkage between credibility criteria in criminal and refugee procedures. In turn, the parallels between the features and presentation of the testimony of both systems need also be highlighted. The unity between human rights testimony in both justice and asylum contexts will be illustrated by the experience of Rwandans, as they may assume a dual role as both justice and protection seekers. Furthermore, it is in response to Rwandan testimony that the clearest and most consistent approach to the evidentiary assessment of oral testimony has been articulated by the jurisprudence of the International Criminal Tribunal for Rwanda ('ICTR').[7]

The critique of EU minimum standards for asylum procedures should not be confused with an attempt to conflate the two disparate legal processes of international criminal and refugee law. It does not advance the proposition that procedural due process rights for criminal trials should be transferred to the realm of asylum law. Neither does it equate, nor confuse, the process of assessing future risk in asylum claims with that of determining individual criminal responsibility. The dynamics of individual asylum deliberations that vary dramatically across, and indeed, often within national jurisdictions, are likewise not to be confused with the theatre of full scale international criminal trials.

Differences between criminal and refugee systems notwithstanding, the criteria used to assess credibility within each are strikingly similar. Kagan's excellent comparative analysis of credibility assessment in national asylum systems identifies and divides the positive from negative factors that are given probative weight in refugee determination processes. The positive criteria consist of detail and specificity, consistency, providing all of the facts early, and plausibility of the account. These are distinguished from the negative factors, which are vagueness,

[7] *Prosecutor* v. *Musema*, Appeals Chamber Judgement, 16 November 2001, *Prosecutor* v. *Musema*, ICTR Trial Judgement, 27 Jan. 2000; *Prosecutor* v. *Akayesu,* ICTR Trial Chamber Judgement, 2 Sept. 1998; *Prosecutor* v. *Kajelijeli*, ICTR Trial Chamber Judgement and Sentence, 1 December 2003, *Prosecutor* v. *Bagilishema*, ICTR Trial Chamber Judgement, 7 June 2001, paras. 22–25.

contradictions, delayed revelation of key facts and implausibility.[8] As discussed in more detail below, these criteria explicitly, and implicitly, inform a range of provisions pertaining to status determination in the EU Directive on Minimum Standards on Procedures.[9] The criteria for credibility assessment in the law of international criminal evidence, demonstrates the extent to which the credibility criteria adopted in asylum law directly mirrors those applied in criminal deliberations.[10]

10.1.1. Justice and Protection Seekers: The Case of Rwandans in the Aftermath of the Genocide

Rwandan justice seekers at the war crimes tribunal in Arusha are in an international spotlight, while Rwandan protection seekers have drifted to the periphery of international attention and concern. Their shared qualities and experiences, however, give rise to unique features of testimony. Aside from the arrival of refugees from the Former Yugoslavia in western Europe in the 1990's, the Rwandan survivors and diaspora from the 1994 genocide are the only population where significant numbers have presented their stories before both tribunals for international criminal justice and asylum adjudication. In the limited field research that includes discussions of credibility assessment, the specific experiences of Rwandan cases offer insights for comparative reflections between the two legal contexts.

The neglect of international responsibility during the genocide, which took the lives of between 500,000 and one million people within 100 days, led to a mass flow of Rwandans seeking protection, accompanied by a strong global cry for justice. The profile of Rwandans seeking justice and protection was varied, as the testimony presented to national asylum officers, or UN investigators and judges, was not only that of victims. It included that of eyewitnesses, and, indeed of perpetrators. For alongside the survivors who crossed borders for protection in the aftermath of the genocide were those who feared reprisals for acts they had committed in 1994.[11]

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[8] Kagan. Supra note 5. *See also* J. Ruppel, 'The Need for a Benefit of the Doubt Standard in Credibility.Evaluation of Asylum Applicants,' 22 *Col. H. R. J.* (1991-92) 1; Immigration and Refugee Board (Canada), 'Refugee Protection Division Assessment of Credibility in Claims for Refugee Protection,' 28 June 2002, <www.irb-cirs.gc.ca/en/about/tribunals/rpd/assesscred/index_e.htm>, last consulted 18 June 2004; *See also,* Immigration Officer Academy (USA), *Asylum Officer Basic Training Course*, 6 December 2002, Chapters IV, V.

[9] EU Directive on Minimum Standard on Procedures above note 4, Art.23(g).

[10] R. May and M. Wierda, *International Criminal Evidence* (Transnational, Ardsley, 2002) pp.166–167.

[11] Hundreds of suspected perpetrators of the genocide are residing in Europe and other African countries. Human Rights Watch, *Leave None to Tell the Story* (Human Rights Watch & FIDH, 1999) Africa Rights, *Rwanda Nor So Innocent: When Women Become Killers* (Africa Rights, London, 1995) pp. 767–768. One of the challenges affecting humanitarian and asylum protection was the dominance of *genocidaires* in the refugee camps and their presence in the pool of Rwandan applications for asylum.

The link between justice and asylum that is traced in this chapter is not merely theoretical, for many of those who appear before the Tribunal as witnesses, and indeed some of the accused, have enjoyed refugee status in third jurisdictions.[12] Likewise, and controversially, there have been contacts between UN and national refugee determination authorities and the Office of the Prosecutor at the International Criminal Tribunal for Rwanda to determine whether individuals seeking asylum may have committed international crimes and should hence be excluded from refugee protection, or perhaps be turned over to international authorities.[13]

While the vast majority of Rwandans remained on the brink of survival in camps near the Rwandan border, forming one of the worst humanitarian crises in a decade, many others migrated farther, seeking refugee status from UNHCR and national governments. The scale of such a genocide in a country with an area of only 26,338 km and a very high population density inevitably meant that few escaped the emotional and mental scars of the atrocities that occurred during this time period.[14] With the creation that same year of ICTR, other victims and witnesses to the mass atrocities were soon sought by international investigators, within and outside Rwanda, in an attempt to secure statements that might be used as evidence for the trials of the major perpetrators of the genocide. While the profile of those offering testimony in international criminal fora and national asylum proceedings remains varied in terms of the individual roles and experiences of Rwandans, so indeed are the motivations for those offering testimony. While public perception holds that protection seekers have greater incentives to misrepresent their histories when claiming a future risk should they be returned to their country of origin, the highly politicised nature of war crimes trials has also found many a witness not to be credible on final determination.

The consequence of the shared profiles of Rwandan justice and asylum seekers is that their background and experiences give rise to many common features of oral testimony. As a consequence, the shared barriers of language, culture, education, and the likely effects of trauma mandate equally that the international criminal judge or national asylum adjudicator adapt their evidentiary approach to credibility assessment in order to account for the barriers to effective communication that affect human rights testimony.

10.1.2. The Role of Preliminary Stages of Information Gathering

Both justice and protection seekers are likely to be required to provide oral statements in a variety of official contexts. The provision of preliminary testimony, and the evidentiary role that it comes to play, is an important factor in the later

[12] M. Othman, 'The Protection of Refugee Witnesses by the International Criminal Tribunal for Rwanda,' 14 *IJRL* (2002) p. 495.
[13] B. Harrell-Bond and G. Verdirame, *Rights in Exile: Janus-Faced Humanitarianism*, *forthcoming* (Oxford, 2004) Chapter 3.
[14] G. Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia, New York, 1995) pp. 1–9.

assessment of credibility. As the negative criteria affecting credibility in asylum determinations singled out by Kagan indicate, factors such as discrepancies between earlier and later statements and the withholding of central information in a preliminary stage of the proceedings may be detrimental to the success of an asylum claim.[15] Attempts to impeach credibility based upon the content of preliminary statements are an integral part of both trial and asylum proceedings. This is particularly relevant for the forthcoming EU Directive on Minimum Standards on Procedures, which allows for competent authorities to determine applications without granting the asylum seeker an interview, based exclusively upon information obtained from the applicant at a preliminary information gathering stage.[16]

For those appearing before the international tribunals, witness statements would be entered as part of the trial record. Taken often many years earlier by an investigator working for the Office of the Prosecutor at the Tribunal, witnesses would have been asked to sign the statement at the closure of the session to verify its accuracy. At the trial stage, the scope of questioning, the quality of communication and the accuracy of transcription are often called into question. Further complications in the reliability of a preliminary statement arise on account of a witness's illiteracy, low education levels or absence of prior experience in speaking in a quasi-official context.[17]

Although taking a range of different forms, most asylum systems have an initial stage of information submission, whereby the asylum seeker provides personal information relevant to the substance of their claim. This may occur at border posts, or in a more formal interview setting, and may require translation services and assistance, with no guarantees as to the presence or quality of either. In spite of the variation across national systems, these statements often carry important evidentiary weight at a later stage in the decision making process.[18]

10.1.3. Features of Human Rights Testimony

As both justice and protection seekers provide information at initial or later information gathering stages, their testimony may be affected by a range of shared

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[15] Kagan, *supra* note 5.

[16] 'The personal interview may be omitted where: . . . the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with filling his/her application and submitting the essential information regarding the application . . .' EU Directive on Minimum Standards on Procedures, *supra* note 4, Article 10 (2) (b).

[17] As in domestic criminal proceedings, prior statements are commonly used to impeach the credibility of witnesses. In the context of recording testimony for human rights abuses, the challenges for comprehensiveness and accuracy are explicitly acknowledged in the deliberations of the trial chambers of the international criminal tribunals. *See supra* note 7.

[18] Anker's study of the asylum determinations in Boston concluded that there was an excessive emphasis on prior statements and paper submissions, impeding the capacity of the asylum hearing to effectively focus on and assess the oral testimony of asylum seekers. Anker, *supra* note 5.

features. This combined with the mental health of the victim or witness, affects their capacity to recall and communicate effectively the substance of their claim. As documented by Herlihy, the mental health of the victim or witness of human rights abuses may considerably affect recall as well as the capacity to recall traumatic events, at both preliminary sessions for information gathering and at later, formal interviews and hearings.[19] Cultural and educational barriers to effective communication, particularly with respect to concepts of space and time, also impede effective presentation of facts as well as understanding of the scenarios they seek to depict.[20] Victims and witnesses may be anxious in the presence of officials in authority, or may also lack confidence in the confidentiality of their statements, and fear reprisals. In the case of asylum seekers, given their fear of rejection, they may be tailoring their testimony, regardless of the strength of its substance, in order to increase the chances that their claim will succeed, and not uncommonly do so in accordance with misguided advice from traffickers or fellow refugees. Likewise, those that ultimately testify before the international criminal tribunals may also be influenced by pressures from local communities and organizations.

10.1.4. Approaching Credibility Assessment of Human Rights Testimony in International Criminal Tribunals

10.1.4.1. Probative Weight of Preliminary Statements

International criminal law places substantial constraints on the assessment of credibility based upon the recorded information of prior statements, in spite of the fact that they have been signed by the witness. Acknowledgement of the evidentiary frailties of preliminary statements marks the cautious approach taken by the international criminal tribunals in placing probative value on their content. This takes the form of a consistent recognition of the potential for technical errors in translations, interpretation and in the recording of various stages of statements, and placing the primary evidentiary focus on the testimony delivered, and tested, at the full oral hearing of the trial. More affirmatively, it also takes the form of evidentiary safeguards. While inconsistencies and discrepancies between past and present testimony may reveal valid grounds for impeaching credibility, the jurisprudence of ICTR sets forth substantial safeguards for adverse evidential conclusions drawn from prior statements.[21] The most detailed explication of the criteria governing

[19] Herlihy *et al.*, *supra* note 5.

[20] The primary barriers to communication identified by Kälin are an asylum seeker's manner of expression, the role and quality of the interpreter, the cultural relativity of the concepts, including that of 'lie' and 'truth', and perceptions of time. Kälin *supra* note 5, pp. 230–232. Anker, *supra* note 5, pp. 505–527; Rousseau, *supra* note 5, pp. 13, 18–22.

[21] *Prosecutor* v. *Laurent Semanza*, Trial Chamber Judgement and Sentence, 15 May 2003, para. 36. *See also Prosecutor* v. *Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo,* ICTY Trial Chamber Judgement, 16 Nov. 1998, where the ICTY Trial Chamber stated that considered inconsistencies or inaccuracies between the prior statements and oral testimony of a witness, or between different witnesses, were 'relevant factors in judging

preliminary statements was set forth in *Prosecutor* v. *Alfred Musema,* which holds that the attachment of probative weight to inconsistencies between past interviews and present testimony requires access of the adjudicator to transcripts and documentation that would allow him or her to assess the nature of the questions posed at earlier interviews and to scrutinize the quality of the translation.[22]

10.1.4.2. Approach to Human Rights Testimony

The features of the oral evidence from justice and protection seekers that distinguish it as 'human rights testimony' has led to a reorientation of the factors used to assess credibility. These pertain directly to the criteria of vagueness, contradictions, and delayed revelation of key facts, which are among the negative credibility factors identified by Kagan in national procedures, and which now inform the central approach to credibility in the forthcoming EU Directive on Minimum Standards on Procedures. This reorientation is informed by a heightened emphasis on the risk of error with respect to translation, cultural, sociological and psychological factors.

In the context of human rights testimony, inconsistency, contradiction and vagueness paradoxically may be evidence of the credibility of a claim. This legal recognition is not new in the context of asylum, as this aspect of human rights testimony has been addressed by the Committee Against Torture ('CATC'). The jurisprudence of the international criminal tribunals has never applied a rule of strict accuracy in testimony for establishing credibility. One of the main adaptations to the problems of recall and accuracy is the distinction between core and peripheral facts. Discrepancies and inaccuracies in testimony related to core facts generally render adverse findings on grounds of credibility, whereas those pertaining to peripheral details are accorded less probative weight. CATC opinions make distinctions between credibility of testimony with respect to core and peripheral details, as well as past torture and future risk – adverse credibility findings with respect to the former should be assessed independently of the latter. For determinations in asylum cases to more accurately respond to the dynamics of 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 the 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'.[23]

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weight but need not be, of themselves, a basis to find the whole of a witness testimony unreliable'.

[22] *Musema***,** ICTR Trial Judgement, 27 Jan. 2000, *supra* note 7 para. 85; *Prosecutor* v. *Bagilishema, supra* note 7, para. 2.4; *See also Prosecutor* v. *Delalic et al. ibid.* Trial Chamber II in *Prosecutor v. Kayishema and Ruzindana*, adopted a more stringent standard for assessing discrepancies, between the content of preliminary statements and courtroom hearings, requiring that corroboration be provided by the witness to substantiate their explanations. ICTR Trial Judgment, 21 May 1999, para.78.

[23] *Haydin* v. *Sweden* (101/1997) 16 Dec. 1998, *Tala* v. *Sweden* (43/1996) 15 Nov. 1996; *Alan* v. *Switzerland* (21/1995) 21 Jan. 1995. A more detailed discussion of the practice under CAT and other international and national principles for assessing testimonial evidence appears in

International criminal law has developed this approach to human rights testimony more fully.[24] Like domestic criminal law, witness testimonies are assessed in terms of internal consistency and detail, consistency against prior statements of the witness, accounting for translation, transcription and the impact of trauma, strength under cross-examination, credibility vis-à-vis other witnesses accounts or other evidence submitted, and possible motives on behalf of a witness.[25] However, in May and Weirda's discussion of credibility assessment in their treatise on the law of international criminal evidence, they dedicate their first paragraph to the principle that inconsistencies, even material inconsistencies, 'need not be fatal to the witness'.[26] While these features may indeed be true indicators of incredible claims, in the context of human rights testimony they require that more interrogatory doors be opened, rather than closed.

Likewise, vagueness in human rights testimony is not considered necessarily to be an index of dishonest or unreliable testimony. The attention paid by the international tribunals to language and communication as a significant evidentiary barrier to accuracy and understanding is instructive. Translation, interpretation and understanding comprise a core evidentiary component for credibility assessment. The frequent necessity of witness and victims, like asylum seekers, to speak through interpreters, requires a more cautious approach to assessing the credibility of oral testimony than would be typically required in national courts. However, the ICTR Appeals Chamber argued in overturning a decision of Trial Chamber II in the Karemera case, that communication through an interpreter does not diminish the need for in-court evaluation and the importance of seeing and hearing a witness testify in order to assess credibility.[27]

Alongside the recognition of potential errors in translating, interpreting and recording testimony in the investigative and trial stages, there is an assumption that the translation and understanding of the language of the testifier needs to be placed contextually. The role of language and understanding in a judicial context requires an alterative approach that is clearly set forth in *Akayesu*. In its judgement, the Trial Chamber stated that it 'did not draw any adverse conclusions regarding the

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Byrne, supra note 6. *See also* B. Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees', 11 *IJRL* (1999) 3.

[24] *Prosecutor v. Kupreskic*, ICTY Appeals Chamber Judgement, 23 October 2001, para. 31; *Prosecutor* v. *Musema*, Appeals Chamber Judgement, 16 November 2001, para. 20; *Prosecutor* v. *Delalic et al.*, Appeals Chamber Judgement, 20 February 2001, paras. 485, 496–498; *Akayesu*, *supra* note 6, paras. 142–143; *Prosecutor* v. *Kajelijeli*, ICTR Trial Chamber Judgement and Sentence, 1 December 2003, paras. 39–40; *Prosecutor* v. *Bagilishema*, ICTR Trial Chamber Judgement, 7 June 2001, paras. 22–25.

[25] R. May and M. Wierda, *International Criminal Evidence* (Transnational, Ardsley, 2002) 6.09–6.15.

[26] If, however, testimony with material inconsistencies is accepted, the Trial Chamber must provide reasons for its decisions. *Ibid.,* 6.09.

[27] *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorer's Motion for Leave to Consider New Material, Prosecutor* v. *Karemera,* ICTR Appeals Chamber, 22 October 2004.

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.[28]

Alongside such barriers of communication, the potential impact of trauma and stress-related disorders on testimony is another core evidentiary matter limiting the use of the core negative credibility criteria of vagueness, contradictions and delayed revelation of facts in international human rights credibility assessments. This is highlighted in the consideration of the Trial Chambers of the factors that may shape witness testimony. In the *Musema* judgement, Trial Chamber I 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 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.[29]

It is important to note that this account of the impact of trauma taken by Trial Chamber I includes a consideration of past, and – crucially for human rights testimony within the EU framework – continuing stress-related disorders.

This brief summary of core international principles and practices has several implications for the treatment of the human rights testimony of protection seekers in the context of EU Minimum Standards on Procedures. These relate to the probative weight of preliminary statements and negative credibility criteria, as well as the recognition of, and accommodation for, complications of communication that occur in a legal context across jurisdictional, cultural, linguistic, and sociological boundaries.

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[28] 'Inconsistencies and imprecisions in the testimonies, accordingly have been assessed in light of this', *Akayesu supra* note 7, para. 143.
[29] Musema, *supra* note 7, paras.100–101.

10.2. COMPARING INTERNATIONAL EVIDENTIARY PRINCIPLES GOVERNING CREDIBILITY ASSESSMENT WITH EUROPEAN STANDARDS AND STRUCTURES

This section seeks to consider whether this reorientation of methods for evaluating the credibility of human rights testimony is reflected in the forthcoming regional structures for seeking protection in the European Union. Although many aspects of the Directive on Minimum Standards on Procedures lend themselves to extensive discussion and critique about adequate protection standards, the focus of this analysis is far narrower.[30] It will not consider the provisions of the Directive that implicitly deal with the credibility of a claimant, relating to the safe country of origin notion, or that contain presumptions about alternative means of protection, such as the provisions relating to safe third countries and super safe third countries.[31] Although Article 4 contains provisions that ensure the right of Member States to introduce or maintain more favourable standards regarding procedures for granting or withdrawing refugee status, past legislative history within Member States has shown that in practice, this possibility is unlikely to define the trend.[32] Hence, an analysis of the assessment of human rights testimony will operate within the confines of the minimum standards that are established by the forthcoming Directive.

10.2.1. Preliminary Information Gathering Phases

Whereas vagueness, strictly inaccurate recall and inconsistencies are not fatal to human rights testimony in international criminal proceedings, in the accelerated procedures under the new Directive they may indeed be the death of a claim for refugee status. Under the new EU standards for procedures set forth in Articles 10 and 23 of the forthcoming Directive, a Member State may forgo providing a personal interview to an applicant if it considers the preliminary information submitted to render an application 'unfounded' on grounds *inter alia* that 'the applicant has made inconsistent, contradictory, unlikely or insufficient

[30] ECRE, 'Broken Promises-Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection' (ECRE, London, 2004) pp. 10–12. UNHCR Press Release, 'Lubbers Calls for EU Asylum Laws not to Contravene International Law', 29 March 2004, <www.unhcr.ch/news>.

[31] Amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 8771/04, 30 April 2004, Arts. 23(4) (c), 26, 27, 30, 30A, 30B, 34A, Annex II. R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law', 9 *Harvard Human Rights Journal* (1996) pp. 190–196. G. Goodwin-Gill, 'safe Country? Says Who?', 4 *International Journal of Refugee Law* (1992) 248; S. Legomsky, 'secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', 15 *International Journal of Refugee Law* (4) (2003) pp.567–667.

[32] R. Byrne, G. Noll, J. Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' 15 *European Journal of International Law* No. 2 (2004) pp. 355-379.

representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution . . .'.[33] Additionally, initial submissions by a protection seeker that are found to have 'only raised issues that are not relevant or of minimal relevance' to a refugee claim may also be considered unfounded.[34] Under accelerated procedures, 'unfounded' claims may not only be denied a personal interview, but there is no obligation for the state to provide a right to an appeal carrying suspensive effect.[35] These accelerated procedures cannot provide an adequate framework for the exploration and testing of testimony required in order to respect the fundamental premise that inconsistencies need not be fatal to the credibility of the claimant. Hence, a national system modelling itself on the procedural framework of the EU Directive will effectively be implementing the converse of a core international standard for assessing the credibility of human rights testimony.

While international principles direct assessment towards a full and sensitised hearing, the EU Directive directs assessment away from a full hearing, as the interview becomes a stage of the process to which a protection seeker must be 'invited'.[36] There is a curious paradox here in terms of the approach by the EU to negative factors of credibility assessment. On the one hand, the Directive allows for a continuation of the appeals that offer a limited review of the asylum rejections, a large percentage of which will be based on adverse credibility findings. This is a widespread phenomenon across national systems, with the absence of rigorous scrutiny of first instance rejections based on credibility justified by a general reluctance of authorities to overturn the credibility determinations of fact finders without having heard, and importantly, witnessed the testimony of the asylum seeker.[37] Hence protection seekers may have claims denied on opaque grounds without an effectively focused review that will scrutinize credibility assessment, because of the weight placed by appeals authorities on the evidentiary value of seeing and hearing the presentation of testimony for accurate credibility assessment. However, on the other hand, under the same EU minimum standards, an asylum seeker may be denied an interview, implicitly on the assumption that an accurate credibility assessment does not require seeing and hearing their testimony. Under Article 10 of the Directive, a personal interview may be omitted where a determination has been made by a 'competent authority' based upon 'meeting with the applicant for the purpose of assisting him/her with filing his/her application and submitting the essential information' or, where there has been a 'complete

[33] EU Directive on Minimum Standards on Procedures, above note 4, Arts. 10 (2) (c), 23 (4) (g). 'The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he /she may be reasonably be supposed to understand in which he/she is able to communicate in.'
[34] *Ibid.,* Art. 23 (4) (a).
[35] *Ibid.,* Art. 38 (3). Rules governing the suspensive effect of appeal decisions are left to the rules of individual Member States pursuant to their 'international obligations.'
[36] *Ibid.,* Art. 10.
[37] Ruppell, *supra* note 8, at 3.

examination of information provided' with no requirement that even a 'meeting' between decision maker and asylum seeker has taken place.[38] There is no provision for an effective record of these initial, and consequential, information gathering processes. Although Member States 'may record the applicant's oral statements, provided he/she has previously been informed thereof,' there is no obligation for authorities to verify the nature and quality of the 'meeting' or examination, that may preclude the opportunity for a full oral hearing in the form of an interview.[39]This confused and conflicting understanding of the criteria for assessing credibility allows EU Member States to restrict both access and review in refugee determination procedures.

The effect of short-circuiting credibility determination is exacerbated by the fact that the Directive does not provide any guarantee of state-funded legal assistance at this, or later, stages. The provision for free legal assistance may be limited to appeals, and yet even this state obligation is somewhat illusory. States may choose to grant this assistance 'only if the appeal is likely to succeed'.[40] At the early stage of documenting the narrative of a claimant, there is effectively no guarantee of legal representation or assistance to guide and focus the applicant.

Even more fundamentally obstructive of effective communication is the absence of an affirmative obligation to provide an interpreter for an asylum seeker at stages prior to the full interview. Although as asylum seekers enter into the application process, they must at a minimum be apprised of the procedures to be followed in a language that they can reasonably be expected to understand, there is no further duty to ensure that they can effectively understand, and be understood, in the preliminary parts of an assessment process that may preclude even the minimal recourse to a hearing in an interview.

10.2.2. Eliciting, Hearing and Assessing Testimony

The advances in understanding the evidentiary challenges of human rights testimony and the circumstances of asylum seekers are not entirely absent from the EU Directive on Minimum Standards. Should the asylum seeker not have their claim accelerated based upon preliminary information, and hence be granted a full interview, there are some limited provisions that aim to direct procedures to ensure that personal interviews are conducted in conditions which allow applicants to present the grounds for their application in a comprehensive manner. This requires that Member States shall ensure that the interviewer is 'sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so . . .'. Special provisions and safeguards are also included to meet the needs of unaccompanied minors. Additionally, an interpreter must be provided to ensure 'appropriate communication', although not necessarily in the language of preference

[38] EU Directive on Minimum Standards on Procedures, supra note 4 Art.10 (2) (b) (c).
[39] *Ibid.,* Art. 9 (2) (f).
[40] *Ibid.,* Art. 13 (4) (c).

of the asylum seeker. However, there is no guarantee for the presence of a third party, be that someone offering legal services or merely personal support.[41]

Strikingly, the standards that adjudicators assessing oral testimony in an international criminal tribunal apply when considering credibility are not sufficiently met even in the full reporting standards for the 'personal interview.' Member States are required to provide a 'written report' of every personal interview 'containing at least the essential information regarding the application . . .'. While this report will constitute the core of the applicant's application, and the grounds for either affirmative or adverse credibility findings, it does not mandate that the questions directed to the applicant be included in this record.[42] Hence, it is not clear to any reviewing body whether there were fatal omissions or a vague presentation of facts as a result of the scope and focus of the questioning. More centrally, if there were misrepresentations in the report, Member States are not required to obtain the approval of the claimant, and hence, a meaningful review of the record by the applicant prior to its formal inclusion in their file. Although access is guaranteed and must be 'timely', it rests with the Member State to determine if this is prior to a determination or simply for the purposes of appeal.[43]

Member States must ensure that decisions on asylum applications are given in writing, and in instances of rejection, the reasons in both fact and law should be provided for the applicant.[44] National compliance with this provision should move beyond the boilerplate asylum denial letters that are released in some jurisdictions offering a slight step towards curtailing seriously unsubstantiated findings of adverse credibility.[45]

While international principles emphasize the need to account for the possibility of past and continuing trauma and stress-related disorders in human rights testimony, this need is heightened in the context of the EU Directive. Recent empirical work has found that these mental health conditions are widespread among asylum seekers placed in detention, and deteriorate significantly over time.[46] The

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[41] *Ibid*., at Art. 11 (3) (a) (b) (4), 14 (3), 15.
[42] *Ibid*., at Art, 12(1).
[43] *Ibid*., Art. 8.
[44] *Ibid.*
[45] '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 Amended Proposed Directive on Minimum Standards (29 April 2004), Art. 8, para. 2.
[46] Byrne, *supra* note 6, citing Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences for Detention for Asylum Seekers,* <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 per cent each month. *See* 'Temporary protection visas compromise refugees

possibility that testimony is impaired by mental health conditions, requiring an explicit reorientation of negative credibility criteria, is highlighted in the wide sweeping detention powers afforded to Member States under the EU Directive. Indeed the only restriction that it places on authorities is that asylum seekers not be detained solely on the grounds that an individual requests asylum; and, echoing the jurisprudence of the European Court of Human Rights, that the detention be reviewed by determining authorities. While not directly related to the assessment of credibility, this sanctioning of detention as acceptable and potentially widely implemented does affect the context in which testimony should be assessed. It intensifies the need for adapting the context to respond appropriately to the needs of victims and witnesses to human rights abuses. Given the practices of compiling information from interviews, detaining asylum seekers, and not providing adequate support within the interview process, there is an evident need for a conscious adaptation of the negative credibility factors to reflect current international standards for the assessment of human rights testimony.

10.3. CONCLUSION

The Common European Asylum System of the EU is developing during a radical period in international law, where witnesses and victims of alleged human rights abuses are telling their stories in the quest for international justice, and no longer simply in pursuit of refugee protection. The extensive assessment of the credibility of alleged human rights witnesses and victims that has been underway in the international courts shows the need for a rigorous and nuanced modification of the standards that govern the assessment of credibility in asylum procedures. International principles for the treatment of human rights testimony fail to offer a panacea for the many barriers and biases that confound issues of proof and credibility in asylum law, and which are covered in the collection of essays in this book. They should, however, offer progressive steps towards a more coherent and comprehensive understanding of human rights testimony. By reorienting standard approaches to credibility assessment for asylum testimony, they will bring the EU into line with current international practice, and ultimately towards a more effective and fair assessment of credibility in asylum systems within, and beyond, the European Union.

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health: new research', University of New South Wales, <www.unsw.edu.au/news/pad/articles/2004/jan/TPV_Health. Html>, (30 Jan. 2004).

D – EPILOGUE

CHAPTER 11

SALVATION BY THE GRACE OF STATE? EXPLAINING CREDIBILITY ASSESSMENT IN THE ASYLUM PROCEDURE

Gregor Noll

11.1. INTRODUCTION

In this final chapter, I shall argue that the idiosyncrasies of evidentiary assessment in contemporary asylum procedures cannot be properly understood, unless the heritage of confession, repentance and absolution is taken into account. This heritage – which has also left traces in penal law – distorts the practice of refugee status determination, which should be properly dealing with the victim of human rights violations, and not the 'sinner-perpetrator' (as the institution of confession and the penal procedure do respectively). Analysing its impact is the first step towards a secular reconstruction of asylum and *non-refoulement*, precisely as contemporary penal theory has sought to carve out a secular justification for penal law.[1]

However, retaining this unaccounted historical heritage in the design of asylum procedure provides host states with important practical advantages. It allows them to neutralise the political agency of asylum seekers and to recast them either as mere impostors or as mere 'victims-to-be-saved'. Either way, applicants are subjected to the grace of the decision-taker, whose 'general credibility assessment' ultimately reproduces the assessment of remorse by the confessor in Roman Catholicism. Also, the hybrid character of asylum procedures allows host states to merge the assessment of immigration law violations with that of the applicant's identity and protection need, creating unwarranted linkages between all three. Absolution as well as asylum is all about re-inclusion – the former into the Church, and the latter into the system of nation-states. This illustrates to what extent the system of nation-states has succeeded the Church as a central organising institution, inheriting its metaphysical surplus of sacredness. This surplus is successfully colluded by the supposedly legal-secular form of the asylum procedure. The historical analogy pursued here shall illustrate that the grant of asylum is far from being the secularised institution it pretends to be.

Section 2 shall revisit the possibilities to draw analogies between asylum procedures and penal as well as administrative procedures. In that section, we shall also look into how states amalgamate three sub-procedures on immigration, identity

[1] For a justification of punishment as a form of secular penance based on communication, *see* R.A. Duff, *Punishment, Communication and Community* (Oxford University Press, Oxford, 2001).

and protection into the asylum procedure, at times embarking on a fourth dealing with exclusion. The emergent procedure cannot be explained in the terms of a penal or administrative law analogy, which faces us with a *sui generis* hybrid. Section 3 shall provide a brief historical background on auricular confession practices within the Roman Catholic Church, providing a basis for a comparison of the functions of the institution of confession and of refugee status determination respectively in Section 4. Illustrations from the EU Qualification Directive,[2] the EU Draft Directive on Asylum Procedures[3] as well as the UNHCR Handbook[4] will be provided. In Section 5, the neutralisation of the asylum seeker's political agency through refugee status determination shall be analysed, and Section 6 shall conclude on this chapter with a few reflections on how to secularise contemporary asylum procedures.

11.2. THE BREAKDOWN OF ANALOGIES TO PENAL AND ADMINISTRATIVE LAW

Our choice of optics is part of the problem. We want the asylum procedure to be a secular institution, we want it to be rational, predictable and egalitarian. Our approach to it is informed by the idea of human rights, whose universality seemingly emancipated itself from state sovereignty. The universality of human rights and the legal language implied by them tempt us to think as if asylum procedures were taking place within a membership, and to forget that they are about admission to that membership. This choice of optics brings us to limit our analysis of asylum procedures to a comparison with other legal procedures, mainly of the criminal and administrative type. Both comparisons are bound to fail.

Earlier, we described asylum procedures as a double hybrid, drawing on administrative as well as on penal procedure, and featuring inquisitorial together with adversarial elements.[5] This eclecticism is troubling and bereaves us of a clear-cut benchmark. Should asylum law be explained per analogy to administrative law? At first sight, this seems reasonable: after all, the claimant appears to request a specific type of service from the host state. The focus of procedures is on material correctness of the decision, which motivates an active role of authorities and an inquisitorial method. However, the asylum applicant is not yet part of the protective community. The asylum procedure is about inclusion into it, rather than services

[2] *Council Directive 2004/83/EC (29 April 2004) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* [hereinafter Qualification Directive, abbreviated QD].

[3] Council of the European Union, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, ASILE 64, Annex I, 9 November 2004 [hereinafter Draft Directive on Asylum Procedures, abbreviated PD].

[4] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Geneva, January 1992 [hereinafter UNHCR Handbook].

[5] *See* Noll, *supra* Chapter 1.2.

rendered within it. This is a *constitutional* question rather than an administrative one.

Would it be more appropriate to draw an analogy between asylum procedures and penal procedures? The importance attached to the account of the applicant allows associations to the *desideratum* of confession in penal procedures. Beyond that, there is little similarity. Penal procedures typically look at what has happened, while asylum procedures rest on a prognosis of what will happen. The perpetrator of persecution is absent in asylum procedures, and the spotlight is on the potential victim. By contrast, criminal procedures are predominantly held for the perpetrator, while victims are at its margins. And, most importantly, asylum procedures are positively not about punishing the persecutor, but deal with the appropriateness and type of protection to be awarded to the potential victim. In the end, both analogies would get it wrong. The administrative procedure analogy forgets about the inclusion dimension, and the penal procedure analogy portrays the applicant as a potential perpetrator rather than a potential victim.

If asylum procedures are a *sui generis* phenomenon, a closer look at what states actually do within their framework seems warranted. In reality, asylum procedures may function as a basket for a number of discernable sub-procedures. Let us exemplify with four of these sub-procedures. The first three are relatively mainstream. They are about immigration, identity and protection respectively. In addition, we will spend a few lines on the special sub-procedure for exclusion (and omit further constellations as double citizenship or cessation). As we will see, none of the four sub-procedures is sufficiently clear-cut to allow for a straight analogy to administrative or penal law. Yet again, traces of administrative as well as penal procedures are present in all of them.

First, as asylum claims often are mounted as a defense against impending removal they trigger a *sub-procedure on the application of immigration laws*. There are two corrective objectives pursued in this procedure. The first one seeks to re-establish the integrity of state borders by removing irregular aliens. A second objective is the reallocation of the applicant to other countries (either EU Member States or safe third countries). To prepare for such reallocation, significant room is usually given to identify the travel route of the applicant. It is tempting to ascribe this procedure a penal character, given the strong focus on deviance from immigration and allocation norms. Yet again, the immigration control objective can be provisionally trumped by *non-refoulement* obligations.[6] The allocation norms are not directed to applicants *de jure*, but remain a means of coordinating states' behaviour. What is more, an applicant's reallocation to another state can hardly be described as a sanction in an objective sense.[7]

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[6] On the exemption from penalisation, *see* Art. 31 CSR. Otherwise, the prohibitions of refoulement apply even to irregular immigrants.

[7] While it very well may be experienced as a sanction by the protection seeker, whose choices are ignored, it cannot be excluded that such reallocation could actually produce a more favourable protection outcome in certain cases.

Second, a growing number of asylum claims trigger a *sub-procedure on the identity of the claimant*, involving document authenticity, citizenship, language recognition or assessment of age.[8] The *topos* of misrepresented identity appears to move this procedure into the vicinity of the penal procedure, as criminal law typically penalises misrepresentation, document fraud and related practices. True enough, there are subtle sanctions for non-cooperative behaviour by the applicant: it is not unusual that the absence of travel documents is seen as tainting his or her general credibility[9] or triggers reallocation to a fast-track procedure.[10] A more tangible measure is to detain applicants whose identity is unclear, or to reduce benefits for those not cooperating in identification. However, these sanctions must not be misunderstood as penalties in the formal sense, which makes the penal analogy precarious.

Third, there is a *sub-procedure on the protection claim* as such. At first sight, we might analogise to administrative procedure, depicting asylum as some kind of community service. Even if we disregard from the absence of community membership, this is patently wrong. States have an interest to portray protection claims as dealing with service rights rather than claim rights or mere prohibitions, because this puts them into a more favourable procedural position. If we correctly grasp protection claims to pivot on a prohibition to *refoule* rather than on the full entitlement package of asylum, the procedural setting changes radically. It would be for states to defend a removal decision against the potential reproach of *refoulement*, rather than for the individual to prove that the preconditions of refugeehood are fulfilled.[11] While an analogy to administrative law is generally appropriate, it risks triggering the wrongful premise of a service claim by the applicant. Measured against the standards of penal procedure, it emerges that asylum applicants are put in the same position as an accused whose guilt is presumed. We believe the question of membership to be a constitutional question, which leaves us with the dissatisfying conclusion that refugee status determination is a *sui generis* procedure.

Fourth, a *sub-procedure on exclusion* is added in a limited number of cases, its symbolic weight should not be underestimated. This might seem to be the best

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[8] Swedish statistics may provide an impression, as related by a recent government survey. Before the entry into force of the Dublin Convention in 1997, 35 per cent of all applicants lacked a valid passport. In 2004, the number had risen to over 90 per cent. *Tidsbegränsat uppehållstillstånd vid oklar identitet och resväg. Betänkande av dokumentlöshetsutredningen SOU 2004:132*, (Stockholm, Fritzes 2004), p. 44.

[9] *See* text accompanying notes 44 and 45 *infra*.

[10] Art. 23.4.f PD envisages the relegation of applicants to 'prioritised or accelerated' procedures where 'the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, or, it is likely that, in bad faith, s/he has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality'. A similar provision in Art. 23.4.d PD covers the withholding of identity or nationality-related information or documents. Also, according to Art. 29.2 PD, Member States may regard such applications as manifestly unfounded, if it is so defined in their national legislation.

[11] *See* Popovic, supra Chapters 3.2 and 3.3.

candidate for a penal law analogy, given the objective of securing the moral integrity of asylum. Also, it appears indicative that the burden of proof is on the state wishing to exclude the applicant. Nonetheless, important counterarguments offer themselves. The standard of proof in exclusion procedures is lower than the one applied in penal procedures. What is more, exclusion from protection does not necessarily lead to prosecution for excludable crimes, or, for that matter, removal from state territory.[12] It appears that host states are not prepared to go all the way, and feel better with a hybrid leading to a limbo outcome.[13] We will have to revert to possible explanations for this choice, and be content with the fact that the sub-procedure on exclusion is as much a hybrid as the others.

At this stage, the whole idea of improving coherence and consistency in refugee status determination by analogising to other areas of law appears to be overoptimistic at best. Yet, the potential of procedural analogies is not exhausted here, provided we move on to look at another system of norm enforcement beyond the confinements of secular law. This will eventually reveal on how much asylum procedures owe to quite a different institution: that of auricular confession.

11.3. THE HERITAGE OF AURICULAR CONFESSION

In the penal context, confession is described as the 'queen of proof'.[14] It may be rewarded by a reduced sentence, leading to earlier re-inclusion into society. In the Roman Catholic tradition, the confession of a contrite sinner is rewarded with absolution, which opens up the path to the re-inclusionary sacrament of communion. It appears that the ideal asylum applicant is to behave just as a penitent delivering confession. This informal norm is a crosscutting feature in the sub-procedures on immigration, identity and protection described above. In all three, the applicant must be prepared to impart any kind of information – be it about the travel route, identity, or details of the protection claim. Withholding information, delivering it piecemeal, in a strategic manner, or in a contradictory fashion is sanctioned by withdrawal of the decision-taker's trust and might be fatal to the claim. This informal norm is insisted upon even in situations where the applicant risks harming her or his own interests by providing information.[15]

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[12] *See* Gilbert, *supra* Chapter 9.

[13] *See* Art. 21 QD, which bluntly states that 'Member States shall respect the principle of non-refoulement in accordance with their international obligations'. Excluded persons will also come within the ambit of this norm, which merely reminds Member States that obligations flowing from Art. 3 CAT, Art. 3 ECHR and Art. 7 ICCPR, remain unaffected by formal exclusion in the refugee determination procedure.

[14] Zahle, *supra* Chapter 2.2.

[15] For an illustration, this could be compared with the right of the accused to remain silent. '[T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an adverse inference from the silence of one who is called upon to speak' *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984). The right to remain silent is an integral part of the human right to a fair trial, enshrined *inter alia* in Art. 6 ECHR. The perspective developed in this text might elucidate why the ECtHR has consistently rejected

In order to determine whether the confession analogy provides explicatory value, we have to briefly revert to the historical sources and functions of confession practices.[16] Within the Roman Catholic Church, confession, penitence and absolution form an institution guarding the integrity of personal and moral boundaries.[17] In that respect, the Church and the State share basic regulatory needs. They could be described as personal and moral sovereignty.

In its early history, confession provided a tool for the church to regulate access to membership, and to defend its moral code rigorously amongst members. Over time, and in tandem with the proliferation of Christianity,[18] the control of membership through confession practices lost its importance. First, the Church gradually toned down the threat of withholding absolution to sinners and, by consequence; exclude them from reconciliation with the Church community. Therewith, personal sovereignty was no longer exercised through the institution of confession. Second, the guarding of moral boundaries became privatised over time. In early Church history, sinners confided publicly. With the advent of auricular confession, the parish was gradually excluded as an audience, and the public display of repentance – through the wearing of sackcloth or other forms of humiliation – gave way to its private performance through works. Reformation had a remarkable impact on the institution of confession, *inter alia* doing away with its sacramental status for protestant Christians and emphasising the grace of God over the role of the confessor priest. Today, confession is close to a stage of near-complete internalisation. Auricular confession is being practised less and less within the Roman Catholic Church, and it appears to be largely replaced by collective absolution before communion, papal countermoves not withstanding.[19] Also, the

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the applicability of Art. 6 ECHR to asylum procedures. The relevant precedent is *Maaouia* v. *France* [GC], no. 39652/98, 5 October 2000, §§ 38 and 40.

[16] Michel Foucault famously analysed the role of confession practices in the discoursive production of truth on sexuality in Chapter III of his *Histoire de la sexualité I: La volonté de savoir* (Editions Gallimard, Paris, 1976). A more comprehensive exploration of the development of contemporary governmentality from what Foucault describes as pastoral power is contained in his 1977–78 lectures at the Collège de France (published as M. Foucault, *Sécurité, Territoire et Population*, Éditions Gallimard/Éditions du Seuil, Paris 2004). The present inquiry cannot claim to be Foucauldian in its method – this would require a greater degree of historical differentiation and a more sophisticated analysis of the discourses actually spawned by the institution of asylum procedures. Rather, it is an attempt to show that a Foucauldian analysis of asylum procedures would be a worthwhile task.

[17] With regard to the history confession practices, the account in the following paragraph is based on B. Arruñada, *Third Party Moral Enforcement: The Rise and Decline of Christian Confession,* January 2003. Working Paper available at <www.univ-nancy2.fr/RECHERCHE/EcoDroit/DOWNLOAD/EALE/Arrunada.pdf>, accessed on 10 January 2005.

[18] Or perhaps, as is tempting to remark, the universalisation of Christianity.

[19] 'Individual and integral confession and absolution remain the only ordinary way for the faithful to be reconciled to God and the Church unless physical or moral impossibility excuses from such confession' *Pastoral Norms concerning the Administration of General*

role of the confessor underwent change: sanctions grew less and less severe, the judge-like functions of the priest gave way to the role of an intermediary between the individual repentant and God, whose grace was sought. All this suggests that the control of moral boundaries has become an internal matter for the individual. Both developments – the abolition of personal sovereignty and the privatisation of moral sovereignty – appear to fit well with a liberal narrative of secularisation and individualisation.

It would be wrong, of course, to assume that occidental communities have simply abandoned self-control of personal membership and moral codes through auricular confession. Personal and moral boundaries still exist, and are defended by specialised community institutions. Some of the most prominent ones are indispensable for the nation state: administrative authorities and courts of law.[20]

Whether we like it or not, the heritage of auricular confession influences the operation of these institutions, irrespective of their nominal secularity. Groebner's study has demonstrated the intimate relationship between the institution of confession and the development of modern population control.[21] When the Fourth Lateran Council of 1215 had prescribed obligatory confession at least once a year, a control need emerged within the Church. Lists of penitents were drawn up, and *schedulae confessionis* were issued, entitling them to participation in communion.[22] These *schedulae* were important identification documents, especially when the credentials of travellers were at issue. In the period of counterreformation, their possession was crucial to avert suspicions of heresy.[23] The religious institution of confession had spawned a control technology of its own, which could be conveniently emulated by emergent nation-states. Hence, we should not be deceived: confession, and its relation to the sacred, did not vanish as the core technology of personal and moral sovereignty. It merely took on different forms, while retaining its links to the sacred.[24]

Sacramental Absolution Issued by the Sacred Congregation for the Doctrine of the Faith. Approved by His Holiness Pope Paul VI on June 16, 1972, para. 1.

[20] There are others. As Jacques Le Goff usefully points out, the institution of confession is at the beginning of a development leading via introspection and self-critique to Freud as the paradigmatic figure of modern psychoanalysis. J. Le Goff, *Das alte Europa und die Welt der Moderne* (C.H. Beck, Munich 1994) p. 35. As the German text was concurrently published with French, English, Italian and Spanish editions in a series edited by Le Goff himself, I have permitted myself to use it here.

[21] V. Groebner, *Der Schein der Person. Steckbrief, Ausweis und Kontrolle im Mittelalter*, (C.H. Beck, Munich, 2004). Groebner's historical account tellingly ends with reflections on the fate of contemporary *sans papiers* and boat refugees in Europe.

[22] *Ibid.,* Groebner, p. 51.

[23] *Ibid*., Groebner, p. 150.

[24] 'Das Mittelalter hat Europa noch auf andere Abwege geführt. Um die Mängel des Feudalsystems und die Ungleichheiten zu begrenzen, auf denen es beruhte, hat es den modernen Staat begründet, der gerechter war, aber sehr schnell zu einem Götzen geworden ist. Er hat den alten religiösen und feudalen Mächten das Sakrale entzogen und es an sich

My argument is that the institution of asylum procedures replicates important elements of the institution of confession, absolution and reconciliation. The emphasis on the narrative of the applicant-penitent, the pivotal role accorded to an elusive 'authenticity' and the difficulties of both institutions to explain the core process of establishing 'general credibility' and 'contrition' are perhaps the most striking similarities. As a matter of fact, both institutions perform analogous functions: to uphold personal sovereignty (the regulation of immigration), to exercise moral sovereignty (to demand truthfulness and cultural adaptation in confiding, to exclude those who have committed acts listed in Article 1F CSR) and to reconfirm the sacredness of the system of nation states. In the following section, the listed elements and their functions will be examined.

11.4. AURICULAR CONFESSION AND THE ASYLUM PROCEDURE

Let us explore the details of the confession analogy suggested here. This is the basic setting: the asylum seeker should be compared to the penitent, with determination officers taking the role of the confessor (that is, a priest). While the confessor is acting within the institutional framework of the Church and tasked to communicate the grace of God by absolving the penitent, the determination officer is acting with the institutional framework of a system of nation states. The officer is tasked to 'recognise'[25] a successful applicant as a refugee, which is a sovereign act. There are other, problematic components in the analogy. What is the equivalent to the confided sin, and what corresponds to penance? If absolution expresses the grace of God, how can a man-made legal decision in the secular framework of asylum procedures be likened to it? What conditions are necessary for absolution? And who decides on whether the conditions are fulfilled? Who is represented by that decision? Let us approach these difficult issues step by step.

It was already stated that confession as well as the asylum procedure are about membership. In the case of confession, this is particularly visible in the early history of the institution. Confession was a singular event, a precondition for passing the threshold for Church membership. In line with this perception, penitence was performed before baptism, and absolution could not be repeated. Apostle Paul believed that a Christian could, and should, live free from sin thereafter.[26] In the period between 150 and 650, the institution of Canonical Penance was developed to reconcile sinning Church members with the Church.[27] Obviously, the emphasis shifted from first time admission through baptism to readmission of Christian sinners.

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gerissen, um einen neuen Leviathan zu schaffen, die *Staatsraison*. Das heutige Europa ist davon noch nicht geheilt.' J. Le Goff, *supra* note 20, p. 35 [emphasis in the original].

[25] The recognition terminology is taken from the UNHCR Handbook, para. 28.

[26] H. Gunkel and L. Zscharnack, *Die Religion in Geschichte und Gegenwart. Handwörterbuch für Theologie und Religionswissenschaft*, 2nd ed. (J.C.B. Mohr, Tübingen, 1927) p. 1394.

[27] B. Arruñada, *supra* note 17, p. 12.

Asylum procedures are, too, about membership. At a minimalist level, *non-refoulement* allows for a limited form of membership. At the other extreme of the scale, we encounter a recognised refugee with a permanent residence permit, perhaps aspiring for naturalisation. But these dimensions of membership do not interest us here. Rather, we shall seek inspiration in the terminology of the late 1940s, which framed refugees as *de facto* stateless persons.[28] Today, this term is perhaps more appropriate to denote asylum seekers, who lack the protection of their home country, while that of the host country is still provisional, and may end at the time when the final decision is taken. In fact, it is only while an asylum claim is pending that the claimant is *de facto* stateless. If the claim is accepted, this means inclusion into the host state. If the claim is rejected, this will lead to return and inclusion into the country of origin, at least in theory. Either way, it is about membership, be it into a new nation state, or into the state of origin.

From that perspective, both acceptance and rejection decisions are about re-inclusion into the system of nation states – or, in sacramental language, *reconciliation*. The irregularity to be mended through reconciliation is not necessarily the undocumented transgression of international borders by the asylum seeker (although this defiance of state sovereignty is a component of the irregularity at issue here). Rather, it is the fact that *the asylum seeker leaves the system of nation states*. Voluntarily or not, s/he demarcates a space outside state sovereignty, a space where man is not citizen. This is a taboo,[29] and its breach is ended only when the asylum procedure comes to a final decision.[30] Agamben has employed the term

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[28] 'There are two categories of stateless persons: *de jure* and *de facto*. 1. Stateless persons *de jure* are persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one. 2. Stateless persons *de facto* are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals. The Constitution of the IRO in its Annex I (First part-Section A.2) uses this formula: "a person . . . who . . . is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality"' United Nations, *A Study on Statelessness* (Lake Success, New York 1949), E/1112;E/1112/Add.1, Section III.

[29] 'If refugees (whose number has continued to grow in our century, to the point of including a significant part of humanity) represent such a disquieting element in the order of the modern nation state, this is above all because by breaking the continuity between man and citizen, nativity and nationality, they put the originary fiction of modern sovereignty in crisis. Bringing to light the difference between birth and nation, the refuge causes the secret presupposition of the political domain – bare life – to appear for an instant within that domain.' Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life* (Stanford University Press, Stanford, 1998) p. 131.

[30] Rejected asylum seekers who cannot be returned to their home country are perceived as a particularly grave problem by states in the North, who see this caseload as challenging the integrity of migration and asylum policies. This caseload actually permeates the taboo breach described here.

scarto[31] for this taboo, and we will use it in the following. The asylum seeker is a supra-national, and it is the function of asylum procedures to reduce her/him to a mere national.[32] We need to revert to the breach of the *scarto* taboo later on, beyond its correspondence to the sin of the penitent.

What is this final decision, then? A form of absolution perhaps? Here, we must discern between recognitions and rejections. Only a decision recognising the protection needs of the claimant features the structural elements of the decision to absolve a repenting sinner. Why is that so? When rejecting a case, the asylum authorities in a host state merely state that the applicant is indeed protected by her/his country of origin. The *de facto* statelessness of the applicant was but an illusion. Or, to translate it into the language of our analogy, the 'sin' of transgressing state sovereignty was never really committed. Hence, there is no need to absolve and reconcile, but merely a practical need to send back the applicant to the state community of which s/he always was, and continues to be, a member. The host state needs not perform an inclusion, but merely state that the original inclusion (by birth, other acquisition of citizenship or 'habitual residence') is still valid, and never ceased to be valid. The applicant was but an impostor.[33]

How about decisions by which an asylum seeker is recognised as a refugee? Indeed, such decisions contain elements of absolution practices. First, they relate to situations were the system of nation states was indeed transgressed, and the monopoly of state sovereignty defied. The *scarto* taboo has been breached, and it is now appropriate to draw parallels to a sin.[34] Asylum procedures privatise the violation of the *scarto* taboo in an interesting way. The old maxim that refugee recognition is declaratory and not constitutive[35] actually colludes that the asylum seeker was supra-national before the decision was taken. Instead, this maxim holds, he was already a refugee, from the moment when the preconditions of the definitions were fulfilled. By consequence, there is no gap between exclusion from the country

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[31] 'The fiction implicit here is that *birth* immediately becomes *nation* such that there can be no interval of separation [*scarto*] between the two terms. Rights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground (who must never come to light as such) of the citizen.' Agamben, *supra* note 29, p. 128.

[32] Or a quasi-national, by means of the denizenship accorded to the recognised refugee.

[33] It is quite another matter that the transgression of immigration laws and the initiation of procedure is an unwanted behaviour from the perspective of the host state. But we need no confession analogy to describe what is going on within the sub-procedure dealing with border control.

[34] At this stage, I want to be cautious with the allocation of responsibility for that 'sin'. What I do not want to do is to claim that the asylum seeker carries such responsibility in a legal or moral sense.

[35] 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.' UNHCR Handbook, para 28.

of origin and inclusion into the host state. For the outsider, the temporal gap of the asylum procedure disappears *ex post* once the maxim is applied.

There are other, less striking parallels between the privacy of the asylum procedure and the privacy of auricular confession. To protect the interests of the applicant, care must be taken that the country of origin, and more specifically, the agent of persecution, is not made aware of individual asylum claims.[36] This norm leads to a culture of privacy, where names of applicants are censored for good reasons. In certain host states, asylum decisions are not published.[37] The confidentiality of auricular confession can rely on the legally protected 'clergy-penitent privilege' for readily understandable reasons. The confessor is obliged not to communicate the content of confessions to third parties, which creates a private space respected by the legal system.

Let us now proceed to a stage where our analogy lays bare a foundational misconception in the secular asylum procedure. Both auricular confession and the penal procedure deal with the perpetrator, as sinner or suspect.[38] The goals of confession as well as of penal punishment are largely identical: repentance, reform and reconciliation.[39] A secular asylum procedure, however, serves to identify victims, not perpetrators. As our structural analysis has shown, the asylum seeker is treated as if s/he were a sinner-perpetrator, up until the very moment where 'general credibility' is established. Only from then on, s/he is a victim – the victim of future, perhaps also of past human rights violations. Structurally, this replicates the change from *attritio* (a state of mind characterised by fear of God) to *contritio* (a state of mind characterised by the love of God) in the process of confession and absolution.[40] The repentant reaches a stage where dissociation from sin is not caused by fear, but by love. The difference is evident: I may fear a sanction, but continue to identify myself with the sanctioned act. Any abstention from such acts will be strategic from my side, as my convictions have not really changed. If I abstain from

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[36] Arts. 22 and 40 PD.

[37] One reason is that the collusion of information enabling the identification of applicants is resource consuming. Sweden is a case in point. A selection of cases considered to possess guiding value is published by the Aliens Appeals Board and the Government. Authorities share other cases upon request. In the shared documents, the names of applicants as well as circumstances enabling their identification have been removed. It is not infrequent that this impairs the reader's capacity to understand the *ratio decidendi*, and detracts from the predictability of future decisions.

[38] And both have great difficulties in dealing appropriately with victims, one should add. The penal procedure risks humiliating victim witnesses, and the confidentiality of auricular confession limits confessors' capability to effectively assist victims or would-be victims.

[39] With regard to the penal procedure, Duff explicitly lists these as the 'the three "R"s of punishment'. Duff, *supra* note 1, p. 107–112. These three are obviously inspired by the practice of auricular confession, which forms part of a larger concept of repentance (*see* H. Gunkel and L. Zscharnack, *supra* note 26, p. 1393–1404). The nucleus of reform is the concept of 'contrition' with the repentant. The linkage between confession and communion reflects the dimension of reconciliation in Roman Catholic rituals.

[40] H. Gunkel and L. Zscharnack, *supra* note 26, p. 1400.

sin for love of God, however, my conviction will have changed and I will dissociate myself from the sin. At the stage of *attritio*, I have committed a sin, due to my power to commit evil. At the stage of *contritio*, I committed a sin, due to my weakness to resist evil. This change is at the heart of repentance, and provides the nucleus of reform.

How is this relevant for the moment of refugee 'recognition', corresponding to the moment where the priest absolves the contrite penitent? What happens when the decision taker concludes that the applicant is 'generally credible'? In the moment of recognition, the applicant transmutes from a potential impostor, from an offender of immigration laws, into the victim, to be saved by the grace of the state sovereign. This is a grace communicated through the decision taker, who merely represents, but is not identical to, the state sovereign.[41]

Let us reconsider the three sub-procedures listed earlier. In the two sub-procedures on immigration and on identity, the applicant is treated as a suspect, acting strategically, and defying norms to promote her or his own interest. This corresponds to the perpetrator role. Consider then the third sub-procedure on protection. Here, the applicant is accorded the role of the victim: a person who could not resist the violation of immigration laws because s/he risks persecution.[42] The asylum procedure already offers us the applicant in both roles, and allows the decision-taker to swap from one to the other when 'recognising' a refugee. It is as if the refugee-victim was colluded by the role of the impostor-perpetrator until the moment of 'recognition'. When the applicant is recognised as a refugee, the decision-taker really says that the *attritio* of the asylum seeker has been changed into the *contritio* of the refugee.

This brings us to the core situation of both institutions: the communication taking place between asylum seeker and determination officers, and between the penitent and the confessor respectively. If a recognition decision in the asylum procedure indeed involves a dimension of absolution, we need to identify the conditions of absolution. But can they be identified?

> The Roman Catholic Church claims that the absolution of the priest is an act of forgiveness; to receive it the penitent must confess all serious (mortal) sins and manifest genuine 'contrition', sorrow for sins, and a reasonably firm purpose of amendment. . . Roman Catholic theologians have not arrived at an explanation of the process of absolution. They do not admit that absolution is merely a recognition by the priest of dispositions on the part of the penitent that merit forgiveness nor that it is merely a process whereby the penitent is reconciled with the church. There seems to be an unspoken belief that it is a rare person who is really

[41] For those who want to stretch the analogy further than what I need to do here, the delegation of competency in Art. 4(5)(e) QD as discussed *infra* corresponds to that effectuated by Christ after resurrection, endowing his disciples with the power to forgive sins: 'Receive the Holy Spirit. If you forgive the sins of any, they are forgiven. If you retain the sins of any, they are retained' (John 20:22-24).

[42] This logic inspires the structure of Art. 31 CSR.

> sorry for his sins and that the sacrament is a manifestation of the graciousness of God to human weakness.[43]

Although the message given by theological expertise is not entirely clear, a number of signposts are set up. Forgiveness is not unconditional, but presupposes a certain comport and state of mind of the applicant. Yet there is no mechanic exchange in confession, and it is neither for the penitent's dispositions nor the priest's personal discretion alone to determine absolution. The surplus element of grace emerges here. Grace is incalculable for the human mind, and remains a black box. Yet, we should add, this incalculability, and the insecurity created by it, is an important feature of the institution.

Demanding the penitent to confess *all serious sins* has a correlate in EU asylum law. According to Article 4.1 of the EU Qualification Directive, 'Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection'.[44] According to that provision, these elements not only comprise information relevant for assessing the protection claim, but also those relating to the sub-procedures on immigration and identity:

> The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.[45]

This makes it abundantly clear that the applicant is expected to impart information even if it reveals irregular behaviour in the migratory process and thwarts her or his own strategic interest. Information that may trigger reallocation to another EU Member State or a Safe Third Country must be passed on as well. States are serious about this demand and various forms of tangible sanctions have been introduced.[46]

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[43] J. L. McKenzie, 'Roman Catholicism' *Encyclopædia Britannica*, from Encyclopædia Britannica Online. <http://search.eb.com/eb/article?tocId=43694>, Accessed November 26, 2004.

[44] It should be underscored that the Directive as such does not oblige Member States to introduce or maintain such a duty. According to Art. 3 QD, 'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive'.

[45] Art. 4(2) QD. It should be noted that the Directive as such does not prescribe that Member States introduce this duty.

[46] A widespread technique is to sanction the applicant's lacking cooperation in establishing her or his identity with a reduction of benefits. By way of example, Sweden has introduced reduced financial benefits for this group in 2004, and is presently considering the possibility of adding further sanctions (denial of the right to family reunification and temporal limitation of residence permits).

The Draft of the EU Asylum Procedures Directive makes explicit that Member States may assume that the applicant has implicitly withdrawn or abandoned her/his application when it is ascertained that s/he 'has failed to respond to requests to provide essential information to his/her application in terms of Article 4' of the Qualification Directive.[47]

In other words, the state sovereign confronts the applicant with an unconditional demand for the whole truth.[48] This correlates to the penitent's unreserved confession of all serious sins as a precondition for absolution. Article 4(5) QD confirms this, adding a linkage between the range of elements to be confided and the establishment of 'general credibility':

> Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
>
> (a) the applicant has made a genuine effort to substantiate his application;
>
> (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
>
> (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
>
> (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
>
> (e) the general credibility of the applicant has been established.

This provision is inspired by the UNHCR Handbook's elaborations on the 'benefit of the doubt'.[49] EU Member States have, however, taken care to phrase it in a more demanding manner. Contemporary asylum claims typically raise issues that cannot

[47] Art. 20(1)(a) QD.

[48] The significance of this truth claim for statecraft is nicely brought out in Derrida's analysis of Kant's 'supposed right to lie out of humanity': '[B]y refusing the basis of any right to lie, even for humane reasons, and so any right to dissimulate and keep something to oneself, Kant delegitimates, or at any rate makes secondary and subordinate, any right to the internal hearth, to the home, to the pure self abstracted from public, political or state phenomenality. In the name of pure morality, he introduces the police everywhere, so much and so well that the absolutely internalised police has its eyes and its ears everywhere . . . Hospitality is due to the foreigner, certainly, but remains, like the law, conditional, and thus conditioned in its dependence on the unconditionality that is the basis of law.' J. Derrida and A. Dufourmantelle, *Of Hospitality. Anne Dufourmantelle invites Jacques Derrida to Respond* (Stanford University Press, Stanford CA, 2000) p. 69–70.

[49] UNHCR Handbook, paras. 203–4.

be supported by documentary or other evidence, and rest solely on the account of the applicant. The requirements laid down in the quoted provision are potentially relevant for many cases.

Its listing of requirements is cumulative, and involves a number of discretionary judgments on part of the determination officers. Let us look at two conditions that are particularly relevant in the practice of states. Those are the condition that the applicant's statements are found to be coherent and plausible (Article 4(5)(b) QD)[50] and the condition demanding that the 'general credibility of the applicant has been established' (Article 4(5)(e) QD). From a strictly scientific point of view, both conditions are questionable, yet the Qualification Directive insists on them anyway. How can this be explained?

A demand of coherence and plausibility of the applicant's statements might seem uncontroversial at first sight. Yet it raises significant obstacles for persons suffering from trauma, PTSD or other psychological *sequelae*, as Herlihy reminds us.[51] The account of a person suffering from such conditions can be regarded as coherent and plausible only if the decision-taker fills in the gaps created by the condition. Here, we do not wish to engage in a critique of EU legislation. Rather, the very fact that the demand of coherence and plausibility is formally upheld even towards persons suffering from PTSD or trauma reflects that the asylum procedure is premised on an inexplicable element of grace. In this particular case, this grace of forgiveness will enable the decision-taker to 'recognise' a refugee suffering from psychological *sequelae*. In the next step, the decision-taker will fill in her or his account in a manner securing coherence and plausibility, to then abstain from corroboration. Logically, this is a circular process. Then again, it might be unfair to subject the exercise of grace to demands of logic. If there is any reason motivating the coherence and plausibility demand for PTSD victims, it is the *raison d'Etat* at most.[52]

Very similar considerations apply to the latently powerful condition of 'general credibility' in Article 4(5)(e) QD. This condition really represents a nexus element, amalgamating the three sub-procedures into one, and allowing the decision-taker to sanction uncooperative behaviour in the sub-procedures on immigration and identity. Let us agree that there are good reasons for general credibility tests from a game-theoretical perspective. Decision-taking on the protection claim alone is usually a one-shot game, where a host state is denied the possibility to sample the

[50] The demand is underscored by a related sanction in Art. 23.4.g PD, which envisages the relegation of applicants to 'prioritised or accelerated' procedures where 'the applicant has made inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having being the object of persecution under' the Qualification Directive. Also, according to Art. 29.2 PD Member States may regard such applications as manifestly unfounded, if it is so defined in their national legislation.

[51] See Herlihy, *supra* Chapter 7.3.

[52] *See* the quotation of Le Goff, *supra* note 24.

reliability of the applicant by repeat observations of his actions.[53] Now, adding the performance of the applicant in the other two sub-procedures theoretically provides a host state with two further possibilities to test the applicant's reliability.

However, from a perspective of logic and relevance, this type of reliability sampling is simply out of place. A fact may be relevant in the sub-procedure on immigration, while it is totally irrelevant in the sub-procedure on protection. Even if we narrow the scope of credibility assessments to facts presented in relation to the protection claim, assessments of personal credibility have a very limited role in an inquisitorial system dominated by the adjudicator's own evaluation of those facts.[54] How come, then, has a condition of general credibility nonetheless retained such a central and malleable position in the asylum procedure?

The confession analogy suggests a possible answer. The asylum seeker who does not confess *all* serious sins will not be absolved, even though s/he is comprehensive and truthful in her or his account on protection-related elements. What is demanded of the applicant is faith in the sovereign state. The decision-taker's *credo* in the general credibility assessment is a conviction that this faith exists. It expresses itself in unreserved openness, an element of the *contritio* of confession. But the condition of *contritio* is not exhausted by a demand of faith. Another facet is the penitent's preparedness for reform. This preparedness is tested, first, through the unconditional demand for truth vis-à-vis the host society, and, second, by conforming to gendered and cultural expectations when delivering her or his account, as Spijkerboer has shown.[55] Third, and perhaps most telling, the applicant's revelation of details on her or his travel route (as explicitly requested by Article 4(2) QD) will potentially enable the state to strike against smugglers and migrants' networks.[56] Where states are successful in doing so, this will block the way for future asylum seekers. The demand for the truth regarding the travel route is but a demand to change sides: the applicant should cease to behave as member of the group of refugees, and become loyal to the host state. Indeed, the showing of a tangible sign of reform is at stake here.[57]

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[53] According to Sobel's theory of credibility, reliability can only be communicated through actions. Someone becomes credible by consistently providing accurate and valuable information or performing useful services. J. Sobel, 'A Theory of Credibility' LII *Review of Economic Studies* (1985) pp. 557–573.

[54] Popovic has explained elsewhere how the applicant's duty of information at all stages of the procedure combined with the absence of a principle of immediacy leads to credibility assessments on the basis of prematurely formulated or misperceived claims. *See* A. Popovic, 'Definitions', forthcoming in *Evidentiary Assessment in the Asylum Procedure. Final Report*. Lund 2005, section 8.

[55] See Spijkerboer, *supra* Chapter 5.1.

[56] M. Williams, 'Nej till generell TUT' (2004) 4 *Artikel 14*, p. 2.

[57] Former *mafiosi* choosing to cooperate with the police authorities and revealing information about the Mafia are known by the Italian word for penitents – *pentiti*. By conforming to the requirement of delivering information on the travel route, asylum seekers cease to be part of migratory networks and become the *pentiti* of the migration control régime.

11.5. IMPOSTOR OR 'VICTIM TO BE SAVED'?

The asylum procedure is the institution where men and women become visible as 'bare life',[58] as political agency beyond its consummation by the sovereign state. The asylum procedure is a device for colluding this political agency by transforming the applicant either into an impostor or a 'victim to be saved'. The breach of the *scarto* taboo and the anomaly of *de facto* statelessness are both addressed and done away with in a binary choice: either, the applicant is returned to her or his country of origin, or subjected at least temporarily to the sovereignty of the host state. Before this decision is taken, however, a large fraction of asylum applicants risk being cast in a perpetrator role by virtue of the irregular means employed to enter the host country. Procedurally, the role model of a perpetrator is amplified by merging the evidentiary assessments of the three sub-procedures on immigration control, identity and the protection claim.

The neutralisation of the refugee's political agency through the role of a mere 'victim to be saved' begs some explanation. Traditionally, the core function of a state's territorial defence is to secure citizens on its territory. The citizens thus protected are the objects of security, as the very purpose of territorial defence is to protect. However, that state's citizens also determine and legitimise the politics of territorial defence. This makes them the subjects of security. This identity between subjects and objects of security ultimately legitimises defence policies – those who are primarily affected by territorial defence are given the opportunity to participate in its regulation.

In the standard case of territorial defence, the subject and the object of security are still identical: it is the citizen of the territorial state defending itself. The much-debated example of a 'humanitarian intervention' without Security Council mandate is different. Concretely, this type of interventions implies that a group of persons (e.g. the victims of gross and widespread human rights violations) benefits from protection, without itself being able to participate in the decision-taking of relevance to their situation. Hence, this group of victims is a mere object of security, rather than its subject. This splits the identity of ruler and ruled, so crucial for the production of legitimacy in democracies. As a consequence of this disaggregation[59] in crisis intervention, its legitimacy has to be produced by other means.

In doing so, the discoursive construction of an appropriate 'victim to be saved' is crucial. In the case of humanitarian intervention, the intervening state produces legitimacy through the 'victim of genocide'. From the perspective of the intervening power, the 'victim to be saved' is no individual person, no political agent, but a figure of speech in conversations about legitimation. Saving such a victim is to make it into a mere object of security. The presumed interest of the 'victim to be saved' not to become or remain a victim of a human rights violation provides for the likewise assumed consent to intervention. These assumptions work, because they rest on a

[58] *See supra* note 29.

[59] For an application of the logic of disaggregation described here, *see* G. Noll, 'Disaggregated Security? Differences in EU Capability Building for Refugee Protection and Military Intervention', 7 *Tidskriftet Politik* (2004) pp. 44–55.

discourse of inalienable and universal human rights. Similar dynamics are at work in the discourses on migration control and trafficking.

In the area of refugee protection, however, the logic of disaggregation cannot function as a device of legitimation. Refugees move between territories, and these moves have political significance. To flee is an attempt to determine one's own security situation. Or, simply put, to become a refugee is to become a subject of security. It is only when the movement of asylum seekers has come to a halt that they may be transformed into a 'victim to be saved' and a mere object of security. This is exactly what happens in the 'general credibility assessment' of the asylum procedure.

11.6. CONCLUDING AN EPILOGUE: FROM THE RITE OF ASYLUM TO A CLAIM TO NON-REFOULEMENT?

Refugee status determination is an ongoing reconfirmation that the system of nation states is truly universal. In each single asylum case where a substantive decision is made, we witness the performance of statecraft.[60] Our inquiry has shown that credibility assessments are central to this performance, which replicates the performance of the sacred in auricular confession. The 'generality' of credibility assessment exceeds the rational exigencies of refugee status determination as a legal procedure, and adds a metaphysical surplus to the exercise of state sovereignty in refugee recognition. In this sense, it would be more appropriate to speak of a 'rite of asylum', if we seek to describe evidentiary assessment in contemporary refugee determination practices.

Where do we go from here? Is it possible to peel off the metaphysical layer and secularise asylum procedures? A first step would be if policy-makers, legislatures and decision-takers seriously considered the suggestions and conclusions by the authors of this volume. Beyond this ever so important change of dynamics, we should have no illusions. The constitutional conflict between the refugee's political agency and the *raison d'Etat* will not go away, as long as the system of nation states dominates the way we organise our lives. There are good reasons, however, to reconstruct the procedures responding to the protection claims of other human beings who happen not to share our citizenship in a transparent and predictable manner – as the legal practice they already purport to be.

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[60] For an analysis of the international refugee regime from a statecraft perspective, *see* N. Soguk, *States and Strangers. Refugees and the Displacement of Statecraft* (University of Minneapolis Press, Minneapolis, 1999).

INDEX

D

E

F

G

H

I

W

BIBLIOGRAPHY (SELECT)

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TABLE OF CASES

TABLE OF CASES

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

AUSTRALIA

CANADA

TABLE OF CASES

DENMARK

THE NETHERLANDS

Afdeling bestuursrechtspraak van de Raad van State [Judicial Department of the Council of State]

NEW ZEALAND

NORWAY

UK

USA

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Jens Vedsted-Hansen has participated in various international research projects as contributor, commentator or panel member. He is a member of the Odysseus Academic Network of Legal Studies on Immigration and Asylum in Europe, and of the editorial board of European Journal of Migration and Law. He served as a member of the Danish Refugee Appeals Board from 1987 to 1994.

His research interests include administrative law, immigration and refugee law, and human rights law. His most recent publications include:

- Midlertidigt asyl i Norden (Temporary asylum in the Nordic Countries), Nordic Council of Ministers, Copenhagen 1999 (with K. U. Kjaer, T. Einarsen and J. W. Dacyl).

- "Non-communitarians: refugee and asylum policies", in : Philip Alston (ed.): The EU and Human Rights, Oxford University Press,1999 (with Gregor Noll).

- Udlaendingeret (Aliens Law), 2nd ed., Copenhagen 2000 (with L.B. Christensen et al.)

- New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union, Kluwer Law International 2002 (ed. with Rosemary Byrne & Gregor Noll, coauthor of chapters 1, 4 and 9).

Henrik Zahle is a professor of jurisprudence at the Faculty of Law, University of Copenhagen. He has worked at different levels within the Danish court system, and served as a judge in the Danish Supreme Court from 1999 to 2002. Professor Zahle has written on the comparative law of evidence, Danish constitutional law, and is currently preparing an introduction to legal philosophy targeting issues relevant for legal practice.

INFORMATION NOTE ON THE REFUGEE RESEARCH PROGRAMME

In June 2001, the Danish Institute for Human Rights and the Office of the UN High Commissioner for Refugees (UNHCR) concluded an agreement on the launch of a Refugee Research Programme. The programme is a common endeavour between UNHCR and the Danish Institute for Human Rights. Initially, it is planned to run over a five-year period, and other actors from the international research community will be invited to participate.

The aim of the Refugee Research Programme is to engage in the research and study of refugee issues in general, and their human rights aspects in particular. A further objective is to collaborate in the promotion of comprehensive, integrated approaches to refugee and migration problems in Europe, and to jointly reflect and strategize on public education and awareness-building needs, with a view to enhancing community understanding of, and support to, refugees and asylum-seekers as one of the means for countering racism, xenophobia and intolerance.

As of 2004, two projects have been implemented:

1. A pilot study on "Safe Avenues to Asylum" has been carried out in 2001 within the framework of the programme. The study scrutinises the different existing models providing for a possibility to apply for asylum at diplomatic or consular representations, and analyses the fairness and efficiency of such practises. It inquires into the potential for harmonising the existing EU acquis in the area of migration and asylum, and indicates possible solutions, which Member States and EU institutions could pursue in the establishment of in-country processing. This pilot study was financed in its entirety by UNHCR, and the final report of the study was published in early April 2002.

Based on the experiences gained during the pilot study, the Danish Centre for Human Rights won a tender for an in-depth study on "the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure", commissioned by the European Commission and financed through the European Refugee Fund (Commission allocation). This study was authored by Gregor Noll, Jessica Fagerlund and Fabrice Liebaut. Its aim was to provide the analytical background for any future community legislation in that area. The results of the study were reported to the European Commission in October 2002 and are available on the Commission's website.

2. The second project "Representations of reality in and by asylum systems. Proof, credibility and public perception" was designed to embrace two interlocking sub-studies: one dealing with different approaches to proof and credibility in the asylum procedure (a major cause of divergences in recognition rates among EU Member States), and another analysing how the layout of asylum procedures may affect the integration of refugees in host societies. A preparatory seminar for the first sub-study took place in November 2001, with two further conferences in Dublin and Lund following. The present volume is the main outcome of the first sub-study.

This project has also spawned further research projects on evidentiary assessment in the asylum procedure. Their results will be reported in future publications.

A third project is currently under preparation.

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