# Introduction: Witness to the Persecution? Expertise, Testimony, and Consistency in Asylum Adjudication

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The narratives of refugees and asylum seekers are routinely subjected to scrutiny in a variety of Western jurisdictions, ranging from the administrative courts in the United States and the immigration review board of Canada, to the multiple levels of review in diverse European jurisdictions. Historically, the refugee and asylum adjudication process (henceforth RSD) has been internal, domestic, and more often than not, behind closed doors and not subject to appeal. From the 1980s, however, many legislatures reformed administrative law systems to reflect greater accountability and domestic immigration laws and asylum review procedures were targeted for particular amendment (Alexander 1999). The legacy of these legislative reforms is now becoming apparent throughout North America, Europe, and Australasia. Just as the asylum and refugee adjudication process has become more transparent, denial and deportation rates have risen (Ramji-Nogales et al. 2009). Over the past decade, judges and adjudicators have sought to insulate their decision making by demonstrating sensitivity to evidence and narrative by incorporating external expertise. *Adjudicating Refugee and Asylum Status* explores the increasing evidentiary burdens on asylum seekers and expanding role of a variety of forms of expertise – ranging from country conditions reports, to biomedical and psychiatric evaluations, to the emerging field of forensic linguistic analysis – in refugee decision making.

In its 1979 *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR Guidelines)*, the UNHCR stated that while "the burden of proof lies on the person submitting a claim," it is often the case that "a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." Therefore, the UNHCR observed, the "duty to ascertain and evaluate all the relevant facts" is shared "between the applicant and the examiner." The handbook further noted that the "requirement of evidence should thus not

be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds" him or herself. Instead, an applicant's fear of persecution should be considered well-founded if he or she "can establish, to a reasonable degree," that his or her "continued stay" in the respective "country of origin has become intolerable." The 2011 reissue of the Handbook reaffirmed these guidelines, and common law countries have generally supported the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish "well-foundedness," persecution must be proved to be reasonably possible (UNHCR 1998).

Notwithstanding this lower threshold, according to Peter Showler, the former Chair of the Canadian Immigration and Review Board, deciding refugee claims is the single most complex adjudication function in Western societies (Rousseau et al. 2002, p. 43). To be a refugee and obtain asylum, an asylum seeker must prove that she is unable or unwilling to return to her country of origin either because she has suffered persecution in the past or because she has a "well-founded fear" of future persecution. The asylum seeker must also prove that her persecutor targeted her on account of at least one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group. Whereas in most criminal and civil procedures adjudicators are able to access a range of concrete evidence, asylum cases are marked by a general lack of factual, verifiable evidence (CREDO 2013, p. 11).

The central piece of evidence in an asylum case is the applicant's testimony, in written and/or oral form, where he or she narrates all the information relevant to her/his case. The case, therefore, hinges on whether the adjudicator deems the applicant's testimony to be credible. Documenting the situation in the country of origin, including general social and political conditions, the human rights situation and record, relevant legislation and application of law, the persecuting agent's politics or practices, and particular policies, practices, or attitudes towards persons who are in similar situations as the applicant, are especially important for assessing an individual's credibility (Cohen 2001; Millbank 2009; UNHCR 2013; CREDO 2013). In addition to country of origin information (COI), experts are increasingly called upon to lend credibility and corroborate the applicant's testimony of both events that occurred in the past (past persecution) and the risk that they will occur in the future should the applicant be returned to his or her country of origin (well-founded fear of future persecution). In evaluating the risk of persecution, bureaucrats, tribunals, and courts take into account the personal circumstances of the applicant such as his/her background, experiences, personality,

and other personal factors that could expose him/her to persecution. Particularly relevant is whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends, persons in the same situation.

There is little international guidance on the role of experts in asylum claims. An expert witness is generally a person, who by virtue of education, or profession, or experience, or a combination of all, is believed to have special subject matter knowledge beyond that of the average person sufficient that others rely on him for his opinions. In the U.S. immigration court, a person must qualify as an expert through a series of questions designed to establish expertise on the specific topic in question (*Immigration Court Practice Manual*, ch. 3). In the United Kingdom, if an expert can demonstrate a particular sitting judge has accepted his proficiency by citing a specific adjudication, other judges appear to be more willing to accept the claim of expertise. Although, technically, any person who has lived or travelled in the applicant's country would qualify as experts by definition, the credentials of such witnesses are often problematic in practice, especially if they appear to have a bias or pronounced view about the country, and carry little weight with the judge. The main exception to this generally rudderless context is that of standards and procedures on how to recognize and document symptoms of torture. The International Association of Refugee Law Judges has issued "Guidelines on the Judicial Approach to Expert Medical Evidence" and the Istanbul Protocol, a non-binding document, contains internationally recognized guidelines for assessing the claims of those who allege torture and ill treatment (Iocapino, Ozkalipci, and Schlar 1999; Haagensen 2007). It is widely used – as the chapters in this volume by Khatiya Chelidze et al. and by Hawthorne Smith, Stuart Lustig, and David Gangsei demonstrate – and has been an official U.N. document, "tantamount to a treaty" since 1999, although its utilization is uneven (Grossman 2009, p. 13; Wallace and Wylie 2014, p. 754).

*Adjudicating Refugee and Asylum Status* has two primary objectives. Collectively, we seek to critique the trend in Western jurisdictions toward the increasing dependence on expert testimony by drawing attention to the ways in which this dependence has distorted the standards, principles, and methods of establishing the facts of refugee claims. The chapters in this anthology examine ways in which expertise is shaped and delimited by immigration determination venues, which operate in a world transformed by greater access to information and technologies, and how knowledge and scholarly disciplines have responded to these challenges. To this end, while speaking to a general need for experts, the volume addresses the concern that

these evidentiary demands for unquestionable proof and authenticity point to the specific problems of documentation in Africa, the Middle East, Asia, and other parts of the Global South, where the lack of verified documentation is endemic. Collectively, the volume wrestles with the need for the development of cross-professional collaborations, guidelines, and standards for ways in which experts can become a more holistic asset to the refugee status determination process. Viewed as a conversation among lawyers, social workers, psychiatrists, social scientists and judges with personal experience of the system, this book offers considered reflection and practical guidance on the role of experts in Western countries where claimants may present their claims to an adjudicator and/or are granted an oral hearing in the RSD process. The expanding role of experts in the resource intensive asylum systems discussed in this volume raises the question whether this development, which makes a burdensome process even more demanding, is applicable globally.

More fundamentally, however, the authors in this volume address the epistemological challenges of the production of knowledge across cultures that are accompanying the increase in asylum and refugee claims worldwide. Whereas the original 1979 UNHCR Guidelines may well have emerged from a context of careful and thoughtful intention on the part of international agencies, the UNHCR does not carry sufficient legal authority to level the playing field internationally for asylum seekers (Avery 1983; UNHCR 2013). Instead, national implementation of the convention through domestic processes for RSD continues to reflect pre-existing legal structures and government institutions rather than any input from the UNHCR handbook. The absence of consensus in Western jurisdictions on common evidentiary assessment standards in RSD procedures remains a major obstacle to the development of a just assessment process (Anker 1990; Gorlick 2003; UNHCR 2013). Given the overall climate of immigration restriction in Western countries, the UNHCR Guidelines have become a double-edged sword, providing standards for those who seek to locate new rules, tools, methods, and procedures, for the deployment of, "deference to" (Barnes 2004, p. 352), and exclusion of expert evidence and testimony, often through new case law and precedent (Refugee Review Tribunal 2006; Norman 2007).

These tensions and contradictions are born of a paradox. The UNHCR struggles with its own RSD role, simultaneously enforcing international legal mandates and acknowledging individual national RSD failures (Goodwin-Gill 2002; Barutciski 2002; Kagan 2006). But rather than simplifying the path to an asylum claim for traumatized, vulnerable, and often-undocumented refugees, the UNHCR Guidelines appear to have generated labyrinthine practices and processes tied to heightened securitization measures (Brouwer

2002). The lower threshold for establishing the "credibility" of a claimant is increasingly conflated with the much higher barrier of "proof" (Sweeney 2009). The essays in this collection narrate the experiences of asylum seekers and refugees as they navigate themselves and their families through untested pseudo-science and unverified country conditions claims, many of which imperil their credibility.

The assembled chapters were selected from over forty-five papers delivered at an international conference held in April 2012 in Rochester, New York, that explored the role and experience of the expert and the employment of expert testimony in refugee contexts. Read together, the chapters narrate a broad spectrum about the Global South migrant experience in Western immigration jurisdictions. This volume constitutes the first attempt to offer a comparative account of the globalized professional and clinical practices pertaining to the increasing reliance on experts in refugee law. Although several scholars have raised concerns about expert evidence in asylum cases (Good 2004; Thuen 2004; Piot 2007; Good 2007, 2008; Bloomaert 2009; Squire 2009), new legislation around the globe, such as the 2005 REAL ID in the U.S., and regional coordination (such as common standards in the European Union and in MERCOSUL countries) is contributing to the increasing reliance on experts. We view the time as ripe for serious scrutiny of the increasing dependence on expertise and the impact on the form, quality, and nature of the expertise produced in the context of RSD.

## THE ASYLUM DIALECTIC

*Adjudicating Refugee and Asylum Status* draws on clinical and academic reflections to raise compelling issues about trends in asylum adjudication, the ambivalence of adjudicators toward expert testimony and, in particular, the "hermeneutics of suspicion" that characterizes asylum and refugee proceedings in Western Europe and the United States (Ricœur 1965; Gadamer 1984; Stewart 1989; Kessler 2005). The resulting conversation provides a productive platform with which to evaluate the unfolding nature of the relationship between expert testimony and asylum adjudication. The clinical reflections by trauma specialists, legal advocates, and forensic experts in the first section highlight the significance of sociocultural inconsistencies in testimonies from refugees, and the back and forth between adjudicators and experts struggling to reconcile testimony with "fact." The academic studies reflect on how perceived physiological and psychiatric inconsistencies stimulate the development of new mechanisms and tests to mitigate inconsistencies. Psycho-medico inconsistency provides the vehicle for exploring the

particular ways in which the testimony of asylum seekers is imperiled by the adjudication process and the responses of experts to the challenges presented by the refugee status determination process.

An overarching interest of the authors here is in understanding the emerging role of experts and the performance of legal process as the dialectical relationship between asylum adjudicators and expert witnesses. While describing the relationship between a decision maker and a third party in dialectical terms may not meet more conventional deployments of classical dialectics, not the least because the power relation is qualitatively and permanently imbalanced, our observations indicate that the "discursive activity" of the professional asylum collective (here, both adjudicators and expert witnesses) is deeply interwoven in complex and powerful ways (Jones and Smith 2004, p. 387; Hardy and Phillips 1999). And when viewed separately from the narratives of claimants, their advocates, and their opponents, the dialectical asylum collective is at least ostensibly united by a commitment to identifying an underlying "truth," as discovered through reason and logic in discussion.

The value of thinking in terms of dialectic is that it highlights a productive interdependence, and in particular, the ever-deepening nature of the dependency. Both parties appear deeply conscious of their mutually constitutive relationship: adjudicators appear increasingly reluctant to proceed to judgment in contentious cases without requisite expert reports on which their decisions – negative or positive – can partly rest; and experts adhere to guidelines on format and content and directly interface with judicial reasoning. By contrast, they regularly seek each other's counsel as part of the broader project of ostensibly delivering justice to asylum claimants: both parties frequently seek specific answers to questions in the course of deliberation; they appear to recognize what might loosely be described as boundaries of knowledge and the relationship of scholarly knowledge to objective evidence, and both regularly defer to the other's respective fields of knowledge.

We highlight the dialectical relationship because the expansive international architecture of RSD – guidelines, protocols, conventions, agencies, indeed, a high commission – encourages us to locate a supra-analytical apparatus transcending specific domestic legal or constitutional traditions. Whereas the chapters in this volume offer individual national case studies, the patterns of interdependency uncovered are transnational and global. The adversarial framework categorizing many scholarly studies of common judicial procedure has little relevance for understanding the unfolding and constantly expanding deployment of expert testimony in the United States or

other common law countries (e.g., Landsman 1983; Barnes 2004, p. 352). Similarly, in some countries employing Roman-Canon inquisitorial traditions, RSD processes have spawned autonomous administrative tribunals where ambiguous stereotypes and social prejudice trump the adherence to law and regulation (Jubany 2011). Moreover, some countries, notably Canada, have created entirely new review boards, decisions of which may remain entirely distinct from the judicial process until a more advanced stage of appeal (Rousseau et al. 2002; Crépeau and Nakache 2008). At the same time, the traditional civil–common law divide appears to break down when RSD is the subject of scrutiny (see Barnes 2004). The "normal civil process" has "no tradition" in asylum jurisdiction (Jones and Smith 2004, p. 388). Common law traditions appear to be subtly infiltrating the RSD process in Europe, and adjudicators operating under common law tradition in the United States and the United Kingdom are increasingly adopting the role of judge-inquisitor or fact-finder (*see* Anker 1992; Jones and Smith 2004).

In addition to the obvious statement that the expert witness is usually a third party whose primary responsibility is, in a very general sense, to the court and governed by rules and procedures, there are several other reasons why a conceptual understanding of the dialectical RSD collective is required. First, the questions adjudicators pose in a refugee status determination, and indeed the manner in which they are posed reflect the global and transnational contexts that give rise to asylum claims as much as they do domestic policy concerns. Second, the individual adjudicators themselves are rarely constitutive of the core demographic of which the wider judiciary is comprised in most domestic jurisdictions. In many countries, the first line of decision making resides in the hands of a government employee, not a judicial officer, and expert testimony is often only solicited after this first stage. It is frequently only on appeal, and before a judge, that an expert statement is submitted. Furthermore, many judges enter immigration tribunals from bureaucratic careers and are rarely career jurists, although this appears to be slowly changing. Third, the venues in which claims are evaluated are often physically quite unlike the classic adversarial geography of the courtroom. In some countries, immigration tribunals or courts look more like boardrooms or meeting rooms, and parties sit in close proximity, but in many cases, the refugee is detained in a remote facility, and appears by video link. And, fourth, in less contentious cases, or when government agents appear to concede the likelihood that a case will prevail in the applicant's favor, government lawyers fail to present. In the United States, experts are frequently required to be available for cross-examination, but in the United Kingdom they are rarely examined on the stand, and when a government lawyer fails to appear, decisions are rendered *ex parte*.

Generally speaking, globally there is agreement that refugee claims constitute neither criminal nor civil law, and that credibility determinations should not rest on "hard" facts, hence our interest in reconceptualizing the relationship by focusing on the mechanisms of knowledge production (Millbank 2009). But the essays in this collection also reveal the detachment from established legal procedure to be a double-edged sword. Adjudicators may base decisions entirely on oral statements and make an assessment of an applicant's subjective account in light of the objective situation in the country of origin, or they may expressly demand the production of an expert report addressing a key element of the claimant's narrative, hence the dialectical relationship. Just as adjudicators are less tied by the constraints of civil or criminal procedure in their respective domestic jurisdictions, as administrative appointments, many are increasingly exposed to the types of domestic pressures attendant to border and identity securitization that characterize the post-9/11 world. Travel documents, for instance, are often not accepted as identification due to the manner in which the date of birth is recorded, while the renewal of documents is often a major problem for refugees unable to meet the expense (Bohmer and Shuman 2015). In addition an absence of documentation is increasingly invoked as grounds for doubting the credibility of an applicant's entire narrative. Combined with a climate of distrust and fear in Western countries about losing control over borders, the project of RSD has departed from the noble rights-based rhetoric post–World War II, and become one of proving identity, credibility, and "genuine" persecution, as distinct from the structural violence and economic inequalities of many countries in the Global South (Hathaway 1984; Kälin 2003).

To be clear, we do not idealize the refugee status determination process. RSD offers perhaps the most clarion example of the entanglement of international human rights obligations with national politics, policy objectives, and domestic anxieties (e.g., for Germany, see Blay and Zimmerman 1994; for Spain and Portugal, see Fullerton 2005; for Australia, see Foster and Pobjoy 2011). And indeed, the chapters in this volume speak to many of the peculiarities and pitfalls associated with this relationship. Whereas the UNHCR Guidelines may have sought to provide clarity and coherence to the proliferation of complex and contradictory domestic adjudication processes, the relationship between adjudicators and experts continues to unfold unevenly worldwide. Courts and lawyers are increasingly straying from these standards by appearing to apply standards that effectively increase the value of and thus burden of proof in asylum cases. In the United States, for example, the 2005 REAL ID Act permits and, some would argue, even encourages immigration judges to find asylum seekers lacking in credibility even if the discrepancies or

miscomprehensions in their responses refer to matters ancillary to their particular claim. Indeed, the REAL ID Act has been used, as Bruce Einhorn and Megan Bertholdt state in their chapter, as a "crypto-diagnostic tool by legal professionals," in lieu of the requisite medical and scientific expertise, "to explain the imperfections in testimony of the alleged victims of persecution, often in negative and discrediting terms" (Einhorn and Bertholdt this volume; Galoni 2008; Conroy 2009). Issuance of a negative credibility determination by an immigration judge – often the "fulcrum" of a decision – is similarly one of the swiftest mechanisms to deportation from the United Kingdom (Thomas 2006, p. 79).

The case studies presented in the volume are those of clinicians, academics, experts and adjudicators reflecting on the dialectical RSD collective. In Part I, trauma specialists, legal practitioners, and forensic professionals discuss the contours of expertise emerging both inside and outside courtrooms and tribunals, ranging from new specialized subfields of research to the creation of national directorates for sourcing expert opinion. These chapters highlight the increasing need of experts to resolve sociocultural inconsistencies and offer solutions that speak to the competing responsibilities of lawyers, judges and experts, lack of training of judges, need for cross-cultural understanding, inadequacy of resources and the caseload of lawyers and adjudicators who are unprepared themselves for the stress of asylum cases. In Part II, social scientists examine the treatment of psycho-medico inconsistencies by practitioners, and experts discuss the perils of persecution testimony invoking physiological and psychological harms, ranging from navigating personal relationships and ethical dilemmas to countering the overzealous deployment of pseudo-scientific standards and biomedical technology. We will consider these two analytical frameworks in more detail in this Introduction.

## SOCIOCULTURAL INCONSISTENCY AND THE CONTOURS OF EXPERTISE

Refugee status determination requires decision makers to have knowledge of the applicant's particular fear of being returned to countries where they say they are in danger. Given the lack of availability of documents, decision makers have turned to experts to resolve inconsistencies in asylum applicant testimony and shed light on questions of demeanor. The chapters in part one examine the ways in which expert testimony responds to and is drawn into the sociocultural inconsistencies of asylum claims while simultaneously creating and defining the boundaries and contours of expertise. As Western countries continue to place barriers to entry with an underlying presumption that most

asylum seeker claims are bogus, the trend has been toward standardization of knowledge that, when combined with the formalism of legal reasoning through which judges apply legal principles to the facts in a case, seeks to remove the discretion of the decision maker (Hart 1961, 1983). Thus, although there has been a greater recognition of the varied sociocultural contexts that contribute to refugee flight, the remedy has sought to increase fairness and professionalism by bringing in experts to help bridge understandings. In this newly forming collaboration between adjudicators and experts, experts both form and shape understandings of particular contexts in the Global South and are redefined by them in ways that need further examination.

Although the figure of the expert may seem relatively straightforward, Anthony Good (2004, 2008) has demonstrated how each specific form of testimony operates within a defined set of parameters and requirements. Judges, for example, may call upon experts when the documentary evidence about persecution is inadequate or credibility imperiled. Immigration lawyers may draw on experts to translate the narrative of a claimant "as a personal trauma into an act of political aggression" (Shuman and Bohmer 2004, p. 396). Experts may be invited to interpret the current status of a domestic statute (such as nationality and citizenship law), and how it pertains to a specific claim of a refugee or asylum seeker, such as statelessness (Lawrance forthcoming). Country conditions experts may level the playing field, as Susan Kerns (2000) argues. Indeed, the tasks of the expert are so wide-ranging that Immigration Judge Gary Malphrus (2010, p. 8) suggests that "what constitutes adequate qualifications to testify as an expert should be broadly defined."

Asylum and immigration experts serve a similar role to that of interpreters in the sense that experts translate the testimony of asylum seekers into vocabularies and images that are legible to decision makers. Absent of sensitivity to the sociocultural background of the asylum seeker, an interpreter can cause misunderstanding. In a general sense, the role of the expert in asylum claims is to testify about the political, cultural, and social climate in the asylum seekers' home countries, and to assess the degree to which a refugee or asylum seeker would be in danger if they were returned. Part of the reason that experts are called upon is to resolve the problem of inconsistency. There is no requirement that a refugee be credible to be granted asylum. Instead, informed by the horrors of World War II, the governing documents require that refugees be given the benefit of the doubt; and, therefore, experts are called to assist adjudicators as they attempt to distinguish the noncredible refugee who has a valid claim for asylum from the noncredible refugee who does not (Kagan 2003). Notwithstanding convention mandates, and, very significantly, eligibility remains in the mind of the adjudicator.