CHARLES UNIVERSITY IN PRAGUE

FACULTY OF SOCIAL SCIENCES

Institute of Political Science

Petra Levrincová

Did It Really Happen?

Testimonies before the International Criminal Tribunals and in Refugee Status Determination

Dissertation

Prague 2010

Author: **Mgr. Petra Levrincová, LL.M.**

Consultant: **Doc. PhDr. Rudolf Kučera, CSc.**

Opponent: **JUDr. Robert Fremr**

Opponent: **Doc. JUDr. Jan Ondřej, CSc., DSc.**

Date of Defence: **2010**

Assessment:

BIBLIOGRAPHICAL REFERENCE

LEVRINCOVÁ, Petra. *Did It Really Happen? Testimonies before the International Criminal Tribunals and in Refugee Status Determination.* Praha: Univerzita Karlova v Praze, Fakulta sociálních věd, katedra politologie, 2010. 159 s. Vedoucí diplomové práce Doc. PhDr. Rudolf Kučera, CSc.

ANNOTATION (ANOTACE)

The dissertation "Did It Really Happen? Testimonies before The International Criminal Tribunals and in Refugee Status Determination" promotes the creation of guidelines for the fair and consistent assessment of evidence in refugee status determination. The correct interpretation and effective application of these principles can reinforce local as well as global trust in the international refugee protection regime. The framework in which witness testimonies are assessed before the two *ad hoc* international criminal Tribunals – the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda – appears to be the most relevant for refugee cases. The judgements issued by Trial Chambers often include a coherent and logical description of how they work with and interpret rules on evidence, and their approach is generally approved by the Appeals Chamber.

In addition to providing a background to the aforementioned Tribunals, and briefly outlining the main aspects of evidentiary practice before them, this work describes the refugee status determination procedure – highlighting selected challenges decision makers face with respect to evidentiary practice – and presents the features that international criminal trials and refugee status determination procedure have in common. It then explores the role of the Tribunals in relation to specific sets of evidentiary rules, mainly with respect to witness evidence, and how the Tribunals' practice shapes these rules. Finally, it provides guidelines for decision makers in refugee status determination procedure on how to apply some of these relevant rules in their practice.

Disertační práce "*Did It Really Happen? Testimonies before The International Criminal Tribunals and in Refugee Status Determination*" si klade za cíl napomoci vytvořit nová doporučení týkající se spravedlivého a konzistentního hodnocení důkazů v řízení o postavení uprchlíka. Správná interpretace a účinné použití těchto principů může posílit místní důvěru, stejně jako celosvětovou, v režim jejich mezinárodní ochrany. Zdá se, že zásadně relevantním pro uprchlické případy je rámec, ve kterém jsou hodnoceny svědecké výpovědi před dvěma *ad hoc* mezinárodními trestními tribunály – Mezinárodním trestním tribunálem pro bývalou Jugoslávii a Mezinárodním trestním tribunálem pro Rwandu. Rozsudky jejich soudních komor často obsahují vnitřně soudržný a zřetelný popis způsobu, jak nakládat s důkazními pravidly a jak je interpretovat, jejich metoda je dále obecně schvalována odvolací komorou. Kromě poskytnutí základního vhledu do problematiky zmíněných tribunálů a stručného přehledu jejich důkazní praxe, popisuje tato práce hlavní aspekty řízení o postavení uprchlíka a upozorňuje na vybrané výzvy, kterým v souvislosti s důkazní praxí čelí ti, jež rozhodují o jejich postavení, a naznačuje, jaké společné rysy má řízení o postavení uprchlíka a řízení před mezinárodními trestními tribunály. Práce zkoumá roli zmíněných tribunálů ve vztahu k určitým sadám důkazních pravidel, především těch, které se týkají svědeckých důkazů, a jak praxe uvedených tribunálů dále tato pravidla tvaruje. Následně tato práce představuje návrh souvisejících pravidel pro ty, jež o právním postavení uprchlíků rozhodují.

KEYWORDS (KLÍČOVÁ SLOVA)

international criminal tribunals, refugee status determination, evidence, testimony, credibility

mezinárodní trestní tribunály, řízení o postavení uprchlíka, důkazy, svědectví, důvěryhodnost

ACKNOWLEDGMENT

I am especially grateful to Prof. Barbara Harrell-Bond, O.B.E., for her wisdom and determination as well as for the opportunity to research refugee law and work in this area under her supervision. I am also grateful to Prof. Boldizsár Nagy for the solid foundations in public international law and refugee law I have obtained and for all his comments and constructive criticism during my academic years. I have also learned a lot from Stéphane Wohlfahrt, my supervisor at the Trial Chamber of the International Criminal Tribunal for Rwanda. These people definitely inspired my career and influenced my way of thinking. I would also like to thank Dr. Rudolf Kučera for his support during my doctoral studies and Reena Sattar for the language editing.

This work stems in large part from my experience working as a Legal Intern in the Trial Chamber III of the International Criminal Tribunal for Rwanda, Arusha, Tanzania in 2004 and as a Volunteer Lawyer and Trainer for refugee legal aid programs in Cairo, Egypt (now the UK-based Charity Amera-Egypt, formerly programs attached to the American University in Cairo and Egyptian Organisation for Human Rights) in 2002 and 2003. At the International Criminal Tribunal for Rwanda, I researched procedural as well as substantive issues of international criminal law and participated in analyzing and evaluating witness testimonies and drafting decisions and parts of judgements. In Egypt, my tasks included providing legal representation to refugees before the UNHCR Office in Cairo, in the first instance cases, appeal cases and reopening of proceedings, interviewing clients, taking and evaluating their testimonies and subsequently writing legal argumentation. I am grateful for these opportunities.

The research and practice at the International Criminal Tribunal for Rwanda that led to this work were supported by the Sasakawa Young Leaders Fellowship Fund of Charles University in Prague.

I alone am responsible for the views expressed herein and all omissions and errors that remain.

DECLARATION

"I hereby declare that this submission is my own work and that to the best of my knowledge and belief it contains nothing which is the outcome of work done in collaboration with others, except as specified in the text and where due acknowledgement has been made."

_____ _____

Petra Levrincová Date

CONTENT

LIST OF BOXES

LIST OF ACRONYMS

AJIL	AMERICAN JOURNAL OF INTERNATIONAL LAW
CE	Council of Europe
CDR	*Coalition pour la défense de la republique*
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	INTERNATIONAL AND COMPARATIVE LAW QUARTERLY
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IJRL	INTERNATIONAL JOURNAL OF REFUGEE LAW
INS	Immigration and Naturalization Service (USA)
IRB	Immigration and Refugee Board (Canada)
MRND	*Mouvement révolutionnaire national pour le développement*
OJ	Official Journal
PSD	*Parti social démocrate*
PTSD	Post-Traumatic Stress Disorder
RPA	Rwandan Patriotic Army
RPE	*Rules on Procedure and Evidence*
RPF	Rwandan Patriotic Front
RTS	Rape Trauma Syndrome
SC	Security Council
SC res.	Security Council resolution
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNHCR	Office of the United Nations High Commissioner for Refugees
UNHCR, *Handbook*	UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979
UNTS	United Nations Treaty Series

We have lived through centuries of enlightenment, reason, revolution, industrialization, and globalization. No matter how idealistic the aim sounds, this new century must become the Century of Humanity, when we as human beings rise above race, creed, colour, religion and national self-interest and put the good of humanity above the good of our own tribe. For the sake of the children and our future. *Peux ce que veux. Allons-y.*

LGen Roméo Dallaire, July 2003

INTRODUCTION

Beyond the fundamental indifference of the public to the mass tragedies still taking place around the world and to the fates of individuals fleeing horrific human rights abuses, there are other common features between international criminal trials and refugee status determination. Although the overall purpose of international criminal trials and refugee status determination may differ, the decision makers conducting refugee status determination and judges before the international criminal tribunals face similar challenges in their everyday evidentiary. The former, however, only rarely look to the international arena for inspiration.

AIM AND STRUCTURE

Refugee status determination is not the only legal discipline where decision makers are required to evaluate evidence presented to them. Case law of the international criminal tribunals has developed important new principles in international criminal and humanitarian law: "Besides arresting and punishing those who committed heinous crimes in Rwanda, the Tribunal has established jurisprudence that has received significant endorsement from academics, representatives of Member States and organs of civil society, and constitutes a reliable body of precedents for the International Criminal Court."[1] Such jurisprudence also includes principles guiding evidentiary practice before the tribunals.

This work is concerned with two legal disciplines, refugee law and international criminal law, and is intended to spur debate and promote the creation of new guidelines in the field of assessment of evidence in refugee cases, whether these guidelines be from non-governmental organisations, international organisations and/or sovereign states.

[1] Briefing Notes on the ICTR Challenges and Achievements, prepared by the ERSPS-15-1-2004, The International Criminal Tribunal for Rwanda, Arusha, 2004, pp.10-11.

Its main aim is to encourage decision makers in refugee status determination to, where appropriate, step back from their daily practice and observe how similar problems are tackled by judges in The Hague, the Netherlands and in Arusha, Tanzania.

The first part of this work is divided into three chapters. The first chapter provides a basic background to the modern *ad hoc* international criminal tribunals – the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda (hereinafter referred to as the Tribunals, ICTY, ICTR) and briefly outlines the main aspects of evidentiary practice before them. The second chapter describes the refugee status determination procedure and highlights selected challenges decision makers face with respect to evidentiary practice. The third chapter gives an idea of *what* features international criminal trials and refugee status determination procedure have in common.

The second part presents sections that explore the role of the Tribunals in relation to specific sets of evidentiary rules, mainly with respect to witness evidence, and how the Tribunals' practice shapes these rules. It also provides guidelines for decision makers in refugee status determination procedure on *how* to apply some of the relevant rules in their practice.

All over the world, many refugees are asking themselves why their stories have not been believed. While unfortunately there are no answers for the refugees in this work, decision makers will have the opportunity to pause and reflect before they again state "*I do not believe it really happened*".

METHODOLOGY

Legal research (i.e., "the search for authority that can be applied to a given set of facts and issues"[2]) was the main method used.

From the world of legal information, primary legal resources were researched and analyzed. These resources govern the main legal issues in evidentiary practice and thus became the main focus of investigation. Most of the work is built on consulting and synthesising modern *ad hoc* Tribunals' judgements, decisions and motions, both at the Trial and Appellate levels. The ICTY and ICTR Statutes and their respective Rules of Procedure and Evidence in the case of international criminal law and the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol in the case of refugee status determination were other irreplaceable tools. The biggest challenge during the research of the primary sources was the endeavour to be comprehensive. It proved an immense task to try to locate all potentially relevant primary sources within the vast numbers of judgements, motions and decisions being an authority in applicable cases and still pertinent to the discussion. When conducting the case research, it was thus necessary to trace relevant information in the most recent cases first, while also ensuring that the appellate authorities have a priority. The biggest limitation on this type of work is that the development of law is a continuous process; this type of research is not exhaustive as the law changes constantly and every day new judgements and decisions can come into play.

Secondary legal authorities, such as textbooks, legal journals, and legal encyclopaedias were also used and are often referred to in the first part of the dissertation. They proved valuable when describing the standing of current international criminal law, background information on evidentiary practice before the tribunals as well as providing a general background to refugee status determination. When deciding on their relative weight and persuasive authority, the texts and textbooks written by the judges themselves (e.g., May) were

[2] Available at: http://www.law.umaryland.edu/marshall/researchguides/TMLLguide/intro.asp [accessed 10 August 2007].

preferred. When interpreting certain issues from the 1951 Convention and the 1967 Protocol, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, a practical guide for government officials concerned with the determination of refugee status based on the knowledge accumulated by the High Commissioner's Office over decades, was used. Some of the secondary materials also served as a helpful tool not only in providing a broad overview of some topics, but also in leading to other sources of information, particularly relevant primary sources. Searching for secondary sources on the nexus between international criminal law and refugee law itself as well as those on credibility in general, however, was quite difficult, as there seem to be only a few texts on these subjects (e.g., Byrne).

PART I

MODERN INTERNATIONAL CRIMINAL TRIBUNALS AND EVIDENTIARY PRACTICE BEFORE THEM

IMPUNITY CANNOT BE TOLERATED, AND WILL NOT BE.

IN AN INTERDEPENDENT WORLD, THE RULE OF THE LAW MUST PREVAIL.[3]

The first chapter provides a background to the modern *ad hoc* international criminal Tribunals – the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda – and briefly outlines the main aspects of evidentiary practice before them.

The work does not deal with the evidentiary procedure at the so-called "hybrid tribunals" that have mixed international and national jurisdiction as well as composition. Reference can be made to the Special Court for Sierra Leone set up by the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January, 2002); and to the East Timorese Panels with Exclusive Jurisdiction over Serious Offences set up by the United Nations Transitional Administration for East Timor Regulation 2000/15 of June 6, 2000 on the Establishment of Panels with Exclusive Jurisdiction over Serious Offences.

The chapter begins with an introduction to the Tribunals, and then briefly outlines the purpose of the trials as well as the nature of the international crimes they cover. Evidentiary practice is represented by sections on rules of evidence (admissibility, relevance, and reliability of evidence) and basic types of evidence in international trials (circumstantial evidence, hearsay). The chapter concludes with an overview of evidentiary challenges in international criminal trials.

---

[3] UN Secretary General Kofi Annan during his visit to the ICTY in 1997. Available at: http://www.un.org/icty/glance-e/index.htm [accessed 3 July 2007].

> JUSTICE IS AN INDISPENSABLE INGREDIENT OF THE PROCESS OF NATIONAL RECONCILIATION. IT IS ESSENTIAL TO THE RESTORATION OF PEACEFUL AND NORMAL RELATIONS BETWEEN PEOPLE WHO HAVE HAD TO LIVE UNDER A REIGN OF TERROR. IT BREAKS THE CYCLE OF VIOLENCE, HATRED AND EXTRA-JUDICIAL RETRIBUTION. THUS PEACE AND JUSTICE GO HAND-IN-HAND.[4]

The two *ad hoc* international criminal Tribunals were set up in reaction to the atrocities committed on a mass scale that shocked the international community. One of the Tribunals is seated in The Hague, the Netherlands and the other in Arusha, Tanzania. Both of them, however, follow the same law and function in a similar way.

The Security Council of the United Nations expressed its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law in the territory of the former Yugoslavia and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the practice of ethnic cleansing, including for the acquisition and holding of territory. The Security Council determined that the situation continued to constitute a threat to international peace and security and made a decision to put an end to such crimes and to take effective measures to bring justice to those responsible. Acting under Chapter VII of the Charter of the United Nations, it decided by Resolution 808 of 22 February 1993 to establish an international tribunal for the persecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[5]

---

[4] Comment from the Tribunal's President, Antonio Cassese, upon the conclusion of the Dayton Peace Agreement, November 1995, available at: http://www.un.org/icty/cases-e/factsheets/achieve-e.htm [accessed 3 July 2007].
[5] U.N. Doc. S/RES/827 (1993).

As soon as in *Prosecutor v. Tadić*, the first trial before the ICTY, the Trial Chamber allowed for expert witnesses to testify about the relevant geographic, historical, administrative and military setting where the alleged crimes were committed "in order to place in context the evidence to the counts of the Indictment, especially Count 1, persecution."[6] It then presented the relevant background in detail and considerable length.[7]

For centuries, the area under examination was part of the Ottoman Empire. In the nineteenth century, the Kingdom of Serbia became independent from Turkey. Following the First World War, the Kingdom of Serbia, independent principality of Montenegro, Croatia, Slovenia, and Bosnia and Herzegovina, having been from 1878 until then under the administration of the Austro-Hungarian Empire, joined the independent Kingdom of Serbs, Croats and Slovenes, in 1929 under a new name – the Kingdom of Yugoslavia. Traditional religious geographic distribution, based on centuries-old division, i.e., Roman Catholicism mainly in the northern and western sectors, Orthodox Christianity and Islam in southern and eastern sectors, continued.[8]

Historically, the population of Bosnia and Herzegovina has been multi-ethnic: a) the Muslims, their identity, culture and religion being the legacy of the long-lasting Turkish occupation; b) the Serbs encouraged to settle on the old military frontier between the Ottoman Empire and the Austro-Hungarian Empire; and c) the Croats settled mainly in the south-west area neighbouring Croatia's Dalmatian coast.[9]

In terms of religion, in 1991 44% of Bosnians were Muslim, 31% were Serbs, and 17% were Croats.[10] The boundary between Roman Catholicism and Islam has traditionally run in or near Bosnia, with Orthodox Christianity being seen in the

---

[6] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No IT-94-1-T, Opinion and Judgement, 7 May 1997 [hereinafter *Prosecutor v. Tadić,* TC Opinion and Judgement], para. 53.
[7] The background is provided *Ibid.* paras. 55-179.
[8] *Ibid.* para. 58.
[9] *Ibid.* para. 56.
[10] *Ibid.*

area as well. Nowadays, most Serbs are Orthodox Christians and most Croats are Roman Catholics.[11]

The Kingdom of Yugoslavia, meaning the kingdom of southern Slavs, emerged on the basis of an "uneasy marriage of two ill-matched concepts" – the Croatian desire for a state with the same language and common ethnic origin and the Serbian desire to have a Greater Serbia. In the interwar period, Yugoslavia went through internal administrative boundary adjustments.[12] During the Second World War, Yugoslavia experienced difficult times, partly fighting against foreign enemies, partly engaged in a civil conflict with three separate local forces fighting one another: "the Ustaša forces of the strongly nationalist Croatian State, supported by the Axis powers, the Chetniks, who were Serb nationalist and monarchist forces, and the Partisans, a largely communist and Serb group" [13], with the latter two also fighting the foreign occupation. Muslims were members of the Ustaša and the Partisans. [14] Numerous harsh struggles and battles occurred on the territory of Bosnia and Herzegovina. As an example, massacres carried out by the Ustaša resulted in the death of more than a quarter of a million of Serbs in about six months of 1941. At the end of the war, the Partisans executed around one hundred Croat soldiers. [15]

The Constitution of 1946 provided for the official division of the Federal Yugoslavia into six Republics: Serbia, Croatia, Slovenia, Macedonia, Montenegro and Bosnia and Herzegovina; and the two autonomous regions of Vojvodina and Kosovo.[16] The post-war period up to 1990 was free of ethnic strife as the communist regime suppressed nationalist efforts and discouraged religious activities.[17] At the outset, Marshal Tito introduced a highly centralised federation. In the 1960's and 1970's, and especially with the enactment of the Constitution of 1974, there was a tendency towards devolution of power, the governments of the Socialist Republics of Yugoslavia were clearly in a position to support ethnic and

---

[11] *Ibid.* para. 67.
[12] *Ibid.* para. 60.
[13] *Ibid.* para. 61.
[14] *Ibid.*
[15] *Ibid.* para. 62.
[16] *Ibid.* para. 65.
[17] *Ibid.* paras. 65 and 66.

nationalist affinities. Already in the 1980's, the Republic of Serbia began its efforts to incorporate Vojvodina and Kosovo into the Republic, it finally succeeded in 1991.[18] During the first multi-party elections held in the Republics in 1991, nationalist parties were elected, "heralding the break-up of the federation and seen by nationalists in both Croatia and Serbia as opening the way to expansion of their territories."[19] These nationalist and ethnocentric developments, together with an economic crisis that extended into political crises as well as with the decline of the communism in Eastern Europe in the late 1980's paved the way for the disintegration of the Socialist Federal Republic of Yugoslavia.[20] The federal authority was severely undermined.

In conformity with the results of the plebiscites held in Slovenia and Croatia in December 1990 and May 1991, respectively, both Republics declared their independence in June 1991. This independence was recognized by the European Community in January 1992.[21]

In December 1991, two Serbian autonomous regions in Croatia along the Bosnian border where the Yugoslav People's Army ("JNA") was deployed – one in Krajina, the other one in Eastern Slavonia – announced that they had become the Republic of Serbian Krajina.[22] In September 1991, Macedonia also declared independence.[23]

Following the referendum of February 1992, Bosnia and Herzegovina declared its independence in March; shortly after the declaration, its independence was recognized by the European Community and by the United States of America. However, the Bosnian Serbs had never agreed to the referendum prepared mainly by the Bosnian Muslims and some Bosnian Croats, and already on 9 January 1992 declared the independence of the Republic of the Serbian People of Bosnia and

[18] *Ibid.* para. 69.
[19] *Ibid.* para. 68.
[20] *Ibid.* para. 70.
[21] *Ibid.* paras. 73, 74 and 77.
[22] *Ibid.* paras. 76 and 77.
[23] *Ibid.* para. 79.

Herzegovina, later known as Republika Srpska, to come into force immediately after the international recognition of the Republic of Bosnia and Herzegovina.[24]

In April 1992, the Federal Republic of Yugoslavia was established out of what remained from the Socialist Federal Republic of Yugoslavia, i.e., from Serbia and Montenegro.[25]

In connection with the indictment introduced in the *Tadić* case which related mainly to the events in Bosnia and Herzegovina in 1992, the Trial Chamber in its judgement not only emphasized the importance of general geographic and historical facts in the Yugoslav territory, but also elaborated in greater detail on Bosnia and Herzegovina and placed it into the general context of the disintegration of the Federal Republic of Yugoslavia[26]. It described the concept of a Greater Serbia[27], and consequently the formation of Serb Autonomous Regions.[28] The judgement also provided a detailed description of the military background, namely the JNA and its role in the process of disintegration of the Federal Republic of Yugoslavia, as well as the description of military actions.[29] The Trial Chamber explained in length its understanding of events taking place in the region that was at stake – in the *opština*[30] Prijedor (namely its take-over), the attacks on the Kozarac area, the treatment of non-Serbs, and camps where thousands of Croat and Muslim civilians were confined, such as Omarska, Keraterm and Trnopolje.[31] The Trial Chamber believed that by presenting geographic and historical facts could it place the acts of the accused, Duško Tadić, into context and correctly assess the evidence before it.

---

[24] *Ibid.* para. 78.
[25] *Ibid.* para. 79.
[26] These facts go beyond the scope of this work, for more information see *Ibid.* paras. 80-84.
[27] These facts go beyond the scope of this work, for more information see *Ibid.* paras. 85-96.
[28] These facts go beyond the scope of this work, for more information see *Ibid.* paras. 97-102.
[29] These facts go beyond the scope of this work, for more information see *Ibid.* paras. 104-126.
[30] District.
[31] See *Ibid.* paras. 127-179.

BOX 1: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The International Criminal Tribunal for the Former Yugoslavia (ICTY)

ICTY LAW: The Tribunal is governed by its Statute, which is annexed to Security Council Resolution 827. The Rules of Procedure and Evidence adopted by the Judges in accordance with Article 15 of the Statute establish the necessary framework for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[32]

RATIONE MATERIAE: According to the Statute, that part of international humanitarian law which has indisputably become customary international law is applicable to armed conflict, namely: the Geneva Conventions of 12 August 1949, the Fourth Hague Convention and the rules concerning the laws and conventions of war on land of 1907, the Convention of 9 December, 1948 for the prevention and suppression of the crime of genocide and the Statute of the Military Tribunal of Nuremberg of 8 August, 1945.[33]

RATIONE TEMPORE: The Tribunal has jurisdiction only over crimes committed after January 1, 1991 (the date which, according to the UN Security Council, marks the outbreak of hostilities in the territory of the Former Yugoslavia).

RATIONE PERSONAE: The Tribunal can try persons presumed responsible for serious breaches of international humanitarian law committed on the territory of the Former Yugoslavia since 1991[34] (i.e., any individual who shall have planned, incited to commit, ordered, committed or in any other manner aided and abetted the planning, preparation or commission of a crime listed under articles 2 to 5 of the ICTY Statute is personally responsible for the said crime[35]).

[32] *Ibid*. Article 15.
[33] *Ibid.*
[34] U.N. Doc. S/RES/808 (1993) and U.N. Doc. S/RES/827 (1993).
[35] U.N. Doc. S/RES/827 (1993), Article 7 para. 1.

RATIONE LOCI: The Tribunal has jurisdiction over crimes committed in the territory of the Former Yugoslavia (the former Socialist Federal Republic of Yugoslavia, consisting of the land space, air space and territorial waters).

www.icty.org

One year after the ICTY was set up, the Security Council of the United Nations, recognizing that serious violations of humanitarian law were committed in Rwanda, and equally acting under Chapter VII of the Charter of the United Nations, decided by Resolution 955 of 8 November 1994 to establish another international tribunal for "the sole purpose of prosecuting 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 January 1994 and 31 December 1994", and to this end, to adopt the Statute of the International Criminal Tribunal for Rwanda.[36] The rationale behind this measure was to put an end to the crimes and to take effective measures to bring the persons who were responsible for these crimes to justice. Such prosecution would contribute to the process of national reconciliation and to the restoration and maintenance of peace in the region.[37]

[36] U.N. Doc. S/RES/955 (1994).
[37] U.N. Doc. S/RES/977 (1995),

To fully understand the events described in the indictments and the evidence presented, the Trial Chambers considered it necessary to address the historical context of the Rwandan genocide.[38] Prior to and during colonial rule (under Germany and from 1917 under Belgium until its independence from the latter), it was an advanced monarchy ruled through the monarch's representatives chosen from the Tutsi nobility. At that time, the distinction between Hutu and Tutsi relied more on lineage than on ethnicity and people could move within these categories by becoming rich or poor or by marriage.[39] Both colonial authorities co-operated with the Tutsi elite. According to an expert witness, Dr. Alison Desforges, the Tutsi were favoured because they looked more liked colonisers, higher, lighter and thus "more intelligent and better equipped to govern", more of a racist theory than anything else.[40] In the 1930's, the Belgians introduced 'ethnic groups': the Hutu (84% of the population), the Tutsi (15%), the Twa (about 1%). It was then required that all Rwandans carry with them an identity card where the respective 'ethnic group' was included and this system prevailed until the tragic events of 1994.[41] Alison Desforges also explained that the Tutsi were also more willing to be converted to Christianity as the Belgians included it as a condition for employment in the civil service supported by the fact that "the cult of obedience to the chiefs … is highly developed in the Rwandan society" and that is why the Catholic Church also supported their monopoly of power.[42]

With the emancipation of the Tutsi leading then to campaigns for independence, and with new philosophies of the Church after the Second World War, the Belgians and the Church turned to the Hutu, giving them more opportunities in education and employment in civil service. Thus, when elections on the basis of universal suffrage were held in 1956, the Hutu held a majority as people were voting along

---

[38] E.g., *Prosecutor v. Jean-Paul Akayesu*, Case No ICTR-96-4-T, Judgement, 2 September 1998 [hereinafter *Prosecutor v. Akayesu*, TC Judgement], or *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No ICTR-95-1-T, Judgement and Sentence (TC), 21 May 1999 [hereinafter *Prosecutor v. Kayishema and Ruzindana*, TC Judgement and Sentence], para. 31.
[39] *Prosecutor v. Akayesu*, TC Judgement, paras. 78-81.
[40] *Ibid.* para. 82.
[41] *Ibid.* para. 83.
[42] *Ibid.* para. 84.

ethnic lines. Tutsi superiority was thus brought to the end, causing political unrest and bringing the cycle of violence characterised by reprisals following attacks and significant exile of Tutsi to surrounding countries. Rwanda became independent in 1962. Seats in the government and in the civil service were reorganised following a quota system reflecting the proportion of a respective 'ethnic group' in the population. In 1975, under Hutu President Juvénal Habyarimana, a one-party system was introduced. A few years later, the *Mouvement révolutionnaire national pour le développement* (MRND) was proclaimed by law a 'State-party'. Over the years, President Habyarimana became not only increasingly discriminatory against the Tutsi in his policies but he also made distinctions among the Hutu, favouring 'his' regions, or better 'his' Akazu household. Forced by foreign donors and the worsening domestic situation caused by his discriminatory policies, Habyarimana had to allow for a new constitution adopting a multi-party system in 1991, as well as a law on political parties and the formation of new parties. [43]

In exile, the Tutsi formed a political organisation called the Rwandan Patriotic Front (RPF) with a military wing called the Rwandan Patriotic Army (RPA). Their main interest at the beginning was to return to their country. President Habyarimana, first refused to negotiate with the RPF which only broadened the RPF's interests to include seizing power. After the RPF attack in October 1990 and in light of violence and increasing destabilisation of the regime, Habyarimana eventually had to allow for negotiations with the RPF. These negotiations led to the first cease-fire and signature of the first part of the Arusha Accords enabling the RPF to participate in governmental institutions. The RPF, however, did not give up its aim of coming to power and launched new attacks causing the extremist Hutu to set up a radical party called *Coalition pour la défense de la republique* (CDR) and call for the elimination of the Tutsi.[44]

In August 1993, the Arusha Accords[45] between the RPF and the Rwandan government were signed thus officially ending a war that had lasted since 1

---

[43] *Ibid.* paras. 85-94.
[44] *Ibid.* paras. 95-99.
[45] "The Accords provided, *inter alia*, for the establishment of a transitional government to include the RPF, the partial demobilization and integration of the two opposing armies (13,000 RPF and

October 1990. However, the Hutu extremists used the assassination of Burundian President and Hutu Melchior Ndadaye during an attempted October coup by Burundian Tutsi soldiers as an excuse to denounce the Accords.[46] The beginning of 1994 brought assassinations of CRS and PSD[47] leaders and massacres of Habyarimana's Hutu opponents and Tutsi. Habyarimana was pressured by the international community to continue to implement the Arusha Accords. On 6 April 1994, President Habyarimana, while returning with the then President of Burundi Ntaryamirai from a meeting in Dar-es-Salam where they had discussed with other regional heads of state the implementation of the Arusha Accords, were killed in a plane crash around 8:30pm near the Kigali airport.[48] Immediately after the plane crash, the Rwandan army, Presidential Guard and militia started to kill the Tutsi and those Hutu in favour of the Arusha Accords across the whole country.[49] The execution of ten Belgium blue helmets caused Belgium to withdraw its soldiers and subsequently the UN Security Council to decide to substantially reduce the UNAMIR peace-keeping force.[50] Open war between the RPF and the Rwandan Armed Forces began.[51] The massacres reached their zenith in the week of 14 to 21 April 1994 and at that time it was crystal clear that the Tutsi were the main target. "Thousands of people, sometimes encouraged or directed by local administrative officials, on the promise of safety, gathered unsuspectingly in churches, schools, hospitals and local government buildings. In reality, this was a trap intended to lead to the rapid extermination of a large number of people."[52] The massacres excluded neither women nor children and took place until the RPF reached Kigali on 18 July 1994. The victims of the conflict were many, estimates vary from half a million to one million, but it could have been more…[53]

35,000 FAR troops), the creation of a demilitarized zone between the RPF-controlled area in the north and the rest of the country, the stationing of an RPF battalion in the city of Kigali, and the deployment, in four phases, of a UN peace-keeping force, the United Nations Assistance Mission for Rwanda (UNAMIR), with a two-year mandate." *Ibid.* para. 102.

[46] *Ibid.* paras. 102-105.

[47] *Parti social démocrate* (PSD) with many intellectuals as its members, members recruited mostly in the South, in Butare. *Ibid.* para. 94.

[48] *Ibid.* para. 106.

[49] *Ibid.* para. 107.

[50] *Ibid.* para. 108.

[51] *Ibid.* para. 109.

[52] *Ibid.* para. 110.

[53] *Ibid.* para. 111.

BOX 2: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The International Criminal Tribunal for Rwanda (ICTR)

ICTR LAW: The Tribunal is governed by its Statute, which is annexed to the Security Council Resolution 955. The Rules of Procedure and Evidence adopted by the Judges in accordance with Article 14 of the Statute establish the necessary framework for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[54]

RATIONE MATERIAE: According to the Statute, the crimes punishable before the Tribunal include: genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II shall be punishable.[55]

RATIONE TEMPORE: The Tribunal has jurisdiction over crimes committed between 1 January and 31 December 1994.

RATIONE PERSONAE AND RATIONE LOCI: The Tribunal can try Rwandan as well as non-Rwandan citizens who committed the crimes in the territory of Rwanda, and Rwandan citizens who committed the crimes in the territory of neighboring States.

www.ictr.org

[54] Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, available at: http://www.unhcr.org/refworld/docid/3ae6b3952c.html [accessed 22 November 2009], Art. 14.
[55] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, available at: http://www.unhcr.org/refworld/docid/3ae6b3952c.html [accessed 22 November 2009].

In *Prosecutor v. Kupreškić et al.*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia explained what it considers the principal purpose of its work. The Trial Chamber has stated that the events which took place on 16 April 1993 in Ahmici represent one of the "most vicious illustrations of man's inhumanity to man"; and elucidated that its main task was to "*decide whether the* six *defendants standing trial were guilty* of partaking in this persecutory violence *or whether they were*, instead, extraneous to it and hence, *not guilty*." [56]

Some legal scholars, looking ahead, believe that the International Criminal Court will consider as the main goal of its proceedings "the search for the truth – not retribution or punishment" of individuals[57]. However, it seems irrefutable that the fundamental purpose of the international criminal trials – which is "to determine whether the guilt of the accused has been proved beyond a reasonable doubt on the various charges brought by the prosecution against him"[58], i.e., to determine the guilt or innocence of the accused – will be left unchanged. In other words, although the nature of the international criminal trials can change over the course of time, the nature of these trials – the search for justice – will not change. The "concept of fairness" [59] will definitely remain the cornerstone of these trials.

In addition to the main goal of the proceedings, which is the search for the justice, the "historical record that has been tested by the judicial process"[60] can be regarded as the chronicle of past events for future generations. In particular, *the facts* sections of judgements in individual cases can serve as an invaluable source

---

[56] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić,* Case No IT-95-16-T, Judgement, 14 January 2000. [hereinafter Prosecutor v. *Kupreškić et al*., TC Judgement] as cited in Richard May, Marieke Wierda, International Criminal Evidence (New York: Transnational Publishers, Inc., 2002) [hereinafter MAY], p. 14 at 1.36 [emphasis added].

[57] David Donat-Cattin, *Art. 68: Protection of Victims and Witnesses and Their Participation in the Proceedings, Commentary on the Rome Statute of the International Criminal Court* at 873 (Otto Triffterer ed., Nomos Verlagsgesellschaft 1999) as cited in May, p. 14 at 1.38.

[58] MAY, p. 12 at 1.30.

[59] MAY, p. 2 at 1.07.

[60] The expression used in MAY, p. 12 at 1.31.

of information. Judgements can establish beyond reasonable doubt facts that used to be the subject of dispute. In the words of the Trial Chamber in *Prosecutor v. Furundžija*: "Having considered the evidence, the Trial Chamber is satisfied beyond reasonable doubt that the following findings may be made".[61] It is no longer justifiable to question the reality of events that took place in and around Celebici, Dubrovnik, Foca, Prijedor, Sarajevo, or Srebrenica, nor the atrocities committed in and around Butare, Cyangugu, or Kigali.[62]

Furthermore, the trial proceedings can also help to "foreclose responsible denial and avert martyrdom for the major leaders"[63] of the atrocities.[64] Facts being determined beyond reasonable doubt by the Tribunals do certainly contest rejection of the atrocities and avert efforts at revisionism.[65]

In a document that is a part of the ICTR's continuing process of refining its completion strategy, the President of the ICTR addresses the President of the Security Council of the United Nations. This letter, dated 30 April 2004, pronounces the following as the Tribunal's main objectives: establishing the guilt or innocence of the accused; bringing justice to victims of the massive crimes that were committed; establishing a record of facts that can aid reconciliation; leaving a legacy of international jurisprudence directing future courts; discouraging commission of these atrocities in the future.[66]

---

[61] *Prosecutor v. Anto Furundžija*, Case No IT-95-17/1-T, Judgement, 10 December 1998 [hereinafter *Prosecutor v. Furundžija*, TC Judgement], para. 120.
[62] Available at: http://www.un.org/icty/cases-e/factsheets/achieve-e.htm [accessed 3 July 2007].
[63] Bernard Meltzer, "*War Crimes": The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VALPARAISO U. L. REV. 895 at 902 (1996). As cited in MAY, p. 12, footnote 36.
[64] It must also be mentioned that the Tribunals have also dealt with the lower-level perpetrators. For discussion about the main reasons for including lower-lever perpetrators in the trials and for adopting the so-called "vertical approach" to prosecution see Address by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Carla del Ponte, to the UN Security Council, 27 November 2001.
[65] Available at: http://www.un.org/icty/cases-e/factsheets/achieve-e.htm [accessed 3 July 2007].
[66] *Letter dated 30 April 2004 from the President of the International Criminal 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 January and 31 December 1994 addressed to the President of the Security Council*, S/2004/341, 3 May 2004, p. 15 at 62.

An international crime is an act that is so grave that it must be considered as a matter for international concern; it is not only a breach of national criminal law where prosecution is merely left to the state with jurisdiction over the crime. The rationale behind the universal concern about these crimes takes into account the efficiency principle, practicality, as well as the likelihood of prosecution by the state that has jurisdiction over the crime. International crimes have their source in international treaties, rules of customary international law, or the combination of treaty provisions and rules of customary international law.[67] For example, in relation to the crime of torture, in *Prosecutor v. Furundžija,* the Trial Chamber reminded that

> [t]reaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders. Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.[68]

The Trial Chamber explained that the existence of the corpus of general and treaty rules outlawing torture demonstrates that the international community realizes the importance of prohibiting such a "heinous phenomenon" and urges taking steps – at both the individual and interstate levels – to curb any manifestation of torture: in this way, "*no legal loopholes have been left*".[69]

Many of the international crimes meet the criteria of violations of international humanitarian law; nearly all of them meet the criteria of serious breaches of human rights. They are extreme in scope and violence, and they are often committed on a mass scale. International crimes are usually not committed only by

[67] Than, C. de & Shorts, E.: International Criminal Law and Human Rights, Sweet & Maxwell, London, 2003, p. 13.
[68] *Prosecutor v. Furundžija*, TC Judgement, para. 145.
[69] *Ibid*. para. 146. [emphasis added]

an ordinary individual; often, there exists the shared responsibility of the leadership.[70]

The context in which these crimes are committed is very important; that context makes a distinction between an international crime and an ordinary criminal offence. In the case of the former, the systematic pattern of these crimes can be tracked; they are often committed in the context of war or an attack on a civilian population, or there can be intent to destroy a defined group.[71] In *Prosecutor v. Furundžija*, the Trial Chamber held that "it is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators".[72] This distinguishes a rape that is an offence under national law from a rape that is an international crime: Article 5 of the Statute of the International Tribunal for the Former Yugoslavia explicitly provides for the prosecution of rape as a crime against humanity; grave breaches of the Geneva Conventions can also be invoked; as well as a violation of the laws or customs of war; or an act of genocide, provided the necessary conditions are satisfied.[73]

Consequently, for an international crime to be invoked, two prerequisites must be met: First, there must be evidence as to the "actual underlying criminal offense", in other words, the "crime-base" has to be defined. Examples can include deportation, murder, rape, and torture.[74] Second, a "general element which reflects the context or intent of the crime" has to be classified. In the case of crimes against humanity, the acts have to be a part of widespread or systematic attack, directed at the civilian population. In the case of genocide, the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group has to be proved. In the case of the grave breaches of the Geneva Conventions of 1949, the crime has to be committed in an international armed conflict.[75]

---

[70] MAY, p. 9 at 1.21.
[71] MAY, p. 8 and 9 at 1.20 and 1.22.
[72] *Prosecutor v. Furundžija*, TC Judgement, para. 169.
[73] *Ibid*. para. 172.
[74] MAY, *p. 8 at 1.20.*
[75] *Ibid.*

In general, evidence can be defined as "information given personally or drawn from a document etc. and tending to prove a fact or proposition"[76]. Evidence is "information [which is] put before a court to establish a fact in question".[77]

The purpose and nature of modern international criminal trials determines the type of procedure, the laws of evidence and their subsequent adaptation to the field of international criminal law.[78]

ICTY and ICTR Rules of Procedure and Evidence are brief in terms of rules of evidence. The most important is the Rule 89. Herein, it is cited from the ICTY Rules of Procedure and Evidence (the ICTR excludes letters D and F):

> (A) A Chamber shall apply the rules of evidence set forth in this Section and shall not be bound by national rules of evidence.
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
> (E) A Chamber may request verification of the authenticity of evidence obtained out of court.
> (F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.[79]

On the other hand, there are many areas of evidentiary practice detailed in individual cases before the Tribunals as well as in academic texts. These include, but are not limited to: the rules on admissibility, relevance and weight, exclusionary rules, rules of disclosure, rules guiding witnesses and the

---

[76] The Concise Oxford Dictionary, Ninth Edition (Oxford: Oxford University Press, 1995), p. 467.
[77] MAY, p. 2 at 1.03.
[78] It falls out of the scope of this work to explore and analyze the general pros and cons of the two *ad hoc* international criminal tribunals. However, it is clear that the developments in the field of evidentiary procedure, and especially the regime of treatment of witness testimonies, are among the main contributions the Tribunals brought to modern international law.
[79] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 44 (2009), *entered into force* 14 March 1994, *last amended* 10 December 2009. [hereinafter ICTY Rules of Procedure and Evidence], Rule 89.

presentation of evidence, documentary and real evidence, treatment of evidence during appeal proceedings.[80] This work will deal only with the issues common to international criminal trials and to refugee status determination procedure. Accordingly, the main emphasis will be placed on the testimony of a witness and assessment thereof.[81] Relevant procedures for the assessment of testimonies and related recommendations for refugee status determination will be presented and elaborated on in Part II of this work.

The judges at the Tribunals are aware of the restricted possibilities of gaining access to documentary evidence in ongoing conflicts. On several occasions, the judges have also admitted that they may be unfamiliar with the settings in which the crimes were committed, and that is why they have demanded to be enlightened as to the relevant socio-historical, political and cultural background. Moreover, the judges are supposed to consider whether statements contained in an admitted document are or are not an accurate portrayal of the facts. For all these reasons, it is useful to briefly examine the practice of the Tribunals as to the rules on *admissibility* of evidence, its *relevance*, as well as its *reliability*.

ADMISSIBILITY OF EVIDENCE

The scarcity of evidence explains the need for a liberal approach to evidence in international criminal trials. In these circumstances, strict rules of evidence would be a significant hindrance to many of the trials.[82] In *Prosecutor v. Kupreskić et al*., the Trial Chamber admitted the challenge involved in establishing "incredible facts by means of credible evidence" more than six years after the events took place far from The Hague, in Ahmici. [83] Witnesses and evidence are dispersed throughout the world, memories fade, and the perpetrators of the crimes have always sought to wipe out all records of their acts.[84]

---

[80] MAY, p. 2 at 1.06.
[81] Testimony is to be understood as "an oral or written statement under oath or affirmation/declaration or statement of fact". The Concise Oxford Dictionary, Ninth Edition (Oxford: Oxford University Press, 1995), p. 1441.
[82] MAY, p. 97 at 4.12.
[83] *Prosecutor v. Kupreškić et al.,* TC Judgement, para. 758.
[84] MAY, p. 97 at 4.12.

BOX 3: BACKGROUND TO CASES: PROSECUTOR V. KUPREŠKIĆ ET AL. ("LAŠVA VALLEY")

***Prosecutor v. Kupreškić et al.* ("Lašva Valley")**

The armed forces of the Croatian Community of Herzeg-Bosna[85] ("Croatian Defence Council") led an armed conflict with the armed forces of the government of Bosnia and Herzegovina from at least October 1992 until at least the end of May 1993. The Croatian Defence Council systematically attacked villages in the Lasva Valley region in Central Bosnia and Herzegovina that were predominantly inhabited by Bosnian Muslims. During these attacks, numerous civilians were wounded and killed. In April 1993, an offensive lasting several days was launched, a highly co-ordinated military operation involving hundreds of Croatian Defence Council troops. Bosnian Muslim civilians were wounded and killed, their houses, barns and livestock burnt. Massive destruction and killings took place in the village of Ahmici where, following the attack, no Bosnian Muslims were left alive.[86] The Amended Indictment alleged that Croatian Defence Council soldiers Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipovic, Dragan Papic and Vladimir Santic had participated in military training, armed themselves, evacuated Bosnian Croat civilians before the attack, organised the Croatian Defence Council soldiers, weapons and ammunition in and around the village of Ahmici-Santici, prepared their homes and the homes of their relatives as staging areas and firing locations for the attack, and concealed from other inhabitants that the attack was imminent. In this way they helped prepare the April attack on the Ahmici-Santici civilians.[87] The Appeals Chamber reversed the Trial Chamber Judgement and found Zoran Kupreškić, Mirjan Kupreškić and Vlatko Kupreškić not guilty. Drago

[85] The Croatian Community of Herzeg-Bosna considered itself an independent political entity inside Bosnia and Herzegovina from at least July 1992. Bosnia and Herzegovina declared its independence on March 3, 1992.

[86] There were 466 inhabitants living before the attack, of those 356 were Bosnian Muslims and 87 Bosnian Croats. *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić,* Case No. IT-95-16-, Amended Indictment, 9 February 1998 [hereinafter *Prosecutor v. Kupreškić et al.,* Amended Indictment], para. 8.

[87] *Ibid.* paras. 1-17.

Josipovic and Vladimir Santic were finally sentenced to twelve and eighteen years' imprisonment, respectively.[88]

Even before the Rules of Procedure and Evidence were adopted, several governments recommended the United Nations Secretary-General not apply overly strict rules of evidence in cases related to ongoing armed conflicts.[89] In this regard, in *Prosecutor v. Delalić et al*., the Trial Chamber noted that these recommendations attract

> particular attention to the limitations arising from the conflict and conditions in the former Yugoslavia. These limitations referred to the restricted possibilities of gaining access to documentary evidence in the process of an ongoing armed conflict and, therefore, the need to rely on *viva voce* evidence. Thus it was submitted that the International Tribunal could not be too strict about the criteria for the admissibility of evidence. Therefore, it was considered that the inclusion of technical rules would only encumber the judicial process.[90]

In *Prosecutor v. Blaskić*, it has been asserted that "the principle is … one of extensive admissibility of evidence". Subsequent questions of credibility or authenticity of evidence should be determined according to the weight that is given to each of the materials by the Judges at the appropriate time.[91] At the ICTR, it has been the Trial Chamber in *Prosecutor v. Musema* calling for the liberal rule of free assessment of evidence:

> [T]he determination of admissibility does not go to the issue of CREDIBILITY, but merely RELIABILITY. Accordingly, documentary evidence may be assessed, on the balance of probabilities, to be reliable, and as a result admitted. Later, that same evidence may be found, after examination by the Chamber, not to be credible.[92]

---

[88] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić,* Case No IT-95-16-A, Appeal Judgement, 23 October 2001 [hereinafter *Prosecutor v. Kupreškić et al.,* AC Judgement], at X – Dispositions.

[89] See for example, Permanent Mission of the Argentine Republic to the United Nations, 27 July 1993, IT/4, 16 November 1993 or Letter dated 29 November 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General, IT/15, 29 November 1993.

[90] *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No IT-96-21-T, Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997, para. 41.

[91] *Prosecutor v. Tihomir Blaškić*, Case No IT-94-14-S, Judgement, 3 March 2000 [hereinafter *Prosecutor v. Blaškić*, TC Judgement], para. 34.

[92] *Prosecutor v. Alfred Musema*, Case No ICTR-96-13-T, Judgement and Sentence, 27 January 2000 [hereinafter *Prosecutor v. Musema*, TC Judgement and Sentence], para. 57.

In relation to Rule 89 (D), in *Prosecutor v. Bagosora*, the Trial Chamber denied the request of the Defence to apply a pre-determination of the rules of evidence. The Trial Chamber argued that "flexibility and efficacy" should be the basic approach if the development of the law is to be permitted. It has reminded the Defence that it can come up with "objections to particular pieces of evidence on a case-by-case basis".[93]

From the Rules of Procedure and Evidence and subsequent practice of the Tribunals, it seems that the Chambers are supposed to apply: first, the principles from the Rules of Procedure and Evidence and the Statute; second, 'the general principles of law'; and only finally, to rely on the principles from national legislations which share some common denominators.

When there is no rule covering a certain matter in the Rules of Procedure and Evidence, the Chambers may fill the gap by applying 'general principles of law'[94]:

> Rule 89 (B) provides the Chambers a certain level of discretion to fill the lacunae in situations where the Rules are silent. This combination seeks to ensure that the parties will know, with a relative degree of certainty, the evidentiary parameters, while also maintaining maximal flexibility for the Chambers to ensure that the proceedings are fair for both parties.[95]

In *Prosecutor v. Tadić*, in his Separate Opinion on Prosecution Motion for Production of Defence Witness Statements, Judge Stephen presented his view that it is correct to consider a solution that has been adopted by a "substantial number of well-recognized legal systems" as entailing "some quite general principle of law such as is referred to in Sub-rule 89 (B)."[96]

In *Prosecutor v. Furundžija,* the Trial Chamber differentiated between the general principles of international law and principles of criminal law common to the major

---

[93] *Prosecutor v. Bagosora*, Decision on the Defence Motion for Pre-Determination of Rules of Evidence, 8 July 1998. (as cited in MAY, p. 100)

[94] In relation to this rule, it is worth noting that the Statute of the International Court of Justice recognizes the 'general principles of law' in the list of sources of international law.

[95] Daryl Mundis, *The Legal Character and Status of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunals*, 1 INT'L CRIM. L. REV. 191 at 197 (2001).

[96] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No IT-94-1-T, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996, para. 6.

legal systems of the world.[97] On the one hand, the national rules of evidence may be "of guidance and assistance to Chambers in determining questions of procedure and evidence"; on the other hand, "there may be dangers in their direct application"[98]. The ICTY and ICTR are thus not bound by them.

RELEVANCE OF EVIDENCE

Evidence is relevant when "its effect is to make more or less probable the existence of any fact which is in issue, i.e. upon which guilt or innocence depends."[99]

Modern trials cover armed conflicts, internal or international, that took place over a longer period of time. In these conflicts, persecution was widespread, crimes were many and they were committed against masses of people.[100] The judges may be unfamiliar with the settings in which the conflicts arose and crimes were committed. They often have to be enlightened as to the socio-historical, political, and cultural background of these conflicts.

The Tribunals are allowed to exclude pieces of evidence if they are irrelevant to the issues in the trial. In *Prosecutor v. Kupreškić et al*., the Trial Chamber excluded as irrelevant evidence, which the Defence wanted to introduce, of crimes committed by the "other side", as well as evidence attempting to determine who was responsible for starting the conflict.[101] The Trial Chamber was not convinced that the evidence was relevant to the Trial.[102] In *Prosecutor v. Kunarac et al.*, the Trial Chamber refused portions of evidence based on the argument that it considers them inadmissible *on their face* because they are irrelevant to the specific charges against the accused. For this very reason, the Trial Chamber refused a portion of evidence elaborating on the historical background of the conflict. It was stressed that the evidence was inadmissible because it was irrelevant, and not because it

[97] *Prosecutor v. Furundžija*, TC Judgement, para. 177.
[98] MAY, p. 101.
[99] MAY, p. 102 (originally in Richard May, Criminal Evidence, pp.1-13 (Sweet & Maxwell 1999).
[100] MAY, p. 102.
[101] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić,* Case No IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999.
[102] *Ibid.*

was beyond the expertise of the expert giving its opinion on the issues, as was submitted by the Prosecutor.[103]

In cases of rape and sexual assaults, evidence related to the prior sexual conduct is considered irrelevant and is *a priori* excluded by the Tribunals. In *Delalić et al.,* the Trial Chamber was of the view that abortion constituted evidence of prior sexual conduct and the statement of Ms. Cecez, a witness for the Prosecution, that she 'had an abortion' is therefore irrelevant and should be redacted from public records.[104]

In *Prosecutor v. Kupreškić et al*., the Trial Chamber presented its opinion that the character evidence of the accused prior to the events for which he is indicted before the Tribunal is not relevant insomuch as:

> (a) by their nature as crimes committed in the context of widespread violence and during a national or international emergency, war crimes and crimes against humanity may be committed by persons with no prior convictions or history of violence, and that consequently evidence of good, or bad, conduct on the part of the accused before the armed conflict began is rarely of any probative value before the International Tribunal, and
> (b) as a general principle of criminal law, evidence as to the character of an accused is generally admissible to show the accused's propensity to act in conformity therewith.[105]

Even though Rule 93 of the Rules on Procedure and Evidence establishes that "evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice", in *Prosecutor v. Kvočka et al.*, the Trial Chamber elucidated that such evidence can only rarely be relied on to prove that there has been

---

[103] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23-T and IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 6.
[104] *Prosecutor v. Mucić et al.,* Decision on the Prosecution's Motion for the Redaction of Public Record, 5 June 1997.
[105] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić,* Case No IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999.

a systematic pattern of conduct if the evidence falls outside the scope of the indictment.[106]

Finally, in *Prosecutor v. Kupreškić et al*., the Appeals Chamber reminded that when it happens that "the evidence turns out differently than expected", there are some solutions: the indictment can be amended, adjournment can be granted, or the evidence which falls out of the scope of the indictment can be excluded.[107]

RELIABILITY OF EVIDENCE

Evidence is admissible when it is relevant. Evidence is relevant when it has probative value. In *Prosecutor v. Delalić et al*., the Trial Chamber made clear that "it is an implicit requirement of the Rules that the Trial Chamber give due considerations to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility."[108] In this case, the Trial Chamber agreed with the reasoning of the "Hearsay Decision" in *Prosecutor v. Duško Tadić*[109] and considered reliability to be "an inherent and implicit component of each element of admissibility".[110] The Trial Chamber concluded that "if evidence offered is unreliable, it cannot be either relevant or of probative value" and as such, under Sub-rule 89(C), is inadmissible.[111] It cannot be deduced, however, that the mere admission of a document into evidence does in and of itself signify that "the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts".[112] The Trial Chamber made it clear that it would assess the weight to be attached to each individual piece of evidence and in this respect factors such as authenticity and proof of authorship would be considered. Finally, the Trial Chamber warned against setting an excessively high threshold standard for the admission of evidence as documents are often admitted into

---

[106] *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić, Dragoljub Prcać,* Case No IT-98-30/1-T, Judgement, 2 November 2001 [hereinafter *Prosecutor v. Kvočka et al*., TC Judgement], para. 652.
[107] *Prosecutor v. Kupreškić et al.*, AC Judgement, para. 92.
[108] *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, at 20.
[109] *Prosecutor v. Duško Tadić,* Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996.
[110] *Ibid.* at 18.
[111] *Ibid.*
[112] *Ibid.* at 20

evidence to present a context and complete the picture based on the evidence that was collected. Documents are not usually used as ultimate proof of guilt or innocence.[113]

The ICTY reasoning in the *Delalić* case was followed by the ICTR. In *Prosecutor v. Musema*, the Trial Chamber concurred with the aforementioned understanding of the relationship between relevance, probative value and reliability. It restated that the reliability of evidence "does not constitute a separate condition of admissibility; rather, it provides the basis for the findings of relevance and probative value required under Rule 89(c) for evidence to be admitted".[114]

It is apparent from the ICTY and ICTR practice that the Tribunals definitely consider reliability to be relevant to admissibility.

[113] *Ibid.*
[114] *Prosecutor v. Musema*, TC Judgement and Sentence, para. 38.

CIRCUMSTANTIAL EVIDENCE AND HEARSAY

Evidence can be direct or indirect. Direct evidence is directly and closely related to the facts in dispute; it is directly and closely linked to what a person wants to prove. Indirect evidence, on the other hand, provides only a basis, using various means, to infer the facts in dispute. There are different types of indirect evidence, but two of them – circumstantial evidence and hearsay – are of particular relevance to the evaluation of evidence by the Tribunals and will be outlined below.

CIRCUMSTANTIAL EVIDENCE

In *Prosecutor v. Delalić et al*., the Trial Chamber explained what is meant by circumstantial evidence. A circumstantial case includes evidence taken from a number of different circumstances existing in combination only because the accused person did what is asserted. If these circumstances are taken together they indicate the guilt of the accused. A reasonable conclusion derived from that evidence is not enough, the conclusion must be the only reasonable conclusion existing, i.e., the conclusion must be established beyond reasonable doubt. If there is another reasonable conclusion available based on the combination of the evidence and is pointing at the innocence, the guilt of the accused person cannot be proven.[115]

Circumstantial evidence plays a significant role in international criminal trials where the access to direct evidence is limited. Circumstantial evidence is usually employed to establish intent. Specific intent required to prove genocide can serve as an example. In *Prosecutor v. Kayishema*, the Trial Chamber stated that "the perpetrator's actions, including circumstantial evidence … may provide sufficient evidence of intent."[116] Along the same line, in *Prosecutor v. Jelisić*, the Appeal Chamber expressed its view that proof of specific intent in relation to genocide may, in the absence of direct explicit evidence, be inferred from various facts and

[115] *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No IT-96-21-A, Judgement, 20 February 2001 [hereinafter *Prosecutor v. Mucić et al*., AC Judgement], para. 458.
[116] *Prosecutor v. Kayishema and Ruzindana*, TC Judgement and Sentence, para. 93.

circumstances. These facts and circumstances would include: the general context; the perpetration of other culpable acts systematically directed against the same group; the scale of atrocities committed; the systematic targeting of victims on account of their membership of a particular group; or the repetition of destructive and discriminatory acts.[117]

Circumstantial evidence can also be used to prove knowledge of joint criminal enterprise. In *Prosecutor v. Kvočka et al.*, the Trial Chamber provided examples of indicia that could assist in establishing that knowledge: the position held by the accused; the amount of time the accused spent in the camp; the function the accused performed; movement of the accused throughout the camp; any contact the accused had with detainees, staff personnel, or outsiders visiting the camp. The Trial Chamber added that ordinary senses can lead to the knowledge of the crimes. According to the Trial Chamber, the accused do not actually have to be eye-witnesses to crimes that were committed [in this case, in the Omarska camp]. It is apparent that

> [T]he evidence of crimes could be *seen* by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor conditions of detainees, as well as observing the cramped facilities or the bloodstained walls. Evidence of abuses could be *heard* from the screams of pain and cries of suffering, from the sounds of the detainees begging for food and water and beseeching their tormentors not to beat or kill them, and from the gunshots heard everywhere in the camp. Evidence of abusive conditions in the camp could also be *smelled* as a result of the deteriorating corpses, the urine and feces soiling the detainees, and the inability of detainees to wash or bathe for weeks or months.[118]

Furthermore, circumstantial evidence can be used to prove superior criminal responsibility. The ICTY Statute in its Article 7 (3) provides that the superior cannot be relieved of his superior criminal responsibility if he knew or had reason to know that the subordinate was about to commit the acts referred to in Articles 2 to 5 of the Statute, or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[119] In this effect, in *Prosecutor v. Delalić et al*., the Trial Chamber held that such knowledge

---

[117] *Prosecutor v. Goran Jelisić*, Case No IT-95-10-A, Judgement, 5 July 2001 [hereinafter *Prosecutor v. Jelisić*, AC Judgement], para. 47.
[118] *Prosecutor v. Kvočka et al.,* TC Judgement, para. 324.
[119] U.N. Doc. S/RES/827 (1993), Article 7(3).

"cannot be presumed, but must be established by way of circumstantial evidence".[120] Similarly, in *Prosecutor v. Kordić and Čerkez*, the Trial Chamber defined actual knowledge as "the awareness that the relevant crimes were committed or were about to be committed", and stated that the knowledge may be established through direct or circumstantial evidence which would permit an inference that "the superior 'must have known' of subordinates' criminal acts". Finally, the Trial Chamber agreed with the Prosecution that the list of indicia available from the United Nations Commission of Experts may be used to arrive at such conclusion: the number, type, and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; their widespread occurrence; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved and the location of the commander at that time.[121]

BOX 4: BACKGROUND TO CASES: PROSECUTOR V. DELALIĆ ET AL. ("CELEBICI")

Prosecutor v. Delalić et al. ("Celebici")

The Konjic Municipality[122] is located in central Bosnia and Herzegovina, strategically linked by road and rail to Sarajevo (59 km north-east) and Mostar (71 km south). The perceived importance of Konjic to the Bosnian Croats meant that armed and organised units of the Croatian Defence Council were present there. In addition, the Yugoslav People's Army was running several military facilities in the municipality. The local, under-equipped, Territorial Defence forces were also aware of the potential value of Konjic. The minority Serb population in Konjic was armed by both the Serbian Democratic Party and the Yugoslav People's Army, and propaganda was directed at their Muslim and Croats neighbours.[123]

---

[120] *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No IT-96-21-T, Judgement, 16 November 1998. [hereinafter *Prosecutor v. Mucić et al*., TC Judgement], para. 386.
[121] *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No IT-95-14/2-T, Judgement, 26 February 2001 [hereinafter *Prosecutor v. Kordić and Čerkez*, TC Judgement], para. 427.
[122] According to the 1991 census, the make-up of the Municipality was as follows: 54.3% were Muslims, 26.2% Croats, 15% Serbs, 3% Yugoslavs, and 1.3% others. *Prosecutor v. Mucić et al.*, TC Judgement,
para. 121.
[123] *Ibid.* para. 130.

Like other municipalities across Bosnia and Herzegovina, Konjic was caught up in tension and suspicion among its ethnic groups, Muslims, Croats and Serbs, in March and April 1992. Frequent armed attacks, defensive action, population displacement and food shortages were the consequence.[124]

By mid-April 1992, Konjic was surrounded by armed Bosnian Serb forces, and access to Sarajevo and Mostar was cut off. Many Bosnian Muslims and Croats from the Konjic Municipality fled their homes and started to arrive into the town. Fear and panic spread over Konjic and Serbs from the town started to leave for the villages inhabited predominantly by Serbs.[125] In May 1992, the first shells were fired by the Yugoslav People's Army and other Serb forces on the Konjic town. The daily shelling lasted for about three years, until the Dayton Peace Agreement was signed. Many people were killed and conditions for the surviving population were unbearable.[126] To make the situation even worse, an open conflict developed between the Croatian Defence Council and the local Territorial Defence forces over the summer, as a consequence of unsuccessful negotiations as well as operations against the Serb forces.[127]

Many Serbs were captured during these military operations. As the detention capacities of Konjic were limited, they were taken to the village of Celebici where they were detained in the barracks and warehouses that constituted a former Yugoslav People's Army complex – the Celebici prison camp.[128]

People were beaten upon their arrest, during the transfer to the camp and upon their arrival. Thus the atmosphere at the camp was one of fear and intimidation. Many former prisoners still suffer physically and psychologically from the physical violence and cruelty at the Celebici prison camp.[129] Injuries and mistreatment were carried out to cause severe pain and suffering to the prisoners. They were

[124] *Ibid.* para. 130.
[125] *Ibid.* para. 133.
[126] *Ibid.* para. 134.
[127] *Ibid.* para. 140.
[128] *Ibid.* paras. 141 and 144.
[129] *Ibid.* paras. 150 and 154.

intended not only to punish and intimidate specific prisoners but also to contribute to the general 'atmosphere of terror' in the camp.[130]

From May to December 1992, Esad Landžo ("Zenga") worked as a guard at the Celebici prison camp. It was established, for example, that Landžo participated in severe beatings of a detainee by the guards employed in the camp;[131] mercilessly beat an elderly person with a heavy implement – the detainee did not survive for more than half an hour afterwards;[132] burned the legs of a detainee, placed a gasmask on his head, forced him to eat grass, filled his mouth with clover and water and beat him;[133] forced a detainee to do push-ups while inflicting blows to his body with kicks and a baseball bat;[134] burned the lips, tongue and ear of a detainee with heated pincers and subjected him to other mistreatment.[135] Landžo's acts were perpetrated in his role as a guard at the Celebici prison camp and, as such, he was an official of the Bosnian authorities running the prison camp.[136]

From about May to November 1992, Hazim Delić was a Deputy Commander of the Celebici prison camp. In November or December 1992, he became the Commander of the camp. It was established that Delić engaged in the beating of a detainee, resulting in his death;[137] kept a detainee in a manhole for at least a night and a day without food or water;[138] and as an official of the Bosnian authorities running the prison camp, he raped detainees during interrogations at the camp.[139]

From about May to November 1992, Zdravko Mucić was the Commander of the Celebici prison camp. As a superior, he exercised de facto authority over the prison camp, the deputy commander and the guards. On his behalf, there was no effective

---

[130] *Ibid.* for example paras. 998 and 1090, 1091. See for example para. 1091: "[t]he detainees in the Celebici prison-camp were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse. Through the frequent cruel and violent deeds committed in the prison-camp, aggravated by the random nature of these acts and the threats made by guards, the detainees were thus subjected to an immense psychological pressure which may accurately be characterised as "an atmosphere of terror".
[131] *Ibid.* para. 845.
[132] *Ibid.* para. 855.
[133] *Ibid.* para. 974.
[134] *Ibid.* para. 1032.
[135] *Ibid.* para. 998.
[136] *Ibid.* para. 923, 998.
[137] *Ibid.* para. 833.
[138] *Ibid.* para. 1007.
[139] *Ibid.* paras. 940, 941, 943 and 965.

attempt to prevent and punish the criminal acts committed by his subordinates.[140] By virtue of his position, Mucić participated in the maintenance of the atmosphere of terror that prevailed in the Celebici prison camp; in the maintenance of inhuman conditions by failing to provide the detainees with adequate food, water and sanitary facilities[141]; as well as in the unlawful continuing confinement of civilians who were granted no procedural rights.[142]

From May to July 1992, Zejnil Delalić was a co-ordinator of the Bosnian Muslim and Bosnian Serb forces in the Konjic area. From July to November 1992, he was the Commander of the First Tactical Group of the Bosnian Army. The Prosecution failed to prove that Delalić had command authority and therefore superior authority over the Celebici prison camp, its commander, deputy commander or guards.[143]

Esad Landžo, Hazim Delić and Zdravko Mucić were sentenced to fifteen, eighteen and nine years' imprisonment, respectively. Zejnil Delalić was found not guilty, and acquitted.[144]

[140] *Ibid.* paras. 774, 775.
[141] *Ibid.* para. 1123.
[142] *Ibid.* para. 1145. [Further explained in *Prosecutor v. Mucić et al.*, AC Judgement, para. 330.]
[143] *Ibid.* para. 721.
[144] Description of established crimes and imposed sentences reflects the state of the case after the Appeal.

Hearsay can be defined as "the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered to establish the truth of its contents".[145]

It is well established that hearsay practice is admissible at the Tribunals. In *Prosecutor v. Blaškić,* the Trial Chamber rejected the standing objection filed by the Defence challenging the admission of hearsay without objecting its reliability. The Trial Chamber argued that, under the Sub-rule 89(C) of the Rules of Procedure and Evidence, it may admit any relevant evidence which it deems to have probative value. The Trial Chamber stressed that "the indirect nature of the testimony depends on the weight which the Judges give to it and not on its admissibility."[146]

In *Prosecutor v. Milošević*[147], one of the most recent cases, the Trial Chamber dealt with the issue of admissibility of a material under Rule 89 of the Rules on Procedure and Evidence in relation to the jurisprudence of the ICTY regarding hearsay. Firstly, it introduced Rule 89(C): "[a] Chamber may admit any relevant evidence which it deems to have probative value." Then the Trial Chamber restated the Appeals Chamber holding from *Prosecutor v. Aleksovski*:

> [i]t is well settled in the practice of the Tribunal that hearsay evidence is admissible.... Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement **and** the **circumstances** under which the evidence arose; or,... the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has

---

[145] U.S. FED. R. EVID 801(c), as cited in MAY, p. 114.
[146] *Prosecutor v Blaškić*, TC Judgement, para. 36 (elaborating on *Prosecutor v. Tihomir Blaškić*, Case No IT-94-14-T, Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, 21 January 1998).
[147] *Prosecutor v. Slobodan Milošević*, Case No IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasović, 26 August 2005, paras. 17-19.

> been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.[148]

Finally, the Trial Chamber reiterated that the Appeals Chamber stated in *Prosecutor v. Aleksovski*: "evidence is admissible only if it is relevant and it is relevant only if it has probative value, general propositions which are implicit in Rule 89(C)".[149] Based on the reasoning from *Prosecutor v. Tadić,* where the Trial Chamber held that "if evidence offered is unreliable, it certainly would not have probative value",[150] the Trial Chamber concluded: "reliability of a hearsay statement is a necessary prerequisite for probative value under Rule 89 (C)".[151] The Trial Chamber then applied the law based on this jurisprudence.

BOX 5: BACKGROUND TO CASES: PROSECUTOR V. ALEKSOVSKI ("LAŠVA VALLEY")

***Prosecutor v. Aleksovski* ("Lašva Valley")**

Zlatko Aleksovski was the commander of the prison facility at Kaonik in Bosnia and Herzegovina from January until May 1993. Many Bosnian Muslim civilians were illegally incarcerated there.[152] As a prison warden, Aleksovski personally participated in physical violence against the detainees and participated in the selection of those detainees who were to become human shields or supposed to dig trenches, thus placing their lives at risk. Furthermore, he was aware of these acts

---

[148] *Prosecutor v. Slobodan Milošević*, Case No IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasović, 26 August 2005, para. 18 (citing *Prosecutor v. Zlatko Aleksovski*, Case No IT-95-14/1-AR73, Decision On Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (citing *Prosecutor v. Duško Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996, paras. 15-19 & Separate Opinion of Judge Stephen on the Defence Motion on Hearsay, pp. 2-3; *Prosecutor v. Tihomir Blaškić*, Case No IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to Its Reliability, 21 January 1998, paras. 10, 12)) (footnotes omitted, emphasis added).

[149] *Prosecutor v. Slobodan Milošević*, Case No IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasović, 26 August 2005, para. 18 (citing *Prosecutor v. Galić*, Case No IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, para. 35).

[150] *Prosecutor v. Duško Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996, para. 15.

[151] *Prosecutor v. Milošević*, Case No IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasović, 26 August 2005, para. 18.

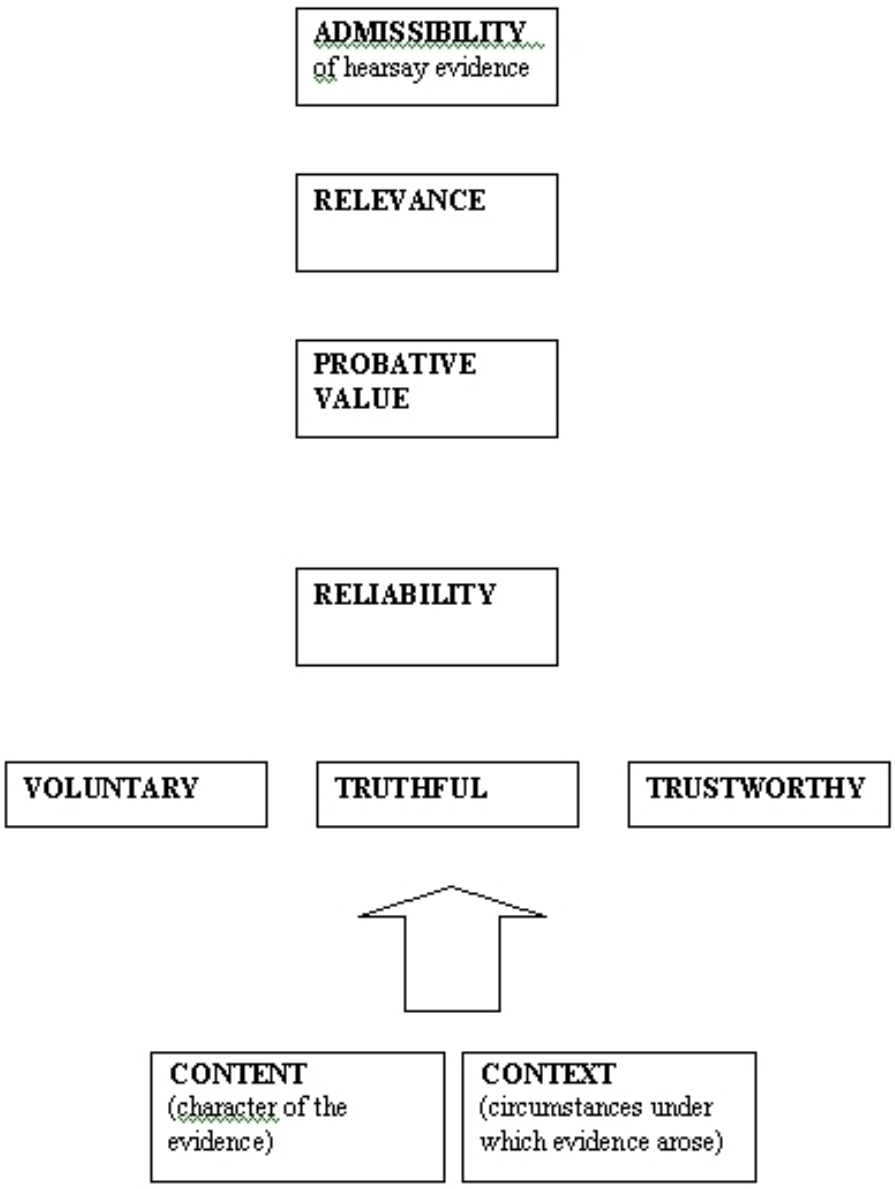
[152] The Head of the District Croatian Defence Council (HVO) "Heliodrom" prison in Mostar from May 1993. *Prosecutor v. Zlatko Aleksovski,* Case No IT-95-14/1-T, Judgement, 25 June 1999 [hereinafter *Prosecutor v. Aleksovski*, TC Judgement], para. 26. *Prosecutor v. Zlatko Aleksovski,* Case No IT-95-14, Initial Indictment, 10 November 1995 [hereinafter *Prosecutor v. Aleksovski*, Initial Indictment], at 7.

and failed to prevent them and punish their perpetrators. To the contrary, as commander Aleksovski served as an example to his subordinates, encouraging them to engage in similar atrocities.[153] Aleksovski was originally sentenced to two and a half years' imprisonment;[154] the Appeals Chamber then revised the sentence to seven years' imprisonment arguing that the Trial Chamber erred in not having sufficient regard for the gravity of Aleksovski's offences.[155]

The diagram below illustrates the reasoning of the ICTY Appeals Chamber, as summarized in the Trial Chamber's Order on Procedure and Evidence in *Prosecutor v. Milutinović et al.*, concerning the admissibility of a hearsay statement. To summarize it, the evidence is *admissible* when it is *relevant*. The evidence is relevant when it has *probative value*. The evidence has probative value when it is *reliable*. The evidence is reliable when it is *voluntary*, *truthful* and *trustworthy*. For these purposes, the *content* of the hearsay statement as well as the *context* under which the evidence arose may be examined. The opportunity to cross-examine the person who made the statements and the information whether the hearsay comes from first-hand or more remote sources can also assist in establishing the probative value of the evidence.

[153] *Prosecutor v. Aleksovski*, TC Judgement, para. 183.
[154] *Ibid.*, para. 244.
[155] *Prosecutor v. Zlatko Aleksovski,* Case No IT-95-14/1-A, Judgement, 24 March 2000 [hereinafter *Prosecutor v. Aleksovski*, AC Judgement], paras. 183, 186, 192.

Diagram: Admissibility of hearsay evidence



It is quite apparent that the weight or probative value given to hearsay evidence is usually less than that afforded to the testimony of a witness given under oath, especially in the case when the witness is cross-examined. Nevertheless, even this depends on the circumstances under which the hearsay evidence arose.

Unquestionably, the fact that the evidence is hearsay does not deny it its probative value.[156]

Rule 92*bis*[157] of the ICTY Rules of Procedure and Evidence governs the admission of written statements and transcripts in lieu of oral testimony.

> (A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.[158]

The Rule also takes into account factors in favour of admitting evidence in the form of a written statement or transcript, such as circumstances in which the evidence in question is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; relates to relevant historical, political or military background; consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; concerns the impact of crimes upon victims; relates to issues of the character of the accused; or relates to factors to be taken into account in determining sentence.[159]

At the same time, Rule 92*bis* also includes factors against admitting this kind of evidence, such as whether there is an overriding public interest in the evidence in question being presented orally; a party objecting can demonstrate that its nature and source render it unreliable, or that its prejudicial effect outweighs its probative value; or if there are any other factors which make it appropriate for the witness to attend for cross-examination.[160]

It follows from the ICTY and ICTR jurisprudence that the Tribunals have admitted both oral and written hearsay in their practice.

---

[156] *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Case No IT-05-87-T, Order on Procedure and Evidence, 11 July 2006, para. 4.
[157] Rule 92bis was adopted on 1 and 13 December 2000 and amended on 13 September 2006.
[158] ICTY Rules of Procedure and Evidence, Rule 92*bis*.
[159] *Ibid.*
[160] *Ibid.*

The very special character of international criminal trials and the unique nature of international crimes mean that judges encounter distinctive evidentiary challenges when it comes to ensuring the fairness of international criminal trials. As has already been stated, many international crimes meet the criteria of violations of international humanitarian law and nearly all of them meet the criteria of serious breaches of human rights. In this respect, May and Wierda identified two main sets of evidentiary challenges.[161]

First, the fact that many international crimes are extremely violent in nature seriously affects the gathering of evidence. Already in relation to the evidentiary procedures at the Nuremberg Trials, the Memorandum from the Secretaries of State of War and the Attorney General warned President Roosevelt: "witnesses will be dead, otherwise incapacitated or scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offences one of appalling dimensions."[162] Such a challenge was not unique to the trials at Nuremberg and Tokyo; it has equally affected modern international criminal trials. In both Rwanda and the Former Yugoslavia, incapacitated witnesses, their trauma, stress and intimidation as well as the lapse of time before the trials commenced and were finished have intruded into evidentiary procedures and certainly are the major obstacles judges must attempt to overcome.[163]

Second, many international crimes are extreme in their scope and are generally committed on a mass scale. The crimes frequently cover many locations that are normally unfamiliar to the judges; moreover, the locations are spread over more than one region. The crimes cover many particular events as well as embrace many people, victims as well as perpetrators. Many of these events and people will never be identified. In addition, international crimes are not usually isolated acts

[161] MAY, p. 9-11 at 1.24-1.27.
[162] Memorandum to President Roosevelt from the Secretaries of State of War and the Attorney General, 22 January 1945 at 5 as cited in MAY, p. 10 at 1.24.
[163] MAY, p. 9-10 at 1.24-1.25.

committed only by an ordinary individual; more often that not they constitute a part of the regime with the shared responsibility of the leadership. Furthermore, during the trials, the judges not only encounter a foreign country but also its distinctive culture. All of this influences both the gathering of and subsequent work with the evidence.[164]

As will be seen below, both sets of these evidentiary challenges can be found in refugee status determination procedure. It will be presented that in many cases refugees may have experienced extremely violent international crimes, and/or they may have a well-founded fear of extremely violent persecution. It is almost impossible to bring before the decision-making authority witnesses that would prove there is a reasonable chance the particular refugee is at risk of persecution if he or she was returned to his or her country of origin. Decision makers will thus have to rely on the testimonies of these refugees, often shaped by trauma, stress, and intimidation as well as the lapse of time before they were given the opportunity to narrate their stories. Furthermore, the decision makers are often unfamiliar with the locations the refugees come from. While responsible for making life-or-death decisions, the decision makers not only encounter a foreign country and language but also distinctive cultures. Again, as with international criminal trials, this will influence their work with the evidence.

[164] MAY, pp. 10-11 at 1.26-1.27.

2

REFUGEE STATUS DETERMINATION

> "THE GRANT OF REFUGEE PROTECTION THROUGH ASYLUM IS A NON-POLITICAL AND HUMANITARIAN ACT THAT REFLECTS A COLLECTIVE DESIRE TO PROTECT THOSE LACKING THE NORMAL PROTECTION OF THE STATES. THE CONVENTION IS AN INSTRUMENT WITH REMARKABLE HUMAN DIMENSIONS. AND IT WAS NOT INTENDED TO BE USED IN A CLINICAL OR RITUALISTIC WAY. IT DEMANDS A BROAD AND COMPASSIONATE CONSTRUCTION THAT GIVES SENSE AND MEANING TO THE WORD 'PROTECTION'. PANDIT NEHRU ONCE SAID THAT 'THE RULE OF LAW MUST STRENGTHEN THE RULE OF LIFE'. THIS IS NO MORE APPROPRIATE THAN IN THE PROTECTION OF REFUGEES."[165]

INTRODUCTION TO REFUGEE STATUS DETERMINATION

All over the world, in the course of the history, people have fled their homes in search of assistance and protection. In ordinary speech, as the causes of forced relocation are many – ranging from various types and scales of violence, persecution, threats to life and freedoms, civil disorder, foreign occupation and oppression, to earthquakes and other environmental catastrophes – the meanings of the word 'refugee' vary.

In international law, states have limited the content of the definition of refugee in order to "facilitate, and to justify, aid and protection."[166] However, it was not until the early twentieth century that the international community came up with the first institutional responses to the refugee problem and the first attempts were made to define a refugee. At that time, for humanitarian reasons, the international

---

[165] *Seminar Materials, Seminar for New Refugee Law Judges*, The materials were developed for the International Association of Refugee Law Judges by the Immigration and Refugee Board, Canada, The Centre for Refugee Studies, York University, Canada, United Nations High Commissioner for Refugees, Geneva (Jun. 1999) [hereinafter SEMINAR FOR NEW REFUGEE LAW JUDGES].

[166] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996) [hereinafter GOODWIN-GILL], p. 4.

community accepted some responsibility for assisting and protecting refugees. [167] After the end of the Second World War, it became apparent that the refugee problem had not been solved, and as such was not a temporary phenomenon but a permanent one. There was a strong need for a new international instrument that would contain a general and universal definition of a refugee, instead of the *ad hoc* agreements adopted in relation to specific refugee situations. Thus, the contemporary legal framework that supports the international refugee protection regime was built in the second half of the twentieth century within the framework of the United Nations. On 28 July 1951, the United Nations Conference of Plenipotentiaries adopted the 1951 Convention relating to the Status of Refugees, which entered into force on 21 April 1954.[168] A few years after the adoption of the 1951 Convention, new refugee situations emerged and there was an increasing call to adjust the provision of the 1951 Convention to include recent refugees. It took more than fifteen years, and on 31 January 1967 the 1967 Protocol relating to the Status of Refugees was opened for accession. The Protocol entered into force on 4 October of the same year.[169] Indisputably, the 1951 Convention and the 1967 Protocol are the cornerstone international documents to which many states have acceded in the few past decades.[170]

---

[167] The historical background against which various definitions of a refugee may be considered falls outside the scope of this work.

[168] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 U.N.T.S. 2545.

[169] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967), 606 U.N.T.S. 8791. At the time when Convention was drafted, the states were only interested in the refugee problems of the time, so the two serious limitations were in place: in addition to continuing protection for people deemed to be refugees under earlier international instruments, the Convention was to be applied only to any person who as a result of events before 1 January 1951 satisfied the four conditions of the Inclusion Clauses. The events occurring before 1 January 1951 were understand to mean: (a) events occurring in Europe before 1 January 1951 or (b) events occurring in Europe or elsewhere before 1 January 1951, and each Contracting State was supposed to make it clear by a declaration at the time of signature, ratification or accession which of these meanings it applied for the purposes of its obligations under the Convention. It took more than fifteen years before the time and the geographic limitations were set aside for the Contracting States of the 1967 Protocol. The Protocol is an independent instrument; states may become a party to the Protocol without becoming a party to the 1951 Convention relating to the Status of Refugees.

[170] As of 1 October 2008, there were 144 States Parties to the 1951 Convention, 144 States Parties to the 1967 Protocol, 141 States Parties both to the 1951 Convention and the 1967 Protocol, and 147 States Parties to one or both of these instruments. Available at: http://www.unhcr.org/3b73b0d63.html [accessed 21 November 2009].

The 1951 Convention and the 1967 Protocol embrace three basic types of provisions. The first type defines who is and who is not to be granted refugee status, as well as who, having been a refugee, ceases to be one. The second type deals with the legal status of refugees and their rights and duties in the country of asylum. The last type of provision describes the implementation of these instruments from both the administrative and diplomatic perspectives.[171]

When men, women and children flee their countries to avoid persecution, they must often rely on foreign authorities to determine if they meet the legal definition of a refugee, in order to avoid being forced to return to their country of origin. The determination of refugee status under the 1951 Convention and the 1967 Protocol is the responsibility of the Contracting State in whose territory the refugee applies for the refugee status. This state assesses who meets the criteria to be granted refugee status.

The 1951 Convention and its 1967 Protocol are applicable to all persons who are refugees defined in their terms. For the purposes of the 1951 Convention relating to the Status of Refugees and its 1976 Protocol, the term 'refugee' applies to any person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[172]

This part of the refugee definition, also referred to as the *Inclusion Clauses*, clearly establishes four basic criteria a person must satisfy to be granted refugee status: (1) the person has to be *outside his country of origin*; (2) the person has to have a *well-founded fear*; (3) that fear must relate to *persecution*; and (4) the fear of persecution must be based on one or more of the enumerated grounds: *race, religion, nationality, membership of a particular social group, or political opinion.*

---

[171] UN High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992, available at: http://www.unhcr.org/refworld/docid/3ae6b3314.html [accessed 22 November 2009][hereinafter *UNHCR Handbook*], p. 4-5.

[172] Convention relating to the Status of Refugees, 189 U.N.T.S. 2545 and Protocol Relating to the Status of Refugees, 606 U.N.T.S. 8791.

Although "the humanitarian thrust of the refugee problem can be lost in a maze of political manoeuvres",[173] the definition of a refugee should always be interpreted and applied in a humanitarian spirit and with humanitarian objectives in mind. Justice and understanding should always lead individual decisions on refugee status. The preamble to the 1951 Convention provides that the High Contracting Parties

> *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,
>
> *Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees with the widest possible exercise of these fundamental rights and freedoms, […]
>
> *Expressing* the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,[174]

Moreover, regarding the interpretation of the 1951 Convention, the 1969 Convention on the Law of Treaties stipulates in its Article 31 that 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 objective.

---

[173] C. Wydrzynski, "Refugees and the *Immigration Act*" (1979), 25 McGill L.J. 154, at 170.
[174] Convention relating to the Status of Refugees, 189 U.N.T.S. 2545, Preamble.

> *HUMAN RIGHTS VIOLATIONS ARE A MAJOR FACTOR IN CAUSING THE FLIGHT OF REFUGEES, AS WELL AS AN OBSTACLE TO THEIR SAFE AND VOLUNTARY RETURN HOME. SAFEGUARDING HUMAN RIGHTS IN COUNTRIES OF ORIGIN IS, THEREFORE, CRITICAL BOTH FOR THE PREVENTION AND FOR THE SOLUTION OF REFUGEE PROBLEMS. RESPECT FOR HUMAN RIGHTS IS ALSO ESSENTIAL FOR THE PROTECTION OF REFUGEES IN COUNTRIES OF ASYLUM.*[175]

Refugees do not choose to enter another country, rather they are pushed to do so by the risk of persecution in their home country: "[i]t is the vital need for international protection from persecution that most clearly distinguishes refugees from other immigrants."[176] It was the UN Human Rights Commission recommendation to the United Nations in 1947 to consider "the legal status of persons who do not enjoy the protection of any government"[177] that triggered the preparatory works on the 1951 Convention relating to the Status of Refugees.

The refugee status determination procedure seeks to establish whether a person should enjoy and benefit from international refugee protection. As in the case of international criminal trials, the "concept of fairness" remains the cornerstone of this procedure.

If a wrong decision is rendered in a refugee case and a person is returned to his or her country of origin, there can be dramatic consequences. As the concept of persecution is at the core of refugee protection, the wrong decision would mean returning a person to the environment where his or her life or liberty could be threatened. Decision makers must always keep in mind that in cases of genuine refugees, the decision can mean either life or death. It is therefore necessary to

---

[175] Statement of the United Nations High Commissioner for Refugees made at the 50th session of the UN Commission on Human Rights (1994) Quoted in UNHCR, *Human Rights and Refugee Protection, Part I: General Introduction* (October, 1995), p.4.
[176] SEMINAR FOR NEW REFUGEE LAW JUDGES, at 1-3.
[177] Commission on Human Rights Report to ECOSOC on the 2nd Session of the Commission Held at Geneva from 2 to 17 December 1947 (1948) UN Doc E/600 at 46.

apply the definition properly and ensure that the applicants for refugee status have access to a fair process.

The 1951 Convention does not specifically regulate the procedure for the identification of who is a refugee; nor does it indicate what procedures for refugee status determination are to be adopted by the Contracting States. These states are left to establish the procedure they consider most appropriate in line with their own constitutional and administrative structures.[178]

The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook) recognizes that an applicant for refugee status, who finds themselves in an alien environment, is in a particularly vulnerable situation. Many of these applicants may experience serious troubles, technical and psychological, in presenting their case to the authorities of a foreign country, often against a linguistic background that is not their own. For this reason, the UNHCR Handbook advises that the application be assessed 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."[179]

According to the UNHCR, it is the judiciary that has a key role to play in guaranteeing appropriate protection to genuine refugees as well as in preventing the root causes of a refugee crisis.[180] In this respect, four key factors in the development of a strong international refugee law judiciary were identified. These are: (1) a "human rights culture"; (2) judicial independence; (3) the rule of law; and (4) consistency in the interpretation and application of the principles of refugee law.[181] This work, in particular Part II thereof, aims to promote these factors and calls for the application of consistent principles in the framework of refugee status determination.

---

[178] *UNHCR Handbook*, para. 189.
[179] *UNHCR Handbook*, para. 190.
[180] SEMINAR FOR NEW REFUGEE LAW JUDGES, at 1-26.
[181] *Ibid.,* at 1-26.

As refugee status determination is part of international law, the adjudicators and decision makers have to be skilled international lawyers who keep abreast of developments in international law as well as new jurisprudence.

Human rights are at the heart of refugee protection. Refugee law closely interacts with the law of human rights. International refugee law, in fact, functions within the framework of international human rights law. Refugees are fugitives of injustice; violations of fundamental human rights cause people to flee their countries. Only a person who has a well-founded fear of persecution, a person who faces a risk to his or her fundamental human rights, can be considered a refugee. Moreover, the process of refugee status determination is interlinked with human rights law. Human rights principles are applied to interpret the basic concepts of refugee law, to strengthen refugee protection, and even to secure protection beyond the Geneva Convention. Finally, only the strict observance of human rights in countries of origin can re-establish refugees' trust in returning home.

Full observance of human rights should be a life-long commitment for judges and other decision makers in the field of refugee status determination. The enduring promotion of human rights should be an ongoing challenge for them. In the words of Antonio Lamer:

> [r]eal recognition of human rights is a product of a *culture* of human rights. By this, I mean a legal and social commitment in a given jurisdiction to the institutions and structures on which protection of human rights depends. In particular, the effectiveness of international human rights law ultimately depends, in my view, not only on the existence and operation of effective institutions, but also on the willingness of all of the actors within the system – the person who holds rights, the states that are obliged to respect those rights, and the bodies that enforce those rights – to regard the norms laid down in human rights instruments as being authoritative and worthy of respect. For international human rights law to be effective, therefore it must be supported by a culture in which there is a firm and deep-seated commitment to the importance of human rights in our world.[182]

[182] Antonio Lamer, C.J.C. "Judicial Independence: Cornerstone of the Protection of Human Rights" IARLJ Conference, October 15, 1998 cited in SEMINAR FOR NEW REFUGEE LAW JUDGES, at 2-6.

Only the correct interpretation and effective application of human rights law can reinforce local as well as global trust in the international refugee protection system. It is thus absolutely necessary to take a human rights-based approach in the process of refugee status determination and to start implementing the best practices developed on the international stage.

EVIDENCE IN REFUGEE STATUS DETERMINATION

> AS MUCH AS POSSIBLE, REFUGEE STATUS DETERMINATION SHOULD BE ABOUT ASSESSING WHETHER A PERSON IS IN DANGER OF HUMAN RIGHTS VIOLATIONS, NOT ABOUT PERSONAL IMPRESSIONS APPLICANTS MAKE ON THEIR ADJUDICATORS.[183]

The refugee status determination procedure is declaratory, not constitutive, in character. A person becomes a refugee as soon as he or she satisfies the criteria of the definition of a refugee. This would logically take place before refugee status is formally determined. It means that a person does not become a refugee because he or she is recognized as one, but is declared a refugee because he or she is one.[184]

Determination of refugee status includes three sets of information: the definition of a refugee, information about the applicant for refugee status, and information on his or her country of origin. When the relevant facts of the case are supplied by the applicant him or herself, it is up to the decision maker to assess the validity of the evidence as well as the credibility of the applicant's statements. Decision makers are not required to pass judgement on conditions in the applicant's country of origin; however, they must consider the applicant's statements in the context of the relevant background information as these cannot be judged in isolation.[185] While interviewing the applicant, the decision maker should endeavour to obtain a complete picture of the applicant and should strive to ascertain all the relevant facts about the person. The decision maker should also have a sound understanding of the conditions in the country of origin, and should be aware of

---

[183] Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT'L J. REFUGEE L. (2006) [hereinafter KAGAN], p. 5.
[184] *UNHCR Handbook*, para. 28.
[185] *UNHCR Handbook*, para. 42.

general conditions in the country as well as more specific conditions related to the particular case.

Only in the second stage of the procedure is the law (the definition from the 1951 Convention and the 1967 Protocol) applied to the relevant facts, i.e., to the evidence pertaining to the testimony of the applicant and the country conditions. The decision makers are in fact assessing the risk of persecution based on one of the grounds the person would face if he or she were returned to his country of origin. The core question is: What would happen to the person if he or she were returned? In other words, "the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned home."[186] When deciding whether a well-founded fear of persecution exists, the decision makers thus perform an inherently future-oriented, hypothetical and speculative exercise.[187]

It is indisputable that the nature of the procedure affects human lives. Decision makers conclude on the facts and form their personal impression of the applicant in the framework of the procedure. As such, the decision-maker must never be led in his conclusions by an impression that he or she is deciding an "undeserving case". In every aspect of the case, the decision maker must apply the appropriate criteria in a spirit of justice and understanding. [188]

As the other types of evidence are rare, oral hearings by the responsible authorities still form the core of the refugee status determination procedure. "The heart of the refugee determination process is the careful consideration of the claimant's own evidence, whether provided orally or in documentary form."[189]

While scholars in the field of refugee law have already acknowledged that memory failures are common when refugees try to recall painful facts related to their

---

[186] *UNHCR Handbook*, para. 42.
[187] GOODWIN-GILL, p. 37.
[188] *UNHCR Handbook*, para. 202.
[189] James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) [hereinafter HATHAWAY], p. 83.

persecution,[190] the judges and decision makers have been less than consistent in their refugee status determination practice. For example, though the Canadian Immigration Appeal Board acknowledged this problem in the *Mario Angel Molina Riquelme* Decision[191], as it ruled on the lack of credibility in other cases when claimants were confused during the hearings or could not recall or elaborate on certain facts[192]. It cannot go unnoticed that the practice of the Tribunals in acknowledging that the credibility of witnesses should not be impugned just because they cannot recount all the details after being subjected to the cruel treatment has been much more stable.

The decision makers should also bear in mind that many refugees have a "good reason to distrust persons in authority".[193] This can be reflected in their co-operation and statements given to the officials upon their arrival, and can be further intensified in the presence of interpreters.

ASSESSMENT OF CREDIBILITY IN REFUGEE STATUS DETERMINATION

> GIVEN THAT CREDIBILITY IS NOT AN ACTUAL CRITERION FOR REFUGEE STATUS; APPLICANTS CANNOT BE EXPECTED TO ESTABLISH CREDIBILITY AS IF IT WERE PART OF THEIR BURDEN OF PROOF. RATHER, APPLICANT TESTIMONY IS A MEANS BY WHICH ASYLUM SEEKERS CAN PROVE THE SUBSTANTIVE CRITERIA FOR REFUGEE STATUS.[194]

Credibility can be defined as "the condition of being credible or believable".[195] In refugee status determination, the word 'credibility' is incorrectly used in various meanings. This work is concerned with the concept of credibility in the context of ascertaining whether a story of an applicant for refugee status can be believed; in contrast to 'credibility' being sometimes improperly brought into play while proving whether an applicant for refugee status has a well-founded fear of

[190] See for example HATHAWAY, p.85.
[191] *Mario Angel Molina Riquelme*, Immigration Appeal Board Decision 79-9363, C.L.I.C. Notes 22.6, July 9, 1980 as cited in HATHAWAY, p. 85 (Footnote 142).
[192] See for example *Accord Victor Manuel Trauco Arlas*, Immigration Appeal Board Decision T84-9334, February 5, 1986 or *Jaswant Singh*, Immigration Appeal Board Decision T87-9326, September 28, 1987 as cited in HATHAWAY, p. 86 (Footnote 142).
[193] HATHAWAY, p. 84.
[194] KAGAN, p. 4.
[195] The Concise Oxford Dictionary, Ninth Edition (Oxford: Oxford University Press, 1995), p. 316.

persecution and can be recognized a refugee. "Credibility in the refugee context should be used to refer only to whether the applicant's own testimony will be accepted in status determination, not to the decision about whether the person is actually a refugee."[196] It may happen that a person makes up several elements of his or her story. However, arriving at the conclusion that such a person cannot have a well-founded fear of persecution related to one of the enumerated grounds in the 1951 Convention and the 1967 Protocol, and thus cannot be a refugee, is erroneous.

In theory, there is no explicit requirement of credibility in the 1951 Convention and its 1967 Protocol. Its drafters did not incorporate assessment of credibility as an extra condition to be satisfied for a person to be recognized a refugee; neither had they included credibility among circumstances under which a person who would otherwise satisfy all the conditions to be recognized a refugee does not enjoy the protection of the 1951 Convention and the 1967 Protocol. It does not have to be proven that a person is credible in order for him or her to be accepted as a refugee. Similarly, it was not established that a person who is not deemed credible does not deserve the protection.

In practice, however, "the applicant's testimony is often the critical core of the asylum determination, since refugees generally are unable to produce external corroborative evidence."[197] The assessment of credibility thus preoccupies the decision makers who – usually with the deficiency of other evidence – base their decisions predominantly on the testimony of the applicant for refugee status. Nevertheless, they should only assess whether their testimony could be admitted to evidence in the process of refugee status determination and detach it from the "ultimate decision on a refugee status."[198]

In cases of serious human rights abuses, people often manage to flee only with their bare belongings. It is generally improbable that on interrogation they will be

---

[196] KAGAN, p. 2.
[197] Deborah Anker, *Law of Asylum in the United States*, 3rd ed. (Boston: Refugee Law Center, Inc., 1999) [hereinafter ANKER], p. 150.
[198] KAGAN, p. 3.

able to produce the 'other evidence' to corroborate their stories.[199] The *'benefit of the doubt'* principle acknowledges the difficulty an applicant for refugee status proving his or her claim may have in corroborating his or her story with other evidence.[200]

The benefit of the doubt should "only be given when all the evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility."[201] From this wording it is clear that the benefit of the doubt principle "offers little direct guidance about the assessment of credibility. The rule applies only if the applicant's account is in fact credible."[202] As credibility is not included among the criteria in the refugee definition, decision makers cannot require the applicants to establish credibility as if it was part of their burden of proof.[203]

A more complicated issue is to determine the substance of the word 'credibility'. In other words, it is necessary to determine what it actually means to be credible and how that credibility can be established. The UNHCR Handbook elaborates on this concept in paragraph 204: "The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."[204] Along similar lines, in its Note on Burden and Standard of Proof in Refugee Claims, the UNHCR has proposed that credibility is established when the claim presented by an applicant for refugee status is "coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed."[205] Capable of being believed seems to be at the core of determining whether the claim is credible. Any decision maker rejecting the claim should make it clear and explicit

---

[199] KAGAN, p. 3.
[200] *UNHCR Handbook* elaborates on this rule in Articles 196, 203 and 204.
[201] *UNHCR Handbook*, para. 204.
[202] KAGAN, p. 3.
[203] KAGAN, p. 4.
[204] *UNHCR Handbook*, para. 204.
[205] UN High Commissioner for Refugees, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, para. 11, available at: http://www.unhcr.org/refworld/docid/3ae6b3338.html [accessed 22 November 2009].

why the claim is not believable, in other words why *no* reasonable person would believe the claim.[206]

It follows from the 'reasonable man' test that the decision maker when assessing the claim of an applicant for refugee status does not have to be left entirely without any doubts as to all pieces of information presented in the testimony. Along similar lines, it is not necessary to prove that the applicant for refugee status will definitely be persecuted, it is enough to prove that, the applicant has a well-founded fear of persecution, i.e., that there are good grounds to believe there is a risk or chance of persecution.

As the credibility in refugee status determination is only relevant when it comes to the assessment whether the applicant's testimony is in fact credible and can be thus accepted as evidence, attempts should be made to explain possible inconsistencies with generally known facts, and the chance has to be given to rebut attacks on coherency and plausibility. In this context, it can be necessary to introduce other evidence such as the country of origin information, expert evidence and affidavits or evidence from other witnesses relevant to the case. Use of additional evidence in this effect has to be distinguished from using a similar kind of information to prove a well-founded fear.

Due to its often very subjective nature, an unsubstantiated negative credibility decision should never on its own lead to the rejection of a refugee. An arbitrary *ad hoc* subjective assessment of credibility causes irreparable damage to the trust in the refugee status determination. "If the decision depends more on adjudicators' personal judgement than articulated logic, adjudicators' personal dispositions naturally come under the microscope, making the refugee status determination system appear arbitrary."[207] The framework in which witness testimonies are assessed before the Tribunals appears to be relevant in refugee cases. The rules and standards developed by the judges in Trial Chambers as well as in the Appeal Chamber of the Tribunals could serve as an example to refugee status determination decision makers.

---

[206] KAGAN, p. 7.
[207] KAGAN, p. 5.

The particular features of refugee status determination mean that decision makers must counter the consequences of evidentiary challenges with respect to the assurance of fairness in the refugee status determination process. Serious human rights violations are clearly a major factor in causing refugees to flee their countries. Moreover, the refugees find themselves in a completely alien environment; many of them experience serious difficulties, both technical and psychological, in presenting their claim to the authorities of a foreign country, often facing a different linguistic background. Undoubtedly, decision makers are confronted by people that are in a particularly vulnerable situation.[208]

A lack of detail in an applicant's testimony can be linked to memory failures, themselves a product of stress, trauma, and intimidation experienced, as well as vague translations and interpretations. Moreover, some people have better memory, some have worse. Even with people who have good memories, the ability to visualize details may be reduced over time. An articulate reproduction of details can also depend on intellectual abilities. Perceptions of what is important and should be presented can vary from individual to individual. Furthermore, the culture of an applicant for refugee status (unfamiliar to his or her assessor) can play a role; in some cultures, certain types of information are not considered important or worth noting. This can be exacerbated by incorrect questioning on the part of the interviewer. Last but not least, the interview setting can influence the amount of detail; people may fear authorities, feel uneasy and shy in front of the interviewer or interpreter, or just be nervous speaking in front of strangers. This is particulary true for refugees who have a valid reason to distrust the authorities. Certainly, a high level of plausible and coherent detail can contribute to a positive credibility assessment. That being said, the lack of detail should not on its own and without any chance of further explanation lead a decision maker to a finding of negative credibility.

[208] *UNHCR Handbook*, para. 190.

As interviews in refugee cases often involve the use of interpreters, contradictions found in an applicant's testimony can be a result of mistranslations and misinterpretations. It is also essential to note that the applicants for refugee status are regularly questioned on various occasions. The interviewer, his or her mode of questioning as well as the interpreter and the setting in which the questioning is taking place, are not the same each time. It is also not unusual to have lapses of time between various instances of questioning. Finally, exclusions of certain information during various instances of interviewing can also have an influence on the testimony and can spur decision makers to announce the existence of contradictions and consequently pronounce a negative credibility statement. Without a doubt, a wholly consistent account full of plausible pieces of information can add to the presumption that the applicant for refugee status is credible. However, decision makers should be careful in refusing testimony in cases when they identify certain inconsistencies and do not make available an opportunity for the applicant to provide explanations. Equally, testimonies should not be simply set aside when perceived inconsistencies are not material to the claim.

Decision makers in refugee status determination often rely on demeanor – non-verbal communication signs – as a device in credibility assessments. The reliability of credibility judgements based on non-verbal communication signs is imperfect in any situation. Non-verbal signals and body language can be affected by the setting in which the interview is taking place as well as by the culture of applicants for refugee status and experiences they have had in their lives. Given these special features of refugee status determination, interpreting non-verbal communication signs in this context is unfeasible. Consequently, "adjudicators have good reasons to disregard demeanor entirely in credibility assessments."[209] It must be made clear that demeanor is wholly dependent on personal and cultural dispositions and is thus an ineffective tool to assess whether an applicant is telling the truth.[210]

Many sources confirm that refugees will not be at ease and/or will be even hesitant to talk freely in front of any authority if they had a negative experience with

---

[209] KAGAN, p. 7.
[210] Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L. MIGRATION REV. (1986), p. 232.

authorities in their own countries. The situation can even be worsened if the interview is carried out in a setting that does not encourage free discussion, does not promote confidentiality and heightens the perceived power imbalance.[211] Getting a complete and detailed picture of such an applicant can prove an immense task.[212] Above all, the applicant for refugee status has to be reassured of the purpose of the interview and most importantly of confidentiality.[213]

It is also important to be aware of specific problems that refugee women in particular may have in presenting their stories, especially when they are supposed to speak about their experiences that are difficult and painful to portray. Mainly, but not exclusively, in cases of rape or other forms of sexual violence, they may be apprehensive about uncovering and/or providing the interviewer with details of their experience. The situation may be further aggravated if they are questioned by males and with male interpreters present. Other aspects such as cultural and religious sensitivities, personal factors such as age and level of education can, even more than in other cases, have a negative influence on their questioning: "Rape, even in the context of torture, is seen in some cultures as a failure on the part of the woman to preserve her virginity or marital dignity. She may be shunned by her family and isolated from other members of the community. Discussing her experience becomes a further source of alienation".[214] It is important that they be allowed to speak in closed setting, ideally without the presence of their male family members. They should also be given the opportunity to choose the sex of interviewers and interpreters, all of whom shall be adequately trained in both sensitive factors affecting the interview, such as social and religious mores of the

---

211 UN High Commissioner for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, para. 36, available at: http://www.unhcr.org/refworld/docid/3d36f1c64.html [accessed 22 November 2009].
212 For example see *UNHCR Handbook*, para. 198.
213 UN High Commissioner for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, para. 36, available at: http://www.unhcr.org/refworld/docid/3d36f1c64.html [accessed 22 November 2009].
214 UN High Commissioner for Refugees, Guidelines on the Protection of Refugee Women, July 1991, para. 60, available at: http://www.unhcr.org/refworld/docid/3ae6b3310.html [accessed 22 November 2009]. These guidelines have been replaced by the UN High Commissioner for Refugees, UNHCR *UNHCR Handbook* for the Protection of Women and Girls, January 2008, available at: http://www.unhcr.org/refworld/docid/47cfc2962.html [accessed 22 November 2009].

refugee's country, as well as in the appropriate way of questioning; all of them should understand the importance of an open and reassuring environment. They should abstain from language and gestures that may be seen as culturally insensitive and inappropriate.[215]

"Plausible refugee testimony depicts a realistic, possible chain of events."[216] Kagan, like many others, argues that not only does the way the institutions work vary from country to country, but also what does not cause doubts in one person could be implausible for another and vice versa. This is even more probable when people come from different cultures, lead a different life and do not share the same values. If a decision-maker does not expect things to be in a certain way, it does not mean they are not that way.[217] Doubts cannot discount reality. Kagan concludes that "[i]mplausibility findings should be based on objective, verifiable facts suggesting an account is really impossible."[218] In plain language, 'unexpected' definitely does not mean 'implausible'.

---

215 UN High Commissioner for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, para. 36, available at: http://www.unhcr.org/refworld/docid/3d36f1c64.html [accessed 22 November 2009]; see also *Ibid.* 36(x): "Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status."

216 KAGAN, p. 11.

217 *Ibid.* p. 12.

218 *Ibid.* p. 12.

COMMON FEATURES

The fundamental purpose of international criminal trials is to determine the guilt or innocence of the accused. It must be added, however, that the overall nature of these trials is the search for justice and the 'concept of fairness' will definitely remain the cornerstone of these trials. Similarly, the fundamental purpose of refugee status determination is to establish whether a person is entitled to enjoy and benefit from international protection from persecution. As in the case of international criminal trials, the 'concept of fairness' must remain the cornerstone of this procedure.

Although the overall purpose of international criminal trials and refugee status determination procedure differs, there are some important features that both share.

Serious human rights violations and atrocities are at the centre of international criminal law as well as refugee status determination. The gravity of the crimes committed or feared is immense in both cases. Witnesses before the Tribunals, like refugees, may well have experienced extremely violent international crimes. Many witnesses before the Tribunals have been incapacitated; trauma, stress and intimidation have been common. Many refugees have also seen or experienced international crimes of an atrocious nature, and many of them have been traumatized by what they have seen or been subjected to. To a lesser or greater extent, refugees and the Tribunals' witnesses share painful experiences of violence, torture, detention; and subsequently possible intimidation, stress and trauma.

The crimes are not committed in a vacuum. Both the persecution of refugees and the international crimes the Tribunals deal with take place in *foreign locations* which, very frequently, are unfamiliar to the decision makers in refugee status determination and to the judges in international criminal trials. Moreover, they are quite often spread out in locations over more than one region. The setting of the crimes, general context, and particular circumstances are frequently unknown to the judges and decision makers. They not only encounter a foreign country but also its distinctive culture. Of course, they are supposed to review generally known

facts about the countries of origin before the procedures; they often have to research specific aspects of unfamiliar places, cultures, religious, social mores. However, they still may, and often they do, listen to 'facts' and experiences they do not expect and they may share their feeling that these 'facts' and experiences are implausible. In both of these instances, historical, geographical, anthropological issues play a role, and the knowledge of history, geography and anthropology is called for and in reality combines with law.

Refugees and witnesses like anyone else *cannot remember everything*. Moreover, memory fades over time. Many refugees as well as witnesses before the Tribunals are interviewed a significant period of time after the events they elaborate on happened. In a substantial number of cases, they were detained without access to clocks and calendars and thus do not know exact dates and times and had no chance to record their experiences. Logically, they are often not able to exactly redraw a picture of what they experienced or what happened to them.

The scarcity and difficulty of getting direct evidence in both international criminal trials and refugee status determination reflects the need for a liberal approach to evidence in their proceedings. Indeed, given the circumstances, strict rules of evidence would be a significant obstruction. Indeed, it is a big challenge to establish "incredible facts by means of credible evidence",[219] very often after a considerable amount of time has passed since the events happened in a place far from the procedure, with memories that fade and perpetrators being deliberately wiping out records of their acts. The testimony – be it that of an applicant for refugee status determination or that of a witness before the Tribunals – thus remains the fundamental evidence in both procedures.

One issue beyond the scope of this work is still worth mentioning. International criminal law as well as refugee law cannot be divorced from politics. Both of these disciplines are part of international law, both of these disciplines, more than others, are guided by political motivations, political decisions, and political pressures. While in theory they should not, political influence and political considerations do prevail over-non political ones. However, after the Tribunals are

[219] *Prosecutor v. Kupreškić et al.*,TC Judgement, para. 758.

set up and the accused brought before the Chambers, it at least seems that non-political procedures prevail, or at least are quite well presented. Interestingly enough, in both cases, i.e., before the Tribunals are established and before the refugees reach the refugee status determination procedure, inaction of the international community preceeded.

The definition of refugee in the Convention stipulates the circumstances, also referred to as the *Exclusion Clauses*, under which a person, who would otherwise satisfy the conditions set up by the *Inclusion Clauses* of the definition, does not need[220] or *deserve* protection. The provisions of the Convention do not apply to any person with respect to whom there are serious reasons for considering that 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 provisions with respect to such crimes; or he has been guilty of acts contrary to the purposes and principles of the United Nations.[221] The purpose of the Convention has never been to protect all people in all circumstances. The *Exclusion Clauses* related to people who do not deserve protection are definitely "the most extreme sanctions provided for by the relevant international refugee instruments",[222] but they were inserted in the definition to retain the trust of the international community in the system of refugee protection as well as to make clear that the international community would not tolerate the commission of the most heinous acts. However, it can easily happen that a witness before a Tribunal is a refugee at the same time. It can easily happen that such a testimony – describing before the Tribunal what happened in a

[220] These clauses fall outside the scope of this work: Art. 1(D): This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance; Art. 1(E): This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. Convention relating to the Status of Refugees, 189 U.N.T.S. 2545, entered into force on April 22, 1954.

[221] Art. 1(F)(a) and Art. 1(F)(c), Convention relating to the Status of Refugees, 189 U.N.T.S. 2545, entered into force on April 22, 1954. The Convention shall not also apply to any person with respect to whom there are serious reasons for considering that: he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee (*Ibid.*, at Art. 1(F)(b)). The proof of past prosecution for the enumerated crimes is not required. In this respect, the standard of proof, being lower than the balance of probabilities, applies to questions of fact, not to questions of law.

[222] UN High Commissioner for Refugees, The Exclusion Clauses: Guidelines on their Application, 2 December 1996, available at: http://www.unhcr.org/refworld/docid/3ae6b31d9f.html [accessed 6 March 2010], at. 2.

particular country, in its specific region, under given circumstances – can be presented to a refugee decision making authority. It can easily happen that that very same testimony will be considered credible in international criminal proceedings but the person will not be found credible when applying for refugee status even though the exclusion clauses cannot be applied…

P A R T II

THE PATH-BREAKING PRECEDENTS SET BY THE ICTR JUDGEMENTS AND THE RELEVANCE OF ITS PIONEERING EXPERIENCE CONTINUE TO IMPACT ON TRENDS MARKING THE LEGALIZATION OF INTERNATIONAL AND REGIONAL INSTITUTIONS. THE ICTR IS MAKING AVAILABLE ITS EXPERTISE AND LESSONS LEARNT TO ENSURE THAT SIMILAR JURIDICAL REGIMES CAN ACQUIRE AT AN EARLIER STAGE, THE CAPACITY TO ADJUDICATE CRIMES AND IMPOSE SANCTIONS BY UPHOLDING A FAIR TRIAL AND NEUTRAL TRIAL PROCESS THEREBY CONTRIBUTING TO PEACE AND RECONCILIATION THROUGH THE APPLICATION OF JUSTICE.[223]

In the following sections, trials of particular relevance to assessing evidence, especially reliability and credibility of testimonies delivered before the Trial Chambers, are analyzed, followed by recommendations in related evidentiary matters to decision makers in refugee status determination.

The jurisprudence of the Tribunals not only forms the basis for the future work of the International Criminal Court, but can be also applied to similar cases on the global level. Thus the recommendations included in this part are international in scope. They highlight the principles which can gain acceptance in any country. They are presented to alert refugee status determination decision makers to the developments related to the evaluation of evidence before the two *ad hoc* Tribunals. The focal areas were chosen based on their potential to be applied in refugee law.

Throughout the whole work, the background to analyzed cases is introduced. It illustrates the types of cases the Tribunals have been dealing with as well as particular circumstances surrounding the events at stake. Information is based on indictments, including amended indictments if relevant, taken together with judgements, including appeal judgements where already available.

---

[223] Briefing Notes on the ICTR Challenges and Achievements, prepared by the ERSPS-15-1-2004, The International Criminal Tribunal for Rwanda, Arusha, 2004, p.12-13.

THE GENERAL FACTORS IN ASSESSING TESTIMONY AND ITS CREDIBILITY

> "WHAT THE HAGUE TRIBUNAL HAS TO ESTABLISH IS ITS CAPACITY TO GET AT THE TRUTH WHILE SITTING FAR FROM THE SCENE OF THE CRIME, AND ITS CAPACITY TO BE FAIR NOTWITHSTANDING MEDIA PREJUDICE AGAINST THE DEFENDANTS AND THE DIFFICULTIES THEIR LAWYERS HAVE IN OBTAINING WITNESSES AND PROCURING DOCUMENTS."[224]

It proved a real challenge to get at the truth of what occurred far from the seat of the Tribunals months and, in most cases, even years later. The challenges the Tribunals faced were exacerbated by the media coverage of the scenes of the crimes and by the tremendous difficulty obtaining witness statements. Assessing the credibility of witnesses in international criminal trials and of applicants in refugee status determination procedure proved the most difficult task in the work of the Tribunals and refugee status determination authorities.

It seems, however, that the approach of the Tribunals and decision makers involved in refugee status determination differs. Byrne argues that the work of the Trial Chambers can be characterized by 'presumptive affirmation' of what witnesses experienced, while the work of decision makers is, in many cases, full of 'presumptive scepticism'. This is a paradox, if one realizes that in both types of proceedings the same obstacles must be overcome – for example the role of cultural, educational, linguistic, and psychological factors affecting the obtainment and subsequent assessment of testimonies.[225]

The jurisprudence of the ICTR contains general principles related to the assessment of witness evidence. The judgements of the ICTR's Trial Chamber I seem to be the best point of departure as they usually contain a separate part on 'Evidentiary Matters'. It is apparent that judges of this Trial Chamber sought to introduce a coherent description of how they work with and interpret rules on

---

[224]Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, (New York: The New Press, 2002), p. 306.
[225] Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 4 INT'L J. REFUGEE L. (2007) [hereinafter BYRNE], p.23.

evidence. Their method is reflected in the work of the ICTY and generally approved by the Appeals Chamber.[226]

As early as in the *Prosecutor v. Akayesu*, the Trial Chamber introduced essential principles on the probative value of evidence, witness statements, the impact of trauma on the testimony of the witnesses, interpretation from Kinyarwanda into French and English, and cultural factors affecting the witness evidence. [227] It informed that it is not bound by the law of any national legal system and is free to assess the evidence before it, reminding that Rule 89 of the ICTR Rules of Procedure and Evidence provides for application of the "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".[228]

The Trial Chamber also offered its explanation for alleged inconsistencies between the testimony of witnesses before the Chamber and their earlier, pre-trial, statements based on interviews carried out by investigators from the Office of the Prosecution mainly in Kinyarwanda. The Chamber ordered such statements to be brought in front of it for examination, but in relation to the transcripts of the pertinent interviews, it had only the translations, not the originals, at its disposal, and thus could not review the nature and form of the questions nor the accuracy of the translation. It has also pointed to other factors that may have caused discrepancies, such as difficulty in remembering the details of events years after they happened, the passage of time between the interviews and testimony during the trial proceedings, as well as the occasional inability to review previously made statements as some of the witnesses were illiterate, and concluded that these statements were not made under oath by judicial officers and thus, and in the light of the aforementioned circumstances, that their probative value was lower.[229]

---

[226] *Ibid.* p. 22.
[227] *Prosecutor v. Akayesu,* TC Judgement, para. 130.
[228] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev. 1 (1995), *entered into force* 29 June 1995. *Last amended* 14 March 2008 [*hereinafter* ICTR Rules of Procedure and Evidence], Rule 89(B).
[229] *Prosecutor v. Akayesu,* TC Judgement, para. 137.

BOX 6: BACKGROUND TO CASES: PROSECUTOR V. AKAYESU

Prosecutor v. Akayesu

Jean-Paul Akayesu was a *bourgmestre* of Taba *commune* in the Gitarama *préfecture* from April 1993 till June 1994, a figure responsible for maintaining law and public order in that *commune* and with exclusive control over the communal police and the *communes*' gendarmes subject only to the authority of the prefect.[230] It was asserted that at a minimum 2,000 Tutsis were killed in Taba *commune* between the beginning of killings on April 7 and the end of June 1994. The killings were committed openly on a widespread basis, and Akayesu, the person in power over the *commune*, must have been aware of them, and though he had the authority and responsibility to prevent the killings, he did not do so.[231] At that time hundreds of displaced civilians came to the bureau communal to seek refuge. In this connection,

"female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings".[232]

Akayesu was not only present during the commission of these acts of sexual violence, beatings and murders, but his presence together with no attempt to prevent these acts even further encouraged the perpetrators.[233]

---

[230] P*rosecutor v. Jean-Paul Akayesu,* Case No ICTR-96-4-I, Amended Indictment, 17 June 1997 [hereinafter *Prosecutor v. Akayesu*, Amended Indictment], paras. 3-4 and 12, *Prosecutor v. Akayesu*, TC Judgement, paras. 3-4 (The Accused) and 12 (Charges). „Rwanda is divided into 11 *préfectures*, each of which is governed by a prefect. The *préfectures* are further subdivided into *communes* which are placed under the authority of *bourgmestres*. The *bourgmestre* of each *commune* is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior. In Rwanda, the *bourgmestre* is the most powerful figure in the *commune*. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*." *Ibid.* para.2 (The Background).

[231] *Prosecutor v. Akayesu*, Amended Indictment, para. 12, *Prosecutor v. Akayesu*, TC Judgement, para. 12.

[232] *Prosecutor v. Akayesu*, Amended Indictment, para. 12A, *Prosecutor v. Akayesu*, TC Judgement, para. 12A .

[233] *Prosecutor v. Ak*ayesu, Amended Indictment, para. 12B, Prosecutor v. Akayesu, TC Judgement, para. 12B.

The charges further included: At a meeting in Gishyeshye sector of the Taba *commune* where more than 100 people were present on 19 April 1994, Akayesu urged the elimination of accomplices of the Rwandan Patriotic Front, which was understood by those present to mean Tutsis, and the killings started shortly thereafter.[234] During and in connection with house searches in Taba, Jean-Paul Akayesu was present, personally threatened to kill residents if they did not provide him with information about the activities and whereabouts of Tutsis he was searching for, and ordered subsequent interrogations and beatings.[235] Akayesu ordered and participated in the killings of three brothers and gave instructions to burn the houses of other family members.[236] He also ordered the militia to kill eight detained men from his bureau communal, the militia members used clubs, machetes, small axes and sticks to carry out the order.[237] Furthermore, Akayesu ordered locals and militias to kill intellectuals and influential people, subsequently based on these instructions five secondary school teachers were killed with machetes and agricultural tools in front of Akayesu's bureau communal.[238]

In its verdict, the Trial Chamber found Akayesu guilty of genocide, direct and public indictment to commit genocide and or several crimes against humanity: extermination, murder, torture, rape, and other inhumane acts), but not guilty of complicity in genocide and of violations of Common Article 3 of the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II.[239] Jean-Paul Akayesu was sentenced to life imprisonment.[240] The Appeals Chamber unanimously

---

[234] *Prosecutor v. Akayesu*, Amended Indictment, paras. 13-15, *Prosecutor v. Akayesu* , TC Judgement, paras. 13-15.
[235] *Prosecutor v. Akayesu*, Amended Indictment, paras. 16-17 and 21-23, *Prosecutor v. Akayesu*, TC Judgement, para. 16-17 and 21-23.
[236] *Prosecutor v. Akayesu*, Amended Indictment, para. 18, *Prosecutor v. Akayesu*, TC Judgement, para. 18.
[237] *Prosecutor v. Akayesu*, Amended Indictment, para. 19, *Prosecutor v. Akayesu*, TC Judgement, para. 19.
[238] *Prosecutor v. Akayesu*, Amended Indictment, para. 20, *Prosecutor v. Akayesu*, TC Judgement, para. 20.
[239] *Prosecutor v. Akayesu*, TC Judgement, 8.Verdict
[240] *Prosecutor v. Akayesu*, TC Sentence.

dismissed all the grounds of appeal raised by Jean-Paul Akayesu and affirmed all of the counts of conviction as well as the sentence of life imprisonment.[241]

The evidentiary matters were further developed in the subsequent case law that followed,[242] most notably in the *Prosecutor v. Musema*[243], where the Trial Chamber elaborated on the general principles of the assessment of evidence, specifically on its admissibility, reliability, and probative value. It touched upon the factors affecting the assessment of evidence, such as interpretation, the impact of trauma on the testimony of witness, and cultural factors affecting the evidence of witness. It also developed the assessment of documentary evidence, its probative value and the relationship between documentary evidence and oral testimony.

First, the Chamber explained its understanding of the term 'document', which should be interpreted broadly and should include "anything in which information of any description is recorded",[244] and should embrace not only written documents but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electro-magnetic records, digital records, databases, sound tracks, audio-tapes, video-tapes, photographs, slides and negatives.[245] The Chamber noted that there can be situations where oral testimony may serve to corroborate documentary evidence. In this connection, the Trial Chamber emphasized that it is a matter of logic that a piece of evidence supported by another piece of evidence will have a greater probative value than unsupported evidence, of course with the exception of when both pieces of evidence lack credibility. The Chamber added that its view is further sustained by the principles it explained in previous paragraphs on the free assessment of evidence, the use of corroborating evidence, and by Rule 89 of the Rules on Procedure and Evidence,

---

[241] *Prosecutor v. Jean-Paul Akayesu*, Case No ICTR-96-4-A, Judgement, 1 June 2001 [hereinafter *Prosecutor v. Akayesu*, AC Judgement], V. Disposition.
[242] See for example *Prosecutor v. Kayishema and Ruzindana*, TC Judgement, paras. 65-80; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No ICTR-96-3-T, Judgement and Sentence, 6 December 1999 [hereinafter *Prosecutor v. Rutaganda*, TC Judgement and Sentence], paras. 15-23; *Prosecutor v. Musema*, TC Judgement, paras. 31-105.
[243] *Prosecutor v. Musema*, TC Judgement.
[244] *Ibid.* para. 53.
[245] *Ibid.*

and also does not divert from the earlier practice of international criminal law, such as the Tokyo trials.[246] In the same way, as admitted independent evidence may serve to corroborate, prove or disprove documentary evidence, the admitted documentary evidence can be used to support oral testimony, and since the documentary evidence is not limited to written documents, also maps, photographs, videos, etc., it can be used to support a witness's oral testimony.

The Trial Chamber also reminded that documentary evidence can be also used as *aides mémoires* to refresh the memory of witnesses. In this very case, however, if the documents do not seem to be used only to refresh the memory of the witness, "but as a crutch without which the testimony of the witness would fall" … "the credibility of the witness and the probative value of his or her testimony may be undermined".[247] The Trial Chamber continued addressing in detail the issue of inconsistencies and contradictions between the document and oral testimony delivered before the Chamber. In the case under examination, it distinguished among three separate categories of prior testimonies submitted as documentary evidence:

1. witness statements and other non-judicial testimonies;
2. testimonies before this Tribunal;
3. statements before other judicial bodies.[248]

The first category relates to situations where witnesses previously made statements, including declarations and interviews, outside the Tribunals' proceedings. The Chamber reminded it would take into consideration circumstances under which those statements had been made, such as the language of the interview and the accuracy of the translation or interpretation, whether the Chamber had or did not have the chance to view the transcripts and thus whether it could examine and analyze the nature of the questions, how much time had passed between the prior statements and the witnesses' testimonies delivered

[246] *Ibid.* paras. 74-75.

[247] *Ibid.* para. 80.
[248] *Ibid.* para. 83.

before the Tribunal, the problems with recollection, the (non)use of solemn declarations, and whether, at the time of making the statements, the witnesses had or did not have a chance to go over them and review them.[249] The Chamber was of the view that in light of these circumstances, the probative value of prior witness statements and other non-judicial testimonies is generally lower than the probative value of oral witness testimonies delivered before the Tribunal where such testimony can also be cross-examined.[250] The Trial Chamber thus reaffirmed the relevant reasoning from *Akayesu* and *Rutaganda* judgements, where the Trial Chamber held:

> [...] these pre-trial statements were composed following interviews with witnesses by investigators of the Office of the Prosecutor. These interviews were mostly conducted in Kinyarwanda, and the Chamber did not have access to transcripts of the interviews, but only translations thereof. It was therefore unable to consider the nature and form of the questions put to the witnesses, or the accuracy of interpretation at the time. The Chamber has considered inconsistencies and contradictions between these statements and testimony at trial with caution for these reasons, and in the light of the time lapse between the statements and the presentation of evidence at trial, the difficulties of recollecting precise details several years after the occurrence of the events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements. Moreover, the statements were not made under solemn declaration and were not taken by judicial officers. In the circumstances, the probative value attached to the statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination.[251]

The second category concerns the problems that may arise when there are inconsistencies or contradictions between testimonies made under a solemn declaration in separate proceedings but before the same Tribunal. The Trial Chamber noted that such a situation can raise doubt as to the credibility and reliability of the latter testimony, but it also confirmed that it plans to evaluate the probative value of such statements on a case-by-case basis, with special attention paid to explanations as to the inconsistencies and contradictions given by each witness who appears to be in such a situation. The Trial Chamber is not in a position to evaluate the credibility and reliability of the previous testimony, since this was the task of the previous Trial Chamber that did so in light of all available

---

[249] *Ibid.* para. 85.
[250] *Ibid.* para. 86.
[251] *Prosecutor v. Rutaganda*, TC Judgement, para. 19.

information before it.[252] However, what the Trial Chamber can do is order that a contradiction or an inconsistency be presented to the witness, who is then given the chance to explain it. Even in these instances, the Trial Chambers are aware of time lapses between the events under examination and statements delivered before the Tribunal as well as between the statements made in separate proceedings. In each separate case, in light of its specific circumstances and in light of convincing explanations provided by the witness on the substance of the interviewer's question rather than on the procedure,[253] the doubts as to the reliability and credibility of the latter testimony can be removed.[254]

The third category encompasses situations of statements previously made before other judicial bodies.[255] The Trial Chamber confirmed its reasoning concerning the two formerly discussed types of contradictions and inconsistencies, reaffirming the general principle of assessing the probative value of the statements in light of circumstances and conditions in which they were made. The Trial Chamber also presented its opinion that testimonies made under solemn declaration, especially judicial testimonies, are likely to be more reliable than non-judicial ones. It concluded that there must be some minimum standards as a baseline against which the probative value of the evidence is assessed; these standards, however,

---

[252] *Prosecutor v. Musema*, TC Judgement, paras. 88-90. See also *Prosecutor v. Kayishema and Ruzindana*, TC Judgement and Sentence.

[253] See for example '"a common explanation provided by witnesses was that the interviewing investigator did not accurately reflect in the written statement what the witness said. Although such an explanation may well be true, particularly considering the translation difficulties, in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process … Conversely, where the witness provides a convincing explanation of substance, perhaps relating to the substance of the investigator's question, then this may be sufficient to remove the doubt raised". *Prosecutor v. Kayishema and Ruzindana*, TC Judgement and Sentence, paras. 78-79.

[254] Doubts as to the reliability and credibility of the testimony can also be removed with the corroboration of other testimonies. The Trial Chambers are aware that corroboration is not a legal requirement to admit a testimony but they do acknowledge the weight of corroboration for the discussed purposes. See for example *Prosecutor v. Kayishema and Ruzindana*, TC Judgement and Sentence, para. 80.

[255] In *Prosecutor v. Musema*, the Trial Chamber was assessing the probative value of the so called "Swiss Files", which were in fact transcripts of interviews conducted with the Accused by a Swiss *juge d'instruction*, after he was arrested in Switzerland in February 1995, containing eight Musema's voluntary statements and some additional documents. The Prosecution, with the approval of the Defence, submitted the "Swiss Files" as evidence. In the course of the proceedings, however, both, the Prosecution and the Defence, questioned the truth of some of the statements and the probative value of some of the documents from the "Swiss Files". *Prosecutor v. Musema*, TC Judgement, para. 91.

vary based on the nature of the interview. According to the Chamber, Rules 39 (i), 39 (ii), 42, 43 of the ICTR Rules of Procedure and Evidence must be read together with Rule 95 to create the minimum standards in cases when the admissibility and probative value of interviews taken before the Trial is to be evaluated.[256] In other words, in order to maintain the integrity of the proceedings, the Rules provide for the inadmissibility of evidence which was obtained by a method casting substantial doubt on its reliability, or if its admission was not ethical.[257] And as Rule 42 vests in itself the basic provisions of a right to a fair hearing, listing the essential rights of a person to benefit from due process, it is more than understandable that if an interview was to be made in violation of these rights, or an investigation was carried out in violation of the above mentioned rules, it would not sustain the test incumbent in Rule 95.[258]

[256] *Prosecutor v. Musema*, TC Judgement, paras. 92-97.
[257] ICTR Rules of Procedure and Evidence.
[258] For the confirmation of this reasoning see also *Prosecutor v. Mucić et al.,* Decision on Zdravko Mucić's Motion for the Exclusion of Evidence", (RP D5082-D5105).

BOX 7: BACKGROUND TO CASES: PROSECUTOR V. MUSEMA

Prosecutor v. Musema

In 1984, by presidential decree, Alfred Musema was appointed director of the Gisovu Tea Factory, a public enterprise. He was also a member of the "*conseil préfectorial*" in Byumba *préfecture*[259] and a member of the Technical Committee in the Butare *commune*.[260]

During the Rwandan genocide in 1994, Musema led and participated in several attacks against Tutsi civilians. Going to the locations of the attacks, he was often armed and accompanied by *Interahamwe* and workers from the Gisovu Tea Factory in uniform. Gisovu Tea Factory vehicles were used to transport some of the attackers to the locations. Musema himself was shooting into the crowds of refugees. During the attacks, thousands of Tutsi men, women and children were killed. Following one such attack, on 13 May 1994, Musema, acting in concert with others, raped a Tutsi woman and encouraged the others to rape her as well.

It was established before the Trial Chamber that Musema exercised *de jure* power over employees of the Gisovu Tea Factory while they were on its premises and even outside the premises of the Gisovu Tea Factory if they were carrying out their professional duties there; he had de facto legal and financial control over these employees and over the resources of the Gisovu Tea Factory. The Trial Chamber was of the opinion that, by virtue of his power, he was to take reasonable measures such as removing or threatening to remove a person from their position in the Factory if they were to commit these crimes, as well as preventing or punishing the use of the Factory vehicles, uniforms or other property for these crimes.[261]

---

[259] *Préfecture*: Political divisions of Rwanda based on the Belgian colonial system. In 1993-1994, Rwanda consisted of ten *préfectures* led by prefects, and sous-prefects. Rwanda is now divided into eleven *préfectures*/provinces (Roméo A. Dallaire (with Brent Beardsley), *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Vintage Canada, 2004) [hereinafter DALLAIRE], Glossary, p. 539).

[260] *Commun*e: Political subdivision of a *préfecture*, equivalent to a county (DALLAIRE, Glossary, p. 527).

[261] *Prosecutor v. Alfred Musema*, Case No ICTR-96-13-A, Judgement, 16 November 2001 [hereinafter *Prosecutor v. Musema*, AC Judgement], paras. 10, 16, 679, 693, 746-757, 861, 879-883 and 861.

In his appeal, Musema challenged the Trial Chamber's findings related to the credibility of Prosecution witnesses. Although the Appeals Chamber reversed Musema's conviction for the crimes against humanity involving rape, the sentence was affirmed. Alfred Musema was sentenced to life imprisonment.[262]

In *Prosecutor v. Bagilishema*, the Trial Chamber, almost literally restating what had been already presented in *Prosecutor v. Akaysu* and *Prosecutor v. Musema*[263] respectively, reaffirmed that it was not bound to apply any national rules to the evidence and it confirmed that factors such as the passage of time, the language and the accuracy of the translation and interpretation as well as the impact of trauma could help explain the discrepancies between the testimony before the Tribunal and previous written statements. A satisfactory explanation, however, had to be provided.[264]

Byrne contends that it is evident from the reasoning of the Trial Chamber in *Prosecutor v. Musema* (as well as from subsequent judgements) that the centre of the Trial Chamber's interest lies in the courtroom proceedings and "[t]his allows for the development of narrative testimony independent of the confines of the content and scope of prior statements."[265]

The International Criminal Tribunal for the Former Yugoslavia reflected the approach of the ICTR to the evaluation of evidence in its practice. It should be emphasized that the Appeals Chamber, in *Prosecutor v. Kupreškić et al*., stated that it is primarily the role of the Trial Chamber to hear, assess, and weigh evidence before it and *only* if the evidence relied on by the Trial Chamber "could not have been accepted by any reasonable tribunal of fact"[266] or if the evaluation of evidence

---

[262] *Ibid.* at VI – Dispositions.
[263] *Prosecutor v. Akayesu,* TC Judgement, para. 131 and *Prosecutor v. Musema*, TC Judgement, para. 33. See also *Prosecutor v. Laurent Semanza*, Case No ICTR-97-20-T, Judgement, 15 May 2003 [hereinafter *Prosecutor v. Semanza*, TC Judgement], para. 36.
[264] *Prosecutor v. Ignace Bagilishema*, Case No ICTR-95-1A-T, Judgement, 7 June 2001 [hereinafter *Prosecutor v. Bagilishema*, TC Judgement], 7 June 2001, para. 24.
[265] BYRNE, p.25.
[266] *Prosecutor v. Kupreškić et al*., AC Judgement, para.30.

by the Trial Chamber is "wholly erroneous"[267] can the Appeals Chamber replace the Trial's Chamber finding with its own. It can happen that two reasonable judges working with the same evidence can reach different conclusions, but it does not remove the responsibility of the Trial Chamber to decide on inconsistencies in and among testimonies and it is free to evaluate these inconsistencies as well as the general reliability and credibility of the testimony: "The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable."[268] The Appeals Chamber also reaffirmed that the Trial Chamber should take into consideration various factors, such as the lapse of time between the events and testimony thereabout before the Tribunal, possible influence of third persons as well as the traumatic nature of the events, when evaluating the evidence before it.[269]

In connection to the relevance of demeanour of the witness in the proceedings, the Trial Chamber in *Prosecutor v. Kupreškić* pronounced its view that one "witness appeared confident and forceful. She was in no doubt at all about her identification of the three accused that she knew well as they had been her neighbours all her life. Although the circumstances could not have been more stressful, she had a good opportunity to identify all three accused since they were in close proximity to her."[270] In the Appeals Chamber's view, which was also supported by the expert evidence, the Trial Chamber may have been influenced by the demeanour of the witness and it "must be careful to allow for the fact that, very often, a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy".[271] The Appeals Chamber concluded that the Trial Chamber erred in relying profoundly on the demeanour of the witness.[272]

Judge May argues that if inconsistencies are not material, they do not necessarily have to be fatal to the testimony of a witness. Even when the inconsistencies are material, the Trial Chamber can still accept the evidence of a witness. There is no

---

[267] *Ibid.*
[268] *Ibid.* para. 31.
[269] *Ibid.*
[270] *Prosecutor v. Kupreškić et al.*, TC Judgement, para.403 (footnotes omitted).
[271] *Prosecutor v. Kupreškić et al.*, AC Judgement, para.138.
[272] *Ibid.* para. 154.

generally accepted definition of material inconsistency, it depends on the circumstances. It is up to the Trial Chamber what parts of the testimony it accepts. In reality, the Trial Chamber does form an opinion as to the credibility of the witness during his or her testimony. The overall assessment of credibility, however, must be considered "in light of the entire trial record".[273]

Recommendations related to the general factors affecting the assessment of credibility of applicants for refugee status include:

1. Decision makers should not place undue probative weight on applicants' previous statements. They should ensure that the applicants for refugee status appearing before them are properly heard and that their testimony is properly evaluated. The applicants must be given the opportunity to explain contradictions and inconsistencies which may arise in connection with their previous statements.

2. With respect to applicants' previous statements which were not made under solemn declaration (or which were made outside judicial/refugee status determination proceedings), decision makers should take into account the circumstances under which those statements were made, such as the language of the interview and the accuracy of the translation or interpretation; whether the decision maker had or did not have the opportunity to obtain the transcripts of these interviews and thus whether he could examine and analyse the nature of the questions the applicant for refugee status was supposed to answer; the lapse of time between the applicant's prior statements and his testimony before the decision maker; problems with recollection; the (non)use of solemn declarations; and in particular whether, at the time of making the statements, the applicant had or did not have an opportunity to review his statements.

[273] MAY, pp. 167.

THE IMPACT OF TRAUMA ON TESTIMONY

"THE CHAMBER HAS THANKED EACH WITNESS FOR HIS OR HER TESTIMONY DURING THE TRIAL PROCEEDINGS AND WISHES TO ACKNOWLEDGE IN ITS JUDGEMENT THE STRENGTH AND COURAGE OF SURVIVORS WHO HAVE RECOUNTED THEIR TRAUMATIC EXPERIENCES, OFTEN RELIVING EXTREMELY PAINFUL EMOTIONS. THEIR TESTIMONY HAS BEEN INVALUABLE TO THE CHAMBER IN ITS PURSUIT OF TRUTH…"[274]

This chapter sets out principles for questioning and assessing credibility of applicants for refugee status who were tortured and/or suffered other traumatic events. It also deals with evidentiary concerns that may arise during questioning and assessing credibility of applicants for refugee status who were raped and/or experienced other forms of sexual violence. The impact of psycho-social therapy on memory is included as well. The chapter offers an approach that builds on recent practice and experience of international Tribunals dealing with similarly affected witnesses.

Decision makers in refugee hearings, similarly to judges in international criminal trials, should realize that refugees, like witnesses, may be very reluctant to talk about traumatic events for a number of reasons – many feel humiliated while talking about it in front of interviewers and interpreters, others fear they will never be believed, some engage in self-blame or may attempt to hold back unpleasant memories in an effort to suppress their own trauma, and quite understandably many fear that their family or community members may find out such sensitive information and consequently they would be dishonoured.

Due to the atrocious nature of international crimes, many eye-witnesses at the ICTY and ICTR may have been traumatized by what they saw or were subjected to. A substantial number of refugees has seen atrocities committed against their family members or close friends, and/or have themselves experienced such atrocities. To a lesser or greater extent, witnesses at the Tribunals as well as

---

[274] *Prosecutor v. Akayesu,* TC Judgement, para 144.

refugees may suffer possible traumatism caused by their painful experience of violence, torture, and detention.

It is commonly believed that that survivors or witnesses of traumatic experiences are likely to evoke images of horror, fear and pain at interviews and such recalls affect their ability to fully recount details and sequence of events in their stories. Actually, there is no uniform way in which they behave and react to such an interview as there is no template reaction to a traumatic event. There may be people who deliver fully coherent stories void of any contradictions and are comfortable in answering questions on sensitive issues such as rape, there may also be some that keep silent for a long time or laugh while answering, and yet others may be completely unable to produce any coherent expression, to mention just a few. It must be stressed that personal background and profile, belief, culture, the nature of atrocities experienced – all of this influences the behaviour of survivors and eye-witnesses of violent and highly traumatic events.

The United Nations Convention Against Torture defines in its Article 1 torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person to obtain from him or a third person information or a confession, punish him for an act he or a third person has committed or is suspected of having committed, or intimidated or coerce him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[275] The definition is considered by international law customary. International humanitarian law is less stringent, for the purposes of its torture definition, it does not require the involvement of a public official or other person in a public capacity as a condition for an act intended to inflict severe pain or suffering. The expression "ill-treatment" is used by the International Committee of the Red Cross to include both torture and other abuses prohibited by international law, such as inhuman, cruel, humiliating and degrading treatment, outrages upon personal dignity and physical or moral

[275] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) , Article 1.

coercion that differ from torture in the level of severity of pain or suffering inflicted.[276] Though torture is often viewed from the perspective of physical pain or suffering inflicted on a person, its devastating consequences in the psychological sphere of the person concerned cannot be overlooked.[277]

Detention may further aggravate the ability to recount and narrate about the events suffered in judicial context. Doctor Donald Payne, Member of the Board of the Canadian Center for Victims of Torture, who during his clinical practice of psychiatry has examined dozens of torture victims from various countries, regards the conditions of detention as a form of psychological torture:

> Many detainees report being held incommunicado in small dark cells with very limited bedding and sanitary facilities. This creates a sensory isolation effect that can be mentally unbalancing. In some countries detainees are crowded into larger cells containing 30 to 50 prisoners and sleep with their back on someone else's chest as there is no enough room to lie on the floor. When taken out of the cell they are usually blindfolded…In addition to the specific psychological tortures, there are psychological aspects to the physical tortures that are employed, e.g. the panic of near suffocation, the psychological strain of electrical shocks, and of being suspended.[278]

Payne testifies that many of them suffer from post traumatic stress disorder.

BOX 8: POST TRAUMATIC STRESS DISORDER

Post Traumatic Stress Disorder

Some people who have been tortured may be suffering from post traumatic stress disorder (PTSD) and may have a great deal of difficulty testifying at an official hearing. PTSD is a discrete psychiatric condition. Current research suggests that the course of PTSD is quite variable. The sequelae of torture can appear immediately on a physical or psychological level, or can be delayed for many years. Symptoms can include: re-experiencing the trauma by current recollections, recurrent dreams, flashback episodes, avoidance of stimuli associated with the

[276] Available at: http://www.icrc.org/web/eng/siteeng0.nsf/html/69MJXC [accessed 10 March 2009].
[277] Payne, D. E.: "The Psychiatric Sequelae of Torture: Diagnosis and Treatment", presented at the XVIth International Congress on Law and Mental Health, Toronto, 20-24 June 1990 [photocopied], pp. 1.
[278] *Ibid*. pp. 1-2.

trauma, numbing of responsiveness, diminished interest in activities, feelings of detachment, difficulty falling or staying asleep, irritability, difficulty concentrating, exaggerated startle responses, etc.[279]

The fourth revised edition of the manual published by the American Psychiatric Association in 2000 (Diagnostic and Statistical Manual of Mental Disorders IV (Text Revision) (DSM-IV-TR) sets forth diagnostic criteria, descriptions and other information guiding the classification and diagnosis of mental disorders. Based on the manual, the diagnostic criteria for PTSD can be summarized as follows (for the full description of the PTSD diagnostic criteria see Annex No. 5 – Diagnostic criteria for 309.81 Posttraumatic Stress Disorder):

A. Exposure of a person to a traumatic event

B. Persistent re-experience of the traumatic event

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma)

D. Persistent symptoms of increased arousal

E. Duration of the disturbance more than one month

F. Clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Three sets of information are then used to diagnose the PTSD. Namely, a) the individual's report of being tortured and the consistency of this with what is known to occur in the country; b) the subjective symptoms which the person reports; c) the objective findings in the presentation of the person and the consistency of these with the history being reported.[280]

---

[279] SEMINAR FOR NEW REFUGEE LAW JUDGES, at 6-4.

[280] Payne, D. E.: The Psychiatric Sequelae of Torture: Diagnosis and Treatment, presented at the XVIth International Congress on Law and Mental Health, Toronto, 20-24 June 1990 [photocopied], pp. 2. For more on the PTSD and for downloading related specialized articles see http://www.behavenet.com/capsules/disorders/ptsd.htm [last accessed 21 November 2009].

Judges at the ICTY and ICTR are aware of trauma, post traumatic and other stress-related disorders witnesses may have suffered, and of the effect it may have on the assessment of evidence.

On several occasions, the Trial Chambers of the ICTR have acknowledged the effect of trauma on witnesses' "ability fully or adequately, to recount the relevant events in a judicial context"[281], as many of the witnesses testifying before the Tribunal may have been traumatized by the experience of violence during the Rwandan conflict. Based on that recognition, as early as in *Prosecutor v. Akaysu*, the Trial Chamber has considered inconsistencies or imprecision in the testimonies of witnesses who could have suffered from post traumatic stress disorder in light of this assumption as well as in light of personal background and the atrocities these people have experienced.[282] Similar reasoning can be found in the ICTR judgements that have followed. In *Prosecutor v. Rutaganda,* the Trial Chamber restated the principles from the *Akayesu* Judgement and admitted that not only many testifying witnesses experienced atrocities themselves and/or seen them committed against their family members or close friends, but some of them became also very emotional and cried during the trial, and even physical signs of fear and pain could have been traced on a few of them when they were questioned about certain atrocities they witnessed.[283] Using the words of the Trial Chamber in *Kayishema and Ruzindana*, "testimonies cannot be simply disregarded because they describe traumatic and horrific events"[284]. In *Prosecutor v. Musema*, the Trial Chamber reaffirmed the *Akayesu* and *Rutaganda* sentences and went on to stress that the trauma that arises from such horrific experiences is a matter of grave concern to it.[285] In all of these cases, the Trial Chamber was of the opinion that many witnesses may have suffered from stress-related disorders and have assessed their evidence in this light.

---

[281] *Prosecutor v. Musema*, TC Judgement, para 100.
[282] *Prosecutor v. Akayesu*, TC Judgement, paras. 142 and 143.
[283] *Prosecutor v. Rutaganda*, TC Judgement, para. 22.
[284] Prosecutor v. *Kayishema and Ruzindana*, TC Judgement, para. 75.
[285] *Prosecutor v. Musema*, TC Judgement, para. 100.

BOX 9: BACKGROUND TO CASES: PROSECUTOR V. RUTAGANDA

Prosecutor v. Rutaganda

Georges Anderson Nderubumwe Rutaganda was a member of the National and Préfectoral Committees of the *Mouvement Républicain National pour le Développement et la Démocratie* (MRND) and a shareholder of *Radio Télévision Libre des Mille Collines*. During the Rwandan genocide, he was the second vice-president of the National Committee of the *Interahamwe*, the youth militia[286] of the MRND.[287]

On three occasions on April 6, 1994, Rutaganda distributed or had distributed the guns to *Interahamwe* in Nyarugenge *commune*, Kigali-ville *préfecture*. In at least two of those cases, the distribution was immediately followed by the killing of people who were present at these locations before Rutaganda's arrival.

From April 7 to 11, 1994, thousands of people, mainly Tutsi civilians, decided to seek refuge at the *École Technique Officielle* (ETO School) in Kicukiro sector, Kicukiro *commune* because they expected protection from the Belgian soldiers from the UNAMIR forces that were stationed there. Heavily armed members of *Interahamwe* surrounded the ETO school. On 11 April, UNAMIR troops left the ETO school to its fate, and on the same day, the ETO school was attacked by the *Interahamwe* and members of the Presidential Guard. Many Tutsis were killed there. Rutaganda personally participated in this attack.

On their way to the Amahoro Stadium, many survivors from the attack on the ETO School were forcibly diverted by Rutaganda, members of the *Interahamwe* and soldiers to a gravel pit in Nyanza where they were surrounded by soldiers and *Interahamwe*. Hutus who could identify themselves were allowed to leave. On April 11, the majority of people from the group were killed by the *Interahamwe*, some of

[286] Militia: Political parties in Rwanda all had youth wings that were covers for a party-loyal security force to protect party leaders and meetings (DALLAIRE, Glossary, p. 535).
[287] MRND: *Mouvement révolutionnaire national pour le développement*, political party formed in 1975 by then President Habyarimana, former ruling party in Rwanda under Habyarimana, party changed name to *Mouvement républicain pour la démocratie et le développement* (National Revolutionary Movement for Democracy and Development) in 1993, Hutu extremist party (DALLAIRE, Glossary, p. 536).

the girls were raped before they were killed. Rutaganda personally directed and participated in this attack in Nyanza.

In mid-April 1994, a roadblock was erected near Rutaganda's garage in Nyarugenge *commune*, Kigali-ville *préfecture* and *Interahamwe* were singling out Tutsi civilians there. Based on an order from Rutaganda, they took some of them to be detained in his garage. Rutaganda also ordered men under his control to take fourteen detainees to a deep hole near his garage and to kill them with machetes there in his presence.[288]

Although the Appeals Chamber reversed Rutaganda's conviction for murder as crime against humanity in relation to the killing with a machete of a Tutsi, Emmanuel Kayittare, the Trial Chamber's sentence was affirmed. Georges Anderson Nderubumwe Rutaganda was sentenced to life imprisonment.[289]

The Trial Chamber of the ICTY recognized in *Prosecutor v. Kunarac et al.* the difficulties the survivors of traumatic events may have in remembering particular details. Because of the nature of traumatic experiences the witnesses went through, they cannot reasonably be expected to recall "the minutiae of the particular incidents charged, such as the precise sequence, or the exact dates and times, of the events they have described".[290] The Trial Chamber pinpointed that there were witnesses who were detained for months without knowing what date it was, having no clocks and no way to record their experiences, and it stressed that these circumstances aggravated the troubles of such witnesses to recount details of these events later.[291] What is even more important, the Trial Chamber affirmed that all this does not necessarily destroy the witness's credibility as to the essence of the events. In this context, the Trial Chamber stated that it had not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as

[288] *Prosecutor v. Rutaganda*, TC Judgement, paras. 2, 10-19, 197-200, 226, 227, 260, 261, 263, 299-302, 304 and 344.
[289] *Prosecutor v. Rutaganda*, AC Judgement, para. 506 and XIV – Dispositions.
[290] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001 [hereinafter *Prosecutor v. Kunarac et al.,* TC Judgement], para. 564.
[291] *Ibid.* para. 564.

discrediting in case the witness has nevertheless described "the essence of the incident charged in acceptable detail."[292]

Following the *Prosecutor v. Kunarac et al.* case further, the Appeals Chamber agreed that "in principle, there could be cases in which the trauma experienced by a witness may make her unreliable as a witness."[293] However, in this connection, the Appeals Chamber stressed that "*there is no recognised rule of evidence that traumatic circumstances necessarily render a witness's evidence unreliable".* (emphasis added.) It must be demonstrated in *concreto* why "the traumatic context" renders a given witness unreliable."[294]

[292] Ibid. para. 564. See also Ibid. para. 679: „The Trial Chamber does not regard the various discrepancies between the pre -trial statements […] and her testimony in court, to which attention was drawn, as grave enough to discredit the evidence that she was raped by Dragoljub Kunarac during the incident in question. The Trial Chamber notes that FWS-95 could not remember in court having been subsequently raped by three other soldiers as is indicted under paragraph 5.5. However, in the light of the afore-mentioned principles with regard to the reliability of testimony, the Trial Chamber regards this lapse of memory as being an insignificant inconsistency as far as the act of rape committed by the accused Kunarac is concerned. In particular, the Trial Chamber is satisfied of the truthfulness and completeness of the testimony of FWS-95 as to the rape by Kunarac because, apart from all noted minor inconsistencies, FWS-95 always testified clearly and without any hesitation that she had been raped by the accused Kunarac during the first incident described under paragraph 5.5. As already elaborated above, the Trial Chamber recognises the difficulties which survivors of such traumatic events have in remembering every particular detail and precise minutiae of these events and does not regard their existence as necessarily destroying the credibility of other evidence as to the essence of the events themselves (Emphasis added).

[293] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* Case No IT-96-23-A and IT-96-23/1-A, Judgement, 12 June 2002 [hereinafter *Prosecutor v. Kunarac et al.,* AC Judgement], para. 324.

[294] *Ibid.* para. 324.

BOX 10: BACKGROUND TO CASES: PROSECUTOR V. KUNARAC, KOVAČ AND VUKOVIĆ ("FOCA")

***Prosecutor v. Kunarac, Kovač and Vuković* („Foca")**

The city and municipality of Foca in the Republic of Bosnia-Herzegovina was politically and militarily taken over by Serb forces in April 1992. The take-over of the surrounding villages was completed by July 1992. Subsequently, Muslims and Croats from Foca and villages were arrested. Men and women were separated and then locked up in various detention facilities[295] where they were killed, beaten or subjected to sexual assault. Detained women and girls in particular were humiliated, subjected to brutal beatings and systematically raped. According to the indictment, many women suffered permanent gynaecological harm due to the sexual assaults, suffered psychological and emotional harm, and some remain traumatised.[296]

As commander of a special unit of reconnaissance of the Bosnian Serb Army from June 1992 until February 1993, Dragoljub Kunarac ("Zaga" or "Dragan") was responsible for the acts of the soldiers, some of whom he had recruited himself, and knew or had reason to know that they engaged in sexual assaults of Muslim women. It has also been claimed that he was personally involved in sexual assaults and rapes of those women. Further, it has been alleged that one of the sub-commanders of the military police and a paramilitary leader in Foca, Radomir Kovač ("Klanfa") engaged in the attack on Foca and surrounding villages and was further involved in the arrest of non-Serb civilians.[297] It was added in the redacted amendment that Zoran Vuković, another sub-commander of the military police and

[295] The detention facilities in Foka included the Foca Kazneno-popravni Dom ("KP Dom") – the primary detention facility for men, Buk Bijela, Foca High School and Partizan Sports Hall ("Partizan"); the military warehouse "Barotni" and Kalinovik Primary School in Kalinovik. Some women were also locked up in houses and apartments used as brothels, operated by mostly paramilitary groups of soldiers.

[296] The Indictment also alleges that the municipality of Kalinovnik was under the control of Serb forces from mid-May onwards. Atrocities committed against non-Serb population were similar to those committed in Foka.

[297] *Prosecutor v. Kunarac, Kovač*, Case No. IT-96-23-PT, Amended Indictment, November 8, 1999, paras. 1.1-3.1.

a paramilitary leader in Foca, was also involved in the attack on Foca, arrest of civilians, and sexual assault, including gang rape.[298]

On the basis of their individual criminal responsibility, Dragoljub Kunarac, Radomir Kovač and Zoran Vuković were sentenced to twenty-eight, twenty and twelve years' imprisonment, respectively.

The *Furundžija* Judgement guides evidentiary practice in relation to traumatic experiences and especially post-traumatic stress disorder (PTSD). In this case, the Trial Chamber accepted the evidence of the Moslem woman about the nature of her interrogation by Furundžija and concluded that, "even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. *There is no reason why a person with PTSD cannot be perfectly reliable witness."* (emphasis added.)[299] The Trial Chamber was of the view that survivors of traumatic experiences cannot reasonably be expected to recall "the precise minutiae of events, such as exact dates or times" as well as "every single element of a complicated and traumatic sequence of events."[300] Moreover, according to the Trial Chamber, *"inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses."* (emphasis added.)[301] The Trial Chamber thus attached no significance to the inconsistencies of the sequence of events and identities of those involved in abuses in witnesses' recollections. It has put no weight on "minor and reasonable" inconsistencies.[302] Moreover, the Trial Chamber appreciated the honesty of a witness who pointed out that she testified to the best of her recollection and that the way she gave evidence was the way she – as the one who had endured the events – saw them. She told the Trial Chamber that: "in those moments, one does not analyse too much".[303] It is

[298] *Prosecutor v. Vuković*, Case No. IT-96-23/1-PT, Amended Indictment, October 5, 1999, paras. 2.3., 5.2., 6.4.-6.7., 7.9.-7.21.
[299] *Prosecutor v. Furundžija*, TC Judgement, para. 109.
[300] *Ibid*. para. 113.
[301] *Ibid*. para. 113.
[302] *Ibid*. para. 114.
[303] *Ibid*. para. 116.

evident that the judges are willing to deal more with the events that took place rather than with the exact dates and times on which these events happened.[304]

At the appeal stage of the *Furundžija* case, the Appellant submitted that the testimony of one witness was unreliable, as it was given in a state of post-traumatic stress disorder, and that the inconsistencies in her testimony did not justify the Trial Chamber's finding that "*inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses"*. In other words, the Appellant's grounds for appeal in this case can be read as follows: The testimony of the witness was not reliable because it has been given in a state of post-traumatic stress disorder.[305] The Appeals Chamber did not find any reason to disturb the findings of the Trial Chamber and accordingly these grounds for appeal failed. The Appeals Chamber based their reasoning on the *Tadić* Apppeals Judgement reiterating that "the Appeals Chamber will only disturb a finding of fact by the Trial Chamber where "the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person…" In the re-opened proceedings, numerous experts gave evidence on the potential effects of PTSD on memory. The Trial Chamber was best placed to assess this evidence and to draw its own conclusions."[306] The rationale that the inconsistencies may, in certain circumstances, indicate truthfulness and the absence of the interference with the witness, has thus been upheld.

---

[304] *Ibid*. para. 115.
[305] *Prosecutor v. Anto Furundžija*, Case No IT-95-17/1-A, Judgement, 21 July 2000 [hereinafter *Prosecutor v. Furundžija*, AC Judgement], para. 98.
[306] *Ibid*. para. 123.

BOX 11: BACKGROUND TO CASES: PROSECUTOR V. FURUNDŽIJA ("LAŠVA VALLEY")

Prosecutor v. Furundžija "Lašva Valley"

Anto Furundžija was the commander of a local unit of the Croatian Defence Council in the Vitez municipality in central Bosnia and Herzegovina during the war in 1993.[307] The unit was called the "Jokers". According to the Trial Chamber, Furundžija was an active combatant and had taken part in the attack on the village of Ahmici as well as in other hostilities against Muslims in Lašva Valley. In Ahmici, Furundžija personally participated in expelling Bosnian Muslims from their homes.[308]

According to the amended indictment, and further confirmed by the Trial Chamber judgement, Anto Furundžija and another soldier interrogated a woman, a non-combatant Muslim civilian, at the Jokers Headquarters in Nadioci in May 1993. While Furundžija was asking questions, the soldier rubbed his knife against the woman's inner thigh and lower stomach and threatened to put his knife inside her vagina if she did not answer truthfully to the answers asked by Furundžija. At the same time, a Bosnian Croat who had previously helped the family of the woman was beaten at the Headquarters. Afterward, the woman and the Bosnian Croat were taken to another room where they were interrogated by Furundžija again and their feet beaten with a baton. The woman was then forced to have oral and vaginal sexual intercourse with the soldier in the presence of Furundžija, who did nothing to prevent it. On the contrary, his presence and continued interrogation aided and abetted the crimes committed by the soldier.[309] Based on these allegations, Anto Furundžija was sentenced to 10 years' imprisonment.[310]

---

[307] A state of international armed conflict and partial occupation existed in the Republic of Bosnia-Herzegovina in the territory of the former Yugoslavia at that time.
[308] *Prosecutor v. Furundžija*, TC Judgement, para 262.
[309] *Ibid*. para. 274.
[310] *Prosecutor v. Anto Furundžija*, Case No IT-95-17/1-PT, Amended Indictment, 2 June 1998 [hereinafter *Prosecutor v. Furundžija*, Amended Indictment], paras. 25 and 26.

Byrne assumes that as the international criminal Tribunals generally shy away from expert testimonies on PTSD, the PTSD and other stress related disorders are "an expected dimension of victims and witnesses of widespread human rights abuses".[311] She further stresses the role of the judges who should reframe questions and come up with alternative mechanisms in order to get crucial information. Human rights testimonies call for proactive interviewing. Only in that way can their essence be adjusted to the judicial context.[312]

THE IMPACT OF PSYCHOLOGICAL THERAPY ON MEMORY

Besides the possible impact of trauma on the testimony of a witness or refugee, the issue of trauma presents another question of the possible contamination of witness/refugee evidence by psychological therapy.

The ICTY dealt with the issue of the possible impact of psychological treatment on memory in *Prosecutor v. Furundžija*. It happened in this case that after the proceedings and closing submissions had been concluded, a new document "Certificate of Psychological Treatment" issued in 1995 by Medica, a Woman's Therapy Center in Zenica, was disclosed by the Prosecutor to the Defence. The document concerned a relevant Prosecution witness to this case. This witness, labelled Witness A, was said to have been diagnosed with PTSD and have received medical and psychological treatment in Medica. Based on the appearance of this new exhibit, the Defence in its Motion requested the Trial Chamber to strike out the testimony of that witness. In the interests of justice and underlying its duty to uphold fairness and presumption of innocence, the Trial Chamber reopened the proceedings. It also mentioned that the exhibit was relevant to the assessment of credibility of Witness A's testimony. Witness A was recalled for examination but only on the issues of medical, psychological or psychiatric treatment or counselling received. Medica was subsequently ordered to provide the Trial Chamber with a report on the treatment of Witness A. Although the witness kept on denying it, Medica in its report confirmed that she had displayed symptoms of PTSD. Expert

[311] BYRNE, p. 28.
[312] BYRNE, p. 29.

witnesses explained to the Trial Chamber that such denials were consistent with findings in the studies on PTSD. Based on Medica's report in conjunction with testimonies of expert witnesses, the Trial Chamber satisfied itself that Witness A suffered from PTSD.[313]

The Defence further argued that Witness A's memory was likely to have been affected and contaminated because she had PTSD and may have received a treatment for it. The Trial Chamber explored the issue of possible effects of therapy on memory of the witness. During the proceedings, an experienced clinical and forensic psychologist called by the Defence indicated that trauma can have an effect on memory: the more trauma, the worse memory; and subsequent group therapy can then lead to filling in the blanks in memory and lead to false beliefs: "If Witness A participated in "dream and imagined journeys", it could contribute to false beliefs."[314] In this particular case, the Trial Chamber rejected this possibility, though on a very limited ground as it was specified that the treatment Witness A had received was only of a preliminary nature and the aim in therapy was not fact-finding.[315] The Trial Chamber concluded that there was no evidence that material aspects of the events presented by Witness A were affected by PTSD and that there was no evidence that her memory has been contaminated by any treatment.[316]

In examining the inconsistencies in the finer details of Witness A's testimony in order to decide whether they were sufficient to submit that the material aspects of Witness A's evidence were unreliable, the Trial Chamber reiterated the evidence of an expert witness, Dr. Morgan, testifying that "the tests carried out to determine consistency and accuracy of answers given by subjects in memory studies have no bearing on the truthfulness of a witness in court proceedings in that there is no

---

[313] *Prosecutor v. Furundžija*, TC Judgement, paras. 92-101.
[314] *Ibid*. para. 103.
[315] *Ibid*. para. 108: "…The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had. Indeed the Trial Chamber accepts the evidence of Dr. Rath that such treatment that she may have had was of a purely preliminary nature. The Trial Chamber also considered that the aim in therapy is not fact-finding."
[316] *Ibid*. paras. 102 and 108.

model in the world that can directly measure what anyone knows in their mind…"I know of no way of measuring what people actually remember."[317]

Robert Cryer, writing on witness evidence before international criminal Tribunals, cautions that the reasoning in *Prosecutor v. Furundžija* seems to accept the possibility that further therapy could contaminate evidence.[318] And in domestic trials, certain forms of psychological therapy (for example dream therapy or hypnotic therapy) have led to evidence of questionable validity forming the basis for charges and allegations.[319]

The words of the Trial Chamber in *Prosecutor v. Kayishema and Ruzindana* that "different witnesses, like different academics, think differently"[320] seem to be the best conclusion to this section.

BOX 12: BACKGROUND TO CASES: PROSECUTOR V. KAYISHEMA AND RUZINDADA

Prosecutor v. Kayishema and Ruzindana

Clement Kayishema was a prefect[321] of Kibuye *préfecture* during the Rwandan genocide in 1994.[322] Obed Ruzindana was a commercial businessman in Kigali at that time.

In mid-April 1994, as the Tutsis in Kibuye *préfecture* were attacked by Hutus, many of them gathered at the community places where they believed they would be protected: the Catholic Church and Home St. Jean Complex, the stadium in Kibuye town and the Church in Mubuga.[323] These places were controlled by the

[317] *Ibid*. para. 110.
[318] Robert Cryer, *Witness Evidence Before International Criminal Tribunals*, 3 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS (2003) [hereinafter CRYER], p. 433.
[319] CRYER, p. 433, supporting his statement by G. F. Wagstaff, "Hypnotically Induced Testimony", in A. Heaton-Armstrong, E. Shepherd and D. Wolchover (eds.), *Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals* (London, Blackstone Press, 1999) p. 162.
[320] Prosecutor v. *Kayishema and Ruzindana*, TC Judgement, para. 74.
[321] *Préfect*: Political head of a *préfecture*, political division of Rwanda, similar to a governor (DALLAIRE, Glossary, p. 539).
[322] *Prosecutor v. Kayishema and Ruzindana*, TC Judgement, paras. 1.3 (9) and 1.3 (11).
[323] Estimations as to the numbers of people at these places vary from about 4,000 to over 5,500 at the Church in Mubuga, about 8000 at the Complex and from 5000 to 27000 at the Kibuye Stadium. *Ibid.* para. 315.

gendarmes. Tutsis inside were not provided with food, water or medical care.[324] Soon, the conditions of siege turned to massacres conducted by gendarmes, communal police, prison wardens, the *Interahamwe* and other armed civilians: "Having surrounded the site, they usually waited for the order from an authority figure to begin the assault. The massacres started with the assailants throwing grenades, tear gas, flaming tires into the structure, or simply shooting into the crowds. Those who tried to escape were killed with traditional weapons. Following these hours of slaughter, the attackers would enter the building or stadium carrying crude traditional weapons and kill those remaining alive."[325] During the attacks, thousands of Tutsi civilians who had sought refuge at these three locations were killed.

The fourth site, the Bisesero area, was home to a lot of Tutsis. In addition, the Tutsi refugees fleeing their homes were hiding in caves there or were congregated on the hills of Bisesero because they were told they would be protected there. To the contrary, Tutsi civilians were hunted and killed in Hutu operations. It seems that the objective was to wipe out the entire Tutsi population of the Bisesero area.[326]

An attack on the "cave" located in Gishyita *commune* of the Bisesero sector, where Tutsis had sought refuge, was one of the most horrific killings in the area. The entrance to the cave was blocked and the cave was set on fire. Hundreds of people inside the cave – in fact all except one – died, suffocated by the smoke.[327] Kayishema and Ruzindana were present and led the attack in which members of the gendarmes, the *Interahamwe*, and local officials participated.[328]

The Trial Chamber found Kayishema guilty of instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of genocide by killing and causing serious bodily harm to Tutsi civilians during the massacres at the Home St. Jean Complex in Kibuye, the Kibuye Stadium and at the Church in Mubuga. The Trial Chamber also held that both Kayishema and

[324] *Ibid.* para. 316.
[325] *Ibid.* paras. 317 and 318.
[326] *Ibid.* paras. 405 and 406.
[327] *Ibid.* para 431.
[328] *Ibid.* para. 438.

Ruzindana instigated, ordered, committed, and otherwise aided and abetted genocide in the preparation and execution of the massacres in the Bisesero area.

The Appeal Chamber affirmed the Trial Chamber verdict of guilt as well as the sentence.[329] Clement Kayishema and Obed Ruzindana were sentenced to life imprisonment and twenty-five years' imprisonment, respectively.

On top of the above mentioned issues, the detailed description of a psychological state of a witness before the Tribunal led to another debate as to what extent the public discussion of psychological conditions and associate treatment has a further humiliating effect on the person concerned, and for this reason whether it should at all be disclosed in full details or whether the statements should only read that the person had undergone some therapy.

[329] *Prosecutor v. Clément Kayishema and Obed Ruzindana,* Case No ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001 [hereinafter *Prosecutor v. Kayishema and Ruzindana*, AC Judgement (Reasons)], para. 372 of IV. – Dispositions.

Kelly Askin criticizes the broad order of the Trial Chamber in *Prosecutor v. Furundžija* that after reopening of the trial, the Defence was allowed to recall any witness to address any medical, psychological or psychiatric treatment or counselling Witness A received since the sexual violence was committed. According to Askin, Witness A's privacy was attacked by the expansiveness of the order without initial consideration of any relevance the records may have on the memory or the testimony of Witness A. She recommends that the Trial Chamber first examine the records *in camera* in order to find out whether they contained, as the Prosecutor claimed, "nothing that distinguishes this rape victim from any other rape victim, and thus were irrelevant"[330] or whether they contained, as the Defence claimed "evidence supporting their assertion that the witness's memory was in doubt, in which case the nondisclosure was prejudicial to the defense and measures must indeed be taken to redress the harm."[331] Askin contends that such wording may not only infringe on the privacy of survivors of traumatic events, but may suggest that traumatic events and subsequent treatment and/or counseling can put their testimony at risk by challenging the credibility of their memory.[332] Despite her criticism of the wording and broadness of the order, Askin appreciates the final verdict and its very good language sensitive to issues of trauma and particularly to gender-based violence.[333]

[330] Askin Kelly D., Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status, 1 THE AMERICAN JOURNAL OF INTERNATIONAL LAW (1999), p.113.
[331] *Ibid.*
[332] *Ibid.*
[333] *Ibid.*

> "WHAT DOES MAKE THEIR CASE SPECIAL IS THE COMBINATION OF POSSIBLE SOCIAL CONSEQUENCES OF IT BECOMING GENERALLY KNOWN IN COMMUNITIES IN THE FORMER YUGOSLAVIA THAT A WOMAN HAS BEEN A RAPE VICTIM AND ALSO THE OFTEN ACUTE TRAUMA FACING ONE'S ATTACKER IN COURT AND BEING MADE TO RELIVE THE EXPERIENCE OF THE RAPE."[334]

In situations of armed conflict, sexual violence such as rape, sexual mutilation, sexual slavery and forced pregnancy are consistently directed at girls and women. "Being female is a risk factor; women and girls are often targeted for sexual abuse on the basis of their gender, irrespective of their age, ethnicity or political affiliation."[335] The conflicts in Rwanda and the former Yugoslavia routinely witnessed sexual assaults, including rape.

During the Rwandan genocide in 1994, Rwandan women faced sexual violence, often on a massive scale – usually committed by the members of *Interahamwe* soldiers of the Rwandan Armed Forces, including the Presidential Guards,[336] and by other civilians. Similarly to killings, these crimes were directed and encouraged by many Rwandan leaders, both on the national and local levels. The main aim was to destroy the Tutsis as a group.

> Although the exact numbers of women raped will never be known, testimonies from survivors confirm that rape was extremely widespread and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced "marriage") or sexually mutilated. These crimes were frequently part of a pattern in which Tutsi women were raped after they had witnessed the torture and killings

---

[334] *Prosecutor v. Tadić*, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.
[335] *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*. Human Rights Watch/Africa. Human Rights Watch Women's Rights Project (1996), p. 2, available at: www.hrw.org/reports/1996/Rwanda.htm [accessed 7 November 2003].
[336] Presidential Guard: Highly trained, well-equipped, ruthless RGF bodyguard unit, based in the centre of Kigali, with detachments all over the city including near the airport in Kigali, Hutu extremist group intensely loyal to President Habyarimana (DALLAIRE, Glossary, p. 539).

> of their relatives and the destruction and looting of their homes. According to witnesses, many women were killed immediately after being raped.[337]

In the conflict of the former Yugoslavia, rape was equally utilized as a "weapon of war"[338] to "humiliate, dishonour, vilify and terrify the victim".[339] Therein, a variety of methods were applied to ensure the final solution – ethnic cleansing – and rape was one of them. According to the report of Mr. Tadeusz Mazowiecki to the U.N. Commission of Human Rights, in the given circumstances, rape was not only directed against the individual, but also aiming to "humiliate, dishonour, vilify and terrify the whole group".[340] Examples included sexual assaults committed in front of a whole village aiming to "terrorise the population and force ethnic groups to flee".[341] It is impossible to obtain the precise numbers, though the evidence suggests that victims were many.

Rape and other forms of sexual violence are still accompanied by social stigma in many countries. The report on sexual violence during the genocide in Rwanda and its aftermath explains why it is not common for Rwandan women to openly unveil their experiences,

> the physical and psychological injuries suffered by Rwandan rape survivors are aggravated by a sense of isolation and ostracization. Rwandan women who have been raped or who suffer sexual abuse generally do not dare reveal their experiences publicly, fearing that they will be rejected by their family and wider community and that they will never be able to reintegrate or to marry. Others fear retribution from their attackers if they speak out. Often, rape survivors suffer extreme guilt for having survived and been held for rape, rather than having been executed.[342]

The same can be applied to the refugee context. Human Rights Watch in its study on sexual violence during the Rwandan genocide explained that rape and sexual

---

[337] *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*. Human Rights Watch/Africa. Human Rights Watch Women's Rights Project (1996), p. 1-2, available at: www.hrw.org/reports/1996/Rwanda.htm [accessed 7 November 2003].
[338] *Le Livre noir de l'ex-Yugoslavie, Ethnic Cleansing and War Crimes*, Documents collected by the Nouvel Observateur and Reporters Sans Frontière. Paris. Le Seuil, Arléa, 1993, p. 485 as cited in Karine Lescure, Florence Trintignac, *International Justice for the Former Yugoslavia: The Working of the International Criminal Tribunal of the Hague*, Nijhoff Law Specials, Vol. 20 (The Hague: Kluwer Law International, 1996) [hereinafter LESCURE & TRINGIGNAC], p. 51.
[339] Cf. Doc E/CN.4/1993/50, p. 19 as cited in LESCURE & TRINTIGNAC, p. 52.
[340] *Ibid.*
[341] *Ibid.*
[342] *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*. Human Rights Watch/Africa. Human Rights Watch Women's Rights Project (1996), p. 3, available at www.hrw.org/reports/1996/Rwanda.htm [accessed 7 November 2003].

violence in the context of conflict can be used to "terrorize and degrade a particular community and to achieve a specific political end."[343] In these circumstances, gender and other aspects of a woman's identity such as ethnicity, religion, social class or political affiliation overlap. A woman is humiliated, hurt and terrorized by the rapist not only to disgrace her as an individual but also to dehumanize the whole group to which she belongs. [344] On their way, these women will encounter serious obstacles seeking and receiving refugee status. They will not only face difficulties speaking about such traumatizing events but they will have almost no chance to support their claims with evidence. Their particular needs and experience are only rarely taken into account in the context of refugee status determination procedure.

In its Conclusions on Refugee Women and International Protection, the UNHCR's Executive Committee noted that refugee women and girls make up the major share of the world refugee population and recognized that many of them encounter special problems getting international protection as a consequence of their vulnerable situation which places them at risk for physical violence, sexual abuse and discrimination.[345] Moreover, in its Conclusions on Refugee Protection and Sexual Violence, the UNHCR Executive Committee recommended sensitive treatment, during refugee status determination, of applicants who may have suffered sexual violence. It also recommended setting up training programmes to prepare all involved in the refugee status determination process to deal with such sensitive issues as gender and culture.[346] There have been attempts to place emphasis on the type of behaviour and appropriate questioning for survivors of sexual violence. For example, the refugee judges were recommended to

> Recognise that woman refugee claimants who have been subjected to sexual violence can exhibit a pattern of symptoms as a consequence of the trauma related to rape. The symptoms exhibited may include a loss of self-confidence and self-esteem, difficulty concentrating, feeling of loss of control, fear, and memory loss or distortion of facts. Women who have suffered sexual violence may be reluctant to speak about such incidents. These symptoms will influence how a woman applicant responds during the hearing. If misunderstood, they may be seen

[343] *Ibid*. p. 2.
[344] *Ibid.* at 2.
[345] UNHCR EXCOM, Conclusions No. 39 Refugee Women and International Protection (1985)(xxxvi).
[346] UNHCR EXCOM, Conclusion No. 73 Refugee Protection and Sexual Violence (1993)(xliv).

> wrongly as discrediting her testimony. In some cases, it may be appropriate to consider whether claimants should be allowed to provide their testimony in writing so as to avoid having to recount traumatic events in front of strangers.[347]

Until now, however, neither the UNHCR nor the countries of asylum have dealt in great depth with evidentiary rules in the context of rape and other forms of sexual violence. It seems that there are also no rules on the substance of questions as there is no framework within which the questions can be asked. Interestingly enough, applicant for refugee status can be asked not only about details of the sexual violence he or she have encountered but what is more, on every detail of his or her life, including his or her prior sexual conduct.

Numerous cases before the Tribunals have included charges related to rape and other forms of sexual violence[348]. In the given context, "[i]nstituting measures to protect victims of such crimes from any unnecessary suffering consequent upon giving evidence"[349] has become a priority for judges.

The Chambers recognized the difficulty the survivors of sexual offences may face when testifying about the events. "The nature of these crimes produces, an almost insurmountable trauma [...], especially when it is amplified by the massive and systematic way in which it is practiced."[350] Moreover, as the survivors often feel stigmatized, ashamed and potentially rejected by their community, they are reluctant to speak openly and publicly about these events. "Some involved in prosecuting genocide, both at the national and international level, have suggested that it is nearly impossible to investigate rape because Rwandan women will not talk about their ordeals."[351] Accurate documentation of the occurrence of these crimes thus becomes extremely complicated.

The very particular nature of sexual crimes made it clear that "[n]ecessary protection measures should therefore be provided in the rules of procedure and

---

[347] SEMINAR FOR NEW REFUGEE LAW JUDGES, at 6.11.
[348] See for example *Prosecutor v. Tadić, Prosecutor v. Akayesu, Prosecutor v. Mucić et al.*
[349] MAY, p. 185.
[350] LESCURE & TRINTIGNAC, p. 54.
[351] Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath. Human Rights Watch/Africa. Human Rights Watch Women's Rights Project (1996), p. 15, available at: www.hrw.org/reports/1996/Rwanda.htm [7 November 2003]. According to Dr. Odette Nyiramilimo of Le Bon Samaritan Clinic, even women who have sought medical treatment often did not disclosed to their doctor that they were raped. *Ibid.* p. 37.

evidence for victims and witnesses, especially in cases of rape or sexual assault."[352] To this effect, the Tribunals introduced special rules governing instances of sexual assault, and especially rape, which resulted in lightening the burden of proof in such cases. Interestingly, from within the ICTY's Rules on Procedure and Evidence, it is only Rule 96 (i) that deals with the issue of corroboration. It is related to the cases of sexual assault, and it explicitly provides for such a lightened burden of proof as they require no corroboration. Rule 96 reads as follows:

> In cases of sexual violence:
> (i) witness corroboration of the evidence of the victim's evidence is not required;
> (ii) consent cannot be used as a defence, where the victim: (a) has been subjected to acts of violence or if she was forced, imprisoned or subjected to psychological pressure or if she feared being subjected to the same or if she was threatened with such acts, or (b) if she considered it reasonable that if she did not submit another woman might be subjected to such acts, or be threatened or forced out of fear;
> (iii) the prior sexual behaviour of the victim cannot be invoked as a defence.[353]

Prosecutor v. Tadić, the first ICTY trial, dealt with charges of sexual violence. In various sections, the second amended indictment embraced rapes, including gang rapes, sexual violence, sexual assaults, and other psychical and psychological abuse, including oral sexual acts and sexual mutilation.[354]

The Trial Chamber's opinion and judgement deals with the testimonies of survivors of sexual violence in considerable detail. The testimony of Suada Ramić, a Muslim who gave evidence about being raped at the Prijedor military barracks, seems the most vivid example:

> After the rape she was bleeding terribly and went to the hospital where she was told by one of the doctors that she was approximately three to four months pregnant and that an abortion would have to be performed without anaesthetic because there was none. When this doctor asked another doctor for assistance, the second doctor started cursing, saying that "all balija women, they should be removed, eliminated", and that all Muslims should be annihilated, especially men ... When she returned from the hospital ... she was subsequently raped for a second time by a former Serb colleague who had come to search her apartment ... She was taken to a prison cell which was covered in blood and where she was raped again

---

[352] Report of the Secretary-General, (S/25704), May 3, 1993 at 108.
[353] ICTY Rules of Procedure and Evidence, Art. 96.
[354] *Prosecutor v. Duško Tadić a/k/a "Dule",* Case No IT-94-1-I, Second Amended Indictment, 14 December 1995 [hereinafter *Prosecutor v. Tadić,* Second Amended Indictment], paras. 2.6, 2.7, 4, 4.3, 6.

> and beaten, afterwards being taken to the Keraterm camp ...She was transferred to the Omarska camp ... Women were called out nightly and raped; on five separate occasions she was called out of her room and raped. As a result of the rapes she has continuing and irreparable medical injuries.[355]

The Trial Chamber reported that her experience, as well as the experience of other witnesses, is not unique and reveals severe sufferings of non-Serbs just because they were of a religion or political opinion considered insulting by those in power in and around Prijedor. These non-Serbs became victims of an evident widespread and systematic discriminatory policy in the region.[356] The Trial Chamber considered credible testimonies[357] and in its judgement concluded that Tadić was guilty on eleven counts included in the indictment[358] and that he committed crimes against humanity and violated the laws or customs of war.

The Trial Chamber explained the function of the Rule 96 (1) of the ICTY's Rules on Procedure and Evidence. It focused attention on *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* written by Virginia Morris and Michael P. Scharf[359] which provides for the same presumption of reliability to testimonies of victims of sexual assaults as well as to victims of other crimes. It stressed that having Rule 96 (1) in the Rules on Procedure and Evidence does not mean that in cases of crimes, other than sexual assault, corroboration is always required.[360] The Trial Chamber noted that most modern continental legal systems no longer stand by the principle of *unus testis, nullus testis.*[361] It finished with the point that the requirement of corroboration is not part of customary international law and thus the ICTY is not obliged to require it.[362]

---

[355] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No IT-94-1-T, Opinion and Judgement, 7 May 1997 [hereinafter *Prosecutor v. Tadić,* TC Opinion and Judgement], para. 470.
[356] *Ibid*. para. 472.
[357] *Ibid.* para. 477.
[358] *Ibid*. at VIII (2).
[359] Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia (*New York, Transnational Publishers, 1995*),* Vol. 1.
[360] "Thus what the Sub-rule certainly does not do is to justify any inference that in cases of crimes, other than sexual assault, corroboration is required. The proper inference is, in fact, directly to the contrary". *Prosecutor v. Tadić,* TC Opinion and Judgement, para. 536.
[361] Requirement of testimonial corroboration of a single witness's evidence as to a fact in issue (literally, one witness is no witness). *Prosecutor v. Tadić,* TC Opinion and Judgement, paras. 537 and 538.
[362] *Ibid.* para. 539.

Prosecutor v. Tadić is the case in which the Trail Chamber explained its general approach to witnesses, including those who were victims of sexual assault. It stressed that their reliability is an estimation which must be determined on a case-by-case basis. The circumstances surrounding each witness must be considered as well as his or her individual testimony.[363]

BOX 13: BACKGROUND TO CASES: PROSECUTOR V. TADIĆ

Prosecutor v. Tadić

Duško Tadić was born in 1955 in the town of Kozarac to a prominent Serb family.[364] He became a member of the Serb Nationalist Party in 1990.[365] Several witnesses before the Tribunal testified that Tadić had supported the Greater Serbia cause and expressed nationalistic ideas.[366] After the ethnic cleansing of Kozarac was over, he became a political leader of the town: in September 1992, he was elected President of the Local Board of the Serb Nationalist Party; subsequently, he became the Secretary of the Srpski Kozarac Local Commune.[367]

In the first half of 1993, the military tried to forcibly enlist Tadić for military service, in this connection he was even arrested and threatened with arrest by the military police on several occasions. In June 1993, he was mobilised and posted to the war zone, from where he managed to escape the following day. He went into hiding but was arrested several times – though he always managed to escape.[368] Finally, he travelled to Germany where he was arrested by German police in February 1994 on suspicion of having committed crimes at the Omarska prison camp. One year later, Tadić was transferred to the International Criminal Tribunal for the Former Yugoslavia.[369]

The indictment against Duško Tadić and a co-accused Goran Borovnica charged them with a significant number of counts, including crimes against humanity (e.g.,

[363] *Ibid*. para. 541.
[364] *Ibid.* para. 180.
[365] *Ibid.* para. 181.
[366] *Ibid.* paras. 182-184.
[367] *Ibid.* para. 188.
[368] *Ibid.* para. 191.
[369] *Ibid.* para. 192.

persecutions on political, racial or religious grounds; rapes; murder; and inhuman acts), grave breaches of the Geneva Conventions (e.g., wilful killing; torture or inhuman treatment; wilfully causing great suffering or serious injury to body or health) and violations of the laws or customs of war (e.g., cruel treatment; and murder).[370] In 2005, Judge Parker issued an Order granting the motion for leave to withdraw the indictment against Goran Borovnica without prejudice as a consequence of the result of the Judges' review of the documents presented by the Prosecution indicating that Borovnica was declared missing in March 1995 and declared dead in November 1996.[371]

At the beginning of Tadić's prosecution, he tried to dismiss his case on three grounds: illegal establishment of the Tribunal; unjustified primacy of the Tribunal over competent domestic courts; and lack of subject-matter jurisdiction. The Trial Chamber dismissed the motion.[372] In the Decision on the defence motion for interlocutory appeal on jurisdiction that followed, the Appeals Chamber affirmed the jurisdiction of the Tribunal and dismissed the appeal;[373] the case then continued in the Trial Chamber, which considered each count of the indictment separately and related the role of Duško Tadić in the alleged events while analysing testimonies of many witnesses in great detail. It also reviewed the case of the defence. Based on these sets of information, the Trial Chamber made findings of fact.

The acts of Duško Tadić were related to incidents alleged to have taken place at various locations in *opština* Prijedor. In May and June 1992, after the capture of the town of Kozarac, Tadić played an active role in the collection and forced transfer of non-Serbs from the Kozarac area in columns through and out of Kozarac to assembly points, and in the subsequent separation of men from women and

[370] *Prosecutor v. Tadić,* Indictment, paras. 4.1.-11.55.
[371] Indictment Against Goran Borovnica Withdrawn Without Prejudice, Press Release, CVO/MOW/965e, The Hague, 22 April 2005. Available at: http://www.icty.org/sid/8600 [accessed 23 January 2010].
[372] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 2.
[373] Ibid. para. 146.

children, for transport to camps.[374] In the town of Kozarac, he also beat and killed Muslim policemen.[375]

On 14 July 1992, the accused was present together with other armed men in the two small villages of Jaskici and Sivci. In Sivci, he took part in the removal of separated men from that village to the Keraterm camp. In Jaskici, he took part in the calling-out of residents and the separation of men from women and children. A number of men were forcibly removed from the village with the direct participation of Tadić, who also violently beat some of them.[376]

During the summer of 1992, Duško Tadić was present at the Omarska prison camp. One day he carried a man in a wheelbarrow and discharged the contents of a fire extinguisher into his mouth.[377] Tadić was one of a group of Serbs who severely beat numerous prisoners in the large garage building or hangar of the Omarska camp, he himself took an active part in kicking and beating prisoners and even threatening them with a knife and stabbing them.[378] He was also present on the hangar floor during the assault upon and sexual mutilation of one prisoner.[379] In the building known as the "white house" in the Omarska camp, he beat and kicked a prisoner until he was unconscious.[380] Around late July, behind the "white house", Tadić severely beat and kicked prisoners.[381] He also took part in the beatings of the prisoners at Keraterm camp and even participated in one mass beating of prisoners from Room 2 in that camp.[382]

While seizing, selecting and transferring non-Serbs to various camps, Tadić was aware that the majority of surviving prisoners would be deported from Bosnia and Herzegovina as the establishment of these camps (specifically Omarska, Keraterm, Trnopolje) was part of the "Greater Serbia plan", cleansing non-Serbs from the

---

[374] *Prosecutor v. Tadić*, TC Opinion and Judgement, paras. 452 and 455.
[375] *Prosecutor v. Tadić,* TC Opinion and Judgement, para. 397; *Prosecutor v. Tadić and Borovnica*, Second Amended Indictment, Case No. IT-94-1-I, 14 December 1995, paras. 11 and 12.
[376] *Ibid.* paras. 342, 369 and 374-375.
[377] *Prosecutor v. Tadić*, TC Opinion and Judgement, paras. 305 and 316.
[378] *Ibid.* paras. 194 and 235-236.
[379] *Ibid.* paras. 194 and 237.
[380] *Ibid.* paras. 245 and 261.
[381] *Ibid.* paras. 281 and 303.
[382] *Ibid.* para. 448.

Prijedor Municipality.[383] He was also aware of the policy of discrimination against non-Serbs, and thus acted on the basis of religious and political grounds.[384]

The Trial Chamber charged Duško Tadić with crimes against humanity (persecutions on political, racial or religious grounds; and inhumane acts), and violations of the laws or customs of war (cruel treatment). He was sentenced to 20 years' imprisonment.[385]

It was not unexpected that the ICTR in its first trial, *Prosecutor v. Akayesu*, was confronted with sexual violence. The amended indictment[386] mentioned acts of sexual violence such as forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or penetration of a vagina or anus with a foreign object, as well as sexual abuse such as forced nudity.[387] It was asserted by the Prosecution that Jean Paul Akayesu, a *bourgmestre* responsible for maintaining law and public order in the *commune* of Taba, knew and allowed acts of sexual violence, beatings and murders of displaced civilians of whom majority were Tutsi to take place at or near the premises of the bureau communal.[388]

The Trial Chamber's judgement contains a significant number of witness testimonies covering sexual violence.[389] After a thorough assessment of these testimonies, the Trial Chamber concluded that "there is sufficient credible evidence

---

[383] *Ibid*. para. 461.
[384] *Ibid.* para. 477.
[385] *Prosecutor v. Tadić*, TC Sentencing Judgement, para. 74. The Appeals Chamber denied Duško Tadić's appeal on all grounds, however allowing the cross-appeal of Prosecution, it reversed the Trial Chamber judgement and charged Tadić with nine additional counts. Subsequently, Duško Tadić was sentenced by the Trial Chamber to 25 years' imprisonment. The Defence filed an appeal against the sentencing judgement. Finally, the Appeals Chamber heard the oral arguments on the Defence appeal and sentenced Duško Tadić to a maximum of 20 years' imprisonment. In 2000, Tadić was transported to Germany to serve his sentence and in July 2008, he was granted early release. Available at: http://www.icty.org/case/tadic/4#acjug [accessed 23 January 2010].

[386] "On 17 June 1997, the Indictment was amended to include allegations of sexual violence and additional charges against the Accused under Article 3(g), Article 3(i) and Article 4(2)(e) of the ICTR Statute. In introducing this amendment, the Prosecution stated that the testimony of Witness H motivated them to renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal." *Prosecutor v. Akayesu*, TC Judgement, para. 417.
[387] *Prosecutor v. Akayesu,* Amended Indictment, 17 June 1997, para. 10A.
[388] *Ibid*. paras. 12, 12A, 12B.
[389] *Prosecutor v. Akayesu*, TC Judgement, paras. 416-446.

to establish beyond a reasonable doubt" that during the Rwandan genocide, Tutsi women and girls were subjected to sexual violence, beatings and killings not only at or near the premises of the bureau communal but at different locations of the Taba *commune* as well. The Trial Chamber also made a note that most of the sexual violence was carried out in front of a wide audience.[390]

With respect to Rule 96 (i) of the ICTR's Rules on Procedure and Evidence, the Trial Chamber followed the ICTY's *Tadić* Judgement explaining that it, i.e., the Trial Chamber, alone specifically deals with the issue of corroboration. The provisions of this Rule concerns only cases of sexual assault where corroboration is not required and grants the same presumption of reliability to the testimonies of victims of sexual assault as well as to victims of other crimes.[391] The Trial Chamber reconfirmed that it is free to rule "on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible."[392] One day after the judgement was delivered, Justice Louise Arbour, the Prosecutor of the International Criminal Tribunal, welcomed in a press release this landmark judgement issued by the ICTR Trial Chamber:

> The judgement is truly remarkable in its breadth and vision, as well as in the detailed legal analysis on many issues that will be critical to the future of both ICTR and ICTY, in particular with respect to the law of sexual violence. The Court showed great sensitivity to the difficulties of bringing forward the victims who are required to reveal, often in public, the shocking indignities to which they were subjected.[393]

Still in connection with the evidentiary puzzles in sexual cases, in the *Čelebići* decision, the Trial Chamber was confronted with a question as to whether statements made by Prosecution witness Grozdana Cecez about the abortion she

---

[390] Seven witnesses testified that "they themselves were raped, … witnessed other girls and women being raped. Many rapes took place on or near the premises of the bureau communal … Many other instances of rape in Taba outside the bureau communal - in fields, on the road, and in or just outside houses - were described … [they] described other acts of sexual violence which took place on or near the premises of the bureau communal - the forced undressing and public humiliation of girls and women." *Prosecutor v. Akayesu*, TC Judgement, para. 449.

[391] *Prosecutor v. Akayesu*, TC Judgement, para. 134.

[392] *Ibid.* "The Chamber can freely assess the probative value of all relevant evidence. The Chamber had thus determined that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence, provided that it is being in accordance with the requisites of a fair trial." *Ibid.* para. 136.

[393] Statement by Justice Louise Arbour Prosecutor of the International Criminal Tribunal for Rwanda, Press Release, ICTY Doc. CC/PIU/342-E (4 September 1998), available at: http://www.icty.org/sid/7642 [accessed 11 March 2009].

had in April 1992, which statements were presented in relation to her testimony about rape and torture allegations, were admissible as evidence.[394]

Answering this question, the Trial Chamber returned to the interpretation of Rule 96 which applies to the admissibility of evidence in cases of sexual assault. Under Sub-rule 96 (iv), evidence concerning the victim's past sexual conduct is not admissible. The Trial Chamber explained the rationale behind this provision, highlighting the special nature of the conflicts during which crimes under the jurisdiction of the ICTY were committed and reminding that systematic and mass rape of women was a common feature of this conflict.[395] Thus the main objective of Sub-rule 96 (iv) is to "adequately protect victims from harassment, embarrassment and humiliation by the presentation of evidence which relates to past sexual conduct".[396] The Court elucidated that in cases of rape and other sexual assaults, evidence of the victims' prior sexual conduct may put their reputation in doubt. Such evidence shall be of no value for the Chamber. It is aware of that fact that requiring it could distress and emotionally damage witnesses. Moreover, this type of evidence could cause confusion of the issues.[397]

The Trial Chamber also considered the reasoning of the judges in *Prosecutor v. Tadić* who in the context of assessing evidence of sexual assaults victims noted that:

> rape and sexual assault often have particularly devastating circumstances which, in certain instances may have a permanent detrimental impact on the victim. (...) the need to show special consideration to individuals testifying about rape and sexual assault has been increasingly recognised in the domestic law of some States. (...) In consideration of the unique concerns of victims of sexual assault, a special Rule for the admittance of evidence in cases of sexual assault was included in the Rules of the International Tribunal. Rule 96 provides that corroboration of the

---

[394] *Prosecutor v. Mucić et al.,* Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997 paras. 1 and 2. [MS. CECEZ]: I was pregnant that year and I didn't have enough of those medicines, so that I didn't use them for a time, and indeed I became pregnant. I think his name was Sejo. I went for a check-up. He told me it was positive, that I was pregnant. I came back. I agreed with my husband what we should do. He said I should have an abortion. I came to Sejo. He was going to send me to Sarajevo but the situation there was already tense. I didn't dare to go. Then he told me to come and I think on 1st April **I had that abortion**. Then I came back and I found those pills and bought five little boxes in this pharmacy, and I continued using them. That is true. **I did have an abortion on April 1st**." *Ibid.* para. 3.
[395] *Ibid.* paras. 43 and 44.
[396] *Ibid.* para. 48.
[397] *Ibid.* para. 48.

> victim's testimony is not required and consent is not allowed as defence if the victims has been subject to physical or psychological constraints. Finally, the victim's prior sexual conduct is inadmissible.[398]

This was the first time the ICTY actually dealt with the Sub-rule 96 (iv). The Trial Chamber thus turned to national jurisdiction for inspiration as to the meaning of the expression 'prior sexual conduct'. It noted for example that in the state as well as federal laws of the United States and in the law of Australia there exists similar exclusionary provisions of inadmissibility of prior sexual conduct evidence, often referred to as "rape shield rules".[399] It then explored national jurisprudence to find out that it is the court that is to determine what conduct is sexual in nature and what evidence is thus prohibited; aborted pregnancy is the result of past sexual behaviour; evidence of an abortion is evidence of prior sexual conduct; evidence of the usage of birth control pills is also evidence of sexual activity.[400]

The Trial Chamber concluded that Sub-rule 96 (iv) completely prohibits the introduction of evidence of prior sexual conduct in sexual violence cases and that there is no waiver in its application.[401] It summarized its reasoning in three main points: a) under the ICTY's Rules on Procedure and Evidence, the trial judges have unfettered discretion to decide what evidence is admissible; b) under Sub-rule 96 (iv) of the ICTR's Rules on Procedure and Evidence, the trial judges enjoy wide discretion to decide what constitutes previous sexual conduct; and c) the information about Ms. Cecez's abortion constitutes previous sexual conduct,[402] adding that her statements on abortion in April 1992 were not relevant to this trial and do not impinge on her credibility.[403] Acting pursuant to Sub-rule 96 (iv) and exercising its inherent right, the Trial Chamber ordered the irrelevant information,

---

[398] *Prosecutor v. Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Separate Opinion of Judge Stephen), 10 August 1995, paras. 46 and 49 as cited in *Prosecutor v. Mucić et al.*, Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997, para. 51.
[399] *Ibid.* para. 53.
[400] *Ibid.* paras. 54-57.
[401] *Ibid.* para. 58.
[402] *Ibid.* para. 59.
[403] *Ibid.* para. 60.

particularly in the case when it could have a detrimental impact on the person, to be redacted from all records.[404]

The Tribunals, particularly in the *Tadić*, *Akayesu*, *Furundžija* and *Čelebići* cases, had enormous impact on the treatment of survivors of torture and especially survivors of sexual assaults. Before their activity in this field, the deficiency in substantive, procedural and evidentiary rules were the main obstacles in addressing rape and other sexual assaults in international law.[405]

In cases involving survivors of torture, and particularly survivors of sexual assault, decision makers in refugee status determination should strive to follow the reasoning of the Tribunals' Appeal and Trial Chambers. On relevant occasions, they should in their decisions acknowledge the strength and courage of survivors who have recounted their traumatic experience. They should be aware of the possible combination of social consequences of rape experience becoming generally known in victims' communities together with the acute trauma they often suffer when having to recount their experience in an official interview.

Recommendations related to assessing the credibility of traumatized refugees thus include:

1. Testimonies should be assessed in light of possibility of stress-related disorders suffered by refugees.

2. Personal background and the nature of the atrocities to which refugees may have been subjected should be taken into account when assessing their testimonies. Survivors of traumatic events should not be expected to recall precise minutiae of events and every single element of a complicated and traumatic sequence of events. Long detention with no means of recording experiences aggravates the troubles of recounting details at the later date.

---

[404] *Ibid.* para. 60.

[405] "Unlike the Nuremberg and Tokyo Tribunals, which largely ignored gender-based crimes, the ICTY and the ICTR have surmounted reluctance and other obstacles to address these crimes despite their sexually graphic nature and traditional insensitiveness to women's rights and needs." Askin Kelly D., Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status, 1 THE AMERICAN JOURNAL OF INTERNATIONAL LAW (1999), p.99.

3. Not remembering exact details of events in case of traumatic circumstances should not destroy a refugee's credibility as to the essence of the events.

4. No particular significance should be attached to minor and reasonable inconsistencies in testimonies of refugeees who are survivors or eye-witnesses of atrocities, if they are otherwise consistent throughout their statements. In this context, minor discrepancies between the evidence of a refugee and a statement previously made by that refugee should not be treated as discrediting if the refugee has nevertheless described the essence of the events in acceptable detail.

5. Decision makers should be willing to deal more with the events that took place rather than with the exact dates and times on which these events happened.

6. There should not be any rule of evidence that traumatic circumstances or PTSD diagnosis necessarily render a refugee's testimony unreliable. It must be demonstrated *in concreto* why 'the traumatic context' makes a given refugee an unreliable witness.

7. Refugees suffering from PTSD do not necessarily have to be inaccurate in the evidence given. There is no reason to believe that a person with PTSD cannot be perfectly reliable. On the other hand, just as in the case of other survivors of traumatic events, refugees suffering from PTSD cannot reasonably be expected to recall precise minutiae of events, such as exact dates or times as well as every single element of a complicated and traumatic sequence of events. Furthermore, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of the interference with the refugee's testimony.

8. Interviewers and decision makers in refugee cases should be provided with relevant training "in issues of trauma, sexual violence, security and confidentiality" to instruct them about the possible effects of psycho-social therapy on memory.[406]

9. Decision makers should always reframe questions and adopt alternative mechanisms to obtain needed information when refugees who experienced serious human rights abuses cannot provide them with testimony suitable to judicial context. Decision makers have to be proactive and correct misunderstandings emanating from communication with refugees who are survivors or eye-witnesses of atrocities.

[406] See ICC Rules of Procedure and Evidence, Rule 17 (iv). Recommendation delivered by Robert Cryer in relation to international criminal cases (especially before the International Criminal Court) involving witnesses that had undergone psychological therapy (CRYER, p. 434.)

CULTURAL FACTORS AFFECTING EVIDENCE

This chapter begins by outlining difficulties arising from misunderstandings based on differences between the interviewer's and interviewee's cultural backgrounds. In other words, it describes the role of culture in evaluation and understanding testimonies of witnesses and applicants for refugee status. It then recommends principles aimed at producing a correct assessment of credibility in the given context.

Walter Kälin identified five (partially overlapping) obstacles to an undistorted interaction between an applicant for refugee status and interviewer. These are:

- the manner in which the applicant expresses him or herself;
- the interpreter;
- the cultural relativity of notions and concepts;
- different perceptions of time;
- the cultural relativity of the concepts of "lie" and "truth".[407]

Given the same nature of the "cross-cultural" relationship between judges and witnesses in international criminal trials, Kälin's obstacles are equally applicable to the Tribunals. That being said, the ICTY and ICTR have gotten at least some experience in dealing with misunderstandings caused by different cultural backgrounds. They could assist in developing relevant guidelines in refugee hearings.

As early as in *Prosecutor v. Akayesu*, the ICTR acknowledged the problems in achieving an accurate appraisal of witnesses in trials where judges have a different cultural background to the witnesses. The Trial Chamber used an expert witness's opinion to explain how particular features of the Rwandan culture may affect the testimony. It presented the view of Dr. Mathias Ruzindana that Rwandans do not always answer questions directly, particularly if they consider them to be delicate; and in order to get a correct meaning, the answers have to be "decoded" taking into account such factors as the context, the particular speech community, the identity

[407] Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L. MIGRATION REV. (1986), p.231.

of and relationship between the orator and the listener as well as the subject matter of the question. The Trial Chamber presented an example of the meaning of the word *Inyenzi*: "many witnesses when asked the ordinary meaning of the term *Inyenzi* were reluctant or unwilling to state that the word meant cockroach, although it became clear to the Chamber during the course of the proceedings that any Rwandan would know the ordinary meaning of the word." Equally, in this case, the Trial Chamber did no draw any adverse conclusions regarding the credibility of a witness based on his or her reticence and circuitousness in responding to questions which required specificity as to dates, times, distances, locations or where witnesses seemed to be inexperienced with maps, films or graphic representations of localities.[408]

In relation to the above-mentioned cultural constraints, however, the judges seemed to be careful in drawing conclusions when it came to distinguishing what witnesses coming from Rwandan culture had seen from what they had heard. In this respect, the Trial Chamber once again presented the opinion of Dr. Ruzindana who noted that

> most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener.

Dr. Ruzindana helped the Chamber to understand why the evidence which had sometimes been reported as an eyewitness version was in fact second-hand information. He explained to the judges that this is "a common phenomenon within the culture", but he added that the witnesses are usually able to distinguish what they had heard from what they had seen. Based on such explanation, the Chamber was consistent in ensuring that the witnesses were expressive in this regard and the distinction was made.[409]

---

[408] *Prosecutor v. Akayesu,* TC Judgement, para. 156.
[409] *Ibid.* para. 155.

In the introductory section of the judgement in *Prosecutor v. Rutaganda*, the Trial Chamber asserted that it is crucial to raise certain issues connected to the assessment of evidence before it. The Trial Chamber noted the rules that are applicable in this context and announced what factors affecting the assessment of evidence it would take into consideration. Among others, it took into account various *socio-cultural factors* in assessing the testimony of some witnesses. It reminded that some witnesses testifying before it were farmers and had a low level of education. Consequently, they faced difficulty when they were supposed to identify and testify to some of the exhibits, for example maps or photographs of various locations, or to testify as to dates, times, distances, colours, and motor vehicles.[410]

In *Prosecutor v. Musema*, the Trial Chamber also in a separate section of the judgement addressed general as well as particular evidentiary matters, including the effect of cultural factors on witness testimonies. The Trial Chamber reconfirmed that cultural factors affected the testimonies of many witnesses who as a result of these cultural differences were answering delicate questions indirectly. In this regard, the Chamber decided not to draw any adverse conclusions as to the witnesses' credibility.[411] It followed the *Akayesu* and *Musema* judgements when describing the impact of the use of unfamiliar documents and spatio-temporal identification mechanisms and techniques. It reaffirmed the difficulty of many witnesses in being specific as to dates, times, distances, locations, and working with maps, films, photographs and other graphic representations. When witnesses were reticent and circuitous in answering questions of such nature, the Trial Chamber did not draw any adverse conclusion as to their credibility. When assessing the evidence, it did not, however, ignore the accuracy and other relevant elements of witnesses' responses.[412] The Trial Chamber reminded the Parties that they should all be sensitive to cultural factors

[410] *Prosecutor v. Rutaganda*, TC Judgement, para. 23.
[411] *Prosecutor v. Musema*, TC Judgement, para. 103.
[412] *Ibid.* para. 104.

not only during the courtroom proceedings but also when gathering and preparing evidence.[413]

In *Prosecutor v. Kupreškić et al*., the Appeals Chamber indicated its position concerning the potential influence of a witness's demeanour on assessing his or her evidence. It noted that the Trial Chamber is in the best position to assess the evidence as it has the chance to observe the witness directly. The Appeals Chamber warned, however, that the Trial Chamber must be careful to allow for the fact that, "very often, a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy."[414] The Appeals Chamber reminded of expert evidence given by Professor Willem Wagenaar during the *Kupreškić* trial. He testified that research has determined that "the relationship between the certainty expressed by a witness and the correctness of the identification is very weak."[415] He pointed out that "the degree of certainty expressed by a particular witness is "more an aspect of personality than an aspect of the quality of what they saw or what they remember".[416] The Appeals Chamber concluded that, based on the evidence of Professor Wagenaar, even those witnesses who are very sincere, honest and convinced about their identification can very often be wrong.[417]

Based on the above-mentioned examples, it is clear that on many occasions, the Tribunals have highlighted the apparent lack of familiarity of some witnesses with spatio-temporal identification mechanisms and techniques (maps, films, photographs, aerial photography, and other graphic representations of locations), and the impact this has had on witnesses' testimony and their perceived credibility. They made consistent effort to consider this fact when evaluating the credibility of these witnesses and warned the parties against using methods such as aerial photography when preparing witness evidence.

Robert Cryer argues that the research into witness evidence and culture carried out within the fields of psychology and anthropology proves the importance of

---

[413] *Ibid.* para. 105.
[414] *Prosecutor v. Kupreškić et al.*, AC Judgement, at 138.
[415] *Ibid.*
[416] *Ibid.*
[417] *Ibid.*

anthropological expert evidence. He reminds us that in some cultures, exaggeration is encouraged. How facial expressions and eye contact are used and interpreted also varies between cultures. Thus, there is a serious chance of inter-cultural misunderstanding which may have a negative influence on a fair assessment of credibility. [418] With the help of expert anthropological evidence to enable all parties to understand the cultural framework within which the testimony is being given, such inter-cultural misunderstanding can be avoided.

Recommendations related to the assessment of the credibility of refugees in light of their often different cultural backgrounds include:

1. **Decision makers should acknowledge the difficulty in achieving an accurate appraisal of refugees where decision makers have a different cultural background to that of the refugees. They should also acknowledge the fact that particular features of the refugees' culture may affect their testimony. Thus, they must take into account various socio-cultural factors when assessing refugees' evidence.**
2. **To get the correct meaning of a refugee's testimony, the answers given by the refugee must be decoded in light of his or her specific culture, taking into account factors such as the context, the particular speech community, the identity of and relationship between the orator and the listener, and the subject matter of the question.**
3. **Decision makers should not make any adverse conclusions regarding the credibility of a refugee based on his or her reticence and circuitousness in responding to questions which require specificity as to dates, times, distances, locations or where the refugees seem to be inexperienced with maps, films or graphic representations of localities.**

[418] CRYER, pp. 428-429.

4. **Decision makers should be careful in drawing conclusions when it comes to distinguishing what a refugee coming from a specific culture has seen from what he or she has heard, especially if he or she lives in oral traditions in which facts are reported as they are perceived by the person recounting, irrespective of whether the facts were personally witnessed by that person or were told to him or her by someone else. Decision makers should also acknowledge that the refugees are usually able to distinguish what they have heard from what they have seen, and should thus be consistent in ensuring that the refugees are expressive in this regard and the distinction is made.**

5. **In the framework of spatio-temporal identification mechanisms and techniques, decision makers should recognize the difficulty refugees may face when they are supposed to identify and testify to unfamiliar documents or other exhibits, such as maps, photographs, films, and other graphic representations; or to testify to dates, times, distances, locations, colours, motor vehicles, etc. It is not in the interest of either party in refugee status determination procedure to require refugees to utilize identification mechanisms which are not familiar to them, such as for example aerial photography, when other alternatives are readily available.**

6. **Decision makers should be aware that cultural factors may affect the testimonies of many refugees who as a result of these cultural differences may answer delicate questions indirectly. In this case, decision makers should not draw any adverse conclusions as to their credibility.**

7. **Decision makers should be careful when considering the potential influence of a refugee's demeanour on the assessment of his or her evidence. They should be careful to allow for the fact that very often a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy. They should be also aware that the relationship between the certainty expressed by a refugee and the correctness of the identification is very weak; and that the degree of certainty expressed by a particular refugee is more an aspect of his or her personality than an aspect of the quality of what he or she saw or remember. At the same time, decision makers should remember that even those refugees who are very sincere, honest and convinced about their identification can very often be wrong.**

8. **Decision makers should be sensitive to cultural factors not only during the proceedings, but also when gathering and preparing support evidence.**

9. **A refugee's testimony should be considered in the light of expert anthropological evidence that explains the cultural framework in which that testimony is being given.**

10. **At the same time, however, when assessing the testimony with regards to cultural differences, decision makers should not ignore accuracy and other relevant elements of refugees' responses.**

LOST IN TRANSLATION:
THE IMPACT OF TRANSLATION AND INTERPRETATION

„THE INTERPRETATION WAS EXCELLENT IN FRENCH, BEARABLE IN ENGLISH, AND [...] FREQUENTLY INCOMPREHENSIBLE IN GERMAN."[419]

"It is a common feature of war crimes trials that witnesses' testimony has to be translated."[420] Equally, it is a common feature of refugee hearings that applicants' testimony has to be translated. Only in exceptional cases will a judge be proficient in several languages used in an international trial. Likewise, only on rare occasions will decision makers be fluent in the mother tongues of applicants for refugee status.

Interpretation will always serve as a filter to effective communication. Misinterpretations and misunderstandings are a real issue. More often than not, judges and decision makers are making their assessment based on the translator's version of what was said, rather than on what the witness or applicant for refugee status actually said.

Problems are even more likely to arise when it comes to simultaneous interpretation of witness or refugee testimonies, rather than in cases when written documents are being translated. The mistranslations can have an effect on the verdict and sentence in the same way as they can affect refugee status decisions. In oral hearings, there is usually much less time and opportunity to rectify mistakes.

The International Tribunals recognized the difficulty of interpreting oral testimonies of witnesses from a third language into one of the official languages of the Tribunals. In *Prosecutor v. Akayesu*, the Trial Chamber noted that:

> the interpretation of oral testimony of witnesses from Kinyarwanda into one of the official languages of the Tribunal has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English. These

---

[419] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth, Penguin, 1994), p. 3.
[420] Ian Bryan, Peter Rowe, *The Role of Evidence in War Crimes Trials: The Sawoniuk Case*, 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW (1999) 307, p. 313.

> difficulties affected the pre-trial interviews carried out by investigators in the field, as well as the interpretation of examination and cross-examination during proceedings in Court. Most of the testimony of witnesses at trial was given in the language, Kinyarwanda, first interpreted into French, and then from French into English. This process entailed obvious risks of misunderstandings in the English version of words spoken in the source language by the witness in Kinyarwanda.[421]

In spite of this recognition, problems with interpretation/translation (and especially with double interpretation/translation) cannot be completely avoided, particularly when interpretation/translation is carried out with speed.

The International Criminal Tribunal for the Former Yugoslavia has adopted *The Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the former Yugoslavia* (IT/144) ('the Code'), as has the Special Court for Sierra Leone.[422] The general purpose of this Code is "to provide for standards of conduct on the part of interpreters and translators that all persons employed by the Tribunal in such a capacity are bound to respect."[423] The document includes a series of requirements for translators and interpreters. Article 6.2 of the Code states that interpreters, when working in the courtrooms, shall inform the Judges of any doubt arising from a possible lexical lacuna in the source or target language.[424] The Code also conveys basic principles as to the *accuracy of interpretations and translations*.[425] In relation to *truth and completeness*, the Code sets out the following instructions:

- Interpreters and translators shall convey with the greatest fidelity and accuracy, and with complete neutrality, the wording used by the persons they interpret or translate;

- Interpreters shall convey the whole message, including vulgar or derogatory remarks, insults and any non-verbal clue, such as the tone of voice and emotions of the speaker, which might facilitate the understanding of their listeners;

---

[421] *Prosecutor v. Akayesu,* TC Judgement, para. 145.
[422] *The Code of Ethics for Interpreters and Translators Employed by the Special Court for Sierra Leone*, Adopted on 25 May 2004.
[423] *The Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the former Yugoslavia* (IT/144), Art. 3.1.
[424] *Ibid.* Art. 6.2.
[425] *Ibid.* Art. 10.

- Interpreters and translators shall not embellish, omit or edit anything from their assigned work;

- If patent mistakes or untruths are spoken or written, interpreters and translators shall convey these accurately as presented.[426]

In connection to recognizing *uncertainties in transmissions and comprehension*, Article 10.2 of the Code states that:

- Interpreters and translators shall acknowledge and rectify promptly any mistake in their interpretation or translation;

- If anything is unclear, interpreters and translators shall ask for repetition, rephrasing or explanation.[427]

In addition, the Code prescribes that interpreters shall ensure, where practicable, that speech is clearly heard and understood by their audience so that *clear transmission* can be ensured.[428]

Robert Cryer noticed that the Code does not establish that the testimony of one witness should be translated by one translator. This can raise the question of possible inconsistency in translations which could potentially adversely influence the credibility of an honest witness.[429]

Tribunals are much aware of the fact that the *context in which the terms to be translated are used is critical to an understanding of meaning and their translation*. In *Prosecutor v. Akayesu*, the Trial Chamber relied on the expert testimony of Dr. Ruzindana, an expert witness on linguistics, to obtain the exact meaning of the words in Kinyarwanda it considered significant, such as *Inkontanyi, Inyenzi, Icyitso/Ibyitso, Interahamwe* and the expressions used for "rape".[430] Dr. Ruzindana explained that it is important to place certain words in context, both in time and in

---

[426] *Ibid.* Art. 10.1.
[427] *Ibid.* Art. 10.2.
[428] *Ibid.* Art. 10.3.
[429] CRYER, p. 424.
[430] *Prosecutor v. Akayesu,* TC Judgement, para. 146.

space, to obtain their precise meaning. The Trial Chamber noted it in its judgement.[431]

Herein, it is demonstrated how complex translations based on the context can be.

> The basic everyday meaning of the term *Inyenzi* is cockroach. Other meanings of the term stem from the history of Rwanda. During the revolution' of 1959, refugees, mainly Tutsi, fled the country. Throughout the 1960's incursions on Rwandan soil were carried out by some of these refugees, who would enter and leave the country under the cover of the night, only rarely to be seen in the morning. This activity was likened to that of cockroaches, which are rarely seen during the day but often discovered at night, and accordingly these attackers were called Inyenzi. A similar comparison, between insurgent Tutsi refugees and cockroaches, was made when the RPF army carried out a number of attacks in Rwanda in 1990. It was thought that the Inyenzi of 1990 were the children of the Inyenzi of the 1960's. "The cockroach begets another cockroach and not a butterfly" was an article heading in the magazine Kangura. Another article in this publication made the reference even more explicitly, saying "The war between us and the Inyenzi-Inkotanyi has lasted for too long. It is time we told the truth. The present war is a war between Hutu and Tutsi. It has not started today, it is an old one.[432]
>
> The term Icyitso, or Ibyitso in the plural, has been in usage in Kinyarwanda for quite some time. It is a common term which means accomplice. In ancient Rwandan history, a king wanting to launch an attack on neighbouring countries would send spies to the targeted country. These spies would recruit collaborators who would be known as Ibyitso. In Rwanda, the term has a negative connotation. Thus it should not be seen as being synonymous with supporter', a term which can be viewed both positively and negatively, but perhaps rather "collaborator". The term evolved, as early as 1991, to include not only collaborators, but all Tutsi. The editor of Kangura stated in 1993, "When the war started, Hutu talked openly about the Tutsi, or they referred to them, indirectly, calling them Ibyitso".[433]
>
> The terms gusambanya, kurungora, kuryamana and gufata ku ngufu were used interchangeably by witnesses and translated by the interpreters as "rape". The Chamber has consulted its official trial interpreters to gain a precise understanding of these words and how they have been interpreted. The word gusambanya means "to bring (a person) to commit adultery or fornication". The word kurungora means "to have sexual intercourse with a woman". This term is used regardless of whether the woman is married or not, and regardless of whether she gives consent or not. The word kuryamana means "to share a bed" or "to have sexual intercourse", depending on the context. It seems similar to the colloquial usage in English and in French of the term "to sleep with". The term gufata ku ngufu means "to take (anything) by force" and also "to rape".[434]

---

[431] *Ibid.*
[432] *Ibid.* 148.
[433] *Ibid.* para. 150.
[434] *Ibid.* para. 152.

There will always be problems when translation and interpretation is made in relation to a war or political conflict. This is the case of international criminal trials as well as many refugee hearings. The words and expressions take on specific meaning; they turn out to be politicized, often mutate and become euphemistic.[435]

It may not be easy to get interpreters and translators who have sufficient knowledge of technical terms used in definite political or military setting; often these terms may not be known to almost anyone other than the participants in the conflict. In such a situation, it may be worth searching for expert evidence on the topic to assist the interpreters and translators.

The cases of *Prosecutor v. Akayesu* and *Prosecutor v. Rutaganda* made it clear that the Tribunal makes some effort and in good faith attempts to resolve mistranslations.

For example, when Akayesu objected to the translation of a witness's sentence "*batangira kujya babafata ku ngufu babakoresha ibyo bashaka*" as "they began to rape them" instead of "they had their way with them" the Trial Chamber paused and noted that the expression "*babafata ku ngufu*" used in the given sentence is the expression most closely connected to the concept of force[436] (see examples above of how complex translations can be, more specifically the one related to rape). The Trial Chamber went on to review in detail with the official trial interpreters the references to "rape" in the transcript and satisfied itself that the translations were correct.[437]

In *Prosecutor v. Musema*, the Trial Chamber noted "the difficulties presented by the consecutive translation of three languages (Kinyarwanda, French and English) in assessing evidence." In particular, it noted "the significant syntactical and grammatical differences between the three languages. These difficulties have been taken into consideration by the Chamber in its assessment of all evidence presented to it, including evidence for which the source was not available for

---

[435] CRYER, p. 426.
[436] *Prosecutor v. Akayesu,* TC Judgement, para. 154.
[437] *Ibid.* para. 154.

examination by the Chamber."[438] To balance this statement, it must be noted that in practice, there have been instances when judges did not detect and resolve mistranslations during the hearing of the cases before them.

In the words of the Trial Chamber in *Prosecutor v. Rutaganda*,

> The Chamber also notes that many of the witnesses testified in Kinyarwanda and as such their testimonies were simultaneously translated into French and English. As a result, the essence of the witnesses' testimonies was at times lost. Counsel questioned witnesses in either English or French, and these questions were simultaneously translated to the witnesses in Kinyarwanda. In some instances it was evident, after translation, that the witnesses had not understood the questions.[439]

The Tribunals did not hesitate to invite expert witnesses to assist judges to help prevent misunderstandings that could arise from cultural differences and from interpretation and translation. In *Prosecutor v. Kupreškić*, Judge Cassese interviewed a Norwegian expert witness, Professor Tone Bringa, on her experience living and conducting field research in a Muslim village located near Sarajevo in Bosnia and Herzegovina, which culminated in her book "Being Muslim the Bosnian Way", published in 1995. Among other issues, Cassese was interested in the problem Bringa encountered when she decided to write the book concerning the time she was supposed to write about, i.e., that anthropological studies are written in the present tense and that the Muslims often confused their tenses, speaking sometimes in the present tense, sometimes in the past tense. Bringa explained that confusing tenses was a reality as the lives of Muslims had been destroyed as they were expelled from their village and lost everything. They used to confuse tenses when they were referring to their lives in their village and their houses, the things that had gone. They used to say "Up in my house we are…", and only suddenly they realized that the house does not exist any more. She explained that it is a shock for a person to lose everything and it takes time for a person to realize what has happened, it is not a question of not knowing what happened, but rather a question of when it was recounted.[440]

---

[438] *Prosecutor v. Musema*, TC Judgement, para. 102.
[439] *Prosecutor v. Rutaganda*, TC Judgement, para. 23.
[440] *Prosecutor v. Kupreškić et al.*, T/10917, T/10918, T/10973-T/10977, 12 July 1999.

Moreover, Tribunals' Trial Chambers, in cases where the words were central to the factual and legal findings, include in the judgment their original versions, i.e., for example in Kinyarwanda.[441] And even more importantly, the judges admit that the essence of the testimony can still be lost in translation.

Even when the exact wording is conveyed by an interpreter or translator, one problem may persist: "whilst translation is always possible, it may for various reasons not have the same impact as the original".[442] According to Robert Cryer, a creative element by the translator may be required in order to achieve the equivalent effect as the original. Though, it places the interpreter into a difficult situation: "If the testimony is rendered exactly in a literal sense, then it may not reflect the importance of what is said. However, to alter the testimony to do this may well be to edit it."[443]

The Code in its Article 11 requires that the interpreters and translators "maintain and continually improve their interpreting and translating skills, and increase their knowledge of court proceedings and technical vocabulary that might be encountered during the performance of their duties."[444] According to this article, interpreters and translators should also provide their colleagues, whenever possible, with "any specialised knowledge they acquire which may be useful to the exercise of their duties."[445] This may definitely assist in getting more precise translation and interpretation, though the intention will be more difficult to achieve when there are witnesses/applicants for refugee status from territorially, historically and culturally and linguistically diverse regions. In such a case, close co-operation with other institutions and mutual maintenance of widely accessible database of "technical vocabulary" and "specialised knowledge" may be an asset.

---

[441] *Prosecutor v. Akayesu,* TC Judgement, para. 145.
[442] P. Newmark, *A Textbook of Translation* (London, Practice Hall, 1988), p.6 as cited in CRYER, p. 423.
[443] CRYER, p. 423.
[444] *The Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the former Yugoslavia* (IT/144), Art. 11.1.
[445] *Ibid.* Art. 11.2.b.

Recommendations related to the difficulties that may arise in the context of interpretation and translation of testimonies of applicants for refugee status include:

1. **Decision makers should recognize the difficulty in interpreting oral testimonies of applicants for refugee status from a different language. They should acknowledge that the whole process of interpretation entails obvious risks of misunderstanding, especially in cases where there are significant syntactical and grammatical differences between the languages. They should make some effort and in good faith attempt to resolve these misinterpretations.**

2. **A set of requirements for translators and interpreters should be introduced and made known to all of them, including for example: informing the decision maker of any doubt arising from a possible lexical lacuna in the source or target language; conveying with the greatest fidelity and accuracy, and with complete neutrality, the wording used by the persons they interpret or translate; conveying the whole message, including vulgar or derogatory remarks, insults and any non-verbal clues, such as the tone of voice and emotions of the speaker, which might facilitate the understanding of their listeners; not embellishing, omitting or editing anything from the assigned work; conveying patent mistakes or untruths accurately as presented; acknowledging and rectifying promptly any mistake in the interpretation or translation; asking for repetition, rephrasing or explanation if anything is unclear, etc.**

3. **Decision makers must understand the importance of placing certain words in context, both in time and in space, to obtain their precise meaning.**

4. **Where the words are central to the factual and legal findings, it may prove useful to include their original versions in the transcript.**

5. **Decision makers should seek the help of linguistic experts to obtain an exact meaning of crucial words.**

6. **More specifically, decision makers should know that in the framework of interpretation and translation in relation to a war or political conflict, words and expressions can take on specific meaning; they turn out to be politicized, often mutate and become euphemistic. Expert evidence on the topic can assist interpreters, translators and decision makers in decoding technical terms used in a specific military or political setting.**

7. **Interpreters and translators should maintain and continually improve their interpreting and translating skills, and increase their knowledge of refugee status determination procedure as well as technical vocabulary that might be encountered during the performance of their duties.**

8. **Interpreters and translators should also provide their colleagues, whenever possible, with any specialised knowledge they acquire which may be useful in the exercise of their duties.**

9. **Close co-operation between refugee status determination institutions and other organisations and the mutual maintenance of a widely accessible database of "technical vocabulary" and "specialised knowledge" may be an asset.**

10. **The testimony of one applicant for refugee status should ideally be translated by only one translator because the testimony given in various instances by the same applicant but translated by two or more translators can appear less consistent and lead to the negative finding on credibility of an otherwise honest refugee.**

11. **It should be ensured, where practicable, that speech is clearly heard and understood.**

12. **Decisions makers should be made aware that even precise interpretation or translation may, for various reasons, not have the same impact as the original. Even if the testimony is rendered exactly in a literal sense, it may not reflect the importance of what is said.**

13. **Importantly, decision makers should admit that the essence of the testimony can still be lost in translation.**

EFFECTS OF TIME ON MEMORY

A refugee like anyone else cannot remember everything. Furthermore, memory fades over time. Many refugees, much like witnesses at the international criminal trials, are interviewed a considerable period of time after the events in question occurred; thus they cannot be expected to reconstruct an exact image of what happened months and often years ago.

The effect of the passing of time on memory was already an issue in criminal proceedings long before the first accused were brought before the Tribunals. In the famous *Sawoniuk* case, the Trial Judge dealt with the issue of witness evidence related to events that had happened more than fifty years ago. Sawoniuk, a longstanding United Kingdom resident, used to be a policeman in Domachevo, Byelorussia. A jury at the Central Criminal Court in London convicted Sawoniuk of murder on two counts constituting a violation of the laws and customs of war; the murder related to the killing of two civilians members of the Jewish population in Domachevo[446] in 1942.[447] The charge was based on the War Crimes Act 1991 and Sawouniuk was sentenced to life imprisonment.[448] Although Sawoniuk's appeal based on issues related to procedural matters and the admissibility of certain items of evidence[449] was dismissed, his case showed how the Lord Chief Justice directed the jury on the process of assessing evidence witnessed a considerable

---

[446] A town under German occupation at that time.
[447] Available at: http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/95d2c9d10c739213c1256ba4005001fb?OpenDocument [accessed 28 July 2006].
[448] Sawoniuk could not have been charged with a grave breach of the Fourth Geneva Convention of 1949, as the murders occurred prior to the adoption of the Convention.
[449] "The appellant submits that the judge erred in law in failing to stay count one of the indictment on the ground that the continued prosecution of the appellant on that count was an abuse of the process of the court. In support of that submission counsel places reliance, in this court as before the judge, on a number of features of this very unusual case: the passage of over 56 years from the date of the alleged crime to the date of trial; the fact that the sole, unsupported, witness was at the time a boy, who did not mention this incident to the NKVD when interviewed after the war and who made no statement on the subject for over 50 years; the inability of the defence, after this lapse of time, to identify or trace the two other policemen said to have been present at the time of this incident, if indeed it took place; the death of the witness's 16 year old companion, who died in 1986 without communicating his recollection, if any, of this event to anyone; the absence of any other witness able to challenge or dispute the account of Alexander Baglay; and the absence of any scientific support for his evidence." R. v. Sawoniuk [2000] 2 Criminal Appeal Reports 220.

time ago and demonstrated that such evidence can still be effective and relied upon when appropriately dealt with,

> On count one we remind ourselves that the conviction rested very largely on the evidence of a witness who was, if his evidence was reliable, standing within feet of the appellant when this murder was committed. It was not a case of an identification made 56 years after the event, but one of contemporaneous recognition to which the witness deposed after that lapse of time. It is not easy to imagine any event which, if witnessed, would impress itself more indelibly on the mind of a 13 year old boy. The jury had to consider whether the witness was honest and reliable. They concluded that he was both. We can see no reason to question the soundness of that judgement.[450]

In *Prosecutor v. Kunarac et al.*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia has recognized the difficulties in recollecting precise details several years after the events happened. The Trial Chamber stated:

> The fact that these witnesses were detained over weeks and months without knowledge of dates or access to clocks, and without the opportunity to record their experiences, only exacerbated their difficulties in recalling the detail of those incidents later. In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness has nevertheless recounted the essence of the incident charged in acceptable detail. Such an approach varied according to the circumstances of each witness, and in particular according to the quality of that witness's evidence in relation to the essence of the particular incident charged. *The Trial Chamber has also taken into account the fact that these events took place some eight years before the witnesses gave evidence in determining whether any minor discrepancies should be treated as discrediting their evidence as a whole.* (Emphasis added).[451]

Thus, the decision makers in refugee status determination procedures should recognize the difficulties a refugee may have when trying to recall the precise details of events that happened a long time ago.

---

[450] *R. v. Sawoniuk* [2000] 2 Criminal Appeal Reports 220.
[451] *Prosecutor v. Kunarac et al.,* TC Judgement, para. 564.

Recommendations on dealing with the impact of time on a refugee's memory include:

1. The testimony of a refugee should be relied upon even if it refers to events that happened a significant time ago when there is no doubt as to the general reliability and honesty of the refugee.

2. Decision makers should always take into consideration that refugees may have been detained over weeks and months without knowledge of dates or access to clocks, and without the opportunity to record their experiences, which can only exacerbate their difficulties in later recalling the details of those incidents.

3. Minor discrepancies in the testimony referring to events that happened a significant time ago should not discredit the evidence as a whole when the refugee has recounted the essence of the events in acceptable detail, special consideration should be also made to the circumstances of each refugee.

In 2003, retired Canadian Lieutenant General Romeo Dallaire,[452] who commanded the United Nations Assistance Mission in Rwanda (UNAMIR) from October 1993 to August 1994, published a book entitled *Shake Hands with the Devil: The Failure of Humanity in Rwanda.* After one of Dallaire's presentations following his return from Rwanda, a Canadian Forces padre asked him how, after all he had seen and experienced, he could still believe in God. "I answered that I know there is a God because in Rwanda I shook hands with the devil. I have seen him, I have smelled him and I have touched him. I know the devil exists, and therefore I know there is a God."[453] This is how the book was given its title.

Romeo Dallaire was cross-examined on his book in the *Prosecutor v. Bagosora et al. ("Military I")* case in 2004. This was not his first time before the Tribunal. Already in 1998, General Dallaire testified as an expert witness before the ICTR in the trial of a former mayor, Jean-Paul Akayesu, who was eventually convicted and sentenced to life imprisonment.

BOX 14: BACKGROUND TO CASES: PROSECUTOR V. BAGOSORA ET AL. ("MILLITARY I")

Prosecutor v. Bagosora et al. ("Military I")

During the Rwandan genocide in 1994, Colonel Theoneste Bagosora, born in Gisenyi *préfecture*, was a *directeur de cabinet* (Director of Cabinet) in the Rwandan Ministry of Defence. In this capacity, he managed day-to-day affairs in the absence of the Minister of Defence.

It has been alleged that his rank, office and personal relations with the commanders of the units involved in the genocide, as well as the fact that they shared the same political beliefs and were from the same region (given the

[452] General Roméo A. Dallaire: Canadian Force Commander of UNAMIR, and Chief Military Observer UNOMUR from October 1993 until August 1994, promoted to the rank of Major General in the filed, 1 January 1994, retired at the rank of Lieutenant General in Ottawa, 22 April 2000 (DALLAIRE, Glossary, p. 527).
[453] DALLAIRE, at Preface, xviii.

regionalist context in which power was exercised in Rwanda), gave him authority over them and over members of militias.[454]

During the Rwandan genocide in 1994, General Gratien Kabiligi, born in Cyangugu *préfecture*, held the office of a Chief of Military Operations (G-3) within the High Command of the Rwandan Army. He was responsible for planning, coordinating and ensuring the execution of military operations in Rwanda. It was alleged that in this capacity, Kabiligi had under his command the units of the sectors of Byumba, Ruhengeri, Mutara and Kigali. He also exercised authority over the elite units such as the Presidential Guard, the Para-Commando Battalion and the Reconnaissance Battalion.[455]

During the Rwandan genocide in 1994, Major Aloys Ntabakuze, born in Gisenyi *préfecture*, was a Commander of the Para-Commando Battalion in the Rwandan Army.[456]

During the Rwandan genocide in 1994, Lieutenant-Colonel Anatole Nsengiyumva, born in Gisenyi *préfecture*, exercised the functions of a Commander of Military Operations for Gisenyi sector. In this capacity, Nsengiyumva held authority over the military in Gisenyi sector. It was alleged that his rank, previous functions (the Chief of Military Intelligence within the High Command of the Rwandan Army) and personal relations with the civilian and military authorities, as well as the fact that they had the same political convictions and came from the same region, gave him authority over the MRND militia, *Interahamwe*,[457] *Impuzamugambi*,[458] and CDR[459] militia.[460]

---

[454] *Prosecutor v. Théoneste Bagosora*, Case No ICTR-96-7-I, Amended Indictment, 12 August 1999 [hereinafter *Prosecutor v. Bagosora*, Amended Indictment], paras. 4.1, 4.2 and 4.4.
[455] *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Case No ICTR-97-34-I and ICTR-97-30-I, Amended Indictment, 12 August 1999 [hereinafter *Prosecutor v. Kabiligi and Ntabakuze*, Amended Indictment], paras. 4.1-4.4. On 16 April 1994, he was appointed *Brigadier-General.*
[456] *Ibid.* paras. 4.5, 4.6 and 4.8.
[457] *Interahamwe*: Kinyarwanda for "those who attack together". Militant young men attached to the young wing of the ruling MRND party, trained and indoctrinated in ethnic hatred against Tutsis. Dressed in cotton combat fatigues in the red, green and black of the then Rwandan flag, carried machetes or carved replicas of Kalashnikovs, often incited violence, largely responsible for the killings during the genocide (DALLAIRE, Glossary, p. 530).
[458] *Impuzamugambi*: Kinyarwanda for "those who have a single aim", CDR youth wing/militia, trained, armed and led by the Presidential Guard and other elements of the RGF closely linked to *Interahamwe*, participated in the killings during the genocide (DALLAIRE, Glossary, p. 530).

These four high-ranking military officials were jointly charged with genocide, crimes against humanity, and serious violations of the Geneva Conventions and the Second Additional Protocol. The Trial Chamber was presented with 82 witnesses for the Prosecution and 160 witnesses of the Defence that presented its final witness on 18 January 2007.[461]

In its Judgement and Sentence, the Trial Chamber sentenced Bagosora, Ntabakuze and Nsengiyumva each to a single sentence of life imprisonment, but acquitted Kabiligi and ordered his immediate release.[462] The "Military I" is currently on appeal.[463]

The aim of providing a court with expert evidence is to bring to the judges' attention facts they would otherwise not be aware of as these fall outside their own experience and knowledge. The general purpose of expert evidence is to "dispel myths".[464] It can enlighten certain phenomena to judges and thus eradicate some errors in the evaluation of evidence.

For example, in cases involving rape or other forms of sexual violence, the testimony of experts can inform the judges about the various forms of behaviour and reactions of those who were sexually assaulted. As an illustration, the judges are informed that it is not unusual that rape victims "delay reporting" and

---

[459] CDR: *Coaltion pour la défense de la république*, Hutu extremist party, splinter group of the MRND. CDR leadership refused to sign the Arusha Peace Agreeement and Statement of Ethics and were shut out of the transitional government. Openly and violently anti-Tutsi (DALLAIRE, Glossary, p. 526).

[460] *Prosecutor v. Anatole Nsengiyumwa*, Case No ICTR-96-12-I, Amended Indictment, 12 August 1999 [hereinafter *Prosecutor v. Nsengiyumwa*, Amended Indictment], paras. 4.1-4.5.

[461] Press Release, Military I Trial Case Closed, ICTR/INFO-9-2-511.EN, Arusha, 19 January 2007, available at: http://69.94.11.53/default.htm [accessed 2 February 2007].

[462] Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No ICTR-98-41-T, Judgement and Sentence, 18 December 2008, paras. 2277, 2278, 2279, 2283.

[463] Status as of 5 March 2010.

[464] I. Freckelton, 'Counterintuitive Evidence' (1997) 4 JOURNAL OF LAW AND MEDICINE 303 as cited in Louise Ellison, *Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases*, 9 THE INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF (2005) [hereinafter ELLISON], p. 256.

"possible explanations for the absence of an immediate complaint" are explained to them.[465]

Even before the ICTR and ICTY, expert evidence plays an important role. In addition to medical and forensic evidence; historians, sociologists, psychiatrists and ballistic expert have been repeatedly invited to present their expert opinions to judges.

Even though a Trial Chamber does not have to accept expert evidence ["In general, an expert may express an opinion (within the confines of his or her expertise) upon facts which are established in the evidence (either by the expert's own evidence or independently), if that opinion is relevant to the issues in the case. The Trial Chamber is not bound to accept that opinion."[466]], there is a shared view that a Trial Chamber "should refrain from acting as its own expert in cases where expert evidence is appropriate".[467]

May and Wierda identified several rules in relation to the subject matter if the expert evidence is to work and assist the court.[468]

First, the subject matter the expert evidence explores should be an appropriate topic for expert evidence. Expert evidence can assist in cases where the judges do not have knowledge and experience in a certain matter.

Second, expert evidence has to be relevant to the subject matter. In other words, it has to have a direct nexus to the subject matter, it has to be of assistance to the judges. Rule 89 (C) of the Rules of Procedure and Evidence provides that "A Chamber may admit any relevant evidence which it deems to have probative value"[469]. According to the Trial Chamber in *Prosecutor v. Kunarac, Kovač and Vuković*, it may rule that evidence is inadmissible where it is irrelevant to the charges against an accused or where it has no probative value. The Trial Chamber

---

[465] ELLISON, p. 256.
[466] *Prosecutor v. Kunarac et al.,* Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 4.
[467] MAY, p. 198.
[468] MAY, pp. 199-200.
[469] ICTY Rules of Procedure and Evidence, IT/32/Rev. 38, 13 June 2006, Rule 89(C).

also specified that such evidence embraces "any written statements or reports adduced as evidence".[470]

Third, the expert should possess relevant qualifications, knowledge, and be able to apply correct methods.

Fourth, the expert has to be independent. In *Prosecutor v. Akayesu*, the Trial Chamber did not permit an accused, Ferdinand Nahimana, who had been indicted by the Prosecutor before the Tribunal[471] and who at the time of Akayesu's trial was being held in custody awaiting his own trial, to serve as an expert for the Defence. The Trial Chamber dismissed the Defence motion on the ground that it was not enough for an expert witness to be a recognized expert in his field, but that he must also be impartial in the case.[472] This condition was not met in this case before the Tribunal as Ferdinand Nahimana was accused by the Tribunal of crimes related to those with which Akayesu was charged.[473]

Finally, expert evidence is relevant to the court only if the facts of the subject matter are true. The Trial Chamber discussed this issue in *Prosecutor v. Kunarac et al.*: "If the Trial Chamber does not accept that the facts upon which the opinion is based have been established, that opinion has no probative value and it is inadmissible for that reason."[474] The Trial Chamber also followed this reasoning in *Prosecutor v. Delalić et al. ("Celebici case")*,

> An expert opinion is relevant only if the facts upon which it is based are true [...] It is for the Trial Chamber, and not for the medical experts, to determine whether the factual basis for an expert opinion is truthful. That determination is made in the

---

[470] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23-T and IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 3.

[471] *Prosecutor v. Nahimana*, Amended Indictment, 15 November 1999, available at: http://69.94.11.53/default.htm [accessed 30 January 2007]. Nahimana's case is currently at the appeal's stage.

[472] In giving its Decision, the Tribunal was careful to distinguish between a witness called to testify about the crimes with which the accused is directly charged; and an expert witness, whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field. *Prosecutor v. Jean-Paul Akayesu*, Case No ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998.

[473] *Ibid.*

[474] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23-T and IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 4.

> light of all the evidence given. Notwithstanding their expertise, medical experts do not have the advantage of that evidence.[475]

Socio-historical and socio-cultural evidence has enormous value anywhere where judges have had no, or just a little, direct exposure to the environment where the crimes were committed. Before the Tribunals, judges have frequently acknowledged that the information as to the history, functioning of society and/or political background has to be presented so that the context of the crimes may be correctly assessed.

In *Prosecutor v. Tadić*, the Trial Chamber recognized that it is necessary to place the evidence related to the charges from the indictment into the relevant historical, geographic, administrative and military context. In doing so, the Trial Chamber relied exclusively on testimonies of expert witnesses called both by the Prosecution and the Defence, testimony of these witnesses was usually consistent. In those rare cases when there was a conflict, the Trial Chamber sought to adopt a neutral language. "It is exclusively upon the evidence presented before this Trial Chamber that this background relies, and no reference has been made to other sources or to material not led in evidence."[476]

The amended indictment in *Prosecutor v. Akayesu* alleged that the victims in each paragraph charging genocide were members of a national, ethnic, racial or religious group.[477] In its judgement, the Trial Chamber quoted an expert witness, Alison Des Forges[478], to bring more light into the determination of ethnic lines in Rwanda,

> The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group…The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition reality is an interplay between the actual conditions and peoples' subjective perception of

---

[475] *Delalić et al*., AC Judgement, 20 February 2001, para. 594.
[476] *Prosecutor v. Tadić*, TC Opinion and Judgement, para. 54.
[477] *Prosecutor v. Akayesu*, Amended Indictment, para. 7.
Available at: http://69.94.11.53/default.htm [accessed 30 January 2007].
[478] Alison Des Forges, American Human Rights Activist, Senior Advisor of Human Rights Watch, an expert on the history of human rights in Rwanda and all aspects of genocide. She has testified at several cases before the ICTR, including *Prosecutor v. Akayesu* and *Prosecutor v. Bagosora et al. ("Military I").* She is the author of "*Leave None to Tell the Story: Genocide in Rwanda*" (New York: Human Righs Watch, 1999), available at: http://129.194.252.80/catfiles/1317.pdf [accessed 16 March 2009].

> those conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene. But, the Belgians did impose this classification in the early 1930's when they required the population to be registered according to ethnic group. The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence by the First Republic and the Second Republic in Rwanda to such an extent that this division into three ethnic groups became an absolute reality.[479]

Following this example, it is clear that socio-historical evidence can assist judges, who have had little exposure to the cultural setting in which the crimes were committed, in grasping that context.

Furthermore, socio-cultural evidence can play a role in the process of assessment of witness testimonies. Dr. Mathias Ruzimanda, an expert in *Prosecutor v. Akayesu*, explained that people in Rwanda are not always direct when answering questions, especially if the question is delicate: "the answers given will very often have to be "decoded" in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question".[480] He told the Trial Chamber that what he described was a particular feature of the Rwandan culture. The Trial Chamber admitted that it noted Ruzimanda's observations in its proceedings:

> many witnesses when asked the ordinary meaning of the term Inyenzi were reluctant or unwilling to state that the word meant cockroach, although it became clear to the Chamber during the course of the proceedings that any Rwandan would know the ordinary meaning of the word. Similar cultural constraints were evident in their difficulty to be specific as to dates, times, distances and locations.[481]

Notably, in light of this expert testimony, the Trial Chamber decided not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.[482]

Dr. Ruzimanda also explained another "common phenomenon within the culture"[483] of Rwanda. He noted that most Rwandans live in an "oral tradition in

---

[479] *Prosecutor v. Akayesu*, TC Judgement, para. 172.
[480] *Ibid.* para. 156.
[481] *Ibid.*
[482] *Ibid.*

which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else."[484] He went on to say that as the illiteracy rate was high and not many people possess a radio, word of mouth played a prominent role in passing on the information from the press in 1994.[485] Based on this observation, the Trial Chamber admitted that in relation to events in Taba, although some things were reported as an eye-witness statement, evidence was actually a second-hand account. Thus the Trial Chamber decided to make a consistent effort to ensure that a clear distinction be drawn throughout the trial proceedings between what witnesses had heard and what they had seen.[486]

Similar practice can be observed before the International Criminal Tribunal for the Former Yugoslavia. For example, in *Prosecutor v. Kupreškić et al.*, Norwegian anthropologist Dr. Tone Bringa was invited by the Trial Chamber to testify about the times she spent with a Muslim family in a mixed Catholic-Muslim village in central Bosnia. During her 15 visits to the former Yugoslavia between 1987 and 1997, Dr. Bringa observed "the gradual shifting of allegiance from the neighbourly relations between Muslims and Croats to a more ethnicity-oriented affiliation and self-identification of sections of the Bosnian population".[487] The Trial Chamber was particularly interested whether and in what way Tone Bringa detected that ethnic divisions started. She replied that:

> originally it was not so much ethnic hatred as a growing fear of the events which were threatening the villagers from outside their close-knit community. As Yugoslavia disintegrated, nationalist ideologies gradually brought about a change in the attitude of each group. Nationalist propaganda fuelled a change in the perception and self-identification of members of the various ethnic groups. Gradually the "other" persons, i.e. members of other ethnic groups, who were originally perceived merely as "diverse", came to be perceived as "alien" and then as "enemy". More specifically, they were perceived as potential enemies who were threatening to the identity or future prosperity of one's group …[488]

---

[483] *Prosecutor v. Akayesu*, TC Judgement, para. 155.
[484] *Ibid.*
[485] *Ibid.*
[486] *Ibid.*
[487] *Prosecutor v. Kupreškić et al.*, TC Judgement, para. 75.
[488] *Ibid*. para. 76. Original footnotes omitted.

Her expert testimony definitely increased the competence of the Trial Chamber to evaluate evidence before it.

In their study on international criminal evidence, May and Wierda have included the issue of admissibility of reports that can be classified as hearsay.[489] They have pointed to transcripts from *Prosecutor v. Kovačevic and Drljaca* ("Prijedor"). In its Resolution 780 (1992), the United Nations Security Council requested that the Secretary-General establish an impartial Commission of Experts to examine and analyse the information submitted to it pursuant to the Resolutions 771 (1992) and 780 (1992) as well as the information the Commission of Experts obtains through its investigations or efforts. The Commission was set up to provide the Secretary-General with a conclusion on the evidence of grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.[490]

In relation to the Commission's work, the Defence argued against including the Prosecution's Exhibit which was essentially a report about what happened in the Prijedor region of Bosnia and Herzegovina – a summary, analysis and collated information from 400 witnesses. According to the Defence, this constituted "the very heart and soul of the prosecuting attorney's case. That is totally unfair and in any court, in any civilised society, to have a man's life depend on multiple hearsay …"[491] Judge May expressed the view that the report was prepared by an expert who studied the material and is therefore qualified to give evidence about that material. According to the judge, in this case, an analogy can be made to the position of a historian. He also considered the fact that the Defence cannot cross-examine those 400 witnesses on whose statements the report is based. To this effect, he stated,

> in this Tribunal we admit all types of evidence. The hearsay rule does not apply, but the issue of how much weight is given to this evidence is very much a matter for the Tribunal. And, in that connection, we shall, of course, bear in mind that it is hearsay… there is no question of this defendant being convicted on any count on

---

[489] MAY, pp. 207-208.
[490] U.N. Doc. S/RES/780 (1992), para. 2.
[491] *Prosecutor v. Milan Kovačević and Simo Drljaca,* Case No IT-97-24, Transcript, 6 July 1998, para. 71.

> the basis of this evidence. And we shall require other evidence before we consider taking any such course.[492]

The Trial Chamber admitted this exhibit into evidence.

BOX 15: BACKGROUND TO CASES: PROSECUTOR V. KOVAČEVIĆ AND DRLJACA ("PRIJEDOR")

***Prosecutor v. Kovačević and Drljaca* ("Prijedor")**

Following the Slovenian and Croatian declarations of independence from the Yugoslav Federation in 1991, and the beginning of subsequent war, Bosnia and Herzegovina began to make moves towards independence. The Serbian Democratic Party stood in opposition to this process. As it became likely that Bosnia and Herzegovina would gain its independence, the Serbian Democratic Party concentrated on the creation of a separate Serbian territory within Bosnia and Herzegovina. The considerable number of Bosnian Muslims and Bosnian Croats who lived in the areas that were supposed to become genuinely Serbian was perceived as an obstacle on that road. Thus the leaders of the Serbian Democratic Party came up with the general plan for permanent removal and "ethnic cleansing" of non-Serbs.[493]

In line with the general plan, the leaders of the Serbian Democratic Party in the Prijedor Municipality, which was located in north-western Bosnia and Herzegovina, prepared a take-over as well as the implementation of the plan. The Municipality of Prijedor Crisis Staff organized and directed the take-over of the Prijedor. On 30 April 1992, Serbian forces took hold of town. The members of the Municipality of Prijedor Crisis Staff assuming authority over the municipal administration continued in their efforts, which led to deaths and forced removal of the majority of Bosnian Muslims and Bosnians Croats from the Prijedor Municipality.[494]

---

[492] *Ibid.* para. 75.
[493] *Prosecutor v. Milan Kovačević and Simo Drljaca*, Case No IT-97-24-I, Amended Indictment, 13 March 1997 at 4.
[494] *Ibid.* para. 5.

Milan Kovačević ("Mico") became a member of the Serbian Democratic Party in 1990, was a member of the Municipal Committee for National Defence, and in November 1991, he was appointed the President of the Executive Committee of the Municipal Assembly of Prijedor. When, intending to take over power, the Serbian Democratic Party instituted a new municipal government of the Serbian Municipality of Prijedor in January 1992, he was reconfirmed in both of his functions, and the Municipal Committee for National Defence was transformed to the Municipality of Prijedor Crisis Staff. Kovačević was soon proclaimed the Vice-president of the Municipality of Prijedor Crisis Staff. After his resignation as President of the Executive Committee of the Municipal Assembly of Prijedor, Kovačević became Director of the Prijedor Medical Center. [495]

In April 1992, Simo Drljaca was appointed the Chief of the Public Security Station for the Municipality of Prijedor. He was a member of the Municipality of Prijedor Crisis Staff during 1992. A year later, Simo Drljaca took on the function of the Deputy Minister of the Interior in the self-proclaimed Republika Srpska. He also served as a chief of the Prijedor regional police district.[496]

It was alleged that Kovacić, serving as the Vice-president of the Municipality of Prijedor Crisis Staff,[497] was responsible for crimes committed in the Municipality of Prijedor; he acted in concert with other core members of the Municipality of Prijedor Crisis Staff[498] in "planning and deciding the complete range of operations related to the conduct of the hostilities and the destruction of the Bosnian Muslim

---

[495] *Ibid.* para. 9.

[496] *Prosecutor v. Simo Drljaca and Milan Kovačević*, Case No IT-97-24-I, Initial Indictment, 13 March 1997, para. 1.
Prosecutor v. Kovačević and Drljaca, Initial Indictment, 13 March 1997, para. 1.

[497] Whose duties included: „assisting the President in his duties and substituting for him in his absence; co-ordinating all activities of the civil defence (including, *inter alia*, planning protective measures for the Serbian population during attacks and the physical clean-up of dead bodies and destroyed buildings in the areas attacked); political work and propaganda; and, to ensure that all logistical support necessary for the successful conduct of the armed conflict and the operation of the Municipality was consistently realised" as cited in *Prosecutor v. Milan Kovačević and Simo Drljaca*, Case No IT-97-24-I, Amended Indictment, 13 March 1997, para. 11.

[498] The Serbian Democratic Party-ppointed President of the Municipal Assembly, the President of the Municipal Board of the Serbian Democratic Party in Prijedor, the Serbian Democratic Party-appointed Commander of the Territorial Defence, the Serbian Democratic Party-appointed Commander of the Public Security Center, and the Commander of the local Yugoslav People's Army garrison. *Ibid* para. 12.

and Bosnian Croat communities in the Municipality … the Crisis Staff worked as a collective body to co-ordinate and implement the overall plan to seize and "ethnically cleanse" Prijedor Municipality".[499]

It was alleged that Drljaca, being a member of the Municipality of Prijedor Crisis Staff, acted in concert with others "in planning and deciding the complete range of operations related to the conduct of the hostilities and the destruction of the non-Serb community in the municipality. The Crisis Staff worked in concert with the military and police authorities involved in the attack upon the Bosnian Muslim and Bosnian Croat people of the municipality and had the authority to control the actions of the police forces involved in those attacks".[500] It was also alleged that Drljaca, serving as the Chief of Police, had the authority to direct and control all actions of both active and reserve members of the Prijedor police between 29 April and 31 December 1992.[501]

On July 10, 1997, Milan Kovačević was arrested by British SFOR soldiers and handed over to the International Criminal Tribunal for the Former Yugoslavia. Simo Drljaca was shot and killed during an attempt to arrest him (it was claimed that he was threatening SFOR soldiers).[502] An initial indictment was thus amended to include only one accused – Milan Kovačević. Noting the physician's report as to the death of Milan Kovačević submitted on 4 August 1998, the Trial Chamber terminated the trial proceedings against Milan Kovačević.[503]

---

[499] *Ibid.* para. 12.
[500] *Prosecutor v. Simo Drljaca and Milan Kovačević*, Case No IT-97-24-I, Initial Indictment, 13 March 1997, para. 4.
[501] *Ibid.* para. 5.
[502] Available at: http://www.unhchr.ch/html/menu2/5/ex_yug/yug_pr4.htm [accessed 1 February 2007].
[503] *Prosecutor v. Milan Kovačević*, Case No IT-97-24-T, Order Terminating the Proceedings Against Milan Kovačević, 24 August 1998, at 3.

May and Wierda pointed out, "the fact that an expert has impressive scientific qualifications does not by that fact alone make his opinion in matters of human nature or behaviour within the limits of normality any more helpful."[504] In *Prosecutor v. Kunarac et al.*, while discussing whether to allow the Defence to disclose witness statements to medical experts, and call the medical experts to testify as expert witnesses, the Trial Chamber emphasized that "it should be clearly understood – as both parties have conceded – that it is for the Trial Chamber, and for the Trial Chamber alone, to assess the credibility of the witnesses."[505] The Trial Chamber made it apparent that it wishes to retain its prerogative as to the final decision on the credibility of witnesses.

Louise Ellison warns against the dangers of a "syndrome testimony" being presented to judges. In the case of a "syndrome testimony", the judges are presented with "a list of 'characteristic' responses or behaviours that conform to a particular observed 'pattern'."[506] Judges may then tend to infer for example that the person was raped simply because his or her behaviour falls exactly into the syndrome pattern.[507] Moreover, on the other hand, not all victims of rape would exhibit the required behaviour. The more general danger of "syndrome testimony" rests in the 'aura of science', i.e., judges may be excessively affected by the credentials of the expert and as such resign from their fact-finding function.[508] The aim of the general expert testimony should be "to dispel myths", it should be educational and help remove the source of error from the evaluative process. It should enlighten the judges on the issues they are not normally aware of.[509]

---

[504] [Turner [1975] 1 Q.B. 834, per Lawton L.J.] in MAY, p. 201.
[505] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23-T and IT-96-23/1-T, Order on Defence Experts, 29 March 2000, para. 7.
[506] ELLISON, p. 253.
[507] *Ibid*, p. 253.
[508] *Ibid*, p. 255.
[509] I.Freckelton, 'Counterintuitive Evidence' (1997) 4 JOURNAL OF LAW AND MEDICINE 303, in ELLISON, p. 256.

SCARS DO NOT SPEAK:
SPECIAL CASE OF MEDICAL EVIDENCE

> FROM TIME TO TIME, MASS GRAVES WERE DISCOVERED AND EXCAVATED, AND THE REMAINS WOULD BE TRANSFERRED TO NEW, PROPERLY CONSECRATED MASS GRAVES. YET EVEN THE OCCASIONALLY EXPOSED BONES, THE CONSPICUOUS NUMBER OF AMPUTEES AND PEOPLE WITH DEFORMING SCARS, AND THE SUPERABUNDANCE OF PACKED ORPHANAGES COULD NOT BE TAKEN AS EVIDENCE THAT WHAT HAPPENED TO RWANDA WAS AN ATTEMPT TO ELIMINATE A PEOPLE. THERE WERE ONLY PEOPLE'S STORIES."[510]

The rationale behind the *investigation* into torture and other cruel, inhuman or degrading treatment or punishment (torture and ill-treatment) is not only to establish the facts relating to alleged incidents so as to identify and prosecute those responsible, but also to use the results of the investigation "in the context of other procedures designed to obtain redress for victims" [511] – as is stipulated in *The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*The Istanbul Protocol*).[512]

Jones highlights the importance of *documenting* torture and ill-treatment during the refugee status determination procedure. An effective documentation of past

---

[510] Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families, Stories From Rwanda* (London: Picador, 1998), p. 21.

[511] UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, available at: http://www.unhcr.org/refworld/docid/4638aca62.html [accessed 22 November 2009] [hereinafter Istanbul Protocol], Chapter III, para. 77.

[512] "The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) is intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body. This manual includes principles for the effective investigation and documentation of torture, and other cruel, inhuman or degrading treatment or punishment… These principles outline minimum standards for States in order to ensure the effective documentation of torture. The guidelines contained in this manual are not presented as a fixed protocol. Rather, they represent minimum standards based on the principles and should be used taking into account available resources." Introduction to the Istanbul Protocol, p. 1. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Istanbul Protocol, Submitted to the United Nations High Commissioner for Human Rights, 9 August 1999, available at: http://www.unhchr.ch/pdf/8istprot.pdf [accessed 21 January, 2007].

torture and ill-treatment can not only aid human rights advocates in their effort to combat future incidents of those acts,[513] but "the corroboration of an assertion of torture" and ill-treatment is also important to ascertain the evidence during a refugee claim. Furthermore, documenting torture and ill-treatment can also have a "therapeutic value" – survivors feel they are being treated as "honest and reliable" and thus they are encouraged to develop further on their past experience.[514]

Jones asserts that the roles of medical experts and decision makers in the refugee status determination procedure should be separated. Separation of their roles is necessary to ensure international protection for torture and ill-treatment survivors.[515] In more general terms, expert opinions should not trespass into the judicial realm of a fact finding in a specific case; in the same way, judges should be careful not to trespass into strictly medical areas, such as medical prognosis.[516]

In the majority of cases, it is almost impossible to ascertain the whole truth; it is definitely easier and more viable to express an expert opinion as to the consistency of signs and symptoms with the story. An example of possible classification of consistency is included in the Istanbul Protocol. The degree of consistency for each lesion and for the overall pattern of lesions and the attribution given by the patient can be expressed in general terms as:

> (a) Not consistent: the lesion could not have been caused by the trauma described;
> (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
> (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
> (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
> (e) Diagnostic of: this appearance could not have been caused in any way other than that described.

---

[513] Istanbul Protocol, Chapter III, para. 78: "The following principles represent a consensus among individuals and organizations having expertise in the investigation of torture. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as torture or other ill-treatment) include the following: […] (*b*) Identification of measures needed to prevent recurrence. "
[514] David Rhys Jones, Sally Verity Smith, *Medical Evidence in Asylum and Human Rights Appeals,* 3 INT'L J. REFUGEE L. (2004) p. 381-382.
[515] *Ibid.* p. 381.
[516] *Ibid*. p. 386.

> … Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story…[517]

It is implicit in this method that it is for the medical expert, not for the decision maker in the refugee status determination procedure who could only barely do so, to compare the survivor's account of his or her torture and ill-treatment with the signs and symptoms during the examination, and to assess his or her consistency.

In its appeal in the *Prosecutor v. Aleksovski* case, the Appellant submitted that the Trial Chamber "relied exclusively on the highly subjective testimony of witnesses, in the absence of objective medical documentation or scientifically objective expert appraisal"[518] while ascertaining whether some witnesses had really suffered serious bodily harm or mental anguish. The Appellant's intention was to have the testimony of these witnesses considered as unreliable and subjective. However, the Appeals Chamber denied the Appellant's ground of appeal. It is apparent that the Appeals Chamber was of the opinion that **medical evidence is not always necessarily required**:

> Neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact […], a Chamber may admit any relevant evidence which it deems to have probative value […], a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial"[519] The role of the Trial Chamber in accepting a testimony that appears to be sufficient and credible was thus supported: „In the present case, the Trial Chamber's reliance on witness testimonies without medical reports or other scientific evidence as proof of the suffering experienced by witnesses, has not been shown to be either wrong as a matter of law, or unreasonable.[520]

In *Prosecutor v. Kunarac, Kovač and Vuković*, the three accused filed a joint motion called "*Defence Joint Request for Presence of Defence Experts during the Trial"*, with the main purpose being to give medical experts access to the statements of five protected witnesses and allow the medical experts to examine these witnesses and give evidence in the trial.[521] The Trial Chamber articulated its view that:

---

[517] Istanbul Protocol, Chapter V, paras. 186 and 187.
[518] *Prosecutor v. Zlatko Aleksovski,* Case No IT-95-14/1-A, Judgement, 24 March 2000 [hereinafter *Prosecutor v. Aleksovski*, AC Judgement], para. 57.
[519] *Ibid*. para. 62. This Appeals Chamber argument was based on the Rule 89 of the Rules.
[520] *Ibid.* para. 64.
[521] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23-T and IT-96-23/1-T, Order on Defence Experts, 29 March 2000, paras. 1-2.

> Expert medical evidence is not required in relation to the evidence of witnesses in relation to crimes such as rape, torture, outrages upon personal dignity and enslavement, and the circumstances in which expert medical evidence would even be relevant are rare. An example where such evidence may be relevant would be where a witness claims that a particular scar resulted from a cigarette burn, but where the expert was able to say that that scar was the result of a surgical procedure.[522]

The Trial Chamber was of the opinion that it "would not be appropriate to permit a medical examination unless there is shown to be a reasonable likelihood in the particular case that it will assist the accused".[523] Along this line, whether evidence may be given by the medical experts will definitely have to be considered on a case by case basis.

In the same case,[524] the Trial Chamber rejected the Defence's request to order the medical and psychological examination of certain witnesses. In Annex III – Procedural Background to its judgement, the Trial Chamber pronounced that it denied such request from the Defence as the Defence had failed to convince the Trial Chamber that "these examinations would be reasonably likely to assist the accused, and that the likelihood that they could verify that the alleged crimes were committed was too remote to justify those highly intrusive examinations."[525] On the other hand, the Trial Chamber granted the Motion of the Defence requesting that the accused Zoran Vuković be medically examined to ascertain that he had endured an injury to his testicles ("contusion with big hematoms" – injury leaving visible marks for a medical expert even after eight years) in June 1992. The Trial Chamber granted the motion arguing that the purpose of the medical examination in this case was to look for the consistency of the physical marks with respect to the scrotum or testicles of Zoran Vuković and the injury to these parts alleged to have been suffered in June 1992.[526]

---

[522] *Ibid.* para. 5.
[523] *Ibid.* para. 6.
[524] *Prosecutor v. Kunarac et al.*
[525] *Prosecutor v. Kunarac et al.*, TC Judgement, para. 917 (Annex III – Procedural Background).
[526] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No IT-96-23-T and IT-96-23/1-T, Order for Medical Examination of the Accused Zoran Vuković, 21 September 2000, para. 3.

Recommendations related to the treatment of expert evidence in refugee cases include:

1. Decision makers should refrain from acting as their own experts in cases where expert evidence is more appropriate.

2. The aim of the general expert testimony should be "to dispel myths", it should be educational and help remove the source of error from the evaluative process. It should enlighten decision makers on issues they are not normally aware of as these fall outside their own areas of experience and knowledge.

3. It is very often necessary to put the evidence in the relevant historical, geographic, political, administrative and military context. Historians, sociologists, anthropologists, linguists, psychiatrists, medical doctors, as well as ballistic and forensic experts can assist decision makers in cases where they do not have knowledge and experience in a certain matter. For example, socio-historical evidence can assist decision makers who have had little exposure to the cultural setting a refugee comes from; socio-cultural evidence can play a role in the process of assessment of refugee testimonies; and in cases involving rape or other forms of sexual violence, the testimony of experts can inform the decision makers about the various forms of behaviour and reactions of those who were sexually assaulted.

4. Importantly, the fact that an expert has impressive scientific qualifications does not inherently make his or her opinion in matters of human nature or behaviour within the limits of normality any more helpful. The following rules should be observed:

i) Expert evidence should only enlighten decision makers on issues they are not normally aware of as these fall outside their own areas of experience and knowledge;

ii) Expert evidence must be relevant to the subject matter;

iii) The expert should possess the relevant qualifications and knowledge, and be able to apply the correct methods;

iv) The expert must be independent; and

v) The expert evidence is relevant only if the facts of the subject matter are true.

5. Finally, medical evidence is not always necessarily required as proof of a material fact. In other words, expert medical evidence is not required for the evidence of witnesses in relation to crimes such as rape, torture, outrages upon personal dignity and enslavement, and the circumstances in which expert medical evidence would even be relevant are rare. An example where such evidence may be relevant would be where a witness claims that a particular scar resulted from a cigarette burn, but where the expert was able to say that that scar was the result of a surgical procedure.

CONCLUSION

PERSONS ACCUSED BY THE TRIBUNAL ARE PROVIDED FAIR TRIALS MEETING THE HIGHEST STANDARDS OF INTERNATIONAL JUSTICE. ABSOLUTE RESPECT FOR THE RIGHTS OF THE ACCUSED IS AN ESSENTIAL INGREDIENT OF JUSTICE AND LIES AT THE HEART OF THE TRIBUNAL'S WORK.

HANS HOLTHUIS, ICTY REGISTRAR (2001-2008)

This work was aimed at promoting a fair and consistent assessment of evidence in refugee status determination. Undoubtedly, only the correct interpretation and effective application of these principles can strengthen local as well as global trust in the international refugee protection regime. The framework in which witness testimonies are assessed before the two *ad hoc* Tribunals appears to be the most relevant for refugee cases. The Tribunals demonstrated that they are in a good position to leave a legacy of international jurisprudence to direct not only future courts in judicial matter but also inspire and encourage other legal disciplines.

It has been asserted in this work that serious human rights violations are at the centre of both international criminal law and refugee status determination. Serious human rights violations are a major factor causing refugees to flee their countries. The gravity of the crimes committed or feared is immense in both cases. Witnesses before the Tribunals in a similar way to refugees may well have experienced extremely violent international crimes. To a lesser or greater extent, refugees and the Tribunals' witnesses share painful experiences of violence, torture, detention; and subsequently possible intimidation, stress, and trauma.

Furthermore, international crimes are not committed in a vacuum. Both the persecution of refugees and the international crimes the Tribunals deal with take place in foreign locations, often covering more than one region, and in distinct cultures that, very frequently, are unfamiliar to the decision makers in refugee status determination and to the judges in international criminal trials. In other words, the settings of the crimes, and both the general context and particular circumstances of these crimes typically lie beyond the knowledge of judges and

decision makers. As refugees and witnesses find themselves in a completely alien environment, they can, and often they do, experience serious difficulties, both technical and psychological, in presenting their claim to foreign authorities, more often than not in a different linguistic background. In both of these procedures, historical, geographical, and anthropological issues play a role, and the knowledge of history, geography and anthropology is called for.

No one, including refugees and witnesses alike, can remember everything. Human memory fades over time, some people have a better memory, some have worse. Even with people who have good memories, the ability to visualize details may be reduced over time. Many refugees as well as witnesses before the Tribunals are frequently interviewed a significant period of time after the events they narrate happened. An articulate reproduction of details can also depend on intellectual abilities. Perceptions of what is important and should be presented also vary from individual to individual and from culture to culture. For refugees or witnesses, exactly redrawing a picture of one's experiences is an immense, and often impossible, task.

Last but not least, the interview setting can influence the amount of detail; people may fear authorities, feel uneasy and shy in front of the interviewer or interpreter, or just be nervous speaking in front of strangers. These are particularly the refugees who have a valid reason to distrust the authorities. All these factors influence the work of decision makers with the evidence.

The general scarcity of and difficulty getting direct evidence in both international criminal trials and refugee status determination reflects the need for a liberal approach to evidence in both cases. Given the circumstances in both of these legal situations, strict rules of evidence would be a significant obstruction. Indeed, it is a big challenge to establish incredible facts by means of credible evidence, very often after a considerable amount of time has passed since the events happened in a place far from the procedure, with memories that fade and perpetrators who deliberately wiped out records of their acts. The testimony thus remains the fundamental type of evidence in both procedures.

International criminal law as well as refugee law cannot be divorced from politics. Both of these disciplines are part of international law, and both are, more than others, guided by political motivations, political decisions, and political pressures. While in theory they should not, political influence and political considerations do prevail over-non political ones. However, the work of the Tribunals is convincing enough, at least to the point that when the accused are finally brought before the Chambers, it seems that coherent non-political procedures of assessing evidence exist. In refugee status determination procedure, what Byrne calls presumptive affirmation of what refugees experienced should prevail over the often overly applied presumptive skepticism. It is not the choice of refugees to enter another country, but rather the risk of persecution in their home country that pushes them to do so; it is the urgent need for international protection from persecution that distinguishes refugees from other immigrants.

While deciding on refugee status, decision makers are not required to pass judgement on conditions in the applicant's country of origin; however, they must consider the applicant's statements in the context of the relevant background information, as these cannot be judged in isolation. The decision makers are in fact assessing the risk of persecution (related to one of the enumerated grounds) the person would face if he or she was returned to his or her country of origin. As other types of evidence are rare, oral hearings by the responsible authorities still form the core of the refugee status determination procedure. The heart of the refugee determination process is the careful consideration of the claimant's own evidence. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not specifically regulate the procedure for the identification of who is a refugee; neither do they indicate what procedures for refugee status determination are to be adopted by the Contracting States. Deciding on a well-founded fear of persecution, the decision makers carry out a future-oriented, hypothetical and speculative exercise. Decision makers conclude on the facts and form their personal impression of the applicant in the framework of the procedure. The nature of the refugee status determination procedure can affect human lives. In every aspect of their case, decision makers should apply the appropriate criteria consistently in a spirit of justice and understanding.

Thus the rules and standards developed by the judges in trial as well as Appeal Chambers of the Tribunals can serve as stimulation to refugee status determination decision makers as the jurisprudence of the ICTR and ICTY contains general principles related to the assessment of witness evidence. As it has been presented, Trial Chambers' judgements often include a coherent and logical description of how they work with and interpret rules on evidence and their method is generally approved by the Appeals Chamber.

The recommendations for decision makers presented in this work highlight principles that can gain acceptance on a global level. They are presented to alert refugee status determination decision makers in any country to the developments related to the evaluation of evidence before the two *ad hoc* Tribunals. The emphasis is placed on their potential to be applied in refugee law, for that reason these recommendations primarily focus on the testimony of applicants for refugee status and assessment thereof.

Based on the analysis of the Tribunals' jurisprudence included in the previous chapters, decision makers should not place undue probative weight on refugees' previous statements when assessing their credibility. Refugees appearing before them should be properly heard and should have their testimony properly evaluated. In every case, refugees must be given the opportunity to explain contradictions and inconsistencies which may arise in connection with their previous statements. Furthermore, in relation to refugees' previous statements not made under solemn declaration or made outside the refugee status determination procedure, the following should be taken into account: the circumstances under which those statements were made, such as the language of the interview and the accuracy of the translation or interpretation; whether the decision maker had or did not have the opportunity to obtain the transcripts of these interviews and thus whether they could examine and analyse the nature of the questions the refugee was supposed to answer; the lapse of time between the refugee's prior statements and his or her testimony before the decision maker; problems with recollection; the (non)use of solemn declarations; and in particular whether, at the time of

making the statements, the refugee had or did not have an opportunity to review his or her statements.

The ICTR and ICTY jurisprudence also casts light on assessing evidence from traumatized refugees. The possibility of stress-related disorders suffered by refugees should be considered when assessing their testimonies. Accordingly, the personal background of refugees and the nature of the atrocities to which they may have been subjected should be taken into account. The rule that survivors of traumatic events should not be expected to recall precise minutiae of events and every single element of a complicated and traumatic sequence of events should not be contested. Long detention with no means for recording experiences aggravates the troubles of recounting details at a later date. If a refugee does not remember the exact details of events in traumatic circumstances, this should not destroy his or her credibility as to the essence of the events. Decision makers should not attach particular significance to minor and reasonable inconsistencies in testimonies of survivors or eye-witnesses of atrocities, if they are otherwise consistent throughout their statements. In this context, minor discrepancies between the evidence of a refugee and a statement previously made by that refugee should not be treated as discrediting if they have nevertheless described the essence of the events in acceptable detail. Decision makers should thus deal more with the events that took place rather than with the exact dates and times on which these events happened.

Traumatic circumstances or a diagnosis of PTSD do not necessarily render a refugee's testimony unreliable; as a rule it should be demonstrated *in concreto* why the traumatic context makes a refugee unreliable. Refugees suffering from PTSD do not necessarily have to be inaccurate in the evidence given; a person with PTSD can be perfectly reliable. On the other hand, refugees suffering from PTSD cannot reasonably be expected to recall precise minutiae of events, such as exact dates or times as well as every single element of a complicated and traumatic sequence of events. On the contrary, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of the interference with the refugee's testimony.

It is absolutely necessary that interviewers and decision makers be provided with relevant training in the areas of trauma, sexual violence, security and confidentiality; they should be also informed about the possible effects of psycho-social therapy on memory.

In cases when refugees who experienced serious human rights abuses cannot provide decision makers with testimony suitable to the refugee status determination context, the questions should be reframed and alternative methods used to obtain the facts required. Interviewers should be proactive and attempt to correct misunderstandings during their communication with refugees.

The Tribunals have also reiterated principles in relation to assessing the credibility of testimony in the framework of different cultures. In general, the problems in achieving an accurate evaluation of testimonies where decision makers have a different cultural background to that of the refugees should be recognized. Undoubtedly, particular features of the refugees' culture may affect their testimony. Thus decision makers should take into account various socio-cultural factors when assessing the evidence and decode the answers in light of a specific culture considering e.g., the context, the particular speech community, the identity of and relationship between the orator and the listener as well as the subject matter of the question, to get a correct meaning.

Decision makers should not make any adverse conclusions regarding the credibility of a refugee based on his or her reticence and circuitousness in responding to questions which require specificity as to dates, times, distances, locations or where the refugees seem to be inexperienced with maps, films or graphic representations of localities.

When it comes to distinguishing what a refugee coming from a specific culture has seen from what they have heard, care must be taken, especially if the refugee lives in oral traditions in which facts are reported as they are perceived, irrespective of whether the facts were personally witnessed or recounted by someone else. The refugees are usually able to distinguish what they heard from what they saw. Decision makers thus should be consistent in ensuring that the refugees are expressive in this regard and the distinction is made.

Refugees may face difficulties when they are supposed to testify using various spatio-temporal identification mechanisms and techniques, such as for example maps, photographs, films and other graphic representations; or to testify to dates, times, distances, locations, colours, etc. It is not in the interest of either party in refugee status determination procedure to require refugees to utilize identification mechanisms with which they are not familiar, when other alternatives are readily available.

Decision makers should not also draw any negative conclusions as to the credibility of refugees who as a result of cultural differences may answer delicate questions indirectly. Care should also be taken when considering the potential influence of a refugee's demeanour on the assessment of his or her evidence. Very often a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy. Moreover, the relationship between the certainty expressed by a refugee and the correctness of the identification is very weak; and the degree of certainty expressed by a particular refugee is more an aspect of his or her personality than an aspect of the quality of what he or she saw or what he or she remembers. At the same time, however, even those refugees who are very sincere, honest and convinced about their identification can be very often wrong.

Overall, decision makers should be sensitive to cultural factors not only during the proceedings, but also when gathering and preparing support evidence. Expert evidence, usually from the field of anthropology, can assist decision makers in solving problems when a testimony is presented in the framework of a completely different culture. On the whole, however, decision makers should not forget about the search for accuracy and other relevant elements of refugees' responses when assessing their 'culturally different' testimony.

Based on the vast experience of the Tribunals in dealing with the interpretation and translation of testimonies, decision makers in refugee status determination should accordingly recognize the difficulties encountered when oral testimonies from refugees are interpreted from a different language. They should acknowledge that the whole process of translation entails obvious risks of misunderstandings, especially in cases where there are significant syntactical and grammatical

differences between the languages. They should in good faith attempt to resolve these mistranslations.

In order to get a precise meaning of certain words in a refugee's testimony, it is important to place these words in context, both in time and in space. Where the words are central to the factual and legal findings, their original versions should be included in the transcript. Linguists and their expert evidence can help to get to the exact meaning of certain words. In particular, during interpretation and translation in relation to a war or political conflict, words and expressions can take on specific meaning; they turn out to be politicised, often mutate and become euphemistic. Expert evidence on the topic can assist the interpreters, translators and decision makers in decoding technical terms used in such a setting.

It is highly recommended to introduce a series of requirements for translators and interpreters, such as: informing the decision maker of any doubt arising from a possible lexical lacuna in the source or target language; conveying with the greatest fidelity and accuracy, and with complete neutrality, the wording used by the persons they are interpreting or translating; conveying the whole message, including vulgar or derogatory remarks, insults and any non-verbal clues, such as the tone of voice and emotions of the speaker, which might facilitate the understanding of their listeners; not embellishing, omitting or editing anything from the assigned work; conveying patent mistakes or untruths accurately as presented; acknowledging and rectifying promptly any mistake in the interpretation or translation; asking for repetition, rephrasing or explanation if anything is unclear, etc. Interpreters and translators should maintain and continually improve their interpreting and translating skills, and increase their knowledge of refugee status determination procedure as well as technical vocabulary that might be encountered during the performance of their duties. They should also provide their colleagues, whenever possible, with any specialised knowledge they acquire which may be useful for their subsequent work.

It may prove valuable to cooperate with other institutions and maintain a widely accessible database of "technical vocabulary" and "specialised knowledge".

The testimony of one refugee should ideally be translated by one translator as the testimony given in various instances by the same refugee but translated by more translators can appear less consistent and lead to a negative finding on the credibility of an otherwise honest refugee. It should also be ensured that speech is clearly heard and understood.

On top of all what was mentioned in relation to interpretation and translation, decisions makers should be aware of the fact that even precise interpretation or translation may, for various reasons, not have the same impact as the original. Even if the testimony is rendered exactly in a literal sense, it may not reflect the importance of what is said and the essence of the testimony can still be lost in translation.

Following the reasoning of the Tribunals' judges, the impact of time on a refugee's memory should be considered. When there is no doubt as to the general reliability and honesty of the refugee, the testimony of a refugee should be regarded as effective and should be relied upon even if it refers to events that happened a significant time ago. Decision makers should take into consideration that refugees may have been detained over weeks and months without knowledge of dates or access to clocks, and without the opportunity to record their experiences – which can only exacerbate their difficulties in later recalling the details of those incidents. Consequently, minor discrepancies in the testimony referring to events that happened a significant time ago should not discredit the evidence as a whole when the refugee has recounted the essence of the events in acceptable detail, and special consideration should be made to the circumstances of each refugee.

The work of the Tribunals was also abundant on the use of expert evidence. Following the Tribunals' practice, decision makers should refrain from acting as their own experts in cases where expert evidence is appropriate. The aim of the general expert testimony is to "dispel myths", it should be educational and help remove the source of error from the evaluative process. It should enlighten decision makers on issues they are not normally aware of as they fall outside their own areas of experience and knowledge. The evidence should be placed into the

relevant historical, geographic, political, administrative and military context. Historians, sociologists, anthropologists, linguists, psychiatrists, medical doctors, as well as ballistic and forensic experts can assist decision makers in cases where the latter do not have knowledge and experience in a certain matter.

Importantly, the fact that an expert has impressive scientific qualifications does not by that fact alone make his or her opinion in matters of human nature or behaviour within the limits of normality any more helpful. The expert evidence should only enlighten decision makers on issues they are not normally aware of as they fall outside their own areas of experience and knowledge and at the same time, the expert evidence should be relevant to the subject matter. Experts themselves should possess relevant qualifications and knowledge; they should be able to apply correct methods and should be independent. And finally, it should not be forgotten that the expert evidence is relevant only if the facts of the subject matter are true.

Neither the judges nor the decision makers 'were really there' when 'it' had happened. Furthermore, in refugee status determination, the only 'witness' is the refugee present before the decision making authority, and the refugee's testimony is the only available evidence in such a procedure. Undoubtedly, the search for the complete truth is a demanding, and often impossible, process and inference drawn from evidence can be very subjective. As such, one can only hope that future decisions will always be reached in the spirit of justice and fairness and decision makers will attempt to pause and ideally reflect on the work the Tribunals' judges before they pronounce "*I do not believe it really happened*".

ANNEX NO. 1: RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: RELEVANT PROVISIONS

Section 3: Rules of Evidence

Rule 89: General Provisions

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
(C) A Chamber may admit any relevant evidence which it deems to have probative value.
(D) A Chamber may request verification of the authenticity of evidence obtained out of court.

Rule 90: Testimony of Witnesses

(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.
(B) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."
(C) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.
(D) A witness, other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.
(E) A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.
(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:
    (i) Make the interrogation and presentation effective for the ascertainment of the truth; and
    (ii) Avoid needless consumption of time.
(G)
    (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subjectmatter of the case.
    (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the

nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

Rule 90 *bis*: Transfer of a Detained Witness

(A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.

(B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met:

(i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

(C) The Registry shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar.

(D) The Registry shall ensure the proper conduct of the transfer, including the supervision of the witness in the Detention Unit of the Tribunal; it shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the Detention Unit and, as promptly as possible, shall inform the relevant Judge or Chamber.

(E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.

(F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a Judge or a Chamber may extend the period, on the same conditions stated in the Sub-Rule (B).

Rule 91: False Testimony under Solemn Declaration

(A) A Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

(C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may:

(i) in circumstances described in paragraph (B) (i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (B) (ii), issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter.

(D) The Rules of Procedure and Evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

(E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.
(F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.
(G) The maximum penalty for false testimony under solemn declaration shall be a fine of USD10,000 or a term of imprisonment of five years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77
(H) Paragraphs (B) to (G) apply *mutatis mutandis* to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 *bis* which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.
(I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless:
    (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
    (ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Rule 92: Confessions

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

Rule 92 *bis:* Proof of Facts Other Than by Oral Evidence

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
    (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:
        (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
        (b) relates to relevant historical, political or military background;
        (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
        (d) concerns the impact of crimes upon victims;
        (e) relates to issues of the character of the accused; or
        (f) relates to factors to be taken into account in determining sentence.
    (ii) Factors against admitting evidence in the form of a written statement include whether:
        (a) there is an overriding public interest in the evidence in question being presented orally;
        (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
        (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.
(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
    (i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:
(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:
(i) is so satisfied on a balance of probabilities; and
(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.

(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

(E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

Rule 93: Evidence of Consistent Pattern of Conduct

(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.

(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the Defence pursuant to Rule 66.

Rule 94: Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall také judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

Rule 94 *bis*: Testimony of Expert Witnesses

(A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 *bis* (B) (iv) (b) and Rule 73 *ter* (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

(B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:
    (i) It accepts or does not accept the witness's qualification as an expert;
    (ii) It accepts the expert witness statement; or
    (iii) It wishes to cross-examine the expert witness.
(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

Rule 95: Exclusion of Evidence on the Grounds of the Means by Which It was Obtained

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96: Rules of Evidence in Cases of Sexual Assault

In cases of sexual assault:

(i) Notwithstanding Rule 90(C), no corroboration of the victim's testimony shall be required;
(ii) Consent shall not be allowed as a defence if the victim:
    (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
    (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.
(iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
(iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence.

Rule 97: Lawyer-Client Privilege

(A) All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:
    (i) The client consents to such disclosure; or
    (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.
(B) Nothing in this rule shall be interpreted as permitting the use of confidentiality between Counsel and Client to conceal the participation of Counsel in illegal practices such as fee-splitting with client.

Rule 98: Power of Chambers to Order Production of Additional Evidence

A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.

Rule 98 *bis*: Motion for Judgement of Acquittal

If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement

Section 3 : Rules of Evidence

Rule 89 General Provisions

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.
(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
(C) A Chamber may admit any relevant evidence which it deems to have probative value.
(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
(E) A Chamber may request verification of the authenticity of evidence obtained out of court.
(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

Rule 90 Testimony of Witnesses

(A) Every witness shall, before giving evidence, make the following solemn declaration: I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".
(B) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the dutyto tell the truth. A judgement, however, cannot be based on such testimony alone.
(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.
(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings.
(E) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.
(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to
    (i) make the interrogation and presentation effective for the ascertainment of the truth; and
    (ii) avoid needless consumption of time.
(G) The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 *bis* (C) and 73 *ter* (C).

(H)

(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counselappears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

Rule 90 *bis* Transfer of a Detained Witness

(A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the detention unit of the Tribunal, conditional on the person's return within the period decided by the Tribunal.

(B) The transfer order shall be issued by a permanent Judge or Trial Chamber only after prior verification that the following conditions have been met:

(i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) transfer of the witness does not extend the period of detention as foreseen by the requested State.

(C) The Registrar shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar.

(D) The Registrar shall ensure the proper conduct of the transfer, including the supervision of the witness in the detention unit of the Tribunal; the Registrar shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the detention unit and, as promptly as possible, shall inform the relevant Judge or Chamber.

(E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.

(F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a permanent Judge or Chamber may extend the period on the same conditions as stated in paragraph (B).

Rule 91 False Testimony under Solemn Declaration

(A) A Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

(C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may:

(i) in circumstances described in paragraph (B)(i), direct the Prosecutor to prosecute the matter; or
(ii) in circumstances described in paragraph (B)(ii), issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter.

(D) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

(E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.

(F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.

(G) The maximum penalty for false testimony under solemn declaration shall be a fine of 100,000 Euros or a term of imprisonment of seven years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H).

(H) Paragraphs (B) to (G) apply *mutatis mutandis* to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 *bis* or Rule 92 *quater* which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.

(I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless
(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Rule 92 Confessions

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

Rule 92 *bis* Admission of Written Statements and Transcripts in Lieu of Oral Testimony

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:
(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
(b) relates to relevant historical, political or military background;
(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
(d) concerns the impact of crimes upon victims;
(e) relates to issues of the character of the accused; or
(f) relates to factors to be taken into account in determining sentence.
(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:
(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or

(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:

(a) that the person making the statement is the person identified in the said statement;

(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;

(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and

(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply.

Rule 92 *ter* Other Admission of Written Statements and Transcripts

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

(i) the witness is present in court;

(ii) the witness is available for cross-examination and any questioning by the Judges; and

(iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

Rule 92 *quarter* Unavailable Persons

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

(i) is satisfied of the person's unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

Rule 92 *quinquies* Admission of Statements and Transcripts of Persons Subjected to Interference

(A) A Trial Chamber may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal, where the Trial Chamber is satisfied that:
  (i) the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect;
  (ii) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion;
  (iii) where appropriate, reasonable efforts have been made pursuant to Rules 54 and 75 to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; and
  (iv) the interests of justice are best served by doing so.

(B) For the purposes of paragraph (A):
  (i) An improper interference may relate *inter alia* to the physical, economic, property, or other interests of the person or of another person;
  (ii) the interests of justice include:
    (a) the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded;
    (b) the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and
    (c) whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.
  (iii) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

(C) The Trial Chamber may have regard to any relevant evidence, including written evidence, for the purpose of applying this Rule.

Rule 93 Evidence of Consistent Pattern of Conduct

(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.
(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66.

Rule 94 Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

Rule 94 *bis* Testimony of Expert Witnesses

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
  (i) it accepts the expert witness statement and/or report; or

(ii) it wishes to cross-examine the expert witness; and
(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

Rule 94 *ter* [Deleted]

Rule 95 Exclusion of Certain Evidence

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96 Evidence in Cases of Sexual Assault

In cases of sexual assault:

(i) no corroboration of the victim's testimony shall be required;
(ii) consent shall not be allowed as a defence if the victim
  (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 97 Lawyer-Client Privilege

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

(i) the client consents to such disclosure; or
(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Rule 98 Power of Chambers to Order Production of Additional Evidence

A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.

ANNEX NO. 3: DIAGNOSTIC CRITERIA FOR 309.81 POST-TRAUMATIC STRESS DISORDER

Citation: American Psychiatric Association. 309.81 Post-traumatic Stress Disorder. In: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition. American Psychiatric Association, Washington 1994:424-429

Available at: http://www.cirp.org/library/psych/ptsd2/ [accessed 14 November 2009]

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of others.

(2) the person's response involved intense fear, helplessness, or horror.

Note: In children, this may be expressed instead by disorganized or agitated behavior.

B. The traumatic event is persistently re-experienced in one (or more) of the following ways:

(1) recurrent and distressing recollections of the event, including images, thoughts, or perceptions.

Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.

(2) Recurrent distressing dreams of the event.

Note: In children, there may be frightening dreams without recognizable content.

(3) Acting or feeling if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated).

Note: In young children, trauma-specific re-enactment may occur.

(4) Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

(5) Physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three or more of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

(2) efforts to avoid activities, places, or people that arouse recollections of the trauma

(3) inability to recall an important aspect of the trauma

(4) markedly diminished interest or participation in significant activities

(5) feeling of detachment or estrangement from others

(6) restricted range of affect. (e.g., unable to have loving feelings)

(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

(1) difficulty falling or staying asleep

(2) irritability or outbursts of anger

(3) difficulty concentrating

(4) hypervigilance

(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than one month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

Acute: if duration of symptoms is less than three months.

Chronic: if duration of symptoms is three months or more

Specify if:

With Delayed Onset: if onset of symptoms is at least 6 months after the stressor

BIBLIOGRAPHY

TABLE OF CASES

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA[527]

Akayesu

Prosecutor v. Jean-Paul Akayesu, Case No ICTR-96-4-I, Amended Indictment, 17 June 1997. [hereinafter *Prosecutor v. Akayesu*, Amended Indictment]

Prosecutor v. Jean-Paul Akayesu, Case No ICTR-96-4-T, Judgement, 2 September 1998. [hereinafter *Prosecutor v. Akayesu*, TC Judgement]

Prosecutor v. Jean-Paul Akayesu, Case No ICTR-96-4-T, Sentence, 2 October 1998. [hereinafter *Prosecutor v. Akayesu*, TC Sentence]

Prosecutor v. Jean-Paul Akayesu, Case No ICTR-96-4-A, Judgement, 1 June 2001. [hereinafter *Prosecutor v. Akayesu*, AC Judgement]

Prosecutor v. Jean-Paul Akayesu, Case No ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998

Bagilishema

Prosecutor v. Ignace Bagilishema, Case No ICTR-95-1A-T, Judgement, 7 June 2001. [hereinafter *Prosecutor v. Bagilishema*, TC Judgement]

Prosecutor v. Ignace Bagilishema, Case No ICTR-95-1A-A, Judgement, 3 July 2002. [hereinafter *Prosecutor v. Bagilishema*, AC Judgement]

Prosecutor v. Ignace Bagilishema, Case No ICTR-95-1A-A, Judgement (Reasons), 3 July 2002. [hereinafter *Prosecutor v. Bagilishema*, AC Judgement (Reasons)]

Bagosora

Prosecutor v. Théoneste Bagosora, Case No ICTR-96-7-I, Amended Indictment, 12 August 1999. [hereinafter *Prosecutor v. Bagosora*, Amended Indictment]

[527] All documents are available at: http://www.ictr.org [section CASES].

Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No ICTR-98-41-T, Judgement and Sentence, 18 December 2008.

Bisengimana

The Prosecutor v. Paul Bisengimana, Case No. ICTR 00-60-T, Judgement, 13 April 2006. [hereinafter *Prosecutor v. Bisengimana*, TC Judgement]

Kabiligi and Ntabakuze

Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, Case No ICTR-97-34-I and ICTR-97-30-I, Amended Indictment, 12 August 1999. [hereinafter *Prosecutor v. Kabiligi and Ntabakuze*, Amended Indictment]

Kajelijeli

Prosecutor v. Juvénal Kajelijeli, Case No-ICTR-99-44-T, Judgement, 1 December 2003. [hereinafter *Prosecutor v. Kajelijeli*, TC Judgement]

Prosecutor v. Juvénal Kajelijeli, Case No-ICTR-99-44-A, Judgement, 23 May 2005. [hereinafter *Prosecutor v. Kajelijeli*, AC Judgement]

Kamuhanda

Prosecutor v. Jean de Dieu Kamuhanda, Case No ICTR-95-54-T, Judgement, 22 January 2004. [hereinafter *Prosecutor v. Kamuhanda*, TC Judgement]

Prosecutor v. Jean de Dieu Kamuhanda, Case No ICTR-95-54-A, Judgement, 19 September 2005. [hereinafter *Prosecutor v. Kamahunda*, AC Judgement]

Kambanda

Prosecutor v. Jean Kambanda, Case No ICTR- 97-23-S, Judgement, 4 September 1998. [hereinafter *Prosecutor v. Kambanda*, TC Judgement]

Kayishema and Ruzindana

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No ICTR-95-1-T, Judgement and Sentence (TC), 21 May 1999. [hereinafter *Prosecutor v. Kayishema and Ruzindana*, TC Judgement and Sentence]

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001. [hereinafter *Prosecutor v. Kayishema and Ruzindana*, AC Judgement (Reasons)]

Muhimana

Prosecutor v. Mikaeli Muhimana, Case No ICTR-95-1B-T, Judgement, 28 April 2005. [hereinafter *Prosecutor v. Muhimana*, TC Judgement]

Musema

Prosecutor v. Alfred Musema, Case No ICTR-96-13-T, Judgement and Sentence, 27 January 2000. [hereinafter *Prosecutor v. Musema*, TC Judgement and Sentence]

Prosecutor v. Alfred Musema, Case No ICTR-96-13-A, Judgement, 16 November 2001. [hereinafter *Prosecutor v. Musema*, AC Judgement]

Nahimana, Barayagwiza and Ngeze

Prosecutor v. Ferdinand Nahimana, Case No ICTR-96-11-I, Amended Indictment, 15 November 1999. [hereinafter *Prosecutor v. Nahimana*, Amended Indictment]

Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No ICTR-99-52-T, Judgement and Sentence, 3 December 2003. [hereinafter *Prosecutor v. Nahimana*, TC Judgement]

Ndindabahizi

Prosecutor v. Emmanuel Ndindabahizi, Case No ICTR-2001-71-I, Judgement, 15 July 2004. [hereinafter *Prosecutor v. Ndindabahizi*, TC Judgement]

Nsengiyumwa

Prosecutor v. Anatole Nsengiyumwa, Case No ICTR-96-12-I, Amended Indictment, 12 August 1999. [hereinafter *Prosecutor v. Nsengiyumwa*, Amended Indictment]

Ntagerura

Prosecutor v. André Ntagerura et al., Case No ICTR-99-46-T, Judgement, 25 February 2004. [hereinafter *Prosecutor v. Ntagerura*, TC Judgement]

Ntakirutimana

Prosecutor v. Gérard Ntakirutimana, Case No-ICTR-96-10-T and ICTR-96-17-T, Judgement, 21 February 2003. [hereinafter *Prosecutor v. Ntakirutimana*, TC Judgement]

Prosecutor v. Gérard Ntakirutimana, Case No ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004. [hereinafter *Prosecutor v. Ntakirutimana*, AC Judgement]

Ruggiu

Prosecutor v. Georges Ruggiu, Case No ICTR-97-32-T, Judgement, 1 June 2000. [hereinafter *Prosecutor v. Ruggiu*, TC Judgement]

Rutaganda

Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No ICTR-96-3-T, Judgement and Sentence, 6 December 1999. [hereinafter *Prosecutor v. Rutaganda*, TC Judgement and Sentence]

Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No ICTR-96-3-A, Judgement, 26 May 2003. [hereinafter *Prosecutor v. Rutaganda*, AC Judgement]

Rutaganira

Prosecutor v. Vincent Rutaganira, Case No ICTR-95-1C-T, *Judgement*, 14 *mars* 2005. [hereinafter *Prosecutor v. Rutaganira*, TC Judgement]

Rwamakuba

Prosecutor v. André Rwamakuba, Case No ICTR-98-44C-T, Judgement and Sentence, 20 September 2006. [hereinafter *Prosecutor v. Rwamakuba*, TC Judgement and Sentence]

Semanza

Prosecutor v. Laurent Semanza, Case No ICTR-97-20-T, Judgement, 15 May 2003. [hereinafter *Prosecutor v. Semanza*, TC Judgement]

Prosecutor v. Laurent Semanza, Case No ICTR-97-20-A, Judgement, 20 May 2005. [hereinafter *Prosecutor v. Rutaganda*, AC Judgement]

Serushago

Prosecutor v. Omar Serushago, Case No ICTR-98-39-T, Judgement, 5 February 1999. [hereinafter *Prosecutor v. Serushago*, TC Judgement]

Simba

Prosecutor v. Aloys Simba, Case No ICTR-01-76-T, Judgement, 13 December 2005. [hereinafter *Prosecutor v. Simba*, TC Judgement]

Aleksovski

Prosecutor v. Zlatko Aleksovski, Case No IT-95-14, Initial Indictment, 10 November 1995. [hereinafter *Prosecutor v. Aleksovski*, Initial Indictment]

Prosecutor v. Zlatko Aleksovski, Case No IT-95-14/1-T, Judgement, 25 June 1999. [hereinafter *Prosecutor v. Aleksovski*, TC Judgement]

Prosecutor v. Zlatko Aleksovski, Case No IT-95-14/1-A, Judgement, 24 March 2000. [hereinafter *Prosecutor v. Aleksovski*, AC Judgement]

Banović

Prosecutor v. Predrag Banović, Case No IT-02-65/1S, Judgement, 28 October 2003. [hereinafter *Prosecutor v. Banović*, TC Judgement]

Blaškić

Prosecutor v. Tihomir Blaškić, Case No IT-94-14-S, Judgement, 3 March 2000. [hereinafter *Prosecutor v. Blaškić*, TC Judgement]

Prosecutor v. Tihomir Blaškić, Case No IT-94-14-A, Judgement, 29 July 2004. [hereinafter *Prosecutor v. Blaškić*, TC Judgement]

Delalić

See *Mucić et al.* below.

Deronjić

Prosecutor v. Miroslav Deronjić, Case No IT-02-61-S, Judgement, 30 March 2004. [hereinafter *Prosecutor v. Deronjić*, TC Judgement]

Erdemović

Prosecutor v. Dražen Erdemović, Case No IT-96-22-Tbis, Judgement, 5 March 1998. [hereinafter *Prosecutor v. Erdemović*, TC Judgement]

---

[528] All documents are available at: http://www.ictr.org/default.htm [last accessed 23 November 2009].

Furundžija

Prosecutor v. Anto Furundžija, Case No IT-95-17/1-PT, Amended Indictment, 2 June 1998. [hereinafter *Prosecutor v. Furundžija*, Amended Indictment]

Prosecutor v. Anto Furundžija, Case No IT-95-17/1-T, Judgement, 10 December 1998. [hereinafter *Prosecutor v. Furundžija*, TC Judgement]

Prosecutor v. Anto Furundžija, Case No IT-95-17/1-A, Judgement, 21 July 2000. [hereinafter *Prosecutor v. Furundžija*, AC Judgement]

Jelisić

Prosecutor v. Goran Jelisić, Case No IT-95-10-T, Judgement, 14 December 1999. [hereinafter *Prosecutor v. Jelisić*, TC Judgement]

Prosecutor v. Goran Jelisić, Case No IT-95-10-A, Judgement, 5 July 2001. [hereinafter *Prosecutor v. Jelisić*, AC Judgement]

Kordić and Čerkez

Prosecutor v. Dario Kordić and Mario Čerkez, Case No IT-95-14/2-T, Judgement, 26 February 2001. [hereinafter *Prosecutor v. Kordić and Čerkez*, TC Judgement]

Prosecutor v. Dario Kordić and Mario Čerkez, Case No IT-95-14/2-A, Judgement, 17 December 2004. [hereinafter *Prosecutor v. Kordić and Čerkez*, AC Judgement]

Kovačević

Prosecutor v. Simo Drljaca and Milan Kovačević, Case No IT-97-24-I, Indictment, 13 March 1997. [hereinafter *Prosecutor v. Kovačević*, Indictment]

Transcript of hearing in *Prosecutor v. Simo Drljaca and Milan Kovačević,* Case No IT-97-24-T, 6 July 1998.

Prosecutor v. Milan Kovačević, Case No IT-97-24-T, Order Terminating the Proceedings Against Milan Kovačević, 24 August 1998.

Krstić

Prosecutor v. Radislav Krstić, Case No IT-98-33-T, Judgement, 2 August 2001. [hereinafter *Prosecutor v. Krstić*, TC Judgement]

Prosecutor v. Radislav Krstić, Case No IT-98-33-A, Judgement, 19 April 2004. [hereinafter *Prosecutor v. Krstić*, AC Judgement]

Kunarac et al.

Prosecutor v. Zoran Vuković, Case No IT-96-23/1-PT, Amended Indictment, 5 October 1999. [hereinafter *Prosecutor v. Vuković*, Amended Indictment]

Prosecutor v. Dragoljub Kunarac and Radomir Kovač, Case No IT-96-23-PT, Amended Indictment, 8 November 1999. [hereinafter *Prosecutor v. Kunarac and Kovač*, Amended Indictment]

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No IT-96-23-T and IT-96-23/1-T, Order on Defence Experts, 29 March 2000. [hereinafter *Prosecutor v. Kunarac et al.,* Order on Defence Experts]

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No IT-96-23-T and IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000.

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No IT-96-23-T and IT-96-23/1-T, Order for Medical Examination of the Accused Zoran Vuković, 21 September 2000. [hereinafter *Prosecutor v. Kunarac et al.,* Order for Medical Examination]

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001. [hereinafter *Prosecutor v. Kunarac et al.,* TC Judgement]

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No IT-96-23-A and IT-96-23/1-A, Judgement, 12 June 2002. [hereinafter *Prosecutor v. Kunarac et al.,* AC Judgement]

Kupreškić et al.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, Case No. IT-95-16-, Amended Indictment, 9 February 1998. [hereinafter *Prosecutor v. Kupreškić et al.,* Amended Indictment]

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, Case No IT-95-16-T, Judgement, 14 January 2000. [hereinafter *Prosecutor v. Kupreškić et al.,* TC Judgement]

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No IT-95-16-A, Appeal Judgement, 23 October 2001. [hereinafter *Prosecutor v. Kupreškić et al.,* AC Judgement]

Prosecutor v. v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, Case No IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999.

Kvočka et al.

*Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić, Dragoljub Prcać, C*ase No IT-98-30/1-T, Judgement, 2 November 2001. [hereinafter *Prosecutor v. Kvočka et al.,* TC Judgement]

Milošević

Prosecutor v. Slobodan Milošević, Case No IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasović, 26 August 2005.

Milutinović et al.

Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Case No IT-05-87-T, Order on Procedure and Evidence, 11 July 2006.

Mucić et al. (Delalić et al.)

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No IT-96-21-T, Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997. [hereinafter *Prosecutor v. Mucić et al.,* Decision on the Prosecution's Motion for the Redaction of the Public Record]

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998.

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No IT-96-21-T, Judgement, 16 November 1998. [hereinafter *Prosecutor v. Mucić et al.,* TC Judgement]

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No IT-96-21-A, Judgement, 20 February 2001. [hereinafter *Prosecutor v. Mucić et al.,* AC Judgement]

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No IT-96-21-A, Sentencing Judgement, 9 October 2001. [hereinafter *Prosecutor v. Mucić et al.,* AC Sentencing Judgement]

Naletilić et Martinović

Prosecutor v. Mladen Naletilić et Vinko Martinović, Case No IT- 98-34-T, Judgement, 31 March 2003. [hereinafter *Prosecutor v. Naletilić et Martinović*, TC Judgement]

Nikolić

Prosecutor v. Momir Nikolić, Case No IT-02-60/1-S, Judgement, 18 December 2003. [hereinafter *Prosecutor v. Nikolić,* TC Judgement]

Biljana Plavšić

Prosecutor v. Biljana Plavšić, Case No IT-00-39 & 40/1-S, Judgement, 27 February 2003. [hereinafter *Prosecutor v. Plavšić,* TC Judgement]

Duško Sikirica

Prosecutor v. Duško Sikirica et al., Case No IT-95-8-T, Judgement, 13 November 2001. [hereinafter *Prosecutor v. Simić,* TC Judgement]

Simić

Prosecutor v. Milan Simić, Case No IT-95-9/2-S, Judgement, 17 October 2002. [hereinafter *Prosecutor v. Simić,* TC Judgement]

Strugar

Prosecutor v. Pavle Strugar, Case No IT-01-42-T, Judgement, 31 January 2005. [hereinafter *Prosecutor v. Strugar,* TC Judgement]

Tadić

Prosecutor v. Duško Tadić a/k/a "Dule", Case No IT-94-1-I, Second Amended Indictment, 14 December 1995. [hereinafter *Prosecutor v. Tadić,* Second Amended Indictment]

Prosecutor v. Duško Tadić a/k/a "Dule", Case No IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

Prosecutor v. Duško Tadić a/k/a "Dule", Case No IT-94-1-T, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996.

Prosecutor v. Duško Tadić a/k/a "Dule", Case No IT-94-1-T, Opinion and Judgement, 7 May 1997. [hereinafter *Prosecutor v. Tadić,* TC Opinion and Judgement]

Prosecutor v. Duško Tadić a/k/a "Dule", Case No IT-94-1-T, Sentencing Judgement, 14 July 1997. [hereinafter *Prosecutor v. Tadić,* TC Sentencing Judgement]

Prosecutor v. Duško Tadić, Case No IT-94-1-A, Judgement, 15 July 1999. [hereinafter *Prosecutor v. Tadić,* AC Judgement]

Prosecutor v. Duško Tadić, Case No IT-94-1-A, Corrigendum Judgement of the Appeals Chamber of 15 July 1999, 19 November 1999. [hereinafter *Prosecutor v. Tadić,* AC Corrigendum Judgement]

Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 August 1996.

Todorović

Prosecutor v. Savo Todorović, Case No IT-95-9/1-S, Judgement, 31 July 2001. [hereinafter *Prosecutor v. Todorović,* TC Judgement]

Vasiljević

Prosecutor v. Mitar Vasiljević, Case No IT-98-32-S, Judgement, 29 November 2002. [hereinafter *Prosecutor v. Vasiljević,* TC Judgement]

DOCUMENTS

INTERNATIONAL CONVENTIONS

- United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at: http://www.unhcr.org/refworld/docid/3ae6b39614.html [accessed 22 November 2009]. [hereinafter Charter of the Nuremberg Tribunal]

- UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly.*, 10 December 1984, A/RES/39/46, available at: http://www.unhcr.org/refworld/docid/3b00f2224.html [accessed 22 November 2009]. [hereinafter Convention Against Torture]

- UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: http://www.unhcr.org/refworld/docid/3ae6b3ac0.html [accessed 22 November 2009]. [hereinafter Genocide Convention]

- UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.unhcr.org/refworld/docid/3be01b964.html [accessed 22 November 2009]. [hereinafter Refugee Convention]

- UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html [accessed 22 November 2009]. [hereinafter Protocol]

- UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: http://www.unhcr.org/refworld/docid/3b36f2fca.html [accessed 22 November 2009].

- UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: http://www.unhcr.org/refworld/docid/3d36f1c64.html [accessed 22 November 2009].

- UN High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, July 1991, available at: http://www.unhcr.org/refworld/docid/3ae6b3310.html [accessed 22 November 2009].

- UN High Commissioner for Refugees, *UNHCR Handbook for the Protection of Women and Girls*, January 2008, available at: http://www.unhcr.org/refworld/docid/47cfc2962.html [accessed 22 November 2009].

- UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, available at: http://www.unhcr.org/refworld/docid/3ae6b3314.html [accessed 22 November 2009]. [hereinafter *UNHCR Handbook*]

- UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*,16 December 1998, available at: http://www.unhcr.org/refworld/docid/3ae6b3338.html [accessed 22 November 2009].

- UN High Commissioner for Refugees, *Note on Refugee Women and International Protection*, 8 July 1985, EC/SCP/39, available at: http://www.unhcr.org/refworld/docid/3ae68cbb4.html [accessed 6 March 2010].

- UN High Commissioner for Refugees, *Refugee Protection and Sexual Violence*, 8 October 1993, No. 73 (XLIV) - 1993, available at: http://www.unhcr.org/refworld/docid/3ae68c6810.html [accessed 6 March 2010].

- UN High Commissioner for Refugees, *RLD2 - Determination of Refugee Status*, 1 January 1989, RLD2, available at: http://www.unhcr.org/refworld/docid/3ae6b35c0.html [accessed 22 November 2009].
- UN High Commissioner for Refugees, *RLD4 - Interviewing Applicants for Refugee Status*, 1995, RLD4, available at: http://www.unhcr.org/refworld/docid/3ccea3304.html [accessed 22 November 2009].
- UN High Commissioner for Refugees, *Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee*, 1 September 2005, available at: http://www.unhcr.org/refworld/docid/43141f5d4.html [accessed 22 November 2009].
- UN High Commissioner for Refugees, *The Exclusion Clauses: Guidelines on their Application*, 2 December 1996, available at: http://www.unhcr.org/refworld/docid/3ae6b31d9f.html [accessed 6 March 2010].

SECURITY COUNCIL RESOLUTIONS

- UN Security Council, *Resolution 808 (1993) Adopted by the Security Council at its 3175th meeting, on 22 February 1993*, 22 February 1993, S/RES/808 (1993), available at: http://www.unhcr.org/refworld/docid/3b00f15d30.html [accessed 23 November 2009].
- UN Security Council, *Resolution 827 (1993) Adopted by the Security Council at its 3217th meeting, on 25 May 1993*, 25 May 1993, S/RES/827 (1993), available at: http://www.unhcr.org/refworld/docid/3b00f21b1c.html [accessed 23 November 2009].
- UN Security Council, *Resolution 955 (1994)*, 8 November 1994, S/RES/955 (1994), available at: http://www.unhcr.org/refworld/docid/3b00f2742c.html [accessed 23 November 2009].
- UN Security Council, *Resolution 977 (1995) Adopted by the Security Council at its 3502nd meeting, on 22 February 1995*, 22 February 1995, S/RES/977 (1995), available at: http://www.unhcr.org/refworld/docid/3b00f1564f.html [accessed 23 November 2009].

REFUGEES

- Basic Law Manual: U.S. Law and INS Refugee Asylum Adjudications, New York, (New York: Matthew Bender, 1995).
- Commission on Human Rights Report to ECOSOC on the 2nd Session of the Commission Held at Geneva from 2 to 17 December 1947 (1948) UN Doc E/600.
- Council of Europe, *Recommendation No. R (1981) 16 on the Harmonisation of National Procedures Relating to Asylum*, 5 November 1981, (1981) 16 , available at: http://www.unhcr.org/refworld/docid/47fdfb0533.html [accessed 22 November 2009].
- Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection*, 31 January 2004, available at: http://www.unhcr.org/refworld/docid/4638af792.html [accessed 22 November 2009].

OTHER

- International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev. 1 (1995), *entered into force* 29 June 1995. *Last amended* 14 March 2008. [hereinafter ICTR Rules of Procedure and Evidence]
- International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 44 (2009), *entered into force* 14 March 1994, *last amended* 10 December 2009. [hereinafter ICTY Rules of Procedure and Evidence]
- UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, available at: http://www.unhcr.org/refworld/docid/4638aca62.html [accessed 22 November 2009]. [hereinafter Istanbul Protocol]

BOOKS AND MONOGRAPHS

REFUGEE LAW

- Deborah Anker, *Law of Asylum in the United States*, 3rd ed. (Boston: Refugee Law Center, Inc., 1999). [hereinafter ANKER]
- Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996). [hereinafter GOODWIN-GILL]
- James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991). [hereinafter HATHAWAY]
- B. S. Chimni (ed.), *International Refugee Law: A Reader* (London: Sage Publications, 2000). [hereinafter CHIMNI]

INTERNATIONAL CRIMINAL LAW

- Roger S. Clark & Madeleine Sann (eds.), *The Prosecution of International Crimes* (London: Transaction Publishers, 1996).
- Karine Lescure, Florence Trintignac, *International Justice for the Former Yugoslavia: The Working of the International Criminal Tribunal of the Hague*, Nijhoff Law Specials, Vol. 20 (The Hague: Kluwer Law International, 1996). [hereinafter LESCURE & TRINGIGNAC]
- Richard May, Marieke Wierda, *International Criminal Evidence* (New York: Transnational Publishers, Inc., 2002). [hereinafter MAY]
- Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New York Press, 2002).
- Claire de Than, Edwin Shorts, *International Criminal Law and Human Rights*, 1st ed. (London: Sweet & Maxwell, 2003).

OTHER

- Roméo A. Dallaire (with Brent Beardsley), *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Vintage Canada, 2004). [hereinafter DALLAIRE]
- Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families, Stories From Rwanda* (London: Picador, 1998).
- Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals (Text and Materials)*, 2nd ed. (Oxford: Oxford University Press, 2000).

REFUGEE LAW

- Michael Alexander, *Refugee Status Determination Conducted by UNHCR*, 11 INT'L J. REFUGEE L. (1999).
- John Barnes, *Developments, Expert Evidence – The Judicial Perception in Asylum and Human Rights Appeals, Prepared for the joint ILPA/IARLJ Conference*, 3 INT'L J. REFUGEE L. (2004).
- Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 4 INT'L J. REFUGEE L. (2007). [hereinafter BYRNE]
- Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. (2001).
- Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. (2000).
- Anthony Good, *Expert Evidence in Asylum and Human Rights Appeals: an Expert's View*, 3 INT'L J. REFUGEE L. (2004).
- Barbara Harrell-Bond, *Can Humanitarian Work with Refugees be Humane?*, 24 HUM. RTS. QUARTERLY (2002).
- Christine Hegel, *Narrative and Truth: Analyzing Refugee Testimonies*, unpublished paper, City University of New York Graduate Center (Mar. 2002).
- Jane Herlihy et al., *Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, BMJ (9 February 2002).
- David Rhys Jones, Sally Verity Smith, *Medical Evidence in Asylum and Human Rights Appeals,* 3 INT'L J. REFUGEE L. (2004).
- Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEORGETOWN. IMMIGR. L. J. (2003).
- Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT'L J. REFUGEE L. (2006). [hereinafter KAGAN]
- Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L. MIGRATION REV. (1986).
- Susan Kneebone, *The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?*, 5 AUSTL. J. ADMIN. L. (1998).
- David Matas, *Credibility of Refugee Claimants*, 21 IMMIGR. L. REP. 2D (1994).
- Joanna Ruppel, *The Need for a Benefit of Doubt Standard in Credibility Evaluations of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1 (1992).
- *Seminar Materials, Seminar for New Refugee Law Judges*, The materials were developed for the International Association of Refugee Law Judges by the Immigration and Refugee

Board, Canada, The Centre for Refugee Studies, York University, Canada, United Nations High Commissioner for Refugees, Geneva (Jun. 1999). [hereinafter SEMINAR FOR NEW REFUGEE LAW JUDGES]

- Sabine Weidlich, *First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?*, 14 GEO. IMMIGR. L.J. (2000).

INTERNATIONAL CRIMINAL LAW

- Robert Cryer, *Witness Evidence Before International Criminal Tribunals*, 3 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS (2003). [hereinafter CRYER]
- Louise Ellison, *Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases*, 9 THE INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF (2005).
  [hereinafter ELLISON]
- Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, 1 September 1996, 2084, available at: http://www.unhcr.org/refworld/docid/3ae6a8510.html [accessed 6 March 2010].
- Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity. A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia*, 1 July 2006, available at: http://www.unhcr.org/refworld/docid/44c9ed244.html [accessed 6 March 2010].

OTHER

- Federico A. Allodi, *Post-Traumatic Stress Disorder in Hostages and Victims of Torture*, 2 PSYCHIATRIC CLINICS OF NORTH AMERICA (Jun. 1994).
- Donald E. Payne, *The Psychiatric Sequelae of Torture: Diagnosis and Treatment*, Canadian Centre for Victims of Torture, Paper presented at the XVIth International Congress on Law and Mental Health, Toronto (Jun. 1990).