

## **Believable Victims: Asylum Credibility and the Struggle for Objectivity**

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In April 2002, the UK government issued a report about human rights violations in Sudan. It contained exactly three sentences about problems in Darfur, referencing vague “claims” of “inter-ethnic” fighting. It concluded that “there is no evidence” of systematic persecution in Darfur.<sup>1</sup> A year later, Darfur would become one of the world’s most well known cases of systematic persecution, to the extent that many considered it genocide. While the situation in Darfur certainly worsened from 2002 to 2003, the more dramatic change may have been the way in which the world suddenly became aware of a long-brewing crisis.

Asylum adjudication is often the invisible frontline in the struggle by oppressed groups to gain recognition for their plights. Through this process, individual people must tell their stories and try to show that they are genuine victims of persecution rather than simply illegal immigrants attempting to slip through the system. In 2002, because the world had not yet acknowledged the nature of the calamity from which they were escaping, many Darfurian asylum cases would have relied on the ability of each individual to convince government offices to believe their stories. They would have had to be deemed “credible,” or they would be in danger of being sent home. Today, a similar process is playing out for youths fleeing gang violence in Central America. The 2014 State Department Human Rights Report on Guatemala, for instance, includes three

sentences about gangs recruiting “street children.”<sup>ii</sup> But recent arrivals pleading to stay in the U.S. have described a far more dire situation.<sup>iii</sup>

Credibility is not an explicit legal requirement for being recognized as a refugee or for winning asylum. The legal criteria derive from the United Nations’ 1951 Convention relating to the Status of Refugees, which requires an asylum-seeker to show a “well-founded fear of being persecuted” for reason of race, religion, nationality, membership in a political social group, or political opinion. In theory, if independent evidence showed that a person was clear danger of persecution, it might not be necessary for the asylum-seeker to even testify. Imagine, for instance, if a three-year-old Jewish child arrived from Germany in 1941, and told interviewers that she had an imaginary friend. It would clearly violate the Refugee Convention to refuse her asylum simply because her testimony was not credible in a strict sense. But such scenarios are extraordinarily rare.

Asylum-seekers typically arrive with no independent evidence that they really face such a danger. As a result, it is a practical necessity for asylum-seekers to be believed as they usually cannot prove their cases except through their own testimony. For the current cases of Central American youths, even if the government were to accept that gang violence in general might be grounds for asylum, it would be left to individual applicants to explain how such violence places them in personal and immediate danger. Previous research has shown that individual credibility assessment determines the fates of more asylum applications than do the technical legal criteria.<sup>iv</sup> But this is a fraught process. The fact that genuine refugees cannot conclusively prove their persecution has

led the United Nations to call for asylum-seekers to be granted the “benefit of the doubt.”<sup>v</sup>

But this very same reality has led to doubts about asylum-seekers’ veracity. William Hague, the British Foreign Secretary until 2014, once made a major political speech complaining that “bogus claimants” were flooding the UK.<sup>vi</sup> In 2014, American law enforcement arrested around thirty people for running an asylum fraud ring, which the *New York Times* dubbed “an industry of lies.”<sup>vii</sup> In 2014, one can see doubts about the veracity of asylum-seekers mapped onto political reactions to the influx of Central American youth. New Mexico Congressman Steve Pearce, who made a brief visit to Guatemala and Honduras, publicly disputed whether the children are really fleeing from violence.<sup>viii</sup> *Investors Business Daily* claimed that the children are preying on American “gullibility.”<sup>ix</sup>

One by one and case by case, asylum-seekers must navigate the tension between refugee protection and migration control as they struggle to be deemed “credible.” In this process, asylum-seekers face a paradox created by our modern media environment. Today, there is more information readily available about other countries than ever before. Reports that were once published annually and available only in a government library are now a click away, and updated throughout the year. But this does not mean that every human rights abuse is immediately reported, even if we have created the impression of a culture of access to complete information. And just as more information is available more quickly, public opinion can also be aroused quickly, creating the potential for political pressure on an asylum system before there has been time to consider each claim carefully.

## **Images of Genuine Victims**

Asylum is hardly the only field in which an adjudicator must decide whether a particular witness should be believed. But it is unique in that the stakes are unusually high, and there is typically little or no independent evidence to corroborate an applicant's account. Asylum adjudication is also an intensely personal process, involving lengthy interviews about painful subjects, often in private rooms where the adjudicator and the applicant are the only people present. Subjectivity and inconsistency remain inherent in asylum adjudications.<sup>x</sup> More specifically, governments and the United Nations High Commissioner for Refugees (UNHCR) remain divided on whether it is appropriate for adjudicators to consider an applicant's demeanor in determining credibility.<sup>xi</sup>

In a context where unstructured subjectivity can play such a pivotal role, unarticulated assumptions about how a genuine victim is likely to look and talk can be unusually important. Consider, as an example, the potential role that gender might play in this process. In other legal contexts, social scientists have detected a tendency for adjudicators in particular to be especially protective of female victims and especially punitive both toward men who abuse women and toward women who do not adhere to conventional images of femininity.<sup>xii</sup> Professor Jacqueline Bhabha has warned that asylum cases often turn on "simplistic, even derogatory characterizations of asylum seekers' countries of origin, as areas of barbarism or lack of civility."<sup>xiii</sup> Post-9/11 studies have shown a tendency for Western politicians and media to portray Muslim men as dangerous while Muslim women are seen as victims.<sup>xiv</sup> Such images of victims and

perpetrators can help or hinder an asylum-seeker's quest to be believed, especially given court culture. Immigration judges work in a setting in which implicit bias is especially likely to influence decision-making because they are systemically overworked and have little time for deliberate decision-making or analysis.<sup>xv</sup>

The tendency for adjudicators to import pre-conceptions into asylum cases can often be vividly seen with asylum claims based on religion. When asylum-seekers flee persecution in countries like Iran or Eritrea because they converted from one religion or another, their cases often turn on whether they are seen as genuine in their faith. This can lead government officials to harshly interrogate asylum-seekers about matters of religion. This has led to many a contentious situation. In one notable case, an American appeals court complained that an immigration judge had administered "a mini-catechism."<sup>xvi</sup> In an Australian case, a judge suggested that it is a contradiction to claim to be both gay and a Catholic.<sup>xvii</sup> An American court once doubted whether an Iranian had actually converted from Islam to Christianity because he continued to eat pork-free meals in prison.<sup>xviii</sup> In Europe, some governments have been accused of trying to test the truthfulness of gay asylum-seekers by measuring their sexual arousal while forcing them to watch pornography.<sup>xix</sup>

Studies have found that asylum adjudicators also make assumptions about how a person fleeing persecution and persecutory governments should behave. Adjudicators base decisions on assumptions about how people would behave in the face of persecution, as well as about how persecutory governments would act. A study in Britain found that asylum adjudicators disbelieved applicants' accounts of persecution because, among other things, they assumed a foreign government would "make discrete inquiries" rather

than arrest a dissident. In another case, adjudicators doubted that a government prosecutor in another country would swear or use ethnic slurs.<sup>xx</sup> A Canadian study found that asylum adjudicators made assumptions about how people would behave in face of danger, often in contradiction to social science literature about how people actually behave in such circumstances.<sup>xxi</sup>

### **Accepting a Level of Doubt**

One of the challenges facing asylum adjudicators is that it is rare to ever learn with certainty whether an individual is actually telling the truth, much less how high the risk of persecution really is. In some cases, this becomes clear in retrospect. For example, we now know the scale of government-sponsored ethnic violence in Darfur, and that an asylum-seeker who reported escalating attacks in late 2002 would probably have been telling the truth. But an asylum adjudicator would not have been able to see this so clearly based on the information that was available at the time.

In common law legal traditions, different types of cases call for different levels of proof. Convictions in a criminal trial require proof beyond a reasonable doubt, while civil cases typically require a mere probability, or preponderance of the evidence. These differences approximate the different stakes in different cases, and may be best understood by the legal system's willingness to accept occasional errors. In criminal cases, the danger of convicting an innocent person of a serious crime calls for the most stringent burden of proof possible so as to make errors as rare as possible. In civil cases,

the system is willing to accept a higher degree of error, and thus sets a lower standard of proof. In all areas of law, adjudicators must constantly adjust their willingness to accept doubt, balancing against the harms that would result from an incorrect decision.

The balance in refugee cases is unique, and calls for a particularly low standard of proof. If a genuine refugee is errantly rejected, the harm is immediate and severe. A person will be deported to a place where he or she is in danger of persecution. But the harm from a fraudulent applicant slipping through the system is more diffuse. While a single high profile case may cast create a strong public impression about the whole system, the vast majority of asylum claims remain anonymous and confidential. The true danger of false claims slipping through is that, cumulatively, they may produce a public sense that the asylum system lacks integrity. This, in turn, would then fuel more draconian measures against all asylum claims. In theory, fraudulent asylum claims might be analogous to counterfeit money. A single fake bill does not have any significant macroeconomic impact, but if too many enter circulation, the results could be disastrous.

Asylum law has tried to accommodate this delicate balance by establishing a fairly low, yet certainly more nuanced, threshold of proof in asylum cases. An asylum claim may be based solely on the applicant's own testimony if no other evidence is reasonably available. More to the point, UNHCR has tried to steer credibility assessment away from a search for truth, given that doubts nearly always remain. Instead, UNHCR argues that an asylum-seeker should be considered credible if his or her account is "capable of being believed."<sup>xxii</sup> This does not require that an adjudicator be entirely free of doubt. It also does not require the level of certainty that might be demanded in a criminal case. It is not, however, such a low standard that even a story no reasonable

person could believe would be accepted. Instead, it is a middle ground protecting the lives of those who, if not for the lower threshold, might be sent back to a country where they might face certain persecution and perhaps even death.

### **Moving Toward Objectivity**

In 1989, UNHCR advised that refugee credibility assessment “be a matter of personal judgment.”<sup>xxiii</sup> This was typical of early approaches to credibility assessment. This subjective approach is closely tied to two related ideas that have long legal roots, but may be empirically quite questionable. The first idea is that directly observing the way a person talks will reveal their level of honesty, as lying will be indicated by the way they talk or by their demeanor. This idea has deep roots in the law of evidence and in popular psychology, appearing in the early twentieth century treatise on evidence by John Henry Wigmore, who traced it to an 1836 Massachusetts criminal case.<sup>xxiv</sup> Yet, social scientists have not found much evidence that demeanor actually assists much in detecting falsehood.<sup>xxv</sup>

The second idea that supports the subjective approach is the rule in many legal systems that appellate courts should defer to first instance adjudicators on credibility precisely because they listened to and watched the testimony directly. The result of such rules is that high courts are often reluctant to step in to offer clear guidance on credibility questions the way they might on questions of law. In addition to the limited usefulness of

demeanor, a significant difficulty with asylum credibility is that adjudicators may not learn to be better at it through experience. The reason for this is that we rarely find out whether an asylum decision was right or wrong. As a result, an adjudicator cannot learn easily from experience. At most, he or she can learn what supervisors like, but it remains unusual to find out if an asylum decision was substantively accurate. This problem is compounded when the adjudicators are not fully independent, as is often the case in administrative immigration procedures.<sup>xxvi</sup> In a highly politicized environment where adjudicators are under pressure to decide asylum cases in a particular way, there is a danger that adjudicators will be implicitly rewarded for confirming preconceptions about asylum claims rather than for objective analysis.

Because of these concerns, the state of the art in credibility assessment is to move toward a more objective analytical approach. In a comprehensive 2013 report on credibility assessment in Europe, UNHCR advocated a structured analysis in which adjudicators should specifically note positive and negative factors, isolate areas of testimony where credibility problems appear to exist, and clearly articulate their reasoning.<sup>xxvii</sup> This newer approach has been captured in a training manual financed by the European Commission, and is promoted by a new UNHCR/European Commission project known as the CREDO Initiative.<sup>xxviii</sup>

Regrettably for asylum-seekers in the United States, American asylum law is in danger of being left behind by these developments. In 2005, Congress enacted the REAL ID Act, which states that Immigration Judges may base credibility assessments on, among other things, “the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account” and may reject a claim in

its entirety because of any apparent inconsistency or minor inaccuracy “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim.”<sup>xxix</sup> This law effectively enshrines an unstructured approach to credibility that invites judges to rely on methods that have largely been rejected by empirical science. Its biggest impact may be to further limit the role of appellate courts in refining the standards that should be used to assess credibility. As a result, as Central American children begin to make asylum claims based on fear of gang violence, their fates depend largely on the approach taken by individual judges. Somehow, even though we live in an age of information, credibility assessment seems to be still rooted in an older era based on instinct and unarticulated assumptions.

A careful, structured analysis of asylum claims requires training, time, and resources. Deciding refugee credibility subjectively is much faster, even if it is less likely to be reliable. Time is regrettably something that many asylum systems simply do not have. Analysis of data published by UNHCR indicates that in 2013, at least 902,756 people submitted individual refugee claims around the world, but only 555,827 of them had their cases decided.<sup>xxx</sup> This imbalance creates a significant danger that adjudicators in many systems will face pressure to simply decide cases as fast as possible, rather than to analyze each application carefully and articulate their reasoning in writing. To safeguard against this tendency, appellate courts need to vigilantly scrutinize asylum adjudication for procedural short-cuts that impair applicants’ opportunities to a full airing of their cases.

## **Conclusion**

Human rights problems are often sources of public controversy because it is often debatable—at least at first—whether claims of persecution are real, or if they are exaggerated to serve a particular agenda. But while these debates play out in the media and in official statements, they also play out with individual lives on the line. Individual lives are affected as government officials decide whether to accept the claims of persecution submitted by migrants trying to avoid deportation. These adjudications are typically hidden from public view, and have long been typified by a highly subjective approach. Implicit assumptions about how foreign countries work and, most importantly, how a genuine victim would act or talk can lead to inconsistent, unreliable decisions with grave consequences for people in danger.

The experience of the UN High Commissioner for Refugees in deciding refugee cases in the Middle East, Africa and Asia offers an encouraging example of the potential to improve the system by establishing a more structured approach to refugee status determination. In 2003, UNHCR for the first time published a comprehensive set of standard for its offices in these cases, in addition to new training programs. The new standards were aimed at all aspects of the process, but their general thrust was to force adjudicators to articulate a clear logic and basis for each step of their decision-making. In the context of credibility assessment – which previously had accounted for the majority of UNHCR rejections<sup>xxxix</sup> – this forces adjudicators toward a more objective approach. Afterward, UNHCR’s recognition rate climbed from below fifty percent to above eighty percent.<sup>xxxix</sup> The UNHCR standards are not meant to be applied to governments and need

not be replicated precisely. But they illustrate the impact of moving toward a more structured approach.

The growing best practice internationally is to develop an objective analytical method that is based on empirical knowledge about human psychology, aimed at producing the most reliable results possible, tailored to the unique context of asylum cases. The solution requires governments to devote more resources to their refugee status determination systems, and to apply principles of due process. But to do this, it is necessary to be aware that there is little certainty in the world of refugee adjudication. Rather than seek proof or truth, asylum cases are more often about becoming comfortable with doubt.

The difficulty with this reality is that the information culture in which we live does not accept doubt easily. Our growing access to information creates an impression that all claims should be immediately verifiable, and it creates an outlet by which strong opinions may be expressed far more quickly than ever before. Asylum cases are defined by uncertainty, and to be decided effectively they need to be analyzed methodically and slowly. This is a challenge when systemic pressures push adjudicators to make decisions quickly, and public opinion expects certainty where none can be had. The battle to preserve asylum requires protecting a system that is rigorous and objective, but in which we must grow comfortable knowing no one is ever sure in advance of the results.

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<sup>i</sup> UK Home Office Immigration & Nationality Directorate, “Country Assessment: Sudan,” RefWorld.org (April 1, 2002): 5.60.

<sup>ii</sup> U.S. Department of State, *Country Reports on Human Rights Practices for 2013: Guatemala* (2014).

<sup>iii</sup> United Nations High Commissioner for Refugees, *Children on the Run*, [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf) (2014); Jill Replogle, “Violence Fuels Dramatic Rise in Central American Asylum-Seekers,” KPBS, <http://www.kpbs.org/news/2014/feb/25/violence-fuels-dramatic-rise-central-american-asyl/>

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<sup>iv</sup> Kagan, “Is Truth in the Eye of the Beholder?”: 368-369.

<sup>v</sup> Michael Kagan, “Is Truth In the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination,” *Georgetown Immigration Law Journal* 17 (2003): 371-374.

<sup>vi</sup> William Hague, “William Hague’s full speech,” *The Guardian* (April 18, 2000).

<http://www.theguardian.com/uk/2000/apr/18/immigration.immigrationandpublicservices>.

<sup>vii</sup> Kirk Semple, Joseph Goldstein and Jeffrey E. Singer, “Asylum Fraud in Chinatown: An Industry of Lies,” *The New York Times* (February 22, 2014).

<sup>viii</sup> Milan Simonich, “Rep. Pearce: Most fled Central America for economic reasons,” *Santa Fe New Mexican* (July 16, 2014).

<sup>ix</sup> “Editorial: Border Surge is About Magnets, Not Gangs,” *Investors Business Daily*, (August 4, 2014).

<sup>x</sup> Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Review* 60 (2007): 295-412.

<sup>xi</sup> United Nations High Commissioner for Refugees, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (2013): 189-190.

<sup>xii</sup> Margaret Farnsworth and Raymond H.C. Teske, Jr., “Gender Differences in Felony Court Processing: Three Hypothesis of Disparity,” *Women & Criminal Justice* 6 (1995): 23; Steven F. Shatz and Naomi R. Shatz, “Chivalry Is Not Dead: Murder, Gender and the Death Penalty,” *27 Berkeley J. Gender L. & Justice* 64 (2012); Chimene I. Keitner, “Victim or Vamp? Images of Violent Women in the Criminal Justice System,” *11 Colum. J. Gender & L.* 38 (2002); Margareth Etienne, “Sentencing Women: Reassessing the Claims of Disparity,” *14 J. Gender Race & Justice* 73 (2011); S. Fernando Rodriguez, Theodore R. Curry, Gang Lee, “Gender Differences in Clinical Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?” *Social Science Quarterly* 87 (2006).

<sup>xiii</sup> Jacqueline Bhabha, “Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights,” *Harv. Hum. Rts. J.* 15: 162 (2002)

<sup>xiv</sup> Smeetra Mishra, “Saving” Muslim women and fighting Muslim men: Analysis of representations in The New York Times, *Glob. Media J.* 6; Jayashri Srikantiah, “Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law,” *87 Bost. U. L. Rev.* 157, 201-202 (2007).

<sup>xv</sup> Fatma E. Marouf, Implicit Bias and Immigration Courts, *New England Law Rev.* 45 (2011): 429-432.

<sup>xvi</sup> *Yan v. Gonzales*, 438 F.3d 1249, 1252 (10th Cir. 2006).

<sup>xvii</sup> *SZAKD v Minister for Immigration* [2004] FMCA 78, 2004 WL 723864 (19 Mar. 2004) (Austl.).

<sup>xviii</sup> *United States v. Bastanipour*, 980 F.2d 1129, 1131 (7th Cir. 1992).

<sup>xix</sup> Dan Bilefsky, “Gays Seeking Asylum in U.S. Encounter a New Hurdle,” *The New York Times* (January 28, 2011).

<sup>xx</sup> Jane Herlihy, Kate Gleeson and Stuart Turner, “What assumptions about Human Behaviour Underlie Asylum Judgments?” *Int J Refugee Law* 22 (2010):351-366.

<sup>xxi</sup> Hilary Evans Cameron, “Risk Theory and ‘Subjective Fear’: The Role of Risk Perception, Assessment, and Management in Refugee Status Determination,” *Int’l Journal of Refugee Law* (2008)20 32 (2008): 568.

<sup>xxii</sup> UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (1988): Para. 11.

<sup>xxiii</sup> United Nations High Commissioner for Refugees, *Determination of Refugee Status* (1989): Ch. 1, RLD 2.

<sup>xxiv</sup> John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (James H. Chadbourn, Rev. Ed. 1973) (1923): § 1395.

<sup>xxv</sup> Charles F. Bond, Jr. & Bella M. DePaulo, “Accuracy of Deception Judgments,” *Personality & Soc. Psychol. Rev* 10 (2006) : 214, 231.

<sup>xxvi</sup> Marouf, “Implicit Bias and Immigration Courts”: 429.

<sup>xxvii</sup> UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013): 246-246.

<sup>xxviii</sup> Gabor Gyulai (Ed.), *Credibility Assessment in Asylum Procedures*, <http://helsinki.hu/wp-content/uploads/Credibility-Assessment-in-Asylum-Procedures-CREDO-manual.pdf> (2013).

<sup>xxix</sup> **REAL ID Act** § 101(a)(3) (codified at **8 U.S.C. § 1158(b)(1)(B)(iii)** (2006)).

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<sup>xxx</sup> UNHCR, *Global Trends 2013*, <http://www.unhcr.org/5399a14f9.html> (2014).

<sup>xxxi</sup> Michael Kagan, "Is Truth In the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination," *Georgetown Immigration Law Journal* 17 (2003): 369.

<sup>xxxii</sup> Asylum Access, "UNHCR recognition rates rise in the wake of new standards," <http://rsdwatch.wordpress.com/2008/07/24/unhcr-recognition-rates-rise-in-the-wake-of-new-standards/> (July 24, 2008).