



SCIENTIFIC ARTICLE

TESTIFYING ACROSS CULTURES: TRIALS AND TRIBULATIONS

*Dylan Drenk, Verena Muckermann, Linda Schoonmade, Krista King, Barbora Holá, Annelies Vredeveldt*¹

ABSTRACT

Legal practitioners frequently report misunderstandings during cross-cultural witness interviews. This article analyses the scope and extent of the available scientific articles and book chapters on culture and witness testimony to help inform practices and research related to further studies. A comprehensive search was performed in databases such as Scopus and Web of Science Core Collection. Seven key thematic areas were identified: (1) Language as culture in the courtroom; (2) Expert witnesses as gatekeepers to culture; (3) The role of the interpreter; (4) Adjudicators' understanding of culture; (5) The culture defence; (6) Mental health, memory, and culture; and (7) Legal culture. The results and implications for both researchers and practitioners are discussed.

Keywords: Culture, International Tribunals, Legal Psychology, Testimony

I. INTRODUCTION

When people who are affected by a crime report about those experiences in cross-cultural legal contexts, misunderstandings and biases may ensue.² The current article presents a scoping review of the literature on witness testimony in cross-cultural legal settings to assess the state of current knowledge and identify directions for future research and practice.

One indication that this is a pressing issue comes from statistics showing that the overall number of people being forcibly displaced surpassed 117 million worldwide by mid-2024.³ Even though most of

¹ *Dylan Drenk is a PhD candidate at the Department of Criminology at the Faculty of Law at the Vrije Universiteit (VU) Amsterdam. Also based at VU are Linda Schoonmade, Krista King, Barbora Holá and Annelies Vredeveldt. Verena Muckermann is based at Ruhr University Bochum.*

² Hope, L., Anakwah, N., Antfolk, J., Brubacher, S. P., Flowe, H., Gabbert, F., Giebels, E., Kanja, W., Korkman, J., Kyo, A., Naka, M., Otgaar, H., Powell, M. B., Selim, H., Skrifvars, J., Kwasi Sorkpah, I., Sowatey, E. A., Steele, L. C., Stevens, L., ... Wells, S. (2022). Urgent issues and prospects at the intersection of culture, memory, and witness interviews: Exploring the challenges for research and practice. *Legal and Criminological Psychology*, 27(1), 1–31.

³ 'Refugee Data Finder: Key Indicators' (UNHCR), available online at www.unhcr.org/refugee-statistics/ (visited 23 June 2024).

them remain internally displaced, there is also evidence of a growing trend of international migration of people who have been forced to flee their home country due to circumstances outside their control.⁴ These elevated migration movements are one of the reasons for the increase of asylum seekers reporting their experiences, such as reasons for fleeing or crimes they have witnessed their home country, to authorities or in legal settings in Europe and other Western countries. While until 2017 over one third of all asylum seekers interviewed by Western European immigration officials came from Sub-Sahara African countries, the conflicts in Syria, the Sahel and more recently in Ukraine led to increasing migration movements from the Middle East and North African region and Eastern Europe respectively, and therewith to a changing background of those reporting their experiences in cross-cultural interactions.⁵

Taking Germany as an example, which is currently the country with the largest refugee population in the European Union, the arrival of Syrian refugees since 2015 has led to a sharp increase of people reporting their experiences in asylum interviews at the Federal Office for Migration and Refugees.⁶ In response, the Federal Office had to undergo extensive restructuring and now employs about 8,100 people in about 60 locations.⁷ The increased worldwide claims for asylum mean that more frequent cross-cultural interactions between authorities and those leaving their host countries are to be expected.

This is not only true for asylum hearings, but also for legal settings where witnesses of serious crimes report their experiences to foreign authorities. Returning to the example of Germany: By the end of 2017, more than 4000 leads regarding international crimes were forwarded to be assessed by the German war crimes unit⁸ – most of which were based on asylum hearings.⁹ Increased flows of asylum seekers therefore lead not only to a growing number of people reporting their experiences in asylum application procedures to foreign authorities, but also to an increased number of witnesses of (international) crimes testifying in intercultural settings.

The International Criminal Court (ICC) is another example in which many witnesses from different cultural backgrounds testify in legal settings about crimes which they have witnessed or experienced. In 2024, 12 ICC investigations are ongoing while 5 have been concluded. Its investigators, judges, and other staff members come from a broad range of countries and cultures.¹⁰ Interacting with witnesses, suspects and victims from across the globe in intercultural encounters is one of the characteristic features of international legal settings.

Even in perceived mono-cultural settings, testifying can prove problematic due to memory issues, lack of understanding of the judicial process on the side of witnesses and improper questioning on the side of legal practitioners. Anecdotal evidence suggests that these issues are exacerbated in intercultural settings.¹¹ After all, culture is relevant for giving, receiving, and evaluating testimony, and concerns all

⁴ ‘Latest Asylum Trends’ (European Asylum Support Office), available online at www.easo.europa.eu/latest-asylum-trends (visited 20 March 2023).

⁵ ‘Asylum quarterly report’ (Eurostat) (visited 20 March 2023).

⁶ ‘MID-YEAR TRENDS 2020’ (UNHCR), available online at www.unhcr.org/statistics/unhcrstats/5fc504d44/mid-year-trends-2020.html (visited 20 March 2023).

⁷ ‘Von der Dienststelle zum Bundesamt’ (BAMF), available online at www.bamf.de/DE/Behoerde/Chronik/Bundesamt/bundesamt-node.html.

⁸ A specialized unit created by the German government to investigate and prosecute war crimes around the world.

⁹ Zorn K. (2017), ‘Die Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch (ZBKV)’ 762–5.

¹⁰ ‘Situations under investigation’ (International Criminal Court), available online at www.icc-cpi.int/pages/situation.aspx (visited 20 March 2023).

¹¹ Combs N.A. (2010), *Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions*. Cambridge University Press.

stakeholders in the proceedings (e.g. legal practitioners and witnesses), as it shapes their resources (e.g. perception of objects, storytelling, and responding to questions) and previous experiences. Therefore, we aim to highlight and synthesize overarching practices in research as they relate to witness testimony in intercultural judicial settings while identifying potential gaps in existing knowledge. By doing so, practitioners and researchers will have a more concrete basis from which to understand culture's influence in intercultural legal settings.

On the one hand, legal practitioners frequently report problems when questioning witnesses from different cultural backgrounds. For example, witnesses from certain parts of Africa may report about an event in ways that make no distinction between having experienced it themselves or relying on what someone else has told them.¹² Although this may be a normal way to report an event in that region, legal practitioners require clarity on the source of information. This poses serious challenges for legal fact-finding, as obtaining high-quality and first-hand experience reports from witnesses is crucial for the successful functioning of the justice system. Incomplete or inaccurate witness accounts may result in wrongful convictions or unjust acquittals. On the other hand, witnesses themselves have complained about the process of testifying. They expressed their dislike of cross-examination and their unfamiliarity with the rules of procedure, both of which are unlikely to be common sociocultural norms for most non-legal groups as they are in international criminal cases.¹³

Moreover, in legal proceedings, as anywhere else, cultural norms can be misinterpreted. For example, avoiding eye contact may be taken as a sign of lying by a legal practitioner coming from a culture where eye contact is expected, whereas it may represent respectful behaviour in other cultures.¹⁴ A further example of issues arising in intercultural (domestic as well as international) legal settings is the mixing of legal cultures, namely civil and common law. Each system has a different way of interviewing witnesses on the stand, potentially leading to problems when witnesses come from a different legal culture or if the legal cultures are mixed, as they are in international tribunals. Witnesses might, for example, feel personally insulted if their testimony is challenged in adversarial cross-examinations; unfamiliarity with legal culture may even result in witnesses falling ill.¹⁵

These anecdotal issues indicate that testifying in intercultural legal settings is prone to misunderstandings. Considering the above-mentioned increased importance of testimonies in intercultural legal processes, as well as the limited, scattered and anecdotal research on this topic, there is a need for further, systematic examination of what is already known on how culture shapes processes of testifying in courts.

Hope et al. highlight the need for considering the role of culture in intercultural legal settings and note that so far, there is no systematic investigation into these issues to form a basis of common knowledge.¹⁶ The goal of this scoping literature review is to find, highlight, and synthesise overarching themes and practices in interdisciplinary research relating to witness testimony in intercultural judicial settings to identify gaps in existing knowledge and make informed recommendations for future research and practice.

¹² O'Brien M. and Kebbell M. (2014), 'Interview Techniques in International Criminal Court and Tribunals', *Cambridge University Press*, 91–102.

¹³ See Swidler A. (1986), 'Culture in action: Symbols and strategies', *American sociological review*, 273–86 and Schotsmans M. and Nsanzuwera F.X. (2002), Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda, *International Federation for Human Rights*.

¹⁴ Combs N.A. (2010), Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions, *Cambridge University Press*.

¹⁵ Ibid.

¹⁶ Hope L. et al. (2022), 'Urgent issues and prospects at the intersection of culture, memory, and witness interviews: Exploring the challenges for research and practice', 27 (1) *Legal and criminological psychology*, 1–31.

Therefore, this scoping review investigates the following question: What does the existing scientific literature indicate about how culture influences giving, evaluating, and receiving testimony in intercultural legal settings? We are interested in how ‘culture’ is defined in scholarship, what the main substantial themes explored in the literature on this topic are, what methodologies are being used and which countries and/or legal settings are studied. We also provide a systematic overview of the research conducted to date, focusing on methodology, the examined actors’ countries of origin, and the studied legal settings.

II. METHODOLOGY: A SCOPING REVIEW

The scoping review as a methodology provided a framework to clarify how previous academic studies and literature understood the key concept of *culture* influencing the key characteristics of *giving*, *evaluating*, and *receiving testimony* (witness statements) in an intercultural legal setting. We define *giving testimony* as the act of testifying or telling what the witness saw or knows. *Receiving* is the act of listening and processing the testimony of the witness. Finally, *evaluating* is the act of judging the value of testimony given by the witness. These three key concepts have been created by the authors to delineate the production of testimony from witnesses and the passive and active acts by legal practitioners that are involved in understanding testimony.

We conducted a scoping review because – in contrast to a conventional systematic review – it is suitable for identifying all the available types of academic evidence (quantitative and qualitative). The scoping review allows us to identify key characteristics of a concept, critically evaluate how and what type of research has been conducted on it, and identify knowledge gaps.¹⁷ With this scoping review, we provide a necessary first assessment and synthesis of the scope, nature, and extent of the available literature that can help inform decisions for further studies.¹⁸ To summarise, we aim to ‘seek and define’.¹⁹

The following paragraphs describe on what basis we identified literature to be included within the scoping review, what criteria were used to exclude articles, and how we searched the selected databases to get to our results. In conducting this review, we followed the formal guidance on how to conduct scoping reviews by the JBI’s methodological working group as outlined in the JBI Manual for Evidence Synthesis.²⁰

II.1 Inclusion and Exclusion Criteria

In line with the methodological approach outlined in Arksey and O’Malley (2005), we designed a search protocol to define the criteria for inclusion and exclusion of sources based on the research question and the aims of this review.²¹ The inclusion criteria entail *witnesses* as types of participants (1), *culture* as the core concept (2), *intercultural legal settings* as the context of where the testimony was given (3), and various *types of research* (4).

¹⁷ Munn Z. et al. (2018), ‘Systematic review or scoping review? Guidance for authors when choosing between a systematic or scoping review approach’, *BMC medical research methodology*, 18 (1), 1–7.

¹⁸ Grant M.J. and Booth A. (2009), ‘A typology of reviews: an analysis of 14 review types and associated methodologies’, *Health information & libraries journal*, 26 (2), 91–108.

¹⁹ Sutton A. et al. (2019), ‘Meeting the review family: exploring review types and associated information retrieval requirements’, *Health information & libraries journal*, 36 (3), 202–22.

²⁰ Peters M.D.J. et al. (2020), ‘Updated methodological guidance for the conduct of scoping reviews’, *JBI evidence synthesis*, 18 (10), 2119–26.

²¹ Arksey H. and O’Malley L. (2005), ‘Scoping studies: towards a methodological framework’, *International journal of social research methodology*, 8 (1), 19–32.

II.1.1 Witnesses as Types of Participants

Research to be included had to focus on witnesses giving testimony in a legal setting. A *witness* was defined as any person giving an official, recorded (in written or another format) statement reporting their experiences or knowledge to at least one other person. Experiences that could be reported include but are not limited to events concerning alleged criminal offences, conflict, or persecution. The knowledge that could be reported also concerns expert witnesses testifying based on their expertise in a certain field. Witnesses not reporting their experiences and their reasons for not testifying were not included.

II.1.2 Culture as a Core Concept

We included articles if *culture* or a related term was explicitly mentioned in the abstract or keywords. Frequent synonyms like *diversity* were included in the search terms, as well as similar concepts suggesting that culture may be mentioned in the full text, such as language, interpretation, or ethnicity. Final selection articles were required to mention culture in the full text.

II.1.3 Intercultural Legal Settings as Context

We defined *intercultural legal settings* as all legal settings where people from different (cultural) backgrounds interact. This includes international criminal courts and tribunals such as the International Criminal Court in The Hague, but also national legal proceedings, asylum hearings, and asylum interviews upon arrival in a host country.

II.1.4 Types of Research

The *types of research* included all publications available electronically that were published in academic journals or theoretical or empirical books. Studies were not excluded based on their research design, to map the totality of the available literature. The comprehensive search was not restricted to languages or dates, however, the full-text selection was eventually bound by the languages spoken by at least one of the authors of this research (French, German, English), unless a translation was provided by the publishing authors. Publication type was used as a second exclusion criterion. Whole books (due to time constraints), book reviews, and article reviews were excluded from the search.

II.2 Search Strategy and Study Selection

Following the review protocol drafted in advance, an experienced librarian [LS] conducted the search strategy in close coordination with the other authors. The review was conducted in line with the Preferred Reporting Items for Systematic Reviews and Meta-Analysis (PRISMA) statement.²² A comprehensive search was performed in the bibliographic databases Scopus, Web of Science Core Collection, APA PsycInfo (via Ebsco), Criminal Justice Abstracts (via Ebsco), and the International Bibliography of Social Sciences (via ProQuest) from inception to July 22, 2021.

The following terms were used (including synonyms and closely related words) as index terms or free-text words: *testimony*, *court*, and *cultural aspects*. The search was performed without date restrictions and duplicate articles were excluded using Endnote X20.0.1 (Clarivate), following the Amsterdam

²² Tricco A.C. et al. (2018), 'PRISMA extension for scoping reviews (PRISMA-ScR): checklist and explanation', *Annals of internal medicine*, 169 (7), 467-73.

Efficient Deduplication (AED)-method²³ and the Bramer method.²⁴ Three reviewers independently screened all potentially relevant titles and abstracts for eligibility using Rayyan, a web tool that helps with the initial screening of research abstracts and titles, to mitigate bias.²⁵ Differences in judgement were resolved through a consensus procedure.

II.3 Data Extraction

Figure 1 presents the flow chart of the search and selection process. The literature search generated a total of 3676 references: 1543 in Scopus, 812 in the Web of Science Core Collection, 538 in APA PsycInfo, 269 in Criminal Justice Abstracts, and 515 in IBSS. After removing duplicates, 2613 references remained. The database search and initial abstract screening yielded 205 publications which were selected for full-text screening. 87 publications were selected for final inclusion. The next section describes the results of our review.

III. RESULTS

In this section, we first summarise relevant features of the studies, including their methodology, setting and precise topic of interest. Next, we reflect on how culture is defined, or failed to be defined, in the publications we reviewed. Finally, we move on to the seven key themes that emerged from thematic coding: (1) language as culture in the courtroom, (2) expert witnesses as gatekeepers to culture, (3) the role of interpreters, (4) adjudicators' understanding of culture, (5) the cultural defence, (6) mental health, memory and culture, and (7) legal culture.

The focus of most studies was within Western countries looking mainly at domestic court proceedings. Qualitative methodology was primarily used over quantitative and mixed methods, and journal articles made up a large bulk of the 87 publications selected (see Appendix 1, for an overview table of all the publications included in the review). Culture was a main theme in all texts chosen for this review, however a definition of culture was only provided in a handful of articles. Through open coding we identified seven qualitative themes in these publications through which culture influences testimony.

III.1 METHODOLOGY AND STUDY DESIGN

A qualitative methodology was used in 89% of the publications in our sample. Only 10% of the publications used quantitative methods, and 2% used a mixed methods approach. Within the qualitative framework, there was much variation in study design, as 32 publications reported case studies, seven used discourse analysis, and three used semi-structured interviews. The sample was comprised of 5% book chapters, 93% journal articles, 1% manuscripts, and 1% monographs.

III.2 COUNTRIES STUDIED AND LEGAL SETTING

²³ Otten R., De Vries R., and Schoonmade L., Amsterdam efficient deduplication (AED) method (version 1), available online at doi.org/10.5281/zenodo.3582928 [Accessed on 05 June 2023].

²⁴ Bramer W.M. et al. (2016), 'De-duplication of database search results for systematic reviews in EndNote', *Journal of the Medical Library Association: JMLA*, 104 (3), 240. The full search strategies for all databases can be provided by the writers of the article upon request.

²⁵ Ouzzani M. et al. (2016), 'Rayyan—a web and mobile app for systematic reviews', *Systematic reviews*, 5 (1), 1–10.

Western countries made up the bulk of countries studied (66% of publications), with the United States making up 51% of the Western sample. Only 21% of publications looked at non-Western countries. Around 13% of publications focused on international settings, which are per definition multicultural in staff make-up and their jurisdiction usually transcends states' borders. These results may be determined by the strict search criteria as well as language restrictions. The following legal settings were identified in our sample: domestic courts (55%), asylum proceedings (18%), international criminal tribunals (16%), laboratory/extra-legal setting (4.5%), international arbitration (2%), truth and reconciliation commission (1%), commercial tribunal (1%), and royal commission²⁶ (1%).

III.3 GIVING, RECEIVING AND EVALUATING TESTIMONY

Approximately 40% of the publications took a holistic view of the testimonial process, examining the act of giving testimony, how different parties in the proceeding receive that information, and how different parties and adjudicators evaluate that testimony. Nine percent of the studies focused solely on the act of giving testimony: how a witness testifies and the effects it may have on the witness. No publications focused solely on receiving testimony. Around 21% focused solely on evaluating testimony, that is, how adjudicators, juries, or other parties in the proceedings judge the value of a given testimony.

When looking at combined concepts in publications, only seven percent addressed receiving and evaluating testimony, focusing specifically on how parties other than witnesses in legal proceedings process the information from testimony and judge that information. The giving and receiving of testimony were addressed by six percent of the studies, focusing on the act of testimony itself and how that information is processed by parties other than witnesses.

III.4 Culture

Of the 87 publications in our sample, to our great surprise, only six publications defined the term culture. As we can see from the definitions presented in Table 1, authors who do define culture do not agree on a common definition. This makes understanding what is meant by the term culture dependent on the interpretation of each author. Similarities do exist between the definitions in Table 1. Systems, practices, and behaviours are all part of each definition, but aside from that, each definition takes a different direction. We reflect in the Discussion on the implications of this definitional confusion or rather 'definitional apathy' in research on culture in legal settings.

Table 1 - Definitions of Culture From Articles in our Final Sample

Definitions of Culture	
Publication	Definition
J. Almqvist (2006)	'The notion of culture may best be understood as referring to: (1) language, skills, and tools (cultural equipment); (2) socio-cultural norms; and (3) culture-specific convictions about justice...' ²⁷
J.R. Campbell (2020)	'...culture as a system of values and meaning is unbounded, dynamic and involves a process of redefining and contesting social norms and forms of power' ²⁸

W.L. Cheah, (2018)	“... draw on Swidler’s (1986) definition of culture as a ‘tool kit’ of ‘symbols, stories, rituals, which people may use in varying configurations to solve different kinds of problems’ (p. 273).” ²⁹
N. Fletcher (2021)	‘...social practices’ ³⁰
A. Good (2008)	“...agree with Zygmunt Bauman that culture ‘does not cause behaviour, but summarizes and abstracts from it, and is thus neither normative nor predictive’ (1996: 11).” ³¹
R. Niezen (2003)	‘...Culture should be looked at as adjectival rather than as a noun, as a process rather than a thing, as an integral part of identity formation not a paradoxical object of fixed history.’ ³²

III.5 ANALYSIS: QUALITATIVE THEMES

To better understand the research landscape on the influence of culture on testimony, in the next step of our analysis, we used inductive and open coding to develop descriptive themes. The seven themes that emerged will be discussed below. Research which did not meet the criteria for final inclusion will also be used to create a broader picture of the themes.

III.5.1 Language as Culture in the Courtroom

About 43% of the publications discussed language and its role in witness testimony.³³ Scholars seem to consider language as the most tangible link to culture in a legal setting, as it is the aspect most often discussed in this context. A mismatch of languages in the courtroom, with the witness not being able to

²⁶ Commercial tribunals have jurisdiction disputes between merchants and generally disputes over commercial acts as well as bankruptcy proceedings. Royal commissions are inquiries into matters of public importance and are usually found in jurisdictions with a constitutional monarchy.

²⁷ Almqvist J. (2006), ‘The Impact of Cultural Diversity on International Criminal Proceedings’, *Journal of International Criminal Justice*, 4 (4), 745–64, at 747.

²⁸ Campbell J.R. (2020), ‘Interrogating the Role and Value of Cultural Expertise in Law’, *LAW*, 9 (4) 1–23, at 1.

²⁹ See from Cheah W.L. (2018), ‘Culture and Understanding in the Singapore War Crimes Trials (1946-1948): Interpreting Arguments of the Defence’, *International Journal of Law in Context*, 14 (1), 87–109, at 88, where the definition for *culture* by Swindler (1986, 273) is used.

³⁰ Fletcher N. (2021), ‘Sociolinguistic Challenges of Prosecuting Rape as Genocide at the International Criminal Tribunal for Rwanda: The Trial of Jean-Paul Akayesu’, *International Journal for the Semiotics of Law*, 1597–614, at 1599.

³¹ See from Good A. (2008), ‘Cultural Evidence in Courts of Law’, *Journal of the Royal Anthropological Institute*, 14, S47-S60, at S51, where the definition for *culture* by Bauman (1996, 11) is used.

³² Niezen R. (2003), ‘Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada’, *Canadian Journal of Law and Society*, 18 (2), 1–26, at 2

³³ See appendix 1 for a full list of articles related to this theme.

speak or understand the language of the court, can exacerbate the power imbalance that is already present in any legal setting (since witnesses usually do not have an in-depth understanding of the legal system).³⁴

The use of interpreters can create further distance between the witness testifying and the other parties in the courtroom, for example by removing hesitation from the testimony.³⁵ Another example of this distance is a situation where the witness professes to understand the main procedural language used in the courtroom, which is not their mother tongue, creating a power imbalance between the witness and the rest of the courtroom parties.³⁶ The concepts of power and control are central in these types of studies. For instance, examining attorneys use language to control the direction of testimony.³⁷ This may be to facilitate and support a witness or, in contrast, to undermine witness testimony. Judges have also been observed to use language to control witnesses, but for a different reason – to control the length of witnesses' responses.³⁸ The lexicon of courtroom discourse and legal language used by parties may also be unfamiliar to a witness. This creates a further power imbalance and means of controlling testimony.³⁹

Potential suggestibility is always a concern when witnesses give evidence.⁴⁰ Crucially, language can influence suggestibility when testifying.⁴¹ If a witness has encoded information in their native language, which is different from the language spoken in the legal setting, suggestibility may be more pronounced.⁴² This may lead decision-makers to question the veracity and credibility of testimony. The increased suggestibility through language confusion is a problem that must be addressed in every intercultural legal setting.

Stereotypes surrounding specific accents or dialects can also affect how a witness' testimony is perceived.⁴³ In the reviewed studies, negative stereotypes associated with specific accents (a Mexican accent in English), or specific dialects (aboriginal English dialects in Australia) were shown to negatively affect judgements of witnesses.⁴⁴ The research suggests that witnesses are seen as less credible because of accents and dialects. In international criminal cases, when the limitations of witnesses' language intersect with evidentiary relevant facts, specific language idiosyncrasies may cause misunderstandings. For

³⁴ Aina O.A. et al. (2018), Chapter 7: the Nature of Power and Control in the Interrogative Patterns of Selected Nigerian Courtroom Discourse, in John Benjamins Publishing Company.

³⁵ Combs N.A. (2009), 'Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials', *UCLA J. Int'l L. Foreign Aff.*, 14, 235.

³⁶ Ibid.

³⁷ Berk-Seligson S. (1987), 'The Intersection of Testimony Styles in Interpreted Judicial Proceedings: Pragmatic Alterations in Spanish Testimony', *Linguistics*, 25 (6), 1087–126.

³⁸ Bresnahan M.I. (1989), 'Attorneys as Equalizers: Eliciting Testimony from Refugee Defendants', *Howard Journal of Communications*, 2 (1), 1–19.

³⁹ Aina et al., *supra* note

⁴⁰ Suggestibility in legal psychology refers to the 'degree to which people are susceptible to altering their memory reports during questioning.' Thorley C. (2013), 'Memory Conformity and Suggestibility', *Psychology, Crime and Law*, 19 (7), 565.

⁴¹ Aydin C. and Ceci S.J. (2013), 'The Role of Culture and Language in Avoiding Misinformation: Pilot Findings', *Behavioral Sciences and the Law*, 31 (5), 559–73.

⁴² Ibid.

⁴³ Cantone J.A. et al. (2019), 'Sounding Guilty: How Accent Bias Affects Juror Judgments of Culpability', *Journal of Ethnicity in Criminal Justice*, 17 (3), 228–53.

⁴⁴ Eades D. (1996), 'Legal recognition of cultural differences in communication: The case of Robyn Kina', *Language & Communication*, 16 (3), 215–27; Cantone et al., *supra* note.

example, a local language may not have a word for specific colours⁴⁵ or may not distinguish between family relations.⁴⁶

Local cultural norms may affect the ways witnesses understand and narrate their experiences, which may impact the outcomes of their legal cases.⁴⁷ In legal settings, narratives must fit into narrow parameters which may not allow for the full retelling of a witness' account. Judicial institutions are concerned with establishing individual criminal responsibility for certain offences, which requires a focus on specific factual elements. Witnesses, in contrast, may present information that emphasises other aspects of their experience, partly determined by their cultural background, that do not meet the legal expectations or are seen as legally irrelevant to the case. Studies examining testimony by First Nations people in Canada⁴⁸ and Aboriginal people in Australia⁴⁹ found that diversions in the narration of testimony from what was expected played a negative role in the outcomes of cases by preventing witnesses from telling their stories. However, there were also examples of adjudicators taking these differences into account when making decisions.⁵⁰

III.5.2 Expert Witnesses as Gatekeepers to Culture

The role of expert witnesses testifying about culture was examined in 22% of the studies.⁵¹ Expert witnesses (anthropologists, psychologists, psychiatrists, and others) can play a key role in the courtroom to explain culture to adjudicators. Unlike interpreters, who are called in to provide necessary translation services in legal settings and typically do not have the authority to discuss culture, expert witnesses are brought in to testify specifically on the subject of culture. Perlin and McClain noted that there is no standardisation in the way expert witnesses discuss culture.⁵² Moreover, there is no standard method to assess the validity of an expert on culture in a legal setting.⁵³ In 75% of the publications examining expert witnesses, anthropologists were the expert witness of choice. Yet, the studies revealed that every expert witness testified about culture in a different way, even when only anthropologists were considered.⁵⁴

When testifying about culture, experts reported feeling forced to fit their explanations about culture into a narrow legal framework, distilling complicated and nuanced information down to simple explanations that fit the specific legal setting.⁵⁵ In the process, important information may be lost. This concept of

⁴⁵ 'Prosecuting Mass Crimes: A Compendium of Lessons Learned and Suggested Practices' (International Criminal Tribunal for the former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); Special Court for Sierra Leone (SCSL); Extraordinary Chambers in the Courts of Cambodia (ECCC); Special Tribunal for Lebanon (STL)).

⁴⁶ International Criminal Court, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga, 7.3.2014, para 66.

⁴⁷ See Appendix 1

⁴⁸ Manley-Casimir K. (2012), 'Creating Space for Indigenous Storytelling in Courts', *Canadian Journal of Law and Society*, 27 (2), 231-47.

⁴⁹ Eades D. (2000), 'I Don't Think It's an Answer to the Question: Silencing Aboriginal Witnesses in Court', *Language in Society*, 29 (2), 161-95.

⁵⁰ Napoleon V. (2005), 'Delgamuukw : a Legal Straightjacket for Oral Histories?', *Canadian Journal of Law and Society*, 20 (2), 123-55; Byrne R. (2007), 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals', *International Journal of Refugee Law*, 19 (4), 609-38.

⁵¹ See Appendix 1.

⁵² Perlin M.L. and McClain V. (2009), "'Where Souls Are Forgotten': Cultural Competencies, Forensic Evaluations, and International Human Rights', *Psychology Public Policy and Law*, 15 (4), 257-77.

⁵³ Campbell, *supra* note.

⁵⁴ Martínez J.C. (2020), 'Anthropological expert work in today's legal field: Between legitimizing the state judicial arena and seeking justice for indigenous peoples', *American Anthropologist*, 122 (3), 632-8.

⁵⁵ Powell R., Gibbons J., and Turell M.T. (2008), *Bilingual courtrooms: In the interests of justice?* (Amsterdam: John Benjamins Publishing Company).

strategic essentialism⁵⁶ was discussed in many case studies that were written by the expert witnesses themselves. It created a dilemma for the expert witness during testimony – how to convey a nuanced point about culture to adjudicators that probably do not (or do not want to) understand the complexity of it.

In some instances, expert witnesses considered it necessary to use negative stereotypes about a specific culture, for example to support a defendant or because it seemed to be the only way to convey the information to the adjudicator.⁵⁷ The use of negative stereotypes by expert witnesses was most pronounced in asylum cases⁵⁸ and criminal cases where a cultural defence⁵⁹ was used as a strategy by a defendant. A cultural defence refers to defendants who use cultural norms to argue for mitigating circumstances, grounds for acquittal, or for sentencing and reparations, which will be discussed in more detail in the fifth theme.

A discussion of power dynamics also appeared in several articles focusing on expert witnesses. In cases in which expert witnesses were called to testify about culture, they were sometimes seen as the authority on that culture, occasionally to the detriment of other witnesses or defendants who testified.⁶⁰ Adjudicators in some cases seem to place more weight on the testimony of an expert witness than on that of a lay person from that culture explaining the same thing.⁶¹ It is problematic that an adjudicator who typically has no specialised knowledge on the culture in question, is responsible for deciding who the expert is.

In the Ongwen case at the ICC, for instance, experts were called to testify about Acholi beliefs and spirituality as these subjects came up quite often in witness testimony. Although lay witnesses explained what these beliefs meant, parties still felt the need to bring in expert witnesses to clarify lay witness testimony to judges.⁶² This issue led Camaeho and López to ponder whether expert witnesses are ‘...tools that help substantiate cultural diversity or statehood benchmarks that reproduce the coloniality of power?’.⁶³ Thus, not everyone believes that expert witnesses are the answer to understanding culture in legal settings.

It is important to note the risk of a research bias connected to this theme. The vast majority of legal proceedings in the studied countries does not involve an expert witness who speaks about culture, even when the cases may involve cultural issues that need explaining. Particularly in the United States, only a very small minority of cases seem to use expert witnesses in this way, mainly for asylum cases and criminal cases. However, relative to this low number of cases, a large number of publications have appeared on the topic. This ‘overrepresentation’ of experts as gatekeepers to culture in the literature might be due to

⁵⁶ Campbell, *supra* note.

⁵⁷ Crabbe H. (2018), ‘State Your Case: Best Practices for Presenting a Cultural Defense in Criminal Litigation’, *Special Issue: Cultural Expert Witnessing*, 74, 165–84.

⁵⁸ Rosenberg J. (2019), ‘Why Are You Seeking Refuge? Conducting Evaluations of Central American Asylum Seekers’, *Journal of Human Rights and Social Work*, 4 (4), 229–37.

⁵⁹ Torry W.I. (2000), ‘Culture and Individual Responsibility: Touchstones of the Culture Defense’, *Human Organization*, 59 (1), 58–71.

⁶⁰ Camaeho M.T.S. and López E.L.L. (2018), ‘Anthropological Expert Witness And The Judicialization Of Indigenous Rights In Mexican Electoral Politics’, *Urban Anthropology and Studies of Cultural Systems and World Economic Development*, 48 (3), 225.

⁶¹ Cryer R. (2006), ‘A Long Way from Home: Witnesses Before International Criminal Tribunals’, *International Commentary on Evidence*, 4 (1).

⁶² Nistor A.-L., Merrylees A., and Holá B. (2020), ‘Spellbound at the ICC: the intersection of spirituality and international criminal law’, in *Intersections of Law and Culture at the International Criminal Court*, in Edward Elgar Publishing, 147–68.

⁶³ Camaeho and López, *supra* note at 229.

anthropologists and other experts publishing case studies in which they themselves testified as an expert witness.

III.5.3 The Role of Interpreters

In 14% of the studies the role of interpreters and issues with intercultural communication between languages were examined.⁶⁴ Interpreters are likely to play a key role in relaying culture between witnesses and other parties in judicial proceedings. However, it is unclear from the literature exactly how that role should be fulfilled. For example, should interpretation be as literal as possible to convey meaning during testimony or should interpretation consider local culture when deriving meaning for testimony? This question was raised in multiple studies and was left mostly unanswered.⁶⁵ What is clear from the research is that culture can influence the meaning of what needs to be interpreted, which can cause problems during testimony.⁶⁶ If decision-makers must hear testimony through interpretation, they must be aware that they may not hear the testimony exactly as the witness had intended it.

In intercultural legal settings, interpreters are seen as experts in language but often not as experts in the culture associated with that language.⁶⁷ This can be burdensome for interpreters when culture affects a translation, for example because they feel they do not have the authority to provide cultural contextualization, rules prohibit them, or because they feel they are not the best placed to provide explanations of culture.⁶⁸ This unclarity may be due to a lack of specific training tailored to legal settings.

There is no standardised training for interpreters working in intercultural legal settings. In a best-practices manual for several international tribunals, released by the Office of the Prosecutor of the ICC, interpreter instructions discuss using literal translations of language and euphemisms.⁶⁹ However, there is no explanation of how interpreters should arrive at these literal translations without considering culture. The studies on interpreters in our sample identify lack of training as one of the largest issues that need to be resolved.⁷⁰

The studies show that interpreters end up making their own decisions about how to convey culture-laden information during testimony.⁷¹ They do this based on their education in the language pairs and their training as an interpreter. Several studies discussed a specific issue in interpretation that illuminates how culture can influence testimony: the zone of uncertainty.⁷²

When interpreting from one language to another, imprecisions may be present that prevent the interpreter from directly translating the meaning of a witness account. This may be because the nuance of words or phrases cannot be captured due to a lack of words or specificity in the target language. One of the reasons for this mismatch could be the cultural context in which the language is used, for example, reticence toward the explicit discussion of sexual acts. When this zone of uncertainty in interpretation

⁶⁴ See Appendix 1.

⁶⁵ e.g. Lee J. (2009), 'When Linguistic and Cultural Differences Are Not Disclosed in Court Interpreting', *Multilingua*, 28 (4), 379-401; Nowak-Korcz P. (2021), 'Le Génocide Des Nazis Dans Les Témoignages Des Interprètes Et Traducteurs Au Procès De Nuremberg' *International Journal for the Semiotics of Law*.

⁶⁶ Byrne, *supra* note.

⁶⁷ Craig S. and Gramling D. (2017), 'Is There a Right to Untranslatability? Asylum, Evidence and the Listening State', *Tilburg Law Review*, 22 (1), 77-98.

⁶⁸ Fennig M. and Denov M. (2021), 'Interpreters Working in Mental Health Settings with Refugees: An Interdisciplinary Scoping Review', *American Journal of Orthopsychiatry*, 91 (1), 50-65.

⁶⁹ Petit, Akerson, and Warren, *supra* note at 104-6.

⁷⁰ Fennig and Denov, *supra* note.

⁷¹ e.g. Einhorn B.J. (2014), 'Reconstructing Babel: Bridging Cultural Dissonance Between Asylum Seekers and Adjudicators', in Cambridge University Press, 27-53.

⁷² Craig and Gramling, *supra* note.

negatively affects the understanding of testimony, this can lead to incorrect or ill-informed decisions in legal cases.⁷³ For example, testimony relating to imminent danger in an asylum seeker's homeland could be misunderstood and could result in a rejection of the asylum claim.

III.5.4 Adjudicators' Understanding of Culture

Around 16% of the studies discussed how adjudicators understand culture.⁷⁴ The perspective of the adjudicator is what defines the outcome of any legal proceeding. All the preceding themes highlight cultural factors that may influence how witnesses understand and present their experiences during testimony, but these themes also relate to how adjudicators determine the credibility and reliability of witness testimony.⁷⁵

Cheah argues that adjudicators use tools from their own cultural toolkit to assess another culture, instead of seeking to understand cultural arguments on their own terms.⁷⁶ If, using their own cultural lens, they are unable to understand another culture, they are less likely to take cultural factors into consideration during their decision-making process. Just as adjudicators understand through tools from their own culture, they also create expectations using those tools.⁷⁷

Expectations of emotional displays when witnesses tell their story can influence how adjudicators evaluate testimony. Several articles noted that adjudicators have their own ideas about how a traumatised person should act and speak.⁷⁸ Others argued that rape myths still influence adjudicators' beliefs about how victims should act during testimony.⁷⁹ Such expectations can put further pressure on a witness to conform to the norms of the adjudicator's culture. In the worst-case scenario, incorrect evaluation of testimony could result in wrongful convictions or unjust acquittals.

III.5.5 The Cultural Defence

The 'cultural defence' was examined by 14% of the publications, all originating from the United States.⁸⁰ A cultural defence refers to a defendant using their cultural norms to argue mitigating circumstances for the crimes of which they are accused.⁸¹ This theme encompasses several concepts from others listed above, as a cultural defence may use expert witnesses, interpreters, and language to explain why a

⁷³ Ibid.; Lee J. (2009), 'When Linguistic and Cultural Differences Are Not Disclosed in Court Interpreting', *Multilingua*, 28 (4), 379-401.

⁷⁴ See Appendix 1.

⁷⁵ See generally International Criminal Court, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga, 7.3.2014.

⁷⁶ Cheah W.L. (2018), 'Culture and Understanding in the Singapore War Crimes Trials (1946-1948): Interpreting Arguments of the Defence', *International Journal of Law in Context*, 14 (1), 87-109.

⁷⁷ Rishikof J.R. (2001), 'Meta-communication and the attribution of credibility versus dishonesty by trial court judges', *Dissertation Abstracts International: Section B: The Sciences and Engineering*, 62(4-B), 2116.

⁷⁸ Baranowski K.A. (2020), 'Documenting human rights violations: An introduction to the psychological evaluation of asylum seekers', *Practice Innovations*, 5 (1), 32-44; Bishop S.C. (2021), 'Intercultural Communication, the Influence of Trauma, and the Pursuit of Asylum in the United States', *Journal of Ethnic and Cultural Studies*, 8 (2), 187-208.

⁷⁹ Mandal S. (2007), 'The Burden of Intelligibility: Disabled Women's Testimony in Rape Trials', *Indian Journal of Gender Studies*, 20 (1), 1-29; Fletcher, supra note; Bonnici L. and Jurt C. (2007), 'Language and Anthropology in the Courtroom', *Current Anthropology*, 48 (4), 473.

⁸⁰ See appendix 1.

⁸¹ Fontaine G. and Severance L.J. (1990), 'Intercultural Problems in the Interpretation of Evidence: A Yakuza Trial', *International Journal of Intercultural Relations*, 14 (2), 163-76.

defendant's actions may be seen as socially acceptable in their native culture. Studies discussing this topic focused on asylum cases⁸² and child abuse cases⁸³.

When expert witnesses were asked to testify, they were confronted with a choice whether or not to endorse negative stereotypes about a specific culture in order to assist in a defence. Case studies weighed the potential positives and negatives of employing this strategy of endorsing negative stereotypes, but came to no concrete conclusions.⁸⁴ Helping a defendant emerged as the positive reason, whereas disparaging a specific culture was discussed as the main pitfall.⁸⁵ Once again, those providing testimony in these cases were forced to fit complex ideas about culture into a narrow legal framework in order to provide a suitable defence.

Although the studies in our sample all focused on United States settings, we can think of at least one example in international criminal law in which a cultural defence was used. In the Ongwen trial at the ICC, the defence counsel utilised culture to argue no criminal responsibility, as Ongwen was under duress. More specifically, the defence argued that spirits and rituals used by Joseph Kony instilled such fear in Ongwen, that he was forced to commit the crimes of which he was accused. However, this argument was dismissed by judges and Ongwen was eventually convicted, and that conviction was upheld on appeal.⁸⁶

III.5.6 Mental Health, Memory, and Culture

The issues of mental health, memory and their relationship with culture were addressed by 15% of the publications.⁸⁷ These studies noted that neither memory nor mental health is universal, but rather both are culturally bound.⁸⁸ Expert witnesses, most likely psychologists and psychiatrists, may be called to testify about the mental health of a witness or a defendant. However, mental health problems and disorders do not always present themselves in the same way across cultures.⁸⁹ Psychologists and psychiatrists testifying about someone's mental state may be unaware of cultural differences in the manifestation of mental disorders, unless they have specific training.⁹⁰ If the expert witness does not understand how culture influences the presentation of mental health symptoms, adjudicators cannot

⁸² Meffert S.M. et al. (2010), 'The Role of Mental Health Professionals in Political Asylum Processing', *Journal of the American Academy of Psychiatry and the Law*, 38 (4), 479-89; Leaf M.J. (2018), 'Judicial Ethnocentrism Versus Expert Witnesses in Asylum Cases', *74 Special Issue: Cultural Expert Witnessing*, 49-99; Campbell H., Slack J., and Diedrich B. (2017), 'Mexican Immigrants, Anthropology, and United States Law: Pragmatics, Dilemmas, and Ethics of Expert Witness Testimony', *Human Organization*, 76 (4), 326-35.

⁸³ Caprioli S. and Crenshaw D.A. (2017), 'The Culture of Silencing Child Victims of Sexual Abuse: Implications for Child Witnesses in Court', *Journal of Humanistic Psychology*, 57 (2), 190-209.

⁸⁴ Good A. (2008), 'Cultural Evidence in Courts of Law', *Journal of the Royal Anthropological Institute*, 14, S47-S60.

⁸⁵ Maguigan H. (1995), 'Cultural Evidence and Male Violence - Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts', *New York University Law Review*, 70 (1) 36-99.

⁸⁶ International Criminal Court, Situation in Uganda in the Case of the Prosecutor v. Dominic Ongwen, 4.2.2021.

⁸⁷ See appendix 1.

⁸⁸ Malkki L. (2007), 'Commentary: The politics of trauma and asylum: Universals and their effects', *Ethos*, 35 (3), 336-43.

⁸⁹ Rosinski A. and Weiss R.A. (2021), 'Competency to stand trial in immigration proceedings', *Translational Issues in Psychological Science*, 7 (1), 55-64; Sarangi A. et al. (2021), 'Severe Post-Traumatic Disorder Leading to Failure of Passing Asylum Interview—a Case Report', *Middle East Current Psychiatry*, 28 (1); Graham B., Herlihy J., and Brewin C.R. (2014), 'Overgeneral Memory in Asylum Seekers and Refugees', *Journal of Behavior Therapy and Experimental Psychiatry*, 45 (3), 375-80.

⁹⁰ Stepakoff S. et al. (2017), 'A Trauma-Informed Approach to the Protection and Support of Witnesses in International Tribunals: Ten Guiding Principles', *Journal of Human Rights Practice*, 9 (2), 268-86.

make a fully informed decision about how to evaluate a defendant or witness.⁹¹ Trauma can influence how witnesses retell events during testimony. The very nature of international criminal cases means that witnesses are likely to be testifying about traumatic events they experienced.⁹² In these cases, trauma may impair memory, making it difficult to narrate experiences as a coherent, chronological story.⁹³

III.5.7 Legal Culture

Few studies (15%) looked at how the legal setting can be a culture in itself.⁹⁴ The legal systems used in different countries can be seen as having their own 'legal culture' within the dominant culture of the jurisdiction. These systems differ in their treatment of witnesses and testimony. For instance, common law systems employ an adversarial way of questioning witnesses during testimony, which typically involves confronting and arguing with the witness,⁹⁵ whereas civil law systems take a more inquisitorial stance, which typically involves less confrontational, more information-focused witness questioning.⁹⁶ International criminal tribunals are a hybrid of these two legal cultures, which can lead to cultural misunderstandings between trial actors themselves. For example, a prosecutor coming from a common law system and a judge from a civil law system may have a different understanding and expectation of their respective roles in the trial process, such as how to question a witness.

Witnesses in intercultural legal settings may come from a different legal culture than the one in which they must testify, potentially causing confusion for all the parties involved. Moreover, any legal system may be foreign to a witness, regardless of which system is used in their home culture. Courtroom culture is a foreign concept to anyone who has not interacted with the legal system. Witnesses may be unsure of how to address people, what type of language to use, when to speak, to whom they should address their testimony, and what to speak about.⁹⁷

Legal culture involves language unfamiliar to most lay people. Witnesses are at a disadvantage, even if they are native speakers, if they do not grasp the specific vocabulary and syntax.⁹⁸ This brings us back to the most prevalent theme, language as culture. Once again in this final theme, something abstract, namely legal culture, is discussed in terms of something more tangible, namely language.

IV. DISCUSSION: IMPLICATIONS FOR PRACTICE AND RESEARCH

The results of the scoping review highlighted various interesting issues that have received relatively little attention in the literature, such as the (lack of) definition of culture. In the present article, we purposefully chose not to define culture prior to analysis in order to explore how culture is defined in the literature. Surprisingly, only six out of 87 publications explicitly defined culture. With so many articles discussing culture, but so few defining the concept, we are unable to identify a core definition. There are several explanations for the 'definitional apathy' we observed. First, studies included in our sample may not have

⁹¹ Meffert et al., *supra* note.

⁹² See generally Stepakoff et al., *supra* note.

⁹³ Marr C. et al. (2021), 'The effects of acute stress on eyewitness memory: an integrative review for eyewitness researchers', *Memory*, 29 (8), 1091–100.

⁹⁴ See Appendix 1.

⁹⁵ Bednarek G.A. (2018), 'Cultural and Linguistic Heterogeneity in Courtroom Discourse: Diverse Methods of Witness Examination in Criminal Trials', in Peter Lang AG, 279–97.

⁹⁶ *ibid.*

⁹⁷ Kirby A. (2017), 'Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: A Question of "Court Culture"?' *Criminal Law Review*, (12), 949–68.

⁹⁸ Kizito E. and Kondowe W. (2017), 'Examining the Impact of Questions and Questioning Techniques in Malawian Magistrate Courts: A Critical Discourse Analysis Approach', *Researchers World - Journal of Arts, Science & Commerce*, 8 (4), 133–41.

focused specifically on culture as a main topic, only using the term in specific instances. Second, authors may assume that the concept of culture is understood and does not require a definition, or alternatively, that culture as a concept escapes a single definition. It can mean different things in different contexts, rendering a universal definition for every context unworkable. Authors may want readers to draw their own conclusions on what culture means, based on the content of the article.

Our review of the above themes reveals problems when culture interacts with testimony, including misunderstandings and misinterpretations, rejections of asylum applications, increased power imbalance, and negative stereotypes being proliferated. We also see that parties in legal proceedings typically have little grasp of other cultures outside of their own culture; they are not equipped to manage cultural issues in intercultural legal settings. Defining culture could constitute an initial step to remedying that problem. When everyone in a legal proceeding can agree on a definition, we can begin to address the more substantial issues of lack of understanding and training.

This scoping review highlights challenges in research and practice at the intersection of culture and witness testimony within international criminal justice settings. It shows that cultural differences typically influence legal testimony in ways that are detrimental to the witness providing the testimony, as well as to the evaluation of the testimony and the legal case as a whole. This is for instance evident in legal cases of asylum seekers, where due to a disregard for cultural meaning in translation, the asylum seeker's testimony may be misunderstood by adjudicators and their asylum claim denied as a result.⁹⁹

The most tangible way of measuring culture in a legal setting is language. Almost 40% of the publications in our sample discussed language and the role it plays in witness testimonies. Because culture has a profound impact on how a story is told, we expected to see more publications engaging with culture's impact on the narrative and narration: how culture shapes what is discussed in a legal setting. From a cultural psychology standpoint, culture and language are different themes, as cultures within the same language group may differ. As there was limited discussion of narration in the literature, we grouped language and narration in our analysis. For future research, we would suggest a clearer distinction between the two, as cultural differences also concern the specific ways of producing knowledge, meaning, and relevance, beyond mere translational difficulties.

Our review shows that the legal systems and those working in them are often ill-equipped to manage cultural issues. Expert witnesses (anthropologists, psychologists, psychiatrists, and others) face the difficulty of having to testify about culture in a narrow legal framework, forcing them to distil nuanced and complicated information into simplified accounts, leaving out key information. In a related vein, there seems to be no clear consensus on the role that interpreters should take in relaying culture between witnesses and other parties in intercultural legal settings. Because language seems to be the main metre of culture in legal settings, the role of interpreters is central to how culture is presented in these intercultural legal proceedings. Uncertainties in interpretation, where nuances of words and phrases might be untranslatable might negatively affect the way testimony is understood by adjudicators. One of the suggestions arising from this scoping review is the need to promote intercultural training among those working in the legal systems, including interpreters, parties, and adjudicators.

Almost 80% of the sample focused on either one Western country (66%) or international settings largely based on Western norms (13%). Thus, our review shows that the influence of culture on testimony is mainly researched in Western, Educated, Industrialized, Rich, and Democratic (WEIRD) societies.¹⁰⁰ Similarly, Henrich, Heine and Norenzayan observed that published behavioural science research conducted in the early 2000s predominantly used research samples from WEIRD societies (96%).¹⁰¹

⁹⁹ Bishop, *supra* note.

¹⁰⁰ Henrich J., Heine S.J., and Norenzayan A. (2010), 'The weirdest people in the world?', *Behavioral and brain sciences*, 33 (2-3), 61-83.

¹⁰¹ *ibid.*

However, our review may have missed relevant international studies due to language limitations. As such further research on culture's influence on testimony in intercultural legal settings should be done outside of the Anglophonic, Francophonic and Germanophonic contexts to investigate whether more research has been conducted in other contexts that may be more generalizable to most of the world population. We suggest that future research into intercultural legal processes could benefit from utilising epistemological decolonization, as proposed by Quijano: '...to clear the way for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality'.¹⁰² The decolonial lens provides a radical approach to Western-centred theory and epistemology and could prove useful for future research by addressing the limitations of both international law procedures¹⁰³ as well as the practices in the intercultural legal sphere.

A limitation in the literature on the cultural defence in our sample focused on the United States, resulting in a clear research bias in this theme. This bias is for instance apparent in the fact that expert witnesses considered 'helping a defendant' as a positive reason to testify in a certain way. Expert witnesses in inquisitorial systems (e.g., in many European countries) would likely consider it inappropriate to gear testimony toward helping one party, given the high value placed on the impartiality of the expert in such settings.¹⁰⁴

Forty percent of the publications in our sample addressed all aspects - the giving, receiving and evaluating of testimony - as defined in the methods section. When studies that included two of the three phases are included, this encompassed 70 percent of the final selection. This may mean that it is hard to disentangle testimony into these three separate aspects. From our seven identified themes, only one could possibly focus on just one aspect of testimony, and that is 'how adjudicators perceive culture.' What can be gleaned from examining different phases of testimony is that culture indisputably influences testimony during all three phases: giving, receiving, and evaluating. In theory, positive aspects of the notion of culture in intercultural legal settings could have been considered in the literature, such as allowing different forms of narration during testimony or breaking down negative stereotypes about specific cultures instead of relying on them. However, the publications in our sample highlighted only negative aspects of culture; whether attached to language use, people present in the legal proceedings, cultural defences, or culture's effect on mental health and memory.

V. CONCLUSION

Our scoping review reveals that there are still many gaps in the existing knowledge about the role of culture in various intercultural legal settings. Ironically, most studies in our sample originated from WEIRD (Western, Educated, Industrialized, Rich and Democratic) societies and focused on domestic courts, even though culture by definition plays a central role in international criminal law settings. Two common themes in the publications we reviewed were *language as culture in the courtroom* and the *role of interpreters*, which have both been anecdotally highlighted as major problems in international criminal trials as well. For example, Swigart found that adequately addressing the linguistic needs of the ICC in itself is a daunting challenge.¹⁰⁵

Similarly, at the International Criminal Tribunal for the former Yugoslavia, one of the primary strategies employed by defence counsels was to call into question the misunderstandings related to interpreting

¹⁰² Quijano A. (2007), 'Coloniality and modernity/rationality', *Cultural studies*, 21 (2-3), 168-78, at 177.

¹⁰³ Crutchley J. (2017), 'How can a decolonial critique rearticulate concepts of peace and victims in international criminal law?'.¹⁰⁵

¹⁰⁴ Vredevelde A. et al. (2022), 'Legal psychologists as experts: guidelines for minimising bias', *Psychology, Crime & Law*, 1-25.

¹⁰⁵ Swigart, L. (2020) 'Now You See It, Now You Don't: Culture at the International Criminal Court', in *Interactions of Law and Culture at the International Criminal Court*. J. Fraser and B.N. McGonigle Leyh. Edward Elga, pp. 14-36.

and translating official court documents and proceedings, creating grounds for appeals.¹⁰⁶ Another way in which defence counsels may use (or abuse) culture is by presenting a *cultural defence*, as was attempted in the Ongwen case. Yet, according to Higgins, defences are the most understudied aspect of international criminal law, with cultural defences getting only a sliver of attention in the relevant literature.¹⁰⁷

Given the high stakes in international criminal trials, it is crucial that *adjudicators* make well-informed, just decisions. If their decisions are influenced by erroneous expectations based on their own cultural background or the *legal culture* to which they are accustomed, misinformed by oversimplifications presented by *expert witnesses*, or coloured by inaccurate *mental health* diagnoses, this jeopardises the pursuit of justice. When viewed through a Westernised cultural lens, some witness testimony may be dismissed as unreliable or implausible, even though it may in fact reflect accurate information.¹⁰⁸ It is crucial that adjudicators and other parties in international criminal law settings are trained to improve their cultural awareness and knowledge, so that they can obtain more informative evidence from witnesses and make better-informed decisions.

¹⁰⁶ Elias-Bursac, *supra* note.

¹⁰⁷ Higgins, *supra* note.

¹⁰⁸ *ibid.*

Testifying Across Cultures: Trials and Tribulations

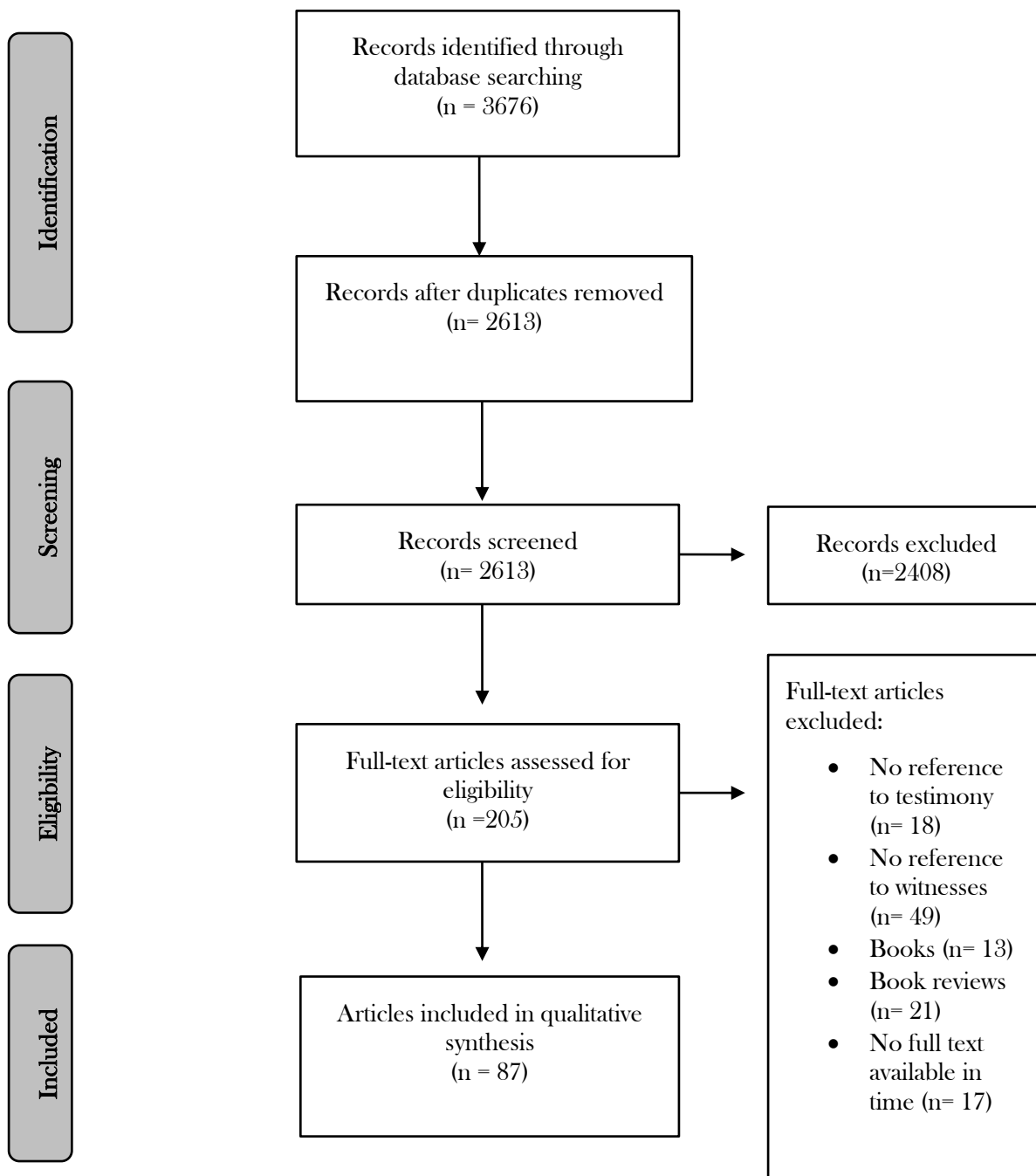


Figure 1 - Flowchart of the search and selection procedure of studies.

Testifying Across Cultures: Trials and Tribulations

Appendix I

	Reference	Publication type	Methodology	Legal Setting	Themes Covered
1	Ade, 2016	Journal article	Qualitative	Commercial Tribunal	Legal culture
2	Aina, 2018	Book chapter	Qualitative	Domestic Court	Language as culture
3	Almond, 2021	Journal article	Qualitative	Domestic Court	Adjudicators' understanding of culture
4	Almqvist, 2006	Journal article	Qualitative	International Tribunals	Adjudicators' understanding of culture; Language as culture
5	Anders, 2014	Journal article	Qualitative	SCSL	Adjudicators' understanding of culture
6	Aydin, 2013	Journal article	Quantitative	Laboratory Setting	Language as culture
7	Baranowski, 2020	Journal article	Qualitative	Asylum Interviews	Memory and culture; Mental health and culture
8	Bednarek, 2018	Monograph	Qualitative	Domestic Court	Language as culture; Legal culture
9	Beim, 2007	Journal article	Qualitative	Extra-Legal Institutions	Memory and culture
10	Benzaquen, 2012	Journal article	Qualitative	ECCC And Film	Language as culture; Memory and culture
11	Bert-Seligson, 1987	Journal article	Mixed methods	Domestic Court	Language as culture
12	Bert-Seligson, 1988	Journal article	Quantitative	Domestic Court	Language as culture; The role of the interpreters
13	Bhatia, 2011	Journal article	Qualitative	International Commercial Arbitration	Legal culture
14	Bishop, 2021	Journal article	Qualitative	Asylum Interviews	Memory and culture; Mental health and culture
15	Bonacker, 2013	Journal article	Qualitative	International Courts	Legal culture
16	Bonnici, 2007	Journal article	Qualitative	SCSL	Language as culture
17	Bresnahan, 1989	Journal article	Qualitative	Domestic Court	Cultural misunderstandings

18	Bresnahan, 1991	Journal article	Qualitative	Domestic Court	Language as culture
19	Briggs, 2000	Journal article	Qualitative	Domestic Court	The cultural defense
20	Bryan, 2013	Journal article	Qualitative	Domestic Court	Language as culture
21	Byrne, 2007	Journal article	Qualitative	International Tribunals	Adjudicators' understanding of culture; Language as culture;
22	Camaeho, 2018	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture
23	Campbell, H. 2017	Journal article	Qualitative	Asylum Courts and Criminal Courts	The cultural defense
24	Campbell, J.R. 2020	Journal article	Qualitative	Asylum Courts	Adjudicators' understanding of culture; Experts as gatekeepers to culture
25	Cantone, 2019	Journal article	Quantitative	Domestic Court	Language as culture
26	Caprioli, 2017	Journal article	Qualitative	Domestic Court	Legal culture
27	Cheah, 2018	Journal article	Qualitative	International Tribunals	Adjudicators' understanding of culture
28	Cheung, 2018	Journal article	Quantitative	Domestic Court	Language as culture
29	Chhim, 2014	Journal article	Quantitative	International Tribunals	Memory and culture; Mental health and culture
30	Crabbe, 2018	Journal article	Qualitative	Domestic Court	The cultural defense
31	Craig, 2017	Journal article	Qualitative	Asylum Interviews	Language as culture;
32	Cryer, 2006	Journal article	Qualitative	International Tribunals	Adjudicators' understanding of culture; The role of the interpreters
33	Darley, 2020	Journal article	Qualitative	Domestic Court	Adjudicators' understanding of culture
34	Dasgupta, 2007	Book chapter	Qualitative	Domestic Court	Experts as gatekeepers to culture
35	De Bruine, 2018	Journal article	Quantitative	Laboratory Setting	Cognitive processes and culture
36	Durst, 2000	Journal article	Qualitative	Asylum Courts	Adjudicators' understanding of culture

37	Eades, 1996	Journal article	Qualitative	Domestic Court	Language as culture
38	Eades, 2000	Journal article	Qualitative	Domestic Court	Language as culture
39	Eades, 2012	Journal article	Qualitative	Domestic Court	Language as culture
40	Eades, 2012	Journal article	Qualitative	Domestic Court	Language as culture
41	Einhorn, 2014	Book chapter	Qualitative	Asylum Courts	Language as culture; The role of interpreters
42	Fennig, 2021	Journal article	Qualitative	Extra-Legal Institutions	Language as culture; The role of interpreters;
43	Fletcher, 2021	Journal article	Qualitative	International Tribunals	Language as culture; The role of interpreters
44	Fontaine, 1990	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture, The cultural defense;
45	Fontein, 2014	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture, The cultural defense
46	Garcia, 2019	Journal article	Qualitative	Domestic Court	Language as culture
47	Gill, 2020	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture; The cultural defense
48	Good, 2008	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture; The cultural defense; Legal culture
49	Graham, 2014	Journal article	Quantitative	Asylum Interviews	Memory and culture; Mental health and culture
50	Hayes, 2013	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture; The cultural defense; Memory and culture
51	Hoehne, 2016	Journal article	Qualitative	Asylum Interviews	Experts as gatekeepers to culture; Language as culture
52	Mandal, 2013	Journal article	Qualitative	Domestic Court	Adjudicators' understanding of culture
53	Meffert, 2010	Journal article	Qualitative	Asylum Courts	Experts as gatekeepers to culture; Language as culture; Mental health and culture
54	Kagee, 2018	Journal article	Qualitative	Truth And Reconciliation Commission	Mental health and culture;

55	Kahaner, 2009	Journal article	Qualitative	Domestic Court	Language as culture; The role of interpreters
56	Kirby, 2017	Journal article	Mixed methods	Domestic Court	Legal culture
57	Kizito, 2017	Journal article	Qualitative	Domestic Court	Language as culture; Legal culture
58	Leaf, 2018	Book chapter	Qualitative	Asylum Courts	Experts as gatekeepers to culture; The cultural defense;
59	Lee, 2009	Journal article	Qualitative	Domestic Court	Language as culture; The role of interpreters
60	Lee, 2009	Journal article	Qualitative	Domestic Court	Language as culture; The role of interpreters
61	MacFarlane & Stratton, 2016	Journal article	Qualitative	Domestic Court	Language as culture
62	Maguigan, 1995	Journal article	Qualitative	Domestic Court	The cultural defense
63	Maldonado, 2017	Journal article	Qualitative	Domestic Court	Adjudicators' understanding of culture
64	Malkki, 2007	Journal article	Qualitative	Asylum Interviews	Mental health and culture
65	Manley-Casimir, 2012	Journal article	Qualitative	Domestic Court	Legal culture
66	Martinez, 2020	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture; Language as culture
67	McDermott, 2017	Journal article	Qualitative	International Courts	Adjudicators' understanding of culture
68	Mendoza, 2000	Journal article	Quantitative	Domestic Court	Language as culture; The role of interpreters
69	Napoleon, 2005	Journal article	Qualitative	Domestic Court	Adjudicators' understanding of culture
70	Niezen, 2003	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture
71	Nowak-Korcz, 2021	Journal article	Qualitative	International Tribunals	Language as culture; The role of interpreters
72	O'Brien, 2009	Journal article	Qualitative	International Tribunals	Language as culture

73	Perlin, 2009	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture;
74	Powell, 2008	Journal article	Qualitative	Asylum Courts	Experts as gatekeepers to culture
75	Rishikof, 2001	Manuscript	Qualitative	Domestic Court	Adjudicators' understanding of culture
76	Roeder, 2015	Journal article	Qualitative	Domestic Court	Legal culture; Language as culture
77	Rosenberg, 2019	Journal article	Qualitative	Asylum Interviews	Experts as gatekeepers to culture
78	Rosinski, 2021	Journal article	Qualitative	Asylum Courts	Experts as gatekeepers to culture
79	Sarangi, 2021	Journal article	Qualitative	Asylum Courts	Mental health as culture
80	Sarat, 1993	Journal article	Qualitative	Domestic Court	Language as culture; Legal culture;
81	Smith, 2012	Journal article	Qualitative	Domestic Court	Legal culture
82	Stepakoff, 2017	Journal article	Qualitative	International Tribunals	Mental health and culture; Vulnerability as culturally bound
83	Svongoro, 2015	Journal article	Qualitative	Domestic Court	Language as culture; The role of interpreters; Legal culture
84	Torry, 2000	Journal article	Qualitative	Domestic Court	The cultural defense
85	Weiner, 2002	Journal article	Qualitative	Royal Commission	Experts as gatekeepers to culture
86	Winkelman, 1996	Journal article	Qualitative	Domestic Court	Experts as gatekeepers to culture; The cultural defense
87	Zitawi, 2014	Journal article	Qualitative	International Arbitration	Language as culture; The role of interpreters