

**INTERPRETING NARRATIVES OF NO RETURN:
CANADIAN ASYLUM CLAIM DECISIONS AND THE EMERGENCE OF THE “ANTI-
REFUGEE”**

by

Diana Nasr Demian

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Abstract

This thesis argues that, firstly, in reading asylum claim decisions, the search for the claimant's "narrative" must end and a search for its "interpretation" by adjudicators must begin. In endorsing such an "interpretive turn," I seek to understand how conceptual and discursive formulations of "the refugee" and "the asylum seeker" — two figures currently imagined in contradistinction to one another through a "myth of difference" — colour how the latter is encountered and subsequently "read" by adjudicators in the hearing room. Accordingly, I engage in a close-reading of asylum claims decisions, focusing on a manifestation of the "asylum seeker" seldom invoked: a woman, fleeing a situation in the Global South not readily identified as being "persecutory," and who frustrates our attempts at locating the 21st century's "authentic" refugee. This latter figure is imagined to be a helpless, immobile woman, often with a child or two in tow, who suffers "legitimate" horrors and untold traumas. My reading aims to explore how the female asylum seeker that I briefly profile above tends to be read, to her detriment, against this formidable invocation of the "authentic" refugee in the hearing room.

Preface

This thesis is original, unpublished, independent work by the author, D.N. Demian.

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*For my family—
DR. N, M&M, D²
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to you, the utmost thanks.*

Chapter 1: Narratives of No Return and the Interpretive Turn

1.1 Introduction

This thesis began as an attempt to read the “testimony” of refugees who encounter the Canadian refugee determination process as asylum seekers, or “claimants.” After scouring publicly available decisions that have been redacted and released in order to locate the refugee’s “voice,” I learned that my attempt to do so was fruitless. To be sure, at times traces of such a voice could indeed be found: a member of the Refugee Appeal Division (RAD), for instance, notes that in using words like “I don’t know” and “maybe,” a claimant was not — as the Refugee Protection Division (RPD) had concluded — being elusive and obscure, but quite literally did not know how her husband went about changing her identity (2015 CanLII 58751 para. [23]). In another instance, the RPD indicates (to its credit) that there may have been translation barriers with the claimant. The woman goes to Uganda in search of her husband after she hears “[translation] echoes” that he is there (2014 CanLII 90123 para. [27]). When she arrives, she begins “[translation] wandering around the region,” travelling from “[translation] place to place” to find him (para. [28]). In all three instances, the RPD parenthetically indicates that what is being quoted is a translation — and a literal one at that, as evidenced by the unorthodox use of “echoes” for what seems to mean, in this context, “hearsay.”

But there is no way, short of being in the hearing room, of completely knowing how the story is told: in what idiom or language, whether with or without an interpreter, if in a series of staccato answers or in traditional narrative form. Indeed, the “refugee” of the hearing room — the biological, demographic, historically-situated individual who is the subject of its proceedings — is a non-existent entity in these texts. This is not because sensitive details about her are

redacted and replaced with an appropriate number of “X”s, but because the asylum claim decision replaces her with a *construct* born of both legal and extralegal categories. This is not to say that the claimant’s story, as it is recorded in the asylum claim decision, has no value. The story that the adjudicator re-tells is indeed the single most important piece of “evidence.” But it is important to acknowledge that much more than a “credible narrative” is relevant here.

Matthew Zagor, a former legal representative for refugees in Australia, has noted that both the story told and “the manner of its reception” matter (1). The refugee’s “narrative identity,” Zagor writes, is “created, received and circulated in the process of refugee status determination by [...] the refugee, their legal advocate and the administrative decision-maker” (1). The “refugee” of the asylum claim decision thus emerges from a complex interaction between different institutional forces. The story, significantly, is a *re*-telling. Emma Cunliffe’s warning that we must “distinguish the subjectivity of those whose lives become engaged with the legal process from legal mechanisms and legally constructed knowledges” is here apt (78) — and serves as a cautionary note for my own endeavour at reading these texts.

This is a thesis in two parts. The first suggests that in reading the asylum claim decision, the search for “narrative” must end and a turn to “interpretation” must begin. Courts write, and they presumably do so for an audience, but as Sanford Levinson asks, “[A]re these actual audiences or only intended, hoped-for audiences? Who actually reads judicial opinions?” (200). Levinson frames these questions around the writing of Supreme Court judicial opinions. Being a more “minor” legal text (in the sense that its adjudicative powers are not so far-reaching), the asylum claim decision thus invites a more elementary question: not “who,” but “why.” Why read asylum claim decisions at all? These are generic, poorly written, jargon-laden texts — certainly not “literary” in any aesthetic sense. Moreover, if one is in search of a faithful rendering of the

refugee's testimony before the RPD, it will not be found in the asylum claim decision. If one is looking for an accurate, transcribed rendering of the refugee hearing, here too the asylum claim decision falls short. But if one were looking for a paper trail of the RPD's reading and interpretive practices — and how these help or harm the claimant — then these are texts certainly worth studying.

In endorsing such an “interpretive turn,” I relate how the Canadian system's reliance on a Eurocentric construct like the “Convention Refugee” has historically served to delegitimize the Third World Refugee, who was deliberately excluded from its formulation in 1951. Taking off from B.S. Chimni's suggestion that a “myth of difference” has since then painted the Third World Refugee as being far different from the “authentic” white, male, and anti-communist refugee of the Cold War years (351), I suggest that a new “myth of difference” has now emerged. With that, I discuss some conceptual and discursive formulations of “the refugee” and “the asylum seeker” — two figures currently imagined in contradistinction to one another — that I argue colour how the latter is encountered and subsequently “read” by adjudicators in the hearing room.

Accordingly, the second part of this thesis engages in a close-reading of asylum claims decisions, focusing on a manifestation of the “asylum seeker” seldom invoked: a woman, fleeing a situation in the Global South not readily identified as being “persecutory,” and who frustrates our attempts at locating the 21st century's “authentic” refugee. This latter figure is imagined to be a helpless, immobile (because camp-bound) woman, often with a child or two (or three) in tow, who suffers “legitimate” horrors and untold traumas. My reading aims to explore how the female asylum seeker that I briefly profile above tends to be read against this formidable invocation of

the “authentic” refugee. In particular, I think of how the claimant’s “will-ful” and “mobile” body tends to be problematized in the hearing room.

1.2 Narratives of No Return

Since at least the 1970s, the study of legal texts has in part been the province of the “law and literature” subdiscipline pioneered by those legal scholars and literary critics who acknowledge, if not privilege, the centrality of narrative and rhetoric in the law. Within this amorphous movement, a number of scholars have argued for the application of literary interpretive methodologies to legal texts — specifically those in the “hermeneutic” strand (Baron 1064). Jane B. Baron has summed up the reasoning behind this approach thus: “To the extent that law is embodied in texts — such as cases, statutes, contracts, orders — those texts must be read and interpreted. [...] [I]t seems that theories and methods developed in the context of literary texts could be applied to legal texts as well” (1065). Others have devoted their efforts to developing what Peter Brooks, in his essay “Narrative Transactions,” calls a “narratology of the law” (1). They note the importance of “attending to the stories told within law by clients, by lawyers, by judges, and by doctrine itself” in order to evaluate their “persuasive impact, their evidentiary value, and their epistemological implications” (Baron 1066). These two methodological strands, however, are not mutually exclusive: stories told within legal texts are often themselves the product of interpretation, if not an instance of it. As Peter Brooks has written elsewhere, “What matters most about stories at the law is how they are evaluated and implemented by listeners: police, judges, juries” (“Narrativity of the Law” 3).

Eligible asylum seekers in Canada are subject to a hearing before the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), after which a board member

produces a write-up of his or her “reasons and decision.” In working through its reasons for a particular decision about the status of a claimant, the RPD adjudicator traditionally retells the testimony, often under a section of the document titled “Allegations.” Below is the beginning of one such case:

On XXXX XXXX, 2012, the claimant and her husband visited the site of their house under construction in XXXX. Two armed men wearing police uniforms addressed them, saying they had come to see the plot of land on which they were building their home and that they had received a complaint about the plot from a senior army official. The plot of land had allegedly belonged to the father of the soldier in question before he fled during the crisis of 1972. The claimant said that she and her husband owned the land, that they were in possession of the title to the property, and that no one could lay claim to their plot. The person in question could only go to the authorities who had assigned the plot or to the courts. The individuals then told the claimant and her husband that the only solution was to stop construction and not to return there. They also demanded that they give them the title to the property, but the claimant refused. (2014 CanLII 90124 [5])

Usually, a chronological and coherent version of the claimant’s persecution history, such as that indicated above, is put together by the adjudicator and told in traditional narrative form (with a beginning, middle, and end). The story begins with a record of the claimant’s plight — how it began, progressed, and reached a breaking point. It ends, for the adjudicator at least, with a record of how the claimant fled the situation and entered Canada. In this way, a conclusive version of the story is eventually produced for the record. Read collectively, asylum claim decisions may determine those stories that “work” and those that do not. Moreover, they tell us

something about how refugee narratives are “listened to, received, reacted to, how they ask to be acted upon and how they in fact become operative” (Brooks, “Narrativity of the Law” 3).

There are, however, limitations to “narratological” and “rhetorical” approaches to reading such documents. In particular, although the asylum claim decision can give us access to the claimant’s alleged “testimony,” we cannot engage with these stories as their tellers have told them or want to tell them. Indeed, one of the drawbacks of thinking narratologically about stories in legal texts is that there is an assumption, here exemplified by Peter Brooks, that “[n]arrative is not wholly defined by the plane of its expression: stories can be translated, they can be transposed to other media, they can be summarized, they can be retold “in other words” and yet still be recognizably “the same story”” (“Narrativity of the law”¹). In some ways, this describes the status of the claimant’s narrative as it is found in the asylum claim decision: the essential “plot” remains there, although in the process of being re-told it is necessarily distilled and often re-ordered. James Boyd White also appears to be hopeful that the legal story can end, as it began, in “the language of its actors” (“Law as Rhetoric” 692) — finding in the legal process an almost poetic closure that those more attentive to the “violence” of legal interpretation (Cover 203) would likely object to. Accordingly, I would contest the assumption that “the same story” can always be located in its various iterations, or that it can somehow be found again when all is said and done. This is especially important to note in asylum claims decisions, where it is nearly impossible to locate an “urtext,” or even a transcript, from which subsequent versions are produced.

To begin with, the claimant’s “testimony” is culled from various sources: firstly, any declarations made to a Canada Border Services Agency (CBSA) officer at a Port of Entry (POE) are ultimately entered into evidence during a hearing; secondly, there is the Basis of Claim

(BOC) Form, where the claimant and/or a legal representative relates the narrative in writing; and finally, there is the testimony given at the oral hearing, which must be consistent with the former two. Indeed, being inconsistent between these spaces of disclosure is a sure-fire way of injuring one's credibility. As one RPD panel explains,

It is trite law that statements to immigration authorities at the POE may be considered by the Board in order to evaluate a claimant's credibility and that *a person's first story is usually the most genuine, and therefore the one to be believed*. As well, contradictions between the Applicant's oral and written statements justify a negative finding of credibility. [...] A hearing is an opportunity for an applicant to complete his evidence and not to introduce new and important facts to his story. (2012 CanLII 100351 [40]-[43], emphasis in original)

To further complicate matters, claimants often engage in "trialogues" mediated by an "omnipresent interpreter" (Good 79) when communicating with CBSA officers and adjudicators. Counsel may then re-translate the claimant's narrative into a "rule-oriented mode" (Good 79) — a legal idiom — that makes sense in the hearing room. The adjudicator handing down the decision will then produce the official version of the refugee's narrative for the record. However, if the claimant is rejected and succeeds in launching an appeal, the story may, in the words of Catharine Mackinnon, "start over to put back in what has been left out" (233). Thus, in the process of being "translated," "transposed," or "summarized," the resultant, often conclusive text inevitably deviates from its source(s). Where (or rather what), then, is the real story? There is no direct way of knowing.

1.3 The Interpretive Turn

What asylum claim decisions *can* show us is how the claimant's narrative is heard and interpreted. After all, these are documents attesting to what adjudicators have opted to record. A given adjudicator's "reasons and decision" is ultimately a story not about the claimant, but about the decision-maker's interpretive process. To focus on interpretation (rather than "narrative") makes better use of a document where the claimant's testimony serves, in part, an ancillary function. A focus on interpretation is also more effective in demonstrating how power operates in institutional contexts, and allows us to move beyond the explicit contents of the "story" in order to look at how broader formulations of and assumptions about the "asylum seeker" become operative in the hearing room.

Engaging with interpretation in the context of the refugee hearing also bring us in touch with the potential violence of this act. Legal interpretation, Robert Cover reminds us in his essay "Violence and the Word," is intimately related to the "practice of political violence" (210). Specifically, Cover uses incarceration in the aftermath of a criminal trial as an example of how "violence" — "pain and death" (203) — can follow an interpretive act. But what about *deportation* in the aftermath of a refugee hearing? What happens when an adjudicator determines that a claimant is not a "Convention Refugee" or a "person in need of protection," and subsequently has her sent away, possibly to her death? "The "interpretations" or "conversations" that are preconditions for violent incarceration are themselves implements of violence," Cover writes (211). "The experience of the prisoner [the refugee] is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated" (Cover 211-212).

Using a narratological approach, one could be tempted — as Anthea Vogl is in her reading of an Australian asylum claim decision — to see that “there is very little that is ‘by design’ in the refugee-determination process” (65). Instead, Vogl writes,

a series of events and circumstances arise by accident. There is the accident of the decision-maker before whom the applicant appears, the accident of that decision-maker’s unique perception of reality, and the accident of the decision-maker’s interpretation of the applicant’s words and actions. In regards to the narrative qualities of the applicant’s evidence, there is the accident of the story the decision-maker wants to hear, and the arbitrary points at which a decision-maker believes the story should begin and where it should end. (65)

What Vogl does is endorse a “subjectivist” notion of interpretation: the decision-maker implements his “unique perception of reality” through which he interprets the applicant’s narrative in a way that cannot be predicted. The kind of story that he wants to hear — where it begins and where it should end — is likewise also an “accident.” But I am not sure that these claims can be sustained. To be fair to Vogl, however, her central argument is that adjudicators want to hear “good” stories that conform to “narrative conventions” and “stock stories about how and why things occur,” which is a fair claim to make (83). Apart from that, however, a lot of what goes on in the refugee-determination process *is* “by design.” Specifically, this form of legal interpretation (like others) is institutionally constrained, just as the violence it occasions is institutionally sanctioned.

To begin with, is the decision-maker before whom the applicant appears really an “accident”? Yes, personal traits such as gender, political party, time served in the IRB, legal training, and country of origin likely come into play (Rehaag 353). But panel members are also

selectively assigned cases, with certain members specializing in certain regions (Rehaag 337): this is not an “accident.” Are certain adjudicators with certain traits assigned certain cases? Most likely. If so, can these assignments be strategic decisions made by the powers that be? Almost certainly. We must also take into account the “unpublished sub-texts” (Cheney 24) that only adjudicators and those inducted into the “Immigration Bureaucracy” (Fuglerud 448) are privy to: “appeal cases, unpublished instructions to immigration officers, the very training of the executives whose lives and very identities are subjected to scrutiny, the scrutiny of the powerful over the powerless, the voiced over the voiceless” (Cheney 24-25).

As Stanley Fish has often pointed out, the legal text — in this case the claimant’s “testimony” — is produced and read within a certain institutional context, and so there is no such thing as an “unconstrained” interpretation of it (“Fish v. Fiss,” 253) in the subjectivist sense of an interpreter being “bound only by their personal preferences and desires” (*Doing What Comes Naturally*, 91). At the same time, the text being interpreted is not self-evident, and neither are the rules governing its interpretation. However, the reading of the text is constrained by the “assumptions and categories” that are made available to and internalized by the interpreter “in the course of [his or her] training” (257). Ultimately, Fish writes, the interpreter becomes “not only possessed of but possessed by [...] a tacit knowledge that tells him not so much what to do, but already has him doing it as a condition of perception and even of thought” (257). Far from being neutral, these “rules” that govern the interpreter’s supposedly objective reading always embody certain moral, political, and/or religious visions (“Fish v. Fiss,” 260). We could thus see the “violence” occasioned by legal interpretation as likewise being a reflection these “visions.” Of course, one could just as easily — indeed must — add to Fish’s list “colonial” and/or “racial.”

It is perhaps with such an understanding that Deborah Cheney, in her 1993 reading of immigration cases, writes that the law is not “an entity ‘out there,’ pristine and inviolate in the face of such considerations as racial and sexual stereotypes or categorizations,” but is rather “informed by and informing these very issues” (23). Sherene Razack, for her part, declares the refugee hearing to be “a profoundly racialized event,” with “race being central to how decisions are made”: “Border control is [...] an encounter between the powerful and the powerless, and the powerful are always from the First World and mostly white, while the powerless are from the Third World and nearly always racialized or ethnicized” (*Looking*, 88). It is therefore important to see how the current refugee regime is racialized, and has been since its inception. In the next chapter, I explore the Eurocentric nature of the “Convention Refugee,” and attempt to trace the genealogy through which today’s refugee came to be.

Chapter 2: The Normal and the New Normal

2.1 The Convention(al) Refugee

The UNHCR's 1951 Refugee Convention Relating to the Status of Refugees ("the Convention") aimed to assert the right of a person who

as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (14)

This definition of a refugee is currently still operative; Canada's Immigration and Refugee Protection Act (IRPA) retains much of this wording. It is not just incidental that the refugee constructed by the Convention is gendered male. A glaring omission in this definition is that it (still) excludes gender as a ground for persecution, despite the West's increasing acceptance, since the 1990s, of gender-based claims. In fact, Canada leads Western nations in this respect with an "innovative jurisprudence" meant to incorporate gender-based claims into the refugee definition (Hamlin 121). The Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act ("the Guidelines") was introduced in 1993 as the Canadian state's official recognition of gender persecution.

While the Convention was introduced in 1951, Canada did not ratify it (and the 1967 Protocol, discussed below) until 1969. Canada's formal acceptance of the Convention was immediately preceded by a period of unusual generosity towards refugees: those escaping the

Hungarian Uprising in the years 1956-57; 325 tubercular refugees and their families in 1959; and foreign-army deserters, including Americans fleeing the Vietnam War (CCR, “Brief History of Canada’s Responses to Refugees”). In the 1970s, Canada turned its attention to Tibetan refugees, Ugandan Asians, and Chilean leftists (Hamlin 46); these were among the first non-European refugees to be resettled (“Brief History of Canada’s Responses to Refugees”). The Immigration Act of 1976 officially incorporated Convention standards into Canadian law, and even went above and beyond: those individuals who did not meet Convention standards could be designated “humanitarian” refugees if found to be in need of protection (Hamlin 46). Thus the 1970s constituted, in some ways, a “golden age” for refugee policy in Canada.

However, it is important to note that this generosity towards refugees was calculated: it was not only in the interest of fulfilling its international obligations that Canada was opening its door to refugees, but also in order to meet its economic needs (Hamlin 45). Indeed, Canada’s commitment to providing asylum for refugees in the aftermath of the Convention risks effacing a more sinister history of exclusion: after World War I, Canada would not accept any stateless refugees on the ground that they could not be deported; between the two World Wars, only 1,300 Armenians were admitted, although here was a people being systematically massacred by the Ottoman government; and, in 1923, Canada barred the admittance of “Asiatic” immigrants (CCR, “Brief History of Canada’s Response to Refugees”). It should come as no surprise, then, that between the 1930s and 40s, European Jews fleeing Nazi persecution were actively barred from entering the country, with fewer than 5,000 being admitted during Hitler’s twelve year reign (“Brief History of Canada’s Response to Refugees”).

It is worth noting that the language used in Canada to talk about Jewish refugees between the 1930s and 40s — during which the Nazis were working steadily towards the ‘final solution’

— bears a remarkable similarity to the way Third World refugees are spoken of today. The Jews were, Abella and Troper write, “undesirable elements”; they had to be controlled because of their inherent “ability to move [...] once an open door [was] obtained” (Chp. 5). “Jews, many concluded, “did not fit in,” their political sensitivities were suspect, their loyalty forever in doubt, their religion based on the continued rejection of Christ, their sole preoccupation making and hoarding money” (Abella and Troper, Chp. 9). Moreover, the Jewish “problem” was a problem of numbers: as the Director of Immigration said at the time, a “ratio of Jews to non-Jews must be set, otherwise the former will, as in the past, succeed in filling a large part of the quota set” (Chp. 5). This perception of the Jews’s unassimilable nature due to their ideological murkiness, apparent fecundity, and economic hostility was shared and sanctioned by the government. In the end, the undesirability of the Jews meant that much of the world, including Canada, came to be complicit in Hitler’s “final solution” to the “problem” that they posed.

The Convention was thus in some ways a belated response to a series of refugee crises that proved to be far from temporary in nature. In the end, however, it was also of an undeniably Eurocentric (and thus exclusionary) nature. Article 1 of the Convention states that

“before 1 January 1951” [...] shall be understood to mean either:

(a) “events occurring in Europe before 1 January 1951”; or

(b) “events occurring in Europe or elsewhere before 1 January 1951”, and each Contracting State shall make a declaration at the time of signature [...] specifying which of these meanings it applies for the purpose of its obligations under this Convention. (15)

The stipulation that contracting states had to indicate which of the two meanings it was signatory to meant that while the “elsewhere” included as an afterthought in Section B could be ignored, Europe itself could not. The majority of relief efforts in this era thus targeted displaced

Europeans, who were framed as “legitimate refugees” in need of legal protection (Sharma 82). In particular, “events occurring in Europe before 1 January 1951” clearly referenced regimes considered “fascist” and “undemocratic” (Goodwin-Gill 17), and thus, as Helen Johnson notes, “hostile to Western Europe” (1019).

No parallel legitimacy was extended to non-Europeans — particularly those displaced during the 1947 Indian Partition (Sharma 82). Moreover, the “persecution” provision was a way of making sure that only certain people claiming to be “political victims” would be eligible. That is to say that while those living under colonial rule could claim to be “political victims,” they could not as easily make the claim that they had a well-founded fear of being *individually* persecuted (Shemak 6). Algeria, in particular, posed an ideological dilemma for the Global North: “Were those who crossed into Tunisia refugees with a well-founded fear of persecution, so implying a judgment on the conduct of both parties to the conflict, including France?” Goodwin-Gill asks. “Or were they people in flight from a general situation of violence [...]?” (20). To have identified Algerians as refugees was to have identified France as a persecutor, and no Northern state — not even the UK — was willing to do that. The stipulation that the Convention only apply to events occurring before 1951 thus meant that persons displaced as a result of decolonization in the 1950s and 60s were, by definition, excluded.

In addition to the Algerian War, the Chinese Communist Revolution and conflicts in Latin America (Johnson 1021-22) were also conveniently ignored by the Convention’s temporal and spatial preoccupation with “events occurring in Europe before 1 January 1951.” The exclusionary origins of the Convention are therefore undeniable: the Third World Refugee *did* exist in 1951, but — being an object of unconcern to the West — was written off from the history of asylum that it offered. In 1967, in a move likely intended to preempt the adoption of a

separate regional convention in Africa (Chimni 351), the UNHCR introduced the Protocol Relating to the Status of Refugees (“the Protocol”), which finally addressed the Global South’s refugee crises.

The Protocol facilitated an acknowledgement of the Third World Refugee after it became impossible to ignore the massive displacement caused by decolonization. Its purposes, however, were not so much humanitarian as they were tactical. In some ways, the Protocol is a product of the Cold War’s “strategic vision, which dictated that human bodies possessed ideological and political value” (Chimni 355-356). The international refugee law regime was essential to Cold War politics and so was its “humanitarian language” (Chimni 351); accordingly, it became essential to etch this language onto the Third World Refugee’s body. This is because the adoption of a separate convention in Africa, B.S. Chimni writes, “would have generated internal contradictions affecting the stability of the global regime too crucial to high politics to rock” (351).

It was the post-Cold War era that produced both the kind of refugee we recognize today and the kind that we do not. Third World bodies (having served their strategic function as objects of humanitarianism during the Cold War) were no longer needed. Accordingly, the Global North sought to destabilize the prevailing refugee regime, and a “myth of difference” was “invoked to justify the institutionalization of the non-entrée regime” (Chimni 357). Through the myth of difference, Chimni writes,

the nature and character of the refugee flows in the Third World were represented as being radically different from refugee flows in Europe between 1920 and 1960. Thereby, an image of a “normal” refugee was constructed — white, male, and anti-communist — which clashed sharply with individuals fleeing the Third World. (351)

Following Chimni, Johnson describes the Cold War refugee as “a white, male individual who may or may not have been accompanied by his nuclear family; [this] refugee had a past, a story and a voice, all of which were used to validate the West in its ideological war” (1020). This figure was, moreover, both political and politicized: by fleeing the USSR, he was a political dissident, “voting with his feet” (Johnson 1020); by fleeing to the West, he was a soldier in its ideological war against communism and the Soviet Union. The early Convention era was to be remembered as that of the “legitimate refugee,” who was soon to be replaced by an indistinguishable mass of nonwhite bodies from the Global South — people whose motives were unclear and who were, moreover, not facing individual persecution, but escaping a chaos of their own making. It is this mass of humanity that we recognize today as the refugee.

One of the central contentions of this thesis is that the myth of difference identified above has evolved, and that the Third World Refugee has now been accepted as the “new normal.” This is not to say that the undesirability of the Third World body has changed. It has not. But concerns about the unsolicited arrival of migrants from the Global South have made it so that today’s “legitimate” refugee — female, single and with child, camp-bound and helpless — differs radically from the “illegitimate” one — male, single and unattached, mobile and suspect. It is not a coincidence that legitimacy has been conferred upon the former. Confined to the Global South and incapable of travelling great distances for asylum, this distant object of humanitarian concern is also a convenient one. That is, she is worthy precisely because of her perceived immobility. By constructing the worthy refugee as necessarily immobile, the West can proceed to legitimize (and legislate) its containment strategies against the domestic asylum seeker, who is not.

And it is the asylum seeker — the illegitimate or “bogus” refugee — that is the subject of this thesis. The asylum claim decisions that I will be reading pertain to those who arrive

uninvited at the Canadian border in order to seek protection from the State. As such, it is necessary to explore what I see as the taxonomic integrity — and contradistinction — of “the refugee” and “the asylum seeker.” In particular, it is my contention that the construction of the asylum seeker as a kind of “anti-refugee” in public and official discourse influences how this figure is read and interpreted by adjudicators in the hearing room.

2.2 The Anti-Refugee

Officially, the refugee and the asylum seeker are distinguished on a technicality: before one legally becomes a “refugee,” s/he must seek asylum. Here is the UNHCR describing the difference between the two in one of its online publications:

The term asylum-seeker is often confused with the term refugee. An asylum-seeker is someone who says he or she is a refugee and seeks international protection from persecution or serious harm in their home country. Every refugee is initially an asylum-seeker, but not every asylum-seeker will ultimately be recognized as a refugee. (“Asylum-seekers”)

Notice how the asylum seeker “declares” him or herself to be a refugee, while the refugee is, conversely, “recognized” as such. The asylum seeker’s declaration necessarily precedes his recognition as a refugee: one claims asylum and is subsequently granted or denied protection based on the “merits” of his or her case. But it is also the case that a recognition of the refugee validates, and thus in a sense precedes, the asylum seeker’s declaration as one.

Indeed, the refugee is such a culturally salient figure that the condition of being one has, beyond the technical distinction outlined above, acquired some unacknowledged features as well. For instance, the Canadian government has been for years promulgating, in the words of Petra

Diop, a “binary between the ‘good’ refugees who remain in refugee camps until they are brought to Canada as government-assisted refugees (GARs), and the bad or ‘bogus’ refugees who autonomously arrive at Canada’s shores, seeking asylum of their own volition” (68). In this formulation, the asylum seeker is vilified for brazenly displaying an “autonomy” that brings him or her to the Canadian border. This refugee/asylum seeker distinction thus not only differentiates between each figure’s capacity for agency, but also between their physical locations and movements.

Moreover, as Liisa Malkki notes, the refugee is capable of being “witnessed” as an object: “tragic,” “sometimes repulsive,” someone “who could be deciphered and healed only by professionals, and who [is] opaque even (or perhaps especially) to himself or herself” (384). More importantly, this is a *voiceless* figure whose story is not told, but made visible by the wounds on his or her body. Indeed, to be a refugee — especially a female refugee — means that one must be “consigned to visibility” (Chow qtd. in Rajaram 252), for “the refugee is constituted as a figure who is thought to ‘speak’ to us in a particular way: wordlessly” (Malkki 390).

If the refugee is this “silent emissary” of Malkki’s invocation (390) — dehistoricized and depoliticized (385) within the camp where he or she is witnessed — then the asylum seeker is quite the opposite: not silent, because s/he must speak and bear witness for him or herself; not dehistoricized or depoliticized, because the story s/he tells is often one of history and politics; and not spatially confined, because the arrival of his or her body indicates its mobility. And if the enthusiasm with which asylum seekers are declared to be “bogus refugees” is any indication, then the asylum seeker seems to be something of an anti-refugee.

I think of the asylum seeker as an “anti-refugee” in order to illustrate the antithetical relationship that is imagined to exist between asylum seekers and refugees. My purpose in

steadily moving away from the presumable neutrality of the UNHCR's distinction — that “every refugee is initially an asylum seeker” — is to elicit the constructed nature of two figures who are imaginary entities just as much as they are legal ones. And both the refugee and the asylum-seeker tend to be defined in extralegal terms. These assumptions no doubt come into play when adjudicators must decide whether a claimant satisfies his or her conception of the “Convention Refugee.”

Consider the words of one Citizenship and Immigration Canada (CIC) official interviewed by the legal scholar Rebecca Hamlin:

There are huge differences between the populations of domestic asylum seekers and people resettled from overseas. They come from completely different sets of nations. The overseas program focuses on the most needy, coming from camps. They need much more help in the resettlement program, they often need training on how to use electricity, they don't speak English, they often have incredible traumas. They are often women with children. The people who make it here [to seek asylum] in general have more money, more skills, speak English, are easier to integrate, often are single men. (51)

Above, the CIC official highlights the taxonomic separation of the refugee and the asylum seeker that I allude to earlier: there are “huge differences” between them. A very precise portrait of the worthy refugee emerges: a displaced woman in an overseas camp, carrying the weight of her children and her “incredible traumas” with her. Significantly, this Madonna-and-child figuration of the refugee differs demographically from the male, moneyed, assimilable, and English-speaking figure of the asylum seeker, who is defined in terms of his mobility — a mobility that is necessarily the point of contention in immigration politics. Indeed, border policies aim to control (and, increasingly, prevent) the movement of bodies between states. The very fact of moving, of

declaring one's body to be mobile, conflates the conceptual divide between "voluntary" and "involuntary" migrants. As Guilia Scalettaris puts it, "Refugees are seen as lacking agency, mostly not doing but being done to; they are forcibly displaced and in need of protection. Migrants are seen as voluntarily migrating and not in need of protection" (58).

Like Helen Johnson, my interest is in the gradual "feminization" (1016) of the imagined refugee. As such, I would suggest that the figure invoked by the CIC official above constitutes the "new normal refugee." B.S. Chimni was right to identify the prototypical refugee as being white, male, and anti-communist. But this is a figure no longer recognizable as a "refugee" in the 21st century. To be sure, his legacy still persists today — and not only in the Convention, which has changed very little since its inception. Consider how, for instance, the current formulation of the asylum seeker as a single male with suspect economic and/or ideological motives (both variations are valid, and serve different purposes) happens to be a foil to the heroic, white male of the Cold War years. The latter risks his life to express his ideological solidarity with the West. The former comes to our border with his ideological hostility, and could very well pose a security threat.

Indeed, in post 9/11 Canada, immigration and asylum policies and practices came to reflect — in a more explicit manner than before — a fear of this asylum seeker. Actions taken against him, according to Razack, include an increase in the federal government's allocation of individuals for immigration detention; the implementation of pre-emptive security checks before asylum proceedings; denied access to hearings for designated "security threats," as well as a loss of their appeal rights; and an expansion of power for immigration officers (*Casting Out* 29). "It is the notion of prevention [...] that best sums up the post 9/11 changes and the increasing logic that law must be suspended in the interests of national security," Razack writes (30).

The designation of this figure as an “asylum seeker” rather than a “refugee” is a tactical one, especially because the former is also presented as the type likely to *persecute* the latter. Today’s legitimate refugee (invoked by the CIC official) is in fact little more than an unimaginative version of the Third World Woman, of whom the Muslim woman is one manifestation. The body of this latter figure, Razack writes, is “confined, mutilated and sometimes murdered in the name of culture,” and Muslim men perpetrate this violence (106). (Notice that the same charges of “confining, mutilating, and murdering” women can be leveled against almost all men reared in the patriarchal worlds of the Global South.) Accordingly, these men must be surveilled and disciplined — both in service of their defenseless victims and in order to protect the Northern communities that they infiltrate (Razack, *Casting Out* 108).

2.3 The Border and the Camp

Beyond their identification as security threats, asylum seekers have also been accused of being “bogus refugees” — an accusation related to the “voluntary” migration they are said to display, as opposed to the “involuntary” (and very limited) movement refugees are supposed to have. The bogus refugee is a figure born of the common belief that most asylum seekers are economic migrants masquerading as political victims. Below is a statement from Migration Watch UK (MWUK), a group that believes “sustainable levels of properly managed immigration are of distinct benefit to our society” (“About Us”). MWUK makes explicit what the CIC official seems to suggest above — that the asylum seeker is often a bogus refugee, an economic migrant only claiming to be a political victim in order to access the great benefits of the West:

In the majority of cases the unsuccessful asylum seeker is, in fact, an economic migrant who has tried to take advantage of the asylum system in the absence of any other

available means of obtaining lawful entry into the United Kingdom. This conclusion is reinforced when one considers that most asylum seekers are young men. Furthermore, many of them, particularly from China and the Indian sub-continent, have paid huge sums of money to people traffickers to bring them to the UK. (“The distinction between asylum seekers and refugees”)

Far from simply being “someone who says he or she is a refugee,” then, the domestic asylum seeker emerges as a problematic figure, gendered male and linked to economic opportunism. The asylum seeker’s mobility is not only criticized, but also criminalized, as his ability to cross borders is often associated with the payment of “huge sums of money” to human smugglers.

This bogus refugee — a figure constituted as an abuser of the West’s “generous” asylum programs (Mountz 96) — was recently invoked by the former Minister of Citizenship and Immigration Jason Kenney in 2012. In a press conference following the tabling of Bill C-31 (the Protecting Canada’s Immigration System Act), Jason Kenney had these emphatic words to say:

[F]or too many years, our generous asylum system has been abused by too many people making bogus refugee claims. Canadians take great pride in the generosity and compassion of our immigration and refugee programs. But they have no tolerance for those who abuse our generosity or take advantage of our country. [...]

[...] For too long, we have spent precious time and taxpayers’ money on people who are not in need of our protection, at the expense of legitimate asylum seekers who have been forced to wait at the back of an unacceptably long queue. [...] 62 per cent of asylum seekers are found to have bogus claims, claims that end up being rejected or withdrawn. We waste precious time, instead of providing much swifter protection for real refugees. (“Speaking notes”)

As Harsha Walia and Omar Chu note, the Protecting Canada's Immigration System Act (dubbed the "Refugee Exclusion Act" by its critics) legislated "a whole new — and far more exclusionary — refugee system" that applied an expedited timeline for the processing of claims (18). It also introduced a "discriminatory, two-tier system" designating "safe" countries of origin, making it impossible for some individuals hailing from these states to make a successful claim (Walia and Chu18). It is against this backdrop of increased exclusion and border control that today's asylum seeker is seeking protection. If Jason Kenney's words are any indication, then the bogus refugee is a figure that asylum seekers encountering Canada's refugee determination system must prove themselves not to be.

The legislation of Bill C-31 in 2012 means that hostile discourses framing asylum seekers as "bogus" do not just circulate innocently, but in fact become law. In doing so, they enter a realm thought to be (as Deborah Cheney reminds us) "pristine" and "inviolable." But, Alison Mountz notes, the asylum seeker's entanglements with domestic asylum programs cannot be separated from publicly constructed narratives and discourses on the "illicit entrant" (102). The bodies of asylum seekers, she writes, "are constituted discursively through media representations and materially through the refugee determination process itself" (Mountz 95). The relationship can be said to be triangular: the state manufactures, often based on public sentiment, a certain image of the asylum seeker and enacts it; this feeds into "media representations" and in turn guides, implicitly and not, the refugee determination process. Notice, for example, how Kenney qualifies the enactment of Bill C-31 against "bogus refugee claims" by declaring that while Canadians are proud of the "generosity and compassion" of the immigration and refugee programs, they will "have no tolerance for those who abuse our generosity or take advantage of our country." Here, public sentiment is identified as that which shapes state policy.

When nation-states amend existing or legislate new security and border control measures, they constitute themselves anew against an “external” destabilizing force — the “illegal” or “undocumented” migrant in the case of Bill C-31. “Law,” as Cover reminds us, “is the attempt to build future worlds” (204), and it would do well to remember that the nation-state is one such world, in constant need of (re)creation. Indeed, several scholars (Sherene Razack in “When Place Becomes Race,” Sunera Thobani in *Exalted Subjects*, and Mona Oikawa in *Cartographies of Violence* among them) see the history of the Canadian nation-state as one of recurring political violence, because “nation-ness” needs to be reinforced every time whiteness — and its entitlements — is at stake. Border discourses, whatever their source, are thus particularly important to monitor as they often have material effects on outsiders encountering (and traversing) the spatial and conceptual divide between here/there and us/them. Indeed, the asylum seeker and the Border are inextricably linked; through the latter, legitimate and illegitimate bodies are constituted, and the nation-state (re)affirmed accordingly. Trinh T. Minh-ha writes:

Constantly guarded, reinforced, destroyed, set up, and reclaimed, boundaries not only express the desire to free/to subject one practice, one culture, one national community from/to another, but also expose the extent to which cultures are products of the continuing struggle between official and unofficial narratives — those largely circulated in favour of the State and its policies of inclusion, incorporation and validation, as well as of exclusion, appropriation and dispossession. (45)

While the Border functions to bar the unsolicited arrival of outsiders and to justify the enactment of questionable exclusionary practices against them, this is not the official narrative. The official narrative is one of “humanitarian internationalism” (Hamlin 51). If there is a clampdown on unsolicited arrivals at the Border, it is because the more “noble” initiatives in the Camp must be

protected. It is because Canadians need to be protected (from an unregulated influx of economic migrants, from potential security threats, from environmental and societal strain and collapse). The asylum seeker thus inevitably demonstrates the extent to which his/her mobility is of concern to the Canadian *nation*.

For Oivind Fuglerud, “Immigration Bureaucracy” demarcates and asserts the State’s “domain of authority” by enforcing border control (448). The Border, for its part, is both a “demarcation, and at the same time a symbol of demarcation — an icon of power symbolizing itself. Nothing outside is relevant to the State if it is not related to its inner life, its ‘national interests’; nothing inside is irrelevant to its enforcement of order” (Fuglerud 448). Strangers presenting themselves at the Border have the task of proving themselves compatible with, or at least willing to submit to, the State’s “national interests.” As such, the asylum seeker’s “biography and moral qualities” (450) are used to gauge the degree to which the claimant is a desirable candidate. As Thobani notes, the national subject defines himself in binary opposition to the stranger: the one law-abiding, the other lawless; the one compassionate, the other deceitful; the one tolerant, the other intolerant; the one egalitarian, the other patriarchal (*Exalted Subjects*, 5). To engage with the “Immigration Bureaucracy” as an adjudicative body requires an understanding that these assumptions about the stranger — in this case the asylum seeker — inevitably come into play.

The Border is to the asylum seeker what the Camp is to the refugee; both are physical and conceptual spaces in which each respective figure is imagined and constituted. Moreover, the Border and the Camp are competing sites of authentic refugeeness, something suggested by the unofficial and official conceptualization of refugees and asylum seekers in the state. While the Camp is a site of immobility and stagnation (in that the refugee within it, according to Malkki, is

dehistoricized and depoliticized), the Border is a site of traversal and transgression. When one arrives unsolicited at the Border, s/he typically intends to cross it, come what may.

Every migration narrative, in that sense, is a story about mobility. Below, I consider how asylum seekers come to tell (or are made to tell) stories of mobility, and how these stories are heard and registered by Refugee Protection Division (RPD) adjudicators in Canada. The asylum seeker's narrative is not simply a narrative of persecution, but of persecution fled. His or her journey is hence paramount — where from? where to? whom to? — and is always accounted for during the hearing. If, as the UNHCR reports, the majority of the world's refugees are in developing countries ("Figures at a Glance"), then it is conceivable that those that traverse the North/South divide demonstrate a suspect transnational mobility precisely because of its statistical improbability. As "North" and "South" imply, there is a geopolitical separation at play here that is not just conceptual, but also spatial. The asylum seeker seeks; he or she is mobile, and this mobility disrupts the colonial dichotomy that first imagined the South to be the North's foil.

In selecting asylum claim decisions, I have first of all sought out those of which women are the subject. My purpose in doing so is to disrupt the myth that the Third World Woman is immobile, helpless, and incapable of saving herself. The female asylum seeker, in crossing the conceptual and spatial divide between the North and South, would suggest otherwise. Secondly, I have tended to focus on domestic violence persecution cases, where the standard of proof is generally much higher. As I go on to discuss, this is partly because domestic violence is not immediately recognizable as "persecution," and thus presents a challenge for women trying to demonstrate their refugeeness and for adjudicators trying to identify it. Rebecca Hamlin writes that the interpretive challenge presented by gender persecution cases relates to how the

[...] persecution of women either comes in the form of a generalized law that affects every female member of society and has the sanction and support of a majority of the population, or it comes in the form of private violence, conducted by a nonstate actor. In this way, gender-based claims can be construed as alternatively too personal and too pervasive to fit the refugee definition. (124)

Finally, I am on the whole invested in bringing to light a Third World Woman that is difficult to imagine in the Camp. This is in order to explore how she — and in particular her body — is/are read against the imagined female refugee.

Chapter 3: Stories of Mobility

3.1 The Dilemma of Sameness

I would like to open my discussion of asylum claim decisions by turning to a domestic violence persecution case that, for all intents and purposes, is not uncommon. The claimant is a twenty-three year old Namibian woman who was forced by her parents into a marriage with a wealthy fifty-six year old man. He becomes abusive, at one point beating her until she miscarries and at another until she requires hospitalization. Both her parents and the police (whom she seeks help from twice) are unwilling to help her, the latter stating that they “do not intervene in domestic matters” (2012 CanLII 99691 [6]). The panel finds, on a balance of probabilities, that the woman’s story is likely not true, although he does not expand on this. There is a psychologist’s report that the panel member gives little weight to; he states, bizarrely given the circumstances, that “[t]here could be many reasons why the claimant may be depressed such as dating issues and family problems, or even anxiety about her upcoming refugee hearing and not necessarily because of the alleged persecution that she suffered in her home country” ([26]). This is despite the psychologist’s observation “that the claimant is depressed, cries frequently, has sleep issues, nightmares and worrisome thoughts about returning to her country” ([26]) — classic symptoms of Post Traumatic Stress Disorder (PTSD). What is interesting about this case, however, is the panel member’s attitude towards domestic violence as a form of persecution, an attitude that, though no doubt prevalent, is often not so explicitly stated by adjudicators. This member writes that

[...] reading all of the evidence, including that of the claimant, Namibia has laws and institutions in place that ought to be the envy of many countries. Women are, to our

shame, abused and killed in Canada. No law can protect anyone from a determined abuser or killer, whether in Canada or Namibia. I find that the claimant has not rebutted the presumption of state protection. [32]

I will return to the RPD's resigned attitude towards the prevalence of domestic violence, but it is his crude use of a "comparative" legal framework for understanding this form of persecution that I would like to focus on at the moment.

Canada's "exemplary" refugee regime has over the years given rise to a particular brand of self-congratulatory humanitarianism; this is what allows Canadians to "take great pride in the generosity and compassion of [their] immigration and refugee programs," as Kenney stated in 2012. It is against Canada's standards that an adjudicator can gauge the degree of a claimant's access to "quality" state protection in her home country. The differences are vast, sustained as they are by a supposedly immemorial distinction between the Global North and the Global South. We are told that things like forced sterilization, bride burning, and female circumcision do not happen here. If they do, they are perpetrated by immigrants who have transplanted their backward culture onto Canadian soil. And yet, a sort of fatigue emerges in this case — an almost counterintuitive appeal, perhaps desperate, to sameness instead of difference. Canada can be tough, too. Canada can be unbearable for women, too. This is the way of the world: domestic violence, like poverty, is a universal affliction. Because women are "abused and killed in Canada," its occurrence in Namibia does not merit international intervention. If Canadian women can suffer abuse and even death at the hands of a "determined" abuser or killer, what exempts this (presumably non-white) woman?

To understand this adjudicator's reasoning, it helps to return to the "myth of difference" of B.S. Chimni's invocation. Even as the RPD here finds a commonality between Canada and

Namibia, he is actually sustaining the myth of difference insofar as the refugee — the *legitimate* refugee — is implicitly constructed as someone suffering an exceptional form of violence only unique to Namibia. In other words: someone unlike this woman, whose experience of abuse is written off as being universal. I would note, however, that this adjudicator seems to ignore this woman's evidence that her state has failed her: on two occasions she requests aid from the police, and they fail her, just as her immediate network of support (her family) has. Audrey Macklin is worth quoting here: "The availability of state protection," she writes, "can rarely be described in absolutes. How often does it have to fail before a claimant's fear of abuse and lack of faith in state protection will be validated as objectively well-founded?" (266).

The requirement, as one RPD panel reminds us (echoing Justice La Forest in *Canada v. Ward*), is that state protection needs to be entirely absent for the "surrogate notion of refugee protection" to even be considered (2012 CanLII 94152 [11]). This standard relates to the strategic post-Cold War assignment of "specialness" and "uniqueness" to refugee protection, and its status as "privileged" migration (Martin qtd. in Chimni 356-357). Whereas the asylum seeker of the early Cold War years (white, male, and anti-communist) appealed to his host state through his racial assimilability and an ideological kinship with the West, today's asylum seeker cannot as easily appeal to an equivalent form of sameness. Difference — preferably extreme — is the way to go. As Efrat Arbel notes, the tendency among adjudicators "to locate domestic violence persecution in cultural difference [...] can be seen as a protective device that distinguishes the violence suffered by refugee women from the violence suffered by Canadian women" (732). She writes:

The effects of these formulations [are] clear: when legal actors portray domestic violence as the product of a foreign culture to which only Bulgarian, Pakistani, or Westernized

Tajik women are subjected — as opposed to “women” writ large — they construct domestic violence as an “othered” harm perpetrated against only certain subcategories of (non-Western) women. (761)

Accordingly, it becomes easier to ignore the “broad power arrangements that make women vulnerable” — both abroad *and* domestically (Arbel 732).

I bring up this case because, firstly, domestic violence persecution cases always confront adjudicators with the “dilemma of sameness”: if a Third World woman is appearing before the Canadian state with a story that any Canadian woman can narrate, is she really a “refugee”? Would a woman suffering from severe domestic violence be so desperate, for instance, as to make her way to the nearest *refugee camp* (as opposed to the police station or a women’s shelter)? If not, then why would she declare herself to be a refugee so far away from home? The logic is not difficult to follow. Secondly, acknowledging that women are just as vulnerable to domestic violence here as they are in the Third World does not necessarily mean that an adjudicator is more likely to investigate or come to an understanding of what forces make them so, as Arbel posits. The adjudicator quoted above does not identify the “systemic gender hierarchies, uneven power distributions, and economic factors that transcend culture” (Arbel 763) and enable the abuse and murder of women, whether here or abroad.

Instead, he locates the cause in the will of a determined criminal. His knowledge of what is actually at play here is not repressed; it is simply not present. Domestic violence can be invalidated in many ways. One of them is to present it as a form of persecution that is not really persecution, but a “shameful” reality about the world that we live in. In some ways, this defeatist stance is even more dangerous than the one that opts to locate gender “persecution” in the Third World and “discrimination” in the First (Macklin 265), particularly because it seems to absolve

the state of its shortcomings. After all, “no law can protect anyone from a determined abuser or killer.”

Before I move on, I would like to note that this adjudicator’s decision to “individualize” the woman’s persecutor in order to avoid implicating the state that twice fails her is not only a problem in domestic violence cases. Macklin notes, for instance, that some decision-makers see rape, even when committed by an obvious state actor, as “the random expression of spontaneous sexual impulses by an individual” — a “common crime” (226). Macklin was writing in 1995. Nineteen years later, an RPD panel — responding to a Tamil woman’s claim that she was raped by an interrogating officer while in a camp for displaced persons (2012 CanLII 100351 [7]) — argues that “if she was raped, as she alleges, it was an act by a rogue officer and is not sanctioned by the state. Otherwise, there would be no reason for the rapist to tell her not to tell anybody” ([24]). Clearly, the idea that rape is often nothing more than just a spontaneous or premeditated expression of a single individual’s sexual impulses is still present. If the state really does endorse his actions, why would he caution her not to tell anyone? (Why would a rapist possibly want to further intimidate and humiliate his victim?) Such reasoning is remarkably ignorant. Macklin’s aptly militarized words are worth quoting: “rape by state actors is an integral and tactical part of the arsenal of weapons deployed to brutalize, dehumanize, and humiliate women and demoralize their kin and community” (226).

3.2 Reading the Will-ful Body

A Guyanese woman comes before the RPD with a “lengthy history of serious domestic violence,” and has fled her ex-husband (2012 CanLII 94152 [3]). The panel member recounts five instances between 2002 and 2007 in which she seeks protection from the Guyanese police.

While her husband is at some point arrested, warned, and detained overnight, he is never charged; the police “[tell] the clamant in passing that they viewed the situation to be a family matter” ([4]). While sympathetic, the panel member ultimately rejects the woman’s claim, writing that “local police failures in regard to a few individuals do not, in themselves, amount to a general lack of state protection for women overall” ([13]). Also, he notes, “states only need to provide adequate protection and do not have to provide perfect protection” ([14]).

The RPD’s state-centric approach here is not surprising, and is consistent with how domestic violence persecution cases are usually handled. What interests me is how this woman’s ability to save herself implicitly works against her. In particular, the panel member seems to be unconvinced by this woman’s performance as someone in need of protection: she is “able bodied and minded” and “[had] the wherewithal to seek protection on five occasions regarding the domestic violence, despite any psychological after effects of all the prior domestic abuse upon her” ([16]). He continues,

For these reasons, I find it objectively reasonable to assume that she remains capable of seeking serious protection efforts from Guyanese authorities now and would be capable of attempting to seek serious protection efforts from them if necessary to attempt to protect herself from her ex-husband when she returns to Guyana. ([16])

Notice that the adjudicator problematically suggests that the claimant has not displayed behaviour befitting a woman suffering from the “psychological after effects” of domestic abuse. But then again, is there any set way that someone suffering from the “psychological after effects” of domestic abuse *should* behave? In the previous section, I recounted a case in which silences and omissions attributed to such “after effects” are dismissed by the RPD, even in the presence of a psychologist’s report; here their absence is instead invoked. Was this woman’s emotional

disclosure during the hearing, if there was any, not convincing enough? One can only speculate; what is clear is that the adjudicator expects that any “psychological after effects” would have somehow paralyzed the claimant, or kept her from actively seeking protection at some point.

What would the alternative have been? Was she expected to remain in the situation rather than save her life? And if so, one wonders whether the adjudicator might have then faulted her for *not* seeking such protection and remaining, instead, in the abusive situation. Indeed, only a paragraph prior, the panel argues that because the woman

has not made any effort to seek home state protection in the past several years [...] the claimant has not presented clear and convincing evidence to rebut the *a priori* presumption that Guyanese authorities would be reasonably forthcoming with serious efforts to protect her in the future.” ([15])

What we have, then, is an instance in which the woman’s attempts to seek protection in five different occasions over a period of years and her failure to do so in one instance both work against her. In seeking protection, she has demonstrated a “wherewithal” that a refugee presumably shouldn’t have; in failing to do so, she has not “rebutted the presumption of adequate state protection,” as the RPD expects her to ([18]). This is a double bind, a contradiction in reasoning that the adjudicator does not seem cognizant of.

It is worth noting that this adjudicator seems to have adopted a formula for dealing with this particular kind of situation. In the case of another woman who also presents with “a history of serious domestic violence,” seeks protection on one occasion, is refused it, and eventually flees, he again raises the same problematic assumptions about “psychological after effects” that he did earlier (2013 CanLII 99027 [4]). Once again, he asserts that

[t]he claimant is an able-bodied adult female and [there is no] medical evidence to establish that she is suffering from post-traumatic stress disorder. Furthermore, she did have the wherewithal to leave Namibia and travel a great distance to seek protection in Canada despite the abuse even if she was suffering any psychological after effects [from the] previous domestic violence upon her. ([17])

What these two cases and others suggest is that adjudicators have a tendency to “read” the female asylum seeker’s body: not just its wounds or the history of violence it seems to carry, but also its resilience and its capacity for survival — its “will.” This capacity is read against a construction of the Third World Woman as being a victim of culture: she must display an entrenched pliability in her nature, a learned helplessness, an assortment of “paralyzing dependencies” (Arbel 766). The adjudicator’s observation above that the claimant has travelled “a great distance to seek protection in Canada *despite* abuse” implies that she has not stuck to the preferred “script of cultural vulnerability” (Arbel 768). Of course, these observations are meant to indicate the adjudicator’s optimism about the claimant’s future; the IRPA, the RPD reminds us, is “forward-looking” (2012 CanLII 99691 [22]). While this is commendable, one cannot ignore the subtext: if she can travel all the way to Canada to save herself, then surely she can go back home and keep trying. The will to survive is there, but it is quite literally mis-placed.

To conclude this section with a note on “will”: in a way, this section of the thesis is ultimately about what adjudicators make of the diverse and unconventional ways that Third World Women employ in order to survive, starting with the unlikely decision to flee the Global South (which I discuss below in more detail). What if, instead of displaying her learned helplessness, the female asylum seeker demonstrates that she is smart, resourceful, even

cunning? One claimant, for example, has a relationship with her abuser that seems to be too friendly for the RPD's liking:

Counsel submits that the claimant has been targeted for severe gender based persecution by XXXX XXXX [her present common law partner]. She was unable to provide any medical evidence to corroborate her claims that she was physically injured by [him].

There are no police reports filed against [him] because the claimant failed to make any reports. There is evidence before the panel that the claimant had amicable contact with [him] in order to get the necessary paperwork to obtain a Canadian visa for their

daughter. The claimant said she was "playing nice" with him. (2014 CanLII 96751 [25])

And with that claim she likely sealed her fate. Can a woman alleging "severe gender based persecution" "play nice" with her persecutor in order to secure a visa facilitating an escape to Canada, where she ultimately files an asylum claim of which he is the subject? There are different ways of surviving, but being diplomatic is apparently not one of them. Ultimately, being smart and possibly cunning does not mesh well with the idealized vision of the "victim" that female asylum seekers are usually held up to.

3.3 Reading the Mobile Body

Mobility is "the ability to move or be moved"; the "capacity for movement or change of place"; "movableness"; "portability" (OED 1.a.). But more than just this ability or capacity for locomotion, mobility is also the "potential of individuals within a society to move between different social levels [...] or between different occupations" (OED 5). Because of its potential for capturing both physical and economic movement, "mobility" is particularly useful for any discussion of migration. Indeed, one common way for scholars of migration to talk about the

regional and international movement of bodies relies on a model premised on “push and pull” factors. This “push-pull paradigm,” according to Salaff et al., “posits that pulled by money or values, after weighing their choices, people leave a poor economic or political situation toward a better life — usually in the West” (2). Based on this model, then, an economic movement (an economic shift for the better) is expected to accompany the physical movement of people. The same goes for asylum seekers: Mountz observes in 2010 that “[i]ncreasingly in North America, Europe, and Australia, refugees and asylum seekers are pulled into the narrative about the loss of state sovereignty, and viewed as somehow “economic” and therefore not “political” or genuine” (101). In my earlier discussion of the bogus refugee discourse, I have noted that it is primarily attached to asylum seekers who present as “single men.” But women, too, can be drawn into narratives of economic opportunism.

And so here I come to a discussion of the female asylum seeker’s “mobile body.” In her capacity to cross a border or borders in order to save herself — and sometimes her children as well — the female asylum seeker manifests as a particularly disruptive figure. This is because her body declares its intention, its ability, to save itself. As Malkki reminds us, women and children have long been the image of a “conventionalized” refugeeness (388). The composite mother-child image, in particular, is one “that we use to cut across cultural and political difference, when our intent is to address the very heart of our humanity” (Malkki 388). Thus women and children are traditional objects of humanitarian concern and rescue, something that enables the rescuer to assert his or her modernity (Razack, *Casting Out* 17) even as s/he claims to be acting in the name of a “common humanity.” Razack’s observation that “[a]ny story that includes a strong, independent woman is likely to prove dangerous” in the hearing room — as

strong women “do not need the West’s protection” — here comes to mind (“The Perils of Storytelling” 172).

Vulnerability, as Heather Johnson has written,

[...] defines the female refugee. Socioeconomic conditions of more serious poverty for women than men, coupled with far greater familial and care obligations, make migration a far more difficult prospect for women than for men. They are non-threatening in this aspect, unlikely to migrate only because of ‘economic pull factors.’ They also move far shorter distances, crossing only what borders are necessary for relative safety and rarely reaching the borders of the Global North. (1032)

While what Johnson writes is in line with statistical fact, this particular construction of the female refugee also serves a strategic purpose, as it discounts virtually all women who *do* reach the borders of the Global North. The image of the female refugee — or the refugee of the Camp — is a formidable one to contend with. David Martin’s stance is a typical one: he posits that far less people would leave their homes, “troublesome as their economic and political prospects might be there, if they thought they were moving to a camp in Honduras or the Sudan rather than [to] the greater benefits available in most Western countries” (qtd. in Chimni 357).

The suggestion is that you can judge the urgency of an asylum seeker’s situation by tracing their movements across the globe (how far have they travelled? Have they bypassed any safe locations? When did they first claim asylum?) and observing their willingness to “settle.” As one panel member has noted,

the action of “shopping” for the best refugee protection benefits is inconsistent with a person living in fear of persecution in their country, and detracts both from their credibility and the subjective fear. It is expected that genuine Convention refugees would

seek protection as soon as is practical, once out of reach of their oppressors (2014 CanLII 51675 [18]).

Indeed, both male and female asylum seekers can be accused of being economic migrants, although the charge is usually leveled against single men. It is worth reiterating that while the current depiction of the asylum seeker as a single male has a demographic basis, this figure is still a *construct* strategically deployed by the West to suggest economic opportunism and/or ideological hostility.

The reality in the hearing room is that women are just as likely to be accused of ulterior motives, although in the cases I have come across the most common charge is asylum shopping. The claimant fleeing her present common-law partner introduced in the previous section, for example, was questioned on her choice of Canada instead of the U.S:

When the panel asked the claimant if any of her travels to the U.S. was due to her fleeing violence by XXXX she answered no. She said the purpose of her trips to the U.S. were “recreational.” [...] According to the claimant’s PIF [Personal Information Form], she visited the U.S. in 2002, three times in 2005, 2006, 2007, 2009 and 2011. She visited her friend in Miami and an aunt in New Jersey. Her mother spends six months a year working in New York. (2014 CanLII 96751 [22]-[23])

In particular, the “recreational” nature of her trips to the U.S. during a time in which she was supposedly being abused by her partner appears, to the panel, suspect. Why Canada when the U.S. could have addressed her immediate needs? Why Canada when she already seems to have a support system in place in the U.S.? More importantly, is an authentic refugee entitled to make “recreational” trips abroad whilst being “persecuted”? The claimant’s explanation that she claimed asylum in Canada because her abuser has friends both in the U.S. and in the U.K. ([28])

is recounted by the RPD but nonetheless not given much weight, presumably because she had already incriminated herself by “asylum shopping” and fleeing only once it was convenient for her to do so.

In the hearing room, women are also especially likely to have their “micro-mobilities” scrutinized, as their ability to navigate their private worlds is just as suspect as their ability to travel internationally. In this next case, a woman’s mobilities become suspect because they do not support her claim to “physical and moral persecution” at the hands of her husband (2014 CanLII 83000 [11]). This woman’s claim to persecution hinges on an assumption — implied by the RPD — that her “freedom of movement” should, by the dictates of the “extreme Islamic customs” that she fears, be severely restricted ([11]). The RPD displays unusually careful detective work when it scrutinizes this woman’s family vacations to five different countries between 2005 and 2010, and then draws a negative credibility finding based on them:

According to [the claimant’s] husband, she had a vehicle at her disposal, as well as a credit card, and in all likelihood she enjoyed freedom of movement as she saw fit. [...] [B]etween the years 2005 and 2010, there were five family vacations; namely, a visit to Morocco in 2005; to Tunisia in 2008; to Spain in 2009; to Italy in 2010, and then the trip by the claimant and her two children to Canada in June 2010. In the opinion of the Tribunal, it is not credible that the claimant was psychologically mistreated and controlled as alleged in her written narrative. ([22])

Several forms of mobility are scrutinized above: there is the woman’s personal “freedom of movement,” which a “vehicle” supposedly facilitates; there is the “credit card,” which implies she had some form of economic independence; and then there are the family vacations to five different countries, which “psychologically mistreated” people apparently do not go on. These

details, however, go beyond simply suggesting that this woman “enjoyed freedom of movement as she saw fit”: there is the assumption, implicitly present, that one must have considerable capital in order to own a credit card, have access to a chauffeured vehicle, and, finally, to be able to travel for leisure.

The woman’s touristic exploits with her husband between the years 2005 and 2010 trace a regional expansion from North Africa (Morocco and Tunisia) to the Mediterranean (Spain and Italy) and finally to North America (Canada) — a steady and upward traversal of the North-South divide. Perhaps damningly, the trip to Montreal, Canada was supposedly in the interest of “[exploring] the Canadian business community for purposes of investment,” but ended with the claimant’s husband abandoning her there with her children ([6]). This final detail suggests that this claimant is too middle class to be the site of refugeeness — and thus, one could argue, almost too much like “us.” Authentic refugees do not shop around for asylum; they travel out of necessity, because they are fleeing persecution, and only after exhausting internal or regional flight alternatives. Razack has rightly noted that such a “recognition of commonness” in the refugee hearing is dangerous because it “makes it easier to imagine that individuals are not fleeing persecution, genocide, and war as much as they are simply seeking a better material life” (*Looking* 93). And indeed, when the RPD goes on to note that the woman “tried on several occasions to convince [her husband] to take up residence in Canada” and concludes based on this that her decision to return to Canada “was in no way related to mistreatment inflicted upon her by her husband” ([24]), the suggestion seems to be that this woman wants to reside in Canada by *choice* — not necessity.

This kind of speculation about the claimant’s motives for migrating is not surprising given the common belief that asylum is often a form of backdoor immigration. Naturally, then,

there is a tendency among RPD adjudicators to meticulously document in their written decisions an account of the claimant's journey. The refugee's arrival to an ostensible haven provides an almost poetic closure to her narrative, one that is also implicitly hopeful. Thus the flight to Canada is traditionally where the claimant's narrative ends and where the adjudicator's determination begins. If it is not narrated correctly, however, this journey can be a problematic part of the refugee's narrative. Indeed, given the frequency with which a claimant's mobility is used against her, one must wonder: does the arrival of an "authentic" refugee to the Global North have to be serendipitous, almost an accident of fate?

Consider this case, where the RPD ends its re-telling of a Burundian woman's narrative with a detailed account of her entry into Canada:

The claimant confided in someone, a reverend named XXXX XXXX, who gave her US \$1,500 so she could leave the country. The claimant then left on XXXX XXXX, 2013, and travelled via New York on XXXX XXXX, 2013, where she stayed for three days. She then went to the Canadian border to claim refugee protection in Canada, given that her half-brother lives in Ottawa. She arrived at the border on XXXX XXXX to claim refugee protection there with her daughter. (2014 CanLII 90123 [23]).

Not only are several border crossings documented in this account, but so is the means by which this movement is supposedly facilitated (the US \$ 1,500) and the reason behind the woman's decision to claim asylum in Canada rather than the U.S. On the surface, this woman's account of her journey to Canada is a sufficiently-detailed, unproblematic one. Until, that is, the RPD asks her why she never "obtained a testimonial letter, affidavit or statement from the priest who allegedly helped her leave" ([40]).

Before going further, it is worth thinking about what the priest adds to this woman's narrative that potentially says something important about her need for protection. It is true that a document from the priest would have corroborated this claimant's narrative, thus lending support to her version of events. It is also true that it is a formality to expect asylum claimants to produce this kind of "evidence" during a hearing, so the adjudicator's question is not particularly surprising. In a sense, the priest is simply there as a witness, and hopefully a credible one. But this otherwise negligible detail in the woman's narrative also paints her as a supplicant — and a successful one at that — even before she enters Canada. In this claimant's narrative, the Church figures as a space of refuge or sanctuary where asylum in the "civilized, ordered North" (Razack, "The Perils of Storytelling" 172) is prefigured.

Indeed, this woman's story is one of continuous expulsion: before she confides in the priest who charitably helps her escape, she is twice expelled from her hiding place by village chiefs, in both Burundi and Congo, who demand money she does not possess in exchange for sanctuary ([20],[22]). The priest is thus present as a foil to the village chiefs. Moreover, before this woman embarks on a regional search for sanctuary, she is persecuted by state agents who invoke a barbarity easily associated with the Global South:

On XXXX XXXX, 2012, some Imbonerakure members came to the claimant's house. In front of the claimant and her daughter, one of the men slit the throat of a duck he was holding and stated that the next time it would be the two of them, if they did not say where the claimant's husband was hiding. The claimant stated that she did not file a complaint with the police about the Imbonerakure's actions because the police and the legal system are puppets of the party in power. ([12])

The priest seems to supply an imperial subtext to this narrative: he is a symbol of Burundi's colonial past, a remnant of an order once present. One wonders whether a testimonial letter would have done more than just corroborate this woman's narrative — if it would have established her as an asylum seeker worthy of sanctuary in the Global North, coming from one of its symbolic agents.

Beyond that, however, there is also the priest's \$1,500 — a gift that helps facilitate (and sanction) her physical traversal of the North-South divide. This woman's narrative, in particular, continuously invokes economic want: just as she saves enough money to flee Burundi, the market where her earnings and savings are kept is lost to a fire, and “[e]verything she had was burned” ([16]). Her inability to pay the village chiefs for her sanctuary adds to this impression. This constant assertion of economic want in the woman's narrative distances her from the “wherewithal” of her journey, making her less likely to be seen as a queue-jumping, economic migrant masquerading as a political victim. Without the priest's letter, however, the question of the woman's ability to pay her way into the Global North remains, problematically, unanswered. At the same time, it creates a disjuncture between a narrative where, on the one hand, the woman is in economic want and, on the other, she is capable of financing a journey to a place so far away from home.

There is, of course, nothing to suggest that authentic refugees must be in severe economic want, but the assumption is there: a defining characteristic of the bogus refugee discourse is that it vilifies moneyed migrants, or those aspiring to be moneyed. For example, “boat people”— who pay smugglers to secure their passage — are especially likely to be accused of being bogus. Malkki notes, based on her field observations, a tendency among even refugee camp administrators and workers to believe that “a real or proper refugee should not be well off”

(383). Thus even in the Camp, where most *bona fide* refugees are presumed to be, any indication of economic well-being serves to lessen the degree of one's refugeeness. *Bona fide* refugees are supposed to reside in want, and if they have the good fortune of being resettled, their journey will be facilitated and financed by the generosity of the government taking them in.

I would not go so far as to suggest that this woman's inability to prove how she financed her journey to Canada is the reason her claim is ultimately rejected. Indeed, \$1,500 hardly indicates a trove of undisclosed treasure. What *is* interesting is how this woman's narrative is sullied by an economic subtext that often threatens to come to the forefront. The danger over here is that this woman consequently fails to tell a purely political story, one that can enable the adjudicator to see a raw refugeeness in her, nothing more. One wonders if economic want, like domestic abuse, is too much of a "familiar" story. The danger of such a story may sit uncomfortably with Western adjudicators looking to safely locate the site of persecution in a specific, far-removed "cultural milieu" (Arbel 762).

It is worth noting that this woman's story gets many things right: whereas the Algerian woman fails to paint her persecutor as the "dangerous Muslim man" she says he is — and, by extension, herself as the "imperilled Muslim woman" (Razack, *Casting Out* 108) — this woman's narrative sets up a perfect dichotomy between the "civilized, ordered North" and "uncivilized, chaotic South" (Razack, "The Perils of Storytelling" 172). Moreover, her story is political, and therefore more easily implicates the state: the woman's missing husband is a wanted activist in Burundi, and she and her daughter are pursued relentlessly by several state agents (the militia, the intelligence service, and the police) as a result. Regional havens are also out of the question, as her attempts to hide out in both Burundi and at one point Congo fail.

But her testimony, the RPD writes, “was shaky and rife with inconsistencies and implausibilities that the claimant was unable to reasonably explain to the panel’s satisfaction” [24]. In particular, this claimant seems to have spoken *too much* (as evidenced by the length of the RPD’s re-telling, which is unusually long). And quite an unusual story she tells: here we have a wife searching for her missing husband; reported sightings of said husband; the wife following leads, detective-like, in order to find him; short, cryptic phone calls from the husband to his wife; a hotel in Uganda where he was reportedly sighted, and which the wife subsequently visits on two occasions; and, finally, Burundian intelligence officers and militiamen pursuing the separated husband and wife individually. It is no wonder, then, that the adjudicator becomes less concerned with the woman’s “core narrative,” which details a plausible case of state persecution, and gets wrapped up in her method of storytelling. Vocality is dangerous — especially when the refugee is thought to be an object that can be apprehended and deciphered visually. This is what I turn to in the next section.

3.4 The Immediacy Bias

As Malkki has observed, one of the most common ways to “fix the ‘real’ refugee on extralegal grounds” is by depending on what the immediately accessible “image” of the figure before us communicates (384). The Hutu, for instance, had a more readily identifiable refugeeeness when they first came to the refugee camp in Mishamo (where Malkki did her field work) because they presented with obvious “wounds and physical problems” (384). Over the years the wounds faded — and so did the camp administrators’ impression that the bodies before them still belonged to “refugees.” “As the visible signs of one’s social refugeeeness faded,” Malkki observed, “one’s worthiness as a recipient of material assistance was likely to decrease”

(385). What Malkki teaches us, and this is relevant to refugees of both the Border and the Camp, is that while being a “Convention Refugee” is a one-time designation, “refugeeness” (notice that the suffix *-ness* aptly connotes degree) is a state that needs to be maintained, an appearance — or is it an aesthetic? — that must always be present in order to legitimize the legal status. As visible signs decrease, and they are bound to over time, this legal status is socially destabilized. For the refugee of the Camp, these visible signs, however dehumanizing, serve as a lifeline.

Before I resume the discussion above, it is worth noting that the aestheticized nature of female and child refugees in particular has to do with the bankable potential of images with universal appeal: the African Madonna and Child comes to mind. Relief organizations, the UNHCR included, are complicit in this “fetishizing of refugee women and children,” which is an easy way to sell calendars, postcards, and other merchandise used for funding purposes (Rajaram 252). Because of their immediate appeal to the consumer, we become accustomed to the refugee’s visuality, but not her vocality; her body and her child’s are “adequate” and sell themselves (Rajaram 252). A consequence of this is that the refugee’s narrative is either stripped from her body or commodified in wholesale form (so that every story reads much like the other). We think of asylum seekers as standing before an immigration officer, “telling their story,” but it is difficult to imagine the refugee of the Camp doing the same.

When she does speak, when she does tell her story, the ostensible inviolability of her silence is lost. And the loss of this silence is dangerous, because in speaking she expels the aura of helplessness that surrounds her. The linguistic anthropologist Shonna Trinch, using the K’iche’ activist Rigoberta Menchu as a case study, notes that “the danger associated with speaking out is often a paradoxical matter of life and death. Not to speak is risky, and to speak is risky, too” (182). (Menchu, a Nobel Prize winner, was famously accused of fabricating elements

of her testimony for political purposes by the anthropologist David Stoll.) The act of narrating in both legal and literary settings “brings about safety (i.e., power) and new risk (i.e., subalterity) for speaking victims,” Trinch writes (182).

Just as visible signs legitimize a refugee’s legal status, so does the legal status initially depend on a visible refugeeness. As I have stated earlier in my discussion of the refugee and the anti-refugee, a recognition of the refugee validates, and thus precedes, the asylum seeker’s declaration as one. The refugee’s image, her body, should ideally speak for itself. Malkki notes that “[w]ounds speak louder than words. Wounds are accepted as objective evidence, as more reliable sources of knowledge than the words of the people on whose bodies wounds are found” (384). Recognizing the refugee(ness) in an asylum seeker is, however, more complicated: for the domestic claimant, police reports, hospital records, psychiatric evaluations, and photographs come together to document her “refugeeness.” Still, they are not quite wounds, and it is not uncommon for an adjudicator to dismiss a psychologist’s evaluation, or even material evidence of physical harm.

Even when there are wounds, however, they are not always read in a way that helps the claimant. The woman who was accused of “playing nice” with her abuser, for example, appeared before the RPD with burns all over her body; a common law partner had at one point hit her with a hot iron rod after she tried to leave him (2014 CanLII 96751 [5]). He was subsequently sentenced to three years in prison. This man, however, is not the persecutor that she is currently fleeing (her most recent common law partner, the one RPD says she has an “amicable” relationship with). While these wounds do not implicate her current persecutor, they do document the extent to which the woman had to suffer before the Jamaican police (the Constabulary Force, or JFC) finally intervened. When, twelve years later, she thinks of leaving

her current abusive partner, he pursues, threatens, and physically harms her ([6]). This time, the claimant does not go to the police because “she [thinks] they would be unwilling to provide adequate assistance,” given that they previously did not intervene until she was “severely injured” ([6]). Instead, she leaves Jamaica and comes to Canada with her daughter.

It is not difficult to see why this woman’s claim would be rejected based on state protection. (The RPD cites other reasons as well, including credibility and the “objective basis” of her fear ([10]).) As adjudicators frequently note, the onus is on the claimant to rebut the presumption of state protection. In the absence of a complete breakdown of order, state protection is presumed to be there, and must be sought accordingly:

[...] When the state in question is a democratic state, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. As mentioned, the claimant never approached the police to report being beaten or threatened by XXXX [her present common law partner]. ([16])

An incident twelve years ago in which the police did not intervene until it was nearly too late does not indicate that they will not intervene presently. As the RPD notes in this case, “A claimant must do more than rely on a subjective assertion that she thought state protection would not be available to her” ([11]). More relevant to my discussion here, however, is the question of how this woman’s wounds should be read.

It is in some ways unfortunate that while this claimant’s body bears witness to a history of severe abuse, there are no “permanent marks or scars” attesting to her present experience. The RPD picks up on this:

The panel accepts that the claimant was a victim of abuse by XXXX [her previous common law partner]. Dr. XXXX in Toronto examined the claimant and found the scars

on her right neck and right thigh and right forearm to be consistent with her history of burns by XXXX. Dr. Richmond reports he was told the claimant had no permanent marks or scars during the episodes of slapping, punching and kicking by XXXX [her present common law partner]. ([15])

Still, there is a different way of reading the wounds on the claimant's body, although the RPD's interpretive tradition would not support it. The most obvious, which Counsel was likely hoping for, is to see the wounds as evidence of state neglect, which finds at least some support in the "mixed" (i.e., inconclusive) documentary evidence "regarding what police and authorities are doing to prevent and respond to domestic violence" ([12]). This also finds support, although less convincingly for the RPD, in the "common belief that police do not respond to complaints of domestic violence" ([12]). This belief, also supported by documentary evidence, does not count as "*actual* evidence" ([12]) for this adjudicator, although there is likely a very good reason — and not just a misinformed "subjective assertion" — why this belief is prevalent among Jamaican women. Indeed, this claimant's harrowing experience with her previous partner would be reason enough for many women.

Even in cases where the wounds on a woman's body correspond directly to her immediate reasons for fleeing, the (literal) standard of proof required can be hopelessly high. In particular, I am thinking of an overtly political claimant from Djibouti who claims asylum along with her son and daughter. This woman has, since 2004, been an activist for the *Union pour la democratie et la justice* (UDJ, or the Union for Democracy and Justice) (2013 CanLII 99193 [3]). Her husband, also an activist, is arrested three times in 2011, injured during his detention, and then arrested again in 2012, after which she hears no more news of him ([5],[8]). After being summoned for a second time by the police as a result of her own political activities, the woman

alleges that she was detained for forty-eight hours without food or sleep, during which she was raped by three masked guards ([8]). She does not file a complaint, but does see a doctor after being released because she was in pain and wanted to check if her IUD had moved; she was also worried about getting pregnant ([8]). The RPD castigates the claimant for not mentioning the medical appointment in her BOC form, and then for not requesting a medical certificate from the doctor. Based on these shortcomings, the adjudicator concludes that she was never summoned, incarcerated, or raped ([20]-[21]).

What strikes me in this case is that the panel member chooses to focus on the claimant's nondisclosure of two occurrences (a visit to the doctor and a worry about STIs and AIDS) that are in some ways ancillary to the fact — or the claim — that she was gang-raped by three men while incarcerated. The rape itself seems to have been disclosed from the start. Nevertheless, the woman's nondisclosure of secondary facts like a visit to the doctor to check her IUD or a concern about STIs and AIDS leads the RPD to reject *all* of the woman's claims about her experience with the police. When the claimant is asked why she never mentioned her fear of STIs and AIDs (presumably to the doctor, although this is unclear), she replies that she was “too traumatized” to do so ([20]). When she is asked why she did not request a medical certificate, either in her country or in Canada, she replies, in the words of the RPD, that she “did not want to be reminded of this incident” ([21]). Notice how, for this adjudicator, the rape — this woman's account of her “wounds” — can only be validated by a doctor, either in Djibouti or in Canada. The claim itself means nothing if her body is not placed under a medical gaze and subsequently documented for evidence.

Beyond being recorded by the adjudicator, the woman's explanations are not acknowledged. Neither are the Guidelines — which prescribe sensitivity to precisely this kind of

case — consulted. This case thus raises some questions worth considering: firstly, what is the relationship between the “written narrative” and the “oral hearing”? In particular, what disjuncture between these two spaces of disclosure is evident and problematized in this case? As I note in Chapter 1, adjudicators rely on the jurisprudential tendency to regard the first story as the truest one, and any inconsistencies between narratives as suspect. Indeed, there seems to be — for lack of a better description — an “immediacy bias” among adjudicators in their evaluation of claimants. I would suggest that this bias is related to an understanding of (authentic) refugees as having a tendency to be immediately decipherable.

Secondly, how is this woman’s silence being used against her — silence, specifically, as it relates to trauma and possibly shame? Why are these not accounted for by the adjudicator, or at least treated sensitively? Singer notes in her discussion of credibility in asylum claims that “feelings of shame, trauma, or fear” may result in an inability to disclose the “full story” or else a disclosure at a “later stage” (110). This often leads to adverse credibility findings, “despite social science and psychological research that disputes its relevance to veracity” (Singer 110).

To complicate matters, while the woman’s claim is rejected, her young daughter, born in 2004, is deemed a Convention Refugee due to the risk of female genital mutilation that she faces at the hands of her extended family members. The panel finds this (extreme) risk very credible. This is not surprising: as Arbel reminds us, “othered harms” (761) are easier to accept than those that are not. And indeed, the panel member is noticeably invested in detailing this particular part of the hearing:

The female claimant explained that she and her husband oppose this practice and that this is the case for a large portion of her generation. She herself underwent this circumcision at the age of eight, executed by her maternal grandmother. No anesthetic is used during

this mutilation. She had pain, her periods were subsequently difficult, and childbirth was difficult, to say nothing of the horror of her wedding night because she was unsewn in the hospital just before her wedding, which made sexual relations with her husband very painful. The female claimant gave many other details on this practice. [44]

Of note is how devoted the panel member is to providing certain details; she experiences a vicarious “horror,” for example, as she describes the claimant’s wedding night, in preparation for which the woman is “unsewn” in the hospital. She also uses loaded words like “executed” and “mutilation” in her writing. Her use of “mutilation” and nothing but (as opposed to a more technical term like FGM) is particularly interesting, and is consistent with how adjudicators speak about overtly exotic practices. Arbel notes that female circumcision is variously described as being a “cruel,” “barbaric,” “horrendous” and/or “torturous” *custom*, and was at one point designated an “atrocious mutilation” (752). This kind of anger and disgust is understandable, but one must question why allegations of intimate violence and rape are not met with equal rage. In this case, the fact that the panel member is a woman is probably significant, if only because it allows her to experience a vicarious “horror” at being thus “mutilated” — meaning that the requisite “immediacy” is there.

What becomes apparent at this point is that certain wounds are more valid than others. “Psychological” wounds can be trivialized or ignored. Nondisclosures as a result of trauma, shame, or a self-preserving desire to forget can simply be registered as inconsistencies and lies. Even in cases where a psychologist’s report is entered into evidence, adjudicators can “respectfully disagree.” In the first case that I cite in the last chapter, for example, the RPD takes the psychologist to task for writing a report “based solely on what the claimant told her” and for not administering the Beck Depression Inventory-II and the Beck Anxiety Inventory, both of

which happen to be self-report measures (2012 CanLII 99691 [25]). (Either way, the psychologist would technically be relying “solely on what the claimant told her.”) The suggestion is obvious: the claimant cannot be trusted to give an account of her own wounds, be they psychological or physical. Traces of intimate and sexual violence — the Jamaican woman’s burns from her first partner and the slaps, punches, and kicks from her present one; the Djiboutian woman’s rape — can likewise be given little weight.

But the prospect of a little girl’s genitals being mutilated simply cannot be ignored, even if the narrator of this threat is, on the whole, deemed lacking in credibility.

Chapter 4: Conclusion

This thesis has explored, firstly, how “interpretation” in legal spaces often depends on concepts and categories that, far from guaranteeing the soundness of legal decision-making, can perpetuate histories of exclusion — histories that were often enabled by the law itself. I have discussed, for instance, how the Eurocentric origins of the 1951 Convention meant that while at the time a crisis of refugees was present globally — in both the North and the South — only those individuals fitting a certain profile made possible by the Convention were deemed to be eligible. The Protocol of 1967, which was introduced in order to address, specifically, the Third World refugee crisis, was likewise a tactical move meant to preserve the language of humanitarianism deployed by Western states during the Cold War. The legacy of the Convention persists in the Immigration and Refugee Protection Act (IRPA), which still retains the former’s definition of a “refugee.” Since then, amendments to the IRPA — including those introduced or mobilized after 9/11 and Bill C-31, the so-called “Refugee Exclusion Act” — have carried on a history of marginalization and containment.

It is with an understanding of this history that we should recognize legal interpretation to be, as Robert Cover famously suggested, an act of violence. “Legal interpretation takes place in a field of pain and death,” he writes:

A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. (203)

It is in some ways ironic that I am quoting Cover's words here, because the international refugee regime is premised on the principle that refugees need to be *protected*, not harmed. And yet, in offering the "text" of their life to be read and "interpreted" by adjudicators, many men and women genuinely in need of protection are sent back to their persecutors. This violent reality of the law should not be surprising; indeed, an understanding of law as being anything but "violent" — especially when it comes to its treatment of outsiders — ignores the fact that this nation-state was born of and through the violence of colonization. As Thobani puts it, "To claim a peaceful and orderly founding of a nation by Europeans anywhere on this continent, innocent and unconnected to this orgiastic violence, as does Canadian mythology, is clearly an exercise in absurdity" (*Exalted Subjects* 43). It is important to realize that the legacies of this founding violence still persist today, sometimes insidiously and covertly — through something as seemingly benign as "interpretation," for instance.

B.S. Chimni has likewise stressed the importance of what he calls the "interpretive moment" (370): we must appreciate, he writes, "the role of interpretation in legal decisions, especially the critical role of power on entering the terrain of conflicting interpretations" (355). "Not only the principle of *non-refoulement* (the cardinal principle of international refugee law) has been given new meaning, but also the definition of refugees contained in the 1951 Convention" (Chimni 355). When, through the "interpretive moment," asylum seekers and refugees can be handed over to their persecutors despite the "cardinal" principal of *non-refoulement*, pain and possibly death are quite literally enacted as a result. At the height of the MV *Sun Sea* crisis in 2010, for example, the Canadian Council for Refugees (CCR) expressed concern that the Canadian and Sri Lankan governments were collaborating in order to determine the identities of some seventy-six Tamil refugees ("Sun Sea: Five Years Later" 7). Many of these

men and women were eventually returned to their country — back to a government that may have been alerted by Canadian authorities of their excursion across the globe.

If this did indeed happen, it is worth asking what interpretive moments enabled this flagrant disavowal of the asylum seeker's right to confidentiality, ones that ultimately breached the non-refoulement clause of the Convention. At the time, CBSA officers were sent memos directing them to “legally” detain the passengers as long as possible, to have them declared inadmissible on “criminality” or “security” grounds, or else to argue against their recognition as refugees” (“Sun Sea: Five Years Later” 3). Clearly these instructions were made possible by “legal” provisions, ones that then enabled a condition in which Canadian authorities (by colluding with their Sri Lankan counterparts) might have inadvertently *created* refugees: if those Tamils concerned were not in need of protection before, they were put in a position in which they may very well now need it.

Beyond an exploration of how the refugee regime's legal history needs to be scrutinized, this thesis has also discussed how the “myth of difference” of B.S. Chimni's invocation is still operative in the present. While initially the myth of difference imagined the “nature and character” of refugee flows from the South to be “radically different” from European refugee flows between 1920 and 1960 (351), today the extensive mobility displayed by asylum seekers to the West is imagined to be very different from the more limited movement displayed by “legitimate” refugees, who remain in the Third World. As such, I suggest that despite the processual relationship that technically exists between these two figures — “every refugee is initially an asylum seeker,” the UNHCR holds — it is actually more accurate to think of them in contradistinction to one another. Such, at least, is the way they are imagined.

So pronounced are the differences between them, in fact, that the asylum seeker could be thought of as the “anti-refugee.” He is usually gendered male, and is believed to have suspect economic or ideological motives. The refugee, on the other hand, is imagined to be a camp-bound single mother in need of being rescued — preferably from a distance. This formulation means that female asylum seekers are often seldom discussed. The female asylum seeker is of particular interest to me because of how difficult it is for a mobile woman capable of crossing the conceptual and spatial divide between the Third World and the First World to prove herself worthy of being granted asylum. This is because she is held up against an impossibly high standard — that of the refugee of the Camp.

As such, I have focused my analysis of asylum claim decisions on those cases that confront adjudicators with the dilemma of sameness: if a Third World woman is appearing before the Canadian State with a story that any Canadian woman can narrate, is she really a “refugee”? Domestic violence persecution cases, especially, are tricky in this regard. Accordingly, I was especially attentive to “will-ful” and “mobile” bodies: bodies that survive in unconventional (unsanctioned?) ways: by migrating, by persisting in their search for sanctuary, even by “playing nice” with their abusers and potential killers.

Ultimately, my reading of asylum claim decisions landed on the importance, for an adjudicator, to be able to apprehend and decipher the refugee immediately. This “immediacy bias” is linked to an idea of the refugee as being a “visual” object as opposed to a “vocal” subject. The problem is that Malkki’s “speechless emissaries” are given a voice — and are in fact tasked with telling their stories — when they become asylum seekers (aptly recast as “asylum speakers” in April Shemak’s 2014 book of the same name). The refugee is voiceless because she must be “witnessed”: refugeeness, as Malkki suggests, is an intensely visual event:

The bodies and faces of refugees that flicker onto our television screens and the glossy refugee portraiture in news magazines and wall calendars constitute spectacles that preclude the “involved” narratives and historical or political details that originate among refugees. It becomes difficult to trace a connection between me/us — the consumers of images — and them — the sea of humanity. (388)

The asylum seeker, conversely, makes herself known through her voice, and in her encounters with the Border traces a connection between “us” and “them.”

For instance, “familiar” stories relating instances of sexual violence by men in power tend to be problematic: the women alleging domestic violence seem to provoke a “defensive anxiety” (Arbel 32) in adjudicators, who in turn do not acknowledge their plight as amounting to “persecution.” Instead, adjudicators search for a clearly demarcated separation between the “civilized, ordered North” and the “barbaric, chaotic South” (Razack, “The Perils of Storytelling” 172). In the case I cite above, the RPD immediately recognizes the refugee in a child at risk of undergoing FGM, but not the mother who was allegedly gang raped while detained by the police.

It is significant, and telling, that the child in this case was voiceless: being underage, her mother spoke on her behalf. Here, finally, was a “refugee” at risk of extreme harm — at risk of being “mutilated” — who can be visually apprehended by the adjudicator. The child did not have to speak (in fact, she may not even have been in the hearing room) because she was *recognized*, almost instantly.

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