

**Are Refugees ‘Disappearing’? An Analysis of Exclusion Technologies Used in
Tamil Immigration and Refugee Board Decisions in Canada.**

by

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Abstract

Audrey Macklin has proposed that in a discursive sense, the refugee is 'disappearing' as a humanitarian category, and now refugees are first perceived as fraudulent, threatening and suspicious upon arrival. In this thesis, I examine Macklin's argument by looking at Tamil refugees who have arrived in Canada, and the discourse that emanates from the written Immigration and Refugee Board (IRB) decisions. A critical discourse analysis is used to look past the text of the decisions and to uncover the ways that language and concepts become normalized. I attempt to demonstrate that exclusion technologies are being used at different levels, or what I call the macro and micro, which reinforce one another. I do this in order to demonstrate how 'disappearance' occurs within the setting of the IRB and how this can have direct implications for the refugee population in question.

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Introduction

Tamil refugee claimants have commonly been suspect of having connections to the Liberation Tigers of Tamil Eelam (LTTE), an organization seen by the Western world as conducting largely illegitimate and violent terrorist activity in Sri Lanka. The other party to the conflict, the Sri Lankan state, has similarly used violence, but in labeling the LTTE as a terrorist organization, Western states have provided a degree of legitimacy for the Sri Lankan state, while lending an aura of criminality to a predominant form of Tamil resistance.¹ Violence has permeated all sides of the complex Sri Lankan conflict. Sinhalese and Tamil allegiances cannot be clearly defined, and violations of human rights have been enacted by both the Sri Lankan state and various resistance groups (not just the LTTE).²

Effectively, this encompassing violence blurs the boundaries between perpetrator and victim roles; there is not one clear 'evil' for the international community to prosecute now that the civil war in Sri Lanka has ended. Despite this, the Canadian immigration and refugee system has continued to attempt to fit Tamil migrants into rigid and fixed categories of deserving and undeserving refugee claimants. This is problematic in itself, because these categories have the effect of presenting a particular interpretation of Sri Lankan ethnic tensions. Specifically, Tamils demonstrate requirements for refugees escaping from regions where there is conflict occurring that is of a certain character. By this, I mean conflicts where there are intersecting issues of race, ethnicity, religion, culture, political affiliation, etc. and the use of violence cannot be easily mapped or attributed to a particular side. In fact, these

¹ Ahilan Kadirgamar, "Legitimacy and Crisis in Sri Lanka" *Economic & Political Weekly* (3 March 2012) online: <www.epw.in/epw/uploads/articles/17184.pdf>.

² World Organization Against Torture, *State Violence in Sri Lanka: An Alternative Report to the United Nations Human Rights Committee* (January 2004), online: <http://www.omct.org/files/2004/01/2444/stateviolence_srilanka_04_eng.pdf> at 11.

conflicts may not have 'sides' that can be so easily separated. These civil wars have deeply rooted histories and tensions, and thus, they require a highly comprehensive and detailed understanding of their complexities. The natural complexity of these conflicts is directly challenged by the narrowly defined processes that the IRB employs.

In a broader sense, it appears that the particular situation of Tamils generates questions concerning what the category of "refugee" or "asylum-seeker" should require, according to IRB decision-makers. By using these forced categories of deservedness, the Immigration and Refugee Board (IRB) has created a subtle discourse relating to how the concept of the 'refugee' should be shaped and applied. Discourse is text, speech, dialogue, etc. that can be assigned further meaning.³ Critical discourse analysis seeks to focus on the ways that social order is legitimized and made natural through the language used and the implications of said language choices. Text (in its various forms) can construct and transform situations, knowledge, identities and relationships. The power of language and discourse, while not always successfully casting out 'undeserving' refugees, has created a growing discursive space within which the refugee *can* be excluded. The effect is that the humanitarian notion of 'refugee' is being gradually replaced with a category of 'refugee' that is suspicious, fraudulent and threatening.

My thesis shows that discourse occurs at different levels within IRB decisions. I am specifically interested in discourse that contributes to exclusion 'technologies'. These technologies seek to draw boundaries around who should/should not be admitted to Canada. On a broader or macro level, because Tamil refugee applicants are fleeing from a region characterized by a highly complex conflict that has been narrowly defined in the West, the

³ Teun A. van Dijk, "Semantics of a Press Panic: The Tamil 'Invasion'" (1988) 3 *European Journal of Communication* 167 at 170.

concept of the 'refugee' has been collapsed with 'terrorist' and/or 'criminal'. Broader political and media coverage of the LTTE, as well as boat arrivals of smuggled Tamils on Canadian shores have contributed to this phenomenon of refugees being conflated with criminals. The use of violence, 'illegal' means of arrival, and *potential* terrorism have constructed the Tamil 'refugee' as an object that should be questioned first, and possibly accepted later. Secondly, at a micro level, seemingly neutral concepts of credibility, security and the Canadian nation have been employed as tools of exclusion. These are concepts that are not entirely unique to Tamil refugee claimants; however, my thesis seeks to explore how both levels of discourse (macro and micro) draw from a similar perception of the ideal refugee. From this, I demonstrate that there is a wide range of technologies being used to exclude and effectively 'disappear' true refugees, as suggested by Audrey Macklin.⁴

Theoretically, my thesis builds from the work of both Audrey Macklin and Catherine Dauvergne. Macklin's proposal of the "discursive disappearance of the refugee" indicates that while not literally disappearing, the area within which refugees can be recognized as such is getting increasingly smaller.⁵ When refugees arrive in the "territory of wealthy industrialized nations", there is an increasing tendency to doubt whether those seeking asylum are in truth, actual refugees.⁶ According to Macklin, the binaries of refugee/migrant and legal/illegal are becoming increasingly interchangeable in the public realm, which leaves the refugee in a discursive space of suspicion, distrust and fraud.⁷

⁴ Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2005) 36 Columbia Human Rights Law Review 365 at 365.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid* at 366.

Catherine Dauvergne's research in the area of the "growing culture of exclusion" looks at how the meaning of 'terrorism' is broadening in refugee law. 'Terrorism' is being misused, and it is also being applied to individuals with a very limited sense of membership to a terrorist organization. The effect is that 'terrorism' becomes a blanket category that can encapsulate many more individuals' actions.⁸ As a result, various acts of resistance and other political acts are being categorized as terrorism by adjudicators at the level of the IRB and federal court system. That is, politically charged resistance is deemed illegitimate and a basis on which to exclude refugee applicants. In the context of Tamil refugees, this allows for a broader space within which to deem all signs of Tamil resistance as potential terrorism, and thus a threat to the security of the nation. I feel that Dauvergne's use of judicial discourse in looking at this theory was an important and effective analytical tool for also exploring Macklin's overarching 'disappearing refugee' concept.

After reading both pieces, I had some further questions: How does the "growing culture of exclusion" play out within the context of Tamil claimants, for whom terrorism and criminality are already constructed as pressing concerns? As a group of refugee claimants, are Tamils demonstrative of these proposed trends? In part, Tamils were selected for my study because of the recent arrivals of large numbers of Tamil migrants on ships chartered by smugglers. In 2009, seventy-six Tamil men were discovered on the *Ocean Lady*, and in August 2010, close to 500 Tamils arrived on the *MV Sun Sea*, both off the coast of British Columbia. These ship migrants, sometimes referred to by the demeaning and popularized name "boat people", provide a unique site to study refugee determination processes in that their identities, stories and mode of transportation are all simultaneously questioned and

⁸ Asha Kaushal & Catherine Dauvergne, "The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions" (2011) 23 *International Journal of Refugee Law* 54.

criticized. This places these Tamils at a juncture where a strong analysis can be employed due to heightened suspicions regarding various aspects of the refugee experience. Refugee identities, stories, and mode of transportation are all regularly investigated, but in looking at Tamils more specifically, their high arrival numbers and boat smuggling incidences have raised the spectre of the criminal and terrorist Tamil migrant. There already exists a dominant Western narrative surrounding the Sri Lankan civil war and its players, and given that the LTTE (a Tamil resistance movement) has been identified as a key instigator of the violence, Tamil migrants have suffered further suspicion.

I was struck by the seeming tension between the highly sensationalized media coverage of Tamil boat arrivals and terrorist links, and the supposed strict and procedural nature of the IRB refugee determination process. Does this demonstrate that technologies of exclusion can simultaneously occur at both a sensationalized (macro) and subtle (micro) level? How do the broader discourses of exclusion (terrorism, smuggling, criminality) set the stage and, in turn, impact the more subtle technologies embedded in IRB processes and decisions? How can critical discourse analysis help to uncover these exclusion technologies and also point to the problematic normative setting of IRB decisions?

Method

The RPD cases were collected through the use of Quicklaw and CanLii online databases. Only a small number of the thousands of IRB decisions each year are made publically available, and this was the most efficient way to access the greatest number of electronically accessible written decisions. Due to the nature of my research, and wanting to

find recurring, subtle and complex patterns of discourse in these decisions, it was best to survey and carefully analyze all relevant cases. Also, IRB written decisions tend to be brief, lacking in detail and largely repetitive. A comprehensive and broad analysis was more useful in uncovering patterns, than it would have been to select a smaller number of cases to look at in greater detail.

Using the search terms of “Sri Lanka” or “Tamil”, I looked at CanLii’s results first. Originally, I had focused on the years 1999-2011, but no electronic results were found for years 1999 or 2011, so the date range was modified to 2000-2010. First, I went through the results, making sure the case was relevant to the context of Sri Lankan Tamil refugee claimants. I read the decisions closely, with an eye for language pointing to intriguing assessments related to deservedness, exclusion, and what came to be realized as credibility. I made sure to characterize the refugee determination cases as successful, unsuccessful, or dismissed under Article 1F of the 1951 Convention relating to the Status of Refugees.⁹ Next, I turned to Quicklaw and repeated this process, while noting any repeated cases in the results.

My dataset includes 272 refugee protection division cases involving applicants that are fleeing Sri Lanka, the majority of which are Tamil. Of those, only 23 at this stage were successful in being granted refugee status. 241 were unsuccessful, and 11 failed on the basis of Article 1F, a clause that excludes those who have committed acts such as international crimes and terrorism. It should be noted that these numbers account for a total of 275, as there were three cases that had multiple claimants with different outcomes. There were two

⁹ Article 1F indicates that individuals who have committed international crimes, serious non-political crimes, and acts contrary to the purposes and principles of the United Nations are to be excluded from refugee protection (*Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1(F), [1969] Can TS No 6).

cases that were partly successful/unsuccessful, and one case that was partly successful and partly excluded under Article 1F.

As noted by Jessica Reekie in her analysis of section 97 of the Immigration and Refugee Protection Act (IRPA), doing a detailed analysis of positive refugee claims is hard because many positive decisions by members of the RPD are brief, delivered orally and/or are not reported.¹⁰ My survey of RPD cases confirms Reekie's observation, as 241 out of 272 cases had negative outcomes. Over a span of ten years (2001-2010) statistics show that of Tamil applicants for asylum in Canada, approximately 77% were accepted, as compared to the average success rate of refugees, which was 43% for the same period.¹¹ With relatively high overall success rates, what does a discourse analysis of Tamil IRB hearings show and why is this important? Clearly, the decisions I had access to do not represent this high degree of success. However, this thesis argues that there is more at stake than success rates for Tamil (and other similarly situated) refugees. A study of Tamil claimants demonstrates that despite a claim being successful/unsuccessful, technologies of exclusion are still developed through IRB discourse. Through the course of my research, I argue that even where claimants are successful in their Refugee Protection Division (RPD) hearing, the underlying discourse of the decision-makers still employs concepts used to transform and sustain the 'refugee' as a body that *can* be excluded.

In Chapter 3, where I discuss normative 'macro' technologies of exclusion, RPD decisions relating to terrorism and smuggling were limited due to their recent nature and the

¹⁰ Jessica Reekie & Justice Carolyn Layden-Stevenson, "Part III: Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act" in *IARLJ 7th World Conference, First Report* (Mexico City: International Association of Refugee Law Judges, Convention Refugee Status and Subsidiary Protection Working Party 2006) at 41.

¹¹ Calculated based on: Peter Showler, *By The Numbers: Refugee Statistics*, online: University of Ottawa Refugee Forum <<http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/projects/documents/RefugeeStatistics.pdf>>.

fact that some of these cases have yet to be heard or are in the process of being heard. As such, in Chapter 3 I also draw from cases in the IRB's immigration division (where refugee admissibility hearings are sometimes sent). I also supplement my analysis with a few Federal Court cases, which involve detained MV Sun Sea and Ocean Lady passengers. In the analysis comprising Chapter 4, I was able to do a closer examination of my dataset of 272 cases. In looking for intricate patterns, reasoning and themes that operate within the average IRB Tamil refugee claim, it was important to consider the dataset as a whole. Largely, I end up highlighting the importance of credibility as a prominent 'micro' exclusion technology, along with other ways that refugees are increasingly viewed with suspicion and are assessed with high expectations.

While IRB decisions are read by few and do not act so as to sway public reasoning or the government per se, they remain an important site for research. The ways in which seemingly neutral concepts such as 'credibility' are deployed and normalized, and the ease with which 'terrorism' and 'crime' are used as labels, thus act as a site where discourse, law and power intersect. While many Tamil claimants are successful in receiving refugee status in Canada, the power of the legal discourse that emanates from these decisions widens the space within which the refugee can be excluded.

Structure

My thesis is divided into four main chapters. Chapter 1 provides an overview of key histories, policies and bureaucratic processes involving Sri Lanka, Canada and the IRB. This includes historical background on the Sri Lankan conflict, the LTTE, and Canada's relationship with Sri Lanka. Also included is a brief overview of the steps to make a claim in

the IRB's Refugee Protection Division (RPD), Canadian refugee policy changes and important proposals currently before Parliament aimed to make the immigration and refugee process more expedient and effective.

Chapter 2 provides a conceptual framework, which begins with an overall exploration of the legal category 'refugee'. This analysis starts by considering how the refugee identity is shaped by its relationship with the sovereign state. Through this relationship, power is exercised through sovereignty and the establishment of control and order, which is then juxtaposed against the chaotic and spontaneous arrivals of refugees. Here I also consider how the ideal refugee testimony is characterized. How is it that spontaneous arrivals are viewed as threatening, but spontaneity is expected of refugees in their oral testimonies? How do these expectations constrain and limit the approach taken by the RPD in assessing refugee claims? Overall, these initial discussions contribute to my later analysis of the 'micro' technologies used by the RPD. Tools such as assessing 'credibility' are used to normalize the process of constraining the space within which refugees can be recognized as a humanitarian category.

Next, my conceptual framework situates the refugee within popularized contexts of terrorist linkages and boat smuggling operations. First I demonstrate how boat arrivals are shaped so as to transform refugees into potential criminals and 'illegal' migrants. This raises questions surrounding themes of victimization, choice and 'proper channels'. By focusing on the means by which a refugee arrives, particular actions and choices are examined, and larger discussions relating to the contexts of conflict and persecution are ignored. The same phenomenon is seen in shifting the focus to refugees portrayed as violent terrorists, rather than individuals who are resisting persecution. Catherine Dauvergne's arguments about the "growing culture of exclusion" points to the broadening ways in which terrorism is being

applied to refugees' stories. This has important political implications for interpreting the Sri Lankan conflict, and yet, the RPD does not acknowledge this political element.

To continue, I turn to national identity and the implication of race in these discussions of the 'disappearing' refugee and the increasing methods through which this disappearance is realized. Ultimately, "foreignness" becomes a marker of threat or potential danger through the IRB increasingly using language that points to the ability to exclude refugees based on notions of criminality, terrorism and fraud. The discourse in IRB decisions opens up a space for other outlets (media, public, government) to start or continue to fuel national anxiety about the growing threat of 'bogus' refugees and the dangers and crime they bring to Canada. I believe this fear points to refugee law as an important site for evaluating national identity and larger "us versus them" discourses. The distinction between "us" and "them" is not a natural distinction; and so, lastly, I point to discourse theory as a necessary tool for deconstructing how the law differentiates and excludes "Others". Discourse theory recognizes that official (legal and political) discourse can have a normalizing effect. For my research, a close analysis of these discourses must look at how refugees are made to have convenient identities that have much larger implications.

Chapter 3 shifts from the conceptual backdrop to beginning an analysis of 'macro' or broad technologies that are readily available; these technologies are used for the purpose of excluding and thus 'disappearing' refugees. In a very publicized arena, the notion of refugees is collapsed with 'criminal' and 'terrorist', especially in the context of Tamils. In turn, this popularized discourse has been incorporated in IRB decisions. Through my analysis of these decisions, I identified a general trend or technology of exclusion that has been relied upon and helps contribute to Macklin and Dauvergne's theses. Individual actions (especially those

linked to terrorism or crime) are closely critiqued and evaluated by RPD members, without situating these actions within a larger analysis of country conditions and contextual scenarios. This includes actions that are considered adequate for proving terrorist membership, as well as the act of being smuggled by boat to reach Canada's shores. The focus on specific individual actions is a method of exclusion that carries through to Chapter 4, where small mistakes and discrepancies in oral testimony can challenge the claimant's credibility in its entirety.

In Chapter 4, I look at how the broader discourses discussed in Chapter 3 are reflected in subtle exclusionary technologies used by RPD adjudicators. I attempt to show how the sensationalized notions of refugee are transformed into normative tools that fit within the procedural and bureaucratic refugee determination process. Through my readings of Tamil IRB hearings, I highlight that credibility is a primary means through which refugee assessments are made, and so, credibility becomes a way by which the category of refugee becomes constrained.

Together, these last two chapters present my analysis of how the case study of Tamils helps to explore and substantiate Macklin and Dauvergne's arguments about the discursive broadening of exclusion and the disappearance of refugees. My analysis argues that through discourse, different types of exclusion technologies can be explored. At the macro level, popular discussions surrounding terrorism, smuggling and criminality occur, and at the micro level, normative processes such as the assessment of 'credibility' have been transformed into subtle exclusionary tools. Together, these technologies reinforce one another and continue to be deployed to constrain the space within which the humanitarian refugee can identity can be readily recognized.

Chapter 1: Background and Historical Overview

Sri Lanka

History of the Conflict

A brief overview of the conflict behind the Sri Lankan civil war is now presented. The purpose of this background on the conflict within Sri Lanka is to establish how ethnic tensions gradually developed and grew. Largely, it also demonstrates that the Sinhalese dominant Sri Lankan state is not an entirely innocent party to the conflict. Sinhalese Sri Lankans have rioted, enacted violence and used restricting measures against the Tamil minority in a highly discriminatory manner.

The Sri Lankan civil war was fought primarily between the Sinhalese-run state, and the Tamil minority, largely represented by the Liberation Tigers of Tamil Eelam (LTTE), the most organized and military Tamil presence. Tamils and Sinhalese coexisted in a relatively peaceful state in pre-colonial Sri Lanka. In 1801, the British procured Sri Lanka from the Dutch, and Josh Linden, a Sri Lanka scholar, attributes the rise in ethnic tensions to British rule.¹ Historically, Tamils had been more exposed to the English language by Christian missionaries, and this made them more attractive candidates to the British for administrative work.² Many authors, such as Josh Linden, have argued that this general favouritism displayed towards the Sri Lankan Tamils angered the Sinhalese, and so, ethnic tensions began to develop.

¹ Josh Linden, "After the Tigers: Moving Beyond the Legacy of Violence in Sri Lanka" (2009) 6 Michigan Journal of Public Affairs 1 at 3.

² *Ibid* at 4.

The British helped to draft Sri Lanka's first constitution, and as such, it incorporated the British majoritarian political framework and limited safeguards for minority rights.³ During the early 20th century, Sinhalese and Tamil politicians initially worked together as a broad coalition to gain political autonomy and more concessions from the British. Ultimately, there was asymmetric representation in the legislature, as the Sinhalese made up more of the population. At the time that Sri Lanka gained independence from the United Kingdom in 1948, the Sinhalese represented 74% of the population, Tamils 18%, and Muslims/Moors 7%.⁴ When the Tamils suggested more balanced representation in parliament, so as to reflect Sinhalese and Tamil perspectives more equally, the Soulbury Commission⁵, rejected the idea, claiming it would impede the progress being made toward self-government.⁶ In effect, the self-government model created a Sinhalese majority government, which insisted that it was the Sinhalese, and not Tamils, that were the discriminated against and threatened group.

The Sinhalese government, created through the process of decolonization, was then able to use its political power to disenfranchise the Tamil minority. The now independent Sinhalese majority government introduced two laws, the Citizenship Act of 1948 and the Indian and Pakistan Resident Act of 1949. These acts took away citizenship rights from Indian Tamils, and several hundred thousand were 'repatriated' to south India.⁷ Later, the

³ *Ibid.*

⁴ Joke Schrijvers, "Fighters, Victims and Survivors: Constructions of Ethnicity, Gender and Refugeeeness among Tamils in Sri Lanka" (1999) 12 *Journal of Refugee Studies* 307 at 310.

⁵ Announced in 1944, this commission was a prime body and instrument of constitutional reform in Sri Lanka. It was this commission that helped to usher in Independence to Sri Lanka in 1948.

⁶ Jayantha Perera, "Political Development and Ethnic Conflict in Sri Lanka" (1992) 5 *Journal of Refugee Studies* 136 at 138.

⁷ Schrijvers, *supra* note 4 at 310.

1956 Official Language Act made Sinhala the official state language, further angering Sri Lankan Tamils.

In 1957, the Bandaranaike-Chelvanayakam Pact was proposed, which would have established Regional Councils (vesting individual areas to deal with their own land matters) and would have accepted the Tamil language as an official language for administrative purposes in the North and East of Sri Lanka.⁸ A backlash to these proposals developed among some Sinhalese, and an anti-Tamil movement grew, using both propaganda and rioting to get their message across. In 1970, a Sinhala-only coalition government came into power after an election, with an overall two-third majority in Parliament.⁹ This government established a new constitution in 1972, abolishing the Senate, reiterating Sinhalese as the official language, and Buddhism as the state religion. This brought Sri Lanka nationalism to its peak, and various outbreaks of rioting directed against the Tamil minority followed in the years to come.¹⁰

In the early 1980s, the still ruling Sinhalese responded to this rioting and emerging youth radicalism by making constitutional amendments that resulted in the harsh Prevention of Terrorism Act, and allowed the government to punish any members who joined the opposition.¹¹ In August 1983, a ban on political parties advocating separatism meant that many members of Parliament were removed from their positions as parliamentarians, further securing the Sinhalese-run state.¹² This ban accompanied a larger set of severe reprisals by armed forces against Jaffna Tamils. This state action was sparked by a Tamil separatist attack

⁸ Perera, *supra* note 6 at 140.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid* at 141.

¹² *Ibid.*

in July 1983, which killed thirteen Sinhalese soldiers in Jaffna.¹³ To provide a balanced understanding of the conflict, here a historical overview of the Sri Lankan conflict needs to shift to the Tamil resistance and its primary embodiment in the Liberation Tigers of Tamil Eelam.

The Liberation Tigers of Tamil Eelam (LTTE)

Tamil separatists first enacted political violence when they sought retaliation for the death of nine Tamils who had been killed at a 1974 conference held in Jaffna, known as the Research Forum Series.¹⁴ Due to growing ethnic tensions, this outdoor political conference attracted thousands of interested Tamils. A large altercation between Tamil protestors and the police occurred and an unstable power line crashed down and killed nine Tamils.¹⁵ The mayor of Jaffna was viewed by the Tamil public as being responsible, for they were convinced that he was working alongside the national government and police to suppress dissent in the North.¹⁶ In 1975, Tamil extremist Velupillai Pirabhakaran successfully assassinated the mayor of Jaffna, and he then became the founder and military leader of the LTTE.¹⁷ Over the course of their secessionist campaign, the Tigers became particularly well-known for performing suicide bombing and other short-term actions at “the level of the spectacular”.¹⁸

¹³ *Ibid* at 145.

¹⁴ Linden, *supra* note 1 at 5-6.

¹⁵ *Ibid* at 6.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ P. L. de Silva, “The Efficacy of ‘Combat Mode’: Organisation, Political Violence, Affect and Cognition in the Case of the Liberation Tigers of Tamil Eelam” in Pradeep Jeganathan & Qadri Ismail, eds, *Unmaking the Nation: The Politics of Identity & History in Modern Sri Lanka* (Colombo: Social Scientists’ Association, 1995) at 182.

Peace talks between various Tamil guerrilla groups and the United National Party government were originally initiated in 1985, but the Sri Lankan government rejected the LTTE's resulting demands. In 1987, the LTTE was excluded from talks with the government by the interveners¹⁹ to the conflict, so as to de-legitimize the LTTE's use of violence.²⁰ The resulting Indo-Sri Lankan Accord met many of the LTTE's demands, but there were some concessions they were unwilling to make, and they even began to target Indian soldiers in retaliation.²¹ In 1993 the Tigers succeeded in killing Sri Lankan president Premadasa and a surge of violence continued throughout Sri Lanka all the way through to 1999.²² Peace talks were attempted on several occasions, but usually the LTTE doubted the sincerity of the other parties or the talks failed for similar reasons relating to distrust and suspicion.²³

In the late 1990's, Norway intervened in the conflict and peace talks led to an official cease-fire agreement in March 2002.²⁴ A federal system was proposed so that Tamils would have self-determination in northern regions of Sri Lanka. However, little action was taken to implement this plan and the LTTE withdrew from the talks in 2003.²⁵ The United Nations labeled the LTTE a terrorist group, with Canada following suit in April 2006.²⁶ When Norway was unable to keep both the Sri Lankan state and the LTTE participating in the peace talks, the European Union also labeled the LTTE a terrorist group in June 2006.²⁷

¹⁹ The intervener at this time (1987-1990) was India. The Indo-Sri Lankan Accord formed the Indian Peace Keeping Force (IPKF), an Indian military contingent, tasked to disarm militant separatist groups (not just the LTTE). The IPKF was inducted into Sri Lanka on the request of the Sri Lankan president due to escalating conflict.

²⁰ Linden, *supra* note 1 at 9.

²¹ *Ibid.*

²² *Ibid* at 10.

²³ *Ibid* at 11.

²⁴ *Ibid* at 12.

²⁵ *Ibid.*

²⁶ "Canada adds Tamil Tigers to list of terrorist groups", *CBC News* (10 April 2006) online: <<http://www.cbc.ca/news/canada/story/2006/04/10/tamils-terror-designation.html>>.

²⁷ Linden, *supra* note 1 at 14.

In 2008 the Sri Lankan government also withdrew from the original 2002 ceasefire agreement and on January 2, 2009 the government moved to capture Kilinochchi, a town housing LTTE headquarters.²⁸ As a result, many LTTE operatives were forced into the Mullaitivu jungle, and on April 5, 2009 the Sri Lankan army officially broadcasted that they had captured all LTTE territory in the northeast.²⁹ In May 2009, the Sri Lankan army in a very small zone cornered the remaining Tiger operatives. Over 100,000 civilians were caught between the two opposing groups.³⁰ More than seven thousand civilians were killed in the crossfire. Three weeks later the LTTE finally surrendered and it was announced that their leader was dead.³¹

There is relative peace in Sri Lanka, at the time of writing in 2012, but the government remains a Sinhalese majority. A general election was held in January 2010 but no substantial change was evident. By popular vote, the Sinhalese leader who defeated the LTTE was re-elected.³² Also, as of 2012, there are still tens of thousands of Tamil people living in internally displaced peoples camps.

The government created a 'Lessons Learnt and Reconciliation Commission' (LLRC) due to mounting international pressure for an inquiry into the civil war atrocities. A final report from the LLRC was presented to the President of Sri Lanka in November 2011. The report (and overall Commission) failed to adequately provide a thorough and independent investigation of the violations of international human rights law. The LLRC had a weak mandate, included pro-government commissioners in its operation, and did not provide

²⁸ *Ibid* at 15.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid* at 16.

³² David Feith, "Tamil and Sinhala relations in Sri Lanka: a historical and contemporary perspective" (2010) 22 *Global Change, Peace & Security* 345 at 345.

witness protection.³³ The report largely disservices victims and the notion of accountability, as seen in the example of how the government has ignored the LLRC's finding that women in the north and east "feel unsafe in the presence of the armed forces".³⁴ Louise Arbour, former UN High Commissioner for Human Rights and former justice of the Supreme Court of Canada, indicates that there is a strong likelihood that the government will continue to disregard the LLRC's recommendations that *would* aid reconciliation, such as those directed at governance and land issues.³⁵

Canada-Sri Lankan Connection

Well before the Sri Lankan civil war began in 1983, Canada was loosely associated with Sri Lanka through their shared membership in the British Empire and Commonwealth, and it is probable that Canada's development aid to Sri Lanka is based, in part, on a tradition of helping those with these ties.³⁶ Inherent in development aid is the concept that the problem to be solved "lies within such nations, not their external relations or degree of economic integration into First World countries".³⁷ This effectively constructs the commonly referred to 'us' and 'them' boundaries or the developed/under-developed dichotomy. However, the Sri Lankan conflict became more than an issue 'domestic' to Sri Lanka, as it began producing refugees, with many of these refugees seeking a new life in Canada.³⁸

³³ Louise Arbour, "Tamils await their peace dividend", *The Globe and Mail* (30 January 2012) online: <<http://www.theglobeandmail.com/news/opinions/opinion/tamils-await-their-peace-dividend/article2318098/print/>>.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Jennifer Hyndman, "Aid, conflict and migration: the Canada-Sri Lanka connection" (2003) 47 *Canadian Geographer* 251 at 260-261.

³⁷ *Ibid* at 263.

³⁸ *Ibid* at 264.

Immigration lawyers and human rights advocates say that most Sri Lankan claimants processed by Canada are Tamil.³⁹ Canada's Tamil population is thought to constitute the largest Sri Lankan diaspora in the world, with a very strong Tamil community located in the city of Toronto.⁴⁰ Despite the increasing suspicion and lack of credibility that seems to shroud the Tamil asylum-seeking process (discussed in more detail in the chapters that follow), Tamils hold one of the highest acceptance rates for refugees assessed by the Immigration and Refugee Board in Canada. Also, Sri Lanka remains among the top ten source countries for refugees arriving in Canada.

My thesis looks past this to the discourse in IRB hearings that is transforming and sustaining the 'refugee' to be a body that can be excluded through various means. Even if a majority of Tamils are not being excluded at this stage in the refugee determination process, the discourse employed in evaluating their claims is contributing to an overarching sense that refugee applicants can and should be turned away. Tamil asylum claims provide a unique research site for exploring this argument largely due to the complex and nuanced nature of the Sri Lankan conflict. As I go on to show in Chapter 3 and 4, broader and common discourses of criminality and terrorism interplay with regularly used technologies of exclusion and boundary construction present in general IRB claims.

The Immigration and Refugee Board (IRB) Process

To start a claim for asylum, an individual must first notify an immigration officer either at the port of entry, at an Immigration Centre, or at a Canada Border Services Agency

³⁹ David McKie, "Canada OK's most Sri Lankan refugee claims" *CBC News* (30 September 2010) online: <<http://www.cbc.ca/news/politics/story/2010/09/27/f-migrant-refugee-numbers.html?ref=rss>>.

⁴⁰ Hyndman, *supra* note 36 at 259.

(CBSA) office that they wish to seek refugee status.⁴¹ The officer will interview the claimant, and if the officer determines that the claim is eligible, the claimant will be sent to the Refugee Protection Division (RPD) of the IRB. To determine eligibility at this first stage, the refugee claimant has the burden of proof and must show that they do not meet any of the inadmissibility criteria.⁴² Following this finding of eligibility, the claimant will be told to complete a Personal Information Form (PIF) (a written account of their reasons for seeking asylum) within twenty-eight days.

Once the PIF is received, the IRB then reviews each claim and assigns it to one of three next stages: a fast-track expedited process, a fast-track hearing, or a full hearing. A fast-track expedited process is used for claims from certain countries depending on country conditions or certain categories of claims, which can change from time to time.⁴³ This involves a refugee protection officer (RPO) interviewing the claimant, who then makes a recommendation about the claim, which is forwarded to a Refugee Protection Division member (adjudicator). The claimant is either granted refugee status or a full hearing is conducted. Fast-track hearings are held for claims that appear to be based on one or two main issues and a full hearing is for more complex issues (more than two). All three processes are private and non-adversarial, meaning they are meant for posing questions to the claimant and the gathering of facts.

The main points of contention that a hearing may encounter surround issues of identity, credibility, well-founded fear of persecution and whether an Internal Flight Alternative (IFA) exists. Largely, RPD members are asked to assess the credibility of oral

⁴¹ Immigration and Refugee Board of Canada, *Process for Making a Claim for Refugee Protection*, online: <<http://www.irb-cisr.gc.ca/Eng/brdcom/references/procedures/proc/rpdspr/Pages/rpdp.aspx>> .

⁴² Inadmissibility criteria include: is a security risk, has already been granted refugee protection in Canada or elsewhere, has been refused protection in Canada, or has traveled through a designated safe third country.

⁴³ IRB, *Process for Making a Claim*, *supra* note 41.

testimonies and the documentary evidence at hand. It should be noted that these members go through a preliminary screening and selection advisory board, and must pass a written test and interview before becoming official RPD adjudicators.⁴⁴ Upon passing through these steps, a recommendation is made to the Minister, who then recommends appointments to the Governor in Council (or what is the Governor General, who acts on the advice of the federal cabinet).⁴⁵ This appointment process is based on very general and not particularly meaningful criteria, and it results in RPD members possessing widely different techniques and methods of analysis.⁴⁶ I will now turn to a brief history of Canada's refugee policies and legislation, which shapes the legislative framework within which RPD members must operate and further outlines how the refugee determination process in Canada functions.

Canadian Refugee Policy

The *Immigration Act, 1976*, was the first acknowledgment and inclusion of refugees in Canadian legislation.⁴⁷ Until the passing of *IRPA* in 2001, Canada relied exclusively on the 1951 Convention on the Status of Refugees to define a 'refugee'. A Convention refugee is an individual who is "outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries".⁴⁸ This inability, fear or unwillingness must then be linked to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social

⁴⁴ Immigration and Refugee Board of Canada, *The Selection Process for Governor in Council Appointments to the Immigration and Refugee Board of Canada*, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/empl/memcom/Pages/process.aspx>> .

⁴⁵ *Ibid.*

⁴⁶ Cecile Rousseau, et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15 *Journal of Refugee Studies* 43 at 45.

⁴⁷ *Immigration Act, 1976*, SC 1976-77, c 52.

⁴⁸ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1(A)(2), [1969] Can TS No 6.

group, or political opinion.⁴⁹ For Tamil refugee claimants, the Convention grounds most often cited are membership in a particular social group, political opinion, race or ethnicity.

In the spring of 1986, long before the most recent boat arrivals, 155 Tamils were found onboard a cargo ship off the coast of Newfoundland. While they were received initially in a humanitarian manner, a backlash eventually developed. The Tamils were depicted as “queue jumpers” or “illegal” migrants who refused to use the proper bureaucratic processes. A similar incident occurred in 1987 when a boat of undocumented Sikhs arrived in Canada. This triggered a focus on measuring desirability and deservedness that has continued up until today.⁵⁰ Processes have had to develop that operate to ensure only legitimate refugees are given protection due to a complex interplay of political, legal, media and public responses to these arrivals.

The Refugee Reform Bill (C-55), introduced in 1987, seemed to follow these two notable cases (Tamils and Sikhs) along with general concern regarding the backlog of refugee claims in Canada. Bill C-55 reconstructed the refugee process by creating the IRB, which had two divisions, the Immigration Appeals Division (IAD) and the Convention Refugee Determination Division (CRDD).⁵¹ Along with these structural changes, Bill C-55 also limited access to refugee status for claimants by excluding those coming from a “safe third country”. As well, claims could be found to lack “credible basis”, and Bill C-55 provided a very limited right to apply for leave to appeal to the Federal Court.⁵² The 1987 Deterrents and Detention Bill (C-84) acted as a set of companion provisions, which provided tougher penalties for smugglers, the ability to turn ships with unauthorized entrants on board

⁴⁹ *Ibid*, art 1(A)(2).

⁵⁰ Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) at 97.

⁵¹ Bill C-55, *An Act to amend the Immigration Act, 1976*, 2nd Sess, 33rd Parl, 1987.

⁵² Pratt, *supra* note 50 at 100.

away before landing, and the detention of those individuals deemed to pose a threat or security risk.⁵³

A few years later in 1992, Bill C-86 was also introduced, which extended the criminal-based grounds for inadmissibility.⁵⁴ Ultimately, it addressed the popular perception that Canadian legislation needed to be stronger when it came to excluding potential terrorists, although there was not yet a clear definition of ‘terrorism’.⁵⁵ As a whole, these provisions showed a need for labeling deservedness and keeping ‘bogus’ claimants out. This deepened criminalization and securitization of the refugee process and also highlighted the threat of criminals or terrorists being allowed entry. As pointed out by Anna Pratt, these bills effectively linked the two categories of ‘bogus refugees’ and criminal terrorists “into a new, hybrid object of governance constructed as a monumental threat”.⁵⁶

An important shift occurred in 2001 with the introduction of Bill C-11, or what is now known as the *Immigration and Refugee Protection Act (IRPA)*.⁵⁷ First, further structural changes were made to the IRB. The *IRPA* created four divisions in the IRB: the Refugee Protection Division (RPD) (of which my thesis dataset largely focuses on), the Immigration Division, the Immigration Appeal Division (IAD), and the Refugee Appeal Division (RAD) (which, controversially, has not yet been brought into force).⁵⁸ Another big change was the inclusion of grounds other than being a Convention refugee that warrants an individual needing asylum. In *IRPA*, a claimant can still be found to be a ‘Convention refugee’, but they

⁵³ William Angus & James Hathaway, “Deterrents and Detention: An Ill Conceived Afterthought” (1987) 7 *Refugee* 8 at 8-9.

⁵⁴ Bill C-86, *An Act to amend the Immigration Act and other Acts in consequence thereof*, 3rd Sess, 34th Parl, 1992.

⁵⁵ Pratt, *supra* note 50 at 105.

⁵⁶ *Ibid* at 102.

⁵⁷ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

⁵⁸ *Ibid*, s 151.

can also be considered a ‘person in need of protection’ under two different *IRPA* provisions.⁵⁹ Section 97(1)(a) states that refugee protection is conferred if removal of the person to their country or countries of nationality would subject them to “danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture”.⁶⁰ Section 97(1)(b) implies refugee protection if removal would subject the individual to a risk to their life or to a risk of cruel and unusual treatment or punishment.⁶¹

Being successful under either section 96 or 97(1) means the claimant is granted refugee protection and can apply for permanent residence status in Canada. It may seem that these provisions broaden the basis by which a claimant can be successfully granted protection, but this is not the case. Section 97(1) has been carefully constructed to be quite limited in scope. Some important distinctions need to be made regarding these provisions and the way they are applied. For example, under section 97(1) the claimant must fear torture, risk to life, or cruel treatment/punishment in a personal context and this must be proved by the claimant on a balance of probabilities (more likely than not).⁶² It is not sufficient to allege that torture is practiced broadly in the source country or that the risk faced is the same for generally all others in the source country.⁶³ In contrast, a section 96 claim does not involve establishing that the individual will be persecuted in the future, but rather, that there are

⁵⁹ ‘Convention refugee’ provisions are found in: *Immigration and Refugee Protection Act*, S.C. 2001, c 27, s 96.

⁶⁰ *IRPA*, *supra* note 57, s 97(1)(a).

⁶¹ Further conditions apply: (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. (*Immigration and Refugee Protection Act*, S.C. 2001, c 27, s 97(1)(b).)

⁶² Jessica Reekie & Justice Carolyn Layden-Stevenson, “Part III: Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act” in *IARLJ 7th World Conference, First Report* (Mexico City: International Association of Refugee Law Judges, Convention Refugee Status and Subsidiary Protection Working Party 2006) at 40.

⁶³ *Ibid* at 40 & 44.

“good grounds” for fearing persecution.⁶⁴ This involves assessing a claimant’s subjective fear alongside the objective conditions of the source country.⁶⁵

Another important distinction surrounds the ‘internal flight alternative’ (IFA). This is referred to when a claimant who otherwise meets section 96 or 97(1), nevertheless has somewhere else in their source country where they could seek refuge. Under section 97(1)(b), claims will fail if an IFA exists anywhere in the source country, meaning that the risk faced by the claimant must be felt in every part of the nation.⁶⁶ In comparison, section 96 subjects a potential IFA to a “reasonableness test” which considers that on a balance of probabilities there is no possibility of the claimant being persecuted, and that it would not be unreasonable, based on conditions in that part of the country, for the claimant to seek refuge there.⁶⁷ While *IRPA* provides the illusion that the scope for inclusion of refugees is broadening, in practice, it is clear that generally, more stringent tests exist for applying section 97(1), as compared to section 96.

Overall, *IRPA* is restrictive and narrowing because it further conflates refugee claimants and ‘illegal’ migrants. For one, it greatly expands upon inadmissibility categories on the basis of security, meaning that in many cases, claimants are viewed through a securitized lens before a humanitarian one.⁶⁸ Second, it continues to highlight issues of credibility linked with identity and proper documentation, when it is well known that due to the lived realities of refugees, this paperwork is not always attainable. *IRPA* requires

⁶⁴ Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law* (Ottawa: IRB Legal Services, 2010) at 5.3, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/rpdspr/def/Pages/index.aspx#table>>.

⁶⁵ *Ibid.*

⁶⁶ Immigration and Refugee Board of Canada, *Persons in Need of Protection, Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (Ottawa: IRB Legal Services, 2002) at 3.1.6, online: <<http://www.irb-cisr.gc.ca/Eng/brdcom/references/legjur/rpdspr/cgreg/lifevie/Pages/index.aspx#31>>.

⁶⁷ IRB, *Interpretation of the Convention Refugee*, *supra* note 64 at 8.1.

⁶⁸ Pratt, *supra* note 50 at 24.

“reasonable explanation” for lacking documentation, with a failure to provide such an explanation resulting in detention.⁶⁹ Therefore, lack of identity is used as a tool to criminalize potentially genuine refugees, creating a sense of ‘threat’, even when this is a frequent occurrence.

Ongoing Contemporary Developments

On February 16, 2012, Immigration Minister Jason Kenney introduced Bill C-31, or the *Protecting Canada’s Immigration System Act*. Bill C-31 improves upon the *Balanced Refugee Reform Act*, which was adopted during the previous minority government. It also encapsulates the government’s “cracking down” on smuggling bill (C-4) tabled in June 2011.⁷⁰ This bill will allow the processing of claims from “safe” democratic countries to be much quicker, assuming that many of these are bogus and need to be weeded out.

Bill Frelick, the program director for Human Rights Watch, has indicated that these new provisions violate basic human rights and contravene Canada’s obligations under international law.⁷¹ Sharry Aiken furthers this critique and points to the example of the Roma people in Central Europe who do face very real persecution, despite living in a so-called ‘safe country’.⁷² This example points to a further lack of comprehensive analysis that could plague the IRB, as under this proposed policy, social and political realities are ignored. With this line of thinking, Tamils could share a similar fate. They are already seen as suspicious refugees due to potential terrorist linkages, use of violence and their sometimes irregular

⁶⁹ *IRPA*, *supra* note 57, s 106.

⁷⁰ Tobi Cohen, “Tories target ‘bogus’ refugees” *National Post* (17 February 2012) online: <<http://news.nationalpost.com/2012/02/17/bill-c-31-protecting-canadas-immigration-act/>>.

⁷¹ Althia Raj, “Human Rights Watch Attacks Mandatory One-Year Detention of Illegal Immigrants in Tory Anti-Smuggling Bill” *Huffington Post Canada* 19 March 2012) online: <http://www.huffingtonpost.ca/2012/03/19/human-rights-watch-canada-anti-smuggling-bill_n_1363850.html>.

⁷² Cohen, *supra* note 70.

arrivals, and to add to that, Western countries perceive Sri Lanka to be relatively democratic and peaceful. In fact, while reading the IRB decisions in my dataset, RPD members often pointed to the democratic nature of Sri Lanka as sufficient reason for Tamils' safe return.⁷³

Under Bill C-31, it is proposed that the Refugee Appeal Division (RAD) will finally be put in place, something that is long overdue. However, the provisions through which this division of the IRB will be implemented leave a vast number of claimants excluded. Bill C-31 states that those claimants with unfounded claims, lack of credibility, those who are subject to a Safe Third Country Agreement exception, or those referred to the IRB before the coming into force, will all have no access to the RAD appeal process.⁷⁴ Further, there will be no access to the RAD for those who arrive as part of an "undesignated irregular arrival", or what is more commonly known as boat arrivals.⁷⁵ Therefore, this new appeal process for refugee claims will effectively exclude a large pool of individuals, many of which may be fleeing real scenarios of persecution and fear.

These IRB "improvements", along with anti-smuggling measures, show that Minister Kenney is largely focused on the dichotomy of deserving/undeserving refugee claims. He stated in a press release, "Too many tax dollars are spent on bogus refugees. We need to send a message to those who would abuse Canada's generous asylum system that if you are not in need of protection, you will be sent home quickly".⁷⁶ The most recent push for refugee

⁷³ In IRB Case MA5-03217, the RPD member assumes that Sri Lanka is a well-functioning democracy, and that if its constitution guarantees its citizens equal rights, than Tamils *must* have equal access and are viewed as important members of Sri Lankan society. In IRB Case MA0-10017, the RPD member insists that even if some Tamils are being harassed, in a democracy, the State is responsible for the security of its citizens.

⁷⁴ Citizenship and Immigration Canada, *Backgrounder: Summary of Changes to Canada's Refugee System in the Protecting Canada's Immigration System Act* (Ottawa, 2012) online: Media Centre <<http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp>>.

⁷⁵ *Ibid.*

⁷⁶ Citizenship and Immigration Canada, *News Release: Harper Government Introduces the Protecting Canada's Immigration System Act* (Ottawa, 2012) online: Media Centre <<http://www.cic.gc.ca/english/department/media/releases/2012/2012-02-16.asp>>.

determination process changes has continued to move further away from its humanitarian origins, and indicates that as a country, there is now an economic need to identify who is undeserving and to get them out of Canada even quicker.

Numerous scholars of the refugee (and immigration) process have argued that these legislative changes, collectively amount to a series of processes within which several phenomenon can be identified. First, the refugee as a humanitarian category becomes severely constrained. The refugee determination process starts from a position that challenges whether claimants are truly fleeing persecution. One way this is done is through increasing links made between the refugee and criminality/terrorism. Another is an overarching sense, as presented by Minister Kenney, that ‘bogus’ refugees are overrunning the system. This is demonstrated through consistent findings of lack of credibility in refugees’ oral hearings.

The remainder of this thesis explores these developments through the example of Tamil applicants. I begin, however, in Chapter 2 by examining the secondary literature that refers to the concepts and theoretical discussions that are pertinent for shifting from this historical overview to an analysis of the IRB decisions themselves. This section will help to outline the research my thesis intends to build upon, which I will do by demonstrating how the example of Tamils are indicative of the trends presented by Dauvergne and Macklin, and the implications that follow. Chapter 3 addresses macro, or more readily available technologies of exclusion, which enable ‘refugee’ to be collapsed with ‘criminal’ and ‘terrorist’. This is especially prevalent due to highly publicized irregular boat arrivals and the Tamil diaspora that is so often linked with the LTTE. Chapter 4 addresses micro technologies of exclusion that take place within the highly institutionalized setting of IRB hearings. What results is a focus on credibility as a tool of exclusion that is used to constrain the space within

which the humanitarian refugee can be recognized. Together, these chapters demonstrate that both levels of exclusionary discourse reinforce and sustain one another, which points to a truly disappearing 'refugee'.

Chapter 2: Conceptual Framework

In this chapter, I will be constructing a theoretical background that will draw out important analyses, debates and research regarding concepts that are central to my thesis. I begin by exploring the socio-legal category of ‘refugee’. I consider how the ‘refugee’ has been shaped by legal provisions, judicial interpretation and the refugee’s juxtaposition against state sovereignty. I also look at the legal/illegal binary that is affixed to refugee claimants, and how things like credibility assessments in the Refugee Protection Division (RPD) hearing can be used to create suspicion and doubt. From here I transition to a discussion relating to boat arrivals or the smuggling of refugees. This is a recent and pressing issue that contributes to the ‘illegality’ or suspicion that enshrouds the refugee determination process. Likewise, I consider how terrorism impacts the category of ‘refugee’, especially when claimants are fleeing a country where their identity implicates them in the violence that has occurred.

These themes help to engage in Audrey Macklin’s notion of the “discursive disappearance of the refugee”. It is through discourses that construct the refugee as “illegal” or suspicious, or discourses that conflate the refugee with ‘terrorism’ and ‘crime’ (as examined by Catherine Dauvergne) that the refugee is viewed as fraudulent first, and as a humanitarian category second. I explore this phenomenon through critical discourse analysis of a large set of Immigration and Refugee Board (IRB) decisions that examine Tamil refugee claimants, as explained in Chapter 1. A focus on discourse has allowed me to demonstrate in the following chapters that technologies of exclusion are happening at both macro and micro levels. They reinforce each other and maintain a space where exclusion is normalized and the category of humanitarian refugee is increasingly constrained.

I point to national identity and race in my conceptual framework as an example of the need for a critical discourse perspective. Throughout the discussion of deserving/undeserving refugee claimants is an underlying power differential that points to an “us versus them” mentality and concerns surrounding national unity. It is important to explore this further. While the racialization of immigration and refugee issues are not as explicit as they were in the past, the increasing language used to create a space where exclusion of refugees *can* occur certainly employs raced notions of risk and criminality, albeit more discretely.¹

The Refugee: Identity and Illegality

As discussed in Chapter 1, Canada is a signatory to the 1951 Convention Relating to the Status of Refugees. Until 2001, when the *Immigration and Refugee Protection Act (IRPA)* was passed, the ‘Convention refugee’ definition was used for determining refugee protection. Under *IRPA*, there are also two provisions (97(1) a & b) under which a person can be found in need of protection, but these require more stringent tests. Well over 90% of all Refugee Protection Division (RPD) claims involve section 96 (‘Convention’) refugee claims, as compared to the 13% that involve section 97(1).² Therefore, the vast number of RPD claims involve an analysis of whether the applicant had a ‘well-founded fear’ of persecution as it relates to the enumerated Convention grounds.

The applicant’s ‘well-founded fear’ is partly assessed against a subjective standard. That is, a claimant’s subjective fear “relates to the existence of a fear of persecution in the

¹ Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) at 110.

² Jessica Reekie & Justice Carolyn Layden-Stevenson, “Part III: Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act” in *IARLJ 7th World Conference, First Report* (Mexico City: International Association of Refugee Law Judges, Convention Refugee Status and Subsidiary Protection Working Party 2006) at 50.

mind of the claimant” and this must be grounded in an objective (valid) basis.³ The interpretation of subjective fear is left to the presiding RPD member, who must be able to grasp the complexities of the claimant’s history and story and use this to fairly assess the application for asylum. From my review of the IRB cases in my dataset, the result is a highly speculative and inconsistent application of what is ‘fear’, something that I discuss in more detail in Chapter 4. The standard of proof indicates that “claimants must establish the factual elements of their case on a balance of probabilities, but they do not have to prove that persecution would be more likely than not”.⁴ In application, this standard of proof equates to having “good grounds” to fear persecution, meaning a less than fifty percent chance, but more than mere possibility.⁵

Article 31 of the Convention⁶ relates to findings of “well-founded fear”. Those refugees that arrive through illegal means are to be protected (under Article 31) as long as they fit the definition provided in Article 1 and they can justify their irregular entry. Therefore, a refugee’s protection from undue penalty (as related to illegal entry) is also tied to the decision-maker’s interpretation of what is ‘well-founded fear’. Seemingly, an accurate understanding of ‘well-founded fear’ requires a full understanding of the historical and political background of the source country. As I go on to show in this thesis, the necessity of this knowledge is something that stands in stark contrast to the active dehistoricization (and

³ Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law* (Ottawa: IRB Legal Services, 2010) at 5.3, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/rpdspr/def/Pages/index.aspx#table>>.

⁴ IRB, *Interpretation of the Convention Refugee*, *supra* note 3 at 5.2.

⁵ *Ponniah v. Canada (Minister of Employment and Immigration)*, [1991] 132 NR 32 at para 245, 13 Imm. L.R. (2d) 241.

⁶ The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (*Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 31, [1969] Can TS No 6.)

inevitable depoliticization) that occurs when IRB decision-makers cut through refugee “stories” to get to “bare facts”.⁷ The importance attributed to ‘fact-finding’ in IRB processes and members’ interpretations means that subjective fear and the claimant’s narrative of their experience is disregarded or made secondary to objective elements, such as country reports and fact sheets.

Cutting through “stories” to get to the “bare facts” seems to be an affront to the refugee’s identity. By starting refugee hearings with the assumption that a claimant’s narrative stands in opposition to objective truth, this challenges the claimant’s due process. I believe this violation occurs because of an inherent tension that exists between refugees as rights-holders and the notion of sovereignty. Dauvergne indicates that while a right is a claim to power, it is situated within pre-existing power arrangements, and a rights claim made by a refugee cannot be equivalent to the sovereign nation’s power over controlling borders.⁸ In popular discourse, refugees are often constructed as being threatening due to the chaotic and spontaneous nature of their arrival. This is juxtaposed with the liberal state’s inherent desire for order, rules and control and effectively, refugees are construed as dangerous, or at the very least, a challenge to the established order.

The refugee determination process is a state-centric one. The state has the ability to select who is deserving of protection, and who is undeserving or lacks credibility. It is through labeling claimants deserving/undeserving that discourse is created around how refugees can be excluded and through what means. Article 33 of the 1951 Convention is another good example of the state’s role in refugee rights and how it maintains its centralized position in the refugee system. This clause reads, “No contracting state shall expel or return a

⁷ Liisa Malkki, “Speechless Emissaries: Refugees, Humanitarianism and Dehistoricization” (1996) 11 *Cultural Anthropology* 377 at 385.

⁸ Catherine Dauvergne, “The Dilemma of Rights Discourses for Refugees” (2000) 23 *UNSWLJ* 56 at 57.

refugee” in a manner “where his life or freedom would be threatened” on account of one of the Convention refugee grounds.⁹ This protection against refoulement indicates an obligation on the nation not to return refugees to countries where they will be at risk.¹⁰ While this appears to protect the refugee from undue harm or torture, it is not written as a right belonging to the individual, but rather, it only functions as a right to remain in a country because of the pervasive right of nations to exclude those seen as “outsiders”.¹¹ Here, international law recognizes that the power to control borders, and thus, the flow of people, lies with the nation state, vesting no power with the refugee. While many negative rights are framed vesting power with the state, the importance here lies in that this negative right is for non-citizens who are already in a position of disadvantage.

Fundamental human rights are primarily protected through procedural rights, and these are realized through the power of the national legal system, which recognizes claims and enforces results.¹² Behind the power of the legal system lie the rights of the nation and its sovereignty. It is for this reason that the state is technically acting well within their rights when forcing boats containing refugees away from their shores; refugee law becomes a site for varying assertions of sovereignty, power and control.¹³ Eleonore Kofman indicates that “asylum challenges the sovereignty of the state to determine the number and composition of those who enter the nation-state, which seeks to reassert its authority against those who

⁹ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 33, [1969] Can TS No 6.

¹⁰ *Ibid.*

¹¹ Dauvergne, *supra* note 8 at 58.

¹² *Ibid* at 62.

¹³ *Ibid* at 60.

disrupt it”.¹⁴ This reassertion can be done by shaping and controlling boundaries regarding who will be allowed in.

The history of western refugee determination processes demonstrates this theory. In the early 1950s to mid-1970s, refugees fleeing from communist states in Eastern and Central Europe were easily incorporated into Western countries on the basis of their European ethnicities. Their desperate plea for asylum provided ideological evidence of the superiority of Western liberal democracy, and so allowing these claimants entry was in effect, an acknowledgement of their inferiority.¹⁵ In the 1960s and 1970s, the face of the refugee began to change and more individuals began arriving from Africa and Asia after long struggles for decolonization.¹⁶ There was a growing concern that North-South inequalities were becoming the sole reason for migration to a more ‘civilized’ nation, and so, refugee policies were narrowed.¹⁷ Throughout the history of migration, the refugee is not constructed as a strong ‘rights-holder’; instead, refugee determination processes becomes predominantly about state interests and control over the movement of persons.

Audrey Macklin suggests that another way in which this sovereign power and control is realized is in the “discursive disappearance of the refugee”.¹⁸ Macklin states that there has been an ongoing erosion of the concept that people who are seeking asylum are truthful and actually fleeing persecution.¹⁹ In the interests of national security, an increasingly globalized

¹⁴ Eleonore Kofman, “Managing migration and citizenship in Europe” in Christina Gabirel and Helene Pellerin, eds, *Governing International Labour Migration: Current issues, challenges and dilemmas* (UK: Routledge, 2008) at 21.

¹⁵ Matthew Gibney, “A Thousand Little Guantanos: Western states and Measures to Prevent the Arrival of Refugees” in Kate Tunstall, ed, *Migration, Displacement, Asylum: The Oxford Amnesty Lectures 2004* (Oxford: Oxford University Press, 2006) at 144.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Audrey Macklin, “Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement” (2005) 36 *Columbia Human Rights Law Review* 365 at 365.

¹⁹ *Ibid.*

world, and the need for national unity, the nation state exercises its power through the legal system (and popular discourse) to provide a general sense of disbelief and skepticism regarding the “asylum-seeker”. When assessing refugee claims, the spectrum upon which claimants are placed appears to have two distinct and opposite outcomes. One is either a ‘true refugee’ or comparatively, an ‘illegal’ migrant who is trying to “queue jump” by defrauding the (otherwise legitimate) refugee determination system.

While refugees should never be considered illegal migrants due to the nature of their various complex situations (and 1951 Convention protections), in various interplaying discourses (public, government, media) refugees have been increasingly positioned within or in relation to the legal/illegal binary. A claimant’s case is meant to be based on a “well-founded fear” of persecution, as this is what differentiates immigrants from refugees. Instead, the legal/illegal binary seems to be applied to refugees through discourses that impute to them standards of appropriate, responsible behavior (in how they flee their country of origin, their conduct in the asylum application process, and so on). These actions are separated from the larger context of their flight. These actions can range from means of arrival, such as paying smugglers to arrive by boat, to mixing up details in the hearing testimony, which is often used to indicate (intentional) inconsistency and thus, a lack of credibility.

Under standard IRB practices, the ‘illegal’ migrant is often perceived to be an immigrant that enters a country in breach of the law or who overstays their permission to stay. My research builds on Macklin’s work, which shows there is a growing tendency to include refugees within this same category. A key problem concerns the use of the term “illegal” and how it establishes fragmented refugee identities that are categorized based on perceived legality, as well as related notions of deservedness and credibility. A further

problem is that the focus on illegal migrants constructs an identity of the refugee that is based solely in terms of a relationship with the law.²⁰ This allows room for IRB adjudicators to focus on the legality/illegality of specific actions of refugees (i.e. being smuggled, resistance through violence, etc.) without situating these acts in a broader context. Refugees determined to be ‘illegal’ (otherwise a contradiction in terms) are depicted as unworthy; having broken “our” law, they are ineligible to remain here.

The term “illegal” is often used directly by media and government figures. Looking at IRB decisions, it appears that decision makers can be upfront with this label, or they can use subtle methods to point to inconsistencies, irregularities or unlawful behaviour. In all of these sites, legality/illegality comes to denote a shift in perception regarding general moral worthiness.²¹ The “illegal” migrant leads to refugees being increasingly criminalized – they are transgressors of Canadian law first, and are seen as an asylum-seeker second.²² It is important to note that this concept of illegality is largely based on refugees arriving to Canada in unorthodox ways or without the proper paperwork, something that is not necessarily criminal but is depicted as such. Developed through an interchange of sites of discourse (public, government, media, law) there is a tendency to conflate being *unable* to meet bureaucratic norms with abusing the Canadian system. The refugee’s potential inability to use the ‘proper channels’ to arrive in Canada, or the inability to gain access to identification documents are constructed as purposed violations of Canadian law or a deliberate challenge directed at border control and national security. These ‘transgressions’ are pointed to increasingly and transformed into arguments about needing to enhance the

²⁰ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) at 16.

²¹ *Ibid.*

²² *Ibid.*

integrity of the refugee system. If more refugees are ‘choosing’ not to follow the appropriate bureaucratic steps, the system needs to more efficiently protect against ‘bogus’ refugees, or immigrants disguising themselves as authentic asylum-seekers.

As the refugee determination process becomes infused with uncertainty, the government is easily able to justify new restrictive measures that enhance order and stability. An example of such a measure is the Canada-U.S. Safe Third Country Agreement, which was enacted on December 29th, 2004 and requires “asylum-seekers” to lodge refugee claims in the very first country of arrival. In connection to these provisions, American anti-immigration activist Mark Kirkorian stated:

Asylum is analogous to giving a drowning man a berth in your lifeboat, and a genuinely desperate man grabs at the first lifeboat that comes his way. A person who seeks to pick and choose among lifeboats is by definition not seeking immediate protection, but instead seeking immigration.²³

This perspective makes the assumption that if a refugee has a preferred country in mind, they are no longer fearful or desperate enough to be considered a true refugee and they are again, taking advantage of the whole system. Despite the possibility that the refugee might be trying to maximize the likelihood of their acceptance, find kin or friends, or demonstrate language or cultural affinity, etc. by pinpointing a certain country, the popular perspective (and the Third Country Agreement) invokes notions of mistrust, taking advantage of the system, and essentialized notions of ‘fear’ and what it is to be a ‘true’ refugee.²⁴ According to Matthew Gibney, in actuality, lack of success in gaining refugee status more often than not is attributable to narrow interpretation of eligibility and *not* an abuse of the system.²⁵ Focusing

²³ Macklin, *supra* note 18 at 382.

²⁴ *Ibid.*

²⁵ Gibney, *supra* note 15 at 158.

on the refugee claimant's credibility is one of the ways in which the process of interpretation is narrowed.

Testimony and Credibility

Just as there are particular conceptions in the Canadian public of what it is to be a 'proper' refugee, there is a conceptualization of appropriate refugee narratives. In this light, refugee status is understood to have a performative element. The exemplary victim is being sought through demonstration of a combination of emotional wounds and credible facts, or subjective and objective fears, respectively.²⁶ As mentioned previously, Refugee Protection Division (RPD) cases are often structured so as to cut through the 'story' and get to the 'bare facts'. This runs counter-intuitive to the form of narrative because it immediately gives more weight to objective truth rather than the subjective. This lack of full comprehension also contributes to an inability to understand how 'the refugee experience' might alter a narrative, producing something less coherent than what is expected by the IRB.

For one, refugees are in the middle of the story they are telling. Their future is threatened, so uncertainty is more likely present than progression and a proper conclusion.²⁷ Generally, claims for protection and admission into a country must conform to the categories of refugee law, but the associated narratives must also conform to the "meta-narratives of truth and credibility of the judicial system".²⁸ This means that a refugee's narrative is being measured in various ways (credibility, reliability, feasibility) and is placed in different sets of categories (deserving versus illegitimate claimants) simultaneously. A refugee's account of

²⁶ Malkki, *supra* note 7 at 384.

²⁷ Marita Eastmond, "Stories as Lived Experience: Narratives in Forced Migration Research" (2007) 20 *Journal of Refugee Studies* 248 at 251.

²⁸ *Ibid* at 260.

persecution may potentially already be disjointed and complex. As an added layer, this account is being assessed according to a multitude of expectations that the claimant is not directly made aware of.

Furthermore, the narrative and its corresponding assessment are unfolding in an already unfamiliar and threatening atmosphere. When providing a narrative in a pressured environment, important parts of a story can be fragmented and details can be beyond recall. Juliet Cohen, in her study of using testimony to assess the credibility of asylum seekers, notes that in 1932, new research introduced the concept of 'schemata'. Schemata is the observation that when people remember stories the recall is not completely accurate, and instead, a blended and dynamic memory forms.²⁹ This is because individuals have a tendency to reconstruct stories in light of their own experiences and knowledge.³⁰ Another concept, hypermnesia, indicates that with repeated recalls, individuals tend to remember more details about an incident.³¹

The problem is that in a growing "culture of disbelief" the realities of narrative are problematic for the refugee claimant.³² The ambiguity, chaos and unresolved nature of refugee situations can undermine the narrative they provide, and yet it is in these situations that forced migrants most depend on their story to be believed.³³ The disbelief that shrouds the refugee process clearly affects notions of truth and plausibility when listening to a refugee's narrative. There is an assumption that truth and plausibility are transparent and

²⁹ Juliet Cohen, "Questions of Credibility" (2001) *Intl J Refugee L* 293 at 295.

³⁰ *Ibid.*

³¹ *Ibid* at 297.

³² Eastmond, *supra* note 27 at 260.

³³ *Ibid* at 259.

given concepts, when really, they are entirely contingent upon the way one perceives the world and one's own life experiences.³⁴

A narrative of displacement, violence and persecution in reality, may be disjointed and fragmented, but this lack of coherence should not point to a claimant having a lack of credibility. Juliet Cohen posits that the IRB may encourage consistency in all testimony to 'keep it simple'.³⁵ However, it is not usually known by the claimant that consistency is valued above all other things, and thus, if a testimony is consistent, largely this is coincidental.³⁶ This shows another point within the refugee process where it is important to have a fully comprehensive understanding of not just contextual factors, but issues such as those surrounding narrative and recall. "Refugee" cannot act as an essentialized and uniform category within which a set of strict and unforgiving expectations is employed. A similar type of blanket approach is seen when connections are made between claimants and smuggling (and other criminal) operations.

Boat Arrivals and Human Smuggling: Criminals or Victims?

The two recent boat arrivals of Tamils (in the summers of 2009 and 2010) have heightened focus in the Canadian media and public discourse on refugees being smuggled.³⁷ In effect, this focus has furthered the construction of an 'illegal migrant' that can be compared with that of the 'legal migrant'.³⁸ These labels also contribute to the 'disappearing

³⁴ *Ibid* at 253.

³⁵ Cohen, *supra* note 29 at 308.

³⁶ *Ibid*.

³⁷ Here, smuggling refers to the process by which individuals make a financial (or other similar arrangement) for passage to a country where they seek refuge. This is contrasted with trafficking of persons, which involves innocent individuals who are involuntarily being transported.

³⁸ William Walters, "Anti-illegal immigration policy" in Christina Gabriel and Helene Pellerin, eds, *Governing International Labour Migration: Current issues, challenges and dilemmas* (UK: Routledge, 2008).

refugee’, or the increasing notion that refugees are not genuinely in need of protection. In the ‘smuggling’ context, an act of desperation can be reformulated as a ground for inadmissibility. This is done on the basis that the presence of smuggling means the refugee can be linked to legitimating criminality, possibly terrorism, and more generally, the breaking of rules and bureaucratic processes. Exclusionary discourses can also center on the refugee as not truly fleeing persecution, but rather, coming to Canada as an economic migrant, or someone seeking voluntary improved living conditions.

An Australian study of media discourses of ‘boat people’ has shown that with media reports of these arrivals, there is an overwhelmingly negative and sensationalized focus on the travel method used.³⁹ In turn, popularized labels shift the public view from overarching reasons for asylum seeking, to the individual behaviours of those arriving by boat.⁴⁰ A presumption then arises that if asylum seekers were genuine, they would not use smugglers to facilitate their journey, and thus, by association, they are criminals as well.⁴¹ In the Canadian context, Jason Kenney, the Minister of Immigration, implied that boat passengers are among those trying to enter Canada through the “back door”, while also suggesting that those who pay human smugglers are criminals and potentially terrorists themselves.⁴²

Dauvergne summarizes the formal distinction between trafficking and smuggling as enacting specific value judgments about the migrants involved; trafficking has innocent victims and that those who are smuggled are culpable for their choice.⁴³ She characterizes the refugee involved with “criminally assisted migration” as being located in a grey area where

³⁹ Fiona McKay, Samantha Thomas & Susan Kneebone, “‘It would be okay if they came through the proper channels’: Community perceptions and attitudes toward asylum seekers in Australia” (In Press Accepted 12 February 2011) *Journal of Refugee Studies* at 12.

⁴⁰ *Ibid* at 16.

⁴¹ *Ibid* at 12.

⁴² Alexandra Mann, “Refugees Who Arrive by Boat and Canada’s Commitment to the Refugee Convention: A Discursive Analysis” (2009) 26 *Refuge* 191 at 201.

⁴³ Dauvergne, *supra* note 20 at 69.

the two concepts of trafficking and smuggling intertwine.⁴⁴ Refugees in this scenario can still face great abuse and hardship and their choices are usually very limited. Yet popular (and legal) discourse seriously constrains the space in which these individuals can be viewed as victims. The formal distinction between trafficking and smuggling, allows legal decision-makers and policy-makers to make simplistic connections between, and assumptions about victimization, agency and crime.

How *should* refugees be arriving in Canada? Given the potential human rights abuses and systemic discrimination often being fled, should formal considerations be expected of a refugee? Does a proper mode of arrival exist or are 'true' refugees only selected from abroad? Macklin points to the fact that *why* someone crosses a border has no necessary relation to *how* they cross it.⁴⁵ Indeed, the negativity with which the government perceives spontaneously arriving refugees has made it impossible for an asylum seeker to legally travel to a western nation. The majority of refugees are not pre-selected and arrive on their own initiative.⁴⁶ A similar situation arises for refugees that arrive in countries of prospective asylum without identity documents. Often obtaining the required documents is impossible, just as following correct and legal procedures may not be feasible for the authentic refugee. This again points to rigidity in the refugee process, and Western assumptions regarding the range of choice a refugee should exercise. Interestingly, receiving Western states prefer that refugees do not exercise choice by choosing to arrive spontaneously or by taking initiative to flee persecution. Receiving states prefer choosing refugees that are abroad, without agency, and needing 'saving'.

⁴⁴ *Ibid* at 91.

⁴⁵ Macklin, *supra* note 18 at 367.

⁴⁶ *Ibid*.

The Migrant ‘Menace’: Violence and Terrorism

There is a reason that when masses of people flow over borders from Burma to Thailand, Rwanda to Burundi, etc. that the West is prepared to assume that they are refugees, and yet, when the border being crossed is closer to the prosperous West, the assumption is often the converse.⁴⁷ In general, it is the very presence of migration laws that makes national borders meaningful for a nation.⁴⁸ These laws constitute a community of insiders and indicate the degrees of belonging and entitlement to Canada. Hence, migration law becomes a key site for national assertions of power and identity.⁴⁹ This is what is being protected when nations turn to border control and the securitization of migration policy.

In “The Growing Culture of Exclusion”, Dauvergne demonstrates that terrorism is increasingly being used as a justification to exclude certain persons from entering Canada.⁵⁰ She focuses on how the meaning of ‘terrorism’ within Canadian refugee law has expanded, so as to broaden the basis on which a person can be seen as a threat or risk. The events of 9/11 certainly created a momentum and highlighted particular racial categories of risk, but there was also a parallel development happening in regards to international conflicts. Examples such as Yugoslavia, Sierra Leone and Sri Lanka all constitute situations where both ‘perpetrators’ and ‘victims’ have sought asylum, and violence permeated all sides to the conflicts.⁵¹ This intensified the perceived need to identify and exclude those seen as undeserving, so as to give legitimacy to the ‘deserving’ claimants and the right side of the

⁴⁷ Dauvergne, *supra* note 20 at 53.

⁴⁸ *Ibid* at 17.

⁴⁹ *Ibid*.

⁵⁰ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23 *International Journal of Refugee Law* 54.

⁵¹ *Ibid* at 65.

conflict.⁵² These motivations have heavily influenced exclusion categories in domestic refugee cases.

Dauvergne goes on to explain two broad findings; the first being that courts and tribunals have a tendency to characterize legal issues as political ones.⁵³ This means that while courts actively refuse to resolve political issues that exist between groups of people in conflict with one another, the court makes political decisions (such as applying terrorism). The labeling of one party to the conflict (such as the LTTE) as a terrorist group immediately shifts the focus to the illegitimacy of the violence they used, while simultaneously taking away from a discussion that looks more to the beliefs and tensions that gave rise to such actions. This partially helps to legitimate other parties to the conflict (including the Sri Lankan state) and thus it depoliticizes and dehistoricizes the ethnic tensions that fueled the civil war. The second finding is that courts and tribunals have been defining violent acts as non-political acts in ways that tend to deny claims for asylum.⁵⁴ The definition of refugee tends to valorize certain kinds of political acts as giving rise to a well-founded fear (i.e. political speech acts; protests, political opposition). By characterizing acts as non-political, refugee decision makers frame the conflicts in question, and the applicant's conduct, as illegitimate and therefore non-political and criminal.

Dauvergne's work helps to highlight the contradictory elements of the refugee system in Canada. Legal determinations are often intensely political without any direct acknowledgment of this. Further, the seemingly small or inconsequential maneuvers by decision makers to individualize contexts have the effect of removing a complex examination of the international conflicts themselves. At the same time, using the label of 'terrorism',

⁵² *Ibid* at 66.

⁵³ *Ibid* at 72.

⁵⁴ *Ibid*.

which effectively renders violence irrational and disproportionate to one's aims, depoliticizes violence. The use of 'terrorism' limits the discussion regarding other contextual factors and historical analysis. In the case of Sri Lanka, this places the state in a position of relative legitimacy as compared to the LTTE, and thus, this presents an immediate challenge for Tamil claimants. Edward Said refers to this as the "new political criminality", which functions to control political expression by refugees and with this, to control their access to asylum.⁵⁵ As bodies that need to be regulated, under the legal veil of the RPD, the very personal beliefs and actions of refugees can be manipulated and made less important for the purposes of exclusion.

Audrey Macklin argues that by allowing terrorism (and criminalization) to inform refugee legislation, legislators "institutionalized into law the figure of the [migrant] as the archetypical menace to the cultural, social, and political vitality of the nation".⁵⁶ The legislation used to invoke security policies in Canada helps to produce and reinforce the perception that 'foreigners' and non-citizens are the problem. The Tamil community in Toronto is a specific example of this trend. Media and popular discourses have emphasized viewing Tamils as potential terrorists (namely, for the LTTE). Following from this, Tamil street gangs in Toronto have become a clear indicator for some in the public that the refugee system is too lax.⁵⁷ The entire Tamil community becomes marked with the prospect of violent and serious crime. Clearly, this also becomes an issue that is racially charged.

⁵⁵ Prakash Shah, "Taking the 'political' out of asylum. The legal containment of political activism by refugees" in Frances Nicholson & Patrick Tworney, eds, *Refugee rights and realities: evolving international concepts and regimes* (Cambridge: Cambridge University Press, 1999) at 134.

⁵⁶ Yasmeen Abu-Laban, "Liberalism, Multiculturalism and the Problem of Essentialism" (2002) 6 *Citizenship Studies* 459 at 476.

⁵⁷ Peter Li, "Contradictions of 'Racial Discourse'" in Vijay Agnew, ed, *Interrogating Race and Racism* (Toronto: University of Toronto Press, 2007) at 48.

National Identity and the Implication of Race

The IRB increasingly uses language that points to the ability to exclude refugees, and effectively 'foreignness' becomes a marker of threat. The unknown "Other" is denoted to carry criminality, violence and danger. This concept becomes a direct implication of the tools used to make the genuine refugee 'disappear'. Because the discussion surrounding refugees is centralized around the "Other", this also implicates broader notions of national anxieties about security and maintaining cohesiveness. The themes of national identity and security point to a further reason why it is important to explore RPD decisions and the discourses that are employed within them, regardless of the applicant's success in being granted asylum. If the language and techniques being used by RPD adjudicators is widening the space where exclusion *can* be applied, there are important trends regarding national identity that should also be examined.

Countries have an evolving but dominant identity, and security action is always taken on behalf of an imputed collectivity that encapsulates this dominant identity. The collective of modern Canadian society is in the process of constant change, and it is seemingly threatened by a continuous influx from the 'outside.'⁵⁸ The same thing has been seen in the United Kingdom, where some migrants have been characterized as bringing "foreign" ways with them that are out of keeping with a sense of "Britishness".⁵⁹ What does the innate sense of "being Canadian" mean? Identifying as a Canadian is linked to the concept that individuals composing a nation are believed to share certain traits marking them off from others.⁶⁰ Therefore, in its very theoretical underpinnings, national identity makes a

⁵⁸ Paul Roe, *Ethnic Violence and the Societal Security Dilemma* (New York: Rutledge, 2005) at 170.

⁵⁹ *Ibid.*

⁶⁰ David Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000) at 30.

distinction between ‘us’ and ‘them’. This dichotomy is a clear marker of colonial influence that has greatly impacted the liberal democratic state and its ability to accept difference.

There is always an ‘Other’ to contrast oneself against. Race is then imposed upon otherness, meaning that the threat (the unknown or the external) is named racially and rendered real.⁶¹ Subtle racialization of threats and outsiders is made possible by discourses that insist racism is a thing of the past, and that any contemporary inequities are due to individual or group inadequacies.⁶² This shift in responsibility is often seen in contexts where the refugee is blamed for not knowing proper procedures or for bringing detention upon themselves. ‘Insiders’ or Canadians are able to benefit from and reproduce racisms, while also distancing themselves from any implication or role in the history of racial inequality.⁶³ Furthermore, racial states claim to mediate relations between white/non-white persons, and as adjudicator, the state claims nominal neutrality.⁶⁴ In this role, the state is removed from having any role in the racialization of belonging.

Most liberal democratic nation-states, including Canada, tend to advocate for an “imagined community” involving the commonalities of liberal values, tolerance, progressiveness, and diversity.⁶⁵ However, in contrast to these concepts is Canada’s endorsement of a racial imaginary realized through the securitization of immigration and refugee law. Commonly held beliefs (important to Canadian identity) are more readily attributed to some demographic groups and more easily disputed for other groups.⁶⁶ Simultaneously, a “safe haven” concept is readily employed, which means that a profile must

⁶¹ David Goldberg, *The Racial State* (Massachusetts: Blackwell Publishers, 2002) at 23.

⁶² *Ibid* at 99.

⁶³ *Ibid*.

⁶⁴ *Ibid* at 111.

⁶⁵ Reg Whitaker, “Refugee Policy after September 11: Not Much New” (2002) 20 *Refuge* 29. See also: Christiane Wilke, “The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada’s Security Certificate Legislation” (2008) 26 *Windsor Yearbook of Access to Justice* 27 at 38.

⁶⁶ Wilke, *supra* note 65 at 38.

exist that has been developed for ‘deserving’ foreigners. The concepts of “imagined community”, racial imaginary and “safe haven” portray the array of experiences and treatment migrants can face depending on their characteristics, and points to a need for further exploration of who is “unfit” and why. It also points to the exercise of power seen through the practices of naming/evaluating and elevating beings or rendering them invisible.⁶⁷

The largest problem with simply accepting that some nations will always view others as foreign is because ‘foreign’ is not a natural characteristic. Ideas about foreignness have developed over time due to various decisions about the shape of the nation and what elements of security should be protected and promoted.⁶⁸ Countries make decisions that mold and influence the minds of its citizens, and as such, the framework of “us versus them” has been wholly constructed and state-based. Foreignness is “a symbolic marker that the nation attaches to the people we want to disavow, deport, or detain because we experience them as a threat”.⁶⁹ Ultimately, one can see how the “bad” migrant is constructed to be someone that is less civilized (perhaps more violent/dangerous), non-white, and an outsider. The challenge lies in the presumptions surrounding democratic society, and how to use discourse to deconstruct race and explain the social significance given to it when the law disallows its use to differentiate and exclude others.⁷⁰

Discourse Theory: A Critical Examination of Language Power and the Law

⁶⁷ David Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* (Massachusetts: Blackwell Publishers, 1993) at 150.

⁶⁸ Wilke, *supra* note 65 at 51.

⁶⁹ *Ibid* at 39.

⁷⁰ Li, *supra* note 57 at 51.

Discourse acts as a system of texts that does not mirror reality but brings into being “situations, objects of knowledge, and the social identities of and relations between people and groups of people”.⁷¹ Discourse analysis presupposes that relations exist between discourse, power, dominance, and social inequality, and it seeks to locate the structures, strategies and other properties of a text that play a role in producing discourse-power relations.⁷² These elements can be realized through different modes of direct/overt support, representation, legitimation, denial, concealment, etc.⁷³ As an example, in an analysis of parliamentary discourse, Dijk notes that legitimation can happen at the semantic level, where discourse represents its partisan view of the events as ‘the facts’, or socio-politically, where the official discourse legitimates itself as authoritative and delegitimizes other competing alternatives.⁷⁴

Critical discourse analysis cannot be merely observational, descriptive, or explanatory, as these modes are often enacted by subtle and routine forms of text that seek to naturalize the current social order.⁷⁵ Also, discourses cannot be found in their entirety, but clues can be derived from particular texts to form larger patterns and themes.⁷⁶ Power and dominance are usually organized and institutionalized, and so critical discourse theory must employ an approach that challenges legitimation and hegemony. Admittedly, this is a top-down focused approach, rather than seeking to explore bottom-up relations of resistance.

⁷¹ Cynthia Hardy & Nelson Phillips, “No Joking Matter: Discursive Struggle in the Canadian Refugee System” (1999) 20 *Organization Studies* 1 at 2.

⁷² Teun A. van Dijk, “Principles of critical discourse analysis” (1993) 4 *Discourse & Society* 249 at 249.

⁷³ *Ibid* at 250.

⁷⁴ Teun A. van Dijk, “‘There was a Problem, and it was Solved!’: Legitimizing the Expulsion of ‘Illegal’ Migrants in Spanish Parliamentary Discourse” (1997) 8 *Discourse & Society* 523 at 523.

⁷⁵ van Dijk, *supra* note 72 at 254.

⁷⁶ Hardy & Phillips, *supra* note 71 at 12.

However, in the realm of refugee studies where inherent power imbalances are prevalent, this seems appropriate.⁷⁷

Zetter uses the term 'labeling' to refer to the process by which policy agendas are established and more particularly, the way in which people, conceived as objects of policy, are portrayed in convenient images.⁷⁸ This brings discourse analysis into the realm of refugee issues. Labeling of the refugee is a process of designation, which involves power-infused judgments and distinctions, meaning that the processes of labeling as much as the labels themselves become significant.⁷⁹ As seen in discussions above, refugee (and immigration) policy is often deployed as a tool to marginalize and exclude, and so, an initially bureaucratic meaning of 'refugee' transforms into a distinctive and highly politicized identity.⁸⁰ It is also through a growing set of labels (given through legal, political and even media discourses) that the perception that refugee protection is no longer a basic Convention right, but a "highly privileged prize" which few deserve and most claim illegally, has been conceived.⁸¹

Dijk finds that the labeling of migrants as "illegal" for the purposes of expulsion is not portrayed as new or exceptional, but rather, a standard procedure.⁸² This is interesting when contrasting the regularity of the procedures with the state's tendency to legitimate specific decisions, which often means putting emphasis on special circumstances that are present.⁸³ A general pattern can be seen here – the exceptional circumstances and stories of refugees are ignored for the sake of uniform 'refugee' identity, for which a range of choices

⁷⁷ van Dijk, *supra* note 72 at 250.

⁷⁸ Roger Zetter, "Labelling Refugees: Forming and Transforming a Bureaucratic Identity" (1991) 4 *Journal of Refugee Studies* 39 at 44.

⁷⁹ *Ibid* at 45.

⁸⁰ *Ibid* at 55.

⁸¹ Roger Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization" (2007) 20 *Journal of Refugee Studies* 172 at 184.

⁸² van Dijk, *supra* note 74 at 537.

⁸³ *Ibid* at 538.

and the proper bureaucratic processes exist. However, when it is felt that justification is needed for labeling migrants as 'illegal' and consequently, for ruling them unable to remain in Canada, the state then points to the unique and special circumstances at hand. There is a tension here between the particularities of refugee experiences and the uniform and categorical nature the refugee system prescribes.

Dijk's research has also looked at the use of discourse analysis in the "Tamil invasion" as presented in the Dutch media. In The Netherlands, in both 1981 and 1985, refugees were associated with criminality from the outset of their arrival.⁸⁴ News articles tended to position the claimants in opposition to the police and judiciary immediately, while also drawing from notions of 'guilty until proven innocent', which goes entirely against refugee policy. The same sort of conception is invoked when Tamils are smuggled into receiving countries – even as victims, these individuals are associated with fraud, illegality, exploitation and terrorism.⁸⁵ Likewise, many refugees, by definition, do not have proper travel documents, but the media insists on focusing on how they have 'broken the law' and are probably disingenuous refugee claimants, regardless of the realities of refugee experience.⁸⁶ Dijk's method contributes to my research because these discourses relating to fraud and criminality as showcased by the Dutch media, are also central to my discourse analysis of IRB decisions.

Dijk and Zetter's discourse analysis and "labeling" approaches helped to construct the lens I wanted to use when reading through my dataset of RPD cases. Underlying both of these perspectives is the fact that discursive concepts become normalized/legitimized through

⁸⁴ Teun A. van Dijk, "Semantics of a Press Panic: The Tamil 'Invasion'" (1988) 3 *European Journal of Communication* 167 at 174.

⁸⁵ *Ibid* at 175.

⁸⁶ *Ibid* at 178.

use in particular settings. In the context of the IRB, the language used when assessing credibility, “well-founded fear” and the overall refugee experience are made to be normative tools used to exclude those who are deemed undeserving of protection. There is also an underlying discourse that occurs on a broader scale, where ‘refugee’ is collapsed with ‘terrorist’ and ‘criminal’, which further adds to and normalizes the suspicion that enshrouds the refugee determination process.

My research, as presented in the next two chapters, aims to look at discourse in the IRB decisions as indicative of the “discursive disappearance of the refugee”. As such, I am interested in the process by which refugees are labeled deserving/undeserving even more so than the final decisions themselves. Inherent in this process are power relations, inequalities and the need for control over boundaries and the flow of people. The result is a highly politicized ‘refugee’ identity that is represented as if it were a simply bureaucratic term. Discourse analysis shows that the category of ‘refugee’ as it is actually being used, points to a suspicious, rather than humanitarian body.

Chapter 3: Macro Processes of Discursive Exclusion

Let me be clear: We are a land of refuge, but at the same time, I think Canadians are pretty concerned when a whole boat of people comes – not through any normal application process, not through any normal arrival channel – and just simply lands... as a fundamental exercise of our sovereignty – we are responsible for the security of our borders.¹

This statement was issued by Prime Minister Stephen Harper immediately following the arrival of the cargo ship the MV Sun Sea. This ship arrived on Vancouver's shores August 2010, carrying approximately four hundred and ninety-two Tamils from Sri Lanka. They were seeking refuge in Canada and recognition as refugees under Canadian law. One might expect that Canada would immediately offer refuge to these individuals. Canada promotes itself as a humanitarian nation, it has connections to Sri Lanka as noted in Chapter 1, and the injustices experienced by Tamils during the Sri Lankan civil war are well-documented by various human rights-based organizations such as the United Nations and Human Rights Watch. However, an alternative discourse arose in the government's response and was in turn, reflected in the media. This discourse focused on the means of arrival – by boat – with the implication that the people on the boat were not necessarily persecuted minorities in need of protection. Rather, they were viewed as 'suspicious' people, 'queue jumpers' and/or individuals attempting fraudulent or illegal entry.

The Ocean Lady, another cargo ship found to be carrying seventy-six Tamil men, arrived off the coast of British Columbia in October 2009, just ten months prior to the MV Sun Sea. There is an urgency that is still present today regarding Tamil refugee claimants. The first public hearing to determine whether to accept the Ocean Lady asylum seekers

¹ Kathryn Blaze Carlson, National Post, "Harper mulls law change to block boatloads of asylum-seekers", *National Post* (17 August 2010).

occurred recently on January 23, 2012, a full two years after the ship arrived.² These two ‘boat people’ incidents also appear to be part of the driving force for Bill C-31, a controversial proposal currently before Parliament that seeks to introduce various stringent immigration measures. One such measure seeks to deter human smugglers from abusing Canada’s immigration system, but in the process, places refugees that are *being* smuggled in a potentially criminal role as well.

It is important to first look at the broader and heavily normalized discourses that help to construct boundaries around the identities of deserving/undeserving refugees. This chapter begins to examine patterns seen in Canada’s refugee determination process regarding Tamil asylum applicants and the grounds articulated for denying them refugee status. Primarily, this chapter considers broad ‘macro’ technologies of exclusion that help to collapse the concept of ‘refugee’ into ‘criminal’ and ‘terrorist’. Catherine Dauvergne’s work regarding the “growing culture of exclusion” assists this analysis. This work is used to support the contention that discursively, the ‘refugee’ as a humanitarian category is disappearing.

Terrorism has and continues to be used as a method to securitize migration and to exclude those seen as unfit for entry, and Dauvergne points to some of the ways the application of terrorism is broadening in refugee cases to do just this. I use the example of Tamils to build on this theory and demonstrate further problematic assumptions that arise when addressing claimants flowing from regions of conflict. Furthermore, I argue that as with terrorism, general criminality is also being increasingly utilized for exclusion purposes. The boat smuggling events have constructed Tamils as criminal either for their participation in smuggling efforts or for their choice to use an illegal method to arrive in Canada.

² Stewart Bell, “I fear my homeland: Ocean Lady Claimant”, *The Vancouver Sun* (24 January 2012) online: <<http://www.vancouversun.com/news/fear+homeland+Ocean+Lady+claimant/6042335/story.html>>.

Both terrorist and criminal perceptions of Tamil asylum seekers denote a sense of threat, suspicion and potentially fraud. Following this chapter's analysis of the broader and perhaps more direct ways in which the refugee process is enshrouded with negative assumptions, chapter four will look at the more subtle techniques that are deployed in Refugee Protection Division (RPD) hearings to construct refugees using these same attributes. Together, these chapters show that there are different levels of discourse and different 'technologies' being used to exclude refugees, but they draw from the same ideologies of the ideal refugee. The fact that exclusion is made possible in such varying ways supports Audrey Macklin's thesis that due to an increasingly constrained space within which to view them, refugees are 'disappearing'.

Tamils as 'Terrorist'

With the arrival of the *Ocean Lady* in 2009, a spokesperson for the Minister of Citizenship, Immigration and Multiculturalism stated that Canada will not become "a place of refuge for terrorists, thugs, snakeheads and other violent foreign criminals".³ It should be noted that many of the men on the *Ocean Lady* were detained on the premise that they posed a threat to the national security of Canada. They were all eventually released, albeit with strict conditions, but effectively quashing the idea that these men were risks requiring detention.⁴ That being said, their refugee claims are still in the process of being heard at the IRB. Likewise, when the *MV Sun Sea* arrived in 2010, Canada's Public Safety Minister, Vic Toews, was quick to speculate that the boat likely contained members of the LTTE.

³ Alexandra Mann, "Refugees Who Arrive by Boat and Canada's Commitment to the Refugee Convention: A Discursive Analysis" (2009) 26 *Refuge* 191 at 201.

⁴ *Ibid* at 199.

Furthermore, Toews suggested that the MV Sun Sea was a “test ship... part of a broader organized criminal enterprise”.⁵ These observations were offered without providing any evidence. Furthermore, his comment directly linked terrorism, security, and crime to the ‘refugee’. Speculations such as those employed by Toews help to create a discursive space within which refugees as a humanitarian category can be challenged. In the context of IRB refugee decisions, potentially persecuted individuals (or refugees), while in the role of victim, are simultaneously associated with fraud, deviance, crime and illegality.⁶

For Tamil claimants, suspicions of ties to the LTTE are an initial concern. Interestingly, in the RPD cases I surveyed, withholding refugee status was rarely based on terrorism membership or activities. Of the 272 cases I surveyed, the vast majority was unsuccessful on the basis of a credibility assessment, which is discussed in further detail in chapter four. What is important to take away from this is not numbers. Instead, my thesis highlights that the space within which the exclusion clause is applied is widening. The result is that both integral planners of terrorism and distant fundraisers are lumped into the same category, and there are some important consequences of this.⁷

Broadening Exclusion

In my study of IRB decisions, there were eight cases in the refugee protection division (RPD) that found the claimant to be excluded from the refugee determination process due to Article 1(F) of the Convention relating to the Status of Refugees. Three of the cases relied solely on part (a) which reads:

⁵ Duncan Campbell, “Sri Lankan Tamil refugees spark racism row in Canada”, *The Guardian* (7 September 2010) online: <<http://www.guardian.co.uk/world/2010/sep/07/canada-tamil-refugees-racism-debate>>.

⁶ Teun A. van Dijk, “Semantics of a Press Panic: The Tamil ‘Invasion’” (1988) 3 *European Journal of Communication* 167 at 175.

⁷ Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23 *International Journal of Refugee Law* 54 at 65.

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.⁸

The remaining five cases relied on both part (a) and (c). Adding to (a), (c) indicates that the provisions of the Convention will also not apply to any person who “has been guilty of acts contrary to the purposes and principles of the United Nations”.⁹

Some interesting trends were located within the few cases that dealt with exclusion on the basis of terrorist ties. For one, in *Nagamany v Canada*, the claimant alleges he was forced into distributing propaganda leaflets and selling wood for the LTTE.¹⁰ From this, the IRB (along with the Federal Court, in its judicial review¹¹) determined that propaganda and finance are two of the most vital functions of a terrorist organization.¹² As such, *Nagamany* willingly and knowingly contributed to the LTTE’s crimes against humanity by participating in such acts. Likewise, in *MA5-01448*, the claimant was found to be an accomplice to the LTTE’s crimes against humanity because he worked at a newspaper under the control of the organization.¹³ In another case, *MA3-06064*, the claimant was refused refugee status despite being an unimportant member of the LTTE.¹⁴ His job was to dig bunkers, an action not central to LTTE operations. In this latter case, there was a complete lack of explanation or analysis. The facts regarding the claimant’s limited role were stated and it was immediately claimed from this that he was excluded under Article 1(F)(a).

⁸ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1(F)(A), [1969] Can TS No 6.

⁹ *Ibid*, art 1(F)(C).

¹⁰ *Nagamany v Canada* [2004] RPDD No 640 (IRB) at para 29-30.

¹¹ *Nagamany v Canada*, 2005 FC 1554, [2005] FCJ No 1930.

¹² *Nagamany*, *supra* note 10 at para 39.

¹³ IRB Case MA5-01448.

¹⁴ IRB Case MA3-06064.

These cases show that despite low numbers, there is a demonstrated ease with which exclusion clauses are employed. This ease translates into a broader sense of who is a criminal or terrorist and can justifiably be excluded from entry into Canada. An additional problem is the conflation by refugee adjudicators of the international concept of crimes against humanity (under Article 1(F)(a)) and terrorist acts. As pointed out by Dauvergne, international criminal tribunals largely deal in leaders and individuals in high positions of authority when applying crimes against humanity. Comparatively, the IRB uses this label in a more broadly interpreted way to apply to a variety of different forms of distanced membership and complicity. Through broadening the definition of membership, more refugee bodies can be excluded and the refugee process is increasingly securitized.

By making these decisions, the IRB also inherently creates a political position on what is or is not legitimate resistance.¹⁵ Moving again to the case of *Nagamany*, the claimant understood the LTTE to be “fighting for freedom”, which was interpreted by the adjudicator as meaning that the claimant was fully aware of the LTTE’s violent and brutal purpose.¹⁶ The adjudicators do not appear to recognize the LTTE as having legitimate political aims. The adjudicator moves past the claimant’s notion of Tamils fighting against persecution, and instead focuses on the illegitimate and violent nature of that resistance. Likewise, in the decision for *MA5-05605-7* and *MA5-08318*, the IRB panel dismisses the female applicant’s insistence that she was not a terrorist but a member of a political organization.¹⁷ Despite finding that she had an unimportant role to play in the LTTE (as far as direct links to terrorist activity), her membership alone was found to be sufficient to link her to crimes against humanity, and therefore to be excluded. The panel ruled that membership in a more political

¹⁵ Kaushal & Dauvergne, *supra* note 7 at 71.

¹⁶ *Nagamany*, *supra* note 10 at para 36.

¹⁷ IRB Case MA5-05605-7, MA5-08318.

or cultural wing of the LTTE did not change the end results because these wings were held to be subordinate to the LTTE's militaristic counterpart.¹⁸

The process of over-simplifying and over-generalizing the concept of terrorist membership has widened the ability of the refugee determination process to exclude refugee claimants. Azeem Lalji, a Canada Border Services Agency lawyer has argued, "An organization like the LTTE would not have succeeded or achieved legitimacy in the Tamil areas of Sri Lanka without individuals like the (migrant) providing support".¹⁹ Here, we see an actor in the Canadian refugee determination process clearly indicating that refugees (or 'illegal' migrants) are central to terrorist operations. An implication of this view is that power imbalances and the lived realities of refugees are not adequately explored. Nearly everyone living in a Tiger-controlled region of Sri Lanka would have had dealings of some kind with the LTTE, due to their widespread operations. In effect, terrorism or membership as a tool of exclusion can place a wide range of Tamils within an excludable category.

***Suresh* Precedents**

IRB decisions concerning allegations of terrorism and connections to the LTTE inevitably turn to the precedents set in the *Suresh* case. Suresh is a Sri Lankan man who was found to be a Convention refugee, but upon applying for landed immigrant status in Canada in 1995, was detained and held under a security certificate for the purpose of deportation.²⁰ He was believed to be a member and fundraiser for the LTTE. The IRB, Federal Court and

¹⁸ *Ibid.*

¹⁹ James Keller, "Border agency criticized for broad definition of Tamil Tiger", *The Globe and Mail* (19 March 2012) online: <<http://www.theglobeandmail.com/news/national/british-columbia/border-agency-criticized-for-broad-definition-of-tamil-tiger/article2004743/email/>>.

²⁰ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

Supreme Court decisions in *Suresh* developed important and long-lasting precedents regarding whether the LTTE is a terrorist organization and what constitutes membership.

The Federal Court decision of Justice Teitelbaum in *Suresh*, which is frequently quoted from in IRB decisions, is full of problematic reasoning.²¹ Justice Teitelbaum's reasoning for finding Suresh's security certificate valid, touches on two main questions: what is "terrorism" and what is "membership". Justice Teitelbaum's reasoning seems guided by a quote he refers to by Justice Denault, "like beauty, the image of a terrorist is, to some extent, in the eye of the beholder".²² When confronted with the issue that terrorism is not clearly defined and it should be, Justice Teitelbaum replies that there is no need to carefully define terrorism because "when one sees a 'terrorist act' one is able to define the word".²³ It is this vague "I know it when I see it approach" that so many IRB cases use as a precedent for labeling terrorism. An IRB adjudicator has actually indicated that the definition of what constitutes LTTE membership has become so broad that if accepted, "ongoing hearings to determine membership in the terrorist group would be meaningless".²⁴

Justice Teitelbaum insists that a judge's reasoning is no place to be making political decisions regarding the Sri Lankan conflict and whether the LTTE have a legitimate claim to separate. He states, "The issue of a homeland, as I stated on August 29, 1997, is a political issue not one to be determined by a Federal Court of Canada judge sitting in Canada and conducting a hearing pursuant to section 40.1".²⁵ This refusal to make political claims is stated despite the fact that Teitelbaum's manipulation of the interpretation of terrorism and the LTTE is in effect, highly politicized. By defining the LTTE as a terrorist organization,

²¹ *Suresh (Re)*, [1997] FCJ No 1537, 140 FTR 88.

²² *Ibid* at para 28.

²³ *Ibid* at para 26.

²⁴ Keller, *supra* note 19.

²⁵ *Suresh*, *supra* note 20 at para 14.

and emphasizing this fact through repeated findings of Tamil terrorist membership, the Sinhalese dominated Sri Lankan state gains some corresponding legitimacy. Justice Teitelbaum goes further to criticize those that consider the LTTE as freedom fighters. He argues that, if the LTTE are indeed “freedom fighters”, they therefore “have the ‘right’ to shoot at soldiers or persons who do not support the LTTE and their aims”.²⁶ He continues to list off various violent LTTE acts against politicians, police and civilians, but never is there an acknowledgment of the atrocities caused by the Sri Lankan state. Some critics have been outspoken in the media concerning the fact that imperialism is quick to condemn resistance movements, because state violence is never considered a form of terrorism.²⁷

Suresh is also precedent setting in defining ‘membership’ in a terrorist organization. Justice Teitelbaum defines membership as an individual that “devotes one’s full time to the organization or almost one’s full time, if one is associated with members of the organization and if one collects funds for the organization”.²⁸ He continues to explain that despite his definition, membership is something that again, needs to be broadly interpreted “when it involves the issue of Canada’s national security”.²⁹ Not only that, but as a concept, terrorist membership should apply beyond just those individuals who *have* engaged or who *might* engage in terrorist activities – an interesting point that he does not further elaborate on.³⁰ The general impact of Justice Teitelbaum’s reasoning in *Suresh* is that ultimately, both ‘terrorism’ and ‘membership’ have been left open to “the eye of the beholder” to interpret. In practice, as

²⁶ *Ibid* at para 31.

²⁷ David Gordon Koch, “Once, We Welcomed Tamil Refugees”, *The Dominion* (24 June 2011) online: <<http://www.dominionpaper.ca/articles/4000>>.

²⁸ *Suresh*, *supra* note 20 at para 21.

²⁹ *Ibid* at para 22.

³⁰ *Ibid*.

I have suggested above, this tends to mean that associations with the LTTE are seen as illegitimate and grounds for exclusion.

The interpretation of the LTTE as a terrorist organization has recently been challenged in the Dutch court system. In October 2011, a Dutch court convicted five ethnic Tamils for raising illegal funds for the LTTE, but the court stated that it refused to brand the LTTE as a terrorist organization.³¹ In an unprecedented judgment, the court stated that the civil war was a “non-international armed conflict” and “atrocities committed by either side should be classified as war crimes or crimes against humanity” and importantly, *not* terrorist attacks.³² This Dutch decision is able to more accurately situate the LTTE within the Sri Lankan civil war (which is certainly a marked improvement), but it still employs the notion that there is a degree of criminality and illegitimacy involved.

Dutch attorney Victor Koppe was quick to highlight a contradiction in the judgment; that on one hand, the court has insisted that the LTTE should not be on the European Union’s banned terror list, and on the other, the men have been convicted for raising money and supporting an organization on that very list.³³ This seems to point to a disconnect between individual actions and the broader context. The Dutch decision shows that some courts have the capacity to consider the LTTE’s role in the Sri Lankan conflict with a wider interpretation. However, underlying this decision is still the notion that individual actions can be separated from the situations within which they occur.

³¹ “Court convicts 5 Dutch Tamils of fundraising for Tamil Tigers – but acquits them of terror links?”, *The Washington Post* (21 October 2011) online: <http://www.washingtonpost.com/world/europe/court-convicts-5-dutch-tamils-of-fundraising-for-tamil-tigers-but-acquits-them-of-terror-links/2011/10/21/gIQAG6La3L_story.html>.

³² *Ibid.*

³³ Richard Walker, “Tamil Tiger 5 – a case of irony and disappointment” *Radio Netherlands Worldwide* (25 October 2011) online: <<http://www.rnw.nl/international-justice/article/tamil-tiger-5-%E2%80%93-a-case-irony-and-disappointment>>.

The same phenomenon is seen in cases of boat arrivals, where despite situational factors, the individual's "choice" to be smuggled is made the central criminal element, and thus one of the justifications for finding a lack of authenticity. Similarly, as will be discussed in Chapter 4, in the average RPD hearing, credibility findings often become centralized on a single discrepancy or error made by the claimant in his/her testimony. This emphasizes the individual's actions to the extent that factors such as fear, confusion and the realities of giving testimony are left out of consideration. Thus, a further technology of exclusion that begins to develop is the method of focusing on particular actions as indicative of crime or fraud without situating those actions within a larger framework. Marc Tessler, an adjudicator for the IRB has notably suggested that to argue that a migrant's specific actions or contribution amounts to terrorist membership or crime "seems remarkably disconnected to the context with persons living in a war zone trying to survive".³⁴

Not Just Tamils?

Catherine Dauvergne argues that legal determinations of the meaning 'terrorist organization' or 'membership', give more than just Tamils a reason to fear the refugee determination process. Dauvergne states that with complex conflicts such as Sri Lanka's, the claimant's participation on either side of the conflict makes it nearly impossible to have a successful refugee hearing.³⁵ The legal interpretation of 'terrorist organization' and 'membership' in Canada constructs violence as an inexcusable means through which to take political action. This leaves open the possibility that an individual cannot be a true refugee if they violently resist a state with a limited, brutal purpose, nor can they be guaranteed refugee

³⁴ Keller, *supra* note 19.

³⁵ Kaushal & Dauvergne, *supra* note 7 at 91.

status if the claimant was a state agent employed to fight back against that very terrorism.³⁶ Thus, broadening exclusion and the “discursive disappearing of the refugee” may also apply in situations of non-Tamil Sri Lankan claims.

In my reading of IRB refugee protection cases, three out of the eleven Article 1(F) exclusion cases were directed at claimants that had participated in the Sinhalese state apparatus. As an example, in *T99-00869* and *MA1-09699*, both sets of claimants were Sinhalese and police officers for the Sri Lankan state police force. The IRB ruled that the claimants were excluded under 1(F)(a) for participating in this work.³⁷ However, despite this exclusion there are some notable differences in language when reading these decisions more closely. For example, in *T99-00869*, the panel briefly entertained the claimant’s argument that “it is misleading to suggest that the Sri Lankan police force is an organization principally directed to a limited, brutal purpose” as it cannot be shown that even a majority of the police are united in purposefully committing international crimes.³⁸ Here, the claimant attempts to situate the role of the police force (and thus, the Sri Lankan state) in the conflict as completely different than the LTTE’s role as a terrorist group.

Despite the exclusion of some who took part in the Sinhalese state apparatus (as seen in the examples provided above), the emphasis placed on the LTTE as a terrorist organization in legal, political and media discourses has lent the Sri Lankan state a degree of legitimacy. As such, within the context of IRB hearings, Sri Lankan state institutions (such as the police force) are bound to be challenged less regarding human rights violations and the use of illegitimate violence. This sets forth an active dehistoricization of the conflict between Sinhalese and Tamil Sri Lankans. Immigration lawyers and human rights advocates have

³⁶ *Ibid.*

³⁷ IRB Case T99-00869, MA1-09699-702.

³⁸ *Ibid.*

made it clear that most Sri Lankan claimants Canada processes are Tamils.³⁹ This would make it appear that Tamils are the group being persecuted and discriminated against. However, because there are so many more Tamil refugee claimants, and IRB discourse is increasingly contributing to the “discursive disappearance of the refugee”, this creates the perception that these claimants are suspicious and potentially defrauding the system. The LTTE has been designated as a terrorist group, the Sri Lankan civil war is deemed to be “over” and the Sinhalese dominated state is now seen as a somewhat functioning democracy. The effect is that Tamil refugees continue to be scrutinized while state violence goes largely unquestioned.

Tamils as ‘Boat People’

While the particular context of the war in Sri Lanka has posed difficulties for Tamil applicants because of the seeming ease with which some applicants can be linked to terrorism, the means of arrival has also been a barrier for Tamil applicants. Next, I am moving on to explore a recent and pressing phenomenon that acts as another strong barrier to gaining refugee status – the notion of smuggling. Terrorist links to the LTTE were highly present in the government’s response to the MV Sun Sea and Ocean Lady arrivals, and similarly, the issue of smuggling persons has been a highly debated topic within the government. Common official government rhetoric jumps to portraying boat arrivals - such as the MV Sun Sea and Ocean Lady – as an illegal or illegitimate means of entry into Canada. In a speech at a 2010 citizenship ceremony, Prime Minister Stephen Harper assumed that the new citizens before him, who had gone through the migration process in a

³⁹ David McKie, “Canada OK’s most Sri Lankan refugee claims” *CBC News* (30 September 2010) online: <<http://www.cbc.ca/news/politics/story/2010/09/27/f-migrant-refugee-numbers.html?ref=rss>>.

'legitimate' manner, were aggrieved about the illegitimate arrival of the MV Sun Sea at the end of the summer. In his speech he stated:

I do not blame Canadians whether it is established Canadians, or new citizens such as yourselves, for shaking your heads over... the growing problem of mass arrivals through human smuggling, designed unfortunately, we are forced to conclude in many cases, to jump the queue and work around the system.⁴⁰

This sense of illegitimacy was replicated in various Tamil smuggling cases, and at varying levels of the refugee determination process – the initial refugee protection division, the immigration division (admissibility hearings) and the federal court (judicial review of detention orders). In *Canada v XXXX*, the Federal Court trial judge viewed the MV Sun Sea passenger as “a participant in a massive smuggling effort for which she paid a considerable amount of money... she may fear persecution in her native country [but] this form of seeking refugee status has no place in the proper application of humanitarian law”.⁴¹ This statement is indicative of a disregard for the reality of some asylum seekers. It is possible that some have no option but to leave their country through fraudulent means or through smuggling, if they are to leave at all. In this particular example, the judge places a value on who is not just an ideal, but also a ‘proper’ refugee in need of humanitarian assistance.

In another case, *MA5-03295*, in the refugee protection division of the IRB, the panel reflects that since the claimant has not used the ‘proper channels’ to arrive, he is therefore an “immigrant in disguise”.⁴² No real explanation is provided for this large shift from potential refugee to system abuser. It was simply stated as if a fact. This portrays the refugee claimant as deviant, and therefore their claim is deemed most likely fake and a full examination of the

⁴⁰ Office of the Prime Minister, *Statement by the Prime Minister of Canada on a Citizenship Ceremony in Ottawa* (Ottawa, 2010) online: Canada News Centre <<http://news.gc.ca/web/article-eng.do?m=/index&nid=567419>>.

⁴¹ *Canada (Minister of Citizenship and Immigration) v XXXX*, 2010 FC 1009 at para 29, [2010] FCJ No 1250.

⁴² IRB Case MA5-03295.

claimant's situation is not carried out. Earlier in this thesis, I noted that boat passengers are commonly detained immediately due to unsubstantiated security and terrorism concerns, and here we see a continuation of that 'guilty until proven innocent' rhetoric. This standard allows for various discourses (government, media, public opinion, legal) to construct the refugee claimant as undeserving and worthy of expulsion from even before they set foot on shore.

Article 31 of the Refugee Convention provides that refugees who enter a country illegally shall not have penalties imposed on them, so long as they present themselves without delay and demonstrate good cause for their illegal entry.⁴³ This (in theory) should effectively protect refugees from having their due process challenged, which is what happens at a fundamental level when claimants are presumed guilty until otherwise demonstrated. The purpose of Article 31 could be read as portraying the scenario of boat arrivals (and other illegal means of travel) as a somewhat normal occurrence for refugees who may not have other avenues open to them to flee from persecution. It is clear however, that this practice has in no way been normalized at the domestic level.⁴⁴ Rather than recognize that some refugees may legitimately seek refuge in this manner, and may have fair reasons for not having all of the legal documentation on their person, these boat passengers are almost immediately cast as 'illegals'.

In *Canada v B031*, a case heard at the Federal Court, the judge wrote that "the unique context of the Sun Sea migrants... and other factors not normally present in the arrivals of refugee claimants by other means created a situation where the Minister placed a high value

⁴³ *Convention, supra* note 8, art 31.

⁴⁴ Michael Thomason, *The politics of accounting for refugees* (M.A. Thesis, University of British Columbia Geography, 2011) [unpublished] at 61.

on establishing identity”.⁴⁵ The judge effectively categorizes the MV Sun Sea’s arrival as ‘irregular’ and as justifying heightened suspicions and security measures. In *Elazi v Canada*, a referenced refugee case that falls outside of the Tamil dataset, the judge insisted that minimizing the importance of official travel documents will only serve “to encourage all those whose only purpose is to take advantage of a system which is intended solely to enable genuine refugees to come to Canada”.⁴⁶ Here there is a reluctance to acknowledge the lived realities of refugee claimants, and the possibility that documents are hard to obtain or may have been destroyed. In *Elazi*, a space is created where it is purposed that by not having these identifying pieces, one is deemed to be a system abuser and an ingenuous refugee claimant.

“Anti-Smuggling” Sentiments

In the aftermath of the MV Sun Sea’s arrival in 2010, the Harper government began making statements that “we will not hesitate to strengthen the laws if we have to” as a vow to stop the flow of ship-borne refugees to Canada.⁴⁷ Bill C-4 (formerly Bill C-49), the “Preventing Human Smugglers from Abusing Canada’s Immigration System Act” resulted from the furor over the MC Sun Sea.⁴⁸ This bill has now been made a part of Bill C-31, which encapsulates various measures to further define and control the immigration and refugee process in Canada. Currently it has only reached its second reading, but it is being heavily pushed and publicized by Minister Jason Kenney.

⁴⁵ *Canada (Minister of Citizenship and Immigration) v B031*, 2011 FC 878 at para 7, [2011] FCJ No 1116.

⁴⁶ *Elazi v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 212 at para 18, 191 FTR 205.

⁴⁷ Youssef Marten & Daniel Leblanc, “Harper vows to toughen laws as Tamils zip through hearings” *The Globe and Mail* (17 August 2010) online: <<http://www.theglobeandmail.com/news/politics/harper-vows-to-toughen-laws-as-tamils-zip-through-hearings/article1676616/>>.

⁴⁸ Bill C-4, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, 1st Sess, 41st Parl, 2011.

In regards to the anti-smuggling provisions, the Conservatives have repeatedly made assurances that Bill C-31 is meant to protect Canadians, criminalize smugglers and smuggling operations, and all without demonizing refugees who might find themselves caught in the middle.⁴⁹ However, the proposed clauses of the Bill (which will be discussed below) demonstrate increasingly broadly defined terms, restrictions, and clear fundamental human rights concerns. Also, there are general worries that the provisions will simply be used to charge refugee passengers with complicity in the smuggling operation, and thus be used as a tool of exclusion.⁵⁰

Clause 5 of Bill C-4 (the smuggling focused component of Bill C-31) allows the government to designate as “irregular” any arrival of a group of persons, meaning they can be held for a mandatory detention of twelve months, with no possibility of judicial review.⁵¹ Clause 13 also allows for indefinite detention on the basis of inadequate demonstration of identity, which as noted previously, is a very common issue with boat passengers.⁵² Clause 4 is problematic because once a designated person is released from detention, a five year suspension can be enacted so that the individual cannot receive permanent residence for a full five years, even if they are declared a refugee.⁵³ In effect, this will leave these particular refugee claimants in a constant state of limbo, as they will continue to be vulnerable to further detentions, will not have the possibility of family reunification, and will be facing restrictions in employment, and receiving loans and mortgages.⁵⁴ Finally, clause 34 will grant the government retroactive application, meaning they could change determinations already

⁴⁹ Stephanie Law, “Bill C-4’s Doubtful and Ineffective Future” *The Dominion* (16 December 2011) online: <<http://www.dominionpaper.ca/articles/4280>>.

⁵⁰ Canadian Council for Refugees, *Bill C-4 Comments on a bill that punishes refugees* (11 November 2011), online: Canadian Council for Refugees <<http://ccrweb.ca/files/c-4-brief.pdf>>.

⁵¹ Bill C-4, *supra* note 48.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Canadian Council for Refugees, *supra* note 50.

made on refugee or immigration status of those who were on the Ocean Lady and MV Sun Sea.⁵⁵

Debates in Parliament have shown that Members of Parliament have a mixture of responses to these “anti-smuggling” (or what some might refer to as “anti-refugee”) provisions. On one hand, those whose ridings are far removed from Vancouver, commented that this human smuggling is a growing transnational crime issue, it threatens national security, and thus, the entire country is directly impacted.⁵⁶ Other representatives, in contrast argued that the law directly disregards real refugees. One M.P. points out that the initial Ocean Lady fears regarding terrorist affiliations were completely unfounded and the men in question were released, and thus, Bill C-4 is fundamentally problematic as it is partially based on refuted prejudice.⁵⁷

Bill C-31 and its anti-smuggling provisions have not yet been passed into law. However, there is already some jurisprudence that exists, demonstrating that the IRB does not find it problematic to find a refugee passenger involved in a smuggling operation. In *BO-01018*, the refugee claimant was a passenger on the MV Sun Sea, and they were asked to assist the smuggler agents upon entering the cargo ship (the exact duties have been removed from the official decision).⁵⁸ Despite the IRB having flexibility in constructing an approach to these issues, the immigration division panel indicated that it was not an issue of punishment but of admissibility as a refugee.⁵⁹ The ruling was that the claimant’s actions did

⁵⁵ Bill C-4, *supra* note 48.

⁵⁶ *House of Commons Debates*, No 016 (20 September 2011) at 1212 (Mike Wallace).

⁵⁷ *House of Commons Debates*, No 025 (3 October 2011) at 1776 (Paulina Ayala).

⁵⁸ IRB Case BO-01018 at para 5.

⁵⁹ *Ibid* at para 9-11.

indeed aid the smuggling effort, and he was found guilty of taking part in transnational crime under section 37 (1)(b) of IRPA and hence denied status as a refugee.⁶⁰

With this sort of decision one sees a more radical move to exclude/deport a refugee claimant on the basis of their connection to a deemed 'illegal' means of arrival. A clear connection can be drawn between this line of IRB reasoning and those previously discussed decisions that equated simple campaigning and fundraising tasks with full-fledged crimes against humanity and LTTE complicity. The continued focus on individual actions provides evidence of the IRB's constrained ability to consider the broader and overarching structural and theoretical reasons for granting refugee status. Instead, individual activities are closely examined in a manner that detaches them from any real context. I argue that in the context of 'macro' discourses regarding Tamil refugees, this acts as a primary tool for broadening exclusion as expressed by Dauvergne, and 'disappearing' the refugee as referred to by Macklin.

Nation, Order and Control

Some scholars, such as Anna Pratt, suggest that perhaps the arrival of "boat people" (or 'bogus' refugees) stands in direct opposition to the values of the nation, such as order and stability.⁶¹ This is a concept that draws from the discussion surrounding national unity found in Chapter 2. Out of this fear that national values are being challenged a 'threat' is created, for which technologies of exclusion are justifiably deployed as a mechanism to maintain the perceived national order. As an example, official rhetoric always returns to the accusation that illegitimate asylum seekers are "queue-jumpers". This assumes that there is a queue to

⁶⁰ *Ibid* at para 27.

⁶¹ Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) at 97.

be jumped, which in the context of refugee law, does not make sense.⁶² The purpose of a refugee determination system is so individuals *can* sporadically reach a country's borders (by whichever means) and ask for assistance and refuge. The wholly state constructed concept of a 'queue' means that refugees are expected to wait their turn. At the heart of the lived realities of refugees, or those who need to immediately flee persecution, are characteristics that challenge this "queue" or the order, control and regulation that state sovereignty aims to uphold.

Historically, Canada's refugee determination system has preferred refugee claimants that do not spontaneously arrive and are not self-selected.⁶³ However, the CBC reported that between 2006 and 2009, a yearly average of 11,273 refugee claims were made from abroad, compared to the yearly average of 29,924 referrals for refugee claims within Canada's borders.⁶⁴ The pre-selected refugee ideal gives no voice to the realities and stories of those refugee claimants that are able to access the means to successfully flee persecution. This limited sense of agency is not something that should undermine a claim in its entirety. Effectively, by treating this agency with suspicion or doubt, the Canadian state constructs 'true' refugees as being "necessarily elsewhere".⁶⁵ Genuine refugees should lack the agency and choice to travel to Canada, such as pre-selected refugees who in comparison, are more helpless.

There is now a very constrained ability for the public to view refugees as victims. It almost appears as if a shift has occurred in perceived victimization, and the new victims are Canadian citizens, whose regulated borders and refugee policies are being challenged by

⁶² Thomason, *supra* note 44 at 59.

⁶³ Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2005) 36 Columbia Human Rights Law Review 365 at 367.

⁶⁴ McKie, *supra* note 39.

⁶⁵ Macklin, *supra* note 63 at 369.

constant fraud and misrepresentation of outsiders.⁶⁶ This sort of perception is seen in cases like *Canada v B479*, where the federal court judge suggested that refugee claimants should expect intrusive and suspicious measures when they arrive “en masse” by boat.⁶⁷ Seemingly, this displays a sense that these asylum-seekers bring their treatment in Canada upon themselves, effectively victimizing themselves through their choice of means to escape an unsafe situation. This in turn, further legitimates and justifies any preventive or punitive action employed by the Canadian government.

The contexts of Tamils as ‘terrorists’ and ‘boat people’ both position the Tamil refugee claimant as an outsider threat. The discourse that surrounds these conceptions act as ‘macro’ exclusion technologies as they place the refugee claimant in a space of illegality, and the Canadian nation as a victim of the threats they supposedly carry. While these conceptions may seem limited to Canada and the refugee determination process, they have further implications for how the Sri Lankan conflict is interpreted and the roles its actors are given. The next chapter looks at how ‘credibility’ is used as a predominant micro or normative tool for creating a discursive exclusionary space in Tamil IRB decisions. This analysis demonstrates that macro and micro exclusion technologies both occur, they reinforce one another, and together, they contribute to a disappearing notion of the humanitarian refugee category.

⁶⁶ Pratt, *supra* note 61 at 93.

⁶⁷ *Canada (Minister of Citizenship and Immigration) v B479*, 2010 FC 1227 at para 16, [2010] FCJ No 1616.

Chapter 4: ‘Credibility’ as a Normative Micro Technology of Exclusion

In Chapter 3, I demonstrated that exclusion can happen at a broader ‘macro’ level, where discourses of terrorism and general criminality are increasingly brought into the refugee context. Discourses that collapse crime and terrorism with ‘refugee’ have the effect of sensationalizing the ‘threat’ that refugees are deemed to carry. This notion of threat contributes to the doubt and negativity that shrouds the refugee determination process. For refugees coming from countries, like Sri Lanka, with complex situations of political and military conflict, emphasizing criminality and terrorist linkages can have further implications. Tamil refugee claimants are intriguing for this reason – they demonstrate a challenge to the rigid and categorical nature of the IRB, and so a tension develops between the IRB’s stringent processes and the realities of conflict.

In the current chapter, I move to a closer examination of my selected Refugee Protection Division (RPD) cases and how they are informed by and develop the broader patterns I have touched on in Chapter 3. How are macro processes (or technologies) of exclusion realized as subtle normative tools that fit within the highly procedural refugee determination process? I argue that there is a strong focus on ‘credibility’ in these RPD decisions, and it has become a primary means of defining the refugee identity. In general, a focus on credibility is important because it can shape the refugee into a body that is doubted and seen as suspicious, and it can also interplay with the criminalized refugee. Macklin and Dauvergne have both outlined theories about the changing nature of the refugee in Canadian law and politics, in which the refugee is increasingly seen as untrustworthy. Thus, this chapter points to ‘credibility’ as increasingly an axis on which substantive assessments are

made about the 'refugee' which intersects with and reinforces the macro processes as highlighted in Chapter 3.

The following review of RPD cases analyzes the credibility assessments used by decision-makers in terms of ideal narratives, discrepancies, and deception. In turn, further implications of these credibility assessments will be explored. How does the RPD construct knowable 'truth' and 'fear'? Within the context of my Tamil case study, how has the RPD's assessments of 'credibility' impacted their identities as both Sri Lankans and as asylum-seekers? Overall, this will help contribute to a larger understanding of whether and how the very notion of the 'refugee' is continuing to disappear as suggested by Macklin.

Credibility

The single most cited reason for denying an application for asylum (regardless of which section of the *IRPA* was used, section 96 of 97(1)) is an RPD member's finding that the claimant is not credible.¹ It is the RPD member's choice to base decisions on documentary evidence (such as reports on country conditions) rather than oral testimony, provided there is good reason to do so after properly weighing the probative value of all evidence that has been presented at the hearing.² Yet, rejections are largely and almost consistently based on implausibility and therefore, lack of credibility of a refugee claimant's account of persecution and fear. I argue that the use of credibility can be seen as a marker of

¹ Jessica Reekie & Justice Carolyn Layden-Stevenson, "Part III: Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act" in *IARLJ 7th World Conference, First Report* (Mexico City: International Association of Refugee Law Judges, Convention Refugee Status and Subsidiary Protection Working Party 2006) at 44.

² Cecile Rousseau, et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15 *Journal of Refugee Studies* 43 at 47.

deserving and undeserving claimants and further, a site of legal power. Credibility will be analyzed more closely to explore how and through what discourses it is used as a tool to normalize the 'refugee' as dishonest, fraudulent and finally, a threat.

Of the 241 unsuccessful cases in my dataset, 176 of those directly cited credibility as a primary reason for the denial of refugee status. This came in various forms, such as lack of detail, lack of explanation, discrepancies, and contradiction in the personal information form (PIF), oral testimony, etc. Credibility findings were also linked to challenging the integrity of the system through forum shopping and violating the third country agreement. Two different types of delay also impacted credibility findings - delays in leaving one's source country and delaying in making a refugee claim upon arrival in Canada.

While some of the usages of credibility were more direct, other patterns pointed to a more discrete shaping of the label 'refugee' to mean "a highly privileged prize which few deserve and most claim illegally".³ As a consequence, in the process of challenging claimant narratives, the RPD and its members define their own conceptions of 'truth', 'fear', and appropriate expressions of Tamil identity. These processes seem to proceed from how the refugee claimant's oral testimony is assessed by RPD members, and the contradictory expectations held by adjudicators regarding a claimant's performance at the oral hearing stage.

Ideal Testimony

By far, the issue of testimony is one of the broadest recurring themes found throughout my analysis of the RPD cases. In the decisions I examine, RPD adjudicators

³ Roger Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization" (2007) 20 *Journal of Refugee Studies* 172 at 184.

highlight oral (and written) testimony as a means of finding a lack of credibility, and thus, it functions as a tool of exclusion for average refugee claimants. This method of deploying exclusion is especially effective where terrorism and smuggling issues do not arise, or in cases where they do, it is highlighted as a key consequence of their alleged terrorist or smuggling ties. A general rule followed by the IRB is that a primary way of testing a claimant's credibility is by comparing the Personal Information Form (PIF) to the testimony at the hearing.⁴ On the other hand, another legal guideline cited by several cases in my dataset states that "when an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness".⁵ It is important to explore how these principles are used in an unbalanced manner. The IRB decisions I have read seem to create a starting point for the refugee that is shrouded in doubt and uncertainty, rather than truth.

The few successful cases that I had access to provide an example of what RPD members expect regarding genuine refugee narratives, two of which will be highlighted. In *VA1-03676*, the principal claimant (and his family) was alleged to be Tamil raised and educated in Jaffna. The claimant worked for someone involved in arms trading with the Sri Lankan government, and the Tamil Tigers, who demanded to know details of his boss's business arrangements, severely threatened him. The RPD member found his testimony to be trustworthy and reliable because he did not exaggerate, create contradictions or omit important information, and his demeanour was open, frank and unhesitant. The RPD member

⁴ *Castroman v Canada (Secretary of State)*, [1994] 81 FTR 227 at para 7, 27 Imm LR (2d) 129. Also see: IRB Case TA0-06826 and Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection* (Ottawa: IRB Legal Services, 2004) at 2.5.2., online: < <http://www.irb-cisr.gc.ca/Eng/brdcom/references/legjur/rpdspr/cred/Pages/index.aspx#233>>.

⁵ *Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302 at para 5, 31 NR 34. Also see: IRB Case TA4-09301 and Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection* (Ottawa: IRB Legal Services, 2004) at 1.1., online: < <http://www.irb-cisr.gc.ca/Eng/brdcom/references/legjur/rpdspr/cred/Pages/index.aspx#233>>.

especially liked how the claimant could be interrupted, answered the question accurately, and picked up his original train of thought. Further, “his emotion was consistent with his story... consistent emotion is not easily fabricated and warrants a conclusion of ‘transparent’ demeanour. Counsel called it ‘integrity’”.⁶ The claimant’s consistent emotion is considered ‘integrity’, a clearly evaluative term. By using words such as ‘integrity’, the “good” refugee is constructed as one that fits pre-established norms and categories. Also problematic is how the RPD member reveals the way in which refugee claimants are viewed in their ‘natural’ state – as always waiting for the opportunity to lie, defraud or abuse the system that has provided them the opportunity to be heard. This quote provides an example of even where decisions may be positive, discourse remains highly important.

In *MA0-03243*, the claimant stated that he was detained by the LTTE in 1992 to work for them, and they forced his family to pay a very high sum of money to secure his release. Upon trying to flee the country, he was detained by state forces and tortured on two occasions. He eventually was granted refugee status in Germany. However, when he learned that the status would soon be revoked because he no longer was considered a ‘young’ Tamil, it was suggested to him to seek refuge elsewhere. In this decision, the RPD member portrays the claimant as being clear, concise, straightforward, and spontaneous in his answers.⁷ Interestingly, the RPD member made sure to point out that “there were many opportunities... to exaggerate the situation, however, in the tribunal's estimation, [the claimant] did not abuse of the opportunity which was offered to him”.⁸

Some clear issues arise in identifying these excerpts from successful claimant testimonies. A rather strong presumption develops concerning truth and plausibility as

⁶ IRB Case VA1-0367.

⁷ IRB Case MA0-03243.

⁸ *Ibid.*

transparent and readily identifiable categories.⁹ A set of standards are seen emerging, which act as markers within a claimant's testimony to determine genuineness. The 'refugee experience' is not a uniform condition, and so, neither should be the characteristics required of a refugee narrative. The lived realities of refugees are constantly shifting and changing, and so, clear progression, chronology and details should not be definite standards. The key point is that through its rigid notions of narrative and fact-finding, the RPD has created an unrealistic and easily unattainable form of successful testimony.

Details and Discrepancies

The above discussion of the successful Sri Lankan decisions begins to paint a picture of an ideal type of testimony that exists for genuine refugees. From this ideal, one can see how claimants are so readily found without credibility, and therefore, without a "well-founded fear" of persecution. There is a strong desire for refugee claimants to be detail-oriented and descriptive. Given possible lived realities of some refugees, the pressure or trauma of a situation may naturally cause details to be fragmented or placed beyond recall.¹⁰ Rather than further explore the issues or support claimants in what is a challenging situation, RPD processes have instead placed a clear emphasis on cutting through the 'stories' to get to 'bare facts'.¹¹ This narrowed vision of 'fact-finding' demeans the value of a claimant's testimony from the beginning of the refugee determination process. It also stands in direct opposition to what is 'narrative truth' or the imperfect and fluid nature of memory,

⁹ Marita Eastmond, "Stories as Lived Experience: Narratives in Forced Migration Research" (2007) 20 *Journal of Refugee Studies* 248 at 253.

¹⁰ *Ibid* at 258.

¹¹ Liisa Malkki, "Speechless Emissaries: Refugees, Humanitarianism and Dehistoricization" (1996) 11 *Cultural Anthropology* 377 at 385.

organization and meaning.¹² Further, this rigid scope and purpose takes away from the adjudicative process that the IRB is meant to embody. Refugee (and other matters within the IRB) are meant to be fully and adequately addressed, and this is not done when minor discrepancies are transformed into major issues, and one wrong detail results in all details being ignored.

MAI-03185/7 is a case that involves two Tamils who were born and raised in Colombo. According to the female claimant, between 1995-1999 her family had various run-ins with the police, which involved being beaten and humiliated. In 2000, when fertilizers were missing from her workplace, the claimant and her husband were taken into custody on suspicion that they had given the fertilizers to the LTTE. She was allegedly stripped nude and beaten during the interrogation in front of her husband. In this case, the discrepancy occurred when the claimant stated in her PIF (or written account) that she was “questioned” and “slapped” by the police, and in her oral testimony she instead indicated that the police were angry and kicked a chair. When asked about this discrepancy by the presiding RPD member the claimant was unable to understand what the issue was concerning. Ultimately, she was unable to recognize what the RPD highlighted as a discrepancy, for she did not see a stark difference between her descriptions. It may be that both had happened – she had been physically assaulted and the police were angry and kicked a chair – but this was used as evidence of a lack of credibility.

A second discrepancy was also highlighted by the RPD member in that her PIF stated that she was ordered not to leave the city by the Sri Lankan government, but in her oral testimony she said she was not to leave the country and that she was to stay in the house. When this was brought to her attention, she said that both of her statements carried the same

¹² Eastmond, *supra* note 9 at 260.

meaning to her. For the claimant, not being able to leave the city or the country, while different words, carried the same meaning. Ultimately, on the basis of these minor discrepancies (ones that easily may have been due to a cultural or language-based barrier), the RPD concluded that the claimant did not experience the police incidents as alleged at all, thus, erasing her experience entirely.

A further case, *MA0-06880*, involves a claimant who had several run-ins with the LTTE and was forced to deliver packages for them. As a result, she also became a person of interest for the army due to her LTTE connections. She claimed to fear both the LTTE and the army on the Convention ground of imputed political opinion due to her experiences. The Tribunal determined she lacked credibility and this determination, once again, was based on a seemingly minor discrepancy. When the presiding RPD member asked her why the Tigers treated her badly, she said that it was because they asked her to “help them”, and she said in a soft voice that she could not help them, and “maybe they heard”.¹³ This is in contrast to her PIF, which states that they asked her to “work for them” and that they beat her severely when she refused.

The RPD rules that minor inconsistencies are indicative of an exaggerated harm or an incident that never occurred, and this effectively erases the claimant’s version of events, and for the purposes of the RPD, the event itself. These minor inconsistencies, if examined more closely, may be explained by factors such as miscommunication or misunderstanding. Many of the cases I examined rely upon a guiding principle that “a general finding of a lack of credibility... may conceivably extend to all relevant information emanating from his

¹³ IRB Case MA0-06880.

testimony”.¹⁴ An adjudicator may point to any number of inconsistencies (whether that is one or many more) as an indicator of a general lack of credibility. From this point, it can be declared that the testimony as a whole cannot be believed, and thus, refugee status is withheld.

My data points to a broad application of this principle. As mentioned, a significant majority of the negative decisions highlighted credibility as a central issue, and the problems of credibility generally resulted in a refusal of refugee status. Application of the principle of credibility was not consistent. The adjudicator has a margin of discretion and from this, inconsistencies that were relied upon for negative findings of credibility could range from minor to significant. Where small discrepancies became the focus of a negative finding of credibility, this has added to a growing trend of focusing more on individual behaviour and how claimants interact with the refugee determination system, as compared to assessing how those actions fit within a refugee’s experiences.

Attempted Explanations

As cited by scholars who research story telling and the refugee experience (such as Marita Eastmond), feelings of fear are common when beginning the refugee determination process.¹⁵ In *MAI-01014*, the claimant is a young Tamil-speaking Muslim man. He claims that after joining a branch of the United National Party (UNP) and becoming their secretary for several years, in 2000, the claimant was allegedly arrested, beaten and accused of being an LTTE supporter. In his case, he is faulted for withholding information from Canadian

¹⁴ *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238 at para 8, 71 DLR (4th) 604. Also see: Immigration and Refugee Board of Canada, *Assessment of Credibility in Claims for Refugee Protection* (Ottawa: IRB Legal Services, 2004) at 2.1.3., online: < <http://www.irb-cisr.gc.ca/Eng/brdcom/references/legjur/rpdspr/cred/Pages/index.aspx#233>>.

¹⁵ Eastmond, *supra* note 9 at 248.

Immigration authorities. At the port of entry interview (POE), or his first contact with authorities upon arriving to Canada, he stated that he had not been in jail. In contrast, his written PIF states that he was arrested and detained several times. When asked to explain, the claimant said he was afraid of being deported at the POE, and he understood “in jail” as being synonymous with having committed a crime, which he did not do.¹⁶

It is common for initial contact with immigration officials to be experienced with anxiety and apprehension, especially for those forced to travel with false documents (a common occurrence for refugees).¹⁷ As well, there is the climate of the refugee determination process to face, which, according to Macklin, has shifted from what should be presumed truth, to distrust, uncertainty and suspicion.¹⁸ And yet, even with all of those considerations, it would seem from the decisions discussed above that the RPD seems to rely on seemingly minor discrepancies as a basis on which to make determinations about a claimant’s overall credibility. Adding to this narrow approach, the RPD does not leave room to understand or accommodate the fear experienced by claimants and how this might impact testimony. Probing questions can sometimes be posed by the RPD member in the process of trying to understand discrepancies and other issues in looking at oral versus written testimonies. However, posing of such leading questions is often avoided, as they are seen by the RPD to be indicative of uncertainty and a lack of confidence. When explanations are offered (either voluntarily or after being asked) to explain discrepancies, they are often evaluated as inadequate or as demonstrative of a changing and unreliable account.

¹⁶ IRB Case MA1-01014 at para 15.

¹⁷ Marie LaCroix, “Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeness” (2004) 17 *Journal of Refugee Studies* 147 at 160.

¹⁸ Audrey Macklin, “Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement” (2005) 36 *Columbia Human Rights Law Review* 365.

Similar to general fear, stress and confusion are also common reactions to the initiation of the refugee determination process. Asylum seekers are expected to have knowledge of the appropriate bureaucratic steps, and they are to initiate these without delay. In *TA2-21342*, when asked about a discrepancy in his PIF versus oral testimony, the claimant indicated that his PIF was meant to be a brief account of his story, and he expected to answer in full detail at the oral hearing.¹⁹ In another case, *MA1-06617-20*, the claimant was asked to explain a delay in claiming refugee status, as he arrived in Canada on June 3, 2001 and did not make such a claim until June 13, 2001. In response, he testified that he “did not know anyone in Canada and did not know what procedures to follow in order to claim refugee status”.²⁰ The adjudicators in this case ruled that if a claimant’s true intent is to claim refugee status and he/she genuinely fears for his/her life, they “should have known what to do”.²¹

In “Securing Borders”, Anna Pratt argues that ‘bogus’ refugees offend modern society’s liberal notions relating to rules, fair play and order.²² The sporadic flow of people (or refugees) threatens the rights of sovereignty and border control. Thus, insisting that the ‘proper channels’ for asylum seeking be utilized, and bureaucratic processes be followed reaffirms control. By constructing power and control in this way, blame can be shifted upon refugees for not knowing enough about proper procedure. The focus on procedure helps to further emphasize the popularized image of the ‘refugee’ as a rule-breaker, sneaky and fraudulent.

Deception & Fraud

¹⁹ IRB Case TA2-21342 at para 13.

²⁰ IRB Case MA1-06617-20 at para 20.

²¹ *Ibid* at para 22.

²² Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) at 97.

Refugees are commonly viewed by the IRB (as well as the government, media, and in turn, the public) as threats to, and abusers of the system, but in the Tamil context, this generalized view is compounded by the possible links to the LTTE and terrorist operations of human smuggling. The set of cases I reviewed tended to perpetuate the criminalization of refugees in various ways, which started with a sense of doubt that quickly escalated to fraud and deviance. To begin, as shown by the next two examples, it seems that refugee claimants can fail to show credibility, even when they attempt to perform the role of narrative in its ideal form. Due to initial assumptions that refugees may not be genuine, oral testimonies that *too* clearly match the claimant's corresponding written testimony are also challenged.

In *MA0-06880*, a case discussed previously in this chapter, the claimant followed her written PIF statements closely while presenting her oral testimony. She had difficulty distancing herself from the written words in that she was not able to spontaneously comment or add to her PIF written testimony. She had to be led with specific questions by the RPD member to get any further details about her alleged persecution. As a result, the RPD found the claimant to be neither credible nor trustworthy.²³ As mentioned earlier, having to use probing questions leads the RPD to believe that the claimant is uncertain and lacking credibility. It also appears that in this case the RPD found the claimant's ability (rather than lack of ability) to follow her written PIF as a reason to doubt her story.

In a second case, *T99-13741*, the claimant was able to provide accurate evidence and descriptions consistent with his PIF. The RPD member indicated:

The claimant gave accurate evidence of the geography of his home area in the Jaffna peninsula. He was also able to describe the procedure for obtaining a NIC in a manner consistent with the documentary evidence. He also described where and when he went to school in a manner consistent with his PIF.²⁴

²³ IRB Case MA0, *supra* note 13.

²⁴ IRB Case T99-13741 at para 14.

However, due to a focus on the claimant's fraudulent Sri Lankan national identity card (NIC)²⁵, he was found to lack credibility overall. After finding that the claimant lacked credibility on the basis of establishing his identity, the RPD member shifted the assessment and argued that "the claimant is capable of 'learning' his PIF".²⁶

In the first case, *MA0-06880*, by suggesting that it is problematic that the claimant cannot separate her oral and written testimonies, it seems that the RPD implied that her Personal Information Form was simply memorized. Thus, it may not reflect her actual story and she may be trying to defraud Canada's refugee system. It should be noted, that in most cases, a claimant that deviates from or modifies the information in their PIF during oral testimony is also found to lack credibility. In *T99-13741*, or the second case, the claimant is found to have (what would have been) credibility in that the RPD member seems to find the relationship between the claimant's oral and written testimonies to be satisfactory. However, due to a connection to a fraudulent identification document his credibility is challenged, and this goes on to challenge whether the PIF and testimony were really genuine. Here, the issue of identity challenges the claimant's credibility, which is then applied to potentially all aspects of his case, even those that were 'performed' adequately.

Decision makers in the refugee determination process rely substantially on the comparison between the PIF and oral testimony in RPD proceedings. The above examples show that even when the PIF is closely followed in a claimant's oral testimony, this can be done "too well". The ideal oral testimony or refugee 'performance' lies somewhere in the

²⁵ The Sri Lankan National Identity Card (NIC) was first introduced in 1972. Any Sri Lankan citizen who is at least sixteen years of age and residing in Sri Lanka is required to apply for the NIC. (Immigration and Refugee Board of Canada, *Sri Lanka: The National Identity Card (NIC); its issuance, cost, validity, period, security features and description of front and back of card*, online: <<http://www.unhcr.org/refworld/docid/4829b5571a.html>>.)

²⁶ IRB Case T99, *supra* note 24.

middle. An oral testimony should not be fraught with differences when compared with the PIF, but on the other hand, if an oral testimony too closely resembles the PIF and does not demonstrate spontaneity, this can also be used as a marker of a fraud.

Another common way this doubt and suspicion materializes is through a strong focus on the need to establish identity. There is a prevalent myth that claimants with forged identification documents are not genuine refugees, when for many, this is often the only means by which to escape persecution. This conception of identity informs incidences such as the arrival of refugees by boat. Tamils themselves have arrived in cargo ships on Canada's shores in three notable cases, and each time a form of moral panic ensues due to the nature of their arrival and the lack of proper paperwork. At first glance, the boat's passengers are often established by government discourse (and then replicated in the media) as threatening, dangerous and needing to be detained, rather than individuals seeking refuge.²⁷ The words of 'threat' and 'danger' are regularly connected to the issue of establishing identity, and thus, lack of identity becomes a marker of criminality and potentially terrorism.

Sherene Razack argues that the focus on outsiders as potentially threatening acquires its coherence in the context of "a national story of white innocence and the duplicity and cunning of people of colour".²⁸ This notion brings the racialization of refugee law to the forefront. Peter Li also demonstrates that sometimes propensity for criminal action is linked to certain 'racial' groups, and the control of admission of these groups into Canada transforms into a *necessary* policy to control crime.²⁹ The broader Tamil community is

²⁷ See Chapter 3, footnote 5.

²⁸ Sherene Razack, "'Simple Logic': Race, the Identity Documents Rule and the Story of a Nation Besieged and Betrayed" (2000) 15 *Journal of Law and Social Policy* 181 at 187.

²⁹ Peter Li, "Contradictions of 'Racial Discourse'" in Vijay Agnew, ed, *Interrogating Race and Racism* (Toronto: University of Toronto Press, 2007) at 47.

readily associated with violent crime and street gangs in Canada (predominantly Toronto).³⁰ From here, public opinion can point to immigration and refugee policy for being too lax, often on the basis of identity concerns.³¹ Within a perspective that links racial categories directly to crime, allowing these ‘criminals’ entry into the country becomes a fundamental concern, and the refugee determination process instantly becomes securitized.

The issue of deception (and how it plays out through “learned” PIFs, matters of identity and racialization) is connected to the broader notion of breaching the integrity of the Canadian refugee system. National integrity is one of the key recurring discourses in various outlets – judicial, government, media and public - as it allows for the justification of refugee measures. As stated by an RPD member, some claimants’ positions are:

based on a fundamental misconception of Canada’s refugee determination system; the purpose of that system is to provide safe haven to those who genuinely need it, not to give a quick and convenient route to landed status for immigrants who cannot or will not obtain it in the usual way.³²

“Queue jumpers” must be turned away for not following clearly set out guidelines and processes. ‘Genuine’ refugees, despite this being extremely difficult for ‘true’ persons needing protection, should utilize the proper channels of migration. Using proper channels maintains order and leaves no room for unexpected/irregular arrivals.

These assertions contribute to the “discursive disappearance of the refugee”. Distinctions made between those who are deserving and undeserving claimants are done in a way that the ‘undeserving’ become synonymous with ‘illegal migrants’.³³ The component of illegality constrains the refugee identity, while simultaneously contributing to already

³⁰ *Ibid* at 48.

³¹ *Ibid*.

³² IRB Case MA2-05253.

³³ Macklin, *supra* note 18 at 369.

prevalent notions of criminality and illegitimacy. This is especially so in cases such as Tamils, where the claimants in question are of a race or political position that already casts them with these concerns. Through matters relating to credibility, refugees are infused with negative characteristics that cast doubt on their claims for protection. Credibility concerns can be attributed to one aspect of a claimant's testimony, and can then spread to the testimony in its entirety. Credibility findings relate to the RPD attributing the refugee with distrust and suspicion, and so, it follows that distrust can originate in one component of a claim and spread to encapsulate the entire refugee.

Further Implications

As discussed above, credibility findings in RPD cases are a clear tool for exclusion. Findings of credibility use different and subtler technologies than pointing to smuggling, terrorism or violence may, which was discussed in Chapter 3. However, these micro technologies of exclusion produce many of the same problems, such as focusing on individual actions that are removed from a larger context. In constructing or transforming the 'refugee' with a focus on credibility, "knowledges" are created within these RPD cases. Here I refer to "knowledges" as a claim to be able to accurately define particular concepts central to the refugee experience. On a general level, 'fear', 'persecution' and 'truth' are claimed to be knowable by the decision-maker.

Applying this specifically to the dataset at hand, Tamil identity is also claimed to be "known" through assessment of credibility. This is done partly through the creation of Tamil profiles, which are used to quickly point out what Tamils are most likely to be persecuted

and what behaviour is expected in a time of resistance. Those who cannot be immediately slotted into these fixed categories are put at a disadvantage and their credibility is challenged. The RPD decisions also put forward claims of knowing who are the claimant's appropriate agents of persecution. The implication of such a claim is that it draws conclusions about the conflict itself and is directly related to findings of credibility.

Within the confines of the IRB, these constructed knowledges are afforded a sense of institutionalized and legal neutrality. The credibility of claimants is constantly confronted, but the credibility of the IRB, RPD, its members and policy-makers goes largely undisputed. This points to the importance of critical discourse analysis. IRB decisions are a site where clear power relations are at play, which work to naturalize the language that is used to potentially exclude those seen as 'outsiders'. It is within this space that the disappearance of the refugee is made possible and a broader range of technologies can be utilized for excluding purposes.

What is 'Fear' and 'Truth'

Well-founded fear is the very basis on which individuals are granted refugee protection and are awarded credibility. The notion of fear is heavily impacted by concerns of "forum shopping", or picking and choosing where one will eventually settle. RPD adjudicators indicate that true fear will lead a refugee to seek asylum in the first possible country, and so carefully selecting a place to resettle is counter-intuitive to fearing for one's life. The Canada-U.S. Safe Third Country Agreement is demonstrative of this concept. The Third Country Agreement states that persons seeking refugee protection must make a claim

in the first country they arrive in (United States or Canada), unless they qualify for an exception.³⁴

As an example, in *MA2-05253*, the claimant did not pursue a claim in the U.S. upon first arrival there. When asked why he did not pursue a claim, the claimant indicated that he knew no one in the U.S., had no money, and no place to stay. The RPD member insisted that given the claimant's claim to fear, it was expected of him to take advantage of the first opportunity to seek refuge. A claimant may travel through various countries (and not seek refuge in the first country) so as to seek refuge in a more familiar location. The implication of provisions such as those in the Third Country Agreement is that the claimant's subjective fear is ruled by the RPD as lacking credibility. The refugee's agency or choice in choosing a place to seek asylum runs counter to the RPD's definition of 'fear'.

Delay is also used by the RPD as an indicator of lack of fear. In the case of *M99-06622*, the claimant, a woman, testified at her oral hearing that while she was at home in Sri Lanka, two drunken soldiers entered her home and proceeded to tear her dress and kiss her. The claimant and her family were prompted to leave the country due to this incident, but they did not for several months, citing the need to first get things in order. For the RPD, this was indicative of a woman who did not fear for her life, as immediate measures to minimize the risk to her life were not taken. The RPD concludes that from this delay in leaving the soldier incident probably never occurred at all. Here, delay is used to erase the claimant's fear for the purposes of her claim, and this has even further deleterious effects in that it erases the incident as well.

³⁴ Canada Border Services Agency, *Canada-U.S. Safe Third Country Agreement*, online: < <http://www.cbsa-asfc.gc.ca/agency-agence/stca-etps-eng.html>>.

These examples suggest that the RPD has very clear indicators in mind about what appropriately fearful claimants do and do not do. In the above case of *M99-06622*, a woman's desire to set her family's affairs in order is used as an indicator that true fear of the incident does not exist. Rather than employ a more complex discussion surrounding subjective fear, delay is emphasized with the effect of erasing the sexual abuse allegedly experienced by this Sri Lankan woman. Likewise, in the former example of *MA2-05253*, the claimant delays in making an application in the U.S. due to reasoned concerns for not wanting to settle there. The fear felt by the claimant in having to start over in an unknown and foreboding place goes unacknowledged, and the feared treatment he was fleeing in Sri Lanka is meant to override all other emotions.

This treatment of fear attempts to create a uniform refugee experience. It assumes that all refugee experiences allow for immediate departure, immediate claims upon arrival in a host country, and fear that silences all other thoughts and concerns. The refugee determination process also requires that claimants shed old subjectivities for new ones that center on desperation and helplessness. A comprehensive understanding of the 'refugee' must be multidimensional; it must fully consider the lives, stories and histories of affected individuals. Sometimes true discrepancies may occur, and fraudulent refugees may arise, but by starting from a position that narrowly considers the factors associated with credibility assessments, the common approach is problematic.

What is 'Tamil Identity'

As mentioned previously, the mechanisms of creating 'knowledge' within the context of the refugee determination process (and findings of credibility) also has implications within

the more specific context of Tamils and Sri Lanka. The RPD's claims that 'fear' and thus the 'truth' of an application are knowable informs the contexts of the particular situations claimants are fleeing. The result is the development of "ways of knowing" appropriate Tamil identity, the Sri Lankan state, persecution and resistance. These findings contribute further to the concept of the possibly 'disappearing' refugee. Largely, this is done through oversimplification of the complex and diverse lived realities of authentic refugees.

Tamils' strong presence within Canada and as refugees has allowed some RPD members to claim to have "specialized knowledge" from the hundreds of Sri Lankan claims heard.³⁵ Some decision-makers have gone further than others in allowing this knowledge to direct the outcome of the hearing. In *TA3-11866*, the RPD member indicates that they have "heard scores of claims from Sri Lanka". From this, the member makes the evaluation that the claimant's story does not have "the ring of truth when taking into consideration cultural norms".³⁶ The problem lies in how this expertise and familiarity only comes from the refugee process and by extension, perhaps international documents and sources. This "knowledge" is limited in scope and cannot be used in place of a full and comprehensive contextual understanding that must be constantly revisited. There is room for the RPD decision makers to use an approach such as this, as long as contextual understanding does not become too heavily burdened with fact-finding and does not situate subjective elements as working against the objective.

As it stands, Tamil claimants have frequently been profiled by RPD members through reference to factual findings and country conditions in the documentary evidence. Categories are constructed regarding who is realistically persecuted in Sri Lanka and who is not. This is

³⁵ IRB Case MA5-03123, MA5-05521.

³⁶ IRB Case TA3-11866 at para 10.

an area that is highly inconsistent from case to case depending on the documentary evidence being relied upon and the stance taken by the RPD member. In *TA9-13357*, the RPD member shows a reluctance to explore the context of the Sri Lankan conflict further, and states that risk of persecution is primarily reserved for young Tamil men that are suspected of being Tigers or Tiger supporters.³⁷ By comparison, in *T99-11804*, in a rare move, the RPD member found a 42-year-old married Tamil man to face a serious risk of persecution. This meant ignoring the Immigration and Refugee Board report on internal flight alternatives within Sri Lanka, which was submitted as documentary evidence.³⁸ Instead, the testimony of the claimant was weighed more heavily in coming to a final decision.

It is the narrow view relating to Tamil youth that has commonly been adopted in many decisions, and it most often leads to a simple finding that a claimant who is not a young Tamil male, is not at risk. This limits the narratives that can be openly heard regarding alleged persecution, and it constructs the vast majority of Tamils as not facing persecution. This acts to instantly discredit or strongly call into question any refugee claims not made by young Tamil males. Further, this presumption has often been maintained despite a vast number of changes in country conditions over the years. Effectively, through this process the RPD has deemed what true persecution looks and sounds like and has limited an open interpretation of certain Tamils' stories.

Through the process of determining credibility, defining Tamil identity does not stop at evaluating risk. I also noticed RPD members making normative claims concerning forms resistance should take. In *TA2-23880*, the RPD claims to “know” how Sri Lankan reporters should have been acting during the conflict and thus, it claims to “know” what resistance

³⁷ IRB Case TA9-13357 at para 15.

³⁸ IRB Case T99-11804 at para 26.

should have looked like for these individuals. This case involves a news reporter who in a single broadcast, rejected government casualty figures and expressed personal opinions about the conflict. He then came to Canada and claimed asylum on the basis that he was being persecuted on the basis of airing his beliefs. His credibility was greatly challenged by the RPD member's claim that "a media reporter with years of experience would probably not speak out" as well as criticize religious leaders and the President for presenting obstacles to the peace process.³⁹ To me this was a striking decision because of the assumptions it makes regarding Tamils and the forms their resistance can take. Further, it demonstrates a certain level of legitimacy that was still being attributed to the state. By evaluating the reporter's response to the civil war as improbable, Tamil resistance or more generally, challenging the Sri Lankan state, is constructed as illegitimate or strange (and ultimately, lacking credibility).

In general, the complexity of the Sri Lankan conflict has not been adequately understood in the refugee determination process. Members of the RPD have demonstrated a poor understanding of political complexities of violence and the nature of persecution where all of ethnic, religious, cultural and political antagonisms intersect.⁴⁰ In the set of cases I examined, a few further themes emerged. For one, there has been a clear inability to understand and distinguish between a multitude of agents of persecution. One claimant, in his testimony, indicated: "not able to say who I fear – neighbours, Police, military – our whole life is living in fear – How can I say who I fear".⁴¹ In a complex conflict such as the one in Sri Lanka, there exist intersecting and confusing identities as far as victims and perpetrators. IRB processes continue to posit war as a situation where clearly defined groups function in

³⁹ IRB Case TA1-04990.

⁴⁰ Rousseau, *supra* note 2 at 61.

⁴¹ IRB Case MA1-00341 at para 12.

opposition or alliance with one another, and the Sri Lankan context simply cannot fit into these pre-determined labels.⁴²

The second pattern also relates to agents of persecution, but insofar as there is a clear privileging of the LTTE, or Tamil Tigers as the agent of persecution when both the LTTE and the army are mentioned. When both parties are cited as agents of persecution by the claimant, it is common for the panel to reason along the lines of, “the only credible and consistent potential agent of persecution would be the LTTE”.⁴³ If a claimant attempts to prove that they have legitimate fears of multiple agents, the RPD member usually points to embellishment or fabrication as justification for finding a lack of credibility.⁴⁴

Both of these patterns point to the constrained ability of the refugee system to encompass the complexities and nuances that exist when looking at conflicts where there are no easily drawn sides. A common result is limiting focus to individual actions, rather than attempting to understand larger implications and consequences as seen in Chapter 3’s analysis of the refugee as criminal/terrorist. This chapter has shown how this method of reasoning is furthered under the exclusion technology of ‘credibility’. The discursive pattern of focusing on individual actions in this manner reflects the shrinking notion that a humanitarian category of refugee exists.

⁴² Rousseau, *supra* note 2 at 61.

⁴³ IRB Case MA5-05765. See also: IRB Case MA5-03217.

⁴⁴ *Ibid.*

Conclusion

In writing this thesis, I chose to focus on Tamil refugee claimants in Canada, and the discourse that develops from the final decisions of their claims in the Refugee Protection Division (RPD) of the Canadian Immigration and Refugee Board (IRB). Due to recent boat arrivals, where hundreds of Tamils have arrived on Canada's shores, this has placed these particular refugee claimants in the public eye. Tamils are an effective site for exploring the various other ways by which refugees are increasingly seen as deceptive and 'illegal', due to already heightened suspicions surrounding their method of arrival. Intersecting with 'boat arrivals' is the complex nature of the Sri Lankan conflict and the perception that Tamils, and their resistance, leads to LTTE terrorist connections. Effectively, the case study of Tamil refugee claimants in Canada helps to support and further explore Audrey Macklin's notion of the "discursive disappearance of the refugee".

I have shown how this 'disappearance' is enabled by exclusion technologies at both the macro and micro level. In Chapter 3, I demonstrated that on a broader, or macro level, discourses of exclusion relating to terrorism, smuggling and general criminality are being used with increasing ease. During my reading of the decisions, it appeared that one of the consistent techniques used by adjudicators is the emphasizing of particular actions (such as irregular arrival, coerced jobs for the LTTE, etc.) as indicative of crime. This allows the RPD adjudicator to single out actions for the purpose of exclusion, without situating them in a context that examines the relationships, inequalities and identities that are involved. In Chapter 4, I showed that at the micro level, or the subtle institutionalized methods of exclusion, I noticed that credibility was the primary tool of assessment used by the RPD to reject claims. Credibility is an effective exclusion technology because alone, it can shape the

refugee as a body that is doubted and seen as suspicious, but it can also maintain the criminalized refugee identity. These macro and micro processes, as highlighted in Chapters 3 and 4 of my thesis, intersect with and reinforce each other to constrain the way the 'refugee' is viewed.

While refugees are not always rejected, and certainly in the context of Tamil claimants, success rates in Canada are high, the importance lies in the power of the language and resulting discourse that emanates from the IRB decisions. The macro and micro processes that I have demonstrated serve to create a growing discursive space that highlights the *potential* (and even the need) to turn refugees away. When a refugee arrives in a receiving country, they are now commonly seen as suspicious, fraudulent and threatening, rather than a person genuinely in need of protection.

The conclusions drawn in this thesis have many important implications. First, and foremost, while the exclusion of certain people from permanent entry to Canada is not a new phenomenon, it is particularly troubling in terms of current and future immigration and refugee policy trends in Canada. We are currently in an era of federal reform of immigration policy under a Conservative majority government that clearly favours entry of skilled workers who are pre-screened before coming to Canada. Also, rights for successful refugees continue to be diminished, as seen with recent changes to refugee healthcare policy. These practices promote a society that may be increasingly willing to use criteria selectively to deny refugees their lived experiences along with their due process and other rights.

Bill C-31, which was proposed in February of this year, was accompanied by clear messages from Minister Kenny. Most notably, he stated that: "Too many tax dollars are spent on bogus refugees. We need to send a message to those who would abuse Canada's generous

asylum system that if you are not in need of protection, you will be sent home quickly”.¹ This statement raises the possibility that decisions will be made quickly and if in doubt, refugees should be kept out of Canada. This perspective also reflects a growing trend of immigration and refugee issues being discussed using language that emphasizes business, economics and related elements such as expediency and efficiency. As this thesis has shown, the space within which the humanitarian category of ‘refugee’ is recognized is already being diminished, and this language of business continues to remove the human element from the refugee experience.

Finally, the conclusions also have clear implications for the vision, mission, and mandate of the IRB, which holds itself to a high standard. Specifically, the IRB purports that they “excel in everything we do and will deal simply, quickly and fairly with everyone”.² My thesis argues that the RPD decisions I examined reflect an IRB that seemingly operates according to an image of the ideal refugee that is not in keeping with their own mission. It is this rigid and categorical nature of the refugee determination process that has created a clear tension with the complex particularities of the refugee experience.

Future research may look at claimants that have fled conflicts such as those in Yugoslavia or Sierra Leone (to name a few), as these are instances where both ‘perpetrators’ and ‘victims’ have sought asylum and violence has permeated all sides to the conflicts. It would be interesting to see how exclusion technologies are deployed and consequentially, how conflicts become interpreted through IRB discourse using different case studies. Also, my research was limited to the final decisions of the RPD. If resources were unlimited, it

¹ Citizenship and Immigration Canada, *News Release: Harper Government Introduces the Protecting Canada’s Immigration System Act* (Ottawa, 2012) online: Media Centre <<http://www.cic.gc.ca/english/department/media/releases/2012/2012-02-16.asp>>.

² Immigration and Refugee Board of Canada, *About the Board*, online: <<http://www.irb-cisr.gc.ca/eng/brdcom/abau/Pages/Index.aspx>>.

would be interesting to examine if and how the processes I have highlighted in this thesis occur throughout the refugee determination system by examining items such as Port-of-Entry Interviews or RPD hearing transcripts.

This study does not and cannot provide a complete understanding of the 'refugee' identity. However, my thesis does present IRB discourse as a site of power that is effectively limiting the way that refugees can interact with the determination process and be perceived as a humanitarian category. My research was focused on the case study of Tamils arriving in Canada and it was shown how Audrey Macklin's "disappearing refugee" concept occurs in a particular setting and how different types of exclusion technologies contribute to its realization. Also, there are further implications that need to be examined regarding the interpretations of the conflict being fled, the players involved, and the ultimate violence or peace that has resulted.

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