

Research Workshop on Critical Issues in International Refugee Law

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Abstract

This paper provides a brief outline and summary of the key academic papers and review commentators' remarks that were presented at the Research Workshop on Critical Issues in International Refugee Law that was held at York University, Toronto, Canada, May 1 and 2, 2008. One of the principal objectives of this Research Workshop was to bring together some of the world's leading senior superior and high court judges and legal scholars to examine a limited number of key issues in international refugee law from a number of perspectives, including the jurist/practitioner and theorist/academic viewpoints, with the aim of trying to find the most promising ways forward and/or avenues for further research. Four substantive academic papers were presented by Professors Guy Goodwin-Gill, Oxford University; Jane McAdam, University of New South Wales; Geoff Gilbert, University of Essex; and Kate Jastram, University of California at Berkeley. The Research Workshop keynote address was delivered by the Honourable Justice Albie Sachs, Constitutional Court of South Africa. The Research Workshop also launched a number of wider international collaborative research projects in international refugee law that will be pursued over the next few years.

Résumé

Cet article propose un bref aperçu et un sommaire des principales présentations savantes et des remarques faites par les commentateurs, présentées à l'Atelier de recherche sur les questions urgentes en droit international des réfugiés (« Research Workshop on Critical Issues in International

Refugee Law ») qui s'est tenu à l'Université York, Toronto, Canada, les 1er et 2 mai 2008. Un des principaux objectifs de l'Atelier de recherche était de rassembler quelques uns des principaux juges doyens de Haute Cour et de Cour Suprême ainsi que des juristes chefs de file, pour qu'ils se penchent sur un nombre restreint de questions clé dans le domaine du droit des réfugiés à partir d'un certain nombre de perspectives, y compris les points de vue du juriste/praticien et du théoricien/chercheur universitaire respectivement, et cela dans le but de trouver les voies les plus prometteuses pour aller de l'avant/ou pour des recherches additionnelles. Quatre présentations de fond furent présentées par les professeurs Guy Goodwin-Gill, de l'université d'Oxford, Jane McAdam de l'université de New South Wales, Geoff Gilbert, de l'université d'Essex et Kate Jastram de l'université de California à Berkeley. Le discours principal de l'Atelier de recherche a été prononcé par l'honorable Juge Albie Sachs de la Cour constitutionnelle de l'Afrique du Sud. L'Atelier de recherche a aussi lancé un certain nombre de projets de recherche collaboratifs élargis sur le plan international sur le droit international des réfugiés, dont on va faire le suivi dans les quelques années à venir.

Introduction

The Research Workshop on Critical Issues in International Refugee Law brought together leading academics and superior and high court judges from around the world to analyze, discuss, and debate some of the most problematic issues in international refugee law in an effort to try to find the most promising solutions or to at least map out the most promising paths for future research that could lead to a pos-

sible resolution of these legal issues and concerns. In essence, the Research Workshop strove to combine the perspectives of both the theorist and researcher with those of the jurist and practitioner to an examination of a number of key issues facing international refugee law today.

The Research Workshop was premised on the notion that as the number of persons affected by forced displacement and migration continues to increase globally, an essential component of the international refugee protection regime, the determination of Convention refugee status, will continue to be confronted with ever more complex and sensitive legal issues and concerns.¹ Refugee law adjudicators, whether in government departments, administrative tribunals, or within the UNHCR, and judges, in the courts and, in particular, the appeal courts, irrespective of their jurisdiction, are now faced with dealing with an ever-growing number of critical issues in international refugee law.

Four specific legal issues and concerns were selected for examination at the Research Workshop: (1) national courts, refugee law, and the interpretation of treaties; (2) the standard of proof in complementary protection; (3) refugees, the UNHCR, and the purposive approach to treaty interpretation since 9/11; and (4) economic harm as a basis for refugee status. The Research Workshop also featured a keynote address by the Honourable Justice Albie Sachs, Constitutional Court of the Republic of South Africa, entitled "Once a Refugee, Now a Judge, Hears a Case about the Rights of Refugees."

The Research Workshop was organized around four sessions over two days. Each session began with an academic paper that was followed by a judicial commentary or commentaries, a roundtable discussion, and then an academic review commentator's observations and remarks on the session. The academic review commentators were asked to focus their remarks on identifying the areas of convergence and/or divergence on the legal issues under consideration, and to try to point out any obvious gaps in knowledge on the topic under examination and the most promising areas for future research that might lead to an eventual resolution of these problematic legal issues and concerns in international refugee law.

The Research Workshop was organized under Chatham House Rules with a limited number of invited academic and judicial participants. There were nine judicial participants and thirteen academic participants, two senior Canadian governmental officials, one NGO senior representative, and four graduate and four undergraduate student participants.² A number of senior academic administrative officials from York University also participated, in an official capacity, at the Research Workshop.

The Research Workshop was chaired by Justice Tony North, Federal Court of Australia, and the current President of the International Association of Refugee Law Judges (IARLJ).³ Justice North called on Chief Justice Allan Lutfy, Federal Court (Canada), and Justice Professor Harald Dörig, Vice-President, Federal Administrative Court of Germany, to chair a session during the Research Workshop. Participants were actively engaged throughout the duration of the Research Workshop. The roundtable discussions, in particular, generated lively and interesting debate and discussion on the legal issues under examination.

The Research Workshop proceedings were not recorded electronically. Rather, four student rapporteurs were retained and assigned to work with the academic review commentators to take notes of each of the sessions. Following the Research Workshop the student rapporteurs' notes were distributed to each of the review commentators and the other session participants for their review and any amendments or corrections. The notes for each of the Research Workshop sessions, along with the academic papers and judicial commentaries, as presented at the Research Workshop, were then posted on the "password-protected" portion of the Research Workshop website. This material will eventually be made available on the "public" portion of the website as well.

An edited collection of articles based on the Research Workshop will be published soon. The articles in this edited volume will include the substantially revised academic papers as well as new articles and material that will not be available on the Research Workshop website.

The Research Workshop Sessions

Day 1: Treaty Interpretation and the Standard of Proof in Complementary Protection

The opening address was delivered by Professor Guy S. Goodwin-Gill, Senior Research Fellow, All Souls College, Oxford University. The title of his paper was "The One, True Way: National Courts, Refugee Law and the Interpretation of Treaties." Professor Goodwin-Gill stated that there is but one "critical issue" in international refugee law and that is "progressive development."⁴ He further pointed out that the challenge for the national courts in the application and interpretation of international refugee law and, specifically, the *Refugee Convention* is to find "the one, true way."

Professor Goodwin-Gill noted that, with 147 States now party to the *Refugee Convention* and *1967 Protocol*, there are enormous challenges and opportunities for interpretation, but little scope for building consensus or authority.⁵ He mapped out the international legal context for the application and interpretation of the *Refugee Convention* by citing the Articles that are relevant for the good-faith implementation of treaty obligations in the *1969 Vienna Convention on*

the *Law of Treaties*. For example, Article 26 of the *Vienna Convention* states, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁶ Article 27 confirms the general rule of international law that a State party “may not invoke the provisions of the internal law as justification for its failure to perform a treaty.”⁷ Article 31 sets out the basic rules of treaty interpretation, and emphasizes the “ordinary meaning, context, and object and purpose.”⁸

Professor Goodwin-Gill pointed out that refugee status determination is as much about questions of fact as it is about law. Consequently, he argued that the principal divergences between States in the application of the *Refugee Convention* are as much about fact as they are about law. Hence, he noted, “Promoting consistency of refugee decision-making, therefore, is as much about accurate and up-to-date information, as about consensus on the meaning of terms.”⁹

Professor Goodwin-Gill further remarked that “State [refugee law] practice” is embodied in both its legislation and its judicial decisions. The comparative study of jurisprudence to discern consensual interpretations of the *Refugee Convention* is, of course, a common research practice and prevalent in the academic literature. In Professor Goodwin-Gill’s opinion, international refugee law is most responsive and adaptable at the national level. He argued that the “national judge will often play a crucially important role in advancing the protection of human rights.”¹⁰

Professor Goodwin-Gill further pointed out that “interpretation requires account to be taken of any relevant rules of international law, whether treaty or customary.”¹¹ Auto-interpretation, or the role and responsibilities of national courts in interpreting and applying the *Refugee Convention*, can be viewed from two perspectives: (1) auto-interpretation as non-opposability; and (2) auto-interpretation as creative discourse.¹² In the first instance, auto-interpretation as non-opposability stands for the proposition that all States parties to a multilateral treaty are free to adopt, in good faith, the interpretation that they consider to be the “autonomous meaning.” In the second instance, auto-interpretation as creative discourse implies that the national judge must interpret the Convention “in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.”¹³ Professor Goodwin-Gill notes that when individual rights, rather than State sovereignty, are at issue, then a good-faith interpretation of the Convention may require a more nuanced approach or even a “reasonable interpretation.”¹⁴

Professor Goodwin-Gill closed his presentation by stating that “the lack of uniformity is simply the price we pay for progressive development, and *that* is the one, true way.”¹⁵

The review commentator for this session, Professor Obiora Okafor, Osgoode Hall Law School, York University, observed that the opening session displayed several points of tension. One was assuring the independence of the refugee law adjudicator, especially those of the non-judicial kind, while avoiding “maverick” as opposed to “independent” adjudicators. Another was the tension between seeking uniformity of the global refugee regime, on the one hand, and on the other, fragmentation. The international refugee regime, Professor Okafor stated, as Professor Goodwin-Gill so ably points out, does not produce international refugee law interpretation that is binding on national refugee law judges. Professor Okafor further noted that there is no desire to have a system that is isolated State by State and that produces judgments that are overly contextualized. The key is to find the balance between creativity and uniformity in the application and interpretation of the *Refugee Convention*.

Professor Okafor went on to say that this session would have profited more from taking into consideration the non-legal factors that influence and come into play in the interpretation of the *Refugee Convention*. He noted that there is an intimate linkage between international refugee law and other areas of international law, such as international criminal law. He suggested that these linkages would become increasingly more important in the future.

Professor Jane McAdam, Faculty of Law, University of New South Wales, Australia, presented her comparative paper on the standard of proof in complementary protection cases.¹⁶ Professor McAdam began by observing that the “standard of proof has become a central distinguishing feature in the Canadian context between attaining protection as a ‘refugee’ or as a ‘person in need of protection.’”¹⁷ This distinction, she points out, has been absent in the European Union (EU).

Professor McAdam’s paper focuses more, rather, on the legal impediments to obtaining subsidiary protection in the EU under the Qualification Directive,¹⁸ one of a number of instruments that sought to harmonize and to streamline legal standards relating to asylum within EU Member States.

Professor McAdam noted that the Qualification Directive was supposed to be transposed by EU Member States into their national laws by October 10, 2006, but sixteen out of the twenty-six EU Member States who are bound by the Qualification Directive had not transposed it, either in full or in part, as of August 2007.¹⁹ Furthermore, there are striking inconsistencies in the way key provisions of the Directive are being interpreted across EU Member States.

One of the most problematic of these is the application and interpretation of Article 15(c) of the EU Qualification Directive, which states that “serious harm” consists of a:

“serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”²⁰

Professor McAdam stated that this provision is “poorly understood, inconsistently applied across Member States, and in some jurisdictions is the only subsidiary protection category given full consideration when a Convention claim fails.”²¹ She argues that EU Member States’ independent analysis of the meaning of Article 15(c),

apparently without regard to the interpretations being adopted in other Member States, the jurisprudential trends in the European Court of Human Rights, or the guidance of UNHCR, has led to vastly different recognition rates across the EU of people fleeing violence in Iraq, Chechnya and Somalia, and has created legal uncertainty about the meaning of a provision that is supposed to give rise to a uniform approach.²²

Part of the problem is that Article 15(c) has not been transposed in a consistent manner into national law by EU Member States. Belgian and Lithuanian law contains wording that is different from Article 15(c). French law includes a requirement that the threat to the civilian’s life be “direct.” In Sweden and the Slovak Republic, Article 15(c) is not limited to “civilians.” German law does not transpose the reference to “indiscriminate violence.”²³ In addition to this clearly inconsistent transposition of Article 15(c) into national laws by EU Member States, higher evidentiary burdens are being placed on claimants under this provision, making it more difficult for claimants “to establish the requisite elements of article 15(c).”²⁴ Professor McAdam argued that although, in theory, the standard of proof in the EU is the same as for Convention refugee claims,²⁵ the *practical* effect of the EU’s evidentiary requirements means that a higher burden is placed on applicants. This resonates with the legal approach in Canada, where the standard of proof for subsidiary or complementary protection is the lower civil standard, “the balance of probabilities” or “more likely than not,” as opposed to the “reasonable chance” or “serious possibility” standard of proof for Convention refugee status.

Professor Elspeth Guild, Radboud University, Nijmegen, the Netherlands, was the academic review commentator at the conclusion of Professor McAdam’s session. Professor Guild observed that the academic-judicial exchange and roundtable discussion during this session highlighted three “big picture” points: (1) international obligations versus national sovereignty; (2) the individual versus the collective; and (3) the rolling power of the administration versus the judiciary. With respect to “international obligations versus national sovereignty” a number of questions come to the

fore, such as, “Is there some kind of higher authority, within the *Refugee Convention*, that gives rise to rights that individuals can access, notwithstanding the antagonisms of the state?” When one goes from the simple picture of the *Refugee Convention*, Professor Guild noted, into a world that is ever more complicated, such as the situation in the EU, with its various asylum directives, the situation becomes ever more complex. As one moves through different levels of analysis, one observes human rights being divided differently.

With respect to the “individual versus the collective,” Professor Guild remarked that “the law likes the individual, not the collective. It wants a plaintiff.” It prefers to deal with individual rights. Professor Guild noted that in her experience with EU law, the legal system becomes quite nervous when dealing with collective rights and how to package these so that representative action and class actions can be asserted. She further noted that Professor Goodwin-Gill stated that Article 1 of the *Refugee Convention* appears to be a collective right; nonetheless, it is treated as if an individual determination is attached to every case.

Professor Guild also raised the following questions: “What is the role of the judiciary in the interpretation of the law?” and “What is the right of the administration to exercise discretion?” Important questions are raised when the power of the administration and the judiciary are considered. Professor Guild remarked that administrative sovereignty is a particular concern, especially, when it is employed as a mechanism of avoiding judicial oversight in a particular field. She argued that if the judiciary escapes national law through the interpretation of international or supranational law, administrative sovereignty is weakened.

Professor Guild concluded her remarks by making the point that these three sets of tensions are inherent in the world we live in and that the role of the law, whether national, supranational, or international, is played out on those who are seeking asylum and/or international protection.

Day 2: A Purposive Approach to the Interpretation of the Refugee Convention, the Honourable Justice Albie Sachs’ Keynote Address, and Economic Harm as a Basis to Convention Refugee Status

The second day of the Research Workshop began with a presentation from Professor Geoff Gilbert, Department of Law, University of Essex, entitled “Running Scared since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation.” Professor Gilbert asserted that the events of September 11, 2001, had a profound effect on those seeking Convention refugee status in the Global North.²⁶ The reaction of States following the events of 9/11 made it increasingly more difficult for those seeking asylum in the United States, Canada, the United Kingdom, Australia, New

Zealand, and other refugee receiving countries in the Global North. Professor Gilbert focused, in particular, on Articles 1F and 33(2). These two Articles of the *Refugee Convention* are the “two different grounds on which someone who fled persecution might lose the protection of the state that would otherwise offer it.”²⁷ Article 1F is the “exclusion clause” in the *Refugee Convention* that excludes a person from refugee status if there are “serious reasons for considering” that the person has committed a crime against peace, a war crime, or a crime against humanity, a serious non-political crime outside the country of refuge, and/or is guilty of acts contrary to the purposes and principles of the United Nations.²⁸ Article 33(2) applies to persons who have refugee status in the State of refuge, but whose guarantee of *non-refoulement* is withdrawn.²⁹ Professor Gilbert notes that “It places a heavier burden on the state now wishing to be rid of the refugee.”³⁰ The important distinction between Article 1F and Article 33(2) is,

Article 1F prevents a person qualifying as a refugee, they do not obtain that status. Article 33.2 does not challenge refugee status, just its principal benefit. The *travaux préparatoires* to the 1951 Convention make clear that Article 1F was drafted to ensure that only the deserving were deemed to be refugees, paragraph 7d of the 1950 Statute had a similar purpose with respect to international protection by UNHCR.³¹

Following 9/11, Professor Gilbert pointed out, a number of States amended their refugee status laws. The United Kingdom, for example, amended its *Nationality, Immigration and Asylum Act* to remove the “double balancing from the Article 1F determination process and the 2002 Act held that a crime punished by two years imprisonment was particularly serious for the purposes of Article 33.2.”³² The United States passed the *USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act)*. Professor Gilbert stated that this act had a far-reaching impact on refugees, “particularly with respect to removal and detention.”³³ The United States also “expanded the meaning of terrorist activities, so increasing the scope of Article 1F.”³⁴

Professor Gilbert also asserted that since 9/11 there has been an increased tendency to exclude refugee applicants under Article 1F.³⁵ In a review of the case law across a number of jurisdictions since 2001, Professor Gilbert finds a tendency for the courts to take an expansive view of Article 1F. In Canada, the Federal Court of Appeal in *Zrig* ruled that the applicant was excluded under Article 1F(b) by virtue of his complicity by association in a movement that was responsible for serious non-political crimes.³⁶ In the United Kingdom, the cases of *KK (Article 1F(c) Turkey) v. Secretary of State*

for the Home Department and Secretary of State for the Home Department v. AA (Exclusion Clause) Palestine, Professor Gilbert noted, dealt in part with the interpretation of Article 1F(c) and expiation. He pointed out that the Immigration Appeal Tribunal (IAT)

adopted a broad approach to Article 1F (c), not limiting it, as one might have hoped, to acts by senior figures in a state, given that the applicant for refugee status has to be ‘guilty of acts contrary to the purposes and principles of the United Nations’ and those are set out in the Charter that is binding on states parties.³⁷

Professor Gilbert also stated that “AA citing *KK* also rejects expiation as a defence to exclusion under Article 1F”³⁸

A review of the case law since 9/11 leads Professor Gilbert to conclude that the courts and tribunals have “placed a great emphasis on the literal language of the 1951 Convention, as if the judges and adjudicators were simply applying an automatic rule with no room for discretion.”³⁹

Professor Audrey Macklin, Faculty of Law, University of Toronto, provided the review commentator’s remarks for Professor Gilbert’s session at the Research Workshop. Professor Macklin observed that the discussion for this session of the Research Workshop could be broken down between the judicial and legislative and the judicial and executive branches of government and the direct experience of decision makers, whether they are refugee adjudicators or judges sitting on judicial review. She further noted that terrorism in the post-9/11 era is the subject of at least three domains of law: migration law, the law of war, and criminal law. While there is a migration dimension to terrorism, she pointed out, it is not necessarily true, of course, that terrorism is a problem that migration law can resolve. Professor Macklin stated that refugee law is nested within migration law, the subject of which is predicated on the citizen–non-citizen distinction. The subject of human rights law, on the other hand, addresses the situation of the person, irrespective of their citizenship status.

One of the features of terrorism, Professor Macklin remarked, as it gets defined in the criminal law in various jurisdictions, is the problem of how one distinguishes terrorism from ordinary crime. It is typically understood that one ought to try to get at terrorism at a much earlier stage, perhaps, than other crimes. This reflects an element of risk prevention.

Professor Macklin also observed that Article 1F(b) is designed to address the problems that the drafters of the *Refugee Convention* faced at the time, but may no longer be applicable in the current context.

Midway through the second day of the Research Workshop, the Honourable Justice Albie Sachs, Constitutional Court of

the Republic of South Africa, presented his moving keynote address at the Research Workshop, on how he, as a former refugee, and now a justice on his country's highest court, decided a recent case on refugee rights. Justice Sachs described how he was arrested and incarcerated as a young lawyer defending people against the repressive racist statutes and security measures during the apartheid era of South Africa. He said that he was tortured while he was held under detention by his State's authorities. After his release from detention, Justice Sachs went into exile in England, where he studied and taught law for more than a decade before he returned to Africa. He said that he enjoyed his new-found freedom in London, but he resented his status as a refugee. Although he experienced feelings of gratitude towards his host country, he said that he also experienced feelings of anger.

Justice Sachs made the point that States are overwhelmingly responsible for the use of torture against their own citizens. He said that States have created more torture victims in the world than any other entities, whether the States are located in South America, Europe, Africa, or Asia. He also observed that one's own life experience cannot help but affect one's values and judgements. A judge's own personal experience necessarily influences his decisions in the cases he is asked to hear.

Justice Sachs said that he has just completed a manuscript of a book, entitled *The Strange Alchemy of Life and Law*, in which he explores at some length the subject of how judges decide cases, through their own experience as judges. He said that his own judicial position was thrust upon him by history. "Judging," he remarked, "is not a natural given function for me." The prominence of values in the final assessment cannot be underestimated. A deep reflection of life, philosophy, and the law dictates what interests us about other people and the intensity of our response.

Justice Sachs stated that he never liked being called a "refugee" because it connoted a sense of helplessness and of others having to be "nice" to you. He said that refugees' sense of dependence is heightened when they have to go to a State bureaucrat for their right *to be*, for the right to work, to live, and so on. With respect to categorizing someone as a refugee, Justice Sachs said that the decontextualized and depersonalized criteria can be good and useful for fair analysis. However, it does not feel good for a person to be categorized in such a way. He said that he preferred to be called, and considered himself to be, a "freedom fighter" or a "displaced person," but not a "refugee."

He described a number of cases that he heard as a member of the Constitutional Court of South Africa. He outlined, in some detail, his dissenting judgment in *Union of Refugee Women*, a case that was heard and decided by the Constitutional Court of South Africa several years ago.⁴⁰

The last academic paper presented at the Research Workshop was from Professor Kate Jastram, School of Law, University of California at Berkeley, entitled "Economic Harm as a Basis for Refugee Status." Professor Jastram started by noting that "economic forms of persecution and persecution for reasons of economic status have been long recognized as falling within the Convention definition."⁴¹ As Michelle Foster⁴² has argued, Professor Jastram notes, refugee law has "largely failed to reflect the growth of a more sophisticated and complex understanding within the human rights realm of the content of economic, social and cultural rights."⁴³ However, not everyone accepts that the *Refugee Convention* can or, in fact, should include a wider range of economic claims. For instance, *In re T-Z-*, 24 I&N Dec. 163 (BIA 2007), the United States Board of Immigration Appeals has endorsed a higher standard of proof for claims based on economic persecution.⁴⁴

Professor Jastram indicates that economic forms of persecution are recognized by statute in Australia and by jurisprudence in New Zealand, the United Kingdom, the United States, and Canada.⁴⁵ While economic harm must meet a higher standard in Australia and in some US federal courts of appeal and the US Board of Immigration Appeals, it is assessed against the same standard or similar standard to the general test for persecution in New Zealand, the United Kingdom, other US federal courts of appeal, and Canada.⁴⁶

It is interesting to note that Australia's *Migration Act 1958* lists six non-exhaustive examples of serious harm that amount to persecution and that three of these are economic in nature and require, specifically, that the economic harm must "threaten the person's capacity to subsist."⁴⁷ As already noted, the US Board of Immigration Appeals (BIA) adopted a two-pronged test of "severe economic disadvantage or deprivation of liberty, food, housing, employment or other essentials to life."⁴⁸ Professor Jastram points out that this is a more restrictive approach than what the BIA applied previously. It is unclear, at this time, whether the various US Circuit Federal Courts of Appeal will adopt this new standard, but, if past experience is any indication, the thirteen US Circuit Federal Courts of Appeal will continue to be divided on the issue. However, Professor Jastram states that the most widely accepted test for economic harm in the United States is "substantial economic disadvantage."⁴⁹

Following an analysis of the case law on economic harm, from January 2006 to February 2008, expressly, with respect to employment, education, and punitive fines, in five countries—Australia, Canada, New Zealand, the United Kingdom, and the United States—Professor Jastram concludes that the standard for economic persecution requires "severity rising to the level of a threat to life or the capacity to subsist."⁵⁰ This is, of course, contrary to the well-accepted notion that per-

secution encompasses more than its most severe manifestations of threats to a person's life or liberty.

Indeed, Professor Jastram reminds us that it is well established that "human rights law is integrally related to refugee law and that it provides an appropriate frame of reference for determining refugee claims."⁵¹ This is certainly the explicitly accepted approach in most refugee receiving countries in the Global North, with the notable exceptions of Australia and the United States.⁵² However, there are severe practical limitations to the application of human rights laws to refugee status adjudication. For instance, human rights law can be either over-inclusive or under-inclusive for the purpose of refugee status determination. Human rights that are enunciated in the international instruments may not be sufficiently detailed for the requirements of refugee status adjudication. For example, Professor Jastram notes that the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) not only has many formal abstract and undefined terms, but it also incorporates the notion of "progressive realization."⁵³ She notes that the proper consideration of refugee claims based on economic harm can require the assessment of concepts such as "taking steps, maximum available resources, and minimum core obligations."⁵⁴ Obviously, this complicates immensely the analysis required for refugee status determination in these types of claims. Further, given that human rights law is an evolving and expansive field, it is a challenge for international human rights experts, let alone refugee law judges, to discern the relevant human rights norms for claims based on economic harm.

Professor Jastram points out that the Economic, Social and Cultural Rights Committee of the ICESCR has adopted a "minimum core obligation" standard for assessing a State party's obligations under the Covenant. Professor Jastram states that the "minimum core obligation is an immediate obligation [for State parties], along with the duty not to discriminate and the duty to take steps toward progressive realization of the Covenant."⁵⁵ While Michelle Foster argues that "a violation of the core obligation of a right in human rights terms should be understood as persecution in refugee terms,"⁵⁶ Professor Jastram cautions that the use of "core obligations approach" to refugee status determination imposes significant interpretative challenges, which would benefit from greater engagement by judges, scholars and the UNHCR.⁵⁷ Professor Jastram concludes by indicating that there is ample scope for further study and reflection on how best to deal with refugee claims based on economic harm.

Professor Sharryn Aiken, Faculty of Law, Queen's University, Kingston, Ontario, was the review commentator for Professor Jastram's session. Professor Aiken began her review comments by quoting Professor Roger Zetter, Director, Refugee Studies Centre, at Oxford University, that there are

"more labels, but less refugees." She noted that Roger Zetter addresses the restrictionist policies now adopted by States with a focus on the context. On the question of whether socio-economic harm could amount to persecution, Professor Aiken stated that it is important to include the contextual situation. She observed that socio-economic harm is by no means a new phenomenon. She made the point that the persecution in Nazi Germany began with socio-economic harm. She also stated that economic harm should not be treated as something different from political persecution.

Professor Aiken noted that we should not lose sight of the fact that in order for the refugee system to function that we need to address the issues at the periphery. People have mixed motives for leaving their country of nationality or former habitual residence. Often the motivations for their departure are complicated and complex. We should not be suggesting, she remarked, that a refugee's story is not true just because it has mixed motives.

She pointed out that when Sri Lankan refugees who were planning to travel to Canada by ship were intercepted off the west coast of Africa a number of years ago, it was the Canadian government that chartered the plane that returned the refugees to Sri Lanka. Professor Aiken said that a Canadian government immigration official who was interviewed at the time stated that these mixed migratory flows always presented difficulties for them.

At the time of the interdiction of Sri Lankan refugee claimants off the west coast of Africa, Sri Lanka was the leading source country for refugees for Canada. Professor Aiken observed that before these refugees were allowed to reach Canada, they were turned aside as economic migrants. As it happened, at least one of the Sri Lankans who was returned to Sri Lanka was tortured by the Sri Lankan authorities.

Professor Aiken also referred to the *Rome Statute of the International Criminal Court*, Article 7(2) (g), which defines persecution in a broad manner as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."⁵⁸ She noted that it is crucial to consider this definition in terms of violations of socio-economic rights. Indeed, she noted that the adoption of this definition of persecution would assist in the resolution of many of the difficulties in recognizing economic harm as a basis for refugee status.

Conclusion

The Research Workshop achieved its principal objective of bringing together a number of leading academics and superior and high court justices to examine in depth a limited number of critical issues confronting international refugee law today. The informal feedback that the organizers received from the Research Workshop participants was highly posi-

tive. The participants at the Research Workshop appreciated, especially, the format of having leading academics present detailed papers on specific legal issue in international refugee law and having a superior and/or high court justice respond to the academic paper. The roundtable discussion following the academic-judicial exchange was found to be very engaging. There was sufficient time for all participants to voice their views and opinions on the issues and concerns raised in the academic-judicial exchange. The review commentators' remarks at the end of each session also provided an opportunity for the participants to consider the issue area from the point of view of a leading academic authority who was seeking to distill the essence from the presentations and discussions during the session and with the expressed intent of identifying the areas of agreement or convergence, disagreement or divergence, any obvious gaps or areas of uncertainty, and the most promising areas for further legal research on the issue under scrutiny.

The formal evaluations submitted by the participants at the end of each day of the Research Workshop revealed that the participants thought that the Research Workshop had met their expectations. The overwhelming majority of the participants also found that each of the panel sessions were not only interesting but that there was also sufficient time for discussion and comments. For instance, one of the Research Workshop participants stated that the "Format was great—very effective."⁵⁹

These findings were further reinforced by Justice Tony North's remarks that he found the format of the Research Workshop to be quite effective and that he planned to recommend it to the International Association of Refugee Law Judges for their forthcoming World Conference, which would be held in Cape Town, South Africa, early in the New Year.

As noted previously, the academic papers, judicial commentaries, and review commentators' remarks will be made available on the Research Workshop website and a selection of the revised academic papers will be published in an edited volume sometime in 2009. The edited volume will also contain new material that was not presented at the Research Workshop or posted on our Research Workshop CIIRL (Critical Issues in International Refugee Law) website.⁶⁰ The Research Workshop will continue to make a contribution to resolving critical issues in international refugee law on an ongoing basis and through a number of other initiatives that have emerged from the Research Workshop.

At Pre- and Post-Research Workshop meetings that were held in conjunction with the Research Workshop, a number of possible research proposals were presented and discussed. At the Pre-Research Workshop meeting, which was held on April 30, the day before the Research Workshop, research

proposals were presented and outlined by Justice Tony North, Professor Kate Jastram, Professor Geoff Gilbert, and Professor Nergis Canefe. There were also presentations from Sarah Whitaker, Senior Research Officer, from the Office of the Associate Vice-President, Research and Innovation, York University, and Kay Li, Research Officer, Office of the Dean, Atkinson Faculty of Liberal and Professional Studies, York University, on various funding opportunities for major international collaborative research project(s) that might emerge from the participants in attendance at the Research Workshop. At the Post-Research Workshop meeting, which was held immediately after the Research Workshop officially concluded on May 2, a number of other suggestions were also made for possible research proposals. These were presented by Professor Elspeth Guild and Justice Geoffrey Care. There was certainly no shortage of ideas for possible wider international collaborative research projects from the Research Workshop participants who were in attendance at these meetings.

Several weeks later, the draft notes from the Pre- and Post-Research Workshop meetings were circulated to all those who participated in the Research Workshop. Two major wider international collaborative research projects came to the fore shortly thereafter and are still being pursued actively by a number of the Research Workshop participants. These include Professor Kate Jastram's research proposal to consider the subject of the fragmentation of international law, specifically by undertaking a comparative study of the application of international human rights law to refugee status determination, and Justice Tony North's research proposal for examining the feasibility of establishing an International Judicial Commission for Refugees.⁶¹ Both of these research proposals are still in the development stage. However, what they illustrate is that the Research Workshop was successful in spawning a number of possible wider international collaborative research projects to continue studying critical issues in international refugee law.

The Research Workshop on Critical Issues in International Refugee Law, most importantly, not only considered and examined a number of critical issues confronting international refugee law from a number of perspectives, including the theoretical/ researchers' and the judicial/practitioners' viewpoints, but also has made a unique contribution to the legal scholarship in the field. We hope that this effort will lead to a constructive resolution and advancement of the legal issues and concerns that were scrutinized at our Research Workshop, as well as make a contribution to the field of international refugee law as a whole. By doing so, we very much hope that this Research Workshop will have assisted, in some small way, the advance of the security and well-being of millions of refugees around the world who are struggling to achieve their

most fundamental human rights, and the respect and dignity, that are their due as human beings.

NOTES

1. "During 2007, a total of 647,200 individual applications for asylum or refugee status were submitted to Governments and UNHCR offices in 154 countries. This constitutes a 5 per cent increase compared to the previous year (614,300 claims) and the first rise in four years. This can primarily be attributed to the large number of Iraqis seeking international protection in Europe. An estimated 548,000 were initial asylum applications, i.e., lodged by new asylum seekers, whereas the remaining 99,200 claims were submitted on appeal or with courts." *2007 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced, and Stateless Persons* (UNHCR, June 2008), 13 <<http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>> (accessed July 5, 2008.)
2. For a complete listing of the Research Workshop participants and program, see the website, "Critical Issues in International Refugee Law," <<http://www.yorku.ca/ciirl/Home/index.html>>. The participants came from at least nine states: Australia, Canada, Germany, Japan, Malawi, the Netherlands, the Republic of South Africa, the United Kingdom, and the United States.
3. For more information on the IARLJ, see <<http://www.iarjl.nl/general/>>.
4. Guy S. Goodwin-Gill, "The One, True Way: National Courts, Refugee Law and the Interpretation of Treaties" (background paper for presentation to the Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 1, 2008) 1.
5. *Ibid.*, 2.
6. *Ibid.*, 3; 1969 *Vienna Convention on the Law of Treaties*: 1155 UNTS 331.
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*, 6.
11. *Ibid.*, 7.
12. *Ibid.*, 8.
13. Article 31(1) of the 1969 *Vienna Convention on the Law of Treaties*.
14. Goodwin-Gill, 13.
15. *Ibid.*, 15 (emphasis in the original).
16. Jane McAdam, "The Standard of Proof in Complementary Protection Cases: Comparative Approaches in North America and Europe" (paper presented at the Research Workshop on Critical Issues in International Refugee Law, May 1, 2008, York University, Toronto, Canada).
17. *Ibid.*, 1.
18. Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.
19. McAdam, 3. Denmark has opted out, pursuant to the Protocol on the Position of Denmark, annexed to the *Treaty on European Union* [2002] OJ C325/5.
20. Council Directive 2004/83/EC of 29 April 2004, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>>.
21. McAdam, 1.
22. *Ibid.*, 6.
23. *Ibid.*, 6–7.
24. *Ibid.*, 7.
25. This is the interpretation in the UK: *Kacaj** [2001] INLR 354, although, McAdam notes that this does not necessarily flow from the wording of the Qualification Directive itself: 15–16.
26. Geoff Gilbert, "Running Scared since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation" (paper presented at the Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 1 and 2, 2008), 1.
27. *Ibid.*, 3.
28. Article 1F of the *Refugee Convention* states, as follows:
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 to such crimes;
 - b. He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 - c. He has been guilty of acts contrary to the purposes and principles of the United Nations.
29. Article 33.2 of the *Refugee Convention* states: "The benefit of the present provision may not, however, be claimed by a refugee when there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."
30. Gilbert, 3.
31. *Ibid.*, 4.
32. *Ibid.*, 5.
33. *Ibid.*, 6.
34. *Ibid.*
35. *Ibid.*, 7.
36. *Zrig v. Canada (Minister of Citizenship and Immigration) (CA)* [2003] FCA., para. 137.
37. Gilbert, 12.
38. *Ibid.*
39. *Ibid.*, 13.
40. *Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others*

- (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) (12 December 2006), <<http://www.saflii.org/za/cases/ZACC/2006/23.html>>.
41. Kate Jastram, "Economic Harm as a Basis for Refugee Status" (paper presented at the Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 1 and 2, 2008), 1.
 42. Michelle Foster, *International Refugee Law and Socio-Economic Rights* (Cambridge: Cambridge University Press, 2007).
 43. Jastram, 2.
 44. *Ibid.*
 45. *Ibid.*, 6.
 46. *Ibid.*
 47. *Ibid.*, 7.
 48. *Ibid.*, 7–8; *In re T-Z-*, 24 I&N Dec. 163 (BIA 2007).
 49. *Ibid.*, 11.
 50. *Ibid.*, 16.
 51. *Ibid.*, 21.
 52. *Ibid.*
 53. *Ibid.*, 24–25.
 54. *Ibid.*, 25.
 55. *Ibid.*, 26–27.
 56. *Ibid.*, 27.
 57. *Ibid.*, 29.
 58. *Rome Statute of the International Criminal Court*, Article 7.2(g), Crimes Against Humanity, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf>.
 59. Helen Wong (Legal Research Assistant), "Critical Issues in International Refugee Law, Research Workshop Evaluation Results, Summary" (Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, Canada, May 26, 2008).
 60. See <<http://www.yorku.ca/ciirl/Home/index.html>>.
 61. Justice Tony North, "A Proposal for the Establishment of a Judicial Commission on Refugees" (paper presented at the conference Moving On: Forced Migration and Human Rights, Parliament House, New South Wales, Australia, November 22, 2005), <<http://www.law.usyd.edu.au/scigl/Documents/North.pdf>>; Justice A. M. North and Joyce Chiara, "Towards Convergence in the Interpretation of the Refugees Convention—A Proposal for the Establishment of an International Refugee Court," in *The Asylum Process and the Rule of Law*, International Association of Refugee Law Judges, The Netherlands (New Delhi: Manak Publications, 2006), 72–136.

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