

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)

*Introduction: the research workshop on
critical issues in international refugee law
and strategies towards interpretative harmony*

James C. Simeon

I INTRODUCTION

It is perhaps trite to note that one of the most pressing humanitarian issues of our time is the plight of those who seek asylum from severe human rights abuse amounting to persecution. The latest annual report of the United Nations High Commissioner for Refugees (UNHCR) indicates that there are 42 million people who are uprooted in the world today.¹ Amongst this staggering total of “people of concern” to the UNHCR are some 15.2 million refugees including 872,000 asylum seekers with pending cases.² The UNHCR further estimates that in 2008 some 839,000 individual applications were submitted for refugee status and that 9 percent of those claims were made at UNHCR offices.³

It is worth noting that the number of asylum seekers making individual claims for refugee status in 2008 rose for a second year in row, up by 28 percent, and that the Republic of South Africa was the largest single recipient of individual refugee status claims estimated at the incredible number of some 207,000 applications. The United

¹ UNHCR, *2008 Global Trends: Refugees, Asylum seekers, Returnees, Internally Displaced and Stateless Persons*. 16 June 2009, p. 2, “2008 in Review – Statistics at a Glance,” www.unhcr.org/4a375c426.pdf. (accessed August 10, 2009) UNHCR, “UNHCR annual report shows 42 million people uprooted worldwide,” Press Release June 16, 2009, [www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4a2fd52412d&query=42 Million Uprooted#hit2](http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4a2fd52412d&query=42%20Million%20Uprooted#hit2). (accessed August 10, 2009).

² *Ibid.* Of the 15.2 million refugees, 10.5 million fall under the UNHCR’s mandate and some 4.7 million Palestinian refugees are the responsibility of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

³ *Ibid.*

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)

States of America came in a distant second, with 49,600 refugee status claims, a mere one-quarter of the number that were received by South Africa. France, with 35,400 claims, and Sudan, with 35,100 claims, came in at third and fourth respectively.⁴ It is also interesting to point out that the Federal Republic of Germany was the only country in the Global North to be listed as a major refugee-hosting country in 2008 with 582,700 refugees.⁵ The number of refugees in the world today is truly astounding⁶ as are the challenges for those who are seeking to address the plight of all persons who are fleeing severe affronts to their most fundamental human rights and dignity as human beings.

It was within this disturbing global reality and background that a Research Workshop on Critical Issues in International Refugee Law was conceived and held at York University, Toronto, Canada, on May 1 and 2, 2008. The research workshop was premised on the notion that refugee law decision-makers and, in particular, judges at the appellate levels are being confronted with ever more sensitive and complex legal issues in refugee law, whether at the national, regional or international level. In short, judges, irrespective of their jurisdiction, are now faced with a broad range of difficult and problematic legal issues in asylum law. For instance, security considerations have reached unprecedented levels since the horrific events of September 11, 2001 and have had a profound impact on the number of new asylum applications received by countries in the Global North. It has been noted that the “securitization” of the asylum systems across industrialized states has had a significant affect on the application and interpretation of the *1951 Convention* and *1967 Protocol relating to the Status of Refugees*.⁷ Given the overriding emphasis on security and

⁴ UNHCR, “UNHCR annual report shows 42 million people uprooted worldwide,” Press Release June 16, 2009, www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4a2fd52412d&query=42MillionUprooted#hit2. (accessed August 10, 2009).

⁵ *Ibid.* The others listed by the UNHCR are Pakistan (1.8 million); Syria (1.1 million); Iran (980,000); Jordan (500,400); Chad (330,500); Tanzania (321,900); and Kenya (320,600).

⁶ Gil Loescher, writing in the early 1990s, observed that: “Over the past decade and a half, the number of refugees in the world has increased alarmingly. The total rose from 2.8 million in 1976 to 8.2 million in 1980 to nearly 18 million at the end of 1992. It is likely that the number will exceed 20 million during this decade. In addition, at least another 20 million people are displaced inside their own country.” *Beyond Charity: International Cooperation and the Global Refugee Crisis*. (Oxford University Press, 1993), p. 5.

⁷ *Convention relating to the Status of Refugees*, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 and the *Protocol relating to the Status of Refugees*, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223, 6257.

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)*Introduction*

3

the concomitant tightening and the stricter enforcement of border controls, further limiting the access to asylum, states parties, it has been argued, have also adopted a more liberal application and interpretation of Article 1F, the exclusion clauses, of the *1951 Convention* and *1967 Protocol*.⁸ Moreover, further developments in international law have raised the possibility, if not created a positive obligation, for state parties to the *1951 Convention* and/or *1967 Protocol* and the international community to prosecute those who have committed international crimes.⁹ In addition, with a number of jurisdictions consolidating Convention refugee status with complementary or subsidiary forms of international protection, this has raised a number of questions and concerns regarding overlapping and competing forms of international protection, evidentiary burdens, and the standards of proof for those who are fleeing serious human rights violations.¹⁰ Furthermore, serious violations of economic, social and cultural rights have increasingly formed the bases for those seeking international protection. These types of claims for Convention refugee status have raised legal issues regarding what, if any, infringement on a person's right to health services, education, to practise their profession or to earn a livelihood, or to live in a reasonably safe and a toxic-free environment may form the basis of a claim to international protection.¹¹ These examples illustrate the growing complexity and the current challenges facing asylum and refugee status adjudicators and, especially, high court and superior court judges, as they address

⁸ See Geoff Gilbert's chapter in this volume and James C. Simeon: "Exclusion Under Article 1F(a) of the 1951 Convention in Canada," *International Journal of Refugee Law*, 21 (2) (July 2009), 194–195.

⁹ See the *Report of the International Criminal Court to the United Nations for 2007/2008*, A/63/323, 22 August 2008, 63th Session of the United Nations General Assembly. www.icc-cpi.int/NR/rdonlyres/60963BCD-DoD7-4DA3-B8CA-BB8oEDD49C7o/278593/ICCA63323En.pdf (accessed September 10, 2009). Matthew Smith, "The Relevance of the Work of the International Criminal Court to Refugee Status Determination," *International Journal of Refugee Law*, 20 (1) (2008), 166–185. Jelena Pejic, "Article 1F(a): The Notion of International Crimes," *International Journal of Refugee Law, Special Supplementary Issue* 12 (1) (2000), 11–45.

¹⁰ Jane McAdam, "Convention Refugee Status and Subsidiary Protection Working Party, First Report," in James C. Simeon (ed.) *Forced Migration and the Advancement of International Protection*, 7th World Conference, November 6–9, 2006, International Association of Refugee Law Judges, (MultiCopy, Haarlem, 2008), pp. 225–237.

¹¹ For a detailed study of these issues see Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007). See also Kate Jastram's chapter in this volume.

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)

the legal and evidentiary issues in the refugee status and asylum cases that they hear on a daily basis.

Accordingly, the research workshop sought to bring together a number of leading high court and superior court judges, academics, senior government officials, and graduate and undergraduate students to address a limited number of “critical” legal issues in international refugee law.¹² One of the primary objectives of the research workshop was not only to explore and clarify, from a variety of theoretical and conceptual perspectives, a number of critical issues in international refugee law but also to identify the key points or areas of international refugee law that require further development and/or research.¹³

This present volume is a further product of the Research Workshop on Critical Issues in International Refugee Law. It not only consists of the substantially revised academic papers that were presented at the research workshop but also a number of new contributions that were not presented at the research workshop.¹⁴

1.1 What are the “critical issues” in international refugee law?

Among the many pressing legal issues and concerns in the field of international refugee law today, which of these can be identified as being the “critical issues?” The phrase “critical issues” can be broken

¹² For a complete overview of the Research Workshop on Critical Issues in International Refugee Law held at York University in Toronto, Canada, on May 1 and 2, 2008, see the Critical Issues in International Refugee Law (CIIRL) website at www.yorku.ca/ciirl/index.html.

¹³ For a thorough review of the legal issues addressed in the Research Workshop on Critical Issues in International Refugee Law see James C. Simeon, “Research Workshop on Critical Issues in International Refugee Law, May 1 and 2, 2008, York University,” *Refuge: Canadian Periodical on Refugees*, vol. 25, Issue 2, 2008, pp. 202–11.

¹⁴ Guy Goodwin-Gill’s paper at the research workshop, “The One, True Way: National Courts, Refugee Law and the Interpretation of Treaties,” is not included, unfortunately, in this collection but is available in Guy Goodwin-Gill and Hélène Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, (Cambridge University Press, 2010). Elspeth Guild’s and Nergis Canefe’s contributions to the collection were not delivered at the research workshop although they both played significant roles at the research workshop as well as the pre- and post-research workshop meetings that were held to discuss the possibility of developing wider ongoing international collaborative research projects. This introductory chapter, of course, was not presented at the research workshop and is also an original contribution to this volume.

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)*Introduction*

5

down in to its two principal components and meanings; that is to say, *critical* in the sense of being, of course, decisive or crucial,¹⁵ and *issue* in the sense of a “point in question, important subject of debate or litigation.”¹⁶ What are then the decisive or crucial subjects of debate or litigation within the field of international refugee law today?

The method that was used to determine these “critical issues” was, in essence, a process of informal informed discussion and consensus among a wide group of leading jurists and academics in the field of international refugee law. Canvassing a wide group of persons working directly in the field, including, those who participated in the research workshop, led to the identification of four legal issues and concerns that formed the basis for the four sessions that were held at the research workshop. The “critical issues” that emerged from this process were: the role of national courts in the interpretation and application of international refugee law, and specifically the *1951 Convention* and its *1967 Protocol*; the standard of proof in complementary protection cases in Europe and North America; the manner in which states have implemented more restrictive measures on refugees following 9/11, particularly, with respect to Articles 1F and 33.2, and the response of national courts and human rights treaty bodies; and, economic harm as a basis for refugee protection in five common law jurisdictions: Australia, New Zealand, Canada, the United States, and the United Kingdom.

The four “critical issues” in international refugee law identified were in large part a reflection of those who participated in the research workshop. Conspicuously absent from these proceedings were representatives from the UNHCR. This was neither deliberate nor by design but rather due to the unavailability of UNHCR officials to be able to attend and to participate in the research workshop. Presumably, if representatives of the UNHCR and, indeed, if other noted academics and jurists in the field, who were invited, had been able to participate in the deliberations at the research workshop, the list of “critical issues” examined, as well as the outcomes of the research workshop itself, may have been substantially different. However, from the very outset it was decided that a highly interactive

¹⁵ Della Thompson (ed.), *The Oxford Dictionary of Current English* 2nd edn, (University of Oxford, 1992), p. 200.

¹⁶ *Ibid.*, pp. 470–471.

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)

research workshop would be best suited for this type of international gathering of leading academics and high court and superior court jurists rather than a symposium or conference. Accordingly, the number of research workshop participants was limited to ensure that everyone in attendance would have a full opportunity to participate in each of the sessions. It was assumed that a small group of participants would allow for a greater discussion and exchange of views on the legal issues under deliberation. Hence, the number of participants was held to about thirty people.¹⁷

Nevertheless, the research workshop organizers were satisfied that an authoritative list of “critical issues” confronting international refugee law today had been identified and that the format of the research workshop was particularly well suited for eliciting a fruitful dialogue and exchange on the substantive national refugee law and international refugee law issues under consideration.

*1.2 Bridging the theorist/researcher – jurist/
practitioner divide*

The structure and format of the Research Workshop on Critical Issues in International Refugee Law was unique and innovative. Each session of the research workshop was structured on the following basis. A leading academic in the field of international refugee law presented an academic paper outlining in some detail the legal issues on a substantive area of concern. This was followed by one or more judicial commentary or commentaries by leading senior jurists on the academic paper presented. Immediately following the academic and judicial exchange there was a round-table discussion on the legal issues raised in the academic paper and the judicial commentaries on the substantive legal issues under examination.

Each session concluded with an academic legal commentator’s remarks on the academic-judicial exchange and the round-table discussion for that session. The role of the academic legal commentator was to highlight the key points of convergence and divergence that arose from the academic theorist-researcher and jurist-practitioner

¹⁷ In fact, it was extremely difficult to keep the number of participants to thirty people and in the end, the number of persons who participated actually exceeded forty people over the two days of the research workshop.

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)*Introduction*

7

exchange and the subsequent round-table discussions. The academic legal commentators were also asked to identify the most promising areas of further research that might help to resolve any obvious impasse or diverging and/or opposing views or approaches on the legal issues under examination during the session.

In the opinion of the organizers and participants, this structure for each of the sessions of the research workshop was effective in stimulating a thorough review, dialogue and debate on the substantive legal issues under examination for each session. This sentiment was expressed by the participants to the research workshop organizers informally during the research workshop or in their responses to the evaluation forms that were provided to the organizers at the end of each day of the research workshop.¹⁸

The structure and format of the research workshop helped to bring together the oft times opposing perspectives of the researcher and decision-maker in the examination of the substantive national refugee law and international refugee law issues under consideration. The perspective of the practicing or working jurist, who has to manage a heavy and, typically, a broad ranging and difficult case load, is tempered by the specialized knowledge and experience of having to deal with the practical realities of conducting refugee hearings and having to address “real life” situations within the hearing room and in the law, while, at the same time, having to decide the legal issues and the merits of the applications for asylum before them. On the other hand, the perspective of the researcher is premised on theoretical and conceptual assumptions, data collection and analysis, and logical and evidence based conclusions. Frequently, this is based on assumptions of how things work, or at least ought to work, in practice. Accordingly, there can often be a wide gulf between how things are intended to be and how things actually are, in short, the difference between theory and practice. Hence, the assumptions of the theorist-researcher may be very different from the experience of the jurist-practitioner.

Accordingly, the design of the research workshop was intended to diminish, if not overcome, this divide between the theorist-researcher

¹⁸ 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).

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)

and the jurist-practitioner or, more simply, as noted above, the gap between theory and practice. It was also anticipated that by bringing together distinguished legal academics and jurists in the field, in this particular structural setting or format, at the research workshop that it could lead participants to a fuller and deeper appreciation and understanding of the legal issues under examination during each of the four research workshop sessions. It was also hoped that this, in turn, could lead possibly to greater insights into the legal issues under consideration while, at the same time, stimulating the emergence and development of viable solutions as well as avenues for further constructive research on the legal issues and concerns under examination. The research workshop sought to generate new ideas for the resolution of the legal issues presently confronting international refugee law.

2 THE RESEARCH WORKSHOP ACADEMIC PAPERS, JUDICIAL RESPONSE AND ROUND-TABLE DISCUSSIONS

2.1 *Panel Session 1: “[A]nd there can only be one true meaning.” Adan [2001] 2 AC 477, p. 517.*

The official opening address of the 2008 Research Workshop on Critical Issues in International Refugee Law was presented by perhaps the world’s foremost authority in international refugee law, Professor Guy Goodwin-Gill, Senior Research Fellow, All Souls College, University of Oxford. The title of Professor Goodwin-Gill’s opening address was the “The One, True Way: National Courts, Refugee Law and the Interpretation of Treatises.” The judicial commentary for Professor Goodwin-Gill’s opening address was provided by the Honourable Allan Lutfy, Chief Justice of the Federal Court (Canada).

In essence, Professor Goodwin-Gill argued that there could only be but one “critical issue” in international refugee law and that is the “progressive development” of the *1951 Convention* and *1967 Protocol*. Professor Goodwin-Gill concluded his opening address by arguing that the international refugee regime is premised on individual state responsibility, with the national courts serving on the front lines and playing an important formative role in the application

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)*Introduction*

9

and interpretation of the *1951 Convention*. Professor Goodwin-Gill asserted:

The bottom line, though, is that I do not believe in uniformity. I believe in consistency with principle, and that the 1951 Convention, its object and purpose, and good faith provide the sufficient principled basis for protecting new categories of refugees.

And, I believe, that the lack of uniformity is simply the price we pay for progressive development, and *that* is the one, true way.¹⁹

Chief Justice Allan Lutfy pointed out that from a judicial point of view in Canada the “critical issues” in international refugee law are return to a substantial risk of torture, including, diplomatic assurances and/or memoranda of understanding and the Safe Third Country Agreement with the United States. Chief Justice Lutfy noted that on the issue of the substantial risk of torture the Canadian courts are being informed by their judicial colleagues in the European courts. There is the further matter of diplomatic assurances and/or memoranda of understanding between first and third countries concerning returning a person to a risk of torture. In this regard, there is also the European Court of Human Rights decision in *Saadi*²⁰ that deals with the risk of keeping the person within a state’s borders balanced against the risk of returning the person back to their country of nationality or country of former habitual residence where they could be possibly tortured.

As noted, a further critical issue in Canada is the Safe Third Country Agreement with the United States. Chief Justice Lutfy raised the question, is the Safe Third Country Agreement between Canada and the United States a question, more generally, of governance or a question of the respective Executive Branches of government making decisions? Chief Justice Lutfy further noted that Professor Goodwin-Gill stated that judicial decisions are not a source of law because they do not directly bind the state. Nonetheless, the judiciary does force the Executive Branch to move on issues. He requested that Professor Goodwin-Gill elaborate on his remarks on this point.

¹⁹ Guy S. Goodwin-Gill, “The One, True Way,” p. 15 [emphasis as in the original].

²⁰ *Saadi v. Italy*, App. No. 37201/06, European Court of Human Rights (Grand Chamber), 28 February 2008. Concurring opinion of Judge Myjer, joined by Judge Zagrebelsky.

Cambridge University Press

978-0-521-19952-0 - Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony

Edited by James C. Simeon

Excerpt

[More information](#)

Professor Goodwin-Gill responded by stating that in the United Kingdom, the House of Lords, in *Adan*, decided that the United Kingdom was unable, in view of its international obligations, to send a person back to a country that does not have the same degree of protection from a risk of torture as in the United Kingdom. Professor Goodwin-Gill also stated that *Saadi* is an important case because it notes, in a clear and unambiguous way, that there are no exceptions, in particular, no national security exceptions, to returning a person to a country where they face a real risk of torture.

These questions and issues were further joined in the round-table discussion that took place during this session. It was further noted that *Saadi* will prove to be an important case because it clearly outlines the absolute requirement of the state to protect a person against the possible risk of torture. The *Saadi* decision raises issues of how trustworthy are diplomatic assurances and how much monitoring is required to ensure the protection of a person upon their return to a state where there may be a possible risk of torture.

A further issue joined in the round-table discussions was the auto-interpretation of the 1951 *Convention* or the role and responsibilities of national courts in the application and interpretation of the 1951 *Convention*.²¹ Professor Goodwin-Gill argued that there are two perspectives to auto-interpretation: (1) non-opposability; and, (2) creative discourse. The former recognizes the right of states to interpret international law and treaties for the purposes of determining their own conduct.²² And, the latter, for the application and interpretation of Conventions “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 object and purpose.”²³ Professor Goodwin-Gill argued that auto-interpretation of the 1951 *Convention* provides for the progressive development of international refugee law.

Another issue that came to the fore in the round-table discussions for this session was consistency in national and international refugee law adjudication. This was a common concern among all the participants at the research workshop and, indeed, is a critical issue that cuts across all jurisdictions that are state parties to the

²¹ Guy S. Goodwin-Gill, “The One, True Way,” p. 8.

²² *Ibid.*, p. 9.

²³ *Ibid.*, p. 13, Article 31(1) 1969 *Vienna Convention on the Law of Treaties* 1155 UNTS 331.