François Crépeau

2008 *Trudeau Fellow,* McGill University

BIOGRAPHY

François Crépeau is a full professor, holds the Hans and Tamar Oppenheimer Chair in Public International Law, and is scientific director of the Centre for Human Rights and Legal Pluralism at the Faculty of Law of McGill University. He is a 2008-2011 Fellow of the Pierre Elliott Trudeau Foundation.

His current research focuses on migration control mechanisms, the rights of foreigners, the interface between security and migration, and the interface between the rule of law and globalization.

He has given many conferences, published numerous articles, and written or edited five books: *Les migrations internationales contemporaines – Une dynamique complexe au cœur de la globalisation* (2009), *Penser l'international, Perspectives et contributions des sciences sociales* (2007), *Forced Migration and Global Processes—A View from Forced Migration Studies* (2006), *Mondialisation des échanges et fonctions de l'État* (1997), and *Droit d'asile: De l'hospitalité aux contrôles migratoires* (1995). He heads the "Mondialisation et droit international" collection at Éditions Bruylant (Brussels) and is a member of the Canadian Commission for UNESCO and a Fellow of the Institute for Research on Public Policy (IRPP). He is a member of the editorial committees of the *International Journal of Refugee Law* and the *Refugee Law Reader*. He also sits on the Quebec Law Society's Committee on Human Rights and Committee on Citizenship and Immigration. He has been guest professor at the following institutions: Université catholique de Louvain (2010-2013); Institut international des droits de l'homme (Strasbourg) (2001, 2002, 2007, 2008); Graduate Institute for International Studies (IUHEI-Genève,

2007); Institut des hautes études internationales, Université de Paris II (2002); and Université d'Auvergne-Clermont 1 (1997).

From 2001 to 2008, he was a professor at the Université de Montréal, holder of the Canada Research Chair in International Migration Law, and founding scientific director of the Centre d'études et de recherches internationales de l'Université de Montréal (CÉRIUM). From 1990 to 2001, he was a professor at the Université du Québec à Montréal. He also served as vice-president of the Canadian Human Rights Foundation (now Equitas) (1992-2004) and editor of the *Revue québécoise de droit international* (1996-2004). He participated in observer missions in the occupied Palestinian territories (2002) and in El Salvador (1991).

François Crépeau holds diplomas from McGill University (BCL and LLB, 1982), Bordeaux University (licence in law, 1981; master's degree in private law, 1982), Université de Paris II (DEA in legal sociology, 1985), and Université de Paris I (DEA in business law, 1984; LLD, 1990).

ABSTRACT

We are all migrants, have always been, and will always be, François Crépeau convincingly tells us. Historically, mobility is the rule, not the exception, and, in any case, borders have rarely prevented people from moving. Our complex societies are made stronger through immigration: our cultures and collective narratives are deeply influenced by it, though they do not necessarily recognize this. In this Trudeau Lecture, François Crépeau addresses the universal nature of migrants' rights. Migrants have fundamental rights, the same rights as anyone else, except for political rights and the right to enter into and stay in the territory. Of course, since 9/11, controlling migration at the border has been made central to all security policies. Professor Crépeau points out that this focus is misplaced and aims essentially to create a political discourse that designates a scapegoat for our fears, and to justify restrictive measures against foreigners in the name of "our" security. Can we imagine a citizenship that would be compatible with the free movement of persons through international borders? As a constant of civilization, should not mobility become a right?

Dealing with Migration: A Test for Democracies
University of Winnipeg
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Introduction[1]

Migration is a complex phenomenon.[2] It is a constant of civilization: the history of humanity is that of an endless journey on the various continents of our planet. Migration has always existed, and it will always exist. While some people stay home for several generations, most people move. Sometimes not far, sometimes across oceans.

2. See François Crépeau, Delphine Nakache, and Idil Atak, "Introduction," in *Les migrations internationales contemporaines – Une dynamique complexe au cœur de la globalisation*, eds. François Crépeau, Delphine Nakache, and Idil Atak (Montreal: Presses de l'Université de Montréal, 2009), 8-12.

Time wise, migration is also a generational phenomenon, triggered by a huge array of political, economic, and social factors that cannot meaningfully be influenced by short-term politics. At the individual level, it is a personal trajectory through several social spaces; we should never forget to listen to the individual voices, with their hopes and fears, beyond the coded language describing "waves" and "flows" of migrants.

Globally, migration can be seen as an economic transfer—of either funds or skills—that responds to push and pull factors, or a development issue, especially through "brain drain" and "brain gain." Migration is sometimes used to fulfill demographic objectives, for example, in Canada, Australia, or the United States, where increasing the population is linked to an international strategic positioning: a search for a more robust economy, stronger clout in international affairs, and therefore an increase in global power.

As a vector of social transformation, migration is often a focus of the political discourse on identity, with all the imaginable demagogical outpourings of hatred about the "others"; very often, this discourse is shaping political agendas. Migration may pose challenges to territorial sovereignty: it may be a security concern, about which the state security agencies often refuse to share information, and is often a clandestine phenomenon, creating pockets of social invisibility.

It is also a key to cultural pluralism, at the same time creating here vibrant multicultural societies, attracting there waves of communal violence, or developing elsewhere into barely coexisting ghettoized communities. Although rife with human rights issues, migration, as a social phenomenon, is not yet a human right in itself; one has the right to exit any country but does not have the right, save for refugees, to enter any country other than one's country of citizenship. On this particular point, Europe stands as a unique experience, as European citizens can move freely across the internal

borders of the European Union and establish themselves wherever they wish in the common territory.

Migration is, therefore, a complex multifaceted phenomenon that should be apprehended in many ways, through multidisciplinary approaches, with methodological caution, and with the constant concern of not loosing the connection to the individual narratives at stake.

The five points of this presentation summarize my intellectual trajectory. My background idea is that, as migration is a constant of civilization, we are all migrants (1). My doctoral thesis was on the progressive devaluation of asylum (2). At first an immemorial tradition, asylum has recently been construed as a potential threat to national security, and we are moving towards a securitized control of migration movements, which was the object of my early research (3). The subject of my present research is the respect, fulfilment, protection, and promotion of the rights of migrants, as they relate to the rights of citizens (4). A potential research agenda would be a reconceptualization of citizenship, in order to recognize the presence of all "foreigners" in terms of their administrative statuses (5).

We Are All Migrants

Humanity is on an ongoing endless journey. We have always been migrants, since our species appeared around 200,000 years ago in Africa and then colonized other continents. Migration is at the heart of many civilizations, as exemplified by the Exodus in the Bible, the Kadesh treaty (1275 BCE) between Ramses II of Egypt and Hatusiliš III of the Hittite empire, Homer's Odyssey, and Greek tragedies by Aeschylus, Sophocles, and Euripides, as well as the Hegira in Islam.[3]

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3. François Crépeau, *Droit d'asile : de l'hospitalité aux contrôles migratoires* (Brussels: Éditions Bruylant and Éditions de l'Université de Bruxelles, 1995), 29-38.

Our settling on the land is recent and unstable. Nomadic populations still exist, such as the Romas and some Aboriginal peoples. Pilgrimages remain important traditions, as exemplified by the importance of Mecca or Santiago de Compostela. The rural exodus, the urbanization process, and the seasonal agricultural workers' programs, among others, all include elements of migration. Many individuals migrate for work, studies, retirement, or tourism. "Expats" and "snowbirds" are all migrants. Moreover, we dream of outer space, as many novels, movies, and TV series show.

Migrants represented approximately 3 percent of the world population throughout the last century, although the number of persons involved has vastly increased. Today, it corresponds to some 214 million migrants worldwide. Migration has always existed from areas of poverty and violence towards regions of prosperity and stability; the first create push factors, the second, pull factors. We can slow migration in the short term but cannot stop it in the long term, as it responds to a basic human need, that is, the ability to imagine a future for oneself and one's children. Most of us would also try to migrate if faced with the choices those millions of migrants face. Irregular migration results, therefore, from the interplay of three factors: our hidden, low-skilled labour migration needs, the needs of people seeking to emigrate from countries in the south, and our repressive border policies which interfere with the effective interplay of push and pull factors. Indeed, the tightening of migration policies in many destination countries has led to a decrease in the legal opportunities for international migration. When stricter border controls are imposed, more people turn to irregular means of migrating, including resorting to smuggling organizations, because they find no other alternative.[4]

4. François Crépeau and Delphine Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection," *IRPP Choices* 1, no. 12 (2006), 4-5.

States from the Global North design policies intended to control migrations in various ways. In countries like Canada, Australia, and the United States, immigration policies are used to fulfill demographic objectives: governments create socioeconomic integration policies and cultural diversity is celebrated. In contrast, continental European states' policies have been designed to manage unskilled foreign populations, often considered as cheap labour; there were few integration measures and multiculturalism has not been considered a founding principle, when it was not rejected outright. However, migrants do integrate somehow in both sets of countries, and they experience common successes and difficulties with the coexistence of various communities.

Both groups of countries also share common policies, such as the repression of irregular migration and resurgent temporary migrant workers' schemes.[5] Temporary migrant workers and irregular migrants are often left at the mercy of employers who can trigger their deportation. This is the case, for example, in Canada, for migrants who come with the seasonal agricultural workers' program or the live-in caregivers program. In the latter case, caregivers are allowed to work for only one employer at a time, they are obliged to live on the employer's premises, and changing employer is a complicated process. Such policies trap migrants in subaltern statuses and create spaces of vulnerability as the power over the migrants' lives generally silences them and creates a huge potential for exploitation: modern slavery, sexual exploitation, forced labour, debt bondage, servitude, and so on. The European Court of Human Rights' decision in *Siliadin v. France*[6] exemplifies this vulnerability. In this case, the court concluded that a young woman of Togolese origin, who had worked as a maid from her arrival in France at age 15, unpaid for more than four years, was subjected to forced labour and held

5. Ibid., 18.
6. *Siliadin v. France*, no. 73316/01, ECHR, 2005-VII.

in servitude. Unlawfully present in France, the young woman was afraid of being arrested if she went to the police.

The migrant thus illustrates the conflict between the territorial sovereignty and human rights paradigms in international law. In the former, old and partly dated, the host state decides who enters and stays, who is a member of the political community, who is a citizen. According to the sovereignty paradigm, the foreigner has no rights a priori in the host state; he enjoys rights only in the home state, or state of citizenship. Traditionally, the host state treats foreigners as it wishes and has administrative discretion over them, subject only to the rule of reciprocity. The human rights paradigm, however, more recent and universal, posits that anyone has inherent rights opposable to any form of power, public or private. States must respect the rights of all persons within their power, everywhere, at any time. Therefore, migrants are entitled to the respect, fulfilment, protection, and promotion of all their fundamental rights, including the right to equality and the prohibition of discrimination. The migrant is, therefore, the case in point in the conflict between the sovereignty and human rights paradigms as basic principles structuring international law and policy.[7]

The Progressive Devaluation of Asylum

Asylum is an immemorial tradition of most civilizations, found in the Bible and Greek tragedies, among others. Many Greek tragedies (e.g., *The Supplicants*, by Aeschylus; *Oedipus at Colona*, by Euripides) expose very clear principles about asylum. Asylum is linked to the notion of justice, as the violation of asylum is considered an unbearable act of violence against the god-made law that protects the weak from the arrogance of the powerful. Granting asylum is also seen as the sovereign right of the one who gives his protection in the name of the gods.[8]

7. Crépeau and Nakache, "Controlling Irregular Migration in Canada," 5.
8. Crépeau, *Droit d'asile*, 32.

In the Bible, the traditional law of hospitality urges us: "Welcome the stranger, because you were a stranger in the land of Egypt."[9] Related to this antique tradition, asylum was probably first justified by religious beliefs: it was the divine protection of the criminal in a sanctuary. It was part of Catholic code of canon law until 1984. It evolved, from the 16th to the 18th century, to become the personal protection offered by a prince or a state, for political reasons, against the wrath of another prince or state.[10]

Notwithstanding this ancient tradition, the concept of "asylum seeker" is a recent construct, dating back only to the early '80s. In 1973, the oil crisis justified the closure of Global North borders to low-skilled foreign migrant workers. Combined with an increased accessibility to international travel and communications, the number of asylum claims soared. In Canada, it jumped from 600 in 1976 to 60,000 in 1986. States reacted to the increasing number of asylum claims and irregular entries into their territory with a strong anti-asylum discourse and with repressive deterrence measures against irregular migration.[11]

Stripped from its ideological dimension with the collapse of the Soviet bloc in 1989, asylum became more and more construed as a threat. Asylum seekers are often presented as "bogus" refugees, whose claims are fictitious, or as irregular migrants trying to "jump the queue" of the numerous honest and worthy applicants in the legal immigration system. The *public discourse* frequently associates asylum with other forms of "international criminality," such as irregular migration, fraud, crime, trafficking in persons, migrant smuggling, and terrorism, thus justifying deterrence and preventive measures against all "unlawful aliens," including asylum seekers.

Deterrence measures attempt to discourage asylum seekers or irregular migrants entering the country by raising the costs and

9. Exodus, 23:9.
10. Crépeau, *Droit d'asile*, 29-45.
11. Ibid., 312-316.

diminishing the benefits of migration. Such measures focus on reducing the entitlements offered to migrants, such as the elimination of appeals in the refugee determination process and the reduction of access to legal aid, the labour market, and social protection.[12] Migrants also face increased detention. Map 1 shows migrant detention facilities in Europe and Mediterranean countries.[13]

In Canada, immigration detention has increased considerably in the last few years. The Immigration and Refugee Protection Act (IRPA)[14] and its regulations provide the Citizenship and Immigration minister with stronger powers to arrest and detain migrants. In addition, the government is making more use of its detention power.

Migrant smuggling is sometimes heavily criminalized and involves excessive penalties: in Canada, helping a group of 10 individuals or more to cross the border irregularly is an offence punishable by life imprisonment. Canadian legislation does not distinguish between persons who are motivated by humanitarian concerns and others. In a recent decision, the Court of Quebec sentenced a woman to a prison term of three months for having helped another person gain entry to Canada without the appropriate documentation, despite the facts that no financial gain was made and that the person she helped received refugee status.[15] This is in violation of at least two Canadian obligations under international law. On the one hand, the Protocol against the Smuggling of Migrants by Land, Sea and Air defines "migrant smuggling" as "the procurement, *in order to obtain, directly or indirectly, a financial or other material benefit*, of the illegal entry of a person into a State Party of which the person
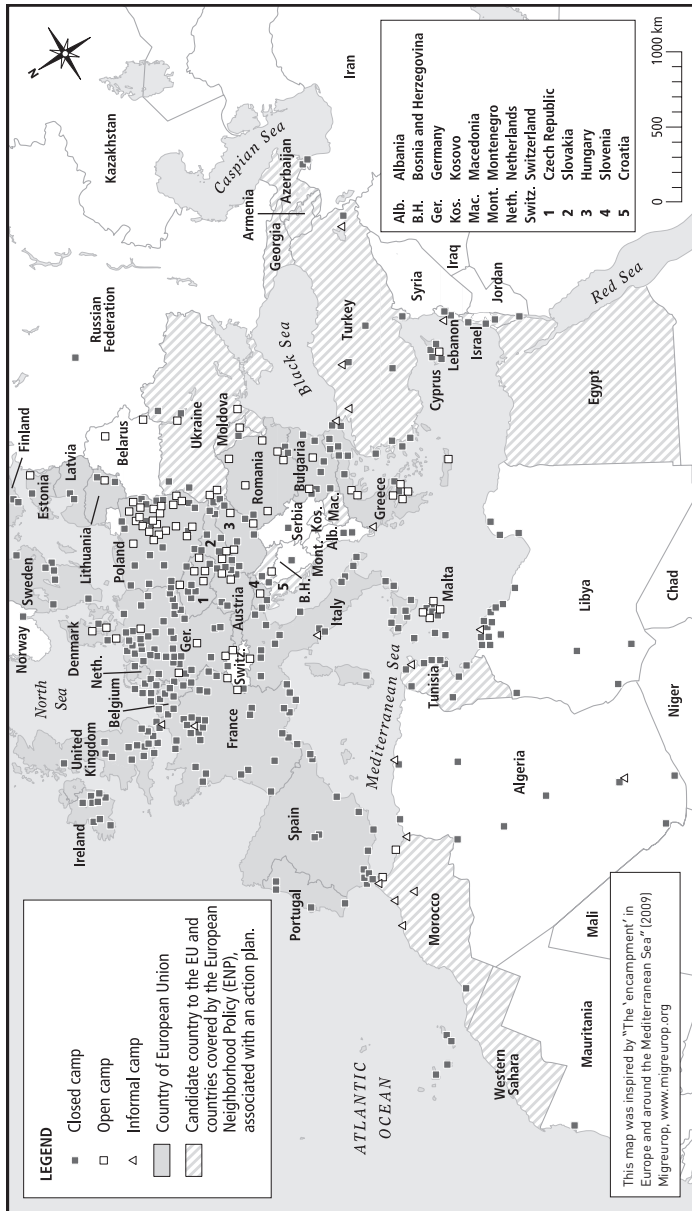
12. Crépeau and Nakache, "Controlling Irregular Migration in Canada," 14.

13. This map was inspired by "'The encampment' in Europe and around the Mediterranean Sea," Mireurop, www.mirgreurope.org.

14. Immigration and Refugee Protection Act, 2001, c. 27.

15. *R.* v. *Bejashvili*, [2007] J.Q. no. 16210.

Map 1　"The encampment" in Europe and around the Mediterranean Sea

LEGEND

- ■ Closed camp
- ☐ Open camp
- △ Informal camp
- Country of European Union
- Candidate country to the EU and countries covered by the European Neighborhood Policy (ENP), associated with an action plan.

Alb.　Albania
B.H.　Bosnia and Herzegovina
Ger.　Germany
Kos.　Kosovo
Mac.　Macedonia
Mont.　Montenegro
Neth.　Netherlands
Switz.　Switzerland
1　Czech Republic
2　Slovakia
3　Hungary
4　Slovenia
5　Croatia

0　500　1000 km

This map was inspired by "The 'encampment' in Europe and around the Mediterranean Sea" (2009) Migreurop, www.migreurop.org

is not a national or a permanent resident."[16] On the other hand, the Convention Relating to the Status of Refugees prohibits State Parties from imposing penalties on refugees on account of their illegal entry.[17] How could one be the accomplice of someone who did not commit any infraction?

Furthermore, states resort to bilateral and multilateral agreements to facilitate the return of undesirable migrants, such as the 2007 readmission agreement between Europe and Russia or the safe third country agreements in Europe (1990 Dublin Convention) and North America (2002 Canada–United States Safe Third Country Agreement).[18]

Preventive measures, on the other hand, are designed to impede the arrival of asylum seekers and irregular migrants: in order to avoid the intervention of nongovernmental organizations (NGOs), lawyers, politicians, or the media who can try to fight the deportations of migrants who have arrived in the country, it is much easier to prevent migrants from setting foot on "our" territory altogether.[19] None of these "annoying" actors will intervene in favour of someone who is maintained abroad.

This type of measure includes visa regimes, of which the visa obligation for Mexican and Czech nationals is the most recent example in Canada, an obligation directly triggered by the rise in the number of asylum claims from these two countries. States also apply carrier sanctions (fines imposed on transportation companies for bringing foreigners without the appropriate documentation), leading to a partial privatization of migration controls. In Canada, the

16. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, November 15, 2000, art. 3, http://www.unhcr.org/refworld/docid/479dee062.html (emphasis added).

17. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, entered into force 22 April 1954, art. 31(1).

18. Crépeau and Nakache, "Controlling Irregular Migration in Canada," 17.

19. Ibid., 12.

IRPA contains several provisions making carriers responsible for the removal costs of foreigners who arrive in Canada by irregular means.

Countries also resort to interception mechanisms abroad in order to prevent irregular migration; to that end, Canada has deployed "immigration integrity officers" in many key origin and transit countries. Some states have created "international zones" in their airports, a practice based on the fiction that the foreigner who has not yet been admitted into the country is considered—for legal purposes—not to be in the territory and finds herself in an international no man's land where the legal guarantees provided by local law are not available to her. Though courts everywhere have rejected the fiction as fallacious (if the police can intervene, the legal guarantees against abusive behaviour by the authorities must also apply), many administrative practices in such restricted areas remain without effective checks. As well, immigration intelligence is widely shared without meaningful control on the transfer of personal information found in intelligence databases.

Nowadays, international economic cooperation arrangements—such as the Barcelona Process in the Mediterranean, the Puebla Process for Central America, or the African, Caribbean and Pacific Group of States–European Community Partnership Agreement—all contain conditions related to migration controls by countries of the Global South.[20] Countries in the Global North thus delegate the "dirty work" of stopping migrants and asylum seekers to other states, regardless of the fact that many of these states do not have a good human rights record.

Borders and seas are militarized with institutions like the Guantanamo military base, used during the '90s by the United States

20. Delphine Nakache and François Crépeau, "Le contrôle des migrations et l'intégration économique : entre ouverture et fermeture," in *Mondialisation, migration et droits de l'homme : le droit international en question*, ed. Vincent Chetail (Brussels: Éditions Bruylant, 2007), 214; Derek Lutterbeck, "Policing Migration in the Mediterranean," *Mediterranean Politics* 59, no. 11 (2006), 69.

to detain Haitian boat people trying to reach Florida, before send-ing them back to Port-au-Prince; the enduring "Pacific Solution," whereby the Australian authorities intercept boats coming from Indonesia and detain the migrants on isolated Christmas Island; and the European Union Frontex agency, which patrols the Mediterranean near Lampedusa, Malta, the Canary Islands, or Gibraltar to prevent boats from reaching the European mainland. European countries are even discussing the idea of an "externaliza-tion" of asylum policies, meaning that asylum procedures would take place only abroad, in such countries as Libya, Morocco, Albania, and Mauritania.[21]

All in all, states are progressively reinforcing, into a coherently articulated strategy, their arsenal of measures for preventing irregu-lar movements of persons, including asylum seekers and refugees, and reducing the "burden" of such migration.

The Securitized Control of Migrations

These measures proceed from a change of political paradigm, reflected by changes in the public discourse on migrants. Especially since the attacks of 9/11, as well as the 2004 Madrid and 2005 London bombings, migrants are considered suspect and dangerous. They are even more associated with economic woes (unemployment, wel-fare state crisis, etc.), security threats (inner cities, petty violence, organized crime, terrorism, etc.), and identity anxiety (demographic changes, identity markers). The "us and them" mentality is at work, creating discrimination that is easily manipulated into hatred.[22]

But migration was part of a new international security para-digm even before the attacks of the '90s. In the past two decades a phenomenon of securitization of the public space has emerged,

21. See, for example, Sophie Huguenet, *Droit de l'asile : le projet britan-nique d'externalisation* (Paris : L'Harmattan, 2004).

22. Crépeau and Nakache, "Controlling Irregular Migration in Canada," 4-5.

which identifies the process by which a policy issue (such as international migration) becomes a security issue.[23] This phenomenon also includes other domains, such as water security, food security, energy security, communication security, environmental security, human security, and urban security, to name only a few.

Since 9/11, however, this process has quickened.[24] Domestic developments include new legislation against terrorism, policies to fight irregular labour, and institutions like the US Department of Homeland Security. Administrative practices, such as the privatization of detention, are extended, and new ones, such as discriminatory practices at the border and abroad, often go undetected.

In the meantime, international and constitutional human rights guarantees remained unchanged. The events of 9/11 did not affect this legal framework, except for some interpretation reworking. It did not change because it is the legacy of the eyewitnesses to the atrocities of World War II and was designed to provide a framework for shocks even greater than 9/11.

Certainly, some states feel "trapped" by their human rights commitments when the time comes to apply them to migrants, as they never envisaged that migrants would use them. Canada was incensed to be condemned by the UN Committee against Torture, in the *Khan* case, in 1994, for its intention to return a Kashmiri militant to Pakistan, as Canada considered that the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had not been intended for such cases.[25]

23. Thomas Faist, "The Migration-Security Nexus. International Migration and Security before and after 9/11," Malmö University School of International Migration and Ethnic Relations, *Willy Brandt Working Papers*, 2004, http://dspace.mah.se:8080/bitstream/2043/686/1/Willy%20Brandt%20 2003-4.pdf.

24. Crépeau and Nakache, "Controlling Irregular Migration in Canada," 4.

25. *Tahir Hussain Khan* v. *Canada*, CAT/C/13/D/15/1994, UN Committee Against Torture (CAT), December 18, 1994.

Securitizing immigration allows states to invoke a "state of exception" against migrants.[26] For example, British prime minister Tony Blair suggested that his country could withdraw from the 1950 European Convention on Human Rights with regard to asylum seekers if their number did not diminish; this necessarily implied that such persons were not worthy of human rights guarantees, that they were second-class human beings of sorts. Canadian authorities recently rejected the conclusion of a communication from the UN Committee against Torture and deported to Iran Mostafa Dadar, an individual whom this treaty body had declared as in need of protection.[27] Dadar had fled his country of origin after being imprisoned and severely tortured because of his loyalty to the Shah, but then committed a crime in Canada; Canadian authorities considered that they have no obligation to comply with the decision of the committee.

The securitization process thus reframed the status of migrants. Irregular migration is now considered part of "international criminality"; the implication is that irregular migrants should not be recognized as having any rights. Indeed, very few states (and not one state in the Global North) signed or ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[28] which details the rights of all migrants; its "flaw" is to extend many of these rights to irregular migrants.

26. Giorgio Agamben, "State of Exception," *New Serbian Political Thought* 1-4 (2005), 135.

27. *Mostafa Dadar* c. *Canada*, CAT/C/35/D258/2004, UN Committee Against Torture (CAT), December 5, 2005; Radio-Canada.ca, "Mostafa Dadar expulsé," (March 27, 2006), http://www.radio-canada.ca/regions/ atlantique/2006/03/26/001-NB-dadar.shtml.

28. On December 8, 2009, 42 states ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (December 18, 1990): United Nations Treaty Collection, "Chapter IV: Human Rights," 13, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families," http://www2.ohchr. org/english/law/cmw.htm.

Actually, irregular entry is not a crime against persons or against property; it is essentially the crossing of a virtual line in the sand, which in itself hurts no one. Moreover, the use of smuggling rings is often essential, when all other avenues towards protection are closed. Human smuggling has always existed and, despite being a nasty business, rife with possibilities of exploitation, examples abound of it saving lives: German Jews (in the movie *Casablanca*, the false travel documents were hidden in the piano), Spanish Republicans, Indochinese boat people, Haitian boat people, and many others who escaped to safety by means of migrant smuggling.

The large majority of irregular migrants pose no security risk, and the 9/11 terrorists were not irregular migrants. Although framed as a fight against international criminality, the migration control mechanisms are more used to create a reassuring discourse about appropriate government action than to effectively increase the security of citizens. Moreover, some of these mechanisms have direct adverse impacts on migrants' security. For example, the wall being erected on the border between the United States and Mexico forces migrants to cross the Arizona desert, a long journey through extreme conditions which have caused hundreds of deaths. Migrants trying to reach the coasts of Europe from Africa or of Australia from Indonesia risk their lives on unseaworthy vessels, seeking Eldorado; hundreds have drowned.

Furthermore, irregular migrants do work and pay at least direct taxes, and their exploitation in specific sectors of the economy (e.g., construction; agriculture; domestic, cleaning, or catering services) enhances the competitiveness of Global North economies.[29] Such migrants are badly needed; without them, those sectors would risk

29. International Labour Office, *Towards a Fair Deal for Migrant Workers in the Global Economy, Report VI* (International Labour Conference, 92nd Session), Geneva, International Labour Office, 2004, at 48, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/meetingdocument/kd00096.pdf.

being wiped out. This essential pull factor is systematically forgotten in government discourse regarding irregular migration; the fact that "we" are co-responsible for their coming in the first place is never mentioned.

Finally, measures against irregular migration are inefficient, as they never address the root causes for migration, which are, at a macro level, the need for exploited labour in the economies of the Global North, and, at a micro level, the personal inability to imagine a future for oneself and one's children in the country of origin due to the persistent failure of international development policies.[30]

Migrants Have Rights

States benefit from territorial sovereignty and may exclude any foreigner from their territory, with due respect for international obligations; this traditional principle of international law remains valid. But we have added a new principle to it: everyone generally benefits from the same fundamental rights, citizens and foreigners alike.

Two rights are exclusive to the citizen: the right to political participation, which means the right to vote and be elected, and the right to enter and remain in the territory. This is the situation in international law and in Canadian constitutional law.[31]

All other rights apply equally to the foreigner and the citizen, by virtue of their common humanity. This means, *inter alia*, that the foreigner has the right to equality and to not be discriminated against on the grounds of nationality, and that she is protected

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30. Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action, Report of the Global Commission on International Migration,* 2005, at 32-40, Global Commission on International Migration, http://www.gcim.org/attachements/gcim-complete-report-2005.pdf.

31. See *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 107; *Canadian Charter of Rights and Freedoms*, part I of the Constitution Act, 1982 [Schedule B to Canada Act 1982 (1982, U.K., c. 11)], art. 1-15.

against return to torture and arbitrary detention. The foreigner must have access to recourses and due process. She benefits from guarantees even in cases of national security. Furthermore, a foreign child enjoys specific protections: among others, the Convention on the Rights of the Child clearly states that states "shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind" and that the "child is protected against all forms of discrimination or punishment on the basis of the status[…]of the child's parent."[32]

States must respect those rights. The non-discrimination standard, based on the right to equality, forbids in principle the differential treatment based on citizenship or immigration status in the implementation of fundamental rights. In Canada, according to article 1 of the Canadian Charter of Rights and Freedoms, a differentiation between citizens and non-citizens must be "reasonable and justifiable in a free and democratic society."[33] The same criteria are used in European law, as interpreted and applied by the European Court of Human Rights.

This is what, still with many caveats, several tribunals have already started to affirm. The Supreme Court of Canada has curtailed the discretionary elements and the secrecy of long-term detention without charges of persons subject to a security certificate signed by cabinet members.[34] The United States Supreme Court has progressively imposed a due process framework on the detention in Guantanamo Bay of suspects caught in the "war against terror," when it had not done so for the Haitian irregular migrants detained

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32. *Convention on the Rights of the Child*, November 20, 1989, 1577 U.N.T.S. 3 (entry into force, September 2, 1990), art. 2.

33. *Canadian Charter of Rights and Freedoms*, part I of the Constitution Act, 1982 [Schedule B to Canada Act 1982 (1982, U.K., c. 11)], art. 1.

34. *Charkaoui* v. *Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

in Guantanamo Bay during the '90s.[35] The European Court of Human Rights has affirmed that so-called international zones in airports are actually national territory where all human rights guarantees apply.[36] The British House of Lords has decided that indefinite detention and discriminatory practices in a foreign airport are not compatible with a proper interpretation of the human rights framework that governs the country and the continent.[37]

In the end, past the moral panic that followed 9/11, normal legal frameworks reassert themselves progressively. Our common universal human rights framework was established by the generation that had lived through the horrors of World War II. The legacy of that generation was that law must always prevail over executive power. This had been threatened by the modus operandi established for the "war on terror." It is heartening to see that courts are slowly reasserting their control over laws and policies that expanded executive powers against individual freedoms. Their point is that the political legitimacy at the base of such policies is not to be found in the objectives pursued but in the procedures followed. Unless public authorities submit to the normal rules of procedure and evidence, their decisions will come out as arbitrary, thus undermining the legitimacy of their action and threatening the political support needed for long-term action against terrorism.

Furthermore, even with regard to the role of borders, exceptions exist that show that it is possible to imagine another regime: citizens of European Union countries can move freely across internal

35. *Boudemiene* v. *Bush*, 553 U.S. (2008); *Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993).

36. *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, June 25, 1996.

37. *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56; *Regina v. Immigration Officer at Prague Airport*, [2004] UKHL 55.

borders of the European territory and may vote in local elections in their country of residence.[38]

Conclusion: Changing Our Conception of Citizenship?

Throughout history, marginalized or vulnerable categories of population have always had to fight for their rights. In modern times, they also fought through the courts, against the executive, against Parliament, and often against the majority public opinion. Among others, they include, in recent times, industrial workers, women, Aboriginal people, national minorities, and detainees, as well as gays and lesbians. Migrants are the latest of such vulnerable groups.

For many reasons, one cannot generally expect the executive or the legislative powers to protect the rights of migrants. They are too convenient scapegoats for some woes of our societies, such as unemployment or criminality. Migrants rarely complain and are thus legally insignificant. Because they do not vote, they are also politically insignificant. Therefore, politicians are unlikely to consider their preferences.[39] As host states' authorities manipulate information and nationalist populist discourses go uncontradicted, the public is easily persuaded not to support migrants and frankly does not care much. It comes down to NGOs, churches, pro bono lawyers, and other concerned citizens to carry the sole burden of the respect, fulfilment, protection, or promotion of their rights; the burden is much too heavy for their meagre resources. We cannot overcome the difficulties of the situation unless we take a different view on migrants.

Our proposal would be that, as they are an integral part of the city, despite not being nationals, migrants should be considered citizens, although with a small "c." They all work and contribute to the

38. See Jean-Yves Carlier and Elspeth Guild, *The Future of Free Movement of Persons in the EU* (Brussels: Éditions Bruylant, 2006).

39. Crépeau and Nakache, "Controlling Irregular Migration in Canada," 4.

economy of the host state. Their irregular work—and exploitation—contributes to the competitiveness of its economy in several sectors, such as agriculture, construction, or catering. Migrants pay taxes on everything they buy or rent, and use public services sparingly. The absence of an administrative status that recognizes the whole range of their rights is the cause of their vulnerability. Creating coherent legal statuses for such persons would go a long way towards empowering them to fight exploitation.

Here are some examples of how we already adopt a different attitude on vulnerable migrants. In many cities in the United States, the police have decided not to control immigration status in encounters with fellow citizens so as to be able to implement their "law and order" agenda with the confidence of all segments of the population; fighting violence becomes impossible when victims do not call the police for fear of deportation. In Toronto, all children have the right to go to school whatever the status of their parents, according to a "don't ask, don't tell" policy. In Massachusetts, the state hands out driver's licences without checking the licensee's immigration status, thus allowing irregular migrants to establish an identity and giving them access to many services. In many European countries, resident European citizens can now vote in local elections. Several other jurisdictions also allow resident aliens to vote in local elections: six townships in Maryland; two towns in Massachusetts (Amherst and Cambridge); New York, Chicago, and Arlington (Virginia) for school board elections; and New Zealand for all elections.[40] In Quebec, the AH1N1 flu vaccination campaign in the fall of 2009 was available to all, irrespective of immigration status; public health measures are

40. See David C. Earnest, *Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm*, American Political Science Association, 2003, http://www.odu.edu/~dearnest/pdfs/Earnest_APSA_2003.pdf; Jamin B. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," *University of Pennsylvania Law Review* 141 (1993), 1391.

partially ineffective if they exclude entire segments of the population. In Paris, since the '80s, 21 medical dispensaries for irregular migrants have been established by an NGO (Médecins du Monde), and they benefit from a cooperation agreement with the authorities that prevents police raids.

These are all examples that show that a different conception of the place of vulnerable migrants in many host societies is possible. If immigration status is still an important factor at a national level, local governments (regional or municipal) can adopt a different stand. Any person who participates in the economic and social workings of any society should enjoy a status that allows her to benefit from services commensurate to her contribution and participate in political decision making, at least at the local level.

Democracy is a complex relationship between political representation, protection of human rights, and the rule of law (understood as the normal access to recourse against unfair decisions, to tribunals or other national human rights institutions). Political mobilization and legal guarantees must be combined to achieve true democracy; the history of the 20th century has demonstrated that majorities can be wrong and that individuals and minorities must be able to defend their rights against any majority. The protection of human rights is always a political struggle in which law is a tool to be used by individuals and groups, a tool that enhances and furthers political mobilization, a tool that is generally useless without political mobilization. The question, therefore, is, in the absence of political mobilization, how, and who, can we mobilize in favour of migrants? Being the ultimate outsider, effectively unable to use political representation, the migrant has become the ultimate test for our democracies.