

PUB2 551 – Immigration and Refugee Law

FRANÇOIS CRÉPEAU

**Syllabus
(17 September 2014)****1. PRESENTATION**

Since time immemorial, migrations have shaped human communities. History of Mankind is that of a continuous migration towards economic prosperity and political stability. Migration is a constant of civilisation. Borders are only a very recent and generally ineffective barrier to migration.

During the last centuries, migrations have considerably increased, both in distance and in numbers. Continents have been populated by external migration, to the detriment of indigenous peoples who had themselves come from somewhere else. In the past fifty years, this movement has accelerated, due to the democratization of means of communication and mass transport. States nowadays wish for an immigration that can contribute to economic growth, but fear migrations that increase the poorer part of their population, destabilize eco-systems and multiply political conflicts.

States in the “New World” have adopted broad immigration policies, selecting “the best and the brightest”, including investors and entrepreneurs. Source countries are therefore losing a good portion of their human capital, a loss which is not really compensated by the remittances that many emigrants send back home.

The European Union has adopted a policy of free movement of capital, goods, services and persons within its common territory, therefore completing an integrated common market. This principle is not applicable to non-European citizens and “Fortress Europe” certainly seems well established, as exemplified by the Melilla and Ceuta incidents in 2014.

The 20th century has been that of the refugees. Communism, totalitarianism, decolonisation, cold-war-based conflicts, post-cold-war ethnic conflicts have all taken their toll on human populations, forcing millions to flee. The legal concept of “refugee” has emerged and a status defined, now monitored by the United Nations High Commissioner for Refugees.

The ‘80s have seen a phenomenal increase of asylum seekers in western countries. Torn between their democratic and humanitarian principles, their short term economic and social objectives, as well as their ill-informed public opinions, most States have initially put in place deterrence mechanisms: restrictive interpretation of asylum, visa obligations, refoulements, deportation, detention, reduction of social benefits or of legal assistance, etc. They have also streamlined their refugee determination procedures.

The fall of the Berlin wall changed the international migration law paradigm and 9/11 completes the radical reconceptualization of the legitimacy of international migration. Refugees are no longer freedom fighters against the communist arch-enemy, but come from the developing world, pushed by generalized violence or political troubles as well as by harsh socio-economic conditions and policies. Irregular migration is placed at the heart of international criminality, next to drugs trafficking, arms trafficking and terrorism, and irregular migrants are thus systematically suspected of carrying with them insecurity, violence or even terror. In many countries, the public debate on migration policies is utterly toxic, based as they are on fantasized threats.

These developments affect the implementation of numerous human rights protection regimes as they apply to foreigners: their universality is compromised.

One cannot escape the conclusion that many migrations will remain uncontrollable: in democratic States (in contrast to police States ... and even then), borders cannot be sealed and territories cannot be made “migration-proof”. One will have to recognise that foreigners are human rights holders as much as citizens are, by virtue of their common

humanity. In a renewed conception of citizenship, security and human rights must be reconciled and migrants should receive the protection required by their vulnerability.

2. COURSE OBJECTIVES

1. To learn the main concepts of immigration and refugee law.
2. To measure the diversity of the sources, to master the main legal instruments and to work with the doctrine related to immigration and refugee law, in domestic and international law.
3. To understand the contemporary issues and challenges related to immigration and refugee law, including its relations to domestic and international human rights law, at the heart of the profound transformations of the universal international law regime relating to mobility.

3. COURSE PEDAGOGY

This is a lecture format. The method will include presentations by the professor and the students, and discussion of the mandatory readings.

The professor is available by appointment, and can be contacted by email (francois.crepeau@mcgill.ca).

In accord with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded.

4. COURSE EVALUATION

1. Forty (40) points for a case comment of 2000 words maximum. The case and its reference will be posted on the web page of the course on Tuesday 4 November 2014, around 10 am. The comment will need to be handed in to SAO on Tuesday 18 November 2014, before 4 pm.
2. Sixty (60) points for an in-class open-book exam. The date and time of the exam will be confirmed later in the term.

McGill University values academic integrity. Therefore all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of Student Conduct and Disciplinary Procedures (see www.mcgill.ca/students/srr/honest/) for more information).

5. READINGS AND DOCUMENTS

The webpage of the course contains:

- This syllabus
- All the mandatory readings for the course
- A select bibliography of further reading readings

This webpage is on the website of the Oppenheimer Chair in public international law. All the readings are clickable on the webpage. Several of the readings are protected by a password for copyright reasons: the password will be communicated to the students in class.

6. TIMETABLE AND READINGS

3 September: *Migration as a constant*

8 September: *The human rights of migrants: The Judiciary's Recognition*

- Readings:
 - *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (excerpts)
 - *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (excerpts)

- Catherine Dauvergne, “How the *Charter* has failed non-citizens in Canada: Reviewing thirty years of Supreme Court of Canada jurisprudence” (2012-2013) 58 *McGill L J* 663.

10 September: ***The human rights of migrants: Accessing them***

- Readings:
 - Hannah Stewart-Weeks, *Out of Sight but Not out of Mind: Plaintiff M61/2010E v Commonwealth*, Case Note, (2011) 33 *Sydney Law Review* 831, http://sydney.edu.au/law/slr/slr_33/slr33_4/SLRv33no4Stewart-Weeks.pdf
 - *Siliadin v. France*, App. no. 73316/01, Eur. Ct. H.R. (2005) (excerpts)

15 September: ***The Human Rights of Migrants: The Challenges***

- Readings:
 - Gregor Noll, “Why Human Rights Fail to Protect Undocumented Migrants” (2010) 12 *European Journal of Migration and Law* 241
 - Stephen Castles, “Bringing Human Rights into the Migration and Development Debate” (2011) 2:3 *Global Policy*, 248-258

17 September: ***Migration control***

- Readings:
 - Catherine Dauvergne, Security and Migration Law in the Less Brave New World, *Social & Legal Studies*, December 2007, 16: 533-549
 - ATAK, Idil, CRÉPEAU, François, “The Securitization of Asylum and Human Rights in Canada and the European Union”, Chapter 8, in JUSS, Satvinder Singh, HARVEY, Colin, *Contemporary Issues in Refugee Law*, London: Edward Elgar Publishing, 2013.

22 September: ***Migration control***

- Readings:
 - Tilman Rodenhäuser, “Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control”, *Int J Refugee Law* (2014) 26 (2): 223-247
 - Andreas Schloenhardt and Hadley Hickson, “Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air”, *Int J Refugee Law* (2013) 25 (1): 39-64

24 September: ***Migration control***

- Readings:
 - LEGOMSKY, Stephen H., “Portrait of the Undocumented Immigrant: A Dialogue”, (2009) 44 *Georgia Law Review* 65-160
 - MANDERSON, Desmond R., “From Zero Tolerance to Harm Reduction: “The Asylum Problem Problem””, *Refugee Survey Quarterly* (2013) 32 (4): 1-21 first published online October 23, 2013 doi:10.1093/rsq/hdt01

29 September: ***Human trafficking***

- Readings:
 - *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000, 2237 *UNTS* 319.
 - Alice Edwards, “Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour” (2007-2008) 36 *Denv J Int'l L & Pol'y* 9.

1 October: ***Human trafficking***

- Readings:
 - James C Hathaway, “The Human Rights Quagmire of “Human Trafficking”” (2008) 49:1 *Virginia Journal of International Law* 1.

6 October: ***Competition for talents***

- Readings:

- SHACHAR, Ayelet: « The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes », (2006) 81 *NYU Law Review* 148-206.
- Leslyanne Hawthorne, “Skilled Enough? Employment Outcomes for Recent Economic Migrants in Canada Compared to Australia” in Triadafilos Triadafilopoulos, ed, *Wanted and welcome? policies for highly skilled immigrants in comparative perspective* (New York: Springer, 2013) (available through McGill library ebook collection).

8 October: ***Labour migration: Crossing Borders***

- Readings:
 - Bridget Anderson, “Migration, immigration controls and the fashioning of precarious workers” (2010) 24 *Work Employment Society* 300.
 - Fay Faraday, *Profiting from the Precarious – How recruitment practices exploit migrant workers*, Metcalf Foundation: 2014, <http://metcalfoundation.com/wp-content/uploads/2014/04/Profiting-from-the-Precarious.pdf>

13 October: ***Thanksgiving***

15 October: ***Labour migration: Constructing Precariousness***

- Readings:
 - Commission des droits de la personne et des droits de la jeunesse du Québec, *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, Résumé de l'avis, Montréal : 2011, http://www.cdpcj.qc.ca/publications/Avis_travailleurs_immigrants_resume.pdf
 - Sarah Marsden, “The New Precariousness: Temporary Migrants and the Law in Canada” (2012) 27:2 *Canadian Journal of Law and Society* 209

22 October: ***Labour migration: Being a Rights Holder and Defending Oneself***

- Readings:
 - *The Labour Movement after Fraser, Report of a Seminar Held May, 30, 2011, on the Supreme Court of Canada Decision AG Ontario v. Fraser*, Canadian Foundation for Labour Rights, Ottawa, 2011, http://oppenheimer.mcgill.ca/IMG/pdf/11-09_CFLR_SCC_Fraser_Labour_Rights_Agricultural_Workers.pdf
 - Canadian Civil Liberties Association, *Who Belongs – Rights, Benefits, Obligations and Immigration Status: A Discussion Paper*, Toronto, 2010, http://oppenheimer.mcgill.ca/IMG/pdf/10-10_CCLA_Who_Belongs_Discussion_Paper.pdf

27 October: ***Labour migration: The Way Ahead***

- Readings:
 - ILO, *Fair Migration: Setting an ILO Agenda*, Director General’s Report to the International Labour Conference, Geneva: 2014, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_242879.pdf
 - Report of the Special Rapporteur on the human rights of migrants, François Crépeau, on the Labour exploitation of migrants, A/HRC/26/35, April 2014, <http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf>

29 October: ***Refugee Status: The International Framework***

- Readings:
 - *1951 Convention and 1967 Protocol relating to the Status of Refugees*, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>
 - *Cartagena Declaration on Refugees*, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b36ec>
 - *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>

3 November: ***Refugee Status: A Difficult Determination***

- Readings:

- ROUSSEAU, Cécile, CRÉPEAU, François, FOXEN, Patricia, HOULE, France, « The Complexity of Determining Refugeehood - A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board », (2002) 15.1 *Journal of Refugee Studies* 43-70.
- Sean Rehaag, “The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010)” (2012) 8:3 *Osgoode CLPE Research Paper Series* 9/2012 (available through McGill library ebook access)

5 November: ***Refugee Status: Protection through the Human Rights Regime***

- Readings:
 - Alice Edwards, “Human Rights, Refugees, and The Right ‘To Enjoy’ Asylum”, (2005) 17 *Int’l J. Refugee L.* 293, pp. 293-330.
 - Ruma Mandal, “Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)", (June 2005) UNHCR Legal and Protection Policy Research Series, <http://www.unhcr.org/refworld/pdfid/435e198d4.pdf> (Excerpts)

10 November: ***Refugee Status: Encampment and Protracted Refugee Situations***

- Readings:
 - Anna Lise Purkey, “Questioning Governance in Protracted Refugee Situations: The Fiduciary Nature of the State-Refugee Relationship”, *Int J Refugee Law* (2013) 25 (4)

12 November: ***Temporary Protection***

- Readings:
 - Jane McAdam, “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime”, *Int J Refugee Law* (2005) 17 (3): 461-516
 - Steve Peers, *The Revised Directive on Refugee and Subsidiary Protection Status*, Statewatch Analysis <http://www.statewatch.org/analyses/no-141-qualifications-directive.pdf>

17 November: ***Environmental migration***

- Readings:
 - François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on Climate Change and Migration*, A/67/299, August 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/460/71/PDF/N1246071.pdf?OpenElement>
 - Foresight Report Executive Summary: “Migration and Global Environmental Change: Future Challenges and Opportunities”, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287717/11-1116-migration-and-global-environmental-change.pdf

19 November: ***Environmental migration***

- Readings:
 - Eric Omeziri and Christopher Core, “Temporary Measures: Canadian Refugee Policy and Environmental Migration” (2014) 29:2 *Refugee* 43
 - Benoit Mayer, “Sustainable Development Law on Environmental Migration: The Story of an Obelisk, a Bag of Marbles, and a Tapestry” (2012) 14:2 *Environmental Law Review* 111

24 November: ***Global Migration Governance***

- Readings:
 - Martin Geiger, Antoine Pecoud, *The Politics of International Migration Management*, Chapter 1 in: Martin Geiger & Antoine Pecoud (Eds.), *The Politics of International Migration Management*, Palgrave Macmillan, London: 2010.
 - Catherine Wihtol de Wenden, “Globalization and International Migration Governance” (2012) 40 *IMIS-Beitrag* 75.

26 November: ***Global Migration Governance***

- Readings:
 - François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on Global Migration Governance*, A/68/283, August 2013, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/421/15/PDF/N1342115.pdf?OpenElement>

1 December: *Representation of migrants*

- Readings:
 - Esses, V M, Medianu, S and Lawson, A S. “Uncertainty, Threat, and the Role of the Media in Promoting the Dehumanization of Immigrants and Refugees” (2013) 69:3 *Journal of Social Issues* 518
 - Roger Zetter, “More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization” (2007) 20:2 *Journal of Refugee Studies* 172

3 December: *Statelessness*

- Readings:
 - Maureen Lynch, *Lives on Hold: The Human Cost of Statelessness*, Washington: Refugees International, 2005, <http://www.refugeesinternational.org/sites/default/files/LivesonHold.pdf>
 - Margaret R. Somers, “Citizenship, Statelessness and Market Fundamentalism: Arendtian Right to Have Rights”, Chap. 2 in: Gökçe Yurdakul, Y. Michal Bodemann, *Migration, Citizenship, Ethnos*, London: Palgrave Macmillan, 2006, pp. 35-62.

4 December: *Recap*