International Migration: Security Concerns and Human Rights Standards

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Part I.
Increased protection for the human rights of migrants in domestic and international law
A. The protection of the *Canadian Charter of Rights and Freedoms*

*Section 1*: guarantee of rights and freedoms to "everyone"

*Section 2*: fundamental freedoms

*Section 7*: fundamental justice must be respected when restricting right to life, liberty and security of the person

*Section 15*: right to equality
1) « Everyone » includes the migrant

Singh v. Canada (SCC, 1985):

- The term « everyone » in the Charter includes every person physically present in Canada and by virtue of such presence amenable to Canadian law.
- The assessment of a risk to the life, liberty and security of the person of a refugee implies an oral hearing of the refugee.
2) The rights are those of « everyone »

- Only four rights are reserved to the citizen:
  - right to vote,
  - right to be elected,
  - right to an education in the minority language
  - right to enter and stay in Canada
3) The right to equality

- Section 15: “equal protection and equal benefit of the law without discrimination (...) based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

- A foreigner may become a member of the Bar
- Section 15 prohibits discrimination on the basis on the analogous ground of citizenship.
- Substantive equality approach preferred to formal equality analysis.
B. Using international law in interpreting domestic standards
The principle of non-refoulement applies to a drug dealer (SCC, *Pushpanatan*, 1998): the “purpose” and “context” of the *1951 UN Refugee Convention* are applicable in determining the meaning of the exclusion clause.
And also to a member of a terrorist organization (SCC, *Suresh*, 2002): the principle of the absolute prohibition of torture and of non-refoulement must be given consideration in expulsion cases “even where national security interests are at stake”, save in “exceptional circumstances”.
C. An increasing role for international human rights mechanisms

- The right to seek and enjoy asylum for:
  - A relative of a deserter officer of the Mexican army (CAT, *Falcon Rios*, 2004)
- Canada’s recent rejection of a CAT decision and deportation of an opponent of the Iranian regime, who committed a violent crime in Canada (CAT, Dadar, 2005)
Two challenges for the coming years:

- The human rights of migrant workers
- The protection of irregular migrants
Part II.
The Canadian migration regime:
An erosion of foreigners’ rights
Deterrence measures

- Faster refugee determination
- Elimination of appeals: credibility issue + RAD
- Restricted access to labour market
- Reduced legal aid and social protection
- Increased detention
- Criminalization of all help to irregular migration
- Excessive penalties for migrant smuggling
- Safe third country agreements
Preventive measures

- Visa regimes
- Carrier sanctions
- Training of border personnel
- Interception mechanisms *en route*
- Immigration intelligence
- Personal information databases and exchanges
- Conditionalities on international economic cooperation
- Militarization of borders and seas
- Externalization of asylum protection
- Rejection of international human rights law
The agenda of securitising migration

- Migration as part of a new international security paradigm
- Migration controls are now part of the phenomenon of “securization of the public space”
- Creation of new structures:
  - the Public Safety and Emergency Preparedness portfolio
  - the Canada Border Services Agency
Policy developments:

- Canada-US immigration cooperation: the *Smart Border Action Plan*
- Communication of passenger information
- National security measures in the *Immigration and Refugee Protection Act*
- Expansion of security-based inadmissibility grounds
- Easier detention of suspects (FC, *Jaballah*, 2004)
- And many discriminatory practices that remain unchecked, because they are often beyond scrutiny by the judiciary, the media, the NGOs, etc.
Conclusion:
The right to equality
and the role of the judiciary

The non-discrimination standard, based on the right to equality, forbids in principle the differential treatment based on citizenship or immigration status.
Authorities must identify and justify security exceptions through limitation and derogation clauses.

A differentiation between citizens and non-citizens must be “reasonable and justifiable in a free and democratic society”.
The role of the judiciary:
Reconciling security concerns (sovereignty paradigm) with the protection of everyone’s rights (Human Rights paradigm).