

## CIAJ Conference: The Law of Borders

Justice Mahmud Jamal  
Supreme Court of Canada  
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Ottawa Marriot Hotel<sup>1</sup>

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Good morning. I'd like to sincerely thank the CIAJ for inviting me to speak to you today. It's a privilege to be here as honorary chair of this important conference on the law of borders.

Bonjour à toutes et à tous. Je tiens à remercier sincèrement l'ICAJ de m'avoir invité à m'adresser à vous aujourd'hui. C'est un privilège de me retrouver ici en tant que président d'honneur de cette importante conférence sur le droit des frontières.

In recent years, the law of borders has come to shape the lives of more people in Canada than ever before. In 2021, over 8.3 million people in Canada identified as immigrants.<sup>2</sup> That's almost one-quarter, or 23%, of our population.<sup>3</sup> Immigration continues to be the main driver of Canada's population growth, accounting for almost 96% of such growth last year.<sup>4</sup> And it seems

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<sup>1</sup> I would like to thank my law clerks Leila Nasr and Jessica Michelin for their assistance in the preparation of these remarks.

<sup>2</sup> Statistics Canada, "Immigrants make up the largest share of the population in over 150 years and continue to shape who we are as Canadians" (online: <https://www150.statcan.gc.ca/n1/daily-quotidien/221026/dq221026a-eng.htm>, last updated October 26, 2022).

<sup>3</sup> *Id.*

<sup>4</sup> Statistics Canada, "40 million strong: Canada reaches a new population milestone" (online: <https://www.statcan.gc.ca/o1/en/plus/3861-40-million-strong-canada-reaches-new-population-milestone>, last updated June 15, 2023).

these trends are here to stay: by 2041, approximately half of all people in Canada are expected to be first or second generation immigrants.<sup>5</sup>

Ces statistiques commencent à expliquer pourquoi le droit des frontières est si important. Elles suggèrent qu’il est impossible de dissocier la trajectoire de ce pays des divers parcours de ceux qui ont fini par considérer le Canada comme chez eux.

Borders shape identities, define nations, and protect interests. They are not simply lines on a map — they embody the legal frameworks established by nations to regulate the movement of people, goods, and ideas. They serve to maintain order, reinforce sovereignty, and ensure security. At the same time, borders test our national character. They are places where our humanity and our courage to do what is right is graded by those who leave their homes in search of something better.

Dans les quelques minutes dont je dispose avec vous aujourd’hui, j’aimerais brièvement discuter de la relation entre les frontières et les défis mondiaux auxquels nous faisons face aujourd’hui — des défis qui sembleraient être en tension avec le concept même des frontières. Des crises comme la COVID-19, les changements climatiques, et des conflits géopolitiques sont des enjeux pressants qui dépassent les frontières nationales. Pourtant, ces crises nous présentent aussi des opportunités de repenser le droit de l’immigration et les politiques frontalières, pour les réimaginer de manière à mieux répondre aux besoins d’un monde en constante évolution.

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<sup>5</sup> Statistics Canada, “Canada in 2014: A larger, more diverse population with greater differences between regions” (online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220908/dq220908a-eng.htm>, last updated September 8, 2022).

I will begin with some thoughts relating to COVID. As we all know, the COVID-19 pandemic led to a substantial tightening of borders around the world. Governments imposed stringent measures to curb the spread of the virus, resulting in severe restrictions on freedom of movement. Governments argued that these measures were necessary to protect Canada's most vulnerable individuals. At the same time, the pandemic highlighted that migrants *themselves* are often among Canada's most vulnerable. Immigrants were at disproportionate risk of COVID transmission. At the height of the pandemic, they made up more than 40% of COVID-19 cases in Ontario, even though they comprised just 25% of the population.<sup>6</sup> Lack of healthcare access and the tendency to hold essential jobs contributed to these figures, particularly among racialized immigrants.<sup>7</sup> Additionally, scholar Oona Hathaway argues that the threat of COVID seemed to offer justification for governments to roll back key protections for immigrants and refugees, often in ways that were contrary to their obligations under international law.<sup>8</sup> In this sense, the pandemic temporarily prevented the arrival of new immigrants to our borders, while highlighting the ongoing vulnerability of those who had already made the journey.

La crise climatique mondiale est un autre domaine dans lequel le droit des frontières est mis à l'épreuve. Au cours des dix dernières années, des conditions météorologiques ont provoqué le déplacement en moyenne de 21.5 millions de personnes de leurs maisons par an.<sup>9</sup> C'est plus du double du nombre de personnes déplacées en raison de conflits et de la violence chaque année.

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<sup>6</sup> Germaine Tuyisenge & Shira M. Goldenberg, "Covid-19, structural racism, and migrant health in Canada", *The Lancet*, Vol 397, Issue 10275 (published February 20, 2021) at p. 651.

<sup>7</sup> *Id.*

<sup>8</sup> Oona A. Hathaway et al, "The COVID-19 Pandemic and International Law", 54 *Cornell Int'l LJ* 149 at p. 191.

<sup>9</sup> UNHCR, "Displaced on the frontlines of the climate emergency" (online: <https://storymaps.arcgis.com/stories/065d18218b654c798ae9f360a626d903>).

Les changements climatiques sont à la fois une cause directe de déplacement, et un facteur aggravant des autres causes de déplacement.<sup>10</sup> La crise climatique ne conduit non seulement à la migration à travers les frontières internationales, mais également aux déplacements des personnes à l'intérieur du Canada. De plus en plus, les communautés autochtones sont déplacées de leurs territoires traditionnels en raison des effets disproportionnés des changements climatiques sur celles-ci. Cet été dernier, nous avons également vu comment les feux de forêts et d'autres urgences climatiques ont forcé des Canadiens à quitter leurs maisons. Ces crises nous rappellent que les frontières provinciales et internationales ne signifient pas grand-chose face à des enjeux pressants qui dépassent les frontières.

COVID and the climate crisis highlight how, in an interconnected world, global problems dictate whether and how people cross borders. Some global challenges prevent people from doing so. Others leave them with no choice *but* to do so. Yet the law of borders is not only about the people who cross borders; it also encompasses situations where *borders* purport to cross *people*.

The war in Ukraine illustrates this well. Since February 2022, almost 6.2 million Ukrainians have been forced to flee their country as a result of Russian advances.<sup>11</sup> The vast majority have become refugees in neighboring European states.<sup>12</sup> More than 5 million are now internally

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<sup>10</sup> *Id.*

<sup>11</sup> UNHCR, "Ukraine refugee situation" (online: <https://data.unhcr.org/en/situations/ukraine>, last updated October 22, 2023).

<sup>12</sup> UNHCR, "About the crisis in Ukraine" (online: <https://www.unrefugees.org/emergencies/ukraine/>).

displaced within Ukraine.<sup>13</sup> The UNHCR says the war has driven the largest annual increase of persons forcibly displaced by conflict and human rights violations in decades.<sup>14</sup>

Voilà quelques exemples qui illustrent la fragilité et la porosité des frontières dans le contexte de crises internationales. Des pandémies, des urgences climatiques, et des conflits géopolitiques présentent des défis qu’aucun pays ne peut ignorer. Toutefois, ces défis nous offrent également la possibilité de mieux adapter le droit des frontières aux besoins mondiaux émergents. Ils nous invitent à considérer comment les politiques frontalières et le droit de l’immigration peuvent sortir de ces crises en étant plus bienveillants, plus créatifs et plus humains que jamais.

We are already seeing examples of this at work. After years of pandemic border restrictions, Canada is welcoming more and more people from around the world to come and see what makes this country such a great place to live. Migrants bring with them unique skills and new perspectives that enrich our society and help us build a better Canada. But ensuring the medium- and long-term security of these newcomers is just as important as getting them here in the first place. With this in mind, advocates are pushing for better pathways to permanent residency for foreign workers and their families. There is much work left to do, but their efforts reflect a desire to welcome these people in, not only as workers, but as part of our national fabric.

Canada has also adjusted its law and policy in response to the war in Ukraine. Hundreds of thousands of Ukrainians have been welcomed through the ‘Canada-Ukraine Authorization for

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<sup>13</sup> UNHCR, “Ukraine refugee situation” (online: <https://data.unhcr.org/en/situations/ukraine>, last updated October 22, 2023).

<sup>14</sup> UNHCR, “Global trends: forced displacement in 2022” (online: <https://www.unhcr.org/sites/default/files/2023-06/global-trends-report-2022.pdf>, June 2023) at p. 8.

Emergency Travel' program. Under this initiative, Ukrainians can live and work in Canada while participating in an expedited visa process.<sup>15</sup> To date, more than 800,000 applications to the program have been approved.<sup>16</sup> Other government initiatives are also creating opportunities for Ukrainians to receive study and work permits, extensions of visitor visas, and to eventually access permanent residency.<sup>17</sup>

Les défis mondiaux que je viens d'évoquer appellent à des changements urgents au sein du droit des frontières : ils demandent d'être plus flexible et modulable que jamais. Ces défis demandent aussi aux praticiens du droit d'être plus innovateurs dans la recherche des réponses à ces problèmes. Ultiment, la tâche est de trouver une balance entre l'intégrité de nos frontières et le besoin de respecter l'humanité des personnes qui cherchent à les traverser.

In this sense, the law of borders functions as national litmus test. A test of our openness. Our empathy. Our courage. The way we arrange and enforce our borders is a measuring stick for our how far we have come, and how far we have to go — both as a country and as part of a global community.

Au cours des prochains jours, vous allez entendre des conférenciers exceptionnels qui vont explorer ces enjeux ainsi que d'autres sujets dans beaucoup plus de détail et avec beaucoup plus

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<sup>15</sup> Christian Paas-Lang, "Canada to launch new permanent residency program for Ukrainians fleeing war", *CBC News* (online: <https://www.cbc.ca/news/politics/ukraine-canada-immigration-new-pathway-1.6907999>, July 15, 2023).

<sup>16</sup> Government of Canada, "Canada-Ukraine authorization for emergency travel: Key figures" (online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/ukraine-measures/key-figures.html>, last updated October 14, 2023).

<sup>17</sup> Government of Canada, "Immigration measures and support for Ukrainians and their families" (online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/ukraine-measures.html>, last updated October 20, 2023).

d'expertise que je pourrais amener à la discussion. Je vous encourage à écouter attentivement et à considérer comment vous pouvez intégrer ce que vous avez appris dans votre propre travail.

The issues we face today are difficult to solve. But as Justice La Forest said in the *Andrews* case, “our nation has throughout its history drawn strength from the flow of people to our shores.”<sup>18</sup>

As we welcome more people to this country, we also welcome the talent and resourcefulness that will help Canada weather the conditions ahead.

Ce fut un privilège de vous parler aujourd’hui. Je vous remercie de m’avoir écouté.

It has been a privilege to speak with you all today. Thank you for listening.

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<sup>18</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 197, per La Forest J. (concurring).