

# States' Obligations to Protect: a Perspective from the Global North<sup>1</sup>

By

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Is the host state's obligation to protect *more critical* in a context where escalating concerns about terrorism seem to have heightened exclusionary policies and xenophobic impulses in developed countries considering asylum applications? From a theoretical perspective, in an ideal world, the answer could be: "no". Host state's obligation to protect *shouldn't be more critical: it should always be as critical*, whatever the circumstances. Indeed, a state cannot enjoy fully from its sovereignty if it doesn't respect human rights of its own population and of every single individual's under its jurisdiction.

However, no wonder, we are not in a perfect world. States do not fully acknowledge all their responsibilities as sovereign states, nor do they respect all their obligations under the international human rights conventions they have ratified. Therefore, the answer *has to be yes*.

In the aftermath of 11 September 2001, security concerns have been permeating policy responses on a wide range of issues, including the institution of asylum and refugee protection<sup>2</sup>. The *integrity*, perhaps even the *survival*, of the asylum institution is today at stake<sup>3</sup>. Hence, it appears crucial to remind states of their responsibilities towards their own populations as well as towards the international community as far as human rights are concerned. The objective is to ascertain that states may have *legitimate concerns of national security* - and consequently they are entitled to take measures to address these worries, but that these measures have to be *proportionate and balanced*, and *consistent with international and refugee law, human rights and humanitarian law*. Migratory measures and policies shall not be incompatible with the *protection of human security*, which can be understood as all individuals' freedom from fear, freedom from want and freedom of expression<sup>4</sup>.

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## The Institution of Asylum is under Attack

The spectre of terrorism has ridden states of complexes – if they had some – about measures to combat it, including increasing restrictive migration policies, at the cost of their human rights obligations. Particularly since 2001, the political discourse in the global North has made clear links between terrorism, security, migration and borders. Developed states seized this occasion to emphasise that *their national priorities and concerns have prevalence on their international obligations under the Refugee Convention and other international human rights treaties*. However, the securitization of borders did not start because of, or after, 9/11. Since the 1980s, a fringe of political discourse has stressed the destabilizing effects of migration on domestic integration and the dangers it implies for public order<sup>5</sup>. But most of the measures taken in the name of security have crucially infringed on human rights, and more specifically on those of *unwelcome people* of developed countries, including asylum-seekers. The impacts of the increased securitization of borders on the asylum institution are at least twofold.

### Restrictive Migration Policies and Mechanisms

Developed countries have elaborated restrictive measures in order to limit unwanted “migration flows” and/or to set obstacles to their asylum systems: they can be classified in two categories, the preventive and the deterrent ones. Among the preventive measures stand visa regimes, intercepting measures and the externalization of asylum policy, whereas detention of asylum-seekers is a deterrent one.

Canada provides two recent examples of the use of visas for the nationals of countries deemed to produce large numbers of – in fact “too many” – asylum-seekers. During summer 2009, Canada imposed a visa requirement on Mexican and Czech nationals, when the numbers of asylum-seekers from these two countries were high. This political decision was done against evidence: increasing social tensions in Mexico have led to numerous human rights violations and threats against individuals; and most claimants from the Czech Republic were Roma, a minority group subject to well-documented harassment, racist attacks and societal discrimination<sup>6</sup>. Wrongly overlapping with the role of the Canadian Immigration and Refugee Board, which is an independent administrative tribunal, the Canadian government judged that these countries were safe countries and that no nationals from Mexico or the Czech Republic may have a well-founded fear of persecution. These are not isolated examples: when human rights abuses increased dramatically in Zimbabwe in 2001, Canada imposed a visa requirement, closing the door on Zimbabweans seeking safety<sup>7</sup>.

Intercepting measures can be illustrated by the role of the European agency Frontex, whose navies patrol in the Mediterranean Sea and on the African coasts to prevent irregular migrants to reach European shores. Intercepting boats of irregular migrants and sending them back to African

countries are common practices that have impeded bona fide asylum-seekers to undergo an individual refugee status determination.

In the same trend, the bilateral agreement concluded in May 2009 between Italy and Libya simply prevents asylum-seekers from applying to asylum. According to this agreement, Libya has to prevent irregular migration from its coast to Italy. Boats intercepted in international waters can be towed back to Libya without determining whether some of those aboard might be refugees, sick or injured, pregnant women, unaccompanied children, or victims of trafficking or other forms of violence against women. However, Libya *is not* party to the 1951 Convention and *does not* provide asylum-seekers with the possibility to get protection – on the contrary. This violates Italy's obligations under the Refugee Convention<sup>8</sup>.

Besides, there has been a trend to externalize European migration policy including asylum policy, as it was first proposed by the UK in 2003<sup>9</sup>. The objective is to report on third countries the responsibility to manage migration flows, but also to process asylum claims outside the European territory, the closest from origin countries or regions: this would facilitate and reduce the cost of the implementation of deportation orders when applications fail. If European states succeed to impose externalization of the asylum policy as a widely accepted way of dealing with their obligations under the Refugee Convention, this trend has the potential to deconstruct the asylum institution and to seriously vitiate the meaning and the reach of the Refugee Convention.

Developed states have also developed *deterrent measures*, to be used once asylum-seekers have despite all reached their borders. The *detention of asylum seekers* until their applications are processed (e.g. Malta, Cyprus), or until they are deported when their applications failed, tends to deny fundamental rights of these individuals. In Australia, the Migration Act 1958 allows for the indefinite detention of a person who is to be deported from Australia. The Australian Refugee Council reported that, on 31 December 2004, of those in immigration detention more than 200 persons had been held in detention for longer than 24 months<sup>10</sup>. But this is not the privilege of the global North. In South Africa, the 2002 Immigration Act allows for detention of deportable immigrants, without any mandatory judicial review until 30 days of detention have elapsed.

This list of preventive and deterrent measures is far from being exhaustive<sup>11</sup>: it is a glimpse of what developed countries have developed in order to regulate access into and to facilitate expulsion out of their territories. What is particularly a concern is that these intercepting and deterring measures have tended to jeopardize the cardinal principle of *non-refoulement*.

### **Criminalization of Refugees and Asylum-Seekers**

Asylum-seekers have been increasingly **criminalized**, in part due to current anxieties about international terrorism and also to growing invalidity

presumptions about their claims: they are sometimes referred to as *the "bad"* or *"fake" refugees*.

The imaginary around "bad" refugees and asylum-seekers rests notably upon their mode of arrival and/or their ethnicity. Among the prejudices, are the ideas that an asylum-seeker who has the means to get to the host state's border (most probably with the help of a smuggler) must not be as desperate as he pretends; if he has come *illegally*, he may be *dangerous*: "A refugee or asylum-seeker today triggers in the popular imagination the image of a terrorist"<sup>12</sup>.

The terminology used in that respect is meaningful. The expression of "asylum-seeker" itself was created in the late 1970s, during the Vietnamese refugee crisis. Before Vietnamese boat people fled in large numbers, a person seeking refuge in another country was already a refugee. The term "asylum seeker" insists on the fact that states are responsible for granting or not the refugee status to claimants, and insinuates that some of them may not be refugees.

The expression of "*queue-jumpers*" in Australia refers to asylum seekers who come directly to Australian border, in opposition to migrants who have been granted the refugee status and who are resettled from a third country. However, *there are no queues for people to jump* for example in Iraq and Afghanistan, as Australia has no diplomatic representation in these countries and that few countries between the Middle East and Australia are signatories to the 1951 Refugee Convention<sup>13</sup>.

This imaginary has been reinforced by the far-right parties' and extremists' discourses on the danger of foreigners and their vicious influence on jobs market and on societies' homogeneity. Asylum-seekers represent poverty from the South and from the East. There are "products" of under-developed countries that wealthy states and populations may not want to see.

Even those who used to be "good" refugees – selected abroad by host states among UNHCR-identified refugees – are suffering from the prevailing degrading discourse and the negative press around the asylum institution. Consequently, their capacity to integrate and their options in host societies have been undermined. They are sometimes left with the same *few* options than irregular migrants have: jobs under remunerated, with few social recognition and no perspective of improvement.

Suspicion towards the asylum institution in developed countries has vilified refugees in the public mind and encouraged discriminatory or xenophobic attitudes towards people of particular races or religions and hate-based harassment<sup>14</sup>. Post-arrival period may also be very delicate and painful, both for landed asylum-seekers and those granted the refugee status under the 1951 and /or the national definition.

A major concern shared by UN human rights bodies, NGOs, human rights groups and academics is that "few concrete measures are taken to compensate for the increasing difficulties that persons encounter and must overcome in order to access protection"<sup>15</sup>. Therefore, refugees "come

to face a terrible situation of double jeopardy: unable to find safety at home, they also cannot find it in the countries in which they have been obliged to seek asylum"<sup>16</sup>.

### **But the Institution of Asylum is Part of States' Human Rights Obligations**

In this context, it is urgent to *remind states of their obligations* towards their populations as well as towards the international community under international human rights law. It is also a must to stem the tendency "to stereotype, stigmatize, vilify and equalize refugees as one and the same thing as terrorist"<sup>17</sup>.

### **Sources of States' Obligations**

Asylum is law based, and most *developed* countries have agreed to be bound by it. The *right to seek and enjoy asylum* is set out in Article 14 (1) of the 1948 *Universal Declaration of Human Rights*. It is among the most basic mechanisms for the international protection of refugees. The 1951 *Convention relating to the Status of Refugees* and its 1967 Protocol set out the essential *obligations, rights and responsibilities* of the system. This system is humanitarian, peaceful and non political. It aims at providing a structured framework for the protection of those individuals who are forced to flee from home for reasons of persecution, violence, forced displacement or serious human rights violations<sup>18</sup>.

The Refugee Convention does not provide a safe haven for criminals. On the contrary, the Convention excludes right away from its protection any person with respect to whom there are serious reasons for considering that he has committed 1) a crime against peace, a war crime, or a crime against humanity; 2) a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; 3) acts contrary to the purposes and principles of the United Nations (Exclusion clause 1F).

### **The Modern Concept of *full* Sovereignty**

Sovereignty used to be understood in its dimensions of States' attributes and prerogatives, such as the privilege to determine who is authorized to enter and to stay in its territory, and the right to defend its territory from any foreign interference. This understanding prevailed in the 1648 *Peace of Westphalia*. However, since this first modern treaty – which initiated a new order in Europe based on the concept of state sovereignty – this concept has much evolved. Today, this restricted interpretation of sovereignty is obsolete<sup>19</sup>.

The concept of sovereignty is inherently composed of states' prerogatives (that are progressively changing with the development of supranational institutions in Europe such as the European Union), on one hand,

and states' obligation to protect their citizens and all other individuals under their jurisdiction, on the other hand.

A *sovereign state* is not *totally independent of all others*. On the contrary, *being sovereign* means to *take into account the rule of law, to be respectful of human rights* – namely citizens' rights but also non-citizens' who are under its jurisdiction. Only those states that respect their obligations under human rights law can be fully sovereign.

This contemporary meaning of sovereignty is at the foundation of the concept of the *responsibility to protect*, elaborated within the United Nations, since 2001 and reiterated in 2005 at the World Summit. The responsibility to protect (R2P) means that each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. When national authorities fail to protect their populations, the international community has the responsibility to intervene and protect these populations. This concept has been meant for Southern countries: Northern states have elaborated it to legitimize their interventions in sovereign matters of states. But could this responsibility also apply to Northern states? To what extent should developed states' sovereignty include a responsibility to protect the populations they have contributed to force to move? After the military interventions in Iraq and Afghanistan, thousands nationals of these countries have fled their homes. A large number of them have tried to reach Europe, and often applied for asylum. Others are irregular migrants, who often aim at reaching the United Kingdom with the hope to start again their lives. France and UK have threatened to send numbers of them back to their countries of origin – and sent back just a few for the time being. Do France or UK have any responsibility towards these people? This would imply an extended interpretation of the responsibility to protect, but maybe a more balanced one; this would make sense as full sovereign states are all the more responsible of their acts, and would suggest the need to broaden the definition of citizenship.

Even if the concept of full sovereignty is increasingly recognized as being the only convincing one, the current crisis of the asylum institution, as well as the predominant discourses on security in developed states, reveal that in practise, sovereignty fails to be consistently applied with respect to human rights. Appropriate mechanisms have to be put in place in the field of asylum as in other areas, so that states can ensure their population's security. But at the same time, a proper balance with the human rights and more specifically the refugee protection principles at stake is a prerequisite.

### **It is Urgent to Define and to Strengthen Host State's Obligation to Protect**

To ascertain host state's obligation to protect does not go against state's interests. Respecting the asylum institution and preserving state's national concerns are compatible. The asylum institution needs to be

preserved and reinforced; states may have to bear extra-costs but the benefits will exceed them. A comprehensive implementation of host states' obligation to protect could lead to significant social and political improvements and to all kinds of advantages for developed and developing societies. These social and political improvements would increase the global health of modern democracies, and would certainly enhance the quality and intensity of collaboration among states and civil societies, allowing to share costs and to collectively harvest social, economic and political benefits.

If developed states are led to acknowledge the benefits of implementing and respecting their obligation to protect – beyond their obligations to do so – they will certainly be more receptive to all the recommendations done by international human rights bodies.

UN treaty bodies and human rights commissions – whose mandates are to remind states of their obligations under the Covenants and conventions they have ratified – have been giving special attention to the obligation to protect in particular since 2001, when security concerns have superseded all other concerns. On that respect, the General Assembly, the High Commissioner for Human Rights, the Committee on economic, social and cultural rights, the Committee on Civil and Political Rights and the Committee against discrimination have worked complementarily. Since 2005, the Commission on Human Rights has established the function of the *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. His mandate is a device to support and advise States in protecting and promoting human rights and fundamental rights while countering terrorism. His mandate is comprehensive, integrated and all-encompassing: it covers all human rights and freedoms, but it is focused on the impacts of the fight against terrorism.

UN bodies' motto is that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law<sup>20</sup>.

Concretely, it means that host states have to do their part to respect the asylum institution – not to impede people in need of protection from accessing to it; it also means that they have to ensure the implementation of human rights whose reach is universal, to all individuals under their jurisdictions. Most of the rights covered by the International Covenants on Civil and Political Rights as well as on Economic, Social and Cultural rights (1966) have to be protected with no discrimination, *both to citizens and non-citizens*<sup>21</sup>. Among these rights stands *the right of access to courts and tribunals* (ICCPR art.14): states have to ensure the accessibility to courts and tribunals to their citizens but also to all individuals, regardless of nationality or statelessness, or whatever their status (whether asylum seekers, refugees, or other persons who may find themselves in the territory or subject to the jurisdiction of a State)<sup>22</sup>.

International law is binding on state parties. However recommendations by UN bodies are only *soft law*. There is no real *supranational and impartial* police agency, which would have the power to

enforce sanctions if states do not respect their commitments, and even less their recommendations<sup>23</sup>. Efforts at the multilateral level have to be supplemented by more focused and stringent efforts, at the regional and national levels, through civil societies, NGOs, academics' research, etc.

Nevertheless, the more efficient way to ensure that host states implement their obligation to protect is to have them on board, collaborating and taking the lead!

One way to convince states to take their responsibilities seriously is to make clear that failing to establish and maintain a balance between security considerations and protection of individuals' freedoms and fundamental rights, can lead to a global deterioration of human rights, and ultimately to jeopardize and hinder their national security itself<sup>24</sup>.

As the UNHCR has stated, "resolute leadership is called for at this particularly difficult time to de-dramatise and de-politicise the essentially humanitarian challenge of protecting refugees and to provide better understanding of refugees and of their right to seek asylum"<sup>25</sup>.

## Notes

<sup>1</sup> The expression "Global North" refers to wealthy developed countries, in opposition to least developed countries, and is not primarily defined by geography.

<sup>2</sup> United Nations High Commission for Refugees (2001). Addressing Security Concerns without Undermining Refugee Protection. Rev.1. Geneva, UNHCR.

<sup>3</sup> Okoth-Obbo, G. (2007). Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terrorism: the Problem of Terrorist Mobility. 5th Special Meeting on the United Nations Counter Terrorism Committee with International, Regional and Sub Regional Organizations. United Nations Conference Centre, Nairobi, Kenya.

<sup>4</sup> UNDP. *Human Development Report 1994: New Dimensions of Human Security* (New York: Oxford University Press, 1994). The principles on which the concept of human security has been developed were part of a discourse made in 1941 by Franklin Delano Roosevelt (*The Four Freedoms*. 77th Congress. January 6, 1941.

<http://usinfo.org/facts/speech/fdr.html>). "The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world."

<sup>5</sup> Huysmans, J. (2000). "The European Union and the Securitization of Migration", *Journal of Common Market Studies*, Vol. 38, n°5: 751-77.

<sup>6</sup> Canadian Council for Refugees (2009). Visas on Mexico and Czech Republic close the door on refugees. Media release, 14 July 2009. On line : <http://www.ccrweb.ca/en/bulletin/09/07/14>

<sup>7</sup> Cr peau, F., and D. Nakache (2006). "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection." *IRPP Choices* 12 (1).



<sup>8</sup> Human Rights Watch Report (2009) "Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers". On line: <http://www.hrw.org/en/news/2009/09/17/italylibya-migrants-describe-forced-returns-abuse>

<sup>9</sup> Statewatch (2003). "Asylum in the EU: the beginning of the end?" On line: <http://www.statewatch.org/news/2003/mar/25asylum.htm>

<sup>10</sup> Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2007). Protection of human rights and fundamental freedoms while countering terrorism. A/62/263. New York, United Nations General Assembly.

<sup>11</sup> Human Rights Watch Report (2009) "Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers". On line: <http://www.hrw.org/en/news/2009/09/17/italylibya-migrants-describe-forced-returns-abuse>.

<sup>12</sup> Okoth-Obbo, G. (2007). Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terrorism: the Problem of Terrorist Mobility. 5th Special Meeting on the United Nations Counter Terrorism Committee with International, Regional and Sub Regional Organizations. United Nations Conference Centre, Nairobi, Kenya.

<sup>13</sup> See the campaign currently led by Australian nationals: "We are all boat people". On line: <http://www.boat-people.org/index.html>

<sup>14</sup> United Nations High Commission for Refugees (2001). Addressing Security Concerns without Undermining Refugee Protection. Rev.1. Geneva, UNHCR.

<sup>15</sup> Ibid.

<sup>16</sup> Okoth-Obbo, G. (2007). Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terrorism: the Problem of Terrorist Mobility. 5th Special Meeting on the United Nations Counter Terrorism Committee with International, Regional and Sub Regional Organizations. United Nations Conference Centre, Nairobi, Kenya.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Bellamy, A. (2009). Responsibility to Protect. Cambridge, Polity Press.

<sup>20</sup> United Nations General Assembly (2005). Protection of human rights and fundamental freedoms while countering terrorism. A/60/370. New York, United Nations. ; A/RES/62/159, 2008

<sup>21</sup> The only rights that states can choose to apply to citizens only are 1) political rights (ICCPR, Art.25) ; 2) economic rights but only in developing countries (ICESCR, Art.2.3). All other rights contained in these Covenants are universal and have to be protected for every individual without discrimination (ICCPR, art.2.1; ICESCR, art.2.2)

<sup>22</sup> Human Rights Committee, General Comment No. 32, para. 9.

<sup>23</sup> The Security Council cannot seriously and convincingly play this role for developed states, even if its mandate could include such role.

<sup>24</sup> Burton, J. (1990). Conflict : human needs theory. New York, St. Martin's Press.

<sup>25</sup> United Nations High Commission for Refugees (2001). Addressing Security Concerns without Undermining Refugee Protection. Rev.1. Geneva, UNHCR.

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