THE EXTRATERRITORIAL PROCESSING OF CLAIMS TO ASYLUM OR PROTECTION: THE LEGAL RESPONSIBILITIES OF STATES AND INTERNATIONAL ORGANISATIONS

Guy Goodwin-Gill*

For decades now, the processing of individuals outside the country in which they are looking for protection and a solution has been relatively non-controversial, particularly with regard to refugee resettlement operations conducted in so-called countries of first asylum or first refuge. Resettlement, understood as the acceptance of refugees presently in one country of refuge for (generally) permanent settlement in another country, has long been one of the three 'durable solutions' for refugees, and has been a historically significant factor in alleviating major crises of displacement. In the aftermath of the Second World War, or following the Hungarian uprising fifty years ago, or as a result of military coups in Latin America in the 1970s, or South East Asia after 1975, resettlement helped other states politically and, of course, provided real and effective solutions for thousands of refugees.[1]

Although many have expressed concerns about aspects of the resettlement process—from robbing refugee communities of their brightest and best to distortion of refugee status criteria and poor decision making[2]—the issue today is with another form of extra-territorial processing. In this version, one state uses another's territory, with or without the assistance of an international organisation, in order to decide claims to asylum which either have already been lodged on its own territory, or might have been lodged there if the claimant had not been intercepted en route.

Given the widespread acceptance now in the practice of states of visa requirements and carrier sanctions, and the perhaps less widespread acceptance of airline liaison officers, should extra-territorial processing or

* Senior Research Fellow, All Souls College, Oxford.

1 See generally, UNHCR, Department of International Protection, Resettlement Handbook, Geneva, 2004; UNHCR, 'New Directions for Resettlement Policy', UN doc. EC/51/SC/INF.2, 14 June 2001, 13 *International Journal of Refugee Law* (2001) 690; G Troeller, 'UNHCR Resettlement: Evolution and Future Direction' (2002) 14 *International Journal Refugee Law* 85; R L Bach, 'Third Country Resettlement' in G Loescher, and L Monahan (eds), Refugees and International Relations (1989) 313.

2 See, for example, M Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination' (2006) 18 *International Journal of Refugee Law* 1.

offshore processing be seen as just another unexceptional and therefore 'legitimate' exercise of sovereign state power to control the movements of people? Or does it in fact engage rather more profound issues of international law and responsibility?

This article attempts to lay out some of the international legal foundations governing the responsibility of states and international organisations in this field. It looks at the responsibility of states for conduct outside their territory; at the responsibility of international organisations, with particular reference to the protection of refugee rights; and at the responsibility of states for the conduct, acts and omissions of international organisations and of other states. Its purpose is to show something of what international law does require, whenever a state elects to intercept or interdict asylum seekers, to transfer them to another state's territory for 'processing', and to contract or engage the assistance of an international organisation. Like many measures which a state may take in the grey, apparently unregulated areas of international law, offshore processing is in fact subject to law, and subject to the rule of law; and so far too little recognition has been given to this and to the legal implications for both states and international organisations.

1. The 1951 Convention and 1967 Protocol Relating to the Status of Refugees

As the basic instrument for the international protection of refugees, the 1951 *United Nations Convention Relating to the Stations of Refugees (Refugee Convention)* and the 1967 *Protocol Relating to the Status of Refugees* certainly have a few lacunae. Nevertheless, the *Refugee Convention* identifies the essential quality of the refugee as someone with a well-founded fear of persecution in their own country; and it lays down the first basic rule of *non-refoulement*—that no refugee should be returned to the frontiers of territories where his or her life or freedom would be at risk.[3] These are the fundamental values or principles of an international refugee regime which exists to provide protection and to find solutions through international co-operation.

What the *Refugee Convention* and Protocol do not do, regrettably, is regulate the responsibilities of states between themselves, or identify which state ought to consider a particular claim to protection. They lay down rules and standards of treatment which are primarily, though not exclusively, territorial in nature; and while non-refoulement is certainly applicable to the actions of state outside its territory,[4] breach of that rule

3 The principle of non-refoulement today necessarily takes account also of human rights-based protection against return to torture and certain other forms of prohibited treatment; see G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (2007, 3rd edn) particularly chapters 5–7.

4 The US Supreme Court's finding to the contrary in *Sale v Haitian Centers Council* 509 US 155 (1993) is incorrect; see further, Goodwin-Gill and McAdam, above n 3, 247–50.

still requires, as Gregor Noll emphasised in a recent article, a close causal connection between such actions and return to persecution.[5]

Moreover, in the background to interpretation and application, as always, stands the self interest of states. So, from one perspective, offshore processing is just the continuation of an old debate in new terms, within a legal framework which allows a measure of auto-interpretation and permits, if it does not endorse, the sorts of unilateral applications of particular articles of the *Refugee Convention* (such as article 1A(2) on the definition of a refugee and article 31 on non-penalisation for illegal entry or presence), which have resulted in the concepts of 'protection elsewhere' and 'safe third country'; and in the legislative or judicial adoption of notions such as 'protection obligations' or 'surrogacy' as barriers to the recognition of status and entitlement to protection.[6] In the residual normative gaps, states look for the freedom to limit their commitments and to promote their own policies, as they have long done: denying access to refugee boats, refusing disembarkation to asylum seekers rescued at sea, never actually returning anyone, but aiming to deal with individual claims to protection outside the law, and beyond the reach of national courts in particular.[7]

Australia's legislative narrowing of its own territory and its use of Nauru and Papua New Guinea after the *Tampa* incident in 2001 is one of the most obvious examples of a state acting to avoid the application of its own laws and to prevent its courts from reviewing executive powers. In this it was successful at the municipal level, but the question of international liability for breach of treaty and other obligations has never been properly tested, although these factors appear certainly to have influenced other states to reject equivalent proposals.[8]

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5 G Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 *International Journal of Refugee Law* 542, 552–56.

6 Goodwin-Gill and McAdam, above n 3, 9–12, 390–407.

7 Is it mere coincidence that Guantanamo was initially used for Haitian asylum seekers in the same way that it is now used for so-called unlawful combatants—to place them beyond the rule of law?

8 For example, in 2003 the British Government suggested to its EU partners that asylum applications might be dealt with 'offshore'. The UK's plan began with the premise that the international protection system was failing, and proposed two new approaches. The first was to set up regional protection areas (RPAs) in regions of origin, with the object of providing accessible protection 'closer to home'. Asylum seekers arriving in Europe would be returned to their local RPA where 'effective protection' would be offered, where they might be processed either for resettlement in the region or, for some, for resettlement in Europe. The RPA might also provide a destination to which failed asylum seekers might be sent from Europe, when immediate return to their country of origin was not possible. The second idea was to establish transit processing centres (TPCs) to which those arriving in EU member states and claiming asylum could be transferred to have their claims processed. Refugee claims would be determined in the TPCs (intended to be beyond the jurisdiction of European courts), those found to be refugees would be resettled in participating member states, while others would be returned to their country of origin. The European Commission put its finger on some of the legal, financial and practical questions still to be resolved, such as whether the new procedures were complementary to or in substitution of the current asylum system; where TPCs would be located (in or outside the EU); whether RPAs and TPCs were

1.1 QUESTIONS ARISING

It is debatable whether refugee studies have ever been conducted apart from a surrounding sense of crisis, real or imagined, and today is no different. In so many areas, we are witness to governmental incompetence, delusion, and ignorance on such a grand scale, it is hardly surprising to find states generally unable to come to terms with globalisation's poor relation—the relatively freer movement of peoples—and its common enough consequence—economic and social insecurity. These and related political developments mean that the international refugee regime is evolving once again, and it is right and proper to examine not only what is changing, but also why it is happening, and how it might be kept within the bounds of its fundamental premises, namely, protection and solutions. There are many 'good' questions here, and it is attracting solid scholarship. Are we seeing, as Gregor Noll suggests, a fundamental shift, or transition in the parameters of the international refugee regime?[9] If so, what are the reasons for the shift of emphasis from dealing with asylum seekers as and when they arrive, to trying to ensure they never get here? Is it just a matter, as Karin Afeef recently described it,[10] of governments' disenchantment with the idea of fulfilling their territorial responsibilities to asylum seekers who actually arrive?

From an international law perspective, however, one most compelling question is that of responsibility, in the legal sense, for what is done in the name of offshore processing. This in turn raises issues touching not only on the rights of individuals, but also on the liability of states and international organisations for violations of international law.

2. Law and Responsibility

2.1 THE INDIVIDUAL

Whatever states may expect or hope, the individual is under no obligation not to move. The 1948 *Universal Declaration of Human Rights*, and the 1966 *International Covenant on Civil and Political Rights*, as well as many regional

compatible with EU legislation, national legislation, the legislation of 'host countries', and the European Convention on Human Rights; what procedural rules would govern RPAs and TPCs; whether the transfer of persons to the RPAs and TPCs would be lawful, given EU member states' national and international obligations, and the absence of any 'link' between such persons and the areas in question; and it asked what provision was to be made for durable solutions. The European Council rejected these proposals at its June 2003 Thessaloniki meeting, although like many bad ideas, the general notion lingers on as a part of the EU's push for better migration management, particularly in its dealings with Morocco and Libya. For a useful summary and critique, see United Kingdom, House of Lords European Union Committee, 'Handling EU Asylum Claims: New Approaches Examined', HL Paper 74, 11th Report of Sessionion 2003–04.

9 G Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *European Journal of Migration Law* 303, 338–41.

10 K Afeef, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific', Refugee Studies Centre, Oxford, Working Paper No. 36, October 2006 <http://www.rsc.ox.ac.uk.>.

treaties and national constitutions, all recognise the individual's right to freedom of movement, to leave his or her own country, and to return there.[11] While it may be incomplete, no country other than the country of nationality being obliged to admit the individual unless bound by a specific rule, it is nevertheless a matter of freedom, not of constraint. The individual also has a right to seek asylum from persecution and torture or refuge from violence and conflict.[12] Treaty rules and general international law recognise this right, and the principles of necessity, force majeure and distress confirm it. No one is obliged to sit out his or her fate, even if the present state of international law offers no immediate local remedy, and imposes no formal duty to grant asylum. Every individual, possessing equal dignity and worth, is entitled to the protection of his or her human rights, even if again the obligation may fall on different states in different degrees.

2.2 THE STATE

Against the claims of the individual in search of refuge stands the state, with its sovereign powers, including the competence to determine community membership and to regulate movement into its territory. Like any other legal competence, this power too is subject to law, which requires that it be exercised in good faith and consistently with the state's other international legal obligations.[13] This is why, among others, certain non-citizens who are members of the families of citizens or residents do have rights of entry;[14] and why racial discrimination is not an allowable basis of regulation.[15]

2.3 INTERNATIONAL ORGANISATIONS

As a matter of principle, and given the active involvement of various international organisations in many aspects of the detention, treatment and processing of refugees and asylum seekers in different parts of the world, it is worth recalling that international organisations have duties too. As Andrew Clapham has explained, an international organisation is capable of having human rights obligations and of violating such obligations, even as states retain their own legal liability.[16]

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11 See, for example, article 13 UDHR48; article 12 ICCPR66; article 2 Protocol No. 4 ECHR50; article 22 ACHR69; article 12 ACHPR81; article 26 ArabCHR 2004; all texts in I Brownlie and G S Goodwin-Gill (eds), *Basic Documents on Human Rights* (2006, 5th edn).

12 Article 14 UDHR48; Goodwin-Gill and McAdam, *The Refugee in International Law*, above n 3, 358–59, 370–71.

13 Cf G S Goodwin-Gill, 'State Responsibility and the 'Good Faith' Obligation in International Law' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility Before International Judicial Institutions* (2004) 120.

14 Cf H Lambert, 'The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion' (1999) 11 *International Journal of Refugee Law* 427; J Liddy, 'The Concept of Family Life under the ECHR' [1998] European HR L Rev 15; H Storey, 'The Right to Family Life and Immigration Case Law at Strasbourg' (1990) 39 ICLQ 328.

15 See [2005] 2 AC 1, discussed below.

16 A Clapham, *Human Rights of Obligations of Non-State Actors* (2006) 109–10. For further

2.4 FILLING THE GAPS IN THE SYSTEM: RESPONSIBILITY FOR EXTRATERRITORIAL CONDUCT

The challenge is to see to what extent these disparate elements of the system of rights and responsibilities may be brought together in the context of extra-territorial processing, for the migration and refugee regimes, considered as legal constructs, are still relatively underdeveloped. Some of the gaps in the system of refugee protection were clearly evident in the House of Lords judgement in 2004 in *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* (the *Roma Rights* case).[17] This involved a challenge to the British Government's occasional practice of stationing immigration officers at Prague Airport with a view to preventing certain passengers from boarding aircraft destined for the United Kingdom—at first glance, a simple instance of extra-territorial immigration control, like visas, undertaken with the consent, even if reluctant, of the Czech Government. The avowed intent nevertheless was to curb the movement of Czech citizens of Roma origin from seeking asylum; some indeed had been granted refugee status or leave to remain on humanitarian grounds, and at the time there was strong evidence of continuing discrimination and harassment, even violence, by non-state agents and often inadequate local protection. But it was embarrassing for the United Kingdom, when the Czech Republic, then a NATO ally and soon to be an EU member, was involved.

How should this pre-clearance operation be characterised, particularly in relation to the principles of refugee protection? The House of Lords held that the *Refugee Convention* did not apply. Those refused entry at Prague Airport, not being outside their country, could not be refugees in the sense of article 1A(2), the *Convention* definition. Nor could the British immigration booths at Prague Airport be considered as the external borders of the United Kingdom, save in a highly metaphorical sense, so that the principle of non-refoulement/non-rejection at the frontier also did not arise and there was no rule entitling individuals wishing to leave their country to seek asylum elsewhere to have the merits of their cases examined by the officials of the prospective country of refuge.[18]

But the evidence presented another perspective—that of discrimination on racial grounds. Over 90% of those denied entry were Roma, who were indeed singled out by reason of racial characteristics and treated differently

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discussion on the related issue of refugee rights in camps and settlements, see Goodwin-Gill and McAdam, above n 3, 466–71.

17 [2005] 2 AC 1.

18 Ibid, para 26 (Lord Bingham). It has also long been questioned whether the individual in search of refuge has a right to apply for asylum and to receive a decision on the merits in the country of his or her choosing; see further Goodwin-Gill and McAdam, above n 3, 358–65, 370–71; and on access to procedures, 390–407.

by reason of their race in comparison with other groups.[19] Discrimination on the grounds of race, even by a public authority, is illegal in the United Kingdom and, as the House of Lords noted, it is also a violation of the United Kingdom's international legal obligations, both as a matter of treaty law (among others, the *International Convention on the Elimination of All Forms of Racial Discrimination 1966*), and of customary international law.[20] It was here that the practice of pre-clearance fell foul of the law. This case illustrates some of the options available to the state anxious to regulate the movement of asylum seekers towards its territory, but equally it confirms that even in an area otherwise characterised by a broad freedom of action, the measures taken must still be compatible with the state's international obligations at large, though it be only at the outer limits.[21]

To what extent, then, is the state *effectively* bound by obligations, particularly human rights obligations, when acting outside its own territory? In the case of *Bankovi v Belgium* the European Court of Human Rights recognised no obligations in the case of the bombing of a TV station in Belgrade during the Kosovo intervention.[22] In short, there was no sufficient connection between those who were killed and injured and the states party to the *European Convention on Human Rights*. But the *possibility* of such a sufficient connection in appropriate cases has been recognised, both by the European Court and by national tribunals.

In the recent British case of *Al-Skeini,* for example, the Court of Appeal held that those in the 'custody and control' of the British armed forces in Iraq were protected by the *Human Rights Act* and therefore by the *European Convention on Human Rights*.[23] The judgement does not restrain war-fighting ability, but goes to the conduct of UK military personnel when they have custody and control of individuals in a foreign operation. Similarly, in *B's* case[24]—Afghan minors seeking protection in the British Consulate in Melbourne—the court again recognised that the *Human Rights Act* was capable of applying to the actions of diplomatic and consular officials, albeit not in the instant case. Significantly, the critical question for the court was 'whether the perceived threat to the physical safety of the applicants when they sought refuge in the ... Consulate was so immediate and severe

19 [2005] 2 AC 1, para 34 (Lord Steyn); see also paras 85, 92, 93 (Baroness Hale).

20 Ibid, para 98 (Baroness Hale). See also the 'Written Case' of the UNHCR as intervener in this appeal (2005) 17 *International Journal of Refugee Law* 427, 440–45.

21 See Goodwin-Gill, above n 13. The questions of 'procedure' and 'procedural standards' applicable in extra-territorial operations raise important issues in themselves and would repay detailed analysis; they are beyond the scope of the present article's focus on basic principles of responsibility, although some suggestions for minimum standards are made in the conclusions below, section 4.

22 (2001) 11 BHRC 435.

23 *R (on the application of Al Skeini) v Secretary of State for Defence* [2005] EWCA Civ. 1609 [2007] QB 140; upheld by the House of Lords in *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26.

24 *R (on the application of 'B') v Secretary of State for Foreign Affairs* [2004] EWCA Civ. 1344, [2005] QB 643.

that the officials could have refused to return them to the Australian authorities without violating their duties under international law'. In the circumstances, and applying the high threshold required by article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR50), jurisprudence for ill treatment, it found that the applicants 'were not subject to the type and degree of threat that, under international law, would have justified granting them diplomatic asylum'.[25]

The outlines of a legal regime of responsibility in relation to the offshore processing of asylum seekers are now beginning to emerge, with the focus on the actions of the state and its agents and their impact in fact on individuals. First, as a matter of general international law, it is undisputed that the state is responsible for the conduct of its organs and agents wherever they occur. The International Law Commission's articles on the responsibility of states for internationally wrongful acts make this abundantly clear.[26] Even when it exceeds its authority or acts contrary to instructions, the organ or agent exercising elements of governmental authority acts for the state.[27]

Whether the conduct of state officials breaches an international obligation binding on the state is in turn to be determined by the content of that obligation.[28] Among others, non-refoulement is precisely the sort of obligation which is engaged by extra-territorial action, for it prohibits a particular result—return to persecution or risk of torture—by whatever means, direct or indirect, and wherever the relevant action takes place.[29] A State which intercepts a boat carrying refugees on the high seas and which returns them directly to their country of origin violates the principle. The fact of interception – the taking of control and custody – establishes the necessary juridical link between the state and the consequence. Equally, an intercepting state which disembarks refugees and asylum seekers in a country which it knows or reasonably expects will refoule them becomes party to that act. It aids or assists in the commission of the prohibited conduct.[30] It is responsible, as is the state which actually does the deed.

25 In *Dixit v Australia*, a complaint examined and in fact rejected by the UN Human Rights Committee, it is interesting to note, as Gregor Noll points out in 'Seeking Asylum at Embassies', above n 4, 561–62, that Australia's arguments against the applicability of the 1966 International Covenant on Civil and Political Rights (ICCPR66) were not based on the simple fact of extra-territoriality, but on a combination of factors demonstrating the absence of a sufficient link—non-citizen status, residence elsewhere, and the only connection with Australia being that the claimant had applied for a visa.

26 The International Law Commission articles are annexed to UN General Assembly resolution 56/83, 'Responsibility of States for internationally wrongful acts', 12 December 2001.

27 Ibid, see articles 4–11 generally, and articles 7, 9, in particular.

28 Ibid, articles 2, 12.

29 Goodwin-Gill and McAdam, *The Refugee in International Law*, above n 3, 244–53.

30 Article 16 of the ILC Articles on State Responsibility (above n 26), 'Aid or assistance in the commission of an internationally wrongful act', provides: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter

Moreover, no state can avoid responsibility by outsourcing or contracting out its obligations, either to another state, or to an international organisation.

3. State Responsibility and the Responsibility of International Organisations

Article 57 of the International Law Commission's articles on the responsibility of states for internationally wrongful acts declares that they are 'without prejudice to any question of the responsibility under international law of an international organisation, or of any State for the conduct of an international organisation'. The first issue—the responsibility of international organisations—is currently being considered by the International Law Commission through the work of the special rapporteur, Giorgio Gaja.[31] The draft articles now being debated aim to complement those already adopted on the responsibility of states for internationally wrongful acts. What is not yet clear is whether this new work will help to fill the gaps which remain where the primary beneficiary of the obligations is *not* a state or an international organisation, for example, in human rights cases, or where a state or other competent subject of international law is unable or unwilling to invoke rights on behalf of individuals.[32]

3.1 THE RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

Not surprisingly, the International Law Commission's work on international organisations follows closely that on the responsibility of states, which is seen as a 'source of inspiration'.[33] The International Law Commission defines an international organisation as 'an organisation established by treaty or other instrument governed by international law and possessing its

is internationally responsible for doing so if (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.' For a comprehensive analysis of related issues and for an argument basing responsibility in 'complicity', see S Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567, 620–21, 642 ff; also Goodwin-Gill and McAdam, The Refugee in International Law, above n 3, 252–53, 389–90.

31 For summaries of the discussion and the text of draft articles and commentaries adopted, see Report of the International Law Commission, 58th Session (2006), UN doc. A/61/10, Ch. VII; 57th Session (2005), UN doc. A/60/10, Ch. VI; 56th Session (2004), UN doc. A/59/10, Ch. V; 55th Session (2003), UN doc. A/58/10, Ch. IV; 54th Session (2002), UN doc. A/57/10, Ch. VIII. Reference should also be made to the Reports of the Special Rapporteur: UN doc. A/CN.4/532, 26 March 2003 (First Report); UN doc. A/CN.4/541, 2 April 2004 (Second Report); UN doc. A/CN.4/553, 13 May 2005 (Third Report); UN doc. A/CN.4/564, 28 February 2006; Add.1, 12 April 2006; Add.2, 20 April 2006 (Fourth Report); and to the comments and observations received from international organisations and governments: UN doc. A/CN.4/545, 25 June 2004; UN doc. A/CN.4/547, 6 August 2004; UN doc. A/CN.4/556, 12 May 2005; UN doc. A/CN.4/568, 17 March 2006; Add.1, 12 May 2006. See also, International Law Association, Berlin Conference (2004), 'Accountability of International Organisations: Final Report'.

32 See Goodwin-Gill, above n 13, 120–22.

33 Report of the ILC, 54th Session, (2002), UN doc. A/57/10, Ch. VIII, para 473.

own international legal personality'.[34] It takes the premise of responsibility as a given, acknowledges that there may be instances of joint, several or subsidiary responsibility, but also that it may not be necessary to specify, 'whether the rights corresponding to the responsible organisation's obligations pertain to a State, another organisation or a person or entity other than a State or organisation.'[35]

The draft articles so far adopted apply essentially the same rules on attribution to the actions of organisation officials, as are applicable to states. Both acts and omissions are covered, and obligations may result 'either from a treaty binding the international organisation or from any other source of international law applicable to the organisation'.[36] The International Law Commission commentary notes further:

> (7) Neither for States nor for international organisations is the legal relationship arising out of an internationally wrongful act necessarily bilateral. The breach of the obligation may well affect more than one subject of international law or the international community as a whole. Thus in appropriate circumstances more than one subject may invoke, as an injured subject or otherwise, the international responsibility of an international organisation.
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> (8) The fact that an international organisation is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organisation may have cooperated with a State in the breach of an obligation imposed on both.[37]

What is particularly interesting in the International Law Commission's work, drawing on state practice and precedent, is its identification of the different ways by which conduct may be attributed. Following the doctrine of the International Court of Justice in its advisory opinion in the *Reparations* case,[38] the International Law Commission adopts an essentially functional approach, allowing for attribution of the conduct not just of officials, but also of other persons acting for the organisation on the basis of functions actually conferred. If the person in question is one through whom the organisation acts, then the conditions of attribution may be met.[39]

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34 Report of the ILC, 55th Session (2003), UN doc. A/58/10, Ch. IV, 38 (draft article 2). The commentary notes the intention to include, for example, organisations established by instruments such as General Assembly resolutions, 40.

35 Ibid, paras 479, 484.

36 Draft article 3, commentary, para (4): ibid, 46; also, Report of the ILC, 57th Session, (2005), UN doc. A/59/10, Ch. VI, 86–87 (draft article 8, Existence of breach, and commentary).

37 Draft article 3, Commentary, paras (7), (8): ibid, 47. See also Report of the ILC, 56th Session, (2004) UN doc. A/59/10, Ch. V, 100–22, 'Attribution of conduct to an international organisation', including the comment on 'dual or even multiple attribution of conduct' (101).

38 Reparations Case, ICJ Rep (1949) 174.

39 Report of the ILC, 56th Session (2004), above n 37, 103–07 (draft article 4 and commentary). See also draft article 5 (organs or agents placed at the disposal of the international organisation by a state or other organisation, where the condition of attribution is the organisation's 'effective control' over the conduct in question;

In addition to conduct undertaken in its own right, an international organisation may be responsible where it aids or assists a state in committing an internationally wrongful act, if it does so with knowledge of the circumstances of the internationally wrongful act, and if the act would be internationally wrongful if committed by it.[40] The International Law Commission commentary also emphasises, in relation to draft article 15,[41] that the separate international personality of an international organisation opens up the possibility that it might try to achieve through its members a result which it was not permitted to achieve directly. In the words of the Austrian delegate during debate in the Sixth Committee; 'an international organisation should not be allowed to escape responsibility by 'outsourcing' its actors'.[42]

3.2 THE RESPONSIBILITY OF A STATE FOR THE ACTS OF AN INTERNATIONAL ORGANISATION

Equally and symmetrically, and depending on the facts, a state may be responsible for the conduct of an international organisation.[43] This may arise, for example, when it aids or assists in the commission of an internationally wrongful act by the organisation;[44] or when it directs and controls the commission of such an act;[45] or when, as a member of an international organisation, the state 'circumvents one of its international obligations by providing the organisation with competence in relation to that obligation'.[46] This last-mentioned provision is intended to deal the situation where a state seeks to avoid one of its international obligations by making use of the separate legal personality of an organisation of which it is a member. No specific intention to circumvent is required, suggests the International Law Commission, drawing on support for this doctrine in the jurisprudence of the European Court of Human Rights, particularly in the case of *Waite and Kennedy v Germany*[47] and in the recent *Bosphorus* judgement.[48] As the Court noted in the latter case, a state cannot free

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and draft article 6 (attribution in the event of excess of authority or conduct in contravention of instructions).

40 Draft article 12: Report of the ILC, 57th Session, (2005) 96; see also draft article 13 (direction and control over the commission of an internationally wrongful act by a State or other international organisation; draft article 14 (coercion of a State or other international organisation). Cf articles 16–18 on the responsibility of states; above n 26.

41 Draft article 15 (decisions, recommendations and authorizations addressed to member states and international organisations), 100–01.

42 Ibid, 101.

43 Cf draft article 16, which declares that the chapter on attribution is 'without prejudice' to the international responsibility of the state or international organisation which commits the act in question: ibid, 105.

44 Draft article 25: Report of the ILC, 58th Session, (2006) 279.

45 Draft article 26, 280–81.

46 Draft article 28, 283–86.

47 *Waite and Kennedy v Germany* (2000) 30 *EHRR* 261.

48 *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 *EHRR* 1.

itself from its obligations under the *European Convention on Human Rights* by transferring functions to an international organisation:

> Absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards...[49]

Moreover, the International Law Commission expressly recognises that responsibility may arise where an international organisation is provided with competence in a general area, 'as in the case of obligations under treaties for the protection of human rights', and that while there must be an act in breach of an international obligation, it is not necessary that the organisation itself be bound by the obligation and 'there is no requirement that the State cause the international organisation to commit the act in question'.[50]

3.3 CIRCUMSTANCES PRECLUDING WRONGFULNESS

As in the case of state responsibility, circumstances may arise which 'preclude' wrongfulness, and the International Law Commission considers that the same principles should apply to international organisations. Draft articles 17–22 thus set out in similar terms the 'defences' of consent, self defence, force majeure, distress and necessity.[51] However, while in principle wrongdoing can be excused in certain circumstances, 'nothing... precludes the wrongfulness of any act of an international organisation which is not in conformity with an obligation arising under a peremptory norm of general international law'.[52] With crimes against humanity and torture (and return to torture also) now recognised as among the body of such norms, any room for manoeuvre and excuses for conduct which might be justified on grounds precluding wrongfulness are clearly ruled out for any international organisation which might contract to provide certain immigration-style functions on behalf of a State.

As the International Law Commission remarks, 'Since peremptory norms also bind international organisations, it is clear, that, like States, international organisations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm.'[53]

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49 Ibid, para 154.

50 Draft article 28 and commentary: Report of the ILC, 58th Session, (2006) 283–86. Responsibility for the protection of human rights will therefore attach to organisations which appear to have no formal human rights role or mandate; see, for example, 'The Constitution of the International Organisation for Migration' in Goodwin-Gill and McAdam, above n 3, 598 (annexe 1, no. 9).

51 Report of the ILC, 58th Session (2006) 263–77 (draft articles and commentary); draft article 19 on 'counter-measures' is postponed for further discussion.

52 Draft article 23, 275–76.

53 Ibid, commentary, para (3).

4. A Framework of International Responsibility

If we assume that offshore processing is here to stay as a tool in the State's attempts to manage movement and avoid responsibility for protection (rather than as an exercise in burden sharing through resettlement), then the framework for international legal responsibility is clear. Now that the lines of obligation are laid down by law, the next question is that of compliance, and the minimum conditions attaching to offshore processing if it is to remain within the limits of international law and if states and international organisations are to avoid responsibility.

A first point to consider will be whether those transferred to another state for processing will in fact enjoy effective protection. 'Effective protection' is not a legal concept as such, but a standard of compliance constructed with the refugee, the asylum seeker, human rights and solutions very much in mind. The background to the notion is the general obligation of the State to respect and ensure the human rights of everyone within its territory or within its power or effective control. In appropriate circumstances, it also extends to ensuring that other states (and international organisations) comply with the relevant obligations.

Clearly, the basic principles of state responsibility govern the situation in which a state initially takes custody and control of refugees and asylum seekers, whether they are found outside territory, such as on the high seas, or on state territory, after arrival. Equally, those basic principles apply to the 'service state', that is, the state where offshore processing is to be carried out and into the territory and jurisdiction of which the refugees and asylum seekers are delivered. Moreover, as illustrated above in the work of the International Law Commission, the equivalent principles of responsibility apply in principle to any international organisation which might undertake or be contracted to supply screening, determination of status, accommodation, security, return to the country of origin, transport to another State, or other services—in brief, to exercise wholly or in part the responsibilities of government in responding to claims for protection.

In addition to any obligations towards refugees and asylum seekers which it may have accepted in its own right,[54] or which are binding as a matter of customary international law, it is submitted that the service State is also bound by the obligations of the client state. For example, Nauru is not a party to the 1951 *Refugee Convention*, the 1967 *Protocol Relating to the Status of Refugees*, nor the 1966 *International Covenant on Civil and Political Rights*; but by acting as the agent for Australia, which is a party, Nauru is necessarily also bound by Australia's treaty obligations; and its performance is bound to be evaluated in the light of those standards. If Nauru acts in violation of those refugee specific or human rights obligations,

54 For example, Papua New Guinea, which has also participated in Australia's off-shore scheme, is a party to the 1951 Convention and 1967 Protocol.

it is liable severally, in its own capacity. Australia is also responsible, for it has established the conditions under which the want of compliance takes place; and it has established its own necessary juridical link with the individuals in question by taking custody and control.[55]

It follows as well that any international organisation contracted to provide services in relation to offshore processing must ensure the human rights of individuals under its administration. This responsibility attaches directly to the organisation as a subject of international law capable of bearing rights and duties; and it follows also from its relationship with the state seeking its services, for as the International Law Commission has noted, no State may circumvent its own obligations by providing an international organisation with competence in the matter.

Taking account of the relevant provisions of international refugee and human rights law, and putting these together with the applicable principles of state and international organisation responsibility, lead to certain legal implications:

— guarantees of due process for asylum seekers transferred for processing off-shore to the level necessary to ensure that claims for protection are effectively decided;

— compliance with internationally recognised minimum standards, including an effective opportunity to present a case, if necessary with the assistance of an interpreter; access to legal aid and representation; written reasons for decisions; an opportunity for appeal or review (which must in turn be effective, entailing more than a simple review of legality);

— supervision by international authority, specifically the UN High Commission for Refugees;[56]

— protection of human rights, including protection against arbitrary and/or indefinite detention;

— protection of family rights, including the right to family reunion;

— special protection of children, consistent with the 1989 *Convention on the Rights of the Child* and the principle of the best interests of the child;

— access to education;

— access to employment or to the means necessary to maintain an adequate standard of living and to survive in dignity;

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55 In addition, the facts underlying the precise relationship between Australia and Nauru would obviously repay close attention. In view of what is known about the money paid, the services expected of the Nauru Government (and the International Organisation for Migration), and the control effectively exercised by Australia regarding aspects of Nauru policy (such as denial of visas to lawyers and journalists), it would be reasonable to conclude that Australia's responsibility, additional to that of the other parties, could be founded on article 8 of the articles on the responsibility of states (conduct directed or controlled by a state): 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' See also article 9 (conduct carried out in the absence or default of the official authorities).

56 As an international organisation itself, UNHCR is also of course responsible for the fulfilment of its international obligations.

— protection against ill treatment and guarantees against return or transfer to any state likely to engage in ill treatment or to refoule the individual in question.

4.1 THE REALITY OF THE RULE OF LAW

The International Law Commission's work on the responsibility of states is complete, in that its articles in final form have been acknowledged and annexed to UN General Assembly resolution 56/83 of 2002. Given their standing, increasingly frequent citation, and widespread acceptance, it may not matter whether they are subsequently incorporated in treaty.

The International Law Commission's work on the responsibility of international organisations continues. Its articles and commentary to date are in draft, but have attracted a considerable input already both from governments and international organisations. So far as they track the path laid down in the International Law Commission's earlier work, they can be seen to reflect a substantial body of agreed general principles, and to set out rules, many of which states and international organisations will ignore at their peril.

In the practice of offshore processing adopted by a few governments to date—primarily, Australia and the US—little or no regard has been given to the international legal implications of involving third states or international organisations in the reception and treatment of asylum seekers, in the determination of claims to protection and the provision of procedural guarantees, and in the delivery of 'solutions', whether resettlement as refugees or return to countries of origin. International law may not prevent states from seeking 'new' solutions to old problems, but it does set the parameters. On the one hand, as in the *Roma Rights* case, it lays down the limits of permissible action, indicating what states may or may not do, as a matter of law. On the other hand, it prescribes a clear framework of responsibility, premised initially on the exercise of control by an 'intercepting' state over those seeking protection, and thereafter, by way of agency or engagement, on the attribution of conduct to other states or international organisations. An internationally wrongful act results, wherever such conduct breaches an international obligation; the challenge now is to develop the ways and means by which to ensure liability and effective accountability on the part of both states and international organisations.