

[This is an embargoed copy of a chapter of the British Refugee Council research report on protection-sensitive borders, to be published in early December 2008. The report will be available soon on the British Refugee Council website at www.refugeecouncil.org.uk]

The legal dimensions

Any analysis of the UK's extra-territorial border controls must be framed within an accurate legal context in order to underline the obligations and responsibilities incumbent on the State. In order to achieve this, we asked Guy Goodwin-Gill, international legal expert and valued member of our project advisory group, to conduct an assessment of the UK's obligations under international refugee and human rights law in relation to border control and access to protection. We hope that this analysis will form a key contribution to the debate on migration control and will serve as a useful tool to legal practitioners, campaigners and policy makers seeking clarity on a much-disputed area of law.

A legal analysis

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In this sixtieth anniversary year of the UN General Assembly's Universal Declaration of Human Rights (UDHR), the status of one article in particular demands attention. Article 14(1) declares that, "*Everyone has the right to seek and to enjoy in other countries asylum from persecution*". But despite much international human rights law-making over the last six decades, the right to asylum, considered as an individual entitlement rather than just the privilege of the State, remains very much where it was in 1948.

Back in 1948, many States saw no need for a right to asylum. The United Kingdom's own proposals for the UDHR contained nothing on asylum, and when France nevertheless proposed text which would have included the right to seek, *and to be granted*, asylum, the UK led the opposition. In its view, no foreigner could claim the right to enter a State, unless it were granted by treaty. To this day, though some regional developments are helping to fill the gap, there is still no general treaty provision on asylum as a human right.¹

Yet human rights and refugee law have themselves developed, governing many aspects of the relationship between the State and individuals within that State's territory or within the jurisdiction, custody, or control of the State. Thus, treaty obligations or obligations which are binding as a matter of customary international law, significantly limit a State's options when it comes to curtailing or obstructing the movement of people in search of refuge.

The 1951 Convention and 1967 Protocol relating to the Status of Refugees, now ratified by some 147 States, provide positive endorsement of a refugee definition which, in the face of the challenges of ethnic and gender-based persecution, has proven itself flexible enough to encompass new groups of refugees. The Convention and Protocol also lay down the fundamental principles of refugee

¹ These developments include the EU's Qualification Directive, which links entitlement to a residence permit to recognition as a refugee, and the extension of protection under human rights instruments, such as the European Convention and the Inter-American Convention on Human Rights.

protection – freedom from penalties for illegal entry (Article 31); freedom from expulsion, save on the most serious grounds (Article 32); and, of course, freedom from *refoulement*, that is, return in any manner whatsoever to a territory in which the refugee would be at risk of persecution.

But there are gaps in the Convention protection regime – grey areas, and matters on which the Contracting States did not anticipate a need for regulation. For example, the Convention does not prescribe which of many possible transit States should assume responsibility for deciding a claim to refugee status and asylum, while many Convention benefits, being oriented to successful settlement in the country of refuge, have a strong, sometimes exclusive territorial focus. In this apparently unregulated area, States such as the United Kingdom, other EU Members, Australia, Canada and the USA, can often be found engaged in operations to curb irregular migratory movements, including (though generally without differentiating) those undertaken by people in search of refuge and protection.

Globalisation may not have brought conflict and the need for protection to an end, but it seems certainly to have enhanced the opportunities to travel further afield. The question is, whether anything remains even of the right ‘to seek’ asylum. The measures now employed to obstruct asylum seekers, as outlined in this report, raise critical questions regarding the human rights obligations of States when acting outside their territory, and whether individuals in that uncertain no-man’s land called transit, are still ‘rights-holders’ and capable, at least in principle, of claiming effective protection. This report illustrates the very great practical difficulties facing asylum seekers today.

In fact, however, developments in the international law of State responsibility, coupled with those in the human rights field, permeate the range of activities which States may engage in beyond their borders. ‘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.

For the United Kingdom, this is well-illustrated by the recent House of Lords judgment in *R (Al Skeini and others) v. Secretary of State for Defence* [2007] UKHL 26, where the Court 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. Similarly, in *R (on the application of ‘B’) v. Secretary of State for Foreign Affairs* [2004] EWCA Civ. 1344, [2005] QB 643 – Afghan minors seeking protection in the British Consulate in Melbourne – the court again recognised, if not on the facts in the instant case, that the Human Rights Act was capable of applying to the actions of officials, for example, where there was an immediate and severe threat to the physical safety of individuals seeking refuge in diplomatic premises.

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.² Even when it exceeds its authority or acts contrary to instructions, the organ or agent exercising elements of governmental authority acts for the State.³

In principle, international responsibility may be engaged wherever the conduct of its organs or agents (the military, the police, officials generally) is *attributable* to the United Kingdom, and that conduct breaches an obligation binding on the UK. To take the simplest example, the United Kingdom may no more torture foreign nationals abroad, than it may 'at home'. The 1984 United Nations Convention against Torture (CAT84) obliges a State party to take effective measures to prevent torture in any territory under its jurisdiction, but also obliges it to establish jurisdiction over all acts of torture where the alleged offender is one of its own nationals.

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.⁴ 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.⁵ It is responsible, as is the State which actually does the deed. Moreover, no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, to an international organisation or to a private agent such as a carrier.

Building on the refugee protection principle of *non-refoulement*, Article 3 of CAT84 expressly prohibits return to risk of torture in another State, just as the doctrine established by the European Court of Human Rights around Article 3 of the European Convention on Human Rights ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment') has also underlined the *absolute* nature of protection against torture, including against return to torture. As the Grand Chamber of the European Court of Human Rights unanimously reiterated this year, in *Saadi v Italy* (Appl. 37201/06, 28 February 2008), there are no exceptions to this principle, and States must find alternative means to deal with so-called security risks, which are compatible with the protection of human rights.

² The ILC articles are annexed to UNGA resolution 56/83, 'Responsibility of States for internationally wrongful acts', 12 December 2001.

³ See arts. 4-11 generally, and arts. 7, 9, in particular; above note.

⁴ Goodwin-Gill, G. S. & McAdam, J., *The Refugee in International Law*, Oxford: Oxford University Press, 3rd edn., 2007, 244-53.

⁵ Art. 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 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.' See also, Goodwin-Gill & McAdam, *The Refugee in International Law*, above note, 252-3, 389-90.

States party to the European Convention have undertaken very distinct obligations – to protect the right to life, to prohibit and protect against torture, to protect life and liberty, to provide a fair trial, and to ensure respect for private and family life, among others. European human rights doctrine recognises that, depending on the facts, these individual rights may have a limiting impact on the sovereign competence of States to determine who may enter and remain in their territory. In addition, the European Court of Human Rights has recognised that the European Convention can apply to States in relation to extra-territorial activities, though there are limitations, and that States cannot ‘contract out’ of their responsibilities, for example, by transferring governmental functions to an international organisation, or a private company. The primary responsibility thus remains with the State.

Other international obligations relevant to the policy and conduct of United Kingdom officials abroad can be found in treaties, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD65), the 1966 International Covenant on Civil and Political Rights (ICCPR66), and the 1989 Convention on the Rights of the Child (CRC89). Article 7 ICCPR66 provides protection not only against torture, but also against cruel, inhuman or degrading treatment or punishment, while Article 3 CRC89 declares that in all actions affecting children, ‘the best interests of the child shall be a primary consideration’. In ratifying ICERD65, the United Kingdom undertook to eliminate and not to engage in racial discrimination. Indeed, the Race Relations Acts, with their foundation in the UK’s international obligations, were an important factor in the *Roma Rights* case.⁶ Here, in a challenge to UK pre-screening at Prague Airport, the House of Lords found evidence of racial discrimination and racial profiling, contrary to British law and the UK’s treaty obligations.

This case illustrates a number of legal issues relevant to the formulation of policy towards the movement of people in search of refuge. Even if the right to be granted asylum is still not formally recognized by States, nevertheless there are certain measures which States may not take in order to stop people from seeking asylum. Racial discrimination is prohibited, as are measures calculated or which have the effect of exposing the individual to the risk of torture, cruel, or inhuman or degrading treatment or punishment.

Clearly, however, the nature of airport liaison officer and similar operations in distant airports will not always allow issues and solutions to be properly identified, including rights and the need for protection. If the United Kingdom’s human rights and refugee protection obligations are to be fulfilled effectively and in good faith, more serious attention must be paid to the general obligation of co-operation and support which States have undertaken in regard to countries admitting or receiving refugees. As the Turkish representative put it at the 1989 UNHCR Executive Committee meeting, the refugee problem, ‘was such that it was no longer possible to disassociate international protection from international co-operation and assistance.’

Human rights and refugee protection obligations such as those illustrated above are not contingent, but neither are they self-executing. The United Kingdom has committed itself to protect, and the Human Rights Act is a clear legislative

⁶ *R (European Roma Rights Centre) v Immigration Officer, Prague Airport (UNHCR Intervening)* [2005] 2 AC 1, [2004] UKHL 55.

statement of intent. A decade or so later, however, it is by no means clear that specific human rights obligations and what they imply are integrated sufficiently, or at all, into policy and practice. In short, a human rights culture throughout government seems to be still some way off.