Chapter 7
Scum of the Earth II: Contemporary Refugees

Introduction

In Chapter 1, I argued that Europe's inter-war refugees were forced outside the pale of the law. Arguably, their predicament arose because the idea of human rights carried very little weight in international law before World War Two. Individuals were entitled to claim rights directly only against the state of which they were citizens. Where states recognised the rights of visitors or non-citizen residents, they did so on the basis of inter-state treaty obligations or principles of reciprocity, or in accordance with provisions of domestic legislation such as naturalisation laws that they were free to limit or change at will. These principles and legislative provisions afforded no comfort to refugees. Without a legal identity protected and secured by their national state, and denied a right to remain by their host state, the presence of the refugees was anomalous. The refugees could be treated with impunity, and had no legal standing on which to contest their treatment nor recognised political avenue through which to seek redress.

Things are different now. An international refugee regime is administered by the Office of the United Nations High Commissioner for Refugees (UNHCR) and supplemented by an international human rights regime that proclaims and supports the universalism of human rights. States remain the main duty bearers with respect to rights protection and realisation, but they now have international obligations to accord rights to all individuals within their jurisdiction regardless of nationality or citizenship status, and individuals are accorded standing and recognition in international law to a degree unknown prior to World War Two. Protection for individual rights has also increased within many liberal democracies and at the regional level.[1] Nevertheless, I demonstrate in this and the following chapter that many refugees continue to be forced outside the pale of the law. The conflict that I have been discussing between the universalism of rights and the sovereignty of the nation in the history of Western European nation-states, as well as in classical liberalism, is writ large in our current world order. Despite the changes wrought by globalisation, this order continues to be structured on the basis of state sovereignty and the sovereign autonomy of states is presupposed by international human

1 See, for example, Canadian Charter of Rights and Freedoms 1982; Human Rights Act 1993 (NZ); Human Rights Act 1998 (UK); Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Council of Europe).

rights law. In Chapter 8, I discuss the claim that human rights are progressively 'humanising' international law and tempering the influence of sovereignty. While this claim has merit insofar as states' treatment of their own citizens and lawful residents is concerned, it has little bearing in the arena of migration policy. States' sovereign rights remain largely unfettered in respect of those who are unlawfully present or whose legal status is qualified by reference to their arrival without legal authorisation, and the supplementary status provided by international law does not bring these refugees within the purview of the liberal democratic state's law. Instead, it marks them out as unequal and unworthy of full recognition under that law. In this chapter, I introduce this argument by demonstrating how the international human rights regime, including the international refugee regime, sanctions the punitive treatment of refugees. I show that it takes for granted the sovereign right of states to regulate entry and matters related to citizenship and nationality, including through the militarised protection of territorial borders. The regime also specifically qualifies the rights of refugees unlawfully present in a state's territory. Although even these refugees should, according to the rhetoric of human rights, be afforded some basic rights, they do not have standing as subjects of justice who are able to demand their rights. Instead, their capacity to access and to enjoy even their most basic rights is undermined by the reality of their unlawful or legally qualified presence, which exposes them to arrest and detention or deportation. Within liberal democracies, legal provisions that specifically exclude refugees from rights protection and from the protection of the law have also multiplied. Domestic courts have been unwilling to impugn these laws. In the main, they uphold the government's capacity to make and enforce immigration policy through draconian measures, and defer to its claim that in doing so it is defending 'the nation' and the 'sovereignty of the people'. The result is that refugees within liberal democracies, or detained in camps funded by these countries, may be denied legal status altogether or be accorded some form of qualified status, but in no case can they be considered to exist within the privileged pale of the law.

In the next section of this chapter I describe how refugees are treated when they attempt to access the territory of liberal democracies. In the following section I analyse the legal status of refugees in international law and within the legal framework of liberal democracies. I argue that liberal democracies are deeply hostile to the rights claims of refugees. In the final section of the chapter I discuss the impact that this hostility has on the rule of law and institutional rights protections within liberal democracies.

Denigrating and Punishing Refugees

The parallels between our current treatment of refugees and Western Europe's response to the inter-war refugees are striking. Also striking, however, is the fact that the measures now taken by many states to exclude, deter and punish refugees go beyond the actions of the inter-war democracies and have been more

comprehensively institutionalised. As I detail below, refugees are repelled at the borders of states, but they are also actively intercepted and repelled en route to liberal democracies. They are incarcerated in third countries at the cost of liberal democracies, and smuggled across borders by officials from liberal democratic states who collaborate with abusive regimes and have been quite willing to stoop to illegal acts (see Arendt 1968, 283). Refugees are denied access to the courts and like Europe's inter-war refugees, 'driven underground' and forced into breaking the law. They are imprisoned – often for years at a time – and brutally treated. For many the search for freedom or a better life has ended in death. Unknown thousands have died in the effort to obtain access to or asylum in a Western democracy. Many others have committed suicide after months or years in detention. As in the inter-war years, there is a vast gap between the rhetoric – where it does exist – of concern for refugees and the reality of the treatment inflicted upon them.

In detailing this treatment my focus is on Australia. Since 2001, Australia has been notable for the extreme nature of its refugee policies, but its approach reflects a more general tightening of border controls across the wealthy liberal democratic world since the 1970s (Wilsher 2012, 57, 121), and the increasingly punitive nature of these controls since the early 2000s. While Australia along with the USA can be considered a world leader in draconian border policing,[2] it differs from other wealthy liberal democracies only by degrees (Gibney 2004, 192). For example, while Wilsher (2012, 58 and 107–18) argues that since World War Two France has shown more restraint towards refugees on its territory or at its borders by comparison with common law countries, he acknowledges that from the early 2000s 'French governments have followed other countries in expanding detention facilities and powers to meet expulsion targets'.

Australia has a detention regime mandating the incarceration of all non-citizens without valid visas.[3] The year 2001 marked the inauguration of its 'Pacific Solution', involving naval interception of boats carrying asylum seekers and off-shore detention and processing of protection claims (see Marr and Wilkinson 2003; Dauvergne 2008, 51–3). Both Australia and the USA, however, have long-standing mandatory immigration detention regimes.[4] In the early 1980s, the USA began intercepting Haitian and Cuban asylum seekers at sea (Wilsher 2012, 67) and since 1991 it has used its naval based at Guantánamo Bay, Cuba as an immigration detention facility (Dastyari and Effeney 2012; Wilsher 2012, 239–43).

Throughout the Western world, immigration detention centres look and function like prisons, although without the framework of legal accountability within which prisons generally operate (see Burnside 2007, 23). In Australia, refugees are incarcerated behind electrified razor wire, under constant video surveillance and

2 Dauvergne (2008, 51; and see 53, 58–9) claims that since 2001, 'Australia has been the global leader in the refugee law race to the bottom'.

3 Migration Act 1958 (Cth), s.189.

4 Dating from 1980–81 in the case of the USA (Wilsher 2012, 67) and from 1989 in Australia's case (Brennan 2002, 13).

subject to the control of private security guards whose authority is 'akin to [the] police or army' (UN Working Group 2002, 11). Official expressions of concern for human dignity and rights appear frankly craven in light of the culture in Australian detention centres and in regional detention centres funded by Australia and managed under agreement with it. Most of these centres are in remote locations where physical conditions such as heat, over-crowding and lack of access to water make living conditions for detainees very difficult (see, for example, UNHCR 2013b). Public and media access, and other forms of independent oversight, are highly restricted and often refused altogether.[5]

These factors contribute to an environment in which psychological and physical abuse of detainees by detention centre staff is widespread and has at times been endemic (Burnside 2007, 23–7, 40–41, 49–52; Curr 2008; Davies 2013; 2013a; Hunter 2013; Isaacs et al. 2013; UN Working Group 2002, 8, para. 35).[6] Detainees are referred to by number rather than name, deprived of privacy, forced to queue endlessly for meals, telephone access and medical supplies, regularly placed in solitary confinement, and subjected to bizarre punishment regimes (Australian Human Rights Commission 2013; 2012;[7] 2011; 2010; Curr 2008; Davies 2013; 2013a; Hunter 2013; McKenna 2014; UNHCR 2013a; 2013b). Burnside (2007, 37–41) notes the case of a woman whose five year old son was placed in solitary confinement while she was held in a containment cell with two other of her cshildren for 15 days. For the first two days they were refused access to a toilet: '[t]he children had to use a plastic bag which I found in the cell as a toilet. I starved myself for two days as a protest before the guards would allow the children to use the toilet [outside the cell]'.[8] In an interview with the Australian Broadcasting Corporation (2008), former guards at a detention centre on Australian territory

5 Regarding lack of media access to the detention camp funded by Australia on Manus Island, Papua New Guinea, see Laughland 2014. Australia's Human Rights Commission has also been refused access to detention centres funded by Australia in Nauru and Papua New Guinea (Cullen and Woodley 2014).

6 Abuse within Australian detention centres was particularly severe in the period 2001–2005. After a short-lived period of reform, reports of abuse are again proliferating. For a brief history of Australia's mandatory detention regime, see Australian Human Rights Commission 2013, pp. 4–5 and appendix 2.

7 In its report of its 2012 visit to Christmas Island Detention Centre, the Australian Human Rights Commission notes (2012, 19) that almost all the detainees it spoke to said they had been treated respectfully by centre staff. This is at odds with the allegations of abuse cited above, including testimony from centre staff and Australian government personnel (Davies 2013a; Hunter 2013). It is unlikely that detainees aggrieved by their treatment were allowed to speak to the Commission. Nevertheless, there are undoubtedly detention centre employees who treat detainees respectfully. Regardless of this, conditions in the centres ensure serious abuses can and do occur, and mean that a culture of abuse becomes entrenched very quickly.

8 This is just one among a number of cases detailed by Burnside. Other cases are discussed at 49–52 and 113–15.

described baton attacks on detainees as an application of 'black panadol' – Panadol is the brand name of a widely used headache tablet in Australia – and the quelling of dissent by 'Emergency Response' teams as 'gas and bash'.[9] It is not surprising that detention centres are breeding grounds for abuse and brutality given 'the strong relationship between incommunicado detention and torture' (HRLRC 2008b, 3). Refugees are sent mad by the isolation, the boredom, the fear of return to countries in which they may be killed or persecuted and the 'wracking uncertainty' of their position.[10] Suicide attempts are frequent and self-harm is rife (Australian Human Rights Commission 2013, 10; Flitton 2014). Children who enter detention without behavioural problems stop eating, stop talking and begin self-mutilating as well as attempting suicide.[11] There have also been repeated eruptions of violence in detention centres run by Australia both on its own territory and in the Pacific Island states of Nauru and Papua New Guinea (Aly 2014). As I noted in the introduction to this book, attacks on detainees held on Manus Island, Papua New Guinea in February 2014 left the 23-year-old Iranian asylum seeker Reza Berati dead, another asylum seeker wounded by gun shot, and more than 60 others seriously wounded, including with slashed throats. Detainees claimed that following a non-violent protest they were attacked by detention centre staff as well as members of Papua New Guinea's mobile police squad, who were the only people carrying guns at the time (Cullen and Woodley 2014; Gordon and Ireland 2014; Gordon and Whyte 2014; Wroe and Callinan 2014; Wroe, Whyte and Wen 2014). Although it accepted that detention centre staff employed by its contractor G4S had attacked detainees, the Australian government 'stood by' its 'tough offshore processing regime' (Wroe, Whyte and Wen 2014). In defending his Immigration Minister, Prime Minister Tony Abbott declared that 'you don't want a wimp running border protection' (Wroe and Swan 2014).

Australia is alone in detaining refugees throughout the entire visa application process and after it pending removal if the application is rejected, but other liberal democracies routinely detain asylum seekers and other people who are unlawfully present (American Civil Liberties Union 2009; UNHCR 2012a; Phillips and Millbank 2005, 3; Roberts 2009; UNHCR 2012a; Wilsher 2012). As a result, detention in the twenty-first century has been 'normalised' 'to an extent only

9 The 'gas and bash' technique involved 'blow[ing] gas on people and beat[ing] them'.

10 A bi-partisan parliamentary committee noted in 2001 the 'despair and depression' of the people held in Australia's immigration detention facilities and referred to 'immigration detention syndrome' (in UN Working Group 2002, 12). In 2008 psychiatrists identified a new mental illness suffered by Australian immigration detainees, with clinical features 'similar to post-traumatic stress disorder, major depression and anxiety disorders' (Miller 2008).

11 In one well documented case a 12 year old repeatedly attempted to hang himself (see UN Working Group 2002, 11 and 12; Zifcak 2006). According to a case-worker on Nauru interviewed by Davies in 2013, a four-year-old child who was then in detention had 'become catatonic and [was] refusing to eat'.

previously seen in wartime' (Wilsher 2012, xxi). Asylum seekers in the UK and other EU countries whose protection claims are considered 'manifestly unfounded' or who have travelled through another 'safe' country en route to the country in which they claim asylum are automatically detained while their claims are considered under a fast track regime (Phillips and Millbank 2005, 4). Many EU countries also detain asylum seekers whose protection claims have been rejected pending deportation (Phillips and Millbank 2005, 4; Wilsher 2012, 115). The numbers affected by these policies are huge – as Wilsher suggests, immigration detention is now occurring globally 'on a vast scale' (2012, ix). The UK, for example, has an average daily immigration detention population of between 2,000 and 3,000 (Silverman and Hajela 2013). Immigration detention is also a thriving business in the US, where the average daily detention population is 34,000 (Urbina and Rentz 2013) and the industry is worth US$1.72 billion (Wilsher 2012, 59) – a figure that is striking in itself but dwarfed by the more than AUD$8 billion (US$7.18 billion) projected cost of Australia's detention regime over the three year period 2013/14–2016/17 (The Greens, Australia 2013). Not only are more people being incarcerated around the world, but they are being incarcerated for longer periods (Wilsher 2012, xii). Among those detained in the US, more than 4,000 have been incarcerated for at least six months and some for more than five years (American Civil Liberties Union 2009, 4; Roberts 2009).

All Western countries construct complex physical and legal barriers and use force to prevent refugees entering their territory (Carens 1987, 251; Wilsher 2012, 123). The result is death by drowning, starvation or heat exposure for hundreds of thousands of people (Hill 2013; Kumin 2007; Mills 2008; Shenker 2013). The militarised defence of Western borders and policing of access routes into these states forces refugees to rely on exploitative and abusive criminal smuggling networks (Dummett 2001, 43–4; Stevis and Ball 2013). It also licences and encourages the punitive treatment of refugees by other countries – thus Malaysia detains and canes Burmese Rohinga refugees and then deports them to Thailand, which smuggles the refugees back across the border into Burma, ignoring the fact that the Burmese military refuses the refugees a right to enter (Staples 2012, 147–9). Wilsher (2012, xii) points out that while the practise of incarcerating refugees began in Western states, it is now 'widespread' in other countries as well. In Indonesia many refugees whose ultimate destination is Australia are detained in appalling conditions (Taylor 2009; Human Rights Watch 2013). Australian Federal Police have also engaged for many years in joint 'People Smuggling Disruption' programmes in Indonesia, and Australia pays Indonesia and the International Organisation for Migration to pressure refugees resident in the country to return home (Taylor 2014). Many Western countries are party to 'containment' agreements with undemocratic and repressive governments. Australia has agreements with Afghanistan and Sri Lanka to ensure that potential asylum seekers are prevented from leaving home and can be forcibly repatriated when they do escape (Irin News 2013; Mogelson 2013). Stevis and Ball (2013) also point out that '[b]efore the Arab Spring, North African leaders such as Muammar Gadhafi kept a lid on [people …] smuggling in exchange for billions in aid from Italy and other European countries'.

As part of its current military led border protection regime – promoted by the government under the label 'Operation Sovereign Borders' and headed by an Australian Defence Force Lieutenant General, Australia intercepts vessels carrying refugees from Indonesia and tows the boats back into Indonesian waters. The navy has also begun forcing refugees into lifeboats specifically purchased for this purpose. The lifeboats are towed into Indonesian waters and then abandoned (AAP/theguardian.com 2014). Under legislation passed with bi-partisan support in 2013, Australia excised its entire coastline and all off-shore territories from its migration zone. The result is that even when boats carrying asylum seekers land on Australian territory, the asylum seekers cannot lodge a protection claim under Australian law except with leave from the Minister for Immigration. Since 2013, leave has been denied wholesale, and almost all asylum seekers forcibly transported to the detention camps on Nauru or Manus Island. Nauru and Papua New Guinea have entered agreements with Australia to process refugee protection applications, but regardless of the outcome of these applications Australia has said it will not resettle the refugees. Other wealthy liberal democracies have created 'non-arrival' or 'non-migration' zones within their territory – for example, at airports and other entry points, and refugees who are detained upon arrival within these zones are denied access to the law of the state on whose territory they are detained.

Deportation operations are also conducted on a massive scale by wealthy liberal democracies. France alone deports around 30,000 people a year (Global Detention Project 2009) – although Wilsher (2012, 115) claims that many of these deportations are 'voluntary' in the sense that detention is not required in order to guarantee that individuals present themselves for removal. When deportations are involuntary the force used may involve shackling and blindfolding, and in Australia intravenously administered 'chemical restraints' (Australian Broadcasting Corporation 2005; Nicholls 2007, 139). Government employees in Australia's departments of immigration and foreign affairs have also engaged in identity fraud, for example by providing stateless asylum seekers with false passports, and have conspired with officials in autocratic countries to facilitate the deportation of asylum seekers (Australian Broadcasting Corporation 2005; Glendenning et al. 2004). Many people have been 'disappeared' after being forcibly returned by Australia to countries such as Afghanistan, Iran and Iraq; others are known to have been killed.[12]

The Legal Status of Contemporary Refugees

How is the treatment of refugees that I describe here possible, given the authority of government in liberal democracies is based on rights protection – to restate the

12 See Burnside 2007, 72; Corlett 2005; Glendenning 2004.

question with which I began Chapter 2, and given that these liberal democracies are parties to a whole gamut of international human rights instruments, including the Convention Relating to the Status of Refugees (Refugee Convention)?[13] In this section I discuss the international rights provisions relevant to refugees and how these provisions apply within liberal democracies. Rather than using the expansive definition of 'refugee' that I have employed to this point, I draw distinctions where necessary for the sake of clarity between asylum seekers seeking protection under the Refugee Convention whose status as Convention refugees has not been determined, and other 'unauthorised' immigrants who arrive in a country without prior permission.

According to Amnesty International, '[a]ll immigrants, irrespective of their legal status, have human rights' (2012, 12). Nash argues along similar lines that 'distinctions between citizens and non-citizens with respect to fundamental human rights are not permitted in international law' (2009, 17). Nash and Amnesty are supported by the claim in Article one of the Universal Declaration of Human Rights (UDHR) that 'all humans are born free and equal in dignity and rights'. The universality of human rights, and the importance of these rights as protections for individual freedom and equality, is consistently expressed in the international human rights system. The same language appears in the preamble to the UN Charter, in the UDHR, in the two major Covenants that provide a legally binding articulation of the rights contained in the UDHR – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in all of the major international rights instruments that have followed. The implications of this language – and of what I am calling the myth of human rights – is that these rights 'are universal, indivisible, interdependent, mutual reinforcing, and as relevant to refugees and stateless persons as to nationals in their own country' (UNHCR 2008, 129).

The ICCPR recognises rights to life (Art. 6); to liberty and security of the person (Art. 9); not to be subject to arbitrary arrest or detention (Art. 9); and to equality before the law (Art. 14). The ICESCR recognises a range of economic, social and cultural rights, including the rights to work (Art. 6) and to an education (Art. 13). Both Covenants also bind parties to protect the rights that they contain without discrimination of any kind, including discrimination on the basis of national or social origin (Art. 2(1) ICCPR; Art. 2(2) ICESCR).[14] The Human Rights Committee

13 The vast majority of Western liberal democracies are parties to the Refugee Convention and/or its Protocol, and to at least some of the core human rights treaties. The USA is notable for its historical unwillingness to ratify human rights treaties but even so, it is a party to the Refugee Convention and to the International Covenant on Civil and Political Rights. It has signed but not ratified the International Covenant on Economic, Social and Cultural Rights.

14 An exception is Article 25 of the ICCPR, which restricts the right of political participation to citizens. Article 2(3) of the ICESCR also recognises that developing countries can 'determine to what extent they … guarantee … economic rights … to non-nationals'.

(HRC) and the Committee on Economic, Social and Cultural Rights (CESCR), responsible for overseeing the ICCPR and the ICESCR respectively, argue that the non-discrimination requirement extends to non-citizens (HRC 1994, para. 1), including immigrants whose presence is unlawful (CESCR 2009, para. 30). In fact, however, discrimination against unauthorised immigrants is justified in, and indeed assumed by, the human rights system. This is explicit in the International Convention on the Elimination of All Forms of Racial Discrimination, which – although prohibiting discrimination on a range of grounds including 'national or ethnic origin', also clearly states that this prohibition does 'not apply to distinctions, exclusions, restrictions or preferences … between citizens and non-citizens' (Art. 1(2)). More broadly, it is evidenced by a striking absence in the list of ICCPR rights – the right to universal freedom of movement.

Despite constant reiteration of the claim that humans are born free and equal and are the subjects of human rights and fundamental freedoms, as well as recognition within the human rights system that liberty of movement is, as the HRC puts it, 'an indispensable condition for the free development of a person' (1999, para. 1), the system nowhere recognises a right to international freedom of movement. The UDHR accords rights to freedom of movement and residence *within* the borders of states (Art. 13(1)), and a right 'to *leave* any country' as well as 'to return to' one's own country (Art. 13(2)). As noted above, the right to leave one's own country is now frequently curtailed by repressive states acting under agreement with liberal democracies. Although arguing for its continued relevance, Goodwin-Gill (2011, 443) recognises that even to speak of such a right now 'probably sounds dated'. In any event, the UDHR does not contain a right to enter countries other than one's own. Article 14(1) of the Declaration accords a right 'to seek and to enjoy in other countries asylum from persecution' but this is not a right enforceable at the behest of the individual (Goodwin-Gill and McAdam 2007, 358) and as we have seen, wide-ranging restrictions prevent asylum seekers from obtaining access to asylum procedures within liberal democracies (Wilsher 2012, xi, 122). Liberal states generally refuse visas to individuals considered likely to make an asylum claim and place blanket visa bans on nationalities likely to require protection (Crisp 2007, 9; Goodwin-Gill and McAdam 2007, 375; UNHCR 2006, 35). They also impose carrier liability sanctions that force international carriers to police their customers for visa and passport compliance. It is common practice to post immigration officials at foreign airports and other points of international departure to vet embarking passengers and to ensure that no asylum seekers or other unauthorised immigrants obtain passage to the destination state (Goodwin-Gill and McAdam 2007, 377).

The Refugee Convention does not provide individuals with a right to enter a state in order to claim asylum, and it recognises that an asylum seeker's presence in a Convention state may be unlawful (Art. 31(2)). This, combined with the

Convention's restrictive refugee definition, requiring that an individual has left his or her home state and is unable or unwilling to return to it because of a well-founded fear of persecution 'on grounds of race, religion, nationality, membership of a particular social group, or political opinion' (Art.1) means that it is appropriate to characterise it as an instrument of containment, used by Western states along with other border policing mechanisms to restrict access to their territories and to regulate refugee flows (Tuitt 1996; and see Dauvergne 2005, 85; 2008, 60; Gibney 2004, 3; Hathaway 1990, 144; and generally, Skran 1995, 88–94; UNHCR 2006, 1). The strongest protection afforded by the Convention is its prohibition in Article 33 on refoulement, or return 'to the frontiers of territories where [the refugee's] life or freedom would be threatened on account of [his or her] race, religion, nationality, membership of a particular social group or political opinion'. The principle of non-refoulement is not, however, considered to impose an obligation on states to facilitate access to their territory or even to accord lawful status to asylum seekers who manage to obtain access – the only obligation in the latter case is not to return a person to a place in which he or she is likely to be persecuted.

The ICCPR recognises a right to liberty of movement, but restricts this right to individuals '*lawfully* within the territory of a State' (Art. 12(1), my emphasis). The question of whether an individual is lawfully within the territory of a state is a matter for the state itself (UNHCHR 2006, 17; HRC 1999, para. 4; 1994, paras 5, 6, 9). In most liberal democracies, asylum seekers – like all other unauthorised immigrants – are treated as having arrived unlawfully, and their presence either remains unlawful, or is legally qualified after they have lodged a protection application through restrictions attached to bridging visas. While Article 31(2) of the Refugee Convention says that states should not impose penalties on refugees for unlawful entry, this is qualified to allow for the detention of asylum seekers. Furthermore, the Convention actually sets out different standards of treatment for refugees lawfully and unlawfully on a state's territory. International law generally recognises that states may deprive individuals who enter their territory without lawful authorisation from freedom of movement within the state.[15]

Detention should not, however, be 'arbitrary' (Art. 9(1), ICCPR). It should not constitute torture or 'cruel, inhuman or degrading treatment or punishment' (Arts 1 and 16, Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment) (CAT), and detainees should be 'treated with humanity and with respect for the inherent dignity of the human person' (Art. 10(1), ICCPR). Nevertheless, findings by treaty bodies that detention in particular instances contravenes international law have not impugned detention as such, and as I discuss below, such findings are in any event routinely ignored or disputed by the states involved.

15 In addition to Article 12 of the ICCPR, see the Declaration on the Rights of Non-Nationals, Article 5(3), and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5(f) and Article 2, Protocol 4.

The border regimes developed by wealthy liberal democracies are premised on preventing asylum seekers, along with other unauthorised immigrants, from accessing the territory of the state. The legality of intercepting and repelling individuals en route to Western states is considered dubious by international lawyers, who point out that it may result in refoulement. Nevertheless, Goodwin-Gill and McAdam (2007, 360) acknowledge that 'states retain considerable discretion to construct sophisticated interception and non-arrival policies within the letter, if not the spirit, of the law'. International lawyers have also expressed concerns about the legality of the non-arrival or non-migration zones that I discussed in the preceding section. Dauvergne (2008, 58) argues that it is 'nonsensical from the perspective of international law' to claim that territory excised from a country's migration zone 'is not in fact [that country's] territory for the purposes of making a refugee claim'. Goodwin-Gill and McAdam also argue that because it is 'a fundamental principle of international law that every state enjoys prima facie exclusive authority over its territory and persons within it', states cannot absolve themselves of obligations under international law within zones that form part of their territory but that they have designated as 'transit or international zones' (2007, 253). In their view, 'the state's sovereign and prima facie exclusive authority or jurisdiction over all its territory', and the 'fact of [the] control' that it exercises over the territory, means it has responsibility under international law for what occurs there (2007, 255). They admit, however, that the state is free to choose the manner in which it implements its international obligations, and that the application of 'procedures and standards' different to those applied outside the designated zones will 'not necessarily' constitute a breach of international law (2007, 255).

Weissbrodt (2008, 52) similarly argues that states must be held accountable for their actions within 'transit' or 'international' zones. He cites the 1996 decision of the European Court of Human Rights in 'Amuur v. France' that '[s]o-called "international zones" administered by states to detain non-citizens … are a legal fiction and a state cannot thereby avoid its international human rights responsibilities by claiming that such areas have extraterritorial status' (Weissbrodt 2008, 52). As Wilsher (2012, 147–8) points out, however, the Court's decision in 'Amur' did not seriously undercut the power of governments to detain individuals in such zones and to do so in a manner sanctioned by international law. The Court accepted that detention might be appropriate in order to organise the removal of a person from the state's territory. It said that 'such holding should not be prolonged excessively' (para. 43, in Wilsher 2012, 147), but it 'endorsed the idea that migrants who seek entry may be deemed to be giving their consent to their continued detention'. (Wilsher 2012, 147) While the court said that such consent could not be inferred if an asylum seeker was in fact unlikely to be afforded protection in another country, Wilsher (2012, 148) emphasises that the decision has no application to other unauthorised immigrants unable to claim protection under the Refugee Convention. These unauthorised immigrants may be held indefinitely in 'non-arrival' zones and their incarceration will not be characterised as detention. Thus

the 'legal fiction' forged by the creation of international zones continues to exert an all too real power over the individuals imprisoned within them.

The UNHCR argues that a state cannot absolve itself of legal responsibility for what happens to asylum seekers and other unauthorised immigrants whom it forcibly transports to camps funded by it in other countries. The legality of such arrangements is not, however, likely to be challenged at the international level. As Dauvergne (2008, 58) points out, individuals do not have a cause of action under the Refugee Convention, and other states do not have an interest in impugning arrangements that they may, at some point, wish to replicate. If the country in which a person is detained is a party to the Optional Protocol to the ICCPR or the Optional Protocol to the CAT, the person detained should in theory be able to argue that their detention is 'arbitrary' or 'cruel, inhuman or degrading'. In reality, however, they will be precluded from doing so by being denied access to legal assistance. Furthermore, such findings rarely have any practical impact because no enforcement mechanism exists to ensure that they are implemented (UNHCHR 2008, 31, 34, 48; Steiner, Alston and Goodman 2008, 915). While the treaty bodies argue that their views represent an authoritative interpretation of international law (see, for example, HRC 2008, para. 34), they are not binding (Kesby 2012, 96; Steiner, Alston and Goodman 2008, 892) and states commonly dispute the views or refuse to implement them (see Steiner and Alston 2000, 740–41).

It is also notable that international law actually provides warrant for many of the border policing practices that I have been discussing. UN Security Council Resolution 1373 (2001) calls on states to actively police their borders and ensure that refugee status is not 'abused' by 'perpetrators, organisers or facilitators of terrorist acts' (in Harvey 2005, 153). The UN Protocol Against the Smuggling of Migrants subsumes all forms of unauthorised migration under the rubric of transnational organised crime. While the Protocol specifies that its provisions do not affect any rights or obligations under the Refugee Convention, it makes provision for states to prevent citizens from leaving their own country 'by unauthorised or irregular measures' (Art. 19; Kneebone 2009, 25) and implicitly justifies the interception practices of destination states (Blay, Burn and Keyzer 2007, 12). The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families requires states parties to 'prevent' and 'eliminate' 'illegal and clandestine movements and employment of migrant workers' (Art. 68), and its recognition of a right to free movement within a state is limited to lawful migrants (Art. 39). While it recognises that even unauthorised migrants have a right to 'liberty and security of person' and not to be subject to 'arbitrary arrest or detention', it sanctions detention in accordance with law and with respect to immigration infringements (Arts 16 and 17). Dauvergne (2008, 27) concludes that 'sovereignty is reinforced [under the Convention] by leaving states in firm control of who can be a migrant worker and under what conditions, and by requiring states to reinforce their borders'. The Convention Relating to the Status of Stateless Persons attempts to attribute a legal personality even to stateless individuals, but allows that this identity

may be severely restricted – for example, by requiring states parties to issue travel documents only to stateless persons who are '*lawfully* staying in their territory' (Art. 28, my emphasis). Finally, limitation clauses in all international rights instruments, such as those allowing rights to be curtailed in the interests of national security or public order, provide avenues for states to legitimate oppressive treatment of unauthorised immigrants, including asylum seekers, simply by characterising them as threats to national security or public order.

While official rhetoric in liberal democracies agrees that even unauthorised immigrants have *human* rights, the suggestion that these rights translate to rights that must be recognised by the state in which the unauthorised immigrant appears – in other words, that they are comparable to citizens' rights – is emphatically denied. Liberal democracies are deeply hostile to the rights claims of asylum seekers and other unauthorised immigrants because these claims are seen to threaten the political autonomy of the nation-state and its sovereign right to determine its own character and composition. Rather than stand respectfully at a distance, unauthorised immigrants arrive in the state – or attempt to scale its borders – and ask for their rights to be recognised. Increasingly, their presence is characterised as a national security problem (Wilsher 2012, xviii) and even, in some instances, 'a national emergency' (Tony Abbott in Mogelson 2013). The latter claim, made by Australia's Prime Minister in response to an increase in asylum seekers attempting to reach the country by boat, would be laughable in view of the relatively small numbers involved were the rhetoric not so politically potent.

Although the treatment of refugees as a national security issue tends to be driven by politicians, this characterisation is commonly accepted by courts, reflecting the fact that the liberal democratic government's power in respect of aliens is 'a descendent of [its] war power' (Wilsher 2012, xi). Courts typically characterise the executive's power over immigration related matters as fundamental to its capacity to determine the character and indeed the on-going viability of the political community. Wilsher (2012, xiii) suggests that courts have 'officially ceded … power over such questions … Building, shaping and protecting nations through migration policy [are seen as] political questions not within the courts' jurisdiction or competence'. In the arena of national security, judges deem parliaments and the executive better equipped than the courts to deal with sensitive policy issues.[16] It is true that some judges carefully avoid assimilating issues relating to unauthorised immigrants and those relating to national security, and there has, in some jurisdictions, been 'fierce resistance by constitutional courts' to the attempt 'to exclude judicial review of immigration decisions' (Wilsher 2012, xix fn. 13, citing Dyzenhaus 2006). Nevertheless, such resistance has ultimately failed to challenge the basic assumption that the sovereign right of the state to exercise control over its borders overrides the rights obligations that it may have towards unauthorised

16 Regarding the fact that courts have proved 'rather ineffective watchdogs' 'at times of perceived threats to national security' and 'in times of crisis', see Bingham 2006, 25.

immigrants under the international human rights system or under ordinary rule of law principles within the liberal state.

Tellingly, the attitude currently prevailing is illustrated by a war-time case. In 'O'Keefe v. Calwell', Australia's Chief Justice referred to 'the deportation of an unwanted immigrant' as 'a measure of protection of the community from undesired infiltration' (1949, 278, per Latham CJ). The Chief Justice's comments were cited with approval many years later – and no longer against the background of a country at war – by Justice McHugh in 'Al-Kateb v. Godwin' (2004, para. 45), a case in which the Australian High Court upheld the constitutionality of mandatory immigration detention even when this might foreseeably result in life-long detention. Justice McHugh concluded that

> Under the aliens power [of the Australian constitution], the Parliament is entitled to protect the nation against unwanted entrants by detaining them in custody. As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. (Para.74)

Consistent with their refusal to seriously impugn immigration detention regimes, courts in liberal democracies have upheld laws that exclude unauthorised immigrants and asylum seekers from many of the other rights secured under law for citizens and residents who are lawfully present. As Wilsher (2012, xvi) points out, 'modern states have stripped away many "fundamental" rights [not only] to liberty [but also to] work, healthcare, social security, and even marriage and family life'. Even if some rights are accorded in some form, these are strictly speaking the rights of the rightless. It is impossible for those who are unlawfully present to freely enjoy their rights because any attempt to claim them – for example, by approaching social service providers or by reporting assaults and other abuses to the police, exposes them to detention or deportation on the basis of their unlawful status.[17]

The refusal by states that are parties to international human rights instruments to secure the human rights of unauthorised immigrants or to be bound by the views of the treaty bodies that oversee these instruments is ultimately justified in both legal and moral terms by reference to states' right to exercise sovereign

17 Amnesty International USA (2012, 12) points out that although 'US legislation makes provision for undocumented immigrants who are victims of crimes … to be given temporary legal immigration status and to pursue remedies against the perpetrator of the crime … many people [are] reluctant to come into contact with the law enforcement authorities and apply for these remedies because they fear that they will be detained and deported or lose custody of their children'. See also Kesby 2012, 110.

control over immigration and matters related to citizenship and nationality. I discuss the principle of sovereignty in greater depth in the next chapter. Now I want to discuss the impact that border policing regimes have on the rule of law within the liberal democratic state.

Erosion of the Rule of Law

Arendt argues that governments in Western democracies during the inter-war years simply devolved responsibility for refugees to the police, who were given licence to treat the refugees with impunity. Arendt focuses on the actions of the police, but it is also illuminating to consider the associated abdication of responsibility by parliaments and the courts, which in the inter-war years left the executive branch of government, and within it, particular ministries such as the French Ministry of the Interior, to set the tone for the behaviour of the police, who were then accorded great licence in the exercise of their day to day duties. Such a characterisation parallels the contemporary situation. Impunity defines the contemporary treatment of refugees, but this impunity is carefully orchestrated and managed by branches of the executive government whose powers have been repeatedly extended. As I argued in the previous section, courts have failed to arrest this general tendency, and parliaments have been similarly 'reluctant to provide *legal* entitlements for persons who are unauthorized, preferring to remove rights or leave matters to executive discretion' (Wilsher 2012, xxi, emphasis in original). This has invidious effects insofar as the integrity, impartiality and protective functions of the law are concerned. The existence of people outside the pale of the law does not leave the integrity of the legal system intact. Instead, their exclusion is upheld by the system and its functionaries, including through laws of exception that mark out those who are unlawfully present for punitive treatment. The result is an expansion in the use of arbitrary powers and a corresponding weakening of those institutions designed to constrain power and hold it to account. This is evidenced in the Australian context by a steady increase in the executive's discretionary powers, along with its increasing disdain for parliamentary processes and other accountability mechanisms.

Australia's Immigration Minister exercises powers that the Minister himself has described as 'extraordinary' (Evans 2008, 5). These powers are employed both to influence public perceptions of refugees – with the current Minister instructing his department and its contractors to refer to unauthorised boat arrivals as 'illegal maritime arrivals', and people held in immigration detention as 'detainees' rather than 'clients' (in Hall 2013); and in the management of refugees themselves. As noted already,[18] it is in the Immigration Minister's discretion whether to allow a person to lodge a protection application under

18 Page 125.

the Refugee Convention if that person arrives on Australian territory by boat – his only consideration in exercising this discretion is 'the public interest'.[19] He is also free to enter agreements with other countries to establish immigration detention centres on their territory and to arrange for the forced transfer of asylum seekers to these centres – again his only consideration is whether such an arrangement is 'in the national interest'.[20] Immigration department officers have also been accorded 'exceptional, even extraordinary' powers (Palmer 2005, ix).

At the same time as the executive branch of government wields extraordinary power, it is quick to deflect blame for its policies by implicating independent contractors who are paid to run detention centres and conduct deportations; and in the ultimate abdication of responsibility, by locating detention camps in third countries and claiming that these countries have sovereign responsibility for what happens in the camps – even though it funds the camps and exercises control over their operation (Cordell 2014, McKenna 2014). Very extensive powers have been accorded to contractors, the police and defence personnel in their dealings with refugees, and these dealings have been hidden from external scrutiny. The confidentiality of commercial contracts is relied on to deny publication of the terms of service agreements with detention and security providers, and personnel who work in detention centres are prevented under their employment contracts from discussing their work (Davies 2013a; Gordon and Whyte 2014; Gordon, Whyte and Wroe 2014). In 2001, the Australian Government sought in its Border Protection Bill to provide absolute immunity to officers of the Commonwealth for civil or criminal acts undertaken in the forced removal of asylum seekers (Poynder 2003, 1). The Bill was blocked in the Senate, but 13 years later the Chief of the Defence Force circumvented this legal constraint by using his powers under workplace health and safety laws to exempt members of the navy who are involved in border policing from the obligation to take 'reasonable care' of all individuals whom they encounter in the exercise of their duties (Wroe 2014).

In the liberal democratic tradition it is recognised that detaining people and thereby depriving them of their liberty is an extreme act that must be attended by rigorous procedural protections, yet liberal democracies now routinely detain refugees en masse without judicial consideration of the individual circumstances of their case. As Wilsher (2012, xii) argues, 'detention has … become a technique of control used in a great many different situations [in respect of] a wide variety of … foreigners, a few alleged to be individually dangerous, most not'. The Australian government itself characterises its immigration detention regime as 'an exceptional measure' (see the Human Rights Committee's decision in 'Shams et al. v. Australia', para. 4.11). Creating and maintaining such detention regimes has invidious effects on the rule of law. This is evidenced by the abusive culture within

19 Migration Act 1958 (Cth.) s.46A.

20 Migration Act 1958 (Cth) s.198AA.

immigration detention centres that I detailed above; a culture that also influences the policing of borders more broadly and the management of deportations. In the European context, Carloz-Tschapp (1997, 166–7) echoes other commentators in claiming that coercive practices associated with the detention and repulsion of refugees have corroded political processes. Contempt for the rule of law is not easily contained or restricted, and it is always a temptation to expand the use of draconian methods initially deployed only against one unpopular minority. Arguably the punitive border policing mechanisms that I have been discussing paved the way for the extraordinary anti-terrorism provisions, including provisions allowing for pre-emptive detention and, in Australia, detention of non-suspects,that were introduced by all Western democracies in the aftermath of 11 September 2001 (Galligan and Larking 2008). Wilsher (2012, 240) certainly suggests that the experience 'of holding aliens [at Guantánamo Bay] for considerable periods without legal rights such as access to lawyers, due process, judicial review or habeas corpus … was a significant factor in the choice … to house post-September 11 prisoners [there]'.

Conclusion

People who arrive in liberal democracies without prior authorisation, including asylum seekers, are routinely denied access to judicial review of their treatment by state authorities and, if they are imprisoned, of the circumstances in which they are detained; but they are also the objects of complex legislative regimes, not to mention the overwhelming coercive power of the state, so it may appear misleading to describe them as existing outside the pale of the law. Arendt's idiom is fitting, however, because the legislative regimes that constitute refugees as 'illegals' are extraordinary provisions falling outside the terrain of the general law.[21] Like Europe's pre-World War Two 'scum of the earth', contemporary refugees can be treated with impunity and are deprived of the legal standing that is necessary to contest their treatment. The term 'illegal' is thus an apt description for refugees, implying an illegality of status and being: the condition of the outlaw. Refugees are the West's unwanted peoples. Although occasionally objects of pity, compassion and 'humanitarian concern', they are never full subjects of justice, law and rights.

In line with the argument that I have been developing throughout this book, one cannot be a full subject of law in a democratic community without also appearing before the law as the bearer of a constituted legal personality. As I argued in Chapters 2 and 3, citizens of liberal democracies are accorded a

21 Newman and Levine (2006, 30) similarly point out that the detention of terrorism suspects by the United States at Guantánamo Bay established a space of exception that was beyond the reach of the law, but was at the same time a system within which rules and laws of exception proliferated.

legal persona and equality on the basis of their membership of 'the people' who are – problematically – assumed to be the ultimate source of law in the state. Lawful visitors and permanent residents are accorded legal status and provisional recognition of equality on the basis of the fact that 'the people', through their representatives, believe it is in their interests to welcome them. While they are not full equals in the sense of being co-legislators, their potential vulnerability is ameliorated by the fact that they have a national state capable of acting on their behalf and to which they can return. Refugees are the bearers of human rights, but without lawful authorisation to enter a state their appeal to human rights effectively marks them out as the rightless. They are objects of state power and of the laws of exception it wields, but they are not subjects of the law of equality that should – according to the argument I will make in Chapters 8 and 9 – nevertheless be extended to them if the integrity of that law is to be preserved.

Chapter 8
The International Human Rights Regime and the Sovereignty of States

Introduction

An individual's legal personality is constituted by his or her status as a national of some country. As we saw in Chapter 1, individuals' attributes as people who stand before and are recognised by the domestic law of their own and other states flow from their national membership, and their home state bears the responsibility of protecting them 'both domestically and internationally' (Weissbrodt 2008, 81). But since the UN Charter affirmed the human rights of all individuals in 1945, and the Universal Declaration of Human Rights (UDHR) spelled out these rights in 1948, individuals have also been accorded standing in international law. From this time, international law has constituted all individuals as subjects of human rights. As I have stressed throughout the course of this book, however, individual subjects of human rights are not accorded standing and the right to appear and claim rights under the domestic law of states other than their own. Even if they are excluded from rights-recognition in their own state, they are not accorded a right to claim rights elsewhere.

States are free to decide whom they will admit to their territory, and they frequently deny access to the law to those who are unlawfully present. As I demonstrated in Chapter 7, this is the case even when states exercise jurisdiction over individuals and make laws in respect of them. In such cases, although these people are subject to the power of the state – even to the point of being detained by it, they do not have standing on the basis of which to claim the rights or protections that the state affords to its own citizens and to those lawfully present in its territory. In theory, refugees can appeal to the institutions of international human rights law, but in Chapter 7 I canvassed the difficulty of accessing these institutions and of enforcing their findings. I argued as well that the sovereign autonomy of states, particularly in relation to matters relating to immigration and membership, is presupposed by international human rights law. Thus while international law recognises all people as the bearers of 'inalienable' rights, when these rights come into conflict with the sovereign rights of states over immigration and membership, they very quickly assume a mythical status. An appeal to human rights in these instances is an appeal to an imagined moral community akin to the ancient natural law community of gods and men. The appeal may have rhetorical or hortatory appeal but it binds states 'in conscience' rather than in fact. Furthermore, the appeal