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Human rights, the right to have rights, and life beyond the pale of the law

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In *The Origins of Totalitarianism*, Hannah Arendt is famously scathing of the societies established between World Wars I and II to advocate on behalf of refugees and advance the protection of human rights. In Arendt's view, 'all societies formed for the protection of the Rights of Man ... showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals'. The human rights they invoked were nothing more than 'the standard slogan of the protectors of the underprivileged, a kind of additional law, a right of exception necessary for those who had nothing better to fall back upon' (1968b, 293). In this article, I compare the position of exiles now living in or seeking to gain entry to Western states to that of Arendt's interwar refugees. I argue that for the modern-day exile, human rights continue to function inadequately as 'a kind of additional law ... for those who [have] nothing better to fall back upon'. I conclude that contemporary exiles have much in common with Arendt's interwar refugees, and pose similar dilemmas insofar as the invocation of universal human rights is concerned.¹

Justice and equity and access are the rights of citizens ...

— Fitzgerald Committee (Nicholls 2007, 129)

Introduction

In chapter 9 of *The Origins of Totalitarianism*, Hannah Arendt discusses the miserable conditions in which millions of refugees lived in the democracies of Western Europe between World Wars I and II. The refugees were routinely abused by the police

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1 The comparison I draw between the interwar refugees and the position of contemporary exiles is one I have made previously (Larking 2003; 2004), although in somewhat different terms and in less detail. This article picks up some of the themes of my earlier work. I also use material in this article taken from my unpublished PhD thesis (Larking 2010).

and other officials, who were able to act with impunity, Arendt argues, because the refugees had been thrust 'outside the pale of the law' (1968b, 277, 286). Arendt is disparaging of the societies formed to advocate on behalf of the refugees and to advance the protection of human rights. In her view (1968b, 292), these societies bore an 'uncanny' resemblance to societies dedicated to the prevention of cruelty to animals. They were, in other words, charitable organisations whose beneficiaries could not speak for themselves, nor be conceived as the subjects of justice. It was for this reason that the refugees required the protection of some 'additional law' or 'right of exception' (293) — a law or right that would be provided in the form of the so-called 'Rights of Man', but which would, ironically, mark its bearers out as underprivileged and unequal.

Arguably, Arendt's scepticism concerning resort to the language of human rights was warranted on the basis that these rights carried very little weight in international law before World War II. Individuals were entitled to claim rights — if at all — only against the state of which they were citizens. Where states recognised the rights of visitors or non-citizen residents, they did so solely on the basis of inter-state treaty obligations or principles of reciprocity (Brownlie 2003, 498; Holborn 1938, 690, n 45; Tiburcio 2001, 12; UN Committee on Refugees 1949, 11–12). These principles afforded no comfort to refugees whose presence — as individuals without the protection of a state of their own — was anomalous. This meant that the refugees had no legal standing on which to contest their treatment nor recognised political avenue through which to seek redress, as I show in more detail in the first part of this article. Contemporary commentators tend to accept without question Arendt's claim that the interwar refugees existed 'outside the pale of the law'. I demonstrate that the refugees were in fact the objects of a complex legislative regime, but that Arendt is nevertheless correct to suggest they were forced outside the pale of the law — although I will need to say more (in my section on the right to have rights) about what this means.

In many respects, the position of contemporary refugees is very different from that of the interwar refugees. An international refugee regime administered by the Office of the United Nations High Commissioner for Refugees is 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 have rights obligations 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 II. On the other hand, however, the international refugee and human rights regimes take for granted the sovereign autonomy of states and the right of states to regulate entry and matters related to citizenship and nationality. Recognised refugees are accorded a degree of standing and protection within states

that are signatories to the UN Convention Relating to the Status of Refugees (Refugee Convention), but arguably this is not enough to bring them 'within the pale of the law' in Arendt's sense. In addition, the international refugee and human rights regimes specifically qualify the rights of individuals deemed to be unlawfully present in a state's territory. These may be asylum seekers, whose refugee status has not been recognised by the country in question but who are seeking protection under the Refugee Convention, as well as other 'undocumented' migrants who have arrived in a country without lawful permission. In the course of this article, I will often refer to asylum seekers and undocumented migrants by the generic term 'exiles'. In all cases, these are individuals seeking residence outside their country of origin as a result of circumstances that are, broadly speaking, beyond their control. For the purposes of my definition, I assume they would be highly unlikely to receive lawful permission from their destination state to immigrate.² My concern here is also solely with the human rights commitments of liberal democratic destination or host states, which I will refer to simply as 'Western' states.³ Although exiles should, consistent with the basic presuppositions of the international refugee and human rights regimes, be afforded some fundamental rights, states commonly deny them such rights. They have limited avenues for redress when this occurs, and the quandary they find themselves in seems to bear out Arendt's claim that recourse to one's human rights is the marker of the underprivileged and unequal. In the second part of this article I examine the position of contemporary exiles. I point to significant parallels between the treatment of the interwar refugees and today's exiles, and I argue that — despite the proliferation of human rights instruments and protection mechanisms since 1945 — contemporary exiles have also, like their interwar predecessors, been forced outside the pale of the law.

In the final part of this article, I consider the significance, in Arendt's terms, of what it means to live within the pale of the law. I examine the relationship between legal subjectivity, Arendt's now widely discussed concept of a 'right to have rights', and the international human rights regime, and I ask whether Arendt's withering attitude to the invocation of human rights might perhaps still be warranted.

The interwar refugees

Millions of people were displaced by World War I and the redrawing of borders, civil

2 This assumption is warranted, given the restrictive admission policies of Western states, which I discuss briefly in the section below on contemporary exiles.

3 This reflects the Western European genealogy of the rights recognising nation-state that is the focus of Arendt's concern in *The Origins of Totalitarianism*.

unrest, and revolutions that followed it.⁴ Most of the refugees were for all practical purposes stateless. As Arendt (1968b, 281 n 28) points out, it was largely immaterial whether the refugees were *de jure* stateless, as a result of a formal denaturalisation process taken by their country of origin, or *de facto* stateless, because they no longer enjoyed the protection of their home country: in practice, their predicament was identical (see also Holborn 1938, 680; UN Committee on Refugees 1949, 6; Weis 1979, 44). The majority were in this position not because of anything they had thought or done in their country of origin, but simply because of their membership of some marginalised or persecuted minority (Koestler 1991, 93; Arendt 1968b, 294). On the other hand, some were outcasts as a result of their anti-fascist political convictions; of these, many were members of Europe's progressive elites. In his account of his 1939 detention in a French internment camp for political suspects, the Hungarian Jewish journalist Arthur Koestler notes (1991, 71) that those who had once been considered 'the martyrs of Fascist barbarism' had very quickly 'become the scum of the earth':⁵

... having been labeled 'refugees' and beaten out of three or four countries, [we] went about as if carrying an invisible leper's bell. Eminent scholars and dignitaries shed tears of happiness when taken to a 'democratic' jail after their escape [from fascism]. Girls with strong views on feminine emancipation accepted, as a square deal, the proposal to marry a passport or to prostitute themselves for a *permis de séjour*. [Koestler 1991, 93.]

As economic conditions worsened throughout the 1930s, the countries of Western Europe grew increasingly hostile towards their refugee populations, and xenophobia and anti-Semitism were rife (Koestler 1991, 46; Skran 1995, 27; Zuccotti 1993, 24–27). Western Europe's constitutional democracies constructed barriers to refugee entry, denied permission to reside or remain, and expelled refugees (Holborn 1938, 698; Jennings 1939, 105, 108; Marrus 1982, 84; Skran 1995, 123, 130–31, 133). The refugees were excluded from ordinary engagement in society with what Marrus (1982, 84) describes as a 'punctilious, almost Kafkaesque formality'. The minority of refugees

4 Up to two million Russians were rendered stateless after the 1917 Revolution and civil war, with Soviet Russia passing denaturalisation legislation in 1921, 1924 and 1925 (Weis 1979, 119; Hathaway 1984, 350). Turkey, Greece and Bulgaria alone produced another two million refugees (Skran 1995, 18), Italy at least 180,000 (UN Committee on Refugees 1949, 5), Germany at least 350,000 (see UN Committee on Refugees 1949, 5), and the Spanish civil war more than half a million refugees (Arendt 1968b, 278). The rise of totalitarianism was one factor contributing to the interwar refugee movements (Skran 1995, 16–17), but more significant numerically was the post-World War I redrawing of borders and the collapse of the Russian, Austro-Hungarian and Ottoman Empires (see Skran 1995, 18).

5 Koestler's expression is taken from the popular press, and it is one to which Arendt (1968b, 269) also refers.

who had passports, and thus evidence of their identity and former national status, might have them confiscated at any moment for the smallest infraction — such as being unable to provide the police with evidence of a fixed address (Skran 1995, 133; Marrus 1982, 84; Zuccotti 1993, 26). Valid passports and travel or residency visas were necessary not only in order to establish one's identity and travel legally across the borders of countries, but also 'for normal existence within countries' (Holborn 1938, 683). Without a passport, one could not stay in a hotel or enter a hospital (Marrus 1982, 84). One could not work legally, qualify for social or welfare benefits, or even apply for a visa or temporary residence permit (Holborn 1938, 683; UN Committee on Refugees 1949, 8–9). In fact, one could not 'marry, be born, or die without creating legal problems, to which there [was] no solution'.⁶ Without work or other rights, the refugees were constantly forced into lawbreaking acts (Arendt 1968b, 286; Marrus 1982, 84). Many obtained false identity documents or crossed secretly into states where the prospects for survival appeared more promising (Holborn 1938, 689; UN Committee on Refugees 1949, 14). The refugees thus adopted 'that very posture of illicit activity and secretive behaviour which was so much a part of anti-foreign and anti-Semitic propaganda' (Marrus 1982, 84; and see UN Committee on Refugees 1949, 24).

The practice of imprisoning refugees in specially established internment camps became increasingly common in the lead-up to World War II (Arendt 1968b, 288; Holborn 1938, 689, 693; Skran 1995, 216–18; Zuccotti 1993, 26). Refugees without valid visas lived under the constant threat of imprisonment. Expelled from one country, they were liable to imprisonment either for failing to comply with the expulsion order or for illegally entering another country. There was no avenue of legal recourse against imprisonment in these circumstances. The refugees were caught in:

... a conflict between two sovereign wills, the one expelling them, the other forbidding their entry. There was no place left to go, and in many cases vagrancy or suicide were the only alternatives of the refugee. [Holborn 1938, 689.]

France alone spent three million francs a year imprisoning undocumented or 'undesirable' aliens (Holborn 1938, 689, n 41). As Arendt (1968b, 288) points out, echoing Koestler's first-hand account, 'even though there were considerable differences in the treatment of their inmates':

6 Extract from memorandum of 6 May 1921 on the Possible Action of the League [of Nations] in Connection with Russian Refugees, *Noel-Baker Papers* 4.450, in Skran 1995, 103; see also UN Committee on Refugees 1949, 17–18.

... concentration camps were ... provided for the same groups in all countries ... if the Nazis put a person in a concentration camp and if he made a successful escape, say, to Holland, the Dutch would put him in an internment camp.

The precarious position of the refugees was exacerbated by the fact that many democracies simply devolved responsibility for them to the police (Arendt 1968b, 287). In the early 1930s, regulations were introduced in France to enhance the Ministry of the Interior's enforcement powers in respect of expulsions (Skran 1995, 131). The Ministry acted through the police, and while '[i]n theory, the expulsion order came from the Minister ... in practice, orders could be issued by local policemen' (Skran 1995, 132). In many states, expulsions were undertaken secretly (Jennings 1939, 105; Skran 1995, 135), and no appeal mechanisms were provided to the refugees (Jennings 1939, 106). It is not surprising, then, that in their dealings with the refugees, the police themselves began to commit illegal acts, smuggling stateless people across borders in order to be rid of them, with the result that police in neighbouring countries routinely did the same (Arendt 1968b, 283–84; Marrus 1982, 84; Holborn 1938, 693, n 61). Arendt (1968b, 287) concludes that in the exercise of their arbitrary authority over the refugees, the police could no longer be characterised as 'an instrument to carry out and enforce the law', but instead functioned as 'a ruling authority independent of government and ministries' (see also Skran 1995, 132). The police in a number of Western European countries went so far as to establish strong links with the Gestapo (Arendt 1968b, 289),⁷ so that when war broke out and the Nazis occupied countries such as France, the local police not only did little to oppose them, but often actively cooperated in their oppression of the domestic population. The story of this collaboration is now widely known (Deák, Tomasz Gross and Judt 2000, 6; Jenkins 1988, 142–43; Koestler 1991, 71, 74–75; Marrus and Paxton 1982, 703, 706).⁸

After the outbreak of war, Britain, Canada, Australia, the United States and Peru also succumbed to the 'totalitarian infection' (Arendt 1968b, 278) sweeping Europe by restricting the refugees' movements, and in many cases engaging in the mass imprisonment of refugees, along with residents with links (such as ancestral ties) to the axis countries, all of whom were branded 'enemy aliens' regardless of their attitude — and often their opposition — to fascism. The indiscriminate nature of these internments, as well as the punitive conditions in the camps, provoked criticism from civil libertarians, but the incarceration regimes were also a populist measure that

7 As well as the GPU, the USSR's foreign intelligence service.

8 Koestler (1991, 46) also points out that after war broke out but prior to the Nazi occupation of France, '[t]he country was living under the *loi des suspects*, which gave police practically uncontrolled power over the individual'.

received broad community support (see Bashford and Strange 2002⁹). Eventually, the critics succeeded in forcing reviews of some aspects of the detention regimes in some countries, but it was not until years after the war that the full scope of the internment regimes was recognised and their legacy of injustice gradually acknowledged.¹⁰

In Arendt's account (1968b, 277, 286), the intolerable position in which the interwar refugees found themselves was a function of the fact that they were forced to live — or to die — 'outside the pale of the law'. In 1949, the United Nations Ad Hoc Committee on Refugees and Stateless Persons (UN Committee on Refugees) used similar language to describe the stateless. A person who is stateless — whether *de jure* or *de facto* — is, it said (6–8), 'an anomaly', 'having no definite legal status' and 'obliged to live outside the law'. Initially, political asylum offered the only possible escape from this impasse, and although Arendt is disparaging of the failure of states to accord asylum to refugees *en masse* (1968b, 280 and see 284–85), it was used on a significant scale to grant sanctuary or even permanent protection to particular individuals (Holborn 1938, 681). But the principle of asylum did not provide the refugees with an enforceable claim to protection.

Of fundamental significance was the fact that the refugees had lost the protection of their national governments in the context of an international system within which the primary actors were — as they continue to be — states rather than individuals. The system takes for granted that '[t]he normal individual is a national of some state enjoying the protection of the government of that state' (Jennings 1939, 99). Nationality¹¹ is the mechanism via which an individual's legal identity is recognised

9 Bashford and Strange (2002, 523) note that while the internment of refugees and other 'enemy aliens' in Australia was governed by the Hague Convention on prisoners of war, the reality of conditions in detention was often at odds with the principles propounded by the Convention.

10 Dyzenhaus and Thwaites (2007, 9) claim that the majority's endorsement of detention in cases such as *Liversidge*, 1942, in the United Kingdom, and *Korematsu*, 1944, in the United States, came afterwards to be 'regarded as badges of shame'. For details of the wartime internment regimes, see Lafitte 1940; Bashford and Strange 2002; and Larkin 1996. A precedent for these internments was set in Britain and Australia during World War I. See Bashford and Strange 2002, 517–19. For conflicting views on the precedent set by wartime internment in Australia, see McHugh and Kirby JJ's reasons in *Al-Kateb v Godwin*, 2004, at [55]–[61] (McHugh) and [162]–[166] (Kirby, in dissent).

11 Used here as a 'politico-legal' concept of international law, denoting membership of a sovereign nation-state (Weis 1979, 3), rather than as a sociological concept referring to membership of a historical, cultural or ethnic nation (Weis 1979, 13).

and protected outside his or her home state (see Weis 1979, 162). Individuals are 'connected with international law' through their state membership (Weis 1979, 13), and historically they were objects rather than subjects of the law (McCorquodale 2006, 307–08; Weis 1979, 32). In the domestic sphere, bonds of citizenship are 'the juridical and political link' (*Messih v Minister of the Interior*, in Weis 1979, 31) uniting individuals with their state and constituting each individual's legal personality, as well as the legal community of the state itself (Brownlie 2003, 497).¹² Through the exercise of 'national' or 'personal' jurisdiction, states establish the particular attributes of a person's legal personality, imposing 'legal characterisations upon persons' (Lowe 2006, 340) under marriage laws, for example, or laws relating to the age of majority. Citizenship provides the basis upon which an individual appears before and is recognised within domestic law; it is the foundation on which the individual asserts his or her rights against the state (see Weis 1979, 29–30). The content of these rights, as well as the duties associated with citizenship, are determined by the state's own laws.

All individuals are 'aliens' in respect of states of which they are not, within the terms of the state's own legislation, nationals (Tiburcio 2001, 1). But in addition to their national or personal jurisdiction, states exercise territorial jurisdiction. According to the doctrine of the sovereign equality of states, each state has legal competence in respect of its territory and the population on that territory, and within its territorial jurisdiction is entitled to develop policy free from external interference.¹³ An alien on the territory of another state is subject to the territorial jurisdiction of that state and thus bound by its laws. An alien may also receive legal recognition and be attributed certain rights under the laws of his or her host state (Brownlie 2003, 500; Lowe 2006, 342) but this is within the state's sovereign discretion. Historically, the state's responsibility in international law to the alien and the alien's rights in respect of the state were founded solely on inter-state duties, with aliens travelling and living

12 The terms 'nationality' and 'citizenship' are often used interchangeably, although the language of citizenship is more common in association with the domestic aspects of membership, while that of nationality is generally used to refer to those aspects of membership relevant in international law (Tiburcio 2001, 17; Weis 1979, 4–5).

13 Given that the national principle allows states to extend the application of their laws to nationals living outside their territorial borders (Lowe 2006, 345), conflicts may arise in which more than one state legislates in respect of the same conduct. In practice, however, this occurs infrequently, with states recognising other states' national jurisdiction for the purposes of establishing individuals' legal status, and — on the other hand — generally refraining from exercising their extra-territorial jurisdiction in a manner at odds with other states' territorial jurisdiction (Lowe 2006, 347).

abroad under the protection of their national state.¹⁴ The state provided, as it still does, all those services, including the provision of identity documents, necessary to allow its nationals 'to carry out the normal formalities of civilian life' while living in another country (UN Committee on Refugees, 24). Meanwhile, the legal standing and identity of individuals in their national state was recognised within another state's borders in accordance with principles of inter-state reciprocity, usually enshrined in a treaty between the particular states (Brownlie 2003, 498; Holborn 1938, 690, n 45; Tiburcio 2001, 12; UN Committee on Refugees 1949, 11–12).

Without the protection of their home state, and unable to establish and assert a legal identity, the interwar refugees could be treated with impunity. Regardless of how they were treated, they had no recourse to legal remedies (UN Committee on Refugees 1949, 44). Europe in the interwar years was thus confronted with the problem of millions of refugees living in the most precarious circumstances. The international response to this crisis was piecemeal. The League of Nations was initially spurred into action in 1921 by calls for a collaborative international response from those states most immediately affected by the refugee influx (Holborn 1938, 682), combined with the advocacy of international relief organisations on behalf of the Russian refugees (Skran 1995, 85). The League Council established a High Commissioner for Russian Refugees, and in 1922 the Nansen passport system — named after Fridtjof Nansen, the first High Commissioner for Refugees — was devised specifically for the Russian refugees.¹⁵ It created a special internationally valid certificate of identity for Russian refugees to substitute for a national passport (Holborn 1938, 684). Insofar as the certificate attested to a person's identity and the fact that he or she was formerly a Russian national, it facilitated travel across international borders and provided what Skran (1995, 104–05) describes as 'a modicum of legal status'.

14 The right to exercise diplomatic protection in accordance with the law of state responsibility for injuries to aliens provides that a wrong under international law inflicted by the organs of one state upon a national of another is an injury against the latter state, which it is entitled to prosecute. The law is concerned with the rights of *states* rather than *individuals* (Brownlie 2003, 374 and 501; Steiner and Alston 2000, 82).

15 Adopted under the 'Arrangement with regard to the issue of certificates of identity to Russian refugees' of 5 July 1922, *League of Nations Treaty Series*, Vol XIII, No 355, in UN Committee on Refugees 1949, 59–60. The Nansen system was gradually extended over the years to include a range of other refugee groups, including Armenian refugees (Holborn 1938, 684, n 15), 'Assyrians and other Christian minorities from the former Ottoman Empire' (Skran 1995, 113; Holborn 1938, 686), refugees from the Saar region (Jennings 1939, 100, n 4), and Czechoslovakian refugees from the Sudetenland (UN Committee on Refugees, 27).

But Nansen certificates were vastly inferior substitutes for national passports and the national status of which valid passports are evidence. While the 1922 Arrangement recommended that states parties grant transit visas upon request to certificate holders, this was dependent on the refugees already having a visa in respect of the country to which they wished to travel. The Arrangement provided no guarantee in respect of the grant of such visas. Furthermore, it specified that 'the grant of the certificate does not in any way imply the right of the refugee to return to the state in which he obtained it'. This provision dramatically reduced the likelihood of refugees being granted entry visas to other countries.¹⁶

In 1933, the Convention Relating to the International Status of Refugees codified the Nansen certificate Arrangements, making them legally binding for signatory states.¹⁷ Parties to the Convention undertook to issue Nansen certificates, 'valid for not less than one year', to those Russian and Armenian refugees 'residing regularly in [their] territory' (Art 2). Certificates issued under the Convention automatically included a right to leave and to return to the territory of the issuing state (Art 2). Skran (1995, 136) notes that the Convention broke new ground in treaty law by containing the first-ever prohibition against expulsion and refoulement. The prohibition was, however, extraordinarily weak. It was open to qualification on the basis of concerns relating to 'national security or public order', and was widely interpreted as applying only to refugees to whom asylum had already been granted (Skran 1995, 136). Skran (1995, 72) also suggests that the 'national security or public order' qualification could be broadly interpreted, allowing for the expulsion of refugees in periods of recession or times of war. Furthermore, where such expulsion was prevented by border controls imposed by other countries, the parties reserved 'the right to apply such internal measures as [they deemed] necessary' (Art 3). This clause provided a basis on which the detention of refugees could be legitimated within the terms of the Convention.

The Convention also dealt with refugees' juridical condition, specifying that their personal status should be governed by the law of their country of domicile or, in the absence of domicile, the law of their country of residence (Art 4). It specified that rights acquired under the refugees' former national law, particularly those associated with marriage, should be respected (Art 4), and that refugees should have 'free and ready access to the courts of law' (Art 6). In addition, the Convention stated that restrictions on refugees' entry to the labour market should be relaxed (Art 7), and

16 Speaking about arrangements to improve the status of stateless people after World War II, the UN Committee on Refugees (1949, 43) notes that a 'right to return' clause 'alone makes it possible to obtain an entry visa for other countries'.

17 *League of Nations Treaty Series*, Vol CLIX, No 3663, in UN Committee on Refugees 1949, 71.

that 'the most favourable treatment' accorded by states parties to foreign nationals should be extended to refugees residing in their territory in relation to industrial accidents (Art 8) and to welfare and relief (Arts 9, 10, 11). In relation to education, the Convention specified that refugees should be accorded 'treatment as favourable as other foreigners in general' (Art 12). States parties undertook not to impose special duties or taxes on refugees, except those costs associated with the administration of the Nansen regime (Art 13). Parties also agreed not to refuse to refugees those rights that were generally extended to foreigners subject to reciprocity (Art 14). Notably, however, certificates were issued by signatory governments rather than League of Nations delegates, so accession to the system was no guarantee of compliance (Skran 1995, 120). In practice, Nansen certificates were expensive and difficult — if not impossible — to obtain (Skran 1995, 108, 120, table 12, 121; Holborn 1938, 684).

German government opposition initially prevented the extension of the Nansen passport system to refugees from the Third Reich (UN Committee on Refugees 1949, 26). A separate High Commissioner's Office for German Refugees was established in October 1933, although the League of Nations eventually took over administration of the Office, and in 1938 amalgamated the refugee work being conducted on its behalf (UN Committee on Refugees, 26–27). A provisional agreement in 1936 and a Convention in 1938 provided for the issue of travel documents to German refugees,¹⁸ and contained protections similar to those provided to Nansen refugees. The position of Austrian refugees was ostensibly assimilated with that of German refugees in September 1939, although only three countries signed the Additional Protocol extending the 1938 Convention to refugees from Austria (UN Committee on Refugees 1949, 27, 33, 39). The support and resources provided by the League to the High Commission were paltry, and the powers exercised by his Office 'rigidly limited' (Lafitte 1940, 61). In 1938, in recognition, Skran (1995, 78) says, of 'the declining prestige of the League of Nations', the Evian Conference agreed to establish an additional organisation to deal with refugees from the Third Reich, the Intergovernmental Committee for Refugees (IGCR). The IGCR functioned from 1938 until 1 July 1947, but its functions were purely diplomatic; it was under-resourced, and it 'lacked an international secretariat' (Skran 1995, 78).

18 In addition to 'persons possessing or having possessed German nationality', the Convention covered 'stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government' (League of Nations document C.75.M.30/1938/XII, in UN Committee on Refugees 1949, 39). The 1936 provisional agreement had excluded stateless people from its refugee definition.

The various organisations created to deal with refugee issues during the interwar years received funding from the League of Nations Council and Assembly, and drew on the League Secretariat for expert advice (Skran 1995, 76). As Skran (1995, 76) points out, the League Assembly was a representative body in which decisions were made by consensus, so any significant measures taken on behalf of refugees required the support of all members of the League. This was particularly significant given that membership of the League included Germany and other refugee-producing countries such as Romania — which passed nationality laws in 1924 that made around 100,000 Jewish citizens stateless (Skran 1995, 94). No funding was provided directly for refugee relief; instead, the High Commissioner's Office and its successors were expected to coordinate the efforts of individual governments and charitable institutions (Holborn 1938, 687; Hathaway 1990, 138).

Writing in 1940, Lafitte argued:

The urgent need of the refugees is precisely for an independent Protecting Power which can ensure to them some of the rights and backing which the ordinary citizen enjoys when in a foreign country, by virtue of having a Government of his own to protect him. [Lafitte 1940, 62.]

This protection was never provided to the interwar refugees, even to the Russian refugees for whom the Nansen regime was created, and thus who could be regarded as 'the aristocracy of the stateless people' (Arendt 1968b, 281, n 30). The Nansen certificates and their equivalents only ever provided temporary legal recognition, and were never considered a pathway to resettlement or naturalisation (Goodwin-Gill and McAdam 2007, 358). Furthermore, it remained virtually impossible for refugees to obtain visas, including transit visas, unless they were sponsored by an individual or organisation prepared to take financial responsibility for them.¹⁹ In addition, widespread failure by signatories to incorporate the Nansen Arrangements into domestic law meant that the refugees' legal status remained anomalous, and the many reservations attached to the Arrangements ensured that when honouring those obligations became politically contentious within the signatory state, its obligations could be easily evaded.²⁰ Despite the scale of the refugee problem and the clear and urgent need for a coordinated response, democratic governments in Europe and around the world 'consistently refused to create a world-wide migration service' (Skran 1995, 99), or to institute a comprehensive strategy to provide the

19 See Lafitte 1940, 22, 24 and 37 in respect of the refugees from Germany.

20 See Holborn 1938, 684; Jennings 1939, 98; Skran 1995, 108 and 120; and, in relation to the UK experience, Lafitte 1940.

legal recognition and permanent protection that the refugees so desperately needed. Holborn (1938, 688) suggests that all schemes aimed at longer-term solutions, such as those providing for the mass resettlement of refugees, 'failed through inability to secure necessary funds'. But the failure was also, and more fundamentally, a result of the unwillingness of states to accept obligations that would limit their sovereign freedom in relation to naturalisation and immigration.

Contemporary exiles

The parallels between Western Europe's treatment of the interwar refugees and the current treatment of exiles are striking. Also striking, however, is that the measures now taken by Western states to control access to their territory go well beyond the actions of the interwar democracies, and the treatment of exiles within these states is arguably even more brutal — certainly it has been institutionalised to a greater degree than occurred in Europe between World Wars I and II.

Like the interwar refugees, today's exiles are a mix of political refugees,²¹ members of persecuted minorities, and individuals trying to escape poverty, generalised war, or otherwise unsustainable living conditions. The majority remain nationals of the country they have fled, but they do not enjoy the active protection of their national government in the international sphere.

Exiles are repelled at the borders of states, as the interwar refugees were, but they are also actively intercepted and repelled en route to Western countries²² and incarcerated in third countries at the cost of Western states. The sophisticated barriers designed to prevent access to Western states mean that exiles are, like their interwar predecessors, forced into illegality — manufacturing travel documents, evading border controls, or engaging the services of professional people smugglers (Brennan 2002, 254; Goodwin-Gill and McAdam 2007, 375; Weber 2010; Weissbrodt 2008, 126; UNHCR 2006, 25). This is the situation for refugees and asylum seekers, along with other exiles. Most European countries do not have dedicated refugee settlement programs providing recognised refugees with authorisation to immigrate. As a result, the only means by which a refugee may obtain asylum in these countries —

21 Whose active opposition to their own government or to factions within it has made them a target of persecution in their home country.

22 The interdiction of exiles may conflict with the 'spirit' of the modern refugee protection regime, but, as Goodwin-Gill and McAdam point out (2007, 360), it is consistent with the letter of the law: 'states retain considerable discretion to construct sophisticated interception and non-arrival policies within the letter, if not the spirit, of the law'.

which are signatories to the Refugee Convention — is to enter their territory without authorisation and then lodge an asylum claim. Other countries with dedicated resettlement programs cap the number of refugees accepted, and the size of these programs is insignificant compared with the number of people identified by the UNHCR as being in need of its protection globally, let alone those people who fall outside the UNHCR's protection mandate. Border policing by Western states also means that exiles are forced to undertake dangerous and life-threatening journeys, with unknown thousands dying in the attempt to obtain access to or asylum in a Western democracy.²³

Like the interwar refugees, exiles are smuggled across borders by Western officials collaborating with abusive regimes and quite willing to stoop to illegal acts.²⁴ Within Western states, exiles are widely vilified (see Nyakairu 2010).²⁵ In many cases, they are denied social support or the right to work (Sabates-Wheeler 2009, 26, citing an Amnesty International report from 2006; Weber 2010, 37; Weissbrodt 2008, 131) and are excluded from participation in the ordinary functioning of society.²⁶ They are

23 See, among others, Kumin 2007, 27; Marr and Wilkinson 2003, 236; Mills 2008; Weber 2010, 50.

24 As well as using force to prevent undocumented migrants entering their territory, all Western states use force to deport failed asylum seekers and other undocumented migrants. In the latter case, the use of force may extend to intravenously administered 'chemical restraints' (see ABC 2005; Nicholls 2007, 139). There is also evidence in Australia of officers from the departments of immigration and foreign affairs engaging in identity fraud and conspiring with officials in autocratic countries to facilitate the deportation of asylum seekers (ABC 2005; Glendenning et al 2004). In relation to the deaths and disappearance of asylum seekers following forced removal from Australia, see Burnside 2007, 72; Corlett 2005; Glendenning et al 2004.

25 For a discussion of the racism underlying Australia's response to asylum seekers, see also McMaster 2001 and Grewecock 2006.

26 Denial of social support and the right to work alone make participation in the ordinary functioning of society extremely difficult. Unlawful status (or semi-lawful status — for example, where a person has a residency visa but is breaching the working restrictions attached to that visa) also makes ordinary social participation incredibly difficult, given the need to evade official attention. Without lawful status, a person cannot, for example, open a bank account (Sabates-Wheeler 2009, 31). Individuals may also be unwilling to seek medical assistance (regarding the European Union, see Sabates-Wheeler 2009, 35, citing a Platform for International Cooperation on Undocumented Migrants (PICUM) report from 2007), or redress if they are the subject of a civil wrong such as a physical assault or refusal by an employer to pay wages (regarding the United Kingdom and generally, see Sabates-Wheeler 2009, 38, 41).

denied access to the courts,²⁷ imprisoned (often for years at a time),²⁸ and treated with casual and vicious brutality.²⁹ Many have committed suicide after months or years in detention.

Arendt argues that governments in Western democracies during the interwar years simply devolved responsibility for refugees to the police, who were given licence to mistreat the refugees with impunity. While impunity characterises the contemporary treatment of exiles, a stunning level of callousness has been actively fostered by governments intimately involved in the administration of border policing. Although quick to deflect blame by implicating independent contractors paid to run detention centres and conduct deportations, and quite willing to accord great scope to the police and military in their dealings with exiles, Western governments have promoted a culture of brutality and have aggressively asserted executive control in asylum and immigration matters. This is evidenced by the sheer volume of reports from NGOs, UN bodies, ombudsmen, and Parliamentary committees that detail and critique conditions in immigration detention, as well as the horrific abuses associated with border policing, combined with the responses and attitudes of governments themselves. Thus government ministers in Western countries routinely refer to exiles in the same context as criminals and terrorists, and characterise them as a threat to Western livelihoods and ways of life at the same time as they support and develop ever-more restrictive and punitive border policing regimes.

27 Asylum seekers are denied access, or have only limited access, to the courts for merits review of their protection applications in most Western countries. In Australia, judicial review of protection applications has been restricted to 'all but exceptional circumstances' (Ruddock 2000, 8). Access to the courts more generally is also impossible if an individual is prevented by his or her unlawful status from prosecuting a civil wrong (see note 26 above) or from approaching the police to report having been the victim of a crime.

28 Article 31(2) of the Refugee Convention says that states should not impose penalties on refugees for unlawful entry, but this is qualified to allow for the detention of asylum seekers. Asylum seekers, along with other 'undocumented' migrants, are 'routinely' detained in many countries 'on an arbitrary basis, for unduly prolonged periods' (UNHCR 2008, 134–36). In Australia, asylum seekers whose refugee application has been rejected, or who have been accepted as Convention refugees but denied a protection visa on the basis of an adverse security assessment, are commonly detained for years at a time, and Australia's High Court has found that a person who has been denied a visa but who cannot be deported from the country (for example, because the person is stateless) may be incarcerated for the rest of his or her life (*Al-Kateb*, 2004; *Al Khafaji*, 2004).

29 In the Australian context, see — among many others — Bhagwati 2002; Australian Human Rights Commission 2011 and 2010; Human Rights and Equal Opportunity Commission 2004, 2001 and 1998; Oxfam 2007; Palmer 2005; and United Nations Committee Against Torture 2008.

Like the interwar refugees, today's exiles are the objects of complex legal regimes, and some enjoy 'a modicum of legal status',³⁰ but arguably none can be considered to live within the pale of the law in Arendt's sense. The principle of asylum is still used to accord at least temporary protection to some individuals and, as I have said, is now buffeted by a regime of protection in the form of the Refugee Convention and other international human rights instruments, but it is not used to provide asylum seekers with protection en masse, and nor does it provide an enforceable claim to protection.

Article 14(1) of the Universal Declaration of Human Rights (UDHR) declares that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. Although the phrase 'to enjoy' seems to imply that countries have an obligation to accord asylum to those who seek it, this was not the intention of the signatory states (Goodwin-Gill and McAdam 2007, 358). In any event, the UDHR is not a legally binding instrument. While many of its provisions have legal force as a part of customary international law, the right to asylum is not one of these (see Brownlie 2003, 534; Goodwin-Gill and McAdam 2007, 371). The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were drafted in order to provide a legally binding articulation of the rights contained in the UDHR, but the right to asylum does not appear in either. Proposals to include a right to asylum were rejected at the time the Covenants were drafted, as were similar proposals in respect of the earlier Refugee Convention (Goodwin-Gill and McAdam 2007, 361–62). All subsequent efforts to secure asylum as an enforceable universal human right have failed (see Goodwin-Gill and McAdam 2007, 362–65).

While a whole raft of international instruments now proclaim that humans everywhere are free and equal in rights, states remain the primary duty bearers in respect of rights recognition.³¹ It is true that individuals enjoy a degree of independent standing in international law unknown prior to World War II, but in order to exercise and to enjoy rights one must still be able to claim them against a particular state. The obligation upon a state to recognise the basic rights of *all* individuals within its jurisdiction is now well established in international law (see UN Human Rights Committee 1994) and, in some instances, recourse may now be had to an international rights treaty

30 Sabates-Wheeler (2009, 6) points out that various categories of 'irregular' and 'regular' migrants exist 'according to a range of legal statuses', and that between these there are 'many shades of grey'.

31 The United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998) recognises that individuals may have duties to protect human rights, but also notes that states remain the primary duty bearers in respect of rights.

body where rights abuse at the hands of a state or its agents is alleged and recourse to the state's own courts has proved futile. This is an advance on the inter-war years, but the views of the human rights treaty bodies are not binding, and adverse views are routinely ignored or repudiated by states. It is also the case that a state's general obligation of rights-recognition is qualified in respect of individuals who are unlawfully within its territory. Most significantly, the right to liberty of movement recognised in Art 12(1) of the International Covenant on Civil and Political Rights and in numerous other UN and regional human rights instruments applies only to aliens lawfully in a state's territory.³² Even those human rights most strongly protected by international law, such as the right not to be subject to torture, do not guarantee exiles access to permanent protection or equal recognition within their host state.

Asylum seekers whose status as refugees under the Refugee Convention is ultimately recognised by a Western state may be considered to be in an enviable position by comparison to their fellow asylum seekers, 'undocumented' migrants, and those refugees confined to camps in the developing world. Generally speaking, they can hope for eventual integration on equal terms in their host community, either through the grant of permanent residency or through citizenship. Even these refugees, however, are not guaranteed protection — the host country is not required by the Convention to offer permanent protection but is simply enjoined not to return refugees to countries in which they may be persecuted. Those refugees who are granted protection visas may have their right to remain revoked if the circumstances in their home country change and their host country concludes that they are no longer refugees within the terms of the Convention. In addition, Art 33(2) allows recognised refugees to be refouled where they can be characterised on 'reasonable grounds' as 'a danger to the security of the country', or where they have been convicted of 'a particularly serious crime' and represent 'a danger to the community'.³³

32 International law has never recognised a right to enter a country other than one's own, and it is a basic tenet of international law that states are free to decide whom they will admit to their territory (see UNHCHR 2006, 17). As a result, the question of whether a person who is not a national is lawfully within the territory of a state is governed by the domestic law of that state (UN Human Rights Committee 1999, para 4).

33 In Australia, this provision has been relied on to detain recognised refugees indefinitely. Refugees have no right to know the evidence on the basis of which adverse security assessments are made, nor are they able to challenge such assessments. See Australian Human Rights Commission 2010, 16 and Narushima 2010.

The right to have rights — living within the pale of the law

One of the clues, Arendt (1968b, 286) says, to the predicament of the interwar refugees, and a sure sign that they had been 'forced outside the pale of the law', was the fact that the commission of a criminal offence actually served to improve their legal position. In Arendt's analysis, the refugee accused of a crime became an 'exception provided for by law', as opposed to an exception 'outside the pale of the law' altogether (1968b, 286). Ordinarily speaking, the law acknowledges only 'one difference between human beings, the difference between the normal noncriminal and the anomalous criminal', but even the anomalous criminal is recognised by and has rights under the law (1968b, 287). Thus:

The same man who was in jail yesterday because of his mere presence in this world, who had no rights whatever and lived under threat of deportation, or who was dispatched without sentence and trial to some kind of internment because he had tried to work and make a living, [could] become almost a full-fledged citizen because of a little theft. [Arendt, 1968b, 286.]

By virtue of the theft he acquired standing in the eyes of the law and became entitled to its protections — he was granted again 'some kind of human equality' (Arendt 1968b, 286).

The non-criminal stateless person was by contrast merely an object to be disposed of by the police as expeditiously as possible. What was true for the interwar refugees remains true for many contemporary exiles. In most Western countries, seeking asylum or simply being unlawfully present does not constitute a criminal offence.³⁴ Instead, exiles are subjected to the coercive power of the executive through measures characterised as 'administrative' and as designed to facilitate the state's control over who enters and remains in the country. In these circumstances, the various human rights accorded to exiles in international law would seem to do little to dent their basic condition of rightlessness.

It is Arendt's argument in *The Origins of Totalitarianism* (1968b, 295) that rights may be accorded to — although, she admits, 'hardly enjoyed' by — individuals living 'under conditions of fundamental rightlessness'. The movements of people living 'outside the pale of the law' may be less restricted, for example, than those of prisoners incarcerated under the ordinary criminal law, and if exiles are detained in

³⁴ This is no longer the case in Italy (as a result of Law 94/2009) and the United States. Entering the United States via its border with Mexico without papers is now a felony (Mills 2008), and Arizona criminalised unlawful residence under state law in 2010 (Lagan 2010; McQuillen 2010).

a democratic country they may have greater freedom of opinion than they would while living 'in an ordinary despotism' — but none of this, Arendt says (1968b, 296), 'changes in the least their fundamental situation of rightlessness'. For those living outside the pale of the law:

... the prolongation of their lives is due to charity and not to right, for no law exists which could force the nations to feed them; their freedom of movement, if they have it all, gives them no right to residence ... and their freedom of opinion is a fool's freedom, for nothing they think matters anyhow. [Arendt, 1968b, 296.]

Even the rightlessness suffered by those who died in Germany's concentration camps was not, Arendt (1968b, 296) claims, primarily a result of the fact that the victims were deprived of their right to life, but rather that before they were killed they were rendered superfluous. Thus, the Nazis:

... started their extermination of Jews by first depriving them of all legal status ... and cutting them off from the world of the living by herding them into ghettos and concentration camps; and before they set the gas chambers into motion they ... carefully tested the ground and found to their satisfaction that no country would claim these people. The point is that a condition of complete rightlessness was created before the right to live was challenged. [Arendt, 1968b, 296.]

The apparent contradiction in Arendt's claim that the Jews were made completely 'rightless' *before* being deprived of the right to life is explained by her identification of a 'right to have rights' as a precondition for having any of those fundamental rights usually described as 'human rights', but which she argues are actually realisable only as the rights of citizens. Without a 'right to have rights', even those Jews who managed to escape the gas chambers did not have a genuine 'right to life' because their lives did not warrant the protection of any law upheld and enforced by a specific political community — all they could rely on was the occasional law of exception, such as that established by the Nansen regime. Whether they lived or died had become a question of charity rather than of justice and of right.

Arendt's 'right to have rights' thus invokes a particular conception of law and of what it means to live within the pale of the law. The 'law' to which Arendt refers is an artefact of a particular sort of political community. It functions as a fence within which the power produced by a political community of equals is both contained within sustainable boundaries and fostered. In Arendt's account, humans are not born equal — contra the rights declarations of both the eighteenth and the twentieth centuries — instead, they become equal on the basis of a political commitment 'to

guarantee [each other] mutually equal rights' (1968b, 301 and see 54).³⁵ Rights are then recognisable not as our 'inalienable' or 'natural' birthright, but as a contingent political achievement. The strength and durability of a constitutive law of equality depends first on its consistent application to all who are subject to it, and second on the ongoing vitality of the political project that creates and maintains it. Within a polity committed to equality and rights recognition, provisions that create a class of people specifically excluded from recognition on equal terms corrode the polity's constitutive law of equality. This is the case in respect of contemporary exiles in Western states as it was the case of the interwar refugees in Western Europe. The non-citizen resident or visitor who is lawfully present in the Western state does not pose the same problem for the state's constitutive commitments because that person is accorded recognition and equality on the basis of his or her standing as a member of another state. As in the interwar years, nationality and citizenship continue to be the primary basis for establishing a person's legal personality and thus that person's capacity to appear before the law in other states as well as his or her own.

In "'The Rights of Man": what are they?', Arendt (1949, 36) claims that the 'right to have rights' is the *only* universal human right. It is a right to political belonging and, like all other rights, it does not arise naturally but is the outcome of political commitment. The right to have rights has not yet been universally secured, but because the sovereign state system with its founding principle of national belonging now girdles the Earth, being deprived of the right to have rights has 'become identical with ... expulsion from humanity altogether' (Arendt 1968b, 297).

It may be argued that the right to have rights can and should be secured on the basis of membership of a global community in which a whole range of rights are recognised and secured — thus, through the continued development of an enforcement apparatus to entrench and uphold existing international human rights instruments. The development of a coercive institutional structure along these lines would, however, threaten political plurality. As a right to political membership, the right to have rights can only be realised in a manner consistent with the plurality that is a precondition of politics. The right 'of every individual to belong to humanity' (Arendt 1968b, 298) must therefore be a right to membership in a state among states, or 'a country among countries' (Arendt 1968a, 81). Nevertheless, recognition of the right necessarily limits the sovereign autonomy of these polities. Arendt's account of the extent of these limits is not clear cut. In "'The Rights of Man": what are they?', she supports fairly minimal limits, although even these are significant by comparison

to current conceptions of the international order.³⁶ In *The Origins of Totalitarianism*, however, her account of the significance of legal status and political belonging implies a more expansive conception of the right to have rights. This issue is best resolved, consistent with Arendt's own thought, by treating the right to have rights as capable of being realised in two distinct forms: first as a limited form of 'universal law', and second as an immanent principle within particular liberal democratic states.

In its universal form, the right to have rights is a response to the crime of genocide (Arendt 1949, 37). This crime 'against the human status' (Arendt 1963, 257) involves 'the deliberate extermination of a whole people' (Arendt 1978, 491), and Arendt (1949, 36) claims that it alone warrants the development of 'a law that is above the nations'. Although directed at a specific people, genocide is an attack on the human community because it is an affront to political plurality, and it destroys the lived world that is a product of that plurality. Armed intervention on behalf of all humanity may be warranted against states guilty of mass denaturalisations, expulsions, or attacks on entire communities within their borders, but this will be a matter of last resort.³⁷ International recognition of a right to have rights requires supplementing the possibility of armed intervention to prevent genocide with other mechanisms, such as diplomatic pressure and sanctions. There is also an obligation on the community of states — as representatives of all humanity — to ensure that members of targeted groups are accorded refuge in another state. This obligation must be discharged through some equitable form of burden sharing enshrined in a multilateral treaty that — contrary to existing human rights declarations and conventions — imposes sanctions on states that fail to meet their treaty obligations. Although Arendt does not draw this connection explicitly, the right to have rights would thus function at the global level as a lawful incarnation of the right of asylum — which in *The Origins of Totalitarianism* she describes (1968b, 280) as 'the only right that had ever figured as a symbol of the Rights of Man in the sphere of international relationships', but which had never acquired lawful status.

36 Much of what Arendt says in "'The rights of man'" is replicated in the second half of chapter 9 of *The Origins of Totalitarianism*, although she does not discuss there the connection between the right to have rights and the crime of genocide — a connection I comment on below.

37 The crime of genocide currently provides warrant for intervention under the auspices of the United Nations. The problems and failures of the UN in this area are well known, and it is well beyond the scope of this article to consider how they might be redressed. There is clearly a need, however, to ensure that a new multilateral treaty along Arendtian lines spreads decision-making power evenly among states (as representatives of humanity), and does not accord veto power to a small group of the most powerful states, as is the case with the UN Security Council.

35 Equality is 'simply ... a working principle of a political organization in which otherwise unequal people have equal rights'.

Thus far, recognition of the right to have rights would appear to be inconsistent with a law requiring states to accord membership to *all* exiles. Yet there seems to be a gap between Arendt's account of the international response warranted by the crime of genocide and the wrong suffered by an individual who is deprived of a right to have rights. Surely one can lose the right to have rights even though the existence of one's entire community is not under threat — in the circumstances, for example, that engage Arendt's attention in chapter 9 of *Origins*, that of large-scale people movements and *de facto* statelessness, not all of which could plausibly be characterised as a response to genocidal threats.

Although the circumstances leading a person into exile may not amount to genocide or constitute a 'crime against humanity' such as to engage a global law of protection, Arendt's theory still provides a basis on which to argue strongly that Western states have an immanent obligation, arising from their constitutive law of equality, to accord a right to have rights to most, if not all, exiles. Recognition of this obligation would appear to impose a demanding — and possibly overwhelming — burden. While Western states are very far from being 'swamped' by exiles, their stability and democratic institutions might conceivably be threatened by removal of the border policing and detention regimes that currently force exiles beyond the pale of the law. All humanity has an interest in the preservation of democratic institutions and the cultural, social and economic life that supports these institutions within independent states. But this can only literally be true if these institutions act as barriers to tyranny and are not preserved — as I have argued they *cannot* be — at the cost of exiles. Obviously, dismantling existing border policing and detention regimes must go along with an enormous constructive policy effort, involving Western states acting collaboratively to accommodate and integrate exiles, and to assist in redressing the issues that force people into exile in the first place. Some of these issues are internal to exiles' countries of origin, but many are produced by global factors and injustices in which the Western world is deeply implicated, and thus for which it must take responsibility (see, among others, Pogge 2005).

Conclusion

In *The Origins of Totalitarianism*, Arendt could hardly be more scathing of the efforts made on behalf of the interwar refugees by human rights idealists. From her perspective:

No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights ... enjoyed only by citizens of the most prosperous countries, and the situation of the rightless themselves. [Arendt 1968b, 279.]

This paradox has not disappeared, and it remains an extraordinarily uncomfortable one. Despite the proliferation of international human rights instruments and the remarkable advances we have seen in international law since World War II, we still confront a situation in which the person who seeks recognition of his or her human rights speaks — if allowed to speak at all — from a position of inequality. The rights that this person invokes are 'the paradoxical rights of the private, poor, unpoliticized individual' (Rancière 2004, 298), and the resort to these rights is stark evidence of his or her exclusion from the sphere of politics and of equality.

Rather than seeking to remedy this situation by coercively enforcing the full gamut of international human rights, these rights need to be explicitly recognised as aspirations that can stimulate and bolster — but not take the place of — the rights of members of individual states as they are worked out and secured within these states. The only human right that should be recognised and enforced at the global level is a right, in the form discussed above, to be protected from genocide. Meanwhile, as members of democratic states, we need to recommit ourselves to the founding law of equality on which our states are based, and then commit ourselves to the project of working out how to meet our obligations to the exiles who may currently be the object of our charitable attention, but who are not yet our equals. ●

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'We know that Indigenous languages do not have a place of power in Australia': recognition for the linguistic rights of Indigenous Australians?

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It has only been within the last 35 years that the Australian legislature has recognised to any degree the distinctive rights of its Indigenous populations. This recognition has been confined to a relatively narrow articulation of cultural heritage and native title rights. This is despite the fact that the continued decline of Indigenous Australian languages has ramifications in areas as important as education, health and the law. While there has been a number of notable initiatives with regards to Indigenous language policy in the last five years, the focus remains largely upon what Kymlicka and Patten (2003) have termed 'instrumental reasons' — the means to access services and engage in the political life of the community. While not diminishing the significance of language rights in these fields, this article argues that language rights should be construed in the context of 'non-instrumental' reasons, so as to acknowledge the unique, sui generis nature of Indigenous rights. By implication, such recognition involves the importance of linguistic rights in asserting claims to land (in native title) and in the context of the broader considerations of self-determination and reconciliation.

We know that Indigenous languages do not have a place of power in Australia.

— Tom Calma (ATSISJC 2009)

Introduction

It is thought that, at the time of the first British settlement in Australia in 1788, anywhere between 250 and 300 Indigenous languages¹ were spoken (HRSCATSI 1992, 1). By 2001, McConvell (2001, 18) had concluded that this number had declined to 'perhaps' 100 traditional languages being spoken, 'many by only a handful of elders'. Nettle and Romaine (2000, 4–5) suggested in their comprehensive 2000 study of the decline of the world's languages that the rate of extinction of Aboriginal languages is one or more a year, and that the rate of decline of the remaining languages could

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1 For the purpose of this article, I have referred to either 'Indigenous languages' or 'Aboriginal languages', but it is worth noting the argument made by Amery and Bourke, consistent with Dixon, for these to be referred to as 'Australian languages' (Amery and Bourke 1998, 122).