Between state sovereignty and invisibility: monitoring the human rights of returned asylum seekers

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In few domains do states assert sovereignty as vigorously as in the control and regulation of borders and territory to migration movements. Moreover, such regulation is particularly evident in the case of asylum migration, often also considered a security threat to the state. This article explores the human rights of asylum seekers who are subject to removal and return from Western states. The article argues that these individuals can be left without rights through the practice of removal and return. The evident gap in establishing the legitimacy of return is seen in the absence of adequate monitoring of individuals after their removal from one state and return to another. The role of non-government organisations is explored as one of many 'organisational actors' necessary to a robust global human rights system.

Introduction

This article seeks to situate forced migration within a human rights discourse in order to evaluate the practice of removal and return of asylum seekers from Western states. Migration, whether 'forced' or 'voluntary', as a movement of people over national borders, is a phenomenon that states seek to control and regulate — indeed, increasingly so. Human rights, on the other hand, are a set of values with a global legitimacy. Indeed, some claim it as the only truly global discourse in a world of cultural plurality with seemingly insurmountable political differences (Alves 2000; Ignatieff 2001).[1] Both the phenomenon of migration and the principles of human rights interact with state sovereignty — though in different ways. Indeed, the intersection of migration movements and of human rights values with the assertion of state sovereignty is the *problem* which underpins this article. Human rights and migrations are in many ways an unnatural coupling: a global value system intersecting with an issue that concerns border integrity, resources and security. The first part of the article sketches a normative framework with which to understand the intersections of migration, human rights and state sovereignty. This framework will

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1 Of note from this point of view of human rights as a 'global discourse' is that this 'imbedding' of human rights in small-scale, local situations in advancing the interests of the powerless is a process that takes account of cultures, practices and worldviews independent of the West (Ignatieff 2001, 7).

be used to evaluate both the efficacy and the justice of the removal and return of asylum seekers from states in which they seek protection. The second part of the article focuses on the process of monitoring return, which would ensure the efficacy and justice of the process. In this regard, the role of non-governmental organisations (NGOs) will be explored as a possible partner to states and to the United Nations High Commissioner for Refugees (UNHCR). Ideally, a systematic process of monitoring would establish not only the efficacy of removal and return, but also the safety and well-being of the returnee. This article will draw on case studies of removal and return from Western states, or more broadly states in which liberal values have been institutionalised.

In the contemporary world, the fulfilment of 'rights' — being able to claim human rights — has a strong relationship to membership of a particular state. Citizenship, or permanent residency status, allows an individual to make claims on a particular state for rights. Where a person is outside a country of origin, or stateless, the fulfilment of human rights may remain an ideal rather than a reality. In such situations, what human rights protections are afforded to those who are outside their country of origin, and are seeking protection *from* it? While states that are party to the 1951 Convention Relating to the Status of Refugees (hereafter the Refugee Convention) are obliged to offer protection to those found to be 'genuine' refugees, their obligation does not extend to individuals who do not have an ongoing need for protection. In such cases, removal from the state territory — or 'return' to a country of origin — is justified. The problem from a human rights perspective is twofold. We must be confident first that refugee determination processes are fair (Taylor 2006), and second that there is efficacy and transparency in the processes of removal and return of persons identified as not in need of protection. This article will not address the first problem. For the second, the best test of the efficacy and justice of removal and return is monitoring. Later, the article develops the distinction between 'types' of removal and return — group and individual return, both of which are in reference to the cessation clauses contained in Art 1C of the Refugee Convention (Türk and Nicholson 2003, 31). In the main, the focus here though will be on individual return.

A growing body of evidence indicates first, that not all removal and return of asylum seekers is justified; second, that not all removal and return is timely and appropriate to societies in transition after conflict (such as, most recently, Iraq and Afghanistan); and third, that removal and return have resulted in cases of *refoulement*[2] (Bloch and

2 *Non-refoulement* is a concept that prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his or her life, or freedom, would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. This principle is expressed in Art 33 of the Refugee Convention.

Schuster 2005; Pratt 2005; Gibney and Hansen 2003; Human Rights Watch 2003; Commonwealth of Australia 2006; ERC 2004). Indeed, this is the conundrum for parties interested in ensuring global human rights — to be able to demonstrate the fulfilment of rights, rather than their mere invocation. Mullender is instructive in this regard, guarding against 'grandstanding' when it comes to claims of upholding human rights standards; 'windy appeals to the general aim of human rights law and complacency (the lazy assumption that in such-and-such a jurisdiction "we know how to protect human rights")' (2004, 86). Rather, if the general aim of human rights law is that the interests of all people should be adequately accommodated (Habermas 1998, 191), we must act with an awareness that the most vulnerable individuals and groups are likely to have difficulty *claiming* rights. However, without monitoring, human rights advocates will make assertions of violations and states that are being criticised will deny their responsibility. The processes of removal and return, and of human rights monitoring, will be explored in more detail later. First, the global context within which migration control takes place will be considered from a normative view. How do the processes of globalisation and migration and the principle of state sovereignty interact? Moreover, how do they interact with human rights values?

Globalisation, migration and state sovereignty: a normative framework

No doubt, globalisation, as a set of processes in economic, cultural and political spheres of life, challenges the principle of sovereignty, as barriers to trade and cultural exchanges have largely dissolved.[3] However, when it comes to the entry to state territory by persons, states have tended towards strengthened measures of control and regulation over the last decade and more, despite the fact that people and businesses conduct their affairs in an increasingly transnational way. The moral argument that a 'border-free world' for people would be a more just arrangement has won little favour, with the exception of some academic debates and among human rights advocates (Carens 1987; Barry and Goodin 1992). The struggle here is between the universal and the particular, between human rights principles and sovereignty of a particular group of people — the 'we' of a state, who by definition exclude others (Benhabib 2002b, 560). The salient point for human rights as global values is the extent to which they *can* transcend local or 'parochial' identities and borders as a set of values to be enjoyed by all (Comaroff and Comaroff 2005, 145).

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3 Ignatieff argues that the spread of human rights norms is a consequence of economic globalisation: 'The U.S. State Department's annual report for 1999 on human rights practice around the world describes the constellation of human rights and democracy — along with "money and the internet" — as one of the three universal languages of globalization' (2001, 7).

The exercise of 'sovereign power' in the way states approach asylum migration is the context here for considering where protection stops for asylum seekers. For those who fall outside the protection of a state, life becomes 'bare' as the layers of what it is to be human are stripped away, leaving simply biological life (Agamben 1998). The ability to *claim* human rights becomes precarious for such individuals. The individuals considered here become invisible through the application of state practices, which insist that any human rights obligations have either ceased, or never existed, as a result of their non-membership in a particular political community, or the unfounded nature of a claim for protection. As a result, these individuals may be rendered without rights where they cannot avail themselves of the protection of any other state. Political sociologists and philosophers suggest that sovereignty needs to be disentangled from its traditional moorings in territory and state power (Hansen 2005, 171; Agamben 1998). Instead, the source of sovereign power exists in life itself — in the body (Bataille 1991, 220–34). Such an understanding of sovereign power is most helpful in considering the intersection of human rights principles with the exercise of sovereignty. By now, with the pressures of globalisation and the increased transnational activities in economic, political and cultural spheres of life, the Hobbesian notion of sovereignty as the power to make 'final and incontestable decisions within a territory and [over a] population' (Hansen 2005, 172) has been transformed into a struggle for the state to maintain coherence and legitimacy, and to allay fragmentation.

The article draws on cases of asylum seekers removed or returned to countries of origin or to 'third countries' to gauge the human rights dimensions of this issue — the intersection of global human rights principles with state sovereignty. In cases where such individuals are genuine asylum seekers who do not have the opportunity to return to a country of origin and are therefore returned or deported to a 'third' country, individuals may be rendered without *the right to have rights*.[4] The clearest example of such cases it that of stateless persons who cannot gain the protection of any state, and thereby have nowhere to lay a claim for substantiation of their personhood and the associated needs — for shelter, food, health care and education. However, the only way to test whether individuals removed and returned are in such a state of 'rightlessness' is through monitoring them. In this regard, the role of civil society organisations in complementing the limited monitoring roles of United Nations agencies such as the Protection Office of the Office of the UNHCR

4 Hannah Arendt alerted us more than half a century ago to the paradox that the 'non-status' of being stateless, displaced or homeless presents to those who want to confirm the 'inalienability' of human rights (Arendt 1973, 279).

will be considered.[5] To what extent does the international human rights system rely on civil society organisations to act as a watchdog for state practices as an informal arrangement?

Removal and return from countries of asylum

The discussion so far has addressed the association between human rights and migration, and the intersection of both these issues with state sovereignty and the exercise of state power. Here, it is particularly the involuntary migration movements of refugees and asylum seekers that are relevant. States have the difficult task of balancing 'national interest' through immigration control measures with human rights obligations (Carens 1997; Joppke 1998; Tazreiter 2004). A raft of external and internal deterrence measures has been employed to this end, including carrier sanctions; the use of airport liaison officers; limited access to work permits; legal support; and the use of detention and other domestic administrative mechanisms to dissuade individuals from entering states without authorisation. The dilemma for liberal states is to ensure that mechanisms are in place to protect individuals who are *owed* an obligation, including refugees and potential refugees. It is in this context that the legitimacy of removal and return needs to be evaluated.

It is not the purpose of this article to detail the developments that have shaped asylum politics and subsequent policies in Western countries. In brief, we see that as asylum applications have increased from the early 1990s, states have felt over-burdened at various points by processing and welfare obligations. At the same time, the international community has sought to uphold three solutions for refugee situations, referred to as 'durable solutions': voluntary repatriation, local integration and resettlement to a third country. Many Western governments have favoured voluntary repatriation, and more coercive forms of removal and return, as a domestic solution to an international problem. As violence and conflict have been on the increase in the post-Cold War era, particularly intrastate conflicts, the emphasis by Western states has moved from working towards solutions to the root causes of conflict to repatriation as a key 'durable solution'. Voluntary repatriation of asylum seekers upon the cessation of a conflict, or when some other source of persecution no longer exists, is a legitimate practice of countries of asylum. Such organised processes of return have happened with the 'voluntary' return of Kosovars, Afghanis

5 The UNHCR tends to undertake monitoring only in cases of large-scale return, such as Kosovo and Afghanistan.

and, most recently, Iraqis.[6] This process of return, where protection is deemed no longer necessary, is important to the continued efficacy of the international refugee system. In contrast, the return of a person to a place where a well-founded fear of persecution exists is illegitimate and a breach of human rights, amounting to refoulement. In sum then, with the return of asylum seekers from countries where they have sought protection, three scenarios are possible. First, an individual does not have ongoing protection needs, and therefore return is justified and necessary for the continued efficacy of the international system of protection. Second, a protection need is ongoing. Third, and most seriously, an individual has been refouled. In all three scenarios, some degree of monitoring of the situation upon return is the only guarantee of ensuring that the human rights of an individual are not abused. No doubt, the difficulty is to establish where the responsibility for such monitoring lies.

In considering removal and return, we must be clear about the terminology used, its intention and the precision needed in order not to complicate a contentious area of public policy and international law. Deportation is the over-arching term used to include all persons removed from a state. The term may include failed asylum seekers, as well as visa overstayers, people convicted of a crime and non-asylum-seeking unauthorised migrants. The term 'removals' is used in some states, such as the United Kingdom and Canada, in preference to 'deportation' (Gibney and Hansen 2003, 8). More precise to refugees and asylum seekers is the term 'return', relevant to both individual and group cases. The right to return to one's country is enshrined in the Universal Declaration of Human Rights (Art 13(2)). At the same time, the clearest obligation on states in the return of an individual is to ensure that refoulement has not taken place. Given the contemporary prevalence of temporary protection and the lack of permanent resettlement opportunities, large numbers of refugees are compelled to exercise their right to return (Hathaway 1997, 533).

Group return takes the form of repatriation of refugee populations when peace and stability are restored in a country of origin and the international community is confident that the causes of flight no longer exist. The repatriations of refugees to Bosnia and later to Kosovo, and more recently to Afghanistan and Iraq, are examples of group return or repatriation. The UNHCR has stressed the importance of

6 In these and many other cases of 'voluntary' return, the timing of return is open for debate. Certainly in the case of Iraq, the ongoing instability and daily violence leave people in a vulnerable position in their day-to-day lives. A recent assessment of life in Afghanistan by a UN official indicates that those returning to Afghanistan are likely to be in a precarious position. Tom Königs, head of the UN assistance mission in Afghanistan, states: 'The economic opportunities for someone returning to Afghanistan are exactly zero. Some crisis nations in Africa are extremely well developed by comparison' (*Sydney Morning Herald*, 21 March 2006, p 8).

respecting the voluntary character of such return (1980, 1991). Individual return is a more difficult issue in human rights terms. An expert roundtable consisting of the UNHCR and states that are party to the Refugee Convention held in Lisbon in 2001 indicates 'substantial agreement' that change in the country of origin needs to be of a 'fundamental, stable and durable character' if the cessation clauses are to be invoked. In addition, the conclusions to this agreement recommend that 'consideration of a range of factors including human security, the sustainability of return, and the general human rights situation' needs to be assessed before cessation clauses are applied (Türk and Nicholson 2003, 32).

Non-government organisations and human rights groups, as 'civil society organisations', have been vocal in raising concerns over the distinctions between the 'voluntary' and 'mandatory' return of asylum seekers. The European Council on Refugees and Exiles (ECRE) argues that either 'mandatory return' or 'forced return' more closely describes the problem areas in practices of return (ECRE 2003). Mandatory return applies to a situation where a person consents to return to a country of origin instead of remaining in a country illegally or being forcibly removed. Forced return describes a situation where a person is required by law to return, but does not consent to do so and might therefore be subject to restraint or force to remove him or her. In the case of mandatory return, rather than voluntary repatriation, ECRE advocates a procedural system that would check the safety of returnees in their destination, as well as provide follow-up monitoring. So far this article has built a case for an integrated approach to asylum migration and human rights in the context of the exercise of state sovereignty. The last part of the article will detail some particular cases where individual return has breached human rights principles. First though, the issue of monitoring will be briefly considered.

Monitoring human rights

Unlike group return or repatriation, individual return is difficult to monitor and may indeed put an individual in increased danger. This is where the role of NGOs will be considered.

Given that states do not see it as their responsibility to monitor the human rights of returnees, and the UNHCR has a limited mandate, NGOs have a significant role to play as human rights monitors. This role is a sensitive one for all the parties involved — most importantly for the safety of the returnee; for the states involved in return and reception; for the UNHCR; and no less for the NGOs involved.

While some research has taken place into the practices of return by states, the existing processes tend to gather information primarily from those involved in facilitating

removal and return: the International Organisation for Migration (IOM); states; and their administrative capacities in the form of security, detention and immigration services (Human Rights Watch 2002; 2003). Establishing the fate of individuals who have been subject to return, whether voluntary or involuntary, is difficult and problematic on a number of fronts. First, neither states nor the UNHCR, who have the most comprehensive data on those returned and their destinations, make such information accessible to researchers or to human rights organisations. Second, when the movement of returnees is able to be established through other sources, ethical dilemmas are presented to those who document return — that is, such research may place individuals at increased risk of human rights abuses in the countries they have been returned to through contact with researchers and NGOs, making returnees visible to law enforcement and security personnel. Significant anecdotal evidence exists of failed asylum seekers and other categories of voluntary and involuntary returnees being arrested, imprisoned and tortured and 'disappearing' on return to a country of origin or to a third country. Amnesty International, Human Rights Watch and numerous NGOs and human rights organisations working within and across state borders have gathered, documented and circulated such evidence through various information and 'issue networks' (Human Rights Watch 2003). This evidence is indeed serious for the continued efficacy of international human rights instruments such as the Refugee Convention and the Convention Against Torture.

While this article has stressed the importance of adequate monitoring to ensure that human rights are not infringed, we are still left with the ever-present dilemma of how an individual can *claim* his or her rights. For those who have access to citizenship, or another form of membership status in a state, and thereby to legal institutions and/or legal representation, the ability to have an abstract set of rights substantiated exists. However, for others, including people who are removed and returned without justification, no 'claim-fulfilling' institutions exist. Universal human rights, codified in the Universal Declaration of Human Rights (UDHR) and significantly in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICECSR), are little more than cosmopolitan ideals for these individuals.

Human rights dilemmas in the removal and return of individuals

Rehabilitation and reintegration measures in post-conflict zones such as Bosnia, Rwanda and most recently Afghanistan and Iraq are facilitated through international organisations, NGOs and state and non-state donors. In turn, these processes are subject to rigorous evaluation and accountability. In this context, group return, followed by reintegration measures, are processes that have several layers of accountability and scrutiny — from the international community, to newly

established or re-established local and national authorities, to international NGOs. While the UNHCR is involved in the monitoring of returnees in the case of large-scale return of refugee populations, protection officers are not given the mandate to monitor individual cases of return and deportation.[7] The transnational 'issue' networks of human rights advocates, lawyers, NGO workers and researchers therefore play an important role in this process.

We can expect that, for individual return, such evaluation and accountability structures are absent. Limited research exists on the human rights situation of individuals returned from countries of asylum. However, evidence does suggest that individual return has resulted in refoulement. This is a dilemma for liberal states — maintaining an effective migration system, premised on 'control', while acting in a just and humane way. Indeed, many Western states have been reluctant to remove individuals, particularly if they face public pressure in individual cases. Removal is also expensive and time-consuming for the state. Large numbers of airlines will not carry asylum seekers who are being removed from one state to another. In many Western states, the longer an individual remains in a country, no matter his or her 'migration status', the less likely that person is to be removed (Gibney and Hansen 2003, 13). Australia, however, is a case of 'exception' to this pattern. The final part of the article will explore the case of Australian removal and return in some detail, drawing on recent research and parliamentary inquiries.

During 2000, the Australian Senate held an inquiry into the efficacy of the protection system in Australia (Australian Senate 2000). One issue highlighted during this inquiry was the lack of monitoring undertaken of those deported from Australia as failed asylum seekers. A submission by the Human Rights and Equal Opportunity Commission (HREOC) suggested that a system of informal monitoring should be set up to ascertain if deportation was just. A number of non-government groups had expressed concern over a protracted period about the safety and life circumstances of asylum seekers who had been voluntarily returned or forcibly deported from Australia. At the 2000 Senate hearing, Chris Sidoti, the Australian Human Rights Commissioner at the time, called for a random sample of returnees to be monitored in order to establish how they were able to live after being removed from Australia. Such a random sample would only be possible if the Department of Immigration and Multicultural Affairs (DIMA) made public the statistics on removals.[8] In his submission, Sidoti called for random checks to be made on returnees, based on the

7 Personal communication with Jeff Crisp and Grainne O'Hara of UNHCR, 12 January 2004.

8 The 2000 Senate Committee conceded that it did not have access to these numbers itself, though it was stated that the number was in the thousands (11.57).

human rights record of the country in which they were now living. In other words, a selection of those asylum seekers who were returned to countries considered of 'high risk' as human rights abusers should be monitored.

In May 2005, Vivian Alvarez Solon, an Australian citizen, was found in the care of the Missionaries of Charity in Ologapo City, the Philippines, after being wrongfully deported in 2001 by DIMA. This case came to light shortly after revelations of the wrongful detention of a mentally ill Australian resident, Cornelia Rau, in an immigration detention facility. The two cases received widespread media scrutiny and criticism of the Australian Government's actions in detaining and deporting individuals to whom they had an obligation. Both women are pursuing legal cases for compensation and several inquiries have been instigated into these and other cases of wrongful removal. In March 2006, the Legal and Constitutional Committee of the Australian Senate published the report of an inquiry into the *Administration and Operation of the 'Migration Act 1958'* (Commonwealth of Australia 2006). The committee's terms of reference included inquiry into the processing and assessment of visa applications; migration detention; deportation from Australia; and the involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia. The details that emerged from the Rau and Solon cases instigated the inquiry, though evidence of unjustified removals had been mounting over several years.[9] Several of the recommendations address the practice of removal specifically and will be discussed later.

In 2003, a Sydney-based research and advocacy NGO, the Edmund Rice Centre (ERC), in collaboration with researchers at the Australian Catholic University, began to monitor asylum seekers who had been removed from Australia on a 'voluntary' or 'mandatory' basis (ERC 2004). They identified asylum seekers who came from the following 'high-risk' countries: Afghanistan, Angola, Democratic Republic of Congo, Iran, Iraq, Nigeria, Pakistan, Rwanda, South Africa, Sri Lanka, Sudan and Zimbabwe. The researchers travelled to the countries to which asylum seekers were returned in order to interview them. In total, 40 people were interviewed in 11 countries.[10] The research focused on five questions to establish the outcomes of the Australian Government practices of return and removal: first, whether people were sent to unsafe places; second, whether the dangers faced on return were heightened

9 This report follows earlier findings of the same committee with the June 2000 report titled *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* and the 2004 report of the Senate Select Committee on Ministerial Discretion in Migration Matters.

10 Some returnees identified by the researchers were not interviewed because of safety concerns.

due to reports sent by the Australian Government to overseas authorities; third, whether asylum seekers had been encouraged to obtain false papers or to become associated with bribery or corruption by the Australian Government; fourth, whether the removals were consistent with Australia's legal obligation; and fifth, whether the manner of conducting removals is consistent with Australia's values. The research findings indicate that of the 40 people interviewed, 35 were living in dangerous circumstances. Some were returned to their country of origin, and some to third countries.[11] Of the 35 individuals interviewed who felt unsafe on arrival or after arrival, the following reasons were given for feeling unsafe: a lack of proper identification papers; statelessness; being forced to live in hiding and in danger due to ethnic violence or persecution; and living in a war zone (ERC 2004, 55–56). Recent revelations regarding the wrongful deportation of Vivian Alvarez Solon to the Philippines suggest major flaws in the procedural safeguards within DIMA to ensure that people are removed in an appropriate manner and, moreover, that individuals are removed without haste and with adequate scrutiny, including monitoring provisions.

The ERC research findings were presented at several international forums through 2003 and 2004, including government and NGO delegations attending the Executive Committee Meeting of the UNHCR in Geneva. The research findings were also communicated to DIMA, which is responsible for the processing, detention and removal of asylum seekers in Australia. Media coverage during 2004[12] of the ERC report findings led to a Federal Police inquiry and an internal DIMA investigation into the involvement of DIMA officials in prompting asylum seekers to obtain false passports to facilitate their removal from Australia. The ERC report (2004) found that Australian officials either suggested, or were fully aware, that some individuals were traveling on false passports and that air tickets were issued with false final destinations. For Kuwaiti Bedoons returned to Damascus, a 'third' country, this practice seemed to facilitate ease of passage through ports en route to their destination. As an example, a ticket was purchased by DIMA for a Bedoon with the last destination marked as 'Kuwait City', and the second-last destination marked as 'Damascus' (ERC 2004, 29). In addition, certificates of identity issued by DIMA stated the nationality of Bedoons as Kuwaiti, even though Bedoons had been rendered stateless by a 1986 Kuwaiti legislative change declaring the Bedoon population as non-Kuwaiti.

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11 'Misleading' travel documents issued by Australian authorities — some of which had expired upon arrival — increased the danger for these individuals.

12 The ABC *Lateline* program screened extensive coverage and scrutiny of the report findings.

Australia interprets international human rights into domestic law through the *Migration Act*. Over the last decade, several government and independent inquiries have been conducted into the administration and operation of the *Migration Act*. The most recent inquiry, by the Legal and Constitutional Committee of the Australian Senate (2006), has made far-ranging recommendations for amendments to the Act and on the conduct of DIMA. Several of the recommendations of the Committee are aimed at a fairer and more transparent and legally defensible 'onshore' protection visa application process (nos 3, 4, 7 and 5), which relates to asylum seekers arriving spontaneously in Australia. The committee also recommends that a comprehensive pre-removal risk assessment be put in place to ensure that 'no "refoulement", humanitarian or welfare concerns exist' (no 56) and that 'those subject to removal be give reasonable notice' (no 57). Recommendation 59 recommends that:

> … in order to comply with its 'non-refoulement' obligations and to ensure the welfare of persons removed or deported from Australia, the Commonwealth continue to enhance the scope of its informal representations to foreign governments, encourage monitoring by Australian overseas missions, and continue to develop strong relationships with local and overseas-based human rights organizations.

Further, recommendation 60 states:

> The committee recommends that the Commonwealth Government review and clarify its removal and deportation processes to ensure that formal and proper procedures for welfare protection are in place for the reception of persons being removed or deported from Australia.

These are far-reaching recommendations, indicative of the problems with the Australian Government's approach to return and deportation. The Law Society of South Australia, in a submission to the Senate Committee, states:

> The circumstances of the persons included in the [Edmund Rice Centre's] study together with the fact that some were subsequently granted protection by other developed countries constitutes an embarrassment and a serious blight on Australia's human rights record. The study shows that the current system is clearly failing and Australia is not meeting its obligation of non-refoulement in some cases. Our view is that the removal of even just one person who is placed into a situation where they are at risk of a serious human rights violation is unacceptable. The consequences of administrative error in this area are potentially tragic. [Submission 110, 13.]

This article has so far shown the precarious nature of rights fulfilment for those unable to gain the protection of a state. What is apparent is the impasse that occurs

between international norms, such as human rights values, and their fulfilment. In this regard, the exercise of state sovereignty re-emerges. One salient contemporary invocation of state sovereignty is the so-called 'state of exception', as special circumstances used to legitimate actions that would in 'normal' circumstances not be acceptable. To be sure, human rights concerns are part of the process of *political globalisation*, where states must suspend the priorities of the bounded community of 'nation' for global priorities (Benhabib 2002b, 449). The tension between local and transnational priorities is played out most dramatically in the case of asylum seekers who are in a sense suspended between states while their status is being determined. Herein lies the contemporary tension of diminishing state sovereignty and proclamations of 'exception', or 'states of emergency', by states in the face of new and not-so-new dangers such as terrorism and transnational crime, which have seen the infringement of the civil liberties and the rights of citizens, but most especially a suspension of rights for outsiders and foreigners. Many Western governments have been returning asylum seekers at an increased rate as part of a legislative program of tougher immigration measures in the years since 2001.[13] A 'state of exception', then, not only can be understood as a reaction to political circumstances, such as heightened fear of terrorism, but must also be seen in the broader context of states suffering a decline or crisis of legitimacy in the face of political globalisation:

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships — except that they were still human. The world found nothing sacred in the abstract nakedness of being human. And in view of objective political conditions, it is hard to say how the concepts of man upon which human rights are based … could have helped to find a solution to the problem. [Arendt 1973, 299–300.]

In relation to removal or return, we can assess the substantiation of human rights by identifying an *infringement*, or *violation*, of rights that would mean that rights are *unfulfilled*. In a case of *just* return, no human rights dilemma would ensure. The rights associated with the ICCPR — such as the inherent right to life (Art 6); to liberty and security of person (Art 9); to liberty of movement and residence (Art 12) — can be demonstrated as being violated in their absence. On the other hand, the rights articulated in the ICESCR, such as 'the right of everyone to an adequate standard of living … including adequate food, clothing and housing' (Art 11), are more difficult to link to relationships of responsibility that would lead to their fulfilment. This

13 In 2004, The Netherlands passed legislation to authorise the expulsion of 26,000 migrants, many of whom are asylum seekers who had not regularised their status (*The Times*, 11 February 2004, p 13).

dilemma can be analysed as first, the *action,* and second, the *inaction,* of states. *Action* equates with the violation of rights, such as wrongful deportation. *Inaction* is the situation where rights are left unfulfilled, as in the case of individuals removed to situations where they are left '*rightless*' — having no institution from which to *claim* their economic, social or cultural rights as human beings.

This leads us to the question of what human rights are infringed or left unfulfilled by the actions of states in the removal and return of asylum seekers as characterised throughout this article. States have an ongoing obligation to persons who claim protection until such time as the source of persecution no longer exists, or the claim for protection is found to be unwarranted. States do have a difficult task in balancing the needs of 'strangers' (non-citizens) who ask for protection, and the safeguarding of resources and security of their constituents (citizens). Where the right to asylum is denied a person who genuinely requires protection, civil and political rights are clearly infringed and the non-refoulement provision comes into play. The evidence documented by human rights organisations such as Amnesty International and Human Rights Watch, referred to earlier, of individuals incarcerated, tortured, put to death and 'disappeared' upon return from a country of asylum where a failed asylum application had been registered, is indicative of such infringements. Two of the 'returned' asylum seekers documented in the ERC report, who were left in a 'third country' without access to basic rights, have subsequently gained permanent protection, one in Canada and the other in the United Kingdom.[14] Less straightforward as a human rights claim is the infringement of economic, social and cultural rights. That is, the country returning an individual should be mindful that if a person is delivered to a 'third country' in which that person does not enjoy citizenship, residency or any other favourable status, the person's ability to access 'basic' rights, such as the right to work, or access to health care and education, will be compromised or non-existent. In fact, we can fairly assume that such individuals will have a clandestine existence, outside the scrutiny and the benefits of official institutions — such as the police, courts, hospitals, schools and other government services — of the society to which they have been returned or deported. However, the ICESCR explicitly asserts that states' duties extend beyond borders (Art 2).

Human rights as global values

The issues that stem from concerns over human rights defy geographical borders and have the potential to unite, as well as to divide people and nations. Local leverage can be applied through links with other states, or other NGOs, through a process of

14 Personal communication with two of the authors of the Edmund Rice Centre report.

'boomerang pressure' (Risse and Sikkink 1999, 119). That is, when NGOs that operate within a state, rather than across states, do not have the power or capacity to directly pressure that state, transnational networks can exert pressure through external forces — either NGOs outside the nation, international NGOs or intergovernmental organisations, as well as other states.[15]

When assessing the role of NGOs in the international arena, a number of key international initiatives point to the significance of NGO action and the growing recognition that governments have given to the role of NGOs in social and economic development, in advocacy and in the fostering of human rights and democracy. At the same time, an identifiable tension has developed between NGOs and states, particularly in the last decade, as a result of the gap between the national and international human rights standards and their application. It is a consequence of the spread of human rights standards that the degree to which such standards are implemented and adhered to by states is increasingly scrutinised by NGOs, as well as by the international media. What has been argued here is that excessive sovereign power exercised on people who are at the margins of a society and, in the case of asylum seekers, individuals who are at the margins globally, turns life into 'bare life'.

Further research needs to be conducted on the fate of returned asylum seekers, whether return is 'voluntary', 'mandatory' or 'forced', to establish the extent to which Western states are putting people at risk due to hasty and ill-thought-out measures of removal. At the same time, further research needs to be undertaken to examine the efficacy of the determination process in Western states. Evidence indicated in the ERC research, and from the recommendations of the recent Australian Senate inquiry into the *Migration Act* (Commonwealth of Australia 2006), suggests that failed asylum seekers deemed as not being in need of protection and returned to a country of origin or to a 'third country' are, in some cases, in need of ongoing protection. The Australian Government's treatment of asylum seekers is significant in the international system of protection. A failure to uphold the principle of protection in one part of an international human rights system weakens the system as a whole. The *refoulement* of one individual to a situation of danger is a serious breach. Where a pattern of such breaches is demonstrated, a serious and determined intervention is required. NGOs working in transnational 'issue networks', exerting pressure from outside, 'above' and 'below' the state, provide some essential human rights monitoring, while also presenting the process with ethical challenges. Closer

15 The international campaign to ban land mines is an example of a network of NGOs within and between nations that operated successfully, utilising boomerang pressure on states which sell, as well as those which use, land mines.

cooperation between sending and receiving states, the UNHCR and other international organisations and NGOs may deliver more robust human rights outcomes for individuals who are subject to removal and return.

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