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Special Workshop 56: "Migration Philosophy"

CONVENORS: James C. Simeon (York University Toronto)
Paul Tiedemann (Justus-Liebig University, Giessen)

Program

1. **Prof. Dr. iur. Dr. phil. Paul Tiedemann (retired judge at the Administrative Court Frankfurt a.M., Honorable Professor, Justus-Liebig-University, Giessen, Germany)**
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Paul Tiedemann has presented two working papers in advance. The participants are requested to deliver critical statements to his papers or to specific aspects in his papers.

Working Paper I: The No-Border-Postulate

The discussion about the no-border postulate, initiated by Prof. Joseph H. Carens in 1983, is developing an ever-increasing dynamism in both Anglo-American and German-speaking philosophy. There are two positions in this discussion: (1) the view that states have the sovereign right to decide whether and under what conditions they grant entry and residence to aliens (the right to exclusion); (2) the view that all people have a moral right to global free movement.

The paper defends the thesis that on the moral level there is neither a right to exclusion nor a right to global free movement. In the relationship between states and aliens the state of nature prevails. In the state of nature, there are no moral rights and duties other than human rights. Neither the alleged right to exclusion nor the alleged right to global free movement is a human right. This is true not only in regard of the philosophical considerations but also in regard to current positive law.

Working Paper II: Moral Duties Toward Refugees

The ethics of refugee protection is not an ethics of assistance to needy people, but an ethics of the prohibition of tort, namely, in particular, the violation of human rights. This is reflected in the positive refugee law only inadequately, because the *1951 Convention relating to the Status of Refugees* does not put the damage in the foreground, from which people flee, but the reasons why they are mistreated by persecutors. On the other hand, the refoulement ban is recognized as part of customary international law (some have argued that it is preemptory norm or *jus cogens*), but, only as a supplement of refugee law. The damage-oriented approach clarifies the reasons why persons in need of protection, who have already reached the territory of the country of refuge, can rely on a subjective right of protection, while refugees outside the territory can, in principle, only appeal to the compassion and humanity of possible helpers. It follows that the refoulement ban is the core of refugee law. However, the boundary between "inside" and "outside" shifts according to the expansion of the *de facto* sphere of power of the acting person or state. This may also create a legal position for persons who are rescued by a ship at sea or whose living and travel conditions are essentially determined by the power of a state outside its territory.

2. Dr. iur. Stefan Schlegel (Oberassistent, Institute of Public Law, Faculty of Law, University of Berne,)

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The harmful act of the non-allocation of property rights over migration

Prof. Paul Tiedemann, in his Working Paper II (“Moral Duties Toward Refugees”), brings forward the claim that the question of whom to protect as a refugee, relies on an ethics of tort, rather than an ethics of needs. He proposes to rethink refugee ethics from the perspective of the damage suffered by potential refugees rather than from the angle of the reasons, why people may be mistreated.

I will hold against this view in my paper. Any approach to the “open borders” question, as well as of the question of who is worthy of a “status of special protection,” requires the faculty of counterfactual reflection on the allocation of what I will define as the property right over a person's migration. I will follow the reasoning of Ronald Coase to show that the

relationship between a potential migrant and a potential receiving State is a relationship of potential reciprocal damage, much like the relationship between a ranger and his neighboring farmer. Whereas a migrant (and a refugee) who imposes his or her immigration on a receiving society might inflict damage or tort upon this society, this society inflicts almost necessarily a damage or tort on the potential migrant by not letting him or her migrate or by demanding specific conditions on them.

Both, a consequentialist and a deontological position, as they are contrasted by Prof. Tiedemann, ought, therefore, to start with the question, “Who is imposing the greater harm on the other?” Is it the potential migrant through migration or the potential receiving state through exclusion? This question is fit to undermine the idea that damage is done by non-admittance only in specific cases. It may also shake up the notion that there is a trigger point somewhere on a spectrum of damages from where they become morally relevant.

Rather, I argue, that answering the question of who is imposing the bigger damage to the other in this bilateral relationship provides a strong argument for “open borders.” This is so because it is very unlikely that the property right over somebody's migration (which is the control over a good and a very consequential good in a world in which place of birth is the most important predictor of lifetime outcomes) is valued higher by anyone else but the concerned individuals themselves. Besides, I will argue, the concept of a property right - not just over territory or institutions - but over the movement of individuals as a good in its own right, is helpful to reorganize refugee law along the lines suggested by Prof. Tiedemann, namely, to free it from the reasons of migration and make it more focused on the magnitude of the harm that is to be avoided. I will build on Prof. Tiedemann's observation that (economic) refugees “can be motivated to mobilize their last resources to seek their fortune elsewhere" to introduce the concept of a basket of commodities in which the control over one's own migration is a good amongst others. The question of how valuable this good is, as compared to other essential goods in the basket, the question of how determined a person would need to be to cling to that good as compared to others is then used to sort individuals on a spectrum of the worthiness of protection.

3. **Prof. Dr. iur. Marcos Augusto Maliska (Procurador Federal, Professor of Constitutional Law, UniBrasil Centro Universitário in Curitiba, Brazil)**

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Human Rights and the Cooperative Constitutional State

Understanding of the relationship between the State and the foreigner, as a relationship that is in a 'state of nature,' in which only one exception is admitted, that is, the protection of the foreigner's human rights relative to their personality, is deficient. This does not consider the historical character of international law (that is, the difference between natural rights and human rights) and the widening of the notion of human rights, as a consequence of political decisions, that have "positivized rights" at the international level. This is the difference between human dignity and human rights.

The spectrum of human rights goes well beyond the protection of human dignity. Here, there is the commitment of States at the international level to the realization of human rights in the extension of these rights in international treaties. States have international responsibilities. The refusal of foreigners to refugee protection must take into account the international human rights norms of which the Cooperative Constitutional State, that it is a part, and, can even remove part of its legitimacy; that is, the international commitment to peace and to the material realization of human rights.

4. **Prof. Dr. iur. Andreas Funke (Professor of Public Law and the Philosophy of Law, University Erlangen-Nürnberg, Germany)**

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The Moral Ground of Refugee Law and its Political Intermediation

In my article, "Refugee law between human rights, the duty to help and responsibility" (published in German 2017), I have suggested that refugee law should not be grounded on human rights. Rather, it ought to be grounded on the idea of moral obligation. This idea gives rise to a special kind of responsibility, a moral connection between states and people

who are compelled to flee their homes. In particular, I argued that a human right to asylum cannot be established as a moral principle. Nevertheless, there are moral obligations which are open to political intermediation and which are woven into the existing body of public international law.

Paul Tiedemann takes a different position in his paper “Moral Duties Toward Refugees.” I identify two main statements that are opposed to my argument. First, refugee ethics would not be directed to the state, but, to the individuals who work in and for the state. Second, a deontological approach to moral theory, to which Tiedemann adheres, as do I, should put the prohibition of damage in the foreground, instead of an auxiliary obligation.

Both the first and second propositions need elaboration and clarification. Ultimately, I think, they are not convincing. The first one ignores the intrinsically supra-individual character of asylum as such; the second one tends to ignore that refugee law necessarily has to be shaped by political processes.

5. Prof. Dr. James C. Simeon (Head of McLaughlin College and Associate Professor in the School of Public Policy and Administration (SPPA), Faculty of Liberal Arts and Professional Studies, York University, Toronto, Canada.)

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The Moral and Legal Philosophical Justification of Article 1F Exclusion from Convention Refugee Status

This paper takes issue with Professor Paul Tiedemann’s assertion in his “Working Paper II,” when he states:

“Since personhood is of absolute value, refugee-ethical relevance depends solely on whether there is serious impairment in HR-goods. There is no need for further circumstances, nor are reservations or forfeiture acceptable. There is, therefore, no moral-philosophical justification for the regulation in Art. 1 F of the Geneva Refugee Convention (GRC), according to which among others war criminals are excluded from refugee

protection. If they are at risk to HR-goods, they are from a moral point of view worthy of protection." (p. 17)

I take this assertion to mean that Article 1F cannot stand because there is no moral-philosophical justification for its provision in the *1951 GRC*. Moreover, it asserts, for illustrative purposes, that it would be a denial of a war criminal's human rights to be excluded from refugee protection, but, from a moral-philosophical or legal point of view this cannot be sustained.

This paper challenges the assertions contained in this line of argumentation by outlining that war criminals, and all others who fall within the ambit of Article 1F, have forfeited their right to be determined to be Convention refugees and to receive refugee protection due to their serious international criminality. It is patently evident that if a refugee claimant falls within the provisions of Article 1F, then, they are excluded from refugee protection, despite having a well-founded fear of persecution. The moral principle underlying this position is simply, those who cause refugees, that is, those persons who persecute others, should not be the beneficiaries of *1951 GRC* that is intended to protect refugees. To do otherwise would violate two general rules of deontological moral theory: Rule 1: Do not harm anyone! (It is prohibited to harm anyone.); and, Rule 2: Pay compensation if you have violated Rule 1! Those who have committed war crimes have by definition violated Rule 1. Justice demands that they compensate their victims, those who have been harmed, if at all possible; and, as well, to the moral wrong or harm they have subjected the international community and/or the society to which they belong.

The paper will argue that Article 1F is morally justified in upholding Rule 2, and, in denying war criminals the protection of the *1951 GRC* as a form of compensation for violating Rule 1. To do otherwise, would undermine the moral integrity and foundations of the very instrument that is intended to protect *bona fide* refugees.

6. Prof. Dr. Dr. Paul Tiedemann

Final comments and the try of defense