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A-Legality and the Death of the Refugee

Patricia Tuitt[1]

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> …a legal order is concrete because it actualizes a determinate realm of practical possibilities, in the twofold sense of certain legal possibilities and certain possibilities of illegality. As exclusion, the closure which inaugurates a legal collective relegates everything that is beyond the pale of joint action and its normative point to the residual domain of the unordered. The unordered compromises a surfeit, rather than a dearth, of practical possibilities, yet a superabundance of possibilities that have been levelled down to the status of the irrelevant and unimportant, as the price that must be paid if there is to be any legal empowerment at all.
> (Lindahl 2013, p. 255)

Introduction

It is reported that between April and September 2015 approximately 1500 drowned in European waters. The largest single incident resulting in loss of life was on 19 April 2015 when at least 700 people drowned after their boat capsized just off the Libyan coast. In the wake of these deaths came an event when the question of human 'right' was momentarily divorced from the question of citizenship.

There are, no doubt, several explanations for this sudden and unexpected bringing to consciousness of the 'abstract nakedness of being human and nothing but human' (Arendt 1968, p. 297) after decades of state-centred discourses, structured upon the opposition of economic migrant/refugee. In this short piece I

✉ Patricia Tuitt
p.tuitt@bbk.ac.uk

[1] School of Law, Birkbeck, University of London, Malet Street, London WC1E 7HX, UK

suggest that the deaths were the result of two oppositional pre-emptory norms of international law being tested to their limits.

More pertinently, I argue that the testing of these norms could equally have brought a radical re-conception of our political existence—at least insofar as that existence is represented in the figure of the refugee. This re-conception will occur if what is now seen as irrelevant, impossible—even ridiculous—in the convergence of those norms were seen instead as carrying infinite possibilities.

Article 33 and International Law Doctrine

Geneva Convention Article 33 states that:

> No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (Convention Relating to the Status of Refugees 1951, p. 137)

There is almost universal consensus that the prohibition against *refoulement* is absolute and 'unconditional'—that it is 'a jus cogens norm'—assuming the place in the hierarchy of international law above that of treaties. It is said that *non-refoulement* is becoming extra-conventional, superseding the wishes expressed by states—it permits of no derogation (UNHCR 2007, paras. 12, 13 and 15). However, the same level of consensus exists over the relation between the principle of *non refoulement* and access to territory of a Convention refugee: state practice and opinion juris permits only one conclusion: the individual has no right to be granted territorial asylum (UNHCR 2007, para. 8).

Against these two (peremptory) positions—an absolute obligation to respect the *non-refoulement* principle applicable to Convention refugees against an absolute right to withhold territorial asylum to Convention refugees—we can and do contemplate a range of possibilities and actions directed against refugees. States can (and do) acknowledge a de facto right of territorial asylum, reasoning that to accord such a de facto right is the only way in which the *non-refoulement* principle can be upheld. States can (and do) circumvent Article 33 in cases where a refugee has a formal connection with another state (such as dual nationality). States can (and do) ignore the imperative of Article 33 and return refugees to the place of nationality or domicile and to his or her uncertain fate there.

Bringing us now to the recent crisis of human movement: states can (and do) allow asylum-seekers to perish in icy waters whilst they await a ruling as to the extra-territorial reach of Convention Article 33 (UNHCR 2007, para. 8), or some process of burden sharing between states.

Between the clearly legal (de facto asylum/connection with an alternative state), clearly illegal (direct *refoulement*) and the not-yet (ill)legal (allowing asylum-seekers to drown on the basis that they are not strictly in territory) lie possibilities which have for too long been deemed by the legal collective—here represented in

the international community of nations—*irrelevant/unimportant* (Lindahl 2013, p. 255).

The possibility that the absolute and unconditional principle of *non-refoulement* can be upheld *at all times* in relation to the Convention refugee *without* the need to offer the refugee a territorial solution is what is at issue here. Read together, in the extremes of their articulation, the two absolute positions command that a refugee is *neither* returned to a place from whence he/she came *nor* be offered territorial protection. What Lindahl's work offers is a way to confront this seemingly impossible challenge/conundrum—intellectually, politically and practically.

Considerations of space preclude me from doing full justice to Lindahl's rich thesis and so I ask the reader to hold the idea that sits at its core (produced in the opening quotation), which invites thinking beyond the legal/illegal and the soon to be designated illegal/or legal, and instead to look toward the unordered/the chaotic within that otherwise regulated realm. Un-order is the pre-condition of A-Legality—the state of affairs to come—that which for now is dismissed as irrelevant—the '*dia-logos—that is a logos—a rationality—of the in between*' (Lindahl 2013, p. 255) still a 'fault-line' but one that contains the seeds or agents that could radically disrupt the extant legal order.

Wherein can be located the state of un-order/the productive chaos of Article 33? According to Lindahl, A-Legality (intrudes) when 'certain types of acts or behaviours' take place where they ought not to take place, but the normative disorientation that this 'disruption' or 'irruption' 'ensues' demonstrates that such behaviours cannot simply be described as illegal, since illegal behaviour is always within the sphere of contemplation within any concrete legal order (Lindahl 2013, p. 158).

As far as Article 33 is concerned, there is nothing more evidently dismissed as irrelevant and unimportant as is the question that states have put aside in favour of behaving legally or illegally—that is the question of whether human life can be respected whilst simultaneously retaining the non-derogatory nature of Article 33 and the non-enforceable right of asylum—a question which invites chaos (Lindahl 2013, p. 162).

Whenever it is asserted that the principle of *non-refoulement* is an absolute and unconditional norm not capable of designing or engineering access to territory, the speaker is forced to contemplate the political significance of the 'human that is nothing but human'—returning to Arendt's formulation (Arendt 1968, p. 297).

In the extremes of its application—extremes that recent scholarly and policy-oriented articulations seek to avoid—the principle of *non-refoulement* commands that a refugee is neither returned to a place in which his/her life or freedom may be placed in peril, nor be offered territorial protection. The recent loss of life on European seas has moved the A-Legal sphere of Article 33 from the realms of the irrelevant to the sphere of the monstrous, the terrible; but the monstrous, terrible possibilities that have long been dismissed must be confronted if the problem of mass migration is to be confronted also. The *non-refoulement* principle unqualified maintains that the refugee with no place on earth to go and thus possessing none of the positive rights derived from the primary law of the earth, still/yet cannot be

sacrificed, and thus possess something of value although that something may exceed our conception of human rights.

For those intent on contemplating the importance of territory to social and political life, I suggest that Article 33(1) provides such a focus. As it has been widely interpreted until quite recently, Article 33 is an *exceptional* legal instrument, providing an important frame from within which to interrogate/challenge the bio-political order.

Article 33 challenges us to think beyond the trinity of state–people–territory and thus to think beyond the bio-political condition. The content of the obligation contained in Article 33 is clear: it seeks to protect the asylum-seeker from the violence that we know is meted out through and on territory. If the way beyond the tragedy of mass statelessness is to accord equal value to the 'abstract nakedness' (Arendt 1968, p. 297) of the human being then the challenge is a singular one and must begin from a philosophical position that disputes that only death results from non-territory—from the unruly seas or the cold air. Article 33 promised to be a source from which to confront our bio-political existence. It has not yet been captured within the logic of territorial immanence and so may yet do so.

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