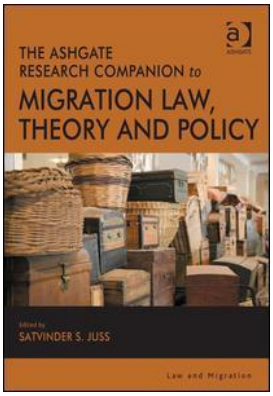

The Ashgate Research Companion to Migration Law, Theory and Policy

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The Modern Refugee in the Post-modern Europe

Publication details
https://test.routledgehandbooks.com/doi/10.4324/9781315613239.ch2
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Published online on: 19 Mar 2013

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The Modern Refugee in the Post-modern Europe

Patricia Tuitt

Introduction

It is a wise scholar who would look with suspicion upon conventional accounts of the causes behind any phenomenon, but the most prevalent hypotheses concerning the impetus behind early European integration will, I think, prove especially productive for the argument I wish to advance in this chapter. In summary, my contention is that the European Union will come into being as a fully fledged political and legal entity only with the complete disavowal of the refugee, as she is understood as both a sociological phenomenon and a legal term of art. To be more precise, when people who flee civil and political oppression, generalized violence or other catastrophic events are denied access in significant numbers to European Union member states, the constitutive force behind the European Union will be revealed. When the regime of rights developed under the Convention Relating to the Status of Refugees[1] no longer has currency within the Union, then (and only then) will we really *know* the European Union.

In common with all sovereign entities that have emerged in any epoch in history, the European Union will define itself through a radical break with what came before it. The European Union is a legal and political community that has been fashioned from previously governed and extensively populated territories of Europe and it can only truly enter history when it has transcended not merely the political, economic and social structures characteristic of the 'old order' of Europe, but when it has surpassed or overborne those individuals or groups who are perceived as uniquely representing that old order.

As so many accounts of the legal nature of the European Union have convincingly argued, the European Union is not a political community born of the old modern world from which the nation-state form was produced but, rather, is an entity that is ambitiously post-national[2] – one that gestures towards a *post-modern* future. Posed thus, the European Union is an entity that is necessarily in tension with the putatively modern world of the nation state.

Conventional accounts of the emergence of the European Union are faithful in depicting the process of its emergence in tension with the old nation state, but there most accounts stop.

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1 28 July 1951, 189 UNTS 150.

2 For example, Neil MacCormick, 'Beyond the Nation State', *Modern Law Review*, 56(1), 1993, 1–18.

To complete the description and analysis of the European Union's emergence onto the stages of the world, there must exist equally faithfully accounts of the European Union's emergence in tension with individuals or groups made to symbolize the old nation state form and more generally the modern world within which that form developed.

Controversially, perhaps, counter-intuitively even, I argue that the refugee is the symbol of the old order that the European Union seeks to transcend. Thus the repudiation of the refugee is the act that signals also the transcendence of the nation state. I would not be so confident as to argue that the refugee exclusively symbolizes the old order as that would be to ignore other groups sacrificed to the ambitious of the European Union – the economic migrant, the resident non-national and so on. In my account, then, the refugee is not the sole but the *principal* signifier of the bankrupt old order of Europe.

The Beginnings of the European Union

To summarize the popular way of relating the history of the so-called 'road to Europe', we learn that the 'new' Europe arose as a consequence of a desire to surpass the nation-state: the conflict and violence it spawned and its obsolete economic structures.

The constitutional lawyer Sionaidh Douglas-Scott captures the popular rendering of the impetus behind integration in her conclusion that the 'European initiative' sought to 'recover from' the 'economic' and 'political' 'bankruptcy' of the 'old order of Europe',[3] the 'old order' being 'the division of Europe into national sovereign states'.[4]

Peter Fitzpatrick has observed that discussion of the European Union's emergence frequently emphasizes what he described as the 'badness' of 'nation', and Douglas-Scott's account of the historical development of the European Union (which is, in turn, strongly characteristic of dominant accounts) offers an example of the tendency Fitzpatrick identifies in the literatures.[5]

Significant for our account is that emphasis on what is bad or, to deploy Fitzpatrick's term, 'savage' about the state that preceded the emergence of a new legal and political order is not unique to discourses around the European Union but is a discernible feature of the discourses surrounding the emergence of other sovereign entities at different times and in different locations, especially so during the most intense period of the assertion of colonial sovereignty during the sixteenth to nineteenth century. Only in relatively recent years have scholars exposed how important to the emergence of sovereign powers was the presentation

[3] Sionaidh Douglas-Scott, *Constitutional Law of the European Union*, Pearson Education, 2002, 19.

[4] D. Weigall and P. Stirk (eds), The *Origins and Development of the European Community*, Lancaster: Lancaster University Press, 1992, 29–32, cited in Douglas-Scott, *Constitutional Law of the European Union*, at 19. See also P. Craig and G. de Burca, *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, 2007, 3–4; E.B. Haas, *Beyond the Nation State*, Stanford, CA: Stanford University Press, 1964; D. Urwin, *The Community of Europe: A History of European Integration*, London and New York: Longman, 1995.

[5] P. Fitzpatrick, *Modernism and the Grounds of Law*, Cambridge University Press: Cambridge, 2001, 137.

of alternative ways of political belonging as 'bad', savage' or 'warlike'.[6] Entirely in keeping with the history of sovereign emergence, the European Union could not have emerged other than against a backdrop of chaos and disorder. The project of European integration could only move forward on the basis of a determined looking *back* upon a savage wasteland in need of modernization. Again, in a distressingly familiar vein, the modernization of Europe – the overcoming of the 'bad' nation state – was to be achieved through the migration and settlement of people, initially offering services and work[7]– and through the movement of goods and capital. Would anyone familiar with the history of sovereign constituting be surprised to learn that the 'savage', 'bankrupt' 'estate' of the old order in Europe was reconstructed into the post-modern New Europe in much the same way that migration and the free play of the primary units of production transformed purportedly 'weak' or 'savage' 'bankrupt' lands in other historical periods and geographical locations?

It is its emergence from within a discursive terrain that juxtaposes the savage and the civil (the good post-nation Union with the bad nation-state) strongly evident in all forms which speak about the European Union's history, presence and future that betrays its origins within a far from *sui generis* process of sovereign emergence. More pertinently, this is a discursive terrain that captures individuals and groups and on whom, as a consequence of this capturing, is meted the ultimate violence – that of threatened extinction. It would hardly be a novel claim if I were to assert that the very *survival* of the refugee – the legal category and the sociological phenomenon – lies in the balance within the European Union. My contribution to discussion of the position of the refugee within the European Union is simply to offer the view that it is within a broader history of the emergence of sovereign entities that we might look to understand why the refugee's existence is threatened – in the faint hope that the spiralling progress towards the complete disavowal of the refugee within the European Union might be halted.

So, this would not be the first time that the figure of the refugee is advanced to expose the European Union's claim to a place somewhere beyond the violence of sovereign constituting, which first Walter Benjamin and then Jacques Derrida spoke of so evocatively.[8] However, I hope to add something to such accounts by situating more precisely the place of the refugee and of international refugee law in the purported transition of Europe in time and space: its transition, not from a pre-modern to modern state of existence – the time-shift that migratory settlements during the 'age of discovery' sought to bring about. For the purposes of this argument, I am content to adopt the grand claims of some European constitutional lawyers and speak of the transition of Europe from the modern to the post-modern.[9] I suggest that this

[6] Ibid.

[7] With the advent of the legal concept of European Union citizenship, the free movement of persons within the European Union is no longer solely for the purpose of work or services or other forms of economic activity.

[8] Walter Benjamin, 'Critique of Violence', in M. Steger and N. Lind (eds), *Violence, Identity and Self-determination*, Stanford, CA: Stanford University Press, 1997; Jacques Derrida, 'Force of Law: The Mystical Foundations of Authority', in J. Derrida and G. Anidjor (eds), *Acts of Religion*, New York and London: Routledge, 2002, 228–99.

[9] '[T]he institutional, juridical and spatial (complexes) associated with the community … constitute nothing less than the first truly post-modern international political form': J.G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', *International*

place is to be found in the contemporary staging of the opposition between the 'progressive' and 'reactionary',[10] or as Balbar would have it, the 'universalistic and progressive' and the 'particularistic and primitive',[11] or the 'ordered' and 'dynamic' and the 'chaotic, static and backward'.[12] This is an opposition that has constituted and authorized virtually every sovereign entity at the most crucial moments of its emergence and is one that is constantly invoked as the European Union seeks to separate itself from the 'old order' of the arrangement of nation-states.[13]

When we hear talk of the 'vicious circle of violence' that 'followed' the sovereign state,[14] or of the old order that held 'calamitous' political structures,[15] or of the state form that was immersed in a 'repetitive pattern of bloody conflict',[16] we see, I suggest, the *grounds* on which the EU asserts its identity. The European Union consolidates itself through a confrontation with its 'others', such as the refugee. It is a human subject that must make concrete the depiction of a 'vicious circle of violence'. It is a human subject in which is embodied the conflicts that the new order seeks to bury and transcend. The evocative descriptions of the development of the European Union from the long road of travel through the nation state have no currency as mere words on the page but only as referents to a concrete *someone*. The 'calamitous' structures of the old order of Europe can only be really understood, *experienced* through the embodiment of chaos or crisis in *someone*. This someone (this *refugee)* is constructed, by the same discursive practices through which the fundamental opposition between the good and the bad, the savage and the civil is configured, as uniquely representing the now utterly discredited 'old order'. Such, I suggest, is the place of the refugee within the European Union – stubbornly attached to the old modern world, antagonistic towards the 'new' post-modern Europe.

Of course, many others before me have argued that the European Union asserts itself against certain 'excluded others', within which grouping the refugee occupies a special place. Interrogating the highly elusive character of the European identity, many argue that it is an identity that is negatively constructed. It is the refugee and the resident non-national in particular around whom this negative imagining of Europe and the 'European' identity coheres.

I am pushing the particular trajectory of inquiry that these discussions of Europe's 'others' have opened out, perhaps to its furthest limit. For me, the refugee is more than one of Europe's others: that is, more than one of a number of identifiably non-Europeans against

Organisation, 1993, 4(1), 139–74. See also I. Ward, *A Critical Introduction to European Law*, London: Butterworths, 1996.

[10] Fitzpatrick, *Modernism and the Grounds of Law*, at 137.

[11] E. Balibar, 'Racism and Nationalism', trans. Chris Turner, in E. Balibar and I. Wallerstein (eds), *Race, Nation, Class: Ambiguous Identities*, London: Verso, 1991, 37–67.

[12] Fitzpatrick, *Modernism and the Grounds of Law*, at 125.

[13] 'What is especially significant here … is that the EU and its law are formed and exalted as epitomes of the universal and the progressive in opposition to the reactionary realms of the nation', Fitzpatrick, *Modernism and the Grounds of Law*, at 136–7.

[14] Douglas-Scott, *Constitutional Law of the European Union*, at 9.

[15] Ibid.

[16] S. Weatherill, *Law and Integration in the European Union*, Oxford: Clarendon Press, 1995, 1–2.

which a 'default'[17] definition of Europe's is being constructed. She is the human remnant in the European Union of the nation-state form, the principal signifier of the 'bankrupt' old order. It is surely instructive in this regard that the only refugee who can come to the European Union secure in the knowledge that a safe haven exists has been endowed with all the negative attributes of the old European order. It is the refugee who suffers persecution on account of her or his nationality, religion, race, social group membership or political opinion who is accorded the reluctant hospitality of member states within the European Union. As critics of the asylum regime have consistently argued, these are not the forms of injury characteristic of contemporary refugee-producing phenomena. A genuine attempt on the part of European Union member states to offer territorial asylum to a fair proportion of the world's refugees would, thus, see a more expansive legal definition of refugee. Yet the pre-eminence of the Geneva Convention definition of refugee status remains, and what remains also, what inheres in the concept of refugee-hood (as understood within the European Union), are those forms of injury for which the nation-state is famed. And so, by dint of a progressive reduction of the phenomenon of refugee-hood to the Geneva Convention definition, the refugee enters the European Union burdened with all the attributes of nation. Being so endowed, the refugee is *necessary* to the European Union, but necessary only insofar as she operates to remind all of the chaos that threatens if the new order of the post-modern and post-national European Union is not embraced fully. Thus the old, bankrupt condition of the nation-state and the refugee are inextricably linked – one cannot be overborne without the simultaneous disavowal of the other. In the contemporary staging of the opposition between the primitive and advanced state, the 'progressive' and the 'reactionary', the refugee occupies the position of the 'wandering tribes', deemed 'primitive in their social being' – the 'chaotic, static and backward',[18] who were displaced in the settlement of the 'new world'.

The Modernism of the Refugee

My references (rather oblique and passing so far) to the 'new world' and the 'golden age of discovery' are no accident. Not unlike the emergence of state in the so-called Age of Discovery, post-war Europe saw, in the wasteland of its political structures and its inefficient and obsolete economic forms, a 'new beginning', a 'New Europe' to be 'discovered' by its model citizens.[19] It must here be understood that in the emergence of the European Union we do not see coming into play a political form without historical precedent – contrary to what so many EU legal scholars and political theorists assert. We see instead in brutal operation an apparently old

[17] Shore, C., 1996. "Imagining the New Europe: Identity and Heritage in European Community Discourse", in Paul Graves-Brown, Sian Jones and Clive Gamble (eds.), Cultural Identity and Archaeology: The Construction of European Identities, London: Routledge: 96–15.

[18] Fitzpatrick, *Modernism and the Grounds of Law*, at 136–7.

[19] For further elaboration, see P. Tuitt, 'From the State to the Union: International Law and the Appropriation of the New Europe', in F. Johns, R. Joyce and S. Pahuja, *Events: The Force of International Law*, Glasshouse: Routledge, 2011, 177–91, and P. Tuitt, 'Used Up and Misused: The State, The European Union and the Insistent Presence of the Colonial', *Columbia Journal of Race and Law*, 2011, 1(3), 490–99.

logic: an entity that is perceived to be 'spent' (as was 'old Europe'), to have reached the limits of its political and economic possibilities, is to be conceived a '*terra nullius*', ready to be placed 'on a new scene'.[20] It is in the exercise of the grant of free movement (which European citizens have always being able to call to command) that this figuratively 'empty space' is filled and thereby radically altered. The European citizen who can exercise the famed four freedoms is, in the very exercise of those freedoms, the new post-modern citizen, empathizing exactly with the ambitions of the post-modern European Union. Those without the freedom to work, proffer services, transport goods and transfer capital exist, at best, with the rights and freedoms associated with the old modern world.

It is now almost folklore that refugee rights have been virtually stripped of all meaning in the securing of the European Union of its external borders, making around Europe a 'fortress' against the incursion of migration from third states, including refugee migration. The freedom of movement of the European Union citizen is made a concrete reality against the relative curtailment of freedom of movement of the refugee. If the European citizen represents the 'progressive' new world, the refugee is made to represent the now discredited 'old' world. So, when she is denied territorial asylum, she is not so much told that she does not suffer but rather that her suffering (like that of so many before who have been sacrificed to other political revolutions) is a result of her failure to *be modern* (or in the case of the refugee *vis-à-vis* the Union) – to be *post-modern*.

We have, through a deliberate process of construction, elements or aspects on which I shall attempt to elaborate below, a thoroughly modern refugee residing in an avowedly post-modern Europe.

As Goodwin-Gill reminded us so long ago, as regards Western Europe at least, the term 'refugee' speaks not to a sociological phenomenon but to a legal term of art.[21] This legal construct has been put to various tasks in the old Europe but it is how the refugee is deployed in the service of New Europe that interests us here. The refugee is made to represent all that in the New European space has supposedly been left behind. Towards the New Europe and in sharp distinction with the New European citizen, the refugees' sufferings are relegated to a distant past, and being so relegated, serve to accent the 'primitive' mode of existence, which is the refugees'.

There are so many ways in which the European Union's ambitions are at odds with its presentation of the refugee, but I want to focus here on the European Union's most enduring claim: to have reached a state of high advancement in terms of its ability to secure fundamental civil and political rights.

[20] Fitzpatrick, *Modernism and the Grounds of Law*, at 161–2.

[21] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Oxford: Clarendon Press, 2007.

Human Rights and the European Union

The Union, we are told, is founded on the principles of 'liberty, democracy and respect for human rights and fundamental freedoms'.[22] Accession of new members to the EU is premised upon proof of a commitment to fundamental rights principles.[23] Since ratification of the Treaty of Amsterdam, the community legislature was empowered to take 'all appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[24] As far back as the early 1990s member states of the European Union have benefited from a presumption that they are 'safe' states for the purposes of the determining whether a prima facie case of a 'well-founded fear of persecution' within the meaning of Article 1.A(2) of the Convention Relating to the Status of Refugees, 1951 has been established. The jurisprudence of the Court of Justice of the European Union has seen the continuous reaffirmation of fundamental rights principles, such as the right to privacy and protection from inhuman and degrading treatment, forming 'an integral part of the general principles of community law protected by the courts of justice'.[25] Not content with that, the Union acceded to the ECHR with the coming into force of the Reform Treaty (Treaty of Lisbon).[26]

The symbolic work that this network of norms, principles, declarations and actions in relation to fundamental human rights undertakes is readily apparent, particularly as regards those concepts such as the safe country of origin that allude to the propensity of members of the European Union to cause or sanction breaches of fundamental rights. These norms and principles are unashamedly declaratory in nature. They do not set out particular aspirations, but purport instead to be indicative of the status quo prevailing in the European Union in which a supposedly advanced state of human dignity and security has been achieved. It is not so much said that those residing within the internal sphere of the European Union will be protected from assaults to their civil and political rights, as it is confidently proclaimed that neither citizen nor resident non-citizen can justifiably fear encroachment on these rights. The post-modern space of the European Union is presented as one in which its inhabitants need no longer fear assaults on their fundamental rights, particularly against their first-generation (the term itself suggestive of a somewhat remedial state) civil and political rights, and can instead concentrate on exploiting the free movement rights essential to achieve the primary goal of European integration, which was to 'place' Europe 'on a new scene'.[27]

The point, then, is that the European Union, through a series of legal manoeuvres (largely brought about by the Court of Justice of the European Union) has positioned breaches of fundamental civil and political rights as an arcane feature of an old order. It is in this light that the fact that the only refugee who comes to the European Union with a legal claim to territorial asylum is invested with these arcane features reveals its deep significance. Within the European Union, the refugee's supposed 'primitive' status is accented by his/her (almost)

[22] The main provisions are contained in the Treaty of European Union Common Principles, Articles 1 and 6 especially.

[23] Treaty of European Union.

[24] The provision is now to be found in Article of the Treaty on the Functioning of the European Union.

[25] See case 11/70 *Internationale Handelsgesellschaft* (1970), ECR 1125.

[26] Treaty of European Union.

[27] Fitzpatrick, *Modernism and the Grounds of Law*, at 161–2.

exclusive reliance upon, and identification with, fundamental civil and political rights that, seen from the vantage point of the ambitions of the EU, belong to a different (and less progressive) political time.

One straightforward indication that the post-modern aspirations of the European Union demand that it presents assaults on fundamental rights as an arcane product of an old order, located somewhere beyond the New European space, is one that several human rights commentators have dawn attention to: the sharp demarcation when 'promoting and applying' fundamental rights principles that the EU draws between its external and internal policies. The EU, it is said, exhibits 'greater willingness to promote and enforce human rights – through forms of conditionality, including the use of negative sanctions – in its external policies than in its internal policies'.[28] An alternative formulation of the same criticism asserts that 'the problem of double-standards between what it expects of itself and its members on the one hand and what it demands of countries outside the EU on the other hand, remains a serious one'.[29] In the other areas of EU competence where inconsistencies between principle and practice have been observed, that is, in 'the fields of asylum, immigration, criminal justice and anti-terrorism',[30] the external/internal dichotomy is equally marked. Indeed, as far back as the establishment of the Trevi group in 1979, organized crime and terrorism were grouped with irregular migration as *external* forces that threatened the *internal* security of the European Union.

Although compelling, these examples of the European Union's distinction between its internal and external spheres in its treatment of fundamental rights principles and their application do not form the primary basis of my claim that, in pursuit of its desire to fully transcend the nation-state arrangement that structured old Europe, the European Union presents itself as having transcended the era of human rights. Rather, the true evidence, I suggest, that the European Union (as expressed through its various organs, particularly the ECJ) views fundamental rights principles as mere artefacts of a past condition is to be found at the seemingly more radical moments of the application of these human rights principles. Somewhat counter-intuitively, perhaps, the moments when we can justifiably claim that the EU is, to coin a phrase, not 'taking rights seriously'[31] (because it need not, because these rights have no salience in the internal sphere) are when its Court produces apparently controversial judgments, such as its recent decision in *Carpenter*,[32] which, ostensibly at least, brought the EU in conflict with its members in the delicate and politically sensitive area of immigration policy. In *Carpenter*, the ECJ granted effective rights of permanent residence in the UK to third-country national family members of an EU citizen. It is when we question (as I shall do in relation to *Carpenter*) how such a decision became possible that we can begin to see how the European Union presents itself as having effectively 'passed' the modernist phase of fundamental rights and, importantly, how the refugee is deployed in support of this claim.

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[28] Craig and De Burca, *EU Law*, at 407.

[29] Ibid., at 408.

[30] Ibid., at 380.

[31] Alluding to the title of Jason Coppel and Aidan O'Neil's influential article, 'The European Court of Justice: Taking Rights Seriously?', *Legal Studies*, 12(2), 1992, 227–39.

[32] C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002]. ECR I-6279.

The case of *Carpenter* concerns an application under Article 49EC (now Article 56TFEU[33]), which governs the free movement of services. The applicant, Mrs Carpenter, was a Filipino national, married to a British citizen. The case was brought to the European Court of Justice (now Court of Justice of the European Union) following a decision to deport her from the UK. The issue before the Court was whether the applicant's deportation would adversely affect the ability of her husband to exercise his rights under Article Ex 49. His business involved the provision of advertising support services to businesses established in other member states of the EU. He was resident in the UK, but his work necessitated frequent travel to other EU states. The UK courts concluded that the issue was a wholly internal one because, being resident in the UK, the applicant's husband was not exercising any freedom of movement provided for under the Treaty.

The ECJ refused to accept the UK court's interpretation of this situation as wholly internal and thus governed by domestic laws. It concluded that because a 'significant proportion' of Mr Carpenter's business consisted of cross-border services 'carried on both within the member state of origin for the benefit of persons established in other member states, and within those states',[34] he was exercising his rights under Article Ex 49EC. Concluding that deportation of Mrs Carpenter would inhibit the exercise of this right, as the couple's 'separation … would be detrimental to their family life and therefore to the conditions under which Mr. Carpenter exercises a fundamental freedom', 'that freedom could not be fully effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in the country of origin to the entry and residence of his spouse'.[35] On the relevance of fundamental rights, the Court had this to say:

> Article 49 of the EC Treaty, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding … a refusal by the member state of origin of a provider of services established in that member state who provides services to recipients established in other member states, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

Carpenter provides authority for the proposition that, in order to comply with European Union law, a domestic court must consider whether removing the non-EU national is a proportionate action, in line with fundamental rights principles, for to deny residence could breach the right to family life as enshrined within Article 8 of the ECHR.

Carpenter is less remarkable for the decision arrived at than for the mathematical precision with which the human rights formula was applied to produce the not inconsiderable personal rights that the applicant was granted. What enabled the fearless application of the Article 8 principles in this case was less a sense that the European Union space was one constitutive of and by fundamental rights, but the fact that external border security surveillance has achieved

[33] Treaty on the Functioning of the European Union.

[34] Case C-60/00 11 July 2002. Mary Carpenter v Secretary of State for the Home Department, PARA 37.

[35] Case C-60/00 11 July 2002. Mary Carpenter v Secretary of State for the Home Department, PARA 37.

a level of containment of third-country nationals to locations outside the European Union area, such that the reach and consequence of human rights norms that might be applied in relation to the relatively few third-country nationals that come to the EU are entirely calculable. So, what might at first sight appear a bold intervention in the domestic immigration sphere in the furtherance of human rights principles evidences instead that fundamental rights principles have never entered the European Union as 'higher' law or 'higher' principle, but always as mere rational legalism. As Coppell and O'Neil observed in their oft-cited article on the 'instrumental' use of rights principles by the ECJ,[36] there was never a time in the evolution of the EU in which human rights were at odds with institutional interests and objectives.[37] According to Douzinas, human rights 'earned' their 'status' as 'higher law' 'as a result of their legal universalism'[38]. Yet, if we take seriously Fitzpatrick's suggestion that the European 'union claims of itself the universal and the nation-state a regressive particularism',[39] it is hard to see how the European Union can recognize a 'higher law' in a concept of rights so intrinsically state centred. And, of course, the ECJ in all its judgments consistently refuses to accord the status of 'higher law' to fundamental rights, as to do so would be to undermine the principle of the supremacy of EU law – human rights inhere in EU law; they can neither be seen as apart from or elevated above EC Treaty norms and secondary principles.

If the anticipation/fear of the 'unintended consequences' sometimes attendant upon an application of human rights principles is the force that ensured that they were once 'taken seriously', then within the European Union the very conditions under which human rights principles are articulated, in the course of adjudication and in the development of the EU constitution and its substantive areas of competence, are certain to quell the more radical possibilities of their application. Instead, the moments of high anxiety, the moments when rights are taken seriously, the moments of judicial creativity, the most important legal innovations of the ECJ, the moments of building for the future are poised towards the development of the free movement rights that its model European citizens enjoy. To summarize, human rights and the nation-state form, being inextricably linked, prompt the EU institutional organs to demonstrate that they (and by extension the European Union) have transcended the state form. This is achieved partly by demonstrating that the era of human rights is effectively surpassed, especially the first generation of fundamental civil and political rights.

It is against the European Union's certainty that it has moved beyond a period in which civil and political rights hung in the balance that we revisit the refugee within that same Union. This refugee is, surely by reason of more than accident, fixed into the legal frame developed with the Geneva Convention, and this frame is one that can only do its work by prioritizing civil and political rights above other push factors behind forced refugee migration. It must be understood that it is not through chance but by a series of political and legal manoeuvres that

[36] 'The European Court of Justice'.

[37] In a similar vein, but in relation to the national sphere, Douzinas remarks: 'when human rights and national interests coincide, governments become their greatest champions'; see C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, Oxford: Hart, 2000, at 119.

[38] Ibid., at 116.

[39] P. Fitzpatrick, 'New Europe and Old Stories: Mythology and Legality in the European Union', in P. Fitzpatrick and J. Bergeron (eds), *Europe's Other: European Law Between Modernity and Postmodernity*, Aldershot: Ashgate, 1998, 27–47.

the European Union has all too successfully reduced the phenomenon of refugee-hood to a single conception of a refugee, which is contained in Article 1.A(2) of the Convention Relating to the Status of Refugees, 1951.

In wording that is all too familiar, this refugee must establish that he or she,

> Owing to a well-funded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[40]

The Convention definition of refugee is the only one that is binding on the entire international community. Yet the association of the idea of the refugee solely as one stripped of civil and political rights is not an inevitable one. There are several different legal definitions of a refugee that do not limit themselves to defining status on the basis of civil and political status, and which are binding in other parts of the globe, notably the Organization of African Unity definition, which includes, but extends beyond, the persecution standard adopted under the Convention Relating to the Status of Refugees, 1951, and accords status to refugees also able to show that they are escaping situations of 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality'. This competing definition has had some measure of success in extending territorial protection to individuals fleeing 'generalized' violence; arguably indeed it has influenced Council Directive 2004/85EC concerning the status of persons who, though not refugees within the terms of the Geneva Convention, 'otherwise need international protection'.[41] However, in spite of recent EU initiatives, the pre-eminence of the Geneva Convention refugee in determining the direction of asylum policy remains.

The Modern Refugee in the Post-modern European Union

Here, then, is a concrete site in which the refugee (reduced entirely to a modernist human rights category of international law) is exposed as an *impossible* post-modern category. The refugee's demand for territorial protection from threats to personal safety and dignity or freedom of speech strikes a jarring note within an institutional setting that all but denies the salience of human rights norms and principles within its internal sphere. In such a setting

[40] Note 1 above.

[41] Council Directive 2004/85/EC of 19 April 2004, on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugee or as Persons who Otherwise need International Protection and the Convent of the Protection Granted (2004), OJ L 304 12.

Douzinas's fear that 'human rights have become the realised myths of post-modern societies'[42] assumes particular significance.

So, it follows from the foregoing that I see no correspondence between European Union free movement rights that heralded the post-national European Union and those more familiar human rights norms. No reading, however sympathetic, of the 'four freedoms', the free movement of persons, goods, capital and services – the axis on which the European Union's economic constitution revolves – can equate them with the three generations of rights, 'civil and political, economic, social and cultural and group rights' [43] that 'entered the world scene after the Second World War'.[44]

If we accept that the invocation of the free movement right of Union citizens, as represented in the Rome Treaty, was the inaugural event of the EU, then those 'four freedoms' of the Rome Treaty are the articulated evidence of the coming into being of a new sovereign entity in a far from radical departure from the modes, forms and processes through which other sovereign entities have emerged throughout history. As such, the four freedoms *per se* are neither a subset of modernist human rights, nor post-modern economic rights, but, as constitutive of a sovereign claim, exceed the opposition between the pre-modern and the modern, the modern and the post-modern, the progressive and the reactionary. Those oppositions are instead precisely brought about by the inaugural event, which heralds a new polity and new law.

Human rights, however, as Douzinas argues in his genealogy,[45] 'are both creations and creators'[46] of modernity. Their 'modern' character is evident most particularly in their integral relation to the state form of the modern world. Human rights propelled 'human nature' to a 'sovereign and unfettered' state, and so heralded its 'counterpoint … which shares in all particulars the characteristics of the undivided singular free will of the individual and literalises his metaphorical unlimited power. The sovereignty of unstructured free will finds its perfect compliment and mirror image in the sovereignty of the state'.[47]

It is this necessary joining of the sovereign state with the sovereign individual bearer of rights that makes the near 40-year period since the Court of Justice of the European Union acknowledged fundamental rights as a primary source of European law a particularly important context for this analysis of the European Union's progressive march against the regressive strains of the old order, and, crucially, how this struggle is displaced on to the figure of the refugee.

The strict adherence to the Convention definition assures the containment of the refugee phenomenon;[48] it refuses (as James Hathaway observed) to 'translate refugee law to meet the realities of the developing world'.[49] Perhaps more charitably, it also recognizes that not all refugee-producing phenomena can be addressed through the grant of cross-border territorial asylum but must be dealt with at the place of origin. What adherence also ensures – and the

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42 Douzinas, *End of Human Rights*, 8.

43 Ibid., 115.

44 Ibid.

45 Ibid., part 1.

46 Ibid., at 19.

47 Ibid., at 20.

48 For general discussion, see S. Juss, *International Migration and Global Justice*, Aldershot: Ashgate, 2006: 187–219.

49 J. Hathaway, *The Law of Refugee Status*, Toronto: Butterworths, 1991.

point that follows is of utmost importance for this thesis – is that when the refugee comes to the European Union she/he is positioned from the moment of her/his arrival (indeed prior to her arrival as she exists in the legal and political imagining) as belonging irresistibly and intractably to a different historical time – a time which narratives of the emergence of the EU locate with the nation-state, a time that, to recall the narratives concerning the impetus behind European integration with which this chapter commenced, the European Union's very existence was called into being to oppose and eventually to transcend.

Into this space in which human rights abuses are relegated to a dark past comes the refugee – her regressive state made real because she is engaged in struggles or conflicts that have been overcome by those in a seemingly more progressive state.[50] She, I suggest, more than any other sociological group or legal construct, has been made to represent all the failings of the nation state that the EU seeks to overcome and eventually to relegate to memory.

The refugee's pursuit of basic human rights – the rights that created and were created by the 'old' modern world – into the new post-modern space that the EU strives to occupy – reveals that the relation between the old and the new, the progressive and the reactionary, is always one of imminent proximity. The remnants of the 'calamitous violence' of the nation state are not to be found in the EU organs that can confidently assert that neither of its diverse members would either produce or threaten the life or safety of a refugee, or whose legal principles (always already included fundamental rights principles), they are not to be found in the economically courageous and astute European citizen as she enjoys her various 'freedoms', they are found instead in the 'profoundly state-centred' refugee law regime and the victim of the disorderly or 'failed' state. In an attempt to deny her enduring proximity, her numbers are reduced, and her incompatibility with the new order constantly underscored.

Conclusion

This chapter ends with a paradox. If, as the foregoing analysis argues, the refugee *vis-à-vis* the European Union is the most visible remnant of the nation state, she is, as other writers have shown, also the nation state's most vociferous critic.

Writing of the refugee condition in an essay towards the end of the *Origins of Totalitarianism*,[51] Hannah Arendt argued that the refugee brings forth consciousness of the essential illusion at the centre of international human rights regimes that purport to attach such rights to 'man's' 'naked existence', outside the political community of the state, but fails the only 'human' – the refugee – who can occupy that position. Commenting on the chapter, Giorgio Agamben claimed that, in seeming to link together 'the fates of the rights of man and of the nation-state', Arendt selects the refugee as the 'figure … that … signals … the concept's radical crisis'.[52]

[50] For further analysis, see Tuitt, 'From the State to the Union', 69.

[51] Schocken Books, 1951. The essay is entitled, 'The Decline of the Nation-state and the End of the Rights of Man'.

[52] Giorgio Agamben, Homo Sacer*: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Stanford: Stanford University Press, 1998, at 126.

Should not then the refugee be the European Union's greatest ambassador, as she was in the cold-war political divide of Eastern and Western Europe?

It would be a mistake to draw parallels between a conflict between 'equal enemies' and an assumption of authority over a 'primitive' (and therefore necessarily unequal) yet opposing force. In the latter relation, the hope of an alliance rests only in the possibility of the progress of the recalcitrant to a proper state of advancement. The refugee, constitutive of and constituted by the opposing of the primitive nation state and the progressive European Union, has, as I suggested earlier, been constructed as an impossible post-modern category, made to bear the burden of a failing community of which (as we learn from Arendt) she was never truly a part. The paradox of the refugee condition is that the refugee brings to bear the brutal materiality of the nation-state even to those depictions of nation in its 'invented', 'imagined' or 'fantastic' character.[53] And even in relation to those theoretical writings that pose the refugee as indicative of 'a new political consciousness, able to challenge the nexus of state, territory and identify',[54] the refugee, as in Agamben's writings, is, in his words, 'the only thinkable category for the people of our time'.[55]

As Agamben concedes in his reading of *Origins*, Arendt's text leaves 'open'[56] the question of whether Arendt, through the refugee, wished to assert the necessity of the state form if the position of 'rightlessness' that the refugee occupies is to be avoided. Others concerned with the protection of refugees are less equivocal over the question of the necessity of state protection for displaced persons. In the essay 'States and Refugees: A Normative Analysis', Joseph Carens argues that the normative justification for offering protection to refugees has less to do with the need to repel threats to international security posed by the irregular movement of people or with the ethical obligations of more fortunate states. He argues instead that the grant of asylum is a necessary gesture if the state system as a whole is to retain its legitimacy in the wake of the failure of individual sovereign states to extend adequate protection to its citizens or those ordinarily domiciled there.

The state system, according to Carens, is legitimated by the offer of surrogate protection by an asylum state. In much the same way that the system of adoption serves to legitimate the institution of the family by securing familial protection to children that their birth families fail to proffer, so an 'adopting' state compensates for the failings of other states, securing the system of states as a whole.

Thus the crisis that Arendt's 'country-less' refugee exposes – the crisis of a concept of human rights that respects not the person who has 'lost all other qualities and specific relations – except that they were still human',[57] is offset by the actions of another state in offering territorial asylum. For many theoretical accounts of the refugee, the state form is an unavoidable locus of criticism and analysis, although more contemporary accounts present the refugee as the figure that most emphatically calls into question the efficacy and ethicality of 'state' and points the way towards a new political consciousness.

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[53] Fitzpatrick, *Modernism and the Grounds of Law*, at 112.

[54] P. Tuitt, 'Refugees, Nations, Laws and the Territorialisation of Violence', in P. Fitzpatrick and P. Tuitt, *Critical Beings: Law, Nation and the Global Subject*, Aldershot: Ashgate, 2004, 37–57.

[55] Agamben, Giorgio (2000) *Means without End: Notes on politics*, trans. Vincenzo Binetti and Cesare Casarino (Minneapolis, London: University of Minnesota Press).

[56] Ibid.

[57] *Origins*, 299.

This new consciousness that Georgio Agamben has, in particular, been forward in advancing, is undoubtedly a post-*national* consciousness. It is, as stated earlier, the trinity of state, territory and identity that the refugee condition first indicts for all its exclusionary violence and then invites its dissolution/destruction. It is in this light that Agamben argues,

> The concept of the refugee (and the figure of the life the concept represents) must be resolutely separated from the concept of the rights of man, and we must seriously consider Arendt's claim that the fates of human rights and the nation-state are bound together such that the decline and crisis of the one necessarily implies the end of the other. The refugee must be considered for what he is: nothing less than a limit concept that radically calls into question the fundamental categories of the nation-state form, the birth-nation to the man-citizen link and that thereby makes it possible to clear the way for a long overdue renewal of categories in the service of politics in which bare life is no longer separated and excepted, either in the state order or in the figure of human rights.[58]

This, on the face of it, appears to be a somewhat formidable objection to my claim that the refugee comes into conflict with the EU precisely because s/he represents the nation-state that the EU claims by its very existence to have transcended. Taking this quote, one would be inclined to argue that, far from being the classic symbol of the regressive nation-state, Agamben's refugee faces the onslaught of the nation's ultimate form of violence – the estrangement from any political community – and thus compels the system of human rights to confront the weakness of its claim to be oriented toward the human *qua* human. Seen thus, the refugee is the only figure capable of performing the urgent task of 'renewal' of obsolete political categories.

Yet Agamben's faith in the refugee is misplaced, for as I have pointed out elsewhere, behind Agamben's utopian ideal lurks a concrete depiction of the refugee that is to effect this ambitious renewal, and that refugee, sadly, is too much bound to the 'nation of blood and soil' to do the work that Agamben sees as awaiting. It does not take much more than a cursory reading of that part of Agamben's text to discern that the refugee he alludes to is that seemingly ineradicable legal term of art: the refugee of the 'Nansen bureau (1921)', of the 'High Commission for Refugees 1936', of the 'Intergovernmental Committee of Refugees 1938', of the 'UN International Refugee Organisation 1946' and, finally, of the 'Office of the High Commission for Refugees 1951'.[59]

While acknowledging that the refugee is 'impossible to define politically',[60] Agamben condescends enough to allow the blunt juridical category to haunt his political imagination, but this is a refugee who is indisputably a state-centred territorial construct. It is a legal precondition that the refugee of the 'Office of the High Commission for Refugees 1951' must be outside the territories of his/her state of origin or domicile before international protection

[58] Agamben, Homo Sacer, at 134.
[59] Agamben, 2000, 18.
[60] Agamben, Homo Sacer, 126.

applies. So, despite or perhaps because of his/her estrangement from territory, the refugee exists to constantly depict the nation as the territory of blood and soil.[61]

The juridical image of the refugee that holds a pre-eminent position within the European Union is so powerful that it is able to hypnotize so acute a political observer as Agamben. As I hope I have been able to show, its purchase is great in the European Union's effort to achieve that elusive state of high civilization, and so, wresting the refugee from the institution of asylum that the 1951 Convention established is a formidable task. My task here is less daunting. It is merely to present a plausible argument to the effect that, whether as mere victim or as strident critic of the system of states, it is difficult, if not impossible, to conceive of the refugee without confronting all too abruptly the materiality of nation. For refugees within a space that claims its legitimacy through the transcendence of the nation, this bodes ill.

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[61] Tuitt, P., 'Refugees, Nations, Laws and the Territorialisation of Violence', in P. Fitzpatrick and P. Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject*, Aldershot: Ashgate, 2004.

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