Articles

NON-EC NATIONALS IN THE EUROPEAN COMMUNITY: THE NEED FOR A COORDINATED APPROACH

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I. INTRODUCTION

The treatment of non-EC nationals in the European Community (EC) has taken on new significance as a result of the massive influx of people into the EC following recent world events. Currently, there are approximately eight million nationals of noncommunity countries living in the territory of the EC, of whom 3.5 million are part of the working population.[1] In considering these figures, a rapidly growing population of illegal immigrants must also be taken into account. Since 1983 total immigration between the EC and noncommunity countries has increased steadily, reaching one million in 1989.[2] These migratory patterns are also no longer confined to the more industrialized member states of the north. Apart from Ireland, all EC countries are now faced with significant levels of immigration.[3] This, however, should not be interpreted to suggest that non-EC nationals are evenly dispersed throughout the Community; the proportion of non-EC nationals in EC countries varies from 0.5 percent to more than 5 percent of the population.[4]

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1. *EC: Commission Submits Analysis on Immigrants,* Agence Europe, May 15, 1992, *available in* LEXIS, Europe Library, Alleur File.

2. *Id.*

3. *Id.*

4. Commission Communication to the Council and the European Parliament on Immigration, SEC(91)1855 final at 13 [hereinafter Commission Communication].

Given the significant numbers of non-EC nationals in the EC and the attendant social strains that their support can impose on individual member states, it is important to examine their status and treatment in the Community. To that end, this article seeks first to define the structures in place in the EC that are responsible for making migration and asylum policy today. Second, it describes the substance of EC migration and asylum policy and the extent of social rights and protections that non-EC nationals receive in the Community. Finally, it explores the potential for a new regime in light of the recent Maastricht Treaty on European Union. Through these steps, this article demonstrates that equal treatment of non-EC nationals and EC nationals concerning the right to freedom of movement and the enjoyment of social benefits requires a coordinated European migration policy and assimilation of the social systems of member states, a state of affairs the that member states have yet to realize.

II. EC MIGRATION AND ASYLUM POLICY

Under the Treaty of Rome (EEC Treaty), the admission of nationals from nonmember countries did not come within the ambit of the Community. This did not mean, however, that the competence of member states to regulate migration from third countries has remained completely unfettered. National migration policies of member states are limited by obligations incurred under the EEC Treaty, which accords priority in favor of Community nationals with regard to access to employment and to establishment.[5] The position of Community nationals, however, cannot be totally separated from that of non-EC nationals. Since both compete within the same labor market, the treatment accorded to migrants from third countries may have serious repercussions for nationals of the member states.[6] Two provisions of the EEC Treaty are particularly relevant in this respect: Article 5(2) of the EEC Treaty requires that member states refrain from any measure which could jeopardize the attainment of the objectives of the EEC Treaty,[7] and Article 234(3) implies that member states must

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5. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 48, 52.

6. Ulrich Wölker, *Commentary, in* 1 KOMMENTAR ZUM EWG-VERTRAG, art. 49, ¶ 11, at 841 (Hans von der Groeben et al. eds., 1991); Meinhard Hilf, *Europäisches Gemeinschaftsrecht und Drittstaatsangehörige, in* STAAT UND VÖLKERRECHTSORDNUNG, FESTSCHRIFT FÜR K. DOEHRING 339, 351 (Kay Hailbronner, et al. eds., 1989); Christopher Greenwood, *Nationality and the Limits of the Free Movement of Persons in Community Law,* 7 Y.B. EUR. L. 185, 208 (1987).

7. EEC TREATY art. 5(2).

not extend the advantages granted to each other within the framework of the EEC Treaty to other countries or their nationals on the basis of a most-favored nation clause.[8] Therefore, member states may not adopt measures which are likely to hinder the free movement of workers from the other Community countries or to compromise the common policy agreed upon by the Community. The European Court of Justice (ECJ) confirmed this view in its judgment of July 9, 1987 concerning the prior communication and consultation procedure on migration policy in relation to nonmember countries.[9] There the ECJ stated that:

> the employment situation and, more generally, the improvement of living and working conditions within the Community are liable to be affected by the policy pursued by the Member States with regard to workers from non-member countries. . . . [T]he Commission rightly considers that it is important to ensure that the migration policies of Member States in relation to non-member countries take into account both common policies and the actions taken at Community level, in particular within the framework of Community labour market policy, in order not to jeopardize the results.[10]

A. EC Authority With Regard to Migration Policy

One can derive a general authority of the Community to regulate the entry and residence of migrants from nonmember countries neither from Article 49 in conjunction with Article 3(f) nor from Articles 100 or 113 of the EEC Treaty.[11] Commentators have suggested, however, that the creation of the internal market sought by Article 8(a) of the EEC Treaty might lead to an extension of the powers of the Community in this field because it will require a common policy vis-à-vis nationals of third states in areas such as visa requirements and

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8. *See id.* art. 234(3) (noting that "incompatibilities" should be eliminated between the EEC Treaty and other prior agreements); 6 THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY, A COMMENTARY ON THE EEC TREATY § 234.03 (Hans Smit & Peter Herzog eds., 1991).

9. Joined Cases 281, 283–285 and 287/85, Germany, France, Netherlands, Denmark and UK v. Commission, 1987 E.C.R. 3203, 1 C.M.L.R. 11 (1988) [hereinafter Joined Cases 281, 283–285 and 287/85].

10. *Id.* at 3251, 1 C.M.L.R. at 50.

11. KAY HAILBRONNER, MÖGLICHKEITEN UND GRENZEN EINER EUROPÄISCHEN KOORDINIERUNG DES EINREISE-UND ASYLRECHTS: IHRE AUSWIRKUNGEN AUF DAS ASYLRECHT DER BUNDESREPUBLIK DEUTSCHLAND 194 (1989); Kay Hailbronner, *Commentary*, *in* HANDKOMMENTAR ZUM EWG-VERTRAG, art. 49/9 (Kay Hailbronner et al eds., 1991); Hilf, *supra* note 6, 349–53.

employment.[12] Article 8(a), which was added by the Single European Act, provides for the creation of an internal market by the end of 1992, comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."[13] Consistent with this goal, the Commission envisioned in its 1985 White Book on the Completion of the Internal Market a harmonization of national legislation on asylum, entry, residence, and access to employment of noncommunity nationals.[14]

Member states have remained reluctant, however, to cede their sovereignty in these sensitive areas. In the General Declaration in Articles 13 to 19 of the Single European Act, it was emphasized that the member states' right "to take such measures as they consider necessary for the purpose of controlling immigration from third countries" should remain intact notwithstanding the provisions of the Act.[15] Additionally, in a political declaration on the free movement of persons, the governments of member states affirmed that "[i]n order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries."[16] Both declarations are evidence of the intention of member states not to surrender their competence to control the

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12. *See, e.g.*, A. Mattera, *L'achèvement du marché intérieur et ses implications sur les relations extérieures, in* RELATIONS EXTÉRIEURES DE LA COMMUNAUTÉ EUROPÉENNE ET MARCHÉ INTÉRIEUR: ASPECTS JURIDIQUES ET FONCTIONNELS 201, 217–18 (Paul Demaret ed., 1988) (arguing that the total abolition of border controls within the Common Market will create the need for a common visa policy to control the movement of non-EC nationals); V. Constantinesco, *Les compétences internationales de la Communauté et des Etats membres à travers l'Acte Unique Européen, in* RELATIONS EXTÉRIEURES DE LA COMMUNAUTÉ EUROPÉENNE ET MARCHÉ INTÉRIEUR: ASPECTS JURIDIQUES ET FONCTIONNELS 63, 68 (Paul Demaret ed., 1988); C.D. Ehlermann, *L'Acte Unique et les compétences externes de la Communauté: un progrès?, in* RELATIONS EXTÉRIEURES DE LA COMMUNAUTÉ EUROPÉENNE ET MARCHÉ INTÉRIEUR: ASPECTS JURIDIQUES ET FONCTIONNELS 79, 88 (Paul Demaret ed., 1988); *see also* Wenceslas de Lobkowicz, *Quelle libre circulation des personnes en 1993?*, REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE No. 334, 96–97 (1990) (arguing that the total abolition of border controls within the Common Market will create the need for a common visa policy to control the movement of non-EC nationals).

13. EEC TREATY art. 8(a) (as amended 1987).

14. COMMISSION OF THE EUROPEAN COMMUNITIES, COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL 15–16 (1985) [hereinafter WHITE PAPER].

15. General Declaration on Articles 13 to 19 of the Single European Act, Feb. 17 & 28, 1986, 25 I.L.M. 504, 510–12.

16. Political Declaration by the Governments of the Member States on the Free Movement of Persons, Feb. 17 & 28, 1986, 25 I.L.M. 505, 505.

migration of non-EC nationals. The powers of the Community in these declarations are those powers explicitly transferred to the Community. The General Declaration is an "agreement relating to the treaty which was made between all the parties in connexion [sic] with the conclusion of the treaty"[17] which has to be taken into account when interpreting the relevant provisions of the Single European Act.[18]

Because of the member states' considerable reluctance to cede their sovereignty in this area, attempts made by the Commission to assert its competence to regulate nonmember country migrants have not been very successful.[19] A draft for a directive to coordinate the rules governing the right of asylum was circulated in 1988, but was not formally presented to the Council.[20] Member states also opposed the decision of the Commission to set up a prior communication and cooperation procedure on migration policies in relation to nonmember states which was based on Article 118 of the EEC Treaty.[21] In its judgment of July 9, 1987, the ECJ did not rule directly on the scope of Article 8(a) of the EEC Treaty.[22] Nevertheless, it recognized the sole responsibility of member states to "take measures with regard to workers who are nationals of non-member countries—either by adopting national rules or by negotiating international agreements—which are based on considerations of public policy, public security and public health."[23] Recently, even the Commission adopted a more cautious position. In its Report on the Abolition of Border Checks on Persons, while maintaining its interpretation of the amended EEC Treaty, the Commission proposed that henceforth

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17. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(2)(a), 8 I.L.M. 679. *See generally* SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 127 (2nd ed. 1984) (discussing the context of Article 31(2)(a)).

18. Joined Cases 281, 283-285 and 287/85, 1987 E.C.R. at 3229, 1 C.M.L.R. at 28 (Mancini, A.G.); HAILBRONNER, *supra* note 11, at 199. *See generally* Matthias Herdegen, *Auslegende Erklärungen von Gemeinschaftsorganen und Mitgliedsstaaten zu EG-Rechtsakten,* 155 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 52, 59-60 (1991) (discussing the impact of Community institutions on the interpretation of EC law).

19. *See, e.g.*, Proposal for a Council Directive Concerning the Approximation of the Legislation of the Member States in Order to Combat Illegal Migration and Illegal Employment, 1978 O.J. (C 97) 9 (one example of a proposal never adopted).

20. Richard Plender, *The Circulation of Persons and Services, in* THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES IN EUROPE: FUTURE PROSPECTS 69, 77–78 (Hague Academy of International Law ed., 1991).

21. *Id.* at 78.

22. Joined Cases 281, 283–285 and 287/85, 1987 E.C.R. at 3203, 1 C.M.L.R. at 11.

23. *Id.* at 3253, 1 C.M.L.R. at 51.

Community legislation should be enacted only in those areas where the legal certainty and uniformity arising from it are the best means to achieve the desired objectives.[24]

The general authority of the EC to regulate the legal position of nationals from third countries is further complicated by the need to draw a clear distinction between the free movement of aliens already residing lawfully in the Community and the initial entry of nationals from third countries into the territory of one of the member states. With regard to the latter, Community regulatory authority may only arise if the existence of conflicting national policies in relation to nationals of nonmember countries threatens to jeopardize the free movement of persons within the internal market.[25] It is obvious, however, that national migration policies vis-à-vis third country nationals may affect the social and labor market policies of the Community.[26] The Council recognized the potential impact of non-EC immigration as early as 1974. In its Resolution of January 21, 1974 concerning a social action program, it acknowledged the need to promote consultation on immigration policies vis-à-vis nonmember countries.[27] The Council has reiterated this view on several occasions.[28] The contested prior communication and consultation procedure on migration policies pertaining to nonmember countries was finally introduced by the Decision of June 8, 1988.[29] In this Decision the Commission asks member states to provide "in good time, and at the latest at the moment they are made public," information concerning draft measures which they intend to take with regard to third country workers and members of their families in the areas of entry, residence, and employment, as well as draft agreements in these areas and draft agreements relating to conditions of residence and employment of their nationals working in third countries.[30]

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24. Communication of the Commission on the Abolition of Controls of Persons at Intra-Community Borders, COM(88)640 final at 5–6.

25. Hilf, *supra* note 6, at 352; Jörn Pipkorn, *Commentary*, *in* 1 KOMMENTAR ZUM EWG-VERTRAG, art. 8(a), ¶ 36, at 199 (Hans von der Groeben et al. eds., 1991).

26. Joined Cases 281, 283–285 and 287/85, 1987 E.C.R. at 3251, 1 C.M.L.R. at 50.

27. Council Resolution Concerning a Social Action Program, 1974 O.J. (C 13) 1, 2.

28. *See, e.g.*, Council Resolution on Guidelines for a Community Policy on Migration, 1985 O.J. (C 186) 3; Council Resolution on Guidelines for a Community Labour Market Policy, 1980 O.J. (C 168) 1; Council Resolution on an Action Programme for Migrant Workers and Members of Their Families, 1976 O.J. (C 34) 2.

29. Commission Decision Setting Up a Prior Communication and Consultation Procedure on Migration Policies in Relation to Non-Member Countries, 1988 O.J. (L 183) 35.

30. *Id.* art. 1.

These developments show that national regulations concerning aliens and asylum seekers can no longer be enacted without having due regard for the common policies and actions taken at the Community level. Despite the absence of a general competence of the Community to regulate these matters, member states must now cooperate with one another and with the Community in order to coordinate their policies.

The Community may also use its existing competences to harmonize certain aspects of the law concerning aliens and asylum seekers. Under Article 49 of the EEC Treaty, the Community can regulate the access of third country nationals who are already residing in the territory of a member state to the labor market.[31] The EC may also take measures concerning noncommunity nationals within the ambit of social policy.[32] In the above-mentioned judgment of July 9, 1987, the ECJ concluded that migration policy could fall within the ambit of Article 118 of the EEC Treaty to the extent that it concerned the impact of workers from nonmember countries on the employment market and on working conditions in the Community.[33]

B. Migration and Association Agreements

Beyond the powers of the Community within the framework of social policy,[34] the ECJ has also attributed authority to the Community to regulate the legal structure of third state nationals within the EC under Article 238, which governs association agreements with third states. In several cases the ECJ has demonstrated a willingness to attribute broad rights to non-EC nationals under such agreements beyond those that should be allowed under the EEC Treaty.

One case indicative of this trend is the *Demirel* case, which concerned the right of the wife of a Turkish worker to move to Germany to join her husband.[35] In *Demirel*, the ECJ held that the EEC Treaty provides for a competence to regulate the entry and stay of nationals of EC-associated states.[36] The ECJ concluded from Article 238 that an agreement of association creates a special relationship between the EC and the associated state covering all areas

31. EEC TREATY art. 49; Wölker, *supra* note 6, art. 49, ¶ 11, at 841.

32. EEC TREATY arts. 117–22.

33. Joined Cases 281, 283–285 and 287/85, 1987 E.C.R. at 3252, 1 C.M.L.R. at 51.

34. EEC TREATY art. 118.

35. Case 12/86, Demirel v. Stadt Schwäbisch Gmünd, 1987 E.C.R. 3719, 1 C.M.L.R. 421 (1989) [hereinafter *Demirel*].

36. *Id.* at 3750–51, 1 C.M.L.R. at 436–37.

regulated in the EEC Treaty, including the freedom of movement for workers.[37] The ECJ, therefore, interpreted Article 238 as implying a competence to extend the market freedoms to nationals of associated states as part of an Association Treaty. Finally, if there is agreement between all member states as to the necessity of a common policy, Articles 100 (et seq.) and Article 235 of the EEC Treaty may be used to implement this policy.[38]

The provision in the Association Agreement with Turkey,[39] whereby the parties agreed to be guided by Articles 48 (et seq.) of the EEC Treaty for the purpose of progressively securing freedom of movement to workers between them until the end of 1986, was not directly applicable within the domestic legal order of the member states.[40] The ECJ held that the Association Agreement and an Additional Protocol fixing the time limit were not sufficiently precise to grant individual rights to Turkish workers.[41]

The Association Agreement gives the Council of the Association the power to lay down rules for the establishment of freedom of movement.[42] The Council reached consensus in 1976 and 1980 on the right of Turkish workers to enjoy free access to any paid employment of their choice in a member state after prescribed periods of lawful residence and employment there.[43] The express terms of both Council Decisions concerned the access to employment but did not extend to the freedom of movement.[44]

Nevertheless, with dubious reasoning the ECJ implied a right of residence for Turkish workers from these Council Decisions in

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37. *Id.* at 3751, 1 C.M.L.R. at 437.

38. HAILBRONNER, *supra* note 11, at 201.

39. Agreement Establishing an Association Between the European Economic Community and Turkey, Sept. 12, 1963, 1973 O.J. (C 113) 1 [hereinafter Association Agreement with Turkey].

40. *Demirel*, 1987 E.C.R. at 3753–54, 1 C.M.L.R. at 439. In an explanation of direct applicability, the ECJ stated that

> [a] provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

Id. at 3752, 1 C.M.L.R. at 438.

41. *Id.* at 3754, 1 C.M.L.R. at 439.

42. *See, e.g.*, Case C–192/89, S.Z. Sevince v. Staatssecretaris van Justitie (Minister of Justice), 1990 E.C.R. 3461, 3463–65, 2 C.M.L.R. 57, 60–61 (1992) [hereinafter *Sevince*] (describing the structure of the Association Agreement and subsequent Protocol).

43. *Id.* at 3464, 2 C.M.L.R. at 62.

44. *Id.*

Sevince.[45] The ECJ argued that without the existence of a right of residence for Turkish workers lawfully established in a member state, the right of access to employment would be useless.[46] This argument, however, does not sufficiently acknowledge that preference is given to EC nationals within the labor market of member states. Equal access to employment, therefore, is a privilege not necessarily connected to a right of residence. The most one could have concluded from the Council Decisions was an obligation by member states not to frustrate the right of access to employment by terminating the lawful stay of a Turkish worker exclusively based on labor market considerations.

Additionally, the ECJ neglected the fact that the unpublished decisions of the Association Council explicitly provided for further implementation of regulations of member states.[47] Member states clearly intend association law to be incomplete in the sense that no individual rights could be inferred from the Council's decisions.[48] The ECJ, brushing aside the member states' intentions, applied the same principles as in the case of traditional EC law.[49] It thus ignored the fact that there are substantial differences between EC regulations on freedom of movement and contractual obligations with third states on access to employment.[50] The ECJ, arguing as if Turkey were already part of the European Community by applying identical rules as those they would have applied to a member state, ignored the different concepts of a progressive and dynamic Community legal order and the limited framework of association law. As a result, general principles of public international law on the interpretation of treaties, as well as the principle of reciprocity, were disregarded by applying EC rules to the association law.

Recently, the ECJ extended this awkward analysis in its interpretation of an equal treatment clause in the Cooperation Agreement between the EC and Morocco.[51] The clause, like many other

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45. *Id.* at 3489–96, 2 C.M.L.R. 57, 81–88 (1992).

46. *Id.* at 3505, 2 C.M.L.R. at 94.

47. EEC-Turkey Association Council Decision 1/80; EEC-Turkey Association Council Decision 2/76 (unpublished decisions, on file with author).

48. *Sevince*, 1990 E.C.R. at 3501–04, 2 C.M.L.R. at 66–69.

49. *See id.* at 3502, 2 C.M.L.R. at 65 (containing the acts of the Association Council on par with the Community legal system).

50. *See* EEC TREATY arts. 48–51 (dealing only with rules among member states).

51. Case C-18/90, Office National de l'emploi (Onem) v. Kziber, 1991 E.C.R. 199, 221, 4 Common Mkt. Rep. (CCH) ¶ 95,766 (1991) [hereinafter *Kziber*]; *cf.* Willy Alexander, *Free Movement of Non-EC Nationals: A Review of the Case-Law of the Court of Justice*, 1992 EUR. J. INT'L L. 53, 62 (1992) (outlining the cooperation agreements between the EC and nonmember

provisions in cooperation agreements with the EC, requires the same treatment for migrant workers and members of their families in the area of social security as for nationals of member states in which they are employed.[52] Mrs. Kziber, a Moroccan national living in Belgium after the retirement of her father who had been working there, applied for special unemployment benefits for school leavers, which the ECJ designated as a social benefit within the meaning of Article 7 paragraph 2 of Regulation 1612/68 applicable to EC migrant workers.[53] Following the same reasoning as in the *Sevince* decision, the ECJ held that the equal treatment clause does grant individual rights in the member states when it is sufficiently precise to be applied without further implementation measures by member states.[54] Again, no reasons were given as to why this equal treatment clause was given as extensive an interpretation as equal treatment clauses in Community law. Originally, the ECJ had justified a broad interpretation of the social benefit clause in the basic Regulation 1612/68 by arguing that in order to fully complete the freedom of movement within the Community every discrimination in social rights and benefits has to be abolished as a possible obstacle to the ability of EC nationals to exercise the freedom of movement.[55] In applying the same rules to the Cooperation Agreement, the ECJ neglected to recognize the essential distinction between the legal status of EC nationals relying directly on the freedom of movement guarantee as a basic individual right under the EEC Treaty and non-EC nationals under a Cooperation Agreement. Simply put, there is no freedom of movement guarantee for non-EC nationals.[56] Social rights, therefore, should not be interpreted as an auxiliary means of achieving market freedom for non-EC nationals.

The ECJ should have interpreted the clause in the context of the Cooperation Agreement and based on the general principles of treaty law as laid down in Article 31 of the Vienna Convention on the Law

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states, including Morocco).

52. Council Regulation 2211/78 Concerning the Conclusion of the Cooperation Agreement Between The European Economic Community and the Kingdom of Morocco, art. 41(1), 1978 O.J. (L 264) 1, 20 [hereinafter Council Regulation 2211/78].

53. *Kziber*, 1991 E.C.R. at 228, 4 Common Mkt. Rep. (CCH) ¶ 95,766; *see also* Council Regulation 1612/68 on Freedom of Movement for Workers Within the Community, 1968 O.J. (L 257) 2 [hereinafter Council Regulation 1612/68] (mandating the same social advantages for nonnational workers as for national workers).

54. *Kziber*, 1991 E.C.R. at 225, 4 Common Mkt. Rep. (CCH) ¶ 95,766.

55. *Id.* at 204, 4 Common Mkt. Rep. (CCH) ¶ 95,766.

56. EEC TREATY arts. 48–51.

of Treaties.[57] As was pointed out by the French government, there was never any intention to include unemployment benefits into the Cooperation Agreement with Morocco.[58] This is apparent from the context of various provisions of the Cooperation Agreement, as well as from the fact that there are no unemployment benefits in Morocco.[59]

This judicial activism on the part of the ECJ in both cases is troubling because it ignores important distinctions between the original and intended scope of an association agreement and the breadth of the protections contained in the EEC Treaty. Such an arrangement blurs the distinction between the legal status of non-EC and EC nationals as a result of presumably limited Community actions in agreements with third states. As noted above, such a de facto policy resulting from Community action is impermissible, especially given the extent of member state sovereignty over migration policy.

C. The Schengen Agreements of 1985 and 1990 and the Draft Convention on the Crossing of External Frontiers

Member states have thus far shown a general preference to cooperate in the field of migration and asylum policy through intergovernmental negotiation outside the framework of the EEC Treaty. On June 14, 1985 Belgium, France, Germany, Luxembourg, and The Netherlands concluded the popularly named Schengen Agreement, which concerns the gradual abolition of controls at their common frontiers.[60] This framework agreement was complemented by the Convention Applying the Schengen Agreement on the Gradual Abolition of Checks at their Common Borders (Schengen Convention), signed by the same parties on June 19, 1990.[61] Italy acceded to both

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57. *See* SINCLAIR, *supra* note 17, at 127–28.

58. *Cf.* Opinion of Attorney General W. van Gerven, *Kziber,* 1991 E.C.R. at 217, 4 Common Mkt. Rep. (CCH) ¶ 95,677 (Kziber, A.G.).

59. *See id.* at 205, 217, 4 Common Mkt. Rep (CCH) ¶ 95,677; Council Regulation 2211/78, *supra* note 52 and accompanying text.

60. Agreement on the Gradual Abolition of Controls at the German Frontiers Among the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, June 14, 1985, 30 I.L.M. 73 [hereinafter Schengen Agreement].

61. Convention Applying the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at their Common Borders Among the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and the French Republic, June 19, 1990, 30 I.L.M. 84 [hereinafter Schengen Convention]; *see* SCHENGEN: INTERNATIONALISATION OF CENTRAL CHAPTERS OF THE LAW ON ALIENS, REFUGEES, PRIVACY, SECURITY AND THE POLICE *passim* (H. Meijers et al. eds. & H.A. Alexander et al. trans., 1991) (collection of articles analyzing the different aspects of this Convention); Thilo Weichert, *Drittausländer in der*

the Agreement and the Convention on November 27, 1990.[62] Portugal and Spain followed suit on June 25, 1991,[63] and Greece has been admitted as an observer.[64]

The Schengen Agreements are generally regarded as having a "pilot function" with regard to future EC legislation.[65] With the abolition of border checks on persons at the internal borders of the member states as a primary goal,[66] the Schengen Convention provides uniform principles on the control of persons at external borders, including airports.[67] The Schengen Convention also envisions a common policy on the movement of persons and, in particular, on the granting of visas for short visits.[68] Until a uniform visa is introduced, the contracting parties have agreed to recognize their respective national visas, insofar as these are issued on the basis of common conditions and criteria to be determined jointly.[69] The Schengen Convention seeks to achieve a certain level of freedom of movement for noncommunity nationals who have legally entered the territory of one of the contracting states or are residing therein.[70] Furthermore, there are detailed provisions about the cooperation of national police authorities[71] and the installation of a joint information system.[72]

Europäischen Gemeinschaft (EG), INFORMATIONSBRIEF AUSLÄNDERRECHT 259–65 (1990); KURT MALANGRÉ, ENTWURF EINES BERICHTS ÜBER DEN FREIEN PERSONENVERKEHR UND DIE SICHERHEIT IN DER EUROPÄISCHEN GEMEINSCHAFT, EUROPÄISCHES PARLAMENT—AUSSCHUß FÜR RECHT UND BÜRGERRECHTE, DOC-DE\PR\105260 8–16 (Mar. 1, 1991).

62. *See, e.g., Schengen Agreements: Italy Becomes a Member*, EUR. REP., Dec. 1, 1990, at 1, *available in* LEXIS, Europe library, Alleur file; *EC: Italy Officially Becomes the Sixth Member of Schengen Agreement*, Agence Europe, Nov. 28, 1990, *available in* LEXIS, Europe library, Alleur file.

63. *See Portugal, Spain Sign Schengen Agreement*, Agence France Presse, June 25, 1991, *available in* LEXIS, Europe Library, Alleur file.

64. *See Schengen Agreements: Greece to Become an Observer in Preparation for Accession*, EUR. REP., Dec. 21, 1991, *available in* LEXIS, Europe Library, Alleur File.

65. This term was used by the Commission. *See Citizens' Europe: The European Commission Regrets the Postponement of the Signing of the New Convention Aimed at Removing Controls at Internal Borders of the Countries Linked Through the Schengen Agreement*, EUR., Dec. 16, 1989, at 17; Thomas Hoogenboom, *Free Movement of non-EC nationals, Schengen and beyond*, *in* SCHENGEN: INTERNATIONALIZATION OF CENTRAL CHAPTERS OF THE LAW ON ALIENS, REFUGEES, PRIVACY, SECURITY AND THE POLICE, *supra* note 61, at 74, 83.

66. Schengen Agreement, *supra* note 60, art. 6, 30 I.L.M. at 75–76.

67. Schengen Convention, *supra* note 61, art. 4, 30 I.L.M. at 75.

68. *Id.* arts. 9–17, 30 I.L.M. at 89–91.

69. *Id.* art. 10(2), 30 I.L.M. at 89.

70. *Id.* art. 19, 30 I.L.M. at 92; *see, e.g.*, Julian J.E. Schutte, *Schengen: Its Meaning for the Free Movement of Persons in Europe*, 28 COMMON MKT. L. REV. 549, 552–54 (1991) (describing Article 19 of the Schengen Convention and its place in EC law).

71. Schengen Agreement, *supra* note 60, art. 18, 30 I.L.M. at 79; Schutte, *supra* note 70, at 554–56.

As far as asylum laws are concerned, the Schengen Agreements have been complemented by the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, which was signed in Dublin on June 15, 1990.[73] This Convention has been signed by all member states.[74] However, neither the Dublin Convention nor the Schengen Convention have led to harmonization in the sense of an adjustment of substantive and procedural law.[75] It is the basic idea of both Conventions to make the examination of an application for asylum—and possibly even the execution of measures to terminate the stay—fall within the jurisdiction of a single state.[76] This state shall be determined according to objective criteria reflecting the explicit or tacit agreement of the state to the asylum seeker's entry to its territory.[77] The most significant of these criteria are (in order of diminishing importance): the granting of a residence permit, the granting of a visa, and illegal entry or de facto residence.[78]

Both the Schengen Convention and the Dublin Convention are based on mutual trust in the equivalency of the different national asylum procedures. As a result, the Commission based its communiqué of October 11, 1991 on the principle of mutual recognition of asylum decisions.[79] This means that member states should no longer be able to fall back on the primacy of national law. Currently, however, both Conventions allow for a divergence in the procedures of the applicable systems.[80] It will be up to each member state to go

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72. Schengen Convention, *supra* note 61, arts. 92–119, 30 I.L.M. at 123–34; Schutte, *supra* note 70, at 559–61.

73. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 (1991) [hereinafter Dublin Convention].

74. *Id.* at 427.

75. *See* José J. Boten, *From Schengen to Dublin: The New Frontiers of Refugee Law*, *in* SCHENGEN: INTERNATIONALIZATION OF CENTRAL CHAPTERS OF THE LAW ON ALIENS, REFUGEES, PRIVACY, SECURITY AND THE POLICE, *supra* note 61, 8, 11–12 (explaining that member states' responsibilities under both agreements are limited to a duty to examine applications for asylum).

76. Dublin Convention, *supra* note 73, art 3(2), 30 I.L.M. at 431; Schengen Convention, *supra* note 61, arts. 29–32, 30 I.L.M. at 95–97.

77. Dublin Convention, *supra* note 73, art. 3, 30 I.L.M. at 431.

78. *Id.*, arts. 4–8, 30 I.L.M. at 432–35.

79. Kommission der Europäischen Gemeinschaften, Mitteilung der Kommission an den Rat und das Europäische Parlament über das Asylrecht, SEK(91)1857 endg. at 5.

80. *See* Philippe Weckel, *La Convention Additionnelle à l'Accord de Schengen*, 95 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 405, 414–17 (1991) (National admission policies remain operative despite the Schengen Agreement. In the absence of prior harmonization

through asylum procedures according to its own laws, possibly even not withstanding the completion of proceedings in other member states.

The planned lifting of border controls within the Community by the end of 1992 has also prompted negotiations on a Convention on the Crossing of External Frontiers, which is to be signed by all member states.[81] The Draft Agreement, which was due to be signed in June 1991, provides for uniform rules on controls at the outer borders of the Community and seeks a harmonization of visa regulations.[82] Under the common visa policy, a list of countries subject to visa requirements and a blacklist of undesired persons will be drawn up.[83] Non-EC nationals who are in possession of a visa issued by one member state would be free to enter another member state for a stay of less than three months without taking employment.[84] So far, the Draft Convention has not been signed because of a disagreement between Spain and the United Kingdom over the status of Gibraltar.[85]

Disagreement also exists between a majority of EC member states and the United Kingdom on the impact of the decision to harmonize controls at external borders while abolishing national border controls.[86] The British government announced that it will keep border controls at all of its frontiers in order to supervise nationals of third states who are not entitled to freedom of movement.[87] The United

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measures, the Dublin Convention leaves unchanged the power of national police authorities to continue to refuse access to European territory in accordance with the Geneva Convention).

81. Commission Communication, *supra* note 4, at 17; David Buchan, *European Freedom of Movement May End at Dover: Britain's Row With Its EC Partners on Border Controls,* FIN. TIMES, May 13, 1992, at 2.

82. Buchan, *supra* note 81, at 2; *EC Commentaries: Social Affairs,* Coopers & Lybrand, Sept. 24, 1992, *available in* LEXIS, Compny Library, CLE File. *See generally EC: Towards Harmonization of Immigration and Asylum Policies,* Agence Europe, Jan. 28, 1992, *available in* LEXIS, Europe Library, Alleur File [hereinafter *Harmonization of Immigration Policies*] (setting out the main elements of the introductory note to the Working Plan drafted by the Council of Ministers).

83. *EC Commentaries: Social Affairs, supra* note 82.

84. Commission Communication, *supra* note 4, at 17.

85. *See, e.g.*, Buchan, *supra* note 81, at 2; *EC: Europe Documents; No. 1796—State of Completion of the Single Market,* Agence Europe, Sept. 11, 1992, *available in* LEXIS, Europe Library, Alleur file (No. 58); Andrew Hill, *UK Urges EC to Avoid Crisis in Frontier Checks,* FIN. TIMES, June 12, 1992, at 2.

86. Hill, *supra* note 85, at 2; *see also Britain to keep Border Check on EC Nationals,* Press Assoc. Ltd., Sept. 3, 1992, *available in* LEXIS, Nexis Library, Panews File [hereinafter *Britain to keep Border Check*] (reporting on a compromise to end the disagreement).

87. *Britain to keep Border Check, supra* note 86.

Kingdom argues that the completion of the Single Market as defined in Article 8(a) of the Single European Act must not result in a de facto extension of the principle of freedom of movement for noncommunity natives residing in or visiting member states.[88] Recently, the Commission and the United Kingdom have reached an agreement which allows Britain to maintain its control of passports at British borders.[89]

D. The Treaty on European Union of February 7, 1992

The Treaty on European Union (Maastricht Treaty) signed in Maastricht on February 7, 1992 significantly extends the powers of the Community in the fields of refugee, alien, and immigration policy.[90] Article 100 of the EEC Treaty, as amended by the Maastricht Treaty, empowers the Council, "acting unanimously on a proposal from the Commission and after consulting the European Parliament," to "determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States."[91] As of January 1, 1996 a qualified majority will be required for such decisions.[92] However, provisions agreed upon in conventions currently in force between the member states (i.e. the Schengen and Dublin Agreements) will remain in force until their content has been replaced by directives or measures adopted by the Community.[93] Article 100(c)(5) allows member states to react as soon as their national interests are implicated by making Community authority contingent on "the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security."[94]

It is now possible, however, to extend Community competence without resorting to a formal treaty amendment. As a result of a unanimous decision of the Council, Article 100(c) of the EEC Treaty may now be applied to certain matters of common interest in the fields

88. *See* Buchan, *supra* note 81, at 2; *EC: Twelve Agree Principles and Objectives of Convention on External Borders*, Agence Europe, June 15, 1991, *available in* LEXIS, Europe Library, Alleur file.

89. *Britain to keep Border Check*, *supra* note 86.

90. Treaty on European Union, Feb. 7, 1992, art. G(C)(23), 31 I.L.M. 247, 264 [hereinafter Maastricht Treaty] (adding art. 100(c)(1) to the EEC Treaty).

91. *Id.* (adding art. 100(c)(1)).

92. *Id.* (adding art. 100(c)(3)).

93. *Id.* (adding art. 100(c)(7)).

94. *Id.* (adding art. 100(c)(5)).

of justice and home affairs,[95] including asylum policy, external border crossings, and various aspects of immigration policy.[96]

Before the Community starts to act in these areas pursuant to Article 100(c) of the EEC Treaty, member states shall inform and consult with one another within the Council in order to coordinate their actions.[97] In response to an initiative of any member state or the Commission, the Council may adopt joint positions and joint actions if Community objectives can be better attained through joint action rather than through the actions of individual member states.[98] The Council may also draw up conventions which it shall recommend to the member states for adoption in accordance with their respective constitutional requirements.[99]

Common action is particularly urgent in the field of asylum policy. The preoccupation of the member states with this issue is reflected in their Declaration on Asylum, which has been annexed to the Maastricht Treaty and explicitly identifies harmonization of member state asylum policies as a goal.[100]

III. THE SINGLE EUROPEAN MARKET AND THE STATUS OF NON-EC MIGRANTS

Any examination of the migration policies of the EC must include an exploration of the substantive rights that non-EC migrants have inside the Community. This article does not focus on a comparison of the asylum, migration, and refugee policies of individual member states (despite the increasing burdens imposed upon the social systems of member states caused by the rising flow of immigration into the Community).[101] Instead, its focus is on the status and rights of non-EC migrants under existing Community structures.

A. The Legal Status of Non-EC Nationals

Non-EC nationals do not enjoy a special status within the framework of the EEC Treaty and secondary EC legislation.

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95. *Id.* art. 100(c)(6), 31 I.L.M. at 264.
96. *Id.* arts. K.1(1)–K.1(6), 31 I.L.M. at 327.
97. *Id.* art. K.3(1), 31 I.L.M. at 328.
98. *Id.* arts. K.3(2)(a)–K.3(2)(b), 31 I.L.M. at 328.
99. *Id.* art. K.3(2)(c), 31 I.L.M. at 328.
100. *Id.*, Final Act of the Conference, 31 I.L.M. at 373 [hereinafter Declaration on Asylum].
101. *See, e.g.*, Roger Cohen, *Paying for the Fall of Communism*, N.Y. TIMES, Sept. 27, 1992, § 3, at 1; *Refugees: Keep Out*, THE ECONOMIST, Sept. 19, 1992, at 64.

Generally, only nationals of member states can invoke the rights and freedoms conferred under EC law.[102] Major exceptions include the equality of treatment for men and women prescribed in Article 119 of the EEC Treaty and the protection of workers as established by Community directives.[103] In these areas, relevant secondary legislation applies irrespective of nationality.[104] The entitlement to other social rights contained in the EEC Treaty and secondary legislation, however, is generally limited to EC nationals.[105] Nationals of nonmember states may invoke these rights only if they are related to an EC national through marriage or kinship.[106]

Beyond the EEC Treaty, non-EC nationals may rely on the provisions of the European Convention on Human Rights (Convention) which has been ratified by all member states of the European Communities.[107] The Convention guarantees certain rights irrespective of nationality to everyone within the jurisdiction of the high contracting parties.[108] Although the rights and freedoms set forth in the Convention and its additional Protocols are essentially civil and political in nature, many of them have important social or economic implications. As the European Court of Human Rights has put it, "there is no water-tight division separating that sphere from the field

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102. *See, e.g.*, EEC TREATY arts. 52, 59.

103. *See, e.g.*, EEC TREATY art. 119.; Council Directive 89/391 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers, art. 118(a), 1989 O.J. (L 183) 1 [hereinafter Council Directive 89/391].

104. *See, e.g.*, Council Directive 89/391, *supra* note 103, pmbl.; *see also* Council Regulation 1612/68, *supra* note 53, pmbl. (discussing social rights afforded to EC nationals who move among the EC member states); Hoogenboom, *supra* note 65, at 84–85.

105. *See, e.g.*, Council Directive 90/366 of 28 June 1990 on the Right to Residence for Students, art. 2, 1990 O.J. (L 180) 30, 30 [hereinafter Council Directive 90/366] (providing that this right applies to any student who is a national of a member state); Council Directive 90/365 of 28 June 1990 on the Right of Residence for Employees and Self-Employed Persons who Have Ceased Their Occupational Activity, art. 1, 1990 O.J. (L 180) 28, 28 [hereinafter Council Directive 90/365] (providing that this right applies to nationals of member states).

106. *See, e.g.*, Council Directive 90/366, *supra* note 105, art. 1 (providing that this right also applies to "the student's spouse and their dependent children"); Council Directive 90/365, *supra* note 105, art. 1 (providing that this right also applies to the employee's "spouse and their descendants who are dependents [and] dependent relatives in the ascending line").

107. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (1955) [hereinafter European Convention on Human Rights]; *see also* The Third Protocol of May 6, 1963 and the Fifth Protocol of January 20, 1966, *reprinted in* COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 3 (1987) [hereinafter COLLECTED TEXTS] (amending European Convention on Human Rights).

108. European Convention on Human Rights, *supra* note 107, art. 1, 213 U.N.T.S. at 224; COLLECTED TEXTS, *supra* note 107, at 4; P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3 (2nd ed. 1990).

covered by the Convention."[109] In the context of the EC, the following rights are particularly relevant: the right to legal assistance and to the free assistance of an interpreter in criminal proceedings,[110] respect for the family life,[111] the peaceful enjoyment of one's possessions,[112] and the right to education.[113] The last of these obliges contracting parties to provide general access to existing educational facilities in accordance with the relevant legislation.[114]

1. *The Free Movement of Workers.* Article 48 of the EEC Treaty does not explicitly limit the free movement of workers to EC nationals.[115] However, according to the prevailing interpretation adopted by the ECJ, the term "worker" in this Article only covers employed persons holding the nationality of a member state.[116] This interpretation conforms with the parallel provisions of Articles 52 and 59 of the EEC Treaty which expressly grant the rights of establishment and provision of services only to nationals of member states.[117]

This restrictive view is further supported by the regulations issued under Article 49 of the EEC Treaty. The main piece of secondary legislation, Council Regulation 1612/68 on the Freedom of Movement of Workers Within the Community is, in principle, only applicable to nationals of member states.[118] Noncommunity nationals are covered

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109. *Airey v. Ireland*, 2 EUR. H.R. REP. 305, 316–17 (1979).

110. European Convention on Human Rights, *supra* note 107, arts. 6(3)(c), 6(3)(e), 213 U.N.T.S. at 228; COLLECTED TEXTS, *supra* note 107, at 7.

111. European Convention on Human Rights, *supra* note 107, art. 8, 213 U.N.T.S. at 230; COLLECTED TEXTS, *supra* note 107, at 7.

112. First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, *reprinted in* COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 24 (1987).

113. *Id.* art. 2, at 24.

114. VAN DIJK & VAN HOOF, *supra* note 108, at 468.

115. *See* EEC TREATY art. 48.

116. *See* Case 238/83, Caisse d'Allocations Familiales v. Meade, 1984 E.C.R. 2631, [1983–85 Transfer Binder] Common Mkt. Rep. (CCH) 14,109 (1984); 1 THE LAW OF THE EUROPEAN COMMUNITY, A COMMENTARY ON THE EEC TREATY § 48.04(b) (Hans Smit & Peter Herzog eds., 1991); Peter Oliver, *Non-Community Nationals and the Treaty of Rome*, 5 Y.B. EUR. L. 57, 62 (1985); TREVOR CLAYTON HARTLEY, EEC IMMIGRATION LAW 54 (1978). *But see* Hoogenboom, *supra* note 65, at 84 ("[b]ut the Treaty in no way compels one to take the view that the free movement of workers from third countries cannot be included within the scope of Articles . . . 42–52, or that the organs of the Community are not competent to regulate the free movement of non-EC nationals.").

117. EEC TREATY arts. 52, 59. *Compare* Case 36/74, Walrave and Koch v. Association Union Cycliste Internationale, 1974 E.C.R. 1405, 1 C.M.L.R. 320 (1975) *with* Case 118/75, Watson and Belmann, 1976 E.C.R. 1185, 2 C.M.L.R. 552 (1976).

118. Council Regulation 1612/68, *supra* note 53, art. 1.

only if they are members of a worker's family. According to Article 10(1) of Regulation 1612/68, a right of residence is guaranteed, irrespective of nationality, to a worker's "spouse and their descendants who are under the age of 21 years or are dependents," as well as to "dependent relatives in the ascending line."[119] Although the English version of this provision suggests that only common descendants are covered, the general interpretation is that the descendants of either the worker or his or her spouse also have the right to install themselves with the worker who is employed in the territory of another member state.[120] Furthermore, it is not necessary that all members of the family live under the same roof within a member state.[121] For example, the right of residence is not affected by the spouses' temporary separation, even if they intend ultimately to divorce.[122] According to Regulation 1251/70, the EC worker's family may, under certain conditions, remain permanently in the territory of a member state in which the worker has been employed.[123] Even if they are not nationals of any member state, the worker's spouse and any children who are under the age of 21 or dependent on the worker may take up any activity as an employed person.[124] Council Regulation 1612/68 also provides for equality of treatment as far as the state's general educational, apprenticeship, and vocational training courses are concerned.[125] Both provisions are supplemented by Article 7 of Regulation 1251/70.[126]

With an eye towards the completion of the internal market, the right of residence has recently been extended by Council Directives 90/364, 90/365, and 90/366, which are to be implemented by June 30, 1992. These Directives respectively cover: (1) nationals of member states who do not enjoy the right of residence under other provisions of Community law;[127] (2) those who have pursued an activity as an

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119. *Id.* art. 10(1).

120. HARTLEY, *supra* note 116, at 131-32.

121. *See* Case 267/83, Diatta v. Land Berlin, 1985 E.C.R. 567, 590, 2 C.M.L.R. 164, 175 (1986).

122. *Id.*

123. Commission Regulation 1251/70 of 29 June 1970 on the Right of Workers to Remain in the Territory of a Member State After Having Been Employed in that State, art. 3, 1970 O.J. (L 142) 24, 24 [hereinafter Commission Regulation 1251/70]; Oliver, *supra* note 116, at 67.

124. Council Regulation 1612/68, *supra* note 53, art. 11.

125. *Id.* art. 12.

126. Commission Regulation 1251/70, *supra* note 123, art. 7.

127. Council Directive 90/364 of June 28, 1990 on the Right of Residence, 1990 O.J. (L 180) 26 [hereinafter Council Directive 90/364].

employee or self-employed person and have ceased their occupational activity;[128] and (3) students.[129] The first two Directives expressly state the rule that spouses, as well as dependent descendants and ascendants, irrespective of their nationality, have the right to install themselves in another member state with the holder of the right of residence.[130]

2. *Freedom of Establishment.* The right of establishment, defined by Article 52 of the EEC Treaty as the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, is expressly confined to nationals of member states.[131] The Community, however, has granted derivative rights, irrespective of nationality, to certain family members of EC nationals who are established or wish to establish themselves in another member state in order to pursue activities as self-employed persons. According to Article 1 of Directive 73/148, member states are required to abolish restrictions on the movement and residence of "the spouse and the children under 21 years of age" as well as of dependent "relatives in the ascending and descending lines . . . ."[132] In this respect, the status of a family of a self-employed person is similar to that of a worker's family.

3. *The Supply of Services.* Article 59 of the EEC Treaty expressly confines the right to provide services to nationals of member states.[133] So far, the Council has not used its competence under section (2) of Article 59 to extend the relevant provisions to nationals of third countries.[134] The already-mentioned Council Regulation 1408/71 and Directive 73/148 are also applicable in the area of services. Due to the temporary nature of services, however, the right to remain

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128. Council Directive 90/365, *supra* note 105, art. 1.

129. Council Directive 90/366, *supra* note 105, art. 1.

130. Council Directive 90/364, *supra* note 127, art. 2; Council Directive 90/365, *supra* note 105, art. 2.

131. EEC TREATY art. 52.

132. Council Directive 73/148 on the Abolition of Restrictions on Movement and Residence within the Community for Nationals of Member States with Regard to Establishment and the Provision of Services, art. 1, 1973 O.J. (L 172) 14, 14.

133. EEC TREATY art. 59.

134. Section (2) allows the Council, acting on a qualified majority and with a proposal from the Commission, to extend the provisions of Chapter 3 of the Treaty to third country nationals established and providing services within the Community. EEC TREATY art. 59(2); *see* Peter Troberg, *Commentary*, *in* 1 KOMMENTAR ZUM EWG-VERTRAG, art. 59, ¶ 36, at 1070–71 (Hans von der Groeben et al. eds., 1991).

in the host state once the services have been completed does not exist.[135]

Nationals from a nonmember country may only indirectly benefit from legislation affecting EC nationals. In *Seco, Desquenne & Giral v. E.V.I.*, the ECJ ruled that the obligation to pay social security contributions for noncommunity nationals who were compulsorily insured in France and who had been employed by a French company to carry out various works in Luxembourg did constitute a discriminatory burden incompatible with Articles 59 and 60 of the EEC Treaty.[136] The ECJ also held that an enterprise established in one member state that provides services in another member state may bring its own labor force consisting of persons currently not enjoying the freedom of movement guaranteed by Article 48 of the EEC Treaty.[137] In such a case, the authorities of the member state in the territory of which the works are to be carried out may not impose conditions relating to the obtaining of work permits.[138]

4. *Social Security.* According to Article 51 of the EEC Treaty, "[t]he Council shall . . . adopt such measures in the field of social security as are necessary to provide freedom of movement for workers . . . ."[139] In connection with this provision the Council enacted Regulation 1408/71 on the Application of Social Security Schemes to Employed Persons, to Self-Employed Persons and to Members of their Families Living Within the Community.[140] This Regulation applies to refugees as defined by Article 1 of the Geneva Convention of July 28, 1951[141] and stateless persons within the meaning of the New York Convention on Stateless Persons of September 28, 1954,[142] as well as

135. Oliver, *supra* note 116, at 86.

136. Joined Cases 62 and 63/81, Seco S.A. and Desquenne & Giral S.A. v. E.V.I, 1982 E.C.R. 223, 236–37, [1981–1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8811 (1982).

137. *See* Case C–113/89, Rush Portuguesa Lda v. Office National d'Immigration, 1990 E.C.R. 1417, 1443, 2 C.M.L.R. 818, 841 (1991).

138. *Id.* at 1446, 2 C.M.L.R. at 843.

139. EEC TREATY art. 51.

140. *See* Council Regulation 1408/71 on the Application of Social Security Schemes to Employed Persons, to Self-Employed Persons and to Members of their Families Living in the Community, Annex, 1983 O.J. (L 230) 8, 49–51 [hereinafter Council Regulation 1408/71] (consolidated version). *See generally* 2 THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY, A COMMENTARY ON THE EEC TREATY §§ 51.04–51.06 (Hans Smit & Peter Herzog eds., 1991) (discussing the history, purpose, and scope of Article 5).

141. *See* Council Regulation 1408/71, *supra* note 140, arts. 1(d), 2.

142. *See id.* arts. 1(e), 2.

members of their families and their survivors.[143] Other noncommunity nationals, however, may benefit from Regulation 1408/71 only if they are family members or members of the household of a national of one of the member states and recognized as such by relevant legislation.[144]

5. *Equal Treatment for Men and Women.* Article 119 of the EEC Treaty guarantees that men and women shall receive equal pay for equal work[145] and applies equally to Community and third country nationals. "Pay," in this Article, has been defined as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer."[146] Because the ECJ held Article 119 of the EEC Treaty to be self-executing, it may be directly invoked before domestic courts.[147] The direct effect of Article 119 of the EEC Treaty also extends to "indirect discrimination," that is, to provisions which formally differentiate on the basis of criteria other than sex, provided that their application leads to discriminatory results which cannot be explained by factors precluding any discrimination on grounds of sex.[148] The objectives of the provision, to prevent unfair competition due to lower-paid female labor and to promote equality between men and women, call for its uniform application within the Community irrespective of the nationality of the employer or the employee.[149] Third country nationals may therefore rely on this provision.[150]

Numerous rulings by the ECJ have clarified the scope of Article 119,[151] and it has been complemented by various directives relating to maternity, access to employment, promotion, vocational training,

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143. *See id.* arts. 1(f)–1(g), 2(1).

144. *See id.* arts. 1(f), 2(1).

145. EEC TREATY art. 119.

146. *Id.*

147. *See* Case 43/75, Defrenne v. SA Belge de Navigation Aérienne Sabena, 1976 E.C.R. 455, 481–82, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8346 (1976).

148. *See* Case 170/84, Bilka-Kaufaus GmbH v. Weber von Hartz, 1986 E.C.R. 1607, 1630, 2 C.M.L.R. 701, 722–23 (1986).

149. CHRISTINE LANGENFELD, DIE GLEICHBEHANDLUNG VON MANN UND FRAU IM EUROPÄISCHEN GEMEINSCHAFTSRECHT 44 (1990) (stating that Article 119 of the EEC Treaty focuses on discrimination on grounds of sex but not nationality).

150. LANGENFELD, *supra* note 149, at 43–45; Julian Currall, *Commentary*, *in* 3 Kommentar zum EWG-Vertag, art. 119, ¶ 31, at 3433 (Hans von der Grueben et al. eds., 1991).

151. *See* COMPENDIUM OF EC EMPLOYMENT AND SOCIAL SECURITY LAW 998–1005 (Mark Furse & Sandra Dutczak eds., 1990).

working conditions, and social security.[152] None of these directives differentiate between nationals of member states and those of third countries.

6. *Protection of Workers.* The Council has adopted various directives concerning the protection of workers in the event of certain business conditions, such as collective redundancies, business transfers, and insolvency.[153] Because Article 118 of the EEC Treaty does not grant specific powers to enact implementing measures, these directives were enacted under the general powers in Article 100,[154] which intended to facilitate the approximation of national laws.[155] The safeguards contained in these directives are applicable to the whole work force, irrespective of the nationality of the employer or the employees.[156]

In the same way, the Community has started to harmonize national legislation on the protection of workers against health and

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152. *See, e.g.*, Council Directive 86/613 of 11 December 1986 on the Application of the Principle of Equal Treatment for Men and Women Engaged in an Activity, Including Agriculture, in a Self-employed Capacity, and on the Protection of Self-employed Women during Pregnancy and Motherhood, 1986 O.J. (L 359) 56; Council Directive 86/378 of 24 July 1986 on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, 1986 O.J. (L 225) 40; Council Directive 79/7 of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, 1979 O.J. (L 6) 24; Council Directive 76/207 of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39) 40; Council Directive 75/117 of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45) 19.

153. *See, e.g.*, Council Directive 80/987 of 20 October 1980 on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of their Employer, 1980 O.J. (L 283) 23 [hereinafter Council Directive 80/987]; Council Directive 77/187 of 14 February 1977 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 1977 O.J. (L 61) 26 [hereinafter Council Directive 77/187]; Council Directive 75/129 of 17 February 1975 on the Approximation of the Laws of the Member States Relating to Collective Redundancies, 1975 O.J. (L 48) 29 [hereinafter Council Directive 75/129].

154. *See* EEC TREATY arts. 100, 118 (granting the Council authority to issue directives to promote the establishment of the common market).

155. Council Directive 80/987, *supra* note 153, pmbl.; Council Directive 77/187, *supra* note 153, pmbl.; Council Directive 75/129, *supra* note 153, pmbl.

156. *See* Council Directive 80/987, *supra* note 153, art. 1 (referring generically to workers); Council Directive 77/187, *supra* note 153, art. 3 (referring generically to employment and employees); Council Directive 75/129, *supra* note 153, art. 1 (referring generically to workers).

safety hazards.[157] The first directives in this field were based on the general provisions of Articles 100 and 235 of the EEC Treaty.[158] Since 1987 Article 118(a) of the EEC Treaty, which was introduced by the Single European Act, expressly provides for the improvement of safety and health conditions at work and thus deals with an essential feature of the social dimension of the internal market: "Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made."[159]

Unlike its powers under Articles 100 and 235 of the EEC Treaty, the Council may act in this area by a qualified majority.[160] It has already used this new authority to adopt, in cooperation with the European Parliament and after consultation with the Economic and Social Committee, minimum requirements that will be implemented gradually.[161]

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157. Frank B. Wright, *The Development of Occupational Health and Safety Regulation in the European Communities,* 8 INT'L J. COMP. LAB. L. & INDUS. REL. 32, 38–43 (1992).

158. *See, e.g.*, Council Directive 86/188 of 12 May 1986 on the Protection of Workers from the Risks Related to Exposure to Noise at Work, 1986 O.J. (L 137) 28, 29; Council Directive 83/477 of 19 September 1983 on the Protection of Workers from the Risks Related to Exposure to Asbestos at Work, 1983 O.J. (L 263) 25, 26; Council Directive 82/605 of 28 July 1982 on the Protection of Workers From the Risks Related to Exposure to Metallic Lead and its Ionic Compounds at Work, 1982 O.J. (L 247) 12; Council Directive 82/501 of 24 June 1982 on the Major-accident Hazards of Certain Industrial Activities, 1982 O.J. (L 230) 1, 2; Council Directive 80/1107 of 27 November 1980 on the Protection of Workers from the Risks Related to Exposure to Chemical, Physical and Biological Agents at Work, 1980 O.J. (L 327) 8; Council Directive 77/576 of 25 July 1977 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Provision of Safety Signs at Places of Work, 1977 O.J. (L 229) 12.

159. EEC TREATY art. 118(a)(1) (as amended 1987).

160. *Id.* art. 118(a)(2).

161. *See, e.g.*, Council Directive 90/394 of 28 June 1990 on the Protection of Workers from the Risks Related to Exposure to Carcinogens at Work, 1990 O.J. (L 196) 1, 2; Council Directive 90/270 of 29 May 1990 on the Minimum Safety and Health Requirements for Work with Display Screen Equipment, 1990 O.J. (L 156) 14; Council Directive 90/269 of 29 May 1990 on the Minimum Health and Safety Requirements for the Manual Handling of Loads where there is a Risk Particularly of Back Injury to Workers, 1990 O.J. (L 156) 9; Council Directive 89/654 of 30 November 1989 Concerning the Minimum Safety and Health Requirements for the Workplace, 1989 O.J. (L 393) 1, 2; Council Directive 89/656 of 30 November 1989 on the Minimum Health and Safety Requirements for the Use by Workers of Personal Protective Equipment at the Workplace, 1989 O.J. (L 393) 18, 19; Council Directive 89/655 of 30 November 1989 concerning the Minimum Safety and Health Requirements for the Use of Work Equipment by Workers at Work, 1989 O.J. (L 393) 13; Council Directive 89/392 of 14 June 1989 on the Approximation of the Laws of the Member States Relating to Machinery, 1989 O.J. (L 183) 9, 10; Council Directive

B. Social Rights

1. *The Community Charter of the Fundamental Social Rights of Workers.*[162] Adopted by eleven of the twelve heads of state and governments of the member states during the Strasbourg Summit held in 1989,[163] this Social Charter proclaims a number of social rights which are considered to be indispensable for the harmonious development of the Single European Market (e.g., freedom of movement, free choice of employment, right to a weekly rest period and to annual paid leave, right to adequate social protection, freedom of association and collective bargaining, equal treatment of men and women, right to information, consultation and participation for workers, right to satisfactory health and safety conditions in the working environment, and special protection for children and adolescents, as well as elderly and disabled persons).[164] The Preamble emphasizes that, in the context of the completion of the internal market, equal importance must be attached to social and economic considerations.[165]

The entitlement to the rights contained in the Social Charter is not expressly confined to nationals of member states. Beneficiaries of these rights are referred to as "every worker"[166] of the EC, or as "every person."[167] The Preamble indicates, as well, that member states enjoy a certain latitude in extending the specified treatment to non-Community nationals: "whereas . . . workers from non-member countries . . . who are legally resident in a Member State of the European Community are able to enjoy . . . treatment comparable to

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89/391 of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work, 1989 O.J. (L 183) 1, 2; Council Directive 88/364 of 9 June 1988 on the Protection of Workers by the Banning of Certain Specified Agents and/or Certain Work Activities, 1988 O.J. (L 179) 44, 45.

162. Community Charter of Fundamental Social Rights: Draft, COM(89)471 final [hereinafter Draft Charter]; *Charter on Fundamental Social Rights: Draft Finalised by the "Social Affairs" Council and Report by the Presidency to the Strasbourg Summit*, EUR. DOCUMENTS, Nov. 8, 1989 [hereinafter *Final Charter*] (on file with author).

163. *See Part One the Single Act: The Verdict*, EUR. REP., Feb. 15, 1992, *available in* LEXIS, Europe Library, Alleur File. The United Kingdom maintained a general reservation and was therefore the only EC member to decline to adopt the Charter. *See EC: Law Column—Common Market Social Policy—the U.K. Opts Out*, Lloyds List, Feb. 7, 1992, *available in* LEXIS, Europe Library, Alleur File.

164. *See* Draft Charter, *supra* note 162, at 6–19; *Final Charter*, *supra* note 162, at 2–5.

165. Draft Charter, *supra* note 162, at 1; *Final Charter*, *supra* note 162, at 1.

166. *See, e.g.*, Draft Charter, *supra* note 162, at 10 (discussing improvement of living and working conditions); *Final Charter*, *supra* note 162, at 3.

167. *See, e.g.*, Draft Charter, *supra* note 162, at 19 (discussing resources available for all elderly persons); *Final Charter*, *supra* note 162, at 5.

that enjoyed by workers who are nationals of the Member State concerned . . . ."[168]

The practical importance of the Social Charter, however, should not be overestimated. It neither enlarges the ambit of Community competence nor creates substantive rights which can be relied upon directly before national administrative or judicial authorities.[169] Paragraph 27 makes it clear that the rights proclaimed by the Social Charter lack domestic enforceability.[170] According to this provision, it is the responsibility of member states to implement the fundamental rights contained in the Social Charter, notably through legislative measures or collective agreements.[171]

In order to ensure the effective implementation of those rights that come within the Community's area of competence, the Commission submitted a detailed Action Programme in 1989.[172] The proposed legislation relates, *inter alia*, to employment and remuneration, the improvement of living and working conditions, freedom of movement, equality between men and women, vocational training, health and safety at the workplace, and the protection of young people.[173] As far as the situation of noncommunity nationals is concerned, the Action Programme is not very explicit. Mentioning no specific legislative initiatives, the Action Programme merely requests the elaboration of a memorandum on their social integration. In September 1990 the Commission formally adopted a report on the policies on immigration and the social integration of migrants in the EC.[174] In its conclusions, this report proposes, *inter alia*, to improve the exchange of information on immigration and integration and devise

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168. Draft Charter, *supra* note 162, at 3; *Final Charter*, *supra* note 162, at 2.

169. Hailbronner, *supra* note 11, art. 117(5)–(6); Landa Zapirain, *La Ejecución del Nuevo Programa de Accion Social de la C.E.E.*, 18 REVISTA DE INSTITUCIONES EUROPEAS 917, 919–20 (1991); Martine Buron, *Community Charter of Basic Social Rights for Workers*, EUR. SOCIALE, Jan. 1990, at 14, 19. *But see* Alan J. Riley, *The European Social Charter and Community Law*, 14 EUR. L. REV. 80, 80–84 (1989) (against this view and in favor of direct effect, at least for some of its provisions).

170. Draft Charter, *supra* note 162, at 20; *Final Charter*, *supra* note 162, at 5.

171. Draft Charter, *supra* note 162, at 20; *Final Charter*, *supra* note 162, at 5.

172. Communication from the Commission concerning Its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM(89)568 final [hereinafter Action Programme]; For a detailed section-by-section analysis of the Action Programme, see Zapirain, *supra* note 169, at 925–42.

173. Action Programme, *supra* note 172.

174. Policies on Immigration and the Social Integration of Migrants in the European Community, SEC(90)1813 final.

a set of basic principles on the integration of migrants in order to delineate their fundamental rights.[175]

2. *The Treaty on European Union and the Maastricht Protocol on Social Policy of February 7, 1992.* The Maastricht Treaty in itself does not significantly enlarge the competence of the Community in social matters. The procedure for the adoption of directives in the area of safety and health conditions at work will be modified to allow for greater participation of the European Parliament.[176] Article 123 of the Maastricht Treaty extends the scope of activities of the European Social Fund and also covers workers' adaptation to industrial changes and to changes in production systems through vocational training and retraining.[177]

At Maastricht, eleven of the twelve member states (with the exception of the United Kingdom) also signed a Protocol and an Agreement on Social Policy which are annexed to the EEC Treaty.[178] Through these they intend to implement the 1989 Social Charter on the basis of the "acquis communautaire."[179] Among the objectives listed in Article 1 of the Agreement on Social Policy are the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment, and the combatting of exclusion.[180]

In some areas covered by the Agreement, the Council now has the power to formulate, by means of directives, minimum requirements for

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175. *Id.* at 38–40.

176. EEC TREATY art. 118(a)(2).

177. Maastricht Treaty, *supra* note 90, art. 123, 31 I.L.M. at 278.

178. *Id.*, Agreement on Social Policy Concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, 31 I.L.M. at 358 [hereinafter Agreement on Social Policy]; *id.*, Protocol on Social Policy, 31 I.L.M. at 357 [hereinafter Protocol on Social Policy]; Manfred Weiss, *The Significance of Maastricht for European Community Social Policy,* 8 INT'L J. COMP. LAB. L. & INDUS. REL. 3, 6–13 (1992).

179. The Community's "acquis" are the totality of rights and obligations, actual and potential, of the Community and its institutions which automatically apply to member states. These rights and obligations include the contents, principles, and political objectives of the treaties, including the Maastricht Treaty; Community legislation and the jurisprudence of the European Court of Justice; declarations and resolutions adopted in the Community framework; international agreements and agreements between the member states connected to Community activities. *European Commission Report on the Criteria and Conditions for Accession of New Members to the Community*, EUR. DOCUMENTS, July 3, 1992 (on file with author).

180. Agreement on Social Policy, *supra* note 178, art. 1, 31 I.L.M. at 358.

gradual implementation.[181] These directives may be adopted by a qualified majority, a procedure governed by Article 189(c) of the EEC Treaty as amended by the Maastricht Treaty.[182] On the other hand, certain areas of social security and the protection of workers will remain subject to the rule of unanimity.[183]

The Agreement on Social Policy also envisions the promotion of consultations between management and labor at the Community level which may eventually lead to contractual relations between the two.[184] Finally, the Agreement on Social Policy reaffirms the principle of equal pay for male and female workers, this time including an express reference to national schemes of affirmative action in favor of women.[185]

On the whole, the Protocol and the Agreement on Social Policy will considerably enlarge the competence of the Community in the social sphere. For the first time, at least eleven member states have explicitly agreed that the regulation of conditions of employment for non-EC nationals falls within the Community domain. As is the case in other areas, the exact scope of Community powers will be determined by the principle of subsidiarity, which will be inserted into Article 3(b) of the EEC Treaty by the Maastricht Treaty.[186] When implementing measures within the framework of the Agreement on Social Policy, "the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy" will also have to be

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181. These areas include the improvement of the working environment and of working conditions, the information and consultation of workers, equality between men and women, and the integration of persons excluded from the labor market. *Id.* art. 2(1).

182. Maastricht Treaty, *supra* note 90, art. 189(c), 31 I.L.M. at 298.

183. Areas still requiring unanimity include: "social security and social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employees, including co-determination . . . ; conditions of employment for third-country nationals legally residing in Community territory; financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund." Agreement on Social Policy, *supra* note 178, art. 2(3), 31 I.L.M. at 359.

184. *Id.* arts. 3–4, 31 I.L.M. at 359.

185. *Id.* art. 6, 31 I.L.M. at 360.

186. Franz Ludwig Graf Stauffenberg & Christine Langenfeld, *Maastricht—Ein Fortschritt für Europa?*, 25 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 252, 255 (1992). *See generally* Rainer HOFMANN, DAS SUBSIDIARITÄTSPRINZIP. GEGENWÄRTIGE BEDEUTUNG IM DEUTSCHEN VERFASSUNGSRECHT UND MÖGLICHE ROLLE FÜR DIE RECHTSORDNUNG DER EUROPÄISCHEN UNION 14–21 (paper submitted to the conference "Verso l'unione politica europea: Una communità di popoli, di stati e di regioni. L'applicazione del principio di sussidiarità" held in Florence, on June 4–5, 1992) (on file with author).

taken into account.[187] Community legislation is thus required to leave some room for adaptation to national idiosyncracies, and must, as far as possible, avoid imposing extra costs or other additional burdens likely to jeopardize competitiveness.[188] The ECJ will have to determine the precise scope of these qualifications.

IV. OUTLINES OF A FUTURE COMMUNITY REGIME

A. The Need for Integrated Action

The pledge of European solidarity in dealing with refugee and immigration problems cannot hide the fact that these matters are closely connected to national perceptions. In recent years, however, member states have increasingly realized that the issues of immigration and asylum cannot be dealt with exclusively on the national level.[189] Uncoordinated national immigration and asylum policies are no longer acceptable.[190] With the realization of the single market and the elimination of controls at the Community's internal borders, the detrimental effects of insufficiently coordinated measures to implement migration and asylum policies are multiplied.[191] The danger of people taking advantage of differences in regulation and thereby undercutting national immigration rules is growing.[192] The achievement of the economic and political aims of the Community—free movement of persons, transparency of the labor market, and political unity—are endangered if each state sets different priorities in its asylum policy. The practice of accepting or rejecting aliens and

187. Agreement on Social Policy, *supra* note 178, art. 1, 31 I.L.M. at 358.

188. Agreement on Social Policy, *supra* note 178, art. 1, 31 I.L.M. at 358; Weiss, *supra* note 178, at 9.

189. AD-HOC-GRUPPE "EINWANDERUNG", BERICHT DER FÜR EINWANDERUNGSFRAGEN ZUSTÄNDIGEN MINISTER AN DEN EUROPÄISCHEN RAT (MAASTRICHT) ÜBER DIE EINWANDERUNGS- UND ASYLPOLITIK (Report of the Immigration Ministers to the European Council Regarding Immigration and Asylum Policy) 2–3 (Dec. 3, 1991) [hereinafter Immigration Ministers' Report].

190. Kay Hailbronner, *Wenn immer mehr kommen. Fragen einer europäischen Harmonisierung des Asylrechts*, FRANKFURTER ALLGEMEINE ZEITUNG, Apr. 21, 1992, at 12.

191. *Cf. Harmonization of Immigration Policies*, *supra* note 82 (reporting the Council of Ministers' concerns over this problem during the formulation of a common immigration policy). *See generally* Commission of the European Communities Background Report on Immigration and Asylum, Mar. 10, 1992, iSEC/B6/92 (on file with author) (outlining the migration and asylum problems and possible solutions as well as the progress that has already been made).

192. *See generally* Commission Communication, *supra* note 4, at 13 (stating that member states have become aware that they must act together to counter manipulation of national rights of asylum procedures).

refugees based upon different procedures is irreconcilable with the vision of a integrated region offering common legal and economic conditions.

As far as a future Community regime is concerned, a strong tendency exists to grant third country nationals who are permanently residing within the Community the same rights and benefits that are currently enjoyed by nationals of member states.[193] In 1985 the European Parliament demanded that the rights enjoyed by migrant workers within the Community be extended to workers from noncommunity countries.[194] In its Resolution of June 14, 1990 on Migrant Workers from Third Countries, the European Parliament reiterated this view, albeit in more cautious terms, urging the creation of a defined community policy extending the rights of migrant workers from non-EC countries.[195]

In 1990 the European Parliament proposed extending the scope of application of Regulation 1612/68 on Freedom of Movement for Workers within the Community[196] to second generation immigrants from noncommunity countries as well as to refugees and stateless persons.[197] Community organs have made similar proposals with regard to two of the three directives on the right of residence for persons who do not enjoy this right under other provisions of Community law.[198] The European Parliament proposed that these

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193. *See, e.g., EC: Commission Submits Analysis on Immigrants, supra* note 1 (summarizing "Immigration and Employment", a working document of the Commission); Immigration Ministers' Report, *supra* note 189, at 6, 27–29.

194. European Parliament Resolution Closing the Procedure for Consultation of the European Parliament on the Communication from the Commission of the European Communities to the Council on Guidelines for a Community Policy on Migration Together with a Draft Council Resolution COM(85)48 final, 1985 O.J. (C 141) 462, 467.

195. The Resolution urges that particular account be taken of the following areas: the entry and residence of workers in Community countries, including the right to reunite families; the free movement of persons throughout the territory of the Community; access to employment and living, working and housing conditions; social rights and social protection; the right to education, continuing training and vocational skills; social integration; the position of female immigrants from third countries; and the right to vote in local elections. European Parliament Resolution on Migrant Workers from Third Countries, 1990 O.J. (C 175) 180, 181.

196. Commission Regulation 1612/68, *supra* note 53.

197. Legislative Resolution Embodying the Opinion of the European Parliament on the Proposal from the Commission to the Council for a Regulation on Guarantees issued by Credit Institutions or Insurance Undertakings, art. 1(12), 1990 O.J. (C 68) 88, 91 [hereinafter Legislative Resolution on Guarantees].

198. Legislative Resolution Embodying the Opinion of the European Parliament on the Council Orientation for a Directive on the Right of Residence, 1990 O.J. (C 175) 89; Legislative Resolution Embodying the Opinion of the European Parliament on the Proposal from the Commission to the Council for a Regulation on the Statistical Classification of Economic

directives also apply to political refugees, stateless persons, and noncommunity nationals who have lived on a regular basis in a member state since before the age of six.[199] In their adopted versions, however, both directives expressly confine the right of residence to member state nationals and their families.[200]

In a communication to the Council and the European Parliament on immigration in 1991, the Commission reiterated its view that, within the internal market, freedom of movement will have to be ensured for all.[201] This does not mean, however, that non-EC nationals legally resident in one member state will have the freedom to settle in every other member state.[202] Before this can happen, the criteria for entry, residence, and access to employment of third country nationals will have to be harmonized.[203] The problem of access to the territory of member states will be addressed chiefly within the framework of intergovernmental cooperation pursuant to the Schengen and Dublin Agreements.[204] An additional convention may be necessary in order to lay down common principles and procedures for the repatriation of immigrants in irregular situations. Such an agreement could be supplemented with bilateral or Community agreements with non-EC countries providing for the deportation of illegal immigrants to their country of origin.[205]

B. The Potential Burdens on Member State Social Welfare Systems

At the present time, the social welfare systems of the member states differ widely.[206] As a result of these differences, the consensus is that harmonization will be difficult.[207] It is therefore highly questionable whether freedom of movement should be granted to non-EC nationals resident in the Community before substantial progress is

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Activities in the European Communities, 1990 O.J. (C 175) 84.

199. Legislative Resolution on Guarantees, *supra* note 197, art. 1(12).

200. Council Directive 90/365, *supra* note 105, art. 1; Council Directive 90/364, *supra* note 127, art. 1.

201. Commission Communication, *supra* note 4, at 16.

202. *Id.*

203. Immigration Ministers' Report, *supra* note 189, at 5, 25–27.

204. Commission Communication, *supra* note 4, at 16.

205. *Id.* at 22.

206. Hoogenboom, *supra* note 65, at 74–75; *Social Security, Healthcare and National Insurance Systems,* EUR. INFO. SERVICE, Doc. No. 1750, Mar. 7, 1992, *available in* LEXIS, Nexis Library, International File.

207. *See, e.g.*, Boten, *supra* note 75, at 34 (explaining the difficulties in harmonizing national immigration laws).

made in the coordination of migration policies, cooperation in police matters, and the basic coordination of social welfare schemes. Advocates of equal treatment and extended rights for non-EC nationals must take into account that the freedom of movement for EC nationals implies not only a right of residence, but also equal treatment in social rights embracing literally every social benefit granted by member states, such as a minimum salary, financial assistance for families with children, unemployment payments, and university scholarships.[208] The social security benefits covered by Council Regulation 1408/71 may also be affected.[209] Currently, for example, the same amount in family allowances must be paid to all EC nationals to cover the costs of children living in their home countries, regardless of differences in the standard of living or pay scale.[210] A similar standard was recently applied to the children of migrant workers by the ECJ, which decided that they are entitled to financial assistance to pursue university studies in their home country if a member state grants financial assistance to its own nationals for university training abroad.[211] To an increasing degree indirect social benefits, such as tax reductions, dependent upon domestic situations like the conclusion of an insurance contract, are subject to attack as disguised violations of the equal treatment clauses of EC law.[212] Believing that member states enact such indirect benefits in an effort to avoid having to extend them to non-EC nationals, the goal of the Commission is to extend their application beyond the territorial limits set by the member states.[213]

Within the Community, broad interpretation of the equal treatment clauses by the ECJ as part of the freedom of movement concept puts heavy strain on, and threatens the stability of, the social systems of some member states. An extended application of the

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208. *See generally supra* notes 102–61 and accompanying text (discussing legal status of non-EC nationals and comparing their current explicit and implicit rights to EC nationals).

209. *But see* Council Regulation 1408/71, *supra* note 140, at 13 (covering presently only "nationals of one of the member states or . . . stateless persons or refugees").

210. *See id.* arts. 73, 75 (providing benefits to an employed EC national for "members of his family residing in the territory of another member state, as though they were residing in the territory" in which the national is employed).

211. Case 308/89, di Leo v. Land Berlin, 1990 E.C.R. 4185, 4203, 4 Common Mkt. Rep. (CCH) ¶ 95,904 (1990).

212. *See, e.g.*, Case C-204/90, Bachmann v. Belgian State, No. 03/92, slip op. at 4–5 (Court of Justice, Jan. 28, 1992) (observing that national social benefit policies might operate to the detriment of workers who work for several years in different EC countries).

213. *Id.* at 5–6 (upholding provisions of Belgian tax law as not contrary to Article 48 of the EEC Treaty on grounds of the need to ensure coherence of tax system).

freedom of movement concept by Community regulations to non-EC nationals would clearly overcharge the system.[214] Equal treatment of non-EC nationals has to be agreed upon in bilateral agreements on the basis of the principle of reciprocity.[215] It should be limited to particular matters like social security or employment conditions according to the different economic, social, and political situations in each particular country. A transfer of the wide concept of freedom of movement to non-EC nationals risks to neglect the basic premises upon which the freedom of movement and equal treatment of EC nationals within the Community rests.

C. Upcoming Initiatives: Community Actions Versus Intergovernmental Cooperation

Initiatives at the Community level will mainly be designed to promote concerted migration policies through the power of the Community to regulate the labor market.[216] The information and consultation mechanism, which has been established under Article 118 of the EEC Treaty, could provide a suitable framework to facilitate the integration of legal immigrants.[217] In 1991 the Commission emphasized that the full integration of such persons can only be achieved by strengthening their legal position.[218] Without calling for a right of establishment, which would automatically extend to the whole Community, the Commission declared equality of treatment for aliens residing lawfully in one of the member states to be a fundamental objective for the whole of the society.[219] In the field of social security, the Commission also favors an equal treatment of workers from third countries residing lawfully in the territory of member states.[220] At the same time, the Commission intends to propose

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214. *Contra* Thomas Hoogenboom, *Integration into Society and Free Movement of Non-EC Nationals*, 3 EUR. J. INT'L L. 36, 41 (1992).

215. *See, e.g.*, Council Regulation 221/78, *supra* note 52, art. 40 (providing that the treatments accorded to Moroccan workers by each member state shall be free from any discrimination based on nationality in relation to its own nationals, and Morocco likewise shall give the same treatment to workers who are nationals of a member state).

216. Commission Communication, *supra* note 4, at 17.

217. *See* Commission Decision 88/384 of 8 June 1988 Setting Up a Prior Communication and Consultation Procedure on Migration Policies in Relation to Non-Member Countries, 1988 O.J. (L 183) 35.

218. Commission Communication, *supra* note 4, at 12, 24.

219. *Id.* at 24.

220. *Final Charter*, *supra* note 162, at 3 ("Every worker . . . shall enjoy an adequate level of social security benefits"); Hoogenboom, *supra* note 65, at 91.

measures to combat illegal immigration.[221] It may soon submit a revised version of its proposal on the approximation of member state legislation in this field and the attendant question of unauthorized work may soon be submitted.[222] Such a directive might be based on Article 49 of the EEC Treaty.[223]

At least for the near future, however, it remains unlikely that the main areas of migration policy will be regulated by uniform Community legislation. The recent informal meeting of EC interior ministers on immigration and crime, held in Lisbon in June 1992, again confirmed interest of member states in intergovernmental cooperation in the field of immigration and judicial policy.[224] The Report of the Ministers Responsible for Immigration and Asylum policy of 1991 (Immigration Ministers' Report) indicates a preference for the coordination of immigration policies of the member states in the area of control of illegal immigration and in the regulation of the legal status of nationals of third states legally resident within a member state of the Community.[225] The Immigration Ministers' Report assumes that immigration pressure will come primarily from countries in Africa (particularly North Africa), eastern Europe, Asia, and other parts of the world producing large numbers of asylum seekers, or with which certain member states have traditionally maintained particularly close ties.[226] The Immigration Ministers' Report identifies a trend towards increased immigration to those countries in which there are already a substantial number of people of the same nationality.[227] Special attention is to be devoted to this phenomenon.

The Immigration Ministers' Report seeks a coordinated, restrictive policy on the admission of nationals of third states on the basis of demographic studies, common practices concerning the entry of spouses and children of resident workers as well as students and

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221. Commission Communication, *supra* note 4, at 12, 21; COMMISSION OF THE EUROPEAN COMMUNITIES, BACKGROUND REPORT: IMMIGRATION AND ASYLUM 3 (1992).

222. Commission Communication, *supra* note 4, at 21.

223. Wölker, *supra* note 6, art. 49, ¶ 12, at 842.

224. Andrew Hill, *Ministers Laud Co-operation in EC: Lisbon Meeting on Immigration and Crime Seen as a Success*, FIN. TIMES, June 13, 1992, at 2; Commission Communication, *supra* note 4, at 8.

225. Immigration Ministers' Report, *supra* note 189, at 2–4; *see Harmonization of Immigration Policies*, *supra* note 82.

226. Immigration Ministers' Report, *supra* note 189, at 19, 21–24; *EC: Details of the Work Agreed on by the Twelve in the Perspective of a "European Policy on Migration,"* Agence Europe, Jan. 29, 1992, *available in* LEXIS, Europe Library, Alleur File [hereinafter *European Policy on Migration*].

227. *European Policy on Migration*, *supra* note 226.

trainees, and the granting of residence permits for humanitarian reasons.[228] Arriving at a consensus on common standards of family union seems much easier than coordinating admissions on humanitarian grounds.[229] Almost all of the member states have strongly objected to the establishment of new legal obligations to admit foreigners on particular humanitarian grounds.[230] Yet if one takes at face value the political statements on European solidarity and burden sharing, a common European policy towards people leaving their home countries for reasons of war, famine, or other compelling reasons would seem desirable. The Immigration Ministers' Report also discusses possible changes in the existing Community system on the labor market in order to improve the ability of the system to react to changes in labor demands.[231] As soon as the freedom of movement for workers is realized, the report considers an extension of the EC system to legally resident foreign workers from third states.[232] This could mean, for instance, that employers would have to make use of a European labor registration system before resorting to outside EC labor resources.

It is essential that one calculate the possible implications of an extension of these rights to nationals of third states. The Immigration Ministers' Report underlines the difficulties inherent in the process.[233] All member states need to be able trust each other's immigration policy decisions. In order to limit possible adverse effects arising from changes in the immigration and integration policy of other states, it is therefore essential to make an inventory of possible improvements in different fields (e.g., social rights, labor market, integration programs, education, and training) and to adopt a flexible approach. The European Community Action Scheme for the Mobility of University Students program (more commonly known as ERASMUS) is open to nationals of third states, for instance, and seems to

228. Immigration Ministers' Report, *supra* note 189, at 25–27; *European Policy on Migration, supra* note 226.

229. Immigration Ministers' Report, *supra* note 189, at 26–27; *European Policy on Migration, supra* note 226.

230. *See* Immigration Ministers' Report, *supra* note 189, at 27 (stating that harmonization in this area is difficult to achieve because humanitarian actions are always dependent on the individual circumstances while harmonization is possible only for objective factors).

231. *Id.* at 26; *European Policy on Migration, supra* note 226.

232. Immigration Ministers' Report, *supra* note 189, at 26; *European Policy on Migration, supra* note 226.

233. Immigration Ministers' Report, *supra* note 189, at 28–29; *Harmonization of Immigration Policies, supra* note 82.

present few problems for the member states.[234] Similarly, the EC could open other programs for nationals of third states legally resident in one member state. It could also establish a priority system for the labor market for cases in which no qualified EC citizens are available. A program to gradually improve the legal status of third state nationals may also provide for different treatment according to the time spent within the EC.

The Immigration Ministers consider the coordination of national laws on the issues of prolongation of residence permits and the termination of residence to be an unsuitable solution in the short run because the regulation of the legal status of nationals of third states is primarily a matter of national public order. The Immigration Ministers do not ignore, however, the implication of these issues for the achievement of the Community's aims.[235] Different types of intracommunity migration of non-EC states nationals can be distinguished in this context: (1) legal migration from one EC country to another in the framework of generally applicable national regulations for the purpose of family union (this is to be dealt within the ambit of efforts to achieve a consensus for common criteria for admission of nationals of third states), and (2) illegal movements of third country nationals including foreigners who have entered the EC illegally or those who move after a termination of their residence permit or for other reasons to another EC country illegally.

Measures against illegal immigration into the EC are of primary importance. European coordination in controlling borders is essential, with the convention on the crossing of external frontiers assuming an important role in achieving this goal.[236] Control of borders, however, is insufficient to cope effectively with the problem of illegal immigration.[237] Supervision of foreigners having illegally entered the EC is

234. *See* Commission Proposal for a Council Decision Concerning the Conclusion of Agreements between the European Economic Community, on the One Side, and (*) on the Other Side, Establishing Cooperation in the Field of Education and Training Within the Framework of the Erasmus Programme (European Community Action Scheme for the Mobility of University Students), 1991 O.J. (C 127) 3; European Parliament Resolution Closing the Procedure for Consultation of the European Parliament on the Proposal from the Commission of the European Communities to the Council for a Decision Adopting a Community Action Scheme for the Mobility of University Students (Erasmus), 1986 O.J. (C 148) 124, 125 (establishing cooperation in the field of education and training within the framework of the ERASMUS Program).

235. *European Policy on Migration, supra* note 226.

236. *Id.*

237. *Id.*

also an essential element of a harmonized European immigration policy.[238] In addition, the Immigration Ministers' Report rightly criticizes the policies adopted by some member states in recent years giving a strong incentive to further illegal immigration though repeated "legalization programs."[239] Social rights granted to illegal immigrants also tend to promote illegal immigration, although exceptions will always have to be made for foreigners staying illegally within the EC for humanitarian reasons. Common standards, however, are necessary both to restrict illegal occupation and to prevent economic exploitation of illegal immigrants.[240] Finally, the Immigration Ministers have emphasized the desirability of developing a common European policy for the repatriation of illegal aliens, including procedural standards for persons facing expulsion.[241]

In this context, repatriation agreements with third states are an essential element to fight illegal immigration. A recent agreement between Spain and Morocco on the circulation of persons, transit, and readmission of illegal immigrants, provides for an obligation to readmit those persons having passed the border illegally from one contracting state to the other, provided they meet certain procedural requirements.[242] A similar agreement was concluded between the Schengen states and Poland—which, however, does not yet apply to third state nationals.[243] It is expected that similar agreements will be concluded with other states.[244]

The range of measures referred to in the Immigration Ministers' Report is not yet adequate to cope with all problems arising from the abolition of border controls. The very fact that administrative acts terminating an alien's right of residence are only enforceable within the country of permanent residence considerably weakens the

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238. *Id.*

239. *Id.*

240. *Id.*

241. Immigration Ministers' Report, *supra* note 189, at 4; *EC: Content of Approved Working Plan for Harmonization of EC Immigration and Asylum Policies*, Agence Europe, Jan. 24, 1992, *available in* LEXIS, Europe Library, Alleur File.

242. ACCORD ENTRE LE ROYAUME DU MAROC ET LE ROYAUME D'ESPAGNE RELATIF À LA CIRCULATION DES PERSONNES, AU TRANSIT ET À LA RÉADMISSION D'ETRANGERS ENTRÉS ILLEGALEMENT ch. I (Dec. 17, 1991) (revised version, on file with author); *see Spain: Moroccan Interior and Information Minister Signs Agreement on Entry of Workers*, MIDDLE E. ECON. DIG., Feb. 28, 1992, *available in* LEXIS, Europe Library, Alleur File; Tom Burns, *Spain and Morocco to Discuss Immigrants*, FIN. TIMES, July 29, 1992, at 3.

243. *See generally* Commission Communication, *supra* note 4, at 22 (noting that the Council and the countries of the Schengen Agreement have also focused on the problem).

244. *Id.*

efficiency of national alien policy. Therefore, European recognition of enforcement of administrative acts parallel to some asylum decisions will be necessary.

D. Future Harmonization of Asylum Laws

Three main areas exist in which harmonization of asylum laws is desirable.[245] First, it is necessary to harmonize substantive asylum laws, such as the principles according to which refugees (both as defined by the Geneva Convention and other refugees in need of protection) are given shelter. In this respect, both the Geneva Convention and the European Convention on Human Rights provide the Community with a common legal framework which can be used to judge whether or not a refugee deserves protection.[246]

Second, the laws governing asylum procedure and judicial remedies should be harmonized.[247] Within the EC, it will be necessary to recognize the principle of "initial host country" which has already been embodied in the Dublin Convention.[248] Successive applications for asylum in different member states of the Community must also be avoided. With due observance for the applicant's rights under the Geneva Convention and the European Convention on Human Rights, shortened procedures to deal with applications that are manifestly ill founded should be introduced.[249]

Finally, institutional precautions for securing a uniform application of European asylum laws are necessary.[250] Various possibilities are conceivable. The ECJ or another judicial authority could be granted the power to function as an appellate authority or to issue preliminary rulings, analogous to the procedure provided under Article 177 of the EEC Treaty.[251] However, the required uniformity in the application

245. Immigration Ministers' Report, *supra* note 189, at 8–9; Hailbronner, *supra* note 190, at 12–13; KAY HAILBRONNER, ZIELE UND SCHRANKEN EINER EUROPÄISCHEN ASYLRECHTSKOORDINIERUNG, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 305–07 (1989).

246. *See generally* VAN DIJK & VAN HOOF, *supra* note 108, at 52–60 (comparing the European Convention system of implementation with the United Nations Covenant on Civil and Political Rights).

247. Commission Communication, *supra* note 4, at 23.

248. *Id.* at 16; *see also* Dublin Convention, supra note 73, 30 I.L.M. at 431–35 (discussing criteria to determine which member state will consider an application for asylum).

249. Commission Communication, *supra* note 4, at 22–23.

250. *Id.*

251. *See* EEC TREATY art. 177 (conferring jurisdiction to the ECJ to give preliminary rulings concerning interpretations of the EEC Treaty, acts of EC institutions, and statutes passed by the Council).

of European asylum laws will—at least for a transitional period—be possible only by resorting to the more traditional instruments of international standardization of laws. In this respect reference to Articles 131–33 of the Schengen Convention which provide for an executive committee consisting of representatives of the responsible ministers can ensure the correct implementation of the Schengen Agreement.[252]

A first move towards the harmonization of the conditions under which asylum is granted occurred under the Strasbourg European Council in 1989. The Council asked the Immigration Group, an informal body of intergovernmental cooperation, to carry out an "inventory of asylum policies with a view to their harmonization."[253] The Group will concentrate on the key issues raised by an asylum application, such as the concept of initial host country, the concept of a safe country, the conditions under which asylum applicants who have been denied the status of refugees should be repatriated, and better flows of information between governments.[254]

The Council has also made various efforts to improve the legal status of immigrant workers. The Assembly Recommendation on the Right of Permanent Residence for Migrant Workers and Members of their Family, for example, invites the governments of member states to recognize the rights of migrants, irrespective of their country of origin or nationality, to reside permanently in their territories when they have resided there for at least five years.[255] In addition, the Recommendation mentions the right to family reunification, the right of permanent residence of the former spouse of a migrant worker, the right to equality of treatment in matters of freedom of movement, the right to access employment, the right to welfare benefits and vocational training, and the right to vote in and run in local elections.[256] The recommendations by the Parliamentary Assembly of the Council of Europe, however, do not have any binding force for the member states.[257] Recently, the Assembly has passed various recommendations on the "new immigration countries."[258] The Assembly recom-

252. Schengen Agreement, *supra* note 60, arts. 131–33, at 30 I.L.M. at 140.

253. Commission Communication, *supra* note 4, at 16.

254. *Id.*

255. *Recommendation 1082 on the Right of Permanent Residence for Migrant Workers and Members of their Families*, EUR. PARL. ASS., 40th Sess., 2 (1988).

256. *Id.*

257. *See* EEC TREATY arts. 137–144; JOSEPHINE STEINER, EEC LAW 8–10 (1990).

258. *See Recommendation 1125 on the New Immigration Countries*, EUR. PARL. ASS., 42nd Sess. (1990).

mends promoting concerted action by the member states to curb clandestine immigration and the attended exploitation of migrants and to increase the scope and substance of work on Community relations, especially in promoting the integration of immigrant communities into the host countries.[259]

V. CONCLUSION

The Community goals of free movement of persons, transparent labor markets, and political unity are threatened if each member state sets different standards for its asylum policy. The practice of accepting or rejecting aliens and refugees based on varying procedures is irreconcilable with the vision of an integrated region offering common legal and economic conditions. Immigration and asylum policy, therefore, must be a part of intergovernmental cooperation between the EC member states and the subject of future EC regulations if the Maastricht Treaty is to succeed.

Despite the fact that there is currently no general equal treatment law applicable to all social rights and benefits, changes in the social sphere through the use of bilateral and multilateral agreements providing primarily for equal treatment in matters of social security and employment conditions indicate a move toward such assimilation. Thus, while a fully integrated European migration policy appears improbable for the near future, it is likely that in special matters—particularly in the prevention of illegal immigration and asylum procedure and the reception of de facto refugees—there will be a coordination of European national policies. It is unlikely, however, that this coordination will eliminate the differences in the migration policies of the member states and will alleviate the problem of illegal immigration sufficiently for lawful residence in the European Community to be equated with freedom of movement.

Action on the Community level is thus required. Asylum laws must be harmonized, as should regulations governing asylum procedures and judicial remedies. In addition, the establishment of institutional safeguards to secure a uniform application of national asylum laws is necessary. Until these steps are taken, the equal treatment of non-EC and EC nationals concerning the right to freedom of movement and the enjoyment of social benefits will remain unrealized.

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259. *Report on the New Immigration Countries*, EUR. PARL. ASS., 42nd Sess., Doc. No. 6211, at 3 (1990).