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## Citizens and Noncitizens in Europe: European Union Measures Against Terrorism After September 11th

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# CITIZENS AND NONCITIZENS IN EUROPE: EUROPEAN UNION MEASURES AGAINST TERRORISM AFTER SEPTEMBER 11

SOPHIE ROBIN-OLIVIER\*

**Abstract:** In the European Union, new anti-terror measures have had an impact on the lives of noncitizens, immigrants, and asylum-seekers. This Essay outlines the rights guaranteed to both citizens and noncitizens under the European Convention on Human Rights and the EU treaties and evaluates how these rights have limited harsh treatment of noncitizens in the fight against terrorism. Although suspicion and rejection of non-citizens are widespread, there remains hope for broadening the principles of equality and fundamental rights to third country nationals through an open conception of the notion of European citizenship.

## INTRODUCTION

Is the European Union's use of the citizen/noncitizen distinction in its post-September 11 fight against terrorism distinguishable from that of the United States? This is not a simple question. On the one hand, the situation of immigrants on both sides of the Atlantic has generally deteriorated. On the other hand, the lives of noncitizens do not seem to have changed in Europe as they have in the United States. Many factors help to explain this difference, including the particular trauma caused by the terrorist attacks on U.S. territory and, from a legal standpoint, the apparent framing of the fight against terror in terms of war and wartime powers in the United States.

The Madrid attacks may well change the situation. General Hamidou Laanigri, Morocco's chief of security indicated in a recent interview that "[t]he Madrid bombings finally have forced the Europeans to make their investigations more serious and their cooperation quicker and more operational."<sup>1</sup> But he added the following interesting comment: "[W]e are victims of laws and guarantees that protect the rights

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<sup>1</sup> Elaine Sciolino, *Morocco Connection Is Emerging as Sleeper Threat in Terror War*, N.Y. TIMES, May 16, 2004, at A3.

of individuals at the expense of cracking down against organized crime.”<sup>2</sup> A similar analysis was offered shortly after the Madrid bombings by Sergio Romano, a former Italian ambassador to Russia and NATO: “Every European country has strengthened its police and judiciary since 9/11. But they cannot go much beyond that. There is a great deal of resistance in Europe to more radical measures impinging on individual rights.”<sup>3</sup> My purpose in this Essay is to explain European resistance to more radical law enforcement measures and, in particular to those measures targeting noncitizens.

Assessing the European situation on this subject requires an analysis on two levels, because both the fight against terrorism and immigration policies are matters on which the European Union (EU) and its constituent Member States have shared competence.<sup>4</sup> Drawing a com-

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<sup>2</sup> *Id.*

<sup>3</sup> Alan Riding, *Europe Knows Fear, But This Time It's Different*, N.Y. TIMES, Mar. 14, 2004, § 4, at 1.

<sup>4</sup> See TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) art. 2(15) (1997) [hereinafter TREATY OF AMSTERDAM]. Only recently has the EU been granted some powers to deal with security and immigration. These issues first belonged to the so-called “third pillar” of the EU, introduced by the Maastricht Treaty (formally, the Treaty on European Union) and signed on February 2, 1992, to deal with “justice and home affairs.” TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 253, 1992 O.J. (C 191) 1, 61–62 [hereinafter TREATY ON EU]. At that time, EU powers were very limited, because decisionmaking required the unanimity of all Member States. The Union’s powers derive from amendments to the Treaty of Amsterdam, specifically the Treaty’s new title establishing the European Community (EC) (the “first pillar”), called Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons. See TREATY OF AMSTERDAM, *supra*, art. 2(15). The insertion into the first pillar allows the use of EC procedures including decisionmaking by the majority and submission to the jurisdiction of the European Court of Justice. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3, arts. 64, 68 (1997) [hereinafter EC TREATY]. Some provisions on police and judicial cooperation in criminal matters have remained in the third pillar of the treaty on the EU. Both the first and third pillar provisions intend to create “an area of freedom, security and justice.” See EC TREATY, *supra*, art. 61; TREATY ON EU, *supra*, art. 29. They have been fostered by the body of rules developed outside the European Union that are based on the Schengen Agreements (on the free movement of people, signed by some Member States on June 14, 1985 and June 19, 1990), which is now part of EU law. See TREATY OF AMSTERDAM, *supra*, Protocol Integrating the Schengen Acquis into the Framework of the European Union. The Schengen *acquis*, composed of the Schengen Agreement and the other provisions adopted in that context, is incorporated into EU law, whereas formerly, it was only international law deriving from an agreement between States (outside the field of EU law). Despite the increasing power of the EU, Member States have not abandoned their own power on these matters. Criminal law and criminal procedure remain, for the most part, within states’ powers. Where EU power to act exists but has not yet been exercised, such as in the field of immigration law, Member States remain free to adopt specific legislation in the absence of a common rule. On the issue of preemption, see KOENRAAD LENAERTS, LE JUGE ET LA CONSTITUTION AUX ÉTATS-UNIS D’AMÉRIQUE ET DANS

plete overview of the situation in twenty-five Member States, as well as at the EU level, however, would be a very ambitious enterprise. Given limits of space and time, this Essay will, therefore, not attempt to describe, analyze and compare twenty-six different legal systems, but will focus on the European Union's legal system. The Essay considers the effects of the EU legal system both within Member States and at the EU level. This approach, of course, tends to neglect many factors, most importantly the particular systems of constitutional and other legal checks and balances in each Member State. Such internal constitutional mechanisms undoubtedly play a crucial role in the Member States and can explain the deviations in their responses to terrorism. It is also true, however, that the EU legal system has an increasing influence on the legal orders of Member States. In particular, the fields of human rights and immigration law are no longer insulated by sovereignty, and therefore, these fields are well within its reach.

In Europe, as in the United States, measures ostensibly designed to fight terrorism have reflected hardline attitudes and have pointedly targeted noncitizens. In dealing with security and immigration issues, the EU has taken a number of steps that tend to reduce the rights and freedoms of noncitizens. Some of these measures require actions to be taken by Member States.<sup>5</sup> European nations and the EU have maintained and strengthened their control over noncitizens through harsh immigration policies and measures to police their external borders.<sup>6</sup> A general expansion of the police power at the border has thus implicated fundamental rights and freedoms of "foreigners."

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L'ORDRE JURIDIQUE EUROPÉEN 577-78 (1998); DENYS SIMON, LE SYSTÈME JURIDIQUE COMMUNAUTAIRE 147-49 (3d ed. 2001); Eugene Daniel Cross, *Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis*, 29 COMMON MKT. L. REV. 447 (1992); António Goucha Soares, *Pre-emption, Conflicts of Powers and Subsidiarity*, 23 EUR. L. REV. 132 (1998). Even then, Member States remain entitled to ensure law and order and the safeguarding of internal security on their territory. See EC TREATY, *supra*, art. 64 (stating that "[t]his title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.").

<sup>5</sup> See discussion *infra* Part II. Some of the European measures imply enforcement actions by Member States, which tend to harden national policies toward immigration and especially illegal immigration.

<sup>6</sup> See discussion *infra* Part II. Enlargement of the EU to twenty-five states this year, with the addition of ten new countries, has made the issue of external border control a growing concern. "A new border control plan was agreed in a matter of weeks in spring 2002. It will be spearheaded by a new unaccountable body: the chiefs of EU border police, meeting regularly in Brussels, who will be coordinating sixteen different ad hoc groups working on different aspects of border control. This will include operations at land borders, sea borders and international airports and mass joint expulsion exercises, each likely to involve

Particular features of the European Union's legal system and identity may, however, confine and even counterbalance the impact of anti-terrorism measures on noncitizens. Discrimination against noncitizens does not fit easily within the current construction of European identity. Although fragile and uncertain, this construction is based on a system of protection of fundamental rights that recognizes the universality of human rights and emphasizes nondiscrimination. Part I of this Essay illustrates how this system of fundamental rights is inconsistent with drastic measures against noncitizens. Part II, however, demonstrates that the system does not forestall measures directed at noncitizens purely for immigration policy purposes. A further and equally vital consideration is the emerging notion of European citizenship. This new citizenship, by its very definition, could lead to new kinds of distinctions between citizens and noncitizens. At present, however, the concept of European citizenship tends to blur the distinction between nationals and non-nationals of Member States and may, in fact, foster a new line of distinction dependent on degree of integration into European society. Part III of this Essay addresses the issue of citizenship and the fading color of nationality in the European Union.

## I. PROTECTING NONCITIZENS WITHIN THE EUROPEAN SYSTEM FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

### A. *Fundamental Rights*

Universality of human rights and the principle of nondiscrimination are essential attributes of the European system for the protection of human rights. This system derives mainly from the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or "Convention"), which all Member States of the EU have ratified and to which the EU itself adheres.<sup>7</sup> Since the mid-1970's, the protection of fundamental rights has been enhanced, albeit within the limited jurisdiction of EU law, by the EU's specific system for the protection of fundamental rights.

The ECHR secures universality of fundamental rights by its first article, which prevents the exclusion of noncitizens from the scope of

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foreign border police exercising controls at the borders of other Member States." *Immigration and Asylum in the EU After 11 September 2001*, STATEWATCH NEWS ONLINE (Sept. 2002), at <http://www.statewatch.org/news/2002/sep/analy14.htm>.

<sup>7</sup> See TREATY ON EU, *supra* note 4, art. 6. See generally European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

the protection of the Convention.<sup>8</sup> Rights and freedoms are granted to *all persons*, regardless of nationality.<sup>9</sup> In this respect, the Convention is not unique. Many believe that the very nature of human rights requires universality and the major international conventions are grounded on this view.<sup>10</sup>

Universality is not so evident, however, with regard to fundamental rights based in constitutions that are designed to protect *citizens'* rights. The potential contradiction between the two approaches is particularly evident in the recently adopted Charter of Fundamental Rights of the European Union (the "EU Charter"), which is best described as a hybrid document: part-international convention, part-constitution.<sup>11</sup> Still, the Charter reserves only a limited number of rights to residents or EU citizens alone, thus departing only slightly from universality.<sup>12</sup>

Noncitizens benefit from most of the rights and freedoms guaranteed to EU citizens and residents. For instance, article 3 of the ECHR, which prohibits torture and inhuman or degrading treatments, has been invoked quite successfully by noncitizens to prevent deportation. The European Court of Human Rights (the "Court") precludes Member States from deporting a person whenever a risk exists that this person could be exposed to torture or inhuman treatment in the receiving country.<sup>13</sup> This reasoning also applies, according to the Court, when the person has a serious disease and deportation would lead to a rapid and certain deterioration of his or her health.<sup>14</sup>

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<sup>8</sup> See European Convention, *supra* note 7, art. 1, 213 U.N.T.S. at 224.

<sup>9</sup> *Id.* (stating that "[t]he . . . Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms . . . of this Convention.")

<sup>10</sup> See Danièle Lochak, *La Défense D'un Point de Vue «Étranger»*, in LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE 205, 212 (Jean-Yves Carlier & Olivier De Schutter eds., 2002); see, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3rd Sess., 183d plen. mtg. at 135-42, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 173.

<sup>11</sup> See CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Dec. 18, 2000, O.J. (C 364) 20 (2000) [hereinafter CHARTER OF FUNDAMENTAL RIGHTS]. The Charter was adopted in December of 2000. *Id.* at 6. The legal value of this charter remains uncertain, as it is not part of the treaties by which member states are bound, nor is it derived from them. However, the EU judiciary is likely to rely on its authority more and more often.

<sup>12</sup> See *id.* arts. 15, 39-46, at 11-12, 18-19.

<sup>13</sup> See, e.g., *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 464, 467-69, 478 (1989) (holding that extradition of the applicant to Virginia, where he would likely be placed on death row, would breach article 3 of the ECHR).

<sup>14</sup> See, e.g., *Bensaïd v. United Kingdom*, App. No. 44599/98, 33 Eur. H.R. Rep. 10, 217-18 (2001) (considering applicant's schizophrenia, but finding that the risk that his condition would deteriorate if he was deported to Algeria was speculative); *D. v. United King-*

Article 8, which guarantees the right to family life, has also been utilized by noncitizens in deportation cases.<sup>15</sup> Concerning family life, the Court typically assumes that the “decision to expel, or indeed not to admit a family member . . . [to its territory] constitutes an ‘interference’ with the right to respect for family life.”<sup>16</sup> The Court places the burden of establishing that the family could relocate on the expelling authorities before assessing the proportionality of the interference.<sup>17</sup>

This case law has compelled legislative transformation within Member States. The recent French statute on immigration is an example.<sup>18</sup> Although hardening French immigration law in some ways, the new statute also embraces the guarantees of articles 3 and 8 of the Convention. It prohibits the deportation of a number of people who are “fully integrated,” one way of enforcing the right to family life.<sup>19</sup> It also precludes deportation if a medical condition requires treatment in France and the absence of treatment would induce consequences

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dom, App. No. 30240/96, 24 Eur. H.R. Rep. 423, 447–48 (1997) (finding that it would violate article 3 to deport applicant with AIDS to St. Kitts).

<sup>15</sup> See European Convention, *supra* note 7, arts. 3, 8, 213 U.N.T.S. at 224, 230; see also *Mehemi v. France*, App. No. 25017/94, 30 Eur. H.R. Rep. 739, 750–51, 753 (1997); *Beldjoudi v. France*, App. No. 12083/86, 14 Eur. H.R. Rep. 801, 830–31, 833–34 (1992); *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, 813–15 (1991). Other cases reveal a more restrictive conception of article 8. See *Bouchelkia v. France*, App. No. 23078/93, 25 Eur. H.R. Rep. 686, 704–07 (1997); *Boughanemi v. France*, App. No. 22070/93, 22 Eur. H.R. Rep. 228, 244–48 (1996); *C. v. Belgium*, App. No. 21794/93, 32 Eur. H.R. Rep. 2, ¶¶ 21–36 (1996). According to this case law, the removal of a person from a country where close members of his family are living is allowed if it meets the requirements of paragraph 2 of article 8. See *Bouchelkia*, 25 Eur. H.R. Rep. at 705–06; *Boughanemi*, 22 Eur. H.R. Rep. at 245–46. Removal must be in accordance with the law, meaning that it is motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society; that is, a pressing social need, proportionate to the desired and legitimate aim, must justify removal. See *Bouchelkia*, 25 Eur. H.R. Rep. at 705–06; *Boughanemi*, 22 Eur. H.R. Rep. at 245–46. The European Court of Human Rights highlighted the limits of what is “necessary in a democratic society” where a spouse has committed an offense in *Boultif v. Switzerland* and *Amrollahi v. Denmark*. See *Amrollahi v. Denmark*, App. No. 56811/00, ¶¶ 33–44 (July 11, 2002), at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=56811/00&sessionid=1352664&skin=hudoc-en> (refraining from deportation of applicant despite a conviction of drug trafficking); *Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. H.R. Rep. 50, 1187–88 (2001) (deciding against deportation although the applicant was convicted of robbery and damage of property).

<sup>16</sup> See *Mehemi*, 30 Eur. H.R. Rep. at 750–51, 753; *Beldjoudi*, 14 Eur. H.R. Rep. at 830–31, 833–34; *Moustaquim*, 13 Eur. H.R. Rep. at 813–15; Nicola Rogers, *Immigration and the European Convention on Human Rights: Are New Principles Emerging?*, 2003 EUR. HUM. RTS. L. REV. 1, 53–64.

<sup>17</sup> Rogers, *supra* note 16, at 53, 55–57, 62–64.

<sup>18</sup> See Law No. 2003–1119 of Nov. 26, 2003, J.O., Nov. 27, 2003, p. 20,136 (Fr.).

<sup>19</sup> See *id.* art. 21.

of an exceptional nature, another requirement inspired by the interpretation of article 3 by the Court of Human Rights.<sup>20</sup>

The European system of protection also guarantees to noncitizens the essential right to a fair trial.<sup>21</sup> Article 6 of the ECHR is of limited applicability, however, in deportation cases. The European Court of Human Rights has ruled that deportation measures are not within the scope of article 6, which extends only to the determination of “civil rights and obligations” and “criminal charges.”<sup>22</sup> Noncitizens may, nonetheless, successfully invoke article 6 in other circumstances. For instance, a person facing extradition is “facing criminal charge” in the language of the Convention and may thus rely on article 6.<sup>23</sup> Additionally, article 13 of the ECHR guarantees an effective remedy when rights and freedoms set forth in the Convention are violated.<sup>24</sup> As the Court decided in a recent case, it precludes the execution of a deportation order before the conclusion of an investigation by national authorities as to its compatibility with the Convention.<sup>25</sup> Moreover, the EU Charter does not limit, as does the ECHR, the scope of the right to a fair trial.<sup>26</sup> Thus, in the EU, this right could include deportation measures, as long as they fall within the sphere of EU law. That sphere is, however, currently restricted to reviewing deportations that affect free movement within the European Union, rather than deportations to non-EU countries. Extension depends on the ability of Member States to move further in defining a common immigration policy.

More generally, any person who is arrested and detained to prevent his unauthorized entry into the country or against whom action is being taken with a view to deportation or extradition is entitled to protection under the right to liberty, contained in article 5 of the ECHR.<sup>27</sup> Article 5 requires prompt provision of information to the person about the reason for his arrest and any charges against him.<sup>28</sup>

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<sup>20</sup> *Id.* art. 7.

<sup>21</sup> European Convention, *supra* note 7, art. 6, 213 U.N.T.S. at 228.

<sup>22</sup> *See* *Agee v. United Kingdom*, App. No. 7729/76, 7 Eur. Comm’n H.R. Dec. & Rep. 164, 175–76 (1976); *Uppal v. United Kingdom*, App. No. 8244/78, 3 Eur. H.R. Rep. 391, 398 (1980).

<sup>23</sup> *See generally* JEAN-FRANÇOIS RENUCCI, DROIT EUROPÉEN DES DROITS DE L’HOMME, (3d ed. 2002) (providing an analysis of extradition and the use of article 6).

<sup>24</sup> European Convention, *supra* note 7, art. 13, 213 U.N.T.S. at 232.

<sup>25</sup> *See* *Conka v. Belgium*, App. No. 51564/99, 34 Eur. H.R. Rep. 54, 1326 (2002) (concerning deportation of Slovakian nationals of Romany origin).

<sup>26</sup> *Compare* CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 11, with European Convention, *supra* note 7, art. 6, 213 U.N.T.S. at 228.

<sup>27</sup> *See* European Convention, *supra* note 7, art. 5, 213 U.N.T.S. at 226.

<sup>28</sup> *Id.*



It also mandates legal “proceedings by which the lawfulness of [the] detention shall be decided speedily by a court and . . . release ordered if the detention is not lawful.”<sup>29</sup> The Court of Human Rights strictly enforced these provisions to prevent arbitrary detention of noncitizens<sup>30</sup> and to limit the possibility of detaining a noncitizen in the international zone of an airport.<sup>31</sup>

One of the most controversial issues in the international “war on terrorism” is the U.S. detentions at Guantanamo Bay. In a report discussing the detentions, the Parliamentary Assembly of the Council of Europe<sup>32</sup> stated that the practice would not pass muster under the European standard.<sup>33</sup> The Assembly pointed out that established case law of the European Court of Human Rights requires a prisoner to be “released pending trial as soon as continued detention ceases to be reasonable [because] only ‘the existence of a genuine requirement of public interest’ can, having regard to the presumption of innocence, justify departure from the rule of respect for individual liberty.”<sup>34</sup> The Assembly added that, if plausible reasons exist to suspect the arrested person of having committed an offense, continued pretrial detention must satisfy two conditions.<sup>35</sup> First, “there must be ‘relevant’ and ‘sufficient’ reasons that continue after a certain lapse of time to legitimize custody.”<sup>36</sup> Second, “special diligence” is required on the part

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<sup>29</sup> *Id.*; see Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11, Nov. 22, 1984, art. 1, Eur. T.S. 117, 34, available at <http://conventions.coe.int/Treaty/EN/CadreListTraites.htm> (giving lawfully resident aliens right not to be expelled without due process) [hereinafter Protocol No. 7]. But the protection is weakened by the recognized possibility for this right to be denied when “expulsion is necessary in the interests of public order or is grounded on reasons of national security.” See Protocol No. 7, *supra*, art. 1.

<sup>30</sup> *Bozano v. France*, App. No. 9990/82, 9 Eur. H.R. Rep. 297, 313 (1986).

<sup>31</sup> *Amuur v. France*, App. No. 19776/92, 22 Eur. H.R. Rep. 533, 556–57 (1996). The stay in an international zone must not be too long, judicial review of the measure must take place rapidly, and the asylum seeker must not be prevented from applying for recognition as an asylee. *Id.* at 557. Although confirming the right of States to control access of noncitizens to their territory, the decision lays down fundamental rights for migrants and asylum seekers. See *id.* at 556–60.

<sup>32</sup> The Parliamentary Assembly is one of the two statutory organs of the Council of Europe composed of elected members of national Parliaments, and is wholly separate from EU institutions.

<sup>33</sup> See *Rights of Persons Held in the Custody of the United States in Afghanistan or Guantanamo Bay*, Eur. Parl. Ass., Doc. No. 9817, ¶ II(E) (2003), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc03/EDOC9817.htm> [hereinafter *Rights of Persons*].

<sup>34</sup> *Id.* ¶ II(B) (d) (29).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

of the authorities in the conduct of the proceedings.”<sup>37</sup> The Assembly also mentioned that the Convention recognizes the right for anyone held in custody to begin legal proceedings and to seek a judicial ruling on the lawfulness of his or her detention.<sup>38</sup>

Although the outlook is promising, however, a basic issue remains controversial: whether the European protection of human rights applies outside the territory of Member States.<sup>39</sup> To date, the European Court of Human Rights has dealt with this issue in only one case. In that case, the Court held that “[t]he Convention was not designed to be applied throughout the world, even [with] respect [to] the conduct of Contracting States.”<sup>40</sup> It noted that jurisdiction over non-Contracting States has been recognized only when the territory in question would normally have been covered by the Convention, but for the specific circumstances of the case, such as the occupation of northern Cyprus by Turkey.<sup>41</sup>

With the possible exception of the territoriality issue, however, the Convention’s universality efficiently protects noncitizens against deprivations of human rights. The efficacy of the European system of protection could explain why only one country in Europe, the United Kingdom, has significantly deviated from it. In 2001, the United Kingdom introduced special proceedings to arrest and detain aliens, a departure from the requirement of article 5 of the ECHR, to enhance national security after September 11.<sup>42</sup> When non-British nationals are certified as suspected international terrorists, their detention without trial is allowed.<sup>43</sup> Challenges to certification can be heard by a Special Immigration and Appeals Commission (SIAC) and appeals can be lodged only

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<sup>37</sup> *Id.* For an example of a violation by France, see *Tomasi v. France*, App. No. 12850/87, 15 Eur. H.R. Rep. 1, 49–50, 52–54 (1992).

<sup>38</sup> *Rights of Persons*, *supra* note 33, ¶ II(B)(d) (28).

<sup>39</sup> See FRÉDÉRIC SUDRE ET AL., LES GRANDS ARRÊTS DE LA COUR EUROPÉENNE DES DROITS DE L’HOMME 534–35 (2003).

<sup>40</sup> See *Banković v. Belgium*, App. No. 52207/99, ¶ 8 (Dec. 19, 2001), at <http://europa.eu.int>. Contracting states are those bound by the Convention.

<sup>41</sup> *Id.*

<sup>42</sup> Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 21–35 (Eng.), available at <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm> [hereinafter ATCSA]; see Home Secretary David Blunkett, Address at Harvard Law School (Mar. 8, 2004), at [http://www.homeoffice.gov.uk/docs3/hs\\_speech\\_harvard04.htm](http://www.homeoffice.gov.uk/docs3/hs_speech_harvard04.htm) (explaining that the Act was justified by national security reasons).

<sup>43</sup> See ATCSA, c. 24, §§ 21, 25–26 (providing for the certification of individuals who are suspected of being terrorists and whose presence in the territory is considered a danger to national security).

on points of law before the Court of Appeal.<sup>44</sup> This departure from article 5 to ensure national security has been severely criticized,<sup>45</sup> despite the British government's explanation that it is sanctioned by article 15 of the Convention, which authorizes derogations "in time of war or other public emergency threatening the life of the nation."<sup>46</sup> Furthermore, the British law arguably does not depart excessively from article 5, as it allows access to a court of law to decide whether the detention is lawful. A recent decision has shown that this system of checks and balances has some efficacy. In a case decided on March 18, 2004, the Court of Appeal upheld a SIAC decision that deemed a detention unjustified because it was based on unreliable evidence that should not have been used and no "reasonable suspicion" existed that the detainee had links to Al Qaeda.<sup>47</sup>

Criticism has also been leveled at Swedish deportations of asylum seekers suspected of terrorism through a procedure under which the government is the sole decisionmaker, and which proscribes the ability to appeal or obtain review.<sup>48</sup> Sweden has been accused of disregarding human rights in its campaign against terrorism, because it allows deportation of asylum seekers to their country of origin without sufficient efforts to monitor guarantees that their human rights would be respected.<sup>49</sup> Similarly, the recent amendment to the Italian immigration law "Bossi Fini" has been vigorously condemned for its failure to abide by European protections of human rights, particularly article 3 of the ECHR, in deportation procedures.<sup>50</sup> Although these examples show

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<sup>44</sup> *Id.* c. 24, §§ 25–26, 30. The Court of Appeal, together with the High Court of Justice, compose England's Supreme Court of Judicature, and hears both civil and criminal appeals.

<sup>45</sup> See Human Rights Watch, *Commentary on the Anti-Terrorism, Crime and Security Bill 2001* (Nov. 16, 2001), at <http://www.hrw.org/backgrounder/eca/UKleg1106.htm>; PRIVY COUNSELLOR REVIEW COMMITTEE, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW: REPORT 52, 52-53 (2003), available at [http://www.homeoffice.gov.uk/docs3/newton\\_committee\\_report\\_2003.pdf](http://www.homeoffice.gov.uk/docs3/newton_committee_report_2003.pdf).

<sup>46</sup> See European Convention, *supra* note 7, art. 15, 213 U.N.T.S. at 232.

<sup>47</sup> *M. v. Sec'y of State for the Home Dep't*, 2 All E.R. 863, 871–73 (Eng.C.A. 2004).

<sup>48</sup> See EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, THE BALANCE BETWEEN FREEDOM AND SECURITY IN THE RESPONSE BY THE EUROPEAN UNION AND ITS MEMBER STATES TO THE TERRORIST THREATS 38 (2003), available at [http://europa.eu.int/comm/justice\\_home/fsj/rights/network/obs\\_thematique\\_en.pdf](http://europa.eu.int/comm/justice_home/fsj/rights/network/obs_thematique_en.pdf) (describing the Swedish Special Control of Alien Act of 1991) [hereinafter BALANCE BETWEEN FREEDOM AND SECURITY].

<sup>49</sup> *Id.* at 38–39.

<sup>50</sup> See generally Michele Totah, *Fortress Italy: Racial Politics and the New Immigration Amendment in Italy*, 26 FORDHAM INT'L L.J. 1438 (2003) (discussing Italy's violation of article 3 of the Convention).

that the European system, as any legal system, is not wholly effective, they can be viewed optimistically as exceptions confirming the rule.

### B. *The Principle of Nondiscrimination*

Let us now turn to the principle of nondiscrimination to assess whether it has had any effect against the adoption of discriminatory measures in the fight against terrorism. Nondiscrimination is a general principle of EU law, and one of the most vital fundamental rights recognized by the EU.<sup>51</sup> The ECHR also establishes a principle of nondiscrimination in article 14, requiring that the rights and freedoms set forth in the Convention be secured without discrimination of any kind.<sup>52</sup> This principle does not, however, prevent distinctions based on nationality that can be justified by the particular status of noncitizens. Where entry, residence, and activity on the national territory are concerned, noncitizenship status allows legal distinction. Immigration policies are grounded on this distinction, and neither EU law nor the ECHR question immigration law's basic legitimacy.

Yet outside the particular fields of immigration law and policies, the nondiscrimination principle has been strictly enforced by the European Court of Human Rights to prevent unwarranted distinctions along nationality lines. For instance, the Court has decided that public benefits, which in several countries have long been reserved to citizens, could no longer be so restricted.<sup>53</sup> In the fight against terrorism, the prohibition of unwarranted nationality distinctions likely encouraged governments to choose measures detached from the distinc-

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<sup>51</sup> See Case 103/77, *Royal Scholten Hönig v. Intervention Bd. for Agric. Produce*, 1978 E.C.R. 2037, 2043–44, 2058–59 (discussing possible discrimination against manufacturers of isoglucose). For a comprehensive analysis on the principle of nondiscrimination in EU law, see generally SOPHIE ROBIN-OLIVIER, *LE PRINCIPE D'ÉGALITÉ EN DROIT COMMUNAUTAIRE, ÉTUDE À PARTIR DES LIBERTÉS ÉCONOMIQUES* (1999).

<sup>52</sup> European Convention, *supra* note 7, art. 14, 213 U.N.T.S. at 232. Note, however, the difficulty in adopting a provision similar to Protocol 12 to the ECHR, which extended the right to nondiscrimination so that it would apply to “any right set forth by law”: the protocol, signed on November 4, 2000, has not yet attained the requisite ten ratifications to be entered into force. See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, art. 1, Europ. T.S. No. 177, 2, available at <http://conventions.coe.int/Treaty/EN/CadreListTraites.htm>. States are reluctant to be bound by such a sweeping principle of nondiscrimination.

<sup>53</sup> See *Koua Poirrez v. France*, App. No. 40892/98, 2, 12–13 (Sept. 13, 2003), at <http://www.worldlii.org/cgi-bin/download.cgi/download/eu/cases/ECHR/2003/459.rtf>; *Gaygusuz v. Austria*, App. No. 17371/90, 23 Eur. H.R. Rep. 364, 381–82 (1996).

tion between citizens and noncitizens.<sup>54</sup> Security-based restrictions on fundamental rights and freedoms have typically not relied on distinctions based on nationality. Personal data protection is a leading example. State interception of traditional and electronic communications, transmission, and centralization of data are now easier virtually everywhere, raising great concerns for the protection of fundamental rights of all individuals, whether they are citizens or noncitizens.<sup>55</sup>

Once again, the United Kingdom is the exception. Its Anti-terrorism, Crime, and Security Act concerns only the arrest and detention of noncitizens, while equally suspect British citizens are not subject to its provisions.<sup>56</sup> It has been criticized by the Council of Europe's Commissioner for Human Rights, who has stated, "In so far as these measures are applicable only to . . . foreigners, they might appear . . . to be ushering in a two-track [system of] justice, whereby different human rights standards apply to foreigners and nationals."<sup>57</sup> When challenged on the basis of article 14 of the ECHR, this distinction was condemned by the SIAC, but the Court of Appeal overruled the decision.<sup>58</sup> The Lord Chief Justice, Lord Woolf invoked the right of nondiscrimination "enshrined in article 14 of the European Convention," and even added that "[t]he danger of unjustified discrimination is acute at times when national security is threatened."<sup>59</sup> Nevertheless, he accepted "the need for a collective approach to terrorism [and] spoke of an appropriate degree of deference to the actions of the executive, which he regarded as proportionate to what is necessary."<sup>60</sup> Similarly, "[i]n arguing against the SIAC ruling, 'Lord Goldsmith (. . . the Attorney General), said that the attacks on the World Trade Cent[er] and the Pentagon had changed for ever the landscape of terrorism,' and he argued that the

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<sup>54</sup> See, e.g., Law No. 2001-1062 of Nov. 15, 2001, J.O. Nov. 16, 2001, p. 18,215 (Fr.). This statute has been criticized for excessive restriction of freedoms to cope with security concerns, but does not distinguish between citizens and noncitizens. See *id.*

<sup>55</sup> See BALANCE BETWEEN FREEDOM AND SECURITY, *supra* note 48, at 25-28 (discussing the issue of personal data protection in the EU and its Member States after Sept. 11).

<sup>56</sup> See ATCSA, c. 24, §§ 21-32 (Eng.), available at <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm>. Detention provisions are in Part 4 of the Act, labeled "Immigration and Asylum." *Id.* pt. 4.

<sup>57</sup> Alvaro Gil-Robles, *Opinion 1/2002 of the Commissioner on Human Rights, Mr. Alvaro Gil-Robles, on Certain Aspects of the United Kingdom 2001 Derogation from Article 5 par. 1 of the European Convention on Human Rights* 8 (Aug. 28, 2002).

<sup>58</sup> See *A, X and Y v. Sec'y of State for the Home Dep't (A, X, and Y)*, 2002 Q.B. 335, 355-56, 359-60, 361-62 (Eng. C.A.). Sir David Williams, *The United Kingdom's Response to International Terrorism*, 13 *IND. INT'L & COMP. L. REV.* 683, 695-96 (2003) (discussing the *A, X and Y* decision).

<sup>59</sup> *A, X and Y*, 2002 Q.B. at 347, 348.

<sup>60</sup> Williams, *supra* note 58, at 696.

detention provisions in the 2001 Act represented ‘a balance between the interests of the suspected individuals and the interests of the Community as a whole to be protected from terrorism.’<sup>61</sup> In its judgment on October 25, 2002, the Court of Appeal broadly agreed.<sup>62</sup> Lord Justice Brooke noted, “[I]t has been a longstanding feature of international law that a state is entitled to treat non-nationals differently from nationals in time of war or other public emergency threatening its life as a nation.”<sup>63</sup> Why discrimination against noncitizens was required to face that threat, however, remained unexplained. The decision pointed out that no discrimination could be found if those affected by the measures were otherwise deportable under immigration law; as the individuals concerned could be deported absent the risk of torture or inhuman treatment in the receiving country, their specific situation allowed for such specific measures.<sup>64</sup> This example shows that the European system does not completely prevent measures that limit the rights of noncitizens. It also highlights, however, that European governments know that they must justify their actions within the ECHR’s framework, even before individuals bring the case to the European Court of Human Rights.<sup>65</sup> This could explain, in part, why so few individuals are detained in the United Kingdom under the special procedures.

## II. THE LIMITATIONS ON THE EUROPEAN PROTECTION OF FUNDAMENTAL RIGHTS

The main problem for noncitizens in Europe since September 11, 2001 is best understood not as illegitimate discrimination, but as the use of the accepted citizenship/noncitizenship distinction in novel ways. Harsh asylum and immigration policies have been fostered by the connection of terrorists with asylum seekers and immigrants, and the idea of a potential nexus among all three groups. This connection was made apparent after attacks in Saudi Arabia and Morocco led four

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<sup>61</sup> *Id.*

<sup>62</sup> *See A, X and Y*, 2002 Q.B. at 359, 382.

<sup>63</sup> *Id.* at 377.

<sup>64</sup> *Id.* at 362.

<sup>65</sup> *See generally id.* at 335 (discussing the legitimacy of a UK rule within the Convention’s framework). According to article 26 of the Convention for the Protection of Human Rights, the Court may only take a case “after all domestic remedies have been exhausted.” European Convention, *supra* note 7, art. 26, 213 U.N.T.S. at 238. As a result, British cases must first be brought before the House of Lords to be received by the European Court of Human Rights.

European countries<sup>66</sup> to assemble a group of experts on terrorism and illegal immigration. Although the link between asylum seekers and terrorism is tenuous at best, asylum requests are now more frequently denied,<sup>67</sup> either on the basis of new laws refusing asylum when the asylum seeker is suspected of terrorist activities<sup>68</sup> or through the use of “profiles” of certain asylum seekers.<sup>69</sup> Because some countries have been conceived to be possible terrorist shelters, asylum seekers from those countries face additional hurdles. Illegitimate as it is, this distinction cannot be considered discrimination against noncitizens, because it distinguishes between asylum seekers, and thus, constitutes discrimination *among* noncitizens.

Terrorism has also inspired more restrictive general immigration policies. Both Spain and Germany have moved to centralize data on noncitizens to combat terrorism.<sup>70</sup> Recent amendments to its Foreigners’ Act (the *Ausländergesetz*) expand deportation provisions and ban from entry into Germany any individuals who threaten state security.<sup>71</sup> Moreover, Germany has added three new grounds for refusing resident permits to its anti-terrorism statute: threats against democracy; participation in violent actions for political reasons; and membership in an organization fostering international terrorism. Germany may not, however, deny entry, indefinitely detain, or deport individuals on the basis of suspicion alone.<sup>72</sup> Thus, despite tightened restrictions governing asylum, Germany has not detained or deported large numbers of foreign residents.<sup>73</sup>

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<sup>66</sup> The nations involved were France, Italy, Spain, and the UK.

<sup>67</sup> EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, SYNTHESIS REPORT: CONCLUSIONS AND RECOMMENDATIONS ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2003, at 54 (2004), [http://europa.eu.int/comm/justice\\_home/cfr\\_cdf/doc/synthesis\\_report\\_2003\\_en.pdf](http://europa.eu.int/comm/justice_home/cfr_cdf/doc/synthesis_report_2003_en.pdf) (criticizing EU Member States for their low levels of recognition of refugee status). Greece has a significantly lower approval rate for asylum seekers than the average of EU member states; its approval rate is 0.3%, while the EU’s rate is 15.8%. *Id.*

<sup>68</sup> See, e.g., ATCSA, c. 24, §§ 33, 89 (laying down specific conditions for arrest and detention of asylum seekers suspected of having links with terrorism); BALANCE BETWEEN FREEDOM AND SECURITY, *supra* note 48, at 40 (discussing the German Act for the Fight Against Terrorism, which uses article 1F of the Geneva Convention to refuse asylum to people having links with terrorist activities).

<sup>69</sup> See BALANCE BETWEEN FREEDOM AND SECURITY, *supra* note 48, at 21.

<sup>70</sup> See *id.* at 29.

<sup>71</sup> See Shawn Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of The Impact on Civil Liberties in the Federal Republic of Germany and the United States*, 11 TULSA J. COMP. & INT’L L. 111, 121 (2003) (discussing the second German anti-terror package).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 175.

In sum, the threat of terrorism has fueled a general trend to restrict the rights of asylum seekers and harden immigration policies. The harshest blows have been dealt within the immigration policies of sovereign nations, where the European system of human rights protection ends. The same trend is discernable at the EU level, where a number of measures have been adopted to fight terrorism.<sup>74</sup> Indeed, it was deemed necessary to cooperate in this matter as in other criminal matters of international import.<sup>75</sup> Terrorism is one concern for which the EU system of cooperation in criminal matters is fully warranted. These measures generally do not distinguish noncitizens from citizens, with the exception of the European Council recommendation on developing “terrorist profiles.”<sup>76</sup> In cooperation with Europol, the EU uses nationality as one element of terrorist identification in creating these profiles to isolate terrorist targets and collect data.<sup>77</sup>

At the same time, Member States have been eager to further their hardline asylum and immigration policies through common measures. Coordination and cooperation in police and judicial matters can be very efficient levers. Indeed, in the field of asylum and illegal immigration, September 11 has ushered in a new era for the EU.<sup>78</sup> It has helped

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<sup>74</sup> See, e.g., Council Decision 2003/48/JHA of 19 December 2002 on the Implementation of Specific Measures for Police and Judicial Cooperation to Combat Terrorism in Accordance with article 4 of Common Position 2001/931/CFSP, 2003 O.J. (L 16) 68, 69 (defining terrorist offense and addressing communication between Member States); Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism, 2002 O.J. (L 164) 3, 4–6 (requiring Member States to define and penalize certain acts as terrorist offenses); Council Recommendation of 9 December 1999 on Cooperation in Combating the Financing of Terrorist Groups, 1999 O.J. (C 373) 1 (recommending Member State cooperation in “combating the financing of terrorist groups.”).

<sup>75</sup> See TREATY ON EU, *supra* note 4, at 21–28 (recommending police and judicial cooperation among Member States in criminal matters).

<sup>76</sup> See Council Recommendation of 14 October 2002 on the Development of Terrorist Profiles, Doc. 118581/02, rev. 1, at 5, available at <http://register.consilium.eu.int/pdf/en/02/st11/11858-r1en2.pdf>.

<sup>77</sup> *Id.* at 4–5. As pointed out by the EU Network of Independent Experts, as long as the relation between this criterion and the risk of terrorism has not been proved, those profiles constitute a violation of the principle of nondiscrimination. BALANCE BETWEEN FREEDOM AND SECURITY, *supra* note 48, at 21.

<sup>78</sup> See, e.g., Council Regulation 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-country National, 2003 O.J. (L 50) 1 (requiring a common policy on asylum seekers); Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence, 2002 O.J. (L 328) 17 (requiring Member States to sanction those who intentionally assist illegal immigration); Council Framework Decision 2002/946/JHA of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation



the Union progress beyond ground previously cleared by the Schengen Agreements of the 1990s.<sup>79</sup> But security measures invariably implicate other values. The European Union has increasingly appeared to some as a fortress trying to protect itself from “dangerous aliens,” not so much because they could be terrorists, but because they are seen as a threat to the social and economic security of Europe.

Once again, the issue of asylum is illustrative. The European Union has adopted a regulation establishing the criteria and mechanisms to determine which Member State would be responsible for examining asylum applications of third country nationals.<sup>80</sup> Because the regulation implies that only one state will consider the application, the EU has effectively closed all doors but one to asylum seekers. Similarly, the United Kingdom has proposed the creation of transit processing centers—special zones at the borders of the European Union where asylum seekers could be detained. Some have expressed regret that, rather than seeking to protect asylum seekers, Europe is seeking to protect itself from them.<sup>81</sup>

This attitude of suspicion and rejection against newcomers isolates the limits of the European system for the protection of fundamental rights. Although this system guarantees a certain level of protection to migrants trying to enter and settle in the EU, it falls short of preventing closure of the European fortress to newcomers. There is, however, another more hopeful aspect to recent developments at the EU level. The rights of nationals in third countries are at last approaching those of all European residents.<sup>82</sup> Although it is not yet the case, emerging concepts of European citizenship may ultimately undermine the distinction between citizens and noncitizens of Member States, provided the latter are integrated into the EU.

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of Unauthorised Entry, Transit and Residence, 2002 O.J. (L 328) 1 (requiring Member States to criminally penalize facilitation of illegal immigration).

<sup>79</sup> See Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, Belg.-Fr.-F.R.G.-Lux.-Neth., 30 I.L.M. 68 (1991) (Convention applying the Agreement enacted June 19, 1990) [hereinafter Schengen Agreement]. The Schengen Agreements were concluded between some EC countries to ensure free movement of persons and abolish checks at the borders. *Id.* pmb., 30 I.L.M. at 73. As a result, these countries have set up a system of cooperation for the protection of the external borders and adopted a number of measures to fight illegal immigration. See *id.* arts. 9, 17, 30 I.L.M. at 76–77, 79.

<sup>80</sup> See generally Council Regulation 343/2003, *supra* note 78 (establishing criteria for deciding which Member State is responsible).

<sup>81</sup> Nathalie Ferré, *Au Lieu de les Protéger, l'Europe se Protège des Réfugiés*, LE MONDE, June 19, 2003, at <http://www.gisti.org/doc/presse/2003/ferre/thessalonique.html>.

<sup>82</sup> See EC TREATY, *supra* note 4, art. 20; see also discussion *infra* Part III.

### III. EUROPEAN CITIZENSHIP AND THE FADING COLOR OF NATIONALITY IN THE EU

In the Member States, the construction of the EU has blurred the distinction between citizens and noncitizens.<sup>83</sup> One reason for this is that there are no longer two categories of people in Member States but three: citizens of a Member State, citizens of other Member States, and third country citizens.

For Member States, the distinction between citizens and nationals of other Member States has diminished in importance due to the combination of two factors: the prohibition of discrimination against residents of other Member States<sup>84</sup> and the creation of European citizenship.<sup>85</sup> According to article 17 of the EC Treaty, citizenship of the Union is recognized for every person who holds citizenship in a Member State.<sup>86</sup> In conjunction with these two factors, Community rights of free movement and residence profoundly affected the ways in which states view and treat citizens of other Member States.<sup>87</sup> Notions such as “immigrant,” “resident alien,” or “temporary guest” are replaced by the concept of “Union citizen” with equal rights, at least as far as Member State citizens are concerned.<sup>88</sup> As one commentator notes:

[T]he physical presence of Community nationals in the territory of another Member State and their engagement in economic activities there ha[s] ceased to be a matter of state permission and tolerance. It has been a matter of exercising fundamental rights. Qualified Community nationals, including workers, work-seekers, self-employed persons, providers and recipients of services, their family members and EEA nationals are entitled to enter the territory of a Member State and to reside without obtaining leave to remain.<sup>89</sup>

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<sup>83</sup> See generally Yves Lequette, *La Nationalité Française Dévaluée*, in L'AVENIR DU DROIT, MÉLANGES EN HOMMAGE À FRANÇOIS TERRÉ 349 (1999) (criticizing this evolution from a French point of view).

<sup>84</sup> See EC TREATY, *supra* note 4, art. 12.

<sup>85</sup> See *id.* art. 17.

<sup>86</sup> *Id.*

<sup>87</sup> Theodora Kostakopoulou, *Nested “Old” and “New” Citizenships in the European Union: Bringing out the Complexity*, 5 COLUM. J. EUR. L. 389, 393 (1999).

<sup>88</sup> *Id.* at 391–93.

<sup>89</sup> *Id.* at 397.

Under decisions of the European Court of Justice, Union citizenship requires increasing equality<sup>90</sup> and dampens remaining restrictions to free movement and residence.<sup>91</sup>

This evolution, however, still excludes those who are not EU citizens—so-called “third country nationals”—who do not enjoy the rights granted to European citizens.<sup>92</sup> These are the individuals who may be deprived of rights granted to EU citizens when citizenship of the Union is conceived as a privileged status. In these circumstances, nationality is indisputably a fading criterion at the EU level as far as Member State nationality is concerned. Nationality in general, however, is not necessarily a fading criterion, because third country nationality remains a justification for limiting the rights of many. According to the European Commission of Human Rights, the integration of Member States into the EU legal order is considered a legitimate ground for distinguishing EU nationals from third country nationals.<sup>93</sup> Many also acknowledge that the creation of EU citizenship has strengthened the exclusionary/discriminatory status of third country nationals in Europe.<sup>94</sup> I share this view. The Charter of Fundamental Rights of the EU confirms that the EU does grant certain specific rights to its citizens that are unavailable to third country nationals.<sup>95</sup>

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<sup>90</sup> See, e.g., Case 85/96, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. 2691, 2705–06 (stating that justification for equality of treatment between nationals and non-nationals residing in Germany is based on the legal status of Union citizens, which is guaranteed to a national of any Member State living in another Member State).

<sup>91</sup> See, e.g., Case C-413/99, *Baumbast & R. v. Sec’y of State for the Home Dep’t*, ¶ 91 (2002), at <http://europa.eu.int> (requiring restrictions on free movement to pass a proportionality test).

<sup>92</sup> See PAUL CRAIG & GRÁINNE DE BÚRCA, *EUROPEAN UNION LAW* 754 (3d ed. 2003); Hans Ulrich Jessurun d’Oliviera, *Nationality and the European Union after Amsterdam*, in *LEGAL ISSUES OF THE AMSTERDAM TREATY* 395, 395–97 (David O’Keefe & Patrick Twomey eds., 1999); Jo Shaw, *Citizenship of the Union: Towards Post-National Membership?*, in *COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW* 237, 268–72 (Academy of European Law ed., 1995); Norbert Reich, *Union Citizenship—Metaphor or Source of Rights?*, 7 *EUR. L. J.* 4, 15–18 (2001).

<sup>93</sup> *C. v. Belgium*, 12 *EUR. CT. H.R.* 916, 925 (1996).

<sup>94</sup> See David O’Keefe, *Union Citizenship*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* 87, 104–07 (David O’Keefe & Patrick M. Twomey eds., 1994); Marco Martiniello, *European Citizenship, European Identity and Migrants: Towards the Postnational State?*, in *MIGRATION AND EUROPEAN INTEGRATION: THE DYNAMICS OF INCLUSION AND EXCLUSION* 37, 40–41 (Robert Miles & Dietrich Thränhardt eds., 1995); Dora Kostakopoulou, *The European Citizenship Menu: Modes and Options*, 7 *J. EUR. PUB. POL’Y* 477, 480 (2000); Theodora Kostakopoulou, *European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes*, 24 *J. ETHNIC & MIGRATION STUD.* 640, 645–47 (1998). See generally *EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE* 115–248 (Massimo La Torre ed., 1998) (containing essays discussing the relationship between nationality and citizenship).

<sup>95</sup> See *CHARTER OF FUNDAMENTAL RIGHTS*, *supra* note 11, arts. 39, 40, 45, at 18, 19.

Nevertheless, the most recent developments in EU law arguably advance toward greater synchronization of the rights of European citizens and third country nationals, provided the latter are integrated into Union territory.<sup>96</sup> In addition, a more objective concept of citizenship is proliferating.<sup>97</sup> Nationality is not a proper criterion with which to build European unity.<sup>98</sup> Because no European nationality exists, and because the EU is bonded by concerns for economic freedoms rather than civil or political rights, the conception of the European citizenship must depart from this criterion.<sup>99</sup>

Two cornerstones of the European Union identity, the construction of the common market and protection of fundamental rights play a significant role in this evolution, paving the way for the decline of nationalities.

First, the decline is intertwined with the market-oriented identity of the EU. The common market has been the engine of integration even if it is no longer the sole unifying factor. The logic of market integration explains why the primary rights of EU citizens are free movement and equality. From a free-market point of view, it is irrational to deprive economic actors of economic freedoms solely because of nationality.<sup>100</sup> Consequently, nationality is not a proper criterion to ensure efficient market functioning, for it impedes the dissolution of the borders separating Member States. Although it has not been easy for Member States to accept the limitation of their control over noncitizens, the European Community naturally requires the progressive extension of economic freedom to all economic actors in the common market.<sup>101</sup>

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<sup>96</sup> See discussion *infra* Part III.

<sup>97</sup> See Bruno Nascimbene, *Nationality Laws and Citizenship of the European Union: Towards a European Law on Nationality?*, in NATIONALITY LAWS IN THE EUROPEAN UNION 1, 10–11 (Bruno Nascimbene ed., 1996) (discussing the merit of replacing the “subjective standard of nationality” by the “objective standard of residence or domicile”); see also Steve Peers, *Building Fortress Europe: The Development of EU Migration Law*, 35 COMMON MKT. L. REV. 1235, 1268–71 (1998) (noting the absence of political will for such a reform).

<sup>98</sup> See Nascimbene, *supra* note 97, at 1–18.

<sup>99</sup> See *id.*

<sup>100</sup> See Theodora Kostakopoulou, *“Integrating” Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms*, 8 COLUM. J. EUR. L. 181, 197–98 (2002) (discussing the logic of market integration as a factor undermining the importance of nationality).

<sup>101</sup> See e.g., EC TREATY, *supra* note 4, art. 49 (allowing the Council to extend the scope of free provision of services to nationals of a third country).

It must also be noted that the abolition of physical borders dividing the EU cannot be confined to nationals of Member States.<sup>102</sup> It is inconceivable for checks to be maintained against only third country nationals. To achieve free movement of people under the Schengen Agreements, Member States were forced to relinquish control of the entry of third country nationals from other Member States.<sup>103</sup> As many have underscored, this has triggered a surge in security measures to control the external border and fostered repression of illegal immigration. As a result, the Schengen *acquis*, now inserted in the treaties, is hardly known as a gateway to Europe for third country nationals, but rather as the foundation of a fortress Europe. However, third country nationals do have certain limited rights of entry and short-term stay once they have been admitted into any Member State.

It should come as no surprise that the evolution toward an extended right to free movement and residence for third country nationals is a long and complex process. Member States first must accept the degradation of their control over citizens of other Member States. This has not yet been completely achieved. Although free movement is a fundamental right for nationals of Member States and a right granted to European citizens, Member States have not completely surrendered their powers in this domain.<sup>104</sup> The right to move and reside freely in another Member State still carries conditions, albeit with diminished state authority since the recent case law of the European Court of Justice, which has required a balancing approach in light of European citizenship.<sup>105</sup> As long as the right for the citizens of the Union to move and reside freely within the territory of the Member States is subject to limitations and conditions,<sup>106</sup> however, Member States remain entitled to control their legal status and to deport them if they fall beyond treaty requirements.<sup>107</sup> In addition, Member States may derogate from the

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<sup>102</sup> See Schengen Agreement, *supra* note 79, art. 2, 30 I.L.M. at 86 (providing for removal of border checks between some EU Member States).

<sup>103</sup> See *id.* art. 19, 30 I.L.M. at 92.

<sup>104</sup> See discussion *supra* pp. 17–18.

<sup>105</sup> See, e.g., *Baumbast*, ¶ 91 (requiring that conditions for citizens to benefit from free movement pass a proportionality test).

<sup>106</sup> See EC TREATY, *supra* note 4, art. 18.

<sup>107</sup> See *id.* However, the case law of the European Court of Justice has made it impossible to deport EU citizens for merely lacking proper documentation, as long as they fulfill the conditions necessary to benefit from the right to enter and reside in the territory. Coordination of national measures limiting the movement and residence of foreign nationals—justified on public policy, public security or public health grounds—has been achieved by Directive 64/221 of February 25, 1964, which curbs the powers of Member States. Council Directive 64/221/EEC of 25 Feb. 1964 on the Consideration of Special Measures Concerning

provisions relating to freedom of movement for reasons of public policy, public security or public health,<sup>108</sup> notwithstanding the fact that these exceptions have been strictly construed.<sup>109</sup>

Widening the freedom of movement and equality principles to include third country nationals requires further, more difficult steps. Member States have been understandably reluctant to accept European Court of Justice rulings, in which broad interpretations of the right to family reunification have challenged the application of national immigration laws. For instance, they may not have expected that a spouse's right to enter and reside on their territory could prevent them from deporting a third country national who never obtained a visa, whose visa expired, or who entered the territory unlawfully.<sup>110</sup> They may also not have expected that they could no longer require work permits for third country nationals employed by a service provider established in the European Union.<sup>111</sup>

Nevertheless, a recent directive on the rights of long-term residents indicates a changing situation.<sup>112</sup> It is indeed a very small step forward, as the conditions of reaping its benefits are rather restrictive,<sup>113</sup> but its clear purpose is to give third country nationals a status "comparable" to that of European citizens. One major right of Euro-

the Movement and Residence of Foreign Nationals Which Are Justified on Grounds of Public Policy, Public Security or Public Health, 1964 O.J. (P 56) 850, arts. 2–4. It has been pointed out that this Directive, still in force, does not provide a right to judicial protection in cases of expulsion. See Siofra O'Leary, *The Free Movement of Persons and Services*, in *THE EVOLUTION OF EU LAW*, 377, 410–12 (Paul Craig & Gráinne de Búrca eds., 1999); see also Christopher Vincenti, *Deportation in Disarray: The Case of E. C. Nationals*, *CRIM. L. REV.* 163, 166, 174 (1994).

<sup>108</sup> See EC TREATY, *supra* note 4, arts. 39, 46.

<sup>109</sup> See generally Council Directive 64/221/EEC, *supra* note 107. Public policy, public security and public health cannot be invoked to serve national economic ends. *Id.* art. 2. In addition, national measures taken on grounds of public policy or public security must be based on the "personal conduct of the individual concerned." *Id.* art. 3. Therefore, a Member State cannot order the expulsion of a Community national as either a deterrent or generally preventive action.

<sup>110</sup> See Case 459/99, *Mouvement Contre le Racisme, l'Antisémitisme et la Xénophobie v. État Belge*, ¶¶ 72, 97, 119, 2001, available at <http://europa.eu.int>. But see Nicholas Blake, *Family Life in Community Law: The Limits of Freedom and Dignity*, in *THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION* 7, 7–17 (Elspeth Guild ed., 1999) (discussing the limits of the rights granted to family members).

<sup>111</sup> See, e.g., Case 43/93, *Vander Elst v. Office des Migrations Internationales*, 1994 E.C.R. 3803 (holding that Member States cannot require businesses established in other Member States, who then enter the Member State to provide services and legally employ nationals of non-member countries, to obtain work permits for the non-EU nationals).

<sup>112</sup> See Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-country Nationals Who Are Long-term Residents, 2003 O.J. (L 16) 44, 47–53.

<sup>113</sup> See *id.* at 47. It specifically requires continuous residence of 5 years. *Id.*

pean citizens, the right to move and reside freely within the Community, is granted to noncitizens,<sup>114</sup> although it has been stressed that the freedom is far from comprehensive.<sup>115</sup> In addition, the directive lays down a principle of nondiscrimination with a large scope of application. Equal treatment is extended to a large number of economic and social rights: employment, education, vocational training, social protection, recognition of diplomas, and housing.<sup>116</sup> The new directive on family reunification, much criticized for setting forth lower standards than a number of national laws,<sup>117</sup> also contributes to the new focus on the “rights” rather than repression of third country nationals.<sup>118</sup> As a result, rights of European citizens and third country nationals are brought somewhat closer together. Is it time to reconsider the idea that “long-term resident third country nationals . . . have been relegated to the periphery of the emerging European civil society”?<sup>119</sup>

This equalization process is enhanced by the universal conception of fundamental rights which, as noted in Part I, prevails in the EU Charter of Fundamental Rights. Although some insist that the Charter does not place citizens and noncitizens on equal footing because it reserves certain rights to citizens, I find it significant that the chapter of the Charter devoted to citizens’ rights contains rights that are granted to “every person” or to any “person residing . . . in a Member State.”<sup>120</sup> Some may contend that whenever citizens’ rights are granted to non-citizens, they simply cease to be citizens’ rights and become human

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<sup>114</sup> See *id.* at 49. A number of other directives proposed by the Commission should further improve free movement of third country nationals within common areas. See generally Amended Commission Proposal for a Council Directive Extending the Freedom to Provide Cross-border Services to Third-country Nationals Established Within the Community, 2000 O.J. (C 311E) 197; Amended Commission Proposal for a Directive of the European Parliament and of the Council on the Posting of Workers Who Are Third-country Nationals for the Provision of Cross-border Services, 2000 O.J. (C 311E) 187.

<sup>115</sup> See Council Directive 2003/109, *supra* note 112, at 50. To reside in another Member State, third country nationals may be asked by the State to fulfill conditions similar to the conditions required to obtain a European long-term resident permit in the Member State where the migrant had previously settled. See *id.*

<sup>116</sup> *Id.* at 49. The directive leaves open, however, some possibilities for Member States to limit equal treatment. *Id.*

<sup>117</sup> See Claire Rodier, *L’“intégration” Mise aux Oubliettes*, 57 PLEIN DROIT 29, 31–32 (2003) (criticizing the directive).

<sup>118</sup> See Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 2003 O.J. (L 251) 12, 12–18.

<sup>119</sup> See Kostakopoulou, *supra* note 100, at 181. Kostakopoulou indicates that “long-term resident third country nationals . . . are no longer mere objects of policy and vulnerable dependants,” and that “[a] more liberal approach is gradually replacing the Council’s favored intergovernmental restraint mode of integrating such persons.” *Id.* at 182.

<sup>120</sup> See CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 11, c. 5, arts. 39–46, at 18–19.

rights. I would rather take it as evidence that the concept of European citizenship itself is not always grounded on distinction and privileges for nationals.<sup>121</sup> Most of all, the Charter indicates that European citizenship can be disengaged from reference to nationality, and that third country nationals can belong to the Community.

Citizenship of Member States has not, however, lost all its value. The most potent political right, the right to vote, is still exclusive to nationals of Member States or European citizens. Nothing indicates that this will change soon. In this realm, the only right of significance granted by EU citizenship is the right of the national of one Member State to take part in municipal elections in another Member State.<sup>122</sup> Participation in the election of the European Parliament in other Member States, which is also recognized for European citizens, does not create a new right to participate in the political process, as this right belongs to every national of a Member State.<sup>123</sup> It only allows participation in another Member State. For the rest, participation in the political decision at the EU level is indirect and flows from participation in national elections through which governments sitting in the Council are elected. Currently, third country nationals are excluded from political participation, unless Member States decide of their own volition to offer them some political rights.

Evolution in this field depends on two equally difficult steps. The first one, justified by an inclusive conception of citizenship, would be to extend the prospect of European citizenship to those other than the peoples of Member States, to include third country nationals in the quorum of European citizens. The second would be to require that Member States recognize as their own citizens a number of third country nationals. In this highly sensitive field of national sovereignty and national diversity, the mere evocation of such an idea may seem sufficient only for European utopists.

Furthermore, it may be impossible to reconcile the arguments in favor of a more inclusive citizenship with the harsh measures recently adopted against noncitizens attempting to enter and reside in the territory. If, as one author contends, “[e]xternal rules on entry have . . . a profound impact on the rules and conditions of Community mem-

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<sup>121</sup> See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 10 (2002) (reconceiving the notion of citizenship in the U.S. context and suggesting that citizenship should be viewed as “commitment, not privilege”).

<sup>122</sup> See EC TREATY, *supra* note 4, art. 19.

<sup>123</sup> See *id.*



bership,”<sup>124</sup> and if official policy responses to the challenge of immigration reveal much about the nature of a polity and the meaning of citizenship, our hypothesis of the emergence of a more inclusive citizenship may be illusory.<sup>125</sup>

Still, the European Union’s ambition in the immigration field has a binary dimension. Inspired by the policies of Member States, it relies on two pillars: the fight against illegal immigration and the integration of long-term residents. To this rather classic scheme, the European Union could add a new conception of citizenship derived—as the Directive on long-term residents and the reference to residents in the Charter of Fundamental Rights suggest—from a form of integration into European society.

This, of course, leaves open the definition of integration and the selection of those who become equal by virtue of integration. This issue is a very sensitive one indeed. In deciding on the scope of application of the directives granting rights to third country nationals (long-term residents and family reunification), the EU has indicated which criteria could be used. It relies mostly, in the usual way, on the operation of time: duration of legal residence is often determinative. Time may not always prove sufficient, however, if integration becomes the major criterion. The recent French immigration statute provides an illustration: in addition to requiring two further years of legal residence to grant a resident permit with the pretext of the new EU legislation, it requires “republican integration in the French society, which will be assessed namely through sufficient knowledge of the French language and principles on which the French Republic is founded.”<sup>126</sup> Such a requirement, for the mere purpose of a resident permit, may trigger two reactions. On the one hand, one may fear that the requirements for granting French citizenship will increase in due proportion. On the other hand, however, if legal residence is the key to equality and the real line along which rights and freedoms are granted—and eventually, European citizenship—it should come as no surprise that integration is required to grant a resident permit. Were it so, nationality would be fading indeed.

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<sup>124</sup> See Kostakopoulou, *Nested “Old” and “New” Citizenships*, *supra* note 87, at 411.

<sup>125</sup> See Zig Layton-Henry, *Insiders and Outsiders in the European Union: The Search for a European Identity and Citizenship*, in *THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION* 49, 55 (Elspeth Guild ed., 1999) (discussing a more inclusive citizenship).

<sup>126</sup> See Law No. 2003–1119 of Nov. 26, 2003, *J.O.*, Nov. 27, 2003, p. 20,136 (Fr.).