European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion

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This article analyzes the extent to which the European Court of Human Rights and the European Court of Justice have developed norms relevant to the status of non-(EU) nationals and the ways in which they have affected domestic law, focusing on the case of aliens' rights in France, Germany and the Netherlands since 1974. The impact of European jurisprudence has been modest and varies across cases. Notwithstanding, a cross-national process-tracing study of the effect of two international jurisdictions serves to identify the requisites for the diffusion of international norms including the attitude towards international law of national judiciaries, the mobilization of legal aid groups, and the preexistence of compatible norms at the domestic level.

Policies towards non-nationals stand at the crossroads between the principle of national sovereignty whereby states can decide who enters and exits their territory and human rights norms that constrain the actions of states in liberal states (Habermas, 1994). Recent academic work on the rights of foreigners in Europe has emphasized the existence of a post-national discourse on membership in Europe that operates at the transnational level and challenges national policy efforts to control migration flows and curtail migrant rights (Soysal, 1993, 1994, 1997; Sassen, 1996; Jacobson, 1996).

What is the impact of norms enacted by international organizations on the rights of foreigners in contemporary Western Europe? This article traces the process of incorporation of European Court of Human Rights and European Court of Justice legal norms in the jurisprudence and policies regarding foreigners in France, Germany and the Netherlands in the postwar period. Resident aliens in European receiving countries have seen their legal status improve since the 1970s, in spite of the restrictive goals of migration policy after the first oil shock and an adverse political climate brought about by socioeconomic restructuring and the rise of anti-immigrant parties. Foreigners were allowed to bring in their families, enjoy a more secure residence status, and have gained access to rights previously reserved for nationals (Brubaker, 1989; Layton-Henry, 1990; Hammar, 1990; Soysal, 1994; Freeman, 1995; Guiraudon,

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1998). Albeit in varying degrees and at different speeds, similar changes in foreigners' rights occurred across European states regardless of their respective immigration histories, traditions of incorporation, or nationality laws, thereby suggesting that a supra-national dynamic was at work. (For cross-national studies on immigration, citizenship, and migrant incorporation policies in Europe, *see* Hammar, 1985; Brubaker, 1992; Soysal, 1994; Ireland, 1994; Hollifield, 1992; Favell, 1997; Baldwin-Edwards and Schain, 1994; Costa-Lascoux and Weil, 1992).

The findings presented in this article seek to contribute to two international relations debates. The first debate regards international/domestic linkages and is relevant to our understanding of the current state of state sovereignty (Krasner, 1993; Wendt, 1992). The hypotheses tested in the study consider both international and domestic factors as well as the relationship between them. In particular, I ask whether international and domestic norms are mutually reinforcing. I identify the respective roles played by the characteristics of international organizations, the strategies of non-state actors, and the outlook of the domestic institutions in charge of implementing these norms. Moreover, the findings are relevant to academic discussions on the capacity of international organizations (the Council of Europe, the European Union) to affect domestic policy outcomes.

The second debate concerns the process of norms diffusion. Scholarly interest in norms, understood as collective understandings of appropriate behavior, re-emerged in the late 1980s as a legitimate competitor to interest-based or power-based explanations in international relations (works on international norms include Kratochwill, 1989; Goldstein and Keohane, 1993; Klotz, 1995; Thomson, 1994; Goertz and Diehl, 1992; Sikkink, 1993a,b; Finnemore, 1993, 1996; Katzenstein, 1996). There is still room for debate as to "which norms matter" (Legro, 1997) and under what conditions (Yee, 1996:69–70). Based on large quantitative studies, organizational sociologists have long argued that norms and rules are socially constructed and diffused through the organizational environment and function as templates for behavior (Scott and Meyer, 1994; Boli *et al.,* 1997). Yet, testable hypotheses on the independent role of norms require a clear specification of the micro-mechanisms whereby norms emerge, are diffused, and transform existing practices and "detailed process-tracing and case study analyses to validate and elaborate the inferences based on correlation" (Finnemore, 1996:339).

This requires a comparative methodology. Existing studies on human rights norms have already underlined cross-national variations in the incor-

poration of norms. Kathryn Sikkink's study on human rights policy in Europe and the United States has demonstrated that the time at which human rights became important and the nature of the policies which they generated were very different (1993b). Jeffrey Checkel's work on citizenship debates in post-Cold War Europe also has emphasized that the incorporation of international norms varies according to a country's state-societal relationship (1997, 1999). Amy Gurowitz's recent work on the mobilization of international norms to support aliens' rights in Japan further underlines that a number of domestic factors must be present for external constraints to have any impact (1999). While this article explores the domestic factors that filter the diffusion of international norms, it also compares the organizations that craft and diffuse international norms. Their characteristics also may affect their development of norms capable of transforming national practices.

RESEARCH DESIGN

The mechanisms whereby norms that transcend the national level can result in domestic changes in aliens' rights fall into different categories. I focus here on international norms that can have a national impact through legally binding agreements. They can be observed and their effect traced more easily than nonlegal norms. They also are more likely to have an effect because of their very degree of institutionalization. They include human rights norms such as those of the European Convention of Human Rights and norms based on other principles (*e.g.,* freedom of trade and services) as they might be found in the Treaty of Rome, as well as the jurisprudence on the European courts that have monitoring and enforcement powers (the European Court of Human Rights and the European Court of Justice). Europe is the "most likely" case for the impact of human rights norms to be observed.

I call the norms analyzed here "international" and distinguish them from national ones for two main reasons. First, a multinational committee of experts finalized the 1950 European Convention of Human Rights' draft. It is interpreted by an independent group of judges from the different signatory states in such a way that neither the Convention nor its jurisprudence can be said to equate with a particular national bill of rights or legal vision. The treaties of the EEC and later European Union and the secondary legislation also involved multinational bargaining and decisionmaking. Furthermore, I examine specifically the norms that emerge through the decisions of a multinational college of judges on the (equal) treatment of aliens. No particular national legal culture dominates European Court of Justice jurisprudence.

When examining the texts which decisions and the jurisprudence produced, I ask the extent to which they affirmed the rights of non-nationals and on what grounds? Did they motivate national policy decisions or jurisprudence? If so, when, in which countries, and through which mechanisms? The answers are based on the analysis of international legal texts, national and European court records, as well as on interviews with judges, lawyers, human rights and pro-migrant activists. They allowed me to evaluate the evolution of attitudes towards international norms as well as the timing and motives behind this evolution. Furthermore, I asked pro-migrant legal groups about the ways in which international law plays into their litigation strategy. Finally, I interviewed national civil servants in Interior and Justice ministries in charge of migration control policy. I also studied immigration debates and official documents for references to international standards. These include laws, decrees, circulars, and internal guidelines for the implementation of policy. In this fashion, I assessed their taking into account of the evolving jurisprudence or their indifference or resistance thereto.

The dependent variable on which the effect of international human rights norms is tested consists of changes in the rights of foreigners (legislative, regulatory, or jurisprudential) since 1973 when European governments declared an official stop to foreign labor recruitment and developed restrictive control policies. Aliens' rights can be divided into two main categories: those that are specific to non-nationals, namely rights of entry and stay, and those that nationals enjoy as well, such as civil, social and political rights. I focus on France, Germany and the Netherlands. These three countries belong to the same web of international organizations and have signed the same international covenants and treaties. They should therefore be exposed to the same international normative pressures. These countries have comparable numbers of foreigners on their soil (SOPEMI, 1998).[1] The three countries have similar stated (restrictive) migration control goals since the oil shock. This controls for "state interests" as Realists would consider these policy goals.

First, I review the debate on the import of international normative constraints within the field of immigration and citizenship studies and in international relations theory. How this research contributes to these debates is described and a model of explanation for the diffusion of norms is developed.

[1]In 1990, there were 4.6 percent of foreigners in the Netherlands, 6.4 percent in France, 8.2 percent in Germany. They are fewer in Great Britain and Scandinavia and many more in countries like Luxembourg and Switzerland (the latter is not part of the same international institutions in any case). I sought to have the smallest variation between the three cases possible with respect to size of the foreign and immigrant population.

The European Convention of Human Rights, the jurisprudence of the European Court of Human Rights (ECHR) on aliens' rights and its national cooptation are examined. Finally, I discuss another possible international source of policy change, namely the European Court of Justice (ECJ).

THE EMPIRICAL CONTRIBUTION: SETTLING A DEBATE IN THE IMMIGRATION AND CITIZENSHIP LITERATURE

The protection of strangers should constitute an important test for human rights since they do not claim protection as members of a family, clan, or nation, but as members of humanity. Since they cannot avail themselves of the rights reserved for citizens, such as rights of political participation, foreigners are more likely to see their human rights usurped and to require their affirmation. Moreover, since immigration is a cross-border phenomenon by nature, international rules designed to regulate the status of migrants should abound. Writing about Europe in the 1930s, Hanna Arendt pointed out that refugees found out cruelly that "loss of national rights was identical to loss of human rights, that the former inevitably entailed the latter" (1979:292). If Hanna Arendt's statement no longer holds true, can we attribute this change to the successful incorporation of post-war international human rights norms into domestic polities?

In *Limits of Citizenship*, Yasemin Soysal (1994) states that the post-war elaboration of an international human rights discourse has functioned as a powerful norm that guides behavior at the domestic level. In her view, "international governmental and non-governmental organizations, legal institutions, networks of experts, and scientific communities ... by advising national governments, enforcing legal categories, crafting models and standards, and producing reports and recommendations, promote and diffuse ideas and norms about universal human rights" (p. 152). She points to the creation of a number of international charters providing nation-states with guidelines for the treatment of non-citizen populations on their territory. She argues that the transnational development and diffusion of a legitimizing discourse based on universal human rights explain why foreigners acquired more rights in a number of European countries even after they were no longer needed as workers. The causal mechanisms whereby one leads to another remain unclear from the examples that Soysal provides (pp. 143–156).

Saskia Sassen, in a book revealingly entitled *Losing Control?* (1996), points to the external economic and human rights constraints on restrictive control policies that render them mostly symbolic. In her view, they constitute a way for national governments to appear to control transnational phenomena

such as migration while they no longer can do so effectively. David Jacobson (1996) in *Rights across Borders,* makes the strongest claim about the causal link between the failure of the state to control migration and the rise of an international human rights regime. In his view, "the basis of state legitimacy is shifting from principles of sovereignty and national self-determination to international human rights" (p. 2). While this view postulates a questionable golden age of state sovereignty, it does not explain the processes whereby this shift becomes effective domestically. Perhaps more importantly, it seems to externalize normative constraints that may be internally generated.

Immigration scholars have pointed out that, although one cannot deny that normative constraints have limited the ability of migration control agencies to stem unsolicited migration flows, the latter have stemmed from domestic constitutions and activist judiciaries. James Hollifield (1992) has argued that the liberal norms of democratic European states explain why, after the mid-1970s, foreign workers stayed and their families came to join them. Studies on policies towards asylum seekers and family reunification further show that aliens secured rights in countries such as Germany and France through activist national judiciaries basing their jurisprudence on national constitutional norms rather than international human rights standards (Guiraudon, 1997; Joppke, 1997; 1998a, b; Neuman, 1990, Guendelsberger, 1988).

Yet, there is a risk that these two literatures speak past each other, with one focusing on transnational factors without tracing their effect and the other on domestic factors without testing the import of transnational dynamics. The research design of this study seeks to remedy these pitfalls and focuses on the interaction between domestic and international processes.

THE THEORETICAL CONTRIBUTION: THE DIACHRONIC INTERACTION OF INTERNATIONAL ORGANIZATIONS, NON-STATE ACTORS AND DOMESTIC INSTITUTIONS

The general findings of the empirical research presented here suggest that, with a limited legal basis and, in the case of the ECJ, limited competence, European courts slowly and recently developed a set of rulings relevant to migration control under specific circumstances. It took more time for national courts to adopt a positive attitude towards international law in this matter, and the process of national incorporation of norms has been uneven. Still, some effect of ECHR and ECJ jurisprudence can be observed in the 1990s to the extent that they are mentioned in national regulations. The cases dif-

fer in the timing at which one can observe signs of the incorporation of European norms: in the 1980s in the Netherlands, in the 1990s in France, and still little impact in Germany. ECJ jurisprudence, albeit not based on human rights but driven by the market-making goal of European integration, has been bolder in going against state interests.

To understand these patterns of outcomes, three sets of institutional actors need to be taken into account: 1) the international organizations that give meaning to and enforce the norms embedded in international texts (here European courts), 2) non-state actors that mobilize international norms as resources to further their claims domestically (here legal aid groups for foreigners), and 3) actors within national institutions in charge of incorporating international norms (in this case national magistrates). Each accounts for a particular pattern of variation.

The characteristics of international organizations influence their jurisprudential strategy. In our case, we have a bold ECJ and a tamer ECHR. One is a separation-of-powers court with many potential allies (the Commission, economic interest groups, varying member-states, courts asking for preliminary rulings) whose decisions have direct effect. The second is a human rights court that can only rule after all national means of appeal have been exhausted and that rules on fewer cases, since individual petition was not allowed in many signatory countries. We can therefore expect that the ECJ will have less fear of increasing its competence and to issue controversial rulings, while the ECHR will adopt a self-limiting approach to slowly gain legitimacy and avoid provoking nation-states.

Non-state actors are crucial participants in the process of norms elaboration and diffusion. In France and the Netherlands, legal aid groups formed in the 1970s to improve aliens' rights sought to use international law as a resource along with national constitutions and legal principles. They were not as developed in Germany, and migrant aid groups focused on the opportunities offered by the Basic Law. This is important to understand why, to this day, there is less influence of international human rights than in the other two cases.

Yet, non-state actors need to find allies within the national institutions responsible for implementing human rights principles. It was not until the 1980s that Dutch judges deemed international human rights jurisprudence worthy of interest. In France, the insider/outsider opportunistic alliance between a minority of magistrates who wanted international law to be applied and legal activists who wanted to consolidate the status of foreigners met with

resistance until 1991. National high courts had to develop a positive attitude towards international law, and insiders lobbied in this direction. Moreover, the European norms that legal activists invoked had to fit in with established national legal principles so as not to shock national magistrates. Convincing national courts explains the timing of the incorporation of international norms (which took longer in France) as well as their substance, as they need to echo national norms.

The diffusion of norms requires the mobilization of international and non-state actors united in support of norms that seek to coerce state actors. This is what Margaret Keck and Kathryn Sikkink (1998) term a "boomerang effect." My case study shows that the diffusion of norms is neither a "bottom-up" nor a "top-down" dynamic. It is an inherently interactive process. Still, my findings differ in two ways from the literature on transnational issue networks. First, this literature tends to construct states as either normatively "bad" as they need to be coerced by transnational coalitions to respect progressive norms. This has theoretical implications to the extent that states seem to be passive or resisting unitary actors. If they are construed as "black boxes," it is difficult to understand why they would submit or not to pressures. This study shows that legal norms are diffused through state institutions in a mediated fashion, a process resembling "ricochets" rather than a boomerang. First, a minority of magistrates within the judiciary needs to convince their colleagues that international law should be applied, and then the judiciary needs to exercise pressure over the executive and legislative branches. Second, the literature on transnational principled-beliefs networks often focuses on cases of success rather than failure, therefore selecting on the dependent variable. This is unfortunate insofar as it obscures the complex matrix of conditions that weigh on the diffusion of norms. The comparative methodology adopted in this study should remedy this problem.

THE IMPACT OF INTERNATIONAL LEGAL HUMAN RIGHTS NORMS: THE CASE OF THE ECHR

This section analyzes international human rights legal norms and the ways in which they speak to issues affecting the rights of foreigners – especially insofar as signatories are meant to protect the fundamental freedoms of people within their jurisdiction regardless of nationality. Focus then is placed on the European Court of Human Rights and its jurisprudence related to aliens' rights. Finally, the incorporation of the ECHR nationally – by courts but also by political actors and policy-makers is systematically compared.

In 1959, the European Court of Human Rights, the first international jurisdiction of human rights protection in history whose decisions are binding on signatory states, began functioning. Between 1959 and 1993 (inclusive), the Court ruled on 447 cases, and this number is rapidly growing. In fact, the number of appeals had risen so dramatically (there were 5,000 cases registered in 1989 for example) and the length of procedures had become so long (5 years) that a reform of the system was decided at the Vienna summit in 1993 (Flauss, 1997).

The European Court of Human Rights and Foreigners: Legal Basis and Jurisprudence

Human rights instruments do not necessarily protect people regardless of the passport that they hold. Postwar conventions setting human rights standards in Western Europe put a number of hindrances to their universal application. Political rights are explicitly reserved for citizens (Article 16 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Article 25 of the 1966 International Covenant on Civil and Political Rights). Compared to the citizenship paradigm, the human rights one is more limited as it overlooks civic rights and political participation of non-nationals (for an illuminating discussion of the relationship between citizenship and human rights discourses in relation to migration issues, *see* Bauböck, 1995). Human rights covenants make clear that the state can decide who enters, who participates in the "general will," who can become part of the nation and naturalize. The same remark applies to conventions on socioeconomic rights insofar as the latter justify laws aiming at the protection of the national labor market (except for the European Union treaties). Furthermore, a number of treaties such as the 1977 European Convention on the Legal Status of Migrant Workers or the European Social Charter restrict the enjoyment of rights to specific nationalities based on the principle of reciprocity.

Does the record of the European Court of Human Rights (ECHR) show that, based on the Convention, the court protected the rights of non-nationals? From 1959, when the Court started functioning, until December 1993, fewer than a dozen decisions have involved the civil rights of foreigners (2.5% of the decisions). The decisions were all issued during the last fifteen years. In fact, the number of cases in Strasbourg rose geometrically during that period, including aliens' related cases. It apparently took a long time for the ECHR to be known and utilized by lawyers and, in the case of France, for individual petitions to be allowed. Most plaintiffs appealed expulsion decisions or

administrative refusals of entry and residence permits. They generally purported that, in the handling of their cases, public authorities had violated rights guaranteed under Article 3 (protection against inhuman treatment) and/or Article 8 (right to lead a normal family life) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention").

Article 3 is often invoked in cases of asylum seekers whose demand for refugee status has been rejected and who claim that they will suffer inhuman or degrading treatment if they are sent back to their countries of origin. At first, the Court did not find that Article 3 was violated in the individual cases that were submitted (*Cruz Varas et al. vs. Sweden; Vilvarajah et al. vs. United Kingdom; Viyayanathan and Pusparajah vs. France*). More recently, however, the Court stated that the absolute character of the provision means that protection cannot be ruled out by considerations relating to the public security of the state (*Chahal vs. United Kingdom*, November 15, 1996). In three cases, it found that Article 3 would be violated if the applicants were to be deported or extradited. Although the Court recognizes different kinds of "inhuman treatment" (one case involved an applicant in the final stages of AIDS), the applicants must show that they face a "real risk" if they are sent back and the Court's standard when it comes to the burden of proof is very high.

The Court has also ruled that Article 8 had been violated in cases involving foreigners. In cases involving foreigners who had lived in the host country since childhood and had tenuous ties to their country of origin, the Commission and the Court considered that their expulsion from the receiving country could not be tolerated even if they had an important criminal record (*see, e.g., Moustaquim vs. Belgium; Beldjoudi vs. France; Nasri vs. France; C. vs. Belgium*). In a case involving a divorced foreign father of a Dutch girl, the Court found that he could not be denied entry or residence into the Netherlands so as to see his daughter (*Berrehab vs. Netherlands*). Article 8 has been, in fact, one of the most dynamically interpreted provisions in the Convention, not only in cases regarding aliens (Feldman, 1997).

In the Convention, other provisions address more directly the foreigners' condition or could be invoked to protect other aspects of the rights of foreigners. Article 14 of the ECHR, which bans discrimination on many grounds including race, color, language, religion and national origin, is sometimes invoked by litigating parties in cases involving aliens yet was deemed irrelevant by the judges (Krüger and Strasser, 1994). Only in one recent case in 1996 (*Gavgusuz vs. Austria*) did the Court consider that refusing a Turk

emergency assistance in Austria was a breach of Article 14 (Cicekli 1998:418). There is no case before the Court involving human rights dispositions which specifically protect foreigners against expulsion (Article 1, 7th Protocol) and against collective expulsion (Article 4, 4th Protocol).

The right to manifest one's religious beliefs (subject to limitations) is covered by Article 9 of the Convention. Given the salience of debates on the cultural rights or religious freedom of aliens, one might have expected an appeal to the ECHR, yet no case is before the Court that involves a foreigner claiming a violation under Article 9. Several plaintiffs invoked violations of Article 9 before the Commission that decides on the admissibility of cases; only four were deemed admissible. The Commission has apparently "chosen to restrict itself in the manner in which it can interpret Article 9" (Stavros, 1997:615), relying on other Convention provisions to claim that the latter was *a priori* incapable of accommodating certain categories of religiously based claims for exemption from generally applicable, neutral laws. Moslem litigants did not see their cases admitted. The Commission avoided pronouncing itself on a case involving a Muslim teacher who had not been permitted to be absent to pray at a mosque on Friday afternoons (*Ahmad vs. United Kingdom*). It declared inadmissible the case of a Muslim who wanted to marry a girl under age 16 in the United Kingdom (*Khan vs. United Kingdom*) and one who wanted his marriage according to a "special religious ritual" recognized by state authorities (*X vs. FRG*).

In cases involving a Buddhist and Sikhs, the Commission stated that limitations which "are prescribed by law and are necessary in a democratic society" applied (paragraph 2 of Article 9). According to the Commission, for various health and security reasons, a Buddhist prisoner could not grow a beard which prevented his guards from identifying him, nor could a high caste Sikh refuse to sweep his cell, nor could a Sikh motorcyclist refuse to wear a crash helmet to keep his turban on. The Commission also declared inadmissible the two cases involving Moslem headscarves (they concerned Turkish women in their home country who had been "punished" for wearing a veil in a university and in the army rather than women migrants). The Commission argued that they had chosen freely to attend secular institutions and they could still practice their religion outside. It is significant that national jurisdictions have taken a stronger stance on the protection of religious expression. This was the case of French Council of State's 1989 recommendation following the Creil *foulard* affair. In Germany as well, courts have given religious freedom priority over the state mandate to provide education in cases involving Moslem girls (Federal Government's Commissioner for

Foreigners' Affairs, 1994:50). In fact, after twenty years of unsuccessful applications to Strasbourg in cases involving religious or cultural minorities, calls for a new Optional protocol specifically guaranteeing the rights of minorities have been heeded in order to circumvent the prudence of the Commission and the Court (Poulter, 1999).

Why is ECHR jurisprudence on aliens limited to condemning states for violating Articles 8 (right to lead a normal family life) and 3 (protection against inhuman treatment)? Perhaps it highlights a certain dynamic: Once the Court opened a breach of redress by recognizing the pertinence of Articles 3 and 8 in cases of expulsion, lawyers and associations engulfed themselves in it so as to find similar cases to fatten the jurisprudence in this area or to uncover other types of application. Ultimately, the goal is to publicize the Court decisions at the national level so that not only national judges take into account the Convention's articles and the relevant Court decisions, but also that governments are deterred from challenging family reunification principles in new regulations. Another factor may be the prudence of the Court when it comes to burning political issues such as immigration or multiculturalism. It balks at solving nations' problems and taking clear-cut sides in controversial issues. This is a matter of maintaining credibility and legitimacy rather than having decisions dismissed as "judicial meddling" by irate signatory states. The ECHR has ascertained its authority slowly.

Notwithstanding the reasons, the ECHR has only been able to pronounce itself on narrow aspects of a foreigner's rights. Even in these cases, the Court has clearly circumscribed the conditions under which the right protected is deemed violated. In all their decisions, judges reaffirm that they do not forbid states from regulating the entry and stay of foreigners. Decisions actually discuss a number of legitimate reasons why a state may want to limit entries such as the economic well-being of a country or expel individuals because of threats to public order (to justify expulsions). These restrictions are vaguely defined as applying if they are "necessary in a democratic society" (Article 8, § 2). The judges estimate the proportionality between the legitimate goal of a measure or a law, the means used to achieve this goal, and the damage done to the individual(s) as measured by the violation of Convention rights. For instance, the Court stated in the Abdulaziz case that "regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual . . . . A State has the right to control the entry of non-nationals into its territory . . . . The duty imposed by Article 8 cannot be considered as extending to a general obligation on the

part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept non-national spouses for settlement in that country" (European Court of Human Rights 1985, 34).

Rather than breaking new ground and going where no national court had gone before, the ECHR confirmed and clarified the pertinence of pre-existing legal principles. As in other areas, it tried to coordinate national jurisprudences rather than subjugate national courts and to harmonize pre-existing practices rather than impose new ones. It is not fortuitous that the main jurisprudence on aliens centers around Article 8 on family life. All of the countries studied here have a clause inscribed in their Constitution on the right to lead a normal family life that resembles Article 8, and they also had made provisions for family reunification. In the Netherlands, Article 10 of the Constitution protects private life, Article 6 of the German Basic Law does the same. In France, as early as 1978, the highest administrative tribunal struck down government suspension of family reunification on the grounds that it was contrary to the *principe général du droit* (general legal principle) that protected an individual's right to a normal family life (*Arrêt GISTI*). In Germany, in 1983, the Federal Constitutional Court forced Bavaria and Baden-Wurtenberg to go back on a plan to establish a three-year waiting period for spouses before family regrouping in Germany was allowed. The Court deemed it contrary to Article 6 of the Basic Law on family life, a constitutional provision taken into consideration in residence permits and expulsion court cases (Ansay, 1992). European human rights provide us with insights on the transmission of norms: national legal norms have been the pillar on which international ones have been elaborated.

The "new" norms that emerged from European jurisprudence only gained currency nationally when comparable and compatible norms already existed at that level. The persuasiveness of ideas stems in this respect from their ability to insert themselves within existing paradigms (for an application of the notion of paradigm to politics, *see* Hall, 1993). This may seem commonsensical: one accepts what one already knows. The more specific point here is that the international norms that have been incorporated by national jurisprudence are important constitutionally protected principles.

The ECHR's jurisprudence has been circumscribed to very specific areas of rights with respect to the protection of aliens. This has to do with the logic of "increasing returns" of litigation whereby one success in court based on a particular provision leads lawyers to multiply cases based on those grounds. In addition, it can be explained by the preexistence of national jurisprudence

in these specific areas. The ensuing question is whether ECHR jurisprudence has been incorporated in national law or taken into account by policymakers.

The National Incorporation of ECHR Norms

There is no reason to believe that all the states that have signed an international convention will apply it uniformly. The provisions themselves can be "customized" to a certain extent. It sometimes takes decades before international conventions are ratified and states can do so only partially and/or fail to ratify controversial protocols. States often use "reserves" or "interpretative declarations" when adhering to international conventions so that "a large part of the system of protection [of rights] is excluded in a way which is antinomical with the idea of a minimum standard of protection embedded in those texts" (Frowein, 1990:193). One such example regards the "declarations and reservations" that France published after it adhered to the International Covenant on Economic, Social, and Cultural Rights in 1980. It stated that the articles that proclaimed a universal right to work and welfare "should not be interpreted as obstacles to enacting regulations restricting foreigners' access to the labor market or establishing residence criteria for the allocation of certain welfare benefits" (*Journal Officiel*, February 1, 1981:405). The Dutch Parliament, when considering the European Social Charter in 1978, also entered a reservation so that the lack of adequate means of subsistence could remain a ground for expelling foreigners.

Drawing on the experience of France, Germany and the Netherlands, I assess the role of domestic jurisdictions and actors in the process of incorporation of ECHR norms. How can the jurisprudence of the ECHR add to national practices? Within the European Convention of Human Rights framework, the Committee of Ministers can order the Commission to publish decisions so as to shame violators. Yet, nearly all cases are reported so that "whatever force lay in this threat has now been lost" (Mower, 1981). More leverage is gained from "institutional co-optation" (Moravcik, 1991), in particular when national courts refer to international human rights standards in their pronouncements. Vincent Berger, division head at the Clerk's Office of the Court, speaks of the "preventive consequences" of Court cases such as when a government changes domestic regulations or makes reform promises during a legal procedure in Strasbourg, or, in countries where an individual right of petition has been granted, when national tribunals take greater care in respecting the Convention so as not to have their decisions overruled in Strasbourg. He acknowledges that these effects are very far from systematic (Berger, 1994:430).

First, there is variation in the litigation strategies of pro-aliens' groups and sued administrations depending on their country of origin. There remain cross-national differences in the number of recourses to the ECHR and in its impact. In our three cases, until December 1993, 27 affairs concerned Germany in the Court, and Germany was condemned in ten of them (in 37% of the cases). France was involved in 44 Court decisions, and the ECHR found that there was a violation in 23 of them (58% of the cases). The Netherlands was also condemned in 58 percent of the cases, yet only 29 decisions involved the Dutch state (Berger, 1994:annex D). This lesser German involvement alerts us to the greater invisibility of international human rights law in Germany. Compared to the other cases, human rights advocates use this resource less, and the pay-off is not as great since fewer cases result in condemnations.

The first striking aspect of national implementation is that it has been delayed or nonexistent in the cases studied. In France, international human rights norms were drawn upon only starting in 1991. France ratified the 1950 Convention in 1974 and waited until 1981 to permit individual petition under Article 25. In 1988, in the Arrêt Nicolo, the French Council of State gave full effect to Article 55 of the Constitution, under which treaties take precedence over domestic statutes once signed, ratified and published. One had to wait two more years, however, before the Council of State held that Article 8 of the European Convention could be used whenever the legality of decisions taken against aliens was challenged on those grounds.

Contrary to the French, the Dutch promptly ratified the European Convention (in 1954) and allowed individual petition. Notwithstanding, national judges and authorities ignored the treaty for about a quarter of a century (Meyjer, 1985:11). This has been explained by ignorance, the lack of prestige of Strasbourg, and the belief that "the invocation of the Convention was a sign of weakness and was only adhered to when no other reasonable argument was available" (Zwaak, 1989:40). The Dutch Constitution regulates the internal force of treaties in a monistic way and, in its 93rd Article, states that "self-executing" treaty provisions will be binding from the time of publication. However, until the 1980s, judges did not deem the ECHR self-executing. They preferred to apply a comparable provision of Dutch law and, in cases when they did apply the Convention, they did so in a very restrictive way.

Postwar Germany counts among the few countries with extensive judicial review, and its Basic Law offers strong human rights guarantees. Very few complaints have been filed with the European Commission of Human Rights. Furthermore, the Federal Constitutional Court can only base its deci-

sions on the Constitution. Consequently, on many occasions the Court has held that a constitutional complaint cannot be based on an alleged violation of the European Convention. It only accepts to interpret the Convention in cases in which a court has violated a plaintiff's fundamental right to equality before the law under Article 3 of the Basic Law by misapplying or disregarding the Convention in an arbitrary fashion. Administrative courts should apply and respect it.

So can one find concrete evidence showing that national courts and policymakers are taking ECHR jurisprudence into account? When asked about the incidence of the Convention on immigration policymaking, a German Interior Ministry official dismissed it by saying that the Convention had been ratified in 1952 and that its mark remained to be seen in the elaboration Aliens Acts including the 1991 Act (interview with Mr. Malward, Federal Ministry of the Interior, Bonn, 1995). The statement is almost true: there is one mention of the Convention in the Aliens Act. German courts have generally preferred to refer to ECHR decisions when the latter display judicial restraint. For instance, in 1982, when the Highest Administrative Tribunal examined the case of an adult alien who wanted to join his parents in the FRG, it referred to a 1977 decision of the European Commission of Human Rights to state that no right to a residence permit could be derived from Article 8 (Steinberger, 1985). A June 1998 incident further shows that Article 8 can be interpreted as a means of expelling an entire family instead of keeping it together in the receiving country. Bavarian authorities that wanted to deport a 13 year old German-born Turkish youth with a criminal record with 60 accusation counts issued a deportation for his parents who had lived in Germany for 30 years. The family would stay together in a way compatible with the right to lead a normal family life – in Turkey.

In France, the ECHR has served to expand the scope of judicial review and, since 1991, several government measures and actions regarding foreigners have been struck down using Article 3 or 8 of the ECHR. During the 1993 reforms on the entry and stay of foreigners, Articles 23, 25 (last paragraph) and 26 relating to expulsion had to be modified to take new Strasbourg-based standards into account. Government internal documents now include a sort of warning against possible litigation on the basis of Article 8. Orders to leave the territory also systematically mention the Convention article. The Interior Ministry is not particularly troubled by the incidence of international law and considers it simply a matter of arguing well either the nonexistence of strong ties in France or the overriding danger to public safe-

ty. Based on the report of an academic familiar with the jurisprudence of Article 8, a special residence permit labeled "private and family life" may be delivered to foreigners under threat of expulsion yet with no ties outside France (Weil, 1997). Yet, as the circular accompanying its implementation makes clear, this permit only applies in rare cases and it quotes a French Council of State decision that states that an expulsion "only exceptionally endangers the private and family life of an individual." (*Libération,* July 29, 1998). Article 3 of the ECHR that prohibits inhuman or degrading treatment of individuals is also beginning to be taken into account, at least on paper. Administrative tribunals and the Council of State thus annulled a number of *arrêts de reconduite à la frontière* (orders to leave the territory). The Interior Ministry, in a 1991 circular, listed the countries where foreigners could not be sent back. It also now motivates its decisions in the written orders. Still, many Algerians have been sent back to their civil-war-torn country, demonstrating a gap between the Interior Ministry's commitment and its *praxis.*

There is a similarity in the use of Articles 3 and 8 of the ECHR. They have affected the outcome of individual cases and, in cases where the government was faced with a large amount of litigation cases, administrative procedure. To understand these developments, one cannot underestimate the role of French lawyers and associations such as the GISTI (*Groupe d'Information et de Soutien aux Travailleurs Immigrés*), who built more and stronger cases referring to the ECHR as well as that of a minority of magistrates who believed that international engagements could be directly enforced by the Council of State (Interviews with Roger Errera and Olivier Stirn, French Council of State, 1995 and 1996 respectively; interview with Danièle Lochak, president of the Groupe d'Information et de Soutien aux Travailleurs Immigrés and law professor, Paris 1995). Rather than an "epistemic community," one can speak of a motley crew made up of actors with different motivations. Magistrates within the Council of State exerting internal pressure for the incorporation of the ECHR were concerned less with human rights norms or aliens' rights as such than with competition with other jurisdictions who were already applying the Convention and the risk of being short-circuited by international courts.

In the Netherlands, the attitude of the courts towards human rights treaties evolved in the late 1970s and early 1980s, and the Supreme Court took a few landmark decisions invoking the ECHR. One should situate within the context of the 1986 ruling of the Supreme Court which stated that the President of a District Court had been right to annul a deportation order

based on the right to lead a normal family life although the Ministry of Justice had argued that this right only applied to allowing family members to join a foreigner already established in the Netherlands. The political climate probably played a role. The decision of the Court followed the enactment of a liberal minority policy and thus was synchronized with a general improvement in the rights of foreigners (they first voted in local elections in 1986). Now the Judicial Section of the Council of State, the highest administrative tribunal responsible for reviewing administrative decisions including those taken by the Ministry of Justice in the area of immigration and asylum, has crafted precise criteria for the taking into consideration of Article 8, such as the age of children, regularity of contacts and means of financial support (Badoux, 1993). Furthermore, the Judicial Section of the Council of State has also decided that divorced women in the country of origin could join their former family in the Netherlands if they are socially isolated (For the ECHR interpretation of these notions, *see* Madudeira, 1989). The limits of the Convention's impact, however, are those imposed by Strasbourg case-law which the Council of State often quotes: "regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual" (European Court of Human Rights, 1985:34).

The activism of public interest law organizations has been instrumental in insuring that foreigners benefited from the provisions of international law (in particular, the Working Group for Legal Aid on Immigrants). They have done so by filing suits to create case law and through lobbying as well, such as providing legal arguments to legislators who needed concrete arguments while building coalitions to reform foreigners' law (Groenendijk, 1980). The Dutch case resembles the French one insofar as the evolution of the judiciary towards international law and the imagination of local activists looking for new bases for reform coincided to result in a limited number of cases in changes in administrative criteria or practice. This grouping of factors seems to have been missing in Germany. There, the legal profession frowns at excessive interference from supranational jurisdictions and texts (Frowein, 1992:125). Not just the courts but also many makers of legal doctrine have argued against the direct application of international charters by courts. For instance, prominent scholars have held that the European Social Charter (Articles 19 and 20 on migrants' rights) could not be directly applied in Germany (Hailbronner, 1989:401).

It should also be underlined that governments pay attention when they are condemned by the ECHR but do not reconsider their policies when other countries are condemned on other aspects of the issue. Both France and the

Netherlands were involved in cases related to the application of Article 8. The situations of the plaintiffs differed. Each country focused on clarifying administrative practice to avoid further similar situations rather than on the significance of Article 8 as a whole. Germany was not condemned on family life issues. The cases involving foreigners regarded court interpreters' fees. Germany considered changing the law on that issue but disregarded the Strasbourg case law on family life. The evidence contradicts the argument that transnational human rights norms uniformly pervade national scenes.

Moreover, the ECHR is leading to a harmonization of human rights standards for reasons that originate in the judicial politics of nation-states. There are differences in the impact of the ECHR jurisprudence. They are perhaps brought about more by differences or lags in legal culture and the strategies of pro-migrant national activists than by legal rules *per se*. To summarize my findings, some effects of the ECHR jurisprudence are observable in the Netherlands starting in the early-to-mid 1980s and in the early 1990s in France. In both countries, there was an active public interest law organization that multiplied cases before the courts. They succeeded only once the attitude of the latter towards international law changed. This took longer in France, which was the last to ratify the whole Convention and allow individual petition. In Germany, lawyers and judges seem to focus on the German Basic Law more than on the Convention. Consequently, one sees both less recourse to and less impact of the ECHR.

Long before ECHR decisions on the matter, improvements in foreigners' rights had been achieved through other means and activists had availed themselves of other nation-based means. This means ECHR jurisprudence fails a simple causal test of antecedence. Opportunities for the improvement of the status of foreigners have emerged because of national traditions embodied in law prior to the emergence of a postwar human rights discourse. This is the case with family reunification guarantees in Germany, which were secured because a right to family life is inscribed in the Fundamental Law of 1949. Its Sixth Article reflects a concern for traditional family values as constitutive of the national character that antedated the war. In France, administrative judges were defending the rights of foreigners on human rights grounds before 1991 and, in particular, their right to lead a normal family life. The aforementioned 1978 *Arrêt GISTI* by the Council of State was an important episode in an arm wrestle opposing the executive and the administrative court on immigration measures (Wihtol de Wenden, 1988; Weil, 1991). It was a clear judicial affirmation of the right of family reunion. Furthermore, French domestic law had already incorporated this right, in particular in the main

postwar text regulating immigration: Article 25 of the *ordonnance* of November 2, 1945 lists a number of categories of aliens who may not be ordered to leave the country because of their family and social situations.

The role of high courts as agents of normative change has been key in the area of aliens' rights. This has been especially the case in Germany, where there was no legislative change between 1965 and 1991 and the 1965 Aliens Act gave the administration great discretion and firmly distinguished fundamental liberties for Germans only and those for all (Dohse, 1981). In Germany, extensive judicial review has favored the development of domestic legal norms, and it is the latter that are referred to in aliens' law cases. Courts have applied the rule of proportionality (Article 20, § 3 of the Basic Law) that implies that the interest of the state had to be balanced against the constitutional interests of the foreign worker. Therefore, for instance, foreigners can no longer be deported for committing a small traffic offense. The concept of entrenchment (*Verwurzelung*), which means that the longer a foreigner stays the more restricted administrative discretion should be, has also been important. Courts affirmed that residence and permit renewal guarantees had to be granted to foreigners who have a right to develop their personality as it is stated in Article 2 of the German constitution and thus must be given the opportunity to plan their future (Schwerdtfeger, 1980). Therefore, domestic norms have played a more major role in determining the current legal status of foreigners than international legal norms as soon as domestic courts entered the fray of immigrant politics.

One factor that may explain why European norms have not weighed as much as national ones is the lack of a transnational issue network of the kind that Kathryn Sikkink (1993a) and Audie Klotz (1995) have discussed in relation to Latin America and South Africa. As Riva Kastoryano (1996) has shown, as long as the nation-state is the primary unit for dispensing rights and privileges, it remains the main interlocutor, reference and target of interest groups and political actors, including migrant groups and their supporters. While social movement scholars have documented the emergence of Euromobilization in areas such as the environment (Tarrow, 1995, 1998), this is not yet the case with respect to migrants. There are about 100 NGO networks present in Brussels (Cram, 1997), yet only one focuses on asylum: the European Council on Refugees and Exiles (ECRE), established in 1973 for cooperation between more than 50 nongovernmental organizations in Europe concerned with refugees, has a Brussels bureau and consultative status with the Council of Europe. Another NGO emerged after 1990 and focuses on migration (the Migration Policy Group). Despite the presence of

a few NGOs in Brussels, and efforts of the European Commission's Directorate General V to sponsor a Forum of Migrants, there is a missing link between European-level groups and migrant organizations mobilizing domestically (Callovi, 1994; Ireland, 1995; Kastoryano, 1996; Favell, 1998; Geddes, 1998; Danese, 1998; Guiraudon, 1999).

TABLE 1
CROSS-NATIONAL DIFFERENCES: A SUMMARY

France	the Netherlands	France	Germany
Institutional co-optation	Yes after 1991	Yes in the mid-1980s	No
Active legal aid groups using international law	Yes	Yes	No
Judicial insiders for international law	Yes in the 1980s	Yes	No
Decisions and findings of violations until 1993	High number of decisions (44) and 58% of findings of violations	High rate of findings violations 29 cases (findings of violations in 58% of the cases)	Low number of cases (27) and low rate of findings of violations (37%)
Individual petition	Only after 1981 (ratification only in 1974)	Since 1954	Since 1952

THE EUROPEAN COURT OF JUSTICE AND THIRD COUNTRY NATIONALS

Another set of European organizations likely to affect domestic policy changes is the European Union. In particular, scholars have identified the European Court of Justice as a crucial organization for the advancement of European integration and an example of an international agent acting against the interests of the principal (the member states) that led to its creation (on the influence of the European Court of Justice, *see* Stone Sweet and Brunnel, 1998; Burley and Mattli, 1993; *see also* Pierson, 1996.) This section examines the ECJ's jurisprudence concerning foreigners who are not citizens of a member state.

Compared with the ECHR's record and influence, the ECJ jurisprudence on third-country aliens was not based on human rights considerations. The Court invoked freedom of services or association treaty provisions rather than human rights principles. Although the Court constantly reiterates that it is its duty to insure observance of fundamental rights in the field of Community Law, it does so in a prudent and self-limiting way. In the case of third-country nationals, it has avoided this tack altogether. We find in the ECJ rulings,

as in the Treaty, the "dehumanizing" element that consists in "treating workers as 'factors of production' on a par with goods, services and capital" (Weiler, 1993; 250). This is no surprise, given that the ECJ's legal bases are free movement clauses not human rights treaties. Still, it should be pointed out that the findings are difficult to reconcile with Yasemin Soysal's argument about postnational human rights norms. In the same way that the Treaty of Rome and Maastricht and subsequent secondary legislation granted special rights to the nationals of member-states (such as local voting rights, free movement, social rights), major rulings regarding third-country nationals also revalorized nationality as a criterion for rights granting. For instance, only nationals of certain countries that had signed agreements with the EEC benefit from ECJ jurisprudence on association treaties. The logic of European integration does not result in universal or postnational rights, but rather in special rights for specific categories and nationalities (*see* Wiener, 1997 for a discussion of European citizenship that develops this point).

In small and tortuous ways, the legal status of third-country nationals has been affected by the jurisprudence of the ECJ in the area of freedom of movement. Chronologically, the first example regards the family of a Community national who exercises his or her freedom of movement in another member-state. They are entitled to the same residence, work and welfare rights as a member-state national even if they are not EU nationals; the only difference is that they may be required to obtain entry visas (*see* Articles 10 and 11 of Regulation 1612/68 and Articles 1, 2, and 3 of Directives 73/148, 90/364, 90/365, 90/366). The ECJ has taken a robust approach to this obligation of nondiscrimination, yet it has repeatedly made clear that foreign spouses do not have rights of their own and only derive them from the Community worker moving to another member-state.

The second instance of Community law affecting national policy towards foreigners is still a burning political issue in some member-states. It regards the status of non-EU workers who are employed by Community firms performing services in another member-state. In the Rush Portuguesa decision of March 27, 1990, the ECJ reiterated that the provisions for the suppression of restrictions to the freedom of establishment and the freedom to deliver services entailed that a company could move with its own staff. If some of the company employees are third-country nationals, member-states cannot refuse them entry to protect their own labor market on the grounds that immigration from non-EU states is a matter of national sovereignty. It is deemed a discrimination against the company (not the employees) yet, by the same token,

non-EU nationals benefit from a derived freedom of employment in these cases for as long as they work for the company. In effect, although the principle of "Community preference" should give priority to EU nationals looking for employment, non-EU nationals can invoke the same principle if they work for an EU firm. The Court confirmed its stance in the 1994 Vander Elst decision, and the Commission proposed a directive again (directive 96/71) to solve the issue (Guild 1998). Walking along Berlin construction sites and hearing the workers speak Portuguese, English and Arabic, one realizes that most of the construction teams contracted include EU and non-EU workers, but very few Germans. The debate is ongoing between unions, employers and the government since what may be seen as a right for foreign workers has been construed by unions as a form of "social dumping."

Other recent developments in ECJ jurisprudence deserve mention. They regard the application of the 1964 EC/Turkey Association Treaty and also of the cooperation agreements signed by the EC and North African countries that the EEC had entered into under Article 238 of the Treaty of Rome. Because of the high numbers of Turkish and North African workers in France, Germany and the Netherlands, any provision on freedom of movement for the nationals of the signatory countries had the potential to consolidate significantly the status of a large number of foreign residents.

After a long dormant period, important steps towards their implementation were taken in the 1980s, mainly as a result of ECJ activism. The purpose of the EC/Turkey agreement was to achieve Turkey's entry in the EU. As it met with political resistance by EC member-states, this goal was not achieved nor was freedom of movement implemented as required by Article 36 (P) of the Agreement. The Council of the Association reached a consensus in 1976 and 1980 on the right of Turkish workers to access the labor market freely after a certain period of residence and employment in a member-state, yet explicitly provided for further implementation of current domestic regulations. As Hailbronner and Katsantonis (1992) suggest, "member-states clearly intend association law to be incomplete in the sense that no individual rights could be inferred from the Council's decisions" (p. 57).

Yet a few ECJ decisions in the late 1980s were diametrically opposed to what states had intended. The ECJ ruled that nationals of the association contracting states had *directly enforceable* rights in a way that made them part of the *acquis communautaire* and had to be upheld by national courts. In the 1987 Demirel case involving the right of a Turkish worker's wife to join him in Germany, the ECJ held that Article 238 of the Treaty gave the Communi-

ty competence to regulate the entry and stay of the nationals of EC-associated states whenever the agreement contained "a clear and precise obligation." This decision established EC competence in this area. In 1990, the ECJ went much further. Judges ruled in the Sevince case that a right of residence could be implied from the Council decisions by arguing that, although these decisions were concerned with the right to employment, the latter would be useless without the existence of a right of residence. A year later, in the Kziber case, the ECJ interpreted an equal treatment clause in the Cooperation Agreement with Morocco with the same line of reasoning by vindicating the application for special employment benefits for a Moroccan living in Belgium. This benefit is designated as one of the social benefits covered by Article 2 of regulation 1612/68 applicable to EC migrant workers. In effect, the Court neglected the difference between an EC national and a non-EC national covered by a Cooperation Agreement and the judges applied the principles of Community law rather than the limited framework of association law (Guild, 2000).

Member-states were furious, especially in Germany after the Kus case.[2] The Federal Ministry of the Interior, the Ministry on Social Affairs criticized the ECJ decisions. Both the *Bundesverwaltungsgericht* (the highest administrative court) and the *Bundessozialsgericht* (the highest social court) stated that decision 1/80 did not constitute law that Turkish citizens could invoke (Faist, 1994).

The "judicial capital . . . which is involved each time that a court breaks with the past and makes a new development" (Weiler, 1993:253) may have seemed prohibitive for the ECJ. In a spring 1995 ECJ decision, judges retreated, to some extent, from their previous stance and did not side with the plaintiff, a Turk with a permanent work incapacity whose residence permit was not being renewed. In any case, member-states have taken steps to preempt future developments in association treaties influence. As these treaties were renegotiated and new ones signed (with East Central States and the former CSFR) in the early 1990s, member-states clearly wished to exclude freedom of movement clauses (interview with Denis Martin, Directorate General V, European Commission, Brussels, 1995). Their attitude is but a sign that, however indirect and unexpected, the impact of the agreements

[2]A German court asked whether the requirement to renew a work permit presupposed a residence permit requirement and whether this only applied to Turks who came as workers. The ECJ had answered the first query affirmatively and had stated that a right of residence should be extended to foreigners benefiting from family reunion measures (*see* deutscher Bundestag, 1993).

signed with countries of emigration instilled fear among national governments. The fact that the Maastricht Treaty did not provide for ECJ automatic judicial review of the decisions taken by the Justice and Home Affairs so-called "third pillar" and that the Amsterdam Treaty limits ECJ competence in the area of immigration and asylum is another illustration that member-states wanted to make sure that the ECJ will not be a hindrance in their plans to restrict aliens' rights. This attitude perhaps stems from the fear that international law may further entrench existing rights and make restrictions or exceptions arduous in the future.

The ECJ case is significant in a number of respects. First, it explains part of the empirical puzzle on the extension of rights to aliens after 1973, albeit for circumscribed categories of foreigners: non-EU family members of EU nationals, Turks and North Africans, foreign workers of EU firms working in another member-state. From a theoretical standpoint, it seems to validate the institutionalists' claim that the regulatory norms diffused by international organizations can effectively constrain state actions. A Neorealist perspective could not account for decisions that clearly went against the stated interests of a powerful state in the region: Germany. The association agreement with Turkey and the jurisprudence on freedom of services concern mostly Germany with its 2 million Turkish citizens and an important number of building contracts due to the move of the capital to Berlin. In the latter case, domestic trade unions and industry suffer and fear a breakdown of neocorporatist arrangements, and with unemployment rising, the government had no electoral gains to expect from the decision.

Nevertheless, it suggests that, whatever effect of international norms we observe domestically, it is more likely to depend on the *modus operandi* of the international organization that seeks their incorporation than on the characteristics of the norms themselves. With a narrower basis to protect third-country nationals than the ECHR, the ECJ has developed a jurisprudence on third-country nationals that has led member states to rewrite treaties and find ways to avoid the ECJ's power of review. As expert lawyer Elspeth Guild acknowledges, "Not all decisions of the Court of Justice point in the same direction" (1998:32). Still, having a strong ally in the European Commission that has always sought to promote the rights of third-country nationals may have contributed to a brasher attitude. The ECHR has established its legitimacy through a more cautious jurisprudence, shying away from interpreting some of the Convention's most relevant articles such as Article 14 on discrimination.

TABLE 2
CROSS-COURT COMPARISON

	European Court of Human Rights	European Court of Justice
Main legal basis	European Convention of Human Rights and Fundamental Freedoms	Treaty of Rome, subsequent treaties and secondary legislation
Relevant jurisprudence	Article 3 on inhuman treatment Article 8 on the right to lead a normal family life	Association treaties with Turkey and ooperation cagreements with Maghreb countries Freedom of services Freedom of movement of EC nationals
Norms that the court shied away from interpreting or vindicating in foreigners' cases	Article 9 on freedom of religion Article 14 on discrimination protocols	Human rights
court characteristics	Decisions binding on signatory states	Separation-of-powers court guardian of European integration with the Commission Decisions have direct effect
Relation to national judiciaries	All national means of redress must be exhausted before a case is lodged with the ECHR	National courts can ask the ECJ for a preliminary ruling

CONCLUSION

My research findings suggest that there is a limited legal basis on which European courts can apply human rights to protect non-nationals. Even where the Convention provided such a basis, the European Court of Human Rights was reluctant to use its judicial capital in a politically explosive dossier. Notwithstanding, they did rule on certain specific areas, such as family life and protection against inhuman treatment, that are directly relevant to state discretion in expelling foreigners.

It is noteworthy that this jurisprudence followed the development of national laws, regulations and court rulings that upheld similar values. In this sense, the building blocks had been laid at the national level to be reasserted internationally, strengthening the chances that the norms would diffuse downwards again. It implies that normative change stems from an interactive process between national and international levels. Brute force can be solely "external" and arrive unannounced at the border. That this is not the case for the softer power of norms is hardly surprising. International norms add to pre-existing cognitive strata, and human rights courts preach to the (almost) converted. With respect to the rights of non-nationals, the impact of international organizations that diffused human rights norms followed the period in which national high courts entered the fray of immigration politics and imposed robust norms on the entry and stay of foreigners based on constitutional principles that went against the policy goals of governments after 1974.

The study of the European Court of Justice furnishes an interesting point of comparison with Council of Europe institutions. Although it tells us little about the impact of human rights norms, it does shed evidence on the domestic impact of international organizations. Without competence on third-country nationals except the one that the Court cut out for itself, it inferred rights of residence or freedom of movement in defiance of the interests of powerful member-states. Even if the jurisprudence is limited, given that it concerns Turks, Maghrebi and employees of EU firms contracted abroad, it potentially affects the rights claims of a significant number of foreigners. As with many other policy areas, the cases brought forward and the rulings of the ECJ could not be anticipated at the time of the Treaty of Rome.

International norms do not delegitimize the principle of nationality nor that of nation-state prerogatives in policymaking or rights distribution to the extent that Yasemin Soysal and other sociologists claim that they do. International institutions are therefore not postnational. In the ECHR case, this can be seen in the way that legal texts and the jurisprudence that refer to them

reaffirm constantly national sovereignty principles. Moreover, it follows from the fact that, when international law sought to circumscribe state discretion in policies towards aliens, it did so in areas in which national legal principles, constitutional norms, and postwar jurisprudence concurred. In the ECJ case, nationality is ever present as the master key to the enjoyment of rights whether it is the nationality of the individuals (who hold passports from EC countries and countries that have signed bilateral agreements with the EC), of their spouses, or of the firm that employs them.

The outlook of the international organizations in charge of monitoring and enforcing norms matters. International courts have different resources and strategies available to them that will accelerate or slow the extent to which they are willing to affirm principles against state interests. Depending on their allies, the instruments at their disposal, their conception of the judicial capital involved in various decisions, their boldness in circumscribing state discretion varies.

One should not underestimate that the diffusion of norms requires the presence of a number of factors that make the process a slow one and one that is uneven across states. European norms had to enter the mental maps of domestic judges and pro-migrant interest groups. The former had to have incentives to be favorable to the incorporation of international law, and the latter had to favor a litigation strategy (as opposed or in addition to other forms of mobilization). These processes take time and do not occur in all countries.

By order of importance, the domestic normative and judicial resources available to protect non-nationals seem crucial. In the German case, the strong human rights guarantees were a disincentive for groups to lodge cases with the ECHR. In turn, this meant that Germany faced less pressure from the ECHR given the small number of cases and condemnations, and domestic courts were less inclined to feel compelled to take these into account. In France and the Netherlands, we see that legal aid groups did feel that their clients' claims could be furthered, more cases were lodged, and findings against states were pronounced. The countries set on different paths. France and the Netherlands differ as far as the timing of the incorporation of a more developed jurisprudence on Article 3 and 8. The resistance in the French case came from domestic judicial institutions (the *Conseil d'Etat*).

The present decade is marked by rights retrenchment rather than of rights granting and consolidation as were the 1970s and 1980s, in particular in the case of non-(EU)nationals. In this context, perhaps European courts,

along with their national counterparts, may play an accrued role as defenders of the status quo rather than as "lawmakers" (Stone, 1992). Notwithstanding, there are a number of hindrances to the emergence of a strong international regime protecting the rights of non-nationals and it also faces adaptive nation-states as it develops.

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