

ILPA Immigration Law Practitioners' Association

 Migration Policy Group

BORDERS AND DISCRIMINATION in the European Union

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the promotion of facilitated exchanges between key
stakeholders in Europe, North America and the international
community, and through the production of substantive,
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Preface

The past two years have seen a tremendous surge of legislative activity at the European level relating to immigration. When MPG and ILPA prepared and published the *Amsterdam Proposals*, we anticipated Community legislative proposals in this field, but the speed and innovative nature of the proposals has been both impressive and, for the most part, to be welcomed with cautious optimism. The Tampere Milestones promising fair treatment for third country nationals in the European Union has provided a sound basis for the development of law and policy in immigration.

One area in particular, however, is of concern to us: the treatment of third country nationals at the Union's borders. In this field, the Community has inherited a substantial body of acts from an intergovernmental convention and its operating decisions, the Schengen Implementing Agreement. The Community is slowly in the process of replacing that borders legislation but there is a clear indication that the framework and way of dealing with the subject matter is not changing. Discrimination on the basis of nationality is fundamental to border policies and the treatment of third country nationals at embassies and consulates of the Member States abroad when seeking short stay visas. However, all too easily permitted discrimination on the basis of nationality can turn into prohibited discrimination on the basis of race, religion or ethnic origin. The EU's visa and borders laws must not overstep the boundary between permitted distinction on the basis of nationality and illegal racial and religious discrimination. We fear that this boundary is being blurred and overstepped.

The tragic events of 11 September 2001 in New York, Washington and Pennsylvania have led to a changed framework for Europe as well as the USA relating to immigration. We see the beginning of an emphasis on security, in the form of protection against foreigners, which easily may be at the expense of security in the form of protection of foreigners and their rights. In this context, already we have seen our leaders at the international level seeking to clarify that the military action in Afghanistan and more generally against terrorism is not a war against Islam. A rise in discrimination on the basis of religion is clearly a major concern in Western states, including the European Union. This series of events has intensified our concerns that visa and border laws do not become confused with the fight against terrorism in such a way that prohibited discrimination on the basis of race and religion are accepted as inevitable consequences. When we make exceptions to our laws against racial and religious discrimination in visa and borders law and policy we undermine all the substantial efforts which we are making in other fora to combat racism and xenophobia.

This report sets out our position and concerns about the increasing confusion in EU visa and border law and policy regarding permitted and prohibited discrimination.

Ian Macdonald QC,
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Ryszard Cholewinski

Leicester, November 2001

Borders and discrimination in the European Union: executive summary

As a result of the shifting of the borders from the Member States to the external borders of the EU, the rules regulating who can cross these, and under what terms, have taken on a whole new significance. This study examines the scope of EU rules concerning the entry of third-country nationals into EU territory and the distinctions made therein on the basis of nationality.

The distinctions made are between nationals of EU Member States and EU citizens, between EU citizens and third-country nationals, and between particular groups of third-country nationals. The study concludes that the fundamental right to be free from discrimination is undermined considerably by EU rules on the crossing of external borders, and by rules concerning the issuing of visas to third-country nationals. It is argued that there is no reasonable and objective justification for these rules, and that they may in fact be masking discrimination based on more invidious grounds such as race, ethnic or national origin and religion. Serious deficiencies can be identified not only in the way these rules are formulated, but in the way they are applied in practice.

CHAPTER 1

EU rules and practice on borders and visas examined

Chapter 1 examined the EU rules relating to entry into EU territory, and their practical application in respect of five groups of persons:

Group 1: Nationals of EU Member States and EU citizens exercising their free movement rights and third-country nationals within EU territory;

Group 2: Third-country nationals whose countries are on the EU 'positive' ('white') visa list, i.e. those who do not require a visa to enter the EU for visits of up to three months;

Group 3: Third-country nationals whose countries are on the EU 'negative' ('black') visa list, i.e. those who must be in possession of a 'Schengen uniform visa' to enter the EU for visits of up to three months;

Group 4: Third-country nationals who must also be in possession of an airport transit visa to pass through an international airport in EU territory;

Group 5: Third-country nationals of one nationality who are singled out for different treatment on the basis of race, ethnic origin or religion.

The relevant European law is found in Title IV EC Treaty on Visas, Asylum, Immigration and other policies related to free movement of persons, and Schengen rules as found in the Schengen Implementing Agreement (SIA) and accompanying measures (collectively, 'the Schengen *acquis*').

The following statements can be made regarding the entry of third-country nationals into EU territory. The implications of each have been examined to establish the extent to which they may lead to discrimination:

There is a gulf in treatment between EU citizens and third-country nationals regarding their entry into the EU.

This difference in treatment has however been accepted by the European Court of Human Rights on the grounds that the EU regime constitutes a 'special legal order'.

The rules enable third-country nationals to be treated differently from EU citizens when physically crossing the EU external border.

No persons are immune from checks at the EU external border. However, whereas EU citizens have the right to enter, no such right exists for third-country nationals, unless they are already lawfully resident in a Member State, or they come within the scope of a Community agreement with their country. Checks on third-country nationals are, in line with Article 6(2) SIA, more stringent than those on EU citizens. Further, the Common Manual on the Crossing of the External Border, which implements the Schengen rules in this area, goes further than Article 6(2), requiring a thorough check on both entry and exit (Article 6(2) foresees such a check only on entry), and can be said to invite arbitrary treatment. The more ambiguous the instructions and the greater the discretion granted, the more likely the discrimination in practice.

Significant differences are found in the treatment of three groups of third-country nationals: those who can enter without a visa; those who require a visa; and those who also need an airport transit visa.

Article 5 SIA provides for the conditions of entry, and Article 15 SIA makes the issuing of a visa dependant on the fulfilment of these conditions. The possession of a visa thus does not entitle automatic entry (confirmed also in Chapter 1, paragraph 2.1 of the Common Consular Instructions). This discretionary approach is often justified on the grounds of the international law principle that it is the sovereign right of the State to determine who should be permitted to enter their territories. However, it is submitted that by signing the Schengen Implementing Agreement, States have already ceded sovereignty in this area:

Article 5(2) SIA imposes *an obligation* on States to refuse entry into Schengen territory if the conditions in 5(1) are not satisfied. In any case, such discretion on the part of the States would be qualified by international human rights norms. The author is of the opinion that the rule of law requires that third-country nationals have the right to enter the EU once they have satisfied the conditions of entry in Article 5(1).

The study contends that the criteria used in placing a country on either the negative visa list or the positive visa list carry the risk of discrimination. The overt distinctions made on the basis of nationality appear to have an adverse impact on large groups of persons distinguished by reference to their race or colour. The majority of the world's non-white people would require a visa to enter the EU, and people of Islamic faith are in a similar position (the only three countries on the positive list with large Muslim populations are Brunei, Malaysia and Singapore).

The preamble of the Visa Regulation identifies irregular migration, public policy considerations as they relate to crime, and international relations as determining the status of a country on the visa lists. It is submitted that the first two purport to focus on the activities of individuals rather than on the relations between the states, which was traditionally the main criterion. This approach is at least suspect, since the risk is assessed not in respect of the activities of an individual, but on the basis of the broad criterion of nationality. While it is accepted that the inclusion of a country on the negative or black visa list does not automatically exclude the individual from entry into the EU, profiling categories of individuals as risks in terms of illegal immigration and crime, and thus placing them in the position of having to meet the visa conditions analysed below, increases the risk of discrimination.

In examining the conditions for the issuing of a visa in Article 5(1) SIA the study finds that these are subject to the potentially broad application of discretionary powers and are thus hardly conducive to the equal and consistent application of the visa issuing rules in Member State embassies or consulates. This increases the risk of differences in the treatment of visa applicants that are in fact in an analogous situation. For example, the number and nature of the supporting documents required may differ considerably depending on where the application is lodged. The rules also clearly favour more affluent migrants.

Third-country nationals who require an airport transport visa (ATV) are subject to the most stringent EU visa rules. There are no clear reasons why these special visas are issued, the most clarification being offered by the 1996 Joint Action on airport transport arrangements which identified a particular risk of illegal immigration posed by persons from these countries as a criterion. Given the stringent restrictions imposed by ATVs on the movement of nationals from the listed countries and the additional vigilance required of consular officials in the issue of ATVs, very good reasons must arguably be advanced for the significant difference in treatment between this category of third-country nationals and other categories.

CHAPTER 2

The Community non-discrimination principle and its potential application to the EU rules on borders and visas

The changes introduced by the Amsterdam Treaty in extending the competence of the Community and in broadening the ambit of the non-discrimination principle, both in terms of its personal scope and its reach beyond sex and nationality discrimination, constitute the focus of this chapter.

A central question is whether Community norms prohibiting non-discrimination can be applied to the EU rules on borders and visas outlined in Chapter 1. However, these norms contain a number of important exceptions and omissions, which, if interpreted too broadly, are unlikely to be of much assistance to third-country nationals, particularly when they apply for a visa in a EU Member State consulate or present themselves at the EU external border. Moreover, the existence of these exceptions and omissions demonstrates clearly that Member States recognise that they are making explicit distinctions on the basis of nationality and arguably also that they are acutely aware that immigration control activities are particularly

susceptible to discrimination on the grounds of race, ethnic or national origin or religion. It is contended that such exceptions and omissions are drawn far too widely and thus risk undermining the commitments Member States have made under international human rights law to guarantee the right to equal treatment and non-discrimination.

Non-discrimination on the grounds of nationality is at the heart of the Community enterprise, as is reflected in Article 12 EC. Before the adoption of the Treaty of Amsterdam, it was accepted by Member State governments that Article 12 EC, despite its apparently broad prohibition of 'any discrimination on grounds of nationality', applied only in the context of ensuring equal treatment between EU citizens. It is strongly arguable, however, that this position has since changed with the entry into force of the Amsterdam Treaty amendments in May 1999. While the very inclusion of Title IV EC implies that full equality between EU nationals and third-country nationals is not envisaged, this does not necessarily preclude the application of Article 12 EC, particularly in the context of distinctions that are made between the different groups of third-country nationals identified in Chapter 1.

The insertion of a more comprehensive non-discrimination clause in the EC Treaty, Article 13, has been generally welcomed. However, it contains a number of inherent limitations. The first part of this provision indicates that its scope is limited to that of Community law and consequently it differs little in this respect from Article 12 EC. A further limitation is that Article 13 EC, in contrast to non-discrimination provisions in international human rights instruments, would appear to be exhaustive and thus does not encompass discrimination based on nationality. The Council has already adopted two measures implementing Article 13 EC. The first is concerned with the general prohibition of discrimination based on racial or ethnic origin (Racial Equality Directive)¹, whereas the second is a Framework Directive outlawing discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation.²

Unfortunately, the impact of the Racial Equality Directive on the treatment of third-country nationals in the field of immigration control is likely to be nominal, largely as a result of the measure's limited material scope.

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

Although the draft Directive held out considerable promise for the protection of the right of third country-nationals to be free from discrimination, its substantive content in this regard was watered-down by the Council on adoption. These drafting changes are quite significant in revealing the fears of Member States that their immigration control activities might be particularly susceptible to challenges on the basis that they discriminate on the grounds of nationality, race, ethnic or national origin and religion.

The exclusion of religious and nationality discrimination from the scope of the Directive, the unwillingness of the Council to expressly protect third-country nationals from distinctions purportedly based on nationality from constituting indirect discrimination on the grounds of racial and ethnic origin and the failure to explicitly identify immigration authorities as public bodies the actions of which are covered by the material scope of the Directive, are unfortunate developments in the overall context of combating discrimination against third-country nationals in the EU. These exceptions and omissions in the Racial Equality Directive identified are hardly in keeping with the Community's commitment to combat racism, xenophobia and intolerance.

Nonetheless, a broad judicial interpretation of the Directive is justified given that Article 13 EC was adopted to strengthen the human rights credentials of the EU. Moreover, in the light of Article 6 of the Treaty on European Union, which views respect for human rights as a cornerstone of the EU, and the recently proclaimed Charter of Fundamental Rights, any other interpretation would be an anathema to the progress that has been made by the EU in this area. Despite its non-legally binding nature, the Charter may nevertheless have an impact on the development of Community law depending on the willingness of the Court of Justice to consider it as a source of human rights forming part of the general principles of Community law and of EU institutions to refer to it in the adoption of legislation.

The adoption of the proposed Council Directive on the status of third-country nationals who are long-term residents³ would strengthen the case for applying the non-discrimination principle to third-country nationals at the EU external

border, whether this be at the physical border or at the 'extended' border in the consulates. Otherwise, a serious disjunction would be created between the aim of protecting third-country nationals residing within the EU territory against discrimination by both private and public bodies on the grounds of race and ethnic origin and the complete absence of such protection at the EU external border of Member States, irrespective of where this border is to be found.

CHAPTER 3

The international human rights framework

The fundamental character and importance of the principle of non-discrimination is not in dispute. It is recognised as constituting customary international law and also as the cornerstone of international human rights law. Non-discrimination is also a universal principle for the protection of all human beings, regardless of citizenship or nationality or legal status. Although non-discrimination provisions in international human rights instruments do not actually specify 'nationality' as a prohibited ground of discrimination, they are nonetheless phrased in open-ended and non-exhaustive language.

Therefore, the enjoyment of the right to be free from discrimination is not confined to the citizens of a state, but must also be protected in respect of all those persons who come within the state's jurisdiction. The scope of this principle should clearly encompass first, those third-country nationals who are required to apply for a visa to enter a EU Member State in the consulate of that state or another Member State. Second, those third-country nationals who are turned away at the EU external border irrespective of whether they require a visa to enter should be included. Moreover, it should also apply to third-country nationals in transit through a EU Member State, whether this amounts to transit through the actual territory of that state or an international airport.

The non-discrimination norms in the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the European Convention on Human Rights (ECHR) are of sufficiently broad scope to scrutinise the distinctions adopted by the EU in respect of its border and visa controls.

³ COM (2001) 127 final of 13 March 2001.

The overall assertion of Chapter 3 is that there remains a significant gap between the commitments EU Member States have made to the principle of non-discrimination in international human rights law, and the implementation of this principle in practice, as this pertains to distinctions adopted between nationals and non-nationals and particularly between groups of non-nationals. These distinctions also risk discriminating indirectly against certain non-nationals defined by reference to their race, ethnic or national origins, or religion.

With regard to the position under the ECHR, there would appear to be clear obstacles to arguing successfully under the non-discrimination provision (Article 14) that the application of EU rules on the crossing of the external border and the issuing of visas discriminate on the grounds of nationality, or indirectly on the grounds of race, ethnicity or religion. First, the relevant action needs to be tied to one of the rights listed in the ECHR and cannot be based exclusively on 'a right to equal treatment'. The limitations of Article 14 in this respect have been recognised by the Council of Europe and its Member States with the adoption of Protocol No. 12, which will introduce a free-standing equality guarantee when it enters into force.

A second obstacle to taking successful action under the ECHR is the unwillingness of the European Court of Human Rights to take a bolder approach in justifying distinctions between EU citizens and third-country nationals. Fewer difficulties in this respect are presented by the distinctions applied between different groups of third-country nationals in respect of their entry into the EU. Finally, the concept of indirect discrimination awaits further development by the European Court of Human Rights.

Recommendations

- 1 The human right to be free from discrimination on the grounds of race, ethnic or national origin and religion as well as nationality must be protected in the immigration field. The perception that discrimination is permissible in the immigration field more than in other fields of activity can only have a negative impact on the treatment of third-country nationals already in EU Member States and also has a detrimental effect on the quality of race relations generally.
- 2 Differences in treatment in the immigration field that have a disparate impact on a particular group of persons defined by reference to race, ethnic or national origin or religion (indirect discrimination) should only be permitted if they can be objectively justified. Legitimate, relevant and sufficient reasons for the differences in treatment must be provided and made publicly available, particularly where such reasons are based, for example, on statistics relating to irregular migration. The actions taken to achieve the legitimate objective sought must be proportionate, and the justifications relied upon must not be related to the grounds of discrimination. Direct discrimination can only be justified for humanitarian reasons in the context of positive discrimination in favour of a particular ethnic group with a view to its protection.
- 3 The Racial Equality Directive should be amended to expressly apply to Title IV of the EC Treaty and the measures adopted thereunder.
- 4 The principle of 'mainstreaming' equality into EU measures concerning borders and visas, and those relating to third-country nationals generally, should be applied. It is important that all the Community instruments proposed and adopted in this field contain a clear statement of non-discrimination, using the EU Charter of Fundamental Rights as their reference point.
- 5 EU rules on borders and visas must be developed on the basis of harmonised standards, such as those advanced in the ILPA/MPG *Amsterdam Proposals*, and not on the basis of mutual or cross-recognition of national decisions, an approach which inevitably results in unequal treatment of persons in like situations.
- 6 There should be a right or at least a presumption of entry for third-country nationals seeking to enter the EU unless the criteria for refusal of entry are clear. Rule of law principles demand a Community-wide notion of public policy to be developed based on the approach adopted under Community law in respect of the restrictions imposed on the free movement rights of EU citizens.
- 7 The profiling of third countries on the basis of criteria relating to the risks of irregular migration and crime is extremely suspect from the standpoint of non-discrimination, and the only criterion that should be applied in determining whether the nationals of a particular country should be subject to a visa requirement or otherwise is that of international relations.

If such profiling is to be pursued, however, the Community can only avoid allegations of discrimination if it adopts, on the basis of reliable and responsible statistical evidence, strict and objective criteria, which are drawn up using a common approach and placed in the public domain, and by which the risks relating in particular to irregular immigration can be objectively assessed in respect of specific countries. Such a system would also have to include a transparent mechanism to ensure that relevant developments in a third country can be taken into account, both in terms of imposing a visa requirement and removing that country from the negative visa list.

- 8 Transparency in the making and practical application of EU border and visa policy is essential. Regular and updated statistics should be publicly available on visas issued and refused, as well as on refusals of entry at the external border. Uniform criteria must be applied to clearly define the visa application as well as the refusal of a visa application and to assess the length of time of such an application. A clear distinction should be made between visas rejected for the reasons in Article 5(1) SIA and situations where the visa application is deemed incomplete. The nationality of persons refused visas or entry at the external border should be recorded. Monitoring of the available statistics on the basis of racial and ethnic origin should also be conducted to ascertain which categories of third-country nationals are most likely to be subject to the refusal of visa applications, and in those cases where uniform visas are issued, to establish whether third-country nationals from particular categories are more likely to obtain a certain type of uniform visa. An expert working party should be formed to establish the necessary mechanisms to collect such data and to analyse this data.
- 9 A Visa Ombudsman, supported by adequate EU resources, should be introduced to monitor practices at the external border and in Member State consulates or embassies and to accept complaints in cases of systematic abuse. In those instances where the application of border and visa rules depends on the exercise of individual discretion, appropriate training of officials should be conducted, based on commonly developed principles, with a view to heightening awareness of the risks of discrimination.
- 10 Reasons for negative visa decisions or refusals at the external border should be provided in writing to individual visa applicants and travellers from third countries as soon as the decision is made and in a language they understand. Information on the possibility of having the decision withdrawn or reviewed and of appealing against it should also be provided.
- 11 Clear remedies should be made available to individuals who wish to challenge a negative decision. These remedies should conform to the two-stage process found in Council Directive 64/221/EEC.
- 12 EU Member States, EEA countries and EU candidate countries, which are also all Council of Europe Member States, should ratify Protocol No. 12 to the ECHR without reservation, thus demonstrating their commitment to combating discrimination in all public spheres of activity.

Introduction

The central contention of this study is that the fundamental human right to be free from discrimination is undermined considerably by European Union (EU) rules relating to the crossing of the external border and the issuing of visas. There are serious deficiencies in the way these rules have been formulated and in the way they are applied in practice. Moreover, it is argued that the rules, which make distinctions on the basis of nationality, lack a reasonable and objective justification and may also mask discrimination on the basis of more invidious grounds, such as race, ethnic or national origin and religion.

The study is set in the context of the Europeanisation of borders and the movement of borders beyond the physical territories of EU

Member States to the EU external border and further to EU consulates in third countries.¹ The issue of 'moving' border controls and discrimination was brought to the public attention only recently by reports that United Kingdom immigration officials, with the agreement of the Czech authorities, had been posted to Prague International Airport to check the documents of passengers travelling to London, an action which purportedly had a disparate adverse impact on Czech citizens who belong to the disadvantaged Roma ethnic group.² Although these checks were suspended following vehement protests in both the United Kingdom and the Czech Republic,³ particularly from human rights groups, they were re-instituted after the Czech Government was informed that it would have to accept the controls or face the imposition of a universal visa requirement on Czech nationals.⁴

National immigration rules make explicit distinctions on the grounds of nationality and less overtly on the grounds of race or ethnic origin. The determination of its own membership is traditionally viewed as the prerogative of the State⁵ and international legal tribunals have frequently accepted this position without asking any further pertinent questions. This approach is reflected in the following extract from an important judgment of the European Court of Human Rights in 1985:

Most immigration policies – restricting, as they do, free entry – differentiated on the basis of people's nationality, and indirectly their race, ethnic origin and possibly their colour. Whilst a Contracting State could not implement 'policies of a purely racist nature', to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute 'racial discrimination'.⁶

1 See E Guild, 'Moving the Borders of Europe', Inaugural lecture delivered during the official ceremony on the occasion of the assumption of the professorship of the CPO Wisselleerstoel at the University of Nijmegen, 30 May 2001.

2 J Huggler, 'Czech Roma barred from flights to UK', *The Independent*, 20 July 2001.

3 See A Travis and K Connolly, 'Britain forced to end 'discriminatory' watch on would-be Czech migrants', *The Guardian*, 8 August 2001. This article cites UK Home Office sources that in the first period of the scheme's operation, which lasted about three weeks, approximately 118 persons had been stopped boarding flights to the UK of which at least 60 were Czech Roma.

4 R Allison, 'Czechs let UK resume asylum screening', *The Guardian*, 23 August 2001. Such a visa requirement can be imposed because the United Kingdom does not participate in the Community uniform rules on visas.

5 For a normative analysis of the collective right of a political community to shape its resident population and the limits on this right, see M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) c. 2, 'Membership' (pp. 31–63).

6 *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 *European Human Rights Reports* [EHRR] 471, para. 84.

This study, however, contends that the prevailing status quo can no longer be tacitly accepted in the context of the developing international and European understanding of discrimination and that the distinctions states often make between persons in the immigration sphere should be subject to the full force of anti-discrimination law, or at the very least to increased and more profound scrutiny in the equality context. Discrimination on the grounds of race and ethnic origin is considered to be particularly objectionable and has been universally prohibited by national and international legal norms. The fight against such discrimination is currently of special interest to the international community, which saw it appropriate to mark the beginning of the 21st century with a World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.⁷ It is somewhat disturbing, therefore, that discrimination is frequently perceived to persist in the immigration field, which states consider to be somehow immune from scrutiny. The official argument for combating race discrimination and racism in many walks of life, such as employment, education, housing and the provision of goods, facilities and services, becomes rather less compelling if it is still practiced in a field of activity where considerable power is exerted by the state in relation to the individual or particular groups of persons. In addition to race and ethnic origin, religion and nationality have also clearly been recognised as prohibited grounds of discrimination by those tribunals and bodies administering the implementation of universal and regional human rights treaties. It should no longer be acceptable, therefore, to take distinctions between citizens and non-citizens as well as between groups of non-citizens in the immigration sphere for granted without the existence of sound, transparent and objective reasons for the different approach adopted.

⁷ Information on the Conference and accompanying documentation is available from the website of the Office of the United Nations High Commissioner for Human Rights at <http://www.unhchr.ch/html/racism/>

⁸ Immigration Law Practitioners' Association and Migration Policy Group (prepared for ILPA and MPG by S Peers), *The ILPA/MPG Proposed Directives on Immigration and Asylum* (Brussels/London: ILPA/MPG, 2000).

⁹ The papers presented at this conference will be published by Kluwer in a volume to be edited by Professors Groenendijk and Guild of the Centre for Migration Law, Faculty of Law, University of Nijmegen.

Current EU rules concerning the entry of third-country nationals into EU territory for a period of up to three months make clear distinctions on the basis of nationality between the nationals of Member States and EU citizens, EU citizens and third-country nationals and between particular groups of third-country nationals. The purpose of this study is to examine the scope of these rules and the justifications that have been advanced for the distinctions that are being made and to make recommendations for a more equitable and transparent EU borders and visa policy. A particular focus of the research is whether these distinctions disguise or mask discrimination based on more invidious grounds, particularly race, ethnic origin or religion. The simple fact that most of the countries on the EU's 'negative' or 'black' visa list (discussed in Chapter 1 below) are states with black or Islamic populations clearly means that the EU has a case to answer against allegations of discrimination on such grounds. In the absence of transparent and equitable criteria objectively justifying these rules, third-country nationals seeking to enter the EU for short-term visits risk being discriminated against on grounds of race, ethnic origin or religion. Such rules are more likely to amount to indirect discrimination, particularly in those cases where the rules appear neutral on their face.

This research builds on the chapter on borders and visas in the Immigration Law Practitioners' Association's (ILPA) and Migration Policy Group's (MPG) *Amsterdam Proposals*⁸ and discussions at the recent ILPA and Meijers' Committee Conference on 'Development of the EU's Borders: Schengen and Beyond', held in London on 11–12 May 2001.⁹ It examines the differentiated impact of EU rules on borders and visas on five particular categories of persons:

Group 1: Nationals of EU Member States and EU citizens exercising their free movement rights and third-country nationals;

Group 2: Third-country nationals whose countries are on the EU 'positive' ('white') visa list, i.e. those who do not require a visa to enter the EU for visits of up to three months;

Group 3: Third-country nationals whose countries are on the EU 'negative' ('black') visa list, i.e. those who must be in a possession of a 'Schengen uniform visa' to enter the EU for visits of up to three months;

Group 4: Third-country nationals who must also be in possession of an airport transit visa to pass through an international airport in EU territory;

Group 5: Third-country nationals of one nationality who are singled out for different treatment on the basis of race, ethnic origin or religion.¹⁰

The first four groups are clearly the target of specific EU rules, which are discussed in Chapter 1. To date, however, rules on entry into EU territory have not explicitly been devised with the fifth group of persons in mind, although this group has been included in the study to demonstrate that the adoption of such rules remains a possibility given the evidence of similar actions that have been taken at the national level in some Member States, such as the British immigration controls carried out at Prague International Airport. These controls should also be considered in the light of recent legislative developments in the United Kingdom. The Race Relations (Amendment) Act 2000 was generally heralded as a positive piece of legislation, particularly as it clearly extends the application of the Race Relations Act 1976 to public authorities, including those carrying out immigration and nationality functions. This new legislation, however, also provides for a controversial exception enabling officials exercising such functions, such as the relevant Minister or immigration officials acting in accordance with a Ministerial authorisation, 'to discriminate against another person on grounds of nationality or ethnic or national origins'.¹¹

¹⁰ I am grateful to Professor Kees Groenendijk, of the Centre of Migration Law at the University of Nijmegen, for identifying this fifth group.

¹¹ Race Relations Act 1976, ss 19B and 19D respectively, as inserted by s. 1 of the Race Relations (Amendment) Act 2000. For a short discussion of the immigration and nationality exception in the 2000 Act and the controversies surrounding it, see C O'Connell, 'The Race Relations (Amendment) Act 2000' [2001] *Public Law* 220–232, at pp. 227–229.

¹² See also letter by Rick Scannell, Chair of ILPA, to Barbara Roche MP, Home Office Minister, 19 April 2001.

¹³ See Race Relations (Immigration and Asylum) (No. 2) Authorisation 2001, entry into force April 2001. This authorisation is available from the Immigration and Nationality Directorate's website at <http://www.ind.homeoffice.gov.uk/> Pontic Greeks have since been removed from this list.

¹⁴ *Hansard* HC Written Answer, 1 May 2001, Col. 626W (Mrs Barbara Roche, Home Office Minister).

¹⁵ Aliens Regulation, Art. 19(4), cited in K Groenendijk, 'Minderhedenbeleid in een onwillig immigratieland' (1981–10) *T Is een vreemdeling zeker* 531–464, at p. 541 (n. 47).

While the initial debates in Parliament indicated that this provision would enable immigration officials to discriminate in *favour* of certain groups, it became clear in subsequent debates that the intentions of the Government were otherwise.¹² These intentions were confirmed in a recent Ministerial authorisation adopted under the Act that enables discriminatory action to be taken *against* persons from enumerated ethnic and national groups.¹³ In explaining this decision to Parliament, the Minister reported as follows:

In the light of evidence about the particular risks posed to the operation of our immigration controls of some members of certain ethnic groups, I have made an authorisation permitting members of the Immigration Service to discriminate, where necessary, in the examination of passengers belonging to the following ethnic or national groups: Tamils, Kurds, Pontic Greeks, Roma, Somalis, Albanians, Afghans and ethnic Chinese presenting a Malaysian or Japanese passport or any other travel document issued by Malaysia or Japan.¹⁴

Another example of signalling out a racial or ethnic group for differential treatment in the immigration sphere comes from past regulation in the Netherlands. In October 1981, a Dutch Aliens' Regulation explicitly provided for the less favourable treatment of persons of 'Chinese descent' from countries in South-east Asia as regards their admission to the Netherlands and the granting of residence permits.¹⁵ These rules have since been repealed.

Framework for analysis

The research seeks to assess whether the differences in treatment between the above groups of persons constitute discrimination using the analytical framework advanced below. This framework is mainly based on the principles developed in Community law, although it also borrows from the jurisprudence of the European Court of Human Rights in attempting to gauge when restrictions on the right to be free from discrimination go beyond the bounds of what is acceptable.

Direct discrimination

A non-controversial definition of direct discrimination is found in the recent EU anti-discrimination measures, discussed in greater detail in Chapter 2. Article 2(2)(a) of the newly adopted Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

(Racial Equality Directive)¹⁶ stipulates that 'direct discrimination shall be taken to occur where a person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. This definition is reiterated in

16 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22 [hereinafter Racial Equality Directive].

17 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16 [hereinafter Framework Directive].

18 See also Arts. 2(2)(b) and 2(2)(b)(i) of the Framework Directive, *ibid.*

19 See Case C-237/94, *O'Flynn v Adjudication Officer* [1996] ECR I-2617, paras. 20–21 where the Court of Justice defined indirect discrimination as follows: '[U]nless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.... It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect'.

20 See Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998 L 14/6, in accordance with which 'indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex' (Art. 2(2)).

21 UK House of Lords, Select Committee on European Union, *Ninth Report: EU Proposals to Combat Discrimination*, 16 May 2000 [hereinafter *Report on EU Proposals to Combat Discrimination*], paras. 79–80 referring to the Commission's definition of indirect discrimination in the Framework Directive. The House of Lords report is available from <http://www.publications.parliament.uk/pa/ld199900/ldselect/lddeucom/68/6801.htm>

22 See L Waddington and M Bell, 'More Equal Than Others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587–611, at pp. 593–594 and A Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination' (2001) 3 *European Journal of Migration and Law* 199–229, at p. 203. However, both the Racial Equality and Framework Directives in their Preambles (Recitals 15 and 16 respectively) do not discount the use of statistical evidence in accordance with national laws or practices: 'The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence'. According to Tyson, *ibid.* at 204, '[i]n practice this means that different tests of indirect discrimination may be applied in different Member States, depending on their traditions and, in particular, the acceptability of ethnic monitoring and the collation of related statistics'.

Article 2(2)(a) of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive),¹⁷ which outlaws discrimination on the grounds of religion or belief, disability, age or sexual orientation in the fields of employment and occupation. Although these definitions do not extend to the ground of nationality, which in European Community law is governed by Article 12 EC, the application of this concept of direct discrimination would mean that the rules affecting the first four groups of persons identified above would clearly constitute direct discrimination on this ground. The treatment of persons in the fifth category, however, would constitute direct discrimination on the grounds of race, ethnic origin or religion.

Indirect discrimination

For the sake of consistency, the definition of indirect discrimination in this study is also the one used in the same EU measures, which is articulated in Article 2(2)(b) of the Racial Equality Directive:

[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹⁸

This definition is now similar to that adopted by the European Court of Justice for discrimination on the grounds of nationality,¹⁹ although it differs from existing Community legislation concerned with gender discrimination, which emphasises the need to demonstrate that a 'substantially higher proportion' of the members of the group concerned has suffered a disadvantage.²⁰ Under Article 2(2)(b) of the Directive, however, it is sufficient for the complainant to demonstrate that the provision, criterion or practice *would* put persons of the group concerned at a particular disadvantage compared with other persons. Therefore, there is no requirement to prove that this has actually occurred with the result that the impugned measure or practice can be challenged as soon as its discriminatory potential is identified.²¹ It would appear therefore that the test for establishing indirect discrimination in the Racial Equality Directive is easier to satisfy than that for indirect sex discrimination as the need for producing complex statistical data to demonstrate a disparate impact is avoided.²²

The need for a comparator

A previous version of the definition of indirect discrimination in the Framework Directive was criticised for the lack of a reference to a comparator, since it is argued that indirect discrimination in particular 'relies on comparison between definable groups'.²³ According to one Commission official, the introduction in this definition of the word 'would' (see above) implies that 'all Member States will have to provide for the use of hypothetical comparators in the demonstration of indirect discrimination'.²⁴ It is recognised that discrimination often can only be established if the distinctions that are being applied concern comparable groups in an analogous situation.²⁵ This may cause particular difficulties when comparing the different treatment of nationals and non-citizens. In one case concerning expulsion from the territory, the European Court of Human Rights concluded that citizens and non-citizens were not comparable because the former could not be expelled, although the Court allowed for a comparison in the expulsion context between two different categories of non-citizens, where persons in one of these categories received more favourable treatment.²⁶ Most of the key comparisons made in this study involve distinctions between different groups of non-citizens who are seeking to enter into EU territory for a period of up to three months. They are therefore all in an analogous situation. One possible exception concerns the situation of the fourth group, airport transit visa nationals, who are not seeking entry into a Member State, at least not with the intention of moving within EU territory, but merely wish to stop at an airport within it on their way to a third country. However, given the particularly disadvantaged position of persons in this group, they are included in this study. Another exception, which is in keeping with the judgment of the European Court of Human Rights referred

to above, is the analysis of the different position as regards entry of persons in the first group, which can be essentially characterised in terms of differences in treatment between non-nationals and nationals where the latter have an unqualified right to enter. Nonetheless, it is important to retain this analysis because it underscores the privileged position in Community law granted EU nationals as regards entry vis-à-vis Member State nationals, which can be assimilated into what is effectively equal treatment and illustrates the gulf that exists between these two categories of persons and third-country nationals. In one respect, however, Member State nationals, EU nationals and third-country nationals are in an analogous situation and that is when they seek to cross the EU external border where they are all supposed to be subject to checks.

Objective justification and proportionality

As indicated in the definition of indirect discrimination above, the existence of an objective justification can save the relevant measure, criterion or practice from constituting discrimination. The concept of objective justification differs depending on the particular legal order under examination. In the European context, this concept is used mainly in relation to indirect discrimination, although it is also relevant for direct discrimination, which holds particularly true in respect of those national and international anti-discrimination provisions that do not distinguish clearly between direct and indirect discrimination.²⁷ However, it is contended that direct discrimination on certain grounds, such as race or ethnic origin in particular, should be subject to stricter scrutiny and should not be justifiable at all unless very good and specific reasons can be advanced for the differential treatment. As discussed in Chapters 2 and 3 below, this level of scrutiny has also been applied to discrimination on the grounds of nationality in Community law and the law of the European Convention on Human Rights (ECHR). With regard to the former, such discrimination is only permissible if based on public policy, public security and public health grounds, which have also been narrowly interpreted by the Court of Justice. A further important caveat is that any justification advanced must be unrelated to the grounds in question, as otherwise it cannot be an *objective* justification. Unfortunately, such wording, included in earlier versions of the Racial Equality Directive proposed by the Commission, did not

²³ See *Report on EU Proposals to Combat Discrimination*, above n. 21, para. 83.

²⁴ Tyson, above n. 22, at p. 204.

²⁵ For the need to find an appropriate comparator in establishing discrimination, see M Banton, 'Discrimination Entails Comparison' in T Loenen and PR Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (The Hague: Kluwer, 1999) 109–117.

²⁶ *Moustaquim v Belgium* (1991) 13 EHRR 802.

²⁷ See IP Asscher-Vonk, 'Towards One Concept of Objective Justification?' in *Non-Discrimination Law: Comparative Perspectives*, above n. 25, 39–51, at pp. 41–42.

make its way into the final version of the Directive adopted by the Council, although it is surely implicit and is understood as such for the purpose of this study. Central to the concept of objective justification is the element of *proportionality*, which gauges whether a measure, criterion or practice, which pursues a legitimate aim, does not disadvantage a particular person excessively. The basis of the Court of Justice's inquiry into proportionality is the following three-part test:

- 1 the articulation of the State's interest, i.e., was the measure a useful, suitable or effective means of achieving a legitimate aim or objective?;
- 2 the articulation of the affected interest, i.e., was there a means of achieving that aim which would be less restrictive of the applicant's interest?;
- 3 even if there was no less restrictive means of achieving a legitimate public aim, does the measure have an excessive or disproportionate effect on the applicant's interest?²⁸

Proportionality plays a crucial role in measuring what kind of restrictions on human rights might be permissible. Under the ECHR, the proportionality element has been developed by the European Court of Human Rights to encompass the following five questions:

(1) are there 'relevant and sufficient reasons' for the measure; (2) is there a less restrictive alternative; (3) does the decision-making process meet the requirements of procedural fairness; (4) do safeguards against abuse exist; (5) does the restriction destroy the 'very essence' of the right in question?²⁹ In particular, questions (3) and (4) are closely connected to important rule of law requirements that must apply in a fair decision-making process where official discretion is exercised.

Chapter 1 of the study sets out the principal EU rules on borders and visas and examines these rules critically in the light of their differentiated impact on the five categories of persons outlined above. The remainder of the study then considers the EU rules in the light of the non-discrimination principle in Community law and international human rights law.

Chapter 2 discusses the anti-discrimination norms in Community law by first examining the established prohibitions on nationality and gender discrimination and then moving to an analysis of the new Community competence in the field of non-discrimination found in Article 13 EC, which is being implemented by way of the two recently adopted Council Directives referred to earlier. The limitations of these measures in respect of potential discriminatory activity in the immigration sphere is underlined in the light of the more encompassing anti-discrimination norm in the EU Charter of Fundamental Rights.

Chapter 3 focuses on international human rights law and examines the non-discrimination principle in the context of three international treaties of a universal and regional application, which have all been ratified by EU Member States and most EU candidate countries. The principal contention of this chapter is that the EU rules must also conform to the broader understanding of non-discrimination expressed in these instruments and articulated by the bodies and tribunals responsible for monitoring their implementation. Finally, the study contains a number of recommendations advancing ways of making the EU rules on borders and visas more equitable, consistent in application, and transparent.

²⁸ G de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105–150, at p. 113. For a further analysis of the principle of proportionality in Community law, see the following contributions to E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999); FG Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' (pp. 1–21); J Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' (pp. 65–84); and E Ellis, 'The Concept of Proportionality in European Community Sex Discrimination Law' (pp. 165–181).

²⁹ See K Starmer, *European Human Rights Law* (London: Legal Action Group, 1999) at p. 171, para. 4.2.

EU rules and practices on borders and visas examined

This chapter examines the EU rules and practices relating to entry into the EU territory in respect of the five groups of persons identified in the Introduction. The EU rules on entry make explicit distinctions on the basis of nationality. Indeed, the whole rationale of the EU enterprise is to develop a specific supranational regime to the benefit of one class of persons in particular, namely the nationals of Member States, or EU citizens as they are labelled in Part II of the EC Treaty.¹ Given that a fundamental right of EU citizens is freedom of movement and residence within the territory of the Member States,² it is hardly surprising that the rules governing entry into a Member State in respect

of EU citizens exercising their free movement rights have been essentially assimilated to resemble the position of nationals of Member States. Although third-country nationals legally resident in the EU are now also able to travel freely within EU territory,³ they have no right of entry across the external border (unless they are in possession of a resident permit or long-stay visa) or to free movement for the purpose of employment and residence. Nevertheless, the position of Member State nationals and EU citizens exercising their free movement and residence rights as regards entry into the territory of a particular Member State is not identical. Some differences remain and these are highlighted in the consideration of the first group in question. The principal aim of this particular examination is not to advance an argument that these differences in treatment constitute discrimination and cannot be justified, but to underline the gulf that exists in respect of the rules that operate between the persons in this category and non-EU or third-country nationals, who form the subject of the next three groups under investigation.

The focus of the chapter is on the distinctions EU rules on borders and visas make between three groups of third-country nationals as regards their entry into the territory of Member States: those who can enter without a visa, those who require a visa and those who also need an airport transit visa when arriving at an international airport of a Member State with a view to continuing their journey to a third country. The three groups in question, therefore, are distinguishable by a regressive sliding scale, with the result that entry into the EU for persons who find themselves in the more undesirable categories is made more difficult.

¹ Art. 17(2) EC reads: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.'

² See Art. 18(1) EC: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

³ Art. 14(2) EC reads: 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'. See also Art. 3(c) EC, which identifies as an activity of the Community 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'. That free movement of persons means all persons, including third-country nationals, is confirmed by Art. 62(1) EC, which mandates the Council to adopt 'measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, *be they citizens of the Union or nationals of third countries*, when crossing internal borders'. Emphasis added. See also Art. 62(3) EC, by virtue of which the Council is required to adopt 'measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months'.

With the exception of Denmark, Ireland and the United Kingdom, these are common rules applicable to the remaining 12 Member States.⁴ These rules are also implemented by Iceland and Norway, which have entered into an Association Agreement with the Community and its Member States in this respect.⁵ It is the distinctions made by the EU between these three categories of third-country nationals and the way these distinctions are applied that are most susceptible to allegations of direct discrimination on the grounds of nationality or indirect discrimination on the grounds of race, ethnic or national origin or religion. A large part of this chapter, therefore, is concerned with the arguments the EU and its Member States advance or might advance in support of these distinctions and whether these reasons constitute an objective justification.

Given that EU rules relating to the entry of third-country nationals are essentially concerned with short-term visits for a period of up to three months (and possibly six months if a recent Commission proposal finds support in the Council⁶), the scope of the discussion below

⁴ As discussed in the section on third-country nationals below, these rules are found in Title IV of Part Three of the EC Treaty, from which these three countries have opted out. However, both Ireland and the United Kingdom have retained the possibility of opting in to the adoption of certain measures and the latter has already done so in respect of a number of measures relating in particular to asylum and irregular migration. On the other hand, Denmark has agreed to be bound in international law on the measures adopted to build on the Schengen *acquis* (see also the section on third-country nationals below). See Protocol No. 3 on the application of certain aspects of Article 14 EC to the United Kingdom and to Ireland, OJ 1997 C 340/97 Protocol No. 4 on the position of the United Kingdom and Ireland, OJ 1997 C 340/99, and Protocol No. 5 on the position of Denmark, OJ 1997 C 340/101.

⁵ Council Decision 1999/439/EC of 17 May 1999 on the conclusion of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*, OJ 1999 L 176/35.

⁶ European Commission, *Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months*, COM (2001) 388 final of 10 July 2001.

⁷ E.g. Universal Declaration of Human Rights (UDHR), Art. 13(2), International Covenant on Civil and Political Rights (ICCPR), Art. 12(4), and Protocol No. 4 to the ECHR, (16 September 1963; *European Treaty Series* No. 46; entry into force, 2 May 1968), Arts. 2(1) and 3(2). However, Article 3(2) of Protocol No. 4 to the ECHR expressly limits the right to enter to 'the territory of the state of which [one] is a national'.

is necessarily limited, although it should be underlined that the provisions relating to the entry and movement of EU citizens and their family members regardless of nationality are much wider in scope. In this respect, therefore, as noted in the Introduction, the comparison between EU nationals and third-country nationals is rather problematic, although no such difficulties exist in making comparisons between EU citizens and third-country nationals when crossing the external EU border, since they are all supposed to be subject to checks, or between the categories of third-country nationals identified above.

Finally, this chapter investigates the potential application of EU rules on the fifth category of persons comprising third-country nationals who are singled out for different treatment as regards entry into the EU territory on the basis of their race, ethnic origin or religion. As discussed in the Introduction, one Member State is currently applying such explicit distinctions and others have certainly done so in the past. Although there are no relevant EU rules in force at the moment, it is contended that the development of such rules cannot be discounted and indeed might be possible under the recently adopted Council Directive establishing minimum standards for the temporary protection of displaced persons.

GROUP 1

EU citizens vis-à-vis the nationals of Member States and third-country nationals

The right to leave and enter one's own country is recognised as a fundamental human right in international law and is reiterated in universal and regional human rights instruments.⁷ Within the unique supranational legal context of the EU, Community law effectively takes this principle one step further by providing for a right of entry for Member States' nationals into other Member States. The principles relating to the free movement of EU citizens within the territory of Member States for the purpose of employment and residence would be rendered nugatory without a corresponding right of entry. Indeed, the Court of Justice has clearly recognised that 'the right of nationals of a Member State to enter the territory of another Member State and reside there for the purposes intended by the Treaty is a right conferred

directly by the Treaty..., or...by the provisions adopted for its implementation'.⁸ Community secondary legislation provides for a minimum of administrative formalities by determining that EU citizens are only required to produce a valid identity document or passport in order to gain entry into another Member State⁹ and to reside there for up to three months without the need to undergo any particular formalities.¹⁰ No other entry controls are permissible, such as a need to possess an entry visa or any other equivalent document,¹¹ or the asking of questions by border officials concerning the purpose and duration of the journey or the possession of financial resources.¹² Given that internal border controls have now been abolished between 13 EU Member States and the two associated countries as a result of the operation of the

Schengen rules and their incorporation into the Community regime, this requirement now only applies at the external EU border. Moreover, the failure to comply with specific after-entry formalities relating to registration with the authorities or the issue of residence permits in a Member State cannot result in the application of disproportionate penalties, such as penal sanctions or a recommendation for deportation from the territory.¹³

The free movement and residence rights of EU citizens can only be 'subject to limitations justified on grounds of public policy, public security or public health'.¹⁴ The scope of this derogation is elaborated in Council Directive 64/221/EEC,¹⁵ stipulating in Article 2(1) that it applies to all measures taken by Member States based on these grounds concerning 'entry into their territory, issue or renewal of residence permits, or expulsion from their territory'. The derogation has also been the subject of extensive Court of Justice jurisprudence. Although a detailed discussion of these Community provisions and the accompanying case law is beyond the scope of this study, three general observations can be made in respect of the principles that have been developed. First, both the secondary legislation and the Court of Justice's jurisprudence have underscored the importance of not undermining the fundamental treaty principles of equality of treatment and free movement for EU citizens by interpreting this derogation strictly. Directive 64/221/EEC provides that 'measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned', that previous criminal convictions are not sufficient in themselves to constitute a basis for taking such measures on these grounds and that the grounds cannot be invoked to service economic ends.¹⁶ In *R v Bouchereau*, the Court observed that 'the existence of a previous criminal conviction can...only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a *present* threat to the requirements of public policy'.¹⁷ The Court of Justice has clearly emphasized the narrow approach to be taken:

The concept of public policy must, in the Community context, and where, in particular, it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly, so that

⁸ Case 48/75, *State v Royer* [1976] ECR 497, para. 31.

⁹ Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ 1968 L 257/13, Art. 3(1). See also Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and provision of services, OJ 1973 L 172/14, Art. 3(1). Although family members, who are third-country nationals, may be required to produce a visa, Member States are obliged 'to accord to such persons every facility for obtaining any necessary visas'. The visa is also to be issued free of charge. Directive 68/360/EEC, *ibid.*, Arts. 3(2) and 9(2) and Directive 73/148/EEC, *ibid.*, Arts. 3(2) and 7(2).

¹⁰ Directive 68/360/EEC, *ibid.*, Art. 8(a).

¹¹ Directive 68/360/EEC, *ibid.*, Art. 3(2) and Directive 73/148/EEC, above n. 9, Art. 3(2).

¹² Case C-68/89, *Re. Entry into Dutch Territory: Commission v Netherlands* [1991] ECR I-2637. However, 'spot checks' at the border requiring EU citizens to produce residence permits, in addition to the documentation listed in Art. 3(1) of Directive 68/360/EEC, above n. 9, are permissible provided that they are not a condition of entry and do not constitute a barrier to freedom of movement by being carried out in a systematic, arbitrary, or unnecessarily restrictive manner. See Case 321/87, *Re. Belgian Passport Controls: Commission v Belgium* [1989] ECR 997, paras. 14 and 15.

¹³ See respectively Case C-265/88, *Messner* [1989] ECR 4209, para. 15 and Case 157/59, *R v Pieck* [1979] ECR 2171, paras. 18-20.

¹⁴ See Art. 39(3) EC regarding freedom of movement for workers.

¹⁵ Council Directive 64/221/EEC of 25 February 1964 on the coordination of the special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ Sp. Ed. 1963-64, 117.

¹⁶ Directive 64/221/EEC, *ibid.*, Arts. 3(1), 3(2) and 2(2) respectively.

¹⁷ Case 30/77, *R v Bouchereau* [1977] ECR 1999, para. 28. Emphasis added.

its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community.¹⁸

Secondly, as this quote clearly implies, the limitations imposed by Member States must conform to a Community notion of public policy, which the Court has defined as follows:

In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.¹⁹

This Community notion of public policy, therefore, is particularly restrictive as it requires that the personal conduct of the individual constitutes a present, 'genuine and sufficiently serious threat' over and above an infringement of the law in the Member State concerned. Moreover, such a threat cannot exist in respect of a EU citizen unless that Member State also takes repressive and effective measures to combat such conduct on the part of its own nationals.²⁰ The emphasis on the personal conduct of the individual also means that the public policy exception cannot be applied on a general basis to restrict freedom of movement, but must be justified in the particular case at issue.²¹

Thirdly, wide-ranging legal remedies are available to EU citizens refused entry to or threatened with expulsion from a Member State.

These remedies are in the form of a double procedural safeguard comprising notification of the reasons for the decision and the availability of the right of appeal.²² The persons affected by a negative decision are entitled to be notified of the reasons upon which the decision is based unless this is contrary to the security interests of the Member State in question.²³ The reasons must be precise and comprehensive so that they can take effective steps to prepare their defence.²⁴ They can also appeal the negative decision to the administrative or judicial authorities on equal terms with Member State nationals. Article 8 of Directive 64/221/EEC obliges Member States to grant EU citizens the same legal remedies in respect of any such negative decision as are available to nationals in respect of acts of the administration. However, this does not mean that Member States are under a duty to permit EU citizens to remain on their territory for the duration of the proceedings, provided they can nonetheless obtain a fair hearing and present their defence in full.²⁵

This substantive Community conception of public policy, which serves as a bulwark against the threat of an arbitrary exercise of discretionary power by Member States' authorities in respect of the entry and expulsion of EU citizens, is very different from the notion applied in the case of the refusal of entry at the external border or the refusal to issue a uniform visa to third-country nationals. As discussed below, not only does a national conception of public policy hold sway, but Member States are also under a strict obligation to apply the public policy conceptions of other Member States. Moreover, the restrictive rules are constructed on the basis of a general profiling of third countries or groups of third-country nationals rather than on the individual and specific circumstances of the person concerned and the legal remedies available in respect of negative decisions are seriously limited.

The narrow Community conception of public policy is, however, applicable to some groups of third-country nationals with the result that they are afforded protection comparable to that available to EU citizens. The third-country nationals concerned are family members of EU nationals, whose free movement and residence rights derive from their relationship with the EU citizen, EEA nationals and Turkish nationals who qualify for the protection of Article 14(1) of Decision 1/80 adopted by the EEC–Turkey

18 Case 36/75, *Rutili v Minister of the Interior* [1975] ECR 1219, para. 22. See also Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337, para. 18.

19 *R v Bouchereau*, above n. 17, para. 35. See also *Rutili*, above n. 18, para. 28.

20 Joined Cases 115/81 and 116/81, *Adoui and Cornuaille* [1982] ECR 1665, para. 8.

21 *Adoui and Cornuaille*, *ibid.*, para. 22: 'Circumstances not related to the specific case may not be relied upon in respect of citizens of the Community, as justification for measures intended to safeguard public policy and public security'.

22 *Rutili*, above n. 18, para. 37.

23 Directive 64/221/EEC, above n. 15, Art. 6.

24 *Rutili*, above n. 18, para. 39.

25 Case 98/79, *Pecastaing v Belgian State* [1980] ECR 691, para. 13. If no right of appeal is available on the merits or where the appeal does not have suspensive effect, Art. 9(1) of Directive 64/221/EEC, above n. 15, introduces a minimal procedural safeguard by delaying the implementation of a negative decision by the administrative authority (save in cases of urgency) until an opinion has been obtained from an independent competent authority. *Pecastaing*, *ibid.*, para. 15.

Association Council under the Community Association Agreement with Turkey.²⁶ Article 14(1) contains identical wording to Article 39(3) EC permitting limitations on the specific rights granted by Decision 1/80 if the limitations are 'justified on grounds of public policy, public security or public health'. The Court of Justice has ruled that these words should be given the same meaning as those in Article 39(3) EC and that consequently the expulsion of a Turkish national solely on the basis of general preventative grounds would not be justified.²⁷ Similarly, a Turkish national to whom Decision 1/80 is applicable and who leaves the Member State for a period of time should have the right to re-enter that Member State on the same basis as EU citizens. Although there is no Court of Justice jurisprudence on this specific question, this position is recognised in the legislation of at least one Member State.²⁸

The position of EU citizens would be assimilated even more to Member State nationals if a recent Commission proposal for a Council Directive on the right of EU citizens and their families to move and reside freely within the territory of Member States finds support in the Council.²⁹ The draft Directive consolidates and strengthens the relevant provisions in secondary legislation as well as codifying the principles established

by the Court of Justice. The Commission provides the following justification for this proposal:

This Directive is being proposed in the context of the new legal and political environment established by citizenship of the Union. The basic concept is as follows: Union citizens should, *mutatis mutandis*, be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country. Any additional administrative or legal obligations should be kept to the bare minimum required by the fact that the person in question is a 'non-national'.³⁰

The principal amendments proposed are the extension of the period of residence, on the basis of a valid identity card or passport, for EU citizens in a Member State without any formalities to six months, the broadening of the definition of 'family member' and the tightening of the definition of the concept of public policy under which free movement and residence rights can be restricted by strengthening the procedural guarantees and providing greater protection against expulsion. In particular, the latter objective is achieved by requiring the host Member State, before taking an expulsion decision on the grounds of public policy or public security, to take account of certain considerations relating to the persons concerned such as length of residence in its territory, age, state of health, family and economic situation, social and cultural integration into the host country and the extent of their link with the country of origin. Moreover, absolute protection against expulsion is foreseen in respect of EU citizens or the members of their families, irrespective of their nationality, who have the right of permanent residence, or against family members who are minors.³¹

In conclusion, although distinctions between EU citizens and the nationals of Member States remain permissible under Community law in respect of their entry to and expulsion from the territory of a Member State, Community secondary legislation and the Court of Justice, in interpreting these rules, have striven to ensure that such differences are kept to a minimum:

The reservations contained in [Articles 39 and 46 EC] permit Member States to adopt, with respect to the nationals of other Member States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto. Although that difference of treatment,

²⁶ Decision 1/80 of the EEC–Turkey Association Council of 19 September 1980 on the development of the Association adopted under EEC–Turkey Association Agreement (1963) and Protocol (1970), OJ 1973 C 113/1. See also N Rogers, *A Practitioners' Guide to the EC–Turkey Association Agreement* (The Hague: Kluwer, 2000) at pp. 12–14 and 57–61 (Annex C).

²⁷ Case C–340/97, *Nazli v Stadt Nürnberg* [2000] ECR I–957, paras. 56–61.

²⁸ Newly adopted Dutch legislation assimilates the position of Turkish nationals to EU citizens in this respect. Art. 2.1 of the Aliens Decree of 23 November 2000 (*Staatsblaad* 2000–497) sets out the general rule that access to the territory is conditional upon non-nationals clarifying the purpose of their stay and demonstrating that they have sufficient means to support themselves during their visit. Art. 2.2 stipulates that the first paragraph does not apply to particular categories of non-nationals possessing residence rights, which include EU citizens (defined broadly to include family members and EEA nationals) and Turkish nationals with residence rights under Decision 1/80, above n. 26. I am grateful to Professor Kees Groenendijk for bringing this measure to my attention.

²⁹ European Commission, *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM (2001) 257 final of 23 May 2001.

³⁰ *Ibid.*, para. 1.3 (Explanatory Memorandum).

³¹ *Ibid.* at p. 42 (draft Art. 26). See also *ibid.* at p. 21 (Explanatory Memorandum).

which bears upon the nature of the measures available, must therefore be allowed, it must nevertheless be stressed that, in a Member State, the authority empowered to adopt such measures must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States.³²

In this context, therefore, it would be difficult to argue that the distinctions adopted between EU citizens and Member State nationals have no objective justification as understood in the context of the non-discrimination principles analysed in the forthcoming two chapters. Given the detailed provisions elaborated above to ensure equal treatment between EU citizens and Member State nationals as regards their entry into Member States and the extent of the safeguards that have been put into place in the event of a refusal of entry to EU citizens exercising their free movement and residence rights, the Community has attained an impressively high threshold in respect of the comparable treatment of non-nationals with nationals.

Distinctions between EU citizens and third-country nationals

With the exception of certain 'privileged' third-country national groups, which have been referred to above, the Community norm of non-discrimination on the grounds of nationality in Article 12 EC (discussed in Chapter 2), is inaccessible to other similarly situated groups. This was plainly demonstrated in the case of

*Ayowemi*³³ where a Nigerian national was stopped by the police while driving in Belgium with a licence issued in the UK and charged for driving a motor vehicle without being in possession of a Belgian driving licence. Mr Ayowemi was convicted and fined BFr2000. In challenging the conviction, he contended that he could rely on his UK driving licence in accordance with Community legislation on driving licences. Although the Court agreed on this point, it stated that the legislation concerned did not make any provision for the imposition of penalties in the event of the breach of the obligation to exchange licences within the requisite one-year period, a question that remained a matter for national law. The pertinent issue in this case, however, was that EU citizens, who find themselves in a similar situation, cannot be subjected to penal sanctions which are disproportionate to the gravity of the offence so as to become an obstacle to the free movement of persons.³⁴ As Elspeth Guild and Steve Peers have observed, this decision exposes the inadequacies of the principle of non-discrimination on the grounds of nationality in Community law:

Because the right to non-discrimination is attached to nationality of a Member State and free movement rights, Mr Ayowemi was not protected. The effect of excluding third country nationals from free movement law is that the Community principle of proportionality applies only weakly, if at all, within the sphere of, for instance, transport law. The end result is that third-country nationals, consisting of substantial numbers of racial, ethnic and religious minorities, might be prosecuted and face severe fines for 'driving without a licence', while Community nationals would be wholly exempt from prosecution in such circumstances. Again the Court's choice not to seek a basis for a Community law right to equal treatment for lawfully resident third country nationals – which should lie in the 'respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States' upon which Article 6 TEU states that the Union is founded – indicates an apparent blindness to third-country nationals.³⁵

The *Ayowemi* decision illustrates the structural and institutional differentiation introduced by the Community legal order between EU citizens and third-country nationals. In the view of the European Court of Human Rights, preferential treatment of EU nationals does not constitute discrimination but has an objective and reasonable justification in that EU Member States 'form a special legal order, which has, in addition, established its own citizenship.'³⁶

³² *Adoui and Cornuaille*, above n. 20, para. 7.

³³ Case C-230/97, *Ayowemi v Belgium* [1998] ECR I-6781.

³⁴ See Case C-193-94, *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paras. 36-37: 'In the absence of Community rules governing the matter, the Member States remain competent to impose penalties for breach of [the] obligation [to exchange driving licences]. However, it follows from settled case-law concerning non-compliance with formalities for establishing the right of residence of an individual enjoying the protection of Community law that Member States may not impose a penalty so disproportionate to the gravity of the infringement that this becomes an obstacle to the free movement of persons... Treating a person who has failed to have a licence exchanged as if he were a person driving without a licence, thereby causing criminal penalties, even if only financial in nature, ... to be applied, would also be disproportionate to the gravity of that infringement in view of the ensuing consequences.'

³⁵ E Guild and S Peers, 'Deference or Defiance? The Court of Justice's Jurisdiction over Immigration and Asylum' in E Guild and C Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001) 267-289, at p. 276.

³⁶ *C v Belgium*, Eur. Ct. HR, judgment of 7 August 1996, Eur. Ct. HR Rep. 1996-III, para. 38.

Consequently, the gulf in treatment between EU citizens and third-country nationals resembles that existing between nationals of a particular country and non-nationals and it is difficult to see how this might be overcome in view of the development of the Community as a distinct integrated entity with state-like features. Although this question is discussed again in Chapter 3 below, it is worth observing at this juncture that the Court of Human Rights has not elaborated its position. A further disturbing feature of the *Ayowemi* decision is the implication that the treatment of the applicant by the Belgian authorities might well have amounted to indirect discrimination on the grounds of race or ethnic origin. Although the Court of Justice's judgment was handed down before the adoption of the Racial Equality Directive, the latter measure would not have assisted the applicant because Criminal Law does not come within the material scope of the Directive.

³⁷ Former Art. 100c EC.

³⁸ Protocol No. 2 integrating the Schengen *acquis* into the framework of the European Union, OJ 1997 C 340/93. The Schengen *acquis* was defined and given a legal base in either the EC Treaty or the Treaty on European Union. See respectively Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis*..., OJ 1999 L 176/1 and Council Decision 1999/436/EC of 20 May 1999 determining...the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, OJ 1999, L 176/17. Most of the measures relating to migration were allocated to Title IV EC, with the exception of the measures on the Schengen Information System (SIS) which were allocated by default to Title VI of the Treaty on European Union on account of a lack of consensus among Member States. The whole Schengen *acquis* was finally published in the *Official Journal of the European Communities* on 22 September 2000 (OJ 2000 L 239/1), with the exception of certain parts that are considered to be confidential (see below).

³⁹ OJ 2001 L 81/1.

⁴⁰ Council Regulation 574/1999/EC (OJ 1999 L 72/2), which itself replaced Council Regulation 2317/95/EC (OJ 1995 L 234/1) after the latter measure was annulled by the Court of Justice in Case C-392/95, *European Parliament v Council* [1997] ECR I-3215.

⁴¹ Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990; (1991) 30 *ILM* 84 (see now OJ 2000 L 239/19); entry into force 1 September 1993. The Agreement first became operational on 26 March 1995 and now operates between 13 Member States, Norway and Iceland. The Schengen *acquis* began to apply in respect of the five Nordic states as of March 2001. See Council Decision 2000/777/EC of 1 December 2000 on the application of the Schengen *acquis* in Denmark, Finland and Sweden, and in Iceland and Norway, OJ 2000 L 309/24.

GROUPS 2, 3 AND 4

Third-country nationals

The framework for EU rule-making on the crossing of the external border by third-country nationals, including the issuing of visas, is now found in Title IV on Visas, asylum, immigration and other policies related to free movement of persons of Part Three of the EC Treaty (Title IV EC), which was inserted by the Treaty of Amsterdam. The relevant provisions are located in Article 62(2) EC:

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

...

- 2 measures on the crossing of the external borders of the Member States which shall establish:
 - a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;
 - b) rules on visas for intended stays of no more than three months, including:
 - i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;
 - ii) the procedures and conditions for issuing visas by Member States;
 - iii) a uniform format for visas;
 - iv) rules on a uniform visa.

This framework builds on earlier rules on visas of a more limited scope, originally transferred to Community competence by the Maastricht Treaty.³⁷ It must also be considered in the context of the rules on borders and visas in the Schengen Implementing Agreement (SIA) and accompanying measures (collectively known as the Schengen *acquis*), which operated outside of the Community and EU legal framework until their incorporation into Community structures by the Amsterdam Treaty.³⁸

Currently, the principal rules on borders and visas are found in the following legal sources: Council Regulation 539/2001/EC of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [the Visa Regulation],³⁹ which specifically implements Article 62(2)(b)(i) EC and replaces the earlier measure adopted in 1999;⁴⁰ the Schengen Implementing Agreement;⁴¹ and the specific

measures adopted to give effect to the relevant provisions on external borders and visas in that agreement, in particular the Common Manual on the Crossing of the External Border and the Common Consular Instructions,⁴² which effectively implement much of the remainder of Article 62(2) EC. The existence of these detailed rules of the Schengen *acquis* does not mean that the competences of the EU institutions and the Member States with regard to Article 62(2) EC are redundant. Further measures building on this *acquis* and providing for revisions to it may of course be adopted and the Council has already adopted a number of measures in relation to this Treaty provision⁴³ as well as other parts of the Schengen *acquis*.⁴⁴ Moreover, the Council also adopted two contentious Regulations enabling it to amend the Common Manual and Consular Instructions.⁴⁵ Each Regulation permits the Council to adopt amendments unanimously on the initiative of a Member State or on the proposal of the Commission, but also enables Member States to amend, on their own initiative, those sections that relate to national law. In the former instance, some amendments

can be considered confidential, and in such cases it will be very difficult to identify the revisions that have been made.⁴⁶ Both measures are currently subject to Commission actions for annulment before the Court of Justice.⁴⁷

The current rules on the entry of third-country nationals into the territories of Member States for short-term visits are potentially discriminatory in a number of ways. In addition to the gulf in treatment that exists between EU citizens and third-country nationals regarding their entry into EU territory, referred to above, justified in the judgments of the European Court of Human Rights on the basis of the identification of the EU regime as 'a special legal order', the rules also enable third-country nationals to be treated very differently from EU citizens when crossing the EU external border. Furthermore, significant differential treatment has been put into place between various groups of third-country nationals. Consequently, the obstacles facing American, Colombian or Sri Lankan nationals in respect of their entry into the EU are hardly the same. This is largely because Americans do not need a visa to enter the EU for visits of up to

42 Schengen Executive Committee Decision SCH/Com-ex (99) 13 of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions, OJ 2000 L 239/317. The former document and some sections of the latter are confidential. See Executive Committee Decision SCH/Com-ex (1998)17 of 23 June 1998 concerning the confidential nature of certain documents, OJ 2000 L 239/137. Most of the Common Manual has now been forwarded to EU candidate countries with the requirement that the State receiving the Manual is to continue to treat it as confidential. See Executive Committee Decision SCH/Com-ex (98) 35, rev. 2 of 16 September 1998 on forwarding the Common Manual to EU applicant States, OJ 2000 L 239/202, point 3. Certain parts of the Common Manual, which correspond to some of the provisions of the Common Consular Instructions, have recently been declassified and are supposed to be published in the *Official Journal* in due course, although they have not appeared at the time of writing. See Council Decision 2000/751/EC of 30 November 2000 on declassifying certain parts of the Common Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985, OJ 2000 L 303/29. However, a recent version of the Common Manual (Council Doc. 8248/01 of 22 June 2001), without the confidential sections, can be downloaded from the Council's website at <http://register.consilium.eu.int/utfregister/frames/introfsEN.htm> I am grateful to Steve Peers for bringing this document to my attention.

43 See Council Regulation 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa, OJ 2001 L 150/4, which amends Art. 18 of the Schengen Implementing Agreement (SIA) by stipulating that visas valid for a period longer than six months, which are national visas under Schengen rules, are to be valid concurrently as uniform short-stay visas for the first three months of their validity

(Art. 1). See also Council Decision of 28 May 2001 on the adaptation of Parts V and VI and Annex 13 of the Common Consular Instructions on Visas and Annex 6a to the Common Manual with regard to long-stay visas valid concurrently as short-stay visas, OJ 2001 L 150/47.

44 See e.g. Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ 2001 L 187/45, which builds on the provisions of Art. 26 SIA concerning the obligations of carriers transporting third-country nationals into the territories of Member States and who are subsequently refused entry, in particular by setting a threshold for the minimum financial penalties that must be applied to carriers (Art. 4).

45 See respectively Council Regulation 789/2001/EC of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications, OJ 2001 L 116/2 and Council Regulation 790/2001/EC of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance, OJ 2001 L 116/5.

46 E.g. see Regulation 789/2001/EC, *ibid.*, Art. 1(3): 'To the extent that such amendments concern confidential provisions and procedures, the information contained therein shall be made available only to authorities designated by the Member States and to persons duly authorised by each Member State or by the institutions of the European Communities, or otherwise entitled to obtain access to such information'. See also Regulation 790/2001/EC, above n. 45, Art. 1(2).

47 Case C-257/01, *Commission v Council*, OJ 2001 C 245/12.

three months, while Colombians and Sri Lankans are required to apply for a visa at the consulates of EU Member States abroad. Moreover, Sri Lankans are also subject to an additional airport transit visa requirement if they wish to travel through the international airport of one of the Schengen states.⁴⁸ In addition to the rules themselves, their application also risks leading to discriminatory treatment. Indeed, the Commission has effectively recognised this particular concern by proposing a Council Decision for the adoption of an action programme for cooperation between national administrations in the fields of external borders, visas, asylum and immigration.⁴⁹ In the Explanatory Memorandum to this proposal, the Commission identifies the following objective:

The objective of the action programme is to reinforce the effectiveness of the relevant procedures in the fields of asylum, visas, immigration and the control of external borders and assist the national administrations in the implementation of the Community legislation founded on Articles 62 and 63 [relating to asylum] of the TEC, *as well as, to ensure openness in the application of this legislation.*

The actions covered under this programme must aim at the implementation of the relevant Community rules independently of who are the national administrations responsible for undertaking those actions....*The ultimate target is that third country nationals receive equivalent treatment* when dealing with the national administrations responsible for applying Community legislation founded on Articles 62 and 63 TEC, and therefore avoid those differences in the national practice likely to prejudice the establishment of an area of freedom, security and justice.⁵⁰

⁴⁸ The term 'Schengen state' connotes one of the 13 EU Member States and two associated states (Iceland and Norway) participating in the borders and visa regime, which is now being developed under EU auspices.

⁴⁹ European Commission, *Proposal for a Council Decision adopting an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration (ARGO)*, COM (2001) 567 final of 16 October 2001. The funding of actions under this proposed programme may also extend to a Member State's cooperation with candidate countries. *Ibid.* at pp. 6, 13–14 (draft Art. 10).

⁵⁰ *Ibid.* at pp. 2–3. Emphasis added.

⁵¹ This section of the study develops arguments advanced in R Cholewinski, 'No Right of Entry: The Legal Regime on Crossing the EU External Border' in K Groenendijk and E Guild (eds), *In Search of Europe's Borders: Article 62 EC, Visas and European Community Law* (Kluwer forthcoming).

⁵² External borders are defined in Article 1 SIA as the 'Contracting Parties' land and sea borders and their airports and sea ports, provided that they are not internal borders'. In accordance with Article 3(1) SIA, external borders 'may in principle only be crossed at border crossing points and during the fixed opening hours'.

While this proposed action programme aspires to a form of equal treatment for third-country nationals by aiming at their 'equivalent treatment' in the application of rules based on *inter alia* Article 62 EC, a development that is to be welcomed, the discussion in the subsequent sections of this study demonstrates that the risk of discrimination is inherent in the construction of the rules themselves and is not merely confined to their inconsistent application. Moreover, the move to 'harmonise' the work of Member States' national administrations overlooks the fact that the EU rules on borders and visas, particularly in relation to the refusal of entry, are largely concerned with the cross-recognition of national decisions and not with their substantive harmonisation. Finally, the aim 'to ensure openness in the application of [the] legislation' can only be regarded as wishful thinking at this point in time given that some of the applicable rules, particularly those concerned with the crossing of the external border (but also some of the rules relating to the issue of visas), remain confidential.

EU external border checks: EU citizens and third-country nationals⁵¹

No persons are immune from checks at the EU external border,⁵² irrespective of their nationality. However, as discussed above, EU citizens have a right to enter EU territory, whereas no such right generally exists for third-country nationals, unless they are already lawfully resident in a Member State or come within the scope of a Community agreement which their country has entered into and they are re-entering EU territory. Moreover, the extent to which the regime for crossing the EU external border impacts on third-country nationals in practice depends on whether they are already resident in the EU territory, visa or non-visa nationals as well as on a number of other factors, which may impinge on them obtaining permission to cross the external border.

The two most important Schengen provisions concerned with the crossing of the external border by third-country nationals are Articles 5 and 6 SIA. Article 5 SIA lays down the conditions of entry while Article 6 SIA relates to the uniform principles to be applied in carrying out checks on movements across the external border.

Article 6(1) SIA obliges the authorities at the EU external border to carry out checks on cross-border movements 'for the Contracting Parties' territories, in accordance with uniform principles, within the scope of national powers and national law and taking account of the interests of all Contracting Parties'. The reference to the need to take account of the interests of other Schengen States has been justified as follows

[T]he requirement that competent national border authorities must consider the interests of other Schengen States must be viewed in the light of the fact that Schengen States have in effect delegated the competence to control entry into their territory to those Schengen States situated on borders to third states. The Schengen States thus situated have, therefore, been called 'trustees' or 'guarantors' in relation to the other Schengen States. Accordingly, the introduction of uniform principles functions as a compensation for the renunciation of sovereignty inherent in the delegation of border control powers.⁵³

This is an example of the criticisms often directed at the Schengen arrangements that they require a 'pooling' of the interests of individual States with the result that the overall conditions imposed on crossing external borders can only be more restrictive. This approach is very different from the one relating to restrictions on the free movement of EU citizens described earlier where a Community notion of public policy has developed as a result of secondary legislation implementing EC Treaty principles and Court of Justice jurisprudence. Although Schengen States certainly share many interests, it cannot be automatically assumed that these interests essentially coincide, particularly in nationally sensitive areas relating to public security, public policy and international relations with third countries. Different conceptions of these areas may well be applied in respect of the entry of certain third-country nationals. A notable example of such differences concerns the identification by the French authorities of a New Zealand national as a security threat

⁵³ K Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (The Hague: Kluwer, 2000) at p. 130 (footnotes omitted).

⁵⁴ For a critical examination of the SIS from the perspective of its compliance with human rights standards, see the excellent report by JUSTICE, *The Schengen Information System: A human rights audit* (London: JUSTICE, 2000).

⁵⁵ Referred to by Dr Helen Staples in discussions at the Conference on the Development of the EU's Borders: Schengen and Beyond, organised by ILPA and the Meijers Committee and held at the British Institute of International and Comparative Law in London on 11–12 May 2001.

and the entry of her details into the Schengen Information System (SIS)⁵⁴ because she was a Greenpeace activist opposing French nuclear testing. When she attempted to enter the Schengen territory at Schiphol International Airport in the Netherlands, the Dutch authorities were obliged to refuse her entry even though there was little support for the decision of the French authorities.⁵⁵

The uniform principles on external border checks are found in Article 6(2) SIA, which is set out in full below:

- 2 The uniform principles referred to in paragraph 1 shall be as follows:
 - a) Checks on persons shall include not only the verification of travel documents and the other conditions governing entry, residence, work and exit but also checks to detect and prevent threats to the national security and public policy of the Contracting Parties. Such checks shall also be carried out on vehicles and objects in the possession of persons crossing the border. They shall be carried out by each Contracting Party in accordance with its national law, in particular where searches are involved.
 - b) All persons shall undergo at least one such check in order to establish their identities on the basis of the production or presentation of their travel documents.
 - c) On entry, aliens shall be subject to a thorough check, as defined in (a).
 - d) On exit, the checks shall be carried out as required in the interest of all Contracting Parties under the law on aliens in order to detect and prevent threats to the national security and public policy of the Contracting Parties. Such checks shall always be carried out on aliens.
 - e) If in certain circumstances such checks cannot be carried out, priorities must be set. In that case, entry checks shall as a rule take priority over exit checks.

What is immediately apparent from this provision is that while checks at the external border are to be applied to all persons irrespective of nationality, checks on third-country nationals are required to be more stringent. Controls on EU citizens are essentially limited to the verification of their identity unless there are grounds for believing that the person concerned may constitute a threat to national security and public policy. In accordance with Article 6(2)(c) SIA, however, only third-country nationals are to be 'subject to a thorough check' on entry. Moreover, an obligation is also imposed on border authorities to *always* carry out exit checks on third-country nationals,

unless these cannot take place in accordance with Article 6(2)(e) SIA. More detailed measures are found in the Common Manual on the Crossing of the External Border.⁵⁶ The detailed rules in the Common Manual effectively increase the impact of this difference in treatment between EU citizens and third-country nationals at the external border. The Common Manual distinguishes between minimal and thorough checks.⁵⁷ A minimal check, in the sense of Article 6(2)(b) SIA, is basically a control of identity based on the travel documents. This control is supposed to be straightforward and speedy and everyone is subject to a minimal check at the external border on both entry and exit. A thorough check, in the sense of Article 6(2)(c) SIA, can be assimilated to the following questions, which essentially replicate the conditions of entry found in Article 5 SIA discussed below: is the travel document valid for crossing the border and, if required, is it accompanied by a visa, and does it show evidence of falsification or forgery?; what is the traveller's country of origin and country of destination, the purpose of the journey and, if necessary, can supporting documents be produced substantiating this purpose?; does the traveller possess adequate means of subsistence for the duration of the stay, for return or for transit to a third country, or can he or she acquire such means lawfully (which will normally be the case if the person concerned has a work permit for the country of destination)?; is there an entry relating to the traveller in the SIS or the national SIS?; is the traveller, his or her vehicle or the objects he or she is carrying of such a nature as to be contrary to public order, national security or the international relations of one of the Contracting Parties? The Common Manual stipulates that as a general rule, third-country nationals are to be subject to a thorough check, both on entry *and on exit*. This goes further than Article 6(2)(c) SIA, which provides for such a check on entry only.

⁵⁶ As noted above n. 42, certain parts of this document are confidential and the provisions referred to below are taken from Part II of the Common Manual in its French version, dated 27 October 1992. It is believed that this section of the Common Manual is largely unaltered, although of course it is impossible to verify this without seeing the most updated version. Unfortunately, this part is deemed confidential in the version of the Manual that can be downloaded from the Council's website.

⁵⁷ Common Manual, *ibid.*, Part II, points 1.3.1, 1.3.2 and 1.3.3.

⁵⁸ *Ibid.*, Part II, points 1.3.4 and 1.3.5.

⁵⁹ Peers (2000), above, Introduction n. 8, at p. 166.

The Common Manual also provides for three exceptions to this framework of external border controls laid down in Article 6(2) SIA.⁵⁸ First, EU citizens may also be subject to a thorough check, both on entry and on exit. Such checks have to be undertaken where specific evidence warrants this action. Second, controls at land borders can be relaxed in particular circumstances, such as when the intensity of traffic at the border would result in excessive waiting times (and where all resources in terms of personnel, means and organisation are used up). In such cases, the local official responsible for border controls can define a strategy to modify these controls sufficiently with a view to guaranteeing their effectiveness. In this regard, entry controls are in principle to take priority over exit controls. The relaxation of controls, however, can only be temporary, must be adapted to the circumstances and implemented gradually. Third, persons who are known personally to officials at the border and in respect of whom it has been established, on the basis of an initial check, that there has been no entry in the SIS or the national list of alerts, and who possess a valid document for crossing the border, should only be subject to a random check. In particular, this exception is to apply to those persons who cross the border frequently at the same crossing-point. However, the Common Manual stipulates that this group of persons should nonetheless be subject to a thorough check from time to time, without warning and at irregular intervals.

It has been argued that the reference to a 'thorough check' in respect of third-country nationals should be removed as it 'encourages overzealous application of the requirement to check at the border'.⁵⁹ Such a 'permissive' provision enables border officials to make questionable distinctions, purportedly on grounds of nationality, which run the risk of constituting direct discrimination on the grounds of racial or ethnic origin. Moreover, it is arguable that the instructions in the Common Manual, particularly the third exception identified above, invite arbitrary treatment. Indeed, the more ambiguous the instructions and the greater the discretion that is granted in carrying out such checks, the more likelihood there will be of discrimination in practice. Although there are not many empirical studies available assessing the operation of border controls in practice, research carried out on trains crossing the

Dutch–German border in 1989 (and therefore before the border-free Schengen area came into being) confirms this suspicion. At this time, Dutch border guards were under the clear instruction to control everyone. The research revealed that in those cases where comparisons could be made (i.e. where there were white and black or ‘foreign-looking’ persons in a carriage and where these checks were actually carried out) a black or ‘foreign-looking’ person was twice more likely to be checked than a white person (i.e. 68% in comparison to 32%).⁶⁰

The conditions of entry for third-country nationals across the external border are found in Article 5 SIA:

- 1 For stays not exceeding three months, aliens fulfilling the following conditions may be granted entry into the territories of the Contracting Parties:
 - a) that the aliens possess a valid document or documents, as defined by the Executive Committee, authorising them to cross the border;
 - b) that the aliens are in possession of a valid visa if required;
 - c) that the aliens produce, if necessary, documents justifying the purpose and conditions of the intended stay and that they have sufficient means of subsistence, both for the period of the intended stay and for the return to their country of origin or transit to a third State into which they are certain to be admitted, or are in a position to acquire such means lawfully;
 - d) that the aliens shall not be persons for whom an alert has been issued for the purposes of refusing entry;
 - e) that the aliens shall not be considered to be a threat to public policy, national security or the international relations of any of the Contracting Parties.
- 2 An alien who does not fulfil all the above conditions must be refused entry into the territories of the Contracting Parties unless a Contracting Party considers it necessary to derogate from that principle on humanitarian grounds, on grounds of national interest or because of international obligations.

⁶⁰ These figures take into account a 1% margin of error. See F Bovenkerk, *Er zijn grenzen* (Arnhem: Gouda Quint, 1989) at pp. 13–14. Indeed, there was only one instance where no checks were carried out in a carriage even though it was full of ‘foreign-looking’ people (i.e. a group of Italian youth). *Ibid.* at p. 14. I am grateful to Professor Kees Groenendijk for bringing this study to my attention.

⁶¹ See JDM Steenbergen, ‘Schengen and the Movement of Persons’ in H Meijers, et al., (eds), *Schengen: Internationalization of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police*, 2nd rev. ed. (Stichling NCJM: Boekerij, 1992) 57–73, at p. 64.

⁶² Common Consular Instructions, above n. 42, Ch. I, para. 2.1.

In such cases authorisation to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly. These rules shall not preclude the application of special provisions concerning the right of asylum or of the provisions laid down in Article 18 [concerning the issue of national visas for stays over a period of three months].

- 3 Aliens who hold residence permits or re-entry visas issued by one of the Contracting Parties or, where required, both documents, shall be authorised entry for transit purposes, unless their names are on the national list of alerts of the Contracting Party whose external borders they are seeking to cross.

These entry conditions are also applicable at the visa-issuing stage. By virtue of Article 15 SIA, a uniform visa valid for all the Schengen States is in principle to be issued if the third-country national fulfils the entry conditions in Article 5(1)(a) and (c)–(e) SIA. The content of these conditions, their application in practice and their potential discriminatory impact are discussed below in the context of the distinctions made by the EU rules between different groups of third-country nationals. With regard to differences in treatment between EU citizens and third-country nationals, however, the most significant feature of this provision is that it does not grant a *right* of entry to third-country nationals. Article 5(1) SIA only stipulates that entry ‘*may* be granted’ if the third-country nationals fulfil the conditions specified. This discretion also encompasses those third-country nationals whose countries are on the negative visa list and have already succeeded in obtaining a visa. As one commentator observes therefore, the absence of a right of entry in this context ‘implies that persons obliged to acquire a visa are twice resigned to discretionary decisions; the first time following the visa request and secondly at the border.’⁶¹ This position is confirmed by the Common Consular Instructions, which stipulate that ‘mere possession of a uniform visa does not entitle automatic right of entry.’⁶² Article 5(3) SIA constitutes the only exception to this overall discretionary framework by stipulating that third-country nationals holding residence permits or re-entry visas have to be allowed to enter for transit purposes unless the country whose external border they are seeking to cross has previously reported them on its national list of alerts. With reference to Articles 5(1) and 15 SIA, it has been contended that this broad discretionary approach is in accordance with general principles of international law,

which provide States with the sovereign right to determine who should be permitted to enter their territories:

Schengen States are not under an obligation to issue a visa for or admit to their territories third-country nationals who meet the conditions of entry contained in Article 5(1) SIA read together with Article 15 SIA. In providing that ‘visas may be issued’ if the relevant conditions are met, Article 15 SIA merely serves the purpose of the Schengen visa regime which is to apply uniform minimum standards for admission of third-country nationals. Nothing indicates that Member States wanted to compromise their position under international law to determine the entry of third-country nationals at their own sovereign will. Communitarization of this part of the Schengen *acquis* has not resulted in any alterations because Title IV [EC] is equally based on the idea that third-country nationals cannot claim a right of entry into the territories of Member States regardless of whether relevant entry regimes flow from a supranational or national source.⁶³

On the basis of this argument, therefore, Member States would appear to retain a broad ‘reserve discretion’ to refuse entry to third-country nationals irrespective of whether the entry conditions are satisfied. However, it would be highly unsatisfactory to accept this position, which can only lead to arbitrary and unjustified treatment, for a number of reasons. First, Member States cannot claim to retain their sovereignty with regard to the entry of third-country nationals, seeking to justify such refusal on the basis of traditional international law arguments, when they have already ceded this sovereignty in another sense. Article 5(2) SIA imposes an *obligation* on Schengen States to refuse entry into the Schengen territory if the conditions in Article 5(1)(a)–(e) are *not* satisfied. In such cases, Member States can only derogate from the criteria for humanitarian reasons on the grounds of national interest or international obligations and the authorisation to enter is restricted to the territory of the state concerned and the other Schengen States have to be

⁶³ Hailbronner, above n. 53, at p. 145.

⁶⁴ See Steenbergen, above n. 61, at p. 65: ‘While the Schengen States have created for themselves a certain discretion to refuse entry to the alien who fulfils all the conditions, they have deprived themselves of the competence to develop a common policy with regard to admission of aliens who fail to meet the requirements. The Convention compels the States to refuse the entry to these persons: quite a new phenomenon in aliens law.’

⁶⁵ Common Consular Instructions, above n. 42, Ch. 2, para. 2.4. Emphasis added.

⁶⁶ See also Hailbronner, above n. 53, at p. 159.

informed accordingly. Clearly, this amounts to a ceding of sovereignty in respect of the discretion to admit third-country nationals, which has been recognized as a novel development.⁶⁴ A further limitation of sovereignty concerns the requirement to apply the interests of other Schengen States in applying the entry condition in Article 5(1)(e) SIA, which was discussed earlier in the context of Article 6(2) SIA. Second, the detailed rules in the Common Consular Instructions, which elaborate on the provisions in Article 5 SIA, effectively grant third-country nationals what is tantamount to a right of entry once the conditions have been satisfied. For example, in the section on the refusal to issue a uniform visa, the Consular Instructions provide:

If a visa is refused and national law provides for the grounds for such a refusal to be given, *this must be done* on the basis of the following text: ‘Your request for a visa has been refused pursuant to Article 15 in conjunction with Article 5 of the Convention implementing the Schengen Agreement of 19 June 1990 because you do not satisfy the conditions under (a), (c), (d), (e), (indicate relevant condition(s)) of Article 5(1) of the said Convention, which stipulates... (quote relevant condition(s)).’ If necessary, the above grounds may be supplemented with more detailed information or contain other information in accordance with the requirements in this area laid down in the national law of the Schengen States.⁶⁵

Although this instruction only encompasses those situations where reasons for a refusal must be provided in the national law of the Schengen State concerned, there appears to be little scope for refusing a visa on grounds other than those specified in Article 5(1) SIA. Third, if any such state ‘reserve discretion’ to refuse entry exists, it is qualified by international human rights law, particularly in those cases where state authorities are under an obligation to respect the principle of non-*refoulement* or the right to family life in the context of family reunion.⁶⁶

That third-country nationals who satisfy all the conditions of entry can still be denied entry into EU territory on the basis of a questionable reserve discretion on the part of the authorities of one particular Member State disadvantages such persons as compared with EU citizens, who can only be refused entry on the basis of strictly applied public policy grounds, and those other third-country nationals permitted entry. It is arguable that such a difference in treatment can only be reasonably and objectively justified in the context of a ‘rights-based’ approach:

An alternative 'rights-based' approach would not mean asserting that there is a human right to entry into the Community, except for refugees, family members of residents, and citizens of the EU and certain countries which the Community has agreed treaties with. *Rather a rights-based approach is appropriate because it ensures legal certainty and the application of the rule of law to migration.*⁶⁷

The application of the rule of law in this context would mean that third-country nationals would have a *right* to enter EU territory once they satisfied the conditions of entry in Article 5(1) SIA. However, given the current wording of Article 5(1), it is difficult at the present time to speak of a right of entry for third-country nationals into the EU, even though the logic of ceding sovereignty by Member States in respect of their discretion to admit third-country nationals requires complementary common action to guarantee their entry once the latter have satisfied the applicable criteria.

⁶⁷ See Peers (2000), above, Introduction n. 8, at p. 163 (footnotes omitted). Emphasis added. Peers, *ibid.*, observes that this is also the logical consequence of the adoption of binding EC rules in other areas concerning entry into the Community, such as the admission of capital and payments from third countries, the entry of goods as well as the provision of services, including establishment.

⁶⁸ The issuing of visas at the border is possible by virtue of Article 17(3) SIA, which stipulates however that further measures on this question are to be elaborated by the Schengen Executive Committee. These measures have been elaborated in the Common Manual, above n. 56, which provides in Part II, point 5 that if 'due to lack of time and for pressing reasons an alien has been unable to apply for a visa, in exceptional circumstances the authorities responsible may issue him [or her] with a short-stay visa at the border'. Third-country nationals must meet a number of conditions for the issue of visas in such circumstances, which are also specified in the Common Manual, *ibid.*: they must hold a valid document authorizing them to cross the border; they must fulfill the conditions laid down in Article 5(1)(a), (c), (d) and (e) SIA; they must submit supporting documents substantiating 'unforeseeable and imperative' reasons for entry; and return to their country of origin or transit to a third State has to be assured. See also Executive Committee Decision Sch/Com-ex (94)2 of 26 April 1994 on the issue of uniform visas at borders, OJ 2000 L 239/163. The Common Manual, *ibid.*, Part II, point 5, provides some examples as to what might constitute 'unforeseeable and imperative' reasons for entry. These relate to serious and unexpected events affecting family members, medical treatment, a change of plane routes for technical or meteorological reasons, and urgent professional reasons. The Executive Committee Decision emphasises, however, that the issue of visas at external borders must remain an exception and that, as a general rule, visas are to be issued by the diplomatic posts and consular missions. Although the visa issued at the border can be a uniform visa without restrictions on territorial validity or a visa with limited territorial validity, in both cases it is only valid for one entry and its validity must not exceed 15 days. Decision Sch/Com-ex (94)2, *ibid.*, Annex, paras. 2 and 3.

GROUPS 2 AND 3

Non-visa and visa nationals

Although everyone is subject to checks at the external border, Article 5(1)(b) SIA identifies 'possession of a valid visa if required' as one of the conditions of entry for third-country nationals into EU territory. The requirement of a visa, therefore, introduces a further differentiation between third-country nationals in respect of entry. Although the possession of such a visa, as discussed above, is not necessarily a guarantee of entry, the fact that a third-country national requiring a visa does not possess one will preclude entry into EU territory unless he or she meets the narrow eligibility criteria for obtaining a visa at the external border.⁶⁸ This section considers whether the explicit distinctions EU visa rules make between nationalities can be objectively justified and also whether they might amount to indirect discrimination on the grounds of racial or ethnic origin or religion. There are two important issues of relevance to this investigation: the criteria determining on what basis a country is placed on the negative or positive visa list; and the conditions nationals of countries placed on the negative list must meet in order to obtain a visa. As noted in the Introduction and the section discussing the non-discrimination principle in the ECHR in Chapter 3, the concept of proportionality plays an important role in establishing whether distinctions treating persons less favourably than others in an analogous situation can be objectively justified. The disadvantages suffered by a person in a situation of differential treatment are not considered excessive *inter alia* if relevant and sufficient reasons are presented for the difference in treatment, if there is a measure of procedural fairness in the decision-making process and if adequate safeguards against abuse are in place. It is submitted that the EU visa rules do not satisfy any of these important criteria and therefore are disproportionate to any 'legitimate' aim that is being pursued. The reasons for determining whether a country should be placed on the 'negative' or 'black' visa list are insufficiently grounded and the conditions persons from such countries must meet in order to obtain a visa and the way these conditions are applied invite arbitrary treatment. The disadvantageous position of those third-country nationals who are visa applicants is also exacerbated by the limited remedies they have at their disposal to challenge refusal decisions.

The visa lists

The Visa Regulation divides the world into two distinct categories: countries whose nationals' entry into the EU territory is considered legitimate and desirable ('positive' or 'white' list – Annex II) and those countries whose nationals are presumed undesirable unless they can demonstrate to the EU visa-issuing authorities that they are really not such a threat after all and should therefore be permitted to enter ('negative' or 'black' list – Annex I). It is instructive to consider which countries appear on which list. The positive list contains 43 countries and two territories. It includes all the EU candidate countries, with the exception of Turkey. Before the adoption of the Visa Regulation, the Council requested the Commission to prepare reports on the measures taken by Bulgaria and Romania in combating illegal immigration and illegal residence and the further commitments they were prepared to make with a view to removing the visa requirement in respect of these two countries.⁶⁹ As a result of the Commission's report on Bulgaria, that country was removed from the list. The confirmation of Romania's place on the positive list was subject to a further report from the Commission, which recommended to the Council at the end of June 2001 that the visa requirement should be removed as from 1 January 2002.⁷⁰ These reports are referred to again below since they constitute an interesting insight, albeit rather an exceptional one given the special relationship between the EU and these two candidate countries, into understanding how illegal immigration is constructed as one of the reasons for imposing the visa requirement.

⁶⁹ See respectively European Commission, *Report from the Commission to the Council regarding Bulgaria in the perspective of the adoption of the Regulation determining the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, COM (2001) 61 final of 2 February 2001, Vol. 1 [hereinafter *Commission Visa Report on Bulgaria*] and European Commission, *Intermediate Report on Visa Issues (Romania)*, COM (2001) 61 final of 2 February 2001, Vol. II [hereinafter *Commission Intermediate Visa Report on Romania*].

⁷⁰ European Commission, *Report from the Commission to the Council – Exemption of Romanian Citizens from Visa Requirement*, COM (2001) 361 final of 29 June 2001 at p. 19 [hereinafter *Commission Final Visa Report on Romania*]. Romania has now been removed from the negative visa list. See Council Regulation 24/14/2001/EC of 7 December 2001 amending Regulation 539/2001/EC listing the third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement, OJ 2001 L 327/1.

The positive list also contains all the South American states with the exception of Colombia and Peru and some Central American countries (Costa Rica, Guatemala, Honduras, Nicaragua, Panama, Salvador). The negative list contains 131 countries. All of Africa is on the negative list and most of the Middle East and Asia, with the exception of Israel, Brunei, Japan, Malaysia, Singapore, South Korea and two special administrative regions of China, Hong Kong and Macao. The Visa Regulation essentially incorporates the former Schengen list with some exceptions. The non-participation of the United Kingdom in the new Regulation, the legal base for which is Article 62(2)(b)(i) in Title IV EC, resulted in the inclusion of all the English-speaking Caribbean countries on the negative list.

At first glance, therefore, the overt distinctions made by the EU on the basis of nationality would appear to have an indirect adverse impact on large groups of persons distinguished by reference to their race or colour since the majority of non-white people living in the world would need to obtain a visa in order to enter EU territory. People of Islamic faith are also in a similar position. There are only three countries on the positive list with large Muslim populations, namely Brunei, Malaysia and Singapore. Can such distinctions, therefore, which impact on third-country nationals in this way, be justified on the basis of reasonable and objective criteria?

The fifth Recital to the Preamble of the Visa Regulation identifies three criteria (*italics*) for determining whether a visa requirement should be imposed upon a country:

The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating *inter alia* to *illegal immigration, public policy and security, and to the European Union's external relations with third countries*, consideration also being given to the implications of regional coherence and reciprocity.

The Commission elaborated on these criteria in its Explanatory Memorandum to its proposal for the Visa Regulation:

- illegal immigration: the visa rules constitute an essential instrument for controlling migratory flows. Here, reference can be made to a number of relevant sources of statistical information and indicators to assess the risk of illegal migratory flows (such as information and/or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures, and clandestine immigration

and labour networks), to assess the reliability of travel documents issued by the relevant third country and to consider the impact of readmission agreements with those countries;

- public policy: conclusions reached in the police cooperation context among others may highlight specific salient features of certain types of crime. Depending on the seriousness, regularity and territorial extent of the relevant forms of crime, imposing the visa requirement could be a possible response worth considering. Threats to public order may in some cases be so serious as even to jeopardise domestic security in one or more Member States. If the visa requirement was imposed in a show of solidarity by the other Member States, this could again be an appropriate response;
- international relations: the option for or against imposing the visa requirement in respect of a given third country can be a means of underlining the type of relations which the Union is intending to establish or maintain with it. But the Union's relations with a single country in isolation are rarely at stake here. Most commonly it is the relationship with a group of countries, and the option in favour of a given visa regime also has implications in terms of *regional coherence*. The choice of visa regime can also reflect the specific position of a Member State in relation to a third country, to which the other Member States adhere in a spirit of solidarity. The *reciprocity criterion*, applied by States individually and separately in the traditional form of relations under public international law, now has to be used by reason of the constraints of the Union's external relations with third countries.⁷¹

These reasons invert the approach states have traditionally adopted in deciding which countries should be subject to visa requirements. While the principal reason for policy-making in this area once focused on inter-state relations, the above criteria emphasise illegal immigration and public policy considerations as they relate to crime. The latter two reasons, therefore, centre on assessing countries on the basis of whether their nationals are likely to enter illegally or commit crimes and thus purport to focus on the activities of individuals rather than on relations between states.

⁷¹ European Commission, *Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, COM (2000) 27 final of 26 January 2000 [hereinafter *Commission Visa Regulation Proposal*] at p. 9.

⁷² Guild (2001:1), above, Introduction n. 1, at pp. 34–35. Emphasis added.

⁷³ J Salt, 'European International Migration: Evaluation of the Current Situation', paper presented at the Council of Europe Conference on Irregular Migration and Dignity of Migrants: Co-operation in the Mediterranean Region, Athens, 3–4 October 2001, at p. 4.

However, this assessment of risk is not undertaken in respect of the activities of a particular individual but on the basis of the broad criterion of nationality:

[R]isk of illegal immigration and crime... are grounds which relate to the behaviour of individuals. When used as reasons for placing visa requirements on all nationals of a country, the Union is in effect stating that nationals of some countries are by definition more likely to be illegal immigrants or criminals than nationals of other countries. This assessment of risk is not connected to the individual behaviour of the person who seeks to travel. The individual's behaviour vis-à-vis the Member States is the subject of the SIS. Here the approach is one of *profiling*: who is likely to be a risk. This profile is not based on individual characteristics, such as statements of intention or activities, but on nationality, to what state does the individual belong?⁷²

This approach is suspect in the context of justifying discrimination. While it is accepted that the presence of a country on the negative or black visa list does not automatically exclude the individual from entry into the EU, profiling categories of individuals as risks in terms of illegal immigration and crime and thus placing them in the position of having to meet the visa conditions analysed below increases the *risk of discrimination*. To be at all acceptable, such profiling must be based on relevant and sufficient reasons, which are lacking particularly with respect to the criterion of illegal immigration, and to a lesser extent, with respect to the criteria of crime and international relations. The importance of illegal immigration to the imposition of visa requirements is recognised by the Commission in the observation that 'visa rules constitute an essential instrument for controlling migratory flows'. In order to establish the extent of the risk of illegal immigration, the Commission refers to 'information and/or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures, and clandestine immigration and labour networks'. This can hardly be considered as a sound empirical approach. For example, statistics cannot be equated to information about illegal immigration in the newspapers. Moreover, reliable statistics on illegal immigration, by their very nature, are notoriously difficult to arrive at. Indeed, one prominent expert has made the observation in respect of smuggled and trafficked migrants that estimates of their numbers reveal two main features: 'First, there is a preference for nice round numbers. Second, estimates are frequently rehearsed and recycled and take on a momentum of their own.'⁷³

While the EU's professional statistical body, EUROSTAT, is concerned with collecting statistics on legal migration, there is no harmonisation of practices in Member States on the gathering of statistics on illegal immigration let alone a harmonised definition of who is an illegal migrant. Some Member States, such as the United Kingdom, publish bi-annual statistics on the number of persons apprehended as irregular migrants, although these also include persons who subsequently claim asylum.⁷⁴ In 1992, European Immigration Ministers set up the Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration (CIREFI), the function of which has since been amended to focus on the exchange of information on irregular migration.⁷⁵ CIREFI is now specifically required to collate, using standard forms, statistical information concerning the following: legal immigration; illegal immigration and unlawful residence; facilitating of illegal immigration; use of false or falsified documents; and measures taken by competent authorities on the basis of which regular and occasional reports are to be drawn up. CIREFI is also mandated to analyse the information compiled, draw conclusions and, when appropriate,

give advice, and conduct exchanges of information on expulsion matters.⁷⁶ The establishment of CIREFI has been criticized for failing to adopt a common understanding of who is a lawful or illegal migrant in individual Member States, without which it is difficult to arrive at accurate statistics relating to irregular migration, and for the limited access to its pool of information, which is restricted to officials.⁷⁷ Without the existence of hard, reliable and publicly available statistics, which are collected on the basis of uniform criteria, profiling a country as a serious illegal immigration risk must be treated with scepticism.⁷⁸

The Commission also considers assessment of the reliability of travel documents issued by the relevant third country and the impact of readmission agreements as further indicators of the risk of illegal immigration. The emphasis on readmission agreements is somewhat ironic, given that the one major agreement currently operating between Member States, the Dublin Convention determining state responsibility for examining asylum applications,⁷⁹ is, as one commentator observes, 'an example of a system in substantial disarray'.⁸⁰

⁷⁴ See Guild (2001:1), above, Introduction n. 1, at p. 35 (n. 120). For the most recent UK statistics, which indicate an increase in enforcement action against illegal entrants in 2000, see J Dudley and P Harvey, *Control of Immigration Statistics: United Kingdom, 2000* No. 14/01 (24 August 2001), para. 8 (available from <http://www.homeoffice.gov.uk/rds/hosbps1.html>).

⁷⁵ See respectively Ministers responsible for immigration Decision of 30 November 1992 setting up a Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI) (this measure was not published in the *Official Journal*, for the text, see E Guild and J Niessen (eds), *The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions* (The Hague: Kluwer, 1996) at pp. 205–209) and JHA Conclusions of 30 November 1994 on the organization and development of CIREFI, OJ 1996 C 274/50.

⁷⁶ Another development is the creation within the framework of CIREFI cooperation of an early warning system for the transmission of information on illegal immigration and facilitator networks (JHA Council Resolution of 27 May 1999, which has not been published in the *Official Journal*, but is available from the JHA Council website at <http://ue.eu.int/jai/>).

⁷⁷ See *Developing Immigration and Asylum Policies of the European Union*, above n. 75, at pp. 213–217, 383. Access to information held by CIREFI is limited officially to 'ministers, national authorities participating in the work of the clearing house, their officials and the Commission.' See 1992 Decision setting up CIREFI, above note 75, para. 12.

⁷⁸ It is perhaps pertinent in this respect that in a recent article by the Head of the Illegal Immigration Bureau of

EUROPOL, only one rather imprecise example was provided of success in dismantling an illegal immigration network. See C Bratz, 'The Contribution of EUROPOL to Combating Illegal Immigration Networks' in M den Boer (ed.), *Schengen Still Going Strong. Evaluation and Update* (Maastricht: European Institute of Public Administration, 2000) 71–75, at p. 72: '[I]t was possible to dismantle a professional group of Chinese criminals with the help of the Portuguese and German ELOs [European Liaison Officers]. The gang had smuggled people with genuine documents but dishonest intentions (e.g. with the intention of overstaying their residence permits) from a former colony of Portugal via Portugal to Germany'. It would be interesting to learn how such 'dishonest intentions' are proved. Improvements in the provision and availability of statistical information on irregular migration are expected in response to the Council Conclusions regarding common analysis and the improved exchange of statistics on asylum and migration, 28 May 2001, Doc. 7973/01 ASIM 10. The Commission is reviewing the publication rules applicable to the statistics exchanged by Member States through CIREFI and has proposed the publication of CIREFI statistics on the following categories of relevance to understanding the scope of irregular migration: refused aliens, apprehended aliens illegally present, apprehended facilitators, apprehended facilitated aliens, and removed aliens. Council Doc. 12079/01 (20 September 2001), at p. 3.

⁷⁹ Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990, OJ 1997 C 254/1; entry into force 1 September 1997.

⁸⁰ Guild (2001:1), above, Introduction n. 1, at p. 36.

Most recent estimates indicate that only 1.7% of all asylum applicants have actually been transferred under the Convention since it entered into force.⁸¹ Moreover, there is very little information available on how readmission agreements are being implemented in practice in third countries. A survey of readmission agreements entered into by the Baltic States, which are all candidates for EU accession, reveals a picture of the hasty adoption of such agreements in order to conform to the demands of the Community asylum and migration *acquis* as well as sparse information on their actual implementation.⁸² To measure the success of combating illegal immigration, therefore, on the basis of the impact of such agreements, is rather questionable.

The Commission's reports on Bulgaria and Romania regarding their removal from the negative visa list constitute, as noted above, a further insight into how the risk of illegal immigration is constructed as a reason for the visa requirement. These reports read like a Commission regular report on the progress of a candidate country towards EU accession, and it is therefore necessary to bear in mind that they pertain to an exceptional situation.

⁸¹ M Heinonen, 'The Efficiency of the Dublin Convention. Evolution of the Statistics', paper presented to the Seminar on the Dublin Convention on Asylum, European Institute of Public Administration, Maastricht, 25–27 April 2001 at p. 8 and European (Staff Working Paper), *Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*, SEC (2000) 522 of 25 March 2000, at p. 16, para. 38.

⁸² See R Cholewinski, *The Baltic States in the Context of the Dublin Convention and Related Asylum Norms* (Helsinki: IOM, 2001) at pp. 71–79, 90.

⁸³ Guild (2001:1), above, Introduction n. 8, at p. 39.

⁸⁴ By virtue of Art. 3(2) SIA, Schengen States undertake 'to introduce penalties for the unauthorised crossing of external borders at places other than crossing points or at times other than the fixed opening hours'.

⁸⁵ *Commission Visa Report on Bulgaria*, above n. 69, at p. 3.

⁸⁶ *Commission Intermediate Visa Report on Romania*, above n. 69, at p. 4; *Commission Final Visa Report on Romania*, above n. 70, at p. 12.

⁸⁷ See respectively *Commission Visa Report on Bulgaria*, above n. 69, at p. 6 and *Commission Intermediate Visa Report on Romania*, above n. 69, at p. 8.

⁸⁸ *Commission Visa Report on Bulgaria*, above n. 69, at p. 6. Original emphasis.

⁸⁹ *Ibid.* at p. 3.

⁹⁰ *Commission Final Visa Report on Romania*, above n. 70, at p. 6. However, the *Commission Intermediate Visa Report on Romania*, above n. 69, at 6, underlines that 'the main rule now is that visas cannot be obtained at border posts'.

In this regard, Guild observes: '[I]t is hardly imaginable that the Union would apply the type of criteria used in the reports as regards the decision on visa requirements for other countries not in such a specific relationship with the Union.'⁸³ The reports reveal that the measures adopted and the commitments made by these countries to combat illegal migration (both of own nationals and third-country nationals), which appear to have led the Commission to make a positive assessment in both cases, are excessive because they clearly go beyond the requirements of the EU *acquis* on irregular migration as well as the practices of most Member States themselves, and also contain serious implications for fundamental human rights, particularly in respect of the treatment of Bulgarian and Romanian citizens by their own governments.

Although the EU *acquis* imposes obligations upon Member States to penalise the illegal crossing of borders,⁸⁴ the measures in place in Bulgaria and Romania as well as the commitments these countries have made can only be described as draconian. In Bulgaria, the crossing of the state border without authorisation is punishable by deprivation of liberty for up to five years *and* a considerable fine of up to 30,000 Lev (i.e. Eur 15, 306).⁸⁵ The criminal penalties are lower in Romania where the fraudulent crossing of the border, whether on entry or exit, is punishable by 3 months to 2 years imprisonment.⁸⁶ Both countries have also adopted legal measures and commitments relating to the requirements of transport carriers, including tourist and travel companies in the case of Bulgaria, to check the documentation of persons travelling to the country concerned and the imposition of sanctions.⁸⁷ Bulgaria has also pledged 'to extend this obligation to the companies that provide services of transport *from* Bulgaria',⁸⁸ which exceeds the minimum required by the EU *acquis*. Moreover, obtaining a visa at the border is no longer possible in Bulgaria,⁸⁹ even though, as noted earlier, the EU arrangements do not preclude such a possibility. In this respect the situation in Romania accords more with the EU *acquis*, since it is still possible to obtain a visa at the border in 'exceptional cases',⁹⁰ although these are not elaborated. The record of these countries in successfully concluding readmission agreements is also a valid consideration

and the Commission reports refer to the conclusion of such agreements with the majority of Member States as well as other candidate countries. The reports also mention the negotiation of readmission agreements with third countries. For example, the Commission observes in respect of Romania, and without any comment, that '[a]ll the new readmission agreements being negotiated or updated with third countries with high migration potential include both nationals of the contracting parties and third country nationals'.⁹¹ The third countries in question include Afghanistan, Bangladesh, China, Egypt, Former Yugoslav Republic of Macedonia, Moldova, Pakistan, Russia and Ukraine,⁹² some of which are significant producers of *bona fide* refugees or known transit countries for asylum-seekers. The Commission's Intermediate Report on Romania also observes that 'Romanian authorities assume that there are no problems with the application of readmission agreements',⁹³ which is perhaps overly optimistic given the recognised difficulties with the operation of the Dublin Convention and the lack of information on the effectiveness of standard bilateral and multilateral readmission agreements, particularly those entered into by other candidate countries. Finally, a particularly disturbing feature of the examination of Bulgarian and Romanian attempts to combat the illegal migration of their own nationals is their willingness to prohibit such persons, who have been apprehended as illegal migrants in Member States, from leaving their homelands

⁹¹ *Commission Final Visa Report on Romania*, above n. 70, at p. 16.

⁹² *Ibid.* The *Commission Intermediate Visa Report on Romania*, above n. 69, at p.9, refers to the existence of a readmission agreement with India, which is in force, although this is not mentioned in the subsequent report. The *Commission Visa Report on Bulgaria*, above n. 69, at p. 6, notes that drafts on readmission agreements have been presented and negotiations are underway with respect to third countries, such as the Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia, Georgia, Russia, Tunisia, and Ukraine.

⁹³ *Commission Intermediate Visa Report on Romania*, above n. 69, at p. 9. Emphasis added.

⁹⁴ *Commission Visa Report on Bulgaria*, above n. 69, at p. 4.

⁹⁵ *Ibid.* at p. 7.

⁹⁶ *Commission Intermediate Visa Report on Romania*, above n. 69, at p. 8; *Commission Final Visa Report on Romania*, above n. 70, at pp. 12 and 13.

⁹⁷ *Commission Intermediate Visa Report on Romania*, above n. 69, at p. 4.

⁹⁸ Protocol No. 4 to the ECHR, above n. 7. Both Bulgaria (4 November 2000) and Romania (20 June 1994) have ratified this instrument.

for a number of years, reinforced by commitments to increase the periods of the prohibitions on exit in the future. Bulgarian law imposes a ban on leaving the country for a one-year period on Bulgarian citizens who have violated the immigration law of another country or who have been expelled from another country.⁹⁴ The Commission's report refers to a draft amendment providing for an extension of this period to two years.⁹⁵ The information on Romania is more specific. Romanians who have been apprehended while illegally attempting to leave Romania or returned on the basis of readmission agreements can have their passports withdrawn for a maximum period of 12 months, although the Commission's reports on Romania also refer to a proposal to increase this period to three years.⁹⁶ Statistics are also cited illustrating that 27,409 Romanian citizens were forbidden to exit the country between 1998 and 2000. Although 7,356 cases were accounted for and consisted of persons listed as being under criminal investigation, on trial or wanted for other offences and those apprehended for using false passports, trying to emigrate hidden in means of transport, or for having irregularities in travel documents, no reasons are provided for the remainder amounting to over 20,000 citizens.⁹⁷ Although the right to leave any country including one's own country, such as that guaranteed by Article 2(2) of Protocol No. 4 to the ECHR,⁹⁸ is not an absolute right and can be restricted in Article 2(3) on a number of grounds, such as in the interests of national security and the maintenance of public order, the extensive measures in place and particularly those proposed are unlikely to satisfy the proportionality criteria developed by the European Court of Human Rights in respect of the imposition of restrictions on rights under the ECHR.

The power relationship between the EU and Bulgaria and Romania is indeed unique in terms of their candidatures for EU accession and is reflected in the political will of governments in these two candidate countries to enthusiastically adopt measures on illegal immigration in order to conform to EU demands and to respond to the pressures of their own populations for visa-free travel to the EU. However, these factors cannot justify the adoption of measures that go beyond the EU *acquis* in terms of the implications for future EU membership and that undermine important human rights guarantees. Although it would be more difficult to extract similar measures and commitments from non-EU

candidate countries that wish to be removed from the negative visa list, such a development is by no means inconceivable given the inducement of visa-free travel between the EU and the third countries concerned, which would no doubt serve to increase the popularity of governments in the latter. Moreover, there must also be the concern that such additional demands will 'work their way back' into future EU policy on irregular migration and thus into the laws of current EU Member States.

The other criteria identified by the Commission in its original proposal for a Visa Regulation, public policy as it relates to crime and international relations, have also been subject to criticism. The approach in regard to the former essentially reinforces that taken under the Schengen arrangements, discussed earlier in respect of external border checks. No Community notion of what are relevant crimes for the purpose of imposing the visa requirement is advanced. It has been argued that with respect to certain forms of crime, such as the use of soft drugs, it would be very difficult to reach

⁹⁹ See Guild (2001:1), above, Introduction n. 1, at p. 36, referring to the difference in approach to the use of soft drugs taken by Belgian and Dutch authorities in comparison with those of France and Greece.

¹⁰⁰ Guild (2001:1), *ibid.* at p. 38, suggests that the apparent discrimination of the visa list in respect of race and religion is 'supplemented by a second level of privilege or discrimination: wealth'. Guild, *ibid.*, argues that this finds support in a recent Portuguese Presidency proposal, for a measure to enable third-country nationals not subject to the visa requirement to have the freedom to travel for longer than three months subject to the negotiation of international agreements on a reciprocal basis between the Community and third countries. See *Initiative of the Portuguese Republic with a view to adopting the Council Regulation on the period during which third-country nationals exempt from visa requirements are free to travel within the territory of the Member States*, OJ 2000 C 164/6. This proposal was prompted by pressure from the United States, whose nationals' right to travel within the EU was cut from three months (in each Member State) to three months in the whole Schengen territory after the Schengen Implementing Agreement began to operate. It is interesting that the Commission has proposed the right to travel within the territory of Member States for a period of up to six months for *all* third-country nationals (i.e., visa and non-visa nationals) on the basis of a specific travel authorisation. See *Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months*, above n. 6.

¹⁰¹ See also Guild (2001:1), above Introduction n. 1, at p. 38, citing *Migration News Sheet* (April 2001) at p. 3.

¹⁰² *Commission Visa Regulation Proposal*, above n. 71, at p. 10.

a consensus among the Member States as to the seriousness of the activity.⁹⁹ Moreover, the Commission takes the view that it is acceptable for Member States to impose a visa requirement to demonstrate solidarity with one or more Member States in which the threat to public order may in some cases be so serious as to undermine domestic security. This approach again mirrors the 'cross-recognition' of individual Member State assessments of risk, which is evident in the Schengen Implementing Agreement and measures adopted thereunder. As far as international relations are concerned, an important factor identified in deciding upon which countries to impose a visa requirement is 'regional coherence'. It is not the EU's relations with a single country that are at issue but its relations with a group of countries. The EU and its Member States can also impose a visa requirement to demonstrate their solidarity with the position of a specific Member State in respect of a particular third country. On this basis, therefore, the visa regime clearly demonstrates the type of relations that the EU has with the countries in Africa, which are all on the negative visa list. However, this is less clear with other regions in the world, particularly Asia where the more affluent countries have been included on the positive visa list, or Central America.¹⁰⁰ Moreover, it is plain that the non-imposition of a visa requirement on most of the South American countries relates to the special relationship of Spain with those countries, although here again it would appear that the criteria of illegal immigration and crime overrode this special relationship in respect of Colombia, which was placed on the negative list.¹⁰¹ Indeed, as noted in the Commission's original proposal for a Visa Regulation, the addition of Colombia to the negative visa list was the only departure from the previous Schengen list,¹⁰² although no justification for this transfer is provided.

Although asylum-seeking is not provided as an 'official' reason for placing countries on the negative visa list, a great number of these countries are significant producers of refugees. Given the perception existing in the government circles of many Member States that most asylum-seekers are 'bogus' and are really economic migrants, a perception often fuelled by negative press reporting, it has been argued that this list also acts as a tool in undermining the right to seek and enjoy asylum proclaimed in Article 14 of the Universal Declaration of Human Rights.

Indeed, such a position has been advanced by the UNHCR.¹⁰³ Clearly, the inclusion of countries on the negative visa list in order to avoid obligations and commitments freely entered into by EU Member States under the Geneva Convention and Protocol Relating to the Status of Refugees¹⁰⁴ cannot constitute a ‘relevant and sufficient’ reason in support of the difference in treatment. From another equality standpoint, it has also been pertinently observed that this list includes countries where persecution is defined by severe discrimination against certain groups.¹⁰⁵

The absence of specific country justifications for placing a country on the white or black visa list, aside from those discussed in relation to the unique situation of Bulgaria and Romania,

¹⁰³ In its July 1997 Note on International Protection, UNHCR identified the expansion of visa regimes as one of the measures, which have closed ‘even the possibility of entry to a number of persons who may be in need of international protection’. Executive Committee of the High Commissioner’s Programme, 48th Session, *Note on International Protection*, UN Doc. A/AC.96/882 (2 July 1997). NGOs have also contended that the inclusion in harmonised visa lists of countries in which there are civil wars, generalised violence or widespread human rights violations producing refugees and displaced persons, constitutes an infringement of the right to seek and enjoy asylum in Article 14 of the UDHR. See European Council on Refugees and Exiles (ECRE), European Network Against Racism (ENAR) and MPG, *Guarding Standards – Shaping the Agenda* (Brussels: ECRE, ENAR, MPG, April 1999) at p. 7.

¹⁰⁴ Convention Relating to the Status of Refugees (28 July 1951; 189 UNTS 137; ratified by 137 States). The Protocol Relating to the Status of Refugees (31 January 1967; 606 UNTS 267; ratified by 137 States) extends the scope of the Convention beyond Europe and to events occurring subsequent to 1951. Both the Convention and Protocol are referred to hereinafter as the ‘Geneva Convention’.

¹⁰⁵ See M Bell, ‘Mainstreaming Equality Norms into European Union Asylum Law’ (2001) 26 *European Law Review* 20–34, at pp. 32–33 with reference to reported persecution in Afghanistan on the basis of sex and sexual orientation.

¹⁰⁶ Preamble, Recital 5.

¹⁰⁷ *Commission Visa Regulation Proposal*, above n. 71, at p. 9.

¹⁰⁸ Contribution by François Darcy discussing the French perspective on the panel ‘Perceptions and realities of the EU external borders of an enlarged Union’ at the Conference on New European Borders and Security Cooperation: Promoting Trust in an Enlarged European Union, organized by the Centre for European Policy Studies (CEPS), the SITRA Foundation and the Stefan Batory Foundation, and held at the CEPS in Brussels on 6–7 July 2001. Another commentator cites similar figures in respect of visas issued but which indicate that about 20% of visa applications are rejected. See V Guiraudon, ‘Before the EU Border: Remote Control of the Huddled Masses’ in *In Search of Europe’s Borders: Article 62 EC, Visas and European Community Law*, above n. 51, citing M Tandonnet, ‘La politique d’européenne d’immigration à la croisée des chemins’ (2001) *Hommes et Migrations* 1230 (March–April) 94–101.

is a serious omission in the wider context of justifying discrimination. It also undermines considerably the ‘commitment’ in the Preamble to the Visa Regulation that ‘the determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment’ of the relevant criteria.¹⁰⁶ The Commission also supported a case-by-case approach in its original proposal for the Visa Regulation:

Given the extreme diversity of situations in third countries and their relations with the European Union and the Member States, the criteria set out here cannot be applied automatically, by means of coefficients fixed in advance. They must be seen as decision-making instruments to be used flexibly and pragmatically, being weighted variably on a case-by-case basis.¹⁰⁷

However, this statement appears somewhat contradictory. On the one hand, it seems to indicate that the criteria must be carefully applied in respect of each third country. On the other hand, it could also be interpreted as granting decision-makers a broad and nebulous discretion in imposing visa requirements.

The profiling of third countries on the basis of criteria relating to the risks of irregular migration and crime is extremely suspect from the standpoint of non-discrimination and the only criterion that should be applied in determining whether the nationals of a particular country should be subject to a visa requirement or otherwise is that of international relations. If such profiling is to be pursued, however, the Community can only avoid allegations of discrimination if it adopts, on the basis of reliable and responsible statistical evidence, strict and objective criteria, which are drawn up using a common approach and placed in the public domain, and by which the risks relating in particular to irregular immigration can be objectively assessed in respect of specific countries. Such a system would also have to include a transparent mechanism to ensure that relevant developments in a third country can be taken into account, both in terms of imposing a visa requirement and removing that country from the negative visa list.

Conditions for issuing a visa

It is estimated that each year about 700 million persons cross the EU external border and that approximately 10 million Schengen uniform visas are issued. The refusal ratio for such visas ranges from 0.5% to 16% depending on the region where applications are submitted.¹⁰⁸ EU-wide statistical

information is hard to come by publicly even though statistics on uniform visas issued and on applications for such visas that have been formally refused are supposed to be exchanged every three months.¹⁰⁹ While these figures would appear to indicate that the great majority of persons who apply for a visa obtain one, this does not mean of course that the criteria the EU adopts in issuing visas are immune from scrutiny. The generally positive image created by such figures hides the fact that visa applicants are human beings, whose lives and family relations may well be seriously affected by the refusal of a visa, particularly if such a refusal also results from an entry in the SIS which would mean the exclusion from the whole EU territory for the foreseeable future. The principal arguments relating to potential discrimination in individual cases centre predominantly on the conditions for issuing a visa and the way these rules are applied.

Before analysing the conditions third-country nationals subject to the visa requirement must satisfy and how these conditions are applied in practice, it is important to underline at the outset that the so-called 'uniform visa' identified in Article 10 SIA has many shades of 'uniformity'. Article 11 SIA specifies that such a visa may be:

- a) a travel visa valid for one or more entries, provided that neither the length of a continuous visit nor the total length of successive visits exceeds three months in any half-year, from the date of entry;
- b) a transit visa authorising its holder to pass through the territories of the Contracting Parties once, twice or exceptionally several times en route to the territory of a third State, provided that no transit shall exceed five days.

¹⁰⁹ Common Consular Instructions, above n. 42, Ch. VIII, point 4.1. See also Schengen Executive Committee Decision SCH/Com-ex (98) 12 of 21 April 1998 on the exchange of statistics on issued visas, OJ 2000 L 239/196 and Schengen Executive Committee Decision SCH/Com-ex (94) 25 of 22 December 1994 on the exchange of statistical information on the issuing of uniform visas, OJ 2000 L 329/173. The latter decision identifies the following data on uniform visas issued by the diplomatic and consular representations, which is to be collected and exchanged: the issuing representation, type of visa (short-stay visa, transit or airport transit visa); type of travel document; and nationality. This information is to be transmitted to the Schengen Secretariat (Council), which is obliged to 'collate this information and compile global tables giving an overview of each period, which it shall make available to the Contracting Parties'. *Ibid.*, Point 2.

¹¹⁰ Common Consular Instructions, above, n. 42, Ch. I, points 2.1.1 and 2.1.3–2.1.4.

¹¹¹ See ILPA and Joint Council for the Welfare of Immigrants (JCWI), *Frontier Law: Why Schengen Isn't Working for Europe's Third Country Nationals* (September 1995) and E Jileva, 'Implementing Schengen: visa issuing in Bulgaria' (2001, unpublished paper).

Variations on these two basic categories of uniform visa are found in the Common Consular Instructions and include; multiple-entry short-stay visas valid for one year, and in exceptional cases, for a maximum of five years permitting visits not exceeding three months in any half-year; airport transit visas permitting third-country nationals to pass through the international transit area of airports (see Airport transit visa nationals below); and group visas issued to groups of between 5 and 30 persons for the purpose of a short-term stay for a maximum of 30 days or for transit on the condition that the persons concerned enter the territory, stay there and leave the territory as a group.¹¹⁰ Thus, if the third-country national is issued with a uniform visa, the 'quality' of this document may differ markedly. This is another area where a difference in treatment might potentially be constructed on the basis of nationality, racial or ethnic origin or religion, although it would be difficult to further such an assertion without the collection of reliable and objective empirical data. This general observation would also apply to the conditions analysed below, although here it is a little easier to identify the potential problem areas that risk discriminatory treatment given the extensive guidelines found in the Consular Instructions. Moreover, some preliminary empirical research has already been conducted demonstrating considerable shortcomings in the visa-issuing process.¹¹¹

By virtue of Article 15 SIA, nationals of countries on the negative visa list must meet the conditions listed in Article 5(1)(a), (c)–(e) SIA in order to be issued with a uniform visa valid for entry into all the participating Member States for a period of up to three months. The conditions in Article 5(1)(c)–(e) SIA are problematic from the perspective of the application of the non-discrimination principle. All of these conditions are subject to the potentially broad application of discretionary powers and are thus hardly conducive to the equal and consistent application of the visa issuing rules in Member State embassies or consulates. Moreover, third-country nationals in some countries may also experience considerable difficulties in accessing a procedure given the existence of limited visa-issuing resources in those countries.

The entry condition in Article 5(1)(c) SIA requiring third-country nationals to produce, if necessary, documents justifying the purpose and conditions of the intended stay and that they have sufficient means of subsistence,

both for the period of their stay and for the return home or transit to a third State, is particularly problematic. The Consular Instructions elaborate on this condition and provide further guidance on its application. In the first instance, the Instructions remind the diplomatic missions or consular posts that the main issues that have to be borne in mind when examining visa applications relate to 'the security of the [Schengen States] and the fight against illegal immigration as well as other aspects relating to international relations'.¹¹² With regard to illegal immigration, the following instruction is particularly pertinent:

The diplomatic mission or consular post shall assume full responsibility in assessing whether there is an immigration risk. The purpose of examining applications is to detect those applicants who are seeking to immigrate to the territory of the Contracting Parties and set themselves up there, using grounds such as tourism, studies, business or family visits as a pretext. Therefore, it is necessary to be particularly vigilant when dealing with 'risk categories', in other words unemployed persons, and those with no regular income etc. If there is any doubt over the authenticity of the papers and supporting documents submitted, the diplomatic mission or consular post shall refrain from issuing the visa.

On the contrary, checks shall be reduced where the applicant is known to be a bona fide person, this information having been exchanged through consular cooperation.¹¹³

In examining visa applications, consular authorities are required to verify a number of matters: the visa application itself and whether the length of the visit requested corresponds with the purpose of the visit; the identity of the applicant, whether an alert has been issued in the SIS for the purpose of refusing entry or whether the applicant poses any other threat to security, or whether, from an immigration point of view, an applicant poses a risk on account of overstaying a period of authorised stay during a previous visit; the travel document; and other supporting documents depending on the application. The supporting documents relate

to the purpose of the journey, the means of transport and return, and the means of subsistence, and accommodation.¹¹⁴ Although on their face these provisions appear very detailed, they leave a considerable amount of discretion to the consular authorities, thus increasing the risk that they will not be applied in a consistent and fair manner and that visa applicants in an analogous situation will not be treated alike.

This extensive discretion can be assimilated into two broad observations. First, checks are to be reduced if the applicant is known to be a 'bona fide person'. According to the Consular Instructions, 'in order to assess the applicant's good faith, the mission or post shall check whether the applicant is recognised as a person of good faith within the framework of local consular cooperation'.¹¹⁵ Consular cooperation at the local level is found in another part of the Instructions and its purpose and scope is described as follows:

On the spot consular cooperation shall, generally speaking, focus on assessing immigration risks. It shall mainly be aimed at determining common criteria for examining files, exchanging information on the use of false documents, on possible illegal immigration routes and on refusing visas where applications are clearly ill-founded or fraudulent. It should also enable the exchange of information on bona fide applicants and on the joint development of information for the general public on the conditions governing Schengen visa applications.¹¹⁶

In order to facilitate the assessment of an applicant's good faith, diplomatic missions or local consular posts may exchange information on the persons whose applications:

have been refused due to the fact that stolen, lost or falsified documents have been used, or that the date of exit on the previous visa was not respected or that there is a risk to security and in particular there is reason to believe that an attempt is being made to illegally immigrate to the territory of the Contracting Parties.¹¹⁷

Interestingly, this information is specified as merely 'serving as a working instrument for assessing visa applications' and is not to 'replace the actual examination of the visa application nor the search in the [SIS], nor consultation with the requesting central authorities'.¹¹⁸ With regard to consultation with central authorities, Article 17(2) SIA provides that 'the Executive Committee shall...specify the cases in which the issue of a visa shall be subject to consultation with the central authority of the Contracting Party with which the application is lodged and,

¹¹² Common Consular Instructions, above n. 42, Ch. V.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, Ch. V, points 1.1–1.4.

¹¹⁵ *Ibid.*, Ch. V, point 1.5.

¹¹⁶ *Ibid.*, Ch. VIII, point 1. See also JHA Council Recommendation of 4 March 1996 relating to local consular co-operation regarding visas, OJ 1996 C 80/1.

¹¹⁷ Common Consular Instructions, above n. 42, Ch. VIII, point 3.

¹¹⁸ *Ibid.*

where appropriate, the central authorities of other Contracting Parties'.¹¹⁹ A list of third countries for whose nationals the central authorities must be consulted before a visa can be issued is found in Annex 5 of the Consular Instructions, which remains confidential.

Consequently, it would appear that the extent of the checks carried out on third-country nationals may also depend on what kind of 'informal' information is stored on them at the local consular level. A recent French Presidency Report on local consular cooperation refers to discussions on this question in certain diplomatic missions, but rejects the possibility of establishing such a system:

Several diplomatic posts are considering the possibility of establishing a local common roster of persons deemed undesirable. As this is not provided for by the texts, all diplomatic and consular representations should be reminded that although it is desirable for partner States to exchange locally information on applicants or intermediaries acting in bad faith, it is not possible, however, to establish a kind of 'local SIS'.¹²⁰

¹¹⁹ The procedure to be followed in cases of prior consultation with the central authorities of the other Contracting Parties is found in the Common Consular Instructions, *ibid.*, Ch. 2, point 2.3.

¹²⁰ *Report on local consular cooperation under the French Presidency*, Council Doc. 14496/00 (11 December 2000) at p. 4. See also Council Docs. 7919/01 (6 April 2001) and 7819/01 REV 1 (30 April 2001).

¹²¹ The only possible safeguard is that the exchange of information is to be carried out 'in accordance with national legislation'. *ibid.*, Ch. VIII, point. 3. Moreover, the JHA Council Recommendation relating to local consular co-operation regarding visas, above n. 116, para. 6, stipulates that the exchange of information 'must take relevant data protection rules into account'.

¹²² Council Doc. 7819/01 REV 1, above n. 120, at p. 1.

¹²³ Long waiting-periods and the lack of administrative capacity in Member States' embassies were identified as particular obstacles that resulted in delays in the issuing of Schengen visas in Bulgaria before the transfer of that country from the black to the white visa list. See Jileva, above n. 111, at pp. 2–4.

¹²⁴ *Report on local consular cooperation under the French Presidency*, above n. 120, at p. 2.

¹²⁵ For example, in France, there is only a visa application once all the necessary documents have been submitted, whereas in Germany the initial enquiry is considered to be a visa application.

¹²⁶ Common Consular Instructions, above n. 42, Part VIII, point 2.

¹²⁷ *Report on local consular cooperation under the French Presidency*, above n. 120, at p. 3. In this regard, the French Presidency, *ibid.* reminds all diplomatic and consular representations that 'the stamp must be affixed when any visa application is lodged but that the presence of the stamp has no legal significance such as entry in the SIS'.

It is difficult to confirm whether local 'informal' lists are actually being used, although the existence of such lists of undesirable persons at the local consular level would be highly inappropriate. If the information available in respect of a particular visa applicant is of an especially serious nature then an entry should be made in the SIS. The existence of such a list would also have negative consequences in terms of the remedies available to the individual. Whereas the right to access data reported in the SIS is provided in Article 119 SIA, no comparable right is specified with respect to the information held in the context of local consular co-operation.¹²¹ The French Presidency Report, however, does identify a number of problem areas where local diplomatic posts act inconsistently in the visa-issuing process. At the outset, though, it should be noted that although uniform application of the Consular Instructions is the goal, specific local interpretations are possible:

In order to increase transparency in relation to visa applicants and avoid 'visa shopping', Member States should make every effort to apply the Common Consular Instructions on Visas in a uniform manner. If, in exceptional cases, Member States' missions interpret the Common Consular Instructions in a way which is specific to local circumstances, this should happen only after agreement within the framework of local consular cooperation so that uniform application is achieved locally.¹²²

The Report refers to a discrepancy in visa-issuing times, which are regarded by many diplomatic posts as one of the factors encouraging 'visa shopping'. Although national practices are largely responsible for this discrepancy,¹²³ the Report notes somewhat worryingly that 'in some instances it also seems to stem from differing interpretations of the rules for consulting the central authorities of partner States',¹²⁴ which, as noted above, is a crucial procedure in respect of the issue of a uniform visa to applicants that fall into certain suspect categories. Another inconsistency concerns the definition of a 'visa application', which may differ between Member States.¹²⁵ With regard to the stamp that is to be affixed to each applicant's passport to indicate where the visa application was lodged and on which date,¹²⁶ the Report observes that some diplomatic posts treat this as a 'rejection stamp' and only issue it when a visa is refused with the result that when they receive an application with a passport containing the stamp, they automatically refuse the visa without consulting the Member State mission that issued it.¹²⁷ A further problem area concerns the handling of

visa applications by travel agencies. The Report notes that this is 'a difficult issue in several diplomatic posts which is not always approached in a harmonised manner since some representations systematically refuse to work with this type of agency, while others accept to do so *but in accordance with different criteria*'.¹²⁸ Given that in many countries, the granting of a visa often depends on the relationship between local consular authorities and private actors, such as a travel agency or the airline which issued the ticket, this admission confirms suspicions that the application of the visa regime can be arbitrary in this respect. Other discrepancies concern the recognition of travel documents and the issuing of visas to third-country nationals who are in transit.¹²⁹ The Report indicates that Member States' missions in certain localities 'do not have a uniform practice as regards the recognition of travel documents' and also identifies 'major differences in practice between missions as regards applications made by applicants who are not resident or who are in transit'.¹³⁰ The recommendations advanced in relation to these two discrepancies are revealing of a rather half-hearted attempt at a harmonised practice, which in turn may impact adversely on the individual visa applicant depending on which consulate he or she approaches for a visa:

Member States' heads of missions should be reminded or recommended to:

- 1 *Take the list of documents in the Schengen rules which may have a Schengen visa affixed to them into account when deciding whether a document can be accepted or not.*
- 2 *Endeavour, within the framework of local cooperation, to apply uniform practice, or else try to reduce differences, with a view to achieving as uniform an approach as possible.*¹³¹

¹²⁸ *Ibid.* at p. 3. Emphasis added. The Report, *ibid.*, observes further that this matter is very delicate in Kiev 'where diplomatic and consular representations have received different instructions from their central authorities.'

¹²⁹ *Ibid.*

¹³⁰ Council Doc. 7819/01 REV 1, above n. 120, at p. 6. London, identified as one of the places with a lot of transit traffic because of its size and geographic location, is referred to where some Member States' missions examine visa applications from persons in transit while others refuse to consider such applications. *Ibid.*

¹³¹ *Ibid.* at p. 7. Emphasis added.

¹³² Common Consular Instructions, above n. 42, Ch. V, point. 1.4.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, Ch. V.

Clearly, these rather weak recommendations reflect that local consular cooperation, by its very nature, cannot lead to the development of a fully harmonised approach. In the absence of clear rules together with reduced control from the central visa issuing authority, the risk of discriminatory practices occurring on the local consular level and of unequal treatment of similarly situated persons, who submit visa applications in different regions of the world, is increased considerably.

The second example of extensive official discretion concerns the number and nature of supporting documents required of the visa applicant. These may differ considerably depending on the country (and consulate) in which the application is lodged. Indeed, the Consular Instructions recognise this possibility:

The number and type of supporting documents required depend on the possible risk of illegal immigration and the local situation (for example whether the currency is convertible) and may vary from one country to another. As concerns the assessment of the supporting documents, the diplomatic missions or consular posts of the Contracting Parties may agree on practical arrangements adapted to suit local circumstances.¹³²

The Instructions list the supporting documents that have to be provided concerning the following four categories: purpose of the journey (e.g. letter of invitation); means of transport and return (e.g. return ticket); means of subsistence (e.g. cash in convertible currency, credit cards); accommodation (e.g. hotel reservation). However, these categories are then supplemented by a fifth 'open' category, i.e. 'other documents where necessary', and where the examples of possible supporting documents listed, such as 'proof of ties with the country of residence' and 'proof of the social and professional status of the applicant', may result in potentially intrusive enquiries.¹³³ Moreover, the benefit of the doubt regarding the authenticity of the supporting documents submitted is to be exercised in favour of the visa-issuing authorities rather than the applicant.¹³⁴

The highly discretionary nature of the visa-issuing process in respect of the extent of the supporting documents required was one of the conclusions of a small empirical study conducted in London in 1995 (soon after the uniform visa policy came into operation), which traced the visa applications of a group of third-country nationals from Turkey permanently resident in the United Kingdom:

The supposedly common criteria which allow the issue of a visa are so loosely worded as to allow substantive variation in the practical application of the system. The Contracting parties in issuing their information require a greater number of documents than are necessary to substantiate the application – a minimum of ten documents. It should be remembered that the ‘uniform visa’ is supposedly tailored for those wishing to make short visits of up to 3 months. In fact the excessive requirement of proof is recognised in the practice of various consular authorities who dispense with certain documents formally demanded.¹³⁵

¹³⁵ *Frontier Law: Why Schengen Isn't Working for Europe's Third Country Nationals*, above n. 111, at p. 13.

¹³⁶ Jileva, above n. 111, at p. 9.

¹³⁷ *Ibid.* at p. 5.

¹³⁸ Common Consular Instructions, above n. 42, Ch. V, point. 1.4.

¹³⁹ The Common Consular Instructions, *ibid.*, list the following as acceptable proof of means of subsistence: ‘liquid cash in convertible currency, travellers cheques, cheque books for a foreign currency account, credit cards or any other means that guarantees funds in hard currency’.

¹⁴⁰ The following Member States have not fixed reference amounts: Germany (‘Reference amounts have not been fixed for the attention of border control officials. In practice, an amount of DEM 50 per day is generally used as a basic reference’); Italy (‘A precise amount has never been fixed for the means of subsistence of which non-Community nationals wishing to stay in Italy must provide proof to the border control authorities... In fact, it is at the discretion of border control officials to assess whether the alien has adequate financial means’); Luxembourg (‘The law of Luxembourg does not provide for any reference amount for border controls. The official carrying out the control decides on a case-by-case basis whether an alien approaching the border has adequate means of subsistence’); Austria (‘Pursuant to Article 32(2) Z 3 of the law on aliens, aliens shall be turned away at the border if they have no place of residence in Austria and do not have sufficient means of subsistence to meet the costs of their stay and return. However, there are no reference amounts for the above’). *Ibid.*, Annex 7.

¹⁴¹ See Draft Initiative of the French Republic with a view to the adoption of a Council Decision on the conditions for issuing visas by Member States, Council Doc. 8297/1/00 REV 1 (29 May 2000), p. 6 (Annex).

¹⁴² S Peers, ‘Key Legislative Developments on Migration in the European Union’ (2001) 3 *European Journal of Law and Migration* 231–255, at p. 247. The proposal would also introduce a new visa condition in addition to those considered above, namely the requirement to take out travel insurance covering the costs of repatriation and emergency hospital treatment with some specified exceptions, including where Member States’ consular representations in a third country ‘establish that local conditions make it impossible to require such insurance’ (Art. 1). Peers, *ibid.*, notes that the ‘broad power to derogate from the requirement as regards the issue of short-stay visas would still leave enormous discretion to Member States’.

¹⁴³ See Guiraudon, above n. 108, at p. 15.

It is not surprising, therefore, as a study on the issue of uniform visas in Bulgaria revealed before the removal of that country from the negative list, that the most common reason for refusing a visa was on grounds of insufficient supporting documents.¹³⁶ Moreover, the submission of the full package of supporting documents does not necessarily guarantee that the visa will be granted.¹³⁷

The applicable rules also clearly favour more affluent migrants. Applicants may be exempted from the requirement to provide supporting documents regarding accommodation ‘if they are able to prove that they have sufficient financial means to cover their subsistence and accommodation costs in the Schengen State or States that they plan to visit’.¹³⁸ Subsistence is defined solely in terms of the possession of hard currency.¹³⁹ The level of subsistence required for the crossing of external borders is supposed to be fixed annually by each national authority. However, the information listed in the Consular Instructions reveals that these amounts vary considerably and, moreover, that not all the Schengen States have fixed reference amounts.¹⁴⁰ A French Presidency initiative proposed the adoption of a Council Decision, which *inter alia* would fix a uniform Community reference amount of Eur40 per day or Eur20 per day for persons whose accommodation costs are to be borne by a third party.¹⁴¹ While this has been heralded as introducing ‘a clear and uniform rule’, it is also questioned whether it ‘adequately takes account of the differences in the costs in different Member States’.¹⁴² Moreover, the evidence Member State consulates may request of visa applicants about their financial status is extensive. Research based on the information Member State consulates in India issue on their websites to prospective visa applicants reveals that the array of evidence that might be required includes possession of ‘valid overseas medical insurance’, a ‘record of ownership of real estate’ and ‘share certificates’.¹⁴³

Given these potential discrepancies, there is a considerable risk that this important condition of entry in Article 5(1)(c) SIA will be applied in a discriminatory manner. The link between discrimination and the obstacles placed in the way of migrants seeking to enter a country was succinctly outlined in a recent inter-agency report submitted to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance:

Whilst immigration controls may discriminate between nationalities, they need not result in racism or xenophobia. They do so, when procedures target particular ethnic groups, become arbitrary or lack transparency, or when the immigration process itself is made as gruelling as possible so as to act as a deterrent.¹⁴⁴

Further measures are clearly required to provide for more effective harmonisation and to ensure the fairer and more consistent application of the conditions for issuing visas. The Action Plan of the Commission and the Council on how best to implement the Amsterdam Treaty provisions on an area of freedom, security and justice, adopted in Vienna in December 1998, identified the procedures and conditions for issuing visas by Member States (including the question of resources, guarantees of repatriation or accident and health cover) as a priority area that should be subject to a Community measure within two

years after the entry into force of the Amsterdam Treaty.¹⁴⁵ Although the Commission confirms this position in the most recent update of its Scoreboard to Review Progress on the Creation of an Area of 'Freedom, Security and Justice' in the EU, the timetable for the adoption of such a measure has now slipped to April 2003.¹⁴⁶ However, in its recent proposal for a Council Decision adopting an action programme for administrative cooperation in *inter alia* the field of visas, a particular area of activity identified for support is 'to promote harmonisation in the examination of visa applications, and in particular supporting documents regarding the purpose of the journey, means of subsistence and accommodation'.¹⁴⁷ The ILPA/MPG *Amsterdam Proposals* suggested that the condition based on support relating to the crossing of the external border or an application for a visa should be simplified and that it should be considered fulfilled 'if the third-country national makes a detailed declaration that he or she has either a sponsor within the Community or funds sufficient to sustain himself or herself at the minimum level of social assistance in the Member State which he or she seeks to enter [to which he or she has applied for a visa]'.¹⁴⁸

With regard to the entry condition in Article 5(1)(d) SIA, an 'alert issued for the purposes of refusing entry' concerns decisions to report a third-country national in the national list of alerts in accordance with the criteria laid down in Article 96 SIA. These alerts are pooled in the central SIS situated in Strasbourg and can then be accessed via the national SIS in each participating Member State.¹⁴⁹ According to Article 96(2) SIA, such decisions 'may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose'. Two examples are emphasised in this provision where such a situation may arise: where the third-country national has been convicted of an offence punishable by a term of imprisonment of at least one year (the actual term served may of course be shorter); and serious grounds for believing that the person has committed serious criminal offences or clear evidence of the intention to commit such offences. By virtue of Article 96(3) SIA, decisions to issue an alert may also be taken in respect of third-country nationals who are subject to measures involving deportation, removal or refusal of entry based on infringements of national immigration rules, and which are still in force. Consequently, the persons most likely to be affected adversely

¹⁴⁴ International Labour Organisation (ILO), International Organisation for Migration (IOM), and Office of the United Nations High Commissioner for Human Rights (OHCHR) (in consultation with UNHCR), *International Migration, Racism, Discrimination and Xenophobia* (August 2001) at p. 7.

¹⁴⁵ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, adopted by the JHA Council on 3 December 1998, OJ 1999 C 19/1 at p. 9, para. 36(d).

¹⁴⁶ European Commission, *Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of 'Freedom, Security and Justice' in the European Union (Second Half of 2001)*, COM (2001) 628 final of 30 October 2001 at p. 52.

¹⁴⁷ COM (2001) 567, above n. 49, at p. 11 (draft Art. 5(c)).

¹⁴⁸ See Peers (2000), above, Introduction n. 8, at pp. 180 and 184 (Arts. 8(2) and 18(2) respectively of the ILPA/MPG proposed Directive on border controls). Indeed, the only EU Member State that is closest to applying such a position is France where the reference amount for the adequate means of subsistence is equal to the amount of the guaranteed minimum wage in France (SMIC), which constituted FFr302 per day as of 28 July 1998. See Common Consular Instructions, above n. 42, Annex 7. It should be noted, however, that some of the other reference amounts specified are lower than this French figure. The Commission has proposed the more liberal approach, but only in relation to EU citizens. In its recent *Proposal for a Directive on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States*, above n. 29, at pp. 12 and 33 (draft Arts. 8(3) and 7(1)(b)), in introducing an optional registration requirement for stays of more than six months in a Member State, the Commission proposes that EU citizens should only provide a declaration that they meet the conditions for the right of residence, including the possession of sufficient resources for themselves and their families to avoid becoming a burden on the social assistance system of the host Member State.

¹⁴⁹ For an overview of how the SIS functions, see chapter 1 of *The Schengen Information System: A human rights audit*, above n. 54.

by the Article 5(1)(d) SIA entry condition are those who have been in EU territory before and not new EU entrants.¹⁵⁰ A recent comprehensive investigation into the operation of the SIS reveals that the vast majority of entries relating to persons are made under Article 96 SIA. As of 31 December 1999, there were 9.7 million entries in the SIS, with 8.4 million relating to objects, such as stolen cars and documents under Article 100 SIA, and 1.3 million entries relating to persons.¹⁵¹ A third of the latter were 'aliases' (most of which were entered by Germany apparently in pursuance of a policy to enter possible alternative spellings of names).¹⁵²

Of the entries relating to persons, 764,851 concerned persons to be refused entry under Article 96 SIA. When the aliases are disregarded, the figures reveal that 89% of all entries relating to persons were made under Article 96 SIA.¹⁵³

As Guild pertinently observes, the basis of this system is national law and not a harmonised conception of who may be entered in the SIS:

The principle at work is cross-recognition in a rather pure form. The constraints on who may be inserted are exclusively those which apply at national level.

¹⁵⁰ Guild (2001:1), above, Introduction n. 1, at p. 24.

¹⁵¹ See *The Schengen Information System: A human rights audit*, above n. 54, at p. 17.

¹⁵² *Ibid.*

¹⁵³ *Ibid.* at p. 18.

¹⁵⁴ Guild (2001:1), above, Introduction n. 1, at p. 23. See also Hailbronner, above n. 53, at p. 150, who observes with regard to Art. 96(2) SIA that this provision leaves Schengen States a wide margin of appreciation concerning the determination of grounds for reporting in the SIS. Moreover, he argues, *ibid.*, that the reference to 'national security' in Art. 96(2) SIA 'indicates that national concepts of 'security' shall be recognised at the European level rather than superseded by a uniform European approach'.

¹⁵⁵ For an early view, see e.g. Steenbergen, above n. 61, at p. 67: 'The wording of Article 96 [SIA] is concrete but non-committal and allows the Parties every opportunity to maintain their own criteria. That means that an alien may be reported as an unwanted person in one State whereas in another State and on the same grounds the alien cannot be so listed'. See also Hailbronner, above n. 53, at p. 151, who also recognises this possibility.

¹⁵⁶ See the cases of *Hamssaoui* (No. 198344) and *Forabosco* (No. 190384), discussed in E Guild, 'Adjudicating Schengen: National Judicial Control in France' (1999) 1 *European Journal of Migration and Law* 419–439.

¹⁵⁷ Guild (2001:1), above, Introduction n. 1, at p. 25.

¹⁵⁸ Emphasis added.

¹⁵⁹ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals, OJ 2001 L 149/34.

¹⁶⁰ K Groenendijk, 'The Directive on Mutual Recognition of Expulsion Decisions: Symbolic or Unbalanced Politics?' (August 2001, unpublished paper).

There is no attempt to restrict or harmonise what is permissible at national level. But what ever happens at that level is then to be recognised as valid by other states. Indeed, all aspects of the system are based on cross-recognition of the laws and practices of other Member States.¹⁵⁴

Such a system has serious implications for the operation of the non-discrimination principle since third-country nationals in analogous situations are likely to be treated differently for SIS reporting purposes depending on the Member State in which they find themselves.¹⁵⁵ The concern has since been confirmed in practice by judicial decisions at the national level, particularly in France where SIS entries made by German authorities were challenged before the courts by two third-country nationals who were refused visas to come to France on the basis of these entries. In both cases, the *Conseil d'Etat* quashed the refusal decisions because neither litigant was provided with sufficient information to challenge the entry.¹⁵⁶ The German entries in the SIS were made because the individuals concerned had previously applied for asylum in Germany and their claims had been rejected. This approach is in conformity with the strong perception in Germany that rejected asylum-seekers are essentially foreigners abusing the asylum system and thus constitute a security threat to the cohesion of German public opinion, a perspective other Member States have difficulty accommodating.¹⁵⁷

The criticisms in respect of the application of the entry condition in Article 5(1)(d) SIA can also be directed at the 'catch-all' entry condition in Article 5(1)(e) SIA, which, when read with Article 15 SIA, allows for the refusal of a visa if the person concerned is considered a threat to 'public policy, national security or the international relations of any of the Contracting Parties'.¹⁵⁸ The concerns relating to the cross-recognition approach in respect of the criteria applied to refuse the issue of a uniform visa under the Schengen Implementing Agreement and accompanying measures, and which clearly undermine the equal treatment principle, are mirrored elsewhere in the EU's treatment of vulnerable groups of third-country nationals. In May 2001, the Council adopted a Directive on the mutual recognition of expulsion decisions,¹⁵⁹ which applies to most third-country nationals. This measure has been criticised on account of the inherent risks contained in the mutual recognition approach to the protection of important human rights and freedoms.¹⁶⁰

Another major instrument that operates on a similar basis is the Dublin Convention determining state responsibility for examining asylum applications, which effectively requires Member States to recognise the negative decisions reached under each other's asylum determination systems even though the Geneva Convention refugee definition is not applied in the same way in all Member States with the result that serious abuses of the non-*refoulement* principle may occur. This approach has been recognised by the European Court of Human Rights as a potential violation of Article 3 of the ECHR¹⁶¹ and has been successfully challenged at the national level in respect of the differences that exist between certain Member States on the question whether persecution by non-state agents falls within the Geneva Convention refugee definition.¹⁶² Although frequently not articulated in this way, discrimination between third-country nationals lies at the heart of the cross or mutual recognition exercise and it is difficult to see what reasons can be advanced for the differences in treatment short of deterring third-country nationals from entering the EU. This contention is reinforced when considered in the light of the attempts by the Court of Justice to develop Community-wide conceptions of public policy in relation to the entry and

expulsion of EU citizens. A related issue and of particular relevance to the question of justifying discrimination is that cross recognition of the public policy or national security conceptions of Member States is inevitably problematic in terms of legal challenges and remedies, which an individual affected by a negative decision may seek to access, largely on account of the lack of adequate information as reflected in the French jurisprudence on the SIS.¹⁶³ This concern hardly accords with the rule of law component of the proportionality principle, which is of such critical importance to justifying differences in treatment and restrictions on rights.

GROUP 4

Airport transit visa nationals

Third-country nationals who require an airport transit visa (ATV) are subject to the most stringent EU visa rules. Although these are persons who are not even travelling to the EU territory, but are merely passing through an international airport located in a EU Member State, they are considered to fall within a 'high-risk' category of persons who first must possess an ATV before they can begin their journey. The Common Consular Instructions define the purpose of an airport transit visa as follows:

This visa entitles aliens who are required to have such a visa, to pass through the international transit area of airports, without actually entering the national territory of the country concerned, during a stop-over or transfer between two sections of an international flight. The requirement to have this visa is an exception to the general right to transit without a visa through the abovementioned international transit area.¹⁶⁴

Annex III of the Consular Instructions lists 12 countries from which nationals (and persons possessing travel documents issued by the authorities of these countries) must possess an ATV: Afghanistan, Bangladesh, Congo (Democratic Republic), Eritrea, Ethiopia, Ghana, Iraq, Iran, Sri Lanka, Nigeria, Pakistan, and Somalia. Persons who hold a residence permit of one of the EEA countries or other specified countries, such as Canada, Switzerland and the United States, which guarantees an unqualified right of return, are not required to obtain an ATV. The Consular Instructions are rather cryptic as to the reasons why these special visas have to be issued. The only clue is found in Annex 13 containing guidelines on how to complete visa-stickers in which four different examples of ATVs are illustrated (single entry, dual entry (return), dual entry (valid in several

¹⁶¹ Eur. Ct. HR admissibility decision of 7 March 2000, Application 43844/98, *TI v United Kingdom*, reproduced in (2000) 12 *International Journal of Refugee Law* 244.

¹⁶² *R v Secretary of State, ex parte Adan; R v Secretary of State, ex parte Aitseguer* [2001] All ER 593. The Commission has proposed the adoption of harmonised rules in this area. See European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, COM (2001) 510 final of 12 September 2001, at p. 44 (draft Art. 9).

¹⁶³ A group of expert academics recommends that individuals refused a visa or admission based on an entry in the SIS, 'should be entitled to written notification of this fact, including the name and address of the authority for review of that entry, together with a standard form request for deletion of the entry'. See Academic Group on Immigration – Tampere (AGIT), 'Efficient, Effective and Encompassing Approaches to a European Immigration and Asylum Policy' (9 June 1999) (mimeo) at p.18, para. 16(c).

¹⁶⁴ Common Consular Instructions, above n. 42, Ch. 1, point 2.1.1. The right of transit through international zones of airports without a visa is found in Annex 9 of the Chicago Convention on International Civil Aviation (Chicago, 7 December 1944, International Civil Aviation Organisation (ICAO) Doc. 7300/6, 7th ed. 1997; entry into force 4 April 1947), although states may make exceptions to this general principle in the form of a transit visa and on notification of the ICAO.

countries) and multi-entry ATVs) and where it is underlined that 'only nationals of certain 'sensitive' countries are subject to an ATV'. Further clues are found in a Joint Action on airport transit arrangements adopted in 1996 by the JHA Council in the pre-Amsterdam era of intergovernmental cooperation,¹⁶⁵ in which the principal reason identified for the imposition of this additional visa requirement is the particular risk of illegal immigration posed by persons from these countries:

Whereas the air route, particularly when it involves applications for entry or *de facto* entry, in the course of airport transit, represents a significant way with a view in particular to illegally taking up residence within the territory of the Member States; whereas improvements should be sought in controlling that route.¹⁶⁶

The conditions the applicant has to satisfy in order to obtain an ATV are essentially the same as those that have to be met in order to be issued with another uniform visa, although the Joint Action obliges Member States' consular services to exercise particular vigilance in issuing an ATV by ensuring that 'there is no security risk or risk of illegal immigration', that the application for an ATV is justified on the basis of the documents submitted by the applicant, and that these documents guarantee entry into the final state of destination, which is to be determined in particular by the presentation of a visa for entry into that country.¹⁶⁷

The Joint Action lists the same countries as those enumerated in Annex III of the Consular Instructions, with the exception of Bangladesh and Pakistan, which have since been added. The legal base of the Joint Action was challenged before the Court of Justice by the Commission, which argued that it should have been adopted as a Community measure under former Article 100c of the EC Treaty rather than as a former third pillar instrument because it involved the crossing of an external border. The Court, however, agreed with the Council ruling that an ATV did not involve the crossing of the EU external border since it required the holders to remain in the transit area of the airport without

crossing a border control-point and consequently the adoption of a Community measure under Article 100c was unnecessary.¹⁶⁸

Given the stringent restrictions imposed by ATVs on the movement of nationals from the listed countries and the additional vigilance required of consular officials in the issue of ATVs, very good reasons would arguably have to be advanced for the significant difference in treatment between this category of third-country nationals and other categories. In the discrimination context, the appropriate comparator in this instance constitutes all those third-country nationals who do not need an ATV to pass through the international airport of a Member State when travelling to a third country. As in respect of the countries on the negative visa list, the reasons why the particular countries listed are subject to an ATV requirement are provided in a general manner and are not specific to the country concerned. Indeed, as noted above, the reason relating to a particular risk of illegally taking up residence is only identified in the Joint Action, which is a non-Community instrument, and not in what now constitutes the principal Community measure, i.e. the Consular Instructions. In the absence of an adequate justification for imposing an ATV requirement, the only other explanation that can be posited is that the countries concerned are significant producers of asylum-seekers. While this explanation has also been advanced in respect of other countries on the negative visa list, it is particularly pertinent in respect of countries the nationals of which require an ATV. The status of international transit zones at airports in relation to the right to seek asylum was considered by the European Court of Human Rights in *Amuur v France*, which was concerned with the illegal detention of asylum-seekers in the international transit zone of Paris-Orly airport, and where the Court underlined that such zones, despite their name, did not have extraterritorial status.¹⁶⁹ Therefore, even though the Court of Justice has ruled that possession of an ATV does not involve the crossing of the EU external border, the jurisdiction of the Member State is nonetheless engaged in respect of a person who claims asylum in the transit area of an international airport on its territory. In the figures on asylum applications published by the UNHCR for 1999 and 2000, five of the 'ATV countries' were in the top 10 countries of origin of asylum applicants in Europe in both years and three of these countries (Afghanistan, Iraq

¹⁶⁵ JHA Council Joint Action of 4 March 1996 on airport transit arrangements, OJ 1996 L 63/8.

¹⁶⁶ *Ibid.*, Recital 4.

¹⁶⁷ *Ibid.*, Art. 2(2), second indent.

¹⁶⁸ Case C-170/96, *Commission v Council (airport transit visas)* [1998] ECR I-3655.

¹⁶⁹ *Amuur v France* (1996) 22 EHRR 533, para. 52.

and Iran) were in second, third and fourth place respectively in 2000 behind Yugoslavia.¹⁷⁰ Moreover, asylum applicants from these three countries are also more likely to be recognised as refugees in Member States even though the recognition rates differ considerably from country to country.¹⁷¹ This evidence, therefore, seems to contradict to a significant extent the apparent official reasoning that the ATV requirement is only imposed on those countries perceived as constituting a high risk for illegal immigration.

GROUP 5

Third-country nationals of one nationality singled out for different treatment on the basis of race, ethnic origin or religion

There are no EU rules currently in force singling out third-country nationals of one nationality for different treatment on the basis of their race, ethnic or national origin or religion, although examples from the law and practice of one Member State have already been alluded to

¹⁷⁰ UNHCR, *Asylum Applications submitted in Europe, 2000* (UNHCR, January 2001) at p. 5 (Table 4). The other 'ATV countries' in the top ten countries of origin of asylum applicants were Sri Lanka and Somalia. *Ibid.*

¹⁷¹ See Guild (2001:1), above, Introduction n. 1, at p. 56.

¹⁷² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12.

¹⁷³ No such decision has been adopted to date, although on 20 September 2001 the JHA Council requested the Commission, in consultation with Member States, 'to examine the scope for provisional application of the Council Directive on temporary protection in case special protection arrangements are required within the European Union' to respond to the risk of large-scale population movements in the light of the terrorist attacks on the United States on 11 September 2001. See Council Doc. 12156/01 (25 September 2001), para. 30.

¹⁷⁴ Council Directive 2001/55/EC, above n. 172, Arts. 5(2)(a) and 5(3)(a) respectively.

¹⁷⁵ European Commission, *Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, COM (2000) 303 final of 24 May 2000 at p. 35 (Art. 15 of the draft Directive). The Explanatory Memorandum, *ibid.* at p. 20, justified this provision in recognition of the fact that 'within the target group specified in the decision introducing temporary protection, there may be persons of different race, ethnic origin, nationality, religion and beliefs'.

where such rules are currently in operation. Such distinctions, however, might possibly be undertaken in respect of a Community measure recently adopted under Title IV EC, namely the Council Directive on minimum standards for affording temporary protection to displaced persons.¹⁷² Temporary protection on a EU-wide level is triggered under the Directive once the Council adopts a Decision under Article 5 establishing the existence of a mass influx of displaced persons. This Decision is to be adopted by a qualified majority on a proposal from the Commission, which is also responsible for examining a request by a Member State that it submit a proposal to the Council.¹⁷³ Both the Commission's proposal and the Council's Decision shall include at least, *inter alia*, 'a description of the specific groups of persons to whom the temporary protection will apply [applies]'.¹⁷⁴ The Directive defines 'displaced persons' in Article 2(c) as *inter alia* 'third-country nationals or stateless persons who have had to leave their country or region of origin...and are unable to return in safe and durable conditions because of the situation prevailing in that country'. Although the definition essentially focuses on nationality, it is by no means inconceivable that the choice of national group might well be defined by reference to its race, ethnicity, national origins or religion, particularly if the reasons for its members seeking protection flow from persecution or ill-treatment on the basis of these characteristics. An obvious example of such a group of third-country nationals would be the Kosovar Albanians (possessing Yugoslav nationality) fleeing 'ethnic cleansing' in Kosovo in 1999. The draft Directive's earlier emphasis on the principle of non-discrimination seems to have been diluted during the negotiations leading up to its adoption. In the Commission's original proposal, an anti-discrimination provision was included in the draft Directive: 'The Member States shall implement their obligations under Articles 8 to 14 [Obligations of the Member States towards persons enjoying temporary protection] without discriminating between persons enjoying temporary protection, on ground of sex, race, ethnic origin, nationality, religion or convictions, or on handicap, age or sexual orientation'.¹⁷⁵ In the Directive as adopted, however, the only reference to discrimination is found in Recital 16 of the Preamble, which cites the international obligations of Member States: 'With respect to the treatment of persons enjoying temporary protection under this Directive, the Member States are bound by obligations under instruments of

international law to which they are party and which prohibit discrimination'. In this regard, it is worth noting that Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (see Chapter 3) declares:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

In accordance with this provision, therefore, EU Member States would be able to grant more favourable treatment by establishing a special temporary protection regime within their territories. Special care would have to be taken, however, to ensure that the relevant Commission proposals and eventual Council Decision do not make unjustifiable distinctions between certain 'eligible' groups of third-country nationals. The same argument can be advanced in respect of individual Member States' measures extending temporary protection to additional categories of displaced persons over and above those to whom the Council Decision applies, which is expressly permitted by Article 7 of the Directive.¹⁷⁶

¹⁷⁶ In accordance with Art. 7, temporary protection can only be extended by individual Member States to additional categories of displaced persons 'where they are displaced for the same reasons and from the same country or region of origin'. Moreover, the Council and Commission are to be notified immediately of such national measures.

The Community non-discrimination principle and its potential application to the EU rules on borders and visas

The principle of equal treatment or non-discrimination is frequently heralded as being of fundamental importance to Community law, although it is also recognised that such assertions are 'largely rhetorical' given the selective relevance of this principle to only certain areas of Community law.¹ In contrast to the general prohibitions on discrimination laid down in international human rights instruments, discussed in Chapter 3, the scope of the Community principle, until recently, had been relatively narrow in terms of the grounds protected, since it only outlawed discrimination on the grounds of nationality and sex.² Moreover, it applied in a limited material context to prohibit discrimination in those areas in which

the Community had competence, which were mainly connected with the exercise of economic activity.³ With regard to non-discrimination based on nationality, it was generally accepted before the entry into force of the Treaty of Amsterdam (on 1 May 1999) that only EU citizens came within its scope, although sex discrimination is outlawed in respect of all working men and women within the EU without distinction, including third-country nationals.⁴ The changes introduced by the Amsterdam Treaty in extending the competence of the Community and in broadening the ambit of the non-discrimination principle, both in terms of its personal scope and its reach beyond sex and nationality discrimination, constitute the focus of this chapter, which examines the possible application of these changes to the EU rules concerning the entry of third-country nationals into EU territory.

A central question is whether new Community norms prohibiting non-discrimination can be applied to the EU rules on borders and visas outlined in Chapter 1. As discussed below, however, these norms contain a number of important exceptions and omissions, which, if interpreted too broadly, are unlikely to be of much assistance to third-country nationals, particularly when they apply for a visa in a EU Member State consulate or present themselves at the EU external border. Moreover, the existence of these exceptions and omissions demonstrates clearly that Member States recognise that they are making explicit distinctions on the basis of nationality and arguably also that they are acutely aware that immigration control activities are particularly susceptible to discrimination on the grounds of race, ethnic or national origin or religion.

¹ G de Búrca, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London: Sweet and Maxwell, 1997) 13–34, at pp. 13–14.

² Formerly Arts. 7 and 119 EEC and currently Arts. 6 and 141 EC.

³ For nationality discrimination, see the freedom of movements provisions discussed in the section on Article 12 EC below. With regard to sex discrimination, Art. 119 EEC originally applied only to equal pay and the equal treatment principle was extended to other aspects of employment by virtue of the general enabling provision in Art. 235 EEC (now Art. 308 EC) in the form of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39/40. Art. 141(3) EC now mandates the Council to 'adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation...'

⁴ European Commission, *Communication on the social situation and employment of migrant women*, COM (88) 743 final, cited by M Bell, 'The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?' (1999) 6 *Maastricht Journal of European and Comparative Law* 5–23, at p. 20.

It is argued that such exceptions and omissions are drawn far too widely and thus risk undermining the commitments Member States have made under international human rights law to guarantee the right to equal treatment and non-discrimination. These commitments constitute the focus of Chapter 3.

Article 12 EC

Non-discrimination on the grounds of nationality is at the heart of the Community enterprise, as is reflected in Article 12 EC (formerly Article 6 EC and Article 7 EEC), which is located in Part I of the EC Treaty entitled 'Principles':

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Article 12 EC has been assessed by the European Court of Justice as 'merely a specific

enunciation of the general principle of equality which is one of the fundamental principles of Community law. That principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified'.⁵ Although Article 12 EC does not grant an independent right to non-discrimination, since the treatment complained of must fall within the scope of Community law, its reach is potentially broad:

No right granted by another article of the EC Treaty can be granted independently by Article [12 EC]. However the Article can be used independently to bar Member States from discriminating in fields mentioned by the Treaty, but for which the Treaty does not provide an explicit bar on discrimination.⁶

The inclusion of the general prohibition of discrimination on the ground of nationality in Article 7 of the original Treaty of Rome (the EEC Treaty) was an essential step in fulfilling an important objective of the Treaty, namely ensuring the equal treatment of Member State nationals exercising their freedom of movement rights for the purpose of taking up employment activity, establishment or the provision of services.⁷ More specifically, with regard to free movement of workers, the prohibition of discrimination is found in Article 39(2) EC: '[F]reedom of movement [for workers] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. Although this provision does not specify that the term 'workers of the Member States' excludes third-country nationals resident and employed in these states, its exclusive application to Community nationals was confirmed by the secondary legislation implementing the free movement of workers provisions in the form of Regulation 1612/68/EEC⁸ and, considerably later, by the European Court of Justice.⁹

Similar non-discrimination clauses are found in Article 4 of the Agreement on the European Economic Area (EEA)¹⁰ and Article 9 of the EEC–Turkey Association Agreement.¹¹ The latter provision prohibits 'any discrimination on grounds of nationality... in accordance with the principle laid down in Article 7 of the Treaty establishing the Community [now Article 12 EC]'. Before the adoption of the Treaty of Amsterdam, it was accepted by Member State governments that Article 12 EC, despite its apparently broad prohibition of 'any discrimination on grounds

⁵ Joined Cases 103 and 145/77, *Royal Scholten v IBAP* [1978] ECR 2037, paras. 26–27, cited by S O'Leary, 'The Principle of Equal Treatment on Grounds of Nationality in Article 6 EC: A lucrative source of rights for Member State nationals?' in *The Principle of Equal Treatment in EC Law*, above ch. 2 n. 1, 105–136, at p. 105.

⁶ S Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 *Common Market Law Review* 7–50, at p. 18.

⁷ See Arts. 39(2), 43 and 49–50 EC respectively. For an absorbing account of the development of the concept of discrimination in Community law with particular reference to discrimination on the grounds of nationality and the free movement of workers, see E Guild, *Immigration Law in the European Community* (The Hague: Kluwer, 2001) at pp. 37–61.

⁸ Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community, OJ Sp. Ed. 1968–69, 475, OJ 1968 L 257/2.

⁹ *Ayowemi*, above ch. 1 n. 33, para. 29: 'A national of a non-member country... may not effectively rely on the rules governing the free movement of persons which, in accordance with settled case-law, apply only to a national of a Member State...'. See also Guild and Peers, above ch. 1 n. 35, at pp. 271 and 276. In an earlier case, Advocate General Mancini had no doubt as to the limited personal scope of this provision: '[T]he workers referred to in Article 48 [Article 39 EC] must be Community citizens. That article itself confirms it. In any event, there is no doubt that the authors of the Treaties... intended to limit freedom of movement to citizens of the Member States...'. See Case 238/83, *Caisse d'Allocations Familiales v Meade* [1984] ECR 2631 at p. 2641.

¹⁰ OJ 1994 L 1/1.

¹¹ EEC–Turkey Association Agreement (1963) and Protocol (1970), OJ 1973 C 113/1.

of nationality', applied only in the context of ensuring equal treatment between EU citizens.¹² It is arguable, however, that this position has since changed with the entry into force of the Amsterdam Treaty amendments in May 1999 for two reasons.

First, the terms 'the scope of application of this Treaty' in Article 12 EC must now of course include Title IV of Part Three of the EC Treaty, by virtue of which the Community has acquired the legal competence to adopt measures on third-country nationals in the areas of immigration and asylum:

[W]ith the new competences of the Community inserted into the EC Treaty by the Amsterdam Treaty..., it is arguable that the non-discrimination principle now applies in those fields. In this sense the scope has been widened. Indeed, the Amsterdam Treaty's amendments to the EC Treaty could, potentially at least, change the meaning of the ground of prohibited discrimination – nationality.¹³

While the very inclusion of Title IV EC implies that full equality between EU nationals and third-country nationals is not envisaged,¹⁴ this does not necessarily preclude the application of Article 12 EC, particularly in the context of distinctions that are made between the different groups of third-country nationals

identified in Chapter 1.¹⁵ Furthermore, it is also arguable that Article 63(3)(a) EC, which specifically mandates the Community to adopt measures on immigration policy with regard to, *inter alia*, 'conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion', requires the Community to adopt legislation that does not discriminate on the grounds of nationality.¹⁶ The Community has not only imposed suspect distinctions between groups of third-country nationals in the context of their entry into the EU, as reflected in the divergent rules on borders and visas analysed in Chapter 1, but differentiations regarding their treatment while legally resident and employed in the EU territory have also been in place for some time. This treatment can vary significantly depending on whether the person concerned is a family member of an EU citizen working in another Member State, an EEA national (of Iceland, Norway or Liechtenstein), or a national of one of the countries (in particular Turkey, a country of the Maghreb region or Central and Eastern Europe), which has entered into an Association Agreement with the EU and its Member States. These agreements protect third-country nationals resident and employed or established within the territory of an EU Member State from discrimination in the fields of employment and social security. In this connection, Mark Bell argues: '[A] first step in reducing nationality discrimination would be to provide all third-country nationals with a common minimum level of protection. This would not only be more equal, it would also render the law more coherent and transparent.'¹⁷

The second reason for viewing Article 12 EC in a broader context is that in addition to Title IV EC, there are other parts of the EC Treaty, which are clearly applicable to third-country nationals. Free movement of persons is one of the fundamental freedoms upon which the European Communities is based and is viewed as an integral part of the single internal market. Article 14(2) EC declares: 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'¹⁸ When the Single European Act originally inserted this provision into the EC Treaty,¹⁹ the United Kingdom in particular contended that free movement of persons applied only to EU nationals.

¹² See also J Niessen, 'The Further Development of European Anti-Discrimination Policies' in I. Chopin and J Niessen (eds), *The Starting Line and the Incorporation of the Racial Equality Directive in the National Laws of the EU Member States and Accession States* (Brussels/London: Migration Policy Group and Commission for Racial Equality, March 2001) 7–21, at p. 8.

¹³ Guild (2001:2), above ch. 2 n. 7, at p. 44. See also Jan Niessen of the Brussels-based Migration Policy Group, above ch. 2 n. 12, at p. 7, who writes: '[T]he inclusion of Title IV extended the scope of the EC Treaty which may lead to a reinterpretation of Article 12 [EC]'. See also the view of Mark Bell: 'Admittedly, Article 12 EC has not been previously deployed to deal with discrimination against (or between) third country nationals. However, the language employed in Article 12 EC is sufficiently open to facilitate its application to third-country nationals in the context of the EC Treaty's extended material scope following the Treaty of Amsterdam'. M Bell, 'Meeting the Challenge? A Comparison between the EU Racial Equality Directive and the Starting Line' in *The Starting Line and the Incorporation of the Racial Equality Directive in the National Laws of the EU Member States and Accession States*, above ch. 2 n. 12, 22–54, at p. 54.

¹⁴ I am grateful to Professor Kees Groenendijk for bringing this point to my attention.

¹⁵ See also Niessen, above ch. 2 n. 12, at p. 9.

¹⁶ Cf. Bell (2001:2), above ch. 2 n. 13, at pp. 53–54.

¹⁷ *Ibid.* at p. 53.

¹⁸ See also Art. 3(c) EC.

¹⁹ OJ 1987 L 169/1.

This standpoint is no longer tenable after the adoption of the Amsterdam Treaty and the integration of the Schengen *acquis*, the rationale of which is the abolition of internal border controls between the 13 participating EU Member States.²⁰ In this regard, Article 62(1) EC mandates the Council to adopt 'measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, *be they citizens of the Union or nationals of third countries*, when crossing internal borders'.²¹

²⁰ For a discussion of this rationale and its place in Community and EU structures, see J Monar, 'The Impact of Schengen on Justice and Home Affairs in the European Union: An Assessment on the Threshold to its Incorporation' in *Schengen Still Going Strong: Evaluation and Update*, above ch. 1 n. 78, 21–35 at pp. 26–30.

²¹ Emphasis added.

²² Art. 137(3) EC, fourth indent.

²³ OJ 2000 C 364/1.

²⁴ Art. 21(2) reads: 'Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited'. For a discussion on this point, see S Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' (2001) 3 *European Journal of Migration and Law* 141–169 at pp. 162–163.

²⁵ Peers, *ibid.* at p. 144. According to Peers, the derogations in the final chapter of the Charter may well hamper its development, if it became legally binding, as a liberal instrument for protecting human rights. However, irrespective of whether it becomes legally binding and how it is interpreted, it is still likely to be significant for the protection of migrants: '[A] more ambitious reading suggests that the Charter, if legally binding, would create or expand rights protection in certain important fields, particularly for migrants. In particular this would be relevant as regards access to employment, equality in working conditions, the right to asylum, non-discrimination on grounds of nationality, access to social security, and access to remedies and a fair trial... [E]ven if the Charter does not become formally legally binding, or becomes legally binding in its current form but is interpreted conservatively, it could still have an impact on migration issues. The Charter is significant simply for recognising a number of migration-related rights in international instruments...'. *Ibid.* at pp. 166–167.

²⁶ For a discussion of the developments leading up to the adoption of Article 13 EC, see M Bell and L Waddington, 'The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article' (1996) 25 *Industrial Law Journal* 320–336.

²⁷ On Art. 13 EC generally, see European Parliament, Directorate General for Research, Working Paper, *Prospects for an Anti-Discrimination Policy: Potential for Implementing Article 13 of the Treaty Establishing the European Community* (Doc. SOCI 105 EN 4–2000); L Flynn, 'The Implications of Article 13 EC – After Amsterdam, will Some Forms of Discrimination be More Equal than Others' (1999) 36 *Common Market Law Review* 1127–1152; Bell (1999), above ch. 2 n. 4.

Furthermore, Title XI on Social policy, education, vocational training and youth of Part Three of the EC Treaty obliges the Council to act unanimously in the areas of, *inter alia*, 'conditions of employment for third-country nationals legally residing in Community territory'.²² Therefore, this is another area in which general Community measures removing discrimination on the basis of nationality might be adopted. Given these additional parts of the EC Treaty where Community competence extends to third-country nationals and where it is also not too difficult to see the adoption of measures removing discrimination on the ground of nationality, to contend that Article 12 EC can in no way apply to this group of persons is somewhat premature. Moreover, the EU Charter of Fundamental Rights, proclaimed solemnly at the European Council in Nice on 7 December 2000, supports this broader approach.²³ Article 12 EC is essentially reiterated in Article 21(2) of the Charter, although, importantly, the scope of the application of the non-discrimination principle is also expressly extended to the Treaty on European Union.²⁴ The Charter is not legally binding, but by virtue of a Declaration attached to the Treaty of Nice (the latest amendment to the EC and EU Treaties, but not yet in force) the legal status of the Charter is due to be considered at the next intergovernmental conference in 2004. Despite its non-legally binding nature, the Charter may nevertheless have an impact on the development of Community law depending on the willingness of the Court of Justice to consider it as a source of human rights forming part of the general principles of Community law and of EU institutions to refer to it in the adoption of legislation.²⁵

Article 13 EC

The insertion of a more comprehensive non-discrimination clause in the EC Treaty was a significant development at the Intergovernmental Conference (IGC),²⁶ which concluded with the adoption of the Treaty on Amsterdam and the insertion of Article 13 EC:²⁷

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

While the inclusion of this provision has been generally welcomed, it contains a number of inherent limitations.²⁸ The first part of this provision indicates that its scope is limited to that of Community law and therefore it differs little from Article 12 EC.²⁹ However, in contrast to the prohibition of discrimination on grounds of nationality in Article 12 EC and the principle of equal pay for equal work between men and women in Article 141 EC, Article 13 EC only empowers the Council to act (by unanimity) and therefore would not seem to confer direct effect:³⁰

[T]here was no support amongst the Member States for a directly effective provision, and it is most unlikely that Article 13 EC will be interpreted as being capable of having direct effect. The absence of direct effect is ensured, effectively, by the most remarkable feature of Article 13 EC, namely, that it sets out no substantive norm whatsoever in relation to discrimination. Discrimination relating to its six protected statuses is implicitly condemned, insofar as such behaviour merits, in the appropriate circumstances, action to be taken in order to 'combat' it. By contrast, in other Treaty provisions, which deal with discrimination on grounds of nationality and of sex, discrimination is explicitly condemned.³¹

Moreover, the list of grounds of prohibited discrimination, in contrast to the non-discrimination provisions in international human rights instruments discussed in Chapter 3, would appear to be exhaustive³² and thus does not extend to discrimination based on nationality.

²⁸ See also Niessen, above ch. 2 n. 12, at pp. 9–10.

²⁹ Guild (2001:2), above ch. 2 n. 7, at p. 45.

³⁰ See also *Report on EU Proposals to Combat Discrimination*, above, Introduction n. 21, para. 29 and Bell (1999) above ch. 2 n. 4, at p. 8.

³¹ Flynn, above ch. 2 n. 27, at pp. 1132–1133.

³² See Flynn, *ibid.* at p. 1150: 'The scope for...arguments [that certain statuses fall within the scope of the protection of Article 13 EC in their own right although they are not enumerated therein] has been severely reduced by the wording of Article 13 EC. Unlike equivalent provisions in national and international instruments on discrimination which use phrases such as 'including' or 'amongst other grounds', it sets out its six statuses in apparently exhaustive fashion.'

³³ *Report on EU Proposals to Combat Discrimination*, above, Introduction n. 21, para. 15.

³⁴ See Tyson, above, Introduction n. 22, at p. 218.

³⁵ Racial Equality Directive, above, Introduction n. 16.

³⁶ Framework Directive, above, Introduction n. 17.

³⁷ I Chopin, 'Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European Union and Non-Governmental Proposals' (2001) 2 *European Journal of Migration and Law* 413–430 at p. 429.

However, in evaluating the Commission's two proposals under Article 13 EC, the United Kingdom House of Lords Select Committee on the EU took the optimistic view that this list 'is neither comprehensive nor final: it simply represents the political consensus that the Member States managed to achieve in 1997'.³³ This position is certainly borne out by the broader non-discrimination provision in Article 21(1) of the EU Charter of Fundamental Rights, which lists a more comprehensive set of non-exhaustive grounds:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

As noted in the Introduction, the Council has already taken action to adopt Commission proposals for two Community measures implementing Article 13 EC. Their speedy adoption was prompted by the political developments in Austria and the electoral success of Jörg Haider's Freedom Party, which led to its inclusion in the Austrian Government.³⁴ The first measure is concerned with the general prohibition of discrimination based on racial or ethnic origin (Racial Equality Directive),³⁵ whereas the second is a Framework Directive outlawing discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation.³⁶ The following section focuses on the potential application of the Racial Equality Directive to third-country nationals, and in particular the possibility of its application to the operation of the border and visa rules in Title IV EC.

Racial Equality Directive

The Racial Equality Directive entered into force on 19 July 2000 and is to be implemented by the Member States within three years, i.e. no later than 19 July 2003. While the Directive's adoption has rightly been heralded as an 'enormous step forward in the fight against racism and xenophobia',³⁷ its direct impact on the treatment of third-country nationals in the field of immigration control is likely to be nominal, largely as a result of the measure's limited material scope. Although the draft Directive held out considerable promise for the protection of the right of third country nationals to be free from discrimination, its substantive

content in this regard was watered down by the Council on adoption. These drafting changes are quite significant in revealing the fears of Member States that their immigration control activities might be particularly susceptible to challenges on the basis that they discriminate on the grounds of nationality, race, ethnic or national origin and religion.

At first glance, the scope of the Directive in terms of persons protected and fields of activity covered appears promisingly broad. Article 3, which is entitled 'scope', begins: 'Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies...'. From this initial cursory reading, therefore, third-country nationals and immigration functions would be covered by the measure. However, the Directive then contains a number of pertinent exceptions and is also characterised by significant omissions, which undermine such an optimistic viewpoint considerably.

Unlike the Framework Directive, which prohibits discrimination in employment and occupation on the grounds of, *inter alia*, religion or belief,³⁸ the Racial Equality Directive, which is broader in material scope since it applies to the employment area as well as other areas (see below), is limited to combating discrimination on the grounds of racial or ethnic origin.³⁹ Consequently, distinctions based on religion or belief and nationality are not expressly the subject of the Racial Equality Directive, unless, as discussed below, such distinctions can be demonstrated to constitute indirect racial

discrimination. Although the Directive clarifies in the Preamble that third-country nationals are indeed covered, differences based on nationality are to be excluded from its application. Moreover, the Directive excludes important elements of Member States' admission policies concerning third-country nationals, which also find an important Community space in Title IV EC:

[The] prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.⁴⁰

This exclusion of nationality discrimination and admission policies from the scope of the Directive is confirmed in Article 3(2) of the Directive:

This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Both of these measures are also reiterated in the Framework Directive.⁴¹ However, Article 3(2) seems more extensive than the corresponding preambular provision since it extends beyond immigration controls and other areas relating to admission, such as residence and access to employment conditions, to '*any treatment arising from the legal status of third-country nationals...*'⁴² Article 3(2) has been assessed as follows:

The main difficulty which arises with Article 3(2) lies in the final clause. The exclusion of rules regarding entry is broadly in keeping with the existing case law of the Court of Justice on the rights of third-country national workers under the bilateral agreements with the European Union. Whilst these may give rise to directly effective individual rights to equal treatment in areas such as social security and employment, these rights to non-discrimination do not alter the control of the state over the initial decision on whether to admit the individual to their territory, and what form of residence/work permit to grant. However, the Directive also excludes from its scope '*any treatment which arises from the legal status of the third-country nationals*', which appears to go beyond safeguarding national discretion in immigration law.⁴³

It is worth noting at this juncture that there was no equivalent of Article 3(2) in either the Commission's original or amended proposal for the

³⁸ Framework Directive, above, Introduction n. 17, Art. 1.

³⁹ These terms are not defined in the Racial Equality Directive, an observation that can also be raised in respect of the Framework Directive. See the *Report on EU Proposals to Combat Discrimination*, above, Introduction n. 21, para. 61: 'The lack of definitions of key concepts [aside from the concepts of direct and indirect discrimination] is one of the most striking features of the... Directives. The grounds of discrimination ('racial or ethnic origin', 'disability', and so on) are not defined...'

⁴⁰ Preamble, Recital 13.

⁴¹ Framework Directive, above, Introduction n. 17, Preamble, Recital 10 and Art. 3(2).

⁴² Emphasis added.

⁴³ Bell (2001:2), above ch. 2 n. 13, at p. 30, citing C-262/96, *Sürül v Bundesanstalt für Arbeit* [1999] ECR I-2685, C-416/96, *El-Yassini v Secretary of State for the Home Department* [1999] ECR I-1209, and C-37/98, *R v Secretary of State for the Home Department, ex parte Savas*, judgment of 11 May 2000.

Racial Equality Directive, although an abbreviated version of the wording in the preambular paragraph excluding nationality discrimination was included.⁴⁴ Article 3(2) appears to have been inserted during the Council's deliberations to allay the fears of some Member States that their immigration rules regulating access to employment or access to social benefits for third-country nationals might be subject to challenge under the Directive.⁴⁵ However, it is contended that Article 3(2) cannot apply to the differential treatment of third-country nationals where this also constitutes indirect racial discrimination, which is defined in Article 2(2)(b) (cited in the Introduction). In this regard, Mark Bell writes:

On a literal reading, Article 3(2) would seem to block any protection against nationality discrimination. However, where such treatment is also indirect racial discrimination a potential conflict arises between Article 3(2) and Article 2(2)(b) in the Directive. Article 3(2) is best understood as protecting differences in treatment in law which are linked to citizenship/residential status from allegations of unlawful discrimination. Consequently, it should not be extended to unfair treatment by employers of third-country nationals where this is not linked to their immigration status, and would otherwise be unlawful indirect discrimination.⁴⁶

44 The relevant wording in both proposals was the same: '[The] prohibition of discrimination should also apply to nationals of third countries. This prohibition does not apply to differences of treatment based on nationality'. See respectively European Commission, *Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, COM (1999) 566 final of 25 November 1999 [hereinafter *Commission Proposal for the Racial Equality Directive*] at p. 13 (Recital 10) and European Commission, *Amended Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, COM (2000) 328 final of 31 May 2000 [hereinafter *Commission Amended Proposal for the Racial Equality Directive*] at p. 6 (Recital 10).

45 See respectively Bell (2001:2), above, ch. 2 n. 13, at p. 31, citing Council Documents 7756/00 SOC 138 JAI 38 (Brussels, 19 April 2000) and 8857/00 SOC 201 JAI 58 (Brussels, 24 May 2000), and Tyson, above, Introduction n. 22, at p. 209.

46 Bell, *ibid.* at p. 31.

47 Tyson, above, Introduction n. 22, at p. 209.

48 Bell (2001:2), above ch. 2 n. 13, at p. 32.

49 Flynn, above ch. 2 n. 27, at p. 1135.

50 European Parliament legislative resolution on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 18 May 2000 (having regard to Report A5-0136/2000) [hereinafter *European Parliament Resolution on the Racial Equality Directive*], Amendment 29 (*ibid.* at p. 17). This wording was also added to the Preamble, Amendment 15 (*ibid.* at p. 11).

Although this argument is confined to the employment context, it is strongly submitted that Article 3(2) should not be used to sanction *any* form of indirect discrimination against third-country nationals on the basis of their race or ethnic origin. Although there is evidence to suggest that some Member States were concerned that the Directive might interfere with their asylum determination systems, which are required to draw differences based on ethnic origin in those cases where asylum-seekers claim to have been persecuted in their country of origin on this ground,⁴⁷ it is important to be wary of such reasoning especially in the light of the history leading up to the adoption in the United Kingdom of the controversial Ministerial authorisation under the Race Relations (Amendment) Act 2000, which was discussed in the Introduction. Clearly, this is an area where clarification from the Court of Justice will be urgently required given that, as one commentator observes, 'the language employed in the Directive is rather loose and ambiguous on this issue'.⁴⁸ Although the removal of Article 3(2) would be the best solution, if retained it should be given a narrow interpretation by the Court of Justice to ensure that any measures adopted and implemented under Title IV EC do not discriminate directly or indirectly on the grounds of race and ethnic origin. Otherwise, the view expressed at the time of the inclusion of Article 13 EC that it would apply to the new EC Treaty competences, including those relating to the area of freedom, security and justice under Title IV EC, would ring embarrassingly hollow.⁴⁹

Nonetheless, the legislative history of the Racial Equality Directive reveals that Member States were well aware in particular of the potential overlapping of nationality and indirect racial discrimination and attempted to ensure that references to this problematic connection were excluded from the final version. On examining the Commission's original proposal, the European Parliament added a new provision to the definition of discrimination in Article 2: 'Discrimination on the basis of racial or ethnic origin which is presented as a difference in treatment on the grounds of religion, conviction or nationality is deemed to be discrimination...'.⁵⁰ This amendment was justified as follows:

This amendment seeks to prevent religion, conviction, belief or nationality from being recognised as a spurious argument for permitting discrimination

on grounds of race or ethnic origin, but without including religion, conviction, belief or nationality as grounds in the Directive.⁵¹

The Commission took this amendment into account when revising its original proposal, although it only chose to add similar wording to the provisions in the draft Directive concerned with information, both in the Preamble and the main text, in order, as it stated in its Explanatory Memorandum, to 'tackle the problem of differences of treatment based on nationality, religion or belief being a disguised form of discrimination on grounds of racial or ethnic origin'.⁵² Consequently, Article 10, entitled 'Dissemination of information', was amended to read in paragraph 2:

Member States shall ensure that competent public authorities are informed by appropriate means as regards all national measures taken pursuant to this Directive. They shall in particular stress the need to ensure that differences of treatment based on nationality, religion or belief are not a disguised form of discrimination on grounds of racial or ethnic origin.⁵³

As one Commission official observed, the inclusion of such a provision 'would to some extent have filled the gap in the directive left by its inability to prohibit discrimination based directly on nationality'.⁵⁴ Unfortunately, the

Council rejected this proposal and the Directive was adopted devoid of any references to the possibility of distinctions based on nationality or religion masking racial or ethnic discrimination.

Whereas discrimination on the basis of religion or nationality may well disguise indirect discrimination on the basis of racial or ethnic origin and thus come within the ambit of the Racial Equality Directive, it remains very questionable, as noted earlier, whether the material scope of the Directive actually extends to the actions of immigration officials or 'immigration functions'. Article 3(1) of the Directive applies 'as regards both the public and private sectors, including public bodies' in relation to the specified areas listed. Indeed, the Commission added this wording in response to amendments suggested by the European Parliament so as to avoid any ambiguity in this respect.⁵⁵ However, the list that follows is not open-ended and the only area within which immigration activities or functions might conceivably fall is 'access to and supply of goods and services which are available to the public...' in Article 3(1)(h). With reference to the original Starting Line Group proposal, which expressly identified 'the exercise of its functions by any public body' as an area in which discrimination should be outlawed, Bell concludes that 'there is no protection against racial discrimination in the administration of immigration controls ...', which he identifies as 'a particularly notable omission given the competence of the Community for immigration and asylum policy since the Treaty of Amsterdam'.⁵⁶ Similarly, the UK House of Lords Select Committee on the EU conceded that 'the public functions of immigration officers are unlikely to fall within the material scope of the race Directive',⁵⁷ although it also considered it appropriate to underline that 'the right to non-discrimination is a fundamental human right and any limitation to this right must be clearly justified'.⁵⁸ This omission from the original draft Directive was also of concern to the European Parliament, which recommended an extension of Article 3(1) to include: 'The exercise of its functions by any public body, including police, immigration, criminal and civil justice authorities',⁵⁹ a recommendation that was not taken on board by the Commission in drafting its amended proposal for the Directive. It is open, however, for the Court of Justice to interpret 'services' broadly to include 'immigration services'

⁵¹ *Ibid.* at p. 17. In its Explanatory Statement to the resolution, *ibid.* at p. 36, the European Parliament argued with respect to nationality discrimination: 'Discrimination on grounds of nationality must not be used as a covert form of discrimination on grounds of race or ethnic origin. It is quite conceivable, for example, that a refusal to rent accommodation to Turks or Moroccans could be a test case for this directive.'

⁵² *Commission Amended Proposal for the Racial Equality Directive*, above ch. 2 n. 44, at p. 2 (Explanatory Memorandum).

⁵³ *Ibid.* at p. 10. This provision was essentially reproduced in Recital 16 of the Preamble of the Commission's amended proposal for the Directive. *Ibid.* at p. 6.

⁵⁴ Tyson, above, Introduction n. 22, at p. 215.

⁵⁵ *Commission Amended Proposal for the Racial Equality Directive*, above ch. 2 n. 44, at p. 2 (Explanatory Memorandum).

⁵⁶ Bell (2001:2), above ch. 2 n. 13, at p. 37.

⁵⁷ *Report on EU Proposals to Combat Discrimination*, above, Introduction n. 21, para. 104. The Select Committee, *ibid.*, also noted the '[UK] Government's wish to secure a specific exemption in relation to immigration functions'.

⁵⁸ *Ibid.*

⁵⁹ *European Parliament Resolution on the Racial Equality Directive*, above ch. 2 n. 50, Amendment 37 (at p. 20). This amendment was justified by the European Parliament, *ibid.*, as follows: 'Ethnic minorities often suffer discrimination when they come in contact with the police and judicial and immigration authorities. These forms of discrimination therefore need to be covered by this Directive.'

as they are known in a number of Member States. It would appear that the intention was to go beyond the limited transnational understanding of services in Article 50 EC⁶⁰ where services are defined as being 'normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.⁶¹ Consequently, the Court of Justice should not be precluded from adopting a more expansive approach in outlining the parameters of the material scope of the Directive. Indeed, even the narrower definition of services should apply to the visa-issuing process given that the issue of a 'Schengen uniform visa' is subject to the payment of a fee.⁶²

Assuming that the material scope of the Directive can be interpreted broadly to encompass immigration functions and where it can be shown that distinctions based on nationality in fact mask indirect discrimination on the grounds of racial or ethnic origin, such discrimination, according to Article 2(2)(b) of the Directive, can still be objectively justified 'by a legitimate aim and [if] the means of achieving that aim are appropriate and necessary'. This wording is rather different to that in the Commission's proposal, where the objective justification by a legitimate aim also had to be 'unrelated to

the racial or ethnic origin of a person or group of persons'.⁶³ With reference to similar wording in the proposal of the Starting Line Group,⁶⁴ Bell contends that 'naturally, it is to be anticipated that judicial authorities will accept that an aim specifically related to racial or ethnic origin could not be legitimate for the purposes of justifying discrimination'.⁶⁵ It is important that such an interpretation is adopted by the courts as otherwise the risk would exist that apparently neutral immigration measures or practices, such as the application of the EU rules on external border checks, which on their face treat all third-country nationals equally but which might place persons of a particular racial or ethnic background at a disadvantage, could be justified by reference to a negative immigration characteristic attributed to the racial or ethnic group in question.

The exclusion of religious and nationality discrimination from the scope of the Directive, the unwillingness of the Council to expressly protect third-country nationals from distinctions purportedly based on nationality from constituting indirect discrimination on the grounds of racial and ethnic origin and the failure to explicitly identify immigration authorities as public bodies the actions of which are covered by the material scope of the Directive, are unfortunate developments in the overall context of combating discrimination against third-country nationals in the EU. Despite these omens, however, a broad judicial interpretation of the Directive, as argued above, is justified given that Article 13 EC has been identified 'as one of several amendments to the EC and EU Treaties intended to give the protection of human rights a more secure foundation'.⁶⁶ In the light of Article 6 of the Treaty on European Union, which views respect for human rights as a cornerstone of the EU,⁶⁷ and the recently proclaimed Charter of Fundamental Rights, any other interpretation would be an anathema to the progress that has been made by the EU in this area. Although the Racial Equality Directive includes a 'non-regression' clause enabling Member States to adopt or maintain more positive measures and ensuring that they do not reduce the protection against discrimination already afforded,⁶⁸ only concerted action at the EU level to remedy the omissions identified is acceptable given that the decisions of immigration authorities in 13 Member States are taken on the basis of common EU border and visa rules. Moreover, such action would also send a clear signal of the importance

⁶⁰ Tyson, above, Introduction n. 22, at pp. 208–209.

⁶¹ Art. 50 EC goes on to state that 'services' shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions'.

⁶² See Common Consular Instructions, above ch. 1 n. 42, Annex 12.

⁶³ *Commission Proposal for the Racial Equality Directive*, above ch. 2 n. 44, at p. 15.

⁶⁴ The original proposal is reproduced in A Dummett, 'The Starting Line: a proposal for a draft Council Directive concerning the elimination of racial discrimination' (1994) 20 *New Community*, pp. 530–538. Cited by Bell (2001:2), above ch. 2 n. 13, at p. 22 (note 4).

⁶⁵ Bell, *ibid.* at p. 26.

⁶⁶ Flynn, above, ch. 2 n. 27, at p. 1127.

⁶⁷ Arts. 6(1) and (2) read: '1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.... 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

⁶⁸ Art. 6. See also Art. 8 of the Framework Directive, above, Introduction n. 17.

of a universal application of the non-discrimination principle in keeping with the general international human rights commitments discussed in Chapter 3.

The shortcomings in the Racial Equality Directive identified above are hardly in keeping with the commitment to combat racism, xenophobia and intolerance and the importance of the adoption of legal measures, which the Commission underlined in its original proposal for the Directive:

The fight against racism is a major concern of the international community and has been at the heart of international cooperation in recent decades.

Europe's experiences of wars and conflicts throughout the 20th century – and even at its close – have brought to the fore the dangers of racism and the dramatic attacks on human dignity that have ensued. Yet, at the end of the century, racial discrimination is still not eradicated from everyday life in Europe.

It is widely acknowledged that legal measures are of paramount importance for combating racism and intolerance. The law not only protects victims and gives them a remedy, but also demonstrates society's firm opposition to racism and the genuine commitment of the authorities to curb discrimination. The enforcement of anti-racist laws can have a significant effect on the shaping of attitudes.⁶⁹

⁶⁹ *Commission Proposal for the Racial Equality Directive*, above ch. 2 n. 44, at p. 2 (Explanatory Memorandum). See also *European Parliament Resolution on the Racial Equality Directive*, above ch. 2 n. 50, Explanatory Statement (at p. 34).

⁷⁰ See *Commission Proposal for the Racial Equality Directive*, above ch. 2 n. 44, at pp. 2–3 (Explanatory Memorandum) and *European Parliament Resolution on the Racial Equality Directive*, above ch. 2 n. 50, Explanatory Statement (at p. 34). Some of the principal measures and activities include: the Joint Declaration against racism and xenophobia, adopted by the Council, Commission and Parliament on 11 June 1986, OJ 1986 C 158/1; the Declaration on principles governing external aspects of migration policy, adopted by the European Council at its summit in Edinburgh on 11–12 December 1992, in which it underlined the need to reinforce the fight against racism and xenophobia, *EC Bulletin*, 12–1991, point I.19; the Council Joint Action of 15 July 1996 concerning action to combat racism and xenophobia, OJ 1996 L 185/5; the Resolution of the Council and Member States' governments of 23 July 1996 proclaiming 1997 European Year against Racism, OJ 1996 C 237/1; a Commission Communication containing an Action Plan on the Fight against Racism, COM (1998) 183 final of 25 March 1998; and the establishment of the European Monitoring Centre on Racism and Xenophobia. The European Council at its summit in Florence in June 1996 approved the establishment of the Centre. See Presidency Conclusions, *EU Bulletin*, 6–1996, point I.5.

⁷¹ Tampere European Council: Presidency Conclusions, 16 October 1999, *Bull. EU 10–1999*, para. 18.

⁷² *Ibid.*, para. 21.

⁷³ COM (2001) 127 final of 13 March 2001.

Article 13 EC and the Racial Equality Directive are the culmination of numerous 'soft law' measures and activities, adopted by Community institutions in the last 20 or so years, which are documented in the Explanatory Memorandum to the Commission's original proposal and the Explanatory Statement to the European Parliament's legislative resolution on the draft Directive.⁷⁰ The evidence of this Community-wide commitment to the principle of non-discrimination on the basis of race and related grounds, however, becomes rather less impressive when juxtaposed with the results achieved in securing equitable treatment for third-country nationals legally residing within EU Member States. After the entry into force of the Amsterdam Treaty and the extension of Community legal competence to third-country nationals, particularly as expounded in Article 63(3)(a) EC discussed above, the Tampere European Council Presidency Conclusions underscored the need to secure the equitable treatment of third-country nationals legally resident in the EU:

The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.⁷¹

In this connection, the Tampere Conclusions proposed that '[a] person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens.'⁷² In response to this recommendation, in March 2001 the Commission published a proposal, with its legal base in Article 63(3)(a) EC, for a Council Directive concerning the status of third-country nationals who are long-term residents,⁷³ which is currently under consideration in the Council. In setting out a generally positive set of rights to be afforded third-country nationals who are long-term residents, the draft Directive also includes an extensive non-discrimination provision in Article 4:

The Member States shall give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.⁷⁴

In its Explanatory Memorandum, the Commission clarifies that this provision 'obliges the Member States to enforce the principle of non-discrimination when implementing the obligations imposed by the Directive' and also that it is in accordance with Article 21 of the EU Charter of Fundamental Rights.⁷⁵ Standard anti-discrimination clauses, purportedly in accordance with the principle of 'mainstreaming' equality,⁷⁶ are now being inserted in a number of the Commission's legislative proposals under Title IV EC. However, contrary to the Commission's assertions, the approach has not been uniform. In some proposals these provisions differ,⁷⁷ while other proposals are devoid of non-discrimination clauses.⁷⁸

The draft Directive on the status of third-country nationals who are long-term residents also contains a substantive equality provision in Article 12 granting this group of third-country nationals equal treatment with nationals in a number of key areas concerning their status in the country of residence: access to employment and self-employed activity; education and

vocational training; recognition of qualifications; social protection, including social security and health care; social assistance; social and tax benefits; access to goods and services and the supply of goods and services made available to the public, including housing; freedom of association; and free access to the entire territory of the Member State concerned. Article 13 also guarantees long-term residents comparable protection with EU nationals against expulsion. If the Council adopts this Directive and its substantive provisions are not watered down greatly in the process, the legal status of third-country nationals who are long-term residents in the EU will improve considerably vis-à-vis EU Member State nationals. It is contended that the adoption of this Directive would strengthen the case for applying the non-discrimination principle to third-country nationals at the EU external border, whether this be at the physical border or at the 'extended' border in the consulates. Otherwise, a serious disjunction would be created between the aim of protecting third-country nationals residing within the EU territory against discrimination by both private and public bodies on the grounds of race and ethnic origin and the complete absence of such protection at the EU external border of Member States, irrespective of where this border is to be found.

⁷⁴ *Ibid.* at p. 31.

⁷⁵ *Ibid.* at p. 14.

⁷⁶ Mainstreaming equality has been defined as follows: 'Mainstreaming demands the integration of the equality perspective into all aspects of law making. At its most basic, it is simply the principle that equality must be taken into account whatever the subject matter under consideration.' See Bell (2001:1), above ch. 1 n. 55, at p. 21.

⁷⁷ For example, the Commission proposal on asylum procedures contains the following anti-discrimination clause in Art. 41: 'Member States shall apply the provisions of this Directive to applicants for asylum without discrimination as to sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation or country of origin'. European Commission, *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, COM (2000) 578 final of 20 September 2000 at p. 48. This would preclude unjustifiable differential treatment of applicants in the asylum process based on the country of their nationality or habitual residence. I am indebted to Mark Bell for bringing this provision to my attention.

⁷⁸ See e.g. the Commission's *Proposal for a Council Directive on the right to family reunification* (COM (1999) of 638 final of 1 December 1999) and the amended proposal (COM (2000) 624 final of 10 October 2000).

The international human rights framework

The fundamental character and importance of the principle of non-discrimination is not in dispute. It is recognised as constituting customary international law and also as the cornerstone of international human rights law:

[The] principle of non-discrimination...is the reverse formulation of the principle of equality and one of the most – if not the most – fundamental human rights...Non-discrimination is primarily a legal technique employed to counteract unjustified inequality, founded on the idea that a State may not legitimately disadvantage an individual on an arbitrary basis. Non-discrimination and equality constitute nowadays basic and essential principles relating to the protection of human rights.

¹ United Nations, Economic and Social Council (ECOSOC), Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, *The concept and practice of affirmative action*, Preliminary report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission Resolution 1998/5, UN Doc. E/CN.4/Sub.2/2000/11 (19 June 2000), paras. 42 and 43.

² International Covenant on Civil and Political Rights, 16 December 1966; 999 UNTS 171; entry into force 23 March 1976.

³ Human Rights Committee (HRC), 37th Session, 1989, General Comment No. 18 on Non-discrimination, para. 1, reproduced in UN, *International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.5 (26 April 2001) [hereinafter *Compilation of General Comments and General Recommendations*], pp. 134–137.

⁴ Charter of the United Nations, 26 June 1945; entry into force 24 October 1945, Arts. 1(3) and 55(c).

⁵ Universal Declaration of Human Rights, GA Res. 217A (III) of 10 December 1948, Arts. 1 and 2(1).

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965; 660 UNTS 195; entry into force 4 January 1969.

⁷ Convention on the Elimination of All Forms of Discrimination against Women; GA Res. 34/180 of 18 December 1979; entry into force 3 September 1981.

Consequently, they have also become principles of customary international law. Extensive support for this view is to be found in various authoritative international instruments proclaiming the principle of non-discrimination...¹

The Human Rights Committee, which is responsible for monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR),² observes: 'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.'³ The non-discrimination principle is a central norm of the UN Charter⁴ and is articulated clearly in the Universal Declaration of Human Rights (UDHR)⁵ and all international human rights treaties. Indeed, two such treaties are specifically devoted to the protection of persons from discrimination, namely the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁶ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁷ A list of the main non-discrimination provisions in these instruments as well as others is reproduced in Annex 1 to this report.

Non-discrimination is also a universal principle protecting all human beings regardless of citizenship or nationality or legal status. Therefore, the enjoyment of the right to be free from discrimination is not confined to the citizens of a state, but must also be protected in respect of all those persons who come within the state's jurisdiction. Consequently, the scope of this principle should clearly encompass those third-country nationals who are required to apply for a visa to enter a EU Member State in the consulate of that state or another Member State

as well those third-country nationals who are turned away at the EU external border irrespective of whether they require a visa to enter. Moreover, it would also apply to third-country nationals in transit through a EU Member State, whether this amounts to transit through the actual territory of that state or an international airport. Although non-discrimination provisions in international human rights instruments do not actually specify 'nationality' as a prohibited ground of discrimination, they are nonetheless phrased in open-ended and non-exhaustive language.

However, it is also clear that not all differences or distinctions in treatment will amount to discrimination. The various monitoring bodies and judicial organs supervising the conformity of state action with international human rights law broadly agree that only distinctions, which are arbitrary or cannot be justified objectively, will constitute discrimination. Moreover, the

⁸ The arguments in this chapter build on earlier arguments advanced in R Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997) at pp. 47–65.

⁹ European Convention on Human Rights, 4 November 1950, *European Treaty Series* No. 5; entry into force 3 September 1953.

¹⁰ See Annex II.

¹¹ Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1976, 999 UNTS 171; entry into force 23 March 1976. From the EU, EEA and EU candidate countries, only Turkey and the United Kingdom have not ratified the Optional Protocol as of 22 October 2001. See Annex II.

¹² Declaration regarding Article 14 of the ICERD (competence of the Committee on the Elimination of Racial Discrimination to receive communications from individuals); entry into force 3 December 1982. The following EU, EEA and EU candidate countries have *not* made a Declaration under Article 14 as of 9 October 2001: Austria, Estonia, Greece, Latvia, Liechtenstein, Lithuania, Romania, Turkey and the United Kingdom. See Annex II.

¹³ Emphasis added.

¹⁴ See also Art. 2(1) of the Universal Declaration of Human Rights: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The *travaux préparatoires* reveal that the words 'of any kind, such as' were added to underline that the prohibited grounds listed were not exhaustive. See S Skogly, 'Article 2' in A Eide *et al.*, (eds), *The Universal Declaration of Human Rights: A Commentary* (Oslo; Scandinavian University Press, 1992) 57 at p. 62, citing UN Doc. E/CN.4/52.

¹⁵ M Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at p. 486.

pursuit of legitimate societal aims by the state will not save certain activities from discrimination, if the means adopted to fulfil or further these aims are disproportionate.

This chapter focuses on the operation of the principle of non-discrimination in three major international human rights treaties:⁸ the ICCPR, the ICERD and the European Convention on Human Rights (ECHR).⁹ The first two instruments are of universal application and have been ratified by all the EU Member States, the three EEA countries, as well as by the 13 EU candidate countries, with the exception of Turkey, which has only signed both.¹⁰ Moreover, many of these countries have accepted the individual complaints mechanisms by ratifying the Optional Protocol to the ICCPR¹¹ or making a Declaration under Article 14 of the ICERD.¹² The third is the principal instrument protecting human rights in Europe and has been accepted by all these states. The non-discrimination norms in these instruments are of sufficiently broad scope to scrutinise the distinctions adopted by the EU in respect of its border and visa controls. The overall contention of this chapter is that there remains a significant gap between the commitments EU Member States have made to the principle of non-discrimination in international human rights law and the implementation of this principle in practice, as this pertains to distinctions adopted between nationals and non-nationals and particularly between groups of non-nationals. These distinctions also risk discriminating indirectly against certain non-nationals defined by reference to their race, ethnic or national origins, or religion.

International Covenant on Civil and Political Rights

The ICCPR contains a non-discrimination provision in Article 2(1) by which: 'Each State Party... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*'.¹³ The emphasised terms demonstrate that this provision is open-ended and the prohibited grounds of discrimination are not exhaustive.¹⁴ Consequently, the provision is sufficiently flexible to encompass new grounds,¹⁵ including

nationality. Indeed, the universal personal scope of the ICCPR is underlined by the Human Rights Committee in its General Comment No. 15 on the position of aliens under the Covenant:

In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

Thus, the general rule is that each of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided in article 2 thereof. This guarantee applies to aliens and citizens alike.¹⁶

Although the Human Rights Committee recognises that some of the rights in the ICCPR are expressly applicable only to citizens, such as political rights in Article 25, or only apply to non-citizens, such as Article 13, which lays down safeguards against their expulsion,¹⁷ its universal application is not in dispute.¹⁸

The ICCPR is unique among universal international human rights instruments in that it contains a 'stand-alone' or substantive

equality clause. Article 26 declares that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law' adding that, in this respect, 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination' on the same grounds as those identified in Article 2(1). The Human Rights Committee clarifies the broader role of Article 26 in protecting persons against discrimination as follows:

While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact *in any field regulated and protected by public authorities*. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.¹⁹

This more expansive guarantee against discrimination is particularly relevant in the context of distinctions made between nationals and non-nationals as well as groups of non-nationals where the impugned actions cannot be connected to any of the rights in the ICCPR. Indeed, in *Gueye et al. v France*, the Human Rights Committee found that differences in treatment on the basis of nationality in respect of pension rights constituted discrimination and confirmed that discrimination based on nationality was prohibited with reference to the ground 'other status' in Article 26.²⁰ Moreover, the italicised wording suggests a very broad material scope for the operation of the non-discrimination principle encompassing immigration authorities.

Although a general right of entry is not recognised *per se* for non-nationals under the ICCPR, with the possible exception of long-term or permanent residents who have established 'close and enduring connections' to the country concerned,²¹ the Human Rights Committee

¹⁶ HRC, 27th Session, 1986, General Comment No. 15 on the position of aliens under the Covenant, paras. 1–2. See *Compilation of General Comments and General Recommendations*, above ch. 3 n. 3, pp. 127–129.

¹⁷ *Ibid.*, para. 2.

¹⁸ The only provision in the ICCPR, which appears to sanction nationality discrimination, is Art. 4(1), which allows States Parties to adopt measures derogating from their obligations under the ICCPR (with the exception of those fundamental rights listed in Art. 4(2)) 'in time of public emergency which threatens the life of the nation...to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination *solely* on the ground of race, colour, sex, language, religion or social origin'. Emphasis added.

¹⁹ General Comment No. 18 on Non-discrimination, above ch. 3 n. 3, para. 12. Emphasis added. See also the Committee's views in the following individual communications under the Optional Protocol to the ICCPR: No. 172/1984, *Broeks v Netherlands*, UN Doc. CCPR/C/29/D/172/1984 (9 April 1987); No. 180/1994, *Danning v Netherlands*, UN Doc. CCPR/C/29/D/180/1984 (9 April 1987); and No. 182/1984, *Zwaan de Vries v Netherlands*, UN Doc. CCPR/C/29/D/182/1984 (9 April 1987).

²⁰ Case 196/1985, *Gueye et al. v France*, cited in M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: NP Engel, 1993) at p. 51, para. 44.

²¹ See HRC, 67th Session, 1999, General Comment No. 27 on Article 12 (Freedom of Movement), para. 20 regarding the state obligation not to arbitrarily deprive anyone of 'the right to enter his own country' in Article 12(4). See *Compilation of General Comments and General Recommendations*, above ch. 3 n. 3, pp. 163–168.

observes clearly that the right to be free from discrimination is one of a number of rights that might be adversely affected in relation to entry thus triggering protection:

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.²²

Indeed, the question of entry was directly at issue in the *Mauritian Women* opinion,²³ where the applicants claimed that the immigration law of Mauritius, which granted automatic residence rights to foreign women who married Mauritian men but which did not do so in respect of foreign men who married Mauritian women, discriminated against women on the ground of sex in violation of Articles 2(1) and 3.²⁴ While the Human Rights Committee stated that there was no right for foreigners to enter Mauritius, it agreed that the law unjustifiably discriminated against women and also found that there was a violation of Article 17(1), which stipulates that 'no one shall be subjected to arbitrary or unlawful interference with [*inter alia*]... his [or her] family...'

Finally, although the Committee does not explicitly distinguish between direct and indirect discrimination in its General Comment No. 18 on non-discrimination, it defines discrimination for the purpose of the ICCPR as follows:

²² General Comment No. 15 on the position of aliens under the Covenant, above ch. 3 n. 16, para. 5.

²³ See Communication 35/1978, *Shirin Aumeeruddy-Cziffra et al. v Mauritius*, UN Doc. A/36/40, Annex XIII (9 April 1981).

²⁴ Article 3 reads: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'

²⁵ General Comment No. 18 on Non-discrimination, above ch. 3 n. 3, para. 7. Emphasis added. See also UN General Assembly, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Preparatory Committee, 2nd Session, Geneva, 21 May–1 June 2001, *Contribution of the Human Rights Committee to the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc. A/CONF.189/PC.2/14 (13 March 2001) at p. 3, para. 10.

²⁶ General Comment No. 18 on Non-discrimination, above ch. 3 n. 3, para. 6.

²⁷ *Ibid.* para. 13.

the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁵

The Human Rights Committee also refers to the definitions of discrimination in Article 1 of both the ICERD and the CEDAW, which include distinctions that have a discriminatory effect²⁶ and, as discussed below in relation to the ICERD, which are considered by the bodies responsible for monitoring the compliance of State Parties with these instruments, to encompass indirect discrimination. However, the Committee underlines that certain distinctions and differences in treatment can be justified under controlled circumstances or conditions: 'Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.²⁷

International Convention on the Elimination of All Forms of Racial Discrimination

Racial discrimination is defined in Article 1(1) of the ICERD as follows:

In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The Committee on the Elimination of Racial Discrimination (CERD), established under the ICERD to supervise the implementation of the instrument by States Parties, has clearly underlined in a General Recommendation on Article 1(1) that this definition also extends to indirect discrimination:

A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by article 2, paragraph 1(c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination....

In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.²⁸

However, Article 1(1) is followed by two problematic provisions, which at first glance, appear to be detrimental to extending the protective ambit of the ICERD to non-nationals:

- 2 This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
- 3 Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

The position has been clarified somewhat by CERD in a General Recommendation on non-citizens, adopted in 1993. While conceding that

²⁸ CERD, 42nd Session, 1993, General Recommendation XIV on article 1, paragraph 1, of the Convention, paras. 1 and 2 respectively. See *Compilation of General Comments and General Recommendations*, above ch. 3 n. 3, pp. 183–184.

²⁹ CERD, 42nd Session, 1993, General Recommendation XI on non-citizens, para. 1. See *Compilation of General Comments and General Recommendations*, above ch. 3 n. 3, p. 182.

³⁰ *Ibid.* para. 2.

³¹ M Banton, *International Action against Racial Discrimination* (Oxford: Clarendon Press, 1996) at p. 193.

³² General Recommendation XI on non-citizens, above ch. 3 n. 21, para. 3.

³³ *Ibid.*, para. 1.

³⁴ In this regard, see a survey of CERD and State reporting practices indicating that the cultural rights of foreign workers are clearly a relevant issue under the ICERD. R Cholewinski, 'The Racial Discrimination Convention and the Protection of Cultural and Linguistic Ethnic Minorities' (1991) *Revue de droit international* 157, at pp. 185–187.

³⁵ See the following Communications: 1/1984, *A Yilmaz-Dogan v The Netherlands*, UN Doc. A/43/18, Annex IV, 59–64 (10 August 1988); 2/1989, *Demba Talibe Diop v France*, UN Doc. CERD/C/39/D/2/1989 (10 May 1991); 4/1991, *LK v Netherlands*, UN Doc. CERD/C/42/D/4/1991 (16 March 1993); 5/1994, *CP v Denmark*, UN Doc. CERD/C/46/D/5/1994 (15 March 1995) (admissibility); 10/1997, *Ziad Ben Ahmed Habassi v Denmark*, UN Doc. CERD/C/54/D/10/1997 (6 April 1999).

³⁶ See ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51st Session, *The rights of non-citizens*, Working Paper submitted by Mr David Weissbrodt in accordance with Sub-Commission Decision 1998/103, UN Doc. E/CN.4/Sub.2/1999/7 (31 May 1999) [hereinafter *Working Paper on the rights of non-citizens*] paras. 15 and 36–44.

³⁷ UN Doc. A/50/18, paras. 83 and 101 respectively, cited in *Working Paper on the rights of non-citizens*, *ibid.* para. 43.

Article 1(2) 'excepts from this definition actions by a State party which differentiate between citizens and non-citizens',²⁹ CERD has nonetheless declared that the provision does not absolve 'States parties from any obligation to report on matters relating to legislation on foreigners'.³⁰ This statement was apparently aimed at those countries, particularly Germany, which maintained the position that there was no requirement under the ICERD, to report on measures to protect non-citizens from racial discrimination.³¹ Moreover, CERD added that the Article 1(2) 'must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the [UDHR, the ICESCR and the ICCPR]'.³² The exclusion of distinctions between citizens and non-citizens from the definition of racial discrimination in the ICERD, however, does not apply in respect of distinctions between groups of non-citizens as indicated in Article 1(3). Indeed, CERD has confirmed this provision 'qualifies' Article 1(2) 'by declaring that, among non-citizens, States parties may not discriminate against any particular nationality'.³³

The practice of CERD as well as State Parties reporting under the ICERD demonstrates that the adverse impact of Article 1(2) on non-nationals is not as significant as the wording might indicate and that discrimination against non-nationals or foreigners on account of their race or ethnic or national origin is a particular concern.³⁴ Several decisions delivered to date by CERD under the optional individual communications procedure, both on admissibility and the merits, have concerned complaints by non-citizens³⁵ and CERD has expressed its concern about discrimination against non-citizens in its concluding observations to States Parties.³⁶ Moreover, distinctions between EU citizens and third-country nationals have also been scrutinized. For example, on examining the report of Italy at its 46th Session in 1995, CERD expressed concern, in connection with Article 5 of the Convention (see below), that asylum legislation applicable to non-EU nationals might 'be more restrictive in matters relating to the status and employment of the people concerned than the ordinary Italian legislation in these areas' and about 'some cases involving the ill-treatment of foreigners of non-Community origin by police officers and prison staff'.³⁷ Indeed, concerns of this kind led CERD to request the UN Sub-Commission

on the Promotion and Protection of Human Rights to undertake a further investigation into differences in treatment between different groups of non-citizens:

In an increasing manner distinctions are being made between different categories of non-citizens (for instance in the law of the European Union). These distinctions may amount to total exclusion of persons, depriving them of the most fundamental rights and having racist implications. This raises questions from the perspective of the International Convention on the Elimination of All Forms of Racial Discrimination, in spite of article 1.2 of the Convention.³⁸

The Sub-Commission requested one of its members, Mr David Weissbrodt, to prepare a working paper on the rights of non-citizens and subsequently, at the request of the Commission on Human Rights and on the authorisation of ECOSOC, appointed him as Special Rapporteur to prepare a comprehensive study on the rights

of this group. In June 2001, Mr Weissbrodt presented his preliminary report on the rights of non-citizens in which he made the following recommendations in connection with the application of Article 1(2):

CERD should consider how to interpret article 1, paragraph 2, of the [ICERD], so as to avoid diminishing the protections for non-citizens under other human rights treaties and within the Convention itself. CERD should be encouraged to prepare a general recommendation on the rights of non-citizens....

CERD is correct in noting that 'distinctions are being made between different categories of non-citizens' (E/CN.4/Sub.2/1997/31, annex, p. 4) and that 'these distinctions may amount to total exclusion of persons, depriving them of the most fundamental rights and having racist implications' (ibid.) Such distinctions raise questions from the perspective of the Convention, in spite of article 2, paragraph 1, and this subject deserves further study in light of recent developments.³⁹

In addition to the above practice, overwhelmingly demonstrating the application of ICERD to non-citizens, support can also be gauged from the *travaux préparatoires*, which reveal that one of the principal objectives of the ICERD was the protection of both citizens and non-citizens from racial discrimination. Article 1(2) was included to appease those governments who feared that their acceptance of the ICERD would prevent them from withholding certain entitlements from non-citizens, such as political rights and the right to work.⁴⁰ This restrictive approach to the interpretation of Article 1(2) is supported by other commentators, who contend that it only enables states to continue to make historic differentiations between citizens and non-citizens as are reasonable under customary international law, such as in the field of political rights which have been traditionally withheld from non-citizens.⁴¹ On the basis of this argument, therefore, some of the rights listed in Article 5 of the ICERD to be guaranteed to everyone, 'without distinction as to race, colour, or national or ethnic origin' may be withheld from non-citizens, such as political rights in Article 5(c).⁴² Indeed, Article 1(2) has been applied in this context by CERD in its opinion in *Diop v France* holding that the refusal to admit a Senegalese national to the Bar on the ground that he was not a French citizen was permissible under the ICERD.⁴³ This approach has also been confirmed by CERD

³⁸ ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Session, *Note by the Secretariat*, UN Doc. E/CN.4/Sub.2/1997/31 (27 May 1997), Annex, p. 4 (Letter dated 19 March 1997 from the Chairman of the Committee on the Elimination of Racial Discrimination addressed to the Chairman of the forty-eighth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities).

³⁹ ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd Session, *The rights of non-citizens*, Preliminary Report of the Special Rapporteur, Mr David Weissbrodt, submitted in accordance with Sub-Commission Decision 2000/103 (Addendum), UN Doc. E/CN.4/Sub.2/2001/20/Add.1 (6 June 2001) at p. 35, paras. 197–198.

⁴⁰ See D Mahalic and JG Mahalic, 'The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' (1987) 9 *Human Rights Quarterly* 74–101, at pp. 75–76.

⁴¹ MS McDougal, HD Lasswell and L Chen, 'Protection of Aliens from Discrimination and World Public Order: Responsibility of States conjoined with Human Rights' (1976) 70 *American Journal of International Law* 432–469, at p. 461.

⁴² See *ibid.* and GS Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford: Oxford University Press, 1978) at p. 67.

⁴³ Communication 2/1989, *Demba Talibe Diop v France*, above ch. 3 n. 35, para. 6.6: 'This provision [of French law stipulating that no one may accede to the legal profession if he or she is not French] operates as a preference or distinction between citizens and non-citizens within the meaning of article 1, paragraph 2, of the Convention: the refusal to admit Mr Diop to the Bar was based on the fact that he was not of French nationality, not on any of the grounds enumerated in article 1, paragraph 1. The author's allegation relates to a situation in which the right to practice law exists only for French nationals, not to a situation in which this right has been granted in principle and may be generally invoked; accordingly, the Committee concludes that article 1, paragraph 1, has not been violated.'

in a General Recommendation on Article 5 adopted in 1996.⁴⁴ However, in accordance with Article 1(3), to make differentiations based on race, colour or national or ethnic origin in the granting of political rights to certain groups of non-citizens would clearly not be permissible without an objective justification. Although CERD underlines that the list of rights in Article 5 is not exhaustive,⁴⁵ in conformity with the position under the ICCPR discussed above, a right of entry for non-nationals cannot be envisaged. Nonetheless, rights are listed which may conceivably implicate entry into a country in a discriminatory context, such as ‘the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution’ and ‘the right to leave any country, including one’s own, and to return to one’s country’.⁴⁶ A right that is not listed expressly, but which is also relevant regarding the entry of non-nationals is the right to enjoy private and family life.⁴⁷

Although it would be correct to argue that immigration controls are another area where differentiations between citizens and non-citizens are permissible, the application of such controls on the basis of race, colour, ethnic or national origin, must also be subject to scrutiny under the ICERD. The possibility of the ICERD applying to the field of immigration was clearly

recognised by the United Kingdom in a reservation lodged at the time of its ratification of the instrument in March 1969:

[T]he United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provision of the Convention, and fully reserves its right to continue to apply those Acts.⁴⁸

The former Chairperson of CERD has argued in somewhat stark terms that Article 1(2) ‘shuts out any consideration of whether or not a state’s immigration laws are ‘racist’, though it leaves open the possibility of considering whether such laws are implemented in a racially discriminatory manner’.⁴⁹ Given that CERD has underlined that the definition of discrimination in Article 1(1) clearly encompasses indirect discrimination, distinctions on nationality, which nonetheless have ‘an unjustifiable disparate impact’ on persons belonging to certain racial or ethnic groups, would violate the ICERD. A recent example from CERD jurisprudence where distinctions based on nationality may mask discrimination on the grounds of ethnic or national origin is its recent opinion in *Habassi v Denmark*.⁵⁰ This case concerned a Tunisian national resident in Denmark who was refused a loan from a bank largely on the basis that he was not a Danish national. Although the Danish Government argued that distinctions on the basis of nationality were not covered by ICERD, it conceded that they could constitute discrimination on the grounds listed in Article 1(1):

[N]either the Act against Discrimination nor the Convention include nationality as an independent ground of discrimination. Against this background it must be assumed that discrimination against foreign nationals only violates the Act to the extent that it could be assimilated to discrimination on the basis of national origin or one of the other grounds listed in section 1(1).⁵¹

The Government contended that the information required by the bank concerning the applicant’s nationality pursued the legitimate aim of establishing the applicant’s ties with Denmark in order to assess the possibility of enforcement in the event that the creditor failed to repay the loan and was thus objectively justified. However, CERD disagreed:

Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.

44 CERD, 48th Session, 1996, General Recommendation XX on Article 5 of the Convention, para. 3: ‘Many of the rights and freedoms mentioned in Article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State; others such as the right to participate in elections, to vote and to stand for election are the rights of citizens’. See *Compilation of General Comments and General Recommendations*, above ch. 3 n. 3, pp. 188–189.

45 *Ibid.* para. 1.

46 See Arts. 5(b) and 5(d)(ii) respectively.

47 For example, in considering the report of the United Arab Emirates at its 47th Session in 1995, CERD inquired in respect of Article 5 ‘to what extent foreign workers... were entitled to have their children join them and to have them educated in their own language, and whether those children were free to practise their religion’. UN Doc. CERD/C/279/Add.1, para. 550, cited in *Working Paper on the rights of non-citizens*, above ch. 3 n. 36, para. 44.

48 Available from the website of the UN High Commissioner for Human Rights at http://www.unhcr.ch/html/menu3/b/treaty2_esp.htm

49 Banton (1996), above ch. 3 n. 31, at p. 193.

50 Communication 10/1997, *Habassi v Denmark*, above ch. 3 n. 35.

51 *Ibid.*, para. 7.4.

In the present case the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis-à-vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.⁵²

CERD concluded that the applicant had been denied an effective remedy within the meaning of Article 6 in connection with Article 2(1)(d), which imposes an obligation on each State Party to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'. While the circumstances of this case cannot be transposed easily to the situation of a third-country national denied a uniform visa at an EU consulate or denied entry into a Member State at the EU external border, this opinion demonstrates clearly that distinctions ostensibly based on nationality may constitute discrimination, whether direct or indirect, on grounds prohibited under the ICERD.

⁵² *Ibid.*, paras. 9.2–9.3.

⁵³ Emphasis added.

⁵⁴ Starmer, above, Introduction n. 29, at p. 50, para. 2.20 referring to *Mrs W v Ireland* (1983) 32 DR 211, para. 14. See also Applications 6780/74 and 6950/75, *Cyprus v Turkey* (1975) 2 DR 125 at pp. 136–137 (Eur. Comm. HR).

⁵⁵ *Piermont v France* (1995) 20 EHRR.

⁵⁶ *Ibid.*, para. 64.

⁵⁷ P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague: Kluwer, 1998) at p. 711.

European Convention on Human Rights

The ECHR does not differ from the ICCPR or the ICERD in that it applies to all persons within a State Party's jurisdiction regardless of nationality or legal status. Article 1 reads: 'The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section 1 of this Convention'.⁵³ The state's jurisdiction extends from its physical border to its embassies and consulates abroad:

Jurisdiction may extend beyond a state's national territory where a state exercises its authority abroad... [T]he authorised agents of the state, including diplomatic and consular agents, ...not only remain under its jurisdiction but bring any other person or property 'within the jurisdiction of the state' to the extent that they exercise power over such person or property.⁵⁴

As with the ICCPR, the ECHR also contains provisions specifically pertaining to non-nationals, such as procedural safeguards against the arbitrary expulsion of lawfully resident aliens (Protocol No. 7, Article 1), freedom of movement (Protocol No. 4, Article 2(1)), and the arrest and detention of illegal migrants (Article 5(1)(f)). A significant clause in this respect is Article 16, which declares: 'Nothing in Articles 10 [freedom of expression], 11 [freedom of assembly and association] and 14 [prohibition of discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens'. However, the term 'aliens' was interpreted restrictively by the European Court of Human Rights in *Piermont v France*,⁵⁵ where a German MEP was expelled from French Polynesia for participating in peaceful protests supporting independence for the colony and opposing the holding of French nuclear tests in the area. The Court found a violation of the right to freedom of expression in Article 10(1) and concluded that Article 16 could not be raised against the applicant because she was an EU national and a Member of the European Parliament in which people living in overseas territories could also participate through elections.⁵⁶

In contrast to Article 26 of the ICCPR, which is a free-standing equality provision, the ECHR does not guarantee an independent right to be free from discrimination. Consequently, it has been described as lagging behind developments at the global level.⁵⁷ The principle of non-discrimination in the ECHR is found in Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This clause is of limited scope because its application is dependent on a connection with the other rights listed in the ECHR. However, Article 14's dependency on other rights in the Convention is qualified in two respects.⁵⁸ First, a violation of Article 14 is possible where there is no infringement of a substantive right. In this sense, therefore, Article 14 has independent status 'to the extent that one need not show a breach of a substantive Article to engage Article 14'.⁵⁹ In an important immigration case under the ECHR, *Abdulaziz, Cabales and Balkandali v United Kingdom*⁶⁰ (discussed again below), rules favouring the entry of women to join their husbands settled in the United Kingdom were found to be in breach of Article 14 on the ground of sex in conjunction with Article 8, which protects the right to respect for private and family life. These rules, however, would not

have violated the ECHR if they had been applied equally to all entrants. Unfortunately, after this judgment was delivered, the United Kingdom government hardly distinguished itself by 'equalising down', i.e. by making it equally difficult for all spouses, irrespective of their sex, to join their settled partners in the country. The second qualification on Article 14's dependency on other rights in the ECHR is that discrimination can also arise if a State Party chooses to go beyond the minimum requirements of the ECHR by providing more favourable provision to certain groups of persons in a discriminatory manner.⁶¹

As indicated in the terms 'on any ground such as' and 'other status' in Article 14, the list of prohibited grounds is not exhaustive. Indeed, the European Court of Human Rights has interpreted 'other status' to encompass distinctions based on such grounds as sexual orientation, marital status, illegitimacy, status as a trade union, military status, conscientious objection, professional status and imprisonment.⁶² Nationality has also been recognised by the Court as a prohibited ground of discrimination. In *Gaygusuz v Austria*,⁶³ a Turkish national argued that the refusal of the authorities to pay an emergency advance on his pension, to which he had contributed through his employment, solely on the ground that he was not an Austrian national, was contrary to Article 14 taken in conjunction with Article 1 of the First Protocol to the ECHR concerned with the protection of property rights. Although the Court conceded that States parties enjoyed a certain margin of appreciation 'in assessing whether and to what extent differences in otherwise similar situations justify a different treatment', it concluded that 'very weighty reasons' would have to be advanced before the Court to justify distinctions based exclusively on the ground of nationality as compatible with the ECHR.⁶⁴

Unfortunately, Article 14 has received little attention in the Court's jurisprudence, with the result that the meaning of discrimination under the ECHR remains relatively under-developed. Indeed, the Court has only recently confirmed that the concept of indirect discrimination is covered under Article 14.⁶⁵ This general lack of development of the non-discrimination principle in ECHR case law is largely due to the Court's reluctance to consider a claim of discrimination under Article 14 once a violation of a substantive right has been found and to the absence of a free-standing equality guarantee.⁶⁶

⁵⁸ See also Starmer, above, Introduction n. 29, at pp. 684–686, paras. 29.4–29.6.

⁵⁹ K Monaghan, 'Limitations and Opportunities: A Review of the Likely Domestic Impact of Article 14 ECHR' [2001] *European Human Rights Law Reports* 167–180, at p. 170.

⁶⁰ *Abdulaziz, Cabales and Balkandali v United Kingdom*, above, Introduction n. 6.

⁶¹ *Belgian Linguistics Case (No. 2)* (1979–80) 1 EHRR 252, para. 9.

⁶² D Harris, O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at p. 470.

⁶³ *Gaygusuz v Austria* (1996) 23 EHRR 364.

⁶⁴ *Ibid.*, para. 42.

⁶⁵ *Thlimmenos v Greece* (2001) 31 EHRR 411, para. 44: 'The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification.... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'. See also Monaghan, above ch. 3 n. 59, at p. 173.

⁶⁶ See Monaghan, *ibid.* and D Gomien, D Harris and L Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe, 1996) at p. 349 with respect to the former reason.

With regard to this first reason, the Court observed in *Dudgeon v United Kingdom*:

Where a substantive Article of the Convention has been invoked both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to examine the case under Article 14, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.⁶⁷

Moreover, the Court will have the opportunity to consider the application of this principle in a less qualified context after the entry into force of Protocol No. 12 to the ECHR (discussed below),⁶⁸ which introduces a free-standing prohibition on discrimination. Consequently, there is considerable scope for further development of the Court's case law on the non-discrimination principle and the fact this area is far from closed is important when considering possible ECHR challenges to the application of EU border and visa rules in Member States.

⁶⁷ *Dudgeon v UK* (1982) 4 EHRR 149, para. 67, cited also in the same context by Starmer, above, Introduction n. 29, at pp. 690–691, para. 29.22; FG Jacobs and RCA White, *The European Convention on Human Rights*, 2nd ed. (Oxford: Clarendon Press, 1996) at pp. 289–290; and van Dijk and van Hoof, above ch. 3 n. 57, at p. 717.

⁶⁸ Protocol No. 12 to the ECHR, Rome, 4 November 2000, *European Treaty Series* No. 177.

⁶⁹ See *Gaygusuz v Austria*, above ch. 3 n. 63, para. 42: 'According to the Court's case-law, a difference of treatment is discriminatory, for the purposes of Article 14..., if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. See also Protocol No. 12 to the ECHR, above ch. 3 n. 68, Preamble, Recital 3, in the context of positive discrimination: 'Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures'.

⁷⁰ Starmer, above, Introduction n. 29, at p. 687, para. 29.10.

⁷¹ *Marckx v Belgium* (1979–80) 2 EHRR 330; *Van der Musselle v Belgium* (1984) 6 EHRR 163; *Lithgow and others v United Kingdom* (1986) 8 EHRR 329. See also Starmer, *ibid.* at p. 687, para. 29.11 and Jacobs and White, above ch. 3 n. 67, at pp. 290–291.

⁷² *National Union of Belgian Police v Belgium* (1979–80) 1 EHRR 578, cited by Starmer, *ibid.* at p. 688, para. 29.16.

⁷³ Starmer, *ibid.* at p. 171, para. 4.42 and p. 688, para. 29.16. These factors are examined, *ibid.* on pp. 171–176, paras. 4.43–4.55).

⁷⁴ See van Dijk and van Hoof, above ch. 3 n. 57, at pp. 727–728 and Starmer, *ibid.* at p. 689, para. 29.17 (footnotes omitted). For elaboration of this argument in relation to nationality, see *Gaygusuz v Austria*, above ch. 3 n. 63, para. 42.

⁷⁵ Starmer, *ibid.*

⁷⁶ *Ibid.* at p. 521, para. 18.46.

As with the non-discrimination provisions in the other international human rights instruments, not every distinction will amount to discrimination under the ECHR. A difference in treatment, however, that cannot be reasonably and objectively justified will constitute discrimination. Such treatment can only be so justified if the measure adopted has a legitimate social aim and the means employed to realise this aim are reasonably proportionate.⁶⁹ It is for applicants to establish the difference in treatment and then for the state to justify this difference.⁷⁰ The first requirement is satisfied if applicants can demonstrate that they were treated less favourably than others in an analogous situation.⁷¹ The question of proportionality is of particular importance in establishing whether discrimination has occurred. The Court has phrased this question as follows: '[whether]...the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued'.⁷² This assessment involves an analysis of the following five factors in respect of a particular measure:

- i) whether 'relevant and sufficient' reasons have been advanced in support of the measure;
- ii) whether there was a less restrictive alternative;
- iii) whether there has been some measure of procedural fairness in the decision-making process;
- iv) whether safeguards against abuse exist; and
- v) whether the restriction in question destroys the very essence' of the Convention right in issue.⁷³

The Court has yet to seriously undertake such a comprehensive assessment in an immigration case, although Chapter 1 has argued that the EU rules on borders and visas, particularly those that distinguish between the specified groups of third-country nationals, are unlikely to meet the test of proportionality on account of some of these factors.

The Court has also identified a number of suspect groups or classifications in its jurisprudence, where distinctions based on grounds such as race, sex, illegitimacy, religion and nationality need to be scrutinised more closely and would be more difficult to justify.⁷⁴ In one commentator's view, however, 'nationality is not a suspect category in the immigration field'⁷⁵ and that the presumption that discrimination based on nationality breaches Article 14 does not apply in admission and expulsion cases.⁷⁶ This reading would appear to follow the Court's judgment in *Abdulaziz, Cabales and Balkandali v United Kingdom*,

in which the Court was not prepared to consider that the immigration rules at issue amounted to direct or indirect racial discrimination:

Most immigration policies – restricting, as they do, free entry – differentiated on the basis of people’s nationality, and indirectly their race, ethnic origin and possibly their colour. Whilst a Contracting State could not implement ‘policies of a purely racist nature’, to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute ‘racial discrimination’. The effect in practice of the United Kingdom rules did not mean that they were abhorrent on the grounds of racial discrimination, there being no evidence of an actual difference of treatment on grounds of race.

That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.⁷⁷

The Court did not agree with the minority view in the European Commission of Human Rights that the immigration rules constituted indirect discrimination on the basis of race, an argument that the Court articulated as follows:

A minority of the Commission...noted that the main effect of the rules was to prevent immigration from the New Commonwealth and Pakistan. This was not coincidental: the legislative history showed that the intention was to ‘lower the number of coloured immigrants’. By their effect and purpose, the rules were indirectly racist and there had thus been a violation of Article 14...under this head in the cases of Mrs Abdulaziz and Mrs Cabales.⁷⁸

It is questionable whether the Court would necessarily arrive at this conclusion today if similar facts were to arise in a pertinent case. This study contends that the Court, if faced with similar facts, would, at the very least, have to consider very seriously allegations of indirect discrimination on the basis of race, ethnic origin

or religion. The Court has also adopted a ‘*carte blanche*’ approach to differences in treatment between EU citizens and third-country nationals in the immigration field by justifying such differences with reference to the EU as a ‘special legal order’. In *Moustaquim v Belgium*,⁷⁹ the Court found that the deportation to Morocco of a second-generation migrant, who had lived most of his life in Belgium, for criminal offences involving theft, robbery and assault committed when the applicant was still a juvenile, violated Article 8 of the ECHR because it amounted to a disproportionate interference in his family life. But the Court did not accept the applicant’s arguments that his expulsion also infringed Article 8 read together with Article 14 because it constituted discrimination on the ground of nationality *vis-à-vis* juvenile delinquents in an analogous position who possessed Belgian nationality (because they could not be deported) and those who were Community citizens of another Member State (because a criminal conviction was insufficient to render them liable to deportation).⁸⁰ With regard to the first contention, the Court found that the applicant could not be compared to Belgian juvenile delinquents because they had a right of abode in their own country and therefore could not be expelled from it. As far as the preferential treatment in the form of enhanced protection against expulsion given to nationals of other Member States was concerned, the Court concluded that there is ‘objective and reasonable justification for it as Belgium belongs, together with those States, to a *special legal order*’.⁸¹ In another case containing similar facts, *C v Belgium*,⁸² more serious crimes committed by the applicant were sufficient to tilt the justification on the question of proportionality in favour of the authorities and the applicant’s deportation was not deemed to be a violation of Article 8. The Court also dismissed the Article 14 argument that the deportation discriminated against the applicant on the grounds of race and nationality because EU nationals would have been treated differently by following the approach taken in *Moustaquim* and agreeing with arguments advanced by the Belgian Government and the European Commission of Human Rights. The Court reached the conclusion ‘that such preferential treatment is based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has, in addition, established its own citizenship’.⁸³

⁷⁷ *Abdulaziz, Cabales and Balkandali v United Kingdom*, above, Introduction n. 6, para. 84 (following the majority argument in the European Commission of Human Rights) and para. 85.

⁷⁸ *Ibid.* para. 84.

⁷⁹ *Moustaquim v Belgium*, above, Introduction n. 26.

⁸⁰ *Ibid.*, para. 48.

⁸¹ *Ibid.*, para. 49. Emphasis added.

⁸² *C v Belgium*, above ch. 1 n. 36.

⁸³ *Ibid.*, para. 38.

In neither of these cases, however, did the Court attempt to 'unpack' the nature of this 'special legal order' or explain why it constituted such a powerful justification for the significant differences in treatment existing between EU citizens and third-country nationals. Given that these cases were concerned with expulsion, where the Court has been more prepared to afford protection to non-nationals, it is unlikely that cases involving admission will have much chance of success if a similar line of argument is adopted. It is submitted, however, that the Court has essentially avoided the issues, by deferring to the EU as 'a special legal order' and by failing to scrutinise more closely whether the reasons for the distinction in treatment are objective and reasonable. In this regard, it has been less proactive than CERD, even though there is no equivalent of Article 1(2) in the ECHR to stall judicial progress in this area.

A specific exception to the generally restrictive approach developed to date by the Court to the use of Article 14 as a tool to combat discrimination on the basis of nationality in the field of immigration is where racially discriminatory laws amount to 'degrading treatment' within the meaning of Article 3 of the ECHR. In *East African Asians*,⁸⁴ the Commission of Human Rights took the view that legislation preventing Asians resident in Kenya and Uganda, who had retained their United Kingdom citizenship, from entering the United Kingdom for the purpose of settlement, amounted to 'degrading treatment', which the Commission defined as follows:

The term 'degrading treatment' in this context indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action, which lowers a person in rank, position, reputation or character, can only be regarded as 'degrading treatment' in the sense of Article 3, where it reaches a certain level of severity.⁸⁵

⁸⁴ Applications Nos. 4403/70–4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70–4478/70, 4486/70, 4501/70 and 4526/70, *East African Asians v United Kingdom*, Opinion of the Eur. Comm. HR, 14 December 1973, (1981) 3 EHRR 76. This report was only fully published at the United Kingdom's request on 21 March 1994 and is reproduced in (1994) 15 *Human Rights Law Journal* 215.

⁸⁵ *Ibid.* para. 189.

⁸⁶ *Abdulaziz, Cabales and Balkandali v United Kingdom*, above, Introduction n. 6, para. 91.

⁸⁷ Protocol No. 12 to the ECHR, above ch. 3 n. 68.

The Commission attached special importance to racial discrimination and suggested that distinctions based on other prohibited grounds of discrimination might not amount to 'degrading treatment'. Indeed, a similar argument in *Abdulaziz, Cabales and Balkandali* contending that the immigration rules violated Article 3 by discriminating on the basis of nationality was rejected by the Court because 'the difference in treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase but was intended solely to achieve [legitimate aims]. It cannot therefore be regarded as "degrading"'.⁸⁶ While this case law would seem to indicate that blatant direct discrimination would have to be present before unjustified distinctions based on race or other prohibited grounds can amount to degrading treatment under Article 3, there is clearly a disjunction between the possibility of such a finding in the immigration field and the allowances the Court appears to have made for State Parties to devise distinctions based on nationality, which also have an indirect adverse impact on persons by reference to their racial, ethnic or national origins or their religion.

As the jurisprudence on Article 14 presently stands, therefore, there would appear to be clear obstacles to arguing successfully that the application of EU rules on the crossing of the external border and the issuing of visas discriminate on the grounds of nationality, or indirectly on the grounds of race, ethnicity or religion. First, the relevant action needs to be tied to one of the rights listed in the ECHR and cannot be based exclusively on 'a right to equal treatment'. Given that many third-country nationals travel to the EU to visit family members, however, Article 8 would clearly be implicated in many cases. Moreover, the rules may also infringe privacy rights under the same provision if, for example, too many intrusive inquiries are made and documents demanded at the stage of the visa application or Article 5 liberty rights if the person concerned is detained or harassed by officials at the external border. The limitations of Article 14 in this respect have been recognised by the Council of Europe and its Member States. On 4 November 2000, the Council of Europe adopted Protocol No. 12,⁸⁷ which introduces a general prohibition against discrimination in respect of any

right 'set forth by law' and by *any* public authority on the same grounds as those listed in Article 14.⁸⁸ The Protocol has been heralded as 'a welcome, if overdue, development in the scope of protection afforded by the [ECHR] system'.⁸⁹ Although this Protocol has been signed by 27 Member States, with 25 signing enthusiastically on the date of its adoption,⁹⁰ as of 25 October 2001 only Georgia had taken the further step of ratifying it.⁹¹ The Protocol will enter into force once it has been ratified by ten states.⁹²

A second obstacle to taking successful action under the ECHR is the unwillingness of the European Court of Human Rights to take a bolder approach in scrutinising the justification of distinctions between EU citizens and third-country nationals, although fewer difficulties in this respect are presented by the distinctions applied between different groups of third-country nationals in respect of their entry into the EU. Finally, the concept of indirect discrimination awaits further development by the European Court of Human Rights.

⁸⁸ Art. 1 of Protocol No. 12 reads: '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1'. For an overview of the Protocol and its possible impact, see U Khaliq, 'Protocol No. 12 to the European Convention on Human Rights: a step forward or a step too far?' [2001] *Public Law* 457–464.

⁸⁹ Khaliq, *ibid.* at p. 463.

⁹⁰ The following Council of Europe Member States have signed Protocol No. 12: Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Moldova, Netherlands, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia, Turkey, Ukraine. This information is available from the Council of Europe Treaty Office website at <http://conventions.coe.int/>. However, not all Council of Europe members support the Protocol in its present form. For example, the United Kingdom government has made it clear that it will not sign or ratify the Protocol for the following reasons: '[T]he text of the Protocol 12 is too general and open-ended. In particular, it does not make clear whether 'rights set forth by law' include international as well as national law; it does not make provision for positive measures; and it does not follow the case law of the European Court of Human Rights in allowing objective and reasonably justified distinctions'. Lord Lester QC, 'Equality and United Kingdom Law: Past, Present and Future' [2001] *Public Law* 77–96, at p. 79, citing HL Deb., Vol. 617, col. WA37, 11 October 2000. See also Khaliq, above ch. 3 n. 88, at p. 457. Lord Lester, *ibid.* at p. 8 contends that these arguments are unconvincing particularly as the United Kingdom is already a State party to the ICCPR containing a similar free-standing equality guarantee in Art. 26.

⁹¹ Georgia ratified Protocol No. 12 on 15 June 2001.

⁹² Protocol No. 12, above ch. 3 n. 88, Art. 5(1).

Conclusion and recommendations

The EU rules on the crossing of the external border and the issuing of uniform visas, discussed in this study, are problematic in terms of the fundamental human right to be free from discrimination. Although the EU is attempting to develop a coherent asylum and immigration policy based on common rules, the provisions relating to borders and visas, though detailed, are rife with possibilities for the exercise of broad national discretion with the result that similarly situated third-country nationals risk experiencing different treatment at the external border or in the consulate. Clearly, these rules were not drafted with the prevention of discrimination in mind. Indeed, this study reinforces the perception that a number of EU Member States appear to believe that the principle of non-discrimination is somehow less forceful in the sphere of immigration, where sovereign interests continue to hold sway despite the transfer of asylum and immigration matters to Community competence. The border and visa rules make explicit distinctions on the basis of nationality, which in many instances are difficult to justify objectively with reference to relevant and sufficient reasons. This is particularly the case with the reasons (or, more accurately, the lack of them) for determining which countries should be placed on the negative visa list. Moreover, the effect of these rules is that they have the potential to discriminate indirectly against third-country nationals by reference to their racial, ethnic or national origins as well as their religion. As discussed in Chapter 3, such discrimination is clearly prohibited by the pertinent international human rights instruments ratified by all EU Member States and most candidate countries. While the recently adopted EU directives are far less clear on this question, the possible

exclusion of discrimination on the grounds of racial and ethnic origin from the immigration field would not only contradict the non-discrimination provisions of these human rights instruments and the resulting commitments made by EU Member States but would also sit very uneasily with the non-discrimination provisions found in some of the proposed measures advanced by the Commission under Title IV EC and with the principles proclaimed in the EU Charter of Fundamental Rights.

The report makes the following recommendations with a view to the development of a fairer and more transparent EU borders and visa policy, which is in conformity with European and international anti-discrimination principles:

- 1 The human right to be free from discrimination on the grounds of race, ethnic or national origin, and religion as well as nationality must be protected in the immigration field. It should not be separate from those other areas where discrimination is frequently applied and practiced. The perception that discrimination is permissible in the immigration field more than in other fields of activity can only have a negative impact on the treatment of third-country nationals already in EU Member States by government officials, employers, the media and others. Moreover, it also has a detrimental effect on the quality of race relations generally.
- 2 Differences in treatment in the immigration field that have a disparate impact on a particular group of persons defined by reference to race, ethnic or national origin or religion (indirect discrimination) should only be permitted if they can be objectively justified. In principle, the standard of justification should not be any different from the standard in other

areas where such an impact might occur, such as the employment, education and housing fields. Legitimate, relevant and sufficient reasons for the differences in treatment must be provided and made publicly available, particularly where such reasons are based, for example, on statistics relating to irregular migration. The actions taken to achieve the legitimate objective sought must be proportionate and the justifications relied upon must not be related to the grounds of discrimination. Direct discrimination can only be justified for humanitarian reasons in the context of positive discrimination in favour of a particular ethnic group with a view to its protection.

- 3 The Racial Equality Directive should be amended to expressly apply to Title IV of the EC Treaty and the measures adopted thereunder. Given that Member States have only just begun to transpose the Racial Equality Directive into their domestic laws, the sooner such an amendment is adopted the less disruptive this is likely to be to legislative processes in Member States. While the Racial Equality Directive enables individual Member States to pursue a more extensive anti-discrimination policy than the 'minimum standards' provided in the Directive, the application of such national measures to encompass differential treatment of third-country nationals in the immigration sphere cannot be expected given that the participating 13 Member States and the two Schengen-associated Nordic countries are committed to a common EU policy on borders and visas.
- 4 The principle of 'mainstreaming' equality¹ into EU measures concerning borders and visas and those relating to third-country nationals generally should be applied. It is important that all the Community instruments proposed and adopted in this field contain a clear statement of non-discrimination, using the EU Charter of Fundamental Rights as their reference point. Mainstreaming is occurring in other areas of Community law, particularly in the field of equal treatment between men and women,² and is an approach consistent with the EU Charter as well as other international human rights instruments to which Member States, the EEA countries and most EU candidate countries are bound.
- 5 EU rules on borders and visas must be developed on the basis of harmonised standards, such as those advanced in the ILPA/MPG *Amsterdam Proposals*,³ and not on the basis of mutual or cross-recognition of national decisions, an approach which inevitably results in unequal treatment of persons in like situations.
- 6 There should be a right or at least a presumption of entry for third-country nationals seeking to enter the EU unless the criteria for refusal of entry are clear. Rule of law principles demand a Community-wide notion of public policy to be developed based on the approach adopted under Community law in respect of the restrictions imposed on the free movement rights of EU citizens. An approach refusing entry into the EU territory based on the mutual or cross-recognition of national public policy or security decisions is highly inappropriate in the context of the non-discrimination principle and the protection of human rights.
- 7 The profiling of third countries on the basis of criteria relating to the risks of irregular migration and crime is extremely suspect from the standpoint of non-discrimination and the only criterion that should be applied in determining whether the nationals of a particular country should be subject to a visa requirement or otherwise is that of international relations. If such profiling is to be pursued, however, the Community can only avoid allegations of discrimination if it adopts, on the basis of reliable and responsible statistical evidence, strict and objective criteria, which are drawn up using a common approach and placed in the public domain, and by which the risks relating in particular to irregular immigration can be objectively assessed in respect of specific countries. Such a system would also have to include a transparent mechanism to ensure that relevant developments in a third country can be taken into account, both in terms of imposing a visa requirement and removing that country from the negative visa list.
- 8 Transparency in the making and practical application of EU border and visa policy is essential. Regular and updated statistics should be publicly available on visas issued and refused as well as refusals of entry at the external border. Uniform criteria must be applied to clearly define the visa application

¹ See Bell (2001:1), above ch. 1 n. 105.

² Art. 3(2) EC requires that 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women' in all its activities. See also Bell, *ibid* at p. 21.

³ *ILPA/MPG Proposed Directives on Immigration and Asylum*, above, Introduction n. 8.

- as well as the refusal of a visa application and to assess the length of time of such an application. A clear distinction should be made between visas rejected for the reasons in Article 5(1) SIA and where the visa application is deemed incomplete. These statistics should be collected through the EU's professional statistical body, EUROSTAT. The nationality of persons refused visas or entry at the external border should be recorded. Monitoring of the available statistics on the basis of racial and ethnic origin should also be conducted to ascertain which categories of third-country nationals are most likely to be subject to the refusal of visa applications, and in those cases where uniform visas are issued, to establish whether third-country nationals from particular categories are more likely to obtain a certain type of uniform visa. An expert working party should be formed to establish the necessary mechanisms to collect such data and to analyse this data.
- 9 A Visa Ombudsman, supported by adequate EU resources, should be introduced to monitor practices at the external border and in Member State consulates or embassies and to accept complaints in cases of systematic abuse. In those instances where the application of border and visa rules depends on the exercise of individual discretion, appropriate training of officials should be conducted, based on commonly developed principles, with a view to heightening awareness of the risks of discrimination.
 - 10 Reasons for negative visa decisions or refusals at the external border should be provided in writing to individual visa applicants and travellers from third countries as soon as the decision is made and in a language they understand together with information on the possibility of having the decision withdrawn or reviewed and of appealing against it.
 - 11 Clear remedies should be made available to individuals who wish to challenge a negative decision. These remedies should conform to the two-stage process found in Council Directive 64/221/EEC. First, the decision at the border or in the consulate should be subject to review by a national authority or body independent of the first decision-maker. Second, it should then be subject to review before the courts of the country whose officials issued the negative decision. If the negative decision is based on a SIS entry by authorities in another Member State then fuller reasons regarding the entry should be provided, although, in the light of Recommendation 6, such entries will only be possible on the basis of a Community-wide notion of public policy or security.
 - 12 EU Member States, EEA countries and EU candidate countries, which are also all Council of Europe Member States, should ratify Protocol No. 12 to the ECHR without reservations and thus demonstrate their commitment to combating discrimination in all public spheres of activity.

ANNEX I

The principle of equality and non-discrimination in international human rights law: selected provisions

United Nations Charter

Article 1(3)

- 1 The purposes of the United Nations are: [*inter alia*]...
- 3) To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...

Article 55(c)

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Universal Declaration of Human Rights

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2, paragraph 1

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights

Article 2(1)

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Economic, Social and Cultural Rights

Article 2(2)

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(3)

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 1

- 1 In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
- 2 This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
- 3 Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
- 4 Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Convention on the Elimination of All Forms of Discrimination Against Women

Article 1

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Convention on the Rights of the Child

Article 2(1)

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 1(1)

The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Article 7

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Article 79

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

European Convention on Human Rights

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol No. 12 to the European Convention on Human Rights

Article 1

- 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

ANNEX II

Status of ratifications by EU, EEA and EU candidate countries

of the International Covenant on Civil and Political Rights (ICCPR)
and the International Convention on the Elimination
of All Forms of Racial Discrimination (ICERD)
and acceptance of individual complaints mechanisms

(as of 13 November 2001)

EU, EEA and EU candidate countries	ICCPR	Optional Protocol to the ICCPR	ICERD	ICERD Art. 14 Declaration
Austria	10 Sept 1978	10 Dec 1987	9 May 1972	No
Belgium	21 April 1983	17 May 1994	7 August 1975	Yes
Bulgaria (c)	21 Sept 1970	26 March 1992	8 August 1966	Yes
Cyprus (c)	2 April 1969	15 April 1992	21 April 1967	Yes
Czech Republic (c)	22 Feb 1993	22 Feb 1993	22 Feb 1993	Yes
Denmark	6 Jan 1972	6 Jan 1972	9 Dec 1971	Yes
Estonia (c)	21 Oct 1991	21 Oct 1991	21 Oct 1991	No
Finland	19 August 1975	19 August 1975	14 July 1970	Yes
France	4 Nov 1980	17 Feb 1984	28 July 1971	Yes
Germany	17 Dec 1973	25 Aug 1993	16 May 1969	Yes
Greece	5 May 1997	5 May 1997	18 June 1970	No
Hungary (c)	17 Jan 1974	7 Sept 1988	1 May 1967	Yes
Iceland (EEA)	22 August 1979	22 August 1979	13 March 1967	Yes
Ireland	8 Dec 1989	8 Dec 1989	29 Dec 2000	Yes
Italy	15 Sept 1978	15 Sept 1978	5 Jan 1976	Yes
Latvia (c)	14 April 1992	22 June 1994	14 April 1992	No
Liechtenstein (EEA)	10 Dec 1998	10 Dec 1998	1 March 2000	No
Lithuania (c)	20 Nov 1991	20 Nov 1991	10 Dec 1998	No
Luxembourg	18 August 1983	18 August 1983	1 May 1978	Yes
Malta (c)	13 Sept 1990	30 Sept 1990	27 May 1971	Yes
Netherlands	11 Dec 1978	11 Dec 1978	10 Dec 1971	Yes
Norway (EEA)	13 Sept 1972	13 Sept 1972	6 August 1970	Yes
Poland (c)	18 March 1977	7 Nov 1991	5 Dec 1968	Yes
Portugal	15 June 1978	3 May 1983	24 August 1982	Yes
Romania (c)	9 Dec 1974	20 July 1993	14 Sept 1970	No
Slovakia (c)	28 May 1993	28 May 1993	28 May 1993	Yes
Slovenia (c)	6 July 1992	16 July 1993	6 July 1992	No
Spain	27 April 1977	25 January 1985	13 Sept 1968	Yes
Sweden	6 Dec 1971	6 Dec 1971	6 Dec 1971	Yes
Turkey (c)	15 Aug 2000 (s)		13 Oct 1972 (s)	
United Kingdom	29 May 1976	No	7 March 1969	No

(c) EU candidate country (s) signatory to Treaty

Source: Office of the UN High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (as of 13 Nov 2001) (available from <http://www.unhchr.ch/pdf/report.pdf>).

Select bibliography

Books and articles

- Academic Group on Immigration – Tampere (AGIT), 'Efficient, Effective and Encompassing Approaches to a European Immigration and Asylum Policy' (9 June 1999) (mimeo)
- Asscher-Vonk, IP, 'Towards One Concept of Objective Justification?' in T Loenen and PR Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (The Hague: Kluwer, 1999) 39–51
- Banton, M, 'Discrimination Entails Comparison' in T Loenen and PR Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (The Hague: Kluwer, 1999) 109–117
- Banton, M, *International Action against Racial Discrimination* (Oxford: Clarendon Press, 1996)
- Bell, M, 'Mainstreaming Equality Norms into European Union Asylum Law' (2001) 26 *European Law Review* 20–34
- Bell, M, 'Meeting the Challenge? A Comparison between the EU Racial Equality Directive and the Starting Line' in I Chopin and J Niessen (eds), *The Starting Line and the Incorporation of the Racial Equality Directive in the National Laws of the EU Member States and Accession States* (Brussels/London: Migration Policy Group and Commission for Racial Equality, March 2001) 22–54
- Bell, M, 'The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?' (1999) 6 *Maastricht Journal of European and Comparative Law* 5–23
- Bell, M and L Waddington, 'The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article' (1996) 25 *Industrial Law Journal* 320–336
- Bovenkerk, F, *Er zijn grenzen* (Arnhem: Gouda Quint, 1989)
- Bratz, C, 'The Contribution of EUROPOL to Combating Illegal Immigration Networks' in M den Boer (ed), *Schengen Still Going Strong. Evaluation and Update* (Maastricht: European Institute of Public Administration, 2000) 71–75
- Cholewinski, R, 'No Right of Entry: The Legal Regime on Crossing the EU External Border' in K Groenendijk and E Guild (eds), *In Search of Europe's Borders: Article 62 EC, Visas and European Community Law* (Kluwer forthcoming)
- Cholewinski, R, *The Baltic States in the Context of the Dublin Convention and Related Asylum Norms* (Helsinki: IOM, 2001)
- Cholewinski, R, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997)
- Cholewinski, R, 'The Racial Discrimination Convention and the Protection of Cultural and Linguistic Ethnic Minorities' (1991) *Revue de droit international* 157–226
- Chopin, I, 'Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European Union and Non-Governmental Proposals' (2001) 2 *European Journal of Migration and Law* 413–430
- Darcy, F, 'Perceptions and Realities of the EU External Borders of an Enlarged Union', paper presented at the Centre for European Policy Studies (CEPS), the SITRA Foundation and the Stefan Batory Foundation Conference on New European Borders and Security Cooperation: Promoting Trust in an Enlarged European Union, Brussels, 6–7 July 2001

- de Búrca, G, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London: Sweet and Maxwell, 1997) 13–34
- de Búrca, G, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105–150
- Ellis, E (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999)
- European Council on Refugees and Exiles (ECRE), European Network Against Racism (ENAR) and MPG, *Guarding Standards – Shaping the Agenda* (Brussels: ECRE, ENAR, MPG, April 1999)
- Flynn, L, 'The Implications of Article 13 EC – After Amsterdam, will Some Forms of Discrimination be More Equal than Others?' (1999) 36 *Common Market Law Review* 1127–1152
- Goodwin-Gill, GS, *International Law and the Movement of Persons Between States* (Oxford: Oxford University Press, 1978)
- Groenendijk, K, 'The Directive on Mutual Recognition of Expulsion Decisions: Symbolic or Unbalanced Politics?' (August 2001, unpublished paper)
- Guild, E, 'Moving the Borders of Europe', Inaugural lecture delivered during the official ceremony on the occasion of the assumption of the professorship of the CPO Wisselleerstoel at the University of Nijmegen, 30 May 2001
- Guild, E, *Immigration Law in the European Community* (The Hague: Kluwer, 2001)
- Guild, E and S Peers, 'Deference or Defiance? The Court of Justice's Jurisdiction over Immigration and Asylum' in E Guild and C Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001) 267–289
- Guild, E, 'Adjudicating Schengen: National Judicial Control in France' (1999) 1 *European Journal of Migration and Law* 419–439
- Guild, E and J Niessen (eds), *The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions* (The Hague: Kluwer, 1996)
- Guiraudon, V, 'Before the EU Border: Remote Control of the Huddled Masses' in K Groenendijk and E Guild (eds), *In Search of Europe's Borders: Article 62 EC, Visas and European Community Law* (Kluwer forthcoming)
- Hailbronner, K, *Immigration and Asylum Law and Policy of the European Union* (The Hague: Kluwer, 2000)
- Heinonen, M, 'The Efficiency of the Dublin Convention. Evolution of the Statistics', paper presented to the Seminar on the Dublin Convention on Asylum, European Institute of Public Administration, Maastricht, 25–27 April 2001
- ILPA and Joint Council for the Welfare of Immigrants (JCWI), *Frontier Law: Why Schengen Isn't Working for Europe's Third Country Nationals* (September 1995)
- International Labour Organisation (ILO), International Organisation for Migration (IOM), and Office of the United Nations High Commissioner for Human Rights (OHCHR) (in consultation with UNHCR), *International Migration, Racism, Discrimination and Xenophobia* (August 2001)
- Jacobs, FG and RCA White, *The European Convention on Human Rights*, 2nd ed. (Oxford: Clarendon Press, 1996)
- Jileva, E, 'Implementing Schengen: visa issuing in Bulgaria' (2001, unpublished paper)
- JUSTICE, *The Schengen Information System: A human rights audit* (London: JUSTICE, 2000)
- Khaliq, U, 'Protocol No. 12 to the European Convention on Human Rights: a step forward or a step too far?' [2001] *Public Law* 457–464
- Lord Lester QC, 'Equality and United Kingdom Law: Past, Present and Future' [2001] *Public Law* 77–96
- Mahalic, D and JG Mahalic, 'The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' (1987) 9 *Human Rights Quarterly* 74–101
- McDougal, MS, HD Lasswell and L Chen, 'Protection of Aliens from Discrimination and World Public Order: Responsibility of States conjoined with Human Rights' (1976) 70 *American Journal of International Law* 432–469
- Monagahn, K, 'Limitations and Opportunities: A Review of the Likely Domestic Impact of Article 14 ECHR' [2001] *European Human Rights Law Reports* 167–180
- Monar, J, 'The Impact of Schengen on Justice and Home Affairs in the European Union: An Assessment on the Threshold to its Incorporation' in M den Boer (ed.), *Schengen Still Going Strong. Evaluation and Update* (Maastricht: European Institute of Public Administration, 2000) 21–35

- Niessen, J, 'The Further Development of European Anti-Discrimination Policies' in I Chopin and J Niessen (eds), *The Starting Line and the Incorporation of the Racial Equality Directive in the National Laws of the EU Member States and Accession States* (Brussels/London: Migration Policy Group and Commission for Racial Equality, March 2001) 7–21
- Nowak, M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: NP Engel, 1993)
- O'Conneide, C, 'The Race Relations (Amendment) Act 2000' [2001] *Public Law* 220–232
- O'Leary, S, 'The Principle of Equal Treatment on Grounds of Nationality in Article 6 EC: A lucrative source of rights for Member State nationals?' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (London: Sweet and Maxwell, 1997) 105–136
- Peers, S, 'Key Legislative Developments on Migration in the European Union' (2001) 3 *European Journal of Law and Migration* 231–255
- Peers, S, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' (2001) 3 *European Journal of Migration and Law* 141–169
- Peers, S, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 *Common Market Law Review* 7–50
- Rogers, N, *A Practitioners' Guide to the EC–Turkey Association Agreement* (The Hague: Kluwer, 2000)
- Salt, J, 'European International Migration: Evaluation of the Current Situation', paper presented at the Council of Europe Conference on Irregular Migration and Dignity of Migrants: Co-operation in the Mediterranean Region, Athens, 3–4 October 2001
- Starmer, K, *European Human Rights Law* (London: Legal Action Group, 1999)
- Steenbergen, JDM, 'Schengen and the Movement of Persons' in H Meijers, *et al.*, (eds), *Schengen: Internationalization of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police*, 2nd rev. ed. (Stichling NCJM: Boekerij, 1992) 57–73
- Tyson, A, 'The Negotiation of the European Community Directive on Racial Discrimination' (2001) 3 *European Journal of Migration and Law* 199–229
- United Nations, International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.5 (26 April 2001)
- United Nations, ECOSOC, Commission of Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd Session, *The rights of non-citizens*, Preliminary Report of the Special Rapporteur, Mr David Weissbrodt, submitted in accordance with Sub-Commission Decision 2000/103 (Addendum), UN Doc. E/CN.4/Sub.2/2001/20/Add.1 (6 June 2001)
- United Nations, Economic and Social Council (ECOSOC), Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, *The concept and practice of affirmative action*, Preliminary report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission Resolution 1998/5, UN Doc. E/CN.4/Sub.2/2000/11 (19 June 2000)
- United Nations, ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51st Session, *The rights of non-citizens*, Working Paper submitted by Mr David Weissbrodt in accordance with Sub-Commission Decision 1998/103, UN Doc. E/CN.4/Sub.2/1999/7 (31 May 1999)
- United Nations, ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Session, *Note by the Secretariat*, UN Doc. E/CN.4/Sub.2/1997/31 (27 May 1997), Annex, p. 4 (Letter dated 19 March 1997 from the Chairman of the Committee on the Elimination of Racial Discrimination addressed to the Chairman of the 48th session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities)
- UNHCR, *Asylum Applications submitted in Europe, 2000* (UNHCR, January 2001)
- United Kingdom House of Lords, Select Committee on the European Union, *Ninth Report: EU Proposals to Combat Discrimination*, 16 May 2000
- van Dijk, P and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague: Kluwer, 1998)
- Waddington, L and M Bell, 'More Equal Than Others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587–611

European Union documents¹

European Commission, *Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of 'Freedom, Security and Justice' in the European Union (Second Half of 2001)*, COM (2001) 628 final of 30 October 2001

European Commission, *Proposal for a Council Decision adopting an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration (ARGO)*, COM (2001) 567 final of 16 October 2001

European Commission, *Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months*, COM (2001) 388 final of 10 July 2001

European Commission, *Report from the Commission to the Council – Exemption of Romanian Citizens from Visa Requirement*, COM (2001) 361 final of 29 June 2001

European Commission, *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM (2001) 257 final of 23 May 2001

European Commission, *Report from the Commission to the Council regarding Bulgaria in the perspective of the adoption of the Regulation determining the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, COM (2001) 61 final of 2 February 2001, Vol. 1

European Commission, *Intermediate Report on Visa Issues (Romania)*, COM (2001) 61 final of 2 February 2001, Vol. II

Report on local consular cooperation under the French Presidency, Council Doc. 14496/00 (11 December 2000)

European Commission, *Amended Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, COM (2000) 328 final of 31 May 2000

European Commission, *Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, COM (2000) 303 final of 24 May 2000

European Parliament legislative resolution on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 18 May 2000 (having regard to Report A5-0136/2000)

European Commission (Staff Working Paper), *Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*, SEC (2000) 522 of 25 March 2000

European Commission, *Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, COM (2000) 27 final of 26 January 2000

European Commission, *Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, COM (1999) 566 final of 25 November 1999

European Parliament, Directorate General for Research, Working Paper, *Prospects for an Anti-Discrimination Policy: Potential for Implementing Article 13 of the Treaty Establishing the European Community* (Doc. SOCI 105 EN 4-2000)

¹ In reverse chronological order.