

ILPA

Immigration Law Practitioners' Association



Migration Policy Group

THE AMSTERDAM PROPOSALS

**The ILPA/MPG proposed
directives on
immigration and asylum**

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organisation based in Brussels. MPG is committed to
improving policy development on migration and related issues
through the promotion of facilitated exchange between key
stakeholders in Europe, North America and the international
community, and through the production of substantive,
comparative policy analysis.

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preface

On 1 May 1999 the Amsterdam Treaty came into force giving to the European Community new responsibilities and obligations in the field of immigration and asylum. For the first time the European Community is charged with the task of adopting binding legislation on immigration from outside the European Union and giving effect to the Member States' duties to provide protection to persons fearing persecution or at risk of torture.

The power to regulate both internal EU migration and migration into the EU go hand in hand. Migration into the EU can be classified in two ways: forced migration of persons in need of protection, which we will return to shortly below, and economic migration. The exercise of the power to regulate migration into the EU needs to be informed by the principal of economic integration that has always guided Community policies. Community legislation removed obstacles for the movement of its citizens for economic purposes. This needs to be complemented by the removal of obstacles to movement of legally resident third-country nationals. Moreover, the benefits to Europe of the presence of migrants bringing skills, capital and entrepreneurship need to be expressed in the development of the European Community's immigration policy. Although Community policies in these areas are beset by difficulties due to differences in traditions, perspectives and approaches, Community legislation will have to achieve agreement on common ground.

The formulation of Community legislation must always be sensitive to the overriding principle that Community measures must safeguard human rights and fundamental freedoms as expressed in the constitutional traditions of the

Member States and in international treaties on which the Member States have collaborated or of which they are signatories. Protecting persons from the risk of persecution or torture is an overriding duty of all the Member States; with the transfer of powers to the Community, it must hold an equivalent place.

On a national level in many Member States challenges are being realised that domestic legislation is not in compliance with these international norms and duties. The European Court of Human Rights is increasingly engaged by petitions in the field as are various UN committees. The moral integrity of Community law is engaged insofar as the rules, when adopted by the Community, must fulfil the Member States' human rights commitments to the world. Similarly the legal integrity of the Community is engaged. Should the rules on immigration and asylum not fulfil these obligations, the courts will be required to strike down such rules as are incompatible with their constitutions and international commitments.

The new powers of the Community in the field of immigration and asylum and the way in which they are exercised is, therefore, of critical importance to the development of the European Union. It is then particularly appropriate that non-governmental organisations should engage with the issue and provide direction and impetus in these sensitive areas.

This report is such an engagement: expert lawyers – in practice, academia and non-governmental organisations – from a number of states have come together to prepare proposals for directives covering six aspects of immigration and asylum:

- Asylum;
- Family reunion;
- Long-term residents;
- Visas and border controls;
- Admission of migrants;
- Irregular migrants.

Each of these subject areas commences with a detailed explanatory memorandum which sets out the legal and political considerations relevant to each area. This is followed by a proposal for a directive to give effect to the new powers of the Community in each area in accordance with the appropriate legal principles and political considerations.

The drafting of each proposed directive was supervised by an expert committee, which deliberated on the framework and specifics of the field. In each area, the second draft proposal was the subject of a seminar at which legal experts from across the Community were invited to discuss the approach and provisions.

Steve Peers, reader in law, Essex University was responsible for writing the proposed directives. The chairs of the expert committees were: Frances Webber, Don Flynn, Ian Macdonald QC, Nicholas Blake QC, Peter Moss, Andrew Nicol QC. The Chair and members of the Dutch Standing Committee of Experts on International Immigration, Asylum and Criminal Law contributed to the entire research process.

We present these proposals to assist policy makers in Europe with the legal and practical approach to the exercise of the Community's powers in the field.

Andrew Nicol QC

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March 2000

asylum

1 The goals of the area of freedom, security and justice

The Tampere European Council (summit meeting) of 15–16 October 1999 endorsed the goal of the step-by-step creation of a ‘Common European Asylum System’ (CEAS), harmonizing many aspects of asylum law in the European Union Member States. The asylum directive proposed here is a suggested version of the CEAS that would ensure the creation of such a system while ensuring full respect for the EU’s and the Member States’ human rights obligations.

The right to asylum is extensively set out in international treaties, most notably the Universal Declaration of Human Rights and the 1951 Geneva Convention on the Status of Refugees and its New York Protocol of 1967. In addition, the European Convention on Human Rights (ECHR) and the UN Convention Against Torture (UNCAT) prevent Member States from expelling a person who would face a real risk of torture or inhuman or degrading treatment in the state to which he or she would be expelled. The new Title IV of Part 3 of the EC Treaty (Articles 61–69), inserted by the Treaty of Amsterdam, should be seen as an obligation to ensure Member States’ protection of fundamental human rights as set out in those treaties. Article 63 EC now requires the EC to act in accordance with the Geneva Convention and New York Protocol, and Article 6(2) EU makes clear that human rights set out in the ECHR and national constitutions form part of the general principles of Community law. Case law of the Court of Justice makes clear that other international human rights treaties in which Member States have participated also form part of the general principles of Community law.

The obligations to act in accordance with the Geneva Convention and its Protocol, and the requirements of the general principles of Community law, make it essential for Community asylum legislation to grant rights to individuals. Legislation which only set out Member States’ obligations toward each other would breach those principles and obligations, for there would be no way for individuals to invoke Community law to derive individual rights. In order to give effect to the very nature of international human rights law, Community asylum law must be drafted to grant rights to individuals.

In particular, Community asylum law should take as a base a high standard of protection. If no minimum standard is set, or if a low minimum standard is set, there is a risk that there will be a ‘race to the bottom’ among Member States anxious to deter asylum applications. Large divergences in Member States’ asylum law means that the ‘single application’ principle underlying the Dublin Convention is at the moment inherently unfair, for asylum applicants will receive substantially different treatment in different Member States and will in many cases be recognized in some Member States but not in others.

2 Relevant human rights rules

Article 14 of the Universal Declaration of Human Rights states that ‘everyone has the right to seek and enjoy asylum’. This right is to some extent implemented by the Geneva Convention, taken with the New York Protocol to that Convention (both ratified by all Member States). The Geneva Convention defines a ‘refugee’ and contains detailed rules on the status which must be accorded to refugees.

The Convention was originally confined in time and potentially confined in space, but these restrictions have now been removed. First, the Convention's limitation to pre-1945 activities was removed by the New York Protocol and second, all Member States (along with most countries in the world) have exercised the option to apply the Convention to all persons, not just those fleeing events in Europe.

The most important rule in the Convention is the *non-refoulement* right in Article 33, which states that signatories cannot 'expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.'. In addition, Article 31 of the Convention states that refugees who enter a state illegally may not face penalties as a result of that illegal entry, if they contact national authorities and give reasons for the illegal entry. Article 31 recognizes the obvious: that persons fleeing persecution may not be able to obtain documents giving them the right to enter states of refuge, and should therefore not be penalized by the states of refuge.

There is no judicial or arbitration system to ensure a harmonized interpretation of the Geneva Convention, but the UN has created the United Nations High Commissioner for Refugees (UNHCR), who has the task of coordinating treatment of refugees and encouraging the effective application of the Convention. With this in mind, the UNHCR issued a Handbook in 1979 on the interpretation of the Convention. This Handbook states the firm view that States do not *grant* refugee status, they *recognize* it; a person is a 'refugee' as soon as the events giving rise to a genuine fear of persecution exist. The Handbook also addressed the procedures applied by States to determine whether a person should be recognized as having refugee status. The UNHCR's Executive Committee has issued many Conclusions and recommendations on aspects of asylum law which fall inside and outside the scope of the Geneva Convention.

¹ See *Chahal v. UK*, *Ahmed v. Austria*, *HLR v. France* and *Amuur v. France* (Eur. Ct. HR) and *Hatami v. Sweden* (Eur. Comm. HR). See Lambert, 'Protection Against Refoulement in Europe: Human Rights Law Comes to the Rescue', (1999) 10 ICLQ 515.

In addition, the European Convention on Human Rights (ECHR) is relevant to asylum law. It does not contain any specific rules on asylum, but bans states from subjecting a person to torture or inhuman or degrading treatment (Article 3). No derogations are permitted from this provision. The ECHR also requires effective remedies to ensure the guarantee of all rights set out in it (Article 13). All Member States are parties. The Court set up to interpret the ECHR has held that Article 3 applies to prevent the return or expulsion of a person to another country where there is a 'real risk' of torture or inhuman or degrading treatment, whether or not that other country applies the ECHR. This principle applies to any person within the jurisdiction of an ECHR signatory, even to persons in some form of 'transit zone'. In practice, this means that Article 3 protects persons who fall outside some Member States' interpretation of the Geneva Convention, because they are fleeing a civil war or the acts of private parties. It also protects persons who have fallen, or could fall, within the scope of the Geneva Convention, but whom Member States wish to expel because they are a threat to national security. The Geneva Convention allows them to expel such persons, but the ECHR does not. Finally, the European Commission of Human Rights, which exercised certain judicial functions in connection with the ECHR until 1998, has concluded that a Member State can breach Article 3 if its system for examining applications for asylum is so defective that a person facing a real Article 3 risk faces removal. Therefore, Article 3 ECHR covers persons who fall outside the 'inclusion' clauses of the Geneva Convention; who have been excluded from Convention status; and defective national procedures.¹ It is also arguable that Member States breach Article 3 if they provide no benefits or very inadequate benefits to asylum-seekers.

In addition, thirteen Member States have ratified the United Nations Convention Against Torture (UNCAT). Article 3 of UNCAT contains an identical ban to that of Article 3 ECHR, and the Committee set up to supervise the Convention has ruled many times that this prevents removal to a state which will likely impose torture or inhuman or degrading treatment. It is clear from this Committee's rulings that UNCAT requires protection against persecution by at least some 'non-state agents', that Member States' defective procedures can lead to a breach of

Article 3, and that Member States breach Article 3 by removing a person to a third state which in turn might remove that person to a fourth state in which he or she faces a risk of torture or inhuman or degrading treatment.²

3 Current EU rules and their defects

The EC Treaty, as amended by the Amsterdam Treaty, gives the EC competence to adopt measures in seven areas of asylum law and *requires* it to adopt measures in six of those areas within five years of entry into force of the Amsterdam Treaty (1 May 2004). Article 63(1) EC sets out the first four powers, addressing:

- in Article 63(1)(a), criteria and mechanisms for determining which Member State is responsible for examining a claim for asylum;
- in Article 63(1)(b), minimum standards on the reception of asylum-seekers;
- in Article 63(1)(c), rules on the definition of 'refugee' within the meaning of the Geneva Convention;
- in Article 63(1)(d), rules on procedures applying to asylum applications.

Article 63(1) is concerned with persons who claim to be within the scope of the Geneva Convention (often called 'Convention refugees'), but Article 63(2)(a) is concerned with persons falling outside the scope of the Geneva Convention. It sets out two more powers:

- adoption of rules concerning temporary protection for displaced persons; and
- adoption of rules on other persons in need of humanitarian protection (often called 'subsidiary' or 'complementary' protection).

² See Fabbricotti, 'The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases' (1998) 10 IJRL 837. On non-state persecution, compare *GRB v. Sweden*, 15 May 1998 (no breach of Article 3 if persecutors entirely private, and no state compliance with their acts) and *Elmi v. Australia*, 25 May 1999, where factions seizing control of parts of Somalia had set up quasi-governmental institutions. On removal to a third state, see *Korban v. Sweden*, 16 Nov. 1998.

³ See respectively Case C-180/99 *Addou*, pending, and the proposed Decision on integration of refugees (COM (1998) 733), now based on Article 137 EC.

⁴ OJ 1997, C 254.

⁵ See Guild and Niessen, *The Developing Immigration and Asylum Policies of the European Union* (Kluwer, 1996) 113–139 and *Guarding Standards – Shaping the Agenda* (ECRE, ENAR and MPG, 1999), 9–10.

Finally, Article 63(2)(b) concerns both refugees and displaced persons, and confers the power to adopt rules on 'solidarity' (a 'balance of effort') between the Member States regarding asylum applicants.

Only the 'solidarity' power is exempt from the five-year deadline for the EC to act. In addition, the EC's powers over visas and border controls in Article 62, over family reunion and residence permits in Article 63(3)(a) and over administrative cooperation in Article 66 are relevant to asylum. Outside Title IV of the EC Treaty, EC social security law is already applicable to refugees and arguably certain aspects of the treatment of refugees falls within the EC's social policy power to combat social exclusion.³ Article 63(1) requires the EC to act in accordance with the Geneva Convention and New York Protocol, along with other relevant human rights treaties, when using its powers under that Article. In turn, Article 63(2) is subject to the general principle of EC law requiring protection for human rights, as defined in international treaties which the Member States have participated in drawing up and in their national constitutions.

The EU's existing rules in many of these areas are problematic. The Dublin Convention of 1990 sets out a 'single application' principle, specifying that asylum-seekers can make an application with only one Member State, and contains a list of criteria for determining which Member State is responsible for the application.⁴ The application of the Convention is in many respects problematic.⁵ First of all, it leads to disrespect of the right to family life. The existence of family members is only relevant if persons whose Geneva Convention status has already been recognized are residing in a Member State. But if the family members of a new applicant are asylum *applicants* in a Member State, or are residing in a Member State on other grounds, the Dublin Convention *requires* Member States to *keep the family apart* unless the new applicant satisfies one of the other Dublin Convention criteria or a Member State invokes an exception from those criteria.

Additionally, the Dublin Convention has resulted in the destruction of travel documents by many asylum-seekers who wish to ensure that they are able to apply for asylum in the Member State of their preference. The Resolution on 'manifestly unfounded' applications urges Member States to subject

such applicants to accelerated determination procedures and to presume that their applications are unfounded. Such an approach may breach the ECHR and the UNCAT (see below). Furthermore, the Dublin Convention has not succeeded by its own standards, for only a small percentage of applications have been allocated to other Member States.⁶

Moreover, the Dublin Convention breaches UNHCR Executive Committee Conclusion 15, which contains principles governing determination of the country responsible for examining an asylum request. Point (h)(iii) of that Conclusion requires that '[t]he *intentions of the asylum-seeker* as regards the country in which he [or she] wishes to request asylum *must as far as possible be taken into account*' (emphasis added). But the Dublin Convention makes the asylum-seeker's intention the *least important* criterion for determining responsibility for a claim. Such intention is only relevant as a 'default', when none of the other criteria in the Convention can be applied. Point (h)(iv) of the Conclusion states that 'asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he [or she] may if it appears fair and reasonable be called upon first to request asylum from that State'. There is no suggestion in the Conclusion that an asylum-seeker could be *obliged* to apply in a particular country, and nothing to suggest that a 'connexion' could include merely crossing a border of a State irregularly. Furthermore, many Member States cut off social benefits for persons while determining whether to transfer their asylum application to another Member State, which may constitute a breach of Article 3 ECHR.

⁶ See the most recent statistics on the operation of the Convention (Council doc. 2402/99).

⁷ See Council doc. 8112/2/96, 27 Sep. 1996 for a later draft.

⁸ OJ 1997, C 221.

⁹ OJ 1996, L 63.

¹⁰ See Fernhout, 'The Refugee in the European Union', in Shah and Doebbler, eds., *United Kingdom Asylum Law in its European Context* (Platinum, 1999).

¹¹ See Peers, *Mind the Gap! Ineffective Member State Implementation of European Union Asylum Measures* (ILPA/Refugee Council, 1998).

¹² For texts, see Guild and Niessen, note 5 above.

¹³ OJ 1996, C 274.

¹⁴ Note 8 above.

¹⁵ See Guild and Niessen, note 5 above, at 148–160, 166–176 and 181–190.

Finally, the presumption underlying the Dublin Convention is that Member States' rules on reception conditions for asylum-seekers, the definition of 'refugee' and the procedures applicable to examination of applications are relatively equivalent. However, this presumption is incorrect, despite the EU's attempts to harmonize national asylum law.

First, in the area of reception conditions, the EU has done nothing to harmonize national law. A proposed 'Joint Position' or 'Joint Action' was discussed for a year during the 'third pillar' era of asylum law, but was never adopted.⁷ However, a 1997 Resolution on unaccompanied minors does address reception issues relating to such persons.⁸

Second, on the definition of 'refugee', there is a Joint Position on the issue, adopted in 1996 during the 'third pillar' era.⁹ This measure is liberal in certain respects but contains highly questionable interpretations of the Geneva Convention as regards persons fleeing civil wars or non-state persecutors and the application of the so-called 'internal flight alternative'.¹⁰ The evidence shows that there has been a huge divergence in the application of the Joint Position, particularly on these important points.¹¹

Third, there have been a number of EU measures relating to asylum procedures. First, there were three so-called 'London Resolutions' in 1992.¹² These are the Resolution on 'manifestly unfounded' asylum applications, the Conclusion on 'safe' countries of origin, and the Resolution on 'safe' third countries. Later, the Council of the EU adopted a Resolution in 1995 on minimum standards for asylum procedures.¹³ Finally, the Resolution on unaccompanied minors also contains procedural safeguards.¹⁴

The three London Resolutions are highly problematic.¹⁵ First, the Resolution on manifestly unfounded applications, taken with the 1995 Resolution on minimum standards, allows for expulsion before the conclusion of an appeal or even the abolition of the right to appeal. In particular, it encourages Member States to conclude immediately that a person is a 'bogus' applicant and apply such minimal procedural rights if that person has given any inconsistent information or has entered the country irregularly. But some inconsistencies in a story told more than once are inevitable

(especially when working through an interpreter) and Article 31 of the Geneva Convention prevents any penalty being imposed on refugees who enter irregularly if they can show cause. The *Hatami* case and the UNCAT jurisprudence state explicitly that complete consistency cannot be expected from a victim of torture, and do not suggest that irregular entry is in any way relevant to the veracity of an asylum claim. In addition, the 1992 Resolution encourages Member States to classify any case where a person's credibility is disputed and all cases involving the supposed 'internal flight alternative' as 'manifestly unfounded', and allows them to classify some 'exclusion clause' cases as 'manifestly unfounded' as well. But such cases raise detailed issues of fact and appraisal of evidence and so are unsuitable for accelerated determination procedures.

This Resolution refers to UNHCR Executive Committee Conclusion 30, on 'manifestly unfounded' applications, but goes well beyond it. That Conclusion states that 'manifestly unfounded applications...are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in' the Geneva Convention. The scope of the EU ministers' Resolution encompasses many applications beyond those which are clearly fraudulent or unrelated to Convention status. Furthermore, the Resolution, taken with the 1995 Resolution on asylum procedures, breaches point (e)(iii) of the Conclusion, which states that 'an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory', because point 21 of the 1995 Resolution allows Member States to expel a person whose application has been deemed 'manifestly unfounded' without a full review of the correctness of the decision. Only 'additional sufficient safeguards' (an assessment by another authority) need be provided. Point 22 of the 1995 Resolution provides that where the 'safe third country' principle applies, a person can be expelled without any review or additional safeguards before expulsion. The various procedural Resolutions therefore breach the UNHCR Conclusion.

¹⁶ See *Mind the Gap!*, note 11 above.

¹⁷ See Lambert, *Seeking Asylum* (Kluwer, 1995), ch. 6.

¹⁸ COM (1998) 372, 24 June 1998.

The safe 'country of origin' Conclusion also encourages Member States not to take account of the circumstances of the individual applicant by applying a presumption to prevent its full consideration. The 'safe third country' Resolution encourages Member States to refuse to consider the merits of asylum claims because persons have some connection, or could have applied, in a third state (ie, a state other than the asylum-seeker's country of nationality (or former habitual residence, if stateless) and other Member States). Again, this goes well beyond UNHCR Executive Committee Conclusion 15 and runs the risk that Member States return persons to countries that will not consider their claims for protection effectively.

The evidence shows that there is a huge divergence in application of the 'manifestly unfounded' and 'safe third countries' Resolutions, showing that the presumption of the Dublin Convention is seriously misguided.¹⁶

Fourth, there have never been EU rules on complementary protection. Nor have any discussions begun on this subject. In practice, Member States have highly divergent procedural and substantive rules applying to 'complementary protection' status. Persons claiming such status are often subject to a status far worse than that applying to Convention refugees and have no procedural rights to make a claim for recognition of their status, even though it often derives from rights under the ECHR or UNCAT.¹⁷

Fifth, there are also no EU rules on temporary protection, except for a Resolution and Decision concerning a procedure to meet and discuss possible 'burden-sharing' in a crisis. The Commission proposed a Joint Action in 1997 on this matter, and revised the proposal in 1998, but agreement has been impossible to reach.¹⁸ This proposal was a valuable attempt to deal with the issues but was flawed because it endorsed a 'region of origin' approach (presuming that persons should be kept close to the state in which they were persecuted) wholeheartedly, without considering the drawbacks of this approach.

4 The alternative approach

An alternative approach which would reconcile EC asylum law with international human rights obligations would be based on the following basic principles:

- 1 asylum legislation must essentially be human rights legislation and must ensure implementation of central principles of asylum law;
- 2 the existing responsibility system set up by the Dublin Convention must be replaced by a system which would be fairer and easier to apply, and which will not lead to breaches of human rights obligations;
- 3 the EC must ensure an effective minimum standard for reception conditions, which must apply during the procedure for determining responsibility and during any appeal against a negative determination;
- 4 the EC must correct problematic divergences in its Member States' interpretation of the Geneva Convention in light of that Convention's status as a basic humanitarian law treaty, not a system for deciding state responsibility;
- 5 the EC must ensure that the Member States apply minimum standards of procedural protection which ensure that decisions are made as swiftly as possible, while fully applying the *non-refoulement* principle and avoiding the human rights breaches that result from examining asylum applications without considering individual circumstances;
- 6 the EC should set out rules to govern both EC and national temporary protection regimes which ensure that minimum standards of protection apply during a limited period in which Member States are unable to process 'regular' asylum claims; and
- 7 there should be a system of 'complementary protection' which is formally established, which gives secure and equal rights to persons who are recognized as needing complementary protection, and which makes sure that no-one 'falls through the cracks'.

5 Detail of the text

a) Sources

Most provisions of this proposed Directive are based on the existing EU texts discussed in Part 3 or the UNHCR handbook. However, since most of these texts are 'soft law' and since they also fall short of human rights standards, as discussed in Part 3, they have been amended.

b) Structure

In accordance with the Union's intention to agree a 'Common European Asylum System' addressing all elements of the right to asylum, this Directive proposes a comprehensive set of rules addressing all aspects of the issue.

However, certain issues are left to separate measures. The preamble refers to the separate Regulation on Eurodac, which the Commission proposed in May 1999,¹⁹ and the text also refers to a separate Regulation on funding solidarity between Member States when receiving applicants for temporary protection. It is assumed that the Commission will propose such a Regulation at some point, to update its proposal for a Joint Action on this subject.²⁰

After an introductory Title I setting out basic principles, the Directive is divided into seven further titles. Titles II to VII follow the structure of Articles 63(1) and (2) of the EC Treaty, addressing in turn:

- responsibility for asylum applicants (Title II);
- reception conditions for asylum applicants (Title III);
- the definition of 'refugee' under the Geneva Convention (Title IV);
- the procedure for determining whether the criteria for recognition as an asylum-seeker are met (Title V);
- the concept of temporary protection (Title VI); and
- the concept of complementary protection (Title VII).

Title VIII then contains general and final provisions.

c) Preamble

The preamble largely sets out the reasons behind the directive, discussed further below. It contains a cross-reference to the proposed Eurodac Regulation (although this proposal

¹⁹ COM (1999) 260, 26 May 1999.

²⁰ Note 18 above.

would have to be adopted in an amended form if the responsibility rules proposed in Title II of this Directive were adopted). It also addresses several points not included within the text of the directive. First, point 7 of the preamble suggests that the Council invite the Court of Justice to consider suggesting a change to its Rules of Procedure to allow the UNHCR to intervene in asylum cases. Such a development would reflect the tradition in several Member States of allowing the UNHCR to intervene in national cases, in order to ensure effective interpretation of the Geneva Convention. This would be particularly appropriate in requests for a preliminary ruling and ‘requests for interpretation’ of asylum legislation under Article 68 EC. It should be stressed that the UNHCR should be allowed to intervene as *amicus curiae*, rather than as a supporter of one of the parties, the Member States or Community institutions.

Secondly, point 19 of the preamble calls upon the Council to adopt a ‘third pillar’ measure addressing the physical safety of refugees and asylum applicants. This could form part of a more general measure concerning criminal sanctions and criminal procedure for crimes based on racism and xenophobia. It would partly implement Article 16(2) of the 1990 UN Convention on the Rights of Migrant Workers, and protect refugees and asylum applicants from violence and harassment.²¹

d) Basic principles: Title I

The proposed Directive fully recognizes the status of asylum as a fundamental human right, as evidenced in the title, the opening provisions and the substantive rules. In particular, the opening provisions point out that the central purpose of the Directive is to ensure the effective application of the right of asylum (Article 1). Article 2(1) makes clear that the right to asylum is not simply found within the Geneva Convention, but can also take the form of temporary or complementary protection status. However, full applications can only be made for Geneva Convention or complementary protection status (Article 2(2)(a)), for temporary protection status only exists where a Member State is overwhelmed by applications (see Title VI). Article 2(2) defines the key concepts, including the definition of a

‘definitively rejected’ application (see particularly Article 2(2)(c)). Article 2(2)(a) makes clear that an application for Geneva Convention status shall always constitute a simultaneous application for complementary protection status in the alternative.

Article 3 defines the key concept of ‘*non-refoulement*’. This Article specifies that the *non-refoulement* right encompasses the suspensive effect of an appeal, in accordance with UNHCR Executive Committee Conclusions 8 (point (e)(vii)) and 30. In light of the UNCAT and ECHR case law, it is necessary to expand upon the concept of ‘*non-refoulement*’ in the Geneva Convention to include cases which fall within Article 3 of the UNCAT and/or the ECHR. Therefore the definition includes the principles of all three Conventions. In addition, the temporal scope of the right is made clear in Article 3(2): a person can only be removed after an application for recognition of the right to asylum is definitively rejected. This is essential to guarantee that a person cannot be sent to an unsafe country while a claim is still pending in some fashion. In addition, due to the risk of ‘chain deportations’ from a so-called ‘safe’ third country to an unsafe one, Article 3(2) further clarifies that the *non-refoulement* right prevents removal to any third country where there is any possibility that such a third country might then violate an applicant’s *non-refoulement* right. This clause should be read in conjunction with the inadmissibility rules of Chapter 5 of Title V.

Article 4 summarizes the substantive rights of refugees which are spelled out in more detail in other provisions of the Directive. The purpose of this provision is to set out a simplified ‘charter of rights’ which can be easily located. Article 5 makes clear that Member States do not ‘grant’ the right to asylum, but rather ‘recognize’ its existence, as is clear from the UNHCR handbook and implicit in the proposed Eurodac Regulation (which refers to ‘recognized refugees’). Article 6(1) makes clear which human rights principles apply in detail to the right of asylum. Article 6(2) makes clear, in accordance with the *Amuur* judgment of the European Court of Human Rights, that Member States must give effect to the right of asylum wherever they have jurisdiction over and responsibility for an application.

Article 7 is a general non-discrimination clause ensuring that the rights set out in the Directive may not be granted in a discriminatory fashion.

²¹ See also UNHCR Executive Committee Conclusion 72.

It is without prejudice to non-discrimination rights already guaranteed by the EC Treaty or measures adopted pursuant to it; the word 'already' is intended to make clear that no discrimination law measures which the Community might subsequently adopt can weaken the non-discrimination principle in Article 7 of this Directive.

The Directive does not specifically state whether it applies to third-country nationals alone or also to EC nationals. This is because the provisions of Articles 63(1) and (2) EC are not consistent as regards their application to EC nationals or their restriction to third-country nationals alone.

As suggested in Part 4, the Directive is drafted in such a way as to confer rights upon individuals. Of course, Member States are free to decide upon the details of the administrative and judicial system to give effect to the central principles of asylum law in their territory. But it would not be in accordance with the underlying principles of human rights law to adopt legislation with key principles that were advisory or discretionary.

e) Determination of responsibility: Title II

This Title replaces the Dublin Convention with a 'one-stop' application system that is fair and workable. Article 8 lays down the 'single application' principle. Article 9 sets out the normal rule that the Member State responsible for examining the application is normally the state in which the first application was made (with certain exceptions set out in Article 10). At a stroke, this hugely reduces the complex bureaucratic rules of the Dublin Convention, which have so clearly failed to achieve their goals in practice. It still prevents applicants from making applications in more than one Member State. This restriction is unobjectionable from an human rights perspective *if* procedural rules, reception conditions, the definition of 'refugee', and the rules applying to complementary and temporary protection are harmonized at a level

which takes full account of human rights standards, as proposed in this Directive. The proposal gives preference to the Member State in which the applicant wishes to apply, clearly implementing the principle in UNHCR Executive Committee 12 that the applicant's wishes should be respected as far as possible.

From the Member States' perspective, such harmonization will hugely reduce the alleged incentive for an asylum-seeker to pick and choose between Member States before making an application. In any event, evidence shows that asylum-seekers often apply for asylum in a particular country because of existing personal or ethnic links with that country, or because of sheer chance.²² If there were some continued distortions of applications between Member States after the adoption of revised responsibility rules, then it would be possible and appropriate for the Community to arrange funding to compensate the Member States which are particularly affected by such distortions. It might be argued that allowing applicants to choose the Member State in which they apply for recognition of the right to asylum would lead to a 'race to the bottom', because Member States would seek to deter applications by reducing reception conditions and procedural protection and adopting a more restrictive interpretation of the Geneva Convention. However, this objection has no force if a change in the responsibility criteria is accompanied by substantial harmonization in other areas of asylum law, as we propose here.

In light of the harmonization achieved by the proposed Directive, it is unobjectionable to extend the responsibility rules to applications for recognition of complementary protection status which, under this proposed Directive, are an alternative claim made at the same time as an application for recognition of Geneva Convention status (see Title VII and Article 2(2)(a)). Of course, it is essential that extension of the responsibility rules to applications for recognition of complementary protection status should be agreed explicitly in a formal legal text (as they are here). Member States discussed in 1998 whether to agree informally to extend the Dublin Convention to complementary protection claims without formally amending the Convention. Such illicit attempts to amend the text of a Convention approved in a different form by national parliaments are unacceptable. Moreover, the suggestion is unacceptable on the merits as

²² See Bocker and Havinga, *Asylum Migration to the European Union: Patterns of Origin and Destination* (Commission, 1997); 'Asylum Applications in the European Union: Patterns and Trends and the Effect of Policy Measures' (1998) 11 JRS 245; and 'Country of Asylum by Choice or by Chance: Asylum-Seekers in Belgium, the Netherlands and the UK' (1999) 25 JEMS 43.

long as there are huge divergences between Member States' systems of complementary protection.

It should be noted that Article 63(1)(a) EC does not require the Community to copy the criteria for responsibility of applications from the Dublin Convention, only to apply *some* criteria in order to determine responsibility for applications. Thus Title I does not violate the EC Treaty. This huge change in the criteria for responsibility reduces the need to transpose a number of provisions from the Dublin Convention to the EC legislation establishing a Common European Asylum System. But certain provisions still need to be transposed, as discussed below.

Article 10 sets out five exceptions from the rule in Article 9. In no way can an asylum applicant ever make a claim in more than one Member State simultaneously, and transfer of claims is only allowed in the circumstances set out in Articles 10(1) to (5). However, it will always be a decision by an asylum applicant, not the Member States, which triggers a change in the responsible Member State. Attempts to force people to make asylum applications in Member States they do not wish to apply in will inevitably lead to destruction of documents and disappearances.

First, Article 10(1) sets out a 'family reunion' exception, based on Article 4 of the Dublin Convention. As noted above, the Dublin Convention only foresees family reunion in limited circumstances, and thus sets a highly objectionable restriction upon the fundamental rights to family reunion and respect for family life. Therefore, Article 10(1) proposes that an applicant can withdraw an application for recognition of the right to asylum in one Member State and apply in another one if the applicant's family member is a recognized refugee (including persons with complementary protection status) in the other Member State. Also the applicant can transfer the application to another Member State if he or she discovers that a family member has applied in another Member State. This is necessary to provide for cases where family members get split up and then make separate applications in different Member States before finding out about each other later. This can only

apply if the family members became separated before entry into the EC,²³ to prevent any possible 'dispersion' of family members to try to make applications in as many Member States as possible. There is a broad definition of 'family member' for the purposes of Article 10(1).

Article 10(2) also reflects family reunion principles. Where a family member has been admitted pursuant to family reunion obligations and makes a separate asylum claim, the Member State which admitted the first asylum applicant is responsible for the later claim(s). This is a fair rule which will prevent the separation of family members that could result under the Dublin Convention if one person has 'gone on ahead'.

The two 'humanitarian' exceptions from the Dublin Convention (Articles 3(4) and 9) have been transposed to Articles 10(3) and (4) of the proposed Directive. Article 10(3) will still permit the courts in some Member States to examine other Member States to see whether they are 'safe third countries' within the national concept of that term, although such examination should be less necessary in light of the level of harmonization which the proposed Directive would achieve.

Finally, Article 10(5) is based upon UNHCR Executive Committee Conclusion 15, which envisages the possibility of 'call[ing] upon' an applicant to apply elsewhere. This wording is suggestive, rather than mandatory. Therefore the application of Article 10(5) requires the consent of the asylum applicant and the requested Member State. The wording of 10(5) essentially transposes the second line of point (h)(iv) of the Excom Conclusion. This demonstrates that the approach to determination of responsibility in this proposed Directive, unlike the Dublin Convention, gives effect to the principles of that Conclusion, notably points (h)(i) to (iii) and the first line of (h)(iv).

Article 10(6) states the consequences of a transfer of responsibility under the relevant provisions of the remainder of this Article.

Article 11 permits Member States to consider a repeat application even if an application has been definitively rejected by another Member State. This is clearly only an option, not an obligation, for Member States. The first line essentially copies point (h) of UNHCR Executive Committee Conclusion 12, which 'recognizes

²³ 'Separation' here refers to *physical* separation, not separation in the family law sense.

that a decision by a Contracting State not to recognize refugee status does not preclude another Contracting State from examining a new request for refugee status made by the person concerned'. The second line copies the procedural provisions of Article 10(2). Therefore, if the applicant moves to another Member State during consideration of the second claim, it is the second Member State that has to take the applicant back.

Articles 12–16 transpose several provisions of the Dublin Convention.²⁴ These provisions are still necessary, because despite the simplified responsibility rules, some applicants might still make multiple applications or move to another Member State while the application is proceeding or after rejection. The clauses have been redrafted so that they only deal with such situations rather than the application of the complex existing criteria. The personal information exchanged in Article 16 of the proposed Directive (current Article 15 of the Convention) is correspondingly reduced, and Articles 16(6) and (8) improve upon the current Convention rules concerning erasure of data and other privacy rights. These specific rules apply in addition to a general privacy right in Article 85 of the proposed Directive (see Part 5(k) below).

The changes in responsibility rules would lead to corresponding changes in the proposed Eurodac Regulation. In particular, it would be pointless to exchange information on persons who have entered a Member State illegally, since such entry would no longer be a criterion for responsibility of the responsible Member State. Furthermore, there would be far fewer multiple applications if the key criterion were the Member State of initial application. This would result in considerable savings for taxpayers in the running costs of the system, estimated at 755,000 Euros annually by the Commission at EC level,²⁵ with unknown further expenses at national level.

²⁴ The proposed Directive does not incorporate any of the provisions of Decision 1/97 or Decision 1/98 of the 'Article 18 Committee' set up by the Dublin Convention, although it might be appropriate for the Community act which replaces the Dublin Convention to do so.

²⁵ See Financial Statement attached to proposed Regulation, note 19 above.

²⁶ Note 5 above, 10–11. However, it also addresses detention issues in detail.

²⁷ See, for instance, judgment of the Divisional Court (UK) in *ex parte Adimi, Kazim and Sorani*, 29 July 1999.

The changes in the responsibility rule should also lead to a reduction in the number of destroyed documents, with the result that there should be fewer doubts raised about the veracity of asylum-seekers during the application procedure (see Part 5(h) below).

f) Reception conditions: Title III

Title III on reception conditions is roughly based on a late draft of the Joint Position/Joint Action discussed over 1995/1996. However, it provides for high standards in order to ensure the dignity of the asylum-seeker, to reduce the risk of a 'race to the bottom' and to ensure that asylum applicants do not choose the Member State they apply to based on the highest reception conditions prevailing. It implements the principles concerning reception conditions set out in the recent *Guarding Standards* analysis of EC asylum and immigration law.²⁶

Article 17(2) makes clear that Member States cannot leave an asylum applicant without basic social protection even if the Member State contests the admissibility of the application or believes that another Member State is responsible. Nor can social protection be withdrawn after the initial rejection of the claim. As noted above, withdrawal of benefits by Member States in such cases is arguably in breach of Article 3 ECHR. Article 18 further provides that Member States cannot reduce or eliminate social protection merely because an asylum applicant has recourse to the courts or administrative authorities. Obviously the right to appeal against a negative determination would be meaningless if the asylum applicant could not eat or had no accommodation during the appeal. Articles 19–21 are straightforward.

Article 22 gives effect to the principles of Article 31 of the Geneva Convention, which have suffered greatly from EU harmonization of asylum law in recent years. Simply put, an asylum-seeker should not be penalized for illegal entry if his or her entry can be explained to the authorities within a short period. This principle must logically apply where persons have used false documents or arranged for clandestine entry, and where persons are in transit to a third country. It will not apply where persons already have protection elsewhere, in accordance with the 'inadmissibility' rules of this proposed Directive.²⁷

Article 23 addresses an extremely important issue for asylum-seekers. The increased use of

detention of asylum-seekers in recent years has led to the adoption of UNHCR guidelines in June 1999.²⁸ Article 23 distills the central principles of these guidelines. The phrase ‘within their jurisdiction’ is a reference to *Amuur v. France*.²⁹

Article 24 sets out accommodation rights which should in principle be guaranteed equally on the same basis as host nationals, offering applicants a choice of accommodation as far as possible. Article 24(3) recognizes the importance of long-term arrangements in ensuring the protection and safety of minors. It is appropriate to grant such minors the right to long-term accommodation immediately upon making an application for asylum, for disruptions in the living arrangements applying to the minor could potentially be highly disturbing. Of course, providing for long-term accommodation immediately does not prejudice the decision on whether the criteria for recognition of the right to asylum are met.

Article 25 allows access to employment for asylum applicants; this will reduce the social security expenditures of Member States which do not currently permit such access. Moreover, if Member States devoted sufficient resources to deciding upon asylum applications more quickly, the time during which applicants could claim benefits or compete on the employment market would be quite limited.

Articles 26–28 apply equality principles to education, health care and social protection. It is arguable that Article 28(2) is declaratory in light of the current text of Regulation 1408/71, which already extends to refugees. Articles 26 and 27 make clear that if ‘special’ education and health care is applied, it must be temporary only and equivalent to that available to nationals. Again, the costs of such care would be reduced as a consequence of speedier decision-making.

Article 29 allows for a wide scope of family reunion for asylum applicants, to give full effect to the fundamental right to family reunion. However, Article 29(2) makes clear that a family member must leave the country if an application has been definitively rejected.

²⁸ ‘Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice’, Standing Committee, 15th Meeting.

²⁹ Note 1 above.

Article 30 recognizes the particular vulnerability of certain groups. Further rules applying to such groups, including unaccompanied minors as distinct from other children, and/or to women, could be agreed in separate legislation. Article 30(2) applies a rule from the unaccompanied minors Resolution to all children, because it is obviously necessary to ensure that all children who have suffered particularly receive special assistance.

g) Definition of ‘refugee’: Title IV

Title IV is subdivided into a clause on principles, followed by five chapters, on inclusion clauses, cessation clauses, withdrawal clauses, effects of recognition and relationship with complementary protection. Throughout this Title (and indeed this Directive) reference is made to a person’s country of nationality, or former habitual residence, in accordance with the wording of the Geneva Convention, rather than the ‘country of origin’ as used in EU measures.

Article 31(1) makes clear the purpose of Title IV of the Directive: to ensure a common interpretation of the concept of ‘refugee’ within the scope of the Geneva Convention. However, Article 31(2) conserves the right of Member States to interpret the concept of ‘Convention refugee’ more favourably, in accordance with Article 63(1)(c) EC. Article 31(3) addresses the relationship with complementary protection: Member States must consider whether a person falling outside the scope of the Convention refugee definition has the right to recognition of complementary protection status. This determination must be made as part of a single application, in accordance with Article 2(2)(a). Article 31(4) sets out the relationship between Convention refugee status and temporary protection: the latter is an alternative form of protection status that applies when the Convention cannot be applied individually because of a mass influx.

Chapter 1 on inclusion clauses (Articles 32–37) contains Article 32, which defines a Convention refugee, followed by Section 1 on persecution (Articles 33–35) and Section 2 on other issues related to inclusion (Articles 36–37). Article 32(1) simply transposes the definition of ‘refugee’ from the Geneva Convention, and Article 32(2) requires Member States’ authorities to give effect to it. Article 33 brings all the rules relating to the nature of

persecution as such, as set out in the EU Joint Position and the UNHCR handbook. Article 34 addresses the important issue of 'agents of persecution', focussing on the position of the asylum applicant rather than the status of the persecutor, in accordance with the principle that the Geneva Convention is a human rights treaty, not a set of rules on state responsibility. Article 35 defines the grounds of persecution. The reference to 'social mores' in Article 35(2)(c) is designed to address cases such as persecution due to a refusal to wear certain clothing or accept the social values of the majority religion.

Articles 36 and 37 address issues of the so-called 'internal flight alternative' (called the 'internal relocation principle' here) and 'refugee *sur place*' respectively. Article 36(1) follows the presumption *against* application of the internal flight alternative rule as found in the UNHCR Handbook, rather than the presumption in *favour* applied by the EU Joint Position. In order to ensure an accurate interpretation of this important principle, Article 36(2) then specifies in more detail how it should be applied. Further provisions on consideration of the 'internal relocation' principle during the asylum determination procedure are set out in Article 55(5).

Chapter 2 on cessation of status (Article 38) makes clear that Article 1C of the Geneva Convention should apply restrictively, as emphasized in the UNHCR Handbook.³⁰ Since the trauma of previous persecution can make it very difficult or impossible for a person to contemplate returning even where the situation in the country of nationality (or, if stateless, prior habitual residence) has greatly improved, it is necessary to preclude Member States from applying the cessation rule at all in some circumstances (Articles 38(3) and (4)). Article 38(5) is a 'testing the waters' clause, effectively defining Article 1C(4) of the Geneva Convention, which allows a refugee to return to his or her state of nationality or (if stateless) habitual residence in order to determine if it is safe to return. Such a temporary return would not automatically be a definitive return 'with a view to permanently residing there' in the

sense of point 134 of the Handbook, unless the refugee did indeed decide to reside there.

Chapter 3 (Article 39) refers to 'withholding or cancelling' refugee status because application of Article 1F might result in either (see para 141 of the UNHCR Handbook). It requires observation of the restrictive principles of the Handbook and reflects a Standing Committee report of May 1997.

Chapter 4 (Articles 40 to 42) governs the status of recognized refugees with Convention refugee status. The residence permit and family reunion rights are additions to Geneva Convention protection. However, the former is the necessary corollary of the recognition of the right to asylum and the latter gives effect to the Declarations in the Final Act of the Conference which concluded the Geneva Convention and Executive Committee Conclusions 15 (point (e)), 24 and 85. Article 40(1) entitles Convention refugees to the social and other protection of the Convention; Article 40(2) creates a right to a declaratory residence permit; and Article 40(3) gives protection against expulsion in addition to the *non-refoulement* obligation.

Article 41 gives broad family reunion rights. In order to ensure equal treatment, Regulation 1612/68 on rights for EC national migrant workers should apply equally to refugees, except for Article 10(3) of the Regulation. This clause is problematic because it requires 'normal housing' before family members can enter, and in practice it might be hard for a refugee to obtain it. So the clause should not apply,³¹ and moreover Member States should be placed under a positive obligation to improve the accommodation of recognized refugees. Therefore Article 41(1) includes a provision based on point 9 of UNHCR Executive Committee Conclusion 24, which suggests 'special measures of assistance' in 'appropriate cases' to assist family reunion. Article 41(2) protects family members further by extending Convention refugee status to them, and protecting them upon death or disability of the recognized refugee in accordance with the rules applying to EC nationals. This also reflects UNHCR Executive Committee Conclusion 24 (point 6).³² Article 41(3) requires Member States to protect the status of family members in accordance with EC or national law. Two other Directives proposed as part of the ILPA/MPG Amsterdam Treaty Project

³⁰ See also UNHCR Executive Committee Conclusion 69 and Standing Committee report of May 1997.

³¹ Moreover, the Commission has proposed deleting Article 10(3) from the Regulation: see OJ 1998, C 344.

³² See also 'Family Protection Issues', UNHCR Standing Committee, 15th Meeting, 4 June 1999.

(concerning family reunion and long-term resident status) suggest detailed provisions to ensure equal treatment rights for family members of third-country nationals.

Article 42(1) makes it clear that if a recognized refugee moves to another Member State, that person's status must be transferred automatically. This implements UNHCR Executive Committee Conclusion 12, point (f). Article 42(2) applies the same principle to family members. The separate proposal on the rights of long-term residents suggests a detailed system to secure the rights of long-term resident third-country nationals and their family members who move to another Member State.

The matters dealt with in these Articles of the Directive do not fall within the 'legal base' of Articles 63(1) and (2) EC, but fall instead within the more general power of the Community to agree rules for conditions of residence and family reunion of third-country nationals pursuant to Article 63(3)(a) EC. Because the proposed Directive is based generally upon Article 63 EC its legal base can encompass such clauses, although the residence and family reunion status of any EC nationals claiming asylum is of course governed by other provisions of EC law, instead of this proposed Directive.

Articles 40 and 41 also apply to persons within the scope of temporary protection and complementary protection, and Article 42 applies to persons with complementary protection status (see Titles VI and VII).

Chapter 5, Article 43, sets out the relationship between Geneva Convention status and complementary protection status. This Article specifies that complementary protection is available if someone falls outside the Geneva Convention inclusion rules or is excluded from Convention status in any way. Article 43(2) ensures that complementary protection status is automatically granted to a refugee who is to be expelled from a Member State on public order or national security grounds. This follows from the *Chahal* judgment.³³

³³ Note 1 above.

³⁴ See the detailed study, *Breaking Down the Barriers: A Report on the Conduct of Asylum Interviewers At Ports* (ILPA, 1999).

h) Procedural rights: Title V

The procedure for examining an asylum application is a critical part of the Common European Asylum System. As the UNCAT jurisprudence and the *Hatami v. Sweden* opinion of the European Commission on Human Rights make clear, a defective system for examining claims will violate international human rights law. This Title therefore gives effect to the principles in the UNHCR Handbook and several Executive Committee Conclusions, along with recent ECRE Guidelines on asylum procedures.

Article 44 makes clear that, in accordance with the 'single application' principle, these procedural rights apply to all applications for recognition of the right to asylum in either form, because Geneva Convention claims are simultaneously claims in the alternative to complementary protection status.

Chapter 1 (Articles 45 and 46) sets out general principles which govern the operation of the asylum regime of Member States. Article 45 makes clear which international human rights obligations apply in the context of considering asylum applications. Furthermore, Article 45(3) establishes the principle of speedy consideration of applications, without derogating from the guarantees of Title V. A timely determination of a claim benefits both the Member States, for budgetary reasons, and the applicant, who should be informed relatively soon whether he or she will be authorized to remain in a Member State.

Chapter 2 (Articles 47–50) sets out the basic structure of Member States' system for the examination of asylum applications. The effectiveness of the system depends upon the training of the staff who come into initial contact with the asylum applicant and of the competent authority which examines and makes initial decisions on requests for recognition.³⁴ Problems arising from the initial contact with an asylum applicant may taint the entire determination process and lead to a breach of the applicant's human rights, as seen in *Hatami*. Article 49 precludes Member States from establishing a special regime at the border which derogates from the guarantees of *non-refoulement* or of reception conditions.

Chapter 3 (Articles 51–58) sets out the core procedural rights which must apply during asylum procedures. In particular, Article 51 provides that applications can be made after

entry, and that information provided to national authorities which does not explicitly refer to claims to recognition of the right to asylum but which does raise asylum issues shall nonetheless engage Member States' obligations to consider an asylum claim. The former principle implements UNHCR Executive Committee Conclusion 15. A lack of valid documents shall not prevent the right to apply for recognition; this implements the principle of Article 31 of the Geneva Convention in part. Article 52 sets out basic rights to legal advice and assistance, interpretation, and contact with the UNHCR during the asylum procedure. Article 53 makes clear that assessment of asylum claims is based on the situation of each individual, but requires Member States to establish a 'fast track' to recognize Convention refugees, in particular where there is a group claim to recognition of the right to asylum. Article 53(4) allows family members to make separate applications if they wish, but in the interests of efficiency, Member States may delay the examination of such claims if they are already examining a claim by another family member. It is implicit that the definitive rejection of a claim by one family member cannot automatically entail the rejection of a claim by another family member, whose application for recognition must be considered separately, in accordance with Article 53(1). Article 54 sets out privacy rights, with the important addition of the ban on the release of applicants' names (as already practiced in some Member States).

Article 55 sets out a number of important rules of evidence and proof. These incorporate principles of the UNCHR Handbook and the principles set out in the Decision of the European Commission of Human Rights in the *Hatami* case, along with the expert opinions interpreting the UNCAT. They replace some of the rules set out in the 1992 London Resolution concerning 'manifestly unfounded' asylum applications, because the Resolution's rules are not in accordance with international human rights law. Article 55(4) sets out an 'equality of arms' rule basic to Article 6 ECHR and, it is submitted, to asylum applications. Article 55(5)

sets out procedural rules concerning the 'internal relocation' principle. Article 55(6) is an essential remedy to ensure that the guarantees provided for in this Article are not nugatory. Article 55(7) replaces the 1992 Conclusion on 'safe countries of origin' to the extent that the Conclusion permits Member States to establish 'white lists' of safe countries. This is in accordance with UNHCR criticism of this concept.³⁵ Of course, it will still be possible for a competent authority to reject an asylum application very quickly if an individual examination of that application showed that there was clearly no evidence of persecution of the applicant in the country of nationality or (for a stateless person) habitual residence.

Article 56 sets out the principle of communicating decisions. It is made clear here that the reasons for refusing an application must be specific and detailed. Article 57 sets out appeal rights. It is implicitly up to each Member State to decide whether there will be additional levels of appeal beyond this first level, subject of course to an applicant's right to bring a claim before the European Court of Human Rights, the UN Human Rights Committee (which interprets UNCAT) and the obligation on the courts or tribunals of 'last resort' in each Member State to refer questions to the European Court of Justice. Article 57(1) also provides that the court or review authority must be properly qualified and apply the principles of assessment of evidence which apply to the initial determination. This will ensure an effective review of the initial decision at the first level of appeal, resulting in a quick correction of any errors made by the competent authority.

Article 58 addresses the critical issue of accelerated procedures. As recognized by the UNHCR, accelerated procedures have a role to play in any system for examination of applications for recognition of the right to asylum.³⁶ However, it is important to limit which types of claim an accelerated procedure can apply to, and to determine what the consequences of such a procedure are. First of all, Article 58 replaces the concept of 'manifestly unfounded' procedures, which was used by the Immigration Ministers when drawing up their 1992 Resolution, with the concept of 'accelerated procedures'. This is because the term 'manifestly unfounded' predetermines the very issue which is at the heart of the procedure. Secondly, Article 58

³⁵ See Note on International Protection, 7 July 1999, point III(A) and Background Note on the 'Safe Third Country' concept, Sub-Committee of the Whole on International Protection, 26 July 1991.

³⁶ UNHCR Executive Committee Conclusion 30.

distinguishes between applications which are subject to accelerated procedures which determine the merits (Article 58(1) and 58(2)) and applications which are subject to accelerated procedures because they may be considered inadmissible (Article 58(3)). Member States may always apply accelerated procedures in cases of inadmissibility.

Thirdly, Article 58 sets out an exhaustive list of circumstances in which an accelerated procedure can be applied, with a further list of circumstances in which it cannot. The procedure can only be applied if the applicant raises no issue under the Geneva Convention or another human rights instrument relevant to complementary protection. It cannot be used where there are claims or indications of torture, issues of 'internal relocation' or Article 1F of the Geneva Convention, or issues of credibility. The first of these exceptions implements the consistent jurisprudence under UNCAT and the *Hatami* ECHR case, while the others are included because they are all issues which require a detailed consideration of the facts and evidence of an individual case. These clauses essentially implement UNHCR Executive Committee Conclusion 30, with the deletion of the concept of 'manifestly fraudulent' cases. This concept has proven to be so unclear and open to abuse that it is inappropriate to exclude full consideration of asylum applications on such grounds. It should also be noted that Member States should be precluded from applying accelerated procedures to applicants merely because they have destroyed documents or obtained clandestine entry, because procedural penalties for these forms of illegal entry breach the principle of Article 31 of the Geneva Convention. The extensive abuse of Executive Committee Conclusion 30 has been recognized by the UNHCR itself, which has criticized in particular the use of such procedures to apply exclusion clauses, the 'internal relocation' principle, and the arrival of applicants without documents or with false documentation.³⁷

Article 58(4) sets out the consequences of an accelerated procedure. An examination of the

claim must still follow the principles of assessment of evidence set out in Article 55. There can be no derogation from the procedural guarantees in this Title or the *non-refoulement* principle, except that a quicker time limit for a decision might provisionally apply to the initial application unless the applicant can rebut the presumption. This means that Member States must allow an in-country appeal against a negative determination. But there need only be *one* in-country appeal; Member States are free to draw a distinction between accelerated procedures and other determination procedures and allow additional appeals only in the latter cases.

The reasoning behind Article 58 is that the best method for ensuring that asylum applications are decided upon quickly is for Member States to commit sufficient resources to ensure that their authorities make a decision on *all* applications quickly. It will of course still prove possible in practice to make quicker decisions on some applications than others, and to rule more quickly on any appeal from such negative determinations, where there is essentially no evidence supporting the applicant's claim. But as noted above, the broad scope of the 1992 Resolution on 'manifestly unfounded' applications is contrary to the Decision of the European Commission of Human Rights in the *Hatami* case along with the expert opinions interpreting the UNCAT. Unless the EC legislation on asylum procedures substantially amends the rules in this Resolution, the EC will be in breach of its human rights obligations.

Chapter 4 (Articles 59–62) addresses applicants in particular situations. Article 59 addresses victims of sexual violence.³⁸ It recognizes that there may be male as well as female victims of such violence. Article 60 addresses unaccompanied minors, and makes several improvements to the 1997 Resolution as regards the procedural rights of such persons. Article 61 addresses the mentally disturbed, a group addressed in the UNHCR Handbook but not in any EU rules to date. Article 62 addresses the particular issue of torture victims. It specifies that there must be an immediate recourse to an independent medical examination if a claim of torture is disbelieved by the person examining the application for recognition or making initial contact with the applicant. This text is based upon a recent legislative amendment in one Member State.³⁹

³⁷ See 1999 Note on International Protection (note 35 above), III(B).

³⁸ See UNHCR Executive Committee Conclusion 73, point (g).

³⁹ Greek Presidential Decree 61/1999, Article 2(4). Our thanks to Ionna Babassika of the Medical Rehabilitation Centre for Torture Victims in Athens for providing this information.

Chapter 5 (Articles 63 to 65) addresses the controversial issues of admissibility, particularly the 1992 Resolutions on ‘manifestly unfounded’ applications and ‘safe third countries.’ First, Article 63 concerns inadmissibility and third countries. In principle, Member States cannot refuse to examine an asylum application from a person with links with a third state (Article 63(1)). Article 63(2) provides certain exceptions to this rule, if the third state has ratified the Geneva Convention without limiting its territorial scope. A third country can be considered ‘safe’ if that country has: already recognized the Geneva Convention refugee status of a person or extended equivalent protection; or has granted a permanent residence permit to that person; or has agreed a treaty with the Community granting equivalent protection to refugees and asylum-seekers as applies within the EC. The latter provision gives the EC an incentive to agree treaties on asylum with third states which contribute to raising international standards of human rights protection. A fourth derogation allows a Member State to request the applicant to apply elsewhere; this implements the principles of point (h)(iv) of UNHCR Executive Committee Conclusion 15 in the same manner as Article 10, which concerns determining responsibility for an applicant among Member States. If these derogations apply, Member States need not extend the principles of Title V to the applicant and the principle of *non-refoulement* will not be breached by a removal (see Article 3(2) of the proposal).

Article 63 is justified because of the tendency of some Member States to interpret the 1992 ‘Safe Third Countries’ Resolution to justify removal to third states with which an applicant has very little connection, without any guarantee that the application will be properly examined and with the risk that the applicant will then be sent to an unsafe fourth country.⁴⁰ Only the certainty provided by proof of existing protection for the applicant in a third state, by a high standard of protection applicable in that state, or the willingness of the applicant to return there can fully ensure the safety of that state.

Article 64 concerns inadmissibility among Member States. It gives effect to Title II of the Directive by providing clearly that applications can be rejected as inadmissible where

applications have been accepted, definitively rejected or are pending in another Member State, unless a recognized refugee is moving as a ‘long-term resident’ or a Member State has exercised the option under Article 11 to consider an asylum application which another Member State has definitively rejected. Member States cannot derogate from the procedural guarantees in Title V under any other circumstances, and they cannot refuse social protection to asylum applicants when considering if another Member State is responsible for the application (see Article 17). Where these circumstances apply, procedural protection can be suspended pending return to the responsible Member State. The Directive only proposes such a reduction in procedural protection as part of an overall package, including a change in the Dublin Convention criteria and the effective minimum standards guaranteed for reception conditions, procedural rights and the definition of refugee. A reduction in procedural protection in Dublin cases would not be appropriate without the rest of the reforms proposed by this Directive. In the absence of extensive harmonization of substantive and procedural asylum law at a high level, as advocated in this Directive, procedural safeguards in Dublin cases should be strengthened, not weakened.

Article 65(1) allows a Member State to reconsider an application which it has definitively rejected. This is wholly optional in most cases. However, Article 65(2) *requires* a Member State to reconsider a rejected application if there is an allegation of poor representation or change of circumstance. This would only require consideration of the specific allegations, not the entire application, and so any such allegations without any foundation could be rejected very quickly.

Finally, Chapter 6 (Article 66) sets out a general rule on the effect of illegal entry or destruction of documents upon procedural rights. This is based on the underlying principles of Article 31 of the Geneva Convention, making it clear that illegal entry or destruction of documents cannot result in presumptions about the application or weakened procedural guarantees.

i) Temporary protection: Title VI

Title VI on temporary protection is based on the second version of the Commission’s draft Joint Action, discussed above. Article 67 makes

⁴⁰ On this point, see the criticism in the 1999 UNHCR Note on International Protection (note 35 above), III(A).

clear that temporary protection regimes can only be established where Member States are overwhelmed by the number of applications. Chapter 1 of Title VI (Articles 70–73) provides for the EC to establish an EC-wide temporary protection regime, but it is assumed that national regimes may continue to be created or maintained. Therefore Chapter 2 (Articles 74–79) sets out rules that apply to all regimes, whether EC or national. The reason for this is that it is desirable to harmonize certain principles applying to national regimes, even where an EC-wide regime is not established. Article 68 makes clear that the EC regime will not apply to persons covered by pre-existing national regimes, but such persons will be covered by the provisions of Chapter 2.

The definitions in Article 69 and rules in Article 70 do not include the concept of ‘safe region of origin’ (as in the Commission’s proposal) for the reasons mentioned in part 3. Article 70(2) provides for a quicker end to an EC regime than foreseen in the Commission’s proposal, to avoid the risk of large numbers of persons being placed in an uncertain status for some time. Article 76 then applies this principle to national regimes as well. Article 71 takes forward the Commission’s proposed procedure for terminating an EC temporary protection regime; the effects of termination are addressed (along with the effects of terminating a national regime) in Article 79. There are no specific provisions on responsibility for applications; rather, it is presumed that persons in an EC temporary protection regime remain the responsibility of the Member State in which they initially apply. However, there is nothing to prevent the Member States making specific offers of admission as they have done recently during the Kosovo crisis. The decision-making procedure in Article 73 is more transparent than that of the proposed Joint Action and requires approval of the EP, albeit after the fact (in order to allow for urgency).

As noted above, Chapter 2 of this Title applies to both national and EC temporary protection regimes (Article 74). Article 76 provides for a simplified procedure to determine whether a person is eligible for temporary protection

status where such status is disputed, although frequently it will not be (for example, where there are a series of special flights into a Member State full of persons displaced by a particular conflict). Where such status is disputed, Article 76(2) provides for the appeal rights under Title V of the Directive to apply. This appeal will usually be limited to the issue of whether a particular individual falls within the group of displaced persons covered by the national or EC regime. Article 76(3) allows Member States to decide ‘on the ground’ in third countries to recognize the temporary protection status of large numbers of persons. It also allows Member States to agree criteria for such recognition. This clause recognizes that where there is a huge influx, it is often necessary to make quick decisions about large groups of persons in third states.

Article 77 sets out the effect of temporary protection status. It provides that persons within a temporary protection regime have the same rights as Geneva Convention refugees for the duration of that regime, except for the free movement rights of long-term residents in Article 42.⁴¹ The exclusion from long-term residents’ rights is justified because the Directive provides for a quick termination of temporary protection regimes; it would *not* be justified if a future EC measure allowed the Member States to keep persons in a ‘temporary protection’ status for long periods. Article 78 governs the relationship between temporary protection status and applications for Geneva Convention or complementary protection status. Article 78(1) to (3) governs the position if a Member State still allows applications for formal Convention refugee status during the temporary protection regime, while Article 78(4) applies if a Member State does not. Article 78(1) makes clear that the normal rules on applications for recognition of the right to asylum (except for reception conditions) will apply to asylum applications if those applications are permitted. Article 78(2) permits a rejected applicant to stay for the duration of the temporary protection regime. Article 78(3) provides that the provisions of Title IV will apply instead of the provisions on reception conditions. This is designed to protect the beneficiary of the temporary protection regime, who will receive status as a Convention refugee rather than status as an asylum applicant during the examination of the application for full recognition. Article 78(4)

⁴¹ On family members and temporary refuge, see UNHCR Executive Committee Conclusions 15, point (e), and 22, point 2(h).

permits Member States to suspend considering asylum applications for an absolute maximum of one year, if the mass influx is so large that they cannot process them at first. After that year is up, it follows that Member States will have to process all applications for asylum in the normal way.

Article 79 then sets out the effects of termination of a temporary protection regime or reduction of its scope. Persons may return voluntarily or alternatively make an application for Geneva Convention asylum status (or resume a suspended application). It is simply not possible for Member States to terminate a temporary protection regime and then refuse to consider asylum applications. This means that no persons can be returned involuntarily unless their asylum applications have been definitively rejected in the normal way. Article 79(2) is an 'acquired rights' clause which ensures that the status which a person has acquired during the application of a temporary protection regime is not downgraded after termination of a regime until a person's asylum application has been definitively rejected.

j) Complementary protection: Title VII

The principles behind this Title are: first, to define the circumstances in which complementary protection should be granted; second, to provide for procedural rules to determine such status; and third, to provide for substantive rights attached to such status. The current national systems are considered to be highly deficient, because the national standards applying to access to the status are highly discretionary, no clear procedural rules apply to applications in most Member States, complementary status is usually informal and uncertain, and the rights of persons given such status are much weaker than the rights granted to persons with Geneva Convention status.⁴² The persons governed by complementary protection systems are persons in need of international protection, but these ambiguous, *ad hoc*, discretionary systems fail to protect their rights and dignity sufficiently.

Article 80(2) sets out the initial rule applying to access to status. Complementary protection

⁴² See Lambert, note 17 above.

⁴³ Even before *Chahal*, expulsion of refugees was justified only in 'very exceptional cases': see UNHCR Executive Committee Conclusion 7.

must be granted to all persons who fall outside Geneva Convention or temporary protection status because: a) they fall outside the 'inclusion' clauses or within the cancellation, withholding or cessation clauses but b) can still argue that they need international protection because of the situation in the country of nationality or (if stateless) habitual residence. The second part of this definition adopts the definition of complementary protection supported by ECRE since 1995.

Article 80(3) makes it clear that complementary protection status in no way prevents prosecution of persons who have allegedly committed a human rights abuse themselves or another crime, subject to the rules limiting the detention of asylum applicants. Such persons have the right to benefit from the *non-refoulement* principle to avoid removal to a state where they will face torture or other inhuman treatment, as is clear from *Chahal*. But this does not entail a right to resist prosecution for the offences which could justify the cancellation or withdrawal of Convention refugee status or (until *Chahal* clarified the point) have justified the expulsion of a refugee.⁴³

Article 81 again provides that an application for Geneva Convention status automatically constitutes a claim in the alternative for complementary protection status, and that (by extension from *Chahal*) expulsion of a recognized refugee should usually result in automatic grant of complementary protection status. Article 81(4) preserves the right of an applicant to appeal the refusal of Geneva Convention status even where complementary protection status has been granted. Article 82 extends the substantive benefits of Geneva Convention refugee status enjoyed within the Community to persons with complementary protection status. This extension is appropriate because there is no justification for treating a person's rights to family reunion or employment (for example) differently depending on the sources of the persecution he or she has suffered.

k) Final provisions: Title VIII

Measures implementing this Directive pursuant to Article 83 may only be taken in three cases: where the Dublin Convention presently explicitly provides for such cases (Articles 14(5) and 15(2) of the Directive) and in the case of

the principles governing decisions on temporary protection taken in third states (Article 76(3)). This is appropriate since the importance of the subject-matter in other cases justifies either the full amendment procedure of consultation with the European Parliament and six weeks' opportunity at a minimum for national parliaments to comment, or the fast-track consultation of the EP (when deciding on temporary protection regime pursuant to Article 72(3)).⁴⁴ Additionally, the Directive provides for the maximum level of control over Commission acts by Member States and the European Parliament.

Article 84 takes the Dublin Convention rules on exchange of information, clarifies them, extends their scope to other asylum measures, and makes such information open to the public. This will end the current secretiveness of the current process within the Council, now handled by the *ad hoc* CIREA discussion group.

Article 85 ensures the application of data protection rights. It should be noted that the proposed Regulation on Eurodac also assumes the application of Article 286 EC and the data protection directive to asylum issues.⁴⁵ Article 85(5) precludes any national practice of placing names of all rejected asylum-seekers into the SIS, in accordance with the clear wording of the Schengen Convention and the recent decisions of the Conseil d'Etat in France.⁴⁶ Article 86 is a judicial protection clause based on the EC's sex equality directives (it is also found in the data protection directive). In addition to more specific provisions on procedural rights, this clause ensures that all rights in the directive can be enforced by access to courts with effective remedies to ensure their application.⁴⁷

⁴⁴ The decisions on the principles governing temporary protection decisions in third states are certainly very important, but it is justified to adopt them as implementing measures because they might need to be adopted urgently.

⁴⁵ Note 19 above.

⁴⁶ *Forabushco*, judgment of 9 June 1999. Directive 2000/04 in this Project (on border controls and visas) incorporates this rule, and also proposes broader amendments to the SIS provisions governing admission of third-country nationals into EC territory.

⁴⁷ See Article 6 of Directive 76/207 (OJ 1976, L 39/40), Art. 22 of Dir. 95/46 (OJ 1995, L 281/31), and interpretation of the former in Case 14/83, *Von Colson*, [1984] ECR 1891; Case 222/84, *Johnston*, [1986] ECR 1651; Case C-271/91, *Marshall II*, [1993] ECR I-4367; and Case C-185/97, *Coote*, [1998] ECR I-5199.

Article 87(1) makes clear that the rights of the child apply fully to all matters within the Directive's scope, and Article 87(2) 'mainstreams' the best interests of the child throughout the Directive. Article 88 is taken from UNHCR Executive Committee Conclusion 24 (point 6), and applies that Conclusion's principles to all matters affecting determination of family status. Article 89 makes clear that all the provisions of the Directive are minimum standards, except for Title II on responsibility (which has its own rules on derogations). Article 90 recognizes the difficult social environment facing refugees and asylum applicants, and therefore requires the Member States to avoid disseminating inaccurate information about them and to promote human rights education. Article 90 is a standard review and implementation clause, with the added proviso that the information the Commission uses for compiling its report should be made public.

Annexes: proposed separate directives

The EC institutions are not likely to discuss a directive creating the entire 'Common European Asylum System' at once. It seems probable that they will first discuss a directive on asylum procedures as the first step towards creation of the CEAS. Therefore, we have also broken the proposed consolidated asylum directive into six separate Directives, addressing responsibility for applications, reception conditions, the definition of 'refugee', asylum procedures, temporary protection, and subsidiary protection. These proposals essentially reproduce the provisions of the relevant Titles of the proposed overall Directive, with cross-references to 'the relevant provisions of Community or national law' instead of to other Titles of the overall Directive. For discussion of the specific provisions of each separate Directive on asylum procedures, see part 5 above.

Since the separate Directives would not be adopted simultaneously, certain changes have been made. The Directive on responsibility does not apply to claims for complementary protection, as it would be inappropriate to apply such rules to complementary protection claims until the EC has harmonized national law on this issue. Similarly, this Directive provides full procedural protection for claimants; it would be inappropriate to reduce

such protection until the EC has substantially harmonized national asylum law.

The separate procedures Directive would not require immediate application of the principle that an application for Convention refugee status constitutes an application in the alternative for complementary protection status (Article 4(1)). However, Member States that do not currently apply such a principle would be entitled to apply separate procedures relating to complementary protection applications until the Council adopts a measure harmonizing national law on complementary protection (Article 4(2) and recital 12).

The procedures proposal does not suggest procedural rules governing applications in the context of the Dublin Convention (see Article 4(1) and recital 9) because that subject could best be addressed when adopting a Community act on responsibility for applications. It should be observed that the limited procedural protection currently available in Dublin Convention cases in some Member States is grounds for concern. There is no reference to possible treaties with third states on substantive asylum law, because the Community should agree its internal legislation on such matters first (Article 24).

ON

the fundamental right to asylum

The Council of the European Union,

Having regard to the Treaty establishing the European Community, and
in particular Article 63 thereof,

Having regard to the proposal of the Commission,

Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to asylum is a fundamental human right;
- 2 Article 61 of the Treaty requires the Community to establish an 'area of freedom, security and justice' within five years of the entry into force of the Treaty of Amsterdam;
- 3 because of the interrelationship between various aspects of the law affecting asylum applicants, refugees, displaced persons and other persons in need of international protection, it is appropriate for the Council to establish a Common European Asylum System which integrates these various aspects to the extent possible;
- 4 according to Article 6(2) of the Treaty on European Union, the European 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;
- 5 the measures on asylum which the Community must adopt pursuant to Article 63(1) of the Treaty establishing the European Community must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties; whereas such other relevant treaties include the European Convention on Human Rights, the United Nations Convention Against Torture, and the Convention on the Rights of the Child;
- 6 the measures on refugees and displaced persons which the Community must adopt pursuant to Article 63(2) of the Treaty establishing the European Community must be in accordance with the general principles of Community law, including the respect for fundamental rights as defined in Article 6(2) of the Treaty on European Union; whereas the European Court of Justice has additionally held that all international human rights treaties in which Member

States have participated are sources of the fundamental rights that form part of the general principles of Community law;

- 7 Declaration 17, attached to the Final Act of the Treaty of Amsterdam, specifies that consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy; whereas the role of the United Nations High Commissioner as regards the procedure for examining a claim for asylum should also be recognized;
- 8 in many Member States the United Nations High Commissioner for Refugees may also intervene during the judicial determination of asylum claims; whereas the Council should therefore invite the Court of Justice to consider whether to propose an amendment to its rules of procedure to permit the intervention of the United Nations High Commissioner for Refugees in appropriate cases before that Court;
- 9 pursuant to Article 63(1)(a) of the Treaty establishing the European Community, the Council must adopt criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; whereas such rules must take into consideration the difficulties experienced in the application of the Dublin Convention; whereas an additional measure implementing this principle is Regulation 0000/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints of applicants for asylum;
- 10 pursuant to Article 63(1)(b) of the Treaty establishing the European Community, the Council must adopt minimum standards on the reception of asylum applicants in Member States; whereas, to ensure the dignity of asylum applicants, such standards should ensure that the educational, accommodation, health and welfare needs of asylum applicants are met;
- 11 pursuant to Article 63(1)(c) of the Treaty establishing the European Community, the Council must adopt minimum standards with respect to the recognition of the rights of asylum of Geneva Convention refugees; whereas, in order to ensure that such measures are in accordance with the Geneva Convention and New York Protocol, such standards must take into account the principles concerning the interpretation of the Geneva Convention set out in the Handbook on Procedures and Criteria for Determining Refugee Status drawn up by the United Nations High Commissioner for Refugees;
- 12 pursuant to Article 63(1)(d) of the Treaty establishing the European Community, the Council must adopt minimum standards on procedures in Member States for granting or withdrawing refugee status; whereas, in order to ensure that such measures are in accordance with the Geneva Convention and New York Protocol, such standards must take into account the principles concerning the procedure for examining applications for protection under the Geneva Convention set out in the Handbook on Procedures and Criteria for Determining Refugee Status drawn up by the United Nations High Commissioner for Refugees; whereas such standards must also be in accordance with the European Convention on Human Rights and the United Nations Convention Against Torture;
- 13 pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of

nationality (or, for a stateless person, the country of former habitual residence); whereas in situations of mass influx, Member States may be temporarily unable to examine applications for recognition of the right to asylum pursuant to the Geneva Convention lodged by such displaced persons; whereas it would be inappropriate in such circumstances to derogate from the rights set out in Title III of this Directive;

- 14 also pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for persons who otherwise need international protection; whereas, in order to protect the rights of such persons, who are outside the scope of the Geneva Convention but who nonetheless face a real risk of torture or inhuman or degrading treatment, the Community must ensure that the Member States grant such persons complementary protection; whereas it would be inappropriate in such circumstances to derogate from the rights set out in Title III and, where relevant, Title V of this Directive;
- 15 pursuant to Article 63(2)(b) of the Treaty establishing the European Community, the Council must adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons'; whereas this balance of effort can be achieved by recourse to the Community budget to assist Member States which are obliged to make greater efforts to receive refugees and displaced persons, without compelling refugees and displaced persons to move between Member States; whereas the modalities of providing such funding shall be set out in a separate measure;
- 16 in order to ensure the effective exercise of the right to asylum, the *non-refoulement* right in Article 33 of the Geneva Convention must be upheld fully; whereas the Community cannot protect the rights of persons outside the scope of the Geneva Convention who nonetheless face a real risk of torture or inhuman or degrading treatment unless it accords them an identical right to *non-refoulement*; whereas, in order to ensure that the right to *non-refoulement* is observed, asylum applicants may not be removed from the territory of a Member State unless their applications for asylum have been definitively rejected and they do not meet the criteria for the grant of complementary protection;
- 17 unaccompanied minors are generally in a vulnerable situation requiring special safeguards and care; whereas it is therefore necessary to lay down specific provisions relating to the consideration of applications for asylum submitted by unaccompanied minors;
- 18 in order to ensure the right to family reunion and rights of residence for persons falling within the scope of this Directive, the Community should exercise its competence pursuant to Article 63(3)(a) of the Treaty establishing the European Community;
- 19 a measure to be adopted pursuant to Title VI of the Treaty on European Union should address the right of all asylum applicants and persons whose right to asylum has been recognized to effective protection by Member States against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions;

has adopted this Directive:

TITLE I Principles

Article 1 Purpose

The purpose of this Directive is to establish a Common European Asylum System which ensures that the right to asylum within the European Community is upheld effectively.

Article 2 Definition of right to asylum

- 1 The right to asylum may take the form of Geneva Convention refugee status, temporary protection status or complementary protection status, as defined in Titles IV, VI and VII.
- 2 For the purposes of this Directive:
 - a) 'Application for recognition of the right to asylum' or 'asylum application' means: a request seeking from a Member State the recognition of the right to asylum in the form of refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol; in accordance with Article 80, such an application shall also constitute an application in the alternative for recognition of the right to asylum in the form of complementary protection, as defined in Title VII;
 - b) 'Applicant for the right to asylum' or 'asylum applicant' means: a person who has made an application for recognition of the right to asylum, where that application has not been withdrawn or definitively rejected;
 - c) 'Definitively rejected' application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant;
 - d) 'Examination of an application' means: all the measures for examination, decisions or rulings given by the competent authorities on an application for recognition of the right to asylum;
 - e) 'Third State' means: a state or territory other than a Member State of the European Union and the country of nationality of the asylum applicant (or, if the applicant is stateless, his or her country of former habitual residence); and
 - f) 'Unaccompanied minor' means: a person under the age of eighteen who either:
 - i) arrives on the territory of a Member State unaccompanied by an adult responsible for the minor, whether by law or custom, for as long as the minor is not effectively in the care of such a person; or
 - ii) is left unaccompanied after entry into the territory of a Member State.

Article 3 *Non-refoulement* right

- 1 No Member State shall expel or return (*refouler*) a person with the right to asylum, or an asylum applicant whose application has not been definitively rejected, in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, or where he or she faces a real risk of torture or inhuman or degrading treatment.

- 2 In accordance with Article 63, no Member State shall expel or return a person with the right to asylum or an asylum applicant whose application has not been definitively rejected to a third state which might effect an expulsion or return as prohibited in paragraph 1.

Article 4 Content of right to asylum

The right to asylum includes the following rights:

- a) the right to *non-refoulement* for asylum applicants, refugees, displaced persons and persons otherwise in need of international protection, as defined in Article 3;
- b) the right to reception conditions which respect human dignity, as specified in Title III;
- c) the right to treatment which gives effect to recognition of the right to asylum;
- d) the right to fair, timely and effective procedures for recognition of the right to asylum in any of the forms referred to in Article 2(1);
- e) the right to family life, as specified in Articles 10, 29, 41, 42, 77 and 82;
- f) the right to privacy, as specified in Article 16, 54 and 85; and
- g) the right to effective judicial protection, as specified in Articles 18, 23, 46 and 86.

Article 5 Declaratory effect of recognition

Recognition of the right to asylum is declaratory, rather than constitutive.

Article 6 Member States' obligations

- 1 To guarantee the effective application of the right to asylum, this Directive shall ensure that Member States implement their obligations under:
 - a) the Geneva Convention, as amended by the New York Protocol, with no geographic restriction of the scope of those instruments, and their commitment to cooperating with the United Nations High Commissioner for Refugees in applying these instruments;
 - b) the European Convention for Human Rights and the United Nations Convention Against Torture;
 - c) the relevant provisions of the Convention on the Rights of the Child; and
 - d) national constitutional principles and other relevant international obligations.
- 2 Member States shall examine an application for the recognition of the right to asylum made by any applicant who applies within their jurisdiction to any one of them for the recognition of that status, in accordance with Article 51 and the rules on responsibility for applications in Title II and Article 63.

Article 7 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

TITLE II Determination of responsibility

Article 8 Single application principle

An application for recognition of the right to asylum shall be examined by a single Member State, which shall be determined in accordance with the criteria defined in this Title.

Article 9 Responsibility rule

An application for recognition of the right to asylum shall be examined by the first Member State with which such an application is lodged.

Article 10 Exceptions

Notwithstanding Article 9:

- 1 Where the asylum applicant:
 - has a member of his or her family who has been recognized as having the right to asylum in another Member State and is legally resident there; or
 - discovers that a family member who has become separated from the applicant before the applicant entered the European Community is an asylum applicant in another Member State and is legally resident there;

the applicant may withdraw the initial application for recognition lodged in one Member State and lodge an application in the Member State where his or her family member resides.

The family member in question may be any of the family members listed in Article 10 of Regulation 1612/68, including any subsequent amendments thereto, or may be a cohabitee as defined in national or Community law.

- 2 Where the asylum applicant is a family member of an applicant and was initially admitted with that applicant, or admitted for the purposes of family reunion with that applicant pursuant to Article 29, a separate application by that family member for recognition of the right to asylum pursuant to Article 53(4) shall normally be examined by the Member State responsible for examining the earlier application.
- 3 Each Member State shall have the right to examine an application for recognition of the right to asylum submitted to it, even if such examination is not its responsibility under Article 9 or 10(1), provided that the applicant agrees thereto.
- 4 Any Member State, even if it is not responsible under the criterion laid out in Article 9 of this Directive, may for humanitarian reasons, based in particular on family or cultural grounds, examine an application for recognition of the right to asylum at the request of another Member State, provided that the applicant so desires.
- 5 Where it appears that an applicant, before requesting asylum in a Member State, already had a connection or close links with another Member State, a Member State may, if it appears fair and reasonable, call upon the applicant to apply for asylum in that other Member State. If the applicant then applies in another Member State, responsibility for examining the application shall not be transferred unless the other Member State accepts responsibility. If the other Member State refuses to accept responsibility, the responsibility for examining the application shall remain with the Member State in which the applicant first applied.

- 6 If the conditions for transferring responsibility set out in paragraphs 1, 3, 4 or 5 are fulfilled, the Member State responsible for examining the application pursuant to Article 9 is then relieved of its obligations, which are transferred to the Member State which is responsible pursuant to paragraphs 1, 3, 4 or 5. The latter Member State shall inform the applicant and the Member State responsible under the said criteria of the transfer.

Article 11 Repeat applications

A definitive rejection of an application for recognition of the right to asylum by the Member State responsible for considering the claim pursuant to Articles 9 and 10 shall not preclude any other Member State from considering a new asylum application made by the person concerned, provided that the applicant agrees thereto.

The Member State responsible for examining the application pursuant to Articles 9 and 10 is then relieved of its obligations under this Title, which are transferred to the Member State which expressed the wish to examine the application. The latter Member State shall inform the applicant and the Member State responsible under the said criteria of the transfer.

Article 12 Obligations of responsible Member State

- 1 The Member State responsible for examining an application for recognition of the right to asylum according to the criteria set out in this Title shall be obliged to:
- a) take charge under the conditions laid down in Article 15 of an applicant who has lodged an additional application for recognition in another Member State;
 - b) complete the examination of the application for recognition, in accordance with the provisions of Titles IV and V and while applying the provisions of Title III;
 - c) readmit or take back under the conditions laid down in Article 15, an applicant whose application is under examination and who is irregularly in another Member State;
 - d) take back, under the conditions laid down in Article 15, an applicant who has withdrawn the application under examination and lodged an application in another Member State, except where Article 10 applies;
 - e) take back, under the conditions laid down in Article 15, an applicant whose application has been rejected and who is illegally in another Member State.

Article 13 Obligations of other Member States

Member States shall facilitate the movement of persons who wish to travel to a particular Member State in order to apply for asylum there pursuant to Articles 9 or 10.

Article 14 Taking charge

- 1 If a Member State with which an application for recognition of the right to asylum has been lodged believes that the applicant has previously made an application for recognition of the right to asylum in another Member State, except where Article 10 applies, it may, as quickly as possible and in any case within the six months following the date on which the application was lodged, call upon the other Member State to take charge of the applicant.

If the request that charge be taken is not made within the six-month time limit, responsibility for examining the application for recognition of the right to asylum shall rest with the Member State in which the application was lodged.

- 2 The request that charge be taken shall contain indications enabling the authorities of that other State to ascertain whether the asylum applicant has previously made an asylum application in that State.
- 3 The Member State shall pronounce judgment on the request within three months of the request of the claim. Failure to act within that period shall be tantamount to accepting the claim.
- 4 Transfer of the asylum applicant from the Member State where the second application was lodged to the Member State where the first application was lodged must take place not later than one month after acceptance of the request to take charge or one month after conclusion of any proceedings initiated by the applicant challenging the transfer decision if the proceedings are suspensory.
- 5 Measures taken under Article 83 shall determine the details of the process by which applicants shall be taken in charge.

Article 15 Taking-back

- 1 An asylum applicant shall be taken back in the cases provided for in Article 12 as follows:
 - a) the request for the applicant to be taken back must provide indications enabling the State with which the request is lodged to ascertain whether it is responsible in accordance with Article 12;
 - b) the Member State called upon to take back the applicant shall give an answer to the request within eight days of the matter being referred to it. Should it acknowledge responsibility, it shall then take back the asylum applicant as quickly as possible and at the latest one month after it agrees to do so.
- 2 Measures taken under Article 83 shall set out the details of the procedure for taking the applicant back.
- 3 The obligation to take back a person pursuant to Article 12(1)(d) shall cease to apply if the asylum applicant has since left the territory of the Member States for a period of at least three months or has obtained from a Member State a residence permit valid for more than three months.

Article 16 Exchange of personal information

- 1 Each Member State shall communicate to any Member State that so requests such information on individual cases as is necessary for:
 - determining whether an asylum applicant has applied for recognition of the right to asylum in more than one Member State, without prejudice to the application of Article 10;
 - examining the application for recognition of the right to asylum; or
 - implementing any obligation arising under this Title.

- 2 This information may only cover:
 - personal details of the applicant, and, where appropriate, the members of his family (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);
 - the place where the application was lodged;
 - the date any previous asylum application was lodged, the date the present application was lodged, the stage reached in the proceedings and the decision taken, if any.
- 3 This exchange of information shall be effected at the request of a Member State and may only take place between authorities the designation of which by each Member State has been communicated to the Commission.
- 4 The information exchanged may only be used for the purposes set out in paragraph 1. In each Member State such information may only be communicated to the authorities and courts and tribunals entrusted with:
 - determining the Member State which is responsible for examining the application for recognition of the right to asylum; and/or
 - examining the application for recognition of the right to asylum; and/or
 - implementing any obligation arising under this Title.
- 5 The Member State that forwards the information shall ensure that it is accurate and up-to-date. If it appears that this Member State has supplied information which is inaccurate or which should not have been forwarded, the recipient Member State shall be immediately informed thereof. Both Member States shall be obliged to correct such information or to have it erased.
- 6 An asylum applicant shall be given a complete copy of the information exchanged concerning him or her, accompanied by a summary of that information in a language that he or she understands. If he or she establishes that such information is inaccurate or should not have been forwarded, he or she shall have the right to have it corrected or erased. This right shall be exercised in accordance with the conditions laid down in paragraph 5.
- 7 In each Member State, the forwarding and receipt of exchanged information shall be recorded.
- 8 Such information shall be kept for two years, at which time it shall be erased unless the Member State can show that it is absolutely necessary to keep the information for a further period of two years. Member States shall inform the applicant, in a language that he or she understands, of their decisions to erase or their intention to retain the information, and they shall not implement their decision to retain the information without considering any objections made by the applicant. After that further period of two years, the information shall be definitively erased and Member States shall confirm this erasure to the applicant in a language that he or she understands.
- 9 In any event, the information thus communicated shall enjoy at least the same protection as is given to similar information in the Member State which receives it.
- 10 When exchanging information pursuant to this Article, Member States shall also comply with Community and international data protection obligations as set out in Articles 54 and 85, in addition to the specific rules set out in this Article.

TITLE III Reception

Article 17 Principles

- 1 In accordance with this Title, Member States shall ensure that the social, educational, accommodation, family reunion and health and welfare rights of asylum applicants pursuant to Titles IV, V or VII are met.
- 2 The provisions of this Title shall apply:
 - during determination of the Member State responsible for examining the asylum application, pursuant to Title II;
 - during consideration of the admissibility of the application pursuant to Articles 63 to 65;
 - during any procedure to determine whether a person who has entered the Member State in question is in need of temporary protection, pursuant to Article 76; and
 - until the definitive rejection of the asylum application.
- 3 This Title is entirely without prejudice to the right of a Member State to provide for more favourable reception conditions, pursuant to Article 89.

Article 18 Judicial protection

In addition to the general right to judicial protection set out in Article 86, Member States shall not in any way restrict the reception conditions guaranteed by this Title if an asylum applicant has recourse to his or her right to bring judicial or administrative proceedings of any kind whatsoever.

Article 19 Information

Member States shall ensure that asylum applicants are informed, at the time of their application for recognition of the right to asylum, of the practical arrangements for their reception in writing and/or orally in a language which they understand. Such information shall be provided by the competent authorities of the Member State concerned, but may also be provided by non-governmental organizations or by private institutions.

Article 20 Coordination

Member States shall ensure coordination between the competent authorities or services involved in the accommodation, health and welfare needs of asylum applicants, and between those authorities and services and the contributions of non-governmental organizations, local authorities, local communities and the United Nations High Commissioner for Refugees. In particular, they shall ensure appropriate training for persons who assume responsibilities in the area.

Article 21 Right to freedom of movement

Asylum applicants may move freely throughout the territory of the host Member State, subject only to restrictions on grounds of public policy, public security or public health. They shall inform the relevant authorities of their current address and notify those authorities immediately of any change of address.

Article 22 Effect of illegal entry

- 1 To give effect to Article 31(1) of the Geneva Convention, Member States shall not impose penalties on asylum applicants who use illegal means to effect entry onto their territory (including the use of false documents or arranging for clandestine entry), provided that they have not obtained protection elsewhere in accordance with Articles 63 or 64 and that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
- 2 Member States shall give full effect to Article 31(2) of the Geneva Convention.
- 3 Paragraphs 1 and 2 shall apply *mutatis mutandis* to asylum applicants who are transiting through a Member State with the intent of applying for asylum in a third country.

Article 23 Detention

- 1 Without prejudice to Article 22, Member States shall only detain asylum applicants or applicants whose claims have been definitively rejected if such detention is:
 - prescribed by law for a specific reason, as enumerated in paragraph 2, and for a specific period, which must be as short as possible;
 - strictly necessary for compelling reasons relevant to the individual case;
 - proportionate, after prior consideration of alternatives to detention and the effect of detention in each individual case; and
 - applied in a non-discriminatory manner.
- 2 Asylum applicants or applicants whose claims have been definitively rejected may only be detained in order to:
 - verify the identity of an asylum applicant who has refused to cooperate with the process of verifying identity;
 - ensure the application of a removal order against an asylum applicant whose claim has been definitively rejected; or
 - protect national security or public order, where there is evidence to show that the asylum applicant is likely to pose a risk to such principles.
- 3 Member States shall ensure full application of Article 5 of the European Convention on Human Rights whenever they have detained an asylum applicant or an applicant whose claims have been definitively rejected within their jurisdiction. In particular:
 - there shall be a prompt, mandatory and periodic review of all detention orders before an independent and impartial body;
 - the detainee must be able to make a full challenge to the merits of the detention order;
 - the procedural guarantees of Article 52, 56 and 57 shall apply *mutatis mutandis*.
- 4 Member States shall:
 - detain asylum applicants or applicants whose claims have been definitively rejected separately from convicted criminals or prisoners on remand;
 - detain men and women separately;

- detain children separately from adults, unless those adults are their relatives; and
- ensure the humane treatment of detainees, including necessary medical treatment, exercise of their religion, continuation of their education, provision of an effective complaints mechanism, and access to the necessities of life.

Article 24 Right to accommodation

- 1 Member States shall ensure the right of asylum applicants to accommodation, comprising a right to adequate board, lodging and care. For this purpose, asylum applicants should normally be given access to housing and to housing allowances on the same basis as nationals of the host State.
- 2 As a temporary measure, applicants may be housed in centres or lodging organized by the Member State's competent authorities, which may be managed by those competent authorities or by other institutions or organizations present in the territory, including NGOs or private organizations. Member States shall allow an asylum applicant to choose between the available accommodation as far as possible.
- 3 Member States shall provide an unaccompanied minor with long-term arrangements for accommodation as soon as that minor applies for recognition of the right to asylum.

Article 25 Right to employment

Member States shall permit asylum applicants to undertake paid employment until their application has been definitively rejected.

Article 26 Right to education

Member States shall ensure that asylum applicants and their family members, and in particular the children of asylum applicants and minor asylum applicants of school age, shall have access to the regular public education facilities on the same basis as nationals. Where this is not practicable, facilities equivalent to those available to nationals shall be offered to them as a temporary measure.

Article 27 Right to health care

- 1 Member States shall ensure that asylum applicants have access to health care on the same basis as nationals. Where this is not practicable, facilities equivalent to those available to nationals shall be offered to them as a temporary measure.
- 2 Member States shall ensure that specialized assistance is provided for asylum applicants who have suffered torture, rape or any form of cruel, inhuman or degrading treatment or punishment.

Article 28 Right to social protection

- 1 Member States shall provide asylum applicants with a minimum income on the same basis as nationals.
- 2 As regards social security, Member States shall ensure that rules equivalent to Regulation 1408/71 shall apply *mutatis mutandis* to asylum applicants.

Article 29 Right to family reunion

- 1 Member States shall ensure that rules equivalent to Articles 10 and 11 of Regulation 1612/68, and any subsequent amendments thereto, shall apply *mutatis mutandis* to asylum applicants.
- 2 Where the right to family reunion has been exercised pursuant to paragraph 1, and the family member does not submit a separate application for asylum pursuant to Article 53, the residence authorization of the family member shall either:
 - be valid until the applicant's right to asylum is recognized, in which case the provisions of Article 41 shall apply; or
 - be valid until the definitive rejection of the application for asylum in accordance with the provisions of this Directive.

Article 30 Rights of particularly vulnerable persons

- 1 In addition to the rights set out in Articles 24 to 28, Member States shall make facilities available to meet the educational, medical, psychological and other special needs of asylum applicants, including in particular the needs of children, torture victims and persons with a disability.
- 2 In particular, special medical or other assistance shall be provided for children who have suffered any form of neglect, exploitation or abuse.

TITLE IV Criteria for recognition of Geneva Convention refugees**Article 31 Principles**

- 1 In order to ensure that Member States have a common approach to recognition to the right to asylum in the form of Geneva Convention refugee status, Member States shall interpret Article 1 of that Convention in accordance with the provisions of this Title.
- 2 This Title is entirely without prejudice to the right of a Member State to interpret Article 1 of the Geneva Convention more favourably, pursuant to Article 89.
- 3 If the circumstances of an asylum applicant do not meet the criteria set out in this Title for interpretation of Article 1 of the Geneva Convention, or any more favourable interpretation of that Article applied by a Member State pursuant to Article 89, each Member State shall consider whether the applicant has the right to asylum in the alternative form of complementary protection, as specified in Title VII.
- 4 Where a Member State has suspended consideration of individual asylum applications in situations of mass influx, the right to asylum of displaced persons shall be recognized in the form of temporary protection, as specified in Title VI.

Chapter 1 Inclusion clauses**Article 32 Definition of Convention refugee**

- 1 A person is a 'Convention refugee' under the terms of the Geneva Convention and the New York Protocol, in accordance with Article 1(A)(2) of that Convention, when owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,

is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

- 2 Member States shall ensure that, when considering asylum applications in accordance with the provisions of Title V, their competent authorities interpret the definition in paragraph 1 in accordance with the provisions of this Chapter.

Section 1 Persecution

Article 33 Concept of persecution

- 1 A 'well-founded fear of persecution' within the meaning of Article 1A of the Geneva Convention exists not only where an applicant was subject to persecution or directly threatened with persecution, but also where an applicant wishes to avoid a situation entailing the risk of persecution.
- 2 A 'well-founded fear of persecution' within the meaning of Article 1A of the Geneva Convention may arise even where the grounds of persecution are merely attributed to an applicant by a persecutor.
- 3 'Persecution' within the meaning of Article 1A of the Geneva Convention may, depending on the facts of an individual case, arise from a combination of events which do not constitute persecution when taken separately.
- 4 Discrimination will constitute 'persecution' within the meaning of Article 1A of the Geneva Convention where, for example:
 - a) measures for the protection of public order, public security or public health are implemented in a discriminatory manner, on one or more of the grounds set out in Article 1A of the Geneva Convention and have sufficiently serious consequences for their victims, in particular where such general measures are used to camouflage individual measures actually taken on the grounds set out in Article 1A of the Geneva Convention; or;
 - b) discrimination leads to consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn a livelihood, to practice his or her religion, or to access normally available educational facilities, in particular where the aim of the discriminatory measures has been condemned by the international community or where the effects of such measures are manifestly disproportionate to a legitimate aim sought by the measures.

Discriminatory punishment or prosecution will constitute 'persecution' within the meaning of Article 1A of the Geneva Convention where:

- c) prosecutions pursuant to a particular criminal law in the country of nationality or (if stateless) former habitual residence are only brought against persons defined by one or more of the grounds set out in Article 1A of the Geneva Convention;
- d) punishment pursuant to a particular criminal law in the country of nationality or (if stateless) former habitual residence is applied more severely to certain offenders on account of one or more of the grounds set out in Article 1A of the Geneva Convention; or

- e) the offences which gave rise to the prosecution are inextricably linked to characteristics of the offender which are connected to the grounds set out in Article 1A of the Geneva Convention.
- 5 Punishment for conscientious objection, absence without leave or desertion shall constitute persecution where:
- a) the conditions in which military duties are or would be performed constitute, or would constitute, persecution; and/or
 - b) the performance of military duties would require the participation of acts falling within the exclusion clauses in Article 1F of the Geneva Convention, as interpreted in Chapter 3 of this Title.
- Such punishment may also constitute persecution if no alternative to military service is provided, or if the punishment for failure to perform military service is excessive or is accorded on a discriminatory basis on account of race, religion, nationality, membership of a particular social group or political opinion.
- 6 Administrative measures taken against an individual will constitute persecution where the effect of the measures is sufficiently severe, and in particular where the measures are intentional, systematic and lasting.
- 7 In deciding whether the acts complained of give rise to a well-founded fear of persecution, Member States' competent authorities shall consider whether there is an effective remedy available to end the abuse. A remedy shall not be considered effective if in practice the applicant is unable to avail himself or herself of it, or if decisions of the relevant authority are not impartial or have no effect.

Article 34 Agents of persecution

- 1 The agents of persecution for the purposes of this Chapter shall include:
- a) acts of a State organ, including organs of unitary States, federal States, or regional and local authorities, whatever that State's status in international law;
 - b) acts of parties or organizations controlling the State;
 - c) acts of third parties, where they are based on the grounds of persecution in Article 1.A of the Geneva Convention, and where the State authorities as defined in sub-paragraphs a) and b) encourage or permit such acts, deliberately fail to act to prevent such acts, or are unable to prevent such acts from occurring; or
 - d) acts of third parties, where the State authorities as defined in sub-paragraphs a) and b) fail to protect against such acts and such failure is based on the grounds of persecution in Article 1.A of the Geneva Convention.
- 2 Acts committed during a civil war or other internal or generalized armed conflict shall constitute persecution if the following agents of persecution engage in acts based on the grounds of persecution in Article 1A of the Geneva Convention:
- a) State authorities, as defined in paragraph (1)(a) and (b) above;
 - b) third parties, as defined in paragraph (1)(c) above; or
 - c) *de facto* authorities in control of part of the territory within which the State authorities, as defined in paragraph (1)(a) and (b) above, cannot afford the State's nationals protection.

Unless such circumstances apply, neither the dangers stemming from such a conflict nor the use of armed forces in accordance with the international rules of war and internationally recognized practice shall constitute persecution.

Article 35 Grounds of persecution

- 1 Persecution for reasons of 'race' shall have a broad meaning, including:
 - a) persecution based on membership of different ethnic groups or of a specific social group of common descent forming a minority within a larger population;
 - b) cases in which the persecutors regard the victims of their persecution as belonging to a different racial group than their own, where this real or supposed difference forms the grounds for their action; and
 - c) cases in which discrimination on racial grounds affects a person's human dignity to the extent of incompatibility with fundamental human rights, or where disregard of racial barriers is subject to serious consequences.
- 2 Persecution for reasons of 'religion' shall have a broad meaning, including:
 - a) persecution based on theist, non-theist, atheist or agnostic beliefs;
 - b) persecution in the form of a ban on membership of a religious community, on worship in public or private, on religious instruction, or
 - c) persecution in the form of serious measures of discrimination against persons for practicing or not practicing a particular religion or aspects of that religion, or for adhering or not adhering to religious customs, practices or mores, or for belonging or not belonging to a particular religious community.
- 3 Persecution for reasons of 'nationality' shall include persecution not only for reasons of citizenship but also persecution for reasons of membership of an ethnic, linguistic or cultural group, or a group which has a relationship with the population of another State.
- 4 Persecution for reasons of 'membership of a particular social group' shall include:
 - a) persecution against groups having the same background, customs, or social status;
 - b) persecution based on a group's perceived disloyalty to a government or based on its political outlook, history, economic activity or very existence;
 - c) persecution against groups which are constituted by the common characteristics of the victimized persons; or
 - d) persecution against groups sharing a common characteristic which is immutable, including gender, sexuality, class or history, or which is so fundamental to identity or conscience that members of the group should not be required to change it.
- 5 Persecution for reasons of 'political opinion' shall include persecution against persons holding or believed to hold different opinions from those of the persecutor, where those opinions are not tolerated by the persecutor and given the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), persons holding such opinions are likely to be persecuted.

Section 2 Other issues

Article 36 Internal relocation

- 1 Where persecution is confined to a specific part of a country's territory, a person will not be excluded from recognition of Convention refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances of the specific case it would not have been possible or reasonable to expect him or her to do so.
- 2 When applying the principle of paragraph 1, Member States shall ensure that their competent authorities consider:
 - the existence of a risk-free area in that country, which must be established by evidence;
 - the stability of that area, particularly the likelihood of the stability of its safety;
 - the accessibility of that area from inside or outside that country;
 - whether persons living in that area would have to endure undue hardship or risk;
 - the personal circumstances of the claimant; and
 - the political, ethnic, religious and other makeup of that country.

Article 37 Refugee *sur place*

A well founded fear of persecution may arise after a person has departed from his or her country of nationality (or, for a stateless person, the country of former habitual residence), in particular where:

- a) political changes in that country; and/or
- b) the person's activities outside that country, where such activities are either:
 - i) a continuation of the convictions that he or she held while previously in that country while an adult, or
 - ii) inextricably linked to characteristics of that person which are connected to the grounds set out in Article 1A of the Geneva Convention

would likely result in persecution of that person on the grounds set out in Article 1A of the Geneva Convention, if he or she now returned to that country.

Chapter 2 Cessation of Convention refugee status

Article 38 Article 1C of Geneva Convention

- 1 Member States shall exchange information as regards their application of the principles in Article 1C of the Geneva Convention. The provisions of Article 84(2) shall apply.
- 2 Member States shall not apply Article 1C of the Geneva Convention unless:
 - a) the application of that Article has been investigated on an individual basis;
 - b) there are compelling reasons which justify the application of that Article; and
 - c) the circumstances of the application of that Article have been determined in an objective and verifiable manner, following procedures which allow the person concerned to contest the application of Article 1C.

- 3 In particular, Member States shall not invoke the cessation provisions to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.
- 4 Member States shall only apply Article 1C(5) or (6) of the Geneva Convention where:
 - a) there has been a fundamental, durable and effective change in the country of nationality (or, for a stateless person, the country of former habitual residence); and
 - b) there is no doubt about the application of the relevant clause in the particular case.
- 5 Without prejudice to paragraphs 2 or 3, a person whose right to asylum has been recognized shall retain that status for a period of at least six months after departure from the Member State which recognized that status, if such departure is for the purpose of ascertaining whether or not conditions in the country of nationality (or, for a stateless person, the country of former habitual residence) have altered sufficiently to resume permanent residence there.

Chapter 3 Withholding or cancelling Convention refugee status

Article 39 Article 1F of Geneva Convention

- 1 Member States shall ensure that, when considering withholding or cancelling recognition of Geneva Convention refugee status pursuant to Article 1F of that Convention, their competent authorities interpret that Article in accordance with the remaining paragraphs of this Article.
- 2 Article 1F of the Geneva Convention must be applied in a restrictive manner. Article 1F may only be applied after determining whether an asylum applicant falls within the inclusion clauses of the Geneva Convention pursuant to Chapter 1 of this Title
- 3 Article 1F(b) of the Geneva Convention may only be applied where the applicant has committed a very grave punishable act which is not closely and directly connected to its alleged political motives.

Chapter 4 Effects of recognition of Convention refugee status

Article 40 Application of Geneva Convention

- 1 If a Member State's competent authorities recognize Geneva Convention refugee status upon concluding the examination of an application pursuant to the provisions of Title V, the Member State shall apply the provisions of Chapters II to V of the Geneva Convention to that person.
- 2 In addition, Member States shall issue a residence permit confirming the right of residence to a recognized Geneva Convention refugee.
- 3 Member States shall apply Directive 64/221 *mutatis mutandis* to proceedings for expulsion of recognized Geneva Convention refugees pursuant to Article 32 of the Geneva Convention, without prejudice to Article 3 or Title VII of this Directive.

Article 41 Right to family reunion

- 1 Upon recognizing a person's right to asylum in the form of Geneva Convention refugee status, Member States shall ensure that rules equivalent to Articles 10 to 12 of Regulation 1612/68, with the exception of Article 10(3), and any subsequent amendments thereto, shall apply *mutatis mutandis*. In accordance with national or Community law, such rights shall also be granted to the cohabitants and intended spouses of persons whose right to asylum has been recognized. In appropriate cases, family reunion shall be facilitated by special measures of assistance to the person whose right to asylum has been recognized so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members.
- 2 Member States shall confer recognition of the right to asylum in the form of Geneva Convention refugee status upon family members as defined in paragraph 1. In the event of occurrence of a risk foreseen in Regulation 1251/70 to the recognized refugee, Member States shall ensure that rules equivalent to that Regulation shall apply to such family members in order to guarantee their continued right of residence.
- 3 In addition to the status set out in paragraph 2, Member States shall ensure full equal treatment of family members of recognized refugees in comparison with nationals of the Member State, in accordance with the relevant provisions of national or Community law.

Article 42 Free movement

- 1 If a person whose right to asylum in the form of Geneva Convention status has been recognized in accordance with the provisions of this Directive acquires the status of 'Long-Term Resident of the European Union' and moves to another Member State in accordance with national or Community law, the effect of recognition of status pursuant to this Chapter shall automatically be transferred to the second Member State.
- 2 The status conferred upon family members pursuant to Article 41(2) shall also automatically be transferred to the second Member State, unless such family members remain in the Member State which originally recognized their status during a transition period provided for in national or Community law.

Chapter 5 Complementary protection

Article 43 Relationship with complementary protection

- 1 If a Member State's competent authorities find that an applicant falls outside the inclusion clauses clarified in Chapter 1 of this Title, or if a Member State applies Article 1C(5) or (6) or Article 1F of the Geneva Convention in accordance with the provisions of Chapters 2 or 3, the competent authorities of that Member State shall simultaneously consider whether that person still enjoys the right to asylum in the alternative form of complementary protection, as defined in Title VII.
- 2 Member States shall automatically recognize the right to asylum of any person falling within the provisions of Article 33(2) of the Geneva Convention in the alternative form of complementary protection, as defined in Title VII.

TITLE V Procedure

Article 44 Scope

The rights in this Title will apply to all applications for recognition of the right to asylum in the form of Geneva Convention refugee status, as defined in Title IV, which, in accordance with Article 80, also constitute applications in the alternative for recognition of the right to asylum in the form of complementary protection as defined in Title VII.

Chapter 1 Principles

Article 45 General principles

- 1 Asylum procedures will be applied in full compliance with the 1951 Geneva Convention and the 1967 New York Protocol relating to the status of refugees, the European Convention on Human Rights (in particular Articles 1, 5, 6 and 13), the United Nations Convention against Torture, and other obligations under international law in respect of refugees and human rights.
- 2 In particular, the procedures will comply fully with:
 - a) Article 1 of the 1951 Convention concerning the definition of refugee, as clarified by Title IV of this Directive or under a more favourable interpretation of Article 1 of the Geneva Convention applied by a Member State pursuant to Article 89;
 - b) Article 35 of the 1951 Convention concerning co-operation with the Office of the United Nations High Commissioner for Refugees including the facilitation of its duty of supervising the application of the Convention; and
 - c) the *non-refoulement* right in Article 3 of this Directive, which implements Article 33 of the 1951 Convention in conjunction with Article 3 of the European Convention on Human Rights and Article 3 of the United Nations Convention against Torture.
- 3 Member States shall conclude the examination of asylum applications as quickly as possible while observing the guarantees set out in this Title.

Article 46 Judicial protection

In addition to the specific rights set out in this Title and the general right to judicial protection set out in Article 86, Member States shall take all general or specific measures to ensure that the procedural rights of asylum applicants may be exercised effectively.

Chapter 2 Examination of asylum applications

Article 47 National implementation

Each Member State shall specify in its legislation the rules on access to the asylum procedure, the basic features of the asylum procedure and the designation of authorities responsible for examination of asylum applications.

Article 48 Initial contact

Member States shall ensure that:

- a) authorities addressed by the applicant at the border or in the territory of the Member State have clear instructions for dealing with asylum applications;
- b) such authorities forward asylum applications, along with all other information available, to the competent authority specified in Article 50 for examination; and
- c) the right of *non-refoulement* as defined in Article 3 is fully applied.

Article 49 Border applications

- 1 The provisions of this Title shall apply fully to all applications falling within the jurisdiction of a Member State.
- 2 In particular, Member States shall not apply special procedures so as to derogate from the *non-refoulement* right as defined in Article 3 prior to admission, and shall not derogate from the requirements concerning reception conditions in Title III, without prejudice to a decision on admissibility of the application pursuant to Articles 63 to 65.

Article 50 Competent authority

- 1 Member States shall ensure that there is a clearly identified competent authority – where possible a central authority – with responsibility for examining requests for recognition of the right of asylum and taking a decision in the first instance.
- 2 Member States shall ensure that the competent authority is fully qualified in the field of asylum and refugee matters and decides on all applications individually, objectively and impartially.
- 3 Member States shall ensure that competent authorities:
 - a) have at their disposal specialized personnel with the necessary knowledge and experience in the field of asylum and refugee matters, and who have an understanding of an applicant's particular situation;
 - b) have access to precise and up-to-date information from various sources, including information from the United Nations High Commissioner for Refugees concerning the situation prevailing in the country of nationality (or, for a stateless person, the country of former habitual residence) of asylum applicants;
 - c) have the right to ask advice from experts on particular issues, for example medical or cultural issues; and
 - d) are adequately provided with staff and equipment so that they can discharge their duties promptly and under the best possible conditions.

Chapter 3 Procedural rights

Article 51 Making applications

- 1 Member States shall ensure that asylum applicants have an effective opportunity to make an asylum application at any time.

- 2 The obligations of Member States to entertain and determine claims for protection are engaged as soon as a person at the border or in the territory provides information which indicates such a fear.
- 3 Member States shall not derogate from their obligations under paragraphs 1 and 2, in particular because of an applicant's lack of valid documents.

Article 52 Rights during procedure

Member States shall ensure that asylum applicants are informed of the procedure to be followed and of their rights and obligations during the procedure, in a language which they can understand. In particular, Member States shall ensure that:

- a) applicants have the right to the services of an interpreter, whenever necessary, for submitting their case to the authorities concerned and otherwise assisting the applicant in matters relating to the procedure. The interpreter must be paid for out of public funds;
- b) applicants have the right to qualified and competent legal advice or assistance during the procedure, paid for out of public funds; this right shall include legal advice and assistance in the preparation and submission of the claim, for and during all interviews, and for and during all hearings, including bail hearings and appeals;
- c) applicants have the right at all stages of the procedure to communicate with the Office of the United Nations High Commissioner for Refugees or with other refugee organizations in the Member State concerned, and *vice versa*; and
- d) the representative of the United Nations High Commissioner for Refugees has the opportunity to be informed of the course of the procedure, to learn about the decisions of the competent authorities and to submit his or her observations.

Article 53 Individual or collective determination

- 1 Member States shall ensure that the competent authority examines each application for asylum on the basis of the facts and circumstances put forward in each individual case, taking account of the objective situation prevailing in the country of nationality or (for a stateless person) former habitual residence.
- 2 Where a group of persons has been exposed to persecution as defined in Title IV, or where membership of a group has been recognized as qualifying applicants for protection, the individual examination carried out by the competent authority shall be limited in the first instance to determining whether the individual belongs to the group in question, without prejudice to a full individual assessment in the event of a negative determination of that issue.
- 3 Member States shall provide that their competent authorities shall recognize the right to asylum as soon as such authorities are satisfied that the criteria for recognition are met.
- 4 Family members of asylum applicants admitted in accordance with Article 29 of this Directive may make an independent application for recognition of the right to asylum in the same Member State. Member States may choose to suspend processing of this application until their competent authorities have reached a decision on the application submitted by the first family member.

Article 54 Right to privacy

- 1 In addition to the data protection requirements of Articles 16 and 85, Member States shall ensure that declarations made by the asylum applicant and other details of his or her application are only made available to persons or agencies who must have access to such information in order to carry out their obligations.
- 2 In particular, Member States shall ensure that such information is not made available to the authorities of the asylum applicant's country of nationality or (for a stateless person) former habitual residence, and shall make public only the initials of the asylum applicant at every stage of any appeal.

Article 55 Evidence and proof

Member States shall ensure that before a final decision is taken on an application, the asylum applicant has the right to a personal interview with an examiner who is employed by the competent authority as defined in Article 50 and who is fully qualified in the field of asylum and refugee matters.

The examiner shall apply the following rules of evidence and proof:

- 1 The applicant's claim shall not be rejected solely because the initial account supplied by the applicant was not complete, or because statements made during the interview are inconsistent with statements made on arrival.
- 2 The applicant shall be accorded time to present further evidence after the initial interview if necessary.
- 3 The following principles shall govern the assessment of evidence:
 - a) where there are statements that are not susceptible of proof, the applicant should be given the benefit of the doubt if his account appears credible, coherent and plausible, and does not run counter to evidence which proves the contrary;
 - b) where necessary, the examiner shall use all the means at his or her disposal to find the necessary facts in support of the application;
 - c) unsupported statements need not necessarily be rejected as false if they are consistent with the general account put forward by the applicant; in particular, examiners must take into account the difficulty of obtaining documentary proof, having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements;
 - d) untrue statements shall not by themselves constitute a reason for the rejection of refugee status and must be evaluated in light of all the circumstances of the case;
 - e) without prejudice to Chapter 6 of this Title, the use of false documents to enter the Member State shall not be prejudicial to the applicant;
 - f) the timing of the application should not automatically be considered an adverse factor, but rather should be appreciated in light of all the circumstances of the case; and
 - g) evidence shall be related to the relevant criteria of the 1951 Geneva Convention and/or other relevant national or international human rights obligations, in order to arrive at a correct conclusion regarding recognition of the applicant's right to asylum.

- 4 The competent authority must inform the applicant of all information it is in possession of which is relevant to assessing the situation prevailing in the country of nationality or (for a stateless person) former habitual residence of an asylum applicant. This information must be made available to the applicant on request, and the applicant shall be afforded an opportunity to make observations upon the accuracy or relevance of this information.
- 5 When applying the 'internal relocation' principle defined in Article 36:
 - a) there shall be a rebuttable presumption that the principle cannot be applied where the agent of persecution is the State;
 - b) the presence of internally displaced persons who are receiving international assistance in one part of the country is not conclusive evidence that an asylum applicant could have chosen to relocate inside that country; and
 - c) the usual principles governing the burden of proof, particularly as defined in paragraphs 3(a) and (b) above, shall continue to apply.
- 6 No evidence obtained in breach of the guarantees in this Article can be relied upon by the competent authority if such reliance would be adverse to the applicant.
- 7 In order to ensure that asylum applications are assessed individually, there can be no presumption of the safety of any country of nationality or (for a stateless person) former habitual residence.

Article 56 Communication of decision

Member States shall ensure that the outcome of the asylum application shall be communicated to the asylum applicant in writing in a language he or she understands. The full decision shall also be communicated to the applicant's legal adviser. If the application is rejected, the decision must contain the detailed reasons for the specific rejection and Member States must also ensure that the applicant for asylum is informed of his or her appeal rights pursuant to Article 57 in writing in a language he or she understands.

Article 57 Right of appeal

- 1 Member States shall ensure that, in the event of a negative decision on his or her application, an asylum applicant has the right of appeal to a court or a review authority, at which all the facts will be reviewed, which shall give an independent ruling on individual cases under the conditions laid down in Article 50(2). The rules concerning assessment of evidence set out in Article 55(3) shall apply.
- 2 Member States shall ensure that an asylum applicant has an adequate period of time within which to exercise the right to appeal and to prepare his or her appeal. Member States shall ensure that these time limits are communicated to an asylum applicant in writing in a language he or she understands.

Article 58 Accelerated procedures

- 1 Member States may apply accelerated procedures to determine the merits of asylum claims where an applicant raises no issue under the Geneva Convention pursuant to Title IV or other protection issue pursuant to Title VII.

- 2 Member States may not apply accelerated procedures to determine the merits of asylum claims in other circumstances, or where an application falling within the scope of paragraph 1:
 - includes a claim of torture, or contains serious indications to this end;
 - relates to the ‘internal relocation’ principle defined in Article 36;
 - relates to Article 1F of the Geneva Convention, as defined in Article 39; or
 - concerns the credibility of the applicant.
- 3 Member States may apply accelerated procedures to determine the admissibility of asylum claims in accordance with Articles 63 to 65.
- 4 The application of accelerated procedures pursuant to paragraph 1 shall have the effect of designating a quicker time limit for the examiner to make an initial decision on the application, after following the guarantees provided for in Article 55. In no case may it have the effect of derogating from any other procedural guarantees in this Title or from the *non-refoulement* principle in Article 3. The presumption that the examiner shall take a quicker initial decision may be rebutted if the applicant provides additional information relevant to the application or clarifies the information previously communicated to the authorities of the Member State.

Chapter 4 Applicants in particular situations

Article 59 Sexual violence

Member States shall ensure that their competent authorities involve skilled female or male employees and female or male interpreters in the asylum procedure where necessary or desirable, particularly where female or male asylum applicants find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin, in particular where the persecution they have suffered is related to their gender or where they have been victims of sexual exploitation or sexual or domestic violence.

Article 60 Unaccompanied minors

- 1 Member States shall guarantee the right of every unaccompanied minor to apply for recognition of the right of asylum.
- 2 Member States shall suspend processing an application for recognition of the right of asylum lodged by an unaccompanied minor until the appointment of a legal guardian, who will work closely with a legal representative.
- 3 Subject to paragraph 2, Member States shall treat the processing of asylum applications by unaccompanied minors as a matter of urgency, in light of the particular needs of minors and their vulnerable situation.
- 4 In principle, an unaccompanied asylum applicant claiming to be a minor shall be believed unless there is compelling evidence to the contrary. If there is such evidence, the Member State shall provide for an opportunity for an independent medical examination by an experienced paediatrician, with the consent of the applicant.

5 Member States shall ensure that:

- a) if any interview(s) are considered necessary in connection with the unaccompanied minor's application, the minor must be accompanied by his or her legal guardian and legal representative;
- b) any interview(s) relating to the unaccompanied minor's application shall be conducted by officers of the competent authority who have the necessary relevant experience or training; and
- c) examination of an unaccompanied minor's application must make allowance for a minor's age, maturity and mental development, and the possibility that the minor may have limited knowledge of conditions in the country of nationality or (for a stateless minor) former habitual residence.

Article 61 Mentally disturbed persons

Member States shall ensure that, when an application is made by a mentally disturbed person, their examiner must, in such cases:

- obtain an expert medical assessment and use that advice to determine how to approach the matter further; and
- obtain information about the application from persons closely related to the applicant and/or draw certain conclusions from the surrounding circumstances.

Article 62 Torture victims

If before or during the interview referred to in Article 55, the applicant claims that he or she has been tortured or if there are serious indications to this end, and the examiner or the official responsible for initial contact with the applicant pursuant to Article 48 does not believe this claim, the Member State shall provide for an opportunity, with the consent of the applicant, for an independent medical examination by a specialist on the treatment of torture victims. This specialist shall make a report on whether injuries or maltreatment or indications of types of suffering that would indicate serious torture do or do not exist.

Chapter 5 Admissibility

Article 63 Admissibility and third countries

- 1 Member States shall consider all asylum applications admissible and shall not derogate from the procedural guarantees in this Title regardless of the possibility that an asylum applicant could or should have submitted an application in a third country.
- 2 By way of derogation from paragraph 1, Member States may consider asylum applications inadmissible and may derogate from the procedural guarantees in this Title where:
 - a) a third country has recognized the Geneva Convention refugee status of the asylum applicant or granted equivalent protection;
 - b) a third country has granted the asylum applicant a permanent residence permit; or
 - c) there is a treaty between the Community and the relevant third country providing guarantees equivalent to those in Titles III to V of this Directive; or

- d) a Member State has considered it fair and reasonable to call upon the applicant to apply for asylum in a third country with which the applicant already had a connection or close links, if the applicant has agreed to make such an application and the relevant third country has agreed to examine the claim if the third country in question has ratified the Geneva Convention and 1967 Protocol without limitation as to territorial scope.

Article 64 Admissibility and member states

Member States shall not consider an asylum application inadmissible or derogate from the procedural guarantees in this Title regardless of the possibility that an asylum applicant could or should have submitted an application in another Member State, except where:

- an applicant’s right to asylum has been recognized in another Member State, without prejudice to Article 42; or
- an application for asylum is pending before the competent authorities or courts of another Member State responsible for examining the application pursuant to Title II; or
- an application for asylum has been definitively rejected by another Member State, unless Article 11 is applicable.

Article 65 Repeat applications

- 1 A Member State is not precluded from considering a new asylum application made by an applicant whose application has been definitively rejected in that Member State, provided that the applicant agrees thereto.
- 2 A Member State must consider a claim by an applicant whose application has been definitively rejected in that Member State if the applicant argues that there has been a change of circumstances relevant to the application or that poor representation of the applicant precluded the submission of evidence relevant to the application at an earlier stage of the procedure. The consideration of this claim shall be limited to the merits of the applicant’s claim regarding a change of circumstances or poor representation. Articles 52, 54, 56 and 57 shall apply.

Chapter 6

Article 66 Procedural consequences of illegal entry or presence

Without prejudice to Article 22, in accordance with the principles underlying Article 31 of the Geneva Convention, Member States shall not derogate from any of the guarantees in this Title or apply any unfavourable presumption regarding an asylum application where an applicant:

- has entered or is present in a Member State’s territory without authorization; or
- has used false or counterfeit documents for the purposes of travel for seeking asylum; or
- does not have documents that would provide evidence of such authorization or evidence of other status or of travel routes

if such an applicant presents himself or herself to the authorities of that Member State and can explain the lack of authorization or documents or the use of false or counterfeit documents.

TITLE VI Temporary protection

Article 67 Principle

Where one or more Member States are temporarily unable, due to a mass influx of persons, to process certain applications for recognition of the right to asylum in the form of Geneva Convention refugee status or complementary protection status pursuant to the substantive and procedural rules in Titles IV, V and VII, they shall recognize the right to asylum in accordance with the provisions of this Title.

Article 68 Application

Chapter 1 of this Title shall not apply to persons who were admitted by Member States in the context of temporary protection regimes set up before the adoption of this Directive.

Article 69 Definitions

For the purpose of this Title:

- a) 'temporary protection regime' means an arrangement, pursuant to this Title, recognizing the right to asylum while an application for recognition of that right in the form of Geneva Convention refugee status or complementary protection status cannot be considered;
- b) 'persons in need of international protection' means any person who has left his or her country of residence and whose safe return is impossible in view of the situation prevailing in that country, in particular where that person:
 - i) has fled from areas affected by armed conflict or persistent violence; or
 - ii) has been or runs a serious risk of being exposed to systematic or widespread human rights abuses; or
 - iii) who, for another reason specific to his or her personal situation, is presumed to be in need of international protection; and
- c) 'mass influx of persons' means: the sudden arrival within the Union of a significant number of persons from a given country or geographical region.

Chapter 1 Procedural rules for Community regime

Article 70 Establishing a temporary protection regime

- 1 In cases of mass influx of persons in need of international protection, the Council may decide to establish a temporary protection regime in accordance with the procedure set out in Article 72.
- 2 The decision referred to in paragraph 1 shall determine at least:
 - the specific groups of persons to which the temporary protection regime applies; and
 - the duration of the regime, which, in accordance with Article 76, shall not exceed two years in aggregate.

Article 71 Revision and termination of temporary protection regimes

- 1 Every year, and at least six months before the end of a temporary protection regime, or when the Council or Parliament so requests, the Commission shall prepare a report on the situation in the country of nationality (or, for a stateless person, the country of former habitual residence) and on the application of the temporary protection regime by the Member States, as well as on its financial and social implications, which it shall submit to the Council and the Parliament. The provisions of Article 84 shall apply.
- 2 After examining this report, and no later than three months before the end of a temporary protection regime, the Council shall, in accordance with the procedure set out in Article 72:
 - decide to revise the decision taken in accordance with Article 70, in particular by amending its duration and/or the groups of persons to which it applies; or
 - decide on the phasing out of the temporary protection regime because the situation in the country of nationality (or, for a stateless person, the country of former habitual residence) allows a safe return of the persons concerned under conditions respecting human dignity.

Article 72 Decision-making procedure

- 1 On the initiative of any Member State or the Commission, which shall ask the United Nations High Commissioner for Refugees for his or her opinion, the Council shall adopt the measures implementing this Chapter, as referred to in Article 71(2), acting by a qualified majority.
- 2 The Council shall consult the European Parliament after adopting any measure referred to in paragraph 1. The European Parliament shall deliver its opinion within a time-limit which the Council and Parliament shall agree by common accord, which shall not be less than one month. If the Parliament delivers a negative opinion, the measure shall be terminated.
- 3 The proposal referred to in paragraph 1 and the implementing measures adopted pursuant to Article 71(2) shall be transmitted to the European Parliament and national parliaments, published in the Official Journal of the European Communities and disseminated to the public by electronic means.

Article 73 Financial support

The report provided for by Article 71(1) shall also refer to all future measures to provide financial support for the application of the temporary protection scheme.

Such measures shall be implemented in accordance with the provisions of the Regulation specifically devoted to financial support for the admission and residence of beneficiaries of Community temporary protection schemes.

Chapter 2 Substantive and procedural rights

Article 74 Scope

The provisions of this Chapter shall apply to persons whose right to asylum in form of temporary protection has been recognized, whether that right has been recognized pursuant to a national temporary protection regime or a Community temporary protection regime established pursuant to the provisions of Chapter 1.

Article 75 Length of temporary protection regimes

Neither a Community nor a national temporary protection regime may exceed two years in duration.

Article 76 Determination of temporary protection status

- 1 Member States shall apply a simplified procedure to determine whether a person entering that Member State as part of a mass influx of persons is in need of international protection. Chapters 5 and 6 of Title V shall apply.
- 2 If a Member State's competent authority refuses to accept that a person entering that Member State as part of a mass influx of persons is in need of international protection, Title V shall apply in full *mutatis mutandis*.
- 3 Member States shall, where relevant, apply the procedure referred to in paragraph 1 to persons who have not yet entered the territory of the Member States. Measures taken under Article 83 shall determine common criteria on the application of temporary protection schemes to such persons.

Article 77 Effects of recognition of temporary protection status

- 1 When a Member State has recognized a person's right to asylum in the form of temporary protection, it shall grant that person rights equivalent to the rights granted to persons whose right to asylum in the form of Geneva Convention refugee status has been recognized, applying the provisions of Articles 40 and 41 of this Directive *mutatis mutandis*.
- 2 A Member State may exclude a person from the right to temporary protection on the grounds set out in Article 1.F or Article 33 of the Geneva Convention. The provisions of Articles 39, 40 and 43 of this Directive shall apply *mutatis mutandis*.
- 3 The *non-refoulement* principle as defined in Article 3 shall apply fully to all persons whose right to asylum in the form of temporary protection status has been recognized.

Article 78 Relationship with Geneva Convention and complementary protection status

- 1 While a Community or national temporary protection regime is in force, and a Member State has not suspended examination of applications for recognition of the right to asylum in the form of Geneva Convention refugee status or complementary protection status, application for recognition of the right to asylum shall be examined by the Member State responsible, pursuant to the provisions of Title II. The provisions of Titles IV and V shall apply.
- 2 If, following the examination of such an application, the application is definitively rejected, the rejected applicant shall retain his or her rights under the provisions of this Chapter for as long as the Community or national temporary protection regime is in force.
- 3 The asylum applicant's status while the application is under consideration shall be governed by this Chapter, in particular Article 77(1), not Title III of this Directive.
- 4 By way of derogation from paragraph 1, a Member State may provide that examination of such applications shall be suspended during periods of mass influx,

if the mass influx renders the Member State temporarily unable to process certain applications. Such examination may not be suspended for more than one year from the Community or national decision establishing a temporary protection regime.

Article 79 Effects of termination

- 1 Upon termination of a temporary protection scheme or deletion of groups of persons from its scope, the persons previously covered by such a scheme shall either:
 - a) return voluntarily to the country of nationality (or, for a stateless person, the country of former habitual residence), with the principles governing that return to be coordinated by the Council, in close cooperation with the international organizations concerned, and in particular the United Nations High Commissioner for Refugees; or
 - b) make an initial application for recognition of the right to asylum or resume an application suspended by a Member State pursuant to Article 78(4). The relevant provisions of Titles II, III, IV, V and VII shall apply.
- 2 Until an application referred to in paragraph 1 is definitively rejected, the provisions of Article 77(1) shall continue to apply to the applicants.

TITLE VII Complementary protection

Article 80 Principle

- 1 This Title governs the recognition of the right of asylum in the form of complementary protection.
- 2 This Title shall apply to any persons who fall outside the criteria for recognition as a Geneva Convention refugee as defined in Title IV or for temporary protection status under Title VI, because such persons:
 - fall outside the inclusion clauses in Chapter 1 of Title IV; or
 - have refugee status withheld or cancelled by virtue of Art 1F of the Geneva Convention or withdrawn by virtue of Art 1C of that Convention; or
 - fall within the criteria for expulsion, pursuant to Article 32 of the Geneva Convention applied in accordance with Article 40(3) of this Directive; or
 - are denied temporary protection status pursuant to Article 77(2);
 and such persons:
 - have fled their country, or who are unable or unwilling to return there, because their lives, safety or freedom are threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order; and/or
 - have fled their country, or who are unwilling to return there, owing to well-founded fear of being tortured or of being subjected to inhuman or degrading treatment or punishment or violations of other fundamental human rights.
- 3 Nothing in this Title shall restrict Member States from prosecuting persons for alleged crimes against humanity or for any other alleged crime, without prejudice to Article 22.

Article 81 Procedure

- 1 Any application for recognition of the right to asylum in the form of Geneva Convention refugee status shall also constitute an application in the alternative for recognition of the right to asylum in the form of complementary protection status. The responsibility rules, reception conditions and procedural provisions of Titles II, III and V shall apply.
- 2 Member States shall ensure that their competent authorities, when taking decisions to refuse, terminate, cancel, or withhold recognition of the right to asylum in the form of Geneva Convention refugee status or temporary protection status on the grounds set out in Article 80, consider fully whether the right to asylum in the form of complementary protection must be recognized for the reasons set out in that Article.
- 3 The right to asylum in the form of complementary protection shall be recognized automatically for all persons with recognized Geneva Convention refugee status or temporary protection status who fall within the scope of Articles 32 or 33(2) of the Geneva Convention and who are not to be expelled to a third country.
- 4 If a competent authority of a Member State recognizes an applicant's right to asylum in the form of complementary protection status but denies recognition of that applicant's claim to recognition of Geneva Convention refugee status, the applicant shall retain the right to appeal the latter refusal, pursuant to the relevant provisions of Title V.

Article 82 Effects of recognition of complementary protection status

- 1 When a Member State has recognized a person's right to asylum in the form of complementary protection, it shall grant that person and his or her family members rights equivalent to the rights granted to persons whose right to asylum in the form of Geneva Convention refugee status has been recognized. The provisions of Articles 39 to 42 of this Directive shall apply *mutatis mutandis*.
- 2 The *non-refoulement* principle as defined in Article 3 shall apply fully to all persons whose right to asylum in the form of complementary protection status has been recognized.

TITLE VIII General and final provisions

Article 83 Implementing measures

Where this Directive provides for the adoption of implementing measures, except in the case provided for in Article 72, the provisions of Article 6 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission shall apply.

Article 84 Transparency and exchange of information

- 1 Member States shall conduct mutual exchanges with regard to:
 - national legislative or regulatory measures or practices applicable in the field of asylum;
 - statistical data on monthly arrivals of applicants for asylum, and their breakdown by nationality;

- general information on new trends in applications for asylum;
 - general information on the situation in the countries of origin or of provenance of applicants for asylum.
- 2 Such information shall be forwarded quarterly to the Commission, which shall see that it is circulated to the General Secretariat of the Council, to the Member States and to the United Nations High Commissioner for Refugees. Except where release of such information would prejudice an ongoing investigation into criminal activity, the Commission shall also ensure that it is disseminated to the public by electronic means, that it is released automatically to all applicants who request it pursuant to Decision 94/90, and that it is received by the European Parliament, the national parliaments of each Member State, and, at the request of any Member State, the sub-national parliaments of that Member State.

Article 85 Right to privacy

- 1 In addition to the specific rights set out in Articles 16 and 54, Member States shall ensure that Directive 95/46 and all relevant international treaties which they have ratified apply fully to personal data that falls within the scope of this Directive and which is held by any national authority.
- 2 In accordance with Article 286(1) of the Treaty establishing the European Community, Directive 95/46 shall apply fully to all personal information that falls within the scope of this Directive and which is held by Community institutions, agencies or bodies.
- 3 In accordance with Article 286(2) of the Treaty establishing the European Community, the independent supervisory body to be established pursuant to that Article shall monitor the application of paragraph 2 above.
- 4 Any relevant provisions of any other measure adopted pursuant to Article 286(2) of the Treaty establishing the European Community shall apply *mutatis mutandis* to all personal information that falls within the scope of this Directive.
- 5 Member States shall not list asylum applicants whose applications have been definitively rejected as persons who must be refused entry pursuant to Article 96 of the Schengen Convention solely because of the rejection of such applications.

Article 86 Right to judicial protection

In addition to the specific rights set out in Title V and in Articles 18 and 23, Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 87 Rights of the child

- 1 When applying the provisions of this Directive, Member States shall comply fully with the United Nations Convention on the Rights of the Child without invoking any derogations from that Convention.
- 2 In all asylum cases involving children, Member States shall ensure a durable solution based on the best interests of the child.

Article 88 Proof of family status

When deciding on family reunification pursuant to Articles 10, 29, 41, 42, 77 and 82, the absence of documentary proof of the marriage or of the affiliation of children should not in itself be considered an impediment. All the relevant facts and circumstances should be taken into account, including in particular the difficulty of obtaining such documentary proof having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements.

Article 89 More favourable provisions

Member States have the right to enact or maintain more favourable national provisions than those set out in Titles III, IV, V, VI and VII.

Article 90 Public awareness, solidarity and tolerance

Member States shall ensure that the public is aware of the importance of the fundamental right of asylum by requiring their competent authorities to include education in fundamental human rights and the right to asylum in national curricula and to disseminate accurate information regarding matters within the scope of this Directive.

Article 91 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive. The provisions of Article 84(2) shall apply.
- 4 The Commission shall submit an annual report on asylum in the Member States. This report shall be based on the information provided by the Member States pursuant to Article 84(1) and any other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective exercise of the right to asylum, at the latest five years after adoption of this Directive.

Article 92

This Directive is addressed to the Member States.

ANNEX I
ILPA/MPG PROPOSED DIRECTIVE 2000/01a

ON

determination of responsibility for applications for asylum

The Council of the European Union,
Having regard to the Treaty establishing the European Community, and
in particular Article 63(1)(a) thereof,
Having regard to the proposal of the Commission,
Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to asylum is a fundamental human right;
- 2 Article 61 of the Treaty requires the Community to establish an 'area of freedom, security and justice' within five years of the entry into force of the Treaty of Amsterdam;
- 3 because of the interrelationship between various aspects of the law affecting asylum applicants, refugees, displaced persons and other persons in need of international protection, it is appropriate for the Council to establish a Common European Asylum System which integrates these various aspects to the extent possible;
- 4 this Directive constitutes a step in the creation of a Common European Asylum System;
- 5 according to Article 6(2) of the Treaty on European Union, the European 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;
- 6 the measures on asylum which the Community must adopt pursuant to Article 63(1) of the Treaty establishing the European Community must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties; whereas such other relevant treaties include the European Convention on Human Rights, the United Nations Convention Against Torture, and the Convention on the Rights of the Child;
- 7 Declaration 17, attached to the Final Act of the Treaty of Amsterdam, specifies that consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on

matters relating to asylum policy; whereas the role of the United Nations High Commissioner as regards the procedure for examining a claim for asylum should also be recognized;

- 8 in many Member States the United Nations High Commissioner for Refugees may also intervene during the judicial determination of asylum claims; whereas the Council should therefore invite the Court of Justice to consider whether to propose an amendment to its rules of procedure to permit the intervention of the United Nations High Commissioner for Refugees in appropriate cases before that Court;
 - 9 pursuant to Article 63(1)(a) of the Treaty establishing the European Community, the Council must adopt criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; whereas such rules must take into consideration the difficulties experienced in the application of the Dublin Convention; whereas an additional measure implementing this principle is Regulation 0000/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints of applicants for asylum;
 - 10 pursuant to Article 63(1)(b) of the Treaty establishing the European Community, the Council must adopt minimum standards on the reception of asylum applicants in Member States; whereas, to ensure the dignity of asylum applicants, such standards should apply in full during the procedure to determine the Member State responsible for examining an application for recognition of the right to asylum;
 - 11 pursuant to Article 63(1)(d) of the Treaty establishing the European Community, the Council must adopt minimum standards on procedures in Member States for granting or withdrawing refugee status; whereas, as long as Member States retain divergent interpretation of the Geneva Convention and other rules relating to asylum, such procedural rules should apply in full to the procedure to determine the Member State responsible for examining an application for recognition of the right to asylum;
 - 12 pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for persons who otherwise need international protection; whereas, as long as Member States retain divergent rules on this subject, it would be inappropriate to apply this Directive to the examination of applications for such protection;
 - 13 in order to ensure the effective exercise of the right to asylum, the *non-refoulement* right in Article 33 of the Geneva Convention must be upheld fully; whereas the Community cannot protect the rights of persons outside the scope of the Geneva Convention who nonetheless face a real risk of torture or inhuman or degrading treatment unless it accords them an identical right to *non-refoulement*; whereas, in order to ensure that the right to *non-refoulement* is observed, asylum applicants may not be removed from the territory of a Member State unless their applications for asylum have been definitively rejected and they do not meet the criteria for the grant of complementary protection;
 - 14 the rules governing the determination of the Member State responsible for examining an application for recognition of the right to asylum must be made as compatible as possible with the right to family reunion;
- has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to determine the Member State responsible for examining an application for recognition of the right to asylum, while respecting the rights to asylum, family reunion, human dignity, privacy and judicial protection.

Article 2 Definitions

For the purposes of this Directive:

- a) 'Application for recognition of the right to asylum' or 'asylum application' means: a request seeking from a Member State the recognition of the right to asylum in the form of refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol;
- b) 'Applicant for the right to asylum' or 'asylum applicant' means: a person who has made an application for recognition of the right to asylum, where that application has not been withdrawn or definitively rejected;
- c) 'Definitively rejected' application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant;
- d) 'Examination of an application' means: all the measures for examination, decisions or rulings given by the competent authorities on an application for recognition of the right to asylum; and
- e) 'Third State' means: a state or territory other than a Member State of the European Union and the country of nationality of the asylum applicant (or, if the applicant is stateless, his or her country of former habitual residence).

Article 3 *Non-refoulement* right

- 1 No Member State shall expel or return (*refouler*) a person with the right to asylum, or an asylum applicant whose application has not been definitively rejected, in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, or where he or she faces a real risk of torture or inhuman or degrading treatment.
- 2 No Member State shall expel or return a person with the right to asylum or an asylum applicant whose application has not been definitively rejected to a third state which might effect an expulsion or return as prohibited in paragraph 1.

Article 4 Scope

This Directive shall not apply to claims for complementary protection.

Article 5 Member States' obligations

- 1 While applying this Directive, Member States shall implement their obligations under:
 - a) the Geneva Convention, as amended by the New York Protocol, with no geographic restriction of the scope of those instruments, and their commitment to cooperating with the United Nations High Commissioner for Refugees in applying these instruments; and
 - b) national constitutional principles and other relevant international obligations.
- 2 Member States shall examine an application for the recognition of the right to asylum made by any applicant who applies within their jurisdiction to any one of them for the recognition of that status.

Article 6 Relationship with other asylum rules

During the process of determining the responsible state for examining the application for asylum, Member States shall extend in full:

- the reception conditions applying to applicants for asylum pursuant to national or Community law; and
- the rules of national or Community law concerning the procedures applicable to examining applications for the recognition of the right to asylum.

Article 7 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Determination of responsibility

Article 8 Single application principle

An application for recognition of the right to asylum shall be examined by a single Member State, which shall be determined in accordance with the criteria defined in this Chapter.

Article 9 Responsibility rule

An application for recognition of the right to asylum shall be examined by the first Member State with which such an application is lodged.

Article 10 Exceptions

Notwithstanding Article 9:

1 Where the asylum applicant:

- has a member of his or her family who has been recognized as having the right to asylum in another Member State and is legally resident there; or
- discovers that a family member who has become separated from the applicant before the applicant entered the European Community is an asylum applicant in another Member State and is legally resident there;

the applicant may withdraw the initial application for recognition lodged in one Member State and lodge an application in the Member State where his or her family member resides.

The family member in question may be any of the family members listed in Article 10 of Regulation 1612/68, including any subsequent amendments thereto, or may be a cohabitee as defined in national or Community law.

- 2 Where the asylum applicant is a family member of an applicant and was initially admitted with that applicant, or admitted for the purposes of family reunion with that applicant, a separate application by that family member for recognition of the right to asylum shall normally be examined by the Member State responsible for examining the earlier application.
- 3 Each Member State shall have the right to examine an application for recognition of the right to asylum submitted to it, even if such examination is not its responsibility under Article 9 or 10(1), provided that the applicant agrees thereto.
- 4 Any Member State, even if it is not responsible under the criterion laid out in Article 9 of this Directive, may for humanitarian reasons, based in particular on family or cultural grounds, examine an application for recognition of the right to asylum at the request of another Member State, provided that the applicant so desires.
- 5 Where it appears that an applicant, before requesting asylum in a Member State, already had a connection or close links with another Member State, a Member State may, if it appears fair and reasonable, call upon the applicant to apply for asylum in that other Member State. If the applicant then applies in another Member State, responsibility for examining the application shall not be transferred unless the other Member State accepts responsibility. If the other Member State refuses to accept responsibility, the responsibility for examining the application shall remain with the Member State in which the applicant first applied.
- 6 If the conditions for transferring responsibility set out in paragraphs 1, 3, 4 or 5 are fulfilled, the Member State responsible for examining the application pursuant to Article 9 is then relieved of its obligations, which are transferred to the Member State which is responsible pursuant to paragraphs 1, 3, 4 or 5. The latter Member State shall inform the applicant and the Member State responsible under the said criteria of the transfer.

Article 11 Repeat applications

A definitive rejection of an application for recognition of the right of asylum by the asylum by the Member State responsible for considering the claim pursuant to Articles 9 and 10 shall not preclude any other Member State from considering a new asylum application made by the person concerned, provided that the applicant agrees thereto.

The Member State responsible for examining the application pursuant to Articles 9 and 10 is then relieved of its obligations under this Chapter, which are transferred to the Member State which expressed the wish to examine the application. The latter Member State shall inform the applicant and the Member State responsible under the said criteria of the transfer.

Article 12 Obligations of responsible Member State

- 1 The Member State responsible for examining an application for recognition of the right to asylum according to the criteria set out in this Chapter shall be obliged to:
 - a) take charge under the conditions laid down in Article 15 of an applicant who has lodged an additional application for recognition in another Member State;
 - b) complete the examination of the application for recognition, in accordance with the relevant provisions of national or Community law;
 - c) readmit or take back under the conditions laid down in Article 15, an applicant whose application is under examination and who is irregularly in another Member State;
 - d) take back, under the conditions laid down in Article 15, an applicant who has withdrawn the application under examination and lodged an application in another Member State, except where Article 10 applies;
 - e) take back, under the conditions laid down in Article 15, an applicant whose application has been rejected and who is illegally in another Member State.

Article 13 Obligations of other Member States

Member States shall facilitate the movement of persons who wish to travel to a particular Member State in order to apply for asylum there pursuant to Articles 9 or 10.

Article 14 Taking charge

- 1 If a Member State with which an application for recognition of the right to asylum has been lodged believes that the applicant has previously made an application for recognition of the right to asylum in another Member State, except where Article 10 applies, it may, as quickly as possible and in any case within the six months following the date on which the application was lodged, call upon the other Member State to take charge of the applicant.

If the request that charge be taken is not made within the six-month time limit, responsibility for examining the application for recognition of the right to asylum shall rest with the Member State in which the application was lodged.

- 2 The request that charge be taken shall contain indications enabling the authorities of that other State to ascertain whether the asylum applicant has previously made an asylum application in that State.

- 3 The Member State shall pronounce judgment on the request within three months of the request of the claim. Failure to act within that period shall be tantamount to accepting the claim.
- 4 Transfer of the asylum applicant from the Member State where the second application was lodged to the Member State where the first application was lodged must take place not later than one month after acceptance of the request to take charge or one month after conclusion of any proceedings initiated by the applicant challenging the transfer decision if the proceedings are suspensory.
- 5 Measures taken under Article 17 shall determine the details of the process by which applicants shall be taken in charge.

Article 15 Taking-back

- 1 An asylum applicant shall be taken back in the cases provided for in Article 12 as follows:
 - a) the request for the applicant to be taken back must provide indications enabling the State with which the request is lodged to ascertain whether it is responsible in accordance with Article 12;
 - b) the Member State called upon to take back the applicant shall give an answer to the request within eight days of the matter being referred to it. Should it acknowledge responsibility, it shall then take back the asylum applicant as quickly as possible and at the latest one month after it agrees to do so.
- 2 Measures taken under Article 17 shall set out the details of the procedure for taking the applicant back.
- 3 The obligation to take back a person pursuant to Article 12(1)(d) shall cease to apply if the asylum applicant has since left the territory of the Member States for a period of at least three months or has obtained from a Member State a residence permit valid for more than three months.

Article 16 Exchange of personal information

- 1 Each Member State shall communicate to any Member State that so requests such information on individual cases as is necessary for:
 - determining whether an asylum applicant has applied for recognition of the right to asylum in more than one Member State, without prejudice to the application of Article 10;
 - examining the application for recognition of the right to asylum; or
 - implementing any obligation arising under this Chapter.
- 2 This information may only cover:
 - personal details of the applicant, and, where appropriate, the members of his family (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);
 - the place where the application was lodged;
 - the date any previous asylum application was lodged, the date the present application was lodged, the stage reached in the proceedings and the decision taken, if any.

- 3 This exchange of information shall be effected at the request of a Member State and may only take place between authorities the designation of which by each Member State has been communicated to the Commission.
- 4 The information exchanged may only be used for the purposes set out in paragraph 1. In each Member State such information may only be communicated to the authorities and courts and tribunals entrusted with:
 - determining the Member State which is responsible for examining the application for recognition of the right to asylum; and/or
 - examining the application for recognition of the right to asylum; and/or
 - implementing any obligation arising under this Chapter.
- 5 The Member State that forwards the information shall ensure that it is accurate and up-to-date. If it appears that this Member State has supplied information which is inaccurate or which should not have been forwarded, the recipient Member State shall be immediately informed thereof. Both Member States shall be obliged to correct such information or to have it erased.
- 6 An asylum applicant shall be given a complete copy of the information exchanged concerning him or her, accompanied by a summary of that information in a language that he or she understands. If he or she establishes that such information is inaccurate or should not have been forwarded, he or she shall have the right to have it corrected or erased. This right shall be exercised in accordance with the conditions laid down in paragraph 5.
- 7 In each Member State, the forwarding and receipt of exchanged information shall be recorded.
- 8 Such information shall be kept for two years, at which time it shall be erased unless the Member State can show that it is absolutely necessary to keep the information for a further period of two years. Member States shall inform the applicant, in a language that he or she understands, of their decisions to erase or their intention to retain the information, and they shall not implement their decision to retain the information without considering any objections made by the applicant. After that further period of two years, the information shall be definitively erased and Member States shall confirm this erasure to the applicant in a language that he or she understands.
- 9 In any event, the information thus communicated shall enjoy at least the same protection as is given to similar information in the Member State which receives it.
- 10 When exchanging information pursuant to this Article, Member States shall also comply any other relevant Community and international data protection obligations in addition to the specific rules set out in this Article.

Chapter III General and final provisions

Article 17 Implementing measures

Where this Directive provides for the adoption of implementing measures, the provisions of Article 6 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission shall apply.

Article 18 Transparency and exchange of information

- 1 Member States shall conduct mutual exchanges with regard to:
 - national legislative or regulatory measures or practices applicable in the field of asylum;
 - statistical data on monthly arrivals of applicants for asylum, and their breakdown by nationality;
 - general information on new trends in applications for asylum;
 - general information on the situation in the countries of origin or of provenance of applicants for asylum.
- 2 Such information shall be forwarded quarterly to the Commission, which shall see that it is circulated to the General Secretariat of the Council, to the Member States and to the United Nations High Commissioner for Refugees. Except where release of such information would prejudice an ongoing investigation into criminal activity, the Commission shall also ensure that it is disseminated to the public by electronic means, that it is released automatically to all applicants who request it pursuant to Decision 94/90, and that it is received by the European Parliament, the national parliaments of each Member State, and, at the request of any Member State, the sub-national parliaments of that Member State.

Article 19 Right to privacy

- 1 In addition to the specific rights set out in this Directive, Member States shall ensure that Directive 95/46 and all relevant international treaties which they have ratified apply fully to personal data that falls within the scope of this Directive and which is held by any national authority.
- 2 In accordance with Article 286(1) of the Treaty establishing the European Community, Directive 95/46 shall apply fully to all personal information that falls within the scope of this Directive and which is held by Community institutions, agencies or bodies.
- 3 In accordance with Article 286(2) of the Treaty establishing the European Community, the independent supervisory body to be established pursuant to that Article shall monitor the application of paragraph 2 above.
- 4 Any relevant provisions of any other measure adopted pursuant to Article 286(2) of the Treaty establishing the European Community shall apply *mutatis mutandis* to all personal information that falls within the scope of this Directive.

Article 20 Right to judicial protection

In addition to the specific rights set out in this Directive, Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 21 Proof of family status

When deciding on family reunification pursuant to this Directive, the absence of documentary proof of the marriage or of the affiliation of children should not in itself be considered an impediment. All the relevant facts and circumstances should be taken into account, including in particular the difficulty of obtaining such documentary proof having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements.

Article 22 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive. The provisions of Article 18(2) shall apply.
- 4 The Commission shall submit an annual report on asylum in the Member States. This report shall be based on the information provided by the Member States pursuant to Article 18(1) and any other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective exercise of the right to asylum, at the latest five years after adoption of this Directive.

Article 23

This Directive is addressed to the Member States.

ANNEX II
ILPA/MPG PROPOSED DIRECTIVE 2000/01b

ON THE
**minimum reception conditions
for applicants for asylum**

The Council of the European Union,
Having regard to the Treaty establishing the European Community, and
in particular Article 63(1)(b) thereof,
Having regard to the proposal of the Commission,
Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to asylum is a fundamental human right;
- 2 Article 61 of the Treaty requires the Community to establish an 'area of freedom, security and justice' within five years of the entry into force of the Treaty of Amsterdam;
- 3 because of the interrelationship between various aspects of the law affecting asylum applicants, refugees, displaced persons and other persons in need of international protection, it is appropriate for the Council to establish a Common European Asylum System which integrates these various aspects to the extent possible;
- 4 this Directive constitutes a step in the creation of a Common European Asylum System;
- 5 according to Article 6(2) of the Treaty on European Union, the European 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;
- 6 the measures on asylum which the Community must adopt pursuant to Article 63(1) of the Treaty establishing the European Community must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties; whereas such other relevant treaties include the European Convention on Human Rights, the United Nations Convention Against Torture, and the Convention on the Rights of the Child;
- 7 pursuant to Article 63(1)(b) of the Treaty establishing the European Community, the Council must adopt minimum standards on the reception of asylum applicants in Member States; whereas, to ensure the dignity of asylum applicants,

such standards should ensure that the educational, accommodation, health and welfare needs of asylum applicants are met;

- 8 pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of nationality (or, for a stateless person, the country of former habitual residence); whereas in situations of mass influx, Member States may be temporarily unable to examine applications for recognition of the right to asylum pursuant to the Geneva Convention lodged by such displaced persons; whereas it would be inappropriate in such circumstances to derogate from the minimum standards set out in this Directive;
 - 9 also pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for persons who otherwise need international protection; whereas, in order to protect the rights of such persons, who are outside the scope of the Geneva Convention but who nonetheless face a real risk of torture or inhuman or degrading treatment, the Community must ensure that the Member States grant such persons complementary protection; whereas it would be inappropriate in such circumstances to derogate from the minimum standards set out in this Directive;
 - 10 pursuant to Article 63(2)(b) of the Treaty establishing the European Community, the Council must adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons'; whereas this balance of effort can be achieved by recourse to the Community budget to assist Member States which are obliged to make greater efforts to receive refugees and displaced persons, without compelling refugees and displaced persons to move between Member States; whereas the modalities of providing such funding shall be set out in a separate measure;
 - 11 unaccompanied minors are generally in a vulnerable situation requiring special safeguards and care;
 - 12 in order to ensure the right to family reunion and rights of residence for persons falling within the scope of this Directive, the Community should exercise its competence pursuant to Article 63(3)(a) of the Treaty establishing the European Community;
 - 13 a measure to be adopted pursuant to Title VI of the Treaty on European Union should address the right of all asylum applicants and persons whose right to asylum has been recognized to effective protection by Member States against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions;
 - 14 nothing in this Directive shall derogate from the right to *non-refoulement*;
- has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to ensure that the social, educational, accommodation, family reunion and health and welfare rights of asylum applicants are met.

Article 2 Definitions

For the purposes of this Directive:

- a) 'Application for recognition of the right to asylum' or 'asylum application' means: a request seeking from a Member State the recognition of the right to asylum in the form of refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol, or for complementary protection;
- b) 'Applicant for the right to asylum' or 'asylum applicant' means: a person who has made an application for recognition of the right to asylum, where that application has not been withdrawn or definitively rejected;
- c) 'Definitively rejected' application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant;
- d) 'Examination of an application' means: all the measures for examination, decisions or rulings given by the competent authorities on an application for recognition of the right to asylum;
- e) 'Unaccompanied minor' means: a person under the age of eighteen who either:
 - i) arrives on the territory of a Member State unaccompanied by an adult responsible for the minor, whether by law or custom, for as long as the minor is not effectively in the care of such a person; or
 - ii) is left unaccompanied after entry into the territory of a Member State.

Article 3 Scope

- 1 The provisions of this Directive shall apply:
 - during determination of the Member State responsible for examining the asylum application, pursuant to the relevant Community rules;
 - during consideration of the admissibility of the application, pursuant to the relevant Community or national rules;
 - during any procedure to determine whether a person who has entered the Member State in question is in need of temporary protection, pursuant to the relevant Community or national rules; and
 - until the definitive rejection of the asylum application.
- 2 This Directive is without prejudice to the right of *non-refoulement* as defined in international, national and Community law.

Article 4 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Reception conditions

Article 5 Judicial protection

In addition to the general right to judicial protection set out in Article 20, Member States shall not in any way restrict the reception conditions guaranteed by this Chapter if an asylum applicant has recourse to his or her right to bring judicial or administrative proceedings of any kind whatsoever.

Article 6 Information

Member States shall ensure that asylum applicants are informed, at the time of their application for recognition of the right to asylum, of the practical arrangements for their reception in writing and/or orally in a language which they understand. Such information shall be provided by the competent authorities of the Member State concerned, but may also be provided by non-governmental organizations or by private institutions.

Article 7 Coordination

Member States shall ensure coordination between the competent authorities or services involved in the accommodation, health and welfare needs of asylum applicants, and between those authorities and services and the contributions of non-governmental organizations, local authorities, local communities and the United Nations High Commissioner for Refugees. In particular, they shall ensure appropriate training for persons who assume responsibilities in the area.

Article 8 Right to freedom of movement

Asylum applicants may move freely throughout the territory of the host Member State, subject only to restrictions on grounds of public policy, public security or public health. They shall inform the relevant authorities of their current address and notify those authorities immediately of any change of address.

Article 9 Effect of illegal entry

- 1 To give effect to Article 31(1) of the Geneva Convention, Member States shall not impose penalties on asylum applicants who use illegal means to effect entry onto their territory (including the use of false documents or arranging for clandestine entry), provided that they have not obtained protection elsewhere in accordance with the relevant provisions of Community or national law and that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

- 2 Member States shall give full effect to Article 31(2) of the Geneva Convention.
- 3 Paragraphs 1 and 2 shall apply *mutatis mutandis* to asylum applicants who are transiting through a Member State with the intent of applying for asylum in a third country.

Article 10 Detention

- 1 Without prejudice to Article 9, Member States shall only detain asylum applicants or applicants whose claims have been definitively rejected if such detention is:
 - prescribed by law for a specific reason, as enumerated in paragraph 2, and for a specific period, which must be as short as possible;
 - strictly necessary for compelling reasons relevant to the individual case;
 - proportionate, after prior consideration of alternatives to detention and the effect of detention in each individual case; and
 - applied in a non-discriminatory manner.
- 2 Asylum applicants or applicants whose claims have been definitively rejected may only be detained in order to:
 - verify the identity of an asylum applicant who has refused to cooperate with the process of verifying identity;
 - ensure the application of a removal order against an asylum applicant whose claim has been definitively rejected; or
 - protect national security or public order, where there is evidence to show that the asylum applicant is likely to pose a risk to such principles.
- 3 Member States shall ensure full application of Article 5 of the European Convention on Human Rights whenever they have detained an asylum applicant or an applicant whose claims have been definitively rejected within their jurisdiction. In particular:
 - there shall be a prompt, mandatory and periodic review of all detention orders before an independent and impartial body;
 - the detainee must be able to make a full challenge to the merits of the detention order;
 - the relevant guarantees of judicial supervision pursuant to Community or national legislation concerning procedures for examining an application for asylum shall apply *mutatis mutandis*.
- 4 Member States shall:
 - detain asylum applicants or applicants whose claims have been definitively rejected separately from convicted criminals or prisoners on remand;
 - detain men and women separately;
 - detain children separately from adults, unless those adults are their relatives; and
 - ensure the humane treatment of detainees, including necessary medical treatment, exercise of their religion, continuation of their education, provision of an effective complaints mechanism, and access to the necessities of life.

Article 11 Right to accommodation

- 1 Member States shall ensure the right of asylum applicants to accommodation, comprising a right to adequate board, lodging and care. For this purpose, asylum applicants should normally be given access to housing and to housing allowances on the same basis as nationals of the host State.
- 2 As a temporary measure, applicants may be housed in centres or lodging organized by the Member State's competent authorities, which may be managed by those competent authorities or by other institutions or organizations present in the territory, including NGOs or private organizations. Member States shall allow an asylum applicant to choose between the available accommodation as far as possible.
- 3 Member States shall provide an unaccompanied minor with long-term arrangements for accommodation as soon as that minor applies for recognition of the right to asylum.

Article 12 Right to employment

Member States shall permit asylum applicants to undertake paid employment until their application has been definitively rejected.

Article 13 Right to education

Member States shall ensure that asylum applicants and their family members, and in particular the children of asylum applicants and minor asylum applicants of school age, shall have access to the regular public education facilities on the same basis as nationals. Where this is not practicable, facilities equivalent to those available to nationals shall be offered to them as a temporary measure.

Article 14 Right to health care

- 1 Member States shall ensure that asylum applicants have access to health care on the same basis as nationals. Where this is not practicable, facilities equivalent to those available to nationals shall be offered to them as a temporary measure.
- 2 Member States shall ensure that specialized assistance is provided for asylum applicants who have suffered torture, rape or any form of cruel, inhuman or degrading treatment or punishment.

Article 15 Right to social protection

- 1 Member States shall provide asylum applicants with a minimum income on the same basis as nationals.
- 2 As regards social security, Member States shall ensure that rules equivalent to Regulation 1408/71 shall apply *mutatis mutandis* to asylum applicants.

Article 16 Right to family reunion

- 1 Member States shall ensure that rules equivalent to Articles 10 and 11 of Regulation 1612/68, and any subsequent amendments thereto, shall apply *mutatis mutandis* to asylum applicants.
- 2 Where the right to family reunion has been exercised pursuant to paragraph 1, and the family member does not submit a separate application for asylum

pursuant to the relevant rules of Community or national law, the residence authorization of the family member shall either:

- be valid until the applicant's right to asylum is recognized, in which case the provisions of national or Community law relating to family reunion for refugees shall apply; or
- be valid until the definitive rejection of the application for asylum.

Article 17 Rights of particularly vulnerable persons

- 1 In addition to the rights set out in Articles 11 to 15, Member States shall make facilities available to meet the educational, medical, psychological and other special needs of asylum applicants, including in particular the needs of children, torture victims and persons with a disability.
- 2 In particular, special medical or other assistance shall be provided for children who have suffered any form of neglect, exploitation or abuse.

Chapter III General and final provisions

Article 18 Transparency and exchange of information

- 1 Member States shall conduct mutual exchanges with regard to:
 - national legislative or regulatory measures or practices applicable in the field of asylum;
 - statistical data on monthly arrivals of applicants for asylum, and their breakdown by nationality;
 - general information on new trends in applications for asylum;
 - general information on the situation in the countries of origin or of provenance of applicants for asylum.
- 2 Such information shall be forwarded quarterly to the Commission, which shall see that it is circulated to the General Secretariat of the Council, to the Member States and to the United Nations High Commissioner for Refugees. Except where release of such information would prejudice an ongoing investigation into criminal activity, the Commission shall also ensure that it is disseminated to the public by electronic means, that it is released automatically to all applicants who request it pursuant to Decision 94/90, and that it is received by the European Parliament, the national parliaments of each Member State, and, at the request of any Member State, the sub-national parliaments of that Member State.

Article 19 Right to privacy

- 1 In addition to the specific rights set out in this Directive, Member States shall ensure that Directive 95/46 and all relevant international treaties which they have ratified apply fully to personal data that falls within the scope of this Directive and which is held by any national authority.
- 2 In accordance with Article 286(1) of the Treaty establishing the European Community, Directive 95/46 shall apply fully to all personal information that falls within the scope of this Directive and which is held by Community institutions, agencies or bodies.

- 3 In accordance with Article 286(2) of the Treaty establishing the European Community, the independent supervisory body to be established pursuant to that Article shall monitor the application of paragraph 2 above.
- 4 Any relevant provisions of any other measure adopted pursuant to Article 286(2) of the Treaty establishing the European Community shall apply *mutatis mutandis* to all personal information that falls within the scope of this Directive.

Article 20 Right to judicial protection

In addition to the specific rights set out in this Directive, Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 21 Rights of the child

- 1 When applying the provisions of this Directive, Member States shall comply fully with the United Nations Convention on the Rights of the Child without invoking any derogations from that Convention.
- 2 In all asylum cases involving children, Member States shall ensure a durable solution based on the best interests of the child.

Article 22 Proof of family status

When deciding on family reunification pursuant to this Directive, the absence of documentary proof of the marriage or of the affiliation of children should not in itself be considered an impediment. All the relevant facts and circumstances should be taken into account, including in particular the difficulty of obtaining such documentary proof having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements.

Article 23 More favourable provisions

Member States have the right to enact or maintain more favourable national provisions than those set out in this Directive.

Article 24 Public awareness, solidarity and tolerance

Member States shall ensure that the public is aware of the importance of the fundamental right of asylum by requiring their competent authorities to include education in fundamental human rights and the right to asylum in national curricula and to disseminate accurate information regarding matters within the scope of this Directive.

Article 25 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference

on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

- 3 Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive. The provisions of Article 18(2) shall apply.
- 4 The Commission shall submit an annual report on asylum in the Member States. This report shall be based on the information provided by the Member States pursuant to Article 18(1) and any other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective exercise of the right to asylum, at the latest five years after adoption of this Directive.

Article 26

This Directive is addressed to the Member States.

ANNEX III
ILPA/MPG PROPOSED DIRECTIVE 2000/01c

ON
the definition of refugee
PURSUANT TO THE GENEVA CONVENTION
ON THE STATUS OF REFUGEES

The Council of the European Union,
Having regard to the Treaty establishing the European Community, and
in particular Articles 63(1)(c) and 63(3)(a) thereof,
Having regard to the proposal of the Commission,
Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to asylum is a fundamental human right;
- 2 Article 61 of the Treaty requires the Community to establish an 'area of freedom, security and justice' within five years of the entry into force of the Treaty of Amsterdam;
- 3 because of the interrelationship between various aspects of the law affecting asylum applicants, refugees, displaced persons and other persons in need of international protection, it is appropriate for the Council to establish a Common European Asylum System which integrates these various aspects to the extent possible;
- 4 this Directive constitutes a step in the adoption of a Common European Asylum System;
- 5 according to Article 6(2) of the Treaty on European Union, the European 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;
- 6 the measures on asylum which the Community must adopt pursuant to Article 63(1) of the Treaty establishing the European Community must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties; whereas such other relevant treaties include the European Convention on Human Rights, the United Nations Convention Against Torture, and the Convention on the Rights of the Child;
- 7 Declaration 17, attached to the Final Act of the Treaty of Amsterdam, specifies that consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on

matters relating to asylum policy; whereas the role of the United Nations High Commissioner as regards the procedure for examining a claim for asylum should also be recognized;

- 8 in many Member States the United Nations High Commissioner for Refugees may also intervene during the judicial determination of asylum claims; whereas the Council should therefore invite the Court of Justice to consider whether to propose an amendment to its rules of procedure to permit the intervention of the United Nations High Commissioner for Refugees in appropriate cases before that Court;
 - 9 pursuant to Article 63(1)(c) of the Treaty establishing the European Community, the Council must adopt minimum standards with respect to the recognition of the rights of asylum of Geneva Convention refugees; whereas, in order to ensure that such measures are in accordance with the Geneva Convention and New York Protocol, such standards must take into account the principles concerning the interpretation of the Geneva Convention set out in the Handbook on Procedures and Criteria for Determining Refugee Status drawn up by the United Nations High Commissioner for Refugees;
 - 10 in order to ensure the effective exercise of the right to asylum, the *non-refoulement* right in Article 33 of the Geneva Convention must be upheld fully; whereas the Community cannot protect the rights of persons outside the scope of the Geneva Convention who nonetheless face a real risk of torture or inhuman or degrading treatment unless it accords them an identical right to *non-refoulement*; whereas, in order to ensure that the right to *non-refoulement* is observed, asylum applicants may not be removed from the territory of a Member State unless their applications for asylum have been definitively rejected and they do not meet the criteria for the grant of complementary protection;
 - 11 in order to ensure the right to family reunion and rights of residence for persons falling within the scope of this Directive, the Community should exercise its competence pursuant to Article 63(3)(a) of the Treaty establishing the European Community;
 - 12 a measure to be adopted pursuant to Title VI of the Treaty on European Union should address the right of all asylum applicants and persons whose right to asylum has been recognized to effective protection by Member States against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions;
- has adopted this Directive:

TITLE I Principles

Article 1 Purpose

The purpose of this Directive is to ensure that Member States have a common approach to recognition to the right to asylum in the form of Geneva Convention refugee status.

Article 2 Definitions

For the purposes of this Directive:

- a) 'Application for recognition of the right to asylum' or 'asylum application' means: a request seeking from a Member State the recognition of the right to asylum in the form of refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol;
- b) 'Applicant for the right to asylum' or 'asylum applicant' means: a person who has made an application for recognition of the right to asylum, where that application has not been withdrawn or definitively rejected;
- c) 'Definitively rejected' application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant;
- d) 'Examination of an application' means: all the measures for examination, decisions or rulings given by the competent authorities on an application for recognition of the right to asylum; and
- e) 'Third State' means: a state or territory other than a Member State of the European Union and the country of nationality of the asylum applicant (or, if the applicant is stateless, his or her country of former habitual residence).

Article 3 *Non-refoulement* right

- 1 No Member State shall expel or return (*refouler*) a person with the right to asylum, or an asylum applicant whose application has not been definitively rejected, in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, or where he or she faces a real risk of torture or inhuman or degrading treatment.
- 2 No Member State shall expel or return a person with the right to asylum or an asylum applicant whose application has not been definitively rejected to a third state which might effect an expulsion or return as prohibited in paragraph 1.

Article 4 Relationship with temporary protection

Where a Member State has suspended consideration of individual asylum applications in situations of mass influx, the right to asylum of displaced persons shall be recognized in the form of temporary protection, as specified in the relevant provisions of Community or national law.

Article 5 Declaratory effect of recognition

Recognition of the right to asylum is declaratory, rather than constitutive.

Article 6 Member States' obligations

- 1 To guarantee the effective application of the right to asylum, this Directive shall ensure that Member States implement their obligations under:
 - a) the Geneva Convention, as amended by the New York Protocol, with no geographic restriction of the scope of those instruments, and their commitment to cooperating with the United Nations High Commissioner for Refugees in applying these instruments; and
 - b) national constitutional principles.
- 2 Member States shall examine an application for the recognition of the right to asylum made by any applicant who applies within their jurisdiction to any one of them for the recognition of that status, in accordance with Community rules on responsibility for asylum applications and national or Community rules on the procedures applicable to examining such applications.

Article 7 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

TITLE II Criteria for recognition of Geneva Convention refugees**Article 8 Principle**

In order to ensure that Member States have a common approach to recognition to the right to asylum in the form of Geneva Convention refugee status, Member States shall interpret Article 1 of that Convention in accordance with the provisions of this Title.

Chapter 1 Inclusion clauses**Article 9 Definition of Convention refugee**

- 1 A person is a 'Convention refugee' under the terms of the Geneva Convention and the New York Protocol, in accordance with Article 1(A)(2) of that Convention, when owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

- 2 Member States shall ensure that, when considering asylum applications in accordance with the relevant provisions of Community or national law, their competent authorities interpret the definition in paragraph 1 in accordance with the provisions of this Chapter.

Section 1 Persecution

Article 10 Concept of persecution

- 1 A 'well-founded fear of persecution' within the meaning of Article 1A of the Geneva Convention exists not only where an applicant was subject to persecution or directly threatened with persecution, but also where an applicant wishes to avoid a situation entailing the risk of persecution
- 2 A 'well-founded fear of persecution' within the meaning of Article 1A of the Geneva Convention may arise even where the grounds of persecution are merely attributed to an applicant by a persecutor
- 3 'Persecution' within the meaning of Article 1A of the Geneva Convention may, depending on the facts of an individual case, arise from a combination of events which do not constitute persecution when taken separately.
- 4 Discrimination will constitute 'persecution' within the meaning of Article 1A of the Geneva Convention where, for example:
 - a) measures for the protection of public order, public security or public health are implemented in a discriminatory manner, on one or more of the grounds set out in Article 1A of the Geneva Convention and have sufficiently serious consequences for their victims, in particular where such general measures are used to camouflage individual measures actually taken on the grounds set out in Article 1A of the Geneva Convention; or;
 - b) discrimination leads to consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn a livelihood, to practice his or her religion, or to access normally available educational facilities, in particular where the aim of the discriminatory measures has been condemned by the international community or where the effects of such measures are manifestly disproportionate to a legitimate aim sought by the measures.

Discriminatory punishment or prosecution will constitute 'persecution' within the meaning of Article 1A of the Geneva Convention where:

- c) prosecutions pursuant to a particular criminal law in the country of nationality or (if stateless) former habitual residence are only brought against persons defined by one or more of the grounds set out in Article 1A of the Geneva Convention;
- d) punishment pursuant to a particular criminal law in the country of nationality or (if stateless) former habitual residence is applied more severely to certain offenders on account of one or more of the grounds set out in Article 1A of the Geneva Convention; or
- e) the offences which gave rise to the prosecution are inextricably linked to characteristics of the offender which are connected to the grounds set out in Article 1A of the Geneva Convention.

- 5 Punishment for conscientious objection, absence without leave or desertion shall constitute persecution where:
- a) the conditions in which military duties are or would be performed constitute, or would constitute, persecution; and/or
 - b) the performance of military duties would require the participation of acts falling within the exclusion clauses in Article 1F of the Geneva Convention, as interpreted in Chapter 3 of this Title.
- Such punishment may also constitute persecution if no alternative to military service is provided, or if the punishment for failure to perform military service is excessive or is accorded on a discriminatory basis on account of race, religion, nationality, membership of a particular social group or political opinion.
- 6 Administrative measures taken against an individual will constitute persecution where the effect of the measures is sufficiently severe, and in particular where the measures are intentional, systematic and lasting.
- 7 In deciding whether the acts complained of give rise to a well-founded fear of persecution, Member States' competent authorities shall consider whether there is an effective remedy available to end the abuse. A remedy shall not be considered effective if in practice the applicant is unable to avail himself or herself of it, or if decisions of the relevant authority are not impartial or have no effect.

Article 11 Agents of persecution

- 1 The agents of persecution for the purposes of this Chapter shall include:
- a) acts of a State organ, including organs of unitary States, federal States, or regional and local authorities, whatever that State's status in international law;
 - b) acts of parties or organizations controlling the State;
 - c) acts of third parties, where they are based on the grounds of persecution in Article 1A of the Geneva Convention, and where the State authorities as defined in sub-paragraphs a) and b) encourage or permit such acts, deliberately fail to act to prevent such acts, or are unable to prevent such acts from occurring; or
 - d) acts of third parties, where the State authorities as defined in sub-paragraphs a) and b) fail to protect against such acts and such failure is based on the grounds of persecution in Article 1A of the Geneva Convention.
- 2 Acts committed during a civil war or other internal or generalized armed conflict shall constitute persecution if the following agents of persecution engage in acts based on the grounds of persecution in Article 1A of the Geneva Convention:
- a) State authorities, as defined in paragraph (1)(a) and (b) above;
 - b) third parties, as defined in paragraph (1)(c) above; or
 - c) *de facto* authorities in control of part of the territory within which the State authorities, as defined in paragraph (1)(a) and (b) above, cannot afford the State's nationals protection.

Unless such circumstances apply, neither the dangers stemming from such a conflict nor the use of armed forces in accordance with the international rules of war and internationally recognized practice shall constitute persecution.

Article 12 Grounds of persecution

- 1 Persecution for reasons of 'race' shall have a broad meaning, including:
 - a) persecution based on membership of different ethnic groups or of a specific social group of common descent forming a minority within a larger population;
 - b) cases in which the persecutors regard the victims of their persecution as belonging to a different racial group than their own, where this real or supposed difference forms the grounds for their action; and
 - c) cases in which discrimination on racial grounds affects a person's human dignity to the extent of incompatibility with fundamental human rights, or where disregard of racial barriers is subject to serious consequences.
- 2 Persecution for reasons of 'religion' shall have a broad meaning, including:
 - a) persecution based on theist, non-theist, atheist or agnostic beliefs;
 - b) persecution in the form of a ban on membership of a religious community, on worship in public or private, on religious instruction, or
 - c) persecution in the form of serious measures of discrimination against persons for practicing or not practicing a particular religion or aspects of that religion, or for adhering or not adhering to religious customs, practices or mores, or for belonging or not belonging to a particular religious community.
- 3 Persecution for reasons of 'nationality' shall include persecution not only for reasons of citizenship but also persecution for reasons of membership of an ethnic, linguistic or cultural group, or a group which has a relationship with the population of another State.
- 4 Persecution for reasons of 'membership of a particular social group' shall include:
 - a) persecution against groups having the same background, customs, or social status;
 - b) persecution based on a group's perceived disloyalty to a government or based on its political outlook, history, economic activity or very existence;
 - c) persecution against groups which are constituted by the common characteristics of the victimized persons; or
 - d) persecution against groups sharing a common characteristic which is immutable, including gender, sexuality, class or history, or which is so fundamental to identity or conscience that members of the group should not be required to change it.
- 5 Persecution for reasons of 'political opinion' shall include persecution against persons holding or believed to hold different opinions from those of the persecutor, where those opinions are not tolerated by the persecutor and given the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), persons holding such opinions are likely to be persecuted.

Section 2 Other issues

Article 13 Internal relocation

- 1 Where persecution is confined to a specific part of a country's territory, a person will not be excluded from recognition of Convention refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances of the specific case it would not have been possible or reasonable to expect him or her to do so.
- 2 When applying the principle of paragraph 1, Member States shall ensure that their competent authorities consider:
 - the existence of a risk-free area in that country, which must be established by evidence;
 - the stability of that area, particularly the likelihood of the stability of its safety;
 - the accessibility of that area from inside or outside that country;
 - whether persons living in that area would have to endure undue hardship or risk;
 - the personal circumstances of the claimant; and
 - the political, ethnic, religious and other makeup of that country.

Article 14 Refugee sur place

A well founded fear of persecution may arise after a person has departed from his or her country of nationality (or, for a stateless person, the country of former habitual residence), in particular where:

- a) political changes in that country; and/or
- b) the person's activities outside that country, where such activities are either:
 - i) a continuation of the convictions that he or she held while previously in that country while an adult, or
 - ii) inextricably linked to characteristics of that person which are connected to the grounds set out in Article 1A of the Geneva Convention

would likely result in persecution of that person on the grounds set out in Article 1A of the Geneva Convention, if he or she now returned to that country.

Chapter 2 Cessation of Convention refugee status

Article 15 Article 1C of Geneva Convention

- 1 Member States shall exchange information as regards their application of the principles in Article 1C of the Geneva Convention. The provisions of Article 21(2) shall apply.
- 2 Member States shall not apply Article 1C of the Geneva Convention unless:
 - a) the application of that Article has been investigated on an individual basis;
 - b) there are compelling reasons which justify the application of that Article; and
 - c) the circumstances of the application of that Article have been determined in an objective and verifiable manner, following procedures which allow the person concerned to contest the application of Article 1C.

In particular, Member States shall not invoke the cessation provisions to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.

- 3 Member States shall only apply Article 1C(5) or (6) of the Geneva Convention where:
 - a) there has been a fundamental, durable and effective change in the country of nationality (or, for a stateless person, the country or former habitual residence); and
 - b) there is no doubt about the application of the relevant clause in the particular case.
- 4 Without prejudice to paragraphs 2 or 3, a person whose right to asylum has been recognized shall retain that status for a period of at least six months after departure from the Member State which recognized that status, if such departure is for the purpose of ascertaining whether or not conditions in the country of nationality (or, for a stateless person, the country of former habitual residence) have altered sufficiently to resume permanent residence there.

Chapter 3 Withholding or cancelling Convention refugee status

Article 16 Article 1F of Geneva Convention

- 1 Member States shall ensure that, when considering withholding or cancelling recognition of Geneva Convention refugee status pursuant to Article 1F of that Convention, their competent authorities interpret that Article in accordance with the remaining paragraphs of this Article.
- 2 Article 1F of the Geneva Convention must be applied in a restrictive manner. Article 1F may only be applied after determining whether an asylum applicant falls within the inclusion clauses of the Geneva Convention pursuant to Chapter 1 of this Title
- 3 Article 1F(b) of the Geneva Convention may only be applied where the applicant has committed a very grave punishable act which is not closely and directly connected to its alleged political motives.

Chapter 4 Effects of recognition of Convention refugee status

Article 17 Application of Geneva Convention

- 1 If a Member State's competent authorities recognize Geneva Convention refugee status upon concluding the examination of an application pursuant to the relevant provisions of Community or national law concerning the procedures applicable, the Member State shall apply the provisions of Chapters II to V of the Geneva Convention to that person.
- 2 In addition, Member States shall issue a residence permit confirming the right of residence to a recognized Geneva Convention refugee.
- 3 Member States shall apply Directive 64/221 *mutatis mutandis* to proceedings for expulsion of recognized Geneva Convention refugees pursuant to Article 32 of the Geneva Convention, without prejudice to Article 3 or Community or national law concerning complementary protection.

Article 18 Right to family reunion

- 1 Upon recognizing a person's right to asylum in the form of Geneva Convention refugee status, Member States shall ensure that rules equivalent to Articles 10 to 12 of Regulation 1612/68, with the exception of Article 10(3), and any subsequent amendments thereto, shall apply *mutatis mutandis*. In accordance with national or Community law, such rights shall also be granted to the cohabitantes and intended spouses of persons whose right to asylum has been recognized. In appropriate cases, family reunion shall be facilitated by special measures of assistance to the person whose right to asylum has been recognized so that economic and housing difficulties in the country of asylum do not unduly delay to granting of permission for the entry of the family members.
- 2 Member States shall confer recognition of the right to asylum in the form of Geneva Convention refugee status upon family members as defined in paragraph 1. In the event of occurrence of a risk foreseen in Regulation 1251/70 to the recognized refugee, Member States shall ensure that rules equivalent to that Regulation shall apply to such family members in order to guarantee their continued right of residence.
- 3 In addition to the status set out in paragraph 2, Member States shall ensure full equal treatment of family members of recognized refugees in comparison with nationals of the Member State, in accordance with the relevant provisions of national or Community law.

Article 19 Free movement

- 1 If a person whose right to asylum in the form of Geneva Convention status has been recognized in accordance with the provisions of this Directive acquires the status of 'Long-Term Resident of the European Union' and moves to another Member State in accordance with national or Community law, the effect of recognition of status pursuant to this Chapter shall automatically be transferred to the second Member State.
- 2 The status conferred upon family members pursuant to Article 18(2) shall also automatically be transferred to the second Member State, unless such family members remain in the Member State which originally recognized their status during a transition period provided for in national or Community law.

Chapter 5 Complementary protection

Article 20 Relationship with complementary protection

- 1 If a Member State's competent authorities find that an applicant falls outside the inclusion clauses clarified in Chapter 1 of this Title, or if a Member State applies Article 1C(5) or (6) or Article 1F of the Geneva Convention in accordance with the provisions of Chapters 2 or 3, the competent authorities of that Member State shall consider whether that person still enjoys the right to asylum in the alternative form of complementary protection, as defined in the relevant provisions of Community or national law.
- 2 Member States shall automatically recognize the right to asylum of any person falling within the provisions of Article 33(2) of the Geneva Convention in the

alternative form of complementary protection, as defined in the relevant provisions of Community or national law.

TITLE III General and final provisions

Article 21 Transparency and exchange of information

- 1 Member States shall conduct mutual exchanges with regard to:
 - national legislative or regulatory measures or practices applicable in the field of asylum;
 - statistical data on monthly arrivals of applicants for asylum, and their breakdown by nationality;
 - general information on new trends in applications for asylum;
 - general information on the situation in the countries of origin or of provenance of applicants for asylum.
- 2 Such information shall be forwarded quarterly to the Commission, which shall see that it is circulated to the General Secretariat of the Council, to the Member States and to the United Nations High Commissioner for Refugees. Except where release of such information would prejudice an ongoing investigation into criminal activity, the Commission shall also ensure that it is disseminated to the public by electronic means, that it is released automatically to all applicants who request it pursuant to Decision 94/90, and that it is received by the European Parliament, the national parliaments of each Member State, and, at the request of any Member State, the sub-national parliaments of that Member State.

Article 22 Right to privacy

- 1 In addition to the specific rights set out in Articles 16 and 54, Member States shall ensure that Directive 95/46 and all relevant international treaties which they have ratified apply fully to personal data that falls within the scope of this Directive and which is held by any national authority.
- 2 In accordance with Article 286(1) of the Treaty establishing the European Community, Directive 95/46 shall apply fully to all personal information that falls within the scope of this Directive and which is held by Community institutions, agencies or bodies.
3. In accordance with Article 286(2) of the Treaty establishing the European Community, the independent supervisory body to be established pursuant to that Article shall monitor the application of paragraph 2 above.
- 4 Any relevant provisions of any other measure adopted pursuant to Article 286(2) of the Treaty establishing the European Community shall apply *mutatis mutandis* to all personal information that falls within the scope of this Directive.

Article 23 Right to judicial protection

In addition to the specific rights set out in this Directive, Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 24 Proof of family status

When deciding on family reunification pursuant to this Directive, the absence of documentary proof of the marriage or of the affiliation of children should not in itself be considered an impediment. All the relevant facts and circumstances should be taken into account, including in particular the difficulty of obtaining such documentary proof having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements.

Article 25 More favourable provisions

Member States have the right to enact or maintain more favourable national provisions than those set out in this Directive.

Article 26 Public awareness, solidarity and tolerance

Member States shall ensure that the public is aware of the importance of the fundamental right of asylum by requiring their competent authorities to include education in fundamental human rights and the right to asylum in national curricula and to disseminate accurate information regarding matters within the scope of this Directive.

Article 27 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive. The provisions of Article 21(2) shall apply.
- 4 The Commission shall submit an annual report on asylum in the Member States. This report shall be based on the information provided by the Member States pursuant to Article 21(1) and any other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective exercise of the right to asylum, at the latest five years after adoption of this Directive.

Article 28

This Directive is addressed to the Member States.

ANNEX IV
ILPA/MPG PROPOSED DIRECTIVE 2000/01d

ON

the procedures applicable to examining a claim

FOR RECOGNITION OF THE FUNDAMENTAL
RIGHT TO ASYLUM

The Council of the European Union,
Having regard to the Treaty establishing the European Community, and
in particular Article 63(1)(c) thereof,
Having regard to the proposal of the Commission,
Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to asylum is a fundamental human right;
- 2 Article 61 of the Treaty requires the Community to establish an 'area of freedom, security and justice' within five years of the entry into force of the Treaty of Amsterdam;
- 3 because of the interrelationship between various aspects of the law affecting asylum applicants, refugees, displaced persons and other persons in need of international protection, it is appropriate for the Council to establish a Common European Asylum System which integrates these various aspects to the extent possible;
- 4 whereas this directive constitutes a step in establishing the Common European Asylum System;
- 5 according to Article 6(2) of the Treaty on European Union, the European 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;
- 6 the measures on asylum which the Community must adopt pursuant to Article 63(1) of the Treaty establishing the European Community must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties; whereas such other relevant treaties include the European Convention on Human Rights, the United Nations Convention Against Torture, and the Convention on the Rights of the Child;
- 7 the measures on refugees and displaced persons which the Community must adopt pursuant to Article 63(2) of the Treaty establishing the European Community must be in accordance with the general principles of Community

law, including the respect for fundamental rights as defined in Article 6(2) of the Treaty on European Union; whereas the European Court of Justice has additionally held that all international human rights treaties in which Member States have participated are sources of the fundamental rights that form part of the general principles of Community law;

- 8 Declaration 17, attached to the Final Act of the Treaty of Amsterdam, specifies that consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy; whereas the role of the United Nations High Commissioner as regards the procedure for examining a claim for asylum should also be recognized;
- 9 in many Member States the United Nations High Commissioner for Refugees may also intervene during the judicial determination of asylum claims; whereas the Council should therefore invite the Court of Justice to consider whether its rules of procedure should be amended to permit the intervention of the United Nations High Commissioner for Refugees in appropriate cases before that Court;
- 10 pursuant to Article 63(1)(a) of the Treaty establishing the European Community, the Council must adopt criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; whereas the procedure applicable during the application of such rules should be agreed at the time of agreeing a Community measure setting out such rules;
- 11 pursuant to Article 63(1)(d) of the Treaty establishing the European Community, the Council must adopt minimum standards on procedures in Member States for granting or withdrawing refugee status; whereas, in order to ensure that such measures are in accordance with the Geneva Convention and New York Protocol, such standards must take into account the principles concerning the procedure for examining applications for protection under the Geneva Convention set out in the Handbook on Procedures and Criteria for Determining Refugee Status drawn up by the United Nations High Commissioner for Refugees; whereas such standards must also be in accordance with the European Convention on Human Rights and the United Nations Convention Against Torture;
- 12 pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for persons who otherwise need international protection; whereas, in order to protect the rights of such persons, who are outside the scope of the Geneva Convention but who nonetheless face a real risk of torture or inhuman or degrading treatment, the Community must ensure that the Member States grant such persons complementary protection;
- 13 whereas it would be appropriate to apply the procedures set out in this Directive to applications for recognition of complementary protection; whereas Member States which do not presently take such an approach may derogate from this principle until the Council adopts a measure establishing minimum standards for persons who otherwise need international protection;
- 14 in order to ensure the effective exercise of the right to asylum, the *non-refoulement* right in Article 33 of the Geneva Convention must be upheld fully; whereas the Community cannot protect the rights of persons outside the scope of the Geneva Convention who nonetheless face a real risk of torture or inhuman or degrading treatment unless it accords them an identical right to

non-refoulement; whereas, in order to ensure that the right to *non-refoulement* is observed, asylum applicants may not be removed from the territory of a Member State unless their applications for asylum have been definitively rejected and they do not meet the criteria for the grant of complementary protection;

- 15 unaccompanied minors are generally in a vulnerable situation requiring special safeguards and care; whereas it is therefore necessary to lay down specific provisions relating to the consideration of applications for asylum submitted by unaccompanied minors;

has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to ensure that Member States apply fair and effective procedures to determine whether applicants for recognition of the right to asylum meet the criteria for recognition of that right.

Article 2 Definitions

For the purposes of this Directive:

- a) 'Application for recognition of the right to asylum' or 'asylum application' means: a request seeking from a Member State the recognition of the right to asylum in the form of refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol; in accordance with Article 4(1), such an application shall also constitute an application in the alternative for recognition of the right to asylum in the form of complementary protection, as defined in sub-paragraph (c);
- b) 'Applicant for the right to asylum' or 'asylum applicant' means: a person who has made an application for recognition of the right to asylum, where that application has not been withdrawn or definitively rejected;
- c) 'Complementary protection' means: protection for persons who fall outside the criteria for recognition as a Geneva Convention refugee because such persons:
- fall outside the inclusion clauses of that Convention;
 - have refugee status withheld or cancelled by virtue of Art 1F of the Geneva Convention or withdrawn by virtue of Art 1C of that Convention; or
 - fall within the criteria for expulsion, pursuant to Article 32 of that Geneva Convention;

and such persons:

- have fled their country, or who are unable or unwilling to return there, because their lives, safety or freedom are threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order; and/or
- have fled their country, or who are unwilling to return there, owing to well-founded fear of being tortured or of being subjected to inhuman or degrading treatment or punishment or violations of other fundamental human rights.

- d) 'Definitively rejected' application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant;
- e) 'Examination of an application' means: all the measures for examination, decisions or rulings given by the competent authorities on an application for recognition of the right to asylum;
- f) 'Third State' means: a state or territory other than a Member State of the European Union and the country of nationality (or, for a stateless person, the country of former habitual residence) of the asylum applicant; and
- g) 'Unaccompanied minor' means: a person under the age of eighteen who either:
 - i) arrives on the territory of a Member State unaccompanied by an adult responsible for the minor, whether by law or custom, for as long as the minor is not effectively in the care of such a person; or
 - ii) is left unaccompanied after entry into the territory of a Member State.

Article 3 *Non-refoulement* right

- 1 No Member State shall expel or return (*refouler*) a person with the right to asylum, or an asylum applicant whose application has not been definitively rejected, in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, or where he or she faces a real risk of torture or inhuman or degrading treatment.
- 2 In accordance with Article 24, no Member State shall expel or return a person with the right to asylum or an asylum applicant whose application has not been definitively rejected to a third state which might effect an expulsion or return as prohibited in paragraph 1.

Article 4 *Scope*

- 1 This Directive shall apply to all applications for recognition of the right to asylum in the form of Geneva Convention refugee status, which shall also constitute applications in the alternative for recognition of the right to asylum in the form of complementary protection. It shall not apply to procedures to determine the responsible Member State for examining an application.
- 2 By way of derogation from paragraph 1, Member States which, at the time of adoption of this Directive, apply separate procedures for examining applications for recognition of the right to asylum in the form of complementary protection status, may derogate from the obligation to apply the rules in this Directive to such applications, until the Council adopts a measure establishing minimum standards for persons falling outside the scope of the Geneva Convention who otherwise need international protection.

Article 5 Declaratory effect of recognition

Recognition of the right to asylum is declaratory, rather than constitutive.

Article 6 Member States' obligations

- 1 Member States shall examine an application for the recognition of the right to asylum made by any applicant who applies within their jurisdiction to any one of them for the recognition of that status, in accordance with Article 12 and the relevant rules on responsibility for applications, including Article 24.
- 2 Asylum procedures will be applied in full compliance with the 1951 Geneva Convention and the 1967 New York Protocol relating to the status of refugees, the European Convention on Human Rights (in particular Articles 1, 5, 6 and 13), the United Nations Convention against Torture, and other obligations under international law in respect of refugees and human rights.
- 3 In particular, the procedures will comply fully with:
 - a) Article 1 of the 1951 Convention concerning the definition of refugee;
 - b) Article 35 of the 1951 Convention concerning co-operation with the Office of the United Nations High Commissioner for Refugees including the facilitation of its duty of supervising the application of the Convention; and
 - c) the *non-refoulement* right in Article 3 of this Directive, which implements Article 33 of the 1951 Convention in conjunction with Article 3 of the European Convention on Human Rights and Article 3 of the United Nations Convention against Torture.
- 4 Member States shall conclude the examination of asylum applications as quickly as possible while observing the guarantees set out in this Directive.

Article 7 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Examination of asylum applications

Article 8 National implementation

Each Member State shall specify in its legislation the rules on access to the asylum procedure, the basic features of the asylum procedure and the designation of authorities responsible for examination of asylum applications.

Article 9 Initial contact

Member States shall ensure that:

- a) authorities addressed by the applicant at the border or in the territory of the Member State have clear instructions for dealing with asylum applications;
- b) such authorities forward asylum applications, along with all other information available, to the competent authority specified in Article 11 for examination; and
- c) the right of *non-refoulement* as defined in Article 3 is fully applied.

Article 10 Border applications

- 1 The provisions of this Chapter shall apply fully to all applications falling within the jurisdiction of a Member State.
- 2 In particular, Member States shall not apply special procedures so as to derogate from the *non-refoulement* right as defined in Article 3 prior to admission, without prejudice to a decision on admissibility of the application pursuant to Articles 24 to 26.

Article 11 Competent authority

- 1 Member States shall ensure that there is a clearly identified competent authority – where possible a central authority – with responsibility for examining requests for recognition of the right of asylum and taking a decision in the first instance.
- 2 Member States shall ensure that the competent authority is fully qualified in the field of asylum and refugee matters and decides on all applications individually, objectively and impartially.
- 3 Member States shall ensure that competent authorities:
 - a) have at their disposal specialized personnel with the necessary knowledge and experience in the field of asylum and refugee matters, and who have an understanding of an applicant's particular situation;
 - b) have access to precise and up-to-date information from various sources, including information from the United Nations High Commissioner for Refugees concerning the situation prevailing in the country of nationality (or, for a stateless person, the country of former habitual residence) of asylum applicants;
 - c) have the right to ask advice from experts on particular issues, for example medical or cultural issues; and
 - d) are adequately provided with staff and equipment so that they can discharge their duties promptly and under the best possible conditions.

Chapter III Procedural rights

Article 12 Making applications

- 1 Member States shall ensure that asylum applicants have an effective opportunity to make an asylum application at any time.
- 2 The obligations of Member States to entertain and determine claims for protection are engaged as soon as a person at the border or in the territory provides information which indicates such a fear.

- 3 Member States shall not derogate from their obligations under paragraphs 1 and 2, in particular because of an applicant's lack of valid documents.

Article 13 Rights during procedure

Member States shall ensure that asylum applicants are informed of the procedure to be followed and of their rights and obligations during the procedure, in a language which they can understand. In particular, Member States shall ensure that:

- a) applicants have the right to the services of an interpreter, whenever necessary, for submitting their case to the authorities concerned and otherwise assisting the applicant in matters relating to the procedure. The interpreter must be paid for out of public funds;
- b) applicants have the right to qualified and competent legal advice or assistance during the procedure, paid for out of public funds; this right shall include legal advice and assistance in the preparation and submission of the claim, for and during all interviews, and for and during all hearings, including bail hearings and appeals;
- c) applicants have the right at all stages of the procedure to communicate with the Office of the United Nations High Commissioner for Refugees or with other refugee organizations in the Member State concerned, and vice versa; and
- d) the representative of the United Nations High Commissioner for Refugees has the opportunity to be informed of the course of the procedure, to learn about the decisions of the competent authorities and to submit his or her observations.

Article 14 Individual or collective determination

- 1 Member States shall ensure that the competent authority examines each application for asylum on the basis of the facts and circumstances put forward in each individual case, taking account of the objective situation prevailing in the country of nationality (or, for a stateless person, the country of former habitual residence).
- 2 Where a group of persons has been exposed to persecution as defined in Article 1A of the Geneva Convention, or where membership of a group has been recognized as qualifying applicants for protection, the individual examination carried out by the competent authority shall be limited in the first instance to determining whether the individual belongs to the group in question, without prejudice to a full individual assessment in the event of a negative determination of that issue.
- 3 Member States shall provide that their competent authorities shall recognize the right to asylum as soon as such authorities are satisfied that the criteria for recognition are met.
- 4 Legally resident family members of asylum applicants may make an independent application for recognition of the right to asylum in the same Member State. Member States may choose to suspend processing of this application until their competent authorities have reached a decision on the application submitted by the first family member.

Article 15 Right to privacy

- 1 In addition to the data protection requirements of Article 28, Member States shall ensure that declarations made by the asylum applicant and other details of his or her application are only made available to persons or agencies who must have access to such information in order to carry out their obligations.
- 2 In particular, Member States shall ensure that such information is not made available to the authorities of the asylum applicant's country of nationality (or, for a stateless person, the country of former habitual residence), and shall make public only the initials of the asylum applicant at every stage of any appeal.

Article 16 Evidence and proof

Member States shall ensure that before a final decision is taken on an application, the asylum applicant has the right to a personal interview with an examiner who is employed by the competent authority as defined in Article 11 and who is fully qualified in the field of asylum and refugee matters.

The examiner shall apply the following rules of evidence and proof:

- 1 The applicant's claim shall not be rejected solely because the initial account supplied by the applicant was not complete, or because statements made during the interview are inconsistent with statements made on arrival.
- 2 The applicant shall be accorded time to present further evidence after the initial interview if necessary.
- 3 The following principles shall govern the assessment of evidence:
 - a) Where there are statements that are not susceptible of proof, the applicant should be given the benefit of the doubt if his account appears credible, coherent and plausible, and does not run counter to evidence which proves the contrary;
 - b) Where necessary, the examiner shall use all the means at his disposal to find the necessary facts in support of the application;
 - c) Unsupported statements need not necessarily be rejected as false if they are consistent with the general account put forward by the applicant; in particular, examiners must take into account the difficulty of obtaining documentary proof, having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements;
 - d) Untrue statements shall not by themselves constitute a reason for the rejection of refugee status and must be evaluated in light of all the circumstances of the case;
 - e) Without prejudice to Chapter VI of this Directive, the use of false documents to enter the Member State shall not be prejudicial to the applicant;
 - f) The timing of the application should not automatically be considered an adverse factor, but rather should be appreciated in light of all the circumstances of the case; and
 - g) Evidence shall be related to the relevant criteria of the 1951 Geneva Convention and/or other relevant national or international human rights obligations, in order to arrive at a correct conclusion regarding recognition of the applicant's right to asylum.

- 4 The competent authority must inform the applicant of all information it is in possession of which is relevant to assessing the situation prevailing in the country of nationality or (for a stateless person) former habitual residence of an asylum applicant. This information must be made available to the applicant on request, and the applicant shall be afforded an opportunity to make observations upon the accuracy or relevance of this information.
- 5 When applying the principle that an asylum applicant should have sought 'internal relocation' within the country of nationality (or, for a stateless person, the country of former habitual residence):
 - a) there shall be a rebuttable presumption that the principle cannot be applied where the agent of persecution is the State;
 - b) the presence of internally displaced persons who are receiving international assistance in one part of the country is not conclusive evidence that an asylum applicant could have chosen to relocate inside that country; and
 - c) the usual principles governing the burden of proof, particularly as defined in paragraphs 3(a) and (b) above, shall continue to apply.
- 6 No evidence obtained in breach of the guarantees in this Article can be relied upon by the competent authority if such reliance would be adverse to the applicant.
- 7 In order to ensure that asylum applications are assessed individually, there can be no presumption of the safety of any country of nationality (or, for a stateless person, the country of former habitual residence).

Article 17 Communication of decision

Member States shall ensure that the outcome of the asylum application shall be communicated to the asylum applicant in writing in a language he or she understands. The full decision shall also be communicated to the applicant's legal adviser. If the application is rejected, the decision must contain the detailed reasons for the specific rejection and Member States must also ensure that the applicant for asylum is informed of his or her appeal rights pursuant to Article 18 in writing in a language he or she understands.

Article 18 Right of appeal

- 1 Member States shall ensure that, in the event of a negative decision on his or her application, an asylum applicant has the right of appeal to a court or a review authority, at which all the facts will be reviewed, which shall give an independent ruling on individual cases under the conditions laid down in Article 11(2). The rules concerning assessment of evidence set out in Article 16(3) shall apply.
- 2 Member States shall ensure that an asylum applicant has an adequate period of time within which to exercise the right to appeal and to prepare his or her appeal. Member States shall ensure that these time limits are communicated to an asylum applicant in writing in a language he or she understands.

Article 19 Accelerated procedures

- 1 Member States may apply accelerated procedures to determine the merits of asylum claims where an applicant raises no issue under the Geneva Convention or an issue relevant to complementary protection.

- 2 Member States may not apply accelerated procedures to determine the merits of asylum claims in other circumstances, or where an application falling within the scope of paragraph 1:
 - includes a claim of torture, or contains serious indications to this end;
 - relates to the ‘internal relocation’ principle;
 - relates to Article 1F of the Geneva Convention; or
 - concerns the credibility of the applicant.
- 3 Member States may apply accelerated procedures to determine the admissibility of asylum claims in accordance with Articles 24 to 26.
- 4 The application of accelerated procedures pursuant to paragraph 1 shall have the effect of designating a quicker time limit for the examiner to make an initial decision on the application, after following the guarantees provided for in Article 16. In no case may it have the effect of derogating from any other procedural guarantees in this Directive. The presumption that the examiner shall take a quicker initial decision may be rebutted if the applicant provides additional information relevant to the application or clarifies the information previously communicated to the authorities of the Member State.

Chapter IV Applicants in particular situations

Article 20 Sexual violence

Member States shall ensure that their competent authorities involve skilled female or male employees and female or male interpreters in the asylum procedure where necessary or desirable, particularly where female or male asylum applicants find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin, in particular where the persecution they have suffered is related to their gender or where they have been victims of sexual exploitation or sexual or domestic violence.

Article 21 Unaccompanied minors

- 1 Member States shall guarantee the right of every unaccompanied minor to apply for recognition of the right of asylum.
- 2 Member States shall suspend processing an application for recognition of the right of asylum lodged by an unaccompanied minor until the appointment of a legal guardian, who will work closely with a legal representative.
- 3 Subject to paragraph 2, Member States shall treat the processing of asylum applications by unaccompanied minors as a matter of urgency, in light of the particular needs of minors and their vulnerable situation.
- 4 In principle, an unaccompanied asylum applicant claiming to be a minor shall be believed unless there is compelling evidence to the contrary. If there is such evidence, the Member State shall provide for an opportunity for an independent medical examination by an experienced paediatrician, with the consent of the applicant.

- 5 Member States shall ensure that:
- a) if any interview(s) are considered necessary in connection with the unaccompanied minor's application, the minor must be accompanied by his or her legal guardian and legal representative;
 - b) any interview(s) relating to the unaccompanied minor's application shall be conducted by officers of the competent authority who have the necessary relevant experience or training;
 - c) examination of an unaccompanied minor's application must make allowance for a minor's age, maturity and mental development, and the possibility that the minor may have limited knowledge of conditions in the country of nationality (or, for a stateless person, the country of former habitual residence).

Article 22 Mentally disturbed persons

Member States shall ensure that, when an application is made by a mentally disturbed person, their examiner must, in such cases:

- obtain an expert medical assessment and use that advice to determine how to approach the matter further; and
- obtain information about the application from persons closely related to the applicant and/or draw certain conclusions from the surrounding circumstances.

Article 23 Torture victims

If before or during the interview referred to in Article 16, the applicant claims that he or she has been tortured or if there are serious indications to this end, and the examiner or the official responsible for initial contact with the applicant pursuant to Article 9 does not believe this claim, the Member State shall provide for an opportunity, with the consent of the applicant, for an independent medical examination by a specialist on the treatment of torture victims. This specialist shall make a report on whether injuries or maltreatment or indications of types of suffering that would indicate serious torture do or do not exist.

Chapter V Admissibility

Article 24 Admissibility and third countries

- 1 Member States shall consider all asylum applications admissible and shall not derogate from the procedural guarantees in this Directive regardless of the possibility that an asylum applicant could or should have submitted an application in a third country.
- 2 By way of derogation from paragraph 1, Member States may consider asylum applications inadmissible and may derogate from the procedural guarantees in this Directive where:
 - a) a third country has recognized the Geneva Convention refugee status of the asylum applicant or granted equivalent protection;
 - b) a third country has granted the asylum applicant a permanent residence permit; or

- c) a Member State has considered it fair and reasonable to call upon the applicant to apply for asylum in a third country with which the applicant already had a connection or close links, if the applicant has agreed to make such an application and the relevant third country has agreed to examine the claim.

if the third country in question has ratified the Geneva Convention and 1967 Protocol without limitation as to territorial scope.

Article 25 Admissibility and Member States

Member States shall not consider an asylum application inadmissible or derogate from the procedural guarantees in this Directive regardless of the possibility that an asylum applicant could or should have submitted an application in another Member State, except where:

- an applicant's right to asylum has been recognized in another Member State;
- an application for asylum is pending before the competent authorities or courts of another Member State responsible for examining the application pursuant to the Dublin Convention; or
- an application for asylum has been definitively rejected by another Member State, unless the Member State in receipt of the second application chooses to examine the subsequent application, in particular where there has been a change in the relevant circumstances.

Article 26 Repeat applications

- 1 A Member State is not precluded from considering a new asylum application made by an applicant whose application has been definitively rejected in that Member State, provided that the applicant agrees thereto.
- 2 A Member State must consider a claim by an applicant whose application has been definitively rejected in that Member State if the applicant argues that there has been a change of circumstances relevant to the application or that poor representation of the applicant precluded the submission of evidence relevant to the application at an earlier stage of the procedure. The consideration of this claim shall be limited to the merits of the applicant's claim regarding a change of circumstances or poor representation. Articles 13, 15, 17 and 18 shall apply.

Chapter VI

Article 27 Procedural consequences of illegal entry or presence

In accordance with the principles underlying Article 31 of the Geneva Convention, Member States shall not derogate from any of the guarantees in this Directive or apply any unfavourable presumption regarding an asylum application where an applicant:

- has entered or is present in a Member State's territory without authorization; or
- has used false or counterfeit documents for the purposes of travel for seeking asylum; or
- does not have documents that would provide evidence of such authorization or evidence of other status or of travel routes

if such an applicant presents himself or herself to the authorities of that Member State and can explain the lack of authorization or documents or the use of false or counterfeit documents.

Chapter VII General and final provisions

Article 28 Right to privacy

- 1 In addition to the specific right set out in Article 16, Member States shall ensure that Directive 95/46 and all relevant international treaties which they have ratified apply fully to personal data that falls within the scope of this Directive and which is held by any national authority.
- 2 In accordance with Article 286(1) of the Treaty establishing the European Community, Directive 95/46 shall apply fully to all personal information that falls within the scope of this Directive and which is held by Community institutions, agencies or bodies.
- 3 In accordance with Article 286(2) of the Treaty establishing the European Community, the independent supervisory body to be established pursuant to that Article shall monitor the application of paragraph 2 above.
- 4 Any relevant provisions of any other measure adopted pursuant to Article 286(2) of the Treaty establishing the European Community shall apply *mutatis mutandis* to all personal information that falls within the scope of this Directive.
- 5 Member States shall not list asylum applicants whose applications have been definitively rejected as persons who must be refused entry pursuant to Article 96 of the Schengen Convention solely because of the rejection of such applications.

Article 29 Right to judicial protection

In addition to the specific rights set out in this Directive, Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 30 More favourable provisions

Member States have the right to enact or maintain more favourable national provisions than those set out in this Directive.

Article 31 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive.

- 4 The Commission shall submit a report on the application of this Directive four years after the date in paragraph 1, based on reports on the application of this Directive submitted to the Commission by the Member States, and any other information made available to the Commission.
- 5 The information and report referred to in paragraphs 3 and 4 shall be circulated to the General Secretariat of the Council, to the Member States and to the United Nations High Commissioner for Refugees. Except where release of such information would prejudice an ongoing investigation into criminal activity, the Commission shall also ensure that it is disseminated to the public by electronic means, that it is released automatically to all applicants who request it pursuant to Decision 94/90, and that it is received by the European Parliament, the national parliaments of each Member State, and, at the request of any Member State, the sub-national parliaments of that Member State.
- 6 The Council will re-examine this Directive, on the basis of the report submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further ensuring that Member States apply fair and effective procedures to determine whether applicants for recognition of the right to asylum meet the criteria for recognition of that right, at the latest five years after adoption of this Directive.

Article 32

This Directive is addressed to the Member States.

ANNEX V
ILPA/MPG PROPOSED DIRECTIVE 2000/01e

ON

temporary protection

The Council of the European Union,
Having regard to the Treaty establishing the European Community, and
in particular Articles 63(2)(a) and 63(3)(a) thereof,
Having regard to the proposal of the Commission,
Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to asylum is a fundamental human right;
- 2 Article 61 of the Treaty requires the Community to establish an 'area of freedom, security and justice' within five years of the entry into force of the Treaty of Amsterdam;
- 3 because of the interrelationship between various aspects of the law affecting asylum applicants, refugees, displaced persons and other persons in need of international protection, it is appropriate for the Council to establish a Common European Asylum System which integrates these various aspects to the extent possible;
- 4 this Directive constitutes a step in the creation of a Common European Asylum System;
- 5 according to Article 6(2) of the Treaty on European Union, the European 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;
- 6 the measures on refugees and displaced persons which the Community must adopt pursuant to Article 63(2) of the Treaty establishing the European Community must be in accordance with the general principles of Community law, including the respect for fundamental rights as defined in Article 6(2) of the Treaty on European Union; whereas the European Court of Justice has additionally held that all international human rights treaties in which Member States have participated are sources of the fundamental rights that form part of the general principles of Community law;

- 7 Declaration 17, attached to the Final Act of the Treaty of Amsterdam, specifies that consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy;
 - 8 in many Member States the United Nations High Commissioner for Refugees may also intervene during the judicial determination of asylum claims; whereas the Council should therefore invite the Court of Justice to consider whether to propose an amendment to its rules of procedure to permit the intervention of the United Nations High Commissioner for Refugees in appropriate cases before that Court;
 - 9 pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of nationality (or, for a stateless person, the country of former habitual residence); whereas in situations of mass influx, Member States may be temporarily unable to examine applications for recognition of the right to asylum pursuant to the Geneva Convention lodged by such displaced persons; whereas it would be inappropriate in such circumstances to derogate from the rights applying to refugees pursuant to the Geneva Convention;
 - 10 pursuant to Article 63(2)(b) of the Treaty establishing the European Community, the Council must adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons'; whereas this balance of effort can be achieved by recourse to the Community budget to assist Member States which are obliged to make greater efforts to receive refugees and displaced persons, without compelling refugees and displaced persons to move between Member States; whereas the modalities of providing such funding shall be set out in a separate measure;
 - 11 in order to ensure the effective exercise of the right to asylum, the *non-refoulement* right in Article 33 of the Geneva Convention must be upheld fully; whereas the Community cannot protect the rights of persons outside the scope of the Geneva Convention who nonetheless face a real risk of torture or inhuman or degrading treatment unless it accords them an identical right to *non-refoulement*; whereas, in order to ensure that the right to *non-refoulement* is observed, asylum applicants may not be removed from the territory of a Member State unless their applications for asylum have been definitively rejected and they do not meet the criteria for the grant of complementary protection;
 - 12 in order to ensure the right to family reunion and rights of residence for persons falling within the scope of this Directive, the Community should exercise its competence pursuant to Article 63(3)(a) of the Treaty establishing the European Community;
 - 13 a measure to be adopted pursuant to Title VI of the Treaty on European Union should address the right of all asylum applicants and persons whose right to asylum has been recognized to effective protection by Member States against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions;
- has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to ensure that Member States shall recognize the right to asylum in the form of temporary protection where one or more of them are temporarily unable, due to a mass influx of persons, to process certain applications for recognition of the right to asylum in the form of Geneva Convention refugee status or complementary protection status.

Article 2 Definitions

For the purposes of this Directive:

- a) 'Application for recognition of the right to asylum' or 'asylum application' means: a request seeking from a Member State the recognition of the right to asylum in the form of refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol or for recognition of the right to asylum in the form of complementary protection;
- b) 'Applicant for the right to asylum' or 'asylum applicant' means: a person who has made an application for recognition of the right to asylum, where that application has not been withdrawn or definitively rejected;
- c) 'Definitively rejected' application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant;
- d) 'Examination of an application' means: all the measures for examination, decisions or rulings given by the competent authorities on an application for recognition of the right to asylum;
- e) 'Third State' means: a state or territory other than a Member State of the European Union and the country of nationality of the asylum applicant (or, if the applicant is stateless, his or her country of former habitual residence);
- f) 'temporary protection regime' means: an arrangement, pursuant to this Directive, recognizing the right to asylum while an application for recognition of that right in the form of Geneva Convention refugee status or complementary protection status cannot be considered;
- g) 'person in need of international protection' means: any person who has left his or her country of residence and whose safe return is impossible in view of the situation prevailing in that country, in particular where that person:
 - i) has fled from areas affected by armed conflict or persistent violence; or
 - ii) has been or runs a serious risk of being exposed to systematic or widespread human rights abuses; or
 - iii) who, for another reason specific to his or her personal situation, is presumed to be in need of international protection; and
- h) 'mass influx of persons' means: the sudden arrival within the Union of a significant number of persons from a given country or geographical region.

Article 3 Non-refoulement right

- 1 No Member State shall expel or return (*refouler*) a person with the right to asylum, or an asylum applicant whose application has not been definitively rejected, in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, or where he or she faces a real risk of torture or inhuman or degrading treatment.
- 2 No Member State shall expel or return a person with the right to asylum or an asylum applicant whose application has not been definitively rejected to a third state which might effect an expulsion or return as prohibited in paragraph 1.

Article 4 Declaratory effect of recognition

Recognition of the right to asylum is declaratory, rather than constitutive.

Article 5 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Temporary protection**Article 6 Application**

Section 1 of this Chapter shall not apply to persons who were admitted by Member States in the context of temporary protection regimes set up before the adoption of this Directive.

Section 1 Procedural rules for Community regime**Article 7 Establishing a temporary protection regime**

- 1 In cases of mass influx of persons in need of international protection, the Council may decide to establish a temporary protection regime in accordance with the procedure set out in Article 9.
- 2 The decision referred to in paragraph 1 shall determine at least:
 - the specific groups of persons to which the temporary protection regime applies; and
 - the duration of the regime, which, in accordance with Article 13, shall not exceed two years in aggregate.

Article 8 Revision and termination of temporary protection regimes

- 1 Every year, and at least six months before the end of a temporary protection regime, or when the Council or Parliament so requests, the Commission shall prepare a report on the situation in the country of nationality (or, for a stateless

person, the country of former habitual residence) and on the application of the temporary protection regime by the Member States, as well as on its financial and social implications, which it shall submit to the Council and the Parliament. The provisions of Article 18 shall apply.

- 2 After examining this report, and no later than three months before the end of a temporary protection regime, the Council shall, in accordance with the procedure set out in Article 9:
 - decide to revise the decision taken in accordance with Article 7, in particular by amending its duration and/or the groups of persons to which it applies; or
 - decide on the phasing out of the temporary protection regime because the situation in the country of nationality (or, for a stateless person, the country of former habitual residence) allows a safe return of the persons concerned under conditions respecting human dignity.

Article 9 Decision-making procedure

- 1 On the initiative of any Member State or the Commission, which shall ask the United Nations High Commissioner for Refugees for his or her opinion, the Council shall adopt the measures implementing this Section, as referred to in Article 8(2), acting by a qualified majority.
- 2 The Council shall consult the European Parliament after adopting any measure referred to in paragraph 1. The European Parliament shall deliver its opinion within a time-limit which the Council and Parliament shall agree by common accord, which shall not be less than one month. If the Parliament delivers a negative opinion, the measure shall be terminated.
- 3 The proposal referred to in paragraph 1 and the implementing measures adopted pursuant to Article 10 shall be transmitted to the European Parliament and national parliaments, published in the Official Journal of the European Communities and disseminated to the public by electronic means.

Article 10 Financial support

The report provided for by Article 8(1) shall also refer to all future measures to provide financial support for the application of the temporary protection scheme.

Such measures shall be implemented in accordance with the provisions of the Regulation specifically devoted to financial support for the admission and residence of beneficiaries of Community temporary protection schemes.

Section 2 Substantive and procedural rights

Article 11 Scope

The provisions of this Chapter shall apply to persons whose right to asylum in form of temporary protection has been recognized, whether that right has been recognized pursuant to a national temporary protection regime or a Community temporary protection regime established pursuant to the provisions of Section 1.

Article 12 Length of temporary protection regimes

Neither a Community nor a national temporary protection regime may exceed two years in duration.

Article 13 Determination of temporary protection status

- 1 Member States shall apply a simplified procedure to determine whether a person entering that Member State as part of a mass influx of persons is in need of international protection. The Community or national rules relating to admissibility of applications and the consequences of illegal entry or presence shall apply.
- 2 If a Member State's competent authority refuses to accept that a person entering that Member State as part of a mass influx of persons is in need of international protection, Community or national rules concerning procedures for examining a claim to recognition of the right to asylum shall apply in full *mutatis mutandis*.
- 3 Member States shall, where relevant, apply the procedure referred to in paragraph 1 to persons who have not yet entered the territory of the Member States. Measures taken under Article 17 shall determine common criteria on the application of temporary protection schemes to such persons.

Article 14 Effects of recognition of temporary protection status

- 1 When a Member State has recognized a person's right to asylum in the form of temporary protection, it shall grant that person rights equivalent to the rights granted to persons whose right to asylum in the form of Geneva Convention refugee status has been recognized. The relevant provisions of the Geneva Convention and Community or national law governing the status of persons with a right to asylum pursuant to the Geneva Convention shall apply *mutatis mutandis*, including the provisions relating to family reunification, residence permits and free circulation within the European Community. However, persons whose right to asylum in the form of temporary protection has been recognized shall not have the right to reside in other Member States until a Member State recognizes their right to asylum in the form of Geneva Convention refugee status or complementary protection.
- 2 A Member State may exclude a person from the right to temporary protection on the grounds set out in Article 1F or Article 33 of the Geneva Convention. The provisions of Community or national law relating to withholding or cancelling refugee status and to complementary protection shall apply *mutatis mutandis*.

Article 15 Relationship with Geneva Convention and complementary protection status

- 1 While a Community or national temporary protection regime is in force, and a Member State has not suspended examination of applications for recognition of the right to asylum in the form of Geneva Convention refugee status or complementary protection status, application for recognition of the right to asylum shall be examined by the Member State responsible, pursuant to the provisions of Community law on responsibility for asylum applications. The Community or national provisions defining a refugee pursuant to the Geneva Convention and governing the procedures applicable to examining a claim for recognition of status under the Geneva Convention shall apply.
- 2 If, following the examination of such an application, the application is definitively rejected, the rejected applicant shall retain his or her rights under the provisions of this Chapter for as long as the Community or national temporary protection regime is in force.

- 3 The asylum applicant's status while the application is under consideration shall be governed by this Chapter, in particular Article 14(1), not by Community or national rules on reception conditions for asylum-seekers.
- 4 By way of derogation from paragraph 1, a Member State may provide that examination of such applications shall be suspended during periods of mass influx, if the mass influx renders the Member State temporarily unable to process certain applications. Such examination may not be suspended for more than one year from the Community or national decision establishing a temporary protection regime.

Article 16 Effects of termination

- 1 Upon termination of a temporary protection scheme or deletion of groups of persons from its scope, the persons previously covered by such a scheme shall either:
 - a) return voluntarily to the country of nationality (or, for a stateless person, the country of former habitual residence), with the principles governing that return to be coordinated by the Council, in close cooperation with the international organizations concerned, and in particular the United Nations High Commissioner for Refugees; or
 - b) make an initial application for recognition of the right to asylum or resume an application suspended by a Member State pursuant to Article 15(4).
The relevant Community or national provisions concerning:
 - determination of responsibility for a claim;
 - the definition of a refugee;
 - the procedures applicable to examining a claim for recognition of the right to asylum; and
 - complementary protection
 shall apply.
- 2 Until an application referred to in paragraph 1 is definitively rejected, the provisions of Article 14(1) shall continue to apply to the applicants.

Chapter III General and final provisions

Article 17 Implementing measures

Where this Directive provides for the adoption of implementing measures, except in the case provided for in Article 10, the provisions of Article 6 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission shall apply.

Article 18 Transparency and exchange of information

- 1 Member States shall conduct mutual exchanges with regard to:
 - national legislative or regulatory measures or practices applicable in the field of asylum;
 - statistical data on monthly arrivals of applicants for asylum, and their breakdown by nationality;

- general information on new trends in applications for asylum;
 - general information on the situation in the countries of origin or of provenance of applicants for asylum.
- 2 Such information shall be forwarded quarterly to the Commission, which shall see that it is circulated to the General Secretariat of the Council, to the Member States and to the United Nations High Commissioner for Refugees. Except where release of such information would prejudice an ongoing investigation into criminal activity, the Commission shall also ensure that it is disseminated to the public by electronic means, that it is released automatically to all applicants who request it pursuant to Decision 94/90, and that it is received by the European Parliament, the national parliaments of each Member State, and, at the request of any Member State, the sub-national parliaments of that Member State.

Article 19 Right to privacy

- 1 Member States shall ensure that Directive 95/46 and all relevant international treaties which they have ratified apply fully to personal data that falls within the scope of this Directive and which is held by any national authority.
- 2 In accordance with Article 286(1) of the Treaty establishing the European Community, Directive 95/46 shall apply fully to all personal information that falls within the scope of this Directive and which is held by Community institutions, agencies or bodies.
- 3 In accordance with Article 286(2) of the Treaty establishing the European Community, the independent supervisory body to be established pursuant to that Article shall monitor the application of paragraph 2 above.
- 4 Any relevant provisions of any other measure adopted pursuant to Article 286(2) of the Treaty establishing the European Community shall apply *mutatis mutandis* to all personal information that falls within the scope of this Directive.

Article 20 Right to judicial protection

In addition to the specific rights set out in this Directive, Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 21 Rights of the child

- 1 When applying the provisions of this Directive, Member States shall comply fully with the United Nations Convention on the Rights of the Child without invoking any derogations from that Convention.
- 2 In all asylum cases involving children, Member States shall ensure a durable solution based on the best interests of the child.

Article 22 Proof of family status

When deciding on family reunification pursuant to this Directive, the absence of documentary proof of the marriage or of the affiliation of children should not in itself be considered an impediment. All the relevant facts and circumstances

should be taken into account, including in particular the difficulty of obtaining such documentary proof having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements.

Article 23 More favourable provisions

Member States have the right to enact or maintain more favourable national provisions than those set out in this Directive.

Article 24 Public awareness, solidarity and tolerance

Member States shall ensure that the public is aware of the importance of the fundamental right of asylum by requiring their competent authorities to include education in fundamental human rights and the right to asylum in national curricula and to disseminate accurate information regarding matters within the scope of this Directive.

Article 25 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive. The provisions of Article 18(2) shall apply.
- 4 The Commission shall submit an annual report on asylum in the Member States. This report shall be based on the information provided by the Member States pursuant to Article 18(1) and any other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective exercise of the right to asylum, at the latest five years after adoption of this Directive.

Article 26

This Directive is addressed to the Member States.

ANNEX VI
ILPA/MPG PROPOSED DIRECTIVE 2000/01f

ON
complementary protection

The Council of the European Union,
Having regard to the Treaty establishing the European Community, and
in particular Articles 63(2)(a) and 63(3)(a) thereof,
Having regard to the proposal of the Commission,
Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to asylum is a fundamental human right;
- 2 Article 61 of the Treaty requires the Community to establish an 'area of freedom, security and justice' within five years of the entry into force of the Treaty of Amsterdam;
- 3 because of the interrelationship between various aspects of the law affecting asylum applicants, refugees, displaced persons and other persons in need of international protection, it is appropriate for the Council to establish a Common European Asylum System which integrates these various aspects to the extent possible;
- 4 this directive constitutes a step in establishing the Common European Asylum System;
- 5 according to Article 6(2) of the Treaty on European Union, the European 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;
- 6 the measures on asylum which the Community must adopt pursuant to Article 63(1) of the Treaty establishing the European Community must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties; whereas such other relevant treaties include the European Convention on Human Rights, the United Nations Convention Against Torture, and the Convention on the Rights of the Child;
- 7 the measures on refugees and displaced persons which the Community must adopt pursuant to Article 63(2) of the Treaty establishing the European Community must be in accordance with the general principles of Community

- law, including the respect for fundamental rights as defined in Article 6(2) of the Treaty on European Union; whereas the European Court of Justice has additionally held that all international human rights treaties in which Member States have participated are sources of the fundamental rights that form part of the general principles of Community law;
- 8 Declaration 17, attached to the Final Act of the Treaty of Amsterdam, specifies that consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy; whereas the role of the United Nations High Commissioner as regards the procedure for examining a claim for asylum should also be recognized;
 - 9 in many Member States the United Nations High Commissioner for Refugees may also intervene during the judicial determination of asylum claims; whereas the Council should therefore invite the Court of Justice to consider whether to propose an amendment to its rules of procedure to permit the intervention of the United Nations High Commissioner for Refugees in appropriate cases before that Court;
 - 10 pursuant to Article 63(2)(a) of the Treaty establishing the European Community, the Council must adopt minimum standards for persons who otherwise need international protection; whereas, in order to protect the rights of such persons, who are outside the scope of the Geneva Convention but who nonetheless face a real risk of torture or inhuman or degrading treatment, the Community must ensure that the Member States grant such persons complementary protection; whereas it would be inappropriate in such circumstances to derogate from the rights applicable to persons who are refugees within the scope of the Geneva Convention;
 - 11 pursuant to Article 63(2)(b) of the Treaty establishing the European Community, the Council must adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons'; whereas this balance of effort can be achieved by recourse to the Community budget to assist Member States which are obliged to make greater efforts to receive refugees and displaced persons, without compelling refugees and displaced persons to move between Member States; whereas the modalities of providing such funding shall be set out in a separate measure;
 - 12 in order to ensure the effective exercise of the right to asylum, the *non-refoulement* right in Article 33 of the Geneva Convention must be upheld fully; whereas the Community cannot protect the rights of persons outside the scope of the Geneva Convention who nonetheless face a real risk of torture or inhuman or degrading treatment unless it accords them an identical right to *non-refoulement*; whereas, in order to ensure that the right to *non-refoulement* is observed, asylum applicants may not be removed from the territory of a Member State unless their applications for asylum have been definitively rejected and they do not meet the criteria for the grant of complementary protection;
 - 13 unaccompanied minors are generally in a vulnerable situation requiring special safeguards and care; whereas it is therefore necessary to lay down specific provisions relating to the consideration of applications for asylum submitted by unaccompanied minors;

- 14 in order to ensure the right to family reunion and rights of residence for persons falling within the scope of this Directive, the Community should exercise its competence pursuant to Article 63(3)(a) of the Treaty establishing the European Community;
 - 15 a measure to be adopted pursuant to Title VI of the Treaty on European Union should address the right of all asylum applicants and persons whose right to asylum has been recognized to effective protection by Member States against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions;
- has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to ensure the effective protection of persons with the right to asylum who fall outside the scope of the Geneva Convention on the Status of Refugees and the New York Protocol to that Convention.

Article 2 Definitions

For the purposes of this Directive:

- a) 'Application for recognition of the right to asylum' or 'asylum application' means: a request seeking from a Member State the recognition of the right to asylum in the form of refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol or pursuant to Chapter II;
- b) 'Applicant for the right to asylum' or 'asylum applicant' means: a person who has made an application for recognition of the right to asylum, where that application has not been withdrawn or definitively rejected;
- c) 'Definitively rejected' application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant;
- d) 'Examination of an application' means: all the measures for examination, decisions or rulings given by the competent authorities on an application for recognition of the right to asylum; and
- e) 'Third State' means: a state or territory other than a Member State of the European Union and the country of nationality of the asylum applicant (or, if the applicant is stateless, his or her country of former habitual residence).

Article 3 *Non-refoulement* right

- 1 No Member State shall expel or return (*refouler*) a person with the right to asylum, or an asylum applicant whose application has not been definitively rejected, in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion,

nationality, membership of a particular social group or political opinion, or where he or she faces a real risk of torture or inhuman or degrading treatment.

- 2 No Member State shall expel or return a person with the right to asylum or an asylum applicant whose application has not been definitively rejected to a third state which might effect an expulsion or return as prohibited in paragraph 1.

Article 4 Declaratory effect of recognition

Recognition of the right to asylum is declaratory, rather than constitutive.

Article 5 Member States' obligations

- 1 To guarantee the effective application of the right to asylum, this Directive shall ensure that Member States implement their obligations under:
 - a) the European Convention on Human Rights and the United Nations Convention Against Torture;
 - b) the relevant provisions of the Convention on the Rights of the Child; and
 - c) national constitutional principles and other relevant international obligations.
- 2 Member States shall examine an application for the recognition of the right to asylum made by any applicant who applies within their jurisdiction to any one of them for the recognition of that status, in accordance with Chapter II and with relevant Community legislation concerning asylum.

Article 6 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Complementary protection

Article 7 Principle

- 1 This Directive shall apply to any persons who fall outside the criteria for recognition as a Geneva Convention refugee or for temporary protection status pursuant to the relevant provisions of Community or national law, because such persons:
 - fall outside the scope of Article 1A of the Geneva Convention; or
 - have refugee status withheld or cancelled by virtue of Art 1F of the Geneva Convention or withdrawn by virtue of Art 1C of that Convention; or
 - fall within the criteria for expulsion, pursuant to Article 32 of the Geneva Convention applied in accordance with Community or national law; or
 - are denied temporary protection status pursuant to Community or national law;

and such persons:

- have fled their country, or who are unable or unwilling to return there, because their lives, safety or freedom are threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order; and/or
 - have fled their country, or who are unwilling to return there, owing to well-founded fear of being tortured or of being subjected to inhuman or degrading treatment or punishment or violations of other fundamental human rights.
- 2 Nothing in this Directive shall restrict Member States from prosecuting persons for alleged crimes against humanity or for any other alleged crime, without prejudice to provisions of Community, international or national law restricting detention of asylum applicants.

Article 8 Procedure

- 1 Any application for recognition of the right to asylum in the form of Geneva Convention refugee status shall also constitute an application in the alternative for recognition of the right to asylum in the form of complementary protection status. The rules set out in Community or national law governing responsibility for applications, reception conditions for asylum applicants, and procedural rules governing applications for recognition of the right to asylum in the form of Geneva Convention refugee status shall also apply to the application in the alternative for recognition of the right to asylum in the form of complementary protection status.
- 2 Member States shall ensure that their competent authorities, when taking decisions to refuse, terminate, cancel, or withhold recognition of the right to asylum in the form of Geneva Convention refugee status or temporary protection status, consider fully whether the right to asylum in the form of complementary protection must be recognized.
- 3 The right to asylum in the form of complementary protection shall be recognized automatically for all persons with recognized Geneva Convention refugee status or temporary protection status who fall within the scope of Articles 32 or 33(2) of the Geneva Convention and who are not to be expelled to a third country.
- 4 If a competent authority of a Member State recognizes an applicant's right to asylum in the form of complementary protection status but denies recognition of that applicant's claim to recognition of Geneva Convention refugee status, the applicant shall retain the right to appeal the latter refusal, pursuant to the relevant provisions of Community or national law.

Article 9 Effects of recognition of complementary protection status

- 1 When a Member State has recognized a person's right to asylum in the form of complementary protection, it shall grant that person and his or her family members rights equivalent to the rights granted to persons whose right to asylum in the form of Geneva Convention refugee status has been recognized. The relevant provisions of the Geneva Convention and Community or national law governing the status of persons with a right to asylum pursuant to the Geneva Convention shall apply *mutatis mutandis*, including the provisions relating to family reunification, residence permits and free movement within the European Community.

- 2 The *non-refoulement* principle as defined in Article 3 shall apply fully to all persons whose right to asylum in the form of complementary protection status has been recognized.

Chapter III General and final provisions

Article 10 Transparency and exchange of information

- 1 Member States shall conduct mutual exchanges with regard to:
 - national legislative or regulatory measures or practices applicable in the field of asylum;
 - statistical data on monthly arrivals of applicants for asylum, and their breakdown by nationality;
 - general information on new trends in applications for asylum;
 - general information on the situation in the countries of origin or of provenance of applicants for asylum.
- 2 Such information shall be forwarded quarterly to the Commission, which shall see that it is circulated to the General Secretariat of the Council, to the Member States and to the United Nations High Commissioner for Refugees. Except where release of such information would prejudice an ongoing investigation into criminal activity, the Commission shall also ensure that it is disseminated to the public by electronic means, that it is released automatically to all applicants who request it pursuant to Decision 94/90, and that it is received by the European Parliament, the national parliaments of each Member State, and, at the request of any Member State, the sub-national parliaments of that Member State.

Article 11 Right to privacy

- 1 Member States shall ensure that Directive 95/46 and all relevant international treaties which they have ratified apply fully to personal data that falls within the scope of this Directive and which is held by any national authority.
- 2 In accordance with Article 286(1) of the Treaty establishing the European Community, Directive 95/46 shall apply fully to all personal information that falls within the scope of this Directive and which is held by Community institutions, agencies or bodies.
- 3 In accordance with Article 286(2) of the Treaty establishing the European Community, the independent supervisory body to be established pursuant to that Article shall monitor the application of paragraph 2 above.
- 4 Any relevant provisions of any other measure adopted pursuant to Article 286(2) of the Treaty establishing the European Community shall apply *mutatis mutandis* to all personal information that falls within the scope of this Directive.
- 5 Member States shall not list asylum applicants whose applications have been definitively rejected as persons who must be refused entry pursuant to Article 96 of the Schengen Convention solely because of the rejection of such applications.

Article 12 Right to judicial protection

In addition to the specific rights set out in Article 8(1), Member States shall maintain or introduce into their national legal systems such measures as are

necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 13 Rights of the child

- 1 When applying the provisions of this Directive, Member States shall comply fully with the United Nations Convention on the Rights of the Child without invoking any derogations from that Convention.
- 2 In all asylum cases involving children, Member States shall ensure a durable solution based on the best interests of the child.

Article 14 Proof of family status

When deciding on family reunification pursuant to this Directive, the absence of documentary proof of the marriage or of the affiliation of children should not in itself be considered an impediment. All the relevant facts and circumstances should be taken into account, including in particular the difficulty of obtaining such documentary proof having regard to the situation in the country of nationality (or, for a stateless person, the country of former habitual residence), in assessing the validity of any evidence and the credibility of the claimant's statements.

Article 15 More favourable provisions

Member States have the right to enact or maintain more favourable national provisions than those set out in this Directive.

Article 16 Public awareness, solidarity and tolerance

Member States shall ensure that the public is aware of the importance of the fundamental right of asylum by requiring their competent authorities to include education in fundamental human rights and the right to asylum in national curricula and to disseminate accurate information regarding matters within the scope of this Directive.

Article 17 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive. The provisions of Article 10(2) shall apply.
- 4 The Commission shall submit an annual report on asylum in the Member States. This report shall be based on the information provided by the Member States pursuant to Article 10(1) and any other information made available to the Commission.

- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective exercise of the right to asylum, at the latest five years after adoption of this Directive.

Article 18

This Directive is addressed to the Member States.

family reunion

1 The goals of the area of freedom, security and justice

The right to family life and/or family reunion is extensively set out in international treaties, in particular the European Convention on Human Rights (ECHR), the Council of Europe Social Charter, the United Nations Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the European Convention on Migrant Workers, Conventions 97 and 134 of the International Labour Organization and the United Nations Convention on the Rights of the Child. Article 6(2) of the EU Treaty provides that human rights set out in the ECHR and national constitutions form part of the general principles of Community law. In addition, the case law of the European Court of Justice makes clear that other international human rights treaties upon which Member States have participated also form part of the general principles of Community law. Therefore, to give effect to the Community's obligation to respect human rights, any legislation drawn up under the new Title IV of Part 3 of the EC Treaty must ensure that Member States protect fundamental human rights as set out in those human rights treaties.

The obligation to act in accordance with international human rights obligations as part of the general principles of Community law makes it essential for Community family reunion legislation to grant rights to individuals. This stems from the very nature of international human rights law. Legislation

which only sets out Member States' obligations toward each other would fail to give effect to human rights principles and obligations, for there would be no way for individuals to invoke Community law to derive individual rights. Nor can Community legislation on family reunion be merely advisory, for that would violate the principles of the recent Inter-Institutional Agreement on the quality of drafting of EC legislation.¹

In particular, Community family reunion law should take as a base a high standard of protection. If no minimum standard is set, or if a low minimum standard is set, there is a risk that there will be a 'race to the bottom' among Member States, meaning that they might compete to lower standards for family reunion in order to deter applications for primary immigration (since such applications might be influenced by the rules which Member States apply to family reunion).

In addition, family reunion assists with the integration (in the sense of security and equality, not 'assimilation') of a third-country national into the European Union, for the obvious reason that most people live as part of a family and a prolonged forced separation is a definite social disadvantage. Since most third-country nationals in the Community form part of racial and/or religious minorities, it is essential to extend the same rules on family reunion to them as apply to EC nationals as far as possible. Otherwise the discrimination and disadvantages that racial and religious minorities already face in the Community will only be exacerbated. The Council and Commission have admitted in their Action Plan on developing the area of freedom, security and justice that legislation under the new Title IV must respect Articles 12 and 13 of

¹ OJ 1999, C 73, principle 12.

the EC Treaty (non-discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation).² In addition, the Tampere European Council of October 1999 agreed that long-term residents should receive treatment based on equality with EC nationals. As long as third-country nationals receive worse treatment than Community nationals, these goals cannot be achieved.

2 Relevant human rights rules

a) Right to family life

The right to family life is protected by both international and regional human rights treaties.³ At international level, Article 16 of the Universal Declaration of Human Rights provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state'. The same provision appears in Article 23(1) of the International Covenant on Civil and Political Rights. Article 17(1) of the latter also provides that 'No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence, nor to unlawful attacks on his [or her] honour and reputation'. Article 10(1) of the International Covenant on Economic, Social and Cultural Rights provides more widely that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'. The fifth recital to the preamble to the UN Convention on the Rights of the Child reads: 'Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection

² OJ 1999, C 19/1, points 6 and 32.

³ See *The Right to Family Life for Immigrants in Europe* (report of an international meeting organized by Coordination Européenne pour la Droit des Etrangers a Vivre en Famille, published in the UK by the Joint Council for the Welfare of Immigrants, 1994); Cholewinski, *Migrant Workers in International Human Rights Law* (Oxford, 1997), 68–70; and Guild and Niessen, *The Developing Immigration and Asylum Policies of the European Union* (Kluwer, 1996).

⁴ On ILO measures, see Cholewinski (*ibid.*), 117–120.

⁵ See Cholewinski (n. 3 above), 171–173.

and assistance so that it can fully assume its responsibilities within the community...'

At regional level, Article 8(1) of the ECHR guarantees the right of everyone to 'respect for his private and family life, his home and his correspondence'. Article 16 of the European Social Charter provides that '[w]ith a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life...'

b) Right to family reunion: international rules

Obviously, the right to family life cannot be exercised effectively unless family members can live together. Therefore, several international and regional human rights treaties provide for the right to family reunion. Article 13(1) of Convention 143 of the International Labour Organization (ILO) states that '[a] Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory'.⁴ Paragraph 13(1) of ILO Recommendation 151 states that '[a]ll possible measures should be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers as rapidly as possible. These measures should include, as necessary, national laws or regulations and bilateral and multilateral arrangements'. The family is defined in both the Convention and Recommendation as 'the spouse and dependent children, father and mother'. Paragraph 13(2) of the Recommendation states that the migrant worker should have 'appropriate accommodation' which meets the standards normally applied to nationals.

Under Article 44(1) of the UN International Convention on the Rights of Migrant Workers,⁵ 'States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state, shall take measures to ensure the protection of the unity of the families of migrant workers'. Article 44(2) requires States 'to take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers' with their families, defined for these purposes

as 'persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their minor dependent unmarried children'. In accordance with Article 44(3), States must 'favourably consider' reuniting a worker with other family members 'on humanitarian grounds'.

c) Right to family reunion: regional rules

Regional treaties are more precise. The 1961 Council of Europe Social Charter defines 'family' in its Appendix as 'at least his wife and dependent children under the age of 21 years'. Article 19(6) of the Charter states that: '[w]ith a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance on the territory of any other contracting party, the contracting parties undertake to facilitate as far as possible the family reunion of a foreign worker authorised to establish himself on the territory'. The Committee of Experts which supervises the application of the Charter has criticized several States which have long waiting periods for family reunion or which set a lower age than 21 for reunion of children.⁶ The recently revised version of the Social Charter refers instead to allowing entry of 'unmarried children, as long as the latter are considered to be minors by the receiving state and are dependent on the migrant worker', and requires reunion with a 'spouse' rather than a 'wife'. However, the revised Charter has not been ratified by all Member States and the EU Treaty refers in its preamble to the 1961 Charter, not the later version.

Article 12 of the European Convention on the Legal Status of Migrant Workers provides:

- 1 the spouse of a migrant worker legally employed on the territory of a contracting state, his non-married dependent children, as long as they are considered as being minor by the relevant regulation of the receiving state, are authorized to join the migrant worker on the territory of a contracting state, in conditions similar to those provided for in the present convention and according to the

procedure provided for this admission by regulation or international agreements. Such an authorization is granted provided that the migrant worker has accommodation considered as normal for the national workers of the region he is employed in. Any contracting state can subject the application of such an authorization to a delay which should not be longer than 12 months.

- 2 Furthermore by a declaration sent to the General Secretary of the Council of Europe, and which will enter into force one month after having been received, any state can at any moment subject family reunion which is the subject of (1) above, to the condition that the migrant worker has regular and sufficient resources so as to support his family.

There has been considerable interpretation of the right to 'respect for family life' in Article 8 ECHR by the European Court of Human Rights. The case law of this Court has essentially interpreted Article 8 to protect persons against expulsion from a State where family members are already present in that State. This applies even where there is an economic reason to expel or where the person has committed a very serious crime. However, in the case of convicted criminals, a State might still be justified in expelling a person after balancing the severity of the crime against the damage to family links that would result from the expulsion.⁷

Of course, the ECHR and the other regional treaties are a minimum standard. Therefore there is no reason that an EC instrument should merely refer to them. Rather an EC instrument should provide for the application of their family reunion principles in detail. This is the same approach that the EC has taken to:

- trade liberalization obligations under the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organization (WTO);
- labour and discrimination law obligations under the Council of Europe Social Charter and ILO Conventions;
- free movement of people under the Council of Europe Convention on establishment; and
- data protection obligations pursuant to the right for respect for 'private life' in Article 8 ECHR and even the detailed rules in the 1981 Council of Europe Data Protection Convention.

⁶ See Cholewinski (n. 3 above), 335–336.

⁷ See analyses of the case law in Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995).

Just as the greater level of economic and social integration between Member States justifies detailed rules going beyond the minimum international standards for economic integration, social rights, free movement of persons, and privacy rights, it should justify detailed rules going beyond international and regional standards for human rights whenever an issue falls within EC competence. Why should family reunion be an exception?

It might be objected that the EU Treaty only obliges the Union to respect the ECHR as forming part of the general principles of Community law (Article 6(2) EU), not any other international human rights treaties. However, the preamble of the EU Treaty also refers to the 1961 Council of Europe Social Charter. Moreover, the case law of the Court of Justice has consistently referred to all international human rights treaties as sources for the human rights protection which forms part of general principles of EC law. Indeed the Court has referred to the Council of Europe Social Charter, to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights.⁸

d) Right to family reunion: European Community rules

The European Community has internal rules on the rights of Community nationals who move to other Member States which guarantee a high standard of protection for the right to family life and consequent right to family reunion.⁹ In addition, the EC has concluded some treaties with third states which give certain rights to the family members of non-Community nationals. The core Community provision is Regulation 1612/68, concerning EC

national workers who move to other Member States, which implements the right to free movement of workers in Article 39 (ex-48) EC in more detail.¹⁰ Article 10(1) of this Regulation allows a worker's 'spouse and their descendants who are under the age of 21 years or are dependants' and 'dependent relatives in the ascending line of the worker and his spouse' to 'install themselves' with a worker who is 'employed on the territory of another Member State'. The nationality of the family members is irrelevant. Article 10(2) obliges Member States to 'facilitate the admission of' other members of the family if 'dependent on the worker... or living under his [or her] roof' in the worker's home country. Article 10(3) imposes just one condition on the exercise of Articles 10(1) and 10(2): that workers must have housing considered normal for national workers in the region of employment. However, the Court of Justice has ruled that this condition only applies upon initial entry of the family and cannot be imposed after their arrival to insist upon their later departure.¹¹

Article 11 of the Regulation allows the spouse and children under 21 or dependents of a worker or a self-employed person to take up any activity as an employed person anywhere in the host state, regardless of their nationality. Article 12 provides that children of a Member State national who 'is or has been employed' in another Member State 'shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'. A further Directive from 1977 governs education rights of the children of EC national workers.¹²

Title I of the Regulation (eligibility for employment) and Title II (equal treatment) do not expressly refer to workers' families. However, the Court of Justice has ruled that the ban on limitations on numbers of foreign workers in Article 3 also applies to third-country national family members of EC national workers, as does the right to equal treatment in 'social advantages' provided for in Article 7(2).¹³ It can be argued in light of the Court's continued stress on the integration of the migrant worker and his family into the host state that all provisions of the Regulation apply *mutatis mutandis* to family members of workers.

Directive 68/360 accompanies Regulation 1612/68, and sets out rules on the immigration

⁸ See most recently Case C-249/96, *Grant*, [1998] ECR I-621, and analysis of the case law in *Guild and Lesieur, The European Court of Justice and the European Convention on Human Rights: Who Said What When?* (Kluwer, 1998) and *Betten and Grief, EU Law and Human Rights* (Longman, 1998).

⁹ However, these rules do not cover EC nationals in their own Member State who wish to exercise family reunion with nationals of third countries (Joined Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR 3723).

¹⁰ OJ 1968, L 257/2.

¹¹ Case 249/86, *Commission v. Germany*, [1989] ECR 1263.

¹² Directive 77/486 (OJ 1977, L 199/32).

¹³ Case 131/85, *Gul*, [1986] ECR 1573 (Article 3), and case law since Case 32/75, *Christini*, [1975] ECR 1085 (Article 7(2)).

status of workers and their family members, in particular the recognition of their right of residence. The rights of workers and their family members after employment are set out in Regulation 1251/70, which allows family members to stay upon a worker's death, disability or retirement under certain conditions.¹⁴

The rules applying to family members of other categories of EC nationals are relatively similar. Directive 73/148 provides rights for self-employed persons and providers and recipients of services, implementing Articles 43 and 49 (ex-52 and 59) EC in more detail.¹⁵ Articles 1(1)(c) and (d) and 1(2) of the Directive are essentially the same as Article 10 of Regulation 1612/68, with the minor distinction that an independent descendant under 21 other than a child could join a worker under the Regulation, but not a self-employed person or service provider or recipient under the Directive. The Directive also contains provisions very similar to Directive 68/360. There is no provision equivalent to Article 11 of the Regulation on family members' employment rights, but it should be kept in mind that Article 11 also expressly applies to family members of the self-employed. There is no express provision on education rights for children or for other social advantages for the self-employed or their family members. However, the case law of the Court of Justice has made it clear that Article 43 (ex-52) EC nevertheless gives self-employed persons the right to claim social advantages for their families, including education rights for children.¹⁶ Directive 75/34 gives the self-employed and their family members the right to remain after self-employment under similar conditions to Regulation 1251/70.¹⁷

¹⁴ OJ 1970, L 142/24.

¹⁵ OJ 1973, L 172/14.

¹⁶ Case C-185/96, *Commission v. Greece*, [1998] ECR I-6601; Case C-337/97, *Meussen*, judgment of 8 June 1999, not yet reported.

¹⁷ OJ 1975, L 14/10.

¹⁸ OJ 1990, L 180/26 and OJ 1990, L 180/28.

¹⁹ OJ 1993, L 317/59.

²⁰ Case 267/83, *Diatta v Land Berlin*, [1985] ECR 567; Case 370/90, *R. v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, [1992] ECR I-4265; and Case 59/85, *Reed*, [1986] ECR 1283.

²¹ See *Reed (ibid)*.

²² *Meussen* (note 16 above).

²³ COM (1998) 394, 22 July 1998.

Directive 90/364 on 'self-sufficient' persons not falling under other EC rules, and Directive 90/365 on the rights of pensioners to move to other Member States after retirement, both allow spouses and dependent relatives in the ascending and descending line to join the worker.¹⁸ This differs from the rules on workers and the self-employed slightly, because there is no obligation to facilitate the admission of certain other family members, and independent descendants (whether or not they are children) cannot join the primary right-holders. However, the spouse and dependent children are entitled to obtain employment or self-employment anywhere in the Member State. This differs slightly from the rights of family members of the employed and self-employed under Article 11 of Regulation 1612/68; their spouses and children who are under 21 or dependent can seek work, but not self-employment. Finally, under Directive 93/96 on rights of students, only the spouse and dependent children can join the student, although they can take up employment or self-employment in the Member State.¹⁹

The Court of Justice has ruled several times on the definition of 'spouse', and it is presumed that the same definition applies under all the EC measures. 'Spouse' only refers to a person connected by marriage, although until the marriage is finally dissolved, the spouse has the right to stay in the host Member State (even after separation of the couple and the initiation of divorce proceedings, as long as the proceedings are not completed).²⁰ However, if a Member State allows unmarried partners to join its own nationals, it must grant the same rights to unmarried partners of nationals of other Member States.²¹ This right is a 'social advantage', but as noted above, it is now clear that social advantages must be granted equally to the self-employed and their family members as well as workers and their family members.²² It is also arguable that the right to equal treatment in Article 12 (ex-6) EC requires that this right be extended to unmarried partners joining any category of EC national.

In mid-1998, the Commission proposed amendments to Regulation 1612/68 and Directive 68/360.²³ The proposed amendment to the Regulation suggests three changes relevant to family members. Article 10 would be amended to:

- allow persons to move with a worker under Article 10(1) if they are considered equivalent to a spouse under the host state's law;
- allow descendant and ascendant relatives to join the worker under Article 10(1) whether or not they are dependants;
- allow other family members dependent upon the worker or living in his or her house to join the worker automatically under a new Article 10(1)(c), if such prior connections had already been formed within a Member State;²⁴
- abolish the current Article 10(3), the accommodation requirement applied to initial entry of family members;
- insert a new Article 10(3), allowing all family members to claim social and other advantages in their own name;²⁵ and
- allow family members to stay after dissolution of a marriage, after three years of residence (new Article 10(4)).

Article 11 would be amended to:

- extend the scope of the Article to all family members, not just spouses and children under 21 or dependent;
- allow family members to take up any *self-employment*, as well as employment, in the host state;

²⁴ Article 10(2) would still require Member States to 'facilitate' admission of such persons where the connections had been formed in a third country.

²⁵ This would be wider than the right of family members to claim equality in social advantages upheld since *Christini*, since the right would not be based upon dependence upon the worker.

²⁶ This would implement the ruling in *Gul* (note 13 above) as regards employment.

²⁷ Reg 1408/71 (OJ 1971, L 149/2), as consolidated by Reg. 118/97 (OJ 1997, L 28/1); see Reg. 307/1999 extending the Regulation to students (OJ 1999, L 38/1).

²⁸ OJ 1994, L 1/1.

²⁹ COM (99) 229, 4 May 1999.

³⁰ OJ 1978, L 263, 264 and 265; new treaty with Tunisia in OJ 1998, L 97; case law beginning with Case C-18/90, *Kziber*, [1991] ECR I-199.

³¹ OJ 1993, L 347 (Poland); OJ 1993, L 348 (Hungary); OJ 1994, L 357 (Romania); OJ 1994, L 358 (Bulgaria); OJ 1994, L 359 (Czech Republic); OJ 1994, L 360 (Slovak Republic); OJ 1998, L 26 (Latvia); OJ 1998, L 51 (Lithuania); OJ 1998, L 68 (Estonia); and OJ 1999, L 51 (Slovenia).

³² Case C-351/97, *Kadiman*, [1997] ECR I-2133; see Advocate-General's Opinion of 3 June 1999 in Case C-329/97, *Ergat*, not yet reported.

³³ Case C-355/93, *Eroglu*, [1994] ECR I-5113; Case C-210/97, *Akman*, [1998] ECR I-7519.

³⁴ Case C-262/96, *Surul*, judgment of 4 May 1999, not yet reported.

- allow family members to retain these rights upon dissolution of a marriage after five years; and
- provide explicitly that family members' take-up of employment or self-employment must be on the same basis as nationals of the host state.²⁶

Amendments to Article 12 would extend educational rights under that Article to all family members of a worker, not just his or her children.

In addition to the rights described above, Community social security legislation also grants rights to the family members of EC nationals who take up work, self-employment or studies in another Member State.²⁷

EC treaties with third countries contain different rules. The European Economic Area agreement of 1994, now applying to Norway, Iceland and Liechtenstein, extends all the legislation described above to nationals of those states and their family members.²⁸ The treaty recently agreed with Switzerland (but not yet in force) would have the same effect after a transition period.²⁹ Treaties with Morocco, Algeria and Tunisia give family members of Maghreb workers (if admitted) the right to equal treatment in social security.³⁰ The Europe Agreements concluded with ten states of Central and Eastern Europe give family members (if admitted) the right to work in the host state.³¹

The EC's treaty with Turkey does not yet oblige the parties to secure free movement of workers or the self-employed, but the Decisions of the Association Council set up by that agreement are in force and grant certain rights. Article 7(1) of Association Council Decision 1/80 leaves Member States discretion as to whether to admit family members to join a worker. However, once the family members have been admitted to a Member State they have the right to stay in its territory and take up work (subject to EC nationals' priority) after three years and take up any work (with EC priority dropped) after five years.³² Article 7(2) of the Decision gives children of Turkish workers who have been employed for at least three years in the host state the right to take up any employment, with a corresponding right of residence.³³ Association Council Decision 3/80 confers the right to equal treatment in social security on Turkish workers and their family members.³⁴

3 Current EU rules and their defects

The family reunion rules agreed within the 'third pillar' of the European Union are sadly inadequate. The main instrument is a Resolution agreed by national immigration ministers in June 1993.³⁵ However, this Resolution is non-binding and cannot be relied on in national courts. It only applies to persons who are resident with 'an expectation of permanent or long-term residence', but does not define this concept. It does not cover persons admitted for a fixed term, asylum applicants or recognized refugees, or third-country national family members of nationals of the host Member State (ie, an Indian citizen joining a British citizen in Britain).

The Resolution accepts that the spouse and children of the resident should 'normally' be admitted (point 2). But it allows Member States to impose an indeterminate waiting period before entry (point 3). Children must be dependent, unmarried and between the ages of 16 to 18 to enter (point 8). Other family members can only be admitted for 'compelling reasons' (point 10). Independent residence status 'may' be granted after an indefinite period and the right to work may be granted 'if appropriate' (point 12). Reunion is dependent not only upon adequate accommodation (with no reference to the standards applying to nationals) but also upon sufficient resources and sickness insurance (point 16). A number of other conditions for possible refusal of entry or expulsion are set out, and there is no reference to the right to education, social advantages or other aspect of equal treatment in the host state. Many of these rules permit or encourage Member States to apply standards that are in breach of their international human rights commitments.³⁶

Subsequent Council resolutions also made reference to family members. The 1994 resolution on workers stated that Member

States 'reserve the right' to admit spouses and dependent children of third-country national workers.³⁷ There was no reference to the 1993 resolution, but presumably the 1994 resolution only refers to situations falling outside its scope (ie, where workers do not yet have a right of long-term or permanent residence). The 1994 resolution on the self-employed states that spouses and children (between the ages of 16 and 18) of the self-employed can join self-employed persons in accordance with the rules in the 1993 resolution on family members.³⁸ Again, this presumably applies only to persons who do not yet have a right of long-term or permanent residence. Finally, the 1994 resolution on students leaves it to each Member State whether to admit family members or allow a student's spouse to take up work.³⁹

A later resolution in 1996 on the rights of long-term resident (LTR) third-country nationals does not address family reunion in any detail. The 1996 resolution does not make clear how it relates to the 1993 resolution, but does state that family members should be entitled to free movement within a single Member State and equal treatment in limited areas, along with the long-term resident.⁴⁰ In practice, the 1993 resolution has resulted in weakening of national rules on family reunion in some Member States.⁴¹

The situation would only have been slightly improved by the Commission's proposed Convention on Migration.⁴² Family members joining an EC national in his or her 'own' state would have had the same substantial rights as those joining EC nationals who had moved to another Member State. However, other categories of persons would still have been in a weak position. There would have been an obligation upon Member States under the Convention to admit spouses and unmarried children below the age of majority, but the obligations to show 'suitable' accommodation and means of support would have remained. Most principal right holders could not have requested family reunion until they had resided for 'at least' a year with the right to reside for another year, and no maximum waiting period would have been provided for. Students could not have applied for reunion until they had been present for two years with a further year of legal residence. Family members would not have been allowed to take up work for at least six months after entry, except in emergencies, and there would have been no maximum limit

³⁵ Unpublished in the OJ; see Guild and Niessen, note 3 above.

³⁶ See critique in Guild and Niessen, *ibid.*

³⁷ Point A(v) of resolution (OJ 1996, C 274/3).

³⁸ Point C(9) of resolution (OJ 1996, C 274/7).

³⁹ Point C(5) of resolution (OJ 1996, C 274/10).

⁴⁰ Point V of resolution (OJ 1996, C 80/2).

⁴¹ Council document 10669/96, 21 Oct. 1996, discussed in S. Peers, 'Building Fortress Europe: The Development of EU Migration Law', (1998) 35 CMLRev. 1235 at 1265–1268.

⁴² COM (97) 387, 30 Jul. 1997, Arts. 24–31.

placed on the waiting period before they could have worked. They could have *requested* separate status upon the death, divorce or separation from the principal right holder, but (unlike family members of EC nationals in another Member) they would have had no *right* to such status upon death or separation.

In late 1999, the Commission proposed a Directive on the right to family reunification of third-country nationals.⁴³ This proposal is an improvement on the proposed Convention, but still falls short of the standards that should be applied in this field.⁴⁴

It is clear that the third pillar rules and the proposed Convention and directive fall well short of the standards applying to EC nationals who move to another Member State. The proposed Convention and directive at least rightly recognize that family reunion rules should be the same for any family members of an EC national, regardless of whether or not the EC national has moved to another Member State or stayed in his or her 'home' Member State. But there is no convincing reason to deny full equal treatment for all legal residents of the EU, especially because most non-EU citizens are part of racial and religious minorities. The equal treatment granted to family members of Norway, Iceland, Liechtenstein and Switzerland is welcome, but in practice it entrenches even further the *de facto* discrimination between minority and majority groups in the EU. The European Union cannot create an area of 'freedom, security and justice' if it continues to entrench differences between racial and religious minorities and majorities on such an important issue.

In addition, it is absurd to allow people to reside in a Member State but not work for some time afterward. Families of third-country nationals need to survive and housing and other costs are influenced by the fact that a large number of families have two incomes. Banning family members from working merely leads to black market employment resulting in

net loss of tax revenue and a high cost of inspections, while putting the workers involved in a very vulnerable position as regards their employer. Also, it violates the principle of equality of spouses. Delays in admitting family members to join a third-country national not only strain the family relationship but also deter formation of family businesses.

4 The alternative approach

European Community family reunion law must be based on security and equality. It is contradictory for any human right to be wholly or largely discretionary. But existing third pillar rules and the proposed Convention leave huge discretion to the Member States to shape or limit the right to family reunion. Third-country nationals should be guaranteed the right to know when their family member will be able to join them and work, and the family member is in turn entitled to know when he or she will be able to claim rights to social advantages and independent residence status. Community legislation must therefore set out a minimum standard on these issues, which Member States can exceed if they wish.

This minimum standard must be based on equality between third country nationals and EC nationals as far as possible. Any lesser approach would fail to end the *de facto* racial and religious discrimination caused by the current rules. It is true that third-country nationals, unlike EC nationals, do not have the right to enter the Member States as primary right-holders; rather their ability to enter as students, self-employed persons and (especially) workers is strictly controlled by the Member States. But that does not justify the unequal treatment of third-country nationals once they *have* been granted legal residence, especially on a matter as important as family reunion.

What should this mean in practice? The Starting Line Group, in conjunction with the Commission for Racial Equality, proposed legislation in 1998 that would address the rights of long-term residents and the right to family reunion in the European Community, alongside a separate proposal for legislation banning racial and religious discrimination more generally.⁴⁵ The proposals made here only address family reunion,⁴⁶ but they take as their basis the relevant provisions in the text proposed by the Starting Line Group, which was based upon the fundamental principles of

⁴³ COM (1999) 638, 1 Dec. 1999.

⁴⁴ For more detailed comments, see ILPA's response to the proposal.

⁴⁵ Chopin and Niessen, eds., *Proposals for Legislative Measures to combat racism and to promote equal rights in the European Union* (Commission for Racial Equality and Starting Line Group, 1998).

⁴⁶ The rights of long-term residents are the subject of a separate proposal in the Amsterdam Treaty Project (Directive 2000/03), and more general discrimination issues are outside the scope of this Project.

security and equality for third-country nationals. The detailed analysis of EC migration and asylum law after Amsterdam from the European Council on Refugees and Exiles, European Network Against Racism, and Migration Policy Group agreed with the principles of the Starting Line proposal.⁴⁷

The Starting Line proposal recognized that where third-country nationals only had temporary rights to reside in a Member State, equality with EC nationals should be secured by analogy with the rules applicable to EC national students, who have more limited rights to family reunion than other EC nationals (see Part 2d above). However, where they had permanent or long-term rights to stay, full equality with EC nationals must be secured.

5 Details of the text

a) Sources

As noted above, the proposal is based on the text of the 1998 Starting Line proposal, with some clarifications.

b) Basic principles: Chapter I

The directive conceives of family reunion as a human right, as evidenced in the title, the opening provisions and the substantive rules. More particularly, the preamble refers to the substantive regional and international human rights law on family reunion, observing that the 1961 version of the European Social Charter must be observed by the EU and that the human rights principles of EC law go beyond those listed in Article 6(2) TEU. The preamble notes that the ECHR right to social security equality must be secured by a measure adopted pursuant to other legal bases.⁴⁸

Article 2(2) in effect leaves the precise definition of 'cohabitee' up to the Member States, because there are differences between national law on what constitutes a relationship 'akin to marriage'. However, Article 2(3) is more precise about the definition of 'intended spouse'. Of course, in some cases an intended spouse will also be a cohabitee.

⁴⁷ *Guarding Standards – Shaping the Agenda* (April 1999), 20–21.

⁴⁸ This is a reference to the Commission's proposal to extend EC social security rules in full to third-country nationals (OJ 1998, C 6; see now OJ 1999, C 38), a proposal which we wholly endorse.

By virtue of Article 3, the scope of the directive covers persons joining EC nationals in their 'own' Member State, as well as third-country nationals joining third-country nationals. Family reunion for asylum applicants and persons with the recognized right to asylum is left to other provisions of national or Community law. This issue is addressed in the separate proposal for a Directive on the fundamental right to asylum. It should be emphasized that the 'right to asylum' in that Directive covers Geneva Convention, temporary protection and complementary (subsidiary) protection status, so the family members of all such persons are covered there. However, we have no objection in principle to including the family members of such persons within a general Community Directive on family reunion, as long as there are specific rules taking account of the nature of asylum law.

There are only two other explicit exclusions from the scope of this Directive. First, third-country nationals joining EC nationals who have moved within the EC are excluded, because they are already addressed by separate legislation. Second, persons covered by the EEA and the EC–Switzerland free movement treaty are excluded on the same ground (on each group, see Section 2d above).

In addition, there are two implicit exclusions. In accordance with the definition of 'short-term resident' in Article 5, it follows that the proposed Directive does not cover family reunion for illegal residents of the Community, or family reunion for persons legally resident for very short periods (resident for less than a year, or resident for over a year but lacking the right to reside for a second year).

Article 3(2) confirms that treaties with third states take priority over secondary EC law, and that Member States also retain the power, acting unilaterally, to set higher standards than those set out in this Directive.

Article 4 confirms that there can be no discrimination as regards the right to family reunion, confirming the interpretation of Article 14 ECHR upheld in *Abdulaziz*. This clause provides that it is without prejudice to measures 'already' adopted, because there would otherwise be a risk that future measures concerning discrimination law would contain objectionable rules on immigration and asylum law with the intent of amending this directive.

c) Chapter II: Short-term residents

This Chapter incorporates the rules applying to short-term residents already found in the draft Starting Line directive, with the addition of other dependent descendants besides children. These rules are without prejudice to the rules on the family reunion rights of long-term residents (LTRs) in Chapter III. Except for the addition of cohabitees, intended spouses, and additional dependent descendants, and the one-year waiting period, these rules are the same as those applying to EC national students under Directive 93/96. Third-country nationals with potentially short-term residence status are therefore largely granted equality with EC nationals who have a potentially short-term status.

The inclusion of 'cohabitees' is in line with the principle in the UN Convention on Migrant Workers, the case law of the European Convention on Human Rights, and social reality in the Member States. Such a right does not yet apply to EC nationals, but it should also be extended to them, in our view, as soon as possible.

The provisions regarding adopted children make clear in Article 6(2)(b) that a third-country court is competent to decide upon the adoption. Alternatively, in accordance with Article 6(2)(a), children who form part of the family unit *de facto* must be recognized where a third state does not accept the formal concept of adoption but does accept that a child might be cared for by persons other than the parents. This is particularly relevant to third states which apply Islamic law. It is presumed that step-children are covered as descendants who are under the age of 21 or who are dependants, just as it has always been presumed that they are covered by the rules governing EC nationals.

The provisions of Article 7 copy the 'adequate resources' rules applied to EC nationals under Directives 90/364, 90/365 and 93/96, although the requirement of adequate resources only applies to extended family members (if authorized to enter pursuant to Article 6(3)), not to immediate family members who must be allowed to enter. It would be inappropriate to apply 'adequate resources' rules to deny entry to the 'nuclear family' members in Article 6(1), where no such rules apply to family members of EC nationals and such persons form the core of family life.

There is no 'adequate housing' provision equivalent to Article 10(3) of Regulation 1612/68, because the Commission has proposed the deletion of that provision from that Regulation and there is no equivalent provision in any other EC free movement legislation. This places third-country nationals on an equal basis with most EC nationals. Use of such an 'accommodation' clause would be highly discretionary in practice and therefore would be incompatible with legislation aiming to secure the right to family reunion.

Article 8 provides for a delay of up to six months before taking up employment, except for graduates. It should be emphasized that Member States are entitled to adopt or maintain more liberal rules on access to employment, either unilaterally or by treaty obligations, pursuant to Article 3(2). In fact, the separate proposed directive on long-term residents imposes a standstill on the national legislation applicable to the access to employment of third-country nationals' family members.

It is true that the delay before entry and the delay before employment of family members are not in full accordance with the principle of equality with EC nationals. Even family members of short-term EC national residents (students under Directive 93/96) can join them immediately and begin employment or self-employment immediately. However, this derogation from mandatory full equality can be justified on the grounds that EC national students are not entirely in the same position as short-term resident third-country nationals. EC national students have the right to stay as workers or self-employed persons after graduation, or to 'drop out' and take up work or self-employment. On the other hand, until short-term resident third-country nationals gain the status of 'long-term resident', their rights to remain in that Member State are in part conditional. This justifies allowing for a possible delay in entry and employment of their family members, although it does not justify indefinite delays or wholly discretionary power over the right to family reunion.

d) Chapter III: Long-term residents (LTRs) and EC nationals

Chapter III essentially incorporates the rules applying to LTRs already proposed in the 1998 Starting Line proposal. However, this Chapter confines itself to scope, entry and access to

employment rules, with other rules addressing the status of all family members contained in Chapter IV. This proposal does not define 'long-term resident'; as Article 9(1) makes clear, that definition is left to national or Community law (see the separate proposal in this project on the rights of long-term residents).

There is no justification whatsoever for treating either long-term resident third-country nationals or family members of 'non-moving' EU citizens differently from the family members of Community nationals who have moved to another Member State. Therefore, Article 9 of this proposal provides that the family reunion rights of long-term residents are governed by rules equivalent to Articles 10 and 11 of Regulation 1612/68 (see Section 2d above). However, Article 9(2) also allows family members to take up self-employment in the host State. Such rights should also be extended to migrant EC nationals' family members as soon as possible. Article 9(3) provides that cohabitants and intended spouses can enter and join long-term residents.

Article 10 is partly based on Directive 68/360. In particular, Article 10(2) makes clear that visas must be issued to family members living outside the Community to allow them to join the Community resident. Therefore Member States cannot use their powers over issuing visas to prevent the entry of family members.

Article 11 makes clear that the family reunion rights of third-country nationals joining EC nationals who have not moved to another Member State (ie, an American national joining a UK national family member residing in the UK) shall be the same as the family reunion rights of long-term residents under Articles 9 and 10 of this proposal, which are in turn the same as the family reunion rights of EC nationals who have moved to another Member State. This implements the proposal made by the Commission in its proposed Convention on

Migration. As that proposal rightly pointed out, this is justified by the principle of equal treatment for all EC nationals.

The 'legal base' for Article 11 is Article 63(3)(a) EC, the same 'legal base' as the rest of this proposed Directive. This is because the free movement provisions of Title III of Part 3 of the EC Treaty, and the power in Article 18 EC to adopt measures concerning EC citizens' right to 'move and reside freely' in other Member States, are apparently restricted to EC nationals who move to another Member State.⁴⁹ On the other hand, there is nothing to indicate that Article 63(3)(a) EC is limited to the rights of third-country nationals who join third-country nationals in a Member State; the Article can therefore also be invoked to govern the status of third-country nationals who join EC nationals in their 'own' Member State.

e) Chapter IV: Status

This Chapter is also based on the Starting Line proposal. Article 12 is a residence provision based on Directive 68/360, assuring a right of residence for all family members and providing expressly that permits are declaratory. This in line with EC law.⁵⁰ The validity of the permit is different for different groups. For family members of short-term residents (Article 12(2)) it will terminate with the end of short-term status. For family members of long-term residents (Article 12(3)), a residence permit will be renewable for five years. It will still be dependent upon the right of the primary right-holder, unless the family member acquires an independent right to remain in accordance with Article 13. However, if the primary right holder dies, retires or suffers a disability or occupational illness, the family member will keep corresponding rights to stay in accordance with the equivalent rights accorded to family members of migrant EC national workers in such circumstances. This is achieved by a reference to Regulation 1251/70.

Article 13 sets out the rules concerning the ability of family members to attain independent residence status after divorce.⁵¹ It should be recalled that, in accordance with Article 3(2), Member States have the right to set higher standards than provided for in Article 13 and grant independent rights to remain more quickly than provided for in Article 13. First, Article 13(1) points out that family members can obtain rights to independent residence if

⁴⁹ On Article 18 (ex-Article 8a) EC, see Joined Cases C-64 and 65/96, *Uecker & Jacquet*, [1997] ECR I-3171.

⁵⁰ See Joined Cases 389 and 390/87, *Echternach and Moritz*, [1989] ECR 723 and *Commission v. Germany* (note 11 above), on the declaratory status of residence permits for EC nationals' family members.

⁵¹ The cross-reference to Articles 10 and 11 of Regulation 1612/68 in Article 9 of the proposed Directive has the effect that family members of long-term resident third-country nationals will retain rights as family members during a separation (see *Diatta* and *Surinder Singh*, note 20 above).

they meet the criteria under national law or EC law on long-term residents. According to the separate proposal on the latter, also part of the Amsterdam Treaty Project, they need not meet any additional criteria other than those applying to all other legally resident third-country nationals.

Next, Article 13(2) sets out the right to independent residence if a family member has no right to independent residence as a long-term resident under Article 13(1). This provision is largely relevant to ex-spouses after divorce, but can also apply to other family members such as children or parents of the former spouse. This provision is based on the Commission's proposed amendments to Regulation 1612/68, which are in turn loosely based on the provisions of Article 7(1) of Decision 1/80 of the EC–Turkey Association Council. Those proposed amendments would cover all third-country national family members of an EC national who has moved to another Member State; this proposed Directive would apply the same rule to all third-country national family members anywhere in the Community in any circumstances. There is no justification for applying lower minimum standards to family members depending on the nationality of their former spouse or which Member State they live in. Nor is there any justification for the indefinitely discretionary approach to this issue in the Commission's proposed Migration Convention.

In two important aspects, Article 13(2) improves upon the Commission's proposal to amend Regulation 1612/68 and Directive 68/360. Of course, identical improvements should be made to the Regulation and the Directive. First, a family member would retain rights to employment and residence after three years, rather than residence after three and employment after five. This is because it is objectionable to allow a person to remain in the country without the right to earn an income. Second, Article 13(2) allows any parent to stay, with no time limit applied, if his or her minor children are legally resident. This effectively implements the right to respect for family life pursuant to Article 8 ECHR, as interpreted in *Berrehab*.⁵²

⁵² *Berrehab v. Netherlands* (A 138 (1988) (Eur. Ct. Human Rights)).

⁵³ See Case C-3/90, *Bernini*, [1992] ECR I-1071 and *Meussen* (note 16 above).

Articles 13(3) and (4) essentially copy the Commission's corresponding proposals to amend Directive 68/360. However, in accordance with Article 8 ECHR, Article 13(3)(c) provides that there is no income or employment obligation necessary in order for a parent to continue residence with minor children, if those children cannot be removed from that Member State. Again, the legislation applied to EC nationals' family members should be improved in the same way. Finally, Article 13(5) provides that Member States shall consider granting independent residence status to family members if the marriage breaks up sooner. This is aimed in particular at situations in which a family member has been subject to domestic violence, or is pregnant, or ill, or where there is an illness in the family.

Article 14 is based on the evidence rule from the Starting Line proposal (again based on Directive 68/360). Article 15 requires equal treatment compared to Articles 1–9 of Regulation 1612/68 (equal access to employment, social advantages, housing and trade union participation), Article 12 of that Regulation (education of children) and Directive 77/486, addressing education of migrant EC workers' children. Member States have already adopted a Declaration disclosing their intent to apply this Directive to children of third-country nationals. It should be emphasized that education of other family members can be claimed as a 'social advantage'.⁵³ Article 15 begins, 'without prejudice to Article 8' solely in order to make it clear that this Article is not derogating from Member States' option to apply a six-month waiting period before family members of short-term residents can begin work.

Article 16 addresses expulsion and refusal of entry. The EC legislation on this issue, Directive 64/221, allows for expulsion or refusal of entry of EC nationals and their family members who provide grave threats to society, subject to detailed procedural and substantive rules. There is no convincing reason why family members allowed entry under this Directive should be subject to less stringent rules. The only derogation from this principle is a cross-reference to Article 7 of this proposal, which allows Member States to insist upon a 'support' requirement for some family members of short-term residents. This cross-reference is necessary because the support requirement is a derogation from the ban in Article 2(2) of

Directive 64/221 on refusing entry to 'service economic ends'. There may be cases in which the European Convention on Human Rights gives stronger protection against expulsion than the rules of Directive 64/221, so that even a person who has committed an extremely serious crime that threatens the social order of the host State has the right to stay because of the extent of his or her family links in the host State. Since this proposed Directive is a minimum standard and cannot in any event compel Member States to derogate from the ECHR, the better provisions of the ECHR will then apply.

Article 17 applies EC legislation on qualifications. This will not require the recognition of all qualifications gained in third states, because the EC legislation does not have

that effect. However, this will still be of use to third-country nationals, since many have either obtained qualifications in one or more Member States, or have experience in the Member States after gaining qualifications in a third country (which will also often bring them within the scope of EC rules).⁵⁴

f) Chapter V: Final provisions

This Chapter sets out rights concerning transparency, rights of the child, privacy, judicial protection, and an application date. The judicial protection clause is similar to provisions in the sex discrimination directives and data protection directive, and ensures that all rights in the directive can be enforced by access to courts with effective remedies to ensure their application.⁵⁵

⁵⁴ See Art. 1(a), Directive 89/48 (OJ 1989, L 19/16).

⁵⁵ See Article 6 of Directive 76/207 (OJ 1976, L 39/40), Art. 22 of Dir. 95/46 (OJ 1995, L 281/31), and interpretation of the former in Case 14/83, *Von Colson*, [1984] ECR 1891; Case 222/84, *Johnston*, [1986] ECR 1651; Case C-271/91, *Marshall II*, [1993] ECR I-4367; and Case C-185/97, *Coote*, [1998] ECR I-5199.

ON

the fundamental right to family reunion

The Council of the European Union,
Having regard to the Treaty establishing the European Community, and
in particular Article 63(3)(a) thereof,
Having regard to the proposal from the Commission,
Having regard to the Opinion of the European Parliament,

Whereas:

- 1 the right to family reunion is a fundamental human right;
- 2 Article 61 of the Treaty establishing the European Community requires the Community to establish an 'area of freedom, security and justice';
- 3 Article 63(3)(a) of the Treaty establishing the European Community confers competence upon the Community to adopt measures concerning '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', for nationals of third countries;
- 4 in accordance with the final provisions of Article 63 of the Treaty establishing the European Community, 'measures adopted by the Council pursuant to' Article 63(3)(a) 'shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements';
- 5 according to Article 6(2) of the Treaty on European Union, the European 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;
- 6 the preamble to the Treaty on European Union confirms Member States' attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers;
- 7 the European Court of Justice has additionally held that all international human rights instruments in which Member States have participated are sources of the fundamental rights that form part of the general principles of Community law;

whereas relevant instruments include the United Nations Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the United Nations Convention on the Rights of the Child, the Convention on Elimination of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination, the European Convention on the Legal Status of Migrant Workers, the European Convention on Establishment, and Conventions 97, 111 and 134 of the International Labour Organization;

- 8 the measures on family reunion adopted pursuant to Article 63(3)(a) of the Treaty establishing the European Community must be in accordance with the general principles of Community law, including the respect for fundamental rights as defined in Article 6(2) of the Treaty on European Union and the case law of the Court of Justice; whereas, in accordance with the preamble to the Treaty on European Union, they must also respect fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961;
- 9 in accordance with Articles 12 and 17 of the Treaty establishing the European Community, citizens of the European Union have a right to equal treatment; whereas at present, they receive unequal treatment as regards the right to family reunion depending on whether or not they have moved within the Community; whereas it is therefore necessary to guarantee such equal treatment;
- 10 for nationals of third countries who are family members of a Community national resident in a different Member State, the fundamental right to family reunion falls within the scope of Articles 12, 18, and 39 to 55 of the Treaty establishing the European Community;
- 11 for nationals of a Member State who are family members of a Community national resident in a different Member State, the fundamental right to family reunion falls within the scope of Articles 12, 18, and 39 to 55 of the Treaty establishing the European Community;
- 12 where all members of a family are nationals of the Member State in which they reside, the fundamental right to family reunion falls outside the scope of the Treaty establishing the European Community and is entirely a matter for national law;
- 13 the exercise of the fundamental right to family reunion for asylum applicants and recognized refugees is governed by separate provisions of national and Community law;
- 14 treaties concluded by the Community or by the Community and its Member States have primacy over secondary acts of the Community;
- 15 in accordance with Article 307 of the Treaty establishing the European Community, the rights and obligations arising from agreements concluded before the application of the Treaty to each Member State between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaty or measures adopted pursuant to it;
- 16 non-discrimination in social security for nationals of third countries and their family members residing in the Community must be ensured in accordance with Protocol 1 and Article 14 of the European Convention on Human Rights; whereas, in addition to the rights guaranteed by the treaties concluded by the Community and its Member States and non-Member States, legislation to secure this human

right fully should be adopted pursuant to Articles 42 and 308 of the Treaty establishing the European Community;

- 17 in order to ensure effective application of the human rights and non-discrimination principles of Community law, the Community must take as a basis equality between nationals of third countries and nationals of Member States; whereas it is therefore necessary to ensure that rules equivalent to Council Regulation 1612/68 shall apply to nationals of third countries resident in the Community;
- 18 third-country nationals who have entered the Community by exercise of their right to family reunion should be eligible to qualify for the rights conferred upon long-term residents of the Community by separate provisions of Community law, once adopted;

has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to ensure that the fundamental right to family reunion within the European Community is upheld effectively.

Article 2 Definitions

For the purposes of this Directive:

- 1 'cohabitee' means a person in a relationship akin to marriage;
- 2 'intended spouse' means a person who enters a Member State in order to marry a resident of that State within six months of entry; and
- 3 'third country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community, including a stateless person.

Article 3 Scope

- 1 This Directive shall apply to third-country national family members who are family members of any resident of the European Community, except for:
 - third-country national family members of third-country nationals who have applied for asylum or whose right to asylum has been recognized in accordance with Directive 2000/01;
 - third-country national family members of Community nationals resident in a different Member State;
 - third-country national family members of nationals of the Member States of the European Free Trade Area which are party to the European Economic Area Agreement, or of Switzerland after the entry into force of the Treaty on Free Movement of Persons between the European Community, its Member States and Switzerland.
- 2 This Directive shall not in any way limit additional rights granted to family members of third country nationals in treaties concluded by the Community, by the Community and its Member States, or by individual Member States, or, in accordance with Article 63 of the Treaty establishing the European Community, more favourable national provisions enacted or maintained by Member States.

Article 4 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Temporary residents

Article 5 Principle

Without prejudice to Chapter III, third country nationals shall be entitled to exercise a right to family reunion at the latest after they have been legally resident in a Member State for one year and have the right of residence in a Member State for at least one further year.

Article 6 Scope of reunion

- 1 Without prejudice to the rights contained in Chapter III, at least the following persons shall be admitted for the purpose of family reunion in accordance with Article 5:
 - the third country national's spouse, intended spouse or cohabitee and their descendants who are under the age of 21 years or are dependants.
- 2 For the purposes of applying paragraph 1, children shall include:
 - a) children who are considered part of the family unit, in accordance with customs of the state of prior residence; and
 - b) adopted children if:
 - a competent court has made an order transferring parental authority; or
 - if the children were adopted pursuant to a *de facto* adoption conforming to the laws of the state in which the adoption took place and verified by an affidavit.
- 3 Member States shall give favourable consideration to family reunion involving dependent relatives in the ascending line of the third-country national and his or her spouse or unmarried partner, provided that the conditions laid down in Article 7 are met.

Article 7 Conditions for reunion

- 1 To exercise the right of family reunion under Article 6(3) only and without prejudice to Chapter III, a third country national shall provide evidence that he or she will have adequate means to support his or her family when reunited.
- 2 The amount of means adequate to support the third country national and his or her family members shall in no case exceed the amount available to nationals of that Member State by way of social assistance for a family of equivalent size.

Article 8 Access to employment

Without prejudice to Chapter III, the family members of a third country national who has been authorized to join him or her shall be entitled to respond to any offer of employment or self-employment within that Member State no later than six months after admission to that Member State in the capacity of family reunion.

Children of third country national workers or self-employed persons who have completed a course of vocational training in the host Member State may respond to any offer of employment or engage in self-employment in the host Member State, irrespective of the length of time they have been resident in the host Member State, provided that one of their parents has been legally employed or self-employed in the host Member State for at least three years.

Chapter III Long-term residents and EC nationals' family members

Article 9 Scope

- 1 Member States shall ensure that rules equivalent to Articles 10 and 11 of Council Regulation 1612/68, with the exception of Article 10(3), and any subsequent amendments thereto, shall apply *mutatis mutandis* to a person whose status as a long-term resident has been recognized in accordance with the provisions of national or Community law.
- 2 In addition to the rights set out in paragraph 1, the family member of a long-term resident shall be entitled to engage in self-employed activities in the host Member State.
- 3 The rules referred to in paragraphs 1 and 2 applying to spouses shall apply equally to cohabitantes and intended spouses.

Article 10 Entry

- 1 The Member States shall grant to third-country national family members referred to in Article 9 the right to enter their territory merely on production of a document or documents referred to in Article 14 of this Directive.
- 2 No entry visa or equivalent document shall be required save in respect of third-country national family members who are not already resident within the territory of the Member States. Member States shall accord to such persons every facility for obtaining such visas without delay, and such visas shall be issued free of charge.

Article 11 Citizenship

This Title shall apply to all third-country national family members of all citizens of the European Union who are residing in the Member State of which they are nationals.

Chapter IV Status of family members

Article 12 Right of residence

- 1 Member States shall recognize the right of residence of family members pursuant to this Directive by issuing declaratory residence permits to the family members to be reunited. As proof of this right a document (hereinafter called a 'residence permit') shall be issued.

- 2 Where the right to family reunion has been exercised pursuant to the provisions of Chapter II, residence permits shall be valid for the remaining duration of the current residence authorization of the person with whom family members are being reunited.
- 3 Where the right to family reunion has been exercised pursuant to the provisions of Chapter III, family members' right to residence shall be dependent upon the principal upon whom they are dependent. The residence permit issued to them pursuant to paragraph 1 shall be valid for not less than five years and shall be automatically renewable and free of charge. In the event of occurrence of a risk foreseen in Regulation 1251/70 to the principal, Member States shall ensure that rules equivalent to that Regulation shall apply to such family members in order to guarantee their continued right of residence.

Article 13 Independent status

- 1 Family members within the scope of this Directive shall acquire the status of long-term resident in their own right, if they meet the conditions to obtain such status set out in national or Community law.
- 2 If family members within the scope of this Directive have not yet acquired the status of long-term resident in accordance with paragraph 1, they shall nonetheless be entitled to an independent right of residence and shall retain the right of employment or self-employment in their Member State of residence upon dissolution of a marriage, on condition that they have lived in that Member State legally for a period of three consecutive years or are the parent of a minor child who is legally resident in that Member State.
- 3 A residence permit shall be issued to persons within the scope of paragraph 2 as follows:
 - a) where such persons are not economically active, the right of residence is recognized provided that they can provide evidence that they have sufficient financial resources for themselves and their dependants in accordance with Article 7(2), and that they have health insurance covering all risks in the Member State in which they are living. Member States shall ensure that the provisions of Council Directive 90/364 on the assessment of sufficient resources, on the duration of residence permits and their renewal shall apply *mutatis mutandis* to the application of this indent;
 - b) the right of residence of family members pursuing economic activities is recognized on presentation of a contract of employment, a certificate of employment or a declaration of self-employment. Member States shall ensure that the provisions of Council Directive 68/360 shall apply *mutatis mutandis* to the application of this indent;
 - c) by way of derogation from indents (a) and (b), the right to residence of a parent of minor children who cannot be removed from the Member State of residence shall be recognized upon presentation of proof of this status.
- 4 Absences not exceeding six consecutive months and absences in connection with the completion of military service or for reasons of health, for maternity or study shall not constitute an interruption of the period of residence for the purpose of calculating the three-year period referred to in paragraph 2.

- 5 Member States shall consider favourably the grant of independent status to family members upon dissolution of a marriage before the periods referred to in paragraph 2, if there are sufficiently strong personal circumstances to justify the grant of such status.

Article 14 Proof of status

Recognition of the right to residence shall not require the production of anything other than the following:

- a) a valid passport;
- b) a document establishing the family relationship issued by a competent authority;
- c) in respect of Articles 7 and 13(2)(a), proof of adequate means of support;
- d) in respect of Articles 6(1), 6(2), 9, and 13(3)(a), evidence of dependency; and
- e) in respect of Articles 13(2) and 13(3)(c), proof of the relevant status.

Article 15 Social provisions

Without prejudice to Article 8, Member States shall ensure that rules equivalent to Directive 77/486 and Articles 1–9 and 12 of Regulation 1612/68, and any subsequent amendments thereto, shall apply *mutatis mutandis* where family reunion has been exercised pursuant to this Directive.

Article 16 Exception for public policy, public security and public health

- 1 Without prejudice to Article 7, Member States shall not refuse entry to or expel family members within the scope of this Directive save on grounds of public policy, public security or public health.
- 2 To give effect to the principle in paragraph 1, Member States shall ensure that rules equivalent to Directive 64/221, and any subsequent amendments thereto, shall apply *mutatis mutandis* to any decisions to refuse entry to or expel any family members within the scope of this Directive.

Article 17 Recognition of qualifications

Member States shall ensure that rules equivalent to the provisions of Community legislation on recognition of qualifications, and any subsequent amendments thereto, shall apply *mutatis mutandis* to all family members within the scope of this Directive.

Chapter V General and final provisions

Article 18 Rights of the child

In applying this Directive, Member States shall comply fully and without derogation with the United Nations Convention on the Rights of the Child.

Article 19 Judicial protection

Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 20 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission:
 - the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive;
 - other national legislative or regulatory measures or practices applicable in the field of family reunion of third-country nationals;
 - statistical data on family reunion of third-country nationals; and
 - general information on family reunion of third-country nationals.

Such information shall be forwarded annually to the Commission, which shall see that it is circulated to the General Secretariat of the Council and to the Member States. Decision 94/90 on the right of access to Commission documents shall apply.

- 4 The Commission shall submit a report every two years on family reunion of third-country nationals in the Member States. This report shall be based on the information provided by the Member States pursuant to paragraph 3 and other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective exercise of the right to family reunion, at the latest five years after adoption of this Directive.

Article 21

This Directive is addressed to the Member States.

long-term residents

1 The goals of the area of freedom, security and justice

The status of long-term resident non-citizens of a State (LTRs) is partly governed by international human rights treaties, in particular the European Convention on Human Rights (ECHR), the United Nations Convention on Migrant Workers (UNCMW – when it enters into force), the European Convention on Establishment, and Conventions of the International Labour Organization.

Article 6(2) of the EU Treaty provides that human rights set out in the ECHR and national constitutions form part of the general principles of Community law. In addition, the case law of the European Court of Justice makes clear that other international human rights treaties upon which Member States have participated also form part of the general principles of Community law. Therefore, to give effect to the Community's obligation to respect human rights, any legislation drawn up under the new Title IV of Part 3 of the EC Treaty must ensure that Member States protect fundamental human rights as set out in those human rights treaties.

The obligation to act in accordance with international human rights obligations as part of the general principles of Community law makes it essential for Community legislation on long-term residents to grant rights to individuals. This stems from the very nature of international human rights law. Legislation which only set out Member States' obligations

toward each other would fail to give effect to human rights principles and obligations, for there would be no way for individuals to invoke Community law to derive individual rights. Nor can Community legislation on long-term residents be merely advisory, for that would violate the principles of the recent Inter-Institutional Agreement on the quality of drafting of EC legislation.¹

In particular, Community law on long-term residents should take as a base a high standard of protection. If no minimum standard is set, or if a low minimum standard is set, there is a risk that there will be a 'race to the bottom' among Member States, meaning that they might compete to lower standards for long-term residence in order to deter applications for primary immigration (since they believe that such applications might be influenced by the rules which Member States apply to long-term residence).

In addition, since most third-country nationals in the Community form part of racial and/or religious minorities, it is essential to treat them equally with EC nationals as far as possible. Otherwise the discrimination and disadvantages that racial and religious minorities already face in the Community will only be exacerbated, and EC policies combatting discrimination and family reunion will not be fully effective. The Council and Commission have admitted in their Action Plan on developing the area of freedom, security and justice that legislation under the new Title IV must respect Articles 12 and 13 of the EC Treaty (non-discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation).²

¹ OJ 1999, C 73, principle 12.

² OJ 1999, C 19/1, points 6 and 32.

The Tampere European Council of October 1999 has now agreed the 'Tampere principles', concluding that long-term residents should receive treatment based on equality with EC nationals:

'The legal status of third country nationals should be approximated to that of Member States' nationals. 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; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence.'

These principles are welcome, but cannot be implemented without the adoption of Community legislation on the matter. The accompanying proposal for a directive therefore suggests implementing the Tampere principles in light of human rights obligations, the EC's anti-discrimination and social inclusion policies, and the effective development of the internal market. It complements five separate but related proposals on asylum, family reunion, visas/border controls, admission and irregular migrants.

2 Relevant human rights rules

The most important human rights rule applicable is Article 8 of the European Convention on Human Rights, requiring respect for private and family life. The European Court of Human Rights has consistently ruled that this Article can restrict expulsion of persons from a Council of Europe Member State. The relevant factors in the case law are, on the one hand, the extent of family, employment and cultural links with the host State, and on the other hand, the severity of the crime committed by a foreign national in the state of residence and the ability to exercise an effective family and private life in the state of that person's nationality.³ There are no explicit rules in the Convention governing the creation of LTR status or rights enjoyed by such status, although the Council of Europe is considering the adoption of a Recommendation on this

³ For a summary of the case law, see Groenendijk, Guild and Dogan, *Security of Residence and Long-Term Migrants: A Comparative Study of Law and Practice in European Countries* (Council of Europe, 1998).

issue. The proposed Community directive is not intended to detract from the possible Recommendation, which would apply to all Council of Europe Member States. Indeed, in our view the Recommendation should take into account the high standards which Community legislation on long-term residents should incorporate, particularly since many non-EU Council of Europe members are applicants to join the Community and/or cooperate with the Community closely on immigration and asylum policy.

In addition, Article 3 of the European Convention on Establishment sets out substantive and procedural rights which affect expulsion after specified periods of residence, and the Fourth and Seventh Protocol to the ECHR respectively ban collective expulsion of foreigners and grant them procedural rights on expulsion. Article 13 of the UN's International Covenant on Civil and Political Rights also sets out procedural rights governing expulsion. Many important rights for migrant workers are set out in ILO measures:

- Convention 97 (Article 6, equal treatment on remuneration, unions, accommodation, social security, employment taxes and legal proceedings; Article 8, expulsion);
- Convention 143 (Article 10, equal treatment in employment, occupations, social security, union and cultural rights; Article 13, family reunion; Article 14, access to all employment after two years);
- Recommendation 86 (Article 15, family reunion; Article 16, access to all employment of workers after five years, and access to all employment of family members; Article 18, expulsion); and
- Recommendation 151 (Article 2, equality of treatment; Article 6, access to all employment after two years; Article 7, assistance to adapt to host state; Article 9, social policy and migrant workers; Articles 13–18, family reunion; Articles 20–22, health; Articles 23–29, social services; Articles 30–34, expulsion).

The United Nations Convention on Migrant Workers, although not yet ratified by an EU Member State, contains detailed provisions on protection of fundamental rights of migrant workers (Part III), including detailed rules on expulsion (Article 22) and equal treatment in employment, union rights, social security, health, education and culture (Articles 27–29, 30 and 31). Part IV, applying to documented workers,

includes more specific rights than those set out in Part III and includes requirements to permit temporary absences (Article 38) and family reunion (Article 44), restrictions on the ability to treat a worker as an irregular migrant (Articles 49 and 51); and a right of access to employment after two or five years (Article 52).⁴

3 Current EU rules and their defects

EC free movement law protects many wide categories of EC nationals:

- employees (Regulation 1612/68 and Directive 68/360);⁵
- the self-employed (Directive 73/148);⁶
- students (Directive 93/96);⁷
- pensioners (Directive 90/365);⁸ and
- the economically self-sufficient (Directive 90/364).⁹

Such persons have the right to move and reside in other Member States and to carry out activities. The rights in the relevant legislation are bolstered by rights in the EC Treaty and by further secondary legislation on such matters as public order rules, social security, recognition of qualifications, and the right to stay upon retirement or disability. The Treaty articles, directives and regulations are directly effective,

⁴ On human rights law and migrant workers, see the detailed study by Cholewinski, *Migrant Workers in International Human Rights Law* (Oxford, 1997).

⁵ OJ 1968, L 257/2 and 13.

⁶ OJ 1973, L 173/14.

⁷ OJ 1993, L 317/59.

⁸ OJ 1990, L 180/28.

⁹ OJ 1990, L 180/26.

¹⁰ OJ 1994, L 1/1 and COM (1999) 229, 4 May 1999.

¹¹ See generally Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union', (1996) 33 CMLRev. 7 and now judgment in Case C-416/96, *El-Yassini*, 3 March 1999.

¹² OJ 1998, C 6.

¹³ Case C-43/93 *Vander Elst* [1994] ECR I-3803.

¹⁴ COM (1999) 3, 26 Feb. 1999.

¹⁵ See the Protocol on the Schengen acquis attached to the EU and EC Treaties, and the Council Decisions defining and allocating the Schengen *acquis* (OJ 1999 L 176).

¹⁶ See criticism in Guild and Niessen, *The Developing Immigration and Asylum Policies of the European Union* (Kluwer, 1996); Hedemann-Robinson, 'Third-Country Nationals, European Union Citizenship and Free Movement of Persons: A Time for Bridges rather than Divisions' (1996) 16 YEL 321 and Peers, 'Building Fortress Europe: the Development of EU Migration Law' (1998) 35 CMLRev. 1235.

with the effect that the issue of a residence permit by a Member State is declaratory, not constitutive.

These rights are not generally extended to third-country nationals, except in the European Economic Area (EEA) agreement with Norway, Iceland and Liechtenstein, and the recent treaty with Switzerland on Free Movement of Persons (not yet in force).¹⁰ The EC's treaty with Turkey gives rights to access to employment (and connected residence) of Turkish workers and their family members after they have been admitted, along with equal treatment in social security. The EC's treaties with Morocco, Tunisia and Algeria also grant the right to equal treatment in social security, and a limited right to extension of a residence permit.¹¹

EC social security law does apply to refugees and stateless persons, but not to other categories of third-country nationals. A Commission proposal to extend such treatment has not yet been agreed.¹² Article 49 (ex-59) of the EC Treaty gives the EC power to extend its rules on free movement of services to self-employed third-country nationals established in the European Union. It also confers directly effective rights upon EC companies to post their third-country national employees to another Member State as part of the provision of services.¹³ The Commission has in 1999 proposed two directives on this subject; one would utilize the power in Article 49 to grant rights to self-employed third-country nationals and the other would facilitate the exercise of companies' directly effective rights to post their employees.¹⁴ These proposals have not been adopted either. However, the Schengen Convention, which now forms part of EU and EC law,¹⁵ gives rights to third-country nationals to circulate freely throughout the territory of the Schengen states for periods of up to three months. Thus there has been a gradual move toward equalizing the rights of resident third-country nationals by comparison with EC nationals.

However, some 'third pillar' measures have led to a move away from this approach. A number of the measures adopted as part of the third pillar made it more difficult for third-country nationals to 'switch' from one category of migrant to another, and increased the employment preference which applies to EC nationals in other Member States.¹⁶ A Council

Resolution on long-term residents at least recognized that such a concept existed, but was not binding, provided for a lengthy and ambiguous wait for acquisition of LTR status, and did not specify clearly what rights would apply to LTRs.¹⁷ The Commission's 1997 proposal for a Convention on migration contained better rules on LTRs, but would still have allowed for a long wait before acquisition of status and did not provide much detail on the rights that would be acquired thereby.¹⁸

4 The alternative approach

The EC Treaty, as amended by the Amsterdam Treaty, now gives the EC competence to adopt measures on the conditions and procedures relating to residence of third-country nationals (Article 63(3)(a)) as well as free movement of third-country nationals to other Member States (Article 63(4)). These powers should be used as soon as possible to adopt legislation in line with the Tampere principles and the Community's human rights, non-discrimination, social inclusion and internal market obligations. This legislation will have to ensure equal treatment for long-term resident third-country nationals, including family reunion and free movement rights.¹⁹ The basic elements of such an approach are as follows:

- the EC needs to adopt binding legislation, not non-binding soft law, on the subject;
- the EC must provide for clear rules for early acquisition of LTR status;
- acquisition of LTR status and ensuing rights should be rights-based, not discretion-based; and
- LTR status must incorporate the principles of secure residence and a wide concept of equal treatment, covering family reunion and free movement to other Member States.

¹⁷ See Hedemann-Robinson and Peers (*ibid*).

¹⁸ OJ 1997, C 337.

¹⁹ Research has shown that free movement rights would not disrupt the employment markets in different Member States: see Muus, 'A Study on the Expected Effects of Free Movement for Legally Residing Workers from Third Countries within the European Community', in *Free Movement of non-EC workers within the European Community* (NCB, 1997).

²⁰ Chopin and Niessen, eds., *Proposals for Legislative Measures to combat racism and to promote equal rights in the European Union* (Commission for Racial Equality and Starting Line Group, 1998).

²¹ *Guarding Standards – Shaping the Agenda* (April 1999).

²² That draft is the second part of *Free Movement of non-EC workers within the European Community* (NCB, 1997).

5 Detail of the text

a) Sources

The proposal is based on the text of the 1998 Starting Line proposal, prepared by the Starting Line Group and the Commission for Racial Equality.²⁰ The recent detailed analysis of EC migration and asylum law after Amsterdam from the European Council on Refugees and Exiles, European Network Against Racism, and Migration Policy Group agreed with the principles of the Starting Line proposal.²¹ The proposal is also partly based on a proposed Regulation on free movement of third-country nationals, prepared by the Nederlands Centrum Buitenlanders.²²

b) Preamble

The preamble sets out a number of principles which governed the proposal. Recitals 2 and 3 point out the importance of equality with EC nationals as the central aspect of this proposal, as confirmed by the Tampere principles. Recital 4 also refers to the importance of the secure residence principle, and points out that the proposal will contribute to achieving social stability in the Member States. Recital 5 points out that the proposal will also contribute to EC policies on combatting discrimination and social exclusion, while recital 6 points out its importance for the internal market.

Recitals 7, 8, 11 and 12 refer to competence issues. The free movement provisions of this proposal have the legal base of Article 63(4) EC, but the family reunion provisions and the provisions on secure and equal status in the original host Member State have the legal base of Article 63(3)(a). Provisions on working conditions have the legal base of Article 137 and provisions on receipt of services are based on Article 49, which is *lex specialis* in comparison with Article 63(4). The proposal does not cover free movement of third-country national service providers or equal treatment in social security, since these matters are already covered by proposals of the Commission (see Part 3). Recitals 13 to 16 point out the relevant human rights rules governing this legislation.

It is implicit that the proposal does not affect national rules on the acquisition of citizenship, or lead to the independent acquisition of EU citizenship by third-country nationals. Issues of admission, other than for family members, are

also not affected; but they would be governed by the separate proposals in this project on asylum, borders and admission.

c) Chapter I: Principles

Article 1 sets out the purpose of the directive, which governs the interpretation of its terms. Article 2 sets out definitions. Two of these ('cohabitee' and 'intended spouse') are identical to the definitions in the separate proposal for a Directive on family reunion. The precise definition of 'cohabitee' will depend on what relationships are considered 'akin to marriage'. The definition of 'third-country national' is the same as that in most of the proposals in this project. Article 2 does not further define 'refugee', but the separate proposal on asylum in this project argues for the extension of free movement rights to recognized Geneva Convention refugees and persons who have a right to complementary (subsidiary) protection.

Article 3 makes clear that all third-country nationals are covered by the proposal. However, this does not preclude the provision of more advantageous rights in other provisions of EC or national law, in particular treaties agreed by the Community (see part 3). But some third-country nationals covered by those treaties, or other provisions of EC law, might in some circumstances need to rely upon this proposed directive to augment the rights which they already have. In no way could they be worse off as a result of this proposal. Article 4 is a general non-discrimination clause applying to all matters within the scope of this directive. It also appears in the other proposals in this project. It is without prejudice to measures 'already' adopted, because there would otherwise be a risk that future measures concerning discrimination law would contain rules on immigration and asylum law with the intent of amending this directive. This clause is also similar to Article 7 UNCMW.

d) Chapter II: Acquisition of rights

This Chapter is based upon the provisions of the Starting Line proposal, but has been restructured and amended. Either three years' economic activity or five years' non-economic activity should give rise to the status of long-term resident. The period of three years was

²³ Certain provisions of Chapter V are also relevant to employment rights.

chosen to ensure that no third-country national would be in a worse position than Turkish workers, while the five-year period reflects the consistent demand of non-governmental organizations for a five-year maximum wait for long-term resident status in the European Union. In this proposal, the five-year wait is a 'backup' to ensure that persons without economic activity, or with intermittent economic activity, may still qualify for LTR status. A three-year period also matches the Commission's proposal for protection of third-country national family members of EC nationals after divorce (see Part 3), which would apply independently of economic activity; there is no convincing reason why all other third-country nationals should be placed in a worse position than this group.

Article 6 lists the rights of long-term residents which are detailed in the later Chapters. Article 7 is a standstill clause. Article 7(1), which merges two provisions of the Starting Line proposal, is based on the provisions of EC-Turkey Association Council Decision 1/80 and the 1970 Protocol to the Ankara Agreement. Article 7(2) protects against the weakening of national law protection for long-term residents.

e) Chapter III: Employment

Chapter III is a restructured version of the Starting Line proposal, itself based upon Association Council Decision 1/80.²³ It is presumed that the case law on Decision 1/80 is applicable, *mutatis mutandis* (see Part 3). Article 8 sets out the right to employment within the same occupation after one year and any occupation within two years. These provisions improve upon the rules in Article 6 of Decision 1/80, because an extended period compelling a person to work for the same employer and/or in the same occupation delays full access to the labour market and restricts social mobility and full social inclusion for third-country nationals, many of whom are from racial and religious minorities. In addition, such an extended transition period leaves third-country nationals far more vulnerable to economic downturns, or to economic changes affecting one company or one occupation, and gives an unscrupulous employer the opportunity to mistreat third-country national employees. Finally, a two-year period for employment equality is set out in both the UN Convention on Migrant Workers and ILO Convention 143 (see Part 2).

After three years, third-country nationals will acquire long-term resident status and have entirely equal access to employment with EC nationals in the original Member State and in any other Member State. Only such unqualified equal treatment will give full effect to the Tampere principles.

f) Chapter IV: Family reunion

The text of this Chapter is identical to the text of Articles 9 and 10 of the separate proposal on family reunion forming part of this project, which also governs family reunion for short-term residents and third-country national family members of EC citizens in their 'own' Member State. It is also based on the Starting Line proposal. While the Tampere principles do not explicitly refer to family reunion, the principles are non-exhaustive. In practice, family reunion is fundamental to the day-to-day life of migrants and it would be unacceptable to exclude it from the Tampere principles of equal treatment.

Article 11 makes direct reference to the EC legislation on workers' right of family reunion (see Part 3), but makes three amendments as regards long-term residents. These changes reflect the proposed amendments to Regulation 1612/68 to delete the housing requirement (which does not apply to categories of migrants besides workers, and cannot be imposed after arrival);²⁴ to grant access to self-employed activities; and to allow entry of all persons whose relationship is considered equivalent to marriage by the host state. It adds the requirement to admit intended spouses, who will often be cohabitants in any event. We do not suggest that third-country nationals be given *more* rights on these issues than EC nationals; in our view, the relevant rules applying to EC nationals should also be amended, as the Commission has already proposed.

Article 12 is partly based upon Directive 68/360. In particular, Article 12(2) requires Member States to issue visas to family members living outside the Community, ensuring that Member State's powers over issuing visas cannot be used to prevent the exercise of the right to family reunion.

g) Chapter V: Status

Chapter V (Articles 13–18) sets out a series of rules which should apply to an LTR's status in the European Union. Each of them is based on equal treatment in comparison with EC nationals. Also, each clause adapts various provisions of the previous Starting Line proposal, except the clause on recognition of qualifications, which is based on a clause in the proposal made by the Nederlands Centrum Buitenlanders. This Chapter does not address free movement rights as such; that subject is more specifically regulated by Chapter VI.

Article 13 governs immigration law status. It gives effect to the equal 'right to residence' referred to in the Tampere principles. This clause is based on the relevant provisions of free movement law applying to EC nationals, in order to ensure equal treatment of LTRs compared to EC nationals. In particular, Articles 13(1) to 13(3) are similar to Articles 4(1) to 4(3) of Directive 68/360, omitting only the provisions which only affect family members. Such issues are addressed in the separate proposal on family reunion forming part of this project, although we would have no objection to more detailed provisions on the rights of LTRs' family members in the future LTR legislation of the Community. Article 13(2) would have the same effect as Article 4(2) of Directive 68/360, in that the residence permit would be declaratory only, not constitutive (see Part 3).

Article 13(4) is identical to Article 6(1) of Directive 68/360, and makes clear that the residence permit would have to be renewed automatically and applicable throughout the territory. Article 13(5) is identical to Article 7(1) of Directive 68/360, and protects LTRs from expulsion because of unemployment. The proposal does not transpose Article 7(2) of Directive 68/360, allowing for possible limitation due to unemployment upon first renewal of the permit, because third-country nationals, unlike EC nationals, have already spent some period in a Member State *before* qualifying for their first residence permit as an LTR. Therefore Article 7(2) must be omitted from this proposal to ensure equal treatment. Article 13(6) transposes Article 9(1) of Directive 68/360, ensuring equal treatment as regards fees for the residence permit. Finally, Article 13(7) applies to third-country nationals the same rules which apply to EC nationals who become ill or who retire in another Member State.

²⁴ Case 249/86, *Commission v. Germany* [1989] ECR 1263

The interruption rule in Article 14 is, at first sight, more favourable than the rules which apply to EC nationals, because Article 6(2) of Directive 68/360 only provides that EC nationals retain their rights in another Member State during departures of up to six months. However, in practice this rule does *not* discriminate in favour of long-term resident third-country nationals, but instead tries to equalize their status with that of EC nationals. This is because EC nationals can *never* lose the potential right to move and reside in other Member States, despite the wording of Directive 68/360. They are always able to move back to a host Member State, no matter how many years they have been away, under the relatively liberal rules which apply to the various categories of EC migrants. The only effect of Directive 68/360 is to make it more difficult to come back for a non-economic purpose after six months, because the returning non-economic migrant will have to satisfy the more stringent conditions of Directives 90/364, 90/365 or 93/96, instead of the right to stay automatically in accordance with Article 7 of Directive 68/360 and Regulation 1251/70. Rights to benefits might also be affected. But third-country nationals who leave a Member State do not have *any* right to return *at all* in any capacity to that Member State once a permitted period of interrupted residence has expired. Even if they were allowed back in, they might not be allowed to resume their LTR status until they met the conditions for acquisition of such status afresh. Therefore a long interruption period is essential, for it is a major step towards equality with EC nationals' indefinite right to return.

Article 15 also ensures equality for LTRs by reference to the relevant EC legislation, giving effect to Tampere principles of equality in employment and self-employment and general non-discrimination. According to Article 15(1), LTRs exercising economic activities as workers

or self-employed persons have the right to equal treatment as regards access to employment, social and tax advantages, working conditions, union rights and housing, as set out in Regulation 1612/68. It might be objected that the Regulation only applies to EC national *workers*, not the self-employed. However, the Court of Justice has held that the right to 'social advantages' and to equal treatment in housing also applies to the self-employed,²⁵ so it is appropriate to provide for the extension of that case law to third-country nationals.

According to Article 15(2), EC Treaty rules and the relevant secondary legislation apply to LTRs exercising other activities. The directive refers to the EC Treaty, as well as the legislation, because in some cases the EC Treaty confers rights directly upon EC nationals, even in the absence of secondary legislation.²⁶ Therefore a reference to the Treaty is necessary to ensure full equality with EC nationals.

Article 16 applies the EC rules on recognition of qualifications to LTRs. It should be emphasized that such rules do not require recognition of qualifications or experience gained in third countries, only in the Member States, although a person can rely on experience gained within the EC even if the initial qualifications were acquired outside it.²⁷ This Article provides a right ancillary to the right of equal access to employment and self-employment, which forms part of the Tampere principles.

Article 17 applies EC rules on expulsion to LTRs. This would ensure that the procedural and substantive minimum standards in the EC legislation apply equally to LTRs. This Article is essential to give effect to the equal right of residence for LTRs, which forms part of the Tampere principles. It should be noted that LTRs with Convention refugee or subsidiary protection status would still be able to rely on that status to resist expulsion from a Member State, with the result that they have higher protection than other third-country nationals.²⁸ This is not discrimination in favour of third-country nationals; rather, it reflects the Member States' and the Community's commitment to their human rights obligations. Conversely, the application of the 'cessation' clause of the Geneva Convention (Article 1C) would only affect the Convention refugee status of an LTR. The third-country national in question would still retain LTR status.

²⁵ See Case C-337/97, *Meussen*, judgment of 8 June 1999, not yet reported; Case 197/84 *Steinhauser* [1985] ECR 1819.

²⁶ For instance, see Case 186/87 *Cowan*, [1989] ECR 195.

²⁷ On this issue, see the Opinion of Advocate-General Jacobs of September 16, 1999 in Case C-238/98 *Hocsmán*, not yet reported.

²⁸ See the asylum directive proposed in this project for suggested detailed rules on the application of these principles in such cases.

Article 18 recognizes the social and cultural rights of third-country nationals. It addresses three different issues. First, Member States must assist LTRs to learn the language of and acquire skills relevant to the host Member State, in order to give effect to the equality principle. Second, Member States must assist LTRs to retain links with the country of origin. EC free movement law already recognizes these principles,²⁹ as does international human rights law (see Part 3). Third, Member States should facilitate EU citizens' understanding of third-country nationals.

h) Chapter VI: Free movement status

Articles 19 and 20 suggest detailed rules giving effect to LTRs' right to move freely to other Member States. They build upon the proposals of the Nederlands Centrum Buitenlanders on this subject.

Article 19 sets out several rules governing the right to move freely. First of all, Articles 19(1) and 19(2) make clear that an LTR can only be refused entry for the same reasons as EU citizens, and enjoys the same procedural rights in such cases. Article 19(3) is based on Articles 2(1) and 2(4) of Directive 68/360 and facilitates the basic free movement rights. Article 19(4) is based on Article 3(1) of Directive 68/360 and takes account of the declaratory nature of an LTR's residence permit. If a Member State has been tardy in granting or renewing an LTR residence permit, the LTR can still exercise his or her right to free movement by producing to the second Member State other evidence that he or she has acquired LTR status. Article 19(5) is based on Article 3(2) of Directive 68/360 and requires Member States to abolish any visa requirement for LTRs who exercise their rights to free movement. This would be of great practical significance, particularly in facilitating short-term movement.³⁰ Finally, Article 19(6) is identical to Article 5 of Directive 68/360. It would give practical effect to the right to employment in another Member State.

Article 20 focusses on transitional issues. It is necessary to ensure that an LTR does not lose

LTR status simply by virtue of his or her free movement, just as an EU citizen cannot lose the citizenship of his or her Member State simply because of residence in another Member State. On the other hand, it would not be appropriate to oblige a Member State to which an LTR moves ('the second Member State') to give immediate recognition of that status. Article 20(1) therefore establishes that an LTR retains status in the original Member State of residence ('the first Member State') for a period of three years after a move to the second Member State; after that point, the second Member State must recognize and secure that status.

Article 20 does not address possible moves to *third* or *fourth* Member States explicitly, but it is implicit that it would also apply in such cases. For example, if a third-country national gains LTR status in the UK, transfers that status to France after three years' residence, and then wishes to move to Germany, France is now the 'first Member State' and Germany is the 'second Member State' for the purposes of Article 20. If the same third-country national wished to move to Germany after only two years' residence in France, the UK would still be the 'first Member State' and Germany would become the 'second Member State' for these purposes.

Article 20(2) regulates the transitional period in more detail. The first four sub-paragraphs address the status of the LTR during the move, while the following four address his or her family members. Article 20(2)(a) requires the second Member State to issue a transitional residence permit and confers the right to family reunion, most rights concerning status, and several aspects of the right of residence to the LTR while in the second Member State. Article 20(2)(b) addresses the particular situation of LTRs receiving services, and is based on Article 4(2) of Directive 73/148, which governs EU citizens in such circumstances. Article 20(2)(c) is an exhaustive list of the grounds upon which the second Member State can require the LTR to leave during the transitional period. The first indent ensures that the second Member State does not have the obligation to allow indefinite residence of the LTR as a benefit claimant if the LTR cannot sustain economic activity during the transitional period, without prejudice to the LTR's separate right to undertake non-economic activities under the rules applicable to EU citizens. The second indent is based on Article 6(2) of Directive 68/360.

²⁹ See Directive 77/486 (OJ 1977, L 199/32).

³⁰ Some provisions of the separate proposal for Directive 2000/04 in the Amsterdam Treaty Project, on borders and visas, would also facilitate short-term visa-free movement of third-country nationals.

Article 20(2)(d) requires the first Member State to readmit the LTR in cases of public order expulsion. This means that the second Member State cannot simply expel the LTR to his or her state of origin; furthermore, the first Member State must also apply Directive 64/221 separately before expelling the LTR from the EU altogether. In turn, a third Member State would have to apply Directive 64/221 separately before refusing entry to the LTR. This is no different than the rules which would apply to an EU citizen expelled on public order grounds, except that an EU citizen would always have the higher protection of the right to reside in his or her state of nationality.

It should be emphasized that Article 20(2)(d) is not an exhaustive list of the circumstances in which the first Member State must readmit; it is implicit from the retention of LTR status in the first Member State that the third-country national is free to return there and resume LTR rights in that State at any time before the end of the transitional period, even if the other provisions of Article 20(2)(c) justify expulsion of the LTR from the second Member State.

It is important to ensure that family members of LTRs who have not yet attained LTR status in their own name are not prejudiced by an LTR's decision to move to another Member State. First, Article 20(2)(e) protects the separate acquisition of LTR status by the family member of an LTR who has not already attained that status. Time spent in either the first or second Member State during the transitional period will count toward acquisition of such status in the first Member State. Once such status is attained, it can be transferred to the second Member State pursuant to the other provisions of Article 20. Second, Article 20(2)(f) makes clear that

family members can retain their status whether or not they move with the LTR immediately. Third, Article 20(2)(g) makes clear that family members can retain a right to acquire *independent* residence status, which might in some cases be different from LTR status, via residence in either the first or second Member State.³¹ Fourth, Article 20(2)(h) governs jurisdiction to determine which Member State is responsible for determining whether a family member is entitled to independent status.

i) Chapter VII: General and final provisions

Article 21 is based on the general clauses on judicial protection in EC sex discrimination law. The Court of Justice jurisprudence on such clauses indicates that they confer important directly effective rights to access to courts and to a effective remedy against breaches of the Directive.³² Also, some of the cross-references in this Directive to EC legislation necessarily entail a cross-reference to procedural protection of individuals in such cases.³³ It is important that the Directive contain such a general clause because of its wide scope, which might mean that possible breaches of it are litigated in a wide number of situations. However, we would not object to a decision to include some specific clauses on remedies in addition to such a general clause in future EC legislation.³⁴ It is important to ensure that LTRs have access to effective remedies, for otherwise there will be no way of ensuring that the Tampere principles of equal treatment can be upheld in practice.

Articles 22 and 23 are standard final provisions in Directives.

³¹ For instance, independent status might be gained before the acquisition of LTR status, and would not carry with it a right to independent free movement throughout the EU. The separate proposal on family reunion suggests detailed rules for minimum standards which would apply to the acquisition of independent status in the EU.

³² See Article 6 of Directive 76/207 (OJ 1976, L 39/40), Art. 22 of Dir. 95/46 (OJ 1995, L 281/31), and interpretation of the former in Case 14/83, *Von Colson*, [1984] ECR 1891; Case 222/84, *Johnston*, [1986] ECR 1651; Case C-271/91, *Marshall II*, [1993] ECR I-4367; and Case C-185/97, *Coote*, [1998] ECR I-5199.

³³ For instance, the cross-references to Directive 64/221 regarding expulsion or refusal of entry, and to the qualifications directives.

³⁴ For example, the time period for the issue of an LTR residence permit could be spelled out explicitly (see Article 5(1), Directive 64/221).

ON

safeguarding the rights of long-term residents of the European Union

The Council of the European Union,

Having regard to the Treaty establishing the European Community, and
in particular Articles 49(2), 63(3)(a), 63(4) and 137(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Whereas:

- 1 Article 61 of the Treaty establishing the European Community requires the Community to establish an 'area of freedom, security and justice' which shall include, according to Article 61(b), measures 'in the fields of asylum, immigration and safeguarding the rights of' third-country nationals;
- 2 As confirmed by the Tampere European Council, to ensure that the rights of third-country nationals are fully safeguarded, including the effective application of the human rights and non-discrimination principles of Community law, the Community must take as a basis equality between third-country nationals and nationals of Member States;
- 3 It is therefore necessary to ensure that rules equivalent to those in the Treaty establishing the European Community and measures adopted pursuant to it apply equally to long-term resident third-country nationals;
- 4 Secure residence and equal treatment will enhance the status of third-country nationals in the European Union and hence social stability in each Member State;
- 5 A large number of third-country nationals resident in the European Union form part of racial, ethnic and religious minorities and face forms of discrimination and/or social exclusion in their host State; whereas guaranteeing their security and equality will also contribute to Community policies combatting discrimination and social exclusion;
- 6 Extending full free movement rights to long-term residents of the European Union will greatly assist the effective operation of the internal market;
- 7 Article 63(3)(a) of the Treaty establishing the European Community confers competence upon the Community to adopt measures concerning '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', for third-country nationals;

- 8 Article 63(4) of the Treaty establishing the European Community confers competence upon the Community to adopt 'measures defining the rights and conditions under which' third-country nationals 'who are legally resident in a Member State may reside in other Member States';
- 9 In accordance with the final provisions of Article 63 of the Treaty establishing the European Community, 'measures adopted by the Council pursuant to' Articles 63(3)(a) and 63(4) 'shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements';
- 10 Non-discrimination in social security for third-country nationals and their family members residing in the Community must be ensured in accordance with Protocol 1 and Article 14 of the European Convention on Human Rights; whereas, in addition to the rights guaranteed by the treaties concluded by the Community and its Member States and non-Member States, legislation to secure this human right fully should be adopted pursuant to Articles 42 and 308 of the Treaty establishing the European Community;
- 11 The right of resident third-country nationals to provide services in other Member States is the subject of a separate proposal from the Commission; whereas it is necessary to secure a corresponding right to receive services, pursuant to the competence conferred upon the Community by Article 49(2) of the Treaty;
- 12 The Community's competence to lay down rules regarding the working conditions of third-country nationals is derived from Article 137(2) of the Treaty;
- 13 According to Article 6(2) of the Treaty on European Union, the European 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;
- 14 The preamble to the Treaty on European Union confirms Member States' attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers;
- 15 The European Court of Justice has additionally held that all international human rights instruments in which Member States have participated are sources of the fundamental rights that form part of the general principles of Community law; whereas relevant instruments include the United Nations Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the United Nations Convention on the Rights of the Child, the Convention on Elimination of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination, the European Convention on the Legal Status of Migrant Workers, the European Convention on Establishment, and Conventions 97, 111 and 143 of the International Labour Organization;
- 16 The right to family reunion is a fundamental human right; whereas the measures on family reunion adopted pursuant to Article 63(3)(a) of the Treaty establishing the European Community must be in accordance with the general principles of Community law, including the respect for fundamental rights as defined in Article 6(2) of the Treaty on European Union and the case law of the Court of Justice;

whereas, in accordance with the preamble to the Treaty on European Union, they must also respect fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961;

- 17 Treaties concluded by the Community or by the Community and its Member States have primacy over secondary acts of the Community;
- 18 In accordance with Article 307 of the Treaty establishing the European Community, the rights and obligations arising from agreements concluded before the application of the Treaty to each Member State between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaty or measures adopted pursuant to it;
- 19 This Directive does not govern the rules applicable to the initial entry of third-country nationals into the Community, other than family members of long-term resident third-country nationals;

has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to safeguard the rights of long-term residents of the European Community who are nationals of third countries.

Article 2 Definitions

Within the scope of this Directive:

- 1 'cohabitee' means a person in a relationship akin to marriage;
- 2 'established' and 'establishment' have the same meaning and their interpretation shall be consistent with that accorded to Article 43 of the Treaty;
- 3 'intended spouse' means a person who enters a Member State in order to marry a resident of that State within six months of entry;
- 4 'self-employed' and 'self-employment' have the same meaning as 'established' and 'establishment'; and
- 5 'third country national' means any person other than a citizen of the European Union, including stateless persons, refugees and persons whose nationality is disputed.

Article 3 Scope

- 1 This Directive shall apply to any third-country national resident in the European Community.
- 2 This Directive shall not in any way limit additional rights granted to third country nationals or their family members accorded by other provisions of Community law, treaties concluded by the Community, by the Community and its Member States, or by individual Member States, or, in accordance with Article 63 of the Treaty establishing the European Community, more favourable national provisions enacted or maintained by Member States.

- 3 In applying this Directive, Member States shall comply fully and without derogation with the United Nations Convention on the Rights of the Child.

Article 4 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Acquisition of long-term resident status

Article 5 Conditions for acquisition

- 1 A third-country national shall acquire the status of 'long-term resident of the European Union' after:
 - three years' legal employment in a Member State; or
 - three years' exercise of a duly registered self-employed activity in one Member State; or
 - five years of habitual residence in a Member State.
- 2 For the purposes of paragraph 1 and Article 8, annual holidays and absences for reasons of maternity or an accident at work or short periods of sickness shall be treated as periods of legal employment. Periods of involuntary unemployment duly certified by the relevant authorities and long absences on account of sickness shall not be treated as periods of legal employment, but shall not affect rights acquired as a result of the preceding period of employment.

Article 6 Rights of long-term residents

- 1 A long-term resident of the European Union has the right to family reunion in accordance with the provisions of Chapter IV.
- 2 A long-term resident of the European Union has the right, in accordance with the provisions of Chapter V, to security of status and equality with Union citizens.
- 3 A long-term resident of the European Union has the rights, in accordance with the provisions of Chapters V and VI, to free access to any paid employment or self-employment, to receive services, to study, to reside after retirement and to reside for other purposes in any Member State.

Article 7 Standstill

- 1 Member States shall not introduce new restrictions on the conditions of access to employment, freedom of establishment or the freedom to provide services applicable to third-country nationals and members of their families legally resident and employed in their territory or duly registered as exercising a self-employed activity in a Member State.
- 2 Member States shall not introduce new restrictions on the acquisition and loss by third-country nationals of the status of long-term resident, permanent resident, or other forms of secure residence status applicable under national law.

Chapter III Prior employment rights

Article 8 Access to employment

Without prejudice to other provisions of Community law and subject to Chapter IV on free access to employment for members of his or her family, a third-country national worker duly registered as belonging to the labour market of a Member State shall be entitled:

- after one year's legal employment, to renewal of his or her permit to work and reside on the territory of that Member State and, subject to the priority to be given to workers of the Member States of the Community, to respond to another offer of employment, with an employer of his or her choice, made under normal conditions and registered with the employment service of that state, for the same occupation; and
- after two years' legal employment, shall enjoy free access to any paid employment of his or her choice in that Member State.

Article 9 Vacancies

Without prejudice to Article 8, the employment services of the Member States shall not discriminate on the basis of nationality in their endeavour to fill vacant positions which they have registered between own nationals, citizens of the Union and third-country national workers who are registered as unemployed and legally resident in the territory of the Member States.

Article 10 Non-discrimination in employment

- 1 The Member States of the Community shall, as regards remuneration and other conditions of work, including dismissal, grant third-country national workers duly registered as belonging to their labour market treatment involving no discrimination on the basis of nationality between them and Community workers.
- 2 Subject to the application of Articles 8 and 9, the third-country national workers referred to in paragraph 1 and members of their families shall be entitled, on the same footing as Community workers, to assistance from the employment services in their search for employment.

Chapter IV Family reunion

Article 11 Scope

- 1 Member States shall ensure that rules equivalent to Articles 10 and 11 of Council Regulation 1612/68, with the exception of Article 10(3), and any subsequent amendments thereto, shall apply *mutatis mutandis* to long-term residents of the European Union.
- 2 In addition to the rights set out in paragraph 1, the family member of a long-term resident of the European Union shall be entitled to engage in self-employed activities in the host Member State.
- 3 The rules referred to in paragraphs 1 and 2 applying to spouses shall apply equally to cohabitantes and intended spouses.

Article 12 Entry

- 1 The Member States shall grant to third-country national family members referred to in Article 11 the right to enter their territory merely on production of a valid passport and a document establishing the family relationship issued by a competent authority.
- 2 No entry visa or equivalent document shall be required save in respect of third-country national family members who are not already resident within the territory of the Member States. Member States shall accord to such persons every facility for obtaining such visas without delay, and such visas shall be issued free of charge.

Chapter V Status

Article 13 Right of residence

- 1 Long-term residents of the European Union have the right of residence in the Member State in which they acquired that right, upon condition that they produce the documents listed in paragraph 3.
- 2 As proof of the right of residence, a declaratory document entitled 'Residence Permit for a Long-Term Resident of the European Union' shall be issued. This document must include a statement that it has been issued pursuant to the measures taken by the Member States for the implementation of the present Directive. The text of such a statement is given in the Annex to this Directive. [Not reproduced].
- 3 For the issue of a 'Residence Permit for a Long-Term Resident of the European Union', Member States may require only the production of the following documents:
 - a) a valid passport; and
 - b) proof that the applicant has qualified as a long-term resident pursuant to Article 5 of this Directive.
- 4 The residence permit:
 - a) must be valid throughout the territory of the Member State which issued it; and
 - b) must be valid for at least five years from the date of issue and be automatically renewable.
- 5 A valid residence permit may not be withdrawn from a long-term resident solely on the grounds that he or she is no longer in employment, either because he or she is temporarily incapable of work as a result of illness or accident, or because he or she is involuntarily unemployed, this being duly confirmed by the competent employment office.
- 6 The residence document referred to in paragraph 2 shall be issued and renewed on payment of an amount not exceeding the dues and taxes charged for the issue of identity cards to nationals. Member States shall take the necessary steps to simplify as much as possible the formalities and procedure for obtaining the residence document.
- 7 In the event of occurrence of a risk foreseen in Regulation 1251/70 to a long-term resident, Member States shall ensure that rules equivalent to that Regulation shall apply to that long-term resident.

Article 14 Interruption

A long-term resident and members of his or her family resident with him or her in accordance with Chapter IV of this Directive shall retain their status notwithstanding any absence from the territory of the Union which does not exceed three consecutive years.

Article 15 Social provisions

- 1 Member States shall ensure that rules equivalent to Articles 1–9 of Regulation 1612/68, and any subsequent amendments thereto, shall apply *mutatis mutandis* to long-term residents of the European Union exercising their rights to employment or self-employment.
- 2 Member States shall ensure that that rules equivalent to the relevant provisions of the Treaty establishing the European Community and Directives 90/364, 90/365 and 93/96 shall apply *mutatis mutandis* to long-term residents of the European Union exercising their rights to receive services, to study, to reside after retirement and to reside for other purposes in any Member State.

Article 16 Recognition of qualifications

Member States shall ensure that rules equivalent to the provisions of Community legislation on recognition of qualifications, and any subsequent amendments thereto, shall apply *mutatis mutandis* to all long-term residents within the scope of this Directive.

Article 17 Protection from expulsion

- 1 Member States shall not expel long-term residents from their territories save on grounds of public policy, public security or public health.
- 2 To give effect to the principle in paragraph 1, Member States shall ensure that rules equivalent to Directive 64/221, and any subsequent amendments thereto, shall apply *mutatis mutandis* to any decisions to expel long-term residents.
- 3 Paragraphs 1 and 2 are without prejudice to guarantees of *non-refoulement* pursuant to the Geneva Convention on the Status of Refugees, the European Convention on Human Rights, the United Nations Convention Against Torture or other protection guaranteed pursuant to national or Community law.

Article 18 Social and cultural rights

- 1 Member States shall cooperate, in accordance with their domestic situations and their legal systems, in appropriate schemes to promote the social and cultural advancement of third-country nationals within the scope of this Directive and their family members, in particular literacy campaigns and courses in the language of the host country, and access to vocational training.
- 2 Member States shall provide encouragement and support for the maintenance of cultural and linguistic links to maintain links with the country of origin of third-country nationals.
- 3 With a view to strengthening relations between different national, cultural and ethnic groups, Member States shall encourage and support projects of cultural

diversity, including cross-cultural exchange and education for citizens of the Union on the cultures of third-country nationals resident in significant numbers in the European Union.

Chapter VI Free movement status

Article 19 Entry into another Member State

- 1 Member States shall not refuse entry to a long-term resident and his or her family members save on grounds of public policy, public security or public health.
- 2 To give effect to the principle in paragraph 1, Member States shall ensure that rules equivalent to Directive 64/221, and any subsequent amendments thereto, shall apply *mutatis mutandis* to any decisions to refuse entry to a long-term resident and his or her family members who wish to move to another Member State in accordance with the provisions of this Directive.
- 3 Member States shall grant long-term residents the right to leave their territory in order to take up activities in the territory of another Member State in accordance with this Directive. Members of the family of the long-term resident, as defined in Chapter IV, shall enjoy the same right. Member States shall not demand from long-term residents or their family members any exit visa or equivalent document.
- 4 Member States shall allow long-term residents to enter and reside in their territory simply on production of a valid passport and either the residence permit referred to in Article 13(2) or the other proof referred to in Article 13(3)(b).
- 5 No entry visa or equivalent document may be demanded save from members of the family of the long-term resident who have not obtained the status of long-term resident. Member States shall accord to such persons every facility for obtaining any necessary visas.
- 6 Completion of the formalities for obtaining a residence permit shall not hinder the immediate beginning of employment under a contract concluded by the applicants.

Article 20 Transfer of long-term resident status

- 1 Long-term residents who have moved to another Member State (hereinafter the 'second Member State') shall retain status as a long-term resident in the first Member State in which that status was recognized (hereinafter the 'first Member State') for a period of three years after moving to the second Member State in accordance with the provisions of this Directive. After expiry of that three-year period, the second Member State shall recognize the status of the long-term resident and his or her family members and shall accord to them the rights set out in this Directive and in other relevant provisions of Community law.
- 2 During that three-year period:
 - a) the second Member State shall issue a residence permit to the long-term resident, valid for three years. The provisions of Chapter IV and Articles 13(3), 13(4)(a), 13(6) and 15–18 shall apply;
 - b) by way of derogation from sub-paragraph (a), the right of residence for persons receiving services shall be of equal duration with the period during

which the services are received. Where such period exceeds three months, the Member State in the territory in which the services are performed shall issue a residence permit as proof of that right. Where the period does not exceed three months, a valid passport shall be sufficient to cover his or her stay. The Member State may, however, require the person concerned to report his or her presence on the territory;

- c) the right to residence may be withdrawn by the second Member State if:
 - the long-term resident is unemployed, or (if self-employed) inactive for more than three months and is not entitled to unemployment benefits or exercising the right to study, receive services, retire or reside for other purposes in that State; or
 - is absent from that Member State for more than six consecutive months, other than for reason of military service; or
 - there are grounds to expel the long-term resident for public policy, public security or public health reasons, pursuant to Article 17.
- d) the first Member State shall readmit a long-term resident whose expulsion is justified from the second Member State pursuant to Article 17;
- e) periods of employment or self-employment completed in either the first or the second Member State by family members of the long-term resident who do not themselves enjoy the status of long-term resident shall be added to prior periods of employment or self-employment concluded by such family members in the first Member State, for the purpose of attaining the status of long-term resident in the first Member State;
- f) the family members of the long-term resident with rights pursuant to this Directive and other provisions of national or Community law may either exercise such rights in the second Member State or remain in the first Member State, where they shall retain such rights.
- g) periods of residence completed in either the first or the second Member State by family members of the long-term resident who do not themselves enjoy the status of long-term resident shall be added to prior periods of residence concluded by such family members in the first Member State, for the purpose of attaining the right to the status of independent resident pursuant to the relevant provisions of national or Community law; and
- h) in the event of dissolution of a marriage between the long-term resident and his or her spouse, the Member State in which a family member is resident shall have responsibility for determining whether the family member is nevertheless entitled to independent residence status pursuant to the relevant provisions of national or Community law.

TITLE VII General and final provisions

Article 21 Judicial protection

Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, possibly after recourse to other competent authorities.

Article 22 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission:
 - the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive;
 - other national legislative or regulatory measures or practices applicable in the field of long-term resident third-country nationals;
 - statistical data on the status of third-country nationals; and
 - general information on the status of third-country nationals.

Such information shall be forwarded every two years to the Commission, which shall see that it is circulated to the General Secretariat of the Council, to the Member States and (where it relates to refugees) to the United Nations High Commissioner for Refugees. Decision 94/90 on the right of access to Commission documents shall apply.

- 4 The Commission shall submit a report every two years on the status of long-term residents in the Member States. This report shall be based on the information provided by the Member States pursuant to paragraph 3 and information made available to the Commission concerning the application of other Council measures adopted pursuant to Articles 49, 62, 63 and 137 of the Treaty establishing the European Community.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission with a view to further strengthening the effective safeguarding of the rights of long-term residents, at the latest five years after adoption of this Directive.

Article 23

This Directive is addressed to the Member States.

EXPLANATORY MEMORANDUM

ILPA/MPG PROPOSED DIRECTIVE ON

visas and border controls

1 The goals of the area of freedom, security and justice

Article 14 EC (formerly Article 7a EC, formerly Article 8a EEC) requires the Community to adopt measures to establish the internal market by the end of 1992. It also specifies that 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'. This is a central obligation of the Community, but free movement of persons was not achieved by the end of 1992. Indeed, it had not been achieved by the end of 1999, although now the new Title IV of Part 3 of the EC Treaty gives the Community a new deadline of 1 May 2004.

Although for most Member States, the goals of abolishing internal frontiers have been met by implementing the Schengen Convention of 1990, this Convention is flawed. It allows Member States great latitude not to abolish border controls at all, with the result that one Member State has never abolished them and two reimposed them in January 2000. It attaches a number of conditions to free movement of persons within the Schengen states. Finally, it provides for establishment of the Schengen Information System (SIS), a system which is highly problematic for human rights and civil liberties.

The Community should take the opportunity when implementing the new 'Area of Freedom,

Security and Justice' to address these problems by adopting fresh legislation replacing the Schengen measures in these areas with rules that:

- a) give greater effect to the principle of free movement of persons;
- b) exercise control of external borders only to the extent necessary; and
- c) reform the SIS to balance public security with individual rights.

2 Relevant human rights rules

Article 8 of the European Convention on Human Rights (ECHR) requires Member States to respect the private and family life of all persons. The creation of the SIS, listing persons to be banned from entering the Community, or to be removed if they are already resident, affects private life because compilation of such information inevitably affects personal privacy, and affects family life because persons will be removed from or prevented from meeting or joining their family members as a result of its operation.

3 Existing EU rules and their defects

Due to disagreements between Member States, the EU has adopted little in the field of internal and external border controls and visas.¹ In 1995, the Commission proposed three directives that would have given effect to free movement rights.² One would have abolished internal border controls; another would have given rights to freedom to travel to third-country nationals who were resident in or visiting the Community; and the third would

¹ For an overview and analysis of developments in this area, see Chapter 4 of Peers, *EU Justice and Home Affairs Law* (Longman, 2000).

² Respectively COM (95) 347, 348 and 346, 12 July 1995 (OJ 1995: C 289/16, C 306/5 and C 307/18).

have made consequential amendments to two existing directives. The proposals were amended in 1997, but were never adopted.³

A listing of third states whose nationals require visas to cross the EU's external borders was agreed in 1995,⁴ but then annulled because the Council had failed to fully consult the European Parliament (EP) on the proposal.⁵ It was adopted afresh in 1999.⁶ This measure shows that the Council was intent on harmonizing national law on this matter without considering from first principles why visa obligations should be imposed upon a large number of third states. The EC also adopted a Regulation on a standard visa format in 1995.⁷

Within the 'third pillar', which governed many aspects of this subject until the entry into force of the Amsterdam Treaty, the Commission proposed an external borders Convention in late 1993, amending a text almost agreed by the Member States in 1991, but this was never agreed either.⁸ The Council did agree a Joint Action on airport transit visas in 1996,⁹ and a Joint Action harmonizing residence permits in 1997.¹⁰ However, it failed to agree a proposed Joint Action on a visa sticker for persons coming from third states which are not recognized by some or all Member States, and a proposed Joint Action updating the existing Joint Action on airport transit visas.¹¹

³ COM (97) 102, 20 March 1997 (OJ 1997 C 140/21).

⁴ Reg. 2317/95 (OJ 1995 L 234/1).

⁵ Case C-392/95 *EP v. Council* [1997] ECR I-3213.

⁶ Reg. 574/1999 (OJ 1999 L 72/2).

⁷ Reg. 1683/95 (OJ 1995 L 164/1).

⁸ COM (93) 684, 20 December 1993 (OJ 1994 C 11/15).

⁹ OJ 1996 L 63/8, upheld by the Court of Justice in Case C-170/96 *Commission v. Council* [1998] ECR I-2763.

¹⁰ OJ 1997 L 7/1.

¹¹ Council documents 12225/98 and 10224/1/98.

¹² Council documents 10865/99, 10867/99 and 12973/99.

¹³ On this process, see Peers, 'Caveat Emptor? Integrating the Schengen acquis into the European Union Legal Order', (1999) 2 CYELS (forthcoming) and other literature cited therein.

¹⁴ See particularly the recent analysis of the SIS by Justice and also Mathiesen, *On Globalization and Control: Towards an Integrated Surveillance System in the EU* (Statewatch, 1999).

¹⁵ See the argument in Peers, n 13 above.

¹⁶ See the analysis by Justice, n 14 above.

¹⁷ This view has now been challenged in the EC courts: see Cases T-349/99 *Miskovic v. Council* and T-350/99 *Karic and others v. Council* (both pending).

¹⁸ For a critique of Schengen visa and borders rules, see *Frontier Law: Why Schengen Isn't Working for Europe's Third-Country Nationals* (ILPA and JCWI, 1995).

Furthermore, the Commission and Council have been slow to use their new powers under the Amsterdam Treaty. The Council did not act to adopt proposed Regulations on visa stickers, airport transit visas and the Common Consular Instructions at an early date, and the Commission waited until early 2000 to propose a Regulation completing the list of countries whose nationals do and do not need a visa to cross the external borders of the Community.¹²

The 'Schengen Protocol' attached to the EC and EU treaties by the Amsterdam Treaty integrates the 'Schengen acquis' (the existing Schengen Convention and measures implementing it) into the EC and EU legal orders. All of the measures relating to visas, external borders and internal borders were 'assigned' to clauses of the EC Treaty which give the Community power to adopt such measures.¹³ However, due to disagreement between the Member States, the Schengen measures relating to the SIS were all allocated by default to the 'third pillar' (now addressing only policing and criminal law), even though the chief function of the SIS in practice is immigration control.¹⁴ There is a strong argument that to the extent that it concerns immigration control, the SIS falls within EC competence.¹⁵ Moreover, there are a number of substantive problems with the SIS. Its effect upon private and family life can be justified on security grounds in accordance with Article 8(2) ECHR, but only if its operation is prescribed by law, necessary and proportionate. A number of defects in control of the SIS give rise to concerns that it does not meet these criteria.¹⁶

Moreover, the Schengen system leaves many important details governing migration status to implementing measures adopted by the Schengen Executive Committee, which have been adopted without democratic input. These measures must now be taken by the Council, but there is still a democratic deficit concerning their implementation. Also, the EU institutions have continued to take the view that restrictions on entry of persons on foreign policy grounds is a matter falling wholly within the EU's 'second pillar', despite the Community's full competence on these matters.¹⁷ Finally, the Schengen rules are based on nearly complete discretion of national authorities over entry and circulation of persons, rather than the rights-based approach traditionally taken to migration of Community nationals. Such an approach precludes legal certainty and judicial control of administrative action.¹⁸

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. The EC Treaty already sets out precise, legally binding rules on the admission of capital and payments from third countries into the EU,¹⁹ and EC secondary legislation implementing the EC's GATT obligations sets out legally binding rules governing the entry of goods into the European Union. Similarly, the EC and its Member States have committed themselves to legally binding GATS obligations, which govern the provision of services (including establishment) of third-country legal and natural persons in the European Union. In that context, it is not revolutionary to apply binding rules to the entry of natural persons into the EU in other contexts.

It should be emphasized that the rules governing the entry and stay of third-country nationals in the EU do not have to be as liberal as the rules governing entry and stay of EC nationals, or of already-resident third-country nationals. After all, the existing Community rules governing the entry of third-country goods, capital, services and establishment do not treat third-country imports as liberally as imports from other Member States.

4 The alternative approach

In light of the criticisms made above, this Directive implements the following principles:

- a) it takes a 'rights-based' approach to the entry and circulation of persons;
- b) it reforms the rules allowing Member States to derogate from the abolition of internal border controls;
- c) it gives the right to entry if the relevant conditions are met, and clarifies the 'support' condition for entry;
- d) it completes the EC's visa policy, gives the right to a visa if conditions are met, clarifies the 'support' condition for a visa, shortens the list of states whose nationals require visas to enter the EC, and liberalizes the visa obligations of

recognized refugees and stateless persons with travel documents;

- e) it provides for more effective freedom to travel within the EU for third-country nationals;
- f) it sets out rules governing the issue of long-term visas;
- g) it reforms the SIS rules governing entry of persons, and brings them within the scope of Community law;
- h) it provides for procedural rules governing entry of persons;
- i) it replaces the Council's powers to implement Schengen with the normal process of implementing EC legislation; and
- j) it sets out rules governing denial of the entry of persons on foreign policy grounds, since this is a matter falling within the scope of both the first and second pillars.

5 Detail of the text

a) Basic issues: structure, implementation and scope

The proposed Directive is based on the agreed or proposed Schengen or Community measures in the relevant areas, with amendments to take account of the changes which we believe should be made. It contains nine Chapters, which follow the structure of the provisions of the EC Treaty as follows:

- a) Chapter I (Articles 1–5), Principles;
- b) Chapter II (Articles 6–7), on abolition of internal border controls (Article 62(1) EC);
- c) Chapter III (Articles 8–9), on external border controls (Article 62(2)(a) EC);
- d) Chapter IV (Articles 10–20), on visas (Article 62(2)(b) EC),
- e) Chapter V (Articles 21–25), on freedom to travel (Article 62(3) EC);
- f) Chapter VI (Article 26), on long-term visas (Article 63(3)(a) EC);
- g) Chapter VII (Articles 27–34), on the SIS as regards immigration control (Article 66 EC);
- h) Chapter VIII (Articles 35–37), on procedural rights; and
- i) Chapter IX (Articles 38–42), the final provisions.

Throughout this proposal, reference to Executive Committee powers in the Schengen Convention have been replaced by references to powers of the Commission, which is given

¹⁹ Article 56(1) (ex-73b) EC; see Joined Cases C–163/94, 165/94 and 250/94 *Sanz de Lera* [1995] ECR I–4821.

powers to implement this Directive pursuant to Article 38. The Schengen Protocol gives the Executive Committee's implementing powers to the Council, but does not prevent subsequent replacement of the Council with the Commission. Since Article 202 EC makes clear that implementation of EC acts is the Commission's job, and only exceptionally falls to the Council,²⁰ it is appropriate to take the first opportunity to replace the Council.

The proposal, like the others in the Amsterdam Treaty Project, is intended to apply to all Member States. Until the present, there have been strong objections in the United Kingdom to abolishing border controls with other Member States. As a result, the United Kingdom has opted out of the abolition of border controls pursuant and has not applied to opt-in to any of the provisions of the Schengen acquis relevant to external border controls, visas or freedom to travel. Furthermore, Ireland has maintained a similar opt-out, because of its desire to maintain its Common Travel Area with the United Kingdom.

There are two types of argument against abolition of internal border controls. First, the United Kingdom Home Office opposes abolishing such controls on the grounds that drugs, illegal immigrants, Mafia dons and rabid dogs will flood into the UK without them. In our view, these concerns have been convincingly addressed by the recent report of the House of Lords European Communities committee, advocating abolition of the UK's border controls with other Member States.²¹ Second, there are a number of reasons to oppose the UK's full integration into the Schengen acquis from a civil liberties perspective:

- a) the possible increase in internal checks in the UK, including identity card requirements;
- b) the requirement to join the restrictive Schengen list of third countries whose nationals require a visa to enter the Schengen area; and
- c) the requirement to apply the list of persons who must be refused entry to the Schengen area, established pursuant to Article 96 of the Schengen Convention.

²⁰ See comitology Decision (OJ 1999 L 184/33).

²¹ *Schengen and the United Kingdom's Border Controls* (House of Lords Select Committee on the European Communities, 7th Report, 1998–1999).

In our view, these are legitimate concerns that would justify a cautious approach to full UK integration into the *present* acquis. However, we believe that such concerns could be addressed by reforms to that acquis such as those proposed in this Directive. After such reforms, the case for UK (and correspondingly Irish) integration into the Schengen acquis would be overwhelming.

b) Preamble

The initial preambular clauses (1–8) set out the context of the proposal and the EC's competence to adopt it. Clause 9 points out that this is a 'minimum standards' proposal. Clauses 10–13 confirm the primacy of human rights protection, treaties agreed by the Community or Member States, and other provisions of EC law. Recital 14 mentions separate amendments that have to be made to Directives 68/360 and 73/148, as per the third Commission proposal of 1995. These proposals require a different legal base. Recital 15 makes clear that the EC's data protection directive applies to matters within the scope of the Directive. Recital 16 justifies replacing the Council by the Commission as regards implementing measures (see Section 5(a) above), while Recital 17 refers to certain related matters that should be the subject of future detailed proposals.

c) Chapter I: Principles

Article 1 sets out the purposes of the proposal. It is in line with the rights-based approach to immigration and asylum law advocated throughout the Amsterdam Treaty Project.

The definitions in Article 2 are largely taken from the Schengen Convention. In some cases the definitions have been taken from the Commission's three 1995 proposals instead, as amended in 1997 ('internal flight'; 'intra-Community sea crossing'; 'residence permit'; 'right to travel'; 'third-country national'; and 'uniform visa'). In several cases the definitions have been further amended by this proposal. The text refers to 'third-country national' throughout, as in the Commission proposals, rather than 'alien' as in Schengen; moreover, it is made explicit (as with several other proposals in the Amsterdam Treaty Project) that 'third-country national' includes stateless persons and refugees.

It was necessary to introduce a definition for 'long-term visa' (Article 2(8)), an important concept in the Schengen Convention. Article 2(10) on 'residence permit' has also been

amended in comparison with the Commission's 1995 proposal. Permits are issued for periods over three months, not six months, to align their validity with that of long-term visas, the validity of which is based on the wording of the EC Treaty.²² Article 2(10) also makes clear that residence permits must be in the form set out in the Joint Action adopted in 1997,²³ and that such permits are proof of rights set out in this Directive. Articles 2(15) and 2(16) reflect the need to ensure that holding a nationality is effective by implicitly connecting a nationality with a right of residence in a state that issued it. The implication of this for EU Member States is spelled out further in the proposed Directive 2000/05 in this Project.

Article 3 protects any greater rights which third-country nationals have under other rules. Article 4 is a standard non-discrimination clause used in other directives in this series. Article 5 protects the right to asylum.

d) Chapter II: Internal border controls

As noted above, this Chapter exercises the Community's powers in Article 62(1) EC, thereby satisfying the Community's obligation to abolish border checks, as set out in Article 14 EC. The text of Articles 6 and 7 of this proposal is based upon Articles 1 and 2 of the Commission's 1995 proposal for a Directive, which gives greater effect to the right to cross internal borders than the relevant provision of the Schengen Convention (Article 2 of the Convention).

There is a risk that the abolition of checks at the internal borders of Member States will simply transfer checks inside the territory. This proposal therefore adds Article 6(3) to the Commission's 1995 proposal, which would make clear that Member States may only impose controls inside the frontier under strict conditions. In particular, any re-imposition of checks must comply with the right to non-discrimination.

Article 7(1) makes some necessary improvements to the 1995 proposal of the Commission. It incorporates the principle of Article 2(2) of

²² Article 62(2)(b) of the EC Treaty expressly governs visas valid for less than three months, implying that 'long-term visas' governed by Article 63(3)(a) are visas for a longer period.

²³ Note 10 above.

²⁴ The security derogations for external and internal movement of goods, services and capital in the Community are similar: see Peers, 'National Security and European Law' (1996) 16 YEL 363.

the Schengen Convention, to the effect that reinstatement of controls should only happen after prior consultation, except in emergencies. Article 7(2) requires Member States to obtain authorization from the Council for extension of controls after the first extension. This provision is necessary to ensure that Member States do not suspend an important Community law right indefinitely without reasons strong enough to convince the Commission and a qualified majority of Member States.

e) Chapter III : external border controls

As noted above, this Chapter exercises the Community's powers in Article 62(2)(a) EC. It adapts Articles 4, 5 and 6 of the Schengen Convention on entry conditions and checks at the border, leaving the operational matters in Articles 7 and 8 of the Convention to be addressed by a future EC measure.

Article 8 of this proposal makes several changes to Article 5 of the Schengen Convention. First, it provides that persons have a right to entry, if they meet the conditions set out in the Article. This forms part of a move towards a rights-based, rather than discretion-based, immigration policy, bringing the entry of third-country nationals into line with the EC's rules on entry of third-country goods, services and capital. Any fear that a rights-based entry policy will lead to an uncontrollable influx of persons is addressed by Article 64 EC, which allows the Council to take emergency short-term action concerning immigration law in certain specified conditions.

Second, Article 8(1)(c) has removed the reference in the Schengen Convention to documents proving the purpose and conditions of a visit. Instead, a new Article 8(2) further defines the principle of 'sufficient resources', by reference to the minimum income of the Member State of entry or the provision of sponsorship. This criterion can be satisfied by means of a detailed declaration. This requirement does not derogate from EC or international social security law, and nothing in the directive precludes persons from undertaking legal economic activity for under three months.

Third, Article 8(2) replaces a reference to 'national security' in the Schengen Convention with 'public security'. The latter phrase brings the Schengen acquis into line with the derogations from free movement rights in the EC Treaty, as there is no reason to have separate derogations to apply to internal and external movement.²⁴

For the same reason, the 'international relations' exception has been deleted. A Member State can still claim that foreign policy can fall within the scope of 'public policy' or 'public security', as it does under the free movement provisions of the EC Treaty.²⁵ This Directive contains a special provision designed to avoid complications resulting from differences between Member States on the application of foreign policy principles to entry of persons (see Article 38, discussed in Section 5(k) below).

Several changes have also been made to Article 6 of the Schengen Convention. First, Articles 9(1) and 9(2) delete the reference to national law. Second, Article 9(2) changes references to 'national security' to 'public security', for the reasons discussed above. Third, Article 9 deletes references to a 'thorough check' (previous Article 6(1)(c) of the Schengen Convention), because this encouraged over-zealous application of the requirement to check at the border. Article 9(2)(c) (former Article 6(2)(d) of Schengen) has deleted the requirement to check all third-country nationals upon departure, because such a requirement is impractical and less effective than checks on entry, as recognized by Article 9(2)(d) (former Article 6(2)(e) of Schengen).

Article 9(3) deletes a rather strange line from Article 6(3) of the Schengen Convention, which read, '[t]his surveillance shall be carried out in such a way as not to encourage people to circumvent the checks at crossing points.' The principle in this line is surely self-evident; unless perhaps the Convention drafters were being ironic?

Article 9(6) adapts Article 4(1) of the Convention to take account of the abolition of mandatory controls on exit, while Article 9(7) transposes the declaration attached to the Decision allocating the Schengen acquis.²⁶

f) Chapter IV: visas

As noted above, this Chapter exercises the Community's powers in Article 62(2)(b) EC. It is subdivided into three sections which match three of the four sub-paragraphs of Article 62(2)(b) EC:

- a) rules on a uniform visa (Articles 10–11 of the Directive; Article 62(2)(b)(iv) EC);
- b) a list of third states whose nationals do or do not require a visa to cross the external EC borders (Articles 12–17 of the Directive; Article 62(2)(b)(i) EC); and
- c) the procedure and conditions for issuing visas (Articles 18–20 of the Directive; Article 62(2)(b)(ii) EC).

The 'rules on a uniform visa' come first, rather than fourth (as in the EC Treaty), because it makes more sense to describe what a uniform visa is before describing who is entitled to one or the conditions for issuing it. This follows the structure of the Schengen Convention. There is no need to adopt fresh measures concerning a uniform visa format (Article 62(2)(b)(iii) EC), since Regulation 1683/95 has already been adopted on this subject.²⁷

Articles 10 and 11 adapt Articles 10 and 11 of the Schengen Convention to the completion of the common visa policy by the Community. The three-month restriction upon short-term visas set out in Article 10 is also in accordance with Article 62(2)(b) EC.

Article 12 is based on Article 1 of the 1999 EC regulation on states whose nationals require a visa to enter the Member States. However, it completes the EC's visa policy in this area by requiring all Member States to allow visa-free entry of the nationals of all third states not on this list (Article 12(2)). It also harmonizes visa policy as regards 'territorial entities or authorities'. This will not affect Member States' policies on whether to recognize such entities). Also, Article 15(4) sets out restrictive criteria for including a country on the 'black list' of states will require visas to enter. This is designed to curtail the Community's tendency to add states to the visa list without a serious consideration of the reasons for including them, or to add states just because there are large numbers of asylum-seekers from such states.

Article 13 harmonizes visa policy as regards stateless persons and recognized refugees. The 1999 visa regulation leaves such policy up to Member States, but in fact the reports on application of the regulation (and its 1995 precursor) show that Member States are all imposing visa requirements on such persons.²⁸ There is no logical reason to impose visa requirements on them unless their travel documents have been issued by a country on the Community's 'black list'.

²⁵ See *ibid.*

²⁶ Council Decision 1999/436 determining legal bases for the Schengen acquis (OJ 1999 L 176/17).

²⁷ Note 7 above.

²⁸ OJ 1996 C 379/3; OJ 1997 C 180/18; OJ 1998 C 101/14; and OJ 1999 C 133/19.

Article 14(1) copies the exemptions provision from the 1999 Regulation (Article 4(1) of the Regulation), amending it to *require* exemption of the persons who *might* be exempted under the Regulation. This is a further step in the harmonization of visa policy. Article 14(2) is the transparency requirement found in Article 2(4) of the 1999 Regulation; several later provisions of this proposal refer back to this requirement. Article 14(3) adds a further exemption for holders of long-term visas on the way back to their 'host' Member State. This requirement is already found in Article 18 of the Schengen Convention, and is set out in more detail later in this Directive (Article 22(7)). This proposal also extends this exemption to holders of residence permits.

Article 15 makes clear that there are special rules for airport transit visas, transposing Article 5 of the 1999 visa Regulation. Articles 16 and 17 set out rules regarding airport transit visas. This proposal assumes that, despite the judgment in *Case C-170/96 Commission v. Council*,²⁹ airport transit visas *now* form part of visa list policy pursuant to Article 62(2)(a) EC after the entry into force of the Treaty of Amsterdam. This is because Article 3(c) (now 3(1)(c)) EC, which was the justification for that judgment, has been amended. However, conditions for issue of airport transit visas now form part of 'visa conditions' policy and so are addressed in Section 3 of this Chapter. In our view, the Community should consider the desirability of the harmonization of *other* forms of transit visa at a later date.

Article 16 completes the harmonization of airport transit visa policy, unlike the 1996 Joint Action (see Articles 5, 8 and 9 of that measure).³⁰ Article 16(1) is based on Article 3 of the 1996 Joint Action, but two important changes follow. First, Article 16(2) precludes Member States from imposing transit visa requirements on any states which are not on the common list. Second, Article 16(3) harmonizes rules regarding airport transit visas for stateless persons and recognized refugees (compare with Article 6 of the Joint Action, leaving such rules up to Member States). These rules follow

the principles adopted for stateless persons and refugees and other types of visa (see Article 13 of this proposal).

The further exemptions set out in Article 17 are based on Articles 6 to 8 of the proposed 1999 Regulation on airport transit visas, which themselves build upon the corresponding exception in the 1996 Joint Action (Article 4). However, this proposal amends the proposals currently before the Council, in order to provide for further harmonization. In particular, it *requires* exemption for holders of residence permits from a number of countries and in several other circumstances (these exemptions are optional in the existing 1996 Joint Action and the 1999 proposal). Also, the transparency requirements have been aligned with those applying to 'ordinary' visas.

Section 3 applies to all types of short-term visas, including different types of transit visa. Article 18(1) and (2) adapts Article 15 of the Schengen Convention, making two important changes. First, there is a right to a visa if the conditions are met; this is an aspect of rights-based immigration policy. It should be observed that for many years the Benelux states accepted that there was a right to a visa if the relevant conditions were met, so there is already evidence that several wealthy EU Member States can implement such a policy without adverse effects.³¹ Again, it should be observed that Article 64 EC allows the EC to deal with mass influxes in an emergency. Second, Article 18(2) specifies the meaning of support conditions; this clause corresponds to Article 8(2), which concerns the application of the same principle to entry controls.

Article 18(3) transposes Article 16 of the Schengen Convention. Finally, Article 18(4) is based upon Article 2(2) of the 1996 Joint Action on airport transit visas. It makes clear that there is no 'sufficient funds' requirement for holders of airport transit visas.

Article 19 does not correspond to a specific provision of the Schengen Convention, although Article 17(3)(c) of the Convention refers to the possibility of issuing visas at the border. Airport transit visas cannot be issued at the border; this transposes Article 2(1) of the airport transit visa Joint Action, which specifies that such visas can only be issued by consular authorities.

Article 20 allows for visa extension or the request of a residence permit without an expensive and time-consuming requirement to leave the

²⁹ Note 9 above.

³⁰ Note 9 above.

³¹ Steenbergen, 'Schengen and the Free Movement of Persons', in Meijers et al, eds., *Schengen: Internationalisation of central chapters of the law on aliens refugees, privacy, security and the police*, 2nd ed., (Stichting NJCM – Boekerij, 1992) 57 at 64.

country first. This provision reflects aspects of the primary migration proposal in the Amsterdam Treaty Project (Directive 2000/05).

In our view, the Community should consider possible separate amendments to several other measures to align them with the principles set out in this directive:

- a) the Schengen Executive Committee decisions regarding visas;
- b) the EU Recommendations on consular cooperation regarding visas and forgery detection;³²
- c) the EU Joint Action on a forged documents archive;³³ and
- d) the proposed EU third pillar decision on counterfeit documents.³⁴

Some of those measures are also relevant to external border controls.

This proposal for a Directive does not address the issue of visa stickers for third states which are not recognized by all Member States. In our view, this issue should be addressed by separate Community legislation, which should provide for a common document but allow Member States discretion to decide on whether to recognize certain third states if there is no agreement on recognition within the Common Foreign and Security Policy.

g) Chapter V: Freedom to travel

The text of this Chapter is based on the Commission's 1995 proposal on freedom to travel, as amended in 1997, which is more liberal than the Schengen rules (Articles 19–23, Schengen Convention). Article 21 of this proposal, setting out the principle of the right to travel, is based on Article 1 of the 1995 proposal. The only change here is that Article 21(2) has replaced the words 'a short time' in the Commission's proposal by 'three months', to be consistent with the rules on validity of short-term visas in Chapter IV of this proposal and in the EC Treaty.

Articles 22 and 23 are based on Articles 3 and 4 of the 1995 proposal, and address in turn the status of people with a residence permit

(Community residents) and people without one (non-residents of the Community). Article 22(1) has amended the definition of 'sufficient resources' to match that in Article 8, and Article 22(2) has been inserted to make it clear that the condition can be satisfied by a declaration (as with Articles 8 and 18). Article 22(5) has also added a transparency requirement. If a person has a long-term visa but is still waiting for a Member State to issue a residence permit, he or she will have a travel right equal to persons with residence permits (Article 22(6)). Also, in accordance with Article 22(7), persons with long-term visas or residence permits can cross the external borders of another Member State on the way back to their 'home' Member State, without having to have a short-term visa to enter. This transposes the existing right of persons with long-term visas to cross the external borders, set out in Article 18 of the Schengen Convention, while expanding the personal scope of that right to include persons with residence permits.

In accordance with the rest of the proposal, Article 22(7) has deleted any reference to threats to international relations.

Article 23 has been amended (in comparison with the Commission proposal) to take account of the completed harmonization of visa policy pursuant to Chapter IV of this proposal. It refers to a uniform visa explicitly and does not provide for the situation of persons subject to visa requirements in some Member States but not others, except where a Member State has imposed a unilateral visa requirement as an emergency measure pursuant to a Council act adopted using the powers conferred by Article 64 EC.

Article 24 transposes Article 5 of the Commission's 1995 proposal. It should be noted that the Commission's proposal (unlike Article 22 of the Schengen Convention) gives Member States the *option* to impose reporting requirements. This is appropriate, given the diversity of Member States' approaches to the issue of illegal immigration.

Article 25 is based on Article 5a of the Commission's 1995 proposal, although in fact this clause first appeared in the Commission's amended proposal of 1997. It amends the Commission's proposed Article by deleting the requirement to leave in advance if there is an 'anticipated breach of the conditions' of entry, and inserts a clause making it clear that the

³² For instance, see the Recommendations on consular cooperation (OJ 1996 C 80/1) and forgery protection at frontiers (OJ 1998 C 189/19).

³³ OJ 1998 L 333/4.

³⁴ OJ 1999 C 176/1.

requirement to leave a Member State is in any case subject to any rights to stay which exist under other provisions of Community or national law.

h) Chapter VI: Long-term visas

This Chapter consists of only one Article (Article 26). It is an exercise of the EC's powers pursuant to Article 63(3)(a) EC. First, it provides that a long-term visa must be issued if the conditions are met. Second, it provides that a request for a long-term visa can be lodged either in a third state, at the border, or within a Member State after legal entry to that Member State. This clause is a further example of the 'rights-based' approach to immigration law pursued by the Amsterdam Treaty project. However, the clause does not set out the substantive grounds upon which a long-term visa must be granted or any other conditions applying to the issue of such a visa. Those issues are addressed in the proposed Directive on primary immigration (Directive 2000/05), which also forms part of the Amsterdam Treaty Project. That Directive also takes as a basis the right to enter and/or stay (and therefore to be granted a long-term visa or residence permit) if the conditions for the exercise of that right are met.

i) Chapter VII: European Information System

As noted above, this Chapter exercises powers conferred on the Community to coordinate national authorities' immigration control actions (Article 66 EC). It is sub-divided into a section on establishment and functioning of the SIS (Articles 27–31) and a section on individual rights (Articles 32–34). Since the SIS will be extended to all Member States, it is no longer appropriate to retain the name 'SIS', so we have proposed a change in name to the 'European Information System' (EIS).

This Chapter gives effect to the argument that the listing of persons for refusal of entry pursuant to Article 96 of the Schengen Convention is a matter within EC competence (Article 66 EC), although the other SIS listings fall within third pillar competence. The appropriate response is to include the relevant Schengen provisions within a Community act, with the use of

Schengen for other purposes still subject to Title VI EU. Such an approach simply copies what has already been done for the Customs Information System (a first pillar Regulation and a Convention with similar rules).³⁵

Substantively, first of all, this Chapter is intended to reconcile individual rights to free movement, privacy and judicial protection in the Community with the Community's and the Member States' interest in protecting their security (Article 27(1), amending Article 93 of the Schengen Convention). Put another way, the current SIS is solely concerned with security; the proposals in this Directive pay equal concern to freedom and justice.

Article 27(2) states that specified provisions of the Schengen Convention relating to the SIS will be replaced by this Directive, as regards immigration and asylum matters. Article 27(3) states that the other relevant SIS provisions of the Schengen Convention will continue to apply. This does not mean we believe the provisions listed in Article 27(3) are perfect. Rather, we believe that a number of those provisions also need amendment, but have focussed in this proposal on the rights of individuals for now. The analysis of the SIS prepared by Justice makes a number of other important recommendations regarding the SIS which we believe the Community institutions should examine as soon as possible with a view to adoption:

- a) an improvement in the provisions regarding data quality (particularly minimum amounts of data to be entered) and data security;
- b) clarification of the legal status of the SIRENE network that supplements the SIS;
- c) changes to the rules that apply when a person's identity is usurped;
- d) examination of the rules regarding data sharing with third countries;
- e) consideration of the possibility of making all requests for access to data to the central SIS authority in Strasbourg initially;
- f) amendments to reinforce the rule that the SIS can only be accessed to obtain information necessary for a specific purpose; and
- g) substantial increases in the powers of national data protection authorities and the Joint Supervisory Authority for the SIS, so that they have effective powers similar to those being proposed for the European Data Protection Supervisor.³⁶

³⁵ Reg. 515/97 (OJ 1997 L 82) and Convention (OJ 1995 C 316).

³⁶ See proposed Regulation in COM (1999) 337.

The core of the first Section of this Chapter is Article 28, replacing Article 96 of the Schengen Convention. This Article sets out the reasons why persons' names can be included in the EIS. First, Article 28(1) amends Article 96(1) of the Schengen Convention by deleting a reference to national procedures for adding names to the EIS. Instead, only the procedures set out in this directive will apply, for since listing in the EIS will result in exclusion from all Member States, it is unfair to have divergent systems for determining whether a name should be placed on the list. This addresses an important concern raised in Justice's analysis, which concluded that since 'the exercise of... individual rights is governed by the different national laws of each Member State... results in an overall complex data protection regime and increases the likelihood of there being inconsistent standards of protection and control among Member States'.³⁷

Second, Article 28(2) replaces the vague and non-exhaustive list of grounds for entering a name in the EIS in Article 96(2) and (3) of the Schengen Convention with a specific and tightly-focussed test. The Convention text allows Member States to list persons who have convictions with a custodial sentence of over one year, persons who have allegedly committed or allegedly might commit serious crimes, and persons who have repeatedly infringed immigration law. In place of such broad rules, the Directive would only allow listing in the SIS if three substantive conditions and one procedural condition are met:

- 1 the person represents a fundamental threat to public policy or public security of a Member State, in line with the Community legislation governing this issue;
- 2 his or her conduct would be subject to repressive measures throughout the EC;
- 3 the conduct in question led to, or would have led to, a substantial criminal sentence; and
- 4 the conduct must have been demonstrated to a court, in accordance with the rules set out in Article 32.

³⁷ Note 14 above.

³⁸ Note 14 above.

³⁹ Of course, EU citizens can be listed in the SIS for other purposes, for example where they are wanted for extradition.

⁴⁰ See statement in the minutes attached to a Declaration of the Schengen Executive Committee (SCH/Com-ex (96) Decl 5).

These are stringent conditions, but they are appropriate because complete exclusion from the territory of the entire European Community is a very drastic measure. These rules do not govern the criteria for drawing up national lists for exclusion by each Member State, although such national lists would still be subject to other provisions of Community law, notably Directive 64/221 and several treaties agreed by the Community with third states. Although Article 28(2) does not set a precise minimum time-limit on what would constitute a 'substantial' prison sentence, such a minimum time-limit would be worth considering.

Third, Articles 28(3) to (5) set out three explicit exclusions from listing in the EIS. The first exclusion, in Article 28(3), allows for rehabilitation of an ex-offender. This implements the principle of EC law that a person must be a *present* threat to public policy to justify exclusion from a Member State. Again, a time limit might be worth considering. This clause also addresses the concern expressed in the recent Justice analysis that Article 96 of the Schengen Convention takes no account of rules on the rehabilitation of ex-offenders.³⁸

The second exclusion, in Article 28(4), prevents Member States from listing EU citizens and members of their families in the EIS. The Commission has interpreted the present Schengen rules to mean that EU citizens cannot be listed at all as persons not to be permitted entry,³⁹ and that their family members as defined by EC law (if third-country nationals) can only be listed if they would represent a fundamental threat to *every* Member State, in accordance with the terms of Directive 64/221.⁴⁰ This interpretation is clearly correct, and it is necessary both to confirm it in this Directive and to go further. It is inappropriate to provide for the possibility of listing family members of EC nationals in the EIS *at all*, for it is possible that one Member State may take it upon itself to decide that a person would constitute a threat to all Member States. This would have such a severe impact upon free movement rights that possible exclusions and entry bans of EU citizens' family members should be left entirely to separate national procedures, precluding the imposition of a joint ban on those family members' entry into the entire Community via the EIS. This does not prevent individual Member States from banning a person or listing him or her on their national lists; it simply prevents a Member State

from forcing all other Member States to ban the person also. Article 28(4) is intended to apply to the family members of *all* EU citizens, not just those who have already moved to another Member State within the EU, for all EU citizens have potential rights to free movement. Indeed, many of them visit other Member States for brief periods even if they never reside in another Member State, and their rights to visit other Member States would be affected unless their family members are exempt from EIS listing.

The third exclusion, in Article 28(5), prevents the inclusion of rejected asylum-seekers in the EIS purely because of their status, or because of their prior illegal entry or presence in the Member State where they applied for asylum. This implements a recent ruling of the French Conseil d'Etat.⁴¹ There are corresponding provisions in proposed Directive 2000/01 on asylum, also part of the Amsterdam Treaty Project.

Article 29 is based upon Article 25 of the Schengen Convention, and concerns the use to which the immigration data in the Schengen Convention can be put. First, a new Article 29(1) specifies that the immigration data in the SIS can only be used to control entry, grant a visa, curtail freedom to travel, or deny a residence permit or long-term visa pursuant to this Directive. This ensures that the information cannot be used for any other purpose – a particular concern raised by the recent Justice analysis of the SIS.

Article 29(2) and (3) adapt Articles 25(1) and (2) of the Schengen Convention. They make several changes from the Convention. First, the scope of these principles is extended to cover long-term visas as well as residence permits, in accordance with similar changes throughout this Directive. Second, Article 29(2) and (3) now spell out what the two Member States must consult about, notably the legality of the report, the interests of both states, and the rights and circumstances of the applicant. At the moment, the Schengen Convention requires consideration *only* of the interests of the reporting Member State. As a result of

Article 28(2), it is clear that the reporting state cannot report a person for a serious crime or alleged serious crime unless it would be a serious crime, receiving a similar penalty, in all Member States. If additional data is placed on the person's file as a result of these consultations, it will be governed by Directive 95/46, the EC data protection Directive.

Third, a new Article 29(4) subjects the decision by a Member State to refuse or withdraw a residence permit or visa to the individual rights in this chapter and in the procedural chapter.

Article 30 adapts Article 101 of the Schengen Convention. It concerns access to EIS data. It confirms the Convention provision reserving access exclusively to certain authorities, although it appears that the asylum authorities of the Member States also have access to the present SIS, which is arguably a breach of the Convention.⁴² Since there are grounds for allowing such authorities access to the EIS, they are listed in Article 30(1)(e), although of course their use of EIS data is subject to the provisions of asylum procedural law.⁴³ In order to prevent any further creative interpretation of the access rules, Article 30(1) states expressly that no further access is allowed, and furthermore reiterates that EIS data can only be used for the purposes set out in Article 29(1).

Article 30(3) (former Article 101(4) of the Schengen Convention) adds a transparency requirement to the existing rules.

Article 30(4) is a very important addition to the Schengen acquis. It addresses a particular concern in the Justice analysis of the SIS.⁴⁴ There is a risk that even if the rules governing SIS data are properly complied with, inaccurate, outdated or illegal SIS data has been copied into national databases with no adequate means of checking, challenging or deleting it. To deal with this problem, Article 30(4) requires Member States to indicate the source of EIS data if they store that data in a national file or database, to record such storage, and to restrict further access to such data. The rules in Articles 31 to 34 also govern such data. These rules ensure that if data has been illegally placed in the EIS or should be deleted or corrected for any reason, a person can be certain of also removing or correcting that data in all national files with copies of it. Article 30(5) is a further implementation of this principle; it extends to national files with copies of EIS data an important provision of the Schengen

⁴¹ *Foraboscho*, judgment of 9 June 1999, No 190384. See Guild, 'Adjudicating Schengen: National Judicial Control in France', *European Journal of Migration and Law*, Vol 4 Spring 2000 (forthcoming).

⁴² Council document 2505/99.

⁴³ See the relevant provisions of Directive 2000/01 on asylum, also part of the Amsterdam Treaty Project.

⁴⁴ Note 14 above.

Convention which would not be amended by this proposed Directive.

Article 31 of the proposal is based on Article 113 of the Schengen Convention. The Convention appears to allow immigration data to remain in the SIS for ten years after entry, although according to the Justice analysis of the SIS, in practice such data is kept only for three years.⁴⁵ Article 31(1) therefore amends Article 113 of the Convention to reflect this practice, and recognizes the possibility of earlier deletion.

Article 32 is based on Article 109 of the Schengen Convention. This critical Article governs the right of access to data held by the EIS. Article 32 completely replaces the vague and ineffective access rules in the Schengen Convention, which the Justice analysis of the SIS has rightly criticized as a bar to supervision of the defence of individual rights.⁴⁶ First, because of the severe effects of listing a person in the EIS, it is inappropriate to list a person until he or she has had a prior opportunity to challenge the listing. Article 32(1) therefore imposes prior disclosure of intention to list upon a Member State. The form in which the disclosure is made is left to each Member State, and Member States would be free to disclose this information at the same time as issuing an exclusion order or other relevant document. Article 32(2) requires a Member State to wait before listing, to give a person a chance to challenge its decision, and Article 32(3) gives suspensive effect to any challenge made. Article 32(4) protects persons who have already been listed, by giving them a simple right to disclosure of information held on them. Article 32(5) permits a single, clearly expressed derogation from the above rights, in the case where disclosure of data would damage a criminal investigation. Even in such cases, information must be disclosed eventually. Of course, more restrictive disclosure rules might be justified as regards some of the other personal data in the SIS; those disclosure rules are unaffected by this Directive. In fact, most immigration data will not be relevant to ongoing criminal investigations, bar the few

cases where a Member State wishes to exclude a person who is suspected of involvement in an ongoing criminal activity.

Article 33 is based upon Article 110 of the Schengen Convention, but adds a number of rights besides the right in that Article to have ‘factually inaccurate data...corrected or legally inaccurate information...deleted’. There are now also rights to insist upon deletion, to prevent inclusion of data, to remove data because it has been listed in breach of this Directive or because of a change of circumstances, and to request reconsideration of a report and the consequences attaching to it. Each of these rights constitute corresponding obligations for the Member States, and several of them address concerns in the Justice analysis of the SIS. It would also be appropriate to consider Justice’s suggestion that there should be harmonized time limits for replies when such rights are exercised.

Article 34, on remedies, is based on Article 111 of the Schengen Convention. It extends the Convention right to correct, delete or to claim provision of information or compensation in a national court to all the rights set out in Articles 33 and 34. It also provides for the necessary right to legal aid. This builds upon recommendations in the Justice analysis of the SIS, which rightly laid stress on the importance of effective remedies.

j) Chapter VIII: Procedural rights

This Chapter sets out a set of specific and important procedural rights to guarantee that the rights set out in this Directive can be upheld effectively. However, it does not affect the specific procedural rights concerning the European Information System in Chapter VII, or any procedural rights in any other instruments.

First, there is a right to disclosure of the reasons underlying any decision affecting the rights set out in this Directive (Article 36(1) and (2)). Second, there is a right to be informed of the remedies available (Article 36(3)). Third, there is the right of appeal to a judicial authority (Article 37(1)). Fourth, there is a right to remain in a Member State (if already legally present) until an appeal is concluded. Without these four rights, it would be very difficult for persons to exercise the rights set out in this Directive.

There are other clauses on remedies set out in the other proposals in the Amsterdam Treaty Project, some of which will also apply at the

⁴⁵ Note 14 above.

⁴⁶ Article 109(2) states that access to data may be refused ‘if it may undermine the performance of the legal task specified in the report, or in order to protect the rights and freedoms of others’. It does not specify any circumstances in which information must be disclosed.

same time as the rights set out in this Chapter. These remedies clauses are in some cases less extensive, and in some cases more extensive, than the procedural rights set out in this Chapter. However, the various clauses do not conflict, and it is intended that where two sets of rights apply to the same situation, a person may rely upon the most favourable provisions.

k) Chapter IX: Final provisions

Article 38 replaces the Council's power to implement the Schengen acquis by the Commission, for the reasons set out in Section 5(a) above. This applies not just to the matters addressed in this Directive (Article 38(1)), but also to other provisions of the acquis falling within the scope of this Directive, including the SIS provisions connected to Article 96 of the Schengen Convention, and to the 1997 Joint Action on residence permits (Article 38(2)). The Article refers to the most 'Member State-friendly' variant of comitology procedures, in light of the importance of the implementing measures.

Article 39 addresses the serious doubts which we have about the legality of using the Council's powers over foreign policy to apply immigration controls (see Section 3 above). Therefore, it establishes a procedure based on the EC Treaty provisions applying to the connection between commercial policy and foreign policy. First of all, Article 39(1) provides that EC-wide restrictions on entry for foreign policy grounds

require a Community act following a CFSP act. This adapts the wording of Article 301 (ex-228a) EC as regards commercial policy.

Secondly, Article 39(2) leaves power with the Member States to take a purely unilateral decision to ban a person on foreign policy grounds, but only in the emergency situations listed in Article 297 (ex-224) EC.⁴⁷ This provision governs the Member States' use of the public policy or public security derogations set out in this Directive for foreign policy reasons. It would be possible to accept a more flexible version of Article 39(2), based instead on Article 60 (ex-73g) EC. This would allow Member States to impose unilateral restrictions on persons for foreign policy reasons 'for serious political reasons and on grounds of urgency', with the possibility for the Council to overturn a Member State's decision. But any further discretion for Member States would breach the principles of free movement set out in this Directive, and would also increase the risk of Member States breaching Article 10 ECHR, which restricts Member States (or the EC as a whole) from expelling or banning the entry of non-violent political radicals.⁴⁸

In our view, the EC institutions should also consider separate measures providing for monitoring of any EC-wide restrictions of entry on foreign policy grounds to ensure that those restrictions are applied effectively by Member States.

⁴⁷ On this clause, see Peers, 'National Security and European Law', note 23 above.

⁴⁸ See judgment of the European Court of Human Rights in *Piermont v. France*.

ON

border controls

ENSURING THE ABSENCE OF ANY CONTROLS ON PERSONS WHEN CROSSING INTERNAL BORDERS AND ESTABLISHING MEASURES CONCERNING THE CROSSING OF THE EXTERNAL BORDERS OF THE MEMBER STATES, INCLUDING THE ISSUE OF LONG-TERM VISAS

The Council of the European Union,

Having regard to the Treaty establishing the European Community, and in particular Articles 62, 63(3)(a) and 66 thereof,

Having regard to the proposal of the Commission,

Having regard to the Opinion of the European Parliament,

Whereas:

- 1 Article 14 of the Treaty establishing the European Community specifies that the 'internal market comprises 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';
- 2 Article 61 of the Treaty establishing the European Community requires the Community to establish an 'area of freedom, security and justice', and refers to the adoption of measures 'safeguarding the rights' of third-country nationals;
- 3 Article 62(1) of the Treaty establishing the European Community confers competence upon the Community 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';
- 4 Article 62(2)(a) of the Treaty establishing the European Community confers competence upon the Community to adopt 'measures on the crossing of the external borders of the Member States which shall establish...standards and procedures to be followed by Member States in carrying out checks on persons at such borders';
- 5 Article 62(2)(b) of the Treaty establishing the European Community confers competence upon the Community to adopt 'rules on visas for intended stays of no more than three months';
- 6 Article 62(3) of the Treaty establishing the European Community confers competence upon the Community 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';

- 7 Article 63(3)(a) of the Treaty establishing the European Community confers competence upon the Community to adopt measures concerning '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', for nationals of third countries;
 - 8 Article 66 of the Treaty establishing the European Community confers competence upon the Community to 'take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas' of immigration, asylum and border controls; as a consequence, the provisions of the Schengen Information System concerning the refusal of entry to third-country nationals fall within Community competence;
 - 9 in accordance with the final provisions of Article 63 of the Treaty establishing the European Community, 'measures adopted by the Council pursuant to' Article 63(3)(a) 'shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements';
 - 10 according to Article 6(2) of the Treaty on European Union, the European 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;
 - 11 treaties concluded by the Community or by the Community and its Member States have primacy over secondary acts of the Community;
 - 12 in accordance with Article 307 of the Treaty establishing the European Community, the rights and obligations arising from agreements concluded before the application of the Treaty to each Member State between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaty or measures adopted pursuant to it;
 - 13 this Directive is without prejudice to rights conferred upon third-country nationals by other provisions of Community law;
 - 14 the provisions of Chapter II will require separate amendments to Directives 68/360 and 73/148;
 - 15 the right to data protection relating to the subject-matter of this Directive is governed by Directive 95/46, in addition to the more specific provisions set out herein;
 - 16 it is appropriate to provide for implementation of measures falling within the scope of Treaty establishing the European Community by the Commission, in accordance with Article 202 of the Treaty;
 - 17 the Commission is invited to make separate proposals concerning detailed aspects of supervision of the external borders of the European Community, and replacing Joint Action 97/11/JHA on a uniform residence permit;
- has adopted this Directive:

Chapter I Principles

Article 1 Purposes

The purposes of this Directive are to ensure the free movement of persons and to safeguard the rights of third-country nationals within the European Community, and in particular:

- to facilitate, in compliance with Article 14 of the Treaty, the right of all persons, be they citizens of the Union or third-country nationals, to cross internal borders within the European Community without any controls, in accordance with Chapter II;
- to adopt conditions for the exercise of the right to cross the external borders of the European Community, including the right to a visa for an intended stay of up to three months;
- to facilitate the right of third-country nationals to travel freely within the European Community for up to three months;
- to adopt conditions for the exercise of the right of entry and residence of third-country nationals, and for the right to a long term visa or residence permit; and
- to ensure that the Schengen Information System is in full compliance with human rights and data protection obligations, to the extent that it governs the rights to entry and residence of third-country nationals.

Article 2 Definitions

For the purposes of this Directive:

- 1 'airport transit visa' means the authorization to which nationals of certain third countries are subject, as an exception to the principle of free transit laid down in Annex 9 to the Chicago Convention on International Civil Aviation, for transit through the international areas of the airports of Member States;
- 2 'border control' means a check made at border in response solely to an intention to cross that border, regardless of any other consideration;
- 3 'external borders' means the Member States' land and sea borders and their airports and sea ports, provided they are not internal borders;
- 4 'external flight' means a flight other than an internal flight;
- 5 'internal borders' means the common land borders of the Member States, their airports for internal flights and their sea ports for regular transshipment connections exclusively from or to other ports within the territory of the Member States not calling at any ports outside the Member States;
- 6 'internal flight' means the movement of an aircraft between two Community airports, without any stopovers outside the Community, and which does not start from or end at a non-Community airport;
- 7 'intra-Community sea crossing' means the movement between two Community ports, without any intermediate calls outside the Community, of a vessel plying regularly between two or more specified Community ports;

- 8 'long-term visa' means any document or authorization issued by the authorities in a Member State issued before or at the crossing of an external border, which permits a person to enter that Member State for a period of more than three months;
- 9 'person not to be permitted entry' means any third-country national listed reported as a person not to be permitted entry in the European Information System, pursuant to Chapter VII;
- 10 'residence permit' means any document or authorization issued by the authorities in a Member State which permits a person to reside in that Member State for a period of more than three months; such a permit shall be issued in the form provided for in Joint Action 97/11/JHA and shall constitute proof of the rights conferred by this Directive upon holders of a residence permit.
- 11 'right to travel' means the right to cross internal Community borders and to remain in the territory of a Member State for a short stay, or to travel onward, without the person concerned being obliged to obtain a visa from the Member State or States in whose territory that right is exercised
- 12 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community, including a stateless person or a refugee;
- 13 'third state' means any State other than a Member State of the European Union, including States which are not recognized by a Member State of the European Union;
- 14 'uniform visa' means a visa which is valid throughout the Community;
- 15 'stateless person' means a person without an effective nationality; and
- 16 'effective nationality' means the right to enter the Member State of nationality.

Article 3 Scope

- 1 Chapters II to VIII of this Directive are without prejudice to the rights conferred by other provisions of Community law upon third-country nationals.
- 2 This Directive shall not in any way limit additional rights granted to third country nationals in treaties concluded by the Community, by the Community and its Member States, or by individual Member States, or, in accordance with Article 63 of the Treaty establishing the European Community, more favourable national provisions enacted or maintained by Member States.

Article 4 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Article 5

This Directive is subject to the right to asylum as defined in national law, Community law, the Geneva Convention on the Status of Refugees and the New York Protocol to that Convention, the European Convention on Human Rights and the United Nations Convention Against Torture.

Chapter II Abolition of internal border controls

Article 6 Abolition of controls

- 1 All persons, whatever their nationality, have the right to cross internal borders at any point, without such crossing being subject to any border control.
- 2 Without prejudice to paragraph 3, the elimination of controls and formalities for persons crossing internal borders shall not affect the exercise of the law-enforcement powers conferred on the competent authorities by the legislation of each Member State over the whole of its territory, nor any obligations to possess and carry documents which are laid down in its legislation.
- 3 The powers exercised in accordance with paragraph 2 shall not constitute the reimposition of an internal border control at a point inside a Member State's territory or entail any arbitrary discrimination prohibited by Article 4. They may only be exercised where necessary to achieve a specific objective prescribed by law and shall be strictly proportionate to that end.

Article 7 Re-imposition of controls

- 1 A Member State may, in the event of a serious threat to public policy or public security, reinstate controls at its internal borders for a period of not more than 30 days after consulting the other Member States and the Commission. If public policy or public security require immediate action, a Member State may reinstate such controls without prior consultation and shall immediately notify the Commission and the other Member States. In either case, the Member State reinstating controls must supply the Commission and the other Member States with all the appropriate information.
- 2 Where the serious threat to public policy or security lasts longer than 30 days, the Member State concerned may maintain the internal border controls for renewable periods of not more than 30 days. The first renewal shall be decided after the other Member States and the Commission have been consulted. Subsequent renewals may only be authorized by the Council, acting by a qualified majority on a proposal from the Commission.

At the Member State's request, the Commission and the other Member States shall treat in confidence the information it supplies to justify maintaining these controls.

- 3 The controls referred to in paragraphs 1 and 2 and the length of the period during which they are applied shall not exceed what is strictly necessary to respond to the serious threat and shall comply with the principles of Articles 4 and 5.

Chapter III Checks at external borders

Article 8 Conditions of entry

- 1 For visits not exceeding three months, entry into Community territory shall be granted to a third-country national who fulfills the following conditions:
 - a) in possession of a valid document or documents permitting them to cross the border, as determined by the Commission in accordance with the procedure set out in Article 38;
 - b) in possession of a valid visa if required;
 - c) substantiates the purpose of the planned visit and has sufficient means of support, both for the period of the planned visit and to return to his or her country of origin or to travel in transit in a third state, into which his or her admission is guaranteed, or is in a position to acquire such means legally;
 - d) has not been reported as a person not to be permitted entry, pursuant to Chapter VII; and
 - e) is not considered to be a threat to the public policy or public security of any of the Member States.
- 2 The support condition referred to in paragraph 1(c) shall 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.
- 3 Entry into Community territory must be refused to any third-country national who does not fulfill all the above conditions unless any Member State considers it necessary to derogate from that principle on humanitarian grounds or in the national interest because of international obligations. In such cases, permission to enter will be restricted to the territory of the Member State concerned, which must inform the other Member States and the Commission accordingly.

These rules shall not preclude the application of special provisions concerning the right of asylum, in accordance with Article 5, or of the provisions of Chapter VI.
- 4 A third-country national who holds a residence permit or a return visa issued by one of the Member States, or, if required, both documents, shall be permitted to enter in transit, unless his or her name is on the national list of persons reported to be refused entry which is held by the Member State at the external borders at which he or she arrives.

Article 9 Obligations to check

- 1 Cross-border movement at external borders shall be subject to checks by the competent authorities. Checks shall be made in accordance with uniform principles, account being taken of the interests of all Member States.
- 2 The uniform principles referred to in paragraph 1 are as follows:
 - a) Checks on persons shall include not only the verification of travel documents and of the other conditions governing entry, residence, work and exit but also checks to detect and prevent threats to the public security and public policy of the Member States. Such checks shall also cover vehicles and objects in the possession of persons crossing the border.

- b) All persons must be subject to at least one check making it possible to establish their identities on the basis of their presentation of travel documents.
 - c) On exit, checks may be carried out as required in the interests of all Member States in order to detect and prevent threats to the public security and public policy of the Member States.
 - d) If checks in accordance with sub-paragraphs (b) and (c) cannot be made because of particular circumstances, priorities must be established. In this connection, entry checks shall in principle take priority over exit checks.
- 3 The competent authorities shall use mobile units to exercise surveillance on external borders between crossing points. The same shall apply to border crossing points outside normal opening hours. The surveillance procedures shall, where appropriate, be fixed by the Commission in accordance with the procedure set out in Article 38.
 - 4 Member States shall deploy enough appropriate officers to conduct checks and maintain surveillance along external borders.
 - 5 A uniform level of control shall be exercised at all external frontiers.
 - 6 Where the checks referred to in paragraph 2 take place in airports and concern flights from third states, Member States shall subject passengers on such flights who board internal flights to personal checks upon arrival, in the airport of arrival of their external flight. Where such checks concern flights to third states, Member States shall exercise the option to conduct personal checks of passengers provided for in paragraph 2(d) in the airport of departure of the passengers' external flight, whether or not such passengers began their journey with an internal flight.
 - 7 Paragraph 6 is without prejudice to checks for public security purposes and checks for fiscal purposes, where appropriate.

Chapter IV Short-term visas

Section 1 Rules on a uniform visa

Article 10 Uniform visa

- 1 A visa issued pursuant to the provisions of this Chapter shall be a uniform visa and shall be issued in the format specified by Regulation 1683/95. It shall govern intended stays of no more than three months.
- 2 By way of derogation from paragraph 1, each Member State may reserve the right to restrict the territorial validity of the visa in accordance with the provisions of this Chapter.

Article 11 Scope of uniform visa

- 1 The visa provided for in Article 10 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 may exceed three months in any half year as from the date of first entry;
 - b) a transit visa allowing its holder to pass through the territories of the Member States once, twice or exceptionally several times en route to the territory of a third state, provided that no transit shall last longer than five days.

- 2 Paragraph 1 shall not preclude a Member State from issuing a new visa, the validity of which is limited to its own territory, within the half year in question if necessary.

Section 2 Visa list

Article 12 Establishment of list

- 1 Nationals of third countries or territorial entities or authorities in the common list in Annex I shall be required to be in possession of visas when crossing the external borders of the Member States.
- 2 Member States may not require a visa for nationals of third countries which are not included on the list in Annex I.
- 3 Nationals of countries formerly part of countries on the common list shall be subject to the requirements of paragraph 1 unless and until the Council decides otherwise under the procedure laid down in the relevant provisions of the Treaty.
- 4 The Council may alter Annex I under the procedure laid down in the relevant provisions of the Treaty. In principle, a third country or territorial entity or authority may only be listed in Annex I if that country, entity or authority constitutes a threat to the security of the European Union or a qualified majority of its Member States.

Article 13 Stateless persons and recognized refugees

Stateless persons and refugees within the meaning of the Geneva Convention 1951 and the New York Protocol of 1967 recognized by third countries shall only be required to be in possession of visas when crossing the external borders of the Member States if they are travelling on the basis of a travel document issued by a State listed in Annex I.

Article 14 Exemptions

- 1 Member States shall exempt third-country national civilian air and sea crew, flight crew and attendants on emergency and rescue flights and other helpers in the event of disaster or accident and holders of diplomatic passports, official duty passports and other official passports from a visa requirement under Article 12(1). They may exempt other third-country nationals from such requirements.
- 2 Within 10 working days of the entry into force of this Directive, Member States shall communicate to the other Member States and the Commission the measures they have taken pursuant to paragraph 1. Any further measures taken pursuant to paragraph 1 shall be similarly communicated within five working days.

The Commission shall publish the measures communicated pursuant to this paragraph and updates thereof in the *Official Journal of the European Communities* for information.
- 3 Member States shall exempt nationals of third countries holding a long-term visa or residence permit from a Member State from visa requirements under Article 12(1), pursuant to Article 22(7).

Article 15 Scope

Articles 12 to 14 shall not apply to visas issued for transit through the international zones of airports and transit between airports in a Member State.

Article 16 Airport transit visas

- 1 Each Member State shall require an airport transit visa for nationals of third countries included on the list in Annex II who do not already hold an entry or transit visa for the Member State in question when passing through the international areas of airports situated within its territory.
- 2 Member States may not require an airport transit visa for nationals of third countries which are not included on the list in Annex II.
- 3 Stateless persons and refugees within the meaning of the Geneva Convention 1951 and the New York Protocol of 1967 recognized by third countries shall only be required to be in possession of airport transit visas when crossing the external borders of the Member States if they are travelling on the basis of a travel document issued by a State listed in Annex II.

Article 17 Exceptions to airport transit visa requirements

- 1 A Member State shall provide for exceptions to the requirement for an airport transit visa in respect of third-country nationals included on the list in Annex II, in particular for:
 - crew members of aircraft and ships;
 - holders of diplomatic, official or service passports;
 - holders of visas issued by a Member State, or a State which is party to the Agreement on the European Economic Area;
 - holders of a residence permit issued by a Member State, or a State which is party to the Agreement on the European Economic Area;
 - holders of a residence permit issued by Andorra, Canada, the Principality of Monaco, the Republic of San Marino, the Swiss Confederation, Vatican City State, Japan or the United States of America which guarantees an unqualified right of return and a high level of forgery proofing.

Article 14(2) shall apply *mutatis mutandis*.

- 2 The list of residence permits guaranteeing an unqualified right of return referred to in the fifth indent of paragraph 1 is set out in Annex III to this Directive. It shall be updated by the Commission, acting in accordance with the procedure set out in Article 38, whenever the States referred to in that indent make changes affecting those permits.

Section 3 Procedure and conditions for issuing visas

Article 18 Conditions for issue of a visa

- 1 A visa shall be issued pursuant to this Chapter if a third-country national fulfills the conditions of entry laid down in Article 8(1)(a), (c), (d) and (e).

- 2 The support condition referred to in Article 8(1)(c) shall be considered fulfilled if the third-country national makes a 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 to which he or she has applied for a visa.
- 3 If a Member State considers it necessary to derogate, on one of the grounds listed in Article 8(3), from the principle enunciated in paragraph 1 by issuing a visa to a third-country national who does not fulfill all of the conditions of entry referred to in Article 8(1), the validity of this visa shall be limited to the territory of that Member State, which must inform the other Member States and the Commission accordingly.
- 4 When considering an application for the issue of an airport transit visa, the diplomatic or consular services of a Member State must ascertain that there is no security risk or risk of illegal immigration. They must above all be satisfied that the application for an airport transit visa is justified on the basis of the documents submitted by the applicant, and that as far as possible these documents guarantee entry into the country of final destination, in particular by presentation of a visa where so required. Article 8(1)(c) shall not apply to airport transit visas.

Article 19 Issuing visas at borders

Member States may issue visas pursuant to this Chapter at their external borders, with the exception of airport transit visas.

Article 20 Extension of visas

A third-country national may apply to any Member State for a short extension of a visa issued pursuant to this Chapter, or for a residence permit, without having to leave the territory of the Community.

Chapter V Freedom to travel

Article 21 Principle

- 1 Member States shall grant third-country nationals who are lawfully in a Member State the right to travel in the territories of other Member States in accordance with this Chapter.
- 2 This Chapter shall not affect provisions of Community or national law applicable to third-country nationals on:
 - stays for longer than three months; and
 - access to employment and the taking-up of activities as a self-employed person.

Article 22 Persons with residence permits or long-term visas

- 1 Member States shall grant the right to travel to third-country nationals who hold a valid residence permit or a provisional residence permit issued by another Member State.

Any such person may travel in the territories of the other Member States for a period of not more than three months provided that he or she meets the following requirements:

- he or she must be in possession of a valid residence permit and a valid travel document;

- he or she must have sufficient means of subsistence, both for the period of the planned visit and to return to his or her country of origin or to travel in transit in a third state, into which his or her admission is guaranteed, or is in a position to acquire such means legally.
- 2 The support condition referred to in the second indent of paragraph 1 shall be considered fulfilled if the third-country national makes a 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.
- 3 Member States shall, in accordance with the conditions laid down in Annex III, readmit any person to whom they have issued a residence permit and who is unlawfully resident in the territory of another Member State, even if the validity of that permit has expired.
- 4 A third-country national who holds a residence permit issued by a Member State and who is exercising the right to travel may be expelled if he or she does not meet the requirements laid down in paragraph 1 or if he or she represents a threat to public order or public security in the Member State in which he or she is exercising the right to travel.
- 5 Member States shall provide the Commission and the other Member States with a list of the documents they issue which are treated as equivalent to residence permits for the purposes of this Article, updating it as and when necessary. Article 14(2) shall apply to this list and any updates to it.
- 6 Paragraphs 1 to 4 shall apply *mutatis mutandis* to persons who have been granted a long-term visa in accordance with Chapter VI, even if they have not yet been issued with a residence permit.
- 7 In addition, a long-term visa granted in accordance with Chapter VI or a residence permit shall enable its holder to transit through the territories of the other Member States in order to proceed to the territory of the Member State which issued the visa, unless he or she fails to fulfill the conditions of entry referred to in Article 8(1)(a), (d) and (e) or he or she is on the national reporting list of the Member State through the territory of which he or she seeks to transit.

Article 23 Persons without residence permits

- 1 Member States shall grant the right to travel to third-country nationals who hold a uniform visa.

Such persons may travel in the territories of the Member States during the period of stay permitted by the visa, provided that they are in possession of a travel document bearing the valid visa and meet the requirement laid down in the second indent of Article 22(1).

- 2 Member States shall confer the right to travel on third-country nationals who are exempted from a visa requirement pursuant to Section 1 of Chapter IV.

Such persons may travel in the territories of the Member States for a total of not more than three months within a period of six months from the date of first entry in the territory of one of the Member States, provided that they are in possession of valid travel documents and meet the requirement laid down in the second indent of Article 22(1).

- 3 Paragraph 2 shall also apply to third-country nationals who are subject to visa requirements in a number of Member States, following a measure adopted pursuant to Article 64(2) of the Treaty establishing the European Community.
However, the right to travel shall in their case be restricted to the territories of such Member States as have exempted nationals of the relevant third country from the obligation to hold a visa, unless they hold a uniform visa.
In the latter event, the period of stay in the territories of the Member States which require a visa shall be limited to the period permitted by the visa.
- 4 The provisions of this Article shall not prevent any Member State from authorizing the stay in its territory of a third-country national beyond three months.
- 5 A third-country national allowed to enter the Community for a short stay who is exercising the right to travel may be expelled if he or she does not satisfy the conditions in paragraphs 1 or 2, according to whether or not he or she is subject to a visa requirement, or if he or she represents a threat to public order or public security in the Member State in which he or she is exercising the right to travel.

Article 24 Reporting of presence

Member States may require persons exercising the right to travel to report their presence in their territories.

Article 25 End of stay

Persons in a Member State on the basis of the right to travel granted in this Chapter should leave the Member State's territory without delay if they no longer satisfy the applicable requirements, without prejudice to any right to remain which they may derive from other provisions of national or Community law.

Chapter VI Long-term visas

Article 26 Procedure for issue

- 1 Member States shall issue a long-term visa to a third-country national who satisfies the conditions for the issue of that visa.
- 2 An application for a long-term visa can be lodged with the diplomatic or consular authorities of a Member State, at the external border of a Member State, or within a Member State after admission pursuant to this Directive or a measure referred to in Article 3.

Chapter VII European Information System

Section 1 Establishment and functioning of the European Information System

Article 27 Purpose of the European Information System

- 1 The purpose of the European Information System shall be, within the scope of this Directive and in accordance with this Chapter to maintain public order and security, including State security, and to apply the provisions of this Directive in Community territory using information transmitted by the system, while fully observing the rights to free movement, privacy and effective judicial protection.

2 The rules governing:

- the reasons for including data in the European Information System;
- the right of access to data in the European Information System;
- use of the European Information System to grant or withhold a residence permit;
- disclosure of information held in the European Information System;
- the right to correct data held in the European Information System;
- related remedies; and
- deletion of data in the European Information System;

shall be those set out in this Chapter, which shall replace Articles 25 and 96 of the Convention applying the Schengen Agreement in their entirety and Articles 101, 109, 110, 111 and 113 of that Convention as regards matters falling within the scope of this Directive.

3 The rules governing:

- the establishment of the European Information System;
- information included in the European Information System;
- restrictions on use of data;
- recording of data;
- the law applicable to transmission and use of data;
- responsibility for data;
- multiple reports;
- correction of data, without prejudice to Section 2;
- introduction of multiple reports in the European Information System;
- designation of an authority which shall have central responsibility for the national section of the European Information System
- exercise of powers by a national supervisory authority;
- the creation of a Joint Supervisory Authority;
- compensation for any injury caused to a person through the use of the national data file of the European Information System; and
- protection of data

shall be those in Articles 92, 94, 102 to 108, 114 to 116 and 118 of the Convention applying the Schengen Agreement.

Article 28 Reason for including data

- 1 Data relating to third-country nationals who are reported for the purposes of being refused entry shall be included on the basis of a national report resulting from decisions taken, in compliance with Articles 32 to 34, by the administrative authorities or courts responsible.
- 2 A third-country national's name may only be reported for the purposes of being refused entry if he or she represents a fundamental present threat to the public policy or public security of a Member State, in accordance with Articles 2(2), 3(1) and 3(2) of Directive 64/221, by reason of conduct having an effect that would be subject to repressive measures throughout the European Community and that can be demonstrated to the satisfaction of a court of competent jurisdiction in

accordance with Article 32. The conduct in question must be such that it has led to a substantial sentence of imprisonment, or would have led to such a substantial sentence had it been the subject of criminal proceedings.

- 3 A person cannot be reported for the purposes of being refused entry pursuant to paragraph 2 if there has been a substantial lapse of time since that person's criminal convictions and there has been no further criminal conviction.
- 4 A citizen of the European Union and members of his/her family, as defined by Community law, cannot be reported as persons not to be permitted entry. If a third-country national acquires the citizenship of the Union or the status of a family member of a citizen of the Union, Member States shall ensure that his or her name shall be immediately removed from the list of persons not to be permitted entry.
- 5 Member States shall not report asylum applicants whose applications have been definitively rejected as persons who must be refused entry solely because of the rejection of such applications or the disputed legality of their presence in that Member State prior to or during examination of those applications.

Article 29 Use of the European Information System

- 1 Reports on persons not to be permitted entry may only be used for the purpose of:
 - determining whether the conditions for the right to enter are met, pursuant to Article 8;
 - determining whether the conditions for the right to a visa are met, pursuant to Article 18;
 - determining whether the conditions for the right to travel are still met, pursuant to Article 22(7); or
 - determining whether the conditions for the issue of a long-term visa or residence permit are met, pursuant to paragraphs 2 and 3.

- 2 Where a Member State considers issuing a residence permit or a long-term visa to a third-country national who has been reported as a person not to be permitted entry it shall first consult the Member State which made the report. This consultation shall determine the detailed reasons for the report, its compliance with Article 28, and the proportionality of a refusal of a residence permit or long-term visa in light of the continued interests of the reporting Member State, the present interests of the Member State considering the issue of the permit or long-term visa and the rights and circumstances of the applicant when deciding whether to issue the permit. In such cases, the residence permit or long-term visa shall be issued nonetheless if there are serious grounds, in particular of a humanitarian nature or pursuant to international obligations, which require it to be issued.

If a residence permit or long-term visa is issued, the reporting Member State shall withdraw the report but may put the third-country national concerned on its national reporting list of persons not to be permitted entry.

- 3 Where it emerges that a third-country national holding a valid residence permit or long-term visa issued by a Member State has been reported as a person not to be permitted entry the reporting Member State shall consult the Member State which issued the residence permit or long-term visa. This consultation shall determine the detailed reasons for the report, its compliance with Article 28, and

the proportionality of the withdrawal of a residence permit or long-term visa in light of the continued interests of the reporting Member State, the present interests of the Member State which has issued the permit or long-term visa and the rights and circumstances of the applicant, before deciding whether there are sufficient grounds for the withdrawal of the residence permit or long-term visa.

If the residence permit or long-term visa is not withdrawn, the reporting Member State shall withdraw the report but may put the third-country national concerned on its national reporting list of persons not to be permitted entry.

- 4 When a Member State invokes paragraph 2 or 3, it shall also inform the person concerned pursuant to Article 32(1). Articles 33 and 34 and Chapter VIII shall apply.

Article 30 Access to European Information System data

- 1 Access to data included in the European Information System within the scope of application of this Directive and the right to search such data directly shall be allowed solely for the purposes listed in Article 29(1) and reserved exclusively for the following:
 - a) the authorities responsible for border checks;
 - b) the authorities responsible for issuing visas;
 - c) the central authorities responsible for examining visa applications
 - d) the authorities responsible for issuing long-term visas and residence permits and the administration of third-country nationals; and
 - e) where relevant, the authorities examining an application for asylum.

Member States shall prohibit any further access to data included in the European Information System.

- 2 Users may only search data which are necessary for the performance of their tasks.
- 3 Each of the Member States shall communicate to the Commission a list of the competent authorities which are authorized to search the data included in the European Information System directly. That list shall indicate for each authority the data which it may search, and for what purposes. The provisions of Article 14(2) shall apply.
- 4 If Member States store information obtained from the European Information System in any national files or databases, an indication of the source of such data shall be attached to the data and Member States shall ensure that access to and further storage of that data shall be restricted as far as possible. Member States shall retain a record of all such storage. Articles 31–34 shall apply *mutatis mutandis* to such national files or databases.
- 5 The obligation to correct or delete data pursuant to Article 106(2) of the Convention applying the Schengen Agreement shall also apply to copies of the data held in national files or databases pursuant to paragraph 4.

Article 31 Deletion of data

- 1 Data shall be retained for a period of maximum of three years in the European Information System, without prejudice to the possibility of earlier deletion pursuant to Articles 33 and 34.

- 2 Data deleted shall continue to be retained for one year in the technical support function. During that period they may be consulted only for the purposes of subsequently checking their accuracy and the lawfulness of their inclusion. Afterwards they must be destroyed.

Section 2 Individual rights

Article 32 Rights of challenge and disclosure

- 1 A Member State shall not enter a person's name as a person not to be permitted entry pursuant to Article 28 until it has informed the person concerned of this intended inclusion, of the information included, and of all rights and remedies available to that person.
- 2 Member States may not report a person as a person not to be permitted entry for a period of three months after the notification referred to in paragraph 1, unless the applicant has indicated before the expiry of that period that he or she will not challenge the intended report.
- 3 Member States may not report a person as a person not to be permitted entry until the definitive rejection of any challenge to the intended report pursuant to Article 34, if such challenge was made within three months of the notification of the intention to report.
- 4 Member States must disclose data on a person who has already been listed as a person not to be permitted entry if that person requests access to data relating to him or her which are included in the European Information System pursuant to this Directive. A Member State may designate the supervisory national authority provided for in Article 114 of the Convention implementing the Schengen Agreement for this purpose.
- 5 Member States may derogate from paragraphs 1 to 4 if the disclosure of such data would jeopardize a planned or ongoing criminal investigation. In such circumstances, the derogating Member State shall inform the applicant concerned as soon as reasonably practical and in any event, on the occasion of any decision refusing a short-term or long-term visa, entry, or a residence permit, or restricting his or her freedom to travel.

Article 33 Rights of prevention, correction and reconsideration

Within the scope of this Directive, any person has the right to:

- prevent the inclusion of a report as a person not to be permitted entry relating to him or her in the European Information System, if the criteria for inclusion set out in Article 28 are not met;
- prevent the inclusion of factually or legally inaccurate information relating to him or her in the European Information System;
- have factually inaccurate information relating to him or her corrected or to have legally inaccurate data relating to him or her deleted;
- insist upon immediate deletion of a report listing him or her as a person not to be permitted entry, upon the acquisition of citizenship of the Union or the status of family member of citizen of the Union;

- insist upon immediate deletion of a report listing him or her as a person not to be permitted entry, if that report was made purely because of the definitive rejection of his or her asylum application or the disputed legality of his or her presence prior to or during the examination of that application;
- require a Member State which reported him or her as a person not to be permitted entry or which seeks to impose consequences upon him or her as a result of such listing to reconsider the report and/or the consequences of that report, in particular in accordance with the principles of Article 28(2) or the Member State's international obligations; and
- insist upon deletion of the data held on him or her, pursuant to Article 31.

Article 34 Remedies

- 1 Any person may, in the territory of each Member State, bring before the courts or the authority competent under national law an action to enforce the rights referred to in Articles 32 or 33 or an action to obtain compensation in connection with a report concerning him or her. Applicants have the right to qualified and competent legal advice or assistance during the procedure, paid for out of public funds where necessary because of the applicant's circumstances.
- 2 Member States shall recognize and enforce final decisions taken by the courts or authorities referred to in paragraph 1, without prejudice to the provisions of Article 116 of the Convention implementing the Schengen Agreement.

Chapter VIII Procedural rights

Article 35 Scope

- 1 The rights in this Chapter will apply where:
 - a) the right to cross internal borders freely pursuant to Chapter II has been breached;
 - b) the right of entry into Community territory has been refused, pursuant to Chapter III;
 - c) the right to a visa, or the extension of a visa, has been refused, pursuant to Section 3 of Chapter IV;
 - d) the right to freedom of travel pursuant to Chapter V has been breached;
 - e) the right to a long-term visa pursuant to Chapter VI has been refused; or
 - f) an application for a new or renewed residence permit has been refused following the application of Article 29.
- 2 This Chapter is without prejudice to procedural rights set out in Chapter VII or any other provisions of Community or national law.

Article 36 Disclosure

- 1 Member States must disclose the detailed reasons for any decision referred to in Article 35(1) at the time of notifying that decision.
- 2 Without prejudice to Article 32, Member States must also disclose any data held in the European Information System at the time of disclosing the reasons for the decision referred to in Article 35(1), if that data was taken into account when taking the decision.

- 3 At the time of disclosing the reasons referred to in paragraph 1, Member States must also inform persons of the remedies available to them to challenge the decision, including the relevant remedies referred to in Article 34.

Article 37 Appeal rights

- 1 Member States shall ensure that all decisions referred to in Article 35(1) may be challenged before a judicial authority, possibly after prior recourse to an administrative authority, which is competent to examine the merits of the decision and to provide an effective remedy.
- 2 Where a Member State:
 - has refused to allow the right to cross internal borders, an extension of a visa or the right to travel; or
 - has refused to grant a long-term visa and the applicant entered that Member State's territory with a valid short-term or long-term visa;
 an applicant cannot be required to leave that Member State until the appeal has been concluded.

Chapter IX Final provisions

Article 38 Implementing measures

- 1 Where this Directive provides for the adoption of implementing measures, the provisions of Article 6 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission shall apply.
- 2 Under the same conditions, the Commission shall implement:
 - all provisions of the Schengen acquis which have a legal basis in the Treaty establishing the European Community, as determined by Council Decision 1999/436/EC;
 - the other provisions of the Convention implementing the Schengen Agreement referred to in Article 27, as regards matters falling within the scope of this Directive; and
 - Joint Action 97/11/JHA concerning a uniform format for residence permits.

Article 39 Foreign policy

- 1 Where it is provided, in a common position or in a joint action adopted pursuant to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to restrict the entry of one or more persons from one or more third countries, the Council shall take the necessary urgent measures by a qualified majority on a proposal from the Commission.
- 2 In other cases, a Member State may only exercise its powers over public policy or public security pursuant to this Directive on foreign policy grounds in accordance with Article 297 of the Treaty establishing the European Community, where entry or stay of one or more persons relates to measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the

maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has carried out for the purpose of maintaining peace and international security.

Article 40 Transition

- 1 Decisions or Declarations adopted by the Schengen Executive Committee or the Council within the scope of this Directive will continue to apply until replaced by Commission acts pursuant to Article 38.
- 2 The following measures are rescinded:
 - a) Articles 2, 4, 5, 6, 10, 11, 15, 16, 18, 19 to 22, 23(1), 25 and 96 of the 1990 Convention Implementing the Schengen Agreement;
 - b) Articles 1, 101, 109, 110, 111 and 113 of that Convention as regards matters falling within the scope of this Directive;
 - c) Regulation 574/1999; and
 - d) Joint Action 96/197/JHA.

Article 41 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission:
 - the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive;
 - other national legislative or regulatory measures or practices applicable in the field; and
 - relevant statistical data.

Such information shall be forwarded annually to the Commission, which shall see that it is circulated to the General Secretariat of the Council and to the Member States. Decision 94/90 on the right of access to Commission documents shall apply.
- 4 The Commission shall submit a report every two years on the subject-matter regulated by this Directive. This report shall be based on the information provided by the Member States pursuant to paragraph 3 and other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission, at the latest five years after adoption of this Directive.

Article 42

This Directive is addressed to the Member States.

EXPLANATORY MEMORANDUM

ILPA/MPG PROPOSED DIRECTIVE ON

admission of migrants

1 The goals of the area of freedom, security and justice

The Tampere European Council of 15–16 October 1999 asked the Commission to propose and the Council to adopt legislation shortly concerning the initial admission of third-country national migrants to the European Community. Since April 1, 1999, the Community has had the power to adopt legislation on this subject pursuant to Article 63(3)(a) of the EC Treaty, which confers upon it the competence to adopt measures concerning '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' of third-country nationals. It is important to ensure that the forthcoming rules strike a balance between the labour market preference traditionally accorded to EC nationals and third-country nationals resident in the Community, and the benefits that the Community can derive from the entry and residence of third-country citizens.

The specific issues of admission to seek and enjoy asylum, to be reunited with families, and as a short-term visitor are addressed in separate specific proposals made as part of this project.¹ So are the situations of long-term residents of the Union and persons in an irregular situation.² This proposal focuses in

particular on the issue of persons admitted legally to pursue either an economic activity (admission for employment or self-employment) or a non-economic activity (particularly education, but also including other activities).

In addition, this proposal clarifies the position of those citizens of a Member State who are designated as having a special, inferior status by that Member State which does not allow them to enjoy rights as citizens of the Union. It is appropriate to deal with their status here because it is closely related to that of the initial entry of non-citizens: both groups usually reside outside the Community and enter it for the first time when they take up economic or non-economic activities there. In particular, the status of 'special' citizens of the Union must be clarified with respect to human rights rules that form part of the general principles of EC law, pursuant to the consistent case law of the Court of Justice.

2 Relevant human rights rules

It is an established principle of international human rights law that states must admit their own citizens. Article 13(2) of the Universal Declaration of Human Rights states that '[e]veryone has the right to leave any country, including his own, and to return to his country'. Article 12(4) of the International Covenant on Civil and Political Rights states that '[n]o-one shall be arbitrarily deprived of the right to enter his own country'. This right is also secured in Article 3(2) of the Fourth Protocol to the European Convention on Human Rights, which states that states that '[n]o-one shall be deprived of the right to enter the territory of the state of which he is a national'.³

¹ See proposed Directives 2000/01, 2000/02 and 2000/04.

² See proposed Directives 2000/03 and 2000/06.

³ See also Article 22(5) of the American Convention on Human Rights and Article 12(2) of the African Charter on Human and People's Rights.

3 Existing EU rules and their defects

To date, the EU has adopted three Resolutions falling within the scope of this proposal. In June 1994, the Council adopted a Resolution on admission for employment,⁴ and in December 1994, it adopted Resolutions on admission for self-employment and admission of students.⁵ It failed to adopt a proposal in 1995 concerning the admission of 'others' falling outside the scope of the 1994 rules.⁶

There are a number of problems with these Resolutions.⁷ First of all, they are not binding and so cannot form a ground to claim a right to enter the European Union. Secondly, there is no legally binding system for ensuring the effective implementation of these Resolutions, except for a Decision requiring Member States to report regularly.⁸ Thirdly, the Resolutions are badly drafted and in many respects unclear; in particular, the employment Resolution does not clearly set out the rules and exceptions that apply to employment of third-country nationals. Fourthly, the Resolutions are overly restrictive, failing to acknowledge adequately the positive role that migration can play in the development of the EC's economy. In particular, they set out too many restrictions on 'switching' from one category to another, hindering the ability of a legal resident to show that he or she could contribute to the EC's economy in a different way.

4 OJ 1996, C 274/3.

5 Respectively OJ 1996, C 274/7 and 10.

6 See Council document 8630/95, 30 June 1995.

7 On the Resolutions, see Hedemann-Robinson, 'Third-Country Nationals, European Union Citizenship and Free Movement of Persons: A Time for Bridges Rather than Divisions' 16 (1996) YEL 321; Hailbronner, 'Migration Law and Policy within the Third Pillar of the Union Treaty' in Bieber and Monar, eds., *Justice and Home Affairs in the European Union: The Development of the Third Pillar* (European University Press, 1995); Guild and Niessen, *The Developing Immigration and Asylum Law of the European Union* (Kluwer, 1996); and Peers, 'Building Fortress Europe: The Development of EU Migration Law' 35 (1998) CMLRev. 1035.

8 OJ 1996 C 11/1.

9 For analyses of the proposed Convention, see Hedemann-Robinson, 'From Object to Subject?' 18 (1998) YEL (forthcoming) and Peers, 'Raising Minimum Standards or Racing to the Bottom? The Commission's Proposed Migration Convention' in Guild, ed., *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union* (Kluwer, 1999).

10 Case C-43/93 *Vander Elst* [1994] ECR I-3803.

11 COM (1999) 3, 26 Feb 1999.

In 1997, the Commission proposed a Convention on migration into the European Community. This proposal addressed migration for economic and non-economic purposes, along with admission for family reunion and the status of long-term residents of the European Union.⁹ The Convention, which was not adopted, is an improvement in several respects on the agreed Resolutions (on which it was based). The Convention would have been legally binding, would have provided for European Court jurisdiction over dispute settlement and interpretation, was better drafted than the Resolutions and was less restrictive than them. However, the proposal was flawed in several respects. In particular, it would only have granted rights to family members and long-term residents; the rules governing other categories of persons would effectively still have been discretionary. It was still unclear as regards the rules governing priority for employment, and still restrictive as regards the ability to switch between categories of migrant. Many important details governing migration status would have been left to implementing measures, which would have been adopted without democratic input.

It should be emphasized that the provision of services by third-country nationals is governed by Article 49 (ex-59) of the EC Treaty, not by Title IV of the EC Treaty or (previously) by the Maastricht-era third pillar. An EC company has the right to post its third-country national employees to another Member State to provide services, pursuant to Article 49 EC.¹⁰ Also, Article 49(2) gives the Council power to adopt rules governing the provision of services by self-employed third-country nationals who are already resident in the Community. In 1999, the Commission proposed two Directives on this subject, which would respectively facilitate the exercise of the first right and exercise the powers granted by Article 49(2).¹¹ Since these proposals address this important subject in detail and do not contain the serious flaws found in the Council's soft law and the Commission's proposed migration Convention, we have not addressed service provision by resident third-country nationals in our attached proposal for a migration directive.

4 The alternative approach

The following proposal takes a 'rights-based' approach to the admission of economic and non-economic migrants. It is not our position

that there is a human right to admission of migrants, except for refugees, family members and citizens of the state of destination. Rather a rights-based approach is appropriate because it ensures legal certainty and the application of the rule of law to migration of this type. It is appropriate to apply the rule of law to this area because of the important role which migrants play in the economic and cultural development of the European Union. The EC Treaty already sets out precise, legally binding rules on the admission of capital and payments from third countries into the EU,¹² and EC secondary legislation implementing the EC's GATT obligations sets out legally binding rules governing the entry of goods into the European Union. Similarly, the EC and its Member States have committed themselves to legally binding GATS obligations, which govern the provision of services (including establishment) of third-country legal and natural persons in the European Union. In that context, it is not revolutionary to apply binding rules to the entry and stay of natural persons into the EU in other contexts.

It should be emphasized that the rules governing the entry and stay of third-country nationals in the EU do not have to be as liberal as the rules governing entry and stay of EC nationals, or of already-resident third-country nationals. After all, the existing Community rules governing the entry of third-country goods, capital, services and establishment do not treat third-country imports as liberally as imports from other Member States. The conditions for entry and stay proposed in the attached Directive are therefore more restrictive than the conditions applying to EC nationals.

The EC Treaty and secondary legislation take a 'rights-based' approach to the entry of third-country goods, capital, services and establishment because it benefits the Community's economy to have binding rules regulating the import of such factors of production. Similarly, it would benefit the Community economy to have binding rules governing the entry and stay of natural persons in other contexts, given the huge role that

migrants have historically played as employees, investors, students and residents in the European Union's Member States.

5 Detail of the text

a) Structure

The proposed Directive is based on the Commission's proposed Convention on migration, which itself uses as a base the soft-law texts agreed in the Council in 1994. It also takes into account the EP's proposed amendments to that Convention as suggested in the plenary EP vote in February 1999.¹³ Of course, the Chapters of the proposed Convention dealing with family reunion and long-term residents do not form part of this proposal, because those subjects are addressed in separate proposals in this Project.¹⁴ The final provisions have also been altered, since (as the Commission recognized in its explanatory memorandum to the proposed Convention) they essentially were only appropriate for the adoption of a Convention.

The proposal does not include rules on the possibility of the Council or Commission adopting implementing measures. Of course, measures implementing EC acts (if there are any) are normally up to the Commission to decide, in conjunction with a committee procedure in which Member States' representatives try to control the Commission's exercise of its discretion (a 'comitology' committee). However, many EC acts do not provide for any type of implementing measures, with the result that any further Community measures within the scope of the existing measure will have to be adopted in accordance with the regular procedure for adopting EC legislation. The regular procedure requires notice of the proposal to national parliaments, a 'waiting period' for national parliaments to consider the proposal, and consultation of or co-decision with the European Parliament.

In our view, it would be inappropriate to confer power on the Commission to adopt measures implementing this proposal. The reason is that the technical details of immigration law are often vital issues of principle that should only be decided with the fuller participation of the EP and national parliaments, which also provides an opportunity for interested parties to comment on the proposals. Therefore the proposal contains no reference to any adoption

¹² Article 56(1) (ex-73b) EC; see Joined Cases C-163/94, 165/94 and 250/94 *Sanz de Lera* [1995] ECR I-4821.

¹³ OJ 1999, C 150/187.

¹⁴ See the proposals for Directives 2000/02 and 2000/03.

of implementing measures. As a result, it incorporates several detailed rules which appeared in the Council's 'soft law' resolutions but which were omitted from the Convention, presumably with a view to adopting them in the form of implementing measures. This partly reflects the position of the EP, which also wanted to incorporate some of the clauses from the 'soft law' into the main text of the Convention.¹⁵

b) Preamble

The proposal refers to the admission of migrants in the EC, not just the admission of third-country nationals, because it also clarifies the status of EC citizens with purportedly inferior status. Therefore, it needs the legal base not only of Article 63(3)(a), but of Article 18(2) EC, which gives the Community the power to adopt legislation facilitating EU citizens' rights 'to move and reside freely' in the EU. Although the Court of Justice has ruled that Article 18 (formerly 8a) EC does not govern the status of persons who seek to move only within their own Member State,¹⁶ the status of persons with a purportedly inferior citizenship status is a distinct issue which the Court will not have an opportunity to address until it hears the pending *Kaur* case.

The preamble points out that this directive sets out only 'minimum standards' which Member States are entitled to exceed, but that the rules governing migration must be in conformity with human rights standards. Also, the preamble makes clear that the directive does not govern the situation of third-country nationals already residing in a Member State who wish to provide services in another Member State, or who are posted by their employer by another Member State, because the Commission's outstanding proposals govern their situation.

c) Chapter I: Definitions and scope (Articles 1–5)

Article 1 sets out the purpose of the proposal. Article 2 sets out definitions, which adapt the definitions used in the proposed Convention or earlier soft law.

Since some types of activity governed by this proposal will be carried out for less than three

months, there is no time limit in Article 2(1) (compare with Article 1(a) of the proposed Convention). In accordance with the 'rights-based' approach in this proposal, Article 2(1) also refers to 'the right to enter', not just permission to enter as in the text of the proposed Convention.

The definition of 'admission for the purposes of pursuing an independent economic activity' in Article 2(2) adapts the definition in Article 11 of the proposed Convention. However, this version explicitly excludes third-country nationals already established in a Member State who wish to provide services in another, who are clearly governed instead by the Commission's proposal to implement Article 49(2) EC.¹⁷ The definition of 'apprentice' in Article 2(3) is new; it is necessary because of the extension of the scope of this proposal compared to the proposed Convention. The definition of 'independent economic activity' in Article 2(4) adopts the EP's proposed Article 11(2) of the Convention.

Article 2(5) is based on the Annex to the 1994 Resolution on workers, but makes a number of important amendments to ensure the ability of legal entities to transfer their staff. The changes are:

- a) non-profit entities can also move their staff between offices in the EC and offices outside it;
- b) entities established in non-member states of the World Trade Organization can also move their staff;
- c) companies with a principal place of business in the Community can also move their staff working for them in third states into their offices in the Community; and
- d) transfers can also be carried out where an EC-based company has a services contract with a non-EC company.

The definition of 'residence authorization' in Article 2(6) is based on the definition in Article 1(b) of the proposed Convention, except that authorizations for the purposes of this proposal can be for less than three months. Moreover, the Directive, unlike the Convention, does not provide for the exclusion of 'temporary authorizations which may be issued by Member States in certain cases' from its scope. This exclusion is unclear and was not explained in the Memorandum to the Commission's proposal. Any exclusion from the scope of EC legislation should be clear and precise, in the interests of legal certainty.

¹⁵ Note 13 above.

¹⁶ Joined Cases C-64 and 65/96 *Uecker and Jacquet*, [1997] ECR I-3171.

¹⁷ Note 11 above.

The definition of 'third-country national' in Article 2(7) is new; the proposed Convention referred variously to 'third-country nationals' and 'nationals of third countries' without defining them. The definition here makes it clear that the concept includes stateless persons and persons from disputed territories. It is consistent with several other proposals forming part of this Project. The definition of 'third state' in Article 2(8) is based on similar principles.

The definition of 'trainees' in Article 2(9) adapts the proposed text of Article 19(1) of the Convention, but this version recognizes that not all trainees should be forced to return and pursue an occupation in a third country. Some might meet the criteria to stay and take up employment within the EC. Finally, the definition of 'transfrontier workers' in Article 2(10) is similar to that in Article 10(1) of the proposed Convention, incorporating the EP's amendment that broadens the scope of the definition.

Article 3 recognizes that, in accordance with Article 63 EC and a declaration attached to the Amsterdam Treaty, Member States can sign treaties with third states on immigration if they wish, as long as such treaties do not conflict with EC rules. Also, the EC Treaty suggests that admission rules to be adopted by the Community will constitute minimum standards, which Member States can exceed if they wish. Furthermore, any treaties agreed by the Community have precedence over secondary Community acts,¹⁸ and a number of other EC measures might govern the access to employment and self-employment of third-country nationals (particularly refugees, family members and long-term residents).¹⁹ Finally, third-country national family members of an EC national who has moved to another Member State are covered by existing EC legislation. The persons covered by such separate rules should not be excluded entirely from the scope of this proposed Directive; rather they should be allowed to claim rights pursuant either to this proposal or pursuant to other measures depending on which is more favourable under the circumstances.

¹⁸ Case C-61/94 *Commission v. Germany* [1996] ECR I-3989.

¹⁹ See proposed Directives 2000/01, 2000/02 and 2000/03 in this Project.

²⁰ Proposed Article 16(4a), note 13 above.

Article 4 is a general non-discrimination clause that also appears in the other proposals in this project.

Article 5 gives effect to the right of Member State nationals to enter the country of which they are nationals. As mentioned in Section 2, this is a basic human right extensively recognized in international human rights law and it is necessary to provide for it expressly in a Community act. Article 5 clarifies the legal status of such persons as EU citizens; their detailed rights therefore derive from the provisions of the EC Treaty and existing secondary legislation on EU citizens, rather than the remainder of this proposal.

d) Chapter II: General rules (Articles 6–11)

Article 6(1) is based on Article 3(1) of the proposed Convention. However, it alters the proposed Convention by allowing people to apply for the right to stay in the Community pursuant to the Directive even if they are already legally present on the territory of the Community for another purpose. It does not grant any such right to persons who are present *without* authorization, although conversely it does not preclude regularization of such persons if a Member State decides. This change from the Commission's proposal is justified because there is no logical reason for denying people who are legally present the opportunity to look for employment or to examine the possibility of taking up self-employment in a Member State. It is implicit in Article 6 that such persons cannot *take up* an economic or non-economic activity in a Member State until that Member State confirms that they fulfil the conditions for the exercise of such a right, and that they must leave a Member State if they do not fulfil those conditions and have no other claim to stay on the territory.

Article 6(2) complements this by providing a specific right to enter to examine the possibility of taking up economic activities. This right complements the right to enter to examine the possibility of pursuing education, recognized in the existing soft law, in the EP's proposed addition to the proposed Convention,²⁰ and in Article 23(4) of this proposed Directive. Any persons wishing to enter pursuant to Article 6(2) would have to show that they met the conditions of Chapter VI of this proposal. Therefore they would not become a burden

on the social assistance or health system of a Member State.

Article 6(3) is based on Article 3(2) of the proposed Convention. However, it makes clear that a person has the right to entry if the relevant conditions are met. Moreover, the vague reference to public policy, security and health in the proposed Convention has been supplanted by the specific provisions of Article 10(2) of this proposal. Article 6(4) adds to the Convention rules by requiring a Member State to make a decision on an application within six months, while allowing persons to reside temporarily in the meantime. The six-month time limit, taken from existing EC legislation covering EC nationals,²¹ promotes legal certainty and is only a maximum; a quick decision would be far preferable and should be issued in the vast majority of cases. Article 6(4) does not mean that applicants can take up economic activity while waiting for a decision, unlike EC national workers waiting for a residence permit.²²

Article 7 is very similar to Article 4 of the Commission's proposed Convention. Lines 1 and 3 are fully covered by the Schengen acquis already, but line 2 would be an important new right, because it would oblige a Member State to issue a visa once it recognizes that a person meets the conditions for the exercise of a right pursuant to this Directive.

Article 8(1) adapts the permitted absences clause (Article 5) of the Commission's proposed Convention. It is drafted more generally than the corresponding Articles 5(1) and 5(3) of the Commission proposal. It does not transpose Article 5(2) of that proposal, dealing with long-term residents, because the rights of long-term residents are the subject of a separate proposal in this project.²³ Article 8(2) and the first line of Article 8(1) clarify the Commission's proposal by making clear that third-country nationals do

not simply have the right to *leave* for specified periods,²⁴ but the right to *readmission* and *continued residence status* at the conclusion of such periods.

Article 9 is based upon the renewal clause in the Commission's proposed Convention (Article 6), which allows persons to apply locally to remain in a Member State if the conditions for their admission are still met, if they are long-term residents, or otherwise under limited circumstances. Otherwise, in the Commission's proposal, persons have to leave the Community if they wish to apply to stay on grounds different from those on which they entered. This amounts to an 'anti-switching' rule, which also appears in the existing soft law. The EP proposed an amendment to Article 6 allowing persons to apply locally to stay pursuant to any reason covered by the Convention, and there is much merit to this position. If a person meets the criteria to switch to another category of migrant, what is the purpose in forcing them to go to the expense of leaving the country and making an application from outside? The third indent of Article 9(1) of this proposal therefore incorporates the EP's proposed amendment, while the second indent also adds that persons can also apply for status as a family member without having to leave.

Article 10, addressing the important issue of expulsion, has no corresponding clause in the Commission's proposed Convention. It limits expulsion or refusal of readmission to grounds of public policy, public security or public health, in which case the rules governing EC nationals will apply, or cases where the original conditions for entry are no longer met and there are no other grounds to stay. This clause has been proposed in the interests of equality and legal certainty. There is no reason to treat third-country nationals differently as regards expulsion on grounds of public policy, public security or public health and it would otherwise be inappropriate to expel them as long as they met the conditions for which they were initially granted entry. Article 10(3) gives further effect to these principles by requiring Member States to give suspensive effect to an expulsion decision.

Article 11 on the requirement to recognize qualifications under the rules of EC law only applies to qualifications gained in a Member State. It will particularly assist persons who stay after graduation, or who gained a degree in a

²¹ Article 5(1) of Directive 64/221 (OJ Spec Ed 1964, No. 850/64, no. 117).

²² Article 5 of Directive 68/360 (OJ Spec Ed 1968, L 257/13, p. 485).

²³ See proposed Directive 2000/03.

²⁴ The right to leave any country, including one's own, is already an established right under international human rights treaties: see Article 13(2) of the Universal Declaration of Human Rights, Article 12(2) of the International Covenant on Civil and Political Rights, Article 2(2) of the Fourth Protocol to the European Convention on Human Rights, Article 22(2) of the American Convention on Human Rights and Article 12(2) of the African Charter on Human and People's Rights.

Member State awhile back and now wish to take up employment or self-employment. This clause is based on the equality principle; there is no reason to refuse to recognize a qualification gained in a Member State on the same basis that EC nationals obtained it.

e) Chapter III: Workers (Articles 12–15)

Article 12, corresponding to Article 7 of the proposed Convention, sets out the general rule applying to admission for employment, and makes the exceptions to that rule clear. Employees can either be admitted in the general category (Article 12(1)(e)) or under one of four special categories. All five types of employee can only be admitted if they are named (Article 12(2)), but intra-corporate transferees and general employees, unlike frontier workers, trainees, etc., and *au pairs*, can only be admitted if they have special skills or experience (Article 12(3)). In addition, general employees can only be admitted if there is a shortage on the labour market, as evidenced by a continuing vacancy on the Eures system or by another method of recruitment. Unlike the proposed Convention and the soft law, there are no special rules applying to seasonal workers.

This clause suggests a fair and workable balance between employment preference for EC nationals and residents and the need of Community employers to have recourse to non-EC employees on occasion in order to start, expand and maintain their business or activities. By continuing to limit admission to persons who have specifically been named, it ensures that Member States' authorities can check to ensure that the system is not being abused. Furthermore, by imposing a skills test on two categories and a shortage test on the general category, it allows Member States to maintain existing preferences except where there is a clear reason to set them aside. However, where the conditions for entry are met, applicants have the right to enter, thus allowing Community employers to challenge the authorities' interpretation of the rules and thereby subjecting all actors in employment migration to the rule of law.

Article 13 corresponds to Article 8(1) of the proposed Convention. It incorporates the EP's

proposed amendment to the Convention that makes clear that a would-be employee needs only the *offer* of a contract, not an actual contract, to enter or stay for employment purposes. In addition, Article 13 deletes the requirement that the initial offer of a contract must be for at least one year, for there is no reason to exclude application of the Directive to employment contracts agreed for shorter periods or to interfere with agreements between employers and employees who prefer to contract for shorter periods of time. Article 13 also makes clear that the admission procedure does not apply to the specific groups of employees listed in Articles 12(1)(a) to (d). Finally, the final line has been amended to make clear that the initial limitations on the period of admission for employment cannot be applied forever, but will eventually be superseded by the right to continued employment and residence rights as a long-term resident.²⁵

Article 14 is essentially the same as Article 10(2) of the proposed Convention, while the definition of 'transfrontier workers' has been moved from Article 10(1) of the Convention to the definitions clause of this proposal (Article 2(10)). Article 15 is not found in the proposed Convention, but simplifies a clause found in the Resolution on admission for employment. It makes clear that persons can be admitted to do business (but not take up employment) without having to apply the full procedure to determine whether they meet the conditions for admission for employment.

f) Chapter IV: Independent economic activity (Articles 16–20)

Unlike the proposed Convention, this Chapter is divided, for the sake of clarity, into two separate sections on establishment (Articles 16–19) and services (Article 20). The definition found in Article 11 of the proposed Convention, as supplemented by the EP, has been moved to Article 2 of this proposal, the definitions clause.

Article 16 corresponds to Article 12 of the proposed Convention. It simplifies the conditions governing admission for self-employment, on the grounds that it is nearly impossible to test accurately whether a business will have a beneficial effect on a Member State. However, it should be possible to determine whether a person has sufficient resources to undertake the planned activity.

²⁵ For instance, see proposed Directive 2000/03 in this Project.

Article 17 of this proposal does not correspond to any clause in the proposed Convention. Instead, it adapts the rules on procedure from the 1994 Resolution on admission of the self-employed, to preclude any recourse to implementation by the Commission.

Article 18 corresponds to Article 13 of the proposed Convention. It broadens the right to stay so that persons can move into another line of business altogether after two years if the initial business proves unpromising or if the business environment has changed. This amendment recognizes that modern business is subject to rapid change and that the Community would be mistaken to expel persons who are able to adjust to changed circumstances or who are willing to invest in business opportunities (in new technology, for example) which have flourished since their initial entry.

Article 19 does not correspond to any provision of the Convention. However, it adapts a provision of the 1994 Resolution on self-employment, allowing Member States, if they wish, to apply a simplified procedure for large investors.

Finally, Article 20 sets out basic rules governing entry into the Community for self-employed persons who have a contract to provide services. It corresponds to Article 14 of the proposed Convention, which would unsatisfactorily leave the entirety of this important subject to be governed by future implementing measures. The Article would subject the provision of services to the conditions of proof that a contract has been offered and the compliance with national professional rules.

g) Chapter V: Admission for education (Articles 21–25)

This Chapter has a wider scope than the corresponding Chapter V of the Commission's proposed Convention,²⁶ including not just students and trainees within its scope, but also pupils in private schools, apprentices and

interns. The purpose of this extension is to ensure that as many entrants to the EC as possible are covered by common rules. In part, it implements the view of the EP, which suggested extending the Chapter to cover apprentices. It should be recalled that if a child is present in the Community with his or her family members, he or she will often have specific educational rights as a result.²⁷ Although this Chapter, like the rest of the proposed Directive, takes a 'rights-based' approach to immigration status, it does not preclude educational institutions or authorities from setting ceilings on the total number of students who may be admitted generally, or to specific institutions or programmes of study.

Article 21(1) is essentially the same as Article 15 in the Commission's proposed Convention, governing the entry of post-secondary students. Article 21(2) is a new clause extending the Chapter to pupils.

Article 22 does not correspond to any clause in the proposed Convention. However, both paragraphs incorporate rules agreed in the 1994 Council Resolution on admission of students, and would preclude the need for implementing measures as foreseen in 16(4) of the proposed Convention. Article 22(1) appeared as part of point C(2) of the 1994 resolution, and would be extended to pupils by this proposed Directive. The EP proposed the addition of a clause similar to Article 22(2) of this proposal as Article 15(2) to the proposed Convention. This 'sufficient resources' test is not really a new restriction, because such rules apply to EC nationals,²⁸ and are also extended to third-country nationals by means of the 1994 Council Resolution.

Article 23 corresponds to Article 16 of the proposed Convention. The final line of Article 23(1) is based on an EP amendment to take account of difficulties which foreign students may encounter. Article 23(3) incorporates an EP amendment about foundation courses, and furthermore has been altered to make it easier for students to change courses after the first year. This recognizes the reality of students who realize relatively late that they are taking an unsuitable course and wish to change courses. The new Article 23(4) incorporates the gist of an EP amendment. This principle actually appears in the Council's 1994 students' resolution, so is not a novel point. In-country

²⁶ See Article 21 of the proposed Convention.

²⁷ See proposed Directives 2000/01 (asylum), 2000/02 (family reunion) and 2000/03 (long-term residents) in this project, and on a more limited basis, proposed Directive 2000/06 (irregular migrants) in this Project.

²⁸ See Directive 93/96 (OJ 1993 L 317/59).

extensions should be mandatory, not discretionary, in accordance with the 'rights-based' approach to this Directive.

Article 24 corresponds to Article 17 of the proposed Convention. It makes the wording more positive and makes it clear there is a right to take up subsidiary employment. This allows the EC to compete with other states for the admission of students, who will often desire to take up subsidiary employment while studying. The initial lines of the clause accept that national and Community law can restrict the employment of pupils if such rules apply generally to minors.²⁹

Article 18 of the proposed Convention has been replaced by Article 9 of this proposal, which contains more liberal rules on 'switching' between categories of migrant.

Article 25 corresponds to Article 19 of the proposed Convention, although it has been extended to cover apprentices and interns. The definition of 'trainee' in Article 19(1) of the proposed Convention has been moved to Article 2 of this proposal, and a definition of 'apprentice' also appears in Article 2. However, 'intern' has not been defined, leaving this subject to national law. Articles 25(1) and (2) of this proposal are similar to Article 19(2) and (3) of the proposed Convention, although the 'anti-switching' rule in Article 19(3) of the proposed Convention has been replaced by the more liberal approach in Article 9 of this proposal.

Article 20 of the proposed Convention, on facilitating entry of persons receiving EC funding for education programmes, has not been reproduced in this proposal, because it merely sets out a non-binding statement of principle. However, we agree that such entry should be facilitated.

h) Chapter VI: Others (Articles 26–27)

These two provisions adapt Articles 22 and 23 of the Commission's proposal for a Convention. They incorporate the following amendments:

- a) persons have a right to admission if the conditions of Article 26 of this proposal are met; this implements an EP amendment;
- b) persons covered by Chapter VI are entitled to pursue gainful activities *outside* the Member States;
- c) persons must also show that they have, or can acquire, health cover in the potential host Member State;
- d) persons need only show that they are able to acquire accommodation, not necessarily that they have it already, before entering;
- e) the existing accommodation rules applying to EC national workers should apply to persons covered by Chapter VI;
- f) the existing rules applying to 'non-economic' EC national migrants moving to another Member State should govern the 'sufficient funds' and 'social security' requirements;³⁰
- g) they shall be allowed to undertake unremunerated work in the host Member State or elsewhere; and
- h) the rules governing renewal of a residence permit are now found in Article 9 of this proposal

These amendments extend legal security to persons falling within the scope of Chapter VI, and require equal treatment with EC national migrants in several respects. A number of migrants would be covered by this Chapter, including the parents of persons admitted pursuant to the education Chapter.

i) Chapter VII: Final provisions (Articles 28–29)

These are the standard final clauses found in EC legislation.

²⁹ See Directive 94/33 (OJ 1994 L 216/12).

³⁰ Directive 90/364 (OJ 1990 L 160/26); see Advocate-General's Opinion of 16 November 1999 in Case C-424/98, *Commission v. Italy*.

ON

admission of migrants to the European Union

The Council of the European Union,

Having regard to the Treaty establishing the European Community, and
in particular Articles 63(3)(a) and 18(2) thereof,

Having regard to the proposal of the Commission,

Having regard to the Opinion of the European Parliament,

Whereas:

- 1 Article 61 of the Treaty establishing the European Community requires the Community to establish an 'area of freedom, security and justice';
- 2 Article 63(3)(a) of the Treaty establishing the European Community confers competence upon the Community to adopt measures concerning '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', for third-country nationals;
- 3 In accordance with the final provisions of Article 63 of the Treaty establishing the European Community, 'measures adopted by the Council pursuant to' Article 63(3)(a) 'shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements';
- 4 In accordance with the Declaration in the Final Act of the Amsterdam Treaty, Member States are entitled to maintain or adopt treaties with third states concerning access to residence and employment in that Member State; whereas this allows Member States to retain links with third states with which they have close historical connections, in accordance with the conclusions of the Tampere European Council;
- 5 Treaties concluded by the Community or by the Community and its Member States have primacy over secondary acts of the Community; whereas in particular Member States and the Community must implement their obligations pursuant to the General Agreement on Trade in Services;
- 6 This Directive is without prejudice to rights conferred upon third-country nationals by other provisions of Community or national law;
- 7 The Member States of the European Community must compete with other developed countries for mobile investment and labour in order to ensure the

constant improvement of the living and working conditions of the peoples of the European Community, and to protect and enhance the interests of citizens of the Union to the extent that they may benefit from the admission of third-country nationals;

- 8 Many companies in the European Community depend upon employment of third-country nationals to develop and sustain their business;
- 9 Many companies and individuals in the European Community would benefit from the ability to contract with third-country national service providers or companies which provide services and whose employees are third-country nationals; whereas the Commission has presented separate proposals pursuant to Article 49 of the Treaty and Articles 47 and 55 of the Treaty regarding such service provision where third-country nationals reside inside the Community; whereas it is also necessary to adopt rules governing such provision where the third-country nationals reside outside the Community;
- 10 The European Community has an obligation to assist with the training and education of persons coming from less-developed countries, and such training is also of great benefit to the economy of the European Union;
- 11 According to Article 6(2) of the Treaty on European Union, the European 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; whereas Member States should in particular respect the right to family life of persons admitted pursuant to this Directive;
- 12 The European Court of Justice has additionally held that all international human rights treaties in which Member States have participated are sources of the fundamental rights that form part of the general principles of Community law; whereas the Fourth Protocol to the European Convention on Human Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights require Member States to admit their own citizens;
- 13 Whereas Member States must also admit their own citizens in order to ensure the effectiveness of the citizenship of the European Union;

has adopted this Directive:

Chapter I Principles

Article 1 Purpose

The purpose of this Directive is to define the circumstances in which persons residing outside the European Union may be admitted into the Union and reside there to undertake economic activity, to study or for other purposes.

Article 2 Definitions

Within the scope of this Directive:

- 1 'admission' means the right of a third-country national to enter the territory of a Member State in order to reside there;

- 2 'admission for the purposes of pursuing an independent economic activity' means the entry into the territory of a Member State of a natural person who is a third-country national, other than a person established in another Member State, in order to pursue in that Member State an economic activity involving no subordinate relationship to an employer;
- 3 'apprentices' means workers whose employment in a Member State is solely for the purpose of learning a skilled trade;
- 4 'independent economic activity' means 'establishment' as defined in Article 43 of the Treaty establishing the European Community, and shall include the setting up and management of undertakings, in particular companies or firms within the meaning of Article 48 of the Treaty, under the conditions laid down by its own nationals by the law of the Member State where such establishment is effected;
- 5 'intra-corporate transferee' means a natural person working within a legal person with activity in the territory of a third state, and being temporarily transferred in the context of the provision of a service through presence in the territory of a Member State of the Community; the legal persons concerned must have activities in the territory of a third state and the transfer must be to an establishment (office, branch or subsidiary) of that legal person, or pursuant to a commercial agreement between a company established inside the Community and a company which operates outside it, effectively providing services in the territory of a Member State;
- 6 'residence authorization' means a decision taken by a Member State, in whatever form is provided by its own legislation to permit a person to reside in its territory;
- 7 'third country national' means any person other than a citizen of the European Union, including a stateless person and a person whose nationality is disputed;
- 8 'third state' means any State other than a Member State of the European Union, including States which are not recognized by a Member State of the European Union;
- 9 'trainees' means workers whose presence in the territory of a Member State is closely linked to their wish to improve their skills and qualification in their chosen occupation; and
- 10 'transfrontier workers' means third-country nationals who pursue their economic activity in a Member State and are resident in a third country, and who in principle return to that third country each day or at least once a week.

Article 3 Scope

This Directive shall apply to all third-country nationals, and shall not preclude the application of more favourable provisions pursuant to:

- a) other provisions of Community law;
- b) bilateral or multilateral agreements concluded between the Community, or by the Community and its Member States, of the one part, and third States of the other part; or
- c) in accordance with Article 63 of the Treaty establishing the European Community, more favourable national provisions enacted or maintained by Member States or contained in agreements concluded between one or more Member States and third countries.

Article 4 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Article 5 Nationals of a Member State

Each Member State shall admit to its territory all persons holding the nationality of that Member State.

Chapter II General rules

Article 6 Examination of applications

- 1 An application by a third-country national for admission to a Member State to exercise the rights provided for in this Directive can be considered by the competent authorities if the applicant is outside the territory of the European Union or is legally present within the European Union after being admitted for a period of less than three months.
- 2 Member States shall admit a third-country national for up to six months, subject to the conditions in Chapter VI, for the purposes of seeking an employment contract pursuant to Chapter III or examining the possibility of establishing a business or seeking a contract to provide services pursuant to Chapter IV.
- 3 The Member State to which an application pursuant to paragraph 1 is made shall examine it carefully. Its competent authorities shall grant the right of admission if the relevant conditions are met.
- 4 A decision on an application shall be taken as soon as possible and in any event not later than six months from the date of application. The person concerned shall be allowed to remain temporarily in the territory, pending the decision on the application, if already legally present there.

Article 7 Travel documents

Third-country nationals must have the relevant travel documents in order to enter the territory of the Member State to which they have the right of admission. The Member State in question shall issue any visas required. Other Member States shall issue any transit visas necessary to enable such third-country nationals to travel to the Member State to which they have the right of admission.

Article 8 Effect of absence

- 1 Third-country nationals admitted to a Member State within the scope of this Directive have the right of readmission to that Member State if:
 - a) they have been absent for a period specified in that Member State's legislation; or
 - b) they have been absent for a longer period, which has been authorized by that Member State; or

- c) the specific conditions attached to the exercise of their right of admission into the European Union are still met.
- 2 Unless third-country nationals have been absent for periods longer than those set out in paragraph 1, Member States cannot withdraw or refuse to renew their residence authorization on grounds of absence.

Article 9 Procedure for renewal of residence authorization

- 1 Member States shall renew the residence authorization of third-country nationals when their authorized period of residence pursuant to this Directive expires, if:
- they still satisfy the conditions to exercise the right of admission; or
 - they wish to exercise the right to remain as family members of an EC national or a third-country national in that Member State; or
 - they wish to remain for any other reason falling within the scope of this Directive, and satisfy the relevant conditions for the exercise of that right.
- 2 Third-country nationals shall not be required to leave the country to exercise their rights pursuant to Article 1.

Article 10 Expulsion after admission

- 1 Member States may only refuse to readmit, refuse to renew the residence authorization of, or withdraw the residence authorization of persons who have the right to enter and reside in the European Community pursuant to this Directive:
- a) where the specific conditions for exercising the right to admission or readmission are no longer met, without prejudice to Articles 8 or 9; or
 - b) on grounds of public policy, public security or public health.
- 2 To give effect to the principle in paragraph 1(b), Member States shall ensure that rules equivalent to Directive 64/221, and any subsequent amendments thereto, shall apply *mutatis mutandis* to any decisions to refuse to readmit, refuse to renew the residence authorization of, or withdraw the residence authorization of residence authorization on grounds of public policy, public security or public health.
- 3 Where a Member State:
- has refused to allow initial admission within the scope of this Directive of an applicant who is already legally present on the territory; or
 - has refused to allow the extension of a residence authorization within the scope of this Directive;
- a person cannot be required to leave that Member State until any appeal against that decision has been concluded, except where this would be contrary to the interests of national security.

Article 11 Recognition of qualifications

Member States shall ensure that rules equivalent to the provisions of Community legislation on recognition of qualifications acquired within the Community, and any subsequent amendments thereto, shall apply *mutatis mutandis* to all persons within the scope of this Directive.

Chapter III Admission for employment

Article 12 Conditions for admission

- 1 Without prejudice to Article 24, a third-country national has the right to admission to the territory of a Member State for the purposes of paid employment if he or she is:
 - a) a frontier worker, in accordance with Article 14;
 - b) a trainee, apprentice or intern, in accordance with Article 25;
 - c) an *au pair* fulfilling the conditions of a scheme complying with the legislation of a Member State;
 - d) an intra-corporate transferee being transferred temporarily by a legal person; or
 - e) a candidate to fill a job vacancy in a Member State that has been vacant after inclusion for one month in the Eures employment clearance system established by Title IV of Regulation 1612/68, taking into account other recruitment methods used.
- 2 To exercise the rights set out in paragraph 1, a third-country national must be a named worker or a named employee of a service provider.
- 3 To exercise the rights set out in sub-paragraph 1(d) or (e), a third-country national must have specialist qualifications or experience.

Article 13 Procedure for admission

Without prejudice to Article 6(2), to exercise the right to admission for the purposes of paid employment pursuant to Article 10(1)(e), third-country nationals must already have obtained the offer of a work contract and have satisfied the conditions for the right to take up that employment in the territory of the Member State concerned. Once these conditions are satisfied, third-country nationals shall be issued with a residence authorization for a period at least equivalent to the duration of the work contract. The first residence authorization, however, is limited to a period of four years, without prejudice to Community or national rules on the acquisition of the status of long-term resident.

Article 14 Transfrontier workers

Transfrontier workers who are third-country nationals may be admitted for the purposes of paid employment in the frontier zone of an adjacent Member State.

Article 15 Business visitors

Nothing in this Chapter shall prevent Member States from admitting as workers third-country nationals not residing in the territory of a Member State who are seeking entry to transact business without entering into employment.

Chapter IV Admission to pursue an independent economic activity

Section 1 Establishment

Article 16 Conditions of admission

Third-country nationals wishing to establish themselves in a Member State in order to pursue an independent economic activity have the right of admission to

the territory of that Member State on condition that they comply with the rules governing the exercise of the activity concerned and that they have sufficient resources to undertake, in the relevant Member State, the activity for which they submit their admission application.

Article 17 Procedure for admission

- 1 Requests to exercise the right of admission pursuant to Article 16 must be accompanied by information which can be used to assess whether the planned activity meets the conditions set out in Article 16, and also by documentary evidence that the activity will be carried out in accordance with the relevant national legislation.
- 2 The following may be considered as evidence in assessing the preconditions set out in paragraph 1:
 - a) documents indicating the nature, scale and duration of the activity in which the person wishes to engage;
 - b) a description of the premises where the activity will be carried out, which should be appropriate for it; and
 - c) evidence of the funds available for the intended purpose.
- 3 The following may be considered as evidence in assessing compliance with national or Community legislation in force:
 - a) proof that the self-employed person meets the conditions of the host Member State regarding professional qualifications and access to the occupation, without prejudice to Article 11;
 - b) in the case of companies or firms, the instrument of incorporation, evidence of publication or registration thereof, and the names of the directors and managerial staff and of the associates authorised to act on their behalf; and
 - c) proof, such as police documentation or similar documents, showing the integrity of the person concerned.

Article 18 Residence authorization

- 1 The residence authorization issued to third-country nationals to pursue an independent economic activity referred to in Article 16 shall be issued for at least two years.
- 2 Applications to exercise the right to renewal may be made in the host Member State for the same activity as that for which the right was initially exercised, for an activity which is a continuation or development of it, or for any other activity which satisfies the conditions set out in Article 16.

Article 19 Large investments

Nothing in this Section prevents a Member State from admitting, subject to its national law, third-country nationals who make substantial investments in the commerce and industry of that Member State where there are economic reasons justifying exemption from the rules in this Section that limit the business activities in which the third-country national is engaged.

Section 2 Services

Article 20 Provision of services

Third-country nationals not habitually resident in a Member State have the right to provide services on an independent basis within a Member State upon proof that they have been offered a contract for the provision of services and that their provision of services will comply with the rules in force in the host Member State governing the exercise of a professional activity.

Chapter V Admission for education

Article 21 Conditions of admission

- 1 Third-country nationals have the right of admission to the territory of a Member State as students if they have been admitted to a State or State-recognized establishment of higher education in order to:
 - a) attend preparatory courses for a specific course of study in higher education;
 - b) pursue a course of study;
 - c) prepare a doctoral thesis; or
 - d) pursue research activity as part of a basic or advanced vocational education after obtaining a degree or higher education diploma, where that activity is not primarily intended to secure an income.
- 2 Third-country nationals have the right of admission to the territory of a Member State as pupils if they have been admitted to a State-recognized establishment providing primary or secondary education which is not funded by the State.

Article 22 Procedure for admission

- 1 A third-country national requesting admission as a student or pupil will have to prove to the competent authorities of the relevant Member State that he or she has a firm offer of admission to an institution referred to in Article 21 or a comparable institution appropriate to his or her studies for education as a main activity.
- 2 Member States may require evidence that third-country nationals have the financial means to support the cost of their education and subsistence for themselves so that during their stay they do not need to claim social assistance in the host Member State. A host Member State may also require evidence of health cover for all risks in that State, if required by its national legislation.

Article 23 Residence authorization

- 1 The period of residence shall be linked to the length of the course of education chosen. The duration of the residence authorization issued shall be the same as the duration of enrolment at the establishment attended. Such duration may be extended if the student encounters specific difficulties relating to his or her immigration status.
- 2 Residence authorizations may be renewed annually. They shall be renewed if the applicants produce evidence that they continue to satisfy the requirements set for the issuance of the initial authorization and that they have taken any tests required by the education establishment which they attend.

- 3 Students admitted pursuant to Article 21(1) may change their course of study after the first year if they are still pursuing the foundation course or if they can explain why they wish to change their course of study.
- 4 A Member State shall permit entry to persons who are interested in preparing an application for education in that Member State or who can demonstrate a genuine and realistic plan for completing a course of education. Such persons may not be required to leave the country in order to obtain an extension of their residence authorization. If they are minors, Member States shall also permit entry to their parents or guardians.

Article 24 Employment of students

Without prejudice to the non-discriminatory application of Community or national law on the employment of minors, third-country nationals admitted to the territory of a Member State pursuant to Article 21 have the right to take up subsidiary or short-term work, including seasonal work, provided that this does not interfere with their studies.

Article 25 Trainees, apprentices and interns

- 1 Third-country nationals seeking the right of admission to the territory of a Member State as trainees or apprentices must satisfy the following requirements:
 - a) they shall hold a training or apprenticeship agreement with a host establishment, guaranteeing them sufficient income to support themselves; and
 - b) they shall enjoy social security cover for any risks that may arise in the host Member State.
- 2 Residence authorizations granted to trainees and apprentices shall be limited to one year. If the time required to obtain a vocational qualification is more than one year, the authorization shall be extended annually.
- 3 Paragraphs 1 and 2 shall apply *mutatis mutandis* to interns, with the exception of sub-paragraph 1(a).

Chapter VI Admission for other purposes

Article 26 Conditions of admission

- 1 Third-country nationals to whom the provisions of Chapters III, IV or V do not apply have the right of admission to the territory of a Member State if they satisfy the following requirements:
 - a) they shall have sufficient means to support themselves without engaging in any of the gainful activities referred to in Chapters III and IV within the territory of the Member States;
 - b) they shall enjoy social security cover that is valid in the Member State to which they are seeking submission;
 - c) they must provide evidence of health cover for all risks in the Member State to which they are seeking admission, or demonstrate the ability to acquire such cover, if required by its national legislation;
 - d) they shall be able to show the lawful origin of their means of support; and

- e) they shall have, or demonstrate the ability to acquire, accommodation in the Member State to which the application is made. Article 10(3) of Regulation 1612/68 shall apply.
- 2 Directive 90/364 shall apply *mutatis mutandis* to sub-paragraphs 1(a) and (b).
- 3 Persons admitted pursuant to paragraph 1 shall not be precluded from undertaking unremunerated activity.

Article 27 Residence authorization

The initial right of residence of a third-country national pursuant to Article 26 shall be limited to one year.

Chapter VII General and final provisions

Article 28 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission:
 - the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive;
 - other national legislative or regulatory measures or practices applicable in the field of admission of third-country nationals;
 - statistical data on admission of third-country nationals; and
 - general information on admission of third-country nationals.

Such information shall be forwarded every two years to the Commission, which shall see that it is circulated to the General Secretariat of the Council and to the Member States. Decision 94/90 on the right of access to Commission documents shall apply.
- 4 The Commission shall submit a report every two years on admission of third-country nationals in the Member States within the scope of this Directive. This report shall be based on the information provided by the Member States pursuant to paragraph 3 and other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission, at the latest five years after adoption of this Directive.

Article 29

This Directive is addressed to the Member States.

EXPLANATORY MEMORANDUM

ILPA/MPG PROPOSED DIRECTIVE ON

irregular migrants

1 The goals of the area of freedom, security and justice

Since 1 April 1999, the Community has had the power to adopt legislation concerning illegal migration and residence pursuant to Article 63(3)(b) of the EC Treaty. In fact, this power must be exercised within five years. It is expected that the Community will adopt legislation governing the details of removing illegal residents from the territory of the European Community and preventing illegal entry and residence. However, it should not be forgotten that illegal residents also are entitled to human rights protection, and that the Community is obliged to implement human rights obligations as part of the general principles of Community law. The EC's new powers in Title IV of the EC Treaty should therefore be interpreted as an obligation to ensure that the Community and Member States are providing effective protection of human rights within the scope of that Title. Since there is a risk that EC measures on illegal migration will overlook this aspect of this subject, we suggest the attached proposal for consideration for adoption as a separate Directive or for inclusion within the context of more general legislation on illegal migration.

The specific issues of asylum, family reunion, long-term residents, border and visa controls,

and admission for an economic or non-economic activity are addressed in separate specific proposals made as part of this project.¹ Those proposals set out a comprehensive set of rules which will prevent many persons from being considered illegal entrants or residents in the first place. This proposal focuses on those who will fall outside of the scope of such rules, because they never had the right or authorization to enter and stay in the Union, or because their entry and stay was initially legal but became illegal.

2 Relevant human rights rules²

a) Lawfully present foreigners

International and regional human rights law grants extensive procedural protection against expulsion for lawfully present persons. Article 13 of the International Covenant on Civil and Political Rights provides that a foreigner lawfully in a state's territory:

shall be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security require, be allowed to submit reasons against his expulsion and to have his case reviewed by, and represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

This Article does not make clear whether a foreigner can insist on exercising the procedural rights before expulsion, and seems to suggest that the rights are lost altogether if the expulsion is on national security grounds. Article 1 of the Seventh Protocol to the ECHR is nearly identical to Article 13 of the Covenant.³ The difference is that Article 1(2) of the Protocol makes clear that

¹ See proposed Directives 2000/01, 2000/02, 2000/03, 2000/04 and 2000/05.

² See in more detail Cholewinski, *Migrant Workers in International Human Rights Law* (Oxford, 1997).

³ See also Article 22(6) of the American Convention on Human Rights and Article 12(4) of the African Charter on Human and People's Rights, requiring that individual expulsion of lawfully admitted persons be in accordance with law.

the procedural rights can be exercised before expulsion, except 'when such expulsion is necessary in the interests of public order or is grounded on reasons of national security'. This implies that the procedural rights can still be exercised after an exceptional expulsion.

In addition, the European Conventions on Establishment and on Social and Medical Assistance limit expulsion of lawful residents, albeit only of the contracting parties. Article 8 of Convention 97 of the International Labour Organization (ILO) limits expulsion of permanent residents and their family members on the sole ground that a permanent resident has become ill after entry. Article 18 of ILO Recommendation 86 prevents removal of a 'regularly admitted' worker due to lack of means or the state of the employment market, unless there is an intergovernmental agreement that contains certain minimum standards.

Regional human rights law also protects against collective expulsion of foreigners, without distinguishing between lawfully and unlawfully resident foreigners. Such expulsion is prohibited in Europe by the Fourth Protocol to the ECHR (Article 4).⁴

Some protection against expulsion of illegal residents is also provided by Article 8 ECHR, which requires states to respect the right to family or private life. The European Court of Human Rights has ruled that illegal residents with established family life in a Council of Europe state can resist an expulsion by invoking Article 8 ECHR, although the fact of their illegal residence counts against them when balancing the factors for and against expulsion.⁵ Article 3 ECHR, which protects against removal to a third state where a person would face torture or inhuman or degrading treatment, also protects illegal entrants.⁶ It should also be recalled that Article 31 of the Geneva Convention on refugees prevents states from imposing penalties on refugees who have crossed the borders of a contracting state irregularly.

⁴ See also Article 22(9) of the American Convention on Human Rights and Article 12(5) of the African Charter on Human and People's Rights. The latter bans 'mass expulsion', meaning expulsion which is 'aimed at national, social, religious or ethnic groups'.

⁵ *Dahlia v. France*, judgment of the European Court of Human Rights.

⁶ *D v. United Kingdom*, judgment of the European Court of Human Rights.

As can be seen, most established international and regional human rights rules specifically governing migration status only serve to protect lawfully present foreigners. But there are important exceptions: the prohibition of collective expulsion, the rules governing asylum and other protection from persecution, and (to some extent) the rules governing family reunion. However, there is nothing to preclude the application of other provisions of international human rights treaties to illegal migrants, most importantly the right to life, the prohibition of torture or other inhuman or degrading treatment, and restrictions upon detention.

Of course, it is often arguable whether or not a particular person is or is not lawfully present on a state's territory, making it difficult in practice to extend procedural rights to lawful present persons but deny it to unlawful ones. For those reasons, it is preferable to refer to persons whose lawful presence is disputed as 'irregular migrants'. Furthermore, there are some more recent international measures that expressly deal with the status of unlawfully present foreigners.

b) Unlawfully present foreigners

More specific protection for irregular migrants has been provided for in Convention 143 and Recommendation 151 of the ILO, and the 1990 United Nations Convention on the Rights of Migrant Workers (UNCRMW), although the latter is not yet in force. Article 9 of Convention 143 provides that irregular migrants have the right to equal treatment as regards remuneration, social security and other benefits arising out of past employment and the possibility of arguing about such rights to a competent body. Workers and their families do not have to bear the cost of their expulsion, and the Convention does not prevent states from regularizing irregular migrants. Article 8 of Recommendation 151 provides rules which apply in the event of regularization of irregular migrants, and in addition suggests that irregular migrants should be entitled to trade union membership and exercise of trade union rights. Article 34 of that Recommendation provides for further rights for irregular migrants as regards prior employment.

The 1990 UN Convention contains one set of provisions that apply to all migrant workers, whether irregular migrants or not (Part III, Articles 8–35), and another, more generous set of provisions that apply only to authorized

migrant workers (Part IV, Articles 38–56). The former Part includes both protection of economic, social and cultural rights, including rights deriving from prior employment, and protection of civil and political rights such as the right to life and protection in criminal trials. It also includes detailed procedural rights governing expulsion.

It might be argued that because some of the treaties discussed above do not bind all Member States, they do not form part of the human rights obligations that constitute the general principles of EC law. However, the Court of Justice has stated that international human rights treaties form part of the general principles of human rights in EC law if Member States have ‘collaborated’ in drawing up such treaties, so it is arguable that all the treaties discussed above do form part of such principles.

3 Existing EU rules and their defects⁷

Where existing EC legislation gives migration rights to EC nationals and their family members, the Court of Justice has consistently ruled that residence permits are only declaratory of rights, not constitutive.⁸ To some extent the same is true of persons deriving rights from treaties with third states agreed by the Community and its Member States.⁹ Logically the same should be true of persons deriving rights from legislation adopted pursuant to Title IV of the EC Treaty. This will reduce the number of persons who can be considered as ‘irregular migrants’ within the European Community.

⁷ For a more detailed discussion of EU measures on illegal migration, see Peers, *EU Justice and Home Affairs Law* (Longman, 2000) 94–99.

⁸ Case 48/75, *Royer*, [1976] ECR 497; on family members, see Case 249/86, *Commission v. Germany*, [1989] ECR 1263 and Joined Cases 389 and 390/87, *Echternach and Moritz*, [1989] ECR 723.

⁹ For instance, see Case C–434/93 *Bozkurt* [1995] ECR I–1475.

¹⁰ Not published in the Official Journal: see Bunyan, ed., *Key Texts on Justice and Home Affairs in the European Union* (Statewatch, 1997) 77.

¹¹ Respectively not published in the Official Journal (see Bunyan, *ibid.*, 81); OJ 1996, C 5/1; OJ 1996, C 304/1.

¹² Point 2 of 1995 Recommendation (*ibid.*). See criticism in Guild and Niessen, *The Developing Immigration and Asylum Law of the European Union* (Kluwer, 1996) and Peers, ‘Undercutting Integration: Developments in EU Policy on Third-Country Nationals’ 22 (1997) ELRev. 76.

¹³ Respectively OJ 1996, C 5/5, 7 and 3.

¹⁴ Respectively OJ 1996, C 274/20, 21 and 25.

In the meantime, the EU has adopted rules governing four types of policy which affect irregular migrants:

- a) defining illegal residence and requiring checks on illegal residence;
- b) assisting the operational aspects of expulsion;
- c) approaching third countries to facilitate readmission; and
- d) exchanging information on illegal migration.

The initial measure in this field, a 1992 Recommendation of Immigration Ministers, addresses all types of policy.¹⁰ It requires expulsion of persons who have entered or remained in a Member State unlawfully, who are subject to expulsion on public policy, public security or public health grounds, or who have submitted a failed application for asylum – unless there are humanitarian grounds for them to remain or their position has been regularized. Irregular migrants should be notified of an expulsion decision, with the ability to challenge it and rights to interpretation and legal representation. Although these rights are only vaguely defined in the Recommendation, they are the first acknowledgement (pending entry into force of the UNCRMW) that irregular migrants are entitled to procedural rights to resist expulsion similar to those that have long been established for lawfully present foreigners.

The Immigration Ministers, then the Council, adopted further Recommendations in 1993, 1995 and 1996 on checks to determine whether persons are residing illegally or employed illegally.¹¹ These rules do not take account of possible racially discriminatory effects of employer sanctions or frequent checks upon migration status. One of them even encourages race-based checking, by providing that checks should be carried out ‘where a person appears to be residing in the country unlawfully.’¹² Immigration Ministers, then the Council, also adopted a Recommendation on transit for expulsion in 1992, amended in 1993, then supplemented in 1995.¹³ In 1994 and 1995, the Council adopted a *laissez-passer* for use during readmission proceedings, standard provisions for use in Member States’ readmission agreements with third states; and standard provisions for use as a Protocol to such agreements.¹⁴ These readmission rules do not take adequate account of persecution concerns, of the right pursuant to Article 5 ECHR

to resist the use of deportation proceedings as disguised extradition proceedings,¹⁵ or of individuals' rights to enter their country of origin if they prefer.¹⁶

EU rules have focused largely on the details of arranging expulsion, paying only limited regard to the status and the rights of illegal migrants. The entry into force of the Treaty of Amsterdam provides an opportunity to reconsider this approach and to restore some balance to Community migration law.

4 The alternative approach

The following proposal takes a 'rights-based' approach to the status of irregular migrants. It is not our position that there is a human right to entry or stay of migrants, except for refugees, family members, long-term residents and citizens of the state of destination. Rather a rights-based approach is appropriate because it recognizes that even persons in an irregular situation have fundamental rights that must be protected. Unless the Community adopts legislation securing such rights, or implements protection for such rights as part of general legislation on illegal migration, there is a risk that the rights of irregular migrants will be overlooked and indeed breached.

Therefore the Community should adopt specific rules governing:

- a) the expulsion and detention of irregular migrants;
- b) the social and economic rights which irregular migrants are entitled to while resident in the Community; and
- c) protection of human rights during enforcement of expulsion decisions or the application of sanctions to persons in connection with irregular migration.

¹⁵ *Bozzano v. France*, judgment of the European Court of Human Rights.

¹⁶ See criticism of EU readmission rules by Meijers, Fernhout and Terlouw, 'Forced Repatriation: Towards Minimum Guarantees for Repatriation Treaties', and Meijers Committee, 'Memorandum regarding Readmission Agreements', both in Meijers, et al., *Democracy, Migrants and Police in the European Union* (Forum, 1997) 105 and 117.

¹⁷ See also Article 9(4) of ILO Convention 143 and Article 8(1) and (2) of ILO Recommendation 151.

5 Detail of the text

a) Structure

The proposed Directive is not based on any single specific legal measure that has previously been adopted or proposed. Instead, it is based largely on the provisions of various human rights treaties that govern, or would govern, the status of irregular migrants.

The proposal does not include rules on the possibility of the Council or Commission adopting implementing measures. Of course, measures implementing EC acts (if there are any) are normally up to the Commission to decide, in conjunction with a committee procedure in which Member States' representatives try to control the Commission's exercise of its discretion (a 'comitology' committee). However, many EC acts do not provide for any type of implementing measures, with the result that any further Community measures within the scope of the existing measure will have to be adopted in accordance with the regular procedure for adopting EC legislation. The regular procedure requires notice of the proposal to national parliaments, a 'waiting period' for national parliaments to consider the proposal, and consultation of or co-decision with the European Parliament.

In our view, it would be inappropriate to confer power on the Commission to adopt measures implementing this proposal. The reason is that the technical details of immigration law are often vital issues of principle that should only be decided with the fuller participation of the EP and national parliaments, which also provides an opportunity for interested parties to comment on the proposals. Therefore the proposal contains no reference to any adoption of implementing measures.

At no point does the proposed Directive either require Member States to regularize the position of irregular migrants, or preclude them from regularizing such persons if it so decides. This 'neutral' position on regularization is in accordance with Article 35 of the UNCRMW.¹⁷

b) Preamble

The proposal is exclusively concerned with the protection of human rights of irregular migrants. We would welcome adoption of the proposal either as an independent act or as part of comprehensive legislation that also governs the

operational aspects of the expulsion of irregular migrants. The proposal has the joint legal base of Article 63(3)(b) EC (illegal residence and migration) and Article 66 EC, governing cooperation between Member States' administrations. The preamble also points out that this Directive sets out only 'minimum standards' which Member States are entitled to exceed, but that the rules governing migration must be in conformity with human rights standards.

c) Chapter I: Definitions and scope (Articles 1–4)

Article 1 sets out the purpose of the proposal. Article 2 sets out definitions. Article 2(1), defining 'person in an irregular situation', is the most important definition in the proposal. It is similar to the definition found in Article 5 of the UNCRMW. The definition of 'third-country national' in Article 2(2) is similar to that found in other proposals in this Project; it makes clear that stateless persons are covered by the scope of this proposal. The definition of 'non-Member State' in Article 2(3) is complementary. Finally, the concept of 'definitively rejected asylum application' in Article 2(4) is the same as that in the asylum proposal in this Project; it makes clear that an asylum applicant cannot be considered rejected, and therefore removable, until all appeals have been exhausted.

Article 3(1) and 3(2) recognize that, in accordance with Article 63 EC and a declaration attached to the Amsterdam Treaty, Member States can sign treaties with third states on immigration if they wish, as long as such treaties do not conflict with EC rules. Also, the EC Treaty suggests that migration rules to be adopted by the Community will constitute minimum standards, which Member States can exceed if they wish. Furthermore, any treaties agreed by the Community have precedence over secondary Community acts,¹⁸ and a number of other EC measures might govern the entry and stay of third-country nationals (particularly refugees, family members and long-term residents).¹⁹ Finally, third-country national family members of an EC national who has moved to another Member State are covered by existing EC legislation.

¹⁸ Case C-61/94 *Commission v. Germany* [1996] ECR I-3989.

¹⁹ See proposed Directives 2000/01 to 2000/05 in this Project.

²⁰ Case C-285/95 *Kol* [1997] ECR I-3069.

Article 3(3) excludes from the scope of this proposal persons who have applied for asylum, whose right to asylum has been recognized, or whose application for asylum has been definitively rejected. The justification for this exclusion is that the rights of such persons should be addressed in detail in asylum legislation. However, we would not oppose the inclusion of definitively rejected asylum-seekers in legislation governing the status of irregular migrants, on the conditions that such persons are protected from removal to a third state in which they would face persecution and that the Community's asylum legislation extends the full right to suspensive effect of an appeal against a negative determination of status or a ruling of inadmissibility.

Article 4 is a general non-discrimination clause that also appears in the other proposals in this Project.

d) Chapter II: Expulsion (Articles 5–15)

This Chapter is the core of the protection that this Directive would extend to persons in an irregular situation. It does not create substantive rights to remain in a Member State, for persons in an irregular situation have no right or authorization to be there. But in order to ensure effective human rights protection and to clarify the procedural rights for irregular migrants already agreed at EU level, it sets out a limited number of circumstances in which an irregular migrant cannot be expelled and provides for effective procedural protection.

Article 5 makes clear that the rights in Chapter II only govern the position of persons in an irregular situation. Article 6 sets out three substantive grounds restricting a Member State's ability to expel persons. Article 6(1) bars collective expulsion of foreigners, combining the wording of Article 4 of the Fourth Protocol to the ECHR and Article 22(1) of the UNCRMW. Article 6(2) protects persons who have only slipped into an irregular situation by accident, for example by missing a deadline to file for a renewal of a residence permit due to illness, but who would have been entitled to remain if they had applied in time. Article 6(3) prevents Member States from expelling persons on grounds of fraud unless the allegation of fraud has been tested in a court. This implements the Court of Justice's ruling as regards the status of Turkish workers accused of fraud, and extends it to all other migrants.²⁰

Article 7 ensures that all expulsion decisions are taken in accordance with law. Article 7(1) is based on point 4 of the 'General Policy' section of the 1992 EU Ministers' Recommendation; it has been amended to require that expulsion rules must be 'clearly set out'. Article 7(2) adapts the wording of Article 1(1) of the Seventh Protocol of the ECHR,²¹ and prevents Member States from expelling persons except in accordance with law, including the legislation referred to in Article 7(1) and other relevant legal rules.

Article 8 sets out four rules governing disclosure of information before an expulsion decision. Article 8(1), on the initial notification of an expulsion decision, implements point 5 of 'General Policy' in the 1992 Recommendation in more detail. It is nearly identical to Article 7 of Directive 64/221, which governs expulsion of EC nationals from a Member State, because there is no reason that irregular migrants should have lesser procedural protection as regards notification of an expulsion. Article 8(2) is based upon Article 22(3) UNCRMW. It ensures that irregular migrants know of the possibility to challenge an expulsion decision as soon as it is notified to them. Articles 8(3) and 8(4) set out rules governing disclosure in general and disclosure of information on the Schengen Information System (renamed the European Information System) in particular.²² This will allow national courts to determine whether the information used to justify an expulsion order is legally or factually correct.

Article 9 governs the judicial control of expulsion decisions. Article 9(1), on the right to judicial examination of the merits of expulsion, implements point 7 of 'General Policy' in the 1992 Recommendation in more detail. It is based upon Article 22(4) UNCRMW. Member States are only obliged to allow for one level of appeal against an expulsion decision, although they are free to provide for further appeals (and earlier administrative appeals) if they choose. Article 9(2), on suspensive effect of an appeal, is essential to ensure that the appeal right is practically effective. Article 9(3) requires

Member States to set up a separate panel to decide *in camera* on expulsions or a refusal to disclose information on security grounds.

Article 9(4) governs the position of an expellee who successfully appeals against expulsion. It prevents such persons from being placed in limbo indefinitely, by requiring Member States to give them a formal and renewable immigration status. However, it does not preclude future expulsion if the conditions later change, and it does not require Member States to regularize the position of irregular migrants. The six-month time limit, taken from Directive 64/221,²³ promotes legal certainty and is only a maximum; a quick decision would be far preferable and should be issued in the vast majority of cases. Article 9(4) does not mean that applicants can take up economic activity while waiting for a decision, unlike EC national workers waiting for a residence permit.²⁴

Article 10, on legal aid and interpretation rights, implements aspects of points 6 and 7 of the 'General Policy' of the 1992 Ministers' Resolution in more detail.

Article 11, like Article 9(4), protects irregular migrants from being placed in an indefinite limbo. Member States have six months to implement an expulsion decision, taking account of any appeal against it. If they fail to implement the decision by the deadline, they are not precluded from *ever* expelling the person in question, but they must begin the expulsion procedure from 'scratch'.

Article 12 governs the effect of an expulsion decision. The five sub-paragraphs are based respectively on Articles 22(5), 22(7), 22(8), 22(9) and 22(6) UNCRMW. Article 12(3), on the costs of expulsion, also implements Article 9(3) of ILO Convention 143 and Article 8(5) of ILO Recommendation 151.

Article 13 governs the important issue of detention of irregular migrants. It is based on the principles of Article 5 of the ECHR, and also adapts the principles governing detention of asylum-seekers as suggested by the United Nations High Commissioner on Refugees. It follows from the reference to Article 5 ECHR in Article 13(3) of this proposal that Member States cannot use expulsion proceedings as a disguised form of extradition proceeding.²⁵

Article 14 makes the fingerprinting of irregular migrants subject to the ECHR and other international and Community rules.

²¹ See also Article 22(2) UNCRMW.

²² The proposed Directive 2000/04 in this Project, on visas and border controls, makes more detailed suggestions concerning reform of the SIS (EIS).

²³ Article 5(1) of Directive 64/221 (OJ Spec Ed 1964, No. 850/64, no. 117).

²⁴ Article 5 of Directive 68/360 (OJ Spec Ed 1968, L 257/13, p. 485).

²⁵ Note 15 above.

Article 15 governs readmission of third-country nationals, and applies to readmission under a treaty concluded by the Community, concluded by a Member State, concluded by both the EC and the Member States, or agreed *ad hoc* in the absence of a readmission treaty. Readmission will also be governed by Article 13(3), which, as noted above, also limits the use of expulsion as a disguised form of extradition proceeding. Article 15(1) concerns readmission to a person's state of nationality, or if stateless, state of habitual residence. It prevents readmission where there is a risk of torture or persecution, in accordance with international human rights obligations. Article 15(2) governs readmission to other states, setting out four rules that must be met before such readmission. The purpose of Article 15(2)(c) is to implement a person's right to enter his or her own country if he or she wishes. Article 15(2)(d), like Articles 9(4) and 11, is also designed to prevent an irregular migrant falling into limbo.

e) Chapter III: Substantive rights (Articles 16–22)

This Chapter contains rules protecting the rights irregular migrants have acquired while resident in the European Union. Articles 16–21 are similar to Articles 25, 26, 27, 28, 30 and 32 UNCRMW respectively. These provisions focus on the social and employment rights falling within the scope of the Community law, so do not transpose other important provisions of the UNCRMW addressing civil and political rights of irregular migrants. Furthermore, Articles 16 to 18 implement the principles of Article 9(1) of ILO Convention 143 and Articles 8(3) and 34 of ILO Recommendation 151, including some of the wording of the latter. It should be emphasized that the social and economic rights in this Chapter constitute only a basic floor, falling below the rights applying to legal migrants, and do not extend to a right to continued residence or regularization.

Article 22 of the proposed Directive does not transpose provisions of the UNCRMW, but instead builds upon a clause in the 1997 EU Joint Action on trafficking in persons and exploitation of women and children.²⁶ Article 22(2) provides for the grant of migration status in more than one Member State if a trial or investigation has cross-border aspects. Article

22(3) requires Member States to ensure that the needs of the victims of trafficking and exploitation are met.

f) Chapter IV: Enforcement (Articles 23–25)

This Chapter does not set out the details of the measures which the Community and Member States adopt to enforce expulsion proceedings or to sanction employers, harbourers, or transporters of irregular migrants. But it does set out rules to ensure that such measures are in compliance with human rights standards. It is essential to ensure that minorities are not checked on racist grounds, that employer sanctions do not lead to racial discrimination by employers, that legislation on trafficking in persons does not prevent the exercise of the right to seek and enjoy asylum, and that the lives and health of irregular migrants are protected during their travel or during an expulsion proceeding.

Article 23 precludes the use of internal checks for racist purposes or on an arbitrary basis. Article 24(1) requires Member States to ensure that employer sanctions do not have a racially discriminatory effect, and Article 24(2) on the burden of proof further contributes to this end and also protects employers. The latter provision implements Article 6(2) of ILO Convention 143 in more detail. Article 24(3) confines the application of trafficking legislation to persons who were aware that they were trafficking in migrants and profited by it. Article 24(4) exempts all persons from liability if the migrants they are connected with have a recognized right to asylum. Article 24(5) makes clear that employers, transporters or harbourers can only be expelled if convicted, and then only in accordance with Chapter II. Article 24(6) makes clear that employees in an irregular situation can still sue an employer in addition to any sanction imposed upon that employer. Finally, Article 24(7) requires Member States to ensure that carriers' liability legislation does not threaten the personal safety of irregular migrants in practice. Article 25 requires Member States to ensure the safety of expellees during the application of expulsion proceedings, to ensure that no further deaths result from such proceedings.

²⁶ OJ 1997 L 63/2.

**g) Chapter V: Final provisions
(Articles 26–29)**

Article 26 is a judicial protection clause similar to that found in EC legislation on sex discrimination and data protection. It is included because the provisions of Chapters III and IV are justiciable, but there might be a wide variety of circumstances in which they apply.²⁷

Therefore it is appropriate to confer a very general right to related judicial protection, in place of the specific rights set out in Chapter II. Article 27 ensures the effective application of the United Nations Convention on the Rights of Child within the scope of this Directive.

Articles 28 and 29 are the standard final clauses found in EC Directives.

²⁷ For example, see Article 9(2) of ILO Convention 143 and Articles 8(4) and 34(2) of ILO Recommendation 151.

ON

ensuring minimum standards of human rights protection applying to persons in an irregular situation in a Member State

The Council of the European Union,

Having regard to the Treaty establishing the European Community, and
in particular Articles 63(3)(b) and 66 thereof,

Having regard to the proposal of the Commission,

Having regard to the Opinion of the European Parliament,

Whereas:

- 1 Article 14 of the Treaty establishing the European Community specifies that the 'internal market comprises 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';
- 2 Article 61 of the Treaty establishing the European Community requires the Community to establish an 'area of freedom, security and justice';
- 3 Article 63(3)(b) of the Treaty establishing the European Community confers competence upon the Community to adopt measures concerning 'illegal immigration and illegal residence, including repatriation of illegal residents'; whereas such measures must be agreed within five years of the entry into force of the Treaty of Amsterdam;
- 4 Article 66 of the Treaty establishing the European Community confers competence upon the Community to 'take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas' of immigration, asylum and border controls;
- 5 in accordance with the final provisions of Article 63 of the Treaty establishing the European Community, 'measures adopted by the Council pursuant to' Article 63(3)(b) 'shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements';
- 6 according to Article 6(2) of the Treaty on European Union, the European 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; whereas the European Court of Justice has additionally held that all international human rights treaties in

- which Member States have participated are sources of the fundamental rights that form part of the general principles of Community law; whereas such treaties include the United Nations Convention on Migrant Workers and ILO Conventions 97 and 143;
- 7 treaties concluded by the Community or by the Community and its Member States have primacy over secondary acts of the Community;
 - 8 in accordance with Article 307 of the Treaty establishing the European Community, the rights and obligations arising from agreements concluded before the application of the Treaty to each Member State between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaty or measures adopted pursuant to it;
 - 9 this Directive is without prejudice to rights conferred upon third-country nationals by other provisions of Community law;
 - 10 the measures adopted by the Community and Member States to combat illegal immigration and illegal employment must observe the fundamental human rights of persons in an irregular situation, and must not contradict national and Community policies on combatting discrimination and social exclusion;
 - 11 the rules governing readmission between Member States, and readmission to non-Member States, must respect the Community's and the Member States' human rights obligations;
 - 12 the Community must adopt separate measures governing the situation of persons who have applied for recognition of the right to asylum, whose claim for such recognition has been accepted or whose application for such recognition has been rejected;
- has adopted this Directive:

Chapter I Principles

Article 1 Purposes

The purpose of this Directive is to ensure the protection of the fundamental human rights of persons in an irregular situation in the European Community.

Article 2 Definitions

- 1 'person in an irregular situation' means a person who is present in the territory of the European Community without any right or authorization to be there;
- 2 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community, including a stateless person;
- 3 'non-Member State' means any State other than a Member State of the European Union, including States which are not recognized by a Member State of the European Union; and
- 4 'definitively rejected' asylum application means: an application for recognition of the right to asylum which has been refused by the competent national authority, where such refusal has been subsequently fully upheld by all administrative authorities and courts or tribunals in a Member State which have jurisdiction to examine the validity of the refusal, or where the right of appeal has not been exercised by the applicant.

Article 3 Scope

- 1 This Directive is without prejudice to the rights conferred by other provisions of Community law upon third-country nationals.
- 2 This Directive shall not in any way limit additional rights granted to third country nationals in treaties concluded by the Community, by the Community and its Member States, or by individual Member States, or, in accordance with Article 63 of the Treaty establishing the European Community, more favourable national provisions enacted or maintained by Member States.
- 3 This Directive shall not apply to:
 - a) persons who have applied for recognition of the right to asylum pursuant to national law, Community law, the Geneva Convention on the Status of Refugees and the New York Protocol to that Convention, the European Convention on Human Rights or the United Nations Convention Against Torture; or
 - b) persons whose application for recognition of the right to asylum pursuant to sub-paragraph (a) has been definitively rejected; or
 - c) persons whose right to asylum pursuant to sub-paragraph (a) has been recognized.

Article 4 Non-discrimination

In accordance with Article 14 of the European Convention on Human Rights and Articles 12 and 13 of the Treaty establishing the European Community, and without prejudice to any measures already adopted pursuant to those Treaty Articles or to other Community law ensuring equal treatment on grounds of sex, Member States shall apply this Directive without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Chapter II Expulsion

Article 5 Scope

The rights in this Chapter will apply where a Member State takes a decision to expel a person in an irregular situation.

Article 6 Limits on expulsion

- 1 Collective expulsion of third-country nationals is prohibited. Each case of expulsion shall be examined and decided individually.
- 2 A Member State shall not regard an inadvertent breach of national or Community migration legislation which is capable of being regularized as constituting unlawful entry or stay for the purposes of Article 2(1), in particular where a person has:
 - submitted inaccurate documentation;
 - submitted a late application pursuant to that legislation due to personal circumstances such as illness; or
 - failed to obtain employment or residence authorization that he or she would otherwise have been entitled to.

- 3 Where a Member State wishes to withdraw, revoke or annul a residence permit on grounds on fraud, it shall not withdraw, revoke or annul the permit unless there has been a judicial finding of fraud.

Article 7 Legal provision

- 1 Member States shall clearly set out the rules governing expulsion under either criminal or administrative law.
- 2 Third-country nationals and members of their families can be expelled from the territory of a Member State only in pursuance of a decision reached in accordance with law.

Article 8 Disclosure

- 1 The person concerned by an expulsion shall be officially notified of any decision to refuse the issue or renewal of a residence permit or to expel him or her from the territory in writing in a language that he or she understands and the language of that Member State. The period allowed for leaving the territory shall be stated in this notification. Save in cases of urgency, this period shall not be less than one month.
- 2 The procedure to be followed to implement paragraph 1, the rights of the person concerned and the remedies available shall be communicated to the person concerned in writing in a language he or she understands and the language of that Member State. The person concerned shall be informed of this information at the time the decision is rendered.
- 3 Member States must disclose the detailed reasons for any decision referred to in paragraph 1 at the time of notifying that decision, unless this is contrary to the interests of the security of the state involved. The reasons must be sufficiently detailed to allow the judicial authority referred to in Article 9 to undertake an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure.
- 4 Member States must also disclose any data held in the European Information System at the time of disclosing the reasons for the decision referred to in paragraph 1, if that data was taken into account when taking the decision, unless the disclosure of that data would jeopardize a planned or ongoing criminal investigation. In such a case, the Member State shall at least disclose that such undisclosed information exists.

Article 9 Appeal rights

- 1 Member States shall ensure that all decisions to expel a person in an irregular situation may be challenged before a judicial authority, whether or not there has been prior recourse to an administrative authority, which is competent to examine the merits of the decision and to provide an effective remedy. During this challenge, a person shall have the right to submit the reasons that he or she should not be expelled. The judicial authority shall give the reasons for its decision regarding such challenges.
- 2 A person subject to an expulsion decision cannot be required to leave a Member State until the appeal has been concluded, unless this is contrary to the interests of the security of the state involved.
- 3 Where a Member State:
 - invokes the derogation from the suspensive effect of an appeal provided for in paragraph 2; or

- refuses to disclose the reasons for its decision pursuant to Article 8(3); or
- both invokes the derogation in paragraph 2 and refuses to disclose the reasons for its decision pursuant to Article 8(3);

the judicial authority referred to in paragraph 1 shall take the form of a panel presided over by an independent arbitrator. A Member State shall fully disclose to this panel the detailed reasons for the expulsion decision, including any reasons which were not disclosed pursuant to Article 8(3). The obligation to state reasons for the judicial authority's decision in such cases may be limited to the extent strictly necessary to preserve the security of the state concerned.

4. If an appeal against expulsion is successful, the applicant must be given a renewable residence permit not later than six months after the date of application for such a permit, without prejudice to the possibility of expulsion when circumstances have changed.

Article 10 Rights during procedure

Persons subject to an expulsion decision:

- a) have the right to the services of an interpreter, whenever necessary, for submitting their case to the authorities concerned and otherwise assisting the person in matters relating to the procedure. The interpreter must be paid for out of public funds;
- b) have the right to qualified and competent legal advice or assistance during the procedure, paid for out of public funds subject to the means of the applicant; this right shall apply for and during all interviews, and for and during all hearings, including bail hearings and appeals.

Article 11 Application of expulsion decision

- 1 If Member States are unable to exercise an expulsion order within six months, the decision to expel shall be null and void *ab initio*.
- 2 The period of six months referred to in paragraph 1 shall be calculated from the date that the Member State officially notified the person concerned of its decision to expel pursuant to Article 8(1). If that decision is challenged pursuant to Article 9 and that challenge is rejected, the period of six months shall be calculated from the date that the judicial authority issued its reasoned decision rejecting the challenge.

Article 12 Effects of expulsion

- 1 If a decision of expulsion that has already been executed is subsequently annulled, the person concerned has the right to seek compensation and the earlier decision shall not be used to prevent him or her from re-entering the Member State concerned or another Member State.
- 2 Without prejudice to the execution of a decision on expulsion, a third-country national or a member of his or her family who is subject to such a decision by a non-Member state may seek entry into a Member State.
- 3 In case of expulsion of a third-country national or a member of his or her family, the costs of expulsion shall not be borne by him or her.
- 4 In accordance with Chapter III, expulsion from a Member State shall not in itself prejudice any rights of a third-country national or a member of his or her family

acquired in any Member State, including the right to receive wages and other entitlements due to him or her or in the process of acquisition.

- 5 In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her or in the process of acquisition and any pending liabilities, pursuant to Chapter III.

Article 13 Detention

- 1 Member States shall only detain persons subject to an expulsion decision if such detention is:
- prescribed by law for a specific reason, as enumerated in paragraph 2, and for a specific period, which must be as short as possible;
 - strictly necessary for compelling reasons relevant to the individual case; and
 - proportionate, after prior consideration of alternatives to detention and the effect of detention in each individual case.
- 2 Persons subject to an expulsion decision may only be detained in order to:
- ensure the application of a removal order; or
 - protect public security or public order, where there is evidence to show that the person is likely to pose a risk to such principles.
- 3 Member States shall ensure full application of Article 5 of the European Convention on Human Rights whenever they have detained a person pursuant to expulsion proceedings within their jurisdiction. In particular:
- there shall be a prompt, mandatory and periodic review of all detention orders before an independent and impartial body;
 - the detainee must be able to make a full challenge to the merits of the detention order;
 - the procedural guarantees of Article 10 shall apply *mutatis mutandis*.
- 4 Member States shall:
- detain persons subject to expulsion proceedings separately from convicted criminals or prisoners on remand;
 - detain men and women separately, unless they are parents or carers of children who have been detained;
 - detain children separately from adults, unless those adults are their relatives or carers; and
 - ensure the humane treatment of detainees, including necessary medical treatment, exercise of their religion, continuation of their education, provision of an effective complaints mechanism, and access to the necessities of life.

Article 14 Fingerprinting

Member States shall only take, store or exchange fingerprints of third-country nationals in an irregular situation where such measures are necessary in pursuit of an overriding public interest and proportionate to that end, in strict compliance with Article 8 of the European Convention on Human Rights and international and Community law concerning data protection.

Article 15 Readmission

- 1 Member States shall only expel a person to his or her state of nationality (or, if stateless, state of habitual residence) if they can show that the person to be expelled will not be persecuted in the state of intended expulsion, in accordance with the instruments referred to in Article 3(3)(a).
- 2 Member States shall only expel a person to a state other than his or her state of nationality (or, if stateless, state of habitual residence) if they can show that:
 - a) that person is admissible to the state of intended expulsion; and
 - b) that person will not be persecuted in the state of intended expulsion, in accordance with the instruments referred to in Article 3(3)(a); and
 - c) that person prefers to enter the state of intended expulsion, rather than his or her state of nationality (or, if stateless, state of habitual residence); and
 - d) the state of intended expulsion will give that person a durable residence right.

Chapter III Substantive rights

Article 16 Employment rights

- 1 Member States shall ensure that persons in an irregular situation are not deprived of any employment rights by reason of any irregularity in their stay or employment. In particular, they shall ensure that employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.
- 2 'Employment rights' referred to in paragraph 1 shall mean treatment not less favourable than that which applies to nationals of the Member State of employment in respect of remuneration and:
 - a) other conditions of work, meaning overtime, hours of work, weekly rest, holidays with pay, including compensation in lieu of holiday entitlement acquired but not used, safety, health, including benefits due in respect of any employment injury suffered, termination of the employment relationship, including any severance payments normally due, and any other conditions of work which, according to Community law or national law or practice, are covered by these terms;
 - b) other terms of employment, meaning the minimum age of employment, restrictions on home work, and any other matters which, according to Community law or national law or practice, are considered a term of employment.
- 3 It shall not be lawful to derogate in private contracts of employment from paragraphs 1 and 2.

Article 17 Freedom of association

- 1 Member States shall ensure the rights of persons in an irregular situation and members of their families:
 - a) to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;
 - b) to join freely any trade union and any other association referred to in paragraph 1, subject only to the rules of the organization concerned;

- c) to seek the aid and assistance of any trade union and any other association referred to in paragraph 1.

Article 18 Social security

- 1 Persons in an irregular situation and members of their families shall enjoy in the state of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation in the Member State in question, Community law and the applicable bilateral and multilateral treaties.
- 2 Where the applicable legislation does not allow persons in an irregular situation a benefit, the Member State or Member States concerned shall reimburse to interested persons the amount of contributions made by them with respect to that benefit on the basis of treatment granted to nationals who are in similar circumstances.

Article 19 Health care

Member States shall ensure the rights of persons in an irregular situation and members of their families to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the Member State concerned.

Article 20 Education

Member States shall ensure the basic rights of children of persons in an irregular situation, and of children in an irregular situation, to public pre-school educational institutions or schools on the basis of equality of treatment with nationals of the Member State concerned.

Article 21 Departure

Upon departure from a Member State, persons in an irregular situation shall have the right to transfer their earnings and savings and their personal effects and belongings.

Article 22 Victims of trafficking and exploitation

- 1 A Member State may provide that victims of trafficking and exploitation, as defined in Joint Action 97/154, who are in an irregular situation in that Member State, may obtain the right to reside temporarily in that Member State in order to provide evidence for a criminal investigation and/or trial.
- 2 If the investigation and/or trial in question so requires, other Member States may also extend the right to reside temporarily to such persons.
- 3 In addition to the rights set out in Articles 16–21, Member States shall make facilities available to meet the educational, medical, psychological and other special needs of the victims referred to in paragraph 1, in particular children.

Chapter IV Enforcement

Article 23 Checks

Any checks carried out by a Member State's competent authorities to determine whether persons are in an irregular situation shall be carried out in strict compliance with the following principles:

- a) they shall entail no discrimination based on racial or ethnic origin; and
- b) they shall only take place where there are reasonable grounds for suspecting that persons are in an irregular situation.

Article 24 Sanctions

- 1 Member States shall take all practical steps to ensure that sanctions imposed upon employers of persons in an irregular situation do not have a racially discriminatory effect.
- 2 Member States shall not impose criminal or administrative penalties upon an employer of persons in an irregular situation unless it can be shown beyond a reasonable doubt that the employer was aware of the employee's lack of authorization for employment.
- 3 Member States shall not impose criminal or administrative penalties upon transporters or harbourers of persons in an irregular situation unless it can be shown beyond a reasonable doubt that such persons trafficked in illegal migrants for financial gain and that they were aware of the irregular situation of the persons in question.
- 4 In any event, Member States shall not impose criminal or administrative penalties upon employers, transporters or harbourers of persons in an irregular situation where the right of asylum of the persons in an irregular situation was subsequently recognized.
- 5 Member States shall not subject employers, transporters or harbourers of persons in an irregular situation to expulsion if such persons have a defence to criminal or administrative sanctions in accordance with paragraphs 1 to 3. In other cases, such expulsion may only be carried out in strict compliance with Chapter II.
- 6 Sanctions imposed upon employers of persons in an irregular situation who do not have a defence in accordance with paragraph 1 shall not impair the rights of the employees against that employer, pursuant to Article 16.
- 7 Member States shall ensure that their legislation on the liability of transporters of persons in an irregular situation is defined and applied with regard to its effects upon the personal safety of persons in an irregular situation.

Article 25 Safety of expellees

- 1 Member States shall ensure that any expulsions enforced pursuant to this Directive shall be carried out in strict compliance with the relevant provisions of national or international human rights law.
- 2 Member States shall ensure adequate training of all persons involved in carrying out expulsions pursuant to this Directive, in particular to enable them to provide emergency first aid to persons being expelled if required.

Chapter V Final provisions

Article 26 Right to judicial protection

In addition to the specific rights set out in Chapter II, Member States shall maintain or introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to grant the rights set out in this Directive to pursue their claims by judicial process, whether or not they have also had recourse to other competent authorities.

Article 27 Rights of the child

Within the scope of this Directive, Member States shall comply fully with the United Nations Convention on the Rights of the Child irrespective of any derogations from that Convention.

Article 28 Final provisions

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001.
- 2 When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- 3 Member States shall communicate to the Commission:
 - the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive;
 - other national legislative or regulatory measures or practices applicable in the field; and
 - relevant statistical data.

Such information shall be forwarded annually to the Commission, which shall see that it is circulated to the General Secretariat of the Council and to the Member States. Decision 94/90 on the right of access to Commission documents shall apply.

- 4 The Commission shall submit a report every two years on the subject-matter regulated by this Directive. This report shall be based on the information provided by the Member States pursuant to paragraph 3 and other information made available to the Commission.
- 5 The Council will re-examine this Directive, on the basis of the reports submitted pursuant to paragraph 4, and, should the need arise, of a proposal to be submitted by the Commission, at the latest five years after adoption of this Directive.

Article 29

This Directive is addressed to the Member States.