

Table of Contents

<i>Table of Cases</i>	xxiii
<i>Table of Legislation</i>	xlili
<i>List of Abbreviations</i>	lxv

1. Introduction: EU Pre-border Controls and Protection Seeker Flows	1
1. Background and subject matter	1
2. Objectives	5
3. Structure	9

PART I. THE EU SYSTEM OF PRE-BORDER CONTROL AND ITS IMPLICATIONS FOR ACCESS TO INTERNATIONAL PROTECTION IN EUROPE

2. Chronology and Conceptualization of ‘Integrated Border Management’: The ‘Embodied Border’ Paradigm	13
1. Introduction: The ideal of borderless Europe and competing rationales	13
2. A history of incremental integration: Towards ‘integrated border management’	14
2.1 From Rome to Maastricht: The exploratory phase	15
2.2 Formal intergovernmental cooperation within and without Community structures	19
2.2.1 Schengen: The security drive gains force	19
2.2.2 Maastricht’s Third Pillar: A purpose-less, fruit-less cooperation?	21
2.3 Amsterdam: The <i>communautarisation</i> of the Schengen <i>acquis</i> and Title IV EC	23
2.4 ‘Integrated border management’: The emergence of a new concept	27
3. Lisbon, Stockholm, and the post-Stockholm landscape: Consolidating IBM	33
3.1 ‘Widening’ IBM: The digitalization of controls	35
3.2 ‘Thickening’ IBM: The militarization of controls	38
3.3 ‘Externalizing’ IBM: The extraterritorialization of controls	39
4. The border overall, irregular migration, and refugee flows: The need for differentiation	41
5. Closing remarks: The ‘embodied border’ and the EU fundamental rights <i>acquis</i>	44
3. The Schengen Borders Code: Securitized Admission Criteria as the Centrepiece of Integrated Border Management—Instilling Ambiguity	47
1. Introduction: Codifying Schengen	47
2. Admission criteria and related rules before codification	49
2.1 The Schengen legacy	49
2.1.1 The Schengen Agreement and the Schengen Convention	49
2.1.2 The Common Manual	52

2.2 Post-Amsterdam EC measures	53
2.2.1 Implementing powers: Retaining sovereignty	53
2.2.2 Facilitating 'legitimate' travel	54
2.2.3 Increasing control to combat 'illegal immigration'	55
3. The Code: A 'common corpus of legislation' for IBM	57
3.1 <i>Travaux préparatoires</i> and outcome of negotiations	58
3.2 Structure, principles, and scope	59
3.3 Admission criteria	60
3.4 Border controls: Checks and surveillance	62
3.5 Denial of entry	65
3.6 Internal controls: Police checks and reintroduction of internal borders	66
4. The impact of the Schengen Borders Code on refugee flows	70
4.1 Are protection seekers covered by general admission criteria?	70
4.2 Are protection seekers covered instead by special provisions?	75
5. Closing remarks: Schengen criteria, protection seekers, and legal (un-)certainty	78
 4. Common Visa Policy: Bordering from Abroad—Applying Admission Criteria before Departure	 81
1. Introduction: Visas as pre-border controls	81
2. Visas and Security: History, format, and the VIS	82
2.1 The evolution of visa powers under the Treaties	82
2.2 Visa format and the VIS	84
3. Visa requirements: The 'black' lists	87
3.1 The pre-Amsterdam heritage: EC and Schengen visa lists	87
3.2 The Visa Regulation: Blacklisting criteria and outcomes	89
4. Visa issuing procedure: The Community Code on Visas	94
4.1 Pre-codification instruments	94
4.2 Community Code on Visas: Definitions, principles, and scope	95
4.3 Application criteria and issuing process	96
4.4 Decisions and appeal rights	99
5. The impact of visas on refugee flows	100
5.1 Visa requirements of protection seekers	100
5.1.1 Visa Regulation provisions	100
5.1.2 Airport Transit Visa requirements	101
5.1.3 Other hidden lists?	103
5.2 Visa issuing procedure for international protection purposes	106
5.2.1 Limited territorial validity visas as 'asylum visas'?	106
5.2.2 Additional procedural obstacles?	109
5.3 Access to visas in practice	111
6. Closing remarks: Visas, protection seekers, and the rule of law	114
 5. Carrier Sanctions and ILOs: Anticipated Enforcement of Visa Requirements through 'Imperfect Delegation'—Diverting Flows, Entrenching Unsafety	 117
1. Introduction: Privatizing border control, thwarting irregular movement	117

2. Carrier sanctions: The rise of anticipated enforcement of admission rules	120
2.1 General framework: Outline of delegated coercion	121
2.2 Specific rules on airlines: EU law as a 'shaper' of international standards—legitimizing pre-emptive enforcement of entry criteria	125
2.3 Special norms on shipping companies: The (limited) impact of international rules on EU standards	129
3. Immigration liaison officers: Reinforcing delegation arrangements of 'remote border coercion'	133
3.1 Pre-EU arrangements: The secrecy of Schengen ILOs	135
3.2 Post-Schengen experience: Opacity continued	137
4. The impact of carrier sanctions and ILOs on refugee flows	142
4.1 Carrier sanctions and forced migrants: The effects of 'imperfect delegation'	143
4.2 ILOs and protection seekers: The effects of 'hidden coercion'	147
5. Closing remarks: Structural incompatibility of delegated coercion with minimum legal guarantees?	150
6. Frontex: Joint Maritime Interdiction of Undifferentiated Flows—Operationalizing Pre-emptive Controls	153
1. Introduction: Institutionalizing 'border security'	153
2. Origins, structure, and mission	155
2.1 The genesis of Frontex	155
2.2 Mandate and attributions	158
2.3 Organization, composition, and accountability channels	160
3. Tasks and powers: Competing or complementary rationales?	165
3.1 Risk analysis: Anticipating threats (discounting fundamental rights?)	166
3.2 Training: Reintroducing fundamental rights?	169
3.3 Research: Establishing and operating EUROSUR	171
3.4 Cooperation with third parties: Promoting external collaboration, diffusing responsibilities?	173
3.4.1 Cooperation with third countries	173
3.4.2 Cooperation with other EU bodies and international organizations	178
4. Joint operations and European Border and Coast Guard Teams (EBCGTs)	180
4.1 Mission planning	181
4.2 Deployment	182
4.3 Conclusion, early termination, and evaluation	185
4.4 EBCGTs and rapid interventions	186
5. Maritime surveillance and protection seekers	188
5.1 <i>Hera</i>	190
5.2 <i>Hermes</i>	191
5.3 <i>Nautilus</i>	193
5.4 <i>Triton</i> and <i>Triton 'Plus'</i>	194
6. Closing remarks: Pre-emptive interdiction and non-access to refuge	197

PART II. THE RIGHTS OF PROTECTION SEEKERS
UNDER EU LAW AND THEIR IMPLICATIONS
FOR PRE-BORDER CONTROLS

7. The Fundamental Rights <i>Acquis</i>: An ‘Integrative Approach’ to Interpretation—The ‘Aggregate Standards’ Model	203
1. Introduction: Tracing the bases of the ‘integrative approach’ to fundamental rights	203
2. Human rights as international law	206
2.1 Human rights as treaty law	207
2.1.1 Direct effect	208
2.1.2 Indirect effect	209
2.2 Human rights treaties and the succession principle	210
2.3 Human rights as international customary law	212
2.4 ‘Substantive borrowing’ and ‘internal embedment’: Transforming human rights into ‘fundamental rights’ within the EU legal order	214
3. Fundamental rights as general principles of EU law	217
3.1 Sources of general principles	218
3.2 Functions of general principles	222
4. Fundamental rights in primary law	223
4.1 Treaty provisions before Lisbon	224
4.2 Treaty provisions after Lisbon	225
5. The EU Charter of Fundamental Rights: Origins and evolution	226
6. Determining the Charter standard of protection: The ‘integrative interpretation’ method	229
6.1 The Charter and the ECHR: Call for consistency	230
6.2 The Charter and the Treaties: Call for uniformity	233
6.3 The Charter and General Principles: Call for complementarity	234
6.4 The Charter and domestic traditions: From deference to ‘Europeanization’?	235
6.5 Limitations: Proportionality and the effectiveness of rights	236
6.6 Organizing coexisting commitments: The ‘aggregate standards’ model	238
6.7 Article 53 CFR: Autonomy as isolation?	241
7. Closing remarks: Defining features of the ‘integrative approach’ to EU fundamental rights	245
 8. EU <i>Non-Refoulement</i>: (The Irrelevance of) Territoriality and Pre-Border Controls	 247
1. Introduction: Extraterritorial borders, refugees, and <i>non-refoulement</i>	247
2. <i>Non-refoulement</i> under the 1951 Convention on the Status of Refugees	249
2.1 Personal scope of application	250
2.2 Material scope of application	251
2.3 Territorial scope of application	253
2.3.1 Article 33 of the Refugee Convention	253
2.3.2 Lessons from international human rights law	259
2.3.2.1 The Human Rights Committee	259
2.3.2.2 The Committee Against Torture	262
2.3.3 Article 33 of the Refugee Convention in light of international human rights law	263

3. <i>Non-refoulement</i> under the European Convention on Human Rights	266
3.1 Personal scope of application	268
3.2 Material scope of application	269
3.3 Territorial scope of application	272
3.3.1 The role of the 'territorial clause' and the 'espace juridique' restriction	272
3.3.2 Jurisdiction as a threshold criterion and extraterritoriality as an exception	273
3.3.3 Models of extraterritorial jurisdiction: Control over an area or over persons abroad	275
3.3.3.1 The <i>Al-Skeini</i> taxonomy: The physical model of 'effective control' and the importance of <i>de facto</i> power	276
3.3.3.2 The <i>Hirsi</i> categorization: The juridical paradigm of 'official authority' and the role of <i>de jure</i> control	280
4. <i>Non-refoulement</i> under EU Law	281
4.1 Sources and material content of EU <i>non-refoulement</i>	282
4.1.1 <i>Non-refoulement</i> in primary law	282
4.1.1.1 <i>Non-refoulement</i> as part of the right to asylum: Article 18 CFR	282
4.1.1.2 <i>Non-refoulement</i> and protection from exposure to ill-treatment: Articles 4 and 19(2) CFR	283
4.1.2 <i>Non-refoulement</i> in secondary law	286
4.2 Personal scope of application	289
4.3 Territorial scope of application	289
4.3.1 Territorial scope of the Charter?	290
4.3.1.1 Article 51 CFR: 'Implementing EU law'	290
4.3.1.2 The irrelevance of 'jurisdiction' (and territoriality)	292
4.3.2 Territorial scope of EU law?	294
4.3.3 Territorial scope of IBM (secondary law) rules?	296
5. The implications of <i>non-refoulement</i> for extraterritorial entry controls	298
5.1 <i>Non-refoulement</i> and visas	298
5.1.1 Visas and refugees as a matter of diplomatic asylum	298
5.1.1.1 The <i>Soering</i> standard and State representations abroad	298
5.1.1.2 Qualifying <i>Soering</i> in the name of PIL	300
5.1.1.3 Strasbourg's take on the 'diplomatic exception' and the related 'conflict of obligations' scenario	305
5.1.1.4 Post- <i>Al-Saadoon</i> developments: The duty of care	307
5.1.2 Visas and refugees as a matter of access to territorial asylum	308
5.1.2.1 Individual visa refusals	309
5.1.2.2 'Black listing' and general visa requirements	311
5.2 <i>Non-refoulement</i> and refusal of boarding	313
5.2.1 Carriers as 'entities exercising elements of governmental authority'	313
5.2.2 Carriers as 'directed or controlled' by States (through ILOs)	316
5.2.3 A separate requirement of 'jurisdiction'?	318
5.2.4 Imperfect delegation, asymmetric penalization, and composite wrongful acts	319
5.3 <i>Non-refoulement</i> and maritime interdiction	320
5.3.1 Matters of jurisdiction	320
5.3.1.1 <i>De jure</i> jurisdiction: The implications of legal competence abroad	320

5.3.1.2	<i>De facto</i> control: Towards 'cause-and-effect' jurisdiction	322
5.3.1.3	The situation under EU law: A 'functional' approach	324
5.3.2	Issues of attribution and responsibility	326
5.3.2.1	Cooperation through a common organ	327
5.3.2.2	Cooperation with third countries	329
5.3.3	The extent of positive obligations at sea	332
6.	Concluding remarks: A functional approach to <i>non-refoulement</i>	333
9.	The EU Right to Asylum: An Individual Entitlement to (Access) International Protection	337
1.	Introduction: Only a right <i>of</i> asylum?	337
2.	Access to asylum and the 1951 Refugee Convention: The aggregate 'right to leave to seek asylum' from persecution	340
2.1	Refugees and the 'right to flee'	341
2.1.1	The right to leave every country including one's own	341
2.1.2	Permissible limitations and interdiction measures	343
2.1.3	The 'opposability' of the right to leave vis-à-vis every Contracting Party	345
2.2	The right to leave as a precondition for access to asylum	348
2.2.1	The right to leave and its intersection with other (refugee) rights	348
2.2.2	Access to international protection under the 1951 Convention	350
2.2.3	The principle of non-penalization for unauthorized entry and admission to refuge	352
3.	Access to asylum and the European Convention on Human Rights: A right to enter a procedure for determining protection needs	354
3.1	The (qualified) right to leave in the ECHR	355
3.2	Permissible limitations and immigration control: A right to leave but only if pre-authorized?	357
3.3	Refugees, restrictions on exit/entry and the right to gain access to asylum procedures	360
4.	Access to asylum under EU Law: A subjective entitlement to (seek and be granted) international protection	365
4.1	Asylum in Europe: From a right of States to (also) a right of the individual	365
4.2	The evolution at EU level: Towards Article 18 CFR	368
4.3	The right to asylum in the Charter of Fundamental Rights	371
4.3.1	Personal scope of application	373
4.3.2	Material scope of application	375
4.3.2.1	The right to be granted territorial protection	377
4.3.2.2	The right to access an asylum procedure	379
4.3.3	Territorial scope of application	380
5.	The implications of the right to asylum for extraterritorial entry controls	384
5.1	Pre-border regulations and Article 18 CFR: The <i>status quo</i>	385
5.2	Compatibility check: Proportionality requirements of the fundamental rights <i>acquis</i>	387
5.3	What about entry? An (implicit) right to gain effective access to (territorial) asylum	389
5.4	Links to <i>non-refoulement</i> : The right to (leave to seek) asylum as an absolute entitlement	391
6.	Concluding remarks: An EU 'right to flee'	393

10. Remedies, Procedural Guarantees (and the Unavoidability of Admission to Territory)	395
1. Introduction: The effectiveness of rights	395
2. Remedies under the 1951 Convention on the Status of Refugees	396
2.1 Procedural guarantees implicit in Article 33(1) CSR51	396
2.2 The meaning of 'access to courts' in Article 16 CSR51	400
2.3 Human rights parallels: Due process under Article 14(1) ICCPR	403
2.4 Implicit procedural safeguards against <i>refoulement</i> : Articles 7 ICCPR and 3 CAT	405
2.5 Appeal rights: Remedies against negative decisions at first instance	406
2.6 Suspensive effect as <i>sine qua non</i> of effective remedies	407
3. Remedies under the European Convention on Human Rights	409
3.1 The right to a fair trial: Article 6 ECHR	410
3.1.1 The determination of 'civil rights and obligations'	410
3.1.2 Access to court as the foremost guarantee: The right to institute proceedings	411
3.1.3 Ancillary safeguards: Ensuring the fairness of procedures	413
3.1.3.1 Equality of arms and adversarial proceedings	413
3.1.3.2 Public hearing in one's presence	414
3.1.3.3 The duty of proper examination and to deliver reasoned decisions	415
3.1.3.4 Institutional guarantees: The right to an 'independent and impartial tribunal'	416
3.1.4 Appeal rights	417
3.1.5 The exclusion of immigration proceedings from the ambit of Article 6 ECHR	417
3.2 Procedural safeguards in immigration proceedings: Article 13 ECHR	418
3.2.1 Key features of an 'effective remedy': Reintroducing fair trial guarantees?	418
3.2.2 Material scope of Article 13 ECHR: The notion of 'arguable claim'	419
3.2.3 Article 3 together with Article 13 ECHR: Positive duties ensuing from <i>non-refoulement</i>	420
3.2.3.1 <i>Ex ante/ex post</i> investigation duties	421
3.2.3.2 A preventative approach: Obligation to instate dedicated (and accessible) procedures	421
3.2.3.3 Independent, individual, and rigorous scrutiny of complaints	423
3.2.3.4 Ancillary safeguards: Guaranteeing the exercisability of remedies	423
3.2.3.5 Evidentiary rules: Burden and level of proof	424
3.2.3.6 Appeal rights	427
3.2.3.7 (Automatic) suspensive effect	428
4. Remedies under EU Law	429
4.1 National procedural autonomy: Equivalence, effectiveness, and the 'no-new-remedies' rule	430
4.2 The principle of effective judicial protection	433
4.2.1 National procedural requirements v. the effectiveness of EU rights	433
4.2.2 Judicial review of administrative action by a 'competent court'	435
4.2.3 The 'exhaustive examination of all facts and circumstances' and interim relief	436

4.3 The invocability of judicial protection as an individual right: Article 47 CFR	437
4.3.1 The input of Article 13 ECHR	438
4.3.2 The contribution of Article 6(1) ECHR	439
4.3.3 Appeals and suspensive effect	442
4.4 Overlapping protection: Article 41 CFR and the right to good administration	443
4.4.1 The right to be heard	443
4.4.2 Access to one's file	444
4.4.3 The duty to provide reasons	445
5. The implications of the right to judicial protection for extraterritorial entry controls	446
5.1 The (Un-)importance of harmonized (international protection) procedures in the context of pre-border controls	446
5.2 The limits of national procedural autonomy when protection seekers are involved	448
5.3 The (inadequate) approach of the EU legislator	450
5.3.1 Procedural guarantees inscribed in Frontex legislation	450
5.3.2 Procedural safeguards provided in Schengen visa regulations	453
5.3.3 Procedural protections regarding ILOs' and carriers' interventions	455
6. Concluding remarks: The inescapability of granting access to territory	457
Conclusions: Taking EU Protection Seeker Rights Seriously	461
1. The <i>Sein</i>	461
1.1 The starting point: An open area of freedom security and justice	461
1.2 The pre-eminence of security and the projection of the border abroad	462
1.3 The ambiguous regulation of protection-based entry (and pre-entry)	464
1.4 The 'irregularization' of forced movement (towards the EU)	464
1.5 The impact of IBM measures on protection seekers	466
1.5.1 Schengen visas	466
1.5.2 Carrier sanctions and ILOs	467
1.5.3 Maritime interdiction	468
2. The <i>Sollen</i>	470
2.1 The 'integrative interpretation' approach	470
2.2 Member States' (non-absolute) powers of border and migration control	471
2.3 The irrelevance of territory: Jurisdiction, attribution, and the <i>Fransson</i> paradigm	471
2.4 EU <i>Non-refoulement</i>	473
2.5 The right to (leave to seek) asylum in the CFR: The EU 'right to flee'	474
2.6 Effective judicial protection as an individual right	475
3. The options left: Adapt or abandon	477
<i>Select Bibliography</i>	479
<i>Index</i>	509