

# Contents

## PREFACE

xv

### A. IMMIGRATION INTO THE EUROPEAN UNION

I. EUROPEAN IMMIGRATION LAW AS AN INTEGRAL PART OF A EUROPEAN INTERNAL MARKET	1
II. MIGRATION TO GEOGRAPHICALLY AND ECONOMICALLY FAVOURABLE STATES	5
1. <i>Migration Movements to the European Union</i>	5
2. <i>Third-country Nationals in the European Union – A Statistical Survey</i>	6
a) Net Immigration to Europe from 1987 to 1997	8
b) Share of Non-EEA-Citizens in the EU as of 1 January 1996	10
c) The Employment of Foreign Workers in the EU Member States (1993)	10
d) Population Development in the European Union in 1998	11
3. <i>The quantity of refugee flows and their geographical distribution</i>	12
a) Asylum Claims in Europe 1992-1999	13
b) Distribution of Asylum Claims among EU Member States	14
4. <i>The Known and Unknown Factor: Illegal Immigration</i>	14
III. MIGRATION AS A SOCIAL AND ECONOMIC FACTOR	16
1. <i>The Alleged Need for Increased Immigration</i>	16
2. <i>Demographic trends in destination countries</i>	19
3. <i>Migration and Labour Requirements</i>	21
4. <i>Migration Trends</i>	23
IV. ENLARGEMENT AND MIGRATION	23
1. <i>The Effects of Association Agreements and Enlargements of the European Union</i>	23
2. <i>CEEC Enlargement</i>	25
3. <i>Non-CEECs Interested in EU Membership</i>	26
4. <i>The CEECs' Adaptation to the Justice and Home Affairs Acquis</i>	27
5. <i>Transitional Arrangements in the course of CEEC Enlargement</i>	30

### B. IMMIGRATION, VISA AND ASYLUM POLICY IN AN AREA OF FREEDOM, SECURITY AND JUSTICE: TITLE IV OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY AND THE COMMUNITARIZATION OF THE SCHENGEN ACQUIS

I. THE CAUTIOUS APPROACH OF TITLE IV ECT TO SUPRANATIONALIZATION	35
II. THE FRAMEWORK OF COMMUNITY ACTION UNDER HUMAN RIGHTS AND THE GENEVA CONVENTION	38
1. <i>The European Convention for the Protection of Human Rights and Fundamental Freedoms</i>	38



2.	<i>The Geneva Convention</i>	43
3.	<i>The Content of the Commitments undertaken by the Community under the European and Geneva Conventions</i>	43
4.	<i>The Competing Jurisdictions of the Strasbourg and Luxembourg Courts</i>	45
5.	<i>Other Human Rights Treaties</i>	46
	a) <i>Asylum Policy</i>	46
	b) <i>Immigration Policy</i>	46
III.	THE BACKGROUND OF COMMUNITARIZATION: THE INSUFFICIENCIES OF MAASTRICHT'S LEGAL FRAMEWORK FOR IMMIGRATION AND ASYLUM POLICIES	47
1.	<i>The Structural Deficit of Third Pillar Decision-Making</i>	48
2.	<i>The Achievements of Third Pillar Co-operation</i>	49
3.	<i>Achievements of Intergovernmental Co-operation outside the EU Framework</i>	51
IV.	FROM MAASTRICHT TO AMSTERDAM: CHANGES AND QUESTIONS OF TRANSITION	53
1.	<i>The Elements of Amsterdam's Legal Framework</i>	53
2.	<i>Title IV and the Schengen Protocol</i>	54
3.	<i>The Follow-up of Maastricht's Primary Community Law (Ex-Article 100(c) ECT)</i>	56
4.	<i>The Effects of the Amsterdam Treaty on Third Pillar Instruments Adopted under the Maastricht Regime</i>	57
V.	STRUCTURAL ASPECTS OF THE NEW LEGAL FRAMEWORK	58
1.	<i>Closer Co-operation</i>	58
	a) <i>Title IV ECT and the Schengen Protocol as Examples of Closer Co-operation</i>	60
2.	<i>Implied Treaty Making Powers in Migration and Asylum Law</i>	63
	a) <i>General Applicability of ERTA-principles</i>	63
	b) <i>Declarations on Title IV Matters – Legal Nature</i>	64
	c) <i>The External Relations Protocol</i>	65
	d) <i>Foreign Policy Considerations in Visa-regimes</i>	66
	e) <i>Declaration on Immigration Policy (Article 63(3)(a) ECT)</i>	66
	f) <i>Ordre-Public Clauses</i>	67
VI.	THE BASIC STRUCTURE OF TITLE IV POWERS	67
1.	<i>Measures Aimed at Ensuring the Freedom of Movement</i>	68
2.	<i>Other Measures</i>	69
3.	<i>Direct Effects of Title IV Provisions?</i>	69
VII.	COMMUNITARIZATION OF THE SCHENGEN ACQUIS	70
1.	<i>General Principles and Issues</i>	70
2.	<i>The Elements of the Schengen Acquis</i>	71
3.	<i>Legal Nature of the Schengen Acquis</i>	72
4.	<i>Judicial Review</i>	72
5.	<i>Iceland and Norway</i>	73
VIII.	RE-ADOPTION OF MAASTRICHT THIRD PILLAR INSTRUMENTS UNDER TITLE IV POWERS	74
IX.	PROCEDURAL ISSUES	75
X.	THE SCOPE OF LEGISLATIVE POWERS UNDER TITLE IV	77



1. <i>Abolition of Internal Border Controls and Compensating Measures</i>	77
2. <i>Visa Policy</i>	78
3. <i>Asylum</i>	79
a) <i>Reception of Asylum Seekers</i>	79
b) <i>Minimum Standards of Procedure</i>	80
c) <i>Temporary Protection</i>	80
d) <i>Sudden Inflows of Third-country nationals</i>	81
e) <i>The Scope of Minimum Standards in the Light of the Notion of Burden-Sharing</i>	84
f) <i>Establishment of a European Asylum Agency?</i>	85
4. <i>Immigration</i>	86
5. <i>The Status of Third-Country Nationals (Article 61(b) ECT)</i>	87
XI. INSTITUTIONAL PROVISIONS	92
1. <i>The Right of Initiative</i>	92
2. <i>Rights of the European Parliament</i>	93
3. <i>Powers of the European Court of Justice</i>	94
XII. OPT-OUT AND OPT-IN PROVISIONS	103
1. <i>Title IV Opt-Out and Opt-In</i>	103
2. <i>Schengen Opt-Out and Opt-In</i>	104
XIII. EXTRA-TITLE IV LEGAL BASES OF COMMUNITY ACTION	106
1. <i>Extra-Title IV Powers on European Aliens Law?</i>	106
a) <i>The Need to Delineate the Scope of Application of Title IV ECT and of other Legal Bases for Community Action</i>	106
b) <i>Delineation of Title IV ECT and extra-Title IV Legal Bases of Community Action</i>	107
c) <i>Delineation of Powers under the Maastricht Treaty</i>	108
d) <i>The Method of Delineation</i>	110
2. <i>The Common and Internal Market Concepts</i>	112
3. <i>Article 310 ECT and Association Agreements</i>	113
4. <i>The Impact of Market Freedoms on the Status of Third-Country-Nationals</i>	116
5. <i>Article 94 ECT (ex-Article 100 ECT)</i>	118
6. <i>Article 308 ECT (ex-Article 235 ECT)</i>	119
7. <i>Social Rights: Article 137 ECT</i>	120
8. <i>Anti-Discrimination: Article 13 ECT</i>	120
XIV. OUTLOOK: POLICY QUESTIONS RELATED TO FURTHER SUPRANATIONALIZATION	122

## C. IMMIGRATION LAW – ENTRY AND SOJOURN

I. THE NEED TO DEVELOP A COHERENT SYSTEM OF EUROPEAN IMMIGRATION LAW	125
1. <i>European Immigration Law After Amsterdam: An Overview</i>	125
2. <i>The Creation of the Internal Market as the Objective of the Schengen Implementation Convention</i>	126
II. CROSSING EXTERNAL AND INTERNAL BORDERS	129
1. <i>General Requirements for the Crossing of External Borders</i>	129
a) <i>General Principles and Definitions</i>	129



b)	Execution of border controls in compliance with uniform principles	130
c)	Intensified surveillance of the green and blue borders	132
2.	<i>Visa Requirements</i>	133
a)	Negative, positive and grey listing under the SIC	134
b)	'Listing' at the Community Level: Regulation 574/99	135
c)	The SIC Provisions related to Airports and the Joint Action on Airport Transit Arrangements	138
d)	Uniform Format for Visas: Regulation 1683/95	141
e)	Harmonization of Criteria	144
3.	<i>Entry for Short-Term Visits</i>	147
a)	Defining the Notion of "Alien"	148
b)	Possession of Travel Documents and Visa	148
c)	Sufficient Means for and Purpose of Visit	149
d)	Reporting Aliens for the Purpose of Being Refused Entry	150
e)	Public Policy and National Security: Article 5(1)(e) SIC	151
f)	Individual Rights, Direct Applicability and Judicial Review	151
4.	<i>Conditions of Intra-EU Movement of Third-Country Nationals</i>	154
a)	Requirements for the Free Movement of Third-Country Nationals	154
b)	Reporting Requirement	155
5.	<i>Practical Experiences and the Need for Further Development</i>	156
a)	Visa Policy	156
b)	The Rule of Law	158
c)	Public Policy	160
III.	ILLEGAL IMMIGRATION AND ANTI-TRAFFICKING MEASURES	161
1.	<i>The Problem of illegal immigration and trafficking</i>	161
2.	<i>Legislative Measures against Illegal Immigration and Trafficking at the European Level</i>	164
a)	Cooperation in Expulsion	165
b)	Illegal Employment	166
c)	Marriages of Convenience	166
d)	Trafficking of aliens and exploitation	167
3.	<i>Cooperation with Central and Eastern European States</i>	170
a)	The Budapest Process	170
b)	The Enlargement of the European Union	173
4.	<i>Perspectives of a future European policy against illegal immigration and trafficking</i>	174
IV.	THIRD-COUNTRY NATIONALS PRIVILEGED WITH RESPECT TO THE EXERCISE OF MARKET FREEDOMS BY EU CITIZENS	175
1.	<i>Family Members of EU Citizens</i>	175
a)	The Market Freedoms and Secondary Community Law aimed at their Implementation	176
b)	The Concept of Family Members	182
c)	Conditions of Entry	185
d)	Non-Discrimination	186
e)	Freedom of Movement under Article 18 ECT	186
f)	The TEU's Reference to the European Convention on Human Rights	187



g)	Immigration and Residence Control Measures	188
h)	Scope of the Right of Residence and Loss of Status	189
2.	<i>Close Persons without Family Ties</i>	190
a)	Divorcés	190
b)	Non-Marital Relationships	192
3.	<i>Posted Workers: The Freedoms to Provide Services and of Establishment</i>	193
a)	Legal Issues of the Posting of Workers	194
b)	Definition of Posted Work	198
c)	Migration Control (Visa Requirements and Registration Duties)	201
d)	The <i>Rush Portuguesa</i> and <i>Vander Elst</i> Principles and the Freedom of Establishment	205
e)	Recent Commission Proposals for EC Directives in the Field of Provision of Services	206
(i)	Cross-Border Posting	206
f)	Third-country national Providers of Services	209
g)	National Discretion in Respect of the Protection of Posted Workers	210
V.	PRIVILEGED THIRD-COUNTRY NATIONALS: TREATMENT IN ASSOCIATION AGREEMENTS	212
1.	<i>Relevant Agreements</i>	212
a)	Effects of Association Agreements and Council of Association Decisions	216
b)	The Powers Conferred upon Councils of Association	220
2.	<i>The EEA Agreement</i>	221
3.	<i>The EEC-Turkey Association Agreement</i>	222
a)	The Progressive Integration of Turkish Workers	222
b)	The Principles Derived from Article 6 of Decision 1/80	225
c)	The Concept of Being Duly Registered as Belonging to the Labour Force	226
d)	The Concept of Legal Employment	227
e)	Further Assimilation of Status	228
f)	Some Methodological Objections against the Court's Reasoning	229
g)	Family Members of Turkish Workers	232
h)	The Status of other Turkish Nationals	234
4.	<i>The Mediterranean Co-operation Agreements</i>	235
a)	The EEC-Algeria and EEC-Morocco Agreements	235
b)	The Euro-Mediterranean Agreement with Tunisia	235
c)	Persons under the Sovereignty of the Palestinian Authority of the West Bank and the Gaza Strip	239
5.	<i>The Europe Agreements</i>	239
a)	The Legal Status of CEEC National Workers	241
b)	The Legal Position of Family Members	243
c)	Decisions of Association Councils	244
d)	Freedom of Establishment	244
e)	Freedom to Provide Services	251
f)	The <i>Ordre Public</i> and Civil Service Reservations	251



g) Further Sources of National Discretion	253
6. <i>The General Agreement on Trade in Services (GATS)</i>	253
7. <i>The EU-Switzerland Agreement</i>	256
a) Swiss Migration Laws	256
b) Free Movement of Persons	257
c) Institutional Provisions	259
d) Future EU-Switzerland Co-operation	260
VI. NON-PRIVILEGED THIRD-COUNTRY NATIONALS	260
1. <i>Survey of Existing Council Resolutions and the Draft Convention of the European Commission</i>	260
2. <i>Admission on Employment</i>	263
a) General Principles	263
b) Conditions of Admission	264
c) Admission of Seasonal Workers	265
d) Admission of Transfrontier Workers	266
e) Self-employed Persons	267
3. <i>Students</i>	269
4. <i>Trainees</i>	273
5. <i>Family Members</i>	274
6. <i>Third-Country Nationals Who Want to enter For Other Reasons</i>	282
7. <i>Long-term Resident Third-Country Nationals</i>	283
8. <i>Conclusions</i>	288
VII. FREE MOVEMENT OF THIRD-COUNTRY NATIONALS WITHIN THE EUROPEAN UNION?	289
1. <i>The completion of the internal market and the "right to travel"</i>	289
2. <i>Freedom of Movement under the Amsterdam Treaty</i>	289
3. <i>Freedom of Movement for Third-Country Nationals</i>	290
a) Proposal for a Directive on the elimination of controls on persons crossing internal frontiers – COM(95)347 final and COM(97)106 final	292
b) Draft Directive amending secondary legislation on the free movement of persons – COM(95)348 final	293
c) Proposal for a Council Directive on the right of third-country nationals to travel within the Community – COM(95)346final	293
d) Proposed Amendments to Regulation 1612/68	296
VIII. PREVENTION OF DISCRIMINATION AND RACISM	299
1. <i>The Principle of Non-Discrimination</i>	299
2. <i>Article 13 ECT and Immigration and Asylum Policy</i>	302
<b>D. SOCIAL RIGHTS OF THIRD-COUNTRY NATIONALS</b>	
I. THE RELEVANCE OF HUMAN AND SOCIAL RIGHTS WITHIN THE TREATIES AND THE CONCEPT OF A CHARTER OF FUNDAMENTAL HUMAN RIGHTS	307
1. <i>Third-Country Nationals within Community Law and Human Rights Instruments</i>	307
2. <i>Human and Social Rights within Community Law</i>	309
3. <i>A Charter of Fundamental Rights in the European Union</i>	311
II. SOCIAL RIGHTS IN ARTICLES 138, 139 AND 141 ECT	311
1. <i>Fields covered by Social Security Provisions in the Treaty</i>	312



2.	<i>Provisions Relating to Workplace Health and Safety</i>	313
3.	<i>Gender Equality in Work</i>	314
III.	THIRD-COUNTRY NATIONALS UNDER THE CURRENT EC PROVISIONS AND THE PROPOSED EXTENSION OF THE PERSONAL SCOPE OF APPLICATION OF SOCIAL SECURITY REGULATIONS	316
1.	<i>Survey</i>	316
2.	<i>The Existing Regulation 1408/71</i>	318
a)	<i>The Personal Scope of Application</i>	318
b)	<i>The Substantive Scope of Application</i>	319
3.	<i>The Proposal for an Extended Personal Scope of Application and for a Council Regulation (EC) on Coordination of Social Security Systems</i>	323
4.	<i>Equal Treatment under Community Law</i>	324
a)	<i>Equal Treatment and EU citizens</i>	324
b)	<i>Equal Treatment and Third-Country Nationals in General</i>	325
c)	<i>Equal Treatment under Community Agreements</i>	327
d)	<i>Equal Treatment after the Gaygusuz Judgment</i>	335
IV.	SOCIAL RIGHTS WITHIN THE COUNCIL OF EUROPE	337
1.	<i>Social Rights according to the European Convention on Human Rights</i>	338
2.	<i>The European Interim Agreements on Social Security Schemes</i>	343
3.	<i>The European Convention on Social Security</i>	344
4.	<i>The European Social Charter and the Revised Social Charter</i>	344
5.	<i>Other Instruments relating to Social Rights</i>	351
E.	REFUGEES AND ASYLUM SEEKERS	
I.	INTRODUCTION	353
1.	<i>Factors and Agents of a European Refugee Policy</i>	353
a)	<i>The Role of UNHCR</i>	353
b)	<i>The Need for a European Approach</i>	356
c)	<i>Cooperation in the Area of Asylum and Refugee Policies in the Framework of the Council of Europe and the OSCE</i>	358
2.	<i>Development and Status Quo of a European Refugee Policy</i>	360
3.	<i>The Legal Framework for a Community Policy on Visas, Asylum, Immigration and other Matters Related to Free Movement of Persons after Entry into Force of the Treaty of Amsterdam</i>	366
a)	<i>Asylum</i>	367
b)	<i>Refugees and Displaced Persons</i>	370
c)	<i>Visas, External Borders and the Return of Illegal Residents</i>	372
II.	HARMONIZATION OF THE CRITERIA FOR RECOGNITION AS A POLITICAL REFUGEE	372
1.	<i>The Geneva Convention as a Starting Point for a Common European Asylum and Refugee Policy</i>	373
a)	<i>Interpretation of the Geneva Convention</i>	373
b)	<i>Persecution by Non-State Agents</i>	374
c)	<i>Military Actions and Punishment of Deserters</i>	375
d)	<i>Internal Flight Alternative</i>	376
2.	<i>The Joint Position of the Council on the Harmonized Application of the Definition of the Term 'Refugee' of 4 March 1996</i>	377



a)	Content	377
b)	The Significance of the Joint Position for the Interpretation of the Geneva Convention	380
3.	<i>Prospects of Harmonization after Entry into Force of the Treaty of Amsterdam</i>	381
III.	ASYLUM PROCEDURE UNDER THE DUBLIN AND SCHENGEN CONVENTIONS	382
1.	<i>Introduction</i>	382
2.	<i>Concept of Exclusive Competence</i>	383
3.	<i>Criteria for the Determination of the Competent State under the Dublin Convention</i>	385
4.	<i>Personal Scope of Application</i>	386
5.	<i>Obligations of the Contracting Parties and Individual Rights</i>	389
6.	<i>Transfer Procedure</i>	394
a)	Transfer Requests to Signatory States	394
b)	Transferral Requests from Signatory States	397
7.	<i>Problems of Application</i>	397
a)	Retroactive Application	397
b)	The Dublin Convention and the Visa Regime of the Draft External Borders Convention	398
c)	Family Reunification	398
d)	Practical Problems and Experiences	399
8.	<i>EURODAC</i>	401
a)	The History of Eurodac	401
b)	The Proposal for a Council Regulation (EC) Concerning the Establishment of "Eurodac"	402
c)	General Provisions	403
d)	Data on Applicants for Asylum	404
e)	Illegal Immigrants	405
f)	Individual Rights, Liability and Supervision	406
g)	Legal Problems: Clarity and Conformity with Human Rights	407
IV.	HARMONIZATION OF MINIMUM STANDARDS ON THE RECEPTION OF ASYLUM SEEKERS	410
V.	HARMONIZATION OF THE RULES OF THE MEMBER STATES ON TEMPORARY PROTECTION, DE FACTO PROTECTION AND HUMANITARIAN RESIDENCE PERMITS; BURDEN-SHARING	413
1.	<i>Introduction</i>	413
2.	<i>Harmonization Efforts</i>	415
3.	<i>Burden-Sharing</i>	417
a)	Criteria for Burden-Sharing	418
b)	The Legal Nature of the Resolution on Burden-Sharing and the Decision on an Alert and Emergency Procedure	419
c)	The Scope of Application of the Resolution on Burden-Sharing	420
d)	Criteria and Implementation	422
e)	Admission and Return, Rights Granted, Relationship to the Asylum Procedure	425
4.	<i>Temporary Protection</i>	425
a)	The Concept of Temporary Protection	425



b)	The Commission Proposal for a Joint Action on Temporary Protection	426
c)	The Legal Nature of the Proposed Joint Action	427
d)	The Scope of Application	427
e)	The Procedure to Establish a Temporary Protection Regime	429
f)	Rights Granted	430
g)	The Relationship of the Temporary Protection Regime to the Asylum Procedure	433
h)	Termination of the Regime and Return of the Persons Concerned	434
i)	Burden-Sharing	436
VI.	ASYLUM PROCEDURE	437
1.	<i>Minimum Standards of Procedure</i>	437
a)	Geneva Convention and the European Human Rights Convention	437
b)	Problems of Harmonisation and the Council Decision of 1995 on Minimum Standards of Asylum Procedure	441
2.	<i>The Safe Third-Country Concept in the European Union</i>	443
a)	The 1992 Resolution of the Community Immigration Ministers	443
b)	International Law Objections	447
c)	Inherent Difficulties of the Safe Third Country Concept	449
3.	<i>Manifestly Unfounded or Abusive Asylum Claims</i>	452
a)	Fast-Track Procedures	452
b)	The Right to Appeal and Suspensory Effect	455
c)	Asylum Application at the border	459
4.	<i>Safe Country of Origin Concept</i>	460
a)	Conclusion on Safe Countries of Origin of 1992	460
5.	<i>Asylum Application From Nationals of EU-Member States</i>	464

## **F. TERMINATION OF RESIDENCE, EXPULSION, DEPORTATION AND RETURN**

I.	DESCRIPTION OF THE PROBLEM	467
II.	COMMON PRINCIPLES ON EXPULSION	469
1.	<i>General policy</i>	469
a)	The Communitarized SIC Provisions	469
b)	Joint Actions, Council Decisions, Recommendations, and Resolutions	473
c)	Voluntary repatriation	475
d)	Special Groups of Third-Country Nationals	476
e)	The Prospective Common Policy under the Amsterdam Treaty	479
2.	<i>Responsibility for Deportation</i>	480
III.	COMMON EUROPEAN RETURN POLICY	481
1.	<i>Obligations of States under Public International Law to Readmit their Own and Foreign Nationals</i>	482
2.	<i>Model Return Agreements</i>	483
3.	<i>Standard Travel Document</i>	485
4.	<i>Common Policy with Respect to Countries of Origin</i>	485



IV. THE INTERNATIONAL LAW FRAMEWORK	486
1. <i>Protection against Expulsion by International Law -The Legal Framework of Prospective European Legislation</i>	486
a) General remarks	486
b) The Covenant on Civil and Political Rights	487
c) The 1951 Convention Relating to the Status of Refugees	488
2. <i>Protection against Expulsion by the European Convention on Human Rights</i>	489
a) Protection against expulsion by the Fourth and Seventh Protocol to the Convention	489
b) The protection against expulsion in case of inhuman treatment (Article 3 ECHR)	490
c) Protection against expulsion by Art . 8 ECHR (family life and privacy)	496
3. <i>Other Council of Europe Conventions</i>	499
V. OUTLOOK	500
<b>G. BIBLIOGRAPHY</b>	503
<b>H. TABLE OF LEGISLATION AND PREPARATORY ACTS</b>	
I. ENTRY AND ADMISSION	529
II. INTEGRATION AND SOCIAL RIGHTS	530
III. COMBATING ILLEGAL RESIDENCE AND REPATRIATION	530
IV. ASYLUM AND REFUGEE LAW	531
V. ASSOCIATION AGREEMENTS CONCLUDED BY THE EUROPEAN (ECONOMIC) COMMUNITY	533
VI. PROPOSALS AND WORKING DOCUMENTS BY THE EUROPEAN COMMISSION ON IMMIGRATION AND ASYLUM	533
<b>I. TABLE OF CASES</b>	
I. EUROPEAN COURT OF JUSTICE	535
II. PENDING CASES OF THE EUROPEAN COURT OF JUSTICE	541
III. JUDGMENTS OF THE COURT OF FIRST INSTANCE	541
IV. EUROPEAN COURT OF HUMAN RIGHTS	542
V. EUROPEAN COMMISSION OF HUMAN RIGHTS	542
<b>J. TABLE OF ABBREVIATIONS</b>	543
<b>INDEX</b>	549