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Introduction

In many parts of Europe (and at least in the 27 of the 47 Council of Europe member states which are now also members of the European Union),¹ there exist four main simultaneous and, often, overlapping legal regimes for the international protection of asylum seekers and refugees. These are:

- the 1951 Geneva Convention relating to the Status of Refugees (the Geneva Convention) and its 1967 Protocol;
- the law of the European Union (EU law);²
- the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); and
- the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols.

In addition, all member states of the Council of Europe are also parties to the various other UN human rights treaties, in particular the 1966 International Covenant on Civil and Political Rights (ICCPR) which offers broadly comparable protection to that of the European Convention on Human Rights (ECHR). For reasons of space, reference is only made in this book to the most important case-law of the UN Human Rights Committee (UN HRC), as the supervisory body for the ICCPR. Other UN key human rights instruments (for example, the 1948 Universal Declaration of Human

1. Not all EU states are bound by all measures: see the section on EU measures.
2. EU member states are required to transpose directives in time and to implement them fully. If they fail to do so they must pay compensation to individuals who suffer as a result of their failure to do so. See *Francovich and Bonifaci v. Italy* (Cases C-6 and 9/90 [1991] ECR I-5357).



Rights (UDHR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1989 Convention on the Rights of the Child (CRC) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD) may also be relevant to asylum issues.

This book is primarily about the standards of protection offered by the ECHR. However, the standards of some or all of the other legal regimes are, in many cases, part and parcel of those standards and are referred to as and when appropriate.

There are many individuals whose situation falls outside the scope of the 1951 Geneva Convention, of the UNCAT and of the EU measures, but who are protected by the ECHR. The ECHR is not so limited, as it protects (at least in theory) “everyone” without distinction. In the following pages the standards of the Geneva Convention, the UNCAT, and the applicable EU regulations and directives will all be referred to when considering the standards of the ECHR.

This may be because the Convention prohibits arbitrariness and so requires that decisions be in accordance with the law – which for EU states includes EU law – or it may be simply because Article 53 of the ECHR provides that “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”. The European Court has, however, frequently stated that it has no power to rule on whether a state has acted in conformity with its obligations under other treaties except in so far as it is required to determine whether there has been an interference with rights guaranteed by the Convention.³ The Court has recalled that its sole task under Article 19 of the ECHR is to ensure the observance of the engagements of the Contracting Parties to the ECHR – it is not the Court’s task to apply directly the level of protection offered in other inter-

3. *K.R.S. v. the United Kingdom*, application no. 32733/08, decision of 2 December 2008.



national instruments.⁴ This approach may be problematic when the national law protecting ECHR rights is either directly applicable EU law (regulations) or derived from EU law (transposed directives or framework decisions).

The 1951 Geneva Convention is the *lex specialis* of asylum and its pre-eminence as the key international instrument for protecting those who fall within its scope is unquestioned. This guide makes frequent references to the protection offered by the Geneva Convention, but for reasons of space and because this text is primarily about the ECHR, those references are brief and thus perform incomplete.

The Council of Europe's Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) set up a system for monitoring all places where people are deprived of their liberty. The European Committee for the Prevention of Torture (CPT) makes periodic and ad hoc visits to all contracting states and publishes (with the consent of the state) reports on those visits. It also produces General Reports and the CPT standards.⁵ Its reports carry great weight and are often relied on by the Court when examining complaints. Both the country reports and the general reports have frequently looked at both the legal and physical conditions in which asylum seekers and other immigration detainees have been held. Although the CPT itself cannot make legal findings that states have violated the prohibition on torture or inhuman and degrading treatment – only the Court can do that – it can make factual findings and recommendations. The work of the Committee is referred to throughout this book.

The pages that follow are divided into three parts.

Part One of this handbook looks at the extraterritorial application of the Convention in connection with the risks faced on expulsion to the pro-

4. *N.A. v. the United Kingdom*, application no. 25904/07, judgment of 17 July 2008.

5. The CPT standards. "Substantive" sections of the CPT's general reports. CPT/Inf/E (2002) 1 – Rev. 2006. The CPT standards set out its recommendations to be applied in different contexts, including as regards "Foreign nationals detained under aliens legislation" (extract from the 7th General Report [CPT/Inf (97) 10]) and the "Deportation of foreign nationals by air" (extract from the 13th General Report [CPT/Inf (2003) 35]).



posed country of destination. This section explores the possible future extraterritorial application of those Convention articles on which no ruling has as yet been made.

Part Two examines the application of the Convention to asylum issues other than the extraterritorial application of the Convention's provisions.

Part Three concerns the subsidiary protection of the Convention organs.

Overview

A key attribute of national sovereignty is the right of states to admit or exclude aliens from their territory.⁶ Only if exclusion from the territory or from protection would involve a breach of some other provision of international law are states bound to admit aliens. The concept of asylum is the most important example of the latter principle. Although Article 14 of the UDHR expressly protects the right to “seek and enjoy asylum from persecution”, this right is not found in the texts of other general instruments of international human rights law such as the ICCPR or the ECHR. When those human rights instruments were drafted it was thought that the Geneva Convention relating to the status of refugees would constitute a *lex specialis* which fully covered the need, and no express provision on asylum was thus included.

The Geneva Convention treats those who are recognised as falling within the scope of its protection as a privileged group and provides them with a comprehensive bundle of rights. In the early years of the Geneva Convention, recognition as a refugee in Europe was not a problem; everyone knew who refugees were. The United Nations High Commissioner for Refugees (UNHCR) saw no need to produce a handbook to guide asylum determination procedures until 1979. In the past decades European states have been more reluctant to recognise people in need of protection as “refugees”. The role previously played by the Geneva

6. See, amongst many others, *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, §135.



Convention is now in many respects performed in the European context by general human rights instruments and, in particular, by the ECHR.

The Geneva Convention remains effective – and essential – as an instrument which provides additional benefits to an increasingly small number of people who are recognised as falling within its ambit by governments.⁷ However, many of those who need international protection because they are at risk of expulsion to situations where they would face serious harm such as torture or inhuman and degrading treatment or punishment, or whose expulsion would in itself constitute such treatment, fall outside the ambit of the Geneva Convention, primarily because no nexus or link can be established between the persecution feared and one of the five Convention grounds.⁸

The new EU regime set up under the Common European Asylum System (CEAS) fills some of these lacunae but still fails to apply to all those who are recognised by the European Court of Human Rights as being in need of – and entitled to – international protection. Article 18 of the Charter of Fundamental Rights of the EU guarantees the right to asylum, however it remains to be seen how it will operate in practice. Even if not actually expelled, those who are refused recognition as refugees and not otherwise granted the appropriate subsidiary (or complementary) protection are often left drifting in a state of undocumented uncertainty (see section on *Status*, page 190).

Both the ECHR, which was opened for signature in November 1950, and the Geneva Convention, which was opened for signature the following year, were drafted as the polarisation in international relations which marked the Cold War set in. Both conventions reflect the concerns and thinking of the period. Over the next 50 years, when the conflict between the two opposing ideologies dominated international relations, the definition of a refugee set out in Article 1A §2,⁹ and the principle of

7. Persons can also be recognised as refugees by UNHCR under its mandate but this grant is declaratory rather than constitutive in nature.

8. Under the 1951 Convention a well-founded fear of persecution must be “for reasons of” race, religion, nationality, membership of a particular social group or political opinion.



non-refoulement established in Article 33 §1,¹⁰ of the Geneva Convention became well recognised in international law. Drafted in the wake of the massive forced displacement at the time of the Second World War, the Geneva Convention was designed to provide a legal status for those persons who found themselves outside their country of nationality or habitual residence and in fear of persecution as a consequence of “events occurring in Europe before 1 January 1951”.

The ECHR, on the other hand, was intended to provide legal regional recognition of most of the rights set out in the UDHR and to provide international mechanisms to police their implementation. It did not, however, contain any express provision to reflect Article 14 of the UDHR, which guarantees the right to seek and enjoy asylum from persecution.

Background considerations: movement of refugees in Europe from the aftermath of the Second World War to the present

There is a long history of people seeking international protection in Europe. While the Geneva Convention was primarily an instrument devised to meet a humanitarian need by providing a proper legal framework for asylum, it was also an instrument which was intended to serve the aims of Cold War politics. The emphasis was on providing protection for those who fled from those countries behind the Iron Curtain. In 1967 the New York Protocol to the Geneva Convention removed the reference

9. An asylum seeker is an individual who has sought international protection and whose claim for refugee status has not yet been determined. However, a refugee is a person who fulfils the criteria of the 1951 Convention. Article 1A, §2 of the 1951 Convention, defines a refugee as someone who “owing to 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 nationality and is unable or, owing to such a fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it...”.

10. Article 33, §1, states: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”



to 1 January 1951,¹¹ and almost all the countries¹² which were then members of the Council of Europe subsequently removed the geographical limitation so that those who arrived from any part of the world were protected, not just European asylum seekers. This was recognition that the refugee question was not simply an isolated European phenomenon. During the years of rapid economic expansion of the 1960s, the Cold War meant that very few refugees or asylum seekers were able to reach western countries and arrivals were, in any case, welcomed to feed the expanding economies' demand for increased labour.

Since then people seeking international protection have arrived in Europe both from the former communist states, from sub-Saharan Africa and from the many other regions of the world which are devastated by civil war, natural disasters or grinding poverty or where they live under oppressive regimes. States have found their commitment to their obligations under international law strained as a result of this greater freedom of movement. Legitimate concerns have also arisen that economic migrants may be misusing asylum legislation in an attempt to secure entry to countries which have closed normal immigration routes.¹³ Many of those who seek international protection are not entitled to it, but in efforts to exclude those people, states are sometimes denying international protection to those who have a real need.

Recent trends in Europe

The vast majority of asylum seekers arriving in Europe since the end of the Cold War have fled countries where serious human rights abuses are

11. New York Protocol to the Geneva Convention, 1967, Article 1, §2.

12. Of the present Council of Europe member states, only Monaco and Turkey still retain the geographical restriction. Monaco provides refugee protection under its bilateral agreements with France. In Turkey, whilst non-European asylum seekers are formally excluded from 1951 Convention protection, they may apply for "temporary asylum-seeker status" under Turkish law, pending UNHCR's efforts to find a solution for them elsewhere. See e.g. *Abdolkhani and Karimnia v. Turkey*, application no. 30471/08, judgment of 22 September 2009; *Z.N.S. v. Turkey*, application no. 21896/08, judgment of 19 January 2010.

13. See Nicholson, F. and Twomey, P. (eds.), *Refugee rights and realities*, Cambridge University Press, 1999.



endemic – countries racked by civil war or countries where the machinery of the state has broken down to such a degree that it can no longer offer protection to its citizens. The early 1990s saw a significant increase in the number of asylum applications in Europe, largely as a result of the Balkan wars and an exodus of people from the countries of the former Yugoslavia. The late 1990s saw yet another rise in applications during the Kosovo crisis, in particular the events of the spring of 1999, which brought about refugee movements in Europe on a scale unseen since the Second World War.

While many of those seeking protection came from within the Council of Europe itself (for example, Turkish Kurds or Roma from the former communist states), others were fleeing repression and civil war in countries further afield such as Sri Lanka, Somalia, the Democratic Republic of the Congo (DRC), Rwanda and Algeria.

The trend in the first few years of the new millennium unsurprisingly showed an increase in asylum seekers from Iraq and Afghanistan. The majority of asylum claims lodged in the first half of 2009 were made by persons from Iraq, followed by those from Afghanistan and Somalia. The other main countries are China, Serbia (including Kosovo),¹⁴ the Russian Federation, Nigeria, Mexico, Zimbabwe, Pakistan and Sri Lanka.¹⁵ In the first part of 2009 up to 2 million people had been uprooted by violence between the government and militant forces in Pakistan alone, representing the most challenging protection crisis since Rwanda in the mid-1990s.¹⁶

14. All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

15. UNHCR, *Asylum Levels and Trends in Industrialized Countries First Half 2009: Statistical overview of asylum applications lodged in Europe and selected non-European countries*, 21 October 2009; and UNHCR “2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons” 16 June 2009.

16. Statement of UN High Commissioner for Refugees, António Guterres, on the release of the 2008 Global Trends report.



Nevertheless, it is clear that Europe remains a primary destination for individual asylum seekers, with increased numbers of asylum applications having been received during 2008 for the second consecutive year.

The expansion of the European Union on 1 May 2004 from 15 to 25 member states and to 27 on 1 January 2007 also extended the EU's external borders. The EU-27 also received an increase in asylum applications during 2008. However, whilst there were significant differences between the 15 "old" and the 12 "new" member states, some of the new member states, such as Malta, experienced a large increase in asylum applications.¹⁷

The member states of the EU have sought to develop a comprehensive Common European Asylum System (CEAS), as defined in the Tampere and the Hague Programme. It was intended to be built in two phases. The first one is now complete and the second phase instruments should be adopted by the end of 2010.

A section of this book deals with the measures adopted at EU level in so far as they are relevant to the application of the ECHR. A list of all the relevant EU measures – which now normally regulate asylum in most of the member states of the EU and thus more than half the member states of the Council of Europe – is appended (see page 257).

Most of those in need of international protection find themselves seeking asylum in member states of the Council of Europe which are outside the EU. Many would prefer to be able to travel on to the EU states where there are established communities of the groups to which they belong and where support networks and thus work opportunities exist. Refugees failing to reach western European countries remain in the member states of the Council of Europe in central and eastern Europe and the former Soviet Union and in some cases in the Mediterranean. These states are under considerable strain as they often lack the mechanisms, legislation, experience, or appropriate resources to handle their caseload.

17. UNHCR Asylum levels and Trends Report 2008.



The provisions of the ECHR now bind 47 countries (as at 9 October 2007).¹⁸ The experience of the Council of Europe in brokering agreements, conventions, recommendations, resolutions and declarations complementary to refugee instruments, the forum for discussion which it offers and the body of case-law built up by the European Commission and Court of Human Rights are invaluable in assisting these states – indeed, all Council of Europe member states – to ensure that their humanitarian obligations under international law are upheld and the rights of refugees protected.¹⁹ There is a pressing need for the Committee of Ministers of the Council of Europe to consider re-establishing a new inter-governmental committee with a permanent mandate to examine asylum and refugee issues to replace the work formerly carried out by the *ad hoc* Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR), which was disbanded.

18. The date at which Monaco became a party. Serbia and Montenegro acceded on 3 April 2003 and have now separated. The accession of the independent Montenegro took place on 11 May 2007.

19. A list of Council of Europe instruments relating to refugees is attached in Appendix I at page 251.



Part One – The role of the European Convention on Human Rights in protection from expulsion to face human rights abuses

Whilst UNHCR keeps a vigilant watch on the way in which national authorities comply with their obligations, the Geneva Convention has no formal international supervision procedure to review the correctness of individual decisions to recognise, or withhold recognition of, refugee status. There is no right of individual petition to a judicial body comparable to that which exists under Articles 34²⁰ and 35²¹ of the ECHR. A large body of specialised case-law has developed on its interpretation and application by national courts. However, there is no uniformity of approach and the result has been a patchwork of disparate decisions. This lack of consistency in approach to the determination of refugee status was one of the problems identified by the EU and addressed in the “Qualification Directive” (EU Directive 2004/83),²² which had to be transposed

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20. Article 34 states: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”
 21. Article 35 §1 states: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”
 22. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 of 30 September 2003, p. 12) (“the Qualification Directive”).

