

# 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)<sup>1</sup>, there exist four simultaneous and, often, overlapping key 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);<sup>2</sup>
- 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 ECHR. For reasons of space, reference is only made in this book to the most important case law of the UN Human Rights Committee, as the supervisory body for the ICCPR. Other UN key human rights instruments (for example, the 1948 Universal Declaration of Human 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) and the 1989 Convention on the Rights of the Child (CRC)) may also be relevant to asylum issues.

This book is 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.

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1 Not all EU states are bound by all measures: see the section on EU measures below.

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).

There are many individuals whose situation falls outside the scope of the Geneva Convention, of the UNCAT and of the EU measures, but who are protected by the European Convention on Human Rights. 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 its arbitrariness and so requires that decisions are in accordance with the law – which for EU states includes EU law – or it may be simply because Article 53 of the ECHR provides “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 insofar as it is required to determine whether an interference with rights guaranteed.

The Geneva Convention relating to the Status of Refugees is the *lex specialis* of asylum in Europe and its pre-eminence as the key international instrument for protecting those who fall within its scope is unquestioned. It provides those people with an ample basket of rights and privileges. This short 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 perforce incomplete.

In addition, many of those now seeking international protection in Europe do not fall within the mandate of the Geneva Convention or have problems and needs which the convention does not address. This book examines the parallel protection offered by the ECHR.

The Council of Europe Convention for the Prevention of Torture (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 visits to all contracting states and publishes (with the consent of the state) reports on the visits. It also produces General Reports. 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. 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. The work of the committee is referred to throughout this book.

The pages that follow are divided into three sections.

Part One of this handbook looks at the approach taken to date by the ECtHR to the extraterritorial application of those articles in connection with the risks

faced on expulsion to the proposed country of destination. The section explores the possible future extraterritorial application of those articles on which no ruling had as yet been made.

Part Two examines the application of the articles 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.<sup>3</sup> 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 European Convention on Human Rights. When those human rights instruments were drafted it was thought that the 1951 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. UNHCR saw no need to produce a handbook to guide asylum determination procedures until 1979. In the new millennium, European governments tend to apply the Geneva Convention's provisions in an increasingly legalistic way and thereby contain their responsibilities towards people at risk of ill-treatment who might otherwise be able to find the protection from expulsion which the Geneva Convention was designed, in part, to provide. That role is now arguably more effectively performed in the European context by general human rights instruments and in particular by the European Convention on Human Rights.

The Geneva Convention remains effective – and essential – as an instrument which provides additional benefits to an increasingly smaller number of people who are recognised as falling within its ambit by governments. 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

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<sup>3</sup> See, amongst many others, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, judgment of 11 January 2007, paragraph 135.

would in itself constitute such treatment, fall outside the ambit of the Geneva Convention, for instance because no nexus or link can be established between the persecution feared and one of the five convention grounds.<sup>4</sup>

The new EU regime 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. 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.

Both the European Convention on Human Rights, 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 fifty years, when the conflict between the two opposing ideologies dominated international relations, the definition of a refugee set out in Article 1A, paragraph 2,<sup>5</sup> and the principle of *non-refoulement* established in Article 33, paragraph 1,<sup>6</sup> 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 European Convention on Human Rights, on the other hand, was intended to provide a legal regional recognition of most of the rights set out in the Universal Declaration of Human Rights (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.

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

5 Article 1A, paragraph 2, 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, is unwilling to return to it ...”.

6 Article 33, paragraph 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.”

## **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 where the furtherance of collective communist ideals took precedence over the observance of the civil and political rights of the individual. The declared sympathies of such refugees were with Western political values.

In 1967 the New York Protocol to the Geneva Convention removed the reference to 1 January 1951,<sup>7</sup> and almost all the countries<sup>8</sup> 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. 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.

The first oil crisis in 1973 and the resulting recession brought growing unemployment and opposition to new immigration. Less than thirty years after the fall of the Nazi regime in Germany, the ugly spectre of racism was also beginning to haunt Europe again.

At the same time, events such as Idi Amin's seizure of power in Uganda in 1971 and General Pinochet's coup in Chile in 1973 prompted thousands to flee the repression which followed in those countries. Although the overwhelming majority of refugees from any conflict or oppression still tend to flee only as far as neighbouring countries, the increasing availability of air travel meant that some were able to reach the developed world. The numbers involved were, however, small compared with the large numbers of both refugees and migrants it was feared might arrive after the fall of the Iron Curtain in November 1989 and the crumbling of the eastern bloc, where movement had previously been tightly controlled.

States have found their commitment to their obligations under international law strained as a result of this greater freedom of movement, while legitimate

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<sup>7</sup> New York Protocol to the Geneva Convention, 1967, Article 1, paragraph 2.

<sup>8</sup> Of the present Council of Europe member states, only Monaco and Turkey still retain it. For information see: [www.unhcr.org/protect/PROTECTION/3b73b\)d63.pdf](http://www.unhcr.org/protect/PROTECTION/3b73b)d63.pdf).

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.<sup>9</sup>

### **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 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 brought about 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 has shown an increase in asylum seekers from Afghanistan and Iraq. Indeed, nationals of Iraq and Afghanistan, along with those from China, the former Federal Republic of Yugoslavia, the Russian Federation (mainly Chechens) and Turkey, currently account for the majority of asylum applications in the world's industrialised nations.

While Europe continues to register significant numbers of asylum applications, general trends are, however, showing a major decrease in the number of people applying for asylum in recent years, to the level of the early 1980s.

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. Some of these new member states, such as Slovakia and Poland, but particularly Malta, have experienced a significant increase in asylum applications.

The member states of the EU have sought to develop a comprehensive common European asylum policy, the latest phase of which is contained in the "Hague Programme", which is, at the time of writing, almost complete.

A section of this book deals with the measures adopted at EU level insofar 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.

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<sup>9</sup> See Nicholson, F. and Twomey, P. (eds.), *Refugee rights and realities*, Cambridge University Press, 1999.

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.

The provisions of the European Convention on Human Rights now bind 47 countries (as at 9 October 2007).<sup>10</sup> 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 is 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.<sup>11</sup> The Council of Europe unit which was previously dedicated to refugee issues (CAHAR) has now been disbanded.

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<sup>10</sup> 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.

<sup>11</sup> A list of Council of Europe instruments relating to refugees is attached in Appendix I at page 137.