

The Minimum Standards of International Protection Applicable to the European Union

States have a sovereign entitlement to protect those fleeing foreign countries because of a grave risk that they will suffer persecution, torture, arbitrary disappearance and other cruel, inhuman or degrading treatment or punishment. This right to provide protection is guaranteed in international law and must not be treated as a hostile act by the state of nationality of the protection seeker.¹ For the purpose of this report, 'protection seeker' covers anyone who applies for international protection under international refugee or human rights law instruments, whether this application has been, or is yet to be, determined by a state.

This state sovereign right to provide international protection has been inscribed in law in all European liberal democracies. All countries have laws and rules on how protection seekers must be admitted to the territory and given access to an asylum procedure, how they must be treated while within the jurisdiction and, in limited and justified cases, while subject to detention. This is the consequence of the commitment of European states to the rule of law.

In their exercise of state sovereignty, European states have chosen to sign and ratify international and European human rights conventions. Indeed, European states are among the most consistent in

ratifying human rights conventions (after South America).² International law does not require states to sign and ratify any convention. The choice to do so is an exercise of state sovereignty. Once a state has signed and ratified a convention, there is a duty of good faith in international law that states will comply with the obligations which they have voluntarily undertaken. It is always open to states to denounce a convention, though this is exceedingly rare.³

European states have signed and ratified most UN human rights conventions, all of which are founded on the Universal Declaration of Human Rights (UDHR).⁴ Many states have also recognised the competence of the Treaty Bodies established by these conventions to receive and determine individual complaints against them. In the regional context, the European Convention on Human Rights (ECHR)⁵ and the European Social Charter (ESC)⁶ are key conventions setting standards with courts and dispute resolution bodies established to settle complaints. The EU adopted the Charter of Fundamental Rights (EUCFR)⁷ in 2000 and established its status as equivalent to the EU Treaties in 2009.

Many human rights conventions address state obligations towards protection seekers either directly or indirectly. The 1951 Convention

¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (CSR51) Preamble: '... States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States'.

² See OHCHR, 'Dashboard' <<https://indicators.ohchr.org/>> (accessed 28 September 2023).

³ In the European context, the Russian Federation chose to withdraw from the European Convention on Human Rights (ECHR) and leave the Council of Europe was completed on 31 December 2022. Russia had already had voting rights suspended following the invasion of Ukraine on 24 February 2022.

⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (adopted 4 November 1950, entered into force 3 September 1953) CETS No 005 (ECHR).

⁶ European Social Charter (adopted 18 October 1961, entered into force 1 July 1999) CETS No 163 (ESC).

⁷ Charter of Fundamental Rights of the European Union [2012] OJ C 326 (EUCFR).

relating to the Status of Refugees (CSR51)⁸ is the primary reference, but also relevant for determining standards are eight others: the International Covenant on Civil and Political Rights (ICCPR);⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR);¹⁰ the International Convention on the Elimination of all Forms of Racial Discrimination (CERD);¹¹ the Convention against Torture (CAT);¹² the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹³ the Convention on the Rights of the Child (CRC);¹⁴ the International Convention for the Protection of All Persons from Enforced Disappearance (CED);¹⁵ and the Convention on the Rights of Persons with Disabilities (CRPD).¹⁶

The Treaty Bodies monitoring the implementation of these conventions have been very active in setting standards for protection seekers. Many cases in the area of asylum have been brought against European states. At the regional level, the adjudication of protection seekers' human rights by the European Court of Human Rights (ECtHR), the Committee on Social Rights and the Court of Justice of the European Union (CJEU) have similarly established the minimum standards applicable. Between the international and European regional level, there is a high level of convergence regarding these minimum human rights standards for the treatment of protection seekers. When divergence occurs, as it occasionally does, over time

it tends to be tempered or to disappear through clarifications by the various Bodies and courts.

Where Member States are parties to international human rights commitments (all are parties to all of the conventions listed above, with the exception of Hungary in respect of the convention on enforced disappearances) they have committed themselves to comply with the standards set out there (consent to be bound). Similarly, as members of the Council of Europe, they are obliged to comply with the ECHR and the judgments of the ECtHR. Under EU law, the Charter is primary law and as such applicable within the scope of EU law in all Member States (and as interpreted by the CJEU).

Where there is divergence among standards, as states are bound by all these fields of law, they must comply with the standard which is most protective of the rights of individuals. They cannot pick and choose among the standards seeking to apply lower levels of rights. To do so would result in the state being in breach of its commitments in international law, ECHR law or EU primary law. This would be in breach of the states' obligations in one or more of the fields of law. The possibility of diverging standards has been covered in EU law by Article 52(3) Charter which specifically recognises the risk of divergence between EU law and the ECHR by providing that the EU must be in conformity with the ECHR standards. This means that the EU may be more expansive in rights than the ECHR, but

⁸ CSR51 (n 1). There is no agreement in the academic community as to the status of the CSR51 as a human rights convention or a separate category of refugee conventions, see Tom Clark and François Crépeau, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) Netherlands Quarterly of Human Rights 389.

⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

¹¹ Convention on the Elimination of all Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD).

¹² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

¹³ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

¹⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

¹⁵ Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED).

¹⁶ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

never less so.¹⁷ As such, we distinguish between European human rights law (specifically under the ECHR) and EU primary law (under the Charter) in this report. Most European states reiterated their commitment to international standards in 2018 voting in favour of the two UN Global Compacts for Refugees and Migrants.

In this report, we set out these international minimum standards regarding protection seekers applicable to the EU in respect of four fundamental elements of protection seekers' rights: access to the territory and protection against expulsion; access to asylum procedures; reception conditions, including family reunification; and limitations on detention. We are careful to distinguish between desirable best practices and mandatory minimum standards established as legally binding by the relevant international Treaty Bodies and European courts. Our focus is on the latter: what does international and European regional law (specifically ECHR and EU primary law) require states to provide to protection seekers? The summary is set out below, the sources and explanations are found in the report.

The Standards

1. Access to the territory and expulsion: non-refoulement

- States must respect the prohibition of *refoulement*, which means that any person either arriving at the borders of a state or within its jurisdiction and who claims to be a refugee or at risk of torture, ill-treatment or enforced disappearance in the country from which he or she has come cannot be arbitrarily refused admission or expelled if the consequence would be a return to such a place. European (Council of Europe) and EU (European Union) human rights law in addition prohibits collective expulsion. The duty of *non-refoulement* is absolute, no national security exception is applicable.
- Where expulsion is to a third country (not the country where the risk is alleged), the procedure

must consider the risk of chain-*refoulement* onwards to a country where there is such a risk.

- States' human rights obligations, including the right to *non-refoulement*, apply not only within the states' territory, but wherever they exercise jurisdiction. Jurisdiction is established where a state or its agents exercise authority or effective control over individuals abroad.
- Only under strictly defined circumstances can states rely on diplomatic assurances to effect the return of an individual to a country where, but for said assurances, he or she would be at risk of torture or inhuman or degrading treatment. Diplomatic assurances must be of a specific nature, include follow-up mechanisms guaranteeing their effectiveness, and this effectiveness must be monitored by an objective and impartial body. The sending state must assess the quality of the assurances given and whether they can be relied upon, including in light of the human rights situation in the receiving country and its track record regarding protection from torture.

2. Access to an asylum procedure

- Everyone who indicates a need for international protection to the authorities of a state is entitled to a full and fair consideration of that application.
- To guarantee access to the asylum procedure, states must provide non-discriminatory treatment of all applicants.
- States must guarantee access to rapid registration as the first step in the procedure and to documentation to ensure protection from arrest or removal and access to relevant state services.
- Protection seekers must have access to interpretation, information, and representation in order to allow them to understand and participate in the asylum procedure.

¹⁷ EUCFR (n 7) Art 52(3): 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

- States must also ensure an efficient determination of asylum claims, which includes a personal interview and a timely decision taken by qualified decision-makers.
 - Applicants must be notified of the outcome of the asylum procedure and must have an effective right to appeal that outcome. Appeals must entail an *ex nunc* examination of the law and the facts and must have suspensive effect.
 - States must make provisions for applicants with specific needs to ensure that they have access to the asylum procedure and are supported in making their claim.
 - States must utilise inadmissibility and accelerated procedures only in appropriate circumstances and while ensuring that necessary safeguards are in place. Accelerating procedures must not be done at the expense of the quality and fairness of the procedure. Decisions on inadmissibility (where a claim will not be treated on the merits on account of lack of responsibility of the state to which the claim has been made or other reasons) must consider whether a ‘first country of asylum’ will readmit an applicant and treat him or her in accordance with the standards provided by the CSR51, including, but not limited to, the prohibition of *refoulement*; and whether a ‘safe third country’ will grant the applicant access to a fair and efficient asylum procedure, permit him or her to remain while the application is being assessed, and, where he or she is determined to be a refugee, will recognise him or her as such and grant him or her lawful stay. States must also consider the applicant’s living conditions in that receiving country.
- ### 3. Reception conditions, including family reunification
- Every protection seeker is dependent on the state where he or she has sought protection and thus that state is responsible for his or her welfare.
 - States must provide reception to protection seekers which includes housing, food, sanitation, water, clothing and conditions of subsistence; the general standard is that of general rules of minimum subsistence in the state.
- All protection seekers must be provided access to basic health care, both physical and mental.
 - All minor protection seekers must have access to primary education on the basis of equality with nationals of the state, access to secondary education on the basis of non-discrimination and access to further education on the basis of merit.
 - Protection seekers must be given access to employment and self-employment, though this can be delayed for a limited period of time.
 - Protection seekers are entitled to family reunification, though temporary delays are permissible.¹⁸
- ### 4. Detention
- Protection seekers must not be arbitrarily deprived of their liberty. In order for detention to not be arbitrary, it must be authorised by law, pursue a legitimate aim and be necessary and proportionate.
 - In principle, international and EU law allows detention for the purpose of documenting protection seekers’ entry, recording their claims, determining their identity, preventing them from absconding, effecting their expulsion, and protecting against crime and threats to national security. However, in all cases, an individual proportionality assessment is required and alternatives to detention must be considered.
 - Detention for the purpose of expulsion is only justified as long as deportation proceedings are in progress and there is a reasonable prospect of removal.
 - Detained protection seekers must be treated in accordance with human rights law. In particular, they must not be subjected to torture, inhuman

¹⁸ We include family reunification in the chapter on reception conditions because the two cannot be separated: there is no right to family reunification unless a person is on the territory or within the jurisdiction of the state. It is part of the entitlement to treatment on the territory like access to social benefits.

or degrading treatment and are entitled to standards of detention which maintain their physical and mental wellbeing.

- Detained protection seekers must have access to information about the reasons for their detention and their rights, to procedures to challenge the lawfulness of their detention, as well as compensation for unlawful detention. This entails access to effective remedies through judicial review or appeal.
- Detention must be time-limited and for the shortest appropriate period. The lawfulness of detention must be re-evaluated at regular intervals and detention facilities must be subject to regular independent monitoring.
- Detention may be wholly inappropriate for certain persons with specific needs. Where such individuals are nevertheless detained, detention conditions must be adapted to their needs.