



1. A person is a refugee as soon as he or she fulfils the criteria contained in the definition of the 1951 Convention

- The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states that "*a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition*".
- In order to see whether a person fulfils or not the criteria contained in the definition for refugee status, the states parties to the 1951 Convention have developed what is known as “refugee status determination procedures” or “asylum procedures”. An asylum procedure will verify whether the person’s claim of fear of persecution falls within the definition of the 1951 Convention.
- An asylum-seeker is therefore an individual who says he/she is a refugee, but whose claim has not yet been definitely evaluated. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided on by the country in which he/she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.
- The 1951 Convention does not have any specific procedural requirements for the refugee determination process. Therefore, States have developed differing procedures and standards.
- The EU does not yet have one common asylum procedure for all its Member States, although it plans to develop one in the coming years. In the meantime, it has adopted a number of Directives that set the minimum standards for the Member States to conduct their own procedures and to interpret the different provisions in the 1951 Convention on the Status of Refugees in a harmonized manner. The main two such Directives are:
 - The so-called Qualification Directive: sets the basic criteria to interpret the 1951 Convention on the Status of Refugees. It also provides for another form of protection called “Subsidiary protection”, for persons who need international protection but do not fall strictly under the refugee definition of the 1951 Convention.
 - The so-called Asylum procedures Directive: which foresees minimum standards for national procedures for the Determination of Refugee Status. Still, each EU Member State keeps their own procedure, as well as responsibility for its integrity and effectiveness for the application of the 1951 Convention.
- If recognized as a refugee, an individual will enjoy a special legal regime. This means that he or she will be entitled to a number of important rights and benefits as well as assistance and protection measures which, taken together, constitute what is known as “international refugee protection”. Refugees also have certain obligations towards the host State, notably that of abiding by the laws of the host country.
- EU and national asylum legislation and procedures establish that a national institution will be responsible for determining asylum claims. In this context they do not foresee a role for border guards with regard to *refugee status determination*. However, a good understanding of the refugee definition will make border guards more sensitive to the protection needs of persons crossing the border. It will also allow them to better identify those who do not explicitly lodge an asylum application.

2. UNHCR monitors the national status determination procedures and the criteria applied to determine if an asylum seeker is a refugee

- For UNHCR, providing international protection to refugees is its core function, and in order to exercise its mandate responsibilities, the Office may need to determine whether an individual is a refugee within its competence. UNHCR normally conducts refugee status determination to ascertain whether the person concerned should be protected, assisted or, sometimes, resettled to another country, or to give governments advice on refugee status.
- Under paragraph 8 of the 1950 Statute and Article 35 of the 1951 Convention, UNHCR has a responsibility to supervise the application of the provisions of the 1951 Convention and 1967 Protocol in States which are Party to these instruments. UNHCR exercises its supervisory role by monitoring both the procedures and the criteria applied, and through interventions on behalf of applicants, as and where appropriate.
- In most States, provision has been made for the involvement of UNHCR, at least in an advisory/consultative capacity. In some countries, UNHCR actually participates in the national refugee status determination procedure. Depending on the circumstances, this may take different forms, for example:
 - Preparing a case for consideration by the national eligibility authority (e.g. registration, preliminary interview, file preparation, presentation to the national authority);
 - Voting on the asylum application or participating as an observer/advisor at the first-instance stage;
 - Voting on the asylum application or participating as an observer/advisor at the appeal or review stage;
 - Reviewing inadmissibility or rejection decisions of applicants who are due to be expelled.
- Moreover, in certain countries which are Party to the 1951 Convention and/or 1967 Protocol, but where national asylum determination procedures have not yet been established, UNHCR conducts refugee status determination on behalf of the State.

3. According to the 1951 Convention, five criteria must be met for a person to qualify as a refugee:

1. Outside country of nationality/former habitual residence
2. Well-founded fear
3. Persecution
4. Reasons (race, religion, nationality, membership of a particular social group, or political opinion)
5. Unable or unwilling, for fear of persecution, to seek that country's protection or to return there

Outside country of nationality/former habitual residence

A person can only be a refugee if he or she is outside his or her country of nationality, or for those who are stateless (that is, without citizenship of any country), their country of habitual residence. This is a factual issue, which is to be established on the basis of documents, statements or any other information submitted by the applicant or obtained from other sources.

Grounds for recognition as a refugee may arise when the individual concerned is already out of the country – in such situations, the person may become a refugee while being in the host country (“sur place”).

The subjective element: fear

Fear is, by definition, a state of mind and hence a subjective condition, which will depend on the individual's personal and family background, his or her personal experiences, and the way in which he or she interprets his or her situation. In practice, any expression of unwillingness to return is normally sufficient to establish the "fear" element of the refugee definition.

If an applicant does not expressly state that he or she is afraid, this may often be inferred from the objective circumstances, for example where there is a clear risk of persecution upon return. In most cases, the mere fact of having applied for refugee status is sufficient to indicate a fear of return.

The objective element: "well-foundedness"

Whether or not the fear is "well-founded" must be assessed in the context of the situation in the applicant's country of origin and in light of his or her personal circumstances. The decision-maker also needs to develop a detailed understanding of the applicant's background, profile and experiences. Experiences of family members and/or other persons with a comparable profile will also be relevant.

The applicant's credibility and his or her fear must then be evaluated against objective information on the conditions in the country of origin. Reliable country-of-origin information is an essential resource in this regard.

Asylum-seekers are not required to prove their fear "beyond reasonable doubt", or that it would be "more probable than not" that the feared harm will materialize. The adjudicator should consider the applicant's fear well-founded if there is a reasonable possibility that the applicant would face some form of harm if returned to the country of origin or habitual residence.

Persecution

The applicant's well-founded fear must relate to persecution. The concept of "persecution" is not defined in the 1951 Convention. From Article 33 of the 1951 Convention it can be inferred that a threat to life or physical freedom constitutes persecution, as would other serious violations of human rights.

When determining whether particular acts amount to persecution, decision-makers should keep in mind that under international human rights instruments, States may never legitimately restrict certain fundamental rights. These are referred to as "non-derogable". Examples of such core rights include:

- The right to life;
- The right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- The right to freedom from slavery or servitude;
- The right to recognition as a person before the law;
- The right to freedom of thought, conscience and religion

Not every violation of an applicant's human rights or instance of discrimination or harassment is serious enough to be considered persecution. In general, serious violations of non-derogable rights would normally constitute persecution. Serious breaches of other rights would generally also be considered persecution, particularly if these have a systematic or repetitive element.

The threshold of persecution is clearly met if the applicant's enjoyment of fundamental human rights – for example, access to the basic means of survival – is seriously restricted. Moreover, discriminatory measures which, taken separately, would not amount to persecution, may have the combined effect of rendering the situation for the applicant intolerable. This would be considered persecution on "cumulative grounds".

Race

“Race” should be broadly interpreted as any kind of distinctive ethnic characteristic, whether real or perceived. Minority groups are more likely to be persecuted than majorities, but this is not always the case: for example, in apartheid South Africa, the racial majority was oppressed by the minority. Men and women in “mixed” marriages, in which each spouse comes from a different ethnic or racial background, may face problems which in some cases may amount to persecution. In such cases, it is particularly important to understand the underlying social context.

Another form of persecution which is frequently based on race is denial of citizenship and the loss of rights which this entails.

Religion

The right to have (or not to have) a religion is absolute and non-derogable, while international human rights law permits certain restrictions to the right to manifest one’s religion. Examples of persecution for reason of religion include the following:

- Serious restrictions on the exercise of religious freedom, for example prohibition of membership in a religious community or of religious instruction;
- Serious discrimination because of religious practice or membership in a given religious community;
- Forced conversion, or forced compliance or conformity with religious practices, provided that such measures have a sufficiently serious impact on the individual concerned.

Nationality

“Nationality” as a ground for refugee status does not only refer to “citizenship”, but also extends to groups of people defined through their real or perceived ethnic, religious, cultural or linguistic identity, regardless of whether this difference has been formalized legally.

Membership of a particular social group

This Convention ground applies where an applicant belongs to a group of persons who share a common characteristic other than the risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is:

- Innate – such as sex, race, caste, kinship ties, linguistic background, or sexual orientation;
- Unchangeable – for example, because it relates to the individual’s past history, such as former military officer, former trade union member, or former landowner; or
- Otherwise fundamental to identity, conscience or the exercise of one’s human rights, such that the person should not be expected to change or reject it. The group must be set apart in some way from others, either because it sees itself as being different, or because it is perceived as such by the persecutor. It does not matter whether the members of the group know each other and associate together, nor is it necessary that it be a small group – thus, for example, there may be situations in which it is appropriate to recognize “women” generally as a particular social group.

Political opinion

The concept of “political opinion” as a ground for recognition as a refugee should be interpreted in a broad sense, as encompassing any opinion concerning matters on which the machinery of the state, government or society is engaged. It goes beyond identification with a specific political party or recognized ideology, and may include for example an opinion on gender roles.

The mere fact of holding a political opinion which is different from that of the government is not in itself a ground for claiming refugee status. The key question is whether the applicant holds – or is perceived to hold – opinions which are not tolerated by the authorities or by the community, and whether he or she has a well-founded fear of persecution for this reason.

4. A person's gender may seriously affect the reasons and the form in which he or she could suffer persecution

- Traditionally, the 1951 Convention has been interpreted through a framework of male experiences. This meant that harm which occurred in the “private sphere”, for example domestic violence, female genital mutilation or rape, was not necessarily acknowledged as persecution, or not considered to be linked to a 1951 Convention ground.
- Since the mid-1980s, however, there has been increasing recognition of the ways in which an applicant's gender may have an effect on his or her claim for refugee status. Whereas “sex” is defined by biology (male or female), “gender” refers to the socially or culturally defined identities, status, roles and responsibilities that are assigned to individuals on the basis of their sex, and to the way in which these shape the power relations between men and women. The applicant's gender may affect:
 - The **form** which persecution takes (for example sexual violence and rape of men or women, forced marriage, female genital mutilation, trafficking for the purposes of forced prostitution or sexual exploitation, dowry and other marriage-related harm and discriminatory laws or practices); and/or
 - The **reasons** for which persecution is experienced (for example, a homosexual may experience violence or severe discrimination on account of his or her sexual orientation, or a woman may be exposed to punishment by her family or her community as a result of her failure to adhere to the codes of behaviour assigned to her on the basis of her sex).
- Not all persecution experienced by women is linked to gender, and in many cases women will experience persecution in the same ways, and for the same reasons, as men. Nor does gender-related persecution only affect women: claims based on persecutory treatment linked to gender may be submitted by men as well as women.

5. There are certain individuals who meet the initial criteria for refugee status, but who do not deserve such protection

- The conditions in which this is the case are defined in Article 1F of the 1951 Convention. These provisions are usually referred to as the exclusion clauses.
- The primary purpose of Article 1F of the 1951 Convention is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.
- Like all exceptions to human rights provisions, the exclusion clauses of the 1951 Convention must be interpreted restrictively and applied restrictively, with extreme caution and additional procedural safeguards.
- Those to whom an exclusion clause of the 1951 Convention applies are not eligible for refugee status. However, such persons continue to enjoy protection under other instruments, particularly international and regional human rights law.
- Article 1F of the 1951 Convention, thus, provides for the exclusion of those for whom there are serious reasons for considering that they:

a) Have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; crimes against peace:

Crimes against peace: According to the 1945 Charter of the International Military Tribunal (“London Charter”), a crime against peace involves the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan of conspiracy for the accomplishment of the foregoing.” Given the nature of this crime, it can only be committed by those in a high position of authority representing a State or a State-like entity, and only in the context of an international armed conflict.

War crimes: only acts which are committed during times of armed conflict, and which are linked to the conflict (the so-called “nexus” requirement), can constitute war crimes. War crimes may be committed by, and against, civilians as well as military persons. War crimes cover such acts as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.

Crimes against humanity are inhumane acts (such as, for example, genocide, murder, rape and torture), when committed as part of a systematic or widespread attack against a civilian population. Crimes against humanity may take place during an armed conflict or in **peacetime**. **Any person can commit crimes against humanity, if his or her acts meet the aforementioned criteria.**

b) Have committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

When determining whether an act constitute a “**serious crime**” it is necessary to judge the seriousness of a crime against international standards. Whether or not a crime is “**non-political**” within the meaning of Article 1F(b) will depend on a number of factors, including, in particular, the motivation, context and methods, as well as the proportionality of the crime in relation to its objectives

c) Have been guilty of acts contrary to the purposes and principles of the United Nations.

The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter. This exclusion ground would apply to acts which, on account of their gravity and impact, are capable of affecting international peace, security and peaceful relations between States, or serious and sustained human rights violations.

In principle, only persons in positions of authority in a State or State-like entity could commit such acts.

- Once it has been determined that the applicant is associated with conduct within the scope of Article 1F, decision-makers must examine whether he or she incurred **individual responsibility** for the acts in question. This will be the case if there is credible and reliable information on the basis of which it can be established that the applicant perpetrated the crime(s) him or herself, or that he or she participated in the commission of crimes by others, for example through planning, ordering or instigating, or by making a substantial contribution, which may take the form of aiding or abetting, or participating in a joint criminal enterprise. Moreover, under certain circumstances, persons in a position of authority in a military or a civilian hierarchy may be held responsible for crimes committed by their subordinates.
- If there are serious reasons for considering that the applicant is individually responsible for acts within the scope of Article 1F, the final step in the exclusion analysis consists of assessing whether exclusion would be in keeping with the general legal **principle of proportionality**: decision-makers must weigh the seriousness of the crime(s) in question against the potential consequences of exclusion for the individual concerned, that is, the treatment which the applicant is likely to face, if he or she were to be excluded.
- The existence or otherwise of effective protection mechanisms under international or regional human rights instruments is an important factor in this regard. If it is found that the seriousness of the crimes in question outweighs the risks resulting from denial of refugee status, the applicant should be excluded.