

# REFUGEE AND ASYLUM SEEKER TRAINING MANUAL

A practical guide for legal and paralegal practitioners  
to understand the basic principles of refugee status  
determinations for LGBTQIA+ asylum claimants

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Kingdom of the Netherlands

# INTRODUCTION TO THE LEGAL RESOURCES CENTRE

The Legal Resources Centre (hereinafter referred to as the LRC) was established in South Africa in 1979 as a human rights organisation.



It has four regional offices in Johannesburg, Cape Town, Durban and Makhanda.



The LRC utilises the law as a mechanism to assist marginalised groups in pursuit of obtaining a fully democratic South African society that embodies equality and non-discrimination.



These groups include women, children, LGBTQIA persons and refugees. The legal strategies that the LRC uses to achieve this equality include legal advocacy in the form of strategic campaigns, legal research and strategic public interest litigation.



The LRC, through the Legacy Programme, aims to provide refugee protection education for legal practitioners and paralegal practitioners to ensure that they are equipped to provide adequate legal assistance to LGBTQIA+ refugee clients.



# OVERVIEW AND PURPOSE

Refugee Conventions define who is a refugee and it is critical that in the implementation of both regional and international law that a refugee must be identified.

Refugee status determination is a crucial step for an asylum applicant to guarantee their protection and access to rights afforded to refugees.

Refugee conventions do not prescribe procedures on how status determinations should be conducted and defers to Contracting State parties to develop procedures in line with their own laws and policies.

Contracting States are encouraged to adopt best practices developed through a series of guidelines and general comments issued by the Office of the High Commissioner for Refugees (UNHCR) but it is critical that refugee practitioners are consistently monitoring adherence to both regional and international laws in refugee status determinations.



Many LGBTQIA+ asylum claimants face many obstacles in seeking refugee protection and rely almost exclusively on the State Officials' ability to apply and implement refugee protection laws.

It is important, in the absence of clear regulations on refugee status determinations for LGBTQIA+ refugees that they have access to legal representation and legal assistance to ensure that, at the earliest possible moment, they are able to present a credible asylum claim throughout the refugee status determination process.

Where Contracting States defer to the UNHCR for refugee status determinations, it is also helpful for practitioners who might be the first people to encounter an LGBTQIA+ refugee claimant to provide clear and accurate guidance on how status determinations are conducted so that a claimant can properly prepare their case.





**This guide is intended for legal practitioners, paralegals and other non-governmental organisations that provide assistance to LGBTQIA+ asylum seekers.**

It is a tool for persons working with LGBTQIA+ asylum seekers by improving their understanding of the law and procedures that affect LGBTQIA+ asylum seekers, in particular, to enable them to understand the basic principles of refugee status determination, the eligibility criteria, and fair and just procedures in determining refugee status of LGBTQIA+ claimants.

This guide will therefore assist service providers in understanding the rights of asylum seekers and thus allows them to provide potential options for legal redress when those rights have been violated by both state and individual actors.

This guide is not intended to replace the need to consult with a lawyer in cases where legal assistance is required and necessary. It is rather aimed to be a resource for those providing services to asylum seekers.



# IMPORTANT ACRONYMS

**ACHPR:** The African Charter on Human and Peoples' Rights

**LGBTQIA+:** Collectively, lesbian, gay, bisexual, transgender, queer, intersex and asexual people are referred to as LGBTQIA+

**UNHCR:** United Nations High Commissioner for Refugees

## Terminology

### → **Asylum seeker**

An asylum seeker is a person seeking recognition as a refugee in a Contracting State.

### → **Asexual**

A sexual orientation generally characterised by not feeling sexual attraction or desire for partnered sexuality. Asexuality is distinct from celibacy, which is the abstention from sexual activity. Some asexual people do engage in sexual activity but only in specific circumstances e.g within the context of a pre-existing emotionally or intimate relationship.

### → **Bisexual**

A person whose primary sexual and affectional orientation is toward people of the same and other sex.

### → **Cisgender**

People whose bodies are recognised- socially/culturally and legally- in a way that corresponds to their gender identity.



→ **Female to Male(FTM) Trans Man**

A transgender man, or female to male, starts his life with female sex characteristics but his gender identity is male and uses male pronouns.

→ **Gender**

Socially constructed characteristics assigned to a person that may vary according to a society or group one belongs to, and which are learned or assigned to women and men.

→ **Gender Binary**

Refers to the idea that there are only two genders, man and woman, and that everyone can be categorised as one or the other.

→ **Gender Identity**

Refers to the way that people self-identify and define their gender. This is a person's private sense of their own gender which is separate from their assigned sex and appearance.

→ **Gender Non-binary**

Also termed genderqueer or gender non-conforming, is a catchall category for gender identities that are not exclusively masculine or feminine.

→ **Homosexual**

Attraction between two people of the same sex.

→ **Intersex**

Intersex people may be born with full or partial genitals of both sexes. Some intersex people have underdeveloped or ambiguous genitalia that cannot be easily classified as either male or female.



→ **Membership in a Particular Social Group**

A particular 'social group' comprises persons of a similar background, habits or social status. This Convention ground applies where a claimant belongs to a group of persons who share common characteristics other than the risk of being persecuted or who are perceived as a group by society. Their characteristics are innate, unchangeable and otherwise fundamental to identity, conscience or the exercise of one's human rights.

→ **Male to Female (MTF) Trans Woman**

A transgender woman, or male to female, starts her life with male sex characteristics but her gender identity is female and uses female pronouns.

→ **Refugee**

A refugee is a person who flees their country of origin, nationality or habitual place of residence:

- i) Due to a well-founded fear of persecution for reasons of their race, religion, nationality, political opinion or membership of a particular social group and is unable or unwilling to avail themselves of the protection of that country, or
- ii) Due to war or conflict in either part or the whole of their country of origin or nationality.

→ **Sex v Gender**

'Sex' is a biological term referring to attributes of the body, whereas 'gender' is a social term referring to a person's internal experience and self-identity. Sex refers to the biological and physical differences between men and women while gender refers to ascribed social and cultural male and female roles.

→ **Sexual Orientation**

Whether you are intimately attracted to members of the same or the opposite sex. Attraction to the other person's sex and/or gender presentation is the point of departure.

→ **Transgender**

Transgender persons do not identify with the gender assigned to them at birth. They feel that there is a mismatch between their gender identity and their biological/physical sex. Transgender individuals may display-through their clothing, make-up, hairstyle and behaviour-a gender identity that contrasts with the gender role that is expected of them according to their biological sex or hetero-normative societal expectations. Transgender has nothing to do with sexual orientation.



## ? What is Refugee Status Determination?

A person is a refugee as soon as they fulfil the criteria contained in the definition of a 'refugee' under regional and international law. This would necessarily occur prior to the time at which their refugee status is formally determined. Recognition of their refugee status does not therefore make them a refugee but declares them to be one. Refugee status determinations are an examination by a government authority or the UNHCR of whether a claimant who has submitted an asylum application or expressed a need to seek international protection, is a refugee- that is whether their situation meets the criteria specified in the refugee definition under regional and international laws or laws promulgated by Contracting States to give effect to their regional or international refugee protection obligations.

## ? Who is a Refugee?

### The 1951 Convention Refugee Definition

In terms of the 1951 Convention, a person is a refugee the moment they fulfil the criteria set out in the definition. The criteria are divided into three parts, namely:

1. The inclusion clauses which define the criteria that a person must satisfy before they are declared a refugee;
2. The exclusion clauses which lists circumstances in which a person may be excluded from International protection, and
3. The cessation clauses which indicate the conditions under which a refugee ceases to be a refugee.



The 1951 Convention is the foundation of international refugee law, and its refugee definition is the principle basis for establishing a claimant's refugee status.

**Article 1A(A)(2) of the 1951 Convention defines a refugee as a person who:**

"As a result of events occurring before 1 January 1951 and 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 fear, is 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."

**General Definition of a Refugee in the 1969 OAU Convention:**

The 1969 OAU Convention definition incorporates the 1951 UN Convention definition of a refugee and adds the following:

"the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

Forty three out of 55 African States signed the OAU Convention and 46 of them ratified the Convention including countries that currently have adopted repressive laws targeting LGBTQIA+ persons such as Uganda, the D.R.C and Tanzania.



## Key Elements of International Refugee Protection

### 1 Protection Against refoulement

The principle of non-refoulement is an international law principle and has been referred to as the cornerstone of international refugee protection. The principle is considered a jus cogens norm, which means that this principle is a norm in international law, and it cannot be set aside.

The OAU Convention contains a similar provision which provides that: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2."

### 2 Other Rights and Benefits under International and Human Rights law

The rights and benefits that a refugee is entitled to are drawn from international and human rights law contained in various international human rights instruments and customary international law. As a signatory to the 1951 Convention and 1967 Protocol as well as the 1969 OAU Conventions, Contracting States and Member States of the African Union are bound by these instruments and should, insofar as it is not inconsistent with their national legislation, be upheld.

These rights and benefits include:

- i) Protection against threats to the physical security of refugees. The State should provide adequate protection against criminal violence, particularly violence incited through racism or xenophobia. There is also an obligation to ensure that refugees are adequately protected from torture, inhuman or degrading treatment by State officials;
- ii) Access to Courts
- iii) Access to socio-economic rights such as Education, Health Care, Housing and Social assistance
- iv) Freedom of movement
- v) Family Reunification
- vi) Access to identity documents and refugee travel documents
- vii) The OAU Convention provides that "member states of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality"<sup>1</sup>

<sup>1</sup> Article 2(1) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

# ELIGIBILITY CRITERIA



## REFUGEE STATUS DETERMINATIONS

The UNHCR guidelines on claims to Refugee Status based on Sexual Orientation provides that main international human rights treaties do not explicitly recognize a right to equality on the basis of sexual orientation and/or gender identity but discrimination on these grounds has been held to be prohibited by international human rights law.

The guidance note further acknowledges that respect for fundamental human rights and the principle of non-discrimination are core features of the 1951 Convention and international refugee law and as such the refugee definition should be interpreted with proper regard to them and the prohibition on discrimination on the basis of sexual orientation and/or gender identity.<sup>2</sup>



## Inclusion Criteria

The 1951 Convention provides the basis for determining who is a refugee and this section draws on UNHCR's guidelines on refugee status determination on claims based on sexual orientation and/or gender identity and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status for the purposes of determining the inclusion or eligibility criteria in applying the 1951 Convention definition of a refugee.

<sup>2</sup> UNHCR Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. International Protection No 9, HCR/GIP/12/09, 23 October 2012.





## Elements of the 1951 Convention Refugee Definition

It is important when determining whether a claimant meets the inclusion criteria to take into account all relevant facts and circumstances of the case to determine whether all the elements in the definition are present.

There are 4 elements within the refugee definition that needs to be satisfied to meet the inclusion criteria:

- i) The claimant is **outside** the country of origin or habitual place of residence.
- ii) The claimant has a **well-founded** fear of persecution. This involves both a subjective and objective analysis, that is a subjective fear of return which has an objective basis and there is a reasonable possibility that the claimant will suffer harm in their country of origin or place of habitual residence and is therefore unwilling or unable to avail themselves of the protection of that country.
- iii) The harm feared amounts to **persecution**.
- iv) The claimant fears persecution **based on a convention ground**, that is on account of their race, religion, nationality, membership in a particular social group or political opinion.<sup>3</sup>

For the purposes of this manual, we will consider the general elements that are applicable to all asylum claims but with a more specific focus on persecution based on 'membership in a particular social group'.

<sup>3</sup> UNHCR Self Study Module 2: Refugee Status Determination, 1 September 2005, page 29.

## 1 Outside the country of nationality or habitual residence

A person can only be a refugee once they are outside their country of nationality or habitual residence. This is a factual analysis based on documents, statements or facts presented by the claimant. If a claimant has more than one nationality, they would have to establish that they have a well-founded fear of persecution in each of the countries they hold nationality. A person would not qualify for refugee status if a second nationality is able to offer them protection in that country and they would enjoy the same rights and freedoms enjoyed by citizens of that country. There are instances where a refugee may be out of their country already before circumstances have arisen that brought them within realm of the refugee definition. In such circumstances a claimant might already be in the host country when they became a refugee. These claimants are called Refugees Sur Place. [e.g. Same-sex relationships were criminalized while the claimant was in another country]

## 2 Well-founded fear

The term 'well-founded fear' contains a subjective and an objective element. The UNHCR Handbook provides that since fear is subjective, the refugee definition involves a 'subjective element', and a determination of refugee status will primarily involve an evaluation of the claimant's statement rather than the prevailing country conditions.<sup>4</sup>

The claimant's story or account, their personal experiences, personal and family background and the way they interpreted the events that led to their flight from their country, may be sufficient to establish a subjective fear of persecution. In some instances, the fact that they have applied for asylum is enough to establish a fear of returning to their country of nationality or habitual residence.<sup>5</sup> The refugee definition however qualifies this subjective fear in that the subjective fear should be 'well-founded'. This implies that claimant's frame of mind must be supported by an objective situation and both the subjective and objective elements must be taken into consideration when examining whether the claimant has a well-founded fear of persecution.<sup>6</sup>

Whether the fear is well-founded must be assessed in the context of the situation in the claimant's country of origin and the claimant's personal circumstances. The experiences of family members or other persons who have had similar experiences might also be relevant.<sup>7</sup>

The claimant's credibility must be evaluated against the objective information on the conditions in the country of origin.<sup>8</sup> Whether or not the claimant has a well-founded fear would therefore involve a (subjective) credibility assessment and the (objective) country of origin information.<sup>9</sup>

<sup>4</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, January 1992, page 11, para.37.

<sup>5</sup> UNHCR Self Study Module 2, page 29, supra.

<sup>6</sup> UNHCR Handbook(1992), supra, pg 11 & 12, para 38.

<sup>7</sup> UNHCR Self Study Module 2, supra.

<sup>8</sup> Ibid.

<sup>9</sup> Sexual Orientation in Refugee Status Determination, Working Paper Series No. 73, Refugee Studies Centre, April 2011.



Generally, to be eligible for refugee protection, the claimant must prove current or future fear of persecution.

Persecution has not been expressly defined in the 1951 Convention but is generally considered to involve serious human rights violations, threats to life and freedoms, and systematic or repetitive human rights violations. Additionally, lesser forms of harm may cumulatively amount to persecution.<sup>10</sup>

If the claimant suffered persecution in the past, it may normally be assumed that they continue to be at risk of persecution.

A person who did not suffer past persecution may still qualify for asylum if they are avoiding persecution in the future.<sup>11</sup>

LGBTQIA+ claimants may not have experienced persecution in the past and the well-foundedness of a claimant's fear of persecution would be determined on what they might face if they returned to their country.<sup>12</sup>

The claimant further need not prove that the State authorities knew about their sexual orientation and/or gender identity before they left their country.<sup>13</sup>

If the claimant fears persecution by non-state actors, an adjudicator of an asylum claim would have to establish whether or not the State is able and willing to provide protection. If the State is able or willing to provide protection, the claimants fear will not normally be considered well-founded.

<sup>10</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 16, *supra*.

<sup>11</sup> UNHCR Self Study Module 2, *supra*.

<sup>12</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 18, *supra*.

<sup>13</sup> *Ibid*

There are situations where the circumstances in the country of origin has fundamentally changed and a claimant who was previously persecuted would no longer face a risk of persecution if they returned. Normally this claimant would no longer have a well-founded fear of persecution.

However, there may be exceptional situations where, despite the change in circumstances in the claimant's country, they would still be deserving of refugee protection due to compelling reasons arising out of past persecution. This would be in instances where the persecution experienced by the claimant caused ongoing psychological harm and trauma and which would make their return intolerable.<sup>14</sup>

The demeanour, behaviour or activities that may relate to a LGBTQIA+ claimant's sexual orientation and/or gender identity may be expressed or revealed in different ways or not revealed or expressed in any way.

The UNHCR is of the view that due to the complex nature of how a person expresses their sexual orientation or gender identity, the distinction between forms of expression that relate to a 'core area' of sexual orientation and those that do not, are irrelevant for the purposes assessing the existence of a well-founded fear of persecution.<sup>15</sup>



### Burden and Standard of proof

The UNHCR Handbook provides that the general legal principle is that "the burden of proof lies" with the claimant. But in some cases, the claimant may not be able to provide documentary or other proof to corroborate their claims and in such cases the duty to "ascertain and evaluate all the relevant facts" is shared between the claimant and the decision-maker.<sup>16</sup>

If the claimant is not in a position to prove every part of their claim and where the claimant has been 'coherent' and 'plausible', and the decision-maker is generally satisfied that the claimant story is credible, the benefit of the doubt should be given to the claimant.<sup>17</sup>

Asylum claimants are not required to prove their fear beyond a reasonable doubt or that it would be more probable than not that their fear might materialise. The acceptable standard of proof is a reasonable possibility that the claimant would face some form of harm if they were to return to their country of origin.<sup>18</sup>

<sup>14</sup> UNHCR Self Study Module 2, page 30, supra.

<sup>15</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 19, supra.

<sup>16</sup> UNHCR Handbook(1992), supra, pg 47, para 196.

<sup>17</sup> Ibid, pg 48, para 203.

<sup>18</sup> Ibid.

### 3 Persecution

The claimant's well-founded fear must relate to persecution. While the 1951 Convention does not expressly define what persecution is, it can be inferred that a threat to life or physical freedom constitutes persecution.<sup>19</sup>

Additionally, the UNHCR handbook provides that serious human rights violations may also constitute persecution while less serious harm, such as discrimination in various forms which may have adverse consequences on the claimant, may cumulatively amount to persecution.<sup>20</sup>

#### Protected Rights

When determining whether human rights violations amount to persecution, it is prudent to distinguish between non-derogable and derogable fundamental human rights.

States may never legitimately restrict non-derogable fundamental human rights such as:

- i) The right to life;
- ii) The right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- iii) The right to freedom from slavery and servitude;
- iv) The right to recognition as a person before the law;
- v) The right to freedom of thought, conscience and religion.<sup>21</sup>

The enjoyment of other derogable rights may be limited only to the extent that such limitation is necessary, proportionate and does not amount to discrimination.<sup>22</sup>

Socio-economic and cultural rights, such as housing, healthcare and social security, under international human rights law do not create binding obligations on States and such rights require progressive realisation, but in situations where States do extend access to these rights progressively, they may not discriminate against persons or a class of persons within society in terms of accessing those rights.<sup>23</sup>

<sup>19</sup> UNHCR Self Study Module 2, page 31, *supra*.

<sup>20</sup> UNHCR Handbook(1992), *supra*, pg 14 & 15, para 51-53.

<sup>21</sup> UNHCR Self Study Module 2, page 32, *supra*

<sup>22</sup> *Ibid*

<sup>23</sup> *Ibid*





### Threshold of Persecution

Not every violation of a claimant's human rights or discrimination would amount to persecution.

Serious violations of non-derogable human rights would generally amount to persecution whilst serious or less serious violations cumulatively of other rights may amount to persecution.

Discrimination can amount to persecution if it is related to a protected right, or there is a persistent pattern of discrimination, or the claimant's enjoyment of fundamental human rights are restricted.<sup>24</sup>

The UNHCR handbook provides that not all persons who receive 'less favourable' treatment are victims of persecution and there are only certain circumstances where discrimination would amount to persecution.<sup>25</sup>

The Handbook says discrimination would amount to persecution if *"measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned."*<sup>26</sup>

The UNHCR's guidelines on claims related to sexual orientation and/or gender identity, provides a number of instances where human rights violations and discrimination rises to the level of persecution. These include:

- i) Threats of serious abuse and violence. Physical, psychological and sexual violence including rape. Corrective rape is common among LGBTQIA+ claimants and the guideline acknowledges that rape has been identified as being used for purposes of *"intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person."*<sup>27</sup>

<sup>24</sup> Ibid, page 34.

<sup>25</sup> UNHCR Handbook(1992), supra, pg 15, para 54.

<sup>26</sup> Ibid.

<sup>27</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 20, supra.

- ii) Measures taken to change a claimant's sexual orientation and/or gender identity by force or coercion. This may constitute "torture, or inhuman or degrading treatment" and violate other serious human rights such as liberty and security of the person.

Examples include: '*forced institutionalisation*', '*forced sex-reassignment surgery*', '*forced electroshock therapy*', and '*forced drug injection*' or '*hormone therapy, non-consensual medical and scientific experimentation*'.<sup>28</sup>

- iii) Detention solely on the basis of sexual orientation and/or gender identity, including in psychological or medical institutions. Transgender females are at particular risk of sexual and physical abuse when being placed in general male prisoner populations and solitary confinement, only because a claimant is LGBTQIA+ person, which can cause psychological harm.<sup>29</sup>
- iv) Family or community disapproval manifests itself in threats of serious physical harm or death. Forced or underage marriage, forced pregnancy and/or marital rape and other forms of corrective measures used as a means of denial or 'correcting' non-conformity may all rise to the level of persecution.<sup>30</sup>
- v) Restrictions on the full enjoyment of other human rights. These include inheritance, custody and visitation rights of children, pension rights, freedom of expression, association and assembly. They may also include access to socio-economic rights, such as housing, education and healthcare. The cumulative effect of the restrictions of these rights may amount to persecution.<sup>31</sup>
- vi) Discrimination in access to and retention of employment. Whilst being dismissed from employment on its own may not amount to persecution, if the claimant can demonstrate that it would be '*highly improbable*' for them to enjoy any kind of gainful employment, it may amount to persecution.<sup>32</sup>

<sup>28</sup> Ibid, para 21.

<sup>29</sup> Ibid, para 22.

<sup>30</sup> Ibid, para 23.

<sup>31</sup> Ibid, para 24.

<sup>32</sup> Ibid, para 25.

The African Charter on Human and Peoples' Rights provides in Article 2 that "every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."<sup>33</sup>

The African Commission has expressed the view that 'other status' as used in the African Charter includes grounds other than those stated in the text of the African Charter. Even though 'sexual orientation' is not expressly stated, the use of the phrase 'other status' indicates that the grounds on which discrimination is prohibited should not be limited to those set out in the text.

The African Commission in the case of Zimbabwe Human Rights NGO Forum v Zimbabwe<sup>34</sup> noted that the aim of Article 2 of the African Charter is 'to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or **sexual orientation**.'

The protection of LGBTIQ+ persons is also inherent in the African Commission's approach to the interpretation of human dignity, which expects that states will not interfere in the private lives of citizens.

### **Persecution vs Prosecution**

Where the claimant is fleeing legitimate prosecution, they would not be entitled to international protection as a refugee. A refugee is a victim or potential victim of injustice not a fugitive from justice.

There are two ways where prosecution can amount to persecution:

- i) Where the law or policy may itself be inherently persecutory; and
- ii) Where the implementation of the law or policy is carried out in a manner that amounts to persecution

It is important to determine in such instances whether the State authorities use criminal law and/or procedures as a tool for persecution and this may be the case where the law in the country of origin defines as crimes those acts that are protected by international human rights standards. In such instances those laws would be inherently persecutory.<sup>35</sup>

<sup>33</sup> ACPHR, Article 2.

<sup>34</sup> ZHR NGO Forum v. Zimbabwe, Ruling, Case No. SADCT: 05/2008 (SADC, Jan. 01, 2008).

<sup>35</sup> UNHCR Self Study Module 2, page 33-34, supra.

Where criminal procedures also lack basic standards of fairness and justice or where the punishment is unduly excessive or disproportional to the crime committed, prosecution may rise to the level of persecution.<sup>36</sup>

The UNHCR guidelines acknowledge that many lesbian, gay or bisexual claimants come from countries that criminalise same-sex relationships and affirms that such criminal laws are discriminatory and violate international human rights norms.<sup>37</sup>

In such instances persecution is evident where claimants are at risk of persecution or punishment such as death penalty, imprisonment or severe corporal punishment.<sup>38</sup>

Additionally, the UNHCR guidelines determine that even where such laws are irregularly, rarely and never enforced, criminal laws prohibiting same-sex relationships could lead to an intolerable situation for an LGB claimant and could amount to persecution.

It can contribute to an oppressive atmosphere, could be used for blackmail or extortion by the authorities, and promote political rhetoric that can expose LGB claimants to risk of persecution.<sup>39</sup>

Whether an LGBTQIA+ claimant has a well-founded fear of persecution involves a fact-based assessment having regard to both the individual and country context. This would involve an examination of the legal system of the country of origin, relevant legislation and how it's interpreted, applied and how it would impact the claimant.<sup>40</sup>

Where there is no clarity on whether or not, or the extent to which the laws are enforced against LGBTQIA+ claimants, the UNHCR guidelines provide that a *"pervading and generalised climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted."*<sup>41</sup>

In situations where there are no specific laws criminalising same-sex relationships, laws of general application, such as public morality or public order laws, when selectively applied and enforced against LGBTQIA+ persons in a discriminatory manner may amount to persecution.<sup>42</sup>

<sup>36</sup> Ibid.

<sup>37</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 26, *supra*.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid, para 29.





### **Concealment of sexual orientation and/or gender identity**

The UNHCR guidelines provides that a LGBTQIA+ claimant concealing or being 'discreet' about their sexual orientation and/or gender identity to avoid persecution is not a valid reason to deny refugee status. It clearly states that *"a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics to avoid persecution."*<sup>43</sup>

It notes further that *"being compelled to conceal one's sexual orientation and or gender identity may result in significant psychological and other harms"* and could lead to intolerable situations that could amount to persecution.<sup>44</sup>

### **Agents of Persecution**

State persecution may be present through the criminalisation of same-sex relationships and enforcement of such laws. Where there are laws criminalising same-sex relationships it is indicative that state protection is not available, and it would be unreasonable to expect a LGBTQIA+ claimant to first seek out State protection. In such instances the presumption, unless there is evidence to the contrary, is that the State is unwilling or unable to provide protection against such harm.<sup>45</sup>

The UNHCR guidelines also clearly states that *"as in other types of claims, a claimant does not need to show that he or she approached authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return."*<sup>46</sup>

<sup>43</sup> Ibid, para 30.

<sup>44</sup> Ibid, para 33.

<sup>45</sup> Ibid, para 36.

<sup>46</sup> Ibid.



Agents of persecution are not limited to the State itself or its agencies. Persecution can be at the hands of non-state actors such as non-governmental entities, irregular forces who have de facto authority over a national territory, the local populace or family members. Persecution may emanate from sections of the population that do not respect the laws or rules of the country concerned. The UNHCR handbook provides that *where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities*", or if there is an absence or unwillingness of State protection.<sup>47</sup>

Where the threat of harm comes from non-state actors such as family members or the community at large, persecution is established where the State is unable or unwilling to provide protection against such harm.<sup>48</sup> The UNHCR guidelines provides that where a non-state actor is an agent of persecution, State protection must be 'available' and 'effective'. Instances where there is a lack of response or apathy, or refusal to investigate, prosecute or punish non-state actors for violence against LGBTQIA+ persons, State protection should not be considered available nor effective.

Where the legal and socio-economic circumstances have changed in the country of origin, an assessment of whether State protection is now available should not be only an examination of whether there has been a change in law, policy or procedure. The UNHCR guidelines provides that the availability and effectiveness of state protection must be examined carefully and that *de facto* and not merely *de jure* change must be present.<sup>49</sup>

#### 4 Convention Grounds

The refugee definition under the 1951 Convention requires that a claimant's well-founded fear of persecution must be based on one or more of the grounds listed. This has been referred to as the 'causal link' requirement. The Convention ground should be a 'contributing' factor to the well-founded fear of persecution but need not be the sole or dominant cause.<sup>50</sup>

It is also not necessary to prove the motives of the persecutor and his intention to persecute is irrelevant.<sup>51</sup> The UNHCR guidelines provides that "perpetrators may rationalise the violence they inflict on LGBTI individuals by reference to the intention of 'correcting', 'curing' or 'treating' the person" and while the motives of the persecutor may be a relevant factor, it is not a prerequisite. What is important to establish is the claimant's experience of the harm rather than the mindset of the persecutor.<sup>52</sup>

<sup>47</sup> UNHCR Handbook(1992), supra, pg 17, para 65.

<sup>48</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 35, supra.

<sup>49</sup> Ibid, para 37.

<sup>50</sup> Ibid, para 38.

<sup>51</sup> UNHCR Self Study Module 2, page 35, supra.

<sup>52</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 38, supra.



The causal link is also established where the authorities mistakenly impute a particular belief or attribute a characteristic to an individual. For example, where the authorities mistakenly believe that the claimant is gay. Where it can be shown that the State authority imputes a Convention ground, this is sufficient to establish the 'causal link'.<sup>53</sup>

Where the persecution originates from a non-State actor, the causal link is established where:

- i) The reason for the persecution is linked to a Convention ground; or
- ii) The reason for the persecution is unrelated to a Convention ground, but the absence of State protection is for a Convention reason.<sup>54</sup>

The 1951 Convention lists five grounds, that is race, religion, nationality, political opinion and membership in a particular social group. For the purposes of this manual, we will focus on the most common ground of persecution for LGBTQIA+ claimants which is 'membership in a particular social group'. This does not mean that LGBTQIA+ claimants do not or could not fear persecution on any one or more of the other grounds listed in the 1951 Convention.

Other grounds, such as political opinion or religion may be also relevant, for example where a LGBTQIA+ activist or human rights defender may fear persecution on the grounds of political opinion in addition to membership in a particular social group. A proper refugee status determination will consider all the facts relevant to the claimant and whether the claimant might have a well-founded fear of persecution on one or more of the Convention grounds.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

## Membership in a Particular Social Group

The UNHCR handbook provides that a 'particular social group' normally *"comprises persons of similar background, habits or social status."*<sup>55</sup>

The UNHCR defines a 'particular social group' as *"a group of persons who share a common characteristic other than their risk of persecution, or who are perceived as a group by society. The characteristics will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."*<sup>56</sup>

These characteristics are often described as: **innate** (sex, race, caste, kinship ties, linguistic background, sexual orientation), **unchangeable** (could relate to person's past history such as belonging to the military or trade union) and **otherwise fundamental** to identity, conscience or the exercise of one's human rights (a person should not be expected to change or reject it).

The UNHCR guidelines provide that there are two approaches in determining a 'particular social group': 'protected characteristics' or 'social perception'. The first 'protected characteristics' approach involves determining whether the 'group' is *"united either by an innate or immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it."*<sup>57</sup>

The second, 'social perception' approach examines whether the particular group shares common characteristics which makes it recognisable or differentiates them from society at large.<sup>58</sup>

The UNHCR guidelines clearly states that under either of these two approaches there is broad acknowledgement that lesbians, gay men, bisexuals and transgender persons, are members of a 'particular social group' within the meaning of the refugee definition.

They further acknowledge that even though there are fewer claims of intersex claimants for refugee protection, they would also qualify under either of these two approaches.<sup>59</sup>

Sexual orientation and/or gender identity are considered innate and immutable characteristics or are characteristics that are fundamental to human dignity, such that a LGBTQIA+ claimant should not be forced to abandon them.<sup>60</sup>

<sup>55</sup> UNHCR Handbook(1992), supra, pg 19, para 77.

<sup>56</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 44, supra.

<sup>57</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 45, supra.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid, para 46.

<sup>60</sup> Ibid, para 47.

The UNHCR guidelines additionally provide the following considerations when determining whether LGBTQIA+ claimants can be regarded as a social group:

- i) Sexual orientation and/or gender fluidity. It may be that a claimant may still be confused or uncertain about their sexuality and/or gender identity. The characteristics of a person whose sexuality or gender identity is still evolving should be considered as fundamental to their evolving identity which would bring them within the social group ground.<sup>61</sup>
- ii) There is no requirement that members of the social group associate with one another or that they are socially visible.<sup>62</sup>
- iii) Decision makers should avoid reliance on stereotypes or assumptions. Not all LGBTQIA+ persons look or behave according to stereotypical concepts.<sup>63</sup>

### **Internal Flight or Relocation Alternative**

Where the claimant's fear of persecution is confined to a certain part of the country, an assessment of whether they could reasonably be expected to move to another part of the country where they could avail themselves of State protection, is required.

The internal flight or relocation alternative is relevant particularly where the claimant's fear of persecution is at the hands of non-State actors.<sup>64</sup>

A determination of whether the internal flight or relocation is an option requires a two-step analysis:<sup>65</sup>

- i) The Relevance Analysis: This involves an examination of whether the area of relocation is "practically, safely and legally accessible" to the claimant and whether the claimant would face persecution on the same or new grounds in the new location from State or Non-State actors.<sup>66</sup>
- ii) The Reasonableness Analysis: Where internal flight or relocation is relevant, the next step would be to determine whether the claimant could reasonably be expected to establish themselves and live a normal life "without undue hardships" in this new location.<sup>67</sup>

Additionally, the UNHCR guidelines provide that when determining the relevance and reasonableness of the internal flight or relocation alternative, gender considerations must be considered.<sup>68</sup>

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, para 48.

<sup>63</sup> Ibid, para 49.

<sup>64</sup> UNHCR Self Study Module 2, page 39, supra.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid, page 40.

<sup>68</sup> UNHCR Guidelines on Sexual Orientation and/or Gender Identity Claims, para. 52, supra.





Where the country criminalises same-sex relationships, the presumption is that this will be applicable to the entire country and as such where the fear of persecution is related to these laws, the internal flight or relocation option would not be relevant.<sup>69</sup>

Additionally, where the laws in that country do not allow transgender or intersex persons access to gender affirming medical treatment or do not allow them to change their gender markers on their documents, this should also be considered when assessing the internal flight or relocation option.<sup>70</sup>

A further consideration in assessing whether internal flight or relocation option is whether there is general intolerance of LGBTQIA+ persons countrywide.

Internal flight or relocation would not be relevant where the claimant would have to continue concealing their sexual orientation or gender identity to be safe.<sup>71</sup>

In assessing the reasonableness of the internal flight or relocation option, the UNHCR guidelines states that the decision maker, who bears the burden of proof, should examine the claimants *"personal circumstances, the existence of past persecution, safety and security, respect for human rights and possibility of economic survival"*.<sup>72</sup>

Additionally the claimant should be able to access a *"minimum level of political, social and economic rights"*.<sup>73</sup>

<sup>69</sup> Ibid, para 53.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid, para 54.

<sup>72</sup> Ibid, para 56.

<sup>73</sup> Ibid.



## SECTION B:

# GENERAL PROCEDURAL CONSIDERATIONS



The UNHCR guidelines offers the following additional procedural considerations in refugee status determinations for LGBTQIA+ refugee claimants:

Issues pertaining to the Interview process:

- i) LGBTQIA+ claimants should be provided with a safe and supportive environment throughout the refugee status determination process, including the provision of a safe environment during consultations with legal representatives.<sup>74</sup>
- ii) Confidentiality is an essential condition of all refugee status determinations. The decision-maker should assure the claimant at the outset that all aspects of their claim would be treated in confidence.<sup>75</sup>
- iii) Interviewers or decision-makers should be objective and not draw conclusions based on stereotypes of LGBTQIA+ persons, such as drawing conclusions about how the claimant behaves or appears.<sup>76</sup>
- iv) The Interviewer or decision-maker should use words that are not offensive and shows a positive disposition towards “diversity of sexual orientation and/or gender identity.”<sup>77</sup> References to the LGBTQIA+ community has evolved over the years, and it is important to learn the correct terminology.
- v) An interviewer or decision-maker should acquiesce to a request by a LGBTQIA+ claimant for an interviewer of a certain gender.
- vi) Directing questions to a LGBTQIA+ refugee claimant about sexual violence should be treated with the same sensitivity as generally applied to other survivors of sexual violence.<sup>78</sup>
- vii) Women refugee claimants should be interviewed separately from male family members.<sup>79</sup>

<sup>74</sup> Ibid, para 58.

<sup>75</sup> Ibid, para 60.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

- viii) Child claimants should be given specific procedural safeguards, such as prioritising the processing their claims, appointing a legal guardian and providing them with legal representation.<sup>80</sup>
- ix) Discrimination, hatred and violence can impact the claimant's ability to present their claims, and, in some instances, the claimant may still not be comfortable with expressing their sexual orientation and/or gender identity. The UNHCR guidelines thus provides that adverse judgements should not be drawn by the claimant not declaring their sexual orientation and/or gender identity at the pre-screening or first interview stage.<sup>81</sup>



### Guidelines on Credibility Assessments

- i) The assessment of credibility of a LGBTQIA+ claimant must be done in an "individualised" and "sensitive" way. The interviewer or decision-maker should focus on exploring the claimant's "personal perceptions, feelings, stigma and shame" rather than their sexual practices.<sup>82</sup>
- ii) Self-Identification as a LGBTQIA+ person should be regarded as the claimant's sexual orientation and/or gender identity; while instances where the claimant does not readily identify as LGBTQIA+ person alone should not rule out the claimant's asylum claim.<sup>83</sup>
- iii) A transgender person not undergoing gender affirming treatment or surgery should not be regarded as evidence that they are not transgender.<sup>84</sup>
- iv) A failure to disclose their sexual orientation and/or gender identity to family members or friends or that the claimant was married or had children does not in itself mean that they are not a LGBTQIA+ person. If there are credibility concerns about a claimant that is married or has children, the interviewer or decision-maker should explore the reasons why the claimant got married and had children and if the claimant provides a consistent and reasonable explanation of why they got married or had children, the interviewer or decision-maker should accept that as credible.<sup>85</sup>

<sup>80</sup> Ibid.

<sup>81</sup> Ibid, para 59.

<sup>83</sup> Ibid, para 62.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

- v) The claimant not having a past or present romantic or sexual relationship does not mean that they are not LGBTQIA+. It could mean that they were trying to avoid persecution. The UNHCR guidelines clearly states that “*sexual orientation and gender identity are about a person’s identity,*” and not whether that identity has been exhibited through sexual acts.<sup>86</sup>
- vi) A claimant’s lack of knowledge of LGBTQIA+ community meeting places and activities, interactions with other LGBTQIA+ persons or failure to join LGBTQIA+ groups in the country does not mean that they are not LGBTQIA+.<sup>87</sup>



## Evidentiary Issues

The UNHCR guidelines provides the following considerations in respect of evidence required and provided at refugee status determinations:

- i) The claimant’s story is primarily the only source of evidence. The claimant should never be asked to produce documentary or photographic evidence of intimate acts and it would be inappropriate to ask a claimant couple to physically demonstrate their relationship to prove their sexual orientation.<sup>88</sup>
- ii) The claimant cannot be asked to undergo medical ‘testing’ to prove their sexual orientation as this would be a violation of their basic human rights.<sup>89</sup>
- iii) The lack of relevant country of origin information on the situation and treatment of LGBTQIA+ persons should not automatically lead to a rejection of the claimant’s application for asylum.<sup>90</sup>

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid, para 64.

<sup>89</sup> Ibid, para 65.

<sup>90</sup> Ibid, para 66.

## SECTION C:

## EXCLUSION CRITERIA



In Section A we set out the inclusion criteria or the positive elements of the refugee definition, which must be met for a claimant to qualify for refugee status.

In this section we will discuss when a person meeting all requirements for inclusion under the refugee definition (they have fulfilled all the inclusion criteria in the refugee definition), are not eligible for refugee protection and are excluded.

“Exclusion” from refugee protection under the 1951 Convention means that an individual who fulfils the criteria for inclusion cannot nevertheless *“benefit from refugee status because he or she is not in need, or not deserving, of international refugee protection.”*<sup>91</sup>

The UNHCR Handbook provide that there are 3 groups of persons that are excluded from refugee protection.

The first group are those already receiving United Nations protection or assistance (Article 1D<sup>92</sup>), such as Palestinian refugees who receive protection and assistance from UNRWA; the second group are those who are not in need of international refugee protection (Article 1E<sup>93</sup>); and the third group are those that are not deserving of international refugee protection (Article 1F<sup>94</sup>.)<sup>95</sup>

The UNHCR manual provides that as in all exceptions to human rights provisions, the exclusion clause in the 1951 Convention must be interpreted “restrictively” and “applied cautiously”; and where exclusion is being considered, procedural safeguards must be in place.”<sup>96</sup>

<sup>91</sup> UNHCR Self Study Module 2: Refugee Status Determination, 1 September 2005, page 70.

<sup>92</sup> Article 1D of the 1951 UN Convention Relating to the Status of Refugees.

<sup>93</sup> Article 1E of the 1951 UN Convention Relating to the Status of Refugees.

<sup>94</sup> Article 1F of the 1951 UN Convention Relating to the Status of Refugees.

<sup>95</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, January 1992, page 33, para.140.

<sup>96</sup> UNHCR Self Study Module 2, page 70, supra.



### **Persons not considered to be in need of international protection.**

Article 1E of the 1951 Convention provides that the convention would not apply *“to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”*

This exclusion would only apply if the claimant has been granted permanent residence or other residence, besides citizenship, and has or enjoys rights and obligations of nationals of that country.<sup>97</sup>

The status afforded to the claimant must provide protection against refoulement, and allow them the right to return, or re-enter, and remain in the country.<sup>98</sup>

The UNHCR Handbook provides that there is no precise definition of what constitutes ‘rights and obligations’ but it is understood that the exclusion clause would be relevant if the claimant has ‘largely assimilated’ as a national of that country would be and would be fully protected against deportation or expulsion.<sup>99</sup>

The UNHCR Handbook further provides that the words ‘taken residence’ implies that the claimant is not merely visiting that country but is continually resident in that country.<sup>100</sup>

<sup>97</sup> UNHCR Self Study Module 2, page 73, supra.

<sup>98</sup> Ibid.

<sup>99</sup> UNHCR Handbook, page 34, para.145.

<sup>100</sup> Ibid, para 146.





### Persons not deserving of international refugee protection

Article 1F of the 1951 Convention provides the instances where a claimant who would otherwise qualify for refugee status is not deserving of international protection and thus excluded.

The convention will not apply to a person, where there are 'serious reasons' to believe that they:

- i) committed a crime against peace, a war crime, or a crime against humanity as defined in human rights instruments;
- ii) committed a serious non-political crime outside the country of refuge prior to his admission into that country; and
- iii) they are guilty of acts contrary to the purposes and principles of the United Nations.

The main reason for excluding claimants from international refugee protection is to deny persons who have committed 'heinous acts' and serious crimes from receiving international protection and to ensure that these persons do not abuse the asylum process to avoid being held legally accountable for their acts.<sup>101</sup>

<sup>101</sup> Ibid



## Application of Article 1F of the 1951 Convention

The UNHCR Manual provides the following guidance on how interviewers or decision-makers should apply this exclusion clause:

- i) Inclusion criteria should be considered first before examining the exclusion criteria.
- ii) In considering whether there are “*serious reasons for considering*” that a claimant has committed acts that exclude them from refugee protection, “*clear and credible*” information is required. The standard of proof need not be beyond a reasonable doubt, but it should be more than on a balance of probabilities.
- iii) The burden of proof lies with the decision maker and only in exceptional cases will this burden shift to the claimant.<sup>102</sup>

There are 4 steps to determine whether a claimant comes within the scope of an Article 1F exclusion:

1. Determining whether an exclusion is triggered.
2. Determining whether the claimant is linked to any of the acts that fall within the scope of Article 1F.
3. Determining whether the claimant incurred individual responsibility for these acts.
4. Determining whether the exclusion would meet the general legal principle of proportionality.<sup>103</sup>

<sup>102</sup> Ibid, page 74-75.

<sup>103</sup> Ibid, page 75-79.



## Determining whether an exclusion is triggered

Generally, this would arise during the interview with the claimant and would be triggered by statements made by claimants themselves or they may be triggered by other information that would suggest that the claimant is associated with an excludable act. If there are reasons to believe that the claimant may have been involved in an excludable act, the interviewer or decision-maker should thoroughly examine all relevant aspects.<sup>104</sup>



## Determining whether the claimant is linked to any of the acts that fall within the scope of Article 1F.

Article 1F exclusions are an exhaustive list and only those acts listed under Article 1F give rise to an exclusion. The UNHCR manual provides useful criteria of what activities would fall within the purview of this exclusion.

### 1 Article 1F(a) Crimes against peace, war crimes and crimes against humanity

- i) **Crimes against peace.** The UNHCR manual draws on the 1945 Charter of the International Military Tribunal and provides that a *"crime against peace involves the 'planning, preparation, initiation or waging of 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.'"* The UNHCR manual provides that due to the nature of the crime it can only be committed by those in *"high positions of authority representing the State or State-like entity and only in the context of an international armed conflict."*<sup>105</sup>
- ii) **War crimes** are serious breaches of international humanitarian law and that are committed during armed conflicts or linked to the armed conflict. War crimes can be committed by and against civilians and military persons. The UNHCR provides that even though war crimes were originally considered to only arise during international armed conflicts, this position was changed in the mid-1990's and serious violations of international human rights laws may also give rise to individual responsibility and could be considered a war crime. War crimes include: "wilful killing and torture of civilians", "indiscriminate attacks on civilians" and "wilfully depriving a civilian or prisoner of war the rights to a fair and regular trial".<sup>106</sup>

<sup>104</sup> Ibid, page 75.

<sup>105</sup> Ibid, page 76.

<sup>106</sup> Ibid.



- iii) **Crimes against humanity** are “inhumane acts” (genocide, murder, rape and torture), “when committed as part of a systematic or widespread attack against a civilian population” and can take place during an armed conflict or not, and be committed by any person.<sup>107</sup>

**2 Article 1F(b) Serious non-political crime committed outside the country of refuge**

Whether a claimant has committed an act that constitutes a “serious crime” should be judged against international standards and whether or not a crime is “non-political” will depend on several factors, including “the motivation, context and method” of the crimes as well as the “proportionality of the crime in relation to its objectives”.<sup>108</sup> Crimes committed within the country of refuge is not excluded under Article 1F(b) of the 1951 Convention.<sup>109</sup>

**3 Article 1F(c) Acts contrary to the purposes and principles of the United Nations**

Any act that is contrary to the purposes and principles set out in the UN Charter would apply to this exclusion and includes 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.”*<sup>110</sup>

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid, page 77.

<sup>110</sup> Ibid, page 77.





### **Determining whether the claimant incurred individual responsibility for these acts**

When it has been established that the claimant has been connected to an excludable act, the next step is to determine whether the claimant is individually responsible for the excludable act.

The UNHCR manual provides that this will be present if:

- i) The claimant committed the act themselves.
- ii) The claimant participated in the act committed by other persons, such as planning, ordering or instigating the commission of the act by others.
- iii) The claimant made a substantial contribution to the act by aiding and abetting or participating in a "joint criminal enterprise."<sup>111</sup>

### **Further Considerations**

- i) Persons in positions of authority may be held responsible for crimes committed by their subordinates.<sup>112</sup>
- ii) The claimant must have the necessary mens rea in the commission of the act, that is they must have the necessary intent in the commission of the act, and the knowledge and appreciation of the consequences of their actions.<sup>113</sup> Additionally, it is important to establish whether the claimant has a valid defence that would exempt them from liability.<sup>114</sup>



### **Determining whether the exclusion would meet the general legal principle of proportionality.**

Interviewers and decision-makers should weigh the seriousness of the crime against the potential consequences for the claimant.<sup>115</sup>

<sup>111</sup> Ibid, page 78.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid, page 79.



## SECTION D:

# CESSATION



Refugee status by its very nature was intended to be temporary in nature and as such there are instances where international refugee protection is no longer needed. If a refugee can safely return to their country of origin or habitual residence, then international protection is not justified or necessary.<sup>116</sup> Like the Exclusion Clauses discussed in the preceding section, the 1951 Convention lists an exhaustive list of circumstances where refugee status will cease. Due to the severe consequences of removing refugee protection from a claimant, an application to invoke the cessation clause must be made with careful consideration as to whether all the relevant criteria are met. The UNHCR manual provides that cessation clauses must be interpreted restrictively and with procedural safeguards in place, including the ability for a claimant to challenge the decision to remove their refugee status.<sup>117</sup>

Article 1C of the 1951 Convention envisages two categories of situations where cessation would apply:

- i) Acts by the claimants giving rise to cessation.
- ii) Fundamental changes in the country of origin/habitual residence.



### Acts by Claimants

Article 1C of the 1951 Convention provides for cessation where a claimant:

- i) voluntarily re-avails themselves of the protection of their country of nationality; or
- ii) having lost their nationality, voluntarily re-acquires it; or
- iii) acquires a new nationality and enjoys the protection of that country; or
- iv) voluntarily re-establishes himself in his country of origin.

<sup>116</sup> Ibid, page 100.

<sup>117</sup> Ibid, page 100.



## Fundamental change in the circumstances

Article 1C(5) and (6) of the 1951 Convention provides for the cessation of refugee status if:

*"(5) He [or she] can no longer, because the circumstances in connection with which he[or she] has been recognized as a refugee have ceased to exist, continue to refuse to avail him[or her]self of the protection of the country of his[or her] nationality;*

*Provided that this paragraph shall not apply to a refugee failing under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail him[or her]self of the protection of the country of nationality;*

*(6) Being a person who has no nationality he is, because the circumstances in connection with which he [or she] has been recognized as a refugee have ceased to exist, able to return to the country of his[her] former habitual residence;*

*Provided that this paragraph shall not apply to a refugee failing under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his[her] former habitual residence."*<sup>118</sup>

The UNHCR manual provides that these clauses are applicable if objective circumstances in the country of origin or former habitual place of residence have changed fundamentally, and such change is "stable and durable." The "compelling reasons" exception reflects a "general humanitarian principle" that a claimant or their family who has suffered severe forms of persecution should not be compelled to return.<sup>119</sup>

<sup>118</sup> Article 1C(5)&(6) of the 1951 Convention on Relating to the Status of Refugees.

<sup>119</sup> UNHCR Self Study Module 2, page 102, *supra*.

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