



# Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU)

## A Judicial Analysis

January 2016

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for Member of Courts and Tribunals



Exclusion:  
Articles 12 and 17  
Qualification Directive  
(2011/95/EU)

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# Contributors

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They have been invited for this purpose by the European Asylum Support Office (EASO) in accordance with the methodology set out in Appendix C. The recruitment of the members of the working group was carried out in accordance with the scheme agreed between EASO and the members of the EASO network of court and tribunal members, including the representatives of the International Association of Refugee Law Judges (IARLJ) and the AEAJ.

Certain preparatory documents were drafted in respect of a workshop held in Malta in December 2014 under the stewardship of Joseph Rikhof, senior counsel, Manager of the Law with the Crimes against Humanity and War Crimes Section of the Department of Justice, Canada. They were further developed during detailed discussions and a moot court exercise conducted at that meeting with the participation of the EASO network of court and tribunal members, which has proven to be of great value to the members of the working group. The members of the working group are also grateful to the European Database on Asylum Law as well as to the courts and tribunals of many Member States for providing an initial compilation of jurisprudence on this subject.

The working group itself met on three occasions in 2015 in March and May in Malta as well as in September at the *Bundesverwaltungsgericht* (Federal Administrative Court, Germany) in Leipzig. Comments on a discussion draft were received from individual members of the EASO network of court and tribunal members, namely judges Jakub Camrda (Czech Republic), Rossitsa Draganova (Bulgaria), Ildiko Figula (Hungary), Villem Lapimaa (Estonia), Walter Muls (Belgium), Elizabeth O'Brien (Ireland), Elisabeth Steendijk (Netherlands), Hugo Storey (United Kingdom), Boštjan Zalar (Slovenia) as well as the Refugee Appeals Board (Malta) and the European Judicial Training Network (EJTN). Comments were also received from members of the EASO Consultative Forum, namely the Belgian Refugee Council (Belgium), Forum réfugiés-Cosi (France), the Dutch Advisory Committee on Migration Affairs (Netherlands), the Directorate of Immigration (Norway). Sarah Singer from the Refugee Law Initiative at the University of London also expressed views on the text. In accordance with the EASO founding Regulation, UNHCR was invited to and did express comments on the draft Judicial Analysis. All these comments were taken into account during the meeting on 10-11 September 2015. The members of the working group are grateful to all those who have made comments which have been very helpful in finalising this Judicial Analysis.

This chapter will be updated in accordance with the methodology set out in Appendix B.

# List of abbreviations

AEAJ	Association of European Administrative Judges
BVerwGE	Collection of judgments of the Federal Administrative Court (Germany)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECTHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
IARLJ	International Association of Refugee Law Judges
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
Refugee Convention	Convention Relating to the Status of Refugees (1951), as amended by its Protocol (1967)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

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# Preface

The purpose of this Judicial Analysis is to put a helpful tool at the disposal of courts and tribunals dealing with international protection cases, for understanding and handling protection issues related to the exclusion grounds contained in the recast Qualification Directive (QD (recast))<sup>(1)</sup>. This Directive contains two key provisions: Article 12 QD (recast) deals with exclusion from refugee status, whereas Article 17 QD (recast) provides for exclusion from eligibility for subsidiary protection status. The application of these provisions by their nature may have potentially serious consequences for the individual concerned. Their interpretation and application pose certain challenges to members of courts and tribunals. The fundamental concept itself is not new, rather it is based on Article 1(D), (E) and (F) of the Refugee Convention<sup>(2)</sup>. The (recast) Qualification Directive has codified these exclusion grounds, re-stating those parts of relevant international treaties, including the Refugee Convention, that the European legislators considered could be reflected within the corpus of EU law. The Member States are, in turn, required to transpose the Directive into national law. This Judicial Analysis is intended to assist the reader towards an understanding of the QD (recast) as this has been stated in the case-law of the Court of Justice of the European Union (CJEU) and decisions of the European Court of Human Rights (ECtHR) as well as relevant decisions of the courts and tribunals of the Member States. The references contained in this Judicial Analysis to national case-law are not intended to be exhaustive but rather illustrative of the way in which the provisions of the QD (recast) in question have been transposed and, perhaps more importantly, interpreted by national courts.

The decisions, particularly those of the European courts, illustrate the role of exclusion in the broader European concept of protection that can be seen in a synergy of refugee law and humanitarian considerations of fundamental rights or human rights law. It must be borne in mind when using this Judicial Analysis that EU law takes precedence over national law in cases of conflict<sup>(3)</sup>. The Analysis reflects the understanding of the working group on the current state of the law. The respective Articles 12 and 17 QD (recast) will likely be subject to further rulings by the CJEU as numerous issues of interpretation of these provisions remain undecided, leaving the door open to further clarification by way of the preliminary reference procedure envisaged in Article 267 TFEU<sup>(4)</sup>. Hence, the reader is reminded of the importance of keeping up to date with such developments.

It is assumed that the reader is familiar with the overall structure of European Union (EU) asylum law as reflected in the EU asylum *acquis*. The Judicial Analysis aims to assist not only those with little or no experience of its application to judicial decision-making but also those who are more specialist.

The Judicial Analysis aims to provide a comprehensive yet not exhaustive overview of the application of exclusion clauses both to situations of exclusion from refugee protection and to instances where an applicant is excluded from being eligible for subsidiary protection. This Analysis does not deal with other instances in which protection is not granted or situations in which international protection may come to an end. Further chapters will be produced in due course which examine distinct but potentially related issues which in summary result in protection not being applicable.

The Judicial Analysis is broadly divided into four parts. The first part provides a general introductory overview of the issue and contextualises the concept against the backdrop of its genesis in the Refugee Convention. The second part deals with exclusion from refugee protection. It describes situations where exclusion is justified, either due to the fact that protection is already being provided, or because of involvement in certain serious crimes or heinous acts. It also examines each of the underlying grounds for the application of exclusion clauses. Part three follows a similar structure in respect of exclusion from eligibility for subsidiary protection. Part four details

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(1) Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9. As explained in recital (50) and (51), Denmark, Ireland and the United Kingdom are not bound by the QD (recast), because they did not take part in the adoption of it. Ireland and the United Kingdom remain bound by the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12. Member States bound by the QD (recast) were required to bring into force domestic legislation necessary to comply with it by 21 December 2013. The QD (recast) makes a number of substantial changes to the Directive 2004/83/EC but retains the identical wording of Article 12 and Article 17 and its corresponding recital albeit the latter is now differently numbered (recital (31), formerly recital (22)). It should be noted that the relevant provisions of the Qualification Directive have not been amended in its recast version.

(2) Convention Relating to the Status of Refugees, 189 UNTS, 28 July 1951 (entry into force: 22 April 1954), p. 137.

(3) For further information, see EASO, Introduction to the Common European Asylum System — Judicial Analysis (forthcoming).

(4) Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

relevant procedural aspects. In addition, Decision Trees are provided in Appendix B, which provides a schematic approach that can be employed by courts and tribunals when applying either Article 12 or Article 17 QD (recast).

The relevant parts of the QD (recast) for the purposes of this Judicial Analysis including recitals are as follows:

### Recitals

- **Recital (4)** — The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees.
- **Recital (31)** — Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations <sup>(5)</sup> and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’ and that ‘knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations’.
- **Recital (37)** — The notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.

### Article 12

1. A third-country national or a stateless person is excluded from being a refugee if:
  - (a) he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive;
  - (b) he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.
2. A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
  - (a) he or she has 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;
  - (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
  - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
3. Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

<sup>(5)</sup> Charter of the United Nations, 1 UNTS XVI, 24 October 1945.

### Article 17

1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

- (a) he or she has 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;
- (b) he or she has committed a serious crime;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
- (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.

Other parts of the QD (recast) where referred to in this analysis are set out in relevant sections.

Article 78 of the Treaty on the Functioning of the European Union (TFEU) states that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection. Such a policy must be in accordance with the Refugee Convention, and 'other relevant treaties'. It is worthy of note that other provisions of international law including international humanitarian law, international human rights law as well international criminal law may be of significant importance when interpreting the exclusion clauses contained in the QD (recast). Selected provisions of other relevant international instruments, while too numerous to list in full, are contained in Appendix A to this Judicial Analysis. Reference to 'Article' in this chapter is to the provisions of the QD (recast) unless indicated otherwise.

# 1. Exclusion — an overview

## 1.1 The origin from the Refugee Convention

Article 12 of the recast QD reflects the grounds for exclusion contained in Article 1(D), (E) and (F) of the Refugee Convention. The QD (recast) has the effect of codifying aspects of this international treaty, which has been signed, *inter alia*, by all EU Member States within the corpus of EU asylum law, notwithstanding the fact that the European Union as an international entity with its own legal personality has not itself signed the Refugee Convention. In its proposal for the QD, made in 2004, the European Commission explained that Article 12 (Draft-Article 14) reiterates the principle that a person who comes within the terms of one of the exclusion clauses in Article 1(D), (E) or (F) of the Refugee Convention is to be excluded from refugee status <sup>(6)</sup>.

The QD (recast) in its fourth Recital, notes that the ‘Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees’. Recital 23 stipulates one of the key aims of the Directive, namely that ‘Standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention’. In addition, the necessity to ‘introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention’ is recognised in Recital 24. The Court of Justice of the European Union (CJEU) has made reference to the QD (recast) on a number of occasions and, in particular, to the Recitals just mentioned, with a view to emphasising that the Refugee Convention:

constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria <sup>(7)</sup>.

Reasoning in light of the overall applicable international and European framework for international protection, the CJEU has held that the provisions of the QD and the QD (recast) must be interpreted in the light of its general scheme and purpose, while respecting the Refugee Convention and the other relevant treaties referred to in Article 78 TFEU <sup>(8)</sup>. Hence, the Court is seen to be applying a systematic approach to interpreting the QD (recast) in a manner consistent with the respective relevant provisions of the Refugee Convention. This approach to interpretation advocated by the CJEU goes even further in that it does not merely assess the object and purpose of the relevant provisions but also those of the entire EU regime, including the fundamental rights protection standards contained in the EU Charter as well as the general principles of law that are included in the founding values of the organisation <sup>(9)</sup>. Such an approach also applies in respect of Articles 12 and 17, which largely adopt the exclusion grounds of Article 1(D), (E) and (F) of the Refugee Convention.

## 1.2 Article 12 — The rationale behind exclusion clauses

The two short paragraphs that make up Article 12 contain two distinct reasons for excluding an individual from refugee status:

Paragraph 1 revolves around the notion of the subsidiarity of international protection. In other words, primacy and priority are to be accorded to protection provided by the country of nationality or by the state of former

<sup>(6)</sup> European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection*, 12 September 2001, COM(2001) 510 final p. 24.

<sup>(7)</sup> CJEU, judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, *B and D*, EU:C:2010:661, para. 77; CJEU, judgment of 2 March 2010, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others*, EU:C:2010:105, para. 52; CJEU, judgment of 17 June 2010, Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, EU:C:2010:351, para. 3.

<sup>(8)</sup> *Bolbol*, *op. cit.*, fn. 7, para. 37 seq.; *B and D*, *op. cit.*, fn. 7, para. 77 seq.; CJEU, judgment of 19 December 2012, Case C-364/11, *El Karem El Kott et al.*, EU:C:2012:826, para. 42 seq.; CJEU, judgment of 26 February 2015, Case C-472/13, *Andre Lawrence Shepherd v Germany*, EU:C:2015:117, para. 22 seq.

<sup>(9)</sup> EASO, *Article 15(c) QD Qualification Directive (2011/95/EU): Judicial Analysis*, December 2014, p. 11; EASO, *An Introduction to the Common European Asylum System: A Judicial Analysis* (forthcoming); see also Moreno-Lax, V., ‘Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law’, in D. Cantor and J.-F. Durieux (eds.), *Refugee from Inhumanity? War refugees and International Humanitarian Law*, Martinus Nijhoff, 2014, p. 298.

habitual residence<sup>(10)</sup>. There is consequently no need to recognise the refugee status of a third-country national as that individual is already in receipt of sufficient protection, either by organs or agencies of the United Nations other than the UNHCR (lit. (a)) or from the country in which that person has taken up residence (lit. (b)). There is a direct correlation between Article 12(1)(a) and Article 1(D) Refugee Convention, whereas Article 12(1)(b) reflects the content of the exclusion clause in Article 1(E) Refugee Convention.

The second paragraph of Article 12 provides for exhaustive exclusion grounds as contained in Article 1(F) Refugee Convention with the objective of maintaining the integrity and credibility of the refugee status provided. The rationale behind these exclusion clauses is twofold. First, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Second, the refugee framework should not act as a barrier to serious criminals facing justice<sup>(11)</sup>. The importance of this rationale was emphasised by the CJEU when it relied on the underlying purpose of the grounds for exclusion in Article 12(2) in order to maintain the credibility of the protection system in accordance with the Refugee Convention<sup>(12)</sup>. The CJEU even held that this reservation precludes Member States from granting refugee status to persons who are excluded pursuant to Article 12(2) or to grant another status to them which entails a risk of confusion with refugee status in order to protect the integrity of refugee status<sup>(13)</sup>. This situation can arise in regard to Article 3 QD (recast), which permits Member States to introduce or retain more favourable standards for determining who qualifies as a refugee in so far, however, as those standards are compatible with the Directive<sup>(14)</sup>.

### 1.3 Mandatory exclusion

Article 12 in its entirety provides for mandatory exclusion in line with Article 1(D), (E) and (F) Refugee Convention. The approach pursued in Article 12(2) differs from the terms of Article 28 of the Temporary Protection Directive 2001/55/EC in that Member States are not afforded any discretion to consider that an applicant ought to be treated as a refugee even in situations where the exclusion criteria have been met. Article 14(3)(a) of the QD (recast) unequivocally requires Member States to revoke refugee status if, after refugee status has been granted, it is established by the Member State concerned that the person should have been or is excluded from being a refugee in accordance with Article 12.

### 1.4 Exclusion within the broader European concept of protection

The act of excluding a person from refugee status pursuant to Article 12(2) does not necessarily imply the adoption of a position on the separate question of whether that person can ultimately be removed to his/her country of origin<sup>(15)</sup>. The same applies in respect of exclusion from subsidiary protection in accordance with Article 17. In other words, exclusion does not pre-empt a decision on the removal of an applicant nor does it prejudice the legal remedies open to that applicant. An applicant who is excluded from being a refugee (Article 12) or from being eligible for subsidiary protection (Article 17) may attempt to rely on the protection against possible forced return potentially afforded by Article 4 EU Charter<sup>(16)</sup> and Article 3 ECHR<sup>(17)</sup>. This additional consideration reflects the need to be cognisant of the interpretation of EU asylum law by the CJEU and the approach that has been taken in these cases. It reflects the approach outlined above under 1.1, namely the broader European concept of protection based on a synergy of refugee law with complementary considerations of fundamental rights and humanitarian law. However, this approach does not go so far as to provide for an additional status outside the scope of the QD (recast). Viewed in light of this approach to interpretation, an assessment of an application for international protection may consist of three elements with regard to the application of exclusion clauses<sup>(18)</sup>.

(1) The competent authority or court and/or tribunal examines whether a third-country national is eligible for refugee protection. This decision depends on an assessment of whether the applicant qualifies as a

<sup>(10)</sup> Federal Administrative Court (Germany), judgment of 8 February 2005, No 1 C 29.03, BVerwGE 122, pp. 376, 387.

<sup>(11)</sup> <http://www.refworld.org/docid/3f5857d24.html>

<sup>(12)</sup> *B and D*, op. cit., fn. 7, para. 104.

<sup>(13)</sup> *Ibid.*

<sup>(14)</sup> *Ibid.*, para. 115.

<sup>(15)</sup> *Ibid.*, para. 110.

<sup>(16)</sup> Charter of Fundamental Rights of the European Union, [2012] OJ C 326/02.

<sup>(17)</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos 11 and 14), ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

<sup>(18)</sup> <https://easo.europa.eu/wp-content/uploads/Article-15c-Qualification-Directive-201195EU-A-judicial-analysis.pdf>

refugee (Article 2(d)) owing to the existence of a well-founded fear of persecution (Article 9) linked to at least one of the five reasons stated in Article 10. An examination must also be made of whether the applicant does or does not meet the criteria for exclusion in Article 12.

It should be noted that the practice of first examining inclusion before proceeding to examine whether exclusion applies, while it may be the most commonly used, is not prescribed by the QD (recast). Some Member States foresee an assessment of the exclusion criteria before going on to make a determination as to the applicant's qualification for international protection (e.g. the Netherlands<sup>(19)</sup> and Spain).

(2) If a claim for refugee protection cannot be made out, consideration must then be given to whether that person is eligible for subsidiary protection under Article 15 and to whether the applicant is not excluded due to Article 17 of the recast Qualification Directive.

(3) Where a person is found not to be entitled to international protection, e.g. because an exclusion clause applies, it is then necessary to determine whether the applicant enjoys protection against removal pursuant to Article 4 and Article 19(2) of the EU Charter (see recital (16) QD) as well as Article 3 ECHR. In particular, the ECtHR's jurisprudence in Article 3 ECHR expulsion and extradition cases is relevant<sup>(20)</sup>. Article 4 EU Charter and Article 3 ECHR promulgate the prohibition of torture, inhuman or degrading treatment or punishment, thereby protecting one of the most fundamental values of a democratic society. The ECtHR has confirmed the absolute and non-derogable nature of that provision, which does not allow for any exemption from the scope of its protection that might arise due to the person's conduct. The Strasbourg Court has thus emphasised that the protection afforded by Article 3 ECHR is wider than that provided by Articles 32 and 33 Refugee Convention<sup>(21)</sup>. On the other hand, Article 3 ECHR protects against mere removal only, but, unlike Article 24 QD (recast), it does not provide for a positive right of residence or even a right to a residence permit.

## 1.5 The roles of the CJEU and ECtHR

The CJEU is responsible for ensuring that European Union law is interpreted and applied uniformly. Article 267 TFEU creates a mechanism for the CJEU to answer questions concerning EU law put to it by national courts on matters of interpretation of EU law (the preliminary reference procedure). Applying this procedure, the CJEU does not actually decide the substance of the case, rather the case is returned to the national court for a final decision on the basis of the interpretation provided by the CJEU. Such decisions are binding on Member States<sup>(22)</sup>.

The ECtHR, on the other hand, hears applications by individuals and references by states where it has been alleged that there has been a breach of a right under the ECHR by one of the 47 States Parties to the Convention. Unlike the CJEU, it decides the case before it, including, where required, making findings of fact. Judgments are binding on the parties to the proceedings. The judgments of the ECtHR have a high jurisprudential value and can be said to constitute persuasive guidance in respect of cases where there are similar facts or issues before other courts and tribunals.

<sup>(19)</sup> See: Administrative Law Department of the Council of State (The Netherlands), ABRvS 27 October 2003, 200305116, p. 2.3.1.

<sup>(20)</sup> ECtHR, judgment of 7 July 1989, *Soering v United Kingdom*, application No 14038/88, para. 85 seq.; ECtHR, judgment of 20 March 1991, *Cruz Varas v Sweden*, application No 15576/89, para. 69 seq.; ECtHR, judgment of 30 October 1991, *Vilvarajah v United Kingdom*, application No 13163/87, para. 107 seq.

<sup>(21)</sup> ECtHR, judgment of 15 November 1996, *Chahal v United Kingdom*, application No 22414/93, para. 79 seq.; ECtHR, judgment of 17 December 1996, *Ahmed v Austria*, application No 25694/96, para. 40 seq.; ECtHR, judgment of 29 April 1997, *H.L.R. v France*, application No 24573/94, para. 35; ECtHR, judgment of 28 February 2008, *Saadi v Italy*, application No 37201/06, para. 127; ECtHR, judgment of 28 June 2011, *Sufi and Elmi v United Kingdom*, application No 8319/07, para. 212.

<sup>(22)</sup> For a helpful guidance to making references to the CJEU see: CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01) in: *Official Journal of the European Union* C 338, 6.11.2012; see also, IARLJ, Preliminary references to the Court of Justice of the European Union: A Note for national judges handling asylum-related cases, April 2014.

## 2. Exclusion from refugee status (Article 12)

### 2.1 Article 12(1) — Exclusion due to protection already being provided

Article 12(1) QD (recast) deals with persons excluded from being refugees as they are not in need of refugee protection<sup>(23)</sup>. The provision covers two exclusion grounds. Under both grounds, the result is that the third-country national is excluded from being a refugee, because he or she already receives sufficient protection by other means. The applicant does not depend on the protection of refugee status either because of the protection of the United Nations (lit. (a)) or of the country of residence (lit. (b)).

#### 2.1.1 Article 12(1)(a) — Assistance of the United Nations

Article 12(1)(a) is directly linked to Article 1(D) Refugee Convention, which applies to any person who is in receipt of protection or assistance from organs or agencies of the United Nations, other than the UNHCR. This exclusion clause was drawn up within the particular context of refugees from the Palestinian territories<sup>(24)</sup>, who are in receipt of protection from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)<sup>(25)</sup>. The CJEU has stated that the objective of this provision is to ensure that Palestinian refugees continue to receive protection as Palestinian refugees until their position has been definitively settled in accordance with the relevant resolutions adopted by the General Assembly<sup>(26)</sup>.

Article 12(1)(a) comprises two sentences which reflect the two subparagraphs of Article 1(D) of the Refugee Convention. The first sentence excludes from refugee status those persons who are already protected by organs or agencies other than UNHCR. It draws a clear borderline between the protection granted by organs and agencies (UNRWA) and by UNHCR and thereby demarcates these systems of protection. The first sentence of Article 12(1) (a) should be interpreted, as is the case with all exclusion clauses, restrictively in light of the broad European concept of protection, bearing in mind the limitations outlined in the case-law of the CJEU, as detailed below.

The second sentence of Article 12(1)(a) goes on to provide for an exception to this exclusion clause. When the alternative protection provided by UNRWA, which motivates this exclusion clause, has ceased to be applicable for any reason, which is beyond the person's control and independent of that person's volition<sup>(27)</sup>, and without the situation within the Palestinian territories having been definitively settled in principle, the applicant *ipso facto* enjoys the protection of the Directive.

##### 2.1.1.1 'within the scope of Article 1(D) of Refugee Convention'

UN General Assembly Resolution No 302 (IV) of 8 December 1949, concerning assistance to Palestine refugees, established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)<sup>(28)</sup> and defined its area of operations which covers Lebanon, Syria, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip.

Historically, the term 'Palestine Refugee' has applied to persons whose normal place of residence was Palestine during the entire period between June 1946 and May 1948, and who lost both their home and means of

<sup>(23)</sup> Federal Administrative Court (Germany), judgment of 8 February 2005, 1 C 29.03, op. cit., fn. 10, p. 387; see also Kraft, I., 'Article 12 Directive 2011/95/EU', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law — Commentary on EU Regulations and Directives*, 2<sup>nd</sup> edn., Hart/Beck/Nomos, 2016 (forthcoming), para. 1.

<sup>(24)</sup> This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of the Member States on this issue.

<sup>(25)</sup> European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, op. cit., fn. 6, p. 24.

<sup>(26)</sup> *El Karem El Kott et al.*, op. cit., fn. 8, paras 60 and 62.

<sup>(27)</sup> *Ibid.*, para. 58; see further 2.1.1.2 below.

<sup>(28)</sup> UNGA, Assistance to Palestine Refugees (2 December 1950) A/RES/393.

livelihood as a result of the 1948 conflict. The understanding of the definition of the Palestine Refugee has subsequently been widened to include those who were permanently displaced as a result of the 1967 conflict <sup>(29)</sup>.

The CJEU's *Bolbol* <sup>(30)</sup> judgment provides some partial clarification as to the personal scope of application of this clause. The Court held that the definition of those who fall within the scope of Article 12(1) QD (recast) is limited to those persons who have actually availed themselves of the assistance provided by UNRWA. It was found that registration with UNRWA was sufficient proof of actually receiving assistance from UNRWA. Assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means <sup>(31)</sup>. The CJEU underlined that this exclusion clause of the Directive must be construed narrowly and cannot include all persons who are entitled to or who have in fact registered to receive protection or assistance from UNRWA <sup>(32)</sup>.

Historically, the term 'Palestine Refugee' has applied to persons whose normal place of residence was Palestine during the entire period between June 1946 and May 1948, and who lost both their home and means of livelihood because they were displaced, as a result of the 1948 Arab-Israeli conflict, from that part of Mandate Palestine which became Israel, and who have been unable to return there <sup>(33)</sup>. The understanding of the definition of the Palestine Refugee has subsequently been widened to include those who, as a result of the 1967 Arab-Israeli conflict, have been displaced from the Palestinian territory occupied by Israel since 1967 and have been unable to return there <sup>(34)</sup>.

In a somewhat more nuanced approach that does not strictly correspond with the jurisprudence of the CJEU, it may be worth noting that UNHCR considers that the scope of Article 1(D) of the 1951 Convention covers Palestine Refugees displaced in 1948 and 1967 as well as their descendants <sup>(35)</sup>, and in particular, that for an individual to fall within the scope of Article 1(D) Refugee Convention, the terms 'receiving protection or assistance of UNRWA' includes not only Palestinians who had actually availed themselves of the protection or assistance of UNRWA but also those who are eligible to receive such protection or assistance <sup>(36)</sup>.

### 2.1.1.2 When such protection 'has ceased for any reason'

The phrase 'for any reason' should be interpreted within its context and in line with the object and purpose of Article 1(D) of the Refugee Convention, which is to ensure continuity of protection and assistance to Palestinian refugees and to avoid overlapping competencies between UNHCR and UNRWA. This includes geographical and/or temporal continuity.

The CJEU has had an opportunity to provide an interpretation of this clause. It has interpreted the clause strictly, focusing on the willingness to leave the area within which protection is afforded as well as other reasons for an individual's departure. In *El Karem El Kott* <sup>(37)</sup> the CJEU held that protection or assistance ceases when:

- (1) UNRWA or organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees are abolished (i.e. when a durable solution to the Palestinian problem has been found) or where they can no longer carry out their missions <sup>(38)</sup>; or
- (2) the applicant has been forced to leave UNRWA's area of operations due to circumstances beyond his/her control and independent of his/her volition <sup>(39)</sup>.

<sup>(29)</sup> UNGA, Persons displaced as a result of the June 1967 and subsequent hostilities (15 December 2004) A/RES/59/118; UNGA, Humanitarian Assistance (4 July 1967) A/RES/2252 and subsequent UN General Assembly Resolutions.

<sup>(30)</sup> *Bolbol*, op. cit., fn. 7.

<sup>(31)</sup> *Ibid.*, para. 52.

<sup>(32)</sup> *Ibid.*

<sup>(33)</sup> UNGA, Palestine — Progress Report of the United Nations Mediator (11 December 1948) A/RES/194.

<sup>(34)</sup> UNGA, Humanitarian assistance, op. cit., fn. 29 and subsequent UN General Assembly resolutions, including UNGA, Persons displaced as a result of the June 1967 and subsequent hostilities, op. cit., fn. 29.

<sup>(35)</sup> UNHCR, *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection*, May 2013, pp. 2-3.

<sup>(36)</sup> *Ibid.*

<sup>(37)</sup> *El Karem El Kott et al.*, op. cit., fn. 8, para. 55.

<sup>(38)</sup> *Ibid.*, para. 56.

<sup>(39)</sup> *Ibid.*, para. 58.



The CJEU further held that it is for the competent national authority in the Member State to ascertain, by carrying out an assessment of the application on an individual basis, whether the applicant was forced to leave the area of operations of such organ or agency or acted voluntarily<sup>(40)</sup>. It should then be examined whether the person can return to the mandate areas and place him/herself back under the protection of UNRWA<sup>(41)</sup>. On the question of when a potential applicant might be said to have left UNRWA's protection area unwillingly, the CJEU found that a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations if 'his personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency'<sup>(42)</sup>. Having said that, the mere fact that the applicant has left UNRWA's area of operations does not, of itself, result in 'cessation of protection and assistance from the Agency'. The absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance in the sense of Article 12(1)(a) second sentence<sup>(43)</sup>.

The questions addressed in *El Kareem El Kott* have also been the subject of national case-law. It was held in a decision of the Belgian *Raad voor Vreemdelingenbetwistingen* (Council for Alien Law Litigation) that Article 1(D) applies only if the 'asylum seeker personally finds himself in grave danger' and the UNRWA 'was unable to offer him living conditions in that area that met the objectives it was tasked with'<sup>(44)</sup>.

The case-law seems relatively well established on this point. UNHCR's position is almost identical to the conclusions reached by the CJEU in *El Kareem El Kott*. As was found by the CJEU, UNHCR considers the phrase 'ceased for any reason' to include (i) the termination of UNRWA as an agency; (ii) the discontinuation of UNRWA's activities; and (iii) any objective reason outside the control of the person concerned such that the person is unable to (re-) avail themselves of the protection or assistance of UNRWA<sup>(45)</sup>.

### 2.1.1.3 'shall *ipso facto* be entitled to the benefits of this Directive'

In *El Kareem El Kott*, the Court held that the words 'shall *ipso facto* be entitled to the benefits of this Directive' must be interpreted in a manner that is consistent with the second subparagraph of Article 1(D) of the Refugee Convention. It states that individuals shall be entitled 'as of right' to the benefits of the Refugee Convention<sup>(46)</sup>.

At this point in the determination of the application for international protection, the competent Member State authority will have verified whether the applicant has in fact not only sought assistance from UNRWA but also that this assistance/protection has ceased due to reasons or circumstances beyond the control of the applicant<sup>(47)</sup>. Member State authorities will also have conducted an examination of whether the person is able to return (in the future) to the UNRWA area of operations and decided that this will not be possible<sup>(48)</sup>. Hence there is both a material and a geographical component to the determination.

As a result, the applicant is not necessarily required to show a well-founded fear of being persecuted within the meaning of Article 2(c) of the Directive at this point<sup>(49)</sup>. Such an applicant, after having applied for asylum in a Member State, should be granted refugee status provided that he/she does not fall within the scope of Article 12(1)(b), Article 12(2) or Article 12(3) of the QD (recast), since the '*ipso facto* entitlement' does not make any provision for a conditional recognition of refugee status. Given the potentially far-reaching legal consequences, an accurate assessment of the conditions of Article 12(1)(a) first sentence (outlined above) is imperative. This was acknowledged by the Court of Appeal in the United Kingdom when it noted that '[s]o great a parcel of rights would not likely be conferred [...] unless the class of its recipients were clear and certain [...]'<sup>(50)</sup>.

<sup>(40)</sup> *Ibid.*, paras 55-67.

<sup>(41)</sup> Council for Alien Law Litigation (Belgium), judgment of 29 January 2010, No 37.912.

<sup>(42)</sup> *El Kareem El Kott et al.*, op. cit., fn. 8, para. 63.

<sup>(43)</sup> *El Kareem El Kott et al.*, op. cit., fn. 8, para. 59.

<sup>(44)</sup> Council for Alien Law Litigation (Belgium), judgment of 2 May 2013, No 102283; Council for Alien Law Litigation (Belgium), judgment of 8 August 2013, No 108.154468; Council for Alien Law Litigation (Belgium), judgment of 10 April 2013, No 100.713469; Council for Alien Law Litigation (Belgium), judgment of 31 January 2013, No 96.372470.

<sup>(45)</sup> UNHCR, *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention*, op. cit., fn. 35.

<sup>(46)</sup> *El Kareem El Kott et al.*, op. cit., fn. 8, para. 71.

<sup>(47)</sup> *Ibid.*, paras 58, 61, 64-65.

<sup>(48)</sup> *Ibid.*, para. 77.

<sup>(49)</sup> *Ibid.*, para. 76.

<sup>(50)</sup> Court of Appeal (United Kingdom), *El-Ali v Secretary of State for Home Dept.*, [2002] EWCA Civ. 1103, para. 50.

## 2.1.2 Article 12(1)(b) — Recognition of rights by the country of residence

This subsection of Article 12, in line with Article 1(E) Refugee Convention, addresses situations in which an applicant has been accorded specific rights (or their equivalent) that would otherwise only be granted to nationals of the country in which the applicant is currently resident. It consists of three elements which must be met cumulatively in order for this provision to apply. These elements can be described as temporal, territorial and material in nature and will be dealt with in turn.

### 2.1.2.1 ‘the country in which he has taken up residence’

The requirement in Article 12(1)(b) that an applicant must be in stable residence contained, reflecting Article 1(E) Refugee Convention, constitutes a specific territorial or physical element in the application of this sub-clause. As a result, temporary stays such as periods in transit or visits to a particular Member State do not constitute a sufficient basis for exclusion. The *travaux préparatoires* of the Refugee Convention reflect the high threshold that must be met to satisfy this territorial element. During the debates, the United Kingdom delegate stated that for the purposes of Article 1(E) ‘the idea of taking up residence was equivalent to taking up permanent stay’<sup>(51)</sup>. In addition, in the French text of Article 1(E) Refugee Convention, the wording was changed during the negotiations from ‘*élu domicile*’ to ‘*a établi sa résidence*’ in order to stress the more permanent idea of stability.

There would appear to have been little, if any, case-law of significance on this matter to date<sup>(52)</sup>. UNHCR considers that voluntary renunciation of residence does not render Article 1(E) Refugee Convention inapplicable, provided the person remains entitled to a secure residency status, including the right to re-entry, and is recognised as having the rights and obligations attached to the possession of nationality<sup>(53)</sup>.

### 2.1.2.2 ‘is recognised by the competent authorities’

The temporal component of Article 12(1)(b) relates to a point in time at which the applicant can be said to actually enjoy rights that would otherwise be reserved for nationals. It should apply only where the person is currently recognised by the country as having these rights and obligations, as opposed to having enjoyed these rights in the past. If the competent authorities of the country concerned have recognised the applicant as having had such rights in the past but no longer endorse this recognition, Article 12(1)(b) is inapplicable. This reflects the fact that the applicant may well be in need of refugee protection once again. Furthermore this applies only to persons who have been granted such rights, not to those persons who are or may be eligible in the future<sup>(54)</sup>.

### 2.1.2.3 ‘rights and obligations attached to the possession of the nationality of the country’

In terms of the substantive or material quality of the rights and obligations that must be accorded to the applicant, the person should at least be protected against deportation and expulsion. Like nationals, there should also be a right to enjoy freedom of movement, including the right to leave and re-enter the country. These rights and obligations need not be identical in every respect to those enjoyed by nationals of the country in question. Divergences can exist such as, for example, no provision for the applicant to have access to the right to vote or to stand in elections as well as limitations being imposed on holding certain public positions<sup>(55)</sup>.

<sup>(51)</sup> UNHCR, *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, March 2009, paras 10-11.

<sup>(52)</sup> Article 1(E) Refugee Convention has in fact been applied in a number of Canadian cases. For an overview of these cases, see: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef10.aspx>.

<sup>(53)</sup> UNHCR, *UNHCR Note on the Interpretation of Article 1E*, op. cit., fn. 51, para. 10.

<sup>(54)</sup> *Ibid.*, para. 7.

<sup>(55)</sup> *Ibid.*, paras 13-16.

## 2.2 Article 12(2) — Exclusion because undeserving of international protection

### 2.2.1 Considerations common to all three exclusion grounds

Article 12(2) reflects the exclusion grounds as contained in Article 1(F) Refugee Convention with the objective of maintaining the integrity and credibility of the refugee status provided (see above at 1.2). The provision contains three separate exclusion grounds which partially overlap in their material scope: the commission of international relevant crimes, i.e. crimes against peace, war crimes or crimes against humanity (Article 12(2)(a)); the perpetration of serious non-political crimes committed prior to entry into that Member State (Article 12(2)(b)); or, the commission of acts contrary to the purposes and principles of the United Nations (Article 12(2)(c)). After highlighting some common fundamental aspects, the specific elements of each of these provisions are illustrated in detail (2.2.2 — 2.2.4). The detailed analysis is followed by a discussion of overarching issues such as personal responsibility (2.3) which covers specific problems of attribution because of participation in the aforementioned acts; defences and mitigating circumstances (2.4); and whether expiation may be relevant when considering the application of exclusion grounds (2.5). It should be noted at this stage that procedural aspects, such as, for example, the lowered standard of proof ('serious reasons for considering'), play a major role in the individual assessment of the grounds for exclusion (see further section 4 below).

#### 2.2.1.1 The objective

During the European Council debates on the QD there was discussion on whether the concept of exclusion from refugee status, with the overall aim of excluding from refugee status those persons who are deemed to be undeserving of protection, should be extended to include those cases provided for by Article 33(2) Refugee Convention. This provision sets out exceptions to the *non-refoulement* principle contained in Article 33(1) Refugee Convention where there are reasonable grounds for regarding that a refugee poses a danger to the national security of the host state or if he or she has been convicted by a final judgment of a particularly serious crime and represents a danger to the community<sup>(56)</sup>. The relevant provision in the QD (recast) is Article 12(2), which, differing from Article 17(1)(d) concerning exclusion from subsidiary protection<sup>(57)</sup>, does not include this additional consideration in respect of exclusion from refugee protection. Ultimately, the exceptions to the principle of *non-refoulement* were not incorporated into Article 12(2), rather they were included within Article 14(4) and (5)<sup>(58)</sup>. This important nuance is due to the fact that the exclusion criteria enumerated in Article 1(D)-(F) Refugee Convention were considered to be exhaustive<sup>(59)</sup>. The decision not to include considerations of national security and/or the prevention of danger reflects the rationale of Article 12(2), which is restricted so as to maintain the integrity and credibility of refugee status<sup>(60)</sup>. The CJEU held in *B and D* that the grounds for exclusion at issue in that case (Article 12(2)(b) and (c)) were intended as a consequence for acts committed in the past. These grounds:

were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability<sup>(61)</sup>.

The tenor of this decision as well as the underlying rationale on which it is based is reflected in a subsequent decision of the *Bundesverwaltungsgericht* (German Federal Administrative Court), where it was held that exclusion is intended not to discredit the status of a 'bona fide refugee'<sup>(62)</sup>.

<sup>(56)</sup> European Council, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, No 9038/02 of 17 June 2002, p. 20; Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, No 10596/02 of 9 July 2002, p. 22 and Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, No 11356/02 of 6 September 2002, p. 17.

<sup>(57)</sup> See also the unitary concept in Article 28(1) Council Directive, 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

<sup>(58)</sup> Kraft, I., 'Article 12 Directive 2011/95/EU', op. cit., fn. 23, paras 9-10.

<sup>(59)</sup> European Council, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, No 12620/02 of 3 October 2002, p. 19.

<sup>(60)</sup> *B and D*, op. cit., fn. 7, para. 115.

<sup>(61)</sup> *Ibid.*, paras 103-104.

<sup>(62)</sup> Federal Administrative Court (Germany), judgment of 24 November 2009, 10 C 24.08, DE:BVerwG:2009:101109U1C24.08.0, BVerwGE 135, p. 252, para. 41.

### 2.2.1.2 Exclusion not conditional on a present danger for the host state

Considerations of safety, security and preventing the endangerment of society are not relevant when considering exclusion from refugee status. They could nonetheless be considered within the context of the refusal to grant refugee status as well as the revocation of this status foreseen under Article 14(4) and (5) <sup>(63)</sup>. The CJEU held that any danger which a refugee may currently pose to the Member State concerned can be taken into consideration, however not under Article 12(2) but only under Article 14(4) or Article 21(2) <sup>(64)</sup>. The wording of Article 12 makes it clear that the grounds for exclusion are intended as a penalty for acts committed in the past. Given that the rationale of excluding persons rests, first, on the premise that they are deemed to be undeserving of protection and, second, that those who have committed certain serious crimes must not be permitted to use refugee status to escape criminal liability, exclusion cannot be conditional upon the existence of a present danger to the host Member State <sup>(65)</sup>. Any assessment of the exclusion criteria in Article 12 must focus on the person's past behaviour. It cannot be directed to a prognostic look at the future, whether the person currently poses or may pose at some time in the future a danger to the host country.

### 2.2.1.3 No further assessment of proportionality (no balancing)

It must also be borne in mind that exclusion is not conditional on an assessment of proportionality in relation to the particular case. This is apparent when interpreting the wording of Article 12(2) systematically in comparison with the divergent wording of Article 28(1)(a)(ii) of the Temporary Protection Directive 2001/55/EC <sup>(66)</sup>. This Directive explicitly stipulates that the severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. The QD (recast) contains no such provision. Indeed, without even addressing this argument, the CJEU in *B and D* held that where the conditions stated in Article 12(2) are met, the person is to be mandatorily excluded from being a refugee <sup>(67)</sup>. The Court recalled that exclusion itself in Article 12(2) is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d). It then went on to reason that:

[s]ince the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed <sup>(68)</sup>.

Therefore an additional assessment of proportionality or a balancing cannot be required <sup>(69)</sup>.

## 2.2.2 Article 12(2)(a) — Crime against peace, war crime, crime against humanity

This exclusion clause applies to acts which are criminalised under international law. For the definition of crimes against peace, war crimes and crimes against humanity, Article 12(2)(a) refers to 'international instruments drawn up to make provisions in respect of such crimes'. The wording and genesis of the provision reveal a dynamic approach, in which the lawmakers assume that international law evolves over time. Therefore, in the present instance the determination of whether crimes against peace, war crimes or crimes against humanity within the meaning of Article 12(2) have been committed must primarily be made in accordance with the Rome Statute of

<sup>(63)</sup> European Council, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, No 13623/02 of 30 October 2002, p. 3.

<sup>(64)</sup> *B and D*, op. cit., fn. 7, para. 101.

<sup>(65)</sup> *Ibid.*, para. 104.

<sup>(66)</sup> Council Directive 2001/55/EC on minimum standards for giving temporary protection, op. cit., fn. 57.

<sup>(67)</sup> *B and D*, op. cit., fn. 7, para. 107.

<sup>(68)</sup> *Ibid.*, para. 109.

<sup>(69)</sup> An alternative view, whereby a proportionality test forms part of the determination of whether or not Article 12(2) applies, is expressed in: UNHCR, *Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003.

the International Criminal Court of 17 July 1998 (Rome Statute) <sup>(70)</sup>, which reflects the current status of developments in international criminal law with regard to these crimes <sup>(71)</sup>. It is worth bearing in mind that there might be a concern as regards the temporal application of the notion of ‘war crimes’ to certain acts; e.g. child recruitment was not generally considered a war crime prior to the conclusion of the Rome Statute. Hence, a court or tribunal, when assessing a situation involving such conduct, which occurred before 1998, cannot qualify such conduct as a war crime. More generally, war crimes were originally considered to arise only in international armed conflict, although it is now widely accepted that war crimes may also be committed in a non-international armed conflict <sup>(72)</sup>.

It is also worth noting that crimes against humanity have an overarching or international element as well as containing a number of specific underlying crimes. These specific crimes are for the most part set out in Articles 7 and 8 of the Rome Statute (see Appendix A).

### 2.2.2.1 Crime against peace — Aggression

According to the London Agreement <sup>(73)</sup> the material scope of a crime against peace is broad and involves ‘planning, preparation, initiation or waging of a war of aggression or a war of violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing’ <sup>(74)</sup>.

The Rome Statute adopts a different terminology in that it does not refer to crimes against peace but, in Article 5(d), establishes the jurisdiction of the ICC with regard to the ‘crime of aggression’. This crime is defined in Article 8 *bis* <sup>(75)</sup> with reference to a list of acts of aggression taken from General Assembly Resolution 3314 (XXIX) (see Appendix A). All are concerned with acts of a state against the sovereignty, territorial integrity or political independence of another state. Such acts may constitute a ‘crime of aggression’ if, by their character, gravity and scale, they constitute a manifest violation of the Charter of the United Nations. The crime of aggression under the Rome Statute may thus only be committed in the context of an international armed conflict and requires state action; it cannot be committed by an individual acting independently. Moreover, Article 8 *bis* (1) of the Rome Statute expressly limits the scope *ratione personae* of this crime to ‘a person in a position effectively to exercise control over or to direct the political or military action of a State’.

This definition of the ‘crime of aggression’ was adopted at the Kampala Review Conference of the ICC Statute in 2010 <sup>(76)</sup>. Although the jurisdiction of the ICC over this crime is suspended until at least 2017 <sup>(77)</sup>, the substantive elements of the crime as set out in Article 8 *bis* are nevertheless already applicable in the context of exclusion under Article 12(2)(a) (‘crime against peace’). The exclusion ground ‘crime against peace’ has been applied in Belgium by the *Commission Permanente de Recours des Réfugiés* (Permanent Commission for Refugee Matters), in the case of a Somali applicant found to have been involved in planning and waging an international armed conflict with Ethiopia <sup>(78)</sup>.

### 2.2.2.2 War crime

War crimes are serious violations of international humanitarian law which are criminalised directly under international law <sup>(79)</sup>. Within the context of exclusion, the definitions of war crimes are primarily found in Article 8(2)

<sup>(70)</sup> Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entry into force: 1 July 2002).

<sup>(71)</sup> UNHCR, Guidelines on International Protection No 5, op. cit., fn. 69, p. 4; see also Federal Administrative Court (Germany), judgment of 24 November 2009, op. cit., fn. 62, para. 31; and also Assembly of States Parties to the Statute of the International Criminal Court, *Elements of Crimes*, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010 (International Criminal Court publication, RC/11) setting out the *actus reus* and *mens rea* requirements for each of the crimes under the jurisdiction of the ICC.

<sup>(72)</sup> ICTY, decision of 2 October 1995, *Prosecutor v Dusko Tadic aka ‘Dule’ (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, T-94-1, para. 134.

<sup>(73)</sup> Charter of the International Military Tribunal — Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (‘London Agreement’), 82 UNTS 280, 8 August 1945 (entry into force: 8 August 1945).

<sup>(74)</sup> *Ibid.*, Article 6(a); See also UNHCR, Guidelines on International Protection No 5, op. cit., fn. 69, para. 11.

<sup>(75)</sup> Rome Statute of the International Criminal Court, op. cit., fn. 70, Article 8 *bis* (2).

<sup>(76)</sup> Conference of the Parties to the Rome Statute, Resolution RC/Res.6, adopted 11 June 2010, 13<sup>th</sup> plenary meeting.

<sup>(77)</sup> As of 16 July 2015, 23 states have accepted or ratified the Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Resolution RC/Res.6 of the Review Conference of the Rome Statute, 11 June 2010 (registered: 8 May 2013).

<sup>(78)</sup> Permanent Commission for Refugee Matters (Belgium), decision of 6 August 2002, No 99-1280/W7769.

<sup>(79)</sup> See e.g. International Committee of the Red Cross (ICRC), Customary international humanitarian law, Rule 156: Definition of War Crimes, December 2006.

of the Rome Statute, which in turn reflects the definitions provided under the four 1949 Geneva Conventions and Additional Protocols thereto of 1977, as well as other relevant instruments and customary international law. In determining whether acts which occurred prior to the adoption of the ICC Statute constitute war crimes alluded to above, it will be necessary to examine them in the light of these instruments and customary international law.

War crimes can only be committed during an armed conflict, that is, a situation which involves ‘a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’<sup>(80)</sup>. The legal provisions which define certain kinds of conduct in an armed conflict as war crimes are different, depending on the nature of the armed conflict.

War crimes in an international armed conflict are defined in Article 8(2)(a) and (b) of the Rome Statute. An international armed conflict exists when there is an intervention by the armed forces of one state in another state, irrespective of whether there has been a formal declaration of war, as well as in situations of occupation, even if there is no armed resistance<sup>(81)</sup>. An international armed conflict also exists where a state indirectly intervenes in an armed conflict in another state on the side of a non-state armed group fighting against the armed forces of the state in question, provided it exercises overall control over the group. Article 8(2)(a) of the Rome Statute is concerned with grave breaches of the four 1949 Geneva Conventions, whereas Article 8(2)(b) identifies other serious violations of the laws and customs applicable in an international armed conflict, including grave breaches of Additional Protocol No I, certain violations of the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, as well as acts which are considered war crimes under customary international law.

War crimes in a non-international armed conflict are defined in Article 8(2)(c) and (e) of the Rome Statute. Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature must be distinguished from those that constitute a non-international armed conflict within the meaning of common Article 3 to the 1949 Geneva Convention. An armed confrontation must reach a minimum of intensity, and there must be parties to the conflict with a certain level of organisation, including a command structure and the capacity to sustain military operations<sup>(82)</sup>. Article 8(2)(c) of the Rome Statute refers to serious violations of common Article 3 to the four 1949 Geneva Conventions, including violence to life and limb against persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. Article 8(2)(e) of the ICC Statute covers other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law<sup>(83)</sup>.

For an act to constitute a ‘war crime’, it is not sufficient that it simply occurred during a time of armed conflict; it is also necessary that there was a functional link (a nexus) between the act and the armed conflict. This means that the act must have been ‘closely’ or ‘obviously’ related to the armed conflict, or that the armed conflict played ‘a substantial part in the perpetrator’s ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed’<sup>(84)</sup>.

War crimes may be committed not only by members of the armed forces, but also by civilians, if there is a sufficient functional nexus with the armed conflict. To qualify as war crimes, the acts in question must be directed against protected persons or objects. Protected persons include civilians, medical personnel or religious personnel not taking direct part in the hostilities, but also persons belonging to a party to the conflict under certain circumstances, for example, when they are detained by the adversary or *hors de combat* for other reasons, or if

<sup>(80)</sup> ICTY, *Prosecutor v Dusko Tadic*, op. cit., fn. 72, para. 70; See also, ICTY Appeals Chamber, judgment of 15 July 1999, *Prosecutor v Dusko Tadic, (Judgment)*, IT-94-1-A, para. 146.

<sup>(81)</sup> Article 2, International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950).

<sup>(82)</sup> ICTY, *The Prosecutor v Dusko Tadic*, op. cit., fn. 80, paras 561-568; see also ICTY, judgment of 30 November 2005, *The Prosecutor v Fatmir Limaj*, IT-03-66-T, paras 94-170.

<sup>(83)</sup> This refers to: International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol III)*, 1125 UNTS 609, 8 June 1977 (entry into force: 7 December 1978); UN General Assembly, *Convention on the Safety of United Nations and Associated Personnel*, 2051 UNTS 363, 9 December 1994 (entry into force: 15 January 1999); UN General Assembly, *Convention on the Rights of the Child*, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990); UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (last amended on 7 July 2009), 25 May 1993; UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994; UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002 as well as customary international law.

<sup>(84)</sup> ICTY (Appeals Chamber), judgment of 12 June 2002, *Prosecutor v Kunarac et al.*, IT-96-23 and IT-96-23/1-A, para. 58. The *Elements of Crimes* adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court specify the nexus requirement for each of the acts defined as war crimes in Article 8 of the ICC Statute in the following terms: ‘The conduct took place in the context of and was associated with an [international] armed conflict’.

they are attacked in a manner that is prohibited under the applicable rules of warfare<sup>(85)</sup>. For example, the prohibition of forced recruitment of children in Article 4(3) of Additional Protocol II to the Geneva Conventions of 1949 provides specific protection to children during non-international armed conflicts. Moreover the conscription of children under the age of 15 years is a war crime under Article 8 of the Rome Statute<sup>(86)</sup>. Many war crimes involve death, injury, destruction or unlawful taking of property. For some war crimes, however, it is sufficient that the conduct endangers protected persons or objects; for example, intentionally directing an attack against a civilian population, even if no civilians are actually harmed in the attack. Acts may also be considered to be war crimes where they breach important values, even if persons or objects are not directly physically endangered<sup>(87)</sup>.

The mental element (*mens rea*) required for the commission of war crimes includes awareness of the factual circumstances that established the existence of an armed conflict in all cases, as well as awareness of the protected status of the person or object attacked. The definitions of certain war crimes also require specific intent to direct an attack against a civilian population or a particular protected object<sup>(88)</sup>. War crimes cannot be justified or relativised with reference to the aims pursued, for example, to achieve a ‘good political purpose’ such as the installation of a government aiming to establish a parliamentary, democratic system<sup>(89)</sup>.

In the context of an exclusion determination, acts committed in an armed conflict which are permitted under the applicable rules of international humanitarian law would not fall within the scope of Article 12(2)(a). Such conduct would be lawful under the relevant ‘international instruments’ concerning Article 12(2)(b)<sup>(90)</sup>. This is relevant, in particular, in a non-international armed conflict, where acts such as attacks against military personnel or objects may constitute crimes under national law even if they do not constitute a violation of applicable rules of international humanitarian law. Such acts, if carried out in a manner consistent with the duty under international humanitarian law to distinguish between legitimate targets and protected persons or objects as well as the requirement of proportionality in conducting military attacks, would therefore be considered to meet the tests required to establish the ‘political’ character of an offence. For this reason, Article 12(2)(b) would thus not be applicable to such acts<sup>(91)</sup>. In a decision concerning Article 12(2)(c), the United Kingdom Supreme Court in *Al-Sirri* has held that an attack on International Security Assistance Force (ISAF) troops did not constitute a war crime but amounted to an act contrary to the purposes and principles of the United Nations<sup>(92)</sup>.

### 2.2.2.3 Crime against humanity

First formulated in the London Charter as a number of very serious crimes, if committed ‘before or during the war’, the definition of ‘crimes against humanity’ has since evolved, including through the work of the International Law Commission as well as provisions in the Statutes of the ICTY and ICTR, until it was given its current expression in Article 7 of the ICC Statute. Thus, for the purposes of exclusion under Article 12(2)(a) crimes against humanity are (i) fundamentally inhumane acts, when committed as part of a (ii) systematic or widespread attack against a (iii) civilian population.

Crimes against humanity no longer require a link with an armed conflict; they may be committed during an armed conflict or in peacetime. This development is reflected also in the definitions of specific crimes against humanity codified in separate conventions, such as, in particular, genocide<sup>(93)</sup> and apartheid<sup>(94)</sup>.

The range of acts which may form the underlying crimes which may be elevated to crimes against humanity if committed in the conditions specified in Article 7 of the ICC Statute has been expanded and includes a number of acts which were not listed in the London Charter. For example, the French Council of State rejected the appeal of the widow of former President J. Habyarimana of Rwanda, who had been excluded from refugee status by the

<sup>(85)</sup> Federal Administrative Court (Germany), judgment of 16 February 2010, 10 C 7.09, DE:BVerwG:2010:160210U10C7.09.0, BVerwGE 136, p. 89, para. 30 seq.

<sup>(86)</sup> National Court of Asylum Law (France), judgment of 29 April 2013, *M.G. — Liberation Tigers of Tamil Eelam*, No 12018386.

<sup>(87)</sup> ICRC, Rule 156: Definition of War Crimes, op. cit., fn. 79. See also Assembly of States Parties to the Statute of the International Criminal Court, *Elements of Crimes*, op. cit., fn. 71.

<sup>(88)</sup> Guidance on the material and mental elements required under the definition of war crimes provided for in the ICC Statute can be found in: ICC, *Elements of Crimes*, *ibid.*, para. 79.

<sup>(89)</sup> Supreme Court (United Kingdom), judgment of 17 March 2010, *JS v Secretary of State for the Home Department*, [2010] UKSC 15, para. 32.

<sup>(90)</sup> Federal Administrative Court (Germany), judgment of 24 November 2009, op. cit., fn. 62, para. 43.

<sup>(91)</sup> *Ibid.*; compare Commission for Refugee Matters (France), judgment of 25 January 2007, *M. K.S.*, 552944.

<sup>(92)</sup> Supreme Court (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, [2012] UKSC 54, para. 68.

<sup>(93)</sup> UNGA, *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277, 9 December 1948 (entry into force: 12 January 1951); Rome Statute of the International Criminal Court, op. cit., fn. 70, Article 6.

<sup>(94)</sup> UNGA, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1015 UNTS 243, 30 November 1973 (entry into force: 18 July 1976).

Refugee Appeals Board (CRR) under Article 1(F)(a) Refugee Convention because of the central role she had played in the early days of the genocide of the Tutsi. It was held that the moral support which she had provided was sufficiently serious as to warrant her exclusion<sup>(95)</sup>.

Article 7(1) of the ICC Statute defines the notion of ‘crime against humanity’ as single acts, such as murder, enslavement, torture or persecution, ‘when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack’.

According to international criminal jurisprudence, widespread is defined as a ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’<sup>(96)</sup>. Systematic refers to acts that can be described as ‘thoroughly organised action, following a regular pattern on the basis of a common policy and involving substantial public or private resources’, ‘organised nature of the acts of violence and the improbability of their random occurrence’ or ‘patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis’<sup>(97)</sup>.

As regards the nature of the acts, Article 7(1) of the ICC Statute provides that they must be ‘widespread’ or (not and) ‘systematic’. They must in any case be part of an ‘attack directed against any civilian population’. According to Article 7(2)(a) of the ICC Statute, this means ‘a course of conduct involving the multiple commission of acts referred to in Paragraph (1) against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack’. Hence, the act must fit into a functional overall context in order for the conduct in question to qualify as a crime against humanity; the final ‘policy’ element has a linking effect<sup>(98)</sup>. This does not mean that a person must have committed multiple acts; an isolated act can constitute a crime against humanity if it is part of a coherent system, or a series of systematic and repeated acts<sup>(99)</sup>.

The requirement of an attack against a civilian population does not mean that the acts must be directed against the entire population of a given state or territory. Instead, as the ICTY clarified, the ‘population’ element is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity<sup>(100)</sup>.

As regards the mental element required for the commission of a crime against humanity, Article 7(1) of the ICC Statute expressly refers to ‘knowledge of the attack’. According to the Elements of Crime, this means that the perpetrator ‘knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population’. He or she must thus be aware of these contextual elements; it is not required that he or she be responsible for the attack overall. For a finding of serious reasons for considering that an individual has committed a crime against humanity for the purposes of exclusion based on Article 12(2)(a) to be justified, it would also need to be established that he or she satisfied both the *actus reus* and the *mens rea* requirements for the underlying crime, or crimes. Article 7 of the ICC Statute also makes it clear that a discriminatory intent must only exist as part of the mental element for the commission of a crime against humanity if this is specifically required by the definition of the underlying crime, as is the case for the crime against humanity of persecution<sup>(101)</sup> and also for the crime of genocide<sup>(102)</sup>.

<sup>(95)</sup> Council of State (France), judgment of 16 October 2009, No 311793. Compare also National Court of Asylum Law (France), judgment of 12 June 2013, *M.M.*, No 09017369.

<sup>(96)</sup> <http://www.refworld.org/docid/40278fbb4.html>

<sup>(97)</sup> <http://www.refworld.org/docid/40278fbb4.html>

<sup>(98)</sup> Federal Administrative Court (Germany), judgment of 24 November 2009, op. cit., fn. 62, para. 39.

<sup>(99)</sup> ICTY, *Prosecutor v Dusko Tadic*, judgment of 7 May 1997, IT-94-1-T, para. 644.

<sup>(100)</sup> *Ibid.*

<sup>(101)</sup> Rome Statute of the International Criminal Court, op. cit., fn. 70, Article 7(1)(h). The commission of this crime requires targeting of the victim(s) by reason of the identity of the group or collective or targeting of the group as such, and did so based on ‘political, racial, national, ethnic, cultural, religious, gender ..., or other grounds that are universally recognized as impermissible under international law’.

<sup>(102)</sup> *Ibid.*, Article 6, which requires an ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.



### 2.2.3 Article 12(2)(b) — Serious non-political crime

Pursuant to Article 12(2)(b), exclusion from refugee status may arise from an individual's involvement in serious non-political crimes, subject to certain geographical and temporal restrictions. In considering whether the acts in question fall within the material scope of this exclusion ground, members of courts and tribunals should consider the following elements: (i) the requirement that the act(s) in question constitute a crime; (ii) the requirement that the crime has to be serious; (iii) the non-political character; as well as (iv) the geographical and temporal elements, namely the requirement that the crime must have occurred outside the country of refuge prior to the individual's admission to that country as a refugee. Jurisprudence on this subject would seem to indicate that serious crime for the purposes of exclusion has an autonomous international meaning and is not to be defined purely by reference to national law <sup>(103)</sup>. The CJEU has interpreted Article 12(2)(b) and (c) and established, as a general rule, that the competent authority must undertake an individual assessment for each case.

#### 2.2.3.1 Material scope (I) — The elements of crime

Criminal responsibility generally requires that the individual concerned committed the material elements of the offence with intent and knowledge. The absence of an element of crime — physical (*actus reus*) or mental (*mens rea*) — required under the relevant definition and mode of criminal liability will result in a finding that the offence has not been committed. Courts and tribunals must assess whether the applicant's conduct and state of mind satisfy the elements of a crime. Aside from satisfying the physical and mental elements <sup>(104)</sup>, consideration must be given to whether there are any applicable defences. '[I]f a person has a defence that is recognised as removing criminal responsibility, no penal consequences follow and so the conduct cannot be regarded as criminal. No crime has been committed.' <sup>(105)</sup>

Since the term 'crime' has various meanings in different judicial systems, whether a certain conduct of a third-country national fulfils the elements of a crime and, if so, whether that crime is serious, can be looked at from different perspectives, namely those of:

- the applicant's home country;
- the national law of the host country; or
- a common international level.

Against the background of diverse legal systems, where the same conduct in one state may be considered to be a crime while in another it is not even considered a minor offence, it would seem to be a reasonable approach to apply international standards <sup>(106)</sup>. Further, the application of an international standard reflects the dual objective for exclusion under Article 12(2)(b) of maintaining the credibility of the protection system to exclude persons who are deemed to be undeserving of protection and of preventing that refugee status from enabling those who have committed certain serious crimes to escape criminal liability <sup>(107)</sup>.

The practical relevance of the issue appeared in a case of the *Raad van State* (Dutch Council of State). The issue was whether the applicant's participation in traditional female genital mutilation in Sierra Leone should result in the application of the exclusion ground of a serious non-political crime. The argument was advanced on behalf of the applicant that this practice was not punishable by law in the country of origin and could not hence be considered a crime. The Dutch Council of State rejected this submission, stating that the qualification of an act as serious non-political crime within the meaning of this exclusion clause needed to be done with reference to international standards, and that the fact that this violation of human rights is not punishable in the applicant's native country did not in itself provide a reason not to qualify it as a crime for the purpose of an exclusion

<sup>(103)</sup> Court of Appeal (England and Wales) (United Kingdom), judgment of 2 April 2012, *AH (Algeria) v Secretary of State for the Home Department*, [2012] EWCA Civ 395, paras 49-50; Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), judgment of 30 October 2012, *AH (Article 1F(b) — 'serious') Algeria v SSHD*, [2013] UKUT 382; Federal Administrative Court (Germany), judgment of 4 September 2012, 10 C 13.11, BVerwGE 144, p. 127, para. 20; Federal Administrative Court (Germany), judgment of 16 February 2010, 10 C 7.09, BVerwGE 136, p. 89, para. 47; Federal Administrative Court (Germany), judgment of 24 November 2009, op. cit., fn. 62, para. 41; UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, para. 151.

<sup>(104)</sup> Compare with Rome Statute of the International Criminal Court, op. cit., fn. 70, Article 30 (mental element) (see also Annex A below).

<sup>(105)</sup> Administrative Appeals Tribunal (Australia), judgment of 16 June 2010, *Re YYMT and FRFJ* (2010), 115 ALD 590, as cited in: Hathaway, J. C. and Foster, M., *The Law of Refugee Status*, 2<sup>nd</sup> edn., Cambridge, 2014, p. 553.

<sup>(106)</sup> Upper Tribunal Immigration and Asylum Chamber (United Kingdom), judgment of 25 July 2013, *AH (Article 1F(b))*, [2013] UKUT 00382.

<sup>(107)</sup> *B and D*, op. cit., fn. 7, para. 115.

determination<sup>(108)</sup>. Uncertainty remains as to whether the *mens rea* aspect can be satisfied in situations where the applicant was not aware that he or she was committing a crime. This may be the case where the act or acts committed are widely practiced or considered acceptable conduct in the country of origin.

### 2.2.3.2 Material Scope (II) — The requirement of seriousness ('serious crime')

A serious crime is understood to be a deliberate capital crime or a grave punishable act or some other crime that is categorised as particularly serious and prosecuted accordingly under criminal law in most legal systems<sup>(109)</sup>. In providing guidance when making the assessment of seriousness, different criteria may be used, such as:

- the nature of the act: this includes considering the degree of violence, the methods used, any use made of a deadly weapon, etc.;
- the punishment: reference could be made to the maximum penalty that would potentially be faced on conviction or the length of the punishment handed down on sentencing;
- the actual harm: here it is necessary to assess the effective damage that can be inflicted either on the person/victim or on the property;
- the form of the procedure used to prosecute the crime: this criterion requires consideration of the procedural standards applicable, e.g. whether the crime is considered to be a summary or an indictable offence<sup>(110)</sup>.

Each of these factors, either on their own or in combination, could lead to the conclusion that the crime is 'serious' within the meaning of Article 12(2)(b).

There is a lack of consensus on whether mitigating factors falling short of a complete defence<sup>(111)</sup> (e.g. coercion, age/maturity<sup>(112)</sup>, mental capacity, superior orders, etc.) and aggravating circumstances (e.g. the fact that the applicant may already have a criminal record<sup>(113)</sup>, the use of civilians or minors<sup>(114)</sup>) are also to be taken in consideration in deciding whether the conduct reaches the threshold so that it should be considered as a serious crime. The CJEU has established that the exclusion of a person from refugee status pursuant to Article 12(2)(b) (or (c)) is not conditional on an assessment of proportionality in relation to the particular case<sup>(115)</sup> (see above 2.2.1.3) because the competent authority had already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person<sup>(116)</sup>. The Court of Appeal and Upper Tribunal (United Kingdom) have both stressed that 'serious' in this context has an autonomous international meaning and is not to be defined purely by national law or the length of the sentence imposed or likely to be imposed<sup>(117)</sup>.

Examples of serious crimes are, inter alia, murder, attempted murder<sup>(118)</sup>, rape<sup>(119)</sup>, armed robbery, torture, grievous bodily harm, human trafficking<sup>(120)</sup>, kidnapping, malicious arson, child abduction, drug trafficking<sup>(121)</sup> and conspiracy to promote terrorist violence<sup>(122)</sup>. Grave economic crimes with a significant loss (e.g. embezzlement<sup>(123)</sup>) can also be counted as serious crimes<sup>(124)</sup>.

<sup>(108)</sup> Council of State (The Netherlands), judgment of 10 February 2014, 201208875/1V/1.

<sup>(109)</sup> Federal Administrative Court (Germany), judgment of 24 November 2009, op. cit., fn. 62, para. 41.

<sup>(110)</sup> UNHCR, *Guidelines on International Protection No 5*, op. cit., fn. 69, para. 14.

<sup>(111)</sup> See sections 2.2.3.5 and 2.3.9.

<sup>(112)</sup> National Court of Asylum Law (France), judgment of 20 December 2010, No 1000487: In this case regarding a former child soldier, it was held that, given the situation of particular vulnerability and constraint of the applicant, there is no reason to apply any of the exclusion clauses.

<sup>(113)</sup> See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, op. cit., fn. 103, December 2011, para. 157.

<sup>(114)</sup> See *Optional Protocol on the Involvement of Children in Armed Conflict of the Convention of the Rights of the Child*, op. cit., fn. 83, which sets 18 as the minimum age for compulsory recruitment or participation in hostilities.

<sup>(115)</sup> *B and D*, op. cit., fn. 7, para. 111.

<sup>(116)</sup> *Ibid.*, para. 109.

<sup>(117)</sup> Court of Appeal (United Kingdom), *AH (Algeria) v Secretary of State for the Home Department*, op. cit., fn. 103, paras 49-50; Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), *AH (Article 1F(b) — 'serious' Algeria v SSHD*, op. cit., fn. 103.

<sup>(118)</sup> Council of State (Greece), judgment of 8 May 2012, 1661/2012; in this case an Indian Sikh had served a sentence in Romania for plotting to kill the Indian Ambassador in 1991.

<sup>(119)</sup> Council for Aliens Litigation (Belgium), decision of 30 September 2008, 16.779.

<sup>(120)</sup> Supreme Administrative Court (Czech Republic) (Grand Chamber), judgment of 7 September 2010, *A.S. v Ministry of Interior*, 4 Azs 60/2007-119.

<sup>(121)</sup> Council of State (Netherlands), judgment of 27 September 2013, 201202758/1/V2.

<sup>(122)</sup> Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), *AH (Article 1F(b) — 'serious' Algeria v SSHD*, op. cit., fn. 103.

<sup>(123)</sup> Council of State (Netherlands), judgment of 30 December 2009, 200902983/1/V1.

<sup>(124)</sup> For an overview of national jurisprudence in various countries, see: Rikhof, J., *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in Domestic and International Law*, Republic of Letters Publishing, 2012, p. 310 seq.; see also, Kapferer, S., 'Exclusion Clauses in Europe: A Comparative Overview of State Practice in France, Belgium and the United Kingdom', *International Journal of Refugee Law*, Vol. 12, suppl. 1, 2000, p. 195, p. 199 seq.

### 2.2.3.3 Material scope (III) — The non-political nature of the crime committed

A serious crime should be considered non-political when other motives are the predominant feature of the specific crime committed. The context and methods are also important factors in evaluating its political nature <sup>(125)</sup>. Extradition cases have frequently been referenced in the developing jurisprudence and may be useful as a source of interpretive inspiration given that similar (but often not identical) considerations have applied in such cases.

The motivation of the offender should be the initial point of any examination of this element. This may vary considerably with the type of offence and the aims pursued. An act is, generally speaking, patently non-political if it was committed primarily for personal reasons or gain. If no clear link between the crime and the alleged political objective can be identified, then non-political motives prevail, thereby characterising the whole act as non-political <sup>(126)</sup>.

UNHCR further limits the substantive scope of politically motivated crimes by including the requirement that, for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles <sup>(127)</sup>. However, there is no clear position on this question and some doubts have been expressed <sup>(128)</sup> based on the assumption that refugee law is politically neutral.

Notwithstanding the above, even if the offender's motivation was in fact political, there is a normative bar in the last clause of Article 12(2)(b) whereby '...particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes...'. This clause reflects approaches developed in extradition law and practice when determining whether a crime may be qualified as political. The political element of the offence must outweigh its character as a common crime in order to qualify it as 'political'. A clear trend can be identified to exclude certain categories of particularly heinous crimes from the rights of the Refugee Convention traditionally granted to politically motivated offenders. The established practice in extradition law and in the application of Article 1(F)(b) Refugee Convention posits a predominance test balancing the ultimate goal of the perpetrator and the acts employed pursuing that goal. It considers the proportionality of the crime to its objectives in this context. Article 12(2)(b) may regularly apply to acts of violence that are commonly considered to be of a 'terrorist' nature <sup>(129)</sup>. Consistent with that, the CJEU has held that terrorist acts characterised by their violence towards civilian populations, even if committed with a purportedly political objective, are to be regarded as serious non-political crimes <sup>(130)</sup>.

### 2.2.3.4 Territorial and temporal scope — Outside the country of refuge prior to admission

Article 12(2)(b) is specific as to the time and location of the commission of the crime. The elements of the provision ensure that the reason for exclusion can be distinguished from the danger-dependent regulations in Article 14(4) and Article 21(2) <sup>(131)</sup>.

In accordance with the QD (recast), a crime committed outside the country of refuge means a crime committed either in the country of origin or in a third-country, i.e. not in the country in which refugee protection is being sought. Situations are encountered where the act or crime was committed on the territory of the country of origin or on the territory of a third country and, based on the same political objective, was continued on the territory of the country of asylum. Referring to the 'prior to the admission' notion, the Directive text defines it as: '... the time of issuing a residence permit based on the granting of refugee status'. This clarification departs from the wording of Article 1(F)(b) Refugee Convention to clarify the time frame. Article 12(2)(b) speaks of 'admission as a refugee' and should be read in the ordinary meaning given to that word, in the context and objective of the Directive. Acts also committed in the country of refuge, but before admittance as a refugee, could be considered

<sup>(125)</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, op. cit., fn. 103, para. 152; UNHCR, *Guidelines on International Protection No 5*, op. cit., fn. 69, para. 15.

<sup>(126)</sup> Federal Administrative Court (Germany), judgment of 16 February 2010, op. cit., fn. 103, para. 48.

<sup>(127)</sup> UNHCR, *Guidelines on International Protection No 5*, op. cit., fn. 69, para. 15.

<sup>(128)</sup> Gilbert, G., 'The Protection of Refugees in International Law post September 11', *Yearbook of International Humanitarian Law*, Vol. 6, 2003, p. 389, p. 407.

<sup>(129)</sup> For further information on Article 12(2)(c), see section 2.2.4.2.

<sup>(130)</sup> *B and D*, op. cit., fn. 7, para. 81; CJEU, judgment of 24 June 2015, Case C-373/13, *H. T. v Land Baden-Württemberg*, EU:C:2015:413, para. 84.

<sup>(131)</sup> Concerning Article 21(2) see: *H. T. v Land Baden-Württemberg*, *ibid.*, para. 56 seq.

for exclusion to take place. UNHCR asserts that the recognition of refugee status is declaratory, so that ‘admission’ in this context includes mere physical presence in the country of refuge <sup>(132)</sup>.

## 2.2.4 Article 12(2)(c) — Acts contrary to the purposes and principles of the United Nations

Article 12(2)(c) provides that a third-country national or stateless person is excluded from being a refugee ‘where there are serious reasons for considering that: ... he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations’.

### 2.2.4.1 Material scope

The wording of Article 12(2)(c) differs somewhat from that of Article 1(F)(c) Refugee Convention, in that it specifically refers to the Preamble and Articles 1 and 2 of the Charter of the United Nations, without however changing its material scope. Bearing in mind the potential breadth of the term ‘purposes and principles of the United Nations’, the United Kingdom Supreme Court in *Al-Sirri* <sup>(133)</sup>, taking into account, inter alia, the CJEU’s reasoning in *B and D*, stated:

The article [Article 1(F)(c) Refugee Convention] should be interpreted restrictively and applied with caution. There should be a high threshold ‘defined in terms of the gravity of the act in question the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security’. And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character.

The court considered it to be clear that the phrase ‘acts contrary to the purposes and principles of the United Nations’ had an autonomous meaning <sup>(134)</sup>. In UNHCR’s view, the use of Article 12(2)(c) should be reserved for situations where the acts offend the principles and purposes of the United Nations in a fundamental manner <sup>(135)</sup>.

As the interpretation of Article 12(2)(c) has evolved, it has become increasingly clear that there are overlaps between it and Article 12(2)(a) and (b). The reference in Article 12(2)(c) to ‘acts’ rather than ‘crimes’ may entail that an assessment of this application goes beyond a determination of criminal liability. In the absence of express reference to ‘non-political crime’ in Article 12(2)(c) or Article 1(F)(c) Refugee Convention, it may be concluded that there is no ‘political crime’ exception <sup>(136)</sup>. The United Kingdom Court of Appeal has rejected the argument that principles of criminal liability were to be applied for the purpose of determining whether a person was guilty of acts falling within Article 12(2)(c), as the acts which could give rise to exclusion under Article 1(F)(c) did not have to be crimes <sup>(137)</sup>. Relevant considerations were, it was thought, the role, maturity and level of activities of the person in question. The United Kingdom Supreme Court in *Al-Sirri* <sup>(138)</sup> held that Article 1(F)(c) Refugee Convention is applicable to acts which, even if they are not covered by the definitions of crimes against peace, war crimes or crimes against humanity as defined in international instruments within the meaning of Article 1(F)(a) Refugee Convention, are nevertheless of a comparable egregiousness and character, such as sustained human rights violations and acts contrary to the purposes and principles of the United Nations <sup>(139)</sup>. According to the United Kingdom Supreme Court, Article 12(2)(c) is of residual nature.

Where acts can be properly said to fall under Article 12(2)(a), they also constitute acts contrary to the purposes and principles of the United Nations. However, by expressly referring to the definitions of war crimes, crimes

<sup>(132)</sup> UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC*, January 2005, p. 27.

<sup>(133)</sup> Supreme Court (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 92, para. 16.

<sup>(134)</sup> *Ibid.*, para. 36. The Supreme Court (United Kingdom) held in its judgment of 17 March 2010, *JS v Secretary of State for the Home Department*, [2010] UKSC 15, para. 2 that there can only be one true interpretation of Article 1(F)(a) Refugee Convention, an autonomous meaning to be found in international rather than domestic law; an interpretation which can surely be read to apply equally to Article 1(F)(c) Refugee Convention.

<sup>(135)</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, para. 47.

<sup>(136)</sup> Special Immigration Appeals Commission (United Kingdom), judgment of 31 July 2000, *Secretary of State for the Home Department v Mukhtiar Singh and Paramjit Singh*, SC 4/99.

<sup>(137)</sup> Court of Appeal (United Kingdom), judgment of 24 March 2009, *MH (Syria) v Secretary of State for the Home Department*, [2009] EWCA Civ 226, para. 30.

<sup>(138)</sup> Supreme Court (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 92, para. 13.

<sup>(139)</sup> Supreme Court (Canada), judgment of 4 June 1998, *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, para. 65.

against humanity or crimes against peace in international instruments, Article 1(F)(a) provides more specific criteria for determining whether the acts in question may give rise to exclusion. Similarly, in cases involving common crimes, asylum judges would need to start the assessment by considering whether the acts are serious non-political crimes within the meaning of Article 12(2)(b), although such acts may also fall within Article 12(2)(c) if they are sufficiently serious and characterised by the international dimension described above. Notwithstanding the potential for overlap, there is jurisprudence from national courts and tribunals which applied Article 12(2)(c) in a stand-alone manner in cases where it is clearly established that the crimes are contrary to UN purposes and principles. This was the case, for instance, in the decision concerning Jean-Claude Duvalier, former President of the Republic of Haiti. It was held by the *Conseil d'Etat* (French Council of State) that during his period as President, he had used his authority to disguise serious human rights violations and that these violations could be regarded as being acts contrary to the purposes and principles of the UN<sup>(140)</sup>. The *Cour nationale du droit d'asile* (French National Court of Asylum Law) came to a similar conclusion concerning a national of the Central African Republic. The individual concerned was a member of the President's Guard. The court considered that there were serious reasons to consider that he had borne a special responsibility within the Presidential Guard at a time when systematic abuses by its members were identified and denounced by the international community. The court also held that he made no effort to prevent these acts or to dissociate from them and on this basis he was excluded from refugee protection<sup>(141)</sup>.

### 2.2.4.2 Terrorism

Article 12(2)(c) is increasingly relied upon in cases involving acts of a terrorist nature. The explicit terms of recital 22<sup>(142)</sup> (the same provision is reproduced in recital 31 Directive 2011/95 QD (recast)) and the decision in *B and D* clearly include terrorist acts within the Article's scope. In *B and D* the CJEU noted that it was clear from Resolutions 1373(2001) and 1377(2001) of the UN Security Council that the Security Council took as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any state participation, contrary to the purposes and principles of the United Nations<sup>(143)</sup>. There is no universally accepted definition of terrorism, though a helpful description is to be found in *Al-Sirri*<sup>(144)</sup>, where the court stated that terrorism consists of:

[...] the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not to act in a particular way.

The court considered it to be clear that the phrase 'acts contrary to the purposes and principles of the United Nations' had an autonomous meaning and affirmed that the definition of terrorism under applicable national legislation and 'where necessary to be read down in an Article 1(F)(c) case so as to keep its meaning within the scope of Article 12(2)(c) of the Directive'<sup>(145)</sup>.

Noting that the CJEU, despite recital 22 of the Directive (cf. recital 31 QD (recast)) consistently referring to 'international' terrorism, when discussing Article 12(2)(c) in *B and D*, the Supreme Court in *Al-Sirri*<sup>(146)</sup> adopted paragraph 17 of the UNHCR Guidelines and Background Note:

Article 1(F)(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.

Of course, many terrorist acts will fall within Article 12(2)(b), (see for example paragraph 81 of *B and D*) and even Article 12(2)(a) in appropriate cases, that is, where acts which would be considered terrorist in nature if

<sup>(140)</sup> Council of State (France), judgment of 31 July 1992, No 13003572.

<sup>(141)</sup> National Court of Asylum Law (France), judgment of 7 October 2014, No 13003572.

<sup>(142)</sup> Recital 22 of Directive 2004/83 provides: Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

<sup>(143)</sup> *B and D*, op. cit., fn. 7, para. 83; confirmed in *H. T.*, op. cit., fn. 130, para. 85.

<sup>(144)</sup> Supreme Court (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 92, para. 39; see also *B and D*, op. cit., fn. 7, para. 81.

<sup>(145)</sup> *Ibid.*, para. 36.

<sup>(146)</sup> *Ibid.*, para. 38; See also Council Framework Decision 2002/475/JHA on combatting terrorism (consolidated version as amended by Council Framework Decision 2008/919/JHA); Council of Europe, Convention on Combating Terrorism, CM(2015)61 final.

committed in peacetime take place during an armed conflict and constitute war crimes in light of the relevant definitions, or if they amount to crimes against humanity.

In French jurisprudence, the Article 12(2)(c) exclusion clause has been used in matters involving terrorism since 2006. According to this stream of jurisprudence, that provision may be relied upon when the claimant has willfully participated in the conception and perpetration of acts of a terrorist nature undertaken by a politically motivated organisation of such size and means that it has the capacity to impact on the international scene. Noting the terrorist methods used by the Liberation Tigers of Tamil Eelam (LTTE) in their struggle against Sri Lankan authorities and considering the international dimension of its activities, the French National Asylum Court excluded a military engineer in charge of an armoured marine division of the Black Sea tigers suicide unit. The decision also makes reference to the UN Security Council Resolution 1373(2001), which explicitly declared terrorist acts as contrary to the purposes and principles of the UN <sup>(147)</sup>.

### 2.2.4.3 Personal scope

Earlier interpretation of the personal scope of Article 1(F)(c) Refugee Convention considered that, in order to have committed an act contrary to the purposes and principles of the United Nations, an individual must have been in a position of power in a state or state-like entity, and instrumental in its infringement of those principles <sup>(148)</sup>. An example of this previous approach can be seen in the invocation by France of Article 1(F)(c) Refugee Convention to exclude the former Haitian dictator, Jean-Claude Duvalier. It was considered that he infringed the respect for human rights and fundamental liberties, which are clearly among the purposes and principles of the UN, as a consequence of those reprehensible acts carried out under his authority <sup>(149)</sup>.

However, the focus has moved increasingly to the nature of the acts rather than the position of their author. Many of the acts covered by this provision could, by their very nature, be committed only by persons in a position of authority in a state and instrumental to that state infringing the principles outlined in the Preamble as well as Articles 1 and 2 of the Charter of the United Nations <sup>(150)</sup>. Nonetheless, it is now accepted that people who were not in a position of formal governmental authority may still be excluded. Indeed, the United Kingdom Court of Appeal in *Al-Sirri* held that Article 1(F)(c) may be applied to non-state actors <sup>(151)</sup>. UNHCR also accepts it will not be a requirement that the person in question holds a position of authority within a state or state-like entity in all cases <sup>(152)</sup>.

Finally, it is clear from *B and D* <sup>(153)</sup> that exclusion from refugee status pursuant to Article 12(2)(c) is not conditional on the person concerned representing a present danger to the host Member State (see above 2.2.1.2).

## 2.3 Individual Responsibility (Article 12(3))

### 2.3.1 Criteria for determining individual responsibility

When members of courts and tribunals are charged with the task of considering the application of Article 12(2), they must determine whether there are serious reasons for considering that the applicant ‘has committed a crime...’ (Article 12(2)(a) and (b)) or ‘has been guilty of acts...’ (Article 12(2)(c)) within the scope of these provisions. Similar language is employed in Article 1(F) of the Refugee Convention. This task first raises the question whether

<sup>(147)</sup> National Court of Asylum Law (France), decision of 27 June 2008, No 07014895; National Court of Asylum Law (France), decision of 15 July 2014, No 11016153.

<sup>(148)</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, op. cit., fn. 103, para. 163; Federal Administrative Court (Germany), judgment of 1 July 1975, 1 C 44.68, Buchholz 402.24. para. 28 AuslG No 9.

<sup>(149)</sup> Council of State (France), judgment of 31 July 1992, 81962 and 81963; see also Immigration and Refugee Board (Canada), decision of 19 August 1991, M90-07224, 5 RefLex 41 in which a former Liberian cabinet minister who had approved of ongoing violence against civilians in Liberia was excluded, cited by J. C. Hathaway & M. Foster, op. cit., fn. 104, p. 587.

<sup>(150)</sup> Council of State (The Netherlands), 1992, *JMS v Secretary of State for Justice*, reported at Intl. Journal of Refugee Law (7, 1995), 129; Federal Court of Appeal (Canada), judgment of 19 December 1995, *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 49 para. 51, insofar affirmed by the Supreme Court (Canada), *Pushpanathan v Canada (Minister for Citizenship and Immigration)*, op. cit., fn. 139; Permanent Commission for Refugee Matters (Belgium), decision of 18 January 1996, 95/1017/F390, quoted by J. C. Hathaway & M. Foster, op. cit., fn. 104, p. 588; Federal Administrative Court (Germany), judgment of 31 March 2011, 10 C 2.10, DE:BVerwG:2011:310311U10C2.10.0, BVerwGE 139, p. 272, para. 38; Federal Administrative Court (Germany), judgment of 7 July 2011, 10 C 26.10, DE:BVerwG:2011:070711U10C26.10.0, BVerwGE 140, p. 114, para. 28.

<sup>(151)</sup> Court of Appeal (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, [2009] EWCA Civ 222, para. 39.

<sup>(152)</sup> UNHCR, UNHCR public statement in relation to cases *Germany v B and D* pending before the Court of Justice of the European Union, July 2009, p. 29.

<sup>(153)</sup> *B and D*, op. cit., fn. 7, para 95.

the relevant conduct meets the material scope of one or more of the grounds for exclusion (see further section 2.2 above). If this is the case and the person concerned is involved without having actually committed the acts by his or her own hand, a further question arises as to the possibility to attribute responsibility for acts committed by others. The latter is the subject matter at the heart of Article 12(3). This provision provides that Article 12(2) ‘applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein’.

The CJEU held in *B and D* that the application of Article 12(2)(b) and (c) is conditional on assessing, inter alia, ‘whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the Directive’<sup>(154)</sup>. The Court considered the issue in the specific context of the possible application of the aforementioned exclusion grounds based on an individual’s membership in a ‘terrorist’ group, but individual responsibility must be established whenever the application of Article 12(2) is considered.

In principle, the criteria for determining the individual responsibility of an applicant depends on the specific exclusion ground. Hence, individual criminal responsibility for crimes under international law, as mentioned in Article 12(2)(a), reflects the provisions contained in Article 25, 28 and 30 of the ICC Statute (see Annex A).

The assessment of criminal responsibility for crimes covered by Article 12(2)(b) cannot draw on such explicit regulations as laid down by an international treaty. It is widely agreed that individual responsibility for crimes falling under Article 12(2)(b) is not limited to cases in which the applicant has committed the acts in question him or herself, but it may also arise through planning, ordering, soliciting, instigating, or otherwise inducing the commission of a crime by another person, or by making a contribution to the commission of an excludable act by others through aiding and abetting or on the basis of participation in a joint criminal enterprise/common purpose liability<sup>(155)</sup>. This is reflected in Article 12(3), which states that persons who incite or otherwise participate in the commission of the crimes or acts mentioned in Article 12(2) are to be excluded. The United Kingdom Supreme Court held in *JS (Sri Lanka)* that ‘Article 12(3) does not [...] enlarge the application of Article 1(F); it merely gives expression to what is already well understood in international law’<sup>(156)</sup>. The German Federal Administrative Court held that participation in a serious non-political crime under Article 12(2)(b) requires attribution under the criteria of national criminal law<sup>(157)</sup>. Nonetheless, consideration should still be given to the standards applicable in other Member States<sup>(158)</sup>. Although the provisions of the ICC Statute concerning individual responsibility are not directly applicable regarding crimes that fall under Article 12(2)(b), they do provide a benchmark of the international standard of criminal attribution that may be of assistance when considering this exclusion ground.

Further difficulties still are presented in the case of establishing common standards in relation to the individual responsibility for ‘acts contrary to the purposes and principles of the United Nations’ covered by Article 12(2)(c). This reason for exclusion does not require attribution in application of criminal criteria, because it does not presuppose a criminal act. Hence, acts of support for a terrorist organisation need not specifically refer to individual terrorist actions in order to be included under Article 12(2)(c) and Article 12(3). Accordingly, even purely logistical acts of support of sufficient importance may fulfil the conditions of Article 12(2)(c) in conjunction with Article 12(3)<sup>(159)</sup>. The same applies to intense ideological and propagandistic activities in favour of a terrorist organisation<sup>(160)</sup>. Attribution of participation in acts covered by Article 12(2)(c) is not limited to cases in which the applicant objectively had the possibility of actually influencing the committing of terrorist acts, or publicly approved of or incited such acts. As in Article 12(2)(c) and Article 12(3) there is no need for a specific nexus between the act of support and an individual act of terror. Participation in acts contrary to the purposes and principles of the United Nations requires neither spatial nor organisational proximity within the organisation to commit terrorist acts, nor for their justification in public<sup>(161)</sup>.

The mode of individual responsibility relevant in a particular case will depend on the facts, and courts and tribunals will need to consider the applicant’s conduct and state of mind in relation to acts within the scope of Article 12(2).

<sup>(154)</sup> *B and D*, op. cit., fn. 7, para. 99.

<sup>(155)</sup> See UNHCR, *Guidelines on International Protection No 5*, op. cit., fn. 69, para. 18.

<sup>(156)</sup> Supreme Court (United Kingdom), *JS v Secretary of State for the Home Department*, op. cit., fn. 134, para. 33.

<sup>(157)</sup> Federal Administrative Court (Germany), judgment of 7 July 2011, op. cit., fn. 150, para. 38; Federal Administrative Court (Germany), judgment of 4 September 2012, op. cit., fn. 103, para. 24.

<sup>(158)</sup> Federal Administrative Court (Germany), judgment of 7 July 2011, op. cit., fn. 150, para. 38.

<sup>(159)</sup> *Ibid.*, para. 39.

<sup>(160)</sup> Federal Administrative Court (Germany), judgment of 19 November 2013, 10 C 26.12, DE:BVVerwG:2013:191113U1026.12.0, ZAR 2014, p. 338, para. 15 seq.; National Court of Asylum Law (France), judgment of 15 July 2014, No 11016153; Refugee Appeals Board (France), decision of 5 June 2006, No 04049586.

<sup>(161)</sup> Federal Administrative Court (Germany), op. cit., fn. 160, para. 16.

### 2.3.2 Applicant as perpetrator of excludable acts

Where the facts of the case indicate that the applicant is the perpetrator (or co-perpetrator) of an act within the scope of Article 12(2), an assessment will be needed of whether the applicant committed the material elements of the crime with the requisite *mens rea*, that is, intent and knowledge as required under the applicable definition<sup>(162)</sup>. The Elements of Crimes adopted by the Assembly of States Parties to the ICC Statute provide helpful guidance on the *actus reus* and *mens rea* requirements of genocide, the crime of aggression, war crimes and crimes against humanity<sup>(163)</sup>.

### 2.3.3 International standards when determining individual responsibility

When determining whether an applicant has individual responsibility for a crime against peace, a war crime, or a crime against humanity, international standards must be considered and applied where required (see 2.3.1. above). This is in line with the explicit reference to ‘international instruments’ in Article 12(2)(a). The ICC Statute is particularly relevant in this regard, as it represents the most recent codification at the international level of standards related to individual responsibility and reflects the approaches and traditions of different legal systems. The jurisprudence of international criminal tribunals and of the ICC also provide helpful guidance.

The relevance of international standards is increasingly reflected in decisions of national courts on Article 12(2)(a) or Article 1(F)(a) of the Refugee Convention. The United Kingdom Supreme Court, for example, held that the Rome Statute of the ICC ‘should now be the starting point for considering whether an applicant is disqualified from asylum by virtue of Article 1(F)(a) of the Refugee Convention<sup>(164)</sup>, and that ‘it is convenient to go at once to the ICC Statute, ratified as it now is by more than a hundred States and standing as now surely it does as the most comprehensive and authoritative statement of international thinking on the principles that govern liability for the most serious international crimes [...]’<sup>(165)</sup>. In the same decision, the Court referred to an additional source, the Statute of the ICTY, and its jurisprudence on questions related to complicity<sup>(166)</sup>.

In Germany, the Federal Administrative Court held that:

the determination of whether war crimes or crimes against humanity [...] have been committed must primarily be made in accordance with the defining elements of these offences formulated in the Rome Statute of the International Criminal Court [...], which articulates the current status of developments in international criminal law for cases of violations of international humanitarian law<sup>(167)</sup>.

In other countries, some decisions on exclusion have undertaken an examination of individual responsibility without express reference to international instruments or the jurisprudence of international courts and tribunals. While this may indicate that asylum judges rely on criteria under domestic criminal law, which may differ in each Member State with different legal traditions as applied in common law and civil law countries, overall the outcomes are similar<sup>(168)</sup>. The preferred approach in the most recent decisions would seem to be to make every effort to interpret and apply international standards and to only have recourse to national provisions where this is still necessary.

Unlike Article 12(2)(a), the exclusion clauses in Article 12(2)(b) and (c) do not expressly refer to international law. With regard to exclusion based on ‘serious non-political crimes’, in particular, a certain divergence is noticeable among the Member States. However, in determining individual responsibility based on complicity, several states have relied on concepts similar to those developed for the application of the exclusion grounds set out in

<sup>(162)</sup> Rome Statute of the International Criminal Court, op. cit., fn. 70, Article 30.

<sup>(163)</sup> ICRC, *Elements of Crimes*, op. cit., fn. 71.

<sup>(164)</sup> Supreme Court (United Kingdom), *JS v Secretary of State for the Home Department*, op. cit., fn. 164, para. 8.

<sup>(165)</sup> *Ibid.*, para. 9; see also paras 10-14.

<sup>(166)</sup> *Ibid.*, paras 15-20; see also Immigration and Asylum Tribunal (United Kingdom), judgment of 14 October 2002, *Gurung v Secretary of State for the Home Department*, [2002] UKIAT 04870, para. 109. Similar approaches have been adopted by superior courts outside Europe. See, for example, Supreme Court (Canada), judgment of 19 July 2013, *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, paras 48-53; Supreme Court (New Zealand), judgment of 27 August 2010, *The Attorney-General (Minister of Immigration) v Tamil X and Anor*, [2010] NZSC 107, paras 52-54.

<sup>(167)</sup> Federal Administrative Court (Germany), judgment of 24 November 2009, op. cit., fn. 62, para. 31; see also, Federal Administrative Court (Germany), judgment of 16 February 2010, op. cit., fn. 85, paras 26, 41-43.

<sup>(168)</sup> See Rikhof, J., op. cit., fn. 124, p. 271 seq.



Article 12(2)(a) in cases involving complicity <sup>(169)</sup>. In the United Kingdom, for example, the *Asylum Instruction — Exclusion: Article 1(F) of the Refugee Convention* states that the test articulated by the Supreme Court on the issue of a voluntary contribution to the commission of crimes by others in *JS (Sri Lanka)* extends to Article 1(F) Refugee Convention generally <sup>(170)</sup>. In Belgium, the *Conseil du Contentieux des Etrangers* (Belgian Council for Alien Law Litigation) found that the applicant, who was found to have incurred individual responsibility for serious non-political crimes, could not invoke any of the defences set out in Article 31(1)(c) and (d) of the ICC Statute <sup>(171)</sup>.

While the wording of Article 12(2)(c) differs from the two preceding exclusion clauses in that it requires the applicant to have been ‘guilty of’ acts within its scope, the CJEU confirmed in *B and D* <sup>(172)</sup> that a determination of individual responsibility is required also for the application of this exclusion ground.

### 2.3.4 ‘Incite ...’

Individual responsibility may arise through planning, ordering, instigating, soliciting or inducing the commission of a crime by another person. The *actus reus* and *mens rea* requirements differ depending on the mode of individual responsibility. The relevant criteria under customary international law have been developed in the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, respectively <sup>(173)</sup>.

### 2.3.5 Contribution (‘[...] or otherwise participate’)

Exclusion considerations also arise where there is evidence that an applicant made a contribution to the commission of excludable acts by another person, or a group of persons. Depending on the circumstances, such cases need to be considered in light of the criteria for aiding and abetting, or within the framework of a joint criminal enterprise/common purpose liability. It is important to distinguish between these different modes of individual responsibility <sup>(174)</sup>.

The *Migrationsöverdomstolen* (Migration Court of Appeal, Sweden) considered the case of a senior official of the Iraqi Ba’ath Party, who could be viewed as having good knowledge about the Ba’ath Party’s criminal intentions and actions towards critics of the regime <sup>(175)</sup>. The Court noted the requirement that an in-depth assessment of his role must be performed and noted that he had provided information about dissidents during his time at university. It also considered evidence about what happened when the information was provided and about the purpose of his surveillance activities. The Court found that there were no grounds for concluding that individuals, due to the information provided by the appellant, had suffered abuse of the type falling within the definition of crimes against humanity and there were no particular grounds for assuming that he had incited or otherwise participated in the commission of crimes against humanity.

#### 2.3.5.1 Aiding and abetting

Aiding and abetting requires that the individual made a substantial contribution to the crime(s) committed. As per the criteria developed in international criminal jurisprudence, this may take the form of rendering practical assistance, encouragement or moral support which had a substantial effect on the perpetration of the crime <sup>(176)</sup>, although a causal connection between the conduct and the commission of the crime(s) in the sense of a *conditio sine qua non* is not required <sup>(177)</sup>. Whether or not a particular conduct had such an effect needs to be established

<sup>(169)</sup> *Ibid.*, pp. 347-349.

<sup>(170)</sup> United Kingdom, *Asylum Instruction — Exclusion: Article 1F of the Refugee Convention* (30 May 2012), at para. 3.3.; Council for Aliens Litigation (Belgium), judgment of 3 November 2009, 33.720.

<sup>(171)</sup> *Ibid.*

<sup>(172)</sup> *B and D*, op. cit., fn. 7, paras 95-99.

<sup>(173)</sup> A detailed extrapolation of the jurisprudence of the ICTY would exceed the remit of this Judicial Analysis. For further information see, Rikhof, J., op. cit., fn. 124.

<sup>(174)</sup> For a discussion of modes of individual responsibility, setting out the distinction between aiding and abetting, on the one hand, and joint criminal enterprise, on the other see, ICTY (Appeals Chamber), *Prosecutor v Tadic*, op. cit., fn. 80, paras 196 to 229.

<sup>(175)</sup> Migration Court of Appeal (Sweden), judgment of 25 October 2012, UM287-10, MIG 2012.

<sup>(176)</sup> See, e.g., ICTY (Appeal Chamber), *The Prosecutor v Tihomir Blaskic*, op. cit., fn. 97, para. 48; ICTY, judgment of 10 December 1998, *The Prosecutor v Anto Furundzija*, IT-95-17/1-T, para. 249; ICTY, *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, op. cit., fn. 97.

<sup>(177)</sup> See, e.g., ICTY, *The Prosecutor v Anto Furundzija*, op. cit., fn. 176, para. 209.

based on the facts of the case. Moreover, the contribution must have been made with intent as to his or her own conduct and with knowledge that his or her acts assisted or facilitated the commission of those crimes<sup>(178)</sup>. This may be done, for example, through funding with the knowledge that those funds will be used to commit serious crimes<sup>(179)</sup>. Aiding and abetting does not require the individual to share the intent of the principal perpetrator(s). It is sufficient that he or she was aware of the main elements of the crime(s).

In the case of MT Zimbabwe before the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), the appellant, who was a detective in the Zimbabwean police force, was found to have participated in two incidents of torture<sup>(180)</sup>. The Tribunal noted that she was present at the scene and was in a position of authority and that while her principal job during an incident was taking notes, she was fully aware that her colleagues were inflicting ill treatment on a detainee and she herself made threats to him while he was blindfolded and her threats, along with those made by her colleagues, put him in fear that he was going to be thrown into the river to drown if he did not cooperate with them in giving certain information. The Upper Tribunal concluded that her conduct during this incident amounted to facilitation of the commission of the crime of torture in a significant way and that her involvement in this incident was with specific intent to contribute substantially to it and that her role assisted the common purpose of putting this man in fear of his life. In relation to a later incident she was present and was fully aware that the beating being visited on the victim by the officers present, including herself, amounted to serious harm. The Upper Tribunal held it was incontrovertible that her actions during this incident had a substantial effect on the commission of the crime of torture which took place. The Upper Tribunal was satisfied that her participation in this incident amounted to the aiding and abetting of a crime against humanity.

### 2.3.5.2 Joint criminal enterprise/common purpose liability

For individual responsibility to be established based on an applicant's participation in a joint criminal enterprise (or through common purpose liability), there must be a plurality of persons with a shared (common) plan or purpose that is either directed at the commission of crimes or whose implementation involves the commission of crimes. Moreover, this mode of individual responsibility requires a significant contribution to the furtherance of this common plan, or to the functioning of a system established to implement the plan. The ICTY Appeals Chamber has held that, although the accused need not have performed any part of the *actus reus* of the crime, he had to have participated in furthering the common purpose at the core of the criminal enterprise but stated that 'not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability'<sup>(181)</sup> and that the notion of '[joint criminal enterprises] is not an open-ended concept that permits convictions based on guilt by association'<sup>(182)</sup>.

Joint criminal enterprises should not immediately be the primary consideration on each occasion on which the applicant was a member of a group or organisation involved in the commission of excludable acts. Whether or not this is the relevant mode of participation, rather than, for example, aiding and abetting, will depend on the facts of the case. Thus, for example, in the case of MT Zimbabwe, the applicant's involvement in the commission of crimes against humanity as part of a joint criminal enterprise, or a co-principal, was considered but it was found that the facts of the case gave rise to individual responsibility based on aiding and abetting, since the applicant did not hold any significant leadership role<sup>(183)</sup>.

### 2.3.6 Command or superior responsibility for persons in positions of authority

In addition to the other grounds of criminal responsibility under the Rome Statute for international crimes, a military commander or superior in a civilian hierarchy, or a person effectively acting as such, shall be criminally

<sup>(178)</sup> National Court of Asylum Law (France), judgment of 15 July 2014, No 11016153C.

<sup>(179)</sup> UNGA, International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197, 9 December 1999 (entry into force: 10 April 2002), see Article 2.

<sup>(180)</sup> Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), judgment of 2 February 2012, MT (Article 1F(a) — aiding and abetting) Zimbabwe v Secretary of State for the Home Department, [2012] UKUT 00015(IAC).

<sup>(181)</sup> ICTY (Appeals Chamber), judgment of 3 April 2007, *Prosecutor v Brđanin*, IT-99-36, para. 427.

<sup>(182)</sup> *Ibid.*, para. 428.

<sup>(183)</sup> Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), MT (Article 1F(a) — aiding and abetting) Zimbabwe v Secretary of State for the Home Department, op. cit., fn. 180.

responsible for crimes committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces<sup>(184)</sup>. In cases of applicants who held positions of authority in a military or civilian hierarchy in contexts where there are indications that excludable crimes have been committed by persons forming part of these structures, asylum judges will need to consider the possibility of exclusion on this basis. However, the first step in such cases should always be to examine the direct conduct or acts of the applicant before addressing issues related to the acts of those they command and their knowledge of these acts.

In a decision of the District Court of the Hague (*Rechtbank*, Netherlands) the application of Article 1(F) Refugee Convention to a former officer in the Syrian army for crimes committed by members of his army unit was considered. It was found that the criteria for command responsibility under Article 28 of the ICC Statute were not met, since it had not been shown that subordinates under the effective command and control of the applicant had committed excludable acts<sup>(185)</sup>.

### 2.3.7 Membership

Exclusion considerations often arise in cases involving persons who acted as part of a group or organisation responsible for serious crimes or heinous acts. In such cases, too, an individualised assessment is required, including (but not limited to) situations where the group in question or the crimes committed by its members have been designated as ‘terrorist’.

The CJEU held in *B and D* that the mere fact ‘that the person concerned was a member of ... an organisation [responsible for excludable acts] cannot automatically mean that that person must be excluded from refugee status’<sup>(186)</sup>. The CJEU further held that exclusion requires a determination of individual responsibility for excludable acts, based on an individualised assessment of the specific facts, including both objective and subjective criteria<sup>(187)</sup>. The national asylum judge must assess, inter alia:

the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct<sup>(188)</sup>.

Thus, even if an applicant was a member of a group or regime involved in excludable acts, exclusion will only be justified if he or she is found to have committed such acts personally, or to have participated in the commission of these acts in one of the ways that give rise to individual responsibility.

In a decision that predates *B and D*, the United Kingdom Supreme Court held that there is a need to ‘concentrate on the actual role played by the particular persons, taking all material aspects of that role into account so as to decide whether the required degree of participation is established’<sup>(189)</sup>. The Court identified the following non-exhaustive list of relevant factors to consider in making this assessment:

- the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum seeker was himself most directly concerned;
- whether and, if so, by whom the organisation was proscribed;
- how the asylum seeker came to be recruited;
- the length of time he remained in the organisation and what, if any, opportunities he had to leave it;
- his position, rank, standing and influence in the organisation;
- his knowledge of the organisation’s war crimes activities; and
- his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes<sup>(190)</sup>.

<sup>(184)</sup> Rome Statute of the International Criminal Court, op. cit., fn. 70, Article 28.

<sup>(185)</sup> District Court of the Hague (Netherlands) judgment of 14 July 2015, AWB 14/11801, NL:RBDHA:2015:8571.

<sup>(186)</sup> *B and D*, op. cit., fn. 7, para. 88; confirmed by *H. T.*, op. cit., fn. 130, para. 87.

<sup>(187)</sup> *B and D*, op. cit., fn. 7, paras 95-96.

<sup>(188)</sup> *Ibid.*, para. 97.

<sup>(189)</sup> Supreme Court (United Kingdom), *JS v Secretary of State for the Home Department*, op. cit., fn. 134, para. 55; see also, Supreme Court (Canada), *Ezokola v Canada (Minister of Citizenship and Immigration)*, op. cit., fn. 166.

<sup>(190)</sup> *Ibid.*, para. 30.

The National Asylum Court in France held that each case requires an examination of the personal facts of the individual applicant, set against the background of what is generally known of the group, e.g. the frequency of violence employed, its command or organisational structures, the degree of fragmentation of the group and the individual's seniority in the group and their ability to influence the group's actions<sup>(191)</sup>. This case concerned the exclusion of a national of the Central African Republic, who was a high-ranking military officer and former member of the Presidential Guard at the time of serious human rights violations committed by this unit.

UNHCR has also stated that '[t]he fact that a person was at some point a senior member of a repressive government or a member of an organisation involved in unlawful violence does not in itself entail individual liability for excludable acts'<sup>(192)</sup>.

### 2.3.8 Presumption of individual responsibility

Individual responsibility for excludable acts in relation to persons affiliated or associated with repressive regimes or organisations responsible for crimes within the scope of Article 12(2), including organisations or groups designated as 'terrorist organisations or groups', may be presumed under certain circumstances. This requires, first, that their membership is voluntary. In addition, the members of such groups or regimes must be reliably and reasonably considered to be individually involved in acts giving rise to exclusion. A presumption of responsibility may also arise where the individual has voluntarily remained a member of a government clearly engaged in activities that fall within the scope of Article 12(2)<sup>(193)</sup>.

If the applicant was a member of group involved in potentially excludable crimes, this does not mean that it would be sufficient for the asylum judge to consider only facts related to that group. In such cases, the asylum judge will need to think about the nature of the group and its activities, but it will also be necessary to establish the applicant's own role, responsibilities and activities. A presumption may arise if sufficient information is available to support a finding of 'serious reasons for considering' that persons in positions such as those held by the applicant incurred responsibility for acts committed by others.

As the CJEU held in *B and D*:

Any authority which finds, in the course of that assessment, that the person concerned has ... occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted<sup>(194)</sup>.

Where information sufficient to meet the 'serious reasons for considering' standard is available, this would not result in an automatic application of Article 12(2)<sup>(195)</sup>. Rather, it means that the applicant would be entitled, as a matter of fair procedures (equality of arms), to be put on notice of the application of this presumption and the evidence on which it is based, and to be given the opportunity to rebut the presumption. Caution must, therefore, be exercised when any such presumption of responsibility arises, to consider issues including the actual activities of the individual and the group and the State should 'provide the asylum judge with evidence that is individuated, rather than based on assumptions about collective guilt or innocence'<sup>(196)</sup>.

## 2.4 Defences and mitigating circumstances

In order to make a correct determination on exclusion, circumstances which may negate individual responsibility need to be considered fully. Exclusion may not be applied if the applicant was unable to form the requisite *mens*

<sup>(191)</sup> National Court of Asylum Law (France), judgment of 7 October 2014, op. cit., fn. 141.

<sup>(192)</sup> UNHCR, Guidelines on International Protection No 5, op. cit., fn. 69, para. 19.

<sup>(193)</sup> For further information, see the section on Burden of Proof under 4.1.2 below.

<sup>(194)</sup> *B and D*, op. cit., fn. 7, para. 98.

<sup>(195)</sup> *Ibid.*, para. 88; confirmed in *H. T.*, op. cit., fn. 130, para. 87.

<sup>(196)</sup> See Hathaway, J. C. & Foster, M., op. cit., fn. 104, p. 534.

*rea*, for example, due to lack of mental capacity, involuntary intoxication or immaturity<sup>(197)</sup>. In certain circumstances, lack of knowledge of a key fact may also mean that the mental element is not satisfied<sup>(198)</sup>.

Although decisions on the application of exclusion based on Article 12(2) follow a different approach from the determination of guilt in criminal proceedings, factors that may constitute defences or mitigating circumstances to criminal responsibility should be taken into account whenever the circumstances of a case indicate that an applicant may have acted, for example, under duress or in self-defence or defence of another person<sup>(199)</sup>.

The application of an exclusion clause would not be justified if the applicant may invoke a valid defence. '[...] [I]f a person has a defence that is recognised as removing criminal responsibility, no penal consequences follow and so the conduct cannot be regarded as criminal. No crime has been committed.'<sup>(200)</sup>

Under international standards, the defence of superior orders may apply only in limited circumstances, where the individual was legally obliged to obey the order and was unaware of its unlawfulness, and where the order itself was not manifestly unlawful. The ICC Statute expressly states that orders to commit genocide or crimes against humanity are manifestly unlawful; as such, in the context of an exclusion assessment, an applicant involved in the commission of these crimes cannot invoke the defence of superior orders. Even if the defence of superior orders is not applicable, possible duress will need to be considered<sup>(201)</sup>.

The defence of duress (or coercion) may apply where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to them or another person. Action taken in self-defence or in defence of others or in defence of property must be both reasonable and proportionate in relation to a threat resulting from an unlawful attack.

Even if the circumstances do not meet the requirement of a full defence, elements of duress or coercion, for example, may be considered as mitigating circumstances, to be considered when assessing the extent of culpability of an applicant. Aggravating factors, such as the use of others including civilians and minors in the commission of the excludable act, or the pre-existence of criminal convictions, would also need to be taken into account as part of this process<sup>(202)</sup>.

## 2.5 Expiation

The relevance of expiation is the subject of discussion. This issue has not yet been taken into account by CJEU. The various conceptions reflect the differing perspectives on the objective of exclusion laid down in Article 12(2).

According to one view, expiation is of little influence and should be afforded scant assessment. With regard to the objective of Article 12(2), to exclude from refugee status persons who are deemed to be undeserving of the protection in order to maintain the credibility of the protection system<sup>(203)</sup>, it is not necessary that the applicant must still be liable to criminal prosecution or punishment<sup>(204)</sup>. Expiation or obstacles to prosecution in the law of criminal procedure (e.g. having served the sentence, been acquitted of the charges due to a lack of evidence, prescription or an amnesty) are appropriate only in connection with one part of the dual objective of exclusion<sup>(205)</sup>, namely preventing refugee status from enabling those who have committed certain serious crimes to escape criminal liability. But the aim of excluding from refugee status persons who are deemed to be undeserving of the protection also applies to cases of expiation or obstacles to prosecution. Therefore these points do not have an irrefutable impact on the question of issue of whether the person concerned should be considered eligible for refugee status.

<sup>(197)</sup> UNHCR, *Guidelines on International Protection No 5*, op. cit., fn. 69, para. 21; see also *Convention on the Rights of the Child*, op. cit., fn. 83, and the application of the minimum age of criminal responsibility.

<sup>(198)</sup> Compare concerning Article 12(2)(b) above 2.2.3.1.

<sup>(199)</sup> *Rome Statute of the International Criminal Court*, op. cit., fn. 70, Article 31(1)(c) and (d); UNHCR, *Background Note on the application of Exclusion Clauses*, op. cit., fn. 135, paras 66-71.

<sup>(200)</sup> Administrative Appeals Tribunal (Australia), *Re YYMT and FRFJ* (2010), op. cit., fn. 105, quoted in Hathaway, J. C. and Foster, M., op. cit., fn. 104, p. 553.

<sup>(201)</sup> *Rome Statute of the International Criminal Court*, op. cit., fn. 70, Articles 31 and 33.

<sup>(202)</sup> See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, op. cit., fn. 103, para. 157

<sup>(203)</sup> See above: 2.2.1.1 The Objective.

<sup>(204)</sup> Rikhof, J., op. cit., fn. 124, p. 319 seq.; See Supreme Court (Canada), judgment of 30 October 2014, *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, para. 36.

<sup>(205)</sup> *B and D*, op. cit., fn. 7, para. 104.

Nevertheless the objective of Article 12(2) allows and mandates an assessment of the offence in the past and the person's conduct in the meantime to decide whether he or she is deserving of protection. Notwithstanding previous misconduct, the passage of a certain period of time, combined with expressions of remorse, reparation and assuming responsibility for previous acts may justify the assessment that exclusion is no longer justified. For example, in the case of previous support for terrorist activities, such an exceptional case was deemed conceivable by the Federal Administrative Court if the individual has not only convincingly distanced himself from his former acts, but now actively works to prevent further acts of terrorism or if the act was youthful folly years or even decades in the past <sup>(206)</sup>.

As representing the other view, the French Council of State <sup>(207)</sup> held that the exclusion clause is no longer applicable if the applicant has served his sentence. Following this view other factors are also relevant, in particular whether the crime would no longer be prosecuted or prosecutable <sup>(208)</sup>. Relevant factors would include the length of the sentence served, the passage of time since the commission of the crime or the end of service of sentence, together with any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. In all such cases, the gravity of the offence may still justify the application of Article 12. The issue then is whether the applicant should still be considered undeserving of refugee protection and whether denial of refugee status in their case would be consistent with the object and purpose of exclusion based on the crime committed before the determination of the asylum claim. This would need to be examined on a case-by-case basis, taking the appropriate criteria into account. This jurisprudence is largely coherent with the position of UNHCR <sup>(209)</sup>.

<sup>(206)</sup> Considered possible by the Federal Administrative Court (Germany), decision of 14 October 2008, 10 C 48.07., DE:BVerwG:2008:141008810C48.07.0, BVerwGE 132, p. 79, para. 34.

<sup>(207)</sup> Council of State (France), judgment of 4 May 2011, No 320910; however, with the exception that there is no danger arising from the previous punished crime for the population of the host country. This conception, which focuses on a current or future danger or a risk, seems hardly to be compatible with the position in *B and D*, op. cit., fn. 7, para 101.

<sup>(208)</sup> Hathaway, J. C. and Foster, M., op. cit., fn. 104, p. 543 seq.

<sup>(209)</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, op. cit., fn. 103, para. 157.

## 3. Exclusion from subsidiary protection (Article 17)

### 3.1 Introduction

During the drafting of QD 2004/83/EC, it was decided to introduce exclusion clauses similar to those of the Refugee Convention in respect of subsidiary protection (for an overview of exclusion from refugee protection, see section 2 above). This resulted in Article 17(1)(a)-(c) QD (recast). Moreover, in the aftermath of 11 September 2001, an additional exclusion clause to those stipulated in the Refugee Convention was added, Article 17(1) (d). This provision aims to prevent any person found to pose a danger to security or the community, including due to involvement in terrorist activities, from seeking and being granted subsidiary protection in the EU <sup>(210)</sup>.

### 3.2 Article 17(1) — Exclusion grounds

#### 3.2.1 Article 17(1)(a) — Crime against peace, war crime or crime against humanity

Article 17(1)(a) reproduces Article 12(2)(a) in the context of subsidiary protection and mirrors Article 1(F)(a) of the Refugee Convention. It should be construed in the same way as Article 12(2)(a), the rationale being the same, namely that the authors of such acts are considered undeserving of international protection (see above 2.2.2). Therefore, the principles set out in the jurisprudence of the CJEU concerning exclusion from refugee protection are relevant in cases of exclusion from subsidiary protection.

#### 3.2.2 Article 17(1)(b) — Serious crime

Article 17(1)(b) is construed in the same way as Article 12(2)(b) and Article 1(F)(b) of the Refugee Convention in that a grave punishable act must have been committed. Minor offences punishable by moderate sentences cannot constitute grounds for exclusion under that provision (see above 2.2.3.1 and 2.2.3.2). However, Article 17(1) (b) differs in two aspects from these provisions. First, in respect of the material scope of the provision, it encompasses both non-political and political crimes. Second, there is no temporal or territorial restriction in respect of the commission of the crime(s). This means that such crimes may result in the application of the exclusion clause irrespective of the time and location of the commission of the offence.

The German Federal Administrative Court established that facilitating international people smuggling for gain is a serious crime within the meaning of Article 17(1)(b). A serious crime, according to this court, must be commensurate with a felony or any other crime that is qualified in most jurisdictions as very serious and will be prosecuted in accordance with criminal law. Applying these standards to the crime mentioned is one of significant importance within the meaning of Article 17(1)(b), because it is punishable by imprisonment from 1 year to 10 years. Also the specific criminal conduct by the applicant was grave, as indicated by the 5 year term of imprisonment imposed. The court rejected the applicant's argument that the criminal offenses occurred a long time in the past and that he no longer represents a danger. It was found by the German court that an applicant who has committed a serious crime can be considered not deserving of protection and must be excluded even if there is no (longer a) risk of repeat offences and no other immediate danger for the State of residence <sup>(211)</sup>.

<sup>(210)</sup> Boggia Cosadia, F., 'Protection subsidiaire et menace à l'ordre public: l'application de la clause d'exclusion de l'article 17(1)(d) de la directive 2004/83/CE du Conseil de l'Union européenne en France', in V. Chetail and C. Laly-Chevalier (eds.), *Asile et extradition: Théorie et pratique de l'exclusion du statut de réfugié*, Bruylant, 2014, p. 122; Guild, E. and Garlick, M., 'Refugee protection, counter-terrorism and exclusion in the European Union', *Refugee Studies Quarterly*, Vol. 29, No 4, 2010, p. 63; McAdam, J., 'The European Qualification Directive: The Creation of a Subsidiary Protection Regime', *International Journal of Refugee Law*, Vol. 17, 2005, p. 461.

<sup>(211)</sup> Federal Administrative Court (Germany), judgment of 25 March 2015, 1 C 16.14, DE:BVerwG:2015:250315U1C16.14.0, para. 26 seqq.

In Austria, the *Verfassungsgerichtshof* (Constitutional Court) has provided guidance on the interpretation of the notion of the level of seriousness required that could lead to an exclusion from subsidiary protection. It should be noted that in this particular case, the court quashed a decision by the National Asylum Court in which the subsidiary protection that had been granted by the administrative decision-maker was revoked, rather than an exclusion clause applied. Nonetheless, many aspects of the judgment apply (by analogy) to cases of exclusion. The revocation was made on the ground of thefts committed by the applicant (theft, attempted theft, incitement to or involvement in theft, embezzlement, attempted petty theft). The Constitutional Court considered that the seriousness of the crime required in Article 17 was not met. In so doing, the court seemed to reject the possibility of an exclusion based on a substantial number of relatively minor offences, thereby reducing the scope of application of a cumulative approach in such cases. The applicant, while sentenced for the simple offences, had not been sentenced for more serious offences that would therefore have carried a more severe punishment. For the Austrian Constitutional Court, interpreting, inter alia, Article 17 QD only ‘serious crimes’ could lead to the withdrawal of subsidiary protection, but not several trivial offences <sup>(212)</sup>.

In France, while assessing the constitutionality of the law modifying the Code of Entry and Residence of Foreigners and Asylum Law, the Conseil Constitutionnel (Constitutional Council) also provided guidance on the interpretation of the notion of ‘serious crime’ for the purpose of exclusion from subsidiary protection. It stated that the seriousness of an offence that could result in a person being excluded from the benefit of subsidiary protection can only be assessed in light of the French criminal law. It was legitimate for the Parliament to defer to the discretion of the French Office for the Protection of Refugees and Stateless Persons, subject to review by the Refugees Board of Appeals (former National Asylum Court), to examine the applicant’s practical situation in depth and to then assess whether the facts, in view of their nature, the conditions in which they were committed and the seriousness of the loss sustained by the victims, were a ‘serious offence against the ordinary criminal law’ that justifies exclusion from subsidiary protection <sup>(213)</sup>. The guidance provided in the judgment of the Constitutional Council was then applied by the French National Asylum Court and the Council of State in assessing the seriousness of a crime in cases of the application of the relevant exclusion clause from subsidiary protection. For example, the Court considered financial and economic crimes which did not cause damage to persons as not being a serious crime <sup>(214)</sup>.

### 3.2.3 Article 17(1)(c) — Acts contrary to the purposes and principles of the United Nations

Article 17(1)(c) reproduces Article 12(2)(c). Consequently, the interpretation provided by the CJEU in its *B and D* judgment is relevant (see above 2.2.4).

The Czech *Nejvyšší správní soud* (Supreme Administrative Court) held that this exclusion clause should be interpreted in a restrictive manner and does not include all human rights abuses. Engaging in mere intelligence gathering activities cannot, as such, be taken as an act contrary to the purposes and principles of the United Nations. In that particular case, the applicant, a Cuban national, lived in communist Czechoslovakia where he was an informer for the Cuban government. The Czech Supreme Administrative Court applied a relatively high threshold that reflects the restrictive interpretation and application of exclusion clauses. It held that in order to trigger the threshold to activate the exclusion clause, the actions must constitute a serious and continuous human rights abuse which could be considered to amount to persecution <sup>(215)</sup>.

### 3.2.4 Article 17(1)(d) — Danger to the community or security of the Member State

Article 17(1)(d) mirrors the exception of the prohibition against *refoulement* in Article 33(2) Refugee Convention. This provision differs from Article 1(F) Refugee Convention. Article 1(F) Refugee Convention, similar to Article 12(2) QD (recast), applies to persons who have a well-founded fear of being persecuted but are not eligible to

<sup>(212)</sup> Constitutional Court (Austria), judgment of 13 December 2011, U 1907/10.

<sup>(213)</sup> Constitutional Council (France), judgment of 4 December 2003, concernant la loi No 52-893 du 25 juillet 1952 relative au droit d’asile, No 2003-485 DC.

<sup>(214)</sup> National Court of Asylum Law (France), judgment of 23 May 2013, *M.U.*, No 11010862.

<sup>(215)</sup> Supreme Administrative Court (Czech Republic), judgment of 23 March 2011, *J.S.A. v Ministry of Interior*, 6 Azs 40/2010-70.



international protection because of actions committed in the past. Article 33 Refugee Convention is relevant for persons who have already been recognised as refugees: they are protected by the principle of ‘*non-refoulement*’ with the exception provided for in paragraph 2. Article 33 of the Refugee Convention has always been construed as a provision of last resort. On the one hand, this exception gives prevalence to security issues within the receiving state over potential risks that a recognised refugee may face in case of return to his or her country of origin. On the other hand, asylum authorities exercise a discretionary authority in respect of policing and security matters, far from their genuine mission <sup>(216)</sup>.

The French case-law has held that the application of Article 17(1)(d) is limited to specific cases, in which there were serious reasons to consider that the applicant was implicated in acts related to international terrorism, suspicion of organised crime or international drug trafficking and also particularly egregious sexual aggression. The acts in question may be committed outside the applicant’s country of origin and after he or she had left his or her country. In all cases, the acts considered were committed on French territory and/or on the territory of one or more Member States before the applicant’s entry in France. The provision may be applied in a stand-alone manner or in combination with other exclusion clauses. It was applied on its own to a Kosovar who committed drug-related crimes and trafficking as well as having a long history as a persistent offender <sup>(217)</sup>. The applicant had been implicated in several criminal procedures in Kosovo and in European countries and sentenced to 3 years of imprisonment in Switzerland. Another case involved a Turkish national implicated in an assassination attempt in Belgium, who was subsequently sentenced in the Netherlands to 16 years imprisonment for ‘murder, drug offences, carrying of prohibited weapons, abduction and recidivism’ as well as being prosecuted in Turkey for drug trafficking and money laundering. Moreover he was subjected to an alert in the Schengen area <sup>(218)</sup>. In another case, Article 17(1)(d) was applied in combination with Article 17(1)(b) concerning Moroccan nationals involved in the perpetration of terrorist acts and activities, either by incitement to committing such acts and providing assistance to perpetrators of such acts <sup>(219)</sup>, or more direct involvement in the preparation of terrorist acts <sup>(220)</sup>. The applicant in the first case was a Moroccan national who was subject to an arrest warrant issued by Interpol for ‘criminal association to commit terrorist acts’ and a request for extradition filed by the Moroccan authorities and had also been reported by the French authorities for his close relation to the international jihadist movement, specifically al-Qaeda. The second case concerned an applicant who had been sentenced in France to 5 years of imprisonment and a permanent exclusion from French territory for ‘criminal association to prepare a terrorist act’. Although he had served his sentence he was considered to represent a threat to French public order, public safety or state security.

Article 17(1)(d) was not applied, however, and subsidiary protection was granted to a Nigerian citizen who had previously been involved in prostitution. She has been sentenced to 12 months’ imprisonment for prostitution offences. However, she had subsequently managed to exit the network and testified against it in a series of other criminal prosecutions. Her sentence, considered in conjunction with the nature of the offences committed, was not deemed to be sufficiently grave so as to permit the conclusion that she constituted a serious threat to public order <sup>(221)</sup>.

### 3.3 Article 17(2)

When applying Article 17(2), the same principles and criteria as set out in Article 12(3) concerning individual responsibility are applicable (see section 2.3 above).

### 3.4 Article 17(3)

Article 17(3) allows Member States to exclude an individual from subsidiary protection for crimes outside the scope of paragraph 1. It is noteworthy that this exclusion clause in respect of subsidiary protection has a wider reach than those for refugee protection. Having said that, certain criteria must also be fulfilled in accordance with

<sup>(216)</sup> Boggia Cosadia, F., op. cit., fn. 210., p. 137.

<sup>(217)</sup> National Court of Asylum Law (France), judgment of 29 June 2012, *Mr A.*, No 10014511.

<sup>(218)</sup> National Court of Asylum Law (France), judgment of 20 September 2012, *Mr M.*, No 10018884.

<sup>(219)</sup> National Court of Asylum Law (France), judgment of 21 April 2011, *Mr R.*, No 10014066.

<sup>(220)</sup> National Court of Asylum Law (France), judgment of 15 February 2013, *Mr B.*, No 10005048.

<sup>(221)</sup> Commission for Refugee Matters (France), decision of 1 February 2006, *Ms O.*, No 533907.

the QD (recast), namely that the act must have been committed outside the country of refuge prior to admission; it must be an offence that is punishable by imprisonment; and the applicant has fled the relevant country of origin to avoid punishment.

This provision addresses the problem posed by fugitives from justice. Crimes that would result in imprisonment following a conviction and that are committed prior to admission to a Member State would result in an individual being excluded from subsidiary protection if they would be punishable by imprisonment had they been committed in the Member State concerned. This provision is qualified, however, in that it only applies where 'he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes'. The limited scope of this provision is indicated by the use of the word 'solely', which indicates that a person who fled for diverse reasons, one of which may have been that he or she intended to avoid sanctions, does not come within the scope of the provision.

## 4. Procedural aspects

### 4.1 Serious reasons for considering

#### 4.1.1 Standard of proof

It seems to be generally agreed that the standard of proof when determining exclusion is less than both the criminal standard (beyond reasonable doubt) and the civil standard (balance of probabilities)<sup>(222)</sup>. As regards the former, the United Kingdom Court of Appeal in *Al-Sirri v Secretary of State for the Home Department* (223) expressly refuted the argument that the criminal standard was applicable and this was endorsed subsequently by the Supreme Court (224). While appraisal somewhat depends on judicial traditions, common law or civil, the general view has been that the bar is set lower than a balance of probabilities (225). Indeed, there seems to be an increasing acceptance that it is preferable simply to take the words as meaning what they say, rather than trying to paraphrase them (226). The Supreme Court in *Al-Sirri* came to the following conclusions.

- ‘Serious reasons’ is stronger than ‘reasonable grounds’.
- The evidence from which those reasons are derived must be ‘clear and credible’ or ‘strong’.
- ‘Considering’ is stronger than ‘suspecting’. In [the Court’s] view it is also stronger than ‘believing’. It requires the considered judgment of the decision-maker.
- The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
- It is unnecessary to import domestic standards of proof into the question. The circumstances of refugee claims and the nature of the evidence available are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case.<sup>(227)</sup>

The United Kingdom Court of Appeal held that even where a decision-maker applies a balance of probabilities standard, this is unlikely to cause a legal error (228). Ultimately, national rules of procedure will play a role in making the determination as to the standard applicable, however, guided by the aforementioned authorities.

UNHCR, drawing on Swiss case law, considers that ‘exclusion does not require a determination of guilt in the criminal justice sense’ and that ‘the balance of probabilities is too low a threshold’ (229).

#### 4.1.2 Burden of proof

The burden of proving that the exclusion criteria are fulfilled is on the State. However, it is possible for the burden to shift. For example, if the applicant claims to be a senior official of an oppressive regime or of an organisation which commits violent crimes, a presumption of exclusion may arise.

<sup>(222)</sup> Carlier, J.-Y. and d’Huart, P., ‘L’exclusion du statut de réfugié: cadre général’, in V. Chetail and C. Laly-Chevalier (eds.), *Asile et extradition: Théorie et pratique de l’exclusion du statut de réfugié*, Bruylant, 2014, pp. 7-9.

<sup>(223)</sup> Court of Appeal (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 151, para. 33 seq; see also Federal Court of Appeal (Canada), *Sing v Canada (Minister of Employment and Immigration)*, [2005] FCA 125.

<sup>(224)</sup> Supreme Court (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 92, para. 75(4).

<sup>(225)</sup> See Federal Administrative Court (Germany), judgment of 24 November 2009, op. cit., fn. 62, para. 35; Council of State (France), judgment of 18 January 2006, No 225091.

<sup>(226)</sup> See again Court of Appeal (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 151, para. 33; Supreme Court (New Zealand), judgment of 20 October 2009, *Tamil X v Refugee Status Appeals Authority; Attorney-General (Minister of Immigration) v Y*, [2010] NZSC 107, [2011] 1 NZLR 721.

<sup>(227)</sup> Supreme Court (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 92, para. 75.

<sup>(228)</sup> Court of Appeal (United Kingdom), judgment of 9 July 2015, *AN (Afghanistan) v Secretary of State for the Home Department*, [2015] EWCA Civ 684; similarly, Supreme Administrative Court (Czech Republic), *J.S.A. v Ministry of Interior*, op. cit., fn. 215; it can also be noted that the Supreme Court of Canada, for its part, considers that the notion of ‘serious reasons for considering’ in Article 1(F) Refugee Convention is less strict than that applied in a criminal trial, but that it requires more than simple suspicion, see Supreme Court (Canada), *Ezokola v Canada (Minister of Citizenship and Immigration)*, op. cit., fn. 169, para. 101.

<sup>(229)</sup> See UNHCR, Background Note on the Application of the Exclusion Clauses, para. 107.

Following the CJEU's decision in *B and D*, two presumptions are legitimate.

— On the collective level: The inclusion of an organisation on a list such as that which forms the Annex to Common Position 2001/931 makes it possible to establish the terrorist nature of the group of which the person concerned was a member. This is a factor which the competent authority must take into account when determining, initially, whether that group has committed acts falling within the scope of Article 12(2)(b) or (c). But the CJEU highlighted that the circumstances in which an organisation has been placed on that list cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status <sup>(230)</sup>.

— On the individual level: Any authority which finds that the person concerned has occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period. But nevertheless the CJEU underlines that it remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status can be adopted <sup>(231)</sup>.

### 4.1.3 No criminal conviction necessary

The general view is that it is not necessary for the applicant to have been convicted of a criminal offence <sup>(232)</sup>. Regard must be had to the substantive content of the crime and it is necessary that '[...] such evidence as has been found to be solid must, overall, conform to the established and uncontested grounds for a relevant form of criminal liability' <sup>(233)</sup>. For example, a child would have to have reached the age of criminal responsibility, and defences such as duress may be relevant. This raises however the question of the relevant criminal law standard. As some academic commentators suggest, the evidence would have to conform to established and uncontested grounds for a relevant form of criminal liability <sup>(234)</sup>.

In the case-law of national courts, the Finnish *korkein hallinto-oikeus* (Supreme Administrative Court), for example, underlined that the concept of exclusion from international protection must be separated from the criminal law concepts of indicting and adjudicating. It does not require a finding of guilt, a criminal judgment or the filing of an indictment. However, the proof for suspicion must be reliable, credible, convincing and more pronounced than a suspicion or a claim. In this case, the applicant was excluded from subsidiary protection under Article 17(1) (b) because of being suspected of committing aggravated rape in Finland. His criminal case had been transferred to a prosecutor for consideration of a possible indictment. Consequently, the court found that this was enough reason to suspect on 'reasonable grounds' that the applicant had committed a serious crime and hence exclude the individual from protection <sup>(235)</sup>.

## 4.2 Individual assessment

The basic principles of procedural fairness remain important, despite the lowered standard of proof. It is clear that there must be an individuated assessment in each case, rather than assumptions about collective innocence or guilt being made <sup>(236)</sup>. Examples of the types of evidence which may be taken into account include Country of Origin Information (COI), statements of the applicant and among them confessions of involvement for instance, credible testimonies of witnesses, indictments or convictions by an international court or tribunal, convictions by national courts (assuming fair trial guarantees have been assured) or extradition requests. Whether or not such evidence can be relied upon in determining that the applicant has incurred individual responsibility for

<sup>(230)</sup> *B and D*, op. cit., fn. 7, para. 90 seq.

<sup>(231)</sup> *Ibid.*, para. 98.

<sup>(232)</sup> Please note that a reference for a preliminary ruling has been made from a Belgian court to the CJEU seeking further clarification on this issue: CJEU, Case C-573/14, *Commissaire general aux réfugiés et aux apatrides v Mostafa Lounani*, EU:T:2015:365; See e.g. Supreme Court (United Kingdom), *Al-Sirri v Secretary of State for the Home Department*, op. cit., fn. 92, para. 71; Council of State (The Netherlands), judgment of 15 October 2014, ABRvS 201405219; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, op. cit., fn. 103, para. 149.

<sup>(233)</sup> Hathaway, J. C. and Foster, M., op. cit., fn. 104, p. 536.

<sup>(234)</sup> *Ibid.*, p. 536.

<sup>(235)</sup> Supreme Administrative Court (Finland), judgment of 18 February 2014, KHO:2014:35 ruled on the notion of 'seriousness of reasons to believe' and the threshold for exclusion.

<sup>(236)</sup> *B and D*, op. cit., fn. 7, para. 87. The Court was, however, prepared to endorse a presumption of individual responsibility where the case involved a senior officer of an organisation which was known to commit relevant crimes (see para. 98). See also UNHCR, *Background Note*, op. cit., fn. 135, para. 35.

an excludable act needs to be assessed on a case-by-case basis, in light of the particular circumstances of the applicant <sup>(237)</sup>.

The CJEU has held that:

it is clear from the wording of those provisions of Directive 2004/83 that the competent authority of the Member State concerned cannot apply them until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses <sup>(238)</sup>.

The Court went on to note that ‘individual responsibility must be assessed in the light of both objective and subjective criteria’ <sup>(239)</sup>. The CJEU confirmed the requirement of an ‘individual assessment of the specific facts’ on a case-by-case basis in a later judgment concerning Article 24(1), thereby referring to its decision in *B and D* <sup>(240)</sup>.

The Austrian Asylum Court based the exclusion of a member of the Taliban who had acted as a ‘bodyguard’ of a Taliban commander on the assumption that he had committed a crime against humanity purely on the applicant’s own admission. The Austrian Constitutional Court granted the applicant’s appeal because the Asylum Court’s decision lacked a sufficient base. The Asylum Court had made an assumption as to the existence of a ground for exclusion solely on the basis of the statement made by the appellant without making further inquiries as to what actions are to be attributed to the commander of the applicant during the Taliban’s rule. The lower court also failed to assess the nature of the position and responsibilities assigned to the ‘bodyguard’ of a commander within the overall Taliban military system <sup>(241)</sup>.

<sup>(237)</sup> Article 4(3) QD (recast) requires that ‘The assessment of an application for international protection is to be carried out on an individual basis...’ and it follows that the facts as they relate to exclusion, form part of the assessment of the application. It is also important that a decision-maker is consistent in the consideration of all evidence, e.g. in its judgment of 2 August 2012, *H.R. v Ministry of Interior*, 5 Azs 2/2012-49, the Czech Supreme Administrative Court found that the administrative body had erred in not considering, on the one hand, the testimony of the applicant to be credible for the purposes of evaluation of fear of persecution but, on the other hand, concluding that the same testimony (that the applicant had been involved in the Iraqi army during the regime of Saddam Hussein) was proof for the purposes of applying exclusion.

<sup>(238)</sup> *B and D*, op. cit., fn. 7, para. 87.

<sup>(239)</sup> *Ibid.*, para. 96.

<sup>(240)</sup> *H. T.*, op. cit., fn. 130, paras 84, 86 and 89.

<sup>(241)</sup> Constitutional Court (Austria), judgment of 11 June 2012, 1092/11.

# APPENDIX A — SELECTED RELEVANT INTERNATIONAL PROVISIONS

## ROME STATUTE

### Article 5

#### Crimes within the jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) the crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) the crime of aggression (not in force yet).

### Article 6

#### Genocide

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

### Article 7

#### Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
- (b) extermination;
- (c) enslavement;

- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) enforced disappearance of persons;
- (j) the crime of apartheid;
- (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) ‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
- (b) ‘extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) ‘enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) ‘deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) ‘torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) ‘forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) ‘persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) ‘the crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) 'enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

## Article 8

### War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Refugee Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) wilful killing;
- (ii) torture or inhuman treatment, including biological experiments;
- (iii) wilfully causing great suffering, or serious injury to body or health;
- (iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) unlawful deportation or transfer or unlawful confinement;
- (viii) taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Refugee Conventions, resulting in death or serious personal injury;



- (viii) the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) declaring that no quarter will be given;
- (xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) pillaging a town or place, even when taken by assault;
- (xvii) employing poison or poisoned weapons;
- (xviii) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123;
- (xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f), enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) taking of hostages;
- (iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

(d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) pillaging a town or place, even when taken by assault;
- (vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f), enforced sterilisation, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
- (vii) conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities;
- (viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) killing or wounding treacherously a combatant adversary;
- (x) declaring that no quarter will be given;
- (xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (xiii) employing poison or poisoned weapons;
- (xiv) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xv) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

(f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence

or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.

3. Nothing in paragraph 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

## **Article 25**

### **Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) be made in the knowledge of the intention of the group to commit the crime;

(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

## **Article 28**

### **Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

### **Article 30**

#### **Mental element**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) in relation to conduct, that person means to engage in the conduct;

(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

### **Article 31**

#### **Grounds for excluding criminal responsibility**

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner

proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) made by other persons; or
- (ii) constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

## **Article 32**

### **Mistake of fact or mistake of law**

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 33.

## **Article 33**

### **Superior orders and prescription of law**

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) the person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) the person did not know that the order was unlawful; and
- (c) the order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

## **CHARTER OF THE UNITED NATIONS**

### **Article 1**

The Purposes of the United Nations are:

- 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of

justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonising the actions of nations in the attainment of these common ends.

## Article 2

The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organisation is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

# APPENDIX B — DECISION TREES

## Preliminary remarks

The Decision Trees that follow are intended to provide guidance to members of courts and tribunals when deciding cases involving the application of exclusion clauses. It should be noted that there is potentially some amount of overlap between the exclusion grounds. In any given case, more than one exclusion ground may be applicable, either to different acts or crimes or with regard to the same conduct which may constitute, for example, serious non-political crimes as well as acts contrary to the purposes and principles of the United Nations. When using these Decision Trees, members of courts and tribunals are invited to bear this in mind.

Certain other general considerations apply to all Decision Trees as follows.

- Where the facts of the case do not indicate that the relevant acts were committed during an armed conflict, ‘war crimes’ cannot apply.
- Where the facts of the case do not indicate that the relevant acts were committed during an international armed conflict, ‘crimes against peace’ cannot apply.
- Where the applicant was under the age of criminal responsibility at the time when acts with which he or she may have been associated took place, exclusion clauses cannot apply.

### Article 12 — refugee protection

<b>Article 12(1) QD</b>	
Article 12(1) deals with persons excluded from being a refugee as they are not in need of protection. It consists of 2 sub-paragraphs that may be considered independently of one another.	
<b>Article 12(1)(a) QD</b>	
<b>A. Is the applicant already protected under Article 1(D) of Refugee Convention, by UNRWA / UN organs or agencies other than UNHCR?</b>	
	<ol style="list-style-type: none"> <li>1. Was Palestine the applicant’s <b>normal place of residence</b> during the entire period between June 1946 and May 1948</li> </ol> <p><b>AND</b></p> <p>has he/she lost <b>both home and means of livelihood</b> as a result of 1948 conflict</p> <p><b>OR</b></p> <p>was he/she <b>permanently displaced</b> as a result of the 1967 conflict?</p>
<b>AND</b>	
	<ol style="list-style-type: none"> <li>1. Has the applicant actually <b>availed him/herself</b> of UNRWA assistance?               <ol style="list-style-type: none"> <li>a. Proof of <b>registration</b> with UNRWA should exist;</li> <li>b. In the absence of such proof of registration, the applicant may adduce <b>evidence of assistance</b> by other means.</li> </ol> </li> </ol>
<b>AND</b>	
	<ol style="list-style-type: none"> <li>1. Has ‘such protection or assistance [...] ceased for any reason’?               <ol style="list-style-type: none"> <li>a. Does <b>UNRWA still exist</b> or is it able to carry out its mission within its assigned area of operations?</li> <li>b. Was the applicant <b>forced</b> to leave UNRWA’s area of operations? (e.g. his/her life was at risk and the Agency was unable to guarantee that his/her living conditions in that area could meet the Agency’s objectives)</li> <li>c. Is it possible for the applicant to return to a UNRWA mandate area and place him/herself back under protection?</li> </ol> </li> </ol>

<b>Article 12(1)(b) QD</b>	
<b>B. Is the applicant already protected by the competent authorities of his/her country of residence.</b>	
	<ol style="list-style-type: none"> <li>1. Does the applicant enjoy ‘rights and obligations attached to the possession of the <b>nationality</b> of this country’? <ol style="list-style-type: none"> <li>a. At a minimum, is the applicant protected against <b>deportation and expulsion</b> from the country of residence?</li> <li>b. Does the applicant enjoy <b>freedom of movement</b> while on the country’s national territory? This should be noted as including the right to leave and re-enter the country.</li> <li>c. Is this level of protection sufficient to consider that the applicant is <b>effectively protected</b> and therefore cannot be considered a refugee?</li> </ol> </li> </ol>
<b>AND</b>	
	<ol style="list-style-type: none"> <li>1. Has the applicant effectively established <b>residency</b> in a country? <ol style="list-style-type: none"> <li>a. Is it proven that the applicant is <b>not merely in transit</b> or visiting someone?</li> <li>b. Has the applicant credibly established <b>permanent stay</b> with regard to the centre of his/her personal and/or family interests?</li> </ol> </li> </ol>
<b>C. Exclusion from refugee protection</b>	
<p>If the cumulative criteria identified in <b>Section A</b> are met, the applicant does not depend on the protection of refugee status because he/she already enjoys the protection of the United Nations.</p> <p>If the cumulative criteria identified in <b>Section B</b> are met, the applicant does not depend on the protection of refugee status because he/she already enjoys the protection of the country of residence.</p> <p>In both cases, the outcome is then that the applicant can be excluded from refugee protection.</p>	
<b>Article 12(2) QD</b>	
<p>Article 12(2) deals with persons excluded from being a refugee as they are deemed to be undeserving of this protection. The three sub-paragraphs contained in Article 12(2)(a), (b) and (c) respectively are <b>non-hierarchical</b>. Based on the factual scenario presented, it will be necessary to determine which sub-paragraph is engaged. More than one sub-paragraph can be simultaneously engaged.</p>	
<b>Article 12(2)(a) QD</b>	
<b>A. It must be considered whether the facts of the case raise potential exclusion issues with regard to acts that may constitute <u>international</u> crimes within the meaning of Article 12(2)(a) QD.</b>	
	<ol style="list-style-type: none"> <li>1. Does the factual situation involve an <b>international armed conflict</b>?</li> <li>2. If no, crimes against peace cannot be considered.</li> <li>3. If yes, the possibility of the application of Article 12(2)(a) ‘<b>crimes against peace</b>’ must be considered: <ol style="list-style-type: none"> <li>a. Were the acts in question related to planning, preparing, initiating or waging of a <b>war of aggression</b> or a war in violation of international treaties, agreements or assurances?</li> </ol> </li> </ol>
	<b>AND</b>
	<ol style="list-style-type: none"> <li>b. Did the person concerned hold a <b>position of authority</b> within a State?</li> <li>4. Does the factual situation involve acts that occurred during an <b>armed conflict</b>?</li> <li>5. If no, war crimes cannot be considered.</li> </ol>
	<ol style="list-style-type: none"> <li>6. If yes, the possibility of an application of Article 12(2)(a) ‘<b>war crimes</b>’ must be considered: <ol style="list-style-type: none"> <li>a. Did an armed conflict exist at the relevant time, and if so, was the armed conflict international or non-international in character? In the case of international armed conflicts, the possible application of Article 12(2)(a) ‘crimes against peace’ should be considered.</li> <li>b. Was there a <b>link (nexus)</b> between the acts in question and the armed conflict?</li> <li>c. If the nexus existed, do the acts in question meet the <b>definition of a war crime under the applicable international standards and jurisprudence</b> (in particular: ICC Statute (see also Elements of Crimes), 1949 Geneva Conventions and 1977 Additional Protocols, ICTY Statute, ICTR Statute)?</li> </ol> </li> </ol>



	<p>7. Do the acts in question fall within Article 12(2)(a) — ‘<b>crimes against humanity</b>’?</p> <p>a. Do the acts in question fall within the definition of the underlying <b>serious crimes</b> provided for in Article 7 of the ICC Statute?</p> <p><b>AND</b></p> <p>b. Did the acts in question occur as part of a <b>widespread or systematic attack</b> against a civilian population?</p>
<p><b>B. If it has been determined that acts within the scope of Article 12(2)(a) have taken place, does the person concerned incur individual responsibility for these acts?</b></p>	
	<p>1. In light of the relevant definitions of the crime(s) in question and depending on the mode of individual responsibility, does the conduct of the person concerned meet the <b>actus reus</b> and <b>mens rea</b> requirements?</p> <p>a. Did the person concerned incur individual responsibility as <b>perpetrator</b> of the crimes in question?</p> <p>b. Did the person concerned incur individual responsibility for the commission of crimes <b>by other persons</b> that fall within the scope of Article 12(2)(a)?</p> <p>These questions relate to persons who incite or otherwise participate in the commission of the crimes or acts in Article 12(2) QD. This could include planning, ordering, soliciting, instigating, or otherwise inducing the commission of such crime by another person, or by making a contribution to it through aiding and abetting or on the basis of participation in a joint criminal enterprise.</p> <p>c. If appropriate when examining the <i>mens rea</i>, are the circumstances such that they may <b>negate individual responsibility</b>, e.g. lack of mental capacity, involuntary intoxication or immaturity?</p>
<p>If one of the three exclusion grounds enumerated under Article 12(2)(a) is found to be relevant and applicable and the criteria for establishing individual responsibility are satisfied, serious consideration should be given to excluding the applicant.</p> <p>Although a presumption of individual responsibility applies in situations where sufficient information to meet the standard of ‘serious reasons for considering’ is provided, individuated evidence should still be considered and the applicant given the opportunity to rebut the presumption.</p>	
	<p>2. If the <i>actus reus</i> and <i>mens rea</i> requirements are otherwise met, could any of the following factors <b>exonerate</b> the applicant from his personal responsibility?</p> <p>a. Self-defence (or defence of others);</p> <p>b. Superior orders;</p> <p>Please note that this defence does <b>not apply</b> in respect of <b>crimes against humanity</b> (Article 33(2) Rome Statute).</p> <p>c. Defence of duress or coercion.</p>
<p><b>Article 12(2)(b) QD</b></p>	
<p><b>C. Do the facts of the case raise potential exclusion issues with regard to acts that may constitute serious non-political crimes within the meaning of Article 12(2)(b)?</b></p>	
	<p>1. Did the acts in question occur ‘<b>outside the country of refuge</b>’ and ‘<b>prior to the person’s admission as a refugee</b>’, i.e. prior to the time of issuing a residence permit based on the granting of refugee status?</p> <p>If not, acts committed within the country of asylum and after admission of the person could not give rise to exclusion under Article 12(2)(b).</p>
	<p>2. If yes, do the acts in question constitute a <b>crime</b> in light of international standards?</p> <p>a. Can the acts in question be said to constitute a crime <b>in most jurisdictions</b> (including the country of origin and the country where the asylum claim is being considered)?</p> <p>b. Do the acts in question constitute a crime in light of <b>transnational criminal law standards</b>, where applicable?</p>

	<p>3. Do the acts in question constitute a <b>serious crime</b> in light of international standards?</p> <p>a. Is the act a <b>deliberate capital crime</b> or a <b>grave punishable act</b>?</p> <p>b. The element of the <b>seriousness</b> of the crime must be assessed considering one or more of the following criteria, either individually or in combination:</p> <ul style="list-style-type: none"> <li>• <b>Nature</b> of the act (severity of the harm caused, damage inflicted);</li> <li>• <b>Degree of violence</b> and methods used (e.g. use of force or of a deadly weapon);</li> <li>• The <b>form of the procedure</b> used to prosecute the crime in most jurisdictions;</li> <li>• The <b>nature and duration</b> of punishment foreseen by law (maximum penalty which could be imposed) in most jurisdictions;</li> <li>• The <b>duration of sentence</b> handed down, where applicable.</li> </ul> <p>This list is not to be considered as exhaustive and additional criteria can be assessed where necessary.</p>
	<p>4. If the serious crime threshold is satisfied, can the crime be said to be '<b>non-political</b>' in nature?</p> <p>a. What are the predominant <b>motives</b> behind the commission of the act in question?</p> <p>i. Was the act primarily committed for personal gain or with a <b>predominant personal motive</b> (jealousy, rage, etc.)?</p> <p>ii. Was there a predominant <b>political motive</b>?</p> <p>If no clear link between the crime and the alleged political objective can be identified, then non-political motives prevail.</p> <p>b. What was the <b>nature</b> of the crime?</p> <p>It must be borne in mind that particularly cruel actions and heinous crimes, even if committed with an allegedly political objective, may be classified as serious non-political crimes. Moreover, terrorist acts characterised by their violence towards civilian populations, even if committed with a purportedly political objective, are to be regarded as serious non-political crimes. The link between the crime and purported political motive must be established.</p> <p>i. Was the crime <b>suitable</b> to further the purported political motive?</p> <p>ii. Was the act committed during a <b>coup d'état</b> or actions linked thereto?</p> <p>iii. Did certain <b>conditions</b> exist within the country or region at time that would go to the (non-)political nature of the crime (e.g. repressive regime, absence of other forms of participation in the political process)?</p> <p>c. What <b>methods</b> were used in commission of the crime and what kind of harm was caused? Can the crime be considered <b>proportionate</b> to the political objective?</p> <p>i. Did the crime cause death or serious harm to civilians?</p> <p>ii. Did the acts in question constitute '<b>particularly cruel actions</b>' which could thus be considered disproportionate to the political objective?</p> <p>An additional consideration may also be whether the alleged political objectives pursued through the commission of the crime be considered commensurate with human rights principles. This position is, however, not universally accepted.</p>
<p><b>D. If it has been determined that acts within the scope of Article 12(2)(b) have taken place, does the person concerned incur individual responsibility for these acts?</b></p>	
	<p>1. In light of the relevant definitions of the crime(s) in question and depending on the mode of individual responsibility, does the conduct of the person concerned meet the <b>actus reus</b> and <b>mens rea</b> requirements?</p> <p>a. Did the person concerned incur individual responsibility as <b>perpetrator</b> of the crimes in question?</p> <p>b. Did the person concerned incur individual responsibility for the commission of crimes <b>by other persons</b> that fall within the scope of Article 12(2)(b)?</p> <p>These questions relate to persons who incite or otherwise participate in the commission of the crimes or acts in Article 12(2) QD. This could include planning, ordering, soliciting, instigating or otherwise inducing the commission of such crime by another person, or by making a contribution to it through aiding and abetting or on the basis of participation in a joint criminal enterprise.</p> <p>c. If appropriate when examining the <b>mens rea</b>, are the circumstances such that they may <b>negate individual responsibility</b>, e.g. lack of mental capacity, involuntary intoxication or immaturity?</p>

If one of the three exclusion grounds enumerated under Article 12(2)(b) is found to be relevant and applicable and the criteria for establishing individual responsibility are satisfied, serious consideration should be given to excluding the applicant.

Although a presumption of individual responsibility applies in situations where sufficient information to meet the standard of ‘serious reasons for considering’ is provided, individuated evidence should still be considered and the applicant given the opportunity to rebut the presumption.

2. If the *actus reus* and *mens rea* requirements are otherwise met, could any of the following factors **exonerate** the applicant from his personal responsibility?
  - a. Self-defence (or defence of others);
  - b. Superior orders;
  - c. Defence of duress or coercion;
  - d. Expiation.

Please note that the application of the concept of expiation is not yet definitely resolved. Divergent national jurisprudence mandates careful consideration of this factor.

#### Article 12(2)(c) QD

#### E. Do the facts of the case raise potential exclusion issues with regard to acts that may constitute ‘acts contrary to the purposes and principles of the United Nations’ within the meaning of Article 12(2)(c)?

1. Do the acts in question have the requisite **international dimension**?
  - a. Are the acts in question capable of affecting international **peace and security**, or friendly relations between States?

2. Do the facts of the case raise exclusion issues, which, by their nature and gravity, fall within the scope of Article 12(2)(c)?
  - a. Do the acts in question constitute **serious and sustained** human rights violations?
  - b. Have the acts in question been designated by the international community as being ‘**contrary to the purposes and principles of the United Nations**’, e.g. in resolutions of the UN Security Council and/or the General Assembly?
  - c. Do the acts in question constitute acts of **terrorism** as per relevant international standards?

#### F. If it has been determined that acts within the scope of Article 12(2)(b) have taken place, does the person concerned incur individual responsibility for these acts?

1. In light of the relevant definitions of the crime(s) in question and depending on the mode of individual responsibility, does the conduct of the person concerned meet the **actus reus** and **mens rea** requirements?
  - a. Did the person concerned incur individual responsibility as **perpetrator** of the crimes in question?
  - b. Did the person concerned incur individual responsibility for the commission of crimes **by other persons** that fall within the scope of Article 12(2)(b)?

These questions relate to persons who incite or otherwise participate in the commission of the crimes or acts in Article 12(2) QD. This could include planning, ordering, soliciting, instigating, or otherwise inducing the commission of such crime by another person, or by making a contribution to it through aiding and abetting or on the basis of participation in a joint criminal enterprise.

- c. If appropriate when examining the *mens rea*, are the circumstances such that they may **negate individual responsibility**, e.g. lack of mental capacity, involuntary intoxication or immaturity?

If one of the three exclusion grounds enumerated under Article 12(2)(c) is found to be relevant and applicable and the criteria for establishing individual responsibility are satisfied, serious consideration should be given to excluding the applicant.

Although a presumption of individual responsibility applies in situation where sufficient information to meet the standard of ‘serious reasons for considering’ is provided, individuated evidence should still be considered and the applicant given the opportunity to rebut the presumption.

	<p>2. If the <i>actus reus</i> and <i>mens rea</i> requirements are otherwise met, could any of the following factors <b>exonerate</b> the applicant from his personal responsibility?</p> <ol style="list-style-type: none"> <li>a. Self-defence (or defence of others);</li> <li>b. Superior orders;</li> <li>c. Defence of duress or coercion;</li> <li>d. Expiation.</li> </ol> <p>Please note that the application of the concept of expiation is not yet definitely resolved. Divergent national jurisprudence mandates careful consideration of this factor.</p>
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### Article 17 — subsidiary protection

<b>Article 17 QD</b>	
Article 17 deals with persons excluded from subsidiary protection as they are deemed to be undeserving of this protection.	
<b>Article 17(1)(a) QD</b>	
	The decision tree in respect of Article 12(2)(a) applies analogously in this respect.
<b>Article 17(1)(b) QD</b>	
<b>A. Do the facts of the case raise potential exclusion issues with regard to acts that may constitute serious crimes within the meaning of Article 17(1)(b)?</b>	
	1. Were the acts committed in <b>the country of origin</b> , in a <b>third country</b> or on the <b>territory of the country of refuge</b> ?
	2. Do the acts in question constitute a <b>crime</b> ? <ol style="list-style-type: none"> <li>a. Do the acts in question constitute a <b>crime</b> in a large number of jurisdictions?</li> <li>b. Do the acts in question constitute a crime in light of <b>transnational criminal law</b> standards, where applicable?</li> </ol>
	3. Do the acts in question constitute a <b>serious crime</b> ? <ol style="list-style-type: none"> <li>a. Is the act a <b>deliberate capital crime</b> or a <b>grave punishable act</b>?</li> <li>b. The element of the seriousness of the crime must be assessed considering one or more of the following criteria, either individually or in combination:           <ul style="list-style-type: none"> <li>• <b>Nature</b> of the act (severity of the harm caused, damage inflicted); Degree of violence and methods used (e.g. use of force or of a deadly weapon);</li> <li>• The <b>form of the procedure</b> used to prosecute the crime in most jurisdictions;</li> <li>• The <b>nature and duration of punishment</b> foreseen by law (maximum penalty which could be imposed) in most jurisdictions;</li> <li>• The <b>duration</b> of sentence handed down, where applicable.</li> </ul> </li> </ol> <p>This list is not to be considered as exhaustive and additional criteria can be assessed where necessary.</p> <ol style="list-style-type: none"> <li>c. Does national law provides <b>specific features or guidance</b> to assess the gravity of the crime?</li> </ol>
<b>B. If it has been determined that acts within the scope of Article 17(1)(b) have taken place, does the person concerned incur individual responsibility for these acts?</b>	
	The decision tree in respect of Article 12(2) applies analogously in this respect.
<b>Article 17(1)(c) QD</b>	
	The decision tree in respect of Article 12(2)(c) applies analogously in this respect.
<b>Article 17(1)(d) QD</b>	
This additional ground for exclusion that is unique to exclusion from subsidiary protection requires that a determination is made whether the applicant constitutes a danger to the community or security of the State of refuge.	
<b>A. Do the facts of the case raise potential exclusion issues such that the application might be considered to be 'a danger to the community or to the security of the Member State in which he or she is present' within the meaning of Article 17(1)(d) QD?</b>	
	1. What is the nature of the acts and offences committed by the applicant in the <b>country of origin</b> , in a <b>third country</b> , <b>AND</b> on the territory of the <b>country of refuge</b> ?

	<p>2. What is the nature of the acts and offences committed by the applicant <b>prior to AND after</b> leaving his or her country of origin?</p>
	<p>3. What is the potential <b>danger to the community</b> and/or to the <b>security</b> of the State of refuge?                  This element must be assessed considering one or more of the following criteria, either individually or in combination:</p> <ul style="list-style-type: none"> <li>• the criminal <b>nature and gravity</b> of the acts committed;</li> <li>• the <b>responsibility</b> of the applicant for the acts;</li> <li>• the <b>possible criminal proceedings</b> brought against the applicant, including the type and severity of the sentence imposed;</li> <li>• the <b>date</b> on which the acts occurred;</li> <li>• any <b>repetitive character</b> of the acts and offences that may exist.</li> </ul>
	<p>4. Is there a <b>link</b> (nexus) between the presence of the applicant on the territory of the State of refuge and the danger considered to exist?</p> <ol style="list-style-type: none"> <li>a. What was the <b>nature</b> of the <b>applicant's behaviour</b> following the acts committed and/or the sentence handed down for those acts (e.g. sentence served, remission of sentence for good conduct, respect of obligations from a restricted-release regime, etc.),</li> <li>b. What were the <b>circumstances</b> in which the applicant <b>entered</b> the territory of the State of refuge (e.g. fugitive status)?</li> <li>c. How did the applicant <b>act and behave</b> on the territory of the country of refuge?</li> <li>d. Has the decision-maker conducted a proper <b>forward-looking assessment</b> of whether the applicant poses a risk to the security or the community of the host country?</li> </ol>
<b>Article 17(2) QD</b>	
	The decision tree in respect of Article 12(3) applies analogously in this respect.
<b>Article 17(3) QD</b>	
<b>A. Do the facts of the case raise potential exclusion issues with regard to acts that fall under Article 17(1)?</b>	
<b>B. If the prerequisites for the application of Article 17(1) are not fulfilled, it must be considered whether (cumulatively):</b>	
	1. Has the applicant <b>committed</b> one or more <b>crimes</b> ?
	2. Were the crimes committed <b>outside</b> the country of refuge?
	3. Were the crimes committed <b>prior</b> to the admission into the country of refuge?
	4. Would the crimes in question be <b>punished by imprisonment</b> had they been committed in the state of refuge?
	5. For what reason did the applicant leave his or her country of origin? <ol style="list-style-type: none"> <li>a. Was it <b>solely</b> in order to avoid sanctions resulting from the crimes committed?</li> <li>b. Was it for <b>diverse</b> other reasons?</li> </ol>

# APPENDIX C — METHODOLOGY

## Methodology for professional development activities available to members of courts and tribunals

### Background and introduction

Article 6 of the EASO founding Regulation <sup>(242)</sup> (hereinafter the Regulation) specifies that the Agency shall establish and develop training available to members of courts and tribunals in the Member States. For this purpose, EASO shall take advantage of the expertise of academic institutions and other relevant organisations, and take into account the Union's existing cooperation in the field with full respect to the independence of national courts and tribunals.

With the purpose of supporting the enhancement of quality standards and harmonisation of decisions across the EU, and in line with its legal mandate, EASO provides for a two-fold training support that includes the development and publication of professional development materials and the organisation of professional development activities. With the adoption of this methodology, EASO aims to outline the procedures that will be followed for the implementation of its professional development activities.

In undertaking these tasks, EASO is committed to follow the approach and principles outlined in the field of EASO's cooperation with courts and tribunals as adopted in 2013 <sup>(243)</sup>. Following consultation with the EASO network of courts and tribunal members, amendments have been made to this methodology so that it better reflects developments that have occurred in the meantime.

### Professional development curriculum

**Content and scope** — In line with the legal mandate provided by the Regulation and in cooperation with courts and tribunals, it was established that EASO will adopt a professional development curriculum aimed at providing courts and tribunal members with a full overview of the Common European Asylum System (hereinafter the CEAS). Following discussions during the Annual Coordination and Planning Meeting of the EASO network of court and tribunal members in December 2014 and thereafter, the point was raised that the term curriculum did not accurately reflect the scope of the materials to be developed nor did it properly accommodate the particular requirements of the target group. Consequently, having consulted with members of the network, the nomenclature used was amended. In the future, reference will be made to the **EASO Professional Development Series** for members of courts and tribunals (hereafter: **EASO PDS**). This series will consist, inter alia, of a number of **Judicial Analyses**, which will be accompanied in turn by **Judicial Trainer's Guidance Notes**. The former will elaborate on substantive aspects of the subject matter from the judicial perspective, whereas the latter will serve as a useful tool for those charged with organising and conducting professional development or training meetings.

The detailed content of the curriculum [as it then was, now Series] as well as the order in which the chapters will be developed was established following a needs assessment exercise conducted in cooperation with the EASO network of courts and tribunals (hereinafter the EASO network) which presently comprises EASO national contact points in the Member State's courts and tribunals, the Court of Justice of the EU (CJEU), the European Court of Human Rights (ECtHR) as well as the two judicial bodies with which EASO has a formal exchange of letters: the International Association of Refugee Law Judges (hereafter IARLJ) and the Association of European Administrative Judges (hereafter AEAJ). In addition, other partners including UNHCR, EU Agency for Fundamental Rights (FRA), European Judicial Training Network (EJTN) and Academy of European Law (ERA) are also to be consulted as appropriate. The outcome of the exercise will also be reflected in the annual work plan adopted by EASO within

<sup>(242)</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereinafter the Regulation). Available on the internet (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF>).

<sup>(243)</sup> Note on EASO's cooperation with Member State's Courts and Tribunals, 21 August 2013.

the framework of EASO's planning and coordination meetings. Taking into consideration the needs communicated by the EASO network, European and national jurisprudential developments, the level of divergence in the interpretation of relevant provisions and developments in the field, training materials will be developed in line with the structure agreed with the stakeholders.

In the meantime, a number of events have occurred which have created the need for a re-assessment of both the list of chapters and the order in which they ought to be dealt with. Among others, work has been started, and in some cases completed, on certain chapters (subsidiary protection — Article 15(c) QD and exclusion). In addition, other chapters that were included on the original list have since been set aside for completion within the framework of a contract concluded between EASO and IARLJ-Europe for the provision of professional development materials on certain core subjects<sup>(244)</sup>. This was done with a view to accelerating the process for the development of the materials and is being conducted with the involvement of the members of the EASO network, who are afforded an opportunity to comment on drafts of the materials being developed. In light of these developments, there is a need for a re-assessment of this methodology. In order to increase the foreseeability of the manner in which remaining chapters will be dealt with and to provide a more reliable roadmap for the future, a re-assessment exercise was carried out in autumn of 2015, whereby members of the EASO network of court and tribunal members provided an opinion on the order in which chapters were to be developed.

#### **Completed thus far:**

- Article 15(c) Qualification Directive (2011/95/EU);
- Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU).

#### **Under development by IARLJ-Europe within the framework of a contract with EASO:**

- Introduction to the CEAS;
- Qualification for International Protection;
- Access to procedures (including gaining access to procedures, individual procedural aspects in light of the APD (recast) as well as access to an effective remedy);
- Evidence assessment and credibility.

#### **Remaining chapters to be developed (subject to amendments)**

- End of protection;
- Reception in the context of the Reception Conditions Directive (recast);
- Evaluating and using Country of Origin Information;
- Accounting for vulnerability in judicial decision-making in the asylum process;
- International protection in situations of armed conflict;
- Fundamental Rights and international refugee law.

## **Involvement of experts**

**Drafting teams** — The EASO PDS will be developed by EASO in cooperation with the EASO network through the establishment of specific working groups (drafting teams) for the development of each chapter of the PDS with the exception of those chapters being developed under the auspices of the contract concluded with IARLJ. The drafting teams will be composed of experts nominated through the EASO network. In line with EASO's work programme and the concrete plan adopted at the annual planning and coordination meetings, EASO will launch a call for experts for the development of each chapter.

The call will be sent to the EASO network specifying the scope of the chapter to be developed, the expected timeline and the number of experts that will be required. EASO national contact points for members of courts and tribunals will then be invited to liaise with national courts and tribunals for the identification of experts who are interested and available to contribute to the development of the chapter.

Based on the nominations received, EASO will share with the EASO network a proposal for the establishment of the drafting team. This proposal will be elaborated by EASO in line with the following criteria:

<sup>(244)</sup> These core subjects consist of Judicial Analyses on: an Introduction to the Common European Asylum System; Qualification for International Protection; Asylum Procedures; and Credibility and Evidence Assessment.

1. Should the number of nominations received equal or be below the required number of experts, all nominated experts will automatically be invited to take part in the drafting team.
2. Should the nominations received exceed the required number of experts, EASO will make a motivated pre-selection of experts. The pre-selection will be undertaken as follows:
  - EASO will prioritise the selection of experts who are available to participate throughout the whole process, including participation in all expert meetings.
  - Should there be more than one expert nominated from the same Member State, EASO will contact the focal point and ask him/her to select one expert. This will allow for a wider Member State representation in the group.
  - EASO will then propose the prioritisation of court and tribunal members over legal assistants or rapporteurs.
  - Should the nominations continue to exceed the required number of experts, EASO will make a motivated proposal for a selection that takes into account the date when nominations were received (earlier ones would be prioritised) as well as EASO's interest in ensuring a wide regional representation.

EASO will also invite UNHCR to nominate one representative to join the drafting team.

The EASO network will be invited to express their views and/or make suggestions on the proposed selection of experts within a maximum period of 10 days. The final selection will take into account the views of the EASO network and confirm the composition of the drafting team.

**Consultative group** — In line with the Regulation, EASO will seek the engagement of a consultative group composed of representatives from civil society organisations and academia in the development of the PDS.

For the purpose of establishing the consultative group, EASO will launch a call for expression of interest addressed to the members of the EASO Consultative Forum and other relevant organisations, experts or academics recommended by the EASO network.

Taking into consideration the expertise and familiarity with the judicial field of the experts and organisations who respond to the call, as well as the selection criteria of the EASO Consultative Forum, EASO will make a motivated proposal to the EASO network that will ultimately confirm the composition of the group. Members of the consultative group will be invited to either cover all developments or focus on areas related to their particular expertise.

The EU Agency for Fundamental Rights (FRA) will be invited to join the consultative group.

### **EASO PDS development**

**Preparatory phase** — Prior to the initiation of the drafting process, EASO will prepare a set of materials, including but not restricted to:

1. A bibliography of relevant resources and materials available on the subject;
2. A compilation of European and national jurisprudence on the subject.

Along with the EASO network of court and tribunal members <sup>(245)</sup>, the consultative group will play an important role in the preparatory phase. For this purpose, EASO will inform the consultative group and the EASO network of the scope of each chapter and share a draft of the preparatory materials together with an invitation to provide additional information that is deemed of relevance to the development. This information will be reflected in the materials which will then be shared with the respective drafting team.

**Drafting process** — EASO will organise at least two (but possibly more where necessary) working meetings for each chapter development. In the course of the first meeting, the drafting team will:

- Nominate a coordinator/coordinators for the drafting process.
- Develop the structure of the chapter and adopt the working methodology.
- Distribute tasks for the drafting process.

<sup>(245)</sup> UNHCR will also be consulted.



- Develop a basic outline of the content of the chapter.

Under the coordination of the team coordinator, and in close cooperation with EASO, the team will proceed to develop a preliminary draft of the respective chapter.

In the course of the second meeting, the group will:

- Review the preliminary draft and agree on the content.
- Ensure consistency of all parts and contributions to the draft.
- Review the draft from a didactical perspective.

On a needs basis, the group may propose to EASO the organisation of additional meetings to further develop the draft. Once completed, the draft will be shared with EASO.

**Quality review** — EASO will share the first draft completed by the drafting team with the EASO network, UNHCR and the consultative group that will be invited to review the materials with a view to assisting the working group in enhancing the quality of the final draft.

All suggestions received will be shared with the coordinator of the drafting team who will coordinate with the drafting team to consider the suggestions made and prepare a final draft. Alternatively, the coordinator may suggest the organisation of an additional meeting to consider the suggestions when these are particularly extensive or would considerably affect the structure and content of the chapter.

On behalf of the drafting team, the coordinator will then share the chapter with EASO.

**Updating process** — In the context of the annual planning and coordination meetings, EASO will invite the EASO network to share their views regarding the need to update the chapters of the PDS.

Based on this exchange, EASO may:

- Undertake minor updates to improve the quality of the chapters including the inclusion of relevant jurisprudential developments. In this case, EASO will directly prepare a first update proposal, the adoption of which will be undertaken by the EASO network.
- Call for the establishment of a drafting team to update one or several chapters of the PDS. In this case, the update will follow the same procedure outlined for the development of the PDS.

## Implementation of the EASO PDS

In cooperation with the EASO network members and relevant partners (e.g. EJTN) EASO will support the use of the PDS by national training institutions. EASO's support in this regard will involve:

**Judicial Trainer's Guidance Note** — The Guidance Note will serve as a practical reference tool to Judicial Trainers and provide assistance with regard to the organisation and implementation of practical workshops on the PDS. In line with the same procedure outlined for the development of the different chapters composing the PDS, EASO will establish a drafting team to develop a Judicial Trainer's Guidance Note. It is envisaged that this drafting team may include one or more members of the drafting team, which was responsible for drafting the Judicial Analysis on which the Guidance Note will be based.

**Workshops for national Judicial Trainers** — Furthermore, following the development of each chapter of the PDS, EASO will organise a workshop for national Judicial Trainers that provides an in depth overview of the chapter as well as the methodology suggested for the organisation of workshops at national level.

- **Nomination of national Judicial Trainers and preparation of the workshop** — EASO will seek the support of at least two members of the drafting team to support the preparation and facilitate the workshop. Should no members of the drafting team be available for this purpose, EASO will launch a specific call for expert Judicial Trainers through the EASO network.

- **Selection of participants** — EASO will then send an invitation to the EASO network for the identification of a number of potential Judicial Trainers with specific expertise in the area, who are interested and available to organise workshops on the EASO PDS at the national level. Should the nominations exceed the number specified in the invitation, EASO will make a selection that prioritises a wide geographical representation as well as the selection of those Judicial Trainers who are more likely to facilitate the implementation of the PDS at national level. On a needs basis and in line with its work programme and the annual work plan, as adopted within the framework of EASO's planning and coordination meetings, EASO may consider the organisation of additional workshops for Judicial Trainers.

**National workshops** — In close cooperation with the EASO network, EASO will establish contact with relevant judicial training institutions to promote the organisation of workshops at the national level. In doing so, EASO will also support the engagement of court and tribunal members who contributed to the development of the PDS or participated in EASO's workshops for Judicial Trainers.

## EASO's advanced workshops

EASO will also hold an annual advanced workshop on selected aspects of the CEAS with the purpose of promoting practical cooperation and a high-level dialogue among court and tribunal members.

**Identification of relevant areas** — EASO's advanced workshops will focus on areas with a high level of divergence in national interpretation or areas where jurisprudential development is deemed relevant by the EASO network. In the context of its annual planning and coordination meetings, EASO will invite the EASO network as well as UNHCR and members of the consultative group to make suggestions for potential areas of interest. Based on these suggestions, EASO will make a proposal to the EASO network that will finally take a decision on the area to be covered by the following workshop. Whenever relevant, the workshops will lead to the development of a chapter of specific focus within the PDS.

**Methodology** — For the preparation of the workshops, EASO will seek the support of the EASO network, which will contribute to the development of the workshop methodology (e.g. case discussions, moot court sessions, etc.) and preparation of materials. The methodology followed will determine the maximum number of participants for each workshop.

**Participation in EASO's workshops** — Based on the methodology, and in consultation with the judicial associations, EASO will determine the maximum number of participants at each workshop. The workshop will be open to members of European and national courts and tribunals, the EASO network, the EJTN, FRA and UNHCR.

Prior to the organisation of each workshop, EASO will launch an open invitation to the EASO network and the above referred organisations specifying the focus of the workshop, methodology, maximum number of participants and registration deadline. The list of participants will ensure a good representation of court and tribunal members and prioritise the first registration request received from each Member State.

## Monitoring and evaluation

In developing its activities, EASO will promote an open and transparent dialogue with the EASO network, individual court and tribunal members, UNHCR, members of the consultative group and participants in EASO's activities, who will be invited to share with EASO any views or suggestions that can potentially improve the quality of its activities.

Furthermore, EASO will develop evaluation questionnaires that will be distributed at its professional development activities. Minor suggestions for improvement will be directly incorporated by EASO and it will inform the EASO network of the general evaluation of its activities in the context of its annual planning and coordination meeting.

On an annual basis, EASO will also provide the EASO network with an overview of its activities as well as relevant suggestions received for further developments which will be discussed at the annual planning and coordination meetings.

## Implementing principles

- In undertaking its professional development activities, EASO will take due regard of EASO's public accountability and principles applicable to public expenditure.
- EASO and the courts and tribunals of the EU+ countries will have a joint responsibility for the professional development series. Both partners shall strive to agree on the content of each of its chapters so as to assure 'judicial auspices' of the final product.
- The resulting chapter will be part of the EASO PDS, including copyright and all other related rights. As such, EASO will update it when necessary, and fully involve the courts and tribunals of the EU+ countries in the process.
- All decisions related to the implementation of the EASO PDS and selection of experts will be undertaken by agreement of all partners.
- The drafting, adoption and implementation of the EASO PDS will be undertaken in accordance with the methodology for professional development activities available to members of courts and tribunals.

Grand Harbour Valletta, 29 October 2015

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# APPENDIX E — COMPILATION OF JURISPRUDENCE

## Court of Justice of the European Union (CJEU) Jurisprudence

Court	Case name/reference/date	Key words/relevance/main points	Cases cited
CJEU	Case C-573/14 <i>Commissaire general aux réfugiés et aux apatrides v Mostafa Lounani</i> 23.1.2015	No criminal conviction necessary. The general view is that it is not necessary for the applicant to have been convicted of a criminal offence.	
CJEU	Case C-373/13 <i>H. T. v Land Baden-Württemberg</i> EU:C:2015:413 24.6.2015	Serious non-political crime. The request has been made in the context of proceedings between Mr T. and the Land Baden-Württemberg concerning a decision ordering his expulsion from the Federal Republic of Germany and revoking his residence permit. The CJEU has held that terrorist acts characterised by their violence towards civilian populations, even if committed with a purportedly political objective, are to be regarded as serious non-political crimes.	
CJEU (Grand Chamber)	Case C-364/11 <i>El Karem El Kott et al.</i> EU:C:2012:826 19/12/2012	Judgment after a reference for a preliminary ruling from the Fővárosi Bíróság — Hungary regarding the right to recognition as refugees on the basis of Article 12 of Directive 2004/83. The Court stated that it was important to note that the GC dealt only with refugee status whilst Directive 2004/83 also deals with subsidiary protection. Therefore the words ‘be entitled to the benefits of the Directive’ in the second sentence of Article 12(1)(a) must be understood as referring only to refugee status as that provision was based on Article 1(D) of the Geneva Convention (para. 67). The words ‘shall <i>ipso facto</i> be entitled to the benefits of the Directive’ must be interpreted in a manner consistent with Article 1(D), as permitting the persons concerned to benefit ‘as of right’ from the regime of the Convention and the benefits conferred by it (para. 71). The Court held that a person who is <i>ipso facto</i> entitled to the benefits of the Directive is not necessarily required to show that he has a well-founded fear of being persecuted within the meaning of Article 2(c) of the Directive, but must nevertheless submit an application for refugee status, which must be examined by the competent authorities of the Member State responsible. In carrying out that examination, those authorities must verify not only that the applicant actually sought assistance from UNRWA, and that the assistance has ceased but also that the applicant is not caught by any of the grounds for exclusion laid down in Article 12(1)(b) or Article 12(2) and (3) of the Directive. Article 11(f) and Article 14(f) of Directive 2004/83 also must be interpreted as meaning that the person concerned ceases to be a refugee if he is able to return to the UNRWA area of operations in which he was formerly habitually resident because the circumstances which led to that person qualifying as a refugee no longer exist.	CJEU — C-71/11 and C-99/11 <i>Germany v Y and Z</i> ; CJEU — C-31/09 <i>Nawras Balbol v Hungary</i> ; CJEU — C-175/08; C-176/08; C-178/08 and C-179/08 <i>Salahadin Abdulla and Ors v Germany</i>
CJEU (Grand Chamber)	Case C-175/08 <i>Salahadin Abdulla and Others</i> EU:C:2010:105 2.3.2010	References for a preliminary ruling: Bundesverwaltungsgericht — Germany. Directive 2004/83/EC — Minimum standards for determining who qualifies for refugee status or for subsidiary protection status — Classification as a ‘refugee’ — Article 2(c) — Cessation of refugee status — Article 11 — Change of circumstances — Article 11(1)(e) — Refugee — Unfounded fear of persecution — Assessment — Article 11(2) — Revocation of refugee status — Proof — Article 14(2).	Joined cases C-175/08, C-176/08, C-178/08 and C-179/08

Court	Case name/reference/date	Key words/relevance/main points	Cases cited
<p><b>CJEU (Grand Chamber)</b></p>	<p>Case C-31/09  <i>Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal</i>            EU:C:2010:351            17.6.2010</p>	<p>Judgment after a reference for a preliminary ruling from the Fővárosi Bíróság — Hungary regarding the right to recognition as refugees on the basis of Article 12 of Directive 2004/83. For the purposes of the first sentence of Article 12(1)(a) of Directive 2004/83, a person receives protection or assistance from an agency of the United Nations other than UNHCR when that person has actually availed himself of that protection or assistance.</p> <p>Article 1(D) of the Geneva Convention relating to the Status of Refugees, to which Article 12(1)(a) of the Directive refers, merely excludes from the scope of that Convention those persons who are at present receiving protection or assistance from an organ or agency of the United Nations other than UNHCR. It follows from the clear wording of Article 1(D) of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.</p>	<p>CJEU — C-175/08; C-176/08; C-178/08 and C-179/08  <i>Salahadin Abdulla and Ors v Germany</i></p>

Court	Case name/reference/date	Key words/relevance/main points	Cases cited
<p><b>CJEU (Grand Chamber)</b></p>	<p>Joined cases C-57/09 and C-101/09 <i>B and D</i> EU:C:2010:661 9.11.2010</p>	<p>Judgment after a reference for a preliminary ruling from the Bundesverwaltungsgericht — Germany on the meaning of Article 12(2)(b) and (c) of Directive 2004/83.</p> <p>The Court found that the competent authority must undertake for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether the acts committed by the person in question fall within the exclusion clauses. Para. 88: The mere fact that a person is a member of one of these organisations cannot automatically mean that the person must be excluded from refugee status. The Court noted that there was no direct relationship between Common Position 2001/931, the Framework Decision 2002/475 and Directive 2004/83. However the terrorist nature of that group must be taken into account when determining initially whether that group has committed acts falling within the scope of the exclusion clauses. Before a finding can be made the grounds of exclusion apply it must be possible to attribute to the person concerned a share of responsibility for the acts committed by the organisation in question while that person was a member (para. 95). This must be assessed in light of both objective and subjective criteria. Factors to assess include: the true role played by the person concerned in perpetration of the acts in question; his position within the organisation; the extent of knowledge he had; or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct (para. 97). If the person has a prominent position within the organisation there can be a presumption that the person has individual responsibility but it nevertheless remains necessary to examine all the relevant circumstances before excluding that person from refugee status pursuant to Article 12(2)(b) or (c). As to the second question the Court made the distinction between Article 12(2) of the Directive and Article 14(4)(a) of the Directive which takes into consideration whether a person may currently pose a danger to the Member State concerned (para. 101). It also referenced Article 21(2) of the Directive and Article 33(2) of the 1951 Geneva Convention in relation to <i>non-refoulement</i>. Article 12(2)(b) and (c) apply only in relation to crimes committed outside the country of refuge prior to admission and are linked to those undeserving of protection which refugee status entails. Exclusion from refugee status under Article 12(2) is not conditional on the person concerned representing a present danger to the host Member State (para. 105). As regards the third question the Court held that exclusion pursuant to Article 12(2)(b) and (c) is not conditional on a proportionality test being undertaken. It is important to the note the distinction the Court made between exclusion from refugee status and the separate question of whether a person can be deported to his country of origin (para. 110). In response to the fifth question the Bundesverwaltungsgericht want to know whether it was compatible with Directive 2004/83, for the purposes of Article 3 of that Directive, for a Member State to recognise that a person excluded from refugee status pursuant to Article 12(2) has a right of asylum under its Constitutional law. The Court held that 'in view of the purposes underlying the grounds for exclusion laid down in that Directive, which is to maintain the credibility of the protection system provided for in that Directive in accordance with the 1951 Geneva Convention, the reservation in Article 3 of that Directive precludes Member States from introducing or retaining provisions granting refugee status under Directive 2004/83 to persons who are excluded from that status pursuant to Article 12(2) (para. 115)'. However the Court noted that it does not preclude States from applying another kind of protection outside the scope of the Directive. As long as a clear distinction is made between national protection and protection under Directive 2004/83 they do not infringe the system provided by that Directive.</p>	<p>CJEU — C-175/08; C-176/08; C-178/08 and C-179/08 <i>Salahadin Abdulla and Ors v Germany</i>; CJEU — C-31/09 <i>Nawras Bolbol v Hungary</i></p>
<p><b>CJEU</b></p>	<p>Case C-472/13 <i>Andre Lawrence Shepherd v Germany</i> EU:C:2015:117 26.2.2015</p>	<p>Directive 2004/83/EC — Article 9(2)(b), (c), and (e) — Minimum standards for the qualification and status of third-country nationals or stateless persons as refugees</p> <p>Conditions for obtaining refugee status —</p> <p>Acts of persecution —</p> <p>Criminal penalties for a member of the armed forces of the United States for refusing to serve in Iraq.</p>	



## European Court of Human Rights (ECtHR) Jurisprudence

Court	Case name/reference/date	Key words/relevance/main points	Cases cited
ECtHR	<i>A v the Netherlands</i> Application No 4900/06 20.10.2010	A, a Libyan national, was given an exclusion order because he was a member of a terrorist organisation related to al-Qaeda. The attention of Libyan authorities was attracted to the criminal proceedings against A in the Netherlands, and the Libyan representative was informed of the detention order for removal. According to the COI of the Dutch Ministry of Foreign Affairs and the Washington State Department, the Libyan government repressed Islamic activism. ECtHR concluded that expulsion to Libya would be a breach of Article 3 ECHR.	
ECtHR	<i>Saadi v Italy</i> Application No 37201/06 ECLI:CE:ECHR:2008:0228JUD003720106 28.2.2008	Violation of Article 3 — Prohibition of torture (Article 3 — Expulsion). Non-pecuniary damage — finding of violation sufficient. Italy and the United Kingdom (as third party intervener) claimed that the climate of international terrorism called into question the appropriateness of the ECtHR's existing jurisprudence on states' <i>non-refoulement</i> obligation under Article 3 of the European Convention on Human Rights (European Convention). Article 3 had earlier been interpreted to prohibit return or extradition of individuals to states in which they faced a 'real risk' of torture, inhuman or degrading treatment. Both states also claimed that diplomatic assurances from a receiving state were sufficient to satisfy a sending state's Article 3 obligations. The ECtHR unanimously reasserted its existing jurisprudence and noted that involvement in terrorism did not affect an individual's absolute rights under Article 3.	<i>Al-Adsani v the United Kingdom</i> [GC], No 35763/97, para. 59, ECHR 2001-XI,  <i>Al-Moayad v Germany</i> (dev.), No 35865/03, paras 65-66, 20 February 2007
ECtHR	<i>Sufi and Elmi v United Kingdom</i> Application No 8319/07 ECLI:CE:ECHR:2011:0628JUD000831907 28.6.2011	Violation of Article 3 in case of expulsion to Somalia.  The Court ruled that those removed to Somalia would be at risk of ill treatment — prohibited by Article 3 of the European Convention on Human Rights (ECHR) — simply by virtue of the current situation of generalised violence in Mogadishu.	<i>Al-Agha v Romania</i> , No 40933/02, 12 January 2010  <i>M.S.S. v Belgium and Greece</i> [GC], No 30696/09, 21 January 2011
ECtHR	<i>H.L.R. v France</i> Application No 24573/94 ECLI:CE:ECHR:1997:0429JUD002457394 29.4.1997	Torture, inhuman or degrading treatment or punishment.  No violation of Article 3. Prohibition of torture (in case of expulsion to Colombia).	<i>Chahal v the United Kingdom</i> , judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, paras 73-74, p. 1855, paras 79 and 80
ECtHR	<i>Chahal v United Kingdom</i> Application No 22414/93 ECLI:CE:ECHR:1996:1115JUD002241493 15.11.1996	Violation of Article 3. Prohibition of torture.  The applicant was a Sikh who illegally entered the United Kingdom but his stay in the UK was later regularised under a general amnesty for illegal entrants. He had been politically active in the Sikh community in the UK and played an important role in the foundation and organisation of the International Sikh Youth Federation. He was arrested but not convicted for conspiracy to kill the then Indian Prime Minister, and was later convicted for assault and affray but the conviction was set aside. A deportation order was issued because of his political activities and the criminal investigations taken against him, and was detained until the ruling of the ECtHR. The ECtHR found a violation of Article 3 and Article 5(4) and (13), but no violation of Article 5(1).	<i>Vivvarajah and Others v the United Kingdom</i> , judgment of 30 October 1991, Series A No 215, p. 34, paras 102 and 103, p. 36, paras 107 and 108, p. 38, para. 121, p. 39, paras 122-126
ECtHR	<i>Ahmed v Austria</i> Application No 25694/96 ECLI:CE:ECHR:1996:1217JUD002569494 17.12.1996	(Article 3) Prohibition of torture. Criminal Conviction. Deportation.  Political activities. Torture, cruel, inhuman or degrading treatment/punishment.	<i>Chahal v the United Kingdom</i> , judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, paras 73-74, p. 1855, paras 79 and 80, p. 1856, para. 86

Court	Case name/reference/date	Key words/relevance/main points	Cases cited
ECtHR	<p><i>Cruz Varas v Sweden</i> Application No 15576/89 ECLI:CE:ECHR:1991:0320IUD0001557689 20.3.1991</p>	<p>No violation of Article 3. Deportation. Family unity. Political activities. Sexual abuse. Torture, cruel, inhuman or degrading treatment/punishment.</p>	<p><i>Soering</i> judgment of 7 July 1989, Series A No 161, p. 35, para. 91, p. 36, para. 91, p. 39, para. 100, p. 34, para. 87, pp. 40-41, para. 103</p>
ECtHR	<p><i>Vilvarajah v United Kingdom</i> Application No 13163/87 ECLI:CE:ECHR:1991:1030IUD0001316387 30.10.1991</p>	<p>No violation of (Article 3) Prohibition of torture. (Article 3) Inhuman treatment. (Article 3) Inhuman punishment. (Article 13) Right to an effective remedy. (Article 13) Effective remedy.</p>	<p><i>Moustaquim</i> judgment of 18 February 1991, Series A No 193, p. 19, para. 43 <i>Cruz Varas</i> judgment of 20 March 1991, Series A No 201, p. 28, paras 69-70, pp. 29-31, paras 75-76 and 83, p. 31, para. 81</p>
ECtHR	<p><i>Soering v United Kingdom</i> Application No 14038/88, ECLI:CE:ECHR:1989:0707IUD0001403888 7.7.1989</p>	<p>(Article 3) Prohibition of torture. (Article 3) Degrading punishment. (Article 3) Degrading treatment. (Article 3) Inhuman punishment. (Article 3) Inhuman treatment. (Article 6) Right to a fair trial. (Article 6(3)(d)) Examination of witnesses. (Article 6(1)) Fair hearing. (Article 6(3)(c)) Free legal assistance. (Article 13) Right to an effective remedy. more... (Article 13) Effective remedy. (Article 2) Right to life. (Article 2(1)) Death penalty.</p>	<p><i>Abdulaziz, Cabales and Balkandali</i> judgment of 28 May 1985, Series A No 94, pp. 31-32, paras 59-60 <i>Johnston and Others</i> judgment of 18 December 1986, Series A No 112, p. 23, para. 48 <i>Boyle and Rice</i> judgment of 27 April 1988, Series A No 131, p. 23, para. 52</p>

## National Jurisprudence

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
NL District Court of the Hague	AWB 14/11801 NL:RBDHA:2015:8571 14.7.2015	Command or superior responsibility for persons in positions of authority. In a decision of the District Court of the Hague (Rechtbank, Netherlands) the application of Article 1(F) Refugee Convention to a former officer in the Syrian army for crimes committed by members of his army unit was considered. It was found that the criteria for command responsibility under Article 28 of the ICC Statute were not met, since it had not been shown that subordinates under the effective command and control of the applicant had committed excludable acts.	
UK Court of Appeal	Judgment <i>AN (Afghanistan) v Secretary of State for the Home Department</i> [2015] EWCA Civ 684 9.7.2015	Serious reasons for considering. Standard of proof. The UK Court of Appeal held that even where a decision-maker applies a balance of probabilities standard, this is unlikely to cause a legal error. Ultimately, national rules of procedure will play a role in making the determination as to the standard applicable, however, guided by the aforementioned authorities.	
DE Federal Administrative Court	Judgment 1 C 16.14 DE:BVVerwG:2015:250315UIC:16.14.0 25.3.2015	Serious crime. The German Federal Administrative Court established that facilitating international people smuggling for gain is a serious crime within the meaning of Article 17(1)(b).	
FR National Court of Asylum Law	M. E., 14016605 C 27.10.2014	Qualification as crimes against humanity. This judgment concerns an Ivorian applicant who was a combatant within a rebel group (GCL-C). The National Court of Asylum applied exclusion clause 1(F)(a) of the Geneva Convention and qualified as crimes against humanity acts perpetrated by this group during the post electoral crises in 2011. In its analysis, the Court relied on UN Security Council resolutions 1975 (2011) and 2000 (2011), as well as a report from the International Independent Investigation Commission on Ivory Coast from 8 June 2011. It also mentioned the indictments of Charles Blé Goudé and Laurent Gbagbo before the International Criminal Court for crimes against humanity.	
FR National Court of Asylum Law	No 13003572 C+, M. B. Y. 7.10.2014	Application of Article 1(F)(c) of the Geneva Convention. Personal functions, actions and responsibilities. The case concerns a member of former Central African President Bozizé's Guard. After a first hearing, the Court raised the issue of exclusion. Parties then submitted observations and a second hearing took place during which the Court extensively interrogated the applicant. The Court ruled that, in case of return to Central African Republic, fear of persecution on the basis of political opinion indisputably exist, and applied Article 1(F)(c) of the Geneva Convention. On the basis of sufficient elements mentioned in the decision and despite denial by the applicant, it was concluded that there were serious reasons to consider that he had a special responsibility in the Presidential Guard at a time when systematic abuses by its members were identified and denounced by the international community, and that he did not try to prevent them or to dissociate himself from them. In this regard, the Court noted that the applicant's statements about his alleged attempts to dissociate himself from the Presidential Central African Guard's actions were not credible.	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
LT Vilnius District Administrative Court	Administracinė byla Nr. 1-7271-171/2014 18.9.2014	Reference made to the Qualification Directive concerning exclusion from refugee status. Exclusion from protection following smuggling conviction.	STS 4 jul 2006, rec. n. 854/2003 CIUE- C-57/09 and C-101/09, 9 November 2010, preliminary ruling under Articles 68 EC and 234 EC from the Bundesverwaltungsgericht (Germany) ECHR, C. <i>Soering</i> v U.K., Application No 14038/88, 7 July 1989
ES	SAN 3335/2013, rec. No 405/2013 17.7.2014	Limited and restrictive nature of the exclusion clauses. Exclusion from refugee status; danger to national security.	
FR National Court of Asylum Law	Mr S. No 11016153 15.7.2014	Application of Article 1(F)(c) of the Geneva Convention. Criteria for determining individual responsibility. In the appeal case of a Sri Lankan applicant, a former local politician of Liberation Tigers of Tamil Eelam (LTTE) who became after his arrival in France an officer of the Tamil Committee of coordination France (CCTF) responsible for publication and supervision of fundraising, the Court referred at first to paragraph 5 of resolution 1373 of the United Nations Security Council, from 28 September 2001, to consider that the terrorist acts attributable to the movement of the LTTE must be qualified as acts contrary to the purposes and the principles of United Nations. LTTE members who directly or indirectly participated in the decision, preparation, and in the execution of acts of terrorist nature, must be considered as falling under the scope of Article 1(F)(c) of the Geneva convention. The Court then recalled that, according to the ruling B. and D. of the Court of Justice of the European Union (CJEU) of 9 November 2010, the exclusion from refugee status of a person who belonged to a criminal or terrorist organisation is subject to an individual examination to establish the existence of serious reasons to attribute to him a personal responsibility as organiser, author or accomplice. Examining the personal case of the applicant, the Court noted that the applicant was sentenced to 4 years detention by the Judicial Court of Paris in particular for financing a terrorist undertaking and participation in a criminal association for the purpose of preparing a terrorist act, and that he had also been involved at a high level in the organisation and financing of the terrorist movement of the LTTE. It then observed that he had expressed refusal to dissociate himself from this organisation. As a consequence, the Court excluded him from refugee status in application of the requirements of Article 1(F)(c) of the Geneva Convention.	ECHR 17.1.2012, <i>Othman (Abu Qatada) v UK</i> ECHR 17.1.2012, <i>Othman (Abu Qatada) v UK</i>
NL	JDCS 201310217/1/V1 27.6.2014	Exclusion in cases of witnesses to ICC; sufficient protection.	
NL	JDCS 201302787/1/V1 16.6.2014	Reasons for decision to apply exclusion clause.	
NL	JDCS 201303363 28.5.2014	Interpretation of level of knowledge and personal participation.	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
NL	JDCS 201302334/1/V4 28.2.2014	Exclusion of member of police service under Article 1(F).	
FI	Supreme Administrative Court, 18 February 2014, KHO:2014:35 18.2.2014	Seriousness of reasons to believe. This case concerns the legality of the application of the exclusion clauses and refusal of international protection for an applicant who was suspected of committing a serious crime.	UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010] UKSC 15  CJEU — C-465/07 <i>Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie</i>  CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i>
FR	Mr A. No 12007633C 10.1.2014	Application of Article 1(F)(c) of the Geneva Convention.  This judgment concerns an applicant alleging fear of persecution from both the Sri Lankan government and the LTTE because of his actions within the intelligence service of this organisation. He also alleged that he physically assaulted a Grama sevaka of his sector who had refused to cooperate, and that he was involved in the murder of a teacher. He then laconically stated that he was watching the movements of the civilian population and, later, of the military, that he has personally arrested and interrogated persons suspected of acting against the LTTE, and that he has prepared reports handed to his superiors. He nevertheless asserted that he had never been the author or had witnessed violence committed during interrogations. The CNDA then found that there were serious reasons to believe that this person was guilty of acts contrary to the purposes and principles of the UN, in particular because of his involvement in the killing of a civilian, and that he had necessarily covered up such acts as part of his responsibilities, so that it was necessary to exclude him from the protection of the Geneva Convention.	
ES	SAN 5689/2013, rec. No 327/2012 26.12.2013	The Court highlights the restrictive application of the exclusion clauses, subject to the need to assess the individual responsibility.  Exclusion clauses; crimes against humanity, Article 1(F)(a).	STS 30 Jun 2011, rec. n. 1298/2010
DE	Judgment 10 C 26.12 DE:BVewG:2013:191113U1026.12.0 19.11.2013	Criteria for determining individual responsibility.  Application of Directive 2004/83/EC Article 12(2)(c)(3).	<i>B and D v Germany</i> , judgment of 9 November 2010 — Cases C-57/09 and C-101/09

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr M. B. No 06014596C 10.10.2013	<p>Non-application of Article 1(F)(c) of the Geneva Convention.</p> <p>In this case, the applicant was from the region of Bandundu and a counterintelligence officer under President Mobutu, President Laurent Kabila and also under the current Congolese regime. He had been arrested because of visits to his former superior condemned to life imprisonment in a trial concerning President Kabila's murder, and was pursued for correspondences he sent to international human rights organisations, and for violation of his oath service. His fear of persecution was considered well-founded.</p> <p>The CNDA considered in its motivation that no geopolitical information source implicated the applicant or indicated that the counter-intelligence direction was among the directions of the national intelligence agency found guilty of human rights violations. The Court also considered that, according to his functions, the applicant was not competent to proceed to interrogations and was not engaged in informing. Also, it judged that he had not participated directly or indirectly in the repression of political opposition, so that it could not be considered that he has participated, directly or indirectly, to acts contrary to the purposes and the principles of United Nations in the sense of Article 1(F)(c) of the Geneva Convention. Thus, the applicant was granted refugee status.</p>	
NL Council of State	Judgment 201202758/1/V2 27.9.2013	The requirement of seriousness ('serious crime').	
HU Metropolitan Court of Budapest (currently: Budapest Administrative and Labour Court)	H.A.I. v Office of Immigration and Nationality (OIN), 3.K.30.602/2013/15 29.8.2013	Application of Articles 1(D) and 1(F) of the Refugee Convention to a Palestinian stateless person; a matter of national security.	CJEU — C-364/11 <i>Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kameel Ismail v Bevandorlasi es Allampolgarsagi Hivatal</i> (BAH) ECtHR — <i>Al Nashif v Bulgaria</i> , Application No 50963/99
BE Council for Alien Law Litigation	Judgment No 108.154468 8.8.2013	<p>Article 12(1)(a) — Assistance of the United Nations.</p> <p>Decision of the Belgian Raad voor Vreemdelingenbetwistingen (Council for Alien Law Litigation) that Article 1(D) applies only if the 'asylum seeker personally finds himself in grave danger' and the UNRWA 'was unable to offer him living conditions in that area that met the objectives it was tasked with'.</p>	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mrs B. No 10003771C 26.7.2013	<p>Non-application of Article 1(F) of the Geneva Convention.</p> <p>In this case concerning a young sister of the former Rwandan president Habyarimana, the Court considered the application of the exclusion clauses. The applicant was a nun and nurse, who became director of a department of the Ministry of Health, and was evacuated by the Red Cross a few days after the disappearance of her brother. She returned to Rwanda 2 years later, and was accused of having supplied a weapon used for the execution of a Tutsi in April 1994. She appeared before the Gacaca jurisdictions, and fled from her country in 2007 after she was summoned by the military intelligence department. She also testified as a non-protected defence witness, in front of the ICTR in November 2010.</p> <p>According to the Court, applicant's declarations were evasive, insufficiently precise, and peppered with contradictions, and reflected a distorted and very partial view of the events during the period of the genocide. It was judged that she faced no risk of prosecution for negation of the genocide committed in Rwanda in 1994. Her application for asylum was rejected on the grounds that her sentence in absentia to 19 years of hard labour by the Gacaca jurisdictions was not established. The exclusion clauses were not applied.</p>	UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010]
UK Upper Tribunal (Asylum and Immigration Chamber)	AH (Article 1F(b)), 2013 UKUT 00382 25.7.2013	<p>Exclusion from protection, Serious non-political crime, Terrorism. This case concerned the meaning of 'serious' in Article 1(F)(b) of the Refugee Convention.</p> <p>Exclusion from protection.</p>	UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010]
FR National Court of Asylum	Mr M. No 09015396C+ 22.7.2013	<p>Application of Article 1(F)(b) and of the notion of danger for the population of the host country.</p> <p>In this case, the applicant was sentenced to 6 years and 6 months detention in Germany for attempted murder, attempted aggravated robbery and aggravated assault. His sentence was then suspended in application of Article 456 A of the German code of criminal procedure and the German authorities planned to proceed to the eviction of the applicant. The CNDA decided that the gravity of the acts committed by the applicant outside the host country implied that requirements of Article 1(F)(b) of the Geneva Convention were met.</p> <p>Moreover, the Court considered that the behaviour of the applicant must be considered as constituting a danger to the population of the host country, because, on one hand, he had tried to hide the motives of the actions which caused his conviction and the reasons which led to the suspension of his punishment and, on the other hand, he showed no compassion to his victim.</p>	UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010] UKSC 15 UK — <i>Yasser Al-Sirri v Secretary of State for the Home Department</i> [2009] EWCA Civ 222 UK — Court of Appeal, <i>SK (Zimbabwe) v Secretary of State for the Home Department</i> , [2012] 1 WLR 2809
UK Court of Appeal	<i>AA-R (Iran) v Secretary of State for the Home Department</i> , [2013] EWCA Civ 835 12.7.2013	<p>Crime against humanity, Exclusion from protection.</p> <p>'Complicity' in crimes against humanity; application of Article 1F of the Refugee Convention. Crime against humanity, Exclusion from protection.</p>	UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010] UKSC 15 UK — <i>Yasser Al-Sirri v Secretary of State for the Home Department</i> [2009] EWCA Civ 222 UK — Court of Appeal, <i>SK (Zimbabwe) v Secretary of State for the Home Department</i> , [2012] 1 WLR 2809

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr M. No 09017369C+ 12.6.2013	<p>Application of Article 1(F)(a) of the Geneva Convention for complicity in genocide.</p> <p>This is the case of a Rwandan Tutsi national who had been granted refugee status in Nairobi in 1996 by the UNHCR which later decided to withdraw the refugee status on the basis of new information and applied the exclusion clauses. The Court observed that, as a former member of the Coalition for the Defence of the Republic (CDR) which gathered Hutu radical extremists in March 1992, he however consistently denied the racist ideology of the movement. The Court held that his regular visits, from 9 to 18 April 1994, to a place where massacres were committed while he was an official agent of the interim government was established, as well as the fact that he has witnessed massacres of Tutsis without seeking to prevent them or to dissociate himself from them.</p> <p>It has also been held that he had a personal relationship with a person directly responsible for massacres, whom he tried to exonerate by testifying as a witness before the International Criminal Tribunal for Rwanda (ICTR). The Court ruled that his behaviour had constituted moral support to the massacre of Tutsis and that there were serious reasons for considering that the applicant was responsible of complicity in genocide. He therefore had to be excluded from the protection of the Convention Geneva.</p>	
FR National Court of Asylum	Mr and Mrs A. No 04020557R 24.5.2013	<p>Application of Article 1(D) of the Geneva Convention.</p> <p>Following the judgment of the Council of State which overruled the previous decision of the French Court for error of law, CNDA's decision referred to the judgment of the Court of Justice of the European Union Mr EL KOTT and its interpretation of Article 12, paragraph 1(a) of Directive 2004/83/EC. The CNDA considered that the provisions relating to cases falling within the scope of Article 1(D) of the Geneva Convention should be interpreted as referring to persons who ceased to benefit from this protection or assistance for a reason beyond their control and independent of their will. In this case, the applicant was of Palestinian origin and has been ordinarily resident in Jordan, where he received assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). However, the applicant had been forced to leave Jordan after a conflict between his brother and a member of an influential Jordanian family. The CNDA has considered that the applicant was unable to enjoy the protection of the Jordanian authorities he had vainly sought, and been forced to leave the UNRWA area of operations for compelling reasons independent of his will. He was thus deprived of the benefit of the assistance provided by this organisation, so that it was appropriate to recognise his and his wife's refugee status.</p>	
BE Council for Alien Law Litigation	No 103.509 23.5.2013	<p>Cessation of protection, Exclusion from protection, Stateless person. Application of Article 1(D) of the Refugee Convention to Palestinian refugees.</p> <p>The CGRS held that the credibility of the asylum seeker's account was weakened by his travelling around. It found that his reason for leaving Lebanon was to seek a better life in Belgium and that there was no ground for fearing persecution. According to CGRS information, Palestinians registered with the UNRWA were able to obtain travel documents necessary to be readmitted to Lebanon. In the circumstances, the Applicant could be excluded from the application of Article 1(D). However, the CALL found, on the contrary, that the Applicant had left Lebanon in 2006 in a situation of unrest, that of his siblings, two brothers had sought and obtained asylum in Germany, and that his father had died as a result of torture inflicted by the Lebanese army. The Applicant was held to be at serious risk of personal danger and the UNRWA was unable to assure him of living conditions in line with its mission, owing to the fact that his former place of residence had in the meantime been almost completely destroyed.</p>	<p><i>El Kareem El Kott et al.</i> Case C-364/11 ECtHR — <i>M.S. v Belgium and Greece</i> [GC], Application No 30696/09</p>



Member State/ Court	Case name /reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr U. No 11010862C+ 23.5.2013	Interpretation of the notion of serious crime for the purpose of exclusion from the benefit of subsidiary protection. In this judgment concerning a Turkish national, the French National Court of Asylum (CNDA) established that the applicant would face serious threat of torture or inhuman or degrading treatment or punishment. The Court then considered his exclusion from the benefit of the subsidiary protection pursuant to Article L. 712-2 b) of the CEDESA for his implication in a serious non-political crime because of business and financial offences. The Court referred to a judgment of the French Constitutional Council and recalled that the seriousness of an offence which might exclude a person from the benefit of this protection can be assessed only in the light of French criminal law. It then decided that the financial and economic crimes, that were at stake did not cause damage to persons, and consequently were not a serious crime within the meaning of the law. Therefore, subsidiary protection was granted to the applicant.	
BE Council for Alien Law Litigation	Judgment No 102283 2.5.2013	Exclusion from protection. Application of Article 1(D) of the Convention Relating to the Status of Refugees. Decision of the Belgian Raad voor Vreemdelingenbetwistingen (Council for Alien Law Litigation) that Article 1(D) applies only if the 'asylum seeker personally finds himself in grave danger' and the UNRWa 'was unable to offer him living conditions in that area that met the objectives it was tasked with'.	CJEU — C-364/11. <i>Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kamel Ismail v Bevandorlasi es Allampalgarsagi Hivatal</i> (BAH)  Belgium — Council of State, 25 October 2005, No 150619  Belgium — Council for Alien Law Litigation, 18 June 2008, No 1725  Belgium — Council for Law Alien Litigation, 25 June 2007, No 398  Belgium — Council of State, 15 January 2003, No 114472
FR National Court of Asylum Law	Mr G. No 12018386C+ 29.4.2013	Application of Articles 1(F)(a) and 1(F)(b) of the Geneva Convention. The applicant is a Sri Lankan national of Tamil origin who directly and knowingly participated, at a senior level, in the forced recruitment of children by the Liberation Tigers of Tamil Eelam (LTTE). It was found that he had violated children's rights as defined in Article 4(3) of Additional Protocol II to the Geneva Conventions of 1949. It was also noted that the conscription of children under the age of 15 years is a war crime under Article 8 of the Statute of the International Criminal Court. Thus, the Court found that there were serious reasons for considering that the applicant was guilty of war crimes for the recruitment of children under the age of 15 and of serious non-political crimes for the recruitment of children over the age of 15.	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum Law	Mr B. 10005048 C (rec. 2013), 15.2.2013	<p>Exclusion based on Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD) in combination with Article L. 712-2 b) of the CESEDA (transp. of Article 17(1)(b) QD). Gravity of the facts emphasised by the National Court of Asylum (CNDA). Criminal association and acts of terrorism. Moroccan national sentenced in France to 5 years of imprisonment accompanied by a permanent exclusion from French territory for 'criminal association to prepare a terrorist act', and served his sentence in France.</p> <p>The National Court of Asylum (CNDA) held that there was a risk for the applicant to be exposed to serious harm in the meaning of Article L. 712-1 b) of the CESEDA (transp. of Article 15(b) QD) in case of return to his country of origin, because of his implication in radical Islamism networks and the harsh treatments of terrorism suspects by the Moroccan authorities. However, considering his sentence in France for 'criminal association to prepare a terrorist act', the applicant was excluded from the benefit of the subsidiary protection according Article L. 712-2 b) of the CESEDA (transp. of Article 17(1)(b) QD). The Court then added that, if he served his sentence, he was still subjected to a permanent exclusion from the French territory and under house arrest. Therefore, there were serious reasons to believe that his activities on the French ground constituted a serious threat to public order, public safety or state security, in the meaning of Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD).</p>	
BE Council for Alien Law Litigation	Council for Alien Law Litigation, No 96933 12.2.2013	<p>Exclusion on the basis of committing the acts contrary to the purposes and principles of the United Nations.</p> <p>Acts contrary to the purposes and principles of the UN, Exclusion from protection, Terrorism.</p>	<p>CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i> — Belgium - Council for Alien Law Litigation, 13 January 2011, No 54335</p> <p>Belgium — Council for Alien Law Litigation, 3 March 2011, No 57261</p> <p>Belgium — Council for Alien Law Litigation, 1 July 2011, No 64356</p> <p>Belgium — Council of State, 13 July 2012, No 220321</p>
BE Council for Alien Law Litigation	Judgment No 96.372470 31.1.2013	<p>Exclusion from protection. Application of Article 1(D) of the Convention Relating to the Status of Refugees.</p> <p>Decision of the Belgian Raad voor Vreemdelingenbetwistingen (Council for Alien Law Litigation) that Article 1(D) applies only if the 'asylum seeker personally finds himself in grave danger' and the UNRWA 'was unable to offer him living conditions in that area that met the objectives it was tasked with'.</p>	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
UK Supreme Court	<i>Al-Sirri v Secretary of State for the Home Department</i> [2012] UKSC 54 21.11.2012	Acts contrary to the purposes and principles of the UN, Exclusion from protection, Standard of proof, Terrorism. Infrequency of the use of Article 1F(c) of the Geneva Convention relating to the principles of the UN. These joint cases concern Article 1(F)(c) of the Refugee Convention. The Court considered what acts fall within the exclusion and what is meant by 'serious reasons for considering' a person to be guilty of acts contrary to the purposes of the United Nations ('UN').	Canada — <i>Pushpanathan v Canada (Minister of Citizenship and Immigration)</i> [1998] 1 S.C.R. 982 CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i> Ireland — High Court, 5 May 2011, <i>A.B. v Refugee Appeals Tribunal</i> [2011] IEHC 198 UK — Court of Appeal, 19 January 2000, Secretary of State for The Home Department, Ex Parte Adan R v Secretary of State for The Home Department Ex Parte Aitseguer, R v [2000] UKHL 67 UK — <i>R v Asfaw</i> [2008] 1 AC 1061 UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010] UKSC 15 UK-29 July 1999, Adimi, R (on the application of) v Uxbridge Magistrates Court and Anor [1999] EWHC Admin 765
UK Upper Tribunal (Immigration and Asylum Chamber)	<i>AH (Article 1(F)(b) — 'serious') Algeria v SSHD</i> UKUT 382 30.10.2012	Serious non-political crime for the purpose of the exclusion has an autonomous international meaning and is not to be defined purely by reference to national law.	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
SE Migration Court of Appeal	Judgment UJM287-10 MIG 2012: 14 25.10.2012	Crime against humanity, Family member, Exclusion from protection. Grounds for exclusion; the standard of proof in relation to 'particular reason to believe'.	Sweden — MIG 2007:12 CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i> Sweden — MIG 2010:23 Sweden — MIG 2011:24
FR National Court of Asylum Law	Mr M. 10018884 C+, 20.9.2012	Exclusion from subsidiary protection, pursuant to Article L. 712-2 d) in combination with Article L. 712-2 b) of the CESEDA (transp. of Article 17(1)(d) and of Article 17(1)(b) OQD): Drug trafficking and money laundering; serious threat to public order; Gravity of the facts emphasised by the National Court of Asylum (CNDA).  This case concerns a Turkish national, a former extreme left activist, who maintained links with leading figures from the extreme right-wing and the mafia in Turkey. After he had left his country, he was implicated in an assassination attempt in Belgium, then sentenced in the Netherlands to 16 years of imprisonment for 'murder, drug offences, carrying of prohibited weapons, abduction and recidivism' and subjected to an alert for the purpose of refusing stay in the Schengen area. He was also prosecuted in Turkey for drug trafficking and money laundering. The Court found that this prosecution in Turkey was not a persecution within the meaning of Article 1A(2) of the Geneva Convention but that the applicant may be exposed, in case of incarceration in Turkey, to reprisals from organised crime and could not be protected by the prison administration. However, considering the gravity of the facts he was prosecuted and sentenced for in the Netherlands, and the fact that he was therefore subjected to an alert for the purpose of refusing stay in the Schengen area, the Court decided that there were serious reasons to believe that his activities constitute a serious threat to public order. He was therefore excluded from the benefit of subsidiary protection according to Article L. 712-2 b) and Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(c) and Article 17(1)(d) OQD).	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
DE Federal Administrative Court	Federal Administrative Court, 4 September 2012, 10 C 13.11 .4.9.2012	Application of Article 12(2) of the Qualification Directive. Acts contrary to the purposes and principles of the UN. Exclusion from protection, First country of asylum, protection, refugee status, safe third country, serious non-political crime, Terrorism. Serious non-political crime for the purpose of the exclusion has an autonomous international meaning and is not to be defined purely by reference to national law.	Germany — Federal Administrative Court, 31 March 2011, 10 C 2.10 Germany — Federal Administrative Court, 7 July 2011, 10 C 26.10 Germany — Federal Administrative Court, 24 November 2009, 10 C 24.08 Germany — Federal Administrative Court, 11 September 2007, 10 C 8.07 Germany — Federal Administrative Court, 08 February 2005, 1 C 29.03 Germany — Federal Administrative Court, 15 December 1987, 9 C 285.86 Germany — Federal Administrative Court, 30 March 1999, 9 C 23.98 CJEU — C-57/09 and C-101/09 Germany v B and D Germany — Federal Administrative Court, 6 April 1992, 9 C 143.90

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
CZ	Judgment <i>H. R. v Ministry of the Interior</i> 5 Azs 2/2012-49 2.8.2012	<p>Acts contrary to the purposes and principles of the UN, Credibility assessment, Exclusion from protection on the basis of participating in crimes against humanity, Membership of a particular social group, Persecution Grounds/Reasons.</p> <p>The court found that the administrative body had erred in not considering, on the one hand, the testimony of the applicant to be credible for the purposes of evaluation of fear of persecution but, on the other hand, concluding that the same testimony (that the applicant had been involved in the Iraqi army during the regime of Saddam Hussein) was proof for the purposes of applying exclusion.</p>	<p>Czech Republic — Supreme Administrative Court, 19 May 2004, <i>M. I. v Ministry of the Interior</i>, 5 Azs 63/2004-60</p> <p>Czech Republic — Supreme Administrative Court, 5 Azs 36/2008-119</p> <p>Czech Republic — Supreme Administrative Court, 4 Azs 103/2007-63</p> <p><b>Česká republika</b> — Nejvyšší správní soud, 21 prosinec 2005, S.N. proti Ministerstvu vnitra, 6 Azs 235/2004-57</p> <p><b>Česká republika</b> — Nejvyšší správní soud, 30 září 2008, S.N. proti Ministerstvu vnitra, 5 Azs 66/2008-70</p>
FR National Court of Asylum Law	10014511 C+ (rec. 2012), Mr A. 29.6.2012	<p>Exclusion from subsidiary protection based on Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD) alone; drug crime and trafficking; Multiplicity of facts.</p> <p>Applicant from Kosovo who had been implicated in several criminal procedures in Kosovo and in European countries. In particular, he was sentenced to 3 years of imprisonment in Switzerland for aggravated drug crime and trafficking. In France, he also had been reported on several occasions for his violent behaviour.</p> <p>The National Court of Asylum (CNDA) underlined his profile of persistent offender as well as the unclear character of his past and current activities, and therefore excluded him from subsidiary protection on the grounds that there were serious reasons to consider that his actions constituted a serious threat to public order, in the meaning of Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD).</p>	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
AT Constitutional Court (VfGH)	Constitutional Court U 1092/11 11.6.2012	Exclusion on the basis of participating in crimes against humanity. Crime against humanity, Exclusion from protection.	Austria — VfSlg. 15.451/1999, 16.297/2001, 16.354/2001, 18.614/2008 Austria — VfSlg. 16.176/2001, 16.504/2002 Austria — VfSlg. 16.214/2001 CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i> Austria — VfSlg. 15.451/1999, 15.743/2000, 16.354/2001, 16.383/2001 Austria — VfSlg. 14.393/1995, 16.314/2001 Austria — VfSlg. 13.836/1994, VfSlg. 14.650/1996, VfSlg. 16.080/2001, 17.026/2003 Austria — VfSlg. 14.039/1995, 16.407/2001 Austria — VfSlg. 14.301/1995, 15.980/2000, 16.814/2003 Austria — VfSlg. 13.327/1993, 16.407/2001
EL	Council of State, 8 May 2012, Application No 1661/2012 .8.5.2012	Application of Article 1(F) of the 1951 Refugee Convention. Actor of persecution or serious harm, Exclusion from protection, Humanitarian considerations, Inhuman or degrading treatment or punishment, Protection, Refugee Status, Religion, Serious non-political crime, Subsidiary Protection. In this case an Indian Sikh had served a sentence in Romania for plotting to kill the Indian Ambassador in 1991.	ECtHR — <i>Saadi v Italy</i> (Application No 37201/06) ECtHR — <i>Chahal v the United Kingdom</i> (Application No 22414/93) ECtHR — <i>Ahmed v Austria</i> (Application No 25964/94) (1996) 24 EHRR 278 CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i> ECtHR — <i>Daoudi v France</i> , Application No 19576/08

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum (CNDA)	National Court of Asylum, 5 April 2012, M.Z., No 10004811 5.4.2012	Application of Article 1(F) of the 1951 Refugee Convention. Acts contrary to the purposes and principles of the UN, Exclusion from protection, Terrorism, Well-founded fear.	
UK Court of Appeal (England and Wales)	<i>AH (Algeria) v Secretary of State for the Home Department</i> EWCA Civ 395 2.4.2012	Serious non-political crime for the purpose of the exclusion has an autonomous international meaning and is not to be defined purely by reference to national law.	
NL ABRvS (Administrative Jurisdiction Division of the Council of State)	ABRvS, 29 February 2012, 201106216/1/ V1 29.2.2012	Application of Article 12(2) of the Qualification Directive. Individual assessment, Exclusion from protection.	CIEU — C-57/09 and C-101/09 <i>Germany v B and D</i>
NL	JDCS 201107836//V4 11.2.2012	Application of exclusion criteria on the basis of a policy of presumption of involvement due to mere membership in a particular military unit.	CIEU 9.11.2010, C-57/09 and C-101/09
FR National Court of Asylum	Mr H. No 10015626C+ 9.2.2012	Non-application of Article 1(F) of the Geneva Convention. The case concerns a Shiite official who was a leader of Ayatollah Sadeq al-Sadr's movement and alleged that he was disgraced by his peers and feared persecution from the interim government and from the current Iraqi government. French Office for the protection of Refugees and stateless Persons (OFPRA) considered that he had indirectly participated in the commission of acts that could be regarded as serious non-political crimes within the meaning of Article 1(F)(b) of Geneva Convention. The Court held that the applicant's allegation that he had no more connection to the movement, in which he had been responsible for external relations until 2008, was not credible. Moreover, it considered that this movement had an important place in the new Iraqi institutions and decisively influenced their political orientations. Therefore his fears of persecution or serious threats from the Iraqi authorities were not well- founded. Accordingly, the Court held that it was not necessary to assess the applicability of Article 1F of the Geneva Convention or of Article L. 712-2 of the Code of entry and residence of Foreigners and the right of asylum (CESEDA).	
UK Upper Tribunal (Immigration and Asylum Chamber)	Judgment MT (Article 1(F)(a) — aiding and abetting) <i>Zimbabwe v Secretary of State for the Home Department</i> [2012] UKUT 00015(IAC). 2.2.2012	Crimes against humanity. Exclusion clauses. Aiding and abetting. In the case of MT Zimbabwe before the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), the appellant, who was a detective in the Zimbabwean police force, was found to have participated in two incidents of torture. The Upper Tribunal held it was incontrovertible that her actions during this incident had a substantial effect on the commission of the crime of torture which took place. The Upper Tribunal was satisfied that her participation in this incident amounted to the aiding and abetting of a crime against humanity.	



Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr A. No 10013960C 24.1.2012	<p>Exclusion from protection and adversarial principle.</p> <p>The applicant is a Russian citizen of Chechen origin who voluntarily rendered his fingerprints unreadable and alleged former responsibilities in the Guard of Sharia in the military base of Tchernomorije. He also declared that he was aware of acts of torture and of executions perpetrated by elements of this Guard, and that he maintained a close relationship with some notorious Chechen fighters. The Court held that in view of his previous responsibilities and the lack of response to questions on the above points, the applicant could be regarded as possibly being guilty of acts referred to in Article 1(F). Therefore, the Court invited the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and the applicant to submit further observations within 2 months after notification of this decision.</p>	
AT Constitutional Court	Constitutional Court, 13 December 2011, U1907/10 13.12.2011	<p>Exclusion from protection, Indiscriminate violence, Revocation of protection status, Internal armed conflict, Serious non-political crime, Subsidiary Protection</p>	<p>VfSlg. 14.650/1996 VfSlg. 13.836/1994 VfSlg. 16.080/2001 VfSlg. 17.026/2003 VfSlg. 16.214/2001 VfSlg. 18.257/2008 VfSlg. 18.142/2007 VfSlg. 15.354/1998 VfSlg. 16.737/2002 VfSlg. 16.993/2003 VfSlg. 16.314/2001 VfSlg. 14.391/1995 VfSlg. 19.251/2010 VfSlg. 18.362/2008 VfGH, 5 October 2011, B1100/09 VwGH, 27 April 2006, 2003/20/0050 VfSlg. 16.273/2001 VfSlg. 16.297/2001 VfSlg. 16.354/2001 VfSlg. 18.614/2008</p>

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
UK	ABC (a Minor) (Afghanistan), R (on the Application of the Secretary of State for the Home Department) [2011] EWHC 2937 6.12.2011	Exclusion under Article 1F. Best interest of the child, Child Specific Considerations, Exclusion from protection, Personal circumstances of applicant.  In considering the possible exclusion under Article 1(F), careful consideration must be given to culpability. Domestic law including any defences must be accurately cited. When the applicant is a child, consideration of her age and understanding together with consideration of her welfare must form part of the overall analysis. If a child is found to be excluded from asylum or humanitarian protection the welfare of the child should be considered when arrangements for other leave to remain are considered.	UK — <i>ZH (Tanzania) (FC) v Secretary of State for the Home Department</i> [2011] UKSC 4  New Zealand — <i>S v Refugee Status Appeals authority</i> [1998] NZ LR91  UK — <i>R (N) v Secretary of State for the Home Department</i> [2009] EWHC 1581  UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010] UKSC 15  UK — <i>R v Lobell</i> [1957] 1 QB 547  UK — <i>Plimer v R</i> [1971] AC 814
FR National Court of Asylum (CNDA)	M.S., No 11005411 30.11.2011	Application of Article 1(F) of the 1951 Refugee Convention.  Acts contrary to the purposes and principles of the UN, Exclusion from protection, Terrorism, Well-founded fear.	CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i>
IE The High Court	<i>A.B. v Refugee Appeals Tribunal and The Minister for Justice, Equality and Law Reform</i> , 2011 IEHC 412 10.11.2011	The standard of proof required by Article 12(2) of Council Directive 2004/83/EC.  Crime against humanity, Exclusion from protection.	CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i>
SE Migration Court of Appeal	UM 3891-10 9.9.11	Exclusion from protection due to possible crimes against humanity. Crime against humanity, Exclusion from protection, <i>Non-refoulement</i> .	Sweden — MIG 2007:33 II Sweden — MIG 2007:33 I Sweden — MIG 2007:15 Sweden — MIG 2007:12 CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i>

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr E. No 10005808C 6.9.2011	<p>Responsibility as an organiser and accomplice of acts contrary to the purposes and principles of the United Nations.</p> <p>The applicant was a national of the Republic of Haiti, founder and spokesperson of various opposition movements to Lavalas, self-proclaimed mayor of the city of Gonaives between January and April 2004, and coordinator of the National Reconstruction Front (FRN). The Court ruled that his fear of persecution was well-founded. It then recalled that the exclusion of a person who belonged to an illegal armed organisation applies if there are serious reasons for considering he has committed or was guilty of acts mentioned in Article 1(F). As an organiser, perpetrator or accomplice, he was found personally responsible of serious non-political crimes or of acts contrary to the purposes and principles of the United Nations. The Court considered that, as a mayor, he had justified and encouraged abuses against the civilian population of Gonaives, in the name of the fight against Lavalas. Consequently, it found that there were serious reasons for considering that he was responsible, as an organiser and accomplice, of acts contrary to the purposes and principles of the United Nations within the meaning of Article 1(F)(c) of the Geneva Convention, despite his attempts to minimise his responsibility in the commission of abuses by armed groups that he led and supervised.</p>	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
DE	Federal Administrative Court, 7 July 2011, 10 C 26.10 17.7.2011	<p>Acts contrary to the purposes and principles of the UN, Individual assessment, Exclusion from protection, Revocation of protection status, Serious non-political crime, Terrorism.</p> <p>This case concerned the revocation of asylum and refugee status in the case of a former official of the Kurdistan Workers' Party (PKK) (following the European Court of Justice case of <i>Federal Republic of Germany v B (C-57/09)</i> and <i>D (C-101/09)</i>, 09 November 2010).</p>	<p>Germany — Federal Constitutional Court, 6 July 2010, 2 BvR 2661/06</p> <p>Germany — Federal Constitutional Court, 12 March 2008, 2 BvR 378/05</p> <p>Germany — Federal Administrative Court, 24 February 2011, 10 C 3.10</p> <p>Germany — Federal Administrative Court, 31 March 2011, 10 C 2.10</p> <p>CJEU — C-175/08; C-176/08; C-178/08 and C-179/08 <i>Salahadin Abdulla and Ors v Germany</i> — resource</p> <p>UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i>, [2010] UKSC 15</p> <p>Germany — Federal Constitutional Court, 13 March 2007, 1 BvF 1/05</p> <p>Germany — Federal Administrative Court, 1 June 2011, 10 C 25.10</p> <p>UK — <i>MH (Syria) v Secretary of State for the Home Department</i> [2009] EWCA Civ 226</p> <p>CJEU — C-226/08 <i>Stadt Papenburg v Germany</i></p> <p>Germany — Federal Administrative Court, 11 September 2007, 10 C 8.07</p> <p>Germany — Federal Administrative Court, 25 November 2008, 10 C 46.07</p> <p>Germany — Federal Constitutional Court, 30 June 2009, 2 BvE 2.08</p> <p>CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i></p>

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
DE Federal Administrative Court	10 C 26.10140 DE:BVerwG:2011:070711U10C26.10.0 7.7.2011	Exclusion does not presuppose a present danger to the security in Germany caused by the applicant. Mere membership of a terrorist organisation does not justify the presumption of a ground for exclusion.	
SE The Administrative Court in Stockholm — Migration Court	UM 21121-10 14.6.2011	Application of Article 1F of the Refugee Convention. Exclusion from protection, Refugee Status, Persecution Grounds/Reasons, Political Opinion.	Sweden — UN 442:03 CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i>
FR Council of State/ Conseil d'Etat	Ofpra v Mr A., No 320910 24.5.2011	Article 1(F)(b) of the 1951 Refugee Convention is applicable even if the sentence (for a serious non-political crime) has been served. Exclusion from protection, Serious non-political crime.	
IE High Court	A.B. v Refugee Appeals Tribunal [2011] IEHC 198 5.5.2011	Application of Article 12 of the Qualification Directive concerning exclusion from refugee status. Crime against humanity, Acts contrary to the purposes and principles of the UN, Exclusion from protection.	CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i> New Zealand — Supreme Court, 27 August 2010, <i>The Attorney-General (Minister of Immigration) v Tamil X and Anor</i> , [2010] NZSC 107 UK — Supreme Court, 17 March 2010, <i>JS (Sri Lanka) v Secretary of State for the Home Department</i> , [2010] UKSC 15

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr R. No 10014066C+ (rec. 2011) 21.4.2011	<p>Exclusion from subsidiary protection based on Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD) in combination with Article L. 712-2 c) of the CESEDA (transp. of Article 17(1)(c) QD): international terrorism.</p> <p>Moroccan national, sought in Morocco for 'constitution of criminal gang to prepare and commit acts of terrorism in connection with a collective undertaking intending to seriously disturb public order, incitement to commit terrorist acts, assistance to perpetrators of terrorist acts'. At the request of the Moroccan authorities, an arrest warrant had been issued by Interpol for 'criminal association to commit terrorist acts' and the applicant thereafter arrested in France. A French Court of Appeal (Metz) then approved the request for extradition filed by the Moroccan authorities, the applicant having also been reported by the French central directorate of internal intelligence (DCRI — Direction Centrale du Renseignement Intérieur) for his close relation to the international jihadist movement, specifically al-Qaeda.</p> <p>The National Court of Asylum (CNDA) rejected the application of Article 1A(2) of the Geneva Convention on the ground that the alleged facts did not fall within its scope, but recognised applicant's well founded fear to be subjected to serious harm, in the meaning of Article L. 712-1 b) of the CESEDA (transp. of Article 15(c) QD) relating to subsidiary protection, if he returned to Morocco, because of the harsh treatments accorded to terrorism suspects. However, he was excluded from subsidiary protection based on Article L. 712-2 c) (transp. of Article 17(1)(c) QD) and Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD). His participation in jihadist forums and communication and media activities on behalf of al-Qaeda, specifically as administrator of an Islamist website recruiting jihadist combatants, were considered acts contrary to the purposes and principles of the United Nations. Moreover, the Court stated that there were serious reasons to believe that he knowingly participated in jihadist propaganda diffusion and incited to commit acts of terrorism. Because these acts were accomplished in the virtual space through internet and therefore have consequences beyond the border, they were considered to constitute a serious threat to public order, public safety or state security.</p>	
NL District Court Haarlem	AWB 10/6592 1.4.2011	<p>This case considered exclusion from refugee status and found that criminal proceedings are not required for the application of Article 12(2) of the Qualification Directive or Article 1(F) of the Refugee Convention.</p> <p>Actor of persecution or serious harm, Crime against humanity, Exclusion from protection.</p>	CIEU — C-57/09 and C-101/09 <i>Germany v B and D</i>
DE Federal Administrative Court	10 C 2. 10139 DE:BVerwG:2011:310311U10C2.10.0 31.3.2011	<p>Exclusion on the ground of having committed war crimes or crimes against humanity.</p> <p>Crime against humanity, Acts contrary to the purposes and principles of the UN, Exclusion from protection, Revocation of protection status, Standard of proof, War crimes.</p>	UK — KK (Turkey) [2004] UKIAT 00101 Germany — Federal Administrative Court, 24 November 2009, 10 C 24.08 Canada — <i>Pushpanathan v Canada, Minister of Citizenship and Immigration Control (Canadian Council for Refugees intervening)</i> [1999] INLR 36 CIEU — C-57/09 and C-101/09 <i>Germany v B and D</i>

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
CZ Supreme Administrative Court	Judgment <i>J.S.A. v Ministry of Interior</i> Azs 40/2010-70 23.3.2011	Exclusion on the grounds of activities 'contrary to the purposes and principles of the United Nations'. Subsidiary Protection, Exclusion from protection, Standard of proof.	
FR Council of State	Mr A. No 329909A 14.3.2011	Exclusion and adversarial principle. The Council of State held that, when considering the application of Article 1(F) of the Geneva Convention or Article L. 712-2 of the code of entry and residence of foreigners and the right of asylum (CESEDA), in cases the exclusion clauses were not assessed by the French Office for the protection of Refugees and stateless Persons (OFPRA), the CNDA must give the applicant an opportunity to submit observations within the framework of the written procedure and, if necessary, after reopening of the debates.	CJEU — C-57/09 and C-101/09 <i>Germany v B and D</i> NB: The judgment of the District Court was quashed on 13.4.2012 by the JDCS, case number 201102789/1/v1.
NL District Court Amsterdam	AWB 06/24277 22.2.2011	Exclusion under Article 1(F) of the Refugee Convention. Actor of persecution or serious harm, Burden of proof, Crime against humanity, Exclusion from protection.	The challenged decision was dated on 24.4.2006. The QD had to be implemented ultimately on 10.10.2006, so on 24.4.2006 the Secretary of State was not yet obliged to apply the QD, and by not applying it no danger was caused for the application of the QD in the future. Reference was made to the CJEU cases of 4 July 2006, C 212/04, Adeneler; 23 September 2008, C 427/06, Bartsch; en 26 mei 2011, C-165/09 tot en met C-167/09, Stichting Natuur en Milieu.

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
SK	<i>S. v Ministry of Interior of the Slovak Republic</i> , 1Šča/5/2011 22.2.2011	Application of Article 1(D) of the Refugee Convention; Article 12 of the Qualification Directive. It follows from the clear wording of Article 1(D) of the Refugee Convention that the clause contained therein on exclusion from refugee status applies only to persons who are actually making use of assistance provided by UNRWA (United Nations Relief and Works Agency for Palestine refugees in the Near East), and this must be interpreted strictly, i.e. it cannot also apply to persons who have made use of or might make use of protection or assistance. For the purposes of Article 12(1)(a), sentence one, of the Qualification Directive, according to the Court a person makes use of the protection or assistance of a UN agency other than the UNHCR when such a person truly makes use of such protection or assistance. According to the Court, Article 1(D) of the Refugee Convention, which is referred to in Article 12(1)(a) of the Directive, limits itself to excluding from the scope of the Convention only those persons who 'at present have' protection or assistance from bodies or specialist organisations of the UN other than the UNHCR.	CIEU — C-31/09 <i>Nawras Bolbol v Hungary</i>
FR Council of State	Mr A., No 312833 26.1.2011	Establishment of the intention of the applicant. The applicant, a national of Rwanda had been excluded from refugee status by the French national Court of Asylum (CNDA) under Article 1(F)(a) of the Geneva Convention for complicity in genocide. On appeal, the Council of State ruled that the intention of the applicant to allow or to facilitate the commission of the crime of genocide needed to be established. Therefore, the Council of State quashed the decision of the Court and indicated that the circumstances presented were not sufficient to establish his intent, nor that he purposely failed to prevent this crime or to dissociate from it. Refugee Status was granted.	
FR	Council of State, 17 January 2011, Mr A., No 316678 17.1.2011	When applying the exclusion clause of Article 1(F)(c) of the 1951 Refugee Convention, the Court has to inquire into the degree of personal involvement of the applicant in acts contrary to the purposes and principles of the United Nations. Exclusion from protection, Acts contrary to the purposes and principles of the UN.	
FR National Court of Asylum	Mr N. No 10004872 C+ 20.12.2010	Exoneration of individual responsibility; applicant acted under coercion. The applicant from Democratic Republic of Congo (DRC) had been subjected as a child to forced recruitment by the National Congress for the Defence of the People (CNDP). The National Court of Asylum considered that he had well-founded fear of persecution because of imputed political opinion related to his activities as a child soldier between 2007 and 2009. Exclusion clause of Article 1(F)(b) of the Geneva Convention was then examined. In its judgment, the Court considered the young age of the applicant, his psychological fragility, his situation of isolation, and the state of subordination he found himself in. Consequently, it decided that because he was under a situation of particular vulnerability and coercion, he could not be held responsible for the acts committed. Therefore he was granted refugee status.	
ES	High National Court, 17 January 2011, 680/2009 17.1.2011	The application of exclusion clauses under Article 1(F)(a) and (b) of the 1951 Refugee Convention. Crime against humanity, Exclusion from protection, Individual assessment, Serious non-political crime.	
FR National Court of Asylum	CNDA, 20 December 2010, Mr N., No 10004872 20.12.2010	Given the situation of particular vulnerability and constraint of the applicant, a former child soldier from the DRC, there is no reason to apply any of the exclusion clauses of Article 1(F) of the 1951 Refugee Convention to him. Child Specific Considerations, Exclusion from protection, Persecution Grounds/Reasons, Political Opinion.	



Member State/ Court	Case name /reference/date	Key words/relevance/main points	Cases cited
CZ Supreme Administrative Court (Grand Chamber)	<i>Decision A.S. v Ministry of Interior</i> 4 Azs 60/2007-119 7.9.2010	The requirement of seriousness. Example of serious crime.	
FR Council of State	Mr A. No 318356A 23.7.2010	Interpretation of Article 1(D) of the Geneva Convention.  This judgment was delivered prior to the Court of Justice of the European Union (CJEU) judgment in the Mr EL KOTT case on the interpretation of Article 1(D) of the Geneva Convention. The French Council of State ruled that the exclusion clause under this section does not apply to a person of Palestinian origin who left the area where United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) operates. It stated that the automatic inclusion clause of the second paragraph may only apply if UNRWA has ceased its activities, and that no resolution was adopted by the UN General Assembly on the fate of the Palestinian people. Then, the Council of State found that recognition of refugee status is conditional on the existence of well-founded fear of persecution within the meaning of Article 1A(2) of the Geneva Convention. In this case, the applicant of Palestinian origin had been registered with UNRWA in Jordan and voluntarily left the UNRWA operating area, so that the national court of asylum (CNDA) made an error of law by not having verified the existence of well-founded fear of persecution or risk of serious threat within the meaning of Article L. 712-1 of the code of entry and residence of foreigners and the right of asylum (CESEDA).	
FR Council of State	Mr K. No 320630 A 14.6.2010	Personal implication in the commission of an act falling under the exclusion clauses.  The Council of State quashed a decision of the Refugee Board of Appeals (CRR) excluding a Rwandan national pursuant to Article 1(F)(A) of the Geneva Convention, on the ground that the Board failed to establish the serious reasons for considering that the applicant was personally implicated in the commission of an act falling under an exclusion clause. The applicant operated his activities as a leading brewer in the context of genocide and sold beer to people responsible for genocide. The Council of State stated that these circumstances were not a sufficient element to conclude that there were serious reasons to consider that he committed a crime of genocide. It added that the Board should have examined whether, within this context and because of his social and economic position, the applicant had a personal knowledge of the consequences of his activities on the genocide.	
FR Council of State	Mr H. A. No 319840 A 7.4.2010	Exonerated from responsibility.  The Council of State quashed a decision of the Refugee Board of Appeals (CRR) and recognised the refugee status of an Iraqi national who had been excluded by the Board pursuant to Article 1(F)(b) of the Geneva Convention for complicity in murder.  The Council of State held that the Refugee Board of Appeals failed to examine whether, given in particular his young age, family constraint could have impacted his free will. It then decided that the applicant, who was under the age of 18, only acted because of the pressures he faced and could not avoid. Therefore, the criminal acts he might have been responsible for could not be considered as deliberate.  In a second phase, the Council of State defined complicity as applicable to persons who did not commit criminal acts themselves but participated in the preparation of such acts or assisted to their execution without trying to prevent them or to dissociate from them.	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
UK Supreme Court	<i>JS v Secretary of State for the Home Department</i> [2010]UKSC 15 17.3.2010	<p>Article 12(3) of the Qualification Directive provides that Article 12(2)(a) (which replicates the terms of Article 1(F) (a)) 'applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein'. The Supreme Court approved the German Federal Administrative Court's interpretation of this provision in <i>BVerwG 10C 48.07</i>. That Court had held that: 'the person seeking protection need not have committed the serious non-political crime himself, but he must be personally responsible for it. This must in general be assumed if a person has committed the crime personally, or made a substantial contribution to its commission, in the knowledge that his or her act or omission would facilitate the criminal conduct... Thus this principle covers not only active terrorists and participants in the criminal sense, but also persons who perform advance acts in support of terrorist activities....'</p> <p>The Supreme Court held that 'one needs...to concentrate on the actual role played by the particular persons, taking all material aspects of that role into account so as to decide whether the required degree of participation is established'. The Court identified a non-exhaustive list of relevant factors to consider in making this assessment. They were:</p> <p>'(i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum seeker was himself most directly concerned; (ii) whether and, if so, by whom the organisation was proscribed; (iii) how the asylum seeker came to be recruited; (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it; (v) his position, rank, standing and influence in the organisation; (vi) his knowledge of the organisation's war crimes activities; and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.'</p>	<p>UK — <i>KJ (Sri Lanka) v Secretary of State for the Home Department</i> [2009] EWCA Civ 292</p> <p>UK — <i>Gurung</i> [2002] UKIAT 04870</p> <p>UK — <i>MH (Syria) v Secretary of State for the Home Department</i> [2009] EWCA Civ 226</p> <p>UK — <i>Yasser Al-Sirri v Secretary of State for the Home Department</i> [2009] EWCA Civ 222</p> <p>United States — <i>McMullen v INS</i> 685 F 2d 1312, 599</p> <p>UK — <i>DKN v Asylum and Immigration Tribunal</i> [2009] CSH 53</p> <p>ICTY — <i>Prosecutor v Tadic</i> (IT-94-1-AR72) ICTY</p> <p>Canada — <i>Ramirez v Canada (Minister of Employment and Immigration)</i> (1992) 89 DLR (4th) 173</p> <p>Germany — Federal Administrative Court, 14 October 2008, 10 C 48.07</p> <p>ICTY — <i>Prosecutor v Brajčin</i> (unreported) 3 April 2007</p> <p>ICTY — <i>Prosecutor v Krajišnik</i> 17 March 2009</p> <p>Canada — <i>Nagamany v Canada (Minister of Citizenship and Immigration)</i>, 2005 FC 1554</p>

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
DE Federal Administrative Court	10 C 7.09 DE:BVerwG:2010:160210U10C7.09.0, BVerwGE 136 16.2.2010	<p>Role of civilian in perpetrating a war crime; internal armed conflicts and war crimes; extent of definition of a non-political crime.</p> <p>1. A civilian may be the perpetrator of a war crime within the meaning of Section 3(2) Sentence 1 No 1. of the Asylum Procedure Act in conjunction with Article 8(2) of the ICC Statute. But there must be a functional connection between the act and the armed conflict. A connection between the perpetrator and one of the parties to the conflict is not needed.</p> <p>2. In an internal armed conflict, it is possible to commit war crimes not only against the civilian population but also against combatants of the adversary party.</p> <p>3. A prerequisite for the war crime of treacherous killing of a combatant under Article 8(2)(e)(ix) of the ICC Statute is that the perpetrator must have deceived the adversary as to the existence of a situation of protection under international law.</p> <p>4. The question of whether a serious crime of a non-political nature within the meaning of Section 3 (2) Sentence 1 No 2 of the Asylum Procedure Act exists depends crucially on the perpetrator's actual motivation.</p>	<p>ICTY — <i>Prosecutor v Zlatko Aleksovski</i> (Trial Judgment), IT-95-14/1-T, 25 June 1999</p> <p>ICTR — <i>Georges Anderson Nderubumwe Rutaganda v The Prosecutor</i> (Appeal Judgment), ICTR-96-3-A, 26 May 2003</p> <p>Germany — Federal Administrative Court, 25 November 2008, 10 C 46.07</p> <p>Germany — Federal Administrative Court, 14 October 2008, 10 C 48.07</p>
BE Council for Alien Law Litigation	Judgment No 37.912. 29.1.2010	<p>Article 12(1): Exclusion due to protection already being provided.</p> <p>It should be examined whether the person can return to the mandate areas and place him/herself back under the protection of UNRWA.</p>	
NL Council of State	Judgment 200902983/1/V1 30.12.2009	Serious non-political crime. Grave economic crimes with a significant loss (e.g. embezzlement <sup>(246)</sup> ) can also be counted as serious crimes.	
DE Federal Administrative Court	10 C 24.08 DE:BVerwG:2009:101109U1C 24.08.0, BVerwGE 135 24.11.2009	<p>Role of civilian in perpetrating a war crime; internal armed conflicts and war crimes; extent of definition of a non-political crime.</p> <p>Reason for exclusion; Rome Statute of the International Criminal Court of 17 July 1998, war crime; non-political crime; separatism; terrorism; crime against humanity; international criminal law; standard of proof.</p> <p>Serious non-political crime for the purpose of the exclusion has an autonomous international meaning and is not to be defined purely by reference to national law.</p>	
BE Council for Alien Law Litigation	Judgment 33.720. 3.11.2009	International standards when determining individual responsibility.	

<sup>(246)</sup> Council of State (The Netherlands), judgment of 30 December 2009, 200902983/1/V1.

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR Council of State	Mrs H. No 311793B 6.10.2009	<p>The case of the widow of the former President Habyarimana.</p> <p>In this judgment, the French Council of State rejected the demand of the widow of former President Juvenal Habyarimana of Rwanda, who was excluded from refugee status by the Refugee Appeals Board (CRR) under Article 1(F)(a) of the Geneva Convention. In its decision, the CRR had stated in detail and abundantly the reasons why it considered that she had played a central role in the early days of the genocide between 6 April and 9 April 1994.</p> <p>The Council of State found that the CRR rightly considered that the actions of the Government of Rwanda before 1994, specifically its involvement in massacres since 1990, the widespread impunity with which it allowed the most extremist groups to operate, and its conduct of propaganda against the Tutsi community, constituted sufficient evidence to believe that the genocide had been prepared before 1994 by those at the highest political level, even though, as contended by the applicant, political parties or movements related to the Tutsis could also have committed abuses against the Hutus, and that negotiations leading to peace agreements could have been conducted. The Council of State stated that the assessment of the CRR of the existence of serious reasons for considering that the applicant was guilty of the conduct alleged against her is not subject to the fact that the applicant has exercised official duties or would be subject to prosecution. The Council of State indicated that the CRR did not commit an error of law in basing itself, in particular, on the elements contained in statements submitted in the context of proceedings before the International Criminal Tribunal for Rwanda (ICTR) by unidentified witnesses who enjoyed protection according to Article 21 of the Statute and Article 69 of the Rules of Procedure of this Tribunal.</p>	
FR National Court of Asylum	Mr S. No 639067 26.7.2009	<p>Exclusion based on Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD) alone. The sole presence of the applicant on the national territory constitutes a serious threat to public order. Multiplicity of acts. Mafia-related acts and arms trafficking.</p> <p>Russian applicant who was involved in mafia-related activities as well as alcohol and arms trafficking. According to his statement, he feared reprisals from individuals linked to these criminal activities.</p> <p>The National Court of Asylum (CNDA) denied protection based on Article 1A(2) of the Geneva Convention on the ground that the alleged facts did not fall within its scope, but recognised applicant's well-founded fear to be subjected to serious harm, in the meaning of Article L. 712-1 b) of the CESEDA (transp. of Article 15(b) QD) relating to subsidiary protection, in case of return to the Russian Federation. However, he was excluded pursuant to Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD) because of his criminal activities and insisted on his criminal condemnation in Czech Republic. The Judges also noted that three arrest warrants had been issued by the Czech authorities for acts of burglary, torture, obstruction of the implementation of a formal decision, and that his wife filed several complaints against him for domestic violence and aggravated violence.</p>	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr I. No 634810 (rec. 2009) 6.4.2009	<p>Exclusion from subsidiary protection based on Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD) alone. Gravity of the crimes emphasised by the National Court of Asylum (CNDA). Drug trafficking.</p> <p>National from Kosovo who fled his country in 1999 and stated that he feared reprisal from an international mafia network in case of return. In 2001 and 2003, he was implicated in judicial procedures in France for armed threat and burglary. He was arrested in France in 2004 for drug trafficking in Switzerland, where he was then sentenced to four years of imprisonment. In 2008, he was registered on the national wanted persons file in France and had been reported by the Swiss authorities for prison break.</p> <p>The National Court of Asylum (CNDA) applied the exclusion clause of Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD), holding that, in view of the gravity of the facts the applicant was sentenced for in Switzerland and considering that he did not respect his obligation from the restricted-release regime he had been placed under, there were serious reasons to believe that his activity constituted a serious threat to public order.</p>	
UK Court of Appeal	<i>MH (Syria) v Secretary of State for the Home Department</i> [2009] EWCA Civ 226, 24.3.2009	<p>Article 12(2)(c): Acts contrary to the purpose and principles of the United Nations.</p> <p>The UK Court of Appeal has rejected the argument that principles of criminal liability were to be applied for the purpose of determining whether a person was guilty of acts falling within Article 12(2)(c), as the acts which could give rise to exclusion under Article 1(F)(c) did not have to be crimes.</p>	
FR National Court of Asylum	Mr B. No 629222 C+ (rec. 2008) 3.12.2008	<p>Acts contrary to the purposes and principles of the UN for having covered them with one's authority.</p> <p>The applicant was the former president of the Island of Anjouan in the Comoro Islands. He was excluded from refugee status by the French National Court of Asylum under Article 1(F)(c) of the Geneva Convention because of atrocities committed by the armed forces of Anjouan, and in particular members of the presidential guard, against the civilian population. The Court considered that because of his functions as Head of State and chief of the armies, he was responsible of acts contrary to the purposes and principles of the UN, at least for having covered them with his authority.</p>	
DE Federal Administrative Court	Decision 10 C 48.07, DE:BVerwG:2008:141008B10C48.07.0, BVerwGE 132 14.10.2008	<p>Expiation. Notwithstanding previous misconduct, the passage of a certain period of time, combined with expressions of remorse, reparation and assuming responsibility for previous acts may justify the assessment that exclusion is no longer justified. In the case of previous support for terrorist activities, such an exceptional case was deemed conceivable by the Federal Administrative Court if the individual has not only convincingly distanced himself from his former acts, but now actively works to prevent further acts of terrorism or if the act was youthful folly years or even decades in the past.</p>	
BE Council for Alien Law Litigation	decision 16.779. 30.9.2008	<p>The elements of crime, example of serious crime — rape.</p>	

Member State/ Court	Case name /reference/date	Key words/relevance/main points	Cases cited
FR National Court of Asylum	Mr M. No 611731 R (rec. 2008) 27.6.2008	Acts of terrorism as acts contrary to the purposes and principles of the UN. This case concerned a Sri Lankan national of Tamil origin who was a member of the LTTE marine unit, the 'Sea Tigers'. He served from 1997 until 2005 in the maintenance facilities of the naval base of Mullaitivu as a trained and qualified engineer. Although the exact nature of his duties could not be established, the applicant was excluded under Article 1(F)(c) of the Geneva Convention for his involvement in terrorist acts. In its judgment, which was delivered prior to the <i>CIUE B and D</i> judgment (C-57/09 and C-101/09), the French National Court of Asylum referred to the UN Security Council resolution 1373 from 28 September 2001 which qualified acts, methods and practices of terrorism as contrary to the purposes and principles of the UN, as well as to the decision of the Council of the EU from 29 May 2006 that listed the LTTE on the European list of terrorist organisations. The Court then ruled that because of the financial and military capacities of the LTTE as well as the quasi-state control exercised by the organisation on certain parts of the Sri Lankan territory, LTTE activities could extend to the world stage. Therefore, terrorist acts committed by the LTTE could be considered as acts contrary to the purposes and principles of the UN. Moreover, because of the intensity and duration of the applicant's commitment to the LTTE, he was necessarily in agreement with the methods used by his unit, and considered as having actively participated in the logistical and technical preparation of terrorist acts.	
FR Refugee Appeals Board	Mr B. No 507465 (rec. 2006) 25.7.2006	Exclusion from subsidiary protection based on Article L. 712-2 (d) of the CESEDA (transp. of Article 17(1)(d) QD) alone. The applicant is an Algerian national who claimed to fear persecution because of his links to the Islamic Salvation Front (FIS) and Army (AIS), and therefore fled his country in 1999. He then went to France and Switzerland, where he was persecuted and sentenced three times for sexual aggressions. Asylum application was denied on the grounds that the alleged facts were not established. Moreover, the Refugee Board of Appeals (CRR) considered that there were serious reasons to consider that his actions constituted a serious threat to public order and public safety, and applied the exclusion clause of Article L. 712-2 d) of the CESEDA (transp. of Article 17(1)(d) QD).	
FR Refugee Appeals Board	Ms O. No 533907 (rec. 2006) 1.2.2006	Non-application of Article L. 712-2 (d) of the CESEDA (transp. of Article 17(1)(d) QD). Exclusion clause. Subsidiary protection granted. Female applicant from Nigeria who declared to have fled her country for religious reasons. Upon her arrival in France, she was integrated in a prostitution network. The network was then dismantled and she was arrested. In court, she testified against the network and was sentenced to 12 months of imprisonment for prostitution. Considering the application of Article L. 712-2 d) exclusion clause, the Refugee Board of Appeals (CRR) decided that her condemnation for prostitution to 1 year of imprisonment was not sufficient to conclude that her activities on the French territory constituted a serious threat to public order. She was granted subsidiary protection pursuant to Article L. 712-1 (b) of the CESEDA (transp. of Article 17(1)(d) QD) because of her well-founded fear of serious harm from the heads of the prostitution network in Nigeria.	
FR Constitutional Council	OFPRA v Mr T. No 255091B 18.1.2006	The meaning of serious reasons to exclude. Concerning a Rwandan national, the Council of State found that the Refugee Appeals Board (CRR) made an error of law in considering that exclusion under Article 1(F) of the Geneva Convention is conditional on the demonstration of applicant's implication in a crime, and not on serious reasons for considering that the applicant had committed a crime in the sense of international instruments.	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR Constitutional Council	Judgment concerning law No 52-893 of 25 July 1952 concerning the right to asylum No 2003-485 DC 4.12.2003	Article 17(1)(b) — Serious crime.	
BE Permanent Commission for Refugee Matters	No 99-1280/W7769 6.8.2002	Crime against peace — Aggression. The exclusion ground 'crime against peace' has been applied in Belgium by the <i>Commission Permanente de Recours des Réfugiés</i> (Permanent Commission for Refugee Matters), in the case of a Somali applicant found to have been involved in planning and waging an international armed conflict with Ethiopia.	
UK Immigration and Asylum Tribunal	Judgment <i>Gurung v Secretary of State for the Home Department</i> [2002] UKIAT 04870 14.10.2002	International standards when determining individual responsibility.	
UK Court of Appeal	<i>El-Ali v Secretary of State for Home Dept</i> EWCA Civ. 1103 26.7.2002	Article 1(D) of the 1951 Refugee Convention only applies to Palestinians who met two criteria. First of all, they had to have been in receipt of United Nations Relief and Works Agency for Palestinian Refugees in the Near East ('UNRWA') protection or assistance on or before 28 July 1951, which was the date that the Convention was adopted. Secondly, whilst UNRWA's mandate continued, if such Palestinians had left UNRWA's field of operation they would have to show that they were in 'exceptional circumstance'; for example if they were prevented from returning to UNRWA's field of operation.	UK — <i>Karanakaran v Secretary of State for the Home Department</i> [2000] EWCA Civ 11 UK — House of Lords, 2 April 1998, <i>Secretary of State for the Home Department, Ex parte Adan</i> , [1998] UKHL 15
FR Refugee Appeals Board	Mr N. No 348805 (rec. 2001) 26.10.2001	Level of responsibilities in an armed group which had been responsible for acts contrary to the purposes and principles of the UN. The applicant is a Lebanese national who served in the South Lebanese Army (SLA) and became one of the highest-ranking officers, necessarily connected to the Israeli commander. He was excluded pursuant to Article 1(F)(c) of the Geneva Convention for his involvement in forced recruitments, displacement of population, extra-judiciary arrests and detention, and acts of torture, committed by members of the SLA against the civilian population. The French Refugee Board of Appeals decided that because of the nature as well as the importance of his responsibilities within the SLA, Mr N. at least covered with his authority the exactions committed, which he could not have ignored.	
FR Council of State	2001 Mr S.I.D. No 195356C 28.2.2001	Elements to be taken into account to exclude under Article 1(F)(b) of the Geneva Convention. Regarding the crimes mentioned in Article 1(F)(b), the Council of State held that the goals pursued by the perpetrators and the degree of legitimacy of the violence that they carried out should be taken into account. In this case regarding a member of Liberation Tigers of Tamil Eelam (LTTE), it considered that his personal participation in the attack of a military camp which caused more than a hundred deaths and his participation in an attempted attack which failed were acts within Article 1(F)(b) of the Geneva convention.	

Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
UK Special Immigration Appeals Commission	Judgment: <i>Secretary of State for the Home Department v Mukhtiar Singh and Paramjit Singh</i> , SC 4/99 31.7.2000	In the absence of express reference to 'non-political crime' in Article 12(2)(c) or Article 1(F)(c) Refugee Convention, it may be concluded that there is no 'political crime' exception.	
FR Refugee Appeals Board	Mr D. N., No 338011 (rec. 2000) 5.6.2000	Responsibility in acts contrary to purposes and principles of the UN for covering them with authority. Sitting in full court ('sections réunies'), the Refugee Board of Appeals applied the exclusion clause of Article 1(F)(c) of the Geneva Convention to a national from Democratic Republic of Congo who was the commander of a battalion responsible for presidential security. The decision stated that because of his high position within the Presidential Special Division (DSP) and the serious and systematic exactions committed by this unit under the Mobutu regime, there were serious reasons for considering that the applicant had at least covered with his authority acts contrary to the purposes and principles of the UN. He was therefore excluded from refugee status pursuant to Article 1(F)(c).	
BE Permanent Commission for Refugee Matters	Decision 95/4017/F390 18.1.1996	Acts contrary to the purpose and principles of the United Nations.	
FR Council of State	Mr DUVALIER No 81963B 31.7.1992	The meaning of Article 1(F)(c) of the Geneva Convention. Regarding the former President of the Republic of Haiti, the Council of State ruled that since Jean-Claude Duvalier had covered with his authority serious violations of human rights committed in Haiti during his term as President of the Republic, the Refugee Appeals Board (CRR) had not incorrectly interpreted the provisions of the Geneva Convention in considering that these violations could be regarded as acts contrary to the purposes and principles of the UN, within the meaning of Article 1(F)(c).	
FR Council of State	Mr MAC NAIR No 13914A 18.4.1980	Field of Convention and political motives of a crime. Regarding this case, the Refugee Board of Appeals (CRR) had noted that the applicant did not provide evidence that, in returning in his country, he would face other risks than those arising from legal proceedings for criminal offences he committed. The French Council of State then considered that, supposing the aircraft hijacking the applicant was guilty of could have had a political motive, this would not imply that legal proceedings for this crime constitute a persecution based on political views. Therefore, the CRR had not disregarded the Geneva stipulations and rightly estimated that the possible political nature of the aircraft hijacking had, in this case, no influence on the right to refugee status.	
DE Federal Administrative Court	Judgment 1 C 44.68, Buchholz 402.24, para. 28 AusIG No 9, 1.7.1975	Personal scope of Article 12(2)(c): Acts contrary to the purpose and principles of the United Nations.	



Member State/ Court	Case name/reference/date	Key words/relevance/main points	Cases cited
FR Refugee Appeals Board	Mr S. No 8 14.5.1954	Application of Article 1(F)(a) of the Geneva Convention for crimes against humanity. This judgment is among the first handed down by the French court on exclusion. The applicant had been deported to the Birkenau camp in 1942 and, afterwards, appointed block leader. He was sentenced in October 1945 by the Seine Court of Justice to 15 years of hard labour, national degradation and confiscation of property for having committed crimes against humanity against other internees. The Court applied the exclusion clause.	

## International Jurisprudence

MS/COURT	Case name/Reference/date	Relevance/key words/main points	Cases cited
ICTY (Appeals Chamber)	<i>Prosecutor v Brđanin</i> IT-99-36 3.4.07	Joint criminal enterprise / common purpose liability.	
ICTY	<i>Prosecutor v Fatmir Limaj</i> IT-03-66-T 30.11.2005	War crime.	
ICTY	<i>Prosecutor v Dario Kordic and Mario Cerkez</i> IT-95-14/2-A 17.12.2004	Crime against humanity.	
ICTY	<i>Prosecutor v Tihomir Blaskic</i> IT-95-14-A 29.7.2004	Crime against humanity. Aiding and abetting.	
ICTY (Appeals Chamber)	<i>Prosecutor v Kunarac et al.</i> IT-96-23 and IT-96-23/1-A 12.6.2002	Crime against humanity. Aiding and abetting. The Elements of Crimes adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court specify the nexus requirement for each of the acts defined as war crimes in Article 8 of the ICC Statute in the following terms: 'The conduct took place in the context of and was associated with an [international] armed conflict'.	
ICTY	Judgment <i>The Prosecutor v Anto Furundzija</i> IT-95-17/1-T 10.12.1998	Aiding and abetting.	

MS/COURT	Case name/Reference/date	Relevance/key words/main points	Cases cited
ICTR (Trial Chamber)	<i>Prosecutor v Jean-Paul Akayesu</i> ICTR-96-4-T 2.9.1998	Crime against humanity.	
ICTY	<i>Prosecutor v Dusko Tadic</i> IT-94-1-T 7.5.1997	Individual responsibility.	
ICTY (Appeals Chamber)	<i>Prosecutor v Dusko Tadic aka 'Dule'</i> <i>(Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)</i> T-94-1 2.10.1995	Crime against humanity.	

## Other jurisprudence

Country/Court	Case name/Reference/date	Relevance/key words/main points	Cases cited
Canada Supreme Court	<i>Judgment Febles v Canada (Citizenship and Immigration)</i> 2014 SCC 68, [2014] 3 S.C.R. 431 30.10.2014	Expiation. With regard to the objective of Article 12(2), to exclude from refugee status persons who are deemed to be undeserving of the protection in order to maintain the credibility of the protection system, it is not necessary that the applicant must still be liable to criminal prosecution or punishment.	
Canada Supreme Court	<i>Judgment Ezokola v Canada (Minister of Citizenship and Immigration)</i> 2013 SCC 40 19.7.2013	Membership. Part of a group or organisation responsible for serious crimes or heinous acts.	
New Zealand Supreme Court	<i>The Attorney-General (Minister of Immigration) v Tamil X and Anor</i> [2010] NZSC 107 27/08/10	International standards when determining individual responsibility.	
Australia Administrative Appeals Tribunal	Judgment of 16 June 2010 <i>Re YYMT and FRFJ</i> (2010), 115 ALD 590 16.6.2010	Criminal responsibility. Defences and mitigating circumstances.	

Country /Court	Case name/Reference/date	Relevance/key words/ main points	Cases cited
New Zealand Supreme Court	<i>Tamil X v Refugee Status Appeals Authority; Attorney-General (Minister of Immigration) v Y</i> , [2010] NZSC 107, [2011] 1 NZLR 721 20.10.2009	Standard of proof.	
Canada Federal Court of Appeal	<i>Sing v Canada (Minister of Employment and Immigration)</i> [2005] FCA 125 11.4.2005	Standard of proof.	
Canada Supreme Court	<i>Judgment Pushpanathan v Canada (Minister of Citizenship and Immigration)</i> [1998] 1 SCR 982 4.6.1998	Drug trafficking. Exclusion clauses. <i>Refoulement</i> . Serious non-political crime. Acts contrary to the purpose and principles of the United Nations.	
Canada Immigration and Refugee Board	Decision M90-07224, 5 RefLex 41 19.8.1991	A former Liberian cabinet minister who had approved of ongoing violence against civilians in Liberia was excluded.	



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