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EASO

Practical Guide on Exclusion for Serious (Non-Political) Crimes

EASO Practical Guide Series

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About the guide

Why was this guide created? The mission of the European Asylum Support Office (EASO) is to support European Union Member States and associated countries through common training, common quality standards and common country of origin information, among others. According to its overall aim of supporting Member States in achieving common standards and high-quality processes within the Common European Asylum System, EASO develops common practical tools and guidance.

How was this guide developed? This guide was created by experts from across the European Union, with valuable input from the European Commission and the United Nations High Commissioner for Refugees. The development was facilitated and coordinated by EASO. Before its finalisation, a consultation on the guide was carried out with all EU+ countries through the EASO Exclusion Network.

Who should use this guide? This guide is primarily intended for asylum case officers, interviewers and decision-makers, as well as policymakers in the national determining authorities. Additionally, this tool is useful for quality officers and legal advisers, as well as any other person working or involved in the field of international protection in the EU context.

How to use this guide. This guide consists of two parts. The first part provides a brief reminder of the main elements of the exclusion examination, while the second part explains the constitutive elements of the 'serious (non-political) crimes' ground, the interplay between exclusion for serious (non-political) crimes and closely related provisions, as well as its relation to criminal proceedings. Additional information concerning specific circumstances that can be taken into account as part of the individual analysis of the seriousness of a crime and regarding relevant principles and notions of criminal law and criminal procedure law can be consulted in the annexes. This guidance should be used in conjunction with the *EASO Practical Guide: Exclusion*.

How does this guide relate to national legislation and practice? This is a soft convergence tool that is not legally binding and reflects commonly agreed standards.

Disclaimer
This guide was prepared without prejudice to the principle that only the Court of Justice of the European Union can give an authoritative interpretation of EU Law.

Contents

List of abbreviations

APD	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
CJEU	Court of Justice of the European Union
COI	country of origin information
EASO	European Asylum Support Office
EU	European Union
EU+ countries	Member States of the European Union and Associated States
Member States	Member States of the European Union
QD	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	The 1951 Convention relating to the status of refugees and its 1967 Protocol
UNHCR	United Nations High Commissioner for Refugees

I. Introduction and general considerations regarding exclusion

Some people do not deserve international protection because of the serious acts they have committed. Sometimes they flee their countries of origin in order to evade being held accountable for these serious crimes or they commit them while transiting third countries or during their stay in the country of refuge. Excluding these persons from international protection is therefore necessary for safeguarding the integrity of the institution of asylum and contributes to fighting impunity.

In the Common European Asylum System, the recast qualification directive (QD) ([1]) provides for the situations where a third country national or a stateless person must be excluded from international protection for the commission, incitement or participation in the commission of an excludable act. These exclusion clauses are contained in Article 12(2) and (3) QD, regarding exclusion from refugee status (which is based on Article 1F Refugee Convention ([2]) and in Article 17 QD concerning exclusion from subsidiary protection ([3]).

This practical guide will focus on the application of exclusion based on the commission of a serious (non-political) crime under Articles 12(2)(b) and 17(1)(b) QD.

In this practical guide, the phrase 'serious (non-political) crime' will be used when referring to this exclusion ground for both refugee status and subsidiary protection, while the term '**serious non-political crime**' is used exclusively for refugee status and the term '**serious crime'** for subsidiary protection.

Chapter I aims to give a brief reminder of the main elements of the exclusion examination, which are explained in more detail in the *EASO practical guide on exclusion*. If you are familiar with exclusion in general, you may wish to go directly to Chapter II, which focuses on concepts concerning exclusion for serious (non-political) crimes and provides relevant background knowledge (together with Annex A and Annex B). Chapter II concentrates on the constitutive elements of the 'serious (non-political) crimes' ground, the interplay between exclusion for serious (non-political) crimes and closely related provisions, as well as its relation to criminal proceedings.

([1]) 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), (OJ L 337, 20.12.2011).

([2]) Convention and Protocol Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954), and 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

([3]) Exclusion under Article 12(1) QD is not within the scope of this guide.

***Figure 1**. Grounds for exclusion*

Exclusion from refugee status	Exclusion from subsidiary protection status
Article 12(2)(a-c) QD	**Article 17(1)(a-d) QD**
• crimes against peace, war crimes and crimes against humanity	• crimes against peace, war crimes and crimes against humanity
• **serious non-political crimes outside the country of refuge prior to his or her admission as a refugee**	• **serious crimes**
• acts contrary to the purposes and principles of the United Nations	• acts contrary to the purposes and principles of the United Nations
	• danger to the community or to the security of the Member State in which the applicant is present
	Article 17(3) QD – Not mandatory
	• other crime (under certain circumstances)

All exclusion clauses in Articles 12(2) QD and Article 17(1) QD are mandatory. Article 17(3) QD, which is an optional ground, allows Member States to exclude from subsidiary protection based on other crimes that are outside of the scope of Article 17(1), if certain conditions are met. **Both the exclusion provisions mentioned at Articles 12(2) and 17(1) QD also apply to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein**, as laid down in Article 12(3) and Article 17(2) QD.

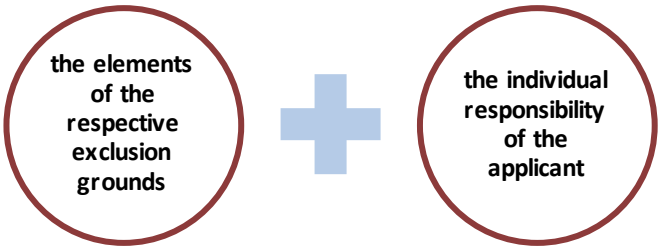
In order to examine whether exclusion is applicable in the case at hand, the case officer should follow three steps:

- determine the material facts;
- examine, based on the established material facts, whether crimes or acts within the scope of an exclusion clause occurred;
- assess the individual responsibility of the applicant.

Exclusion clauses may only be applied to persons who can be held individually responsible for excludable acts. The assessment of individual responsibility is based on the nature and extent of the applicant's involvement in the excludable act (*actus reus*), as well as their state of mind (intent and knowledge) in relation to this act (*mens rea*) ([4]).

([4]) EASO, *Practical Guide: Exclusion*, January 2017, pp. 29-33

Figure 2. *The focus of the exclusion examination*



The burden of proof when assessing exclusion is on the determining authority / state and requires a high standard of proof ('serious reasons for considering') for establishing whether the applicant incurred individual responsibility for an excludable act, which must be based on clear and reliable evidence, but is not as high as the standard required for a finding of guilt in criminal proceedings ('beyond reasonable doubt'). The determining authority must therefore demonstrate that there are serious reasons for considering the applicant is responsible for the excludable act(s). At the same time, the applicant has a general duty to cooperate in establishing all facts and circumstances relevant to the application of the exclusion clauses.

Figure 3. *Elements of the individual responsibility*

The examination should take into account potential grounds negating the individual responsibility, such as mental disease or defect, involuntary intoxication, immaturity, mistake of fact and mistake of law, duress, self-defence or defence of others, superior orders in specific circumstances ([5]).

Related EASO tool

For general guidance on exclusion (including detection of potential cases, interview, evidence assessment and legal analysis), refer to the *EASO Practical Guide: Exclusion*.

([5]) EASO, *Practical Guide: Exclusion*, January 2017, pp. 33-34

II. Concepts and background knowledge relevant to exclusion for serious (non-political) crimes

A. The 'serious (non-political) crime' ground

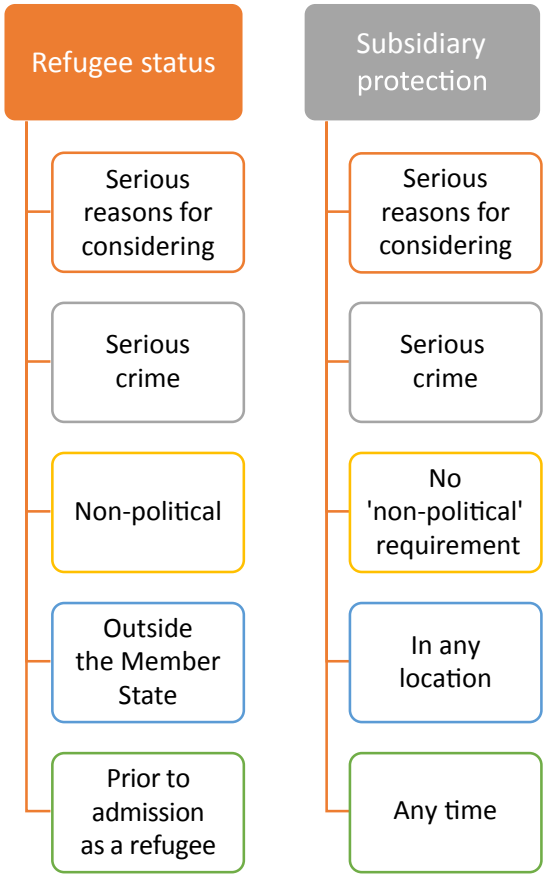
1. The serious (non-political) crime ground in the legal framework

The commission of a serious crime can be a ground for exclusion both from **refugee status** (under Article 12(2)(b) QD) and from **subsidiary protection** (under Article 17(1)(b) QD). However, depending on whether the applicant would otherwise be eligible for refugee status or subsidiary protection, **different criteria** apply.

Article 12(2)(b) QD sets out the requirements for exclusion from refugee status: the serious crime must be of a 'non-political' nature and must have been committed outside the country of refuge, prior to the applicant's admission as a refugee.

In comparison, exclusion from subsidiary protection under Article 17(1)(b) QD merely requires serious reasons for considering that a 'serious crime' has been committed, irrespective of time or location and the political nature of the crime.

Figure 4. *Constitutive elements for exclusion in accordance with Article 12(2)(b) and Article 17(1)(b) QD*



Article 12(2)(b) QD

'A third-country national or stateless person is excluded from being a refugee where there are serious reasons for considering that:

[…]

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 the refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes.'

Article 17(1)(b) QD

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

b) he or she has committed a serious crime'

2. Constitutive elements of serious (non-political) crimes

This section will look at the constitutive elements of the serious (non-political) crime ground for exclusion from refugee status and subsidiary protection. Whereas the question of whether an act qualifies as a 'crime' (1) that meets the seriousness threshold (2) is central and common to both provisions, only exclusion from refugee status requires the element of 'non-political' crime (3), as well as having a more limited geographic (4) and temporal scope (5).

It should be noted that at national level, an indicative list of acts that can be considered as 'serious (non-political) crimes' may be set out in the national asylum legislation regarding exclusion for this specific exclusion ground. However, the existence of such a list does not relieve the case officer from their duty to carry out a full assessment of the case, as required by CJEU case law (see Chapter II, Section A.2.b What makes a crime serious?).

a) What is a 'crime'?

There is **no common definition** of the term 'crime' nor is there a common classification of criminal offences at the international or EU level. The notion of 'crime' varies across national legal systems, with some systems qualifying every act punishable by the national criminal law as a 'crime', while others distinguish between crimes and one or more different types of criminal offences, classified according to gravity ([6]). For the purposes of this practical guide, the terms 'crime' and 'offence' are used interchangeably.

When initiating the assessment of possible exclusion due to the commission of a serious (non-political) crime, the case officer should look at the criminal law of the country of asylum, keeping in mind that international standards govern the scope of this exclusion ground. As a prerequisite, the determining authority **cannot exclude** a person from international protection **for a conduct** that is **not punishable by the criminal law of the country of asylum** (Member State of the European Union or associated country

([6]) For example, some national legal systems classify criminal offences as either crimes or misdemeanours, others classify them into crimes, intermediate offences and misdemeanours, and yet others follow other classifications.

(EU+ country)). Nonetheless, the fact that a **conduct** is **not punished** by criminal law in the applicant's **country of origin** does **not preclude** applying **exclusion.**

It should be noted that while national criminal law concepts might be helpful in applying exclusion clauses, notably to understand what elements can make a criminal offence a 'serious crime', criminal law is fundamentally distinct from asylum law. While they have certain parallels and may intersect at times, they are two separate areas of law: they have different aims and a different legal basis (see Chapter II, Section C. Relation between the exclusion examination and criminal proceedings and Annex B. Relevant notions of criminal law and criminal procedure law). Thus, the qualification of a 'serious (non-political) crime' under asylum law is as such independent from the definition of a 'crime' under national criminal law. An act that could be qualified as an 'intermediate offence' under national law could, if the conditions listed below are met, be considered a 'serious (non-political) crime' for the purposes of exclusion. Conversely, not every act qualified as a 'crime' or 'serious crime' by national criminal law would automatically constitute a serious crime under the exclusion legal regime.

b) What makes a crime 'serious'?

To be qualified as 'serious', the act at issue in a specific case must first meet the required **seriousness threshold**. For some types of criminal offences, this is manifestly the case given the nature of the offence. For instance, the acts listed in Article 7(1) of the Rome Statute of the International Criminal Court (ICC) – including murder, rape and torture – are normally qualified as 'serious crimes' within the meaning of Articles 12(2)(b) or 17(1)(b) QD, unless they are committed as part of a 'widespread or systematic attack directed against any civilian population', which would qualify them as crimes against humanity, and thus within the scope of Articles 12(2)(a) or 17(1)(a) QD. For other acts, it may be less evident to reach the conclusion whether the conduct at issue can be considered as serious enough for the purposes of exclusion.

The Court of Justice of the European Union (CJEU), in the *Ahmed* ([7]) and *B and D* ([8]) cases, has provided **guidance on how to assess whether a certain conduct amounts to a serious crime**, highlighting that such an assessment must take into account different criteria and must be based on an individual assessment of the specific facts of the case. In order to reflect the guidance provided by the CJEU, this section will, for the purposes of this practical guide, refer to '**criteria to assess seriousness**' when explaining the specific criteria mentioned in the *Ahmed* judgment and to '**specific circumstances**' when elaborating on the requirement of an individual assessment.

Criteria to assess seriousness

In the *Ahmed* case, the CJEU identified certain criteria to be taken into account when assessing the seriousness of a crime, as cited in the article boxes below, referencing the relevant elements outlined in the EASO judicial analysis on exclusion ([9]) and, in a similar manner, in the United Nations High

([7]) CJEU, judgment of 13 September 2018, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, C-369/17, EU:C:2018:713. Summary available in the EASO Case Law Database.

([8]) CJEU, judgment of 9 November 2010, *B and D v Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge*, joined cases C-57/09 and C-101/09, EU:C:2010:661, para. 81. Summary available in the EASO Case Law Database.

([9]) EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) – A Judicial Analysis*, 1st edition, January 2016.

Commissioner for Refugees (UNHCR) handbook on procedures ([10]). Although the *Ahmed* case concerned exclusion from subsidiary protection status, its findings regarding the concept of 'serious crime', which is common to both Articles 12(2)(b) and 17(1)(b), are also applicable to exclusion from refugee status. In this case, the CJEU held that while the **criterion of the penalty** provided for in the Member State national law is of **particular importance** when assessing the seriousness of a crime, it cannot be the sole criterion, as **other criteria must be taken into account** as well.

CJEU, 2018, *Ahmed*, paras. 55-56 ([11])

'While the **criterion of the penalty** *provided for under the criminal legislation of the Member State concerned is of* ***particular importance*** *when assessing the seriousness of the crime justifying exclusion from subsidiary protection pursuant to Article 17(1)(b) of Directive 2011/95,* ***the competent authority of the Member State concerned may apply the ground for exclusion laid down by that provision only after undertaking, for each individual case, an assessment of the specific facts*** *brought to its attention with a view to determining whether there are serious grounds for taking the view that the acts committed by the person in question, who otherwise satisfies the qualifying conditions for the status applied for, come within the scope of that particular ground for exclusion […]*

That interpretation is supported by the report of the European Asylum Support Office (EASO) for the month of January 2016, entitled 'Exclusion: Articles 12 and 17 of the Qualification Directive (2011/95/EU)', which recommends, in paragraph 3.2.2 on Article 17(1)(b) of Directive 2011/95, that the seriousness of the crime that could result in a person being excluded from subsidiary protection be ***assessed in the light of a number of criteria such as, inter alia, the nature of the act at issue, the consequences of that act, the form of procedure used to prosecute the crime, the nature of the penalty provided and the taking into account of whether most jurisdictions also classify the act at issue as a serious crime****.'*

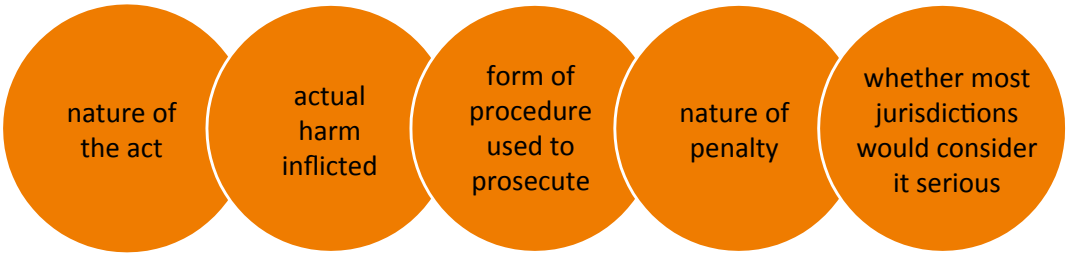
(Emphasis added.)

The criteria mentioned in *Ahmed* are explained further below. It should be noted that there is a certain interplay between these criteria, which need to be taken into account when determining whether, all things considered, a crime reaches the seriousness threshold. The list stated below should not be seen as an exhaustive one.

([10]) UNHCR, *Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, paras 155 to 157; UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, para. 39.

([11]) CJEU, judgment of 13 September 2018, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, C-369/17, EU:C:2018:713, paras. 55-56. Summary available in the EASO Case Law Database.

***Figure 5**. Criteria to assess seriousness*



- **Nature of the act**

  The nature of the act refers to the **type of act** that was committed, for instance whether the act aimed at causing death or grave physical injury to a person and the degree of violence involved (e.g. murder or rape). It should be noted that there is an evident **interdependence between this criterion and the actual harm inflicted**. The nature of the act will be a more prominent criterion in the assessment in case of violent acts, whereas this would not be the case for crimes that do not usually involve violence, e.g. financial crimes, where the criterion of the actual harm inflicted would play a more significant role in the assessment.

- **Actual harm inflicted**

  The **effective damage sustained by a person or property** as a result of the conduct is another element that assists in determining whether the act at issue can be deemed a serious crime. For instance, criminal offences causing grievous bodily or mental harm will generally be serious enough to meet the threshold of the exclusion clause.

  Be aware that this criterion assumes the existence of a **causal link** that connects the act at stake to the harm that followed. In other words, the damage should not be accidental or coincidental, in a way that could not have been reasonably anticipated.

  Actual harm includes the **direct consequences** of an act (e.g. death of the victim due to being shot at with a gun) as well as the **indirect consequences**, such as the injury or death of people after causing a power outage at a hospital or after selling defective medical equipment to hospitals.

  The actual consequences of the crime can be a very useful factor when deciding on the seriousness of cases that are not clear-cut, i.e. cases involving offences that can neither be categorised as manifestly serious nor as clearly petty and thus not sufficiently serious. The criterion of the actual harm inflicted is, for instance, particularly relevant for offences such as financial crimes, where both direct and indirect consequences can be taken into account.

- **Form of procedure used to prosecute such crimes**

  This criterion refers to procedures resorted to by the relevant judicial authorities when investigating or conducting legal proceedings against the perpetrator of the offence. In general, **forms of prosecution that derogate from the ordinary criminal procedure** can indicate the seriousness of an offence. Depending on the legal system, special forms of prosecution can, for example, include being tried by a jury or a grand chamber of several judges instead of a single judge chamber. Further, certain serious crimes, such as crimes linked to terrorism may be prosecuted by specialised judges. Similarly, special procedural rules may be established for the investigation of certain serious crimes.

- **Nature of envisaged penalty**

  As held by the CJEU, the penalty provided for by national law is of 'particular importance' when assessing seriousness, although it cannot be the sole criterion.

  Both the type and the duration of the punishment should be taken into account. Where the penalty consists solely of a fine or community service, the act will not generally meet the seriousness threshold. Conversely, the mere fact that a prison sentence is envisaged for a particular offence does not automatically mean that the offence has reached the seriousness threshold. Yet, although **there is no commonly accepted threshold to measure seriousness with regard to the duration of a prison sentence**, the longer the envisaged prison sentence, the more likely it is that the seriousness threshold is reached.

  Case officers should refer to the minimum and maximum prison sentence envisaged in their national legislation for the offence at issue, usually at the time it was committed, to guide their assessment. However, this does not mean that a case officer should endeavour to establish which exact penalty would be applicable to the offence as committed in an individual case, as a criminal court would do. Case officers should have a sufficient degree of familiarity with national criminal law or have the possibility to consult a senior case officer specialised in exclusion. It is merely the range of the applicable prison sentence provided for by national criminal law (in abstract) that should serve the case officer as point of reference. However, where the applicant has already been convicted (by final judgment) to a prison sentence by a national criminal court, the actual penalty decided by the court should serve as a reference, unless there are reasonable grounds to question the fairness of the criminal trial (See also Chapter II, Section C.2.c. Country of the criminal proceedings).

  Moreover, where changes to national law of the country of asylum have resulted in a lighter penalty than the penalty that was applicable at the time of commission of the crime, the more favourable criminal provision should serve as a reference to determine whether the crime is serious. See also **right to a fair trial** in Annex B. Relevant notions of criminal law and criminal procedure law.

- **Whether most jurisdictions would consider it serious**

  Some serious crimes are **universally condemned**, such as murder.

  There is **no requirement that the offence must constitute a crime in both the country of origin and the country of asylum**. Nevertheless, international standards, i.e. whether or not most jurisdictions consider the acts in question to be a serious crime, should be taken into account.

  This criterion is also useful to preclude the application of an exclusion clause if a certain act is considered to be a serious offence in the applicant's country of origin but would not qualify as such in most jurisdictions. Examples of such cases can include blasphemy, adultery and apostasy.

  In looking at whether most jurisdictions would consider a crime serious, **international conventions and their number of signatories can be relevant**. Here, a distinction between international crime treaties and transnational crime treaties must be made. The existence of an international legal instrument that directly criminalises an act reflects the seriousness of the act, although the appropriate exclusion ground in cases of applicants who have committed such international crimes will generally be Article 12(2)(a) or 17(1)(a) QD.

However, with regard to **acts criminalised by transnational criminal law treaties**, that is, international conventions which establish an obligation on state parties to criminalise or sanction a particular act under their national law, an assessment of their seriousness needs to be conducted in each case, as even less serious criminal acts may be listed in such conventions. Some of these treaties, for example on drug trafficking, cover a range of offences and indicate gradations in seriousness. Therefore, not all acts provided for in these transnational criminal law instruments are necessarily serious enough to meet the threshold required for exclusion under Articles 12(2)(b) or 17(1)(b) QD.

In addition, the fact that **all EU+ countries consider a crime serious would be a strong indication** that the seriousness threshold is met for the criminal offence at issue.

Specific circumstances

In addition to the abovementioned criteria, more specific elements **pertaining to the individual case** come into play when assessing the seriousness of a crime. Indeed, the seriousness of an act should be evaluated on a **case-by-case** basis **to prevent any automatic application** of the exclusion clause. In *B and D*, the Court found that the fact that a person is a member of an organisation that is on the 'EU Terrorist List' ([12]) due to its involvement in terrorist acts, does not automatically constitute a serious reason to exclude that person from refugee status. At the same time, the judgement recalled that no exclusion decision should be taken without conducting an individual assessment of the specific facts of a case.

CJEU, 2010, *B and D*, paras. 91 and 93 ([13])

'In that regard, it is important to note that the circumstances in which the two organisations to which the respondents before the Bundesverwaltungsgericht respectively belonged were 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 pursuant to Article 12(2)(b)*** *or (c) of Directive 2004/83 […]*

Not only was Framework Decision 2002/475, like Common Position 2001/931, adopted against a background different from the context of Directive 2004/83, which is essentially humanitarian, but ***the intentional act of participating in the activities of a terrorist group,*** *which is defined in Article 2(2)(b) of that Framework Decision and which the Member States were required to make punishable under their national law****, is not such as to trigger the automatic application of the exclusion clauses laid down in Article 12(2)(b)*** *and (c) of the directive,* ***which presuppose a full investigation into all the circumstances of each individual case.'***

(Emphasis added.)

Although the above paragraphs in *B and D* concerned the issue of individual responsibility, they were applied by analogy to the seriousness assessment in the *Ahmed* judgment.

([12]) Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), published in the Official Journal of the EU, (OJ L 344/93 28.12.2001).

([13]) CJEU, judgment of 9 November 2010, *B and D v Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge*, joined cases C-57/09 and C-101/09, EU:C:2010:661, paras. 91 and 93. Summary available in the EASO Case Law Database.

CJEU, 2018, *Ahmed,* para. 49 ([14])

'It follows that any decision to exclude a person from refugee status must be preceded by ***a full investigation into all the circumstances of his individual case and cannot be taken automatically*** *(see, to that effect, judgment of 9 November 2010, B and D, C-57/09 and C-101/09, EU:C:2010:661, paragraphs 91 and 93).'*

The full investigation into all the circumstances of the applicant's individual case requires the case officer to have regard to several factors that are relevant to assessing whether the seriousness threshold has been reached. The factors that can be taken into account as part of this individualised analysis of the seriousness of a crime are numerous and may be identified at different levels. These include:

- **factors pertaining to the act itself** e.g. the profitability of the crime;
- **factors pertaining to the applicant** e.g. if they acted in an official capacity;
- **factors pertaining to the victim** e.g. if they were vulnerable.

Mitigating circumstances vs grounds negating individual responsibility

In criminal law, mitigating circumstances (see Annex B. Relevant notions of criminal law and criminal procedure law) allow the courts to take into account all the circumstances of the case that would reduce the level of the sentence to be applied to a person who has been found individually responsible for committing a criminal act and is to be convicted.

In the exclusion examination, mitigating circumstances play a different role. They are relevant and should be taken into account when assessing the seriousness of the crime. Mitigating circumstances cannot negate individual responsibility in an exclusion case. Grounds negating individual responsibility ([15]) will prevent an applicant from being held responsible for excludable acts they have committed, and therefore from being excluded.

For a non-exhaustive list of relevant factors to be considered, please refer to Annex A. List of specific circumstances that can be taken into account as part of the individual analysis of the seriousness of a crime (non-exhaustive). The circumstances listed in the annex would not necessarily lead to a finding of seriousness, as this will always depend on the specific circumstances of each individual case.

c) What is a 'non-political' crime?

(Applicable to refugee status only)

In addition to being of a serious nature, a crime must be '**non-political**' in order to be able to exclude an applicant from refugee status. Some offences, such as direct attacks on the integrity of the state, treason, espionage, subversive propaganda, and membership of a prohibited political party, may be considered to be **purely political offences**, which **do not come under** the terms of **Article 12(2)b QD**.

([14]) CJEU, judgment of 13 September 2018, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, C-369/17, EU:C:2018:713, paras. 55-56. Summary available in the EASO Case Law Database.

([15]) For information on grounds negating individual responsibility, see EASO, *Practical Guide: Exclusion*, January 2017, p.33.

Some international treaties also list and define which crimes can be considered to be political or non-political. Such examples can be found in extradition treaties. It should be also noted that, as set out in numerous international treaties, such as the European Convention on the Suppression of Terrorism of 1977 ([16]), **terrorist acts are considered to be non-political crimes ([17])**. This point was also stated in the CJEU's *B and D* judgment, which held that 'terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purported political objective, fall to be regarded as serious non-political crimes' ([18]) for the purposes of the application of Article 12(2)(b) QD.

However, some offences can be **common crimes**, but committed **with a political motivation**, for example to generate change in a state. Yet, the QD gives an indication in this regard, outlining that **a political motive will by itself not be enough** to consider a crime to be 'political', **if the crime in question is particularly serious**, **and will therefore fall within the scope of Article 12(2)(b)**.

Article 12(2)(b) QD

'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes'

When trying to establish whether a crime is of a political nature, you should use a test called the '**predominance test**'. This test is set out in the EASO practical guide on exclusion, according to which an act should be considered to have a **predominantly non-political motivation** or be **disproportionate to a claimed political objective** in order to be considered a non-political crime ([19]). In order to establish whether or not non-political objectives were 'predominant features' of the crime committed, case officers can look at the link between the act and the eventual political objective invoked as well as at the proportionality between the act and the political objective pursued. Thus, an act **clearly disproportionate to a political objective**, such as one causing unnecessary harm, will be considered **a non-political act**.

As part of a **case-by-case** assessment, you should analyse the political nature of the identified acts. To this end, you could use the following elements ([20]).

([16]) Articles 1, 2, 8, and 13 of the Council of Europe, European Convention on the Suppression of Terrorism, 27/01/1977, European Treaty Series – No 90.

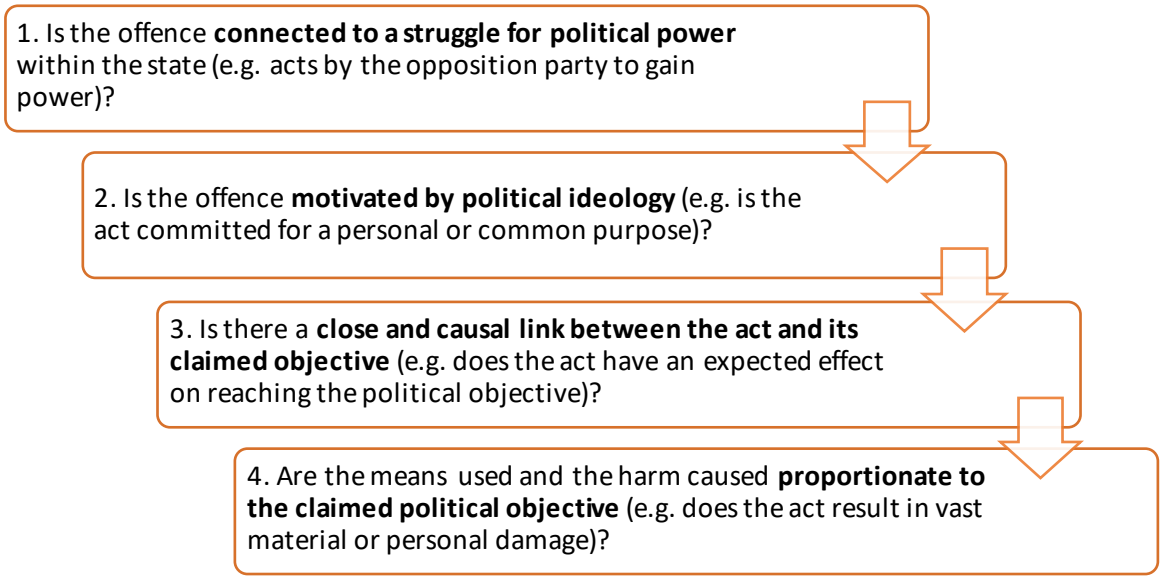
([17]) See as well the international treaties cited in Annex D of the UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees HCR/GIP/03/05, 4 September 2003; More detailed information can be found in the UNHCR, Guidance Note on Extradition and International Refugee Protection, April 2008.

([18]) CJEU, judgment of 9 November 2010, *B and D v Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge*, joined cases C-57/09 and C-101/09, EU:C:2010:661, para. 81. Summary available in the EASO Case Law Database.

([19]) EASO, *Practical Guide: Exclusion*, January 2017, p. 25; See also UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para. 15.

([20]) These factors are mentioned in UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para. 41.

Figure 6. *Elements to assess the political nature of the act*



d) Outside of the country of refuge (geographic scope)

(Applicable to refugee status only)

Exclusion for a serious non-political crime **can only be applied** if the crime in question has been **committed outside of the country of refuge**. Case officers should note that this does not necessarily mean that the crime should be committed in the applicant's country of origin. Crimes committed in third countries, for example in countries traversed to reach the country of refuge and those committed in other Member States will also fall within the geographic scope of Article 12(2)(b) QD.

Although crimes committed by a refugee in the country of refuge will not result in an exclusion for serious non-political crimes, case officers should note that such crimes could fall under **another exclusion clause**. For example, an applicant convicted for the commission of terrorist acts in the country of refuge cannot be excluded from refugee status under Article 12(2)(b) QD, but, if all conditions are met, may be excluded under Article 12(2)(c) QD for 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. Case officers should also note that in such cases, the fact that the applicant is not excluded under Article 12(2)(b) QD does not prevent the person from being convicted and from facing a penalty under national criminal law. Serious non-political crimes committed in the country of refuge may also fall within the provisions pertaining to threats to national security or to the community (see also Chapter II, Section B.4. Serious crime and danger to the security or community of the Member State).

e) Prior to the admission as a refugee (temporal scope)

(Applicable to refugee status only)

The QD lays down the temporal scope of this exclusion clause, stating that the serious non-political crime must have been committed **prior to the applicant's admission as a refugee**, specifying that 'admission' for the purpose of the application of this exclusion clause should be understood as '**the time of issuing a residence permit** based on the granting of the refugee status'.

Article 12(2)(b) QD

'A third-country national or stateless person is excluded from being a refugee where there are serious reasons for considering that:

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 the refugee status'***

(Emphasis added)

Thus, in accordance with the QD, a refugee who has committed a serious non-political crime outside the country of refuge, but before they have been issued a residence permit in that country based on the granting of the refugee status, should fall under the application of Article 12(2)(b) QD. This explanation of what 'prior to the admission as a refugee' is an addition in the QD as this was not contained in the Refugee Convention.

Example

The applicant applies for asylum in Member State A. Before Member State A can take a decision on the applicant's asylum claim, the latter travels to Member State B and commits a serious non-political crime there. Member State A can exclude the applicant since the crime was committed outside of Member State A and prior to the issuance of a residence permit based on the granting of the refugee status.

It should be noted that if the Member State already granted the person refugee status, but has not yet issued a residence permit, and the person commits a serious non-political crime within that time frame (i.e. between the issuance of the decision granting refugee status and the issuing of the residence permit), the Member state would need to end the person's refugee status pursuant to Article 14(3)(a) QD ([21]). See also Chapter II, Section B.3. Withdrawal of international protection for a serious (non-political) crime.

It is noted that UNHCR, in its note on the application of the exclusion clause in Article 1F(b), on which Article 12(2)(b) QD is based, indicated that 'admission' in the context of this exclusion ground should include 'mere physical presence in the country' of refuge ([22]).

([21]) EASO, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd Edition, 2020, p. 87.

([22]) UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, para. 41.

Transborder and continuous acts

Certain crimes such as human trafficking, migrant smuggling, drug offences, financial crimes are often committed **over a long period of time** and **in different countries**, including the country of refuge and countries of transit. This 'transborder' characteristic of these offences must be taken into account by the case officers when applying exclusion, i.e. only serious non-political crimes committed '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' will lead to exclusion from refugee status on the basis of Article 12(2)(b) QD.

If different criminal acts without links with each other were committed outside and inside the country of refuge, possibly before and after admission as a refugee, only the acts committed outside the country of refuge, prior the admission as refugee will be considered as potentially excludable acts under Article 12(2)(b) QD. You must however take into account the possible consequences of these acts in the country of refuge when you are assessing the seriousness of these acts.

However, if the acts constitute a continuous criminal conduct, which started outside the country of refuge, prior to the admission as refugee, and continued in the country of refuge, possibly even after the admission as a refugee, **case officers should look at their national criminal law, jurisprudence and practice to assess whether these acts would fall under** Article 12(2)(b) QD as potentially excludable acts.

B. The interplay between exclusion for serious (non-political) crimes and closely related provisions

When examining cases under the exclusion ground for serious (non-political) crimes, case officers may come across situations where other closely related provisions may be applicable **instead or in addition to** Articles 12(2)(b) or 17(1)(b) QD.

This section aims to place the 'serious (non-political) crime' ground into the wider framework of other mandatory exclusion grounds (1) and compare it to exclusion from subsidiary protection for crimes under Article 17(3) QD (2). It points out in which situations withdrawal of international protection should be considered on the basis of a serious (non-political) crime (3) or could be considered based on considerations of national security and public order (4).

1. Cumulative application of serious (non-political) crime and other exclusion grounds

It should be borne in mind that based on the factual elements, **it may be possible to qualify a certain act both as a serious (non-political) crime as well as under another exclusion ground**.

National practice may vary regarding whether one particular act should be qualified under more than one ground where the necessary elements are present.

Some crimes, for instance, financing a terrorist enterprise, could also come under another qualification, such as where there are serious reasons for considering that the applicant has committed acts contrary to the purposes and principles of the United Nations, in accordance with Articles 12(2)(c) and 17(1)(c) QD.

The exclusion clauses contained in Articles 12 and 17 QD are non-hierarchical. Therefore, none of the grounds for exclusion is more important than another.

Pay attention that some exclusion grounds require more elements than others, depending on the factual elements of the case, your national jurisprudence and the available information.

Depending on your national practice and the factual elements of the case, you may also decide to apply **exclusion based on one or more exclusion grounds simultaneously**. In some cases, applying more than one exclusion ground where possible might reinforce an exclusion decision, in particular in the event of an appeal.

2. Exclusion from subsidiary protection for a serious crime and exclusion of those escaping the penalty for the commission of a crime under Article 17(3) QD

The exclusion of those eligible for subsidiary protection for a serious crime under Article 17(1)(b) QD must be distinguished from another exclusion ground **applicable only to subsidiary protection** and provided for under Article 17(3) QD, which is also a ground for withdrawing the status under Article 19(2) QD.

Article 17(3) QD

'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.'

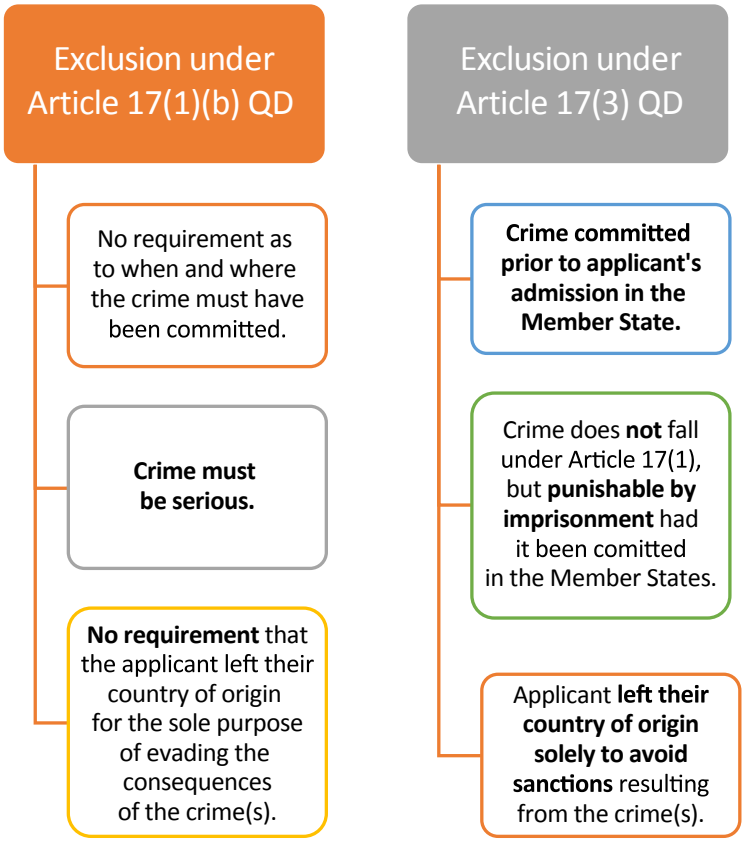
Article 19(2) QD

'Member States may revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).'

The exclusion clause under Article 17(3) QD is **optional** and shares a few similarities with the exclusion for a serious crime under Article 17(1)(b) QD. The exclusion clause under Article 17(3) QD also seeks to contribute to the fight against the impunity of those who would commit crimes before seeking international protection.

However, significant differences can be outlined between these two exclusion clauses applying to subsidiary protection.

Figure 7. *Comparison between exclusion under Article 17(1)(b) and Article 17(3) QD*



Therefore, if a crime committed by the applicant does not reach the seriousness threshold required by Article 17(1)(b) QD, but would nevertheless be sanctioned with a prison sentence according to the Member State's national criminal law, and where it is established that the reason for the applicant's departure was only to avoid being punished for that crime, exclusion can be envisaged under Article 17(3) QD.

3. Withdrawal of international protection for a serious (non-political) crime

According to Article 2(o) APD withdrawal of international protection means the decision by a competent authority to revoke, end or refuse to renew the refugee or subsidiary protection status of a person in accordance with Directive 2011/95/EU.

The potential application of the exclusion clause for serious non-political crimes, provided by Article 12(2)(b) QD, may intervene either before a decision is made on the application for international protection or once an applicant has already been granted refugee status. This is set out in Article 14(3)(a) QD, which stipulates the conditions necessary for revoking, ending or refusing to renew refugee status.

Notably, Article 14(3)(a) QD applies where new information indicates that an applicant should have been excluded in the first place or where a recognised refugee engages in excludable conduct.

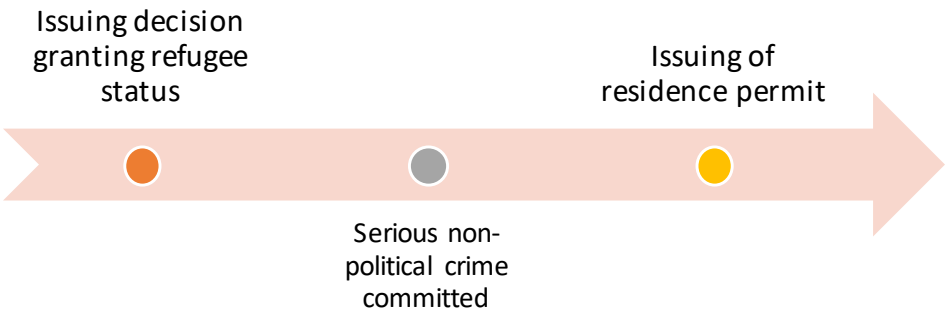
Article 14(3)(a) QD

'Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;'

As far as exclusion from refugee status for serious non-political crimes is concerned, the first hypothesis (i.e. new information shows that the recognised refugee should have been excluded to begin with) would be the one that would normally occur in practice. In the second situation, the refugee status could be ended under Article 14(3)(a) only if the serious (non-political) crime was committed after the decision granting refugee status but before the residence permit is issued, due to the temporal limitations attached to Article 12(2)(b) (see Chapter II, Section A.2.e Prior to the admission as a refugee (temporal scope).

Figure 8. *Timeline of applying Article 14(3)(a) QD ('is excluded')*



Similarly, an applicant who has been granted subsidiary protection by a Member State can also be excluded subsequently, in accordance with Article 19(3) QD. Regarding exclusion from subsidiary protection for serious crimes, both situations where new information shows that the beneficiary of subsidiary protection should have been excluded at the time of the decision and where this exclusion ground arises after granting of the status, can equally lead to the application of Article 19(3)(a) QD.

Article 19(3)(a) QD

'Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person, if:

(a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);'

It should be noted that Article 14(3)(a) QD and Article 19(3)(a) QD are mandatory provisions ([23]).

([23]) For further details, see EASO, *Ending International Protection – Judicial analysis*, 2nd edition, 2021.

4. Serious crime and danger to the security or community of the Member State

Under Articles 14(4) and 14(5), the QD sets out the possibility to withdraw the status granted to a refugee or not to grant status to a refugee when there are reasonable grounds for considering that the refugee represents a danger to the security of a Member State in which they present or, if convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that state. These provisions draw on Article 33(2) Refugee Convention that sets out an exception to the prohibition of expulsion or return (*refoulement*) ([24]).

Article 14(4) and 14(5) QD

'4) Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

5) In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.'

In contrast with Article 14(3)(a) and Article 19(3)(a) QD, Article 14, paragraphs (4) and (5) are **optional provisions**.

Article 14(4)(a) QD does not refer to the commission of a serious crime. However, this provision may be applicable to cases where a recognised refugee (after their residence permit is issued) has committed a serious crime but the conditions stipulated by Article 14(4)(b), notably the fact that the crime was 'particularly' serious, are not fulfilled, but there are reasonable grounds for regarding the person concerned as a danger to the security of the host country. In any case, danger to security and danger to community are separate concepts ([25]). This could be the case, for example, where a recognised refugee has been convicted by final judgment of a serious crime committed in the country of refuge after their residence permit was issued, and for whom there are reasonable grounds that they pose a danger to the security of that country.

([24]) Nevertheless, case officers must respect Article 3 of European Convention on Human Rights, which is an absolute right without any exceptions therefore an applicant cannot be expelled or returned to a country where they would be subjected to torture or inhuman or degrading treatment or punishment.

([25]) CJEU has not yet given an interpretation of danger to community but interpreted the concept of 'public security' within the meaning of Articles 27 and 28 of the Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC; In the *H.T.* judgment, the Court explicitly mentioned that concept of 'public security' covers both a Member State's internal and external security and that, consequently, a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security; CJEU, judgment of 24 June 2015, *H.T. v Land Baden-Württemberg*, C-373/13, EU:C:2015:413, para. 78. A summary is available in the EASO Case Law Database.

Articles 14(5) and 14(4)(b) QD read together provide **a ground to refuse granting refugee status,** which bears some similarities with exclusion for serious (non-political) crimes. In accordance with these articles, a Member State can refuse to grant the refugee status to a person who has been convicted by a final judgment of a particularly serious crime, and therefore constitutes a danger to the community of the Member State. Both provisions are similar in that they require the commission of a serious crime. However, they can be distinguished for two main reasons.

Firstly, the 'danger to the community' clause of Article 14(4)(b) QD follows a **different rationale** to the exclusion clauses. While the exclusion clause aims to protect the integrity of the asylum system and to contribute to the fight against the impunity of perpetrators of serious offences, the 'danger to the community' clause focuses on protecting the public against potentially dangerous refugees. Moreover, the **exclusion clause looks to the past** whereas the **'danger to the community' clause looks to the future**, and case officers applying the second must make a prospective analysis of the threat represented by an applicant to their particular Member State. This prospective analysis of the danger represented by an applicant is not necessary when applying exclusion for serious (non-political) crimes, and where this is done in the circumstances provided for in Article 14(3)(a) QD. With regard to the 'danger to the security' clause in Article 14(4)(a) QD, similar considerations regarding the difference in rationale when compared to the exclusion clauses were set out in the *B and D* decision of the CJEU.

CJEU, 2010, *B and D*, paras. 104-105 ([26])

'In that regard it should be pointed out that the grounds for exclusion at issue 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. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State.

In those circumstances, the answer to the second question is that exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.'

Secondly, exclusion for serious non-political crimes and the conditions for refusing/withdrawing the refugee status under Articles 14(4)(b) have **different requirements**.

([26]) CJEU, judgment of 9 November 2010, *B and D v Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge*, joined cases C-57/09 and C-101/09, EU:C:2010:661, para. 104-105. Summary available in the EASO Case Law Database.

Exclusion for serious non-political crimes under Article 12(2)(b) QD	Withdrawal of refugee status under Article 14(4)(b) QD
A serious crime	
There are **serious reasons for considering** that the applicant has committed the serious crime.	Applicant has been **convicted by a final judgment** for having committed the serious crime.
The serious crime was **committed outside the country of refuge, prior to the applicant's admission as a refugee.**	There are **no conditions** set out in the QD concerning when and where the serious crime was committed.
The serious crime was **not of a political nature.**	There **are no conditions** set out in the QD concerning the political nature of the serious crime, however, the crime must have been **'particularly' serious**.
No requirement that the applicant constitutes a **danger to the community** of the Member State.	Applicant must constitute a **danger to the community** of the Member State **due to the committed crime**.

Where conditions under Article 14(3)(a) QD and also under Article 14(4)(b) QD would be met, refugee status should be withdrawn on the basis of Article 14(3)(a) QD, since this is a mandatory provision and it takes precedence over the applicability of Article 14(4)(b) QD. However, it must be noted that even if the refugee status was withdrawn, the person continues to be a refugee for the purposes of Article 1A Refugee Convention based on the Article 14(6) QD ([27]).

C. Relation between the exclusion examination and the criminal proceedings

1. Exclusion examination versus criminal proceedings

When dealing with exclusion cases based on serious (non-political) crimes, case officers will often encounter situations where applicants are or have been subject to criminal proceedings. Therefore, it is useful to understand the relevant aspects of the criminal proceedings and how they may impact the exclusion examination.

The **purpose** of the criminal proceedings is to bring perpetrators of criminal offences to justice whereas the exclusion examination aims to determine whether international protection should be denied to persons who are considered not to be worthy of it due to, among others, the commission of serious (non-political) crimes.

The criminal proceedings involve two steps, first establishing whether the individual is guilty of a crime and if that is the case, to decide on the penalty within the framework set by the criminal law. For asylum law, **establishing the precise criminal sanction that could potentially be imposed** in an exclusion case **is outside the scope of the exclusion examination**. Nevertheless, the circumstances that are taken into account by the criminal court when determining the sanction to be imposed can

([27]) For more details see CJEU, judgment of 14 May 2019, *M v Ministerstvo vnitra, X. and X. v Commissaire général aux réfugiés et aux apatrides*, joined cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paras. 99 and 110. A summary is available on the EASO Case Law Database.

assist the case officer in the assessment of the seriousness of the crime. See also Chapter II, Section A.2. Specific circumstances.

The two procedures are **not mutually exclusive**, i.e. a person can be convicted of a serious crime and at the same time be excluded from international protection.

***Figure 9**. The interaction between the exclusion examination and the criminal proceedings*

The procedures can go in parallel, however, depending on national law and practice, the exclusion examination could be suspended until the criminal case is settled. In the APD there is **no legal obligation on the determining authority to suspend the exclusion examination** until a final judgment is made in the criminal case. Nevertheless, when the examination or the decision on exclusion is suspended, the determining authority must comply with the time limits set by Articles 31(3)-(5) APD to take a decision in first instance on the application for international protection.

Exclusion should not be seen as being the immediate consequence of the criminal punishment, meaning that a **conviction for a crime will not automatically lead to a decision to exclude from international protection or to withdraw** the protection status. In this situation, depending on the particular circumstances of the case at hand, the examination of potential exclusion may be initiated.

Conversely, the exclusion from international protection for the commission of a serious (non-political) crime **does not necessarily require that the individual in question was previously convicted of the crime or that a criminal investigation was initiated** in relation to that crime by the competent authorities on the basis of the applicable criminal legislation. In certain cases, information in this regard may not be available or accessible to the case officer when considering potential exclusion, and the exclusion examination is based on evidence other than a criminal file.

While examining potential exclusion, the case officer has to perform **a full investigation of the circumstances of the case**, based on all available pieces of evidence, **including a criminal conviction or information available from a criminal file**. However, **this does not imply a 'duplication' of the criminal proceedings** when considering exclusion, nor does it mean that the case officer should apply the same rules and standards provided for in the criminal law to the exclusion examination.

The state has the obligation to prove the commission of the crime and the individual responsibility in both procedures, but the **standard of proof in criminal proceedings is higher,** as guilt in the criminal sense requires proof 'beyond reasonable doubt'. The means used in these procedures and available to the authorities are significantly different. **The authorities responsible for the criminal proceedings have access, under specific rules, to more diverse methods and tools for investigation,** including through police and judicial international cooperation, such as searches, confiscation of documents, interception of communication/correspondence, use of specific forensic technologies, access to various criminal databases, possibility to contact authorities in the country of origin to obtain relevant information, etc. Compared to these means, **the asylum authority has very limited resources at its disposal,** hence having access to relevant information in the criminal file according to national law and practice, could provide an important advantage when exploring possible exclusion from international protection**.**

Last but not least, the fact that an exclusion examination was initiated **does not affect the ongoing criminal investigation.** Nonetheless, information that is collected during the asylum procedure might be **relevant and useful for the initiation of, or during, the criminal investigation** as it may assist in establishing the factual situation. This information may be referred to the competent authorities according to national law and practice.

2. Different situations in criminal proceedings

The implications of criminal proceedings for an exclusion examination depend on different elements such as the **stage of the criminal procedure**, **its outcome, the country of the criminal proceedings, as well as other particular situations (e.g. international criminal proceedings) and related procedures (e.g. extraditions)**. Since there can be different situations in the asylum file (e.g. final conviction/acquittal in the country of origin, pending court procedure in a third country or pre-trial investigation in the country of asylum), these elements are further dealt with separately.

> Taking into account the individual circumstances of a particular case, the case officer should consult and combine guidance in relation to these situations. This will provide a comprehensive view of the possible implications these situations may have for the exclusion examination.

It is essential to remember that even if a criminal procedure is ongoing or has been finalised this would not alter the obligation of the case officer to fully examine the facts in the case, including those elements that are considered 'established' according to the rules of the criminal procedure (e.g. knowledge or intent in relation to a criminal conduct). Consequently, an acquittal or conviction in the criminal proceedings may, under specific circumstances, not correspond to a decision to exclude or not exclude, depending on the individual elements of the case at hand.

The information from the criminal procedure may provide leads/indications for the exclusion examination or corroborate other pieces of evidence available in the asylum file. Even if some evidence collected in the criminal proceedings was considered inadmissible according to the standards applicable to the criminal trial, it may however be relevant for the exclusion consideration as long as this is not inconsistent with the applicable law.

It is equally important to stress that access to information in the criminal file may be limited to certain phases of the criminal trial and/or to particular actors and may be subject to specific conditions according to the criminal procedure law and to the legislation on data protection and confidentiality. For this

reason, if the exclusion examination is not postponed or suspended as a result of the ongoing criminal trial for the commission of a serious (non-political) crime, it is important to closely follow the course of the criminal trial and to take the necessary actions that would allow timely access to the information available in the criminal file, where this is possible.

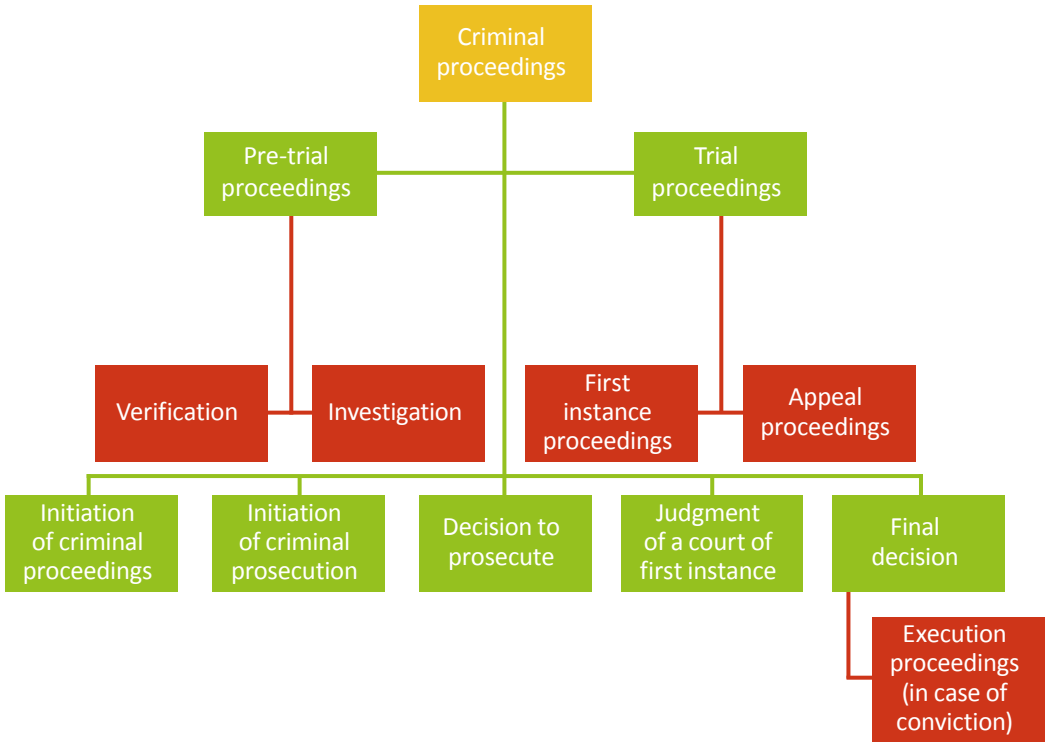
a) Stage of criminal procedure

The stage of the criminal procedure (e.g. investigatory phase, decision to prosecute, pre-trial procedure, court procedure) reflects the amount of information and evidence that could be available in the criminal file concerning the crime that was committed and possible individual responsibility of the person concerned.

According to the applicable criminal procedure law, access of third parties to this information and evidence may differ, usually being more limited in the initial stages of the criminal proceedings.

Figure 10. *Criminal proceedings' chart*

*This is a simplified schematic overview that aims to illustrate possible phases in criminal proceedings, taking into account that there may be variations in criminal proceedings across countries.



- **No ongoing criminal procedure**

The fact that a criminal procedure has not (yet) been initiated does not preclude a possible ongoing preliminary investigation performed by the competent authorities with a view to initiating criminal proceedings against a person suspected of the commission of a crime. Criminal proceedings may not have been launched due to several reasons. For instance, the preliminary investigation has not been concluded, but that does not mean that exclusion cannot be considered and applied. Depending on the nature of the crime and on the investigative interests, information concerning the preliminary investigation (prior to initiation of criminal proceedings) may not be accessible to other entities except for those involved in it.

- **Pending criminal procedure, no court decision**

It must be noted that the evaluation of certain factual situations or types of evidence, including their admissibility, may change during the distinct phases of the criminal procedure. They involve assessments done by different actors (law enforcement, public prosecutors, investigative judges, court panels) at different moments that can result in previous decisions being changed. For instance, a certain fact considered established in the decision to prosecute may be found by the judge to be insufficiently proven in the pre-trial procedure, or a witness testimony that was initially admitted in the criminal file in the investigation phase is later refuted based on an expert opinion.

The information from the criminal file, where available to the case officer, should be examined with caution and assessed in light of the evidence from the asylum file.

Depending on the national legislation or practice, the exclusion examination may be suspended until a final decision is taken in the criminal case or at least until a decision by the first instance is available.

If it will not be possible to have a clear view on the progress of the criminal proceedings or when these proceedings move very slowly (e.g. stretching over a long period of time) or they are 'frozen' due to procedural grounds, the case officer may still take a decision on exclusion in the case at hand based on the elements that are available in the asylum file. The national guidelines, if available, or the supervisor should be consulted in this regard. The case officer could decide either to exclude, if there are serious reasons to consider that the person has committed a serious (non-political) crime, or to grant/refuse international protection, or to maintain/withdraw the protection status, depending on the circumstances of the case. In this situation, future review of these decisions may be needed based on the final outcome of the criminal proceedings.

- **Criminal conviction which is not final**

The fact that a court already found that the offender is individually responsible for the commission of a crime may be an indication concerning the potential commission of an excludable act. Even if the decision is not final, the judgment could be an important source of factual information and may highlight possible sources of evidence that could be corroborated with the evidence already available in the asylum file.

It should be borne in mind that the criminal conviction may be overturned by the appeal court for several reasons, such as procedural deficiencies or based on new evidence or on a different assessment of the same probationary material. Even so, there could still be serious reasons for considering that the person in question committed a serious (non-political) crime since the threshold of proof for establishing guilt in criminal proceedings – 'beyond reasonable doubt' – is higher.

- **Final decision by criminal court**

A final decision by a criminal court concerning a serious (non-political) crime marks the end of the criminal trial and could trigger exclusion considerations depending on its outcome. It could include clear findings on the commission of an excludable act unless there are reasonable grounds to question the legality and the fairness of the criminal proceedings that preceded the decision.

Usually, the conditions under which a criminal court decision is considered final are defined in the national law of the country of jurisdiction. The decision could become final either when there are no means to appeal it in court as provided by law or in a situation where the person who has been convicted has not appealed the decision.

The actual judgment normally includes an analysis of the basic elements that have to be considered by the case officer when assessing exclusion. These are the factual elements of the criminal case, the individual responsibility of the person who has been judged by the court, including possible grounds negating individual responsibility and any mitigating and aggravating circumstances.

Even if a final decision ensures a substantial input into the exclusion examination concerning facts and evidence that was admitted to assess the conduct and the individual responsibility, it does not modify the obligation of the case officer to perform a full assessment of all facts and relevant circumstances before taking a decision.

A decision to exclude may be taken independently from the finalisation of the criminal procedure if there are serious reasons to consider that the person committed a serious (non-political) crime or acts within the scope of other relevant exclusion grounds. In case the two procedures have different outcomes, it may be necessary to review the exclusion decision or to re-examine the case for possible exclusion.

b) Outcome of the criminal procedure

Not all criminal convictions for serious (non-political) crimes result in exclusion from international protection, and sometimes the acquittal of the person by the criminal court may nevertheless lead to a decision to exclude from international protection. This depends, amongst other, on the individual circumstances of the applicant (e.g. a diplomat who has immunity from prosecution in the countries where they are accredited), the reliability of the criminal justice system and the fairness of the criminal trial (e.g. the criminal proceedings and/or the decision are in themselves acts of persecution), the evidence behind the court judgment (e.g. important procedural flaws: existence of reliable accounts from the country of origin on the use of torture to force certain witnesses to declare aspects that were later used to prosecute/convict the applicant) and the scope of the criminal prosecution, which may not have covered all acts for which potential exclusion issues arise in the context of an asylum procedure.

! However, when a court found that a person can or cannot be held individually responsible for the crime, the exclusion examination cannot reach a different conclusion with regard to their individual responsibility for this particular crime, except in the situations where the reliability of the court's decision and/or fairness of the proceedings should be questioned (see Chapter II, Section C.2.c Country of the criminal proceedings). The same is generally valid for facts that were established by the final decision of the criminal court.

- **Criminal conviction**

It is universally accepted that a criminal conviction is a finding to the criminal standard of proof ('beyond any reasonable doubt'), by a judge or jury at the end of a criminal trial, following the analysis of all the evidentiary material, that the accused is guilty of the commission of a crime.

In case the applicant was convicted of the commission of a serious (non-political) crime, the case officer should nonetheless perform a full assessment of all the circumstances of the case. In doing so, they may rely on the result of the investigation performed during the criminal proceedings and also on judicial findings, explanations and any other references contained in the final decision of the criminal court, unless there are reasonable grounds to question their reliability and fairness.

The administrative procedural rules may allow to make reference to the judgment if the determining authority can state, in setting out the reasons for its exclusion decision, why an important fact has been taken into account or ignored. The special feature of the administrative procedure regulating the asylum process is the independence and the 'freedom' of the determining authority to consider based on all circumstances relevant to the applicant's claim for international protection, rather than the pure fact of conviction itself, which may not necessarily result in an exclusion decision.

The reliability and the fairness of the criminal conviction should be assessed based on the country of jurisdiction and the individual circumstances of the case at hand.

- **Acquittal**

Acquittal represents a finding by a criminal court that a person accused of a criminal offence cannot be held criminally responsible for the charges brought against them. The reasons behind this conclusion can vary depending on the criminal law of the country of criminal proceedings. For instance:

- it has not been proven that the act was committed by the accused, or the act in question lacks one of the constitutive elements of a crime within the scope of an exclusion clause; or
- there is a ground negating the individual responsibility for the crime that was committed ([28]).

In general, an acquittal on substantive grounds does not lead to a possible exclusion with regard to the crime(s) concerned e.g. the act of which a person was accused of did not happen or they were charged with a crime for which there is no provision in the criminal law. However, there can be situations in practice, depending on the circumstances of the case, where the person could be excluded, even if acquitted. For example, there was no sufficient evidence for a conviction according to the applicable standard of proof (beyond reasonable doubt) or some of the available evidence that could incriminate the accused was not admitted in the court due to a procedural deficiency (e.g. lack of prior authorisation) or the person was acquitted by an international criminal court for the commission of a certain type of crime (e.g. a war crime, a crime against humanity) if the circumstances are such that the conduct in question would nevertheless constitute a crime falling within the scope of an exclusion clause (for instance, murder, torture, etc.).

The fact that a criminal court was unable to determine beyond reasonable doubt that the accused committed the crime will not necessarily mean that the person cannot be excluded from international protection if the 'serious reasons to consider' threshold is met.

Some evidence that was found inadmissible according to the standards of criminal procedure (which are very strict in light of the serious consequences of the criminal conviction) can still be relevant for the exclusion examination. For example, a statement made by the accused before being properly informed on their rights and obligations during the criminal proceedings, a piece of evidence dismissed for being irrelevant to the criminal charges, a document submitted at a very late stage of the process when the assessment of the factual situation was considered closed, etc.

([28]) EASO, *Practical Guide: Exclusion*, January 2017, Section 6.2. 'Individual responsibility'.

- **Order to follow special treatment in a psychiatric or similar facility**

In some cases, the court may decide to order the person who committed a crime to follow special treatment in a psychiatric or similar facility due to the fact that their ability to understand the consequences of their conduct or to control their own actions was impaired. This may also involve, or be relevant to, an assessment concerning a potential danger that the individual concerned poses to the community of the Member State on whose territory they are.

As the finding that the person is found guilty and thus convicted by a criminal court is separated from the actual sentence that is imposed by the criminal court, potential exclusion issues can be considered in these cases.

c) Country of the criminal proceedings

The rules concerning the criminal trial in the country of the procedure or the manner in which they are applied in practice will determine the extent to which the criminal proceedings/their outcome can be taken into account in the exclusion examination. The competence of the criminal authorities in the country of asylum over common crimes which were committed outside its territory if neither the alleged perpetrator nor the victim(s) are its nationals depends on the national law and practice. A case of potential exclusion from international protection must be considered irrespective of such competence. See also Annex B. Section 'Universal Jurisdiction'.

- **In the country of origin**

If the criminal proceedings are ongoing or a criminal judgment (either conviction or acquittal) was issued by a court in the country of origin during the examination of the application, the case officer should carefully assess the procedural steps and measures carried out within the criminal proceedings and the relation between them and the merits of the application for international protection or the grounds for which the person was granted international protection (in case a withdrawal procedure was initiated).

It may be that the criminal procedure or the judgment that was passed is in fact an act of persecution if motivated by race, religion, nationality, political opinion or membership to a particular social group (as a result of legal, administrative, police, and/or judicial measures which were in themselves discriminatory or which were implemented in a discriminatory manner or following prosecution or punishment which was disproportionate or discriminatory or due to denial of judicial redress resulting in a disproportionate or discriminatory punishment).

Even if not intended as an act of persecution, the prosecution/criminal conviction may be based on evidence obtained unlawfully, e.g. through illegal methods or means which constitute violations of basic human rights as well as principles and procedural guarantees (e.g. witness declarations provided under torture, falsified documents, deprivation of legal advice and of the possibility to provide evidence in defence, procedures carried out in secret, etc.). A risk of persecution may also arise in the broader context of the prosecution, e.g. if the person would be subject to torture or other forms of ill-treatment while in (pre-trial) detention.

The reliability and fairness of the proceedings could be seriously questioned when, for instance, there are reasons to consider that they have been carried out in breach of the principle of legality or where the standard of proof that was applied was inferior to a finding of guilt beyond reasonable doubt, or if

the person concerned was obliged to prove their innocence starting from a presumption of guilt. What is more, a criminal procedure is not reliable from the perspective of an asylum determination if it does not comply with other basic requirements for a fair trial (see Annex B. Section 'Right to a fair trial'). It must be also noted that, based on the available evidence in the file, an applicant who was acquitted by the authorities in the country of origin could still be considered for potential exclusion if there are grounds to question the reliability and fairness of the procedure (e.g. in case substantial flaws can be identified in the criminal procedure that manifestly altered the outcome of the criminal trial in favour of the defendant).

The fact that the country of origin is included by the EU+ country on the national list of safe third countries should be taken into account when considering the reliability of the criminal justice system ([29]) in that country. The case officer should fully assess this aspect in light of all individual circumstances of the case and the available information concerning the country of origin.

In order to establish the reliability and fairness of the criminal procedures and convictions in the country of origin, the case officer should consult precise and up-to-date information covering, among others, the rule of law, the operation of the justice system, the existence/lack of judicial independence, the criminal law and the criminal procedure law and the manner in which they are/were applied in the relevant period, from various sources such as other EU+ countries, UN, Council of Europe, EASO, UNHCR and from other relevant (international) organisations/sources.

The information concerning the application for international protection or the status of international protection is confidential and should not be provided to the authorities of the country of origin, even if they are contacted by authorities in the country of asylum other than the authority responsible for determining the asylum claim, for example in the context of extradition proceedings.

- **In a third country (outside the EU+ countries)**

On their way to the country of refuge, persons often transit through third countries and sometimes stay there for a certain period of time. Information concerning criminal proceedings or sentences in these transit countries may be put forward by the person concerned or by other applicants / beneficiaries of international protection or may come to light in the context of an extradition request or of a notification in international criminal databases. When such information becomes available to the case officer, it should be assessed with caution, applying a similar approach to the one described above.

Moreover, the same caution should be applied when deciding to contact the authorities of a third country to obtain additional information on the criminal proceedings, through the channels available at national level (e.g. police, ministry of justice, ministry of interior, ministry of foreign affairs, etc.). No information on the application for international protection or the international protection status in the country of asylum should be communicated to the authorities of the third country as, in some cases, it may indirectly reach the authorities of the country of origin.

- **In another EU+ country**

The EU+ countries observe the same standards concerning the operation of the criminal justice systems, which are in line with the relevant international obligations. As a consequence, at EU level, Member

([29]) In accordance with Article 39(2)(c) APD: 'A third country can only be considered as a safe third country for the purposes of paragraph 1 where: (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.'

States apply the principle of mutual recognition of judgments and judicial decisions and work towards the approximation of their criminal laws in several areas ([30]).

In this context, information on criminal proceedings in other EU+ countries is reliable and may be accessible in the framework of the close cooperation in criminal matters. The case officer should follow the internal guidance and/or consult their supervisor to identify the means that are available to obtain further information on criminal procedures/convictions in another EU+ country. For instance, a request for information could be made in the framework of Article 34 of Regulation No 604/2013 ([31]) or through official channels / national contact points from the police or ministry of justice or interior authorities in order to receive relevant information on the status of the criminal procedure and/or any prospects concerning their finalisation. See also the section on the European Arrest Warrant in Chapter II, Section C.e Extradition procedures and other forms of cooperation in criminal matters.

- **In the country of asylum**

If a criminal procedure is ongoing / a criminal conviction was delivered in the country of asylum and the case officer is examining potential exclusion from international protection, if possible, they should consult/request access to the relevant documents in the criminal file according to the applicable national legislation. Depending on the status of the criminal procedure and based on the internal guidelines, if available, the determining authority may decide to postpone the decision on exclusion until a (final) decision is taken by the criminal court on whether the applicant / beneficiary of international protection is guilty of the commission of a crime or not. If any concerns are raised or submissions are made by the individual during the exclusion examination in relation to the criminal proceedings, the person concerned should be guided to present them to the competent authorities for the criminal investigation as they are outside the scope of the case officer's competence in the asylum procedure.

d) Persons involved in International Criminal Courts / International Criminal Tribunals' proceedings

The main international criminal tribunals have been established by the United Nations to prosecute and try individuals for serious violations of international criminal law or international humanitarian law, such as genocide, crimes against humanity and war crimes. The main international criminal tribunals are described below.

International Criminal Court

The ICC 'investigates and, where warranted, tries individuals charged with genocide, war crimes, crimes against humanity and the crime of aggression […] As a court of last resort, it seeks to complement, not replace, national courts. Governed by an international treaty called the Rome Statute, the ICC is the world's first permanent international criminal court' ([32]).

([30]) More information on main legislative acts, agencies for judicial cooperation in criminal matters and other related bodies can be found at the European Parliament, 'Judicial cooperation in criminal matters', April 2021.

([31]) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

([32]) ICC, 'About the Court'. More information on its mandate, procedure, instrumented cases and decisions can be found on the website for the International Criminal Court.

International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) dealt with war crimes that took place during the conflicts in the Balkans in the 1990s. Its activity lasted from 1993 to 2017 ([33]).

International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established 'to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring states, between 1 January 1994 and 31 December 1994. The Court delivered its last trial judgement on 20 December 2012' ([34]).

Note
The International Residual Mechanism for Criminal Tribunals (IRMCT) was established by the UN Security Council in 2010 to finish the work begun by ICTY and ICTR. In accordance with its mandate, the Mechanism has assumed responsibility for a number of functions, such as tracking and prosecution of remaining fugitives, appeals and review proceedings, retrials, supervision of enforcement of sentences, assistance to national jurisdictions, preservation and management of archives. For further information, refer to the United Nations International Residual Mechanism for Criminal Tribunals webpage.

Apart from these, other tribunals with an international or 'hybrid' character have been established to function within a national judicial system or based on an agreement between a national government and the UN to try individuals for crimes under international law, focusing on specific periods of time characterised by conflict and unrest involving serious human rights violations. For instance, the Special Court for Sierra Leone was set up in 2002 to address serious crimes against civilians and UN peacekeepers committed during the civil war (1991–2002). In 2009, the Special Tribunal for Lebanon was created as the first tribunal of international character to have jurisdiction over the crime of terrorism in times of peace. The Extraordinary Chambers in the Courts of Cambodia was established in 2003 to function as a special Cambodian court to prosecute the senior leaders of Democratic Kampuchea and those believed to be most responsible for grave violations of national and international law.

Some applicants or beneficiaries of international protection may have a history in relation to these courts or tribunals or they may be subject of pending procedures, though this occurs quite rarely in the asylum practice.

- **Persons indicted**

An indictment by an international criminal tribunal or court is generally considered to meet the 'serious reasons for considering' standard required under Article 1F Refugee Convention. In this case, the burden of proof is reversed to the applicant, creating a rebuttable presumption of excludability ([35]). If the person concerned is subsequently acquitted on substantive (rather than procedural) grounds, following an examination of the evidence supporting the charges, the indictment can no longer be relied upon to

([33]) More information on its mandate, procedure, instrumented cases and decisions can be found on the website for the United Nations International Criminal Tribunal for the former Yugoslavia.

([34]) ICTR, 'The ICTR in Brief'. More information on its mandate, procedure, instrumented cases and decisions can be found on the website for the United Nations International Residual Mechanism for Criminal Tribunals.

([35]) UNHCR, *Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, para. 34, p. 9.

support a finding of 'serious reasons for considering' that the person has committed the crimes for which they were charged ([36]).

- **Persons acquitted**

The consequences of an acquittal by an international criminal tribunal or court do not differ much from a similar decision pronounced by a national criminal court with full respect of international standards related to the right to a fair trial. However, it must be borne in mind that the investigative means and resources that can be employed by these courts are more extensive and far reaching as their work is especially focused on particularly serious crimes condemned by the international community and on certain countries.

Exclusion may still apply in relation to the crimes for which the person was acquitted in light of the lower threshold of proof used in the asylum procedure (not enough evidence to assert guilt 'beyond reasonable doubt' but still having sufficient evidence to support a finding of 'serious reasons to consider') or regarding crimes not covered by the original indictment (that were identified during the exclusion examination or in the framework of the national criminal proceedings). Exclusion could also be based on a different legal qualification of the criminal conduct (e.g. the constitutive elements for crimes against humanity or genocide or war crimes are missing but there are serious reasons to consider that the person committed a serious (non-political) crime such as murder, torture, rape, etc.). What is more, the acquittal may be the result of procedural, technical or other reasons ([37]).

- **Witnesses**

The fact that a person was admitted to testify as a witness by an international criminal court / tribunal does not exclude possible involvement in the commission of serious (non-political) crimes. It is true that a screening is performed by the office of the prosecutor to assess the reliability of the witnesses to be involved in the criminal proceedings ([38]) but being able to provide a reliable account is a different matter from the actual conduct of the individual. There can be 'fact witnesses' who have knowledge and testify about what happened (they can be crimes-based witnesses when they have suffered harm and testify as witnesses about what happened to them) or 'insider witnesses' who have a direct connection with the accused. These witnesses can be called, or asked to give testimony, by the Office of the Prosecutor, the Defence, the Legal Representative of Victims, or the Judges themselves ([39]). There can be cases in practice where persons who could have a certain involvement in the commission of serious crimes and who are subject to criminal investigations in third countries to be admitted to testify as defence witnesses in proceedings before international criminal courts, including while being in detention ([40]).

([36]) See UNHC and ICTY, Note on Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha, Tanzania, July 2011, paras 41, p. 7.

([37]) For more information, see *EASO, Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis, 2nd edition, 2020*, pp. 56-57.

([38]) Regulation 36, Regulations of the Office of the Prosecutor, entry into force 23 April 2009: *'Selection of persons to be questioned* – 1. In selecting persons to be questioned in connection with an investigation, the Office shall assess inter alia **the person's reliability** and shall give due consideration to his or her safety and well-being, including all aspects relevant to the risks of re-traumatisation.'

([39]) More information on witnesses in ICC procedures, see the ICC webpage 'Trying individuals for genocide, war crimes, crimes against humanity, and aggression'.

([40]) Joris van Wijk, 'When International Justice Collides with Principles of International Protection; assessing the consequences of ICC Witnesses seeking asylum, defendants being acquitted and convicted being released', *Leiden Journal of International law*, Vol. 26 No 01, 2013.

e) Extradition procedures and other forms of cooperation in criminal matters

Extradition procedures and other forms of cooperation in criminal matters can provide relevant information on facts and circumstances concerning ongoing criminal proceedings or a final criminal conviction imposed in relation to a certain person who has applied for or is a beneficiary of international protection in the country of asylum. The case officer's access to the relevant databases and information with regard to extradition procedures and other forms of cooperation depends on national legislation and practice.

- **European arrest warrant**

The European arrest warrant (EAW) is a simplified cross-border judicial surrender procedure for the purpose of prosecution or executing a custodial sentence or detention order. This procedure has been in force since 1 January 2004 in all Member States and has replaced the lengthy extradition procedures that used to exist between EU countries ([41]). An EAW may be issued by a national judicial authority for prosecuting a person when the offence for which the person is being prosecuted has a maximum penalty of at least 1 year of prison or for the execution of a custodial sentence or detention order when the sought person has been sentenced to a prison term of at least 4 months.

The EAW can be a valuable source of relevant and reliable information concerning (potential) crimes committed by an asylum applicant or a beneficiary of international protection and hence useful for the detection and/or investigation of a possible exclusion case. The following information can be found in the EAW ([42]):

— the identity and nationality of the requested person;

— the name, address, telephone and fax numbers and email address of the issuing judicial authority;

— evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect;

— the nature and legal classification of the offence;

— a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

— the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;

— if possible, other consequences of the offence.

- **Extradition procedure**

An extradition procedure between two states usually takes place according to international treaties to which both countries are parties, or pursuant to bilateral agreements, or ad hoc extradition agreements, based on an expectation of reciprocity in the future. Persons who are subject to

([41]) See 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; For more information concerning the background of the EAW, how it works, the proportionality check, procedural rights, statistics, implementation and other relevant documents see European Commission, 'European Arrest Warrant – Background'.

([42]) Article 8 of 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

extradition procedures are either being prosecuted for a criminal offence or wanted for the purpose of serving a sentence in the requesting state.

Note
Sometimes, extradition requests are used by states against opponents, for political reasons; therefore, caution is needed when taking information obtained in the context of these procedures into consideration in the examination of the person's asylum claim or in the framework of a possible withdrawal procedure.

Depending on the applicable treaties/agreements and the national law and practice, an extradition may only take place if the request to extradite complies with minimum requirements, such as:

- a minimum threshold for the punishment that could be applied or was applied by the criminal court in the requesting state;
- double criminality (the act is considered a crime both in the requesting and the requested state);
- proceedings in the requesting state are consistent with the requirements of a fair trial that are internationally accepted (see Annex B. Relevant notions of criminal law and criminal procedure law);
- there is no direct/indirect serious risk of persecution or serious harm following extradition in the requesting state, including through subsequent return/surrender to another country (e.g. torture, inhuman or degrading treatment or punishment, death penalty, etc.);
- the crime that forms the object of the request is not a political crime (some conventions/treaties on extradition define categories of crimes which under no circumstance can be considered to have a political nature such as war crimes, crimes against humanity, terrorist offences, etc.).

It must be noted that the crimes listed in extradition treaties/agreements cannot be automatically considered as serious and a thorough examination of the case is needed.

Compared to the cooperation between Member States based on the EAW, extradition procedures involve more formalities, including a thorough check of the crime for which the request to extradite was made and the way criminal proceedings are implemented in the requesting state, thus making the process lengthier. Moreover, the requirement of double criminality must be verified in almost every case.

Similar to the EAW, the extradition file will generally contain information on the crime and the individual conduct of the wanted person, however the access of the determining authority to it may be limited by applicable legislation. A pending asylum procedure means that extradition of the wanted person to the country of origin can proceed only if the requested state's *non-refoulement* obligations are met. This requires a determination on eligibility for international protection before a decision can be made on whether the person's surrender to the requesting country would be consistent with the principle of *non-refoulement*. In cases concerning an extradition request from the country of origin for a person already recognised as a refugee, the wanted person enjoys protection against *refoulement* (in the form of extradition) unless it is determined that there are grounds justifying the withdrawal of their refugee status. This could be because of exclusion issues or based on a re-assessment of the case that concludes that the person did not have a fear of persecution in the first place. See also Chapter II, Section B.4. Serious crime and danger to the security or community of the Member State.

Last but not least, a decision to grant or refuse extradition to a third country will not necessarily determine a decision to exclude the person concerned from international protection, or to withdraw

such protection. As in all cases, exclusion may apply if there are serious reasons to consider that the person is individually responsible for the commission of a serious non-political crime.

INTERPOL Red Notices ([43])

A Red Notice is a request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender ([44]), or similar legal action. A Red Notice is **not an international arrest warrant**, nor does it constitute an extradition request, meaning that a person cannot be extradited or surrendered on the mere basis of a red notice.

Red Notices are issued for fugitives wanted either for prosecution or to serve a sentence. This follows judicial proceedings in the country issuing the request. This is not always the home country of the individual, but may be the country where the crime was committed, or the country whose nationals were the victims of the crime.

When a person is sought for prosecution, they have not been convicted and should be considered innocent until proven guilty. A person sought to serve a sentence means they have been found guilty by a court in the issuing country.

The Red Notice contains **two main types of information:**

- information to identify the wanted person, such as their name, date of birth, nationality, hair and eye colour, photographs and fingerprints if available;
- information related to the crime they are wanted for, which can typically be murder, rape, child abuse or armed robbery**.**

Red Notices are published by INTERPOL at the request of a member country and must comply with INTERPOL's rules. Pursuant to Article 3 of the INTERPOL Constitution, **international notices cannot be based on activities of a political, military, religious or racial character**.

Other types of notices may be issued, for instance, to collect additional information about a person's identity, location or activities in relation to a crime, to warn about a person's criminal activities where a person is considered to be a possible threat to public safety, to provide information on modus operandi, objects, devices or concealment methods used by criminals, etc.

Case officers should assess the information obtained from an INTERPOL file in light of all relevant circumstances of the case. Note that the information disseminated through the INTERPOL system (e.g. in the context of a red notice) emanates from the country that requested the issuance of the red notice or placed the information into INTERPOL's online databases, which are accessible to other member countries of the organisation. This is important, as case officers need to be aware that information such as **an arrest warrant or a description of the crime imputed to a person that accompanies a red notice was not produced or vetted for accuracy by INTERPOL**, but rather was provided to the organisation by the country in question – often the country of origin of the wanted person. It may also be worth noting that some countries use the possibility offered by Interpol to issue 'diffusions' in relation to wanted persons, which are similar to red notices in terms of their scope and intended use, but which can be placed directly into the INTERPOL databases by a member country, without requiring approval by INTERPOL prior to issuance.

([43]) Official information is available on the Interpol website, Section 'About Notices'.

([44]) Interpol Red Notices may be used, for example, to seek a person's arrest in the context of procedures concerning the execution of an EAW.

Link back to Chapter II, Section A.2.2. Specific circumstances

Annex A. List of specific circumstances that can be taken into account as part of the individual analysis of the seriousness of a crime (non-exhaustive)

Below is a list of circumstances that can be taken into account when assessing whether a crime can be considered to be sufficiently serious to reach the threshold necessary to apply Articles 12(2)(b) and 17(1)(b) QD. They should be examined together with the criteria listed by the CJEU in the *Ahmed* case, (see Chapter II, Section A.2.b What makes a crime serious?).

This list is only indicative and should not be understood as being exhaustive. These elements are based on EU+ countries' national criminal law and practice.

Further, although elements in this list pertain to the individual profile of the applicant and the motives of the crime (indicated using *) and should be seen as part of the analysis of whether a crime meets the seriousness threshold, some may also be relevant to assessing individual responsibility, in particular the *mens rea* (knowledge and intent). For instance, an element can constitute, under certain circumstances, a ground negating individual responsibility. If an element falls short of constituting a ground negating individual responsibility, it can nevertheless be taken into account when assessing the seriousness of the crime. For example, an involuntary intoxication would negate the individual responsibility but the fact that the perpetrator used drugs for the commission of the crime should be assessed under seriousness.

Factors pertaining to the act

- **Methods employed to commit the crime** (e.g. using violence, weapons)
- **Motivation to commit the crime*** (e.g. hate crime)
- **Premeditation of the crime*** (e.g. whether the crime was 'of passion' or planned)
- **Frequency and scale of the criminal act**
- **Conduct of the offender(s) after the commission of the crime*** (e.g. attempt to conceal evidence, collaboration with the police)
- **Number of offenders** (e.g. whether the act was perpetrated as part of a group)
- **Profitability of the crime** (e.g. whether there was a high level of profit from the offence)
- **Timing of the crime** (e.g. whether the offence was committed while on parole/bail, during night-time)
- **Location of the crime** (e.g. whether the offence was committed in the victim's home, in a place of religious worship, where a political assembly takes place, etc.)

- **Crime committed under the influence of alcohol or drugs*** (where these elements are not sufficient to negate individual responsibility)
- **Damages exceeding the means necessary to reach stated goal*** (e.g. deliberate and gratuitous violence or damage to property)
- **Additional degradation, humiliation of the victim(s)** (e.g. taking photographs as part of a sexual offence, insults)

Factors pertaining to the (profile of the) victim(s)

- **Number of victims**
- **Age of the victim(s)** (e.g. minor, elderly)
- **Vulnerability of the victim(s)** (e.g. mental disability)
- **Official position of the victim(s)** (e.g. member of the police force, doctor, etc.)
- **Special relation with the applicant** (e.g. family member, relationship from which arises a duty of care/dependence, abuse of power or trust)

Factors pertaining to the (profile of the) applicant

- **Age and health condition*** (e.g. where these elements are not sufficient to negate individual responsibility)
- **Official capacity*** (e.g. member of the government, of the police force)
- **Family and social situation*** (e.g. potentially excludable person part of a powerful family was not being held accountable for criminal conduct)
- **'Professionalisation' of the criminal conduct*** (e.g. whether the applicant was known to habitually commit crimes, relied on their criminal acts as their exclusive means of supporting themselves)
- **Previous criminal conduct***

Link back to Chapter II, Section A.2.a. What is a crime?

Annex B. Relevant notions of criminal law and criminal procedure law

Given that the exclusion examination for the commission of a serious (non-political) crime relates to the criminal law and criminal procedure law, knowledge of basic principles and key notions of the two is essential for a proper application of this exclusion ground and for a correct understanding of the available information concerning a pending or closed criminal case. In particular, it is important for case officers to understand which elements are relevant for their exclusion assessment and how these should be taken into consideration.

This knowledge will also support the case officer in determining the reliability of the information from the criminal procedure and/or the decisions taken by authorities responsible for the investigation of the circumstances regarding the commission of a crime and for establishing the guilt and punishment to be applied to an offender.

It is to be noted that across EU+ countries, national criminal justice systems and legislation differ and different concepts may be used in the criminal law and the criminal procedure law.

What is 'criminal law'?

The criminal law is a set of legal rules that establish which acts constitute crimes, the conditions of criminal liability, penalties and other measures to be applied or taken by the courts in the case of persons who have committed crimes in order to protect important social values.

What is 'criminal procedure law'?

The criminal procedure law defines the procedures used by the actors involved in criminal proceedings to ensure that criminal offences are properly investigated and their perpetrators justly punished under the law. It includes the rules for pre-trial and trial procedures concerning criminal offences and the rules on enforcement of decisions made in criminal matters.

This guidance does not aim to be exhaustive concerning the notions of criminal (procedure) law and the explanations that are provided cannot and should not replace legal definitions and criteria/requirements according to the applicable legislation and relevant standards.

Other relevant concepts and definitions can be found in national and international law, doctrine and available glossaries ([45]).

([45]) See the Translation Centre for the Bodies of the European Union, Interactive Terminology for Europe, 2018.

General principles applicable to criminal justice systems	
Principle of legality	
Presumption of innocence	
Burden and standard of proof	
Non bis in idem	
Universal jurisdiction	
Notions of criminal law	**Notions of criminal procedure law**
Application in time	Prior complaint
Territorial application	Investigatory phase (pre-court procedure)
Classification of crimes	Decision to prosecute
Commission of a crime	Pre-trial procedure
Attempt	Court procedure
Mitigating and aggravating circumstances	Court decision
Cumulative offences	Evidence and means of proof
Continuing and complex offences	Right to a fair trial
Statutes of limitation	Pre-trial detention
Applying the punishment	Searches
Postponement of the application/suspension of the execution of the punishment	Suspect
Conditional release	Accused person
	Convicted criminal

General principles applicable to criminal justice systems

The foundations of a just criminal system lie in a set of general principles and rules that are universally applicable, irrespective of the national legal system, and ensure a fair and proper delivery of justice when a crime is committed.

The principle of legality, the presumption of innocence, *non bis in idem,* and the burden and the standard of proof are four of the core rules of criminal justice.

Principle of legality

All conducts considered to be a crime in the territory of a state, including the sanctions to be applied for them, must be defined by law. This general rule is known as the principle of legality or *nullum crimen, nulla poena sine lege* and it is recognised in almost all criminal justice systems in the world.

The principle of legality encompasses four dimensions.

a. Criminal rules are written

Rules governing criminal conducts and penalties must be written in the law. Unwritten or judge-made criminal rules do not satisfy this requirement.

b. Criminal law is clear

The criminal provisions must be clear so as to alert the potential lawbreakers of what constitutes an illicit conduct and what is the penalty provided by the law. If the meaning or the application of a certain criminal law provision is unclear, it cannot be given a broader interpretation which is disadvantageous to the person subject to the criminal proceedings.

c. No criminalisation by analogy

The criminal law is to be interpreted in a strict manner without extending its application to other conducts that are similar to the ones that are criminalised. However, this does not mean that the law must be interpreted in a rigid manner that would be inconsistent with its rationale.

d. Non-retroactivity of criminal law

A certain conduct can constitute a crime only if it was defined as such at the moment when it was committed. Therefore, new criminal laws should not outlaw conducts which occurred in the past, prior to their adoption.

Presumption of innocence

The presumption of innocence is a core right in criminal justice. It guarantees that everyone is presumed innocent until an independent court finds them guilty. The rights to remain silent and to be present at trial are closely connected to this general rule ([46]).

Burden and standard of proof

In criminal proceedings, the prosecution has the obligation to prove an accusation beyond reasonable doubt. This principle is directly linked to and ensures the materialisation of the presumption of innocence. The standard of proof is reached if, based on the evidence, there is no reasonable explanation other than that the accused is guilty. In case there is a reasonable doubt, the court must decide the case in favour of the accused (*in dubio pro reo*).

The burden of proof may shift from the prosecution to the accused in case of legal and factual presumptions of criminal responsibility under very strict requirements provided for by criminal law (e.g. in case of possession of illegal goods, such as drugs or weapons).

Non bis in idem

No one shall be liable to be tried or punished again in criminal proceedings for a crime which they have already been finally acquitted for, or convicted of, in accordance with the law and penal procedure

([46]) EU Fundamental Rights Agency, *Presumption of Innocence and Related Rights – Professional perspectives*, 2021.

of the state. This is a principle that is commonly accepted and guides the criminal justice system at national level.

At international level there is no general agreement on the fact that an individual should not be held criminally responsible for the same conduct in two or more states (for instance, there are cases where third country nationals face new criminal trials in their country of origin for the same crime for which they served their sentence in another country). However, the *non bis in idem* principle is applicable within the European Union ([47]).

Universal jurisdiction

Universal jurisdiction is 'defined as "a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim". This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim. But the rationale behind it is broader: "it is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim". Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world.' ([48])

Notions of criminal law

Application in time

The criminal law is applicable to all crimes committed while it was in force. In cases where the penalty provided by the law for a certain crime at the moment when it was committed was reduced by subsequent legislation, the more favourable provision could be applied depending on national law.

Territorial application

The criminal law of a state is applicable to all crimes committed on its territory, including on ships or aeroplanes registered in that country.

Classification of crimes

In national legislation, crimes are typically grouped in different categories based on the social values that are infringed or their gravity (e.g. crimes against life and physical integrity, crimes against property, financial crimes, crimes related to illegal drugs, cybercrimes, etc.). There may be differences concerning the rules of procedure that are applied in relation to some types of crimes and the competence of certain courts to judge particular offences.

([47]) Article 50 of the Charter of Fundamental Rights of the European Union, (C 202/389, 7.6.2016)

([48]) Philippe Xavier, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?*, International Review of the Red Cross, Selected articles on international humanitarian law, Vol. 88, No 862, June 2006, p. 377.

Commission of a crime

Committing an offence means executing any of the acts that the law punishes as a consummated offence or as an attempt, as well as participating in their commission as a co-perpetrator, instigator or accomplice.

Attempt

Attempted commission of a crime requires that substantial steps have been taken toward the execution of the crime, but it has been halted for reasons independent of the intentions of the perpetrator.

Mitigating and aggravating circumstances

These are circumstances that diminish or amplify the level of culpability of an individual who committed a crime and hence may influence the punishment to be applied.

Examples of mitigating circumstances include the commission of the crime under a strong emotional state due to provocation, full coverage of the material damage that was caused through the illicit conduct, the circumstances in which the crime was committed make the crime less serious, etc.

The following aggravating circumstances could increase the culpability of the individual for the crime that was committed: committing the act in association with several persons, committing the crime through cruelty or subjecting the victim to degrading treatment, committing the crime by methods or means likely to endanger other persons or property, committing the crime taking advantage of the state of obvious vulnerability of the injured person due to age, state of health, disability or other causes, etc.

Cumulative offences

Two or more offences can be committed by the same person, by separate actions or omissions, or when one of the offences has been committed to carry out or conceal another offence. There could also be an accumulation of offences when an action or an omission committed by a person, due to the circumstances in which it took place or the consequences it produced, can be qualified under several offences.

Continuing and complex offences

In the case of a continuing offence and a complex offence, there is no plurality of offences.

The crime is continued when a person commits at different time intervals, but on the basis of the same resolution, actions or omissions that present, each in part, the content of the same crime.

The crime is complex when its content includes, as an element or as an aggravating circumstance, an action or omission that constitutes in itself an offence provided by the criminal law.

Applying the punishment

The criminal law provides for the type of punishment that can be applied for the commission of the crime (e.g. imprisonment, fine, etc.) and its minimum and maximum thresholds (e.g. minimum 1 year and maximum 5 years of imprisonment). Normally, only less serious crimes are punished by a fine as opposed to other more severe offences that justify stricter punishments, i.e. confinement in a detention facility.

It is for the court to decide the punishment to be applied for the act that was committed. The determination of the duration or the amount of the punishment is usually made in relation to the gravity of the crime that was committed and to the extent of culpability as well as, where applicable, the dangerousness of the offender.

Depending on the applicable criminal law, criteria that could be taken into account in this regard include: the circumstances and manner of committing the crime, as well as the means used, the state of danger created for the protected value, the nature and gravity of the result produced or of other consequences of the crime, the reason for committing the crime and the purpose pursued, etc.

Postponement of the application/suspension of the execution of the punishment

Usually in case of less serious crimes, the court may order in accordance with the applicable law the postponement of the application of the punishment or the suspension of its execution when it was applied, establishing a period of supervision, if it considers that the immediate application or the execution of a punishment when it was applied is not necessary, but it is more appropriate to monitor the conduct of the offender for a specified period of time. In this case, the person was found guilty of the commission of the crime, but the punishment is postponed or suspended.

Conditional release

A convicted criminal may be temporarily released from prison before the expiry of their sentence after the execution of a certain fraction from their punishment if the court is convinced that the person concerned can reintegrate into the society. It is common that the interval between the date of conditional release and the date of fulfilment of the sentence constitutes a period of supervision for the convict.

Statutes of limitations

The time within which the legal proceedings may be brought against the perpetrator of a crime usually vary depending on the seriousness of the offence from as short as a few years for minor offences up to 30 years or more for crimes involving very long sentences. In many jurisdictions, there are no statutes of limitations for heinous crimes such as murder, war crimes and crimes against humanity.

Notions of criminal procedure law

Prior complaint

In the case of offences for which the initiation of criminal proceedings is conditioned by the introduction of a prior complaint by the victim, the absence of this complaint may, according to the applicable law, remove the criminal liability. In case of serious crimes, the initiation of criminal proceedings is not usually not dependent on the submission of a prior complaint by the victim.

The investigatory phase (pre-court procedure)

The investigation of the circumstances in which a criminal offence was committed is initiated by the competent authorities (e.g. the police, the public prosecutor) once the act is reported. This phase starts the criminal process and focuses on collecting relevant evidence for a possible trial.

The police are responsible for interrogating suspects and witnesses and they carry out arrests and searches. Depending on the national law, they may act under the supervision of a public prosecutor or they could perform some parts of the criminal investigations on their own authority.

The public prosecutor can either conduct the investigation concerning certain types of criminal offences (usually the more serious crimes), instructing the police to perform different actions, hearing witnesses or they may oversee the whole investigation performed by the police, authorising specific acts to be performed such as searches, seizures, surveillance of telecommunications that affect fundamental rights.

The decision to prosecute

Based on the results of the investigation, commonly the public prosecutor is the authority that establishes whether a charge may be brought to court by filling a complaint and for which offence(s). This formal accusation is generally accepted as an essential precondition for a criminal trial.

Pre-trial procedure

In many legal systems, the competent court may preliminarily determine whether there is enough evidence for the case to proceed based on the evidence collected during the investigation phase.

Court procedure

During this phase, according to the applicable legislation, the court examines the evidence that is presented by the accusation and the accused and may decide to introduce new evidence in order to establish the relevant factual circumstances with a view to decide on whether the accused can be held responsible for the offence(s) they were charged with.

Court decision

The decision taken at the end of the court procedure concerns the guilt or innocence of the accused for the commission of a crime and the penalty to be applied if they are found guilty. The criminal law provides the framework for the punishment to be applied, however the sanction must be individualised based on the particular circumstances of each case (e.g. by taking into consideration mitigating or aggravating circumstances).

The judgment of the first instance should normally be subject to appeal or review based on the procedural rules in force and it may be considered final only when the appeal/review courts have passed their verdict ([49]).

Evidence and means of proof

Evidence represents any element of fact that serves to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the fair settlement of the case and that contribute to finding out the truth in criminal proceedings.

([49]) See Article 14(5) International Covenant on Civil and Political Rights, entry into force 23 March 1976.

The evidence may be obtained in the criminal proceedings by various means, such as statements of the suspect / the accused, statements of the victim, witness statements, documents, expert or finding reports, minutes, photographs, material means of proof and any other means of proof that is not prohibited by the applicable criminal procedure law.

During the criminal investigation, the criminal investigation body should collect and administer evidence both in favour and against the suspect or defendant, ex officio or upon request. In some cases, special methods of surveillance may be employed during the investigation, if prior authorised by the competent body, for instance, interception of communications or any type of distance communication, access to a computer system, video, audio or photography surveillance, obtaining data on a person's financial transactions, the use of undercover investigators, etc.

Evidence obtained through torture, evidence derived from it and illegally obtained evidence cannot be used in criminal proceedings.

The evidence does not have a value established in advance by law and is subject to the free assessment of the judicial bodies following the evaluation of all the evidence administered in question.

Right to a fair trial

The International Covenant on Civil and Political Rights stipulates conditions for a fair trial ([50]), as follows.

- **All persons should be equal** before the courts and tribunals.
- In the determination of any criminal charge against them, or of their rights and obligations in a lawsuit, **everyone should be entitled to a fair and public hearing** by a **competent, independent and impartial tribunal established by law**.

  > The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- Anyone arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorised by law to exercise judicial power and should be entitled to trial within a reasonable time or to release.

  > It should not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement.

- **Anyone who is deprived of their liberty** by arrest or **detention should be entitled to take proceedings before a court**, in order that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful.

([50]) See Articles 9, 13, 14 and 15 of the International Covenant on Civil and Political Rights, entry into force 23 March 1976.

- **Any judgement rendered in a criminal case should be made public** except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
- Everyone charged with a criminal offence should have **the right to be presumed innocent until proved guilty according to law.**
- **In the determination of any criminal charge** against them, **everyone should be entitled to the following minimum guarantees**, in full equality.

❑ To be informed promptly and in detail in a language which they understand of the nature and cause of the charge against them.
❑ To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.
❑ To be tried without undue delay.
❑ To be tried in their presence, and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.
❑ To examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.
❑ To have the free assistance of an interpreter if they cannot understand or speak the language used in court.
❑ Not to be compelled to testify against themselves or to confess guilt.

- In the case of juvenile persons, **the procedure should be such as will take account of their age and the desirability of promoting their rehabilitation**.
- **No one should be held guilty of any criminal offence** on account of any act or omission **which did not constitute a criminal offence**, under national or international law, **at the time when it was committed.**
- **No heavier penalty should be imposed than the one that was applicable at the time when the criminal offence was committed**. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender should benefit thereby.
- Everyone convicted of a crime should have **the right to their conviction and sentence being reviewed by a higher tribunal according to law.**
- When a person has been convicted by a final decision of a criminal offence and **when subsequently their conviction has been reversed or they have been pardoned** on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, **the person who has suffered punishment as a result of such conviction should be compensated according to law**, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to them.

- **No one should be liable to be tried or punished again for an offence for which they have already been finally convicted or acquitted** in accordance with the law and penal procedure of each country.

Pre-trial detention

The measure of pre-trial detention may be taken according to the national law by the competent judge during the criminal investigation or the pre-trial procedure, for instance where the evidence shows a reasonable suspicion that the accused has committed an offence and they:

— fled or hid, in order to evade criminal prosecution or trial, or made preparations of any kind for such acts; or

— tried to influence another participant in the commission of the crime, a witness or an expert or to destroy, alter, hide or steal material evidence or cause another person to engage in such behaviour; or

— exerted pressure on the victim or tried to reach a fraudulent agreement with them; or

— have intentionally committed a new offence or they are preparing to commit a new offence.

Pre-trial detention may also be decided where the evidence in the criminal file shows a reasonable suspicion that the accused committed an intentional serious crime such as crimes against life, national security, acts of terrorism, rape, deprivation of liberty, or other serious offences as defined by the national law, on the basis of an assessment of the gravity of the act, the manner and circumstances of its commission, the criminal record and other circumstances concerning the accused, if it is found that their deprivation of liberty is necessary to remove a state of danger to society or to the public order.

Searches

A search may be ordered, inter alia, if there is a reasonable suspicion that a person has committed a crime or is in possession of objects or documents related to a crime and it is assumed that the search may lead to the discovery and collection of evidence regarding this crime, the preservation of the traces of the commission of the crime or the arrest of the suspect or defendant. The search can be done with regards to a dwelling, the body of the person, a computer/similar device or a vehicle.

Legal position in the criminal proceedings

The legal position of the person in the criminal proceedings (suspect, accused person or convicted criminal) indicates the evidence that is available to the competent authorities concerning the criminal conduct and the individual's responsibility for the commission of a certain crime. Certain rights and obligations and procedural rules are specifically attached to this legal position and define the framework within which the actors involved in the proceedings carry out their activities.

Suspect

Any individual who is suspected of committing a criminal offence, including before the competent authorities make them aware that they are a suspect. This term relates to the initial stages of criminal investigations / pre-trial proceedings.

Accused person (defendant or alleged offender)

Any individual who is formally charged by the competent criminal authority (i.e. a prosecutor or an investigative judge or even the police) with having committed a criminal offence. This term commonly refers to persons subject to more advanced stages of pre-trial proceedings and/or persons committed to trial.

Convicted criminal

Any person having been found guilty of a criminal offence by the verdict of a jury or the decision of a judge.

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