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European Asylum Support Office

EASO Practical Guide: Exclusion

EASO Practical Guides Series

January 2017

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EASO Practical Guide: Exclusion

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Introduction to the Practical Guide on Exclusion

Why was this practical guide created? The EASO Practical Guide 'Exclusion' is intended as a practical tool to accompany the case officers across the European Union and beyond in their daily work.

The purpose of the Practical Guide is to assist in detecting and examining potential exclusion cases.

The guide is designed in accordance with the relevant legal requirements and at the same time suggests a practical approach, translating the standards of the Common European Asylum System (CEAS) into guidance for daily work.

What is the scope of this practical guide? This guide focuses on the provisions of **Article 12(2) of the Qualification Directive, based on Article 1F of the 1951 Geneva Convention, and Article 17 of the Qualification Directive**, i.e. the provisions regulating exclusion in case the applicant does not 'deserve' international protection.

Exclusion under Article 12(1) of the Qualification Directive, based on Article 1D and Article 1E of the 1951 Geneva Convention, i.e. in case the applicant already benefits from protection and therefore is not in need or refugee status protection, is not subject to this Guide.

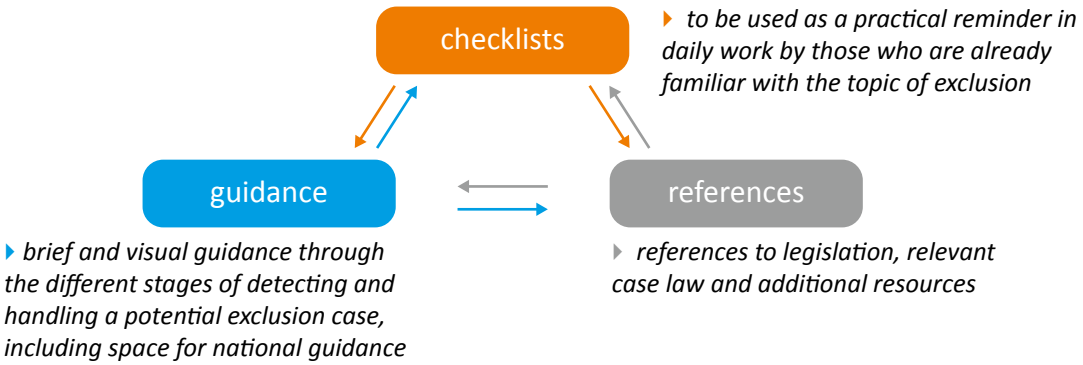
Most of the concepts addressed in this Practical Guide are drawn from criminal law, national or international, as well as international humanitarian law. However, it should be underlined that exclusion is an institute of asylum law, which differs in its essence and objectives, and specific considerations apply in this regard.

Who should use this practical guide? This guide is primarily intended for officials of the national determining authorities. It refers to **'case officers'** in general. Its main target group are interviewers and decision-makers, but it could also represent a useful tool for officials in first-contact situations, along with anyone else who could be involved in the detection and/or handling of an exclusion case.

The practical guide caters to the needs of case officers to whom the topic of exclusion is a new topic: for them the tool will be primarily of awareness-raising value; it also caters to the needs of those with years of experience, including specialised exclusion case officers, for whom it could serve as a practical reminder.

How to use this practical guide? The practical guide is structured in three layers, which could be used independently, or in an interlinked manner, depending on the needs of the user. They guide the user from the detection of a potential exclusion case to the written decision and potential follow-up.

Using the layers of the Practical Guide:



In addition to providing structured guidance, this practical guide can be seen as a tool for self-evaluation and/or could be used as a quality supervision tool.

How was this practical guide developed? The guide was created by experts from EU+ States, facilitated by EASO and with the valuable input of the United Nations High Commissioner for Refugees (UNHCR). Before its finalisation, the guide was consulted with all EU+ States.

How does this practical guide relate to other EASO support tools? EASO's mission is to support Member States through, inter alia, common training, common quality and common country of origin information. As all EASO support tools, the Practical Guide: Exclusion is based on the common standards of the CEAS. It is built in the same framework and should be seen as a complement to other available EASO tools. Its consistency with those tools has been a primary consideration, especially in relation to the closely related EASO Training Curriculum module on Exclusion. The EASO Judicial Analysis Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) was also a valuable source in the development.

This is a practical guide developed in the EASO Quality Matrix process. It should be seen in conjunction with other available practical tools, in particular the EASO Practical Guide: Personal Interview and the EASO Practical Guide: Evidence Assessment.

How does this Practical Guide relate to national legislation and practice? This is a soft convergence tool, which reflects the common standards and incorporates dedicated space for national variances in legislation, guidance and practice.

Each national authority can include relevant pieces of legislation and guidance into the practical guide in the designated spaces, in order to provide its case officers with one-stop guidance on exclusion.

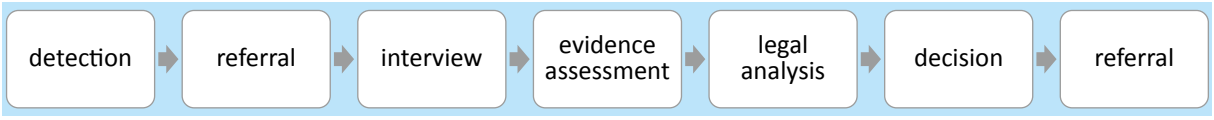
Contents

EASO Practical Guide: Exclusion

GUIDANCE

1. What is exclusion? [checklist]

This Practical Guide only refers to exclusion under Article 12(2) of the Qualification Directive, based on Article 1F of the 1951 Geneva Convention, and Article 17 of the Qualification Directive.



Below are a few key messages to introduce the case officer to the topic of exclusion:

☐ Applying the exclusion clauses is mandatory [checklist]

When there are serious reasons to consider that the applicant has committed acts that would fall under the exclusion clauses, the application of the latter is mandatory.

The application of exclusion for acts that fall under the provisions of Article 12(2) of the Qualification Directive, based on Article 1F of the 1951 Geneva Convention, and Article 17(1) of the Qualification Directive is mandatory. The only exception to the mandatory character of the exclusion clauses is Article 17(3) of the Qualification Directive (exclusion from subsidiary protection based on other crimes that do not qualify as serious crimes, if certain conditions are met).

☐ The purpose of exclusion is to safeguard the integrity of the institution of asylum [checklist]

Exclusion applies to those who would otherwise qualify for international protection due to a well-founded fear of persecution or real risk of serious harm. It constitutes a necessary safeguard for the integrity of the institution of asylum.

There are two main reasons for exclusion of:

those not deserving of international protection	1. Certain acts are so serious that the applicants who can be held responsible for such acts do not deserve international protection.
those evading being held to account for serious crimes	2. The international protection framework should not be a form of protection which allows those who have committed crimes to evade being held to account.

Given the serious consequences this may have for the individual, the application of the exclusion clauses should always be considered in a restrictive manner and with great caution.

□ Grounds for exclusion [checklist]

Exclusion is applicable in case there are **serious reasons for considering** that the applicant incurred individual responsibility for excludable acts (or, in the case of subsidiary protection, that he or she constitutes a danger to the community or the security of the Member State). It would only be justified with regard to the following exclusion grounds:

Grounds for exclusion			
refugee status	▪ crimes against peace, war crimes and crimes against humanity	subsidiary protection	▪ 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 principles and purposes of the United Nations		▪ acts contrary to the principles and purposes of the United Nations
			▪ danger to the community or to the security of the Member State in which the applicant is present
			▪ other crimes (under certain circumstances)

The exclusion grounds for refugee status and subsidiary protection are similar and stemming from the provisions of Article 1F of the 1951 Geneva Convention; however, it should be noted that they are not exactly the same. Article 17(1) Qualification Directive removes some of the requirements for serious crimes (Article 17(1)(b) Qualification Directive) and introduces additional exclusion grounds (Article 17(1)(d) Qualification Directive and Article 17(3) Qualification Directive) for subsidiary protection.

Further guidance on the qualification of excludable acts and on determining individual responsibility can be found in the specific sections below.

The full text of these legal provisions can be found **here**.

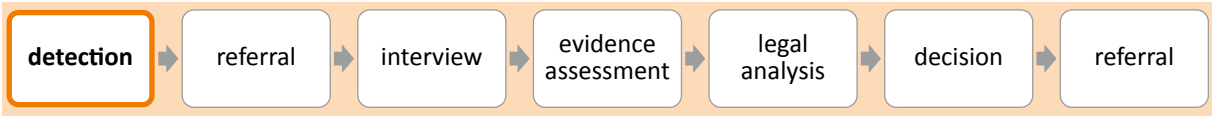
□ The burden of proof that the exclusion criteria are fulfilled is on the State [checklist]

The burden of substantiating that the exclusion criteria are fulfilled is on the State whilst the applicant has a duty to cooperate in establishing all facts and circumstances relevant to his/her application. Issues regarding defences would usually be brought up by the applicant. However, it is the duty of the case officer to explore all circumstances fully, including defences, whether they are explicitly raised by the applicant or not.

It is important to mention that although exclusion relies on a number of criminal law concepts and definitions, the standard of proof applied to exclusion is not as high as the 'beyond reasonable doubt' standard applied to establish criminal responsibility. 'Serious reasons for considering' requires clear and reliable evidence.

Further guidance on evidence assessment can be found in the specific section below.

2. Detection of potential exclusion cases [checklist]



Detection of a potential exclusion case can take place at any stage of the asylum procedure. It could be possible at the very beginning of the asylum procedure based on the information provided in the application and/or based on other available information. In some cases, indication of potential excludable acts would not appear before the actual personal interview or even after a person has been granted international protection.

In order to detect exclusion cases as early as possible, all involved in the asylum procedure should be aware of potential indications, in particular in relation to certain countries of origin.

It is important to gather as much information as possible on the person, his or her background, residence and employment history, family members, military service (if applicable), political affiliations, group membership, travel routes, and other relevant information. It should be noted that considerations relevant to the inclusion and exclusion aspects of an individual application are often closely linked. The case officer should remain open to all possibilities while being attentive to possible exclusion indications.

□ Use available detection resources [checklist]

Further guidance may be available regarding potential indications when it comes to exclusion and/or national security issues related to specific countries of origin. Lists of indications which highlight some of the most relevant potential profiles, while not exhaustive, may be a useful aide to case officers in order to detect whether in-depth exclusion examination is required.

Such documents could be used in conjunction with this guide.

National practice:
Include information on available detection tools and links to them where available.

□ Consider the available information [checklist]

The potential sources of information which would be relevant to exclusion are the same that would be considered in relation to inclusion.

Below is a **non-exhaustive** list of potential pieces of evidence, which can contain possible indications and further information relevant to exclusion:

- □ *identity and travel documents*
- □ *country of origin information (COI)*
- □ *extradition request, judgment, crime records and arrest warrants*
- □ *information from official databases*
- □ *statements of the applicant including in initial application and in interviews*
- □ *statements of others (family members, third parties)*
- □ *open sources and social media (according to national practice)*
- □ *etc.*

These could provide information with regard to the potential exclusion grounds, as well as the individual circumstances of the applicant, helping the case officer to prepare for the interview.

More information on different pieces of evidence and their consideration can be found in the EASO Practical Guide: Evidence Assessment.

□ Potential profiles [checklist]

Awareness about exclusion, being prepared and having gone through relevant country of origin information (COI) as well as checking the file for key elements, are a must.

It should be underlined that it is not possible to present an exhaustive list of what circumstances may potentially indicate that exclusion could be considered.

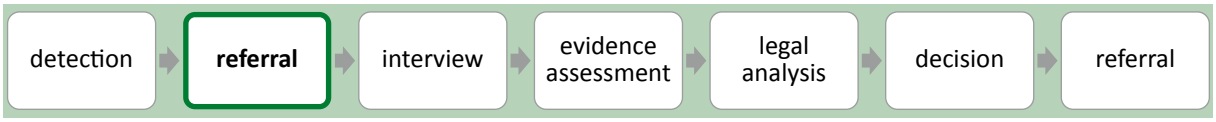
The following list of profile examples is **non-exhaustive.**

The potential relevance of these indications would largely depend on the country of origin:	
▸ ***soldier*** ▸ ***rebel group*** ▸ ***militia*** ▸ ***police (or particular branches of the police)*** ▸ ***intelligence services***	Where COI indicates that serious violations of international humanitarian law (in the case of an armed conflict) or grave human rights abuses have been committed by such actors, if the applicant falls under the particular profile this would be an indication which needs to be explored further. Additional information should be collected regarding time, place, stations, commanders and/or subordinates, actual duties, etc. to establish whether grounds for exclusion might arise.
▸ ***member of government*** ▸ ***public official***	If the applicant comes from a country with an oppressive government regime, his or her potential involvement with the government would be an indication which needs to be explored further. Depending on the country of origin, different levels of involvement, roles and responsibilities could be considered.
▸ ***member of organisation***	Depending on the organisation's aims, goals and methods and on the applicant's activities, role and responsibilities, as well as his or her position within the organisation, this could be an indication that exclusion clauses should be considered.
▸ ***persons otherwise linked to the categories above***	In some cases, persons who do not formally fall under the categories above may be implicated in the conduct of others who do. For example: medical doctors assisting in torture or female genital mutilation; chemical engineers developing weapons, civilian informants, etc.
▸ ***link to an event***	Based on the information about the applicant (e.g. place of residence, travel route), he or she may be linked to an event related to potential exclusion considerations.

Additionally, and not necessarily related to the country of origin information:

▸ ***criminal act***	If there are indications that the applicant has committed a criminal act this may be a trigger to consider the application of exclusion. It should be noted that attempt may in itself be considered a crime.

3. Referral and procedural guarantees [checklist]



According to national practice, specific procedural actions may be triggered in case of potential exclusion cases:

☐ If applicable according to national practice, refer the potential exclusion case [checklist]

Depending on national practice, (potential) exclusion cases may have to be referred to a specialised unit, specialised case officer or a senior colleague, etc.

National practice:
If applicable, describe the steps of referral.

☐ Ensure applicable procedural guarantees are in place [checklist]

In some cases, in addition to the general procedural guarantees applicable in the asylum procedure, specific procedural guarantees may apply when a potential case of exclusion is considered:

- ☐ ***Appointing a legal adviser if applicable*** [checklist]

National practice:
Include information on the provision of legal advice and representation (if specific to exclusion cases) and the respective referral information.

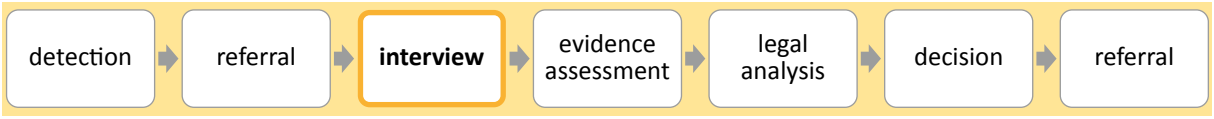
- ☐ ***Informing the applicant (and/or the legal adviser) that exclusion is being considered*** [checklist]

National practice:
Include information on how and at what stage the applicant should be informed that exclusion is being considered.

- ☐ ***Other specific procedural guarantees if applicable*** [checklist]

National practice:
Include information on other specific procedural guarantees if applicable.

4. Interview with a focus on exclusion [checklist]



The interview is a fundamental element to accurately assessing whether an applicant should be excluded from international protection. It gives the case officer an opportunity to interact with the applicant directly and, most importantly, to present the evidence, giving the applicant an effective opportunity to address it.

Depending on national practice and on the case at hand, the interview with a focus on exclusion issues may form part of the (general) personal interview or could be a stand-alone interview focusing on exclusion matters.

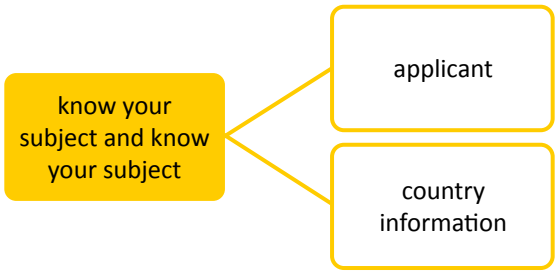
In this section, the practical guide underlines some of the aspects of preparing and conducting an interview, which are particularly important from an exclusion perspective.

The general guidance on interviewing outlined in the EASO Practical Guide: Personal interview remains applicable.

4.1. Preparation [checklist]

☐ Importance of preparation – "know your subject and know your subject" [checklist]

Preparation is the key element to conducting an exclusion interview. It can be broken down into two areas:



Knowing your subject (1. the applicant) and knowing your subject (2. the country of concern regarding the exclusion) is fundamental to addressing any exclusion issues during the personal interview.

Prior to the interview, the case officer should familiarise him/herself with all information available to him or her about the applicant. The case officer should also have a detailed understanding of the country where an excludable act was potentially carried out. Where relevant, this will include historical events as well as current affairs. When conducting research into both the applicant and the country, the case officer should utilise all available and reliable pieces of evidence. He or she may also need to collect additional information, which is as specific as possible in relation to the individual case.

☐ Consult relevant national guidance and relevant case law [checklist]

There may be national general and/or country-specific guidance on conducting an interview with a focus on exclusion. Additionally, case law may be relevant when preparing to explore the necessary elements.

National practice:
Include information on available national guidance on conducting an interview with a focus on exclusion. *Include information on case law that may need to be consulted before conducting the interview.*

☐ To the extent possible, identify the material facts related to exclusion [checklist]

A material fact is one that is central to the decision that will be made on the application.

It is important for the case officer to distinguish between what is a material fact and what is not when exploring past and current events.

The material facts related to exclusion are those that are directly linked to the exclusion clauses.

In order to identify the material facts, the case officer should consider all elements of potential evidence, with a focus on the individual case.

Material facts should be identified as early as possible. Good preparation on the individual case at hand and on the country of concern assists the case officer in identifying the material facts and gives him or her the opportunity during interview to react to what the applicant is saying. Failure to prepare, on the other hand, can lead to a failure to identify the material facts and distinguish them from potentially peripheral issues and to failure to accurately recognise and assess issues during the interview, which could then lead to weak and/or erroneous decisions.

This, of course, does not mean that all material facts would always be identified in preparation for, or even during, the interview. There may be many reasons for material facts to emerge at a later stage and the case officer should keep an open mind.

☐ Prepare a case plan [checklist]

Each case officer develops his or her own individual method of preparation. Having identified relevant material facts, it could be useful to draw up a time-line of areas to be covered during the interview. The level of detail of the plan is part of the individual case officer's preferences, but the case officer should not lose focus of what the purpose of the interview is and should remain flexible.

A chronological or logical/thematic structure to an interview is useful and may assist when drafting a decision; however, there is a fine balance to strike, as being too prescriptive in the case plan may be counter-productive for the interview.

The case plan should cover the material facts, i.e. the elements of the exclusion clauses, including aspects relevant to individual responsibility, to the extent they have been identified at this stage of the process. If at this point any potential credibility issues have been noted, they can also be reflected in the case plan in order to address them during the interview.

☐ Prepare mentally [checklist]

The case officer should give him/herself plenty of time to consider who he or she is interviewing and why. The case officer should also factor in that exclusion interviews can be intense and long.

Not all applicants who are interviewed in relation to possible exclusion issues will have significant profiles but some may have. For example, the applicant may have a background, which suggests that he or she is used to being in a position of authority and control and/or have intelligence and counter-intelligence training.

Some applicants, including in potential exclusion cases, may have been through traumatic situations or have other special needs due to vulnerability. It is important to remember and take this into account when preparing mentally.

The case officer should also ask him/herself which attitudes, thoughts or preconceptions relevant to the case may influence his or her objectivity and should make an effort to avoid them.

☐ Make practical arrangements [checklist]

☐ Consider whether it is appropriate to involve another case officer [checklist]

Based on the profile of the applicant and on national practice, it may be appropriate to involve another case officer in conducting the interview. Individual circumstances should be taken into account as well as the set-up available for the interview.

In some States, specific rules in this regard may apply to (potential) exclusion cases.

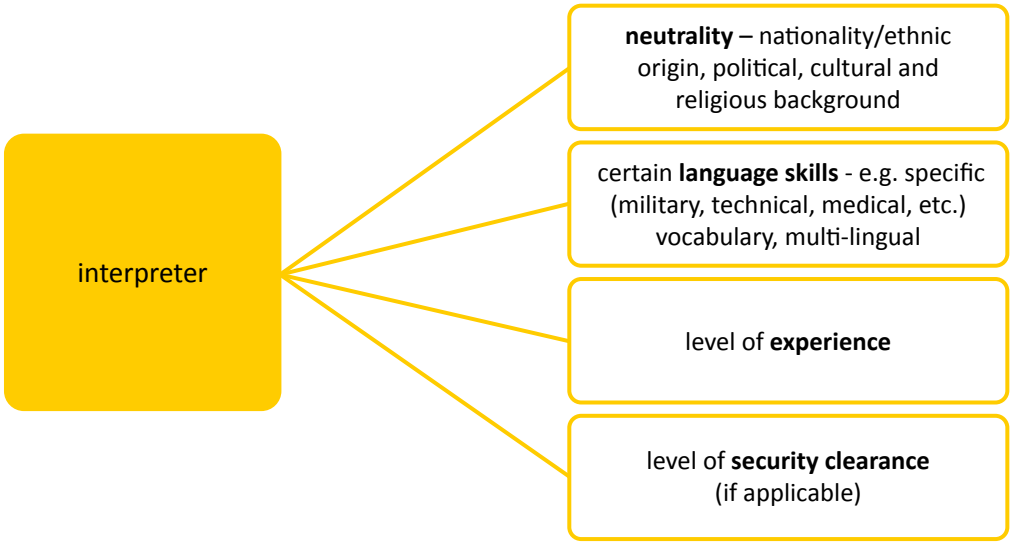
National practice:
Include national guidance regarding the possibility to involve a second case officer in conducting the interview.

☐ Security arrangement [checklist]

Security arrangements should be in place in accordance with national practice.

☐ Selecting the interpreter [checklist]

When selecting an interpreter you may wish to consider their:



☐ Briefing the interpreter [checklist]

The case officer should give the interpreter the opportunity to mentally prepare for the interview; it is as important for the interpreter to do this as it is for the case officer. The interpreter should be briefed by the case officer of the nature of the case, prior to the commencement of the interview. Given the exclusion issues potentially in-play, the interpreter may also be notified of what areas are going to be discussed as this will assist with his or her own mind-set and preparation.

It may also be of assistance if the case officer informs the interpreter that the interview may take longer than average.

The interpreter should be reminded of the principles of confidentiality and neutrality.

☐ Possibility to have an additional interview [checklist]

Depending on the complexity of the case, it may be necessary to conduct more than one interview.

4.2. Conducting the interview [checklist]

☐ Provide information to the applicant according to national practice [checklist]

Some specific information may have to be provided in the beginning of an interview which would focus on exclusion. Depending on national practice, this may include informing the applicant that issues related to potential exclusion would be explored.

National practice:
List the elements of specific information to be provided at the beginning of an interview with a focus on exclusion.

☐ Ensure the interpreter's conduct is appropriate [checklist]

If the case officer has any concerns about the ability or conduct of the interpreter, this should be addressed in accordance with national procedures (for example, by raising it with senior officials). The interview may have to be suspended and recommenced with a different interpreter.

☐ Maintain a professional attitude [checklist]

The case officer should maintain a professional attitude at all times and make sure his or her verbal and non-verbal communication are not perceived as being judgmental.

☐ Use appropriate interview techniques [checklist]

The purpose of the interview is to establish the material facts, address the evidence and give the applicant the opportunity to effectively present his or her application.

- ☐ **Adapt to the individual** [checklist]

Each applicant will be different. The case officer should be aware that certain exclusion interviews will be conducted with individuals who may have held prominent positions within their country of origin. Conversely, some applicants may be uneducated or poorly educated. It will be important to ensure that all questions are tailored at the correct level to be fully understood.

- ☐ **Invest in building rapport** [checklist]

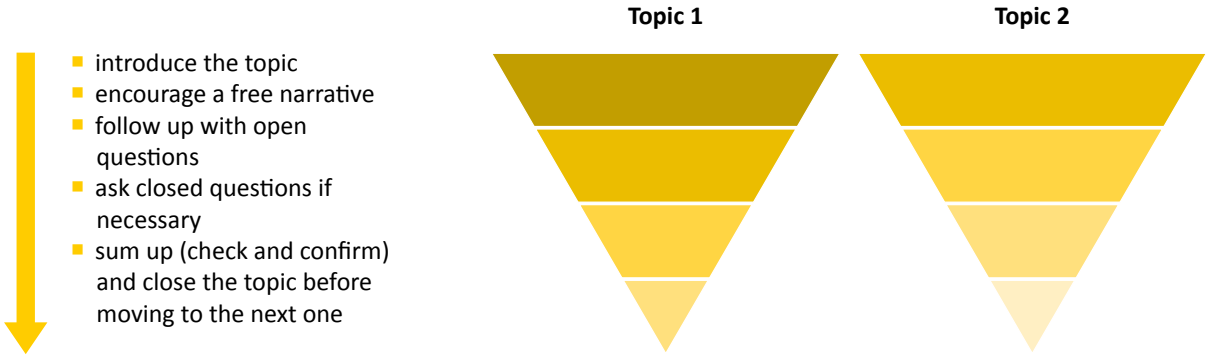
Building rapport with the applicant is fundamental. A good practice approach is to begin the interview with matters that are not directly linked to the material facts. A suggestion could be to begin by discussing the applicant's family background, educational background, and life since entering the Member State, etc. This approach generally allows for all parties participating in the interview to feel more at ease.

It is not advisable to begin the interview with a question directly linked to an exclusion matter, given the prospect of the applicant becoming defensive, wary and 'closing-up' during the interview, which would undermine the quality of collected information and ultimately the quality of the decision.

Reminding the applicant that this is an asylum interview, i.e. for the purposes of considering whether he or she is eligible for international protection, could also assist in building rapport.

- **Apply the funnel approach** [checklist]

A 'funnel' approach refers to the way the interviewer structures the interview. For each important topic, the interviewer should follow an approach which goes from introducing the theme and inviting free narrative through follow-up open questions to, only if still necessary, closed questions. This approach allows the interviewer to identify the key issues during the free narrative along with spontaneously provided information of direct relevance to the aim of the interview. Information provided in this way is usually more detailed and of better quality than information provided to closed questions.



- **Use open questions and encourage free narrative**

The aim of the **free narrative** is to obtain as much reliable and accurate information as possible by providing the applicant with an opportunity to give an uninterrupted personal account of the relevant facts. Enabling the applicant to provide contextual information is an important part of conducting an exclusion interview.

Open questions allow to explore each important issue and minimise the risk that the interviewer would miss relevant information.

Some applicants may have difficulties providing a free narrative or be unwilling to answer the questions. In such cases, the case officer should try to take a more active role and ask more focused questions, but also remember to continue to introduce all topics and always start a new topic by asking open questions. While promoting a free narrative and using open questions is important, the case officer should always ensure that the applicant answers the question asked.

Closed questions can also be useful if there are certain elements that need clarification or confirmation (timing, names, dates, etc.). Such questions allow the interviewer to explore all remaining necessary information before closing the topic. However, using closed questions too often may restrict the applicant's ability to engage in the interview, detracting from the quality and accuracy of the information.

- **Check and confirm** [checklist]

A good practice during an exclusion interview would be to summarise and confirm (with a closed question) material facts and other important issues on a number of occasions. This will assist the case officer with controlling the interview, identifying key points and ensuring that no areas of concern are ambiguous, while promoting a free narrative.

Focus on the applicant's individual involvement: *'I'* instead of *'we'* [checklist]

The purpose of the interview is to obtain information enabling the case officer to establish whether acts that may fall within the scope of an exclusion clause occurred and if so, the applicant's conduct and state of mind in relation to these acts.

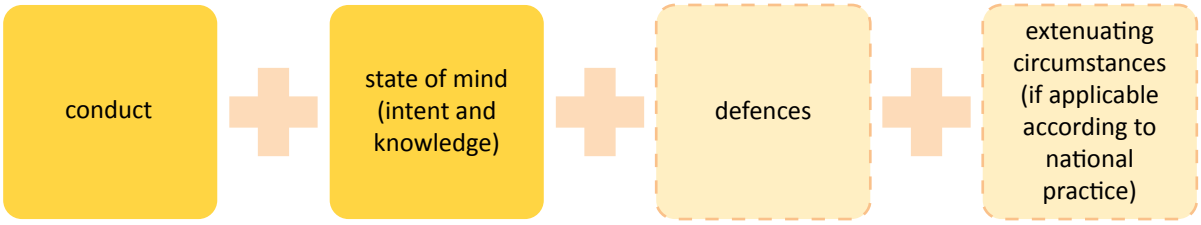
All relevant issues need to be explored fully; however, the core aspect in order to determine whether exclusion applies or not is the aspect of individual responsibility.

The applicant must be encouraged to talk about his or her personal activities, role and/or responsibilities. If the applicant instead makes references to *'us' or 'we'*, he or she should be asked to clarify who he or she is referring to and then to clarify his or her specific involvement, i.e. the applicant should be answering with *'I'*.

If the applicant continuously answers questions with *'us'* or *'we',* he or she must be reminded to answer specifically what his or her individual role was/is. The question should be repeated and if necessary rephrased until the case officer can establish what the applicant's individual involvement was.

Where the applicant refers to others as *'they'*, establishing who is meant by this may be important, especially in cases where the applicant may have been associated with crimes committed by others. In such cases, it would be important to establish who the perpetrator was, and what, if any, relationship existed between him or her and the applicant.

The questions asked during the interview should help to establish with regard to the applicant:



□ Address potential credibility issues [checklist]

Potential issues may arise based on internal or external credibility considerations.

If there are any potential credibility issues, they should be addressed during the interview, giving the applicant an effective opportunity to explain. If the case officer does not challenge the identified credibility points during the interview, then he or she is not performing according to his or her duties to fully, objectively and impartially examine the relevant facts and circumstances. This would leave a potential decision referring to those credibility points open to challenge.

See the EASO Practical Guide: Evidence Assessment for further guidance.

5. Evidence assessment [checklist]

As in all asylum cases, evidence assessment is a crucial and often challenging part of the examination. Particular challenges may be present in exclusion cases, stemming from the fact that the burden of proof lies on the determining authority and that in many cases the applicant may not be willing to cooperate in establishing the relevant facts and circumstances.

For general guidance on evidence assessment, see the EASO Practical Guide: Evidence Assessment.

☐ Apply the 'serious reasons to consider' standard [checklist]

The 'standard of proof' is a threshold to be met in order to establish a given proposition.

The exclusion clauses themselves refer to the standard **'serious reasons to consider'.**

This standard of proof is higher than the one for risk assessment in determining the need of international protection, which is generally agreed to be 'reasonable degree of likelihood'.

To exclude an applicant, therefore, **requires clear and reliable information** which would satisfy the 'serious reasons' standard.

Simple suspicions would clearly not be enough to apply exclusion. The standard of proof is also considered to be higher than 'more likely than not' (balance of probabilities). However, it is not necessary to reach the criminal standard of 'beyond reasonable doubt', relevant for establishing 'guilt'.

Some States may have specific guidance on the applicable standard of proof in place.

National practice:
Include national guidance concerning the applicable standard of proof.

☐ Examine all relevant circumstances, even when the burden of proof is shifted to the applicant [checklist]

Case officers should be aware of two situations where the burden of proof shifts from the State to the applicant, meaning that the establishment of individual responsibility could start from a presumption of its existence. Such a presumption could be justified based on the existence of sufficient information to indicate that there are serious reasons for considering that a person in the situations described below would have incurred individual responsibility in one way or another**:**

- When the applicant has been indicted by an international criminal tribunal.
- When it is established that the applicant has voluntarily become or remained a member and occupied a prominent position in a repressive government or an organisation that commits excludable acts.

However, the presumption of individual responsibility in those cases is of course rebuttable and caution should be exercised when applying it.

It remains necessary to examine all relevant circumstances, such as the applicant's personal activities, role and responsibilities as well as possible defences, before a decision on exclusion is made.

The applicant should be given an effective opportunity to address the presumption of individual responsibility. In these cases, the standard of proof to be met by the applicant to rebut the presumption is that of a **plausible explanation** regarding non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary.

□ Take into consideration some specificities [checklist]

Some specific pieces of evidence/sources of information may become especially relevant in exclusion cases and the case officer should know how to approach them.

- □ **Evidence that the applicant was subject to criminal proceedings in the country of origin** [checklist]

The case officer should examine whether the prosecution was legitimate and the applicant was not, for example, prosecuted and/or convicted for political reasons. The case officer should also be aware that a certain behaviour may be considered as a criminal act in the country of origin but not in their State. A criminal conviction would not automatically mean that exclusion clauses are to be applied.

- □ **Confidential materials** [checklist]

The case officer must look into whether and how confidential materials, if available, can be used in assessing and drafting the exclusion decision. This may vary depending on national legislation and practice, and also depend on the materials in the particular case. If such materials cannot be used, the case officer should consider if there are other relevant sources of evidence that can be used in the case.

National practice:
Include information concerning legislation or guidance on the use of confidential materials.

- □ **Open sources and social media** [checklist]

Depending on national practice, case officers may search for information about the applicant in open sources or sites such as Facebook, Twitter, etc. or such information may be researched for them by colleagues.

Care should be taken when using this information in an exclusion case. If evidence from open sources or social media would be used in the examination, the case officer should inform the applicant about the evidence and provide him or her with an effective opportunity to comment before an assessment is made.

National practice:
Include information concerning the use of social media when assessing a case.

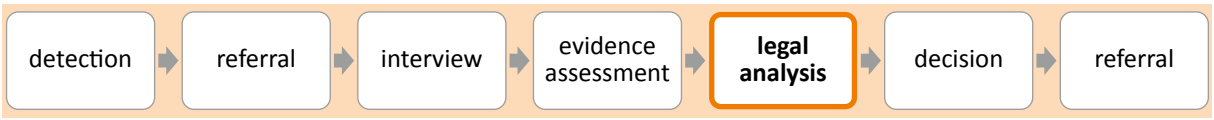
- □ **Anonymous testimonies** [checklist]

Anonymous testimonies would generally not be used as a piece of evidence to justify an exclusion decision. The reasons why such anonymous testimonies are provided may vary widely (jealousy, vengeance, genuine concern, etc.) and given that the source cannot be confirmed they would have very limited credibility. However, in some cases anonymous testimonies could be a clue of excludable acts, which the case officer may have to explore further.

6. Legal analysis [checklist]

Based on the accepted facts, the case officer analyses the applicability of exclusion grounds and the elements necessary to establish individual responsibility.

6.1. Qualification of excludable acts [checklist]



In this step, the case officer should demonstrate whether the **elements of an exclusion ground are present**.

It should be taken into account that the applicant could have committed multiple excludable acts, falling under different exclusion clauses. National practice may vary regarding whether one particular act should be qualified under more than one ground where the necessary elements are present.

National practice:
Include guidance concerning qualifying one particular act that may fall under more than one of the exclusion clauses.

a. Crimes against peace - war crimes– crimes against humanity [checklist]

1951 Geneva Convention

- Article 1F(a)

Qualification Directive

- Article 12(2)(a)
- Article 17(1)(a)

National legislation
Insert provision

The same exclusion ground applies with regard to exclusion from refugee status and subsidiary protection. The crimes under this provision would trigger the application of the exclusion clauses independently of where and when they were committed, including if committed in the Member State and/or after the person has been granted international protection.

▸ Are there serious reasons to consider the act as a **crime against peace?** [checklist]

The case officer must determine if an act is a crime against peace (crime of aggression) by considering these elements:

- **Act:** includes the planning, preparation, initiation or waging of a war of aggression, or an armed conflict in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
- **Context:** crimes against peace can only be committed if there is an international armed conflict, i.e. conflict in which States or State-like entities are involved.
- **Actor:** Since international armed conflicts are normally being waged by States or State-like entities, a crime against peace is usually committed by individuals in a high position of authority representing a State or State-like entity.

▸ Are there serious reasons to consider the act as a **war crime**? [checklist]

The case officer must determine if an act is a war crime by considering these elements:

- **Act:** War crimes are serious violations of international humanitarian law that entail individual responsibility directly under international law. War crimes can only be committed in the context of an armed conflict, which may be international or non-international in character. The elements of the war crimes depend on the nature of the conflict (international or non-international) and, for that reason, it is important to establish (i) the existence of an armed conflict, and (ii) its nature.

  It is important to highlight that not all acts of war are war crimes. Combatants who lawfully take part in hostilities are not committing war crimes as long as they follow the rules provided for by international humanitarian law. Depending on the circumstances, a combatant who unlawfully takes part in hostilities or a civilian that takes direct part in the hostilities may be linked to an excludable act for which his or her individual responsibility would need to be assessed.

  War crimes are listed, *inter alia*, under Article 8 of the Rome Statute, under the 'Grave Breaches' provisions of the 1949 Geneva Conventions and Additional Protocol I, common Article 3 and relevant provisions of Additional Protocol II, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Statute of the International Criminal Tribunal for Rwanda (ICTR).

  Military necessity and proportionality should be taken into account when determining whether the act qualifies as a war crime.

- **Context:** There should be a sufficient **link between the crime and the armed conflict.**

  The case officer should establish the following elements:

  - whether **armed conflict took place at the time** of the crime;
  - whether the act in question took place **in connection with** and was associated with the armed conflict (nexus);
  - whether the armed conflict was **international** or **non-international** at the time of the crime:

International armed conflict	Non-international armed conflict
An international armed conflict is a conflict which involves two or more States or a State and a national liberation movement.	Non-international armed conflicts can be defined as large-scale hostilities, between State authorities and rebels, or between two or more organised armed groups within a State. At least two factual criteria are used for classifying a situation of violence as a non-international armed conflict: - parties involved must demonstrate a certain level of organisation, and - violence must reach a certain level of intensity. Other internal disturbances and tensions, or riots or isolated or sporadic acts of armed violence would not qualify as a non-international armed conflict.

  There would usually be COI or national guidance specifying what the nature of the armed conflict is. Helpful sources for confirming the nature of conflicts could be judgments of International Court of Justice, verdicts of the International Criminal Court, resolutions of the UN Security Council, State opinions or UN reports.

  An important thing to bear in mind is that conflict situations may change, including their nature (e.g. from non-international to international).

- **Actor**: War crimes can be committed by anyone, including by civilians who do not take part in the hostilities, as long as there is sufficient link to the armed conflict (nexus).

- **Object:** The case officer would need to establish that a crime occurred against protected persons or objects (civilians, combatants placed out of combat, civilian and especially cultural objects), or that unlawful weapons or means of warfare were used.

- **Specific mental element:** The mental element requires knowledge of the factual circumstances (awareness of the existence of the armed conflict) and the protected status of the person or object. Some war crimes require an additional specific mental element (e.g. the war crimes of treacherously killing or wounding, hostage taking). This mental element is in addition to the general requirements outlined in the sub-section on individual responsibility.

▸ Are there serious reasons to consider the act as a **crime against humanity**? [checklist]

The case officer must determine if an act is a crime against humanity considering these elements:

- **Act:** the crimes qualified as crimes against humanity are fundamentally inhumane acts, when committed as part of a systematic or widespread attack against civilians. Criminal acts such as murder, extermination, torture, rape, political or religious persecution and other inhumane acts reach the threshold of crimes against humanity if they are part of a widespread or systematic attack against civilians.

  Even a single act may fall under the definition of crimes against humanity as long as there is a link to a widespread or systematic attack.

  Crimes against humanity are defined in international instruments, *inter alia* Article 7 of the Rome Statute.

- **Context:** The case officer should establish that the attack is:

  directed against a civilian population — The attack to which the crime is linked is directed against a civilian population. During armed conflict, this would include persons who do not – or no longer – take part in armed hostilities.

  widespread or systematic — The attack either forms part of a policy by a government, a de facto political authority, or an organised political group; or is tolerated, condoned, or acquiesced in by the aforementioned government, group or authority.

  The crime should have a **sufficient link with the attack**. Isolated inhumane acts fall short of the stigma attached to crimes against humanity, although they may still constitute excludable acts (e.g. as serious non-political crimes).

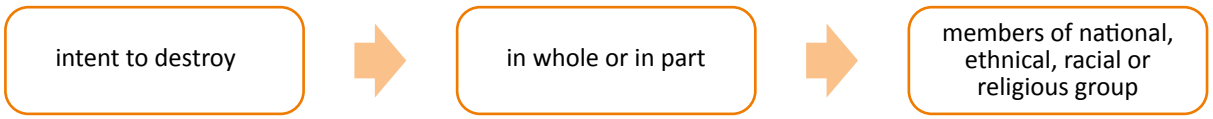
  Crimes against humanity differ from war crimes in that they can be committed in both, times of peace and during an armed conflict.

- **Specific mental element:** The crime has to be committed by someone who had knowledge of the attack and the link of the act to the attack. Some crimes against humanity would require an additional specific intent (e.g. persecution and genocide). This mental element is in addition to the general requirements outlined in the sub-section on individual responsibility.

▸ Are there serious reasons to consider the act as **genocide**?

Some crimes against humanity may amount to the crime of genocide (Article 6 of the Rome Statute).

In order to determine whether there are serious reasons to consider that a crime of genocide has been committed, the case officer should take into account whether '**genocidal intent**' is present:



Acts which may fall under the qualification of genocide if the intent is present are, *inter alia*:

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

b. Serious (non-political) crimes [checklist]

1951 Geneva Convention

- Article 1F(b)

Qualification Directive

- Article 12(2)(b)
- Article 17(1)(b)

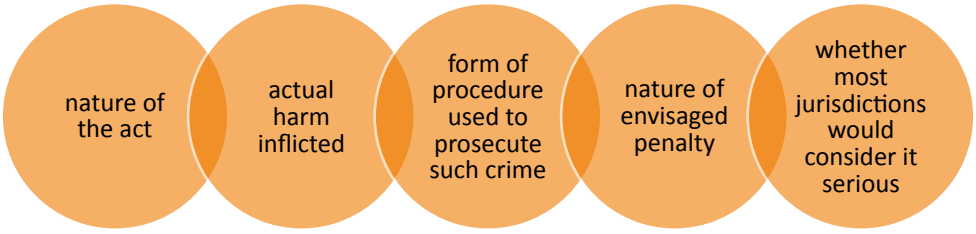
National legislation
Insert provision

The elements below apply to refugee status. In the case of exclusion from subsidiary protection, establishing 'serious crime' is sufficient.

▸ Are there serious reasons to consider the act as a serious (non-political) crime?

☐ **Act:** The case officer should establish that the crime was sufficiently **serious.**

Not all crimes can lead to exclusion under this provision. In assessing whether a crime is to be regarded as serious, the following factors may be taken into account:



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

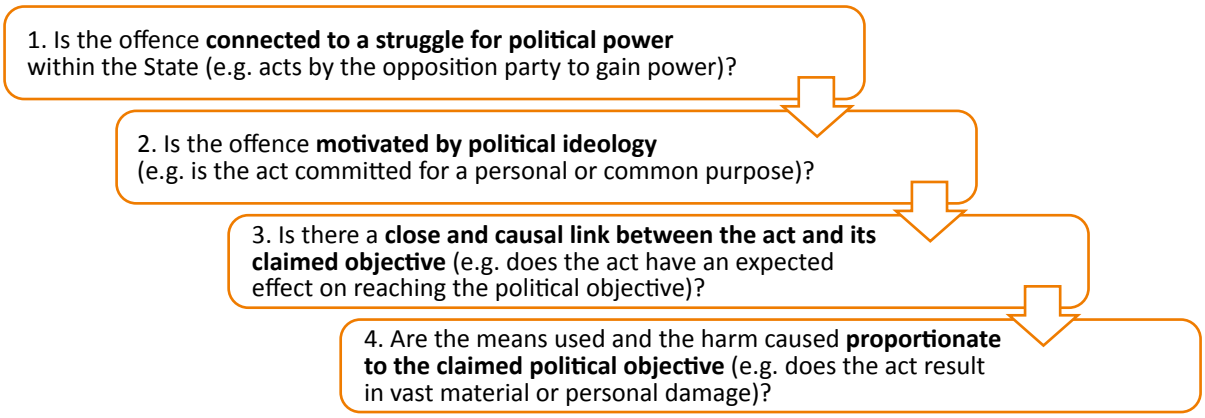
There may be additional national guidance as to what constitutes 'serious crime'.

National practice:
Include information on national guidance regarding what would constitute a 'serious' crime.

☐ **Non-political** *(refugee status only)*

In order for an act to qualify as a non-political crime, it should be considered to have a predominantly non-political motivation or be disproportionate to a claimed political objective. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes.

Several aspects could be considered:



- **Context** *(refugee status only)*: The criminal acts must have occurred:
  - **outside the country of refuge**, and
  - **prior to the applicant's admittance as a refugee**

According to EU legislation, 'admittance as a refugee' should be interpreted as the time of issuing a residence permit based on the granting of refugee status.

National variations in practice may apply.

National practice:
Include information on guidance relevant to the interpretation of 'admission as a refugee'.

c. Acts contrary to the purposes and principles of the United Nations [checklist]

1951 Geneva Convention

- Article 1F(c)

Qualification Directive

- Article 12(2)(c)
- Article 17(1)(c)

National legislation
Insert provision

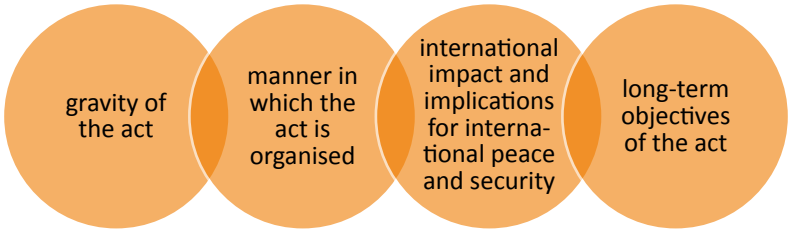
The same exclusion ground applies with regard to exclusion from refugee status and subsidiary protection. The acts under this provision would trigger the application of the exclusion clauses independently of where and when they were committed, including if committed in the Member State and/or after the person has been granted international protection.

- Are there serious reasons to consider the acts as contrary to the purposes and principles of the United Nations?

The case officer must determine if an act is contrary to the purposes and principles of the UN considering these elements:

- **Act:** The purposes and principles of the UN are set out in the Preamble and Article 1 and 2 of the UN Charter. Accordingly, this exclusion ground may apply to certain acts which constitute serious and sustained human rights violations and/or acts specifically designated by the international community as contrary to the purposes and principles of the UN.

Since international law is constantly evolving, the interpretation of relevant concepts is also subject to continuous change. While taking into account that exclusion grounds should be interpreted in a restrictive manner, elements which can be considered in this regard are:



- **Context:** The acts must have an **international dimension**, in the sense that they are capable of having a negative impact on international peace and security, or the friendly relations between States.
- **Actor:** In principle, any person can be the actor of the acts falling within this exclusion ground. However, many of the acts could only be committed by high-ranking officials in a position of authority in a State or a State-like entity.

Having been *'guilty'* does not imply that there needs to be a criminal prosecution or conviction in place in order to qualify the act under this exclusion clause. The same standard 'serious reasons for considering' applies.

The broad and general terms of 'the purposes and principles of the United Nations' make the scope of this provision vague in comparison to the provisions under (a) and (b). Therefore, it may be more practical for the case office to consider whether (a) or (b) are applicable before assessing (c).

Additional national guidance may be in place with regard to the application of this provision.

National practice:
Include information concerning national guidance on the application of the exclusion ground.

d. Danger to the community or the security of the Member State [checklist]

Qualification Directive

- Article 17(1)(d)

National legislation
Insert provision

This applies only to exclusion from subsidiary protection.

- Are there serious reasons to consider the person as a danger to the community or the security of the State?

A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

The assessment whether this exclusion ground is applicable or not is informed by the past or present conduct of the person, but it is ultimately a forward-looking **assessment of risk**.

Given the nature of this provision, its application would often require the involvement of other authorities, which may have access to relevant information.

National practice:
Include information concerning the interpretation and national guidance on this provision.

Commission of one or more crimes of lesser seriousness [checklist]

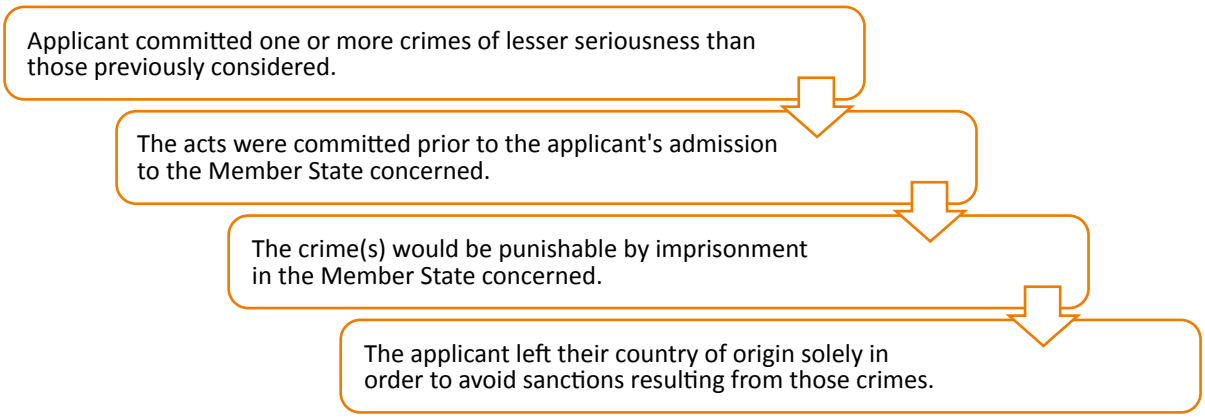
Qualification Directive

- Article 17(3)

National legislation
Insert provision

This applies only to exclusion from subsidiary protection and is not a mandatory exclusion clause.

The following elements have to be demonstrated in order to apply this exclusion ground:



Given that this is not a mandatory exclusion clause, it would only be applicable if Member states have decided to transpose it in national legislation. Additional national guidance may be in place.

National practice:
Include information concerning relevant guidance.

Acts of a terrorist nature [checklist]

Acts of a terrorist nature do not constitute a specific exclusion ground, but relevant activities may be qualified under any of the grounds.

There is no generally accepted definition as to what constitutes terrorism. The Council Framework Decisions on combating terrorism of 13 June 2002 and of 28 November 2010 are a step in developing such definition of 'terrorist offences'. A number of international instruments have been adopted on specific acts of a terrorist nature.

Acts of a terrorist nature could be qualified as:	
Crime against peace	If committed in planning, preparation, initiating or waging a war of aggression.
War crime	Acts or threats of violence aimed at spreading terror among the civilian population are explicitly prohibited under international humanitarian law (Additional Protocols I and II). Generally, acts which in peacetime would be considered to be of a terrorist nature would, if committed in the context of and with a link to an international or non-international armed conflict, qualify as war crimes.
Crime against humanity	If consisting of one of the underlying crimes, when committed as part of a widespread and systematic attack against a civilian population.
Serious non-political crime	The non-political element would generally be satisfied given that acts of a terrorist nature are always considered disproportionate to a political objective, if the crime is sufficiently serious. The geographic and temporal criteria also need to be met.
Acts contrary to the purposes and principles of the UN	A direct link with this ground can be found, *inter alia,* in the 2001 UN Security Council resolutions 1373 and 1377: *'Acts, methods and practices of terrorism are contrary to the purposes and principles of the UN'* and *'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the UN'.* Under certain circumstances, acts properly qualified as 'acts of terrorism' may thus fall within the scope of this exclusion ground. It is generally agreed that an international dimension is necessary in order to consider terrorism under this provision.
Danger to the community or security of the Member State	If the acts fail to meet the criteria for the above, the applicant could still be excluded from subsidiary protection if he or she is found to constitute danger to the community and security of the State.

If the applicant is on a list of terrorist suspects or associates him/herself with a listed terrorist group, this should be explored as an indication that such individual may be linked to excludable acts. However, exclusion will always be based on a full assessment of individual responsibility. This does not mean that if the applicant has not personally taken part in any particular terrorist act, he or she could not be excluded from international protection.

Specific national guidance may be in place with regard to handling cases of applicants suspected to be involved in acts of a terrorist nature.

National practice:
Include information concerning specific national guidance on potential cases of acts of terrorism.

6.2. Individual responsibility [checklist]

In this step, the case officer needs to demonstrate whether there are serious reasons for considering that the applicant is linked to the excludable act(s) under consideration in a manner that gives rise to individual responsibility.

The case officer will assess potential individual responsibility based on the nature and extent of the applicant's involvement in the act(s), as well as his or her state of mind in relation to the act(s).

Conduct incurring individual responsibility *(actus reus)*

Conduct could refer to act or failure to act. Furthermore, the case officer should bear in mind that a basis for individual responsibility may exist when (there are serious reasons for considering that) the applicant only attempted the excludable acts(s).

□ Direct commission [checklist]

The case officer must focus on evidence that shows whether the applicant committed, as a perpetrator or co-perpetrator, the excludable act(s) in question.

This generally requires **intent** with regard to the conduct and/or its consequences and **knowledge** with regard to conduct, consequences and/or other relevant circumstances. Depending on the circumstances, the definition of the crime(s) involved may include specific intent and/or knowledge requirements.

□ Inducing commission of an excludable act by others [checklist]

A link between the individual and the act(s) committed by others will exist if the conduct of the applicant induced (incited) others to commit the crime. Forms of inducing the commission of a crime by others could be:

planning	instigating	ordering

The conduct of the applicant should be a **clear contributing factor** to the criminal conduct of the other person(s). However, it is not necessary for the case officer to demonstrate that the excludable act(s) would not have occurred without the applicant being involved.

The intent and knowledge requirements for these forms of participation to the crime(s) will be demonstrated where the applicant **intended to provoke or induce** the commission of such act(s), **or was aware of the substantial likelihood** that the commission of the crime(s) would be a probable consequence of his or her act(s).

□ Aiding and abetting [checklist]

Substantial contribution to the commission of an excludable act by other could take the form of aiding and abetting.

The case officer can establish a link to the excludable act(s) in question when evidence indicates the applicant:

- **provided practical assistance** to the commission of the excludable act(s) (e.g. by organising the physical or logistical support necessary to enable a criminal group to operate or by providing funds to such criminal group);
- encouraged the commission of the excludable acts by others or **provided moral support** to such conduct.

What needs to be established is that the conduct of the applicant had a **substantial effect** to the perpetration of the excludable act(s) by others (e.g. in case of abuse of individuals, can the case officer establish this was due to information provided by the applicant, in the sense that this information was significant to the commission of the crime(s)). However, it is not required to demonstrate that the commission of the excludable act would not have been possible without the conduct of the applicant.

In case of someone viewed as authority (superior or anyone with moral or religious authority, etc.) there may be significant legitimising or encouraging effect by their mere presence at a scene where the excludable act(s) are committed.

Whether this form of participation happened before, during or after the criminal conduct of others or geographically separated therefrom is irrelevant for establishing individual responsibility, provided it is established that the conduct (act or failure to act) had a significant effect on the commission of the crime(s) by the principal perpetrator(s).

Finally, in order to link the applicant to the act(s) under consideration on the basis of this form of participation, the case officer must demonstrate that the applicant **knew that his or her conduct would assist or facilitate** the probable commission of the act(s) in question. It is not necessary that the aider or abettor knew the precise act that was intended or which was actually committed, insofar as he or she knew that one of a number of such acts will probably be committed and one of them was in fact committed. Aiding and abetting **does not require the person to share the intent of the principal perpetrator**.

☐ Joint criminal enterprise [checklist]

Joint criminal enterprise is another form of significantly contributing to the commission of an excludable act by others.

The requirements for joint criminal enterprise are:

plurality of persons sharing a common criminal purpose
significant contribution to this common criminal purpose
commonly intended crime took place

Joint criminal enterprise, therefore, requires more than merely associating with persons committing crimes.

☐ Command responsibility [checklist]

Attention must be drawn to individuals who were in a position of authority over subordinates involved in excludable act(s). If the case officer cannot demonstrate individual responsibility for the act(s) based on the personal conduct of the applicant, such may be incurred due to 'command responsibility'. This is based on the consideration that persons in superior positions in hierarchies have particular responsibilities with regard to the conduct of those under their effective command and control.

The following elements would have to be established:

- ☐ existence of a **superior-subordinate relationship** between the individual and the other(s) linked to the excludable act(s):

  Identifying a formal chain of command - whether in a military or in a civilian hierarchy - is one indicator, but not exclusive. The case officer can establish a superior-subordinate relationship whenever the applicant had effective command/authority and control over those who committed the excludable act(s).

- ☐ serious reasons for considering the applicant **knew or should have known** that his or her subordinate had committed, was committing, or was about to commit, the excludable act(s):

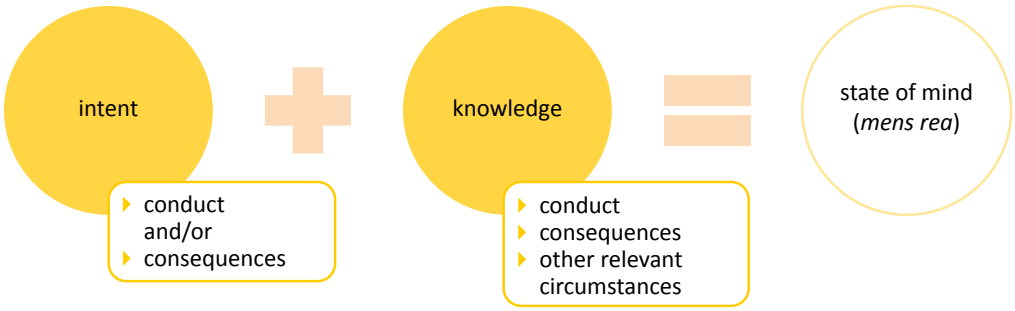
  Here, knowledge should be interpreted in a broad sense, including whether the applicant should have known due to his/her position.

- ☐ the applicant abstained or **failed to prevent or halt** the commission of the act(s) and **to punish** the perpetrators:

The applicant could still be individually responsible in case he or she attempted but failed to prevent or halt the commission or the act(s) if he or she failed to punish his or her subordinate(s) accordingly.

State of mind: intent and knowledge *(mens rea)*

At this stage, based on the evidence at hand, the case officer must examine whether there are – or not - serious reasons for considering that the applicant had **knowledge** and **intent** to participate in the excludable act(s).



Without those elements individual responsibility cannot be established and the exclusion clauses would not be applicable.

□ Knowledge [checklist]

In general, when discussing individual responsibility, 'knowledge' is understood as awareness that a circumstance exists or a consequence will occur in the ordinary course of events. The case officer should therefore demonstrate that there are serious reasons for considering that the applicant was aware thereof.

Depending on the qualification of the excludable act, knowledge may have a more precise meaning in the specific circumstances (e.g. genocide, war crimes).

The different forms of conduct incurring individual responsibility may also require demonstrating specific knowledge elements (e.g. inducing, command responsibility).

The case officer may demonstrate knowledge and awareness based on the available evidence, including the applicant's statements. Caution should, however, be exercised when knowledge is inferred from circumstantial evidence, such as information about the general context during which the conduct occurred, the scale of atrocities committed, their general nature in a region or a country, etc. What is available in country of origin information would not necessarily have been known by the applicant at the time of committing the crime.

□ Intent [checklist]

Two aspects of intent need to be taken into account:

- did the applicant mean (intend) to engage in the conduct?
- did the applicant mean (intend) to cause the consequence (or was aware it will occur in the normal course of events)?

In some cases, the qualification of excludable acts would require a further intent element (e.g. 'genocidal intent', specific intent for persecution as a crime against humanity).

Some modes of participation in the commission of a crime by another person require intent not only with regard to one's own conduct, but also the crime (to be) committed by that person (e.g. planning, ordering or instigating the commission of crimes by another person, joint criminal enterprise).

Excludable acts attributed to a group or regime [checklist]

Caution is required when assessing exclusion with regards to applicants who were associated with a group or regime implicated in excludable acts.

> The fact that an applicant was/is linked to a group or regime responsible for excludable act(s) does not relieve the case officer from demonstrating the applicant's individual responsibility for such act(s).

There is no such thing as individual responsibility based on mere association with a criminal group or regime. Depending on the nature, scale of the group or regime, the voluntary association with the group and the position, rank, standing and influence of the applicant within the group, there may be sufficient evidence for both the 'conduct' requirements under the applicable mode of individual responsibility and the 'state of mind' of the applicant to be inferred. It remains necessary, however, that the case officer identify the relevant mode of individual responsibility and examine the facts in light of the respective criteria.

The following elements need to be taken into account in addition to the actual activities of the applicant:

☐ Form of association of the applicant with the group or regime [checklist]

In addition to the applicant's activities, role and responsibilities, the case officer should look into the precise form of association the applicant has or had with the group or regime implicated in excludable acts (e.g. through formal membership or informal association).

☐ Activities and nature of the group or regime [checklist]

The case officer should consider the activities of the group and its criminal nature (e.g. excludable crimes can be attributed to it) during the period in which the applicant was or is associated to the group.

The fact that the group or regime was/is proscribed by the European Union and/or the international community (UN Security Council Resolutions, scrutiny by the International Criminal Court, etc.) would be a strong indicator to take into account, but it is not as such determinative.

The possible fragmentation of the group or regime in political, militant, intelligence wings, etc. must be taken into account. The assessment should then focus on the part of the group or regime the applicant was directly associated with.

Such analysis will also take into account knowledge by the applicant of the excludable acts committed by the group or regime.

☐ Freedom of choice when associating with the group or regime [checklist]

In order to demonstrate individual responsibility, the case officer is required to establish that the applicant voluntarily:

- ☐ **associated him/herself** with the group or regime, and/or
- ☐ **continued his or her involvement** with the group or regime: In this regard, the case officer should consider the length of time the applicant associated him/herself with the group or regime and the opportunities he or she had to dissociate from it.

Considerations of duress may be applicable.

☐ Position, rank, standing and influence of the applicant in the group or regime [checklist]

The position, rank, standing and influence of the applicant within the group or regime would help to determine the capacity of the applicant to control or to influence the activities of the group or regime.

Grounds negating individual responsibility [checklist]

☐ Lack of mental capacity to comprehend and control one's conduct [checklist]

Certain grounds would negate the subjective element required for individual responsibility ('state of mind').

The following indications that the person lacked the capacity to comprehend the nature or unlawfulness of his or her conduct or the capacity to control it should be taken into account:

- ☐ ***Mental disease or defect*** [checklist]

Mental disease or defect which destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law is a circumstance negating individual responsibility

- ☐ ***Involuntary intoxication*** [checklist]

This would **not** apply as a ground negating individual responsibility if the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting an excludable act);

- ☐ ***Immaturity*** [checklist]

Exclusion would not be justified in cases involving an applicant who, at the time of his or her involvement in criminal acts, had not reached the minimum age of criminal responsibility. While there is no internationally agreed minimum age in order for exclusion to be applied, the Committee on the Rights of the Child has recommended that States set an appropriate threshold. This threshold should not be fixed at too low an age level, bearing in mind the circumstances of emotional, mental and intellectual maturity.

This ground for negating criminal responsibility may also apply if an applicant had reached the minimum age of criminal responsibility at the time of the criminal acts, but it is determined that he or she had not reached the level of intellectual, physical and/or emotional maturity required to comprehend the nature of unlawfulness of his or her conduct.

In the case of a child, the exclusion analysis needs to take into account certain additional considerations, in particular those related to the best interest of the child, the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake. The case officer should further ensure that the necessary procedural safeguards have been put in place.

However, children under the age of 18 may be held criminally responsible if in accordance with national legislation. The level of maturity, taking into account education, awareness, vulnerability, etc. of the child should be considered in this regard.

Most States provide for an age (at the time of conduct) under which in no circumstances could an individual be excluded from international protection. Often, it would coincide with the minimum age at which criminal responsibility may be incurred, envisaged under national criminal law.

National practice:
Include information concerning minimum age with regard to the application of the exclusion grounds.

☐ Mistake of fact and mistake of law [checklist]

Under international standards, mistake of fact and mistake of law may, under certain circumstances, negate individual responsibility by negating the requisite mental elements:

- ☐ **mistake of fact:** a mistake of fact shall be a ground for negating responsibility only if it negates the mental element required by the crime.
- ☐ **mistake of law:** a mistake of law as to whether a particular type of conduct is a crime could be a ground for excluding responsibility only if it negates the mental element required by such a crime, or in relation to the defence of superior orders where the conditions are met.

☐ Defences [checklist]

In cases where serious reasons for considering that the applicant has committed the excludable act have been established, the case officer further needs to consider whether other circumstances which would negate individual responsibility may apply.

The case officer should consider the extent to which the applicant, in committing the excludable act(s), did so in one of the circumstances set out below:

Duress [checklist]

*The following **cumulative** conditions have to be met:*

1. The applicant's conduct resulted from a threat (against the applicant or another person) of imminent death or continuing or imminent serious bodily harm.
2. The applicant acted necessarily and reasonably to avoid this threat.
3. The applicant did not intend to cause a greater harm than the one sought to be avoided.

Self-defence or defence of others (or property in case of war crimes) [checklist]

*The following **cumulative** conditions have to be met:*

1. Imminent and unlawful use of force against the applicant or another person (or property).
2. The applicant acted reasonably to defend himself or herself or another person (or property).
3. The conduct of the applicant was proportionate to the degree of danger.

Defence of property can exclude responsibility only for war crimes. One of the following conditions needs to be met:

a. the property was essential for the applicant's survival or the survival of another person, or
b. the property was essential for accomplishing a military mission.

Superior orders [checklist]

*The following **cumulative** conditions have to be met:*

1. The conduct was pursuant to an order of a government or of a superior of the applicant (whether military or civilian);
2. The person was under a legal obligation to obey orders of the government or the superior in question;
3. The person did not know that the order was unlawful; and
4. The order was not manifestly unlawful (under international standards, an order to commit torture, genocide or crimes against humanity would be considered manifestly unlawful).

Additional considerations [checklist]

The considerations below would be subject to national practice.

When there are serious reasons for considering that the applicant incurs individual responsibility for the excludable act(s), depending on national practice, the case officer may continue to consider whether exclusion in this case would meet the **purposes of the exclusion clauses**. The more egregious the excludable act(s), the less relevant the following factors would be when taking the final decision.

☐ Served sentence for the (otherwise) excludable act [checklist]

Depending on national practice, the case officer could consider whether the applicant has already borne sufficient punishment for the excludable act(s) by taking into account:

- ☐ **time that has been served** in relation to what would be considered a reasonable time under EU standards;
- ☐ **conduct of the individual since** his or her participation in the act(s), including when in prison;
- ☐ whether the applicant has **expressed remorse**, **provided reparation** and/or **assumed responsibility** for the act(s).

☐ Time since the criminal conduct [checklist]

The case officer could consider the statute of limitation to which the respective crime(s) are subject**,** i.e. whether the crime(s) would no longer be prosecuted or prosecutable.

This could be relevant mostly when considering serious crimes of a lesser gravity, since other excludable acts - due to their particular gravity – would not be covered by a statute of limitation.

☐ Amnesty or a pardon [checklist]

The case officer could also take into consideration whether the act(s) committed by the applicant is subject to amnesty or pardon.

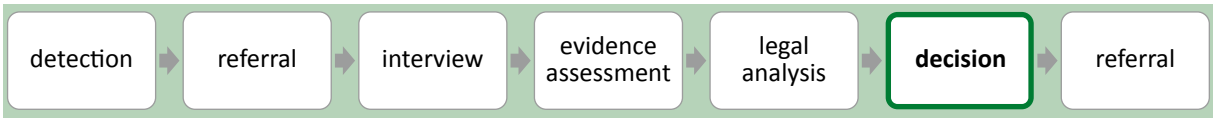
In that case, further consideration should be given as to whether:

- ☐ the amnesty or pardon were the **expression of the democratic will** of the citizens of the relevant country, and
- ☐ whether the individual has been held **accountable in other ways** (e.g. through a Truth and Reconciliation Commission).

National guidance regarding possible additional considerations may be available.

National practice:
Include information concerning specific national guidance on additional considerations.

7. Drafting the decision elements related to exclusion [checklist]



The decision would have to clearly and objectively justify the exclusion of the applicant from refugee status and/or subsidiary protection.

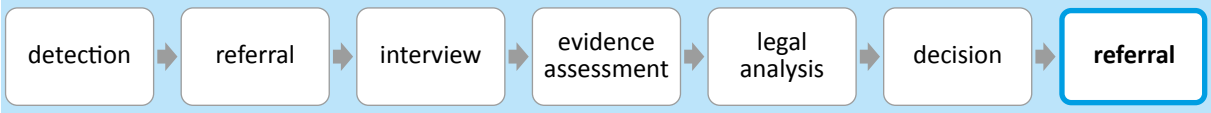
□ Ensure that the different parts of the decision are clearly defined [checklist]

Having a clearly defined structure in the decision contributes to more clarity, transparency and objectivity in the reasoning and the conclusions. The separation of the questions of facts and questions of law is an important element to demonstrating that a fair and structured approach has been followed in the assessment of the case.

The structure suggested below reflects the guidance above and should be read in conjunction with the content included in the respective sections. It is without prejudice to demonstrating in the decision that the criteria to qualify for refugee status or subsidiary protection are otherwise met:

Questions of facts	**1.** Basis of claim	*The first part of a decision normally summarises the identified material facts.* *The available elements of evidence should also be specified.* *This part should contain no assessment.*
	2. Credibility assessment	*The credibility (evidence) assessment part focuses on the identified material facts and the respective pieces of evidence and assesses them in accordance with the credibility indicators.* *Based on this part, it should be clear which material facts have been accepted and which rejected.*
Questions of law	**3.** Qualification of the excludable act	*The accepted material facts are the basis for the qualification of the potential excludable act in accordance with the elements outlined above.*
	4. Individual responsibility: **a.** conduct of the applicant **b.** intent and knowledge **c.** circumstances negating individual responsibility **d.** additional considerations (if applicable according to national practice)	*A crucial part of the decision is the establishment of individual responsibility. It should look at all elements: what was the conduct link of the applicant with the excludable act(s), was the mental element (intent and knowledge) as required under the definition of the act(s) identified and the relevant mode of individual responsibility present, and do circumstances negating individual responsibility potentially apply. Additional considerations may be applied according to national practice.*
	5. Decision	*In case exclusion from refuge status and/or subsidiary protection has been applied, Member States may still decide to grant residence/protection on humanitarian or other grounds to excluded persons. Depending on the national system, this may be part of the exclusion decision or a separate act.*

8. Referral for investigation and/or prosecution [checklist]



Depending on the findings made in a potential exclusion case (without prejudice to its actual outcome), there may be necessary further steps for the case officer to consider. Such steps may be required at any stage of the examination of the case. If the findings relate to acts that can be investigated and prosecuted in the Member State concerned, referral to the relevant authorities should take place as soon as possible.

Even if the person would not be excluded, there may be sufficient reasons to refer the case to the national authorities responsible for investigation and/or prosecution.

Depending on national regulations as well as obligations under international law, this may require that the information collected in the case is sent to relevant authorities such as the prosecutor's office, police and/or the security services.

In those actions, the case officer should take into account the applicable **privacy and confidentiality** regulations, as well as any national arrangements.

National practice:
Include information concerning relevant national arrangements.

EASO Practical Guide: Exclusion

CHECKLISTS

- *Click on the checklist items for further guidance.*

1. What is exclusion?

Remember:

- ☐ **Applying the exclusion clauses is mandatory**
- ☐ **The purpose of exclusion is to safeguard the integrity of the institution of asylum**
  - ☐ against misuse by those who are not deserving of international protection
  - ☐ against evading being held to account for serious crimes
- ☐ **The grounds for exclusion are:**
  - ☐ crimes against peace, war crimes and crimes against humanity
  - ☐ serious non-political crimes committed outside the country of refuge prior to the person's admission as a refugee
  - ☐ acts contrary to the principles and purposes of the United Nations
  - ☐ serious crimes *(subsidiary protection only)*
  - ☐ constituting danger to the community or to the security of the Member State in which the applicant is present *(subsidiary protection only)*
  - ☐ other crimes, under certain circumstances *(subsidiary protection only)*
- ☐ **The burden of proof that the exclusion criteria are fulfilled is on the State**

2. Detection of potential exclusion cases

- ☐ **Use available detection resources**
- ☐ **Consider the available information**
  - ☐ consult the case file
  - ☐ consult relevant country of origin information
- ☐ **Are any of those profiles applicable?**
  - ☐ soldier
  - ☐ rebel group
  - ☐ militia
  - ☐ police (or particular branches of the police)
  - ☐ intelligence services
  - ☐ member of government
  - ☐ public official
  - ☐ member of organisation
  - ☐ link to the categories above
  - ☐ link to an event
  - ☐ criminal acts

Remember that relevance depends on country of origin.

Remember that this list is non-exhaustive.

3. Referral and procedural guarantees

- ☐ **If applicable according to national practice, refer the potential exclusion case**
- ☐ **Ensure applicable procedural guarantees are in place**
  - ☐ appointing a legal adviser if applicable
  - ☐ informing the applicant (and/or the legal adviser) that exclusion is being considered
  - ☐ other specific procedural guarantees

4. Interview with a focus on exclusion

Preparation

- ☐ **Remember the importance of preparation**
- ☐ **Consult relevant national guidance and relevant case law**
- ☐ **To the extent possible, identify material facts related to exclusion**
- ☐ **Prepare a case plan**
- ☐ **Prepare mentally**
- ☐ **Make practical arrangements**
  - ☐ consider whether it is appropriate to involve another case officer
  - ☐ security arrangements
  - ☐ selecting the interpreter
  - ☐ briefing the interpreter
  - ☐ possibility to have an additional interview

Conducting the interview

- ☐ **Provide information to the applicant according to national practice**
- ☐ **Ensure the interpreter's conduct is appropriate**
- ☐ **Maintain a professional attitude**
- ☐ **Use appropriate interview techniques**
  - ☐ adapt to the individual
  - ☐ invest in building rapport
  - ☐ apply the funnel approach
  - ☐ check and confirm
- ☐ **Focus on the applicant's individual involvement: *'I'* instead of *'we'***
- ☐ **Address potential credibility issues**

5. Evidence assessment

- ☐ **Apply the 'serious reasons to consider' standard**
- ☐ **Examine all relevant circumstances, even when the burden of proof is shifted to the applicant**
- ☐ **Take into consideration some specificities**
  - ☐ evidence that the applicant was subject to criminal proceedings in the country of origin
  - ☐ confidential materials
  - ☐ open sources and social media
  - ☐ anonymous testimonies

6. Legal analysis

6.1. Qualification of excludable acts

□ ***Are there serious reasons for considering that the applicant may have been associated with any of the following:***

a.	act	context	actor	object	specific mental element[1]
Crime against peace	*Concerning a war of aggression:* planning □ preparation □ initiation □ waging □ participation in a common plan or conspiracy	□ international armed conflict (State or State-like entity must be involved)	□ high position of authority	-	-
War crime	□ serious violations of international humanitarian law which entail individual responsibility directly under international criminal law (inter alia Article 8 of the Rome Statute)	□ Existence of an armed conflict (international or non-international) □ nexus (link) to the armed conflict	□ any (incl. civilians)	□ protected persons / objects □ any, if use of unlawful weapons or methods of warfare	*knowledge of:* □ existence of conflict and □ protected status of the person/object attacked □ specific mental element applies to certain war crimes
Crime against humanity	□ qualified crime (fundamentally inhumane act) – see Article 6 and 7 of the Rome Statute	*attack which is:* □ directed against a civilian population □ widespread or systematic (part of a pattern of misconduct)	□ any (incl. civilians)	□ civilian population (including non-civilians in certain circumstances) □ some crimes against humanity require specific object (e.g. genocide)	□ knowledge of the attack □ some crimes against humanity require specific intent (e.g. persecution and genocide)

[1] In order to qualify certain acts, a specific mental element may be required in addition to the general state of mind requirements of intent (with regard to conduct and/or consequences) and knowledge (with regard to conduct, consequences and/or relevant circumstances), as required under the definition of the crime(s) in question.

□ ***Are there serious reasons for considering that the applicant may have been associated with any of the following:***

b.	**act**	**context**	**actor**	**object**	**specific mental element**[1]
Serious non-political crime (refugee status)	□ qualified crime – sufficiently serious □ non-political (predominance test)	*Crime was committed:* □ outside the country of refuge □ before admission as a refugee	any	any (depending on the definition of the crime)	Specific requirements may apply, depending on the crime
Serious crime (subsidiary protection)	□ qualified crime – sufficiently serious	-	any	any (depending on the definition of the crime)	-

□ ***Are there serious reasons for considering that the applicant may have been associated with any of the following:***

c.	**act**	**context**	**actor**	**object**	**specific mental element**[1]
Acts contrary to the purposes and principles of the UN	□ serious and sustained human rights violations as well as acts specifically designated by the international community as contrary to the principles and purposes of the UN	□ international dimension (capable of affecting international peace and security and peaceful relations between States)	□ any (often someone with high position of authority)	□ depending on the act specifics may apply	□ depending on the act specifics may apply

□ *With regard to exclusion from subsidiary protection only:*

Are there serious reasons to consider the person as a danger to the community or the security of the State?

□ *With regard to exclusion from subsidiary protection only and if applicable according to national law:*

Has the applicant committed one or more crimes outside the scope of other exclusion provisions?

	act	context	actor	object	specific mental element[1]
Other crimes, under certain circumstances	□ one or more crimes outside the scope of other exclusion grounds □ act(s) would be punishable by imprisonment, had they been committed in the Member State	□ committed prior to admission in the Member State □ left the country of origin solely in order to avoid sanctions resulting from those crimes	□ any	-	-

□ ***If examining a case of acts of a terrorist nature, consider which exclusion ground may be applicable, based on the elements above.***

6.2. Individual responsibility

- ☐ **Establish whether the conduct of the applicant is linked to the excludable act by considering:**
  - ☐ **Direct commission:** Has the applicant directly carried out the excludable act?
  - ☐ **Inducing others:** Has the applicant induced others to commit the act(s)?
  - ☐ **Aiding and abetting:** Has the applicant aided and abetted the commission of the act(s) by others?
  - ☐ **Joint criminal enterprise:** Has the applicant participated in a joint criminal enterprise?
  - ☐ **Command responsibility:** Does the applicant bear responsibility for acts of his or her subordinate(s)?
- ☐ **Assess the state of mind of the applicant at the time of the conduct:**
  - ☐ Knowledge
  - ☐ Intent

Where the applicant may have been the perpetrator	Where the applicant may have participated in the commission of crimes by others
Intent with regard to: • conduct and/or • consequences • *as required under the applicable definition of the crime* **Knowledge** with regard to: • conduct • consequences and/or • relevant circumstances • *as required under the applicable definition of the crime*	**Intent** with regard to: • conduct and/or • consequences • *as required depending on the relevant mode of participation* **Knowledge** with regard to: • conduct • consequences and/or • relevant circumstances • *as required depending on the relevant mode of participation*

- ☐ **When excludable acts are attributed to a group or regime which the applicant was associated with, consider in particular:**
  - ☐ activities of the applicant
  - ☐ form of association of the applicant with the group or regime
  - ☐ activities and nature of the group or regime
  - ☐ freedom of choice when associating with the group or regime
  - ☐ position, rank, standing and influence of the applicant in the group or regime
- ☐ **Assess whether grounds negating individual responsibility apply:**
  - ☐ Lack of mental capacity to comprehend and control one's conduct
    - ☐ mental disease or defect
    - ☐ involuntary intoxication
    - ☐ immaturity
  - ☐ Mistake of fact or mistake of law
  - ☐ Defences
    - ☐ duress
    - ☐ self-defence or defence of others (or property in the case of war crimes)
    - ☐ superior orders
- ☐ **If applicable according to national practice, take into account additional considerations:**
  - ☐ served sentence for the (otherwise) excludable act
  - ☐ time since the criminal conduct
  - ☐ amnesty or pardon

7. Drafting the decision elements related to exclusion

☐ **Ensure that the different parts of the decision are clearly defined:**

Questions of fact:

1. Basis of claim - including available evidence
2. Credibility assessment - clearly concluding on the accepted/rejected material facts

Questions of law:

3. Qualification of the excludable act
4. Individual responsibility
- **a. conduct** of the applicant, clearly identifying the mode of individual responsibility determined to be applicable
- **b. intent and knowledge**, as required in light of the criteria governing the mode of individual responsibility determined to be applicable
- **c. circumstances negating individual responsibility**
- **d. additional considerations** (if applicable according to national practice)

Decision

8. Referral for investigation and/or prosecution

☐ **Refer the case to the relevant authorities depending on the nature of the findings**
Take into account privacy and confidentiality considerations.

EASO Practical Guide: Exclusion

REFERENCES

This section outlines relevant legislation and case law that could assist the case officer when examining a potential exclusion case.

Qualification Directive

Exclusion clauses under 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:

Exclusion from refugee status	Exclusion from subsidiary protection
Article 12 Qualification Directive	**Article 17 Qualification Directive**
1. A third-country national or a stateless person is **excluded from being a refugee** if: (a) he or she falls within the scope of **Article 1(D) of the Geneva Convention** […] (b) he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the **rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent** to those. 2. A third-country national or a stateless person is **excluded from being a refugee** where there are **serious reasons for considering** that: (a) he or she has committed a **crime against peace, a war crime, or a crime against humanity**, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a **serious non-political crime outside the country of refuge prior to his or her admission as a refugee**, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes; (c) he or she has been **guilty of acts contrary to the purposes and principles of the United Nations** as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. 3. Paragraph 2 applies to persons who **incite or otherwise participate** in the commission of the crimes or acts mentioned therein.	1. A third-country national or a stateless person is **excluded from being eligible for subsidiary protection** where there are **serious reasons for considering** that: (a) he or she has committed a **crime against peace, a war crime, or a crime against humanity**, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a **serious crime**; (c) he or she has been **guilty of acts contrary to the purposes and principles of the United Nations** as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a **danger to the community or to the security** of the Member State in which he or she is present. 2. Paragraph 1 applies to persons who **incite or otherwise participate** in the commission of the crimes or acts mentioned therein. 3. Member States **may** exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, **prior to his or her admission** to the Member State concerned, has committed **one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment**, had they been committed in the Member State concerned, and if he or she **left his or her country of origin solely in order to avoid sanctions resulting from those crimes.**

Return to the **Guidance**.

Abbreviations and useful links

- **CJEU** – Court of Justice of the European Union
  - About the CJEU
  - Jurisprudence
- **ECtHR** – European Court of Human Rights
  - About ECtHR
  - Jurisprudence
- **ICJ** – International Court of Justice
  - About ICJ
  - Jurisprudence
- **ICTR** - International Criminal Tribunal for Rwanda
  - About ICTR
  - Jurisprudence
- **ICTY** - International Criminal Tribunal for the former Yugoslavia
  - About ICTY
  - Jurisprudence
- **QD** – Qualification Directive
  - Text of the QD
- **Rome Statute** – Rome Statute of the International Criminal Court
  - Text of the Rome Statute
- **SCSL** – Special Court for Sierra Leone
  - About SCSL
  - Jurisprudence

This overview of legal references and jurisprudence is not intended as an exhaustive reference tool. It only aims to provide practical direction to the case officer by referring to some of the most relevant provisions and jurisprudence.

The references below are organised by topics.

Evidence assessment

Burden of proof

Legal references	Jurisprudence
Article 4 QD Article 12 QD Article 17 QD	▪ **CJEU**, Judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, B and D, EU:C:2010:661, para. 95

Standard of proof

Legal references	Jurisprudence
Article 4 QD Article 12 QD Article 17 QD	▪ **CJEU**, Judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, B and D, EU:C:2010:661, para. 87 ▪ **Supreme Court (United Kingdom)**, JS v Secretary of State for the Home Department, 17 March 2010, para. 39 ▪ **Supreme Court (United Kingdom)**, Al-Sirri v Secretary of State for the Home Department,21 November 2012, para. 69 -75 ▪ **Court of Appeal (England and Wales)**, AN (Afghanistan v. Secretary of State for the Home Department), [2015], EWCA ▪ **Supreme Court of Canada**, Ezokola v. Canada (Minister of Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678, Introduction ▪ **Supreme Court of Canada**, Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 ▪ **Administrative Appeals Tribunal (Australia)**, SRYYY v. Minister for Immigration and Multicultural Affairs, [2006] AATA 320, 5 April 2006, paras 52-62

Qualification of excludable acts

Crime against peace

Legal references	Jurisprudence
Article 1F(a) Geneva Convention Article 12(2)(a) QD Article 17(1)(a) QD Article 8*bis* Rome Statute Article 6 of the 1945 Charter of the International Military Tribunal (London Charter)	▪ **Federal Court of Canada**, Hinzman v. Canada (Minister of Citizenship and Immigration) (F.C.), 2006 FC 420; [2007] 1 F.C.R. 561, Canada: Federal Court, 31 March 2006; para. 141-142 and 155-160

War crime

Legal references	Jurisprudence
Article 1F(a) Geneva Convention Article 12(2)(a) QD Article 17(1)(a) QD Article 8 Rome Statute Grave breaches provisions of the 1949 Geneva Conventions and Additional Protocol I Article 3 common to the 1949 Geneva Conventions Articles 4, 13, 16 Additional Protocol II	▪ **ICTY**, Case No. IT-94-1, Prosecutor v. Dusko Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 128-134

Crime against humanity

Legal references	Jurisprudence
Article 1F(a) Geneva Convention Article 12(2)(a) QD Article 17(1)(a) QD Article 6 Rome Statute Article 7 Rome Statute Article 5 ICTY Article 3 ICTR 1948 Convention on the prevention and punishment of the crime of genocide	▪ **ICJ**, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, para. 299, 319 ▪ **ICTY**, Case No IT-05-88-T, Popović et al., (Trial Chamber), Judgment, 10 June 2010, para. 809-832 ▪ **ICTY**, Case No. IT-95-14-A, Prosecutor v. Blaškić, (Appeals Chamber), Judgment, 29 July 2004, para. 96-102 ▪ **ICTR**, Case No. ICTR-99-52-A, Prosecutor v. Nahimana et al. (Appeals Chamber), Judgment, 28 November 2007, para. 915-924 ▪ **ICTR**, Case No. ICTR-96-4-T, Prosecutor v. Jean-Paul Akayesu (Trial Chamber 1), Judgment, 2 September 1998, para.,500-509, 521, 579 ▪ **Court of Appeal (England and Wales)**, AA-R (Iran) v Secretary of State for the Home Department, [2013] EWCA Civ 835 ▪ **Administrative Appeals Tribunal (Australia)**, SRYYY v. Minister for Immigration and Multicultural Affairs, [2006] AATA 320, 5 April 2006

Serious (non-political) crime

Legal references	Jurisprudence
Article 1F(b) Geneva Convention Article 12(2)(b) QD Article 17(1)(b) QD	▪ **CJEU**, Judgment of 24 June 2015, H. T. v Land Baden-Württemberg, EU:C:2015:413 ▪ **Upper Tribunal (United Kingdom) (Asylum and Immigration Chamber)**, AH (Article 1F (b)), [2013] UKUT 00382 ▪ **House of Lords Judicial Committee (United Kingdom)**, T v. Secretary of State for the Home Department, [1996] 2 All ER 865, 22 May 1996 ▪ **Supreme Court of Canada**, Febles v Minister of Citizenship and Immigration, 2014, SCC 68 ▪ **Court of Appeal (New Zealand)**, S v. Refugee Status Appeals Authority, CA262/97, 2 April 1998

Acts contrary to the purposes and principles of the UN

Legal references	Jurisprudence
Article 1F(c) Geneva Convention Article 12(2)(c) QD Article 17(1)(c) QD UN Charter	▪ **CJEU**, Judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, B and D, EU:C:2010:661, para. 79-99 ▪ **Supreme Court (United Kingdom)**, Al-Sirri v Secretary of State for the Home Department,21 November 2012 ▪ **National Court of Asylum Law (France)**, SR, No 611731, 27 June 2008 ▪ **National Court of Asylum Law (France)**, Mr S, No 11016153, 15 July 2014

Danger to the community or the security of the State

Legal references	Jurisprudence
Article 17(1)(d) QD	▪ **National Court of Asylum Law (France)**, judgment of 29 June 2012, Mr A., No 10014511 ▪ **National Court of Asylum Law (France)**, judgment of 20 September 2012, Mr M., No 10018884 ▪ **National Court of Asylum Law (France)**, judgment of 21 April 2011, Mr R., No 10014066 ▪ **National Court of Asylum Law (France)**, judgment of 15 February 2013, Mr B., No 10005048 ▪ **Commission for Refugee Matters (France),** decision of 1 February 2006, Ms O., No 533907

Acts of a terrorist nature

Legal references	Jurisprudence
Article 51(2) Additional Protocol I Article 4(2)(d) and 13(2) Additional Protocol II Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism International Conventions and Protocols pertaining to Terrorism (click here) UN Security Council, Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001) UN Security Council, Security Council Resolution 1566 (2004) Concerning Threats to International Peace and Security Caused by Terrorism, 8 October 2004, S/RES/1566 (2004)	▪ **CJEU**, Judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, B and D, EU:C:2010:661 ▪ **CJEU**, Judgment of 29 June 2010, Generalbundesanwalt beim Bundesgerichtshof v. E and F, Case C-550/09, para. 61-62 ▪ **National Court of Asylum Law (France)**, Mr S, No 11016153, 15 July 2014 ▪ **National Court of Asylum Law (France)**, SR, No 611731, 27 June 2008

Individual responsibility

General aspects

Legal references	Jurisprudence
Article 12 QD Article 17 QD Articles 25, 28, 30-33 Rome Statute	▪ **CJEU**, Judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, B and D, EU:C:2010:661 ▪ **Supreme Court (United Kingdom)**, JS v Secretary of State for the Home Department, para. 55; ▪ **Supreme Court of Canada**, Ezokola *v.* Canada (Citizenship and Immigration), 201, Introduction

Modes of individual responsibility

Commission of an excludable act

Legal references	Jurisprudence
Article 12(3) QD Article 17(2) QD Article 25(3)(a) Rome Statute Article 30 Rome Statute	▪ **ICTY**, Case No. IT-98-30/1-T, Trial Judgement, 2001, Prosecutor v. Miroslav Kvocka et al, para. 243 ▪ **ICTY**, Case No. IT-98-30/1-T, Trial Judgement, 2001, Prosecutor v. Miroslav Kvocka et al, para. 251 ▪ **ICTY**, Case No. IT-94-1, Prosecutor v. Dusko Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 188

Inducing the commission by others

Legal references	Jurisprudence
Article 12(3) QD Article 17(2) QD Article 25(3)(b) Rome Statute Article 25(3)(e) Rome Statute Article 30 Rome Statute	▪ **ICTY**, case No IT-04-82-A, Prosecutor v. Boskoski and Tarculovski (Appeal Judgment), 19 May 2010, para. 125 ▪ **ICTY**, Case No IT-95-14/2-A, Prosecutor v. Dario Kordic, Mario Cerkez (Appeal Judgement), 17 December 2004, para. 27 ▪ **ICTY**, Case No. IT-98-30/1-T, Trial Judgement, 2001, Prosecutor v. Miroslav Kvocka et al, para. 252 ▪ **ICTR**, Case No. ICTR-99-52-A, Prosecutor v. Nahimana et al. (Appeals Chamber), 28 November 2007, para. 440, 479, 482 ▪ **ICTR**, Case No. ICTR-99-54A-A, Jean de Dieu Kamuhanda v. The Prosecutor (Appeal Judgment), 19 September 2005, para. 593 ▪ **SCSL**, Case No SCSL-2004-16-A, The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (the AFRC accused) (Appeal Judgment), 22 February 2008, para. 301

Aiding and abetting

Legal references	Jurisprudence
Article 12(3) QD Article 17(2) QD Article 25(3)(c) Rome Statute Article 30 Rome Statute	▪ **ICTY**, Case No. IT-95-13/1, Prosecutor v. Mrksic et al. (Appeal Judgment), 5 May 2009, para. 49, 145-159 ▪ **ICTY**, Case No. IT-98-32-A, Appeal Judgement, Prosecutor v Mitar Vasiljevic, 25 Feb 2004, para 102 ▪ **ICTY**, Case No. IT-98-30/1-T, Trial Judgement, 2001, Prosecutor v. Miroslav Kvocka et al, paras. 253 – 256 ▪ **ICTY**, Case No IT-94-1A, Prosecutor v. Dusko Tadic (Appeals Chamber), 15 July 1999, para. 229 ▪ **ICTR,** Case No. ICTR-2001-70-A, Rukundo v. The Prosecutor (Appeal Judgment), 20 October 2010, para. 52 ▪ **ICTR**, Case No. ICTR-05-88-A, Kalimanzira v. The Prosecutor (Appeal Judgment), Judgment, 20 October 2010, para. 220 ▪ **ICTR**, Case No. ICTR-99-52-A, Prosecutor v. Nahimana et al. (Appeals Chamber), 28 November 2007, para. 482 ▪ **ICTR**, Case No. ICTR-96-4-T, Prosecutor v. Jean-Paul Akayesu (Trial Chamber 1), 2 September 1998, para. 484, 545 ▪ **SCSL**, Case No. SCSL-04-14-A, The Prosecutor v. Moinina Fofana, Allieu Kondewa (the CDF Accused) (Appeal Judgment), 28 May 2008, para. 72 ▪ **Upper Tribunal (United Kingdom),** MT (Article 1F(a) - aiding and abetting) Zimbabwe v. Secretary of State for the Home Department,[2012] UKUT 00015(IAC)

Joint criminal enterprise

Legal references	Jurisprudence
Article 12(3) QD Article 17(2) QD Article 25(3)(d) Rome Statute	▪ **ICTY**, Case No. IT-99-36, Prosecutor v. Radoslav BrđJanin, - Appeal Judgment, 3 April 2007, ▪ **ICTY**, Case No. IT-98-30/1-T, Trial Judgement, 2001, The Prosecutor v. Miroslav Kvocka et al, paras. 265-312 ▪ **ICTY**, Case No. IT-94-1-A, Prosecutor v. Dusko Tadic, Appeal Judgement, July 15, 1999, paras. 190-191, 195-196, 202-204, 220, 227 ▪ **Upper Tribunal (United Kingdom),** MT (Article 1F(a) - aiding and abetting) Zimbabwe v. Secretary of State for the Home Department,[2012] UKUT 00015(IAC)

Command responsibility

Legal references	Jurisprudence
Article 12(3) QD Article 17(2) QD Article 28 Rome Statute	▪ **ICTY**, Case No IT-03-68-A, Prosecutor v. Naser Oric (Appeal Judgment), 3 July 2008, para. 18, 20, 177 ▪ **ICTY**, IT-98-30/1-T, Trial Judgement, 2001, Prosecutor v. Miroslav Kvocka et al, para. 313 -314; ▪ **ICTY**, IT-95-14-T, Trial Judgement, Prosecutor v. Tihomir Blaškić, 3 March 2000, para. 41-42, 67 ▪ **ICTR**, Case No. ICTR-97-20-T, Prosecutor v. Laurent Semanza, (ICTR Trial Chamber III),15 May 2003, para. 401-402

State of mind (intent and knowledge)

Legal references	Jurisprudence
Article 30 Rome Statute Article 32 Rome Statute	▪ **ICTY**, Case No. IT-02-60-A, Appeal Judgement, Prosecutor v. Vidoje Blagojevic and Dragan Jokic, 9 May 2007, para 127 ▪ **ICTY**, Case No. IT-98-32-T, Trial Judgement, Prosecutor v. Mitar Vasiljevic, November 29, 2002, para. 71 ▪ **ICTY**, Case No. IT-98-30/1-T, Trial Judgement, 2001, Prosecutor v. Miroslav Kvocka et al,para. 255. ▪ **ICTY**, Case No. IT-95-14-T, Trial Judgement, Prosecutor v. Tihomir Blaškić, 3 March 2000, para. 286 ▪ **ICTY**, Case No. IT-95-17/1, Trial Judgement, Prosecutor v. Anto Furundzija,10 December 1998, para. 246 ▪ **ICTR**, Case No. ICTR-96-4-T, Prosecutor v. Jean-Paul Akayesu (Trial Chamber 1), 2 September 1998, para. 523

Excludable acts attributed to a group or regime

Legal references	Jurisprudence
Article 12 QD Article 17 QD	▪ **CJEU**, Judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, B and D, EU:C:2010:661, paras. 88-98 ▪ **ICTY**, IT-97-24-T Prosecutor v. Milomir Stakic (Trial Judgement), 31 July 2003, para. 433

Grounds negating individual responsibility

Mental capacity to comprehend and control one's conduct

Legal references	Jurisprudence
Article 31 (a), 31 (b), Rome Statute Article 40(3) Convention on the Rights of the Child	▪ **ICTR**, Case No. ICTR-96-4-T, Prosecutor v. Jean-Paul Akayesu (Trial Chamber 1), 2 September 1998, para. 523

Duress

Legal references	Jurisprudence
Article 31(d) Rome Statute Article 33 Rome Statute	▪ **ICTY**, Case No IT-96-22-A, Appeal Judgement, Prosecutor v Dragan Erdemovic, Appeal,7 October 1997, para. 19 ▪ **Upper Tribunal (United Kingdom)**, AB (Article 1F(a) – defence - duress) Iran [2016] UKUT 00376 (IAC)

Self-defence and defence of others

Legal references	Jurisprudence
Article 31(1)(c) Rome Statute	▪ **Administrative Appeals Tribunal (Australia)**, judgment of 16 June 2010, Re YYMT and FRFJ (2010), 115 ALD 590

Superior orders

Legal references	Jurisprudence
Article 33 Rome Statute	▪ **ICTY**, Case No IT-96-22-A, Appeal Judgement, Prosecutor v Dragan Erdemovic, Appeal,7 October 1997

Additional considerations

Legal references	Jurisprudence
Article 29 Rome Statute	▪ **CJEU**, judgment of 9 November 2010, Joined Cases C-57/09 and C-101/09, B and D, EU:C:2010:661, paras. 103-105 ▪ **Upper Tribunal (United Kingdom) (Asylum and Immigration Chamber)**, AH (Article 1F (b)), [2013] UKUT 00382

Other resources

The EASO Judicial Analysis 'Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) is part of the EASO Professional Development Series for Members of Courts and Tribunals and provides a comprehensive look at the exclusion clauses from a judicial perspective.

The website of the International Criminal Court contains a large database on international instruments and international and national jurisprudence on international crimes. A helpful tool for case officers dealing with elements of crime could be the ICC Legal Tools.

Relevant materials from the UN High Commissioner for Refugees (UNHCR):

- Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (chapter IV);
- Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees
- Guidelines on international protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees
- Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees

On issues relating to international humanitarian law and the laws and conducts in international or non-international conflicts, the website of the International Committee of the Red Cross (ICRC) could be a relevant source.

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