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Judicial analysis

Exclusion:
Articles 12 and 17 Qualification Directive

Second edition

EASO Professional Development Series for members of courts and tribunals

Updated by IARMJ-Europe
under contract to EASO

2020

European Asylum Support Office professional development materials have been created in cooperation with members of courts and tribunals on the following topics:

- an introduction to the Common European Asylum System for courts and tribunals;
- qualification for international protection (Directive 2011/95/EU);
- asylum procedures and the principle of non-refoulement;
- evidence and credibility assessment in the context of the Common European Asylum System;
- Article 15(c) Qualification Directive (2011/95/EU);
- exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU);
- ending international protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU);
- country of origin information;
- detention of applicants for international protection in the context of the Common European Asylum System
- legal standards for the reception of applicants for international protection (Reception Conditions Directive 2013/33/EU).

The Professional development series comprises judicial analyses, judicial trainers' guidance notes and compilations of jurisprudence for each topic covered, apart from country of origin information which comprises a judicial practical guide accompanied by a compilation of jurisprudence. All materials are developed in English. For more information on publications, including on the availability of different language versions, please visit the website (http://www.easo.europa.eu/courts-and-tribunals).

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European Asylum Support Office

The European Asylum Support Office (EASO) is an agency of the European Union that plays a key role in the concrete development of the Common European Asylum System (CEAS). It was established with the aim of enhancing practical cooperation on asylum matters and helping Member States fulfil their European and international obligations to give protection to people in need.

Article 6 of the EASO founding regulation ([1]) (hereinafter the Regulation) specifies that EASO is to establish and develop training available to members of courts and tribunals in the Member States. For this purpose, EASO takes advantage of the expertise of academic institutions and other relevant organisations, and takes into account the European Union's existing cooperation in the field with full respect to the independence of national courts and tribunals.

The International Association of Refugee and Migration Judges

The International Association of Refugee and Migration Judges (IARMJ) ([2]) is a transnational, non-profit association that seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership of a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. Since the foundation of the association in 1997, it has been heavily involved in the training of judges around the world dealing with asylum cases. The European chapter of the IARMJ (IARMJ-Europe) is the regional representative body for judges and tribunal members within Europe. One of the chapter's specific objectives under its constitution is 'to enhance knowledge and skills and to exchange views and experiences of judges on all matters concerning the application and functioning of the Common European Asylum System (CEAS)'.

([1]) Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11.

([2]) Formerly known as the International Association of Refugee Law Judges (IARLJ).

Contributors

This judicial analysis has been developed by a process with two components: an editorial team (ET) of judges and tribunal members with overall responsibility for the final product and three researchers responsible for drafting.

The ET comprised serving judges and tribunal members with extensive experience and expertise in the field of asylum law and was selected under the auspices of a joint monitoring group (JMG). This process is designed to ensure the integrity of the principle of judicial independence and that the EASO professional development series for members of courts and tribunals is developed and delivered under judicial guidance. For its part, the JMG is composed of representatives of the contracting parties, namely EASO and IARMJ-Europe. The ET reviewed drafts, gave detailed instructions to the drafting team, drafted amendments, and was the final decision-making body as to the scope, structure, content, and design of the work. The work of the ET was undertaken through regular electronic/telephonic communication.

Editorial team of judges and tribunal members

The judges and tribunal members of the ET for this judicial analysis were: **Hugo Storey** (United Kingdom, chair), **Hilkka Becker** (Ireland), **Jakub Camrda** (Czechia), **Harald Dörig** (Germany), **Catherine Koutsopoulou** (Greece), **Florence Malvasio** (France), **Liesbeth Steendijk** (Netherlands), and **Boštjan Zalar** (Slovenia). The ET was supported and assisted in its task by project manager, **Clara Odofin**.

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Acknowledgements

Comments were received from Judge Lars Bay Larsen and Legal Secretary Yann Laurans of the Court of Justice of the European Union (CJEU) in their personal capacity. The Office of the United Nations High Commissioner for Refugees (UNHCR) also expressed its views on the draft text. EASO experts further reviewed the material and provided comments to IARMJ.

All of these comments were taken into consideration by the ET in finalising the text for publication. The members of the ET and EASO are grateful to all those who have made comments, which have been very helpful in finalising this analysis.

The methodology adopted for the production of this analysis is set out in Appendix F: Methodology.

This judicial analysis will be updated, as necessary, by EASO in accordance with the methodology for the EASO professional development series for members of courts and tribunals.

Contents

List of abbreviations

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
APD (recast)	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court, Germany)
CEAS	Common European Asylum System
CERI	Consolidated Eligibility and Registration Instructions
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CNDA	Cour nationale du droit d'asile (National Court of Asylum Law, France)
Common Article 3	Article 3 common to the four Geneva Conventions of 12 August 1949
Displaced persons	Persons displaced as a result of the 1967 and subsequent Arab-Israeli hostilities
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EMN	European Migration Network
EU	European Union
EWCA	England and Wales Court of Appeal (UK)
FDLR	Forces démocratiques de libération du Rwanda (Liberation Forces of Rwanda)
GC	Geneva Convention (used to refer to one or other of the Geneva Conventions in tables or footnotes)

Geneva Conventions	The four Geneva Conventions of 12 August 1949: (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (II) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; (III) Geneva Convention relative to the Treatment of Prisoners of War; (IV) Geneva Convention relative to the Protection of Civilian Persons in Time of War
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
IARMJ	International Association of Refugee and Migration Judges
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	international humanitarian law
IJRL	International Journal of Refugee Law
IMT	International Military Tribunal
IRMCT	International Residual Mechanism for Criminal Tribunals
ISAF	International Security Assistance Force (in Afghanistan)
ISIL	Islamic State in Iraq and the Levant
London Agreement	Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis
LTTE	Liberation Tigers of Tamil Eelam
Member States	Member States of the European Union and the Associated Countries
OFPRA	Office Français de Protection des Réfugiés et Apatrides (French Office for the protection of refugees and stateless persons)
PKK	Kurdistan Workers' Party
QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
Refugee Convention	Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967) [referred to in EU asylum legislation and by the CJEU as 'the Geneva Convention']
Rome Statute	Rome Statute of the International Criminal Court
RSCSL	Residual Special Court for Sierra Leone
SCSL	Special Court for Sierra Leone
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKUT	United Kingdom Upper Tribunal
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	Office of the United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

Preface

In close cooperation with courts and tribunals of the Member States as well as other key actors, the European Asylum Support Office (EASO) has been engaged in the development of a professional development series. It is aimed at providing courts and tribunals with a full overview of the Common European Asylum System (CEAS) on a step-by-step basis. Consultations with the EASO network of court and tribunal members, including the International Association of Refugee and Migration Judges-European chapter (IARMJ-Europe), made it clear that there was a pressing need to make available to courts and tribunals judicial training materials on certain core subjects dealt with in their day-to-day decision-making. It was also vital that there be regular review and updating (where appropriate) of existing publications in the professional development series. It was recognised that the process for developing such core materials was one that had to facilitate the involvement of judicial and other experts in a manner fully respecting the principle of judicial independence as well as accelerating the development of the overall professional development series.

Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) – Judicial analysis is one of the materials in the professional development series. EASO published the first edition in January 2016. This publication is the second edition and has been produced by IARMJ-Europe under contract to EASO. IARMJ-Europe wishes to express its gratitude to all members of the working group who were involved in writing the first edition of the Judicial analysis.

This analysis is primarily intended for use by members of courts and tribunals of Member States concerned with hearing appeals or conducting reviews of decisions on applications for international protection. It aims to provide an analysis of how to interpret and apply the clauses for exclusion from refugee status, and the clauses for exclusion from subsidiary protection status, laid down respectively in Article 12 and Article 17 of Directive 2011/95/EU (QD (recast)). Members of courts and tribunals may not deal with exclusion issues often. When they do, however, the cases may well be complex and sometimes high profile. Article 12 and Article 17 QD (recast) may also be relevant in cases concerning the revocation of, ending of, or refusal to renew refugee status or subsidiary protection status (Articles 14(3)(a) and 19(3)(a) QD (recast) respectively). In the nature of the exclusion provisions set out in Article 12 and Article 17, it is necessary to provide a thorough analysis that can assist practically in the handling of such cases.

Members of courts and tribunals will, of course, approach exclusion cases through the lens of their national law. In doing so, they must, however, consider whether it is a correct transposition of the directive. It is also necessary to bear in mind that the exclusion provisions of the directive are closely modelled on the provisions of Articles 1D, 1E and 1F of the 1951 Convention relating to the Status of Refugees (Refugee Convention). Further, the Court of Justice of the European Union (CJEU) has made clear that,

> although Directive 2011/95 establishes a system of rules including concepts and criteria common to the Member States and thus peculiar to the European Union, it is nonetheless based on the Geneva Convention [Refugee Convention] and its purpose is, inter alia, to ensure that Article 1 of that convention is complied with in full. (See Judgment of the Court (Grand Chamber) of 14 May 2019 in joined cases C-391/16,

C-77/17 and C-78/17, M v Ministerstvo vnitra and X and X v Commissaire général aux réfugiés et aux apatrides, EU:C:2019:403, para. 83.)

This judicial analysis is intended to be of use both to those with little or no prior experience of adjudication in the field of international protection within the framework of the CEAS as well as to those who are experienced or specialist judges in the field. As such, it aims to be a useful point of reference for all members of courts and tribunals concerned with qualification for international protection. The structure, format and content have, therefore, been developed with this broad audience in mind. This judicial analysis provides the following.

— A general introduction to the exclusion clauses. This includes, for example, a comparison between the clauses for exclusion from refugee status and those for exclusion from subsidiary protection status, and the rationale behind each exclusion clause (Part 1).

— An analysis of the two grounds for exclusion from refugee status in Article 12(1)(a) and (b) QD (recast). These concern persons who for very specific reasons do not need refugee protection (Part 2).

— An analysis of the three grounds for exclusion from refugee status in Article 12(2) QD (recast). These concern persons who for equally specific reasons are considered undeserving of such protection (Part 3).

— An analysis of the five grounds for exclusion from subsidiary protection status in Article 17 QD (recast). This refers back as applicable to the analysis in Part 3 of the grounds for exclusion from refugee status in Article 12(2) QD (recast) (Part 4).

— An overview of a number of specific procedural and evidential issues relating to the assessment of exclusion under Article 12(2) and Article 17 QD (recast) (Part 5).

— An overview of the particular decisions on international protection to which the exclusion clauses are applicable, i.e. decisions under Articles 12, 17, 14(3)(a) and 19(3(a) QD (recast).

The judicial analysis is supported by a compilation of jurisprudence in a separate document and by appendices. These list relevant EU primary and secondary legislation and relevant international treaties of universal and regional scope. They also list essential case-law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), the International Criminal Court (ICC), and other international criminal tribunals, along with selected jurisprudence of the courts and tribunals of Member States. Decision trees are also provided, setting out the questions courts and tribunals of Member States need to ask when assessing whether any of the exclusion clauses are applicable in an individual case. To ensure that the relevant legislation and case-law is easily and quickly accessible to readers using the digital version, hyperlinks have been inserted. Other judicial analyses, which have been or are being developed as part of the professional development series, explore other specific areas of the CEAS.

The aim is to set out clearly and in a user-friendly format the current state of the law. This publication analyses the law of the CEAS as it stood at 19 December 2019. It is worth emphasising that, together with other judicial analyses in the professional development

series, this analysis will be further updated periodically as necessary. However, it will be for readers to check whether there have been any changes in the law. This analysis contains a number of references to sources that will help the reader to do that.

This is the second edition of this judicial analysis. It takes into account legislative and jurisprudential developments that have taken place since the publication of the first edition in January 2016. It also incorporates the results of a comprehensive review of the content, structure and user friendliness of that first edition, carried out by IARMJ-Europe for EASO in 2018.

Key questions

This judicial analysis aims to provide to courts and tribunals of the Member States an analysis of the grounds for exclusion from refugee protection in Article 12 Qualification Directive 2011/95/EU (QD (recast)), and the grounds for exclusion from subsidiary protection in Article 17 QD (recast). It strives to answer the following main questions.

1. What are exclusion clauses? (Section 1.2)

2. How do the clauses for exclusion from subsidiary protection status **resemble** or **differ** from those for exclusion from refugee status? (see Sections 1.2, 4.2, and 4.3)

3. What **rationale** lies behind the clauses for exclusion from refugee status and those for exclusion from subsidiary protection status, and is it **the same for each exclusion clause**? (Section 1.3)

4. Does exclusion from refugee status or subsidiary protection status ever depend on whether the person concerned constitutes a **danger** to the host Member State? (Sections 1.3 and 4.2.5)

5. Which clause for exclusion from refugee status also contains a **specific positive rule of inclusion** which requires that a person who satisfies be granted refugee status, assuming that that person does not fall within any of the other clauses for exclusion from refugee status? (Section 2.2)

6. Who are **persons receiving protection or assistance from United Nations organs or agencies other than UNHCR**? (Section 2.2)

7. Under what circumstances can a person be excluded from refugee status because that person has **taken up residence in another country**? (Section 2.3)

8. Which exclusion clauses are capable of being applicable to **persons involved in terrorism** (Section 3.1.1) and what **type and degree of personal involvement in terrorism** would be required for exclusion to be applicable in an individual case? (Sections 3.4, 3.5.2.1 and 3.6)

9. What are **'serious reasons for considering'** that a person has committed or participated in the commission of an excludable crime or act? (Section 3.2)

10. What are **'crimes against peace'** (Section 3.3.2), **'war crimes'** (Section 3.3.3) and **'crimes against humanity'** (Section 3.3.4)?

11. What is a **'serious non-political crime'**? (Section 3.4)

12. What are **'acts contrary to the purposes and principles of the United Nations'**? (Section 3.5)

13. According to what criteria may a person be held to be **individually responsible** for an excludable crime or act and what defences (e.g. duress) can be claimed in relation to an excludable crime? (Section 3.6)

14. If a person has been found to be individually responsible for an excludable crime or act, does that person's exclusion from refugee status or subsidiary protection status depend on whether that person has already been **punished** or has subsequently **reformed** their behaviour? (Section 3.7)

Part 1: General introduction

1.1 Scope

This judicial analysis concerns the interpretation and application of Articles 12 and 17 of the Qualification Directive (2011/95/EU) (QD (recast)) ([3]), which contain the 'exclusion clauses' of the directive. Article 12 sets out the grounds on which a person is excluded from the definition of a 'refugee' in Article 2(d) of the directive. Article 17 sets out the grounds on which a person is or may be excluded from the definition of a 'person eligible for subsidiary protection' in Article 2(f) of the directive.

The 'exclusion clauses' are to be contrasted with the 'inclusion clauses'. The latter term is a short-hand reference to the clauses that specify who is eligible for refugee or subsidiary protection as set out in Articles 2-10 and Article 15 QD (recast). The 'inclusion clauses' relating to both types of protection are addressed in a separate judicial analysis: *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis* ([4]). Another judicial analysis deals with the 'cessation clauses' relating to each type of protection, and with the rules on revoking, ending or refusing to renew the protection concerned: *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) – Judicial analysis* ([5]).

1.2 The exclusion clauses

Article 12(1) QD (recast) lays down two grounds on which a person is **excluded from being a refugee**.

Article 12(1) QD (recast)

A third-country national or a stateless person is excluded from being a refugee if:

a) he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this directive;

b) he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.

([3]) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9, (QD (recast)).

([4]) EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, December 2016.

([5]) EASO, *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) – Judicial analysis*, December 2016.

Article 12(2) QD (recast) lays down three further grounds on which a person is also **excluded from being a refugee**.

Article 12(2) QD (recast)

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.

Article 17(1) QD (recast) stipulates that a person is **excluded from eligibility for subsidiary protection** on the same grounds as those laid down in Article 12(2)(a) and (c) QD (recast), and also, as stipulated by Article 17(1)(b) and (d) QD (recast) read in conjunction with Article 17(2).

Article 17(1) and (2) QD (recast)

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.

Article 17(3) QD (recast) also provides an additional ground under which Member States **'may' exclude a person from eligibility for subsidiary protection**.

Article 17(3) QD (recast)

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.

The grounds for exclusion from qualification as a refugee and from eligibility for subsidiary protection are compared and summarised in Table 1 ([6]) below.

Table 1: Comparison between grounds for exclusion in Article 12 QD (recast) and grounds for exclusion in Article 17 QD (recast)

	Article 12 QD (recast)		Article 17 QD (recast)
Exclusion from refugee status	→ **Article 12(1)(a):** protection or assistance from organs or agencies of the United Nations other than UNHCR	**Exclusion from subsidiary protection status**	
	→ **Article 12(1)(b):** rights and obligations attached to the possession of the nationality of the country of residence		
	→ **Article 12(2)(a):** crimes against peace, war crimes or crimes against humanity		→ **Article 17(1)(a):** crimes against peace, war crimes or crimes against humanity
	→ **Article 12(2)(b):** serious non-political crimes outside the country of refuge prior to admission as a refugee		→ **Article 17(1)(b):** serious crimes
	→ **Article 12(2)(c):** acts contrary to the purposes and principles of the United Nations		→ **Article 17(1)(c):** acts contrary to the purposes and principles of the United Nations
			→ **Article 17(1)(d):** danger to the community or to the security of the Member State in which present
			→ **Article 17(3):** other crimes outside the Member State concerned (under certain circumstances)

All grounds for exclusion are **mandatory provisions** except for the last ground listed in the table above, namely that laid down in Article 17(3) QD (recast).

([6]) Table 1 draws on EASO, *Practical Guide: Exclusion*, 2017, p. 9.

1.3 The rationale for exclusion

1.3.1 Exclusion from being a refugee (Article 12)

The grounds for exclusion from qualification as a refugee in Article 12 QD (recast) correspond to the grounds for exclusion from refugee status in Article 1D, 1E and 1F Refugee Convention ([7]).

Article 1D, 1E and 1F Refugee Convention

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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

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

As required by Article 78(1) of the Treaty on the Functioning of the European Union (TFEU) ([8]), the grounds for exclusion in Article 12 QD (recast) must, therefore, be interpreted in a manner consistent with the corresponding articles in the Refugee Convention ([9]) (see Table 2 below).

([7]) See, for example, CJEU, Judgment of 9 December 2012, Grand Chamber, C-364/11, Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal, EU:C:2012:826, paras. 18 and 21. See also European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 12 September 2001, COM(2001) 510 final, p. 24.

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

([9]) See, for example, CJEU, Judgment of 14 May 2019, Grand Chamber, joined cases C-391/16, C-77/17 and C-78/18, M v Ministerstvo vnitra and X and X v Commissaire général aux réfugiés et aux apatrides, EU:C:2019:403, para. 74; CJEU, Judgment of 9 November 2010, Grand Chamber, joined cases C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, EU:C:2009:285, para. 78; CJEU, 2012, *El Kott*, op. cit., fn. 7; para. 43. For further information about the general principles for interpreting the QD (recast), see EASO, *Qualification for International Protection (Directive 2011/95/EU) – A Judicial analysis*, December 2016, pp. 16-18; EASO, *An Introduction to the Common European Asylum System for Courts and Tribunals – A judicial analysis*, August 2016, pp. 63-65.

Table 2: Correspondence between Article 12 QD (recast) and Article 1D, E and F Refugee Convention

QD (recast)	Refugee Convention
Article 12(1)(a)	Article 1D
Article 12(1)(b)	Article 1E
Article 12(2)(a)	Article 1F(a)
Article 12(2)(b)	Article 1F(b)
Article 12(2)(c)	Article 1F(c)

An important distinction exists between the rationale behind Article 12(1) QD (recast) and that behind Article 12(2) QD (recast).

The rationale behind the grounds for exclusion in Article 12(1) is that persons falling within those grounds **do not need refugee status**. This is either because they are already receiving protection or assistance from organs or agencies of the United Nations other than UNHCR (in particular the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) (see Section 2.2)) or because the country in which they have taken up residence treats them equivalently to its own nationals.

The rationale behind the grounds for exclusion in Article 12(2) is that persons falling within those grounds **do not deserve refugee status** ([10]). This is the case, where there are serious reasons for considering that they are individually responsible for grave crimes or for acts contrary to the purposes and principles of the United Nations. Those grounds for exclusion were (like the corresponding Articles in the Refugee Convention) established with the **dual aim** of:

— excluding from refugee status individuals deemed to be undeserving of the protection which refugee status entails;

— ensuring that the granting of refugee status does not enable the perpetrators of certain serious crimes to escape criminal liability ([11]).

Consequently, exclusion under Article 12(2) QD (recast) is **not dependent on 'the existence of a present danger to the host Member State'** ([12]).

The CJEU held in *K and HF* that the crimes and acts listed in Article 12(2) QD (recast) and Article 1F Refugee Convention 'seriously undermine the fundamental values, such as respect for human dignity and human rights, on which […] the European Union is founded, and the peace which it is the Union's aim to promote' ([13]).

The CJEU has also held that the grounds for exclusion in Article 12(2) QD (recast) and Article 1F Refugee Convention are **'structured around the concept of "serious crime"'** ([14]).

([10]) CJEU, 2010, B and D, op. cit., fn. 9, para. 104; CJEU, Judgment of 2 May 2018, Grand Chamber, joined cases C-331/16 and C-366/16, K v Staatssecretaris van Veiligheid en Justitie and HF v Belgische Staat, EU:C:2018:296, para. 50.
([11]) CJEU, 2018, *K and HF*, op. cit., fn. 10, para. 50. See also CJEU, 2010, *B and D*, op. cit., fn. 9, para. 104.
([12]) CJEU, 2018, *K and HF*, op. cit., fn. 10, para. 50 (emphasis added).
([13]) CJEU, 2018, *K and HF*, op. cit., fn. 10, para. 46.
([14]) CJEU, Judgment of 13 September 2018, C-369/17, Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal, EU:C:2018:713, para. 46 (emphasis added).

1.3.2 Exclusion from eligibility for subsidiary protection (Article 17)

In its *Ahmed* judgment, the CJEU held that the purpose underlying the grounds for exclusion from subsidiary protection is, like the grounds for exclusion from refugee status in Article 12(2) QD (recast), 'to exclude from subsidiary protection status persons who are deemed to be undeserving of the protection which that status entails and to maintain the credibility of the Common European Asylum System […]' ([15]).

The Court also stated:

> [T]he EU legislature drew inspiration from the rules applicable to refugees in order to extend them, so far as possible, to beneficiaries of subsidiary protection status. The content and structure of Article 17(1)(a) to (c) [QD (recast)], concerning exclusion from eligibility for subsidiary protection, bear similarities to Article 12(2)(a) to (c) of that directive, relating to exclusion from refugee status, which itself reproduces, in essence, the content of Article 1(F)(a) to (c) of the [Refugee Convention]. It is clear, furthermore, from the preparatory documents relating to [the QD (recast)] […] that Article 17(1)(a) to (c) [QD (recast)] follows from the EU legislature's intention to introduce grounds for exclusion from subsidiary protection similar to those applicable to refugees ([16]).

Although the CJEU has not yet ruled on the interpretation of the ground for exclusion in Article 17(1)(d) QD (recast), that ground for exclusion is clearly of a different nature to the grounds for exclusion in Article 17(1)(a) to (c) QD (recast). This is because it is structured around the concept not of 'serious crime' committed in the past but of present **'danger'** to the community or to the security of the host Member State. Danger to the community or to the security of the host Member State may also be grounds for the revocation of, ending of, or refusal to renew refugee status according to Article 14(4) and (5) QD (recast), or grounds for revocation, ending or refusal to renew the residence permit of a refugee based on Articles 21(3) and 24(2) QD (recast). Therefore, some guidance for the interpretation of Article 17(1)(d) QD (recast) may be found in the judgment of the CJEU in *HT*. This states:

> Furthermore, the Court has found that international terrorist acts are, generally speaking and irrespective of any state participation, contrary to the purposes and principles of the United Nations (judgment in *B and D*, C-57/09 and C-101/09, EU:C:2010:661, Paragraph 83). It follows that a Member State could, in the event of such acts, justifiably rely on the existence of compelling reasons of national security or public order within the meaning of Article 24(1) of [the QD] in order to apply the derogation provided for by that provision ([17]).

The CJEU has also not yet ruled on the interpretation of the optional ground for exclusion in Article 17(3) QD (recast). Although not amounting to a 'serious crime' within the meaning of Article 17(1)(b), the crimes at issue in the optional ground for exclusion in Article 17(3) QD (recast) must at least be punishable by a sentence of imprisonment had they been committed in the Member State concerned.

([15]) CJEU, 2018, *Shajin Ahmed*, op. cit. fn. 14, para. 51.
([16]) CJEU, 2018, *Shajin Ahmed*, op. cit. fn. 14, paras. 43-45.
([17]) CJEU, Judgment of 24 June 2015, C-373/13, HT v Land Baden-Württemberg, EU:C:2015:413, para. 85.

1.3.3 More favourable standards

Article 3 QD (recast) permits Member States to introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection under the directive, but only in so far as the national standards in question are compatible with the directive.

Article 3 QD (recast)

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this directive.

In its *B and D* judgment, the CJEU held that, since the underlying purpose of the exclusion clauses in the QD is 'to maintain the credibility of the protection system provided for in [the QD] in accordance with the [Refugee Convention]', a national provision that permits the granting of refugee status under the QD to a person excluded under Article 12(2) QD would be incompatible with the QD ([18]). The Court added, however, that Member States are not precluded from granting such a person 'another kind of protection' outside the scope of the QD, provided that that protection does not risk being confused with refugee status under the QD ([19]).

Clearly, the same would apply *mutatis mutandis* as regards exclusion from subsidiary protection status under Article 17(1) QD (recast).

1.3.4 Exceptional nature of exclusion

In *Ahmed*, the CJEU held that Article 17(1)(b) QD (recast) sets out a ground for exclusion which 'constitutes an **exception** to the general rule stipulated by Article 18 [QD (recast) on the granting of subsidiary protection status] and therefore calls for **strict interpretation**' ([20]). Similarly, the CJEU held in *Bolbol* that the clause excluding refugee status set out in Article 1D Refugee Convention, to which Article 12(1)(a) QD (recast) refers, '**must, as such, be construed narrowly**' ([21]).

It can therefore be inferred that the CJEU considers that all the grounds for exclusion from refugee status in the QD (recast) and Refugee Convention, and all the grounds for exclusion from subsidiary protection status in the QD (recast), must be **narrowly interpreted**.

([18]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 115.
([19]) CJEU, 2010, *B and D*, op. cit., fn. 9, paras. 116-120.
([20]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, para. 52 (emphasis added).
([21]) CJEU, Judgment of 17 June 2010, Grand Chamber, C-31/09, Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal, EU:C:2010:351, para. 51 (emphasis added).

1.4 Burden of proof

It is generally accepted that, since the exclusion clauses are exceptions to a rule, they require a narrow interpretation and that the burden of proving exclusion from refugee status or subsidiary protection status lies, as a rule, with the decision-maker.

As explained in Section 3.6, in certain cases the decision-maker may be entitled to presume that an applicant for international protection who has held a prominent position in a terrorist organisation is individually responsible for the acts committed by that organisation during the relevant period. This includes any such acts which fall within the scope of the exclusion clauses in Article 12(2) or Article 17 QD (recast). This does not mean, however, that the burden of proving exclusion no longer lies with the decision-maker in such cases, since the CJEU has underlined that it remains necessary to examine all the relevant circumstances in the case before an exclusion decision can be adopted ([22]). Accordingly, it can be helpful to keep in mind the following view expressed by the UK Supreme Court in *JS*, a case concerning exclusion under Article 12(2)(a) QD.

> [T]he nature of the organisation [of which the applicant was a member] itself is only one of the relevant factors in play and it is best to avoid looking for a 'presumption' of individual liability, 'rebuttable' or not. As the present case amply demonstrates, such an approach is all too liable to lead the decision-maker into error ([23]).

The High Court of Ireland has used the following formulation.

> [While the decision-maker] is entitled to proceed on the **working assumption** that a person occupying a senior position in a terrorist organisation has individual responsibility for the crimes against humanity committed by the organisation during the relevant period, an individual examination of all relevant circumstances must nonetheless be conducted ([24]).

The standard of proof in exclusion cases is discussed in Section 3.2.

1.5 Order of analysis: Inclusion before exclusion?

Whenever there is a possible issue of exclusion, the question arises of whether analysis of exclusion can be addressed straightaway or whether the decision-maker must first consider the inclusion clauses.

Before addressing that question, however, it should be noted that, whether or not the exclusion clauses are tackled before or after the inclusion clauses, the structure of the QD (recast) requires that the first exclusion issue to be addressed is exclusion from refugee eligibility. This follows from the definition of a 'person eligible for subsidiary protection' in Article 2(f) QD (recast), which requires that the person concerned **'does not qualify as**

([22]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 98.
([23]) Supreme Court (UK), JS (Sri Lanka) v Secretary of State for the Home Department, [2010] UKSC 15, para. 31. In essence, the question before the court was: 'assuming that there are those within an organisation who clearly are committing war crimes, what more than membership of such an organisation must be established before an individual is himself personally to be regarded as a war criminal?' (see para. 1 of the judgment).
([24]) High Court (Ireland), Judgment of 5 May 2011, AB v Refugee Appeals Tribunal and Minister of Justice, Equality and Law Reform [2011] IEHC 198, para. 50 (emphasis added).

a refugee' ([25]). It also follows ([26]) from Article 10(2) of the Asylum Procedures Directive (2013/32/EU) (Asylum Procedures Directive (APD) (recast)) ([27]). This expressly provides:

> When examining applications for international protection, the determining authority shall first determine whether the applicants qualify as refugees and, if not, determine whether the applicants are eligible for subsidiary protection.

With the exception of the ground for exclusion contained in Article 12(1)(a) QD (recast) (see Section 2.2), the CJEU has not yet ruled on **whether the application of the exclusion clauses must be preceded by an assessment of the inclusion clauses** of the protection status concerned. What the Court has already said, though, is that the exclusion clauses cannot be applied 'automatically' without investigating 'all the circumstances' of the individual case. In *Ahmed*, it ruled:

> [T]he Court held [in its judgment in *B and D*] that it is clear from the wording of Article 12(2)(b) and (c) [QD], now Article 12(2)(b) and (c) [QD (recast)], that the competent authority of the Member State concerned cannot apply that provision until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of the two grounds for exclusion laid down by that provision. It follows that any decision to exclude a person from refugee status must be preceded by a full investigation into all the circumstances of his individual case and cannot be taken automatically […]. Such a requirement must be transposed to decisions to exclude a person from subsidiary protection ([28]).

It has been argued that the CJEU has in fact taken the position that inclusion **does** need to be assessed before exclusion, since the Court expressly referred in *B and D* to the assessment of exclusion having to be made in relation to a person who 'otherwise satisfies the conditions for refugee status' ([29]). Thus far, however, the courts and tribunals of the Member States have taken the approach that the QD (recast) does not preclude the competent authorities from determining that a person is excluded from refugee status, or from subsidiary protection status, without first having determined whether the person concerned satisfies the inclusion clauses of the status at issue.

In a judgment by the Dutch council of state, the court reasoned that the state secretary for immigration was free to decide whether to deal with inclusion before exclusion or otherwise ([30]). According to a decision of the grand chamber of the Czech supreme administrative court, a conclusion on the exclusion of the applicant renders further investigation of the potential grounds for inclusion of the same person unnecessary. Before such a conclusion can be reached, however, the Czech court ruled that the facts indicating

([25]) See to that effect CJEU, Judgment of 8 May 2014, C-604/12, HN v Minister for Justice, Equality and Law Reform and Others, EU:C:2014:302, para. 35.
([26]) CJEU, Judgment of 25 July 2018, Grand Chamber, C-585/16, Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite, EU:C:2018:584, para. 89.
([27]) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.
([28]) CJEU, 2018, *Ahmed,* op. cit., fn. 14, paras. 48-50. See also CJEU, Judgment of 31 January 2017, Grand Chamber, C-573/14, Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani, EU:C:2017:71, para. 72 and CJEU, 2010, *B and D*, op. cit., fn. 9, para. 87.
([29]) See D. Kosar, 'Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say', *International Journal of Refugee Law* (2013) 87-119, p. 117; J.-Y. Carlier and P. d'Huart, 'L'Exclusion du statut de réfugié: Cadre général' in V. Chetail and C. Laly-Chevalier (eds.), *Asile et extradition: Théorie et pratique des clauses d'exclusion au statut de réfugié* (Bruylant, 2014), p. 22.
([30]) Council of State (the Netherlands), Judgment of 2 June 2004, 200308845, ECLI:NL:RVS:2004:AP2043, para. 2.6.8 (in Dutch).

both potential inclusion and exclusion must be fully investigated with the awareness that they may often be closely intertwined ([31]).

Where such an approach is taken in an individual case and it is determined that the person concerned is indeed excluded from the status at issue, there is then no need to determine whether the person satisfies the inclusion clauses of that status. With reference to the Refugee Convention, UNHCR guidelines on exclusion state:

> The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula. Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue ([32]).

It is, however, clear from the CJEU's ruling quoted above that a decision to take such an approach could only be made on the basis of a full investigation into all the circumstances of the individual case, including the facts and circumstances relevant for exclusion. This investigation must include an assessment of the personal circumstances of the applicant, as well as the relevant facts regarding the country of origin. An appropriate interpretation of both international humanitarian law (IHL) and international criminal law, as set out in more detail below, is also highly relevant. Altogether, where the facts of the case indicate that exclusion may be at issue, assessments of exclusion must be just as rigorous as, and are no less complex than, assessments of inclusion.

1.6 Persons excluded from international protection under the QD (recast)

The detailed interpretation of each of the grounds for exclusion from refugee status or subsidiary protection status will be addressed below. Before doing so, it is nevertheless pertinent to briefly address here what the position of persons who fall within the scope of the exclusion provisions is according to the QD (recast).

Once a final decision to exclude has been taken, the Member State has then to decide whether to make a decision to send the person concerned back to their country of origin or former habitual residence. In its *B and D* judgment, the CJEU held that exclusion of a person from refugee status pursuant to Article 12(2) QD 'does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin' ([33]). The same would clearly apply to the other grounds for exclusion from refugee status in Article 12. *Mutatis mutandis* this also applies to the grounds for exclusion from subsidiary protection status in Article 17.

([31]) Supreme administrative court (Czechia), Decision of 7 September 2010, A.S. v Ministry of Interior (in Czech), 4 Azs 60/2007-119, para. 19.
([32]) UNHCR, Guidelines on International Protection No 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, HCR/GIP/03/05, para. 31.
([33]) CJEU, 2010, B and D, op. cit., fn. 9, para. 110.

As already noted in Section 1.3.3, Member States are not precluded from granting 'another kind of protection' outside the scope of the QD (recast) to someone who has been denied 'international protection' under the directive, even if one of the reasons for this denial is that the person concerned was determined to be excluded from refugee status or from subsidiary protection status. By protection in this context, the CJEU clearly had in mind the grant by a Member State of some kind of residence or leave to stay.

It is important to note that, where the removal of a person denied international protection under the QD (recast) is under consideration, removal of that person to their country of origin or to any other country is prohibited if it would contravene the principle of *non-refoulement* under the EU Charter of Fundamental Rights of the European Union (EU Charter) ([34]) and international human rights law. That principle is explained in a separate judicial analysis: Asylum procedures and the principle of non-refoulement ([35]). What needs to be re-emphasised here is that the prohibition of *refoulement* is absolute, both under Article 4 and Article 19(2) of the EU Charter and under international human rights law, including Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) ([36]).

The prohibition of *refoulement* under the EU Charter and international human rights law thus applies even in a case where:

— the person concerned is excluded from refugee status and subsidiary protection status on the grounds that there are serious reasons for considering that that person has committed terrorist offences or other particularly heinous crimes; and/or

— the person concerned is excluded from subsidiary protection status on the grounds that there are serious reasons for considering that that person constitutes a danger to the community or to the security of the Member State in which that person is present.

Whether because of the terms of the exclusion decision or for separate reasons, the Member State may also decide to launch criminal proceedings against the person concerned before taking any decision to expel/deport, if such proceedings are not already in process in parallel with the procedure on the application for international protection. This is, however, a choice to be made by the Member State based on national rules and policy. Because this judicial analysis aims only to assist members of courts and tribunals in applying the exclusion clauses in cases of international protection, it does not deal with criminal proceedings that might be launched against applicants excluded because of excludable criminal offences.

1.7 Decisions on exclusion and extradition procedures

The absolute nature of the prohibition of *refoulement* under the EU Charter and international human rights law has important implications for any issues that may arise in any particular case concerning extradition or deportation ([37]).

([34]) Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391 (entry into force: 1 December 2009). See also, CJEU, 2019, *M, X and X*, op. cit., fn. 9.

([35]) EASO, Asylum procedures and the principle of non-refoulement – *Judicial analysis*, 2018, Section 1.5.

([36]) *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953). See also, ECtHR, Judgment of 28 February 2008, Saadi v Italy, Application no 37201/06, para. 127.

([37]) See, for example, UNHCR, Guidance Note on Extradition and Refugee Protection, 2008, paras. 52, 57, 59 and 64-65 and S. Kapferer, The Interface Between Extradition and Asylum, UNHCR, Legal and protection policy research series, 2003.

Article 9(2) APD (recast) allows for two situations under which Member States may make an exception to the right of an applicant for international protection to remain in that Member State pending a decision at first instance on that person's application. One such situation is where that Member State will surrender or extradite the applicant either to another Member State, or to a third-country (non-EU country) or to an international court or tribunal. (The other situation mentioned in Article 9(2) APD concerns subsequent applications.) Article 9(3) APD (recast) nevertheless adds that the Member State concerned may extradite an applicant to a third-country pursuant to that exception only if it will not result in direct or indirect *refoulement* ([38]).

Article 9 APD (recast)

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third-country or to international criminal courts or tribunals.

3. A Member State may extradite an applicant to a third-country pursuant to Paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of the international and [European] Union obligations of that Member State.

In conclusion, the receipt by a Member State of a request to extradite or surrender an international protection applicant does not relieve that Member State of its obligation to respect the principle of *non-refoulement* – even vis-à-vis another Member State ([39]). It may, however, sometimes trigger an investigation into whether the applicant is excluded from refugee status or subsidiary protection status (see Section 5.1, Table 17).

([38]) For a more detailed analysis of Article 9 APD (recast), see EASO, Asylum procedures and the principle of non-refoulement – *Judicial analysis*, op. cit., fn. 35, pp. 81-82.

([39]) Whilst this does not follow directly from Article 9(3) APD (recast), it should be noted that the principle of mutual trust in EU law is not absolute, including as regards the execution of European Arrest Warrants: see CJEU, Judgment of 5 April 2016, Grand Chamber, joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198; CJEU, Judgment of 25 July 2018, Grand Chamber, C-220/18 PPU, *ML*, EU:C:2018:589. Similar considerations apply as regards the right to a fair trial guaranteed by Article 47 of the EU Charter: see CJEU, Judgment of 25 July 2018, Grand Chamber, C-216/18 PPU, *LM*, EU:C:2018:586.

Part 2: Exclusion of persons not in need of refugee status (Article 12(1))

2.1 Introduction

As explained above, the grounds for exclusion from refugee status can be subdivided between those that apply to persons who are **not in need of refugee status** (Article 12(1)(a) and (b) QD (recast)) and those that apply to persons who are **undeserving of refugee status** (Article 12(2)(a) to (c) QD (recast)).

Part 2 of this judicial analysis discusses persons who are not in need of refugee status, whereas Part 3 discusses persons who are undeserving of refugee status (see Figure 1 below). Exclusion from subsidiary protection status is covered in Part 4.

Figure 1: Persons excluded from refugee status under Article 12 QD (recast)

Persons not in need of refugee status (Part 2)	Persons undeserving of refugee status (Part 3)
→ Persons already receiving protection or assistance from UN organs or agencies other than UNHCR **(Section 2.2)**	Persons in respect of whom there are serious reasons for considering that they are responsible for any of the following crimes or acts:
→ Persons having equivalent rights and obligations to nationals of the country in which they have taken up residence **(Section 2.3)**	→ Crimes against peace **(Section 3.3.2)**
	→ War crimes **(Section 3.3.3)**
	→ Crimes against humanity **(Section 3.3.4)**
	→ Serious non-political crimes **(Section 3.4)**
	→ Acts contrary to the purposes and principles of the United Nations **(Section 3.5)**

2.2 Persons receiving protection or assistance from United Nations organs or agencies other than UNHCR (Article 12(1)(a))

Article 12(1)(a) QD (recast) lays down the following ground for exclusion from refugee status.

Article 12(1)(a) QD (recast)

A third-country national or a stateless person is excluded from being a refugee if:

a) he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this directive;

Article 12(1)(a) QD (recast) directly refers to Article 1D Refugee Convention.

Article 1D Refugee Convention

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this convention.

De facto, the only UN organ or agency falling within the scope of Article 1D is the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). UNRWA was established to 'protect and assist', within its area of operations, Palestinians who are 'Palestine refugees'. UNRWA's 'area of operations' covers the Gaza Strip, the West Bank (including east Jerusalem), Lebanon, Jordan and Syria. (See Section 2.2.1.1 for further information about UNRWA's operations and the persons who are protected and assisted by UNRWA).

The positions of Palestine refugees and that of persons displaced as a result of the 1967 and subsequent hostilities (hereinafter 'displaced persons'), have each been addressed in a series of annual UN General Assembly (UNGA) resolutions. The latest such resolutions are UNGA Resolution 73/92 of 7 December 2018, concerning assistance to Palestine refugees,

and UNGA Resolution 73/93 of 7 December 2018 concerning displaced persons ([40]). It can be concluded from those resolutions that neither the position of Palestine refugees nor that of displaced persons has yet been 'definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations' ([41]). This is evident from the extracts from those resolutions that are quoted in Table 3 below.

Table 3: Extracts from the most recent UNGA resolutions concerning (i) assistance to Palestine refugees, and (ii) displaced persons

	Palestine refugees		Displaced persons
UNGA Resolution 73/92 of 7 December 2018	1. *Notes with regret* that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly Resolution 194(III), has not yet been effected, and that, therefore, the situation of the Palestine refugees continues to be a matter of grave concern […]; 2. *Also notes with regret* that the United Nations Conciliation Commission for Palestine has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly Resolution 194(III) […]; 3. *Affirms* the necessity for the continuation of the work of [UNRWA] and the importance of its unimpeded operation and its provision of services, including emergency assistance, for the well-being, protection and human development of the Palestine refugees and for the stability of the region, pending the just resolution of the question of the Palestine refugees.	**UNGA Resolution 73/93 of 7 December 2018**	1. *Reaffirms* the right of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967; 2. *Stresses* the necessity for an accelerated return of displaced persons […]; 3. *Endorses*, in the meantime, the efforts of the Commissioner-General of [UNRWA] to continue to provide humanitarian assistance, as far as practicable, on an emergency basis, and as a temporary measure, to persons in the area who are currently displaced and in serious need of continued assistance as a result of the June 1967 and subsequent hostilities […].

Prior to the adoption of the QD, Article 1D Refugee Convention had often been interpreted by the courts and tribunals of the Member States in quite different ways. A number of key points have, however, since been settled by the CJEU – at least for purposes of the application of the QD – since the Court has already delivered preliminary rulings in three cases concerning the interpretation of Article 12(1)(a) of the directive and its recast ([42]). All three rulings concern persons receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). A request from the German federal administrative court for a fourth preliminary ruling on the same issue was pending before the CJEU as of the date of finalisation of this judicial analysis ([43]).

The CJEU does not make findings of fact in its preliminary rulings. It has nevertheless proceeded on the basis that **UNRWA at present constitutes the only United Nations organ or agency** for the purposes of Article 1D Refugee Convention and the first sentence of Article 12(1)(a) QD ([44]).

([40]) See UNGA Resolution 73/92 of 7 December 2018, concerning assistance to Palestine refugees, and UNGA Resolution 73/93 of 7 December 2018 concerning persons displaced as a result of the June 1967 and subsequent hostilities. UNGA Resolution 74/83 concerning assistance to Palestine refugees and 74/84 concerning persons displaced as a result of the June 1967 and subsequent hostilities were adopted on 13 December 2019.
([41]) Article 12(1)(a) QD and its recast.
([42]) CJEU, 2010, *Bolbol*, op. cit., fn. 21; CJEU, 2012, *El Kott*, op. cit., fn. 7; CJEU, 2018, *Alheto*, op. cit., fn. 28.
([43]) Federal administrative court (Germany), decision of 14 May 2019, BVerwG 1 C 5.18, BVerwG:2019:140519B1C5.18, the questions referred being set out in CJEU, Federal Republic of Germany v XT, 3 July 2019, C-507/19.
([44]) CJEU, 2010, *Bolbol*, op. cit., fn. 21, para. 44; CJEU, 2012, *El Kott*, op. cit., fn. 7, para. 48.

According to the CJEU, the first sentence of Article 12(1)(a) QD (recast) corresponds to the first paragraph of Article 1D Refugee Convention, and the second sentence of Article 12(1)(a) QD (recast) corresponds to the second paragraph of Article 1D Refugee Convention ([45]). Specifically, Article 12(1)(a) sets out:

> **[…] [F]irst**, **a ground for exclusion from refugee status and, second, a ground for no longer applying that ground for exclusion**, both of which may be decisive for the purpose of assessing whether the [person] in question is entitled to access to refugee status in the European Union […] ([46]).

The rules laid down in Article 12(1)(a) thus constitute a *lex specialis* ([47]) to the general provisions on inclusion. Where the ground in the second sentence of Article 12(1)(a) applies, the person concerned is *ipso facto* entitled to the benefits of the QD (recast). This means that that person must be recognised as a refugee within the meaning of Article 2(d) QD (recast) and **must automatically be granted refugee status, unless any other of the grounds for exclusion in Article 12 QD (recast) apply** ([48]). In those circumstances, the person concerned is not required to show that they satisfy the inclusion clauses of the refugee definition in Article 2(d) QD (recast) ([49]).

In other words, although Article 12(1)(a) is an exclusion clause, it also identifies a specific situation in which it is mandated that the person concerned qualifies as a refugee. Unlike the other exclusion clauses, Article 12(1)(a) thus contains both a negative rule of exclusion and a specific positive rule of inclusion that applies as *lex specialis* in place of the inclusion clauses in Articles 2(d)-10.

The CJEU sets out the conditions required in order to establish refugee status *ipso facto* as follows:

> [A] person who is *ipso facto* entitled to the benefits of [the QD] is not necessarily required to show that he has a well-founded fear of being persecuted within the meaning of Article 2(c) of the directive [now Article 2(d) QD (recast)], but must nevertheless submit […] an application for refugee status, which must be examined by the competent authorities of the Member State responsible. In carrying out that examination, those authorities must verify not only that the applicant actually sought assistance from UNRWA […], and that the assistance has ceased but also that the applicant is not caught by any of the grounds for exclusion laid down in Article 12(1)(b) or (2) and (3) of the directive ([50]).

2.2.1 Exclusion from refugee status (first sentence of Article 12(1)(a))

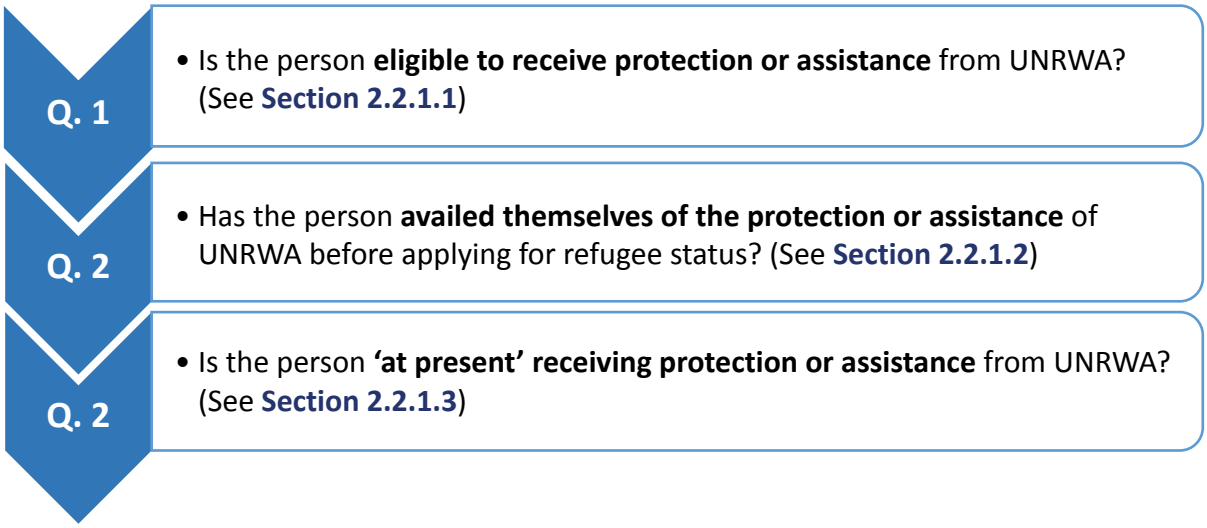
In *Bolbol*, the CJEU held that a person can be considered to 'receive protection or assistance' within the meaning of Article 1D Refugee Convention only when that person **'has actually availed himself of that protection or assistance'** ([51]). Persons who are or have been eligible

([45]) CJEU, 2018, *Alheto*, op. cit., fn. 26, para. 85.
([46]) CJEU, 2018, *Alheto*, op. cit., fn. 26, para. 87 (emphasis added).
([47]) CJEU, 2018, *Alheto*, op. cit., fn. 26, para. 87.
([48]) CJEU, 2012, *El Kott,* op. cit., fn. 7, para. 81; CJEU, 2018, *Alheto*, op. cit., fn. 26, para. 92.
([49]) CJEU, 2012, El Kott*,* op. cit., fn. 7, para. 76; CJEU, 2018, *Alheto,* op. cit., fn. 26, para. 86.
([50]) CJEU, 2012, *El Kott*, op. cit., fn. 7, para. 76.
([51]) CJEU, 2010, *Bolbol*, op. cit., fn. 21, para. 53 (emphasis added).

to receive protection or assistance from UNRWA, but who have not availed themselves of that protection or assistance prior to their application for refugee status, do not fall within the scope of Article 1D Refugee Convention. They cannot therefore fall within the ground for exclusion from refugee status in the first sentence of Article 12(1)(a) QD ([52]).

The assessment of exclusion from refugee status under Article 12(1)(a) QD (recast) can be broken down into three elements, as illustrated in Figure 2 below:

Figure 2: Assessment of exclusion from refugee status under Article 12(1)(a) QD (recast)



2.2.1.1 Persons eligible to receive protection or assistance from UNRWA

As explained below, the CJEU has clarified that 'persons eligible to receive protection or assistance from UNRWA' can be classified into two groups**: 'registered persons'** and **'non-registered persons**'. So far, the CJEU has held that **'Palestine refugees'** are one sub-category of 'registered persons' who are eligible to receive protection or assistance from UNRWA within the meaning of Article 1D Refugee Convention. UNRWA defines 'Palestine refugees' in summary as **'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict'** ([53]). Additionally, the CJEU has held that **'persons displaced as a result of the 1967 and subsequent hostilities'** are one-sub-category of 'non-registered persons' who are eligible to receive such protection or assistance.

In *Bolbol*, the CJEU derived the above classification from UNRWA's 'Consolidated Eligibility and Registration Instructions' (CERI) ([54]). The Court referred to these instructions to ascertain whether it is necessary for a person to be registered with UNRWA in order to receive protection or assistance from that agency within the meaning of Article 1D Refugee Convention.

([52]) CJEU, 2010, *Bolbol*, op. cit., fn. 21, para. 51.
([53]) CJEU, 2010, *Bolbol*, op. cit., fn. 21, para. 45 (emphasis added).
([54]) UNRWA, Consolidated Eligibility and Registration Instructions, 1 January 2009.

According to the CERI, UNRWA's current mandate is: 'to provide relief, humanitarian, human development and protection services to Palestine refugees and other persons of concern in its Area of Operations' ([55]).

The purpose of the CERI is, inter alia, to set out the categories of persons of concern who are 'eligible to receive UNRWA services' and to describe the services that are available to those persons ([56]). Section III of the CERI divides the categories of persons of concern who are eligible to receive those services into two groups, as summarised in Table 4 below.

Table 4: Persons who are eligible to receive UNRWA services

	Registered persons		Non-registered persons
CERI, Section III.A	**'Palestine refugees'** and certain other categories of persons are eligible to be registered in UNRWA's registration system. They are eligible to receive UNRWA's services upon being registered and obtaining an UNRWA registration card as proof of registration.	**CERI, Section III.B**	Persons who do not meet, or are unable to prove that they meet, UNRWA's registration criteria are not eligible to be registered in UNRWA's registration system. Nevertheless, **'persons displaced as a result of the 1967 and subsequent hostilities'** and certain other categories of persons are eligible to receive UNRWA's services without being registered. UNRWA keeps 'due records' on such persons.

In *Bolbol* the CJEU was only addressing the point whether a person must be registered with UNRWA in order to fall within the scope of Article 1D Refugee Convention. This means that the Court's ruling in that case does not necessarily exhaustively establish which categories of persons of concern in the CERI may potentially fall within the scope of Article 1D. The ruling has clarified, however, that not only 'Palestine refugees' but also 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' are eligible to 'receive protection or assistance' from UNRWA within the meaning of Article 1D:

> […] [I]t is clear from UNRWA's [CERI] – the currently applicable version of which was adopted during 2009 – that while the term 'Palestine Refugee' applies, for UNRWA's purposes, to 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict' (Point III.A.1 of CERI), other persons are also eligible to receive protection or assistance from UNRWA. They include 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' (Point III.B of CERI; see also, inter alia, paragraph 6 of the United Nations General Assembly Resolution No 2252 (ES-V) of 4 July 1967).
>
> In those circumstances, it cannot be ruled out *a priori* that a person such as Ms Bolbol, who is not registered with UNRWA, could nevertheless be among those persons coming within Article 1D of the [Refugee Convention] and, therefore, within the first sentence of Article 12(1)(a) of the Directive ([57]).

In *Bolbol*, the CJEU ruled that persons displaced as a result of 1967 hostilities come within the scope of Article 1D Refugee Convention. The court pointed out that the Refugee Convention, in its original 1951 version, had been amended by the 1967 Protocol relating

([55]) UNRWA, Consolidated Eligibility and Registration Instructions, 1 January 2009, p. 1.
([56]) UNRWA, Consolidated Eligibility and Registration Instructions, 1 January 2009, p. 2.
([57]) CJEU, 2010, *Bolbol*, op. cit., fn. 21, paras. 45 and 46.

to the Status of Refugees 'specifically to allow the interpretation of that convention to adapt and to allow account to be taken of new categories of refugees, other than those who became refugees as a result of "events occurring before 1 January 1951' ([58]). The CJEU thus considers that the **descendants** of the first-generation Palestine refugees also come within Article 1D Refugee Convention. This is also borne out by the CJEU's later ruling in *Alheto*, a case in which the court proceeded on the basis that the applicant in the main proceedings – who was born in 1972 – was a 'Palestine refugee' ([59]).

It should be noted that UNRWA's full definition of a 'Palestine Refugee', for its operational purposes, is set out in Point V.J of the CERI as:

> Any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict, **and descendants of such persons, including legally adopted children, through the male line** […] ([60]).

2.2.1.2 Evidence of availment of the protection or assistance of UNRWA

In *Bolbol*, the CJEU held that **registration with UNRWA is sufficient proof** that the person concerned has availed themselves of the assistance of UNRWA. It is not, however, necessary proof since non-registered persons can also receive assistance from UNRWA. In such cases, 'the beneficiary must be permitted to adduce evidence of that assistance by other means' ([61]).

The Court did not need to consider specifically what other evidence might be sufficient to prove receipt of assistance from UNRWA. It is clear from the CERI, however, that 'non-registered' persons who are eligible to receive UNRWA services are only designated as 'non-registered' because they are ineligible, or are unable to prove that they are eligible, to be registered in the '[UNRWA] registration system'. UNRWA's programmes do nevertheless 'keep due records' of such persons ([62]).

The above is not to say, however, that documentary evidence from UNRWA is necessarily the only way to prove that the person concerned has availed themselves of UNRWA's assistance. For example, as Advocate General Sharpston stated in her opinion in *Bolbol*, regarding some of the evidentiary issues that may arise in relation to both the first and the second sentences of Article 12(1)(a) QD, 'administrative records may lag behind the event […] or may themselves have been destroyed during hostilities' ([63]). She also stated:

> I do not underestimate the evidentiary issues that will arise […]. The problems range from fragmentary evidence (that bears out part of a narrative but not every single step) to the possibility of fabricated evidence (or genuine evidence obtained by bribing the right official). Here, as with demonstrating actual receipt of assistance, the state

([58]) CJEU, 2010, *Bolbol*, op. cit., fn. 21, paras. 47 and 48.
([59]) CJEU, 2018, *Alheto,* op. cit., fn. 26, para. 49. Note also the opinion of Advocate General Sharpston of 4 March 2010, C-31/09, Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal, EU:C:2010:1192010, para. 66, which reasons that, in addition to the persons who were already receiving protection or assistance from UNRWA in 1951, both the descendants of those persons and also new displaced persons receiving such protection or assistance come within the scope of Article 1D.
([60]) UNRWA, Consolidated Eligibility and Registration Instructions, op. cit., fn. 54, p. 32 (emphasis added).
([61]) CJEU, 2010, *Bolbol*, op. cit., fn. 21, para. 52.
([62]) UNRWA, Consolidated Eligibility and Registration Instructions, op. cit., fn. 54, p. 6.
([63]) Opinion of Advocate General Sharpston, *Bolbol*, op. cit., fn. 59, para. 93.

> is entitled to insist on some evidence, but not on the best evidence that might be produced in an ideal world ([64]).

For further information about the assessment of evidence and credibility under the QD (recast), see: EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis* ([65]).

2.2.1.3 Persons who are 'at present' receiving protection or assistance from UNRWA

In order to be excluded from refugee status under Article 1D Refugee Convention and Article 12(1)(a) QD (recast), the person concerned must **'at present'** be receiving protection or assistance.

In *El Kott*, the CJEU held that, if that requirement only encompasses persons who are 'currently availing themselves' of the assistance of UNRWA, it would deprive the ground for exclusion from refugee status in Article 12(1)(a) QD of any practical effect. That is because no one submitting an application for asylum in the territory of a Member State, and who is therefore physically outside UNRWA's area of operations, would ever fall within that ground for exclusion. Moreover, **voluntary departure** from UNRWA's area of operations, and therefore **voluntary renunciation** of the assistance of UNRWA, cannot mean that the person concerned is not 'at present' receiving assistance. That would run counter to the objective pursued by the first paragraph of Article 1D Refugee Convention, which is 'to exclude from the benefits of the convention all persons who receive such assistance' ([66]).

The CJEU therefore ruled that the expression 'at present receiving protection or assistance' must therefore be interpreted as covering not only persons who are 'currently availing themselves' of assistance provided by UNRWA but also:

> **[persons] who […] availed themselves of such assistance shortly before submitting an application for asylum in a Member State**, provided, however, that that assistance has not ceased within the meaning of the second sentence of Article 12(1)(a) [QD] ([67]).

While the CJEU has not addressed this particular issue, the German federal administrative court considers, for its part, that Article 12(1)(a) QD (recast) does not, however, apply to the situation where a stateless Palestinian, who had been receiving protection or assistance from UNRWA, subsequently establishes a habitual residence in a third-country outside UNRWA's area of operations before submitting an application for asylum in the EU ([68]). The Dutch council of state pronounced in similar vein in a case of a Palestinian who had been registered with UNRWA but had lived nearly all her life in the United Arab Emirates ([69]). (See further Section 2.2.2 which follows.)

([64]) Opinion of Advocate General Sharpston, *Bolbol*, op. cit., fn. 59, para. 102.
([65]) EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018.
([66]) CJEU, 2012, *El Kott*, op. cit., fn. 7, paras. 49-51.
([67]) CJEU, 2012, *El Kott*, op. cit., fn. 7, para. 52 (emphasis added).
([68]) Federal administrative court (Germany), Judgment of 25 April 2019, BVerwG 1 C 28.18, DE:BVerwG:2019:250419U1C28.18.0, paras. 18, 19 and 21.
([69]) Council of state (the Netherlands), 19 February 2019, 201708043/1/V1, para. 4.2 (in Dutch).

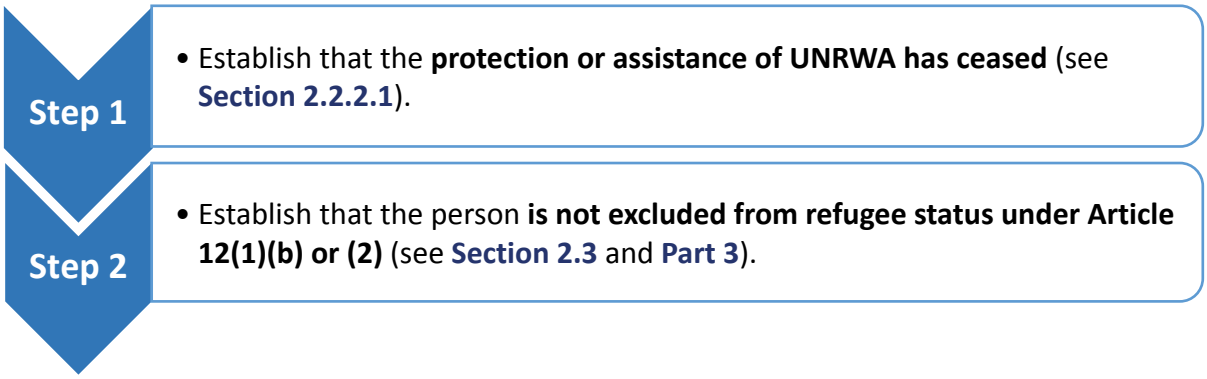
2.2.2 *Ipso facto* entitlement to refugee status (second sentence of Article 12(1)(a))

As mentioned above, the second sentence of Article 12(1)(a) QD (recast) is in fact an inclusion clause, since it identifies a specific situation in which it is mandated that the person concerned qualifies as a refugee ([70]).

Palestine refugees and displaced persons who availed themselves of the protection or assistance of UNRWA before applying for refugee status in the EU, but who are no longer receiving such protection or assistance, within the meaning of the second sentence of Article 12(1)(a) QD (recast), are thus *ipso facto* entitled to the grant of refugee status, provided that they do not fall within any of the grounds for exclusion from refugee status in Article 12(1)(b) and (2) QD (recast).

Specifically, the assessment of whether a person who has availed themselves of the assistance of UNRWA before submitting an application for refugee status in a Member State is entitled to refugee status under the second sentence of Article 12(1)(a) can be broken down into two steps. This is illustrated in Figure 3 below.

Figure 3: Assessment of *ipso facto* entitlement to refugee status under the second sentence of Article 12(1)(a) QD (recast)



In *Alheto*, the CJEU held that the second sentence of Article 12(1)(a) of both the QD and the QD (recast) must be interpreted as:

– precluding national legislation which does not lay down or which incorrectly transposes the grounds for no longer applying the ground for exclusion from being a refugee contained therein;

– having direct effect; and

– being applicable even if the applicant for international protection has not expressly referred to it ([71]).

([70]) See also, for example, UNHCR, Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection, May 2013, pp. 4-6; UNHCR, Guidelines on International Protection No 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, December 2017, HCR/GIP/16/12, paras. 12 and 18-20.

([71]) CJEU, 2018, *Alheto,* op. cit., fn. 26, para. 101. On the meaning of 'direct effect' in EU law, see EASO, *An Introduction to the Common European Asylum System for Courts and Tribunals*, op. cit., fn. 9, pp. 66 and 67.

In the case at issue, the Member State concerned had failed to transpose Article 12(1)(a) QD (recast) correctly into national law. Instead of having examined the applicant's claim under Article 12(1)(a), the decision-maker at first instance had assessed whether the applicant qualified for refugee status on the grounds of having a well-founded fear of being persecuted for one of the five reasons enumerated in the refugee definition ([72]).

It should also be noted that the CJEU has held in *El Kott* that – in accordance with Article 11(f) QD, read in conjunction with Article 14(1) QD – a person granted refugee status under the second sentence of Article 12(1)(a) QD ceases to be a refugee if '[…] he is able to return to the UNRWA area of operations in which he was formerly habitually resident because the circumstances which led to that person qualifying as a refugee no longer exist […]' ([73]).

In the view of the German federal administrative court, it remains unclear, however, whether the CJEU was referring in *El Kott* to UNRWA's entire area of operations, or whether, because of the addition of the words 'in which he was formerly habitually resident', the CJEU was only referring to the specific territory within UNRWA's area of operations in which the person had been formerly habitually resident ([74]). One of the questions concerning Article 12(1)(a) currently pending before the CJEU has a bearing on that issue ([75]). In any event, the federal administrative court's view is that, in assessing whether protection or assistance has ceased within the meaning of the second sentence of Article 12(1)(a) QD (recast), the relevant time is the date of departure of the applicant from UNRWA's area of operations. Additionally, the court stated that, in order for an applicant to qualify for refugee status, it must be impossible, **at the time of the oral hearing or factual determination** by a court of fact, for the applicant to return to UNRWA's area of operations and to re-avail themselves of the organisation's protection or assistance. the federal administrative court found that because, in accordance with Article 11(1)(f) QD (recast) in conjunction with Article 14(1) QD (recast), refugee status ceases and must be withdrawn in such a situation, 'it would be pointless to grant refugee status if that status then had to be revoked immediately' ([76]).

2.2.2.1 Cessation of protection or assistance

According to the CJEU's *El Kott* judgment, one of the objectives of Article 12(1)(a) QD is 'to ensure that Palestinian refugees continue to receive protection by affording them effective protection or assistance […]' ([77]). The application of Article 12(1)(a) must take account of the objective of Article 1D Refugee Convention. This is 'to ensure that **Palestinian refugees continue to receive protection**, as Palestinian refugees, **until their position has been definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations**' ([78]).

In the light of that objective, the circumstances in which 'such protection or assistance has ceased for any reason' within the meaning of the second sentence of Article 12(1)(a) QD include:

([72]) CJEU, 2018, *Alheto,* op. cit., fn. 26, paras. 42-62.
([73]) CJEU, 2012, *El Kott,* op. cit., fn. 7, para. 77.
([74]) Federal administrative court (Germany), 2019, BVerwG 1 C 28.18, op. cit., fn. 68, para. 21 (in German).
([75]) See federal administrative court (Germany), 2019, BVerwG 1 C 5.18, op. cit., fn. 43 (in German), the questions referred being set out in CJEU, Federal Republic of Germany v XT, 3 July 2019, C-507/19.
([76]) Federal Administrative Court (Germany), 2019, BVerwG 1 C 28.18, op. cit., fn. 68, para. 26.
([77]) CJEU, 2012, *El Kott,* op. cit., fn. 7, para. 60.
([78]) CJEU, 2012, *El Kott,* op. cit., fn. 7, para. 62 (emphasis added).

— **'events affecting UNRWA directly** such as the abolition of UNRWA or an event which makes it generally impossible for UNRWA to carry out its mission'; and

— **circumstances which are 'beyond [the] control and independent of [the] volition [of the person concerned]** which force him to leave the area in question and thus prevent him from receiving UNRWA assistance' ([79]).

The CJEU ruled that a Palestinian refugee must be regarded as having been **forced to leave UNRWA's area of operations** under such circumstances, if 'his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency' ([80]).

In *Alheto*, the CJEU underlined that the assessment of whether protection or assistance has ceased must be made in relation to UNRWA's area of operations as a whole, not just to the person's territory of habitual residence within that area. The applicant in the main proceedings in that case was a Palestinian registered with UNRWA. She had fled from one part of UNRWA's area of operations – the Gaza Strip, her place of birth and territory of habitual residence – to seek safety in another part of UNRWA's area of operations, namely Jordan, before applying for international protection in the EU. The CJEU did not exclude the possibility that UNRWA may be able to provide a person in her situation with a standard of living conditions, in the part of its area of operations to which that person had fled, which meet the requirements of its mission ([81]). It therefore ruled that protection or assistance cannot be regarded as having ceased, if the person is able to stay in that other part of UNRWA's area of operations 'in safety, under dignified living conditions and without being at risk of being refouled to the territory of habitual residence for as long as he or she is unable to return there in safety […]' ([82]).

The Belgian council for aliens law litigation held in a case regarding an applicant from the Gaza Strip that the closure of the border between Israel and Gaza, and the danger of travelling to Gaza through Egypt due to the security situation in the Sinai, were one reason which led to the cessation of UNRWA's protection or assistance in the case concerned ([83]). The court applied the test set out by the CJEU in *El Kott* and ruled that the civilian population of the Gaza Strip was being subjected to continuing and systematic violations of fundamental human rights, which amounted to inhuman and degrading treatment ([84]). It found that the applicant was prevented from re-availing himself of the assistance provided by UNRWA and it was therefore impossible for UNRWA to guarantee his living conditions in accordance with its mission ([85]).

The German federal administrative court has held that the 'necessary living conditions commensurate with UNRWA's mission' include safety from persecution within the meaning

([79]) CJEU, 2012, *El Kott,* op. cit., fn. 7, paras. 58 and 61 (emphasis added).
([80]) CJEU, 2012, *El Kott,* op. cit., fn. 7, para. 63.
([81]) CJEU, 2018, *Alheto,* op. cit., fn. 26, paras. 49 and 132-134.
([82]) CJEU, 2018, *Alheto,* op. cit., fn. 26, para. 134. Note that UNHCR's own position on the interpretation of Article 1D of the Refugee Convention differs from that of the CJEU in a number of important respects. For example, UNHCR considers that the assessment whether protection or assistance ceased should be made only in relation to the specific territory within UNRWA's area of operations in which the person concerned habitually resided: see UNHCR, Note on Interpretation of Article 1D 1951 Convention and Article 12(1)(a) QD, op. cit., fn. 70, p. 5; UNHCR, Guidelines on International Protection No 13, op. cit., fn. 70, para. 22, point (k).
([83]) *Raad voor Vreemdelingenbetwistingen/Conseil du contentieux des étrangers* (Council for Aliens Law Litigation, Belgium), Decision of 31 July 2017 (in Dutch), no 190.280, para. 2.15, second to fourth indents, and para. 2.16 (see UNHCR summary in English). However, see *Raad voor Vreemdelingenbetwistingen/Conseil du contentieux des étrangers* (Council for Aliens Law Litigation, Belgium), decision of 19 November 2019, no 228.949, para. 6.2., which, applying the test set out by the CJEU in *El Kott*, overruled this decision.
([84]) Ibid., para. 2.15, first indent.
([85]) Ibid., para. 2.16.

of Article 9 QD (recast) and from serious harm within the meaning of Article 15 QD (recast). This is thus more than the provision by UNRWA of food, schools or healthcare, which would otherwise have no practical value. The court held that this is also consistent with the Palestinian concerned being able to remain in UNRWA's area of operations 'in safety, under dignified living conditions' ([86]). The court considered, however, that the CJEU had not yet clarified whether, in a situation where that Palestinian has a substantive connection with only one territory within UNRWA's area of operations, only that specific territory – or the whole of UNRWA's area of operations – should be considered under the test in the second sentence of Article 12(1)(a) ([87]). The court held that, either way, under that test the requirements for internal protection within the meaning of Article 8 QD (recast) must be applied *mutatis mutandis* in relation to each of the territories within UNRWA's area of operations ([88]).

Finally, it should be noted that UNHCR considers that even if a person was not forced to leave the UNRWA area of operations for reasons beyond their control and independent of their volition, protection or assistance should also be regarded as having ceased if practical obstacles (such as border closures), obstacles relating to safety or personal security (such as dangers en route), or legal obstacles (such as the absence of necessary documentation) prevent the person from returning to that part of UNRWA's area of operations in which they were formerly residing ([89]).

2.3 Persons recognised as having the rights and obligations attached to the possession of the nationality of their country of residence (Article 12(1)(b))

Article 12(1)(b) QD (recast) lays down the following ground for exclusion from refugee status.

Article 12(1)(b) QD (recast)

1. A third-country national or a stateless person is excluded from being a refugee if:

[…]

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.

It should be noted that Article 1E Refugee Convention, to which Article 12(1)(b) QD (recast) corresponds, states only that the person concerned must be 'recognised […] as having the rights and obligations which are attached to the possession of the nationality of that country', without adding the phrase 'or rights and obligations equivalent to those'. Article 1E

([86]) Federal administrative court (Germany), 2019, BVerwG 1 C 28.18, op. cit., fn. 68, para. 27 (in German).
([87]) Federal administrative court (Germany), 2019, BVerwG 1 C 28.18, op. cit., fn. 68, para. 26, referring to questions 1 and 2 referred to the CJEU by Federal administrative court (Germany), 2019, BVerwG 1 C 5.18, op. cit., fn. 43, C-507/19 (in German).
([88]) Federal administrative court (Germany), 2019, BVerwG 1 C 28.18, op. cit., fn. 68, para. 26 (in German).
([89]) UNHCR, Note on Interpretation of Article 1D 1951 Convention and Article 12(1)(a) QD, op. cit., fn. 70, p. 5; UNHCR, Guidelines on International Protection No 13, op. cit., fn. 70, para. 22, points (g) to (i).

Refugee Convention also uses the expression 'taken residence' ([90]), rather than 'taken up residence'.

The CJEU has not yet had an opportunity to interpret Article 12(1)(b). Also, the national case-law of the Member States on that provision, and on Article 1E Refugee Convention, appears to be very limited. Nevertheless, the national case-law of certain third-countries – in particular Australia, Canada, and New Zealand – is more developed as regards the interpretation of Article 1E Refugee Convention ([91]). UNHCR has also issued a note on the interpretation of Article 1E ([92]).

In light of the fact that, in order to interpret a particular provision of EU secondary legislation, the CJEU sometimes gives weight to the will of the EU legislator and the *travaux préparatoires* of the legal instrument concerned ([93]), it should also be noted that the Commission's explanatory memorandum to the legislative proposal for the QD states:

> This paragraph [now Article 12(1)(b) QD (recast)] relates to situations covered by Article 1(E) of the [Refugee Convention]. It prescribes the situation in which refugee status may be denied when an applicant for asylum is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. Mere transient or purely temporary presence in such a state is not a basis for exclusion. An applicant shall be excluded only if there is guaranteed full protection against deportation or expulsion ([94]).

Moreover, as already mentioned, the grounds for exclusion in the QD (recast) must be interpreted narrowly ([95]) and in a way which is 'in line with the level of protection guaranteed by the rules of the Geneva Convention' ([96]).

It should be noted that, in the opinion of UNHCR, Article 1E Refugee Convention may not be applied if the person concerned would be at risk of persecution or other serious harm in the country in which they have taken residence ([97]).

2.3.1 Residence in a country outside the country of origin

According to UNHCR

> The wording of Article 1E [Refugee Convention] limits its application to a person who 'has taken residence' in the country under consideration. It does therefore not apply to individuals who could take up residence in that country, but who have not done so. The phrase 'has taken residence' means that temporary or short-term stay, mere transit or visit is not sufficient. The person concerned must benefit from a residency status which

([90]) The expression 'taken residence' is also used in Article 12(1)(a) QD (2004/83/EC).
([91]) For examples of relevant national case-law of non-Member States, see, for example, J.C. Hathaway and M. Foster, *The Law of Refugee Status* (2nd edn., CUP, 2014), pp. 500-509, which cites case-law from Australia, Canada, New Zealand and the United States. For a succinct survey of relevant Canadian case-law, see Immigration and Refugee Board of Canada, Interpretation of the convention refugee definition in the case law, 31 March 2018, Chapter 10.
([92]) UNHCR, UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees, March 2009.
([93]) EASO, *An Introduction to the Common European Asylum System for Courts and Tribunals – Judicial analysis*, op. cit., fn. 9, p. 65.
([94]) European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, 2001, op. cit., fn. 9, p. 25.
([95]) See Section 1.3.4.
([96]) CJEU, 2019, *M, X and X*, op. cit., fn. 9, para. 75.
([97]) UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, 2009, op. cit., fn. 92, para. 17.

> is secure and hence includes the rights accorded to nationals to return to, re-enter and remain in the country concerned. These rights must be available in practice. Voluntary renunciation of residence does not render Article 1E inapplicable, provided the person remains entitled to a secure residency status, including the right to re-entry, and is recognized as having the rights and obligations attached to the possession of nationality. The name of the status which an individual is holding under national law is not the critical issue. Different rights may be attached to similarly named statuses in different countries and at different times. It is the rights attaching to that status in practice in the individual case that are determinative and whether these rights are currently effective and available ([98]).

2.3.2 Rights and obligations attaching to the possession of nationality

For a person to be excluded from refugee status under Article 12(1)(b) QD (recast), they must be recognised as having **either** 'the rights and obligations which are attached to the possession of the nationality of that country' **or** 'rights and obligations equivalent to those'.

Whether 'equivalent' rights and obligations means approximately the same or comparable ([99]), or effectively the same, or in essence the same ([100]), has yet to be resolved.

The United Kingdom Upper Tribunal (UKUT) has held, based on the undisputed submission of the appellant summarised below, that a Tibetan exile who had been living in India before applying for international protection in the United Kingdom (UK) was not excluded from refugee status under Article 12(1)(b) QD and Article 1E Refugee Convention ([101]):

> […] the evidence produced by the appellant demonstrated that Tibetans in India do not have rights that come remotely close to those attached to possession of Indian nationality or equivalent to the same. Reliance was placed on the expert report and background reports on Tibetans in India. These included being considered as foreigners, living in a state of legal limbo, not being able to open an account without obtaining reserve bank approval, lacking civil and political rights and having limited or closed employment opportunities. Reliance was placed on the Federal Court of Canada judgment in *Tendzin Choezom* v *MCI* [2004] FC 1608. Given the current position that the appellant was in the UK as an asylum seeker with no Indian residence documents he would face major problems in the event of a return to India as a Tibetan without a registration card […] ([102]).

([98]) UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, 2009, op. cit., fn. 92, paras. 9-11.

([99]) Compare, ECtHR, Judgment of 30 June 2005, Grand Chamber, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland, application no 45036/98, paras. 149-165, concerning the test for whether protection of fundamental rights under European Community (now EU) law, as regards both the substantive guarantees offered and the mechanisms controlling their observance, is at least 'equivalent' to that which the ECHR provides. The ECtHR held that 'equivalent' means 'comparable', not 'identical', given the importance of the legitimate interest of international cooperation pursued by a Contracting Party to the ECHR in complying with legal obligations flowing from its membership of the European Community [EU] (paras. 150 and 155).

([100]) Compare, CJEU, Judgment of 18 October 2017, C-662/17, EG v Republic of Slovenia, EU:C:2018:847, concerning the derogation from the right to an effective remedy against a decision considering an application unfounded in relation to refugee status in a case where the applicant has been granted subsidiary protection status which 'offers the same rights and benefits as those offered by the refugee status under Union and national law'. The CJEU held that that derogation must be interpreted 'narrowly' and, as such, 'must be interpreted as applying only if the rights and benefits offered by subsidiary protection status, granted by the Member State concerned, are genuinely identical to those offered by refugee status under Union law and the applicable national law' (paras. 49-50). The CJEU also held that any 'ancillary rights' which derive from the rights accorded by the status concerned must be taken into account in ascertaining whether, for purposes of Article 46(2) APD (recast), the rights and benefits granted by each status of international protection are identical (paras. 60-61). Finally, the CJEU held that that condition must be assessed 'on the basis of an evaluation of the national legislation in question as a whole, and not on the basis of the particular circumstances of the applicant in question' (para. 63).

([101]) Upper Tribunal (UKUT), Judgment of 18 May 2016, TG v Secretary of State for the Home Department, [2016] UKUT 00374 (IAC), para. 32.

([102]) Upper Tribunal (UKUT), Judgment of 18 May 2016, TG v Secretary of State for the Home Department, [2016] UKUT 00374 (IAC), para. 21.

According to UNHCR, for a person to be excluded under Article 1E Refugee Convention, it is not enough that they merely enjoy better treatment than that provided for by the Refugee Convention ([103]). Rather, exclusion can only apply 'if the person – with the exception of minor divergences – **in essence enjoys the same civil, political, economic, social and cultural rights and has on the whole the same obligations as nationals**' ([104]).

([103]) UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, 2009, op. cit., fn. 92, para. 12.
([104]) UNHCR, Note on the Interpretation of Article 1E of the 1951 Convention, 2009, op. cit., fn. 92, para. 16 (emphasis added).

Part 3: Exclusion of persons considered undeserving of refugee status (Article 12(2) and (3))

3.1 Introduction

As already noted, Article 12(2) QD (recast) provides that a person is excluded from refugee status if there are serious reasons for considering that they have committed any of the crimes referred to in points (a) or (b) of that provision. They are in addition excluded if, pursuant to point (c) of that provision, there are serious reasons for considering that they have been guilty of acts contrary to the purposes and principles of the United Nations.

Article 12(2) should be read together with Article 12(3)

Article 12(2) and 12(3) QD (recast)

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.

It should be noted that the English-language version of Article 12(3) QD (recast) (2011/95/EU) uses the word 'incite', whereas the English-language version of Article 12(3) QD (2004/83/EC) uses the word 'instigate'. In the versions of those two directives in the other official languages of the EU, which are equally authentic, there appears to be no such

terminological difference between Article 12(3) QD (recast) (2011/95/EU) and Article 12(3) QD (2004/83/EC) ([105]).

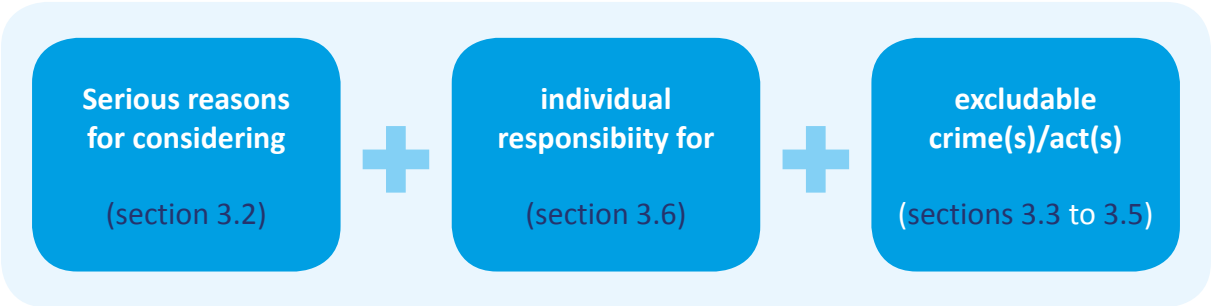
The inclusion of Article 12(3) in the QD (recast) does not mean that the grounds for exclusion from refugee status laid down in the QD (recast) are broader than those under Article 1F Refugee Convention. This is so even though the latter itself makes no mention of 'inciting' or 'otherwise participating' in the crimes or acts concerned. As is generally accepted, Article 1F Refugee Convention covers not only persons who have 'committed' those crimes or acts, but also persons who have contributed to the commission of those crimes or acts in a manner that incurs their individual responsibility ([106]).

According to the CJEU, Article 12(2) cannot be applied until the competent authority of the Member State concerned – subject to review by the national courts and tribunals – has undertaken, for each individual case:

> an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of the […] grounds for exclusion laid down by that provision ([107]).

Exclusion from refugee status under Article 12(2) can thus be conceived of as being comprised of three elements, as illustrated in Figure 4 below.

Figure 4: Elements of exclusion from refugee status under Article 12(2) QD (recast), taken together with Article 12(3) QD (recast)



3.1.1 Exclusion and terrorism

Before turning to consider the three specified grounds for exclusion under Article 12(2), it will assist to address the issue of terrorism. References to 'terrorism' in the context of the exclusion clauses must be treated with considerable care, particularly since the term 'terrorism' can have many different meanings depending on the context in which it appears.

([105]) For example, Article 12(3) of the French-language versions of both the QD and the QD (recast) provides: 'Le paragraphe 2 s'applique aux personnes qui sont **les instigatrices** des crimes ou des actes visés par ledit paragraphe, ou qui y participent de quelque autre manière' (emphasis added). On the interpretation of different language versions of EU legal provisions, see EASO, An Introduction to the Common European Asylum System for Courts and Tribunals, op. cit., fn. 9, pp. 63-64.

([106]) Opinion of Advocate General Sharpston of 31 May 2016, C-573/14, Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani, EU:C:2016:380, para. 71; Federal administrative court (Germany), Judgment of 24 November 2009, BVerwG 10 C 24.08, DE:BVerwG:2009:241109U10C24.08.0 (English summary), paras. 23 and 29; Federal administrative court (Germany), Judgment of 7 July 2011, BVerwG 10 C 27.10, DE:BVerwG:2011:070711U10C27.10.0, para. 32 (in German); Supreme Court (UK), 2010, *JS (Sri Lanka)*, op. cit., fn. 23, para. 33.

([107]) See, most recently, CJEU, 2018, *Ahmed,* op. cit., fn. 14, para. 48. The CJEU was only referring to points (b) and (c) of Article 12(2) QD (recast), but clearly the same applies to point (a) of that provision.

Terrorism is not as such mentioned as a ground for exclusion in the QD (recast). It is only referred to in recitals 31 and 37. Therefore, it is not the label 'terrorism' as such which must be taken into account but the nature of the relevant acts. Acts of a terrorist nature and other activities connected with terrorism are, however, capable of falling within any of the grounds for exclusion laid down in Article 12(2) and Article 17(1) QD (recast). Since terrorism can be relevant for the application of Article 12(2), (a), (b) and (c) (as well as to Article 17), it is important to address this before going into more detail regarding Article 12(2).

Examples of exclusion based on acts considered to be of a terrorist nature include the following.

— **'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population'** ([108]) are a war crime, if committed in the context of and associated with an armed conflict. As such, they fall within the scope of Article 12(2)(a) QD (recast) (see Section 3.3.3).

— According to the CJEU, **'terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of [Article 12(2)(b) QD]'** ([109]) (see Section 3.4.1.2).

— The CJEU has held that it follows from the UN Security Council resolutions relating to measures combating terrorism ([110]) that **'international terrorist acts are, generally speaking and irrespective of any state participation, contrary to the purposes and principles of the United Nations'** ([111]). Terrorist acts 'with an international dimension' ([112]) thus fall within the scope of Article 12(2)(c) QD (recast) (see Sections 3.5 and 3.5.2.1).

— The CJEU has held that it also follows from the UN Security Council resolutions relating to measures combating terrorism that not only 'the commission of [international] terrorist acts as specified in the Security Council resolutions' ([113]) constitutes acts contrary to the purposes and principles of the United Nations, but so does **'the financing, planning and preparation of, as well as any other form of support for, acts of international terrorism'** ([114]) (see Section 3.5).

The examples above clearly also apply, *mutatis mutandis*, to the grounds for exclusion from eligibility for subsidiary protection laid down in Article 17(1)(a) to (c) QD (recast). Additionally, even if the person concerned does not fall within any of those grounds for exclusion, there may still be serious reasons related to terrorism that require their exclusion from eligibility for subsidiary protection under Article 17(1)(d) QD (recast). This provision concerns situations 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' (see Section 4.2.5).

([108]) Such acts are prohibited by Article 51(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978); and Article 13(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (entry into force: 7 December 1978) (emphasis added).
([109]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 81; CJEU, 2015, *HT*, op. cit., fn. 17, para. 84 (emphasis added).
([110]) A full list of the UNSC resolutions relating to measures combating terrorism is maintained by the Counter-Terrorism Committee of the UN Security Council are available online.
([111]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 83; CJEU, 2015, *HT*, op. cit., fn. 17, para. 85 (emphasis added).
([112]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 84.
([113]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 48 (emphasis added).
([114]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 46.

It is important to note, however, that while, for example, a number of international conventions and UN Security Council resolutions have been adopted that require states to combat specific terrorist acts or activities (see below), as yet **there is no internationally agreed definition of 'terrorism' or of a 'terrorist act'**. **Nor has the CJEU sought to define those concepts for purposes of the interpretation and application of the exclusion clauses of the QD (recast)** ([115]).

Nevertheless, there are treaty provisions at the international and European level, which come close to providing such a definition.

The UN has adopted 19 conventions and protocols, which are considered to relate to terrorism ([116]). Although none of them define 'terrorism', one such convention – the International Convention for the Suppression of the Financing of Terrorism ([117]) – provides in Article 2 that an offence is committed if, inter alia, the person concerned:

> by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out … **[a]ny … act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act** ([118]).

The UNSC does not have legislative competence and is therefore not able to issue a definition of terrorism. Nonetheless, in its Resolution 1566 (2004) ([119]), it sought to clarify how 'acts of terrorism' should be understood. Considering that acts of terrorism constitute one of the most serious threats to peace and security, the UNSC recalled that:

> […] criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *call[ed] upon* all states to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature; *Calls* upon all states to become party, as a matter of urgency, to the relevant international conventions and protocols whether or not they are a party to regional conventions on the matter ([120]).

At the European level, the EU and the Council of Europe have adopted numerous instruments for combating terrorism ([121]). Article 1(1) of the Council of Europe Convention on the

([115]) Note, for example, Opinion of Advocate General Sharpston, 2016, C-573/14, *Lounani*, op. cit., fn. 106, para. 40.
([116]) See Article 2(1)(a) and the annex of International Convention for the Suppression of the Financing of Terrorism, 3178 UNTS 197, 9 December 1999 (entry into force: 10 April 2002); UNGA, Measures to Eliminate International Terrorism (16 January 1997), A/RES/51/210, para. 6; UNGA, Measures to eliminate international terrorism (14 December 2012), A/RES/67/99, paras. 12 and 13; list maintained by the Counter-Terrorism Committee of the UN Security Council at (https://www.un.org/sc/ctc/resources/international-legal-instruments). See also Appendix B: Selected instruments relating to terrorism.
([117]) International Convention for the Suppression of the Financing of Terrorism, op. cit., fn. 116.
([118]) International Convention for the Suppression of the Financing of Terrorism, op. cit., fn. 116, Article 2(1)(b) (emphasis added).
([119]) UN Security Council, Resolution 1566(2004) (8 October 2004) UN Doc S/RES/1566(2004).
([120]) UN Security Council, Resolution 1566(2004) (8 October 2004) UN Doc S/RES/1566(2004), paras. 3 and 4, emphases in original.
([121]) See Appendix B: Selected instruments relating to terrorism.

Prevention of Terrorism ([122]), to which the EU is a party ([123]), defines as a 'terrorist offence' any of the offences defined in 11 of the UN treaties relating to terrorism, including the offences defined in the International Convention for the Suppression of the Financing of Terrorism. At the EU level, Directive (EU) 2017/541 on combating terrorism ([124]) establishes minimum rules concerning 'the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, as well as measures of protection of, and support and assistance to, victims of terrorism' ([125]). Article 3 of that directive defines 10 acts that constitute 'terrorist offences' **when committed with any one of the following aims:**

1. **seriously intimidating a population;**
2. **unduly compelling a government or an international organisation to perform or abstain from performing any act;**
3. **seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.**

The directive also defines the following offences:

— offences relating to a terrorist group (Article 4);

— public provocation to commit a terrorist offence (Article 5);

— recruitment for terrorism (Article 6);

— providing training for terrorism (Article 7);

— receiving training for terrorism (Article 8);

— travelling for the purpose of terrorism (Article 9);

— organising or otherwise facilitating travelling for the purpose of terrorism (Article 10);

— terrorist financing (Article 11);

— other offences related to terrorist activities (Article 12).

Although the CJEU has not yet ruled on Directive (EU) 2017/541, it did rule on its predecessor, Council Framework Decision 2002/475/JHA on combating terrorism ([126]). In *Lounani*, the CJEU rejected the idea that the concept of 'acts contrary to the purposes and principles of the United Nations' within the meaning of Article 12(2)(c) QD and Article 1F(c) Refugee Convention applies 'solely to terrorist offences specified in Article 1(1) of Framework Decision 2002/475' ([127]).

([122]) Council of Europe, Convention on the Prevention of Terrorism, ETS No 196, 16 May 2005 (entry into force: 1 June 2007).
([123]) Council Decision (EU) 2018/889 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism [2018] OJL 159/1.
([124]) Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6.
([125]) Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6, Article 1.
([126]) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164/3, as amended by Council Framework Decision 2008/919/JHA of 28 November 2008, [2008] OJ L 330/21.
([127]) CJEU, 2017, *Lounani*, op. cit., fn. 28, paras. 48-49, 51-53.

In *B and D*, the CJEU held that **a criminal conviction for the intentional act of participating in the activities of a terrorist group, within the meaning of the framework decision, does not necessarily and automatically mean that the person concerned must be excluded from refugee status** ([128]).

The same would clearly apply *mutatis mutandis* as regards the directive on combating terrorism.

Section 3.6 of this judicial analysis discusses in detail the criteria for assessing whether an applicant for international protection has incurred 'individual responsibility' for crimes or acts within the scope of the exclusion clauses, including where they have been a member of, or have participated in the activities of, a terrorist organisation.

Finally, it should be noted that another EU instrument relating to terrorism is Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism ([129]). That common position falls under the EU's common foreign and security policy and its purpose is the implementation of UNSC Resolution 1373 (2001) ([130]), adopted following the terrorist attacks carried out in the United States on 11 September 2001. The common position 'mainly [concerns] the prevention of terrorist acts by means of the adoption of measures for the freezing of funds in order to hinder acts preparatory to such acts, such as the financing of persons or entities liable to carry out terrorist acts' ([131]). Included in the annex of the common position is a list of persons, groups and entities involved in terrorist acts, which is reviewed and as necessary updated at least every six months, most recently by Council Decision (CFSP) 2020/20 of 13 January 2020 ([132]).

In *B and D*, the CJEU held:

> [T]he inclusion of an organisation on a list such as that which forms the Annex to Common Position 2001/931 makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor which the competent authority must take into account when determining, initially, whether that group has committed acts falling within the scope of Article 12(2)(b) or (c) [QD].

In *HT* the CJEU, when interpreting Article 24(1) QD, stated that:

> The inclusion of an organisation on a list annexed to Common Position 2001/931 is […] a strong indication that it either is a terrorist organisation or is suspected to be such an organisation. Such a circumstance must thus necessarily be taken into account by the competent national authorities when they must, as a first step, determine whether the organisation in question has committed terrorist acts ([133]).

([128]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 93. See also CJEU, 2017, *Lounani*, op. cit., fn. 28, paras. 62-78.

([129]) Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, [2001] OJ L 344/93, amended by: Council Decision (CFSP) 2016/1711 of 27 September 2016, OJ LI 259/3; and Council Decision (CFSP) 2017/2073 of 13 November 2017, OL LI 295/59, amended by (see consolidated version): Council Decision (CFSP) 2016/1711 of 27 September 2016, OJ LI 259/3; Council Decision (CFSP) 2017/2073 of 13 November 2017, OL LI 295/59.

([130]) UN Security Council, Resolution 1373(2001) (28 September 2001) UN Doc S/RES/1373(2001).

([131]) CJEU, Judgment of 14 March 2017, Grand Chamber, C-158/14, A, B, C, D v Minister van Buitenlandse Zaken, EU:C:2017:202, para. 83.

([132]) Council Decision (CFSP) 2020/20 of 13 January 2020 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2019/1341.

([133]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 90. CJEU, 2015, *HT*, op. cit., fn. 17, para. 83, regarding the interpretation and application of Article 24(1) QD: 'The inclusion of an organisation on a list annexed to Common Position 2001/931 is […] a strong indication that it either is a terrorist organisation or is suspected to be such an organisation. Such a circumstance must thus necessarily be taken into account by the competent national authorities when they must, as a first step, determine whether the organisation in question has committed terrorist acts.'

A group's inclusion on the list does not, however, necessarily mean that it has committed acts falling within the scope of Article 12(2)(b) or (c) QD. As the CJEU notes, the circumstances under which such lists are drawn up 'cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status' ([134]). Moreover, even if it is established that the group has committed acts falling within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) QD, the mere fact that a person has been a member of that group does not automatically mean that they must be excluded from refugee status. This is because, as the CJEU has ruled, '[t]here is no direct relationship between Common Position 2001/931 and [the QD] in terms of the aims pursued' ([135]). Rather, the exclusion from refugee status of such a person is conditional upon:

> an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way ([136]).

In other words, if an applicant for refugee status has been a member of a group included on a list such as that annexed to the common position, it does not automatically follow that there are serious reasons for considering that they have incurred a share of the responsibility for the acts committed by the group while they were a member. Nor, even, does it necessarily follow that the acts committed by the group include serious non-political crimes or acts contrary to the purposes and principles of the United Nations. The group's inclusion on such a list, however, does make it possible to establish the group's 'terrorist nature'. This is then a factor that must be taken into account in determining, initially, whether the group has committed serious non-political crimes or acts contrary to the purposes and principles of the United Nations.

It can be concluded that an act of a terrorist nature may fall within various grounds for exclusion.

These are listed below in Table 5.

([134]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 91.
([135]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 89; CJEU, 2015, *HT*, op. cit., fn. 17, para. 88.
([136]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 94.

Table 5: Grounds for exclusion within which acts of a terrorist nature may fall ([137])

An act of a terrorist nature could be qualified as follows	
Crime against peace	Acts concerned with the planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
War crime	Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are a war crime, if committed in the context of and associated with an armed conflict of either international or non-international character and if the perpetrator was aware of the factual circumstances that established the existence of the armed conflict.
Crime against humanity	An inhumane act constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, pursuant to or in furtherance of a state or organisational policy; and when there is a nexus between the individual act and the attack and the perpetrator has knowledge of this nexus and the attack.
Serious non-political crime	Terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of Article 12(2)(b) QD. The geographic and temporal criteria also need to be met.
Acts contrary to the purposes and principles of the UN	International terrorist acts are, generally speaking and irrespective of any state participation, contrary to the purposes and principles of the United Nations. Terrorist acts with an international dimension thus generally speaking fall within the scope of Article 12(2)(c) QD (recast). Not only does the commission of [international] terrorist acts as specified in the UNSC resolutions constitute acts contrary to the purposes and principles of the United Nations, but so does the financing, planning and preparation of, as well as any other form of support for, acts of international terrorism.
Danger to the community or security of the Member State	If the acts fail to meet the criteria for the abovementioned crimes and acts, the applicant could be excluded from subsidiary protection if he/she is found to constitute a danger to the community or to the security of the state in which he/she is present.

3.1.2 Distinction between exclusion from refugee status and prosecution and punishment for a criminal offence

As already noted ([138]), the CJEU has stated that the purpose of the grounds for exclusion laid down in Article 12(2) QD (recast) is to exclude from refugee status individuals who are deemed to be undeserving of the protection which refugee status entails, and to ensure that the granting of refugee status does not enable the perpetrators of certain serious crimes to escape criminal liability ([139]). Similarly, exclusion from refugee status is intended as a 'penalty' for acts committed in the past ([140]) and to 'maintain the credibility of the protection system' provided for in the QD (recast) in accordance with the Refugee Convention ([141]).

At the same time, it should be recalled that the CJEU has consistently held that the interpretation of a provision of EU law 'must take into account, inter alia, the context of that provision and the objective pursued by the rules of which it is part' ([142]). Accordingly, even though Article 12(2) refers expressly to 'crimes', it is important not to lose sight of the following points.

([137]) Table based on EASO, *Practical Guide: Exclusion*, 2017, p. 28, amended to align with the analysis in this judicial analysis.
([138]) See Section 1.3.1.
([139]) CJEU, 2018, *K and HF*, op. cit. fn. 10, para. 50. See also CJEU, 2010, *B and D,* op. cit., fn. 9, para. 104.
([140]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 103.
([141]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 115.
([142]) See, for example, CJEU, 2018, *Ahmed,* op. cit., fn. 14, para. 36.

(a) The objective of the QD (recast) is different from that of legislative measures to prevent, suppress and punish crime, and is **essentially humanitarian** ([143]).

(b) Procedures to determine international protection status are subject to **very different rules from those applying in a criminal trial**. In particular, the means and procedures for establishing the facts of claims for refugee status are very different than those for establishing the facts in criminal proceedings (see Part 5).

(c) A decision to exclude an individual from refugee status **does not entail a finding of criminal guilt** and is based on a **different standard of proof** (see Section 3.2).

(d) Exclusion from refugee status is **not a criminal penalty**.

3.1.3 Proportionality – why inappropriate

In *B and D*, the CJEU held that exclusion under Article 12(2) is subject only to one condition, namely that there be serious reasons for considering that the acts committed by the person concerned fall within one of the grounds for exclusion laid down in that provision. The CJEU stated:

> [I]t should be borne in mind that it is clear from the wording of Article 12(2) of [the QD] that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article 2(c) [now Article 2(d) QD (recast)] expressly makes the status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article 12. Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of [the QD] […] is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status […]. **Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot […] be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed** ([144]).

The CJEU identified two elements to this:

— seriousness of the acts committed; and

— attribution of individual responsibility.

The first element – seriousness of the acts committed – must be of such a degree that the person concerned cannot legitimately claim protection. The second element – individual

([143]) See CJEU, 2010, *B and D,* op. cit., fn. 9, paras. 89 and 93, regarding the application of Article 12(2)(b) and (c) QD in the context of EU measures to combat terrorism. See also in that regard the opinion of Advocate General Sharpston, 2016, *Lounani*, op. cit., fn. 106, para. 55 and *mutatis mutandis* CJEU, Judgment of 30 January 2014, C-285/12, Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides, EU:C:2014:39, Para. 25.

([144]) CJEU, 2010, *B and D,* op. cit., fn. 9, paras. 107-109 (emphasis added).

responsibility – must be assessed in the light of both objective and subjective criteria ([145]). Once this condition is satisfied, **exclusion is not subject to an additional condition, namely an assessment of proportionality in relation to the particular case** ([146]).

It should be stressed that the ruling above only precludes the application of a proportionality test in which the seriousness of the acts committed is weighed against the consequences of exclusion.

Finally, it should be noted that, as already mentioned, exclusion from refugee status under Article 12(2) is **not dependent on 'the existence of a present danger to the host Member State'** ([147]). Nor does it imply the adoption of a position on **'the separate question of whether [the person concerned] can be deported to his country of origin'** ([148]). This question is addressed in Section 1.6.

3.1.4 Acts falling under more than one ground for exclusion from refugee status

A single excludable act may come within more than one of the grounds for exclusion from refugee status laid down in in Article 12(2) QD (recast) ([149]).

One example of such overlap that has already been mentioned above is acts of terrorism ([150]). Another example, to name just one, is rape, which, in addition to being capable of constituting a serious crime within the meaning of Article 12(2)(b) is also capable of constituting a war crime or a crime against humanity within the meaning of Article 12(2)(a). But more elements are required to establish that a specific act of rape is a war crime, or a crime against humanity, than to establish that it is a common crime. To determine that an act of rape is a war crime, it needs to be established, inter alia, that the act took place in the context of, and was associated with, an international or non-international armed conflict (see Section 3.3.3.1). In line with a definition in the international instruments in the sense of Article 12 (2)(a) QD (recast), to determine that an act of rape is a crime against humanity, it needs to be established, inter alia, that the act was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (see Section 3.3.4.1).

Members of courts and tribunals should keep in mind that, if it is determined that one of the grounds for exclusion from refugee status is applicable in an individual case, there is no requirement under the QD (recast) to determine whether any of the other grounds for exclusion from refugee status may also be applicable in that case.

([145]) CJEU, 2010, *B and D,* op. cit., fn. 9, paras. 96, 99 and 108-109.
([146]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 111.
([147]) CJEU, 2018, *K and HF*, op. cit. fn. 8, para. 50.
([148]) CJEU, 2010, B and D, op. cit., fn. 9, para. 110.
([149]) Supreme Court (UK), Judgment of 21 November 2012, Al-Sirri v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department, [2012] UKSC 54, para. 12.
([150]) See Section 3.1.1.

3.2 Serious reasons for considering

The requirement for exclusion under Article 12(2) QD (recast) that there be 'serious reasons for considering' that the person concerned is individually responsible for an excludable crime or act establishes the **standard of proof** for exclusion from refugee status ([151]). It must therefore be established whether there is **sufficient evidence** for attributing individual responsibility to the person concerned for acts falling within the scope of the grounds for exclusion laid down in points (a) to (c) of Article 12(2). (See Sections 3.6 and 5.3.)

The evidential standard of proof for exclusion from refugee status under Article 12(2) QD (recast) is not that of *in dubio pro reo* as in national and international criminal law ([152]). Rather, it is something different, namely **'serious reasons for considering'** that the person concerned is individually responsible for an excludable crime or act ([153]).

The CJEU held in *Lounani* that:

> […] participation in the activities of a terrorist group can cover a wide range of conduct, of varying degrees of seriousness. In those circumstances, the competent authority of the Member State concerned may apply Article 12(2)(c) of [the QD] only after undertaking, for each individual case, an assessment of the specific facts brought to its attention with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the qualifying conditions for refugee status, fall within the scope of that particular exclusion […] ([154]).

In *Ahmed*, the CJEU held that 'any decision to exclude a person from refugee status must be preceded by a full investigation into all the circumstances of his individual case and cannot be taken automatically'. The CJEU then held the same regarding exclusion from subsidiary protection status. It found that a crime could not automatically be considered a 'serious crime' within the meaning of the ground for exclusion laid down in Article 17(1)(b) QD (recast) on the basis that it attracted a penalty of at least 5 years' imprisonment. since there must be 'serious reasons' for taking the view that the person concerned has committed a serious crime ([155]).

In the opinion of UNHCR:

> The standard of proof set out in Article 1F [Refugee Convention] – 'serious reasons for considering' – is not a familiar concept in domestic legal systems. State practice is not consistent on this matter but does, at least, make it clear that the criminal standard of proof […] need not be met. […] Nevertheless, in order to ensure that Article 1F

([151]) See CJEU, 2010, B and D, op. cit., fn. 9, paras. 95 and 99.

([152]) For example, in international criminal law and in many national jurisdictions the standard of proof is 'beyond reasonable doubt'. In EU criminal law, note Article 6(2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, [2016] OJ L 65/1, which provides: 'Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.'

([153]) See, for example, Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, para. 75; Council of State (France), Judgment of 18 January 2016, *M X*, application no 255091, FR:CESSR:2006:255091.20060118 (in French); Federal administrative court (Germany), 2009, BVerwG 10 C 24.08, op. cit., fn. 106, para. 35; Supreme administrative court (Finland), Judgment of 18 February 2014, 497 KHO:2014:35 (in Finnish). The latter judgment concerns exclusion from subsidiary protection status under Article 17(1)(b) QD, not exclusion from refugee status under Article 12(2) QD, but it interprets Article 17(1)(b) QD on the basis of Article 1F(b) of the Refugee Convention, referring in that regard to, inter alia, CJEU, 2010, *B and D*, op. cit., fn. 9, concerning the interpretation of Article 12(2)(b) and (c) QD.

([154]) CJEU, 2017, *Lounani*, op. cit., fn. 28, paras. 71-72.

([155]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, para. 49.

> is applied in a manner consistent with the overall humanitarian objective of the [Refugee Convention], the standard of proof should be high enough to ensure that bona fide refugees are not excluded erroneously. Hence, the 'balance of probabilities' is too low a threshold. As found in civil law jurisdictions, serious reasons from which arise a substantial suspicion are at least what is necessary; simple suspicions are not sufficient. […] It would appear that clear and credible evidence of involvement in excludable acts is required to satisfy the 'serious reasons' test in Article 1F ([156]).

The UK supreme court has held that 'there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character' ([157]). It has further held the following.

> (1) 'Serious reasons' is stronger than 'reasonable grounds'.
>
> (2) The evidence from which those reasons are derived must be 'clear and credible' or 'strong'.
>
> (3) 'Considering' is stronger than 'suspecting'. In our view it is also stronger than 'believing'. It requires the considered judgment of the decision-maker.
>
> (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.
>
> (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has ***not*** committed the crimes in question or has ***not*** been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the convention (and the directive) in the particular case ([158]).

The German *Bundesverwaltungsgericht* (Federal Administrative Court) has stated the following.

> A standard of proof such as is called for in criminal law is not necessary […]. Rather, 'serious' indicates that the evidence of the commission of the crimes referred to in Section 3(2)(1) of the Asylum Procedure Act [Article 1F(a) Refugee Convention] must be of substantial weight. As a rule, reasons are 'serious' when there is clear and credible evidence that such crimes have been committed ([159]).

Thus, the evidential standard of proof for exclusion from refugee status is lower than that required for a finding of guilt by a criminal court. As a result, the fact that a person has been

([156]) UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, paras. 107 and 108.
([157]) Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, para. 16.
([158]) Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, para. 75 (emphasis in original).
([159]) Federal administrative court (Germany), Judgment of 31 March 2011, BVerwG 10 C 2.10, DE:BVerwG:2011:310311U10C2.10.0, para. 26, unofficial translation into English made for purposes of this judicial analysis.

acquitted by a criminal court of involvement in a particular crime does not necessarily mean that that person cannot be excluded from refugee status in connection with the same alleged crime. For example, in 2014 the Dutch *Raad van state* (council of state) upheld the exclusion from refugee status under Article 1F Refugee Convention of a national of the Democratic Republic of the Congo who had previously been acquitted of war crimes and crimes against humanity by the International Criminal Court (ICC) ([160]). In similar vein, the French Conseil d'État (council of state) held that the fact that the person had been acquitted by the International Criminal Tribunal for Rwanda (ICTR) does not preclude the French authorities from excluding him from international protection ([161]).

There may also be other reasons why an acquittal does not necessarily mean that the person concerned is not excluded from refugee status. For example, the UK upper tribunal held in *AAS and Others*:

> We readily accept that in most cases an acquittal will provide a compelling answer to the question of whether there are serious reasons. This would usually be so where a jury had returned a verdict of not guilty on counts based on offending that would other [sic – presumably the word should be 'otherwise'] give rise to exclusion. However, we agree […] that there will be cases where an acquittal arises for procedural, technical or other reasons as was the case for the first eight appellants. KU [the ninth appellant, in respect of whom evidence had not been offered by the prosecution because he was not fit to enter a plea] is another example of where an acquittal may not provide a complete answer to the enquiry ([162]).

3.3 Crime against peace, war crime or crime against humanity (Article 12(2)(a))

The ground for exclusion laid down in Article 12(2)(a) QD (recast) and Article 1F(a) Refugee Convention is confined to crimes against peace, war crimes and crimes against humanity **'as defined in the international instruments drawn up to make provision in respect of such crimes'**. Decision-makers must therefore consult those instruments and apply the definitions therein of the crimes to which Article 12(2)(a) QD (recast) refers, even though those instruments are not part of the EU legal order ([163]). Additionally, the jurisprudence of the ICC and other international criminal tribunals on the interpretation of the definitions of the crimes to which Article 12(2)(a) refers represents an authoritative resource for decision-makers in the absence of any CJEU rulings on these definitions. The present section therefore refers extensively not only to the international instruments, which decision-makers must consult when applying Article 12(2)(a), but also to associated international jurisprudence.

([160]) Council of state (the Netherlands), Decision of 15 October 2014, 201405219/1/V1 (in Dutch), NL:RVS:2014:3833. But note that the council of state based its ruling not only on the fact that the standard of proof for exclusion from refugee status is lower than that for a finding of criminal guilt, but also on the fact that the excludable crimes were committed over a broad period of time, whereas the indictment before the ICC concerned crimes committed on one single day. See also the Judgment of the supreme administrative court (Czechia), Judgment of 31 March 2011, A.S. v Ministry of Interior (in Czech) 4 Azs 60/2007-136, p. 18, which considered the standard of 'serious grounds for considering' to be limited by the minimal level of approximately 50 % probability. To meet this standard of proof, clear, persuasive and credible evidence must be available, not only assumptions. Such strong evidence may be based on the confession of the applicant, testimony of other persons, but is not conditional upon the criminal conviction of the applicant. On the contrary, the mere fact of an extradition request or criminal proceedings against the applicant in the country of origin is per se not sufficient to meet this standard.

([161]) See Conseil d'État (Council of State, France), Judgment of 28 February 2019, *M. A.* (in French), no 414821 A, ECLI:FR:CECHR:2019:414821.20190228, para. 7.

([162]) UKUT, Judgment of 14 May 2019, AAS and Others v Secretary of State for the Home Department, AA/08375/2011, para. 77.

([163]) Contrast CJEU, 2014, *Diakité*, op. cit., fn. 143, paras. 20-21 and 23-27, according to which the definitions of 'armed conflict' in international humanitarian law – including Common Article 3 of the four Geneva Conventions and Article 1(1) of Protocol II of 8 June 1977 – should **not** be used to interpret the term 'internal armed conflict' in Article 15(c) QD (recast) since 'international humanitarian law, on the one hand, and the subsidiary protection regime introduced by [the QD], on the other, pursue different aims and establish quite distinct protection mechanisms.'

It should be noted that sometimes the definitions of the crimes within the scope of Article 12(2)(a) use terms that are also used in the inclusion clauses of the QD (recast), such as 'persecution' ([164]) and 'armed conflict' ([165]). Bearing in mind the importance placed by the CJEU on interpreting provisions of EU law within their context, terms used in the definitions of crimes within the scope of the exclusion clause in Article 12(2)(a) do not necessarily have the same meaning as in the inclusion clauses.

3.3.1 International instruments defining the crimes enumerated in Article 12(2)(a)

When the Refugee Convention was adopted in 1951, the international instruments that had been drawn up to make provision for the crimes to which Article 12(2)(a) QD (recast) and Article 1F(a) Refugee Convention refer were the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945 ('London Agreement') ([166]), and the four Geneva Conventions of 12 August 1949 ([167]). See Table 6 below.

Table 6: The Geneva Conventions of 12 August 1949

I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
III	Geneva Convention relative to the Treatment of Prisoners of War
IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War

In recent decades, further instruments have been adopted which make provision for the crimes to which Article 12(2)(a) QD (recast) refers. In 1977, Additional Protocols I and II ([168]) relating to the victims of (non)-international armed conflicts were adopted. Most recently, in 1998 the Rome Statute of the International Criminal Court ([169]) ('Rome Statute'), was adopted, amended in 2010 ([170]) and then amended again in 2017 ([171]). Other recent international instruments that are applicable to Article 12(2)(a) have been adopted in parallel to the Rome Statute. These are the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ([172]), which was adopted

([164]) Compare, for example, Article 9 QD (recast) and Article 7(h) of the Rome Statute, 2187 UNTS 3, 17 July 1998 (entry into force: 1 July 2002).
([165]) Compare, for example, Article 15(c) QD (recast) and Article 8 of the Rome Statute, op. cit., fn. 164.
([166]) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945, 82 UNTS 279, 8 August 1945 ('London Agreement') (entry into force: 8 August 1945).
([167]) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, 12 August 1949 (entry into force: 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, 12 August 1949 (entry into force: 21 October 1950); Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949 (entry into force: 21 October 1950); Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950).
([168]) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (entry into force: 7 December 1978).
([169]) Rome Statute, op. cit., fn. 164.
([170]) Amendment to Article 8 of the Rome Statute of the International Criminal Court, 2868 UNTS 195, 10 June 2010 (entry into force: 26 September 2012 in regard to San Marino, 1 year after the deposit of its instrument of ratification, and, in regard to subsequent state parties, 1 year after the deposit of their instruments of acceptance or ratification). Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, 2922 UNTS 1, 11 June 2010 (entry into force: 8 May 2013 for Liechtenstein, 1 year after the deposit of its instrument of ratification, and, in regard to subsequent state parties, 1 year after the deposit of their instruments of acceptance or ratification).
([171]) Assembly of the States Parties to the Rome Statute, Amendments to Article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/16/Res.4, 14 December 2017 (entry into force: 2 April 2020 in regard to Luxembourg, the first state Party, 1 year after the deposit of its instrument of ratification).
([172]) 2253 UNTS 172, 26 March 1999 (entry into force: 9 March 2004). See Article 15, which defines five war crimes.

in 1999, and the Statute of the Special Court for Sierra Leone ([173]) (SCSL), which was adopted in 2002.

The CJEU is yet to interpret Article 12(2)(a) in either the QD or QD (recast) ([174]). Nevertheless, it is broadly agreed that the Rome Statute should form the starting point for interpreting and applying that provision ([175]), since it contains both the most recent and by far the most comprehensive (albeit still not complete ([176])) codification of international criminal law.

The provisions of the Rome Statute can, however, only be properly understood by examining their historical antecedents, to which the ICC itself frequently refers in its jurisprudence. Moreover, the Rome Statute also refers expressly to certain of those antecedents – namely, the Geneva Conventions of 12 August 1949 – and must be interpreted accordingly. The most significant antecedents of the Rome Statute are therefore set out in Appendix D: Antecedents to the Rome Statute. The Rome Statute is itself discussed in Section 3.3.1.1 and the crimes to which Article 12(2)(a) QD (recast) refers are then discussed individually in Sections 3.3.2, 3.3.3 and 3.3.4.

This judicial analysis can only provide a brief introduction to the crimes listed in Article 12(2)(a) QD (recast). The reader may therefore wish to consult some of the standard treatises on international criminal law for further details ([177]).

3.3.1.1 Rome Statute

The International Military Tribunal (IMT), the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were all established as temporary tribunals to address crimes that had been committed within a particular geographical area and/or context in the past, not to address crimes that might be committed anywhere in future. The ICC, on the other hand, was established as a permanent international criminal court with jurisdiction with respect to crimes committed after the date of entry into force of its statute ([178]). For the first 60 state parties, which included 23 Member States, that date was 1 July 2002. The remaining five Member States had all ratified the Rome Statute by 21 July 2009 ([179]).

([173]) Statute of the Special Court for Sierra Leone – Annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 UNTS 137, 16 January 2002 (entry into force: 12 April 2002). The statute defines the jurisdiction of the Special Court for Sierra Leone (SCSL) for serious crimes against civilians and UN peacekeepers that were committed after 30 November 1996 during the civil war in Sierra Leone, namely crimes against humanity (Article 2), war crimes (Article 3 and Article 4) and various crimes under Sierra Leonean law (Article 5). In 2013, the SCSL was closed and its residual functions were transferred to the Residual Special Court for Sierra Leone (RSCSL): see Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone, 2871 UNTS 333, 29 July 2010 New York, 11 August 2010 Freetown (entry into force: 2 October 2012).

([174]) In C-472/13, the CJEU was, however, asked to interpret Article 9(2)(e) QD, which expressly refers to Article 12(2) QD. Although the CJEU did not interpret Article 12(2)(a) in its Judgment of 26 February 2015, Advocate General Sharpston briefly reviewed that provision in her opinion of 11 November 2014, C-472/13, Andre Lawrence Shepherd v Bundesrepublik Deutschland, EU:C:2014:2360, paras. 41-43.

([175]) See, for example, Supreme court (UK), 2010, *JS (Sri Lanka)*, op. cit., fn. 23, para. 8; Federal administrative court (Germany), 2009, BVerwG 10 C 24.08, op. cit., fn. 106, para. 31; National court of asylum law (France), Judgment of 26 February 2015, *M K.*, No 09018932 C+, which refers to the IMT Charter and Rome Statute as being of equal importance (note that the judgment concerns the ground for exclusion from subsidiary protection laid down in Article 17(1)(a) QD (recast) but interprets that ground on the basis of Article 1F(a) of the Refugee Convention, as evidenced by the reference in the judgment to UNHCR's guidance on Article 1F of the Refugee Convention); UNHCR, Background Note on the Application of the Exclusion Clauses, op. cit., fn. 156, para. 25, but cautioning that the Rome Statute should not be referred to exclusively.

([176]) See Section 3.3.3.

([177]) See, for example, G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn., OUP, 2014); W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., OUP, 2016); O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., C.H. Beck, Hart, Nomos, 2016); A. Cassese et al., *Cassese's International Criminal Law* (3rd edn., OUP, 2013) and also Appendix G: Select bibliography, Publications.

([178]) Rome Statute, op. cit., fn. 164, Article 11. For more on the antecedents to the Rome Statute, see Appendix D: Antecedents to the Rome Statute.

([179]) The five Member States that ratified the Rome Statute after 1 July 2002 were Greece (1 August 2002), Latvia (1 September 2002), Malta (1 February 2003), Lithuania (1 August 2003) and Czechia (21 July 2009). See UNTS, Database of Multilateral Treaties Deposited with the Secretary-General, Rome Statute of the International Criminal Court. For those states the ICC has jurisdiction only for the crimes committed after the date the statute became effective for such a state unless that state declared that it accepts ICC's jurisdiction from the date of 1 July 2002.

The crimes defined in the Rome Statute as coming within the ICC's jurisdiction are **genocide** (Article 6), **crimes against humanity** (Article 7), **war crimes** (Article 8) and the **crime of aggression** (Article 8 *bis*). The crime of aggression was not defined until 2010 ([180]), when the Rome Statute was first amended and the ICC's jurisdiction over that crime was only activated as of 17 July 2018 ([181]). As of 1 December 2019, nine Member States ([182]) had not ratified the amendment defining that crime. Those Member States, and a tenth Member State ([183]), had also not ratified the other amendment of 2010 to the Rome Statute, which defined three additional war crimes ([184]). The amendment to the Rome Statute in 2017, which defined three further war crimes ([185]), had as of 1 December 2019 been ratified by only two Member States ([186]), which were also the only two state parties as of that date.

Article 9 Rome Statute provides that *Elements of Crimes* are to assist the ICC in the interpretation and application of the definitions of those crimes ([187]). The *Elements of Crimes* ([188]) were adopted by the Assembly of States Parties to the Rome Statute by consensus in 2010 ([189]).

Article 21(1) of the Rome Statute provides that the law to be applied by the ICC is as follows.

Article 21(1), Rome Statute

The court shall apply:

(a) in the first place, this statute, elements of crimes and its rules of procedure and evidence;

(b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this statute and with international law and internationally recognized norms and standards.

The prosecution of a case before the ICC is subject to a number of admissibility criteria. These ensure that the court's jurisdiction over the crimes defined in the Rome Statute is complementary to that of criminal national jurisdictions ([190]), that the person concerned

([180]) Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, op. cit., fn. 170.
([181]) Assembly of the States Parties to the Rome Statute, Activation of the jurisdiction of the Court over the crime of aggression, ICC-ASP/16/Res.5, 14 December 2017 (activation of jurisdiction: 17 July 2018).
([182]) Bulgaria, Denmark, Greece, France, Italy, Hungary, Romania, Sweden and the United Kingdom. See UNTS, Database of Multilateral Treaties Deposited with the Secretary-General, Amendments on the crime of aggression to the Rome Statute of the International Criminal Court.
([183]) The 10th Member State was Ireland. See UNTS, Database of Multilateral Treaties Deposited with the Secretary-General, Amendment to Article 8 of the Rome Statute of the International Criminal Court.
([184]) Amendment to Article 8 of the Rome Statute of the International Criminal Court, op. cit., fn. 170.
([185]) Amendments to Article 8 of the Rome Statute of the International Criminal Court, op. cit., fn. 171.
([186]) UNTS, Database of Multilateral Treaties Deposited with the Secretary-General, Amendment to Article 8 of the Rome Statute of the International Criminal Court (Weapons which use microbial or other biological agents, or toxins).
([187]) See also Rome Statute, op. cit., fn. 164, Article 21 ('Applicable law'): 'The Court shall apply: (a) In the first place, this Statute, elements of crimes and its Rules of Procedure and Evidence; […]'.
([188]) Assembly of States Parties to the Statute of the International Criminal Court, Elements of Crimes, Official Records of the Review Conference of the Rome statute of the International Criminal Court, Kampala, 31 May-11 June 2010 (International Criminal Court publication, RC/11).
([189]) For a discussion of the relationship between the elements of crimes and the Rome Statute see Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op. cit., fn. 177, pp. 334-338.
([190]) Rome Statute, op. cit., fn. 164, Article 17(1)(a) and (b).

is not tried twice for the same crime ([191]), and that the case is of 'sufficient gravity' to justify prosecution before the ICC ([192]). For purposes of the application of Article 12(2)(a) QD (recast), however, the admissibility criteria are immaterial, since they only concern the ICC's jurisdiction over the crimes defined in the Rome Statute, not the actual definition of those crimes. For the same reasons, the fact that the ICC's jurisdiction has only recently been activated with respect to the crime of aggression is also immaterial.

Furthermore, as held by the Dutch council of state, even if an act defined as a crime in an international agreement to which Article 1F(a) Refugee Convention refers is committed prior to the entry into force of that agreement, this does not mean that the agreement may not be relied upon when applying Article 1F(a) ([193]).

This does not, however, answer the question whether an act, which was committed before the adoption of the Rome Statute and which is defined as a crime in the Rome Statute, can fall within the scope of Article 12(2)(a) QD (recast) and Article 1F(a) Refugee Convention only if it was already a crime under international law at the time that it was committed. In other words, is the principle of legality paramount in refugee law just as it is in criminal law? That principle has been described as follows by Justice Robertson in the Appeals Chamber of the Special Court for Sierra Leone (SCSL).

> The principle of legality, sometimes expressed as the rule against retroactivity, requires that the defendant must at the time of committing the acts alleged to amount to a crime have been in a position to know, or at least readily to establish, that those acts may entail penal consequences. Ignorance of the law is no defence, so long as that law is capable of reasonable ascertainment. The fact that his conduct would shock or even appal decent people is not enough to make it unlawful in the absence of a prohibition. The requisite clarity will not necessarily be found in there having been previous successful prosecutions in respect of similar conduct, since there has to be a first prosecution for every crime and we are in the early stages of international criminal law enforcement ([194]).

If the principle of legality is paramount in refugee law as well as in criminal law, from national case-law it might be concluded that **an act defined as a crime in the Rome Statute falls within the scope of Article 12(2)(a) only**:

— if the act was committed after 1 July 2002, the date of entry into force of the Rome Statute; **or**

— if at the time that the act was committed:

(a) the act was a crime under customary international law; or

(b) the act had already been defined as a crime in a previous international instrument.

In conclusion, acts defined as war crimes, crimes against humanity or crimes of aggression in the Rome Statute fall to be considered under Article 12(2)(a) QD (recast). Views differ,

([191]) Rome Statute, op. cit., fn. 164, Article 17(1)(c).
([192]) Rome Statute, op. cit., fn. 164, Article 17(1)(d).
([193]) Council of State (the Netherlands), decision of 18 April 2005, 200408765/1, NL:RVS:2005:AT4663, paras. 2.4 and 2.4.1 (in Dutch).
([194]) SCSL (Appeals Chamber), decision of 31 May 2014, Prosecutor v Sam Hinga Norman, SCSL-04-14-AR72(E), dissenting opinion of Justice Robertson, para. 13.

however, as to whether acts defined in the Rome Statute as crimes of genocide fall to be considered under Article 12(2)(a) in their own right, or whether they fall within the scope of that provision only if they also satisfy the definition of a war crime, crime against humanity, or crime of aggression. (See Appendix D: Antecedents to the Rome Statute, Section 6)

3.3.2 Crime against peace (Article 12(2)(a))

Article 6(a) of the IMT Charter defines a **crime against peace** as '[the] planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing' ([195]). Thus, the Rome Statute does not refer to a crime against peace but defines, in paragraph 1 of Article 8 *bis* the term **'crime of aggression'**:

Article 8 *bis*, paragraph 1, Rome Statute

For the purpose of this statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

There is no guidance yet in CJEU case-law about the relation between crime against peace and crime of aggression. In the literature it is, however, assumed that crime of aggression is the modern equivalent of crime against peace. This judicial analysis adopts the same assumption ([196]).

As stated in the *Elements of Crimes*, an act of aggression must have been committed by the aggressor state for the person concerned to have committed the crime of aggression ([197]). Thus, if an act of aggression was planned by the person concerned but was not committed by the aggressor state, no crime will have been committed.

Paragraph 2 of Article 8 *bis* Rome Statute defines the term **'act of aggression'**.

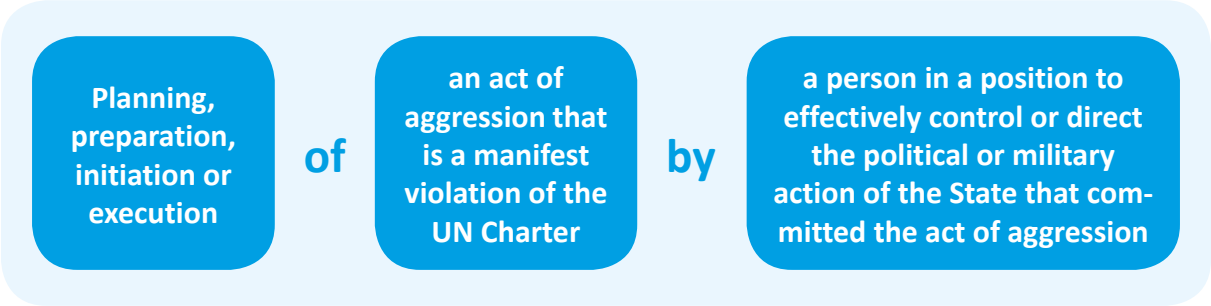
Article 8 *bis*, paragraph 2, Rome Statute

For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. […]

The definition of the crime of aggression can accordingly be summarised as in Figure 5 below.

([195]) Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'), 82 UNTS 279, 8 August 1945 (entry into force: 8 August 1945).
([196]) Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op. cit., fn. 177, Introduction to Article 8 *bis*, p. 302. On the page, Schabas also describes 'crime against peace' as 'a more ancient term used to describe the concept of aggression'.
([197]) Elements of Crimes, op. cit., fn. 187, para. 2 of Article 8 *bis*, Element 3.

Figure 5: The crime of aggression



The *Elements of Crimes* state that, to incur criminal responsibility, the person who planned, prepared, initiated or executed the act of aggression **must be aware of the following factual circumstances**:

— the factual circumstances that established that the use of armed force was inconsistent with the UN Charter;

— the factual circumstances that established that the act of aggression was a manifest violation of the UN Charter.

Paragraph 2 of Article 8 *bis* of the Rome Statute lists seven acts which qualify as acts of aggression (see Table 7 below). The list is identical to the list of acts of aggression contained in the 'Definition of Aggression' annexed to UNGA Resolution 3314 (XXIX) of 14 December 1974 ([198]). While the UNGA defined the list in that definition as being non-exhaustive ([199]), it should be noted that the ICC has not yet addressed the crime of aggression in its case-law. It therefore remains an open question whether the list in Article 8 *bis* of the Rome Statute is non-exhaustive ([200]).

Table 7: Acts of aggression listed in paragraph 2 of Article 8 *bis* of the Rome Statute

(a)	The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof.
(b)	Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state.
(c)	The blockade of the ports or coasts of a state by the armed forces of another state.
(d)	An attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state.
(e)	The use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.
(f)	The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state.
(g)	The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

([198]) UNGA, Definition of Aggression (14 December 1974), A/RES/3314(XXIX), Article 3.
([199]) UNGA, Definition of Aggression (14 December 1974), A/RES/3314(XXIX), Article 4.
([200]) See Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op. cit., fn. 177, pp. 313-314; Werle and Jessberger, op. cit., fn. 177, p. 548, marginal note 1473.

The courts and tribunals of the Member States do not yet appear to have addressed the definition of a 'crime of aggression' in the Rome Statute in the context of examining the application of Article 12(2)(a) QD (recast) in an individual case. They also appear to have barely addressed the earlier definition of a 'crime against peace' in the IMT Charter in that context, which is perhaps unsurprising given the narrow personal scope of that definition as interpreted by the IMT ([201]).

Since the personal scope of the 'crime of aggression' as defined in the Rome Statute is also very narrow, exclusion from refugee status on the basis that the person concerned is individually responsible for a crime against peace is unlikely to arise very often. Nevertheless, in cases where exclusion on that basis does need to be considered, members of courts and tribunals should bear in mind that 'planning', 'preparation', 'initiation' and 'execution' are a material element of the definition of the crime of aggression. They are not a comprehensive list of modes of individual responsibility for that crime ([202]). (See Section 3.6 on individual responsibility.) Members of courts and tribunals should also bear in mind that an act of aggression must meet a minimum threshold – namely that of a 'manifest violation' of the UN Charter – to be considered a crime against peace.

It should be noted that crimes of aggression are not war crimes, since they are governed by '*jus ad bellum*', not '*jus in bello*'. As explained by the International Committee of the Red Cross.

> *Jus ad bellum* refers to the conditions under which states may resort to war or to the use of armed force in general. The prohibition against the use of force amongst states and the exceptions to it (self-defence and UN authorization for the use of force), set out in the United Nations Charter of 1945, are the core ingredients of *jus ad bellum* […]. *Jus in bello* regulates the conduct of parties engaged in an armed conflict. [International humanitarian law] is synonymous with *jus in bello*; it seeks to minimize suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible ([203]).

3.3.3 War crime (Article 12(2)(a))

When the Refugee Convention was adopted in 1951, the principle of individual criminal responsibility for serious violations of international humanitarian law applied to international armed conflict only. International humanitarian law has since evolved and it is now accepted that war crimes can be committed in both international and non-international armed conflicts. This was codified for the first time in Article 8 of the Rome Statute ([204]). Article 8 ([205]) of the Rome Statute provides a comprehensive definition of what constitute war crimes and distinguishes between crimes committed in an international or a non-international conflict. The question may arise whether an act committed before the entry into force of the Rome Statute in 2002 may give rise to exclusion from protection in a decision made after this date if this is act is now considered to be a war crime but was not

([201]) See Werle and Jessberger, op. cit., fn. 177, p. 542, marginal note 1459.
([202]) See Article 25(3) *bis* Rome Statute, from which it can be inferred that the modes of individual responsibility defined in Article 25 of the Rome Statute are applicable to the crime of aggression. See further R. O'Keefe, *International Criminal Law* (OUP, 2015), p. 157, paras. 494-495; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op. cit., fn. 177, pp. 586-587.
([203]) ICRC, International Humanitarian Law: Answers to Your Questions, February 2015, p. 8.
([204]) See Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op. cit., fn. 177, pp. 223-224.
([205]) See Appendix C: Selected relevant international legal provisions for the text of this provision.

before 2002. So far, the CJEU has not pronounced on the relevance of the legality principle in exclusion cases.

It is not always straightforward to determine whether a specific armed conflict is international or non-international in character. For example, a non-international armed conflict may sometimes mutate into an international armed conflict, or *vice versa*, and it may not always be easy to establish precisely when or if the change occurred ([206]). The situation may also be one of 'mixed conflict', in which both types of conflict are simultaneously taking place in the same territory. There may even be multiple armed conflicts simultaneously taking place.

Table 8 ([207]) below may help to discern between an international and a non-international conflict.

Table 8: Character of international armed conflict and non-international armed conflict

International armed conflict	Non-international armed conflict
→ An armed conflict is international if it takes place between two or more states. → An internal armed conflict breaking out on the territory of a state may become international if (i) another state intervenes in that conflict through its troops (unless invited by the state in whose territory the hostilities are taking place), or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state. → International armed conflicts include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.	An armed conflict not of an international character is characterised by the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which takes place within the confines of a state territory. The hostilities may break out (i) between government authorities and organised dissident armed groups or (ii) between such groups.

Article 8 Rome Statute lists exhaustively the individual war crimes in international and non-international armed conflict that are within the jurisdiction of the ICC. Although the list is by far the most comprehensive in an international instrument to date, it is not complete ([208]). Decision-makers cannot therefore treat Article 8 of the Rome Statute as wholly determinative of the issue of whether a person has committed a war crime within the meaning of Article 12(2)(a) QD (recast). For example:

— Article 8 of the Rome Statute provides that '[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives' is a war crime in international

([206]) For example, the conflict on the territory of the former Yugoslavia began as a civil war but was internationalised when the former Yugoslavia began to fragment into several independent states. The ICTY subsequently had to determine whether the armed conflict in Bosnia and Herzegovina after 19 May 1992, when the Yugoslav People's Army withdrew from Bosnia and Herzegovina after the latter's secession from the Socialist Federal Republic of Yugoslavia, was purely non-international in character, or whether it continued to have an international element: see ICTY (Appeals Chamber), Judgment of 15 July 1999, Prosecutor v Duško Tadić, IT-94-1-A, paras. 68-162.

([207]) Table based on EASO, *Practical Guide: Exclusion*, 2017, p. 22, amended to align with the analysis in this judicial analysis.

([208]) Note that Article 22 of the Rome Statute provides: '1. A person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. […] 3. This article shall not affect the characterisation of any conduct as criminal under international law independently of this statute'. In other words, the fact that a specific form of conduct is not defined as criminal in the Rome Statute does not mean it is not criminal under international law.

armed conflicts only ([209]). As consistently held by the ICTY, however, attacks against civilian objects are a war crime in non-international armed conflicts as well ([210]).

— Other war crimes in non-international armed conflict that are missing from Article 8 include certain serious violations of Article 4(2) of Additional Protocol II ([211]) that are defined as war crimes in the statutes of the ICTR ([212]) and the SCSL ([213]), namely 'collective punishment' and 'acts of terrorism' ([214]), or 'threats to commit' either of those acts. Also missing are 'threats to commit' any other of the acts prohibited under Article 4(2) of Additional Protocol II.

— Various war crimes in international armed conflict are missing as well. For example, as held by the Appeals Chamber of the ICTY, acts of terror against the civilian population are a war crime in both international and non-international conflict ([215]).

Article 8(1) Rome Statute provides that the ICC is to have jurisdiction in respect of war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. This is, however, of no consequence to the assessment of exclusion from refugee status pursuant to Article 12(2) QD (recast), since it does not pertain to the actual definitions of the war crimes enumerated in Article 8 of the Rome Statute.

Article 8(2)(a) and (b) of the Rome Statute sets out a long list of war crimes that are applicable in international armed conflict, whereas Article 8(2)(c) and (e) Rome Statute sets out a shorter list of war crimes that are applicable in non-international armed conflicts. Each of the war crimes in a non-international armed conflict matches, either identically or *mutatis mutandis*, a war crime in an international armed conflict.

In cases where an act would constitute a war crime in both international and non-international armed conflict, it is not always necessary to determine the character of the armed conflict in which the act has been committed in order to ascertain whether it is a war crime. One has to be aware, however, that acts of a similar nature may constitute a war crime only when committed in the context of an international or, conversely, a non-international armed conflict.

Finally, it should be noted that an understanding of the law on war crimes requires familiarity with the fundamental principles and concepts of international humanitarian law. Beyond the brief introduction that is provided by this judicial analysis, the reader may wish to consult some of the standard treatises on international humanitarian law for further details ([216]).

([209]) Rome Statute, op. cit., fn. 164, Article 8(2)(b)(ii).

([210]) See, in particular, ICTY (Trial Chamber), Judgment of 31 January 2005, Prosecutor v Pavle Strugar, IT-01-42-T, paras. 223-226 and 277-289. Note that, as stated at para. 216 of that judgment, the trial chamber avoided pronouncing itself on whether the armed conflict in question was international or non-international since it considered that its findings were applicable regardless of the nature of the conflict.

([211]) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (entry into force: 7 December 1978).

([212]) ICTR Statute, annexed to UN Security Council, Resolution 955(1994) (8 November 1994) UN Doc S/RES/955(1994), Article 4(b) and (d). The ICTR Statute was subsequently amended by further resolutions of the UN Security Council: see the consolidated version of 31 January 2010.

([213]) SCSL Statute, op. cit., fn. 173, Article 3(b) and (d).

([214]) See also Additional Protocol II, op. cit., fn. 211, Article 13(2): 'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'

([215]) ICTY (Appeals Chamber), Judgment of 30 November 2006, Prosecutor v Stanislav Galić, IT-98-29-A, paras. 87-90.

([216]) See, for example, J.-M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (CUP, 2005, reprinted with corrections 2009); Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn., CUP, 2016); Y. Dinstein, *Non-International Armed Conflicts in International Law* (CUP, 2014); D. Fleck, *The Handbook of International Humanitarian Law* (3rd edn., OUP, 2013); United Kingdom Ministry of Defence, The Manual of the Law of Armed Conflict (OUP, 2004).

In terms of the case-law of the Member States, the French National Court of Asylum Law considered an applicant who had been playing an active role in the genocide in Rwanda in 1994 to be responsible for war crimes ([217]). The French National Court of Asylum Law also considered a local police officer in Afghanistan, who had tortured Taliban prisoners during interrogation to be responsible for war crimes ([218]).

The Dutch council of state considered military acts by the Kurdish organisation, the Kurdistan Workers' Party (PKK), aimed at the civilian population, to be crimes of war ([219]) and concluded the same in relation to acts of the Afghan army during the civil war from 1979 to 1992, including bombing villages and using excessive violence by which hundreds of thousands of people were killed ([220]).

It is important to bear in mind that war crimes can, at the same time, constitute a serious non-political crime within the meaning of Article 12(2)(b) and/or a crime against humanity as meant in Article 12(2)(a) QD (recast).

3.3.3.1 Contextual elements of a war crime

In order to constitute a war crime, the act concerned must in all cases satisfy two contextual elements ([221]).

— The **act must take place in the context of and be associated with an armed conflict**, which, depending on the war crime at issue, is either international or non-international in character.

— The **perpetrator must have been aware of factual circumstances that established the existence of an armed conflict**.

If the act took place during an armed conflict but does not satisfy the above requirements, it is not a war crime. That does not, however, preclude it from being a crime under national law (see Section 3.4.1.3, p. 96) or a crime under international law, notably a crime against humanity (see Section 3.3.4).

In principle, not only combatants but also civilians can commit war crimes, providing that their acts satisfy the above requirements ([222]). There is no need for a connection between the civilian perpetrator and one of the parties to the conflict, but there must be a connection between the act and the armed conflict ([223]).

It should be noted that the *Elements of Crimes* state with respect to the contextual elements above that:

([217]) Cour nationale du droit d'asile (National Court of Asylum Law, France), Judgment of 20 February 2019, *M.G.,* 14033102 (in French).
([218]) Cour nationale du droit d'asile (National Court of Asylum Law, France), Judgment of 15 February 2018, *M.G*, 14020621 C (in French).
([219]) Council of state (the Netherlands), Judgment of 23 July 2004, 200402639, ECLI:NL:RVS:2004:AQ5615, para. 2.6 (in Dutch).
([220]) Council of State (the Netherlands), Judgment of 21 August 2018, 201803118/1/V2, ECLI:NL:RVS:2018:2813, para. 8.4.
([221]) Elements of Crimes, op. cit., fn. 187, Article 8(2)(a), Article 8(2)(b), Article 8(2)(c) and Article 8(2)(e).
([222]) See, for example, ICTR (Trial Chamber I), Judgment of 27 January 2000, The Prosecutor v Alfred Musema, ICTR-96-13-A, para. 274; ICTR (Appeals Chamber), Judgment of 1 June 2001, The Prosecutor v Jean-Paul Akayesu, ICTR-96-4-A, paras. 425-446.
([223]) Federal administrative court (Germany), Judgment of 16 February 2010, BVerwG 10 C 7.09, DE:BVerwG:2010:160210U10C7.09.0 (in German), paras. 30-33, translation by the federal administrative court.

(a) there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

(b) in that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;

(c) there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with' ([224]).

In most cases, it will of course be obvious that an armed conflict was going on and that the perpetrator knew it ([225]).

The term 'armed conflict' is not defined in the Rome Statute or the *Elements of Crimes*, but the definition of that term which was adopted by the Appeals Chamber of the ICTY ([226]) has been endorsed in several rulings of the ICC:

> [A]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there ([227]).

Sections 3.3.3.2.2 and 3.3.3.3.2 address respectively the definitions of international and of non-international armed conflict.

3.3.3.2 War crimes in international armed conflict

3.3.3.2.1 War crimes defined in the Rome Statute

Article 8 of the Rome Statute divides the war crimes in international armed conflict that fall within the jurisdiction of the ICC into two categories:

— **grave breaches** of the Geneva Conventions (Article 8(2)(a));

— **other serious violations** of 'the laws and customs applicable in international armed conflict, within the established framework of international law' (Article 8(2)(b)).

([224]) Elements of Crimes, op. cit., fn. 187, Article 8, Introduction.
([225]) ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP, 2016), marginal note 3053 (internet version available at ICRC online database: Commentary on the First Geneva Convention).
([226]) ICTY (Appeals Chamber), 1995, *Tadić*, op. cit., fn. 491, para. 70.
([227]) See, for example, ICC (Trial Chamber 1), Judgment of 14 March 2012, Situation in the Democratic Republic of the Congo, The Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, para. 533; ICC (Trial Chamber III), Judgment of 21 March 2016, Situation in the Central African Republic, The Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05-01/08 2016, para. 128.

Grave breaches of the Geneva Conventions involve any of the acts listed in Table 9 below, **when committed against persons or property protected under the provisions of the relevant Geneva Convention** (see Table 6 above and Table 18, respectively at p. 64 and p. 180).

Table 9: Grave breaches of the Geneva Conventions (summary of crimes defined in Article 8(2)(a) of the Rome Statute)

	War crime	Article
Acts against persons	Wilful killing.	8(2)(a)(i)
	Subjecting persons to: (i) severe physical or mental pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind ('torture'); (ii) severe physical or mental pain or suffering ('cruel treatment'); or (iii) biological experiments.	8(2)(a)(ii)
	Wilfully causing great physical or mental pain or suffering, or serious injury to body or health.	8(2)(a)(iii)
	Compelling service in the forces of a hostile power.	8(2)(a)(v)
	Denying a fair trial.	8(2)(a)(vi)
	Unlawfully deporting or transferring persons to another state or to another location.	8(2)(a)(vii)
	Unlawfully confining persons to a certain location.	8(2)(a)(vii)
	Taking hostages.	8(2)(a)(viii)
Acts against property	Destroying or appropriating protected property, when not justified by military necessity and carried out wantonly.	8(2)(a)(iv)

The material and mental elements of each of the war crimes are summarised in this table, while the *Elements of Crimes* are detailed in Table 10 below ([228]).

The 'other serious violations' of the laws and customs applicable in international armed conflict that are defined in Article 8(2)(b) of the Rome Statute can, for ease of reference, be divided into five categories ([229]):

(i) war crimes against persons;

(ii) war crimes against property and other rights;

(iii) war crimes involving use of prohibited methods of warfare;

(iv) war crimes involving prohibited means of warfare, namely prohibited weapons;

(v) war crimes against humanitarian operations.

The applicable war crimes in each category involve any of the acts listed under the category concerned in Table 10 below.

([228]) Elements of Crimes, op. cit., fn. 187, Article 8(2)(a) and (b). For a fuller explanation of each war crime, see: ICRC, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP, 2002), pp. 17-381; Werle and Jessberger, op. cit., fn. 177, pp. 409-526, marginal notes 1075-1428.

([229]) Werle and Jessberger, op. cit., fn. 177, p. 410, marginal note 1076.

Table 10: Other serious violations of the laws and customs applicable in international armed conflict (summary of crimes defined in Article 8(2)(b) of the Rome Statute)

	War crime	Article
Acts against persons	Attacking the civilian population as such, or attacking individual civilians unless and for such time as they take a direct part in the hostilities.	8(2)(b)(i)
	Killing or wounding a person *hors de combat*.	8(2)(b)(vi)
	Treacherously killing or wounding.	8(2)(b)(xi)
	Subjecting prisoners of war or civilians in occupied territories ('persons who are in the power of an adverse party') to: (i) mutilation; or (ii) medical or scientific experiments.	8(2)(b)(x)
	Committing: (i) rape; (ii) sexual slavery; (iii) enforced prostitution; (iv) forced pregnancy; (v) enforced sterilisation; or (vi) any other form of sexual violence also constituting a grave breach of the Geneva Conventions.	8(2)(b)(xxii)
	Committing outrages upon personal dignity, including upon dead persons.	8(2)(b)(xxi)
	Compelling nationals of a hostile party to participate in military operations against their own country or forces.	8(2)(b)(xv)
	Using, conscripting or enlisting children under the age of 15.	8(2)(b)(xxvi)
	Transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.	8(2)(b)(viii)
Acts against property and other rights	Attacking civilian objects.	8(2)(b)(ii)
	Attacking protected objects.	8(2)(b)(ix)
	Destroying or seizing the enemy's property, unless imperatively demanded by the necessities of war.	8(2)(b)(xiii)
	Pillaging.	8(2)(b)(xvi)
	Depriving the nationals of the hostile power of rights or actions in a court of law.	8(2)(b)(xiv)
Acts involving use of prohibited methods of warfare	Using civilians or other protected persons as shields.	8(2)(b)(xxiii)
	Using starvation as a method of warfare.	8(2)(b)(xxv)
	Declaring or ordering that there are to be no survivors ('denying quarter').	8(2)(b)(xii)
	Attacking undefended places which are not military objectives.	8(2)(b)(v)
	Attacking objects or persons using the distinctive emblems of the Geneva Conventions.	8(2)(b)(xxiv)
	Improper use of: (i) a flag of truce; (ii) a flag, insignia or uniform of the hostile party; (iii) a flag, insignia or uniform of the United Nations; or (iv) the distinctive emblems of the Geneva Conventions.	8(2)(b)(vii)
	Launching an attack knowing that it will cause excessive incidental death, injury or damage.	8(2)(b)(iv)
Acts involving use of prohibited weapons	Employing poison or poisoned weapons.	8(2)(b)(xvii)
	Employing prohibited gases, liquids, materials or devices.	8(2)(b)(xviii)
	Employing biological weapons.	8(2)(b)(xxvii)
	Employing prohibited bullets.	8(2)(b)(xix)
	Employing weapons primarily injuring by non-detectable fragments.	8(2)(a)(xxviii)
	Employing laser weapons designed to permanently blind.	8(2)(b)(xxix)
	Employing weapons, projectiles or materials or methods of warfare listed in the annex to the statute, if and when adopted ([230]).	8(2)(b)(xx)
Acts against humanitarian operations	Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission, unless and for such time as they take a direct part in the conflict.	8(2)(b)(iii)

([230]) The Assembly of States to the Rome Statute has not adopted the annex to the Rome Statute.

3.3.3.2.2 Definition of international armed conflict

The term 'international armed conflict' is not defined in the Rome Statute or the *Elements of Crimes*. It has, however, been defined as follows in several rulings of the ICC. These took into account Common Article 2 of the Geneva Conventions and the judgment of the Appeals Chamber of the ICTY in *Tadić* ([231]) and determined:

> […] [A]n armed conflict is international if it takes place between two or more states. In addition, in case of an internal armed conflict breaking out on the territory of a state, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another state intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state ([232]).

This definition has been elaborated upon by, for example, the ICC Trial Chamber in *Katanga*. Thus, **in order to assess whether an international armed conflict exists by reason of the indirect participation of a state**:

> [T]he Chamber must analyse and appraise the degree of control exerted by that state over one of the armed groups participating in the hostilities. In appraising the degree of such control, Trial Chamber I held the 'overall control' test to be the correct approach, allowing a determination as to whether an armed conflict not of an international character has become internationalised due to the involvement of armed forces acting on behalf of another state. That test is met when the State *'has a role in organising, coordinating or planning the military actions of the military group,* in addition to financing, training and equipping or providing operational support to that group'. It is not required that the State give specific orders or direct each military operation ([233]).

Note, however, that an internal armed conflict does not become international in character if the state in whose territory the hostilities are taking place invites the armed forces of another state to assist it with combating the other parties to the conflict ([234]).

On the other hand, as specified in the *Elements of Crimes*, the term 'international armed conflict' does extend to **military occupation** ([235]). The trial chamber in *Katanga* elaborated upon that scenario as follows:

> […] In the chamber's estimation, and in view of the pertinent jurisprudence and treaty law, 'territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised'. Hence, military occupation exists where a state's military forces intervene in and exercise control over a territory beyond that state's internationally recognised frontiers, whether that territory belongs to a hostile state, a neutral state or a co-belligerent, provided that the deployment of forces has not been authorised by an agreement with the occupied power.

([231]) ICTY (Appeals Chamber), *Tadić,* op. cit., fn. 206, para. 84.
([232]) See, for example, ICC (Trial Chamber I), 2012, *Lubanga*, op. cit., fn. 227, para. 541; ICC (Trial Chamber II), Judgment of 7 March 2014, Situation in the Democratic Republic of the Congo, The Prosecutor v Germain Katanga, ICC-01/04-01/07, para. 1177.
([233]) ICC (Trial Chamber II), 2014, *Katanga*, op. cit., fn. 232, para. 1178 (original emphasis, footnotes omitted).
([234]) ICC (Pre-Trial Chamber I), decision of 16 December 2011, Situation in the Democratic Republic of the Congo, The Prosecutor v Callixte Mbarushimana, Decision on the Confirmation of Charges, ICC-01/04-01/10, para. 101.
([235]) Elements of Crimes, op. cit., fn. 187, Article 8(2)(a), fn. 34.

In determining whether the occupying power has established its authority the following non-exhaustive list of factors may be relevant.

— The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly.

— The enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation.

— The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.

— A temporary administration has been established over the territory. The occupying power has issued and enforced directions to the civilian population ([236]).

Finally, as already noted, Article 1(4) of Additional Protocol I provides that international armed conflicts include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination […]' ([237]).

3.3.3.3 War crimes in non-international armed conflict

3.3.3.3.1 War crimes defined in the Rome Statute

Article 8 of the Rome Statute divides the war crimes in non-international armed conflict that fall within the jurisdiction of the ICC into two categories:

— **serious violations of Common Article 3** (Article 8(2)(c));

— **other serious violations** of 'the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law' (Article 8(2)(e)).

Serious violations of Common Article 3 involve any of the acts listed in Table 11 below, when **committed against 'persons taking no active part in the hostilities'**. Such persons include:

— persons who are *hors de combat*, due to having laid down their arms or due to sickness, wounds, detention or any other cause;

— any of the following persons, unless and for such time as they take an active part in the hostilities:

(a) members of armed forces who are medical or religious personnel;

(b) personnel involved in a humanitarian or peacekeeping mission;

(c) civilians.

([236]) ICC (Trial Chamber II), 2014, *Katanga*, op. cit., fn. 232, paras. 1179 and 1180.

([237]) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978).

Table 11: Serious violations of Common Article 3 (summary of crimes defined in Article 8(2)(c) Rome Statute)

	War crimes	Article
Acts against persons	Violence to life or person, including: (i) committing murder; (ii) mutilating; (iii) inflicting severe physical or mental pain or suffering ('cruel treatment'); or (iv) or inflicting severe physical or mental pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind ('torture').	8(2)(c)(i)
	Committing outrages upon personal dignity, including upon dead persons.	8(2)(c)(ii)
	Taking hostages.	8(2)(c)(iii)
	Sentencing or carrying out executions without due process.	8(2)(c)(iv)

The 'other serious violations' of the laws and customs applicable in non-international armed conflict that are defined in Article 8(2)(e) of the Rome Statute involve any of the acts listed in Table 12 below.

Table 12: Other serious violations of the laws and customs applicable in non-international armed conflicts (summary of crimes defined in Article 8(2)(e) Rome Statute)

	War crime	Article
Acts against persons	Attacking the civilian population as such, or attacking individual civilians unless and for such time as they take a direct part in the hostilities.	8(2)(e)(i)
	Treacherously killing or wounding.	8(2)(e)(ix)
	Subjecting prisoners/detainees ('persons who are in the power of another party to the conflict') to: (i) mutilation; or (ii) medical or scientific experiments.	8(2)(e)(xi)
	Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence also constituting a serious violation of Common Article 3.	8(2)(e)(vi)
	Using, conscripting or enlisting children under the age of 15.	8(2)(e)(vii)
	Ordering the displacement of a civilian population, without justification of military necessity or the security of the civilians involved.	8(2)(e)(viii)
Acts against property	Attacking protected objects.	8(2)(e)(iv)
	Destroying or seizing the enemy's property, unless imperatively demanded by the necessities of the conflict.	8(2)(e)(xii)
	Pillaging.	8(2)(e)(v)
	Declaring or ordering that there are to be no survivors ('denying quarter').	8(2)(e)(x)
	Attacking objects or persons using the distinctive emblems of the Geneva Conventions.	8(2)(e)(ii)
Acts involving use of prohibited weapons	Employing poison or poisoned weapons.	8(2)(e)(xiii)
	Employing prohibited gases, liquids, materials or devices.	8(2)(e)(xiv)
	Employing biological weapons.	8(2)(e)(xvi)
	Employing prohibited bullets.	8(2)(e)(xv)
	Employing weapons primarily injuring by non-detectable fragments.	8(2)(e)(xvii)
	Employing laser weapons designed to permanently blind.	8(2)(e)(xviii)
Acts against humanitarian operations	Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission, unless and for such time as they take a direct part in the hostilities.	8(2)(e)(iii)

The material and mental elements of each of the war crimes summarised above are detailed in the *Elements of Crimes* ([238]).

3.3.3.3.2 Definition of non-international armed conflict

The term 'armed conflict not of an international character' is not defined in the Rome Statute or the *Elements of Crimes*. It has, however, been defined, inter alia, by the Pre-Trial Chamber of the ICC in *Bemba*, which derived assistance from the jurisprudence of the ad hoc tribunals, Common Article 3, and Article 1 of Additional Protocol II. The chamber held that, for purposes of the Rome Statute:

> […] [A]n 'armed conflict not of an international character' is characterised by the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which takes place within the confines of a state territory. The hostilities may break out (i) between government authorities and organized dissident armed groups or (ii) between such groups ([239]).

It should be noted, however, that the Rome Statute potentially introduces a distinction between the contextual elements of, on the one hand, the war crimes defined in Article 8(2)(c), and, on the other hand, the war crimes defined in Article 8(2)(e).

Specifically, Article 8(2)(d) of the Rome Statute provides that:

Article 8(2)(d), Rome Statute

[Article 8(2)(c)] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Article 8(2)(f) of the Rome Statute provides the same in respect of the war crimes defined in Article 8(2)(e), but then adds that:

> [Article 8(2)(e)] […] applies to armed conflicts that take place in the territory of a state when there is **protracted armed conflict** between governmental authorities and organized armed groups or between such groups (emphasis added).

Most commentators are of the view that Article 8(2)(f) does not impose a higher threshold of armed conflict than Article 8(2)(d) ([240]). Although the ICC is yet to decide the point, its jurisprudence does offer at least some interpretive assistance. For example, the Pre-Trial Chamber in *Bemba* held the following as regards the requirements of Article 8(2)(d):

([238]) Elements of Crimes, op. cit., fn. 187, Article 8(2)(c) and (e). For a fuller explanation of each war crime, see: ICRC, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, op. cit., fn. 225, pp. 382-484; Werle and Jessberger, op. cit., fn. 177, pp. 409-526, marginal notes 1075-1428.

([239]) ICC (Pre-Trial Chamber II), decision of 15 June 2009, Situation in the Central African Republic, The Prosecutor v Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/5-01/08, para. 231.

([240]) See, for example, Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op. cit., fn. 177, p. 234; Werle and Jessberger, op. cit., fn. 177, p. 419, marginal note 1100.

> […] The argument can be raised as to whether [the requirement of the existence of a 'protracted armed conflict'] may […] be applied also in the context of Article 8(2)(d) of the statute. However, irrespective of such a possible interpretative approach, the chamber does not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as 'protracted' in any event ([241]).

According to the Trial Chamber of the ICC in *Lubanga*:

> […] Article 8(2)(f) of the statute only requires the existence of a 'protracted' conflict […]. It does not include the requirement in Additional Protocol II that the [organised armed groups] need to 'exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations'. It is therefore unnecessary […] to establish that the relevant armed groups exercised control over part of the territory of the state. Furthermore, Article 8(2)(f) does not incorporate the requirement that the organised armed groups were 'under responsible command', as set out in Article 1(1) of Additional Protocol II. Instead, the 'organised armed groups' must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence. […]
>
> The intensity of the conflict is relevant for the purpose of determining whether an armed conflict that is not of an international character existed, because under Article 8(2)(f) the violence must be more than sporadic or isolated. The ICTY has held that the intensity of the conflict should be 'used solely as a way to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.' In order to assess the intensity of a potential conflict, the ICTY has indicated a chamber should take into account, inter alia, 'the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.' The Chamber is of the view that this is an appropriate approach ([242]).

3.3.4 Crime against humanity (Article 12(2)(a))

The concept of crimes against humanity has developed in international criminal law since the beginning of the 20th century ([243]). In Article 6(c) IMT Charter, crimes against humanity were defined as '[…] inhumane acts, committed against any civilian population, before or during the war, […]'.

Article 7(1) of the Rome Statute provides that an inhumane act constitutes a crime against humanity when committed as **'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'**.

([241]) ICC (Pre-Trial Chamber II), 2009, *Bemba*, op. cit., fn. 239, para. 235.
([242]) ICC (Trial Chamber 1), 2012, *Lubanga*, op. cit., fn. 227, paras. 536 and 538.
([243]) Schabas, *The International Criminal Court: A Commentary on the Rome Statute,* op. cit., fn. 177, Introductory comments to Article 7, pp. 147-8.

3.3.4.1 Contextual elements of a crime against humanity

In contrast to war crimes, crimes against humanity can be committed **both inside and outside the context of an armed conflict** ([244]). Nevertheless, an inhumane act still requires a specific overarching context to constitute a crime against humanity, as explained below.

Article 7(2)(a) of the Rome Statute defines an 'attack directed against any civilian population':

Article 7(2)(a) Rome Statute

'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 [defining crimes against humanity] against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack;

The *Elements of Crimes* state that the attack need not be a military attack ([245]).

As held by the ICC, crimes against humanity thus involve the five contextual elements listed in Table 13 below ([246]).

Table 13: Contextual elements of a crime against humanity

(i)	An attack directed against any civilian population.
(ii)	A state or organisational policy.
(iii)	An attack of a widespread or systematic nature.
(iv)	A nexus between the individual act and the attack.
(v)	Knowledge of the attack.

As explained by the ICC Trial Chamber in *Katanga*, establishing the contextual elements of a crime against humanity requires **three stages of reasoning**.

> […] [The Chamber] regards a recitation of the [three stages of reasoning] essential to a clear understanding of which element has a normative connection to a given term or expression, so as to place the meaning of each term or expression in context, such that full effect is ultimately given to each of the contextual elements of crimes against humanity, within the meaning of Article 7, and no element is disregarded, misconceived or rendered ineffective.
>
> The first stage of reasoning concerns analysis of the **existence** of an attack, which, within the meaning of Article 7(2)(a) of the statute, entails: (1) establishment of the existence of an operation or course of conduct involving, notably, the multiple commission of acts referred to in Article 7(1) aforecited; (2) that the operation or

([244]) Note that under Article 6(c) of the IMT Charter, an inhumane act only constituted a crime against humanity when committed 'in execution of or in connection with' a crime against peace or a war crime. It is, however, now only of historical interest whether that condition was a reflection of customary international law as it stood at the time, or whether it was merely a jurisdictional limitation.
([245]) *Elements of Crimes*, op. cit., fn. 187, Article 7, Introduction, para. 3.
([246]) ICC (Pre-Trial Chamber III), decision of 15 November 2011, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', ICC/02-11, paras. 27-29.

course of conduct be directed against a civilian population; and (3) that it be proved that the operation or course of conduct took place pursuant to or in furtherance of a state or organisational policy. In this regard, it must be shown first that a policy existed and second that the policy was connected to a state or an organisation.

The second stage pertains to **characterisation** of the attack, in particular ascertainment as to whether it was widespread or systematic. To so proceed is paramount to establishing the existence of a crime against humanity and in principle should be subject to the first stage being conclusive. It is generally recognised that the adjective 'widespread' adverts to the large-scale nature of the attack, whereas the adjective 'systematic' reflects the organised nature of the acts of violence.

The third and final stage seeks to determine, firstly, the existence of the requisite **nexus** between the widespread or systematic attack and the act within the ambit of Article 7 and, secondly, **knowledge** of that nexus by the perpetrator of the act ([247]).

3.3.4.2 Underlying acts

Article 7(1) of the Rome Statute defines 11 acts that constitute a crime against humanity when committed in the above context. Additionally, Article 7(1) provides that 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' also constitute a crime against humanity when committed in that context. The acts defined in Article 7(1) are referred to as **'underlying acts'** and are listed in Table 14 below.

Table 14: Underlying acts of crimes against humanity, as defined in Article 7(1) of the Rome Statute

(a)	'Murder'.
(b)	'Extermination' ([248]).
(c)	'Enslavement' ([249]).
(d)	'Deportation or forcible transfer of population' ([250]).
(e)	'Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'.
(f)	'Torture' ([251]).
(g)	'Rape, sexual slavery, enforced prostitution, forced pregnancy ([252]), enforced sterilization, or any other form of sexual violence of comparable gravity'.
(h)	'Persecution ([253]) against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender […] ([254]), or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court'.
(i)	'Enforced disappearance of persons'.

([247]) ICC (Trial Chamber II), 2014, *Katanga*, op. cit., fn. 232, paras. 1096-1099, emphases in the original.
([248]) See definition of 'extermination' in Article 7(2)(b) of the Rome Statute.
([249]) See definition of 'enslavement' in Article 7(2)(c) of the Rome Statute.
([250]) See definition of 'deportation or forcible transfer of population' in Article 7(2)(d) of the Rome Statute.
([251]) See definition of 'torture' in Article 7(2)(e) of the Rome Statute.
([252]) See definition of 'forced pregnancy' in Article 7(2)(f) of the Rome Statute.
([253]) See definition of 'persecution' in Article 7(2)(g) of the Rome Statute.
([254]) See definition of 'gender' in Article 7(3) of the Rome Statute.

(j)	'The crime of apartheid' ([255]).
(k)	'Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

When the contextual elements of Article 7 of the Rome Statute are satisfied, individual responsibility for a crime against humanity may be incurred by a single underlying act. For example, as stated by the ICC Pre-Trial Chamber in *Bemba*.

> A single act of murder by a perpetrator may constitute a crime against humanity as long as the legal requirements with regard to the contextual element of crimes against humanity, including the nexus element, are met ([256]).

The *Elements of Crimes* set out the material and mental elements that need to be satisfied for each individual crime against humanity.

3.3.4.3 Meaning of 'widespread' and 'systematic'

Article 7 Rome Statute defines only some of the terms and expressions in the definition of crimes against humanity. The ICC has therefore turned to the jurisprudence of the ad hoc tribunals for assistance with the interpretation of terms and expressions that are undefined ([257]).

For example, as regards the meaning of **'widespread'**, the ICC Trial Chamber in *Bemba* concurred with prior jurisprudence of the ICC, which had drawn upon jurisprudence of the ICTR and ICTY. It held:

> […] [T]he term 'widespread' connotes the large-scale nature of the attack and the large number of targeted persons, and that such attack may be 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'. The Chamber notes that the assessment of whether the 'attack' is 'widespread' is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts. The temporal scope of the attack does not […] have an impact on this specific analysis ([258]).

Using the same approach, the ICC Pre-Trial Chamber in *Bemba* held that the expression 'widespread or systematic' sets **disjunctive conditions**:

> [T]he terms 'widespread' and 'systematic' appearing in the chapeau of Article 7 of the Statute are presented in the alternative. The Chamber considers that if it finds

([255]) See definition of 'the crime of apartheid' in Article 7(2)(h) of the Rome Statute. Note that that definition is worded differently from the definition of the 'crime of apartheid' in Article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 1015 UNTS 243, 30 November 1973 (entry into force: 18 July 1976) ('Convention on the Crime of Apartheid'). Note also that, although Article I of the Convention on the Crime of Apartheid provides: '[The states parties to the present convention declare that apartheid is a crime against humanity […]'. The acts defined as crimes of apartheid in Article II of that Convention are crimes of apartheid for purposes of the convention irrespective of whether they have been committed as 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

([256]) ICC (Pre-Trial Chamber II), 2009, *Bemba*, op. cit., fn. 239, para. 151.

([257]) As already mentioned, ICC (Trial Chamber II), 2014, *Katanga*, op. cit., fn. 232, para. 1100, justified this approach as follows: '[…] [I}nterpretation of the terms of Article 7 of the Statute and, where necessary, the *Elements of Crimes*, requires that reference be had to the jurisprudence of the ad hoc tribunals insofar as that jurisprudence identifies a pertinent rule of custom, in accordance with Article 31(3)(c) of the Vienna Convention. Of note in this connection is that the negotiation of the definition of a crime against humanity was premised on the need to codify existing customary law.'

([258]) ICC (Trial Chamber III), 2016, *Bemba*, op. cit., fn. 227, para. 163.

> the attack to be widespread, it needs not consider whether the attack was also systematic ([259]).

As regards the meaning of **'systematic'**, the ICC Trial Chamber in *Katanga* held:

> […] An established line of authority holds that […] the adjective 'systematic' reflects the organised nature of the acts of violence and the improbability of their random occurrence. It has also been consistently held that the 'systematic' character of the attack refers to the existence of 'patterns of crimes' reflected in the non-accidental repetition of similar criminal conduct on a regular basis ([260]).

The ICC has also interpreted other terms and expressions that are undefined in Article 7 of the Rome Statute, as well as making additional points concerning the meaning of 'widespread' and 'systematic'. It is, however, beyond the scope of this judicial analysis to go into further detail.

3.4 Serious non-political crime (Article 12(2)(b))

Article 12(2)(b) QD (recast) lays down the following ground for exclusion from refugee status.

Article 12(2)(b) QD (recast)

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

[…]

b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

3.4.1 Material scope of Article 12(2)(b)

In *Ahmed*, the CJEU observed that the concept of **'serious non-political crime'** in Article 12(2)(b) is not defined in the QD (recast); nor does the QD (recast) contain any express reference to national law for the purpose of determining the meaning and scope of that concept ([261]). As a result, that concept must be interpreted in accordance with the following rule as settled in the court's jurisprudence:

> [T]he wording of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope

([259]) ICC (Pre-Trial Chamber II), 2009, *Bemba*, op. cit., fn. 256, para. 82.
([260]) ICC (Trial Chamber II), 2014, *Katanga*, op. cit., fn. 232, para. 1123.
([261]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, paras. 33 and 34.

> must normally be given an autonomous and uniform interpretation throughout the European Union, and that interpretation must take into account, inter alia, the context of that provision and the objective pursued by the rules of which it is part […] ([262]).

The CJEU noted in that regard:

> It is apparent from Recital 12 of [the QD (recast)] that one of its main objectives is to ensure that all Member States apply common criteria for the identification of persons genuinely in need of international protection. It also follows from Article 78(1) TFEU that the common policy which the European Union is to develop on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement* must be in accordance with the Geneva Convention [Refugee Convention]' ([263]).

As is noted in Section 1.3.1 above, there is a connection between Article 12(2)(b) and Article 1F(b) Refugee Convention.

Concretely, the CJEU had been asked in *Ahmed*, a case concerning exclusion from subsidiary protection, whether the penalty provided under the law of a particular Member State for a specific crime may constitute the sole criterion for determining whether that crime is a 'serious crime' within the meaning of Article 17(1)(b) QD (recast). It could be considered that the concept of 'serious crime' in Article 17(1)(b) is inspired by, and has the same meaning as, the concept of 'serious crime' in Article 12(2)(b). Accordingly, the CJEU's ruling in *Ahmed* could be as applicable to Article 12(2)(b) as it is to Article 17(1)(b).

This section discusses the following issues (see Table 15 below).

Table 15: Structure of Section 3.4.1

Subsection 3.4.1.1	The concept of 'serious crime', taking into account the CJEU's ruling in *Ahmed*.	pp. 90-92
Subsection 3.4.1.2	The condition in Article 12(2)(b) that the serious crime at issue be 'non-political'.	pp. 92-96
Subsection 3.4.1.3	The applicability of Article 12(2)(b) to acts that are permitted under international humanitarian law when committed in the context of armed conflict.	pp. 96-97

3.4.1.1 Serious crime

As noted above, the CJEU held in *Ahmed* that 'any decision to exclude a person from refugee status must be preceded by a full investigation into all the circumstances of his individual case and cannot be taken automatically' ([264]). The CJEU added that '[s]uch a requirement must be transposed to decisions to exclude a person from subsidiary protection' ([265]),

([262]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, para. 36.
([263]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, para. 37.
([264]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, para. 49.
([265]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, para. 50.

the purpose of which is the same as the grounds for exclusion from refugee status ([266]). Accordingly, the assessment of whether an applicant for international protection has committed a 'serious crime' must be made as follows.

> It must be noted that Article 17(1)(b) of [the QD (recast)] permits a person's exclusion from subsidiary protection status only where there are 'serious reasons' for taking the view that he has committed a serious crime. That provision sets out a ground for exclusion which constitutes an exception […] and therefore calls for strict interpretation.
>
> According to the referring court, the [Hungarian] Law on the right to asylum leads, however, to any offence which may be punished, under Hungarian law, by a custodial sentence of five years or more automatically being classified as a serious crime.
>
> […] [I]t is important to note that, while the criterion of the penalty provided for under the criminal legislation of the Member State concerned is of particular importance when assessing the seriousness of the crime justifying exclusion from subsidiary protection pursuant to Article 17(1)(b) […], the competent authority of the Member State concerned may apply the ground for exclusion laid down by that provision only after undertaking, for each individual case, an assessment of the specific facts brought to its attention with a view to determining whether there are serious grounds for taking the view that the acts committed by the person in question, who otherwise satisfies the qualifying conditions for the status applied for, come within the scope of that particular ground for exclusion […] ([267]).

The CJEU took into account that the above approach is supported by the analysis of national jurisprudence made in the first edition of this judicial analysis ([268]), according to which the seriousness of the crime at issue must be assessed in the light of a number of criteria. These criteria include,

> the nature of the act at issue, the consequences of that act, the form of procedure used to prosecute the crime, the nature of the penalty provided and the taking into account of whether most jurisdictions also classify the act at issue as a serious crime ([269]).

The CJEU added that '[s]imilar recommendations are, furthermore, set out in [paragraphs 155 to 157 of the 1992 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status]' ([270]).

Examples of cases in which the courts and tribunals of the Member States have ruled that an applicant for international protection should be excluded from refugee status on the basis that they are responsible for a 'serious' non-political crime include:

— sexual abuse of a minor niece ([271]);

([266]) CJEU, 2018, *Ahmed,* op. cit., fn. 14, para. 51.
([267]) CJEU, 2018, *Ahmed,* op. cit., fn. 14, paras. 52-55.
([268]) EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) – A Judicial analysis*, January 2016.
([269]) CJEU, 2018, *Ahmed,* op. cit., fn. 14, para. 56.
([270]) CJEU, 2018, *Ahmed,* op. cit., fn. 14, para. 57.
([271]) Council for Aliens Law Litigation (Belgium), decision of 30 September 2008, no 16.779, in particular para. 3.2.

— large-scale embezzlement and acceptance of bribes to a very high amount ([272]);

— involvement as a senior participant in a conspiracy to carry out violent terrorist acts ([273]);

— participation in the forced conscription of minors over the age of 15 into the Liberation Tigers of Tamil Eelam (LTTE) ([274]).

It must be stressed, however, that it is not simply how the crime is labelled that matters, since all the circumstances of the individual case must be taken into account before it can be concluded that the person concerned is individually responsible for a 'serious' non-political crime.

3.4.1.2 Non-political crime

Even if there are serious reasons for considering that an applicant for international protection is individually responsible for a 'serious crime', Article 12(2)(b) QD (recast) is engaged only if the crime was 'non-political' and was committed outside the country of refuge prior to the applicant's admission as a refugee.

The QD (recast) does not define 'non-political' but does stipulate in Article 12(2)(b) that 'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes'. As already noted, the CJEU has held that 'terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall [sic]to be regarded as serious non-political crimes within the meaning of [Article 12(2)(b) QD]' ([275]). It is not always easy to assess whether a serious crime must be considered *political*. Here, the 'predominance test' can be helpful. UNHCR states that 'where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant' ([276]).

In order to assess whether a serious crime is non-political, the following questions need to be examined.

(1) Is the offence connected to a struggle for political power within the state (e.g. acts by the opposition party to gain power)?

(2) Is the offence motivated by political ideology (e.g. is the act committed for a personal or common purpose)?

(3) Is there a close and causal link between the act and its objective (e.g. does the act have an expected effect on reaching the political objective)?

(4) Is the offence (the means) proportionate to the political objective pursued (e.g. does the act result in vast material or personal damage)? ([277])

([272]) Council of State (the Netherlands), Judgment of 30 December 2009, 200902983/1/V1, NL:RVS:2009:BK8653, para. 2.3.5 (in Dutch).
([273]) UKUT, Judgment of 25 July 2013, AH (Algeria) v Secretary of State for the Home Department [2013] UKUT 382, paras. 100-102, upheld at appeal by EWCA (UK), Judgment of 14 October 2015, AH (Algeria) v Secretary of State for the Home Department [2015] EWCA Civ 1003.
([274]) National Court of Asylum Law (France), Judgment of 20 April 2017, *M K*, application no 12033163, paras. 12-15.
([275]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 81; CJEU, 2015, *HT*, op. cit., fn. 17, para. 84.
([276]) See UNHCR, Guidelines on International Protection No 3, 2003, op. cit., fn. 32, para. 15.
([277]) See EASO, *Practical Guide: Exclusion*, 2017, p. 25.

The importance of the fourth question is emphasised in Article 12(2)(b), relating to criminal acts which are particularly egregious. This states that '[…] particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes'.

As is set out in Section 3.1.1, the CJEU has not defined the concept of 'terrorist acts' but all the circumstances of the individual case must in any event be considered before it can be concluded that an individual is excludable under any of the grounds for exclusion laid down in Article 12(2) QD (recast) ([278]).

Other than the above, the CJEU has not specified the circumstances under which a crime is regarded as non-political ([279]). Criteria have, however, been developed by the courts and tribunals of the Member States. For example, the German federal administrative court has held the following.

> In this [determination of whether the act is non-political], regard is to be given to the nature of the offence, as well as to the motives behind the act and the purpose it pursues. An offence is non-political if it has been committed primarily for other reasons – for example, for personal reasons or gain ([UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 152]). If there is no clear connection between the crime and its alleged political goal, or if the act committed is out of proportion to its alleged political objective, then non-political motives predominate and characterise the offence as a whole as non-political (House of Lords, Judgment of 22 May 1996 – [1996] 2 All ER 865 – *T* v *Secretary of State for the Home Department* […]). In implementation of Article 12(2)(b) last clause of [the QD], the lawmakers categorised especially brutal acts, for example, as serious non-political crimes even if they were committed in pursuit of primarily political goals. This will regularly be the case for acts of violence that are commonly considered to be of a 'terrorist' nature (see paragraph 15 of the UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, of 4 September 2003 – HCR/GIP/03/05) ([280]).

In the judgment of the former United Kingdom House of Lords to which the German federal administrative court referred, the majority held that the question of what constitutes a political crime is unlikely to receive a definitive answer. The House of Lords nevertheless provided the following as a 'description of an idea'.

> A crime is a political crime for the purposes of Article 1F(b) of the Geneva Convention if, and only if; (1) it is committed, for […] a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target,

([278]) CJEU, 2018, *Ahmed,* op. cit., fn. 14, para. 49. See Section 1.5.
([279]) Note, however, Opinion of Advocate General Mengozzi of 1 June 2010, joined cases C-57/09 and C-101/09, Federal Republic of Germany v B and D, EU:C:2010:302, paras. 54-57, which follow UNHCR's approach in determining whether a crime is 'non-political'.
([280]) Federal administrative court (Germany), 2009, BVerwG 10 C 24.08, op. cit., fn. 106, para. 42, translation by the federal administrative court.

> on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public ([281]).

It should be noted that extradition treaties and other international instruments commonly specify that certain crimes are to be regarded as non-political for the purposes of extradition or mutual legal assistance. Such provisions are to be found, for example, in the Council of Europe Convention on the Prevention of Terrorism ([282]) and the International Convention for the Suppression of the Financing of Terrorism ([283]). Extradition treaties containing such provisions also stipulate, however, that they do not impose an obligation to extradite or to afford mutual legal assistance if:

> the requested state party has substantial grounds for believing that the request for extradition […] or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons ([284]).

In UNHCR's view, the designation of a crime as non-political in extradition treaties is 'significant' for the assessment whether a crime is non-political within the meaning of Article 1F(b) Refugee Convention but should nevertheless be considered 'in light of all relevant factors' ([285]). That would be consistent with the CJEU's observation in *B and D* to the effect that there is no direct relationship between the aims pursued by EU legal instruments relating to measures for combating terrorism and the aims pursued by the QD ([286]). Thus, as Advocate General Mengozzi stated in his opinion in that case.

> [T]he fact that a crime is regarded as non-political in an extradition treaty, albeit significant, is not of itself conclusive for the purposes of the assessment to be made on the basis of Article 1F(b) of the 1951 Geneva Convention, and, in consequence, ought not to be conclusive in terms of [the QD] either ([287]).

In conclusion, the indicators of a political crime are as illustrated in Figure 6 below.

([281]) House of Lords (UK), Judgment of 22 May 1996, T. v Immigration Officer [1996] UKHL 8. See also, Supreme administrative court (Czechia), 2011, A.S. v Ministry of Interior, 4 Azs 60/2007-136, op. cit., fn. 160 (in Czech), where the Court underlined the importance of assessing whether an alleged crime is not in fact a political crime which would not be punishable as a crime in a democratic country at all due to the fact that it was in reality a legitimate exercise of the applicant's fundamental rights.

([282]) Council of Europe Convention on the Prevention of Terrorism, ETS No 196, 16 May 2005 (entry into force: 1 June 2007), Article 20.

([283]) International Convention for the Suppression of the Financing of Terrorism, op. cit., fn. 116, Article 14.

([284]) Council of Europe Convention on the Prevention of Terrorism, op. cit., fn. 279, Article 21(1); International Convention for the Suppression of the Financing of Terrorism, op. cit., fn. 116, Article 15.

([285]) UNHCR, Background Note on the Application of the Exclusion Clauses, *op. cit.*, fn. 156, para. 42.

([286]) CJEU, 2010, B and D, op. cit., fn. 9, para. 89. See further Section 3.1.1.

([287]) Opinion of Advocate General Mengozzi, 2010, Federal Republic of Germany v B and D, op. cit., fn. 279.

Figure 6: Indicators of a political crime

For example, in the case of *Tamil X*, members of an LTTE military unit had deliberately and illegally scuttled [deliberately sank their own] cargo vessel, which was carrying munitions to Sri Lanka for use by the LTTE. The New Zealand Supreme Court held that although it was not in dispute that the LTTE unit had committed a 'serious crime', any possible support provided by the appellant in committing that crime could not give to rise to his exclusion since the crime was political in nature. Even though the crime had been committed in order to prevent the vessel's seizure by the Indian authorities, it was not too remote from the purpose of the voyage, which was directed at securing the political aims of the LTTE by supporting the latter's armed capacity in Sri Lanka. Despite the scuttling having endangered the lives of sailors on board nearby Indian naval and coastguard vessels, it '[could] not be equated to indiscriminate violence against civilians which would make the link between the criminal conduct and any overall political purpose too remote'. Thus, preventing the seizure of the munitions by 'Indian authorities unsympathetic to the Tamil Tigers' must be seen as 'sufficiently connected to the political aims to be within them' ([288]).

In contrast, the UKUT held in *AAS* that, although the hijacking of a civilian aircraft by the appellants was a serious crime which had a political purpose, namely to escape from political persecution in Afghanistan ([289]), the hijacking was too remote from, or disproportionate to, that political purpose. This was because:

> the flight contained a wholly innocent flight crew and about a hundred passengers not associated with the appellants or their families. [Also], by its very nature, hijacking was a chaotic and uncertain event and […] by taking weapons on board the flight, it was likely to involve at the very least a risk of injury to members of the public. […] [T]he hijacking was a serious offence […] that caused great fear and anxiety for the innocent passengers who were detained for a significant period of time. Moreover, […] reasonable persons facing the same perceived risk [of political persecution by the Taliban] and sharing the same characteristics [as the appellants] would not have hijacked the plane [but would have chosen an alternative means of escape] ([290]).

([288]) Supreme Court (New Zealand), Judgment of 27 August 2010, The Attorney General (Minister of Immigration) v Tamil X and Refugee Status Appeals Authority, [2010] NZSC 107, paras. 81-100.
([289]) UKUT, 2019, *AAS and Others*, op. cit., fn. 162, paras. 118-119.
([290]) UKUT, 2019, *AAS and Others*, op. cit., fn. 162, paras. 120-122.

3.4.1.3 Applicability of Article 12(2)(b) to acts that are not prohibited under international humanitarian law when committed in the context of armed conflict

In **international armed conflicts**, members of the armed forces of a party to the conflict (other than medical personnel and chaplains) are 'combatants', with the right under international humanitarian law to participate directly in hostilities ([291]). This means that, if captured, they cannot be prosecuted for acts that are permitted under international humanitarian law – including killing enemy combatants or destroying legitimate and proportionate military objectives – even if the acts in question would constitute a serious crime in peacetime. For the same reasons, a **former combatant** cannot be excluded from refugee status under Article 12(2)(b) on the basis that they have committed such acts whilst a combatant.

In **non-international armed conflicts**, the position is different. Although international humanitarian law creates legal obligations for all the parties to such a conflict – including rebel armed groups – it does not confer upon them any particular legal status ([292]). Thus, even if a rebel armed group respects its obligations under international humanitarian law, nothing prevents the state on whose territory the conflict is taking place from prosecuting members of the group for their acts related to the conflict. In this context, it should be noted that Article 6(5) of Additional Protocol II encourages prosecutorial restraint by providing that '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict […]' ([293]).

In principle, therefore, Member States are not precluded from determining that an act committed in non-international armed conflict is a 'serious crime' within the meaning of Article 12(2)(b) QD (recast), even when the act was not prohibited under international humanitarian law. If the act remained proportionate to its objectives, however, it is unlikely to meet the condition for exclusion from refugee status pursuant to Article 12(2)(b) that it be 'non-political'.

For example, the German federal administrative court has held that the proportionality of an act committed in non-international armed conflict should be assessed against the standards of international humanitarian law. It therefore found that, provided the act was not a war crime, Article 12(2)(b) would as a rule not be applicable ([294]). The French Commission des recours des réfugiés (Refugee appeals board) effectively took the same approach in the case of a Chechen fighter, who was deemed not to be excluded under Article 1F(b) Refugee Convention. The Commission found that this was because the acts he had committed against Russian armed forces had not violated international humanitarian law and had legitimate objectives since 'he could be regarded as […] having defended the Chechen people and his own family' ([295]).

([291]) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978), Article 43(2). Note that civilians may also have the status of combatants in the exceptional situation of a *levée en masse*: see Article 2 of the Hague Regulations annexed to Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (entry into force: 26 January 1910); GC (I), op. cit., fn. 167, Article 13(6); GC (III), op. cit., fn. 167, Article 4A(6).

([292]) See the last paragraph of Common Article 3.

([293]) The ICRC states that the objective of Article 6(5) of Additional Protocol II is 'to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided'. See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), p. 1402, marginal note 4618 [Internet version available at ICRC online database: Commentary to Additional Protocol I and Commentary to Additional Protocol II].

([294]) Federal Administrative Court (Germany), 2009, BVerwG 10 C 24.08, op. cit., fn. 106, para. 43.

([295]) Commission des recours des réfugiés (Refugee Appeals Board, France), decision of 25 January 2007, decision of 25 January 2007, *M S*, application, application no 552944, in National Court of Asylum Law, Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2007, 2008, pp. 99-100 (unofficial translation).

3.4.2 Territorial and temporal scope of Article 12(2)(b)

If an applicant for international protection is deemed to be individually responsible for a serious non-political crime, Article 12(2)(b) QD (recast) stipulates that they are excluded from refugee status if, and only if, that crime was committed '**outside the country** of refuge **prior to his or her admission as a refugee**, which means the time of issuing a residence permit based on the granting of refugee status'.

Members of courts and tribunals should be aware that Article 12(2)(b) is the only provision of Article 12(2) containing a territorial and temporal restriction.

It should be noted that Article 1F(b) Refugee Convention, to which Article 12(2)(b) QD (recast) corresponds, states only that the crime at issue must have been committed outside the country of refuge 'prior to […] admission to that country as a refugee', without adding that this means 'the time of issuing a residence permit based on the granting of refugee status'. It should also be noted that UNHCR considers the phrase 'which means the time of issuing a residence permit' to be inconsistent with Article 1F(b) Refugee Convention ([296]).

Article 12(2)(b) QD (recast) expressly adds that 'prior to […] admission as a refugee' means 'the time of issuing a residence permit based on the granting of refugee status'. It would thus appear that a person must be excluded from qualifying as a refugee if there are serious reasons for considering that they have committed a serious non-political crime outside the Member State concerned while waiting for a decision on their application for international protection, or even after a decision by that Member State to grant refugee status. This would, however, only be possible if the person concerned had not yet been issued a residence permit based on the granting of refugee status. Article 12(2)(b) thus appears to include within its scope a situation in which, after the Member State has recognised that the person concerned qualifies as a refugee and has accordingly granted the person refugee status pursuant to Article 13 QD (recast), the person commits a serious non-political crime outside that Member State prior to being granted a residence permit pursuant to Article 24(1) QD (recast). In such a situation, the Member State would be required under Article 14(3)(a) QD (recast) to end the person's refugee status on the grounds that they are 'excluded from being a refugee in accordance with Article 12' ([297]).

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

Article 12(2)(c) QD (recast) lays down the following ground for exclusion from refugee status.

Article 12(2)(c) QD (recast)

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

([296]) UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004, 28 January 2005, p. 27.

([297]) On Article 14 QD (recast) more generally, see EASO, *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) – A Judicial analysis*, op. cit., fn. 5.

> […]
>
> (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.

Article 12(2)(c) QD (recast) adds to the wording of Article 1F(c) Refugee Convention, which does not itself mention the UN Charter ([298]).

Unlike Article 12(2)(b) QD (recast), Article 12(2)(c) is limited neither temporally nor territorially. It therefore applies to acts contrary to the purposes and principles of the United Nations committed **inside** the country of refuge as well as **outside** it, either **before or after** the admission of the person concerned as a refugee.

3.5.1 Legal characterisation of acts within the scope of Article 12(2)(c)

The expression 'acts contrary to the purposes and principles of the United Nations' originates in the qualification of the right to asylum in Article 14(2) of the 1948 Universal Declaration of Human Rights ([299]).

> **Article 14, Universal Declaration of Human Rights**
>
> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from **acts contrary to the purposes and principles of the United Nations** (emphasis added).

The use of the word 'prosecutions' in Article 14(2) of the Universal Declaration of Human Rights implies that, for the purposes of that article, 'acts contrary to the purposes and principles of the United Nations' are confined to criminal acts. The scope of Article 1F(c) Refugee Convention and Article 12(2)(c) QD (recast) is not, however, necessarily likewise confined. This is notwithstanding that, as already noted, the CJEU has held that all three grounds for exclusion laid down in Article 12(2) QD (recast) are structured around the concept of serious 'crime' ([300]). Thus, while it is clear that the acts falling within the scope of Article 12(2)(c) must be of a comparable gravity to the crimes coming within the scope of

([298]) Charter of the United Nations, San Francisco, 1945.
([299]) UNGA, Universal Declaration of Human Rights, 11 December 1948, A/RES/217 (III) A. See S. Kapferer, 'Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection', *Refugee Survey Quarterly* (2008), pp. 53-75.
([300]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, para. 46.

Article 12(2)(a) and (b) ([301]), it is generally accepted that they need not be criminal acts ([302]) and that the applicant need not be prosecuted because of this act. Also, UNHCR, while assuming that acts contrary to the purposes of the UN must be of a criminal nature, does not exclude the possibility that acts which do not constitute crimes, may fall within the scope of Article 1F(c) Refugee Convention ([303]).

3.5.2 Material scope of Article 12(2)(c)

Recital 31 QD (recast) states the following regarding 'acts contrary to the purposes and principles of the United Nations'.

Recital 31 QD (recast)

Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

So far, the CJEU has addressed the application of Article 12(2)(c) only in the context of terrorism, which will therefore be discussed first (see Section 3.5.2.1). Given the breadth of the purposes and principles of the UN as set out in the preamble and in Articles 1 and 2 of the UN Charter ([304]), however, it is clearly not only conduct falling within the concept of terrorism that may fall within the ambit of Article 12(2)(c). The specific characteristics of acts contrary to the purposes and principles of the UN, as established by the courts and tribunals of the Member States, are accordingly discussed in Section 3.5.2.2.

3.5.2.1 Terrorism as an act contrary to the purposes and principles of the United Nations

This section assumes that the reader is already familiar with the contents of Section 3.1.1, which makes various essential points about 'terrorism' in the context of exclusion that will not be repeated here.

([301]) See, for example, Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, para. 13; UKUT, 2013, *AH (Algeria)*, op. cit., fn. 273, para. 86; CJEU, 2018, *K and HF*, op. cit. fn. 8, para. 46, stating that 'the crimes and acts that are the subject of […] Article 12(2) of [the QD (recast)] seriously undermine both fundamental values such as respect for human dignity and human rights, on which […] the European Union is founded, and the peace which it is the Union's aim to promote'. In *Al-Sirri,* the relevant facts included suspicion of conspiracy in the murder of an Afghan general and suspicion of involvement in armed attacks against the UN forces in Afghanistan. In *AH,* the relevant facts included suspicion of involvement in airport bombing.

([302]) See, for example, Federal Administrative Court (Germany), Judgment of 19 November 2013, BVerwG 10 C 26.12, DE:BVerwG:2013:191113U10C26.12.0, para. 15, concerning terrorism; Supreme administrative court (Czechia), Judgment of 29 March 2011, J.S.A. v Ministry of Interior, 6 Azs 40/2010-70, para. 33 concerning collaboration with Cuban security forces (in Czech); Immigration Appeal Tribunal (UK), Judgment of 7 May 2004, *KK (Article 1F(c))* [2004] UKIAT 101, para. 88, concerning terrorism; UKUT, Judgment of 2 March 2016, Hany Youssef v Secretary of State for the Home Department [2016] UKUT 00137 (IAC), para. 20, concerning terrorism, upheld by England and Wales Court of Appeal (EWCA), Judgment of 26 April 2018, Hany El-Sayed El-Sebat Youssef and N2 v Secretary of State for the Home Department, [2018] EWCA Civ 933, paras. 68-77.

([303]) See UNHCR, UNHCR intervention before the Supreme Court of the United Kingdom in the cases of Yasser al-Sirri (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (Appellant) v Secretary of State for the Home Department (Respondent), 23 March 2012, para. 17.

([304]) See Appendix C: Selected relevant international legal provisions for the text of these provisions.

As mentioned, so far, the case-law of the CJEU has addressed the application of Article 12(2)(c) only in the context of terrorism. In *B and D*, the court held that it is clear from UNSC Resolutions 1373 (2001) ([305]) and 1377 (2001) ([306]) that '**international terrorist acts** are, generally speaking and irrespective of any state participation, contrary to the purposes and principles of the United Nations' ([307]). In *Lounani*, the CJEU held that it further follows from UNSC Resolution 1377 (2001) that **'the financing, planning and preparation of, as well as any other form of support for, acts of international terrorism'** are also acts contrary to the purposes and principles of the UN ([308]). Furthermore, it can be inferred from UNSC Resolution 1624 (2005) ([309]) that:

> acts contrary to the purposes and principles of the United Nations are not confined to 'acts, methods and practices of terrorism'. The Security Council, in that resolution, calls upon all states, in order to fight against terrorism, in accordance with their obligations under international law, to deny safe haven to and bring to justice 'any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts, or provides safe haven'. Moreover, […] that resolution calls upon all states to deny a safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of incitement to commit a terrorist act or acts.
>
> It follows that the concept of 'acts contrary to the purposes and principles of the United Nations', to be found in Article 1F(c) of the Geneva Convention and in Article 12(2)(c) of Directive 2004/83, cannot be interpreted as being confined to the commission of terrorist acts as specified in the Security Council resolutions (hereafter: 'terrorist acts') ([310]).

The CJEU noted in relation to the case in the main proceedings in *Lounani* that UNSC Resolution 2178 (2014) ([311]) addresses the phenomenon of foreign terrorist fighters, namely 'individuals who travel to a state other than their states of residence or nationality for the purpose of the perpetration, planning or preparation of […] terrorist acts' ([312]). That resolution expresses concern regarding 'the international networks established by terrorist entities enabling them to move, between states, fighters of all nationalities and the resources to support them' ([313]). Further, it calls upon states to adopt various countermeasures, including the prevention and suppression of the following activities:

> the recruitment, organisation, transportation or equipment of individuals who travel to a state other than their states of residence or nationality for the purpose of, inter alia, the perpetration, planning or preparation of terrorist acts ([314]).

Accordingly, even if an applicant for international protection has not perpetrated, instigated or otherwise participated in an international terrorist act, they will fall within the scope

([305]) UN Security Council, Resolution 1373 (2001), op. cit., fn. 127.
([306]) UN Security Council, Resolution 1377 (2001) (12 November 2001) UN Doc S/RES/1377(2001).
([307]) CJEU, 2010, *B and D*, *op. cit.*, fn. 9, para. 83 (emphasis added). See also para. 84, noting that the terrorist acts in question had an 'international dimension'.
([308]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 46.
([309]) UN Security Council, Resolution 1624 (2005) (14 September 2005) UN Doc S/RES/1624(2005).
([310]) CJEU, 2017, *Lounani*, op. cit., fn. 28, paras. 47 and 48.
([311]) UNSC, Resolution 2178 (2014) (24 September 2014) UN Doc S/RES/2178(2014).
([312]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 67.
([313]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 67.
([314]) CJEU, 2017, *Lounani*, op. cit., fn. 28, paras. 68 and 69.

of Article 12(2)(c) if there are serious reasons for considering that they have carried out, instigated or otherwise participated in the above activities ([315]).

The CJEU underlined in both *B and D* and *Lounani* that the acts of terrorism at stake had an **international dimension** which contributed to bringing the acts concerned within the scope of Article 12(2)(c) ([316]). This in contrast to terrorist conduct falling within the scope of Article 12(2)(b), with regard to which the CJEU has made no such observation ([317]). In *Lounani*, the CJEU thus observed that the following factors, amongst others, needed to be taken into consideration in determining whether the applicant in the main proceedings was excluded from refugee status under Article 12(2)(c).

> [I]t should be observed that the order for reference indicates that Mr Lounani was a member of the leadership of a terrorist group that operated internationally, was registered, on 10 October 2002, on the United Nations list which identifies certain individuals and entities that are subject to sanctions, and continues to be named on that list, as updated since that date. His logistical support to the activities of that group has an international dimension in so far as he was involved in the forgery of passports and assisted volunteers who wanted to travel to Iraq ([318]).

The French Council of State held:

> [I]f acts of a terrorist nature can fall within Article 1F(b) of the Refugee Convention, terrorist acts of **an international scale in terms of gravity, international impact and implications for peace and international security** can also amount to acts contrary to the purposes and principles of the United Nations within the meaning of Article 1F(c) of the Refugee Convention ([319]).

In the case concerned, the lower court whose judgment was being appealed had held that there were serious reasons for considering that the applicant had committed acts contrary to the purposes and principles of the United Nations within the meaning of Article 1F(c) Refugee Convention. The lower court had found that the applicant had been charged with offences in connection with a violent act of the Kurdistan Workers' Party (PKK) in which Molotov cocktails were thrown at the premises of a Turkish cultural association in France. It had also determined that that act had been categorised as terrorist by the prosecutor, and was part of a series of violent acts carried out in Europe by the PKK, which was considered to be a terrorist organisation by the EU. The council of state annulled the decision of the lower court, however, on the grounds that it had failed to assess the seriousness of the act in issue in relation to its international dimension ([320]).

As discussed below, it is generally accepted that **all** acts contrary to the purposes and principles of the UN – not just those falling within the concept of terrorism – require an international dimension.

([315]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 70.
([316]) CJEU, 2010, *B and D*, *op. cit.*, fn. 9, para. 84; CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 74.
([317]) CJEU, 2010, *B and D, op. cit.*, fn. 9, para. 81.
([318]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 74.
([319]) Conseil d'État (Council of state, France), Judgment of 11 April 2018, *M A*, application no 402242, FR:CECHR:2018:402242.20180411 (English summary), para. 2, unofficial translation for this judicial analysis (emphasis added).
([320]) Conseil d'État (Council of state, France), Judgment of 11 April 2018, *M A*, application no 402242, FR:CECHR:2018:402242.20180411 (English summary), paras. 1-3, unofficial translation for this judicial analysis.

3.5.2.2 Examples of acts contrary to the purposes and principles of the UN

It is generally accepted that an act offending the purposes and principles of the UN must be of sufficient gravity and international impact to come within Article 12(2)(c). UNHCR has put it this way:

> The principles and purposes of the United Nations are reflected in myriad ways, for example by multilateral conventions adopted under the aegis of the UN General Assembly and in Security Council resolutions. Equating any action contrary to such instruments as falling within [Article 1F(c) Refugee Convention] would, however, be inconsistent with the object and purpose of this provision. Rather, it appears that Article 1F(c) only applies to acts that offend the principles and purposes of the United Nations in a fundamental manner. **Article 1F(c) is thus triggered only in extreme circumstances by activity which attacks the very basis of the international community's coexistence** under the auspices of the United Nations. The key words in Article 1F(c) – 'acts contrary to the purposes and principles of the United Nations' – should therefore be construed restrictively and its application reserved for situations where an act and the consequences thereof meet a high threshold. **This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security. Thus, crimes capable of affecting international peace, security and peaceful relations between states would fall within this clause, as would serious and sustained violations of human rights** ([321]).

In short, according to UNHCR:

> Article 1F(c) [of the Refugee Convention] is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category ([322]).

The courts and tribunals of the Member States have taken essentially the same approach, albeit sometimes differing as to certain details.

For example, UNHCR's approach has been expressly endorsed by the UK Supreme Court ([323]), and by the French National Court of Asylum Law ([324]), subsequent to a similar position taken by the French Council of State ([325]).

([321]) UNHCR, Background Note on the Application of the Exclusion Clauses, op. cit., fn. 156, para. 47 (emphasis added).
([322]) UNHCR, Guidelines on International Protection No 13, op. cit., fn. 70, para. 17.
([323]) Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, paras. 14 and 38.
([324]) See National Court of Asylum Law (France), judgments of 25 June 2019, Grand Chamber, *Mme I*, application no 180287385, paras. 9-12 and of 30 August 2019, *M. A*, application no 18052314, paras. 6-9. The two cases concerned Nigerian beneficiaries of international protection, whose protection status OFPRA sought to revoke on the grounds that they had been involved in pimping as part of a prostitution ring. In the first case, Mme I had been personally implicated in a trafficking network, but her low level of responsibility was found not to rise to the level of seriousness or of individual responsibility to result in her exclusion under Article 1F(c). (Her subsidiary protection status was nonetheless revoked on the grounds that she had committed a serious non-political crime.) By contrast, in the second case, the court determined that in view of M. A's high rank and responsibility in a transnational prostitution network, he should be excluded under Article 1F(c). It found that he had directed the network with others, including through high-level contacts among the administrative and diplomatic elite, that the network had involved a high number of victims, and that he had received multiple heavy sentences for various crimes. His refugee status was therefore revoked.
([325]) Council of State (France), Judgment of 11 April 2018, application no 410897, FR:CECHR:2018:410897.20180411, para. 2 (in French).

The Czech Supreme Court, citing, inter alia, the seminal judgment of the Canadian Supreme Court in *Pushpanathan* ([326]), considers that acts contrary to the purposes and principles of the UN include: (i) acts that have been expressly designated as such by the UN; and (ii) acts that constitute sufficiently serious and sustained violations of human rights as to amount to persecution ([327]). In the Czech judgment, the facts included collaboration with Cuban security forces and providing them with information on activities of other Cuban nationals living abroad, especially about their contacts with persons coming from 'Western' countries or about their intentions to travel (or emigrate) to the West. In *Pushpanathan*, the Canadian Supreme Court had ruled to that effect when determining whether trafficking in narcotics was contrary to the purposes and principles of the UN.

Regarding **acts expressly designated as acts contrary to the purposes and principles of the UN**, the Canadian Supreme Court held:

> […] [W]here a widely accepted international agreement or United Nations resolution explicitly declares that the commission of certain acts is contrary to the purposes and principles of the United Nations, then there is a strong indication that those acts will fall within Article 1F(c). The *Declaration on the Protection of All Persons from Enforced disappearance* (GA Res. 47/133, 18 December 1992, Article 1(1)), the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (GA Res. 3452 (XXX), 9 December 1975, Article 2), and the Declaration to Supplement the 1994 *Declaration on Measures to Eliminate International Terrorism* (GA Res. 51/210, 16 January 1997, Annex, Article 2), all designate acts which are contrary to the purposes and principles of the United Nations. Where such declarations or resolutions represent a reasonable consensus of the international community, then that designation should be considered determinative.
>
> Similarly, other sources of international law may be relevant in a court's determination of whether an act falls within Article 1F(c). For example, determinations by the International Court of Justice may be compelling. In the case *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, p. 3, at para. 91, the court found:
>
> 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.'
>
> The International Court of Justice used even stronger language in the advisory opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* ICJ Reports 1971, p. 16, at para. 131, finding that the policy of apartheid 'constitute[s] a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the Charter' ([328]).

The court then held that drug trafficking failed to meet the above test.

([326]) Supreme Court (Canada), Judgment of 4 June 1998, Veluppillai Pushpanathan v Minister of Citizenship and Immigration [1998] 1 SCR 982.
([327]) Supreme administrative court (Czechia), 2011, *J.S.A.*, op. cit., fn. 302, para. 34 (in Czech).
([328]) Supreme Court (Canada), 1998, *Pushpanathan*, op. cit., fn. 323, paras. 66 and 67.

> […] There is no indication in international law that drug trafficking on any scale is to be considered contrary to the purposes and principles of the United Nations. The respondent submitted evidence that the international community had developed a coordinated effort to stop trafficking in illicit substances through numerous UN treaties, declarations, and institutions. It has not, however, been able to point to any explicit declaration that drug trafficking is contrary to the purposes and principles of the United Nations, nor that such acts should be taken into consideration in deciding whether to grant a refugee claimant asylum. Such an explicit declaration would be an expression of the international community's judgment that such acts should qualify as tantamount to serious, sustained and systemic violations of fundamental human rights constituting persecution ([329]).

Regarding **acts constituting sufficiently serious and sustained violations of fundamental human rights as to amount to persecution**, the Canadian Supreme Court held the following.

> The second category of acts which fall within the scope of Article 1F(c) are those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution. This analysis involves a factual and a legal component. The court must assess the status of the rule which has been violated. Where the rule which has been violated is very near the core of the most valued principles of human rights and is recognized as immediately subject to international condemnation and punishment, then even an isolated violation could lead to an exclusion under Article 1F(c). The status of a violated rule as a universal jurisdiction offence would be a compelling indication that even an isolated violation constitutes persecution. To that end, if the international community were ever to adopt the *Draft Statute of the International Criminal Court*, UN Doc. A/CN.4/L.491/Rev.2, which currently includes trafficking in narcotics within its jurisdiction, along with war crimes, torture and genocide, then there would be a much greater likelihood of a court being able to find a serious violation of human rights by virtue of those activities.
>
> A serious and sustained violation of human rights amounting to persecution may also arise from a particularly egregious factual situation, including the extent of the complicity of the applicant. Assessing the factual circumstances of a human rights violation as well as the nature of the right violated would allow a domestic court, for example, to determine on its own that the events in the Tehran hostage-taking warrant exclusion under Article 1F(c) ([330]).

The court held that drug trafficking also failed to meet that second test.

> In this case there is simply no indication that the drug trafficking comes close to the core, or even forms a part of the corpus of fundamental human rights. The respondent sought to bring the Court's attention to a novel category of international offence devised by M. C. Bassiouni called 'crimes of international concern' (*International Criminal Law*, vol. 1, *Crimes* (1986), at pp. 135-63). Those 'crimes' evince certain characteristics indicating that the international community does view their violation as particularly serious and worthy of immediate sanction; however, the bar appears to be set too low, including such categories of offence as 'interference with submarine

([329]) Supreme Court (Canada), 1998, *Pushpanathan*, op. cit., fn. 323, para. 69.
([330]) Supreme Court (Canada), 1998, *Pushpanathan*, op. cit., fn. 323, paras. 70 and 71. Note that the Rome Statute, op. cit., fn. 164, ultimately did not include trafficking in narcotics as a crime within the ICC's jurisdiction.

> cables' and 'environmental protection', as well as drug trafficking and eight other categories ([331]).

The UK Supreme Court held in *Al-Sirri* that the Canadian Supreme Court's categorisation of acts contrary to the purposes of the UN is not exhaustive ([332]), since neither of the above two categories developed by the Canadian court covered an attack on the former International Security Assistance Force (ISAF) in Afghanistan. Specifically, in view of the fact that ISAF's mandate was established and renewed by a succession of UNSC resolutions, the UK Supreme Court considered that an attack on ISAF was in principle capable of being an act contrary to the purposes and principles of the UN. The court found this was so because such an attack sought to frustrate ISAF's fundamental aims and objectives which accorded with the purpose of maintaining international peace and security set out in Article 1 of the UN Charter. The court considered it immaterial in that regard that ISAF was a combat force and therefore did not enjoy under international humanitarian law the same protection from attack as a UN peacekeeping force. It was also immaterial whether the attack was a war crime or other crime in international law ([333]).

Conclusions to the same effect as of those of the UK Supreme Court had also been reached previously by the Irish High Court ([334]).

The German federal administrative court has emphasised UNSC resolutions under Chapter VII of the UN Charter.

> The aims and principles of the United Nations that are pertinent for the reason for exclusion under [Article 12(2)(c) QD and Article 1F(c) of the Refugee Convention] are set forth in the preamble and Articles 1 and 2 of the Charter of the United Nations […]. In the preamble and Article 1 of the Charter, the aim is stated of maintaining international peace and security. Chapter VII of the Charter (Articles 39 through 51) governs the measures to be taken in the event of threats to the peace, breaches of the peace, and acts of aggression. Under Article 39 of the Charter, it is the task of the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression. According to the case law of the European Court of Justice, special importance attaches to the fact that, in accordance with Article 24 of the Charter, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what poses a threat to international peace and security (ECJ, Judgment of the Grand Chamber of 3 September 2008 – Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* – Col. 2008 at 294) ([335]).

The case before the German federal administrative court concerned abuses committed by combat units of the Forces démocratiques de libération du Rwanda (FDLR) in the eastern part of the Democratic Republic of the Congo. The court held:

([331]) Supreme Court (Canada), 1998, *Pushpanathan*, op. cit., fn. 323, para. 72.
([332]) Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, para. 67.
([333]) Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, paras. 59-68.
([334]) High Court (Ireland), 2011, *AB*, op. cit., fn. 22, paras. 55 and 56.
([335]) Federal Administrative Court (Germany), 2011, 10 C 2.10, op. cit., fn. 156, para. 35, translation by the court.

> In its Resolution 1493 (2003) of 28 July 2003, the UN Security Council held that the armed conflict in the Democratic Republic of the Congo represented a threat to international peace, basing its action expressly on Chapter VII of the Charter (Resolution before item 1). In so doing, it referenced the continuation of hostilities in the eastern part of the country, and the accompanying grave violations of human rights and of international humanitarian law. It strongly condemns the 'acts of violence systematically perpetrated against civilians, including the massacres, as well as other atrocities and violations of international humanitarian law and human rights, in particular, sexual violence against women and girls, and it stresses the need to bring to justice those responsible, including those at the command level' (item 8 of the Resolution). Additionally, the Security Council imposed an arms embargo to prevent the further importation of arms and related material into the Democratic Republic of the Congo (item 20 of the Resolution). Thus it is clear that the armed conflicts in the Democratic Republic of the Congo, in which the FDLR is a participant, constitute a breach of international peace, even without the national courts being authorised to perform a review in this regard. It is furthermore established by the UN Security Council Resolution that the breach of international peace proceeds, in any case, also from the atrocities and violations of international humanitarian law identified further in the Resolution, and also from the importation of weapons into the area of the conflict. These disruptive acts therefore contravene the aims and principles of the United Nations ([336]).

Further examples of acts contrary to the purposes and principles of the UN in the case-law of the courts and tribunals of the Member States include:

— involvement in human trafficking, providing that the conduct of the person concerned is of sufficient seriousness ([337]);

— the torture of a kidnapped UN official ([338]);

— the forced recruitment of minors over the age of 15, given that Article 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict ([339]) provides that '[a]rmed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years' ([340]).

3.5.3 Personal scope of Article 12(2)(c)

It used sometimes to be said that acts contrary to the purposes and principles of the UN could only be committed by persons in a position of power in a state or state-like entity ([341]). This approach has changed during the last decades, due to the development of international law in reaction to terrorism. UNHCR's 2009 Statement on Article 1F reflects this change

([336]) Federal Administrative Court (Germany), 2011, 10 C 2.10, op. cit., fn. 156, para. 36, translation by the court.
([337]) National Court of Asylum Law (France), 2019, Grand Chamber, *Mme I*, application no 180287385, op. cit., fn. 321, paras. 8-13 (in French).
([338]) Council of State (France), Judgment of 7 June 2017, *Mme B*, application no 396261, FR:CECHR:2017:396261.20170607, para. 3 (in French).
([339]) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2173 UNTS 222, 25 May 2000 (entry into force: 12 February 2002).
([340]) National Court of Asylum Law (France), Judgment of 20 April 2017, *M K*, application no 12033163, paras. 12-15 (in French).
([341]) UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, op. cit., fn. 265, para. 163; Federal Administrative Court (Germany), Judgment of 1 July 1975, 1 C 44.68, Buchholz 402.24. para. 28 AuslG No 9.

of approach ([342]). The jurisprudence of the CJEU demonstrates, however, that that view is no longer valid, at least in so far as terrorist conduct is concerned. In *B and D*, the CJEU held that 'international terrorist acts are, generally speaking and **irrespective of any state participation**, contrary to the purposes and principles of the United Nations' ([343]). Based on the CJEU's ruling in *Lounani*, it is also clear that the same applies to other forms of terrorist conduct which has an international dimension and which, according to resolutions of the UNSC, is contrary to the purposes and principles of the United Nations ([344]).

The question, though, is whether terrorism is an exception to a putative general rule that Article 12(2)(c) QD (recast) only applies to persons in a position of power in a state or in a state-like entity, or whether there may also be other forms of conduct of non-state actors that can fall within the scope of Article 12(2)(c). The German federal administrative court considers:

> [T]here is much to argue that under certain narrow conditions, non-state actors may also bring about the reason for exclusion under [Article 12(2)(c)]. For members of terrorist organisations, this proceeds from the judgment of the [CJEU in *B and D*] […]. For other breaches of international peace, it must be decided on the basis of the Resolutions of the UN Security Council whether and in what regard the court finds a breach of international peace, whether a private actor has a significant influence on that breach, and whether the effect on the breach of international peace that proceeds from that individual is similar to the effect of state bearers of responsibility. This interpretation permits a proper distinction of reasons for exclusion under [points (a) and (c) of Article 12(2) QD], because [point (b)] also includes the acts of non-state persons in positions of political responsibility who might not be treated as criminally responsible under [point (a)], but whose exclusion, because of their significant influence on the breach of international peace, for example as the political representatives or leaders of paramilitary associations or militias, is imperative in order to preserve the integrity of refugee status ([345]).

The Czech supreme administrative court held that secret reporting by a private person to the authorities of a totalitarian state about the activities of the nationals of that state with the intention to cause, or at least the awareness of causing, severe violations of human rights (persecution) of the individuals concerned may be regarded as a participation in the commission of acts contrary to the purposes and principles of the UN ([346]). The Supreme Court of Canada came to a similar conclusion in *Pushpanathan* ([347]).

([342]) UNHCR, Statement on Article 1F of the 1951 Convention Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive, July 2009, p. 19.
([343]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 83 (emphasis added).
([344]) CJEU, 2017, *Lounani,* op. cit., fn. 28.
([345]) Federal administrative court (Germany), 2011, 10 C 2.10, op. cit., fn. 156, para. 38, translation by the Federal Administrative Court.
([346]) Supreme administrative court (Czechia), 2011, *J.S.A.*, op. cit., fn. 302 (in Czech).
([347]) Supreme court (Canada), 1998, Pushpanathan, op. cit., fn. 323, para. 68.

3.6 Individual responsibility

When it comes to the determination of individual responsibility in the context of the application of the exclusion clauses, Article 12(2) QD (recast) must be read in conjunction with Article 12(3) QD (recast).

Members of courts and tribunals must determine whether there are 'serious reasons for considering' that the applicant '**has committed a crime**' (Article 12(2)(a) and (b)) or '**has been guilty of acts**' (Article 12(2)(c)) within the scope of these provisions. Similar language is employed in Article 1F Refugee Convention.

Furthermore, an applicant for international protection may also be excluded from refugee status pursuant to Article 12(3), in a situation where they have participated in the commission of a crime under Article 12(2)(a) or (b) or in the commission of an act under Article 12(2)(c) by way of **incitement or other form of participation**.

Together Article 12(2) and (3) define three modes of responsibility for crimes within the scope of Article 12(2)(a) and (b). These are set out in Table 16 below.

Table 16: Modes of responsibility for crimes within the scope of Article 12(2)(a) and (b)

Article 12(2)(a) and (b)	Article 12(2)(c)
→ 'committed',	→ 'guilty of',
→ 'incited', or	→ incited', or
→ 'otherwise participated in'.	→ 'otherwise participated in'.

In that regard, the UK Supreme Court held in the case of *JS (Sri Lanka)* that 'Article 12(3) does not […] enlarge the application of Article 1F' of the Geneva Convention, but rather 'merely gives expression to what is already well understood in international law' ([348]). Similarly, the German federal administrative court held, with reference to *JS (Sri Lanka)*, that Article 12(3) QD was not designed to expand the application of Article 1F of the Geneva Convention. Rather, the court found that it was intended to further clarify its application in EU law in recognition of the diverse interpretation of the terms, perpetration, incitement and other forms of participation in the Member States ([349]). Considering the matter further in a subsequent decision, the German federal administrative court acknowledged that there are no uniform international criteria for the assessment of the perpetration of, and participation in, excludable crimes or acts. It therefore found that national law may, in principle, be of assistance by way of orientation ([350]).

Given the specific nature of the exclusion clauses that draw expressly on other branches of public international law, as most evident in Article 1F(a) Refugee Convention, but also apparent in Article 1F(b) and (c), the case-law on complicity and culpability has also drawn on the jurisprudence of international courts and tribunals. The latter include the International

([348]) Supreme Court (UK), 2010, *JS (Sri Lanka)*, op. cit., fn. 23, para. 33.
([349]) Federal Administrative Court (Germany, BVerWG), Judgment of 7 July 2011, BVerwG 10 C 26.10, ECLI:DE:BVerwG:2011:070711U10C26.10.0, para. 38.
([350]) Federal Administrative Court (Germany, BVerWG), Judgment of 4 September 2012, BVerwG 10 C 13.11, ECLI:DE:BVerwG:2012:040912U10C13.11.0 (English summary), para. 24.

Criminal Court (ICC), the UN International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) ([351]).

3.6.1 Criteria for determining individual responsibility

For a finding that there are 'serious reasons for considering' that an individual applicant has committed a crime or act which justifies their exclusion from international protection, two criteria need to be established. Thus, the court or tribunal needs to be able to establish both that:

- an excludable crime or act has been committed (*actus reus*) and that
- the individual had the requisite intent (*mens rea*) to commit or participate in the particular crime or act.

Clearly, the court or tribunal has to take into account the nature of the crime that is at stake and the mode of responsibility that is applicable in connection to this specific crime.

In that regard, according to Advocate General Mengozzi, 'it will be necessary to determine whether there is sufficient evidence, regard being had to the standard of proof required under Article 12(2) [QD], to establish the individual responsibility of the person concerned […], in the light of both objective criteria (**actual conduct**) and subjective criteria (**awareness and intent**)' ([352]).

As set out in Section 3.2, however, the evidential standard of proof for exclusion from refugee status under Article 12(2) QD (recast) is not that of *in dubio pro reo* as in national and international criminal law ([353]). Rather, it is something different, namely **'serious reasons for considering'** that the person concerned is individually responsible for an excludable crime or act ([354]).

The decision of the Supreme Court of Canada in *Ezokola* provides some useful guidance in this regard. The court clarified that in Canada:

> […], the Refugee Protection Division does not determine guilt or innocence, but excludes, *ab initio*, those who are not *bona fide* refugees at the time of their claim for refugee status. This is reflected in and accommodated by the unique evidentiary burden applicable to art. 1F(a) determinations: a person is excluded from the definition of 'refugee' if there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity. While this standard

([351]) The websites for the ICC, ICTY, and ICTR are available at: (http://www.icc-cpi.int); (http://www.icty.org); and (http://www.unictr.org). See also, J.C., Simeon, 'Complicity and Culpability and the Exclusion of Terrorist from Convention Refugee Status Post-9/11', *Refugee Survey Quarterly* (29:4, December 2010), pp. 104-137 at p. 107.

([352]) Opinion of Advocate General Mengozzi, Federal Republic of Germany v B and D, op. cit., fn. 279, para.78 (emphasis added).

([353]) For example, in international criminal law and in many national jurisdictions the standard of proof is 'beyond reasonable doubt'. In EU criminal law, note Article 6(2) of Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence, op. cit., fn. 152, which provides: 'Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.'

([354]) See, for example, Supreme Court (UK), 2012, *Al-Sirri*, op. cit., fn. 153, para. 75; Council of State (France), 2016, *M. X*, application no 255091, op. cit., fn. 153 (in French); Federal administrative court (Germany), 2009, BVerwG 10 C 24.08, op. cit., fn. 106, para. 35; and Supreme administrative court (Finland), 2014, 497 KHO:2014:35, op. cit., fn. 153, (in Finnish). The latter judgment concerns exclusion from subsidiary protection status under Article 17(1)(b) QD, not exclusion from refugee status under Article 12(2) QD, but it interprets Article 17(1)(b) QD on the basis of Article 1F(b) of the Refugee Convention, referring in that regard to, inter alia, CJEU, 2010, *B and D*, op. cit., fn. 9, concerning the interpretation of Article 12(2)(b) and (c) QD.

> is lower than that applicable in actual war crimes trials, it requires more than mere suspicion ([355]).

3.6.1.1 Material elements of the act – *actus reus*

In considering the application of the exclusion clauses, members of courts and tribunals must first be satisfied that the facts at stake constitute an excludable act or crime covered by Article 12(2) QD (recast). This is discussed in detail in Sections 3.3, 3.4, and 3.5.

If, however, an applicant for international protection may be liable to exclusion under Article 12(2) QD (recast) due to their conduct as a leader of a group, the fact that the crime or act intended was ultimately not committed by members of the group would not preclude the conduct of the leader from constituting an excludable act. As the CJEU stated in its judgment in *Lounani*:

> [T]he fact, were it to be established as such, that the group of which Mr Lounani was one of the leaders may not have perpetrated any terrorist acts or that the volunteers who wanted to travel to Iraq and were helped by that group may not ultimately have committed such acts, is not, in any event, such as to preclude the conduct of Mr Lounani from falling [sic] to be regarded as contrary to the purposes and principles of the United Nations […] ([356]).

3.6.1.2 Mental elements of the act – *mens rea*

The facts of the case may either indicate that the applicant is the principal perpetrator, in other words the person who directly committed the excludable crime or act within the scope of Article 12(2) QD (recast), or that the person incited or otherwise participated in the commission of that crime or act. In such circumstances, court or tribunal members will be required to make an assessment as to whether they committed the material elements of the crime or act, or participated in the commission of same, with the requisite *mens rea*, that is, intent and knowledge.

In *B and D,* the CJEU ruled on the liability of a person for acts committed by the organisation led by him. What the court said about this also implies that the mental element is relevant.

To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; **the extent of the knowledge he had**, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct ([357]).

The provisions of Article 30 of the Rome Statute may be of assistance to judges and tribunal members when making such an assessment, even though they, of course, are only directly applicable to the commission of crimes covered by the Rome Statute. This is at least so when considering the mental element of crimes that fall under Article 12(2)(a) QD (recast),

([355]) Supreme Court (Canada), Judgment of 19 July 2013, Ezokola v Canada (Minister of Citizenship and Immigration), SCC 40, [2013] 2 SCR 678.
([356]) CJEU, 2017, *Lounani,* op. cit., fn. 28, para. 77.
([357]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 97 (emphasis added).

in other words, crimes against peace, war crimes or crimes against humanity as defined in international instruments such as the Rome Statute.

Article 30 Rome Statute

Mental element

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

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

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

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

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

Guidance on the application of the concept of mental elements may be found in the case-law of the ICC. This makes clear that it has to be determined that the person intended to participate in the criminal act, was aware of the facts happening, and of their own contribution to those facts ([358]).

Directive 2017/541 on combating terrorism may also be of assistance ([359]), when determining whether an applicant had the *mens rea* for the commission of a terrorist offence. As discussed in Section 3.1.1, this may fall to be considered a crime under Article 12(2)(a) QD (recast), e.g. a war crime, a serious non-political crime, (Article 12(2)(b)), or an act that is contrary to the purposes and principles of the United Nations (Article 12(2)(c)). In Recital 15 the Directive provides the following.

Recital 15 Directive 2017/541 on combating terrorism

15. [T]he provision of material support for terrorism through persons engaging in or acting as intermediaries in the supply or movement of services, assets and goods, including trade transactions involving the entry into or exit from the [European] Union, such as the sale, acquisition or exchange of a cultural object of archaeological, artistic, historical or scientific interest illegally removed from an area controlled by a terrorist group at the time of the removal, should be punishable, in the Member States, as aiding and abetting terrorism or as terrorist financing **if performed with the knowledge that these operations or the proceeds thereof are intended to be used, in full or in part, for the purpose of terrorism or will benefit terrorist groups** (emphasis added).

([358]) ICC (Trial Chamber 1), 2012, *Lubanga*, op. cit., fn. 227, para. 1274; ICC (Trial Chamber II), 2014, *Katanga*, op. cit., fn. 232, para. 1415.
([359]) Directive (EU) 2017/541 on combating terrorism, op. cit., fn. 124.

3.6.2 Direct commission of excludable crimes or acts

When determining whether an individual applicant is individually responsible for the commission of a particular excludable crime or act, judges and tribunal members need to be aware that each exclusion ground contains specific criteria for determining the individual responsibility of an applicant. As is set out in Section 3.6, Articles 12(2) and (3) contain different wording for defining individual responsibility. Clearly, the condition that 'serious reasons' exist includes the assessment of individual responsibility.

Individual responsibility for crimes under international law as contained in Article 12(2)(a) QD (recast) can be assessed with reference to Articles 25, 28 and 30 of the Rome Statute ([360]). Additionally, the jurisprudence of international criminal tribunals and the ICC, as well as the *Elements of Crimes* adopted by the Assembly of States Parties to the Rome Statute, provide helpful guidance on the *actus reus* and *mens rea* requirements of genocide, the crime of aggression, war crimes and crimes against humanity ([361]).

The assessment of individual responsibility for acts covered by Article 12(2)(b) and (c) QD (recast) cannot draw directly on such explicit regulations, as laid down by an international treaty.

In the UK, the supreme court, in its judgment in *JS (Sri Lanka)*, did refer to Articles 25 and 30 of the Rome Statute in its interpretation of the individual responsibility of applicants for international protection for all excludable acts under Article 1F of the Geneva Convention. This includes both serious non-political crimes (Article 12(2)(b)) and acts that are contrary to the purposes and principles of the United Nations (Article 12(2)(c)) ([362]). By contrast, the German federal administrative court has categorically stated that unless war crimes or crimes against humanity are under consideration, the provisions of the Rome Statute are not applicable. It has also found that there are no uniform international criteria for the assessment of the perpetration of, and participation in, excludable acts under Article 12(2)(b) and (c) QD (recast) ([363]).

In other countries, some decisions on exclusion have examined individual responsibility without express reference to international instruments or the jurisprudence of international courts and tribunals. This may indicate that members of courts and tribunals rely on criteria under domestic criminal law, which may differ in each Member State, with different legal traditions as applied in common law and civil law countries. In any case, overall the outcomes are similar ([364]).

In that regard, Directive 2017/541 on combating terrorism ([365]) may – at least in relation to the assessment of terrorism-related offences where these fall under either Article 12(2)(b) and/or Article 12(2)(c) QD (recast) – further assist the interpretation of the exclusion clauses in an EU law context.

Furthermore, in assessing whether an applicant is individually responsible for an excludable crime or act, such as those discussed in detail in Sections 3.3, 3.4, 3.5, it is important to be

([360]) Rome Statute, op. cit., fn. 164 (see also Appendix C: Selected relevant international legal provisions).
([361]) Elements of Crimes, op. cit., fn. 187.
([362]) Supreme Court (UK), 2010, *JS (Sri Lanka)*, op. cit., fn. 23, para. 33.
([363]) Federal Administrative Court (Germany), Judgment of 4 September 2012, BVerwG 10 C 13.11, ECLI:DE:BVerwG:2012:040912U10C13.11.0, para. 24.
([364]) Conseil d'État (Council of State, France), 2019, *M. A.*, no 414821, op. cit., fn. 161, para. 7 (in French).
([365]) Directive (EU) 2017/541 on combating terrorism, op. cit., fn. 124.

aware that what might look like a mode of participation, may sometimes be itself a material element of the commission of the crime or act itself.

The CJEU noted in its judgment in *Lounani*:

> As stated in Recital 22 of Directive 2004/83, acts contrary to the purposes and principles of the United Nations, covered by Article 12(2)(c) of that directive, are set out in, inter alia, 'the United Nations Resolutions relating to 'measures combating terrorism', which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that '**knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations**' ([366]).

The court further clarified:

> One of those resolutions is Security Council Resolution 1377 (2001), from which it is apparent that not only are 'acts of international terrorism' contrary to the purposes and principles stated in the Charter of the United Nations, but so are '**the financing, planning and preparation of, as well as any other form of support for**, acts of international terrorism' ([367]).

Similarly, the England and Wales Court of Appeal (EWCA) (UK) held in the case of *Youssef* ([368]) that the ambit of Article 1F(c) Refugee Convention is not confined to acts which would satisfy the requirements for specific prosecution in the ICC, or the ICTY. Lord Justice Irwin of the court held:

> [T]he specific creation of an international criminal offence of incitement to genocide cannot directly affect the ambit of Article 1F(c), although of course it may have an effect on the ambit of Article 1F(a). In my judgment it is clear that Article 1F(c) extends beyond acts which would also satisfy Article 1F(a). Lord Brown and Lord Hope in *JS (Sri Lanka)* were only considering the ambit of Article 1F(a) and, while their broad approach to the interpretation of the charter is helpful, their particular conclusions are not decisive in this case ([369]).

LJ Irwin noted in his judgment:

> It seems perfectly clear […] that the upper tribunal were deciding that the actions of the Appellant in encouraging jihadist terror in themselves amounted to acts sufficient to justify exclusion. In doing so they were, of course, rejecting the principal argument advanced by the Appellant that, in order to cross that threshold, the acts relied on must amount to crimes within the ICC [Rome] Statute or within international law, or at least must be shown to lead to the commission of such substantive crimes ([370]).

With reference to the decision of the CJEU in *Lounani*, the court of appeal further found that 'it seems that whilst *Lounani* concerned a different factual matrix, the decision of the

([366]) CJEU, 2017, *Lounani,* op. cit., fn. 28, para. 45 (emphasis added).
([367]) CJEU, 2017, *Lounani,* op. cit., fn. 28, para. 46 (emphasis added).
([368]) Court of Appeal (EWCA, UK), 2018, Youssef v Secretary of State for the Home Department*,* op. cit., fn. 302.
([369]) Court of Appeal (EWCA, UK), 2018, Youssef v Secretary of State for the Home Department*,* op. cit., fn. 302, para. 74.
([370]) Court of Appeal (EWCA, UK), 2018, Youssef v Secretary of State for the Home Department*,* op. cit., fn. 302, para. 24.

CJEU lends support to the conclusion that acts contrary to the purposes and principles of the United Nations are not confined to specific terrorist acts' ([371]).

3.6.3 Incitement or participation otherwise

Article 12(3) QD (recast) provides that persons who 'incite or otherwise participate' in the commission of the crimes or acts mentioned in Article 12(2) are to be excluded from refugee status. The following sections provide guidance on the judicial interpretation of 'incitement' in the context of exclusion and analyse the various modes of participation, which may establish individual responsibility in application of Article 12(3).

It is generally agreed that

> individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice ([372]).

In this regard, Advocate General Sharpston noted in her opinion in the matter of *Lounani* ([373]):

> Article 1F(c) of the Geneva Convention makes no mention of 'instigating' or 'participating' in acts contrary to the aims and purposes of the United Nations. Nonetheless, that provision is to be interpreted as also covering those who do not actually carry out acts contrary to those purposes and principles themselves. A combined reading of Article 12(2)(c) and (3) indicates that persons guilty of committing, instigating or otherwise participating in acts contrary to the purposes and principles of the United Nations are all within the ambit of the conditions for exclusion. That reading accords both with the interpretation of the Geneva Convention favoured by the guidelines and with the objectives of the Qualification Directive ([374]).

She concluded: 'It follows that the exclusion in Article 12(2)(c) of the Qualification Directive is not restricted to the actual perpetrators of terrorist acts. Read together with Article 12(3), it extends to those who facilitate the commission of terrorist acts' ([375]). She further asked: 'But how far does that extension under Article 12(3) go? Where along the spectrum that stretches from a person who is merely shaking a collecting tin in the street to an individual who is directly involved in a terrorist attack as the driver of the getaway car should the line be drawn?' ([376]).

It appears, however, that the QD (recast) does not provide a further distinction between incitement and participation. By contrast, the Rome Statute – applicable to crimes against peace, war crimes, and crimes against humanity – distinguishes clearly between the commission of crimes in Article 25(3)(a) and other forms of participation, i.e. ordering,

([371]) Court of Appeal (EWCA, UK), 2018, Youssef v Secretary of State for the Home Department, op. cit., fn. 302, para. 77.
([372]) UNHCR, Guidelines on International Protection No 5, op. cit., fn. 32, para. 18.
([373]) Opinion of Advocate General Sharpston, 2016, *Lounani*, op. cit., fn. 106.
([374]) Opinion of Advocate General Sharpston, 2016, *Lounani*, op. cit., fn. 106, para. 71.
([375]) Opinion of Advocate General Sharpston, 2016, *Lounani*, op. cit., fn. 106, para. 72.
([376]) Opinion of Advocate General Sharpston, 2016, *Lounani*, op. cit., fn. 106, para. 73.

soliciting or inducting in Article 25(3)(b) and aiding, abetting or otherwise assisting in Article 25(3)(c).

The following subsections examine these related issues.

— incitement to commit a crime or act (Section 3.6.3.1);

— aiding and abetting (Section 3.6.3.2);

— participation in a joint criminal enterprise (or through common-purpose liability) (Section 3.6.3.3);

— command or superior responsibility (Section 3.6.3.4); and

— membership of an organisation responsible for crimes or acts falling within the scope of Article 12(2) or 12(3) QD (recast) and whether this may result in a presumption of individual responsibility (Section 3.6.3.5).

3.6.3.1 Incitement

Article 12(3) QD (recast) specifically cites 'incitement' alongside 'participation'. It could be read, within the meaning of that article, as a mode of participation rather than a form of commission or indirect perpetration of a crime or act. It is clear, however, that even where incitement is viewed as a mode of participation, if there are serious grounds for considering that an applicant has contributed to the commission of a crime or act included in Article 12(2) in this particular way, 'incitement' will lead to the application of the exclusion clauses contained therein.

In this regard, the CJEU found in the case of *Lounani*, with reference to UNSC Resolution 1624 (2005), that acts contrary to the purposes and principles of the United Nations are not confined to 'acts, methods and practices of terrorism' ([377]). It continued:

> The Security Council, in that resolution, calls upon all states, in order to fight against terrorism, in accordance with their obligations under international law, to deny safe haven to and bring to justice 'any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts, or provides safe haven'. Moreover, in point 1(c), that resolution calls upon all states to deny a safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of incitement to commit a terrorist act or acts ([378]).

As set out above, in Section 3.6.2, it is important also to be aware that what might look like a mode of participation, may sometimes, as in the case of *Lounani*, itself be a material element of the commission of the crime or act itself.

([377]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 47.
([378]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 47.

3.6.3.2 Aiding and abetting

As UNHCR indicates:

> 'Aiding or abetting' requires the individual to have rendered a substantial contribution to the commission of a crime in the knowledge that this will assist or facilitate the commission of the offence. The contribution may be in the form of practical assistance, encouragement or moral support and must have a substantial (but not necessarily causal) effect on the perpetration of the crime. Aiding or abetting may consist of an act or omission and may take place before, during or after the commission of the crime, although the requirement of a substantial contribution must always be borne in mind, especially when failure to act is in question. Thus, presence at the scene of a crime is not in itself conclusive of aiding or abetting, but it could give rise to such liability if such presence is shown to have had a significant legitimising or encouraging effect on the principal actor. This may often be the case where the individual present is a superior to those committing the crimes (although liability in such circumstances may also arise under the doctrine of command/superior responsibility […] ([379]).

As per the criteria developed in international criminal jurisprudence, the 'substantial contribution' may take the form of rendering practical assistance, encouragement or moral support which had a substantial effect on the perpetration of the crime ([380]). A causal connection between the conduct and the commission of the crime(s) in the sense of a *conditio sine qua non* is not, however, required. Whether or not a particular conduct had such an effect needs to be established based on the individual facts of the case.

Moreover, the contribution must have been made with intent as to their own conduct and with knowledge that their acts assisted or facilitated the commission of those crimes. This may be done, for example, through funding with the knowledge that those funds will be used to commit serious crimes ([381]). Aiding and abetting does not require the individual to share the intent of the principal perpetrator(s). It is not necessary for the acts to have been specifically directed to assist, encourage or lend moral support to the commission of the crimes ([382]). It is sufficient that they were aware of the main elements of the crime(s).

The case of *Lounani* concerned a member of the leadership of a terrorist group that operated internationally and was registered on the UN list which identifies certain individuals and entities that are subject to sanctions, and continued to be named on that list. The CJEU observed that 'his logistical support to the activities of that group has an international dimension in so far as he was involved in the forgery of passports and assisted volunteers who wanted to travel to Iraq' ([383]). The court stated unambiguously: 'Such conduct may justify the exclusion of refugee status' ([384]).

In the case of *MT (Article 1F (a) – aiding and abetting) Zimbabwe* before the UK upper tribunal, the appellant, who was a detective in the Zimbabwean police force, was found to

([379]) UNHCR, Background Note on the Application of the Exclusion Clauses, *op. cit.*, fn. 156, para. 53.
([380]) See, e.g. ICTY (Appeal Chamber), Judgment of 29 July 2004, The Prosecutor v Tihomior Blaskic, IT-95-14-A, para. 48; ICTY, Judgment of 10 December 1998, *The Prosecutor* v *Anto Furundžija*, IT-95-17/1-T, para. 249; ICTY, Judgment of 22 February 2001, The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23-T and IT-96-23/1-T.
([381]) International Convention for the Suppression of the Financing of Terrorism, op. cit., fn. 116, Article 2.
([382]) See ICTY (Appeals Chamber), Judgment of 23 January 2014, *The Prosecutorv Šainović, Pavković, Lazarević, and Lukić*, IT-05-87-A, paras. 1650 and 1651.
([383]) CJEU, 2017, *Lounani,* op. cit., fn. 28, para. 74.
([384]) CJEU, 2017, *Lounani,* op. cit., fn. 28, para. 75.

have participated in two incidents of torture ([385]). The upper tribunal noted that that she was present at the scene and was in a position of authority and that while her principal job during an incident was taking notes, she was fully aware that her colleagues were inflicting ill-treatment on a detainee. It further noted that she herself threatened him whilst he was blindfolded and that her threats, along with those made by her colleagues, led him to fear that he was going to be thrown into the river to drown if he did not cooperate with them in giving certain information. The upper tribunal determined that her conduct during this incident amounted to facilitation of the commission of the crime of torture in a significant way and that her involvement in this incident was with specific intent to contribute substantially to it. It therefore concluded that her role assisted the common purpose of putting this man in fear of his life. In relation to a later incident, she was present and was fully aware that the beating being visited on the victim by the officers present, including herself, amounted to serious harm. The upper tribunal held it was incontrovertible that her actions during this incident had a substantial effect on the commission of the crime of torture which took place. The upper tribunal was satisfied that her participation in this incident amounted to the aiding and abetting of a crime against humanity ([386]).

3.6.3.3 Joint criminal enterprise/common-purpose liability

For individual responsibility to be established based on an applicant's participation in a joint criminal enterprise (or through common-purpose liability), there must be a plurality of persons with a shared (common) plan or purpose that is either directed at the commission of crimes or whose implementation involves the commission of crimes. Moreover, this mode of individual responsibility requires a significant contribution to the furtherance of this common plan, or to the functioning of a system established to implement the plan. The ICTY appeals chamber has held that, although the accused need not have performed any part of the *actus reus* of the crime, he had to have participated in furthering the common purpose at the core of the criminal enterprise. It stated, however, that 'not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability' ([387]) and that the notion of '[joint criminal enterprise] is not an open-ended concept that permits convictions based on guilt by association' ([388]).

Joint criminal enterprise may not always be the primary consideration regarding each situation where an applicant for international protection was a member of a group or organisation involved in the commission of excludable acts. Whether or not this is the relevant mode of participation, rather than, for example, aiding and abetting, will depend on the individual facts of the case. Thus, for example, in the case of *MT (Article 1F(a) – aiding and abetting) Zimbabwe*, the applicant's involvement in the commission of crimes against humanity as part of a joint criminal enterprise, or as a co-principal, was considered. It was found, however, that the facts of the case only established individual responsibility based on aiding and abetting, since the applicant did not hold any significant leadership role ([389]).

([385]) Upper Tribunal (Immigration and Asylum Chamber, UK), Judgment of 2 February 2012, *MT (Article 1F(a) – aiding and abetting) Zimbabwe*, [2012] UKUT 00015(IAC).
([386]) Upper Tribunal (Immigration and Asylum Chamber, UK), Judgment of 2 February 2012, *MT (Article 1F(a) – aiding and abetting) Zimbabwe*, [2012] UKUT 00015(IAC), para. 131.
([387]) ICTY (Appeals Chamber), Judgment of 3 April 2007, Prosecutor v Brđanin, IT-99-36, para. 427.
([388]) ICTY (Appeals Chamber), Judgment of 3 April 2007, Prosecutor v Brđanin, IT-99-36, para. 428.
([389]) Upper Tribunal (Immigration and Asylum Chamber), 2012, *MT (Article 1F(a) – aiding and abetting) Zimbabwe* op. cit., fn. 385, para. 121.

3.6.3.4 Command or superior responsibility

In addition to the other grounds of criminal responsibility, under the Rome Statute for international crimes, a military commander or superior in a civilian hierarchy, or a person effectively acting as such, is to be criminally responsible for crimes 'committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces' ([390]). In the case of applicants who held positions of authority in a military or civilian hierarchy in contexts where there are indications that excludable crimes have been committed by persons forming part of these structures, members of courts and tribunals will need to consider the possibility of exclusion on this basis. The first step in such cases should, however, always be to examine the direct conduct or acts of the applicant before addressing issues related to the acts of those they command and their knowledge of these acts.

For example, the ICC ruled in *Bemba* that, in a situation where rape was used as a method of war in a particular armed conflict, individual criminal responsibility may be incurred even by a commander who was far away from the theatre of operations ([391]).

In the Netherlands, the council of state considered the application of Article 1F Refugee Convention to a former officer in the Syrian army for crimes committed by members of his army unit. The council of state found that the criteria for command responsibility under Article 28 of the Rome Statute were met and ruled:

> The state secretary has rightly held against the applicant that he has failed to take all necessary and reasonable measures within his power to prevent or restrict the commission of crimes. The court finds support for this assessment in Judgment of 30 June 2006 of the ICTY, N. Orić (IT-03-68-T; www.icty.org) in which it was considered in paragraph 331 that a superior fails to take necessary and reasonable measures if he, although aware of the crimes of his subordinates, does nothing, for example by simply ignoring that information. Furthermore, the court finds support for this judgment in the ruling of 21 March 2016 of Trial Chamber III of the International Criminal Court (ICC-01 / 05-01 / 0803343: www.icc-cpi.int) in the case against J. Bemba Gombo. In paragraph 202 of this judgment, it is considered that a commander is in breach of his obligation as referred to in Article 28, preamble and under a (ii) of the Statute, if he does not take measures to stop crimes that are about to take place. In addition, it is stated in paragraph 200 of this judgment that if a commander has fulfilled his duty to take all necessary and reasonable measures within his control, he cannot be held responsible, even if the crimes nevertheless ultimately take place or the perpetrators go unpunished ([392]).

The French National Court of Asylum Law had earlier pronounced in similar vein in 2014 ([393]).

([390]) Rome Statute, op. cit., fn. 164, Article 28(a).
([391]) ICC (Appeals Chamber), Judgment of 8 June 2018, Situation in the Central African Republic, The Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05-01/08 A.
([392]) Council of State (the Netherlands), Judgment of 17 May 2016, 201506251/1/V1, ECLI:NL:RVS:2016:1441, para. 5.2 (unofficial translation).
([393]) National Court of Asylum Law (France), Judgment of 15 May 2018, *M.N., 11013546*, para. 13 (in French).

3.6.3.5 Membership and presumption of individual responsibility

Membership of an organisation responsible for crimes or acts that fall within the scope of Article 12(2) or 12(3) QD (recast), including organisations or groups designated as 'terrorist' ([394]), does not necessarily result in a presumption of individual responsibility for such crimes or acts. As the CJEU ruled in *B and D*:

> Even if the acts committed by an organisation on the list forming the Annex to Common Position 2001/931 because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) [QD], the mere fact that the person concerned was a member of […] an organisation cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions ([395]).

Where, however, an authority finds that an applicant for international protection has 'occupied a prominent position within an organisation which uses terrorist methods', that authority 'is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, […] ([396]). Nevertheless, this does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' ([397]). Rather, it 'remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) [QD] can be adopted' ([398]). This means that:

> the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed [a crime or act falling within Article 12(2) and 12(3) QD] ([399]).

Further, before an applicant can be excluded from refugee status, 'it must be possible to attribute to the person concerned […] a share of the responsibility for the acts committed by the organisation in question while that person was a member' ([400]).

Members of courts and tribunals applying EU law in the context of exclusion, pursuant to Article 12(2) QD (recast), must therefore, inter alia, assess:

— 'the true role played by the person concerned in the perpetration of the acts in question;

— his position within the organisation;

([394]) As part of its response against terrorism after the attacks of 11 September 2001, in December that year the EU established a **list of persons, groups and entities involved in terrorist acts and subject to restrictive measures**. Set down in Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, op. cit., fn. 129, these were additional measures adopted in order to implement UN Security Council Resolution 1373 (2001). The list includes persons and groups active both within and outside the EU. It is reviewed regularly, at least every six months. This regime is **separate from the EU regime implementing UN Security Council resolution 1989 (2011)** on the freezing of funds of persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (including Islamic State in Iraq and the Levant (ISIL)/Da'esh) (emphasis added).

([395]) CJEU, 2010, B and D, op. cit., fn. 9, para. 88; confirmed in CJEU, 2015, HT, op. cit., fn. 17, para. 87. See also, UNHCR, Guidelines on International Protection No 5, op. cit., fn. 32, para. 26, stating 'Exclusion should not be based on membership of a particular organisation alone, although a presumption of individual responsibility may arise where the organisation is commonly known as notoriously violent and membership is voluntary'; UNHCR, Background Note on the Application of the Exclusion Clauses, op. cit., fn. 156, paras. 59-62.

([396]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 98.

([397]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 99.

([398]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 98.

([399]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 94.

([400]) CJEU, 2010, *B and D*, op. cit., fn. 9, para. 95.

— the extent of the knowledge he had, or was deemed to have, of its activities;

— any pressure to which he was exposed; or

— other factors likely to have influenced his conduct' ([401]).

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

In a 2018 judgment, the Greek council of state ruled that the courts are required to assess the applicant's contribution to the achievement of the political aim of an organisation he or she supported, which used violence and committed serious criminal acts in pursuit of that aim. The council of state also required the courts to assess whether the applicant was both conscious of (had sufficient knowledge of and had accepted this aim) and provided a substantial contribution to the commission of criminal offences, (knowing that it would assist or facilitate their commission) ([402]). Moreover, the council of state ruled that in these cases it should be possible, after an individualised assessment, to impose on the applicant part of the responsibility for the serious criminal acts committed by the organisation in order to achieve its objectives. The judgment refers, inter alia, to the CJEU's ruling in *B and D* and to the Canadian judgments in *Sivakumar* and *Ezokola* ([403]). As a matter of fair procedure, it noted that the applicant would be entitled to be put on notice of the application of this presumption and the evidence on which it is based and to be given the opportunity to rebut the presumption ([404]).

Caution must, therefore, be exercised when any such presumption of responsibility arises. To facilitate the consideration of the actual activities of an individual applicant and the group they were involved in or associated with, members of courts and tribunals require evidence that permits an individual assessment of an applicant's contribution to a crime or act, rather than one 'based on assumptions about collective guilt or innocence' ([405]).

Following the decision of the CJEU in *B and D*, the Belgian council of state asked the CJEU in the matter of *Lounani* to:

> ascertain whether Article 12(2)(c) of Directive 2004/83 must be interpreted as meaning that a prerequisite for the ground for exclusion of refugee status specified in that provision to be held to be established is that an applicant for international protection should have been convicted of one of the terrorist offences referred to in Article 1(1) of Framework Decision 2002/475 ([406]).

In answer to that question, the CJEU clarified:

([401]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 97.
([402]) Council of state (Greece), Decision 19694/2018, 21 August 2018, (English summary).
([403]) Council of state (Greece), Decision 19694/2018, 21 August 2018, (English summary), para. 24, referring to CJEU, 2010, *B and D,* op. cit., fn. 9; Supreme Court (Canada), Judgment of 19 July 2013, Ezokola v Canada (Minister of Citizenship and Immigration), SCC 40, [2013] 2 SCR 678; and Federal Court of Canada, Judgment of 4 November 1993, Sivakumar v Canada (Minister of Employment and Immigration), 1993 CanLII 3012 (FCA), [1994] 1 FC 433.
([404]) Council of State (Greece), Decision 19694/2018, 2018, op. cit. fn. 402.
([405]) Hathaway and Foster, *Law of Refugee Status*, op. cit., fn. 91, p. 534.
([406]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 40.

> If the EU legislature had intended to restrict the scope of Article 12(2)(c) of Directive 2004/83, and to confine the concept of 'acts contrary to the purposes and principles of the United Nations' solely to the offences listed in Article 1(1) of Framework Decision 2002/475, it could easily have done so, by expressly stipulating those offences or by referring to that framework decision. ([407]).

The court further noted that Article 12(2)(c) QD does not refer, however, 'either to Framework Decision 2002/475, although that framework decision was in existence when Article 12(2)(c) was drafted, or to any other European Union instrument adopted in the context of the fight against terrorism' ([408]). It therefore concluded:

> The answer […] is that Article 12(2)(c) [QD] must be interpreted as meaning that it is not a prerequisite for the ground for exclusion of refugee status specified in that provision to be held to be established that an applicant for international protection should have been convicted of one of the terrorist offences referred to in Article 1(1) of Framework Decision 2002/475 ([409]).

More substantially however, the referring court in *Lounani* also asked the CJEU whether Articles 12(2)(c) and 12(3) QD:

> must be interpreted as meaning that acts constituting participation in the activities of a terrorist group, such as the acts of which the defendant in the main proceedings was convicted, can fall within the scope of the ground for exclusion laid down in those provisions, even though the person concerned did not commit, attempt to commit, or threaten to commit a terrorist act ([410]).

The Criminal Court, Brussels, had found that Mr Lounani had participated, as a member of the leadership, in the activities of the Belgian cell of the Moroccan Islamic Combatant Group. It also found that he had provided logistical support to that group, inter alia, by supplying information or material resources, engaging in forgery and the fraudulent transfer of passports, and participating actively in the organisation of a network for sending volunteers to Iraq. No finding was made, however, that he had personally committed terrorist acts, or instigated such acts, or participated in their commission.

With reference to the Security Council resolutions, in particular Resolution 2178(2014), the CJEU held:

> […] [T]he fact, were it to be established as such, that the group of which Mr Lounani was one of the leaders may not have perpetrated any terrorist acts or that the volunteers who wanted to travel to Iraq and were helped by that group may not ultimately have committed such acts, is not, in any event, such as to preclude the conduct of Mr Lounani from falling [sic] to be regarded as contrary to the purposes and principles of the United Nations ([411]).

([407]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 52, Framework Decision 2002/475, now being replaced by Directive (EU) 2017/541 on combating terrorism, op. cit., fn. 124.
([408]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 53.
([409]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 54.
([410]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 62.
([411]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 76.

The court further held:

> [T]he same is true, […], of the fact, […] that Mr Lounani has not committed, nor attempted to commit, nor threatened to commit terrorist offences, within the meaning of Article 1(1) of Framework Decision 2002/475. For the same reasons, the application of Article 12(3) [QD] does not require it to be established that Mr Lounani instigated such offences or that he otherwise participated in such offences ([412]).

In answer to the second and third question referred to it by the referring court, the CJEU held:

> Article 12(2)(c) and Article 12(3) [QD] must be interpreted as meaning that acts constituting participation in the activities of a terrorist group, such as those of which the defendant in the main proceedings was convicted, may justify exclusion of refugee status, even though it is not established that the person concerned committed, attempted to commit or threatened to commit a terrorist act. For the purposes of the individual assessment of the facts that may be grounds for a finding that there are serious reasons for considering that a person has been guilty of acts contrary to the purposes and principles of the United Nations, has instigated such acts or has otherwise participated in such acts, the fact that that person was convicted by the courts of a Member State on a charge of participation in the activities of a terrorist group is of particular importance, as is a finding that that person was a member of the leadership of that group, and there is no need to establish that that person himself or herself instigated a terrorist act or otherwise participated in it ([413]).

At the national level, in an earlier decision, the UK supreme court had held that there is a need to 'concentrate on the actual role played by the particular persons, taking all material aspects of that role into account so as to decide whether the required degree of participation is established' ([414]). The court identified the following non-exhaustive list of relevant factors to consider in making this assessment:

> (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes ([415]).

Similarly, the National Court of Asylum Law in France held that each case requires an examination of the personal facts regarding the situation of the individual applicant, set against the background of what is generally known about the group of which they were a member. This includes an examination of the frequency of violence employed, its command or organisational structures, the degree of fragmentation of the group, the individual's seniority in the group, and their ability to influence the group's actions ([416]). This case concerned the exclusion of a national of the Central African Republic, who was a high-ranking military officer and former member of the presidential guard at the time of serious human rights violations committed by this unit.

([412]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 77.
([413]) CJEU, 2017, *Lounani*, op. cit., fn. 28, para. 79.
([414]) Supreme Court (UK), 2010, *JS (Sri Lanka)*, op. cit., fn. 23, para. 55. See also, Supreme Court (Canada), Ezokola v Canada, op. cit., fn. 355.
([415]) Supreme Court (UK), 2010, *JS (Sri Lanka)*, op. cit., fn. 23, para. 30.
([416]) Cour nationale du droit d'asile (National Court of Asylum Law, France), 7 October 2014, *M. B*, no 13003572 C+ (summary in English).

3.6.4 Grounds precluding individual responsibility

Individual responsibility for an excludable crime or act cannot be found where an applicant for international protection may have committed such a crime or act or have incited or otherwise participated in such act, where they have a valid defence.

Defences that typically fall to be considered by members of courts and tribunals in the context of the application of the exclusion clauses contained in Article 12(2) QD (recast) are discussed in greater detail in subsequent sections. They include:

— superior orders (see Section 3.6.4.1);

— lack of capacity (see Section 3.6.4.2);

— duress/coercion (see Section 3.6.4.3); and

— self-defence; defence of other persons or property (see Section 3.6.4.4).

In this regard, it is helpful to consider the provisions of the Rome Statute regarding the grounds for excluding criminal responsibility for crimes against peace, war crimes and crimes against humanity.

Article 31 Rome Statute

Grounds for excluding criminal responsibility

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

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

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

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the

person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.

Article 33 Rome Statute

Grounds for excluding criminal responsibility

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

a) the person 'was under a legal obligation to obey orders of the government or the superior in question';

b) the person did not know that the order was unlawful; and

c) 'the order was not manifestly unlawful'.

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

Outside the provisions of the Rome Statute, however, in particular in the context of exclusion based on the commission of a serious non-political crime pursuant to Article 12(2)(b) QD (recast), other relevant criminal law standards will need to be considered.

3.6.4.1 Superior orders

UNHCR, in its *Background Note on the Application of the Exclusion Clauses*, states:

> A commonly invoked defence is that of 'superior orders' or coercion by higher governmental authorities, although it is an established principle of law that the defence of superior orders does not absolve individuals of blame ([417]).

In that regard, as cited in full above, Article 33 of the Rome Statute further provides that the defence of superior orders will only apply if the individual in question 'was under a legal obligation to obey orders of the government or the superior in question'; was unaware that 'the order was unlawful'; and 'the order was not manifestly unlawful'. In all cases involving orders to commit genocide or crimes against humanity, these orders are deemed manifestly unlawful.

In the matter of *CM (Article 1F(a) – superior orders)*, the UK upper tribunal found:

([417]) UNHCR, Background Note on the Application of the Exclusion Clauses, op. cit., fn. 156, para. 67.

> [T]he appellant had engaged in acts which fell within the Rome Statute in two separate respects: first he was involved in acts of torture or, failing that, inhumane acts within the meaning of Article 7 and Article 25(3)(a); and secondly, he was involved in ordering others to carry out such acts, so as to bring him within the ambit of Article 25(3)(b) ('Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted') ([418]).

In response to the argument advanced on behalf of the appellant in that matter, that his participation in beatings was excusable because he was acting in obedience to superior orders, the upper tribunal found that he 'was not entitled to rely on superior orders as a defence' ([419]). The upper tribunal went on to set out the reasons why this is so:

> […] Article 33 [of the Rome Statute] does not fully reject what is known as the 'conditional liability approach'. In the context of deciding whether a person is excluded from Refugee Convention protection by virtue of having committed acts contrary to Article 1F(a), the effect of Article 33(1) of the Rome Statute is that whilst obedience to superior orders can be a defence if each of its three requirements – as set out at (a), (b) and (c) – are met, by virtue of Article 33(2) the Article 33(1)(c) requirement can never be met in cases where the order was to commit genocide or a crime against humanity. Such cases are always 'manifestly unlawful'.

Put simply, under the Rome Statute, in relation to criminal responsibility for commission of crimes against humanity, the defence of obedience to superior orders is unavailable by operation of law ([420]).

3.6.4.2 Lack of capacity

Again, the main guidance regarding the interpretation and application of the defence of lack of capacity – outside of the national law of the Member States – in the context of the exclusion clauses can be found in international criminal law. This has direct application only in relation to the crimes included in Article 12(2)(a) QD (recast).

Article 31(1) of the Rome Statute provides that in order for it to be recognised as a defence in international criminal law, a mental disease or defect must destroy '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'.

Similarly, a person will only be recognised as having been in a state of intoxication to the level that it constitutes a defence if the intoxication:

> destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the [International Criminal] Court.

([418]) UK Upper Tribunal (Immigration and Asylum Chamber), *CM (Article 1F(a) – superior orders) Zimbabwe* [2012] UKUT 00236(IAC), 17 April 2012, para. 17.
([419]) Ibid., para. 23.
([420]) Ibid., paras. 23 and 24.

However,

> a special feature of the defence of intoxication is a third requirement, which states that the defence cannot be raised if the toxic condition has been voluntarily induced while knowingly disregarding the risk of an engagement in criminal conduct as a result of intoxication. In other words, intoxication can only be successfully pleaded if it occurred involuntarily, or voluntarily but without being aware of the risk that this would result in criminal conduct ([421]).

3.6.4.3 Duress/coercion

UNHCR states in its *Background Note on the Application of the Exclusion Clauses*:

[W]here duress is pleaded by an individual who acted on the command of other persons in an organisation, consideration should be given as to whether the individual could reasonably have been expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts. The consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors ([422]).

The UK upper tribunal (Immigration and Asylum Chamber) held in that regard in the case of *AB (Article 1F(a) – defence – duress) Iran*:

> In response to an allegation that a person should be excluded under Article 1F(a) of the Refugee Convention because there are serious reasons for considering that the person has committed a crime against peace, a war crime or a crime against humanity as defined in the Rome Statute, there is an initial evidential burden on an appellant to raise a ground for excluding criminal responsibility such as duress.
>
> The overall burden remains on the respondent [the decision-making authority] to establish that there are serious reasons for considering that the appellant did not act under duress ([423]).

The case concerned an Iranian citizen who had held a senior role in a women's prison under the control of the Islamic Revolutionary Guard Corps in which political prisoners were detained and tortured. The appellant claimed to have acted under duress. In its judgment, the upper tribunal first established on the basis of 'clear, credible and strong' evidence that the appellant knowingly provided assistance to those who perpetrated torture within the prison in which, latterly, she was the deputy governor. It then concluded that her knowledge and assistance (if established) easily met the test of aiding and abetting.

The tribunal helpfully sets out the five cumulative requirements of the defence of duress, all of which must be satisfied, as specified in Article 31 of the Rome Statute.

([421]) Y. Li, *Exclusion from Protection as a Refugee – An approach to harmonising interpretation in international law*, International Refugee Law Series 09 (Brill Nijhoff 2017), p. 278.

([422]) UNHCR, Background Note on the Application of the Exclusion Clauses, op. cit., fn. 156, paras. 69/70.

([423]) *AB (Article 1F(a) – defence – duress) Iran*, [2016] UKUT 00376 (IAC), UK Upper Tribunal (Immigration and Asylum Chamber), 22 July 2016.

i. There must be a threat of imminent death or of continuing or imminent serious bodily harm.

ii. Such threat requires to be made by other persons or constituted by other circumstances beyond the control of the person claiming the defence.

iii. The threat must be directed against the person claiming the defence or some other person.

iv. The person claiming the defence must act necessarily and reasonably to avoid this threat.

v. In so acting the person claiming the defence does not intend to cause a greater harm than the one sought to be avoided ([424]).

The tribunal further notes that 'the essence of the defence of duress is that the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon' ([425]).

3.6.4.4 Self-defence

Article 31(1)(c) of the Rome Statute, cited in full above, concerns acts committed in self-defence. It states that a person is not to be criminally responsible if, at the time of that person's conduct,

> the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

So far there appears to be no relevant jurisprudence on this issue.

3.7 Expiation

Some commentators consider that, in certain cases, it is inappropriate to exclude an individual from refugee status even when it has been determined that the person concerned is individually responsible for an excludable crime or act. That view is shared by UNHCR, which has stated:

> Where **expiation** of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant

([424]) *AB (Article 1F(a) – defence – duress) Iran*, [2016] UKUT 00376 (IAC), UK Upper Tribunal (Immigration and Asylum Chamber), 22 July 2016, para. 63.
([425]) *AB (Article 1F(a) – defence – duress) Iran*, [2016] UKUT 00376 (IAC), UK Upper Tribunal (Immigration and Asylum Chamber), 22 July 2016, para. 69.

> period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty ([426]).

The French Conseil d'État ruled that that while the conditions covered by Article 12(2)(b) QD (recast) may in principle justify the refusal of refugee protection, they do not prevent the granting of this protection, if the criminal acts have resulted in a sentence which has been effectively served. It found this to be so, unless the state in which the application was made considers that, due to the serious non-political crimes committed in the past, the applicant represents a danger or a risk for the population ([427]).

The question whether the expiation of an excludable crime or act may indeed be a relevant consideration when assessing exclusion from refugee status was indirectly addressed by the CJEU in *B and D* in its response to two of the questions referred by the German federal administrative court ([428]). First, the German court asked whether the grounds for exclusion laid down in Article 12(2)(b) and (c) QD are only satisfied if the person concerned continues to pose a danger to the host Member State, given that the applicants in the main proceedings had credibly broken with their terrorist past and presented no risk of reoffending. Second, if the answer to the first question was no and the applicants fulfilled the grounds for exclusion, the court asked whether the exclusion of the applicants was conditional upon the application of a proportionality test in accordance with 'the principle of proportionality recognised in international and European law […] [which] requires that every measure must be suitable and necessary, and in reasonable proportion to the intended purpose' ([429]). The federal administrative court's own view was that, since the applicants were in any event protected against *refoulement*, exclusion could conceivably be disproportionate under such a test only in exceptional circumstances, namely where:

> in spite of his previous misconduct, the individual must deserve to be placed (back) on a par with a 'bona fide refugee'. This is the case when an overall assessment of his personality and his conduct in the meantime shows that in spite of his past, he is (i.e. has again become) deserving of protection. For this purpose, this court believes, it is not sufficient that, as in the present case, the individual no longer poses a danger, has distanced himself from his previous acts, and has at least partially paid the penalty [part-completion of a prison sentence], suffering injury to his health in the process. However, in the case of previous support for terrorist activities, an exceptional case might come into consideration, for example, if the individual not only distances himself from his acts, but now actively works to prevent further acts of terrorism, or if the act is a 'sin of youth' lying decades in the past ([430]).

([426]) UNHCR, Guidelines on the Application of the Exclusion Clauses, op. cit., fn. 32, para. 23 (emphasis in original), and also UNHCR, AH (Algeria) v. Secretary of State for the Home Department: Case for the Intervener, 21 October 2014.

([427]) Conseil d'État (Council of state, France), Judgment of 4 May 2011, *Office français de protection des réfugiés et apatrides c M. A*, *320910*, ECLI:-FR:CESSR:2011:320910.20110504 (English summary).

([428]) CJEU, 2010, *B and D,* op. cit., fn. 9; Federal administrative court (Germany), Judgment of 14 October 2008, BVerwG 10 C 48.07 (preliminary reference to CJEU in in case of *B*), DE:BVerwG:2008:141008B10C48.07.0; Federal administrative court (Germany), Judgment of 25 November 2008, BVerwG 10 C 46.07 (preliminary reference to CJEU in in case of *D*).

([429]) Federal administrative court (Germany), 2008, BVerwG 10 C 48.07, op. cit., fn. 428, para. 32, translation by the Federal Administrative Court; Federal Administrative Court (Germany), BVerwG 10 C 46.07, para. 28.

([430]) Federal administrative court (Germany), 2008, BVerwG 10 C 48.07, op. cit., fn. 428, para. 34, translation by the Federal Administrative Court; Federal Administrative Court (Germany), BVerwG, 10 C 46.07, para. 28.

As already mentioned, the CJEU replied that exclusion from refugee status is not conditional on any assessment of proportionality once it is determined that the grounds for exclusion in Article 12(2)(b) or (c) QD are satisfied ([431]). It also determined that Article 12(2)(b) and (c) QD do not require that the person concerned represents a danger to the host Member State ([432]). Accordingly, the federal administrative court went on to rule that the fact that B and D had renounced their former terrorist activities, and presented no risk of reoffending, was not relevant to the question of whether they were excluded from refugee status ([433]).

The Canadian Supreme Court was subsequently called upon in *Febles* to address a slightly different question than had been asked of the CJEU in *B and D*, namely:

> **[whether 'has committed a serious … crime' in Article 1F(b) of the Refugee Convention] is confined to matters relating to the crime committed, or should be read as also referring to matters or events after the commission of the crime,** such as whether the claimant is a fugitive from justice or is unmeritorious or dangerous at the time of the application for refugee protection ([434]).

The majority of the supreme court held that 'only factors related to the commission of the criminal offences can be considered, and whether those offences were serious within the meaning of Article 1F(b)' ([435]). Accordingly, it ruled:

> Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation ([436]).

That ruling has been endorsed by the England and Wales Court of Appeal (UK) ([437]), which also effectively held the same as regards Article 1F(a) and (c) of the Refugee Convention ([438]). The court, in reaction to the argument that expiation is a factor to be taken into account, emphasised that Article 1 Refugee Convention, including the grounds for exclusion contained in Article 1F, is a 'definition section' of the Convention. It ruled:

> [T]he decision-maker is required to decide only matters of objective fact. Once he has ascertained the facts, he applies the exclusion or not, as the case dictates. He is not called on to evaluate [whether the individual is undeserving of protection] in light of the ascertained facts ([439]).

([431]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 111.
([432]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 105.
([433]) Federal administrative court (Germany), Judgment of 7 July 2011, BVerwG 10 C 26.10 (case of D), DE:BVerwG:2011:070711U10C26.10.0, para. 24; Federal Administrative Court (Germany), 2011, BVerwG 10 C 27.10 (case of B), op. cit., fn. 106, para. 18.
([434]) Supreme Court (Canada), Judgment of 30 October 2014, Febles v Minister of Citizenship and Immigration [2014] 3 SCR 431 (emphasis added).
([435]) Supreme Court (Canada), Judgment of 30 October 2014, Febles v Minister of Citizenship and Immigration [2014] 3 SCR 431, para. 6.
([436]) Supreme Court (Canada), Judgment of 30 October 2014, Febles v Minister of Citizenship and Immigration [2014] 3 SCR 431, para. 60.
([437]) EWCA (UK), 2015, *AH (Algeria)*, op. cit., fn. 273, para. 30.
([438]) EWCA (UK), 2015, *AH (Algeria)*, op. cit., fn. 273, paras. 10-11.
([439]) EWCA (UK), 2015, *AH (Algeria)*, op. cit., fn. 273, para. 20.

Part 4: Exclusion from subsidiary protection status (Article 17)

4.1 Introduction

As already noted, Article 17(1) QD (recast) provides that a person is excluded from eligibility for subsidiary protection if there are serious reasons for considering that:

— He or she 'has committed' any of the crimes referred to in points (a) and (b) of that provision; or

— He or she 'has been guilty of' acts contrary to the purposes and principles of the United Nations, as laid down in point (c) of that provision; or

— as laid down in point (d) of that provision, he or she 'constitutes a danger' to the community or to the security of the Member State concerned ([440]).

Article 17(1) should be read together with Article 17(2) ([441]):

Article 17(1) and 17(2) QD (recast)

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.

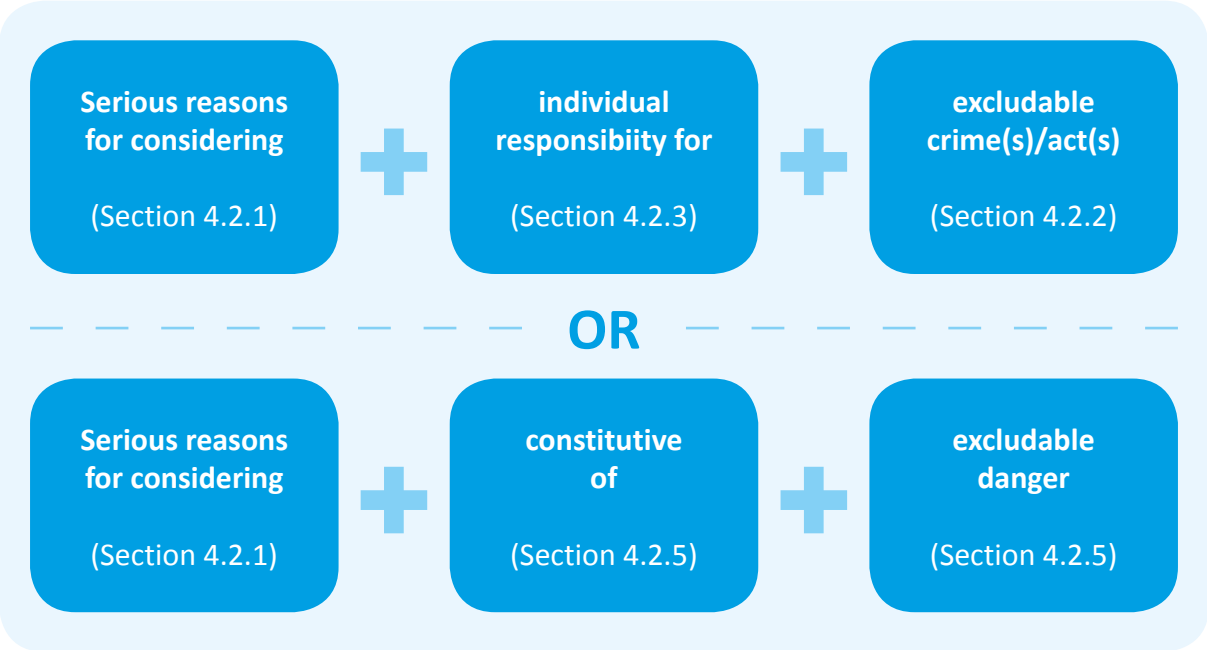
2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

Exclusion from subsidiary protection status under Article 17(1) and (2) QD (recast) can be conceived of as comprising three elements, as illustrated in Figure 7 below:

([440]) See Section 1.2, citing and contrasting the provisions of Articles 12 and 17 QD (recast) and Table 1.

([441]) Note that the English-language version of Article 17(2) QD (recast) (2011/95/EU) uses the word 'incite', whereas the English-language version of Article 17(2) QD (2004/83/EC) uses the word 'instigate'. See *mutatis mutandis* the observations on Article 12(3) QD (recast) (2011/95/EU), compared to Article 12(3) QD (2004/83/EC), in the second and third paragraphs of Section 3.1.

Figure 7: Elements of exclusion from subsidiary protection status under Article 17(1) and (2) QD (recast). Section references refer to this judicial analysis.



Finally, Article 17(3) QD (recast) adds that a person may be excluded from eligibility for subsidiary protection if, prior to their admission to the Member State concerned, he or she 'has committed' one or more crimes meeting the conditions specified in that provision, and if they left their country of origin solely in order to avoid sanctions resulting from those crimes. (See Section 4.3)

4.2 Mandatory grounds for exclusion from subsidiary protection status (Article 17(1) and (2))

4.2.1 Serious reasons

The expression 'serious reasons for considering' is identical to that in Article 12(2) QD (recast) and should be interpreted in the same way. See Section 3.2.

4.2.2 Excludable crimes and acts

4.2.2.1 Crime against peace, war crime or crime against humanity (Article 17(1)(a))

Article 17(1)(a) QD (recast) is worded identically to, and should be interpreted in the same way as, Article 12(1)(a) QD (recast). See Section 3.3.

4.2.2.2 Serious crime (Article 17(1)(b))

Article 17(1)(b) QD (recast) lays down the following ground for exclusion from eligibility for subsidiary protection.

> **Article 17(1)(b) QD (recast)**
>
> 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:
>
> […]
>
> b) he or she has committed a serious crime.

It can be seen that the scope of Article 17(1)(b) QD (recast) is broader than that of Article 12(2)(b) QD (recast), since it is limited neither territorially nor temporally, nor by the condition that the crime at issue be 'non-political' ([442]). (See Sections 1.3.2 and 3.4.1.1.)

It could be considered that the concept of 'serious crime' in Article 17(1)(b) QD (recast) is inspired by, and has the same meaning as, the concept of 'serious crime' in Article 12(2)(b). Therefore, the CJEU case of *Ahmed* ([443]), which concerned whether the penalty provided under the law of a particular Member State for a specific crime may constitute the sole criterion for determining whether that crime is a 'serious crime' within the meaning of Article 17(1)(b) QD (recast), is addressed in Section 3.4.1.

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

Article 17(1)(c) QD (recast) is worded identically to, and should be interpreted in the same way as, Article 12(1)(c) QD (recast). See Section 3.5.

4.2.3 Individual responsibility

See Section 3.6, *mutatis mutandis*.

4.2.4 Expiation

See Section 3.7, *mutatis mutandis*.

([442]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, paras. 46 and 47.
([443]) CJEU, 2018, *Ahmed*, op. cit., fn. 14, paras. 46 and 47.

4.2.5 Danger to the community or to the security of the Member State (Article 17(1)(d))

Article 17(1)(d) QD (recast) lays down the following ground for exclusion from subsidiary protection.

Article 17(1)(d) QD (recast)

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:

[…]

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.

The grounds for exclusion from eligibility for subsidiary protection laid down in Article 17(1)(a) to (c) are directed solely towards crimes or acts committed in the past. By contrast, Article 17(1)(d) relates to the present and sets out the only ground for exclusion that is predicated on the person concerned constituting a danger.

The CJEU has not yet had an opportunity to interpret the concepts of 'danger to the community' and 'danger to the security of the Member State' in Article 17(1)(d) or in other provisions of the directive which also employ those concepts ([444]). It has nevertheless interpreted the expression 'compelling reasons of national security or public order' in Article 24 of the directive, which concerns the issuance of residence permits. Some aspects of the Court's ruling on the latter expression may provide useful guidance for the interpretation of Article 17(1)(d). The CJEU recognised in *HT* that neither the concept of 'national security' nor that of 'public order' is defined in the QD. It therefore decided that those concepts should be interpreted taking into account the interpretations it has made of the concepts of 'public security' and 'public order' in Article 27 and Article 28 of the Citizenship Directive ([445]). The court determined this to be the case, since:

> While [the Citizenship Directive] pursues different objectives to those pursued by [the QD] and Member States retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another […], the extent of the protection a society intends to afford to its fundamental interests cannot vary depending on the legal status of the person that undermines those interests ([446]).

The CJEU noted that it had previously held that the concept of 'public security' in Article 28(3) of the Citizenship Directive:

([444]) See Articles 14(4) and 21(2) QD (recast).
([445]) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004], OJ L 158/77, amended by (see consolidated version): Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011, OJ L 141/1.
([446]) CJEU, 2015, CJEU, 2015, *HT*, op. cit., fn. 17, para. 77.

> covers both a Member State's internal and external security […] and that, consequently a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security ([447]).

The CJEU also noted that it had previously held that the concept of 'public policy' in Articles 27 and 28 of the Citizenship Directive presupposes 'in addition to the perturbation of the social order which any infringement of the law involves, [the existence] of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' ([448]). Finally, the CJEU noted that Recital 28 QD (now Recital 37 QD (recast)) states: 'The notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association' ([449]).

The CJEU nevertheless held that support provided by a refugee to a terrorist organisation does not automatically justify the conclusion that there are 'compelling reasons of national security or public order' for denying them a residence permit in accordance with Article 24(1) QD, since this depends on the assessment of the circumstances of the individual case ([450]). This requires an assessment of factors including: (i) whether the organisation engages in terrorist acts; (ii) the nature of the refugee's support for that organisation; and (iii) the degree of seriousness of the danger to national security or public order posed by that support, regard being had to the principle of proportionality ([451]).

The Austrian constitutional court has held that, for the ground of exclusion in Article 17(1)(d) QD to be applicable, at least the commission of an offence of similar gravity to those referred to in Article 17(1)(a) to (c) QD must be present. The court considered that this was confirmed by the fact that the directive and its *travaux préparatoires* refer to the Refugee Convention, Article 33(2) of which also refers to a danger to the security or to the community of a country. The court noted that the case-law and academic literature on Article 33(2) Refugee Convention show that there is only a danger to the security or the community of a country if the existence or territorial integrity of a state is endangered, or if particularly serious crimes (such as homicide, rape, drug trafficking or armed robbery) have been committed ([452]).

The French National Court of Asylum Law held that, in order for the applicant to be held responsible for excludable behaviour, her ideological proximity to the Syrian regime was not sufficient to exclude her from subsidiary protection, because this would not constitute a threat to public order, public security or the security of the state ([453]).

([447]) CJEU, 2015, CJEU, 2015, *HT*, op. cit., fn. 17, para. 78.
([448]) CJEU, 2015, CJEU, 2015, *HT*, op. cit., fn. 17, para. 79.
([449]) CJEU, 2015, CJEU, 2015, *HT*, op. cit., fn. 17, paras. 81-99.
([450]) See also the court's similar reasoning in CJEU, 2010, B and D, op. cit., fn. 9.
([451]) CJEU, 2015, HT, op. cit., fn. 17, paras. 81-89.
([452]) Constitutional Court (Austria), Judgment of 13 December 2011, U1907/10 (English summary), Section III, paras. 2.5-2.6.
([453]) National Court of Asylum Law (France), Judgment of 3 July 2018, *OFPRA c Mme A.A.,* No. 17021233.

4.3 Optional ground for exclusion from subsidiary protection status (Article 17(3))

Article 17(3) QD (recast) lays down the following non-mandatory ground for exclusion from eligibility for subsidiary protection.

Article 17(3) QD (recast)

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.

The CJEU has not yet ruled on the interpretation of Article 17(3). It is clear, however, that the ground for exclusion laid down in that provision may be applied only if:

— the person concerned left their country of origin 'solely' in order to avoid sanctions resulting from crimes less serious than those within the scope of Article 17(1); and

— the person committed those crimes prior to their admission to the Member State assessing their eligibility for subsidiary protection; and

— the crimes would be punishable by imprisonment had they been committed in said Member State.

The exclusion ground provided in Article 17(3) may not be applied by a Member State that has not transposed this article into its national law.

Part 5: Specific issues relating to assessment of exclusion under Articles 12(2) and 17

A number of specific issues that have to be taken into account by courts and tribunals dealing with exclusion cases deserve special attention. These issues are not directly related to the legal aspects of exclusion as such but may have to be dealt with while working on these cases.

First of all, special difficulties may arise in identifying potential exclusion cases (see Section 5.1). In particular in exclusion cases, the decision-making authorities may base their decisions on classified information (see Section 5.2). As in inclusion cases, the assessment of the evidence and of the credibility of the applicant is crucial. In exclusion cases, however, since the facts to be established are against the applicant, the burden of proof is, in principle, with the state. This therefore requires a different approach from the judge or tribunal member (see Section 5.3).

5.1 Identification of potential exclusion cases

Sometimes an applicant may directly state in their initial application for international protection that they have committed crimes or acts that may potentially fall within the scope of the grounds for exclusion laid down in Article 12(2) or Article 17 QD (recast). Such information may also arise during the subsequent personal interview(s). These are not, however, the only situations in which exclusion may need to be considered. It is not possible to present an exhaustive list of the circumstances that may, in an individual case, trigger consideration of exclusion under Article 12(2) or Article 17 QD (recast). Table 17 below nevertheless lists some of the scenarios that most commonly arise in practice.

Table 17: Non-exhaustive list of profiles and indicators which may trigger consideration of whether the person concerned is excluded under Article 12(2) or Article 17 QD (recast) ([454])

Profile	Indicators triggering consideration of exclusion
Members of: → **state armed forces** → **rebel group** → **militia** → **police (or particular branches of the police)** → **intelligence services**	Where country of origin information 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.
→ **members of government** → **public officials**	If the applicant comes from a country with an oppressive government regime, their 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.

([454]) This table is based on EASO, *Practical Guide: Exclusion*, 2017, p. 11, adapted to reflect the logic of this judicial analysis.

→ **members of organisations**	Depending on the organisation's aims, goals and methods and on the applicant's activities, role and responsibilities, as well as their position within the organisation, this could be an indication that exclusion clauses should be considered.
→ **persons otherwise linked to the profiles 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, chemical engineers developing weapons, civilian informants, etc.
→ **persons linked to a particular event**	Based on the information about the applicant (e.g. place of residence, travel route), they may be linked to an event related to potential exclusion considerations.
→ **persons subject to an extradition request** → **persons registered in databases related to the prevention or detection of crime, and/or the apprehension and prosecution of offenders**	An extradition request may signify that the person is potentially a fugitive from justice, in which case exclusion may need to be considered. Extradition requests may, however, also be abused by the country of origin (sometimes in concert with a third-country) to seek the return of *bona fide* refugees.
→ **persons who are or have been subject to investigation, a warrant of arrest and/or an indictment by the ICC or another international criminal tribunal**	The same applies to information on criminal suspects or offenders that is recorded in databases, which, depending on its provenance (in particular if it was provided by the country of origin), may not always be reliable.

5.2 Use of classified information

Article 12(1)(d) APD (recast) requires that applicants and, if applicable, their legal advisers or other counsellors in accordance with Article 23(1), be given access to the country of origin information made available to the personnel responsible for examining and deciding on applications for international protection. They are also to be given access to expert information on medical, cultural, religious, child-related, gender or **other particular issues**, as provided by Article 10(3)(b) and (d), respectively.

Such access is **limited to the information that has been 'taken […] into consideration' by the determining authority 'for the purpose of taking a decision on their application'**.

In addition to the specific requirements in Article 12(1)(d) APD (recast), it should be noted that, according to the general EU law principle on the right to be heard ([455]), applicants must be allowed:

> to comment in detail on the elements that must be taken into account by the competent authority and to set out, if [they think] it appropriate, information or assessments different from those already submitted to the competent authority when [their] asylum application was examined ([456]).

Notably, the right of access to information is limited to such legal advisers and counsellors as have been admitted or permitted under national law in accordance with Article 23(1) APD (recast). The reference in Article 12(1)(d) to this provision makes clear that advisers' and counsellors' access to information may be subject to the restrictions laid down in Article 23(1). At the same time, however, Article 12(1)(d) does not explicitly allow for any restrictions on the **applicant's** access to the material mentioned here.

([455]) See e.g. EU Charter of Fundamental Rights, op. cit., fn. 34, Article 41(2)(a).
([456]) CJEU, Judgment of 9 February 2017, C-560/14, M v Minister for Justice and Equality, Ireland, Attorney General, ECLI:EU:C:2017:101, para. 40.

With regard to access to sensitive 'information or sources', Article 23(1) APD (recast) provides the following.

Article 23(1) APD (recast)

Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised.

In such cases, Member States shall:

(a) make access to such information or sources available to the authorities referred to in Chapter V; and

(b) establish in national law procedures guaranteeing that the applicant's rights of defence are respected.

In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.

The authorities referred to in Chapter V of the APD (recast), which consists only of Article 46 on the right to an effective remedy, include the 'courts or tribunals' of the Member States.

Member States' practice regarding the provision of access to classified information and of appointing a 'legal adviser or other counsellor' varies ([457]). As for the CJEU, it has not yet ruled on the restriction of access to classified information in the context of applications for international protection under Article 23 APD (recast). The Court's judgment in the case of *ZZ* v *Secretary of State for the Home Department* ([458]) nevertheless provides useful guidance regarding the disclosure of evidence in the context of national security concerns.

The dispute in the *ZZ* case related to a French/Algerian national who had been permanently resident in the UK but who, following his departure from the UK in 2005, had his right of residence cancelled and an entry ban imposed on him on the ground that his presence was not conducive to the public good. The CJEU was asked in that case,

([457]) See: European Migration Network (EMN), EMN Ad-Hoc Query on Ad-Hoc Query on the criteria for application of exclusion clause – danger to the community and danger to the state security – while reviewing the applications for international protection, requested 6 September 2016.

([458]) CJEU, Judgment of 4 June 2013, Grand Chamber, C-300/11, ZZ v Secretary of State for the Home Department, EU:C:2013:363.

> in essence, whether Article 30(2) of Directive 2004/38/EC, read in the light in particular of Article 47 of the Charter, must be interpreted as requiring a national court hearing an appeal of a Union citizen against a decision refusing entry taken under Article 27(1) of that directive to ensure that the essence of the public security grounds which constitute the basis of that decision is disclosed to the person concerned where the competent national authority contends before that court that such disclosure is contrary to the interests of state security ([459]).

The CJEU noted that 'the fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views […]' ([460]). The Court went on to hold:

> In order that the person concerned may make effective use of the redress procedures thereby established by the Member States, the competent national authority is required, as is laid down as a principle by Article 30(2) of Directive 2004/38, to inform him in the administrative procedure precisely and in full of the public policy, public security or public health grounds on which the decision in question is based.
>
> […]
>
> It is only by way of derogation that Article 30(2) of Directive 2004/38 permits the Member States to limit the information sent to the person concerned in the interests of state security. As a derogation from the rule set out in the preceding paragraph of the present judgment, this provision must be interpreted strictly, but without depriving it of its effectiveness.
>
> […]
>
> Admittedly, it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with state security (see, to this effect, *Kadi and Al Barakaat International Foundation* v *Council and Commission,* Paragraph 342).
>
> […] [I]f, in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken under Article 27 [of Directive 2004/38/EC], by invoking reasons of state security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate state security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle […] ([461]).

([459]) CJEU, 2013, *ZZ*, op. cit. fn. 458, para. 40.

([460]) CJEU, 2013, *ZZ*, op. cit. fn. 458, para. 56. See also CJEU, Judgment of 2 December 2009, C-89/08 P, European Commission v Ireland and Others, EU:C:2009:742, para. 52 (and the case-law cited).

([461]) CJEU, 2013, *ZZ*, op. cit., fn. 458, paras. 48, 49, 54 and 57, as well as paras. 61, 64, 65, 69. See also, by analogy, CJEU, Judgment of 3 September 2008, Grand Chamber, joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v Council and Commission, para. 344.

The CJEU concluded in *ZZ*:

> [I]t is incumbent upon the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him ([462]).

In order to maintain a balance between national interest considerations and the applicant's right to an effective remedy under Article 46(3) APD (recast) in conjunction with Article 47 of the Charter, provision may need to be made for various measures. These may include the disclosure of confidential information to qualified advisers who have undergone security checks, for directions prohibiting or restricting the further disclosure of such information, for open and closed sessions at appeal hearings, and for open and closed decisions ([463]).

The European Court of Human Rights (ECtHR) dealt with the issue of disclosure of sensitive information in the matter of *Ljatifi* v *The Former Yugoslav Republic of Macedonia* ([464]). This case concerned the expulsion of a lawful resident on the basis of a finding by the national authorities that she posed a threat to national security. The applicant challenged the failure of the national authority to provide any indication of the facts serving as the basis for that assessment. This was then accepted without any further details in the ensuing judicial review proceedings. Both levels of administrative court had only added that the ministry had reached its decision on the basis of a classified document obtained from the intelligence agency. In finding a violation of paragraph 1 (a) and (b) of Article 1 of Protocol No 7 to the Convention ([465]), the court stated:

> [E]ven where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary (see *C.G. and Others*, cited above, § 40) ([466]).

In an earlier case, *A and Others* v *United Kingdom*, the ECtHR dealt with the use of undisclosed evidence before the special immigration appeals commission in the UK. The ECtHR accepted that there was a strong and legitimate public interest in states obtaining information about terrorist groups and their associates and in maintaining the secrecy of the

([462]) CJEU, 2013, *ZZ*, op. cit., fn. 458, para. 68.

([463]) CJEU, 2013, *ZZ*, op. cit., fn. 458, para. 64. See also ECtHR, Judgment of 19 February 2009, Grand Chamber, case of A and Others v United Kingdom, application no 3455/05, paras. 202-211. The use of open and closed sessions with the use of a Special Advocate to represent an appellant's interests was also found to be lawful and compliant with the ECHR by the House of Lords (UK), in Judgment of 18 February 2009, RB (Algeria) and Another v Secretary of State for the Home Department and OO (Jordan) v Secretary of State for the Home Department [2009] UKHL 10.

([464]) ECtHR, Judgment of 17 May 2018, Ljatifi v The Former Yugoslav Republic of Macedonia, application no 19017/16.

([465]) Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (not ratified by Germany, the Netherlands or the UK). Having regard to the finding of a violation under Article 1 of Protocol No 7 as a result of the failure of the domestic courts properly to scrutinise whether the impugned order had been issued on genuine national security grounds, the Court considered it not necessary to examine whether there had also been a violation of Article 13 of the Convention in this case.

([466]) ECtHR, 2018, *Ljatifi*, op. cit., fn. 463, para. 35.

sources of such information ([467]). It nevertheless ruled that the applicant's rights to procedural fairness had to be balanced against this important public interest. The court affirmed:

> Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) ECHR [right to liberty] required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him ([468]).

Article 23(1) APD (recast) refers specifically to 'information in the appellant's file' as disclosable. There may be circumstances, however, in which disclosure is sought of information not on the file as such. This may be a request for further details about how the information was obtained or who it was from, if the source is anonymous, or may relate to information relevant to an applicant's claim, which is said to be in the possession of the authorities but has not been disclosed.

In France, the National Court of Asylum Law has held that the identity of an anonymous source need not be disclosed in the light of the need to protect their security. It nevertheless ruled that a summary had to be produced of the declarations and that the judge could not base a decision only on the basis of confidential information ([469]). This jurisprudence has been confirmed by the reform of French asylum law adopted in July 2015. Article L. 733-4 of the Code on the entry and stay of foreigners and asylum law provides that where the determining authority relies on an anonymous source, in order to guarantee the security of its source it must justify the need for confidentiality and provide a summary of the elements of this piece of information ([470]). The French law also makes clear that judges cannot found their judgment exclusively on confidential information.

The UK upper tribunal held, in the case of *CM (EM country guidance; disclosure) Zimbabwe CG,* that in international protection claims there is no general duty of disclosure on the state. It ruled nonetheless that there was a duty on the secretary of state not to mislead by failing to disclose information which was known or ought to have been known to detract from information relied on by reference to country of origin information reports, or other evidence. Further, the secretary of state could not make assertions 'that she knows or ought to know are qualified by other material under her control or in the possession of another government department' ([471]). A claimed failure to disclose was a matter for the tribunal to consider and in particular whether undisclosed material was relevant to the issues, whether the public immunity claim was made out, and whether the material was of such significance that fairness required a direction that the material in whole or part be disclosed ([472]).

([467]) ECtHR, 2009, A and Others v United Kingdom, op. cit., fn. 463, paras. 202-224.
([468]) ECtHR, 2009, *A and Others v United Kingdom*, op. cit., fn. 463, para. 218.
([469]) Cour nationale du droit d'asile (National Court of Asylum Law, France), Judgment of 27 February 2015, M. B.A., no 11015942 (case summary at p. 4 In French); Supreme administrative court (Czechia), Judgment of 20 June 2007, R.K. v Ministry of Interior, 6 Azs 142/2006-58 (EDAL case summary), where a similar conclusion was reached.
([470]) France, Code de l'entrée et du séjour des étrangers et du droit d'asile, (Code on the entry and stay of foreigners and asylum law) consolidated version of 1 November 2019 (in French), the determining authority in this case being the Office français de protection des réfugiés et apatrides (French Office for the protection of refugees and stateless persons, OFPRA).
([471]) Upper tribunal (UK), Judgment of 31 January 2013, *CM (EM country guidance; disclosure) Zimbabwe CG,* [2013] UKUT 00059, para. 45 and paras. 23-32 on the procedure for determining disclosure issues upheld in Court of Appeal (England and Wales, UK), Judgment of 30 July 2013, CM (Zimbabwe) v Secretary of State for the Home Department [2013] EWCA Civ 1303.
([472]) UKUT, 2013, *CM (EM country guidance; disclosure) Zimbabwe CG,* op. cit., fn. 471, para. 29.

5.3 Assessment of evidence and credibility

There are two parts to the individual assessment of whether, on the specific facts of the case, there are 'serious reasons for considering' that an applicant for international protection has committed, incited or otherwise participated in crimes or acts that are excludable pursuant to Articles 12(2) and 17(1) (a) to (d) QD (recast).

One part concerns whether 'there are serious reasons for considering that the crimes or acts committed or contributed to by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses' ([473]). In that regard, the upper tribunal (UK) has held that 'exclusion from refugee status […] is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status' ([474]).

The other part concerns the question whether there is sufficient evidence to attribute individual responsibility to the applicant for having committed, incited, or otherwise participated in the crimes or acts in issue. In this regard, the CJEU held in its judgment in *B and D* that it must be possible to attribute individual responsibility to the applicant, 'regard being had to the standard of proof required under Article 12(2)' ([475]). It also determined that 'individual responsibility must be assessed in the light of both objective and subjective criteria' ([476]).

As the CJEU pointed out, however, in its ruling in *MM* ([477]), the QD 'in no way seeks […] to prescribe the procedural rules applicable to the examination of an application for international protection or, therefore, to determine the procedural safeguards which must, in that respect, be afforded to an applicant' ([478]). Although under the APD (recast) there is still no full harmonisation, it contains a number of safeguards pertaining to evidence and credibility assessment which courts and tribunals in Member States must take into account.

In the assessment of evidence and credibility in relation to the application of the exclusion clauses contained in Articles 12 and 17 QD (recast), judges and tribunal members may wish to refer also to the judicial analysis on evidence and credibility assessment ([479]), including notably Part 4.3.4 of that judicial analysis on the use of 'classified documentation'.

Relevant also for exclusion cases is Section 3.4 of the judicial analysis on evidence and credibility assessment regarding relevant principles and standards for the conduct of hearings before courts or tribunals. Particular attention must be paid to the fact that the applicant is in a different position from an applicant in an inclusion hearing. Clearly it is also possible that inclusion and exclusion are dealt with in the same hearing. Since it is not, legally, a criminal hearing, the rules for criminal proceedings, such as the presumption of innocence and the privilege against self-incrimination, are not applicable. Similar to hearings in a criminal case, however, the judge or tribunal member has to be aware that, in relation to the exclusion issue, the applicant is in a defensive position. An example of difficult situations that can easily arise in exclusion cases is when the statements of the applicant are found to lack credibility, yet the same statements are relied upon to exclude the applicant from international protection. This was found to be inconsistent by the Czech supreme administrative court ([480]).

([473]) UKUT, 2013, *CM (EM country guidance; disclosure) Zimbabwe CG,* op. cit., fn. 471, para. 87.
([474]) UKUT, 2013, *CM (EM country guidance; disclosure) Zimbabwe CG,* op. cit., fn. 471, para. 108.
([475]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 122.
([476]) CJEU, 2010, *B and D,* op. cit., fn. 9, para. 96.
([477]) CJEU, Judgment of 22 November 2012, C-277/11, MM v Minister for Justice, Equality and Law Reform, Ireland and Attorney General, EU:C:2012:744.
([478]) CJEU, 2012, *MM*, op. cit., fn. 477, para. 73.
([479]) EASO, *Evidence and credibility assessment in the context of the Common European Asylum System - Judicial analysis*, 2018.
([480]) Czech supreme administrative court, Judgment of 2 August 2012, R.H. v Ministry of Interior, 5 Azs 2/2012-49 (in Czech).

Appendix A: Decision trees

The decision trees below are based on the analysis of the grounds for exclusion from refugee status in Part 2 and Part 3 above, and the analysis of the grounds for exclusion from subsidiary protection status in Part 4 above. They provide a suggested framework of analysis for each individual ground for exclusion, and represent just one possible ordering of the analysis.

1. Exclusion of persons not in need of refugee status (Article 12(1))

<table>
<tr><th colspan="3">A. Is the applicant excluded from refugee status, or automatically entitled to refugee status, under Article 12(1)(a)?</th></tr>
<tr><td>A.1 Does the applicant fall within the scope of Article 12(1)(a)?</td><td>A.1.1 Has the applicant been registered by UNRWA as a ‘Palestine refugee’?
OR
A.1.2 Has the applicant received services from UNRWA as a ‘person displaced as a result of the 1967 and subsequent hostilities’ (hereinafter ‘displaced person’)?</td><td>See Sections 2.2.1.1 and 2.2.1.2.
It is generally accepted that UNRWA at present constitutes the only United Nations organ or agency other than UNHCR which is referred to in Article 12(1)(a). The applicant will fall within the scope of Article 12(1)(a) if:
(i) they are a first-generation or later-generation ‘Palestine refugee’ (as defined by UNRWA for its operational purposes), or they are a ‘displaced person’; and
(ii) they are not merely eligible for protection or assistance from UNRWA but have actually received it before applying for international protection in the EU.
The applicant will satisfy the above two conditions if it is shown that:
— they have been registered by UNRWA as a ‘Palestine refugee’; or
— they have been receiving services from UNRWA as a ‘displaced person’.
If the above two conditions are not satisfied, the applicant does not fall within the scope of Article 12(1)(a) and their eligibility for refugee status should be assessed under Article 2(d) and the grounds for exclusion from refugee status in Article 12(1)(b) and (2).</td></tr>
<tr><td>A.2 If the answer to A.1 is yes, is the applicant ‘at present’ receiving protection or assistance from a UN organ or agency other than UNHCR?</td><td colspan="2">See Section 2.2.1.3.
Even though UNRWA only provides its services within its area of operations, the applicant should be regarded as ‘at present’ receiving UNRWA’s protection or assistance if:
(i) they had been receiving UNRWA’s protection or assistance shortly before submitting an application for international protection in a Member State; and
(ii) they have voluntarily renounced that protection or assistance (as opposed to UNRWA’s protection or assistance being no longer available: see question A.3).
If the above two conditions are satisfied, the applicant is excluded from refugee status under the first sentence of Article 12(1)(a).</td></tr>
</table>

A.3 If the answer to A.2 is no, has such protection or assistance 'ceased for any reason'?	**A.3.1 Has such protection or assistance ceased due to events affecting UNRWA directly?** **OR** **A.3.2 Has such protection or assistance ceased due to circumstances which are beyond the control and independent of the volition of the applicant?**	See Section 2.2.2.1. **Events affecting UNRWA directly** that would result in the cessation of its protection or assistance would include the abolition of UNRWA or an event which makes it generally impossible for UNRWA to carry out its mission. **Circumstances beyond the control and independent of the volition of the applicant** that would result in the cessation of UNRWA's protection or assistance include (i) the applicant being **forced to leave UNRWA's area of operations** due to their personal safety being at serious risk and it being impossible for UNRWA to guarantee that their living conditions in its area of operations will be commensurate with its mission; (ii) **other obstacles** preventing the applicant from returning to UNRWA's area of operations, including legal obstacles (such as the absence of necessary documentation), practical obstacles (such as border closures), and obstacles relating to safety or personal security (such as dangers en route).
A.4 If the answer to A.3 is yes, has the position of the applicant been 'definitely settled in accordance with the relevant resolutions' adopted by the UN General Assembly (UNGA)?	See Section 2.2.2. The applicant's position will not have been definitely settled in accordance with the relevant UNGA resolutions, if: (i) The applicant is a 'Palestine refugee' whose repatriation or compensation – as provided for in paragraph 11 of UNGA Resolution 194(III) – has not been effected; ***or*** (ii) The applicant is a 'displaced person' whose return to their home or former place of residence in the territories occupied by Israel since 1967 – as called for, most recently, in paragraphs 1 and 2 of UNGA Resolution 73/93 – has not been effected.	

Conclusions on exclusion from refugee status/automatic entitlement to refugee status under Article 12(1)(a)

If the answer to question **A.1** is negative, the applicant does not fall within the scope of Article 12(1)(a) and, their eligibility for refugee status should be assessed under Article 2(d) and the remaining grounds for exclusion from refugee status in Article 12(1)(b) and (2).

If the answer to question **A.2** is positive, the applicant is excluded from refugee status under the first sentence of Article 12(1)(a).

If the answer to question **A.3** is positive and the answer to question **A.4** is negative, the applicant is entitled to refugee status provided they do not fall within any of the grounds for exclusion from refugee status in Article 12(1)(b) and (2).

If the answer to question **A.3** is positive and the answer to question **A.4** is positive, the applicant's eligibility for refugee status should be assessed under Article 2(d) and the grounds for exclusion from refugee status in Article 12(1)(b) and (2).

B. Is the applicant excluded from refugee status under Article 12(1)(b)?	
B.1 Has the applicant 'taken up residence' in a country that is not their country of origin?	See Section 2.3.1.
B.2 If the answer to B.1 is yes, is the applicant recognised as 'having the rights and obligations attached to the possession of the nationality' of the country of residence?	See Section 2.3.2.
Conclusions on exclusion from refugee status under Article 12(1)(B) If the answer to question **B.1** or question **B.2** is negative, the applicant is not excluded from refugee status. If the answer to questions **B.1** and **B.2** is positive, the applicant is excluded from refugee status.	

2. Exclusion of persons undeserving of refugee status (Article 12(2) and (3))

An applicant could have committed multiple excludable acts, falling under different exclusion clauses in Article 12(2) QD (recast). Or one particular act could qualify as excludable under more than one exclusion clause where the necessary elements are present. The analysis of exclusion need not follow the same order as in the decision tree below ((first Article 12(a), then Article 12(2)(b), then Article 12(2)(c)).

<table>
<tr><th colspan="4">C. Is the applicant excluded from refugee status under Article 12(2) and (3)?</th></tr>
<tr><td>C.1 Are there indications that the applicant may be linked to an excludable crime or act under Article 12(2)?</td><td colspan="3">See Section 5.1 on identification of potential exclusion cases.</td></tr>
<tr><td rowspan="3">C.2 If the answer to C.1 is yes, is the act excludable under Article 12(2)(a)?</td><td>C.2.1 Was the act committed during peacetime?</td><td>C.2.1.1 Was the act a crime against humanity?</td><td>See Section 3.3.4 on crimes against humanity.
If the act was a crime against humanity, assess whether there are serious reasons for considering that the applicant was individually responsible for it (see question C.5 below).</td></tr>
<tr><td>C.2.2 If the answer to C.2.1 is no, was the act committed in connection with a non-international armed conflict?</td><td>C.2.2.1 Was the act a war crime?
OR
C.2.2.2 Was the act a crime against humanity?</td><td>See Section 3.3.3.3 on war crimes in non-international armed conflict and Section 3.3.4 on crimes against humanity.
If the act was a war crime or a crime against humanity, assess whether there are serious reasons for considering that the applicant was individually responsible for it (see question C.5 below).</td></tr>
<tr><td>C.2.3 If the answer to C.2.2 is no, was the act committed in connection with an international armed conflict?</td><td>C.2.3.1 Was the act a crime of aggression?
OR
C.2.3.2 Was the act a war crime?
OR
C.2.3.3 Was the act a crime against humanity?</td><td>See Section 3.3.2 on crimes against peace, Section 3.3.3.2 on war crimes in international armed conflict, and Section 3.3.4 on crimes against humanity.
If the act was a crime of aggression, a war crime or a crime against humanity, assess whether there are serious reasons for considering that the applicant was individually responsible for it (see question C.5 below).
[Note that ‘crime of aggression’ is the modern rendering of ‘crime against peace’: see Section 3.3.2.]
[Note that crimes of aggression are not war crimes, since they fall under jus ad bello, not jus in bello: see Section 3.3.2.]</td></tr>
</table>

C.3 If the answer to C.1 is yes, is the act excludable under Article 12(2)(b)?	**C.3.1 Was the act committed outside the Member State prior to the applicant's 'admission as a refugee'?**	See Section 3.4.2. The condition that the act must have been committed outside the Member State 'prior to admission as a refugee' means that: 15. the applicant committed the act outside the Member State prior to a final decision on whether they qualify as a 'refugee'; ***or*** 16. the applicant committed the act outside the Member State after a final decision by the competent authorities of the Member States that the applicant qualifies as a 'refugee', but prior to the issuance of a residence permit based on the granting of 'refugee status'. See Section 3.4.2.
	C.3.2 If the answer to C.3.1 is yes, could the act in principle qualify as a 'serious crime'?	See Section 3.4.1.1.
	C.3.3 If the answer to C.3.2 is yes, was the act a serious 'non-political' crime?	See Sections 3.4.1.2 and 3.4.1.3. If the act was a serious non-political crime committed outside the Member State concerned prior to the applicant's admission as a refugee, assess whether there are serious reasons for considering that the applicant was individually responsible for it (see question **C.5** below).
C.4 If the answer to C.1 is yes, is the act excludable under Article 12(2)(c)?	**C.4.1 Was the act contrary to the purposes and principles of the United Nations?**	See Section 3.5. If the act was contrary to the purposes and principles of the United Nations, assess whether there are serious reasons for considering that the applicant was individually responsible for it (see question **C.5** below).

C.5 If the answer to C.2, C.3, or C.4 is yes, are there serious reasons for considering that the applicant is individually responsible for the act?	**C.5.1 Does the applicant's conduct meet the material elements for establishing individual responsibility?**	See Section 3.6.1.1, 3.6.2 and 3.6.3. Has the applicant committed, incited or otherwise participated in the commission of an excludable crime or is the applicant 'guilty of' an excludable act?
	C.5.2 Does the applicant's state of mind meet the requirements with regard to the mental element for establishing individual responsibility?	See Section 3.6.1.2. Did the applicant have the intent and knowledge of the commission of an excludable act or crime?
	C.5.3 Are there any grounds negating individual responsibility?	See Section 3.6.4. Does the applicant have a valid defence which excludes his or her responsibility for the excludable act or crime?

Conclusions on exclusion from refugee status under Article 12(2) AND (3)

If the answers to questions **C.2**, **C.3** and **C.4** are all negative, the applicant is not excluded from refugee status.

If the answers to questions **C.2** and **C.5** are both positive, the applicant is excluded from refugee status under Article 12(2)(a) read, as applicable, in conjunction with Article 12(3).

If the answers to questions **C.3** and **C.5** are both positive, the applicant is excluded from refugee status under Article 12(2)(b) read, as applicable, in conjunction with Article 12(3).

If the answers to questions **C.4** and **C.5** are both positive, the applicant is excluded from refugee status under Article 12(2)(c) read, as applicable, in conjunction with Article 12(3).

3. Exclusion from subsidiary protection status (Article 17)

A. Is the applicant excluded from subsidiary protection status under Article 17?	
A.1 Is the act excludable under Article 17(1)(a)?	The test is the same as for Article 12(2)(a). See question **C.2** of the decision tree concerning persons undeserving of refugee status.
A.2 Is the act excludable under Article 17(1)(b)?	The test is the same as for Article 12(2)(b), except that: (i) there is no requirement that the 'serious crime' be 'non-political'; (ii) there is no requirement that the crime be committed outside the Member State, or prior to a particular point in time. See question **C.3.2** of the decision tree concerning persons undeserving of refugee status.
A.3 Is the act excludable under Article 17(1)(c)?	The test is the same as for Article 12(2)(c). See question **C.4** of the decision tree concerning persons undeserving of refugee status.
A.4 If the answer to A.1, A.2, or A.3 is yes, are there serious reasons for considering that the applicant is individually responsible for the act?	The test is the same as for Article 12(2) and (3). See question **C.5** of the decision tree concerning persons undeserving of refugee status.

A.5 Does the ground for exclusion in Article 17(1)(d) apply?	**A.5.1 Are there any indications that the applicant may constitute a danger to the community or to the security of the Member State?**	See Section 4.2.5.
	A.5.2 If the answer to A.5.1 is yes, are there 'serious reasons for considering' that the applicant constitutes such a danger?	The standard of proof is the same as that for persons excluded from subsidiary protection status under Article 17(1)(a)-(c) and (2), and for persons excluded from refugee status under Article 12(2) and (3).

A.6 Does the ground for exclusion in Article 17(3) apply?	**A.6.1 Has this ground for exclusion been transposed into national legislation?**	The exclusion ground in Article 17(3) is optional and may only be applied by Member States that have transposed it into national law.
	A.6.2 If the answer to A.6.1 is yes, has the applicant committed one or more crimes outside the scope of Article 17(1) prior to admission to the Member State?	See Section 4.3. The crimes must be less serious than the crimes and acts within the scope of Article 17(1).
	A.6.3 If the answer to A.6.2 is yes, would those crimes be punishable by imprisonment had they been committed in the Member State?	See Section 4.3.
	A.6.4 If the answer to A.6.4 is yes, did the applicant leave their country of origin solely in order to avoid sanctions resulting from those crimes?	See Section 4.3.

CONCLUSIONS ON EXCLUSION FROM SUBSIDIARY PROTECTION STATUS UNDER ARTICLE 17

If the answers to questions **A.1, A.2, A.3, A.5** and **A.6** are all negative, the applicant is not excluded from subsidiary protection status.

If the answers to questions **A.1** and **A.4** are both positive, the applicant is excluded from subsidiary protection status under Article 17(1)(a) read, as applicable, in conjunction with Article 17(2).

If the answers to questions **A.2** and **A.4** are both positive, the applicant is excluded from subsidiary protection status under Article 17(1)(b) read, as applicable, in conjunction with Article 17(2).

If the answers to questions **A.3** and **A.4** are both positive, the applicant is excluded from subsidiary protection status under Article 17(1)(c) read, as applicable, in conjunction with Article 17(2).

If the answer to question **A.5** is positive, the applicant is excluded from subsidiary protection status under Article 17(1)(d).

If the answer to question **A.7** is positive, the applicant is excluded from subsidiary protection status under Article 17(3).

Appendix B: Selected instruments relating to terrorism

1. Selected EU instruments relating to terrorism

European Union, Restrictive measures (sanctions) in force, against individuals/entities only on the basis of Article 215 TFEU (list updated on 7 July 2016).

Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, [2001] OJ L 344/93, amended by (see consolidated version): Council Decision (CFSP) 2016/1711 of 27 September 2016, OJ LI 259/3; Council Decision (CFSP) 2017/2073 of 13 November 2017, OL LI 295/59.

Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344/70, amended by (see consolidated version): Commission Regulation (EC) No 745/2003 of 28 April 2003, OJ L 106/22; Commission Regulation (EC) No 1207/2005 of 27 July 2005, OJ L 197/16; Commission Regulation (EC) No 1957/2005 of 29 November 2005, OJ L 314/16; Commission Regulation (EC) No 1461/2006 of 29 September 2006, OJ L 272/11; Council Regulation (EC) No 1791/2006 of 20 November 2006, OJ L 363/1; Commission Implementing Regulation (EU) No 1250/2012 of 20 December 2012, OJ L 352/40; Council Regulation (EU) No 517/2013 of 13 May 2013, OJ L 158/1; Commission Implementing Regulation (EU) No 646/2013 of 4 July 2013, OJ L 187/4; Council Regulation (EU) 2016/1710 of 27 September 2016, OJ L 259/I1; Council Regulation (EU) 2017/2061 of 13 November 2017, OJ L 295/3; and treaty concerning the accession of new Member States.

Consolidated version of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations, amended 307 times as of 5 July 2019.

Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253/22, amended by (see consolidated version): Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017, OJ L 88/6.

Council Decision 2005/848/EC of 29 November 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/722/EC, OJ L 314/46.

Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6.

Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities

or bodies associated with them, OJ L 255/1, as amended by (see consolidated version): Council Implementing Regulation (EU) 2018/281 of 26 February 2018, OJ LI 54/1; Council Implementing Regulation (EU) 2018/999 of 16 July 2018, OJ LI 178/1; Council Implementing Regulation (EU) 2018/1539 of 15 October 2018, OJ LI 257/1; Council Implementing Regulation (EU) 2019/270 of 18 February 2019, OJ LI 46/1.

Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, OJ L 255/25, amended by (see consolidated version): Council Decision (CFSP) 2017/1560 of 14 September 2017, OJ L 237/71; Council Decision (CFSP) 2018/283 of 26 February 2018, OJ LI 54/6; Council Decision (CFSP) 2018/1000 of 16 July 2018, OJ LI 178/3; Council Decision (CFSP) 2018/1540 of 15 October 2018 OJ L 257I; Council Decision (CFSP) 2019/271 of 18 February 2019, OJ LI 46/3.

Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6.

Council Decision (EU) 2018/889 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism [2018] OJL 159/1.

Council Decision (EU) 2018/890 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism [2018] OJL 159/15.

Council Decision (CFSP) 2019/1341 of 8 August 2019 amending and updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/1084, [2019] OJ L 6/6.

Council Decision (CFSP) 2020/20 of 13 January 2020 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2019/134 [2020] OJL 81.

2. United Nations conventions relating to terrorism ([481])

Convention on offences and certain other acts committed on board aircraft, 704 UNTS 219, 14 September 1963 (entry into force: 4 December 1969).

Convention for the suppression of unlawful seizure of aircraft, 860 UNTS 105, 16 December 1970 (entry into force: 14 October 1971).

Convention for the suppression of unlawful acts against the safety of civil aviation, 974 UNTS 177, 23 September 1971 (entry into force: 26 January 1973).

([481]) Note that not all conventions enjoy the same level of ratification/accessions and some have a very limited number of ratifications/accessions. In particular, not all conventions have been ratified/acceded to by all Member States. See also, UNGA, Measures to Eliminate International Terrorism (16 January 1997), A/RES/51/210, para. 6; UNGA, Measures to eliminate international terrorism (14 December 2012), A/RES/67/99, paras. 12 and 13; list maintained by the Counter-Terrorism Committee of the UN Security Council (https://www.un.org/sc/ctc/resources/international-legal-instruments).

Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, 1035 UNTS 167, 14 December 1973 (entry into force: 20 February 1977).

Convention on the physical protection of nuclear material, 1456 UNTS 101, 3 March 1980 (entry into force: 8 February 1987).

International convention against the taking of hostages, 1316 UNTS 205, 17 December 1979 (entry into force: 3 June 1983).

Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention of 23 September 1971, 24 February 1988 (entry into force: 6 August 1989).

Convention on the marking of plastic explosives for the purpose of detection, 2122 UNTS 359, 1 March 1991 (entry into force: 21 June 1998).

Convention for the suppression of unlawful acts against the safety of maritime navigation, 1678 UNTS 222, 10 March 1988 (entry into force: 1 March 1992).

Protocol to the convention of 10 March 1988 for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, 1768 UNTS 304, 10 March 1988 (entry into force: 1 March 1992).

International convention for the suppression of terrorist bombings, 2149 UNTS 256, 15 December 1997 (entry into force: 23 May 2001).

International convention for the suppression of the financing of terrorism, 3178 UNTS 197, 9 December 1999 (entry into force: 10 April 2002).

International convention for the suppression of acts of nuclear terrorism, 2445 UNTS 89, 13 April 2005 (entry into force: 7 July 2007).

Amendment to the convention on the physical protection of nuclear material, 8 July 2005 (entry into force: 8 May 2016).

Protocol of 2005 to the convention for the suppression of unlawful acts against the safety of maritime navigation, 14 October 2005 (entry into force: 28 July 2010).

Protocol of 2005 to the protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, 14 October 2005 (entry into force: 28 July 2010).

Convention on the suppression of unlawful acts relating to international civil aviation, 10 September 2010 (entry into force: 1 July 2018).

Protocol supplementary to the convention for the suppression of unlawful seizure of aircraft, 10 September 2010 (entry into force: 1 January 2018).

Protocol to amend the convention on offences and certain acts committed on board aircraft, 4 April 2014 (not yet in force).

3. Selected United Nations Security Council resolutions relating to terrorism

United Nations Security Council, Resolution 1267 (1999), 15 October 1999 on the situation in Afghanistan and a sanctions regime on persons associated with the Taliban.

United Nations Security Council, Resolution 1333 (2000), 19 December 2000, expands the air embargo and financial embargo to include freezing the funds of Usama Bin Laden and associates, imposes arms embargo over the territory of Afghanistan controlled by the Taliban and embargo on the chemical acetic anhydride.

United Nations Security Council, Resolution 1368 (2001), 12 September 2001, on the condemnation of 11 September attacks against United States

United Nations Security Council, Resolution 1373 (2001), 28 September 2001 on threats to international peace and security caused by terrorist acts.

United Nations Security Council, Resolution 1377 (2001), 12 November 2001 concerning efforts to eliminate international terrorism.

United Nations Security Council, Resolution 1390 (2002), 16 January 2002 ([482]), modifies and expands the sanctions regime originally imposed in resolutions 1267 (1999) and 1333 (2000).

United Nations Security Council, Resolution 1452 (2002), 20 December 2002 introduces certain exceptions for the release of funds under the sanctions regime overseen by the 1267 Committee.

United Nations Security Council, Resolution 1456 (2003), 20 January 2003, on the declaration by Foreign Ministers on combating terrorism.

United Nations Security Council, Resolution 1540 (2004), 28 April 2004, on the threat of proliferation of nuclear, chemical and biological weapons.

United Nations Security Council, Resolution 1566 (2004), 8 October 2004, concerning threats to international peace and security caused by terrorism.

United Nations Security Council, Resolution 1624 (2005), 14 September 2005 on the prohibition of incitement to commit terrorist acts.

United Nations Security Council, Resolution 2133 (2014), 27 January 2014, on the prevention of kidnapping and hostage-taking committed by terrorist groups.

([482]) Updated in 2013.

United Nations Security Council, Resolution 2178 (2014), 24 September 2014, on foreign terrorist fighters.

United Nations Security Council, Resolution 2253 (2015), 17 December 2015, on threats to international peace and security caused by terrorist acts (and that the Al-Qaida Sanctions List shall henceforth be known as the ISIL (Da'esh) and Al-Qaida Sanctions List).

United Nations Security Council, Resolution 2368 (2017), 20 July 2017, on threats to international peace and security caused by terrorist acts: renewing and updating the 1267/1989/2253 ISIL (Da'esh) & Al-Qaida Sanctions regime.

United Nations Security Council, Resolution 2370 (2017), 2 August 2017 on preventing terrorists from acquiring weapons.

United Nations Security Council, Resolution 2388 (2017), 21 September 2017, on maintenance of international peace and security: trafficking in persons.

United Nations Security Council, Resolution 2396 (2017), 21 December 2017, on foreign terrorist fighters.

United Nations Security Council, Resolution 2427 (2018), 09 July 2018, on children in armed conflict.

For a full list, see United Nations Security Council, Security Council Resolutions List.

4. Selected Council of Europe instruments relating to terrorism

European Convention on the Suppression of Terrorism, ETS No 90, 27 January 1977 (entry into force: 4 August 1978).

Council of Europe Convention on the Prevention of Terrorism, ETS No 196, 16 May 2005 (entry into force: 1 June 2007) ([483]).

Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, ETS No 217, 22 October 2015 (entry into force: 1 July 2017) ([484]).

([483]) Not ratified by all Member States but ratified by the EU.
([484]) Not ratified by all Member States but ratified by the EU.

Appendix C: Selected relevant international legal provisions

1. Rome Statute

Article 7

Crimes against humanity

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

   (a) murder;

   (b) extermination;

   (c) enslavement;

   (d) deportation or forcible transfer of population;

   (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

   (f) torture;

   (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

   (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;

   (i) enforced disappearance of persons;

   (j) the crime of apartheid;

   (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

   (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian

population, pursuant to or in furtherance of a state or organizational policy to commit such attack;

(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

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

Article 8 ([485])

War crimes

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

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

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

(i) wilful killing;

(ii) torture or inhuman treatment, including biological experiments;

(iii) wilfully causing great suffering, or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer or unlawful confinement;

(viii) taking of hostages.

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

(ii) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(iii) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iv) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

([485]) Paras. 2(e)(xiii) to 2(e)(xv) were amended by Resolution RC/Res.5 of 11 June 2010 (adding paras. 2(e)(xiii) to 2(e)(xv)).

(v) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(vi) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vii) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(viii) making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(ix) the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(x) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(xi) subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) killing or wounding treacherously individuals belonging to the hostile nation or army;

(xiii) declaring that no quarter will be given;

(xiv) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xv) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xvi) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvii) pillaging a town or place, even when taken by assault;

(xviii) employing poison or poisoned weapons;

(xix) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xx) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xxi) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123;

(xxii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxiii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, Paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiv) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxvi) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvii) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

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

(i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) taking of hostages;

(iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

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

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

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) pillaging a town or place, even when taken by assault;

(vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

(vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) killing or wounding treacherously a combatant adversary;

(x) declaring that no quarter will be given;

(xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(xiii) employing poison or poisoned weapons;

(xiv) employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

(f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

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

Article 8 *bis* ([486])

Crime of aggression

1. For the purpose of this statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

([486]) Inserted by Resolution RC/Res.6 of 11 June 2010.

(a) The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof;

(b) Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;

(c) The blockade of the ports or coasts of a state by the armed forces of another state;

(d) An attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state;

(e) The use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state;

(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 25

Individual criminal responsibility

1. The court shall have jurisdiction over natural persons pursuant to this statute.

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

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

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

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

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

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

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

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

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

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

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a state.

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

Article 26

Exclusion of jurisdiction over persons under eighteen

The court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

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

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

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

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

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

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

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

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

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the court shall not be subject to any statute of limitations.

Article 30

Mental element

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

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

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

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

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

Article 31

Grounds for excluding criminal responsibility

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

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

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

   (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

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

      (i) made by other persons; or

      (ii) constituted by other circumstances beyond that person's control.

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

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

Article 32

Mistake of fact or mistake of law

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

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

Article 33

Superior orders and prescription of law

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

   (a) The person was under a legal obligation to obey orders of the government or the superior in question;

   (b) The person did not know that the order was unlawful; and

   (c) The order was not manifestly unlawful.

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

2. Charter of the United Nations

Chapter I: Purposes and principles

Article 1

The purposes of the United Nations are:

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

or settlement of international disputes or situations which might lead to a breach of the peace;

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

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

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

Article 2

1. The organization and its members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles.

2. The organization is based on the principle of the sovereign equality of all its members.

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

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

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

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

7. The organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.

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

Appendix D: Antecedents to the Rome Statute

This appendix sets out the antecedents to the *Rome Statute of the International Criminal Court* ([487]) ('Rome Statute'). They concern:

— the London Agreement of 1945

— grave breaches of the Geneva Conventions of 12 August 1949

— Common Article 3 of the Geneva Conventions of 12 August 1949

— Additional Protocols I and II to the Geneva Conventions of 1977

— the United Nations ad hoc tribunals

— the Convention on the Crime of Genocide of 1948

— crimes under customary international law.

1. London Agreement

The London Agreement established the International Military Tribunal (IMT) at Nuremberg. Article 6 of the Charter of the IMT, which was annexed to the agreement ([488]), defined the crimes falling within the IMT's jurisdiction as follows:

Article 6, International Military Tribunal Charter

[…] The following acts, or any of them, are crimes coming within the jurisdiction of the tribunal for which there shall be individual responsibility:

(a) 'Crimes against peace': namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) 'War crimes': namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

([487]) Rome Statute, op. cit., fn. 164, for more on which see Section 3.3.1.1.

([488]) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tibunal of 8 August 1945, 82 UNTS 279, 8 August 1945 ('London Agreement') (entry into force: 8 August 1945), Article 2.

(c) 'Crimes against humanity': namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated. […]

2. Grave breaches of the Geneva Conventions of 12 August 1949

Each of the four Geneva Conventions of 12 August 1949 requires its high contracting parties to prosecute and punish persons who commit, or order to be committed, a **grave breach** of the convention concerned ([489]). Grave breaches involve any of the acts listed in Table 18 below, if committed against persons or property protected by the relevant convention ([490]).

Table 18: Grave breaches of the four Geneva Conventions of 12 August 1949

	Convention				Grave breaches
	I	II	III	IV	
1	✔	✔	✔	✔	Wilful killing.
2	✔	✔	✔	✔	Torture or inhuman treatment, including biological experiments.
3	✔	✔	✔	✔	Wilfully causing great suffering or serious injury to body or health.
4	✔	✔	✘	✔	Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.
5	✘	✘	✔	✔	Compelling a protected person to serve in the forces of a hostile power.
6	✘	✘	✔	✔	Wilfully depriving a protected person of the rights of fair and regular trial.
7	✘	✘	✘	✔	Unlawful deportation or transfer or unlawful confinement of a protected person.
8	✘	✘	✘	✔	Taking of hostages.

Each grave breach of the Geneva Conventions is a war crime within the meaning of Article 12(2)(a) QD (recast) and Article 1F(a) Refugee Convention.

It should be noted that the provisions of the Geneva Conventions, including those relating to grave breaches, apply only to a situation of **international armed conflict** (i.e. armed conflict between states) ([491]), except for 'Common Article 3' to those conventions, which prohibits certain acts in the case of **armed conflict not of an international character**.

([489]) Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, 12 August 1949 (entry into force: 21 October 1950), Article 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, 12 August 1949 (entry into force: 21 October 1950), Article 50; Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949 (entry into force: 21 October 1950), Article 129; Geneva Convention (IV) <relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950), Article 146.

([490]) GC (I), Article 50; GC (II), Article 51; GC (III), Article 130; GC (IV), Article 147.

([491]) See ICTY (Appeals Chamber), decision of 2 October 1995, Prosecutor v Duško Tadić, IT-94-1-A, paras. 81-84, confirming that the 'grave breaches' provisions of the Geneva Conventions only apply within the context of international armed conflicts.

3. Common Article 3 of the Geneva Conventions of 12 August 1949

Common Article 3 of the Geneva Conventions provides as follows:

Common Article 3 of the Geneva Conventions

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.

[…]

It should be noted that by no means all violations of the Geneva Conventions or of the international laws and customs of war more generally (hereinafter 'international humanitarian law' or 'international law of armed conflict') constitute a crime under international law. Thus, at the time of the adoption Refugee Convention in 1951, the acts prohibited under Common Article 3 were not regarded as war crimes. This is in particular so, given that Common Article 3 had only just, for the first time, extended the treaty-based reach of international humanitarian law to non-international armed conflict, which traditionally had been viewed as purely a domestic matter.

International humanitarian law, and, more specifically, the law of war crimes, has, however, developed considerably in recent decades. It is now accepted both that the rules set out in Common Article 3 form part of customary international law ([492]) and that a serious violation of those rules constitutes a war crime under customary international law ([493]). In 1994, the acts prohibited by Common Article 3 in the case of non-international armed conflict were expressly defined in the Statute of the International Criminal Tribunal for Rwanda (ICTR) as crimes coming within the jurisdiction of that tribunal ([494]), even though at that point it

([492]) ICJ, Judgment of 27 June 1986, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), ICJ Reports 1986, para. 218.
([493]) ICTY (Appeals Chamber), 1995, *Tadić*, op. cit., fn. 491, paras. 128-134.
([494]) ICTR Statute, annexed to UN Security Council, Resolution 955(1994) (8 November 1994) UN Doc S/RES/955(1994), Article 4. The ICTR Statute was subsequently amended by further UNSC resolutions: see the consolidated version of 31 January 2010.

remained debatable whether those acts constituted war crimes ([495]). In 1995, however, the Appeals Chamber of the ICTY ruled conclusively in *Tadić* that the acts prohibited by Common Article 3 in the case of non-international armed conflict are indeed war crimes ([496]). The *Tadić* decision was ground-breaking, not least because it established that **all 'serious violations' of international humanitarian law are war crimes** ([497]).

In UNHCR's understanding, the notion of 'war crimes' does not apply to **all** serious violations of international humanitarian law (IHL) in non-international armed conflict, but rather to those which meet the criteria set out by the ICTY in *Tadić*:

> The appeals chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the international tribunal under Article 3:
>
> (i) The violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
>
> (iii) The violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law' although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory;
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
>
> It follows that it does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met ([498]).

4. Additional Protocols I and II to the Geneva Conventions

In 1977, two Additional Protocols to the Geneva Conventions were adopted (see Table 19 below).

([495]) Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), 13 February 1995, UN Doc. S/1995/134, paras. 11-12.
([496]) ICTY (Appeals Chamber), 1995, *Tadić*, op. cit., fn. 491, paras. 128-134.
([497]) ICTY (Appeals Chamber), 1995, *Tadić*, op. cit., fn. 491, para. 94. See also, more generally, J.-M. Henckaerts, and L. Doswald-Beck, *Customary International Humanitarian Law*, *Volume I: Rules* (CUP, 2005, reprinted with corrections 2009), Rule 156, pp. 569-603 (also available at ICRC, *Customary IHL Database*, Rule 156: Definition of War Crimes).
([498]) ICTY (Appeals Chamber), 1995, *Tadić*, op. cit., fn. 491, para. 94.

Table 19: Additional Protocols I and II to the Geneva Conventions

I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) ([499])
II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) ([500])

Additional Protocol I supplements the provisions of the Geneva Conventions and extends protection to additional categories of persons. It provides that situations of international armed conflict include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes [regimes] in the exercise of their right of self-determination' ([501]). The protocol also defines further 'grave breaches' ([502]) which, along with the 'grave breaches' of the Geneva Conventions referred to above, are expressly defined as 'war crimes' ([503]).

Additional Protocol II develops and supplements Common Article 3. Its field of application is, however, restricted to non-international armed conflicts in which the state is one of the parties to the conflict ([504]), whereas Common Article 3 also applies to non-international armed conflicts in which the conflict is exclusively between non-state armed groups ([505]). In 1995, the Appeals Chamber of the ICTY held in *Tadić* that many of the provisions of Additional Protocol II have crystallised as part of customary international law, and that serious violations of those provisions constitute war crimes under customary international law ([506]). Some violations of Additional Protocol II have been defined as crimes in the statutes of the ICTR ([507]) and the SCSL ([508]). The Rome Statute includes a more comprehensive, albeit still not complete, list of definitions of such crimes ([509]). Significantly, the Rome Statute stipulates that those definitions apply to non-international armed conflicts that take place in the territory of a state 'when there is protracted armed conflict between governmental authorities and organised armed groups or **between such groups**' ([510]). The Rome Statute thus lifts the restriction contained in Additional Protocol II that the State must be a party to the non-international armed conflict concerned.

10. The United Nations ad hoc tribunals

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) constitute the 'United Nations ad hoc tribunals'. They

([499]) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978).
([500]) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (entry into force: 7 December 1978).
([501]) Additional Protocol I, op. cit., fn. 499, Article 1(4).
([502]) Additional Protocol I, op. cit., fn. 499, Article 11(4) and Article 85(2)-(4).
([503]) Additional Protocol I, op. cit., fn. 499, Article 85(5).
([504]) Additional Protocol II, op. cit., fn. 500, Article 1(1).
([505]) See, for example, ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP, 2016), marginal notes 415 and 416 (internet version available at ICRC online database: Commentary on the First Geneva Convention).
([506]) ICTY (Appeals Chamber), 1995, *Tadić*, op. cit., fn. 491, para. 177 read in conjunction with paras. 128-133.
([507]) ICTR Statute, op. cit., fn. 491, Article 4.
([508]) Statute of the Special Court for Sierra Leone – Annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 UNTS 137, 16 January 2002 (entry into force: 12 April 2002), Article 3. The statute defines the jurisdiction of the Special Court for Sierra Leone (SCSL) for serious crimes against civilians and UN peacekeepers that were committed after 30 November 1996 during the civil war in Sierra Leone, namely crimes against humanity (Article 2), war crimes (Article 3 and Article 4) and various crimes under Sierra Leonean law (Article 5). In 2013, the SCSL was closed and its residual functions were transferred to the Residual Special Court for Sierra Leone (RSCSL): see Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone, 2871 UNTS 333, 29 July 2010 New York, 11 August 2010 Freetown (entry into force: 2 October 2012).
([509]) Rome Statute, op. cit., fn. 164, Article 8(2)(e), which does not expressly refer to Additional Protocol II but draws on various sources of law, including Additional Protocol II, to define the crimes that it enumerates. See further Section 3.3.3.
([510]) Rome Statute, op. cit., fn. 164, Article 8(2)(f) (emphasis added).

were the first international criminal jurisdictions to be created after the International Military Tribunal (IMT) ([511]). The ICTY was established in 1993 to prosecute and punish the serious crimes under international law that had been committed during the conflict in the former Yugoslavia from 1991 onwards. The ICTR was established in 1994 to prosecute and punish the serious crimes under international law that had been committed in the territory of Rwanda and its neighbouring states between 1 January 1994 and 31 December 1994.

Unlike the IMT, which was established by an international treaty, the ICTY and ICTR were established pursuant to resolutions of the UNSC on the basis of Chapter VII of the UN Charter ([512]). The crimes falling within their jurisdiction were war crimes, crimes against humanity and genocide, as summarised in Table 20 below.

Table 20: Crimes falling within the jurisdiction of the ICTY and ICTR

Crimes	ICTY Statute	ICTR Statute
Genocide	→ Article 4 ('Genocide').	→ Article 2 ('Genocide').
War crimes	→ Article 2 ('Grave breaches of the Geneva Conventions of 1949'). Article 3 ('Violations of the laws or customs of war'), interpreted by the ICTY as including **all 'serious violations' of international humanitarian law**, whether committed in the context of **international armed conflict** or of **non-international armed conflict** ([513]).	→ Article 4 ('Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II').
Crimes against humanity	→ Article 5 ('Crimes against humanity'), but only when committed **in the context of international or non-international armed conflict.**	→ Article 3 ('Crimes against humanity'), but only when committed **on national, political, ethnic, racial or religious grounds**.

The jurisprudence of the ICTY and ICTR is substantial and has had a profound influence on the interpretation and development of international criminal law, including the interpretation by the ICC of the Rome Statute. Both tribunals have now closed – the ICTY on 31 December 2017, the ICTR on 31 December 2015. Their remaining work has been inherited by the International Residual Mechanism for Criminal Tribunals (IRMCT) ([514]). Their jurisprudence nevertheless remains a relevant source of interpretation of the definitions of the crimes to which Article 12(2) QD (recast) refers. For example, the ICC has given the following justification for referring to that jurisprudence for assistance in interpreting terms and expressions that are undefined in Article 7 of the Rome Statute, which defines 'crime against humanity' for purposes of that statute:

> [I]nterpretation of the terms of Article 7 of the Statute […] requires that reference be had to the jurisprudence of the ad hoc tribunals insofar as that jurisprudence identifies a pertinent rule of custom, in accordance with Article 31(3)(c) of the Vienna

([511]) Note that an 'International Military Tribunal for the Far East' was established in Tokyo in 1946. The charter of that tribunal, although based on the Charter of the IMT at Nuremberg, was not established by treaty but by a unilateral directive from the commander-in-chief of the allied forces, Douglas MacArthur. See further G. Werle and F. Jessberger, op. cit., fn. 177, pp. 10 and 11, marginal notes 30-33.

([512]) The ICTY Statute, annexed to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, was adopted pursuant to UNSC Resolution 827(1993) (25 May 1993) UN Doc S/RES/827(1993). The ICTY Statute was subsequently amended by further resolutions of the UNSC: see the consolidated version of September 2009. The ICTR was established pursuant to UNSC resolution 955 of 8 November 1994, op. cit., fn. 491.

([513]) See, in particular, ICTY (Appeals chamber), Judgment of 20 February 2001, *Prosecutor* v *Zejnil Delalić and Others*, IT-96-21-A, paras. 131-133, elaborating upon ICTY (Appeals chamber), 1995, *Tadić*, op. cit., fn. 491.

([514]) The IRMCT was established specifically to assume the residual functions of the ICTY and the ICTR. It was established pursuant to UNSC Resolution 1966(2010) (22 December 2010) UN Doc S/RES/1966(2010).

Convention. Of note in this connection is that the negotiation of the definition of a crime against humanity was premised on the need to codify existing customary law ([515]).

Furthermore, for example, as explained in Section 3.3.3, the list of war crimes defined in the Rome Statute, although exhaustive for purposes of the ICC's jurisdiction, does not include all war crimes under international law. The jurisprudence of the ad hoc tribunals can therefore be relevant to the identification and interpretation of the definition of crimes under customary international law that have not been codified in the Rome Statute.

5. Convention on the Crime of Genocide

It should be noted that Article 12(2)(a) QD (recast) and Article 1F(a) Refugee Convention do not refer to the crime of genocide. That crime, which has its own specific requirements distinguishing it from war crimes and crimes against humanity, was first defined in an international instrument in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') ([516]). The definition was reproduced verbatim in the statutes of the ICTY and ICTR, and specifies:

Article II, Genocide Convention

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

As specified in Article I of the Genocide Convention, genocide may be committed in times of peace as well as in times of war.

Conduct that amounts to the crime of genocide can also amount to a war crime or a crime against humanity in circumstances where the required material and mental elements of those latter crimes are met ([517]). In these circumstances, such conduct clearly falls within

([515]) ICC (Trial Chamber II), Judgment of 7 March 2014, Situation in the Democratic Republic of the Congo, The Prosecutor v Germain Katanga, ICC-01/04-01/07, para. 1100.

([516]) 78 UNTS 277, 9 December 1948 (entry into force: 12 January 1951).

([517]) For example, the IMT's Judgment of 1 October 1946 in the trial of the major war criminals of the European axis made numerous findings of fact concerning acts of extermination of the Jews which constituted war crimes and crimes against humanity as defined in Article 6 of the IMT Charter, many or all of which would incontrovertibly also now constitute crimes of genocide within the meaning of Article II of the Genocide Convention: see IMT (Nuremberg), Judgment of 1 October 1996, in The Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946: Vol. I (Nuremberg, 1947), pp. 171-341. Note that the word 'genocide' was never used in the aforementioned judgment, although it was used once in the pre-trial indictment, Count Three ('War Crimes') of which included the following statement: '[The accused] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others'. See, more generally, W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., CUP, 2009), pp. 13-15, arguing that crimes of genocide and crimes against humanity, while distinct from each other, are intimately related.

the scope of Article 12(2)(a) QD (recast) and Article 1F(a) Refugee Convention. Views are divided, however, as to whether the crime of genocide per se falls within the scope of those provisions. For example, the courts and tribunals of at least two Member States (Belgium and France) have held that the crime of genocide **does** fall within the scope of Article 1F(a) Refugee Convention because, in their view, it constitutes a crime against humanity ([518]). The England and Wales Court of Appeal (EWCA) (UK) has been more equivocal and has held *obiter* that the crime of genocide **'may'** have an effect on the ambit of Article 1F(a) Refugee Convention ([519]). One commentator considers that the crime of genocide per se **does not** fall within the scope of Article 1F(a) Refugee Convention. He maintains that it nevertheless falls within the grounds for exclusion from refugee status because it can be qualified as a 'serious non-political crime' within the meaning of Article 1F(b) Refugee Convention, or as an act contrary to the purposes and principles of the United Nations within the meaning of Article 1F(c) Refugee Convention ([520]).

6. Crimes under customary international law

The charter of the IMT, and the statutes of the ICTY and ICTR, did not define new crimes in international law ([521]). Had they done so, the principle of non-retroactivity of punishment would have prevented any of the persons indicted before those tribunals from ever being convicted, since all three tribunals were established to address crimes that had been committed in the past. Note that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity precludes parties to this convention from setting temporal limitations to the applicability of the crimes mentioned in this convention ([522]).

What made conviction and punishment possible was that the IMT Charter and statutes of the ICTY and ICTR defined **the scope of the jurisdiction of the court or tribunal concerned with respect to crimes which, when they were committed by the accused, were already recognised as crimes under international law**. That explains, for example, the difference between the definition of the crimes against humanity within the jurisdiction of the ICTY and the definition of the crimes against humanity within the jurisdiction of the ICTR (see Table 20 above, p. 185). Both definitions reflected the definition of crimes against humanity in customary international law, but both definitions also in different ways restricted the application of the definition in customary international law. For instance, the latter does not itself include the requirement in Article 5 of the ICTY Statute that the acts concerned be committed in armed conflict, or the requirement in Article 3 of the ICTR Statute that the acts concerned all be committed on 'national, political, ethnic, racial or religious grounds' ([523]). Furthermore, whereas the ICTY and the ICTR were both confined in their jurisdiction to

([518]) Commission permanente de recours des réfugiés (Permanent Refugee Appeals Board, Belgium), decision of 19 March 2004, no 03-2672/F1640/cd (anonymous Rwandan); National Court of Asylum Law (France), Judgment of 15 May 2018, M N, no 11013546, para. 2. This is also the view expressed by UNHCR in UNHCR, UNHCR, Background Note on the Application of the Exclusion Clauses, op. cit., fn. 156, para. 35.

([519]) England and Wales Court of Appeal (EWCA), Judgment of 26 April 2018, Hany El-Sayed El-Sebat Youssef and N2 v Secretary of State for the Home Department, [2018] EWCA Civ 933, para. 74 (emphasis added).

([520]) A. Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees – A Commentary* (OUP, 2011), p. 595.

([521]) Note that opinion remains divided as to whether – notwithstanding how the IMT argued the point in its Judgment of 1 October 1946 – all the crimes prosecuted under the IMT Charter were already criminal under international law at the time they were committed. However, whatever may have been the case then is no longer the case now since the so-called Nuremberg Principles are now firmly established as customary international law. See Werle and Jessberger, op. cit., fn. 177, pp. 8-10, marginal notes 25-29.

([522]) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73, 26 November 1968 (entry into force: 11 November 1970).

([523]) Note that one crime against humanity **does** require that the act concerned be committed on 'political, racial, national, ethnic, cultural, religious, gender […], or other grounds'. See Rome Statute, op. cit., fn. 164, Article 7(1)(c).

a particular geographical area, under customary international law a crime against humanity may be committed anywhere.

More generally, whereas treaty law is only binding on the state parties concerned, customary international law is binding on all states. Thus, if a crime is defined by treaty and is also criminal under customary international law, a person who commits that crime is criminally responsible under international law even when the state in which they committed the crime is not party to the treaty concerned ([524]).

As effectively held by the Dutch council of state, if an international agreement defines a rule of international humanitarian law but does not define a violation of that rule as a war crime, that agreement may nevertheless be relied upon when applying Article 12(2)(a) QD (recast), if the violation is a war crime under customary international law. In the case concerned, the state secretary for immigration had relied upon Common Article 3 of the 1949 Geneva Conventions with respect to war crimes that were committed in Afghanistan between 1986 and 1992. The council of state held that, in view of inter alia the decision of the Appeals Chamber of the ICTY in *Tadić* (discussed in Section 3), the state secretary was entitled to rely upon on a violation of Common Article 3 ([525]).

([524]) A corollary to this is the principle of universal jurisdiction under customary international law according to which all states are authorised to prosecute crimes under customary international law, irrespective of where the crime took place, who the victims were, or whether any other link with the prosecuting state can be established. See further Werle and Jessberger, op. cit., fn. 177, pp. 23-79, marginal notes 213-225.

([525]) Council of state (the Netherlands), Decision of 18 April 2005, 200408765/1, NL:RVS:2005:AT4663, para. 2.4.2.

Appendix E: Primary sources

1. European Union law

1.1 EU primary law

Treaty on European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/13.

Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/47.

Charter of Fundamental Rights of the European Union (as amended on 12 December 2007 (entry into force: 1 December 2009)) [2007] OJ C 303/01.

1.2 EU secondary legislation

Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, [2001] OJ L 344/93, amended by: Council Decision (CFSP) 2016/1711 of 27 September 2016, OJ LI 259/3; Council Decision (CFSP) 2017/2073 of 13 November 2017, OL LI 295/59, amended by (see consolidated version): Council Decision (CFSP) 2016/1711 of 27 September 2016, OJ LI 259/3; Council Decision (CFSP) 2017/2073 of 13 November 2017, OL LI 295/59.

Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164/3, amended by Council Framework Decision 2008/919/JHA of 28 November 2008, [2008] OJ L 330/21.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004], OJ L 158/77, amended by (see consolidated version): Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011, OJ L 141/1.

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011, OJ L 141/1.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, [2016] OJ L 65/1.

Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, [2017] OJ L 88/6.

Council Decision (EU) 2018/889 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism [2018] OJL 159/1.

Council Decision (EU) 2018/890 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism [2018] OJL 159/15.

Council Decision (CFSP) 2019/1341 of 8 August 2019 amending and updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/1084, [2019] OJ L 6/6.

Council Decision (CFSP) 2020/20 of 13 January 2020 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2019/134 [2020] OJL 81.

2. International treaties of universal and regional scope

2.1 United Nations

Charter of the United Nations and Statute of the International Court of Justice 24 October 1945, 1 UNTS XVI (signed at San Francisco on 26 June 1945).

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 82 UNTS 279, 8 August 1945 (entry into force: 8 August 1945). (London Agreement)

Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entry into force: 12 January 1951).

Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954).

Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 243, 30 November 1973 (entry into force: 18 July 1976).

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172, 26 March 1999 (entry into force: 9 March 2004).

International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, 15 December 1997 (entry into force: 23 May 2001).

International Convention for the Suppression of the Financing of Terrorism, 3178 UNTS 197, 9 December 1999 (entry into force: 10 April 2002).

International Convention for the Suppression of Acts of Nuclear Terrorism, 2445 UNTS 89, 13 April 2005 (entry into force: 7 July 2007).

2.2 International Committee of the Red Cross

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, 12 August 1949 (entry into force: 21 October 1950).

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, 12 August 1949 (entry into force: 21 October 1950).

Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949 (entry into force: 21 October 1950).

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (entry into force: 7 December 1978).

2.3 Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

European Convention on the Suppression of Terrorism, ETS No 90, 27 January 1977 (entry into force: 4 August 1978).

Council of Europe Convention on the Prevention of Terrorism, ETS No 196, 16 May 2005 (entry into force: 1 June 2007).

Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, ETS No 217, 22 October 2015 (entry into force: 1 July 2017).

3. Statutes of the international criminal courts and tribunals

3.1 International Military Tribunal at Nuremburg

Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement'), 82 UNTS 279, 8 August 1945 (entry into force: 8 August 1945).

3.2 United Nations ad hoc tribunals

Updated Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, S/25704, adopted pursuant to United Nations Security Council Resolution 827 of 25 May 1993 and successively amended by subsequent resolutions of the United Nations Security Council (consolidated version of September 2009).

Statute of the International Criminal Tribunal for Rwanda, annexed to United Nations Security Council Resolution 955 of 8 November 1994 and successively amended by subsequent resolutions of the United Nations Security Council (consolidated version of 31 January 2010).

Statute of the International Residual Mechanism for Criminal Tribunals, annexed to United Nations Security Council Resolution 1966 of 22 December 2010.

3.3 Special Court for Sierra Leone

Statute of the Special Court for Sierra Leone – Annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 UNTS 137, 16 January 2002 (entry into force: 12 April 2002).

Statute of the Residual Special Court for Sierra Leone – Annex to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone, 2871 UNTS 333, 29 July 2010 New York, 11 August 2010 Freetown (entry into force: 2 October 2012)

3.4 International Criminal Court (ICC)

Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entry into force: 1 July 2002) (consolidated version of 2011).

Assembly of States Parties to the Statute of the International Criminal Court, Elements of Crimes, Official Records of the Review Conference of the *Rome Statute of the International Criminal Court*, Kampala, 31 May-11 June 2010 (International Criminal Court publication, RC/11).

Amendment to Article 8 of the Rome Statute of the International Criminal Court, 2868 UNTS 195, 10 June 2010 (entry into force: 26 September 2012 in regard to San Marino, one year after the deposit of its instrument of ratification, and, in regard to subsequent state parties, one year after the deposit of their instruments of acceptance or ratification).

Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, 2922 UNTS 1, 11 June 2010 (entry into force: 8 May 2013 for Liechtenstein, one year after the deposit of its instrument of ratification, and, in regard to subsequent state parties, one year after the deposit of their instruments of acceptance or ratification).

ICC, Rules of Procedure and Evidence (2nd edn., 2013).

Assembly of the States Parties to the Rome Statute, Amendments to Article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/16/Res.4, 14 December 2017 (entry into force: 2 April 2020 in regard to Luxembourg, the first state party, one year after the deposit of its instrument of ratification).

Assembly of the States Parties to the Rome Statute, Activation of the jurisdiction of the Court over the crime of aggression, ICC-ASP/16/Res.5, 14 December 2017 (activation of jurisdiction: 17 July 2018).

4. United Nations resolutions

4.1 United Nations Security Council

UNSC, Resolution 827(1993) (25 May 1993) UN Doc S/RES/827(1993).

UNSC, Resolution 955(1994) (8 November 1994) UN Doc S/RES/955(1994).

UNSC, Resolution 1267 (1999) (15 October 1999) UN Doc S/RES/1267(1999).

UNSC, Resolution 1333 (2000) (19 December 2000) UN Doc S/RES/1333(2000).

UNSC, Resolution 1368 (2001) (12 September 2001) UN Doc S/RES/1368(2001).

UNSC, Resolution 1373(2001) (28 September 2001) UN Doc S/RES/1373(2001).

UNSC, Resolution 1377(2001), (12 November 2001) UN Doc S/RES/1377(2001).

UNSC, Resolution 1390 (2002), (16 January 2002) UN Doc S/RES/1390(2002).

UNSC, Resolution 1452 (2002), (20 December 2002) UN Doc S/RES/1452(2002).

UNSC, Resolution 1456 (2003), (20 January 2003) UN Doc S/RES/1456(2003).

UNSC, Resolution 1540 (2004), (28 April 2004) UN Doc S/RES/1540(2004).

UNSC, Resolution 1566(2004), (8 October 2004) UN Doc S/RES/1566(2004).

UNSC, Resolution 1624(2005) (14 September 2005) UN Doc S/RES/1624(2005).

UNSC, Resolution 1966(2010) (22 December 2010) UN Doc S/RES/1966(2010).

UNSC, Resolution 2133 (2014), (27 January 2014) UN Doc S/RES/2133(2014).

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Appendix F: Methodology

The first edition of the *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) - Judicial analysis* was published in January 2016. In 2018, under a specific contract implementing Framework Contract for Services (FWC) EASO/2017/589, the International Association of Refugee and Migration Judges (IARMJ-Europe) ([526]) undertook a review of the first edition of the judicial analysis and the accompanying judicial trainer's guidance note (JTGN). Based on feedback and an analysis of the content of the first edition, and taking into account findings regarding key legislative and jurisprudential developments since its publication, IARMJ produced a review report. This report set out recommendations to EASO with regard to the need to update the materials. On 3 July 2019, the IARMJ and EASO concluded a specific contract under which IARMJ was to update the judicial analysis, including a separate accompanying compilation of jurisprudence, and JTGN on the basis of the recommendations made in the review report.

The Review and update subcommittee (RUS) of the IARMJ's Editorial team, which comprises exclusively serving judges and tribunal members with expertise in asylum law and/or the training of members of courts and tribunals from across the European Union Member States and the Associated Countries, selected and appointed two researchers. They were commissioned to undertake the update of the judicial analysis and to update the JTGN. Didactic experts provided editorial support and prepared the compilation of jurisprudence and appendices. Their work was undertaken under the supervision and guidance of the RUS. The RUS was established in order to ensure the integrity of the principle of judicial independence and to guarantee that judicial training materials for members of courts and tribunals are prepared and delivered under judicial guidance. The RUS provided guidance on the update of the training materials and took all decisions pertaining to the structure, format, style, and content of the materials.

The role of the commissioned researchers was to undertake research in line with a 'research methodology' provided by the RUS and to produce an updated new edition of the judicial analysis with appendices, and a JTGN in accordance with the instructions set out in terms of reference. Each researcher and didactic expert was required to adhere to a schedule of work and to produce drafts to publication standard in line with the *EASO Professional Development Series for court and tribunal members: Style Guide*. They were required to keep in mind at all times that the materials being produced are for use by judges and tribunal members. In particular, they were required to take into account that judicial independence is a cardinal principle in the professional development of judges and tribunal members and that for them there is an abiding concern to interpret the relevant legal provisions in accordance with EU law and to identify trends in jurisprudence.

The RUS shared the draft materials with a judge of the CJEU in his personal capacity, UNHCR, and EASO. The feedback received was taken into consideration by the RUS in the finalisation of the materials.

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