



## 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*

### Introduction

On 10 February 2009 and 13 March 2009, the German Federal Administrative Court<sup>1</sup> lodged two requests to the Court of Justice of the European Communities<sup>2</sup> for a preliminary ruling concerning the interpretation of Articles 12(2)(b) and (c) of 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.<sup>3</sup> These provisions exclude a person from being a refugee where there are serious reasons for considering that she/he has committed certain heinous acts. Articles 12(2)(b) and (c) of the Qualification Directive are based on Articles 1F(b) and (c) of the 1951 Convention relating to the Status of Refugees.<sup>4</sup>

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<sup>1</sup> Hereafter the “referring court”.

<sup>2</sup> The referring court lodged two references for a preliminary ruling to the Court of Justice of the European Communities (hereafter “ECJ”) in the case C-57/09 *Bundesrepublik Deutschland v B* [OJ C 129/3, 06.06.2009] at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:129:0007:0007:EN:PDF> and the case C-101/09 *Bundesrepublik Deutschland v B* [OJ C 129/7, 06.06.2009] at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:129:0003:0003:EN:PDF>.

<sup>3</sup> Council of the European Union, *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* [OJ L 304/12, 30.09.2004], at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML> (hereafter: “Qualification Directive” or “QD”).

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, at: <http://www.unhcr.org/refworld/docid/3be01b964.html> (hereafter: “1951 Convention”).

The questions posed by the referring court<sup>5</sup> concern the conditions under which exclusion from refugee status under Article 12(2)(b) and (c) of the Qualification Directive should be applied to persons being member of a terrorist organization or supporting the armed struggle of such organization.

This is the fourth preliminary ruling reference regarding the interpretation of the Qualification Directive<sup>6</sup> and the third case in which the ECJ is asked to clarify the application of a specific provision of the 1951 Convention in the framework of the EU asylum *acquis*. UNHCR has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees.<sup>7</sup> According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”.<sup>8</sup> This supervisory responsibility is confirmed by Article 35 of the 1951 Convention<sup>9</sup> and Article II of the 1967 Protocol relating to the Status of Refugees<sup>10</sup> and extends to all EU Member States, as they are all States Parties to both instruments.

UNHCR’s supervisory responsibility has been reflected in European Community law, including by means of a general reference to the 1951 Convention in Article 63(1) of the Treaty establishing the European Community,<sup>11</sup> as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy”.<sup>12</sup> EC secondary legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Qualification Directive states that consultations with the UNHCR “may provide

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<sup>5</sup> The English translation of the questions is reproduced in Part 4 below.

<sup>6</sup> Case C-465/07 *Elgafaji*, Judgment of 17 February 2009, Official Journal of the European Union [OJ C 90/3, 18.04.2009], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:090:0004:0004:EN:PDF>; joined cases: Case C-179/08 *Dler Jamal*; Case C-178/08 *Ahmed Adem and Hamrin Mosa Rashi*; Case C-177/08 *Khoshnaw Abdullah*; Case C-176/08 *Kamil Hasan*; Case C-175/08 *Aydin Salahadin Abdulla*, [OJ C 197/3, 02.08.2008], at: [http://eur-lex.europa.eu/JOIndex.do?year=2008&serie=C&textfield2=197&Submit=Search&ihm\\_lang=en](http://eur-lex.europa.eu/JOIndex.do?year=2008&serie=C&textfield2=197&Submit=Search&ihm_lang=en); C-31/09 *Bolbol Nawras v Bevándorlási és Állampolgársági Hivatal*, [OJ C 82/15, 04.04.2009], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:082:0015:0015:en:pdf>.

<sup>7</sup> UN General Assembly, UNHCR, *Statute of the Office of the United Nations High Commissioner for Refugees*, A/RES/428 (V), Annex, UN Doc. A/1775, para. 1 (14 December 1950), at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>8</sup> *Ibid.*, para. 8(a).

<sup>9</sup> See above footnote 4. According to Article 35(1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of this Convention”.

<sup>10</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

<sup>11</sup> *Consolidated version of the Treaty on European Union and of the Treaty establishing the European Community* [OJ C 321 E/65, 29.12.2006], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:en:pdf>.

<sup>12</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention”. The supervisory responsibility of UNHCR is also specifically articulated in Article 21 of Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.<sup>13</sup> It is also reflected in the recent proposal of the European Commission for a Regulation establishing a European Asylum Support Office,<sup>14</sup> which recognizes UNHCR’s expertise in the field of asylum<sup>15</sup> and foresees a non-voting seat for UNHCR on EASO’s Management Board.<sup>16</sup>

Against this background, UNHCR in this Statement expresses its view on the issues arising in the preliminary ruling references of 10 February and 13 March 2009. Part 1 of this Statement addresses the need to interpret the Qualification Directive in accordance with the 1951 Convention and in the light of UNHCR’s authoritative guidance. Part 2 provides UNHCR’s interpretation of Article 1F(b) and (c) of the 1951 Convention. Part 3 provides a short overview of German practice with regard to exclusion, which forms the background of the request. This may facilitate the understanding of Part 4 which sets out UNHCR’s views on the specific questions submitted to the ECJ.

## 1. The Qualification Directive and the 1951 Convention

The Treaty establishing the European Community clearly creates an obligation for EC secondary legislation on asylum to conform to the 1951 Convention and its 1967 Protocol.<sup>17</sup> The primacy of the 1951 Convention is further recognized in European Council Conclusions and related Commission policy documents, which affirm that the Common European Asylum System is based on the “full and inclusive application” of the

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<sup>13</sup> Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [OJ L 326/13, 13.12.2005], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:01:EN:HTML>.

Article 21(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure”.

<sup>14</sup> European Commission, *Proposal For a Regulation of the European Parliament and of the Council Establishing A European Asylum Support Office*, COM(2009) 66 final, 18.02.2009, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0066:FIN:EN:PDF> (hereafter: “EASO”).

<sup>15</sup> Recital 9 of the EASO Proposal indicates that “the Office should act in close cooperation with the Office of the UN High Commissioner for Refugees (UNHCR) in order to benefit from its expertise and support”.

<sup>16</sup> Recital 14 of the EASO Proposal underlines that “given its expertise in the field of asylum, UNHCR should be a non-voting member of the Board so that it is fully involved in the work of the Office”. UNHCR’s membership on the EASO Management Boards is governed by Article 23(4).

<sup>17</sup> See above footnote 11. Article 63(1) provides that measures on asylum shall be “in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees and other relevant treaties”. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community provides in its Article 63 that the common policy on asylum, subsidiary protection and temporary protection must be “in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

1951 Convention.<sup>18</sup> It follows that the transposition of the Qualification Directive into national legislation of EU Member States, all of which are States Parties to the 1951 Convention and therefore bound by its obligations, must also be in line with the 1951 Convention.<sup>19</sup>

The Qualification Directive recognizes the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”<sup>20</sup> and stipulates that the Directive’s minimum standards are aimed at ensuring “full respect for [...] the right to asylum”<sup>21</sup> as well as guiding Member States in the application of the 1951 Convention.<sup>22</sup> Certain provisions of the Directive replicate the wording of the 1951 Convention almost exactly.<sup>23</sup> One of the purposes of the Directive is thus not only to ensure compliance with the 1951 Convention, but to contribute to its full implementation.

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<sup>18</sup> See para. 13 of the *Presidency Conclusions of the Tampere European Council* of 15-16.10.1999, at: [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm); para. 6 of *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13.12.2004, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>; para. 1 of the Green Paper of the Commission on the Future Common European Asylum System COM(2007) 301 final, 06.06.2007, at: [http://ec.europa.eu/justice\\_home/news/intro/doc/com\\_2007\\_301\\_en.pdf](http://ec.europa.eu/justice_home/news/intro/doc/com_2007_301_en.pdf); part 1.1 of the European Commission’s *Policy Plan on Asylum: an integrated approach to protection across the EU*, COM(2008) 360, 17.06. 2008, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>. The Policy Plan recognizes the fundamental role played by the 1951 Convention in the existing Treaty provisions and those resulting from the Lisbon Treaty. See also p. 11 of the European Pact on Immigration and Asylum adopted on 16 October 2008, in which the European Council reiterates that “any persecuted foreigner is entitled to obtain aid and protection on the territory of the European Union in application of the Geneva Convention [...]”, *European Pact on Immigration and Asylum*, 13440/08, 16.10.2008, p. 11, at: <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.

<sup>19</sup> For UNHCR’s remarks on the Qualification Directive, see: UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29.04.2004 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 (OJ L 304/12 of 30.9.2004)*, 28 January 2005, at: <http://www.unhcr.org/refworld/docid/4200d8354.html>. See also: Maria-Teresa Gil-Bazo, “Refugee Status and Subsidiary Protection under EC Law. The EC Qualification Directive and the Right to be Granted Asylum”, in: A. Baldaccini, E. Guild and H. Toner (eds), *Whose freedom, security and justice? EU immigration and asylum law and policy*, Hart (2007), pp. 229-264.

<sup>20</sup> Recital 3 of the Qualification Directive.

<sup>21</sup> Recital 10 of the Qualification Directive.

<sup>22</sup> Recital 16 of the Qualification Directive.

<sup>23</sup> For instance, Article 2(c) of the Qualification Directive replicates almost exactly Article 1A of the 1951 Convention.

In general, the Conclusions of UNHCR's Executive Committee,<sup>24</sup> as well as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status<sup>25</sup> and subsequent Guidelines on International Protection<sup>26</sup> issued by UNHCR, should also be taken into account in interpreting the provisions of the EU asylum *acquis*. These provide guidance for the interpretation and application of the 1951 Convention, and influenced significantly the drafting of the Qualification Directive. The Explanatory Memorandum of the Commission's proposal<sup>27</sup> quotes the UNHCR Handbook and Executive Committee Conclusions as sources, along with the 1951 Convention itself.<sup>28</sup>

## 2. UNHCR's interpretation of Article 1F

### 2.1. General considerations

UNHCR's interpretation of Article 1F of the 1951 Convention is set out in UNHCR's Handbook,<sup>29</sup> the Guidelines on the Application of the Exclusion Clauses<sup>30</sup> and the

<sup>24</sup> The Executive Committee of the High Commissioner's Programme ("ExCom") was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states inter alia that it is "to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office". This includes issuing Conclusions on International Protection (often referred to as "ExCom Conclusions") which address issues in the field of refugee protection and serve as "international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues"; see: UNHCR, *General Conclusion on International Protection*, ExCom Conclusion No. 55 (XL) – 1989, 13 October 1989, para. (p), at: <http://www.unhcr.org/refworld/docid/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees; see: G. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Oxford University Press, 2nd Edition, 2007, p. 128. At present, 78 States are Members of the UNHCR Executive Committee.

<sup>25</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereafter: "UNHCR Handbook").

<sup>26</sup> UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook (see above footnote 24) and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>27</sup> European Commission, *Proposal for a Council Directive on minimum standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, COM(2001) 510 final, 12.09.2001, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>.

<sup>28</sup> *Ibid*, part 3, p. 5. The 1996 Joint Position of the Council on the harmonized application of the definition of the term "refugee", which constituted the "starting point" of the Qualification Directive, recognized that the Handbook is a "valuable aid to Member States in determining refugee status"; see *Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees* [OJ L 63/2, 13.3.1996], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996F0196:EN:HTML>.

<sup>29</sup> See UNHCR Handbook, above footnote 25, paras. 147-163,

<sup>30</sup> 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,



Background Note on the Application of the Exclusion Clauses<sup>31</sup> the last of which forms an integral part of the UNHCR Guidelines on Article 1F. The present Statement clarifies and complements these previous positions issued by UNHCR.

In relation to Article 1F of the 1951 Convention, UNHCR is also guided by subsequent legal developments in international human rights law,<sup>32</sup> international humanitarian law, international criminal law, international extradition law and as well as State practice.

Article 1F reads as follows:

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.<sup>33</sup>

The purpose of Article 1F was recognized by the *travaux préparatoires* as being twofold: firstly, to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees but who are undeserving of such benefits as there are “serious reasons for considering” that they committed heinous acts or serious common crimes; and secondly, to ensure that such persons do not misuse the institution of asylum in order to avoid being held legally accountable for their acts.<sup>34</sup> This provision is therefore intended to protect the integrity of the institution of asylum, and should be applied “scrupulously”, as repeatedly stated by the Executive Committee.<sup>35</sup>

At the same time, the exclusion clauses are exhaustively enumerated in Article 1F, and while these clauses are subject to interpretation, they cannot be amended or modified in

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available at: <http://www.unhcr.org/refworld/docid/3f5857684.html> (hereafter: “UNHCR Guidelines on Article 1F”).

<sup>31</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, available at: <http://www.unhcr.org/refworld/docid/3f5857d24.html> (hereafter: “Background Note on Exclusion”).

<sup>32</sup> For a brief overview of these developments see Geoff Gilbert, “Current issues in the application of the exclusion clauses”, in E. Feller, V. Turk and F. Nicholson (eds), *Refugee Protection in International Law*, Cambridge (2003), pp. 429-432, at: <http://www.unhcr.org/refworld/docid/470a33bc0.html>

<sup>33</sup> See above footnote 4.

<sup>34</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, statements of Herment (Belgium) and Hoare (UK); Gilbert, above footnote 32, pp. 427-428.

<sup>35</sup> UNHCR, *Conclusion on Safeguarding Asylum*, ExCom Conclusion No. 82 (XLVIII), 17 October 1997, para. (v), at: <http://www.unhcr.org/refworld/docid/3ae68c958.html>; *General Conclusion on International Protection*, ExCom Conclusion No. 102 (LVI)2005, 7 October 2005, para. (i), at: <http://www.unhcr.org/43575ce3e.html>; *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, ExCom Conclusion No. 103 (LVI), 7 October 2005, para. (d), at: <http://www.unhcr.org/refworld/docid/43576e292.html>.

the absence of an agreement by the contracting Parties.<sup>36</sup> As with any exception to human rights guarantees, and given the possible serious consequences for the individual, the exclusion clauses enumerated in Article 1F should always be interpreted in a restrictive manner and applied with utmost caution,<sup>37</sup> and in the light of the overriding humanitarian character of the 1951 Convention.<sup>38</sup>

When considering exclusion from international refugee protection in relation to acts of terrorism,<sup>39</sup> it should be noted that the application of Article 1F requires first, that the acts in question be assessed against the exclusion grounds, taking into account the nature of the acts, as well as the context and all individual circumstances in which they occurred. Such an act will not lead to exclusion merely because of its qualification as “terrorist”, but only if such act falls within the scope of Article 1F. Secondly, it must be established, in each case, that the individual concerned committed a crime which is covered by one of the sub-clauses of Article 1F, or participated in the commission of such a crime in a manner which gives rise to criminal liability in accordance with internationally applicable standards.

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<sup>36</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at para. 7. As a general principle of international law, a treaty can only be modified or revised by agreement between the contracting Parties. This principle is set forth in Article 39 of the *1969 Vienna Convention on the Law of Treaties*, which stipulates that: “[...] a treaty may be amended by agreement between the Parties”. Similarly, no reservations to Article 1 of the 1951 Convention are permitted by virtue of Article 42 of the 1951 Convention. For further guidance on the law of treaties, see Ian Brownlie, *Principles of International Law*, sixth Edition, Oxford University Press, 2003, at pages 581-584.

<sup>37</sup> See UNHCR *Handbook*, above footnote 25, para. 149.

<sup>38</sup> See above footnote 4. See Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which are generally accepted as being declaratory of international law. In particular, under Article 31, a treaty shall be interpreted “in good faith in accordance with the ordinary meaning given to the terms [...] in their context and in the light of its object and purpose”. The object of the 1951 Convention, as stated in its Preamble, is to endeavour to ensure that refugees have the widest possible exercise of fundamental rights and freedoms.

<sup>39</sup> The international community, under the auspices of the United Nations, has developed 16 universal international legal instruments relating to terrorism (13 instruments and 3 recent amendments). In addition, there are 14 regional legal instruments which pertain to the subject of international terrorism. The universal Conventions set out States’ obligations in relation to terrorism, indicate that certain specific acts are considered offences at the international level, and cover a wide range of acts commonly referred to as “terrorist in nature”. However, they do not provide a comprehensive definition of the term. Instead, these 16 legal instruments are “sectoral” in nature and address specific subjects, such as air safety, maritime navigation and platforms, the protection of persons, the unlawful seizure of aircraft and the taking of hostages, or the suppression of the means by which terrorists acts may be perpetrated or supported. These instruments also require States to take specific measures to prevent the commission of terrorist acts and prohibit terrorist-related offences, including by obliging States Parties to criminalize specific conducts or offences, establish certain jurisdictional criteria, and provide a legal basis for cooperation on extradition and legal assistance. See *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/8/13*, of 2 June 2008, at paras. 18-24, available at: <http://www.unhcr.org/refworld/docid/484d121a2.html> (“*Report of the High Commissioner for Human Rights 8/13 (2008)*”). For the current status of international legal instruments related to the prevention and suppression of international terrorism, see *Report of the Secretary-General, Measures to Eliminate International Terrorism, A/63/173*, 25 July 2008, at pages 18-27, available at: <http://www.unhcr.org/refworld/docid/48db911f2.html>.

Although acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses, Article 1F is not to be equated with a simple anti-terrorism provision. The fact that an individual may be on a list of terrorist suspects or be a member of an organization designated as terrorist should not suggest an automatic application of the exclusion clauses. It may nevertheless trigger consideration of the applicability of the exclusion clauses, and in some instances, depending on the organization and circumstances, individual responsibility for excludable acts may arise.<sup>40</sup> However, it will not in itself constitute sufficient evidence to justify exclusion.

It should be recalled that an asylum application by a person having (or presumed to have) used force, or to have committed acts of violence of whatever nature and within whatever context, must in the first place – like any other application – be examined from the standpoint of the inclusion clauses in the 1951 Convention.<sup>41</sup>

Article 1F is to be distinguished from Article 33(2) of the 1951 Convention, which provides for the exceptions to the principle of *non-refoulement*. These are distinct provisions serving different purposes. Article 1F forms part of the refugee definition in the 1951 Convention, and exhaustively enumerates the grounds for exclusion from refugee status based on criminal acts committed by the applicant. Unlike Article 1F, Article 33(2) does not form part of the refugee definition and does not constitute a ground for exclusion from refugee protection. While Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country. The application of Article 33(2) affects the treatment afforded to refugees, rather than their recognition as refugees under the 1951 Convention. It permits, under exceptional circumstances, the withdrawal of protection from *refoulement* of those previously recognized as refugees who pose a danger to the host country.<sup>42</sup> A decision to exclude an applicant based on a finding that s/he constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.<sup>43</sup>

## 2.2 Requirements for the application of Article 1F of the 1951 Convention

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<sup>40</sup> See further below, part 4.1 of the Statement.

<sup>41</sup> See UNHCR *Handbook*, above footnote 25, para. 176.

<sup>42</sup> UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, 10 August 2006, paras. 11-12, at: <http://www.unhcr.org/refworld/docid/44dc81164.html>; On the “danger to the security” exception, see “*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*”, in 14:1 *International Journal of Refugee Law* (2002), at: <http://www.unhcr.org/refworld/docid/3e71bbe24.html> (hereafter: “UNHCR, *Suresh Factum*”). A detailed analysis of the scope of the principle of *non-refoulement* can be found in E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of *non-refoulement: Opinion*”, in E. Feller, V. Türk and F. Nicholson (eds.), above footnote 32, (hereafter: “E. Lauterpacht and D. Bethlehem”). See also UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html> (hereafter: “UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*”).

<sup>43</sup> See UNHCR, *Annotated Comments on the Qualification Directive*, above footnote 19. UNHCR Comment on Article 14(4)-(6).



### 2.2.1 Seriousness of the acts covered by Article 1F

All the types of criminal acts leading to exclusion under Article 1F of the 1951 Convention involve a high degree of seriousness. This is obvious regarding Article 1F(a) and (c), which address acts of the most egregious nature such as “war crimes” or “crimes against humanity” or “acts contrary to the purposes and principles of the United Nations”.<sup>44</sup> In light of its context and the object and purpose of the exclusion grounds highlighted above, a “serious non political crime” covered by Article 1F(b) must also involve a high threshold of gravity.<sup>45</sup> Consequently, the nature of an allegedly excludable act, the context in which it occurred and all relevant circumstances of the case should be taken into account to assess whether the act is serious enough to warrant exclusion within the meaning of Article 1F(b) and 1F(c).

### 2.2.2 Individual responsibility, due process and standard of proof

For exclusion to be applied, individual responsibility must be established in relation to an act covered by Article 1F. In general, individual responsibility arises where the individual committed or made a substantial contribution to the act in question, in the knowledge that his or her act or omission would facilitate the criminal conduct. This also derives from the wording of Article 1F which refers to a “person with respect to whom there are serious reasons for considering” that he has committed the acts under Article 1F(a) and (b), or “he has been guilty” of the acts under Article 1F(c). Accordingly the degree of personal, knowing and intentional involvement<sup>46</sup> of the person in the criminal act must be carefully assessed.

This requirement for individual responsibility is critical in cases of alleged membership of an organization which engages in excludable acts where, among other things, the specific role, personal involvement and the substantial contributions of the person concerned to the activities of the organization must be examined carefully to determine his or her individual responsibility.<sup>47</sup>

The 1951 Convention sets a high standard of proof for establishing that an individual has committed or participated in the commission of acts covered by Article 1F, requiring “serious reasons for considering” that the individual has committed or participated in the commission of such acts. Although the application of the exclusion clause does not

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<sup>44</sup> For instance, the non-exhaustive list of acts amounting to war crimes in Article 8 of the ICC Statute clearly demonstrates the exceptional gravity of such crimes.

<sup>45</sup> This will be further demonstrated in para. 4.1.1.1 below.

<sup>46</sup> As reflected in Article 30 of the ICC Statute, criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. For a definition on the terms “intent” and “knowledge” and a detailed analysis on individual responsibility and exclusion, see UNHCR Guidelines on Article 1F, above footnote 30, at paragraphs 18-23, and UNHCR *Background Note on Exclusion*, above footnote 31, at paragraphs 50-75. See further below section 1.1.1.3. of the Statement, and Articles 25 and 28 of the ICC Statute, which provide useful guidance on the grounds for individual responsibility and superior/command responsibility respectively.

<sup>47</sup> See above footnote 30, para. 59. Goodwin-Gill and Jane McAdam, above footnote 24, p. 169. See further below UNHCR’s reply to Question 1, part 4.1 of the Statement.

require a “determination of guilt” in the criminal justice sense, and therefore, the standard of proof required would be less than “proof of guilt beyond reasonable doubt”, it must be sufficiently high to ensure that refugees are not erroneously excluded. The words “serious reasons for considering”<sup>48</sup> should thus be construed in line with their plain meaning, and require a high standard of proof, in light of the serious consequences of exclusion and the need to preserve and adhere to the object and purpose of Articles 1F of the 1951 Convention. Thus, in UNHCR’s view, reliable, credible and convincing evidence, going beyond mere suspicion or allegation, is required to demonstrate that there are “serious reasons for considering” that individual responsibility exists.

While due process and procedural fairness are essential in all refugee status determination procedures, rigorous procedural safeguards are particularly important in exclusion cases, given the exceptional nature and severe consequences of exclusion, and the overriding humanitarian character of the 1951 Convention.<sup>49</sup>

Furthermore, there may be grounds for finding that individual responsibility does not apply, such as the absence of the requisite mental element (knowledge and intent) or the existence of valid defences to criminal liability. Any other mitigating factors would also need to be assessed. In cases where the person has a valid defence, exclusion will not be applicable.<sup>50</sup>

### 2.2.3 Proportionality

In UNHCR’s view, consideration of proportionality is an important safeguard in the application of Article 1F, in view of the serious consequences of exclusion, which denies the benefit of refugee status to certain persons who otherwise qualify as refugees. While this principle is not expressly stated in the 1951 Convention, it is derived from the nature and rationale of the exclusion clauses and the overriding humanitarian object and purpose of the 1951 Convention.<sup>51</sup>

As an exception to a human rights guarantee, exclusion clauses should be applied in a manner proportionate to their objective. This requires an assessment of the gravity of the offence in question, which should be weighed against the consequences of exclusion.<sup>52</sup> This principle of proportionality has been recognized under international human rights law and international humanitarian law. More specifically, a balancing test

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<sup>48</sup> See also Article 61(5) of the ICC Statute.

<sup>49</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at paras. 98-113. See also Goodwin-Gill and McAdam, above footnote 24, p. 179.

<sup>50</sup> See UNHCR *Handbook*, above footnote 25, paras. 21-23; and ICC Statute, Articles 25-30, footnote 46 above.

<sup>51</sup> See above footnotes 4 and 38.

<sup>52</sup> It is also supported by the drafting history of the 1951 Convention, where in the *travaux préparatoires*, the President of the Conference emphasized that the country of refuge would have “to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well founded”. Takkenberg, Tabhaz, A/Conf.2/SR. 29, p. 23.

was mentioned in relation to Article 1F(b) during the negotiation of the 1951 Convention,<sup>53</sup> and has been developed in subsequent case law and expert analysis.<sup>54</sup>

The consequence of exclusion under Article 1F is the denial of the set of rights attached to refugee status, including protection from removal to a country where s/he could face persecution. The proportionality test must therefore involve determining the degree and likelihood of persecution feared, and measuring these against the seriousness of the acts committed. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant. This would be the case where the offence in question constitutes a grave crime, satisfying, for example, the definition of crimes against humanity.<sup>55</sup>

In addition, the proportionality test should include an examination of whether other guarantees under human rights instruments will apply, most notably Article 3 of the 1984 Convention against Torture, Articles 6 and 7 of the ICCPR and Article 3 of the ECHR. Where such protections entail protection against removal (*refoulement*) that would result in exposing the person concerned to human rights violations such as those prohibited by those instruments, and would be effective and accessible to the person concerned, proportionality would be satisfied, as it is not the exclusion decision *per se* which would lead to return.

### 2.3 *Specific issues regarding Articles 1F(b) and 1F(c)*

In view of the questions raised by the referring court, further observations are provided below regarding the application and interpretation of Articles 1F(b) and (c) of the 1951 Convention.

#### 2.3.1 Article 1F(b): Serious non-political crimes committed outside the country of refuge and prior to his [or her] admission to that country as a refugee<sup>56</sup>

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<sup>53</sup> A/CONF.2/SR. 29, p. 23 and A/CONF.2/SR.24, 13. Proportionality will most frequently be relevant in cases relating to the application of Article 1F(b). This is because the exceptional gravity of the acts covered by Articles 1F(a) and (c), namely war crimes, crimes against peace, crimes against humanity and acts contrary to the principles and purposes of the UN, are likely in many cases, to outweigh the degree of persecution feared. See UNHCR, *Background note on Exclusion*, above footnote 31, paragraphs 78.

<sup>54</sup> Under Article 1F(b), the terms “serious” and “non-political” warrant a proportionality test to determine if the seriousness and the non-political nature of the crime justify exclusion. Gilbert, above footnote 31, p. 453; UNHCR, *Background Note on Exclusion*, above footnote 31, paras. 76-78. The Supreme Court of Canada also took this view in the case of *Pushpanathan v Canada* [1998] 1 SCR 982, stating at paragraph 62, “Article 1F(b) contains a balancing mechanism in so far as the specific adjectives “serious” and “non-political” must be satisfied [...]. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual fear of persecution on the one hand and the legitimate concern of states to sanction criminal activity on the other ...”, cited in Goodwin-Gill and McAdam, *The Refugee in International Law*, above footnote 24.

<sup>55</sup> See UNHCR, *Background note on Exclusion*, above footnote 31, paragraphs 76-78.

<sup>56</sup> For a more detailed discussion of the relevant criteria, see also UNHCR, *Background Note on Exclusion*, above footnote 31, at paras. 37–45, 81–82 and 85–86.

As outlined above, excludable acts under Article 1F(b) should reach a certain threshold of seriousness. The insertion of the term “serious” to qualify the word “crime” during the *travaux préparatoires*,<sup>57</sup> and the ordinary meaning given to this word, clearly support this interpretation. In determining whether a particular crime is sufficiently serious, the following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime. Given the diversity of State practice, standards from international instruments rather than national or domestic laws or practice are most relevant in this regard.

In UNHCR’s view, a serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of such crime. 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, the crime should be considered non-political.<sup>58</sup> The motivation, context, means applied and proportionality of a criminal act to its objectives are important factors in evaluating its political nature. The seriousness of the crime will therefore affect the determination of its political or non-political nature. Accordingly, egregious acts of violence, such as acts commonly considered as being of a “terrorist” nature, will in most cases be deemed disproportionate to any political objective and therefore considered non-political.

In cases where the person is accused of membership in a group that engages in serious non-political crime, an assessment in particular of that person’s substantial contribution, personal involvement, position and responsibility in the organization is required. While membership in such organizations does not *per se* constitute a crime under Article 1F(b), the specific role played by the person concerned within the organization needs to be assessed to determine whether he or she carries individual responsibility for an act which reaches the level of seriousness required under Article 1 F(b). It must be shown that the requirement of “serious reasons for considering” that the individual engaged in, and intended to commit the excludable act, or knowingly made a substantial contribution to it, is fulfilled.

When assessing whether an act alleged to be an “act of terrorism” may fall within the scope of Article 1F(b), it must be established that the act in question meets the “serious and non-political” threshold required under this provision. The geographic and temporal criteria required under Article 1F(b) must also be met (“committed outside the country of refuge prior to admission to that country as a refugee”). The drafting history demonstrates that only crimes committed before entry are at issue.<sup>59</sup> Individuals who commit serious non-political crimes within the country of refuge are subject to that country’s criminal law process and, in the case of particularly grave crimes, to Articles 32 and 33(2) of the

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<sup>57</sup> A/CONF.2/SR.29, 17-24. See also *Convention relating to the Status of Refugees Its History, Contents and Interpretation*, A Commentary by Nehemiah Robinson, Institute of Jewish Affairs, World Jewish Congress, 1955, re-printed by UNHCR in 1997, p. 57, at: <http://www.unhcr.org/3d4ab67f4.html>.

<sup>58</sup> See UNHCR *Handbook*, above footnote 25, para. 152.

<sup>59</sup> A/CONF.2/SR.29, 11-12. Goodwin-Gill and McAdam, above footnote 24, p. 173.

1951 Convention.<sup>60</sup> In addition, decision-makers need to examine the particularities of the specific crime, the act in question, and all of the surrounding circumstances.

### 2.3.2 Article 1F(c): acts contrary to the purposes and principles of the United Nations

Article 1F(c) refers to “acts contrary to the purposes and principles of the United Nations”. The purposes and principles of the UN are contained in the Preamble and Articles 1 and 2 of the UN Charter.<sup>61</sup> Their broad and general terms give little guidance as to the types of acts that would deprive a person of the benefits of refugee status under Article 1F(c) of the 1951 Convention. The *travaux préparatoires* of the 1951 Convention provide some clarification as to the intention of the drafters, and indicate that this provision was intended to cover mainly violations of human rights which, although falling short of crimes against humanity, were nevertheless of an exceptional nature. Delegates noted that Article 1F(c) was not meant to be applied to the “man in the street”.<sup>62</sup> The *travaux préparatoires* also show that this provision was meant to be applied only in exceptional circumstances, stressing that “the discussion was an academic one, since the provision in question would only be applied very rarely”.<sup>63</sup>

Given the vagueness of its terms, the lack of coherent State practice and the danger of being open to abuse, it is particularly important that Article 1F(c) is interpreted restrictively, narrowly and with caution, in light of the purposes and object of the Convention. During the *travaux préparatoires*, some of the delegates already expressed concerns about the risks of this provision being open to misuse, as well as the need to

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<sup>60</sup> See UNHCR Guidelines on Article 1F, above footnote 30, para. 16.

<sup>61</sup> The purposes of the United Nations are to maintain international peace and security; to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples; to achieve international cooperation in solving socio-economic and cultural problems, and in promoting and encouraging respect for human rights and fundamental freedoms; and to serve as a centre for harmonizing the actions of nations. The principles of the United Nations are: the sovereign equality of States; fulfilment in good faith of obligations assumed under the Charter; the peaceful resolution of international disputes; and refraining from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with the purpose of the United Nations; and assistance in promoting the work of the United Nations.

<sup>62</sup> As expressed by the French Delegate: “The provision was not aimed at the man-in-the-street, but at persons occupying government posts, such as heads of States, ministers and high officials” (E/AC.7/SR.160, 18 August 1950, at page 18 and E/AC.7/SR.166, 22 August 1950, at page 6); Similar views were expressed by Canada: “[...] her delegation objected to the provision whereby the benefits of the Convention would not apply to any person who, in the opinion of the Contracting States, had committed any acts contrary to the purposes and principles of the Charter of the United Nations. That was an extremely vague and wide provision which might obviously lay itself open to much abuse” (E/AC.7/SR.165; 19 August 1950, at page 23).

<sup>63</sup> UNHCR, *Background Note on Exclusion*, above footnote 31 at para. 46. See also Atle Grahl-Madsen, “The Status of Refugees in International Law”, Vol. I, 282-3 (1972). He observes that “it appears from the records that those who pressed for the inclusion of the clause had only vague ideas as to the meaning of the phrase “acts contrary to the purposes and principles of the United Nations” [...] it is easily understandable that the Social Committee of the Economic and Social Council expressed genuine concern, feeling that the provision was so vague as to be open to abuse. It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively”. The Supreme Court of Canada held similar views in the case of *Pushpanathan v Canada*, above footnote 53.



preserve the protection afforded by the 1951 Convention.<sup>64</sup> As noted by one of the Delegates, “[...] he therefore felt it his duty to warn the Council against a clause like that at present under discussion, by the provisions of which the status of refugee could be refused to a person, who had not been sentenced, or even tried, by a national or international court, simply on the presumption that he had done something as vague as an act contrary to the purposes and principles of the United Nations”.<sup>65</sup>

Given that the purposes and principles of the United Nations enshrined in Article 1 and 2 of the UN Charter set out the fundamental principles which States must uphold in their mutual relations, excludable acts violating such principles must therefore have an international dimension. Exclusion from refugee protection based on the criteria of Article 1F(c) should thus be reserved for situations where an act and the consequences thereof meet a very high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which it is organized, its international impact and long-term objectives, and the implications for international peace and security.<sup>66</sup> Thus, in UNHCR’s view, crimes which are capable of affecting international peace and security, and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights.<sup>67</sup> This analysis also applies where exclusion is considered with regard to acts considered to be of a terrorist nature.<sup>68</sup>

However, more recent developments in international law and in the practice of the United Nations Security Council,<sup>69</sup> including the Resolutions which have designated terrorist acts as violating the purposes and principles of the UN, suggest that acts contrary to the purposes and principles of the UN could also be committed by an individual who is a member of an organization designated as “terrorist”, irrespective of his/her position in the organization, which may therefore lead to his/her exclusion under Article 1F(c) without limitations as to the nature and seriousness of the act. However, references to United Nations General Assembly<sup>70</sup> and UN SC Resolutions pertaining to measures for combating terrorism which declare that acts of terrorism are contrary to the purposes and

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<sup>64</sup> See Summary Records, A/CONF.2/SR.24, at page 5; “[...] it was difficult to define what acts were contrary to the purposes and principles of the United Nations, though he presumed that what was meant by such acts as war crimes, genocide and the subversion or overthrow of democratic regime” (UK). Similarly, the delegate from Pakistan, concurring with the representative of Canada, said that “the words, ‘or any other act contrary to the purposes and principles of the Charter of the United Nations’ were so vague as to be open to abuse by governments wishing to exclude refugees [...] and to confer on Contracting States the decision as to whether such acts should exclude those who had perpetrated them from the benefits of the Convention might be dangerous” (E/AC.7/SR/160, at page 16). Likewise, the delegate from Mexico indicated that: “[...] there had been instances in which tyrants had imprisoned their political enemies on the pretext that they were enemies of democracy and of the United Nations, [...] the Committee should avoid restrictive language, which would be open to abuse.” (E/AC.7/SR.160; 18 August 1950 at page 19).. See also Guy S. Goodwin-Gill and Jane McAdam, above footnote 24, pages 184-185, where it refers that Article 1F(c) was not meant for “an ordinary individual”, and pages 191-197.

<sup>65</sup> Delegate of Chile, E/AC.7/SR.165, 19 August 1950, at page 24.

<sup>66</sup> UNHCR, *Background Note on Exclusion*, above footnote 31, at para. 47.

<sup>67</sup> *Ibid.*, at para. 47. See Guy S. Goodwin-Gill and Jane McAdam, above footnote 24, at pages 188-189.

<sup>68</sup> UNHCR, *Background Note on Exclusion*, above footnote 31, at para. 49.

<sup>69</sup> Hereafter “UN SC”

<sup>70</sup> Hereafter “UN GA”

principles of the UN should not suggest an automatic application of Article 1F(c).<sup>71</sup> For the application of Article 1F(c), an individual assessment in each case should be undertaken to determine whether the acts in question meet the threshold required, in terms of their gravity, international impact, and implications for the maintenance of international peace and security.

In UNHCR's view, mere membership of a "terrorist" organization will not suffice. Exclusion may be applied in such cases only where the person's individual responsibility is established, based on his or her position in the organization, his or her involvement, and/or knowing acts.<sup>72</sup> As previously stated, the application of Article 1F(c) requires an individual examination and determination, on the basis of reliable and credible evidence, that "there are serious reasons for considering" that the individual concerned has incurred individual responsibility for (i.e. is "guilty of") acts of terrorism which are contrary to the purposes and principles of the UN, in full observance of due process safeguards.<sup>73</sup>

### **3. Comments on the interpretation and the application of Article 1 F of the 1951 Convention as practiced in Germany**

Germany introduced provisions on exclusion from refugee status with the Law on Fighting Terrorism in 2002.<sup>74</sup> Since then, these provisions have been applied in practice not only in refugee status determination procedures, but also as a reason for revocation of decisions granting refugee status. The relevant provisions were amended most recently by the Transposition Act 2007,<sup>75</sup> which transposed secondary EC law on migration and asylum into German legislation on aliens.

Three aspects, in particular, need to be explained in order to understand German practice on exclusion and the line of reasoning used by authorities and courts. One concerns the merging of grounds for exclusion from refugee protection with exceptions to the *non-refoulement* principle. The second aspect pertains to a practice in some cases of excluding aliens from refugee status for reasons of minor crimes, if committed by members of terrorist organizations. Finally, there are divergent opinions on whether a continuing danger emanating from the applicant is a condition for exclusion; the positive answer by most of the courts, *inter alia*, is based on the equation of exclusion with the exceptions to the *non-refoulement* principle in German law.

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<sup>71</sup> See sections 2.1 above and 4.1.2 and 4.1.3 below. See also UNHCR, *Background Note on Exclusion*, above footnote 31, at paras 79-84.

<sup>72</sup> See above, section 2.2.2

<sup>73</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at paras. 98-100. See Guy S. Goodwin-Gill and Jane McAdam, above footnote 24, at pages 191-197.

<sup>74</sup> BGBl. 2002 I (Nr.3), p. 361.

<sup>75</sup> BGBl. 2007 I (Nr.1), p. 2.

### 3.1 *Merging of exclusion and exceptions from the non-refoulement principle*

German law provides that refugee status is recognized if the inclusion criteria are fulfilled, unless exclusion criteria apply<sup>76</sup>; or the person concerned poses a serious danger to the German State or German society.<sup>77</sup> This does not correspond to the differentiation between exclusion from refugee status under Article 1F on the one hand, and the exceptions from *non-refoulement* as contained in Article 33 (2) of the 1951 Convention on the other. The two concepts, their relevant criteria and their legal consequences differ.<sup>78</sup> Exclusion grounds are exhaustive and do not allow the addition of other situations, including those covered by Article 33(2) of the 1951 Convention. Moreover, the different legal consequences of these provisions need to be taken into account in order properly to review proportionality.

### 3.2 *Exclusion for low-level support of terrorist organizations*

German law allows for the application of the provision transposing Article 33(2) of the 1951 Convention only if the person concerned has received a final sentence of at least three years of imprisonment. German administrative authorities have nevertheless applied this provision in some cases for relatively low-level involvement in terrorist organizations. In such cases, the level of involvement was significantly lower than that which would attract a sentence of three years of imprisonment.<sup>79</sup> This suggests that in the view of the administrative authorities, the German equivalent of the exclusion clauses of Article 12 (2)(c) of the QD and Article 1 F(c) of the 1951 Convention may be triggered by any form of membership in or support of a terrorist organization. In such cases, it would appear that the seriousness of the alleged act, as well as the degree of individual responsibility, have not been considered by the administrative authorities to the extent that UNHCR considers necessary to apply Article 1 F(c).

In the practice of the administrative courts, the criteria are not uniformly interpreted. Several administrative courts require a specific level of support to a terrorist organization, in particular in the form of contributions to specific violent acts<sup>80</sup> or carrying out

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<sup>76</sup> BGBl. 1993 I, Section 3 para. 2 Asylum Procedures Act p. 1361. According to the quoted provision, the person concerned is not a refugee.

<sup>77</sup> BGBl. 2004 I (Nr.41), Section 3 para. 4 Asylum Procedures Act, in connection with Section 60 para. 8 Residence Act, page 1950. According to the quoted provision, the person concerned is a refugee but is not granted refugee status.

<sup>78</sup> UNHCR has criticized such merging of exclusion grounds and exceptions to the principle of *non-refoulement* also with regard to Articles 14 (4) and (5) QD. See UNHCR, *Annotated Comments on the Qualification Directive*, above footnote 19; and see also above section 2.1.

<sup>79</sup> See examples in UNHCR, *Asylum in the European Union – A Study of the Implementation of the Qualification Directive* (2007), 94, 102, 103. The cases in this study were usually not subsumed under Article 1 F b) of the 1951 Convention and concerned the activities of the person concerned after the admission to Germany.

<sup>80</sup> See, for instance, Frankfurt Administrative Court, judgment of 18 July 2008, 7 K 325/08.F.A(V) (supporter of the PMOI who had stayed for several years – for most of the time against his will – in the Ashraf Camp in Iraq without having been involved in any armed acts; exclusion rejected); Bayreuth Administrative Court, judgment of 25 February 2003, B 6 K 03.30079 (applicant had tolerated the hiding of weapons in his house by militants of the organization; exclusion confirmed).

executive functions in an organization considered to be “terrorist”.<sup>81</sup> However, other courts have stated that any membership or involvement in the structures of a “terrorist” organization would be sufficient.<sup>82</sup> Other courts state that exclusion under Article 1 F(c) of the 1951 Convention only applies to persons holding a central position in a State, since the principles and purposes of the United Nations can only be violated by States.<sup>83</sup>

### 3.3 *Divergent practice on the requirement for a continuing threat*

Whereas the administrative authorities do not review the question of whether a person who may be excluded continues to pose a danger to German society, the majority of courts do.<sup>84</sup> Those courts base their argument on the wording of the relevant provision in the German law which uses the wording (“the same applies”)<sup>85</sup> equating the exclusion clauses with the exceptions to the non-refoulement principle. The latter, of course, includes a requirement of present danger.<sup>86</sup> Courts in favour of the continuing danger requirement also refer to the need for a proportionality test. These courts also quote UNHCR’s call for a restrictive interpretation of all exclusion clauses in order to support this approach.<sup>87</sup> The opposite approach mainly relies on the wording of the exclusion clauses, which refer only to acts committed in the past.<sup>88</sup> Moreover, the positive effect of exclusion in limiting membership in terrorist organizations is mentioned. Under this reasoning, exclusion from refugee status may have this positive effect if the person concerned withdraws from membership subsequently.<sup>89</sup>

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<sup>81</sup> See, for instance, Düsseldorf Administrative Court, judgment of 1 December 2006, 9 K 2247/06.A; Cologne Administrative Court, judgment of 22 September 2005, 16 K 5591/03.A (person concerned had distributed leaflets and audio and video cassettes; exclusion rejected); Higher Administrative Court of Hesse, decision of 25 January 2005, 3 UZ 234/05.A (high ranking position in an exile organization supposed to provide financial resources to a terrorist organization in the country of origin; exclusion confirmed).

<sup>82</sup> See, for instance, Hanover Administrative Court, judgment of 14 March 2006, 11 A 3466/03 (authorship of political speeches and distribution of leaflets; exclusion rejected).

<sup>83</sup> See, for instance, Higher Administrative Court of North Rhine Westphalia, judgment of 27 March 2007, 8 A 4728/05.A (applicant had financially and publicly supported the armed wing of the communist party; applicant is severely handicapped and does not constitute a danger; exclusion rejected); Gelsenkirchen Administrative Court, judgment of 4 March 2008, 14a K 3288/06.A (long term support of PKK as a semi-professional member, applicant does not constitute a danger after having distanced himself from the organization; exclusion rejected). In support of this argument, UNHCR’s Guidelines on international protection: Exclusion, para. 17 are quoted. While the Guidelines indeed contain a statement to that end, the authorship of in cases of terrorism is not as restricted. Rather, the emphasis is put on the impact of a terrorist act on the international level.

<sup>84</sup> Higher Administrative Court of North Rhine Westphalia, judgment of 27 March 2007, 8 A 4728/05.A; judgment of 29 July 2008, 15 A 620/07.A; Higher Administrative Court of Lower Saxony, decision of 2 May 2007, 11 LA 367/05; Higher Administrative Court of Rhineland-Palatine, judgment of 1 December 2006, 10 A 10887/06.OVG.

<sup>85</sup> Section 60 (8) sentence 2 Residence Act.

<sup>86</sup> Section 60 para. 8 sentence 1 Residence Act.

<sup>87</sup> See for instance, Higher Administrative Court of North Rhine Westphalia, judgment of 27 March 2007, 8 A 4728/05.A; judgment of 29 July 2008, 15 A 620/07.A.

<sup>88</sup> Ansbach Administrative Court, judgment of 8 August 2007, AN 1 K 06.30018.

<sup>89</sup> Hamburg Administrative Court, judgment of 22 January 2007, 15 A 1731/4.

#### 4. UNHCR's responses to questions referred to the ECJ

##### 4.1 *Question 1: Membership in and active support of armed combat of a terrorist organization listed on the EU list may trigger application of Articles 12 (2) (b) and (c) of the Qualification Directive*

1. *Does the membership in and the active support of the armed combat of an organization listed as a terrorist organization on the EU list (Annex to the Common Position of 2002) constitute a serious non-political crime in the sense of Article 12 (2) (b) QD or an act contrary to the purposes and principles of the UN in the sense of Article 12 (2)(c) QD?*

Membership in, combined with the provision of active support to the armed combat of a terrorist organization, may fall within the ambit of both Articles 12 (2) (b) and (c) QD. However, as stated above, membership or association with, or support to an organization responsible for unlawful violence or crimes, including terrorist acts, should not lead to an automatic application of the exclusion clauses. For the application of Article 1F, it must firstly be determined that the concerned act falls within the scope of the exclusion clauses; that is, whether the criteria of a “serious non-political crime” or of an “act contrary to the purposes and principles of the United Nations” are fulfilled and reach the seriousness and high threshold of seriousness required under the relevant part of Article 1F.<sup>90</sup> Secondly, it must be established that “there are serious reasons for considering” that the person can be held individually responsible for the excludable acts. The assessment must include a careful review of all specific circumstances of the case. In other words, the activities of an individual in supporting an organization designated to be a terrorist organization do not lead to exclusion merely because of the label “terrorism,” but only if the particular crimes in question constitute excludable acts falling within the scope of Articles 12 (2) (b) or (c) QD, for which the person concerned carries individual responsibility.

##### 4.1.1 Serious non-political crime in the sense of Article 12 (2) (b) QD

The question of the German Federal Administrative Court regarding Article 12 (2) (b) QD is restricted to whether membership in a terrorist organization and active support of its armed combat qualify as a serious non-political crime. Other criteria which may be relevant in the review of Article 12 (2) (b) QD and the related national provisions are not discussed here.<sup>91</sup> On the other hand, since it is not exactly clear what activities are covered by “active support of the armed combat” or the meaning of these terms, the scope of activities of relevance for exclusion under this heading need to be analysed in detail.

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<sup>90</sup> See above, section 2.2.2

<sup>91</sup> In particular, geographical limitation (outside the country of refuge) and temporary limitation (“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”); this latter approach is criticized in UNHCR’s Annotated Comments on the QD, above footnote 19, Comment on Article 12 (2) (b).



#### 4.1.1.1 Seriousness of the crime

As outlined above regarding Article 1F(b),<sup>92</sup> a high threshold applies regarding the seriousness of the non-political crime under Article 12(2)(b) QD. This follows from the context of this provision as well the general object and purpose of the exclusion provisions, and is confirmed by the drafting history of the 1951 Convention and of the QD, UNHCR's authoritative view and guidance, and doctrine.

First of all, this results from a comparison with the other exclusion grounds contained in Article 12 (2) QD. Those other clauses, Articles 12 (2) (a) and (c) QD, address acts of a most egregious nature such as war crimes or crimes against humanity, or acts which violate most fundamental values such as the purposes and principles of the United Nations.<sup>93</sup>

Second, the object and purpose of the exclusion provisions also support the requirement of a high threshold for the seriousness of the crime, in view of the severe consequences of exclusion. The provisions serve, in particular, to exclude persons undeserving of refugee protection from the scope of the QD as well as from the 1951 Convention. Refugee protection should not preclude serious criminals from facing justice, and exclusion aims to ensure that such persons do not misuse the institution of asylum in order to avoid being held legally accountable for their acts. Given the general aim of the QD and the 1951 Convention to provide international refugee protection to those in need, the exclusion clauses can only be of an exceptional character and require a restrictive application and interpretation, with utmost caution,<sup>94</sup> in the light of the overriding humanitarian character of the 1951 Convention.

The requirement of a high threshold for the seriousness of the crime committed is also confirmed by drafting history, as apparent in the *travaux préparatoires*. In particular, the French delegate drew a parallel to Article 14 of the Universal Declaration of Human Rights, exclusion from which he related to serious crimes.<sup>95</sup> Based on this argument, he proposed inserting the term "serious".<sup>96</sup> The Swiss<sup>97</sup> and Belgian<sup>98</sup> delegates also emphasised serious nature of the crimes committed.

Given the requirement to interpret an exclusion clause restrictively, the qualification "serious" in Article 1F(b) indicates that the crime has to be at least a "capital crime or a

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<sup>92</sup> See above, section 2.2.2

<sup>93</sup> Grahl-Madsen, *The Status of Refugees in International Law* (1966), p.294.

<sup>94</sup> In the context of counter-terrorism, the need for a restrictive interpretation of the exclusion clauses has been recognized by the *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, in his report of 15 August 2007, A/62/263 ("Report of the Special Rapporteur 2007"), at paragraph 71, available at: <http://www.unhcr.org/refworld/docid/472850e92.html>.

<sup>95</sup> Takkenberg, Tabhaz, *The collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees*, Vol. III, A/Conf.2/SR.29, p.18.

<sup>96</sup> Takkenberg, Tabhaz, above footnote 92, p. 20.

<sup>97</sup> Takkenberg, Tabhaz, above footnote 92, p. 17.

<sup>98</sup> Takkenberg, Tabhaz, above footnote 92, p. 24.

very grave punishable act”.<sup>99</sup> Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F(b), even if technically referred to as “crimes” in the penal law of the country concerned. For instance, murder, rape, arson, and armed robbery are considered to be “serious crimes”. Other offences may be regarded as “serious” if they are accompanied, for example, by the use of deadly weapons, or involve serious injury to persons.<sup>100</sup>

Many recognized commentators have also placed significant emphasis on the seriousness of the crime.<sup>101</sup> Some refer to a capital crime or particularly serious crime,<sup>102</sup> while others to crimes against physical integrity, life, and liberty,<sup>103</sup> or crimes which potentially attract long periods of custodial punishment.<sup>104</sup>

This approach in applying a high threshold of seriousness is corroborated by State practice and jurisprudence. French Courts have accorded particular emphasis to the seriousness of a crime, having explicitly qualified as “serious non political crimes” pre-meditated murder (of civilians, members of armed forces or political opponents); direct participation in the preparation of terrorist acts; supervision of a terrorist cell; theft of weapons to support an opposition armed group; rape and large-scale drug trafficking.<sup>105</sup> In Spain, France, Slovak Republic and Hungary, “serious crimes” are considered to be those crimes for which domestic law imposes a minimum penalty of five years’ imprisonment.<sup>106</sup> Given the variances in domestic penal sanctions for particular crimes, however, penalties alone should not be seen as decisive of the “seriousness” of a crime for the purposes of Article 12(2)(b). Rather, criminal penalties should be considered as part of an assessment of all the circumstances of the crime including any aggravating elements, the gravity of which should be judged against international standards rather than by domestic laws.<sup>107</sup>

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<sup>99</sup> See UNHCR, *Handbook*, above footnote 25, at paragraph 155.

<sup>100</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at para. 38-41. These are also crimes mentioned in the context of an exception to the non-refoulement principle in Article 33 (2) of the 1951 Convention, see Lauterpacht, Bethlehem, The scope and content of the principle of non-refoulement: Opinion, in: Feller, Türk, Nicholson, above footnote 32, pp. 87-177 (139).

<sup>101</sup> See, for instance, Goodwin-Gill/McAdam, above footnote 24, p. 175: “The primary emphasis is on ‘seriousness’, such was illustrated, but not limited, by crimes associated with extradition.”

<sup>102</sup> Marx, Reinhard: “Unterstützung terroristischer Organisationen nach Art. 12 II Buchst. b) und c) QRL,” *Zeitschrift für Ausländerrecht (ZAR)*, 2008, 343-350.

<sup>103</sup> Goodwin-Gill/McAdam, above footnote 24, p 177.

<sup>104</sup> Gilbert, Current issues in the application of the exclusion clauses, in: Feller, Türk, Nicholson, above footnote 32, pp. 425-485 (449).

<sup>105</sup> CRR, 13 November 1989, 75353, *Saglam* (premeditated murder); CRR, 3 February 1994, 254153, *Thurairasa* (direct participation in terrorist act); CRR 3 November 1994, 265230, *Serrat* (theft of weapons).

<sup>106</sup> UNHCR unpublished research.

<sup>107</sup> See for instance, Goodwin-Gill and McAdam, above footnote 24, pp. 239 and 240 in the context of the exceptions to the principle of *non-refoulement*: “An approach in terms of the penalty alone would be likely to be arbitrary”; and “in the case of Article 1F(b), *a priori* determinations of seriousness by way of legislative labelling or other measures substituting executive determinations for judicial (or judicious) assessments are inconsistent with the *international* standards which are to be applied, and with the humanitarian intent of the Convention” (emphasis added).

The commission of acts commonly considered as terrorist acts, including those which involve atrocities such as killing, abductions, or torture, will generally constitute a serious crime.<sup>108</sup> It is not the “terrorist” label attached to such acts which prompts the application of the exclusion clauses, but the nature and seriousness of the crimes.

Resolutions adopted by the UN Security Council indicate that the support of a terrorist organization may potentially constitute a serious crime, in the sense of Article 12 (2)(b) QD. This finding is further corroborated by EU practice and international criminal law. The relevant Resolutions of the UN Security Council refer directly to “terrorist acts” and the planning of, the facilitation of and participation in such acts,<sup>109</sup> to “financing, planning, preparation of as well as any other form of support for acts of international terrorism”,<sup>110</sup> or to “financing, planning and inciting terrorist acts”.<sup>111</sup> Even though those resolutions are related to specific criminal acts, which are qualified as “terrorist”, Resolution 1377 is worded quite broadly when referring to “any other form of support”. This may also be understood to cover support of the organization in general, without the support being related to a specific armed attack or atrocity.<sup>112</sup> This approach is also taken in the EU Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, which designates also the directing of a terrorist group and the participation in a terrorist group as “terrorist acts”.<sup>113</sup> Moreover, this approach is also supported by the standards applied in international criminal law.

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<sup>108</sup> According to SC Resolution 1373, 2.e), terrorist acts must be “established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts”. See also UN SC Resolution 1566 (2004) where the UN SC called on all States to cooperate fully in the fight against terrorism and, in doing so, to prevent and punish criminal acts that have the following three characteristics, irrespective of whether they are motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature: (a) Committed, including against civilians, with the intent to cause death or serious bodily injury, or taking of hostages; and (b) Committed with the purpose of provoking 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; and (c) Constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism. In UNHCR’s view, these acts would normally reach the gravity required for the application of Article 1F(b). See UN SC Resolution 1566 (2004) *Threats to international peace and security caused by terrorist acts*, S/RES/1566 (2004) of 8 October 2004, available at: <http://www.unhcr.org/refworld/docid/42c39b6d4.html>. See also: *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin, to the Commission on Human Rights, Sixty-second Session, E/CN.4/2006/98, 28 December 2005, available at: <http://www.unhcr.org/refworld/docid/441181f10.html> (“*Report of Special Rapporteur 2005*”) at paragraphs 36, 38-42 and 50. See also reference to certain acts in the International Convention for the Suppression of the Financing of Terrorism which is referred to in the SC Res. (more specific reference).

<sup>109</sup> UN SC Res. 1373 (2001), OP 2 (d).

<sup>110</sup> UN SC Res. 1377 (2001), PP 5.

<sup>111</sup> UN SC Res. 1624 (2005), PP 8.

<sup>112</sup> The literature on this reveals divided viewpoints. According to *Goodwin-Gill/McAdam*, at page 197, exclusion may apply if the offence has been specifically identified by the international community as one which must be addressed in the fight against terrorism. *Marx*, above footnote 102, at page 348, thinks that founding of and membership in terrorist organizations was not covered by SC Council Resolutions whereas *Zimmermann* sees such support covered under the term “facilitation of terrorist acts”. *Gilbert*, above footnote 32, p. 444 et seq., draws on parallels to command responsibility and 28 of the ICC Statute with a view to addressing the exclusion of members of terrorist organizations.

<sup>113</sup> 2001/931/CFSP, Article 1 (3) lit. j) and k).

Even though membership in and support of a terrorist organization may constitute a crime in many national jurisdictions and under international law, it is clear that not all forms of membership or of support would reach the seriousness threshold of Article 12 (2)(b) QD. The fact that a person may be affiliated or associated with a group or organization responsible for unlawful violence or crimes, including terrorist acts, should not lead to an automatic application of the exclusion clauses.<sup>114</sup>

In this connection, the question of whether the person concerned had a central role, such as the founder or leader of a terrorist organization, or merely acted as a distributor of leaflets, must make a difference with a view to the seriousness of the crime. Moreover, the period of time during which support was provided, as well as the organization's activities at the relevant moment, are factors to be analysed thoroughly.

Recital 28 QD further supports the idea that not all forms of membership or support will reach the seriousness threshold required for Article 12 (2)(b) QD. This Recital refers to the concept of "national security and public order" based on which the QD permits Member States to reduce or limit the entitlements accorded to refugees or subsidiary protection beneficiaries. However, reasons or considerations of "national security and public order" are not sufficient to constitute grounds for exclusion under the criteria of Article 12(2) of the QD. Recital 28 states that "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". This indicates that such membership or support may be taken into account when examining the possibility of limiting the entitlements of refugees and subsidiary protection beneficiaries to travel documents, to residence permits after a period of three years, and to additional rights for family members, under Chapter VII of the Qualification Directive – but does not affect their status.<sup>115</sup> Given such considerations are named as material factors for limiting the

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<sup>114</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, paragraphs 59-61, 82 and 105-106. State practice and jurisprudence have recognized that membership is not sufficient basis for the exclusion clauses to be applied. In the UK, in *T v. Secretary of State for the Home Department*, [1996] 2 All ER 865; [1996] 2 WRL 766, available at: <http://www.unhcr.org/refworld/docid/3ae6b70f4.html>, the House of Lords ruled that there was an error by the Immigration Appeals Tribunal to exclude a person on the basis of mere connection with an organization. See also, New Zealand, Refugee Status Appeals Authority, *Refugee Appeal No. 74540* (1 August 2003, available at: <http://www.unhcr.org/refworld/docid/48abd566d.html>). The Refugee Status Appeals Authority concluded that with regards to the FIS, "it cannot be said an organization principally directed to a limited, brutal purpose, of which mere membership alone would be enough to bring the appellant within the exclusion provisions of Article 1F". In France, decisions makers have emphasized individual responsibility rather than mere membership; See CRR, SR, 20 July 1993, 231.390 *Chahrouh*, in the case of a high-ranking member of the FIS in Algeria. Similarly, the Canadian courts have also held that membership in an organization is generally not sufficient basis in which to exclude, see *Ramirez v. Canada* [1992] 2 F.C. 306. Under German criminal law, significant weight is accorded to the individual's role in/contribution to the organization: the founding / building of a terrorist organization as a rule would be seen to constitute a serious crime on the part of the founders, members and, in particular, leaders of such organizations; the support of such an organization without membership is penalized with a shorter term of imprisonment; while in the case of minor contributions, by contrast, the sanction may be reduced below the minimum sentence.

<sup>115</sup> For instance, Qualification Directive, Articles 23(4), 24(1), 25(2).

scope of rights attached to grants of protection, they cannot of themselves suffice to justify exclusion from refugee status.

#### 4.1.1.2 *Non-political nature*

Where there is no clear link between the crime and its allegedly political motive, or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant.<sup>116</sup> In order to apply the predominance test, in every individual case in which a political aim may have motivated the person concerned, the means applied in committing the criminal act in question and the allegedly political aims pursued must be examined. Egregious acts of violence commonly associated with “terrorism” will in most cases fail the predominance test, being wholly disproportionate to any political objective. Thus, holding membership in or providing support to a terrorist organization, if the organization is involved in committing violent crimes disproportionate to any political objective, would qualify as a “non-political” crime in the sense of Article 12(2)(b) QD and Article 1F(b) of the 1951 Convention. As stated above, for the application of Article 1F(b), the seriousness test for acts falling within the scope of Article 1F must also be applied.

Art 12(2)(b) of the QD goes beyond the wording of Article 1F, in providing that “particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes”. However, “particularly cruel actions” remains undefined in the Qualification Directive, in other instruments of the *acquis*, or in international law.

This provision on “particularly cruel actions” has not been transposed into national law in a significant number of Member States including, for instance, Austria, Belgium, Czech Republic, France, Hungary, Ireland, Luxembourg, Netherlands, Poland, Romania, Slovenia, Sweden and United Kingdom. The few national laws providing a definition of “particularly cruel actions”, notably Bulgarian and Slovak law, have referred to acts of an exceptionally heinous nature which pose an extremely high degree of social danger. The Slovak legislation specifically defines as “particularly inhuman actions” crimes including “endangering the peace, genocide, terrorism, torture and other inhuman and cruel treatment...”.<sup>117</sup> German law provides that such acts would involve in particular “attacks on the civilian population”.<sup>118</sup> State law and practice thus reflects a cautious approach to the concept of “particularly cruel actions”, omitting it from the legislative criteria for exclusion, or confining its scope to exceptional and particularly egregious crimes.

#### 4.1.1.3 *Individual responsibility and standard of proof*

Exclusion from refugee protection based on the criteria under Article 1F of the 1951 Convention requires a determination of individual responsibility, as it must be

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<sup>116</sup> *UNHCR Handbook*, above footnote 25, paragraph 152; UNHCR, *Background note on Exclusion*, above footnote 31, at para 41.

<sup>117</sup> Unofficial translation. Source for all references: UNHCR unpublished research.

<sup>118</sup> Unofficial translation: *Bundestag printed papers* (BT-Drs) 16/5065; page 214



established, in each case, that the individual concerned committed a crime which is covered by Article 1F, or participated in the commission of such a crime in the knowledge that his or her act or omission would facilitate the criminal conduct, and in a manner which gives rise to criminal liability in accordance with internationally applicable standards. Thus, exclusion is only justified if the person concerned can be held individually responsible for the serious non-political crime falling within the scope of Article 1F(b).

As the exclusion clauses contained in Article 1F of the 1951 Convention are based on criminal conduct, the requirement under fundamental principles of criminal law for an individualized assessment to determine responsibility for criminal acts applies also in the context of exclusion proceedings.

In this regard, a criminal law standard of participation applies. This is also recognised in Article 12 (3) QD which refers to the excludability of persons who “instigate or otherwise participate in the commission of crimes or acts mentioned”. Consequently, both objective and subjective criteria of participation in the commission of the relevant crime need to be fulfilled. As the Swiss Asylum Commission stated, “an application of Article 1 F of the 1951 Convention is only justified if the person concerned exercised a decisive influence on the criminal acts in question and therefore can be held individually responsible, irrespective of whether he has committed the acts himself or only supported or tolerated them”.<sup>119</sup> Similarly, individual responsibility for excludable acts arises where the perpetrator commits the crimes, or induces crimes committed by others (by planning, ordering or instigating them), or makes a substantial contribution thereto (through aiding, abetting, or participating in a joint criminal enterprise).<sup>120</sup> The ICC Statute provides useful guidance on the issue of individual responsibility for people in command or superior positions. In particular, the Statute explicitly extends jurisdiction of the ICC to contributions made “in any other way” (than aiding, abetting or otherwise assisting in the commission of a specific crime), to the commission “of such a crime by a group of persons acting with a common purpose” if this is made with the “aim of furthering the criminal activity or criminal purpose of the group”.<sup>121</sup>

While membership of “terrorist” organizations or groups should not automatically lead to exclusion clauses, it could nevertheless trigger consideration of the application of exclusion clauses. In some instances, depending on the organization and circumstances, individual responsibility for excludable actions may arise if membership is voluntary, and when the members of such groups can be reliably and reasonably considered to be individually responsible for terrorist acts falling under the scope of Article 1F. In such cases, as with any exclusion analysis, decision-makers need to examine each case on its own merits and take into consideration all the relevant facts. Due regard and caution should be given in particular to the actual activities of the organization, its structure (including potentially whether it operates in a centralized or fragmented way); the

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<sup>119</sup> EMARK 2005 No. 18, decision of 16 June 2005 (unofficial translation).

<sup>120</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at paragraphs 51-56.

<sup>121</sup> Article 25 (3) d (i) ICC Statute, U.N. Doc. A/CONF.183/9, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>.

organization's place and role in the society in which it operates, and its purposes and methods. The individual's role and involvement must also be examined, including his or her position in it; his or her personal involvement or substantial contribution to the criminal act in the knowledge that his or her act or omission would facilitate the criminal conduct; his or her ability to influence significantly the activities of the group or organization; and his or her rank and/or command responsibility.<sup>122</sup>

In particular, when assessing the individual responsibility of persons who are suspected of providing funds or assistance to "terrorist groups or organizations", the degree of involvement of the person concerned must be carefully assessed to determine whether the person committed, or made a substantial contribution to a criminal act. In such cases, the particular features of the specific crime, and factors such as the regularity and amount of contributions provided, should be assessed, as well as the non-political nature of the crime. For instance, there is a difference between an isolated and small financial donation and the consistent and long term financial support on a substantial scale.<sup>123</sup>

As part of the examination of individual responsibility in cases which could trigger the application of exclusion clauses, the applicant must be given the opportunity to put forward any applicable defence regarding non-involvement or dissociation from any excludable act.<sup>124</sup> If this is provided, in the absence of serious evidence to the contrary, the applicant should no longer be considered within the scope of the exclusion clauses.

As a matter of principle, the fact that the alleged acts concern so-called "terrorist offences" should not be a determining factor, particularly in the absence of a universal definition of "terrorism". It may constitute an aggravating factor or may be central to the crime concerned (for instance, the forming of or membership in a terrorist organization), but for Article 1F to apply, the requisite seriousness of the crime and individual responsibility must still be established in the individual circumstances of each case.

A high standard of proof applies to the establishment of individual responsibility,<sup>125</sup> requiring "serious reasons for considering" that the person concerned "has committed" or "has been guilty" of the relevant excludable acts under Article 12(2) QD. In a number of EU Member States, including Poland, Netherlands and Sweden, the standard of proof required for exclusion corresponds to those laid down for prosecution under international criminal law instruments.<sup>126</sup> In assessing individual responsibility based on due process

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<sup>122</sup> *Ibid.*, at paras. 59-62, 80, 82, 106 and 109.

<sup>123</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at paragraphs 80-82. If the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness. On the other hand, a regular contributor of large sums to a terrorist organization may well be guilty of a serious non-political crime; for example, if the person concerned is in control of the funds of such an organization, with the knowledge that it is dedicated to achieving its aims through terrorist acts; or if his or her monetary assistance has substantially contributed to the organization's ability to continue functioning effectively in pursuance of its violent or terrorist aims.

<sup>124</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at paras. 62, 80, 106, 109 and 110.

<sup>125</sup> See section 2.2.2 above

<sup>126</sup> UNHCR unpublished research.

standards, decision-makers must also examine any valid defences (e.g., that he or she was forced to participate in the commission of a crime under duress or self-defence).<sup>127</sup>

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

As outlined above,<sup>128</sup> the purposes and principles of the United Nations are contained in the Preamble and in Articles 1 and 2 of the UN Charter. The Qualification Directive notes that they are also, amongst other sources, embodied in United Nations Resolutions regarding terrorism.<sup>129</sup> Most relevant in the present context is the United Nations' purpose of maintaining international peace and security. This implies that an exclusion provision can only be triggered by acts which have impact on the international level. As stated above, exclusion from refugee protection based on the criteria of Article 1F(c) should thus be reserved for situations where an act and the consequences thereof reach a very high threshold, that is, where an act is serious or egregious enough to be capable of being contrary to the purposes and principles of the United Nations. An assessment of whether this threshold is reached should consider the gravity of the act in question, the manner in which the act is performed or organized, its international impact and long-term objectives, and the implications for international peace and security.

The wording of the Security Council Resolutions could be interpreted as providing scope for membership in a terrorist organization to be construed as violating the purposes and principles of the United Nations. UN SC Resolution 1624 explicitly states that the “acts, methods, and practices of terrorism” are contrary to the purposes and principles of the United Nations, and thereby links them to the exclusion grounds of the 1951 Convention.<sup>130</sup> UN SC Resolution 1377 points out that “any other form of support” for acts of terrorism is contrary to the purposes and principles of the United Nations.<sup>131</sup> Moreover, participation in terrorist organizations is designated as a “terrorist act” in the EU Common Position of 2001.<sup>132</sup> The UN GA and SC have also stressed that the “financing, planning and preparation of as well as any other form of support for acts of

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<sup>127</sup> For more detailed guidance on determining individual responsibility in the context of an exclusion analysis, including circumstances which would negate individual responsibility. See UNHCR, *Background Note on Exclusion*, above footnote 31, at paras. 50–75.

<sup>128</sup> See section 2.3.2 above

<sup>129</sup> Recital 22 QD

<sup>130</sup> UN SC Res. 1624: “the Refugees Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations”; “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”. See General Assembly resolutions: *Resolution 49/60 (1994)*, at para. 2; *Resolution 51/210 (1996)*, at para. 2; *Resolution 60/158 (2006)*, at preamb. para. 12; *Resolution 60/288 (2006)*, at preamb. para. 7. See also Security Council resolutions: *Resolution 1377 (2001) Threats to international peace and security caused by terrorist acts*, SC/RES/1377 (2001) of 12 November 2001, Annex, at para. 5; *Resolution 1624 (2005)*, at preamb. para. 8.

<sup>131</sup> UN SC Res. 1377.

<sup>132</sup> EU Council Common Position 2001/931/CFSP, Art. 1 (3) j and k.

international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations”.<sup>133</sup>

Thus, where Article 1F(c) is said to apply to active involvement in the armed combat of a terrorist organization, the individual acts in question must be assessed for their impact on and relevance to international peace. Regarding membership in a terrorist organization, it is necessary to determine whether the activities of the organization reach the threshold required for the application of Article 1F(c), namely whether their gravity and impact on the international plane are such that they impinge on the maintenance of international peace and security; or peaceful relations between States; or constitute serious and sustained violations of human rights which would come within the scope of Article 1F(c) of the 1951 Convention. If the organization’s acts are found to meet the threshold required for the application of Article 1F(c), an individual assessment in each case should nevertheless be undertaken to determine whether the person is individually responsible for those acts, including as a member of the terrorist organization.<sup>134</sup>

When implementing obligations imposed by UN resolutions concerning threats to international peace and security posed by acts of terrorism, and measures to combat terrorism, UN Member States are nevertheless obliged to act in accordance with the UN Charter and their obligations under international law, including international refugee law.<sup>135</sup> This is confirmed by UN SC resolutions on the fight against terrorism, which refer to international refugee law as part of the legal framework which needs to be respected in the fight against terrorism.<sup>136</sup>

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<sup>133</sup> UN SC Resolution 1377 (2001) *Threats to international peace and security caused by terrorist acts*, SC/RES/1377 (2001) of 12 November 2001, Annex, at para. 5, available at: <http://www.unhcr.org/refworld/docid/3c4e9456e.html>. See also UN SC Resolution 1624 (2005), above footnote 5, at preamb. para. 8; General Assembly resolutions: *Resolution 49/60 (1994)*, at para. 2; *Resolution 51/210 (1996)*, at para. 2; *Resolution 60/158 (2006)*, at preamb. para. 12; *Resolution 60/288 (2006)*, at preamb. para. 7.

<sup>134</sup> See above sections 2.2.2 and 4.1.1.3 on individual responsibility.

<sup>135</sup> See Articles 24 and 25 of the UN Charter. Most recently, for instance, UN SC Resolution 1624 (2005), PP 2: “States must ensure that any measures taken to combat terrorism comply with their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law”, and preamb.4: “Recognizing that international cooperation and any measures undertaken by Member States to prevent and combat terrorism must fully comply with their obligations under international law, including the Charter of the United Nations and relevant international convention and protocols, in particular human rights law, refugee law and international humanitarian law”; See also SC Resolution 1373 (2001) para. 3(f) and 3(g); SC Resolution 1624 (2005), preamb. paras. 2 and 7 and op. paras 1 and 4; and SC Resolution 1269 (1999), para. 4(iv); See also, for example, General Assembly resolutions: GA Resolution 60/288 (2006); and most recently, *The United Nations Global Counter-Terrorism Strategy*, A/RES/62/272 of 15 September 2008; *Protection of human rights and fundamental freedoms while countering terrorism*, A/RES/62/159 of 11 March 2008; *Measures to eliminate international terrorism*, A/RES/62/71 of 8 January 2008, preamb. paras. 12 and 20; and *2005 World Summit Outcome*, A/RES/60/1 of 24 October 2005, at para. 85; The Human Rights Council has also reaffirmed these obligations in its *Resolution on the Protection of human rights and fundamental freedoms while countering terrorism*, A/HCR/7/L.11 of 27 March 2008 and March 2009. See also further guidance in Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32, 2008*, July 2008.

<sup>136</sup> For instance, UN SC Res. 1624 (2005), PP 2: States must ensure that any measures taken to combat terrorism comply with their obligations under international law, and should adopt such measures in

Ensuring compliance with international refugee law also requires the proper and diligent application of the exclusion clauses of Article 1F of the 1951 Convention. This means that the requirements and limitations imposed by the 1951 Convention must be taken into account in interpreting and applying those Resolutions in light of the object and purposes of the 1951 Convention.<sup>137</sup> Therefore, references to UN GA and SC resolutions pertaining to measures for combating terrorism which declare that acts of terrorism or support for acts of terrorism are contrary to the purposes and principles of the UN should not suggest an automatic application of Article 1F(c).

Since the purposes and principles of the United Nations are addressed to the UN Organization and to its Member States, in principle it would seem that only high-ranking persons within UN Member States (i.e. Heads of State and persons in analogous positions) are capable of violating those purposes and principles in the exercise of their State leadership functions.<sup>138</sup> This view would suggest that mere membership in a terrorist organization generally cannot bring an individual within the scope of Article 12(2)(c) QD.

The question of whether Article 1F(c) may extend beyond States and those acting in State capacities, to individuals acting as such, has been subject to divergent approaches in State practice and jurisprudence since the drafting of the 1951 Convention. The drafters of the 1951 Convention expressed their intention to limit the personal scope of this provision. The delegate at the Conference of Plenipotentiaries who pressed for inclusion of this clause in the 1951 Convention specified clearly that it was not aimed at the “man in the street”.<sup>139</sup> Many commentators have also supported a restrictive view, limiting the application of Article 1F(c) to heads of States and high officials, while reserving scope for its exceptional application to individuals not necessarily connected with Governments, such as those responsible for serious violations of the human rights of others.<sup>140</sup> Jurisprudence in different countries has revealed two differing approaches: one focused on State leaders and those in similar positions, while another - since the mid-1990s – has focused on extending individual responsibility to individuals not holding such positions and being party to human rights violations, either individually, or as members of organizations engaged in such activities.<sup>141</sup>

The development of international law since World War II, in particular in relation to the practice of the UN SC when acting under Chapter VII of the UN Charter to address threats to international peace and security, is also relevant in examining this question. The

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accordance with international law, “in particular international human rights law, refugee law, and humanitarian law”.

<sup>137</sup> See section 2.2.2 UNHCR Guidelines on Article 1F, above footnote 30, Section D. See UNHCR, *Background Note on Exclusion*, above footnote 31, at paras. 98-100. See Guy S. Goodwin-Gill and Jane McAdam, above footnote 24, at pp. 191-197.

<sup>138</sup> See UNHCR, *op cit*, above footnote 31, paragraph 48ff.

<sup>139</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, at para. 48.

<sup>140</sup> See Guy S. Goodwin-Gill and Jane McAdam, above footnote 24, at pages 151ff.

<sup>141</sup> *Ibid.* See also *Pushpanathan v Canada*, where the Supreme Court of Canada held that Article 1F(c) was not limited to State actors, above footnote 64.

UN SC has concluded that threats to international peace and security may emanate from non-state entities, and that it has power to take enforcement action against such entities.<sup>142</sup> More specifically regarding terrorism, various Resolutions of the UN SC refer to acts of terrorism and support thereof as being contrary to the purposes and principles of the UN,<sup>143</sup> including acts emanating from non-state actors.

Based on the above considerations and in light of today's reality, the commission of crimes which, because of their nature and gravity, are capable of affecting international peace and security, or the relations between States, or which constitute serious and sustained violations of human rights, may not in all cases require the holding of a position of authority within a State or State-like entity. Thus, in addition to persons in positions of State authority, individuals acting in a personal capacity, including as leaders of a group responsible for "acts of terrorism" which are contrary to the principles and purpose of the United Nations, could also be capable of falling under Article 1F(c), where they are found to possess individual responsibility based on the requisite tests.<sup>144</sup>

Unlike high-ranking figures in a terrorist organization, persons having provided small-scale support for an organization will not automatically be excludable on the basis of Article 12 (2)(c) QD even if they are involved in the armed combat of the organization, since the degree of individual responsibility may not reach the level of responsibility which would be required for triggering the application of the exclusion clause of Article 12(2)(c) QD.<sup>145</sup>

Various Member States, namely Belgium,<sup>146</sup> Czech Republic,<sup>147</sup> Slovak Republic, Spain and Sweden have limited the application of Article 1F(c) of the 1951 Convention to persons exercising a leadership role or holding a position of authority within a State. Moreover, prevalent Member State practice accords particular weight to the "individual responsibility" requirement, holding that mere membership in a terrorist organization is not enough to bring the person concerned within the exclusion clauses. In the UK, by

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<sup>142</sup> For instance, UN SC Res. 1540 aims at the non-proliferation of weapons of mass destruction and explicitly addresses the threats emanating from "non-state actors" (pp. 8).

<sup>143</sup> UN SC Res. 1373: "such acts, like any act of international terrorism, constitute a threat to international peace and security"; UN SC Res. 1377: "acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations".

<sup>144</sup> See UNHCR, *Background Note on Exclusion*, para 49, which notes that "only the leaders of groups responsible for such atrocities would in principle be liable to exclusion under this provision". For the requirements and standard of proof for individual responsibility, see section 2.2.2, 2.3.2 and 4.1.1.3 above.

<sup>145</sup> See above in section 4.1.1.1 on assessing the individual responsibility of persons suspected of providing funds or assistance to "terrorist groups or organizations or members of such groups".

<sup>146</sup> See the case of *XXX v Commissaire général aux réfugiés et aux apatrides*, CCE, N. 24.173 (4 March 2009) where the Conseil du Contentieux des Etrangers required a leadership role in order to trigger the application of the exclusion clause of Article 1F(c). The court did not elaborate on the nature or seniority of the required leadership role.

<sup>147</sup> Although there is no national practice on exclusion from refugee status under Article 12(2)(c), a recent first-instance case on exclusion from subsidiary protection on the same grounds (under Article 17(1)(c) QD) held that State agents are in a position to commit such acts.

contrast, the asylum authorities and courts have concluded in a number of cases that a person who is not acting on behalf of a State can commit an act contrary to the purposes and principles of the United Nations, and that Article 1F(c) can apply.<sup>148</sup>

#### 4.1.3 Qualification as terrorist organization: EU list sufficient?

Regarding designation as a “terrorist organization”, the question posed by the Federal Administrative Court implies the additional question of whether the designation as such on an EU list is sufficient to warrant exclusion under refugee law.

UNHCR has reiterated that in cases where an organization appears on an international list of terrorist organizations, the association of an individual with such an organization shall not mean that exclusion is automatically justified. However, a consideration of the applicability of the exclusion clauses can be triggered, and depending on the nature of the individual’s involvement, inclusion on the list may give rise to individual responsibility.<sup>149</sup> Such responsibility may arise if the list has a credible basis; if the membership of such a group is voluntary; and the criteria for placing a particular organization or individual on the list are such that all members or listed persons or organizations can reliably be considered to be individually and heavily involved in excludable acts. Individual responsibility must nevertheless be established for “acts of terrorism” which fall within the scope of Article 1F for persons considered to be members of organizations or entities listed on “terrorist lists” established by the international community or national authorities.<sup>150</sup>

It should be noted that lists established by the international community should not generally be treated as reversing the burden of proof, in view of the fact that the evidentiary threshold for inclusion in at least some cases may not meet the standard of proof required for exclusion cases.<sup>151</sup>

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<sup>148</sup> *KK (Article 1F(c) Turkey) v. Secretary of State for the Home Department* [2004] UKIAT 00101 cites UNSCR 1377 and refers to the UN Security Council’s “unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by *whomever* committed”. This position has been approved recently by the Court of Appeal in *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, which refers also to the Supreme Court of Canada’s decision in *Pushpanathan v Canada* (see above footnote 53).

<sup>149</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, paragraph. 62, and further in paragraphs 80, 106 and 109.

<sup>150</sup> Individual responsibility must be examined carefully in such cases, in full compliance with due process guarantees, and detailed consideration given to the acts in question and all surrounding circumstances. See further UNHCR, *Background Note on Exclusion*, above footnote 31, paras. 62, 80, 106, 109 and 110.

<sup>151</sup> See UNHCR, *Background Note on Exclusion*, above footnote 31, paras. 80, 106, and 109. See also UNHCR, *Guidelines on Exclusion* (above footnote 30), which also refer to the need for high procedural standards: “36. Exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon, but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker’s ability to challenge the substance of the evidence is not substantially prejudiced. Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. Where national security interests are at stake, these may be protected by introducing procedural safeguards which also respect the asylum-seeker’s due process rights.”



The list mentioned by the Federal Administrative Court in its question is contained in an annex to the Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP). Given its status as a common position adopted under the third pillar of the EU legal order, it does not have binding legal effect<sup>152</sup> and cannot constitute a conclusive decision on the interpretation of a binding provision of Community legislation under the first pillar. Regarding the list, a binding character also cannot be founded on the argument that it is simply implementing determinations made by the United Nations Security Council or the so-called “Sanctions Committee”.<sup>153</sup> Even though there is an obligation to review the entries on the list at least every six months, concerns about the inclusion of a number of individuals and organization in the list and its compliance with due process guarantees were recognized by the Court of First Instance, which in 2006 ruled that a Council decision placing the People’s Mojahedin Organization of Iran (PMOI) on the list was unlawful.<sup>154</sup> The listing procedures were modified following the *PMOI* decisions, to provide for a statement of reasons and right of appeal to the European Council’s terrorist proscription working group. However, concerns have persisted and the adequacy of procedural safeguards have been examined closely in subsequent litigation, particularly in regard to people and organisations listed on the basis of decisions of the UN SC Sanctions Committee, including in the case of *Kadi and Al-Barakaat*, which annulled the decision to include the applicants in the list based on the lack of procedural safeguards.<sup>155</sup> In April 2009, the European Commission adopted a proposal which among other things, would require

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<sup>152</sup> As stated in Article 1 (4) of the EU Common Position of 27 December 2001, persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions *may* be included in the list.

<sup>153</sup> In the *Kadi* case, this aspect was considered as possibly excluding jurisdiction on acts adopted in the framework of Regulation (EC) 881/2002. Jurisdiction was accepted by the Court nonetheless with a view to reviewing human rights protection as guaranteed by the EC legal order. (ECJ judgment of 3 September 2008, *Kadi and others*, C-402/05 P and C-415/05 P, 321 et seq.)

<sup>154</sup> In its judgment of 12 December 2006, *Organisation des Modjahedines du peuple d’Iran*, T-228/2, the Court found that decisions on the list of organizations and persons whose assets are frozen based on the Regulation 2580/2001, adopted in implementation of Common Position 2001/931/CFSP, lacked an adequate statement of reasons, an opportunity for affected persons or bodies to raise defences or objections, and effective legal remedies. See also the Judgments of the EU Court of First Instance in the *Cases*, T-284/08 of 4 December 2008, T-256/07 of 23 October 2008, and T-228/02 of 12 December 2006 respectively, on the freezing of PMOI funds.

<sup>155</sup> See the ECJ Judgement in *Joined cases C-402/05 P and C-415/05 P*, of 3 September 2008. The Court ruled that in respect to the inclusion of Mr. Kadi and Al Barakaat in the list of persons and entities whose funds are to be frozen, the rights of the defence, in particular the right to be heard, and the right to effective judicial review were “not respected”. The Court found that “the Council Regulation at issue provided no procedures for communicating the evidence justifying the inclusion of the names of the persons concerned in the list, either at the same time as, or after, that inclusion. That infringement of Mr. Kadi and Al Barakaat’s rights of defence also give rise to a breach of the right to a legal remedy, inasmuch as the appellants were also unable to defend their rights in satisfactory conditions before Community courts”. The Court granted a period of three months for the EU Council to remedy the shortcomings of the listing mechanisms, or the EU Regulation implementing the UN listing will become null and void. (*Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 (OJ 2002 L 139, p 9)*).

people or organisations listed by the Sanctions Committee to receive a statement of reasons and an opportunity to express views in response, prior to any decision to include them on the EU list.<sup>156</sup> However, as the proposal is still under discussion in the Council at the time of writing, and it is unclear whether or in what form it might be adopted or implemented, concerns persist regarding the procedural fairness of the listing procedures.

The Council of Europe has also expressed concerns about the procedural standards for compiling lists at the international and regional level, and called for caution in their use.<sup>157</sup>

#### 4.2 Question 2: Requirement of continued danger?

2. If yes, does the application of Articles. 12 (2) b and c QD require that the person concerned continues to pose a danger?

The wording of the said provisions does not contain any indication that exclusion hinges on the question of whether the person concerned continues to pose a danger. Insofar as the German approach relying on the criterion of a continued danger is grounded on the wording of the German transposition provisions, this does not find any parallel in the provisions of the 1951 Convention or the Qualification Directive.<sup>158</sup> The object and purpose of the exclusion clauses rather indicate that the continuing danger does not constitute a requirement for their application.

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<sup>156</sup> European Commission, *Proposal for a Council Regulation amending Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Lade, the Al-Qaida network and the Taliban*, COM(2009)187 final, Brussels, 22.4.2009

<sup>157</sup> Parliamentary Assembly of the Council of Europe (PACE), Res. 1597 (2008): *United Nations Security Council and European Union blacklists*: “5.4. Equally important is the issue of remedy. The Council of the European Union and the European Union (EU) member states must implement immediately the decisions of competent European and national judicial institutions affecting the status of the listed persons or entities. 6. The Assembly finds that the procedural and substantive standards currently applied by the UNSC and by the Council of the European Union, despite some recent improvements, in no way fulfil the minimum standards laid down above and violate the fundamental principles of human rights and the rule of law. 6.1. Concerning procedure, it must be noted and strongly deplored that even the members of the committee deciding on the blacklisting of an individual are not fully informed of the reasons for a request put forward by one member. The person or group concerned is usually neither informed of the request, nor given the possibility to be heard, nor even necessarily informed about the decision taken – until he or she first attempts to cross a border or use a bank account. There are no procedures for an independent review of decisions taken or for compensation for infringements of rights. Such a procedure is totally arbitrary and has no credibility whatsoever.” See also *Doc. 11454 Addendum (22 January 2008), UN Security Council and European Union blacklists*: “Having analysed the most important cases, the PACE concludes [...] 17. Blacklists, as we said, can be acceptable, for a time, as a weapon to fight terrorism and its supporters. Such a measure, which has severe consequences, must however be well targeted, following a serious procedure. This is not at all the case today. [...]”

<sup>158</sup> As set out above, in Section 3.3, the continued danger requirement is also based on the consideration that the wording equates the exception to the non-refoulement principle with the exclusion clauses (“the same applies”). It is assumed that the reference to the non-refoulement provision and its criteria of present danger would have to be transferred to the exclusion clauses as well.

As outlined above, the object and purpose of the exclusions clauses enshrined in Article 12 (2) (b) and (c) QD and Article 1F of the 1951 Convention are to ensure that refugee status is not granted to persons undeserving of protection. By contrast, the exception to the non-*refoulement* principle as incorporated in Articles 33 (2) of the 1951 Convention and reflected in the Qualification Directive in its Articles 14 (4) and (5) includes the element of dangers posed to the host State and society by a person who has already been recognized as a refugee. The conclusion that exclusion grounds do not require a continuing danger to emanate from the person concerned is clear in relation to Articles 12 (2)(a) and (c) QD and it is based on the distinct conceptual framework of Articles 1F and 33(2) respectively, since Article 33(2) does not constitute a ground for exclusion. As stated above, the exclusion clauses of Article 1F concern the integrity of the refugee protection regime, while Article 33(2) concerns protecting the national security of the host country, allowing under exceptional circumstances the withdrawal of protection against *refoulement* of those already recognized as refugees who pose a danger to the host country. Article 12 (2)(b) QD also does not contain any indications to a criterion of this nature in its wording. Moreover, the central purpose of the provision is the preservation of the purposes of the refugee system: it shall ensure that persons responsible for excludable acts shall not find refuge from prosecution and – if they cannot be returned or extradited – escape prosecution and moreover enjoy refugee status in the host state.

#### **4.3 Question 3: Proportionality test?**

3. *If question 2 is answered negatively, do Articles 12 (2)(b) and (c) QD require an assessment of proportionality of exclusion in every individual case?*

In UNHCR's view, the application of a proportionality test, when considering exclusion and its consequences for the individual, is required to ensure that Article 1F is applied in a manner consistent with the overriding humanitarian character of the 1951 Convention. The QD, which acknowledges that the 1951 Convention and 1967 Protocol provide the "cornerstone" of the international legal regime for the protection of refugees and "seeks to ensure full respect for [...] the right to asylum" must also be construed in line with these protection objectives.<sup>159</sup>

This proportionality principle is an important safeguard in the application of Article 1F, and of Article 12(2) QD, given the serious consequences of exclusion for the individual, as exclusion denies the benefit of refugee status – and the rights which are associated with it, including to protection from removal which could result in persecution – to certain persons who otherwise qualify as refugees.<sup>160</sup> The proportionality test must involve, *inter alia*, determining the degree and likelihood of persecution feared, and measuring this against the seriousness of the acts committed.

In UNHCR's view, the proportionality test should also be applied in cases where other guarantees, under human rights instruments or other regional or national mechanisms

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<sup>159</sup> Qualification Directive, Recitals 3,10

<sup>160</sup> See section 2.2.3 above.

could apply. These could include Article 3 of the 1984 Convention against Torture, Articles 6 and 7 of the ICCPR and Article 3 of the ECHR, which bind all EU Member States. Such protections should be taken into account where they entail protection against *refoulement*, and are effective and are accessible to the person concerned.

#### 4.4 Question 4: Scope of proportionality test?

4. *If question 3 is answered positively:*

- a) *Does the test of proportionality include considerations of protection under Article 3 ECHR or national provisions against return?*
- b) *Can exclusion only be disproportionate in particularly exceptional situations?*

On a):

A proportionality test must assess all the consequences of applying the exclusion clauses. In reaching a decision on exclusion, it is therefore necessary to weigh the degree and the likelihood of persecution feared against the seriousness of the acts committed. In this context, the fact that there is another effective and accessible form of protection against removal, without the rights attached to refugee status, is a relevant consideration in the exclusion assessment. In other words, an exclusion assessment should include review of the accessibility and likely grant of other human rights guarantees under human rights instruments, in particular the protection against removal to torture or to other cruel, inhuman or degrading treatment or punishment.

This may depend on the procedural safeguards and arrangements in the relevant State. The availability of alternative protection may be at issue if, for example, the decision on exclusion must be taken in an asylum procedure, while the question of whether to grant protection against removal on human rights grounds comes only after the asylum procedure is concluded and the removal process is underway. In such cases, it may not be possible in the exclusion assessment to assess accurately the likelihood of protection against removal in case exclusion is applied.

On b):

In cases in which Article 12 (2)(b) QD is applied, all facts of the case should be weighed in the determination of whether exclusion is proportionate. Even if the crimes in question are serious, and individual responsibility for those crimes has been established, proportionality considerations must be examined to determine if the consequences of exclusion – potentially including removal to face severe persecution – would be so grave as to outweigh the gravity of the crimes committed.

If the applicant is likely to face severe persecution as a result of exclusion, the crime in question must be very serious in order to exclude the applicant. There are many excludable acts which are so egregious, including crimes against peace, crimes against humanity and acts contrary to the purposes and principles of the United Nations, that they will outweigh the degree of persecution feared, where they are proven. In such cases, exclusion will not be found to be disproportionate. By contrast, “serious non-political crimes” and war crimes can involve a wider range of misconduct. For acts with less significant consequences – for example, isolated incidents of property damage by soldiers – exclusion may not be proportionate if its consequence would be removal of the person to torture or death in his or her country of origin. By contrast, a person guilty of

deliberate infliction of serious harm to or killing of civilians outside the scope of combat would not benefit from proportionality considerations.<sup>161</sup>

**4.5 Question 5: More favourable provisions under national law despite exclusion under the Qualification Directive?**

5. *Is it reconcilable with Article 3 QD if the asylum seeker has a claim for asylum under national constitutional law even though exclusion grounds under Article 12 (2) QD apply?*

Exclusion grounds are compulsory under the Directive (as they are under the 1951 Convention), and there is no scope for a more favourable approach under national law with a view to applying refugee status under the QD. Whereas Article 3 QD in principle allows for provisions in national law which are more favourable to the person seeking protection, this exception is limited to those situations which do not contravene the Directive, as well as international refugee law.<sup>162</sup> Since the object and purpose of the exclusion provisions is not only to provide for a sanction against persons not deserving international protection, but also to preserve the integrity of asylum against misuse, an exemption from the exclusion clauses cannot be justified based on the minimum standards approach under Article 3 QD.

If the status granted is identical or very similar, whether granted under national constitutional law or as refugee status in the sense of Article 13 QD, it would simply result in applying a different legal regime to the provision of the same form of protection. This could result in granting refuge protection to those who are undeserving of it. The legal consequences of the obligation to apply the exclusion clauses in a manner consistent with the 1951 Convention may not be circumvented simply by applying a different label to an identical or largely identical status. In particular, this applies to the issuance of a Convention Travel Document in accordance with Article 28 of the 1951 Convention which would allow the person concerned also to travel to other States. Being presented with such a document, the relevant State would assume that the holder of the travel document is a refugee in the sense of the 1951 Convention – or in the sense of the Qualification Directive – while this is in fact not the case, due to the application of the exclusion clauses under Article 12 of the QD.

UNHCR  
July 2009

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<sup>161</sup> UNHCR, *Exclusion Guidelines*, above footnote 31, para 78.

<sup>162</sup> The QD should be interpreted in line with the 1951 Convention, which has been recognized as the foundation of the international regime for the protection of refugees. See QD, Recital 3; and UNHCR, *Note on International Protection*, A/AC.96/951, 13 September 2001, available at: <http://www.unhcr.org/refworld/docid/3bb1c6cc4.html>