MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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EU Countering Terrorism through Asylum Law: Serious Reasons to Exclude Members of Terrorist Organisations from Refugee Status Due to Their Participation in Acts Contrary to the Purposes and Principles of the UN

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Abstract:

Members of terrorist organisations may be excluded from refugee protection due to their participation in acts contrary to the purposes and principles of the UN (exclusion ground (c)). However, the court practice of EU Member States is divergent in relation to the application the said exclusion ground. Recently, the emerging trend has been to apply the provisions of EU counter terrorism law as guiding the interpretation of the exclusion ground (c). This research responds to the need to clarify to what extent the provisions of EU counter terrorism law may be used for the interpretation of the exclusion ground (c), and the limits such interpretation.

Firstly, the terrorist nature and the acts and activity of terrorist groups are discussed. The establishment of the terrorist nature of an organisation in the exclusion context is affected by the UN and EU lists of terrorist groups. Additionally, different terrorism related acts and activities are listed in the EU Terrorism Directive. These actions may be considered as acts contrary to the purposes and principles of the UN in the meaning of the UNSC resolutions. However, that does not necessarily mean that such actions also conform to the acts regulated in the context of the exclusion ground (c). The application of the exclusion ground (c) requires that an action fulfils a certain gravity threshold. The threshold may be crossed at least then when the action contains indiscriminate violence or violence against civilians, or then when the action has serious implications on international peace and security. Not all terrorism related actions criminalised in the Terrorism Directive conform to these gravity requirements.

Secondly, the serious reasons to consider standard requires that the member of a terrorist organisation was individually responsible for the actions of the organisation so that exclusion may become applicable. International criminal law contains different forms of individual criminal responsibility of which incitement; and aiding and abetting are also regulated in the Terrorism Directive. Some other forms of individual criminal responsibility have been regulated as independent criminal facts in the Terrorism Directive. Additionally, individual responsibility in the Terrorism Directive may exceed even further to the preparative phase than in international criminal law. The individual responsibility emanating from the articles of the Terrorism Directive may correspond to individual responsibility required in the application of the exclusion ground (c). However, the participation of a member of a terrorist group must also fulfil a gravity threshold of substantial participation. The threshold is crossed at least in case leaders of such groups.

Key words: EU Asylum Law, Exclusion Clause, Acts Contrary to the Purposes and Principles of the UN, EU Counter Terrorism Law, Terrorist Acts, Terrorism Directive, Individual Responsibility	
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ABBREVIATIONS

CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention for Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MICG	Moroccan Islamic Combatant Group
PKK	Kurdistan Workers' Party
QD	Asylum Qualification Directive (recast)
TFU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council

1. Introduction

1.1. Refugees, Security, Terrorism, and Exclusion

Picture a person who supports the armed guerrilla warfare of a terrorist organisation in the mountains of a foreign country. They are arrested, tortured, and sentenced to life imprisonment.[1] Another person joins a terrorist group to become a fighter and one of its senior officials. After leaving the organisation because of political differences with its leadership, they come under threat.[2] Both individuals successfully flee from their difficult situations and arrive in the European Union (hereafter, EU). Imagine yet another person who has been residing illegally in different EU member states for many years, and at the same time has acted as a leading member of a terrorist group.[3] All three individuals apply for asylum in different EU member states and claim that they would be persecuted if they were returned to their countries of origin. What kind of effect should their acts as members of terrorist organisations have on the processing of their asylum applications?

All EU member states are parties to the 1951 Geneva Convention Relating to the Status of Refugees (hereafter, the Refugee Convention) and its 1967 Protocol (hereafter, the Protocol).[4] The right to asylum is guaranteed in Article 18 of the Charter of Fundamental Rights of the EU, and protection from *refoulement* is guaranteed in Article 19. The principle of *non-refoulement* requires that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[5] In addition, the Refugee Convention requires that states' parties do not remove refugees to countries in which they are at risk of persecution.[6] Naturally, the principle of *non-refoulement* also involves asylum seekers whose asylum applications have not yet been processed.[7]

[1] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paras. 44–48.
[2] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paras. 56–58.
[3] CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 28–30.
[4] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954). Hereafter, the Refugee Convention.
[5] Article 19 of the Charter of Fundamental Rights of the EU, Official Journal of the European Union C 326/395, 26 October 2012.
[6] Article 33 of the Refugee Convention.
[7] See Lauterpacht and Bethlehem 2003, p. 113.

The recast Asylum Qualification Directive (hereafter, the QD) determines the concept of a refugee and the rights it entails in more detail.[8] The QD sets common criteria for recognising applicants for asylum within the meaning of Article 1 of the Refugee Convention.[9] The concept of a "refugee" is defined in Article 2(d) of the QD as:

> …a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

Therefore, a refugee is a person to whom, according to Article 12, exclusion does not apply. Exclusion is thus an exception or a limitation upon the granting of refugee status and the guarantees it brings with it to a person otherwise fulfilling the definition of a refugee. Article 12(1) considers exclusion of persons who are eligible for appropriate protection from other sources such as different United Nations (hereafter, UN) organisations or agencies, or other states. Article 12(2), which is based on Article 1 F of the Refugee Convention, consists of the exclusion clause that is relevant for the topic of this thesis.[10] According to Article 12(2)(a–c) of the QD,

> A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time

[8] Directive 2011/95/EU of the European Parliament and of the Council, 13 December 2011, Recast, OJ 20.12.2011, L 337/9. Hereafter, QD. In addition, the QD contains a separate system of subsidiary protection as a complementary and additional protection type of the EU asylum law. Subsidiary protection is regulated in Articles 1 and 2 of the QD, and it covers situations in which an individual does not qualify as a refugee, but substantial grounds have been shown that they would face a real risk of suffering serious harm if returned to their country of origin.

[9] Recital 24 of the QD.

[10] Exclusion from subsidiary protection is regulated in Article 17 of the QD. The provision slightly differs from the exclusion clause regulated in Article 12(2–3). For instance, it has an additional exclusion ground: According to the exclusion ground (d), an individual is excluded from being eligible for subsidiary protection in case they constitute a danger to the community or to the security of the member state in which they are present. However, the CJEU has regarded in its case *Shajin Ahmed* that, in principle, the interpretation of exclusion grounds (a–c) should correspond to their counterparts in the article regulating exclusion from refugee status. See CJEU, Case C-369/17 *Shajin Ahmed*, 13 September 2018, paras. 42–46.

> of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
>
> (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

In addition, Article 12(3) of the QD states that exclusion grounds (a–c) also apply "to persons who incite or *otherwise participate* in the commission of the crimes or acts mentioned therein". Unlike the QD, the Refugee Convention does not directly determine forms of criminal liability other than the direct liability that may lead to exclusion. However, it is generally recognised that indirect forms of responsibility may also justify exclusion.[11]

Originally, the exclusion clause in Article 1 F of the Refugee Convention was intended to deny the benefits of refugee status for persons who would otherwise qualify as refugees but who were considered as "undeserving" of such benefits because there were "serious reasons for considering" that they had committed heinous acts or serious common crimes. The exclusion clause was also created to ensure that such persons do not misuse the asylum institution for escaping justice and avoiding being held accountable for their actions.[12] The aim of the provision is to protect the integrity and credibility of the asylum institution.[13] Terrorist acts are likely to be considered under the scope of the exclusion clause, even though there is no internationally agreed definition of such acts.[14]

Furthermore, national security has sometimes been referred to when justifying exclusion, even though the provision does not require the person to be a threat to the national security of a state.[15] According to the United Nations High Commissioner for Refugees (hereafter, UNHCR), basing exclusion on a determination that the applicant constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1 F and the conceptual framework of the Refugee Convention.[16] Both the Refugee

[11] UNHCR Guidelines 2003, para. 18.
[12] Conference of Plenipotentiaries 24th Meeting 1951; UNHCR Background Note 2003, para. 3; UNHCR Guidelines 2003, para. 2; UNHCR Statement on Article 1 F 2003, p. 6.
[13] EXCOM Conclusion on Safeguarding Asylum 1997, para (v); UNHCR Guidelines 2003, para. 2. See also in the context of the EU asylum system: CJEU, C-369/17, *Shajin Ahmed*, 13 September 2018, para. 51. The CJEU recognized, *inter alia*, the maintenance of the credibility of the *Common European Asylum System* (hereafter, CEAS) as the purpose of the exclusion clause.
[14] See Wouters 2012, p. 581.
[15] See Hathaway & Forster 2014, p. 529. See also Ng 2018, p. 34.
[16] UNHCR Statement on Article 1 F 2003, p. 8.

Convention and the QD deal with the concerns of national security in different provisions.[17] The provision related to national security legitimises the *refoulement* of a refugee who is considered as a danger to the security of the state in which they are present, or who has been convicted by a final judgment of a particularly serious crime and thus constitutes a danger to the community of that state.

When comparing the security-based provision to the exclusion clause, the exclusion clause denies the Refugee Convention's applicability *ratione personae*.[18] Therefore, because the Refugee Convention does not apply to excluded individuals, the *refoulement* of an excludable person otherwise eligible for international protection is similarly possible as the *refoulement* of persons on national security grounds. However, the provision on national security in the QD has additional limitations for the *refoulement* of refugees that are also applicable to excludable persons: the expulsion is only legitimate in situations in which the international obligations related to the principle of *non-refoulement* do not prohibit the act. These international obligations are formulated in various human rights treaties.[19] In addition, supervisory bodies of these treaties, such as the European Court of Human Rights (hereafter, the ECtHR), have acknowledged that the prohibition of *refoulement* is absolute.[20] Therefore, whatever the reason for expulsion, a person cannot be *refouled* if the risk of torture or ill-treatment after removal exists. Consequently, in relation to the expulsion on the ground of national security and on the basis of the application of the exclusion clause, it is highly probable that the principle of *non-refoulement* prohibits the expulsion because in both cases it has been disclosed that the person in question has a well-founded fear of persecution.

After the events of 9/11, asylum applicants and refugees have been considered as suspected security threats.[21] Many scholars have argued that security concerns have put pressure on the EU asylum policy and led to the strengthening of national and EU asylum

[17] Article 33(2) of the Refugee Convention, and Article 21(2) of the QD.
[18] Zimmermann and Wennholz 2011, p. 583.
[19] Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force 26 June 1987). Under the International Covenant on Civil and Political Rights and the European Convention on Human Rights (hereafter, ECHR) the principle of *non-refoulement* has been developed under the general prohibition of torture and other forms of cruel, inhuman, or degrading treatment or punishment.
[20] ECtHR, *Saadi v. Italy*, Judgment (Grand Chamber), 28 February 2008, para. 138. The prohibition of *refoulement* in Article 33 of the Refugee Convention is not absolute.
[21] Simeon 2020, p. 5; Perruchoud 2012, p. 135.

laws.[22] Therefore, notwithstanding the separate application of the exclusion clause and the national security-based provision, the concerns of national security, especially in relation to terrorism, may have affected both the application and interpretation of the exclusion clause. Terrorist acts and other affiliations with terrorist groups have been increasingly identified as excludable acts.[23] However, the proper application of the exclusion clause should make it impossible that terrorists benefit from the protection provided for refugees.[24]

Returning to the asylum cases of the individuals described at the beginning of this chapter, it must be revealed that the cases are not fictitious; these individuals have been asylum applicants in different member states of the EU. The respective national courts handling their asylum cases referred to the Court of Justice of the European Union (hereafter, CJEU or the Court) for preliminary rulings in relation to the application of the exclusion clause. These are also the most relevant cases referred to in this thesis. The cases, *B and D* and *Lounani*, have noteworthy characteristics. Based on the questions that the respective national courts referred to the CJEU, the Court had to decide on the application of the EU counter terrorism measures in the context of application of the exclusion clause. The European Court of Justice (hereafter, the ECJ) (now the CJEU) took the stance in *B and D* that the instruments relating to terrorism should be kept separate from the interpretation of the QD.[25] In *Lounani*, the CJEU held that the QD is not directly referring to any EU instrument adopted in the context of combating terrorism.[26] In addition to its determination of the separation of these fields of law, the CJEU actively applied the EU law on counter terrorism to determine the scope of Article 12(2).[27]

[22] See e.g. Murphy 2015, pp. 29–30, 81; Guild and Garlick 2011, pp. 74–75: Leonard 2010, p. 32. See also in a more general context: Simeon 2020, p. 5; Salinas de Frías 2012, pp. 111–112. Salinas de Frías arguments that governments may use immigration and asylum laws as a substitute for criminal law process in relation to terrorism, because lower standards of protection are applied in them.
[23] See e.g. CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para.81. In this case, the CJEU determined that the perpetrators of terrorist acts cannot benefit from the political crime exception of exclusion ground (b), even if such acts were committed with a purportedly political objective.
[24] UNHCR Observations on the European Commission Proposal 2001, para. 2.
[25] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010. The Court followed this position also in *H.T.* by determining that there is no direct relationship between Common Position 2001/931 and the QD in terms of their respective aims. This case did not consider the application of the exclusion clause but of a revocation of a residence permit. CJEU, Case C-373/13, *H.T*, 24 June 2015, para. 88.
[26] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 53.
[27] See CJEU, Case C-573/14, *Lounani*, 31 January 2017. See also Walsh 2017; Singer 2019, pp. 386–388.

1.2. Research Question and Limitations

The central research question is: *To what extent and under what requirements may the EU counter terrorism law be used to assist in the interpretation of the exclusion of members of terrorist groups from refugee status for participation in acts against the purposes and principles of the UN under article 12(2)(c) of the QD?* The research question is divided into two sub-questions, which are discussed particularly in the context of the application of counter terrorism law for the interpretation of exclusion ground (c): When an organisation is considered as a terrorist group, what kind of activity undertaken by such a group might constitute acts against the purposes and principle of the UN? Under what requirements a member of a terrorist group may be held individually responsible for participation in the acts of such a group?

Making unjustified linkages between terrorism and asylum should be avoided.[28] However, it is recognised that those linkages, whether existing or hypothetical, are an ever-growing topic in the public debate, and may affect legislative efforts at both regional and national levels.[29] The topic of linkages between security concerns, particularly terrorism, and asylum and migration policies in the EU has received significant research attention since the 9/11 terrorist attacks.[30] The topic is still relevant because of the increasing numbers of asylum applicants and the recent refugee crisis in 2015–2016,[31] which means that the EU's asylum laws and practices are increasingly being followed and applied by the member states. This thesis analyses how EU law on counter terrorism has affected EU asylum law in relation to the interpretation of exclusion ground (c), and to what extent the counter terrorism law can be used to guide the interpretation of the said

[28] Lubbers 2002; UNHCR Background Note 2003, para. 84.

[29] See eg. Proposal for a Regulation of the European Parliament and of the Council, COM (2016) 466 final, pp. 13, 22, 37. The Proposal for the Qualification Regulation (hereafter, QR) intermingles the exclusion clause and terrorism more comprehensively than the QD: It is proposed in Recital 31 to expand the text concerning exclusion ground (b) as followed: "Committing a political crime is not in principle a ground justifying exclusion from refugee status. However, in accordance with relevant case law of the Court of Justice of the European Union, particularly cruel actions, where the act in question is disproportionate to the alleged political objective, and terrorist acts which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, should be regarded as non-political crimes and therefore can give rise to exclusion from refugee status." The text in Article 12(2)(b) of QD does not explicitly involve such acts, even though it has been established in the case law of the CJEU that the acts of that nature are covered by exclusion ground (b). See in that regard, CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 81.

[30] See Leonard 2010, p. 32.

[31] See Eurostat, Asylum Statistics. However, the number of asylum applicants decreased in 2020 due the COVID-19 pandemic and the related travel restrictions: Eurostat, Number of asylum applicants: decrease in 2020.

exclusion ground. The aim of the analysis is to determine the content of exclusion ground (c) in terrorism related cases so that its application will be more predictable for asylum seekers suspected of relevant terrorism related acts. This will ensure that the principles of international refugee law are not overridden by the securitisation aspects when using EU counter terrorism law as an interpretative guidance for the application of the exclusion clause. Therefore, the broader context of international refugee law is considered when analysing the research question.

The research question is current and thus relevant since only limited research has emerged after the two major developments that are of relevance for the application of exclusion ground (c) in relation to members of terrorist groups. First, in 2017 the CJEU gave a judgment in *Lounani* in which it widely applied EU counter terrorism law as an interpretative tool for exclusion ground (c), as explained above. Second, in the same year, the Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA[32] (hereafter, Terrorism Directive) was adopted.[33] This thesis focuses especially on the relevance of these new developments in relation to the research question. However, because the exclusion clause has traditionally been interpreted in the context of international criminal law,[34] these developed practices are also referred to in the analysis or used in comparison with the new interpretative tools.

This thesis is limited to studying exclusion for the reason of the asylum applicant being guilty of acts contrary to the purposes and principles of the UN (i.e., exclusion ground [c]). Acts in relation to terrorism may, in certain conditions, meet any of the definitions described in subparagraphs (a–c) of the exclusion clause. However, states are increasingly relying on exclusion ground (c) in relation to exclusion based on affiliation with terrorism.[35] The CJEU has applied exclusion grounds (b) and (c) in cases that have a confluence to terrorism.[36] In addition, this thesis is limited to situations in which it is a

[32] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6. Hereafter, the Terrorism Directive.
[33] See for previous research in which these developments have been considered: Singer 2019; EASO Judicial Analysis Exclusion 2020.
[34] See UNHCR Background Note 2003, paras. 51–56; EASO Judicial Analysis Exclusion 2020, pp. 98–99.
[35] See e.g. Saul 2008, p. 9; Rikhof 2019, p. 400.
[36] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010; CJEU, Case C-573/14, *Lounani*, 31 January 2017.

question of *participation* in the acts against the purposes and principles of the UN. The asylum procedure does not include a thorough examination of the facts as that included in the criminal investigation. Essentially, the decision is based on the story provided by the asylum applicant. Therefore, it may be difficult to establish that the person is directly involved in the commission of an excludable crime or act, unless the person admits to the commission of such a crime. However, the acts of the organisation of which the asylum seeker has been a member may be more straightforwardly defined through reports from international human rights organisations or other reporting institutions. Therefore, in many cases the exclusion may be applicable when the asylum seeker has participated in excludable acts through their membership of a specific organisation.

In both *B and D* and *Lounani*, the CJEU assessed the exclusion of members of terrorist groups on two levels. On the collective level, the CJEU examines whether the group with which the asylum applicant is affiliated has committed acts falling within the scope of the exclusion clause. On the individual level, the member's participation in the groups' excludable acts is assessed.[37] The structure of the analysis in this thesis follows these stages. In Chapter 2, the terrorist nature and the acts and activities of terrorist groups are analysed. In Chapter 3, the individual responsibility of a member of a terrorist group is discussed.

1.3 Method and Sources

The research methodology used in this study is legal dogmatics or doctrinal legal research. Legal dogmatics is used to interpret and systematise formally valid legal rules and to weigh and balance legal principles and other legal standards that enjoy adequate institutional support and societal approval so as to have legal significance.[38] Doctrinal legal research is suitable to study topics that seek to systematise legal norms and to understand the relationship between different bodies of legal norms.[39] Legal dogmatics is a suitable method for this thesis since the application of exclusion ground (c) in the context of members of terrorist organisations is determined, which requires application and interpretation of legal norms from different fields of EU law.

[37] See CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010; CJEU, Case C-573/14, *Lounani*, 31 January 2017.
[38] Siltala 2003, pp. 108–109.
[39] Cryer; Böhm; Sokhi-Bulley; and Hervey 2011, p. 38.

In pure legal positivism, a strict separation of morals and law prevails. In addition, only traditional legal sources such as treaties and custom are applied in strict legal positivism.[40] The research question is examined in the framework of EU law that is *sui generis*, and thus separate from international and national law.[41] The legal sources of the *acquis communautaire* include, in principle, the written law, general principles of law, and the case law of the CJEU. EU law does not contain customary law.[42] However, the EU asylum law originates from international refugee law and especially from the Refugee Convention and the Protocol. Article 78 of the Treaty on the Functioning of the European Union[43] (hereafter, the TFU), states that the EU's common policy on international protection must be in accordance with the Refugee Convention and the Protocol and other relevant treaties[44]. Therefore, besides using the sources of the EU law, also these international sources are considered.

Refugee law is closely linked to international humanitarian law and international human rights law. The UNHCR Executive Committee has called on states to protect refugees in compliance with their obligations under international human rights and humanitarian law instruments.[45] Furthermore, in its *Aydin Salahadin Abdulla and Others* judgment, the CJEU established that the QD must be interpreted in a manner consistent with the fundamental rights and principles recognised, in particular, by the Charter of Fundamental Rights.[46] The European Convention for Human Rights (ECHR) as well as case law of the ECtHR are also relevant for European asylum law. However, the ECtHR system is only concerned if the expulsion of asylum seekers and other foreigners is forbidden under the principle of *non-refoulement* established under Article 3 of the Convention. Therefore, the ECHR framework does not cover the contents of exclusion assessment or the requirements under which persons may be excluded from international protection.

[40] Ratner and Slaughter (eds.) 2004, p. 27.
[41] Laakso 2012, p. 278.
[42] Laakso 2012, p. 282.
[43] Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202/47, 7 June 2016.
[44] "Other relevant treaties" comprise of the ECHR, as well as the Convention Against Torture, the International Covenant on Civil and Political Rights, and other instruments on fundamental rights to which all Member States are party. Guild and Garlick 2011, p. 77.
[45] EXCOM General Conclusion on International Protection 1997, para. (e).
[46] CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and Others*, 2 March 2010, para. 54.

The European Council's Tampere Conclusions in 1999 (hereafter, Tampere Conclusions) constitute the founding act of the Common European Asylum System (hereafter, CEAS). In this key document, the European Council "has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention".[47] The CEAS today contains several legislative instruments that are part of EU asylum law. The principal legislative instrument of CEAS used as a source in this study is the QD.[48] The exclusion clause is examined in relation to QD Article 12(2)(c), which considers acts against the purposes and principles of the UN. EU asylum law originates from international refugee law, especially from the Refugee Convention and Protocol. Article 78 of the TFU states that the EU's common policy on international protection must be in accordance with the Refugee Convention and Protocol and other relevant treaties. This is also recognised in the Preamble of the QD.[49] According to Recital 4 in the Preamble of the QD, the cornerstone of the international legal regime for the protection of refugees lies in the Refugee Convention and Protocol. Therefore, it is recognised in CJEU case law that the QD must be interpreted in light of its general scheme and purpose, and in a manner consistent with the Refugee Convention and other relevant treaties referred to in Article 78(1) of the TFU.[50] In addition, secondary sources interpreting the exclusion clause in the context of the Refugee Convention may be of relevance when interpreting the contents of the exclusion clause in EU asylum law. It is also recognised that guidance provided by the UNHCR is of importance in the refugee status determination process, including the exclusion assessment.[51] The guiding status of the UNHCR Handbook has also been recognised in CJEU case law.[52] Similarly, the CJEU

[47] Presidency Conclusions from Tampere European Council 15 and 16 October 1999, para. 13. See Chetail; De Bruycker; and Maiani (eds), 2016. The CEAS is currently under reform. The reform of the QD demonstrated above is also part of this reform.

[48] The legislative instruments of the CEAS currently in force are the Asylum Procedures Directive; the Reception Conditions Directive; the Dublin Regulation; and the EURODAC Regulation. However, these instruments are not relevant in the analysis of the topic of this thesis.

[49] See paras. 3–4 of the Preamble of the QD.

[50] See CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and Others*, 2 March 2010, para. 53. See also in the context of exclusion clause: CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 78; CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 41; CJEU, C-369/17, *Shajin Ahmed*, 13 September 2018, para. 37. See also *Qurbani* para. 28. The CJEU has accepted that it has jurisdiction to interpret the provisions of the Refugee Convention to which EU law made a *renvoi*.

[51] See Recital. 22 in the Preamble of the QD; CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 43.

[52] CJEU, C-369/17, *Shajin Ahmed*, 13 September 2018, para. 57.

has referred to reports of the European Asylum Support Office (hereafter, EASO) for guidance.[53]

The use of international criminal law and EU law on counter terrorism as sources for this research on asylum law requires deeper explanation. The exclusion assessment is predominantly different from the inclusion part of the refugee status determination process. For inclusion, the relevant legal framework may be regarded to include not only asylum law but also international human rights law and international humanitarian law[54] whereas for the exclusion process, international criminal law is also relevant.[55] For example, the general principles of criminal liability have been widely used as an interpretative guidance to establish the individual responsibility in the context of the exclusion clause.[56] Therefore, the main sources of international criminal law used in this thesis are the Rome Statute of the International Criminal Court[57] (hereafter, the Rome Statute), and the case law of the International Criminal Tribunal for the former Yugoslavia (hereafter, ICTY) and the International Criminal Tribunal for Rwanda (hereafter, ICTR).

Recent CJEU case law has also shown that EU law in relation to counter terrorism is of increasing relevance in cases that involve persons affiliated with terrorist groups and the exclusion clause. The relevant sources of European counter terrorism law include the Terrorism Directive. Even though the Council Framework Decision (13 June 2002) on combating terrorism (2002/475/JHA) (hereafter, Framework Decision (2002/475)) has been replaced with the above-mentioned Terrorism Directive, scholarly documents commenting on the Framework Decision (2002/475) may be used as sources as many of the articles within the Terrorism Directive correspond to articles within the Framework Decision (2002/475). The Council Common Position (27 December 2001) on the application of specific measures to combat terrorism (2001/931/CFSP) (hereafter,

[53] CJEU, C-369/17, *Shajin Ahmed*, 13 September 2018, para. 56.
[54] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 44. See also EXCOM General Conclusion on International Protection 1997, para. (e). The UNHCR Executive Committee has called states to protect refugees in compliance with their obligations under international human rights and humanitarian law instruments.
[55] In Article 17(1)(a) of the QD, that considers *subsidiary protection* it directly stated that the concepts of crimes against peace, war crimes and crimes against humanity are defined in "international instruments drawn up to make provision in respect of such crimes" However, such reference is not made in Article 12(2) concerning exclusion from refugee status.
[56] See UNHCR Background Note 2003, paras. 52, 66; Expert Meeting on Complementarities 2011, para. 48.
[57] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).

Common Position (2001/931)) was adopted to implement United Nations Security Council (hereafter, UNSC) Resolution 1373 (2001).).[58] In Article 2 of the Common Position (2001/931), the European Community is requested to order the freezing of the funds and other financial assets or economic resources of persons groups and entities listed in the Annex. The Annex to the Common Position (2001/931) thus contains a list of persons, groups, and entities involved in terrorist acts.[59] Article 1(4) of the Common Position (2001/931) sets the basis for the process of adding persons, groups, and entities on the list in the Annex. In addition, persons, groups, and entities identified by the UNSC as being related to terrorism and against whom it has ordered sanctions may also be included in the list.[60] The list may be reviewed at regular intervals and at least once in every six months.[61]

National case law of the Member States of the EU is used when it is referencing the relevant EU law. In addition, national law and cases are only used as examples.

1.4 EU Counter Terrorism Law as a Guidance for the Interpretation of Article 12(2)(c)

The principles of interpretation are regulated in the Vienna Convention on the Law of Treaties (hereafter, Vienna Convention). Interpretation of treaties is regulated in the Section 3 of the Vienna Convention. Article 31 contains the general rule of interpretation:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

[58] See parts 2 and 5 of the Preamble of the Common Position (2001/931).
[59] See Article 1(1) of the Common Position (2001/931).
[60] Article 1(4) of the Common Position (2001/931).
[61] Article 1(6) of the Common Position (2001/931).

> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 of the Vienna Convention includes the supplementary means of interpretation:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

The ECJ has affirmed that the Union has its own legal system.[62] Thus, the EU law is considered *sui generis*, and it is not subject to the interpretative principles of public international law. However, the articles of the Vienna Convention considering interpretation of treaties may be relevant for the interpretation of the Refugee Convention as an international treaty.[63] In addition, it is recognized that the Refugee Convention is a living instrument that must be interpreted and applied in the light of present-day conditions and in accordance with developments in international law.[64]

The UNHCR has underlined that even though the exclusion clause is subject to interpretation, it cannot be modified or amended without the explicit agreement between the contracting parties.[65] Exclusion ground (c) should be interpreted narrowly and with caution in light of the purposes and object of the Refugee Convention.[66] The main purpose of the Refugee Convention is asserted in its Preamble: to assure refugees the widest possible exercise of their fundamental rights and freedoms.[67] Therefore, the interpretation of the exclusion clause (c) should be guided by the awareness of that exclusion has an effect upon fundamentally important legally protected rights. In addition, the systematic context of the exclusion clause and the overall protective purpose of the Refugee Convention should be regarded.[68]

[62] See ECJ, Case 6/64, *Costa v ENEL*, 15.7.1964, p. 593.
[63] McAdam 2011, pp. 81–114.
[64] UNHCR Introductory Note 2010; See also McAdam 2011, pp. 103–104.
[65] UNHCR Background Note 2003, para. 7.
[66] UNHCR Statement on Article 1 F 2003, p. 14.
[67] See also UNHCR Handbook 2011, Foreword, p.1.
[68] Zimmermann and Wennholz 2011, p. 605.

The EU itself is not a party to the Refugee Convention. However, all its member states are parties to that convention. International agreements concluded by EU member states and not the Union itself are not binding on the EU institutions under public international law.[69] However, the special status of the Refugee Convention has been recognized in Article 78 of the TFEU and in the Preamble of the QD as explained above.

The interpretation methods used by the CJEU correspond to the rules of interpretation in the Vienna Convention to some extent.[70] Secondary legislation, such as the QD, is interpreted in light of the wording, the systemic structure, the drafting history, the objectives and the requirements of human rights or international law and the unwritten general principles of Union law.[71] The provisions of the QD, the exclusion clause included, must be interpreted in light of its general purpose and scheme and in harmonization with the Refugee Convention.[72] The QD is a humanitarian instruments which main aim is to ensure for those genuinely in need the minimum level of protection in all EU member states.[73] One of the main objectives is also to ensure that all member states apply common criteria for the identification of such persons.[74] Because exclusion constitutes an exception to a general rule, it should be interpreted strictly.[75]

EU asylum law and EU counter-terrorism law have different legal bases in the EU acquis. The QD and the Terrorism Directive are based in different sections of the Treaty on the Functioning of the European Union (TFEU). The legal basis of the QD lies in Article 78(2) (a) and (b) of the TFEU that is in Chapter 2 concerning policies on border check, asylum and immigration. In comparison, the Terrorism Directive has its legal basis in Article 83(1) of TFEU that lies in Chapter 4 concerning judicial cooperation in criminal matters.

[69] See Hailbronner and Thym 2016, p. 28.
[70] See Hailbronner and Thym 2016, p. 6 and p. 6 fn. 37; Senden 2011, pp. 50–66. Senden points out that the CJEU has never specifically referred to the Vienna Convention in any of its judgments. Nonetheless, the CJEU has used similar interpretation methods than the ones established in the Vienna Convention.
[71] Hailbronner and Thym 2016, p. 6.
[72] See CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 42.
[73] Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast), COM (2009) 551 final/2, p. 4; Proposal for a Regulation of the European Parliament and of the Council, COM (2016) 466 final, p. 19. See also CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 93.
[74] CJEU, C-369/17, *Shajin Ahmed*, 13 September 2018, para. 37.
[75] CJEU, C-369/17, *Shajin Ahmed*, 13 September 2018, para. 52.

The main aim of EU counter-terrorism regulations is to fight terrorism by means of harmonization or approximation of criminal law.[76] The purpose of the Terrorism Directive is to implement the most recent international standards and obligations in relation to counter terrorism to the EU law so as to adequately respond to the emerging terrorist threat.[77] In general, the purpose of modern counter terrorism regulations is the prevention of attacks rather than the pursuit of perpetrators.[78] Already Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism (hereafter, Amended Framework Decision (2008/919)) recognized the general policy objective of preventing terrorism.[79]

What is central in this research is the application of the EU counter terrorism law as guiding the interpretation of certain key concepts of the exclusion clause, and especially exclusion ground (c). In the interpretation of the EU asylum law, it is important to recognize that EU immigration and asylum legislation sometimes include similar terminology used in legislative acts in other areas of EU law, and that these concepts may have separate meanings.[80] This hypothesis emerges between certain concepts used in the EU counter terrorism regulations and the terminology of exclusion ground (c), such as the "participation in terrorist acts". In this regard, the CJEU supports the coherence of EU law and attempts to interpret similar concepts in an identical way when possible. This may mean that concepts developed in other parts of EU law are applied to asylum instruments.[81] Such interpretation method also supports the object of harmonizing the application of the EU asylum law in general, and exclusion ground (c) in particular. Nevertheless, the EU counter terrorism regulations may only be used as assisting the interpretation of these concepts, but it cannot determine the scope of application of the exclusion clause. That would be inconsistent with the suggestion that the Refugee Convention constitutes the cornerstone of the international legal regime for the protection

[76] See Article 83(1) of TFU; Recitals 6 and 7 of the Framework Decision (2002/475); Recital 10 of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism (hereafter, Amended Framework Decision (2008/919); Recitals 3 and 6 of the Terrorism Directive.
[77] Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 4, 12; Committee on Legal Affairs 2017, p. 4.
[78] Murphy 2015, p. 54.
[79] Recital 7 of the Amended Framework Decision (2008/919).
[80] Hailbronner and Thym 2016, pp. 7, 10.
[81] Hailbronner and Thym 2016, pp. 7, 10.

of refugees.[82] Therefore, the Refugee Convention imposes the limits for the interpretation of exclusion ground (c) even in the context of the EU law.

2. Exclusion Assessment on the Collective Level in Relation to Terrorist Groups

2.1 Acts Contrary to the Purposes and Principles of the United Nations

In this chapter, exclusion ground (c) relating to terrorism is discussed on the collective level. The discussion considers the terrorist group and its acts and activities. The exclusion assessment on the collective level may be derived into two different stages. Firstly, a determination is made as to whether the group the person concerned was a member of is terrorist in nature. Secondly, it is determined whether that group has committed acts falling within the scope of exclusion ground (c) during the relevant time the asylum applicant was a member.[83] However, the content of acts contrary to the purposes and principles of the UN are discussed first.

The purposes and principles of the UN to which exclusion ground (c) refers are described in Articles 1 and 2 of the Charter of the United Nations (hereafter, UN Charter).[84] The objectives of the UN may be summarised as follows: international peace and security; friendly relations among nations; international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting respect for human rights; and to serve as a centre for harmonising the actions of nations. The summarised version of the principles of the UN are: sovereign equality of its members; good faith fulfilment of obligations by members; peaceful settlement of international disputes; refraining from the threat or use of force against the territorial integrity or political independence of any state; assistance in any action the UN takes and refraining from giving assistance to states against which the UN is taking action; ensuring

[82] See Recital 4 of the QD; CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 53. Advocate General Sharpston determines that the scope and purpose of the QD and Article 1 of the Framework Decision (2002/475) are not the same. She also concludes that "[t]he Qualification Directive was adopted almost two years after the Framework Decision. The legislator could have included an express reference to the latter. However he did not do so, perhaps because a restriction of that nature would probably have been inconsistent with the Geneva Convention."

[83] See CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paras. 90, 95; CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 74. See also CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, paras. 76-79; CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, paras. 83-85; EASO Exclusion 2016, p. 42.

[84] United Nations, Charter of the United Nations, 24 October 1945.

that states that are not members of the UN act in accordance with the principles; and the UN has no authorisation to intervene in matters of domestic jurisdiction.

It is difficult to derive the types of acts that are meant in exclusion ground (c) from the purposes and principles described in Articles 1 and 2 of the UN Charter because these articles are so broad and general in character.[85] Originally, the intention of the drafters of the Refugee Convention was to cover violations of human rights in exclusion ground (c) that were not already covered in exclusion grounds (a) and (b) but that were nevertheless of similar exceptional character.[86] During the negotiations on Article 1F(c) of the Refugee Convention, Pakistan's representative observed that the ground was "so vague as to be open to abuse by governments wishing to exclude refugees".[87] The vagueness of the article makes it difficult to define what kind of acts fall into the category or who may commit such acts.[88]

To determine what kind of terrorism related activity may be considered as against the purposes and principles of the UN, the relevant UNSC terrorism related resolutions should be examined. In Resolution 1373 (2001), the UNSC stressed that Member States are obliged to take appropriate measures before granting refugee status to ensure that the asylum seeker has not planned, facilitated, or participated in the commission of terrorist acts. Refugee status should not be abused by the perpetrators, organisers, or facilitators of terrorist acts. The UNSC also declared that "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".[89] Resolution 1377 (2001) confirmed this stance and also added in its preamble that the "preparation of as well as any other form of support for acts of international terrorism" are also contrary to the purposes and principles of the UN.[90]

In Resolution 1624 (2005), the UNSC called upon states to adopt measures with a view to deny safe haven to any persons with respect to whom there is credible and relevant

[85] See UNHCR Statement on Article 1 F 2003, p. 13.
[86] UNHCR Background Note 2003, para. 46.
[87] UNHCR Background Note 2003, p. 17, fn. 41.
[88] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 58.
[89] Resolution 1373 (2001).
[90] Resolution 1377 (2001).

information giving serious reasons for considering that the person has been guilty of incitement to terrorist acts. It is also stressed in this resolution that any measures to combat terrorism must comply with, inter alia, refugee law and humanitarian law.[91] The most recent is Resolution 2178 (2014), in which the UNSC expressed its concern over the growing threat posed by foreign terrorist fighters. In this resolution, the UNSC emphasises that states are obliged to prosecute and punish persons who support terrorism by recruiting, organising, equipping and transporting individuals to a state other than their states of residence for the purpose of the perpetration, planning, preparation of, and participation in terrorist acts.[92]

The UNSC resolutions related to combating terrorism cover a wide variety of terrorism related acts and activities that are declared concerning, and which states should prevent and suppress. However, the resolutions do not contain a clear definition of terrorism,[93] nor is there a common, internationally accepted definition in international law.[94] Therefore, it is problematic that the above-mentioned UNSC resolutions promote the exclusion of asylum applicants on the grounds of *terrorism* without any clear legal definition of the term.[95] The UNHCR is concerned that the absence of such a legal definition may lead to an overly extensive application of exclusion ground (c) in relation to terrorism related activity.[96] In the EU context, the concept of terrorism is defined first in the Framework Decision (2002/475) and the Common Position (2001/931), and more recently in the Terrorism Directive. Therefore, in the EU context it may be justified to refer to the EU counter terrorism legislation, mainly the Terrorism Directive, for interpreting the terrorism related concepts in the application of exclusion ground (c).[97]

Due to the vagueness of the concept of "acts contrary to the purposes and principles of the UN", the UNHCR has also advised that it is important to read Article 1F(c) narrowly and to use a high threshold for acts mentioned in the article.[98] Acts that can lead to

[91] Resolution 1624 (2005).
[92] Resolution 2178 (2014).
[93] See Goodwin-Gill and McAdam 2007, p. 194. However, in Resolution 1566 (2004), the UNSC recalled states to prevent certain acts, and this definition may be regarded as an effort to determine how "acts of terrorism" should be understood.
[94] See Saul 2006, p. 57. See also Goodwin-Gill and McAdam 2007, p. 192.
[95] See Singer 2019, p. 380.
[96] UNHCR Annotated Comments on the QD 2005, p. 6; UNHCR Background Note 2003, para. 46.
[97] EASO Judicial Analysis 2020, p. 102.
[98] See UNHCR Background Note 2003, para. 46; The Status of Refugees in International Law, 1966, p. 283. Grahl-Madsen comments that "It seems that agreement was reached on the understanding that the

exclusion under Article 1F(c) are those that offend the purposes and principles of the UN in a fundamental manner. They are acts that attack the very basis of the international community's coexistence. Such acts can affect international peace, security, and peaceful relations between states. In addition, serious and sustained violations of human rights may be included in the category.[99] The requirement to interpret the article restrictively has been derived from these UNHCR statements. In addition, the act must be of a sufficient gravity and have international implications.[100] The terrorism related activity outlined in the Terrorism Directive is analysed against these requirements in the following sub-chapters.

2.2 Terrorist Nature of a Group

In *B and D*, the CJEU determined that the *terrorist nature* of a group of which the asylum applicant was a member is a factor that must be taken into account in the exclusion assessment.[101] In its guidelines for the exclusion assessment, the UNHCR stresses the importance of analysing the *violent nature* of the organisation of which the asylum applicant was a member.[102] Although both these concepts refer mainly to terrorist groups, the contents of the analysis in relation to them is considerably different.

According to the UNHCR, when considering the violent nature of a group, the actual activities of the group, the organisation's place and role in the society in which it operates, and its organisational structure must be carefully examined.[103] In addition, the fragmentation of certain organisations should be considered.[104] The fragmentation of organisations is considered in more detail in the United Kingdom (hereafter, the UK) immigration tribunal's decision in *Gurung v. Secretary of State for the Home Department*. In its decision, the tribunal explained that when comparing organisations through their

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phrase should be interpreted very restrictively". See also CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 59.

[99] UNHCR Guidelines 2003, para. 17; UNHCR Background Note 2003, paras. 46-47; UNHCR, Addressing security concerns 2015, para. 20.

[100] UNHCR Annotated Comments on the QD 2005, p. 6; UNHCR Addressing Security Concerns 2015, para. 20; EASO Judicial Analysis 2020, p. 92. See also Singer 2019, p. 386.

[101] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 90.

[102] UNHCR Guidelines 2003, para. 19; UNHCR Background Note 2003, paras. 60–61; UNHCR Addressing Security Concerns 2015, para. 24.

[103] UNHCR Background Note 2003, para. 61; UK Immigration Appeal Tribunal, *Gurung*, 15 October 2002, para. 110.

[104] UNHCR Background Note 2003, para. 61; UK Immigration Appeal Tribunal, *Gurung*, 15 October 2002, para. 110; CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 77.

violent character, on one end of the continuum are organisations that may have significant support amongst the population. In addition, the political aims and objectives may include political, social, economic and cultural issues. The long term aims of such organisations include a parliamentary, democratic mode of government and the safeguarding of basic human rights. Such organisations may have had, in a limited way or for a limited time, a military wing in a response to atrocities committed by a dictatorial government.

At the other end of the continuum are organisations that have little or no political agenda, or if they originally had genuine political aims and objectives, they have now come to focus on terrorism as the mode of operation. The recruitment policy, structure, and strategy of those organisations have increasingly concentrated on the execution of terrorist acts that are seen as a way of winning the war against the enemy, even though the chosen targets are primarily civilian. Such organisations may also strive for authoritarian government and disregard fundamental human rights.[105] The UNHCR has further determined that after carefully assessing the nature of the organisation, members of groups whose purposes, activities, and methods are of a *particularly violent nature*, could be presumed to have individual responsibility for the acts of the group, and thus be excluded from refugee status.[106] Examples of "particular violent nature" include indiscriminately killing or injuring of members of the civilian population or acts of torture.[107]

An emerging trend in some states that are party to the Refugee Convention is increased concentration on the level of participation of the individual in the commission of an Article 1 F crime or act, rather than considering the nature of the organisation of which the individual was a member.[108] A similar trend is noticeable in the CJEU's two preliminary rulings for *B and D* and *Lounani*, which consider the exclusion of members of terrorist organisations. In these cases, the CJEU has determined that no presumption of individual responsibility is allowed in relation to members of terrorist groups, and the

[105] UK Immigration Appeal Tribunal, *Gurung*, 15 October 2002, paras. 112-113. See also Federal Court of Canada, *Ramirez*, 7 February 1992.
[106] UNHCR Guidelines 2003, para. 19; UNHCR Background Note 2003, paras. 60–61; UNHCR Addressing Security Concerns 2015, para. 24.
[107] UNHCR Background Note 2003, para. 60.
[108] Singer 2015, p. 139. See also UK Supreme Court, *JS (Sri Lanka)*, 17 March 2010, para. 35; Supreme Court of Canada, *Ezokola*, 19 July 2013, para. 41.

exclusion assessment must always include an individual analysis of all the facts of the case.[109]

The CJEU's analysis in relation to the nature of the group is different from the UNHCR's analysis because it only requires analysis of the *terrorist* nature of the group rather than the *violent* nature of the group.[110] The concept of "terrorist group" is defined in Article 2(3) of the Terrorism Directive as "a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences; 'structured group' means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".[111] However, based on CJEU case law, it seems that an assessment of whether a group fulfils this definition of a terrorist group is not required if the group appears on a list of terrorist organisations.

The CJEU determined in *B and D* that the terrorist nature of the group to which an asylum applicant is associated can be established if the group has been added to the list forming the Annex to Common Position (2001/931).[112] The Court confirmed this stance in *H.T.*, where it concluded that the inclusion of an organisation on a list annexed to Common Position (2001/931) is a strong indication that the group is, in fact, a terrorist organisation or at least is suspected of being such an organisation.[113] Furthermore, in *Lounani*, the CJEU does not otherwise analyse the nature of the organisation of which Lounani was a member, but only refers to its registration (on 10 October 2002) on the UN list that identifies certain individuals and entities that are subject to sanctions, and to the fact that the organisation of which Lounani was a member continues to be named on that list.[114]

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[109] See CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paras. 87-88 and Section 1 of the Operative part of the judgment; CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 72.

[110] See CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, paras. 92-95. Advocate General Sharpston states that the terrorist organisation does not need to have made any acts of a *particularly cruel nature* so that the exclusion clause may be applied.

[111] The definition of a terrorist group in the Terrorism Directive corresponds to the definition of such a group in Article 1(3) of the Common Position (2001/931) and Article 2(1) of the Framework Decision (2002/475).

[112] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 90.

[113] CJEU, Case C-373/13, *H.T*, 24 June 2015, para. 83.

[114] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 74. See also CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 36. Advocate General Sharpston considered that the listing of the terrorist group in question on the UN Sanctions list had not been questioned and therefore, the present proceedings are based on that that the MICG is validly categorised by the UN as a terrorist organisation. She was referring to the CJEU case *A and Others*, in which the Court considers the definition of a terrorist organisation in international law, and which was at that time still in the pipeline.

Therefore, it appears that this part of the exclusion analysis is solely covered by referring to the relevant lists of terrorist groups, and whether, if the group in question is found on such a list, its terrorist nature has been established.

The listing has another purpose in the assessment of the nature of the organisation. As the requirements derived from UN resolutions state that only acts of *international* terrorism are regarded as against the purposes and principles of the UN, the excludable terrorist activity must have an international dimension.[115] Therefore, the precondition for the application of exclusion ground (c) is that the terrorist group operates internationally.[116] Consequently, there is a distinction between international and domestic terrorism.[117] In *Lounani*, the CJEU determined that the international dimension of a terrorist group is satisfied if the group in question has been entered in the UN Sanctions List.[118]

In some cases, it may appear problematic if a group's features are not analysed further than the inclusion on the UN or EU terrorist lists.[119] Groups that have been listed as terrorist groups may have wings or branches that are separate from the military or terrorist wing. Some of the listed terrorist groups may also be armed groups involved in non-international armed conflicts and, in addition to the military wing, they may have, for example, political divisions, human rights wings, or humanitarian relief branches.[120] Groups may be fragmented in such a way that they have moderate and extremist cells, or the objectives and strategies may have changed over time.[121] When only concentrating on the listing of a group, the fragmentation of such groups is disregarded; thus, in this kind of analysis groups that are particularly violent appear to be on the same level as more moderate groups.

[115] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 84. See also CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 74–75.
[116] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 74.
[117] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 70; CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 86.
[118] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 86; CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 74.
[119] See also UNHCR Background Note 2003, para. 109. It is questionable, whether other lists of terrorist groups except the UN and EU terrorist lists would even be relevant in the exclusion assessment, as national lists of terrorist organisations tend to have low evidentiary threshold in relation to the inclusion of an organisation to such a list, because no international consensus is needed for the act.
[120] Sivakumaran 2017, p. 361.
[121] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, fn. 70.

The lack of more thorough analysis in relation to the nature of the group is covered, to some extent, in the following step in the exclusion assessment: assessment in relation to relevant acts of the listed terrorist organisation. Inclusion on lists of terrorist organisations does not necessarily mean that the group in question has committed any excludable acts. Such a listing is only one factor to consider when assessing whether the organisation has committed acts falling within the scope of exclusion ground (c).[122]

2.3 Terrorist Acts

In Resolutions 1373 (2001) and 1377 (2001) the UNSC determined that acts of international terrorism are a threat to international peace and security and thus are contrary to the purposes and principles of the UN. However, as previously explained, "terrorism" has no clear or universally agreed definition.[123] Therefore, in the UNHCR's view, labelling a particular act, person, or group as terrorist in nature is not enough to determine the act excludable or to justify exclusion. Rather than focusing on the label, it is necessary to determine whether the acts of the organisation constitute acts such as those described in Article 1 F(c).[124]

In *B and D*, the CJEU determined that the acts committed by a terrorist organisation must meet the conditions laid down in the exclusion clause. It must be determined whether the terrorist organisation has committed acts against the purposes and principles of the UN during the relevant period the asylum applicant was a member.[125] In relation to exclusion ground (c), the Court observed that it is clear from UNSC Resolutions 1373 (2001) and 1377 (2001) that international terrorist acts are, generally speaking and irrespective of any state participation, contrary to the purposes and principles of the UN.[126] Therefore, the Court concluded that terrorist acts with an "international dimension" fall within the

[122] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paras. 90–91 and Section 1 of the Operative part of the judgment. See also CJEU, Case C-373/13, *H.T*, 24 June 2015, para. 83. See also UNHCR Background Note 2003, paras. 106, 109. The UNHCR has underlined that if an asylum seeker is a member of an organisation that is included in an international list of terrorist organisations, that fact does not in itself satisfy the "serious reasons to consider" test. However, this kind of fact must trigger the consideration of the exclusion clauses. According to the UNHCR, the evidentiary threshold for inclusion to such lists is likely much lower than the "serious reasons to consider" test, because the terrorist lists are drawn up in a political process rather than in a judicial one.
[123] See Saul 2006, p. 57. The problem to establish such a general definition lies fundamentally in political disagreements, since technically that would be possible.
[124] UNHCR Addressing Security Concerns 2015, para. 23.
[125] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 98 and Section 1 of the Operative part of the judgment.
[126] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 83.

scope of the exclusion clause.[127] However, the Court did not further define the concept of a *terrorist act* in the context of the exclusion clause.

According to Goodwin-Gill and McAdam exclusion ground (c) ought only to be applied, when the act conforms to an offence that the international community has specifically identified as one which must be addressed in the fight against terrorism.[128] The UNSC attempted to define "acts of terrorism" in Resolution 1566 (2004). It called upon states to prevent and punish such acts with penalties consistent with their grave nature:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism…[129]

Terrorist acts are defined within several international and regional instruments pertaining to terrorism.[130] However, international instruments concerning terrorism have concentrated on identifying and prohibiting certain *activities* that are condemned by the whole international community rather than identifying the terrorism related *motive* behind such acts.[131] Article 2 of the International Convention for the Suppression of the Financing of Terrorism defines a terrorist act as

> an act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[132]

In the EU context, terrorism related activity is thoroughly defined in the Terrorism Directive. Both the Terrorism Directive and its predecessor, the Framework Decision (2002/475), define three categories of terrorism related conduct that Member States are required to criminalise. These are terrorist offences in Article 3, offences relating to a

[127] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para 84.
[128] Goodwin-Gill and McAdam 2007, p. 197.
[129] Resolution 1566 (2004).
[130] UNHCR Background Note 2003, para. 80; See also Annex D to UNHCR Background Note 2003, pp. 43-45.
[131] See UNHCR Background Note 2003, para. 79; Murphy 2015, p. 52; Goodwin-Gill and McAdam 2007, pp. 192–193; Singer 2015, pp. 15-16.
[132] Article 2 of the International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002).

terrorist group in Article 4, and offences related to terrorist activities in Articles 5 to 12. The terrorist offences regulated in Article 3 may be regarded as the principal terrorist acts.[133] The European Commission's Proposal for the Terrorism Directive explains that terrorist acts are offences that become terrorist offences by reason of the motivation of the offender. Therefore, a terrorist act consists of an objective and a subjective element, meaning the actual offence and the specific intent.[134] Article 3(1)[135] defines the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, as terrorist offences:

> (a) attacks upon a person's life which may cause death;
>
> (b) attacks upon the physical integrity of a person;
>
> (c) kidnapping or hostage-taking;
>
> (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
>
> (e) seizure of aircraft, ships or other means of public or goods transport;
>
> (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons;
>
> (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life;
>
> (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
>
> (i) illegal system interference, as referred to in Article 4[136] of Directive 2013/40/EU of the European Parliament and of the Council in cases where

[133] See Lehto 2008, p. 401.
[134] Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 15.
[135] The list of acts in Article 3(1) of the Terrorism Directive corresponds to the list of acts regarded as terrorist offences in the Framework Decision (2002/475). Only addition is the point (i) that refers to Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and considers illegal system interference and illegal data interference.
[136] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218, 14.8.2013, p. 8). Hereafter, Directive on Attacks against Information Systems. Article 4 of the Directive on Attacks against Information Systems considers illegal system interference reads as followed: "Member

Article 9(3)[137] or point (b) or (c) of Article 9(4)[138] of that Directive applies, and illegal data interference, as referred to in Article 5[139] of that Directive in cases where point (c) of Article 9(4) of that Directive applies;

(j) threatening to commit any of the acts listed in points (a) to (i).

The list of terrorist offences is extensive, and many kinds of acts may be regarded as terrorist offences. The definition of terrorist acts codifies the most important aspects of the UN conventions against terrorism. However, the article has even wider scope and some of the points cannot be found in UN conventions and protocols, such as point (h) protecting natural resource supplies, and point (j) criminalising the threat to commit the offences listed in points (a) to (i).[140] However, all acts may fall under the far-reaching nature of relevant UNSC resolutions concerning terrorism. The article also has a requirement of seriousness that is assessed based on the nature or context of the offence in relation to the notion that it may seriously damage a country or an international organisation. Nevertheless, not all the acts described in points (a) to (j) would fulfil the gravity requirement demanded in the application of exclusion ground (c).[141]

In *B and D*, the CJEU did not analyse the gravity of the terrorist acts of the terrorist groups in question. It determined based on the relevant UNSC resolutions that international terrorist acts are against the purposes and principles of the UN. However, the CJEU

States shall take the necessary measures to ensure that seriously hindering or interrupting the functioning of an information system by inputting computer data, by trans-mitting, damaging, deleting, deteriorating, altering or suppressing such data, or by rendering such data inaccessible, intentionally and without right, is punishable as a criminal offence, at least for cases which are not minor.".

[137] Article 9(3) of the Directive on Attacks against Information Systems: "Member States shall take the necessary measures to ensure that the offences referred to in Articles 4 and 5, when committed intentionally, are punishable by a maximum term of imprisonment of at least three years where a significant number of information systems have been affected through the use of a tool, referred to in Article 7, designed or adapted primarily for that purpose.".

[138] Article 9 of the Directive on Attacks against Information Systems considers penalties. Article 9(4)(a–c) reads as followed: "Member States shall take the necessary measures to ensure that offences referred to in Articles 4 and 5 are punishable by a maximum term of imprisonment of at least five years where: (a) they are committed within the framework of a criminal organisation, as defined in Framework Decision 2008/841/JHA, irrespective of the penalty provided for therein; (b) they cause serious damage; or (c) they are committed against a critical infrastructure information system.".

[139] Illegal data interference is determined in Article 5 of the Directive on Attacks against Information Systems: "Member States shall take the necessary measures to ensure that deleting, damaging, deteriorating, altering or suppressing computer data on an information system, or rendering such data inaccessible, intentionally and without right, is punishable as a criminal offence, at least for cases which are not minor.".

[140] Murphy 2015, p. 56. See also Lehto 2008, p. 400.

[141] See UNHCR Observations on the European Commission Proposal 2001, para. 3. The UNHCR has stated in the context of the application of the Framework Decision (2002/475) that unwarranted automaticity between such criminal offences related to terrorism and the application of the exclusion clause should generally be avoided.

appears to understand terrorist acts to cover, in particular, acts that are characterised by their violence towards civilian populations.[142] In his opinion in relation to *B and D*, Advocate General Mengozzi considered that the act's intrinsic nature and gravity is also taken into account in the exclusion assessment.[143] He noted that the UNHCR's recommended interpretation, which is also generally accepted both in legal literature and in practice, is that terrorist acts insofar as they involve the use of indiscriminate violence and are directed at civilians or persons unconnected with the objectives pursued, are generally disproportionate to the purported political objectives and are thus categorised as non-political crimes, as required in the application of exclusion ground (b).[144] Such acts, given their nature, the methods used, and their seriousness are considered as acts against the purposes and principles of the UN when applying exclusion ground (c).[145] Therefore, from this determination it could be stated that at least acts involving indiscriminate violence or violence towards civilians satisfy the gravity requirement.

The definition of a terrorist offence in the Terrorism Directive does not include the word civilian. However, most of the acts defined in the article have a requirement that the results of the act have potential to endanger human life. Even those acts that do not have this specific requirement, such as hostage-taking or possession of certain weapons, emphasise the protection of human life and physical integrity of a person.[146] These kinds of acts are quite close to the definition of violence towards the civilian population and could establish grounds for exclusion. However, not all acts covered in Article 3(1) of the Terrorism Directive require that violence towards civilians has occurred or even that human lives have been endangered. For example, point (d) of the article requires that the said act[147] is likely to endanger human life *or result in major economic loss*. Similarly,

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[142] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 81.
[143] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 68.
[144] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 69.
[145] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 70. See also Proposal for a regulation of the European Parliament and the Council, COM(2016) 466 final, p. 37. The proposal for QR would add an additional paragraph to Article 12 concerning exclusion. According to Article 12(5): "For the purposes of points (b) and (c) of paragraph 2, the following acts shall be classified as serious non-political crimes:
(a) particularly cruel actions when the act in question is disproportionate to the alleged political objective,
(b) terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective."
[146] See Lehto 2008, p. 399.
[147] "…causing extensive destruction to a government or public facility, a transport system, an infrastructure facility including an information system, a fixed platform located on the continental shelf, a public place or private property…"

point (j) only considers *threatening*. Assessed against the background of the CJEU's judgment, it is questionable whether acts that may not place any human lives in danger would be serious enough to cross the high threshold of exclusion ground (c).

The assessment of the gravity of the act also covers assessment in relation to the fragmentation of groups.[148] Some listed terrorist groups are more violent towards civilians and in the means used to achieve their aims than other groups. Therefore, the particularly violent nature of certain groups is considered through the above gravity analysis of the acts of the group. As discussed above, such acts against civilians may easily be determined as fulfilling the gravity requirement of the excludable acts.

Besides describing the specific acts, the definition of a terrorist offence also requires a subjective element, the specific terrorist intent, that is regulated in Article 3(2) of the Terrorism Directive. To be considered as terrorist offences, the article requires that the acts described in Article 3(1) are committed with one of the following aims:

> (a) seriously intimidating a population;
>
> (b) unduly compelling a government or an international organisation to perform or abstain from performing any act;
>
> (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Even though the article concerning terrorist offences also covers the terrorist intent or the terrorist aims that the act must satisfy to be regarded as a terrorist offence in the meaning of the article, in the exclusion assessment similar intent does not appear to have relevance, at least in relation to acts of *listed* terrorist groups. In the exclusion assessment, the group's terrorist intent in relation to its acts appears to be assumed in circumstances in which the terrorist nature of the group is established through the listing.

2.4 Terrorist Activity

After its judgment in *B and D*, the CJEU expanded its determination on the application of exclusion ground (c) from the actual terrorist acts to terrorism related activity. In the *Lounani* case, the CJEU based its determination of the facts on the criminal conviction

[148] See above sub-chapter 2.2: The fragmentation of certain terrorist groups is disregarded in the assessment of the terrorist nature of a group.

imposed on Lounani by the local court "tribunal correctionnel Bruxelles". The established facts in the conviction included "providing logistical support to a terrorist group by the provision of, inter alia, material resources or information"; "forgery of passports" and "fraudulent transfer of passports"; and "active participation in the organisation of a network for sending volunteers to Iraq".[149] The terrorist group of which Lounani was a member, the Moroccan Islamic Combatant Group (hereafter, MICG), is linked to Al-Qaeda, which has committed terrorist acts against international bodies.[150] Therefore, the MICG was considered as a cell providing logistical support for a terrorist movement.[151]

However, no specific act of the MICG could be regarded as falling within the terrorist offences listed in Article 1(1) of the Framework Decision (2002/475) (that mainly correspond to the terrorist offences in Article 3(1) of the Terrorism Directive), even in the inchoate form.[152] Therefore, such activity probably would not satisfy the gravity requirement of the indiscriminate violence discussed in the previous sub-chapter. In her opinion on *Lounani*, Advocate General Sharpston denied that exclusion ground (c) would contain a particular threshold for the violence used.[153] In addition, the CJEU denied that the Framework Decision (2002/475) and the QD would be connected in the sense that the application of the exclusion clause would require that an actual terrorist offence has been committed.[154] The Court referred to UNSC Resolutions 1377 (2001) and 1624 (2005) and determined that acts contrary to the purposes and principles of the UN are not confined to "acts, methods and practices of terrorism". It can be derived from the UNSC Resolutions that "the financing, planning and preparation of, as well as any other form of support for acts of international terrorism" are also against the purposes and principles of the UN.[155] The CJEU highlighted the importance of Resolution 2178 (2014), in which the UNSC expressed its "grave concern over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of …

[149] CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 30, 64.
[150] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 26.
[151] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 30.
[152] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 36. See also CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 59; CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 39. One of the questions of the referring national court was concerning the relationship between the QD and the Framework Decision (2002/475), and whether participation to a terrorist offence as defined in Article 1(1) of Framework Decision (2002/475) is required in the application of the exclusion clause.
[153]CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, paras. 92-95.
[154] CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 49-54.
[155] CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 46-47, 66.

terrorist acts".[156] In this resolution, the UNSC also expressed its concern "that international networks have been established by terrorists and terrorist entities among States of origin, transit and destination through which foreign terrorist fighters and the resources to support them have been channelled back and forth".[157] In this resolution, the UNSC also noted "that the threat of foreign terrorist fighters may affect all regions and Member States, even those far from conflict zones". Fundamentally, in this resolution the UNSC considered that foreign terrorist fighters pose a threat to international peace and security. The CJEU drew a conclusion that Article 12(2)(c) is not confined to the actual perpetrators of terrorist acts but it also extends to those who have engaged in terrorist activity, such as persons "who engage in activities consisting in the recruitment, organisation, transportation or equipment of individuals who travel to a State other than their States of residence or nationality for the purpose of, inter alia, the perpetration, planning or preparation of terrorist acts".[158]

Articles 5 to 12 of the Terrorism Directive cover offences related to terrorist activities. These are not terrorist acts as such but may be considered as preparatory acts for terrorism.[159] They include public provocation to commit a terrorist offence; recruitment for terrorism; providing or receiving training for terrorism; travelling for the purpose of terrorism; organising or otherwise facilitating travel for the purpose of terrorism; terrorist financing; and other offences related to terrorist activities[160]. For the offences related to terrorist activity to become punishable, it is not necessary that a terrorist offence is committed.[161] Offences linked to terrorist activities are not committed with the defined terrorist intent; rather, they are executed with a view to committing or contributing to terrorist acts, but they are not the actual terrorist acts themselves.[162] Therefore, a link

[156] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 67; Resolution 2178 (2014). The Resolution 2178 (2014) requires that states ensure the prevention and suppression of such activities
[157] Resolution 2178 (2014).
[158] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 69.
[159] In addition, the offences relating to a terrorist group are not terrorist acts as such. These offences are discussed in Chapter 3.
[160] The offences related to terrorist activities are defined such as aggravated theft, extortion or drawing up or using false administrative documents if they are committed with a view of committing a terrorist offence.
[161] Article 13 of the Terrorism Directive. See also CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 77. In *Lounani*, it was not required that the volunteers who were helped by the terrorist group to travel to Iraq to have committed any terrorist acts either.
[162] Commission staff working document - Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism (COM(681) final), COM(2007) 681 final.

between the actual harm a terrorist act causes and the offences related to terrorist activities is not required.[163]

Furthermore, in relation to the CJEU's analysis in *Lounani*, it is not required that the terrorist organisation had committed or even planned to commit any actual terrorist acts.[164] Terrorism linked activity is sufficient in cases where it includes some form of support for acts of international terrorism as determined in the UNSC resolutions.[165] This is similar to the requirement in relation to offences related to terrorist activities in the Terrorism Directive. For the offences to be punishable, there must be a purpose of committing or contributing to the commission of the actual terrorist offences. Therefore, the excludable terrorist activity appears to correspond to the offences related to terrorist activities as defined in the Terrorism Directive.

All the offences related to terrorist activities in the Terrorism Directive are of a serious nature because of their potential to lead to the commission of actual terrorist offences. They also enable terrorists and terrorist groups to maintain and further develop their criminal activities, which justifies the criminalisation of such conduct.[166] Many of the offences related to terrorist activities (Articles 5 to 12) are also mentioned in the UNSC resolutions, but possibly in a simpler form. Resolution 2178 (2014) concerning foreign terrorist fighters has been in the background of Articles 9 and 10 of the Terrorism Directive that consider travelling or assisting travel for the purpose of terrorism.[167] Article 5 of the Terrorism Directive considers public provocation to commit a terrorist offence, which means, in a simpler form, the incitement to commit a terrorist act, which is mentioned in Resolution 1624 (2005). This resolution calls upon all states to deny a safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of *incitement* to commit a terrorist act or terrorist acts.[168] Article 6 of the Terrorism Directive criminalises

[163] See Murphy 2015, p. 67.
[164] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 77.
[165] CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 46-47, 66.
[166] Recital 9 of the Terrorism Directive. See also Committee on Civil Liberties, Justice and Home Affairs, Draft report 2016, p. 38–39. Criminalisation of the support activities that do not have a direct link to the terrorist acts is important because otherwise "the networks of recruiters, decision-makers, contact-points and communication strategists would slip through the European and national law enforcements' and courts' investigations and judicial prosecution".
[167] Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 4.
[168] Incitement of terrorist acts is mentioned also in other UNSC resolutions, such as Resolution 2161 (2014).

recruitment for terrorism. The UNSC has expressed its concern in relation to recruiting for terrorist groups, *inter alia*, in Resolutions 1373 (2001); 2161 (2014); and 2199 (2015). Articles 7 and 8 consider providing and receiving training for terrorism. For example, in Resolution 1989 (2011) the UNSC decided that states must, among other measures, prevent terrorist groups from having access to technical advice, assistance or training related to military activities. Terrorist financing is criminalised in Article 11 of the Terrorism Directive. Financing of terrorism has also been focused on in the UNSC resolutions. Resolution 1373 (2001) concentrates on, among other issues, the prevention and suppression of terrorist financing. In Resolution 1377 (2001), the UNSC stressed that, *inter alia*, financing acts of international terrorism is contrary to the purposes and principles of the Charter of the UN. As a result, many of the offences related to terrorist activities are of a notable seriousness because they have direct links to the UNSC resolutions.

As disclosed at the beginning of this chapter, acts excludable under exclusion ground (c) must still satisfy the gravity and internationality requirements. In fact, the CJEU's judgment in *Lounani* has been criticised because the CJEU does not appear to have assessed the gravity of the terrorist activity, and considered that it was enough that the acts assisting the travel of foreign terrorist fighters are directly prohibited in the UNSC resolutions.[169] If the act's or activity's link to a UNSC resolution was only considered in the gravity assessment, all the offences related to terrorist activities would fall under exclusion ground (c). However, according to the UNHCR, equating any action contrary to the UNSC resolutions as falling within exclusion ground (c) would be inconsistent with the object and purpose of the provision.[170] The act or activity must offend the purposes and principles of the UN in a fundamental manner, and exclusion ground (c) is only triggered in extreme circumstances. Crimes capable of affecting international peace, security and peaceful relations between states would fall within the exclusion grounds.

[169] Singer 2019, p. 387. See also Walsh 2017.
[170] UNHCR, Background Note 2003, para. 47. See also Zimmermann and Wennholz 2011, pp. 603–604; Goodwin-Gill and McAdam 2007, p. 196. Goodwin-Gill and McAdam assert that "[i]t is one thing to state as a matter of policy that terrorism is contrary to the purposes and principles of the United Nations, but quite another to translate that policy into a rule of law".

Therefore, the international implications of acts should be assessed in terms of their seriousness and impact on international peace and security.[171]

Furthermore, in her opinion in *Lounani*, Advocate General Sharpston acknowledges that the "serious reasons to consider" standard requires that a high threshold is used for invoking exclusion ground (c). The act must have an impact on the international level, and be of such gravity that it has implications for international peace and security.[172] Sharpston denies that a terrorist organisation should have conducted any violent acts of a particularly cruel nature so that exclusion clause may be applied.[173] Therefore, even though the group had not committed any disproportionate attacks against the civilian population or any particularly cruel attacks, the gravity threshold for the excludable act may be satisfied if there are considerable negative effects on international peace and security. Therefore, even though the UNSC resolutions relating to combating terrorism cover a wide variety of acts of concern, and the resolutions may even cover all the different terrorism related activities of the Terrorism Directive, it does not necessarily mean that all these acts would satisfy the requirements of the application of exclusion ground (c) in all situations. The mention of these acts or activities in the UNSC resolution still does not mean that they fulfil the gravity requirement in relation to the application of exclusion ground (c).

The UNHCR has discussed the seriousness of providing funding to terrorist groups in the context of exclusion ground (b) and concluded that such activities, even if criminalised, may not automatically reach the gravity required to fall under exclusion ground (b). According to the organisation, the particulars of the crime should be considered on a case by case basis. For example, if the amount of financial support paid is small and if the funding has occurred on a sporadic basis, the offence may not reach the required level of seriousness. Conversely, regular contributions of large amounts to a terrorist organisation may reach the gravity level required for the application of exclusion ground (b).[174] The CJEU has also dealt with funding of terrorism in relation to Article 24(1) of the QD

[171] CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 70; CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, 75, 89. See also UNHCR Background Note 2003, para. 47. The UNCHR has also emphasized the relevance to analyse the consequences of the act on international peace and security.
[172] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, paras. 75, 89.
[173] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, paras. 92-95.
[174] UNHCR Background Note 2003, para. 82.

concerning the revocation of a residence permit in its case *H.T.* The case concerned Mr. T. who had, during the act of distributing a periodical published by the Kurdistan Workers' Party (hereafter, the PKK), also collected donations on behalf of this listed terrorist group.[175] The CJEU decided that the fact that he committed[176] such acts does not automatically mean that he supported the legitimacy of terrorist activities, and such acts also do not constitute terrorist acts as such.[177] To derive a conclusion from this discussion, the gravity requirement in relation to exclusion ground (c) may not be easily fulfilled, particularly in situations involving moderate sums.

In conclusion, the terrorist activity regulated in Articles 5 to 12 of the Terrorism Directive may be excludable if the act is serious enough to have a grave negative impact on international peace and security. Therefore, even though the act or activity of the terrorist group is mentioned in the UNSC resolutions relating to combating terrorism, it must also be of sufficient gravity to have a negative effect on international peace and security.

3. Individual Responsibility and Membership of a Terrorist Group

3.1 Requirement for Individual Responsibility

In this chapter, the exclusion assessment is discussed on the individual level. For the exclusion to become applicable, there must be *serious reasons to consider* that the applicant is guilty of acts contrary to the purposes and principles of the UN. The threshold for serious reasons to consider is typically the standard of proof for exclusion. The standard is the same in the Refugee Convention and the QD. The standard of proof for exclusion is significantly lower than the standard of proof used in criminal law, *beyond reasonable doubt*.[178] Therefore, exclusion does not require the determination of guilt in the criminal justice sense.[179] However, the threshold must be high enough to satisfy the overall humanitarian objective of the Refugee Convention, and that applicants otherwise eligible for refugee status are not excluded incorrectly.[180]

[175] CJEU, Case C-373/13, *H.T*, 24 June 2015, paras. 34, 81.
[176] In this case Mr. T. directly committed these acts, and the discussion in relation to funding terrorism did not consider the acts of the terrorist group.
[177] CJEU, Case C-373/13, *H.T*, 24 June 2015, para. 91.
[178] See in general about the standard of proof in international criminal law in Rohan 2010, pp. 650-670.
[179] UNHCR Background Note 2003 para. 107.
[180] UNHCR Background Note 2003, para. 107. In the view of the UNHCR, at least the standard of proof required for an indictment of an international criminal tribunal also satisfies the standard of proof for exclusion.

The clearest serious reasons to consider standard is relevant as the standard of proof for the quantity of evidence required to exclude a person otherwise eligible for refugee status. However, the threshold requires that the evidence is also *qualitatively sufficient*. It is not sufficient that the amount of evidence rises above the required level; the evidence must be serious enough.[181] Furthermore, the adduced evidence must be *substantively sufficient* in relation to the elements of the crime or act in question. This means that the quantitatively and qualitatively sufficient evidence also supports the person's individual responsibility for the excludable acts.[182] A person may have individual responsibility for an act if they have directly committed the act, or if their conduct satisfies the other forms of individual responsibility.

As outlined above, the serious reasons to consider threshold as an evidential standard is much lower than the corresponding standard in criminal law. However, the relaxed application of the standard of proof only applies to the questions of fact, not law. The reduced application of fundamental criminal law principles is not justified when assessing the evidence in relation to exclusion.[183] To establish individual responsibility for a crime, both the material element and the mental element of the crime must be fulfilled.[184] This is a general principle of law.[185] Similar to criminal law, when applying the exclusion clause, for individual responsibility to arise, the applicant must have committed or substantially contributed to the criminal act in the knowledge that their act or omission would facilitate the criminal conduct.[186] The acts the applicant is found to have committed must conform with a relevant form of criminal liability. If it is determined that the relevant form of criminal liability remains contested as a matter of law, it may not satisfy the test for serious reasons for considering.[187] Therefore, in addition to being an evidential

[181] Hathaway & Forster 2014, p. 535. See also UNHCR Background Note 2003, para. 108. According to the UNHCR, the adduced evidence should be clear and credible. For example, an applicant's confession may satisfy the test of clear and credible evidence, but the credibility of the confession must be examined, especially if the confession has been made under coercion in the country of origin.
[182] See UNHCR Background Note 2003, para. 111; Hathaway & Forster 2014, pp. 534-535.
[183] Supreme Court of Canada, *Ezokola*, 19 July 2013, para. 102. See also Hathaway & Forster 2014, p. 535.
[184] See generally about the concepts of material and mental elements in Keiler 2013, p. 7. The terminology varies between different legal systems. In common law systems, the concepts of *actus reus* and *mens rea* are used. *Actus reus* refers to the material element of a crime, whereas *mens rea* means the mental element of a crime. For example, the German criminal jurisprudence is referring to "objektiver und subjektiver Tatbestand".
[185] ICTY, *Mucic et al. Case*, 16 November 1998, paras. 424-425.
[186] UNHCR Background Note 2003, para. 51, EASO Judicial Analysis 2020, p. 30.
[187] Hathaway & Forster 2014, p. 537.

standard, the serious reasons to consider threshold may be regarded as the underlying principle in the application of the exclusion clause.

Furthermore, the CJEU has acknowledged that the individual responsibility of a member of a terrorist group must be assessed in light of both objective (actual conduct) and subjective (awareness and intent) criteria.[188] The applicant's acts should have a connection to the principal excludable acts of the terrorist organisation, the *material element*, and the requirement of the *mental element* should be fulfilled. In relation to terrorist activity, the person's intent and motivation are important factors to consider.[189] In addition, if a defence better known in the criminal law context, such as the defence of duress or superior orders, is applicable, it may be that there are no serious reasons to consider the applicant as criminally liable and thus exclude them.[190]

For example, the UNHCR relies on international criminal law when looking for guidance to determine an applicant's individual responsibility in the context of the application of the exclusion clause.[191] In relation to the crimes described in exclusion ground (a), reflecting international crimes in the statutes and jurisprudence of international criminal tribunals, individual responsibility arises as in these sources of international criminal law. It may not be possible to refer to such exact regulations of an international source when determining the forms of individual responsibility in relation to exclusion grounds (b) and (c).[192] However, the wording used in the exclusion clause, such as "commit", "crime" or "being guilty", still suggests that the individual responsibility required from the applicant

[188] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 96. See also CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 78.
[189] See UNHCR Observations on the European Commission Proposal 2001, para. 3.
[190] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para, 97; EASO Judicial Analysis 2020, p. 34; Hathaway & Forster 2014, pp. 536-537. See generally in the context of international criminal law in Eser 2008, pp. 863–893. The Grounds for excluding criminal responsibility in international criminal law are listed in Article 31 of the Rome Statute (suffering from a mental disease or defect; intoxication; self-defence; and duress. Also Articles 25(3)(f) (abandonment the effort to commit the crime, or otherwise preventing of the crime, Article 26 (Exclusion of jurisdiction over persons under eighteen), Article 32 (Mistake of fact or mistake of law) and Article 33 (Superior orders and prescription of law).
[191] UNHCR Guidelines 2003, para. 18; UNHCR Background Note 2003, paras. 51–56. See also Expert Meeting on Complementarities 2011, para. 48.
[192] See EASO Exclusion Judicial Analysis 2016, p. 29; EASO Judicial Analysis 2020, p. 102; Rikhof, 2019, p. 148.

should correspond to a *criminal* liability.[193] However, this does not necessarily mean the criminal liability established in the sources of international criminal law.

EASO has summarised the national case law of some EU Member States. Based on that summary, the national case law considering individual responsibility in relation to exclusion grounds (b) and (c) is inconsistent, and differing methods to establish the individual responsibility of the applicant have been used. In the UK, the Supreme Court has determined that the forms of individual criminal liability of Article 25(3)(b–d) of the Rome Statute may be applicable to the exclusion clause as a whole. Conversely, the Federal Administrative Court of Germany has considered that the provisions of the Rome Statute are not applicable to exclusion grounds (b) and (c), and that there are no consistent international standards to assess individual responsibility in relation to these exclusion grounds. For example, some national courts in Europe have deemed that the criteria of national criminal law should be considered.[194] In addition, different notions of extended liability, also without regard to international criminal law, have been developed in an autonomous fashion at the national and regional levels.[195]

Therefore, the standard for individual criminal responsibility in relation to Article 12(2)(c) remains unsettled. The following section discusses how EU counter terrorism law may affect the notions of individual responsibility in the application of exclusion ground (c) and if and how it conforms to the individual criminal responsibility of international criminal law. In addition, whether EU law corresponds to the serious reasons to consider standard is discussed.

3.2 Forms of Individual Responsibility

Originally, the exclusion clause referred to the simplest form of individual responsibility known in the criminal law context – direct liability.[196] Direct liability arises when a person directly commits a crime. The Refugee Convention does not refer to any other forms of

[193] See Li 2017, p. 241. *But see* EASO Exclusion Judicial Analysis 2016, p. 26. EASO is arguing that since exclusion ground (c) is referring to acts rather than crimes, the application of this ground may go beyond the determination of *criminal* liability.
[194] EASO Judicial analysis 2020, p. 102.
[195] See Expert Meeting on Complementarities 2011, para. 51; Li, pp. 243, 269-273.
[196] See Singer 2015, pp. 124–125.

individual responsibility than direct liability that may lead to exclusion. However, it is generally recognised that other forms of responsibility may also lead to exclusion.[197]

In the legislative process of the QD other forms of individual responsibility were chosen to be included in the article considering exclusion. Article 12(3) states that applicants who incite or otherwise participate in the commission of the crimes or acts listed in Article 12(2) are also excluded from being a refugee. Thus, the individual responsibility for crimes or acts described in the exclusion clause may arise in three different ways: directly; inciting others to commit the crime or act; or through participation in the commission of crimes or acts of others.[198] In the QD, incitement is equated with the concept of participation and thus may be considered as a mode of participation rather than a form of commission or indirect perpetration of a crime or act.[199] The QD does not mention attempting to commit a crime as a basis for individual responsibility in the application of the exclusion clause. Attempting is also not determined in the CJEU cases, and therefore it is not discussed in this thesis.

The CJEU cases, *B and D* and *Lounani*, both consider participation as the basis for individual responsibility in the application of the exclusion clause. In *B and D*, the CJEU referred to the forms of participation (instigation and participation in a crime or act in any other way) stated in Article 12(3) of the QD, and determined that the individual responsibility for carrying out the excludable acts must be attributed to the person concerned so that exclusion may become applicable.[200] In relation to the members of terrorist organisations, this determination means that a share of the responsibility for the acts committed by the organisation using terrorist methods must be attributable to the member during the relevant time they were a member.[201] In *B and D*, the question was about participation in the actual terrorist acts.

[197] UNHCR Guidelines 2003, para. 18.
[198] See Expert Meeting on Complementarities 2011, para. 48; EASO Exclusion judicial analysis 2020, p. 98.
[199] EASO Judicial Analysis 2020, p. 105.
[200] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paras. 94, 99 and Section 1 of the Operative part of the judgment; CJEU, Opinion of Advocate General, Joined Cases C-57/09 and C-101/09, *B and D*, 1 June 2010, para. 78.
[201] See CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 95.

In *Lounani*, the CJEU decided that the application of exclusion ground (c) extends to those who engage in terrorist activities.[202] Exclusion ground (c) is applicable to persons who instigated acts contrary to the purposes and principles of the UN or participated in such acts. Furthermore, it is not a prerequisite that the person instigated or participated in any terrorist acts.[203] Therefore, for the *Lounani* case, the CJEU considered participation in terrorist activities other than the actual terrorist offences.

The possible acts of participation that may connect a member's acts to the principal excludable acts of the terrorist organisation and that may establish the individual responsibility of a member are not determined more comprehensively in the QD or in CJEU case law.[204] The UNHCR has relied on the forms of participation developed in international criminal law when considering individual responsibility in relation to the exclusion clause.[205]

There are various forms of participation that establish individual responsibility in international criminal law. The principles for considering criminal liability for international crimes find expression in the statutes and jurisprudence of international criminal tribunals or courts: International Criminal Court (hereafter, ICC), ICTY and ICTR.[206] Most importantly, the ICC's Rome Statute recognises different material elements of criminal participation through which individual responsibility arises. The relevant regulation in the Rome Statute is Article 25(3)(a–e):

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

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[202] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 69. In *Lounani,* the question was about "activities consisting in the recruitment, organisation, transportation or equipment of individuals who travel to a State other than their States of residence or nationality for the purpose of, inter alia, the perpetration, planning or preparation of terrorist acts".
[203] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 70.
[204] Instead Article 17(1)(a) of QD regulating exclusion from subsidiary protection directly recognizes the international criminal law modes of participation.
[205] See UNHCR Guidelines 2003, para. 18; UNHCR Background Note 2003, paras. 51–56.
[206] See Expert Meeting on Complementarities 2011, para. 48.

> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide…

Article 25(3)(a) states that individual responsibility may arise in ways other than direct participation. Article 25(3)(b) refers to ordering, soliciting, or inducing, of which inducing may be considered the lowest grade of instigation, and thus is broad enough to cover any type of influence causing another person to commit a crime.[207] Article 25(3)(c) refers to aiding, abetting or otherwise assisting in the commission of a crime. Article 25(3)(d) refers to common purpose responsibility; and Article 25(3)(e) to incitement, but only in relation to genocide. Article 28 of the Rome Statute also regulates about the responsibility of commanders and other superiors.[208]

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[207] Sliedregt 2012, p. 107.

[208] Article 28 of the Rome Statute reads as following: "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

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

> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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

> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

The particulars of the mental element of a crime are also defined in international criminal law. Article 30 of the Rome Statute defines the general rule of the mental element.[209] According to Article 30, a person has individual criminal responsibility only if the material elements of a crime are committed with intent and knowledge. Article 30 also defines the relevant concepts in relation to the mental element: a person has *intent* in relation to conduct when that person means to engage in the conduct, and in relation to a consequence, when that person means to cause that consequence or is aware that it will occur in the ordinary course of events. *Knowledge* means awareness that a circumstance exists, or that a consequence will occur in the ordinary course of events.[210]

The forms of participation developed in international criminal law have been used in relation to exclusion ground (a) concerning international crimes, and differing views exist about their applicability to the other exclusion grounds as explained above. Recently, it was suggested in legal literature that it may be more beneficial to use counter terrorism regulations on individual liability in the application of the exclusion clause in terrorism related contexts.[211] The CJEU has not directly applied the terrorism related regulations in the assessment of individual liability, even though it has referred to them in the determination of the excludable acts. However, in *Lounani*, the Court recognised that the applicant's conviction of a terrorism related crime, and that the conviction had become final, was of particular importance in the individual assessment related to exclusion.[212] Therefore, it appears that the requirements for individual responsibility are satisfied in the case because the applicant had been considered as criminally liable for certain terrorist crimes in previous criminal proceedings. Hence, the Court has indirectly used the EU and national regulations on criminal liability of terrorism related crimes to establish individual responsibility in the exclusion assessment.

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

[209] There are exceptions from this default rule. For instance, the above-mentioned Article 28 of the Rome Statute sets lower standards for the mental element of superiors: Commanders and other superiors must have the *mens rea* standard amounting to negligence or recklessness.

[210] See in relation to mental element in ICTY and ICTR in Sliedregt 2012, pp. 50–51. The founding documents of ICTY and ICTR do not include the provisions of mental element, however, the mental elements of specific crimes are defined in the case law of these tribunals. The requirements for the mental element in the ICTY/ICTR case law partly differ from the default mental element of the ICC.

[211] See Rikhof 2019, p. 149–150; EASO judicial analysis 2020, p. 102.

[212] CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 78–79.

The forms of complicity establishing extended liability are regulated in Article 14(1–2)[213] of the Terrorism Directive. Article 14(1) requires that aiding and abetting in relation to offences listed in Articles 3 to 8[214], 11[215] and 12[216] are punishable, while Article 14(2) requires that inciting in relation to Articles 3 to 12[217] is also punishable.[218] This means that aiding and abetting or inciting preparatory offences is criminalised similar to aiding and abetting or inciting the terrorist acts themselves. The extent of such criminalisation in the directive is thus wider than in the Framework Decision (2002/475).[219] However, the Terrorism Directive appears to comprise fewer modes of individual responsibility in comparison to the modes of participation in international criminal law.

The special feature of counter terrorism legislation is that many of the criminalised acts are similar to complicity in terrorist offences, but they are principal crimes in themselves. In the Framework Decision (2002/475), the distinction between the liability arising from the direct act of participation in the activities of a terrorist group[220] or the offences linked to terrorist activities[221] and the liability arising from complicity[222] to the actual terrorist offences[223] is blurred.[224] This also appears to be the case in the Terrorism Directive. For example, Article 6 of the Terrorism Directive covers one of the offences related to terrorist activities; it considers recruitment for terrorism, and it reads as intentionally *soliciting* another person to commit or contribute to the commission of one of the terrorist offences or to an offence relating to a terrorist group is punishable as a criminal offence by itself. Soliciting is one of the forms of individual responsibility in the Rome Statute.[225]

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[213] Article 14(3) of the Terrorism Directive considers attempting that is not discussed in this thesis as explained above.
[214] Article 3 of the Terrorism Directive considers the actual terrorist offences; Article 4 considers offences relating to a terrorist group; Article 5 is about public provocation to commit a terrorist offence; Article 6 considers recruitment for terrorism; Article 7 is about providing training for terrorism; and Article 8 is about receiving training for terrorism.
[215] Article 11 of the Terrorism Directive considers terrorist financing.
[216] Article 12 of the Terrorism Directive considers other offences related to terrorist activities.
[217] Therefore, inciting is possible in relation to all the terrorism related offences. In addition to the offences mentioned in relation to aiding and abetting, incitement is thus also possible in relation Article 9 concerning travelling for the purpose of terrorism; and Article 10 concerning organising or otherwise facilitating travelling for the purpose of terrorism.
[218] This article also criminalizes attempting but that is outlined from this thesis.
[219] See Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 19.
[220] Article 2(2)(b) of the Framework Decision (2002/475).
[221] Article 3 of the Framework Decision (2002/475).
[222] Article 4(1) of the Framework Decision (2002/475).
[223] Article 1(1) of the Framework Decision (2002/475).
[224] See Dumitriu 2004, pp. 598-599.
[225] Article 25(3)(b) of the Rome Statute.

Correspondingly, Article 7 considering providing training for terrorism requires the criminalisation of "providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of" one of the actual terrorist offences.[226] Therefore, in some cases the act of providing training for terrorism may also fulfil the requirements for material and mental elements of aiding and abetting the actual terrorist offences.

Furthermore, Article 4 of the Terrorism Directive considering offences relating to a terrorist group is a participation crime that may be easily mixed with the other forms of individual responsibility. Article 4 is twofold. The first part considers intentionally directing a terrorist group, while the second part considers intentionally "participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group". The first part of the article is clearly seen as a representation of the superior responsibility of international criminal law. In addition, similarities with *ordering*, as regulated in Article 25(3)(b) of the Rome Statute, can be seen. According to Lehto, when the second part of the article considering participation in the activities of a terrorist group is read together with the definition of a terrorist group,[227] it is similar to the common purpose mode of participation regulated in the Rome Statute. However, the common purpose offence in international criminal law is only punishable when a substantive crime occurs.[228] This is not required of the offences relating to a terrorist group in the Terrorism Directive. This is also a feature of the participation crimes in the Terrorism Directive in that for them to become punishable they do not require that an actual terrorist offence is committed.[229]

Therefore, even though EU counter terrorism legislation appears to contain less forms of participation than international criminal law, this is not the case. Some offences that may

[226] The act needs to be also intentional and committed knowingly that the skills provided are intended to be used for the required purpose.
[227] In the Framework Decision (2002/475), the definition of a terrorist group was situated in the same article as the crime of participation in the activities of such a group. In the Terrorism Directive, the definition of a terrorist group has been moved to Article 2 that comprises also other relevant definitions.
[228] Lehto 2008, p. 403.
[229] Article 13 of the Terrorism Directive states that for the offences relating to a terrorist group or the offences related to terrorist activities to become punishable, it is not necessary that a terrorist offence be actually committed.

correspond, to some extent, to the forms of complicity in international criminal law become punishable as independent criminal offences in the Terrorism Directive. Furthermore, criminal procedural law in the field of counter terrorism often extends further into the preparative phase than "normal" criminal procedural law.[230] Therefore, counter terrorism regulations may contain additional forms of individual responsibility that go further to the preparative stage, and that may not be found in international criminal law.

However, because of the page count limitations of this thesis, the offences related to terrorist activities are not discussed in more detail in the context of participation crimes. In the following sub-sections, the forms of complicity in the Terrorism Directive, aiding and abetting or incitement, are discussed in more detail. They are compared to the corresponding forms of individual responsibility in international criminal law. In addition, participation in the activities of a terrorist group, as determined in Article 4(b) of the Terrorism Directive, is discussed as a participation crime.

3.3 Participation through Aiding and Abetting or Inciting Terrorism

Exclusion ground (c) is applicable to persons who instigated acts contrary to the purposes and principles of the UN, or participated in such acts.[231] If the Terrorism Directive is used for the interpretation of the concepts of participation and instigation in terrorism related activity, it would mean that the possible forms of participation are aiding and abetting and inciting as regulated in Article 14(1–2). According to the CJEU, individual responsibility must be assessed in light of both objective and subjective criteria.[232] Therefore, in this section the material and mental elements of aiding and abetting and inciting in counter terrorism law and international criminal law are discussed, considering the context of exclusion ground (c).

The UNHCR has widely relied on the criteria developed in international criminal jurisprudence in the application of the exclusion clause. It has referred to the ICTY's *Kvocka et al.* case in which participation in a crime is discussed under four headings: instigation; commission; aiding and abetting; and participation in a joint criminal

[230] Meijers Committee 2016, para. 8a.
[231] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 70.
[232] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 96.

enterprise.[233] According to the ICTY's determination in the case, aiding and abetting may be an act or omission and may take place before, during or after the commission of a crime. The act or omission must substantially contribute to the commission of a crime; however, causal connection between the conduct and the commission of a crime is not required.[234]

According to the European Commission's Proposal for the Terrorism Directive, the material element of aiding and abetting in the Terrorism Directive is sufficiently wide and may contain different kinds of activities.[235] In relation to aiding and abetting a terrorist offence, these may include providing financial resources for the execution of a terrorist attack or providing supportive services or material (for example transportation, weapons, explosives, or shelter).[236] In the European Commission's proposal, aiding and abetting is described more as an active way to assist in the commission of the principal offence, while in international criminal law omission or failure to act may sometimes be regarded as aiding and abetting.[237] However, it may not have been the intention of the legislator to exclude the omission liability because the Terrorism Directive does not comprehensively define the material element of aiding and abetting. Instead, the Terrorism Directive leaves the States to apply their existing provisions of national penal laws on aiding and abetting.[238] However, in the context of the application of the exclusion clause, referring to international criminal law for the application of the material element of aiding and abetting may also be justified.

A member of a terrorist group must also have had the requisite mental element to participate in the particular terrorism related act so that their conduct may be regarded as aiding and abetting. The mental element is a fundamental aspect of the criminal offence and if it is missing, the individual responsibility for the crimes or acts is not fulfilled.[239]

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[233] UNHCR Background Note 2003, para. 52.
[234] ICTY, *Kvocka et al. Case*, 2 November 2001, paras. 253–263. See also UNHCR Background Note 2003, para. 53; EASO Judicial Analysis 2020, p. 106.
[235] See Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 19.
[236] Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 19.
[237] Sliedregt 2012, pp. 124-126, 130. Such liability in international criminal law may become applicable only in rare cases, in which the person has a legal duty to intervene or to act.
[238] See Lehto 2008, p.406.
[239] See UNHCR Background Note 2003, para. 64. See also Sliedregt 2012, p. 40.

In the Rome Statute, the mental element of aiding and abetting is purpose based: the aider and abettor commits their acts for the purpose of facilitating the commission of a certain crime described in the statute. In ICTY and ICTR case law, the required mental element for aiding and abetting is knowledge based. The aider and abettor must have knowledge that their conduct assists in the commission of the specific crime of the principal perpetrator. The aider and abettor must have knowledge of the essential elements of the crime. In relation to crimes with a specific intent, such as the crime of persecution, the aider and abettor must also have knowledge of the discriminatory context of the crime.[240]

The mental element of aiding and abetting in the context of EU counter terrorism law may be derived from Recital 15 of the Terrorism Directive:

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

Therefore, the mental element of aiding and abetting in the Terrorism Directive is similar to the knowledge based mental element of the ICTY and ICTR. In addition, in *B and D* the CJEU required that, in the individual assessment, the competent authority must examine, *inter alia*, **the extent of the knowledge** the member had or was deemed to have of the activities of the terrorist group.[241] However, in the Terrorism Directive, the knowledge requirement is expressed in more detail than in the CJEU's case. The aider and abettor must have knowledge of the circumstance that the group they are supporting is, in fact, a terrorist group. In addition, the aider and abettor must have knowledge about the consequence that their acts benefit the group, or the purposes of terrorism in general.

[240] *Simić et al. Case*, 28 November 2006, para. 86.
[241] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 97.

However, it appears that it is not required that the conduct of the aider and abettor has a causal effect on those consequences. Furthermore, the aider and abettor may not have to know about the principal terrorist crimes of the group. In relation to terrorist financing, Lehto argues that it may be presumed that a person has intended to finance terrorist activities in a case in which funds have been transferred to a proscribed terrorist group.[242] Similarly, the knowledge requirement of the aider and abettor may be presumed in a case in which the person is acting for the benefit of a listed terrorist group.[243]

Incitement in the context of the exclusion clause is closer to the concept of "instigation" than the "incitement to genocide" of international criminal law. The UNHCR has referred to international criminal law when defining the concept of instigation in the application of the exclusion clause.[244] It has referred to ICTY's judgment in *Kvocka et al.*, in which the Tribunal determined that the *actus reus* of instigating requires that a person prompts another person to act in a particular way. The required *mens rea* is that the person intended to provoke or induce the commission of the crime or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.[245] Therefore, the instigator puts an idea about a crime to someone's mind but does not participate in the actual commission of the crime. It is the latter person who decides whether and how to commit the act.[246]

The Terrorism Directive contains incitement in two separate articles. Article 5 considering public provocation to commit a terrorist offence contains incitement as a material element of the crime itself.[247] Article 14(2) contains incitement as a mode of participation in the terrorism related crimes. According to the European Commission's Proposal for the Terrorism Directive, the inciter is often the driving force behind the

[242] Lehto 2008, p. 379.
[243] See also Sivakumaran 2014, p. 361. Sivakumaran notices that it may difficult or impossible for a suspected member of a terrorist group to prove that they lacked knowledge, or was not involved with such a group, and therefore, any presumptions of exclusion are not justified.
[244] See UNHCR Background Note 2003, para. 52.
[245] ICTY, *Kvocka et al. Case*, 2 November 2001, para. 252.
[246] Sliedregt 2012, p. 107.
[247] Article 5 of the Terrorism Directive reads as following: "Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally."

actions taken by a direct offender.[248] The Terrorism Directive does not further determine the concept of incitement.

3.4 Participation in the Activities of a Terrorist Group

In the *Lounani* case, the CJEU determined that the acts constituting participation in the activities of a terrorist group, such as those which Lounani was convicted of by the Belgian court, may justify exclusion.[249] Lounani was convicted of, among other crimes, participation in the activities of a terrorist group as a member of its leadership. The Criminal Court, Brussels, found that Lounani had provided logistical support to a terrorist group by providing, *inter alia*, material resources or information; engaging in forgery and fraudulent transfer of passports; and participating actively in the organisation of a network for sending volunteers to Iraq. The fraudulent transfer of passports was described as an act of participation in the activities of a cell providing logistical support to a terrorist movement.[250] The CJEU determined that for exclusion ground (c) to become applicable, it is not required that the asylum applicant directly committed or instigated terrorist offences or otherwise participated in such offences.[251] The CJEU held that in the individual assessment it is of particular importance, *inter alia*, that the asylum applicant was convicted of *participation in the activities of a terrorist group*.[252]

In the EU counter terrorism legislation, participation in the activities of a terrorist group is currently regulated in the second part of Article 4 of the Terrorism Directive considering offences relating to a terrorist group. It criminalises the intentional act of participation in the activities of a terrorist group. Lounani's conviction for participation in the activities of a terrorist group corresponds to Article 4(b) of the Terrorism Directive.

Article 4(b) of the Terrorism Directive appears as complicity but in fact it is punishable as a criminal offence by itself. [253] Therefore, some acts that are under the umbrella of Article 4(b) may also be close to fulfilling the requirements for aiding and abetting a

[248] Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 19.
[249] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 79.
[250] CJEU, Case C-573/14, *Lounani*, 31 January 2017, paras. 29, 30, 63, 64.
[251] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 77.
[252] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 79.
[253] See Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, pp. 15–16.

terrorist offence.[254] However, punishing the aider and abettor would require that the principal crime is committed or at least attempted. In participation offences, this is not required.[255] In addition, in participation crimes the conduct of the individual is further from the actual terrorist offence than aiding and abetting such an offence.[256]

Article 4(b) of the Terrorism Directive regulates the lowest form of a punishable crime for members of terrorist groups. However, the reading of the offence does not require that Member States criminalise membership of a terrorist group as such.[257] Therefore, the member must participate in the activities of a terrorist group actively so that the participation may become punishable. The article provides a few examples of such active participation: supplying information or material resources, or in any way funding the activities of a terrorist group. For example, in the Finnish Government Bill, supporting the group by participating in its meetings or supporting it with an expression of opinion has been excluded from punishable behaviour.[258] The requirement of active participation corresponds to the determination of the CJEU that mere membership is not accepted as the basis for individual responsibility of a member of a terrorist organisation in the context of the exclusion clause.[259]

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[254] See Lehto, p. 406. Lehto is pointing out that some scholars seem to consider that this participation crime is only a little more than complicity, conduct that is already covered by most national penal codes.

[255] Lohse, 2011, p. 15; Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism 2005, para. 78. Participation crimes are criminal offences of a serious nature related to terrorist offences as they have the potential to lead to the commission of such offences.

[256] See Lohse pp. 14–17. Lohse has compared the participation crimes to aiding and abetting in the Finnish Criminal Code. The terrorist crimes in the Finnish Criminal Code were based, at the time of his writing, to the Framework Decision (2002/475). See also Hallituksen esitys Eduskunnalle terrorismia koskeviksi rikoslain ja pakkokeinolain säännöksiksi 2002, s. 55.

[257] See Heikkilä 2002, p. 56. Heikkilä explains that the individual responsibility does not arise in international criminal law on the basis of mere membership. The collective criminality has been rejected because of human rights concerns: the presumption of innocence requires that guilt is never presumed.

However, the sole membership of a terrorist group is criminalized in some national jurisdictions. For example, Section 11 of the UK Terrorism Act creates the offence of membership to a proscribed organisation. The Act clearly bases the criminality of a person to the proscription of the organisation to which the person is a member: It sets that a defence for a person charged with the membership offence is that the person must prove that the organisation was not proscribed when they became its member or that they have not taken part in the activities of the organisation at any time while it was proscribed. See Walker 2011, paras. 8.39–8.48.

[258] Hallituksen esitys eduskunnalle terrorismia koskeviksi rikoslain ja pakkokeinolain säännöksiksi 2002, pp. 52, 54.

[259] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paras. 89, 93. See contra UNHCR Background Note 2003, para. 60. The UNHCR previously recognized that in some rare cases exclusion based on mere membership may be possible. That would require that the membership is voluntary, and the activities of the group involve especially severe crimes such as indiscriminate killings or torture.

In *Lounani*, the CJEU did not assess the mental element of the asylum applicant. However, this does not mean that consideration of the mental element was not relevant in the determination of Lounani's individual responsibility. Instead, the Court held that Lounani's conviction for participation in the activities of a terrorist group and that the conviction had become final have particular importance in the individual assessment in the application of the exclusion clause.[260] Therefore, it appears that in *Lounani* the mental element of the crime had already been considered in the criminal process by the national criminal court. Thus, consideration of the mental element in the criminal process in relation to the crime of participation in the activities of a terrorist group also satisfy the required mental element in the exclusion assessment.

Article 4(b) has dual requirements for the mental element. Firstly, the act of participation must be intentional. Secondly, knowledge in relation to a circumstance that the participation will contribute to the criminal activities of the terrorist group is required. The knowledge requirement of Article 4(b) defines the limits of the activities that may be considered as criminal under the article. For example, it would be difficult to imagine that the direct support of non-terrorist conduct of a terrorist group, such as cooking meals or providing other goods or services not directly linked with violent terrorist acts, could be considered to be covered by the article.[261]

According to the interpretation of some scholars, the article only requires knowledge of the broader non-terrorist criminal activities of the group.[262] When the article is read literally, it does not require that the person participating in the activities of a terrorist group had knowledge of the group's terrorist activities. However, in the context of exclusion ground (c), it seems reasonable to require that the member was at least aware of the terrorist nature of the group. The purpose of exclusion ground (c) is to cover acts considered against the purposes and principles of the UN. As terrorism has been considered as such an act, it would be difficult to imagine that exclusion would become

[260] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 78. See also CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 86.
[261] See International Commission of Jurists 2020, p. 22. See also Hallituksen esitys Eduskunnalle terrorismia koskeviksi rikoslain ja pakkokeinolain säännöksiksi 2002, p. 54. In the Finnish Government Bill, for example the legal advice to a terrorist group has been excluded from the scope of the offence.
[262] Lehto, p. 404; Murphy 2015, pp. 63, 76. See contra Hallituksen esitys Eduskunnalle terrorismia koskeviksi rikoslain ja pakkokeinolain säännöksiksi 2002, p. 52. In the Finnish Government Bill the starting point is that the participation forwards the terrorism related criminal activity of the group.

applicable in a situation in which the person is not aware of the fact that the group engages in terrorist activities.[263]

A participant's knowledge of the terrorism context is also recognised in the application of the exclusion clause. In her opinion on *Lounani*, Advocate General Sharpston commented that a participant shares responsibility for the terrorist activities of a group in the case where the person had the knowledge that they were *facilitating the commission of terrorist activities*.[264] Therefore, a person's motives and intentions in relation to the terrorist group in which they were a participant are also relevant to establishing their personal responsibility.[265] Moreover, the CJEU's *H.T.* case supports this determination even though the case did not directly consider the exclusion clause. In the *H.T.* case, Mr. T. had participated in the legal meetings of the PKK, collected donations for the group, and occasionally distributed the group's periodical. Mr. T.'s funding of the group was general and not funding for committing terrorist acts. The CJEU ruled that such acts in themselves do not constitute terrorist acts, and that it does not necessarily follow from those acts that Mr. T. *supported the legitimacy of terrorist activities*.[266] Therefore, knowledge about supporting or furthering the terrorist activities in general is required without them being linked to a specific terrorist offence.

In conclusion, participation in the activities of a terrorist group may be an excludable act under exclusion ground (c). In the Terrorism Directive, a participation crime may not fully correspond to the excludable participation act that is required in the application of exclusion ground (c).

3.5 Seriousness of Participation

Participation in the activities of a terrorist group; aiding and abetting and inciting terrorism related activity can cover a wide range of conduct of varying degrees of

[263] However, theoretically the mental element of a member of a terrorist group could be fulfilled in the exclusion context in such situations in which the criminal activities of the group included also other excludable acts, and the member actively participating in the group's activities was aware of them but not of the terrorist nature of the group.
[264] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 85.
[265] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, paras. 86, 89.
[266] CJEU, Case C-373/13, *H.T*, 24 June 2015, paras. 34, 91. See also CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, fn. 60.

seriousness.[267] The most serious of such acts may be participation in the commission of actual terrorist acts. However, the Terrorism Directive also enables punishment for chain-participation when it makes the punishment for participation in the participation crimes possible. For example, aiding and abetting or inciting participation in the activities of a terrorist group is also punishable.[268]

Therefore, not all participation acts listed in the Terrorism Directive come under the auspices of exclusion ground (c). The asylum law sets additional requirements on what kind of participation may be regarded as serious enough to justify exclusion. The UNHCR has stated that for individual responsibility to arise in the exclusion assessment, the applicant must have made a **substantial** contribution to the criminal act.[269] In the national case law of some Member States, substantial or significant contribution or support to the main crime is required.[270] In her opinion in *Lounani*, Advocate General Sharpston commented that for individual responsibility to arise, a person should have made a substantial contribution to the terrorist activities of a group.[271] Consequently, participation also has a certain level of gravity requirement. Therefore, in relation to members of terrorist groups that substantially contribute to an excludable activity, there may be serious reasons to consider that the member participated in acts against the purposes and principles of the UN.

To assess whether the member has made a substantial contribution to the terrorist activities of the group, the person's position within the organisation and their ability to influence the group's activities should be assessed. The true role played by the person in the commission of the excludable acts must be assessed. In addition, whether and to what extent the person was involved in planning, decision-making, or directing other persons with a view of committing terrorist acts, and whether and to what extent they financed

[267] See CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 71; Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 19; Meijers Committee 2016, para. 8.
[268] See Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, COM(2015) 625 final, p. 19.
[269] UNHCR Background Note 2003, paras. 51, 53. See also Rikhof 2019; Supreme Court of Canada, *Ezokola*, 19 July 2013, paras. 8, 29, 84. The Supreme Court of Canada calls this as a "significant contribution test". See also Sliedregt 2012, pp. 121-122. The *actus reus* of aiding and abetting in international criminal law also requires that the activity of the aider and abettor has a substantial effect upon the perpetration of the crime.
[270] Kraft 2016, p. 1219. Kraft is analysing German, Belgian and the UK case law in relation to this matter.
[271] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 85.

such acts or provided the means for other persons to commit them must be examined.[272] In relation to the *Lounani* case, Advocate General Sharpston analysed Lounani's situation on the above demonstrated grounds. She concluded that because Lounani was a leading member of the terrorist group, it follows logically that he could presumably influence the group's activities. Because of his logistical support to the group, he facilitated and enabled others to participate in or commit terrorist acts.[273]

In its exclusion assessment in both exclusion related cases, the CJEU highlighted the applicants' leadership role in a terrorist organisation. In *B and D*, the Court determined that the individual responsibility of a terrorist group's leader for acts committed by that organisation during the relevant period can be presumed.[274] In in its analysis of *Lounani*, the CJEU maintained the importance of the fact that Lounani had participated in the activities of a terrorist group and the fact that he had been a member of the group's leadership, even though he had not been convicted for directing a terrorist group. Both facts were given particular importance in the Court's exclusion assessment, which led to the conclusion that Lounani's acts were considered to fall under Articles 12(2)(c) and 12(3).[275]

Originally, the UNHCR's position was that acts under exclusion ground (c) could only be committed by persons holding high positions in a state or state-like entity because the UN's purposes and principles are intended to be a guide for states in their relations with each other.[276] In the past, this was also the general view among commentators.[277] However, neither conditions, the position as a state official, nor senior status, are absolute requirements for the application of exclusion ground (c).[278] However, it appears that the closer a person is to a leadership position rather than an ordinary member, the more likely

[272] See CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 85; CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 97.
[273] CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 86.
[274] CJEU, Joined Cases C-57/09 and C-101/09, *B and D*, 9 November 2010, para. 98. However, the Court continued that even then exclusion cannot be presumed but nevertheless it remains necessary to examine all the relevant circumstances before making a decision on exclusion.
[275] CJEU, Case C-573/14, *Lounani*, 31 January 2017, para. 79.
[276] UNHCR Guidelines 2003, para. 17; UNHCR Background Note 2003, para. 48; UNHCR Addressing Security Concerns 2015, para. 20. See also Zimmermann and Wennholz 2011, pp. 602–603.
[277] See Sivakumaran 2014, p.379. See also Gilbert 2003, p. 457. According to Gilbert, in the exclusion of not high-ranking members of terrorist organisations, who are involved in acts of international terrorism constituting a threat to international peace and security, should be referred to exclusion ground (b).
[278] See e.g. UNHCR Addressing Security Concerns 2015, para. 20; Zimmermann and Wennholz 2011, p. 603; Sivakumaran 2014, pp. 379–380; Li 2017, p. 339; Goodwin-Gill 2020, p. 22.

a conclusion may be drawn that the person knew of the terrorist activities.[279] The same applies to a leader's ability to substantially contribute to the group's activities compared to an ordinary member's ability.[280] According to some commentators the scope of application of exclusion ground (c) should be limited to acts bearing a certain element of "policy-making", meaning that the perpetrator or the participant to such acts usually occupies a higher position within any organizational structure.[281]

Therefore, a cautious conclusion could be that the contribution of a leader of a terrorist group may be regarded as substantial enough to fulfil the gravity threshold for participation. However, other kinds of participation may be serious enough to be regarded under the umbrella of exclusion ground (c).

4. Conclusions

Members of terrorist groups may have committed, directly or through participation in the acts of the group, many different excludable crimes. In situations in which the member has not directly committed any excludable acts, the exclusion is assessed on collective and individual levels. On the collective level, the terrorist nature of the group and the acts and activity of the group are analysed. In the context of EU asylum law, the terrorist nature of a group is established in situations in which the group has been added to the UN or EU lists of terrorist groups. The requirement for the international character of such a group is also fulfilled through listing. Therefore, such lists have a significant effect on the application of exclusion ground (c) in the European context. However, the exclusion is not justified if it is only based on the determination of the terrorist nature of the group of which the asylum applicant was a member.

Terrorist acts or activity that may be considered as against the purposes and principles of the UN are reflected in the UNSC resolutions relating to terrorism. However, the

[279] See Federal Court of Canada, *Sivakumar*, 4 November 1993. The Federal Court of Canada stated that "[t]he case for an individual's complicity in international crimes committed by his organization is stronger if the member holds a position of importance within the organization. The closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit them. And remaining in a leadership position with the knowledge that the organization was responsible for crimes against humanity may constitute complicity." See also UNHCR Observations on the European Commission Proposal 2001, para. 3. According to the UNHCR, in some cases the personal knowledge and responsibility of the asylum applicant may be established on the ground of the person's position.
[280] See CJEU, Opinion of Advocate General C-573/14, *Lounani*, 31 May 2016, para. 86.
[281] See Zimmermann and Wennholz 2011, p. 605. See also Goodwin-Gill and McAdam 2007, pp. 189–190.

resolutions do not clearly define the terrorism related concepts. The Terrorism Directive defines such acts more comprehensively and systematically in the articles concerning terrorist offences or offences related to terrorist activity. In addition, acts or activities criminalised in the Terrorism Directive may also be found in some form in the UNSC resolutions related to terrorism. However, even if an act is found in the UNSC resolution, it does not necessarily mean that the act fulfils the gravity requirement of exclusion ground (c). The Refugee law sets additional limits to the interpretation of what kind of acts may be regarded as excludable acts under exclusion ground (c).

The gravity threshold may be fulfilled when the terrorist group is using indiscriminate violence or violence against civilians. In addition, the gravity requirement may be satisfied even without proof of such a violence when the acts of the group, such as assisting foreign terrorist fighters, have serious implications for international peace and security. Therefore, not all the actions criminalised in the Terrorism Directive conform to these standards of gravity. The article of the Terrorism Directive that criminalises acts and activities related to terrorism are useful interpretation tools when determining the concept of a terrorist act or terrorist activity in the exclusion assessment under article 12(2)(c) of the QD. However, in the final decision on exclusion the gravity of the act or activity must also be considered.

On the individual level, a terrorist group member's individual responsibility for the excludable acts is analysed. In the Terrorism Directive, only aiding and abetting or inciting are mentioned as forms of participation. However, the special feature of counter terrorism regulations is that some of the offences imply complicity, but they are principal acts in themselves. Therefore, other forms of participation similar to international criminal law become applicable through participation crimes. However, some participation crimes go even further than the forms of individual responsibility in international criminal law. In participation crimes, the terrorist act is not required for the commission or the attempt of the principal crime, as it is required when applying the rules of participation of international criminal law.

EU counter terrorism law does not completely define the concepts of aiding and abetting or incitement. Thus, when applying these concepts, guidance still needs to be taken from international criminal law or national penal codes. However, the Terrorism Directive has more substance in relation to aiding and abetting than inciting. The Terrorism Directive

is still the most relevant as a guidance for the interpretation of participation crimes, and especially the offence of participation in the activities of a terrorist group. In its *Lounani* case, the CJEU accepted that such participation may be regarded as a form of individual responsibility in the meaning of the exclusion clause. Participation in the activities of a terrorist group may be considered as the lowest form of individual responsibility. However, the participation must still reach the level of active participation. In addition, the active participant must act in the knowledge that they are facilitating the commission of terrorist activities.

Furthermore, the exclusion assessment on the individual level contains a gravity requirement originating from international refugee law. The gravity requirement for participation is the substantial contribution to the terrorist activities of the terrorist group. A conclusion may be derived from CJEU case law that the requirement of substantial contribution of members of terrorist groups is the most clearly fulfilled in the case of leaders of such groups. The closer the person is to the leadership level of such groups, the more likely a conclusion may be drawn that the person knew of the group's activities and could substantially contribute to those activities.

The application of exclusion ground (c) is somewhat ambiguous. Some commentators have reasoned that it should be applied similarly to the other exclusion grounds, and that the rules established in international criminal law should also be applied to this exclusion ground. Other commentators have concluded that international criminal law is not applicable to exclusion ground (c), but they have not suggested other substitutes that could help with its interpretation and that could be widely accepted. In addition, states have also applied exclusion ground (c) on diverging standards. Therefore, the application of exclusion ground (c) has not been consistent globally, and not even in the EU member states. Using the EU counter terrorism law for the interpretation of exclusion ground (c) in relation to members of terrorist groups would have an important function in harmonising the application of exclusion ground (c) in the EU member states. However, the counter terrorism regulations do not fully cover all the aspects of the exclusion assessment. For some parts of the assessment, especially in relation to assessing individual responsibility, reference to international criminal law or to regulations of national penal codes may still be required. Furthermore, the Refugee Convention creates

limits for the dynamic interpretation of exclusion ground (c) in cases of members of terrorist groups.

Together, assessments of the collective and individual levels constitute the exclusion assessment. Therefore, further research is needed about how the results on both levels are balanced against each other. The question is whether the gravity level of a terrorist group's acts affect the level of contribution that is required from the member to justify exclusion. The same question is also relevant in reverse: if the asylum applicant is a leading member of a terrorist group, the question is whether less serious acts of the terrorist group may cause the exclusion clause to become applicable to that member.

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