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Preliminary remarks

COMMON ANALYSIS
Last update: February 2019
*Minor updates added October 2021

Applying the exclusion clauses where there are serious reasons to consider that the applicant has committed any of the relevant acts, is mandatory.

This chapter focuses on the exclusion of applicants found not to deserve international protection in accordance with Article 12(2) QD and Article 17(1) QD.

If a person would otherwise qualify for refugee status, the following would constitute exclusion grounds, according to Article 12(2) QD:

Article 12(2) and (3) QD
Exclusion (refugee status)

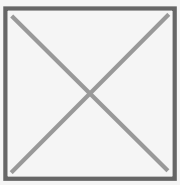
2. A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that

a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

If the person would otherwise be eligible for **subsidiary protection**, the exclusion clauses under Article 12(2)(a) and (c) QD would apply in the same way (Article 17(1)(a) and (c) QD, respectively). The ground of 'serious crime' (Article 17(1)(b) QD), on the other hand, is broader than 'serious non-political crime' and has no geographical or temporal limitations. Furthermore, additional exclusion grounds are envisaged under Article 17(1)(d) QD and Article 17(3) QD. Article 17(3) QD contains an optional provision and its applicability would depend on the

transposition of this provision in national legislation.[29]



Article 17 QD
Exclusion (subsidiary protection)

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

a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
b) he or she has committed a serious crime;
c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

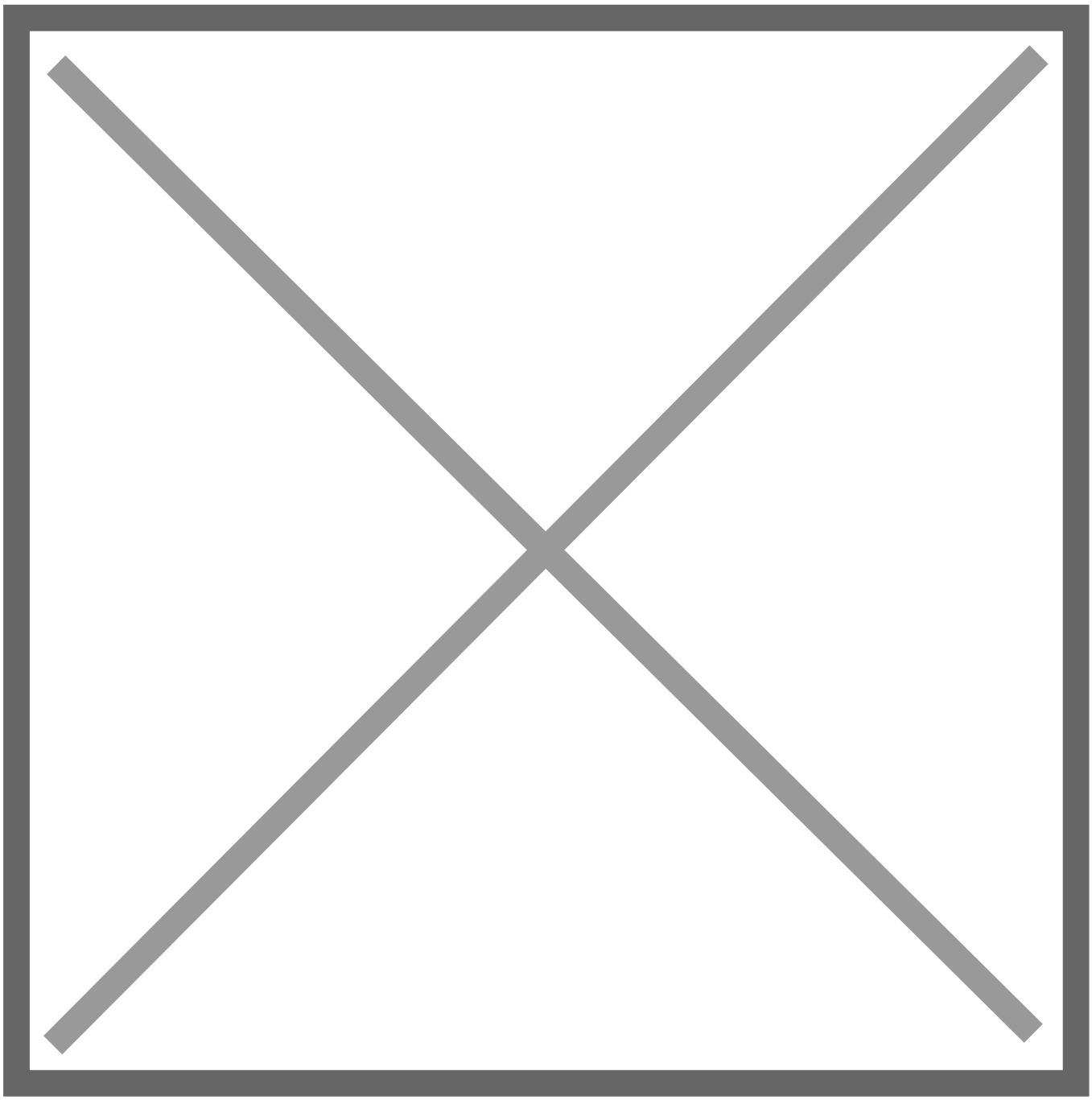
2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.

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

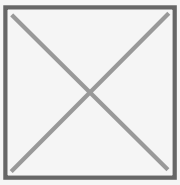
It should be underlined that the determining authority has the burden of proof to establish:

Figure 18. Elements in applying exclusion.



At the same time, the applicant has the duty to cooperate in establishing all facts and circumstances relevant to his or her application.

Individual responsibility could be substantiated not only in case of direct commission of the excludable act (for the perpetrator), but also in other instances where the person substantially contributed to the commission of an excludable act. The assessment of individual responsibility is based on the nature and extent of the applicant's involvement in the excludable act(s), as well as his or her state of mind in relation to these act(s). Different **forms of conduct** may lead to a finding of individual responsibility (for example, direct commission, inducing others, aiding and abetting, command responsibility, etc.), where the relevant intent and knowledge are established.



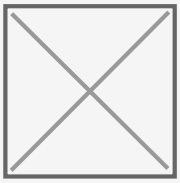
The applicable standard of proof is ‘serious reasons for considering’, which requires clear and reliable evidence, but is not as high as the standard for criminal responsibility (‘beyond reasonable doubt’).

The fact that the applicant was or is associated with a group or regime responsible for excludable acts(s) does not relieve the determining authority from demonstrating his or her individual responsibility.

However, depending on the nature, scale of the group or regime, the voluntary association with it and the position, rank, standing and influence of the applicant within the group, there may be sufficient evidence for both the ‘conduct’ and the ‘state of mind’ requirements to be inferred. It remains necessary, however, that the decision-maker identify the relevant mode of individual responsibility and examine the facts in light of the respective criteria

Furthermore, the examination should take into account **potential grounds negating the individual responsibility**, such as lack of mental capacity to comprehend and/or control one’s conduct (e.g. due to age, mental disease or defect, involuntary intoxication), duress (e.g. in the context of forced recruitment), self-defence or defence of others (or property, in the case of war crimes), superior orders in specific circumstances (see Article 33 of the Rome Statute)[30], etc.

Depending on national practice, the analysis may further proceed to take into account whether the possible exclusion of the applicant would meet the purposes of the exclusion clauses. Elements, such as the fact that an applicant has already served a sentence for the (otherwise) excludable act, or that the act is subject to an amnesty, could potentially be taken into account. In relation to the militant groups in the Niger Delta, for example, the participation to the ongoing large-scale amnesty programme (DDR), initiated in 2009 and benefitting about 30 000 (former) militia members, could be taken into consideration [Targeting, 2.2.1]. The more egregious the excludable acts, the less relevant such aspects would be when taking the decision.



For further horizontal guidance on individual responsibility, see the EASO Practical Guide: Exclusion, p.29.

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[29] Noting the optional nature of this exclusion ground, and its scope, which is not country-specific, no further analysis and guidance is provided on Article 17(3) QD. [back to text]

[30] Rome Statute of the International Criminal Court, Article 33. [back to text]

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