

5.1. International legal framework

The requirement of assessing the individual responsibility of the applicant has recently been codified in the QR, both for exclusion from refugee status (Article 12(4)) and from subsidiary protection status (Article 17(4)).

The recast QD does not refer specifically to the ‘individual responsibility’ of the applicant. While Articles 12(2) and 17(1) of the recast QD refer to the direct commission of a crime, noting serious reasons to believe that the applicant “committed” or was “guilty of” the excludable acts, Articles 12(3) and 17(2) specify that exclusion must also be applied to persons who “incite or otherwise participate” in the commission of the aforementioned excludable acts.

As EU asylum law does not elaborate on the assessment of individual responsibility for exclusion, courts generally rely on the provisions of the Rome Statute. In this regard, Article 25(3) is particularly relevant as a starting point as it sets out the different modes of participation in a crime for individual criminal responsibility to be established:

Article 25 (3) of the Rome Statute

“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

a. **Commits such a crime**, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
b. **Orders, solicits or induces** the commission of such a crime which in fact occurs or is attempted;
c. For the purpose of facilitating the commission of such a crime, **aids, abets or otherwise assists in its commission or its attempted commission**, including providing the means for its commission;
d. In any other way **contributes to the commission or attempted commission** of such a crime by a **group of persons acting with a common purpose**. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime;
e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
f. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose. “

While Article 25 sets out the different modes of participation in a crime, Article 28 is also important as it regulates the particular conditions under which individual responsibility may be attributed to commanders and other superiors for acts committed by their subordinates. This article thereby recognises the increased level of responsibility held by such persons to actively prevent and punish crimes.

Article 28 of the Rome Statute

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. 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:

(a) 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

(b) 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**.

2. 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:

(a) The superior either **knew, or consciously disregarded information** which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The **crimes concerned activities that were within the effective responsibility and control of the superior**; and

(c) 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"

Of additional relevance to the assessment of individual criminal responsibility is Article 30, which sets out the requirements of intent and knowledge:

Article 30 of the Rome Statute

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

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

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

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

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

Finally, Articles 31-33 examine the grounds which may mitigate individual criminal responsibility. This is addressed in Section 6.

While national courts rely extensively on the Rome Statute, it is critical to note that criminal law and asylum law are two distinct areas of law, and the standard of proof is lower in asylum law. Therefore, the assessment of individual responsibility under exclusion provisions must primarily be carried out in light of the EU asylum *acquis* and guidance from the EUAA and UNHCR. When a discrepancy between the two fields of law arises, precedence must be given to the authoritative sources on asylum law when assessing exclusion grounds. Nevertheless, as Section 5.4 demonstrates, as courts navigate through the complex interactions between the Rome Statute and ICC jurisprudence, national criminal law, national asylum law and the EUAA and UNHCR guidance, a wide divergence in practices has emerged.

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