Court judgment in Federal Republic of Germany v B, Same v D [2012] 1 WLR 1076 at 1097C-D, which was referred to in LC Paper No. CB(2)809/13-14(01)

Court of Justice of the European Union

*Federal Republic of Germany *v* B

Same *v* D

(Joined Cases C-57/09 and C-101/09)

2010 March 9;
June 1;
Nov 9

President V Skouris,
Presidents of Chambers A Tizzano, J N Cunha Rodrigues, K Lenaerts, J-C Bonichot,
Judges A Borg Barthet, M Ilešič, U Lõhmus, L Bay Larsen,
Advocate General P Mengozzi

European Union — Persons needing international protection — Refugee status — Persons eligible — Member state refusing third country nationals' applications for refugee status on grounds of serious reasons for considering applicants committing serious non-political crimes before being admitted to its territory — Whether membership and active support of organisation listed in common position on measures combating terrorism "serious non-political crime" or "acts contrary to purposes and principles of United Nations" — Whether exclusion from refugee status conditional on applicant presenting continuing danger — Whether competent authorities required to carry out proportionality test in each case — Whether grant of asylum under national law compatible with refusal of refugee status under European Union law — Council Directive 2004/83/EC, arts 3, 12(2)(b)(c)

D, a Turkish national of Kurdish origin, applied for asylum in Germany. In support of his application he stated that he had been a member a specified organisation and had been a guerilla fighter. He was initially granted asylum. Subsequently that organisation was added to the list of groups involved in terrorist acts annexed to Council Common Position 2001/931/CFSP[1] on the application of specific measures to combat terrorism. B, also a Turkish national of Kurdish origin, who stated that he had been a sympathiser of another organisation listed in the annex to Common Position 2001/931/CFSP and had supported armed guerilla warfare, likewise sought asylum in Germany. D's right to asylum and refugee status were revoked and B's application for asylum refused on the grounds that there were serious reasons for considering that they had committed serious non-political crimes prior to being admitted to Germany and so were not entitled to the status of refugee, pursuant to the German law implementing article 1F(a) of the Convention and Protocol relating to the Status of Refugees. Article 1F was given effect for the purposes of European Union law by article 12(2)(b)(c) of Council Directive 2004/83/EC[2]. D and B appealed successfully, and on further appeals in both cases the German court referred to the Court of Justice of the European Union for a preliminary ruling five questions concerning, inter alia, what constituted a "serious non-political crime" or "acts contrary to the purposes and principles of the United Nations" within the meaning of article 12(2)(b)(c); whether exclusion from recognition as a refugee under that article required that the foreign national continue to constitute a danger or required that a proportionality test be undertaken in relation to his case; and whether article 3 of the Directive allowed a right of asylum to

[1] Council Common Position 2001/931/CFSP, Annex, as amended: see post, judgment, para 30.

[2] Council Directive 2004/83/EC, art 3: see post, judgment, para 19.
Art 12(2)(3): see post, judgment, para 20.
Art 14(1)(3) see post, judgment, para 22.
Art 21(1)(2) see post, judgment, para 23.

A be enjoyed under national constitutional law even if one of the exclusion criteria in article 12(2) was satisfied and refugee status had been revoked under article 14(3).

On the reference—

Held, (1) that the fact that a person had been a member of an organisation which, because of its involvement in terrorist acts, was on the list forming the Annex to Common Position 2001/931/CFSP and that that person had actively supported the armed struggle waged by that organisation did not automatically constitute a serious B reason for considering that that person had committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations" within the meaning of article 12(2)(b)(c) of Council Directive 2004/83/EC, even if the acts committed by the organisation fell within each of the grounds for exclusion laid down in article 12(2)(b)(c); that, however, the inclusion of an organisation on such a list made it possible to establish the terrorist nature of the group of which the person concerned was a member, which was a factor which the competent authority had to C take into account when determining, initially, whether that group had committed acts falling within the scope of article 12(2)(b) or (c); that the finding that there were serious reasons for considering that a person had committed such a crime or been guilty of such acts was conditional on an assessment, on a case by case basis, of the specific facts with a view to determining whether the acts committed by the organisation concerned met the conditions laid down in those provisions and whether individual responsibility for carrying out those acts could be attributed to D the person concerned, regard being had to the standard of proof required under article 12(2); and that exclusion from refugee status pursuant to article 12(2)(b) or (c) of the Directive was not conditional on either the person concerned representing a present danger to the host member state or an assessment of proportionality in relation to the particular case (post, judgment, paras 88, 89, 90, 98, 99, 105, 111, operative part, paras 1–3).

(2) That under article 3 of Council Directive 2004/83/EC member states could grant a right of asylum under their national law to a person who was excluded from E refugee status pursuant to article 12(2) of the Directive, provided that that other kind of protection did not entail a risk of confusion with refugee status within the meaning of the Directive (post, judgment, paras 119–121, operative part, para 4).

Per curiam. (i) Terrorist acts are "serious non-political crimes", within the meaning of article 12(2)(b), even if committed with purportedly political objectives. Terrorist acts with an international dimension committed in the course of a person's membership of an organisation which is on the list forming the Annex to Common F Position 2001/931/CFSP can be considered "acts contrary to the purposes and principles of the United Nations", within the meaning of article 12(2)(c) (post, judgment, paras 81, 84).

(ii) Any danger which a refugee may currently pose to the member state concerned is to be taken into account under articles 14(4)(a) and 21(2) of Directive 2004/83, pursuant to which a member state may, respectively, revoke refugee status or refoule a refugee considered to be a danger to the security of that state, and not G under article 12 (post, judgment, para 101).

The following cases are referred to in the judgment:

Abdulla v Bundesrepublik Deutschland (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08) [2011] QB 46; [2010] 3 WLR 1624; [2010] All ER (EC) 799, EGC

Bolbol v Bevándorlási és Állampolgársági Hivatal (Case C-31/09) [2011] INLR 296, H ECJ

The following additional cases are referred to in the opinion of the Advocate General:

Kurdistan Workers' Party (PKK) v Council of the European Union (Case T-229/02) [2005] ECR II-539, ECJ

Van Duyn v Home Office (Case 41/74) [1975] Ch 358; [1975] 2 WLR 760; [1975] 3 All ER 190; [1974] ECR 1337, ECJ

REFERENCES by the Bundesverwaltungsgericht (Federal Administrative Court), Germany

By order of 14 October 2008, in proceedings between the Federal Republic of Germany and B (Case C-57/09), the Bundesverwaltungsgericht referred five questions, post, judgment, para 67, on the interpretation of articles 3 and 12(2)(b)(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and on the content of the protection granted (OJ 2004 L304, p 12).

By order of 25 November 2008 in proceedings between the Federal Republic of Germany and D (Case C-101/09) the Bundesverwaltungsgericht referred five questions, post, judgment, para 67, on the interpretation of articles 3 and 12(2)(b)(c) of Council Directive 2004/83/EC.

The judge rapporteur was Judge Bay Larsen.

The facts are stated in the judgment.

M Lumma, *J Möller* and *N Graf Vitzthum*, agents, for the German Government.

R Meister for B.

H Jacobi and *H Odendahl* for D.

G de Bergues and *B Beaupère-Manokha*, agents, for the French Government.

C Wissels, agent, for the Netherlands Government.

A Falk and *A Engman*, agents, for the Swedish Government.

S Ossowski, agent, and *Tim Eicke QC* for the United Kingdom Government.

M Condou-Durande and *S Grünheid*, agents, for the European Commission.

1 June 2010. **ADVOCATE GENERAL MENGOZZI** delivered the following opinion.

1 By two successive orders, the Bundesverwaltungsgericht (Federal Administrative Court), Germany, has referred to the court, pursuant to articles 68(1)EC and 234EC of the EC treaty, a number of questions for a preliminary ruling concerning (i) the interpretation of article 12(2)(b) of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L304, p 12) and (ii) the interpretation of article 3 of that Directive. The questions have arisen in the context of disputes between the Federal Republic of Germany, represented by the Bundesministerium des Inneren (Federal Ministry of the Interior), represented, in turn, by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) ("the Bundesamt") and B (Case C-57/09) and D (Case C-101/09), concerning the Bundesamt's rejection of the application for asylum filed by B and its revocation of the refugee status initially granted to D.

A *I—Legislative background*

A—International law

1. The Geneva Convention relating to the Status of Refugees

2 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (Cmd 9171), was approved by a special conference of the United Nations Organisation and entered into force on 22 April 1954.
B The Convention—supplemented in 1967 by a protocol extending its scope, which was initially confined to persons who had become refugees as a result of the Second World War—defines the term "refugee" and lays down the rights and duties attaching to refugee status. At present, 146 states are signatories to the Geneva Convention.

3 In article 1A, a definition is given of the term "refugee" for the
C purposes of the Geneva Convention, and the following provision is made in article 1F:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make
D provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

4 Under article 33 of the Geneva Convention, entitled "Prohibition of expulsion or return ('refoulement')":

E > "1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> "2. The benefit of the present provision may not, however, be claimed
F by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

2. The resolutions of the UN Security Council

5 On 28 September 2001, acting on the basis of Chapter VII of the
G Charter of the United Nations, the UN Security Council adopted Resolution 1373 (2001), Threats to International Peace and Security caused by Terrorist Acts ("UNSCR 1373"). Pursuant to paragraph 2(c) of that resolution, the states are to "Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens". Pursuant to paragraph 3(f)(g), the states are called on to

H > "Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts"

and to

> "Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists."

Lastly, under paragraph 5 of UNSCR 1373, the Security Council declares 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."

(To the same effect, see UN Security Council Resolution 1269 (1999) of 19 October 1999 ("UNSCR 1269"), on the Responsibility of the Security Council in the Maintenance of International Peace and Security.)

6 Declarations to essentially the same effect are also contained in subsequent resolutions concerning threats to international peace and security as a result of terrorism, beginning with UN Security Council Resolution 1377 (2001), Threats to International Peace and Security caused by terrorist acts ("UNSCR 1377"), annexed to which is a declaration by the Security Council, at ministerial level, reaffirming its "unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed". (For example, in UN Security Council Resolution 1566 (2004) Threats to International Security Caused by Terrorist Acts ("UNSCR 1566") adopted on 8 October 2004, again on the basis of Chapter VII of the UN Charter, the Security Council states that "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".)

B—European Union ("EU") law

1. Primary law

7 Under article 2EU of the EU Treaty (following amendment by the Treaty of Lisbon),

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities . . ."

Article 3(5)EU provides that the European Union is to contribute to "the protection of human rights . . . as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

A 8 Under the first sub-paragraph of article 6(1)EU, the European Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (OJ 2007 C303, p 1) ("the Charter") which, in legal terms, has the same authority as the Treaties. Article 18 of that Charter states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention . . . and in accordance with the Treaty on European Union and the Treaty on B the Functioning of the European Union".

9 Under point (1)(c) of the first paragraph of article 63EC of the EC Treaty, within a period of five years after the entry into force of the Treaty of Amsterdam, the Council is to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, in relation, inter alia, to "minimum standards with respect to the qualification C of nationals of third countries as refugees".

2. Council Common Position 2001/931/CFSP

10 According to the recitals in the Preamble thereto, Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L344, p 93), adopted on the basis of D articles 15EU and 34EU, is designed to implement the measures to combat the financing of terrorism contained in UNSCR 1373. Under article 1(1) of Common Position 2001/931, it applies to "persons, groups and entities involved in terrorist acts and listed in the Annex". Article 1(2) provides that, for the purposes of that Common Position, "persons, groups and entities involved in terrorist acts" means "persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of E terrorist acts" and

> "groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and F entities."

Article 1(3) defines "terrorist act" and "terrorist group" for the purposes of Common Position 2001/931. Pursuant to articles 2 and 3,

> "The European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community, shall order the freezing of the funds and other financial assets or economic G resources of persons, groups and entities listed in the Annex"

and "shall ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly" for the benefit of such persons, groups and entities.

11 By article 1 of Council Common Position 2002/340/CFSP of 2 May 2002 (OJ 2002 L116, p 75) the list of persons, groups and entities to which H Common Position 2001/931 applies was updated for the first time. Pursuant to article 2 of the Annex to Common Position 2002/340, the "Kurdistan Workers' Party (PKK)" and the "Revolutionary People's Liberation Army/Front/Party (DHKP/C) (aka Devrimci Sol (Revolutionary Left), Dev Sol)" were inserted in the list with effect from the date on which that

measure was adopted. (In April 2004, the entry regarding the PKK was amended as follows: "Kurdistan Workers' Party (PKK) (aka KADEK, aka KONGRA-GEL)": see Council Common Position 2003/309/CFSP of 2 April 2004 (OJ 2004 L99, p 61).)

3. Council Framework Decision 2002/475/JHA

12 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L164, p 3) provides a common definition of terrorist offences, offences relating to a terrorist group and offences linked to terrorist activities, and provides that each member state is to take the necessary measures to ensure that such offences are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition. Under article 2, entitled "Offences relating to a terrorist group", "terrorist group" means, for the purposes of Framework Decision 2002/475, "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences". Article 2(2) provides that each member state:

> "shall take the necessary measures to ensure that the following intentional acts are punishable: (a) directing a terrorist group; (b) 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."

4. Council Directive 2004/83

13 At its extraordinary meeting in Tampere on 15 and 16 October 1999, the European Council agreed "to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention", to include in a first stage—in accordance with the timetable established in the Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of Treaty of Amsterdam on the creation of an area of freedom security and justice (OJ 1999 C19, p 1)—the adoption, more specifically, of "common standards for a fair and efficient asylum procedure" and "the approximation of rules on the recognition and content of the refugee status": see the presidency conclusions, which may be accessed at http://www.europarl.europa.eu/summits/tam_en.htm.

14 Consonant with that objective, Directive 2004/83 is designed, as is explained in recital (6), both "to ensure that member states apply common criteria for the identification of persons genuinely in need of international protection" and "to ensure that a minimum level of benefits is available for these persons in all member states". As is clear from recitals (16) and (17), in particular, the Directive is intended to establish "Minimum standards for the definition and content of refugee status . . . to guide the competent national bodies of member states in the application of the Geneva Convention" and "common criteria for recognising applicants for asylum as refugees within the meaning of article 1 of the Geneva Convention". According to recital (3), the Geneva Convention and the 1967 Protocol "provide the cornerstone of the international legal regime for the protection of refugees", and recital (15) recognises that

A "Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for member states when determining refugee status according to article 1 of the Geneva Convention."

According to recital (8):

B "It is in the very nature of minimum standards that member states should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a member state, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of article 1A of the Geneva Convention, or a person who otherwise needs international protection."

C Lastly, recital (22) states that:

"Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that D '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'."

15 Article 1 of Directive 2004/83, which is entitled "Subject matter and scope", states that the purpose of that Directive is to

E "lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted."

Article 2 contains a number of definitions for the purposes of the Directive. Under point (c) of article 2, "refugee" means:

F "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 the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to G return to it, and to whom article 12 does not apply."

16 Article 3 of Directive 2004/83, which is entitled "More favourable standards", provides that the member states:

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

17 Article 12 of Directive 2004/83, which is entitled "Exclusion", forms part of Chapter III, the title of which is "Qualification for being a refugee". Paragraphs 2 and 3 of article 12 provide:

"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 instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

18 Under article 14(3)(a) of Directive 2004/83, which forms part of Chapter IV, the title of which is "Refugee status", member states are to revoke, end or refuse to renew the refugee status of a third country national or stateless person, if, after that person has been granted refugee status, it is established by the member state concerned that "he or she should have been or is excluded from being a refugee in accordance with article 12".

19 Chapter VII, entitled "Content of international protection", lays down rules defining the obligations of the member states vis-à-vis persons with refugee status in relation, notably, to the issue of residence permits and travel documents, access to employment and education, housing, social welfare and health care. That Chapter also includes article 21, entitled "Protection from refoulement", paragraph 1 of which provides that the member states are to respect the principle of "non-refoulement" in accordance with their international obligations.

C—The national legislation

20 Under article 16a of the Grundgesetz (German Basic Law), "Persons persecuted on political grounds shall have the right of asylum". According to the information provided by the national court, the elements of German legislation on refugee status which are material to the present case may be summarised as follows.

21 Recognition of refugee status was originally governed by paragraph 51 of the Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Law on the entry into and residence of foreigners in the Federal Republic) ("the Ausländergesetz"). Paragraph 51(3) was amended, with effect from 1 January 2002, by the Gesetz zur Bekämpfung des internationalen Terrorismus [2002] I Bundesgesetzblatt 361 (Law on the prevention of terrorism), which introduced the grounds for excluding refugee status, as provided for under article 1F of the Geneva Convention.

22 Following the entry into force on 27 August 2007 of the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union [2007] I Bundesgesetzblatt 1970 (Law implementing the Directives of the European Union on rights of residence and asylum) ("the Richtlinienumsetzungsgesetz") of 19 August 2007, which also transposed Directive 2004/83 into German law, the conditions for the recognition of

refugee status are determined by paragraph 60(1) of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreigners in the Federal Republic) ("the Aufenthaltsgesetz"), read in conjunction with paragraph 3(1) of the Asylverfahrensgesetz [2008] I Bundesgesetzblatt 1798 (Law on asylum procedure). Under the latter provision,

> "a foreigner shall be considered to be a refugee within the meaning of the [Geneva Convention] if, in the country of which that person is a national, he or she is exposed to the risks listed in paragraph 60(1) of the [Aufenthaltsgesetz]."

23 Points (2) and (3) of paragraph 3(2) of the Asylverfahrensgesetz—which replaced, as of 27 August 2007, the second sentence of paragraph 60(8) of the Aufenthaltsgesetz, the latter having itself replaced the second sentence of paragraph 51(3) of the Ausländergesetz—transposes article 12(2)(3) of Directive 2004/83 into German law. It provides, inter alia, that a foreign national is to be excluded from refugee status in accordance with article 3(1) where there are serious reasons for considering that:

> "(2) he or she has committed a serious non-political crime outside the national territory prior to being admitted as a refugee; particularly cruel actions, even if committed with a purportedly political objective; or (3) he or she has been guilty of acts contrary to the purposes and principles of the United Nations."

24 Under the second sentence of paragraph 3(2), the provision made in the first sentence is also to apply to foreign nationals who have instigated such offences or acts, or otherwise participated in them.

25 Paragraph 73(1) of the Asylverfahrensgesetz, as amended, provides that both the right of asylum and refugee status are to be revoked without delay if the conditions for their recognition are no longer fulfilled.

II—The national proceedings, the questions referred and the procedure before the court

A—Federal Republic pf Germany v B (C-57/09)

26 Born in 1975, B is a Turkish national of Kurdish origin. In late 2002, he travelled to Germany where he applied for asylum. When filing his application, he stated that while still a schoolboy in Turkey he had been a sympathiser of Dev Sol (now DHKP/C), and that, from late 1993 to early 1995, he had supported armed guerrilla warfare in the mountains. After being arrested in February 1995, he had been subjected to serious physical abuse and forced to make a statement under torture. In December 1995, he was given a life sentence, and, in 2001, he was given another life sentence after confessing to killing a fellow prisoner. In the autumn of 2000, he took part in a hunger strike and, in December 2002, because of the resultant damage to his health, he was granted a conditional release from custody and took the opportunity to leave Turkey. His experiences had left him suffering from serious post-traumatic stress syndrome and, as a result of the hunger strike, he had suffered brain lesions and the associated amnesia. B claims that he is now regarded as a traitor by the DHKP/C.

27 By decision of 14 September 2004, the Bundesamt rejected the application for asylum, having established that the conditions laid down in paragraph 51(1) of the Ausländergesetz were not satisfied. (The decision was adopted by the Bundesamt für die Anerkennung ausländischer Flüchtlinge (Federal Office for the recognition of foreign refugees), which was later replaced by the Bundesamt.) The Bundesamt found that the ground for exclusion laid down in the second limb of the alternative specified in the second sentence of paragraph 51(3) of the Ausländergesetz (now point (2) of article 3(2) of the Asylverfahrensgesetz) applied. It also found that there were no obstacles to the deportation of B to Turkey and declared him liable for deportation.

28 By order of 13 October 2004, the Verwaltungsgericht (Administrative Court), Gelsenkirchen, annulled the decision of the Bundesamt and ordered the latter to recognise a right of asylum and to declare that the conditions for prohibiting the deportation of B to Turkey were met.

29 By judgment of 27 March 2007, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for North Rhine-Westphalia) dismissed the appeal lodged by the Bundesamt, on the view that B should be recognised as having a right of asylum under article 16a of the Grundgesetz, as well as refugee status. According to the Oberverwaltungsgericht, the ground for exclusion laid down in the second limb of the alternative in the second sentence of paragraph 51(3) of the Ausländergesetz did not apply if the foreign national proved to be no longer a danger—for example, because he had renounced all terrorist activity or because of his state of health—and its application required an overall assessment of the individual case in the light of the principle of proportionality.

30 The Bundesamt appealed that judgment before the Bundesverwaltungsgericht, arguing that both of the grounds for exclusion laid down in the second sentence of paragraph 51(3) of the Ausländergesetz (points (2) and (3) of paragraph 3(2) of the Asylverfahrensgesetz) applied, and maintaining that article 12(2) of Directive 2004/83, which lays down those grounds for exclusion, is among the principles from which, pursuant to article 3 of the Directive, states may not derogate. The Vertreter des Bundesinteresses (Representative of the Federal Interest) intervened in the proceedings, disputing the position adopted by the Oberverwaltungsgericht.

B—Federal Republic of Germany v D (C-101/09)

31 Born in 1968, D is a Turkish national of Kurdish origin. In May 2001, he travelled to Germany where he applied for asylum. As grounds for his application, he stated that he had been arrested and tortured on three occasions in the late 1980s because of his commitment to the right of the Kurds to self-determination. In 1990, he joined the PKK, becoming a guerrilla fighter and achieving the status of senior party official. In late 1998, the PKK sent him to northern Iraq where he remained until 2001. Political differences with the PKK leadership led D to leave the organisation in May 2000 and, from then on, he has been regarded as a traitor and threatened as such. He fears persecution both by the Turkish authorities and by the PKK.

A 32 In May 2001, the Bundesamt recognised D's right to asylum on the basis of the legislation in force at the time. (In the case of D, as in the case of B, the decision was adopted by the Bundesamt für die Anerkennung ausländischer Flüchtlinge, which later became the Bundesamt.) Following the entry into force of the Gesetz zur Bekämpfung des internationalen Terrorismus in 2002, the Bundeskriminalamt (Federal Criminal Police Office) proposed that the Bundesamt should initiate the procedure for B revoking the right to asylum. According to the information in the possession of the federal police, D had been a member of the PKK's 41-person governing body since February 1999. In August 2000, Interpol Ankara had placed him on a list of wanted persons, believing him to have been involved, between 1993 and 1998, in attacks in which a total of 126 people had been killed, as well as in the murder of two PKK guerrillas. By decision of 6 May C 2004, the Bundesamt revoked recognition of D's right to asylum and refugee status, pursuant to paragraph 73(1) of the Asylverfahrensgesetz. The Bundesamt found that there were serious reasons for considering that D had committed a serious non-political crime outside the territory of the Federal Republic of Germany and had been guilty of acts contrary to the purposes and principles of the United Nations, and that, in consequence, the grounds for exclusion originally laid down in the second sentence of D paragraph 51(3) of the Ausländergesetz and subsequently in the second sentence of paragraph 60(8) of the Aufenthaltsgesetz and, lastly, in paragraph 3(2) of the Asylverfahrensgesetz applied in his case.

33 By judgment of 29 November 2005, the Verwaltungsgericht Gelsenkirchen annulled the revocation decision. By judgment of 27 March 2007, the appeal lodged by the Bundesamt was dismissed by the E Oberverwaltungsgericht für das Land Nordrhein-Westfalen. On grounds similar to those of the judgment, handed down on the same day, by which it dismissed the appeal by the Bundesamt in the proceedings concerning the rejection of B's application for asylum, the Oberverwaltungsgericht held that the grounds for exclusion laid down in the German legislation did not apply in relation to D either.

34 The Bundesamt appealed that judgment before the F Bundesverwaltungsgericht. The Representative of the Federal Interest intervened in the proceedings, disputing the position adopted by the Oberverwaltungsgericht.

C—The questions referred

35 The Bundesverwaltungsgericht took the view that resolution of the G disputes turned on the interpretation of Directive 2004/83, and, by orders of 14 October 2008 (C-57/09) and 25 November 2008 (C-101/09), it stayed both sets of proceedings and, in both cases, referred the following five questions to the court for a preliminary ruling: [the questions referred are set out, post, judgment, para 67].

D—Procedure before the court

H 36 By order of the President of the court of 4 May 2009, Cases C-57/09 and C-101/09 were joined for the purposes of the written and oral procedure and the judgment. Observations were submitted by B, D, the Kingdom of Sweden, the Kingdom of the Netherlands, the French Republic, the United Kingdom and the commission, pursuant to the second paragraph of

article 23 of the Statute of the Court of Justice. At the hearing on 9 March 2010, B, D, the above governments, the commission and the Federal Republic of Germany presented oral argument.

III—Analysis

A—Preliminary observations

37 Before turning to consider the questions referred, I should begin by setting out a number of brief considerations.

38 First of all, I note that the measures refusing and revoking recognition of refugee status and a right of asylum, with regard to B and D respectively, were adopted on the basis of the legislation in force before Directive 2004/83 was transposed into German law (by the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, which came into force on 27 August 2007) and pre-date the deadline for the Directive's implementation by the member states (10 October 2006). (Moreover, the revocation in D's case, dated 6 May 2004, and the refusal in B's case, dated 14 September 2004, pre-date the entry into force of Directive 2004/83 (20 October 2004).) None the less, the Bundesverwaltungsgericht considers the questions referred to the court to be relevant. In essence, it takes the view that, if one or both of the grounds for exclusion laid down in article 12(2)(b)(c) of Directive 2004/83 were to apply to B and D, the measures adopted in that regard could not be annulled. More specifically, as regards D, the Bundesverwaltungsgericht takes as its starting point the assumption that, under article 14(3) of Directive 2004/83, if refugee status has been accorded to a person who ought to have been excluded pursuant to article 12, that status must be revoked, even if it was accorded before Directive 2004/83 entered into force. According to the Bundesverwaltungsgericht, it follows that, even if the revocation decision in D's case turned out to be unlawful under the rules in force at the time of its adoption, it could not in any event be annulled, because of the primacy of EU law, as it would immediately have to be replaced with a measure that was identical in substance. However, the Bundesverwaltungsgericht leaves open the question whether, on the basis of German law, a change in the legal position might justify revoking recognition of refugee status. I do not consider that the above factors can call into question the admissibility of the reference for a preliminary ruling. In principle, it is for the national court to determine the relevance of the questions submitted to the court for the purposes of resolving the dispute before it. As regards the jurisdiction of the court, given that these situations do not fall within the scope ratione temporis of Directive 2004/83, I would simply refer to the court's recent finding in *Abdulla v Bundesrepublik Deutschland* (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08) [2011] QB 46, para 48.

39 I would also point out that, taking as its basis the findings of fact made by the Oberverwaltungsgericht, which has to act within the confines of the appeal brought before it, the Bundesverwaltungsgericht has established that, in the case of B and D, the conditions for recognition of refugee status, as laid down both in the provisions of national law applicable before the transposition of Directive 2004/83 and in the Directive itself, are satisfied and is uncertain only as to whether one of the grounds for excluding refugee status applies to them. As a consequence, the court is not required in any way to make a ruling regarding those conditions. Moreover, the judgments

A handed down by the national courts have established that B and D were members of the PKK and Dev sol, respectively, and the duration, level and manner of their involvement in the activities of those organisations. With regard to those aspects also, the court must therefore abide by the findings made by the courts adjudicating on the substance, in the context of the national proceedings.

B *B—Consideration of the questions referred*

1. Introductory remarks

40 At the root of the questions referred by the Bundesverwaltungsgericht is the conflict between the obligations of the states in relation to the fight against terrorism and their responsibility for applying the instruments designed to protect those who invoke international protection in order to
C escape persecution in their own countries. The international community's resolute condemnation of acts of international terrorism, and the adoption of restrictive measures, under Chapter VII of the Charter of the United Nations, against individuals or organisations considered to be responsible for such acts, have a direct impact on substantive aspects of the recognition of refugee status. (Thus, for example, UNSCR 1373 declares "acts, methods and
D practices of terrorism" to be contrary to the purposes and principles of the United Nations, and prohibits states from according safe haven to those who "finance, plan, support, or commit terrorist acts": see points 5 and 6 of this opinion.) The questions referred hinge precisely on the sensitive issue of excluding from refugee status individuals who have once belonged to organisations on lists annexed to European Union instruments relating to the fight against terrorism.

E **41** In considering these issues, account must be taken of the close relationship between Directive 2004/83 and the Geneva Convention, the nature of the law on refugees, and, more specifically, the nature and purpose of the grounds for excluding refugee status.

(a) Directive 2004/83 and the Geneva Convention

F **42** In relation to asylum, it is vital that there should be consistency between the EU rules and the international obligations entered into by member states, particularly under the Geneva Convention, as is apparent from the legal basis for Directive 2004/83 (in particular article 63(1)(c)EC, which is one of the provisions on the basis of which Directive 2004/83 was adopted) and the origins of that Directive (see point 13 of this opinion) and
G as is also clearly expressed in the Preamble to Directive 2004/83 (see point 14 of this opinion) and evident from many of its provisions, which reproduce, practically word for word, the corresponding provisions of the Geneva Convention. Moreover, the court has recently confirmed the need for consistency: see the *Abdulla* case [2011] QB 46, para 53.

43 From that perspective, in addition to consultations with the UN High Commission for Refugees ("UNHCR"), to which recital (15)
H to Directive 2004/83 refers[1*], guidance for interpreting provisions of the Directive which have their origin in the text of the Geneva Convention is provided by the Conclusions on the International Protection of Refugees,

* *Reporter's note*. The superior figures in the text refer to notes which can be found at the end of the Advocate General's opinion, on pp 1106–1108.

adopted by the UNHCR's Executive Committee, which specify the content of the standards of protection established by the Geneva Convention[2], by the *Handbook on Procedures and Criteria for Determining Refugee Status* ("the Handbook")[3] and by the Guidelines on International Protection (Cessation of Refugee Status under article 1C(5)(6) of the 1951 Convention relating to the Status of Refugees of 10 February 2003) ("the Guidelines"), issued by the UNHCR's Department for International Protection, following summary approval by the Executive Committee, which supplement the *Handbook* by elaborating on individual issues. Legal writers have not failed to point out (*James C Hathaway, The Rights of Refugees under International Law* (2005), pp 115 and 116) that this plethora of documents, which in some cases contradict each other and which are supplemented by the positions adopted on various bases by the UNHCR (such as the opinion appended to B's written observations), does not make it easy to develop uniform practice in the interpretation and application of the Geneva Convention by the contracting states. In my analysis, I shall, however, endeavour to take account of the guidance that emerges from the various sources mentioned above.

(b) Nature of the law on refugees

44 Although traditionally regarded as an autonomous system of law, the law on refugees is closely linked to international humanitarian law and international law on human rights, with the result that the progress achieved by the international community in those areas is reflected in the content and range of international protection for refugees, so that the two systems are closely interrelated[4]. The fundamentally humanitarian nature of the law on refugees and the fact that it is so closely tied in with the development of human rights must accordingly provide the backdrop whenever the instruments for securing that protection are being interpreted and applied. Moreover, the court recently took that approach when, in the *Abdulla* case [2011] QB 46, para 45, it held that Directive 2004/83 must be interpreted in a manner consistent with the fundamental rights and principles recognised, in particular, by the Charter of Fundamental Rights of the European Union.

45 It should be pointed out in that connection that the right to seek asylum from persecution is recognised as a fundamental right within the European Union and is listed as a fundamental freedom under that Charter.

(c) The nature and purpose of the grounds for excluding refugee status

46 The grounds for exclusion deprive individuals whose need for international protection has been established of the guarantees laid down in the Geneva Convention and Directive 2004/83, and, in that sense, constitute exceptions to or limitations on the application of a provision of humanitarian law. (The assessment concerning the conditions for recognition of refugee status takes place, save in exceptional cases, before consideration is given as to whether the exclusion clauses apply ("inclusion before exclusion").) Given the potential consequences of applying those grounds, a particularly cautious approach must be taken: see the Lisbon Expert Round-table Global Consultations on International Protection, 3–4 May 2001, para 4 of the final observations, available at http://www.unhcr.org/3b38938a4.pdf. The UNHCR has consistently reaffirmed the need to construe the grounds for

A exclusion laid down in the Geneva Convention narrowly, even in the context of combating terrorism: see the Special Rapporteur on the promotion and the protection of human rights and fundamental freedoms while countering terrorism, United Nations Report of 15 August 2007, para 71, available at http://www.unhcr.org/refworld/docid/472850e92.html.

47 As regards the aims underlying the grounds for exclusion, even the
B travaux préparatoires for the Geneva Convention refer to two separate objectives: (i) to deny refugee status to persons whose conduct has rendered them "undeserving" of the international protection accorded by the Geneva Convention and (ii) to prevent such individuals from being able to escape justice by invoking the law on refugees. In that sense, the grounds for exclusion are intended to safeguard the integrity and credibility of the system established under the Geneva Convention, and they must therefore
C be applied "scrupulously". (To that effect, see, inter alia, "Safeguarding Asylum", No 82 of 1997 Excom Conclusions 17 October 1997 http://www.unhcr.org/3ae68c958.html.)

2. The first question

48 By its first question, the Bundesverwaltungsgericht asks, in essence,
D whether the involvement, established by the relevant judgments on the substance, of B and D with organisations on the list set out in the Annex to Common Position 2001/931, as updated, which use terrorist methods, even if only to a degree, constitutes a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of article 12(2)(b)(c) of Directive 2004/83.

49 The answer to this question requires above all a definition of the
E terms "serious non-political crime" and "acts contrary to the purposes and principles of the United Nations", as used in Directive 2004/83. It will then be necessary to determine the parameters within which those terms can be applied to the activities of an organisation on the list of entities covered by the EU legislation on combating terrorism. Lastly, it will be necessary to determine whether—and, if so, in what circumstances—involvement with
F an organisation of that nature entails a "serious non-political crime" and/or "acts contrary to the purposes and principles of the United Nations".

(a) The term "serious non-political crime", as used in article 12(2)(b) of Directive 2004/83

50 For a particular form of conduct to fall within the category
G contemplated in article 12(2)(b) of Directive 2004/83, it must, first and foremost, be categorised as a "crime". The fact that the connotations of that term may vary with the legal system serving as the point of reference is one of the factors which make it difficult to define, whether in the context of the Geneva Convention or in the context of Directive 2004/83. For the purposes of this analysis, it is sufficient to point out in that regard that, given the origin of the provision at issue—which reproduces word for word the provision
H made under article 1F(b) of the Geneva Convention—and the aim of Directive 2004/83, as described above, the categorisation of certain conduct as a crime principally requires the application of international standards, even though criteria applied within the legal system under which the application for asylum has come under consideration may also be relevant,

as may principles common to the legislation of the member states or flowing from EU law.

51 It emerges from the travaux préparatoires for the Geneva Convention and from a systematic interpretation of article 1F(b) (in particular, if that provision is construed in the light of the other two grounds for exclusion laid down in points (a) and (c) of article 1F of the Geneva Convention)—as well as, more generally, from the nature and purpose of that provision—that, for the application of that clause to be triggered, the crime in question must be very serious. That interpretation is borne out by the interpretative approach taken by the various UNHCR bodies and by the way in which that provision is consistently implemented by the contracting states: see, in that connection the document drawn up by the UNHCR for the purposes of this case and appended to B's written observations. It is also endorsed by legal writers: see, for example, *Grahl-Madsen, The Status of Refugees in International Law*, 2nd ed (1972) vol 1, p 294; *Goodwin-Gill & McAdam, The Refugee in International Law*, 3rd ed (2007), p 117.

52 Specifically, the assessment of the seriousness of the crime must be undertaken on a case-by-case basis, in the light of all the mitigating or aggravating circumstances, as well as any other relevant circumstances, whether subjective (for example, the age of the person applying for refugee status at the time when the crime was committed, or the economic, social and cultural situation of that person, especially in the case of individuals falling into certain categories, (such as ethnic or religious minorities)) or objective[5], prior or subsequent to the offence[6], entailing the adoption of international rather than local standards. Inevitably, that assessment leaves a broad measure of discretion to the authorities responsible for making it.

53 In the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: article 1F of the Geneva Convention relating to the Status of Refugees, 4 September 2003 ("the 2003 Guidelines"), para 14, the UNHCR sets out an illustrative list of the factors to be taken into consideration: the nature of the act; the actual consequences of that act; the form of procedure used to prosecute the crime; the nature of the penalty; and whether the act constitutes a serious crime in a considerable number of jurisdictions. In particular, the severity of the penalty laid down or actually imposed in the state in which the request for recognition of refugee status is being considered is significant[7], even if not decisive in itself, as it may vary from one legal system to another. Crimes against the life, physical integrity or freedom of the person are generally regarded as serious crimes: *Goodwin-Gill & McAdam, The Refugee in International Law*, p 177.

54 The fact that the crime must be "non-political" is to prevent refugee status being invoked in order to escape prosecution or the enforcement of a penalty in the state of origin, the intention being to distinguish between "fugitives from justice" (this expression is used in the travaux préparatoires for the Geneva Convention with reference to article 1F(b)) and persons who, for political reasons—often directly linked to the fear of persecution—have committed acts which are significant in terms of the criminal law. In that sense, there is a relationship between that condition and extradition, even though the fact that a crime is regarded as non-political in an extradition treaty, albeit significant, is not of itself conclusive for the purposes of the assessment to be made on the basis of article 1F(b) of the Geneva

A Convention, (see the 2003 Guidelines, para 15) and, in consequence, ought not to be conclusive in terms of Directive 2004/83 either.

55 In assessing whether or not a crime is political, the UNHCR recommends, first and foremost, the application of a "predominance" test, according to which a crime in relation to which non-political motives (such as personal reasons or gain) predominate must be regarded as non-political. Factors such as the nature of the act (certain offences, such as robbery or B drug-trafficking, even if committed for the purpose of pursuing political objectives, could, because of their nature, be categorised as non-political offences), the context in which it is carried out (murder or attempted murder may, within certain limits, be differently assessed if it takes place in the context of a civil war or an insurrection), the methods used (it is relevant, for example, whether the act was directed at civilian or military or, indeed, C political targets, if it involves the use of indiscriminate violence or is committed with cruelty), the reasons for committing it (as well as the individual motivation, it is necessary to assess whether there is a clear and direct causal link with the political objective) and the proportionality of the crime to the purported objectives are important for assessing whether a crime is political in nature: see the Handbook, para 152; the 2003 Guidelines, para 15.

D 56 In particular, if there is no clear or direct link between the crime and its purported political objective, or if the act in question is disproportionate to that objective, it will be regarded as predominantly non-political: see the Handbook, para 152; the 2003 Guidelines, para 15. The European Union legislature took a similar approach when, in reproducing the text of article 1F(b) of the Geneva Convention in E article 12(2)(b) of Directive 2004/83, it specified—summarising the UNHCR's interpretative guidelines—that "particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes". The term "particularly cruel actions" should be applied, not only to the crimes subject to prosecution under the international instruments for the protection of human rights and F humanitarian law, but also to crimes which involve the use of abnormal and indiscriminate violence (such as the use of explosive devices), especially when directed at civilian targets.

57 Such an assessment is undeniably complex and sensitive, both from an ethical perspective—since it implies the idea that, within certain limits, the use of violence can be legitimate—and a political perspective, even more so than from a legal point of view. It will be difficult to keep the assessment G distinct from a value judgment concerning the motives for the act, a judgment which, truth to tell, will enter into consideration as a weighting factor in the appraisal of the various circumstances of the case. (A particular act may, for example, be assessed differently if it takes place against a background of opposition to totalitarian, colonialist or racist regimes, or regimes which have committed serious violations of human rights. It should, in any event, be pointed out that, according to the UNHCR, for an offence to H be regarded as a political offence, the objectives pursued must always be consistent with the principles of protecting human rights.) This inevitably results in a certain measure of discretion for the authorities responsible for assessing the application for recognition of refugee status. Furthermore, it is quite possible that, in the specific case, the assessment may take account of

the interests of the state in which the application is filed: its economic, political or military interests, for example.

(b) The term "acts contrary to the purposes and principles of the United Nations"

58 The term "acts contrary to the purposes and principles of the United Nations", which appears in article 1(F)(c) of the Geneva Convention and article 12(2)(c) of Directive 2004/83, is vague and makes it difficult to define either the kind of act which may fall into that category or the persons who may commit such acts. Unlike article 1F(c) of the Geneva Convention, article 12(2)(c) of the Directive specifies that the purposes and principles of the United Nations are "as set out in the Preamble and articles 1 and 2 of the Charter of the United Nations".

59 The general terms employed in the UN Charter, as well as the lack of any consolidated practice for applying it on the part of the states, have suggested a restrictive interpretation of article 1F(c), which is borne out, moreover, by the travaux préparatoires for the Geneva Convention, which reveal that that provision was intended to "cover mainly violations of human rights which, although falling short of crimes against humanity, were nevertheless of an exceptional nature". The various documents drawn up by the UNHCR stress the exceptional nature of the provision and warn against the danger of making abusive use of it. (The UNHCR points out that, in the majority of cases, it is the grounds for exclusion laid down in article 1F(a)(b) that will in fact apply.) For example, in the 2003 Guidelines, the UNHCR states, at para 17, that article 1F(c) is triggered only in "extreme circumstances by activity which attacks the very basis of the international community's coexistence". According to the UNHCR, such an activity must nevertheless have an *international dimension*, as in the case of "crimes capable of affecting international peace, security and peaceful relations between states", and "serious and sustained violations of human rights". In the Background Note on the Application of the Exclusion Clauses of 4 September 2003, para 47 (see http://www.unhcr.org/refworld/docid/3f5857d24.html) the UNHCR points out that the principles and purposes of the United Nations are reflected in myriad ways, for example by multilateral conventions adopted under the aegis of the UN General Assembly or by Security Council resolutions: however, equating any action contrary to such instruments as falling within the scope of article 1F(c) would be inconsistent with the object and purpose of that provision. Article 12(2)(c) must, in my view, be construed in the same way.

60 The question of the persons who may be guilty of such actions has also been raised. Given that the UN Charter applies exclusively to states, the view was initially taken that only individuals "at the head of a state hierarchy or parastatal entity" were in a position to commit actions capable of being caught by the definition under article 1F(c) of the Geneva Convention: see *Goodwin-Gill & McAdam, The Refugee in International Law*. That interpretation, which is supported both by the travaux préparatoires for the Geneva Convention (in which it was specified that the provision in question was not aimed at the "man in the street"; see the Background Note on the Application of the Exclusion Clauses, para 48) and by the Handbook, para 163, seems, however, to have been overtaken in

practice, and, in specific cases, article 1F(c) has been applied also to persons who are not engaged in activities involving the exercise of public authority. (In The Exclusion Clauses: Guidelines on their Application, Geneva, 1 December 1996, the UNHCR refers to the application of article 1F(c) in the 1950s to persons whose denunciations of individuals to the occupying authorities had had serious consequences for the individuals concerned, including death (para 61); see Gilbert, "Current Issues in the Application of the Exclusion Clauses" (2001) p 22. Gilbert, however, seems to endorse a narrower interpretation of the provision in question and suggests that it should apply only to persons in high office in the government of a state or in the leadership of a rebel movement which controls territory within a state.)

(c) The application of article 12(2)(b) to "acts of terrorism"

61 One of the most complex and debated issues concerning the application of the grounds for exclusion laid down in article 1F(b)(c) of the Geneva Convention concerns acts of terrorism. The problem partly arises because there is currently no internationally recognised definition of terrorism. In recent times, the attempt has been made in some resolutions of the UN General Assembly (see UN General Assembly Resolution 53/108 of 26 January 1999 ("UNGAR 53/108")) and of the Security Council (see point 5 of this opinion), as well as in the International Convention for the Suppression of the Financing of Terrorism (annexed to UN General Assembly Resolution 54/109 of 25 February 2000 ("UNGAR 54/109")) to define the terrorist character of an act by reference to its nature (acts directed against civilians with the intention of causing death or serious injury) and purpose (to provoke a state of terror or to intimidate a population, a group of persons or particular persons, or to compel a government or international organisation to perform or to refrain from performing an act). The same approach is taken in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, article 1, which provides a particularly well-constructed definition of "terrorist offences".

62 The large number of international instruments governing individual aspects of terrorism (such as its financing) or specific forms of conduct which are generally regarded as falling within the category of terrorist acts (such as hijacking, hostage-taking, bombings, crimes against diplomats and "nuclear terrorism"), together with the Security Council's many resolutions on the subject, have inevitably had an impact on the law on refugees and, in particular, on issues relating to the determination of refugee status. In that connection, I have already mentioned UNSCRs 1373 and 1269, in which states are urged to ensure that asylum-seekers have not planned, participated in or facilitated the committing of terrorist acts, and to refuse to accord refugee status to anyone responsible for such acts. The Security Council also categorises acts, methods and practices of terrorism as contrary to the purposes and principles of the United Nations, and calls for them to be depoliticised, for the purposes both of recognising refugee status and of extradition. The European Union legislature itself refers to this in the Preamble to Directive 2004/83 where, in recital (22), it specifies that acts contrary to the purposes and principles of the United Nations are "embodied in the United Nations resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly

financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations' ".

63 In considering these positions, however, it must be pointed out, on the one hand, that the Security Council resolutions are not always binding in their entirety and that the Security Council itself is, in any event, required to act in conformity with the Charter of the United Nations and its principles and purposes, one of the consequences being that its opportunities to interfere with the international obligations assumed by states are limited: see, in this connection, inter alia, Daniel Halberstam & Eric Stein, "The United Nations, the European Union and the King of Sweden: Economic sanctions and individual rights in a plural world order" (2009) 46 CML Rev 13. On the other hand, the point must be made that both the General Assembly and the Security Council itself have consistently called on the states to comply with the international instruments for the protection of human rights, including the Geneva Convention and the principle of non-refoulement, in the context of combating terrorism.

64 However, as legal writers are not slow to point out, the law on refugees is based on the system set up under the Geneva Convention, within the framework of which specific international standards were drawn up, including in relation to the determination of refugee status and the grounds on which recognition of that status may be refused: see *Goodwin-Gill & McAdam*, *The Status of the Refugee in International Law*, p 195. It is, above all, that system, the coherence and organic nature of which must, as far as possible, be secured and maintained, which must provide the frame of reference for assessing whether a specific criminal act is relevant for the purposes of applying the grounds for exclusion laid down in article 1F(b)(c) of the Geneva Convention, irrespective of whether that act can be assigned to a category of offences defined on the basis of common features.

65 By the same token, it is the rules of that system which must provide the primary point of reference for interpreting Directive 2004/83, even when it is a case of applying concepts which are autonomously defined in legislative acts of the European Union adopted in sectors other than the law on refugees.

66 It is necessary, therefore, to treat with extreme caution the commission's argument that, in order to assess whether membership of a terrorist organisation constitutes a "serious non-political crime" for the purposes of article 12(2)(b), it is necessary to refer to the provisions of Framework Decision 2002/475. The reason is that that decision was adopted as part of the fight against terrorism, a context with different requirements from the—essentially humanitarian—requirements that inform the international protection of refugees. Although dictated by the desire to encourage the development of uniform criteria at European Union level for the application of the Geneva Convention, the commission's argument fails to acknowledge that, on the basis of Directive 2004/83 itself, the approximation of the laws and practices of the member states in this area must proceed in compliance with the Geneva Convention, account being taken of the international nature of its provisions.

67 That said, I pointed out above that one of the special features of the system under the Geneva Convention is the casuistic approach taken in applying the grounds for exclusion laid down in article 1F(b)(c), an approach that does not as such lend itself to the use of generalisations and

A categorisations. On the other hand, in the United Nations context also, attention has certainly been drawn to the risks of the indiscriminate use of the term "terrorism": see the Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Effective Functioning of Human Rights Mechanisms, UN doc E/CN.4/2004/4, 5 August 2003.

B **68** On the basis of the foregoing, I therefore consider—along the lines suggested by the UNHCR in the document drawn up for the purposes of this case—that, going beyond the definitions, it is necessary to take account of the intrinsic nature and gravity of the act itself.

69 The interpretation recommended by the UNHCR and generally accepted both in legal literature and in practice, is to consider the criminal acts which are generally described as terrorist acts as being disproportionate C to the purported political objectives in so far as they involve the use of indiscriminate violence and are directed at civilians or persons unconnected with the objectives pursued: see the 2003 Guidelines, para 15. Subject to an assessment of all the relevant circumstances of the individual case, such acts are likely to be categorised as non-political crimes.

70 Similarly, the approach that has more recently developed within the various UNHCR bodies seems to be to consider such acts, given their nature, D the methods used and their seriousness, as contrary to the purposes and principles of the United Nations within the meaning of article 1F(c) of the Geneva Convention. As we have seen, however, the 2003 Guidelines and the Background Note on the Application of the Exclusion Clauses suggest that it is nevertheless necessary to verify whether they have an *international dimension*, especially in terms of their seriousness and their impact and E implications for international peace and security. (The Background Note and the 2003 Guidelines refer to "egregious acts of international terrorism affecting global security". Para 49 of the Background Note further elaborates that "only the leaders of groups responsible for such atrocities would in principle be liable to exclusion under this provision". The UNHCR document drawn up for the purposes of this case also appears to take the same approach.) Within those limits, it therefore seems F permissible to make a distinction between international terrorism and domestic terrorism. Here again, the assessment will have to be made in the light of all the relevant circumstances.

71 It seems to me that the same approach should be taken in applying the grounds for exclusion laid down in article 12(2)(b)(c) of Directive 2004/83.

G

(d) Involvement with an entity on a list drawn up by the European Union in connection with instruments for combating terrorism: a ground for exclusion under article 12(2)(b)(c)

72 The considerations set out above lead me to rule out the possibility that the mere fact that the asylum-seeker is on the lists of individuals involved in acts of terrorism, drawn up as part of EU measures to combat H terrorism, can of itself be conclusive, or even merely indicative, evidence of the application of one or both of the grounds for exclusion laid down in article 12(2)(b)(c) of Directive 2004/83. In fact, as mentioned above and pointed out by the Netherlands Government in particular, there is no relationship between those instruments and the Directive, especially as

regards the objectives pursued. Moreover, to take the opposite view would be contrary to the principles of the Geneva Convention, which requires a careful analysis, in the light of the specific features of the individual case, of the situations which may result in a refusal to recognise refugee status.

73 A fortiori, I do not consider it legitimate to infer automatically that the conditions for the application of those exclusion clauses are satisfied simply because the applicant was once a member of a group or organisation on those lists. Without going into the question whether such lists (the methods used to draw them up have not been free from criticism[8]) can provide an accurate reflection of the frequently complex reality of the organisations or groups listed, it is sufficient to point out that the exclusion clauses at issue cannot apply unless it is possible to establish the *individual responsibility* of the person concerned, with regard to whom there must be serious grounds for believing that he has committed a serious non-political crime or has been guilty of an act contrary to the purposes and principles of the United Nations within the meaning of article 12(2)(b)(c) of Directive 2004/83 or, pursuant to article 12(3) of that Directive, that he has instigated or otherwise participated in the commission of such crimes or acts.

74 If we are not to proceed on the basis of assumptions[9], an individual's voluntary membership of an organisation does not of itself support the conclusion that that person has actually been involved in the activities which led the organisation to be placed on the lists in question[10].

75 Aside from those general considerations, another significant fact to emerge from the main proceedings is that B and D had broken away from the groups in question quite some time before those groups were placed on the relevant lists. As has already been mentioned, the PKK and Dev Sol were placed on the list annexed to Common Position 2001/931 with effect from 2 May 2002. According to their statements at the time of their applications for recognition of refugee status, B had been a member of Dev Sol from 1993 to 1995, while D had been a member of the PKK from 1990 to 1998. It follows that, even if the mere fact of voluntary membership of a group on the above lists were to be regarded as constituting conduct material for the purposes of applying the grounds for exclusion laid down in article 12(2)(b)(c)—an automatic reaction rejected by all the intervening governments and the commission—those conditions would not be met in relation to the period when B and D were active in Dev Sol and the PKK.

76 That said, it seems to me that there are essentially three stages in the process of determining whether the conditions governing the application of article 12(2)(b)(c) of Directive 2004/83 are satisfied in cases where the person concerned was once a member of a group involved in criminal activities which can be categorised as terrorism.

77 During the first stage, it will be necessary to consider the nature, structure, organisation, activities and methods of the group concerned, as well as the political, economic and social context in which it was operating during the period when the individual in question was a member. While inclusion in a list drawn up at national, EU or international level may constitute an important indicator, it does not dispense the competent authorities of the state concerned from the obligation to carry out that review. (The group in question could—to give just a few examples—be fragmented and made up internally of different cells or different tendencies in conflict with one another, some moderate and others extremist, or have

changed objectives and strategies over time, moving from political opposition to guerrilla warfare and vice versa, from focusing on military targets to implementing a genuine terrorist strategy, and so on. Similarly, the context in which the group operates may have changed, as a result, for example, of a change in the political situation or the expansion of the group's activities from a local or regional level to an international level.)

78 During the second stage, it will be necessary to determine whether there is sufficient evidence, regard being had to the standard of proof required under article 12(2) of Directive 2004/83, to establish the individual responsibility of the person concerned for the acts attributable to the group during the period in which that person was a member, in the light of both objective criteria (actual conduct) and subjective criteria (awareness and intent). In order to do this, it is necessary to identify the role actually played by the individual concerned in the committing of such acts (instigation, participation in the perpetration of the act, reconnaissance or support activities, and so on); his position within the group (involvement in decision-making processes, leadership or representation, recruitment or fund-raising activities, and so on); the extent to which the person knew or should have known about the group's activities; possible physical or psychological constraints to which he has been subjected or other factors capable of affecting the subjective aspect of that person's conduct (such as mental disability or the fact of being a minor, and so on: see the 2003 Guidelines); whether that person had a genuine opportunity to prevent the acts in question or to distance himself from them (without jeopardising his own safety). These are just some of the factors to be taken into account in such an appraisal, as the process of establishing the group member's individual responsibility must take into account all the circumstances of the individual case. (According to the 2003 Guidelines, for example, the application of the exclusion clauses may not be justified where expiation of the crime is considered to have taken place (for instance, if a sentence has been served or a significant period of time has elapsed since the offence was committed). However, the UNHCR takes a more cautious approach to pardons or amnesties, particularly in the case of heinous acts or crimes: see the 2003 Guidelines, para 23.)

79 During the third stage, it will be necessary to determine whether the acts for which individual responsibility can be regarded as established are among those envisaged by article 12(2)(b)(c) of Directive 2004/83, account being taken of the express provision made under article 12(3) to the effect that "Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein". This assessment will have to be made in the light of all the aggravating or mitigating circumstances and any other relevant fact.

80 The criteria set out above, together with all the considerations set out so far, should make it possible to provide the national court with guidance on the issue addressed by the first question. It is apparent, however, from the terms employed by the national court that, in both of the cases before it, it is in fact requesting a ruling on the specific sets of circumstances on which it is required to hand down judgment. For two reasons, essentially, I consider that the court should decline.

81 First, the national court alone is aware of all the circumstances of the particular cases before it, such as they have come to light during the

administrative stages of the review of the applications filed by B and D and at the various levels of court proceedings; the process of determining whether the exclusion clauses at issue can be applied specifically to B and D requires those circumstances to be carefully assessed and weighed.

82 Secondly, Directive 2004/83 lays down common minimum rules for the definition and content of refugee status, in order to provide the competent authorities of the member states with guidance for applying the Geneva Convention. Directive 2004/83 does not introduce a uniform body of rules to govern that area[11]; nor does it lay down a centralised procedure for considering applications for recognition of refugee status. As a consequence, it is for the competent authorities and the courts of the member states, which are responsible for reviewing such applications, to assess in the individual case and in the light of the common criteria laid down in Directive 2004/83, as interpreted by the court, whether the conditions for recognition of refugee status are met, and also whether the grounds for exclusion of refugee status apply.

3. The second question

83 By its second question, which is identical in both orders for reference, the Bundesverwaltungsgericht asks whether, if the first question is answered in the affirmative, exclusion from refugee status under article 12(2)(b)(c) of Directive 2004/83 is conditional on the applicant continuing to represent a danger. B and D suggest that the court should answer this in the affirmative, whereas the Bundesverwaltungsgericht leans towards a negative response, as do all the governments that have intervened in the proceedings, as well as the commission. (The UNHCR expressed the same view in the document drawn up for the purposes of this case.)

84 I agree with the latter view, which is based on a textual and teleological interpretation of article 12(2) of Directive 2004/83. It is in fact clear from the wording of article 12(2) that the pre-condition for the application of the exclusion clauses laid down in that provision is *past conduct* on the part of the applicant which is characterised by the elements described and which occurred before that person was accorded recognition as a refugee. This is clear, in particular, from the verb forms used—"has committed" in point (b) and "has been guilty" in point (c)—and from the further specification, in point (b), that the conduct in question must pre-date the applicant's admission as a refugee, that is to say, as further elucidated in point (b), it must occur before the "time of issuing a residence permit based on the granting of refugee status".

85 However, neither the provision at issue nor the corresponding provision in the Geneva Convention refers, whether explicitly or implicitly, to an assessment as to whether the applicant constitutes a *current* danger to society as an *additional condition* for the application of the exclusion clauses at issue. The absence of such a condition is consistent with the objectives pursued by the exclusion clauses, which—as we have seen—are intended both to prevent persons who have committed serious offences or non-political crimes from escaping justice by invoking the law on refugees and to prevent refugee status from being accorded to persons whose own conduct has rendered them "undeserving" of international protection, regardless of the fact that they have ceased to be a danger to society.

A 86 It is true that, so far as the application of article 1F(b) of the Geneva Convention is concerned, the UNHCR has stated that, if an applicant convicted of a serious non-political crime has already served his sentence, or has been granted a pardon or benefited from an amnesty, there is a presumption that the exclusion clause laid down therein no longer applies, "unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates": see the Handbook, para 157. However, that statement seems merely to suggest that, in such circumstances, the state concerned can simply continue to refuse the applicant refugee status because he represents a danger to society, in a manner reminiscent of the condition for derogating from the principle of non-refoulement under article 33(2) of the Geneva Convention: see *Goodwin-Gill & McAdam, The Status of the Refugee in International Law*, p 174. Even reasoning a contrario, it is not possible to infer from this a general approach whereby the provision should, *in all circumstances*, be construed as precluding application of the grounds for exclusion at issue where the applicant has ceased to pose a danger to the European Union.

87 Lastly, in answer to the question submitted by the Bundesverwaltungsgericht, it seems to me neither necessary nor appropriate to undertake a comparative analysis of article 12(2) of Directive 2004/8 and article 21(2) of that Directive, which, on the basis of article 33(2) of the Geneva Convention, lays down the exception to the principle of non-refoulement. In fact, the court is not being asked to rule on the possibility of refusing an applicant refugee status because of considerations, relating to the threat posed by that person, analogous to the considerations that may make it legitimate for member states to derogate from the principle of non-refoulement: it is simply being asked whether application of one of the exclusion clauses under article 12(2)(b)(c) of Directive 2004/83 is precluded where it has been established that there is no longer such a danger.

88 On the basis of the foregoing, I propose that the court should answer the second question to the effect that exclusion from refugee status under article 12(2)(b)(c) of Directive 2004/83 is not conditional on the applicant continuing to represent a danger.

4. The third and fourth questions

89 By its third question, the Bundesverwaltungsgericht asks whether exclusion from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83 is conditional on a proportionality test. By its fourth question (referred in the event that the third question is answered in the affirmative), it asks, on the one hand, whether it is to be taken into account in considering proportionality that the applicant enjoys protection by virtue of the principle of non-refoulement under article 3 of the European Convention on Human Rights or under national law and, on the other, whether exclusion must be regarded as disproportionate only in exceptional cases with particular characteristics.

90 These questions, which should be considered together, also raise a sensitive issue that has long been the subject of debate in the context of the Geneva Convention: does the application of article 1F of the Geneva Convention require a balance to be struck between the seriousness of the offence or act and the consequences of exclusion, so as to ensure that that provision is applied in a manner proportionate to its objective? Although

the terms in which that question is framed appear to have changed somewhat with the expansion and consolidation of the protection of human rights, especially as regards the obligation to protect from torture, the development of international criminal law and the system of extradition (see Gilbert, "Current Issues in the Application of the Exclusion Clauses", p 5, who points out that many extradition treaties provide for a duty either to extradite or to prosecute (aut dedere aut judicare) and that various multilateral anti-terrorist conventions include clauses providing that extradition should be refused if there is a risk of persecution on account of race, religion, nationality, political opinion or ethnic origin) and as a result of the move towards the gradual recognition of a universal jurisdiction in relation to serious international crimes it remains topical: see Gilbert," Current Issues in the Application of the Exclusion Clauses", p 4.

91 The UNHCR seems to accept a balancing exercise of that nature in relation to article 1F(b) of the Geneva Convention, but to rule it out, in principle, in relation to article 1F(c), in view of the particularly serious nature of the acts covered by that provision: see the 2003 Guidelines. See also the 1979 Handbook, para 156. This distinction does not, however, appear to me equally apparent from the document drawn up by the UNHCR for the purposes of this case. Many courts in contracting states have made rulings reflecting their opposition to it even in relation to article 1F(b): see Gilbert, "Current Issues in the Application of the Exclusion Clauses", p 18. Of the interveners, the French, German, United Kingdom and Netherlands Governments are opposed to a proportionality test, while the Swedish Government and the commission are in favour of it.

92 Some of the intervening governments have stressed that nothing in the text of article 1F of the Geneva Convention or article 12(2) of Directive 2004/83 would appear to permit a proportionality test. But it seems to me equally possible to argue that there is nothing in those provisions to preclude a proportionality test. Moreover, the need for such a test was explicitly referred to in the travaux préparatoires for the Denmark Convention: see also the document drawn up by the UNHCR for the purposes of this case.

93 It has also been argued, with reference to the origins of Directive 2004/83, that the fact that the specific reference to proportionality made by the commission in its initial proposal was not incorporated into the final text of the Directive weighs against the legitimacy of a proportionality test. However, I do not find that argument particularly convincing, since that omission from Directive 2004/83 may simply reflect the European Union legislature's desire to abide by the text of the Geneva Convention on that point, leaving the issue to be resolved through interpretation, thus making it easier to adapt to possible changes in the way the Convention is applied.

94 It has also been pointed out that, under article 1F(b)(c) of the Geneva Convention and article 12(2)(b)(c) of Directive 2004/83, exclusion depends solely on certain past conduct on the part of the applicant and leaves out of consideration the seriousness and gravity of the threats of persecution faced by that person. That argument does not seem to me to be decisive either. In reality, we have seen above that factors subsequent to the criminal conduct are also generally taken into consideration, at least in the context of point (b), in assessing whether that conduct is covered by the exclusion clauses in question. Various intervening governments—even if opposed to a

A proportionality test—list, for instance, among those factors, the fact that the applicant, an active militant in a group considered responsible for terrorist acts, has broken away and openly distanced himself from the group, while the UNHCR regards the fact that the applicant has served his sentence, or that a significant period of time has elapsed since the act was committed, as relevant factors potentially sufficient to prevent exclusion.

B **95** The principle of proportionality plays a central role in the protection of fundamental rights and in the application of the instruments of international humanitarian law generally. Those instruments have also to be applied in a flexible and dynamic manner. Even if the intention is to preserve the credibility of the system for the international protection of refugees, it does not seem to me desirable to insert an element of rigidity into the application of the exclusion clauses: on the contrary, I consider it essential to C retain, within that context, the flexibility needed both to take account of the progress made by the international community in the protection of human rights and to facilitate an approach based on consideration of all the circumstances of the individual case, even if this requires the application of a system under which a balance has to be struck twice (when assessing whether the conduct is serious enough for the purposes of exclusion and when weighing the seriousness of that conduct against the consequences of D exclusion).

96 For the purposes of the answer to be given to the national court, it seems to me possible, moreover, to draw a distinction between balancing the seriousness of the conduct against the consequences of exclusion, on the one hand, and applying the principle of proportionality, on the other.

97 As regards the former element, the fact that the applicant benefits E from effective protection against refoulement, whether pursuant to international instruments (for example, pursuant to article 3 of the ECHR or article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded in New York on 10 December 1984 (1990) (Cm 1775)) or under national law, comes into play. If that protection is available and accessible in practice, it will be possible to exclude the applicant from refugee status, which entails a range F of rights which go above and beyond protection against refoulement and must, in principle, be denied to persons who prove undeserving of international protection; if, on the other hand, recognition of refugee status is the only way of preventing the applicant's forcible return to a country where he has serious grounds for fearing that—for reasons of race, religion, nationality, adherence to a specific social group or political opinion—he will G be subject to persecution endangering his life or physical integrity or to inhuman or degrading treatment, it will not be possible to declare that he is excluded from refugee status. Nevertheless, notwithstanding that the possibility of withholding even the minimum protection afforded by non-refoulement might appear unacceptable, I think that in the case of certain exceptionally serious crimes, that balancing exercise is simply not permissible. (It may be possible for the requested state to accord informal H protection to individuals who have been guilty of such crimes, and that state will also be able to bring criminal proceedings against the person concerned on the basis of the universal jurisdiction recognised in multilateral treaties in respect of certain crimes, see, to that effect, Gilbert, "Current Issues in the Application of the Exclusion Clauses", p 19.)

98 As regards the latter element, it is my view that the competent authorities and the courts of the member states must ensure that points (b) and (c) of article 12(2) of Directive 2004/83 are applied in a manner proportionate to its objective and, more generally, to the humanitarian nature of the law on refugees. In essence, this means that the process of verifying whether the conditions for the application of those points are met must include an overall assessment of all the circumstances of the individual case.

99 For the reasons set out above, I propose that the court answer the third and fourth questions in accordance with the approach set out in points 97 and 98 above.

5. The fifth question

100 By its fifth question, the wording of which is essentially the same in both orders for reference, save for the necessary adjustments to reflect the circumstances of each case, the Bundesverwaltungsgericht asks whether it is compatible with Directive 2004/83 to accord recognition of a right of asylum under national constitutional law to a person excluded from refugee status under article 12(2) of the Directive.

101 In that connection, it is necessary, on the one hand, to point out that, consistently with its legal basis, Directive 2004/83 merely lays down minimum common standards and that, under article 3 of that Directive, member states may introduce or retain more favourable standards for determining who qualifies as a refugee and for determining the content of international protection, provided that those standards are compatible with the Directive. On the other hand, as I have already had occasion to point out, Directive 2004/83 defines refugee status in accordance with the Geneva Convention.

102 As we have seen, the exclusion clauses play a fundamental part in maintaining the credibility of the system set up under the Geneva Convention and preventing abuse. Accordingly, where the conditions for their application are met, member states are required, both under the Geneva Convention and under Directive 2004/83, to exclude the applicant from refugee status. Should they not do so, they would be in breach both of their international obligations and of article 3 of Directive 2004/83, under which more favourable standards for determining refugee status are permissible only if they are compatible with that Directive.

103 However, the question submitted by the Bundesverwaltungsgericht turns on whether it is possible for member states to accord protection to such a person under national law. More specifically, the Bundesverwaltungsgericht raises the question whether such protection is compatible with Directive 2004/83, if—as appears to be the case in relation to the right of asylum guaranteed under article 16a of the Grundgesetz, according to the information provided by that court—the content of that protection is defined by reference to the Geneva Convention. However, just as the Geneva Convention does not require contracting states to adopt specific measures in relation to applicants who are excluded from refugee status, neither does it prohibit the granting to such persons of any protection provided for under the national legislation on the right of asylum. Nor can a prohibition of that nature be inferred from Directive 2004/83.

A 104 It is clear, however, that in a case of that nature, the legal position of such persons is governed exclusively by national law and—as is explicitly stated, moreover, in recital (9) to Directive 2004/83 in relation to "third country nationals or stateless persons, who are allowed to remain in the territories of the member states for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds"—they fall outside the scope both of Directive
B 2004/83 and of the Geneva Convention.

105 That said, and as the commission has, in my view, properly emphasised, the purpose of the exclusion clauses, as regards maintaining the credibility of the international system for protecting refugees, would be jeopardised if the national protection accorded in this way were likely to raise doubts concerning the source of that protection and convey the
C impression that the person benefiting from it enjoyed refugee status within the meaning of the Geneva Convention and Directive 2004/83. In consequence, it is the responsibility of the member state which intends, on the basis of the rules of its own legal system, to grant asylum to persons excluded from refugee status under Directive 2004/83, to adopt the measures necessary to enable a clear distinction to be made between that protection and the protection accorded under the Directive, not so much
D in terms of the content of that protection, which must, in my view, be determined by the member state in question, as in terms of the possibility of confusion as to the source of the protection.

106 On the basis of the foregoing, I propose that the court answer the fifth question to the effect that Directive 2004/83, and, in particular, article 3 thereof, does not prevent a member state from according to a third country
E national or stateless person excluded from refugee status under article 12(2) of that Directive the protection provided for under the national law on the right of asylum, provided that that protection cannot be confused with the protection accorded to refugees under Directive 2004/83.

IV—Conclusions

F 107 In the light of all of the foregoing considerations, I propose that the following reply be given to the questions referred by the Bundesverwaltungsgericht for a preliminary ruling:

1 For the purposes of applying the grounds for exclusion from refugee status laid down in article 12(2)(b)(c) of Council Directive 2004/83 in cases where the applicant has once been a member of a group on lists drawn up in the context of EU measures to combat terrorism, the competent authorities
G of the member states are required to consider the nature, structure, organisation, activities and methods of the group in question, as well as the political, economic and social context in which it was operating during the period when the person concerned was a member. They will also have to determine whether there is sufficient evidence, regard being had to the standard of proof required under article 12(2) of Directive 2004/83, to establish the individual responsibility of the person concerned in relation to
H the acts attributable to the group during the period in which that person was a member, in the light of both objective and subjective criteria and of all the circumstances of the individual case. Lastly, those authorities will have to determine whether the acts for which individual responsibility can be regarded as established are among those envisaged by article 12(2)(b)(c) of

Directive 2004/83/EC, account being taken of the express provision made under article 12(3). That assessment will have to be made in the light of all the mitigating and aggravating circumstances and any other relevant fact. It is for the competent authorities of the member states responsible for reviewing an application for recognition of refugee status, and the courts before which an action is brought against a measure adopted on completion of that review, to determine, in the specific case, in the light of the common criteria laid down in Directive 2004/83, as interpreted by the court, whether the conditions for recognising refugee status are met, and also whether the grounds for exclusion of refugee status, laid down in article 12(2)(b)(c) of that Directive 2004/83, apply.

2 Exclusion from refugee status pursuant to article 12(2)(b)(c) of Directive 2004/83 is not conditional on the applicant continuing to represent a source of danger.

3 For the purposes of applying article 12(2)(b)(c) of Directive 2004/83, the competent authorities or the courts of the member states seised of an application for recognition of refugee status must balance the seriousness of the conduct justifying exclusion from refugee status against the consequences of such exclusion. In the course of that appraisal, account must be taken of the fact that the applicant is entitled, on a different basis, to effective protection against refoulement. Where that protection is available and accessible in practice, the applicant will have to be excluded from refugee status; if, on the other hand, recognition of refugee status is the only way of preventing the applicant's forcible return to a country where he has serious grounds for fearing that—for reasons of race, religion, nationality, adherence to a particular social group or political opinion—he will be subject to persecution likely to endanger his life or physical integrity or to inhuman or degrading treatment, it will not be possible to declare that that person is excluded from refugee status. In the case of exceptionally serious crimes, that balancing exercise is not permissible. The competent authorities and the courts of the member states must ensure that points (b) and (c) of article 12(2) of Directive 2004/83 are applied in a manner that is proportionate to its objective and, more generally, to the humanitarian nature of the law on refugees. Directive 2004/83 and, in particular, article 3 thereof does not preclude a member state from according to a third country national or stateless person excluded from refugee status under article 12(2) of that Directive the protection provided for under the national law on the right of asylum, provided that that protection cannot be confused with the protection accorded to refugees under Directive 2004/83.

Notes

1. See point 14 of this opinion. The process of consultations with the UNHCR was already provided for in Declaration No 17 annexed to the Treaty of Amsterdam. The importance of the UNHCR's role was recently reconfirmed in the 2008 European Pact on immigration and asylum, and in the Proposal for a regulation establishing a European Asylum Support Office, adopted by the commission on 18 February 2009 (COM(2009) 66 final).

2. Currently made up of 78 members, representatives of the UN member states or members of one of the specialised agencies, the Executive Committee was set up in 1959 by the Economic and Social Council of the United Nations, at the request of the General Assembly. The Conclusions of the Executive Committee are adopted by agreement. A thematic compilation of Executive Committee conclusions, updated in

August 2009, is available on the UNCHR website. Although they are not binding, compliance with the conclusions is part of the process of co-operating with the UNHCR, with which the contacting states undertook to co-operate under article 35(1) of the Geneva Convention.

3. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the Geneva Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, available at http://www.unhcr.org/refworld/docid/3ae6b3314.html. The Executive Committee commissioned the drafting of the Handbook in 1977. While the Handbook, too, is not binding on the contracting states, it is seen as having a certain persuasive effect: see *James C Hathaway, The Rights of Refugees under International Law* (2005), p 114.

4. Point (e) of the General Conclusion on International Protection No 81 of 1997 of the UNHCR's Executive Committee calls upon the states "to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection, as well as through full co-operation with the UNHCR in the exercise of its international protection function and its role in supervising the application of international conventions for the protection of refugees"; in point (c) of Conclusion No 50 of 1988, the Executive Committee stresses that "states must continue to be guided, in their treatment of refugees, by existing international law and humanitarian principles and practice, bearing in mind the moral dimension of providing refugee protection".

5. In my view, objective circumstances to be considered would include the political, social and economic situation in the state in which the offence was committed, as well as the level of protection of human rights.

6. According to the Handbook, paras 151–161, relevance must be accorded—including for the purposes of not applying the exclusion clauses—to the fact that the person applying for refugee status has already served all or part of his sentence, or has been granted a pardon or benefited from an amnesty.

7. According to the Handbook, para 155, the offence must at least be a "capital crime or a very grave punishable act", whereas, at para (11) the Global Consultations on International Protection of 3–4 May 2001 classify as serious an offence which attracts a long period of imprisonment. See also, to that effect, Gilbert, "Current Issues in the Application of the Exclusion Clauses" in *Feller, Türk & Nicholson, Refugee Protection in International Law* (2003), p 17.

8. As we know, between late 2006 and early 2008, ruling on actions brought by certain organisations on that list, the Court of First Instance of the European Communities annulled, basically on grounds of failure to state adequate reasons and breach of the rights of the defence, the decisions by which the Council had placed the plaintiff organisations on the list, in so far as the decisions related to the latter; see, in particular, in relation to the PKK, *Kurdistan Workers' Party (PKK) v Council of the European Union* (Case T-229/02) [2005] ECR II-539.

9. In the September 2003 Guidelines, para 19, the UNHCR states that a presumption of responsibility may, however, arise from the voluntary membership of a group where "the purposes, activities and methods [of the group] are of a particularly violent nature". Such a presumption is, however, always rebuttable.

10. It cannot be ruled out, for example, that responsibility for such activities resided solely with a number of extremist fringe elements with which the person concerned never came into contact or that he belonged to the organisation during a period before or after terrorist strategies were employed, or yet that he remained part of the organisation only for the time needed to become aware of the methods employed and to break away. In that connection, it is worth pointing out that in *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, para 17, the court held—albeit in the different context of restrictions on the freedom of movement for workers justified by reasons of public policy—that membership of a body or organisation can in itself constitute a voluntary act or personal conduct of the individual concerned

or reflect participation in the activities of the body or organisation, as well as identification with its aims and designs. A

11. In the Hague Programme: Strengthening freedom, security and justice in the European Union (OJ 2005 C53, p 1), which lays down the objectives and instruments in relation to justice and home affairs for the period 2005 to 2010, the European Council expressed its commitment to develop further the common European asylum system by making changes to the legislative framework and improving practical co-operation, in particular by setting up the European Asylum Support Office. However, as the European Council recently pointed out in the 2008 European Pact on Immigration and Asylum, adopted by the European Council on 16 October 2008, document 13440/08, the granting of protection, and refugee status more specifically, falls within the competence of the individual member states. B

9 November 2010. **THE COURT (Grand Chamber)** delivered the following judgment. C

1 These references for a preliminary ruling concern (i) the interpretation of article 12(2)(b)(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L304, p 12) and (ii) the interpretation of article 3 of that Directive.

2 The references have been made in proceedings between, on the one hand, the Federal Republic of Germany, represented by the Bundesministerium des Inneren (Federal Ministry of the Interior), in turn represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) ("the Bundesamt"), and, on the other, B (C-57/09) and D (C-101/09), Turkish nationals of Kurdish origin. The proceedings concern the Bundesamt's rejection of B's application for asylum and recognition of refugee status and its revocation of D's refugee status and right of asylum. D E

Legal context

International law

The Convention relating to the Status of Refugees F

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (Cmd 9171), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, adopted on 31 January 1967 in New York (Cmnd 3906), which entered into force on 4 October 1967 ("the Geneva Convention").

4 Article 1A of the Geneva Convention defines, inter alia, the term "refugee" for the purposes of that act, and article 1F states: G

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: . . . (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations." H

5 Article 33 of the Geneva Convention, entitled "Prohibition of expulsion or return ('refoulement')", provides:

> "1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or

freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

"2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The European Convention for the Protection of Human Rights and Fundamental Freedoms

6 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ("the ECHR"), provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Resolutions of the UN Security Council

7 On 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, the UN Security Council adopted Resolution 1373 (2001), Threats to International Peace and Security caused by Terrorist Acts ("UNSCR 1373") on the basis of Chapter VII of the Charter of the United Nations.

8 The Preamble to UNSCR 1373 reaffirms "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts".

9 Under point 5 of that resolution, it is declared that "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and . . . knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".

10 On 12 November 2001, the UN Security Council adopted Resolution 1377 (2001) Threats to International Peace and Security caused by Terrorist Acts ("UNSCR 1377"), in which it "*Stresses* that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of [that Charter]".

European Union legislation

Directive 2004/83

11 Recital (3) in the Preamble to Directive 2004/83 states that the Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees.

12 Recital (6) to Directive 2004/83 states that the main objective of that Directive is, on the one hand, to ensure that member states apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all member states.

13 Recital (9) to Directive 2004/83 is worded as follows:

"Those third country nationals or stateless persons, who are allowed to remain in the territories of the member states for reasons not due to a

need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive."

14 Recital (10) to Directive 2004/83 states that the Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (OJ 2007 C303, p 1). In particular it seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum.

15 Recitals (16) and (17) to Directive 2004/83 are worded as follows:

"(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of member states in the application of the Geneva Convention.

"(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of article 1 of the Geneva Convention."

16 Recital (22) to Directive 2004/83 states:

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

17 In accordance with article 1 of Directive 2004/83, the purpose of that Directive is, inter alia, to lay down minimum standards in relation to the conditions which third country nationals or stateless persons must meet in order to receive international protection and in relation to the content of the protection granted.

18 Article 2 of Directive 2004/83 states that, for the purposes of that Directive:

"(a) 'international protection' means the refugee and subsidiary protection status as defined in (d) and (f) . . . (c) 'refugee' means 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; (d) 'refugee status' means the recognition by a member state of a third country national or a stateless person as a refugee . . . (g) 'application for international protection' means a request made by a third country national or a stateless person for protection from a member state, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately . . ."

A **19** Article 3 of Directive 2004/83 provides:

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

B **20** Paragraphs 2 and 3 of article 12 of Directive 2004/83, which is entitled "Exclusion" and forms part of Chapter III of the Directive, itself entitled "Qualification for being a refugee" provide:

"2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: . . . (b) he or she has committed a serious non-political crime outside the C 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 D Charter of the United Nations.

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

21 Articles 13 and 18 of Directive 2004/83 state that member states are to grant refugee status or subsidiary protection status to a third country national who satisfies the conditions laid down in Chapters II and III or E Chapters II and V, respectively, of that Directive.

22 Article 14 of Directive 2004/83, which is entitled "Revocation of, ending of or refusal to renew refugee status" and forms part of Chapter IV of the Directive, itself entitled "Refugee status", provides:

"1. Concerning applications for international protection filed after the entry into force of this Directive, member states shall revoke, end or F refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with article 11 . . .

"3. Member states shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the member state G concerned that: (a) he or she should have been or is excluded from being a refugee in accordance with article 12 . . ."

23 Paragraphs 1 and 2 of article 21 of Directive 2004/83, which forms part of Chapter VII of the Directive, entitled "Content of international protection", provide:

H "1. Member states shall respect the principle of non-refoulement in accordance with their international obligations.

"2. Where not prohibited by the international obligations mentioned in paragraph 1, member states may refoule a refugee, whether formally recognised or not, when: (a) there are reasonable grounds for considering him or her as a danger to the security of the member state in which he or

she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that member state."

24 In accordance with articles 38 and 39 of that Directive, Directive 2004/83 entered into force on 9 November 2004 and had to be transposed into national law by 10 October 2006 at the latest.

Common Position 2001/931/CFSP

25 In order to implement UNSCR 1373(2001), the Council of the European Union adopted Common Position 2001/931/CFSP of 27 December 2001, on the application of specific measures to combat terrorism (OJ 2001 L344, p 93).

26 Under article 1(1) of Common Position 2001/931, that act applies to "persons, groups and entities involved in terrorist acts" and listed in the Annex thereto.

27 Paragraphs 2 and 3 of article 1 of Common Position 2001/931 provide that, for the purposes of that act:

"2. . . . 'persons, groups and entities involved in terrorist acts' shall mean: —persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts —groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

"3. . . . 'terrorist act' shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of: . . . (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation: . . . (k) 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 group."

28 Common Position 2001/931 includes an Annex entitled "First list of persons, groups and entities referred to in article 1 . . ." Initially, neither the DHKP/C nor the PKK were on that list.

29 The content of that annex was updated by Council Common Position 2002/340/CFSP of 2 May 2002 (OJ 2002 L116, p 75).

30 In that annex, as updated, the list set out in section 2 ("Groups and entities") names as entries 9 and 19, respectively, the "Kurdistan Workers' Party (PKK)" and the "Revolutionary People's Liberation Army/Front/Party (DHKP/C), (aka Devrimci Sol (Revolutionary Left), Dev Sol)". Those organisations have subsequently been retained on the list referred to in article 1(1)(6) of Common Position 2001/931 by subsequent Council Common Positions, and most recently by Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities subject to articles 2, 3 and 4 of Common Position 2001/931 (OJ 2010 L178, p 28).

A Framework Decision 2002/475/JHA

31 Article 1 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L164, p 3) requires member states to take the necessary measures to ensure that the intentional acts referred to in that provision—which, given their nature or context, may seriously damage a country or an international organisation where committed with one of the
B aims also listed in that provision—are deemed to be terrorist offences.

32 Paragraph 2 of article 2 of Framework Decision 2002/475, which is entitled "Offences relating to a terrorist group", provides:

> "Each member state shall take the necessary measures to ensure that the following intentional acts are punishable: . . . (b) participating in the activities of a terrorist group, including by supplying information or
C 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."

National legislation

33 Article 16a(1) of the Grundgesetz (Basic Law) provides: "Persons persecuted on political grounds shall have the right of asylum."

D 34 Paragraph 1 of the German Law on asylum procedure (Asylverfahrensgesetz), in the version published on 2 September 2008 [2008] I Bundesgesetzblatt 1798, states that that Law applies to foreigners who apply for protection from political persecution in accordance with paragraph 16a(1) of the Grundgesetz, or for protection from persecution in accordance with the Geneva Convention.

E 35 Paragraph 2 of the Asylverfahrensgesetz provides that, in the Federal territory, persons entitled to asylum are to have the legal status defined by the Geneva Convention.

36 Refugee status was initially governed by paragraph 51 of the Law on the entry and stay of foreigners on Federal territory (Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet) ("the Ausländergesetz").

F 37 The Law on combating international terrorism of 9 January 2002 (Gesetz zur Bekämpfung des internationalen Terrorismus) ("the Terrorismusbekämpfungsgesetz") [2002] I Bundesgesetzblatt 361 introduced, for the first time, in the second sentence of paragraph 51(3) of the Ausländergesetz, with effect from 11 January 2002, grounds for exclusion reflecting those laid down in article 1F of the Geneva Convention.

G 38 By the Law implementing European Union Directives on the right of residence and asylum of 19 August 2007 (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union) [2007] I Bundesgesetzblatt 1970, which entered into force on 28 August 2007, the Federal Republic of Germany transposed Directive 2004/83, among others, into national law.

39 Currently, the conditions for being considered a refugee are laid
H down in paragraph 3 of the Asylverfahrensgesetz. Under paragraph 3(1)(2) of the Asylverfahrensgesetz:

> "1. A foreign national is a refugee within the meaning of [the Geneva Convention] if, in his state of nationality, he is exposed to threats within the meaning of paragraph 60(1) of the [Law on the residence, work and

integration of foreign nationals on Federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet) ("the Aufenthaltsgesetz")].

"2. A foreign national shall not be accorded refugee status under sub-paragraph 1 if there are serious reasons for considering that: . . . (2) he has committed a serious non-political crime outside the Federal territory prior to his admission as a refugee, in particular a cruel action, even if committed with a purportedly political objective, or (3) he has been guilty of acts contrary to the purposes and principles of the United Nations. The first sentence shall apply also to foreign nationals who have instigated, or otherwise participated in, the commission of those crimes or acts."

40 The grounds for exclusion listed in paragraph 3(2) of the Asylverfahrensgesetz replaced, with effect from 28 August 2007, the second sentence of paragraph 60(8) of the Aufenthaltsgesetz, which had itself replaced the second sentence of paragraph 51(3) of the Aufenthaltsgesetz.

41 Paragraph 60(1) of the Aufenthaltsgesetz, in the version published on 25 February 2008 [2008] I Bundesgesetzblatt 162, provides:

"Pursuant to the [Geneva] Convention, a foreign national may not be deported to a state in which his life or liberty is under threat on account of his race, religion, nationality, membership of a certain social group or political convictions . . ."

42 The first sentence of paragraph 73(1) of the Asylverfahrensgesetz provides that "Recognition of a right of asylum and of refugee status shall be revoked without delay if the conditions on which such recognition is based are no longer satisfied".

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-57/09

43 Born in 1975, B entered Germany at the end of 2002, where he applied for asylum and for protection as a refugee and, in the alternative, for an order prohibiting his deportation to Turkey.

44 In support of his application, B stated, inter alia, that, in Turkey, he had been a sympathiser of Dev Sol (now DHKP/C) when still a schoolboy and that, from the end of 1993 until the beginning of 1995, he had supported armed guerrilla warfare in the mountains.

45 After being arrested in February 1995, he had been subjected to serious physical abuse and had been forced to give a statement under torture.

46 In December 1995, he had been sentenced to life imprisonment.

47 In 2001, while he was in custody, B had been given another life sentence after he had confessed to killing a fellow prisoner suspected of being an informant.

48 In December 2002, B took advantage of a six-month conditional release from custody on health grounds to leave Turkey and make his way to Germany.

49 By decision of 14 September 2004, the Bundesamt rejected B's application for asylum as unfounded and found that the conditions laid down in paragraph 51(1) of the Ausländergesetz were not satisfied.

A The Bundesamt took the view that, since B had committed serious non-political crimes, he fell into the second exclusion category, laid down in the second sentence of paragraph 51(3) of the Ausländergesetz (referred to subsequently in the second sentence of paragraph 60(8) of the Aufenthaltsgesetz, then in paragraph 3(2)(2) of the Asylverfahrensgesetz).

50 In the same decision, the Bundesamt also held that there were no
B obstacles to B's deportation to Turkey under the applicable law and declared him liable to deportation to that country.

51 By judgment of 13 June 2006, the Verwaltungsgericht Gelsenkirchen (Administrative Court, Gelsenkirchen) annulled the decision of the Bundesamt and ordered that authority to grant B asylum and to declare that his deportation to Turkey was prohibited.

52 By judgment of 27 March 2007, the Oberverwaltungsgericht für das
C Land Nordrhein-Westfalen (Higher Administrative Court of North Rhine-Westphalia) dismissed the appeal brought by the Bundesamt against the judgment of the Verwaltungsgericht Gelsenkirchen, on the view that B should be granted a right of asylum in accordance with paragraph 16a of the Grundgesetz, together with refugee status.

53 The Oberverwaltungsgericht found, in particular, that the exclusion
D clause relied on by the Bundesamt must be understood to the effect that it does not seek only to punish a serious non-political crime committed in the past, but also to forestall the danger which the applicant could pose to the host member state, and that the application of that clause requires an overall assessment of the particular case in the light of the principle of proportionality.

54 The Bundesamt appealed against that judgment on a point of law
E ("Revision") before the Bundesverwaltungsgericht (Federal Administrative Court), relying on the second and third exclusion clauses laid down in the second sentence of paragraph 60(8) of the Aufenthaltsgesetz (and subsequently in paragraph 3(2), points (2) and (3) of the Asylverfahrensgesetz) and arguing that, contrary to the approach adopted by the appeal court, those two exclusion clauses do not imply that there must
F be a danger to the security of the Federal Republic of Germany; nor do they entail the need for an assessment of proportionality with regard to the particular case.

55 Furthermore, according to the Bundesamt, the exclusion clauses laid down in article 12(2) of Directive 2004/83 are among those principles from which, by virtue of article 3 of that Directive, member states cannot
G derogate.

Case C-101/09

56 Since May 2001, D, who was born in 1968, has resided in Germany where, on 11 May 2001, he applied for asylum.

57 In support of his application, he stated, inter alia, that, in 1990, he
H had fled to the mountains where he joined the PKK. He had been a guerrilla fighter for the PKK and one of its senior officials. At the end of 1988, the PKK had sent him to northern Iraq.

58 Because of political differences with its leadership, D had left the PKK in May 2000 and since then had been under threat. He had stayed on in northern Iraq for about one more year, but had not been safe there.

59 In May 2001, the Bundesamt granted D asylum and recognised his right to refugee status under the national law in force at that time.

60 Following the entry into force of the Terrorismusbekämpfungsgesetz, the Bundesamt initiated a revocation procedure and by decision of 6 May 2004, pursuant to paragraph 73(1) of the Asylverfahrensgesetz, it revoked the decision granting D a right of asylum and refugee status. The Bundesamt found that there were serious reasons for considering that D had committed a serious non-political crime outside Germany before being admitted to its territory as a refugee and that he had been guilty of acts contrary to the purposes and principles of the United Nations.

61 By judgment of 29 November 2005, the Verwaltungsgericht Gelsenkirchen annulled that revocation decision.

62 The appeal brought by the Bundesamt was dismissed by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen by judgment of 27 March 2007. On grounds similar to those underpinning the judgment handed down on the same day in the case concerning B, the Oberverwaltungsgericht held that the exclusion clauses laid down in the German legislation did not apply in D's case either.

63 The Bundesamt appealed that judgment on a point of law, its grounds of appeal being, in substance, analogous to those relied on in support of the appeal in the case concerning B.

The questions referred and the procedure before the court

64 The Bundesverwaltungsgericht points out that, according to the findings of the appeal court, by which it is bound, B and D would not, in the event of their return to their country of origin, be sufficiently safe from renewed persecution. The Bundesverwaltungsgericht infers from this that the positive conditions for being considered a refugee are satisfied in both cases. Nevertheless, B and D will not be able to have their refugee status recognised if one of the exclusion clauses laid down in article 12(2) of Directive 2004/83 applies.

65 The Bundesverwaltungsgericht states that, if one of those exclusion clauses were to apply, B and D would be entitled to have their right of asylum recognised under article 16a of the Grundgesetz, which does not exclude any category of persons from that right.

66 Lastly, the Bundesverwaltungsgericht points out that neither exclusion under article 12 of Directive 2004/83 nor a finding that article 16a of the Grundgesetz is incompatible with Directive 2004/83 would necessarily lead B and D to lose the right to remain in Germany.

67 It is against that background that the Bundesverwaltungsgericht decided to stay the proceedings and to refer, in each of the cases before it, the following five questions—the first and fifth of which differ slightly on account of the particular facts of each of those cases—to the court for a preliminary ruling:

> "(1) Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of article 12(2)(b)(c) of [Council Directive 2004/83/EC] if
>
> "—the person seeking asylum was a member of an organisation which is included in the list of persons, groups and entities annexed to the . . . Common Position [2001/931] and employs terrorist methods, and the

A appellant has actively supported that organisation's armed struggle? (Case C-57/09)

"—a foreign national was for many years involved as a combatant and an official—including for a time as a member of its governing body—in an organisation (in this case, the PKK) which repeatedly employed terrorist methods in the armed struggle waged against the state (in this case, Turkey) and is included in the list of persons, groups and entities annexed to the . . . Common Position [2001/931], and the foreign national thereby actively supported its armed struggle in a prominent position? (Case C-101-09)

"(2) If question 1 is to be answered in the affirmative: does exclusion from recognition as a refugee under article 12(2)(b)(c) of [Directive 2004/83] . . . require that the foreign national continue to constitute a danger?

"(3) If question 2 is to be answered in the negative: does exclusion from recognition as a refugee under article 12(2)(b)(c) of [Directive 2004/83] . . . require that a proportionality test be undertaken in relation to the individual case?

"(4) If question 3 is to be answered in the affirmative: (a) is it to be taken into account in considering proportionality that the foreign national enjoys protection against deportation under article 3 of the [ECHR] or under national rules? (b) Is exclusion disproportionate only in exceptional cases having particular characteristics?

"(5) Is it compatible with Directive 2004/83, for the purposes of article 3 of [Directive 2004/83] . . . , if

"—the appellant has a right to asylum under national constitutional law even if one of the exclusion criteria laid down in article 12(2) of Directive 2004/83 is satisfied? (Case C-57/09)

"—the foreign national continues to be recognised as having a right of asylum under national constitutional law even if one of the exclusion criteria laid down in article 12(2) of the Directive is satisfied and refugee status under article 14(3) of Directive 2004/83 is revoked? (Case C-101/09)"

68 By order of the President of the court of 4 May 2009, Cases C-57/09 and C-101/09 were joined for the purposes of the written and oral procedure and of the judgment.

Jurisdiction of the court

69 In the cases before the referring court, the Bundesamt adopted the contested decisions on the basis of the legislation applicable before the entry into force of Directive 2004/83, that is to say, before 9 November 2004.

70 As a consequence, those decisions, which have given rise to the present references for a preliminary ruling in the present case, do not fall within the scope ratione temporis of Directive 2004/83.

71 It should nevertheless be borne in mind that where the questions referred by national courts concern the interpretation of a provision of European Union law, the court is in principle obliged to give a ruling. In particular, neither the wording of articles 68EC and 234EC of the EC Treaty nor the aim of the procedure established by article 234EC indicates that those responsible for framing the EC Treaty intended to

exclude from the jurisdiction of the court references for a preliminary ruling on a directive in the specific case where the national law of a member state refers to the content of provisions of an international agreement which have been restated in that directive, in order to determine the rules applicable to a situation which is purely internal to that state. In such a case, it is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of that international agreement which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply: see, by analogy, *Abdulla v Bundesrepublik Deutschland* (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08) [2011] QB 46, para 48.

72 The Bundesverwaltungsgericht points out, in the cases before it, that the Terrorismusbekämpfungsgesetz introduced into the national law grounds for excluding a person from refugee status which correspond in substance to those laid down in article 1F of the Geneva Convention. Given that the grounds for exclusion laid down in article 12(2) of Directive 2004/83 also correspond in substance to those laid down in article 1F of that Convention, it follows that the exclusion clauses which were considered and applied by the Bundesamt in both the decisions at issue before the referring court, which were adopted before Directive 2004/83 entered into force, correspond in substance to the exclusion clauses subsequently inserted in the Directive.

73 Moreover, as regards the decision of the Bundesamt to revoke the decision according refugee status to D, it should be noted that article 14(3)(a) of Directive 2004/83 requires the competent authorities of a member state to revoke refugee status if ever they establish, after according that status, that the person "should have been or is excluded" from being a refugee, in accordance with article 12 of the Directive.

74 In contrast with the ground for revocation laid down in article 14(1) of Directive 2004/83, the ground laid down in article 14(3)(a) is not subject to transitional arrangements and cannot be limited to applications made or decisions taken after the Directive entered into force. Nor is its application discretionary, like the grounds for revocation laid down in article 14(4).

75 Accordingly, the questions referred for a preliminary ruling must be answered.

Consideration of the questions referred

Preliminary observations

76 One of the legal bases for Directive 2004/83 was point (1)(c) of the first paragraph of article 63EC, under which the Council was required to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to "the qualification of nationals of third countries as refugees".

77 Recitals (3), (16) and (17) to Directive 2004/83 state that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of Directive 2004/83 for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the member states in the application of that Convention on the basis of common concepts and

A criteria: the *Abdulla* case [2011] QB 46, para 52, and *Bolbol v Bevándorlási és Állampolgársági Hivatal* (Case C-31/09) [2011] INLR 296, para 37.

78 Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of article 63EC of the EC Treaty, now article 78(1)FEU of the
B FEU Treaty. As is apparent from recital (10) to that Directive, Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union: see the *Abdulla* case, paras 53 and 54, and the *Bolbol* case, para 38.

The first question

C

79 By its first question in each case, the Bundesverwaltungsgericht asks, in substance, whether a case where the person concerned has been a member of an organisation which, because of its involvement in terrorist acts, is on the list of persons, groups and entities annexed to Common Position 2001/931 and that person has actively supported the armed struggle waged by that organisation—and perhaps occupied a prominent position within
D that organisation—is a case of "serious non-political crime" or "acts contrary to the purposes and principles of the United Nations" within the meaning of article 12(2)(b) or (c) of Directive 2004/83.

80 In order to answer that question, which seeks to elicit the extent to which a person's membership of an organisation on that list can bring that person within the scope of points (b) and (c) of article 12(2) of Directive
E 2004/83, it is necessary at the outset to ascertain whether the acts committed by such an organisation can, as the national court assumes, fall within the categories of the serious crimes and the acts referred to in those points.

81 First, it is clear that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of point (b).

F 82 Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of article 12(2) of Directive 2004/83, recital (22) to that Directive states that such acts are referred to in the Preamble to the Charter of the United Nations and in articles 1 and 2 of that Charter and that they are among the acts identified in the UN Resolutions relating to "measures combating terrorism".

G 83 Those include UNSCRs 1373 and 1377, from which it is clear that the Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any state participation, contrary to the purposes and principles of the United Nations.

84 It follows that—as is argued in their written observations by all the governments which submitted such observations to the court, and by the
H European Commission—the competent authorities of the member states can also apply article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension.

85 Next, the question arises as to what extent membership of such an organisation implies that the person concerned falls within the scope of article 12(2)(b)(c) of Directive 2004/83 where he has actively supported the armed struggle waged by that organisation, possibly occupying a prominent position within that organisation.

86 On that point, it should be noted that points (b) and (c) of article 12(2) of Directive 2004/83—in the same way, moreover, as points (b) and (c) of article 1F of the Geneva Convention—permit the exclusion of a person from refugee status only where there are '"serious reasons" for considering that "he . . . has committed" a serious non-political crime outside the country of refuge prior to his admission as a refugee or that "he . . . has been guilty" of acts contrary to the purposes and principles of the United Nations.

87 It is clear from the wording of those provisions of Directive 2004/83 that the competent authority of the member state concerned cannot apply them until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses.

88 As a consequence, first, even if the acts committed by an organisation on the list forming the Annex to Common Position 2001/931 because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in article 12(2)(b)(c) of Directive 2004/83, the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions.

89 There is no direct relationship between Common Position 2001/931 and Directive 2004/83 in terms of the aims pursued, and it is not justifiable for a competent authority, when considering whether to exclude a person from refugee status pursuant to article 12(2) of the Directive, to base its decision solely on that person's membership of an organisation which is on a list adopted outside the framework set up by Directive 2004/83 consistently with the Geneva Convention.

90 However, the inclusion of an organisation on a list such as that which forms the Annex to Common Position 2001/931 makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor which the competent authority must take into account when determining, initially, whether that group has committed acts falling within the scope of article 12(2)(b) or (c) of Directive 2004/83.

91 In that regard, it is important to note that the circumstances in which the two organisations to which the respondents before the Bundesverwaltungsgericht respectively belonged were placed on that list cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83.

92 Nor, secondly, and contrary to the submissions of the commission, can participation in the activities of a terrorist group, within the meaning of article (2)(2)(b) of Framework Decision 2002/475, come necessarily and automatically within the grounds for exclusion laid down in article 12(2)(b)(c) of Directive 2004/83.

A **93** Not only was Framework Decision 2002/475, like Common Position 2001/931, adopted against a background different from the context of Directive 2004/83, which is essentially humanitarian, but the intentional act of participating in the activities of a terrorist group, which is defined in article 2(2)(b) of that Framework Decision and which the member states were required to make punishable under their national law, is not such as to trigger the automatic application of the exclusion clauses laid down in article 12(2)(b)(c) of the Directive, which presuppose a full investigation into all the circumstances of each individual case.

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94 It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of article 12(3) of Directive 2004/83.

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D **95** Before a finding can be made that the grounds for exclusion laid down in article 12(2)(b)(c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned—regard being had to the standard of proof required under article 12(2)—a share of the responsibility for the acts committed by the organisation in question while that person was a member.

96 That individual responsibility must be assessed in the light of both objective and subjective criteria.

E **97** To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

F **98** Any authority which finds, in the course of that assessment, that the person concerned has—like D—occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83 can be adopted.

G **99** In the light of all the foregoing considerations, the answer to the first question referred in each of the two cases is that article 12(2)(b)(c) of Directive 2004/83 must be interpreted as meaning that:

—the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations";

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—the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of

such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under article 12(2) of the Directive.

The second question

100 By its second question in each of the cases, the Bundesverwaltungsgericht wishes to know whether exclusion from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83 is conditional on the person concerned continuing to represent a danger for the host member state.

101 It is appropriate to point out first that, within the system of Directive 2004/83, any danger which a refugee may currently pose to the member state concerned is to be taken into consideration, not under article 12(2) of the Directive but under (i) article 14(4)(a) of that Directive, pursuant to which member states may revoke refugee status where, in particular, there are reasonable grounds for regarding the person concerned as a danger to security and (ii) article 21(2) of the Directive, which provides that the host member state may—as it is also entitled to do under article 33(2) of the Geneva Convention—refoule a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that member state.

102 Under points (b) and (c) of article 12(2) of Directive 2004/83, which are analogous to points (b) and (c) of article 1F of the Geneva Convention, a third country national is excluded from refugee status where there are serious reasons for considering that "he . . . has committed" a serious non-political crime outside the country of refuge "prior to his . . . admission as a refugee" or that he "has been guilty" of acts contrary to the purposes and principles of the United Nations.

103 In accordance with the wording of the provisions in which they are laid down, both those grounds for exclusion are intended as a penalty for acts committed in the past, as has been pointed out by all the governments that submitted observations and by the commission.

104 In that regard it should be pointed out that the grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional on the existence of a present danger to the host member state.

105 In those circumstances, the answer to the second question is that exclusion from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host member state.

The third question

106 By its third question in each of the cases, the Bundesverwaltungsgericht asks whether exclusion from refugee status

A pursuant to article 12(2)(b) or (c) of Directive 2004/83 is conditional on a proportionality test being undertaken in relation to the particular case.

107 In that regard, it should be borne in mind that it is clear from the wording of article 12(2) of Directive 2004/83 that, if the conditions laid down therein are met, the person concerned "is excluded" from refugee status and that, within the system of the Directive, article 2(c) expressly makes the status of "refugee" conditional on the fact that the person
B concerned does not fall within the scope of article 12.

108 Exclusion from refugee status on one of the grounds laid down in article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under article 2(d) of that Directive.

C 109 Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot—as the German, French, Netherlands and United Kingdom Governments have submitted—be required, if it reaches the conclusion that article 12(2) applies, to undertake an assessment of proportionality, implying as that does
D a fresh assessment of the level of seriousness of the acts committed.

110 It is important to note that the exclusion of a person from refugee status pursuant to article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin.

111 The answer to the third question is that the exclusion of a person
E from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

The fourth question

112 In view of the answer given to the third question, there is no need to
F answer the fourth question referred by the Bundesverwaltungsgericht in each of these two cases.

The fifth question

113 By its fifth question in both cases, the Bundesverwaltungsgericht wishes, in substance, to know whether it is compatible with Directive 2004/83, for the purposes of article 3 of that Directive, for a member state to
G recognise that a person excluded from refugee status pursuant to article 12(2) of the Directive has a right of asylum under its constitutional law.

114 In that regard, it should be borne in mind that article 3 permits member states to introduce or retain more favourable standards for determining who qualifies as a refugee in so far, however, as those standards
H are compatible with Directive 2004/83.

115 In view of the purpose underlying the grounds for exclusion laid down in Directive 2004/83, which is to maintain the credibility of the protection system provided for in that Directive in accordance with the Geneva Convention, the reservation in article 3 of the Directive precludes member states from introducing or retaining provisions granting refugee

status under Directive 2004/83 to persons who are excluded from that status pursuant to article 12(2).

116 However, it is clear from the closing words of article 2(g) of Directive 2004/83 that the Directive does not preclude a person from applying for "another kind of protection" outside the scope of Directive 2004/83.

117 Directive 2004/83, like the Geneva Convention, is based on the principle that host member states may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under article 12(2) of Directive 2004/83 to remain in the territory of the member state concerned.

118 The grant by a member state of such national protection status, for reasons other than the need for international protection within the meaning of article 2(a) of Directive 2004/83—that is to say, on a discretionary and goodwill basis or for humanitarian reasons—does not, as is stated in recital (9), fall within the scope of that Directive.

119 That other kind of protection which member states have discretion to grant must not, however, be confused with refugee status within the meaning of Directive 2004/83, as the commission, amongst others, has rightly stated.

120 Accordingly, in so far as national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of Directive 2004/83 permit a clear distinction to be drawn between national protection and protection under the Directive, they do not infringe the system established by that Directive.

121 In the light of those considerations, the answer to the fifth question referred is that article 3 of Directive 2004/83 must be interpreted as meaning that member states may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to article 12(2) of the Directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the Directive.

Costs

122 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On those grounds the Court (Grand Chamber) hereby rules:

1 Article 12(2)(b)(c) of Directive 2004/83 must be interpreted as meaning that:

—the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 on the application of specific measures to combat terrorism and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations";

—the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of

A such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under article 12(2) of Directive 2004/83.

B 2 Exclusion from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host member state.

3 The exclusion of a person from refugee status pursuant to article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

C 4 Article 3 of Directive 2004/83 must be interpreted as meaning that member states may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to article 12(2) of Directive 2004/83, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the Directive.

Jessica Giles, Solicitor

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