OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 1 June 2010[1]

1. By two successive orders, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) has referred to the Court, pursuant to Articles 68(1) and 234 EC, a number of questions for a preliminary ruling concerning (i) the interpretation of Article 12(2)(b) 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 ('Directive 2004/83')[2] 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.

I — Legislative background

A — *International law*

1. The 1951 Geneva Convention relating to the Status of Refugees

2. The Geneva Convention relating to the Status of Refugees ('the 1951 Geneva Convention' or 'the Convention')[3] was approved on 28 July 1951 by a special conference of the United Nations Organisation and entered into force on 22 April 1954. 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

1 — Original language: Italian.
2 — OJ 2004 L 304, p. 2.
3 — United Nations Treaty Series, Vol. 189, p. 50, No. 2545 (1954).

'refugee' and lays down the rights and duties attaching to refugee status. At present, 146 States are signatories to the Convention.

3. In Article 1A, a definition is given of the term 'refugee' for the purposes of the Convention, and the following provision is made in Article 1F (a), (b) and (c):

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.' [4]

4 — This footnote does not apply to the English-language version of the Opinion.

4. Under Article 33 of the Convention, entitled 'Prohibition of expulsion or return ("*refoulement*")':

'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.

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 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 Charter of the United Nations, the UN Security Council ('the Security Council') adopted Resolution 1373 (2001). Pursuant to paragraph 2(c) of that resolution, the States are to '[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe

havens'.[5] Pursuant to paragraph 3(f) and (g), the States are called upon to '[t]ake 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 '[e]nsure, 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 Resolution 1373 (2001), 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'.[6]

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 Resolution 1377 (2001), 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'.[7]

B — *European Union ('EU') law*

1. Primary law

7. Under Article 2 TEU, '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,

5 — This footnote does not apply to the English-language version of the Opinion.

6 — To the same effect, see UN Security Council Resolution 1269 (1999) of 19 October 1999, adopted earlier.

7 — For example, in Resolution 1566 (2004) 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'.

including the rights of persons belonging to minorities...'. Article 3(5) TEU 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'.

2. Common Position 2001/931/CFSP

8. Under the first subparagraph of Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union which, in legal terms, has the same authority as the Treaties. Article 18 of that Charter states that '[t]he right to asylum shall be guaranteed with due respect for the rules of the [1951] Geneva Convention... and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.

9. Under point (1)(c) of the first paragraph of Article 63 EC, 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 1951 Convention and other relevant treaties, in relation, inter alia, to 'minimum standards with respect to the qualification of nationals of third countries as refugees'.

10. According to the recitals in the preamble thereto, Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, adopted on the basis of Articles 15 EU and 34 EU, is designed to implement the measures to combat the financing of terrorism contained in Security Council Resolution 1373 (2001), mentioned above. [8] 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 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,

8 — OJ 2001 L 344, p. 93.

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.' Article 1(3) defines 'terrorist act' and 'terrorist group' for the purposes of Common Position 2001/931. Pursuant to Articles 2 and 3, '[t]he 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 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 Common Position 2002/340/CFSP of 2 May 2002,[9] the list of persons, groups and entities to which Common Position 2001/931 applies was updated for the first time. Pursuant to Article 2 of Common Position 2002/340, the 'Kurdistan Workers' Party (PKK)' and the 'Revolutionary People's Liberation Army/Front/Party (DHKP/C) [a.k.a Devrimci Sol (Revolutionary Left), Dev Sol]' were inserted in the list with effect from the date on which that measure was adopted.[10]

3. Framework Decision 2002/475/JHA

12. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism[11] 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'

9 — OJ 2002 L 116, p. 75.

10 — In April 2004, the entry regarding the PKK was amended as follows: 'Kurdistan Workers' Party (PKK) (a.k.a. KADEK, a.k.a. KONGRA-GEL)'; see Common Position 2003/309/CFSP of 2 April 2004 (OJ 2004 L 99, p. 61).

11 — OJ 2002 L 164, p. 3.

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. 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 Amsterdam Treaty and the Vienna Action Plan — 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'. [12]

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 '[m]inimum standards for the definition and content of refugee status... to guide the competent national bodies of Member States in the application of the [1951] Geneva Convention' and 'common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the [1951] Geneva Convention'. According to recital 3, the 1951 Geneva Convention and the 1967 Protocol 'provide the cornerstone of the international legal regime for the protection of refugees', and recital 15 recognises that '[c]onsultations 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 [1951] Geneva Convention'. According to recital 8, '[i]t is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions

12 — See the presidency conclusions, which may be accessed at http://www.europarl.europa.eu/summits/.

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 [1951] Geneva Convention, or a person who otherwise needs international protection'. Lastly, recital 22 states that '[a]cts 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"'.

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

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), '[p]ersons 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 Terrorismusbekämpfungsgesetz (Law on the prevention of terrorism), which introduced the grounds for excluding refugee status, as provided for under Article 1F of the 1951 Geneva Convention.

22. Following the entry into force on 27 August 2007 of the Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union (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 (Law on asylum procedure; 'the AsylVerfG'). Under the latter provision, 'a foreigner shall be considered to be a refugee within the meaning of the [1951 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 AsylVerfG — 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) and (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 AsylVerfG, 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 — *German Federal Republic* 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 [13] rejected the application for asylum, having established that the conditions laid down in Paragraph 51(1) of the Ausländergesetz were not satisfied. 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 AsylVerfG) 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

13 — 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.

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 AsylVerfG) 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 — *German Federal Republic* 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.

32. In May 2001, the Bundesamt [14] recognised D's right to asylum on the basis of the legislation in force at the time. Following the entry into force of the Terrorismusbekämpfungsgesetz in 2002, the Bundeskriminalamt (Federal Criminal Police Office) proposed that the Bundesamt should initiate the

14 — 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.

procedure for 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 2004, the Bundesamt revoked recognition of D's right to asylum and refugee status, pursuant to Paragraph 73(1) of the AsylVerfG. 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 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 AsylVerfG applied in his case.

33. By judgment of 29 November 2005, the Verwaltungsgericht Gelsenkirschen annulled the revocation decision. By judgment of 27 March 2007, the appeal lodged by the Bundesamt was dismissed by the 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 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 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:

'(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) and (c) of Council Directive 2004/83/EC of 29 April 2004 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 Council Common

Position of 17 June 2002 [15] on the application of specific measures to combat terrorism and employs terrorist methods, and the 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 Council Common Position of 17 June 2002 on the application of specific measures to combat terrorism, 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) and (c) of Directive 2004/83/EC 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) and (c) of Directive 2004/83/EC 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 European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or under national rules?

(b) Is exclusion disproportionate only in exceptional cases having particular characteristics?

15 — Common Position 2001/931; see, in that regard, point 11 of this Opinion.

(5) Is it compatible with Directive 2004/83/EC, for the purposes of Article 3 of that directive, 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 that directive is satisfied? [(Case C-57/09)]

the foreign national continues to be recognised as having 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 and refugee status under Article 14(3) of that directive is revoked? [(Case C-101/09)]'

D — *Procedure before the Court*

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. 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 Richtlinienumsetzungsgesetz, 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).[16] 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) and (c) of Directive 2004/83 were to apply to B and D, the measures adopted in their regard could not be annulled. More specifically, as regards

16 — 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).

D, the Bundesverwaltungsgericht takes as its starting point the assumption that, under Article 14(3) of the directive, 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 paragraph 48 of the judgment in *Aydin Salahadin Abdulla and Others*. [17]

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 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 — *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

17 — Joined Cases C-175/08, C-176/08 and C-179/08 [2010] ECR I-1493.

relation to the fight against terrorism and their responsibility for applying the instruments designed to protect those who invoke international protection in order to 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. [18] 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 Community instruments relating to the fight against terrorism.

41. In considering these issues, account must be taken of the close relationship between Directive 2004/83 and the 1951 Geneva Convention, the nature of the law on refugees, and, more specifically, the nature and purpose of the grounds for excluding refugee status.

18 — Thus, for example, Resolution 1373 (2001) declares 'acts, methods and 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.

(a) Directive 2004/83 and the 1951 Geneva Convention

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 1951 Geneva Convention, as is apparent from the legal basis for Directive 2004/83 [19] and the origins of that directive, [20] and as is also clearly expressed in the preamble to Directive 2004/83 [21] and evident from many of its provisions, which reproduce, practically word for word, the corresponding provisions of the Convention. Moreover, the Court has recently confirmed that need for consistency. [22]

43. From that perspective, in addition to consultations with the UN High Commission for Refugees ('UNHCR'), to which recital 15 to Directive 2004/83 refers, [23] guidance

19 — In particular Article 63(1)(c) EC, which is one of the provisions on the basis of which Directive 2004/83 was adopted.

20 — See point 13 of this Opinion.

21 — See point 14 of this Opinion.

22 — *Aydin Salahadin Abdulla and Others*, cited in footnote 17 above, paragraph 53.

23 — 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).

for interpreting provisions of the directive which have their origin in the text of the Convention is provided by the Conclusions on the International Protection of Refugees, adopted by the UNHCR's Executive Committee, which specify the content of the standards of protection established by the Convention, [24] by the Handbook on Procedures and Criteria for Determining Refugee Status, 'the Handbook') [25] and by the Guidelines on International Protection ('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 [26] 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 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. [27] The

24 — 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 UNHCR website. Although they are not binding, compliance with the conclusions is part of the process of cooperating with the UNHCR, with which the Contracting States undertook to cooperate under Article 35(1) of the Convention.

25 — The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1 January 1992, 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 Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 114.

26 — Hathaway, op. cit., pp. 115 and 116.

27 — Point (e) of the 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 cooperation 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'.

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 paragraph 45 of its judgment in *Aydin Salahadin Abdulla and Others*, [28] 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 [29] of the guarantees laid down in the 1951 Geneva Convention and Directive 2004/83, and, in that sense, constitute exceptions to or limitations upon the application of a provision of humanitarian law. Given the potential consequences of applying those grounds, a particularly cautious approach must be taken. [30] The UNHCR has consistently reaffirmed the need to construe the grounds for exclusion laid down in the 1951 Geneva Convention narrowly, even in the context of combating terrorism. [31]

47. As regards the aims underlying the grounds for exclusion, even the *travaux préparatoires* for the 1951 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 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 Convention, and they must therefore be applied 'scrupulously'. [32]

28 — Cited in footnote 17 above.

29 — 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').

30 — Global consultations on International Protection, 3-4 May 2001, paragraph (4) of the conclusions, available on the UNHCR website.

31 — Special Rapporteur on the promotion and the protection of human rights and fundamental freedoms while countering terrorism, report of 15 August 2007, paragraph 71, availableathttp://www.UNHCR.org/refworld/docid/472850e92.html.

32 — To that effect, see, inter alia, Conclusion No. 82 of the UNHCR's Executive Committee of 1997 on safeguarding asylum.

2. The first question

48. By its first question, the Bundesverwaltungsgericht asks, in essence, 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 Council 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) and (c) of Directive 2004/83.

49. The answer to this question requires above all a definition of the terms 'serious non-political crime' and 'act 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 an organisation of that nature entails a 'serious non-political crime' and/or an 'act 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 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 1951 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 made under Article 1F(b) of the 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 Convention and from a systematic interpretation of Article 1F(b) [33] — as well as, more generally, from the nature and purpose of that provision — that, for the application of

33 — 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 Convention.

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; [34] it is also endorsed by legal writers. [35]

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 [36] or objective, [37] prior or subsequent to the offence, [38] 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 its Guidelines of 4 September 2003 ('the 2003 Guidelines'), [39] 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. [40] 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, [41] 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. [42]

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

34 — See, in that connection, paragraph 4.1.1.1. of the document drawn up by the UNHCR for the purposes of this case and appended to B's written observations.

35 — See, for example, Grahl-Madsen, *Status of Refugees*, Vol. 1, p. 294; Goodwin-Gill and McAdam, *The Refugee in International Law*, Oxford University Press, 3rd edition, p. 117.

36 — 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).

37 — 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.

38 — According to the Handbook, paragraphs 151 to 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.

39 — The UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, paragraph 14.

40 — Ibid.

41 — According to the Handbook, the offence must at least be a 'capital crime or a very grave punishable act', whereas the Global Consultations on International Protection of 3 to 4 May 2001 classify as serious an offence which attracts a long period of imprisonment (paragraph 11). See also, to that effect, Gilbert, *Current Issues in the Application of the Exclusion Clauses*, 2001, available at http://www.unhcr.org/refworld/docid/3b389354b.html, p. 17.

42 — Goodwin-Gill and McAdam, op. cit., p. 177 and the legal writers cited in footnote 216.

origin, the intention being to distinguish between 'fugitives from justice' [43] 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 1951 Geneva Convention, [44] 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, [45] the context in which it is carried out, [46] the methods used, [47] the reasons for committing it [48] and the proportionality of the crime to the purported objectives are important for assessing whether a crime is political in nature. [49]

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. [50] The Community legislature took a similar approach when, in reproducing the text of Article 1F(b) of the 1951 Geneva Convention in 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

43 — This expression is used in the *travaux préparatoires* for the 1951 Geneva Convention with reference to Article 1F (b).

44 — 2003 Guidelines, paragraph 15.

45 — Certain offences, such as robbery or drug-trafficking, even if committed for the purpose of pursuing political objectives, could, because of their nature, be categorised as non-political offences.

46 — 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.

47 — It is relevant, for example, whether the act was directed at civilian or military or, indeed, political targets, if it involves the use of indiscriminate violence or is committed with cruelty.

48 — As well as the individual motivation, it is necessary to assess whether there is a clear and direct causal link with the political objective: see, to that effect, paragraph 152 of the Handbook and paragraph 15 of the 2003 Guidelines.

49 — See the Handbook, paragraph 152; the 2003 Guidelines, paragraph 15.

50 — See the Handbook, paragraph 152; the 2003 Guidelines, paragraph 15.

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 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 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. [51] 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.

51 — 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 be regarded as a political offence, the objectives pursued must always be consistent with the principles of protecting human rights.

(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 1951 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 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 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. [52] For example, in the 2003 Guidelines, the UNHCR states 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 ('the Background Note'), [53] 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. [54] 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 Convention. [55] That interpretation, which is supported both by the *travaux préparatoires* for the Convention [56] and by the Handbook, [57] 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. [58]

(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

52 — The UNHCR points out that, in the majority of cases, it is the grounds for exclusion laid down in Article 1F(a) and (b) that will in fact apply.

53 — The text is available at: http://www.unhcr.org/refworld/docid/3f5857d24.html.

54 — Paragraph 47.

55 — See Goodwin-Gill and McAdam, op. cit., p. 22, footnote 143.

56 — In which it was specified that the provision in question was not aimed at the 'man in the street'; see Background Note, paragraph 48.

57 — Paragraph 163.

58 — In the 1996 Guidelines, 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 (paragraph 61); see Gilbert, op. cit., p. 22, footnote 144. 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.

Article 1F(b) and (c) of the 1951 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 [59] and of the Security Council, [60] as well as in the International Convention for the Suppression of the Financing of Terrorism, [61] 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 Framework Decision 2002/475/JHA, Article 1 of 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 Security Council Resolutions 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 Community 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

59 — See Resolution 53/108 of 26 January 1999.

60 — See point 5 of this Opinion.

61 — Annexed to Resolution 54/109 of the UN General Assembly of 25 February 2000.

the Security Council itself is, in any event, required to act in conformity with the UN Charter and its principles and purposes, one of the consequences being that its opportunities to interfere with the international obligations assumed by States are limited. [62] On the other hand, the point must be made that both the General Assembly and the Security Council itself have consistently called upon the States to comply with the international instruments for the protection of human rights, including the 1951 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 1951 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. [63] And 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) and (c) of the 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/JHA. 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 EU level for the application of the 1951 Geneva Convention, the Commission's argument fails to acknowledge that,

62 — See, in this connection, inter alia, Halberstam and Stein, *The United Nations, the European Union and the King of Sweden: Economic sanctions and individual rights in a plural world order*, in Common Market Law Review, 2009, p. 13 et seq.

63 — Goodwin-Gill and McAdam, op. cit., p. 195.

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 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 Convention is the casuistic approach taken in applying the grounds for exclusion laid down in Article 1F(b) and (c), an approach that does not as such lend itself to the use of generalisations and 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'. [64]

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 to the purported political objectives, [65] in so far as they involve the use of indiscriminate violence and are directed at civilians or persons unconnected with the objectives pursued. 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, 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 Convention. As we have seen, however, the 2003 Guidelines and the Background Note suggest that it is nevertheless necessary to verify whether they have an *international dimension*, especially in terms of their seriousness and their impact and implications for international peace and security. [66] Within those limits, it therefore seems 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.

64 — See UN doc. E/CN.4/2004/4, 5 August 2003.

65 — See the 2003 Guidelines, paragraph 15.

66 — The Background Note and the 2003 Guidelines refer to 'egregious acts of international terrorism affecting global security'. Paragraph 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.

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) and (c) of Directive 2004/83.

(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) and (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 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) and (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 1951 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 [67]) 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) and (c) of the directive

67 — 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, Case T-229/02 *PKK* v *Council* [2008] ECR II-45.

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, [68] 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. [69]

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) and (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) and (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

68 — In the 2003 Guidelines, 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 (paragraph 19).

69 — 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*, 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 (Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 17).

of the State concerned from the obligation to carry out that review. [70]

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), [71] 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. [72]

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) and (c) of Directive 2004/83, account being taken of the express provision made under Article 12(3) to the effect that '[p]aragraph 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

70 — 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.

71 — See the 2003 Guidelines.

72 — 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 (paragraph 23).

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 1951 Geneva Convention. Directive 2004/83 does not introduce a uniform body of rules to govern that area;[73] 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) and (c) of Directive 2004/83 is conditional upon the applicant continuing to represent a danger. B and D suggest that the Court should answer this in the affirmative, whereas the

73 — In the Hague Programme, 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 cooperation, 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, the granting of protection, and refugee status more specifically, falls within the competence of the individual Member States.

Bundesverwaltungsgericht leans towards a negative response, as do all the governments that have intervened in the proceedings, as well as the Commission. [74]

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 1951 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.

86. It is true that, so far as the application of Article 1F(b) of the 1951 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'. [75] 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

74 — The UNHCR expressed the same view in the document drawn up for the purposes of this case.

75 — See the Handbook, paragraph 157.

Convention. [76] 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 community.

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 1951 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) and (c) of the directive 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) and (c) of Directive 2004/83 is not conditional upon 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 upon 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 for the Protection of Human Rights and Fundamental Freedoms ('ECHR') 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 1951 Geneva Convention: does the application of Article 1F of the Convention require a balance to be struck between the seriousness of the offence or act and the consequences of exclusion, so as to ensure

76 — See Goodwin-Gill and McAdam, op. cit., p. 174.

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, [77] and as a result of the move towards the gradual recognition of a universal jurisdiction in relation to serious international crimes, [78] it remains topical.

91. The UNHCR seems to accept a balancing exercise of that nature in relation to Article 1F(b) of the 1951 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. [79] Many courts in Contracting States have made rulings reflecting their opposition to it even in relation to Article 1F(b). [80] 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 1951 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. [81]

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 the directive may simply reflect the Community legislature's desire to abide by the text of the 1951 Geneva Convention on that point, leaving the issue to be

77 — Gilbert, op. cit., 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.

78 — *Ibid.*, p. 4.

79 — See the 2003 Guidelines. See also the 1979 Handbook, paragraph 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.

80 — See Gilbert, op. cit., p. 18.

81 — See also footnote 52 to the document drawn up by the UNHCR for the purposes of this case.

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) and (c) of the Convention and Article 12(2)(b) and (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 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.

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 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 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 from effective

protection against *refoulement*, whether pursuant to international instruments [82] 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 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 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. [83]

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

82 — For example, pursuant to Article 3 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.

83 — It may be possible for the requested State to accord informal 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, op. cit, p. 19.

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 1951 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 1951 Geneva Convention and preventing abuse. Accordingly, where the conditions for their application are met, Member States are required, both under the 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 the 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 1951 Geneva Convention. However, just as the 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.

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 2004/83 and of the 1951 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 impression that the person benefiting from it enjoyed refugee status within the meaning of the 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 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 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

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) and (c) of Council Directive 2004/83/EC of 29 April

2004 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 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/EC, to establish the individual responsibility of the person concerned in relation to 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) and (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/EC, 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) and (c) of that directive, apply.

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

3. For the purposes of applying Article 12(2)(b) and (c) of Directive 2004/83/EC, 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/EC are applied in a manner that is proportionate to its objective and, more generally, to the humanitarian nature of the law on refugees.

4. Directive 2004/83/EC 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/EC.