

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 11 November 2014 (1)

Case C-472/13

Andre Lawrence Shepherd
v
Bundesrepublik Deutschland

(Request for a preliminary ruling from the Bayerisches Verwaltungsgericht München
(Germany))

(Area of freedom, security and justice — Asylum — Minimum standards for the qualification and status of third-country nationals as refugees and the content of the protection granted — Conditions for obtaining refugee status — Acts of persecution under Article 9(2)(e) of Directive 2004/83/EC — Prosecution and punishment of a member of the armed forces of the United States of America for refusing to serve in the war in Iraq)

1. This request for a preliminary ruling from the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich (Germany)) confronts the Court with a singular and unusual case.
2. Mr Shepherd, a national of the United States of America ('the US'), enlisted for service in the US armed forces in December 2003. He was trained as a maintenance mechanic for Apache helicopters. In September 2004, he was transferred to Germany. His unit had at that time been deployed in Iraq since February 2004 and he was accordingly sent on to join them. In Iraq he carried out maintenance, particularly on helicopters, from September 2004 to February 2005. He did not participate in direct military action or combat operations. In February 2005 he returned with his unit to its base in Germany. He then began to have doubts about the legitimacy of the war and to investigate those concerns.
3. At the beginning of 2007 it became known that Mr Shepherd's unit would shortly be redeployed to Iraq. On 1 April 2007 he received the order to deploy. By that time he had reached the view that the war in Iraq was contrary to international law and infringed Article 2(4) of the Charter of the United Nations. He considered that the military operations in Iraq involved the systematic, indiscriminate and disproportionate use of weapons without regard to the civil population. As a result particularly of the increasing deployment of Apache helicopters, more and more civilians were being harmed and international humanitarian law violated. He took the view that the helicopters could not have been deployed in the war if he and other maintenance mechanics had not made them combat-

ready. (Between 2007 and 2008, when Mr Shepherd's unit was again in action in Iraq, there was further bombing. Numerous reports are available alleging that the US army committed war crimes in Iraq, although Mr Shepherd does not know whether the impugned operations involved the actual helicopters on which he had carried out maintenance.)

4. Mr Shepherd did not want to risk participating in war crimes in the context of his unit's deployment in Iraq. He did not consider the possibility of making a request to the US authorities not to be deployed on grounds of conscientious objection (2) because he does not completely reject the use of war and force. He had, indeed, re-enlisted at the end of his initial period of service. He believed that an application to refuse to perform military service would not have protected him from further deployment in Iraq. He therefore decided to leave the US army before commencing a second tour of duty there; and deserted on 11 April 2007. Refusal to perform military service in Iraq puts him at risk of prosecution for desertion. From a US perspective, a conviction for that offence subsequently restricts one's life. In August 2008 Mr Shepherd therefore applied for asylum in Germany. (3)

International law

The Geneva Convention relating to the Status of Refugees

5. According to the Geneva Convention, (4) on which the Qualification Directive (5) is based, the term 'refugee' is to apply to any person who, 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. (6)

6. Under Article 1(F)(a), the Geneva Convention does not apply to any person for whom there are serious reasons for considering that 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'. (7)

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

7. Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (8) guarantees the right to freedom of thought, conscience and religion, including freedom to change religion or belief.

European Union law

The Charter of Fundamental Rights of the European Union

8. Article 10(1) of the Charter of Fundamental Rights of the European Union ('the Charter') (9) corresponds to Article 9(1) of the ECHR. Under Article 10(2), the right to conscientious objection is recognised in accordance with the national laws governing that right. Article 52(3) states that the rights enshrined in the Charter should be interpreted consistently with corresponding rights guaranteed by the ECHR.

The Qualification Directive

9. The Qualification Directive is one of the measures comprising the Common European Asylum System. It is based upon the full and inclusive application of the Geneva Convention, which provides the cornerstone of the international legal regime for the protection of refugees. (10) The Qualification Directive seeks to establish minimum standards and common criteria for all Member States for the recognition of refugees and

the content of refugee status, for the identification of persons genuinely in need of international protection, and for a fair and efficient asylum procedure. (11) Fundamental rights and the principles recognised by the Charter are recognised and observed. (12) In their treatment of persons falling within the scope of the Qualification Directive, Member States are bound by their obligations under instruments of international law. (13)

10. Reflecting Article 1(A)(2) of the Geneva Convention, the Qualification Directive defines a refugee as ‘... a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply’. (14)

11. The assessment of facts and circumstances relating to applications for refugee status is governed by Article 4. Member States may consider it to be the applicant’s duty to submit as soon as possible all elements needed to substantiate his application. It is the duty of the Member State to assess the relevant elements of the application in cooperation with the applicant. (15)

12. Under the Qualification Directive, ‘actors of persecution or serious harm’ include the State, parties or organisations controlling the State and non-State actors. (16)

13. Protection from persecution can be accorded by, inter alia, the State. (17) Such protection is generally provided when the State, for example, takes reasonable steps to prevent persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of such acts and the applicant has access to such protection. (18)

14. An individual who fulfils the conditions in Chapter II of the Qualification Directive concerning the assessment of applications for international protection qualifies as a refugee if he is able to demonstrate that he has been subjected to, or has reason to fear, acts of persecution within the meaning of Article 9. Such acts must be sufficiently serious by their nature to constitute a severe violation of basic human rights, in particular the inalienable rights set out in Article 15(2) of the ECHR, (19) or must involve an accumulation of various measures which is sufficiently severe to amount to such a violation of basic human rights. (20) Acts capable of falling within the definition of persecution include: ‘legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner’; (21) ‘prosecution or punishment which is disproportionate or discriminatory’; (22) and ‘prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)’. (23) There must be a connection between the reasons for persecution in Article 10 and the acts of persecution described in Article 9 of the Qualification Directive. (24)

15. The reasons listed in Article 10(1) include:

‘(d) ... [membership of] a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

...;

- (e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.’

16. A third country national is excluded from the scope of the Qualification Directive if he falls within Article 12 thereof. For present purposes, the relevant exclusion is Article 12(2), which reflects the wording of Article 1(F) of the Geneva Convention. Thus, a person is excluded from protection under the directive where there are serious reasons for considering that 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’. (25) Article 12(2) ‘applies to persons who instigate or otherwise participate in the commission of the crimes or acts’ there mentioned. (26)

17. Member States must grant refugee status to a third country national who qualifies as a refugee in accordance with Chapters II and III of the Qualification Directive. (27)

National law

18. According to the explanation provided by the referring court, the national provisions governing the definition of a refugee are derived from Article 1(A)(2) of the Geneva Convention. Individuals are excluded from that definition where there are serious reasons for considering that one of the grounds in Article 1(F) of that convention applies. (28)

19. National law contains a prohibition against deportation to a State where an individual’s life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Where such threats emanate from the State they amount to persecution for the purposes of the relevant national provisions. (29)

Facts, procedure and questions referred

20. I have set out in the introduction to this Opinion such facts about Mr Shepherd as may be gleaned from the order for reference.

21. By notice of 31 March 2011 the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees; ‘the Bundesamt’) refused Mr Shepherd’s application for asylum. It gave the following reasons: (i) there is no fundamental right to conscientious objection; (ii) Mr Shepherd could have left military service legally; (iii) he does not fall within Article 9(2)(e) read together with Article 12 of the Qualification Directive. That directive presupposes that acts contrary to international law have been committed in the conflict in question. The US armed forces do not tolerate such violations, still less do they encourage them. Mr Shepherd was merely a helicopter mechanic; he did not personally participate in combat. There is no indication that he participated indirectly in war crimes and/or that ‘his’ helicopters were involved in such crimes. Even if he had participated indirectly in such crimes, that would not be sufficient to establish his criminal responsibility for them within the meaning of Article 25 of the Rome Statute of the International Criminal Court. (30) Furthermore, as regards a possible crime against peace, whether or not the invasion of Iraq was contrary to international law, Mr Shepherd cannot be considered a

'perpetrator' as he is not part of the high-ranking military personnel. The deployment of the coalition forces in Iraq had, moreover, already been legitimised under international law during Mr Shepherd's first tour of duty in Iraq.

22. Finally, the Bundesamt considered that in so far as Mr Shepherd might be prosecuted by the US authorities for breach of his military obligations, in particular for desertion, that possibility merely represented his home country's legitimate interest in taking such action.

23. On 7 April 2011 Mr Shepherd challenged the Bundesamt's decision before the referring court. He considers that the Bundesamt wrongly focused on the concept of the *act* of persecution, neglecting the concept of the *reasons* for persecution. The Bundesamt misapplied principles of international criminal law to a claim for asylum. It therefore erroneously concluded that a person refusing to perform military service may be granted refugee status only if he can prove 'beyond reasonable doubt' that, had he remained in the armed forces, he would have rendered himself guilty of the commission of an offence under international criminal law. The referring court explains that Mr Shepherd's claim is based upon a fear of persecution within the meaning of Article 9(2)(e) of the Qualification Directive, claiming that there are two reasons for persecution: (i) that he belongs to a social group within the meaning of Article 10(1)(d), and/or (ii) because of his political opinion within the meaning of Article 10(1)(e). During the oral procedure this Court was informed that Mr Shepherd relies solely upon Article 10(1)(d). [\(31\)](#)

24. Against that background, the Verwaltungsgericht seeks a preliminary ruling on the following questions:

'(1) Is Article 9(2)(e) of [the Qualification Directive] to be interpreted as meaning that the protection afforded extends only to those persons whose specific military duties include direct participation in combat, that is armed operations, and/or who have the authority to order such operations (first alternative), or can other members of the armed forces also fall within the scope of the protection afforded by that legislation if their duties are confined to logistical, technical support for the unit outwith actual combat and have only an indirect effect on the actual fighting (second alternative)?

(2) If the answer to Question 1 is that the second alternative applies:

Is Article 9(2)(e) of [the Qualification Directive] to be interpreted as meaning that military service in a conflict (international or domestic) must predominantly or systematically call for or require the commission of crimes or acts as defined in Article 12(2) of [the Qualification Directive] (first alternative), or is it sufficient if the applicant for asylum states that, in individual cases, crimes, as defined in Article 12(2)(a) of [the Qualification Directive], were committed by the armed forces to which he belongs in the area of operations in which they were deployed, either because individual operational orders have proved to be criminal in that sense, or as a result of the excesses of individuals (second alternative)?

(3) If the answer to Question 2 is that the second alternative applies:

Is refugee protection granted only if it is significantly likely, beyond reasonable doubt, that violations of international humanitarian law can be expected to occur in the future also, or is it sufficient if the applicant for asylum sets out facts which indicate that such crimes are (necessarily or probably) occurring in that particular conflict, and the possibility of his becoming involved in them therefore cannot be ruled out?

- (4) Does the intolerance or prosecution by military service courts of violations of international humanitarian law preclude refugee protection pursuant to Article 9(2)(e) of [the Qualification Directive], or is that aspect immaterial?

Must there even have been a prosecution before the International Criminal Court?

- (5) Does the fact that the deployment of troops and/or the occupation statute is sanctioned by the international community or is based on a mandate from the [UN Security Council] preclude refugee protection?
- (6) Is it necessary, in order for refugee protection to be granted pursuant to Article 9(2)(e) of [the Qualification Directive], that the applicant for asylum could, if he performs his duties, be convicted under the statutes of the [ICC] (first alternative), or is refugee protection afforded even before that threshold is reached and the applicant for asylum thus has no criminal prosecution to fear but is nevertheless unable to reconcile the performance of the military service with his conscience (second alternative)?
- (7) If the answer to Question 6 is that the second alternative applies:

Does the fact that the applicant for asylum has not availed himself of the ordinary conscientious objection procedure — even though he would have had the opportunity to do so — preclude refugee protection pursuant to the abovementioned provisions, or is refugee protection also a possibility in the case of a particular decision based on conscience?

- (8) Does a dishonourable discharge from the army, the imposition of a prison sentence and the social ostracism and disadvantages associated therewith constitute an act of persecution within the meaning of Article 9(2)(b) or (c) of [the Qualification Directive]?’

25. Written observations were submitted by Mr Shepherd, Germany, Greece, the Netherlands, the United Kingdom and the European Commission. Apart from the Netherlands, all parties made oral submissions at the hearing on 25 June 2014.

Preliminary remarks

26. The circumstances giving rise to Mr Shepherd’s request for asylum may be thought to trigger wider issues, such as the interface between EU law and international law. However, the referring court has focussed on narrower questions in its order for reference. Essentially, it wishes to know whether Article 9(2)(e) of the Qualification Directive applies to this case and if so how the application for asylum should be assessed. Article 9(2)(e) provides that there is an act capable of qualifying as an act of ‘persecution’ where a person is at risk of prosecution or punishment for refusal to perform military service in a conflict, where so doing would involve committing certain acts, including crimes against peace, war crimes and crimes against humanity within the meaning of Article 12(2) of that directive. In my view, the Court should refrain from exploring the wider issues, which have not been adequately addressed in argument before it, when providing answers for the referring court; and I shall accordingly not address those wider issues in this Opinion.

27. The Geneva Convention is a living instrument that should be interpreted in the light of present day conditions and in accordance with developments in international law. [\(32\)](#) The United Nations High Commissioner for Refugees (‘the UNHCR’) plays a particular role under the Convention, providing valuable guidance for Member States when determining

refugee status. (33) The Geneva Convention is the cornerstone of the international regime for the protection of refugees; and the Qualification Directive must be construed in the light of the general scheme and purpose of that Convention. (34) Furthermore, as Article 78(1) TFEU makes clear, any interpretation of the Qualification Directive must be consistent with the Geneva Convention and other relevant treaties and with the rights recognised by the Charter. (35)

28. Any interpretation of the individual provisions of the Qualification Directive must, moreover, take account of the ordinary meaning of the language used, its purpose and the legislative scheme and context. In regard to the latter, Article 4 (in Chapter II of the directive) governs the assessment of applications for international protection. (36) That assessment process attempts to strike a balance. Genuine refugees need and deserve protection; but Member States must be permitted to operate procedures that distinguish genuine applicants from bogus claimants. Allowance must indubitably be made for the fact that genuine applicants are often people who have suffered traumatic experiences. Nevertheless, an individual claimant must put forward a clear and credible account in support of his request for asylum.

29. In Mr Shepherd's case the referring court has asked eight inter-linked, partially overlapping, questions. The principal question is whether a person in Mr Shepherd's position can invoke an act of persecution as described in Article 9(2)(e) in support of his application for refugee status under the Qualification Directive. I shall therefore focus primarily on the scope of that provision and its connection with the 'reasons for persecution' mentioned in Article 10(1)(d) and (e).

Question 1

30. By Question 1 the referring court seeks clarification of the scope of Article 9(2)(e) of the Qualification Directive, in particular the meaning of the words '*... where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)*'. (37) Are only those directly engaged in combat covered by that provision; or does it extend to all serving military personnel, including individuals providing logistical and technical support, such as a helicopter maintenance mechanic?

Article 9(2)(e) of the Qualification Directive

31. Mr Shepherd, Germany, the United Kingdom and the Commission consider that all military personnel fall within the scope of Article 9(2)(e) of the Qualification Directive. Greece takes a different approach. It considers that the referring court is asking about the extent to which the person applying for refugee status must be involved in committing acts, such as war crimes, in order to establish that he has personal responsibility for such acts. The Netherlands points out that personnel in support roles do not generally participate in military action or combat. Whether it considers that such personnel may nevertheless fall within the scope of Article 9(2)(e) is not entirely clear.

32. It seems to me that Article 9(2)(e) of the Qualification Directive covers all military personnel including logistical and support staff such as a helicopter maintenance mechanic.

33. In defining a particular category of 'acts of persecution', Article 9(2)(e) makes express reference to Article 12(2) of the Qualification Directive, which should be read together with Article 12(3). (38) There is nothing in the text of the Qualification Directive limiting the phrase 'where performing military service would include' to combat personnel. The plain wording of Article 12(3) ('*otherwise participate in the commission of*') confirms

that persons who are not directly involved in committing the actual actions that are caught by Article 12(2) can nevertheless be excluded from protection under the Qualification Directive by virtue of that provision. If Article 9(2)(e) is to be read consistently with Article 12(2) and (3), it follows that the designated function, title or job description of the person concerned cannot determine whether he fears an act of persecution within the meaning of Article 9(2)(e) of the Qualification Directive.

34. Including support personnel within the scope of Article 9(2)(e) is, moreover, consistent with the Qualification Directive's overarching aim of identifying those persons who are forced by circumstances to seek protection in the European Union and are genuinely in need of it. (39) Where a person is able to show that if he performed military service he would be involved in committing one of the acts identified as reasons for exclusion in Article 12(2) of the directive, there is no plausible reason for excluding him from the scope of Article 9(2)(e) of the Qualification Directive (there is, indeed, good reason to think that he may genuinely need protection).

35. Furthermore, I can identify no reason why a person is, or should be, prevented from invoking Article 9(2)(e) of the directive because he is an enlisted recruit rather than a conscript. The wording '... refusal to perform military service ...' is sufficiently broad to encompass anyone in military service. No distinction is made by reference to the manner in which the person concerned was recruited, which is thus irrelevant.

36. The next stage in the analysis is more delicate. Would the person concerned be led to participate in the commission of acts, such as war crimes listed in Article 12(2) of the Qualification Directive? That involves assessing the requirements of Article 12(2) through the prism of Article 9(2)(e). Article 9(2)(e) requires an *ex ante* assessment of the applicant's position, and thus of the likelihood of an act occurring. Article 12(2) is concerned with an *ex post* assessment of acts that have already happened.

37. First, it seems to me that, in stating '... would include crimes or acts falling under the exclusion clauses as set out in Article 12(2) ...', Article 9(2)(e) must be read as meaning that the person concerned would, in performing military service, instigate or otherwise participate in the commission of such acts. That interpretation is consistent with, and supported by, the French text of Article 9(2)(e) of the directive '... *en cas de conflit lorsque le service militaire supposerait de commettre des crimes ou d'accomplir des actes ...*'. (40) The focus is on what performing that military service would *or could* entail. Second, the word 'would' indicates that committing acts such as those listed in Article 12(2) is conditional upon the person concerned performing his military service. (41) Third, 'would' also indicates that the person concerned has not yet committed such acts. It therefore refers to possible future actions, rather than acts that have occurred in the past.

38. This assessment is thus fundamentally different from the *ex post* inquiry that is conducted either where criminal proceedings are set in train, or where a Member State seeks to show that a particular person should be excluded from the protection afforded by the Qualification Directive because he comes within the excluded category delineated by Article 12(2). Article 9(2)(e) cannot sensibly be construed as requiring the applicant for refugee status to demonstrate that he is within Article 12(2). Could he do so, he would by definition be ineligible for protection.

39. Article 12(2) of the Qualification Directive is derived from Article 1(F) of the Geneva Convention. Only Article 12(2)(a) is relevant to Mr Shepherd's case. Let me explain briefly why I take that view.

40. Article 12(2)(b) of the directive refers to persons who have committed a 'serious

non-political crime'. Nothing in the order for reference suggests that Mr Shepherd falls into that category. There is therefore no need to consider Article 12(2)(b) further. Article 12(2)(c) concerns persons who have been guilty of acts contrary to the purposes and principles of the United Nations. (42) Only persons who have been in positions of power in a State or a State-like entity can, as I see it, commit such acts. Mr Shepherd was not in such a position.

41. Returning therefore to Article 12(2)(a): the acts listed in that provision and in Article 1(F)(a) of the Geneva Convention are identical. They include crimes against peace, war crimes, and crimes against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes (there is no separate definition in the directive).

42. The Charter of the International Military Tribunal (43) defines a 'crime against peace' as involving the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties or other agreements. Such a crime by its very nature can only be committed by personnel in a high position of authority representing a State or a State-like entity. (44) Mr Shepherd was never in that position. It is therefore unlikely that he would have been at risk of committing such an act. 'Crimes against humanity' cover acts such as genocide, murder, rape and torture carried out as part of a widespread or systematic attack directed against a civilian population. (45) In the absence of any findings of fact to that effect in the order for reference I shall not explore that avenue further. (46)

43. A number of international instruments define 'war crimes'. (47) Such crimes include serious breaches of rules of international humanitarian law which seek to protect persons who are not, or are no longer, taking part in hostilities and to restrict the methods and means of warfare employed. It is recognised that war crimes cover acts of wilful killing and torture of civilians. (48) The material in the order for reference suggests that that category (and that category alone) of alleged war crime is relevant to Mr Shepherd's case.

44. I have already concluded that military personnel who do not directly participate in combat are not excluded from the scope of Article 9(2)(e) of the Qualification Directive. Whether such persons would commit war crimes if they performed their military duties is a matter of fact to be assessed by the competent national authorities. That assessment is difficult because it requires those authorities to consider acts and the consequences of actions that have not yet taken place. The question then becomes, is it plausible that the acts of the person concerned *would* make it possible for war crimes to be committed? (49)

45. The Court cannot sensibly propose exhaustive criteria for the national authorities to apply. For example, military personnel working at a US army base barber shop ensuring that serving personnel all have the standard hair cut are remote from combat operations and would therefore be unlikely to be able to demonstrate such a direct link. However, a person who arms aircraft with bombs or who maintains fighter jets is more likely to be able to show that his role is directly linked to such operations and therefore to the possibility of committing war crimes. In that respect, a serviceman flying or crewing an aircraft or helicopter that aims a missile at, or machine-guns a column of, civilian refugees is clearly closer in the chain of events to the commission of a war crime than the person who armed the aircraft or helicopter and ensured that it was combat ready. However, it does not follow that the maintenance mechanic cannot be 'involved in' (or that there is no likelihood that he could be involved in) committing that crime.

46. In essence, it seems to me that the national authorities must consider whether there is a direct link between the acts of the person concerned and the reasonable likelihood that

war crimes might be committed, such that the person concerned could be led to participate in the commission of war crimes because his actions comprise a necessary element of those crimes. Essentially, the test is whether, without that contribution or all the contributions made by individuals in the situation of the person concerned, the war crimes or acts would not be possible.

Qualification as a refugee

47. A person who has a well-founded fear of persecution for reasons such as membership of a particular social group (Article 10(1)(d)) or his political opinions (Article 10(1)(e)) and who meets the conditions of Article 2(c) of the Qualification Directive must be granted refugee status. (50) There must be a connection between the reasons listed in Article 10 and the acts of persecution defined in Article 9 of the Qualification Directive. According to the referring court, Mr Shepherd's application for refugee status is based on Article 9(2)(e) read together with both Article 10(1)(d) and Article 10(1)(e). However, at the hearing before the Court counsel for Mr Shepherd indicated that his case was put on the basis of Articles 9(2)(e) and 10(1)(d) alone (in other words, that no reliance was placed on Article 10(1)(e)). The Court has not been asked by the referring court to interpret Article 10(1)(d) of the Qualification Directive. None the less, I consider it necessary also to examine that provision in the light of Mr Shepherd's oral submissions.

48. It seems to me that Mr Shepherd would clearly come within Article 10(1)(e) of the Qualification Directive. Holding a political opinion includes holding an opinion, thought or belief on a matter related to a State and its policies or methods. That must cover believing that one cannot perform military service in a conflict where to do so would possibly lead to committing war crimes.

49. However, the position is less clear in relation to Article 10(1)(d) (membership of a particular social group).

50. Mr Shepherd argues that his belief that participating in the war in Iraq meant that he would risk committing acts listed within Article 12(2) is so fundamental to his conscience that he should not be forced to go against it (thus, he comes within the first indent of Article 10(1)(d)); and that he is therefore a member of a group that has a distinct identity within the US because it is perceived as being different by the surrounding society (for the purposes of the second indent of Article 10(1)(d)).

51. Whether that is so turns on a number of factors.

52. The expression 'conscientious objector' does not appear in the text of Article 10(1) of the Charter, which closely mirrors Article 9(1) of the ECHR. The European Court of Human Rights has nevertheless ruled that opposition to military service — where it is motivated by a serious and insurmountable conflict between the obligation to serve in an army and a person's conscience — constitutes a conviction of sufficient cogency, seriousness, cohesion and importance to be protected by Article 9(1) of the ECHR. (51) Article 10(1) of the Charter should therefore be interpreted in a similar manner. Article 10(2) of the Charter does identify and recognise the right to conscientious objection in accordance with the national laws governing the exercise of this right. (52)

53. However, the term 'conscientious objection' has more than one meaning. It is understood to cover pacifists (such as Quakers) where the objection to military action is absolute. (53) It may also refer to persons who object to a particular conflict on legal, moral or political grounds or who object to the means and methods used to prosecute that conflict.

54. I can see that those who have an absolute objection to military action might fairly readily be deemed to 'share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it' for the purposes of the first indent of Article 10(1)(d). Their stance is clear and unequivocal. They are not prepared, under any circumstances, to contemplate the use of force. Because their position is so clear-cut, it is readily believable.

55. Those who have a more nuanced objection to the use of force are in a more difficult position. Precisely what they are opposed to on grounds of conscience will vary from one person to another. One may object to a particular war; another to the means and methods employed in a given conflict; a third may refuse on very personal grounds because he is required to fight against his own ethnic group. Because there is no absolute objection to the use of force, but only a partial objection, such individuals may find it correspondingly more difficult to establish that their individual position is credible; that their individual objection is one of conscience and principle rather than of convenience. They may thus have greater difficulty in bringing themselves within the first indent of Article 10(1)(d).

56. I see less difficulty in relation to the second indent of Article 10(1)(d). Conceptually, it is perfectly plausible that both those whose objection to the use of force is absolute and those whose objection is more nuanced might (separately or together) form a group that 'has a distinct identity in the relevant country' (here, the US) 'because it is perceived as being different by the surrounding society'. Whether that is in fact the case would be for the competent authorities to determine on the basis of the evidence presented to them, subject to review by the national courts.

57. When judged by those criteria, is Mr Shepherd covered by the two (cumulative) indents of Article 10(1)(d)?

58. The referring court has explained that Mr Shepherd's objection to military action is not absolute. He was an enlisted member of the US army. He does not entirely reject the use of armed force. His argument is more that he objects to the conduct of a particular war in a particular way (a way that he considers has included, and/or may in future include, the commission of war crimes); and that he feared that he might have found himself caught up in such activity had he continued his military service and obeyed orders to redeploy to Iraq.

59. First, the national authorities must determine whether to classify Mr Shepherd as a conscientious objector or as a deserter. In determining that issue, they should have regard to whether Mr Shepherd holds a conviction of sufficient cogency, seriousness, cohesion and importance regarding the conflict in question that he falls within the first indent of Article 10(1)(d). Put another way: is Mr Shepherd simply a deserter; or did he have, as he vehemently claims, an objection of conscience to further military service in Iraq? If the national authorities decide that he is a deserter, pure and simple, it is highly unlikely that he could bring himself within the first indent of Article 10(1)(d). Since both indents of Article 10(1)(d) must be satisfied, it would then be immaterial whether those who desert from military service are viewed as a single, uniform group by society.

60. If, however, the national authorities decide that Mr Shepherd refused to perform further military service in Iraq because there was a serious and insurmountable conflict between what he reasonably anticipated that that obligation to serve would entail and his conscience, he would be covered by the first indent of Article 10(1)(d). The national authorities would then have to consider whether, on the basis of the material available to them, it is reasonable to suppose that, in the US, persons in Mr Shepherd's specific position are regarded differently and are subject to particular treatment by society in general. If so, the second indent of Article 10(1)(d) would also be satisfied. I do not think

that there is sufficient information before the Court for it to be able to offer greater guidance on this point.

Question 2

61. The referring court here frames its question by putting forward two alternatives. For Article 9(2)(e) of the Qualification Directive to be engaged, must the conflict in question predominantly or systematically involve the commission of crimes or acts as listed in Article 12(2) thereof; or is it sufficient for the applicant to show that, in individual cases, such acts were committed by the armed forces to which he belongs?

62. In my view, neither alternative is determinative of whether or not Article 9(2)(e) of the Qualification Directive applies. What matters is the likelihood that the *applicant* risks committing war crimes. The person concerned must show why he believes that he would be at risk of committing such crimes if he performed his military duties.

63. In a conflict where such acts are alleged already to have occurred systematically and where probative material is in the public domain, it may be (in relative terms) less difficult for an applicant to satisfy that test. Absent a change of policy before he is deployed to the theatre of war, he would have reasonable grounds for arguing that such acts might plausibly occur in the future and that he might be involved in them. Where such acts are alleged to have occurred in a conflict as individual or isolated instances, an applicant faces a more difficult task. He will need to demonstrate why he considers it likely that *his* actions, if he performed his military service, would place *him* at risk of involvement in committing war crimes (the subjective element). Thus (for example) he would need to explain why, given the location to which he was to be deployed and the acts that he would be required to carry out, he might plausibly believe that he might find himself participating in such crimes. There is also an objective element: on the basis of the available information, is it reasonable to conclude that the applicant might find himself in that situation? Thus, it is necessary to assess whether there are objective grounds for considering that the person concerned could be involved in committing war crimes.

Question 3

64. It seems to me that Question 3 is necessarily covered by the answer that I have proposed to Question 2. It is not necessary to establish beyond reasonable doubt that violations of international humanitarian law can be expected to occur.

Question 6

65. It is convenient next to deal with Question 6, where the referring court asks whether it is relevant to take account of the provisions of the Rome Statute of the ICC when considering Article 9(2)(e) of the Qualification Directive.

66. I do not consider the provisions of the ICC's statute to be relevant. Article 9(2)(e) of the Qualification Directive is not aimed at those who might be prosecuted for committing international crimes. On the contrary: its purpose is to afford protection to persons who wish to *avoid* committing such acts when performing military service. Using the likelihood that soldier X would successfully be prosecuted for a war crime as the benchmark for deciding whether soldier X should be protected as a refugee because he wishes to avoid being placed in a position where he *could* successfully be prosecuted runs directly counter to that aim. Article 4 of the Qualification Directive describes the assessment of facts and circumstances required to evaluate an application for refugee status. Ultimately, the test is whether, in any given case, the applicant's claim is credible. The standards set by

international criminal law for a successful war crimes prosecution are completely different (they are much higher) and play no part in that assessment. (54)

Question 4

67. The referring court here asks whether refugee status is precluded in certain circumstances. Specifically, (a) does the fact that the authorities in an applicant's country of nationality prosecute war crimes preclude him from invoking Article 9(2)(e) of the Qualification Directive; and (b) is a prosecution before the ICC of relevance? In its commentary, the referring court suggests that, where such machinery exists to prosecute and punish those who commit war crimes, one might consider that war crimes are unlikely to be committed because they are not tolerated by the State in question. The very fact that war crimes are prosecuted — so the argument runs — means that the State provides protection from persecution within the meaning of Article 7 of the Qualification Directive.

68. In my view the short answer to both those questions is 'no'. The existence of national or international machinery to prosecute war crimes may in principle be a deterrent to their commission. However, it is a sad but inescapable fact that, even though such machinery may exist, war crimes *are* sometimes committed in the heat of conflict (55) (just as the presence in civilised legal systems of laws criminalising and punishing rape and murder do not, alas, guarantee that people will never be raped or murdered). If Article 9(2)(e) of the Qualification Directive is to have any value as a means of enabling those at risk of finding themselves forced to participate in committing war crimes to find a safe haven, it must operate independently of whether national or international machinery to prosecute and punish war crimes exists and is used.

Question 5

69. By this question the referring court asks whether Article 9(2)(e) can be invoked notwithstanding that military action is sanctioned by the international community or engaged upon pursuant to a UNSC mandate.

70. I am not sure that I understand precisely what is meant, as a matter of law, by the expression 'sanctioned by the international community'. The UN Charter does not define what constitutes a legitimate war; nor am I aware of another international instrument that fills that lacuna (if lacuna it be). (56) I cannot see that seeking to define the scope of Article 9(2)(e) of the Qualification Directive by reference to an undefined expression helps to take matters forward. Since the existence of a UNSC mandate is not a prerequisite to starting a war or defending against aggression, its presence or absence cannot be determinative of whether acts listed in Article 12(2) of the Qualification Directive occur. Thus, even where a conflict is preceded by a UNSC resolution authorising the use of force in certain circumstances and under certain conditions, that cannot mean that 'by definition' war crimes cannot and will not be committed.

71. I therefore conclude, in answer to this question, that the existence of a UNSC mandate relating to the conflict in question does not obviate the need for, or affect the outcome of, the assessment conducted under Article 4 of the Qualification Directive. Nor does it per se exclude the possibility that acts listed in Article 12 of the Qualification Directive have been or might be committed.

Question 7

72. In the last of its questions concerning the interpretation of Article 9(2)(e) of the Qualification Directive, the referring court asks whether, before he can rely on that

provision, an applicant must avail himself of the ordinary conscientious objector procedure with his national authorities.

73. I should first recall that the prosecution or punishment to which Mr Shepherd might be subject, were he to be returned to the US, would be for desertion rather than conscientious objection.

74. It is not clear what the referring court means by 'the ordinary conscientious objector procedure'. In so far as the phrase might refer to procedures available under US law for making such a claim, this Court has no information as to whether Mr Shepherd would be eligible to have recourse to such a procedure under US law or whether he is precluded from so doing because (as the referring court points out) he does not object absolutely to the use of armed force. Here, I draw attention to Point 1-5(a)(4) of Army Regulation 600-43, which states that 'requests by personnel for qualification as a conscientious objector after entering military service will not be favo[u]rably considered when these requests are ... [b]ased on objection to a certain war'. I do not, of course, know how that provision has been interpreted in practice by military tribunals in the US.

75. It is for the national authorities to verify (if necessary, by receiving expert evidence) whether Mr Shepherd is correct in believing that he could not have qualified as a conscientious objector under US law. If he could have invoked that procedure with a reasonable prospect of success but did not do so, I can see no good reason why he should qualify for refugee status on a ground of persecution which (on this assumption) he would have been able to avoid without compromising his beliefs. Conversely, if as serving personnel he would have been precluded from seeking conscientious objection status on the basis of his objection to redeployment in Iraq, the fact that he did not lodge a request for such status cannot have any bearing on his application for refugee status under Article 9(2)(e) of the Qualification Directive.

Question 8

76. In Question 8 the referring court asks about two different 'acts of persecution' identified in the Qualification Directive, namely 'legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner' (Article 9(2)(b)) and 'prosecution or punishment, which is discriminatory or disproportionate' (Article 9(2)(c)). The referring court asks whether a dishonourable discharge following a prison sentence and the social ostracism and disadvantages associated with such punishment constitute acts of persecution under those provisions.

77. Question 8 is self-standing. In approaching it, I recall that entitlement to refugee status only arises where an act of persecution under Article 9 is connected with a reason for persecution under Article 10. (57) All parties making observations to the Court, including Mr Shepherd, accept that States may impose penalties on military personnel who refuse to perform further military service where their desertion is *not* based on valid reasons of conscience and provided that any penalties and the associated procedures comply with international standards. As I understand it, Question 8 is therefore relevant only if the national authorities conclude that Mr Shepherd did *not* plausibly believe that he risked committing war crimes if he redeployed to Iraq (so that, in consequence, he is not covered by Article 9(2)(e)); but are satisfied that he nevertheless either fulfils both indents of Article 10(1)(d) (membership of particular social group) or comes within Article 10(1)(e) because of the political beliefs that he holds about the conduct of the Iraq war. One might perhaps describe such a view of Mr Shepherd as being that he is a 'deserter with a conscience'.

78. Is court-martialing and punishing such a person discriminatory or disproportionate, so that it is caught by Article 9(2)(b) or Article 9(2)(c)?

79. Court martial proceedings and/or a dishonourable discharge clearly fall within the phrase 'legal, administrative, police, and/or judicial measures' in Article 9(2)(b). However, an applicant has to show that such measures are in themselves discriminatory or are applied in a discriminatory manner. As Mr Shepherd relies on Article 10(1)(d) of the directive (membership of a particular social group), in making that assessment it is necessary to consider whether there are social groups in the US that are comparable to that to which Mr Shepherd claims to belong in so far as such groups are similarly situated and whether his group is more likely than the comparable group to face discrimination and whether any apparent difference in treatment could be justified. In the absence of any evidence on the case-file indicating that discrimination of that kind is relevant here, it is for the national authorities to make the necessary detailed assessment of the facts and circumstances to determine the true position.

80. It is likewise impossible to say in the abstract whether a possible prosecution is disproportionate or discriminatory, or whether Mr Shepherd's likely punishment, if he is convicted of desertion, (58) would be disproportionate; and thus whether Article 9(2)(c) would be triggered. In general terms, in assessing whether prosecution or punishment for desertion is disproportionate it is necessary to consider whether such acts go beyond what is necessary for the State concerned to exercise its legitimate right to maintain an armed force. The sentences described by the referring court do not appear to be obviously disproportionate. Ultimately, such matters are again matters for the national authorities to assess in the light of the circumstances of the case.

81. I add for the sake of completeness that the criteria would be the same where Article 10(1)(e) (political opinion) is cited as the reason for persecution. However, as the concept of a social group is not relevant to that ground it would be very difficult for a person in Mr Shepherd's position to demonstrate discrimination on the basis of his individual position alone. He might also face difficulties in identifying an appropriate group to form the basis of the necessary comparison.

82. Social ostracism is not identified as such in Article 9(2) as an 'act of persecution' and in my view it does not fit very naturally into either Article 9(2)(b) or (c). That said, it is of course true that the listing in Article 9(2) is non-exhaustive. The fact that social ostracism is the result of the actions of 'non-State actors' (as defined in Article 6(c) of the directive) would not of itself preclude its being considered as an (additional) act of persecution under Article 9(2).

83. However, in order to be capable of forming the basis of a successful application for refugee status, acts of persecution within the meaning of Article 9(2) must either 'be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights' (Article 9(1)(a)) (59) or 'be an accumulation of various measures, including violations of human rights[,] which is sufficiently severe as to affect an individual in a similar manner' (Article 9(1)(b)). There is no information before the Court to indicate whether any possible prosecution, punishment or social ostracism which Mr Shepherd might face were he to be returned to the US would be sufficiently serious to cross that threshold. Those are (yet again) matters that will need to be determined by the competent national authorities, subject to review by the national court.

Conclusion

84. In the light of the foregoing considerations I propose that the Court should answer

the questions referred by the Bayerisches Verwaltungsgericht München (Germany) to the following effect:

- The scope of Article 9(2)(e) 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 extends to military personnel who do not directly participate in combat, where such personnel could, in performing military service, be led to instigate or otherwise participate in the commission of crimes or acts of the kinds referred to in that provision.
- In assessing whether that is the case, the national authorities must consider: (i) whether there is a direct link between the acts of the person concerned and the reasonable likelihood that war crimes might be committed, because his actions comprise a necessary element of those crimes and without his contribution or all the contributions made by individuals in his situation, the war crimes or acts would not be possible; (ii) whether there are objective grounds for considering that the person concerned could be involved in committing war crimes. In that regard, it is inconsistent with Article 9(2)(e) of Directive 2004/83 to apply: (a) a criminal standard of proof (such as ‘beyond all reasonable doubt’) or (b) principles derived from international criminal law.
- The fact that the authorities in an applicant’s country of nationality prosecute war crimes does not preclude him from invoking Article 9(2)(e) of Directive 2004/83; whether there is a prosecution before the International Criminal Court is likewise of no relevance in that regard.
- The existence of a mandate from the United Nations Security Council covering the conflict in question does not preclude claims for refugee status based upon Article 9(2)(e) of Directive 2004/83.
- A person who refuses to perform military service cannot qualify for refugee status under Article 9(2)(e) of Directive 2004/83 unless either he has first had recourse, unsuccessfully, to any available procedures for claiming the status of conscientious objector or no such procedures are plausibly available to him.
- In assessing whether a person who refuses to perform military service may be considered to be a member of a particular social group for the purposes of Article 10(1)(d) of Directive 2004/83, it is necessary to take into account: (i) whether he holds a conviction of sufficient cogency, seriousness, cohesion and importance; (ii) whether by virtue of that conviction he meets the requirements of the first indent of Article 10(1)(d) in that his objection stems from a belief that is fundamental to his conscience; and (iii) whether individuals who hold such convictions are perceived as being different in their country of origin within the meaning of the second indent of Article 10(1)(d).
- In so far as an applicant relies upon Article 9(2)(b) and Article 10(1)(d) of Directive 2004/83, it is necessary for the competent national authorities to assess whether a dishonourable discharge from the army and a prison sentence is discriminatory because the applicant is a member of a particular social group. In making that assessment it is necessary to consider whether there are social groups in the country concerned that are comparable to that to which the applicant claims to belong in that such groups are similarly situated and whether the applicant’s group is likely to be subject to different treatment by virtue of the fact that it might be

subject to court martial proceedings and/or dishonourable discharge and whether any apparent difference in treatment could be justified.

- In so far as an applicant relies upon Article 9(2)(c) of Directive 2004/83, it is necessary for the competent national authorities to assess whether prosecution or punishment for desertion is disproportionate. In that regard it is necessary to consider whether such acts go beyond what is necessary for the State concerned to exercise its legitimate right to maintain an armed force.

[1](#) – Original language: English.

[2](#) – See points 48 to 59 below.

[3](#) – See points 20 to 23 below where I set out a summary of the dispute in the main proceedings.

[4](#) – Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, entered into force on 22 April 1954 ('the Geneva Convention'). It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967. That Protocol is not relevant to determining the present request for a preliminary ruling.

[5](#) – Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) ('the Qualification Directive' or 'the directive'). That directive was repealed and replaced in recast form by Directive 2011/95/EU (OJ 2011 L 337, p. 9). The wording of the relevant provisions has not changed materially.

[6](#) – First subparagraph of Article 1(A)(2) of the Geneva Convention.

[7](#) – Article 1(F)(b) and (c) of the Geneva Convention provide respectively that it does not apply to a person who commits a serious non-political crime outside the country of refuge; or is guilty of acts contrary to the purposes and principles of the United Nations.

[8](#) – Signed at Rome on 4 November 1950 ('the ECHR').

[9](#) – OJ 2010 C 83, p. 389.

[10](#) – Recitals 1 to 4. See also Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13) ('the Procedures Directive'), which applies to all applications for asylum made within the territory of the Union.

[11](#) – Recitals 1 to 4, 6, 7, 8, 10, 11 and 17.

[12](#) – Recital 10.

[13](#) – Recital 11.

[14](#) – Article 2(c).

[15](#) – Article 4(1).

[16](#) – Article 6.

[17](#) – Article 7(1).

[18](#) – Article 7(2).

[19](#) – The inderfeasible rights under Article 15(2) of the ECHR are the right to life (Article 2), the prohibitions against torture and slavery and forced labour (respectively Articles 3 and 4) and the right not to be punished without prior due legal process (Article 7).

[20](#) – Article 9(1).

[21](#) – Article 9(2)(b).

[22](#) – Article 9(2)(c).

[23](#) – Article 9(2)(e). The English version of that provision does not mention the *commission* of crimes or acts, I consider the English text's use of the word 'include' to be odd. The French text states: '... en cas de conflit lorsque le service militaire supposerait de commettre des crimes ou d'accomplir des actes ...'. That seems to come closer to the sense of the provision. See further points 35 and 37 below.

[24](#) – Article 9(3).

[25](#) – Article 12(2)(a). The wording of Article 12(2)(b) and (c) is similar to Article 1(F)(b) and (c) of the Geneva Convention; see footnote 7 above.

[26](#) – Article 12(3).

[27](#) – Article 13.

[28](#) – See Paragraph 3(1) and (2) of the Asylverfahrensgesetz (Law on asylum procedure).

[29](#) – Paragraph 60(1) of the Aufenthaltsgesetz (Law on residence).

[30](#) – Statute of the International Criminal Court, signed at Rome on 17 July 1998, which entered into force on 1 July 2002 ('the Rome Statute'). The referring court explains that the Bundesamt considers that participation in the commission of a crime generally requires that the act in question be committed with intent and knowledge (see Article 30 of the Rome Statute).

[31](#) – See further points 47 to 60 below.

[32](#) – See the Introductory Note to the Geneva Convention by the office of the UNHCR, dated December 2010; and see further Article 35 of the Geneva Convention, Articles 8(2)(b) and 21 of the Procedures Directive and recital 15 in the preamble to the Qualification Directive. The UNHCR has produced helpful documents including Guidelines on International Protection No 10 concerning claims to refugee status related to military service within the context of Article 1(A)(2) of the Geneva Convention ('the UNHCR Guidelines No 10') and Guidelines on the application of the exclusion clauses: Article 1(F) of the Geneva Convention ('the UNHCR Guidelines on exclusion clauses'). Neither of those documents is legally binding, but they nevertheless reflect established principles of international law.

[33](#) – See recital 15 in the preamble to the Qualification Directive.

[34](#) – Judgment in *Salahadin Abdulla and Others*, C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraph 52; judgment in *Y and Z*, C-71/11 and C-99/11, EU:C:2012:518, paragraph 47; and judgment in *X*, C-199/12 to C-201/12, EU:C:2013:720, paragraph 39.

[35](#) – Judgment in *X*, EU:C:2013:720, paragraph 40. See also Article 10 of the Charter.

[36](#) – The elements mentioned in Article 4(1) are listed in detail in Article 4(2) of the Qualification Directive. See also judgment in *M.M.*, C-277/11, EU:C:2012:744, paragraph 73.

[37](#) – Emphasis added.

[38](#) – Article 12(3) indicates that Article 12(2) applies to persons who instigate or otherwise participate in the commission of war crimes or acts mentioned therein.

[39](#) – See recitals 1 and 6 in the preamble to the Qualification Directive.

[40](#) – See footnote 23 above.

[41](#) – The Qualification Directive was adopted on 29 April 2004. At the time of its adoption, the official languages of the European Union were Danish, Dutch, English, French, Finnish,

German, Greek, Italian, Portuguese, Spanish and Swedish. Article 9(2)(e) is expressed in the conditional tense in those languages (albeit not in every linguistic version as the present tense is used in the Dutch text).

[42](#) – The purposes and principles of the United Nations ('UN') are set out in Chapter I of its Charter (the Charter of the United Nations and Statute of the International Court of Justice signed in San Francisco on 26 June 1945 ('the UN Charter')). In relation to its Members, those principles include the recognition of sovereign equality, the settlement of international disputes by peaceful means and abstinence from the threat or use of force in their international relations (Article 2 of the UN Charter).

[43](#) – Charter of the International Military Tribunal, signed at London on 8 August 1945.

[44](#) – See, for example, paragraph 11 of the UNHCR Guidelines on exclusion clauses.

[45](#) – See, for example, paragraph 13 of the UNHCR Guidelines on exclusion clauses.

[46](#) – The referring court points out that Mr Shepherd considered the war in Iraq to be contrary to international law (see point 3 above). The question of the legality of that war is not for this Court or the national authorities to decide in Mr Shepherd's case. That issue remains a matter of debate between legal experts in international law and indeed political leaders. On 16 September 2004 Mr Kofi Annan (the then Secretary-General of the UN) said that the 2003 invasion of Iraq was contrary to the UN Charter. However, subsequent to that statement a number of UN Security Council ('UNSC') resolutions relating to Iraq were adopted.

[47](#) – See recital 11 in the preamble to the Qualification Directive; see further Article 8 of the Rome Statute.

[48](#) – See, for example, paragraph 12 of the UNHCR Guidelines on exclusion clauses.

[49](#) – See point 37 above.

[50](#) – See Article 13 of the Qualification Directive.

[51](#) – Eur. Court H. R., *Bayatyan v. Armenia* [GC], no. 23459/03, paragraph 110, ECHR 2011.

[52](#) – Whether Article 10(2) of the Charter is relevant to Mr Shepherd's case thus depends on the national laws governing conscientious objection of the Member State (Germany) where he has sought asylum. That is a matter for the relevant national authorities to assess, subject to review by the national courts. As to Mr Shepherd's position as a US national and a former member of the US armed forces; see points 74 and 75 below.

[53](#) – See, for example, paragraph 3 of the UNHCR Guidelines No 10.

[54](#) – I note that, since the US is not a Contracting Party to the ICC, the terms of that court's Statute could not be applied in Mr Shepherd's case in any event.

[55](#) – An infamous example is the Mỹ Lai Massacre committed in the Vietnam War. Of the 26 US soldiers prosecuted for committing criminal offences at Mỹ Lai only Lieutenant William Calley Jr. was convicted. More recently the Prosecutor of the ICC has opened cases concerning situations in Uganda and the Democratic Republic of the Congo. In relation to the latter, a conviction was obtained in *Prosecutor v. Thomas Lubanga Dyilo*.

[56](#) – Indeed, much thought and ink has been expended in analysing whether and in what circumstances a war may be characterised as 'legitimate' and/or 'just'. Just war theory (*jus bellum iustum*), initially explored by St Augustine of Hippo (354 to 430), was famously expounded by St Thomas Aquinas (1225 to 1274) in the *Summa Theologica*. Subsequent analysis has gradually distinguished between the rules that govern the justice of war (*jus ad bellum*), those that govern just and fair conduct (*jus in bello*) and the responsibility and accountability of warring parties after the war (*jus post bellum*). The principles of the justice of war are commonly held to be: having just cause, being a last resort, being declared by a proper authority, possessing right intention, having a reasonable chance of success, and the end being proportional to the means used. Each element is open to critique.

[57](#) – Article 9(3).

[58](#) – The order for reference states that, '[t]he Bundesamt has established that the applicant is facing a prison sentence for desertion of between 100 days and 15 months, although the sentencing range extends up to five years'.

[59](#) – In particular the indefeasible rights identified in Article 15(2) of the ECHR: see footnote 19 above.