FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

DECISION

BVerwG 10 C 7.09
OVG 2 L 26/06

Released
on 16 February 2010
Ms. Röder
as Clerk of the Court

In the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

the Tenth Division of the Federal Administrative Court
upon the hearing of 16 February 2010
Federal Administrative Court Justice Dr. Mallmann sitting as Presiding Justice,
assisted by Federal Administrative Court Justices Prof. Dr. Dörig, Richter,
Prof. Dr. Kraft and Fricke

decides:

The decision of the Higher Administrative Court of the State of Saxony-Anhalt dated 28 November 2008 is set aside.

The matter is remanded to the Higher Administrative Court for further hearing and a decision.

The disposition as to costs is reserved for the final decision.

R e a s o n s :

I

1 The Complainant, a Russian national from Chechnya, seeks refugee status.

2 By his own account, the Complainant, born in September 1978, entered Germany by land in 2002, accompanied by his brother, and applied for asylum. During his hearing before the Federal Office for Migration and Refugees (then the Federal Office for the Recognition of Foreign Refugees) – the 'Federal Office' – on 4 November 2002, he stated that in May 2002, together with a friend, he had shot to death two people in Chechnya and taken a Russian officer prisoner to obtain through an exchange the release of his brother, who had been taken captive in a 'cleanup' operation. He stated that he had become a murderer to save his brother. After that, he said, the Complainant, his released brother, and the friend had fled, and had been brought to Germany with the assistance of a facilitator of underground travel. He was now being sought everywhere in Russia, he said.

3 The Federal Office denied the application for asylum in a decision of 25 April 2003, finding that the requirements of Section 51 (1) of the Aliens Act had not been met and that there were no obstacles to deportation under Section 53 of the Aliens Act, and it threatened the Complainant with deportation to the Russian Federation. Among the reasons it cited was that the Complainant had not presented adequate prima facie substantiation of the history of persecution he alleged.

4 By a decision of 15 June 2005, the Administrative Court ordered the Respondent to find that the requirements of Section 60 (1) Sentence 1 of the Residence Act were met with regard to deportation to the Russian Federation, and suspended the decision of the Federal Office insofar as it was in opposition to this order. The court found against the Complainant with regard to the asylum application. The Federal Officer for Asylum Matters – the 'Federal Officer' – appealed this decision.

5 At the public hearing before the Higher Administrative Court on 28 November 2008, the Complainant personally described the details of the events of the killing of two Russian soldiers and the subsequent forcing of the release of his brother (Hearing Transcript, p. 2 et seq. – Case Record, sheets 91 et seq.). He stated that in the spring of 2002 his only brother had been taken captive by the

Russians in a cleanup operation. He had asked a member of the Chechen militia who worked for the Russians how he might free his brother. The militia member told him the most effective method was to ‘catch’ a Russian officer and carry out an exchange for him. The Complainant stated that he then asked resistance fighters how such a thing might be brought about. He and a resistance fighter had then looked around at markets for the possibility of ‘catching’ an officer. An opportunity then presented itself at a market in W. He and the resistance fighter had at that time been carrying a weapon of the AKM-45 type, which he said was a modern form of the Kalashnikov. This weapon could be very easily concealed under a jacket. At the market, he said, it was possible to go about with concealed weapons. A Russian military vehicle had arrived, out of which three Russians descended, an officer and two soldiers. They were intending to buy at the market. The soldiers had turned their backs on the Complainant and his companion, when the companion opened fire from a distance of some 5 to 6 meters. After the resistance fighter, the Complainant too fired, and struck one of the soldiers. The Russian soldiers had returned fire. The Complainant said that he and his companion had not known whether the Russians were dead or only wounded. He had had no intent to kill, but had to put the Russian soldiers *hors de combat* in order to free his brother. The Russian officer also had a weapon, but had not drawn. Instead he had behaved as though paralyzed and hardly resisted. The Complainant and the resistance fighter accompanying him had then driven the officer into the woods and handed him over to the resistance fighters there. In June 2002 the exchange of the officer for his brother took place. The Complainant had driven to the location with some 10 resistance fighters and the Russian officer. The exchange had been filmed by the Russians. After the operation, he and his brother had hidden because it was clear to them that the Russians would search for them.

6 In a decision of 28 November 2008, the Higher Administrative Court denied the appeal by the Federal Officer, substantially on the following grounds: The Complainant had left the Russian Federation after being previously persecuted. At the time of his emigration, he was threatened with (criminal) prosecution for killing two Russian soldiers, abducting a Russian officer, and forcing the release of his brother from Russian captivity with the assistance of Chechen resistance

fighters during the Second Chechen War (Copy of the Decision p. 11). This criminal prosecution, said the court, was in any case partially of a political nature. His conduct had appeared, from the viewpoint of the Russian security forces, as an involvement in the Chechen separatist cause. There was also no good reason to believe he would not be prosecuted if he returned to Chechnya today. Although the situation in Chechnya has now improved, said the court, the Complainant belongs to an especially endangered group of persons because he had been associated by the security forces with members of the rebel organisation. For this group of persons, the presumptive rule of Article 4 (4) of Directive 2004/83/EC applies, according to which they would face measures relevant to persecution upon their return. Moreover, said the court, the Complainant had no internal flight alternative available in the remaining territory of the Russian Federation. Rather, the court found, he could be expected to be exposed to acts of persecution by the power of the state in other territories of the Russian Federation as well, because of his participation in the operation to free his brother, and the consequent nationwide manhunt.

7 The court below declined to exclude the Complainant from refugee status pursuant to Section 3 (2) Asylum Procedure Act. His participation in the killing of the soldiers was not a war crime excluding him from that status, the court found, because the act had been directed against soldiers and not against the civilian population. Exclusion on the grounds of a serious non-political crime under Sentence 1 No. 2 of that the same section was also not applicable. The court found that the killing of the two Russian soldiers in which the Complainant was involved was not comparable to ‘classic terrorist acts’ such as bomb attacks against civilians or also against agents of state authority, especially if these acts involved non-participants, or also such as taking hostages and hijacking aircraft (Copy of the Decision p. 29).

8 In their appeals, accepted for a hearing by this Court, the Federal Office and the Federal Officer allege a faulty handling of the reasons for exclusion. The Federal Office opposes the Higher Administrative Court’s interpretation of the law to the effect that war crimes within the meaning of Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act can be perpetrated only against civilians. The

Federal Office refers to Article 8 of the Rome Statute of the International Criminal Court, according to which not only attacks on the civilian population, but also certain measures directed against combatants, may be war crimes. Such measures include, for example, the use of forbidden methods of waging war, such as the resort to perfidy. The excluding characteristic of a serious non-political crime within the meaning of Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act is also not limited to crimes against the civilian population, the Federal Office argues. The seriousness of the crime is obvious here. Since the Complainant's reason for acting was to free his brother, he committed the crimes for personal reasons. Therefore these were 'non-political crimes'.

9 The Complainant defends the appealed judgment. To be sure, Article 8 of the Rome Statute of the International Criminal Court includes a comprehensive definition of the term 'war crime'. However, the criminal acts listed there do not apply to the Complainant. In particular, he says, intentional killing is out of consideration here, because the Complainant has furnished credible prima facie evidence that there was no intent to commit the crime. Moreover, the Complainant's conduct also does not meet the criteria for a serious non-political crime. His act did not pursue a political objective, still less a terrorist one, and he also did not identify with the goals of the Chechen resistance fighters. His acts were instead in the nature of an isolated case, and served exclusively toward the purpose of freeing his brother from Russian captivity. Finally, the exclusion from refugee status presupposes that the foreigner must continue to pose a danger, which is not the case. But even if a reason for exclusion from refugee status should be assumed, the Complainant argues, he would be entitled to asylum under German constitutional law.

10 The representative of the Federal interests before the Federal Administrative Court has intervened in the proceedings. In his opinion, the Complainant meets the criterion for exclusion under Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act, owing to the commitment of a war crime. The war crime consisted in treacherously killing the two soldiers and taking the officer hostage.

II

11 This Court upholds the appeals by the Respondent and the Federal Officer for Asylum Matters – the 'Federal Officer'. The court below affirmed the Complainant's entitlement to refugee status contrary to appealable law (Section 137 (1) No. 1 of the Code of Administrative Court Procedure). To be sure, this Court has no cause for objection to the lower court's assessment that there is no good reason to believe that the Complainant, who is to be considered as having suffered previous persecution for individual reasons, will not be threatened with such persecution again upon his return to Chechnya, and that there is also no possibility for internal protection in other regions of the Russian Federation (1.). However, the court below denied the existence of reasons for exclusion under Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act (2.) and Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act (3.) on grounds that do not withstand review by this Court. Because this Court cannot itself render a final decision as to the Complainant's refugee status for lack of sufficient findings of fact on the part of the court below, the matter must be remanded to the court below for a new hearing and a decision, in accordance with Section 144 (3) Sentence 1 No. 2 of the Code of Administrative Court Procedure.

12 The present appeal proceedings concern the Complainant's petition for refugee status under Section 3 (1) of the Asylum Procedure Act in conjunction with Section 60 (1) of the Residence Act, or alternatively – in the event that refugee status is denied – a finding of a prohibition on deportation under European law, in accordance with Section 60 (2) et seq. of the Residence Act, and as a further alternative, a finding of a prohibition on deportation under German law, under the aforesaid provisions. However, a finding is no longer to be made as to his entitlement to asylum under Article 16a of the Basic Law, because in that regard the Constitutional Court rejected the Complainant's petition for asylum, without possibility of appeal, in its judgment of 15 June 2005.

13 The pertinent law governing the legal assessment of an application for refugee status is found in Section 3 (1) and (4) of the Asylum Procedure Act in the version of the Announcement of 2 September 2008 (BGBl I p. 1798) and Section 60 (1) of the Residence Act in the version of the Announcement of 25 February 2008 (BGBl I p. 162). The changes in the law acknowledged in these announcements as a result of the Act for the Transposition of Directives of the European Union on Residence and Asylum Law of 19 August 2007 (BGBl I p. 1970) – the Directive Transposition Act – which took effect on 28 August 2007, were rightly adopted as a basis by the Higher Administrative Court in its appealed decision handed down on 28 November 2008, in accordance with Section 77 (1) Sentence 1 Clause 1 of the Asylum Procedure Act .

14 1. According to Section 3 (1) of the Asylum Procedure Act, a foreigner is a refugee within the meaning of the Convention Relating to the Status of Refugees of 28 July 1951 – the Geneva Convention on Refugees (GCR) – if in the country of his citizenship or in which he habitually resided as a stateless person he faces the threats listed in Section 60 (1) of the Residence Act. Under Section 60 (1) Sentence 1 of the Residence Act, in application of this Convention, a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions. In determining whether persecution within the meaning of Sentence 1 exists, supplementary application must be made of Article 4 (4) and Articles 7 through 10 of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 p. 12), known as the ‘Qualification Directive’ (Section 60 (1) Sentence 5 Residence Act).

15 The reasoning on which the court below bases its prognosis of a danger of persecution within the meaning of Section 60 (1) of the Residence Act withstands review by this Court.

16 a) According to the findings of fact by the court below, which the Respondent and the Federal Officer have not attacked on procedural grounds, and which are binding upon this Court (Section 137 (2) Code of Administrative Court Procedure), at the time of his emigration the Complainant was threatened with persecution because of the killing of two Russian soldiers, the abduction of a Russian officer, and the forced release of his brother during the Second Chechen War.

17 The court below found that the criminal prosecution with which the Complainant was threatened went beyond the punishment of a criminal act. In criminal proceedings against alleged terrorists from the Northern Caucasus – especially Chechnya – the court found that in numerous cases, lengthy sentences of imprisonment had been imposed on the basis of confessions obtained by torture. It found that the Complainant was threatened with disproportionate or discriminatory criminal prosecution, because as a consequence of the operation he carried out, he was under suspicion by the Russian security forces of sharing the political views of the Chechen resistance, and of having supported those views with the force of arms. Thus the court below established the constituent elements of an act of persecution within the meaning of Article 9 (2) (c) of Directive 2004/83/EC. Here the persecution emanated from Russian security forces, and thus directly from the state (Section 60 (1) Sentence 4 letter a of the Residence Act in conjunction with Article 6 (a) of the Directive).

18 b) Section 60 (1) Sentence 1 of the Residence Act furthermore presupposes that the protected rights must be under threat because of the foreigner's race, religion, nationality, membership of a certain social group or political convictions. Under European law as well, an act of persecution is relevant to refugee status only if it is connected with one of the reasons for persecution indicated in Article 10 of Directive 2004/83/EC (Article 9 (3) of the Directive). In assessing the reasons for persecution, it is sufficient if these characteristics are merely attributed to the applicant by the actor of persecution (Article 10 (2) of the Directive).

19 According to the findings of the court below, the individual persecution with which the Complainant was threatened was based on his Chechen ethnicity in association with the ‘forced release of his brother from Russian captivity’ carried out ‘with the assistance of Chechen resistance fighters’, which from the viewpoint of the Russian security forces was seen as an involvement in the Chechen separatist cause. This represents a combination of two reasons for persecution, nationality and – at least attributed – political conviction.

20 c) The prognosis of persecution reached by the court below in regard to the Complainant is not open to objection by this Court, as primarily an assessment of the facts.

21 The Complainant, who was directly threatened with persecution at the time when he left his country of origin, is entitled to the facilitated standard of proof under Article 4 (4) of Directive 2004/83/EC. Under that provision, the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant’s well-founded fear of persecution, unless there are good reasons to consider that the threat of such persecution will not be repeated.

22 The court below was satisfied that there was no good reason to believe that upon his return to Chechnya or other regions of the Russian Federation, the Complainant would not be threatened again with state persecution by the Russian security forces. This prognosis is based on the Higher Administrative Court’s presumption that the Complainant will continue to be exposed to an elevated risk, and that he is being sought nationwide. There is nothing to be said against this prognosis in a court of appeal on matters of law alone.

23 d) Moreover, the court below presumed that no possibility of internal protection in other regions of the Russian Federation would be open to the Complainant. This assessment as well meets with no objections from this Court.

24 2. According to Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act, a foreigner is not a refugee if there is good reason to believe that he has commit-

ted a crime against peace, a war crime or a crime against humanity within the meaning of the international instruments drawn up for the purpose of establishing provisions regarding such crimes (Section 3 (2) Sentence 1 No. 1 Asylum Procedure Act). This also applies to foreigners who have incited others to commit such crimes or who have otherwise been involved in such crimes or acts (Section 3 (2) Sentence 2 Asylum Procedure Act).

25 The appealed decision is contrary to Federal law because it assumes that the requirements of Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act are met only when a crime listed in the provision is directed against the civilian population. In any case this interpretation does not apply to a war crime, which is the only form that comes into consideration here. The criterion for exclusion under Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act may also be met if a soldier is a victim of a war crime.

26 For a definition of the characterising elements of a crime against peace, a war crime, or a crime against humanity, Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act refers to ‘international instruments drawn up for the purpose of establishing provisions regarding such crimes’. As this Court found in its decision of 24 November 2009 – BVerwG 10 C 24.08 – (publication planned in the BVerwGE decision collection – Marginal No. 31), the question of whether war crimes or crimes against humanity within the meaning of Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act are present must be decided in the present case primarily on the basis of the elements of these offences as formulated in the Rome Statute of the International Criminal Court of 17 July 1998 (BGBl 2000 II p. 1394, hereinafter: the ICC Statute). This represents the current status of development of international criminal law in violations of international humanitarian law.

27 Article 8 (2) of the ICC Statute distinguishes between war crimes committed in international armed conflicts (letters (a) and (b)) und those in internal armed conflicts (letters (c) through (f)). For internal armed conflicts, letter (c) is concerned with serious breaches of the common Article 3 of all four Geneva Conventions for the protection of war victims of 12 August 1949. Among other

points, it provides for sanctions against violence to life and person, and the taking of hostages, committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. This provision accordingly also counts acts committed against soldiers as war crimes. Letter (e) covers other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. Thus letter (e) (ix) – (xi) protects combatant adversaries in the case of treacherous killing or wounding, declaring that no quarter will be given, or physical mutilation of persons who are in the power of another party to the conflict.

28 The court below made no findings as to whether the requirements of Article 8 (2) of the ICC Statute have been met with regard to the elements indicating that a war crime may also have been committed against a soldier. In the absence of sufficient findings of fact, this Court cannot itself reach a final decision as to whether the Complainant is entitled to refugee status. For that reason, the matter must be remanded to the court below for a new hearing and decision, pursuant to Section 144 (3) Sentence 1 No. 2 of the Code of Administrative Court Procedure. In that process, the court below will have to give consideration to the following aspects:

29 a) In the present case it is obvious that one must assume an internal armed conflict. Article 8 (2) (d) and (f) of the ICC Statute distinguish internal armed conflicts from situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. Letter (f) furthermore presumes that there is protracted armed conflict between governmental authorities and organised armed groups or between such groups. These provisions mark the lower threshold of relevance under international law for an internal armed conflict. A certain degree of intensity and permanence of a conflict is required in order to justify intervention in the sovereignty of the state concerned (see decision of 24 November 2009, loc. cit., Marginal No. 33, with further authorities). The court below did not explicitly find that the Second Chechen War has the distinguishing characteristics of an internal armed conflict. In the

appealed decision it mentions ‘war events’, but without subsuming this concept of fact under the international law criteria of an international or internal armed conflict. The assumption of an internal armed conflict, however, is rather obvious, at least for the period in question here, and was shared by the parties in the hearing before this Court.

30 b) The fact that the Complainant should quite possibly be deemed a civilian does not exclude the possibility that he may be the perpetrator of a war crime under Article 8 (2) of the ICC Statute. Although the court below stated that the Complainant had ‘fought at the side of the Chechens against the Russian occupying force in the Second Chechen War, by playing a significant role in the abduction of a Russian officer and the forced release of his brother from Russian captivity’ (Copy of the Decision p. 9), by a reasonable assessment this means only that the Complainant acted jointly with Chechen resistance fighters in carrying out the operation to force his brother’s release. On the other hand, it is not evident from the aforementioned comments of the court below that – contrary to the Complainant’s contentions – he should be deemed a combatant. This would moreover require him to have belonged to the administrative apparatus of one of the parties to the conflict, and to have performed a ‘continuous combat function’ for that party (see International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva 2009, p. 27, 33, 35 – http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf <status: February 2010>). There are no indications of such a situation.

31 Article 8 (2) of the ICC Statute defines only what acts represent war crimes, and who may be an applicable victim; it does not, however, define the boundaries of the group of perpetrators itself. According to the case law of international criminal courts, and according to the literature on international criminal law, in general a civilian may also commit a war crime, not just combatants for the opposing parties to the conflict. However, there must be a functional connection with the armed conflict (‘sufficient nexus’ – cf. Werle, *Völkerstrafrecht* [International Criminal Law], 2nd ed. 2007, Marginal No. 971 et seq.; Ambos, in: *Münchener*

Kommentar zum Strafgesetzbuch [Munich Commentary on the Penal Code], Vol. 6/2, 2009, before Section 8 et seq. Code of International Criminal Law Marginal No. 37, and Zimmermann/Geiss, op. cit., Section 8 Code of International Criminal Law, Marginal No. 111 et seq.; International Criminal Tribunal for Rwanda (ICTR), decision of 26 May 2003, Prosecutor v. Rutaganda <Appeals Chamber>, ICTR-96-3-A, Marginal No. 569 et seq. – http://www.ictr.org/ENGLISH/cases/Rutaganda /decisions/030526%20XII.htm; International Criminal Tribunal for the former Yugoslavia (ICTY), decision of 25 June 1999, Aleksovski <Trial Chamber>, No. IT-95-14/1-T, Marginal No. 45 – http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf <Status: February 2010>).

32 The functional connection requires a connection between the act and the armed conflict, not between the actor and one of the parties to the conflict. A connection between the actor and one of the parties to the conflict is, to be sure, an indication of a functional connection between the act and the conflict, but not a necessary requirement. The existence of an armed conflict must be of material significance to the actor's ability to commit the crime, his decision to commit the act, the manner in which it was committed, or the purpose of the act (cf. Werle, op. cit., Marginal No. 972, with further authorities). It would argue for a functional connection if certain acts were committed while exploiting the situation created by the armed conflict. But this does not apply to acts that are committed only upon the opportunity offered by a contemporaneous armed conflict, and independently from that conflict. To that extent, it would have to be examined whether the act could just as well have been committed in peacetime, or whether the situation of the armed conflict facilitated the commitment of the act and adversely affected the victims' situation. The actor's personal motivation is immaterial: for example, even someone who, as a soldier on watch, kills a prisoner of war out of jealousy is exploiting the special situation of the armed conflict and therefore has committed a war crime (see Ambos, op. cit., Marginal No. 35 with further authorities; cf. also Zimmermann/Geiss, op. cit., Marginal No. 111 – 118; Cottier, in: Triffterer, Commentary on the Rome Statute of the International Criminal Court, 2nd ed. 2008, Article 8, p. 293 Marginal No. 6).

33 In the present case, by the Complainant's own account there is much to argue that the necessary nexus between the act and the conflict exists. Nor does it argue against the functional connection that the operation was carried out outside general combat events, at a market. This is because, given the assumption of an internal armed conflict, the operation was directed against one of the parties to the conflict. It was carried out with the assistance of the opposite party to the conflict. The act was triggered by the capture of the Complainant's brother by the Russian combatant forces as part of an armed conflict. Thus several aspects argue that there is a sufficient nexus with the armed conflict here. The Complainant's personal motive of releasing of his brother from Russian captivity does not argue against this possibility, since it was the specific situation of danger in the armed conflict that made the act possible. The Complainant's participation in the killing of the Russian soldiers would thus in principle be capable of constituting a war crime within the meaning of Article 8 (2) of the ICC Statute. The final overall assessment of this matter, however, is the province of the judge of fact; it must be carried out by the court below.

34 c) The two Russian soldiers killed and the captured Russian officer may be considered possible victims of a war crime under Article 8 (2) of the ICC Statute.

35 aa) However, contrary to the interpretation argued by the representative of the Federal interests before the Federal Administrative Court, the assumption that taking the Russian officer hostage represents a war crime under Article 8 (2) (c) (iii) of the ICC Statute is rather remote. According to that provision, taking civilians hostage may be a war crime, as can taking hostage those members of the combatant forces who have laid down their weapons or who are *hors de combat*. If one accepts the testimony of the Complainant, who thus far in these proceedings is the only source for the sequence of events in capturing the Russian officer, that officer was not taken hostage to force the release of the Complainant's brother at a time when the officer had surrendered and laid down his weapons. Rather, the attack on him, with the aim of taking him hostage, was carried out at a moment when he was still armed and the two Russian soldiers accompanying him answered the attack with the force of arms. A person has

laid down arms only if the person ceases to fight and signals the intent to cease combative action, particularly by surrendering control over his or her weapons (cf. Werle, op. cit., Marginal No. 1006). There is no reason to believe that the officer laid down his weapon before being captured, or either expressly or presumptively declared that he had surrendered. In any case this presumably cannot be deduced from the fact that according to the Complainant he behaved 'as though paralyzed' and 'hardly resisted'. Rather, at the time of being taken hostage, he may well have still been a combatant. Likewise, an intentional killing of the two soldiers in the sense covered by Article 8 (2) (c) (i) of the ICC Statute may also be remote, since it is not evident that they had laid down their arms or were *hors de combat*.

36 bb) The lower court will have to give closer examination to the constituent elements of a treacherous killing of the two Russian soldiers under Article 8 (2) (e) (ix) of the ICC Statute.

37 To kill or wound treacherously a combatant adversary (what is known as the 'prohibition of perfidy') has been considered a war crime since the adoption of Article 23 (b) of the 1907 Hague Convention on the Laws and Customs of War on Land 1907 (RGBl 1910, 132) (cf. BTDrucks 14/8524, p. 34 et seq.). While this war crime may also be committed against civilians in an international armed conflict (cf. Article 8 (2) b (xi) ICC Statute), the only pertinent victims in a non-international armed conflict are combatants from the opposite party (Article 8 (2) (e) (ix) ICC Statute, cf. also Werle, op. cit., Marginal No. 1184). This requirement is met here: the two persons in whose killing the Complainant was involved were Russian soldiers. In a given case, however, prohibited perfidy may be difficult to distinguish from permitted stratagems (cf. Bothe, in: Graf Vitzthum, *Völkerrecht* [International Law], 4th ed. 2007, Section 8, Marginal No. 71; Cottier, op. cit., p. 385 Marginal No. 117).

38 For a more specific determination of the requirements for 'treacherous killing', one may refer to the prohibition of perfidy in international armed conflicts under Article 37 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

(Protocol I), of 8 June 1977 (Additional Protocol I – BGBl 1990 II p. 1551), which also applies to internal armed conflicts. This provision reads as follows:

> ‘Article 37 Prohibition of Perfidy
>
> 1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
>
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
> (b) the feigning of an incapacitation by wounds or sickness;
> (c) the feigning of civilian, non-combatant status; and
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.’

39 Accordingly, not every misleading of the adversary is contrary to international law, but rather only the exploitation of a state of confidence created by specific acts, especially those described in Article 37 (1) of Additional Protocol I (cf. Werle, op. cit., Marginal No. 1181). The critical point is that the perpetrator must have deceived the adversary precisely as to the existence of a situation of protection under international law. This also applies in an internal armed conflict, because according to the interpretive aids adopted under Article 9 of the ICC Statute (‘elements of crimes’) for Article 8 (2) (e) (ix) (cf. International Criminal Court <ICC>: Elements of Crimes – Explanation of Article 8 (2) (e) (ix) – http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf <status: February 2010>), acts are considered treacherous in an internal armed conflict if one or more adversaries are misled, with the intent of betraying their confidence, into believing that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict. For the last variant, which is the one that comes under consideration in the present case, the actor must have feigned to the victim that under the rules of international law applicable in the conflict, the victim was obliged to recognise that the perpetrator was entitled to

protection. Thus not every misleading of an adversary is prohibited, but rather only the exploitation of a confidence obtained under false pretences through specific acts contrary to international law. This concept of perfidy under the international laws of war is therefore not equivalent to the characteristic of perfidy under Section 211 (2) of the German Penal Code (cf. BTDrucks 14/8524, p. 34 et seq. on Section 11 (1) No. 7 Code of International Criminal Law).

40 However, for an internal armed conflict, it must be taken into account that guerrilla or resistance fighters are not under any obligation of international law to wear a uniform. Thus the element of feigning civilian or non-combatant status is satisfied only under special conditions. For resistance fighters in an internal armed conflict, however, there is a duty to carry arms openly, as a characteristic distinguishing combatants from civilians. This can be deduced from Article 44 (3) of Additional Protocol I, according to which combatants do not violate the prohibition on perfidy if they carry their arms openly during each military engagement, including during the preparation of attacks. This assessment must also be taken into account in the application of the prohibition of perfidy in an internal armed conflict (cf. Werle, op. cit., Marginal No. 1185).

41 In the present case there is a need for the court below to explore the details of the circumstances of the act, so as to clarify whether the Complainant acted treacherously within the meaning of Article 8 (2) (e) (ix) of the ICC Statute. This possibility might be argued by the fact that not only the Complainant but the resistance fighter accompanying him prepared for the attack on the Russian soldiers, presumably in civilian clothing, with initially hidden weapons. In that regard, the requisite findings of fact are absent. One must consider the possibility that the resistance fighter violated the duty to bear weapons openly. If one assumes an event involving complicity, treacherous conduct on the part of the resistance fighter might be attributed to the Complainant (cf. Article 25 (3) (a) of the ICC Statute). But treacherous conduct on the Complainant's own part might also come under consideration if the criterion were satisfied that he took a direct part in the hostilities (on this point cf. Article 13 (3) Additional Protocol II <BGBl 1990 II p. 1637>) and did not make this known, by openly carrying weapons or otherwise. Then he himself would have been feigning at the time in question

that he enjoyed no protection and therefore could have been attacked directly (cf. the interpretive guidance of the International Committee of the Red Cross <ICRC> of May 2009: ICRC, Interpretive Guidance of the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva 2009, op. cit., esp. p. 85). Carrying a concealed weapon might have deceived the Russian soldiers that they need expect no attack from the resistance fighter and the Complainant working with him, and that therefore they were not allowed to attack the two of them. The fact that the soldiers extended confidence to the Complainant and his companion could possibly be deduced from the fact that according to the Complainant, the soldiers had turned their backs as they were struck by the shots.

42 It will furthermore have to be determined whether intent and knowledge within the meaning of Article 30 of the ICC Statute were present. This is suggested by the Complainant's own testimony, insofar as he fired directly on the soldiers, from a distance of 5 to 6 meters, with a firearm that he calls a 'modern form of the Kalashnikov'. Moreover, during his hearing by the Federal Office, he answered in the affirmative the question of whether he had 'become a murderer' to save his brother, a factor that argues against mere negligence.

43 If the Complainant invokes grounds for excluding criminal responsibility, these are to be measured by the standard of Article 31 (1) of the ICC Statute. Here, according to the findings to date, little argues for the existence of such grounds. To be sure, by his own testimony, the Complainant was pursuing the goal of releasing his brother from a captivity that he considered unlawful, in the course of which he feared abuses that might go to the point of torture. However, it appears doubtful whether the Complainant acted reasonably within the meaning of the cited provision, and defended his brother from the imminent threat of an unlawful use of force in a manner proportionate to the degree of danger threatening his brother. However, this cannot be finally assessed on the basis of the court below's findings of fact to date.

44 3. The appealed decision is also contrary to Federal law because it adopts too narrow a foundation of fact for denying the applicability of a serious non-political

crime as a reason for exclusion (Section 3 (2) Sentence 1 No. 2 Asylum Procedure Act). It categorises the Complainant's act as political in nature without finding on a sufficient foundation of fact that a political motivation exists.

45 Under Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act, the Complainant is not a refugee if there is good reason to believe that he has committed a serious non-political crime outside the Federal territory before being admitted as a refugee, in particular a brutal act, even if it was supposedly intended to pursue political aims. This also applies in the case of an involvement in such crimes (Section 3 (2) Sentence 2 Asylum Procedure Act). Article 1 F (b) of the Geneva Convention, on which this reason for exclusion is based, serves – as has already been discussed in greater detail in this Court's judgment of 24 November 2009 (BVerwG 10 C 24.08 op. cit., Marginal No. 25-41) – to exclude 'presumed perpetrators of crimes'. The intent was to withhold the Convention's protection from these persons for reasons of acceptance, so as not to discredit the status of a bona fide refugee. For that reason, not every criminal act committed before entering the country by a person seeking protection entails disqualification from refugee status. What is required, rather, is a serious non-political crime.

46 a) According to the findings to date, much stands to argue that the Complainant committed a serious crime within the meaning of Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act.

47 Whether a crime is of the seriousness required under Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act is to be determined by international standards, not national ones (cf. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979, No. 155). It must be a capital crime or a punishable act that is categorised as especially grave in most legal systems and prosecuted accordingly in criminal law. The court below found that the Complainant was involved in killing two Russian soldiers and abducting an officer (Copy of the Decision p. 3, 29 and 27). These are serious crimes within the meaning of Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act if – as is the case here – the perpetrator is not legitimated by combatant status to en-

gage in them. Anything else could result only if the Complainant had not acted with intent, or could invoke grounds of justification or a lawful excuse, but according to the findings to date (cf. 2 c) bb above) this possibility appears rather remote.

48 b) The question whether the act committed by the Complainant was non-political must be assessed according to the type of offence and the motives underlying the specific act, together with the aims it pursued. An act is non-political if it is committed primarily for other motives, such as personal reasons or gain (UNHCR op. cit., No. 152). If there is no clear connection between the crime and the alleged political objective, or if the act is out of proportion to the alleged political objective, then non-political motives prevail and thus characterise the act as a whole as non-political (cf. judgment of 24 November 2009 – BVerwG 10 C 24.08 – op. cit., Marginal No. 42).

49 The court below categorises the crimes committed by the Complainant as political substantially by explaining them in connection with politically motivated acts of violence, but then distinguishes them from ‘classic terrorist acts’ because it holds they are not comparable with such crimes. But the categorisation as political crimes is based on too narrow a foundation of fact. In particular, the court below does not take into account that the Complainant’s motive for killing the two soldiers and taking the officer hostage – as the court below finds (Copy of the Decision p. 11) – was to free his brother from Russian captivity. Indeed, by the Complainant’s own account, this was the sole purpose of his acts. To that extent, he was pursuing a personal objective, not a political one. It is not sufficient to establish the political quality of the crime that from the viewpoint of the Russian security forces it constituted an involvement by the Complainant in the ‘Chechen separatist cause’ (Copy of the Decision p. 11). Rather, to that extent, the categorisation depends essentially on the Complainant’s actual motivation. A political motivation on the Complainant’s part presumably cannot be derived from the aforementioned remarks by the court below that the Complainant had ‘fought in the Second Chechen War at the side of the Chechens and against the Russian occupying forces by playing a significant part in abducting a Russian officer and forcing the release of his brother from Russian captivity’ (Copy of the

Decision p. 9). One cannot deduce from this that the Complainant was a resistance fighter, and that the action was intended to serve the objectives of the Chechen resistance (cf. 2 b above). Moreover, the Complainant stated that he was not a member of the resistance. At the hearing before this Court, the Complainant's attorney furthermore emphasised that his client does not identify with the objectives of the Chechen resistance, but only carried out a single operation with the support of the resistance. However, the assessment of what motives were ultimately determinative in the Complainant's crimes, and whether the emphasis therein was on personal or political reasons, is a matter for the judge of fact, which the court below must again take up on remand, taking the indications of this Court into account.

50 In its decision, the court below will also have allow for the possibility that the potential further requirements for the applicability of this reason for exclusion (danger of repetition, proportionality test) that proceed from Article 12 (2) (b) of Directive 2004/83/EC must be deemed to need clarification under European law, in accordance with this Court's own referrals to the European Court of Justice for preliminary rulings (cf. decisions of 14 October 2008 – BVerwG 10 C 48.07 – BVerwGE 132, 79 et seq. and 25 November 2008 – BVerwG 10 C 46.07 – Buchholz 451.902 *Europ. Ausl.- und Asylrecht* No. 24). If a matter of doubt under European law proves to be material to reaching the new decision, the court below will have to examine whether it should stay the proceedings pending the conclusion of the current referral proceedings.

51 The disposition as to costs is reserved for the final judgment. Court costs are not levied, in accordance with Section 83b of the Asylum Procedure Act. The value at issue proceeds from Section 30 of the Act on Attorney Compensation.

Dr. Mallmann Prof. Dr. Dörig Richter

Prof. Dr. Kraft Fricke

Field: BVerwGE: Yes

Asylum Law Professional press: Yes

Sources in Law:

Asylum Procedure Act	Section 3 (1), (2) Sentence 1 No. 1 and 2, (2) Sentence 2
Residence Act	Section 60 (1) Sentence 1
GCR	Article 1 F
ICC Statute	Article 8, Article 9, Article 25, Article 30, Article 31
Code of Administrative Court Procedure	Section 108 (1) Sentence 1, Section 137 (2), Section 144 (3) Sentence 1 No. 2
Directive 2004/83/EC	Article 4 (4), Article 12 (2)
Geneva Conventions of 12 August 1949	Article 3
Additional Protocol I of 8 June 1977	Article 37, 44
Additional Protocol II of 8 June 1977	Article 13

Headwords:

Reason for exclusion; standard of proof; refugee status; functional connection; internal armed conflict; fighter; combatant; war crime; treacherous killing; non-political crime; separatism; terrorism; international criminal law; civilian.

Headnotes:

1. A civilian may be the perpetrator of a war crime within the meaning of Section 3 (2) Sentence 1 No. 1 of the Asylum Procedure Act in conjunction with Article 8 (2) of the ICC Statute. But there must be a functional connection between the act and the armed conflict. A connection between the perpetrator and one of the parties to the conflict is not needed.

2. In an internal armed conflict, it is possible to commit war crimes not only against the civilian population but also against combatants of the adversary party.

3. A prerequisite for the war crime of treacherous killing of a combatant under Article 8 (2) (e) (ix) of the ICC Statute is that the perpetrator must have deceived the adversary as to the existence of a situation of protection under international law.

4. The question of whether a serious crime of a non-political nature within the meaning of Section 3 (2) Sentence 1 No. 2 of the Asylum Procedure Act exists depends crucially on the perpetrator’s actual motivation.

Judgment of the 10th Division of 16 February 2010 – BVerwG 10 C 7.09

I. Magdeburg Administrative Court, 15 June 2005 – Case No.: VG 3 A 216/03 MD -
II. Magdeburg Higher Administrative Court, 28 November 2008 – Case No.: OVG 2 L 26/06 -