FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 2.10

Released
on 31 March 2011

In the administrative case

Dr. M. versus Federal Republic of Germany

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 31 March 2011
by Federal Administrative Court Justices Prof. Dr Dörig, Richter,
Beck, Prof. Dr Kraft and Fricke

decides:

The Complainant's appeal against the judgment of the Bavarian Higher Administrative Court of 11 January 2010 is denied.

Costs of this appeal are adjudged against the Complainant.

R e a s o n s :

I

1 The Complainant appeals the revocation of his recognition as a refugee and a person entitled to asylum.

2 The Complainant, born in 1963, is a Rwandan citizen and is a member of the Hutu ethnic group. He completed secondary school examinations in Rwanda in 1983, subsequently worked as a teacher there, and then attended university in the Democratic Republic of the Congo from 1987 to 1989. In March 1989 he entered the Federal Republic of Germany for university study. He completed his initial studies in economics here in 1995, and received a doctorate in December 2000. Since the civil war in Rwanda in 1994, the Complainant has been involved in Rwandan exile organisations in Germany, primarily in a leadership capacity. By a decision of 17 March 2000 he was recognised as a person entitled to asylum on the basis of the danger of political persecution with which he was threatened because of his political activities in exile, and it was found that the requirements under Section 51(1) of the Aliens Act existed with regard to Rwanda. In mid-2001 the Complainant became President of the Forces Démocratiques de Libération du Rwanda (hereinafter the 'FDLR'), a Hutu exile organisation founded in 1999, which has armed combatant units in the eastern part of the Democratic Republic of the Congo.

3 On 1 November 2005, the Sanctions Committee of the United Nations Security Council – on the basis of Security Council Resolution 1596 (2005) of 18 April 2005 – included the Complainant in the list of persons and institutions on whom restrictions were imposed because of the arms embargo for the territory of the Democratic Republic of the Congo. Thereupon, in a decision of 22 February 2006, the Federal Office for Migration and Refugees (the 'Federal Office') revoked the recognition of his entitlement to asylum and the finding that the requirements under Section 51(1) of the Aliens Act were met, and found that the requirements under Section 60(1) of the Residence Act manifestly did not exist.

4 The revocation was founded in substance on the fact that the Complainant is the President of the FDLR, and therefore there is good reason to believe that he has committed war crimes and crimes against humanity, as well as actions that contravene the purposes and principles of the United Nations. The Federal Office found that the FDLR was responsible for regular abuses – such as raids, rapes and abductions – of villagers in the eastern Congolese province of South Kivu. It estimated that the organisation had 10,000 to 15,000 combatants in the eastern part of the Democratic Republic of the Congo, and for years had been committing crimes against the Congolese civilian population. These, the Federal Office found, were war crimes and crimes against humanity within the meaning of the Rome Statute of the International Criminal Court of 17 July 1998. It found that the Complainant was responsible for these, as a superior officer. Moreover, by violating the arms embargo imposed by the United Nations Security Council on 28 July 2003, the FDLR was committing acts contrary to the purposes and principles of the United Nations. For that reason, the Sanctions Committee of the Security Council had placed the Complainant on the list of persons against whom sanctions were imposed, and who the Committee was convinced were violating the arms embargo.

5 The Administrative Court reversed the revocation decision in a judgment of 13 December 2006. The decision rested primarily on the consideration that the Federal Office had been unable to adequately set forth and document the existence of the requirements for exclusion. The court found that the information produced in the

proceedings was rather vague and insufficiently reliable. The same was all the more true, the court said, for the Complainant's responsibility.

6 The Respondent appealed that decision. In the course of the appeal proceedings, the Complainant was taken into investigative custody under an arrest warrant from the investigating judge of the Federal Court of Justice dated 16 November 2009, in part on suspicion of crimes against humanity and war crimes under Section 4, Section 7(1)(1) and (6), Section 8(1)(1) through (5) and (9), and Section 11(1)(4) of the International Criminal Code. On 17 June 2010, the investigating judge of the Federal Court of Justice ordered that the investigative custody be continued (decision of 17 June 2010 – AK 3/10, JZ 2010, 960). In December 2010, the Attorney General of Germany brought a criminal action against the Complainant and the Vice-President of the FDLR before the Federal Court of Justice, in part because of crimes against humanity and war crimes; in a decision of 1 March 2011, the Stuttgart Higher Regional Court found that the action was procedurally allowable.

7 In a judgment of 11 January 2010, the Higher Administrative Court amended the judgment at the first instance, and denied the complaint. It shared the opinion of the Federal Office that as the President of the FDLR, the Complainant had brought about the circumstances for exclusion under Section 3(2) sentence 1 nos. 1 and 3 of the Asylum Procedure Act, and therefore the requirements for revocation of his refugee status under Section 73(1) sentence 1 of the Asylum Procedure Act were met. The court saw no obstacle to this revocation in the fact that the actions that resulted in exclusion were subsequent in time to the grant of protection as a refugee. Nor did anything different apply, in substance, for the revocation of the recognition of entitlement to asylum.

8 The court found that the Complainant had brought about the circumstances for exclusion under Section 3(2) sentence 1 no. 1 and 3 of the Asylum Procedure Act, at least as a person 'otherwise' involved under Section 3(2) sentence 2 of that Act. He was the President of the FDLR and therefore, the court found, was partly responsible for its activities if only for that reason, as a significant supporter. He himself had never denied his significant influence on the organisation and his fundamental approval of its combat missions, and this influence and approval were

also confirmed, among other evidence, by the testimony of former FDLR fighters. The investigating judge of the Federal Court of Justice had likewise come to the conclusion, based on witnesses' testimony and monitored telecommunications, that the Complainant had unrestricted powers of command and disposition within the FDLR. Consequently the reasons for exclusion that had been brought about by the organisation as such, and for which the organisation therefore must be held responsible according to its structure, also had to be attributed to the Complainant personally. The court found that for good cause, it was justified in holding that actions by the FDLR constituted reasons for exclusion under Section 3(2) of the Asylum Procedure Act. It noted that the Foreign Office had been reporting for years on plundering of the population, burnings of villages, shootings of women and children, mass rape, and mutilations as weapons of war, as well as the recruitment of child soldiers by the FDLR (as well as by others). The court was satisfied that the reported acts of violence were also at least to a large part in fact the fault of the FDLR, and that the FDLR was systematically using abuses of the civilian population as a means of waging war. The court found that the listed acts of the FDLR represented war crimes and crimes against humanity under the terms of the Rome Statute of the International Criminal Court of 17 July 1998.

9 The circumstance for exclusion represented by contraventions of the aims and principles of the United Nations (Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act) was also fulfilled, the court found. This proceeded from the established systematic war crimes and crimes against humanity. The FDLR, the court held, was an organisation similar to a state, and the Complainant personally was one of the holders of positions of power who are able to commit contraventions of the aims of the United Nations.

10 The Complainant argues the reasons his appeal to this Court against the judgment of the court below substantially as follows: According to Section 73(1) of the Asylum Procedure Act, recognition of entitlement to asylum and refugee status may be revoked only if the actual conditions on which the recognition was based have ceased to exist. By contrast, a subsequent occurrence of circumstances for exclusion does not justify revocation. The Geneva Convention on Refugees, he says, also presupposes that the circumstances for exclusion under Article 1 F must already have existed at the time of the decision whether to accept a person as a refugee. Measures to terminate a status may be taken only under the conditions of Article 33(2) of the GRC. A revocation of entitlement to asylum because of a subsequent occurrence of circumstances for exclusion would be a violation of Article 16a of the Basic Law. If the rights of the community are viewed as an inherent limit on granting asylum, he argues, this is to be interpreted as meaning the German community, which is not affected in the present case. Furthermore, his personal responsibility owing to abetment and dominance in an organisation is only a matter of allegation. It has not been established, he argues, what contribution he made towards the acts. Furthermore, his right to a fair procedure had been violated in that the alternative prayer included in his brief of 4 January 2010, that the proceedings be stayed until the preliminary results of the Attorney General’s investigations in the Congo were available, had been denied. Reports that might represent any basis at all for the decision that was reached had been published within a period of only about 2 months before the Higher Administrative Court’s decision. The denial of a stay had frustrated his right to gather evidence against the impression conveyed by the reports about the FDLR’s involvement and his participation.

11 The Respondent argues against the appeal, and in substance defends the judgment of the Higher Administrative Court. It argues that the Complainant must accept the contrary argument that in the procedural complaint that he has filed, he did not choose the appropriate means available to him, such as filing specific petitions for evidence instead of a petition for a stay of judgment. Furthermore, the accusations against the Complainant, in their core, did not merely arise shortly before the appeal hearing, but had already been a basis for the revocation decision.

12 The representative of the Federal interests before the Federal Administrative Court intervened in the proceedings, and in substance concurred in the Respondent's arguments.

II

13 The Complainant's appeal to this Court is without merit. (1.) The procedural complaint he has filed is barred. The complaint of a violation of Federal law (Section 137(1) no. 1 Code of Administrative Court Procedure) does not meet with success. The Higher Administrative Court's decision that the Complainant's legal status as a refugee (2.a) and as a person entitled to asylum (2.b) were rightfully revoked is consistent with Federal law.

14 1. The Complainant's complaint that the denial of a stay of proceedings is a violation of the principles of a fair procedure (Article 2(1) in conjunction with Article 20(3) Basic Law) is procedurally barred.

15 Insofar as it is directed against the denial of a stay of proceedings under Section 94 of the Administrative Code, the procedural complaint is barred because a violation of Section 94 of the Administrative Code per se cannot be appealed to this Court as a procedural defect. A decision on a stay under Section 94 of the Administrative Code is unappealable if issued as an order (Section 152(1) of the Administrative Code). In these cases, an appeal to this Court cannot be founded on a defective denial of a stay. This proceeds from Section 173 of the Administra-

tive Code in conjunction with Section 557(2) of the Code of Civil Procedure (see decision of 22 December 1997 – BVerwG 8 B 255.97 – NJW 1998, 2301; Rudisile, in: Schoch/Schmidt-Assmann/Pietzner, Verwaltungsgerichtsordnung, version: July 2009, Section 94, at 42; Kraft, in: Eyermann, Verwaltungsgerichtsordnung, 13th ed., 2010, Section 132, at 52). Nor can anything else apply if – as in this case – a decision regarding a stay requested as an alternative is made in a judgment, and the stay is denied (decision of 15 April 1983 – BVerwG 1 B 133.82 – Buchholz 310 Section 94 Administrative Code no. 4).

16 Nor does the Complainant argue that the denial of a stay of proceedings resulted in a consequent defect that continues to apply to the appealed judgment (on this point see the judgment of 17 February 1972 – BVerwG 8 C 84.70 – BVerwGE 39, 319 <324>). To be sure, the appeal to this Court complains of a violation of fair procedure in that the denial of a stay of proceedings deprived the Complainant of the opportunity to gather evidence 'against the impressions produced by the reports about the involvement of the FDLR and his participation', which represents in substance a claim of a violation of the right to a hearing in accordance with law (Article 103(1) Basic Law, Section 138 no. 3 Administrative Code). But for that purpose one of the requirements provided by law under Section 139(3) sentence 4 of the Administrative Code is lacking, namely that of a sufficient description of a procedural defect, including an indication of the facts that lead to this defect. The Complainant does not explain why he was supposedly unable to present arguments on the 'reports' detrimental to the FDLR, which he does not identify in any further detail, and which he says were published 'in a period of approximately 2 months before the decision'. Yet this explanation would have been necessary in order to establish why the appealed decision of 11 January 2010 supposedly violated the principle of ensuring a hearing in accordance with law, or a fair procedure. It would have been the Complainant's responsibility to explain which of the accusations, from what 'reports', he considered inaccurate, and why he was not yet able to explain and prove his view of matters. Furthermore, the judgment of the Higher Administrative Court is founded not only on reports from the Foreign Office, from a group of experts appointed by the United Nations Security Council, and from nongovernmental organisations like Human Rights Watch, but also on the arrest warrant from the investigative judge of the Federal Court of Justice, which

was made known to the Complainant – as was conceded by the Complainant's attorney at the oral hearing before this Court – at the time when he was taken into custody in mid-November 2009. The alleged procedural violation furthermore was not adequately argued because in his grounds for his appeal to this Court, the Complainant does not indicate specifically what he would have submitted, and if applicable furnished evidence for, if he had been given sufficient time for a response (see decision of 13 June 2007 – BVerwG 10 B 61.07 – juris, at 5).

17 2. The complaint of a violation of Federal law is without merit. The Higher Administrative Court decided in compliance with Federal law that the Complainant's status as a refugee and his entitlement to asylum had been rightfully revoked. The revocation is in compliance with the pertinent requirements of Section 73 of the Asylum Procedure Act. Here, in regard to the formal requirements, the decision is to be based on the version of the Immigration Act that took effect on 1 January 2005 and was in force at the time when the revocation was declared. With regard to the substantive requirements, the provision is applicable in the version that took effect on 28 August 2007, following the entry into force of the Act to Implement Residence- and Asylum-Related Directives of the European Union of 19 August 2007 (BGBl I p. 1970) – the Directive Implementation Act (promulgation of the new version of the Asylum Procedure Act of 2 September 2008, BGBl I p. 1798).

18 The formal requirements for a revocation under Section 73 of the Asylum Procedure Act exist here. The appeal to this Court has also not raised any objections in that regard.

19 a) The Higher Administrative Court correctly concluded that the substantive requirements for a revocation of refugee status have also been fulfilled. According to Section 73(1) of the Asylum Procedure Act, recognition of refugee status is to be revoked if the conditions on which that recognition is based have ceased to exist.

20 aa) Contrary to the opinion advanced in the Complainant's appeal, this provision pertains not only to the *post facto* cessation of circumstances establishing a basis for persecution, which is mentioned as an example ('in particular') in sentence 2 of

the provision, but also to the subsequent occurrence of reasons for exclusion under Section 3(2) of the Asylum Procedure Act.

21 (1) This interpretation is argued for by the very wording of Section 73(1) sentence 1 of the Asylum Procedure Act, which establishes the obligation to revoke, without objective restrictions, if the conditions on which that recognition is based 'have ceased' to exist. This is also the case if reasons for exclusion arise subsequently. It is furthermore evident from Section 73(2a) sentence 4 of the Asylum Procedure Act that this situation is supposed to be included under the rule. That section provides that a revocation is also possible once three years have passed after the decision on recognition becomes non-appealable, but then it is also up to the discretion of the Federal Office, unless the revocation is declared because the requirements under Section 60(8) sentence 1 of the Residence Act or Section 3(2) of the Asylum Procedure Act are present. In the latter case, the obligation to revoke under Section 73(1) sentence 1 of the Asylum Procedure Act remains. Therefore the provision is based on the assumption that the occurrence of circumstances justifying exclusion is also among the reasons whose subsequent occurrence has the consequence that the requirements for recognition under Section 73(1) sentence 1 of the Asylum Procedure Act 'cease' to exist. This conclusion is confirmed by the Federal government's statement of reasons for Section 73(1) of the Asylum Procedure Act in the version of the Directive Implementation Act (BTDrucks 16/5065 p. 219). That explanation states that the requirements for revocation 'also exist if reasons for exclusion arise subsequently'. The only exception here is the reason for exclusion under Section 3(2) sentence 1 no. 2 of the Asylum Procedure Act, the substance of which presupposes a serious non-political crime committed before the person was admitted as a refugee.

22 (2) This interpretation is not opposed by the Geneva Convention on Refugees (GRC). Article 1 F of the GRC governs only the substantive requirements for exclusion from refugee status, not the procedure for recognition or withdrawal. The circumstances for exclusion are significantly based on the concept of unworthiness for asylum (see judgment of 24 November 2009 – BVerwG 10 C 24.08 – BVerwGE 135, 252 at 24 et seq.). The need to exclude persons unworthy of asylum does not depend on the date at which they bring about the substantive reasons for

exclusion under Article 1 F of the GRC. Anything to the contrary applies only to the reason for exclusion under Article 1 F (b) of the GRC, which unlike the circumstances for exclusion under Article 1 F (a) and (c) of the GRC – which apply here – is limited to non-political crimes that were committed prior to admission as a refugee (as does Section 3(2) sentence 1 no. 2 of the Asylum Procedure Act). The High Commissioner for Refugees also deems a revocation of refugee status justified if reasons for exclusion arise only after the decision granting that status. For example, item 4 of the UNHCR Guideline on Cessation of Refugee Status of 10 February 2003 (HCR/GIP/03/03) states: ‘Revocation may take place if a refugee subsequently engages in conduct coming within the scope of Article 1 F (a) or 1 F (c).’ Nor can anything to the contrary be concluded from the wording regarding reasons for exclusion that arose in the past (‘committed’, ‘was guilty of’), because this indicates only that such conduct must have existed before the reason for exclusion takes effect (diverging, however, Funke-Kaiser, in: GK-AsylVfG, version: June 2010, Section 2, at 33). Nor can this Court concur with Marx’s interpretation (InfAuslR 2005, 218 <225 et seq.>) cited in the present appeal. It is his opinion that unless they are to arouse concerns under international law, national provisions on reasons for exclusion can block only a status decision, but cannot justify a *post facto* revocation, and he founds it on a referral to the Background Note of the UNHCR on the reasons from exclusion dating from 2003 (op. cit., p. 226 footnote 52). However, Marx cites only the passage that concerns a revocation of refugee status *ex tunc*, while in the subsequent section of the cited Background Note (op. cit., at 17) the UNHCR deems that revocation *ex nunc* because of a subsequent occurrence of reasons for exclusion under Article 1 F (a) and (c) of the GRC is justified if the prerequisites are met, and cites as an example the refugee’s participation in armed actions within the country to which he or she was admitted.

23 (3) Such an interpretation of Section 73(1) sentence 1 of the Asylum Procedure Act is also argued for by Article 14(3)(a) of Directive 2004/83/EC, which establishes the obligation to revoke, terminate or refuse to renew refugee status if a reason for exclusion exists, irrespective of when the reasons for exclusion arose (‘should have been or is excluded’). Section 73 of the Asylum Procedure Act in the version under the 2007 Directive Implementation Act also serves to implement this provision of European Union law, and therefore must be construed in conformity

with that provision (concurring, ultimately, also Hailbronner, AuslR, version: Aug. 2008, Section 73 Asylum Procedure Act, at 50; Wolff, in: HK-AuslR, Section 73 Asylum Procedure Act, at 23).

24 (4) Contrary to the view advanced in his appeal, the Complainant also enjoys no protection of a legitimate expectation that his recognition as a refugee dating from March 2000 could not be subjected subsequently to the restrictions that arose from the introduction of the reasons for exclusion into Federal law when the Act to Combat Terrorism of 9 January 2002 took effect as from 1 January 2002 (BGBl I p. 361). The Higher Administrative Court deduced that the Complainant satisfied the reasons for exclusion on the basis of facts that came into being primarily during the period from 2005 to 2009. To that extent, from the period before 2005 only the Complainant's accession to the office of President of the FDLR in mid-2001 is of significance. We may set aside the question of whether an exclusion from refugee status may also refer to actions that came into being before the reasons for exclusion were transposed into national law, because in the present case, the revocation of refugee status is founded solely on crimes by the FDLR, attributed to the Complainant, that were committed after the reasons for exclusion were introduced. If only for that reason alone, the complainant cannot invoke protection of a legitimate expectation. Furthermore, Union law also requires an application of reasons for exclusion to recognitions declared before Directive 2004/83/EC took effect. The European Court of Justice (ECJ) cites in this connection the mandatory nature of Article 14(3)(a) of the Directive, which requires refugee status to be terminated or revoked when reasons for exclusion exist, even for proceedings that had already been initiated and completed before that time (ECJ, judgment of 9 November 2010 – Cases C-57/09, (B) and C-101/09, (D) – NVwZ 2011, 285 at 74).

25 bb) The court below concluded, in a manner not subject to objection by this Court, that the Complainant has brought about the reason for exclusion under Section 3(2)(1) of the Asylum Procedure Act. Under Section 3(2)(1) of the Asylum Procedure Act a foreigner is not a refugee within the meaning of the Geneva Convention on Refugees if there is good reason to believe that he has committed a war crime or a crime against humanity within the meaning of the international in-

struments drawn up for the purpose of establishing provisions regarding such crimes.

26 (1) The Higher Administrative Court applied the appropriate standard of proof in judging that the reason for exclusion under Section 3(2)(1) of the Asylum Procedure Act exists. It satisfied itself that through the acts of the FDLR, war crimes and crimes against humanity had been committed within the meaning of Section 3(2)(1) of the Asylum Procedure Act, and that these were attributable to the Complainant as President of the FDLR. It is sufficient for this formation of opinion that there be good reason justifying the assumption that such crimes had been committed. A standard of proof such as is called for in criminal law is not necessary for this purpose. Rather, the term ‘good reason’ indicates that the evidence that the crimes referred to in Section 3(2)(1) of the Asylum Procedure Act have been committed must be of substantial weight. As a rule, reasons are ‘good’ when there is clear, credible evidence that such crimes have been committed (on this point see Recommendation <2005> 6 of the Committee of Ministers of the Council of Europe of 23 March 2005 on exclusion from refugee status in the context of Article 1 F (b) of the GRC; similarly, Hailbronner, AuslR, version: Dec. 2007, Section 3 Asylum Procedure Act, at 8). The court below applied this standard of proof (copy of the judgment, at 29).

27 (2) The Higher Administrative Court determined specifically which actions it was satisfied that the FDLR had committed that would lead to exclusion under Section 3(2)(1) of the Asylum Procedure Act. These included plundering the population, burning down villages, shooting women and children, abductions, mass rape, and mutilations as means of waging war, together with recruiting child soldiers. The court below did not merely develop its opinion on the basis of a comprehensive assessment of situation reports from the Foreign Office alone, but also referred to specifically listed cases in a report from a United Nations group of experts dating from 23 November 2009, in the arrest warrant from the investigating judge of the Federal Court of Justice of 16 November 2009, in the reports from Human Rights Watch of April and December 2009, and in the informational bulletin from the Federal Office for Migration and Refugees of May 2009. The assessment of the evidence is founded on a sufficiently broad foundation of fact.

28 The Higher Administrative Court correctly views these acts as war crimes within the meaning of Article 8 and crimes against humanity within the meaning of Article 7 (a) and (g) of the Rome Statute of the International Criminal Court of 17 July 1998 (BGBl 2000 II p. 1394, hereinafter: the Rome Statute). In its judgment of 24 November 2009 – BVerwG 10 C 24.08 – (op. cit., at 31) this Court has previously decided that 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 exist should currently be decided primarily in accordance with the circumstances constituting these crimes as defined in the Rome Statute. This manifests the current status of developments in international criminal law regarding violations of international humanitarian law. In this regard, the Higher Administrative Court was free to set aside the question of whether the combat in eastern Congo is an international or non-international armed conflict, because the murders, rapes, mutilations, plundering and forced recruitment of child soldiers found there are to be considered war crimes in both cases, under Article 8 of the Rome Statute (Article 8(2)(a) item I, (b) items I, II, X, XVI, and XXII, (c) item I, and (e) items I, V, VI, VII and XI of the Rome Statute, Articles 2 and 3 des of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, BGBl 1954 II, p. 917). The murders and rapes, as part of a sustained, systematic attack on the civilian population, at the same time constitute crimes against humanity within the meaning of Article 7 (a) and (g) of the Rome Statute (see also the arrest warrant from the investigating judge of the Federal Court of Justice of 16 November 2009, p. 16 et seq.).

29 (3) The court below correctly found that the Complainant bore a responsibility for the crimes committed by the FDLR, on the basis of his position as President of the organisation and the associated influence over the actions of its combatants. The findings in the appealed judgment support the conclusion that the Complainant should be viewed as a perpetrator of the crimes committed by the FDLR, and not only – as held in the appealed judgment – as a person otherwise involved, in accordance with Section 3(2) sentence 2 of the Asylum Procedure Act.

30 The Complainant's responsibility proceeds from Article 28 (a) of the Rome Statute. That article provides, among other points, that a military commander is criminally responsible for crimes committed by forces under his effective command or control if he knew, or should have known, that the forces were committing such crimes, and he failed to take all necessary and reasonable measures within his power to prevent their commission. The Higher Administrative Court found that the Complainant is the President of the FDLR, exerts a significant influence over the organisation, and has unrestricted power of command and disposition within the FDLR. It supplementally cites the arrest warrant from the investigating judge of the Federal Court of Justice of 16 November 2009, who likewise comes to this conclusion. According to that warrant the Complainant, as President of the FDLR, is at the same time its supreme military commander (arrest warrant p. 6 and 14 et seq.), and is consequently empowered both to issue commands for strategic missions and to suppress certain acts or methods of combat (arrest warrant p. 15). He also exercised a *de facto* power of command, the warrant indicates. The warrant states that commanders subordinated to the Complainant, and acting in the field, had regularly sought close contact with the Complainant via satellite telephone, e-mail or conventional telephone connections, in order to take his orders or at least obtain his consent for certain military actions (arrest warrant p. 15 and 23 et seq.). These findings by the court below (Section 137(2) of the Administrative Code) result in the Complainant's responsibility for the war crimes and crimes against humanity committed by the FDLR, pursuant to Article 28 (a) of the Rome Statute.

31 According to the findings of the court below, the Complainant also acted wilfully. To be sure, negligence suffices for subjective responsibility within the meaning of Article 28 (a) of the Rome Statute. With regard to subjective responsibility, however, the Higher Administrative Court cites the arrest warrant of 16 November 2009, in which the investigating judge arrives at the conclusion that the Complainant acted wilfully. As grounds, the judge cites that on the basis of the numerous reports and of personal information from the local commanders of the FDLR, the Complainant had a knowledge of the criminal acts of the FDLR militiamen. Moreover, the judge states, the Complainant was well aware that the militiamen he commanded would continue committing killings, torture, plundering and forced displacement within their zone of control as long as he did not suppress such actions.

The court below rightly comes to the conclusion that distancing press releases are not sufficient for an appropriate suppression of the crimes. Nor does the inclusion of a prohibition of such crimes in the bylaws of the FDLR, which the appeal to this Court cites, suffice, if the Complainant takes no suitable measures to enforce the prohibition.

32 One may also conclude that the Complainant is responsible if one applies the criteria of the European Court of Justice as developed in its judgment of 9 November 2010 for the exclusion of refugee status under Article 12(2)(b) and (c) of Directive 2004/83/EC (op. cit., at 95 et seq.). According to those criteria, a member of an organisation may be attributed with a share of the responsibility for the acts committed by the organisation in question while that person was a member. Here it is of particular significance what role was played by the person concerned in the perpetration of the acts in question; his position within the organisation; and the extent of knowledge he had, or was deemed to have, of its activities. Here the Complainant, as the President and supreme military commander, held a high position in the organisation that committed war crimes and crimes against humanity. He knew of the crimes that had been committed, and took no suitable measures to prevent the acts.

33 In this connection, the appeal's complaint that the Higher Administrative Court only alleged the Complainant's responsibility, but did not formally declare what contribution he made to the acts, is incorrect. Rather, the appealed judgment focuses on the Complainant's dominant position in the organisation as President and supreme military commander, so that all acts by the organisation he led are to be attributed to him unless he took suitable steps to prevent them. The reference to his dominant position in the organisation as President is more than a mere 'blanket allegation of perpetration'. Nor is it the case that – as the appeal to this Court contends – the analyses of the telecommunications monitoring and of the Complainant's laptop cannot play any role, because these had 'largely not yet been analysed even on 31 March 2010'. In its assessment that the Complainant had a significant influence over the FDLR, the arrest warrant is founded on the information from the Complainant himself, on numerous reports from nongovernmental organisations, on the information from three witnesses, and on the findings from the monitoring of

the Complainant's telecommunications and the analysis of his e-mail correspondence. This documentation is highly detailed and precise.

34 cc) Since the recognition of the Complainant's refugee status was to be revoked because of the existence of the reason for exclusion under Section 3(2) sentence 1 no. 1 of the Asylum Procedure Act, this Court could set aside the question of whether – as assumed by the court below – the Complainant also met the requirements for the reason for exclusion under Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act. However, there is much to argue that the Complainant acted contrary to the aims and principles of the United Nations.

35 (1) The aims and principles of the United Nations that are pertinent for the reason for exclusion under Section 3(2) no. 3 of the Asylum Procedure Act are set forth in the Preamble and Articles 1 and 2 of the Charter of the United Nations (see ECJ, judgment of 9 November 2010, op. cit., at 82). In the Preamble and Article 1 of the Charter, the aim is stated of maintaining international peace and security. Chapter VII of the Charter (Articles 39 through 51) governs the measures to be taken in the event of threats to the peace, breaches of the peace, and acts of aggression. Under Article 39 of the Charter, it is the task of the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression. According to the case law of the European Court of Justice, special importance attaches to the fact that, in accordance with Article 24 of the Charter, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what poses a threat to international peace and security (ECJ, judgment of the Grand Chamber of 3 September 2008 – Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat – Col. 2008 at 294).

36 In its Resolution 1493 (2003) of 28 July 2003, the UN Security Council held that the armed conflict in the Democratic Republic of the Congo represented a threat to international peace, basing its action expressly on Chapter VII of the Charter (Resolution before item 1). In so doing, it referenced the continuation of hostilities

in the eastern part of the country, and the accompanying grave violations of human rights and of international humanitarian law. It strongly condemns the ‘acts of violence systematically perpetrated against civilians, including the massacres, as well as other atrocities and violations of international humanitarian law and human rights, in particular, sexual violence against women and girls, and it stresses the need to bring to justice those responsible, including those at the command level’ (item 8 of the Resolution). Additionally, the Security Council imposed an arms embargo to prevent the further importation of arms and related materiel into the Democratic Republic of the Congo (item 20 of the Resolution). Thus it is clear that the armed conflicts in the Democratic Republic of the Congo, in which the FDLR is a participant, constitute a breach of international peace, even without the national courts being authorised to perform a review in this regard. It is furthermore established by the UN Security Council Resolution that the breach of international peace proceeds, in any case, also from the atrocities and violations of international humanitarian law identified further in the Resolution, and also from the importation of weapons into the area of the conflict. These disruptive acts therefore contravene the aims and principles of the United Nations.

37 (2) However, it would argue against the Complainant’s bringing a reason for exclusion into being if such contraventions could be committed only by persons in a position of power in a member State of the United Nations, or at least in an organisation similar to a state. This interpretation is not only argued by the UNHCR, but is also consistent with the previous case law of the First Division of the Federal Administrative Court (UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, September 1979, at 163; judgment of 1 July 1975 – BVerwG 1 C 44.68 – Buchholz 402.24 j Section 28 Aliens Act no. 9). It is not evident from the findings in the appealed judgment that the Complainant is among this group of persons. There are no sufficient findings of fact to justify the conclusion by the court below that as the President of the FDLR, the Complainant heads an organisation similar to a state.

38 Nevertheless, in the view of this Court, there is much to argue that under certain narrow conditions, non-state actors may also bring about the reason for exclusion under Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act. For members of

terrorist organisations, this proceeds from the judgment of the European Court of Justice of 9 November 2010 (op. cit., at 82 ff.). According to that judgment, international terrorist acts are contrary to the purposes and principles of the United Nations ‘irrespective of any State participation’, and in the event of individual responsibility, result in an exclusion from refugee status. As grounds, the European Court of Justice cited Resolution 1373 (2001) of 28 September 2001, item 5 of which expressly ‘declares that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’. For other breaches of international peace, it must be decided on the basis of the Resolutions of the UN Security Council whether and in what regard the court finds a breach of international peace, whether a private actor has a significant influence on that breach, and whether the effect on the breach of international peace that proceeds from that individual is similar to the effect of state bearers of responsibility. This interpretation permits a proper distinction of reasons for exclusion under Section 3(2) sentence 1 nos. 1 and 3 of the Asylum Procedure Act, because no. 3 then also includes the acts of non-state persons in positions of political responsibility who might not be treated as criminally responsible under no. 1, but whose exclusion, because of their significant influence on the breach of international peace, for example as the political representatives or leaders of paramilitary associations or militias, is imperative in order to preserve the integrity of refugee status.

39 Courts in other countries also apply the exclusion clause on contravening the purposes and principles of the United Nations (Article 1 F (c) GRC) to persons who have no state power (see, for example, the judgment of the British Immigration Appeal Tribunal of 7 May 2004, KK <Article 1 F c Turkey> [2004] UKIAT 00101 at 20; Supreme Court of Canada in Pushpanathan v. Canada [1999] INLR 36), although there is no uniform practice among countries in this regard. If one follows the interpretation developed here by the present Court, it would mean abandoning the Federal Administrative Court’s decision from 1975, according to which the exclusion provision under Article 1 F (c) of the GRC covers only actions contrary to international peace and international understanding among peoples (see judgment of 1 July 1975, op. cit.).

40 If one applies these criteria, such a responsibility on the Complainant's part does not proceed from the mere fact that he has been included by the United Nations in a list of persons against whom restrictions should be applied in order to enforce the arms embargo. In Resolution 1596 (2005) of 18 April 2005, in items 13 and 15, the Security Council adopted a prohibition on immigration, and financial restrictions, against persons designated under item 18(a) of the Resolution by a Committee appointed for that purpose, and maintained on a list to be updated. The Complainant was added to this list on 1 November 2005, on the grounds of his position as President of the FDLR and his participation in arms trading, in violation of the embargo that had been imposed. However, inclusion in such a list does not in itself suffice for assuming that the reason for exclusion of acting contrary to the purposes and principles of the United Nations exists; in that regard it has (only) a significant indicative effect. Rather, if the person concerned – as here – disputes the underlying circumstances of fact, findings in this regard by the national authorities or courts are necessary. This examination must also include the Complainant's individual responsibility in regard to acting contrary to the purposes and principles of the United Nations by violating the arms embargo (see ECJ judgment of 9 November 2010, op. cit., at 82 ff.). The court below performed no such individual examination here.

41 However, the following circumstance does argue that the Complainant is responsible within the meaning of Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act: It is evident from UN Security Council Resolution 1493 (2003) that a breach of international peace exists, and that it proceeds from the armed conflicts in the eastern Democratic Republic of the Congo, which involve the participation of not only army units of the state, but also non-state militias like the FDLR, as well as from the systematic acts of violence against civilians and breaches of international humanitarian law, which the Security Council urges 'all parties, including the Government of the Democratic Republic of the Congo' to prevent (item 8 of the Resolution). This argues that here, non-state actors are also attributed a significant influence on the breach of international peace. If one furthermore adds the findings of the court below that the FDLR has been involved in the armed conflict for years, occupies territory in the eastern Democratic Republic of the Congo, and systematically perpetrates acts of violence against the civilian population, it might well be

considered a non-state organisation that acts contrary to the purposes and principles of the United Nations. Here it does not matter – as the Higher Administrative Court believes – whether the FDLR is an organisation similar to a state. Rather, the deciding factor is whether the effects on the breach of international peace that it and its leaders produce are comparable to the effects that proceed from authorities of a state. The Complainant, as the organisation's President, who according to the findings of the court below has a significant influence on his combatants' conduct, has personal responsibility for the acts of the FDLR that breach international peace (see ECJ judgment of 9 November 2010, op. cit., at 97 et seq.).

42 Even though, in this Court's opinion, there is much to argue that the reason for exclusion under Section 3(2) sentence 1 no. 3 of the Asylum Procedure Act may also be brought about in special cases by non-state actors like the Complainant, no final decision is needed here on this question, because the Complainant is already excluded from refugee status under the terms of Section 3(2) sentence 1 no. 1 of the Asylum Procedure Act.

43 b) Furthermore, the Higher Administrative Court rightly held that the substantive requirements for a revocation of the Complainant's entitlement to asylum have been met. A revocation of entitlement to asylum is imperative if reasons for exclusion come about after the decision granting that entitlement. This proceeds from both national and Union law.

44 aa) The requirements for revocation of a grant of asylum under national law proceed from Section 73(1) of the Asylum Procedure Act. This provision expressly refers to the revocation of refugee status and of the entitlement to asylum. It provides that a recognition of entitlement to asylum is to be revoked if the conditions on which such recognition is based have ceased to exist (Section 73(1) sentence 1 Asylum Procedure Act). As this Court has already discussed for the revocation of refugee status, this provision pertains not only to the subsequent cessation of circumstances connected with persecution, but also the subsequent occurrence of reasons for exclusion under Section 3(2) of the Asylum Procedure Act (see paragraphs 20 et seq. above). It furthermore proceeds from Section 73(2a) sentence 4 of the Asylum Procedure Act that Parliament assumed that the rea-

sons for exclusion under Section 3(2) of the Asylum Procedure Act also extend to the recognition of entitlement to asylum, and accordingly also justify a revocation of that recognition. The term ‘revocation or withdrawal’ in this provision plainly refers to both forms of recognition. A further argument for this reading of the law also comes from Section 30(4) of the Asylum Procedure Act, according to which an asylum application is to be rejected as manifestly unfounded if the requirements of Section 60(8) sentence 1 of the Residence Act or of Section 3(2) of the Asylum Procedure Act apply. The statement of reasons for the Federal government’s bill for the Directive Implementation Act indicates that the provision in Section 30(4) of the Asylum Procedure Act was intended to avert a potential conflict between recognition of refugee status and recognition of an entitlement to asylum, by applying the exclusion clauses equally to both recognition of refugee status and recognition of an entitlement to asylum (BTDrucks 16/5065 p. 214).

45 We may set aside the question of whether this purely statutory provision is entirely compatible with Article 16a of the Basic Law, or whether the limits of the fundamental right to claim asylum under the case law of the Federal Constitutional Court that has applied until now ought to be defined differently than under the Geneva Convention on Refugees (on this point, see the decision of 14 October 2008 – BVerwG 10 C 48.07 – BVerwGE 132, 79 at 36 et seq.). This is because in any event, the Complainant’s case is not covered by the scope of protection of constitutionally guaranteed asylum, so that the revocation of his entitlement to asylum does not violate Article 16a of the Basic Law.

46 According to the case law of the Federal Constitutional Court, the scope of protection of Article 16a of the Basic Law is limited by a ‘terrorism reservation’. Accordingly, the right of asylum does not apply if a new site of combat is merely being sought for terrorist activities, from which those activities can be continued or supported (Federal Constitutional Court, decision of 20 December 1989 – 2 BvR 958/86 – BVerfGE 81, 142 <152 et seq.>). Accordingly, no one can claim asylum who intends to continue or support terrorist activities undertaken in his or her country of origin from the Federal Republic of Germany, using the forms available here. Such a person is not seeking the protection and peace that the right of asylum is intended to confer. This normative limitation of the scope of protection ap-

plies irrespective of any persecution for terrorist activities in the country of origin. According to the case law of the Federal Administrative Court, it also applies for those who first take up political struggle using terrorist means from Germany, in the context of political activities from exile (judgment of 30 March 1999 – BVerwG 9 C 23.98 – BVerwGE 109, 12 <16 et seq.>; the Federal Constitutional Court declined to hear the constitutional appeal against this judgment, decision of 26 October 2000 – 2 BvR 1280/99 – InfAuslR 2001, 89).

47 If the cases previously decided in case law have been based only on matters involving terrorist activities by persons seeking asylum, this by no means signifies that the normative limitation of the scope of protection under Article 16a of the Basic Law is limited to terrorist activity. The reason for this normative limit is that in conformity with the system of international law that it helps support, the Federal Republic of Germany utterly condemns such activity (see judgment of 30 March 1999, op. cit., at 17). Committing war crimes and crimes against humanity represents a violation of the system of international law supported by the Federal Republic of Germany that is comparable in severity to acts of terrorism. According to the Rome Statute of the International Criminal Court, such actions are among the most serious crimes that are ‘of concern to the international community as a whole’ (Article 5 Rome Statute). That Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17 July 1998 and has now been signed by 139 countries. The Statute codifies international criminal law in consideration of the shared beliefs of the international law community (see the Federal government’s position paper on the Ratification Act, BRDrucks 716/1999 p. 99). Foreigners who commit crimes against humanity or war crimes after entering Germany, or who participate in such crimes, commit a serious violation of the system of international law, and are not seeking the protection and peace that the right of asylum is intended to confer. They cannot claim the protection of asylum law under Article 16a of the Basic Law.

48 Such a limitation of the scope of protection of Article 16a of the Basic Law is furthermore supported by Article 26 of the Basic Law, according to which actions are unconstitutional if they tend, and are undertaken with the intent, to disturb peaceful relations between nations (see Hobe, in: Friauf/Höfling, *Berlin Commentary on the*

Basic Law, Article 26 at 11; I. Pernice, in: Dreier, Grundgesetz, vol. 2, 2nd ed., 2006, Article 26 at 18). In Article 26(1) sentence 1 of the Basic Law the constitution itself directly forbids conduct intended to cause or promote situations in violation of international law that pose a threat to international peace or security within the meaning of Article 39 of the Charter of the United Nations (see Herdegen, in: Maunz/Dürig, Grundgesetz, version: March 2006, Article 26, at 13). Committing or aiding and abetting crimes under international law – such as those governed by Article 5 et seq. and Article 28 of the Rome Statute – tends to disturb peaceful relations between nations, and is therefore covered by the ban on such disturbances under Article 26(1) sentence 1 of the Basic Law (concurring, I. Pernice, in: Dreier, Grundgesetz, vol. 2, 2nd ed., 2006, Article 26, at 15 and 17). Understood in this way, Article 26(1) of the Basic Law might also provide the basis for an inherent constitutional limit on the promise of asylum under Article 16a of the Basic Law.

49 As has already been explained in connection with the revocation of refugee status, there is good reason to believe that the FDLR led by the Complainant has committed war crimes within the meaning of Article 8 of the Rome Statute and crimes against humanity within the meaning of Article 7 (a) and (g) of the Rome Statute, and that the Complainant is responsible for those crimes as a perpetrator under Article 28 (a) of the Rome Statute. In the Complainant's case, the current danger that is furthermore required here (or also a danger of recurrence – on this see the judgment of 30 March 1999, op. cit., at 22 with citation to the judgment of 10 January 1995 – BVerwG 9 C 276.94 – Buchholz 402.25 Section 1 Asylum Procedure Act no. 175, juris, at 23) exists, according to the findings of the court below, because he remains the President of the FDLR and that organisation – as the arrest warrant states – continued to carry out its pertinent activities even during the appeal proceedings. Consequently the Complainant is excluded from recognition as a person entitled to asylum under constitutional law as well.

50 bb) Irrespective of that consideration, the revocation of the entitlement to asylum is also required under European Union law if reasons for exclusion under Section 3(2) sentence 1 no. 1 and 3 of the Asylum Procedure Act arise.

51 The reasons for exclusion governed by Section 3(2) of the Asylum Procedure Act implement the requirements for refugee status under Article 12(2) of Directive 2004/83/EC. According to Article 14(3)(a) of the Directive, the obligation to revoke refugee status in the event of the subsequent discovery of reasons for exclusion under Article 12 of the Directive also applies for persons who – like the Complainant – filed their application for refugee status even before the Directive took effect. It must also be obeyed for the entitlement to asylum conferred under national law. This is because Article 3 of the Directive allows Member States to have more generous provisions about who is to be deemed a refugee only to the extent compatible with the Directive.

52 In a decision of 14 October 2008 – BVerwG 10 C 48.07 – (op. cit.), this Court referred to the European Court of Justice the question of whether it is compatible with Article 3 of the Directive for a Member State to grant a right of asylum under its constitutional law to a person who is excluded from recognition as a refugee under Article 12(2) of the Directive. The European Court of Justice answered that it would contravene Article 3 of the Directive for a Member State to introduce or retain provisions granting refugee status to persons who are excluded from that status pursuant to Article 12(2) of the Directive (judgment of 9 November 2010, op. cit., at 115). To be sure, Member States may grant protection for reasons other than the need for international protection. Possible examples might be granting protection for family or humanitarian reasons (op. cit. at 118). But this other kind of protection which Member States have discretion to grant must not be confused with refugee status within the meaning of the Directive (op. cit. at 119). National rules under which a right of asylum is granted to persons excluded from refugee status under the Directive do not infringe the system established by the Directive only insofar as they permit a clear distinction between national protection and protection under the Directive (op. cit. at 120).

53 Applying the criteria developed by the European Court of Justice to the configuration of the entitlement to asylum under ordinary law in accordance with Article 16a of the Basic Law, this is a national protected status that is largely equivalent to the legal status of a refugee under the Directive, and thus creates a possibility of confusion within the meaning of the ECJ’s case law. The entitlement to asylum under

Article 16a of the Basic Law is not a protected status different than the recognition of refugee status – in that it is founded, for example, on family or humanitarian reasons. Rather, a person entitled to asylum under Section 2(1) of the Asylum Procedure Act enjoys within German territory the legal status of a refugee within the meaning of the Geneva Convention on Refugees. His or her legal position within Germany also corresponds to the status of refugees under European Union law, as configured by Directive 2004/83/EC (see Hailbronner, ZAR 2009, 369 <371 et seq.>). Consequently it would be contrary to the reservation under Article 3 of the Directive if Germany were to grant or maintain a legal status largely equivalent to refugee status for individuals who are excluded from that status under Article 12(2) of the Directive. The requirements of Union law therefore demand that the reasons for exclusion under Article 12(2) of the Directive must also be applied to persons entitled to asylum, and that the recognition of that entitlement must be revoked if reasons for exclusion under Article 14(3)(a) of the Directive arise subsequently. The German lawmakers took this into consideration by specifying that the reasons for exclusion should also apply to persons entitled to asylum (see paragraph 44 above).

54 The extension of the exclusion clauses under ordinary law to persons entitled to asylum is not objectionable constitutionally, because in this way the German lawmakers complied with their obligation to transpose European Union law into national law. The link to mandatory requirements of a Directive under Article 288 of the Treaty on the Functioning of the European Union complies with the legal principles of the Basic Law stated in Article 23(1), as long as the case law of the European Court of Justice generally affords effective protection of fundamental rights against the sovereign power of the Union that can be considered substantially equal to the protection of fundamental rights that is absolutely imperative under the Basic Law (see Federal Constitutional Court, decision of 13 March 2007 – 1 BvF 1/05 – BVerfGE 118, 79 <95 et seq.>). Given the right to asylum guaranteed under Article 18 of the Charter of Fundamental Rights of the European Union and the provisions of Directive 2004/83/EC that are committed to the standard of protection under the Geneva Convention on Refugees (see, for example, recitals 3 and 17 of the Directive), it cannot be assumed that this absolutely imperative protection of fundamental rights would not generally be assured at the level of Union

law in regard to the right of asylum. To be sure, the priority of the application of Union law does not result in the nullity of contrary national law. But within the sphere of application of Union law, contrary laws of the Member States are fundamentally inapplicable (see Federal Constitutional Court, decision of 6 July 2010 – 2 BvR 2661/06 – NJW 2010, 3422). However, the priority of application applies in Germany only by virtue of the imperative of applying the law that results from the Act consenting to the treaties. For the sovereignty exercised in Germany, it therefore extends only insofar as the Federal Republic of Germany has consented, and was permitted to consent, to this rule on conflict of laws (see Federal Constitutional Court, judgment of 30 June 2009 – 2 BvE 2/08 et al. – BVerfGE 123, 267 <343>). Within those limits, nevertheless, Union law must also be obeyed even in interpreting the Basic Law. The consequence here is that with the transposition of Directive 2004/83/EC into national law, the fundamental right to asylum must be construed in conformity with the Directive, and even in the case of a conflict of laws that cannot be resolved by an interpretation of this fundamental right or its further evolution in conformity of the Directive, the exclusion clauses must be observed anyway by way of the priority of application of Union law as transposed by the national lawmakers.

55 The disposition as to costs for these proceedings proceeds from Section 154(2) of the Administrative Code. No court costs are imposed in accordance with Section 83b of the Asylum Procedure Act. The amount at issue proceeds from Section 30 of the Attorneys' Compensation Act.

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