

Harald Dörig, Judicial Experience with the Geneva Convention in Germany and Europe, in: James Simeon, *The UNHCR and the Supervision of International Refugee Law*, Cambridge 2013, S. 148-156

1. Growing Importance of the Geneva Convention

The *1951 Convention relating to the Status of Refugees* – the ‘Geneva Convention’ – has gained growing influence in the application of refugee law in Europe. Of course most Western European States had already signed the *1951 Convention* decades ago and Eastern Europe has followed in the early 1990s. But many states had hidden the *1951 Convention* in their national law. And, the *1951 Convention* was not directly cited in the text of the national refugee acts. As a consequence, national courts have mostly only applied their national asylum law without having a close look on the Convention.

This has changed with the development of a common asylum policy and asylum legislation within the European Community. In 2004 and 2005 the member states of the European Community have agreed on Directives concerning the standards for the qualification as a refugee¹ and concerning the recognition procedure². Both Directives have developed their standards on the basis of the *1951 Convention* and call the Convention “the cornerstone of the international regime for the protection of refugees”.³ As a consequence, national law has been altered. From January 2005 the refugee definition in the *German Asylum Procedure Act* is based on the Geneva Convention and this is said expressly in the text of the act. And, in December 2009, the *Charter of Fundamental Rights of the European Union* as part of the Lisbon Treaty has entered into force.⁴ In Article 18 of the *Charter of Fundamental Rights* the right to asylum is guaranteed. It is defined as follows:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community. ...and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’)

This means that the interpretation of refugee law in Europe is no longer based primarily on national law, but on supranational law. And, this supranational European Law recognizes the Geneva Convention as its basis, and uses, to a large extent, the same wording as the *1951 Convention* and defines various terms expressly in the sense of the *1951 Convention*.

The national judiciary and the Court of Justice of the European Union (CJEU) will more often apply and refer to the Geneva Convention, than it has done in the past. In its first judgement on refugee law the CJEU stated, in March 2010⁵, that the Geneva

¹ Council Directive 2004/83/EC, OJ L 304/12

² Council Directive 2005/85/EC, OJ L 326/13

³ Recital (2) of Council Directive 2004/83/EC

⁴ OJ dated 30.3.2010. C 83/389

⁵ CJEU Judgement of 2.3.2010 - C-175/08 - para 52

Convention constitutes the cornerstone of the international legal regime for the protection of refugees. The provisions of the European Directive for determining who qualifies for refugee status were adopted to give guidance in the application of the Geneva Convention on the basis of common concepts and criteria. The provisions of the Directive must for that reason be interpreted with respect to the Geneva Convention.

In the following, I will give you some examples for the application of the Geneva Convention by the German and the CJEU judicature.

2. German and Court of Justice of the European Union (CJEU) Judicature

2.1. Definition who qualifies to be a Refugee

The German Federal Administrative Court has given criteria for how to define the term refugee as found in its judgement issued 5 May 2009.⁶ The term consists of two elements:

- (a) an act of persecution;
- (b) certain reasons for persecution.

(a) The court defines first, what are “acts of persecution” within the meaning of Article 1 A of the Geneva Convention. In this respect, Article 9 of the *EU Qualification Directive* has a more precise definition than the Geneva Convention. The *EU Qualification Directive* defines persecution as follows:

Acts of persecution within the meaning of Article 1 A of the Geneva Convention must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Under Article 15 (2) of the *European Convention on Human Rights* no derogation can be made from the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of punishment without law.

Having regard to this definition the German Federal Administrative Court came to the conclusion that the extremely serious physical abuse which a Chechen claimant had suffered by the Russian security forces represents a serious violation of fundamental human rights – here, the prohibition of inhuman or degrading treatment within the

⁶ BVerwG 10 C 21.08 -

http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_2ss__8_lu.html

meaning of Article 3 of the *European Convention on Human Rights* – and thus meets the definition of an act of persecution (Article 9 (1) (a) in conjunction with Article 9 (2) (a) of Directive 2004/83/EC). In another case the Court decided, that the deprivation of citizenship can also amount to a severe violation of human rights and be an act of persecution.⁷ The critical factor in regard to the severity of the violation of rights is that the state deprives the individual of his or her fundamental status as a citizen, and thus necessarily denies residency protection, thereby rendering the person stateless and unprotected – in other words: It excludes him or her from the state's system of protection and peace.

(b) After having defined the acts of persecution the court draws his attention to the reasons for persecution. They are enumerated in Article 1 A of the Geneva Convention. But, they get more precise in Article 10 (1) of the EU Qualification Directive. In the Chechen case, the claimant had to fear persecution in Russia solely because of his 'Caucasian appearance' (labelling as 'black' or 'dark-skinned'). Among the Russian security forces – with no concrete reason or accusation of an act – this triggered a generalised suspicion that the complainant was a Chechen fighter. On this background, the German Federal Administrative Court found that the Convention reason of persecution is fulfilled. First, the Court draws its attention to racial grounds and defines: The concept of race particularly includes considerations of colour, descent, or membership of a particular ethnic group (Article 10 (1) (a) of the Directive). Then, the Court examines the persecution by reasons of nationality and says: "the concept of nationality is not confined to citizenship or the lack thereof, but in particular also includes membership in a group that is determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State" (Article 10 (1) (c) of the Directive). The term "political conviction shall in particular include the holding an opinion, thought or belief on a matter relating to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant" (Article 10 (1) e of the Directive). In examining the reasons for persecution, it is sufficient if these characteristics are only attributed to the applicant by the actor of persecution (Article 10 (2) of the Directive).

The Federal Administrative Court of Germany decided that a combination of race and political opinion is present as reasons for persecution in the case of the Chechen claimant and, thus, sets aside the question of whether the applicant falls within the grounds of a member of a particular social group

2.2. The Exclusion Clause

According to Article 1 F of the Geneva Convention there are three reasons to exclude a person from Convention refugee status:

There are serious reasons for considering that

(a) he or she has committed a crime against peace, a war crime or a crime against humanity;

⁷ Judgement dated 26 February 2009 - BVerwG 10 C 50.07
http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_5_7_kp.html

(b) he or she has committed of a serious non-political crime outside the country of refuge prior to his admission in that country as a refugee;
(c) has been guilty of acts contrary to the purposes and principles of the United Nations.

These three reasons are the basis for exclusion also in the EU Qualification Directive (Article 12) and in German refugee law (Article 3 (2) *Asylum Procedure Act*).

My court has decided on various exclusion cases in the last two years. We didn't get those cases earlier, because Germany had not transposed the exclusion clause in national law until 2002. In two judgements of 24 November 2009⁸ and 16 February 2010⁹ the court decided what the criteria for a war crime are in the sense of Article 1 F (a) of the *1951 Convention*. Both cases dealt with Chechen fighters who had killed Russian soldiers. The lower German courts had rejected exclusion, because the claimants' acts had been directed against combatants and not against the civilian population. The Federal Administrative Court of Germany quashed these decisions and held that war crimes can also be committed against soldiers and the lower courts, now, must examine if the assumptions for such war crimes against combatants are fulfilled. The Federal Administrative Court also held that a war crime is defined in the *Rome Statute of the International Criminal Court*. According to Article 8 (2) (c) of the Rome Statute, a war crime can be also committed against members of armed forces who have laid down their arms or if the killing is performed treacherously (Art. 8 (2) (e) (IX) and the acts directed against the adversary combatant can be of a terrorist nature if a large number of civilians are affected (for example, the attacks in Moscow on the musical theatre in 2002).

In October and November 2008 my court made two references to the CJEU to answer questions on the exclusion clauses.¹⁰ The CJEU has the competence to rule on these legal questions with authority for all 27 member states of the European Union, since the exclusion clauses are part of the EU Qualification Directive. The references asked for guidance to the exclusion clauses (b) and (c), that means the commitment of a serious non-political crime and of an act contrary to the UN principles. With our first question we asked the CJEU to decide, whether exclusion takes place, if the applicant has belonged to an organisation that appears on the EU list of persons, groups and entities which have been enacted to combat terrorism, and the applicant actively supported the armed struggle of that organisation? In its judgement of 9 November 2010 the Court decided that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall within the meaning of serious non-political crimes under Article 1 F (b).¹¹ And they may also fulfill the criteria of the exclusion clause Article 1 F (c), because in Resolutions 1373 (2001) and 1377 (2001) the UN Security Council takes as its starting point the principle that international terrorist acts are,

⁸ BVerwG 10 C 24.08 -

http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_24_8_ma.html

⁹ BVerwG 10 C 7.09

http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_7_9_nf.html

¹⁰ Reference of 14.10.2008 - BVerwG 10 C 48.07; Reference of 25.11.2008 - BVerwG 10 C 46.07 -

http://www.bverwg.bund.de/enid/44c2fb8cf1cafde25e2535d5e6a25931,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_48_7_km.html

¹¹ CJEU Judgement of 9.11.2010 - C-57/09 and C-101/09 - B and C, para 81

generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations. But an individual assessment of the personal responsibility of the person in question is required. The Court then decided that exclusion from refugee status is not conditional on the person concerned representing a present danger to the host state.¹² And exclusion is not conditional on an assessment of proportionality in relation to the particular case.¹³ The decision of the Court of Justice of the European Union has clarified and settled a lot of questions on exclusion, at least for Europe, and it will influence undoubtedly the judicature in the other State signatories of the Geneva Convention as well.

2.3. The Cessation Clause

The CJEU has also decided on the cessation clause in Article 1 C of the Geneva Convention. This was CJEU's first judgement on refugee law and it dates from 2 March 2010.¹⁴ Again the Court decided on a reference of my court. According to Article 1 C (5) of the Convention a person shall cease to be a refugee, if he can no longer continue to refuse to avail himself or herself of the protection of the country of nationality, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist.

In Germany, thousands of Iraqi citizens who were recognized as refugees ceased to be refugees after the fall of the Saddam Hussein regime in 2003. The main question was, if it is sufficient that the danger of persecution, which was the basis for the recognition in the time of Saddam Hussein, has diminished after the fall of the regime or, whether there must be a stable security situation with a State protecting the individual effectively from persecution. In addition, my court wanted to know, if the living conditions must be of the kind that would ensure the minimum basis for a livelihood.

The CJEU decided that the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment to grant or to withdraw Convention refugee status (paragraph 68). Consequently, refugee status ceases to exist where a refugee is no longer exposed to circumstances which demonstrate that his home country is unable to guarantee him protection against acts of persecution (paragraph 69). The change of circumstances, however, must be of a significant and non-temporary nature (paragraph 73). In order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities must verify, that the authorities in his home country have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection, if he ceases to have refugee status (paragraph 70).

The refugee status can also be withdrawn if in the person's home country there exists a situation which constitutes a danger to his life or his personal integrity which grants him subsidiary protection. The CJEU states that refugee status and subsidiary protection are two distinct systems of protection (paragraph 80). Having made the

¹² *ibid* para 105

¹³ *ibid* para 111

¹⁴ CJEU Judgement of 2.3.2010 - C-175/08 - Abdullah

point, the CJEU did not even mention refraining from cessation when the living conditions in the appellant's home country are poor.

This judgement helps to interpret the cessation clause and underlines the importance of the Geneva Convention in the application of national or supranational law. The German Federal Administrative Court has decided the relevant cessation cases on 24 February 2011 - which concerned Iraqi citizens - on the basis of the CJEU judgement and has denied the refugees' appeal in two cases and has remanded three other cases to the Higher Administrative Court for a new hearing and a decision.¹⁵ In those Iraqi cases the Court agreed with the conclusion of the lower courts that the refugee status granted before 2003 has - as a rule - ceased to exist. Those Iraqi refugees were recognised in the years before 2003 because at that time the Federal Office held that the Iraqi authorities viewed a mere application for asylum in another country as political opposition. This fact, on which the refugees' fear of persecution by the state was based, has permanently ceased to exist, because the fall from power of the dictator Saddam Hussein and his regime is irreversible. A return of the Baath regime is viewed as out of the question. Neither the new Iraqi government nor other actors attach measures for persecution to applying for asylum in another country. Since it is therefore clear that the former refugees no longer need to fear persecution from any side in Iraq because of their application for asylum, this also embraces the finding that a state actor of protection is present, in the form of the new Iraqi government, which has eliminated the former state sanctions and abuses relating to applications for asylum, and has therefore taken sufficient appropriate steps to permanently prevent the persecution on which the recognition of refugee status was based.

3. Conclusions

The judgements of the Court of Justice of the European Union have given important guidance for the German judiciary. When German courts have to decide whether foreigners have to be excluded from refugee status because of their engagement in activities supporting terrorism they reach their conclusions on the basis of the CJEU Judgement of 9 November 2010.

The German Federal Administrative Court has pointed out in his judgement of 7 July 2011, that terrorist activities can lead to an exclusion under Art. 1 F (b) and (c) of the Geneva Convention. But the mere fact of a person's membership of an organisation that attempts to achieve its goals with (in part) terrorist means does not automatically justify the presumption of a ground for exclusion. Rather, the exact circumstances of fact must be assessed in each case individually to determine whether the acts committed by the organisation constitute serious non-political crimes or acts contrary to the purposes and principles of the United Nations within the meaning of these grounds for exclusion, and whether an individual responsibility for the acts can be attributed to the person concerned.¹⁶ It is not sufficient that a foreigner was a high

¹⁵ BVerwG 10 C 3.10

http://www.bverwg.bund.de/enid/4e213d4ba5442a13c4840798935b553c,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_3_ss__pn.html

¹⁶ BVerwG 10 C 26.10 para 35 f

http://www.bverwg.bund.de/enid/7ff9900b7332bf768c5c3a1e2b43096a,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_26_ss__py.html

officer of the Kurdish PKK for a certain period - a Turkish organisation which is included in the EU Terror List. It has rather to be assessed by the courts when and for how long the Turkish national actually belonged to the 41-member executive body of the PKK, and what specific terrorist crimes the PKK committed or planned during this period. We regard those findings necessary for the presumption of an individual responsibility of the person concerned.

What concerns the cessation of refugee status the German Courts now follow the condition laid down by the CJEU Judgement of 2 March 2010, that the change of circumstances in the refugee's home country must be of a significant and non-temporary nature.¹⁷ According to the new German Judicature the actual circumstances in the country of origin must have changed clearly and materially with regard to the factors that gave rise to the risk of persecution from which the recognition of refugee status originally derived. In the comparative consideration of the circumstances at the time of recognition of refugee status, and of the circumstances of fact relevant to revocation, new facts must indicate a significant change, material to a decision, in the basis on which the likelihood future persecution is determined. A reassessment of an essentially unchanged situation of fact is not sufficient, because the mere passage of time per se does not bring about any change in the situation of fact. And the changes have to be stable, or in other words, that the factors that formed the basis of persecution will remain eradicated for the foreseeable future. The Federal Administrative Court has seen those significant and stable changes in Iraq, but remanded a case from Algeria to the court below for further hearing and a new decision.¹⁸

The Judgements of the CJEU play a significant unifying role within the 27 member states of the European Union, because all courts now have the same basis for their decisions in applying the 1951 Convention relating to the Status of Refugees.

¹⁷ BVerwG 10 C 25.10, Judgement dated 1 June 1011, para 20 ff
http://www.bverwg.bund.de/enid/1597e566434f4164e0adba5a3bca042d,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_25_2_ss__pp.html

¹⁸ *ibid* para 24 f.