

Deserters and Persons avoiding Military Service originating from the Federal Republic of Yugoslavia in Countries of Asylum:
Relevant Considerations

245

Part I: Introduction

1. It is generally accepted that States are entitled to request their citizens to perform military obligations and that citizens have a duty to do so. Therefore, punishment for failure to meet such obligations cannot, *per se*, be regarded as persecution for the purposes of the 1951 Convention relating to the status of refugees. However, there are certain circumstances in which punishment for such refusal would amount to persecution in the Convention sense and could found refugee status.¹ The nature of the conflict in Kosovo, which has given rise to reliable reports of serious human rights violations and other crimes allegedly committed by the armed forces of the Federal Republic of Yugoslavia, suggests that there may be cases in which refusal to perform military service could justify refugee status. Also because of the nature of the conflict, such claims may well require an analysis of whether the exclusion clauses of the 1951 Convention relating to the status of refugees may be applicable in any individual case. Credibility of the asylum-seeker will usually be an important element.

Part II: Factual Background

2. On 24 March 1999 a state of war was declared by the parliament of the Federal Republic of Yugoslavia. From the date of this declaration, until the lifting of the state of war on 23 June, the borders of the Federal Republic of Yugoslavia were closed to males of draft age. Although no general mobilisation was called for, an increasing number of men were called up for military duty. Despite the lifting of the state of war in late June, it should be noted that the punishment applicable for draft evasion and desertion during the war period will be as under the state of war.

3. Draft evasion is covered by the Military Law, Official Gazette Federal Republic of Yugoslavia no 67 of October 1993. Draft evasion and desertion are covered in addition by the Federal Criminal Code. The Military Code and the Federal Criminal Code are both dealing with draft evasion. The difference in application relates to how and when in the process the draftee evades the draft and the authorised body which initiates the process of draft.

4. Articles 214, 217 and 226 of the Criminal Code deal with draft evasion and desertion and provide for the following terms of imprisonment on conviction:

- failure to answer a recruitment call in peacetime; max. 1 year
- idem during war or threat of war; 1 to 10 years
- hiding inside the country with the intent to evade recruitment in peacetime: 3 months to 5 years

¹ See part III below, "UNHCR Analysis," for a comprehensive explanation of when punishment may found refugee status.

- idem during war or threat of war: 5 to 20 years
- going and staying abroad with the intent to evade recruitment in peacetime: 1 to 10 years
- idem during war or threat of war: 5 to 20 years
- desertion and not returning within 30 days in peacetime: 6 month to 5 years
- idem during war or threat of war: 5 to 20 years
- desertion and leaving the country in peacetime: minimum 1 year
- idem during war or threat of war: 5 to 20 years.

5. Under the Federal Republic Constitution, capital punishment no longer exists. All reference to it has disappeared. But it should be noted that the punishment of 20 years imprisonment continues to exist only in those laws where previously capital punishment could be applied.

6. Administrative provisions are in place to provide for exemption from military duties where there is an objection for reasons of conscience. Civil duties within the military structure can be performed for a period twice as long as the normal military service would have been required. During the state of war this provision did not apply. Furthermore, exemptions of military service which were issued before the declaration of the state of war were no longer valid during the time of war.

7. Under the declared state of war, military courts were applying the Criminal Code for both draft evasion and desertion in a shortened procedure. No monitoring of trials has been possible as all court procedures currently fall under military security regulations and are classified as confidential. As noted above with respect to penalties, despite the lifting of the state of war on 23 June 1999, all desertion and draft evasion cases for the period within the state of war will be treated as under the state of war.

Part III: UNHCR Analysis

The General Position:

8. Punishment for refusal to perform military service may constitute persecution under certain circumstances. Chief among these are the following:

(a) If, owing to a Convention reason, the **punishment is applied in a discriminatory manner**. For instance, if sanctions for draft evasion/desertion are only applied in a country to persons of a certain ethnic background, political opinion or religious belief;

(b) If the **punishment for draft evasion/desertion is aggravated** owing to a Convention reason. This would be the case if, for example, the sanction generally applied is 6 months' imprisonment, but persons of a certain race, religion or political opinion are sentenced to two years;

(c) If, again owing to a Convention reason, the person is **denied due process of law**.

9. There is, in addition, another circumstance in which a draft evader/deserter may qualify as a refugee. That is the case known as "**conscientious objection**". A person who fears to be punished for draft evasion/desertion may qualify as a refugee even if none of the conditions set out in paragraph 8 apply, if he/she can establish that performance of military service would have required his/her participation in military action contrary to his/her genuine and deep moral, religious or political convictions or to other valid reasons of conscience. In principle, conscientious objection should not provide grounds for recognition of refugee status where an alternative civilian service can be performed.

10. Establishing a valid conscientious objection may not be too difficult where it is evident that the military action in which the asylum-seeker would be requested to participate is contrary to basic rules of human conduct. This, for instance, will be the case if the action has been condemned by the international community (Cf. Handbook, paragraph 171). This is not, however, indispensable. Even if the military action in which the person is required to participate is generally conducted within the limits prescribed by the laws of war, he/she may be regarded as a conscientious objector and, hence, qualify as a refugee, if he/she can establish that his/her moral, religious or political objections to participating in such action are so genuine, serious and profound that it would be morally wrong to require him/her to participate in such action. One case that may fall under this description is that of a member of an ethnic minority who, in a situation of internal conflict, may be required to participate in military action against his/her own ethnic community.

Considerations Specific to the Federal Republic of Yugoslavia:

11. Currently, three different groups can be identified:

- Those who left FRY before the state of war was declared in anticipation of a general mobilisation and/or the closure of the borders. They left before they received a draft call and during the war they never received one.
- Those who left FRY because they received a draft call or those who left before they received a draft call but received one while they were abroad.
- Deserters.

12. It is to be expected that those who left in anticipation that a general mobilisation would be announced and who never received an individual draft call, can return to the Federal Republic of Yugoslavia. There is no basis for a claim for refugee status on the single basis that they left FRY.

13. For those who did not receive draft calls but left in anticipation of a general mobilisation and received a draft call while abroad, the provision concerning staying abroad with the intention to evade recruitment is applicable. The punishment can amount to 20 years. Similar for those who left and already had received their draft call.

14. For the status determination of deserters, it is important to recall that those who commit **war crimes, crimes against humanity or serious non-political crimes** may be excluded from refugee status as not deserving of international protection, even though they may otherwise have a well-founded fear of being persecuted for one of the Convention reasons. Important considerations and areas of questioning which must be taken into account in such exclusion matters include an examination of

- the **nature of the acts** performed or ordered by the asylum-seeker and whether they amount to the excludable acts (in this case, a consideration of crimes against humanity, including genocide, may be relevant) and
- the **level of responsibility** of the individual asylum-seeker for any such excludable acts.

15. It is also important to consider defences to exclusion, including **coercion, necessity and lack of awareness of the nature of the act**. Questioning on these areas and a careful analysis of the implications of the answers will be essential to a proper application of the exclusion cases. Important considerations might include the extent to which the asylum-seeker had knowledge of, and a moral choice to be involved or complicit in excludable acts.

16. If, after a comprehensive interview, the decision is made to exclude a refugee, that person can no longer receive refugee protection or assistance from UNHCR. The person, if desiring to stay in the asylum country, should request the protection of the host country government on another basis. It should be noted that under international law provisions other than the 1951 Convention, persons may still be protected against refoulement. Examples of instruments providing such protection include the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

17. Further guidance on the relevant inclusion issues can be found in the *UNHCR Handbook*, paragraphs 167 - 174. Material in the Suggested Framework of Analysis on *REFUSAL TO PERFORM MILITARY SERVICE AS A BASIS FOR A WELL-FOUNDED FEAR OF PERSECUTION* of the Immigration and Refugee Board of Canada (September 1992) may also be helpful in analysing such cases. Further guidance on exclusion can be found in the *UNHCR Handbook*, paragraphs 147 - 163, and in the *UNHCR Guidelines Application of the Exclusion Clauses* of December 1996. These materials can be found on the UNHCR REFWORLD CD ROM.

18. UNHCR is actively seeking more substantive information on state practice with regard to prosecution of deserters and draft-evaders. Bearing in mind the present extremely volatile political circumstances in FRY, UNHCR will continue to closely monitor the evolving situation.

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