

Answer

of the Federal Government

to the minor interpellation tabled by members of the Bundestag Ulla Jelpke, Harald Koch, Petra Pau, further Members of the Bundestag and the Left Party parliamentary group.

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Providing refugee protection for deserters who flee in order to avoid obeying orders to commit illegal acts

Preliminary remarks of the questioners

Council Directive 2004/83/EC (the “Qualification Directive”) contains provisions to ensure that active soldiers or conscripts are granted protection as refugees if they fear being prosecuted for refusing to obey orders, the execution of which would constitute a crime.

Orders of this nature are also issued to the members of numerous NATO armies. NATO’s attack on Yugoslavia, for example, and the invasion of Iraq by a US-led coalition of forces were in breach of international law. In the war in Afghanistan, civilians are being killed time and again which, in the eyes of the questioners, constitutes a criminal act.

German asylum law needs to be reviewed to establish to what extent it offers adequate protection to soldiers and deserters who flee in order to avoid participating in acts of war which are in breach of international law or which are criminal. This is particularly important in light of the fact that the law in many countries either refuses to recognise conscientious objection or makes it disproportionately difficult to achieve recognition.

In recent years, a few hundred US soldiers have refused to undertake war service. Only around 50 per cent of them are recognised as conscientious objectors, which casts doubt on the efficacy of the legal safeguard. In addition, US law restricts conscientious objection to matters of pacifist principle. Soldiers who declare that they do not want or no longer want to be involved in illegal deployments in illegal wars are not able to make use of this possibility. As a consequence, soldiers who refuse to undertake military service face the threat of prosecution (for desertion, absence without leave or similar).

According to reports, far more US soldiers have deserted on these grounds since the beginning of the Iraq war: some 25,000. In the opinion of the questioners, the prosecution of soldiers who refuse to collaborate in crimes (or what they anticipate will be crimes) constitutes politically motivated persecution and those who face this threat should be entitled to international protection.

Yet the situation of such soldiers from foreign armed forces in Germany is precarious, regardless of whether or not they have applied for recognition as conscientious objectors in accordance with the provisions of their countries of origin. A.A., a conscientious objector, for example, was held for six months in the US military prison in Mannheim in 2006/2007. In November 2008, the US soldier A.S. applied for asylum on the grounds of the illegality under international law of the war in Iraq where he had already served in 2003 (as a helicopter mechanic). Through his own researches he established that, as a mechanic on the Apache attack helicopter, he had been indirectly complicit in actions carried out in the course of the war which were in breach of international law. “We have destroyed nations, killed leaders, raided homes, tortured, kidnapped, lied, and manipulated not just citizens and leaders of our enemies, but of our allies as well.” (www.connection-ev.de). He therefore had serious grounds to assume that when he was redeployed to Iraq in 2007, he would again be called on to assist in criminal acts. If he were to be deported to the USA – or if he were to report to a US barracks in Germany – A.S. would expect to be arrested.

Preliminary remarks of the Federal Government

The Federal Government strongly rejects the suggestions in the first two paragraphs of the preliminary remarks.

1. How does the Federal Government assess the problems associated with the criminal prosecution of conscientious objectors and/or deserters who seek to avoid participating in wars of aggression and/or war crimes from the point of view of fundamental human rights considerations?

There is no fundamental human rights problem associated with the criminal prosecution of desertion. The motives and aims may, if appropriate, be taken into consideration in the criminal proceedings.

2. What general experience has the Federal Office for Migration and Refugees had so far with asylum applications lodged by deserters and/or conscientious objectors who based their asylum application on the fact that they would face political persecution on the grounds of their refusal to undertake military service?
 - a) What criteria does the Federal Office for Migration and Refugees use to investigate whether conscientious objectors are entitled to protection?

An investigation of whether a conscientious objector threatened with punishment is entitled to protection is based on the general criteria applying to the recognition of refugees. Punishment itself does not routinely constitute sufficient grounds for a person to be recognised as a refugee or having a right to asylum. However, it becomes relevant in terms of asylum or refugee law if it is used deliberately against certain people on the grounds of their religion, political conviction or any other reason for persecution. The exceptional severity of a threatened punishment routinely gives cause to examine whether it constitutes persecution (*polit malus*).

If the punishment is not linked to a reason for persecution, subsidiary protection status may be considered, e.g. if a conscientious objector is threatened with the death sentence, torture or inhuman treatment..

- b) Has the Federal Government made efforts to record statistically the experience gathered so far in order to evaluate it in terms of necessary consequences (please give details as appropriate)?

Grounds for asylum are not recorded statistically.

- 3. What experience has the Federal Office for Migration and Refugees had with asylum applications lodged by conscripts or active soldiers who based their applications on fear of prosecution in their home country for refusal to follow orders which would induce them to commit or be complicit in a crime?

- a) What criteria does the Federal Office for Migration and Refugees use to examine the entitlement of such refugees to protection?

The general criteria for the recognition of refugees and entitlement to asylum apply (see answer to question 2 a).

In examining the conditions for recognition of refugee status, account is also taken of Section 60 (1) sentence 5 of the Residence Act (AufenthG), in conjunction with Article 9 (2) letter e and (3) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive – OJ L 304 of 30 September 2004, page 12). Under these provisions the granting of refugee status can also be considered in the case of a soldier who is threatened with prosecution because he refuses to commit a crime against peace, a war crime, a crime against humanity, a serious non-political crime or an act which is contrary to the purposes and principles of the United Nations. In this case, too, recognition as a refugee is also contingent on the prosecution being linked to a reason for persecution (e.g. religion, political conviction).

If the punishment is not linked to a reason for persecution, subsidiary protection status may be considered. A soldier who refuses to commit a war crime or other serious crime is behaving lawfully. Punishment for this behaviour routinely constitutes a demeaning or inhuman punishment.

- b) Has the Federal Government made efforts to record statistically experience gathered so far in order to evaluate it in terms of necessary consequences (please give details as appropriate)?

Please refer to the answer to question 2 b).

- 4. In the view of the Federal Government, to what extent does prosecution of members of the military who refuse to carry out orders, the performance of which would with a high degree of probability or possibly – please differentiate – constitute a crime or complicity in a crime constitute political persecution or justify a need for protection in the meaning of the Qualification Directive?

According to the wording of Article 9 (2) letter e of the Qualification Directive, prosecution or punishment on the grounds of refusal to undertake military service in a conflict can only constitute an act of persecution

if the military service would include crimes against peace, war crimes, crimes against humanity, serious non-political crimes or acts which are contrary to the purposes and principles of the United Nations. The mere possibility that military service could include such a crime or act does not, accordingly, suffice. For the rest, please refer to the answer to question 3a).

5. In the view of the Federal Government, to what extent is the refusal of a soldier to obey orders to take part in a war which is in breach of international law covered by the protection contained in the Qualification Directive, and to what extent

- a) does this refer to participation in a war which is in breach of international law,

Refusal to take part in a war which is in breach of international law may lead to the granting of refugee status if participation in the war qualifies as a crime against peace or as an act which is contrary to the purposes and principles of the United Nations and if the threatened punishment is connected with a reason for persecution. Crimes against peace and acts which are contrary to the purposes and principles of the United Nations can in principle only be committed by persons who hold a position of power within a state or comparable structure and who can hence exert a decisive influence on (war) policy (cf. Reinhard Marx, *Kommentar zum Asylverfahrensgesetz*, 7th edition, Section 3, marginal notes 21, 22 and 51).

- b) does this refer to participation in a (war) crime in an armed conflict which may be legal under international law?

Refusal to participate in (war) crimes in a conflict which is legal under international law may lead to the granting of refugee status if the acts in questions are war crimes, crimes against humanity or serious non-political crimes.

- c) What degree of certainty or probability must exist to ensure that desertion or refusal to obey an order falls within the protection of the Qualification Directive?

Please refer to the answer to question 4.

6. What international declarations, agreements, conventions etc supported by Germany promote recognition of conscientious objection as a human right and how is it ensured that these agreements and declarations are translated into German refugee and/or residence legislation?

The Federal Government has given its backing to a series of resolutions of the UN General Assembly and the UN Commission on Human Rights, as well as its successor organisation, the Human Rights Council, which contain statements regarding refusal to undertake military service in a conflict. The latest such resolution is the resolution adopted by consensus in 2004 by the Commission on Human Rights (which preceded the Human Rights Council until 2006) (CN.4/2004/L. 54).

German asylum law practice is consistent with these resolutions. No unrestricted right to refuse military service can be construed from these resolutions or from the rest of international law.

7. In the view of the Federal Government, to what extent does the protection afforded by the Qualification Directive cover a case in which a state massively curtails the right of soldiers to refuse to undertake military service through restrictive rules of procedure and brings criminal prosecutions against those who absent themselves from military service?

a) To what extent does this apply if the soldiers in question cite conscience as grounds for refusing to undertake military service?

According to the Qualification Directive, refusal to undertake military service for reasons of conscience is not yet in itself reason for recognition as a refugee.

b) To what extent does this apply if the soldiers in question cite conscience as grounds for refusing to undertake military service only in a particular situation – in particular, refusal to participate in a war of aggression or war crimes?

Please refer to the answer to a) and to question 5.

c) To what extent can a claim to asylum or other protection under the terms of the Geneva Refugee Convention and/or the Qualification Directive be derived from the prosecution of such soldiers?

Please refer to the answer to question 3a).

8. Does the Federal Government see the need to adapt German asylum and/or refugee law in this respect (please explain and justify as appropriate)?

No.

9. In the view of the Federal Government, to what extent do prisoner abuse, the use of chemical weapons and the bombing of assemblies of civilians (as reported in the context of the behaviour of the US army in Iraq) constitute breaches of international law and/or international humanitarian law or crimes?

The Federal Government rejects the suggestion contained in the question. For the rest, it makes reference to Common Article 3 of the Geneva Convention of 12 August 1949, the Protocol of 17 June 1925 on the prohibition of the use of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, as well as the Convention of 13 January 1993 on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction.

10. In the view of the Federal Government, to what extent does the criminal prosecution of soldiers who refuse to carry out orders to commit acts contrary to international law or provide support for them constitute a case of persecution in the meaning of the Qualification Directive?

Please refer to the answer to question 3a).

11. Does the Federal Government know how many soldiers belonging to foreign armed forces who are stationed at German bases have deserted since the beginning of the Iraq war and may still be living in Germany?

The Federal Government does not know how many foreign soldiers have deserted and may still be living in Germany.

12. What consideration has the Federal Government given so far to the consequences in this regard for residence and asylum legislation?

Please refer to the answer to question 8.

13. What treaties and agreements have been signed between Germany and the USA on dealing with US deserters and conscientious objectors and what consequences in terms of refugee status do these have for US deserters and conscientious objectors in Germany?

There are no bilateral treaties or agreements between the Federal Republic of Germany and the United States of America on dealing with US deserters and conscientious objectors. Likewise, there are no special conditions relating to the treatment of conscientious objectors or of criminal acts relating to military service (such as insubordination or evasion of compulsory military service) in the agreements which define the status of US soldiers in Germany, the NATO Status of Forces Agreement (SOFA) and the SOFA Supplementary Agreement. In accordance with the division of jurisdiction between the Sending State and Receiving State provided for in Article VII of the SOFA agreement, the military authorities of the Sending State (USA) have the right to exercise exclusive jurisdiction in criminal matters over persons subject to the military law of this state in respect of acts which are subject to prosecution under the law of the Sending State (USA) but not under the law of the Receiving State (Germany).

No special factors in terms of refugee policy apply to American deserters or conscientious objectors who apply for asylum in Germany.

14. Is the Federal Government in contact with the US government to discuss how to deal with US deserters in Germany and, if so, what understanding has been reached or is the Federal Government seeking to reach?

No.

15. What consequences does the possible threat of the death penalty in the USA on soldiers who desert in wartime have for the asylum and/or deportation process?

The Federal Government points out that it is lobbying actively for the worldwide abolition of the death penalty.

If an asylum-seeker makes a credible case that he faces the threat of the death penalty, this can lead in the asylum process – depending on the circumstances of the case in question – to the granting of refugee status or subsidiary protection status.

The threat of the imposition or enforcement of the death penalty is grounds to refuse deportation.

- a) Can the Federal Government exclude the possibility of the US armed forces internment of US soldiers on German soil (in particular in the military prison in Mannheim) for desertion, insubordination, absence without leave or other relevant offences and transporting them to the USA?

In cases in which the military authorities of the Sending State exercise jurisdiction over members of its armed forces, particularly with respect to acts which are liable to prosecution under the law of the Sending State but not, however, under the law of the Receiving State (Article VII (2) (a) of the NATO SOFA agreement), the authorities of this state are entitled to detain in custody members of its armed forces (Article 22 of the SOFA Supplementary Agreement). This applies to custody in premises belonging to the US armed forces in Germany and likewise to transport to the USA for prosecution.

- b) Can the Federal Government exclude the possibility of such soldiers being threatened with the death penalty and, if not, what efforts is it making to exclude this possibility in the future?

According to Article VII (7) (a) of the NATO SOFA agreement, death sentences may not be carried out by the authorities of the Sending State in Germany. Article 18 A of the SOFA Supplementary Agreement states that the authorities of the Sending State may not conduct any prosecution in the Federal Republic of Germany which may lead to the imposition of the death penalty in the Federal Republic of Germany. The Federal Government has no possibilities at its disposal under basing law to exert influence on prosecution procedures in the USA.

elektronische Vorab-Fassung*