GENEVIEVE ZINGG, No man's land: Syrian asylum seekers and the status of military deserters under international refugee law

Since 2011, an estimated 100,000 soldiers have deserted Syria's national army, a conscripted force for men over the age of 18. The majority of Syria's military deserters are suspected to have fled the country to seek international protection abroad, raising several critical questions about the status of former military personnel under international refugee law. Using the Syrian army controlled by President Bashar al-Assad as a case study, this article examines the laws governing military desertion and draft evasion, and investigates relevant issues including forced recruitment, military service that involves war crimes or 'acts contrary to the basic rules of human conduct', and the use of torture as a penalty for disobedience or desertion. This paper argues that the right of former military personnel to successfully claim international protection is compromised by unclear and ambiguous laws. Developing a clear and specific legal framework for military deserters claiming asylum is imperative in order to ensure that groups vulnerable to forced military service are adequately protected under international law.

As the Syrian civil war progresses into its sixth year, the protracted and brutal nature of the conflict has caused upwards of 100,000 men to desert the Syrian Arab Armed Forces (Washington Post 2015). Coupled with high rates of death, defection to rebel factions and draft evasion, the numbers are significant. Overall, it is estimated that the Syrian army has shrunk from 300,000 personnel in 2011 to between 150,000 and 180,000 in 2016; by approximately 30-50% (Reuters 2014). The majority of deserters and draft evaders have presumably fled the country to seek international protection abroad, though precise figures are elusive. According to a fact-finding report published by the Finnish Immigration Service in 2016, Syrian deserters generally abandon or destroy their military books, tags, and identification as a protective measure in case they are stopped by Assad forces, and further to present as civilians when applying for refugee status so as to avoid any potential security concerns.

The high volume of military desertion in the context of the Syrian refugee crisis raises several critical questions about the status of former military personnel under international law. While the topic has been addressed within jurisprudence¹⁰, former military personnel nonetheless remain unrecognised as a discrete, specially recognised group under international refugee law. Rather, military deserters and draft evaders fall into the broader category of political persecution, one of five grounds for refugee status as stipulated by the 1951 Refugee Convention. To successfully obtain international protection as a refugee, military deserters must establish a nexus with one of the five Convention grounds rather than relying on a broad category, such as compulsory

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¹⁰ See: Ates v. Canada (Minister of Citizenship and Immigration), 2004 FC 1316, Canada: Federal Court, 27 September 2004, available at: http://www.refworld.org/docid/47177d36d.html [accessed 20 November 2016]; Ayegh v. Sweden, 4701/05, Council of Europe: European Court of Human Rights, 7 November 2006, available at: http://www.refworld.org/docid/45d5c67e2.html [accessed 20 November 2016]; Azaab v. Minister for Immigration and Citizenship, [2009] FCA 248, Australia: Federal Court, 27 March 2009, available at: http://www.refworld.org/docid/4b2915912.html [accessed 20 November 2016]; B. A. c. France, Requête no 14951/09, Council of Europe: European Court of Human Rights, 2 December 2010, available at: http://www.refworld.org/docid/4d42ad7a2.html [accessed 20 November 2016]; Said v. The Netherlands, 2345/02, Council Europe: European of Human Rights, 2005, of Court 5 July available http://www.refworld.org/docid/42ce6edf4.html [accessed 20 November 2016]; Savda c. Turquie, Requête no 42730/05, Council of Europe: European Court of Human Rights, 12 June 2012, available at: http://www.refworld.org/docid/4fe9a9bb2.html [accessed 20 November 2016]

military service. According to a 1999 UNHCR report regarding deserters originating from the former Yugoslavia, 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 (UNHCR 1999). Though they are expected to abide by overarching principles of international human rights law, conscription and punishment for draft evasion or desertion fall under the national jurisdiction of a state. As such, a claim for refugee status on the basis of avoiding mandatory military duty or fear of being punished for failing to comply with compulsory duties does not itself amount to persecution.

In 1995, the United Nations Commission on Human Rights resolution 1995/83 recognized the right of individuals to have conscientious objections to military service in the context of conscription. This was further developed in 1998 when resolution 1998/77 recognized that 'persons [already] performing military service may develop conscientious objections' (OHCHR 1998) and further implored states to grant asylum to conscientious objectors fearing persecution for their refusal to bear arms. To obtain asylum on these grounds, an individual must first prove the genuity of his beliefs and clearly demonstrate how participation in military action would be acting in a manner contrary to sincerely held political, religious or moral convictions. Second, in demonstrating the forced nature of the military service, the applicant must show that the State provides no accommodation for conscientious objectors, such as the option of administrative duties. Despite encouragement from international bodies to recognize the right of conscientious objectors to protection, many states have established 'jurisprudential barriers' blocking objectors from successfully claiming asylum (Musalo 2007). In practice conscientious objectors are often denied protection due to the ambiguous nature of the law in this area, with the US for instance employing 'an overly formalistic nexus analysis' and Canada adopting 'a troubling approach to determining whether the military service is condemned by the international community...' (Musalo 2007).

However, refugee status is attainable when the avoidance or desertion of compulsory military service stems from political views held by the individual. In the context of the Syrian civil war, individuals who have actively evaded their draft call or deserted their post would subsequently be perceived as opposing the government. According to the UNHCR's International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update IV, persons perceived to be in political opposition to the government are considered 'high risk' and therefore 'likely deserving of international protection' (UNHCR 2015). Individuals that fall into this category include members of political opposition parties; protesters, activists, and others perceived to be sympathising with the opposition; members of anti-government armed groups; draft evaders and deserters from the Armed Forces (UNHCR 2015). In order to successfully obtain refugee status and protection, then, military deserters must prove that members of the political opposition are subject to persecution by the state. In the Syrian context, the risk of persecution for desertion would not be difficult to establish. Several reports published from 2012 onward by the UN Human Rights Council's independent international commission of inquiry on the Syrian Arab Republic and prominent NGOs including Amnesty International and Human Rights Watch have documented the Assad regime's use of torture, execution, and arbitrary detention against deserters (OHCHR 2012).

Military service is evidently not in itself grounds for obtaining international protection. However, when the service is of a forced nature like conscription or compulsory duty, desertion becomes

an act of political defiance. It is imperative to view the desertion of a conscripted force, like the Syrian army, for men over the age of 18, as a conscious political decision defying the authority of the state. When desertion is viewed as a type of conscientious objection, claimants can be found in danger of persecution based on political opinion and can therefore claim international protection on an established Convention ground.

However, even if the risk of persecution based on political opposition is established, a military deserter will not necessarily be found deserving of international protection. Another issue blocks former military personnel from straightforward asylum claims. Under the exclusion clauses enumerated in Article 1F of the Convention, parties to war crimes, crimes against humanity, or serious non-political crimes are generally excluded from refugee status (UNHCR 1997). This is subject to the nature of the acts performed or ordered by the asylum seeker and the level of responsibility of the individual (UNHCR 1999). Determining the applicability of the exclusion clause requires a process of 'questioning in these areas and a careful analysis of the implications of the answers' (UNHCR 1999) - rendering the clause vulnerable to arbitrary application. The lack of a clearly defined legal framework determining how military chains of command are treated in the evaluation of asylum claims, and to what extent responsibility for war crimes is (or should be) borne by conscripted soldiers, leaves deserters at risk of arbitrary treatment under the law

Military deserters are vulnerable to ambiguous laws that leave them at risk of international persecution rather than protection. Subjected to a wide range of human rights violations and lengthy periods of arbitrary detention in poor conditions, it can certainly be argued that all refugees face varying degrees of punishment and persecution throughout the asylum seeking process. However, deserters applying for refugee status take the risk of being found to have perpetrated or been complicit to war crimes, and can face lengthy re-entry bans as a result.

The asylum claim of a deserter is further complicated by the nature of the military and the regime it serves. More specifically, the consensus of the international community as to the legal and political legitimacy of the state itself has a significant impact on the individual's claim for protection. Though states have the legitimate authority to conscript citizens, the processes used to establish, apply and enforce conscription are expected to conform with fundamental democratic principles. The purpose and intent of the armed force is subject to similar standards of international scrutiny and review. Accordingly, a claim made by a deserter who served a compulsory military force deployed by a dictatorial regime and used to 'defend institutions and policies unrelated to accepted human rights standards, or utilized for internal or external aggression...' (Jaeger 1983) is markedly different from that of a freely consenting militant who participated in warfare conducted within the boundaries of international law. The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (1992) states that an individual facing punishment for deserting a type of military action 'condemned by the international community as contrary to basic rules of human conduct' could in itself be regarded as persecution. Thus the refusal to participate in military service on the basis of illegitimate political purposes qualifies an individual for asylum and refugee status.

An example of the role of international condemnation can be found in 1979, when the United Nations General Assembly urged members of the international community to grant asylum to

persons refusing military service in South Africa because they were being forced to uphold apartheid, thereby violating basic human rights. A further example is seen in *Zolfagharkhani v. Canada*, a 1993 case in which an Iranian soldier deserted military service due to chemical warfare being used against the Kurds. His asylum claim on the grounds of political opinion was granted due to the 'total revulsion of the international community to all forms of chemical warfare and that such warfare was now contrary to customary international law' (*Zolfagharkhani v. The Minister of Employment and Immigration 1993*). The sustained and widespread international condemnation of the conduct of the Syrian armed forces, most notably for its use of chemical agents including chlorine bombs and sarin gas, should be parallel to this precedent, and should be taken into account when evaluating asylum claims lodged by deserters of the Assad regime.

While military deserters can claim asylum under international refugee law based on the Convention ground of political persecution or conscientious objection, a brief survey of recent case law indicates the risk posed by such an ambiguous patchwork of laws and directives. For example, in September 2015 Slovenia's Ministry of the Interior refused refugee status to a Syrian military deserter due to his inability to provide evidence of his personal conscription (I Up 47/2015). The decision was subsequently overturned on appeal to the country's Supreme Court, which based its ruling on reports that the Syrian '... government and the opposition are committing crimes against the civil population' and 'available information' regarding the death penalty for deserters. The difference in reasoning between the two decisions demonstrates a lack of clarity as to what extent asylum claims should be evaluated on a personal basis, what weight general factors and country conditions should carry, and how the likelihood of future persecution should be measured against evidence of past persecution.

Similarly, in June 2016, Hungary rejected the asylum claim of a Turkish army deserter and declared that he could be returned to Turkey (30.K.31.507/2016/8). The Court subsequently quashed the decision on appeal, ruling that the lower decision had failed to properly assess the fact that the claimant was a military deserter, and ordered a new procedure. The lack of consistency between judicial bodies in determining the claims of military deserters highlights the need for further development in this area of the law.

Developing and tightening the legal framework concerning military desertion, particularly in the case of forced recruitment or conscription, is necessary to counterbalance the worrying gap in protection deserters are exposed to. Currently, the ambiguous language and unclear standards covering military desertion in international refugee law has resulted in a lack of consistency at the national level, and allowed states to unilaterally deny protection to deserters based on their own interpretations of the law. The international community should use the protection of deserters as a mechanism to welcome and promote the condemnation of war crimes and illegal armed conduct by combatants themselves, which could arguably be a useful tool in dismantling the forces relied on by aggressive or dictatorial regimes. Ultimately, the right of military deserters to international protection should be strengthened by establishing an explicit set of international directives to be universally and consistently applied. Military deserters refusing to participate in armed conduct condemned by the international community deserve clearer and more robust protection under international refugee law.

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Bibliography

HUMAN RIGHTS WATCH (2011) 'By All Means Necessary: Individual and Command Responsibility for Crimes against Humanity in Syria', 15 December 2011. Available from: https://www.hrw.org/report/2011/12/15/all-means-necessary/individual-and-command-responsibility-crimes-against-humanity.

JAEGER, **G.** (1983) The Definition of Refugee: Restrictive versus Expanding Trends, World Refugee Survey.

MUSALO, K. (2007) 'Conscientious Objection as a Basis for Refugee Status Protection for the Fundamental Right of Freedom of Thought, Conscience, and Religion', *Refugee Survey Quarterly* 26(2):69-78.

REUTERS (2014) 'Assad's army stretched but still seen strong in Syria's war', 18 September 2014. Available from: http://www.reuters.com/article/us-syria-crisis-military-idUSKBN0HD0M420140918.

UN COMMISSION ON HUMAN RIGHTS (1998) *Conscientious objection to military service*, 22 April 1998, E/CN.4/RES/1998/77. Available from http://www.refworld.org/docid/3b00f0be10.html.

UN GENERAL ASSEMBLY (1979) 'Policies of *apartheid* of the Government of South Africa', 93rd plenary meeting, 24 January 1979, A/RES/33/183. Available from: http://www.un.org/documents/ga/res/33/ares33r183.pdf.

UNHCR (1999) Deserters and Persons avoiding Military Service Originating from the Federal Republic of Yugoslavia in Countries of Asylum: Relevant Considerations, 1 October 1999. Available from: http://www.unhcr.org/cgibin/texis/vtx/search?page=search&docid=3c3c480e5&query=handbook%20refugee%20status.

UNHCR (2003) Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003, ('UNHCR Exclusion Guidelines'). Available from: http://www.unhcr.org/refworld/docid/3f5857684.html.

UNHCR (2014) Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/13/10, 12 November 2014. Available from: http://www.unhcr.org/529efd2e9.pdf.

UNHCR (2011) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee, (reissued, Geneva, 2011), ('UNHCR Handbook'). Available from: http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf.

UNHCR (2015) International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic: Update IV (November 2015). Available from: http://www.refworld.org/docid/5641ef894.html.

UNHCR (1997) Standing Committee, Note on the Exclusion Clauses EC/47/SC/CRP.29, 30 May 1997. Available from: http://www.unhcr.org/excom/standcom/3ae68cf68/note-exclusion-clauses.html.

WASHINGTON POST (2015) 'The Syrian military has thousands of deserters. New research tells us why they left', 17 December 2015. Available from: https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/17/talking-to-assads-military-deserters/

Case Law

Ates v. Canada (Minister of Citizenship and Immigration) [2004] FC 1316, Canada: Federal Court

Ayegh v. Sweden, 4701/05, [2006] Council of Europe: European Court of Human Rights

Azaab v. Canada (Minister for Citizenship and Immigration), [2009] FC 248, Australia: Federal Court

B.A. v. France, Requête no. 14951/09 [2010], Council of Europe: European Court of Human Rights

Hungary - Metropolitan Court of Public Administration and Labour [2016] 30.K.31.507/2016/8, European Database of Asylum Law

Said v. The Netherlands, 2345/02, [2005] Council of Europe: European Court of Human Rights

Salibian v. Canada (Minister of Employment and Immigration) [1990] 3 F.C. 250 (C.A.)

Savda v. Turquie, Requête no. 42730/05, [2012] Council of Europe: European Court of Human Rights

Slovenia - Supreme Court of the Republic of Slovenia, [2015], Judgment of I Up 47/2015. European Database of Asylum Law

Zolfagharkhani v. Canada (Minister of Employment and Immigration) 3 F.C. 540, [1993]