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**Between inclusion and exclusion:
Protection under EU law for Russians refusing to
perform military service**



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PROTECT POLICY BRIEF

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Between inclusion and exclusion: Protection under EU law for Russians refusing to perform military service

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1. Introduction

Following Russia's announcement of a [partial mobilisation of 300,000 Russian personnel](#) on 21 September 2022, thousands of Russian men of fighting age are seeking to leave the country. Long queues were [reported](#) at border crossing points with Georgia and Finland, while wealthy individuals [reportedly](#) pay up to £25,000 for a seat on a private plane to Armenia, Turkey or Azerbaijan. In response to this, Latvia, Lithuania and Estonia indicated that they [will not offer refuge to any Russians fleeing Moscow's mobilisation of troops](#) due to security concerns. As pointed out by asylum lawyers – for example Alasdair Mackenzie of Doughty Street Chambers on [Twitter](#) – however, Russians refusing military service may well be entitled to asylum, seeing as there is evidence of Russian troops committing war crimes in Ukraine. [Germany](#), on the other hand, has stated that it will accept their asylum applications if they can get there. Which states are right?

As we will show in this policy brief, in both international refugee law and in EU law, people fleeing punishment or persecution for seeking to avoid conscription to fight in a conflict in which war crimes are taking place are entitled to seek and enjoy protection as a refugee. EU states which seek to hinder or prevent entry and asylum claims from persons fleeing punishment or prosecution for avoiding being drafted to fight on behalf of a party to a conflict where the [UN Special Rapporteur](#) has found that war crimes are being committed are acting in violation of international and EU law.

Under EU law, asylum applications from individuals refusing to perform military service raise complex legal questions. In this policy brief, we seek to outline and untangle some of the relevant issues.

2. Evidence and analysis

Inclusion and Exclusion

EU law sets out common standards for qualification for international protection (and its contents) in the [2011 EU Qualification Directive](#) (EUQD). The Directive is based on the [1951](#)

[Convention relating to the Status of Refugees](#) (CSR51) and must be interpreted in line with this instrument (Recital 3 EUQD). According to Article 1A(2) of the CSR51 (as amended by its 1967 Protocol), a refugee is any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

However, the CSR51 also contains exclusion clauses in Articles 1D-F. For the present discussion, Article 1F is the most relevant exclusion clause, stating that the provisions of the CSR51 shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The EUQD adopts the CSR51's refugee definition in Article 2(d), while adding that only those individuals 'to whom Article 12 does not apply' will be refugees. We will return to the contents of Article 12 – more specifically Article 12(2) – EUQD shortly. In Article 9(2), the Directive also provides an illustrative list of measures which may constitute persecution, including Article 9(2)(e): 'prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)'. Article 12(2), in turn, excludes a third-country national or a stateless person from being a refugee where 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, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

As such, the EUQD reproduces the CSR51's Article 1F, while making a number of additions. Under Article 9(2)(e) EUQD, a provision which functions as an *exclusion* clause in the CSR51 (and indeed in the EUQD) is turned into a provision which is relevant to the *inclusion* of asylum applicants as beneficiaries of international protection.

All of the reasons for exclusion listed above are potentially relevant to both the inclusion and exclusion of Russians refusing to perform military service.

Article 1F(a)

Article 1F(a) CSR51 lists three different criminal acts. Crimes against peace, war crimes, and crimes against humanity. International criminal law instruments such as the [Charter of the International Military Tribunal of Nuremberg](#) and the [Rome Statute](#) clarify what such crimes entail. According to the Nuremberg Charter, crimes against peace constitute the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.'

War crimes are 'violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.' The Rome Statute lists a number of more specific offences that also constitute war crimes.

Finally, crimes against humanity are 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.' The Rome Statute lists a number of additional examples of what constitutes a crime against humanity, including torture and rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

All of these crimes are potentially relevant in the context of Russia's invasion of Ukraine.

Article 1F(b)

Article 1F(b) CSR51 refers to crimes committed outside the country of refuge prior to admission to that country as a refugee because it is aimed at excluding persons who are trying

to make use of the refugee protection system to evade justice. As [UNHCR](#) notes in its Guidelines on the Application of the Exclusion Clauses,

in determining whether a particular offence is sufficiently serious, international rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime. Thus, for example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not.

UNHCR notes further that ‘a serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed.’

It is conceivable that the provision on serious non-political crimes is also of relevance in the context of Russia’s invasion of Ukraine.

Article 1F(c)

Article 1F(c) excludes persons from refugee status who have committed acts which are contrary to the purposes and principles of the United Nations. This is a very generally-worded exclusion clause and thus, UNHCR cautions in its Guidelines that it should be read narrowly. The purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. For example, the UN Charter states that it seeks ‘to save succeeding generations from the scourge of war,’ ‘to reaffirm faith in fundamental human rights,’ to ‘maintain international peace and security,’ and to ‘develop friendly relations among nations.’ From this it could be inferred that an individual, in order to have committed an act contrary to these principles, she must have been in a position of power in a state and instrumental to her state’s infringing of these principles. UNHCR notes that given Articles 1 and 2 of the United Nations Charter ‘essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts’.

While this provision is the least clear of the three exclusion clauses, it might still be relevant in the context of Russia’s invasion of Ukraine where the applicant in question is in a position of power in Russia.

An individual assessment

When considering the relevance of the above provisions for the inclusion or exclusion of individuals refusing to perform military service in Russia, it should be noted first of all, that anyone claiming asylum in the EU is entitled to an individual assessment of their claim. When considering the applicability of Article 9(2)(e) EUQD, a number of questions will need to be answered. Is the applicant at risk of prosecution or punishment for refusal to perform military service? Does the military service in question entail a risk of committing the crimes and acts falling within the scope of Article 1F CSR51/Article 12(2) EUQD? In [C-472/13](#), the CJEU has held that only individuals who would ‘sufficiently directly and reasonably plausibly’ be involved in the commission of war crimes can claim protection (para 38) and that refusal to perform military service ‘must constitute the only means by which that applicant could avoid participating in the alleged war crimes’ (para 44). In this context, it is also important to consider the applicable standard of proof. It is generally accepted that the standard of proof for inclusion as a refugee is low, entailing a ‘[reasonable chance](#)’ or as the EUQD puts it in the context of subsidiary protection, a ‘real risk’ (Article 2(f)). The standard of proof under Article 1(F) and Article 12(2) EUQD, on the other hand, is ‘serious reasons for considering’ that someone has committed one of the crimes and acts listed. This is a higher standard of proof than reasonable likelihood/ real risk and care must be taken not to apply the higher standard in the inclusion context.

Assuming that there is a real risk that an individual will be prosecuted or punished for refusal to perform military service and assuming that there is also a real risk that this will entail committing the relevant crimes and acts, another requirement must be fulfilled for recognition as a refugee. There must be a connection between the persecution feared and the applicant’s race, religion, nationality, political opinion or membership of a particular social group. Individuals fleeing military service in Russia may be able to establish this connection in a number of ways. For example, there are reports of the mobilisation [targeting in particular ethnic minorities](#). Membership of such a group may establish a sufficient link to the Convention grounds race or nationality. Further, in [C-238/19](#), the CJEU stated that ‘in many situations, refusal to perform military service is an expression of political opinions – whether they consist of the rejection of any use of military force or of opposition to the policy or methods of the authorities of the country of origin – or of religious beliefs, or is motivated by membership of a particular social group. In those cases, the acts of persecution to which that refusal may give rise are also linked to the same reasons’. As with all other elements of the determination of eligibility for refugee status, an individual assessment is required here.

Assuming then that a nexus to one or several Convention grounds can be established, it must nevertheless still be assessed whether the individual in question should be excluded from refugee status. Thus, if there are ‘serious reasons for considering’ that the individual in question has already committed any of the relevant acts and crimes, this person will be excluded from refugee protection. It should be noted that the same reasons for exclusion also apply in the context of subsidiary protection under the EUQD (Article 17). In addition, Article 17(d) provides for exclusion from subsidiary protection status where the applicant ‘constitutes a danger to the community or to the security of the Member State in which he or she is present’. With regard to determination of eligibility for refugee status, however, security reasons do not play a role when it comes to exclusion. It should nevertheless be noted that refugee status may be revoked for security reasons (Article 14(4)). However, an outright refusal of protection based on security ground as apparently envisaged by certain Member States is not in line with EU law.

3. Policy implications

The question whether individuals fleeing military service in Russia can be recognised as refugees under EU law raises a number of complex questions. Relevant questions include whether the applicant is at risk of prosecution or punishment for refusal to perform military service; whether this military service will entail a risk of committing war crimes and other acts leading to exclusion from refugee status; whether a nexus to Refugee Convention grounds can be established; and whether rather than being included as a refugee, the person in question should be excluded from refugee status for already having committed any of the relevant crimes and acts.

Based on the fact that the Russian military’s actions in Ukraine may well fall within the scope of Article 1F CSR51/ Article 12(2) EUQD, there is a strong presumption that individuals fleeing military service in Russia may be eligible for refugee status both in international and EU law. Such individuals must be allowed to arrive at the border and to make an asylum claim. An individual assessment of the asylum claim must then be conducted in each case.

4. Project Identity

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- Horizon 2020
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