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1. Is the act a sufficiently severe violation of human rights, taking one of the following forms?

Article 9(2) QD specifically mentions certain forms which can, inter alia, qualify as persecution where the required threshold of Article 9(1)(a) or (b) QD is met.

a. Acts of physical or mental violence, including acts of sexual violence. Acts of physical or mental violence qualify as persecution if they are of such intensity that they substantially infringe an individual's physical integrity or mental capacity of independent decision-making.

b. Legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner.

c. Prosecution or punishment which is disproportionate or discriminatory.

Specific considerations

Can prosecution qualify as persecution?

Since international protection is not intended to enable persons to escape justice in their country of origin, prosecution or punishment for an offence would not normally entail that a person qualifies as refugee.

However, prosecution could qualify as persecution and result in the qualification of the person as a refugee if one or more of the following applies and the consequences reach the threshold of severity.

- It is conducted in violation of due process of law.
- It is discriminatory. A clear example would be prosecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- The punishment is implemented on a discriminatory basis.
- The punishment is disproportionate.
- The punishment amounts to persecution.

It should also be noted that in addition to fearing prosecution, the applicant may have a well-founded fear of persecution on other grounds. In such cases, particular attention should be given to potential exclusion consideration.

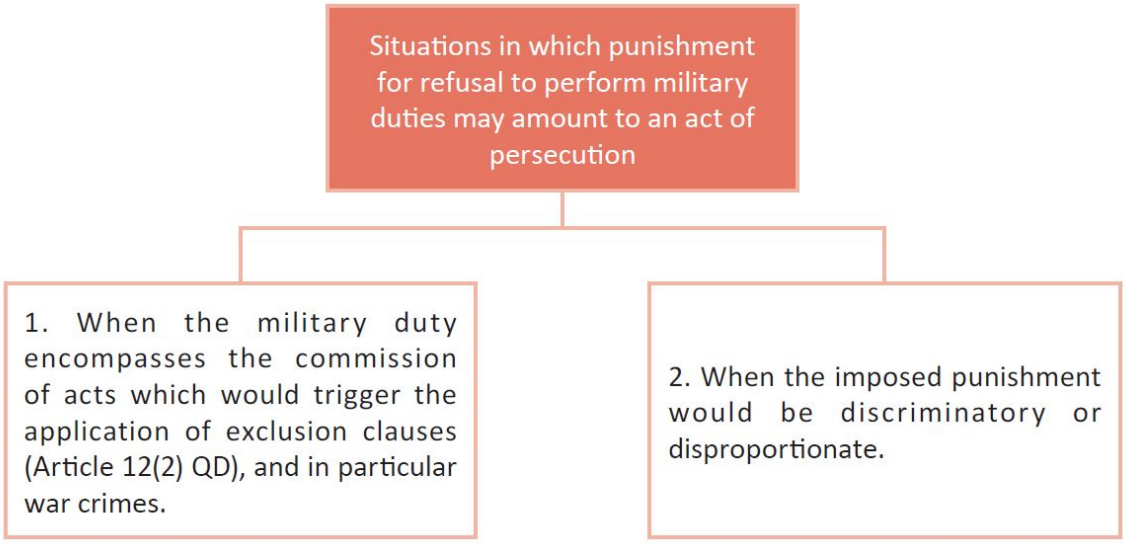
d. Denial of judicial redress resulting in disproportionate or discriminatory punishment.

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.

Specific considerations

Can punishment for refusal to perform military service qualify as persecution?

There are two situations in which punishment for refusing to perform military duties may amount to an act of persecution.



The first scenario is specifically included as a possible form of persecution under Article 9(2) QD.

It includes situations in which the applicant would have participated only indirectly in the commission of war crimes, such as through providing support of substantial effect to the preparation or execution of those crimes. Moreover, it does not exclusively concern situations in which it is established that war crimes have already been committed, but also where there is a sufficient degree of likelihood to give rise to a real risk of being involved in the commission of such crimes.

The assessment should also take into account whether there was an available alternative to refusal to perform military service by means of which the

applicant could have avoided participating in the alleged war crimes.

Additional guidance on evasion of military service is provided in the section ‘Refugee status: reasons for persecution’ (subsection ‘Political opinion’) below.

f. Acts of a gender-specific or child-specific nature.

Acts of a gender-specific nature could involve, for example, sexual violence, genital mutilation, forced abortion or forced sterilisation. Such acts could be committed for different reasons, including with a nexus to race, religion, nationality or political opinion. They could also be gender based and for reasons of membership in a particular social group (see the specific considerations in the section ‘Refugee status: reasons for persecution’ (subsection ‘Membership of a particular social group’)).

Acts of a child-specific nature could include, for example, underage recruitment in the armed forces, child trafficking or child prostitution. They could involve the infringement of specific rights of the child, such as those laid down in the Convention on the Rights of the Child and its optional protocols.

If the act does not fall under one or more of the above, the case officer should still move to consideration under step 2.

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