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## Applying Double Standards: The Preliminary Ruling of the European Court of Justice on Conditions of Granting Asylum to Deserters

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### Fokus

The judgment of the European Court of Justice (ECJ) in the case *André Lawrence Shepherd v. Bundesrepublik Deutschland* generally strengthens the protection of deserters applying for asylum in the European Union, but sets double standards concerning the country of origin of the applicant.

#### Quellen

Judgment of the European Court of Justice (Second Chamber) of 26 February 2015 in Case C-472/13

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011:

<http://www.refworld.org/docid/4f197df02.html>

The preliminary ruling of the European Court of Justice (ECJ) in the case *André Lawrence Shepherd v. Bundesrepublik Deutschland* first of all rules that the refusal to perform military service must constitute the only means to avoid participating in alleged war crimes. This means that if Shephard cannot prove to have tried to obtain the status of a *conscience objector*, he is excluded from protection (para 21 (6)). The court's interpretation of the EU directive is still noteworthy as it generally strengthens the protection of deserters from third states seeking asylum in the European Union, but sets double standards concerning the applicant's country of origin.

US citizen André Lawrence Shepherd applied for asylum in Germany in April 2008 after he had left its unit's military base in Germany to escape being deployed in the war in Iraq for a second time as maintenance mechanic for Apache helicopters. He considered his maintenance of the helicopters as *conditione sine qua non* for breaches of international humanitarian and human rights law. Facing prosecution as deserter, Shepherd unsuccessfully sought protection as refugee in Germany. He appealed the rejection of his application. The German administrative court sent a request to the European Court of Justice for an interpretation of the EU Qualification Directive (Directive 2011/95/EU) about protection for deserters.

Prosecution due to desertion can qualify for refugee status, if the punishment includes discriminatory legal, administrative, police, or judicial measures (Art. 9,2 (b)), if it is disproportionate or arbitrary (Art. 9,2 (c)) or if performing the military service would include war crimes or crimes against humanity (Art. 9,2 (e)). The ECJ interpreted Art. 9,2 (e) as applicable to all kinds of soldiers, concerning indirect as well as direct crimes and also those "highly likely" to be committed in the future. Art. 9,2 (b) and (c), however, are interpreted to be only applicable if the measures taken by the authorities against the deserter constitute a form of personal prosecution as defined in Art. 1 (A) of the Geneva Convention relating to the status of refugees. Both articles are dismissed by stating that the imprisonment of up to five years, which he is facing, would not go "beyond which is necessary for the State concerned to exercise its legitimate right to maintain an armed force" (Judgment of the Court, para. 52) and that ostracism and social disadvantages following the imprisonment are of secondary nature, not a persecution in itself. This contradicts previous decisions of Canadian courts, which have repeatedly ruled in favor of US deserters of the war in Iraq, based on evidence that they would not get a fair trial in front of a martial court in the US and would be punished more harshly if they had spoken out loud against the war. Simply assuming the existence of rule of law within a befriended democracy despite justified reasons to doubt this means applying double standards.

Shephard's primary reason for desertion was to avoid committing war crimes and crimes against humanity. The ECJ judgment challenges the existence of such crimes in Iraq by emphasizing that "an armed intervention engaged upon on the basis of a resolution adopted by that Security Council offers, in principle, every guarantee that no war crimes will be committed and that the same applies, in principle, to an operation which gives rise to an international consensus" (judgment of the Court, para 41.) and considering the prosecution of war crimes by the state who is conducting that operation as evidence of this state generally not committing such crimes. This is a nonobservance of the preliminary examinations currently conducted at the International Criminal Court (ICC) against officials of the United Kingdom for war crimes committed in Iraq. US citizens cannot be held responsible for those crimes because the United States never ratified the Rome Statute: The willingness of the government to prosecute such crimes can therefore be doubted. Again, however, double standards are applied which generally acquit the United States from committing war crimes.

### Verantwortung

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