JUDICIAL JUDGMENT OF THE IRAQ WAR: UNITED STATES ARMED FORCES DESERTERS AND THE ISSUE OF REFUGEE STATUS

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> "It seems, I think, to most Canadians rather strange to say, 'You're a refugee and you're coming from the United States? Aren't you supposed to be coming from some hellhole in South Asia?'"[1]

> "War is hell, and waging it according to the rules of common decency is hellishly difficult. But if we would prefer not to hear shameful allegations from our own deserters and be judged by our neighbors, we cannot lightly dismiss expressions of moral outrage from those who fight for us all."[2]

INTRODUCTION

On July 4, 2008, in an irony of timing, United States (U.S.) military deserters living in Canada received their first victory in the Canadian courts, albeit a qualified one.[3] The Federal Court of Canada reversed and remanded a determination by the Immigration and Refugee Board (IRB), denying refugee status to Joshua Key, a deserter of the United States military and conscientious objector to the war in Iraq.[4] The decision in Key's case is the first of its kind in an unfolding saga, where United States military personnel have sought refugee status based on their objections to the U.S. war in Iraq, the alleged illegality of the conflict itself, and the actions of the U.S. military in waging that war, and the assertion that they will be persecuted by the American government if returned to the United States.

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1 Christian Cotroneo, *Vietnam Vets Aid New Cohort*, TORONTO STAR, Nov. 24, 2005, at A10.

2 Editorial, *Conscience on Trial*, L.A. TIMES, July 14, 2008, at A16.

3 *See* Tu Thanh Ha, *U.S. Deserter Wins Appeal in Fight for Refugee Status*, GLOBE & MAIL (Toronto), July 5, 2008, at A2; Janice Tibbetts, *U.S. Deserter may Qualify for Asylum*, WINNIPEG FREE PRESS, July 5, 2008, at A5; Colin Perkel, *Asylum Bid to be Reheard*, TORONTO STAR, July 5, 2008, at A19.

4 *See* Key v. Min. of Cit. & Immigr., [2008] F.C. 838 (Can.).

Since the decision in Key's case, and in light of the Federal Court's analysis therein, another deserter, Corey Glass, has been granted a stay of removal pending disposition of his appeal from the Board's denial of his refugee claim.[5] The Canadian courts decisions in the Key and Glass cases do not necessarily mark a dramatic shift in the willingness of the Canadian courts to rethink the approach they have traditionally taken to this issue. For example, in another "first," on July 15, 2008, Robin Long was returned to the United States after the denial of his request for an emergency stay of removal. Long became the first United States military deserter to be removed from Canada following the denial of his claims.[6]

Joshua Key, Corey Glass, and Robin Long, along with other high profile deserters such as Jeremy Hinzman and Brandon Hughey, are part of a body of individuals whose numbers are not quite clear. Since the beginning of the Iraq war, it is estimated that there were as many as 5,500 deserters by the end of 2004,[7] 8,000 deserters by March 2006,[8] and 25,000 deserters by March of 2008.[9] Another source estimated that between 2001 and 2006, 19,390 individuals deserted; a number equal to approximately 1 percent of the entire United States Armed Forces.[10] It is presumed that many of these deserters have fled to neighboring Canada, but the exact number is unknown.[11] The War Resisters Support Campaign, "a non-profit coalition of labor groups and community organizations,"[12] estimates that currently there are roughly 225 deserters living in Canada.[13] Others estimate that there may be up to 600 deserters living in Canada, with the majority living underground rather than pressing for

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5 *See* Glass v. Min. of Cit. & Immigr., [2008] F.C. 881 (Can.) [hereinafter *Glass* (PRRA)]; Glass v. Min. of Cit. & Immigr., [2008] F.C. 882 (Can.) [hereinafter *Glass* (H&C)].

6 See Petti Fong, *U.S. Army Deserter First to be Deported*, TORONTO STAR, July 16, 2008, at A20; Ian Austen, *Canada Expels an American Who Deserted During the War in Iraq*, N.Y. TIMES, July 16, 2008, at A13; Rod Mickleburgh, *U.S. Deserter's Incarceration Decried*, GLOBE & MAIL (Toronto), July 10, 2008, at A7; and Rod Mickleburgh, *News of Imminent Deportation Shocks American Army Deserter*, GLOBE & MAIL (Toronto), July 9, 2008, at S3.

7 Cotroneo, *supra* note 1.

8 Marina Jiménez, *U.S. Deserter Seeks Asylum in Canada*, GLOBE & MAIL (Toronto), Mar. 31, 2006, at A15.

9 Ben Ehrenreich, *War Dodgers*, N.Y. TIMES, Mar. 23, 2008, at MM16 (as estimated by the U.S. Dept. of Defense).

10 Mark Larabee, *Soldiers Still Go Over the Hill Even in an All-Volunteer Army*, OREGONIAN, July 16, 2007, at A1.

11 Cotroneo, *supra* note 1.

12 *Id.*

13 Ehrenreich, *supra* note 9.

refugee status through the IRB and the courts.[14] Nonetheless, by the end of March 2006, twenty United States military deserters had filed applications for refugee status in Canada, asserting they would be persecuted if removed.[15]

The course of these applications, through the Immigration and Refugee Board and then through the Federal court system, has elicited strong reactions from both sides of the border, both in support of, and against, the cause of the deserters. Some have trumpeted the cause of these individuals for taking a stand based on their convictions against the alleged immorality and illegality of the Iraq War.[16] Indicative of this view is Olivia Chow, a New Democratic Party MP in the Canadian House of Commons: "To deport courageous war resisters who oppose the illegal invasion of Iraq is saying 'yes' to George W. Bush's war and 'no' to supporting and protecting people seeking peace[.]"[17] Moreover, many Vietnam-era deserters who have remained in Canada have helped the Iraq War deserters with legal advice and adjustment, assisted them in coping with the cultural and public upheaval the war has caused, and have joined them in seeking political solutions to their illegal status in Canada.[18]

Conversely, Major Thomas Earnhardt of the United States Army's 82nd Airborne Division, asserted that "AWOL [absent without leave] and desertion are self-centered acts that not only affect the soldier, but may also adversely effect the safety, security, and discipline of the unit in which the solider was serving."[19] Others have opined that, as these individuals have broken the law of the United States by deserting, they should be punished for that violation and then permitted to go on with their lives.[20] Still others have questioned what there is to fear even

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[14] Andrew Hunt, Op-Ed., *Accepting U.S. Deserters is a Small Step in the Right Direction*, WATERLOO REG. REC., July 12, 2008, at A13; Michael Den Tandt, *U.S. Activist Pressures Canada*, GLOBE & MAIL (Toronto), May 5, 2006, at A10; Michel, *supra* note 8; Jiménez, *supra* note 8.

[15] Jiménez, *supra* note 8.

[16] Kevin Maurer, *Canadian Court Denies Fort Bragg Deserter*, FAYETTEVILLE OBSERVER, Nov. 16, 2007, *available at* 2007 WLNR 22703937.

[17] Wency Leung, *Redefining the Mission: A Soldier Reconsiders*, S. CHINA MORNING POST, Nov. 25, 2007, at 11. *See also* Hunt, *supra* note 14.

[18] Cotroneo, *supra* note 1.

[19] Maurer, *supra* note 16.

[20] *See* Michel, *supra* note 8. "It's our belief that those who have deserted their countries' forces at any time have broken the laws of their country and should be prosecuted as such," quoting Bob Butt, spokesman for the Royal Canadian Legion. "I think that they should throw the deserters back and let them pay the penalty for deserting the armed forces. When their penalty is served, then they can choose to either stay in the United States or anywhere in the world. Basically, you

if "punishment" is forthcoming, as most deserters have been penalized administratively through other-than-honorable discharges, and only a few have been sentenced to imprisonment.[21]

This article addresses the question of whether deserters from the United States military may have colorable claims to refugee status under international law. Despite the incendiary nature of this topic, the issue should be resolved in an objective way, based on prevailing international law instruments, the relevant domestic jurisprudence, statutes and regulations, and any relevant materials from other jurisdictions. Part I of this article will address the relevant provisions of the Refugee Convention and the 1967 Protocol, along with the United Nations High Commissioner for Refugee's *Handbook on Procedures and Criteria for Determining Refugee Status*. Part II will proceed by examining Canadian law and jurisprudence regarding refugee claims generally, as well as its specific approach concerning refugee claims made by deserters. The main cases concerning Iraq War deserters will also be addressed and critiqued in this section. Finally, Part III poses, and attempts to answer, the question of whether, in light of all the foregoing, U.S. military deserters from the Iraq War should be granted refugee status in Canada.

I. THE UNITED NATIONS FRAMEWORK FOR DETERMINING THE STATUS OF REFUGEES

The current international regime regarding the protection of refugees is founded in the 1951 United Nations Convention Relating to the Status of Refugees and the subsequent 1967 Protocol Relating to the Status of Refugees.[22] Subsection A of this Part will examine these two documents, which represent the legal, "positivist" side, of the international protection of refugees. Subsection B will address the interpretive guidance promulgated by the High Commissioner for Refugees in 1979, the *Handbook on Procedures and Criteria for Determining Refugee Status*

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do the crime, you do the time," quoting William Schmitz, editor of the United States' Veterans of Foreign War's newspaper.

[21] *See* Larabee, *supra* note 10.

[22] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The United States has not ratified the Refugee Convention, although it is a party through its accession to the 1967 Protocol. Protocol Relating to the Status of Refugees, *approved* Dec. 16, 1966, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.[23] Although the *Handbook* does not stand on the same legal footing as the Convention itself, it has been found to be an authoritative guide to the international regime of refugee protection and has been recognized as persuasive authority in domestic courts for the purpose of applying the substantive articles of the Refugee Convention and the 1967 Protocol.[24]

A. THE REFUGEE CONVENTION AND THE 1967 PROTOCOL

The immediate animating force behind the Refugee Convention was the need to provide an international framework to deal with the massive displacement of persons occasioned by the Second World War. Considering the destruction wrought by that conflict, the reorganization of national borders and ideological spheres of influence, and the nature and evolution of many of the political forces brought to power around the world in the wake of the Allied victory, it was deemed prudent by the international community to provide a mechanism of international protection for certain individuals against the state. Thus, in certain narrow and well-defined circumstances, an individual would have internationally recognized recourse against an abusive national government. The initial definition of "refugee" was thus a product of this limited intent to address the situation following the end of the Second World War:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who . . . As a result of events occurring before 1 January 1951 and owing to a 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

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[23] United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/Rev.1 (1979) [hereinafter *Handbook*].

[24] *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) ("The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the [Board of Immigration Appeals], or United States courts.") and INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (noting that, although the *Handbook* does not carry the force of law, it does provide significant guidance on the interpretation of the Refugee Convention and the 1967 Protocol). *See also* Chan v. Minister of Employment & Immigration, [1995] 3 S.C.R. 593, 620 (Can.) ("This much-cited guide has been endorsed by the Executive Committee of the UNHCR, including Canada, and has been relied upon for guidance by the courts of signatory nations. Accordingly, the UNHCR Handbook must be treated as a highly relevant authority in considering refugee admission practices.").

> and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[25]

Although this definition suited the immediate needs of the post-war years, over time it took on an anachronistic feel, as the modern world showed a perverse propensity for creating refugee crises. Thus, "[w]ith the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the 1951 Convention applicable to such new refugees."[26]

Accordingly, whereas the Refugee Convention contained temporal limitations commensurate with its initial purpose, the 1967 Protocol sought to establish an enduring regime without any restrictions concerning what events could serve as the basis for a claim to refugee status or when those events had to have occurred:

> For the purposes of the present Protocol, the term "refugee" shall . . . mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . . " and the words . . . "a result of such events," in article 1(A)(2) were omitted.[27]

Thus, by acceding to the 1967 Protocol, "States under[took] to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 dateline."[28] Today, this non-bounded definition of "refugee" is the prevailing international norm.

As with many legal enactments, especially in the international sphere, the Refugee Convention and the 1967 Protocol paint only in broad strokes. They establish a base-line definition for refugee and deal with several other pressing points concerning the scope, nature, and duration of such protection. However, the Refugee Convention and the 1967 Protocol are not exhaustive. They do not cover every conceivable situation that could arise whereby an individual claimed refugee status. To fill these gaps, as well as to give interpretative guidance to states parties, the United Nations High Commission first promulgated the *Handbook* in 1979.[29]

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[25] Refugee Convention, *supra* note 22 art. 1(A)(2).

[26] *Handbook*, *supra* note 23, para. 8.

[27] 1967 Protocol, *supra* note 22, art. I(2).

[28] *Handbook*, *supra* note 23, para. 9

[29] *See id.* Foreword.

B. THE UNHCR HANDBOOK

The purpose of the *Handbook* is to give guidance on interpreting the key provisions of the Refugee Convention. To that end, Chapter II of the *Handbook* addresses the scope of the inclusion clauses of the Convention, giving guidance on the issue of who should be, as an initial matter, considered a "refugee" under the international definition.[30] Chapter III then addresses the scope and application of the cessation clauses (i.e., when refugee protection can be said to cease or be voluntarily relinquished by the individual).[31] Whereas the first two chapters deal with the articles that grant refugee status and define the extent of that protection, Chapter IV addresses the exclusion clauses.[32]

The exclusion clauses are when, pursuant to Article 1(F) of the Refugee Convention, an individual who otherwise would qualify as a "refugee" under the Convention definition will be excluded from such protection if he falls within certain specified classes of individuals:

> (a) [H]e 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.[33]

Thus, even individuals who otherwise fall within the definition of "refugee" contained in Article 1(A) will be excluded if they come within the purview of Article 1(F).

Chapters II through IV deal with general issues. Chapter V, however, deals with so-called "Special Cases." Special cases are situations outside the normal course of those an adjudicator could be expected to confront and in which the individual may or may not come within the purview of refugee status.[34] Subpart B of Chapter V addresses the issue of "Deserters and persons avoiding military service."[35]

The *Handbook* recognizes that military service is compulsory in many, if not most, countries in the world, and that even in those states that do not mandate compulsory military service, desertion is considered

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[30] *Id.* ch. II.

[31] *Id.* ch. III.

[32] *Id.* ch. IV.

[33] Refugee Convention, *supra* note 22, art. 1(F).

[34] *See Handbook*, *supra* note 23, ch. V.

[35] *Id*. ch. V(B).

criminal.[36] The power to call up and maintain armies is considered a necessary and proper component of state sovereignty, and one to whose end the state may compel compliance.[37] Any prosecution and punishment the individual receives, or fears, for evading service or desertion will not constitute persecution or entitle the evader or deserter to "refugee" status.[38] On the other hand, it is not absolute that punishment for evasion of military service or desertion will not constitute persecution. As the *Handbook* recognizes, "[d]esertion or draft-evasion does not [necessarily] exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader."[39] This subpart of the *Handbook* attempts to delineate the circumstances in which an evader or deserter could be deemed to have the requisite well-founded fear of persecution to establish eligibility for refugee status.

The *Handbook* makes clear that fear of combat or a general dislike or aversion to military service is insufficient to bring a deserter within the scope of the Refugee Convention.[40] A deserter, however, may establish refugee status if his desertion is tied to flight based on a protected

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[36] *Id.* para. 167.

[37] *See* Cecilia M. Bailliet, *Assessing* Jus ad Bellum *and* Jus in Bello *Within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum*, 20 GEO. IMMIGR. L.J. 337, 337 (2006) ("Traditionally, all states have the right to call upon their citizens to undertake military service."); Alexandra McGinley, *The Aftermath of the NATO Bombing: Approaches for Addressing the Problem of Serbian Conscientious Objectors*, 23 FORDHAM INT'L L.J. 1448, 1468-69 (2000) ("In general, sovereign nations may call up their citizens for active military duty . . . Compelling military service is ordinarily considered to be well within the powers of a sovereign nation."). *See also* Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988) (noting that national governments possess the "legitimate authority to raise armies").

[38] *See Handbook*, *supra* note 23, para. 23 ("[Penalties for desertion] are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition."); Bailliet, *supra* note 37, at 337 ("A state's prosecution of a person refusing to serve in the military is not usually considered persecution because the interest of the state in maintaining an army is deemed to outweigh the individual's own interests."). *See also* Rodriguez-Rivera v. INS, 848 F.2d 998, 1005 (9th Cir. 1988) ("requiring military service does not constitute persecution"); Espinoza-Martinez v. INS, 754 F.2d 1536, 1540 (9th Cir. 1985) ("[T]here is no indication that this desertion charge threatens the type of persecution that we are to be concerned with in this proceeding. Other than petitioner's own unsubstantiated allegation, there is no evidence to indicate that this is other than a routine, nonpolitical crime of desertion."); Batistic v. Pilliod, 286 F.2d 268, 269 (7th Cir. 1961) (holding that plaintiff's refusal to serve in the Yugoslavian military was insufficient to grant his application to withhold deportation); Chao-Ling Wang v. Pilliod, 285 F.2d 517, 520 (7th Cir. 1960) ("A prosecution before a military tribunal convened pursuant to laws of a foreign state to try offenses committed by a member of the military forces of that country, cannot be construed to be physical persecution under the statute,"); *Arteaga*, 836 F.2d at 1232 ("This court has rejected persecution claims based on the threat of conscription into a national army . . .").

[39] *Handbook*, *supra* note 23, para. 167.

[40] *Id.* para. 168.

ground; for example, if his desertion is concomitant with fleeing persecution in his country of nationality based on race, religion, nationality, membership in a particular social group, or political opinion.[41] On this reading, paragraph 168 embodies the unexceptional proposition that desertion may be tied to a genuine fear of persecution based on a Convention ground, and that refugee status should not be denied simply because the individual is also a deserter or evader of military service. A deserter may also establish refugee status if he can show that he would suffer disproportionate punishment for the offense of desertion on account of a protected characteristic, or if there is a risk of harm "above and beyond" that to be inflicted based on the military offense, and this additional harm is motivated by a protected characteristic.[42]

Paragraphs 168 and 169 focus on refugee status pursuant to Article 1(A)(2) and the application of that definition to specific examples, including deserters. Pursuant to paragraph 168, if an individual can otherwise establish refugee status, the fact that he may also be a deserter will not bar the extension of protection. Pursuant to paragraph 169, if an individual can demonstrate that he will suffer harm that surpasses what would usually be expected as punishment for his offense, and that harm is connected to a Convention ground, he may be able to establish refugee status. These examples of application, although taking into account an individual who would fall outside the normal course of refugee flows, do not represent any special analysis regarding whether an individual can establish refugee status. Rather, they make clear that refugee status will be available to a deserter who can otherwise demonstrate past persecution or a fear of future persecution.

Paragraphs 170 and 171, however, represent specific analyses of the special case presented by military service evaders and deserters, and have been the central focus of the IRB and Canadian courts regarding U.S. military deserters and whether they are eligible for refugee status. Paragraph 170 reads:

> There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e., when a person can show that the performance of military service would have required his participation in military action contrary to

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[41] *Id.* ("He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.").

[42] *Id.* para. 169.

> his genuine political, religious or moral convictions, or to valid reasons of conscience.[43]

Some have argued that this statement represents an international endorsement of the right of absolute conscientious objectors to obtain refugee status based on their views. Furthermore, so long as a genuine conviction can be shown that falls within the scope of paragraph 170, such status should be granted.[44] However, it does not. Paragraph 170 must be read in the context of its two preceding paragraphs and its subsequent paragraph. Paragraph 170 makes clear that, contrary to the situations presented by paragraphs 168 and 169, an individual *may* assert eligibility for refugee status based solely on his desertion and the allegation that his desertion was for reasons of conscience or based on his political, moral, or religious views. Thus, the situation presented by paragraph 170 is distinct from the preceding examples because, as explained earlier, those examples dealt with claims stemming from alleged well-founded fear ancillary to the act of desertion itself. Paragraph 170 simply states that there will also be claims based directly on the desertion of the individual which do not involve other facts or circumstances that could bring the claimant within the purview of Article 1(A)(2).

The claim that paragraph 170 represents endorsement of the rights of absolute conscientious objectors is also severely undercut by paragraph 171:[45]

> Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action.[46]

The first sentence negates any possibility that an absolute conscientious objector could obtain refugee status simply because he is a conscientious

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[43] *Id.* para. 170.

[44] *See, e.g.*, Arthur C. Helton, *Resistance to Military Conscription or Forced Recruitment by Insurgents as a Basis for Refugee Protection: A Comparative Perspective*, 29 SAN DIEGO L. REV. 581, 587 (1992); Kevin J. Kuzas, Note, *Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?*, 31 VA. J. INT'L L. 447, 457 (1991) ("This paragraph embodies the increasingly accepted view that a nation's refusal to recognize the absolute conscientious objection of a pacifist constitutes persecution of that individual.").

[45] For purposes of clarification, an absolute conscientious objector is one who opposes all military actions, whereas selective conscientious objectors "are not true pacifists but claim the right to oppose certain military actions." Kuzas, *supra* note 44, at 454.

[46] *Handbook*, *supra* note 23, para. 171.

objector. Rather, even in the case of an absolute conscientious objector, there must be a further showing before such status may be granted:

> Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.[47]

When a specific military action is so condemned, any punishment a deserter may face will be considered persecution, and refugee status will naturally flow from that determination. But what does condemnation comprise? And what actions are necessarily "contrary to basic rules of human conduct"? Although the *Handbook* establishes this guiding inquiry for determining in what circumstances refugee status may be granted to a deserter solely on the basis of his desertion, it leaves considerable play in the joints, a gap that has been filled by the U.S. courts in the course of hearing such claims, and which has been revisited by the IRB and Canadian courts in the context of the U.S. deserters.

Although paragraph 171 is the focus of the judicial decisions subsequently addressed in this article, it is worth noting the concluding paragraphs of subpart B of the *Handbook*, as well as the guidance provided in subpart C. Paragraphs 172 and 173 of subpart B provide an additional basis for granting refugee status to a deserter and, in conjunction, further undermine the claim that the *Handbook* endorses an absolute right of conscientious objection. Paragraph 172 provides that valid religious beliefs *may* serve as a basis for refugee status *when* it can be shown that those beliefs are not taken into account by the national authority in determining the claimant's fitness to serve in the military.[48] The validity and genuineness of the beliefs notwithstanding, if they are taken into account by the state in its determination, refugee status should not be forthcoming. Paragraph 173 implicitly rejects the arguments of those who would see more expansive protection in paragraph 170. Paragraph 173 notes that international law is developing to grant broader protections, such as recognizing a right of absolute conscientious objection, and that states should feel free to grant such relief under their domestic regimes if they so desire.[49]

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[47] *Id.*

[48] *Id.* para. 172.

[49] *Id.* para. 173.

Subpart C harkens back to the exclusion clauses, and deals with "persons having resorted to force or committed acts of violence."[50] Subpart C and the exclusion clauses are relevant to the deserter who is asserting eligibility for refugee status under paragraph 171, as they may have already seen combat prior to lodging their claim of status. Thus:

> Where it has been determined that an applicant fulfils the inclusion criteria, the question may arise as to whether, in view of the acts involving the use of force or violence committed by him, he may not be covered by the terms of one of more of the exclusion clauses.[51]

If the claimant falls within the exclusion clauses of Article 1(F), even if he could otherwise establish eligibility for refugee status under Article 1(A)(2) of the Refugee Convention and paragraph 171 of the *Handbook*, he will be excluded from international protection. Nonetheless, considering the gravity of this consequence, "the exclusion clauses should be applied in a restrictive manner."[52]

The preceding establishes the international framework for the protection of refugees, from the strictly legal implementation of those obligations in the Refugee Convention and the 1967 Protocol, to the interpretative guidance promulgated by the United Nations High Commission for Refugees. These documents, although embodying principles, ideals, and standards, must be given concrete life by the domestic agencies and courts that have jurisdiction over particular claims of refugee status. Accordingly, in the following section, the Canadian statute and jurisprudence dealing with refugee status will be examined, to determine what concrete rules have emerged from the international baseline.

II. CANADIAN LAW ON REFUGEE PROTECTION AND THE ISSUE OF REFUGEE STATUS CLAIMS BY IRAQ WAR DESERTERS

International law provides only a useful starting point for the issue raised by this article. To answer the question of whether Iraq War deserters should be granted refugee status in Canada, Canadian law provides the focal point for the relevant inquiry. This section proceeds in four parts. Subsection A addresses the relevant articles of the Immigra-

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[50] *Id*. paras. 175-80.

[51] *Id*. para. 177.

[52] *Id.* para. 180.

tion and Refugee Protection Act (IRPA), the primary Canadian statute dealing with immigration.[53] Subsection B provides an analysis of the main Canadian case dealing with the issue of when and under what circumstances a deserter may have a valid claim to refugee status, *Zolfagharkhani v. Canada (Minister of Employment & Immigration)*.[54] Subsection C will address the court cases of several Iraq War deserters, including Jeremy Hinzman, Brandon Hughey, and Joshua Key. Finally, subsection D will address and critique the two instances where Iraq War deserters have prevailed in the Canadian courts.

A. THE IMMIGRATION AND REFUGEE PROTECTION ACT

The Canadian statutory framework for dealing with refugees closely mirrors the United States', with the important caveat that the Canadian statute is, by its own terms, outward looking and focused on that state's international obligations. Thus, where the United States grants "asylum" to applicants who can establish that they fall within the statutory definition of a "refugee," the Canadian statute is focused on who can be, and how one can become, a "Convention refugee." This distinction is largely semantic, as the end result in both systems is nearly identical. It does provide, however, a different frame of reference for the adjudication of cases, subtle as it may be. This referential difference can be seen immediately in the statement of objectives that the Act is meant to advance:

> (a) [T]o recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted; (b) to fulfill [sic] Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement; (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution; (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment; (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings; (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in

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[53] Immigration and Refugee Protection Act (IRPA), 2001 S.C., c. 27 (Can.).

[54] Zolfagharkhani v. Min. of Employ. & Immigr., [1993] 3 F.C. 540 (Can.).

> Canada; (g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.[55]

The Canadian system is not solely concerned with granting asylum to refugees, but rather with granting such protection within broader policy concerns, including the implementation of its international agreements and respect for more idealistic norms, including international human rights and humanitarian law principles.

Under Canadian law, a "refugee" is:

> [A] person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[56]

Canadian law also provides recourse for "persons in need of protection," which embodies both forms of punishment prohibited by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[57] Additionally, Canada excludes certain individuals from status as refugees or "persons in need of protection" if they fall within the purview of Article 1(E) or 1(F) of the Refugee Convention.[58] As with United States law, the burden is on the claimant to establish that they are a refugee or a person in need of protection within the meaning of IRPA.[59]

These provisions are broad and open-ended, and no greater clarity is given by the regulations concerning when a deserter may qualify as a refugee. Like all other countries, the "Canadian authorities do not recognize 'draft evaders' or 'military deserters' *per se* as refugees." The Canadian authorities also do not categorically foreclose refugee eligibility for such individuals.[60] Rather, as the next case will illustrate, the IRB

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[55] IRPA § 3(2).

[56] IRPA § 96.

[57] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85

[58] IRPA § 98.

[59] IRPA § 100(4).

[60] *See* Helton, *supra* note 44, at 590.

and federal courts have looked to the *Handbook* for guidance on when refugee protection should be extended to evaders of military service. It is worth noting, however, that although military deserters have been granted asylum in Canada based solely on their desertion, the only claims that have thus far been granted have been made by individuals coming from countries with mandatory conscription.[61] In other words, there have been no successful claims made by those who voluntarily entered the service and then decided to desert. An examination of the main Canadian case dealing with the issue of refugee status and desertion follows.

B. THE *ZOLFAGHARKHANI* CASE

Despite having been decided fifteen years ago, the Federal Court of Canada's decision in *Zolfagharkhani* remains the seminal account of when an applicant who is avoiding military service may qualify for refugee protection under Canadian law.[62] Zolfagharkhani was an Iranian citizen who had served in the Iranian military for twenty-seven months during the Iran-Iraq War in the 1980's.[63] After his service in the conflict, he was asked to remain in the military for an additional six months and to serve as an ambulance driver in an internal conflict against the ethnic Kurds.[64] Zolfagharkhani "reported for a one-month training course for paramedics, and during the last week of training discovered the apparent intention of his government to engage in chemical warfare against the Kurds. His conscience being troubled by this, he deserted and fled his country."[65] The IRB denied his claim, finding that he did not object to military service in general, or to war against the Kurds specifically, but rather only to the possible use of chemical weapons on the Kurds.[66] Further, the IRB said:

> [T]he claimant was not to engage in any direct combat in the war against the Kurdish movement. His military duties were restricted solely to treatment of the injured and these injured included both the Iranian soldiers and the Kurdish people. The Iranian military did warn the claimant regarding the possibility of injuries caused by chemical warfare, with the clear understanding that chemical wea-

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61 Jiménez, *supra* note 8.

62 *See* Martin Jones, *The Refusal to Bear Arms as Grounds for Refugee Protection in the Canadian Jurisprudence*, 20 INT'L J. REFUGEE L. 123, 133 (2008).

63 *Zolfagharkhani*, [1993] 3 F.C. at 544.

64 *Id*.

65 *Id*.

66 *Id.* at 545.

> pons might be used by both the Iranian and Kurdish military. In effect, the claimant would not be fighting his own brothers, the Kurds, with chemical weapons as alleged, but rather, he would be placed in a role as paramedic where he may be able to help his brothers on both sides of the camp . . . namely, the Iranian soldiers and the Kurdish people . . . this panel does not find good grounds to substantiate the claimant's fear of persecution on the basis of his political opinion, namely his objection to serving as a paramedic in the Iranian military in a war against the Kurdish movement.[67]

Zolfagharkhani appealed the denial to the Federal Court.

The Federal Court first addressed the IRB's determination that Zolfagharkhani did not object to war generally or war specifically against the Kurds. The Federal Court found that the IRB determination was reasonable on the facts in the record.[68] Other than this finding, however, the Court found the remainder of the IRB's factual findings and conclusions to be erroneous.[69]

Before reaching the merits of Zolfagharkhani's claims, the Court had to confront the then preeminent precedent on conscientious objection in Canadian refugee law, *Musial v. Canada (Minister of Employment & Immigration)*.[70] In *Musial*, the IRB denied the claim of a Polish national whose alleged fear of persecution derived from his refusal to serve with the Soviet military in Afghanistan, and the potential punishment he would receive for this evasion.[71] The Federal Court upheld this denial, reasoning, in part, that:

> A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it . . . [T]he Board was right in assuming that a person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.[72]

In *Zolfagharkhani*, however, the Court did not take this statement to be an absolute proposition. Rather, it found that:

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[67] *Id.* at 545-46.

[68] *Id.* at 546.

[69] *Id.* at 547-48.

[70] Musial v. Min. of Employ. & Immigr., [1982] 1 F.C. 290 (Can.).

[71] *Zolfagharkhani*, [1993] 3 F.C. at 548-49.

[72] *Id.* at 549 (citation omitted).

> The essence of the reasoning . . . in *Musial* . . . is . . . that the mental element which is decisive for the existence of persecution is that of the government, not that of the refugee . . . [A] claimant's political motivation cannot alone govern any decision as to refugee status.[73]

Additionally, although it is true that deserters and other military evaders are not *per se* eligible for refugee status under Canadian law, there is also nothing about their circumstances that would categorically exclude them from such protection.[74]

Thus, the Court in *Zolfagharkhani* devised four propositions concerning the proper inquiry to undertake when an individual has claimed a well-founded fear of persecution based on his violation of a law of general applicability (1) the intent of the law, not the subjective motivation of the claimant, will be the central focus in determining the question of persecution;[75] (2) a law of general applicability must, nevertheless, be judged objectively to determine whether it is, in fact, neutral concerning the five protected grounds;[76] (3) laws of general applicability will enjoy a presumption of validity, and the burden is on the claimant to demonstrate otherwise;[77] and (4) the law must actually be persecutory on a protected ground, not simply oppressive or hostile.[78]

In Zolfagharkhani's case, the law of general applicability was the Iranian conscription law.[79] The sole issue before the Court, then, was whether the claimant's objection to the use of chemical weapons against the Kurds, and the potential for punishment because of his desertion on that account, would qualify him as a refugee.[80]

The Court confronted this issue directly and succinctly: "I believe that all that is necessary to dispose of the instant case . . . is evidence of the total revulsion of the international community to all forms of chemical warfare."[81] Noting the evidence presented, including the Convention on the Prohibition of the Development, Protection and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, the Court concluded "that the use of chemical wea-

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[73] *Id.* at 549-50.
[74] *Id.* at 551.
[75] *Id.* at 552.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 552-53.
[80] *Id.* at 553.
[81] *Id.* at 554.

pons should now be considered against international customary law."[82] Citing to paragraph 171 of the *Handbook*, the Court held that:

> [T]he probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.[83]

Accordingly, the IRB's decision was set aside and Zolfagharkhani's case remanded for further proceedings consistent with the Court's statement of the applicable law and standards.

The *Zolfagharkhani* case is consistent with the position taken in paragraph 171 of the *Handbook.* As the Federal Court made clear, if a deserter claims that he would have been required to engage in conduct condemned by the international community in the course of fulfilling his military service, he may qualify for refugee status even if he fears only the normal punishment associated with a violation of a law of general applicability. In such cases, any punishment is persecutory because of the nature of the acts the claimant is seeking to avoid.

Yet, not every conceivable issue was raised and addressed by the Court in *Zolfagharkhani*. The Court was silent on the pertinent issues of what "international condemnation" actually means and what pronouncements it extends to, as well as what "acts" the *Handbook* is concerned with (i.e., acts after an armed conflict or hostilities have commenced, or belligerent and illegal acts in the actual commencement of hostilities). Although *Zolfagharkhani* does serve, for the time being, as the central case for inquiries concerning evasion of military service, it fails to address those issues which are the central focus of the Iraq War deserter cases, the most important being: with what "acts" is paragraph 171 concerned?

C. IRAQ WAR DESERTERS IN THE CANADIAN COURTS

As noted in the introduction, although there may be as many as 600 U.S. deserters currently living in Canada, only around twenty have come forward and attempted to qualify as refugees. From this group, the following cases represent those that have gained the most publicity in

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[82] *Id.* at 555.

[83] *Id.*

Canada and the United States. The first subsection deals with Jeremy Hinzman, an individual who has become one of the public faces of the deserter movement in Canada. The second subsection deals with the Federal Court of Canada's decision in the case of Brandon Hughey. Hinzman's and Hughey's cases were consolidated for review before the Federal Court of Appeal, whose decision will be the focus of subsection three. Subsection four discusses Joshua Key, the first deserter successful in the Canadian courts. Finally, subsection five will discuss the Justin Colby and Corey Glass cases, the most recent decisions of the Federal Court. Colby's application for review was dismissed, whereas Glass obtained temporary relief in the form of a stay of removal.

1. JEREMY HINZMAN

Jeremy Hinzman met with a recruiting officer from the United States Army in mid-November 2000 and enlisted for a four year term a couple of weeks later.[84] From approximately January 17, 2001 to the end of May 2001, Hinzman undertook the required basic training. He would later testify that it was beginning in this period, and extending through the early summer of 2002, that "his concerns about killing were simmering."[85] At some point in this general time-frame, Hinzman became aware that the U.S. Army provided accommodation to conscientious objectors, including non-combatant roles and discharges; but, despite the emergence of his alleged moral qualms, "[h]e did not share his dilemma with anyone in the army because the work atmosphere was loaded with *machismo*."[86]

Nonetheless, on August 2, 2002, Hinzman formally applied for conscientious objector status pursuant to the requisite Army regulation. Before the Board, Hinzman testified:

> [T]hat his decision to apply for conscientious objector non-combatant status was not the result of an epiphany, but rather a gradual process that began during basic training. Through the process of having to dehumanize other people, including his co-workers, and with what was happening in the world at that time, he came to the conclusion that he could not kill, and that all violence does is to perpetuate more

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[84] Hinzman, et al., TA4-01429/30/31 (Immigr. & Refugee Bd., Mar. 16, 2005) (Can.) [hereinafter *Hinzman* (IRB)]. A recitation of the facts in Hinzman's case is found at paragraphs 23 through 51 of the Board's decision.

[85] *Id.* para. 31.

[86] *Id*. para. 32.

> violence. The only solution was to take himself out of the equation, the equation being killing.[87]

Despite being properly submitted, Hinzman's August 2002 application was not processed. At the end of October or beginning of November 2002, Hinzman submitted a second application. His second application proceeded according to the regulations and he was interviewed by both an Army chaplain and a psychiatrist. Their reports, along with the underlying application, were forwarded to the commanding officer with jurisdiction over conscientious objector applications.

In the meantime, Hinzman and his unit were deployed to Afghanistan, where he was assigned to perform menial kitchen tasks. During Hinzman's time in Afghanistan, a hearing was held on his application for conscientious objector status. In a memorandum submitted to Hinzman's commanding officer in Afghanistan, the hearing officer noted that:

> The applicant sincerely opposes war on philosophical, societal and intellectual levels . . . The applicant truly feels that he could not perform an offensive combat operation, but feels that he could perform defensive operations, and [t]he applicant's wife had recently given birth to the applicant's son during the same time frame as when his unit found that they were headed to Afghanistan[.] The applicant subsequently submitted the application for reclassification.[88]

The April 29, 2003 memorandum concluded that Hinzman's beliefs were not congruent with those of a conscientious objector, and thus his application should be denied:

> After a comprehensive review of the packet and personal investigation, I strongly believe that PFC Hinzman is using this regulation to get out of the infantry. He is not willing to conduct offensive operations as a combatant, but he is willing to conduct defensive operations as a combatant. He is not unwilling to conduct the other operations such as peacekeeping operations, and safe and secure environment operations that infantrymen conduct. He clearly stated "it would be his duty to defend his airfield if it were attacked." He is willing to defend a military installation as part of his duty. If he is willing to fight and defend against the enemy, he cannot choose when or where.[89]

Despite the recommendation, Hinzman continued to work in the kitchen until his unit returned to the United States. In December 2003, Hinzman was notified that his unit would be deploying to Iraq in January 2004.

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[87] *Id*. para. 33.

[88] *Id*. para. 45.

[89] *Id*. para. 47.

Hinzman believed he had two options, refuse his orders and accept the consequences, or flee to Canada.[90] Hinzman "decided to go to Canada because, in his mind, the expedition in Iraq was of an illegal nature, and that by complying with it, he would be complicit in a criminal act."[91] On January 2, 2004, Hinzman, his wife, and child arrived in Ontario, Canada and on January 22, 2004 he made a refugee claim.

Before the IRB, Hinzman alleged that he was a conscientious objector to the war in Iraq, which he believed to be in violation of international law and undertaken on false pretenses.[92] Hinzman argued that if he were returned to the United States he would be prosecuted for his desertion, and that any punishment would be a form of persecution, as it would be in retribution for his following his conscience.[93] Prior to addressing the merits of Hinzman's claim, however, the Board confronted the preliminary question of whether evidence relating to the illegality of the U.S. invasion should be considered in determining eligibility for refugee status under the *Handbook*.[94] The Board answered that question in the negative, finding that such evidence was irrelevant to the question of whether Hinzman could establish a valid claim under paragraph 171 of the *Handbook*.[95]

The first issue in the Board's analysis, and ultimately the dispositive one, concerned the question of state protection: "the claimant's country of nationality must be assessed with respect to the availability of protection for the claimant there."[96] This inquiry is of paramount importance to any refugee claim, as "[t]he responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant."[97] There is a rebuttable presumption that states will protect their nationals, and this presumption can only be rebutted upon a showing, by clear and convincing evidence, that the state would be unable to protect the individuals.[98] Additionally, so long as such protection may be forthcoming, an applicant must have actually

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[90] *Id.* para. 50.

[91] *Id.*

[92] *Id.* para. 3.

[93] *Id.* para. 5.

[94] *Id.* paras. 8-10.

[95] *Id. See also id.* para. 17 ("[M]y authority does not include making judgments about U.S. foreign policy, including the legality or the wisdom of the U.S. government's decision to authorize its military to enter Iraq.").

[96] *Id.* para. 55.

[97] *Id.* para. 56.

[98] *Id.* para. 57.

sought such protection from his country of nationality prior to seeking protection abroad.[99] Finally, the more democratic a country is, the more an applicant must have done to exhaust any possible domestic remedies and possible avenues of redress.[100] Considering the status and internal governance of the United States, "exceptional circumstances" must be established for a refugee claim to succeed against that country. For example, the applicant must show he could not obtain "a fair and independent judicial process[.]"[101] Thus, Hinzman had to show that he would be denied due process if returned to the United States, or that the law would be applied to him in a discriminatory manner.[102]

After reciting the four principles utilized for weighing the possible persecutory nature of laws of general applicability,[103] the Board found that Hinzman did not meet his burden of bringing forth evidence that would establish he would be deprived of due process or not afforded the full protection of the laws during the course of his court-martial.[104] The Army Regulations provided sufficient avenues by which to pursue conscientious objector status, as well as an appeals mechanism, and the Uniform Code of Military Justice (UCMJ) provided due process of law during the course of any court-martial proceedings.[105] There was additionally no evidence that Hinzman would suffer a discriminatory application of the relevant law and regulations, or would in any way be treated differently.[106] Thus, the Board found that Hinzman failed to rebut the presumption of state protection.[107] Although this finding was dispositive of his claim, the Board continued and addressed the remainder of Hinzman's contentions, on account of the "public interest."[108]

The first of these concerned the issue of "conscientious objection." The Board reviewed the relevant sections of the *Handbook*, as well as the evidence submitted by Hinzman, including his testimony before the Board, and noted the fact that Hinzman was not opposed to war

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[99] *Id.*
[100] *Id.* para. 58.
[101] *Id.* para. 59.
[102] *Id.* para. 60.
[103] *Id.* para. 62 (citing *Zolfagharkhani*, [1993] 3 F.C. at 551-52).
[104] *Id.* paras. 63, 65.
[105] *Id.* paras. 66-70.
[106] *Id.* para. 71.
[107] *Id.* para. 72.
[108] *Id.* para. 73.

generally or to the war in Afghanistan specifically.[109] Regarding Iraq, the Board found that Hinzman believed that the war:

> [W]as unlawful and unjust and that any military act of violence that takes place without justification is criminal, wrong and atrocious. He stated that the decision to go to war and the conduct of the war were of the same essence, and that any act in pursuit of an unjust war is itself unjust . . . He stated that if he were sent on a peacekeeping mission, he would be prepared to perform a non-combatant role, such as a medic, but not take part in offensive missions. He just does not want to shoot or kill people.[110]

The Board found Hinzman's convictions genuine and said that his decision to desert was based on a genuine feeling of conscience. However, the Board concluded that this decision was motivated solely by opposition to the Iraq War and not based on opposition to war in general.[111] In fact, Hinzman's position struck the Board as inherently contradictory. The Board said that if Hinzman was sincerely opposed to the Iraq War because he felt it was waged for economic reasons, that it was illegal, and unjust, then he should have been equally opposed to taking *any* part in the war, not just opposed to assuming an active combat role.[112] Regardless, under Canadian law an individual cannot be a selective conscientious objector—they must be opposed to war in general and cannot base their claim on opposition to a specific war.[113]

The Board also found Hinzman's actions to be contrary to those of a genuine conscientious objector. He failed to pursue his applications or appeal the denial, and he returned to his role as an infantryman after the denial of his application, notwithstanding his alleged objections.[114] If his beliefs were genuine, the Board thought it unreasonable for him to have failed to pursue subsequent avenues of relief and to have failed to renew his application in light of his scheduled deployment to Iraq.[115] As the Board determined Hinzman was not a genuine conscientious objector, it held that any "punishment . . . he may receive under the UCMJ as a consequence of his decision to desert is not inherently persecutory."[116]

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[109] *Id.* paras. 76-87, p. 35 n.43.
[110] *Id.* para. 83.
[111] *Id*. para. 88. *See also id.* paras. 89-93.
[112] *Id.* para. 94.
[113] *Id.* para. 95 (citing Ciric v. Min. of Employ. & Immigr., [1994] 2 F.C. 65, 73 (Can.)).
[114] *Id.* paras. 97-100.
[115] *See id.* paras. 101-04.
[116] *Id.* at para. 106.

The Board next confronted the main issue in Hinzman's case, his paragraph 171 claim:

> It is also Mr. Hinzman's position that, the type of military action with which he does not wish to be associated in Iraq is condemned by the international community as contrary to basic rules of human conduct, and therefore punishment for desertion should, in itself, be regarded as persecution.[117]

Hinzman based this claim on reports of abuses at the U.S. detention facility at Guantanamo Bay and the possibility that if deployed to Iraq, he would have to treat Iraqi prisoners in a similar way.[118]

Referencing the United Kingdom's Supreme Court of Judicature's decision in *Krotov v. Secretary of State for the Home Department*,[119] the Board found that there were two distinct levels of inquiry under paragraph 171.[120] First, the alleged acts themselves had to be brought within the purview of paragraph 171. In *Krotov*, the United Kingdom's Supreme Court said that violations of international law, international humanitarian law, and human rights:

> [I]f committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of [the Refugee Convention].[121]

Even if an applicant can establish the existence of "acts" that would fall within the ambit of paragraph 171, he must nonetheless demonstrate that there is some risk to him in particular that he might be associated with such acts if deployed with the military:

> [T]he grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalized assertion of fear or opinion based on reported examples of individual excesses of the kind that almost inevitably occur in the course of armed conflict, but which are not such as to

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[117] *Id.* para. 107. *See also Id.* paras. 109-10, 114.

[118] *Id.* para. 108.

[119] Krotov v. Sec'y of State for the Home Dep't, [2004] EWCA Civ 69, (2004) 1 W.L.R. 1825 (Eng.).

[120] *Hinzman* (IRB), *supra* note 84, paras. 117-19.

[121] *Id.* para. 117.

> amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorization or indifference.[122]

Accordingly, under the reasoning in *Krotov*, "if a court . . . is satisfied:

> (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards that, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognized by the international community, (b) that they will be punished for refusing to do so, (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established.[123]

Demonstrating eligibility under paragraph 171 is a high standard to meet. The Board found that Hinzman failed to establish that the United States' actions in Iraq reached this threshold:

> I find that Mr. Hinzman has failed to establish, that if deployed to Iraq, he would have engaged, been associated with, or been complicit in military action, condemned by the international community as contrary to basic rules of human conduct. He has not shown that the U.S. has, either as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law.[124]

The Board did not say, however, that there had not been documentation of serious violations of international humanitarian law by the U.S. forces in Iraq. It pointed to reports by the International Committee of the Red Cross (ICRC) and Human Rights Watch (HRW). The Board said that these reports recognized that the violations that occurred were not part of a deliberate U.S. military policy. Furthermore, the reports said that after any questionable incidents, U.S. military personnel were investigated and, where proper, reprimanded and punished for improper behavior.[125]

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[122] *Id.* para. 118.

[123] *Id.* para. 119 (citing *Krotov*, [2004] EWCA Civ 69, para. 16).

[124] *Id.* para 121.

[125] *See id.* paras. 129, 133 ("HRW is quick to point out, among other things, that the U.S. military with responsibility for security in Baghdad was not deliberately targeting civilians and that many U.S. military personnel dealt respectfully with Iraqis and were working hard to train police, guard facilities and pursue criminals . . . There is evidence before the panel that the U.S. military has investigated instances of alleged reckless or indiscriminate use of force in Iraq, and has taken disciplinary action. There is no evidence in front of the panel that the U.S., as a matter of policy or practice, [sic] is indifferent to alleged violations of international human rights law in Iraq.").

Additionally, the Board said that although it seemed likely that Hinzman would have been involved in actions that would have resulted in the loss of innocent civilian life, "it is regrettably virtually impossible to eliminate loss of civilian life during times of armed conflict. Unfortunately, there will always be the collateral damage associated with the 'fog of war.'"[126] Hinzman failed to proffer sufficient evidence that the actions of the U.S. military in Iraq are of a kind condemned by the international community as contrary to the basic rules of human conduct. Thus, the punishment Hinzman would receive upon his removal to the United States was not *per se* persecutory.[127]

The final issue the Board addressed concerned Hinzman's claim under paragraph 169 of the *Handbook*, whether the punishment Hinzman might receive would represent mere prosecution or constitute persecution. To establish persecution, Hinzman had to establish that the UCMJ would be applied to him in a discriminatory manner or that the actual punishment he would receive would amount to "cruel or unusual punishment."[128] The only argument made by Hinzman in this regard, other than the fact that he would be imprisoned and dishonorably discharged, was that he feared the "social stigma and economic consequences of being convicted of desertion and dishonorably discharged."[129] The Board determined that any punishment Hinzman faced if removed was nothing more than the punishment to be expected for the violation of a law of general applicability and that any sentence Hinzman could expect to receive was commensurate with the seriousness of his violation.[130] Thus, the Board found that Hinzman's final claim lacked merit and denied his application for refugee status.

Hinzman appealed this decision to the Federal Court of Canada. Hinzman argued that the Board erred in not considering evidence relating to the illegality of the Iraq War, in ignoring evidence of widespread and systematic violations of human rights, and in applying a heightened standard of proof regarding paragraph 171.[131] Additionally, Hinzman contended that objection to a specific war should be sufficient to establish a valid claim as a conscientious objector.[132]

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[126] *Id.* para. 137.
[127] *Id.* para. 144.
[128] *Id.* paras. 146, 148-49.
[129] *Id.* para. 145.
[130] *Id.* paras. 151-52.
[131] Hinzman v. Min. of Cit. & Immigr., [2006] F.C. 420, paras. 3-4 (Can.).
[132] *Id.* para. 4.

After reviewing the relevant facts, the Court first addressed the Board's preliminary ruling regarding Hinzman's proffer of evidence on the illegality of the U.S. invasion of Iraq. This evidence was comprised of two affidavits from professors of international law, which concluded that:

> [I]n the absence of either Security Council approval or a sound case for self-defense, no legal justification exist[ed] for the war in Iraq. As a consequence, each conclude[d] that the American invasion of Iraq was carried out in violation of the prohibition on the use of force enshrined in Article 2(4) of the U.N. Charter, and was thus illegal.[133]

In addition to these affidavits, other evidence was proffered which reached a similar conclusion. The Board denied admission of this evidence, finding that it was irrelevant to any claim under paragraph 171, as that provision was concerned with "the nature of the *acts* that the evading deserting soldier would be expected to perform or be complicit in, rather than the legality of the conflict as a whole."[134]

The Federal Court observed that the interpretation urged by Hinzman sought to bring within the purview of paragraph 171 not only violations of *jus in bello*, but also any violations of *jus ad bellum*.[135] The Court held that the meaning of paragraph 171 had to be discerned by reading it in conjunction with paragraph 170, which is the subjective article of the two, requiring an individual to have a genuine and sincere objection to military service.[136] Paragraph 171, in contrast, requires the admission of "objective evidence to demonstrate that 'the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules

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[133] *Id.* para. 39.

[134] *Id.* para. 44.

[135] *Id*. paras. 92, 95. The Court also noted that Hinzman testified that he would have opposed the war even if it were "legal." *See id.* paras. 99-105. For an exposition on the distinction between *jus in bello* and *jus ad bellum*, see Bailliet, *supra* note 37, at 338-39 *("Jus ad bellum* refers to the conditions under which one may resort to war. Violations constitute crimes against humanity or crimes against peace, including: the planning or waging of a war of aggression or a war in violation of international agreements, and the participation in a common plan or conspiracy for the accomplishment of war crimes. Liability for crimes against peace attaches to high-ranking members of government and policy-makers; nevertheless, soldiers may still hold themselves morally accountable for participation in such wars. *Jus in bello* refers to the laws and customs of warfare, which include the Geneva Conventions of August 12, 1949, and their Protocols. Violations are characterized as war crimes and encompass the following: 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; and devastation not justified by military necessity.")*.*

[136] Hinzman v. Min. of Cit. & Immigr., [2006] F.C. 420, paras. 90-91, 108-09 (Can.).

of human conduct.'"[137] An applicant must establish both the subjective and objective components (1) that he is a genuine conscientious objector and (2) that there is objective evidence to establish that the service he wishes to avoid is condemned by the international community.[138] The crucial question then becomes what the phrase "military action" in paragraph 171 denotes. Is it that "military action" is only acts that have been committed once hostilities have commenced or also violations of the laws of peace and the illegal use of force?

After a review of the relevant case law and scholarship, the Court found it clear that an applicant who would have been required to participate or be complicit in acts that fell within the ambit of paragraph 171 would have a valid claim to refugee status.[139] Of less certainty was the status of a soldier who simply fought in an illegal war. Hinzman contended that the *Krotov* case supported his interpretation of paragraph 171, as that case held that violations of both humanitarian law and international law fell within the purview of paragraph 171, ostensibly meaning that paragraph 171 was addressed to violations of *jus ad bellum* and *jus in bello*.[140] The Court agreed with Hinzman to a degree, finding that a crime against peace could potentially bring an individual within the protection of paragraph 171, *but only* when the legality of the war itself would be germane to the claim made by the applicant, noting, "it is only those with the power to plan, prepare, initiate and wage a war of aggression who are culpable for crimes against peace."[141] Insomuch as the Court interpreted *Krotov* in this fashion, it proved unhelpful to Hinzman, as he was not in any way connected with the planning of the Iraq War or the decision to actually invade Iraq.

Hinzman also relied on a Canadian case, the Federal Court of Appeal's decision in *Al-Maisri v. Canada (Minister of Employment & Immigration)*.[142] The Court conceded that *Al-Maisri* "arguably accepts that a non-defensive incursion into foreign territory would constitute a military action condemned by the international community . . . with the result that any punishment visited upon a deserter would be persecutory *per se*."[143] The Federal Court of Appeal in that case, however, was not

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[137] *Id.* para. 109.
[138] *See id.* paras. 108-09.
[139] *See id.* paras. 115-30.
[140] *See id.* paras. 133-40.
[141] *Id.* paras. 141-42.
[142] Al-Maisri v. Min. of Employ. & Immigr., [1995] F.C.J. No. 642 (Can.).
[143] *Hinzman*, [2006] F.C. 420, para. 146.

required to resolve the actual issue presented by Hinzman, that is, whether a low-level soldier could claim status under paragraph 171 based solely on the alleged illegality of the war.[144] As the issue presented was *sui generis*, neither of the cited cases provided the Court with a definitive resolution of Hinzman's claim. Accordingly, the Federal Court conducted its own analysis on the issue.

First, the Court determined that paragraph 171 had to be interpreted in light of the Refugee Convention*'s* exclusionary clauses, "such that refugee protection is available to those who breach domestic laws of general application, where compliance with those laws would result in the individual breaching accepted international norms."[145] The issue was whether Hinzman could be excluded from refugee protection solely for participating in the Iraq War, if in fact that war was determined to be illegal.[146] Although Hinzman argued that he would have been complicit in a crime against peace, the nature of his service and involvement was not such as would render him capable of committing a crime against peace, as he was in no way involved with the planning or policy making stages of the war:[147]

> [T]he ordinary foot-soldier such as Mr. Hinzman is not expected to make his or her own personal assessments as to the legality of a conflict in which he or she may be called upon to fight. Similarly, such an individual cannot be held criminally responsible merely for fighting in support of an illegal war, assuming that his or her own personal wartime conduct is otherwise proper.[148]

Thus, the Court held that when considering a refugee claim from an ordinary soldier, the focus of the inquiry had to be on military acts in alleged violation of *jus in bello*, not on the legality of the conflict itself.[149]

The Court's holding on this issue notwithstanding, Hinzman could have established refugee eligibility under paragraph 171 if he could have demonstrated that the U.S. military was engaged in widespread and systematic violations of *jus in bello*. The Court, citing *Krotov* and the Canadian decision in *Popov v. Canada (Minister of Employment & Immigration)*,[150] said that "isolated breaches of international humanita-

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[144] *Id.* paras. 148-49.
[145] *Id.* para. 150.
[146] *Id.* para. 151.
[147] *Id*. paras. 152, 154-57.
[148] *Id.* para. 159.
[149] *Id.* para. 164.
[150] Popov v. Min. of Employ. & Immigr., [1994] F.C.J. No. 489 (Can.).

rian law are an unfortunate but inevitable reality of war[.]"[151] Accordingly, refugee protection under paragraph 171 will only become available when the alleged violations reach a "sufficiently widespread basis[.]"[152] On its review of the evidence in the record, the Court found that there was no indication that the alleged abuses by the U.S. military were either widespread and systematic or condoned by the state, or that the Board had placed an improperly high standard on Hinzman to reasonably demonstrate that he would be required to participate or be complicit in the commission of such acts.[153] Thus, Hinzman failed to establish refugee status under paragraph 171 because he was outside the class of individuals who could make a claim based on the illegality of the war itself and he had failed to elicit sufficient evidence that he would have to associate with military acts condemned by the international community.[154]

The final issue that the Court addressed was whether, notwithstanding Hinzman's failure to establish refugee status under paragraph 171, he could, nevertheless, demonstrate he possessed a well-founded fear of persecution in the United States based on his political opinion.[155] Hinzman argued that he rebutted the presumption of state protection in the United States because the United States' failure to recognize selective conscientious objectors constituted a "gap" in the international protection of refugees, and thus, an "exceptional circumstance" sufficient to rebut the presumption of state protection.[156] In effect, Hinzman argued that the United States did not go far enough by failing to recognize that individuals could have an objection to a particular war. The Court found this argument unavailing for a number of reasons.

First, notwithstanding the substantial development of international law over the past fifty years, compulsory military service was still seen as a prerogative of sovereignty, and there was no internationally recognized right to either absolute or partial conscientious objection.[157] Second, and perhaps more importantly to the Court, selective conscientious objection was not permitted under Canadian law.[158] Finally, this determination, that there was no "gap" in United States law, was reinforced

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[151] *Hinzman*, [2006] F.C. 420, para. 169.
[152] *Id.* para. 170.
[153] *Id*. paras. 171-85.
[154] *Id*. paras. 188-89.
[155] *Id.* para. 190.
[156] *Id.* paras. 191-93.
[157] *See id.* paras. 201-13.
[158] *Id*. paras. 218-23.

by the then recent decision of the Federal Court in *Ates v. Canada (Minister of Citizenship & Immigration)*,[159] where the Court found no persecution despite the fact that the applicant was repeatedly prosecuted and imprisoned for his refusal to serve in a system where such service was compulsory and which provided no alternative avenues of service for conscientious objectors.[160]

The Court concluded by noting that Hinzman had not alleged that the punishment he would receive was outside the bounds of what would be considered acceptable under international law. Thus, the Court said, he could not establish a claim under paragraph 169 of the *Handbook*. The Court also recognized the inevitable conflict between moral beliefs and acceptable and legitimate laws and the unfortunate fact that genuine and sincere beliefs must sometimes be punished in ordered society:

> As judges we would respect their views but might feel it necessary to punish them all the same . . . We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we sympathized and even shared the same opinions, we had to give greater weight to the need to enforce law.[161]

In essence, "sympathy alone does not provide a foundation for finding that there is an internationally recognized right to object to a particular war, the denial of which results in persecution."[162] Hinzman would, however, have one last hearing on his claim, in a joint appeal with Brandon Hughey before the Federal Court of Appeal.

2. BRANDON HUGHEY

Brandon Hughey enlisted in the United States Army when he was seventeen years old, and reported for a four year term of service after turning eighteen, on July 9, 2003.[163] Hughey was not, at that point and in his own words, "a total pacifist," as he believed in defending "home and family."[164] After completing his required basic training, how-

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[159] Ates v. Min. of Cit. & Immigr., 343 N.R. 234, [2005] F.C.A. 322 (Can.).

[160] *Hinzman*, [2006] F.C. 420, paras. 224-25.

[161] *Id*. para. 231 (quoting Sepet v. Sec'y of State for the Home Dep't, [2003] UKHL 15, para. 34 (Eng.)).

[162] *Id*. para. 232.

[163] Hughey v. Min. of Cit. & Immigr., [2006] F.C. 421, paras. 7-8 (Can.).

[164] *Id.* para. 7.

ever, Hughey testified "that he formed the belief that the war in Iraq was being waged upon false pretenses."[165] Hughey also testified that, after learning he would be deployed to Iraq, he approached an officer concerning his qualms about the Iraq War, but was told nothing could be done.[166] Hughey "was not aware of the option of seeking conscientious objector status at this time."[167] In January 2004, Hughey went Absent-Without-Leave (AWOL), but his father convinced him to return to his base and speak to a different officer about his reservations.[168] Hughey was again told that nothing could be done concerning his situation and objections.[169] By February 2004, it became apparent that Hughey's unit would be deployed to Iraq.[170] At this time, Hughey:

> [D]id not seek out the assistance of a military chaplain or psychiatrist to help him sort out his feelings. Nor did he consider refusing to go to Iraq, testifying that he did not think that it would be fair for him to be sent to jail for refusing to fight in a war that he believed was wrong.[171]

On March 5, 2004, Hughey entered Canada.[172] In April, Hughey made a claim for refugee status.[173] Concerning this claim, Hughey:

> [T]estified that even if Iraq had been found to have been in possession of weapons of mass destruction, or to have had ties to al-Qaeda, he would still have been of the view that the war was wrong, because, in his opinion, the people of Iraq posed no imminent threat to the United States.[174]

If returned to the United States, Hughey argued that he faced imprisonment of anywhere between one and five years, and that he could face harsher punishment because he had made a refugee claim in Canada.[175] Hughey, however, conceded:

> [T]hat he ha[d] no evidence to support his concern . . . While [he] acknowledges that he would receive a fair trial in the United States, before an independent judiciary, he nonetheless asserts that any form of

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[165] *Id*. para. 14.
[166] *Id*. para. 18.
[167] *Id*.
[168] *Id*. para. 19.
[169] *Id*. paras. 20-21.
[170] *Id*. para. 22.
[171] *Id*.
[172] *Id*. para. 26.
[173] *Id*.
[174] *Id*. para. 24.
[175] *Id*. para. 28.

> punishment that he would incur for merely following his conscience would amount to persecution.[176]

Before reaching the merits of Hughey's claim, the Board adopted its reasoning from the *Hinzman* decision and summarily refused to consider any proffered evidence regarding the issue of whether the American led invasion of Iraq was illegal under international law.[177]

Regarding the merits of Hughey's claim, the Board found that the only significant difference between Hughey's claim and the claim rejected in *Hinzman* was that Hughey failed to seek conscientious objector status.[178] As this difference was, if anything, detrimental to Hughey's claim, the Board adopted its reasoning on state protection from the *Hinzman* decision, and found that Hughey failed to rebut the presumption of state protection in the United States.[179] Additionally, in response to an argument raised by Hughey, the Board also held that the presumption applied even when it was alleged that the state was the persecutor, as the presumption does not shift the burden of proof and Hughey failed to establish the necessary elements of his claim.[180]

The Board then turned its attention to the issue of whether Hughey could claim a well-founded fear in the United States. First, the Board noted that Hughey did not make any claim that he opposed war generally.[181] Nor did he allege that he opposed the war because of any atrocities or crimes allegedly being committed by United States personnel there.[182] Rather, his opposition was solely based on his view that the "war was immoral and illegal under international law."[183] Citing to the Federal Court's decision in *Ciric*, the Board held that one could not be a selective conscientious objector.[184] Although the Board found Hughey's beliefs to be sincere, it further determined that they could not provide him with a basis for relief.[185]

The third issue dealt with paragraph 171 of the *Handbook* and Hughey's claim that any punishment he would suffer would be *per se* persecutory because the military action by the United States in Iraq was

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[176] *Id*. paras. 28-29.
[177] *See id.* paras. 30-45.
[178] *Id*. para. 47.
[179] *Id*. paras. 48-60.
[180] *Id*. paras. 59-60.
[181] *Id*. para. 62.
[182] *Id*. para. 63.
[183] *Id*.
[184] *Id*. para. 64 (citing *Ciric*, [1994] 2 F.C. 65, para. 17).
[185] *Id*. para. 65.

of a kind condemned by the international community.[186] In support of this contention, Hughey submitted reports by the ICRC and HRW detailing serious abuses of humanitarian law in Iraq, and alleged that, if deployed to Iraq, he ran the risk of participating in activities that would render him excludable under Article 1(F) of the Refugee Convention.[187] The Board determined that Hughey's evidence "fell short of establishing that the United States is engaged in military actions that are condemned by the international community as contrary to the basic rules of human conduct," and that, although unfortunate, the loss of innocent lives was an inevitable aspect of war.[188] Thus, any punishment that Hughey faced if returned to the United States was not *per se* persecutory.[189]

Considering the Board's resolution of the paragraph 171 claim, the final issue it had to confront was whether the punishment Hughey faced if returned to the United States was normal prosecution or persecution. Since the punishment would not be *per se* persecutory, Hughey had to "demonstrate either that the punishment that he feared he would receive for desertion . . . would result from a discriminatory application of the UCMJ, or would amount to cruel or unusual treatment or punishment."[190] As it had done previously in its opinion, the Board referenced its decision in *Hinzman* and adopted that reasoning, finding that:

> [T]he treatment or punishment that Mr. Hughey feared . . . would be punishment for the breach of a law of general application that did not violate his human rights, and did not differentiate on a Convention ground, either on its face or in its application . . . Mr. Hughey [also] failed to establish that he would be treated more harshly because of his political opinions, or that the penal provisions of the UCMJ were disproportionate, or amounted to cruel or unusual punishment.[191]

Thus, Hughey's claim was denied in its entirety.

Hughey's first argument before the Federal Court on appeal was identical to Hinzman's, namely, that the Board erred in excluding evidence regarding the illegality of the Iraq War. His contention was that paragraph 171 was equally applicable to violations of *jus ad bellum*, and

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[186] *Id*. para. 66.

[187] *Id*. paras. 67-69.

[188] *Id.* paras. 70, 72. S*ee also id.* para. 71 ("While accepting that there had been instances where members of the American military in Iraq had engaged in serious violations of international humanitarian law, the Board observed that the military had investigated instances of alleged recklessness or indiscriminate use of force, and had taken disciplinary action, where appropriate.").

[189] *Id*. para. 74.

[190] *Id*. para. 75.

[191] *Id*. paras. 86-87.

that any participation in an illegal war would represent association with military action condemned by the international community.[192] After conducting an identical analysis to that undertaken in *Hinzman*, the Court concluded that, "[w]hen one is considering the case of a mere foot soldier such as Mr. Hughey, the focus of the inquiry should be on the law of *jus in bello*, that is, the international humanitarian law that governs the conduct of hostilities during an armed conflict."[193]

Hughey also contended that the Board erred in finding that the alleged violations of humanitarian law in Iraq were not systematic or condoned by the state. As with its decision in *Hinzman*, the Court referenced the United Kingdom and Canadian decisions in *Krotov* and *Popov*, noting that breaches of humanitarian law are an inevitable, if unfortunate, consequences of armed conflict.[194] For that reason:

> [T]he availability of refugee protection should be limited to deserters from armed conflicts where the level and nature of the conflict, and the attitude of the relevant government, have reached a point where combatants are, or may be, required, on a sufficiently widespread basis, to breach the basic rules of human conduct.[195]

The Court agreed with the Board's finding that the evidence did not establish either the existence of widespread and systematic breaches of international humanitarian law, or that the breaches that did occur were condoned or sanctioned by the state.[196] Nor was the Court persuaded by Hughey's argument that the Board placed on him a heightened burden of establishing his association with these alleged violations.[197] Accordingly, as the Board correctly found Hughey to be outside the bounds of paragraph 171, any punishment he would receive if returned to the United States was not persecutory *per se*.[198]

That left only the final issue of state protection, where Hughey made the "gap" argument—that U.S. law concerning conscientious objectors was under-inclusive because it did not include provision for selective conscientious objectors, and that state protection was an irrelevant inquiry when the alleged persecutor was the state itself.[199] The first ar-

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[192] *See id.* para. 95.
[193] *Id*. para. 153.
[194] *Id*. para. 156.
[195] *Id*. para. 157 (citation omitted).
[196] *Id*. paras. 158-65.
[197] *See id.* paras. 166-74.
[198] *Id*. paras. 175-76.
[199] *Id*. paras. 178-84.

gument was rejected on the same basis as the *Hinzman* decision. The second argument was rejected based on the fact that, even if the state would be the persecutor, evidence of state protection goes to the issue of the objective reasonableness of the applicant's well-founded fear, which is a necessary component of the applicant's burden of proof.[200] Thus, the Court found no basis for interfering with the Board's decision, and noted that "the issues raised by this application have not required me to pass judgment on the legality of the American led military action in Iraq, and no finding has been made in this regard."[201]

3. HINZMAN'S AND HUGHEY'S JOINT APPEAL BEFORE THE FEDERAL COURT OF APPEAL

Along with denying the appeals of Hinzman and Hughey, the Federal Court certified one question to the Court of Appeal: "When dealing with a refugee claim advanced by a mere foot soldier, is the question whether the given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR *Handbook*?"[202] The Court of Appeal, however, found that consideration of this question was premature in the course of the instant appeal since, "to qualify for refugee status, the appellants would have to first satisfy the court that they have sought, but were unable to obtain, protection from their home state, or alternatively, that their home state, on an objective basis, could not be expected to provide protection."[203] Only if this first hurdle was cleared would paragraph 171 have any relevance to the inquiry. In support of their appeal, Hinzman and Hughey argued that state protection would be absent in their case, as the state itself was the alleged persecutor.[204]

The Court of Appeal commenced its analysis by noting the scope and purpose of refugee protection, and that it is only meant to be invoked in those circumstances where the applicant's state is unable or unwilling to protect its national.[205] To ensure that this purpose is served, the Court

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[200] *See id*.

[201] *Id*. paras. 220-21.

[202] Hinzman & Hughey v. Min. of Cit. & Immigr., [2007] F.C.A. 171, para 35 (Can.).

[203] *Id*. para. 37.

[204] *Id*. para. 40.

[205] *Id.* para. 41 ("[T]he starting point must be the direction from the Supreme Court of Canada that refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protections of his home state.").

said that the applicant must show that he either approached his home state for protection or that such protection would not be reasonably forthcoming.[206] There is a presumption that a state will protect its nationals, which the applicant may rebut by "clear and convincing confirmation of a state's inability to protect[.]"[207] The applicant's burden to rebut the presumption of state protection is on a sliding scale, as "the more democratic a country [is], the more the claimant must have done to seek out the protection of his or her home state[.]"[208] The United States is a democratic country, which includes an independent judiciary and guarantees of due process of law.[209] Accordingly, Hinzman and Hughey must meet the high burden of demonstrating that all possible avenues of domestic relief were exhausted prior to making their claims in Canada.[210]

The United States regards desertion as a crime and "has also established a comprehensive scheme complete with abundant procedural safeguards for administering these provisions justly."[211] By regulation, the U.S. Army established procedures by which an applicant could seek conscientious objector status, as well as a review process if the initial application was decided in the negative.[212] Additionally, although imprisonment for up to five years was within the sentencing guidelines of the U.S. Army's court-martial handbook, most cases of desertion (as many as 94 percent) were dealt with administratively through other than honorable discharges.[213]

Neither Hinzman nor Hughey exhausted domestic relief prior to coming to Canada, despite the procedural avenues presented by regulation and the due process protections at the court-martial stage. Hughey never sought conscientious objector status prior to fleeing to Canada.[214] Hinzman did apply for conscientious objector status, but his initial application was rejected. Pursuant to the regulations, Hinzman should have appealed and renewed his application when his deployment to Iraq be-

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[206] *Id.* ("[Refugee protection] was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged" (citing Att'y Gen. v. Ward, [1993] 2 S.C.R. 689, 709 (Can.)).

[207] *Id*. paras. 43-44 (quoting *Ward* [1993] 2 S.C.R. at 724).

[208] *Id*. para. 45 (citing Kadenko v. Solicitor Gen.), [1996] D.L.R. 534 (Can.).

[209] *Id*. para. 46.

[210] *Id*.

[211] *Id*. para. 47.

[212] *Id*.

[213] *Id*. para. 48.

[214] *Id*. para. 51.

came imminent.[215] Hinzman and Hughey were not entitled to come to Canada and claim refugee status, as neither made an adequate "attempt to seek out the protections available" in the United States.[216]

Rather than dispute that they sought protection in the United States, Hinzman and Hughey reiterated their previous arguments made before the Board and Federal Court. They argued that when the state is the persecutor, evidence regarding a failure to protect is unnecessary, and that a "gap" exists in the U.S. protection of conscientious objectors because U.S. law does not recognize a right of selective conscientious objection.[217] The Court of Appeal found neither argument availing. First, if the alleged persecutor was the state, the issue of state protection would go to whether the claimant had an objective basis for his well-founded fear; "[o]nly where there is clear and convincing evidence that such protections are unavailable or ineffective such that state conduct amounts to persecution will this country be able to extend its refugee protections to the claimants."[218] Second, although Hinzman and Hughey argued that state protection would not be reasonably forthcoming based of the alleged "gap" in protection, the Court of Appeal found that it was, "'objectively unreasonable for [them] not to have sought the protection of [their] home authorities.'"[219] Insufficient evidence was adduced to support their contention that state protection would not be forthcoming, especially taking into account the democratic nature of the United States and the comprehensive framework established to allow conscientious objectors to apply for such status, as well as the due process protections inherent in the U.S. judicial system and the UCMJ.[220] For this reason, the Court declined to answer the certified question and concluded that Hinzman and Hughey:

> [F]ailed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the[m] in the United States. Because [they] have not adequately attempted to access these protec-

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[215] *Id*. para. 50.
[216] *Id*. para. 52.
[217] *Id*. para. 55.
[218] *Id*. para. 54.
[219] *Id*. para. 56 (citation omitted).
[220] *Id*. para. 58.

> tions . . . it is impossible for a Canadian court or tribunal to assess the availability of protections in the United States.[221]

Accordingly, their claims failed and the appeal was dismissed.[222]

Hinzman and Hughey sought review in the Supreme Court of Canada. However, the Supreme Court declined to grant leave to appeal without comment.[223] In the wake of the Court of Appeal and the Supreme Court decisions, supporters of the deserters and other war activists turned to the political arena, in the hopes of gaining a legislative victory for the pair as well as other similarly situated individuals.[224] Olivia Chow, a New Democratic Party MP, called for ministerial intervention to allow U.S. deserters to remain in Canada.[225] Immigration Minister Diane Finley, however, was not sympathetic to the calls for intervention:

> The Supreme Court ruled, backed by two previous court rulings and a ruling by the Immigration and Refugee Board. Canadians want a refugee system that helps true refugees . . . All refugee claimants in Canada have the right to due process and when they have exhausted legal avenues, we expect them to respect our laws and leave Canada.[226]

When approached for comment, Major Tom Earnhardt, a spokesman for the 82nd Airborne Division of the United States Army, stated that:

> When Pfc. Hinzman returns to military control, his case will be evaluated on its own merits, and it would be inappropriate to speculate on the disposition of his case . . . He will be treated like a soldier, with dignity and respect, and he will receive all due processes and rights afforded to soldiers under the UCMJ.[227]

Thus, the journeys of Hinzman and Hughey through the Canadian judicial system ended in disappointment. Joshua Key's journey, however, has taken an interesting course which may bode well for the future of U.S. deserter claims in Canada.

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[221] *Id.* para. 62.

[222] *Id.* paras. 62, 64.

[223] Barry Brown, *Army Deserters Denied Asylum, Court Says Soldiers Didn't Seek Way Out in U.S.*, WASH. TIMES, Nov. 16, 2007, at A13; John Ward, *U.S. Army Deserters Lose Supreme Court Bid, Political Arena Only Hope Left for Pair, who Sought Refugee Status on Grounds of their Opposition to the Iraq War*, GLOBE & MAIL (Toronto), Nov. 16, 2007, at A9; Maurer, *supra* note 16.

[224] *See* Ward, *supra* note 223.

[225] Leung, *supra* note 17.

[226] Ward, *supra* note 223.

[227] Maurer, *supra* note 16.

4. JOSHUA KEY

Joshua Key's claim before the IRB was different from those presented by Hinzman and Hughey. Key had actually served in Iraq. This fact gave his testimony a vividness and reality that Hinzman's and Hughey's lacked, as they relied solely on the reports of what was happening in the War.[228] Key testified before the Board that he had joined the military to support his family.[229] On April 1, 2002, Key began his term of service, allegedly with the assurance that he would not be deployed overseas.[230] However, on April 10, 2003, Key was deployed to Kuwait.[231] He testified that: "[A]lthough he felt betrayed in being deployed outside the United States, 'whenever Iraq came I was ready to go and do my job for my family. I thought my family was threatened, I thought weapons of mass destruction; I was going to do my duty.'"[232]

By the end of April 2003, Key and his unit had entered Iraq and taken a position in Ramadi.[233] Raiding homes was the principal task assigned to the squad.[234] These raids were unpleasant for Key. According to Key's testimony, the raids included looting homes and the detention and interrogation of males.[235] At the end of May 2003, Key and his squad were transferred to Fallujah.[236] Key testified that in early June a squad member fired his weapon into a crowd of civilians, killing perhaps a dozen, with what appeared to be no provocation.[237] A few days later, at a traffic stop, a car was fired upon, killing a man inside and severely wounding a child passenger.[238] The man was not armed, and no contraband was found in the vehicle.[239] Days later, Key's staff sergeant turned his machine gun on a truck that had cut off his vehicle, blowing it up.[240] After a time in Fallujah, Key returned to Ramadi where, at one point, he

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[228] *See, e.g.*, Jiménez, *supra* note 8.

[229] Key et al., TA5-03896/97/98/99/00/01 (Immigr. & Refugee Bd., Oct. 20, 2006) (Can.) [hereinafter *Key* (IRB)], *available at* http://www.canlii.org/en/ca/irb/doc/2006/2006canlii59661/2006canlii59661.pdf.

[230] *Id*. at 4.

[231] *Id*.

[232] *Id*.

[233] *Id*.

[234] *Id*.

[235] *Id*. at 5.

[236] *Id*. at 6.

[237] *Id*.

[238] *Id*.

[239] *Id*.

[240] *Id*. at 7.

witnessed guardsmen playing football with the decapitated head of an Iraqi, while another drove over a severed head in a truck.[241] During this time period, the raids of Iraqi homes continued, and Key testified that he witnessed detention abuses.[242] Other incidents against civilians also followed, including the shooting of an old man for making a "rude gesture" at military personnel, and the discharge of a weapon into a crowd of civilians, resulting in the death of a child.[243]

On November 13, 2003, Key was transferred to Baghdad, and from there made his way to the United States for a brief period of leave.[244] He was expected to report back to his unit by December 2, 2003 for redeployment.[245] By this time, however, Key was determined not to return to Iraq. He contacted an official of the Judge Advocate General's office to see if he could somehow avoid redeployment; he was told to redeploy or face prison time.[246] Key decided to desert. He made his way to Toronto, Canada. On March 11, 2005, he claimed refugee status.[247]

As in the Hinzman and Hughey decisions, the Board determined at a pre-hearing conference that any evidence pertaining to the alleged illegality of the U.S. invasion of Iraq was irrelevant to Key's claim and denied its admission.[248] On the merits, the Board found that Key did not qualify either as a refugee or a person in need of protection.[249] As an initial matter, the Board found that Key did not object to war generally, and that he had "indicated that he would still be fighting in Iraq if there had been weapons of mass destruction as this would have been, in his view, a threat to his country and his family."[250] According to Key's testimony, "[h]is determination to quit his relationship with the military ar[ose] out of his experience in Iraq and his fear of being 'associated with the ongoing violation of human rights by the U.S. Army."[251] The question of whether Key could establish an objective well-founded fear of persecu-

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[241] *Id*.
[242] *Id*. at 7-8.
[243] *Id*. at 8-9.
[244] *Id*. at 9.
[245] *Id*.
[246] *Id*.
[247] *Id*. at 9-10.
[248] *Id*. at 2.
[249] *Id.* at 2. *See also* Marina Jiménez, *American Deserter's Refugee Claim Rejected*, GLOBE & MAIL (Toronto), Nov. 8, 2006, at A14.
[250] *Key* (IRB), *supra* note 229, at 10.
[251] *Id*.

tion had to be answered by recourse to paragraph 171 of the *Handbook* and the Federal Court's decision in *Hughey*.[252]

Upon a review of these resources, the Board determined that:

> The question . . . as to whether Mr. Key's objection to military service in Iraq falls within the meaning of conscientious objection as set out in paragraph 171, can be answered by examining whether Mr. Key could have been excludable from Convention refugee protection by virtue of the military duties he was personally called upon to perform in Iraq.[253]

Put another way, if Mr. Key would have been forced to perform acts upon his return to Iraq that would have rendered him excludable under the Refugee Convention, he would have established his eligibility for refugee status under paragraph 171. It is worth quoting the Board's summation of the nature of Key's duties in Iraq in full, as it attempted to ascertain whether he would fall within the purview of paragraph 171:

> Mr. Key performed at least seventy raids on the homes of Iraqi citizens ostensibly looking for weapons. None of them was pleasant. In the blackness of night, doors blown in, homes ransacked, personal effects looted, residents violently roused from their beds and forced outdoors by heavily armed and uniformed soldiers hollering in a foreign language, Muslim women shamed by their exposed bodies, boys too tall for their age, and men cuffed and hauled away for interrogation in their nightclothes, regardless of weather conditions, never, at least as far as Mr. Key could ascertain, to return.[254]

The Board found Key's account to be consistent with other reports, noting that the ICRC had estimated as many as 70 to 90 percent of those arrested were arrested by mistake, and that many of those arrested had no connection to the armed resistance against the U.S. military.[255]

The question was not, however, whether the raids were efficacious, but rather "whether the methodology employed in those raids crossed the line."[256] To answer this question, the Board referenced articles 27 and 31 through 33 of the Fourth Geneva Convention, which governs the protection of civilians during times of war.[257] Although it was

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[252] *See id.* at 11-14 (citations omitted).

[253] *Id*. at 14.

[254] *Id*. at 17.

[255] *See id.* at 18.

[256] *Id*. at 19.

[257] *See id*. at 19-20; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, *available at* http://www.unhchr.ch/html/menu3/b/92/htm (Art. 27: Protected persons are entitled, in all circumstances, to respect for their persons, their

possible that these articles had been violated by the U.S. military in the course of its conflict in Iraq, from the evidence presented in the record, only "grave breaches" of the Geneva Conventions constituted war crimes, and thus an excludable offense.[258] In the Board's view, despite the fact that the raids conducted by Key evidenced "a disturbing level of brutality," they did not reach the level of a war crime.[259] Nor was there widespread and systematic misconduct in the course of these raids to bring the violations within the definition of "crimes against humanity."[260] Thus, Key was not excludable based on his own conduct, or his association with the conduct of others, during the course of these home raids.

Two final issues, under the paragraph 171 analysis, related to the allegation of detainee mistreatment and the commission of random acts of violence against civilians. First, Key submitted no evidence to indicate that he had knowledge of how detainees were being treated by the U.S. military in Iraq.[261] What evidence was proffered, including a report from the ICRC, did not support the allegation that U.S. treatment of detainees would place it in violation of *jus in bello*. Thus, there was no evidence to support the conclusion that such actions fell within the purview of paragraph 171. Furthermore, in the cases where detainee mistreatment had been documented, the U.S. had actively investigated and punished those who were responsible, and there was otherwise no indication that these abuses were condoned by the United States or the mili-

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honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measure of control and security in regard to protected persons as may be necessary as a result of war.; Art. 31: No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.; Article 32: The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.; Article 33: No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.).

[258] *Key* (IRB), *supra* note 229, at 20-22.

[259] *Id*. at 22.

[260] *See id*. at 23.

[261] *Id*. at 26.

tary.[262] Thus, Key was not excludable from refugee protection based on the treatment of detainees in Iraq. Second, the Board said that there was no evidence regarding actual cover-ups, and no indication that shooting of civilians represented anything more than "isolated individual excesses . . . committed by rogue elements in the military,"[263] The Board made this decision despite Key's testimony that described incidents where civilians were shot upon with little or no provocation and Key's allegations that there were official cover-ups following some of these incidents. According to the Board, such unfortunate acts are inevitable in the course of armed conflict and neither Key nor other non-participating personnel would be held accountable for them.[264] Accordingly, Key was unable to establish *per se* persecution under paragraph 171.

The final issue the Board addressed was whether Key would face persecution if removed to the United States, based on the potential for his prosecution for desertion. On this point, the Board agreed with the previous holdings in the *Hinzman* and *Hughey* cases:

> I find that there is no serious possibility that the punishment that Mr. Key would receive for desertion if he were to return to the United States would amount to persecution or that he would face a risk to life or cruel and unusual treatment or punishment or entail a danger of torture.[265]

Thus, Key's refugee status claim was rejected. Key appealed this denial to the Federal Court, maintaining that the "killings of civilians happened on a systematic basis" in Iraq, and that he had no viable avenues to protest or object to the military's actions.[266]

The Federal Court identified two issues ripe for adjudication (1) whether the Board erred by holding that refugee status for a military deserter could only be conferred where there was an expectation of involvement in an excludable offense and (2) whether the Board erred in its application of the principle of state protection and, if so, would the denial of Key's claim to refugee status be inevitable in the face of the state protection reasoning in the Federal Court of Appeal's decision in

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[262] *Id.* at 27-28.

[263] *Id.* at 28-29.

[264] *See id*.

[265] *Id*. at 31.

[266] Colin Perkel, *Deserter Had No Way to Object to War, Court Told*, GLOBE & MAIL (Toronto), Apr. 3, 2008, at A9; Colin Perkel, *American Army Deserter Wants to Stay in Canada*, WATERLOO REG. REC., Apr. 2, 2008, at D10.

Hinzman.[267] On its review of the Board's decision, the Federal Court found that, although the Board's reasoning concerning the paragraph 171 issue was clear, the Board had engaged in little substantive analysis on the issue of state protection, seemingly because it had accepted Key's argument that the persecutor would be the state itself.[268] The Court also accepted the Board's finding that the conduct of the U.S. military in Iraq was not of the requisite character to constitute either war crimes or crimes against humanity, with the important caveat that, "[n]evertheless, the Board's observations that some of that conduct reflected 'a disturbing level of brutality' and that many of these reported indignities would represent violations of the Geneva Convention prohibition against humiliating and degrading treatment cannot be seriously challenged."[269] The Court then proceeded with its review of the merits of the Board's decision.

The fundamental holding of the Board's decision, in the Court's opinion, was "that refugee status can only be conferred where a soldier's past combat experiences or the expectations for further combat service would constitute excludable conduct[.]"[270] This finding was erroneous, and, according to the Court, misread both the *Hinzman* and *Zolfagharkhani* decisions.[271] Moreover, the Court alleged that the exact contours of paragraph 171 protection had not been addressed in the *Hinzman* decision, insofar as that decision was mainly concerned with the issue of whether a foot soldier could claim protection under paragraph 171 based on the illegality of the conflict itself.[272] The Federal Court in *Hinzman* did not have occasion to address the issue of "whether refugee protection is available for persons like Mr. Key who would be expected to participate in widespread and arguably officially sanctioned breaches of humanitarian law which do not constitute war crimes or crimes against humanity."[273] Although a risk of participating in war crimes or crimes against humanity may be a sufficient condition to establishing eligibility under paragraph 171,[274] "[i]t does not follow from this . . . that widespread violations of international law carried out by a military force but not rising

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[267] *Key*, [2008] F.C. 838, para. 11.
[268] *See id.* paras. 7, 10.
[269] *Id.* para. 13.
[270] *Id.* para. 14.
[271] *Id.* paras. 14, 17.
[272] *Id.* para. 19.
[273] *Id*.
[274] *Id.* para. 20 (citing Tagaga v. INS, 228 F.3d 1030 (9th Cir. 2000)).

to the level of war crimes or crimes against humanity can never support a refugee claim by a conscientious objector."[275] The issue for the Court, then, is how to judge international condemnation, what actions are relevant to the consideration of whether military actions are condemned as contrary to basic rules of human conduct, and what must the nature of these actions be to constitute a valid basis for refugee protection under the *Handbook*.

Although the Court found that an explicit response by the "international community to the legitimacy of a particular conflict or to the means by which it is being prosecuted" has been seen as a relevant consideration in determining eligibility under paragraph 171, such reaction or lack thereof is not a dispositive consideration.[276] As the Court reasoned, "[t]hat this is so is not surprising: there are many reasons for countries to be reticent to criticize the decisions or conduct of an ally or a significant trading partner even where the impugned actions would, in some other political context, draw widespread international condemnation."[277] As explicit international condemnation may be a sufficient condition, it does not necessarily following that the lack of such "vocalization" will doom a refugee claimant under paragraph 171.

In those cases where the international reaction to a conflict is "muted . . . refugee protection may still be available where it is shown that the impugned conduct is, in an objective sense and viewed in isolation from its political context, contrary to the basic rules or norms of human conduct."[278] In essence, the determination of condemnation is taken outside the political sphere, with all the vagaries attendant on international relations, and placed within the more objective competence of the judiciary. The Federal Court found support for this proposition in both domestic and foreign legal precedents that had confronted the identical issue. In *Zolfagharkhani*:

> [T]he Court was fundamentally concerned with the moral weight to be assigned to the obligation to provide any form of material assistance to a regime that was conducting a revulsive military campaign. The Court held that where a reasonable person "would not be able to wash his hands of guilt" the claim to refugee protection will be made out.[279]

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[275] *Id.*

[276] *Id.* para. 21 (citations omitted).

[277] *Id.*

[278] *Id.*

[279] *Id.* para. 23 (citing and quoting *Zolfagharkhani*, [1993] 3 F.C. 540).

Likewise, in *Al-Maisri*, the "Court concluded by saying that official military action that is contrary to the basic rules of human conduct will support a refugee claim by a person unwilling to participate for that reason," and that any punishment threatened for refusing to serve, in that context, would constitute persecution *per se*.[280] The United Kingdom decision in *Krotov* similarly forswore any requirement that the "military action" sought to be avoided had to constitute excludable conduct. The Court in *Krotov* reasoned that if certain especially heinous crimes:

> "[C]ommitted on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for refusal to participate will constitute persecution within the ambit of the [Refugee Convention]."[281]

Finally, the Federal Court cited to the United States Ninth Circuit Court of Appeals decision in *Tagaga v. INS*. In *Tagaga*, the Ninth Circuit accorded:

> "[R]efugee status . . . to [an applicant] who was simply unwilling to participate in race based arrests and detention. This was based on a standard defined by participation in acts "contrary to basic rules of human conduct" and not by one restricted to war crimes or crimes against humanity."[282]

These precedents, according to the Federal Court, made clear that "officially condoned military misconduct falling well short of a war crime may support a claim to refugee protection."[283] The Court found that the Board did err by placing a heightened burden on Key to demonstrate that the actions he sought to avoid constituted excludable conduct under the Refugee Convention.[284]

The remaining inquiry concerned state protection. The Court said that the Board, finding the inquiry irrelevant based on a "state as persecutor" theory, failed to conduct a reasoned analysis of this issue,

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[280] *Id.* para. 24 (citing *Al-Maisri*, [1995] F.C.J. No. 642).

[281] *Id.* para. 26 (quoting *Krotov*, [2004] EWCA Civ 69, para. 37).

[282] *Id.* para. 27 (citing and quoting *Tagaga*, 228 F.3d 1030).

[283] *Id.* para. 29.

[284] *Id. See also id.* para. 30 ("I would add that the Board's assertion that Mr. Key's past combat participation would not be sufficient to support his claim to asylum unless it constituted excludable conduct cannot be correct. This would give rise to an unacceptable 'Catch-22' situation where the factual threshold for obtaining protection would necessarily exclude a claimant from that protection.").

and a new hearing was required.[285] The Court also found that the holding of the Federal Court of Appeal was not determinative since it did not appear that Key would necessarily fail in his argument that state protection would not be forthcoming or would be otherwise unavailable.[286] Framing the issue on remand, the Court noted that:

> [c]lear and convincing evidence about similarly situated individuals who unsuccessfully sought to be excused from combat duty or who were prosecuted and imprisoned for a refusal to serve, may be sufficient to rebut the presumption of state protection in the United States . . . Because the outcome of this case cannot be considered . . . a foregone conclusion, Mr. Key should be given the opportunity to address fully the issue of state protection . . . before the Board.[287]

With this determination, U.S. deserters could claim their first judicial victory in Canada. Subsequent developments would prove a mixed bag.

5. JUSTIN COLBY AND COREY GLASS

At the beginning of July 2008, after the *Key* decision, the Federal Court dismissed an application for judicial review brought by Justin Colby, who contended that the Board erred in its finding that he failed to adequately avail himself of state protection prior to claiming refugee status in Canada.[288] In July 2004, prior to his unit's deployment to Iraq, Colby told his First Sergeant that he believed, "the troops were being lied to."[289] Yet Colby was told "not to question the chain of command."[290] Once in Kuwait, Colby spoke with the chaplain's office to discuss applying for conscientious objector status.[291] When Colby raised the issue with his First Sergeant, however, he was allegedly told:

> [T]hat conscientious objector status was reserved for people who refused to pick up a gun. The First Sergeant called him a "domestic terrorist." [Colby] was also told that he could be prosecuted under the [UCMJ] for his dissent.[292]

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[285] *Id.* paras. 31, 36.

[286] *See id.* paras. 32-35.

[287] *Id.* para. 35.

[288] Colby v. Min. of Cit. & Immigr., [2008] F.C. 805 (Can.), para. 3; Jamie Komarnicki, *U.S. Army Deserter Loses Refugee Bid in Canada*, GLOBE & MAIL (Toronto), Jul. 3, 2008, at A7.

[289] *Colby*, [2008] F.C. 805, para. 5.

[290] *Id*.

[291] *Id.* para. 7.

[292] *Id*.

Once in Iraq, Colby began his service as a medic. Colby alleged that he was required to perform procedures on many Iraqi civilians, even children, without anesthetic, on the suspicion that they were part of the resistance against the U.S. forces.[293] Colby and his unit left Iraq in August 2005. Thereafter, he was stationed in the United States.[294] In July 2006, Colby deserted the Army. On September 18, 2006, he arrived in Canada where he claimed refugee status.[295]

The Board denied Colby's claims using the same reasoning as its prior decision in *Hinzman*. Specifically, the Board found that the illegality of the war itself was not a valid consideration and that Colby had failed to adequately exhaust domestic avenues of relief prior to making his claim in Canada.[296] Accordingly, Colby presented no facts that would rebut the presumption of state protection in the United States.[297] On appeal to the Federal Court, Colby argued that he did establish sufficient facts to distinguish his case from Hinzman's, namely, the fact that he saw, and to a limited extent participated in, the mistreatment of Iraqi medical patients.[298] Although the Court accepted that his allegations *may* bring him within the ambit of paragraph 171, it further held that the inquiry under paragraph 171 only became relevant after a determination was made regarding state protection, and it was on this point that Colby's claim necessarily failed.[299] Colby inquired about conscientious objector status only once. He did not follow up on this initial inquiry and he never actually filed an application for such status.[300] This was particularly relevant to the inquiry, because, "[a]s a person from a democratic country, [Colby] was required to exhaust all forms of recourse available to him domestically."[301] As he did not, his claim for protection in Canada necessarily failed.

The higher profile Corey Glass case presents a more convoluted factual context than the Justin Colby case. In 2006, Glass deserted the United States military and fled to Toronto. Later that same year, Glass

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[293] *Id.* para. 8.
[294] *Id.* para. 9.
[295] *Id.*
[296] *Id.* paras 11-15.
[297] *Id.* para. 15.
[298] *Id.* para. 19.
[299] *Id.* paras. 21-23.
[300] *See id.* para. 24.
[301] *Id.*

was apparently discharged by the military.[302] In fact, a spokesman from the United States Army stated, after the publication of Glass's claim in Canada, that "Mr. Glass is not considered a deserter by the U.S. military, and . . . he need not fear criminal sanction if he returns home."[303] The Board denied his refugee claim and ordered him deported. Thus, Glass was threatened with the possibility that he might be the first U.S. "deserter" returned to the United States.[304] On March 25, 2008, his Pre-Removal Risk Assessment was decided negatively.[305] On June 21, 2008, his request for permanent residency based on the "humanitarian and compassionate" application was denied.[306] Removal was scheduled for July 10, 2008, but the Federal Court granted his motion to stay the execution of the removal order on July 9, 2008.[307]

Glass joined the Army National Guard in 2002. Glass was activated and deployed to Iraq, where he served in the Military Intelligence Service.[308] He served an initial six month deployment in Iraq:

> [D]uring which he observed "gross human rights violations and gross misconduct by U.S. soldiers against Iraqi civilians including children." During this service, he observed many Iraqi civilians who were killed "for no good reason". . . He also became aware of misconduct by U.S. soldiers, including extorting protection money from Iraqi shopkeepers. He stated that military records were falsified to "white wash" the real situation of violation of human rights against Iraqi civilians and misconduct by some army soldiers.[309]

When he attempted to inform his superiors of what he was seeing and hearing, he was told to mind his own business and reminded of the penalties for desertion.[310] Glass came to believe that Iraq was an "illegal war." When Glass attempted to gain non-combatant status and that proved unavailing, he decided to desert.[311] In August 2006, on a two-week leave to the United States, he fled to Canada.[312]

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[302] Matthew Campbell, *U.S. Veteran Seeking Asylum in Canada not Technically a Deserter, Report Says*, GLOBE & MAIL (Toronto), July 3, 2008, at A6.

[303] *Id.*

[304] *See* Dan Glaister, *U.S. Army Deserter Fights Deportation from Canada*, IR. TIMES, June 11, 2008, at 15.

[305] *Glass* (PRRA), [2008] F.C. 881, para. 2.

[306] *Glass* (H&C), [2008] F.C. 882, para 2.

[307] *Glass* (PRRA), [2008] F.C. 881, para. 1.

[308] *Id.* para. 4.

[309] *Id.* paras. 5-6.

[310] *Id*. para. 7.

[311] *Id*. para. 8.

[312] *Id*.

The Officer hearing his applications to stay removal and remain in Canada determined that there "was no objective new evidence since the [Board's] decision to support [Colby's] claim and that he faced 'no more than a mere possibility of persecution.'"[313] Noting the *Hinzman* decision, the Officer also wrote that the vast majority of deserters could expect no more punishment than a less than honorable discharge.[314]

The Federal Court disagreed, finding that the evidence proffered in *Hinzman* and that line of cases "was contradicted by recent documentation" that, "[the] army is cracking down on deserters, prosecuting them and convicting them to lengthy imprisonment."[315] Additionally, and in light of the Federal Court's recent decision in *Key*, the Court opined that the actions of the U.S. military in Iraq were in fact condemned by the international community as contrary to the basic rules of human conduct, and, thus, Glass might be able to demonstrate that *any* punishment he would receive for desertion would constitute persecution *per se*.[316] On the issue of state protection, the Court found that sufficient evidence had been submitted to require a reexamination of the issue of state protection, as it seemed clear that the U.S. military was "cracking down" on desertion in a way that rendered present circumstances distinct from those confronted by the Board, Federal Court, and Court of Appeal in previous Iraq War deserter cases.[317] Based on this evidence, the Court found that it would be "reasonable" to argue that the presumption of state protection had been rebutted, thus triggering the second inquiry, namely, whether Glass could establish that he fell within the purview of paragraph 171 of the *Handbook*.[318] Whether he could establish this was a question that was not clear, but, in any event, did not need to be addressed at this juncture.[319]

Next, the Court analyzed the standard for a stay: "A serious issue exists to be tried; [i]rreparable harm will be caused if the stay is not

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[313] *Id*. para. 17.

[314] *Id*. para. 18.

[315] *Id*. para. 19. One of the "new facts" adduced by Glass was his transfer to the U.S. Ready Reserve program by which he could be called up to service again. *Id*. para. 12. Apparently, this fact mooted any concern that Glass was not a deserter at the time of the Board's decision, the denial of his applications by the Hearing Officer, or at the time the Federal Court granted his stay.

[316] *See id.* paras. 20-22.

[317] *See id.* paras. 24, 26-30, 32-33.

[318] *See id*. paras. 34-35.

[319] *See id*. paras. 36-42.

granted; and [t]he balance of convenience favors the applicant."[320] The Court found serious issues concerning state protection and whether the state would be a persecutor in this case; it was concerned about irreparable harm stemming from possible punishment, the repercussions of this punishment, and the mooting of Glass's application for judicial review.[321] In the end, it held that the balance of convenience, in light of the foregoing and the absence of any significant harm to the government, favored the applicant.[322] A stay of removal was granted until disposition of the Glass's application for leave or disposition of the case on the merits by the Federal Court, whichever occurred first.

D. MORE WRONG THAN RIGHT: THE FEDERAL COURT'S DECISIONS IN *KEY* AND *GLASS*

In the course of an administrative and judicial battle stretching back four years, United States deserters in Canada have received only two decisions that could be deemed victories: the Federal Court's *Key* and *Glass* decisions. The Court's decision in *Glass* does not hold up under the barest of scrutiny, and in some senses represents a profound misunderstanding of the necessary inquiries to be made when confronted with a claim of refugee status based on desertion. While the Court's decision in *Key* is the correct result, it nonetheless misread prior cases and, thus, avoided a nuanced and in-depth inquiry concerning the main issue: whether Key would be able to establish facts that would bring him within the purview of paragraph 171. It is this decision that will first be addressed here.

In *Key*, the Court correctly ruled regarding the nature of the acts that need to be established in order to bring an individual within the ambit of paragraph 171 by rejecting the Board's holding that only past acts or the fear of participating in or being associated with future acts that constitute excludable conduct qualify.[323] Both Canadian and U.S. jurisprudence make clear that acts "condemned by the international community as contrary to basic rules of human conduct" encompass more than excludable conduct under either the Refugee Convention or the domestic

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[320] *Id*. para. 43 (quoting Toth v. Min. of Employ. & Immigr.), 86 N.R. 302 (1988) (Can.)

[321] *Id*. paras. 44-64.

[322] *Id*. paras. 65-67.

[323] *See generally Key*, [2008] F.C. 838, paras. 14-20.

implementations of its articles.[324] Additionally, the Court was correct to fault the Board for its inadequate analysis concerning the issue of state protection, as the Federal Court had previously made clear that even in cases where the alleged persecutor is the state, the issue of state protection remains relevant as a part of the inquiry concerning the objective reasonableness of the applicant's fear of persecution.[325] On these two grounds alone, and more clearly on the failure to actively engage the state protection issue, remand was required so that the Board could undertake a fuller and more jurisprudentially correct assessment of Key's claim.

Although not central to its final decision, the Court did not correctly interpret and apply prior precedent in its assessment of paragraph 171 eligibility when violations of *jus in bello* are alleged. The Court asserted that neither the *Hinzman* or *Hughey* cases had engaged in an analysis of this issue, but this statement is patently false. Hinzman and Hughey did not just claim that the mere participation in an allegedly illegal war established paragraph 171 eligibility. Both made claims that they would be forced to participate or be associated with acts *in the course of their service* that would establish their paragraph 171 eligibility.[326] By failing to engage the holdings of these two decisions on this point, the Court ignored the clear standard enunciated in those decisions for dealing with claims analogous to that raised by Key, and thus failed to give sufficient direction to the Board on remand.

This standard, noted by the Federal Court in both the *Hinzman* and *Hughey* decisions, stems from the United Kingdom's *Krotov* case. The standard requires evidence of widespread and systematic violations of international humanitarian law, international law, or human rights, as well as evidence establishing (1) that such violations occur and are occurring because of a deliberate policy of the state, or (2) because they are either condoned or tolerated by the state.[327] The Federal Court, in both *Hinzman* and *Hughey*, had made it clear that there was absolutely no evidence to establish that violations were occurring on account of a deliberate policy of the United States or because these violations were con-

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[324] *See, e.g.*, *Zolfagharkhani*, [1993] 3 F.C. 540, para 29; *Krotov*, [2004] EWCA Civ 69, para. 16; Mekhoukh v. Ashcroft, 358 F.3d 118, 127 (1st Cir. 2004); *Tagaga*, 228 F.3d at 1034-35 (9th Cir. 2000).

[325] *See Hinzman & Hughey*, [2007] F.C.A. 171, para. 54.

[326] *Hinzman*, [2006] F.C. 420, paras. 171-72; *Hughey*, [2006] F.C. 421, paras. 156-76.

[327] *Hinzman*, [2006] F.C. 420, para. 168; *Hughey*, [2006] F.C. 421, para. 157 (citing *Krotov*, [2004] EWCA Civ 69, para. 51).

doned by the U.S. military.[328] Rather, violations had been investigated and, where appropriate punished, a fact noted by reports by the ICRC and HRW.[329] In the *Key* decision, there was no indication that there was new evidence to contradict these findings, rather than the bare unsubstantiated assertions of Key himself.

The Board will likely reach the correct decision, which would seem to be, on the evidence noted in the Court's decision, a rejection of Key's claim. Nonetheless, the Court was disingenuous to ignore its own clear precedent, even if remand was ultimately the correct result. Such reasoning gives the appearance that it was more important to impugn a disfavored policy than it was to reach a balanced and supported conclusion, especially since the Court's ruling on this issue was largely superfluous.

Any hint of correctness is entirely absent from the Federal Court's decisions in *Glass.* First, the Court's reliance on the stringent enforcement of penalties against deserters is misplaced. The likelihood that Glass will face punishment, even a full five year prison term, is irrelevant as to whether he can establish refugee status under Canadian law or the *Handbook.* Rather, he must either establish discriminatory application of punishment based on a protected ground or establish that he could face additional punishment beyond that levied for his desertion, on account of a protected ground. He failed to adduce any such evidence. In the event that Glass could establish that he fell within the purview of paragraph 171, the nature or probability of punishment is still a moot point, as *any potential punishment* would constitute persecution *per se*. Accordingly, whether or not the United States is likely to punish Glass for his desertion upon his removal to the United States does not have anything to do with whether he may be able to establish refugee status, a fact reinforced by the Canadian Court's own precedent.[330]

The Court compounded this initial error by implying that this evidence of more stringent enforcement against deserters was relevant to the issue of state protection.[331] It is not, and cannot be under the relevant inquiry. Glass has a right to be free of persecution, not a right to be free of lawful punishment arising from a law of general applicability. The fact that he may be punished is of no concern, unless he can establish that this punishment would be persecutory. Glass, however, cannot

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[328] *See Hinzman*, [2006] F.C. 420, paras. 177-78; *Hughey*, [2006] F.C. 421, para. 163.

[329] *See Hinzman* (IRB), paras. 129, 133; *Hughey*, [2006] F.C. 421, para. 71.

[330] *See Hinzman*, [2006] F.C. 420, paras. 224-25 (citing *Ates*, [2005] F.C.A. 322).

[331] *See Glass* (PRRA), [2008] F.C. 881, paras. 24-34.

make this showing based on the discriminatory punishment standard found in paragraph 169. Nor did Glass establish that he sufficiently pursued other avenues of relief or attempted to exhaust remedies prior to making his claim in Canada.[332] In short, under the framework established by the Federal Court of Appeal in the Hinzman/Hughey joint appeal, Glass failed to establish that the presumption of state protection was rebutted, or that he could otherwise claim an objectively reasonable fear of persecution in the United States. Yet, by focusing on a point immaterial in isolation and inadequately connected to any relevant ground, the Court was able to overlook this inconvenient fact and find the existence of a "serious legal question."

The Court's error concerning potential paragraph 171 eligibility is more glaring. It simply took cursory note of the facts alleged by Key, and found that Glass might be able to bring himself within the purview of paragraph 171. The error in the *Key* decision has already been noted, and is equally applicable in noting a misstep in this context. Glass submitted no evidence that violations were either widespread or systematic, or that they were occurring because of a deliberate policy of the United States or by official toleration of the military. Moreover, while Key could arguably claim prior participation in, and a future risk of association with, paragraph 171 acts, Glass did not allege any circumstances where it would be reasonable to assume that he would be party to the types of military actions that would establish his eligibility for refugee status under paragraph 171. In short, the Court in *Glass* possessed no evidence that Glass had or would be able to rebut the presumption of state protection, or that, even if he did, he would be able to establish refugee status under paragraph 171. Thus, there is no redeeming aspect to the Court's decision.

III. DO IRAQ WAR DESERTERS QUALIFY FOR REFUGEE PROTECTION?

There is nothing inherent in the position of a U.S. military deserter that would render him *per se* eligible for refugee status in a foreign country or necessarily ineligible for such status. Whether refugee status should be granted must be a function of the specific facts alleged, the circumstances of the individual, and, possibly, the nature of the punishment

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[332] *See id.* paras. 7-8.

one would face if returned to the United States. On this last point, it is worth noting that none of the deserters in the cases surveyed argued that the punishment they might receive was outside the bounds of international consensus, or proffered any evidence that they might be treated in a disparate manner because of their opposition to the war and their legal proceedings in Canada.[333] In fact, the evidence tended to point in the other direction; each would receive the full measure of due process if returned to the United States and each would be placed into proceedings before a court-martial.[334]

As the Iraq War deserters would not face disproportionate punishment if returned to the United States, only three issues need be addressed in the remainder of this section. The first is that of state protection, namely whether facts exist that could potentially rebut the presumption of state protection so as to foreclose, almost *ab initio*, the possibility that a deserter may obtain refugee status abroad. The second issue is a corollary of the first, whether selective conscientious objectors should be recognized under international law, and whether the United States' failure to recognize this class of individuals provides them with sufficient evidence to rebut the presumption of state protection. Finally, the third issue relates to paragraph 171 and whether "military action" in Iraq constitutes conduct condemned by the international community as contrary to the basic rules of human conduct.

A. AN UNREBUTTED PRESUMPTION OF STATE PROTECTION

The starting point for any claim of refugee status is whether the applicant can rebut the presumption of state protection, as the Federal Court of Appeal made clear in its decision in the joint appeal of Hinzman and Hughey.[335] The most important principle present in the inquiry is that no individual has an absolute right to be found a conscientious objector. What an applicant is entitled to is a fair and unbiased process

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[333] *See Hinzman* (IRB), *supra* note 84, paras. 65-72, 151, 152, 166, 168; "It should be noted that the applicants have not asserted that the punishment that Mr. Hinzman faces in the United States is outside the range of what is considered acceptable under international human rights law." *Hinzman*, [2006] F.C. 420, para. 226; *Hughey*, [2006] F.C. 421, paras. 29, 86-87; *Key* (IRB), *supra* note 229, para. 31.

[334] *See, e.g.* Maurer, *supra* note 16.

[335] *See Hinzman & Hughey*, [2007] F.C.A. 171, para. 41.

through which he may press his claim to such status.[336] Additionally, deserters must be guaranteed due process and fundamentally fair proceedings if they are brought up on charges before a court-martial.[337] These two requirements represent the main issues pertaining to state protection. If the United States presents an adequate avenue for applying for relief and having that relief granted in appropriate circumstances, as well as fundamentally fair and impartial proceedings for trying those who violate its laws, the presumption of state protection will not have been rebutted, and the applicant will have failed to establish an objectively reasonable fear of persecution.

First, regarding conscientious objector status, the United States Army has provided a mechanism by which an applicant can claim such status and be either reassigned to a noncombatant role or be discharged from service.[338] Under Regulation 600-43, a service-member may apply for conscientious objector status, and that individual's superior officers have the responsibility to ensure that the application is passed through the appropriate hands.[339] Moreover, the applicant is required to be advised concerning the process, the waiver of certain rights, including that of privacy on issues covered by the application, and the consequences of filing an application.[340] After the application is filed, the applicant is interviewed by a chaplain and a psychiatrist, the claim is investigated, and a hearing is held, if the applicant so desires.[341] If the application is denied, the applicant also has the right to have the denial reviewed at various subsequent levels.[342] Finally, even if all appeals are exhausted and the claim is ultimately denied, provision is made for subsequent applications in certain circumstances, one of which would appear to be in regards to a different deployment.[343] In sum, the Regulation provides a comprehensive procedure by which applicants are guaranteed due process, prompt consideration of their claims, and review of any denials. Thus, insofar as alleged conscientious objectors are concerned, the United States provides ample protection and avenues by which to seek relief.

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[336] *See id.* para. 46.

[337] *See id.*

[338] Army Reg. 600-43, Conscientious Objection (U.S. Army, Aug. 21, 2006), § 1-5.c, *available at* http://www.usapa.army.mil/pdffiles/r600_43.pdf. *See also* 50 U.S.C. Appendix § 456(j) (dealing with conscientious objection under the Selective Service Act).

[339] Army Reg. 600-43, *supra* note 338, § 2-1.a, 2-1.c.

[340] *Id.* § 2-2.

[341] *See id.* §§ 2-2.e, 2-3.a & b, 2-4, 2-5.

[342] *Id.* § 2-6.

[343] *Id.* § 2-9.a.

At bottom, the complaint of Hinzman has less to do with the process, and more to do with the fact that his application was denied, pursuant to a clear provision finding selective conscientious objectors ineligible for relief under the Regulation.[344] Furthermore, Hughey, Key, Colby, and Glass failed to even apply for status or affirmatively seek to engage the protective mechanisms put into place by the United States Army.[345] In this circumstance, there should be no doubt that the presumption of state protection has not been rebutted, and individuals who have never sought out the protections of their home state should not be granted international protection.

Second, the UCMJ provides a requisite measure of due process to individuals brought within its purview.[346] Pursuant to the UCMJ, desertion is defined and rendered a felony.[347] The deserters have consistently conceded that they do not face the death penalty if removed to the United States, but could serve a lesser sentence in lieu of or in addition to other penalties (loss of pay and dishonorable discharge). Although a court-martial may decree any other penalty which, on evidence proffered to the Federal Court, may be as light as a dishonorable discharge.[348] Even if a deserter did not face a summary dishonorable discharge, he would have every expectation of fair, regular, and due processes in the course of his proceedings. The UCMJ (1) guarantees prompt notification of charges and a speedy trial;[349] (2) prohibits compulsory self-incrimination and double jeopardy;[350] (3) provides the accused with access to legal representation;[351] (4) prohibits cruel and unusual punish-

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[344] *Id.* § 1-5.a (1). *See also infra* Part IV.B.2.

[345] *See Hinzman & Hughey*, [2007] F.C.A. 171, para. 51; *Key* (IRB), *supra* note 229, para. 31; *Colby*, [2008] F.C. 805, paras. 4-9; *Glass* (PRRA), [2008] F.C. 881, paras. 7-8.

[346] *See generally* 10 U.S.C. § 801 (2000).

[347] 10 U.S.C. § 885 (2000) ("(a) Any member of the armed forces who—(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion . . . (c) any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct.").

[348] *See* MANUAL FOR COURTS-MARTIAL UNITED STATES, Art. 82-Solicitation, § 6.e. (2008), *available at* www.jag.navy.mil/documents/mcm2008.pdf.

[349] 10 U.S.C. § 810 (2000).

[350] 10 U.S.C. §§ 831, 844 (2000).

[351] 10 U.S.C. § 838 (2000).

ment;[352] and (5) contains provisions for review through the military courts and eventually before the United States Supreme Court.[353] Although deserters would face a court-martial if tried on charges of desertion, they would have nearly every procedural protection available to them that could be wished for in a democratic society. On this evidence, it is equally untenable to presume that they would not enjoy the necessary "state protection" if returned to the United States.

One final note, as the Canadian Courts have consistently held, the issue of state protection is equally important in those circumstances where the state would allegedly be the persecutor.[354] In those circumstances, the inquiry takes on a slightly different tenor, as the underlying question becomes whether the applicant can establish an objectively reasonable fear of persecution.[355] Applying this principle to the issue of the Iraq War deserters, even if the United States itself will be the agent of punishment, through the arm of its military, there is no objective evidence that this punishment would constitute persecution. In the cases surveyed above, the applicants have either conceded that the punishment they would receive is within the bounds of international acceptability, or failed to proffer any evidence that they would suffer disparate or discriminatory treatment if charged with desertion.[356] As Major Earnhardt made clear regarding Hinzman, these soldiers will be treated with the dignity and respect they deserve, and any punishment they may receive will be the result of an evenhanded application of a neutral law of general applicability.[357] There are no grounds for believing, nor has there been any evidence submitted to establish, that these deserters have anything other than prosecution to fear if returned to the United States.

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[352] 10 U.S.C. § 855 (2000).

[353] 10 U.S.C. §§ 863, 864, 866, 867, 867(a) (2000).

[354] *See, e.g.*, *Hinzman & Hughey*, [2007] F.C.A. 171, paras. 53-56.

[355] *Id*. para. 56.

[356] *Hinzman* (IRB), *supra* note 84, para. 71; *Hinzman*, [2006] F.C. 420, para. 226; *Hughey*, [2006] F.C. 421, paras. 86-87; *Key* (IRB), *supra* note 229, para. 31; *Colby*, [2008] F.C. 805, paras. 13-14.

[357] *See* Maurer, *supra* note 16.

B. THE NON-EXISTENCE AND IMPRACTICALITY OF AN ALLEGED RIGHT TO SELECTIVE CONSCIENTIOUS OBJECTION

A deserter from the U.S. Army would have difficulty rebutting the presumption of state protection or establishing an "objectively reasonable" fear of persecution from his home country. Nonetheless, an argument raised by Hinzman and Hughey regarding whether such protection would be "reasonably forthcoming" is deserving of further examination at this juncture; whether U.S. law is under-protective in its regime because it fails to provide recourse to "selective conscientious objectors."

Under Army Regulation 600-43, objection to a particular war, as opposed to war in general, is insufficient to establish eligibility as a conscientious objector.[358] This is an adoption of the United States Supreme Court's decision in *Gillette v. United States*,[359] and a position also taken by the Federal Court of Canada.[360] The reasoning behind the rejection of any such right is succinctly stated by Justice Marshall in the opinion for the U.S. Supreme Court in *Gillette*:

> A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." All the factors that might go into non-conscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion. Indeed, over the realm of possible situations, opposition to a particular war may more likely be political and non-conscientious, than otherwise. The difficulties of sorting the two, with a sure hand, are considerable. Moreover, the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events. Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant's view of the facts in relation to his judgment that a given factor or congeries of factors colors the character of the war as a whole. In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results."[361]

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[358] Army Reg. 600-43, *supra* note 338, § 1-5.a.(4).

[359] Gillette v. United States , 401 U.S. 437, 443 (1971).

[360] *See Ciric*, [1994] F.C. 65.

[361] *Gillette*, 401 U.S. at 455-56.

The practicality of sorting true convictions from "fortuitous" convictions concerning particular wars would indeed by daunting, to say the least, and disallowing such selective conscientious objectors seems to be a reasonable limitation on the granting of relief under U.S. and Canadian law. The concerns noted by Justice Marshall are especially acute in the instant circumstance, where the objections voiced by the Iraq War deserters are largely derivative from differences of opinion over policy. They disagree with the U.S. invasion of Iraq and, in some cases, the execution of that war on the ground. In other cases, however, they voiced the opinion that had weapons of mass destruction (WMDs) been found in Iraq, they would have had no qualms about fighting. The cases of the Iraq War deserters highlight the difficulties in attempting to discern true conscientious objection in an individual who does not generally object to war and who would also be content with a non-combatant role in the same war that he supposedly objects to.

A more fatal blow to the deserters' claim on this point is that, despite the proliferation of international human rights instruments over the previous fifty years, under international law there is no right to absolute conscientious objection. The general rule is still that states may require military service of their citizens.[362] There is not a requirement that alternative forms of service be offered, as the Federal Court noted in its *Hinzman* decision when it cited to the Federal Court of Appeal's opinion in *Ates*.[363] In that case, confronted with a certified question that asked, "In a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offense of refusing to do his military service, constitute persecution based on a Convention refugee ground?"[364] The Court of Appeal answered in the negative.

Under international law, there is no absolute right to obtain conscientious objector status in a system that provides a fair process by which to adjudicate such claims. Furthermore, there is not an international right to *partial or selective* conscientious objection. This conclusion is supported by paragraph 173 of the *Handbook*, which makes no claim that international law embodies any right to conscientious objection. In fact, if it did, paragraph 173 of the *Handbook* would be largely surplusage. Courts could simply turn to concrete international law rather

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[362] *See Hinzman*, [2006] (F.C.) 420, paras. 201-13.

[363] *Id*. paras. 224-25.

[364] *Ates*, [2005] F.C.A. 322, para. 1.

than persuasive guidance on the issue. Furthermore, paragraph 173 provides that states may implement whatever protections they deem fit for their domestic systems, without regard to the status of international law. Canada has not, however, gone above and beyond the *Handbook* requirements in this regard. Thus, any claim to selective conscientious objector status is fatally flawed and was correctly rejected.

C. THE HIGH AND UNMET BURDEN OF PARAGRAPH 171

The inability to either exhaust domestic remedies or to rebut the presumption of state protection is dispositive of any claim by a deserter that he is entitled to refugee status in Canada. Nonetheless, the scope of paragraph 171 of the *Handbook* should be addressed here, and the question answered whether, on the facts presented, a valid claim under paragraph 171 could be successful. There are two potential inquiries in this regard. First, whether the alleged illegality of the war in Iraq is in any way a relevant consideration to determining the refugee status of a low-level solider. Second, whether the military actions of the U.S. forces on the ground are violations of *jus in bello* that are sufficiently widespread and systematic and conducted by or at the instigation of the state, or by its implicit toleration.

The Federal Court of Appeal declined to answer the certified question regarding whether violations of *jus ad bellum* could bring a mere soldier within the ambit of paragraph 171,[365] but the Federal Court's analysis of that issue stands as a legitimate interpretation of the *Handbook* and prevailing international law. If the war itself is illegal, that illegality cannot be traced to any actions undertaken by those deserters claiming refugee status in Canada, nor would their participation in the war itself, so long as their conduct in that war was within the bounds of *jus in bello*, render them criminally accountable for the illegality of the war. Only those who had a hand in planning and prosecuting the war could be held liable under international law, and it is only those who would avoid taking part in such an activity that should be able to claim refugee status under paragraph 171.[366] As the Federal Court noted, the rank and file solider should not be called upon to decide whether the war he is fighting in is legal or illegal, but should only be concerned with keeping his own actions within internationally accepted bounds. If there

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[365] *Hinzman & Hughey*, [2007] F.C.A. 171, paras. 37, 64.

[366] *See Hinzman*, [2006] F.C. 420, para. 142; *Hughey*, [2006] F.C. 421, paras. 222-224.

is no potential way by which the solider could be held accountable for the action he claims to want to avoid, i.e., taking part in an illegal war, then refugee status should not be forthcoming if he shirks his duty and deserts based on this qualm. None of the deserters could be punished solely for taking part in the Iraq War, based on international law principles accepted since Nuremberg. Thus, their claim that the war itself is illegal is not relevant to a determination of whether they are refugees under paragraph 171.

Regarding the second point, there is a more or less acceptable standard for determining whether military actions on the ground constitute conduct condemned by the international community as contrary to basic rules of human conduct: the UK's decision in *Krotov*, as adopted by the Federal Court.[367] The Board's decision in *Hinzman*, citing *Krotov*, held that violations of international law and human rights will bring an individual within the purview of paragraph 171 "if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military[.]"[368] Further, even if these acts are established in the abstract, the applicant must also demonstrate that he may be engaged in, associated with, or be complicit in such military actions if returned to service:[369]

> [T]he grounds should be limited to reasonable fear on the part of the objector that he will be personally involved in such acts, as opposed to a more generalized assertion of fear or opinion based on reported examples of individual excesses of the kind that almost inevitably occur in the course of armed conflict, but which are not such as to amount to the multiple commission of inhumane acts pursuant to or in furtherance of a state policy of authorization or indifference.[370]

There can be no doubt that there have been serious violations of international humanitarian law and human rights during the course of the United States military action in Iraq. These abuses have been documented, not only by international and non-governmental organizations, but also by the United States military itself. The question is not whether such abuses have occurred, but whether they have been widespread and systematic, and whether they have occurred because of a deliberate policy or official indifference. It does not seem that a refugee claimant could establish that the actions of the United States and its military in Iraq con-

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[367] *Krotov*, [2004] EWCA Civ 69, para. 47.

[368] *Hinzman* (IRB), *supra* note 84, para. 117.

[369] *Id*. para. 121.

[370] *Id*. para. 118.

stitute the kind of conduct that would bring the applicant under the protection of paragraph 171.

First, there is no indication that acts contrary to basic rules of human conduct are widespread and systematically occurring in Iraq. For example, the International Criminal Tribunal for Rwanda adopted the following definitions of "widespread" and "systematic" in the context of "crimes against humanity":

> ["W]idespread" . . . was defined . . . as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims, whilst 'systematic' was defined as thoroughly organized action, following a regular pattern on the basis of a common policy and involving substantial public or private resources.[371]

During the Iraq War, the acts noted by the ICRC and HRW, and those recounted by deserters like Joshua Key, do not fit comfortably into these definitions. The violations appear random and of a low-scale, not as massive retaliations undertaken against large segments of the subject populace. Nor is there any indication, for the most part, of any notion of collective action. The incidents complained of by Key were the result of individual action, not partaken by the unit as a whole. While there were certain incidents involving crowds, most of the incidents involved specific victims, not a multiplicity of victims. Moreover, even if there were some occurrences that could be deemed to involve massive and large scale action, the frequency element would not be met. There is no indication that such significant attacks against civilians occur with any alarming frequency.

Additionally, accepting Key's evidence as indicative of the general state of affairs in Iraq, the violations he alleged do not appear to be the result of organized action following any sort of common policy. Rather, the violations seem to be instantaneous reactions to presumed provocations or the result of the stress that accompanies prolonged deployment in a war zone. Whether the act is the shooting of a civilian who had made a rude gesture or the targeting of a truck that had cut off the convoy, the violations of *jus in bello* cannot be deemed to be the product of any organized and common policy of targeting innocent bystanders. These acts are, admittedly and understatedly, brutal and unacceptable violations of the rights of the Iraqi populace. Yet, as the Federal Court

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[371] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, para. 69 (Dec. 6, 1999) (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 580 (Sept. 2, 1998)).

noted, such unfortunate acts are an inevitable consequence of any armed conflict. These acts will not serve to establish refugee status under paragraph 171 unless they can be shown to be widespread and systematic.[372]

The requirement of widespread and systematic violations is simply one part of the two part inquiry the Federal Court borrowed from *Krotov*. Additionally, an applicant must show that the violations occurred because of a deliberate policy of his state, or pursuant to implicit tolerance.[373] There has been no evidence offered during the course of the deserters' litigation to establish that the violations that have occurred or are occurring in Iraq are pursuant to a deliberate policy of the United States government or the military force in Iraq. Moreover, there was no evidence submitted that the government and military tolerated the violations committed by its forces. Although Key alleged that records were "white-washed" and violations "hushed-up," he admitted that this was conjecture and that he had no evidence of such official indifference to or toleration of human rights and humanitarian law violations in Iraq.[374] On the contrary, the reports of the ICRC and HRW found that violations were, for the most part, investigated and the violators were punished according to the nature of their violation.[375] This fact belies any official sanction to the violations that have occurred.

However, violations of human rights and international humanitarian law *have occurred* in Iraq, are probably occurring presently, and most likely will occur in the future. This is an unfortunate inevitability of war, but one that can hardly be guarded against in any circumstance. The actions of soldiers cannot be policed at all times. Whether through a trigger-happiness or pseudo-provocation, civilians will be injured and killed in situations where no harm should have come about. Nonetheless, the standards under international law do not ask whether there have been some occurrences, no matter what the context. Rather, it requires significant military action, of a widespread and systematic character, that bears the imprint of governmental sanction, whether explicit or implicit. This is an extraordinarily high standard to meet. On the evidence in this case, and on a broader examination of the literature on the Iraq War, it is a standard that the deserters have been and will be unable to meet. Accordingly, notwithstanding their failure to rebut the presumption of state protection, or to establish that they would be subject to persecution if re-

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[372] *Hinzman*, [2006] F.C. 420, paras. 169-71.

[373] *See, e.g.*, *Hinzman* (IRB), *supra* note 84, para. 117.

[374] *Key* (IRB), *supra* note 229, at 28-29.

[375] *See, e.g.*, *Hinzman* (IRB), *supra* note 84, paras. 129, 133.

turned to the United States by virtue of the nature of the punishment they might suffer, the deserters are also not entitled to claim that the punishment they would suffer constitutes *per se* persecution.

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Iraq War deserters do not qualify as refugees under international law or the Canadian interpretation of paragraph 171. The United States does not require military service from its citizens. Additionally, the U.S. provides more than ample opportunity to apply for non-combatant status and a discharge if, after entering the military, one does discover that he is a genuine conscientious objector. Furthermore, the military provides due process to those who have been found in violation of the UCMJ on account of, as relevant here, their crime of desertion. Finally, United States law on this point is not only consistent with international law, but it stands in the vanguard of that development.

Just because the deserters would have the United States and the international community go further in its protection of "conscientious objectors" is no reason for a court to unilaterally read that requirement into instruments that, under any fair reading, will not support such an interpretation. Besides the issue of state protection, the deserters have otherwise failed to establish that the United States' military action in Iraq falls within the purview of paragraph 171. This provision was not meant to extend to every individual who could conceivably come into contact with a distasteful duty in the course of their military service. Rather, it was meant to extend to truly horrific and expansive violations of human rights and humanitarian law. Such violations have not occurred and are not occurring under the U.S. watch in Iraq.

Iraq War deserters do not qualify for refugee status under an objective reading of the law. Furthermore, to read the law to give them such protections would do a grave disservice to the international rule of law and the Canadian asylum system. Strained readings, such as the Federal Court's decisions in *Glass*, evidence nothing other than a veiled political agenda. Attempting to fit these individuals within systems of refugee protections degrades the notion of "refugee status" and will inevitably lead to broader foreign policy grievances. If Canada is intent on doing something to accommodate Iraq War deserters currently living in that country, it should proceed through the legislature. A system, akin to that which allowed Vietnam War deserters to remain in Canada, would be a relatively neutral and legitimate way to provide for a class of indi-

viduals that otherwise has no valid claim to status in Canada.[376] This route would be within the prerogative of the Canadian government, but not one without inherent shortcoming. Deserters have committed a crime. Deserters' actions cannot be justified under any acceptable rubric of refugee law. Canada should not erect a refuge simply because it did not and does not agree with the U.S. invasion of Iraq. Nonetheless, even an imperfect political result is far preferable to an incorrect judicial result, which seems to be the only other avenue that would legitimate the deserters' presence in Canada.

CONCLUSION

The Iraq War does not inspire moderate or lukewarm rhetoric. Debate on both sides has been impassioned and, at times, filled with vitriol. Such combative attitudes may or may not be appropriate in the political sphere, in which this debate has so far been conducted. Rhetoric and opinion are not, however, appropriate in the realm of the judiciary, whether the court sits in the United States, Canada, or some other jurisdiction. Although laws are not perfect, and may not encompass every conceivable situation, through dispassionate and objective reasoning, an approximately correct answer can be found to almost any legal problem. That stated, the correct answer in this case brooks no equivocation—U.S. deserters in Canada do not qualify as refugees under international or Canadian law, and should not be afforded such status no matter how much sympathy one may feel towards them.

As the Federal Court succinctly stated in its *Hinzman* decision, sympathy alone cannot give rise to a right that otherwise does not exist at law.[377] Even more apt in this context is the quotation from the United Kingdom's decision in *Sepet*:

> As judges we would respect [the deserters'] view but might feel it necessary to punish them all the same . . . We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we

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[376] *See generally* John Hagan, *Narrowing the Gap by Widening the Conflict: Power Politics, Symbols of Sovereignty, and the American Vietnam War Resisters' Migration to Canada*, 34 LAW & SOC'Y REV. 607 (2000). During the Vietnam War-era, Canada permitted certain deserters and draft-evaders to seek residence in Canada based on a points-system, rather than through the refugee protection regime. *Id.* at 616.

[377] *Hinzman*, [2006] F.C. 420, para. 232.

> sympathized and even shared the same opinions, we had to give greater weight to the need to enforce law.[378]

The correct result in these cases is that the law offers no remedy to the perceived plight of the Iraq War deserter. Application of this rule in this context may be difficult to bear, but it evinces a far greater respect for law than the contrary result. To conclude, as with any strong democracy, the appeal to politics remains, in both Canada and the United States.

[378] *Sepet*, [2003] UKHL 15 Civ, para. 34 (*aff'g* [2001] EWCA Civ 681).