IMMIGRATION AND REFUGEE BOARD
(REFUGEE PROTECTION DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DE LA PROTECTION DES RÉFUGIÉS)

TA4-01429
TA4-01430
TA4-01431

CLAIMANT(S) / DEMANDEUR(S)

JEREMY HINZMAN
(a. k. a. Jeremy Dean Hinzman)
NGA THI NGUYEN
LIAM LIEM NGUYEN HINZMAN
(a. k. a. Liam Liem Nguye Hinzman)

DATE(S) OF HEARING / DATE(S) DE L'AUDIENCE

December 8, 2004
December 7, 2004
December 6, 2004

DATE OF DECISION / DATE DE LA DÉCISION

March 16, 2005

CORAM / CORAM

Brian Goodman

FOR THE CLAIMANT(S) / POUR LE(S) DEMANDEUR(S)

Jeffry A. House
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[1] These are the Reasons for my decisions in the claims for refugee protection of Jeremy Hinzman (the principal claimant), Nga Thi Nguyen (the female claimant), and Liam Liem Nguyen Hinzman (the minor claimant), made under section 99(1) of the Immigration and Refugee Protection Act (the Act).[1]

BACKGROUND

[2] On January 22, 2004, Jeremy Hinzman, then 25 years-of-age, and his wife Nga Thi Nguyen, then 31 years-of-age, made inland claims for Convention refugee status and refugee protection on their own behalf and on behalf of their then 1-year-old child, Liam Liem Nguyen Hinzman, against the United States of America (US), their country of citizenship.

[3] In the narrative to his Personal Information Form (PIF),[2] declared February 16, 2004, Mr. Hinzman alleges that he is a conscientious objector to the war in Iraq, which he believes is contrary to international law and is being waged on false pretences. He asserts that the use of force is immoral and counterproductive, and that he is not willing to kill or be killed in the service of ideology and economic gain. Participating in the war in Iraq would be a violation of his conscience, religious principles, and international law.

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1 Immigration and Refugee Protection Act, S.C. 2001, c. 27.

2 Exhibit C-1, Personal Information Form (PIF), Client ID Number 5359-5558.

[4] He states that, in mid-January 2004, he received notification that his battalion was to be deployed to Iraq. He alleges, in his PIF narrative, that because the military occupation of Iraq is without legal underpinnings, he would be a criminal if he were to take part in it. He believes that although any soldier has a duty to refuse to follow a manifestly unlawful order, if he were to refuse to obey a direct order in Iraq, there would be a strong likelihood of extra-judicial punishment, in addition to penal incarceration.

[5] He fears that, if he is returned to the US, he will be prosecuted for desertion, and that being punished for following his conscience is a form of persecution.

PRELIMINARY MATTERS

[6] On June 29, 2004, in response to an application made by the Canadian Broadcasting Corporation (CBC), I ruled that the hearing of these claims should be conducted in public, subject to the measure that only non-disruptive audio equipment would be allowed in the hearing room during the proceedings, and cameras would be allowed in the hearing room only when the hearing was not in process.

[7] On the unopposed oral application of counsel for the claimants, I ruled on November 12, 2004, that the pre-hearing conference, convened at the request of the parties, should be conducted in public so that interested members of the media and the public might attend.

[8] At the pre-hearing conference, I indicated that one of the issues to be determined was the relevance to Mr. Hinzman's claim of the allegation that that the war in Iraq was illegal. I advised the parties that following the completion of our pre-hearing conference I would consider whether I ought to proceed to make a preliminary ruling on this issue after requesting and considering written submissions from the parties.

[9] Counsel for Mr. Hinzman, in particular, stated his preference for my making a ruling on the issue, as it would assist him in determining which witnesses he should call and what evidence should be adduced at the hearing. Counsel for the Minister as well as the Refugee Protection Officer (RPO) appeared to support my making a preliminary ruling.

[10] I subsequently wrote to the parties, and requested submissions. After carefully considering written submissions, I ruled on November 12, 2004, for the reasons set out in my Interlocutory Reasons of that date, that Mr. Hinzman's allegation that US military action in Iraq is illegal because it is not authorized by the United Nations (UN) Charter,[3] or UN Resolution is not relevant to the question of whether it is "the type of military action" which "is condemned by the international community, as contrary to basic rules

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[3] The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.

of human conduct," within the meaning of paragraph 171 of the Handbook on Procedures and Criteria for Determining Refugee Status[4] (the Handbook) of the Office of the United Nations High Commissioner for Refugees (UNHCR). I ruled that, consequently, evidence with respect to the legality of the US embarking on military action in Iraq, would not be admitted into evidence at the hearing of these claims.

[11] At the first sitting on December 6, 2004, of the hearing of these claims, Mr. Hinzman and Ms. Nguyen agreed that Mr. Hinzman would be designated to represent the interests of their minor child, Liam Liem Nguyen Hinzman. I therefore designated Mr. Hinzman to represent the interests of their minor child, Liam Liem Nguyen Hinzman.

ISSUES

[12] I have addressed the issues with respect to the principal claimant, Mr. Hinzman, under the following headings: Identity, Credibility, State Protection, Conscientious Objection, Objection to Service in Iraq, and Punishment for Desertion: Prosecution or Persecution?

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[4] Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Chapter V B, paragraph 171.

[13] As they relate to the principal claimant, the substantive issues include:

1. Has Jeremy Hinzman rebutted the legal presumption that the government of the US will be willing and able to protect him?
2. Is Jeremy Hinzman a Convention refugee by reason of a well-founded fear of persecution by the US government and its military for reasons of political opinion, religion, or membership in a particular social group, namely, conscientious objectors to military service in the US army?
3. Is the type of military action, with which Mr. Hinzman does not wish to be associated in Iraq, condemned by the international community as contrary to basic rules of human conduct?
4. Is Jeremy Hinzman a person in need of protection, in that his removal to the US would subject him personally to a risk of cruel and unusual treatment or punishment by the US government and its military? Is the risk of punishment to Mr. Hinzman for desertion from the US military inherent or incidental to lawful sanctions, imposed in conformity with accepted international standards?

[14] In relation to the other claimants:

1. Is there a serious possibility that the other claimants will be persecuted because of their membership in a particular social group, namely the family of Jeremy Hinzman or that they are persons in need of protection because of a risk to their lives or a risk of cruel and unusual treatment or punishment?

[15] Prior to addressing these issues, a word or two concerning my authority under the Act[5] would, in my view, be helpful.

[16] First, my authority as a member of the RPD does not extend to determining whether the claimants should have the right to stay in Canada. Other officials, outside of the RPD, make those decisions under the Act, pursuant to different processes.

[17] Second, my authority does not include making judgments about US foreign policy, including the legality or the wisdom of the US government's decision to authorize its military to enter Iraq.

[18] Once again, my authority is to determine whether the claimants are Convention refugees under section 96 of the Act, or persons in need of protection under section 97 of the Act.

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5 Immigration and Refugee Protection Act, S.C. 2001, c. 27.

DETERMINATION

[19] I find that the claimants are not Convention refugees, as they have not established that they have a well-founded fear of persecution for a Convention ground in the US. I also find that they are not persons in need of protection, in that their removal to the US would not subject them personally to a risk to their lives or to a risk of cruel and unusual treatment or punishment, and in that there are no substantial grounds to believe that their removal to the US will subject them personally to a danger of torture.

[20] In reaching these determinations I have considered the totality of the evidence and the post-hearing submissions of counsel for the claimants, received January 18, 2005, the submissions of counsel for the Minister, received February 7, 2005, and the reply of counsel for the claimants, received February 28, 2005. I have, where appropriate, stated the relevant legal principles that guided my decisions.

FACTS

[21] The following are the facts on which I rely in determining Mr. Hinzman's claim.

Mr. Hinzman's Enlistment

[22] After moving from Rapid City, South Dakota, to Boston, Massachusetts, in August 2000 and working until December 2000 in a supermarket, Mr. Hinzman determined that, at that point in his life, he needed some focus and direction. He wanted to attend university, but did not have the means to do so. The US military provides financial assistance for recruits to attend university upon completion of their term of enlistment. A further motivating factor was that Mr. Hinzman had been brought up to believe that the army had a higher or noble purpose of doing good things, like spreading democracy, and he wished to "transcend" himself and the everyday work world.

[23] In mid-November 2000, Mr. Hinzman met with a recruiting officer in Boston, who provided him with some documents. A couple of weeks later, Mr. Hinzman enlisted in the US Army. He testified that "they weren't seeking me out; I sought them out."

[24] He chose to enlist for a term of four years, because it was midway between the minimum term of two and a maximum of six years. As a consequence of his high scores on the armed services vocational aptitude battery of tests, he was able to pick his job. "I could have been a cook, I could have been in psychological operations, I could have been a linguist. I chose to be an infantryman." He testified that he chose to be an infantryman because, if he was going to be in the army, which was not going to be a career, he wanted to experience the essence of the army:

> "I mean, when you watch a war movie and you see people shooting back-and-forth or whatever else, that's the feel."

[25] Counsel for the claimant filed a copy of the completed enlistment document, signed by Mr. Hinzman on November 27, 2000, as well as the Annex dated January 24, 2001, dealing with the financial support for postsecondary education[6].

Training

[26] Mr. Hinzman testified that on January 17, 2001, he travelled to Fort Benning, Georgia, to begin basic training. He believes that the basic training finished towards the end of May or June 2001. His basic training consisted of an initial nine weeks that all soldiers take, followed by one 13-week block of basic soldiering and specific infantryman tasks.

[27] Mr. Hinzman testified that the first couple of weeks of basic training consisted of a pretty intense time of being converted from a civilian to a soldier. He described this process as "dehumanising" and "desensitising" the soldiers to the enemy as other human beings. He stated that, beginning in basic training, the trainees would march to the mess hall, chanting about wanting to kill, rape and pillage. Their officers encouraged them to chant more loudly. He testified that he first thought it was all in good fun, and then he

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[6] Exhibit C-7, Enlistment/Reenlistment Document.

started to question it in his own mind. This was the beginning of the self-questioning process that led to his application for non-combatant status.

[28] Mr. Hinzman received training in the tasks and activities that he was expected to perform. This included training in marksmanship and in the use of a wide range of infantry weapons including machine guns, anti-tank devices and grenade and rocket launchers. He remained at Fort Benning for a month or so following the completion of his basic training and then began three weeks of training at the Airborne School, also at Fort Benning, after a hiatus of a few weeks. He testified that he had decided that he wanted to be in the Airborne unit when he enlisted because it seemed exciting and enjoyable. He received his parachutist badge on June 15, 2001.[7]

Posting

[29] He waited approximately one month to receive his posting orders to go to Fort Bragg. He was in Alpha Company, in the 2nd Battalion of the 504th Parachute Infantry Regiment of the 82nd Airborne Division of the US Army. He became airborne qualified, and was required to do a parachute jump from a plane at least once every three months to maintain his jump status. This entitled him to extra pay. Mr. Hinzman testified that the purpose of the parachute airborne training was to seize enemy airfields, eliminate the

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[7] Exhibit C-7, Enlistment/Reenlistment Document.

enemy and, if required, to establish a secure landing zone for allied aircraft. This necessitated being dropped behind enemy lines.

[30] From August 2001 until the early summer of 2002, when he was made platoon radio operator (RTO), Mr. Hinzman was a grenadier in a rifle platoon. He was trained, tested for and awarded his Expert Infantryman's Badge (EIB)[8] on September 21, 2001. He became a member of the EIB Committee, and trained and judged soldiers trying for the badge, beginning in July 2002, on the M-240 Bravo machine gun. He was promoted to Private First Class (PFC) three or four months earlier than the normal one-year timeframe, as a result of his positive and proactive performance. He was among the 15% of his company of 135 soldiers, selected for the pre-Ranger course, in which he had expressed an interest. He testified that the Ranger program, in which he would have been enrolled had he successfully completed the pre-Ranger course, is an exceptional leadership program, designed to enhance one's knowledge of soldiering beyond what one would normally learn, enabling them to excel in combat situations by making the right decisions with limited resources. According to Mr. Hinzman, those who are awarded the Ranger “tab” are “made men,” “in like Flint.”(sic)

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[8] Exhibit C-7, Enlistment/Reenlistment Document.

[31] Mr. Hinzman testified that he had been "kind of living a double life." On the one hand, he gave every outward indication to his peers and superiors that he was a "soldier's soldier." Inwardly, however, his concerns about killing were simmering. He self-questioned whether he should be proceeding to pre-Ranger school and Ranger school, which he described as a point of no return. After that, there would be no turning back, and he would be living his life as a lie.

[32] At that time, he became aware that the army made provision for personnel to apply for conscientious objector status, in which the options of a complete discharge from the army or remaining in the army in a non-combatant role were available. He did not share his dilemma with anyone in the army because the work atmosphere was loaded with *machismo*.[9] He did tell his wife, whom he had married on January 12, 2001, and his grandmother, who had been the primary maternal figure in his life.

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[9] Machismo (mä-chiz mo) n : exaggerated masculinity.
Source: *WordNet ® 2.0, © 2003 Princeton University.*

Non-Combatant Conscientious Objector Application, Hearing, Report and Recommendation

[33] Mr. Hinzman testified that 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 the time, he came to the conclusion that he could not kill, and that all violence does is to perpetuate more violence. The only solution was to take himself out of the equation, the equation being killing.

[34] On August 2, 2002, PFC Hinzman formally applied[10] for conscientious objector non-combatant status, in accordance with Army Regulation (AR) 600-43.[11] In his application, Mr. Hinzman asserted his belief that war in any guise is wrong, and that he felt that he could no longer be a part of a unit that trains to kill. He states that, over the past few years, he had been discovering a world-view framed by the teachings of Buddhism. He proceeds to outline how some of the core teachings and concepts of Buddhism led to his decision that he was unable to kill.

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[10] Exhibit C-4, Item .15, pages 116 to 125.

[11] Exhibit R/A-2, Army Regulation (AR) 600-43.

[35] In his application, he explained how his beliefs had changed from the time of his enlistment, and when and why these beliefs became incompatible with military service as a combatant. He made reference to his experiences and feelings during training, including the dehumanization that, while necessary, "makes one no different than an animal." He referred to the intensification, since the beginning of 2002, of his meditation practice, which led him to see himself and everything else in the world as interconnected. He came to the realization that killing will do nothing but perpetuate it, and that an act of violence towards another human being would be an act of violence towards all. He did not feel that he could remain as a combatant in the army, whose express purpose is to bring harm to others.

[36] He stated in the application that, beginning in January 2002, his wife and he had begun attending meetings of The Religious Society of Friends, or Quakers, which he describes as a peace church, espousing pacifism. However, Mr. Hinzman answered "N/A" to the request for a statement as to whether the applicant is a member of a religious sect or organization.

[37] Mr. Hinzman testified that he submitted his application to his commanding officer, and it "flew off somewhere" and was not proceeded with. When Mr. Hinzman learned that no action had been taken on his application, he submitted a new application, on October 31 or November 1, 2002, following which he saw both the army Chaplain and psychiatric technician,[12] which was required by the regulation.

[38] Mr. Hinzman did not produce before the RPD a copy of his renewed application. He stated that after his battalion returned to the US, his Squad Leader retrieved his August application from the file cabinets, and asked Mr. Hinzman whether he wanted it. Mr. Hinzman brought it home to the US with him, and opened the folder after he came to Toronto, at which time he found the August application.

[39] Mr. Hinzman's commanding officer forwarded his application, the Chaplain's report of interview and the report of mental status examination to the commander exercising special court-martial jurisdiction over him. The commander appointed First Lieutenant (1LT) Dennis Fitzgerald, as investigating officer.[13]

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[12] Exhibit R/A-2, Army Regulation 600-43, Chapter 2-2(e), page 6.

[13] Exhibit R/A-2, Army Regulation 600-43, Chapter 2-2(e), page 6.

[40] Mr. Hinzman stated that, for the duration of his deployment in both the US and later in Afghanistan, he was first assigned to guarding gates at access points to Fort Bragg, and then assigned, in Afghanistan, to perform menial kitchen tasks.

[41] Sometime between the date in August when he submitted his first application and the date in October when he submitted a new application, virtually identical to the first, it became apparent to the claimant that his battalion was to be deployed in December to Afghanistan. Mr. Hinzman contends that the timing of the second application makes it appear that it was the news of his intended deployment to Afghanistan that precipitated his application for non-combatant status, when this was not the case, his August application having been mislaid by the chain of command.

[42] 1LT Fitzgerald conducted a hearing on the application on April 2, 2003,[14] at the Kandahar Airbase in Afghanistan. Three witnesses gave evidence, in addition to Mr. Hinzman, who did not call any witnesses or produce any other evidence. The witnesses testified that Mr. Hinzman's conscientious objector application had come as a shock to them because he was preparing to go to pre-Ranger school, was fully aware of his mission and duties as a member of a rifle platoon and had experienced many field exercises. They were also aware of his Buddhist beliefs.

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[14] Exhibit C-4, Hearing Summary, Tab 16, pages 126 to 128.

[43] In his evidence before Fitzgerald, Mr. Hinzman stated that:

> "That is not to say that I could not act in defence; I have a weapon and it would be my duty to defend this airfield if it were attacked…. I could not participate in premeditated acts of violence such as an ambush… just wearing the uniform is supporting war. I just wouldn't be in patrols looking for trouble. I wouldn't be doing the offensive roles, such as support by fire, waiting to pull the trigger on someone."[15]

[44] He stated that he just felt that he was losing his sense of self, and the process that he was undergoing was taking away any degree of moral autonomy, which was in conflict with his understanding and practice of Buddhism. He said that he had a wife and child and needed to consider their futures, in addition to his own. He closed by stating that he was not applying for non-combatant status to get out of the deployment to Afghanistan, because he was there. His long-term goal was to finish his enlistment and then go to college.

[45] On April 29, 2003, 1LT Fitzgerald submitted to his commander a memorandum[16] containing a detailed summary of his findings, conclusions and a recommendation. Among his findings in relation to the sincerity of Mr. Hinzman's beliefs were the following:

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[15] Exhibit C-4, Hearing Summary, Tab 16, p. 127.

[16] Exhibit C-4, Hearing Summary, Tab 17.

a) The applicant sincerely opposes war on philosophical, societal and intellectual levels.

b) The applicant truly feels that he could not perform an offensive combat operation, but feels that he could perform defensive operations, and

c) The applicant's wife had recently given birth to the applicant's son during the same time frame as when this unit found that they were headed to Afghanistan in support of OEF. The applicant subsequently submitted the application for reclassification.

[46] 1LT Fitzgerald concluded that PFC Hinzman's beliefs were not congruent with the definition of conscientious objector, as outlined in AR 600-43.[17]

[47] I reproduce 1LT Fitzgerald's recommendation in its entirety.

> Recommendation: 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.

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[17] Exhibit R/A-2, Army Regulation 600-43, Appendix D, page 18.

The Decision to Desert and Request Refugee Protection in Canada

[48] Mr. Hinzman continued to work in the kitchen or dining room at the airfield in Afghanistan until his unit returned to Fort Bragg, at which time he resumed his normal infantryman duties, first in administration, then as the unit's armourer. He still went on training operations, but had the additional duty of being responsible for administration, security protocol and maintenance of his company's weapons systems.

[49] Minister's counsel asked Mr. Hinzman why he did not desert when he returned from Afghanistan. He replied that he was back with his family, and the thought had not occurred to him. Although he said it was inevitable that he was going to be sent to Iraq, it did not become obvious until his battalion was told, in December 2003, that the members would be deployed to Iraq on or about January 16, 2004.

[50] Mr. Hinzman testified that he began thinking about the inevitability of being deployed to Iraq while he was in Afghanistan. He decided that he was not going to go to Iraq. He only discussed his decision with his wife. When he learned of his intended deployment to Iraq, he discussed and explored two options with her, ultimately concluding that he would not go to Iraq. The options were to refuse the orders of his command, and either take the repercussions under the Universal Code of Military Justice (UCMJ), or go absent without leave (AWOL) to Canada. He 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.

[51] Mr. Hinzman testified that, prior to leaving the US, he and his wife tied up some loose ends, packed up the car, and left with Liam on January 2, 2004, arriving in Niagara Falls, Ontario, the following day, January 3, 2004. After consulting legal counsel, the claimants made inland refugee claims on January 22, 2004. In the documents that were completed when they made their claims,[18] Mr. Hinzman explained why he was seeking refugee status and why he could not return to the US. He stated that he was in the army and was to be deployed to Iraq to what he believed to be an illegal war. He feared returning because he believed that he would be punished and because of that, persecuted for following his conscience. He indicated that he had filed a conscientious objector request prior to being deployed to Afghanistan, which request was denied.

[52] After arriving in Canada, Mr. Hinzman arranged with his mother and grandmother to have his mail forwarded. In January or February 2004, his grandmother received a letter from the army asking where he was and stating that he should return to Fort Bragg. Mr. Hinzman does not have that letter. Mr. Hinzman is unaware as to whether a warrant has been issued for his arrest, but understands that after 30 days of AWOL, a warrant is

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[18] Exhibit R/A-1, CIC Etobicoke In-Person Refugee Intake Record of Examination, E. Claim Information, page 9.

issued. Since their arrival in Canada Mr. Hinzman and Ms. Nguyen have been "attenders" at the Toronto Monthly Meeting of the Religious Society of Friends (Quakers).[19]

ANALYSIS

Identity

[53] The claimants' identities as US nationals is confirmed by the personal identity documents filed, and in particular the US passports of the adult claimants, and the Social Security card of the minor claimant.[20]

Credibility

[54] Mr. Hinzman testified in a forthright and thoughtful manner. There were no material inconsistencies within his testimony, or between his testimony and the documentary evidence, for which he did not offer a satisfactory explanation.

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[19] Exhibit C-8, Item 2, Letter from Anne Mitchell, Co-clerk, Toronto Monthly Meeting of the Religious Society of Friends (Quakers), dated December 6, 2004.

[20] Attachments to Exhibits C-1, C-2 and C-3, Personal Information Forms (PIFs) of the claimants.

State Protection

[55] Mr. Hinzman fears persecution, if returned to the US, as a result of his desertion from the US army. In any claim for refugee protection, the claimant's country of nationality must be assessed with respect to the availability of protection for the claimant there.

[56] The responsibility to provide international protection only becomes engaged when national or state protection is unavailable to the claimant.[21]

[57] There is a presumption in refugee law that, except in situations where the state is in a condition of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect.[22] A claimant is required to approach his or her state for protection in situations in which protection might reasonably be forthcoming.[23]

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21 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85, page 709.

22 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85, pages 725-726.

23 Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85, page 724.

[58] Where the state claimed against is a democratic state, the burden of proof that rests on the claimant, is in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her.[24]

[59] The US is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process. According to the Federal Court of Appeal, a person claiming refugee status against the US must establish "exceptional circumstances" exist in his case, such that one would be left to assume that a fair and independent judicial process would not occur.[25] In this case, the particular judicial process at issue would be the court-martial of the claimant pursuant to US Department Of Defense Directive Number 1325.2, the Manual for Courts-Martial of the United States,[26] and Articles 85 and 86 (relevant punitive Articles) of the Universal Code of Military Justice (UCMJ).[27]

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[24] Canada (Minister of Citizenship and Immigration) v. Kadenko (1996), 143 D.L.R. (4th) 532 (F.C.A.).

[25] Canada (Minister of Employment and Immigration) v. Satiacum (1989), 99 N.R. 171 (F.C.A.).

[26] Excerpts included in Exhibit M-5, tabs 1-4.

[27] Exhibit R/A-2, Army Regulation 600-43, pages 1 to 22.

[60] Therefore, Mr. Hinzman must establish that he would not have a fair and independent judicial process if he were to return to the US and face a court-martial, as a result of his desertion from military service. In order to do so, he would have to establish that he would not have full access to due process or that the law would be applied against him in a discriminatory manner.

[61] The process that would apply to Mr. Hinzman, should he be court-martialled, is outlined in the UCMJ and the Manual for Courts-Martial of the United States. This process reveals a sophisticated military judicial system that respects the rights of the service person, guarantees appellate review and a limited access to the US Supreme Court.

[62] The UCMJ is a law of general application. The Federal Court of Appeal in Zolfagharkhani, set forth some general propositions relating to the status of an ordinary law of general application in determining the question of persecution:

> (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
>
> (2) But the neutrality of an ordinary law of general application, vis-a-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
>
> (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should be given a presumption of a validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
>
> (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.[28]

[63] Applying the general propositions to this claim, the punitive articles of the UCMJ are presumed to be valid and neutral, and the onus is on Mr. Hinzman to show that these laws are either inherently, or for some other reason persecutory in relation to a Convention ground. I find that Mr. Hinzman has failed to discharge this onus.

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[28] Zolfagharkhani v. Canada (Minister of Employment and Immigration) [1993], 3 F.C. 540; (1993), 20 Imm. L.R. (2d) 1 (C.A.), at page 552.

[64] As the Federal Court recently affirmed in its decision in Tuck,[29] on the issue of whether a US citizen would face persecutory treatment under the marijuana laws of the state of California:

> The United States of America is a democracy. The CUA is a law of general application in the State of California. The Federal Drug Enforcement Agency is a federal agency charged with the administration of federal legislation concerning the use of drugs. It is beyond the purview of this Court to comment upon the choices of elected legislative bodies in the enactment of legislation affecting residents of the State of California or the Republic of the United States of America, respectively.[30]

[65] Mr. Hinzman has brought forward no evidence to support his allegation that he would not be accorded the full protection of the law pursuant to the court martial process.

[66] In considering the issue of state protection by the US as it applies to Mr. Hinzman, I have taken into account the fact that the US has in place military regulations that allow for both exemption from military service and for alternative, non-combatant service for persons who can invoke genuine reasons of conscience.

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[29] Tuck, Steven William v. M.C.I. (F.C., no. IMM-2196-04), Heneghan, January 27, 2005, 2005 FC 138.

[30] Tuck, Steven William v. M.C.I. (F.C., no. IMM-2196-04), Heneghan, January 27, 2005, 2005 FC 138, at 140.

[67] US AR 600-43 sets out the policy, criteria, responsibilities and procedures to classify and dispose of military personnel who claim conscientious objection to participation in war in any form or to the bearing of arms.[31] The policy applies regardless of whether a soldier volunteered for, or was drafted into, the army. It recognizes that claims may be based on conscientious objection growing out of experiences before entering or after entering military service, which did not become fixed until after the person's entry into the service.[32]

[68] The policy provides that requests by personnel for qualification as a conscientious objector after entering military service will not be favourably considered when these requests are, among other things, based solely upon policy, pragmatism or expediency (although applicants otherwise eligible may not be denied simply because of their views on the nation's domestic or foreign policies), based on objection to a certain war or based on insincerity.

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31 Exhibit R/A-2, Army Regulation 600-43, page 5.

32 Exhibit R/A-2, Army Regulation 600-43, page 5.

[69] The Supreme Court of the United States decided, in 1971,[33] that section 6(j) of the Military Selective Service Act of 1967,[34] which provided an exemption from service in the US armed forces, by reason of religious training and belief, for a person who was conscientiously opposed to "participation in war in any form" applies to those who oppose participating in all war, and not to those who object to participation in a particular war only, even if the latter objection is religious in character.

[70] Mr. Hinzman availed himself of the opportunity to apply for conscientious objector non-combatant status first in August, and later in October 2002. Following a hearing into his application, on April 2, 2003, 1LT Fitzgerald concluded that Mr. Hinzman's beliefs were not congruent with the definition of conscientious objector, as outlined in AR 600-43.[35]

[71] Mr. Hinzman has failed to offer sufficient evidence to establish that he was, or would be, denied due process with respect to his application for conscientious objector non-combatant status, or that he would be denied due process or be treated differentially, were he to return to the US and be court-martialled.

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33 Gillette v. United States, 401 US 437 (1971).

34 The Military Selective Service Act, originally called the Selective Service Act of 1948, renamed the Universal Military Training and Service Act by Act June 19, 1951.

35 Exhibit R/A-2, Army Regulation 600-43, Appendix D: Informal Guide for the Investigating Officer, D4, page 18.

[72] I find that Mr. Hinzman has not rebutted the presumption that the US system of military justice, including court-martialling, is fair and independent, nor has he established any persecutory intent toward him on the part of enforcement officials, prosecutors or judges within the US military justice system.

[73] Mr. Hinzman's failure to rebut the presumption of state protection by the US is fatal to his claims under both sections 96 and 97 of the Act. In view of the public interest in these claims, I have nevertheless proceeded to consider other issues associated with Mr. Hinzman's claim.

Conscientious Objection

[74] It is Mr. Hinzman's stated view that the performance of military service as a combatant in Iraq would have required his participation in an unjust war, and in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience, and that accordingly, any punishment imposed as a consequence of his refusal to serve in a combative capacity in Iraq constitutes persecution.

[75] Mr. Hinzman contends that, were he to be required to deploy to Iraq as a combatant, he would be ordered to engage in offensive operations, contrary to his genuine conviction against killing other than in a defensive mode. He further claims that such a requirement constitutes persecution.

[76] In making refugee determinations, relevant government officials, including judges, are guided by the office of the UNHCR Handbook. Chapter V, “Special Cases” B deals with the situation of deserters and persons avoiding military service.[36]

[77] The Handbook provides that there are cases where a person can show that the performance of military service would have required his or her participation in military action, contrary to his or her genuine political, religious or moral convictions, or to valid reasons of conscience.[37]

[78] The Handbook also states that if an applicant for refugee status is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.[38]

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36 Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Chapter V "Special Cases" B Deserters and persons avoiding military service, page 40, paragraph 170, and paragraphs 167 to 174.

37 Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Chapter V "Special Cases" B Deserters and persons avoiding military service, page 40, paragraph 170.

38 Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Chapter V "Special Cases" B Deserters and persons avoiding military service, page 40, paragraph 172.

[79] The Handbook states further that a person is clearly not a refugee if his only reason for desertion is his dislike of military service or fear of combat. He or she may, however, be a refugee if his or her desertion is concomitant with other relevant motives for leaving his or her country, or if he or she otherwise has reasons, within the meaning of the definition of Convention refugee, to fear persecution.[39]

[80] The Handbook also states that the genuineness of a person's political, religious or moral convictions, or of his or her reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his or her personality and background. The fact that he or she may have manifested his or her views prior to being called to arms or that he or she may already have encountered difficulties with the authorities because of his or her convictions, are relevant considerations. Whether he or she has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his or her convictions.[40]

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39 Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Chapter V "Special Cases" B Deserters and persons avoiding military service, Page 40, paragraph 168.

40 Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Chapter V "Special Cases" B Deserters and persons avoiding military service, Page 41, paragraph 174.

[81] With respect to his the religious beliefs, Mr. Hinzman conceded at the hearing that he was not a Buddhist in the strict sense. He also stated that he was not a "member" of the Quakers or the Society of Friends, but rather an "attender." He left open the possibility that he would apply for membership in the future, but was not definitive that he would seek to become a member. He testified that there were Friends who agreed to take part in a non-combatant role in World War II, while others refused to take part in any way and went to prison. However, there is an ongoing peace testimony that violence is wrong. Most Quakers would take every step possible to avoid acting in a violent manner. Mr. Hinzman testified that, although the world would probably be a better place without armies, this was not practical. When asked why he had applied for a non-combatant role rather then outright discharge, Mr. Hinzman stated that he felt he needed to finish his enlistment even though he recognized that he would be complicit in an illegal war, even in a non-combatant role such as a cook or a medic. However, he would not be actively engaging in violence.

[82] In answer to questions from the Minister's counsel, Mr. Hinzman testified that he had come to the conclusion that war was wrong. If necessary, on a personal level, he would act in self-defence, to the extent necessary to protect himself and the members of his family. He analogises that, if he were put in the position of his house being burglarised or his camp attacked, he could not help but take measures to stop it, and

would act. He reiterated in his testimony the essence of the statement in his PIF narrative that he "still believes that expelling an attacker in the heat of the moment is warranted, due to the fact that there is often no time for any meaningful interaction."[41]

[83] He stated to his counsel that, at the time he made his decision not to deploy to Iraq, his thinking was that the war in Iraq was 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. It was not beyond the realm of possibility that, if he went to Iraq, he "could be doing things that weren't warranted and good conduct." 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.

[84] It is clear from the narrative to Mr. Hinzman's PIF, the summary of his evidence given at the hearing held April 2, 2003, in Afghanistan and from his testimony before me that he believes that there are circumstances where war, as well as the bearing of arms for defensive purposes, may be necessary. Although Mr. Hinzman stated in his conscientious objector application that he was opposed to war of any kind, he testified at the hearing before me that he did not object to the US military presence in Afghanistan

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[41] Exhibit C-1, Personal Information Form (PIF) narrative, page 2.

because America had established that the Taliban had been linked to the September 11, 2001, attacks to which the US was responding.

[85] I find, based on the evidence of his background and my observations of him, that Mr. Hinzman is an intelligent, thoughtful young man, with an inquisitive mind and a desire to try different life experiences to determine whether he is able to meet the challenges that they present, whether they are personally satisfying and whether they accord with his moral code. Although that moral code has been influenced by his readings and experiences, including meditation related to Buddhism and the Society of Friends, he does not consider himself either a Buddhist or a Quaker. His moral code is an evolving one. It evolved after he joined the military, during his periods of training and his assignments and was influenced by the birth of his son, Liam, on May 12, 2002.

[86] When I asked Mr. Hinzman at the hearing of his claim whether Liam's birth had any influence on his decision to apply for non-combatant status, he replied that it did and that he was unwilling to kill babies. While I have no doubt this is so, I find that Liam's birth resulted in Mr. Hinzman rethinking his combatant status with the military, in the context of his role and responsibilities as a husband and a father.

[87] I find that, in April/May 2002, prior to preparing his application for non-combatant conscientious objector status, Mr. Hinzman came to the realization that, while he enjoyed being in the airborne infantry, in which he excelled, he could not continue to serve as a combatant in the army. He determined that violence is futile, only begets further violence and harms everything in the world. He decided that he was unable to kill anyone, unless all other measures taken to subdue that person by causing him the least amount of harm, had failed. His credo is outlined in some detail in the nine-page attachment to the form he completed on August 2, 2002, requesting non-combatant conscientious objector status.[42]

[88] I find that the evidence demonstrates that, although Mr. Hinzman was no doubt guided by this moral code at the time he made his decision, on January 2, 2004, to come to Canada and claim refugee protection rather then reporting to his unit for deployment to Iraq, he decided to desert because he was opposed to the US military incursion into Iraq, not because he was opposed to war generally.[43]

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[42] Exhibit C-1, Personal Information Form (PIF) narrative, page 2.

[43] He testified that he was not opposed to the US war in Afghanistan.

[89] My finding is supported by the fact that Mr. Hinzman states, in his PIF narrative[44] and in the notes prepared by the immigration officer when he and his family came to Canada,[45] that the war with Iraq was the immediate reason for his decision to refuse military duty in its entirety.

[90] First, he felt the war was contrary to international law in that it lacked legal underpinnings, and had been waged on false pretences.[46] In his testimony, he explained these false pretences as being the presence of weapons of mass destruction in Iraq, the assertion that Iraq was linked to international terrorist organizations and that Iraq posed a threat to the US.

[91] Second, he asserted, in his PIF narrative, that he was not willing to kill or be killed in the service of ideology and economic gain.

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44 Exhibit C-1, Personal Information Form (PIF) narrative, page 2.

45 Exhibit R/A-1.1, Record of Examination - principal claimant, page 9.

46 See for example Exhibit R/A-2, Pages 3 to 23, Army Regulation 600-43; Pages 78 and 79, Toronto Star newspaper article dated February 19, 2004, at page 79 – "He said he felt the war there was unjust and was being fought over oil interests."; Pages 101 to 105, www.JeremyHinzman.net, paragraph 101 at page 102, for Mr. Hinzman's response to the question "What is the basis of your rejection of this war?"

[92] Third, because he had been denied non-combatant status, he would be required to take part in any offensive operation his command deemed justified, even though such commands were in violation of his conscience, religious principles, and probably international law and would constitute a crime.

[93] In this connection, it is important to note that Mr. Hinzman objected to participating in any offensive operation in Iraq because he believed the war in Iraq to be manifestly illegal and unjust. However, he was prepared to serve in a non-combatant role in Iraq, for example as a medic.

[94] I find Mr. Hinzman's position to be inherently contradictory. Surely an intelligent young man, like Mr. Hinzman, who believed the war in Iraq to be illegal, unjust and waged for economic reasons, would be unwilling to participate in any capacity, whether combatant or non-combatant.

[95] The Federal Court, in its decision in Ciric,[47] clearly sets out that one cannot be a selective conscientious objector:

> The applicants can hardly be described as 'conscientious objectors' because they were prepared to serve in the Yugoslavian military and in fact did, but to protect national sovereignty if it was threatened and not to bear arms against their friends.[48]

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47 Ciric v. Canada (Minister of Employment and Immigration), [1994] 2 F.C. 65 (T.D.); (1993), 23 Imm. L.R. (2d) 210 (F.C.T.D.).

48 Ciric v. Canada (Minister of Employment and Immigration), [1994] 2 F.C. 65 (T.D.); (1993), 23 Imm. L.R. (2d) 210 (F.C.T.D.), at paragraph 17.

[96] The evidence demonstrates that Mr. Hinzman's decision to desert was not influenced by any alleged atrocities or crimes against humanity that he had learned about; rather, as set forth in his PIF narrative and the Record of Examination completed when he came to Canada, because he believed the military occupation of Iraq to have no legal basis, he would be a criminal if he took part in it, and would be imprisoned and might suffer extra-judicial punishment if he refused to obey an order to take part in an offensive operation.

[97] Further, I find that the failure of Mr. Hinzman to pursue further his quest for conscientious objector status after his application was rejected, as well as his subsequent resumption of regular infantryman activities, constitutes conduct that is inconsistent with his claim to be a genuine conscientious objector.

[98] Mr. Hinzman testified before me that since he had been fairly confident that his application would be accepted, he had not investigated the avenues of appeal open to him, in the event of a negative decision. He stated that he treated his application in a closed manner, and did not consult, when he returned to the US, with either the Quaker Fellowship or a lawyer about the possibility of an appeal.

[99] Mr. Hinzman acknowledged, in his testimony, that there were appeal rights from the recommendation of 1LT Fitzgerald, rejecting his application for non-combatant status. These rights existed both within the military chain of command, and outside within the court system. He stated that he is now aware, through his readings, that he could have conceivably appealed the decision to the US Supreme Court. He testified, in response to the questions of Minister's counsel, that he knew he could appeal 1LT Fitzgerald's findings and recommendation to Fitzgerald's commander but he assumed that since Fitzgerald worked in the same unit as the commander, and the commander would act in the best interests of the unit, he would act upon Fitzgerald's recommendation. He conceded that he was speculating that this would be an ineffective remedy, but testified that he had no reason to believe that appealing through his chain of command (which command he testified had not initially acted upon his August 2002 application) would result in fair treatment.

[100] He stated that the thought had crossed his mind about submitting another conscientious objector application, but he was worn down, and he believed that he required some sort of striking new piece of evidence in order to submit another application.

[101] I find that it is not unreasonable to expect that Mr. Hinzman would have pursued further his request for non-combatant status once 1LT Fitzgerald submitted his report to his commanding officer. Chapter 2.5 of US AR 600-43[49] states that a person has the right to submit a rebuttal statement to the record within 10 calendar days, and after receipt of the record must complete a prescribed form acknowledging rebuttal rights. Chapter 2.6[50] sets out the responsibilities for review on the Unit Commander, the General Court-Martial Convening Authority (GCMCA) and the Staff Judge Advocate (SJA). I do not find Mr. Hinzman's partial explanation, that he did not do so because he believed that the chain of command would support the recommendation, to be satisfactory.

[102] Nor do I accept as satisfactory Mr. Hinzman's explanation for not making a new request for conscientious objector non-combatant status[51] in relation to the proposed deployment to Iraq. Mr. Hinzman testified that he did not do so because it was his understanding that the definition of "conscientious objection" in US AR 600-43[52] does not encompass opposition to a particular war, as opposed to war in any form, or the

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49 Exhibit R/A-2, Army Regulation 600-43, pages7 and 8.

50 Exhibit R/A-2, Army Regulation 600-43, page 8.

51 Exhibit R/A-2, Army Regulation 600-43, page 9, chapter 2.9 "Second and Later Applications."

52 Exhibit R/A-2, Army Regulation 600-43, Glossary, Section II "Terms" at page 20.

bearing of arms. While he may be correct, it was open to him to frame his application as he saw fit.

[103] Mr. Hinzman testified that the delay in processing his application for conscientious objector non-combatant status prejudiced him because it resulted in his hearing taking place in Afghanistan, rather than the US, where he could have called witnesses, such as his wife and members of the Society of Friends. It is neither possible nor appropriate for me to determine the circumstances that resulted in the delay in processing Mr. Hinzman's August 2002 application for non-combatant status. What I can say is that US AR 600-43 requires the chain of command to ensure that an application for conscientious objector status is processed expeditiously and that all persons involved in the application process are familiar with their respective responsibilities.[53]

[104] At the hearing before me, Minister's counsel asked Mr. Hinzman why he would not have tried to delay the hearing until he returned to the US, so that he could present witnesses. Mr. Hinzman replied that, although he would have preferred that the hearing take place in the US, or early in his deployment, so that it was over with, he had no control over when the hearing would take place. I note however that AR 600-43 allows for a hearing to be delayed for good cause at a person's request. There is no evidence that Mr. Hinzman made such a request.

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[53] Exhibit R/A-2, Army Regulation 600-43, page 6, chapter 2.1 "Application."

[105] I find that Jeremy Hinzman is not a conscientious objector because he is not opposed to war in any form,[54] or to the bearing of arms in all circumstances due to of his genuine political, religious or moral convictions, or to valid reasons of conscience.

[106] As a result, punishment that he may receive under the UCMJ as a consequence of his decision to desert is not inherently persecutory.

Paragraph 171 Of The Handbook And Objection To Military Service In Iraq

[107] 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.[55]

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[54] Exhibit R/A-2, Pages 80 and 81, Fayetteville online February 19, 2004 at page 81, "Had we, say, gone to war with North Korea or someone that was an imminent threat, I would have gone along with it… I signed up to defend our country, not to be a pawn in some sort of political ideology."

[55] Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Paragraph 171.

[108] He testified that he was aware, through reading and the media, of the conditions at the Guantanamo prison facility and the position of the US Administration with respect to the Geneva Convention,[56] and that, since the chain of command was referring to Iraqis as terrorists, they could expect to receive the same treatment as the prisoners at Guantanamo. At the time he returned from Afghanistan, he had some understanding that people being detained at Guantanamo prison were not being treated in accordance with the Geneva Convention.

[109] The Handbook states that not every conviction, genuine though it may be, will constitute sufficient reason for claiming refugee status after desertion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action.

> 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 could, in the light of all other requirements of the definition, in itself be regarded as persecution.[57] (emphasis mine)

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[56] Geneva Convention relative to the Treatment of Prisoners of War, Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 *entry into force* 21 October 1950.

[57] Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Paragraph 171.

[110] Mr. Hinzman claims that the type of military action (namely offensive, potentially involving the killing of innocent civilians) with which he does not wish to be associated in Iraq, falls into this category and accordingly, any punishment for desertion due to his political opinion concerning the US military incursion in Iraq should be regarded as persecutory.

[111] In Zolfagharkhani,[58] the issue before the Federal Court of Appeal of Canada was whether the claimant's refusal to participate in a military action that could involve chemical warfare was conscientious objection, for which punishment for refusal to participate would be persecutory.

[112] After citing paragraph 171 of the Handbook, the court determined that it applied to the situation in the Zolfagharkhani case. The court considered the Convention on the Prohibition of the Development, Protection and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction,[59] for which both Canada and Iran voted in 1971, other international undertakings along with the fact that the use of chemical weapons in the Iran/Iraq war was perhaps their only use in international warfare

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58 Zolfagharkhani v. Canada (Minister of Employment and Immigration) [1993], 3 F.C. 540; (1993), 20 Imm. L.R. (2d) 1 (C.A.); I deal with this case at page 20 to 23 of my Interlocutory Reasons dated November 12, 2004.

59 Signed at Washington, London, and Moscow April 10,1972; Ratification advised by U.S. Senate December 16, 1974; Ratified by U.S. President January 22, 1975; U.S. ratification deposited at Washington, London, and Moscow March 26, 1975; Proclaimed by U.S. President March 26, 1975; Entered into force March 26, 1975. (Source: U.S. State Department).

in the past 75 years and concluded that the probable use of chemical weapons was contrary to basic rules of human conduct. Consequently, punishment for refusal to serve in the conflict, amounted to persecution for conscientious objection.

[113] The court stated, in *obiter dictum*,[60] earlier in its decision that it was open to question whether participation by Mr. Zolfagharkhani, even as a paramedic, if chemical weapons were actually used, might not have led to his exclusion from Convention refugee status for having committed "a crime against peace, a war crime, or a crime against humanity."[61] [62]

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60 Obiter dictum: Pronunciation: 'O-bi-ter-'dik-tum, noun. Etymology: Late Latin, literally, something said in passing: an incidental and collateral remark that is uttered or written by a judge but is not binding.

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61 Ramirez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306 (C.A.).

62 Therefore, one can be guided, in part, by the meaning of war crimes and crimes against humanity, in trying to assess whether a military action is contrary to basic rules of human conduct.

[114] Mr. Hinzman contends that, were he deployed to Iraq, he could have been required to participate in atrocities that amount to the type of crimes outlined in Section 1F(a) of Article 1 of the Refugee Convention,[63] thereby excluding himself as a Convention refugee or person in need of protection, by virtue of section 98 of the Act.[64]

[115] In the United Kingdom (UK), the Supreme Court of Judicature, Court of Appeal (Civil Division), had occasion, in 2004, to consider the meaning of section 171 of the Handbook in its Judgment in Krotov,[65] an appeal from the Immigration Appeal Tribunal. In its judgment, the Court of Appeal made reference to an earlier decision, Sepet & Bulbul.[66] Lord Justice Potter remarked that the Justices in that case both had in mind conduct universally condemned by the international community, in the sense of crimes recognized by international law or at least gross and widespread violations of human rights. He commented that the Tribunal, in B v. SSHD,[67] propounded an expanded test,

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63 Section F of Article 1 states that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, war crime, or crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

64 Immigration and Refugee Protection Act, S.C. 2001, c. 27.

65 Krotov v. Secretary Of State for the Home Department [2004] EWCA Civ. 69. I also deal with this decision at pages 27 to 31 of my Interlocutory Reasons, dated November 12, 2004.

66 Yasin Sepet & Erdem Bulbul v. Secretary Of State for the Home Department [2001] EWCA Civ. 681.

67 B v Secretary of State for the Home Department [2003] UKIAT 20.

based upon paragraph 171 of the Handbook as follows:

> Where the military service to which he is called involves acts, with which he need be associated, which are contrary to basic rules of human conduct as defined by international law.

[116] He stated that, in this respect, there is a core of humanitarian norms generally accepted between nations, as necessary and applicable to protect individuals in war or armed conflict and, in particular, civilians, the wounded and prisoners of war. They prohibit rape, torture, the execution and ill-treatment of prisoners and the taking of hostages. This was manifest from a number of international instruments (such as the Geneva Conventions[68] (the Convention)) and other materials.[69]

[117] It was the view of Lord Justice Potter that the crimes listed, 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, 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 1951 Convention.[70]

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68 Geneva Convention relative to the Treatment of Prisoners of War, Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949**,** *entry into force* 21 October 1950.

69 Krotov v. Secretary Of State for the Home Department [2004] EWCA Civ. 69, at page 11.

70 Krotov v. Secretary Of State for the Home Department [2004] EWCA Civ. 69, at page 13.

[118] His second observation in respect of the test, propounded in B v. SSHD, is that he would substitute the words "in which he may be required to participate" for the words "with which he may be associated" as emphasizing that the 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.[71]

[119] He states that if a court or Tribunal 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.[72]

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71 Krotov v. Secretary Of State for the Home Department [2004] EWCA Civ. 69, pages 13 and 14.

72 Krotov v. Secretary Of State for the Home Department [2004] EWCA Civ. 69, at page 16.

[120] As I indicated in my Interlocutory Reasons, dated November 12, 2004, although the decision of the UK Court Of Appeal is not binding on either Canadian courts or the RPD, it is helpful and instructive, since the definition of Convention refugee in Article 1A(2) of the European Convention on Human Rights[73] is identical to section 96(a) of the Act,[74] and both Canada and the UK are signatories to the 1951 Convention and 1967 Protocol, and use the Handbook as a guide in making Convention refugee determinations.

[121] 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 US 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.

[122] That is not to say that instances of serious violations of international humanitarian law, for example the mistreatment by military personnel of prisoners of war, as in the notorious Abu Ghraib prison,[75] have not occurred.

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73 The European Convention on Human Rights, ROME 4 November 1950, and its Five Protocols; PARIS 20 March 1952; STRASBOURG 6 May 1963; STRASBOURG 6 May 1963; STRASBOURG 16 September 1963; STRASBOURG 20 January 1966.

74 Immigration and Refugee Protection Act, S.C. 2001, c. 27.

75 Exhibit C-4, part 1, tab 2, "US Army Report on Iraqi Prisoner Abuse" (the "Taguba Report").

[123] In the case of Popov[76] the applicant asserted that he objected to serving in the Israeli military because its activity against Palestinians contravened acceptable international standards. The Federal Court ruled as follows:

> I do not think the evidence supports the conclusion that the activity of the Israeli military falls into that category.
>
> It is true that the evidence contains accounts of violations, or allegations, at least, of violations from time to time. And one would not be too surprised if the allegations were substantiated. But an isolated incident or incidents of the violation of international standards is not the kind of activity which the Federal Court of Appeal was referring to in the jurisprudence which has been cited.(Zolfagharkhani) One is talking about military activity which is condoned in a general way by the state, by the military forces. One thinks of places like El Salvador.[77]

[124] Counsel for the claimants filed a report submitted by the International Committee of the Red Cross (ICRC) to the Coalition Forces (CF) in February 2004.[78] The main violations, which are described in the report, include instances of brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury, physical or psychological coercion during interrogation to secure information and excessive and disproportionate use of force against persons deprived of their liberty,

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[76] Popov v. Canada (Minister of Employment and Immigration) (1994), 24 Imm. L.R. (2d) 242 (F.C.T.D.).

[77] Popov v. Canada (Minister of Employment and Immigration) (1994), 24 Imm. L.R. (2d) 242 (F.C.T.D.) at 493.

[78] Exhibit C-4, Report of the International Committee of the Red Cross (ICRC) on the Treatment by Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation.

resulting in death or injury during their period of internment. The ICRC observes that, in spite of some improvements in the material conditions of internment in 2003, allegations of ill-treatment collected by the ICRC perpetrated by members of the CF against persons deprived of their liberty suggested that the use of ill-treatment against persons deprived of their liberty went beyond exceptional cases, and might be considered as a practice tolerated by the CF. The Committee made a number of recommendations to the CF in Iraq to redress this situation.

[125] Among the materials also filed by counsel for the claimants is a Human Rights Watch (HRW) report[79] that documents and analyses Iraqi civilian deaths caused by US military forces in Baghdad since President George W. Bush declared an end to hostilities in Iraq on May 1, 2003.[80] Based on interviews with witnesses and family members, HRW confirmed the deaths of twenty Iraqi civilians in Baghdad in legally questionable circumstances between May 1 and September 30, 2003. Eighteen of these deaths are documented in the report. In addition, HRW collected data on civilian deaths by US forces from the Iraqi police, human rights organizations, western media and US military statements. In total, HRW estimated that the US military killed ninety-four civilians in

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79 Exhibit C-10, Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by US Forces; Human Rights Watch, volume 15, no. 9(E).

80 Exhibit C-11, Human Rights Watch Report, Vol. 15, no. 7(E) Violent Response: the US Army in Al-Falluja.

questionable circumstances. Although it did not verify each of these individual cases, it found, taken as a whole, that they revealed a pattern of alleged illegal deaths that merited investigation.

[126] On October 1, 2003, the US military had acknowledged completing five investigations above the division level into alleged unlawful killings of civilians. In four of those incidents, the soldiers were found to have operated within the US military's confidential rules of engagement. In the fifth case, a helicopter pilot and his commander faced disciplinary action following an investigation. A sixth investigation was ongoing involving the killing of eight Iraqi policemen and one Jordanian guard by soldiers of the 82nd Airborne Division (Mr. Hinzman's former division) in al-Falluja on September 12, 2003.

[127] The author of the report determined that, although US military with responsibility for security in Baghdad was not deliberately targeting civilians, it was not doing enough to minimize harm to civilians, as required by international law. The individual cases of civilian deaths documented revealed a pattern, by US forces, of overaggressive tactics, indiscriminate shooting in residential areas and a quick reliance on lethal force.

[128] Among the civilian deaths investigated were civilian deaths caused by US soldiers who responded disproportionately and indiscriminately after they came under attack at checkpoints, including killings at checkpoints when Iraqi civilians failed to stop.

[129] HRW is quick to point out, among other things, that the US military with responsibility for security in Baghdad was not deliberately targeting civilians and that many US military personnel dealt respectfully with Iraqis and were working hard to train police, guard facilities and pursue criminals.

[130] The author notes that, in general, US military police in Baghdad seem better suited for the post conflict law-enforcement tasks required by military occupation. More problematic were combat units like the 82nd airborne division and the First Armoured Division who, according to HRW, were called upon to provide services for which they were not adequately trained or attitudinally prepared. HRW documented eight Baghdad incidents involving these two divisions in which sixteen civilians died. Military officials told HRW that they recognized the problem and were providing extra training, with their declared aim being to hand over policing functions to Iraqi security forces, once these institutions have been built.[81]

[131] HRW advocated timely and thorough investigations into questionable incidents that, it argued, created an atmosphere of impunity, in which many soldiers felt that they could pull the trigger without coming under review. It acknowledged, however, that, at the same time, steps had been taken to reduce civilian deaths. For example, checkpoints

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81 Exhibit C-11, Human Rights Watch Report, Vol. 15, no. 7(E) Violent Response: the US Army in al-Falluja; Summary, pages 3 to 6.

are more clearly marked and some combat troops have received additional training for police tasks. It submitted however, that more initiatives were required, and that Iraqis were entitled to know the guidelines for safe behaviour, even if the rules of engagement are not made public for security concerns.

[132] The authors concluded that of central importance were prompt investigations and punishment for all inappropriate or illegal use of force, as required by international law, as well as accountability to effectively restrain excessive, indiscriminate or reckless use of lethal force.[82]

[133] There is evidence before the panel that the US 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 US, as a matter of policy or practise is indifferent to alleged violation of international human rights law in Iraq. HRW acknowledged that the US military has taken steps to reduce civilian deaths. In fact, the willingness of the US government and military to allow "embedded" media representatives[83] to report freely on US military action in Iraq, including alleged abuses, is also an important facet of a democratic government. A free and independent media is

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82 Exhibit C-11, Human Rights Watch Report, vol. 15, no. 7(E) June 2003 Violent Response: the US Army in al-Falluja. The report documents two violent incidents of April 28 and 30, 2003, involving soldiers from the 82nd Airborne Division.

83 Former Staff Sergeant Massey referred in his testimony to one such reporter, with whose account he vehemently disagreed.

able to keep the public, not only in the US, but around the world, informed on a continuous and vigilant basis. This expectation of accountability by the military is an important hallmark of a democracy.

[134] Because Mr. Hinzman had not maintained contact with anyone in the 82nd Airborne, he was not familiar with the activities of his former unit in Iraq. Mr. Hinzman testified that, first and foremost he was an infantryman, and that being airborne qualified is incidental, being the means of arriving at the battle. He believes that, as an infantryman, he would probably go out on a lot of patrols, that he could be assigned to man checkpoints, to search vehicles or people going through different areas, or be involved in policing an area, or in crowd control or in airborne assaults, or even doing kitchen duty.

[135] It is certainly possible, were Mr. Hinzman deployed to Iraq as a combatant, that he could have been involved in activities, such as those described by his witness at the hearing, former US Marine Corps Staff Sergeant Jimmy Massey. These include, for example; manning vehicle checkpoints where vehicles were to be cleared of occupants and checked for explosives and occupants were to be interrogated, and, if appropriate, referred to the human intelligence group. Such activities may have resulted in him killing Iraqi citizens who failed to stop at the checkpoint and who were subsequently determined to be innocent civilians rather than enemy combatants.

[136] It was Mr. Massey's evidence that his US Marine battalion, which was among the first to enter Iraq, had received intelligence reports warning of the potential for suicide bombers (both Republican Guard and non-Iraqi Arab terrorists), in civilian attire and possibly driving stolen police cars and ambulances loaded with explosives, running them into US military checkpoints. While Mr. Massey testified that this was military propaganda to "jack up" (pump up) the troops, he conceded that he was aware that such incidents had taken place.

[137] While loss of life, and in particular innocent civilian lives, should be minimized at all times, it is regrettably virtually impossible to eliminate loss of civilian life during times of armed conflict. Unfortunately, there will always be the collateral damage[84] associated with the "fog of war." Mr. Massey testified that it was difficult for the American forces to determine how to distinguish enemy combatants from non-combatant civilians and that, to protect the lives and safety of American military personnel, their commanders instructed them to suspect all Arabs of being potential enemy combatants.

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[84] Collateral damage: n : (euphemism) inadvertent casualties and destruction inflicted on civilians in the course of military operations.
Source: *WordNet ® 2.0, © 2003 Princeton University*

[138] I can certainly sympathize with the situation of former Staff Sergeant Massey, who was understandably unable to come to terms with his platoon having shot to death, over a 48-hour period, more than thirty Iraqis, whom he testified were innocent civilians. However, these persons, for the most part, were in vehicles that failed to stop at a military checkpoint, in spite of the defensive layout and multiple warnings stipulated for in the then relevant army standard operating procedure. This clearly had a devastating psychological impact on Mr. Massey.

[139] Mr. Massey referred to an incident wherein a vehicle containing a young Iraqi man entered the red security zone and was fired upon by the members of his platoon. Despite the fact that the young man, who had been hit, managed to try and exit the vehicle with his hands in the air, members of Mr. Massey's platoon continued to be fire at him, and he was killed. It was Mr. Massey's understanding that, according to the then relevant standard operating procedure, and in accordance with the Geneva Convention,[85] because this individual surrendered, a member of the platoon was required take the individual into custody and he was to be treated as a prisoner of war.

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[85] Geneva Convention relative to the Treatment of Prisoners of War, Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949**,** *entry into force* 21 October 1950.

[140] I asked to see the then relevant standard operating procedure. Counsel for the claimant indicated that he would try to obtain the relevant standard operating procedure but that it may be classified. He has not produced it prior to the issuance of these Reasons.

[141] Mr. Massey did comment that the US military had adopted a new standard operating procedure for personnel within Iraq, because the old standard operating procedure was not working. According to Mr. Massey, the new standard operating procedure gives the military "every right" to fire at vehicles and individuals who do not stop at checkpoints, even if it is later determined that they were civilians.

[142] I find that standard operating procedures existed, to which Mr. Massey testified, which required US military personnel at checkpoints to post warnings in Arabic, signal drivers of approaching vehicles to stop, first using hand and arm gestures and verbally, and then by firing a warning shot in the air, before opening fire on the vehicles and their occupants.

[143] As Mr. Massey testified, the incidents resulting in the civilian deaths were investigated, and it was determined that that no charges would be proceeded with, by way of court-martial, against either him or any member of his platoon.

[144] Mr. Hinzman has failed to adduce sufficient evidence to establish that the military action in which he could be involved in Iraq, would be condemned by the international community as contrary to basic rules of human conduct. Therefore, any punishment Mr. Hinzman receives as a consequence of his desertion is not persecutory.

Punishment For Desertion: Prosecution Or Persecution

[145] Mr. Hinzman asserts that he fears being court-martialled for desertion, convicted and sentenced to a term of imprisonment, before being dishonourably discharged. He also fears the social stigma and economic consequences of being convicted of desertion and dishonourably discharged.

[146] Having found that Mr. Hinzman is not a conscientious objector, either by reason of genuine religious, political or moral convictions, or in that he would be participating in military action condemned by the international community as contrary to basic rules of human conduct, any punishment he faces as a result of his desertion is not *per se* persecution. Mr. Hinzman must establish, then, that the punishment he fears would be as a result of discriminatory application of the law under the UCMJ, or that the punishment he would receive amounts to cruel or unusual treatment or punishment.

[147] When asked what he thought would happen to him if he returned to the US, Mr. Hinzman testified that he would be prosecuted or court-martialled and undoubtedly would go to prison for one to five years or more. He fears what could happen to him in prison. Mr. Hinzman believes that he has "probably offended enough military sensibilities" to result in him being treated in a different manner than other deserters, should he be returned to the US.

[148] The Handbook recognizes that desertion is invariably considered a criminal offence and the penalties, which vary from country to country, are not normally regarded as persecution. Fear of prosecution and punishment for desertion do not, in themselves, constitute a well-founded fear of persecution under the definition of Convention refugee.

[149] The Handbook states that a deserter may be considered a refugee if it can be shown that he or she would suffer disproportionately severe punishment for the military offence on account of his or her race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he or she has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion.[86]

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[86] Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, Chapter V "Special Cases" B Deserters and persons avoiding military service, Page 40, paragraph 169.

[150] Any country is entitled to have, and to enact, laws that will contribute to the better, safer and more just functioning of the national community and its government. Additionally, any state is entitled to impose penalties upon those who break its laws. The laws must be neutral in intent and application.[87]

[151] I find, on the totality of the evidence, that the treatment or punishment that Mr. Hinzman fears would be punishment for nothing other than a breach of a neutral law that does not violate human rights, and does not adversely differentiate on a Convention ground, either on its face or in its application. Any punishment that Mr. Hinzman may receive for being absent without leave or desertion would be pursuant to the punitive articles of the UCMJ (Articles 85 and 86), a law of general application that neither violates human rights, nor adversely distinguishes on a Convention ground, either expressly or in its application.

[152] Counsel for the claimant submits that Mr. Hinzman risks incarceration for a lengthy period of time, should he be found guilty of any of these offences. He argues that the cases set out in the materials suggest that the most likely sentence may be several years in custody. He states that each case turns on its own facts and that it is not impossible that a lengthened, or indeed a shortened, sentence might be imposed. He

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87 Zolfagharkhani v. Canada (Minister of Employment and Immigration) [1993], 3 F.C. 540; (1993), 20 Imm. L.R. (2d) 1 (C.A.).

submits that, unless the Board were to conclude that the length of sentence imposed is likely to be minimal, the risk of such incarceration would satisfy the objective fear that Mr. Hinzman is required to establish. I disagree. Mr. Hinzman has adduced insufficient evidence that he would be treated differently or punished more severely because of his religious beliefs or political opinions. In addition, he has not established that the punitive articles of the UCMJ amount to cruel or unusual treatment or punishment. The articles are a lawful sanction, not imposed in disregard of acceptable international standards, because they do not represent a disproportionate punishment for the offence of desertion, and the punishment is not so excessive as to outrage standards of decency and surpass all rational bounds of punishment. The punishment is not grossly disproportionate to the inherent seriousness of the offence of desertion.[88]

[88] R v. Smith [1987] 1 SCR 1045.

[153] I do concur with counsel for the claimant, that each court-martial is decided on its own facts, as is the sentence imposed. However, Article 85 of the Manual for Court-Martial[89] sets out, among other things, the maximum punishment for the various manifestations of the offence, as follows:

> Article 85(e) Maximum Punishment:
>
> (1) *Completed or attempted desertion with intent to avoid hazardous duty or to shirk important service*. Dishonourable discharge, forfeiture of all pay and allowances, and **confinement for five years.** (emphasis mine)
>
> (2) *Other cases of completed or attempted desertion.*
>
> (a) *Terminated by apprehension*. Dishonourable discharge, forfeiture of all pay and allowances, and **confinement for 3 years.** (emphasis mine)
>
> (b) *Terminated otherwise*. Dishonourable discharge, forfeiture of all pay and allowances, and **confinement for 2 years.** (emphasis mine)
>
> (3) *In time of war*. **Death or such other punishment as a court-martial may direct.** (emphasis mine)[90]

[154] Counsel for the Minister produced two news articles,[91] as well as eight decisions of US military Courts of Appeals and Military Review,[92] which address the sentences imposed on military personnel court-martialled for desertion.

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89 Exhibit M-5, Tab 2, Part IV.

90 Exhibit M-5, Tab 2 at page 26.

91 Exhibit M-5, Tabs 11 and 12.

92 Exhibit M-5, Tabs 13-20.

[155] One article,[93] which appeared in the Washington Post on May 22, 2004, recounts the court-martial and sentence imposed upon former Staff Sergeant Camilio Mejia, a nine-year military veteran who went into hiding after returning to the US from Iraq on a two week furlough from his Florida National Guard unit in October 2003.

[156] Former Staff Sergeant Mejia's application for conscientious objector status had not yet been heard. He maintained that his tour in Iraq had turned him against all wars and called the Iraq conflict "oil driven." Mejia turned himself in to authorities after a news conference at which, according to the news article, he took the unusual step of publicly criticizing his commanding officers, whom he said unnecessarily put soldiers in harm's way.

[157] Mejia was found guilty of desertion by a court-martial in Fort Stewart, Georgia, on May 21, 2004, and sentenced to one year in prison, a bad conduct discharge and a reduction in rank. In the article, his attorney is quoted as having stated his intention to appeal to the US Army Court of Appeals.

[158] The news article states that, according to the army, 1,076 soldiers deserted their units between October 2003 and March 2004, fewer than during the same period during the previous year.

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93 Exhibit M-5, Tab 12.

[159] No other decisions of court-martials were drawn to my attention concerning members of the US Armed Forces who deserted during the conflict in Iraq.

[160] In a decision of the US Air Force Court of Criminal Appeals decided October 31, 2001,[94] the court affirmed a sentence of dishonourable discharge, confinement for twelve months and a reprimand for the appellant. He had deserted in the Philippines, where he was born, after he was taken to a general court-martial for stealing military property. During the eighteen years that the airman was a deserter, he obtained a college degree, got married, had children, and became a successful civil servant in his native provincial government.

[161] In a decision of the same court, decided September 12, 2000,[95] a dishonourable discharge and confinement for two years was affirmed in a case where the appellant had deserted only a month after having been convicted of two serious charges.

[162] In Krotov,[96] a decision of the UK Civil Court of Appeal, referred to earlier in these Reasons, the court referred to that part of the decision of the Immigration Appeal Tribunal that addressed the issue of whether the punishment of the appellant, a citizen of the Russian Federation, for refusing active military service in Chechnya, could be

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94 Exhibit M-5, Tab 13.

95 Exhibit M-5, Tab 14.

96 Krotov v. Secretary Of State for the Home Department [2004] EWCA Civ. 69. I also deal with this decision at pages 27 to 31 of my Interlocutory Reasons, dated November 12, 2004.

regarded as disproportionately harsh or severe so as to amount to persecution. The tribunal agreed with the view expressed by the tribunal in an earlier decision, that a substantial period of imprisonment (in that case 2 to 10 years, in this case 3 to 7 years) could not be regarded as disproportionate in itself for refusing active military service.

[163] I find that there is less than a mere possibility that Mr. Hinzman, should he be court-martialled, will be sentenced to death. Even if the US military operation in Iraq is considered by the military to be a war, the last time that a US serviceman was sentenced to death for desertion was during the Second World War, when Private Eddie Slovik was sentenced and executed, in January 1945, by a firing squad from his own unit.

[164] Counsel for the claimants acknowledges, in his reply to the Minister's submissions, that the claimants have not met the burden of establishing that the degree of the risk of the imposition of the death penalty on Mr. Hinzman for desertion is more likely than not.[97]

[165] I find, on a balance of probabilities, that, were Mr. Hinzman to return to the US, he would be court-martialled, found to have breached the article respecting desertion, would be sentenced to a term of one to five years imprisonment, would forfeit his pay and be dishonourably discharged.

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[97] Claimant's Reply dated February 28, 2005, Paragraph 18.

[166] I find that Mr. Hinzman has failed to establish that a sentence for desertion that included imprisonment for a term of from 1 to 5 years would be persecutory. In Usta,[98] the Court found that where a claimant would be punished because of his failure to serve and not for any beliefs he held, the result is not persecution as long as the law is not discriminatory and is a law of general application within the framework of the four principles in Zolfagharkhani. Nor has Mr. Hinzman established that this would constitute a disproportionately severe punishment for desertion, such that it amounts to cruel and unusual treatment or punishment.

[167] Further to my earlier findings with respect to state protection, it is also worthy of note that, should Mr. Hinzman be court-martialled, he would have a right to have the decision and sentence of the court-martial reconsidered by the US Army Court of Military Review, which decision could be appealed to the US Army Court of Criminal Appeals. That decision could be appealed to the US Court of Appeals for the Armed Forces, and upon a writ of *certiorari*[99] to the US Supreme Court.

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98 Usta, Arif v. M.C.I. (F.C., no. IMM-50-04), Phelan, October 28, 2004, 2004 FC 1525.

99 Certiorari: A writ from a higher court to a lower one requesting a transcript of the proceedings of a case for review.

[168] Mr. Hinzman also claims he will face discrimination and persecution as a result of a finding of desertion upon court-martial, a prison sentence, and a dishonourable discharge. The consequences of a dishonourable discharge typically means forfeiting federal education benefits, federal home loans and any opportunity to obtain a job with the federal Government. It may be more difficult to obtain employment with some employers and to be socially accepted by those Americans who favour military action in Iraq, and/or the perceived obligation of a volunteer to complete his term of service.[100] Although Mr. Hinzman may face some employment and societal discrimination, such discrimination does not amount to persecution in that the discrimination does not lead to a consequence of a substantially prejudicial nature.[101] I find that it does not constitute cumulative discrimination, amounting to persecution or to cruel and unusual treatment or punishment. The treatment does not amount to a violation of a fundamental human right, and the harm is not serious.

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[100] Exhibit M-5, Tab 6, US Army Research Institute Special Report 51, August 2002, What We Know About AWOL and Desertion, pages 74 and 80.

[101] Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, reedited, Geneva, 1992, paragraph 54.

CLAIMS OF NGA NGUYEN AND LIAM HINZMAN

[169] The claims of Mr. Hinzman's wife and their son are based on their membership in a particular social group, namely the immediate family of Mr. Hinzman. The adult claimants adduced no evidence that Nga Thi Nguyen or Liam Liem Nguyen Hinzman would face a serious possibility of persecution or other serious harm as a result of being part of Mr. Hinzman's family, even were he to receive a term of imprisonment for his desertion. They relied on the evidence of Mr. Hinzman, with whose claim theirs were joined. Since Mr. Hinzman has failed to establish his claim, their claims must also fail.

CONCLUSION

[170] Based on the foregoing analysis, these claims are rejected.

"Brian Goodman"
Brian Goodman

DATED at Toronto this 16th day of March, 2005