American War Resister Cases in the Canadian Federal Court

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There has been mixed treatment at the Canadian Federal Court of U.S. deserters who have claimed refugee status in Canada on the basis of refusal to serve in the U.S. military. To quote one article:

> In their battle to secure asylum in Canada, U.S. military deserters are being sorted into winning and losing camps by the Federal Court, which some lawyers contend has been inconsistent and confusing in its treatment of war resisters. In six court decisions in the last two years, there have been four losers and two winners among the first batch of former soldiers to challenge their defeats at the Immigration and Refugee Board. "We've got a divided court," said Toronto lawyer Geraldine Sadoway, whose client, Justin Colby, recently lost his refugee bid, after fleeing to Canada two years ago following a one-year stint as a medic in Iraq. Ms. Sadoway says she cannot figure out why the Federal Court rejected Mr. Colby's claim on June 26, only one week before it handed the first ever victory to deserter Joshua Key, who also served in Iraq.[1]

To date there have been at least ten cases considered by the Canadian Federal Court and the Federal Court of Appeal on the U.S. war resister issue. In seven of those cases the decision went against the Americans who claimed refugee status on the basis of refusal to serve in the U.S. military. Those cases are *Hinzman, Re*[2] and *Hughey v. Canada (Minister of Citizenship & Immigration)*.[3] Both of these decisions were rendered by Madam Justice Mactavish of the Federal Court. *Hinzman, Re* was appealed to the Federal Court of Appeal where the ap-

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[1]Janice Tibbetts and Linda Nguyen, "Courts send mixed messages to U.S. deserters," *National Post*, July 15, 2008.

[2](2006), 55 Imm. L.R. (3d) 54, 2006 FC 420 (F.C.).

[3](2006), 52 Imm. L.R. (3d) 192, 2006 FC 421 (F.C.).

pellate court rejected the appeal.[4] Hinzman was also before the Federal Court in a failed judicial review of his Pre-Removal Risk Assessment (PRRA). Mr. Justice Russell was the presiding judge in that case.[5]

The judgment in *Colby v. Canada (Minister of Citizenship & Immigration)*[6] also went against the U.S. soldier refugee claimant. The main issue was state protection following the Federal Court of Appeal decision in *Hinzman, Re*. The Federal Court judge in that case was the Honourable Mr. Justice Beaudry.

In *Robin Long v. Canada* the Federal Court dismissed an application for a stay of removal. The judge in that instance was Justice Mactavish.[7]

Another case where the Federal Court rejected a U.S. war resister's judicial review of his negative decision of the refugee claim is *Landry v. Canada (Minister of Citizenship & Immigration)*.[8] This case was decided on June 8, 2009, with Mr. Justice Harrington presiding. The case followed the Federal Court of Appeal decision in *Hinzman, Re* and was decided on the basis of state protection.[9]

There is an interesting decision of the Federal Court rendered on February 5, 2009: *Canada (Minister of Citizenship & Immigration) v. Hund*.[10] In this asylum case, the Immigration and Refugee Board accepted a claim for refugee status for an American old-order Mennonite family accepting that they were conscientious objectors and had an alleged fear of persecution in the U.S. They also had a run-in with a U.S. sheriff. The claimants stated that "their country is ruled by a President who believes in war and who leads their country on a path of self-destruction and they do not share the political values of the present administration."[11]

The Department of Justice, on behalf of the Canadian government, applied for and obtained a judicial review of this decision and it has been referred back to

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[4]*Hinzman, Re* (2007), 63 Imm. L.R. (3d) 13, 2007 FCA 171 (F.C.A.).

[5]*Hinzman v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 415.

[6]2008 FC 805.

[7](July 14, 2008), (IMM-3042-08) (F.C.).

[8]2009 FC 594.

[9]*Ibid.*, see paras. 25-31.

[10](2009), 78 Imm. L.R. (3d) 278, 2009 FC 121 (F.C.).

[11]*Ibid.*, para. 10.

the Immigration and Refugee Board. The standard of review in such cases is, to quote the reasons of the Federal Court:

> The Court owes deference to decisions of the RPD, an administrative decision maker with an expertise in the application of the *IRPA* (*Dunsmuir v. New Brunswick*, 2008 SCC 9).[12]

The refugee claimants in this case had not served in the U.S. Army, had not been to Iraq, had failed to make a refugee claim in their widespread travels, and while many would agree with their political sentiments, it was an unusual decision for the Immigration and Refugee Board. It contained many errors in law and the Federal Court judge, Mr. Maurice E. Lagace, not surprisingly, overturned the decision. In his reasons he wrote:

> [45] By erroneously construing the facts of this case to what constitutes persecution on cumulative grounds, and by erroneously equating to persecution the political and moral opposition with the politics of a country, the RPD acted manifestly in an unreasonable manner justifying the intervention of this Court.[13]

There have been three decisions of the Federal Court where U.S. Army deserters won their cases at the Federal Court. The first decision is *Key v. Canada (Minister of Citizenship & Immigration)*.[14] Key testified to witnessing numerous human rights violations while serving in the U.S. military in Iraq. The presiding Federal Court judge in that case was Mr. Justice Barnes.[15]

The second case where the Federal Court ruled in favour of a U.S. deserter overturning a PRRA decision is *Glass v. Canada (Minister of Citizenship & Immigration)*.[16] The presiding Federal Court judge in that case was Deputy Judge Frenette.

The most recent decision, on August 10, 2009, which went in favour of the U.S. war resister is *Rivera v. Canada (Minister of Citizenship & Immigration)*.[17] Mr. Justice Russell was the presiding judge in that case. In *Rivera* the Federal Court overturned a decision of a PRRA officer on the basis of differential treatment of war resisters who have publicly expressed political opinions opposing the war in Iraq.

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[12]*Ibid.*, para. 15.

[13]*Ibid.*, para. 45.

[14](2008), 73 Imm. L.R. (3d) 278, 2008 FC 838 (F.C.).

[15]*Ibid*.

[16](2008), 74 Imm. L.R. (3d) 46, 2008 FC 881 (F.C.).

[17]2009 FC 814.

Hinzman at the Federal Court

Madame Justice Mactavish extensively reviewed the law on conscientious objection in the Federal Court decision in *Hinzman*. Jeremy Hinzman had volunteered to serve in the U.S. Army and had been willing to serve in the U.S. Armed Forces in Afghanistan, but not in Iraq. He objected that the war in Iraq did not have UN approval and in his opinion was a war of aggression, as it was the non-defensive invasion of a sovereign state. Hinzman argued that his objection to the war should fall under paragraph 171 of the *UNHCR Handbook*.[18] He also objected that the U.S. Armed Forces were known to engage in torture in Iraq, and that any participation in the war would associate him with acts contrary to his conscience. Again, this objection relates to paragraph 171 of the *UNHCR Handbook* which states:

> Where . . . the type of military action, with which an individual does not wish to be associated, is condemned by the international legal community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could . . . in itself be regarded as persecution.[19]

The Federal Court in *Hinzman* gave detailed consideration to the issue of the proper interpretation of paragraph 171 of the *Handbook*, however, the Court found that a mere foot-soldier cannot claim to fear association with human rights abuses committed by an army he serves in. This distinction confuses the test for exclusion with the test for allowing a person to refuse to associate with a military action. Her conclusions are as follows:

> [228] While it would have been preferable for the Board to have specifically addressed the applicants' arguments with respect to the alleged under inclusiveness of the American policy governing conscientious objection, I am satisfied that this failure on the part of the Board did not affect the outcome of the applicants' claims.
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> [229] For the reasons given, I am satisfied that there is currently no internationally recognized right to object to a particular war, other than in the circumstances specifically identified in paragraph 171 of the *Handbook*. As a result, while Mr. Hinzman may face prosecution in the United States for having acted in accordance with his conscience, this does not amount to persecution on the basis of his political opinion.
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> [230] The reality is that States, including Canada, can and do punish their citizens for acting in accordance with their sincerely held moral, political and religious views when those individuals break laws of general application.

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[18]*UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, 1988.

[19]Quoted in *Hinzman*, *supra*, para. 43.

> The environmentalist who blocks a logging road may face prosecution and imprisonment, as may the individual who opposes the payment of taxes used to support the military on deeply felt religious grounds, notwithstanding that in each case, the individual may merely have been following his or her conscience.
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> [231] Indeed, as Lord Hoffman noted in *Sepet*:
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> > As judges we would respect their views but might feel it necessary to punish them all the same . . . We would take into account their moral views but would not accept an unqualified moral duty to give way to them. On the contrary we might feel that although we sympathized and even shared the same opinions, we had to give greater weight to the need to enforce the law. [at ¶ 34]
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> [232] I have sympathy for Mr. Hinzman. As the Board noted, he is clearly a thoughtful young man. The Board found his concerns with respect to the legality of the American led military intervention in Iraq to be sincere and deeply held. However, sympathy alone does not provide a foundation for finding that there is an internationally recognized right to object to a particular war, the denial of which results in persecution.
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> [233] Given that conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in international instruments such as the *Universal Declaration of Human Rights* and the *European Convention on Human Rights*, it may be that as the law continues to evolve in this area, both on the international and domestic fronts, a sincerely held political or religious objection to a specific war may some day provide a sufficient basis on which to ground a claim for refugee protection. This, however, represents the "international consensus of tomorrow" (*Sepet*, at ¶ 20), and not the state of the law today.
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> **XI. — Summary of Conclusions**
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> [234] For these reasons I have concluded that there is no basis for interfering with the decision of the Immigration and Refugee Board in this case. Accordingly, the applicants' application for judicial review is dismissed.
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> [235] As was noted at the outset, the issues raised by this application have not required me to pass judgment on the legality of the American led military action in Iraq, and no finding has been made in this regard.[20]

Justice Mactavish certified the following "serious question of general importance" in *Hinzman*:

> When dealing with a refugee claim advanced by a mere foot soldier, is the question whether a given conflict may be unlawful in international law rele-

[20] *Ibid.*, paras. 228-235.

> vant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR *Handbook*?[21]

Although Justice Mactavish certified a question in *Hinzman*, the Federal Court of Appeal declined to answer the certified question. The Court instead rejected the appeal on the narrow grounds that the applicant had not made enough of an attempt to access potential protective mechanisms in the U.S.

To quote the reasons from the Federal Court of Appeal in *Hinzman*:

> [41] In evaluating the appellants' claims, the starting point must be the direction from the Supreme Court of Canada that refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protections of his home state. In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at page 709 ("Ward"), La Forest J., speaking for the Court, explained this concept as follows:
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> > At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back up to the protection one expects from the state of which an individual is a national. **It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged**. [Emphasis added.]
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> [42] The appellants say they fear persecution if returned to the United States. However, to successfully claim refugee status, they must also establish that they have an objective basis for that fear: *Ward* at page 723. In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. As the Supreme Court of Canada explained in *Ward* at page 722, "[i]t is clear that the lynch pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well founded." [Emphasis in original.] Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well founded and therefore will not be entitled to refugee status. It is only where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of persecution. If indeed the illegality of the war is relevant, it is at this second stage that the court would consider it. However, because I

[21] *Ibid.*, para. 240.

have determined that the appellants are unable to satisfy the first stage of the analysis, that is, that the United States is incapable of protecting them, it is unnecessary to consider the issues arising in the second stage, including the relevance of the legality of the Iraq war.

[43] In *Ward*, the Supreme Court explained at page 725 that in refugee law, there is a presumption of state protection:

> . . . nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

[44] To rebut the presumption, the Court stated that "clear and convincing confirmation of a state's inability to protect must be provided": *Ward* at page 724.

[45] In *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 at page 534 (F.C.A.), Décary J.A. elaborated on these principles and highlighted that the more democratic a country, the more the claimant must have done to seek out the protection of his or her home state:

> When the state in question is a democratic state, as in the case at bar, the claimant must do more than simply show that he or she went to see some members of the police force and that his or her efforts were unsuccessful. **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**. [Emphasis added.]

[46] The United States 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. The appellants therefore bear a heavy burden in attempting to rebut the presumption that the United States is capable of protecting them and would be required to prove that they exhausted all the domestic avenues available to them without success before claiming refugee status in Canada. In *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171 at page 176 (F.C.A.) ("Satiacum") this Court was called upon to consider a claim of insufficient state protection in the United States and commented on the difficult task facing a claimant attempting to establish a failure of state protection in the United States:

> In the case of a nondemocratic State, contrary evidence might be readily forthcoming, but in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection pro-

> cess in the relevant part of the country, or the independence or fair mindedness of the judiciary itself.

[47] Although the United States, like other countries, has enacted provisions to punish deserters, it has also established a comprehensive scheme complete with abundant procedural safeguards for administering these provisions justly. In particular, Army Regulation 600 43 formally recognizes the validity of conscientious objection to military service by providing conscientious objectors with exemptions from military service or alternatives to combat. Soldiers attempting to avail themselves of these exemptions from combat service are provided with numerous procedural protections, including the right to a hearing and a right of appeal. They are also transferred to non combat positions upon the making of an application, a provision from which Mr. Hinzman benefitted when he was assigned to act as a guard at the entrance of the Fort Bragg base and to kitchen duties for the duration of his deployment in Afghanistan.

[48] Furthermore, while punishment for desertion can include imprisonment, the evidence indicates that the vast majority of Army deserters in the United States have not been prosecuted or court-martialed. Rather, approximately 94% of deserters have been dealt with administratively and merely receive a less than honourable discharge from the military (Exhibit M 5, Appeal Book at page 2420).

[49] The Board found that no evidence had been brought forward to establish that the appellants would not be afforded the full protection of the law if they were court-martialed in the United States. It concluded that if the appellants were court-martialed, they would be subjected to a sophisticated military justice system that respects the rights of the service person, guarantees appellate review and provides a limited access to the U.S. Supreme Court, as outlined in the UCMJ and the Manual for Courts Martial of the United States.

[50] Neither Mr. Hinzman nor Mr. Hughey made an adequate attempt to avail himself of the protections afforded by the United States. Although Mr. Hinzman applied for conscientious objector status, he did not avail himself of all the recourses available to him. In particular, he failed to take advantage of his right to request an adjournment of the hearing respecting his conscientious objector application until his return to the United States, where he would be able to call appropriate witnesses, and to avail himself of his right of appeal from a negative decision at first instance. Like the Board, I find that it was not unreasonable to expect that Mr. Hinzman would have pursued further his request for conscientious objector status after learning that First Lieutenant Fitzgerald had found against him.

[51] Unlike Mr. Hinzman, Mr. Hughey did not apply for conscientious objector status, nor did he take any other formal steps to avoid combat service contrary to his political views. Mr. Hughey's attempts to avail himself of protections available in the United States appear to be limited to the discussions he had with his superior officers about the possibility of obtaining a discharge from the military, in which he was told that such a discharge was

> not available. He apparently did not seek any other advice, for example from a chaplain or a lawyer, about the options available to him.
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> [52] Rather than attempt to take advantage of the protections potentially available to them in the United States, the appellants came to Canada and claimed refugee status. As the Supreme Court of Canada directed in *Ward*, however, refugee protection is not available where there has been an inadequate attempt to seek out the protections available in one's home country.
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> [53] The appellants challenge this reasoning, arguing that evidence of the state's failure to protect is unnecessary where the state is the agent of persecution. They cite *Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3 at paragraph 19 (F.C. T.D.), for the proposition that when the state is persecuting the claimants, state protection is, by definition, absent. They note that in *Ward*, at issue were the actions of a non state entity that was allegedly persecuting the claimant. According to the appellants, only in that situation is it appropriate for the Court to inquire into whether the state was able to protect the refugee claimant from his persecutor.
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> [54] However, the concepts of persecution and state protection are interconnected such that the question of whether the refugee claimant has attempted to avail himself of the protective mechanisms provided by the state is relevant both where the alleged persecutor is an organ of the state and where the alleged persecutor is a non state entity. The central feature of the refugee protection scheme is that the refugee claimant has a fear of persecution that is objectively well founded (*Ward* at page 723). Where the claimant alleges that he is being persecuted by the state itself, the inquiry into the availability of state protection goes to the question of whether the claimant has an objective basis for his fear of persecution. If effective state protection for religious or political beliefs is available to the claimant, it can hardly be said that there is a serious possibility of persecution by the state sufficient to make his fear of persecution objectively well founded. The presumption of state protection described in *Ward*, therefore, applies equally to cases where an individual claims to fear persecution by non state entities and to cases where the state is alleged to be a persecutor. This is particularly so where the home state is a democratic country like the United States. We must respect the ability of the United States to protect the sincerely held beliefs of its citizens. Only where there is clear and convincing evidence that such protections are unavailable or ineffective such that state conduct amounts to persecution will this country be able to extend its refugee protections to the claimants.[22]

The unanimous conclusion of the Federal Court of Appeal:

> [62] In conclusion, the appellants have failed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system. Several protective mechanisms are potentially available to the appellants in

[22] *Hinzman*, *supra*, paras. 41-52.

> the United States. Because the appellants have not adequately attempted to access these protections, however, it is impossible for a Canadian court or tribunal to assess the availability of protections in the United States. Accordingly, the appellants' claims for refugee protection in Canada must fail.[23]

In my view the Court of Appeal's treatment of the question of state protection is problematic. The failure of the Court of Appeal to directly address the interpretation of paragraph 171 in the *UNHCR Handbook* is also unfortunate. The Supreme Court of Canada did not grant leave in *Hinzman*,[24] and as a result, the question of the legality of the U.S. invasion of Iraq and the application of s. 171 of the *Handbook* on conscientious objection and its applicability to volunteer soldiers has not been dealt with by the higher courts. Accordingly, one of the central issues in conscientious objection law remains unsettled.

In *Colby* the Court also ruled against the U.S. refugee claimant. Colby's primary reasons for deserting the U.S. Army are summarized as follows in the reasons for the Federal Court:

> [8] The applicant arrived in Iraq in August 2004, where he worked as a medic. In this capacity, he performed administrative tasks and attended to patients in a medical capacity. He was given Iraqi patients on whom to "practice" procedures which were outside of the scope of practice allowed of a medic, including tracheotomies, intubations, chest tubes and veinous cutdowns. The applicant was required to perform these procedures on Iraqi patients without administering anaesthetic. He was told that the use of anaesthetic on terrorists was a waste. Patients who were labeled as combatants, as opposed to civilians, were denied anaesthetics, and the applicant recalled 11 and 12 year old children being labeled as combatants. The applicant described these acts as atrocities.[25]

In *Colby* the Federal Court considered paragraph 171 of the *UNHCR Handbook*, however, following the Federal Court of Appeal decision in *Hinzman*, gave the following analysis and reasons for the Court's decision:

> [21] Paragraph 171 of the UNHCR Handbook deals with the question of persecution, and not the availability of state protection. The Court of Appeal in *Hinzman*, stated that state protection is the first step in assessing the existence of objective fear. Justice Sexton of the Federal Court of Appeal laid out the analytical framework for evaluating the availability of state protection at paragraph 42 of the decision:
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> > [42] The appellants say they fear persecution if returned to the United States. However, to successfully claim refugee status,

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[23]*Ibid.*, para. 62.

[24](2007), 2007 CarswellNat 3846, 2007 CarswellNat 3847, [2007] S.C.C.A. No. 320 (S.C.C.).

[25]*Colby*, *supra*, para. 8.

> they must also establish that they have an objective basis for that fear: *Ward* at page 723. In determining whether refugee claimants have an objective basis for their fear of persecution, **the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state**. As the Supreme Court of Canada explained in Ward at page 722, "[i]t is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." [Emphasis [underlining] in original.] **Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status. It is only where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of persecution**. If indeed the illegality of the war is relevant, it is at this second stage that the court would consider it. However, because I have determined that the appellants are unable to satisfy the first stage of the analysis, that is, that the United States is incapable of protecting them, it is unnecessary to consider the issues arising in the second stage, including the relevance of the legality of the Iraq war. [Emphasis added in bold].
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> [22] Therefore, the facts raised by the applicant that would fall under paragraph 171 of the UNHCR Handbook are relevant only if he can establish that state protection is unavailable to him.
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> [23] On this issue (state protection), I am of the opinion that the Board's determination is reasonable.[26]

As noted above, there have been several decisions where the Federal Court has ruled in favour of U.S. war resisters. On July 4th, 2008, the Federal Court overturned a decision of the Immigration and Refugee Board in *Key*. Mr. Key had served an extensive tour of duty in Iraq. The Court summarized the facts in the refugee claim as follows:

> **The Board Decision**
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> [4] The Board had no concerns about Mr. Key's credibility. It observed that he testified "in an honest and direct manner" and that he was "earnest," "sincere," "open," and "spontaneous." In the result, the Board accepted his allegations as truthful.
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> [5] The Board found that Mr. Key was not a conscientious objector in the usual sense of being opposed to war generally and that his objections to the conflict in Iraq were not politically or religiously motivated. Rather, what

[26] *Ibid.*, paras. 21-23.

Mr. Key objected to were the systematic violations of human rights that resulted from the conduct of the United States Army in Iraq and the requirement that he participate. The Board summarized Mr. Key's evidence concerning these events and compared his experiences to the observations of the International Committee of the Red Cross (ICRC) detailed in its report from 2003.[1] It is apparent that the Board found Mr. Key's experiences to be consistent with the ICRC findings, as can be seen from the following passages from its decision:

> Mr. Key performed at least seventy raids on the homes of Iraqi citizens ostensibly looking for weapons. None of them was pleasant. In the blackness of night, doors blown in, homes ransacked, personal effects looted, residents violently roused from their beds and forced outdoors by heavily armed and uniformed soldiers hollering in a foreign language, Muslim women shamed by their exposed bodies, boys too tall for their age, and men cuffed and hauled away for interrogation in their nightclothes, regardless of weather conditions, never, at least as far as Mr. Key could ascertain, to return. Should there have been a belligerent that needed flushing out, Mr. Key had white phosphorous grenades at the ready, part of the standard issue for this type of job. Mr. Key indicated that the searches were largely ineffectual as his unit seldom found weapons or contraband, although they probably did work to the extent that any insurgents would soon learn to hide their guns and bomb making paraphernalia outside their homes.
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> The *International Committee of the Red Cross* (ICRC) confirms that this type of military operation followed a "fairly consistent pattern." In its *Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, covering the period between March and November 2003, the ICRC reported:
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> > Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets and other property. They arrested suspects, tying their hands in the back with flexi cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in the house, including elderly, handicapped or sick people. Treatment also included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing at the time of

> the arrest B sometimes in pyjamas or underwear B and were denied the opportunity to gather a few essential belongings, such as clothing, hygiene items medicine or eyeglasses. Those who surrendered with a suitcase often had their belongings confiscated. In many cases personal belongings were seized during the arrest, with no receipt being issued.
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> While some of those who were arrested may have been involved in armed resistance to the US led occupation of Iraq, it is apparent that most were not. Indeed, the ICRC reports that between 70% and 90% of those arrested had been arrested by mistake. In any event, though, it is the activities of the troops in carrying out the raids and not the guilt or innocence of a particular person arrested that is germane to this analysis. In other words, the issue is not whether the raids were justified based on the results yielded but whether the methodology employed in those raids crossed the line.
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> [Footnotes omitted]

[6] The Board considered Mr. Key's description of these events and seems to have felt that some of the behaviour contravened international law intended to protect civilians, albeit not rising to the level of war crimes or crimes against humanity. The Board's views of this are set out in the following passages from its decision:

> In my view, the manner in which the military routinely invaded the homes of Iraqi citizens and the conduct of the soldiers may have been violations of articles 27, 31, 32 and 33 of the *Fourth Geneva Convention*. In so raiding the homes, the military showed little understanding that the residents were protected persons under the Convention. The wanton destruction of property, the intimidation of the entire family including children, the absence of any cultural sensitivity, the disrespect for human dignity and physical integrity, the pillaging and the violence could well be breaches of the *Geneva Conventions*.[27]

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[27]See *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949.

> **Part III. Status and Treatment of Protected Persons**
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> Section I. Provisions common to the territories of the parties to the conflict and to occupied territories
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> Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated,

> It could be argued that the home invasions were undertaken without any regard to the principle of proportionality. A score of young men brandishing weapons and armed with white phosphorous grenades, descending on a sleeping family in the middle of the night and blowing up the front door is arguably disproportionate to the military objective of recovering contraband and bringing in men for questioning. One might conclude, the impact on the civilians far outweighs the advantages gained by the military in using this excessive methodology. Like the laws of war, occupation law is an ongoing application of the principals of necessity and proportionality. It is an exercise in finding an appropriate balance.
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> However, even if one were to assume that the raids under discussion were in breach of *Geneva Conventions*, I remain mindful that not all breaches of the *Geneva Conventions* are war crimes. As noted earlier, to reach the level of a war crime in the context of the *Geneva Conventions*, there must be a grave breach of the Conventions.

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and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

.....

Art. 31. No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Art. 32. The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Art. 33. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

> In my view, the home invasions in which Mr. Key participated, despite a disturbing level of brutality, did not reach to the level of a war crime. The invasions, in my opinion, do not reflect the heinous conduct anticipated by the definition of war crimes which according to the *Rome Statute* includes such misdeeds as murder, deportation to slave labour and taking civilian hostages. I am enured to this view given the recommendations or lack of same made by the ICRC in the aforementioned report with respect to home invasions. There was no suggestion that the invasions should be stopped, be less frequent or more targeted or that there be prosecutions of the transgressors; rather, it was recommended that the individuals involved receive adequate training enabling them to operate in a proper manner without resorting to brutality or using excessive force. The ICRC also reminded the military of its obligations to notify families of all prisoners of war or those arrested by the military of their place of detention. I would have expected a much stronger set of recommendations from the ICRC had it considered the military action to be war crimes.
>
> Nor do I consider the home invasions to be crimes against humanity. In my view, they simply do not rise to the level of mistreatment as anticipated by the *International Military Tribunal Charter* or the *Rome Statute*. Mr. Waldman points out that the Federal Court has held that the following types of conduct will constitute war crimes or crimes against humanity: participation in systematic acts of torture; participation on a tribunal which systematically sentenced people to death in violation of principals of justice; murdering innocent civilians who were held in prison; participation in a secret police force engaged in systematic extrajudicial killings and torture; and, participation in a program that enforced sterilization of women.
>
> [. . .]
>
> I find that Mr. Key would not have been excludable from Convention refugee protection on the basis of his participation in the war in Iraq or upon his return to duty in Iraq if he was to serve there again and therefore cannot avail himself of paragraph 171 of the UNHCR *Handbook*.
>
> [Footnotes omitted]

[7] What is clear from the above passages is that the Board was of the view that unless the events Mr. Key described were sufficiently egregious as to constitute war crimes or crimes against humanity, they could not, for the purpose of obtaining refugee protection, justify his desertion from the United States Army.

> [8] The Board concluded by finding, on a balance of probabilities, that if Mr. Key were to return to the United States he would be arrested, court martial led and sentenced to at least a year of imprisonment.
>
> [9] The Board also found that some of the events described by Mr. Key that arguably did constitute war crimes (for example, the use of unjustified lethal force against civilians, the physical abuse of detainees, etc.) were isolated events or were otherwise based upon speculation.
>
> [10] The issue of state protection was effectively taken off the table by the Board at the commencement of the hearing on the basis that "the alleged agent of persecution in this case is the state itself." In the result, very little evidence was adduced concerning this issue beyond the testimony of Mr. Key that he had consulted a JAG representative and was advised that he had "two choices, either get back on the plane and go to Iraq or go to prison."[28]

Mr. Justice Barnes addressed the board's analysis of paragraph 171 of the *UNHCR Handbook* in its reasons for decision:

> [17] The Board's narrow interpretation of Article 171 of the UNHCR Handbook seems to me to rest upon a misreading of both Justice Anne Mactavish's decision in *Hinzman* above, and the earlier Court of Appeal decision in *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540, 155 N.R. 311.[29]

It was the Federal Court judge's considered opinion in *Key* that:

> [20] [. . .] there is a compelling policy rationale for affording refugee protection to persons faced with the choice of either being punished for refusing to serve or being placed at risk of participating (or being complicit) in the commission of war crimes or crimes against humanity: see *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000) at para. 14. Where the requirements of military service would put a person at risk of being excluded from refugee protection, the law must provide a meaningful anticipatory option. The idea that a refugee claimant in such circumstances ought to be returned to his home country to face such a dilemma is repugnant and inimical to the furtherance of humanitarian law. It does not follow from this, however, that widespread violations of international law carried out by a military force but not rising to the level of war crimes or crimes against humanity can never support a refugee claim by a conscientious objector. The caselaw I have reviewed does not support the idea that refugee protection is only available where the particulars of one's objection to military service would, if carried out, exclude a claim by that person to protection.
>
> [21] The language of Article 171 of the UNHCR Handbook is not the language either of direct participation or even complicity; rather, it speaks to

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[28] *Key*, *supra*, paras. 4-10.

[29] *Ibid.*, para. 17.

unwanted *association* with objectionable military action. While that provision also incorporates the notion of international condemnation, the response of the international community to the legitimacy of a particular conflict or to the means by which it is being prosecuted has generally been seen as a relevant but not a determinative consideration: see *Krotov v. Secretary of State for the Home Department*, [2004] EWCA Civ 69. Nevertheless, in some cases it will suffice: see *Al Maisri v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 642, 55 A.C.W.S. (3d) 375 at para. 6. That this is so is not surprising: there are many reasons for countries to be reticent to criticize the decisions or conduct of an ally or a significant trading partner even where the impugned actions would, in some other political context, draw widespread international condemnation. Article 171 of the UNHCR Handbook speaks of the need for international condemnation for "the type of military action" which the individual finds objectionable. Thus, even where the response of the international community is muted with respect to objectionable military conduct, the grant of refugee protection may still be available where it is shown that the impugned conduct is, in an objective sense and viewed in isolation from its political context, contrary to the basic rules or norms of human conduct.

[22] The Federal Court of Appeal decision in *Zolfagharkhani*, above, has been widely recognized as authoritative in this area of the law. The decision was applied with approval by the House of Lords in Sepet et al v. Secretary of State for the Home Department [2003] 3 All E.R. 304 and it is cited in the von Sternberg text, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff, The Hague, 2002) for the following propositions:

> The original position of the Court of Appeal has undergone significant modification in the case law. Modern Canadian law has adopted an approach similar to that of the Ninth Circuit in the area of conscientious objection. In *Zolfagharkhani v. M.E.I.*, the Court of Appeal granted the applicant refugee status finding that his conscientious opposition to the use of chemical weapons in Iran's internal war against the Kurds was reasonable. The holding of *Zolfagharkhani* is considerably broader than any of the United States decisions discussed above and it adopts the correct standard for adjudicating such claims.
>
> [. . .]
>
> The view that the intent of the law provides the critical consideration in "conscientious objector" cases seems incomplete. The claimant in *Zolfagharkhani* had adopted a position in which he had refused to violate fundamental international humanitarian norms relating to the protection of human rights in armed conflict as set forth in a critical treaty. His relationship to the law must be seen then as one of comparative privilege. His right not to violate such peremptory norms is not qualified; the claimant is not, in other words, obligated to demonstrate that application

> of the law would entail, as to him, a disproportionately severe punishment. *Rather, the privilege obtaining with respect to a claimant's fundamental right not to violate the dignity of others is absolute. Any harm of a serious nature occasioned as the result of the claimant's having made this choice is persecution.*[30]

It is interesting that the Federal Court of Canada cited with favour a U.S. Court decision on the issue of conscientious objection.[31] The Federal Court in this decision also cites with favour several British cases.[32]

The Federal Court in *Key* also gave the following analysis based on the Federal Court of Appeal decision in *Zolfagharkhani v. Canada (Minister of Employment & Immigration)*.[33]

> [23] It appears to me that *Zolfagharkhani*, above, did not turn on whether the claimant would be required to commit war crimes or crimes against humanity in order to obtain refugee protection. Indeed, it is at least implicit from that decision that no such finding was required to support a protection claim. While the Court of Appeal observed that the expectation that Mr. Zolfagharkhani's work as a medic might implicate him in the commission of a war crime in the context of combat involving chemical weapons, it did not make such a finding the *sine qua non* of a successful claim to protection. Rather, the Court was fundamentally concerned with the moral weight to be assigned to the obligation to provide any form of material assistance to a regime that was conducting a revulsive military campaign. The Court held that where a reasonable person "would not be able to wash his hands of guilt" the claim to refugee protection will be made out.[34]

Mr. Justice Barnes in *Key* also cited the Federal Court of Appeal decision in *Al-Maisri v. Canada (Minister of Employment & Immigration)*[35] in support of his reasons and analysis of the law on conscientious objection and paragraph 171 of the *UNHCR Handbook*.

> [24] To the same effect is the decision of the Federal Court of Appeal in *Al Maisri*, above. In that decision the Court cited with approval a passage from

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[30]*Ibid.*, paras. 20-22. For a much lower threshold for application of the exclusion provisions see *Cibaric v. Canada (Minister of Citizenship & Immigration)* (1995), 105 F.T.R. 304 (Fed. T.D.).

[31]*Tagaga v. United States (Immigration & Naturalization Service)* (2000), 228 F.3d 1030 (U.S. C.A. 9th Cir.), para. 14.

[32]*Krotov v. Secretary of State for the Home Department*, [2004] EWCA Civ 69 (Eng. C.A.) and *Sepet v. Secretary of State for the Home Department*, [2003] 3 All E.R. 304 (U.K. H.L.).

[33](1993), 20 Imm. L.R. (2d) 1 (Fed. C.A.).

[34]*Key*, *supra*, para. 23.

[35]1995 CarswellNat 133, [1995] F.C.J. No. 642 (Fed. C.A.)

> James C. Hathaway's text, *The Law of Refugee Status* (Toronto: Butterworths, 1991) which recognized that refugee protection is available where the impugned military activity violates basic international standards, including the violation of basic human rights and breaches of the Geneva Convention standards for the conduct of war. The Court concluded by saying that official military action that is contrary to the basic rules of human conduct will support a refugee claim by a person unwilling to participate for that reason. It is also interesting that the Court held that essentially any form of punishment that might have been meted out by the Yemeni authorities for desertion would amount to persecution and thus support a claim to protection.[36]

The Court in *Key* also relied on the following analysis taken from the British case *Krotov v. Secretary of State for the Home Department*.[37]

> [26] Similarly, in *Krotov*, above, the Court dealt with the interpretation of Article 171 of the UNHCR Handbook in the following pertinent passage at paras. 29 and 30:
>
> > In considering the rival submissions of the parties, I should say at once that, whereas Mr Wilken has made much before us of the differing nuances of expression employed in paragraph 171 of the Handbook and the recent jurisprudence as indicative of an undesirable vagueness surrounding the concept of a claim for asylum on the grounds of fear of persecution for refusal to participate in a repugnant war, I do not regard those differences as irreconcilable in respect of the test to be applied to the nature of the war or conflict to which objection is taken. In *Sepet* and *Bulbul*, Laws LJ simply adopted the wording of paragraph 171 (absent the reference to condemnation by the international community), namely military action involving acts "contrary to basic rules of human conduct." Lord Bingham on the other hand referred to "atrocities or gross human rights abuses." However, I do not doubt that both had in mind in this context conduct universally condemned by the international community, in the sense of crimes recognised by international law or at least gross and widespread violations of human rights. The Tribunal in *B v SSHD* propounded a test based upon paragraph 171 and an expansion of the words of Laws LJ as follows:
> >
> > > Where the military service to which he is called involves acts, with which he may be associated, which are contrary to basic rules of human conduct as defined by international law.

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[36]*Key*, *supra*, para. 24.

[37][2004] EWCA Civ 69, [2004] 1 W.L.R. 1825 (Eng. C.A.)

> 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 actions such as genocide, the deliberate killing and targeting of the civilian population, rape, torture, the execution and ill treatment of prisoners and the taking of civilian hostages.

The Court then went on to identify the international law sources that could be invoked in support of a refugee claim. Included in that review were several articles of the four Geneva Conventions of August 12, 1949 which explicitly require humane treatment of civilians and which prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment" and "unlawful confinement." The Court completed its analysis with the following conclusion at para. 37:

> In my view, the crimes listed above, 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.[38]

Continuing his analysis of paragraph 171 of the *UNHCR Handbook*, Mr. Justice Barnes, relying on American case law, made the following observation:

> [27] Even the legal authorities from the United States do not seem to adopt such a restrictive standard. In *Tagaga*, above, refugee status was accorded to the claimant who was simply unwilling to participate in race based arrests and detentions. This was based on a standard defined by participation in acts "contrary to basic rules of human conduct" and not by one restricted to war crimes or crimes against humanity.
>
> [28] To the same effect is the decision of the United States Federal Courts of Appeal in *M.A. A26851062 v. U.S. Immigration & Naturalization Service*, 858 F.2d 210 (4th Cir. 1988), where the following standard was applied:
>
> > 44 Similarly, we do not think that M.A. must wait for international bodies such as the United Nations to condemn officially the atrocities committed by a nation's military in order to be eligible for political asylum. Paragraph 171 of the Handbook shelters those individuals who do not wish to be associated with military action "condemned by the international community as contrary to basic rules of human conduct . . ." These basic rules are well documented and readily available to guide the Board in discerning what types of actions are considered unacceptable by the world community. The Geneva Conventions of August 12,

[38] *Key*, *supra*, para. 26.

> 1949 represent the international consensus regarding minimum standards of conduct during wartime. They include the following, as to all of which M.A. has presented evidence to show their contravention by the Salvadoran military: the obligation to treat humanely persons taking no active part in hostilities, and the prohibition of certain acts, including violence to life and person, specifically murder of all kinds, mutilation, cruel treatment, and torture; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court. See Art. 3, Geneva Conventions of August 12, 1949, reprinted in United States Treaties and Other International Agreements Vol. 6, part 3 (1955).
>
> 45 We hold that M.A. has made out a prima facie case that he merits refugee status and thus consideration for political asylum on the basis of his sincere refusal to participate in the actions of the Salvadoran Armed Forces, and the likelihood that he will be punished for his refusal to serve. We think that M.A. has presented the evidence to show "an objective situation" from which it can be inferred that "persecution is a reasonable possibility." Stevic, 467 U.S. at 424 425, 104 S.Ct. at 2498.[39]

The Federal Court's conclusion in *Key*:

> [29] It is clear from the above passages that officially condoned military misconduct falling well short of a war crime may support a claim to refugee protection. Indeed, the authorities indicate that military action which systematically degrades, abuses or humiliates either combatants or non combatants is capable of supporting a refugee claim where that is the proven reason for refusing to serve. I have, therefore, concluded that the Board erred by imposing a too restrictive legal standard upon Mr. Key.[40]

The Federal Court also rendered a second decision in favour of another U.S. soldier who made a claim for protection of Canada as a war resister. This case is *Glass*. In this case the Federal Court granted a stay of deportation and prevented the removal of Mr. Glass to the U.S. on the basis of his winning leave for a judicial review of his PRRA.

The Federal Court deputy judge wrote the following summary of the facts behind Glass's claim for protection under PRRA:

> [5] He served during six months in Iraq during which he observed "gross human rights violations and gross misconduct by U.S. soldiers against Iraqi civilians including children". During this service, he observed many Iraqi civilians who were killed "for no good reason."

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[39] *Ibid*., para. 27-28.

[40] *Ibid.*, para. 29.

> [6] He also became aware of misconduct by U.S. soldiers, including extorting protection money from Iraqi shopkeepers. He stated that military records were falsified to "white wash" the real situation of violation of human rights against Iraqi civilians and misconduct by some army soldiers.
>
> [7] He tried to inform his superiors of the violations of human rights and discuss the situation with them but was told to mind his own business. His immediate supervisor attributed his worries to stress and recommended leave. He was reminded that if he deserted, he would face the death penalty.
>
> [8] Scandalized by what he saw, he decided to try to avoid participating in what he considered an "illegal war." He tried, with no avail, to be transferred to a non-combatant role in Iraq. When he was granted a two week leave in the U.S., he decided not to report back to the army and in August 2006, fled to Canada. Here he publicly denounced the conditions in Iraq and publicized his opposition to that war.[41]

There were a number of issues raised in this decision, including whether the evidence submitted for the PRRA was new evidence and the fact that U.S. soldiers that went public with their objection to the "undeclared War" in Iraq and Afghanistan were given harsher punishment than those that kept their opposition private and also would be denied due process.[42] The Federal Court judge in *Glass* relied on the decision in *Key*, issued only thirteen days earlier, in their decision to grant the judicial review and to stay the deportation order.

In *Hinzman* the Federal Court relied upon evidence that indicated that in 94% of the cases prosecuted for desertion, the only penalty imposed was a dishonourable discharge from the U.S. military.[43] However, some new evidence was presented in support of the PRRA:

> [13] Among the documents provided by the applicant, is a New York Times article of April 9, 2007 entitled "Army is cracking down on deserters," which states that:
>
> > Army prosecutions of desertion and other unauthorized absences have risen sharply in the last four years, resulting in thousands more negative discharges and prison time for both junior soldiers and combat-tested veterans of the wars in Iraq and Afghanistan, Army records show.
> >
> > [. . .] Using courts-martial for these violations, which before 2002 were treated mostly as unpunished nuisances, is a sign that active-duty forces are being stretched to their limits, military lawyers and mental health experts said.

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[41] *Glass*, *supra*, paras. 5-8.

[42] *Ibid.*, para. 10.

[43] *Ibid.*, para. 18.

> [14] The same article quotes Maj. Anne D. Edgecomb, an army spokeswomen, as saying "[t]he Army's leadership will take whatever measures they believe are appropriate if they see a continued upward trend in desertion, in order to maintain the health of the force."
>
> [15] The problems set out in that article are supported by a 2008 CNN report, entitled "Concern mounts over rising troop suicides."
>
> [16] The situation prompted the Canadian Parliament to pass a resolution on June 3, 2008, calling on the Canadian Government to permit U.S. conscientious objectors to remain in Canada and to cease deportations of such objectors.
>
> [17] In this case, Officer Dello rejected the evidence put forward by the applicant as "not new" and did not consider its implication on the issues to be decided. In the March 25, 2008 PRRA decision, it was concluded that the applicant would not risk persecution if he were returned to the U.S. The Officer decided there was no objective new evidence since the RPD decision to support the applicant's claim and that he faced "no more than a mere possibility of persecution." The allegation of a risk of undue hardship was dismissed on the basis that the presumption of state protection had not been rebutted.
>
> [18] Finally, the Officer referred to the RPD decision, which stated that 94% of AWOL soldiers between 1994 and 2001 were not persecuted by the military or were given "less than honourable discharges" (the same fact relied upon which the Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413 (*Hinzman*), saying 2000-2001 statistics showed those deserters were only sentenced to "less honourable discharges").
>
> [19] This evidence was contradicted by recent documentation and the "new evidence" adduced in this case by the applicant, showing that in 2007-2008 the "army is cracking down on deserters," prosecuting them and convicting them to lengthy imprisonment. This statement was corroborated in 2008 by the affidavit of an experienced U.S. Attorney, Mr. Eric Seitz, who represented numerous objectors to the war and deserters in their U.S. prosecutions.[44]

The judge of the Federal Court in *Glass*, following the precedent set in *Key*, made the following observation:

> [22] I believe the behaviour of the U.S. Army in Iraq, as described in *Key* above, is condemned by the international community as contrary to basic rules of human conduct. Punishment for desertion or draft evasion could, in

[44] *Ibid.*, paras. 13-19.

> light of all other requirements of the deportation, in itself be regarded as persecution.[45]

The Federal Court then set forth the following arguments in its analysis of the case in *Glass* and applicable law on the issue of state protection:

> [32] The U.S. has procedures to punish deserters and the evidence before the Board, dating from 2001-2002, was that the vast majority of army deserters in the U.S. had not been persecuted or court-martialled. Rather, approximately 94% of deserters had been dealt with administratively and merely received a less than honourable discharge from the military.
>
> [33] However, the situation has since changed. The evidence before the Board, here particularly the new evidence, reveals that, while the majority of deserters had previously been treated in a lenient manner, since 2007-2008 those who have spoken publicly against the war have suffered a different and harsher treatment which distinguishes the facts of the instant case from those of *Hinzman*.
>
> [34] On this basis, it can reasonably be argued that state protection does not exist in the U.S. to shelter these persons from such treatment and would not prevent the applicant from suffering degrading treatment during a prison term which could be as much as five years.
>
> [35] This would bring the applicant to the second stage of Justice Sexton's test where the legality of the war could be assessed among other factors.
>
> [36] There has been no official declaration of war by the U.S. against Iraq and it is a notorious fact that the U.S. Congress has not officially authorized such war. The applicant reported human rights abuses committed by American Forces against Iraq's civilian population which revolted him and prevented him from returning there.
>
> [37] As Justice Barnes pointed out in *Key* in para. 19:
>
> > It is apparent to me that the Board in *Hinzman* did not have before it the kind of evidence that was presented by Mr. Key and, therefore, neither the Board nor Justice Mactavish were required in that case to determine the precise limits of protection afforded by Article 171 of the UNHCR Handbook. I do not consider Justice Mactavish's remarks to be determinative of the issue presented by this case — that is, whether refugee protection is available for persons like Mr. Key who would be expected to participate in widespread and arguably officially sanctioned breaches of humanitarian law which do not constitute war crimes or crimes against humanity.[46]

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[45] *Ibid.*, para. 22.

[46] *Ibid.*, paras. 32-37.

The Federal Court judge in *Glass* did acknowledge that the Federal Court was split on these issues:

> [38] I acknowledge that the recent jurisprudence is divided on the issues raised in this case, *i.e.* deserters from U.S. Army whose objections to the war are based upon their conscience or the way the war is conducted.
>
> [39] Justice Michel Beaudry, in *Colby v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 805, [2008] F.C.J. No. 1015 (QL) (*Colby*), relied upon the Court of Appeal decision in Hinzman, because the factual situation was similar. In *Colby*, the applicant joined the U.S. Army as a medic but was later informed that the invasion and occupation of Iraq was based upon the claim of weapons of destruction which were never found.
>
> [40] Justice Beaudry dismissed the application principally because, as reiterated in *Hinzman*, the applicant had not passed the first stage of assessing the existence of objective fear, by exhausting the potential for state protection in the U.S.
>
> [41] In a recent case, *Robin Long v. Canada (MCI & MPSEP)* (July 14, 2008), IMM-3042-08, Justice Mactavish refused a stay because there had been no clear and convincing evidence that Mr. Long would suffer irreparable harm if deported.[47]

The Federal Court, in this instance following *Key*, noting the evolution in the law and fact situation, made a contrary determination to the Federal Court cases cited immediately above:

> [42] I conclude that the Officer, in the present case, did not give the applicant the opportunity to present a meaningful case on the issue of state protection and to establish the undue hardship he feared if returned to the U.S.[48]

In further support for the granting of the judicial review of the PRRA decision, the Federal Court in *Glass* ruled that:

> [49] The PRRA Officer erred in failing to provide adequate reasons for excluding the new evidence. The respondent submits this was sufficiently explained. A simple analysis of the law leads to the conclusion that such reasons were essential to explain excluding such evidence but were not given.
>
> [50] The PRRA Officer misconstrued the risks identified by the applicant and failed to analyse the new risks not raised before the RPD.
>
> [51] The respondent alleges that the Officer did not fail to assess the new risk. The respondent relies upon the U.S. Army publicity claiming the applicant is not considered a deserter. An analysis of the new evidence and the reasons of the Officer, it is evident that the risk was considered to be low as found by the RPD when in fact the new evidence contradicted findings made

[47] *Ibid.*, paras. 38-41.

[48] *Ibid.*, para. 42.

> by the RPD as to the recent situation in the U.S. and its treatment of deserters.[49]

On the issue of state protection, the Court further elaborated on its reasons in *Glass*:

> [52] The applicant submits that the Officer's reference to state protection indicates the application of a more stringent test. The respondent argues that the Court of Appeal's decision in *Hinzman* shows that soldier facing punishment in the U.S. for deserting must, as a rule, pursue state protection at home before seeking protection in Canada.
>
> [53] However, as Justice Barnes points out at paragraph 32 of the *Key* decision, the circumstances of each case varies:
>
> > [. . .] The circumstances of this case are very different from those which were considered in Hinzman and Hinzman (C.A.), above, most notably because, unlike Mr. Hinzman, Mr. Key was not required to address the state protection issue.
>
> He also added:
>
> > 34. Unlike many cases where state protection is invoked as the basis for denying refugee status, here the 'die may have been cast' by Mr. Key's decision to enter Canada before exhausting his protection options at home. [. . .] If there is clear and convincing evidence presented that Mr. Key faced a serious risk of prosecution and incarceration notwithstanding the possible availability of less onerous, non-persecutory treatment, he is entitled to make that case and to have that risk fully assessed.
>
> [54] I endorse these remarks and believe they apply to the facts of the present case.[50]

The Federal Court in *Glass* also addressed the issue of agent of persecution:

> [55] A problem arises to rebut the presumption of state protection when the agents of the State themselves are the cause of the persecution.
>
> [56] Justice Tremblay-Lamer wrote the following statement on this point in *Chaves v. Canada (MCI)*, 2005 FC 193, 45 Imm. L.R. (3d) 58 at para. 15:
>
> > [. . .] where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country.

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[49] *Ibid.*, paras. 49-51.

[50] *Ibid.*, paras. 52-54

> [57] The statement was quoted with approval by Justice Kelen in *Farias v. Canada (MCI)*, 2008 FC 578, [2008] F.C.J. No. 735 (QL) at para. 30.
>
> [58] This issue should have been addressed in this case.[51]

On April 24, 2009, the Federal Court rendered an entirely different conclusion in its judicial review of the negative PRRA decision in *Hinzman*:

> [17] The Officer stated that a PRRA is not an appeal of a decision of the RPD: *Perez v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1380. She found that the documentary evidence did not indicate a material change in the country conditions since the RPD and Federal Court of Appeal decisions. As well, the risks put forward by the Applicants were the same that had been heard and assessed by the RPD.
>
> [18] The Officer found that the evidence did not support that the Principal Applicant would not receive due process if charged with being AWOL, desertion or missing movement upon his return to the U.S. The Principal Applicant had availed himself of some of the recourse available under the U.S. military justice system, but he had not exhausted all of the avenues available to him.
>
> [19] The Officer accepted that the Applicants, particularly the Principal Applicant, would be the object of criticism and negative commentary from military personnel and members of the public in the U.S.. However, the Officer did not find that the Applicants had provided sufficient evidence to counter the RPD's finding that the discrimination they could face upon returning to the United States did not amount to persecution.[52]

In terms of the risk posed by judicial punishment, the Federal Court in *Hinzman* noted that the PRRA officer made the following findings:

> [23] The Officer found that it was objectively unreasonable to conclude that the Principal Applicant would face the death penalty if court marshalled upon his return to the United States. As well, the Officer found that the objective evidence did not support that the Principal Applicant would be subjected to disproportionate punishment should he be charged and convicted in a court martial proceeding upon his return to the United States. The Principal Applicant had chosen not to exhaust avenues of appeal available to him in the U.S..
>
> [24] The Officer also found that the Applicants had presented insufficient evidence to support their claim that the UCMJ would be applied in a disproportionately harsh manner against the Principal Applicant because of his personal circumstances. An H&C application is not an avenue to circumvent lawful and legitimate prosecutions commenced by a democratic country. Based on the evidence of the Principal Applicant, he would face charges and

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[51] *Ibid.*, paras. 55-58.

[52] *Hinzman*, *supra*, paras. 17-19.

> be prosecuted upon his return to the United States. However, the Officer was not unconvinced that the Principal Applicant would not be afforded due process or that accessing due process and state protection would be a hardship.[53]

On the issue of non-judicial hardship, the Federal Court noted that:

> [25] The Officer found that the existence of Army Regulation 27 10 (which allows a commander to impose any non judicial punishment deemed appropriate upon a solider under their command) did not mean it would be applied towards the Principal Applicant in a manner that amounted to unusual, undeserved or disproportionate hardship.[54]

The Federal Court in Jeremy Hinzman's PRRA decision considered the issue of "Other Identified Risks" and found that:

> [26] The Officer considered other risks identified by the Applicants, which included being socially ostracized, possible physical danger from individuals opposed to the Principal Applicant's political opinions, the inability to vote or work in certain occupations if convicted of desertion or other military convictions, and the inability to apply to immigrate to Canada as a skilled worker.
>
> [27] In relation to social ostracism and physical violence, the Officer concluded that the Applicants would be able to access state protection and that it was not a hardship for them to access that protection. In relation to people disagreeing with the Principal Applicant's political opinions and public opposition to the war in Iraq, the Officer did not find that the potential or actual expression of opposing opinions to those of the Applicants amounted to an unusual, undeserved or disproportionate hardship. In relation to the Principal Applicant's inability to vote or seek employment in certain occupations, the Officer found that if the Principal Applicant is convicted of a military offence, there is no evidence that supports that the laws disproportionately targeted him compared to other individuals charged and convicted of similar military offences.[55]

Mr. Justice Russell upheld the finding of the PRRA officer and rejected the application for judicial review. In his conclusion he wrote:

> [97] If Court room attendance at the hearing is anything to go by, this application has attracted significant public interest and debate. In completing my review of the Officer's Decision I have simply applied the relevant jurisprudence and the principles of judicial review as I understand them. The result will obviously displease not only the Applicants but also the larger community of supporters behind them. My conclusions are in no way intended as a

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[53] *Ibid.*, paras. 23-24.

[54] *Ibid.*, paras. 25.

[55] *Ibid.*, paras. 26-27.

> comment upon, or sympathy for, either side in the public debate. They are simply the conclusions I feel compelled to reach in applying Canadian law to the facts and arguments before me. The fact that I have to conclude against the Applicants does not mean that the Court does not recognize, or have sympathy for, the significant challenges they may face as a family when returned to the U.S..[56]

In August 2009 the Federal Court ruled in favour of the U.S. war resister in *Rivera*. The presiding judge, Mr. Justice Russell, had previously ruled against Hinzman's judicial review of his PRRA decision. However, Justice Russell in *Rivera* overturned the decision of a PRRA officer on the basis of failure to consider evidence of differential treatment of war resisters who have publicly expressed political opinions opposing the war in Iraq. Most deserters received administrative punishment only, but deserters who spoke out against the war were targeted and given prison sentences. To quote the decision:

> [101] . . . the whole state protection analysis needs to be reconsidered in the light of the stated risk, and supporting evidence, that the U.S. authorities will not neutrally apply a law of general application, but will target the Principal Applicant for prosecution and punishment solely because of her political opinion in a context where other deserters, who have not spoken out against the war in Iraq, have been dealt with by way of administrative discharge.
>
> [102] In my view, the Officer's failure to fully address the targeting issue, and the evidence that supports the Applicants' position, renders the Decision unreasonable and it must be returned for reconsideration.[57]

It is certainly clear that the Federal Court of Canada is of a divided opinion when it comes to the law on conscientious objection and U.S. soldiers who have refused to serve in the Iraq war and have come to Canada seeking protection as Convention refugees.

There is also a private members bill introduced by Liberal M.P. Gerard Kennedy on September 17, 2009 that "would allow foreign military deserters — or those who refuse mandatory military service — to stay in Canada if their action is based on 'sincere moral, political or religious objection.'"[58]

Canadian MPs have already voted twice to support U.S. war resisters, but that was through motions that are not binding on the government. Kennedy's bill, however, would be binding because it would amend the *Immigration and Refu-*

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[56]*Ibid.*, paras. 97.

[57]*Rivera*, *supra*, paras. 101-102.

[58]The Canadian Press, "Liberal MP introduces war resisters bill," *Globe & Mail*, September 17, 2009.

gee Protection Act and become law. Private members' bills rarely pass, but in the current minority Parliament its chances for success are greatly improved.[59]

After the Second World War, the Nuremberg Tribunal set out important principles of international law. Those principles established that soldiers have a moral duty, not a choice, to refuse to carry out illegal orders. It is the opinion of noted international law expert Francis Boyle that George W. Bush's war against Iraq is a war of aggression and constitutes a crime against peace as defined by the *Nuremberg Charter* (1945), the *Nuremberg Judgment* (1946), and the *Nuremberg Principles* (1950), as well as by paragraph 498 of *U.S. Army Field Manual* 27-10 (1956).[60]

After the massive human rights abuses in the Second World War and the Nazi persecution of the Jews, the International Military Tribunal at Nuremberg described the waging of aggressive war as "essentially an evil thing . . . to initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[61]

The chief prosecutor at the Nuremberg Tribunal and Associate United States Supreme Court Justice Robert Jackson wrote: "No political or economic situation can justify" the crime of aggression. Justice Jackson also said: "If certain acts in violation of treaties are crimes they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."[62]

There is certainly a great deal of wisdom in Justice Robert Jackson's words.

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[59]*Ibid*.

[60]Francis A. Boyle, "US as Belligerent Occupant Iraq and the Laws of War," *CounterPunch*, December 22, 2005.

[61]Marjorie Cohn, "Aggressive War. Supreme International Crime," *Truthout*, November 9, 2004.

[62]Nicolas J.S. Davies, "The Crime of War: From Nuremberg to Fallujah. A review of current international law regarding wars of aggression," *Z Magazine*, February 2005, Volume 18, Number 2.