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Docket: IMM-2168-05

Citation: 2006 FC 420

Ottawa, Ontario, March 31, 2006

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

JEREMY HINZMAN (A.K.A. JEREMY DEAN HINZMAN)

LIAM LIEM NGUYEN HINZMAN (A.K.A. LIAM LIEM NGUYE HINZMAN)

AND NGA THI NGUYEN

Applicants

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Jeremy Hinzman is an American soldier who deserted the United States Army after his unit was deployed to fight in Iraq. Mr. Hinzman says that he deserted because of his strong moral objections to the war in Iraq, and his belief that the American-led military action in that country is illegal.

[2] After deserting the military, Mr. Hinzman came to Canada, accompanied by his wife and infant son. Shortly thereafter, the family claimed refugee protection, asserting that they had a well-founded fear of persecution in the United States, based upon Mr. Hinzman's political opinion. The family's claims were rejected by the Refugee Protection Division of the Immigration and Refugee Board, which found that the family were neither Convention refugees nor persons in need of protection.

[3] Mr. Hinzman and his family now seek judicial review of the Board's decision, asserting that the Board erred in refusing to allow them to lead evidence with respect to the alleged illegality of the American military action in Iraq. The Board further erred, they say, in ignoring evidence with respect to the alleged condonation of ongoing human rights violations perpetrated by the American military in Iraq, and with respect to the systemic nature of those violations.

[4] In addition, the applicants say that the Board imposed too heavy a burden on them to demonstrate that Mr. Hinzman would himself have been involved in unlawful acts, had he gone to Iraq. Finally, the applicants argue that the Board erred in failing to properly consider the fact that an objection to a particular war is not recognized as a legitimate basis on which to grant conscientious objector status in the United States. Given that Mr. Hinzman's sincere conscientious objections to the war in Iraq were not taken into account by the United States Army, the applicants say that any punishment that he may receive for having deserted automatically amounts to persecution.

[5] For the reasons that follow, I have concluded that this application for judicial review must be dismissed. It should be noted that the question of whether the American-led military intervention in Iraq is in fact illegal is not before the Court, and no finding has been made in this regard.

II. Factual Background

[6] As the Federal Court of Appeal observed in *Zolfagharkhani v. Canada(Minister of Employment and Immigration)*, [1993] 3 F.C. 540, conscientious objector cases are often fact-specific. It is therefore necessary to review the facts underlying the applicants' refugee claims in some detail, particularly as they relate to the nature of Mr. Hinzman's objection to military service generally, and to serving in the war in Iraq in particular.

[7] Mr. Hinzman enlisted in the United States Army in November of 2000. Mr. Hinzman acknowledged that, in joining the Army, he was motivated by both the financial assistance that the military provided to recruits, which would have allowed him to attend university upon completion of his term of enlistment, and by the "higher and noble purpose" that the Army represented.

[8] Mr. Hinzman could have signed up for a term of two, four or six years. He chose a four year term of service. He also had a choice of positions within the army, and elected to be an Infantryman. He explained that "... if I was going to be in the army ... I was going to experience the essence of the army, which is what the Infantry is. I mean, when you watch a war movie and you see the people shooting back and forth or whatever else, that's the feel."

[9] Although he says that he was a practising Buddhist prior to enlisting in the Army, it appears that, at the outset of his military service, Mr. Hinzman did not have any qualms about bearing arms or otherwise participating in active military service.

[10] Mr. Hinzman explained that as he went through basic training, he was exposed to a process of desensitization, involving a dehumanization of the enemy. This process included having the recruits repeat chants about killing, raping and pillaging. Mr. Hinzman initially thought that this was all done in good fun, but subsequently began to question his involvement in such activity.

[11] Mr. Hinzman evidently excelled in his military training, achieving the rank of Private, First Class, with a "Specialist" rating. He was one of the select few chosen for the "pre-Ranger course". The Ranger program is an elite leadership training course which enables individuals to deal with combat situations successfully, by making the right decisions with limited resources. Obtaining the Ranger certification would have greatly enhanced Mr. Hinzman's career prospects within the army.

[12] Before the Board, Mr. Hinzman testified that during this period, he was "kind of living a double life". While he continued to do very well at his military training, the concerns about killing that Mr. Hinzman had started to develop in basic training had continued to grow, as he explored a world view framed by Buddhist teachings, which resulted in a deepening of his religious beliefs. He says that he gradually came to realize that he had a significant inhibition against the taking of human life, stating that his concerns in this regard came to a head as he was on the verge of starting the pre-Ranger course, when he realized that he was "at a point of no return", and that he "couldn't do it anymore".

[13] Mr. Hinzman says that he did not discuss his concerns with anyone outside his family at this time. He did, however, become aware that the US Army allows personnel to apply for conscientious objector status. This policy allows soldiers to be reassigned to non-combatant duties where the soldier objects to bearing arms, and also permits the complete separation of the individual from the military, where the individual objects to war of all kinds.

[14] In August of 2002, Mr. Hinzman decided to seek reassignment to non-combatant duties as a conscientious objector. He testified that he did not ask to be discharged from the Army, as he felt an obligation to complete his four year contract, and was willing to continue to serve as a medic, truck driver, cook, administrator or any other position that did not require him to kill anyone.

[15] While he acknowledged that an early release from the Army would have limited the educational benefits to which he would be entitled, Mr. Hinzman says that this was not a factor in his decision to seek reassignment while remaining in the Army.

[16] In his application for conscientious objector status, Mr. Hinzman stated that it was his belief that war in any guise was wrong, and that he could no longer be part of a unit that was trained to kill. While Mr. Hinzman stated that he was not a member of a religious sect or organization, he did explain how his involvement with principles of Buddhism and meditation, as well as his attendance at meetings of the Society of Friends, or "Quakers", had influenced the evolution in his beliefs.

[17] In accordance with the military's conscientious objector procedures, within three days of submitting his application for conscientious objector status, Mr. Hinzman was reassigned to guard the entrance gate at the Fort Bragg base. This position involved checking license plates of cars entering the base. He was subsequently transferred to work in the dining facility at Fort Bragg.

[18] The evidence is not very clear as to what happened to Mr. Hinzman's initial conscientious objector application. It seems to have somehow gone astray, and was never dealt with by the Army on its merits.

[19] At the end of October, 2002, when Mr. Hinzman realized that his application had not been dealt with, he submitted a new application. By this point, it had become clear to Mr. Hinzman that his unit was to be deployed to fight in Afghanistan as part of "Operation Enduring Freedom". Because of the timing of Mr. Hinzman's second application, it appeared that his application had been precipitated by his learning of his imminent deployment to Afghanistan, when in fact this was not the case.

[20] Although Mr. Hinzman did not know whether the American military action in Afghanistan had been sanctioned by a resolution of the Security Council of the United Nations, he was nonetheless of the view that the United States had a legitimate basis for going into Afghanistan. Mr. Hinzman explained that he was satisfied that there were links between the Taliban regime then in power in Afghanistan and al-Qaeda, al-Qaeda being the terrorist organization responsible for the September 11, 2001 attacks on the United States.

[21] Accordingly, Mr. Hinzman went with his unit to Afghanistan, where he was assigned kitchen duties.

[22] A hearing with respect to Mr. Hinzman's conscientious objector application was held in Kandahar on April 2, 2003. Mr. Hinzman has complained that he was unable to call any witnesses at the hearing because the hearing was held in Afghanistan, and the witnesses that he might have called, including his wife and the Quakers with whom he had attended meetings, were all in the United States. However, although Army Regulation 600-43, which governs conscientious objector procedures, expressly contemplates the adjournment of hearings for good cause at the request of the applicant, Mr. Hinzman never sought to have the hearing adjourned until his return to the United States so as to permit him to call witnesses.

[23] After the hearing, the First Lieutenant assigned to hear the case concluded that while Mr. Hinzman sincerely opposed war on a philosophical, societal and intellectual level, his beliefs were not congruent with the definition of conscientious objector set out in the Army regulations. In coming to this conclusion, the First Lieutenant appears to have been influenced by the fact that while Mr. Hinzman was unwilling to participate in offensive combat operations, he was prepared to participate in defensive operations. The First Lieutenant concluded that Mr. Hinzman could not choose when or where he would fight and, as a result, his application was denied.

[24] The First Lieutenant also found that Mr. Hinzman was using his conscientious objector application as a way to try to get out of the Infantry. This

conclusion was based, in part, on a negative, and apparently erroneous, inference drawn from the First Lieutenant's belief that Mr. Hinzman had not claimed conscientious objector status until shortly after he found out that he was to be sent to Afghanistan.

[25] Although there is a right of appeal from a negative first-level decision, Mr. Hinzman did not appeal the First Lieutenant's decision, nor did he take any steps to investigate his rights in this regard. He continued to perform kitchen work for the remainder of his deployment in Afghanistan, and upon his return to the United States in July of 2003, Mr. Hinzman resumed his normal duties as an Infantryman.

[26] Mr. Hinzman testified that he did not pursue his claim for conscientious objector status on his return to the States because he was "worn out", and because he felt that there would be no point to pursuing the matter. He also testified that he did not want to go through another long process of waiting, and did not want to have to do menial tasks while a decision was pending.

[27] He also stated that while he was still in Afghanistan, he began thinking about the fact that he could be deployed to fight in Iraq, and that he resolved at that time that he would not go. At his refugee hearing, Mr. Hinzman was asked why, if that was the case, did he not desert upon his return from Afghanistan. He said that once he returned to the States, he was back with his family and the thought of deserting had simply not occurred to him, even though by this point he knew that it was inevitable that he would be sent to Iraq.

[28] Mr. Hinzman says that he decided not to fight in Iraq because, in his view, the American military action in that country was illegal. He based this opinion on the fact that even though Iraq was supposed to be in possession of weapons of mass destruction, after months of investigation, no such weapons had been uncovered. Similarly, no links to terrorist organizations had been established, even though these ostensible links had been offered as a pretext for the United States going into Iraq. Finally, given his belief that Iraq posed no threat to the United States, Mr. Hinzman was of the view that there was no justification for such a non-defensive incursion into foreign territory.

[29] In December of 2003, Mr. Hinzman was told that his unit was to be deployed to Iraq on January 16, 2004. Having resolved not to go, Mr. Hinzman had two options - he could refuse the order to deploy, or he could desert. If he chose to refuse the deployment order, Mr. Hinzman could have been prosecuted under the Universal Code of Military Justice. Instead, he opted to desert.

[30] Mr. Hinzman arrived in Canada with his family on January 4, 2004, and the family filed their applications for refugee status some three weeks later. Their applications were based on Mr. Hinzman's political beliefs. In his Personal Information Form (or 'PIF'), Mr. Hinzman describes his reasons for deserting in the following terms:

The war with Iraq was the immediate reason for my decision to refuse military duty in its entirety. First, I feel that the war is contrary to international law and waged on false

pretenses. Second, I am not willing to kill or be killed in the service of ideology and economic gain.

[31] Mr. Hinzman further claimed that participating in the war in Iraq would violate both his conscience and his religious principles, although his refugee claim was based only upon his political opinion.

[32] Mr. Hinzman says that because the military occupation of Iraq was without a proper legal foundation, he would be a criminal if he were to take part in it. At the same time, however, he acknowledged that he would have been prepared to serve in Iraq in a non-combatant role, even though he was of the view that this limited participation would still make him complicit in an illegal war.

[33] If he were returned to the United States, Mr. Hinzman says that he would be prosecuted for desertion. While acknowledging that the vast majority of military deserters merely receive a dishonourable discharge from the military, and are not prosecuted, Mr. Hinzman is of the view that he has "ruffled enough feathers" that he would probably be court-martialled, and would likely receive a sentence of anywhere from one to five years in a military prison.

[34] While Mr. Hinzman acknowledges that he would receive a fair trial in the United States, before an independent judiciary, he nonetheless asserts that any form of punishment that he would incur for merely following his conscience would amount to persecution.

III. The Board's Preliminary Evidentiary Ruling

[35] In the pre-hearing process leading up to the hearing of the applicants' refugee claims, counsel for the applicants indicated that he intended to lead evidence at the hearing as to the alleged illegality of the American military action in Iraq.

[36] This evidence primarily took the form of affidavits from two professors of international law, both of whom focused on the lack of United Nations Security Council approval for the American government's use of force in Iraq. Both professors observe that the *Charter of the United Nations*, 26 June 1945, Can T.S. 1945 No. 7 [UN *Charter*], permits the use of force by one country against another in only two situations: in cases of self-defense, and where there is Security Council approval.

[37] Both professors observe that the United States did not invoke self-defense as a legal justification for its military intervention in Iraq. They further argue that none of the Security Council resolutions relied upon by the United States to justify its conduct condoned military action against Iraq in the present circumstances. The professors specifically refer to Security Council Resolution 1441, which recognizes further breaches by Iraq of its disarmament obligations, and requires that any further non-compliance be reported to the Security Council for reassessment. Although this Resolution does not expressly contemplate the need for an additional resolution authorizing force, the professors argue that, given the deep disagreements that led to the adoption of this compromise Resolution, it is impossible to read the Resolution as either an express or implied authority for the use of force.

[38] One of the professors also discusses a developing view of humanitarian intervention as a third possible justification for one State to use armed force against another. However, the professor observes that President Bush made no attempt to justify the American invasion of Iraq as a humanitarian intervention.

[39] Both professors conclude that, in the absence of either Security Council approval or a sound case for self-defense, no legal justification exists for the war in Iraq. As a consequence, each concludes that the American invasion of Iraq was carried out in violation of the prohibition on the use of force enshrined in Article 2(4) of the UN *Charter*, and was thus illegal.

[40] The other evidence which the applicants sought to adduce was to a similar effect.

[41] The Board decided to address the admissibility of this evidence in advance of the hearing, receiving submissions on the following question:

> ... [W]hether the allegation that the United States' military action in Iraq was not authorized by the UN *Charter* and UN Resolution is 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 of human conduct. If it is relevant, how so?

[42] In a lengthy and detailed ruling, the Board answered this question in the negative, determining that the legality of the American military action in Iraq was not relevant to the question of whether it was "the type of military action" which is "condemned by the international community, as contrary to basic rules of human conduct", within the meaning of paragraph 171 of the United Nations High Commission for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status: United Nations*, Office of the United Nations High Commissioner for Refugees; Geneva, 1988.

[43] Paragraph 171 of the *Handbook* provides that:

> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. *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 the basic rules of human conduct*, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution. [emphasis added]

[44] The Board found that when Canadian and international courts have considered this provision in order to determine whether an individual meets the definition of "Convention refugee", it has almost invariably been the nature of the *acts* that the evading or deserting soldier would be expected to perform or be complicit in, rather than the legality of the conflict as a whole, that have dictated the result.

[45] Based upon this understanding of the relevant test, the Board found that evidence as to the alleged illegality of the war in Iraq was not relevant to the analysis to be carried out in accordance with paragraph 171 of the *Handbook*.

[46] The Board also rejected Mr. Hinzman's submission that the alleged illegality of the war in Iraq was relevant to his claim because it made it more likely that there would be widespread and systematic violations of international humanitarian law going on in Iraq, in which Mr. Hinzman himself would be required to participate. In the Board's view, this argument was purely speculative.

[47] As a consequence, the Board refused to admit the evidence regarding the legality of the American military action in Iraq, ruling that this evidence was irrelevant to the applicants' refugee claims.

IV. The Board's Decision with Respect to the Merits of the Applicants' Claims

[48] The Board identified four substantive issues raised by the applicants' refugee claims. These were:

1. Had Mr. Hinzman rebutted the legal presumption that the government of the United States would be willing and able to protect him?

2. Was Mr. Hinzman a Convention refugee? That is, did he have a well-founded fear of persecution by the American government and its military because of his political opinion, religion, or membership in a particular social group, namely conscientious objectors to military service in the United States Army?

3. Is the type of military action with which Mr. Hinzman does not wish to be associated condemned by the international community as contrary to basic rules of human conduct within the meaning of Section 171 of the UNHCR *Handbook*?

4. Is Mr. Hinzman a person in need of protection, in that his removal to the United States would subject him personally to a risk of cruel and unusual treatment or punishment by the American government and its military? In this regard, the Board also considered whether the risk of punishment for desertion faced by Mr. Hinzman was inherent or incidental to lawful sanctions imposed in conformity with accepted international standards.

[49] Insofar as the other applicants were concerned, the Board characterized the issues presented by their claims as firstly, whether there was a serious possibility that they would be persecuted because of their membership in a particular social group, namely members of Mr. Hinzman's family, and secondly, whether they were persons in need of protection because of a risk to their lives or a risk of cruel and unusual treatment or punishment.

i) State Protection

[50] With respect to the issue of State protection, the Board noted that the responsibility to provide international protection is only engaged when State protection is not available to a claimant in his or her home country. The Board further observed that there is a rebuttable presumption in refugee law that, in the absence of a complete breakdown of the State apparatus, a State will be able to protect its own nationals. Moreover, the more democratic the State, the greater the obligation on a claimant to exhaust all courses of action available in the claimant's country of origin, prior to seeking refugee protection abroad.

[51] Citing the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Satiacum* (1989), 99 N.R. 171, the Board found that refugee claimants from the United States must establish the existence of 'exceptional circumstances', such that the claimant would not have access to a fair and independent judicial process.

[52] That is, Mr. Hinzman 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, if he were to return to the United States and face court-martial proceedings. The Board found that the Universal Code of Military Justice (UCMJ) and the Manual for Courts-martial of the United States reveal a sophisticated military justice system that respects the rights of service personnel, and guarantees appellate review, including limited access to the United States Supreme Court.

[53] Noting that the UCMJ is a law of general application, the Board then reviewed the approach set out by the Federal Court of Appeal in *Zolfagharkhani*, previously cited, to determine whether the prosecution of Mr. Hinzman under an ordinary law of general application would amount to persecution.

[54] The Board thus found that the onus was on Mr. Hinzman to show that the American law was either inherently persecutory, or for some other reason was persecutory in relation to a *Convention* ground. In the Board's view, he had failed to satisfy this onus.

[55] In coming to this conclusion, the Board found that Mr. Hinzman had not brought forward any evidence to support his allegation that he would not be accorded the full protection of the law in the court-martial process.

[56] The Board also observed that the United States has military regulations in place that allow for exemption from military service, as well as for alternative, non-combatant service for persons who can invoke genuine reasons of conscience. The regulations also recognize that conscientious objections can be long-standing, or can result from an evolution in a person's belief system resulting from their military experiences.

[57] The Board recognized that American military regulations do not permit a conscientious objection to be founded on an individual's objection to a particular war, noting that this limitation had been upheld by the Supreme Court of the United States in the Vietnam-war era decision in *Gillette v. United States*, 401 US 437 (1971).

[58] The Board concluded that Mr. Hinzman had failed to offer sufficient evidence to establish that he was denied due process with respect to his application for non-combatant status, or that he would be denied due process or be treated differentially, were he to return to the United States and be court-martialled.

[59] Having failed to rebut the presumption that State protection would be available to him in the United States, it followed that Mr. Hinzman's claim under both sections 96 and 97 of the *Immigration and Refugee Protection Act* had to be dismissed.

ii) Did Mr. Hinzman Have a Well-founded Fear of Persecution in the United States?

[60] Even though the Board's conclusion on the issue of State protection was determinative of the applicants' claims, the Board went on to consider the other issues raised by the claims, starting with the question of whether any punishment that would be imposed upon Mr. Hinzman as a consequence of his refusal to serve in a combative capacity in Iraq would be inherently persecutory, given his political and moral views.

[61] The Board also considered Mr. Hinzman's argument that had he gone to Iraq, he would have been ordered to engage in offensive operations, contrary to his genuine convictions against killing other than in self-defence, and that this would also have amounted to persecution.

[62] The Board began by reviewing the relevant paragraphs of the UNHCR *Handbook*, the full text of which are appended to this decision. In this regard, the Board noted that, in certain circumstances, the political and religious beliefs of an individual may be grounds for refusing military service, and may also form the foundation for a successful refugee claim.

[63] The Board then proceeded to examine Mr. Hinzman's own beliefs. In this regard, the Board found Mr. Hinzman to be an intelligent and thoughtful individual, whose moral code was in a state of evolution.

[64] Based upon statements made by Mr. Hinzman in his PIF, at his conscientious objector hearing in Afghanistan, and at his refugee hearing, the Board found that Mr. Hinzman decided to desert because he was opposed to the American military incursion into Iraq, and not because he was opposed to war in general. While accepting the sincerity of Mr. Hinzman's objections to participating in the war in Iraq, the Board went on to find that Mr. Hinzman's position was "inherently contradictory".

[65] In this regard, the Board noted that while Mr. Hinzman was of the view that the military occupation of Iraq was illegal, and that, as a result, any actions that he might take in relation to the war would therefore also be illegal, he was nevertheless prepared to serve in Iraq in a non-combatant role.

[66] Citing the decision of this Court in *Ciric v. Canada(Minister of Employment and Immigration)*, [1994] 2 F.C. 65, the Board held that one cannot be a selective conscientious objector. The Board further found that Mr. Hinzman's failure to pursue his conscientious objector application in the United States, and his

resumption of regular infantry duties on his return from Afghanistan, were each inconsistent with his claim to be a conscientious objector.

[67] In addition, the Board found that Mr. Hinzman had also not properly explained why he had not sought an adjournment of his conscientious objector hearing in Afghanistan. Moreover, the Board rejected as 'unacceptable' Mr. Hinzman's explanation that he had not investigated possible avenues of appeal in relation to the negative decision he had received because he was "worn out".

[68] Thus, while seemingly accepting the sincerity of Mr. Hinzman's objections to participating in the war in Iraq, the Board nevertheless concluded that Mr. Hinzman was not a conscientious objector because he was not opposed to war in any form, or to the bearing of arms, due to his genuine political, religious or moral convictions, and that, as a result, any punishment for desertion would not be inherently persecutory.

iii) Section 171 of the UNHCR Handbook

[69] The Board also rejected Mr. Hinzman's assertion that the type of military action with which he did not wish to be associated in Iraq - that is, the specific acts that he would personally have been called upon to perform - were ones that were "condemned by the international community as contrary to basic rules of human conduct", as that phrase is used in section 171 of the UNHCR *Handbook*, and that, as a result, any punishment that he might receive for deserting would be persecutory.

[70] In support of his contention that he could well have been called upon to commit human rights violations, had he gone to Iraq, Mr. Hinzman pointed to evidence regarding conditions at the Guantanamo prison facility in Cuba, to incidents of torture at the Abu Ghraib prison in Iraq, and to two legal opinions prepared by the American Department of Justice (the "Gonzales opinions"), suggesting that the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, UN Doc. A/39/51, 1984, *entered into force* June 26, 1987, might not apply to the interrogation of 'enemy combatants' held by the United States.

[71] According to Mr. Hinzman, this evidence demonstrates that the United States has conducted itself with relative impunity, and has evidenced a complete disregard for international norms in its conduct on the various fronts of its "War Against Terror".

[72] Before the Board, Mr. Hinzman contended that if he were required to participate in offensive action in Iraq, potentially killing innocent civilians, he would be excluding himself as a Convention refugee or person in need of protection by virtue of s. 98 of the *Immigration and Refugee Protection Act*. In such circumstances, Mr. Hinzman submitted that any punishment that he might receive for deserting would be persecutory *per se*.

[73] After reviewing the evidence adduced by Mr. Hinzman, the Board concluded that Mr. Hinzman had not shown that the United States had, either as a matter of deliberate policy or official indifference, required or allowed its combatants

to engage in widespread actions in violation of international humanitarian law. Citing the decision of this Court in *Popov v. Canada(Minister of*

Employment and Immigration) (1994), 24 Imm. L.R. 242, the Board noted that isolated instances of serious violations of international humanitarian law will not amount to military activity that is condoned in a general way by the State.

[74] In coming to this conclusion, the Board considered the findings of a Human Rights Watch report that documented the killing of civilians by American forces in Iraq. While observing that there had been questionable deaths, the report acknowledged that the American military has taken steps to reduce civilian deaths, and to investigate specific incidents where deaths had occurred.

[75] The Board further noted that the use of "embedded" media representatives in Iraq indicated an attitude of openness and accountability on the part of the American military.

[76] Finally, the Board reviewed the evidence of United States Marine Corps Staff Sergeant Jimmy Massey, who served with Mr. Hinzman's division in Iraq, and was involved in manning a vehicle checkpoint. The Board accepted Staff Sergeant Massey's testimony that the standard operating procedure at such checkpoints tried to minimize harm to civilians.

[77] The Board thus concluded that Mr. Hinzman had failed to adduce sufficient evidence to establish that if deployed to Iraq, he would have personally been engaged in, been associated with, or been complicit in acts condemned by the international community as contrary to basic rules of human conduct.

iv) Punishment for Desertion: Prosecution or Persecution?

[78] Having previously found that Mr. Hinzman was not a conscientious objector, the Board observed that any punishment that he would face would not automatically be persecutory in nature. The Board held that to establish that he faced a risk of persecution, Mr. Hinzman had to establish either that the punishment that he feared he would receive for desertion, if he were returned to the United States, would result from a discriminatory application of the UCMJ, or would amount to cruel or unusual treatment or punishment.

[79] In this regard, the Board noted that Mr. Hinzman had testified that he would likely face between one and five years in a military prison, and that because he had "probably offended ... military sensibilities", he would likely be treated more harshly than other deserters.

[80] Noting that the *Handbook* recognizes that desertion is invariably considered to be a criminal offence, the Board found that penalties for desertion will not ordinarily be considered to be persecutory. However, the Board also observed that paragraph 169 of the *Handbook* provides that a deserter may be considered to be 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 in a particular social group or political opinion. A deserter may also be

considered to be a refugee where it can be shown that he or she has a well-founded fear of persecution on the enumerated grounds, above and beyond the punishment for desertion.

[81] On the totality of the evidence before it, the Board concluded that the treatment or punishment that Mr. Hinzman fears in the United States would be punishment for nothing more 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.

[82] The Board did not accept Mr. Hinzman's argument that he would be punished more severely because of the publicity that has surrounded his case, finding that there was insufficient evidence to justify this assertion.

[83] Moreover, the Board concluded that the punitive articles in the UCMJ were not grossly disproportionate to the inherent seriousness of the offence of desertion. Although the UCMJ allows for the theoretical possibility of a sentence of death for desertion, the Board noted that, in practice, the last time a deserter was sentenced to death was during the Second World War.

[84] After reviewing the evidence, including sentences handed down to other American deserters, the Board found that there was less than a mere possibility that Mr. Hinzman would be sentenced to death. Indeed, counsel for Mr. Hinzman admitted that he would not face the death penalty in this case.

[85] Accepting that Mr. Hinzman would likely be sentenced to a prison term of somewhere between one to five years for his desertion, in addition to having to forfeit his pay and be dishonourably discharged, the Board held that Mr. Hinzman had not established that treatment would be persecutory.

[86] Finally, the Board found that while Mr. Hinzman could ultimately face some employment and societal discrimination as a result of his dishonourable discharge, this also did not amount to persecution.

v) The Claims of the Other Applicants

[87] The refugee claims of Mr. Hinzman's wife and son were based upon their status as members of his family. The Board found that there was no evidence to suggest that they would be at risk in the United States, even if Mr. Hinzman were to be sentenced to a term of imprisonment. To the extent that they relied on the evidence of Mr. Hinzman to establish their claims, the failure of Mr. Hinzman to establish his claim was fatal to the claims of his immediate family.

V. Issues

[88] The issues raised by the applicants before this Court can be addressed under the following headings:

1. Did the Board err in finding that evidence with respect to the alleged illegality of the American military action in Iraq was irrelevant to

the determination that had to be made by the Refugee Protection Division in accordance with paragraph 171 of the UNHCR *Handbook*?

2. Did the Board err in finding that the applicants had failed to establish that the violations of international humanitarian law committed by the American military in Iraq rise to the level of being systematic or condoned by the State?

3. Did the Board err in imposing too heavy a burden on the applicants to demonstrate that Mr. Hinzman would himself have been involved in unlawful acts, had he gone to Iraq? and

4. Did the Board err in its analysis of the State protection and persecution issues?

[89] In addition, the question of the appropriate standard of review will have to be addressed in relation to each of these issues.

VI. Did the Board Err in Finding that Evidence as to the Alleged Illegality of the American Military Action in Iraq was Irrelevant to the Determination That Had to Be Made in Accordance with Paragraph 171 of the UNHCR *Handbook*?

[90] Before addressing the applicants' submissions on this issue, it is important to observe that paragraph 171 of the *Handbook* cannot be considered in a vacuum, and must be read in conjunction with the other provisions of the *Handbook* dealing with "Deserters and Persons avoiding military service".

[91] In particular, for the purposes of this analysis, paragraph 171 has to be read in conjunction with paragraph 170. For ease of reference, the two paragraphs are reproduced here:

> 170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
>
> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. 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 the basic rules of human conduct*, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution. [emphasis added]

i) The Applicants' Position

[92] The applicants assert that the evidence that they sought to adduce with respect to the alleged illegality of the American-led war in Iraq would have allowed them to establish that the "military action" with which Mr. Hinzman did not wish to be associated - that is, the war in Iraq - was one that was "condemned by the international community as contrary to the basic rules of human conduct".

[93] Had they been able to establish this, the applicants say, it follows that any punishment that Mr. Hinzman might suffer as a result of his objection to serving in the United States Army would constitute persecution, and that, as a result, the applicants should have been entitled to refugee protection.

[94] According to the applicants, the Board erred in law and improperly fettered its discretion in finding that it was only the legality of the military activities that Mr. Hinzman would himself have been called upon to perform that were germane to its inquiry, and not the legality of the conflict as a whole.

[95] In other words, the applicants say that the Board was wrong to conclude that the "type of military action" mentioned in paragraph 171 refers to 'on the ground' violations of international humanitarian law governing the conduct of actions during an armed conflict *(jus in bello),* and not to violations of international law governing the use of force or the prevention of war itself *(jus ad bellum).*

[96] In addition, although the Board found that a decision to go to war was essentially a political one, and that the Board was not entitled to pass judgment on the foreign policies of other countries, the applicants say that the legality of a given war is just that - a legal question - and not a political one.

[97] Moreover, the applicants say, the Board can - and regularly does - make determinations as to the legality of specific wars in the context of assessing whether refugee claimants should be excluded from refugee protection as a result of having been involved in crimes against peace.

[98] Finally, the applicants point to the decisions of the Federal Court of Appeal in *Al-Maisri v. Canada (Minister of Employment and Immigration),* [1995] F.C. J. No. 642 and of the England and Wales Court of Appeal (Civil Division) in *Krotov v. Secretary of State for the Home Department* [2004] EWCA Civ 69, as authority for the proposition that participation in a non-defensive (ie: illegal) war will bring a refugee claimant squarely within the ambit of section 171 of the *Handbook.*

ii) Preliminary Question

[99] Before turning to consider the appropriate interpretation of paragraph 171 of the *Handbook*, a threshold question arises as to whether any error on the part of the Board in this regard was material to the outcome of the applicants' claims.

[100] In this regard, counsel for the Minister submits that, in light of the evidence that was subsequently placed before the Board as to the specific nature of Mr. Hinzman's personal objections to participating in the war in Iraq, the question of

whether the American-led military action in Iraq had been sanctioned by a Security Council resolution ultimately turned out not to be germane to the outcome of this case.

[101] This issue will be considered next.

iii) In Light of the Evidence Before the Board, Was the Question of Whether the American-led Military Action in Iraq Had Been Sanctioned by a Security Council Resolution Ultimately Germane to the Outcome of this Case?

[102] The primary focus of the disputed evidence was the alleged illegality of the American-led military action in Iraq, based largely on the absence of a Security Council resolution authorizing the use of force in that country.

[103] A review of the evidence discloses that Mr. Hinzman went to Afghanistan believing that the American military action in that country was justified, even though he did not know, and evidently did not care, whether or not it had been sanctioned by a Security Council resolution.

[104] Insofar as the war in Iraq was concerned, it is not entirely clear from the evidence that Mr. Hinzman knew whether or not the American military action in that country had been sanctioned by a Security Council resolution at the time that he made his decision to desert. What is clear from the evidence, however, is that the absence of such a resolution was not a factor in his decision.

[105] Thus, it appears that Mr. Hinzman's belief that the war in Iraq was wrong was not predicated on the failure of the Security Council to sanction the American-led intervention in that country. Mr. Hinzman himself testified before the Board that even if there had been such a resolution, it would not necessarily have changed his view that the war in Iraq was illegal and immoral: in his eyes, the American involvement in Iraq was wrong "regardless of law".

[106] Does it automatically follow from this that the disputed evidence was necessarily irrelevant to Mr. Hinzman's refugee claim?

[107] To answer this question, it is necessary to have an understanding of the inter-relationship between paragraphs 170 and 171 of the *Handbook*.

[108] Paragraph 170 speaks to the nature and genuineness of the personal, subjective beliefs of the individual, whereas paragraph 171 refers to the objective status of the "military action" in issue. That is, to come within paragraph 170 of the *Handbook*, the claimant must object to serving in the military because of his or her political, religious or moral convictions, or for sincere reasons of conscience. In this case, the Board accepted that Mr. Hinzman's objections to the war in Iraq were indeed sincere and deeply-held, and no issue is taken with respect to that finding.

[109] Mr. Hinzman has therefore brought himself within the provisions of paragraph 170 of the *Handbook*. This is not enough, however, to entitle him to seek refugee protection, as paragraph 171 is clear that a genuine moral or political objection to serving will not necessarily provide a sufficient basis for claiming

refugee status. Paragraph 171 requires that there also be objective evidence to demonstrate that "the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules of human conduct".

[110] Thus while it may be true that the presence or absence of a Security Council resolution authorizing the use of force in Iraq was not a determining factor in the formulation of Mr. Hinzman's personal belief that the war in Iraq was illegal, it does not automatically follow that evidence as to the lack of such a resolution was necessarily irrelevant, for the purposes of determining whether he met the objective criteria set out in paragraph 171.

[111] As a result, it is still necessary to determine whether the Board erred in its interpretation of paragraph 171 of the *Handbook*. Specifically, a determination has to be made as to whether, in the circumstances of this case, the phrase "the type of military action" relates solely to "on the ground" actions, or also relates to the legality of the war itself, in which case the disputed evidence would indeed have been relevant. This issue will be addressed next.

iv) Paragraph 171 of the Handbook - Standard of Review

[112] In considering this issue, I am first required to determine the appropriate standard of review to be applied to this aspect of the Board's decision. This necessitates identifying the nature of the question that the Board was called upon to answer in this regard.

[113] As is noted above, in determining whether the disputed evidence could have assisted the applicants by bringing Mr. Hinzman within the exception created by paragraph 171 of the *Handbook*, the question that the Board was called upon to answer was whether, in the circumstances of this case, the phrase "the type of military action" relates solely to "on the ground" actions, or also relates to the legality of the war itself. This is a question of law, and is thus reviewable against the standard of correctness: see *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 39, 2005 SCC 40, at ¶ 37, where the Supreme Court of Canada recently reaffirmed that decisions of the Immigration and Refugee Board relating to questions of law are to be reviewed against the correctness standard.

[114] With this understanding of the appropriate standard of review, I turn now to consider the applicants' arguments as to the proper interpretation of paragraph 171 of the UNHCR *Handbook*.

v) The Status and Purpose of the UNHCR Handbook

[115] Before addressing these arguments, however, it is necessary to start by considering the role that the *Handbook* plays in the determination of refugee claims in Canada.

[116] In *Chan v. Canada (Minister of Employment and Immigration)*, [1995] S.C.J. No. 78, the Supreme Court of Canada stated that the *Handbook*:

> ... has been formed from the cumulative knowledge available concerning the refugee admission procedures and criteria of signatory states. This much-cited guide has been endorsed by the Executive Committee of the UNHCR, including Canada, and has been relied upon for guidance by the courts of signatory nations. Accordingly, the UNHCR *Handbook* must be treated as a highly relevant authority in considering refugee admission practices.
>
> [at ¶ 46]

[117] It is also necessary to have an understanding of the purpose behind paragraph 171. In this regard, the *Handbook* provisions dealing with conscientious objection and desertion recognize that, as a general rule, punishment for the breach of a domestic law of general application prohibiting desertion will not necessarily be persecutory, even where the desertion is motivated by a sincere conscientious objection.

[118] There are, however, exceptions to this - where, for example, the punishment that the individual faces is disproportionate, or where the individual faces an increased level of punishment by reason of his or her race, religion or other similar personal attribute.

[119] Paragraph 171 of the *Handbook* creates a further exception to the general rule, which has been described as the "right not to be a persecutor": see Mark R. von Sternberg, *The Grounds of Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (The Hague; New York: Martinus Nijhoff, 2002), at pp. 124, 133.

[120] That is, the structure of the *Convention Relating to the Status of Refugees*, 189 UNTS 150, *entered into force* 22 April, 1954, including the exclusion grounds, requires an interpretation of paragraph 171 of the *Handbook* that would allow would-be refugees to avoid military actions that would make they themselves 'persecutors', and thus excluded from protection under the *Convention*: von Sternberg, at p. 133.

[121] In other words, paragraph 171 makes refugee protection available to individuals who breach domestic laws of general application if compliance with those laws would result in the individual violating accepted international norms: Lorne Waldman, *Immigration Law and Practice*, 2nd edition (Buttersworth) at § 8-212.

[122] Interpreting paragraph 171 of the *Handbook* in conjunction with the exclusion provisions of the Refugee *Convention* is the approach favoured by the Council of the European Union. As the English House of Lords observed in *Sepet and Another v. Secretary of State for the Home Department*, [2003] UKHL 15, [2003] 3 All. E.R. 304, the Joint Position adopted by the Council of the European Union on the harmonised application of the term 'refugee' is that refugee protection may be granted on the grounds of conscience in cases of desertion where the performance of the individual's military duties would lead the person to participate in activities falling under the exclusion clauses in Article 1F of the Refugee *Convention*. (See *Sepet*, at ¶ 14.)

[123] I acknowledge that the views of the Council of the European Union are not binding on me, but they are nevertheless indicative of the state of international opinion on this issue.

[124] Interpreting the provisions of paragraph 171 in this manner also accords with the preponderance of the Canadian jurisprudence on this issue. Perhaps the leading Canadian authority addressing this question is the decision of the Federal Court of Appeal in *Zolfagharkhani*, previously cited.

[125] *Zolfagharkhani* involved a claim for refugee protection by an Iranian Kurd who deserted the Iranian army because of the Iranian government's intention to use chemical weapons in the internal war being waged against the Kurds. The use of chemical weapons had unquestionably been condemned by the international community as evidenced by international conventions such as the *United Nations Convention on the Prohibition of the Development, Protection and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, G.A. Res. 65, U.N. GAOR, 48th Sess., Supp. No. 49, at 68, U.N. Doc. A/48/40 (1993), 1015 U.N.T.S. 163 *entered into force* March 25, 1975.

[126] Even though the applicant worked as a paramedic in the Iranian army, and would have thus not been directly responsible for the discharge of the chemical weapons, the Federal Court of Appeal observed that he could nevertheless be called upon to assist fellow soldiers unwittingly caught in the chemical clouds. As a result, Mr. Zolfagharkhani's work as a paramedic would have been of material assistance in advancing the goals of the Iranian forces, by helping the violators of international humanitarian law deal with the side effects of the unlawful weapons.

[127] The Federal Court of Appeal then observed that this level of participation could arguably have led to the exclusion of Mr. Zolfagharkhani from refugee protection for having committed an international crime. As a consequence, the Court found he came within the provisions of paragraph 171 of the *Handbook*.

[128] The issue was revisited by the Federal Court of Appeal the following year in *Diab v. Canada(Minister of Employment and Immigration)*, [1994] F.C.J. No. 1277. In *Diab*, the Court again allowed the appeal of a refugee claimant who refused to be involved in military activities which amounted to crimes against humanity.

[129] In *Radosevic v. Canada(Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 74, this Court dismissed an application for judicial review on the basis that, on the evidence, it was unlikely that the claimant would *personally* have been called upon to commit atrocities.

[130] Thus these cases clearly establish that direct participation or complicity in military actions that are in violation of international humanitarian law will bring a refugee claimant within the exception contemplated by paragraph 171 of the *Handbook*. What is less clear is whether the mere participation of a foot soldier in an illegal war of aggression will also allow a claimant to derive the benefit of the provision.

[131] As was noted earlier, the applicants rely on the decisions of the Federal Court of Appeal in *Al-Maisri* and of the English Court of Appeal in *Krotov*, both previously cited, as authority for the proposition that mere participation in a non-defensive (ie: illegal) war will bring a refugee claimant squarely within the ambit of paragraph 171 of the *Handbook*.

[132] I will first consider the decision in *Krotov*. Both sides rely heavily on this case in support of their respective positions, and, as a result, it is necessary to look closely at what the decision actually says. Such an examination discloses that, when read fairly, in its entirety, the decision supports the interpretation of paragraph 171 discussed in the preceding paragraphs.

[133] *Krotov* involved a refugee claim by a Russian citizen who had evaded military service. Mr. Krotov objected to his country's involvement in the war in Chechnya based upon his belief that the war was politically motivated, and because it offended his conscience.

[134] In considering an appeal from the denial of Mr. Krotov's claim, the Court of Appeal adopted the view that the test in paragraph 171 is ultimately whether the conduct in question is contrary to international law or international humanitarian law, as opposed to condemnation by the international community, which involves a more politically-dependent analysis.

[135] The Court found that propounding the test in terms of actions contrary to international law or international humanitarian law norms applicable in times of war is also consistent with the overall framework of the Refugee *Convention*, specifically having regard to the exclusion provisions of the *Convention*.

[136] In this regard the Court stated:

> It can well be argued that just as an applicant for asylum will not be accorded refugee status if he has committed international crimes as defined in [the *Convention*], so he should not be denied refugee status if return to his home country would give him no choice other than to participate in the commission of such international crimes, contrary to his genuine convictions and true conscience. [at ¶ 39]

[137] The Court further observed that claims based on a fear of participation in crimes against humanity should be limited to cases where there is a:

> ... 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 which 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. [at ¶ 40, emphasis added]

[138] In coming to this conclusion, the Court of Appeal relied upon its decision in *Sepet and Bulbul v. Secretary of State for the Home Department* [2001] EWCA Civ

681, [2001] INLR 376 [subsequently affirmed by the House of Lords, previously cited], where the Court held that:

> ... it is plain (indeed uncontentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft-evasion would amount to persecution: where the military service to which he was called involves acts, *with which he may be associated*, which are contrary to basic rules of human conduct: where the conditions of military service are themselves so harsh as to amount to persecution on the facts; where the punishment in question is disproportionately harsh or severe. [emphasis added]

[139] The Court in *Krotov* concluded by promulgating a three-part test to be used in cases such as this. That is, it must be established that:

1. The level and nature of the conflict, and the attitude of the relevant governmental authority towards it, 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;

2. They will be punished for refusing to do so; and

3. 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.

[140] It is true that in *Krotov*, the Court of Appeal held that the test should be propounded in terms of acts contrary to both international humanitarian law *and* international law. This, the applicants say, supports their contention that participation by Mr. Hinzman in an illegal war would bring him within the purview of paragraph 171 of the *Handbook*.

[141] As will be explained further on in this decision, I am of the view that a refusal to be involved in the commission of a crime against peace could indeed potentially bring a senior member of a government or military within the ambit of paragraph 171. A crime against peace cannot occur without a breach of international law having been committed by the State in question: *R. v. Jones*, [2006] UKHL 16, at ¶ 16. As a result, in the case of a senior official, the legality of the war in issue could well be germane to the claim.

[142] This presupposes, however, that the involvement and level of the individual is such that he or she could be guilty of complicity in a crime against peace. Crimes against peace have been described as "leadership crimes": *Jones*, above, at ¶ 16. That is, it is only those with the power to plan, prepare, initiate and wage a war of aggression who are culpable for crimes against peace. Mr. Hinzman was not such an individual. As a result, I am of the view that the reference to breaches of international law in *Krotov* does not assist him.

[143] This then leaves the Federal Court of Appeal's decision in *Al-Maisri v. Canada(Minister of Employment and Immigration)*, previously cited. Mr. Al-Maisri was a Yemeni citizen, Yemen being one of the few countries to support the 1990 Iraqi

invasion of Kuwait. While Mr. Al-Maisri was prepared to fight to protect his own country from foreign aggression, he was not prepared to fight for the defence of Iraq, in a conflict that had involved hostage-taking and mistreatment of the Kuwaiti people. Accordingly, he deserted, came to Canada, and sought refugee protection.

[144] The Immigration and Refugee Board rejected Mr. Al-Maisri's claim, finding that what he faced in Yemen was prosecution and not persecution. His appeal to the Federal Court of Appeal was allowed, with the Court finding that the Board had misapplied the guidance afforded by paragraph 171 of the *Handbook* when it found that the Iraqi invasion of Kuwait had not been condemned by the international community as contrary to the basic rules of human conduct, even though the invasion had been condemned by the United Nations itself. Quoting Professor Hathaway in *The Law of Refugee Status*, (Toronto: Butterworths, 1991), the Court stated that:

> .... there is a range of military activity which is simply never permissible, in that it violates international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and *non-defensive incursions into foreign territory*. Where an individual refuses to perform military service which offends fundamental standards of this sort, "punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself be persecution. [my emphasis]

[145] The Federal Court of Appeal itself then went on to dispose of the appeal with the following statement:

> On the basis of these views, the correctness of which was not challenged, I am persuaded that the Refugee Division erred in concluding that Iraq's actions were not contrary to the basic rules of human conduct. Accordingly, in my view, the punishment for desertion which would likely be visited upon the appellant if he were returned to Yemen, *whatever that punishment might be*, would amount to persecution of which the appellant has a well-founded fear. [my emphasis]

[146] Thus, *Al-Maisri* arguably accepts that a non-defensive incursion into foreign territory would constitute a military action condemned by the international community as contrary to the basic rules of human conduct, with the result that any punishment visited upon a deserter would be persecutory *per se*.

[147] The Minister says that *Al-Maisri* should not be followed as, in counsel's words, it is "dubious authority" for the proposition that a desire to avoid participation in an illegal war will be sufficient to justify the grant of refugee protection to a deserting soldier. Moreover, counsel contends that there was evidence before the Court as to human rights violations in the form of hostage-taking and the mistreatment of the Kuwaiti people, and that it is not clear what role these "on the ground" breaches of international humanitarian law played in the Court's decision. Counsel also notes that the Court in *Al-Maisri* cites no jurisprudence in support of its conclusions, and further observes that the case has only been considered once in over a decade: see *Zuevich v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 453.

[148] In my view, I cannot simply disregard a decision of the Federal Court of Appeal for these reasons. Nor can I do as the Board did, and decline to follow the decision because I might not accept the premises on which it is based. That said, a close review of the decision reveals that the Federal Court of Appeal was not called upon to turn its mind directly to the issue before the Court in this case, that is, whether, when one is considering the claim of a low-level 'foot soldier' such as Mr. Hinzman, the legality or illegality of the military conflict in issue is relevant to the analysis that must be carried out in accordance with paragraph 171 of the *Handbook*.

[149] As a consequence, I am of the view that the decision in *Al-Maisri* is of limited assistance in this case.

[150] For these reasons, I am satisfied that paragraph 171 of the *Handbook* should be interpreted in light of the exclusion provisions of the Refugee *Convention*, such that refugee protection is available to those who breach domestic laws of general application, where compliance with those laws would result in the individual breaching accepted international norms.

[151] If one accepts that paragraph 171 of the *Handbook* should be interpreted in this fashion, the question then arises as to whether Mr. Hinzman could have been excluded from refugee protection merely for having participated in the war in Iraq, should it be that the American-led military action in that country is, in fact, illegal. This issue will be considered next.

vi) Individual Culpability for Crimes Against Peace

[152] Article 1(F)(a) of the Refugee *Convention* excludes individuals from protection where there are serious reasons for considering that those individuals have committed crimes against peace, war crimes, or crimes against humanity. The applicants say that had he participated in the war in Iraq, Mr. Hinzman would have been complicit in a crime against peace, and would thus have been excluded from the protection of the *Convention*.

[153] A review of the jurisprudence in this area does not bear this out.

[154] First of all, no suggestion has been made in this case that the United States Army is an organization that is principally directed to a limited, brutal purpose such that mere membership in the organization could be sufficient to meet the requirements of personal and knowing participation in international crimes: see *Penate v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 79 (T.D.).

[155] Moreover, in 1945, the Charter of the International Tribunal at Nuremberg defined the elements of the offense of "crime against peace" as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy [to do so]": as cited in Michael J. Davidson, *War and the Doubtful Soldier*, 19 ND J.L. Ethics & Pub Pol'y 91, at p. 123.

[156] Since that time, the jurisprudence developed by international tribunals, including those considering charges of crimes against peace arising out of the military

action in Europe and the Far East during the Second World War, has shed further light on when it is that an individual will be held to account for a crime against peace.

[157] In summary, this jurisprudence establishes that an individual must be involved at the policy-making level to be culpable for a crime against peace: see Davidson, above, at pp. 122-124, and the Papers for the Preparatory Commission for the International Criminal Court (the "Princeton Papers"), United Nations Documents PCNICC/2002/WGCA/L.1, and PCNICC/2002/WGCA/L.1/Add.1.

[158] That is, the ordinary foot-soldier such as Mr. Hinzman is not expected to make his or her own personal assessment as to the legality of a conflict in which he or she may be called upon to fight. Similarly, such an individual cannot be held criminally responsible merely for fighting in support of an illegal war, assuming that his or her own personal wartime conduct is otherwise proper: Davidson, above, at p. 125. See also François Bugnion, *Just Wars, Wars of Aggression, and International Humanitarian Law*, International Review of the Red Cross, No. 847, Vol. 84, p. 523.

[159] As a consequence, it appears that the legality of a specific military action could potentially be relevant to the refugee claim of an individual who was involved at the policy-making level in the conflict in question, and who sought to avoid involvement in the commission of a crime against peace. However, the illegality of a particular military action will not make mere foot soldiers participating in the conflict complicit in crimes against peace.

[160] As a result, there is no merit to the applicants' contention that had Mr. Hinzman participated in the war in Iraq, he would have been complicit in a crime against peace, and should thus be afforded the protection offered by paragraph 171 of the *Handbook*.

[160]

vii) Other Potential Relevance of the Disputed Evidence

[161] Finally, even though Mr. Hinzman never expressed any concern about having to commit breaches of international humanitarian law, had he gone to Iraq, the applicants nevertheless contend that the evidence as to the illegality of the war in Iraq was potentially relevant to their claims, as the willingness of the President of the United States to ignore international law, and the resultant illegality of the American military action in Iraq, made it more likely that Mr. Hinzman would himself have been called upon to participate in violations of international humanitarian law, had he actually gone to Iraq.

[162] That is, the applicants say that the fact that the United States has allegedly acted with a blatant disregard for international law in going into Iraq suggests that members of the American military would be more likely to act with impunity once they got there.

[163] The Board found such a contention to be purely speculative, a finding with which I agree.

viii) Conclusion

[164] For these reasons, I am satisfied that when one is dealing with a foot soldier such as Mr. Hinzman, the assessment of the "military action" that has to be carried out in accordance with paragraph 171 of the *Handbook* relates to the 'on the ground' conduct of the soldier in question, and not to the legality of the war itself.

[165] As a consequence, I am satisfied that the Board did not err in finding evidence as to the alleged illegality of the American-led military action in Iraq to be irrelevant to the determination that had to be made by the Refugee Protection Division in this case, in accordance with paragraph 171 of the UNHCR *Handbook.*

[166] When one is considering the case of a mere foot soldier such as Mr. Hinzman, the focus of the inquiry should be on the law of *jus in bello*, that is, the international humanitarian law that governs the conduct of hostilities during an armed conflict. In this context, the task for the Board will be to consider the nature of the tasks that the individual has been, is, or would likely be called upon to perform "on the ground".

[167] This then takes us to the second issue raised by the applicants.

VII. Did the Board Err in Finding That the Applicants had Failed to Establish That the Violations of International Humanitarian Law Committed by the American Military in Iraq Rise to the Level of Being Systematic or Condoned by the State?

[168] The Board found that the evidence before it did not establish that the United States has, "as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law", that is, that the breaches of international humanitarian law that have been committed by American soldiers in Iraq rise to the level of being either systematic or condoned by the State. This is a finding of fact, and is thus reviewable against the standard of patent unreasonableness: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at ¶ 40, and *Aguebor v. Canada(Minster of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.).

[169] It is generally accepted that isolated breaches of international humanitarian law are an unfortunate but inevitable reality of war: see *Krotov*, at ¶ 40. See also *Popov v. Canada(Minister of Employment and Immigration)*, [1994] F.C.J. No. 489.

[170] As the British Court of Appeal noted in *Krotov*, at ¶ 51, the availability of refugee protection should be limited to deserters from armed conflicts where the level and nature of the conflict, and the attitude of the relevant government, have reached a point where combatants are, or may be, required, on a sufficiently widespread basis, to breach the basic rules of human conduct (see also *Popov*, above).

[171] In this case, the applicants say that the Board erred in failing to properly address the evidence before it with respect to the allegedly systematic violations of international humanitarian law committed by members of the American military in Iraq and elsewhere, and further failed to properly consider the evidence of the official condonation of these human rights violations by the American government.

[172] In support of his contention that Mr. Hinzman could well have been called upon to commit human rights violations had he gone to Iraq, the applicants rely, in part, upon evidence regarding conditions at the Guantanamo prison facility in Cuba and at the Abu Ghraib prison in Iraq, as well as the alleged failure of the American government to respect the provisions of the *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, in its treatment of the detainees held at those facilities.

[173] The applicants place particular reliance on two legal opinions prepared for the President of the United States by the Office of the Attorney General in January and August of 2002 (the "Gonzales opinions"). These opinions relate to the supposed unconstitutionality of American domestic legislation implementing the *UN Convention Against Torture*, previously cited, if applied to the interrogation of 'enemy combatants' pursuant to the President of the United States' powers as Commander-in-Chief of the American military.

[174] According to the applicants, these documents demonstrate that the United States has conducted itself with relative impunity, and has evidenced a complete disregard for international norms in its conduct of the various fronts of its so-called "War Against Terror".

[175] As a general rule, the Board does not have to specifically refer to every piece of evidence, and will be presumed to have considered all of the evidence in coming to its decision: see *Woolaston v. Canada (Minister of Manpower and Immigration)*, [1973] S.C.R. 102 and *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946, 1992, 147 N.R. 317.

[176] In this case, the Board did canvas the evidence before it in some detail. While recognizing that violations of international humanitarian law by American soldiers had occurred in Iraq and elsewhere, the Board also noted that the evidence revealed that civilians were not being deliberately targeted by the American military, and that incidents of human rights violations by American military personnel were investigated, and the guilty parties punished.

[177] It is true that the Board did not specifically reference the Gonzales opinions in its reasons. It is also true that the more important the evidence that is not specifically mentioned and analysed in a decision, the more willing a court will be to infer from the silence that the Board made an erroneous finding of fact without regard to the evidence: *Cepeda-Gutierrez v. Canada (MCI)* (1998), 157 F.T.R. 35 at ¶ 14 - 17.

[178] While the content of the Gonzales opinions is unquestionably disturbing, one must not lose sight of the nature of the documents. The opinions are just that - legal opinions prepared for the President of the United States. They do not represent a statement of American policy. In these circumstances, I am not persuaded that the probative value of the Gonzales opinions is such that the failure of the Board to specifically discuss them in its decision amounts to a reviewable error.

VIII. Did the Board Err in Imposing Too Heavy a Burden on the Applicants to Demonstrate That Mr. Hinzman Would Have Been Involved in Unlawful Acts, Had He Gone to Iraq?

[179] The applicants take issue with the Board's finding that Mr. Hinzman:

> ... 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 the basic rules of human conduct. [at ¶ 121, emphasis added]

[180] The applicants say that in coming to this conclusion, the Board erred by imposing too heavy a burden on them to establish that Mr. Hinzman would himself have been implicated in violations of international humanitarian law. According to the applicants, the decision of the Federal Court of Appeal in *Adjei v. Canada(Minister of Employment and Immigration)*, [1989] F.C.J. No. 67, establishes that they need only show that there was more than a mere possibility of this occurring.

[181] A question as to the appropriate standard of proof to be applied in a given case is a question of law, and is thus reviewable against the standard of correctness: *Mugesera*, previously cited,at ¶ 37.

[182] With this in mind, I am satisfied that the Board applied the correct standard of proof in making the finding in issue.

[183] The decision in *Adjei* stands for the proposition that a refugee claimant need only demonstrate that there is more than a mere possibility that the individual would face persecution in his or her country of origin in the future. That is not what the Board was deciding in the disputed paragraph.

[184] A distinction has to be drawn between the legal test to be applied in assessing the risk of future persecution, and the standard of proof to be applied with respect to the facts underlying the claim itself. While the legal test for persecution only requires a demonstration that there is more than a mere possibility that the individual will face persecution in the future, the standard of proof applicable to the facts underlying the claim is that of the balance of probabilities: *Adjei*, at p. 682. See also *Li v. Canada(Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1, 2005 FCA 1 at ¶ 9-14 and 29.

[185] In other words, where, for example, a woman is claiming protection based upon the abuse that she says that she suffered at the hands of her partner, it will not suffice for her to establish that there is more than a mere possibility that she is telling the truth about her past abuse. She must establish the facts underlying her claim on a balance of probabilities. At the same time, she need only show that there is more than the mere possibility that she would face abuse amounting to persecution in the future.

[186] As a consequence, I am not persuaded that the Board erred in this regard.

[187] Moreover, the applicants' argument is premised on it having been established that the violations of international humanitarian law that have taken place

in Iraq rise to the level of being systematic or condoned by the State, and that, therefore, an involvement in the war would amount to complicity in a crime. As was discussed in the previous section, I have found that the Board did not err in concluding that this was not, in fact, the case.

IX. Conclusion to this Point

[188] Based upon the foregoing analysis, I am satisfied that, as a mere foot soldier, Mr. Hinzman could not be held to account for any breach of international law committed by the United States in going into Iraq. As a result, in the circumstances of this case, the "type of military action" that is relevant to Mr. Hinzman's claim, as that phrase is used in paragraph 171 of the *Handbook*, is the "on the ground" activities with which he would have been associated in Iraq.

[189] I have also found that the Board did not err in finding that the breaches of international humanitarian law that have been committed by American soldiers in Iraq do not rise to the level of being either systematic or condoned by the State. In addition, I have found that the Board did not err in finding that the applicants had failed to establish that Mr. Hinzman would himself have been called upon to commit breaches of international humanitarian law, had he gone to Iraq.

[190] The question that is left, then, is whether Mr. Hinzman nonetheless faces persecution in the United Statesas a result of his political opinions. The answer to this question hinges on whether, in these circumstances, Mr. Hinzman's right to freedom of conscience extends to allow him to refuse to fight in Iraq because of his sincerely held moral objection to that specific war, and whether the denial of such a right, and the ensuing punishment for the breach of a law of general application, amounts to persecution. These issues will be considered next.

X. Did the Board Err in its Analysis of the State Protection and Persecution Issues?

i) The Applicants' Position

[191] The applicants contend that the Board erred in finding that they had failed to rebut the presumption that adequate State protection would be available to Mr. Hinzman in the United States, based upon the Board's conclusion that he would have been afforded the full protection of a law of general application in that country.

[192] While recognizing that the ordinary presumption that a State will be able to protect its own nationals will be higher in the case of a highly-developed democracy such as the United States, and recognizing as well that refuge will only be granted to American claimants in exceptional circumstances, the applicants nonetheless say that the failure of the United States to recognize conscientious objection to specific wars results in there being a 'gap' between the rights guaranteed through American domestic law and those protected by international law.

[193] According to the applicants, this 'gap' amounts to an 'exceptional circumstance', and justifies the conclusion that, in this case, the American law of

general application was persecutory in its effect. This, in turn, made it objectively reasonable for Mr. Hinzman to seek refugee protection in Canada.

[194] The applicants observe that paragraph 172 of the *Handbook* provides that:

Refusal to perform military service may also be based on religious convictions. If an applicant 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. [emphasis added]

[195] While conceding that Mr. Hinzman would be accorded due process in the United States, the applicants nevertheless submit that the Board failed to recognize or address the fact that he was unable to assert his conscientious objection to the war in Iraq, as a result of the under-inclusiveness of the American law relating to conscientious objection.

[196] According to the applicants, the failure of the Board to deal with this issue renders inadequate and erroneous its conclusion that the American law regarding conscientious objectors does not discriminate on a Convention ground, and is therefore not persecutory.

[197] Moreover, the applicants say, given that the United States government was itself the agent of persecution, it follows that the Board's conclusion that adequate State protection was available to Mr. Hinzman in the United States was fundamentally flawed.

ii) Standard of Review

[198] The error alleged is the failure of the Board to recognize the existence of a 'gap' between the limited right to conscientious objection recognized in American domestic law, and that ostensibly protected by international law. This allegedly resulted in the Board's finding that Mr. Hinzman would not face persecution in the United States, and its finding that he would receive adequate State protection in that country both being fatally flawed.

[199] Questions as to whether an individual faces persecution in his or her country of origin and questions as to the adequacy of State protection are both questions of mixed fact and law, and are ordinarily reviewable against a standard of reasonableness: *Pushpanathan*, previously cited.

[200] However, as was noted earlier, in this case, the applicants' arguments as to the error of omission allegedly committed by the Board hinge on the premise that there is an internationally recognized right to object to a particular war, other than in the circumstances specifically identified in paragraph 171 of the *Handbook*. If there is no such right, then the applicants' arguments must fail.

iii) Analysis

[201] A review of the Board's reasons discloses that the Board was indeed aware of the fact that Mr. Hinzman could not seek conscientious objector status based upon his objection to fighting in the war in Iraq under the terms of the American military's policy on conscientious objection (see paras. 68 and 105 of the Board's decision). The question is whether this alleged 'under-inclusiveness' has led to the breach of an internationally recognized right, resulting in persecution.

[202] Refugee protection is available to those who face persecution in their country of origin by reason of their political opinion or their religion: see Article 1A(2) of the *Convention Relating to the Status of Refugees*.

[203] Although we are not dealing with a conscript in this case - Mr. Hinzman having voluntarily enlisted in the US Army - there is broad international acceptance of the right of a State to require citizens to perform military duty. Indeed, mandatory military service is often described as an 'incident of citizenship'.

[204] It is also well-recognized that the refusal of a soldier to fight is an inherently political act: see *Ciric*, previously cited. Indeed, as Professor Goodwin-Gill noted in *The Refugee in International Law*, (Oxford: Clarendon Press, 1996, at p. 57), cited with approval in *Zolfagharkhani*, the refusal to bear arms reflects an essentially political opinion as to the permissible limits of a State's authority, and goes to the very heart of the body politic.

[205] Does this then mean that anyone who sincerely opposes a particular war has an absolute right to conscientious objector status? Does it follow that if conscientious objector status is not available to the individual in his or her country of origin, that any punishment that the individual may receive for refusing to fight will be inherently persecutory?

[206] There is no question that freedom of thought, conscience and religion are fundamental rights well recognized in international law: see, for example Article 18 of the 1948 *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Article 12 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, 6 I.L.M. 368 (*entered into force* 23 March 1976) and Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,

4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5.

[207] At the present time, however, there is no internationally recognized right to either total or partial conscientious objection. While the UN Commission on Human Rights and the Council of Europe have encouraged member States to recognize a right to conscientious objection in various reports and commentaries, no international human rights instrument currently recognizes such a right, and there is no international consensus in this regard: see *Sepet*, previously cited, at ¶ 41-44.

[208] Indeed, the notion that such a right could even exist is one of relatively recent origin: *Sepet*, at ¶ 48.

[209] It has been suggested that the failure to recognize a right of conscientious objection stems, at least in part, from the real difficulties that would be encountered in achieving an international consensus as to the minimum scope of any such right. As Lord Rodger of Earlsferry noted in his concurring reasons in *Sepet*, questions could arise, for example, as to whether the same outcome should result in relation to an objection made during peacetime, as opposed to one advanced when a State is fighting for its very survival: at ¶ 57.

[210] Certainly, it is arguable that if freedom of conscience is truly to be recognized as a basic human right, individuals should not be forced, on pain of imprisonment, to comport themselves in a way that violates their fundamental beliefs: see Hathaway in *The Law of Refugee Status*, previously cited, at p. 182.

[211] If, on the other hand, conscientious objection is viewed as more of a relative right, then the specific nature of the consequences faced by the claimant will have to be taken into account in the assessment of the claim: see von Sternberg, *The Grounds of Protection in the Context of International Human Rights and Humanitarian Law*, previously cited, at p. 42. This appears to be the approach favoured by the UNHCR, as reflected in the *Handbook*.

[212] Moreover, consideration has to be given to the fact that States have a legitimate interest in the maintenance of their military forces and national defence. As Professor Goodwin-Gill observes, the provision of alternative service helps to reconcile these competing interests in a way that promotes the State's interest in defence, while, at the same time, taking into account individual beliefs: see *The Refugee in International Law*, at p. 58.

[213] Indeed, paragraph 173 of the *Handbook* recognizes that many States now provide forms of alternate service to citizens who object to serving in the military for genuine reasons of conscience.

[214] How far, then, does a State have to go in providing alternate service to its citizens?

[215] The applicants say that the United States did not go far enough by failing to recognize that one could have a legitimate conscientious objection to a specific war, asserting that this brings Mr. Hinzman within the ambit of paragraph 172 of the *Handbook*. In these circumstances, the applicants say that any punishment that Mr. Hinzman might receive in the United Stateswould be inherently persecutory.

[216] There are several reasons why I cannot accept this argument. First of all, paragraph 172 of the *Handbook* has to be read in context. The preceding paragraph - paragraph 171 - explicitly states that it is not enough for a person merely to be in disagreement with his or her government with respect to the political justification for a particular military action.

[217] Secondly, although Mr. Hinzman did discuss his religious beliefs in both his PIF and in his testimony before the Board, the foundation for the applicants' claims for refugee protection is Mr. Hinzman's political opinion, and not his religion. While the Board did acknowledge at the pre-hearing conference that Mr. Hinzman also had

religious objections to serving in the military, his religious views did not relate specifically to serving in the Iraqi conflict. Paragraph 172 relates to religious objections and not to political ones.

[218] Finally, in considering the applicants' argument that American law is under-inclusive, in that it denies members of the military the right to assert genuine conscientious objections to specific military actions, regard must be had to paragraph 60 of the *Handbook*. Paragraph 60 provides that in assessing whether punishment meted out under the law of another nation is persecutory, the domestic legislation of the country being asked to grant protection may be used as a 'yardstick' in evaluating the claim.

[219] An examination of the approach of the Canadian Armed Forces to the issue of conscientious objection discloses that the protection afforded to Canadian conscientious objectors is very similar to that provided by the United States. The relevant provisions of the Department of National Defence's *Defence Administrative Orders and Directives on Conscientious Objection* (DAOD 5049-2, July 30, 2004) provides that:

> Enrolment of persons in the [Canadian Forces] is strictly voluntary and CF members must be prepared to perform any lawful duty to defend Canada, its interests and its values, while contributing to international peace and security. A CF member who has a conscientious objection remains liable to perform any lawful duty, but may request voluntary release on the basis of their objection.
>
> Eligibility for Voluntary Release
>
> A CF member may request voluntary release on the basis of conscientious objection if the CF member has a sincerely held objection to participation in:
>
> - war or armed conflict in general; or
>
> - the bearing and use of arms as a requirement of service in the CF.
>
> *An objection based primarily on one or more of the following does not permit voluntary release on the basis of a conscientious objection*:
>
> - *participation or use of arms in a particular conflict or operation*;
>
> - *national policy*;
>
> - personal expediency; or
>
> - *political beliefs*. [emphasis added]

[220] As Professor Goodwin-Gill observed in *The Refugee in International Law*, at p. 59, States are free to recognize conscientious objection as a sufficient ground on which to base a grant of refugee protection. However, each State has to decide for itself how much value should be attributed to the fundamental right to freedom of conscience.

[221] While acknowledging that the Canadian scheme governing conscientious objection is "broadly analogous" to the American one, the applicants nonetheless submit that there is an important difference between the two. That is, relying on the decision of the Supreme Court of Canada in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, the applicants say that the Canadian scheme is subject to judicial review to ensure that it complies with the *Charter*, whereas the American scheme is immune from judicial scrutiny under the "political questions" doctrine.

[222] Leaving aside the fact that there is no expert evidence before the Court as to the justiciability of challenges to the American policy on conscientious objection, and assuming for the sake of argument that the applicants are correct in their submission, the fact is that, at the present time, Canada does not accord the members of its own armed forces the latitude to object to specific wars. In my view, this is further evidence of the fact that there is no generally accepted right to conscientious objection on the grounds being advanced by the applicants.

[223] If this is so, it follows that there is nothing inherently persecutory in the American system.

[224] My conclusion in this regard is reinforced by the recent decision of the Federal Court of Appeal in *Ates v. Canada(Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1661. In *Ates*, the Court stated that even in a country where military service is compulsory and where there is no alternative to military service available, the repeated prosecutions and imprisonments of a sincere conscientious objector does not amount to persecution on a *Convention* ground.

[225] If persecution does not arise in the circumstances described in *Ates*, then surely the prosecution and potential imprisonment of a volunteer soldier by a country that does provide some, albeit limited, alternatives to military service would similarly not amount to persecution on a *Convention* ground.

[226] It should be noted that the applicants have not asserted that the punishment that Mr. Hinzman faces in the United States is outside the range of what is considered acceptable under international human rights law. Rather they argue that *any* punishment that he might suffer for following his conscience would be inherently persecutory. As a consequence, it is unnecessary to consider whether the term of imprisonment that he might receive is disproportionate.

[227] Finally, given that there is no error in the Board's finding that what Mr. Hinzman faces in the United Statesis prosecution and not persecution, it follows that the issue of State protection does not arise.

iv) Conclusion

[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.

[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.

[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. 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.

[231] Indeed, as Lord Hoffman noted in *Sepet*:

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]

[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.

[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.

XI. Summary of Conclusions

[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.

[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.

XII. Certification

[236] Counsel have jointly proposed the following two questions for certification:

1. Is the question whether a given conflict may be unlawful in international law relevant to the determination which must be made by the Refugee Division under s. 171 of the UNHCR *Handbook*?

2. Where a claimant can establish that a particular war involves systematic violations of international humanitarian law, must he also establish that it is more probable than not that he would be required to participate in such acts, or must he establish only a serious possibility of having to do so?

[237] With respect to the first question, as I have noted earlier, I am satisfied that the lawfulness of a conflict could well be relevant where a refugee claimant is a high-level policy-maker or planner of the military conflict in issue, who could thus be held responsible for a crime against peace. The question that arises here is whether the legality of the conflict is relevant in the case of a mere foot soldier such as Mr. Hinzman.

[238] For the reasons given, I have found that the weight of authority favours the view that when dealing with a mere foot soldier, the lawfulness of the military conflict in question is not relevant to the question of whether or not the claimant is a refugee. However, given the decision of the Federal Court of Appeal in *Al-Maisri*, it is fair to say that the issue is not entirely free from doubt. As a consequence, I am prepared to certify the first question, varying it only to specify that the question is posed in the context of a foot soldier.

[239] The second question is premised on the assumption that the claimants have established that the war in question in fact involves systematic violations of international humanitarian law. Given my conclusion that the Board did not err in concluding that the applicants had not shown this to be the case, the second question submitted for certification would not be dispositive of the applicants' claims, and I decline to certify it.

JUDGMENT

[240] **THIS COURT ORDERS that**:

1. This application for judicial review is dismissed.

2. The following serious question of general importance is certified:

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 relevant to the determination which must be made by the Refugee Division under paragraph 171 of the UNHCR *Handbook*?

"Anne Mactavish"

Judge

APPENDIX

Chapter V section B of the UNHCR *Handbook* states as follows under the heading "Deserters and Persons avoiding military service":

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft evasion does not, on the other hand, exclude a person from being a refugee, and the person may be a refugee in addition to being a deserter or draft-evader.

168. The person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons within the meaning of the definition, to fear persecution.

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it could be shown that he has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. 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 the basic rules of human conduct, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant 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.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (ie: civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In light of these developments, it would be open to Contracting States to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

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

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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