



American Refugees and Asylum Seekers in Canada:  
*A History and Perspective on Military War Resisters and Their Efforts to Escape Prosecution  
in The United States, with Particular Emphasis on The Current War in Iraq.*

By Todd Zabel



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<sup>1</sup> [dahrjamailliraq.com/gallery/](http://dahrjamailliraq.com/gallery/)

<sup>2</sup> [http://www.resisters.ca/resisters\\_stories.html](http://www.resisters.ca/resisters_stories.html)

<sup>3</sup> [dahrjamailliraq.com/gallery/](http://dahrjamailliraq.com/gallery/)

<sup>4</sup> Id.

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*“Those who make the conscientious judgment that they must not participate in this war... have my complete sympathy, and indeed our political approach has been to give them access to Canada. Canada should be a refuge from militarism.”-Pierre Trudeau<sup>5</sup>*

## **A Brief History of American Refugees and Asylum Seekers in Canada**

Marginalized and disenfranchised Americans have been fleeing to Canada throughout American history in order to escape persecution and oppression. First, during the American Revolution, thousands of American colonists who wanted to stay loyal to England fled to Canada.<sup>6</sup> Then, after the British Empire abolished slavery in 1833, Canada was the destination of the Underground Railroad for American slaves.<sup>7</sup> In 1917, about 4,000 Hutterites emigrated to Alberta from South Dakota, where they had been suffering prejudice because they were German-speaking and unwilling to fight in WWI.<sup>8</sup> During the Vietnam War, as many as an estimated 60,000 Americans ‘dodged the draft’ by fleeing to Canada.<sup>9</sup> In 1971 and 1972, the U.S. was the largest source country of immigration to Canada because of the thirty to forty-thousand draft dodgers and military ‘deserters’ who found refuge in Canada during those years.<sup>10</sup> During the Vietnam War, Canada developed an explicit policy of accepting draft resisters under Prime Minister Pierre Trudeau.<sup>11</sup>

In the last few years, Americans fleeing the Bush administration’s crackdown on marijuana clubs that provide marijuana to terminally ill people, among others, have also sought

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<sup>5</sup> Refugee Reality in Canada, [www.canadiandemocraticmovement.ca/](http://www.canadiandemocraticmovement.ca/) Jan 08, 2006

<sup>6</sup> US Deserter’s Canadian Campaign: BBC News: [news.bbc.co.uk/2/hi/Americas/3867481.stm](http://news.bbc.co.uk/2/hi/Americas/3867481.stm) July 6, 2004 by Jeff Gray

<sup>7</sup> Id.

<sup>8</sup> Canadian Council for Refugees: A Hundred Years of Immigration to Canada: A Chronology Focusing on Refugees and Discrimination. [www.web.net/~ccr/history.html](http://www.web.net/~ccr/history.html)

<sup>9</sup> US Deserter’s Canadian Campaign: BBC News: [news.bbc.co.uk/2/hi/Americas/3867481.stm](http://news.bbc.co.uk/2/hi/Americas/3867481.stm) July 6, 2004 by Jeff Gray

<sup>10</sup> Canadian Council for Refugees: A Hundred Years of Immigration to Canada: A Chronology Focusing on Refugees and Discrimination. [www.web.net/~ccr/history.html](http://www.web.net/~ccr/history.html)

<sup>11</sup> MPI: Migration Information Source: Fresh Thought, Authoritative Data, Global Reach: Placing American Emigration to Canada in Context- By Audrey Kobayashi and Brian Ray. January 1, 2005 [www.migrationinformation.org/Feature/display.cfm?id=279](http://www.migrationinformation.org/Feature/display.cfm?id=279)

refugee status in Canada.<sup>12</sup> This phenomenon has been particularly prevalent among Californians, residents of a state where voters approved Proposition 215 in 1996, the Compassionate Use Act, which authorized the possession, cultivation, and distribution of marijuana for personal medical use under a doctor's supervision.<sup>13</sup> This was allegedly in conflict with Federal law, and the Bush Administration directed the DEA to enforce Federal law against California cannabis clubs.<sup>14</sup>

Since 2003, 'deserters' from the Second Iraq war have begun trickling into Canada to escape prosecution in the United States.<sup>15</sup> Canada, a place where antiwar feelings are strong and the Iraq war in particular is deeply unpopular, is also an ideal location culturally and geographically for war resisters fleeing the United States, considering its proximity, common language and customs.<sup>16</sup> In addition, Canada has a history and reputation which have established it as a safe-haven for the oppressed and disenfranchised. Canada was awarded the Nansen medal in 1986 by the United Nations High Commissioner for Refugees for its contribution to the protection of refugees.<sup>17</sup> Over 700,000 individuals have been offered refugee protection in Canada since WWII.<sup>18</sup> In the course of contemporary politics, many marginalized Americans continue to view Canada as a refuge from what they consider to be the perils of living in The United States. According to Canada's Migration Information website, in the twenty four hours following George W. Bush's re-election victory on November 2, 2004, the Canadian government's Department of Citizenship and Immigration website received 115,016 hits, six

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<sup>12</sup> CNBC: American Refugees Again Find a Haven in Canada: Medical Marijuana Users Forcing Ottawa to Stand Up to U.S. Or

Evict the Yanks-by Jay Bergstrom [www.papinc.org/drugnews/v02/n1698/a01.html?101](http://www.papinc.org/drugnews/v02/n1698/a01.html?101)

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Will War Deserters Find Asylum in Canada? By Yochi J. Dreazen The Wall Street Journal February 8, 2006; Page B1

<sup>17</sup> Amnesty International Canada-Human Rights Issues- Refugees. February 1, 2006 [www.amnesty.ca/Refugee/history.php](http://www.amnesty.ca/Refugee/history.php)

<sup>18</sup> Id.

times the average daily number, and double the previous record.<sup>19</sup> This may have been due to Canada's greater rights for gays and lesbians, its official opposition to the U.S. led invasion of Iraq, a universal health care system, stricter gun control laws, the legal use of medical marijuana, or Canada's ratification of the Kyoto Protocol.<sup>20</sup> Additionally, Canada has signed the United Nations 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol.<sup>21</sup>

It now appears that the current political tide in Canada has contributed to a decreasing flow of refugee immigrants from the United States. This may be due in part to the dismantling of Paul Martin's embattled Liberal government and the triumph of Stephen Harper's more conservative administration, but the policy shift seems to have been materializing slowly for several years.<sup>22</sup> In 2003, none of the 268 U.S. citizens who applied for refugee status in Canada received it.<sup>23</sup>

### **Gulf War II: The Escape of American Soldiers from a Controversial War**

Even before the beginning of military action, the Gulf War II anti-war movement had exceeded the opposition to the Vietnam War in terms of the number of protesters.<sup>24</sup> Worldwide protests have proliferated in response to the continuing conflict and the many casualties that have resulted from it.<sup>25</sup> As of March 2006, over two-thousand American soldiers had been killed in Iraq, and tens of thousands have been seriously wounded.<sup>26</sup> The Pentagon has reported that as many as one-third of Iraq War veterans have sought assistance for Post Traumatic Stress

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> <http://www.cic.gc.ca/english/refugees/index.html>

<sup>22</sup> [http://en.wikipedia.org/wiki/Stephen\\_Harper](http://en.wikipedia.org/wiki/Stephen_Harper)

<sup>23</sup> CBC NEWS- Michelle Mann: Canada Refuses Refugee from the U.S. March 29, 2005, [www.cbc.ca/news/viewpoint/vp\\_mann/20050329.html](http://www.cbc.ca/news/viewpoint/vp_mann/20050329.html)

<sup>24</sup> Opposition to the Iraq War- [En.wikipedia.org/wiki/Popular\\_opposition\\_to\\_the\\_Iraq\\_War](http://en.wikipedia.org/wiki/Popular_opposition_to_the_Iraq_War). March 28, 2006.

<sup>25</sup> Id.

<sup>26</sup> AWOL in Canada: A Counseling Memo-War Resisters Support Campaign-April 2006-[www.resisters.ca](http://www.resisters.ca).

Disorder.<sup>27</sup> Much like in the 1960's and 70's, American soldiers destined for Iraq have begun deserting their units; seeking refuge in Canada.<sup>28</sup> The Pentagon says more than 8,000 servicemen have deserted since the war started in Iraq.<sup>29</sup> Although the Army does not actively seek out 'deserters,' the soldiers' names are placed in a database for law enforcement and border guards in the event that one crosses an international border into the United States.<sup>30</sup> The Pentagon maintains that most 'deserters' have illegally left the military for economic reasons, rather than because of any political opinion they have regarding the war. However, according to the Pentagon, 110 service members from the various branches of the armed forces filed conscientious objector requests in 2004, four times the number in 2000, with slightly less than half being granted.<sup>31</sup>

In addition to desertion, the United States military has lost an alarming number of soldiers to suicide.<sup>32</sup> In January 2004, the Army reported that 22 American soldiers had committed suicide in Iraq, although some speculate that this number was artificially low.<sup>33</sup> The Army does not include in this figure the number of soldiers who have committed suicide after returning to the United States from the war zone.<sup>34</sup> It is perhaps because of the large numbers of 'deserters,' military suicides, widespread opposition to the war and the ever increasing need for more troops that the federal government has felt compelled to send a message to would-be 'deserters.' USA Today reported that the U.S. military has been intensifying its hunt for

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<sup>27</sup> Id.

<sup>28</sup> CBS News- "Deserters" We Won't Go To Iraq- December 9, 2004, [www.cbsnews.com/stories/2004/12/06/60II/main659336.shtml](http://www.cbsnews.com/stories/2004/12/06/60II/main659336.shtml)

<sup>29</sup> Id.

<sup>30</sup> Canadian Council for Refugees: A Hundred Years of Immigration to Canada: [www.web.net/~ccr/history.html](http://www.web.net/~ccr/history.html)

<sup>31</sup> An American Deserter in Canada, [www.peacemagazine.org/archive/v21n4p25.htm](http://www.peacemagazine.org/archive/v21n4p25.htm) by Jeremy Hinzman, December 2005

<sup>32</sup> CBS Evening News: -January 29, 2004 [www.cbsnews.com/stories/2004/01/29/eveningnews/main596755.shtml](http://www.cbsnews.com/stories/2004/01/29/eveningnews/main596755.shtml)

<sup>33</sup> Id.

<sup>34</sup> Id.

Vietnam-era war resisters.<sup>35</sup> A former Vietnam War resister who has been living in Canada since the Vietnam War era was arrested in Mid-March of 2005 at the Canada-Idaho border and jailed on desertion charges.<sup>36</sup> The 56 year-old Allen Abney had lived in Canada since deserting the Marines to protest the Vietnam War in 1968.<sup>37</sup>

### *The Problem of an All-“Volunteer” Force*

Today’s U.S. military is an all volunteer force.<sup>38</sup> That fact has led to a degree of skepticism among Canadians as well as Americans about the ‘deserters’ true motivations for seeking asylum.<sup>39</sup> This consideration is also important, according to the UNHCR, with respect to seeking asylum. Whether a soldier has been drafted into compulsory service or joined the army as a volunteer may be indicative of the veracity of his stated religious, moral convictions which later lead him to seek conscientious objector status or to desert/evade a draft.<sup>40</sup> However, some analysts point out that many soldiers come from poor rural backgrounds where military service is the only way to get a job or a college education.<sup>41</sup> Well known activist and mother of an American soldier who was killed in Iraq, Cindy Sheehan, said, “The soldiers are within their rights to desert because many are lied to by U.S. military recruiters who tell them they won’t have to fight in Iraq. My son was an honourable, honest person lied to by his recruiter.”<sup>42</sup>

### **A War Resister’s Rights and Duties under International Law**

Pursuant to the Geneva Convention on Refugees, to which Canada is a signatory, an asylum applicant must demonstrate that he or she is fleeing persecution or a well-founded fear of

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<sup>35</sup> [www.democracynow.org](http://www.democracynow.org) Tuesday, March 14<sup>th</sup>, 2006

<sup>36</sup> [www.democracynow.org](http://www.democracynow.org) Tuesday, March 14<sup>th</sup>, 2006

<sup>37</sup> Id.

<sup>38</sup> <http://www.whitehouse.gov/news/releases/2003/07/20030701-11.html>

<sup>39</sup> [online.wsj.com/public/article\\_print/SB113936906429768047.html](http://online.wsj.com/public/article_print/SB113936906429768047.html)

<sup>40</sup> UNHCR HANDBOOK Chapter V section B Paragraph 168

<sup>41</sup> US Deserter’s Canadian Campaign: BBC News: [news.bbc.co.uk/2/hi/Americas/3867481.stm](http://news.bbc.co.uk/2/hi/Americas/3867481.stm) July 6, 2004 by Jeff Gray

<sup>42</sup> <http://www.theglobeandmail.com/servlet/story/LAC.20060505.SHEEHAN05/TPStory/?query=Sheehan>

persecution in their country and faces serious harm should they return.<sup>43</sup> They must also establish a nexus between that fear and a convention ground of race, religion, nationality, membership in a particular social group or political opinion.<sup>44</sup> In cases where the alleged persecution takes the form of prosecution for military desertion or draft evasion, the UNHCR Handbook provides that not every conviction constitutes a sufficient reason for claiming refugee status.<sup>45</sup> It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action.<sup>46</sup> According to the UNHCR, a 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.<sup>47</sup> Generally, the prosecution and punishment of those who do not want to serve in the military do not constitute persecution, although there are exceptions.<sup>48</sup> The necessity to perform military service may be the sole ground for a claim to refugee status 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.<sup>49</sup> 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.<sup>50</sup> Also, where the type of military action with which an individual does not wish to be associated is

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<sup>43</sup> UNHCR HANDBOOK Chapter V section B Paragraph 170

<sup>44</sup> *Determining Refugee Status: United Nations*, Office of the United Nations High Commissioner for Refugees; Geneva, 1988.

<sup>45</sup> UNHCR *Handbook* Chapter V section B Paragraph 171

<sup>46</sup> UNHCR *Handbook* Chapter V section B Paragraph 171

<sup>47</sup> Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees-HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979-Section 168

<sup>48</sup> Id.

<sup>49</sup> Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees-HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979-Section 170

<sup>50</sup> Id.

condemned by the international community as contrary to the basic rules of human conduct, punishment for desertion or draft evasion could in itself be regarded as persecution.<sup>51</sup>

With regard to what the Canadian Courts have called the “State Protection” issue, the UNHCR also states that individuals who commit common crimes, receive a fair trial and are not subject to excessive punishment will generally not be eligible for refugee protection where the disproportionately severe punishment for the military offence is not on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>52</sup> Under U.S. law, desertion in wartime technically carries the death penalty, although that punishment was last implemented in World War II.<sup>53</sup> Additionally, according to some commentators, the more democratic the country from which a refugee claimant is fleeing, the more likely it is that a Canadian Court will find adequate state protections there, negating the need for refugee status.<sup>54</sup> In the Federal Court review of the Immigration and Refugee Board’s (stated as IRB *infra*) decision in the case of Jeremy Hinzman, for example, the Board found a rebuttable presumption that in the absence of a complete breakdown of the State apparatus, a State will be able to protect its own nationals.<sup>55</sup> Canadian legal scholars argue that this so-called “democratic country factor” is one reason why American refugee claimants are unsuccessful in Canada. Moreover, sovereign nations traditionally, under the norms of international law, have the right to conscript their citizenry in order to raise an army. States may, therefore, legally prosecute and punish draft evaders or ‘deserters.’<sup>56</sup>

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<sup>51</sup> UNHCR HAND BOOK Chapter V section B Paragraph 171

<sup>52</sup> Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees-HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979-Section 169

<sup>53</sup> Will War Deserters Find Asylum in Canada? By Yochi J. Dreazen The Wall Street Journal February 8, 2006; Page B1

<sup>54</sup> CBC NEWS- Michelle Mann: Canada Refuses Refugee from the U.S. March 29, 2005, [www.cbc.ca/news/viewpoint/vp\\_mann/20050329.html](http://www.cbc.ca/news/viewpoint/vp_mann/20050329.html)

<sup>55</sup> 2006 FC 420 IMM-2168 05 at 50

<sup>56</sup> Refugee Law and Policy: A Comparative and International Approach. P. 409 Second Edition. Karen Musalo, Jennifer Moore, Richard A. Boswell. Carolina Academic Press, 2002.

### *Applicable Canadian Law*

With respect to the question of illegality, which will be discussed in more detail below, a case involving Serbian asylum seekers is instructive in the context of Canada's approach to interpreting its obligations under the Geneva Conventions. Serbian asylum applicants to Canada in Ciric v. Canada served in the Yugoslav army during a civil war.<sup>57</sup> The Immigration Board ignored evidence by several groups asserting that the military action was condemned in the international community.<sup>58</sup> The reviewing court held that this was error. The evidence included documents from Helsinki Watch and Amnesty International among other organizations, denouncing atrocities committed during the conflict.<sup>59</sup> The court found that military conduct occurring during the war was "immediately abhorrent to the world community."<sup>60</sup> The court allowed for re-application.<sup>61</sup> Although the United Nations had not been quick to condemn the atrocities committed by all sides, the Court held that Amnesty International, Helsinki Watch and ICRC all had made pronouncements which the Board should have seen as condemnation by the world community.<sup>62</sup> The Court held that "by down-playing the woundings, killings, torture and imprisonment, the Board treated the evidence before it in a capricious, perverse manner."<sup>63</sup> Ultimately, in the Ciric case, the official opinions of non-legal international bodies such as Amnesty International and Helsinki Watch were entitled to respect in the context of asylum claims.<sup>64</sup>

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<sup>57</sup> Ciric v. Canada Ciric v. Canada A-877-92 [1994] 2 F.C. 65<sup>57</sup>

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>64</sup> Ciric v. Canada

## Discussion of the Hinzman Case

Jeremy Hinzman joined the Army in 2001 and completed basic training and airborne school at Fort Benning, Georgia.<sup>65</sup> He began to develop a moral aversion to killing during basic training and, as he further explored Buddhist teachings, his resolve became more steadfast.<sup>66</sup> In 2002, he began attending meetings of the Religious Society of Friends with his wife.<sup>67</sup> After attending the meetings, and also as an outgrowth of his buddhist studies, he developed increasingly pacifist beliefs and became interested in theories of non-violence.<sup>68</sup> The birth of his son, Liam, in May of 2002, also contributed to his purported spiritual conversion.<sup>69</sup> However, he continued his military duty and served in the War in Afghanistan where he applied unsuccessfully for conscientious objector status and served the rest of his tour.<sup>70</sup> He was notified in July of 2003 that his unit would be sent to Iraq in December of that year.<sup>71</sup> In an interview, Hinzman stated “I was told in basic training that, if I’m given an illegal or immoral order, it is my duty to disobey it, and I feel that invading and occupying Iraq is an illegal and immoral thing to do.”<sup>72</sup> After returning to the United States, he was ordered to report to his base for deployment to Iraq. He did so, but then left his uniform and equipment at the base along with a note explaining his reasons for deserting, and left for Canada with his wife and son.<sup>73</sup> Shortly thereafter, the family claimed refugee protection, asserting that they had a well-founded fear of

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<sup>65</sup> [http://en.wikipedia.org/wiki/Jeremy\\_Hinzman](http://en.wikipedia.org/wiki/Jeremy_Hinzman)

<sup>66</sup>Id.

<sup>67</sup> Id.

<sup>68</sup>Id.

<sup>69</sup> Id.

<sup>70</sup> Will War Deserters Find Asylum in Canada? By Yochi J. Dreazen The Wall Street Journal February 8, 2006; Page B1

<sup>71</sup> Id.

<sup>72</sup> CBS News- “Deserters” We Won’t Go To Iraq- December 9, 2004, [www.cbsnews.com/stories/2004/12/06/60II/main659336.shtml](http://www.cbsnews.com/stories/2004/12/06/60II/main659336.shtml)

<sup>73</sup> Id.

persecution in the United States, based upon Mr. Hinzman's political opinion.<sup>74</sup> The Hinzman family made its way to a Quaker church in downtown Toronto, where congregation members directed Mr. Hinzman to Attorney Jeffrey House.<sup>75</sup> House, himself a Vietnam War draft dodger, agreed to defend Hinzman in his attempt to gain asylum in Canada. He was the first U.S. service member to formally seek political asylum in Canada on the basis of his refusal to fight in Iraq.<sup>76</sup> According to Hinzman's attorney, there may be several hundred American soldiers currently residing in Canada who have decided not to be deployed to Iraq, contrary to their orders to do so.<sup>77</sup> Authorities in Canada and the U.S. have commented that a ruling in his favor would trigger similar applications from many other American 'deserters' living secretly in Canada.<sup>78</sup> House represents eleven other war resisters and has met with nearly one-hundred 'deserters' who were introduced to him by Quaker churches and other anti-war organizations.<sup>79</sup> Since applying for asylum, Hinzman and his family have received death threats from Americans who support the Bush Administration's war and feel that Hinzman should be returned to the United States for a Court Martial.<sup>80</sup>

If returned to the United States for a Court Martial the penalties resulting from a conviction could be severe. The death penalty is an available punishment for war time 'deserters' of the United States military, although the last such execution took place during WWII.<sup>81</sup> In the past, Canada has refused to return asylum seekers who would face the death penalty in the United States but this issue has not been of great concern to the Canadian courts in

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<sup>74</sup> *MCI v. Hinzman*, 2006 FC 420 IMM-2168-05 Ottawa, Ontario, March 31, 2006

<sup>75</sup> Will War Deserters Find Asylum in Canada? By Yochi J. Dreazen The Wall Street Journal February 8, 2006; Page B1

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> [http://en.wikipedia.org/wiki/Jeremy\\_Hinzman](http://en.wikipedia.org/wiki/Jeremy_Hinzman)

<sup>81</sup> Id.

the Hinzman proceedings.<sup>82</sup> Most legal scholars have stated that any Iraq war ‘deserter’ would face a five year prison sentence if sent home.<sup>83</sup> In late May of 2005, a court martial sentenced another U.S. soldier to a year in prison for deserting his unit in Iraq.<sup>84</sup> The U.S. Army has declined to comment on any probable sentence in Hinzman’s case and has stated that a decision on whether to court martial Mr Hinzman or grant him an administrative discharge can only be reached when he returns.<sup>85</sup> Finally, because Canada is under no obligation to return Hinzman to the United States should his application and subsequent appeals be denied, Canada can still decide not to return him to the United States. The forced return of Hinzman to the United States is a discretionary power of Canada’s Minister of Immigration and Canada is under no legal obligation to return him.<sup>86</sup>

### *Conscientious Objector*

The U.S. Army allows personnel to apply for conscientious objector status in order to avoid combat.<sup>87</sup> This policy allows soldiers to be reassigned to non-combatant duties if the soldier objects to bearing arms.<sup>88</sup> The policy also permits the complete separation of the individual from the military where the individual objects to war of all kinds.<sup>89</sup> Hinzman applied for conscientious objector status in the summer and fall of 2002. If it had been granted, it would have most likely kept him in the Army as a noncombatant. Hinzman was interviewed by a panel reviewing his application and conceded that although he wouldn’t want to take part in offensive

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<sup>82</sup> Canadian Council for Refugees: A Hundred Years of Immigration to Canada: A Chronology Focusing on Refugees and Discrimination. [www.web.net/~ccr/history.html](http://www.web.net/~ccr/history.html)

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> US Deserter vows to continue fight to stay in Canada By Doug Struck in Toronto March 26, 2005

<sup>86</sup> <http://www.smh.com.au/news/World/US-Deserter-vows-to-continue-fight-to-stay-in-Canada/2005/03/25/1111692629146.html>

<sup>87</sup> Central Committee for Conscientious Objectors <http://www.objector.org/>

<sup>88</sup> Id.

<sup>89</sup> 2006 FC 420 IMM-2168 05 at 13

operations, it would be his duty to defend the airfield at his base if it were attacked.<sup>90</sup> The hearing officer cited his stated willingness to fight in his recommendation that the application for conscientious objector status be denied. Hinzman has stated that 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.<sup>91</sup> At a later Canadian Federal Court review of his case, it was held that although he claimed to be a practicing Buddhist prior to enlisting in the Army, he did not have any objection, on that basis, to carrying a weapon or participating in active military service when he enlisted.<sup>92</sup>

### *The Basis for Hinzman's Illegality Claim*

Prior to his Board hearing, Hinzman was prepared to argue, through his Attorney Jeffrey House, that pursuant to the Geneva Convention provision for conscientious objectors, the Iraq War was condemned by the international community as contrary to the basic rules of human conduct and thus, that his application for asylum should be granted.<sup>93</sup> Hinzman's proffered evidence to support the illegality claim 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 invasion.<sup>94</sup> They testified that the *Charter of the United Nations* 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.<sup>95</sup> Both professors stated that the United States did not

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<sup>90</sup> Will War Deserters Find Asylum in Canada? By Yochi J. Dreazen The Wall Street Journal February 8, 2006; Page B1

<sup>91</sup> Id.

<sup>92</sup> 2006 FC 420 IMM-2168 05 at 9

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> 26 June 1945, Can T.S. 1945 No. 7 [UN *Charter*]

invoke self-defense as a legal justification for its military intervention in Iraq.<sup>96</sup> They further alleged that none of the Security Council resolutions that were relied upon by the United States to justify its conduct condoned military action against Iraq.<sup>97</sup> One of the professors also discussed a developing view of humanitarian intervention as a third possible justification for one State to use armed force against another.<sup>98</sup> However, the professor noted that President Bush made no attempt to justify the American invasion of Iraq as a humanitarian intervention.<sup>99</sup>

Supporting the witnesses' testimony, many nations, non-governmental, religious and international organizations have weighed in on the illegality argument. There has been significant opposition to the Iraq War across the world.<sup>100</sup> Russian President Vladimir Putin said the U.S.-led military action was "completely unjustified," and he urged the U.S. to halt what he called the unjustifiable attack on Iraq.<sup>101</sup> Chinese officials said, "The strike violated the UN charter."<sup>102</sup> President Jacques Chirac of France "expressed regret" at the launch of hostilities without UN backing.<sup>103</sup> Chinese Foreign Ministry spokesman King Quan said, "[the military operation] violated the principles of international law; they ignored the opposition of most countries and peoples of the world and went around the UN Security Council to bringing military action against Iraq."<sup>104</sup> President Megawati Sukarnoputri of Indonesia said, "Washington has pushed the UN to one side to wage war."<sup>105</sup> Iranian Foreign Minister Kamal Kharazi condemned

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<sup>96</sup> 2006 FC 420 IMM-2168 05 at 37

<sup>97</sup> *Id.* at 38

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Opposition to the Iraq War- Wikipedia; En.wikipedia.org/wiki/Popular\_opposition\_to\_the\_Iraq\_War. March 28, 2006.

<sup>101</sup> BBC News-Middle East-War Draws Condemnation, March 20, 2003; news.bbc.co.uk/2/hi/middle\_east/2867027.stm

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

what he said was the “illegitimate and unjustifiable attack on Iraq.”<sup>106</sup> Pakistan said it “deplor[ed] the attack.”<sup>107</sup> India called the attacks “unjustified.”<sup>108</sup> Pope John Paul II and other Vatican officials strongly condemned the U.S. military strike on Iraq, calling it “immoral, risky and a crime against peace.”<sup>109</sup> The Pope also asserted that “war is a defeat for humanity” and that “a preventive strike against Iraq is neither legally nor morally justified”<sup>110</sup> and that the Vatican was “deeply pained” by the conflict and “deplor[ed] the interruption of peace efforts made by diplomats and weapons inspectors who never had an opportunity to conclude their inspection.”<sup>111</sup> On September 13, 2002, U.S. Catholic bishops signed a letter to President Bush stating that “any pre-emptive, unilateral use of military force to overthrow the government of Iraq could not be justified at the time.”<sup>112</sup> The executive committee of World Council of Churches issued a statement in opposition to war with Iraq, stating that war against Iraq would be “immoral, unwise and in breach of the principles of the UN charter.”<sup>113</sup> Although Amnesty International’s general policy is never to comment on whether the use of military force is justified or appropriate, Amnesty did make implicit condemnations of the war when it stated on its website that “AI urged the international community to pursue solutions that would lead to improvement in the human rights situation in Iraq, not to further deterioration, needless loss of life and increased suffering.”<sup>114</sup>

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<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> FoxNews.com-U.S. & World News- Vatican Strongly Opposes Iraq War, March 12, 2003 [www.foxnews.com/story/0,2933,80875,00.html](http://www.foxnews.com/story/0,2933,80875,00.html)

<sup>110</sup> Id.

<sup>111</sup> BBC News-Middle East-War Draws Condemnation, March 20, 2003; [news.bbc.co.uk/2/hi/middle\\_east/2867027.stm](http://news.bbc.co.uk/2/hi/middle_east/2867027.stm)

<sup>112</sup> Opposition to the Iraq War- Wikipedia; [En.wikipedia.org/wiki/Popular\\_opposition\\_to\\_the\\_Iraq\\_War](http://En.wikipedia.org/wiki/Popular_opposition_to_the_Iraq_War). March 28, 2006 .

<sup>113</sup> Id.

<sup>114</sup> [http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=7463-Amnesty for Iraq-By Christopher Achangelli](http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=7463-Amnesty%20for%20Iraq-By%20Christopher%20Achangelli) April 24, 2003

With respect to the application of the Ciric case, described above, in which the Canadian courts found international, non-legal bodies such as Amnesty International to be persuasive in their official position on a particular military conflict's legality, the Iraq war has been condemned by the international community, considering the immense international opposition to the war as contrary to International Law.

*The Canadian Proceedings: A Shocking Twist*

Shortly after Hinzman filed his application for asylum, the Solicitor General of Canada intervened and urged the Board to disregard arguments from Hinzman related to the war's alleged illegality.<sup>115</sup> A lawyer representing Canadian Solicitor-General Irwin Cotler argued that the legality of the war was beyond the purview of Canada's Immigration and Refugee Board because the International Court of Justice in The Hague is the only body with the authority and competence to hear arguments concerning the war's legality.<sup>116</sup> The Immigration and Refugee Board hearing Hinzman's case was quick to endorse the government's position.<sup>117</sup> Brian Goodman, Chairman of the IRB Board panel held that "evidence with respect to the legality of the United States embarking on military action will not be admitted into evidence at the hearing of these claims."<sup>118</sup> Hinzman's lawyer, Jeffrey House, responded by saying his client would be willing to await a decision on the war's legality if the Canadian government would bring the question before the International Court.<sup>119</sup> This request was unheeded by the IRB.<sup>120</sup>

Some commentators have asserted that the Solicitor General's intervention in the Hinzman case was not aimed at ensuring that the appropriate legal body renders judgment on the

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<sup>115</sup> <http://www.wsws.org/articles/2005/feb2005/cana-f10.shtml> US Deserter's refugee claim Canadian government blocks consideration of legality of Iraq war By Keith Jones 10 February 2005

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id.

legality of the war but at suppressing consideration of the issue altogether.<sup>121</sup> Political commentator Keith Jones wrote that he believed the federal intervention underscored the Canadian government's determination to prove itself to be a loyal ally of the Bush Administration.<sup>122</sup> It has also been suggested that Canadian officials have determined unofficially that Canada should not become a magnet for American 'deserters.'<sup>123</sup> In particular, they do not want to see a repeat of the Vietnam War experience when tens of thousands of draft dodgers and 'deserters' were given refuge in Canada under the policy of Pierre Trudeau. Ultimately, the Solicitor General's intervention was an enormous blow to Hinzman's case. Hinzman stated in an interview, "The solicitor general of the Canadian government intervened in our case, and that's only done in about 5% of cases."<sup>124</sup> Hinzman was forced to rely upon secondary arguments to support his application.

#### *The IRB Decision and Subsequent Federal Court Review*

The Immigration and Refugee Board rejected Hinzman's application for asylum.<sup>125</sup> He applied immediately for review of the Board's decision to the Canadian Federal Court.<sup>126</sup> The following is a discussion of the Canadian Federal Court's review of the Board's decision, which addresses several issues presented to it by Hinzman and his attorney.

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<sup>121</sup> [http://therevolutionwillbeblogged.blogspot.com/2005\\_03\\_01\\_therevolutionwillbeblogged\\_archive.html](http://therevolutionwillbeblogged.blogspot.com/2005_03_01_therevolutionwillbeblogged_archive.html)-Let Freedom Ring Throughout the World, March 21, 2005

<sup>122</sup> <http://www.wsws.org/articles/2005/feb2005/cana-f10.shtml> US Deserter's refugee claim Canadian government blocks consideration of legality of Iraq war By Keith Jones 10 February 2005

<sup>123</sup> [http://therevolutionwillbeblogged.blogspot.com/2005\\_03\\_01\\_therevolutionwillbeblogged\\_archive.html](http://therevolutionwillbeblogged.blogspot.com/2005_03_01_therevolutionwillbeblogged_archive.html)

<sup>124</sup> Democracy Now! U.S. Army Resister Jeremy Hinzman: "I Have a Duty to Disobey." December 13<sup>th</sup>, 2004. [www.democracynow.org/article.pl?sid=04/12/13/1457230](http://www.democracynow.org/article.pl?sid=04/12/13/1457230)

<sup>125</sup> 2006 FC 420 IMM-2168 05 Ottawa, Ontario, March 31, 2006

<sup>126</sup> Id.

### The Conscientious Objector Issue

Based upon statements made by Hinzman 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.<sup>127</sup> The Court ultimately held that he 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.<sup>128</sup> The Court also addressed, in the context of the State Protection Issue, whether 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.<sup>129</sup> The Board found that he had not properly explained why he had not re-applied for conscientious objector status after returning to the United States.<sup>130</sup>

### The Illegality Issue

The Board arrived at its decision to reject the illegality claim, discussed supra, by stating that the question turned on an examination of 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."<sup>131</sup> The Court reasoned that "when one is considering the case of a mere foot soldier such as Mr. Hinzman, the focus of the inquiry should be on the international humanitarian law that governs the conduct of hostilities during an armed conflict."<sup>132</sup> The Court concluded that,

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<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> UNHCR *Handbook* Chapter V section B *Paragraph 171*

<sup>132</sup> 2006 FC 420 IMM-2168 05 Ottawa, Ontario, March 31, 2006

“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.”<sup>133</sup> Hinzman’s attorney, in reaction to the decision, stated, “It would mean soldiers that don’t want to participate in illegal wars will be either required to do so or jailed, and that makes the idea of illegal war trivial.”<sup>134</sup>

### The Systematic Illegal, Immoral Acts Issue

Because Hinzman’s illegality argument was disregarded by the Board and the reviewing court, he was forced to rely upon the secondary argument that his acts as a soldier would be contrary to international law, thus qualifying him as a Convention Refugee under the “condemned by the International Community as contrary to the norms of human conduct” provision under the UNHCR.<sup>135</sup> The Geneva Conventions on War and the Nuremberg Principles establish the rule that soldiers have a responsibility to refuse orders which would be illegal under international law.<sup>136</sup> The Geneva Conventions of August 12, 1949, represent the minimum standards of conduct during wartime.<sup>137</sup> These include the obligation to treat humanely persons who take no active part in hostilities, the prohibition of certain acts including violence to life and person, specifically murder of all kinds, mutilation, cruel treatment, and torture, and the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court.<sup>138</sup> Additionally, all parties to the conflict must issue clear instructions to their forces prohibiting any direct attacks against civilians or civilian objects, prohibiting attacks which do not attempt to distinguish between military targets or civilians

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<sup>133</sup> Id.

<sup>134</sup> An American Deserter in Canada, [www.peacemagazine.org/archive/v21n4p25.htm](http://www.peacemagazine.org/archive/v21n4p25.htm) by Jeremy Hinzman, December 2005

<sup>135</sup> UNHCR Handbook Chapter V section B Paragraph 171

<sup>136</sup> Principles of the Nuremberg Tribunal, 1950 No. 82, Principle 1.

<sup>137</sup> 1949 Geneva Convention *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, Oct. 21, 1950

<sup>138</sup> In re A-G-, Int. Dec. No. 3040 (BIA 1987).

objects, prohibiting attacks which, although aimed at a legitimate military target, have disproportionate impact on civilians or civilian objects, prohibiting attacks using inherently indiscriminate weapons, to treat humanely all prisoners, that the wounded and those seeking to surrender must never be killed or held as hostages, and finally to take all other necessary measures to protect the civilian population from arising from military operations including not locating military objectives amidst civilian concentrations.<sup>139</sup>

In court, Hinzman's lawyer introduced evidence, including eyewitness testimony, of a systemic pattern of American war crimes in Iraq, including deliberate killing of civilians and the torture and murder of prisoners.<sup>140</sup> Hinzman asserted, "my country was, and is, committing systematic war crimes in a war that lacks justification."<sup>141</sup> House introduced the testimony of Former Marine Sergeant Jimmy Massey, who served in Iraq during the initial invasion. He testified that as his battalion moved into Baghdad, "every vehicle was treated as an enemy target."<sup>142</sup> If cars didn't stop at U.S. checkpoints, "we were lighting them up, discharging our weapons, 50 'cals' and M16's into the civilian vehicles."<sup>143</sup> Massey told a U.S. radio show that Marines would subsequently search the cars they had attacked but would find no weapons.<sup>144</sup> Massey stated, "I would guess my platoon alone killed 30 plus innocent civilians."<sup>145</sup> He also testified that he recalled firing into a demonstration near the Baghdad International Airport and subsequently realized that he had just fired on a group of peaceful demonstrators.<sup>146</sup> Massey

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<sup>139</sup> Amnesty International and the Iraq Conflict: An overview of Amnesty International's concerns and positions involving the conflict in Iraq. April 17, 2003 [Web.amnesty.org/pages/irq-faq-eng](http://www.amnesty.org/pages/irq-faq-eng)

<sup>140</sup> CBC NEWS- Michelle Mann: Canada Refuses Refugee from the U.S. March 29, 2005, [www.cbc.ca/news/viewpoint/vp\\_mann/20050329.html](http://www.cbc.ca/news/viewpoint/vp_mann/20050329.html)

<sup>141</sup> An American Deserter in Canada, [www.peacemagazine.org/archive/v21n4p25.htm](http://www.peacemagazine.org/archive/v21n4p25.htm) by Jeremy Hinzman, December 2005

<sup>142</sup> ZNet-Anti-War-"Let's Put Teeth In Our Protest" December 2, 2004, by Naomi Klein [www.zmag.org/content/showarticle.cfm?ItemID=6777](http://www.zmag.org/content/showarticle.cfm?ItemID=6777)

<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Id.

<sup>146</sup> Id.

asserted that these were not isolated accidents.<sup>147</sup> Backing Massey's story are several major newspapers. During the siege of Falluja, the New York Times reported that U.S. forces were sending all fighting-age Iraqi men back into the city, which was under heavy attack at the time from American troops, even if they were found to be unarmed and tested negative for explosives residue.<sup>148</sup> The Washington Post quoted a Marine Sergeant as saying, "basically, every house in Fallujah has a hole through it, every house is the enemy and every house is a target."<sup>149</sup> According to Jeffrey House, "that is the meaning of collective punishment and it is barred under the Geneva conventions."<sup>150</sup>

With respect to high-level complicity in these alleged war crimes, Hinzman's attorney also attempted to introduce as evidence two legal opinions prepared for President Bush by Attorney General Alberto Gonzales. According to House, these opinions demonstrate the Bush Administration's resolve not to comply with the *UN Convention Against Torture* 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.<sup>151</sup> According to Hinzman, these documents demonstrate that the United States has conducted itself without regard for international norms in its conduct of the various fronts of its so-called "Global War on Terror."<sup>152</sup> The Court summarily dismissed this evidence by finding that the opinions did not necessarily represent a statement of American policy but rather just the opinions of an administrator.<sup>153</sup>

In further 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 well-documented incidents

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<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> 2006 FC 420 IMM-2168 05 Ottawa, Ontario, March 31, 2006

<sup>152</sup> Id.

<sup>153</sup> Id.

of torture at the Abu Ghraib prison in Iraq.<sup>154</sup> Subsequent to Hinzman’s Federal Court review, evidence has mounted against another prison that has been a focal point of the American “War on Terror.” In May of 2006, the United Nations called on the United States to close the Guantanamo Bay Prison. In a U.N. report on U.S. compliance with Convention Against Torture, the U.N. resolved that the United States should close the prison and cease the use of certain interrogation techniques used there, including sexual humiliation and the use of attack dogs.<sup>155</sup> Guantanamo Bay Prison has been regarded as an example of the manner in which the United States has persisted in mistreating detainees in Iraq and throughout the world; torture, lack of due process and inhuman conditions have been widely reported.<sup>156</sup> On May 18, 2006 it was reported that four inmates attempted suicide on one single day at the prison.<sup>157</sup> However, at the time of its review, the Board and, subsequently, the reviewing court concluded that 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.”<sup>158</sup> Michael Sharf, a war crimes expert, commented in reaction to the decision, “It would be different if Defense Secretary Donald Rumsfeld or the generals had officially and openly ordered the systematic commission of war crimes.”<sup>159</sup> The Court went on to cite Popov v. Canada, commenting 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.<sup>160</sup> In coming to this conclusion, the Court also considered the findings of a Human Rights Watch

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<sup>154</sup> 2006 FC 420 IMM-2168 05 Ottawa, Ontario, March 31, 2006

<sup>155</sup> Democracy Now: May 19, 2006. [Http://www.democracynow.org/article.pl?sid=06/05/19/1322252](http://www.democracynow.org/article.pl?sid=06/05/19/1322252)

<sup>156</sup> CNN: [www.cnn.com/2006/WORLD/Americas/05/19/gitmo.clash.ap/index.html](http://www.cnn.com/2006/WORLD/Americas/05/19/gitmo.clash.ap/index.html)

<sup>157</sup> Id.

<sup>158</sup> 2006 FC 420 IMM-2168 05 Ottawa, Ontario, March 31, 2006

<sup>159</sup> Canada A haven Again: Like Draft Evaders and Deserters of Vietnam Era, American Soldiers are heading North to Find Refuge from What They Sai is an Unjust War in Iraq. By Andrew Metz. Wednesday, February 1, 2006.

<sup>160</sup> Popov v. Canada (Minister of Employment and Immigration) (1994), 24 Imm. L.R. 242,

report that documented the killing of civilians by American forces in Iraq.<sup>161</sup> While observing that there had been questionable deaths, the report acknowledged that the American military has publicly taken steps to reduce civilian deaths, and to investigate specific incidents where deaths had occurred.<sup>162</sup> The Court concluded by lamenting, “It is generally accepted that isolated breaches of international humanitarian law are an unfortunate but inevitable reality of war.”<sup>163</sup>

Following the decision of Hinzman’s case, the evidence supporting his claim of systematic illegal and immoral acts continue to accumulate. In May of 2006, Representative John Murtha of Pennsylvania made a report to the press that Marines had entered civilian homes and murdered at least 30 innocent Iraqi women and children in cold blood in the town of Haditha in November of 2005.<sup>164</sup> Murtha contends that U.S. Commanders who originally made a report detailing far less severe casualties and abuses during that event grossly exaggerated and fabricated information in order to cover up the truth.<sup>165</sup>

#### The State Protection Issue

Finally, the Board addressed the question of whether Hinzman’s prosecution for desertion would be disproportionately severe and whether he would suffer because of any lack of due process afforded in his particular prosecution on the basis of a convention ground (political opinion).<sup>166</sup> Notwithstanding the possibility that Hinzman could actually be executed for his alleged crime, the Board found that 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. The Board found that the Universal Code of Military Justice “reveal[ed] a sophisticated

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<sup>161</sup> <http://hrw.org/english/docs/2003/12/12/iraq6582.htm>

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 170

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

military justice system that respects the rights of service personnel and guarantees appellate review, including limited access to the United States Supreme Court.”<sup>167</sup>

*Hinzman’s Next Step: The Federal Court of Appeal*

Judge Mactavish, who authored the Federal Court opinion reviewing the IRB decision in Hinzman’s case certified the question of illegality.<sup>168</sup> Specifically, the certified issue entails appellate examination of whether or not a foot soldier can claim that the illegality of a war would be grounds for granting a petition for asylum.<sup>169</sup> The certification permits Hinzman to appeal the Federal Court decision to the Canadian Federal Court of Appeal and perhaps, ultimately, to the Canadian Supreme Court.

*Hinzman’s Last Resort: Humanitarian and Compassionate Review*

If the Federal Court of Appeal affirms the lower court’s ruling affirming the decision of the IRB, Hinzman’s final option may be a direct plea to Canada’s Immigration Minister for leave to remain on *humanitarian and compassionate* grounds if the Canadian Supreme Court opts not to hear the case.<sup>170</sup> Humanitarian and Compassionate Review is available in Canada to people who would suffer excessive hardship if they were forced to return to their home country to apply for permanent residence in Canada as required by the Immigration and Refugee Protection Act.<sup>171</sup> Unfortunately for Hinzman, this is only a discretionary remedy which does not rest upon any recognized international law norms or treaties.<sup>172</sup> Thus, Hinzman remains at the mercy of the Canadian government to protect him and his family from being returned to the U.S. where he is sure to be court martialed and imprisoned for his refusal to take part in the Iraq War.

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<sup>167</sup> *Id.*

<sup>168</sup> 2006 FC 420 IMM-2168 05 Ottawa, Ontario, March 31, 2006

<sup>169</sup> *Id.*

<sup>170</sup> BBC News: US Deserter Denied Canada Asylum. News.bbc.co.uk/2/in\_depth/4381009.stm March 25, 2005

<sup>171</sup> <http://www.cic.gc.ca/English/refugees/asylum-4.html>

<sup>172</sup> Citizenship and Immigration Canada-Canada’s Immigration Law-<http://www.cic.gc.ca/English/pub/imm-law.html>, April 20, 2006

## U.S. – Canadian Cooperative Policies

The ruling to deny asylum to Hinzman did not come as a surprise to most Canadian legal scholars or politicians. Some correspondents have remarked that the decision to deny Hinzman asylum may negatively affect the applications of many other war resisters but would improve Canadian-U.S. relations.<sup>173</sup> The BBC has reported that while Canada officially opposed the U.S. led invasion of Iraq, officials there were acutely aware that accusing Washington of persecuting its own citizens would cause an international diplomatic incident.<sup>174</sup> Historically, Canada has been a willing recipient of American immigrants and refugees, but there are examples in the past of Canadian cooperation with American officials in searching for draft evaders and war resisters. One example occurred in 1969, when a Canadian hostel for draft dodgers and ‘deserters’ from the United States was raided 10 times, possibly the result of Royal Canadian Mounted Police and FBI cooperation.<sup>175</sup> The following is a discussion of other forms of cooperation between Canada and the United States with respect to its treatment of immigrants and asylum seekers.

### *Bilateral Agreements*

In addition to enforcement actions, the United States and Canada have recently entered into a series of cooperative border administration policies. In December 2001, Ottawa signed the “Smart Border Declaration.”<sup>176</sup> This agreement was the product of legislation developed after the September 2001 terrorist attacks in the United States.<sup>177</sup> Some commentators have intimated that the agreement was designed in part to prevent draft dodgers, in the event of a draft, and military service members who seek to desert from finding sanctuary in Canada.<sup>178</sup> The

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<sup>173</sup> BBC News: US Deserter Denied Canada Asylum. [News.bbc.co.uk/2/in\\_depth/4381009.stm](http://news.bbc.co.uk/2/in_depth/4381009.stm) March 25, 2005

<sup>174</sup> Id.

<sup>175</sup> <http://www.web.net/~ccr/history.html> –Canadian Council for Refugees

<sup>176</sup> [http://www.dfait.gc.ca/can-am/main/border/smart\\_border\\_declaration-en.asp](http://www.dfait.gc.ca/can-am/main/border/smart_border_declaration-en.asp) Canadian Department of Foreign Affairs

<sup>177</sup> Id.

<sup>178</sup> <http://www.projectcensored.org/publications/2005/24.html>

declaration contains an “Action Plan” which includes the sharing of security information related to asylum applicants, the development of joint removal capabilities and the “Safe Third Country Agreement.”<sup>179</sup> Under that controversial agreement, the claims of refugees who travel to Canada through countries deemed safe, most likely the United States, will be rejected without any hearing on the merits.<sup>180</sup> Thus, it could lead to persons being denied asylum in countries which have a higher threshold for granting asylum than the country to which the applicant intended as their destination.<sup>181</sup>

### *Cooperation in Gulf War II*

The Canadian government decided not to join the United States-led “coalition of the willing” in the 2003 invasion of Iraq.<sup>182</sup> As a consequence of that decision, the Liberal Party of Paul Martin enjoyed popular support in Canada for its decision not to deploy the Canadian Armed Forces to that country.<sup>183</sup> However, in January of 2006, a new government was elected in Canada and the Conservative Party achieved a majority control of parliament for the first time in over a decade.<sup>184</sup> Overall, however, in Canada’s last election, 80% of Canadians, in a recent poll were happy that Canada did not officially join the American invasion of Iraq. In fact, the more recent victory of conservative Stephen Harper may even have been predicated on his promise not to send Canadian troops to Iraq.<sup>185</sup> Notwithstanding Canada’s official position at the time, Paul Martin’s Liberal government provided important political and logistical support for

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<sup>179</sup> [http://www.dfait.gc.ca/can-am/main/border/32\\_point\\_action-en.asp](http://www.dfait.gc.ca/can-am/main/border/32_point_action-en.asp)

<sup>180</sup> Id.

<sup>181</sup> Id.

<sup>182</sup> <http://www.wsws.org/articles/2005/feb2005/cana-f10.shtml>- US Deserter’s refugee claim Canadian government blocks consideration of legality of Iraq war By Keith Jones 10 February 2005

<sup>183</sup> Id.

<sup>184</sup> AWOL in Canada: A Counseling Memo-War Resisters Support Campaign-April 2006-[www.resisters.ca](http://www.resisters.ca).

<sup>185</sup> AWOL in Canada: A Counseling Memo-War Resisters Support Campaign-April 2006-[www.resisters.ca](http://www.resisters.ca)

the invasion and subsequent occupation of Iraq.<sup>186</sup> The Canadian navy led a multi-national “anti-terrorism” task force in the Persian Gulf that worked closely with the U.S. and British.<sup>187</sup> Canada also sent forces to Afghanistan and freed-up U.S. troops for action in Iraq.<sup>188</sup> Canadian Brigadier-General Walter Natynczyk was even made one of the principal commanders of the Iraq occupation forces.<sup>189</sup>

## CONCLUSION

Canada has a long history of embracing refugees from all over the world who have been subjected to persecution, violence, slavery, oppression and forced conscription. The Canadian population and political establishment have developed a reputation for tolerance toward people seeking asylum in their country for nearly two centuries. However, recent trends signal an alarming fundamental shift in Canada’s historically open policy to refugees and asylum seekers. It now seems that pressure from the United States due to its ever increasing position of political and military dominance in world affairs, and also because of the Bush Administration’s demonstrated refusal to engage diplomatically with individuals who disagree with its policies has caused fundamental changes to Canada’s policies toward the protection of refugees. An examination of the Ciric case, for instance, reveals a more open, tolerant, welcoming Canada, committed to protecting human rights, while an examination of the Hinzman case, decided twelve years later, reveals a much different Canada. In the Ciric case, the court was willing to overlook certain factual defects in the petitioner’s case while taking a liberal view toward the opinions of the international community and non-legal bodies when examining the legality of a particular governmental action.<sup>190</sup> The Canada which produced the Hinzman decision is one

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<sup>186</sup> Id.

<sup>187</sup> <http://www.wsws.org/articles/2005/feb2005/cana-f10.shtml> -Keith Jones 10 February 2005

<sup>188</sup> Id.

<sup>189</sup> Id.

<sup>190</sup> Ciric v. Canada, A-877-92 [1994] 2 F.C. 65

which exists in the post-9/11 world, but also one which has developed ever increasing bureaucratic and political links to conservative American political institutions. The future of asylum law in Canada may ultimately depend upon how the Canadian populace votes. Canadians will decide whether they want to live in the Canada of human rights champion Pierre Trudeau, the Canada of Paul Martin's Liberal government which plays down its ties with Washington publicly while supporting and benefiting from Washington's power in private, or Stephen Harper's Conservative government which declares itself, openly, to be an ally of Washington in the so-called "Global War on Terror."