Court File No. IMM 2168-05

FEDERAL COURT OF CANADA

B E T W E E N :

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

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

- and -

THE INTERNATIONAL HUMAN RIGHTS CLINIC – UNIVERSITY OF TORONTO, FACULTY OF LAW and AMNESTY INTERNATIONAL (CANADA)

Interveners

INTERVENERS' MEMORANDUM OF ARGUMENT

PART I – THE FACTS

Overview

1. The International Human Rights Clinic ("IHRC") and Amnesty International-Canada Section ("Amnesty") brought a motion for leave to intervene in this application for judicial review. The grounds on which they sought intervention was to advocate for the ability of conscientious objectors to claim refugee status in Canada under the *Immigration and Refugee Protection Act* ("*IRPA*") on the basis of their political opinion and refusal to be associated with grave breaches of international humanitarian law ("IHL") and other core human rights principles recognized and upheld by this country.

Background

2. This judicial review arises out of the decision of Mr. Hinzman to refuse service with the 82nd Airborne division of the U.S. Army in Iraq and to flee to Canada.[1] The Applicants seek to overturn the decision of the Immigration and Refugee Board ("IRB") to deny their claims for refugee status in Canada.

Decision of the Immigration and Refugee Board ("IRB Decision") at para. 2

3. On January 2, 2004, Mr. Hinzman and his wife packed up their belongings and drove to Canada with their son, Liam. They arrived in Niagara Falls, Ontario on January 3, 2004.

IRB Decision, at para. 51

4. On January 22, 2004, the Applicants made inland refugee claims. Mr. Hinzman fears that if he returns to the US he would be prosecuted for deserting and persecuted for following his conscience.

IRB Decision, at para. 51

5. The Applicants' case was heard by the IRB on December 6 to 8, 2004 to determine whether the claims for refugee protection of the applicants should be allowed.

6. On an interlocutory motion to admit material related to the conduct of the U.S. military inside Iraq and, specifically, the military's compliance with IHL, the IRB refused to allow a number of relevant documents. The refused evidence includes, *inter alia*, reports by the International Committee of the Red Cross (ICRC) and Human Rights Watch documenting IHL violations, and the "Gonzalez Memo", which outlined the basis for the U.S. government policy justifying the use of torture.

Applicants' Memorandum of Argument at paras. 25-26

[1] Under U.S. law, Mr. Hinzman is considered a deserter and is subject to prosecution and imprisonment.

The commission of war crimes in Iraq

7. The IRB heard evidence from Staff Sergeant James Massey of the U.S. Marine Corps, who commanded a squadron of between 25 to 55 Marines in Iraq. Mr. Massey testified about numerous incidents in which his squadron was involved in the killing of innocent Iraqi civilians.

Applicants' Memorandum of Argument at paras. 19-23

8. The Human Rights Watch (HRW) Report entitled, "Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the US Army's 82nd Airborne Division" ("HRW Report") focuses on the actions of soldiers of the 82nd Airborne Division, 1st Battalion, 504th Parachute Infantry Regiment, stationed at FOB Mercury, near Fallujah in Iraq. Before coming to Canada, the Applicant was a member of the 82nd Airborne. The HRW Report recounts the evidence of one officer and two non-commissioned officers regarding abuses by the Applicant's division in 2003 to 2004.

Human Rights Watch, "Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the US Army's 82nd Airborne Division" (2005) 17(3) *HRW* 1 at p. 1

9. The HRW Report concludes that the torture and other mistreatment of detainees by the 82nd Airborne was systematic and known at various levels of command. It states that military intelligence personnel directed and encouraged army personnel to subject prisoners to forced, repetitive exercise, sometimes to the point of unconsciousness, sleep deprivation for days on end, and exposure to extremes of heat and cold as part of the interrogation process.

HRW Report, *supra* at pp. 1-2

10. According to the HRW Report, the torture and other cruel and inhumane treatment alleged violate the Geneva Conventions, the U.S. Uniform Code of Military Justice and various international human rights instruments.

HRW Report, *supra* at p. 27

11. The witnesses describe abusive interrogation ordered by military intelligence personnel and known to superior officers. The HRW Report states that there is increasing evidence that high-ranking U.S. civilian and military leaders issued policies and made decisions that facilitated serious and widespread violations of law. The Report claims that even following the Abu Ghraib

scandal, the U.S. military made no effort to conduct an investigation into the possible involvement of military command in the abuses.

HRW Report, *supra* at p. 26, 28

12. The HRW Report concludes that the abuses in Iraq alleged by the soldiers interviewed can be traced to the decision of the administration of President George W. Bush to disregard the Geneva Conventions in its armed conflict in Afghanistan.

HRW Report, *supra* at p. 25

13. On February 7, 2002, President Bush announced that the Geneva Conventions did not apply to al-Qaeda members or Taliban soldiers because they were not members of armed forces. President Bush instructed the troops to treat detainees humanely – not as a legal requirement, but as a matter of policy. According to the HRW Report, troops were not given clear guidance on how to treat detainees. It cites the 2004 Schlesinger Commission report finding that the use of torture and maltreatment of prisoners "migrated" to U.S. detention centres in Iraq.

HRW Report, *supra* at pp. 25-26

PART II – THE ISSUES

14. In the Applicant's Factum, the issues in dispute are set out at paragraphs 28-33. The interveners' submission is limited the following issues:

(i) Did the Honourable Member err in law by failing to interpret the UNHCR *Handbook* definition of "convention refugee" in the context of compliance with international humanitarian law in assessing whether this case raised "exceptional circumstances"?

(ii) Did the Honourable Member err in law failing to consider whether a decision by a state or its military command to suspend adherence to international humanitarian law, including authorizing the use of torture, constitutes "exceptional circumstances" so as to rebut the presumption of state protection?

PART III – ARGUMENT

A. THE IRB FAILED TO INTERPRET THE UNHCR *HANDBOOK* DEFINITION OF "CONVENTION REFUGEE" IN THE CONTEXT OF COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW AND TO ASSESS WHETHER THIS CASE RAISED "EXCEPTIONAL CIRCUMSTANCES."

Overview

15. Under international refugee law, it is presumed that a state is able to protect its citizens. All refugee claimants must overcome this presumption, regardless of their country of origin. There is a corollary presumption which must also be considered: the fear of persecution is presumed to be well-founded where objective evidence of the state's inability to protect the claimant is combined with a subjective fear of persecution.

> *Ward v. Canada (Minister of Employment & Immigration)*, [1993] 2 S.C.R. 689 at para. 52

16. The IRB appears to have misapplied the presumptions in a way which failed to reflect the underlying human rights rationale of refugee protection legislation.

Presumption applied to the U.S.

17. The IRB mechanically applied the "presumption" against recognizing refugee claims originating in the United States or other democratic countries to the facts in this case. Specifically, the IRB appears to have viewed this case within the framework of the 1989 Federal Court of Appeal case of *Satiacum* without appreciating the substantial legal and factual differences posed by this matter. In *Satiacum*, the claimant was a Native American chief who was convicted of federal criminal charges in the U.S. and who fled to Canada claiming that he feared a risk to his life if incarcerated in a federal prison. His claim was rejected on the basis that he had failed to establish "exceptional circumstances" to rebut the presumption that his country of origin would afford him fair and just treatment. The Court held that:

> …in relation to a democracy like the United States contrary evidence might have to go to the extent of substantially impeaching, for example, the jury selection process in the relevant part of the country, or the independence or fair-mindedness of the judiciary itself.
>
> *Canada (Minister of Employment and Immigration) v. Satiacum*, [1989] S.C.J. No. 505 (F.C.A.) at 176

18. The facts of *Satiacum* are wholly inapplicable to the present case. Mr. Hinzman is not convicted of a crime and the refugee determination process need not assume characteristics of the extradition process. Rather, Mr. Hinzman's has sought sanctuary in Canada to *avoid* the commission of war crimes. The IRB found that Mr. Hinzman did so as a matter of deeply-felt, personal conviction.

Underlying human rights imperative of refugee law

19. Any inquiry into a person's refugee status must begin from the standpoint of the general purposes of refugee law. The preamble to the UN Convention on Refugees (the "Convention") acknowledges the international community's commitment to the assurance of basic human rights. This approach has been adopted by the Supreme Court of Canada, citing refugee law scholar James Hathaway, who explains the significance of the human rights underpinnings to the Convention:

> The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.
>
> *Ward*, *supra* at para. 63 [emphasis added]
>
> *Convention relating to the Status of Refugees* 189 U.N.T.S. 150, *entered into force* April 22, 1954

20. Referring to the testimony of U.S. Marine Staff Sergeant, James Massey in its Decision, the IRB noted that it is "virtually impossible" to eliminate civilian deaths in war and that there would always be "collateral damage".[2]

> IRB Decision at para. 137

21. "Collateral damage" is not a term that carries any legal meaning. The law of armed conflict is governed by international humanitarian law (IHL), embodied in the four Geneva Conventions of 1949, and especially the (*Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War*. Violations of the core protections of the Convention are considered "grave breaches" and amount to "war crimes". Such acts include: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property; wilfully depriving a prisoner of war or a civilian a fair and regular trial, unlawful deportation or transfer of civilians, and hostage-taking.

> 1949 Geneva Conventions, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950 ["Geneva Conventions"]

[2] The IRB further found that there was adequate accountability in the manner in which the U.S. handled instances of indiscriminate or excessive force. Citing the fact that investigations have taken place, the IRB found that there is no evidence of official indifference to violations of international human rights law in Iraq. It also linked the presence of "embedded" journalists to evidence of U.S. accountability, which it characterized as an "important hallmark of a democracy".

22. The International Criminal Tribunals for the former Yugoslavia ("ICTY") and for Rwanda ("ICTR") incorporated "grave breaches" of the Geneva Conventions into their respective enabling statutes as indictable offences. The Supreme Court of Canada relied on ICTY and ICTR decisions in *Mugesera*, when it interpreted and applied Canada's *Crimes Against Humanity and War Crimes Act.*

> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 126
> *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24

23. The prohibition on torture is reinforced both in IHL and in the body of international human rights law, including the 1984 U.N. *Convention against Torture*. The Convention defines torture in Article 1 as any act which intentionally inflicts severe mental or physical pain on a victim for the purpose of obtaining information or a confession, or for punishing the victim for conduct or suspected conduct. This definition has been adopted and enforced in international criminal law in the jurisprudence of the ICTY and the ICTR.

> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987
> Musema, (Trial Chamber), ICTR, January 27, 2000 at para. 285; Kunarac, Kovac and Vokovic, (Appeals Chamber), ICTY, June 12, 2002 at para. 142

24. The appropriate standard within which refugee law must be therefore interpreted and applied is that which is consistent with core human rights values, including the prohibition on torture and other non-derogable war-time protections enshrined in the Geneva Conventions.

25. The IRB erred by applying the standard of "democracy" rather than the standard of "core human rights" to the presumption that a state is able to protect its citizens. The Supreme Court has explained that the starting point of the interpretive exercise is, first, to define the purpose of the Convention as a whole, and then to locate the purpose and place of the particular provision within that scheme. The IRB failed to define the purpose of the Convention within the framework of Canada's domestic and international human rights obligations.

> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 56

26. The importance of Canada's domestic and international human rights obligations as a contextual framework for interpreting refugee legislation was confirmed by the Supreme Court when it stressed the importance of the "human rights character of the Convention". It further held

that the "overarching and clear human rights object and purpose [of the Convention] is the background against which interpretation of individual provisions must take place".

Pushpanathan, *supra* at para. 57

27. The interpretive guidelines offered by the courts are consistent with the interpretation clause in the *IRPA*, which states that:

> 3 (3) This Act is to be construed and applied in a manner that
>
> (*a*) furthers the domestic and international interests of Canada;
>
> (*b*) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;
>
> (*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;
>
> (*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;
>
> (*e*) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and
>
> (*f*) complies with international human rights instruments to which Canada is signatory.

Immigration and Refugee Protection Act, 2001, c. 27, ["*IRPA*"], s. 3

Exceptional circumstances are easily established in this case

28. Had the IRB properly adopted a human rights analysis, it would have had no difficulty finding that a person in Mr. Hinzman's circumstances would meet the standard of "exceptional circumstances" for two reasons.

29. Firstly, the facts and circumstances giving rise to the fear of persecution, namely the widespread commission of war crimes in Iraq, are extra-territorial. Domestic constitutional protections and the rule of law do not apply in the same way outside the state's jurisdiction, particularly in the context of war and military occupation, as they do within the territory of the state. The IRB failed to give any weight to the unique circumstances of this case.

30. Secondly, the U.S. itself has declared these to be exceptional circumstances. In response to the September 11, 2001 attacks, Congress enacted Senate Joint Resolution 23, which authorized military force against those responsible, recognizing the "unusual and extraordinary threat to the national security and foreign policy of the United States".

> Joint Resolution to Authorize the Use of United States Armed Forces against Those Responsible for the Recent Attacks against the United States, Pub.L.No. 107-40, 115 Stat. 224 (2001) [emphasis added]

31. Supported by its claim that the war on terror gave rise to exceptional circumstances, the U.S. declared that the *Geneva Conventions* would not apply to its treatment of al-Qaeda and Taliban prisoners, a policy which was later found to have "migrated" to Iraq:

> The Pentagon and the Justice Department developed the breathtaking legal argument that the president, as commander-in-chief of the armed forces, was not bound by U.S. or international laws prohibiting torture when acting to protect national security, and that such laws might even be unconstitutional if they hampered the war on terror.
>
> Reed Brody, "The Road to Abu Ghraib" in *Torture: Does it make us safer? Is it ever OK? A Human Rights Perspective*, Kenneth Roth and Minky Worden, eds. (New York: The New Press, 2005) ("*Torture*") at pp. 146-147

32. It was therefore patently unreasonable for the IRB to reach the conclusion that there were no exceptional circumstances in the present case. The IRB erred in law by failing to consider in its analysis the fact that the U.S. itself had declared exceptional circumstances to the rule of law in the international arena in its prosecution of the war on terror.

33. It was precisely this marked departure from *jus cogens* norms of international law – the commission of core human rights violations and war crimes, including torture – from which Mr. Hinzman sought Canada's protection. A person in such exceptional circumstances would have an objectively reasonable basis for drawing the conclusion that the U.S. could not protect him from persecution for refusing to commit acts that the highest levels of government had expressly authorized.

B. THE IRB ERRED IN LAW BY FAILING TO CONSIDER WHETHER A DECISION BY A STATE OR ITS MILITARY COMMAND TO SUSPEND ADHERENCE TO IHL, INCLUDING AUTHORIZING THE USE OF TORTURE, CONSTITUTES "EXCEPTIONAL CIRCUMSTANCES" SO AS TO REBUT THE PRESUMPTION OF STATE PROTECTION.

34. Section 171 of the UNHCR *Handbook* states that where the type of military action the deserter does not wish to be associated with is "condemned by the international community as contrary to the basic rules of human conduct", punishment for desertion may in and of itself be persecution. In its reasons, the IRB acknowledged that the UNHCR *Handbook* guides officials in making refugee determinations, including those under the *IRPA*.

35. The IRB erred in 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.

IRB Decision at para. 121

36. The IRB correctly referred to *Zolfagharkhani* as an authority on this issue. In that decision, the Federal Court of Appeal applied section 171 of the UNHCR *Handbook* to circumstances in which a member of the Iranian military had decided to desert and flee to Canada based on his objection to the use of chemical weapons by the Iranian military.

37. *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (F.C.A.)

38. The Court found that, even though the claimant had not been called upon to participate in chemical warfare, the *probable* use of chemical weapons was contrary to the basic rules of human conduct as judged by the international community. Applying section 171 of the *Handbook*, the claimant was granted refugee status.

39. The IRB correctly referred to a leading case from the United Kingdom on point. In *Krotov*, a citizen of the Russian Federation claimed asylum in the U.K. based on his fear of persecution for evasion of service in the Russian military because of his objection to fighting in Chechnya.

Krotov v. Secretary of State for the Home Department, [2004] EWCA Civ 69 at para. 2

40. The Court interpreted section 171 of the UNHCR *Handbook* and found that:

> [T]here is a core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular, civilians, the wounded and prisoners of war. They prohibit actions such as genocide, the deliberate killing and targeting of the civilian population, rape, torture, the execution and illtreatment of prisoners and the taking of civilian hostages.

Krotov, *supra* at para. 30

41. The Court held that the recognition of these norms is manifest in international instruments and materials including the Geneva Conventions and Additional Protocol II, as well as the decision of the International Court of Justice in the *Nicaragua* case.

> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978
>
> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar v. US)* 1986 ICJ Reports 14

42. The Court in *Krotov* established a test for deciding whether section 171 of the *Handbook* applies:

> If a court or tribunal is satisfied (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards 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 recognised by the international community, (b) that they will be punished for refusing to do so and (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established.
>
> *Krotov*, *supra* at para. 51

43. The IRB correctly adopted the *Krotov* test in its Decision. However, it incorrectly applied the test. It failed to give sufficient consideration to the evidence that violations of IHL were occurring in Iraq, and failed to consider whether Mr. Hinzman was entitled to desert so as to avoid participating in such crimes.

> IRB Decision at paras. 119-120

44. Where instances of grave breaches of the Geneva Conventions, such as torture, have been shown to have occurred, this will give rise to a finding that the “basic rules of human conduct” have been violated or should, at the very least, precipitate consideration of why the Applicant would not be tainted by such conduct.

45. The IRB appears to have found that Mr. Hinzman’s refusal to be associated with war crimes amounted to a disagreement with the U.S. administration’s “political justification for a

particular military action". This finding is at odds with the absolute and non-derogable nature of the prohibition against torture in international law. Our refugee determination process must avoid being influenced by political justifications offered by states to change or deviate from the "basic rules of human conduct" standard.

> IRB Decision at paras. 108-109
>
> W.P. Nagan & L. Atkins, "The International Law of Torture: From Universal Proscription to Effective Application and Enforcements" (2001) Harvard Hum. Rts. J. 87 at 114

46. Furthermore, the persecution vs. prosecution distinction is not significant where the refugee claim is based on flight from the commission of war crimes. In a U.K. decision interpreting the *Krotov* test, the court clarified that the "punishment" for refusing to commit breaches need not be severe. The mere existence of sanctions for refusing to act in breach of the rules of human conduct amounts to persecution and is sufficient to bring a claimant within the meaning of Convention refugee:

> But it is plain, in particular from para 51 in *Krotov*, that, if condition (a) is satisfied, condition (b) requires only that there should be punishment for refusal to act, not that the punishment should itself be grossly excessive or disproportionate or otherwise constitute persecution or infringement of the individual's human rights. <u>That is, where condition (a) is satisfied, punishment for refusal to serve itself constitutes persecution for the purposes of the Convention.</u>
>
> *Davidov v. Secretary Of State For The Home Department*, [2005] S.L.T. 953 at para. 17 [emphasis added]

47. The HRW Report demonstrates that Mr. Hinzman could reasonably have been associated with violations of international law if he had remained in his military position.

> HRW Report, *supra* at pp. 1-2

48. The fact that he may have faced only one to five years in prison for deserting does not alter the fact that facing *any* punishment in such circumstances amounts to persecution.

49. The HRW Report states that military intelligence personnel directed and encouraged army personnel to subject prisoners to forced, repetitive exercise, sometimes to the point of unconsciousness, sleep deprivation for days on end, and exposure to extremes of heat and cold as part of the interrogation process.

HRW Report, *supra* at 4

50. The reports outline almost daily abuse of detainees. The officers interviewed in the report claim that abuse was so widely accepted that troops would abuse detainees in the manner described above as a form of stress relief.

HRW Report, *supra* at 7

51. This is consistent with other accounts of inhuman treatment. Mr. Massey's testimony before the IRB told of instances of reckless disregard for civilian life. According to Dinah PoKempner:

> …[a]s the battles in Iraq and Afghanistan proved tough, enormous pressure was applied from the top down to obtain intelligence, a purpose whose end (saving the lives of U.S. forces and civilians) served to rationalize repugnant means. We now know that hundreds participated in or witnessed the abuses, that officers and medical personnel must have been complicit, and that what few whistle blowers emerged were threatened or ignored.

Dinah PoKempner, "Command and Responsibility for Torture" in *Torture, supra* at 162

52. The treatment of prisoners by the U.S. military outlined in the HRW Report and elsewhere clearly violates the "core of humanitarian norms generally accepted between nations" referred to in *Krotov* and violates the instruments from which these norms are derived. Credible, independent sources such as HRW confirm that violations were more than isolated incidents.

53. A soldier deployed as part of the 82nd Airborne Regiment in Iraq could reasonably be associated with acts, such as those described in the HRW Report. This is conduct which is condemned by the international community as contrary to the basic rules of human conduct. Such circumstances would come within the definition of refugee in section 171 of the *Handbook*.

C. THE IRB FAILED TO GIVE ADEQUATE CONSIDERATION TO THE FACT THAT THE U.S. HAS, EITHER AS A MATTER OF DELIBERATE POLICY OR OFFICIAL INDIFFERENCE, REQUIRED OR ALLOWED ITS COMBATANTS, AND PARTICULARLY THOSE IN THE 82ND AIRBORNE, TO ENGAGE IN WIDESPREAD ACTIONS IN VIOLATION OF INTERNATIONAL HUMANITARIAN LAW, OR AT A MINIMUM FAILED TO INVESTIGATE ALLEGATIONS OF HIGH-LEVEL RESPONSIBILITY.

54. Canada is committed to international human rights law and IHL. Canada rejects the use of torture and other cruel and inhumane treatment. The decision to grant Mr. Hinzman refugee status on the basis of his political opinion should be made in the context of Canada's commitment to international human rights principles.

55. Canada's commitment to international human rights law and IHL is implicit in the *Charter*, which adopts these principles and protects these rights.

Section 7 Right to Life, Liberty and Security of the Person

56. In particular, section 7 of the *Charter* protects the right to life, liberty and security of the person. In applying section 7 the tribunal firstly asks whether there exists a real or imminent deprivation of life, liberty, security of the person. The tribunal then identifies and defines the relevant principle or principles of fundamental justice before determining whether the deprivation has occurred in accordance with the relevant principle or principles.

57. The Supreme Court has held that the inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens.*

Suresh v. Canada (Minister of Citizenship and Immigration)

58. In the interveners' submission, Mr. Hinzman's right to liberty should be protected. Should he be forced to return to the U.S., Mr. Hinzman faces imprisonment for his conscientious objection. This deprivation of liberty is inconsistent with the principles of fundamental justice, particularly in light of the systematic and grave breaches of the Geneva Conventions perpetrated or permitted by the U.S. military in Iraq.

Section 15 Equality Rights

Section 15 of the *Charter* protects equality rights and is aimed at promoting a society in which all persons enjoy equal recognition at law as human beings and members of Canadian society, and has been interpreted to hold the preservation of human dignity as its central objective. When interpreting the term refugee, section 15(1) requires that a person not be treated adversely or in a discriminatory fashion based on his or her country

of origin. Presumptions, and findings of fact, should therefore reflect relevant and current differences and not be based on stereotypical assumptions about the nation in question.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

59. In *Ward*, the Supreme Court of Canada adopted Grahl-Madsens's definition of political opinion as a basis for a well-founded fear of persecution as persecution of persons on the ground "that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party".

Ward, *supra* at 746

60. The interveners submit that a fear of persecution based on a political opinion should apply even if those opinions are contrary to those currently held by the military chain of command in a democratic government. A decision to desert from the 82nd Airborne based on a refusal to participate in acts that amount to violations of IHL and human rights law means asserting an opinion that is contrary to the position of the U.S. government. Such opinions require protection.

Canada Takes Military Abuses Seriously

61. Canada has high expectations of its own armed forces, and rigorously enforces and upholds the standards the interveners are urging this court to consider in this case. When reports of Canadian troops committing abuses in Somalia reached the Canadian government, a full federal inquiry was constituted to investigate and make recommendations.

See *Final Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*

62. In contrast, the U.S. government has been plagued by reports of abuses in Afghanistan, Iraq and in its offshore detention centres. According to official reports and non-governmental sources, referred to above, these abuses can be traced to deliberate policy on the part of the U.S. government to refuse to apply the Geneva Conventions to the armed conflict in Afghanistan, and a tacit approval of its suspension in detention centres in Iraq. Investigations conducted by the U.S. government have confirmed this official policy.

63. The interveners' submit that the IRB failed to consider all of the circumstances surrounding the systematic abuses by the U.S. military in Iraq and the U.S. government policy in

this regard. Instead, the IRB deferred to the U.S. government on the basis that the U.S. is an established and stable democracy, without undertaking an appropriate analysis of the facts.

64. By failing to explore the policy and conduct of the U.S. government and the upper echelons of military command, the IRB paid insufficient attention to the spirit of the *Charter*, particularly sections 7 and 15. The interveners submit that IRB failed to discharge its duty to interpret the *IRPA* through the lens of the rights contained in the *Charter* and those reflected in Canada's international human rights obligations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 6, 2006

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