Seen in Its True Light: Desertion as a Pure Political Crime

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Abstract

Individuals from democratic states who flee state prosecution and seek refugee status in Canada face significant challenges in obtaining asylum. There is a strong presumption that the legal system of their country of nationality will provide adequate procedural safeguards. This presumption extends to US military deserters who refused to serve in Iraq. The consequence is that numerous claimants have been denied over the past decade.

This article contends that where the feared prosecution relates to a political crime, there should not be a presumption of state protection. Furthermore, the article posits and discusses why desertion should constitute a pure political crime much like treason, sedition, or espionage. Lastly, the article argues, pursuant to United Nations policies, that such deserters should be able to obtain refugee status only where their desertion constitutes a refusal to be associated with military actions that are internationally condemned as contrary to the basic rules of human conduct.

Résumé

Les personnes originaires de pays démocratiques faisant face à des poursuites font face à plusieurs difficultés lorsqu'elles fuient leur pays et font une demande d'asile au Canada. Il y a en effet une forte présomption que le système légal de ces pays peut assurer une procédure judiciaire sécuritaire et équitable. Ces présomptions s'appliquent également dans le cas des militaires américains qui ont déserté pour éviter de servir en Irak. Plusieurs demandes d'asile ont par conséquent échoué pendant la dernière décennie. Cet article avance qu'il ne devrait pas y avoir de présomption de sécurité lorsque les procédures judiciaires relèvent de crimes politiques. De plus, on y argumente que la désertion devrait être considérée comme un véritable crime politique, tout comme le sont la trahison, la sédition et l'espionnage. Enfin, cet article montre, en accord avec les politiques des Nations Unies, que les déserteurs devraient obtenir le statut de réfugié seulement lorsque leur désertion consiste en un refus de participer à des manœuvres militaires qui sont internationalement condamnées en raison de principes moraux humains.

Introduction

Soldiers play important roles in the defence of their nation. However, there are reasonable legal limitations to what they should be expected to do in the name of defending their country or in combatting an internal insurgency against the state. The legal limitations can be located in international conventional and customary law as well as domestic law. Throughout history, and despite the presence and development of these norms over the past century, many governments (including those elected in democratic states) have required their soldiers to engage in armed conflict that is not defensive (despite claims to the contrary). In many other situations, even where the lawfulness of the armed conflict itself may not be in question, governing authorities have ordered soldiers to commit acts that are unlawful and in violation of the laws of war. Just as soldiers play an important role in defending their nation, they also serve an important function as legal agents by deserting the military as a way of refusing to (further) engage in unlawful actions that violate international norms. In these particular circumstances, they may be viewed as temporary and

context-dependent public office-holders at international law[1] stepping in to act where superiors, states, and/or the international community have failed to do so.

Nevertheless, desertion as a form of political resistance comes at a significant price to the principled military resister. Some will submit to the home state's punishment, while others will also legitimately seek asylum in other countries to avoid it. There is a logical reason why soldiers who desert in order to refuse participation in violations of international law seek protection from a third-party state. Deserting soldiers face prosecution and potentially severe punishment for their resistance. In some jurisdictions, this includes the possibility of a death sentence.[2] It is therefore a serious crime.[3] Are such individuals eligible for political asylum under international law? Indeed, soldiers who desert the military as an act of resistance to unlawful military actions and who then seek asylum in a third-party state to avoid prosecution as a form of persecution in their countries of nationality have been deemed eligible to obtain refugee status under the 1951 Convention Relating to the Status of Refugees[4] and/or the 1967 Protocol Relating to the Status of Refugees.[5] There is a fairly well-established jurisprudence confirming this.[6]

Not every foreign military resister has been able to obtain this protection in Canada, however. Soldiers from fellow democratic states who have sought refugee status in Canada, for example, have been largely unsuccessful. As I discuss in this article, this includes US soldiers who have deserted to avoid (further) participation in military operations in Iraq following the illegal invasion of the country in 2003. When military resisters seek refugee status to avoid prosecution and punishment, they must—like all other such asylum-seekers—prove that they have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion.[7] Yet demonstrating a fear of prosecution for desertion may not be easily conducive to showing a well-founded fear of persecution.[8] It is contingent on the proof of certain elements. Asylum-seekers must show, as part of a well-founded fear of persecution, that their country of nationality is unable to provide adequate protection.[9] In the case of US military resisters, many Canadian judges and adjudicators have determined that because the US military court system provides adequate protection through procedural safeguards, their claims for refugee status fail.[10] Typically, if sufficient state protection is unavailable, it must be determined whether the conduct that is alleged to be persecutory provides an objective basis for a well-founded fear of persecution.[11] This persecution must then also have a nexus to one of the above-mentioned convention grounds such as "political opinion." Political opinion has been defined under Canadian law as "any opinion on any matter in which the machinery of state, government, and policy may be engaged."[12] The notion of what constitutes the "political" is heavily tied to the state. While desertions may be politically motivated, not all deserters will be considered eligible for refugee status. However, the UNCHR *Handbook* provides that where a soldier refuses to be associated in a military action that is internationally condemned as contrary to the basic rules of human conduct, punishment for desertion can be viewed as persecution.[13] Although the UNCHR Handbook is not binding on states party to the Refugee Convention and/or Protocol, this above-mentioned provision has been applied numerous times in refugee cases relating to deserters and has become a recurring feature within the jurisprudence on deserters seeking refugee status.[14]

Given that state protection has been so critical to the denial of US war resisters seeking refugee status in Canada, in this article I focus on the analytical stage of assessing the existence or absence of state protection as part of the overall analysis of determining whether there is a well-founded fear of persecution. Flowing from the Hinzman decision of the Canadian Federal Court of Appeal,[15] Federal Court of Canada justices as well as panel members at the Immigration and Refugee Board have determined largely that there is a substantial presumption that because the United States is a democratic state, it protects its deserting soldiers by providing fair and impartial trials replete with procedural protections.[16] This approach has also received scholarly support from Patrick J. Glen, who contends, "U.S. deserters in Canada do not qualify as refugees under international or Canadian law, and should not be afforded such status no matter how much sympathy one may feel towards them."[17] For Glen (and likely many others), the "[d]eserters have committed a crime. Deserters' actions cannot be justified under any acceptable rubric of refugee law."[18]

In this article, I respectfully take a view different from Glen's and make three arguments with respect to these cases. First, there should be no presumption of state protection, even in democratic states where the fear of state prosecution relates to an offence such as desertion, which is in essence a (pure) political crime. Flowing from the underlying rationale for the political crimes exception rooted in international refugee law and extradition law, there is significant doubt that courts in the prosecuting state can be fair and impartial when the target of the crime is the state itself. Second, assuming that the fear of prosecution for political crimes eliminates the presumption of state protection accorded to courts in an asylum-seeker's country of nationality, I address whether military desertions are indeed "political crimes." As I elaborate in greater detail below, desertions are in essence political crimes, given that the main "victim" or

target of an act of desertion is the state. Furthermore, such desertions should be designated as "pure political crimes" akin to offences such as treason, sedition, and espionage. Third, I contend that even as a pure political crime, a desertion must still meet the test established in jurisprudence and formulated by the United Nations High Commissioner for Refugees (UNHCR). That is, the desertion is one that is committed to avoid association with military actions that are internationally condemned as contrary to the basic rules of human conduct as set out in paragraph 171 of the UNHCR *Handbook*.[19] Thus even if desertions should be more broadly viewed as pure political crimes as part of the state protection analysis, this will not mean that every such act will give rise to an individual obtaining refugee status if the requirements of paragraph 171 are not satisfied.

State Protection and Political Crimes

Underlying the concept of state protection is the belief that states have an obligation to protect their own citizens. Asylum-seekers must first seek protection from their own country of nationality before seeking "surrogate" protection from a third-party state.[20] Typically the expectation is that one must first seek protection from law enforcement or other appropriate agencies of the executive branch charged with enforcing the laws in the jurisdiction. This is particularly relevant where the agents of persecution are non-state actors or minor government actors acting perhaps in an unsanctioned manner. However, where the alleged agents of persecution are in fact law enforcement authorities themselves, where is the asylum-seeker to turn to? The jurisprudence indicates that where a well-founded fear of persecution relates to a prosecution for a crime, one is expected to turn to judicial authorities to ensure that a fair and impartial trial is held. Yet when the offence in question is political, that is to say a crime that is directed primarily at the state or government for the purpose of challenging its policies, the presumption of fairness and impartiality should not be taken for granted.[21]

The presumption of state protection as a basis for rejecting deserting US soldiers' claims for refugee status in Canada has been a recurrent issue in recent years.[22] This has been the case specifically for the numerous US soldiers who have refused to serve in Iraq and more recently includes those refusing to return to fight in Afghanistan. The main basis for their rejection has been the presumption that the United States, as a democratic state, provides sufficient state protection through procedural guarantees of fairness during trials, including military proceedings.[23] This then requires the asylum-seeker to provide "clear and convincing confirmation of a state's inability to protect."[24] Because the United States is presumed to be capable of protecting its own citizens, through the existence of an independent judiciary, asylum-seekers from the United States are deemed to bear a heavy burden in attempting to rebut the presumption that their state is incapable of protecting them.[25]

This poses an important question: can a legal system that can otherwise provide a fair and impartial trial in the prosecution of non-political offences prevent against individual and/or institutional biases that arise when the crime being prosecuted is inherently a political crime?[26] If it could, would it then not undermine the rationales underlying the political crimes doctrine that has developed both in extradition and refugee law? Although extradition law and refugee law serve and advance different purposes more generally, a common theme running through both legal regimes is the political crimes exception. At this stage it will be useful to consider these rationales and the relevance of the political crimes doctrine to refugee protection and state protection.

A central purpose of the political crimes exception, which developed in extradition law within the nineteenth century, was to protect individuals from being returned to jurisdictions where they may be subjected to unfair trials and punishments because of their political opinions that form the basis of their actions.[27] Prior to the creation of today's refugee protection system founded within the Refugee Convention and Protocol, extradition law's adoption of the political crimes exception effectively operated as a form of political asylum. As Lord Reid of the House of Lords once observed, the political crimes exception within the extradition context gave effect to the principle that asylum should be offered to political refugees.[28] Extradition law's protection for political refugees extends to today. Canada's Extradition Act, for instance, mandates that individuals shall not be extradited where the purpose of the extradition is to prosecute or punish individuals because of their "political opinion,"[29] or with respect to a "political offence or an offence of a political character."[30] Such protections do not exclude instances where the state seeking extradition is a democratic one.[31] The clear assumption underlying the political crimes exception is that states cannot provide fair trials in cases where the primary nature of the crime for which extradition is sought is political.

The political crimes exception has also become incorporated within the framework of international refugee law through Article 1F(b) of the Refugee Convention.[32] It states that the "provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee."[33] By its plain terms, the individual who is designated as having committed "serious non-political crimes" is the person whose exclusion is mandated, not the

political criminal or someone who has committed a less serious or minor non-political crime.[34] An underlying concern of the Convention's framers was with allowing criminals who have committed serious crimes to escape legitimate prosecution by claiming refugee status.[35] Through their examination of the drafting history of Article 1F(b), James Hathaway and Michelle Foster demonstrate that there was a strong correlation between political crimes within the extradition context and its expected role in the refugee protection regime.[36] Specifically, the framers were focused on preventing fugitives who committed serious non-political crimes from availing themselves of the protections offered in the Convention.[37] As Hathaway and Foster articulate, the "inclusion of the 'non-political crime' proviso thus furthers the general purpose of ensuring that only persons whose admission would threaten the integrity of the refugee protection system are excluded by Art. 1F(b)."[38] Since political criminals were not viewed as bona fide fugitives from justice, they did not pose such a threat.[39]

In addition to the drafting history, some courts have also emphasized the connection between the political crimes exception in extradition law and refugee law.[40] Indeed in the case of *Gil v Canada,* the Canadian Federal Court of Appeal, after extensively reviewing the political crimes extradition jurisprudence, adopted the legal test used in Anglo-American political crimes cases in extradition law for application in the Article 1F(b) context.[41]

It is worth observing that while the political crimes doctrine continues to exist, there have been significant international and domestic efforts to limit its scope, particularly where the use of violence has been employed. In many cases, various crimes are explicitly excluded as qualifying as a political crime, including murder.[42] This is regardless of the fact that the victim of such a crime may be a legitimate non-civilian target and the means employed were not disproportionate. Similarly, in other instances, broadly worded legislation within refugee law has specifically deemed individuals inadmissible for conduct that also involves any use of force, regardless of the nature of the target, the nature of the oppression being countered, or the proportionality of the means adopted.[43] However, despite these significant changes, military desertion has not been excluded explicitly and certainly does not qualify as being a violent crime.

Given this history of protecting political offenders, it seems reasonable that where the fear of state prosecution is for a political crime, the presumption of state protection should not come into play.[44] As noted above, the political crimes doctrine was created in part because there were serious doubts that the legal systems wherein the crimes took place could provide fair and impartial trials to political offenders. While it may not necessarily be the case that all states will be unable to provide adequate safeguards as part of their mandate to provide state protection, given that all refugees must meet the burden of establishing a well-founded fear of persecution (which necessarily includes a finding of inadequate state protection), those refugees who fear political persecution at the hands of the state should, almost by definition, have a less difficult time satisfying this burden.[45]

Where soldiers are involved, the prosecutions take place within the specific context of courts martial. Such courts are seldom interested in the political motivations of deserting soldiers and antagonistic to (at least) open demonstrations of disobedience and desertion.[46] There is an institutional bias within the military against desertions and disobedience, and it is reflected in legal norms.[47] Even where a military judge may view the conduct of the deserter sympathetically, there may be ramifications to such a jurist for legitimizing an act of desertion. In recent years, Federal Court of Canada decisions have held that US military judges lack adequate independence and thus may cater to the actual or perceived attitudes held by superiors toward deserters.[48] Specifically, such judges lack security of tenure and sufficient institutional independence.[49] As a general rule, tenure may be secured through fixed appointments and removal only for just cause. Institutional independence is marked by the tribunal's control over the day-to-day running of its functions. Both are missing in the US military court system and relevant to the issue of whether state protection exists. However, even assuming US military judges and courts had the indicia of independence, there is the inherent bias against desertion, given its political nature and the need to maintain the chain of command and discipline. This is why the political crimes exception ought to play a role in the analysis of state protection under Article 1A(2) of the Refugee Convention and invalidate a presumption of state protection.

Certain questions still remain. Even if a prosecution for a political crime should give rise to a negation of the presumption of state protection in the case of political crimes, is desertion considered a political crime as matter of law? If not, should it be?

Desertion: A Pure Political Crime?

In this section, I articulate why military desertions can and should be considered political crimes, specifically pure political crimes. At present they are not explicitly considered political crimes at all. As developed in extradition and refugee law, there is a recognized distinction between "pure" and "relative" political crimes. Pure political crimes are offences aimed directly at the state: treason, sedition, and espionage.[50] Such offences do not violate the private rights

of individuals.[51] By contrast, relative political offences are "common law offences" such as murder (that do affect, by implication, individual rights but), are motivated by political objectives.[52] As desertions do not implicate the rights of other individuals (at least directly), there cannot be any basis for designating them as relative political crimes.

Desertions should be considered pure political crimes because the main "victim" of the crime is the state. A desertion is essentially the refusal to (continue to) bear arms for the state (or other entity to which allegiance was given). Desertions bear a sufficiently close relationship to acts of treason, sedition, and espionage such that they should be considered pure political crimes. An examination of these three offences illustrates this point. Definitions of treason, sedition, and espionage are not uniformly worded. Yet the common element is the target of these crimes—the state. Treason includes armed attacks on the state or the attempt to overthrow the government.[53] Treason is also defined as attacks on the life of the head of state and significant public officials.[54] Sedition is designated as the advocacy to effect any governmental change through the use of force.[55] Espionage involves the disclosure of confidential or secret state information to another government without the permission of the state that holds the secret.[56] There will be instances where deserting soldiers or officials will engage in specifically treasonous or seditious acts as well as espionage after their defection, but the act of desertion itself is not included within the definitions of these specific crimes.

Although these offences are likely to be driven in part, if not in substantial measure, by the political motivation(s) of the perpetrator, the presence or absence of such motivation(s) is not necessary for an offender to qualify for the "pure" political crimes exception.[57] Feasibly, a paid assassin or mercenary who is not motivated by political objectives can still commit treason, sedition, or espionage that advances the cause of political freedom in a totalitarian state. There is nothing illegitimate about such hired persons advancing the goals of resistance to an oppressive government and their being granted protection to avoid a politically motivated and biased trial.

Drawing from the observations above, should desertions qualify as pure political crimes? Like the aforementioned offences, desertion is a crime against the state. A soldier who deserts at a time of armed conflict in particular deprives the government or ruling authority, at minimum, of an asset to fight an opposing force in the said conflict. If the soldier deserts for specific political reasons—for example, the refusal to advance the goals of an oppressive and/or illegal military action—it is no less a political crime than that of the "freedom fighter" who seeks to overthrow the government by force, who calls for the overthrow of the state through direct military action, or the spy who provides crucial data that will facilitate an attack on the oppressive government's defences or security network. Where the deserting soldier is of a higher rank, the government's interests may be further imperilled by the danger of other soldiers being influenced.[58] This is of particular concern to governments that rely on voluntary recruitment or conscript their personnel.

As with treason, sedition, and espionage, statutes defining desertion do not require that the political motivations of the accused constitute an element of the offence.[59] The subjective fault requirement is that the soldier intended to avoid his or her duties. Nevertheless, military desertions are inherently political acts. One may go so far as to say that regardless of the political reasons that an individual has deserted, the act of desertion from the military is and should be considered a political one by its very nature and its impact on the state as the "victim" or object of the offence. The Canadian Federal Court of Appeal has affirmed Guy S. Goodwin-Gill's position that "[m]ilitary service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority, it is a political act."[60]

Lastly, another factor that suggests that desertion should be considered a political crime is the fact it has not yet been considered a serious non-political crime. Or, put another way, soldiers seeking asylum have not been excluded from being designated refugees by virtue of their desertion, having been construed as a serious non-political crime. To recall, Article 1F(b) of the Refugee Convention requires exclusion where there are reasonable grounds to consider that an asylum-seeker has committed a serious non-political crime. Desertion is most certainly a serious offence, given the considerable penal consequences that may be imposed on a deserting soldier. If desertion is a serious non-political crime, it is curious that this has not been used to exclude soldiers seeking refugee status. It would surely be an easy way to exclude an individual without having to engage in an analysis of the claim for refugee status under Article 1A(2). It is a technique that decision-makers at the Immigration and Refugee Board have employed in other circumstances: exclusion under Article 1F(a) of the Convention.[61]

Interestingly, and in connection with deserting US soldiers who have avoided (re)deployment in Iraq, the use of Article 1F(b) could avoid the seemingly unnecessary (and potentially) embarrassing determination of whether the United States is a jurisdiction that fails to provide suitable legal protections. It focuses on the fact that the individual in question belongs to an excludable class of persons—criminals as a result of their act of desertion. The likely reason that

tribunals and courts do not exclude asylum-seekers on the basis of such a designation may well be the fact that they implicitly recognize such desertions, as well as others, for what they are: political crimes. This is particularly so when the desertion is the manifestation of a selective conscientious objection in accordance with paragraph 171 of the UNCHR *Handbook*.[62] All of this stands to reason that if desertion from the military during a time of armed conflict is a political crime (in addition to being designated a military crime too), this should give rise to concerns about the level of protection any state will practically be able to give during a criminal prosecution with respect to such a political criminal.

Paragraph 171 Desertions

It may cause consternation for some to regard desertions as "pure" political crimes as a matter of law, for the perception may be that it will open the floodgates for every military deserter to claim refugee status. Yet in order for deserters to secure refugee status, it must be shown that prosecution and any punishments that arise therefrom amount to persecution. That persecution must also be connected to a Convention ground, including political opinion. Not every desertion motivated by political opinions will justify the granting of refugee status. To recall, paragraph 171 of the UNCHR *Handbook* provides that

> [n]ot every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.[63]

As such, even if desertion is to be considered a pure political crime, within the context of an inclusion analysis under Article 1A(2) there is still the necessity to determine whether the well-founded fear of persecution has a nexus to, in this case, a political opinion. That political opinion, however, must also be connected to such military conduct that is condemned by the international community as contrary to the basic rules of human conduct.

Although paragraph 171 does not spell out what actions fall within its purview, case law from Canada and other jurisdictions has provided guidance. They include[64] the refusal to participate or assist in the prosecution of chemical warfare;[65] participate in an international armed conflict that was initiated without just cause;[66] take part in the murder of non-combatants;[67] fire onto an unarmed group of protestors;[68] engage in ethnic cleansing;[69] participate in systematic but non-grave breaches of international humanitarian law during the course of military operations;[70] arrest leaders of political parties and seize their property following a military coup d'état;[71] follow an order to engage in paid assassinations;[72] and participate in the persecution of an identified class of people based on race or some other prohibited ground.[73]

Paragraph 171 also indicates that the conduct objected to be internationally condemned as being contrary to the basic rules of human conduct. There is, however, no consensus as to what constitutes international condemnation. Two courts suggest that international condemnation may be established through explicit statements of condemnation. In its most restrictive incarnation, one US court has articulated that universal condemnation is evidenced through statements by international governmental bodies such as the United Nations.[74] Such an approach is problematic, since international bodies are fundamentally political, and states may be unwilling to openly criticize and censure other states. Doing so may hinder diplomatic relations or spark international tensions.[75] A Canadian court, by contrast, has articulated an alternative approach whereby international condemnation may be ascertained through a broader range of sources. These include the statements, writings, and documented reports of international non-governmental human rights organizations such as Amnesty International, Human Rights Watch, and others.[76]

Unlike the previous examples, others have questioned whether paragraph 171 requires such explicit condemnation by international intergovernmental or non-governmental organizations. Indeed, paragraph 171 indicates that condemnation by the international community is concerned with the "type of military action" that the individual refuses to be associated with.[77] The use of the words "type of" strongly suggests that condemnation by the international community can, for example, relate to the prohibited use of chemical or biological agents more generally without having to locate specific statements by international organizations about their particular use in a given context.[78] Hathaway rightly observes that "there is a range of military activity which is simply never permissible, in that violates basic international standards."[79] He asserts that these would include military actions perpetrated with the intent to "violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory."[80]

Some courts and tribunals in the United Kingdom take the position that evidence of condemnation by the

international community should merely be relevant but not a mandatory or determinative consideration.[81] In support, one UK tribunal decision suggested that to require condemnation by the international community for military deserter cases would be incongruous with the general approach applied in other refugee claims assessments.[82]

Amongst the various approaches articulated, the approach articulated by Hathaway and pursued by some Canadian courts is most consistent with the text of paragraph 171 and the humanitarian objectives of international law. Also, unlike the UK approach, the reference to condemnation of the international community as it appears in paragraph 171 does not seem to read as merely optional language. On the other hand, the need to establish international condemnation should not require specific and express condemnation of new outbreaks of international legal violations. As already articulated, certain "types of military conduct" have already been generally condemned by the international community through the signing and ratification of international conventions and the recognition of certain customary international legal prohibitions.

The high standard that paragraph 171 sets, however, is important. Military organizations must be able to maintain discipline and to rely on its personnel to obey orders. However, this requirement is not to be followed blindly in the commission of internationally condemned actions. Paragraph 171 furthers important norms and principles of international law and the recognition that individual soldiers have a responsibility to disobey orders in certain contexts.[83]

Once an applicant establishes that she or he has committed a "paragraph 171 desertion," it leads to considerable doubts that the state that perpetrates such internationally condemned conduct will give the deserting soldier a fair and impartial trial. Such states already demonstrate that they are willing to commit internationally condemned breaches of the basic rules of human conduct. It is at least likely that such states will fail to provide basic procedural protections with respect to deserting soldiers.

Conclusion

In this article, I have argued that deserters who seek refugee status face particular challenges in obtaining refugee status. There has been a presumption in Canadian law that such states provide basic guarantees of procedural protections in connection with prosecutions regarding desertion (or, for that matter, any crimes). I have argued that this presumption should not exist when the prosecution is for desertion, given that desertion is an inherently political crime. This article has argued that desertions can be characterized as a pure political crime, since the primary victim of the offence is the state. Lastly, even if desertions are considered pure political crimes, it must still be established that the desertion is in accordance with paragraph 171 of the *UNCHR Handbook*.

Notes

1 I am grateful to Evan Fox-Decent for this particular construction after reviewing my doctoral thesis as an examiner.

2 See e.g. *Uniform Code of Military Justice,* 10 USC s 885 [*UCMJ*] ("Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct" at s 885(c)).

3 For examples of what constitute serious crimes, see *Immigration and Refugee Protection Act,* SC 2001, c 27, ss 36–37 [*IRPA*].

4 Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [Refugee Convention].

5 Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) [Protocol].

6 See Amar Khoday, "Protecting Those Who Go Beyond The Law: Contemplating Refugee Status for Individuals Who Challenge Oppression Through Resistance" (2011) 25:3 Geo Immigr LJ 571.

7 Refugee Convention, *supra* note 4 at art 1A(2).

8 *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/Eng/Rev1 (1992) at para 171 [*Handbook*]. Even where the desertion is not deemed to be justified, where the punishment is disproportionate to the crime, the granting of refugee status may still be appropriate. *Ibid* at paras 12 and 169.

9 *Hinzman v Canada (Citizenship and Immigration),* 2007 FCA 171 at paras 42, 54, & 56, 282 DLR (4th) 413.

10 See e.g. *ibid*; *Landry v Canada (Citizenship and Immigration),* 2009 FC 594; *Colby v Canada (Citizenship and Immigration),* 2008 FC 805; *Key* (*Re*), 2010 CarswellNat 4288 (WL Can), 2010 CanLII 62705 (IRB); *X (Re),* 2009 CanLII 47118 (IRB); *X (Re),* 2007 CanLII 71037 (IRB); *X (Re),* 2007 CanLII 57310 (IRB); *X (Re),* 2012 CanLII 95533 (IRB); *X (Re),* 2010 CanLII 98045 (IRB).

11 *Ibid* at para 42.

12 See *Canada (Attorney General) v Ward,* [1993] 2 SCR 689 at 746, 103 DLR (4th) 1 [*Ward*].

13 *Handbook, supra* note 8 at para 171.

14 See Khoday, *supra* note 6.

15 *Hinzman, supra* note 9 at paras 46–57.

16 See *supra* note 10.

17 Patrick J Glen, "Judicial Judgment of the Iraq War: United States Armed Forces Deserters and the Issue of Refugee Status" (2009) 26 Wis Int'l LJ 965 at 1031.

18 *Ibid.*
19 *Handbook, supra* note 8.
20 See *Ward, supra* note 12 at 709; James C Hathaway and Michelle Foster, *The Law of Refugee Status* 2d ed (Cambridge: Cambridge University Press, 2014) at 292–295.
21 There is no single definition of what constitutes a political crime. For some jurists, political crimes may extend to non-state targets. See *Minister for Immigration and Multicultural Affairs v Singh,* [2002] HCA 7, 209 CLR 533 at 553, Gaudron J.
22 See *supra* note 10.
23 As the Canadian Federal Court of Appeal observed, "[T]he United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process." *Hinzman, supra* note 9 at para 46. The Court also posited that US military service members who deserted and faced prosecution would have their rights respected within a "sophisticated military justice system." *Ibid* at paras 49 and 57.
24 *Ward, supra* note 12 at para 57; *Hinzman, supra* note 9 at para 44.
25 *Hinzman, supra* note 9 at para 46.
26 Even in the prosecution of serious non-political offences, Canadian courts have allowed evidence procured by very questionable police tactics until very recently. See *R v Hart,* 2014 SCC 52.
27 See *Quinn v Robinson,* 783 F 2d 776 at 792 (9th Cir 1986).
28 *Schtracks v Government of Israel and Others,* [1964] AC 556, [1962] 3 All ER 529.
29 *Extradition Act,* SC 1999, c 18, s 44(1)(b).
30 *Ibid*, s 46.
31 *United States v Pitawanakwat,* 120 F Supp 2d 921 (D Oregon 2000) (refusing to extradite First Nations individual to Canada on the basis of the political crimes exception).
32 Hathaway and Foster, *supra* note 20 at 554–562.
33 Refugee Convention, *supra* note 4, art 1F(b).
34 *Handbook, supra* note 8 at para 151. See also Hathaway and Foster, *supra* note 20 at 540–542.
35 *Handbook, supra* note 8 at para 151.
36 Hathaway and Foster, *supra* note 20 at 540–542.
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*
40 *Ibid* at 554–555.
41 *Gil v Canada,* [1995] 1 FC 508, 119 DLR (4th) 497. Notably, however, the Federal Court of Appeal has since adopted a different test for Article 1F(b) political crimes. See *Sing v Canada (Minister of Citizenship and Immigration),* 2005 FCA 125 at para 62, 253 DLR (4th) 606.
42 It is worth noting that while Canadian, Australian, and European law has curtailed the scope of the political crimes exception in extradition law to exclude violent crimes such as murder and terrorist acts, this has not been extended to non-violent crimes or crimes such as desertion. See e.g. *Extradition Act, supra* note 29, s 46; *Extradition Act 1988* (Cth), s 5; European Convention on the Suppression of Terrorism, 27 January 1977, 1137 UNTS 93 art 1 (entered into force 4 August 1978).
43 See e.g. *IRPA, supra* note 3, s 34(1)(b).
44 Furthermore, as Hathaway and Foster assert, there are strong arguments against the presumption more broadly and not limited just to the issue of political crimes. See Hathaway and Foster, *supra* note 20 at 319–323.
45 I am thankful to one of the peer reviewers for this observation.
46 See e.g. *US v Huet-Vaughn,* 43 MJ 105 (Armed Forces CA, 1995).
47 See Mark J Osiel, *Obeying Orders* (London: Transaction, 1999) at 41–89. See also *National Defence Act,* RSC 1985, c N-5, s 88(2); *UCMJ, supra* note 2, s 885.
48 *Tindungan v Minister of Citizenship and Immigration,* 2013 FC 115 at paras 144–159, 426 FTR 200; *Vassey v Minister of Citizenship and Immigration,* 2011 FC 899, [2013] 1 FCR 522; *Smith v Canada,* 2009 FC 1194 at paras 85–87, [2011] 1 FCR 36 ("It is clear that in the Army reigns an atmosphere of unconditional obedience to the hierarchy" at para 43). However *cf RB (Algeria) (FC) and Another (Appellants) v Secretary of State for the Home Department (Respondent),* [2009] UKHL 10.
49 *Tindungan, supra* note 48; Eugene R Fidell, "Military Judges and Military Justice: The Path to Judicial Independence" (1990) 74 Judicature 14; Eugene R Fidell, "Military Law" (2011) 140:3 Daedalus 1.
50 *Quinn, supra* note 27 at 793; *Singh, supra* note 21 at 550; Refugee Appeal No 29/91, *Re SK*, [1992] NZRSAA 3; *Dutton v O'Shane,* [2003] FCAFC 195 at para 186, 132 FCR 35; *T v Secretary of State for the Home Department,* [1996] 2 All ER 865 at 875, [1996] AC 742; *Republic of Namibia v Alfred and Others,* 2004 (2) BLR 101 (CA).
51 *Ibid.*
52 *Ibid* at 794.
53 *Criminal Code,* RSC 1985, c C-46, ss 46–47.
54 *Ibid.*
55 *National Defence Act, supra* note 47, s 82. See also *Criminal Code Act of 1995* (Cth), s 80.2. In India, it is defined more broadly as exciting disaffection or inciting contempt or hatred against the government. *Indian Penal Code, 1860,* s 124A.
56 Under Canadian law, this is considered an act of treason. *Criminal Code, supra* note 53, s 46(2)(b).
57 As I discuss below, however, the presence of political motivation will be key with respect to relative political crimes.
58 Carol Morello, "For One Syrian Officer, a Months-Long Wait for the Chance to Defect to Turkey" *The Washington Post* (12 January 2013), online: <http://www.washingtonpost.com>; Olga Khazan, "A Defector's Tale: Assad's Reluctant Army" *The Washington Post* (9 January 2013), online: <http://www.washingtonpost.com>.

59 See Canada's *National Defence Act*, which provides that desertion is the intentional act of being absent from military service without authority. *National Defence Act, supra* note 47, s 88(2). The United States *Uniform Code of Military Justice* establishes that it is (1) the intentional act of being or remaining permanently absent from one's unit, organization, or place of duty; or (2) the act of quitting one's unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service. *UCMJ, supra* note 2, s 885.

60 *Zolfagharkhani v Canada (Minister of Employment and Immigration),* [1993] 3 FC 540, 20 Imm LR (2d) 1, 1993 CarswellNat 89 at para 32 (WL Can) (FCA) [emphasis added]. See also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 3d ed (New York: Oxford University Press, 2007) at 111.

61 See e.g. *Merceron v Canada (Minister of Citizenship & Immigration),* 2007 FC 265, 316 FTR 273.

62 *Handbook, supra* note 8 at para 171.

63 *Ibid.*

64 In a number of selective conscientious objector decisions, courts and tribunals may not explicitly refer to the provisions of paragraph 171 for guidance, but in their decisions they indicate nevertheless that the orders that the resister refuses to perform are unlawful and implicitly violate the basic rules of human conduct. Some of these are included below.

65 *Zolfagharkhani, supra* note 60.

66 *Al-Maisri v Canada (Minister of Employment and Immigration),* 183 NR 234, 1995 CarswellNat 133 (WL Can) (FCA). *See also Re Le,* 1994 CarswellNat 2901 (WL Can) (Imm & Ref Bd (Ref Div)).

67 *Abarca v Canada (Minister of Employment & Immigration),* 1986 CarswellNat 867 (WL Can) (Imm App Bd); *Phong v Director of Immigration,* [1997] HKCFI 284.

68 Commission des Recours des Réfugiés [CRR] [Refugee Appeals Board] 5 July 2007, No 597325, I.

69 *Vujisic v INS,* 224 F 3d 578 (7th Cir 2000); *Ciric v Canada (Minister of Employment & Immigration),* [1994] 2 FC 65, 71 FTR 300, 1993 CarswellNat 188 at para 3 (WL Can) (FCTD).

70 *Key v Canada (Minister of Citizenship and Immigration),* 2008 FC 838 at paras 14 and 20, [2009] 2 FCR 625.

71 *Mohamed v Canada (Minister of Employment & Immigration),* 176 NR 60, 1994 CarswellNat 1848 (WL Can) (FCA).

72 *Barraza Rivera v INS,* 913 F 2d 1443 (9th Cir 1990).

73 *Tagaga v INS*, 228 F 3d 1030 (9th Cir 2000); Refugee Appeal No 2248/94 *Re ZH* (NZ Refugee Status App Auth 1995).

74 See *MA v INS*, 899 F 2d 304 at 312 (4th Cir 1990). The court's position in this respect was also supported by one scholarly commentator. See Kevin J Kuzas, "Asylum for Unrecognized Conscientious Objectors to Military Service: Is There a Right Not to Fight?" (1991) 31 Va J Int'l L 447 at 472–473.

75 *Key, supra* note 70 (stating that "there are many reasons for countries to be reticent to criticize the decisions or conduct of an ally or a significant trading partner even where the impugned actions would, in some other political context, draw widespread international condemnation" at para 21). During the Vietnam War, thousands of draft-evaders fled to Canada in order to avoid conscription or criminal prosecution for evading the draft. Rather than having status granted through the asylum process, applications were processed through the regular immigration routes, with the result that many draft-evaders eventually obtained Canadian citizenship. Although in so doing Canada effectively endorsed this form of resistance, it did so under the cover of granting immigration status rather than as a statement that the United States was engaging in acts of persecution. However, the true intent of the actions was reflected in Prime Minister Pierre Trudeau's statement, "Canada should be refuge from militarism." See Frank Kusch, *All American Boys: Draft Dodgers in Canada from the Vietnam War* (London: Praeger, 2001) at 94–97.

76 See *Ciric*, *supra* note 69.

77 *Key*, *supra* note 70 ("Article 171 of the UNHCR Handbook speaks of the need for international condemnation for 'the type of military action' which the individual finds objectionable. Thus, even where the response of the international community is muted with respect to objectionable military conduct, the grant of refugee protection may still be available where it is shown that the impugned conduct is, in an objective sense and viewed in isolation from its political context, contrary to the basic rules or norms of human conduct" at para 21).

78 *Zolfagharkhani*, *supra* note 60 at paras 29–31.

79 James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworth, 1991) at 180.

80 *Ibid* at 180–181.

81 See *Krotov v Secretary of State for the Home Department*, [2004] EWCA Civ 69 at para 48, [2004] 1 WLR 1825 (Eng CA); *Lebedev v Canada*, 2007 FC 207 at para 70, 62 Imm LR (3d) 161.

82 *Foughali v Secretary of State for the Home Department*, 2 June 2000 [00/TH/01513].

83 *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 5 UN GAOR Supp (No. 12) at 11, UN Doc A/1316 (1950). See in particular Principle IV, which reads, "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

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