Conscientious Objection and Refusal to Perform Military Service

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There is no specific provision for draft evaders, deserters and conscientious objectors in either the *1951 Geneva Convention* or the *Immigration and Refugee Protection Act* of Canada for recognition as Convention refugees. However, as James Hathaway notes, "Persons who claim refugee status on the basis of a refusal to perform military service are neither refugees per se nor excluded from protection."[1]

In Canada today it is clearly established in law that "conscientious objection" to compulsory military service and the refusal to serve in the military is a basis for recognition as a Convention refugee where that military service is fundamentally illegitimate as when it leads to participation in violations of human rights or violates the general principles of international law.[2] As Hathaway argues, refusal to serve in the military where it is tied to political opinion that is opposed to the actions and policies of a government that is attempting to enforce compulsory conscription is a valid basis for grounding a claim for refugee status.[3]

The leading case on "conscientious objection" and refugee law in Canada is *Zolfagharkhani*.[4] To quote one Federal Court Judge:

> [11] The seminal case regarding what has been termed "conscientious objection" is *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (C.A.), which articulates the analytical framework for determination of the issue of whether refusal to comply with a law of

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[1]James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1991), p. 179.

[2]See also Edward C. Corrigan, "Refusal to Perform Military Service as a Basis for Refugee Claims in Canada," (2000) 8 Imm. L.R. (3d) 272.

[3]Hathaway, *supra*, p. 179; *UNHCR Handbook*, para. 168; *Abarca v. Canada (Minister of Employment & Immigration)* (1986), 1986 CarswellNat 867 (Imm. App. Bd.).

[4]*Zolfagharkhani v. Canada (Minister of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 1, [1993] 3 F.C. 540 (Fed. C.A.).

> general application would result in prosecution or persecution by the state in question.[5]

In *Zolfagharkhani* a member of the Iranian military who had served two years in the Iranian Army fighting the Iraqi invasion of his country deserted the Iranian Army when he was informed that the Iranian military was planning to use poison gas against a Kurdish rebellion. He was being trained as a paramedic and for treating patients affected by chemical weapons.

According to many authorities there is a higher obligation than blind obedience to authority. Military service sometimes forces conscripts, and even volunteers, to violate human rights and international law. This reality presents the soldier with the choice of violating the law of his country and risking punishment or continuing to serve in the military and being forced to commit violations of international law. As Hathaway argues:

> There is a range of military activity which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory. Where an individual refuses to perform military service which offends fundamental standards of this sort, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.[6]

Another noted authority, Gilbert Jaeger, writes:

> . . .a broad perception in democratic countries is that there is considerable difference between military service by consent, instituted according to democratic legislative process and called upon to defend the life of a democratic society, on the one hand, and on the other hand, military service in a dictatorial or quasi-dictatorial regime called upon to defend institutions and policies unrelated to accepted human rights standards or, even worse, utilized for internal or external aggression. . . [T]he right to refuse military service on account of its illegitimate political purpose. . .is formally acknowledged by the UN General Assembly; such refusal qualifies an individual for the grant of asylum and refugee status.[7]

In the Federal Court of Appeal decision *Zolfagharkhani*, Mr. Justice MacGuigan, writing for the Court, reviewed the law on conscientious objection and the refusal to perform military service and in particular the Federal Court decision

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[5]*El Kasim v. Canada (Minister of Citizenship & Immigration)*, 2002 FCT 1087 (Fed. T.D.).

[6]Hathaway, *supra*, pp. 180-181.

[7]Gilbert Jaeger, "The Definition of 'Refugee': Restrictive verus Expanding Trends", [1983] *World Refugee Survey* 5 at 7.

Musial[8]. Until *Zolfagharkhani* was issued by the Federal Court of Appeal *Musial* was then considered the leading case on conscientious objection and refusal to perform military service. To quote Mr. Justice MacGuigan's analysis of *Musial*:

> The "liberal interpretation" of the definition of the word "refugee" appears to me to be incompatible with the requirement of that definition that a refugee have "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion". A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it. In my opinion, therefore, the Board was right in assuming that a person who has violated the laws of his country of origin by evading ordinary military service, and who merely fears prosecution and punishment for that offence in accordance with those laws, cannot be said to fear persecution for his political opinions even if he was prompted to commit that offence by his political beliefs.[9]

Mr. Justice MacGuigan continued in his analysis:

> [12] This decision has, I think, often been taken by the Board to establish the proposition that, where a government is merely enforcing "an ordinary law of general application", it cannot be guilty of persecution but is merely engaging in prosecution. With respect, I believe that to be only a half-proposition, and in any event one not asserted by Pratte J.A. Since any given ordinary law of general application in a dictatorial or totalitarian state may well be an act of political oppression, I believe it is self-evident that such an absolute proposition of prosecution, not persecution, could not be supported in relation to the majority of countries from which refugee cases arise.
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> [13] The essence of the reasoning of Pratte J.A. in *Musial*, as it appears to me, is rather that the mental element which is decisive for the existence of persecution is that of the government, not that of the refugee. In the statutory definition of a Convention refugee as a person who "by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion", the key words in this context are "persecution for", which have reference to the state of mind of the active party, the persecutor, rather than to that of the "persecuted." Probably all fanatic assassins in the world today have as their motivation political, religious, racial, nationalistic or group reasons, but they cannot be refugees if the action which is taken against them by a government is not itself for similar reasons. Accordingly, this Court has held that a claimant has a well-founded fear of persecution if, however unreasonably, his act appears to his government to be an expression of political opinion on his part:

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[8]*Musial v. Canada (Minister of Employment & Immigration)*, [1982] 1 F.C. 290, 38 N.R. 55 (Fed. C.A.).

[9]*Zolfagharkhani*, *supra*, para 11.

> *Astudillo v. Minister of Employment and Immigration* (1979), 31 N.R. 121 (F.C.A.); *Hilo v. Minister of Employment and Immigration* (1991), 130 N.R. 236 (F.C.A.).
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> [14] Of course, the statutory definition of Convention refugee also speaks of "fear", and this Court has also held that, to qualify as a refugee, there must be subjective fear on the part of a refugee claimant. Such a subjective element may make all of a claimant's motives relevant, in that context, but it cannot make them determinative as to the existence of persecution.
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> [15] It is worth noting that in the final paragraph of his reasons set out supra, Pratte J.A. was responding to the sweeping assertion that punishment for evading military service must be considered as persecution for political opinions *in all cases* where the refusal to perform military duties is motivated by political opinion. To such an extreme argument there can be only one answer, that a claimant's political motivation cannot alone govern any decision as to refugee status. In my opinion, that was the only issue decided, and the majority decision in *Musial* does not establish any general proposition as to an ordinary law of general application.[10]

Mr. Justice MacGuigan then went on to consider the concurring reasons of Chief Justice Thurlow. He noted that Thurlow C.J.C. "perhaps pointed the way to a fuller development of the law at pages 292-293 of *Musial*":

> While there may be sympathy for the applicant's attitude and for his plight, I do not think the case is one of the Board having failed to consider the applicant's motives or of its having ruled that such motives were not relevant. While the Board's reasons, which were dated some three weeks after the decision was pronounced, are perhaps ineptly expressed and give the impression that in the Board's view army deserters and conscientious objectors do not fall within the definition, I do not read the reasons as meaning anything more than that army deserters and conscientious objectors are not as such within the definition. That is, as I see it, far from saying that because a person is an army deserter or a conscientious objector he cannot be a Convention refugee and I do not think the Board has made any such ruling. What the Board appears to me to have done is to point out that army deserters and conscientious objectors are not dealt with as such by the definition and then to go on to consider the applicant's case on its merits, including the applicant's motives, and to conclude that in the case before it, the applicant's objection to serving in Afghanistan, if called upon to do so, was not sufficient to differentiate his case from the case of any other draft evader and thus to form its opinion that there were not reasonable grounds to

[10] *Ibid*., paras. 12-15.

> believe that the applicant's claim for Convention refugee status could be established.
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> In the view of the then Chief Justice, conscientious objectors or army deserters are no more automatically excluded from being Convention refugees than they are necessarily included.[11]

Justice MacGuigan also reviewed some of the recent Federal Court decisions on the question of conscientious objection and refusal to do military service. He also addressed the issue of "an ordinary law of general application."

> [17] Recent decisions of this Court carry us further. In *Padilla v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 1 (F.C.A.), where the Board found that the claimant had deserted from the El Salvadoran army by reason of conscientious objection, but nevertheless held (presumably because of the existence of an ordinary law of general application) that his fear was of prosecution rather than persecution, the Court reversed, because the Board had taken a foreshortened view, in terms of the letter of the law. In *Cheung v. Canada (Minister of Employment & Immigration)*, [1993] 2 F.C. 314 (C.A.), where the Board held against the existence of a well-founded fear of forced sterilization under China's one-child policy, because that policy amounted to a law of general application whose clear objective was not persecution but general population control, this Court again refused to accept that the mere invocation of an ordinary law of general application negatived the possibility of persecution by the government.[12]

Justice MacGuigan, after his careful review of the current state of the law, then set out four general propositions relating to the status of "an ordinary law of general application" in determining the question of persecution and refugee protection:

> (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
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> (2) But the neutrality of an ordinary law of general application, vis-à-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
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> (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.

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[11] *Ibid*., para. 16.

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

> (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.[13]

Justice MacGuigan also cited with favour section 171 of the *UNHCR Handbook*.

> *The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1988, paragraph 171, states:
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> > Where . . . the type of military action, with which an individual does not wish to be associated, is condemned by the international legal community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could . . . in itself be regarded as persecution.[14]

Justice MacGuigan concluded:

> In my view, that is precisely the situation in the case at bar. The probable use of chemical weapons, which the Board accepts as a fact, is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion.[15]

The Federal Court of Appeal also addressed the issue of conscientious objection due to religious belief in *Rostamzadeh-Jahan*.[16] In that case the Federal Court of Appeal dealt with a refugee claimant who did not want to serve in the Iranian Army because it was at war with Iraq. He was a Muslim and stated that his religious conviction was that Muslims should not kill one another:

> Because even in the principles of the religion, in the Holy Book of Kiran, it doesn't say that two brothers because of their religious relation they can fight.[17]

The Federal Court of Appeal Court held, per Desjardins J.A.:

> [7] Although the appellant did not explicitly refer to the fact that he may have been a conscientious objector, the Board members understood him to say that "it would be contrary to his religious belief to fight in the war."

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[13] *Ibid*., paras. 19-22.

[14] *Ibid*., para. 30.

[15] *Ibid*.

[16] *Rostamzadeh-Jahan v. Canada (Minister of Employment & Immigration)* (1993), 1993 CarswellNat 263, [1993] F.C.J. No. 23, 150 N.R. 318 (Fed. C.A.).

[17] *Ibid*., para. 6.

Yet they concluded that:

> No evidence was introduced to establish that the claimant has a well-founded fear of persecution for reasons of his religion or that he was prevented from practising his religion.
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> [8] The Board, in our view, erred in rejecting that part of his claim which dealt with religion, on the basis that there was no evidence. In view of the appellant's testimony, the Board was bound to consider the evidence before them and decide the claim. They erred in law in failing to do so.[18]

The Federal Court of Appeal, in a short and rather perfunctory decision, also addressed conscientious objection in *Ates*. They were considering a Certified Question of General Importance. The entire reasons are reproduced below:

> [1] In a country where military service is compulsory, and there is no alternative thereto, do repeated prosecutions and incarcerations of a conscientious objector for the offence of refusing to do his military service, constitute persecution based on a Convention refugee ground?
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> [2] We would answer this question in the negative. This appeal will be dismissed.[19]

A summary of the facts in *Ates*, taken from the Federal Court decision which rejected his application for judicial review, is as follows:

> [8] Without having sought asylum in the USA, he came to Canada in May 2001, whereupon he immediately claimed refugee status. In addition to recounting the above facts in his Personal Information Form, he stated that military service was compulsory in Turkey but he did not serve as students are deferred. Some months after arriving here he received his call-up notice, which he has ignored. However, if he were returned to Turkey, he would likely be jailed as a draft dodger. His sense of pacifism is such that he will not bear arms in any circumstances. Apparently, no alternative service is available for conscientious objectors. Even if he were to serve he fears persecution by the military because he is both a Kurd and an Islamist.[20]

The United Nations High Commissioner for Refugees Handbook

As noted in the seminal *Ward* decision of the Supreme Court of Canada, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*

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[18]*Ibid*., para. 7-8.

[19]*Ates v. Canada (Minister of Citizenship & Immigration)*, [2005] F.C.J. No. 1661 (F.C.A.), paras. 1-2.

[20]*Ates v. Canada (Minister of Citizenship & Immigration)*, [2004] F.C.J. No. 1599 (F.C.), para. 8.

is another important source for refugee law. To quote the Supreme Court of Canada:

> A much-cited guide on this question is . . . the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*. While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states.[21]

To quote *Lebedev* on the *UNHCR Handbook*:

> [28] While not binding on this Court, the *UNHCR Handbook* is a useful starting point in trying to interpret the Convention. As Justice Gérard La Forest stated in *Chan*, above, at paragraph 46, it "must be treated as a highly relevant authority in considering refugee admission practices."[22]

The *UNHCR Handbook* specifically deals with the issue of deserters, persons avoiding military service and the issue of conscientious objection. The relevant parts on avoiding military service and conscientious objection, sections 167 through 174 of the *UNHCR Handbook*, are reproduced below:

> **Deserters and Persons Avoiding Military Service**
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> 167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.
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> 168. 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. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.
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> 169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The

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[21] *Ward v. Canada (Minister of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 85 (S.C.C.), para. 34.

[22] *Lebedev v. Canada (Minister of Citizenship & Immigration)* (2007), 62 Imm. L.R. (3d) 161 (F.C.), para. 28.

same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

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

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

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.24 In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that

> he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

Several Cases of Interest

Al-Maisri[23] also deals with a refusal to perform military service. The applicant, Al-Maisri, was from Yemen. He deserted the army because he did not want to contribute to Yemen's support of Saddam Hussein's invasion of Kuwait. Al-Maisri lost his refugee hearing at the IRB. The board acknowledged that the United Nations had condemned the Iraqi invasion of Kuwait and also condemned the ways in which the Kuwaiti population was being mistreated. The IRB Panel, however, held this was not enough to be considered international condemnation because the United Nations "did not condemn the Iraqi's actions as being contrary to the basic rules of human conduct."[24] After describing the board's logic as "cryptic," the Federal Court of Appeal allowed Mr. Al-Maisri's appeal. The Federal Court of Appeal concluded that the board erred by finding Iraq's actions were not contrary to the basic rules of human conduct.[25]

The Federal Court also considered the issue of refusal to serve in the military in *El Kasim*. The facts involved an Iraqi citizen and his son who refused to serve in Saddam Hussein's army. They also refused to buy their way out of compulsory military service in Iraq because it would provide support to Saddam Hussein's regime, which they strongly opposed. Madame Justice Layden-Stevenson made the following comments in granting the application for judicial review.

> [10] The documentary evidence before the CRDD revealed that Iraqis who fail to serve in the military are subject to life imprisonment and those who criticize or fail to support Saddam Hussein are subject to punishment, which can include the death penalty. Although the panel viewed "buying out" as distinct from "serving", it appears to me that it is a reasonable inference that if one refuses to pay, the ultimate result is that the person has not served. The panel did not address this question.
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> [11] The seminal case regarding what has been termed "conscientious objection" is *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (C.A.), which articulates the analytical framework for determination of the issue of whether refusal to comply with a law of

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[23]*Al-Maisri v. Canada (Minister of Employment & Immigration)*, [1995] F.C.J. No. 642 (Fed. C.A.).

[24]*Ibid*. para. 4.

[25]*Ibid*., para 6.

> general application would result in prosecution or persecution by the state in question.
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> [12] In my view, the question to be addressed, in the circumstances of this particular matter, is whether the applicant's opposition to payment constituted a political act or opinion which could result in persecution within the meaning of the Convention. The CRDD failed to address it.
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> [13] I am mindful of the fact that the onus is on the applicant to establish that he falls within one of the enumerated grounds on the basis of both a subjective as well as an objective fear of persecution. Here, the evidence of the applicant as well as the documentary evidence before the panel should have alerted the panel to the necessity of analysing the evidence in accordance with the framework set out in Zolfagharkhani, supra, to determine what the ultimate effect of the application of the law in question would be with respect to the applicant. In failing to do so, the CRDD erred in law.[26]

In *Ozunal*, Mr. Justice Michel Shore, of the Federal Court, refused an application for judicial review. He found that the Turkish applicant would not be forced to participate in any condemned military activities. In assessing whether Mr. Ozunal was a conscientious objector, Justice Shore wrote:

> [17] As a conscientious objector, Mr. Ozunal was required to demonstrate not only the possession of such conviction but also the existence of a reasonable chance that he, if conscripted, would be required to participate in military activities considered illegitimate under existing international standards.[27]

In *Lebedev* the Federal Court considered a decision where the refugee claimant was a deserter from the Russian Army who refused to serve in Chechnya. This case dealt with a refusal to grant a Pre-Removal Risk Assessment (PRRA).[28] However, to quote Justice de Montigny, "I have dedicated a good portion of my reasons to the issue of conscientious objection. This issue has been the subject of confusion and inconsistent treatment over the years. Thus, while it raises largely hypothetical questions in the context of Mr. Lebedev's case, in my view those questions are important enough to warrant the Court's attention."[29] The Federal Court Judge summarized the grounds for making a refugee claim based on a refusal to serve in the military as follows:

> [14] Thus, an applicant generally cannot claim refugee status under the *United Nations Convention Relating to the Status of Refugees* (the Conven-

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[26]*El Kasim*, *supra*, paras. 10-13.

[27]*Ozunal v. Canada (Minister of Citizenship & Immigration)* (2006), 291 F.T.R. 305 (Eng.) (F.C.), para. 17.

[28]*Lebedev*, *supra*, paras. 3-11.

[29]*Ibid*., para. 2.

> tion) — and accordingly, under s. 96 of the *IRPA*, just because he does not want to serve in his country's army. According to Hathaway, however, there are three exceptions to the general rule above. First, military evasion might have a nexus to a Convention ground if conscription for a legitimate and lawful purpose is conducted in a discriminatory way, or if the punishment for desertion is biased in relation to a Convention ground. Second, evasion might lead to Convention refugee status if it reflects an implied political opinion that the military service is fundamentally illegitimate under international law. Hathaway describes this as "military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory" (Hathaway, above, at pages 180-181). The third and final exception applies to those with "principled objections" to military service, more widely known as "conscientious objectors".[30]

Justice de Montigny analyzed the current state of the law on conscientious objection and the refusal to perform military service. His discussion is most thorough and it is useful to review his detailed analysis of the law:

> [22] In the last 10 or 15 years, both in Canada and other western countries, there has been a growing body of jurisprudence on military service evasion as a ground for refugee protection. While there are still contentious issues, which I will discuss shortly, a consensus is also emerging that if freedom of conscience and opinion is to be taken seriously, it must inform the way we deal with refugee claimants who have fled their countries of origin because they object to military service.
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> [23] Most recently, Justice Anne Mactavish canvassed these issues in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420; aff'd 2007 FCA 171. She aptly summarized the applicable principles after dealing with the relevant Canadian and foreign case law most comprehensively, as well as the leading textbooks on the subject. As will become evident throughout these reasons, I am much indebted to her analysis and I share most of her views.
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> [24] Having said this, the Federal Court of Appeal recently declined to answer the certified question in *Hinzman*, above. It affirmed Justice Mactavish's decision on the narrow basis that the applicant had not made enough of an attempt to access potential protective mechanisms in the U.S. As a result, there is still no definitive pronouncement on how to properly interpret paragraph 171 of the *UNHCR Handbook* — and particularly, whether the unlawfulness of a given conflict is relevant to the refugee claim of an ordinary foot soldier.
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> [25] Before proceeding any further, it is important to go back to the basics. Section 96 of the *IRPA* states that a Convention refugee must have a "well-founded fear of persecution for reasons of race, religion, nationality, mem-

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[30] *Ibid*., para. 14.

> bership in a particular social group or political opinion." It is not at all clear from reading s. 96 of the *IRPA* — and for that matter, the definition of "Convention Refugee" at s. 2(1) of the former Immigration Act, what a "well-founded fear of persecution" means. But the Supreme Court of Canada stated, in *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 [Chan] at paragraph 70, that "[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way". A decision-maker must therefore consider whether forced military service per se, without any possibility for alternative service, constitutes a denial of a core human right. Of course, the punishment for the individual who evades compulsory military service will have to be severe enough to amount to persecution. Moreover, the persecution must be based on one of the five enumerated grounds in s. 96 of the *IRPA*, and state protection must be unavailable.[31]

The Federal Court Judge in *Lebedev* wrote the following on the question of violating a "law of general application":

> [26] Generally speaking, punishment for violating a law of general application amounts to prosecution, not persecution. In *Musial v. Minister of Employment and Immigration*, [1982] 1 F.C. 290 [*Musial*], the Federal Court of Appeal held that a claimant's reasons for refusing military service were irrelevant. Fear of prosecution and punishment for one's offence, even if based on political beliefs, could not transform the punishment for draft evasion into persecution.
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> [27] As we shall see, the Federal Court of Appeal later distinguished and qualified its reasons in *Musial*, above, in a number of ways. It is now accepted that compulsory military service may, in some circumstances, support a claim of persecution under s. 96 of the *IRPA*. Indeed, the UNHCR Handbook explicitly provides for that possibility. First, paragraph 167 of the Handbook says that "[f]ear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition."[32]

Justice de Montigny made the following comment on the leading case on conscientious objection, *Zolfagharkhani*:

> [42] There is therefore some ambiguity as to the precise ground on which *Zolfagharkhani*, above, was actually decided. I would personally be inclined to think that, as a matter of principle and of precedent, conscientious objection can only be global and with respect to participation in all armed conflicts. When a claimant objects to a specific war, it is not because he rejects war on philosophical, ethical or religious grounds. Rather, he is objecting to the military's goals or strategies in a particular conflict. As we shall see, his

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[31] *Ibid*., paras. 22-25.

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

> objection is not driven by his conscience, but in an objective assessment about whether military action in a particular situation is valid. That is not the same thing as conscientious objection.[33]

The Federal Court elaborated further on the difference between conscientious objection and refusal to perform military service due to the nature of the military service. Justice de Montigny points out that "conscientious objection" is a different legal concept than "refusal to perform" or to serve in a particular military campaign.

> [43] The facts underlying the *Zolfagharkhani* decision bear witness to that dichotomy. In that case, the claimant's objection to the war against the Kurds had nothing to do with his dislike of war but stemmed from his belief that the use of chemical weapons was contrary to the most fundamental rules of human conduct. And yet, in many cases on this issue, the Court has blended the subjective inquiry into an applicant's beliefs with the objective inquiry into the nature of a specific war. This blending of subjective and objective elements is nowhere more evident than in the following passage from *Bakir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 70:
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> > [30] The Federal Court of Appeal in *Zolfagharkhani*, supra, established that an individual need not be an absolute pacifist or express opposition to all armed services in order to warrant recognition as a conscientious objector to military service. Where the military action at issue has been condemned by the international legal community as contrary to basic human rights, the Court has reasoned that selective objection to military service in a particular conflict or military operation, for reasons of conscience or profound conviction, should be recognized as conscientious objection.
>
> [44] In my view, the phrase "partial conscientious objection" implies a non-existent link between two different exceptions from Hathaway and the *UNHCR Handbook*. As I see it, conscientious objection applies to those who are totally opposed to war because of their politics, ethics or religion. Selective objection really refers to cases in which an applicant opposes a war he feels violates international standards of law and human rights.
>
> [45] The first type of claim, conscientious objection, raises subjective issues. Decision-makers must evaluate the applicant's personal beliefs and conduct to see if his claim is genuine. The second type of claim requires both a subjective and objective assessment of the facts. Along with evaluating the sincerity of an applicant's beliefs, a decision-maker must look at whether the conflict objectively violates international standards. The two types of objections should be treated as distinct categories — just as they are distinguished in paragraphs 171 and 172 of the *UNHCR Handbook*.

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

> [46] What, then shall we make of the foregoing discussion? First, I think it is better to restrict the notion of conscientious objection to those cases where a claimant refuses to take part in any military action because of his genuine convictions grounded in religious beliefs, philosophical tenets or ethical considerations. I am mindful of the fact that paragraph 172 of the *UNHCR Handbook* speaks of "religious" convictions. But it seems to me this notion should be expanded, to recognize that moral principles may also be, for a number of people, sufficiently compelling to ground and organize their lives. This is also consistent with the interpretation that has been given to the right to freedom of religion by the Supreme Court of Canada: see, for example, *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.[34]

The Federal Court Judge in *Lebedev* buttressed his argument by citing a U.S. Supreme Court decision:

> The U.S. Supreme Court captured this idea admirably in *Welsh v. United States*, 398 U.S. 333 at 339-340:
>
> > What is necessary. . .for a registrant's conscientious objection to all war to be "religious". . .is that this opposition to war stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. . .If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . .God" in traditionally religious persons.[35]

Mr. Justice de Montigny then made the following comments on the evolution of international law on these issues:

> Nevertheless, the question of whether to recognize a right of conscientious objection is gathering attention both in Canada and internationally. Given its importance, there is a surprising lack of jurisprudence on the issue. For that reason, I offer the following observations.
>
> [48] Justice Mactavish was most certainly correct when she wrote that, "at the present time, there is no internationally recognized right to conscientious objection" (*Hinzman*, above, at paragraph 207). This holding is consistent with the recent House of Lords decision *Sepet v. Secretary of State for the Home Department*, [2003] UKHL 15, [2003] 3 All ER 304 [*Sepet*]. These decisions are sending the message that punishing people who refuse military

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[34]*Ibid*., paras. 43-46.

[35]*Ibid*., para. 46.

> service on conscientious grounds does not amount to persecution. Courts are obviously reluctant to meddle with one of the state's most sacred prerogatives: raising an army for the defence of the realm and to participate in military operations considered crucial by the government of the day.
>
> [49] Yet equally clearly, countries are starting to give voice to conscientious objectors in different ways. For example, some countries exempt genuine conscientious objectors from conscription. This gives weight to their freedom of thought, conscience and religion in a balancing act between individual rights and the interests of their state governments. As previously noted, paragraph 172 of the *UNHCR Handbook* explicitly refers to conscientious objection, and the UN Commission on Human Rights and the Council of Europe have encouraged member states to recognize such a right. Some of the most respected authorities on refugee law also believe the international community is moving towards accepting a right of conscientious objection (see Hathaway, above, at page 182 and Goodwin-Gill, above, at page 55). But maybe more importantly for our immediate purposes, a number of recent cases from this Court have given credence to that claim and have explicitly or implicitly accepted the premise that fear of reprisal for objecting to military service on principled grounds could amount to persecution: see, for example, Bakir, above; *Atagun v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 612; *Ozunal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 560.
>
> [50] Until the Federal Court of Appeal provides further clarification, I feel bound to follow its most recent decision on the subject in *Ates*, above. However, in my view, the issue of conscientious objection still raises a host of outstanding questions, begging for resolution. For Mr. *Lebedev*, however, the most relevant exception is the one I will discuss below: refusing to serve in wars condemned by the international community.[36]

The Federal Court then considered the issue of "condemnation by the International Community."

> [51] The case law and academic scholars recognize that a person who refuses to undertake compulsory military service can be considered a refugee if such service would involve acts contrary to the basis rules of human conduct, as defined by international law. There is, however, a lack of consensus on some of the key aspects of this exception to the general principle that says those who refuse to perform military service do not have a nexus to a Convention refugee ground under s. 96 of the *IRPA*.[37]

Mr. Justice de Montigny then went on to discuss the facts of the case as it related to the legal issues and paragraph 171 of the *UNHCR Handbook*. He also

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[36] *Ibid*., paras. 47-50.

[37] *Ibid*., para 51.

made the following observation and cited a number of authorities to back his legal opinion.

> [57] This principle has been upheld by academics and courts on a number of occasions. Hathaway, for one, writes that "there is a range of military activity which is simply never permissible, in that it violates basic international standards. This includes military action intended to violate basic human rights, ventures in breach of the Geneva Convention standards for the conduct of war, and non-defensive incursions into foreign territory" (Hathaway, above, at 180-181). See also: Goodwin-Gill, above; Mark R. von Sternberg, *The Grounds of Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (New York: Martinus Nijhoff, 2002) 126-143; Martin Jones, "Beyond Conscientious Objection: Canadian Refugee Jurisprudence on Military Service Evasion", Centre for Refugee Studies Working Paper Series No. 2 (Toronto: York University, 2005) 8-13 [Jones]; Edward Corrigan, "Refusal to Perform Military Service as a Basis for Refugee Claims in Canada," (2000) 8 *Imm. L.R.* (3d) 272.[38]

Citing the Federal Court of Appeal decision in *Zolfagharkhani*, he further argued:

> [58] But the leading authority for this proposition in Canada is the Federal Court of Appeal's decision in *Zolfagharkhani*, above. That was the case in which the Iranian applicant fled his country upon learning his government intended to engage in chemical warfare against the Kurdish people. While unable to state authoritatively, on the basis of the evidence in the record, that the gases used by the Iranian army were included in the various Conventions prohibiting the use of asphyxiating, poisonous or other gases, the Court nevertheless considered that there was evidence "of the total revulsion of the international community to all forms of chemical warfare" and that the use of chemical weapons "should now be considered to be against international customary law" (*Zolfagharkhani*, above, at paragraph 29). It then relied on paragraph 171 of the *UNHCR Handbook* to conclude that the Iranian conscription law amounted to persecution for political opinion, when applied to a conflict where the army intended to use chemical weapons (*Zolfagharkhani*, above, at paragraph 30, quoted at paragraph 41 of these reasons).[39]

The Federal Court then went on to discuss the law as it related to the Federal Court decision in *Hinzman*[40]:

> [59] In *Hinzman*, above, Justice Mactavish opined that paragraph 171 of the *UNHCR Handbook* could not be evaluated in isolation, but had to be read in conjunction with paragraph 170. This contextual construction led her to con-

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[38]*Ibid*., para. 57.

[39]*Ibid*., para. 58.

[40]*Hinzman, Re* (2006), 55 Imm. L.R. (3d) 54 (F.C.).

clude that paragraph 171 has both objective and subjective components. Because I find her reasoning unassailable, it is worth quoting it in full:

> [108] Paragraph 170 speaks to the nature and genuineness of the personal, subjective beliefs of the individual, whereas paragraph 171 refers to the objective status of the "military action" in issue. That is, to come within paragraph 170 of the Handbook, the claimant must object to serving the military because of his or her political, religious or moral convictions, or for sincere reasons of conscience. In this case, the Board accepted that Mr. Hinzman's objections to the war in Iraq were indeed sincere and deeply-held, and no issue is taken with respect to that finding.
>
> [109] Mr. Hinzman has therefore brought himself within the provisions of paragraph 170 of the Handbook. This is not enough, however, to entitle him to seek refugee protection, as paragraph 171 is clear that a genuine moral or political objection to serving will not necessarily provide a sufficient basis for claiming refugee status. Paragraph 171 requires that there also be objective evidence to demonstrate that "the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to the basic rules of human conduct".[41]

Mr. Justice De Montigny then made the following legal comment:

> [60] There is another reason to come to that conclusion. If a claimant refuses to serve in the military because of fear, or even inconvenience, the nexus to a Convention ground under s. 96 of the *IRPA* will simply be lost. People who resist the draft or evade the army on a principled basis are assumed to fear persecution on the basis of political or religious reasons. If their motives are more mundane, the fear of persecution will not rest upon these grounds and a claimant could not be considered a Convention refugee.[42]

The Federal Court Judge then made the following observation on the law:

> [63] Based on the case law and academic commentaries dealing with paragraph 171 of the *UNHCR Handbook*, I think it is fair to say the phrase "international condemnation" has not been consistently defined. The confusion probably stems from the paragraph's ambiguous language, which can be interpreted as referring both to a legal standard ("basic rules of human conduct") and a political assessment ("condemned by the international community").
>
> [64] It is therefore no surprise to see the same kind of ambiguity in the jurisprudence, and most notably in the decisions emanating from this Court. The

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[41] *Lebedev*, *supra*, para. 59.

[42] *Ibid*., para 60.

decision in Bakir, above, provides a good illustration of such an attempt to reconcile these various tests. In that case, the Court opined that selective objection to military service should be recognized as conscientious objection if that service has been "condemned by the international legal community" (at paragraph 30; emphasis added).

[65] Justice Bud Cullen also analyzed the notion of international condemnation in *Ciric v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 65, finding that documentary evidence from Helsinki Watch, Amnesty International, and the International Committee of the Red Cross was enough to constitute "international condemnation". He wrote:

> [18] I believe the applicants are correct in asserting that the Board erred in ignoring evidence of international condemnation of the situation in Yugoslavia. The Board's conclusion that there was insufficient evidence that the on-going military action in Yugoslavia was one that was condemned by the international community such as to justify the applicants' avoidance of military service flies in the face of the evidence it had before it to consider. This evidence included reports from Helsinki Watch, Amnesty International, ICRC and the applicant's own, uncontradicted testimony. Thus, their conclusion cannot be said to have been made in regard to the totality of the evidence and amounts to an error of law.

[66] Justice Cullen made further comments about the sort of activity subject to said condemnation, writing:

> [22] The Board may take some comfort in the fact that the United Nations was not quick off the mark in condemning the violations by all sides. It must be remembered that this world organization, intent on maintaining peace, must act of necessity slowly and carefully if it is to remain the honest broker in any conflict. Fortunately, respected organizations like Amnesty International, Helsinki Watch and ICRC, are able to move quickly, study sufficiently and make pronouncements. And all did so here which surely the Board should have seen as condemnation by the world community. The atrocities committed were immediately abhorrent to the world community, eventually leading to a more public position by the United Nations. Basic human rights were violated through woundings, killings, torture, imprisonment and all clearly condemned by the world community.

[67] While the Federal Court of Appeal did not deal with the issue in any great detail in *Zolfagharkhani*, above, it did conclude that the use of chemical weapons violated "international customary law" at paragraph 29. The Court referred to the Hague Convention and various Geneva Conventions,

> including one prohibiting the development and use of biological and toxic weapons.[43]

The Federal Court in *Lebedev*, after reviewing the decisions in *Al-Maisri* and *Ozunal*, then concluded as follows:

> [70] On the basis of the foregoing, I think it is fair to say that international condemnation will not always be required, and may also take different forms. An isolated breach of the basic rules of human conduct will clearly not be sufficient to fall within the purview of paragraph 171 of the *UNHCR Handbook*. Conversely, there will also be instances where political expediency will prevent the UN or its member states from condemning massive violations of international humanitarian law. This is why reports from credible non-governmental organizations, especially when they are converging and hinge on ground staff, should be accorded credit. Such reports may be sufficient evidence of unacceptable and illegal practices. But at the end of the day, condemnation by the international community can only be one indication of human rights violations. It should never be, in and of itself, an absolute requirement.[44]

Judge de Montigny then made the following statement, relying on British jurisprudence, to support his legal analysis. The analysis is very useful and is quoted at some length:

> [71] I find comfort for that position in *Krotov v. Secretary of State for the Home Department*, [2004] EWCA Civ 69, [2004] 1 WLR 1825 [Krotov], a recent decision by the United Kingdom Court of Appeal cited in *Hinzman*, above. That case is particularly interesting in the context of Mr. Lebedev's application, not only for its thorough analysis of paragraph 171 but because it also involved an asylum seeker who deserted the Russian army just before being sent to fight in Chechnya.
>
> [72] The Court in *Krotov*, above, relied heavily on U.K. tribunal decisions dealing with the issue of international condemnation. At paragraph 10, the Court cited the following excerpt from one of those tribunal decisions, entitled *Foughali v. Secretary of State for the Home Department*, 2 June 2000 [00/TH/01513]:
>
> > [28] The question whether a conflict is or is not internationally condemned may cast light on the Convention issue, but it is not the underlying issue. To make it so would be to interpolate into the text of the Refugee Convention definition of refugee an additional requirement of international condemnation. When assessing risk on the basis of serious human rights violations outside the context of military service cases, decision-makers do not hinge their decisions on whether or not these violations have

[43] *Ibid*., paras. 63-67.

[44] *Ibid*., para. 70.

> also been internationally condemned, although such condemnation may be part of the evidence. It would be illogical to behave differently in relation to an overlapping field of public international law governed by the same fundamental norms and values.
>
> [29] In the opinion of this Tribunal it would much improve the clarity of decision-making if issues as to whether or not a conflict is internationally condemned are raised only in the context of whether or not there exists sufficient objective evidence of violations of the basic rules of human conduct. International condemnation should not be treated as the underlying basis of exception (b). [NB Exception (b) was earlier defined as "persecution due to the repugnant nature of military duty likely to be performed." — see paragraph 9 of the judgment].

[73] The Court in Krotov, above, also quoted extensively from *B v. Secretary of State for the Home Department*, [2003] UKIAT 20 [B]. At paragraphs 44-47 of that case, the U.K. tribunal gave five reasons why formulating the test as one of "international law" was more appropriate than "condemnation by the international community":

> 1. International condemnation is too dependant on the vagaries of international politics, "apt to vary depending on shifting alliances and whether other countries surveying the conflict take a particular view";
>
> 2. A test based on international law is more consistent with the overall framework of the Convention, whose scheme includes a specific provision cast in terms of international law principles (Article 1F, the so-called exclusion clause);
>
> 3. The reference to "the basic rules of human conduct" has a distinct meaning in international law;
>
> 4. Interpreting the Convention should be based on fundamental norms and values drawn from international law sources;
>
> 5. The Convention must be given a contemporary definition based on the developments in international humanitarian law. As a result, "international condemnation is only one indicator — albeit a highly relevant one — of whether the armed conflict involved is/would be contrary to international law" (B, above, at paragraph 48).

[74] In *Krotov*, above, the Court reviewed the main international instruments setting out humanitarian norms to protect individuals, particularly civilians, the wounded and prisoners of war in armed conflicts. It looked at the sorts of crimes committed in such conflicts, such as the deliberate killing and targeting of civilians, rape, torture, execution and ill-treatment of prisoners, and the taking of civilian hostages, writing the following:

> [37] . . .the crimes listed above, if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indif-

> ference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 Convention.

[75] In reaching that conclusion, the Court in *Krotov*, above, took note of *Sepet*, above, in which the House of Lords wrote the following after citing Canadian jurisprudence on the issue:

> [8] There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment. . .

[76] Commenting on that paragraph, the Court wrote the following at paragraph 20 of *Krotov*, above: It is to be noted that Lord Bingham treated the grounds to which he referred as being separate rather than synonymous. He certainly did not suggest in the passage quoted that condemnation of a particular conflict by the international community was an essential or additional requirement where an applicant for asylum advanced the case that the relevant military service would or might require the appellant to commit atrocities or gross human rights abuses.

[77] This Court is obviously not bound by rulings of the British courts, or any foreign courts for that matter. I nevertheless find the reasoning outlined in the previous paragraphs compelling, and entirely consistent with previous rulings from this Court and the Federal Court of Appeal.[45]

In support of his conclusion in *Lebedev*, Justice de Montigny made the following argument:

> [78] Applying these principles to the case at bar, I am troubled by the PRRA officer's comments. Quite apart from the question of whether there was sufficient evidence to establish systemic human rights abuses by the military in Chechnya, to which I will return to shortly, I believe the officer erred by focusing on the Russian military's "intention" to engage in planned and systemic human rights abuses. It would set a dangerous precedent to accept that Russia had not systemically violated human rights solely because it had not admitted to it directly. Massive human rights violations may take place not only through deliberate policy, but also through official indifference or by being condoned by the authorities. Transgressions of international norms should always be taken into account in assessing a refugee claim, however they come about. The officer could not dismiss the issue, solely because there was no evidence that the Russian army intended to engage in human

[45] *Ibid*., paras. 71-77.

> rights abuses. This does not necessarily mean I am concluding the Russian government is indeed guilty of systemic violations. Rather, the officer should have looked into the evidence more closely to determine whether Mr. Lebedev's allegations were borne out by the facts.
>
> [79] As for the PRRA officer's conclusion that there was insufficient evidence of international condemnation, I would make the following observations. The war has been broadly and unequivocally condemned across the board. The UN Commission on Human Rights adopted two resolutions in 2000 and 2001 on the matter (Resolutions 2000/58 and 2001/24). According to the *U.S. Department of State Report on Human Rights Practices for 2005* (U.S. DOS Report), there are still instances of indiscriminate use of force against civilian areas, though by that time such incidents were decreasing. The following excerpt is from the introduction to that report, where it found:
>
> > The government's human rights record in the continuing internal conflict in and around Chechnya remained poor. Both federal forces and their Chechen government allies generally acted with legal impunity. The civilian authorities generally maintained effective control of the security forces. Pro-Moscow Chechen paramilitaries at times appeared to act independently of the Russian command structure, and there were no indications that the federal authorities made any effort to rein in their extensive human rights abuses.[46]

The Federal Court went on to examine even more damning condemnation in the War Resisters International Report on the Russian Army's actions in Chechnya.[47]

The question as to how to interpret paragraph 171 of the *UNHCR Handbook* was examined in detail and since Justice de Montigny's commentary is very useful, the analysis is quoted at length:

> [83] As a final note on this issue, there appears to be some controversy about how involved a claimant's participation in atrocities would have to be to fit within paragraph 171 of the *UNHCR Handbook*. Justice Mactavish discussed this issue at length in *Hinzman*, above. While I generally agree with her analysis and reasoning, I would nevertheless be inclined to nuance her conclusion slightly.
>
> [84] There are compelling reasons to interpret paragraph 171 of the *UNHCR Handbook* in conjunction with the Convention's exclusion provisions. It is only appropriate to grant refugee status to a person who objects to participating in human rights violations if that person's involvement with those viola-

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[46] *Ibid*., paras. 78-79.

[47] *Ibid*., para. 80-81.

tions could result in his exclusion from Convention refugee status. This is indeed what the U.K. Court stated in *Krotov*, above:

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

[85] This finding echoes the Council of the European Union's Joint Position on the harmonized application of the term "refugee", and it certainly accords with logic and canons of interpretation. It is because of that logic, espoused by Justice Mactavish, that a foot soldier's mere participation in an illegal war was found insufficient to ground a refugee claim. While the legality of a particular military action might be relevant to the refugee claim of an individual involved in triggering or monitoring the conflict, more will be required of an ordinary soldier. Because the soldier's personal conduct would not breach accepted international norms, he could not be excluded from Convention refugee status under Article 1F of the Convention. Accordingly, his mere participation would also fail to bring him within the fold of paragraph 171 of the *UNHCR Handbook* (*Hinzman*, above, at paragraphs 159 and 166).

[86] That being said, the extent of "on the ground" participation in the violations of international humanitarian law does not lend itself to an easy definition and is still subject to much debate. In *Krotov*, above, the U.K. Court suggested the test should not be whether one may be "associated" with acts contrary to basic rules of human conduct as defined by international law, but rather whether he may be required to "participate" in those acts. While this may be consistent with the jurisprudence that has developed in the context of exclusion, it obviously raises the bar in a way that may not be warranted in the context of inclusion.

[87] As Martin Jones notes, the test for complicity in exclusion jurisprudence has developed in a restrictive manner, given the gravity of a finding that one is excluded from claiming Convention refugee status (Jones, above, at pages 9-10). In that spirit, it is perfectly understandable to limit complicity findings to cases where an applicant knew of an organization's crimes and shared its purpose in committing them (at least in cases where the organization was not principally dedicated to a limited, brutal purpose): *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 303; *Ramirez v. Canada (Minister of Employment and Immigration)* (1992), 89 D.L.R. (4th) 173; *Baqri v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1096.

[88] But the purpose of applying the complicity test in claims of persecution resulting from refusing military service is quite different and, indeed, opposite. The more restrictive we are in defining what it means to be complicit in this context, the more difficult it will be for such claimants to claim refugee status. Obviously, sporadic occurrences of prohibited actions should not be

> sufficient for a deserter or draft evader to claim refugee status. On the other hand, the notion of direct participation may well be too narrow if we are to take into account the language of paragraph 171 of the *UNHCR Handbook*, which says ". . .the type of military action, with which an individual does not wish to be associated. . ." Of course, this whole discussion will sometimes be of an academic nature, when the pervasiveness and scale of the violations of international humanitarian law are such that virtually any soldier will likely be required to be involved in those violations.
>
> [89] All of this to say that the Board should pay attention to this dimension of the problem if it finds, on reconsideration, that the Russian military's actions in Chechnya breach international standards. There is obviously no hard and fast rule in assessing the degree of potential involvement a particular soldier is likely to have in specific military actions. But in keeping with the spirit and intent of the Convention, the Board would be well advised to look at these claims with some measure of flexibility. After all, the Federal Court of Appeal was able to find that a paramedic's role in treating injured soldiers was sufficient to bring him within the purview of paragraph 171 of the *UNHCR Handbook* in *Zolfagharkhani*, above. That case clearly stands as an indication of how we should approach the difficult moral dilemma confronted by those called to serve in wars of dubious legitimacy[48]

Justice De Montigny certified three questions in *Lebedev*:

> 1) What is the difference between claiming Convention refugee status as a conscientious objector, and claiming Convention refugee status on the basis that one does not want to participate in an internationally condemned conflict? What are the different requirements to prove each?
>
> 2) Is there such a thing as "partial" conscientious objection, or does that phrase merely indicate that an applicant's claim really relates to the "international condemnation" exception at paragraph 171 of the *UNHCR Handbook*?
>
> 3) How should decision-makers define "international condemnation"? Does it refer to breaches of international law only? Must it come from an official body that claims to speak with an international voice, like the United Nations? Or would a consensus of reputable international sources, like non-government organizations, be sufficient?[49]

Accordingly, there was an expectation of guidance from the Federal Court of Appeal on the issue of conscientious objection, refusal to perform military service and paragraph 171 of the *UNHCR Handbook* when it considered *Lebedev*. The Department of Justice (DOJ) filed the Notice of Appeal on August 3, 2007. Unfortunately the DOJ decided against pursuing the Appeal and to get the three certified questions answered and the legal issues clarified by the Federal Court

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[48] *Ibid*., paras 83-89.

[49] *Ibid*., para 101.

of Appeal. A Notice of Discontinuance was filed by the DOJ on January 4th, 2008.[50]

It would have been useful for the Federal Court of Appeal to adjudicate these issues. However, the Federal Court decision in *Lebedev* extensively reviews the law on evasion of military service and also considers international approaches to conscientious objection. *Lebedev* is one of the few Federal Court decisions to give a clear analytic framework of analysis on the issue of conscientious objection and the refusal to perform military service, and presents a valuable analysis of paragraph 171 of the *UNHCR Handbook*. Accordingly, *Lebedev* is very useful for refugee claims dealing with conscientious objection and refusal to perform military service.

Federal Court Justice Gauthier relied on *Lebedev* in deciding *Tewelde*.[51] This case involved a refugee claimant from Israel who refused to serve in the Israeli military. The facts are summarized by the Court as follows:

> [2] Mr. Tewelde alleges that he fears persecution because he objects, on grounds of conscience, to serving as a reservist in the Israeli Defence Forces (IDF) in either Gaza or the West Bank, given his belief that the IDF has repeatedly committed human rights violations in those areas, including the reckless shooting and shelling of civilians, the use of civilians as human shields, and the wide scale destruction of civilians' houses without due regard to their security.[52]

The Federal Court extensively reviewed excerpts from a report from Human Rights Watch which documented human rights abuses committed by the Israeli Army. In discussing the application of paragraph 171 of the *UNHCR Handbook*, the Court made the following finding:

> [16] In *Lebedev v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 975, a recent decision on the subject of selective conscientious objectors, my colleague Justice Yves de Montigny examined what section 171 of the *UNHCR handbook* means by "actions. . . condemned by international communities as contrary to basic rules of human conduct. . .", at paragraphs 57 and following. Justice de Montigny adopts most of the findings of Justice Ann MacTavish in *Hinzman*, supra, in that respect.
>
> [17] It appears that international condemnation is not limited to an assessment by a state or inter-state body. As noted at paragraph 70 of *Lebedev*, "There will also be instances where political expediency will prevent the

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[50]Telephone conversation with the Federal Court Registry Office in Toronto, July 7, 2009.

[51]*Tewelde v. Canada (Minister of Citizenship & Immigration)* (2007), 65 Imm. L.R. (3d) 267 (F.C.).

[52]*Tewelde*, *supra*, para. 2.

> U.N or its member states from condemning the violation of international humanitarian law. This is why reports from credible non-governmental organizations, especially when they are converging and hinge on ground staff, should be accorded credit. Such reports may be sufficient evidence of unacceptable and illegal practices". . ..[53]

The Federal Court, on considering credible evidence from Non-Government Organizations (NGOs), in *Tewelde*, further held that:

> [18] In this regard, the decision of Justice Bud Cullen in *Ciric v. Canada (Minister of Citizenship and Immigration)*, [1994] 2 F.C.J. 65, is on point. In that decision, observations and comments of Helsinki Watch, Amnesty International and the International Committee of the Red Cross were considered sufficient to constitute international condemnation.
>
> [19] It is evident from the above that in the instant case, the various reports of Human Rights Watch (of which only one was commented on by the Court in these reasons) constituted highly relevant evidence that not only corroborated the applicant's testimony, but indeed went to a central element of the claim.
>
> [20] Although *Lebedev* dealt with the actions of the Russian army in Chechnya and a very different record then the one presently before the Court, it is nonetheless of assistance in the present case to note Justice de Montigny's finding that the PRRA officer was, at the very least, under an obligation to substantiate her conclusion that the evidence on record, which included U.S. Department of State reports and a War Resisters International report, did not establish a breach of international standards by the Russian army.
>
> [21] The Court is satisfied that the RPD's use of the words "there is little. . .to suggest" cannot be meant to refer to the HRW report referred to above which expressly alleges that the IDF engaged in "systemic violations of international humanitarian law and gross human rights abuses". Having reviewed all the evidence, the Court is convinced that this is indeed a case where it should infer that the RPD ignored the evidence.
>
> [22] In any event, if contrary to my belief, the RPD indeed considered the evidence at issue, its reasons are inadequate to enable the Court or the applicant to review their validity, or to appreciate why some evidence was discarded. A simple statement that the evidence is not persuasive, without further comment, does not meet the duty of fairness incumbent on the RPD. As Justice Sexton observed in *Via Rail Canada Inc. v. National Transportation Agency*, [2000] F.C.J. No. 1685, at paragraph 22, "(t)he obligation to provide adequate reasons is not satisfied by merely reciting the submissions of the parties and stating a conclusion (. . .) (t)he reasoning process followed by the

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[53]*Ibid*., paras. 16-17.

> decision-maker must be set out and must reflect consideration of the main relevant factors."[54]

Tewelde, following *Ciric*[55] and *Lebedev*, sets out the principle that credible evidence from NGOs can be considered sufficient evidence to constitute international condemnation for purposes of paragraph 171 of the *UNHCR Handbook* and to qualify a conscientious objector, or an individual who has refused to perform their military service, to be a Convention refugee.

In a further article I will review the case law from the Canadian Federal Court on members of the American military who have refused to serve in the Iraq and Afghanistan conflicts.

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[54]*Ibid*., paras. 18-22.

[55]*Ciric v. Canada (Minister of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 210, [1994] 2 F.C. 65 (Fed. T.D.).