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## Conscientious Objection and International Law: A Human Right?

by Marie-France Major\*

### I. INTRODUCTION

Since the Second World War, concern for the legal and social protection of human rights and fundamental freedoms has taken increasingly manifest forms. At the national and international level, there has been increased recognition that certain basic humanitarian guarantees must receive protection.<sup>1</sup> In contemporary society, respect for human rights is an important element of political legitimacy.<sup>2</sup>

"One of the main purposes of the concern for human rights is to ensure that divergent opinions can be accommodated, respected and acted upon in such a way that due attention is paid both to the common good and to the concerns of individuals."<sup>3</sup> The characterization of a specific goal as a human right is of the utmost importance since it "elevates it above the rank and file of competing social goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity."<sup>4</sup>

Whenever claims are made for the recognition of new fundamental rights:

[t]he challenge is to achieve an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and on the other hand, the need to adopt a dynamic approach that fully reflects changing needs and perspectives

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<sup>1</sup> See generally DETLEV F. VAGTS & DAVID WEISSBRODT, *OUT OF THE SHADOWS: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS* (1989) (discussing the history of post World War II efforts to secure human rights to all, with emphasis on the role of the United States); Lloyd Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575 (tracing the historical acceptance of human rights with emphasis on consequences in various countries).

<sup>2</sup> See generally NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN (Jeremy Waldon ed., 1987) [hereinafter NONSENSE UPON STILTS]; Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

<sup>3</sup> Asbjorn Eide & Chama Mubanga-Chipoya, *Conscientious Objection to Military Service*, U.N. ESCOR, Sub-Comm. on the Prevention of Discrimination and Protection of Minorities, at 4, U.N. Doc. E/CN.4/Sub. 2/1983/30/Rev. 1 (1983) [hereinafter *Conscientious Objection*].

<sup>4</sup> Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988).

and responds to the emergence of new threats to human dignity and well-being.<sup>5</sup>

It is in the perspective of such a balance that the issue of conscientious objection to military service should be examined.

## II. CONSCIENTIOUS OBJECTION

Initially, one must understand that conscientious objection does not simply refer to a person's refusal to bear arms in time of war. The expression can also apply to a variety of situations in which an individual decides to follow the dictates of his conscience instead of the collective interest of society. As recent events have again demonstrated, however, the most dramatic, and perhaps the most complex, form of conscientious objection relates to military service.

Conscience can be defined as a genuine ethical conviction, whether of religious or humanist inspiration, which is supported by a variety of sources.<sup>6</sup> As was stated in *United States v. Nordlof*,<sup>7</sup> conscience is a "moral judgment that prohibits the violation of a previously recognized ethical principle."<sup>8</sup> Conscientious beliefs are said to reflect "an individual's inward conviction of what is morally right or morally wrong, and it is a conviction that is genuinely reached and held after some process of thinking about the subject."<sup>9</sup> In all situations, conscientious refusal can be characterized as "noncompliance with a more or less direct legal injunction or administrative order."<sup>10</sup>

The right to refuse to participate in war because of individual convictions, requires an examination of the degree to which an individual should be entitled to take responsibility for his convictions. Because the refusal to participate in war is not only a matter of opinion, but also of conscience, the question in cases of objection to military service is whether a state should purposely violate the conscience of individuals.

The conscience of the individual is a precious asset for every society. It is part of the socialization process to nurture and encourage the moral conscience of the individual, without which civilization would be meaningless. At the center of this process is the effort to instill in the individual the conviction that it is immoral in most circumstances to

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<sup>5</sup> Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 609 (1984) [hereinafter *Conjuring Up New Human Rights*].

<sup>6</sup> NONSENSE UPON STILTS, *supra* note 2, at 3.

<sup>7</sup> 440 F.2d 840 (7th Cir. 1971).

<sup>8</sup> *Id.* at 843.

<sup>9</sup> Norman S. Rearburn, *Conscientious Objection and the Particular War*, 43 AUSTL. L. J. 317, 319 (1969) (citing *Grundal v. Minister of State for Labor and National Service*, Supreme Court of Western Australia, unreported judgment, 11th September 1953).

<sup>10</sup> JOHN RAWLS, A THEORY OF JUSTICE 368 (1971).

take the life of other persons.<sup>11</sup>

In all societies, individuals should be entitled to take responsibility for their convictions. The decision not to participate in war needs to be respected, for the moral revulsion of the convinced conscientious objector at the thought of taking human life is great. Military conscription of such men necessarily entails grave interference with conscience."<sup>12</sup> Further, when a state exempts those whose convictions do not permit them to participate in war, it reaffirms its adherence to the principles of individual and religious liberty.<sup>13</sup>

More importantly, in the case of military service, an individual is not merely prohibited from acting in accordance with his convictions, but rather he is compelled to perform an affirmative act which goes against his convictions.<sup>14</sup>

There may be and probably is a very radical distinction between compelling a citizen to refrain from acts which he regards as moral but which the majority of his fellow citizens and the law regard as immoral or unwholesome to the life of the state on the one hand, and compelling him on the other to do affirmative acts which he regards as unconscientious and immoral. . . . [T]he former does not in most instances which are likely to occur do violence to his conscience; but conscience is violated if he is coerced into doing an act which is opposed to his deepest convictions of right and wrong. . . . However rigorous the state may be in repressing the commission of acts which are regarded as injurious to the state, it may well stay its hand before it compels the commission of acts which violate the conscience.<sup>15</sup>

Because the individual is compelled to commit the ultimate act of killing another human being, governments must recognize the right of conscientious objection in the case of military service.

### III. THE PROTECTION OF CONSCIENCE

Once the right to conscientious objection to military service has been accepted, the next question to be addressed is the range of grounds

<sup>11</sup> *Conscientious Objection*, *supra* note 3, at 3.

<sup>12</sup> Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1412 (1967).

<sup>13</sup> See RAWLS, *supra* note 10, at 382. See also *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969). "[E]very man shares and society as a whole shares an interest in the liberty of the conscientious objector, religious or not. . . . Society's own stability and growth, its physical and spiritual prosperity are responsive to the liberties of its citizens, to their deepest insights, to their free choices. . . ." *Id.* at 908.

<sup>14</sup> See generally Theodore Hochstadt, *Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV. C.R.-C.L. L. REV. 1 (1967); Russell Wolff, *Conscientious Objection: Time for Recognition as a Fundamental Human Right*, 6 ASILS INT'L L.J. 65 (1982).

<sup>15</sup> H.F. Stone, *The Conscientious Objector*, 21 COLUM. Q. 253, 268 (1919).

on which objection will be permitted. At present there does not exist, in the international community, any agreement on the scope of convictions that should be protected. Many countries recognize a pacifist objection to military service if an individual believes that it is wrong under all circumstances to kill. However, many countries do not recognize that the objection to the use of force can be valid in some circumstances but not in others.<sup>16</sup> Thus, "the nature of the beliefs that are required to obtain conscientious objector status" play an important role.<sup>17</sup>

For some individuals, the killing of another human being is immoral under all circumstances. These individuals are absolutely opposed to any participation in war. This position is based either on religious judgments or feelings of conscience which dictate that human life should be revered and should never be terminated.<sup>18</sup> Although religion and conscience are not synonymous, the right to conscientious objection must be recognized so long as individuals possess a sincere conviction that human life is sacred.<sup>19</sup>

For other individuals, the opposition to war is based on political ideals or is simply founded on the notion that armed force can only be justified under limited circumstances not found in the context of a particular war engaged in by the national authority.<sup>20</sup> This objection can be based on a violation of the standards of national or international law, or of the principles of morality.<sup>21</sup>

The idea that war can be morally acceptable only in certain circumstances emanates from the concept of just war as developed by Christian theologians.<sup>22</sup> According to St. Augustine, it was morally justifiable to engage in war whenever this was done in defense of a just state against invaders.<sup>23</sup> This theory put forward *moral conditions* for waging war

<sup>16</sup> For a survey of the acceptance by the international community of the right to conscientiously object to military service, see *Conscientious Objection*, *supra* note 3, at 1; Patricia Schaffer & David Weissbrodt, *Conscientious Objection to Military Service As a Human Right*, 9 REV. INT'L COMM'N JURISTS 33 (1972); Report of the Secretary-General to the Commission on Human Rights: U.N. ESCOR, 29th Sess., U.N. Doc. E/CN.4/1118/ Corr.1 & Add.1-3 (1982).

<sup>17</sup> Wolff, *supra* note 14, at 69.

<sup>18</sup> See generally Note, *Conscientious Objectors: Recent Developments and a New Appraisal*, 70 COLUM. L. REV. 1426, 1434 (1970).

<sup>19</sup> Wolff, *supra* note 14, at 69-70. See generally, David M. Cohen & Robert Greenspan, *Conscientious Objection, Democratic Theory, and the Constitution*, 29 U. PITT. L. REV. 389 (1968).

<sup>20</sup> See generally H. Patrick Sweeney, *Selective Conscientious Objection: The Practical Moral Alternative to Killing*, 1 LOY. L.A. L. REV. 113 (1968).

<sup>21</sup> Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 667-670 (1939).

<sup>22</sup> *Id.* at 669.

<sup>23</sup> According to D.S. Sax, some of the criteria necessary to establish the existence of a just war included the following:

1. The war must have a just cause, i.e. it must be waged in defense of a country or else (some added) to right a wrong one state has inflicted on another.

which were intended to apply to individuals as well as nations.<sup>24</sup>

Despite this long standing concept of just war, the right to partial objection to military service has not yet received world-wide acceptance. One reason for such reluctance is the fact that when an individual refuses to participate in a specific war he is in essence asserting the illegality of its purpose or of the means and methods used in combat by the state.<sup>25</sup> States do not want to admit that they could be acting illegally. Further, any objection to the war that is expressed by an individual is viewed as a criticism of the policies of the government. Consequently, states generally assert that it is the nation, rather than the individual citizen, who must decide whether a war is morally acceptable or not.<sup>26</sup>

The refusal to take part in all war under any conditions is an unworldly view bound to remain a sectarian doctrine. It no more challenges the state's authority than the celibacy of priests challenges the sanctity of marriage. By exempting pacifists from its prescriptions the state may even seem to display a certain magnanimity. But conscientious refusal based upon the principles of justice between peoples as they apply to particular conflict is another matter. For such refusal is an affront to the government's pretensions, and when it becomes widespread, the continuation of an unjust war may prove impossible.<sup>27</sup>

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2. The motive of those who wage it must be justice, not revenge or hatred.
  3. The legally constituted ruler of the land, not any leader of a mob, must declare the war.
  4. It must be a last resort, after every other way to settle the conflict has been tried and has failed.
  5. There must be a reasonable prospect of victory, lest people kill and are killed to no avail.
  6. The cost must be calculated as carefully as possible, and the suffering the war will entail must not be disproportionately large in relation to its aims.
  7. The war must be waged by just means without unnecessary violence or cruelty.
  8. The combatants must not harm or rob innocent non-combatants (specifically farmers, women, children, clergy).
  9. The peace that will ensue must be a just one.

D.S. Sax, *The Just War and Situational Objection*, in CONSCIENTIOUS OBJECTION (Center for Intergroup Studies, Occasional Paper No. 8, 1984). See also Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31 (1971).

<sup>24</sup> See generally J. CHILDRESS, *JUST-WAR THEORIES* (1978); J.T. JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* (1981); WILLIAM V. O'BRIAN, *THE CONDUCT OF A JUST AND LIMITED WAR* (1981) [hereinafter *THE CONDUCT OF JUST AND LIMITED WAR*]; PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* (1968); PAUL RAMSEY, *WAR AND THE CHRISTIAN CONSCIENCE: HOW SHALL MODERN WAR BE CONDUCTED JUSTLY?* (1961) [hereinafter *WAR AND THE CHRISTIAN CONSCIENCE*]; JOAN D. TOOKE, *THE JUST WAR IN AQUINAS AND GROTIUS* (1965); ROBERT TUCKER, *THE JUST WAR* (1960); MICHAEL WALZER, *JUST AND UNJUST WARS* (1977) Inis L. Claude Jr., *Just Wars: Doctrines and Institutions*, 95 POL. SCI. Q. 83 (1980); von Elbe, *supra* note 21.

<sup>25</sup> *Conscientious Objection*, *supra* note 3, at 6.

<sup>26</sup> Note, *supra*, note 18, at 1437.

<sup>27</sup> RAWLS, *supra* note 10, at 382.

A second argument for the non-recognition of partial objectors is that it would have a deleterious effect on national morale in war time if persons who did not agree with the political objectives of their government were excused from military service.<sup>28</sup>

Another rationale is that it is more difficult to prevent fraudulent exemptions of partial objectors than it is with respect to total objectors.<sup>29</sup> There is a danger that more false claims will be presented if the exception is extended to partial objectors because of the difficulty of disproving the objectors' motives. It is also argued that if partial objection were accepted, the number of people in the forces would be drastically reduced and therefore nations recognizing such a right would no longer be able to defend themselves.<sup>30</sup>

These arguments can be easily countered. The conscientious objector can fulfill his duty to the state through alternative service, which can be for the same length of time as service in the armed forces. Thus society can not view the objector as avoiding his duty. Further, this will assure that there is no incentive for false claims to be brought forward. Experience has shown that in those countries which do permit conscientious objection, only a limited number of individuals claim such status, leaving the armed forces with more than sufficient manpower to defend the country.<sup>31</sup> There is, therefore, no valid reason why the right to partial objection should not be recognized.<sup>32</sup> As is argued by Wolff, "the protection sought for rights of conscience applies no less forcefully when an individual's beliefs dictate the need to abstain from specific combat than when all war is broadly condemned."<sup>33</sup>

This view is reinforced by the position adopted in some recent international resolutions and studies that deal with the question of conscientious objection. Eide and Mubanga-Chipoya, in their report to the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, argued that the pacifist position was not the only form of conscientious objection that should be recognized. "Objection to participation in military service could also be partial, that is related to the purposes of or means used in armed action."<sup>34</sup> In 1978, the United Nations General Assembly accepted the notion of partial objection when it recognized the right to "refuse service in military or police

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<sup>28</sup> Giannella, *supra* note 12, at 1416.

<sup>29</sup> Hochstadt, *supra* note 14, at 15.

<sup>30</sup> Greenawalt, *supra* note 23, at 48-50.

<sup>31</sup> See Schaffer, *supra* note 16, at 52.

<sup>32</sup> For a similar point of view, see generally, *A CONFLICT OF LOYALTIES, THE CASE FOR SELECTIVE CONSCIENTIOUS OBJECTION* (James Finn ed., 1968).

<sup>33</sup> Wolff, *supra* note 14, at 70.

<sup>34</sup> *Conscientious Objection*, *supra* note 3, at 3.

forces which are used to enforce apartheid.”<sup>35</sup> Amnesty International also affirmed that a conscientious objector is:

a person liable to conscription for military service, or to register for conscription for military service (even where there is no military service), who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical, political or similar motives refuses to perform armed service or any other direct or indirect participation in wars or armed conflicts.<sup>36</sup>

Although the right to partial objection is not universally accepted,<sup>37</sup> it needs to be recognized as a protected right. As long as the reason for the partial objection falls within one of the defined categories on which such objection can be based, the national authorities must recognize as valid the claim of the objector. For, once it is accepted that the right to conscientious objection is necessary to protect the right of persons to act according to their conscience, there seems no reason to differentiate between those whose convictions are based on religious principles and those who base their convictions on political ideas or ideals. In cases of total or partial objection the same feelings of sincerity and conviction exist.<sup>38</sup> It can even be argued that a partial conscientious objector, because he has been forced to make a discriminating study of the problem, has a deeper understanding of the issues than does a total objector.<sup>39</sup>

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<sup>35</sup> G.A. Res. 33/165, U.N. GAOR, 33rd Sess., Supp. No. 45, at 154, U.N. Doc. A/33/45 (1978).

<sup>36</sup> Amnesty International, *Policy Guidelines on Conscientious Objection*, at 1, reprinted in *The Role of Youth in the Promotion and Protection of Human Rights*, including the Question of Conscientious Objection to Military Service, U.N. Doc. E/CN.4/1985/25 (1984).

<sup>37</sup> See, for example, Hum. Rts. Comm. Res. 1987/46, U.N. ESCOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 5, at 108-109, U.N. Doc. E/CN.4/1987/60 (1987), where the Commission recognizes that “conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious, ethical, moral or similar motives”. The Council of Europe similarly maintains that “anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligations to perform such service”. Committee of Ministers Recommendation No. R (87) 8, Communication on the Activities of the Committee of Ministers, Eur. Parl. Ass., 39th Sess., Doc. 5725, at 10 (1987), reprinted in COUNCIL OF EUROPE, COLLECTION OF RECOMMENDATIONS, RESOLUTIONS AND DECLARATIONS OF THE COMMITTEE OF MINISTERS CONCERNING HUMAN RIGHTS 1949-1987, at 184-185 (1989).

In its explanatory report, the Committee asserts that “only reasons involving a conflict of conscience can be taken into consideration and such reasons must, moreover, be “compelling” i.e. impossible to resist. It should be noted that the recommendation does not cover cases of so-called “selective” or “partial” objections of conscience that is, those limited to the use of arms in certain cases only.” *Role of Youth in the Promotion and Protection of Human Rights Including the Question of Conscientious Objection to Military Service*, U.N. ESCOR, Hum. Rts. Comm., 45th Sess., Agenda Item 15, at 24, U.N. Doc. E/CN.4/1989/30 (1989) at 24.

<sup>38</sup> See Ruth C. Silva, *The Constitution, the Conscientious Objector, and the “Just” War*, 75 DICK. L. REV. 1, 9-15 (1970).

<sup>39</sup> See *United States v. Sisson*, 297 F. Supp. 902, 908 (D. Mass. 1969).



In a democracy, it seems necessary that individuals be allowed to criticize and object to the actions of their government. "Given the often predatory aims of state power, and the tendency of men to defer to their government's decision to wage war, a general willingness to resist the state's claims is all the more necessary."<sup>40</sup>

#### IV. INTERNATIONAL LAW AND THE RIGHT OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

##### A. *International Standards*

A number of international legal principles implicitly support the right to conscientiously object to military service. Among these principles are the rights to freedom of thought, conscience and religion, the right to life and the right to peace.

Rules of conduct that circumscribe participation in war, include the theories of *jus contra bellum* and *jus in bello*, the condemnation of genocide and the right of countries to self-determination. These standards will now be examined more closely because they support the contention that the right of conscientious objection is, or should be recognized as, a basic human right.

##### 1. Freedom of Thought, Conscience and Religion

The first international standard on which the right to conscientiously object to military service can be founded is the right to freedom of thought, conscience and religion. Many international conventions assert that everyone has the right to freedom of conscience and religion and that such freedom includes the right to manifest one's belief in teaching, practice, worship and observance.<sup>41</sup> Such conventions include the Universal Declaration of Human Rights,<sup>42</sup> the International Covenant on Civil and Political Rights,<sup>43</sup> the European Convention on Human Rights and Fundamental Freedoms,<sup>44</sup> the American Declaration on the Rights and Duties of Man,<sup>45</sup> the American Convention on Human Rights,<sup>46</sup> and

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<sup>40</sup> RAWLS, *supra* note 10, at 382.

<sup>41</sup> Universal Declaration of Human Rights, art. 18, G.A. Res. 217A, U.N. Doc. A/810 (1948).

<sup>42</sup> *Id.*

<sup>43</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18, 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976).

<sup>44</sup> European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 222, 230.

<sup>45</sup> American Declaration of the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Bogota, May 1948), art. III, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, O.A.S. OFF. REC., OEA/Ser. L.V./11.71 Doc. 6 (English) Rev. 1, at 15, 19 (1988).

<sup>46</sup> American Convention on Human Rights, Nov. 22, 1969, art. 12, INTER-AMERICAN COM-

the African Charter on Human and People's Rights.<sup>47</sup>

The question then becomes whether there is a basis for claiming exemption to military service on the grounds that freedom of conscience and religion are protected rights. For, as was explained above, when an individual is asserting the right to object to military service, he is in essence exercising a right to freedom of conscience.<sup>48</sup> The United Nations Commission on Human Rights answers this question in the affirmative. A 1989 resolution states that the Commission:

*Recognizing* that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions arising from religious, ethical, moral or similar motives,

1. *Recognizes* the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion as laid down in article 18 of the Universal Declaration of Human Rights as well as article 18 of the International Covenant on Civil and Political Rights.<sup>49</sup>

The resolution specifically recognizes that objection to military service on conscientious grounds is a legitimate exercise of the right to freedom of conscience.

Problems arise, however, when the right to conscientiously object to military service is based on Article 18 of the International Covenant on Civil and Political Rights.<sup>50</sup> During the debates on the adoption of Article 18, the Philippines delegation proposed an additional paragraph to the Convention which stated that "[p]ersons who conscientiously object to war as being contrary to their religion shall be exempt from military service."<sup>51</sup> This amendment, however, was withdrawn prior to a vote on the issue.<sup>52</sup> There is, therefore, some controversy on whether the draftsmen intended to include the right to conscientiously object to military service within the notion of freedom of religion and conscience.

Another obstacle is the fact that Article 8, Paragraph 3(c) of the Convention provides that "forced or compulsory labor" shall not include

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MISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, O.A.S. OFF. REC., OEA/Ser. L.V./11.71 Doc. 6 (English) Rev. 1, at 25, (1988).

<sup>47</sup> African Charter on Human and Peoples' Rights, June 27, 1981, art. 8, O.A.U. Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 59, 60 (1982). [hereinafter Banjul Charter].

<sup>48</sup> See *supra* note 11 and accompanying text.

<sup>49</sup> Hum. Rts. Comm. Res. 1989/59, Draft Report of the United Nations Commission on Human Rights, U.N. Doc. E/CN.4/1989/L.10/Add. 15 (1989).

<sup>50</sup> International Covenant on Civil and Political Rights, *supra* note 43.

<sup>51</sup> U.N. ESCOR, Human Rts. Comm., 6th Sess., at 11, U.N. Doc. E/CN.4/353/SR.161 (1950). An argument can be made that the reason why the proposed addition to Article 18 was withdrawn is simply that its inclusion was unnecessary in light of the fact that Article 18 already covered the matter.

<sup>52</sup> *Id.* at 12.

"any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors."<sup>53</sup> This article seems to accept the idea that individual countries may decide whether or not they will grant a right of conscientious objection since it speaks in terms of "where conscientious objection is recognized."<sup>54</sup> This interpretation is also consistent with the decisions of the U.N. Human Rights Committee.

The Committee first examined the case of a Finnish citizen who claimed that Finland had breached Articles 18 and 19 of the International Covenant on Civil and Political Rights<sup>55</sup> by refusing to recognize his status as a conscientious objector and by subjecting him to criminal prosecution because of his refusal to perform military service.<sup>56</sup>

The Committee first noted that the complainant "was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service."<sup>57</sup> It then concluded that:

[t]he Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3(c)(ii) of article 8, can be construed as to imply that right.<sup>58</sup>

Therefore, the Human Rights Committee rejected the communication on the grounds that it was inadmissible.

The Committee reaffirmed its position in a case which decided whether a violation of Article 26 could be proven by a citizen of the Netherlands.<sup>59</sup> The Committee observed that "the Covenant does not preclude the institution of compulsory military service by States parties, even though this means that the rights of individuals may be restricted during military service, within the exigencies of such service."<sup>60</sup> It therefore seems clear that Article 18 of the International Covenant on Civil and Political Rights does not include the right to conscientiously object to military service.<sup>61</sup>

Unlike the Human Rights Commission which mentions, in its resolutions, Articles 18 of both the Universal Declaration of Human Rights

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<sup>53</sup> International Covenant on Civil and Political Rights, *supra* note 43, art. 8.

<sup>54</sup> *Id.*

<sup>55</sup> *Right to Conscientious Objection in Finland*, 7 HUM. RTS. L.J. 267 (1986).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 268.

<sup>58</sup> *Id.*

<sup>59</sup> See Communication No. 245/1987. U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 265 U.N. Doc. A/43/40, (1988).

<sup>60</sup> *Id.* at 266.

<sup>61</sup> See also Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 209, 211-212 (Louis Henkin ed., 1981) [hereinafter THE INTERNATIONAL BILL OF RIGHTS].

and of the International Covenant on Civil and Political Rights, the Committee of Ministers of the Council of Europe does not refer, in recommendation R(87), to Article 9 of the European Convention.<sup>62</sup> The Recommendation simply states that:

anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out thereafter. Such person may be liable to perform alternative service.<sup>63</sup>

No reference was made to Article 9 of the Convention because this would have presented a conflict with previous committee decisions which held that Article 9 of the Convention did not assure a right of conscientious objection.<sup>64</sup>

Although Article 9, at first glance, may appear to grant a right of conscientious objection, it must be read and interpreted in light of Article 4.<sup>65</sup> Article 4(3)(b) makes express reference to conscientious objectors and provides that, for purposes of that article, the term "forced or compulsory labor" shall not include service exacted from conscientious objectors instead of compulsory military service in countries where a right to objection is recognized.<sup>66</sup> Since Article 4 speaks of conscientious objectors "in countries where they are recognized," states are not obliged under Article 9 to recognize objectors.<sup>67</sup> Further, because Article 4 refers to substitute service, a person cannot claim, under Article 9, exemption from substitute service where the state recognizes his status as a conscientious objector.<sup>68</sup>

The question of the right to conscientious objection to military service was examined by the European Commission on Human Rights in the *Grandrath* case.<sup>69</sup> In that case, a German citizen who was a Bible

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<sup>62</sup> European Convention on Human Rights, *supra* note 44.

Article 9 provides:

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of the public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>63</sup> Recommendation R(87)8, *supra* note 37.

<sup>64</sup> *Id.*

<sup>65</sup> European Convention on Human Rights, *supra* note 44, art. 4.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See FRANCIS JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 144-45 (1975).

<sup>69</sup> 10 Y.B. EUR. CONV. ON H.R. 626 (1967).

study leader in a congregation of Jehovah's Witnesses, had been recognized by the national authorities as a conscientious objector.<sup>70</sup> He was required to perform substitute civilian service but was given an opportunity to apply for exemption or postponement of such substitute service.<sup>71</sup> The national authorities, however, rejected his claim for exemption from substitute service.<sup>72</sup> As a result of his refusal to perform substitute civilian service, proceedings were brought against him, and he was convicted and sentenced to prison.<sup>73</sup> Appearing before the Commission, the applicant alleged breaches of Article 9, because he had not been exempted from substitute civilian service; and of Article 14, because he was discriminated against by the national authorities where the national law created exceptions for Evangelical or Roman Catholic ministers.<sup>74</sup>

The Commission first distinguished the issues of religion and conscience under Article 9. It stated that the civilian service which the applicant was required to perform would not restrict his right to manifest his religion since it would not interfere with the private and personal practice of his religion, or with his duties to his religious community.<sup>75</sup> On the question of conscience, the commission examined Article 4(3)(b) and held:

[a]s in this provision it is expressly recognized that civilian service may be imposed on conscientious objectors as a substitute for military service, it must be concluded that objections of conscience do not, under the Convention, entitle a person to exemption from such service.<sup>76</sup>

The reasoning of the Commission, as explained by Fawcett,<sup>77</sup> was that:

had there been no reference in Article 4(3)(b) to conscientious objection to compulsory military service, it could have been argued that, while such service is not forced labour contrary to Article 4, it is still contrary to Article 9(1) if imposed on conscientious objectors. But since Article 4(3)(b) refers to conscientious objection in terms, which plainly imply that contracting States are not bound to recognize it, compulsory military service is an exception to Article 9(1) as well as Article 4. It follows *a fortiori* that substitute civilian service is also an exception.<sup>78</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 628.

<sup>74</sup> *Id.* at 630.

<sup>75</sup> *Id.* at 672.

<sup>76</sup> *Id.* at 674.

<sup>77</sup> J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1987).

<sup>78</sup> *Id.* at 241.

The Commission also found no breach of Article 14 of the Convention.<sup>79</sup>

In *X v. Austria*<sup>80</sup> the Commission once again examined the issue of conscience and military service. In that case, the applicant, who had been convicted for refusing to serve in the military, claimed that, as a Roman Catholic, it was impossible for him to serve as an armed combatant.<sup>81</sup> He therefore alleged before the Commission that his right to freedom of conscience had been violated.<sup>82</sup>

The Commission, in examining the scope of Article 9, held that Article 4(3)(b) had to be taken into consideration. It stated that, "by including the words, in countries where they are recognized, in Article 4(3)(b), a choice is left to the High Contracting Parties to the Convention whether or not to recognize conscientious objectors and, if so recognized, to provide some substitute service for them."<sup>83</sup> The Commission therefore concluded that Article 9, as qualified by Article 4(3)(b), does not impose on a state an obligation to recognize conscientious objection and the Convention does not prevent a state which fails to recognize conscientious objectors from punishing those who refuse military service.<sup>84</sup>

As illustrated in these two cases, the Commission has clearly concluded that the right to conscientiously object to military service is not protected by the European Convention. It must also be noted that in the case of the International Covenant on Civil and Political Rights and the European Convention, the decisions of the courts that freedom of conscience did not include the right to object to military service, were predicated on the fact that both conventions contained limiting articles.

In conclusion, despite the fact that certain conventions specifically recognize the right to freedom of conscience, international human rights tribunals have consistently held that the right to conscientiously object to military service is not an element of the right to conscience. Accordingly, the international community must broaden the concept of freedom of conscience to include the right to object to military service.

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<sup>79</sup> *Grandath*, 10 Y.B. EUR. CONV. H.R. at 686; The Commission reaffirmed its decision in *X. v. The Federal Republic of Germany*, App. No. 7705/76 9 Eur. Comm'n H.R. Dec. & Rep. 196 (1977) and in *Johansen v. Norway*, Appl. 10600/83, (1987) 9 Eur. H.R. Rep. 103 (Commission Report).

<sup>80</sup> 43 Eur. Comm'n. H.R. Dec. & Rep. 161.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* See also *Johansen v. Norway*, 9 Eur. H.R. Rep at 106-107; *Conscientious Objectors v. Denmark*, App. No. 7565/76, 9 Eur. Comm'n H.R. Dec. & Rep 117, 118 (1977) (Commission report); Dec. Adm. Com. App. 7548/76, October 7, 1977, in 3 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 374 (1984).

## 2. Right to Life

The right to conscientiously object to military service is reinforced by the fact that the right to life is guaranteed in the Universal Declaration of Human Rights,<sup>85</sup> the International Covenant on Civil and Political Rights,<sup>86</sup> the European Convention on Human Rights,<sup>87</sup> the American Declaration on the Rights and Duties of Man,<sup>88</sup> and the African Charter on Human and Peoples' Rights.<sup>89</sup>

Although the right to life is not an absolute right,<sup>90</sup> the rule is that no one should be arbitrarily deprived of his life.<sup>91</sup> As Eide and Mubanga-Chipoya argue:

there may be, in national and international law, a legitimate basis for taking the life of others when this is not arbitrary. Specific norms to this effect have been developed in all societies. To deprive a person of his life is everywhere considered as something that can be justified only under extreme circumstances and for reasons clearly defined in advance. This principle forms part of the conscience of every moral person, and it therefore reinforces the conviction that one shall not participate in the taking of life of others unless there exists an extreme situation that is clearly justified.<sup>92</sup>

If the right to life is one of the most important human rights, then it may also be said that the right to refuse to take a life must be regarded as a fundamental human right. If national laws and international custom forbid individuals from engaging in arbitrary killing, conscientious objectors should not be punished for refusing to kill.<sup>93</sup> Therefore, the right to life, liberty and security of person must include within its scope the right not to be forced to take the life of others.

The relevance of the right to life with regard to the issue of conscientious objection to military service was recognized by the Commission on

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<sup>85</sup> Universal Declaration of Human Rights, *supra* note 41, art. 3.

<sup>86</sup> International Covenant on Civil and Political Rights, *supra* note 43, art. 6.

<sup>87</sup> European Convention on Human Rights, *supra* note 44, art. 2.

<sup>88</sup> American Declaration of the Rights and Duties of Man, *supra* note 45, art. I.

<sup>89</sup> Banjul Charter, *supra* note 47, art. 4.

<sup>90</sup> Under the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter, certain categories of permissible deprivations of the right to life are recognized. See generally C. K. Boyle, *The Concept of Arbitrary Deprivation of Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 221 (B.G. Ramcharan, ed., 1985) [hereinafter *THE RIGHT TO LIFE*]; Daniel D. Nserko, *Arbitrary Deprivation of Life: Controls on Permissible Deprivations*, in *THE RIGHT TO LIFE*, *supra* at 245.

<sup>91</sup> See B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in *THE RIGHT TO LIFE*, *supra* note 90; Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS*, *supra* note 61, at 114.

<sup>92</sup> *Conscientious Objection*, *supra* note 3, at 5.

<sup>93</sup> See Statement of the International Peace Bureau, U.N. ESCOR, Hum. Rts. Comm., 45th Sess., Agenda Item 15, at 2, U.N. Doc. E/CN.4/1989/NGO/71 (1989).

Human Rights in resolution 1989/59, which states, "*Mindful* of articles 3 and 18 of the Universal Declaration of Human Rights, which proclaim the right to life, liberty and security of person and the right to freedom of thought, conscience and religion . . . we recognize a right of conscientious objection."<sup>94</sup>

### 3. *Jus Contra Bellum*

*Jus Contra bellum* refers to that body of international law which restricts the right to use armed force to certain well defined situations.<sup>95</sup> For example, the United Nations Charter curtails the right of states to use armed force as an instrument of foreign policy. Article 2, paragraph 4 of the Charter of the United Nations stipulates that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>96</sup> Article 51 of the Charter also establishes that the only justifiable use of armed force is for self-defence in the event of an armed attack on a member state.<sup>97</sup>

The principles developed in the Charter have been reinforced by a number of other international instruments such as the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>98</sup> the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,<sup>99</sup> the Definition of Aggression,<sup>100</sup> and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.<sup>101</sup>

These instruments establish the principle that the use of armed force must be limited and, in fact, that it is prohibited in most situations. The rules developed in these instruments are important to the issue of a right of conscientious objection because:

when a person is convinced that the armed forces of his own country

<sup>94</sup> Hum. Rts. Comm. Res. 1989/59, *supra* note 49.

<sup>95</sup> See generally YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* (1988).

<sup>96</sup> U.N. CHARTER, art. 2, para. 4.

<sup>97</sup> *Id.* art. 51. See generally JAMES LESLIE BRIERLY, *THE LAW OF NATIONS* chaps. IV-V (6th ed., 1963); Ian Brownlie, *The United Nations Charter and the Use of Force, 1945-1985*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE*, at 491 (Antonio Cassese ed., 1986) [hereinafter *THE CURRENT REGULATION*]; Bert V.A. Röling, *The Ban on the Use of Force and the U.N. Charter*, in *THE CURRENT REGULATION supra* at 3; C.H.M. Waldock, *The regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 454 (1952).

<sup>98</sup> G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

<sup>99</sup> G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. 28, at 121, U.N. Doc. A/8028 (1970).

<sup>100</sup> G.A. Res. 3314, U.N. GAOR, 24th Sess., Annex, at 143-44, U.N. Doc. A/9030/Add. 1 (1974).

<sup>101</sup> G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965).



are being used or may be used in the future for purposes that are in violation of international law, and when therefore a conscience built on respect for international law reinforces the general repulsion against taking the life of others arbitrarily, should not this objection be accepted? This would form a concrete application of the extent of the right to freedom of conscience and to freedom of action built on conscience.<sup>102</sup>

The Nuremberg Charter raises an additional argument that can be invoked for the recognition of the right to refuse military service. Article 6 of the Charter establishes in part that:

[t]he following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
- (b) *War crimes*: namely, violations of the laws or customs of war. . .
- (c) *Crimes against humanity*: namely, murder, exterminations, enslavement, deportation, and other inhumane acts committed against any civilian population before or during war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>103</sup>

The Nuremberg Charter is particularly relevant to the issue of conscientious objection since it advances the principle of individual responsibility for the crime of attacking international peace.<sup>104</sup> In the *Nurnberg Trial*, the International Military Tribunal stated:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as upon States has long been recognized . . . the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedi-

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<sup>102</sup> *Conscientious Objection*, *supra* note 3, at 6.

<sup>103</sup> Charter of the International Military Tribunal, August 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279, 286.

<sup>104</sup> See generally Anthony D'Amato, et al., *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CALIF. L.R. 1055 (1969); Mary M. Kaufman, *Judgment at Nurnberg: An appraisal of Its Significance*, 40 GUILD PRACT. 62 (1983); Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397 (1989).

ence imposed by the individual State. He who violates the law of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.<sup>105</sup>

The argument for the conscientious objector is that since he is responsible under international law for his actions, he should not be forced to participate in international crimes. If the objector believes that the armed forces of his country are being used for purposes that violate the principles of international law, he must be able to object. Further, the notion of crimes against the peace reinforces the idea that, in international law, aggressive and illegal wars should not be supported.

#### 4. *Jus in Bello*

The principle of *jus in bello*<sup>106</sup> regulates the means and methods that a nation can use to wage war.<sup>107</sup> A number of international instruments prohibit the use of certain means and methods of warfare.<sup>108</sup> Unacceptable conduct includes the failure to discriminate between combatants and civilians and between military and civilian targets.<sup>109</sup> Reference can also be made to Article 6 of the London Charter which deals with war crimes and crimes against humanity.<sup>110</sup>

The guidelines established by the different conventions can be

<sup>105</sup> The Nurnberg Trial, 6 F.R.D. 69, 110 (1946).

<sup>106</sup> *Jus in bello* "can be referred to interchangeably as the 'laws of armed conflict' or the 'laws of war.'" Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1, (1992) (citing DOCUMENTS ON THE LAWS OF WAR 1-2 (Adam Roberts & Richards Guelff eds., 1989)).

<sup>107</sup> See generally THE CONDUCT OF JUST AND LIMITED WAR, *supra* note 24, at 37-70; RALPH B. POTTER, WAR AND MORAL DISCOURSE (1969); WAR AND THE CHRISTIAN CONSCIENCE, *supra* note 24.

<sup>108</sup> 1977 U.N. JURID. Y.B. 95, U.N. Doc. ST/LEG/SER.C/15.

<sup>109</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>110</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, Oct. 6, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter]. The Agreement and the Charter are collectively referred to as the London Charter. Article VI defines war crimes as:

[M]urder, ill-treatment or deportation to slave labor or for any other purpose the civilian population of or in an occupied territory, murder or ill-treatment of prisoners of war or persons on the scene, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

*Id.* art. VI, 59 Stat. at 1547, 82 U.N.T.S. at 287-88. Crimes against humanity are defined as: [M]urder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated . . . .

*Id.*

viewed as drawing the "line between protection of the life of the individual and the legitimate scope of action when the use of armed force is unavoidable."<sup>111</sup> These guidelines play an important role in the debate concerning the right to conscientiously object to military service since an individual can argue that he should be able to object to participation in an action that goes beyond a legitimate armed action.

### 5. Nuclear Weapons

Because of the possibility that nuclear weapons will be used in the context of war, it can be argued that "a youth may refuse to take part in military preparations for such a war on the ground that it would necessarily violate the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1929 and 1949, the customary international law of warfare, and every tenet of morality and rationality."<sup>112</sup>

Since international law has recognized that under certain circumstances there is a duty to refuse to take part in armed combat or to participate in certain prohibited actions,<sup>113</sup> a right to object to military service in these situations is a prerequisite to the implementation of that duty.<sup>114</sup>

### 6. Genocide

Following the adoption of a 1946 General Assembly resolution affirming the principles of the Nuremberg Charter,<sup>115</sup> the Convention on the Prevention and Punishment of Genocide was adopted in 1948.<sup>116</sup> In Article 1 of the Convention, the parties confirm that genocide "is a crime under international law which they undertake to prevent and to punish."<sup>117</sup> Article 2 defines genocide as acts "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."<sup>118</sup> These acts include killing members of the group, causing serious bodily or mental harm to members of the group, deliberately in-

<sup>111</sup> *Conscientious Objection*, *supra* note 3, at 6.

<sup>112</sup> Schaffer, *supra*, note 16, at 38. *See also*, JUST WAR THEORY IN THE NUCLEAR AGE (John D. Jones & Marc Griesbach eds., 1985).

<sup>113</sup> *Conscientious Objection*, *supra* note 3.

<sup>114</sup> *See generally* The Role of Youth in the Promotion and Protection of Human Rights, Including the Question of Conscientious Objection to Military Service, U.N. ESCOR, Hum. Rts. Comm., 45th Sess., Agenda Item 15, at 1, U.N. Doc. E/CN.4/1989/NGO/18 (1989).

<sup>115</sup> G.A. Res. 95, U.N. Doc. A/236, at 1144 (1946).

<sup>116</sup> G.A. Res. 260, U.N. Doc. A/760 & A/760/Corr. 2, at 810 (1948).

<sup>117</sup> *Id.* art. I.

<sup>118</sup> *Id.* art. II. On the question of genocide, *see also* IRVING LOUIS HOROWITZ, GENOCIDE: STATE POWER AND MASS MURDER (2nd ed., 1977); NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: ITS ORIGINS AND INTERPRETATION (1949); THE PREVENTION OF GENOCIDE CONVENTION: A COMMENTARY (1960); J. Graven, *Les Crimes Contre L'Humanité*, 76 R.C.A.D.I. 433 (1950); G. Levasseur, *The Prevention of Genocide*, 7 J. INT'L COMM'N OF JURISTS 74 (1966).

flicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures to prevent births within the group, and forcibly transferring children of the group to another group.<sup>119</sup>

According to the Convention, all individuals must refuse to participate in genocide since they are subject to criminal liability under Article VI which states:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.<sup>120</sup>

Because individuals are personally responsible for their actions, under the Nuremberg principles,<sup>121</sup> in the case of genocide, an individual must not only be allowed to refuse to participate, but he has a positive duty to refrain from participating in activities constituting genocide.<sup>122</sup> The Genocide Convention therefore reinforces the significance of individual conscience as regards military service.<sup>123</sup>

## 7. Apartheid

Under International law, it is a crime to participate in apartheid. Article 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>124</sup> states that "apartheid is a crime against humanity" and that the "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial discrimination . . . are crimes violating the principles of international law. . . ."<sup>125</sup> Article 1 also stipulates that the parties to the Convention "declare criminal those organizations, institutions and individuals committing the crime of apartheid."<sup>126</sup>

Therefore, as in the case of genocide, individuals have not only a right, but a duty, to refuse to participate in the crime of apartheid. This view is reinforced by General Assembly resolution 33/165 which provides that all persons must refuse service in military forces which are

<sup>119</sup> Convention on the Prevention and Punishment of Genocide, *supra* note 116, art. III.

<sup>120</sup> *Id.* art. VI.

<sup>121</sup> See generally THE CONDUCT OF JUST AND LIMITED WAR, *supra* note 24, at 57; Lawrence, *supra* note 104.

<sup>122</sup> *Conscientious Objection*, *supra* note 3, at 6.

<sup>123</sup> See Lynn Berat, *Conscientious Objection in South Africa: Governmental Paranoia and the Law of Conscription*, 22 VAND. J. OF TRANSNAT'L L. 127, 175 (1989).

<sup>124</sup> Nov. 30, 1973, 1015 U.N.T.S. 244 (entered into force July 18, 1976).

<sup>125</sup> *Id.* art. 1.

<sup>126</sup> *Id.* art. 1.

used to enforce apartheid.<sup>127</sup>

### 8. The Right to Self-Determination

In Article 1, paragraph 2, and in Article 55 of the United Nations Charter references are made to "the principle of equal rights and self-determination of peoples."<sup>128</sup> The principle of self-determination as defined in the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>129</sup> is viewed as emanating from the obligations set forth in the Charter. Further, in the Declaration on Principles of International Law relating to Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>130</sup> the General Assembly provides that:

[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.<sup>131</sup>

These principles can be invoked by an objector to argue that he must refuse to participate in any action that tends or would tend to deprive people of their right to self-determination.

### 9. Life in Peace

The United Nations has also affirmed the right of man to live in peace. In the Declaration on the Preparation of Societies for Life in Peace,<sup>132</sup> Principle 1 provides:

Every nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life in peace. Respect for that right, as well as for other human rights, is in the common interests of all mankind and an indispensable condition of advancement of all nations, large and small, in all fields.<sup>133</sup>

Furthermore, the Declaration on the Right of Peoples to Peace, reaffirms the right to peace and declares that "the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each State."<sup>134</sup>

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<sup>127</sup> G.A. Res. 33/165, *supra* note 35.

<sup>128</sup> U.N. CHARTER, art. 1, para. 2 & art. 55.

<sup>129</sup> G.A. Res. 1514, *supra* note 98.

<sup>130</sup> G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 29, at 123, U.N. Doc. A/8028 (1970)

<sup>131</sup> *Id.*

<sup>132</sup> G.A. Res. 33/73, U.N. GAOR, 33rd Sess., Supp. No. 45, at 54, U.N. Doc. A/33/45 (1979).

<sup>133</sup> *Id.*

<sup>134</sup> G.A. Res. 39/11, U.N. GAOR, 39th Sess., Supp. No. 51, at 220, U.N. Doc. A/39/51 (1985).

These Declarations can be advanced in order to support a right to conscientiously object to military service by arguing that since a person has a right to live in peace, he must be allowed to decide not to participate in war.

### *B. Religious Perspectives*

The question of whether individuals should have the right to conscientiously object to military service has been debated for a number of years by religious organizations. These organizations have, in a series of worldwide conferences, by and large, endorsed the right to conscientious objection. Some of the recommendations of these organizations will now be examined, for they illustrate a pattern of acceptance toward the right to conscientiously object.

In 1970, the World Conference on Religion and Peace (which included representatives from ten religions) issued a statement entitled the "Rights of Conscientious Objectors," which declared:

We consider that the exercise of conscientious judgment is inherent in the dignity of human beings and that, accordingly each person should be assured the right, on grounds of conscience or profound conviction, to refuse military service, or any other direct or indirect participation in wars or armed conflicts. The right of conscientious objection also extends to those who are unwilling to serve in a particular war because they consider it unjust or because they refuse to participate in a war or conflict in which weapons of mass destruction are likely to be used.<sup>135</sup>

The Committee on Society, Development and Peace (SODEPAX) also issued a proclamation in 1970 (the Baden Consultation) which concluded:

29. The consultation considers that the exercise of conscientious judgment is inherent in the dignity of human beings and that accordingly, each person should be assured the right, on grounds of conscience or profound conviction, to refuse military service, or any other direct or indirect participation in wars or armed conflicts.

30. The right of conscientious objection also extends to those who are unwilling to serve in a particular war because they consider it unjust or because they refuse to participate in a war or conflict in which weapons of mass destruction are likely to be used.

31. The consultation also considers that members of armed forces have the right and even the duty, to refuse to obey military orders which may involve the commission of criminal offenses, or of war crimes or crimes against humanity.

32. It is urged that the churches should use their best endeavor to

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<sup>135</sup> RELIGION FOR PEACE 183 (Homer A. Jack ed., 1973) (proceedings of the Kyoto Conference on Religion and Peace, Japan, October 1970).

secure the recognition of the right of conscientious objection as herein before defined under national and international law. Governments should extend the right of asylum to those refusing to serve in their country for reasons of conscience.<sup>136</sup>

In 1974, the World Conference on Religion and Peace reaffirmed its commitment to the rights of conscientious objectors when it stated:

We reaffirm the assertion of the Kyoto Conference of the right to conscientious objection to military service. We urge religious organizations to continue their work for the recognition of conscientious objection by the international community through the U.N.

Governments which have not yet recognized the right of conscientious objections, should be persuaded to do so, and make [available] alternative forms of humanitarian service. They should grant suitable amnesties to those who have come into conflict with the law in asserting this right. Religious organizations should also seek to open creative avenues of work in reconciliation, peace-making, and development as alternative forms of service for those who reject all compulsory state service.<sup>137</sup>

And in 1979, the Third World Conference on Religion and Peace also recognized the need to protect conscientious objectors by stating in the Princeton Declaration:

We uphold the right of citizens to conscientious objection to military service.<sup>138</sup>

(b) Commission findings No. 19 on religion and human dignity, responsibility and rights:

We urge all governments to consider peaceful alternatives to compulsory military service.<sup>139</sup>

What can be gleaned from these declarations is a global commitment to the idea of conscientious objection. Of further importance is the fact that the declarations support not only the rights of pacifists to object to participation in war, but also the rights of partial conscientious objectors.<sup>140</sup>

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<sup>136</sup> COMMITTEE ON SOCIETY, DEVELOPMENT AND PEACE, *PEACE - THE DESPERATE IMPERATIVE* 57-58 (1970).

<sup>137</sup> Homer A. Jack, *Commission III on Human Rights and Fundamental Freedoms*, in *WORLD RELIGION/WORLD PEACE* 44, 46-47 (Homer A. Jack ed., 1974) (proceedings of the Second World Conference on Religion and Peace, Belgium, August 1974).

<sup>138</sup> Homer A. Jack, *The Princeton Declaration*, in *RELIGION IN THE STRUGGLE FOR WORLD COMMUNITY* i, v (Homer A. Jack ed., 1980) (proceedings of the Third World Conference on Religion and Peace, Princeton, New Jersey 1979).

<sup>139</sup> *Id.* at 117.

<sup>140</sup> See, e.g., *OFFICIAL REPORT OF THE FOURTH ASSEMBLY OF THE WORLD COUNCIL OF CHURCHES* (Norman Goodall ed., 1968).

Protection of conscience demands that the churches should give spiritual care and support not only to those serving in armed forces but also to those who, especially in the light of the

### C. Resolutions and Decisions Adopted by International Organizations

#### 1. The United Nations

The issue of conscientious objection to military service was discussed in the United Nations as early as 1950,<sup>141</sup> when the Secretary-General of the U.N. circulated a statement that documented the legislative and administrative provisions of thirty-four countries regarding conscientious objection.<sup>142</sup> It was only in 1956, however, in the *Study of Discrimination in the Matter of Religious Rights and Practices*,<sup>143</sup> that the issue was considered by the United Nations. The Study concluded that:

[a]s a rule, it may be stated that where the principle of conscientious objection to military service is recognized, exemptions should be granted to genuine objectors in a manner ensuring that no adverse distinction based upon religion or belief may result.<sup>144</sup>

In 1965, the General Assembly adopted the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples.<sup>145</sup> In Principle 1 of the Declaration it was declared:

Young people shall be brought up in the spirit of peace, justice, freedom, mutual respect and understanding in order to promote equal right for all human beings and all nations, economic and social progress, disarmament and the maintenance of international peace and security.<sup>146</sup>

Although this Declaration did not specifically address the issue of conscientious objection, it established the notion that individuals must be brought up in a society that respects peace and personal conscience.<sup>147</sup>

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nature of modern warfare, object to participation in particular wars they feel bound in conscience to oppose, or who find themselves unable to bear arms or to enter the military service of their nations for reasons of conscience. Such support should include pressure to have the law changed when this is required, and be extended to all in moral perplexity about scientific work on weapons of mass destruction.

*Id.* at 14.

<sup>141</sup> See generally Jonathan M. Engram, *Conscientious Objection to Military Service: A Report to the United Nations Division of Human Rights*, 12 GA. J. INT'L & COMP. L. 359 (1982).

<sup>142</sup> Statement by Service Civil International U.N. ESCOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/NGO/1 Add. 1 (1950).

<sup>143</sup> Arcott Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev. 1 (1960), reprinted in 11 N.Y.U.J. INT'L L. & POL. 227 (1978). It should be noted that the Study devoted only two pages to the issue of conscientious objection. *Id.* at 258-259.

<sup>144</sup> *Id.* at 259.

<sup>145</sup> G.A. Res. 2037, U.N. GAOR, 20th Sess., Supp. No. 14, at 40, U.N. Doc. A/6014 (1965).

<sup>146</sup> *Id.* Principle 1.

<sup>147</sup> See also Education of Youth in the Respect for Human Rights and Fundamental Freedoms, G.A. Res. 2447, U.N. GAOR, 3rd Comm., 23rd Sess., Supp. No. 18, at 52, U.N. Doc. A/7218 (1968); *International Youth Year: Participation, Development, Peace*, U.N. GAOR, 3rd



It was, however, only at its 27th session that the Commission on Human Rights truly considered and debated the issue of conscientious objection to military service. This was done in the context of the Commission's agenda item entitled "Study of the Question of the Education of Young People all over the World for the Development of its Personality and Strengthening of its Respect for the Rights of Man and Fundamental Freedoms."<sup>148</sup>

The next step in the debate over the right to conscientiously object to military service occurred in the General Assembly. The General Assembly first recognized a restricted right to conscientious objection in a resolution which affirmed "the right of all persons to refuse service in military or police forces which are used to enforce apartheid."<sup>149</sup> It called upon member states to grant asylum or safe transit to another state, in the spirit of the Declaration on Territorial Asylum, to persons compelled to leave their country of nationality because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces.<sup>150</sup> It urged member states to consider favorably the granting to such persons of all the rights and benefits accorded to refugees under existing legal instruments and it called upon the appropriate United Nations bodies to provide the necessary assistance to such persons.<sup>151</sup>

In a further resolution, the General Assembly once again dealt with the issue of conscientious objection and apartheid when it appealed to the youth of South Africa to refrain from enlisting in the South African

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Comm., 37 Sess., Supp. No. 51, at 182, U.N. Doc. A/37/51 (1982). In 1974, the General Conference of UNESCO also adopted a recommendation concerning education for international understanding, co-operation and peace and education relating to human rights. See 1 UNESCO, Records of the Eighteenth Session of the General Conference, Paris, 1974, Resolutions, at 148-49 (Principle 6). And in 1980 during UNESCO's World Conference on Disarmament Education, the following principle was set out:

As an approach to international peace and security, disarmament education should take due account of the principles of international law based on the Charter of the United Nations, in particular, the refraining from the threat of force against the territorial integrity or political independence of States, the peaceful settlement of disputes, non-intervention in domestic affairs and self-determination of peoples. It should draw upon the international law of human rights and international humanitarian law applicable in time of armed conflict and consider alternative approaches to security, including such non-military defence systems as non-violent civilian action. The study of the United Nations efforts, of non violent conflict resolution and other means of controlling international violence take on a special importance in that regard. Due attention should be accorded in programs of disarmament education to the right of conscientious objection and the right to refuse to kill.

See RELIGION FOR PEACE, *supra* note 135, at 183.

<sup>148</sup> At this writing the Commission on Human Rights continues to debate the issue.

<sup>149</sup> G.A. Res. 33/165, U.N. GAOR, 33rd Sess., Supp. No. 45, at 154, U.N. Doc. A/33/45 (1978).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

armed forces, "which are designed to defend the inhuman system of apartheid, to repress the legitimate struggle of the oppressed people and to threaten, and commit acts of aggression against, neighboring States."<sup>152</sup> The Assembly also invited all Governments and organizations to assist, in accordance with the resolution, persons compelled to leave South Africa because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces.<sup>153</sup>

Then in 1981, the United Nations Commission on Human Rights requested that the Sub-Commission on the Prevention of Discrimination and Protection of Minorities prepare a report on the question of conscientious objection to military service.<sup>154</sup> After a thorough study of the matter, the authors of the report made a series of recommendations to the Commission.<sup>155</sup> One of those recommendations was that there be recognition of the principle of conscientious objection. The report stated in Article 1 that:

- (a) States should recognize by law the right of persons who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian or similar motives, refuse to perform armed service, to be released from the obligation to perform military service.
- (b) States should, as a minimum, extend the right of objection to persons whose conscience forbids them to take part in armed service under any circumstances (the pacifist position).
- (c) States should recognize by law the right to be released from service in armed forces which the objector considers likely to be used to enforce apartheid.
- (d) States should recognize by law the right to be released from service in armed forces which the objector considers likely to be used in action amounting to or approaching genocide.
- (e) States should recognize by law the right to be released from service in armed forces which the objector considers likely to be used for illegal occupation of foreign territory.
- (f) States should recognize the right of persons to be released from service in armed forces which the objector holds to be engaged in, or likely to be engaged in, gross violations of human rights.
- (g) States should recognize the right of persons to be released from the obligation to perform service in armed forces which the objector considers likely to resort to the use of weapons of mass destruction or weapons which have been specifically outlawed by international law or to use means and methods which cause unnecessary

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<sup>152</sup> G.A. Res. 34/93 A of 1979.

<sup>153</sup> *Id.* This appeal was repeated in G.A. Res. 35/206 B, 35 U.N. G.A.O.R. Supp. (No. 48) at 30, U.N. Doc. A/35/48 (1981).

<sup>154</sup> E.S.C. Res. 40 (XXXVII), 37 U.N. ESCOR Supp. (No. 5) at 243, U.N. Doc. E/1981/25; E/CN.4/1475 (1981).

<sup>155</sup> *Conscientious Objection*, *supra* note 3.

suffering.<sup>156</sup>

This report was followed in 1987 and 1989 with two resolutions by the Commission on Human Rights. In resolutions 1987/46<sup>157</sup> and 1989/59,<sup>158</sup> the Commission recognized the right of conscientious objection. In its 1987 resolution the Commission appealed to states to "recognize that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience and religion recognized by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights."<sup>159</sup> The 1989 resolution, stated that the Commission:

*Recognizing* that conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, arising from religious or similar motives,

1. *Recognizes* the right of everyone to have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion as laid down in article 18 of the Universal Declaration of Human Rights as well as article 18 of the International Covenant on Civil and Political Rights;

2. *Appeals* to States to enact legislation and to take measures aimed at exemption from military service on the basis of a genuinely held conscientious objection to armed service;

3. *Recommends* to States with a system of compulsory military service, where such provision has not already been made, that they introduce for conscientious objectors various forms of alternative service which are compatible with the reasons for conscientious objection, bearing in mind the experience of some States in this respect, and that they refrain from subjecting such persons to imprisonment;

4. *Emphasizes* that such forms of alternative service should be in principle of a non-combattant or civilian character, in the public interest and not of a punitive nature;

5. *Recommends* to States Members of the United Nations, if they have not already done so, that they establish within the framework of their national legal system independent and impartial decision-making bodies with the task of determining whether a conscientious objection is valid in a specific case;<sup>160</sup>

The main difference between the 1987 and 1989 resolutions is that while in 1987 the Commission appealed to member states to recognize the right of conscientious objection, in 1989 the Commission itself recog-

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<sup>156</sup> *Id.* at 18.

<sup>157</sup> Hum. Rts. Comm. Res. 1987/46, *supra* note 37.

<sup>158</sup> Hum. Rts. Comm. Res. 1989/59, *supra* note 49.

<sup>159</sup> Hum. Rts. Comm. Res. 1987/46, *supra* note 37.

<sup>160</sup> Hum. Rts. Comm. Res. 1989/59, *supra* note 49.

nized the right of conscientious objection to military service. Although this is a welcome change, problems still remain with the drafting of the 1989 resolution. The main difficulty is that the resolution does not directly address the issue of partial objectors. Despite the fact that the resolution stipulates that objection to military service can be derived from "principles and reasons of conscience, including profound convictions, arising from religious or *similar motives*,"<sup>161</sup> it does not specifically refer to the partial objector. Therefore, the position of the Commission on Human Rights as regards the right to partial objection remains unclear.

## 2. Council of Europe

The Council of Europe has dealt with the question of the right to conscientious objection to military service in two resolutions. In 1967, the Consultative Assembly of the Council of Europe adopted Resolution 337 "on the right of conscientious objection,"<sup>162</sup> which was subsequently presented to the Council of Europe's Committee of Ministers in Recommendation 478.<sup>163</sup> In 1987 the Committee of Ministers of the Council of Europe reaffirmed its commitment to the right of conscientious objection by adopting Recommendation R(87)8.<sup>164</sup> The 1987 Recommendation provides:

. . . *Noting* that in the majority of member States of the Council of Europe military service is a basic obligation of citizens;

*Considering* the problems raised by conscientious objection to compulsory military service;

*Wishing* that conscientious objection to compulsory military services

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<sup>161</sup> *Id.*

<sup>162</sup> See Amnesty International, *Special Action for Conscientious Objectors in Western Europe*, Circular 2, 1979, at 3. Resolution 337 states:

The Assembly,

Having regard to article 9, of the European Convention on Human Rights, which binds member states to respect the individual's freedom of conscience and religion,

Declares:

A. Basic Principles

1. Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service.

2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.

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

<sup>164</sup> *Supra*, note 37, at 19.

be recognized in all the member States of the Council of Europe and governed by common principles;

*Noting* that, in some member States where conscientious objection to compulsory military service is not yet recognized, specific measures have been taken with a view to improving the situation of the individual concerned;

*Recommends* that the government of member States, in so far as they have not already done so, bring their national law and practice into line with the following principles and rules:

*A. Basic Principles*

1. Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service; . . . .<sup>165</sup>

In essence, these resolutions affirm that anyone who is liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in war, shall have the *right* to be released from the obligation to perform such service. The problem with the resolutions, however, as was mentioned earlier, is that they do not recognize the right to partial objection to military service.

## V. CONCLUSION

After a brief examination of the documents that recognize and grant a right of objection, and a review of the standards on which such a right can be based, we are left with the question that was previously formulated, that is: Should the right to conscientiously object to military service be regarded as a human right?

Many tests or criteria have been proposed in order to determine whether a given claim qualifies as a human right. Alston, for example, advances that, at a minimum the proposed new human right should:

reflect a fundamentally important social value; be relevant, inevitably to varying degrees, throughout a world of diverse value systems; be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law; be consistent with, but not merely repetitive of, the existing body of international human rights law; be capable of achieving a very high degree of international consensus; be compatible or at least not clearly incompatible with the general practice of states; and be sufficiently precise as to give rise to identifiable rights and obligations.<sup>166</sup>

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

<sup>166</sup> Alston, *supra* note 5, at 615.

When these criteria are applied to the issue of conscientious objection, it becomes evident that a right of objection could qualify as a human right in terms of international law.

As argued, the right to conscientiously object to military service advances important social values, is relevant throughout the world and consistent with the existing body of international human rights law which seeks to protect freedom of conscience and the rights of individuals to live in peace. The right has achieved a certain degree of international consensus and is compatible with the practice of many states.<sup>167</sup> As defined in the various resolutions, it is sufficiently precise to give rise to identifiable rights and obligations.

Further, the right to conscientious objection can be viewed as an interpretation of U.N. Charter obligations. Resolution 1989/59 specifically refers to the U.N. Charter and the right to freedom of thought and religion guaranteed in Article 18 of the Universal Declaration of Human Rights.<sup>168</sup>

In addition to the list of reasons for recognizing the right to conscientiously object to military service as a human right, many resolutions have already made it clear that conscientious objection qualifies as a human right. The General Assembly in resolution 33/165 recognized the right "to refuse service in military or police forces which are used to enforce apartheid."<sup>169</sup> Secondly, the Commission on Human Rights in resolutions 1987/46 and 1989/59 recognized that everyone has the right to "have conscientious objections to military service as a legitimate exercise of the right to freedom of thought, conscience and religion."<sup>170</sup> And finally, the Council of Europe, in two recommendations, considered that "anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the *right* to be released from the obligation to perform such service. . . ."<sup>171</sup>

These resolutions fulfill a number of the criteria to be considered rules of international law. Since the resolutions of the General Assembly specifically refer to the Charter of the United Nations, they are an authoritative interpretation of the provisions of the Charter.<sup>172</sup> The Inter-

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<sup>167</sup> See Report of the Secretary-General, *supra* note 16; *Conscientious Objection*, *supra* note 3.

<sup>168</sup> Hum. Rts. Comm. Res. 1989/59, *supra* note 49.

<sup>169</sup> G.A. Res. 33/165, *supra* note 149.

<sup>170</sup> Hum. Rts. Comm. Res. 1987/46, *supra* note 37. Hum. Rts. Comm. Res. 1989/59, *supra* note 49.

<sup>171</sup> COUNCIL OF EUROPE, COLLECTION OF RECOMMENDATIONS, RESOLUTIONS AND DECLARATION OF THE COMMITTEE OF MINISTERS CONCERNING HUMAN RIGHTS, *supra* note 37 (emphasis added).

<sup>172</sup> *Id.* See also Robert E. Riggs, *The United Nations and the Development of International Law*, 1985 B.Y.U.L. REV. 411, 429-437 (1985)

national Law Commission has also stated that reference can be made to resolutions adopted by the General Assembly and the Economic and Social Council to prove the existence of obligations with respect to human rights.<sup>173</sup> Reference must also be made to the different standards discussed above which implicitly recognize the right to conscientious objection.

In light of all these facts, it is proposed that conscientious objection to military service is a basic human right. The problem, however, remains that such a right has never been explicitly codified in a major human rights instrument. Since resolutions are not considered as "full-fledged" rules of international law<sup>174</sup> and since they need further elaboration and adaptation by states in order to become operative, it is imperative that the major human rights instruments be amended to include the right of conscientious objection to military service.

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<sup>173</sup> *Id.*

<sup>174</sup> *See, Riggs, supra* note 172.

The U.N. Charter . . . establishes beyond doubt that assembly resolutions were intended to be only hortatory in nature. . . . [T]his understanding has been repeatedly confirmed in statements by member states, and it has been implicitly affirmed by the practice of following up certain declarations with a treaty drafting process when legally binding effects are intended.

*Id.* at 435.