THE RECOGNITION OF CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AS AN INTERNATIONAL HUMAN RIGHT

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INTRODUCTION

Since the passage of the Universal Declaration of Human Rights in 1948,¹ numerous international instruments have expanded and refined the rights enumerated in the declaration.² The recognition of a right to conscientious objection to military service is a conspicuous omission from the list of internationally guaranteed human rights. Briefly stated, conscientious objection is the refusal to participate in the armed services based upon opposition to war. This opposition may rest upon reasons of religious belief, philosophy, morality or political ideology.³

The failure to recognize a right to conscientious objection to military service is explicable by the fact that, as noted in 1977 by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe, “there are few areas in which respect for human rights conflicts as sharply with the interests of the state as in the matter of conscientious objection to military service.”⁴ The

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⁴ Conscientious objectors have been classified into three groups: religious, ethical and political objectors. The religious objector finds support for their views in biblical texts and may belong to a church which preaches pacifism as a religious obligation. The ethical objector bases their opposition to military service on a personal moral code; while the political objector usually opposes participation in a particular war on the grounds of international and domestic law and policy. Individuals within these three broad categories of conscientious objectors adhere to differing views towards military service. Some are willing to perform non-combatant military service. Others object to any form of military service, but are willing to serve in a civilian capacity. A third group refuses to submit to any form of secular authority or to the policies of a particular regime. States differ as to their treatment of these various categories of objectors. See generally Smith & Bell, The Conscientious-Objector Program—A Search for Sincerity, 19 U. Pitt. L. Rev. 695 (1958); Russell, Development of Conscientious Objector Recognition in the United States, 20 Geo. Wash. L. Rev. 409 (1952).
individual obligation to militarily defend the state is viewed as a fundamental obligation of citizenship\(^5\) and the conscientious objector is viewed as threatening national security and as undermining the equality of obligation of all citizens, rich as well as poor, to sacrifice for the welfare of society.\(^6\) As was observed during the 1983 debate on conscientious objection in the European Parliament, "people who refuse to perform their military service ought to be considered beyond the pale, by their own choice, since they have refused to participate in the most vital matter of their country's survival and safety."\(^7\) The conscientious objector popularly is perceived as an "abnormal, cowardly or selfish creature"\(^8\) whose refusal to fight is "something of which to be ashamed."\(^9\) Surveys indicate that a relatively small number of people believe it is important to respect the beliefs of conscientious objectors and to exempt them from armed military service.\(^10\)

At the same time, the human rights of even the most controversial and unpopular members of society ought to be considered as deserving of protection. Any violation of human rights presents a precedent which can be used to rationalize the violation of additional rights.\(^11\) Instead of being "shut up in asylums, as though conscientious objection were a crime or a kind of madness,"\(^12\) it must be affirmed that, as Chief Justice Hughes stated in United States v. Macintosh,\(^13\) "in the forum of conscience, duty to a moral power higher than the State has always been maintained."\(^14\) Conscientious objection also provides one of the few mechanisms through which individuals are able to assert the primacy of international law and morality over the self-interest of sovereign states.\(^15\)

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8. Id. at 249 (remarks of Mrs. Macciocchi).
14. Id. at 627.
15. See generally Greenawalt, All or Nothing At All: The Defeat of Selective Conscientious Objection, 1971 SUP. CT. REV. 31.

https://scholarlycommons.law.cwsl.edu/cwilj/vol21/iss1/3
Initially, this Article reviews the arguments for and against conscientious objection. Section two then outlines the domestic legal procedures for the determination and treatment of conscientious objectors in various countries. Despite the limited recognition standards for the determination of conscientious objection, there is no internationally recognized universal right to conscientious objection. International efforts to establish a right to conscientious objection, as an expression of the right of freedom of conscience, thought and religion, then are reviewed and evaluated. In conclusion, it is argued that a right to conscientious objection already is implicitly recognized by provisions of international instruments which limit the use of armed aggression and which establish an international right to peace. Conscientious objection to aggressive war, rather than only being conceived of as an expression of the individual right to freedom of conscience, thought and religion, thus may be viewed as an affirmation of the fundamental collective human right of all peoples to peace. In order to assure recognition and protection of the universal right of conscientious objection to aggressive war, it should be formally protected by international declaration.

I. THE DEBATE OVER CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

A. The Case Against Conscientious Objection

The difficulty in determining the sincerity of an individual’s purported beliefs makes recognition of conscientious objection problematic—a seemingly sincere individual may be motivated by cowardice rather than conscience. As was observed during the 1967 debate in the Consultative Assembly of the Council of Europe, “until someone invents a truth machine” it will remain difficult to evaluate the claimant’s alleged opposition to war.

At any rate, military service is a fundamental obligation of all citizens, particularly during periods of national emergency, and the conscientious objector should not be permitted to gain the benefits of living in a society which they refuse to militarily defend. It is considered to be unconscionable that “there should be people who use the very principles that others are defending with their lives as

16. EUR. CONSULT. ASS. DEB., supra note 12, at 858 (remarks of Marchese Lucifero d'Aprigliano).
17. Id.
18. Id.
19. 1982-1983 EUR. PARL. DEB., supra note 7, at 259 (remarks of Mr. Gontikas).
a basis for refusing to participate in that defence."

The recognition of conscientious objection necessarily weakens a nation's moral and military defense. Combat troops who risk injury and death resent that conscientious objectors are being accorded preferential treatment by being exempted from military service and, as a result, question whether the government's willingness to exempt objectors from combat indicates a lack of commitment to prosecute the war. During the European Parliamentary Assembly debates on conscientious objection, it was argued that no communist country recognizes conscientious objection to military service and that the West cannot afford to weaken its defenses by recognizing or introducing liberalized conscientious objection provisions.

The number of objectors in those democratic states which permit conscientious objection already has reached an alarming level. For example, the number of objectors in Italy reportedly increased from roughly 100 in 1973 to over 20,000 in 1982.

The true conscientious objectors argue that they are willing to fight for freedom against the forces of totalitarianism and tyranny. Extolling the virtues of those who refuse to engage in armed combat implicitly portrays those who take up arms in defense of their country as possessing a "second-class morality" and "second-class conscience."

Conscientious objection may be appropriate in a future, utopian society, but at present it only will contribute to anarchy and disorder. Although conscientious objectors claim their actions are guided by the moral imperative to refrain from violence, they fail to recognize that the resort to military force, at times, is morally required. Opponents of conscientious objection also point out that once it is conceded that an individual has the right to be exempted from military service, there is no principled basis for refusing to exempt individuals from other legal obligations such as the pay-

20. EUR. CONSULT. ASS. DEB., supra note 12, at 860 (remarks of Marchese Lucifero d'Aprigliano).
21. Id.
22. Id. at 859-60.
23. Id. at 860.
25. EUR. CONSULT. ASS. DEB., supra note 12, at 859 (remarks of Marchese Lucifero d'Aprigliano).
26. Id. at 860.
27. Id.
28. Id. at 855 (remarks of Mr. Amatucci).
29. Id.
ment of taxes,\textsuperscript{30} which may be used to fund military activities or research.

\textbf{B. The Case for Conscientious Objection}

It is a fundamental democratic principle that the state should respect the divergent beliefs and opinions of the citizenry and, to the extent possible, the state should refrain from requiring individuals to act in a fashion which contradicts these beliefs and opinions.\textsuperscript{31} The fact that the conscientious objector adheres to an unpopular view which contradicts the prevailing norms of society "does not make it an any less profound and tenaciously held conviction, which ought to be respected."\textsuperscript{32} While it may be difficult to evaluate the sincerity of a claimant's beliefs, democratic values dictate that risks should be taken in order to promote and to protect individual liberty.\textsuperscript{33}

The evidence does not support the argument that recognition of conscientious objection or an expansion of the standards for determining conscientious objection will lead to an avalanche of claimants. For instance, despite widespread opposition to the Vietnam War in the United States, only slightly more than one percent of registrants were exempted from service as conscientious objectors.\textsuperscript{34} In The Federal Republic of Germany and in Austria, reportedly less than one percent of those subject to military service are classified as conscientious objectors.\textsuperscript{35} The stigma attached to conscientious objection and the patriotic duty felt by most individuals to serve in the military will insure that the number of conscientious objectors will remain relatively small.\textsuperscript{36} Further, proponents of conscientious objection point out that the number of conscientious objectors exempted from military service pales in comparison to the number of deferments granted on other grounds such as mental,

\begin{itemize}
\item[30.] \textit{Id.} at 859 (remarks of Marchese Lucifero d'Aprigliano).
\item[31.] 1982-1983 \textit{EUR. PARL. DEB.}, supra note 7, at 258-59 (remarks of Mrs. Van den Heuvel).
\item[33.] 1982-1983 \textit{EUR. PARL. DEB.}, supra note 7, at 259 (remarks of Mr. Gendebien).
\item[36.] Wolff, \textit{supra} note 34, at 83.
\end{itemize}
physical and moral considerations.37

There are also pragmatic reasons for recognizing conscientious objection to military service. Most objectors make poor soldiers, present disciplinary problems and undermine military morale. It is therefore preferable to assign these individuals to alternative work of national importance where they can contribute to the public welfare.38

The exemption of conscientious objectors from military service will not necessarily lead to individuals claiming exemption from other social responsibilities. Military service is unique in requiring that individuals undergo training in the techniques of killing and maiming human beings. Other social obligations usually do not entail the direct taking of human life and require a violation of what is perceived as a fundamental moral prescription against the killing of another.39 The conscientious objector also is not arbitrarily refusing military service, but instead is seeking legal recognition of their status. Lastly, the conscientious objector is able to fulfill their military obligation in an alternative fashion and still meaningfully contribute to the public good.40 Reviewing the arguments offered by the proponents and the opponents of conscientious objection, Professor Kent Greenawalt concludes that the fact "many countries have no such exemption shows there is no universal sentiment that the pro arguments outweigh the con..."41

II. CONSCIENTIOUS OBJECTION AND DOMESTIC AND INTERNATIONAL LAW

A. Conscientious Objection and Domestic Law

The question of the recognition and the appropriate scope of conscientious objection primarily arises in countries with conscription, or, as it is commonly referred to, a civilian draft for military service. In states with voluntary military service, claims of conscientious objection generally are limited to those members of the military who file claims for conscientious objector status ("in-service" objectors). However, in many of the latter countries, conscription may be invoked in the event of a national emergency and, in the

39. Wolff, supra note 34, at 84.
40. See generally Girouard, 328 U.S. at 64-65.
event of such a crisis, some decision as to the recognition and pro-
tection of draftees who claim conscientious objector status would
have to be made by government officials. 42

Slightly over half of the countries with conscription do not pro-
vide for conscientious objection. In those countries which do recog-
nize conscientious objection, the most commonly accepted basis for
exemption on the grounds of conscientious objection is religious
belief. Some states only exempt those who belong to so-called peace
churches which preach pacifism or which reject the legitimacy of
secular authority. Others take a broader view and exempt those of
any religion whose opposition to war is based upon sincerely held
beliefs which derive from biblical authority. In Northern and West-
ern Europe, conscientious objection also is recognized on ethical
and humanist grounds. No national law appears to provide an ex-
emption for those whose opposition to a particular conflict is based
upon international law or policy. Recently, some western countries
have indicated they will recognize conscientious objection based
upon the illegality or immorality of the possible deployment of nu-
clear weapons. However, Panama does not require naturalized citi-
zens or aliens to participate in armed conflicts against their country
of origin in order to avoid placing such persons in the position of
being compelled to fight against their original homeland. 43

42. Conscientious Objection, supra note 32, at 11. The following countries do not have
conscription: Australia (in peacetime), Bahamas, Bahrain, Bangladesh, Barbados, Bhutan,
Botswana, Brunei, Burundi, Cameroon, Canada, Central African Republic (except for civil
servants), Congo, Costa Rica, Dominican Republic, Gambia, Ghana, Grenada, Holy See,
Hong Kong, Iceland (may be introduced in case of national emergency), India (may be
introduced in times of national emergency), Indonesia, Ireland (may be introduced in times
of national emergency), Jamaica, Japan, Kenya, Lebanon, Lesotho, Liberia, Liechtenstein,
Luxembourg, Malawi (compulsory call-up in times of national emergency), Malaysia,
Maldives, Malta, Mauritania, Mauritius, Monaco, Nauru, Nepal, New Zealand, Nigeria,
Oman, Pakistan, Panama (in peacetime), Papua New Guinea, Qatar, Rwanda, Samoa, Se-
negal, Sierra Leone, Sikkim, Somalia, Sri Lanka, Sudan, Swaziland, Togo, Tonga (in peace-
time), Trinidad and Tobago, Uganda, United Arab Emirates, United Kingdom, United Re-
public of Tanzania, United States of America, Zambia, Zimbabwe. Id. at 30 (Annex II).
The following countries provide for, but do not enforce their conscription laws: Burma, Haiti,
Honduras, Ivory Coast (only selectively enforced), Upper Volta, Zaire. Id.

43. Id. at 11. Countries with conscription in which provision is made for conscientious
objectors to perform civilian or unarmed military service include: Austria, Belgium, Den-
mark, Finland, France, Federal Republic of Germany, Guyana, Israel (for women), Leba-
non, Netherlands, Norway, Poland, Spain, Sri Lanka, Sweden. Id. at 30 (Annex II). Coun-
tries with conscription in which provision is made for conscientious objectors to perform non-
combatant service in the armed forces include: German Democratic Republic, Greece, Portu-
gal, South Africa, Uruguay. A number of countries informally permit objectors to perform
non-combatant service: Argentina, Bulgaria, Czechoslovakia, Hungary, Republic of Korea,
Soviet Union, Switzerland. Id. Countries with conscription which do not recognize conscien-
tious objection include: Afghanistan, Albania, Algeria, Benin, Brazil, Cape Verde, Chile,
China, Colombia, Cuba, Cyprus, Democratic People's Republic of Korea, Ecuador, Egypt,
Application for conscientious objector status usually must be filed at any time following a claimant's call-up into the armed forces. In some countries the claim must be filed within a limited period following call-up, usually within fifteen or thirty days. The claimant's induction often is suspended or they are informally assigned to non-combat service pending the disposition of their application. In some countries information regarding the procedure for applying for conscientious objection is fully available, while in others, it is not easily obtained or its dissemination is prohibited.\footnote{44}

Those responsible for administering military induction determine the merits of claims for conscientious objector status in various countries. The trend, however, is towards vesting the decision in a specialized tribunal. In either case, the relevant administrative body must determine whether the grounds upon which the applicant bases their objection falls within the statutory criteria and whether the applicant is sincere in their conscientious objection. The latter decision, of course, involves the often difficult task of evaluating the motivation of relatively young individuals who often are emotionally and intellectually immature. In some states the tribunals are composed of military personnel who often are reluctant to recognize claims for conscientious objector status. In other countries, the tribunals are comprised of civilian and military personnel. A third group of states provide for civilian panels. Various countries permit an appeal to a higher administrative tribunal or to a judicial body.

El Salvador, Equatorial Guinea, Gabon, Guatemala, Guinea, Honduras, Iran, Iraq, Israel (for men), Ivory Coast, Mali, Mongolia, Morocco, Niger, Paraguay, Peru, Philippines, Romania, San Marino, Saudi Arabia, Singapore, Thailand, Tunisia, Turkey, Venezuela, Zambia. \textit{Id.}

There is no reliable information on the number of conscientious objectors throughout the world. Some indication of the extent of conscientious objection is suggested by data supplied to the United Nations by various countries: Austria, as of 1980, 4,011 applications for conscientious objector status had been filed and 3,188 were accepted; Belgium, as of 1979, 1,762 applications for conscientious objector status had been filed and 1,287 were accepted; France, in 1980, 1,000 applications for conscientious objector status were filed and 552 were accepted; Netherlands, in 1978 there were 2,432 applications for conscientious objector status and 624 were accepted (no reported action on 1,321 cases), in 1979 there were 3,091 applications for conscientious objection and 36 were accepted (no reported action on 2,873 cases); Norway, in 1978 there were 2,000 applications for transfer to civilian service and 1,860 recognized claims; Spain, it is estimated that 825 conscientious objectors were imprisoned between 1958 and 1976; Sweden, in 1980 there were 3,836 applications for conscientious objection, 3,531 cases were examined and 2,961 were accepted; Switzerland, 354 objectors were convicted of refusing military service in 1980 and there were 593 such cases in 1981. \textit{Id.} at 25-26 (Annex 1).

\footnote{44} \textit{Id.} at 12. The dissemination of information regarding conscientious objection is not automatically provided or is prohibited in various countries including: Denmark, France, German Democratic Republic, Federal Republic of Germany, Greece, Italy, Poland, Spain, Turkey. \textit{Id.} at 29 (Annex 1).
In others, the decision of the initial tribunal is final and no appeal is available.\textsuperscript{45}

Where conscientious objection is legally recognized, conscientious objectors usually are required to perform some form of alternative service. This requirement is designed to balance the individual's interest in exemption from military service against the state's interest in insuring that the individual contribute to the national defense and welfare. The alternative service requirement also serves to deter those who may seek conscientious objector status out of a desire to avoid armed military service.\textsuperscript{46}

Objectors in countries with alternative service provisions often are assigned non-combat roles in the armed forces. In some countries, objectors who believe that all use of force is immoral may be assigned to positions outside the military, such as in a hospital. Some innovative programs view alternative service as a vehicle to advance the public welfare rather than to punish objectors and permit involvement in international development activities and peace activism and research. Objectors who deny the legitimacy of the government and who refuse alternative service, of course, risk criminal penalties.\textsuperscript{47}

The term of alternative service usually is longer than regular military service. In some countries only those involved in alternative service outside the military are required to serve a longer term. Often the additional period of service is relatively brief and is designed to compensate for the fact that military recruits are required to undergo annual reserve training upon the expiration of their tour of duty. In other countries the period of alternative service is considerably longer than that served by those who undergo military training and is designed to deter individuals from claiming conscientious objector status.\textsuperscript{48} The longer term also reflects the fact that military service and its accompanying dangers is viewed as much more threatening and difficult than is alternative service.

Unsuccessful claimants for conscientious objector status, successful claimants who refuse alternative service, and objectors who reside in states which do not recognize conscientious objection are all

\textsuperscript{45} Id. at 12.
\textsuperscript{46} Id. Alternative service, depending on the country and the grounds upon which the individual bases their objection to military service, may fall into one of three categories: (a) non-combat roles in the military; (b) social service and economic development projects; (c) peace and peace research activity. Id. at 13.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
subject to criminal sanctions. These penalties range from imprisonment to capital punishment and dishonorable discharge where an objector is a member of the armed forces. In some cases, persistent objection to military service may be considered a mental disturbance which may result in psychiatric internment.\textsuperscript{49} Those who are punished also may forfeit their civil rights and may be denied access to public benefits, education and employment.\textsuperscript{50}

There are two approaches to imprisonment. One imposes a relatively short prison sentence in order to convince the objector to change their mind and to submit to induction. If upon release the objector again refuses military service, the objector is sentenced to another prison term. This may result in an objector spending most of their life in prison, although in some countries a pardon is granted after two or more prison terms. In a second group of countries, long prison terms of up to ten or fifteen years are imposed in order to punish the objector and to deter other individuals from resisting conscription into the armed forces.\textsuperscript{51}

Conscientious objectors who face imprisonment often flee their country of residence and seek political asylum abroad. Many countries grant asylum provided they are satisfied that the resister possesses a well founded fear of persecution on the grounds of race, religion, nationality, membership in a particular social group, or adherence to a political opinion. In practice, asylum decisions are

\textsuperscript{49} Id.
\textsuperscript{50} Id. at 14.
\textsuperscript{51} Id. at 13-14. Prison terms imposed on conscientious objectors vary between countries: Albania, up to five years (in peacetime and during a war or emergency), more than five years imprisonment, or the death sentence; Brazil, between four months to a year in peacetime and from two to five years during war; Bulgaria, up to three years during peacetime and up to twenty years or death in wartime; China, various laws punish incitement to desertion with penalties including death; Czechoslovakia, two to ten years; Denmark, nine to fifteen months in prison depending on the offense; Finland, those refusing alternative service may be imprisoned for up to a year; France, two to twenty-four months in prison; Federal Republic of Germany, a sentence of up to five years; Greece, an initial sentence of twelve years may be imposed which, in practice, is substantially reduced; Hungary, up to five years imprisonment during peacetime and between ten and fifteen years or the death penalty during war; Israel, repeated short prison terms or loss of civil rights; Italy, between two and four years in prison; Libya, up to one year in prison with a loss of civil rights; Netherlands, those refusing alternative service may face a prison sentence not exceeding two years; Norway, refusal of all forms of national service may result in a prison sentence not exceeding three months (twelve months for continued refusal); Romania, up to five years; South Africa, up to three years; Spain, refusal to perform military service may lead to up to three years imprisonment; Sweden, a continued refusal to perform military or non-military service may result in up to four months confinement in an open prison; Switzerland, a maximum penalty of up to six months imprisonment in semi-liberty; Yugoslavia, one to ten years imprisonment with additional penalties imposed for any subsequent refusal to enter the armed forces. Id. at 27-29 (Annex I).
determined by the political relationship between the countries involved and whether the asylum country views the military activities of the resister's country of residence as justified.\textsuperscript{52}

Reliable information on the number of conscientious objectors imprisoned or discriminated against is difficult to obtain. However, some indication of the type of difficulties confronting conscientious objectors is suggested by the country reports contained in Amnesty International's 1989 report covering the period between January and December 1988.\textsuperscript{53} Such examples of discrimination against conscientious objectors are listed below.

An Austrian psychology student active in the peace movement was imprisoned after being denied conscientious objector status. He was released after a month of imprisonment and was granted conscientious objector status.\textsuperscript{54}

Czechoslovak law offers no civilian alternative to those objecting to military service. A young Christian objector was sentenced to eighteen months imprisonment for evading military service. He was amnestied and released after two months. Also, three members of a peace group who organized to promote demilitarization and the rights of conscientious objectors were arrested and charged with offenses carrying a potential penalty of up to three years in prison.\textsuperscript{55}

Numerous French conscientious objectors were prosecuted and sentenced to prison terms of up to fifteen months.\textsuperscript{56} Several objectors who were imprisoned had their applications rejected since they had not filed their applications until their call-up orders had been issued. One was imprisoned for seven months in military barracks, spent extensive periods in solitary confinement, and ultimately was sentenced to a six month suspended sentence. Another objector was released after serving nine months of a twelve month sentence. When he again refused military service he was sentenced to another eight months in prison.\textsuperscript{57}

Greece released its first conscientious objector to refuse military service on purely pacifist grounds after the objector had served twenty months of a twenty-six month sentence. Another objector subsequently was arrested and sentenced to five years in prison. His

\textsuperscript{52} Id. at 14-15. See generally id. at 31 (Annex III).
\textsuperscript{53} AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT (1989).
\textsuperscript{54} Id. at 212.
\textsuperscript{55} Id. at 215.
\textsuperscript{56} Id. at 217-18. Alternative civilian service in France is twice the length of ordinary military service.
\textsuperscript{57} Id. at 217-18.
sentence ultimately was reduced to one and a half years. Other Greek conscientious objectors received sentences longer than the standard four year period. In October 1988, two Jehovah’s Witnesses were sentenced to twelve and thirteen years in prison, respectively. Another Jehovah’s Witness had their ten year sentence reduced to five years, two months. Some conscientious objectors alleged they had been ill-treated and abused in prison.68

In Hungary, 158 conscientious objectors were in prison for refusing to perform military service; 146 were Jehovah’s Witnesses, 6 were Roman Catholics, 1 was a Nazarene, 1 was a Seventh Day Adventist, and the remaining 4 were non-religious conscientious objectors. Two additional objectors were imprisoned. One received a suspended six month sentence for refusing reserve duty on religious grounds and the other, a Roman Catholic member of a religious community, received a one year, eight month sentence.69

At least four Israelis were imprisoned for periods of between fourteen and thirty-five days for refusing to serve in the Occupied Territories. Others refused to serve in the Occupied Territories, but were offered alternative assignments by their commanding officers.60

In Italy, several hundred people, the majority of whom were Jehovah’s Witnesses, were believed to be serving sentences of up to sixteen months imprisonment as a result of their refusal on religious or political grounds to conform to the national service laws. The period of alternative service is eight months longer than the period of ordinary military service.61

Conscientious objectors also were serving prison terms in other countries. Roughly 281 objectors were imprisoned in Switzerland;62 in Yugoslavia at least eight religious objectors were serving sentences of between two to three-and-a-half years for refusing to perform military service;63 and in South Africa three white critics of the government were sentenced to terms ranging from twenty-one months to six years for refusing, based upon reasons of conscience, to serve in the military.64 Two Orthodox believers were arrested in 1985 in the Soviet Union for evading military service. De-

58. Id. at 222-23.
59. Id. at 224.
60. Id. at 262.
61. Id. at 225.
62. Id. at 232.
63. Id. at 244.
64. Id. at 88-89.
spite the believers' claim that their religion forbade them to bear weapons or to swear an oath of allegiance to a secular state, they were sentenced to two years imprisonment. Upon their release, they again refused military service and were sentenced to three more years in prison based upon the same charge.65

B. Conscientious Objection and International Law

International human rights instruments do not explicitly recognize conscientious objection to military service as a human right. Article 18 of the Universal Declaration of Human Rights66 provides for "freedom of thought, conscience and religion" which includes the right to manifest religion or belief in "teaching, practice, worship and observance."67 Article 1968 protects the freedom of opinion and expression, but, like Article 18, does not mention conscientious objection to military service.

The rights enumerated in the Universal Declaration of Human Rights were elaborated upon in the 1966 International Covenant on Civil and Political Rights.69 Article 8 prohibits forced or compulsory labor,70 but specifically excludes from this prohibition any service of a military character and, in countries which recognize conscientious objection, any national service which may be required of such objectors.71 Article 8, however, does not require states to recognize conscientious objection.

Article 18 recognizes the right to freedom of thought, conscience and religion, including the right to manifest the "religion or belief in worship, observance, practice and teaching."72 Article 18 goes on to establish that individuals are not to be subject to coercion which would impair their freedom to have or to adopt a religion or belief of their choice.73 While a broad interpretation of the latter provisions might include the right to conscientious objection, the covenant permits limitations on such freedom of religion or belief as are

65. Id. at 238. In 1988, one of the believers lost an eye in an industrial accident at the labor camp to which he was assigned.
66. Universal Declaration of Human Rights, supra note 1, art. 18.
67. Id.
68. Id. art. 19.
70. Id. art. 8(3).
71. Id. art. 8(3)(c)(ii).
72. Id. art. 18(1).
73. Id. art. 18(2).
prescribed by law and are "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." These limiting provisions arguably would permit States Parties to refuse to recognize conscientious objection on the grounds of public safety and order. Article 26 protects individuals against discrimination on the grounds of religion, politics or opinion. Conscientious objection arguably is not protected conduct within Article 18 and the refusal to recognize conscientious objection thus would not violate Article 26's prohibition on discrimination. In addition, denying all pacifists, whatever their motivation, an exemption from military service arguably would not violate Article 26.

The inherent right to life is protected by both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. This is the most basic right which may not be abrogated even during periods of public emergency. The complimentary right not to be compelled by the state to take the life of another, however, is not explicitly set forth. Some also may question whether killing during warfare violates the international covenant's prohibition on the arbitrary deprivation of human life.

Undoubtedly, given the strong emphasis upon the sanctity of human life within human rights instruments, a strong argument may be made that the right to conscientious objection is implicitly protected by these and other provisions within human rights instruments. However, the argument that conscientious objection is not protected by these human rights instruments is strengthened by the fact that during the drafting of the international covenant, an amendment was proposed and withdrawn by Mr. Mendez of the Philippines which would have included a right to conscientious objection within the provision guaranteeing freedom of religion. The amendment would have provided that those "who conscientiously object to war as being contrary to their religion shall be exempt from military service." The United Kingdom and Australia

74. Id. art. 18(3).
75. Id. art. 26.
76. Universal Declaration of Human Rights, supra note 1, art. 3.
77. International Covenant on Civil and Political Rights, supra note 69, art. 6(1).
78. Id. art. 4(2).
79. See generally id. at Preamble; Universal Declaration of Human Rights, supra note 1, at Preamble.
80. Wolff, supra note 34, at 80-89.
82. Id. at 11.
stated that such an amendment would not be appropriately included within a provision protecting freedom of religion. The Uruguayan delegate argued that conscientious objection was already adequately covered by the provision which exempted alternative service from the definition of compulsory and enforced labor.\textsuperscript{88} The Chilean delegate articulated that service in the military did not necessarily require involvement in or preparation for war.\textsuperscript{86} He pointed out that the military was involved in mitigating the effects of various emergency situations and military training was a mechanism for inculcating national discipline and patriotism.\textsuperscript{87} Some delegates feared that religious objectors could not be exempted without political and other objectors demanding exemption from military service.\textsuperscript{88} Mr. Mendez, faced with overwhelming opposition to his amendment, withdrew it from consideration.\textsuperscript{89} Thus, there was a clear recognition that conscientious objection was not to be protected as a fundamental human right within the international covenant; and the fact that such protection was thought necessary indicates it was not viewed as being protected within any existing international instrument.

The failure to protect conscientious objection to military service as a human right is a serious oversight which has contributed to the abuse and imprisonment of objectors throughout the world. The international legal protection of conscientious objectors and the establishment of minimum standards and procedures for the determination of conscientious objector status is imperative given the fact that compulsory military service disproportionately affects young individuals who often lack the political and economic power to influence domestic policy. The international legal system thus provides one of the few mechanisms available to protect youthful conscientious objectors and to establish that forcing objectors to engage in military training is incompatible with respect for human rights and with preparation for global peace and justice.\textsuperscript{90} However,
efforts to establish an international human right to conscientious objection, although finally experiencing some success,91 have yet to succeed in the formal codification of such a right.92

III. INTERNATIONAL EFFORTS TO ESTABLISH A RIGHT TO CONSCIENTIOUS OBJECTION

A. Efforts at the United Nations

The first formal attempts to establish an international right to conscientious objection occurred at the European regional level. This provided the impetus and foundation for similar efforts at the United Nations.

On January 26, 1967, the Consultative Assembly of the Council of Europe ("The Assembly") adopted Resolution 337,93 which provided that "[p]ersons liable to conscription for military service who, for reasons of conscience or profound conviction . . . refuse to perform armed [military] service shall enjoy a personal right to be released from the obligation to perform such service."94 The Resolution stated that such persons remain liable to perform alternative service.95 The right to conscientious objection emanated from Article 9 of the European Convention on Human Rights96 which guarantees freedom of thought, conscience and religion.97 The Assembly also recommended to the Committee of Ministers98 that they

instruct the Committee of Experts on Human Rights to formulate proposals to give effect to the principles laid down by the Assembly in its Resolution 337 by means of a Convention or a recommendation to Governments so that the right of conscientious objection may be firmly implanted in all member States of the Council of Europe.99

94. Id. ¶ A(1).
95. Id. ¶¶ C(1)-(3).
97. Resolution 337, supra note 93, ¶ A(2).
99. Id. ¶ 2(a).
The Committee of Ministers declined to act on the Assembly’s recommendation.\textsuperscript{100} It noted that several member states had “already settled the problems of conscientious objection in the framework of their own law.”\textsuperscript{101} Other states, according to the Ministers, had made it clear that they were unable, for various reasons of principle, to envisage amending their law.\textsuperscript{102} The Ministers went on to observe that several member states, while supporting the ideals which motivated the recommendation, doubted whether the actions of the Council of Europe would lead to the enactment of an international agreement on conscientious objection.\textsuperscript{103}

A virtually identical recommendation was passed by the Parliamentary Assembly in 1977.\textsuperscript{104} This recommendation, however, also called upon the Ministers to take steps to “introduce the right of conscientious objection to military service into the European Convention on Human Rights.”\textsuperscript{105} The Ministers again concluded they were not in a position to act on the recommendation.\textsuperscript{106}

In 1987, however, the Ministers adopted Recommendation (87)8\textsuperscript{107} proclaiming 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 military service. The Ministers went on to note that such persons may be liable to perform alternative service.\textsuperscript{108}

The European Parliament earlier had passed a February 7, 1983 resolution\textsuperscript{109} declaring that the right “of freedom of conscience implies the right to refuse to carry out armed military service and to withdraw from such service on grounds of conscience.”\textsuperscript{110} The resolution also proclaimed that alternative service must not be regarded as a sanction and must be organized so as to respect both the dig-

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{105} Id. ¶ 4(b).
\textsuperscript{109} 26 O.J. EUR. COM. (No. C 68) 14 (1983).
\textsuperscript{110} Id. ¶ 2.
nity of the individual and to benefit the community.\textsuperscript{111} The Parliament called on the governments and parliaments of the member states of the Community to examine their legislation on conscientious objection\textsuperscript{112} and to support efforts to include the right of conscientious objection in the European Convention on Human Rights.\textsuperscript{113} These European efforts to establish both a regional and international right to conscientious objection to military service stimulated United Nations initiatives in the area of conscientious objection. The Commission on Human Rights, in Resolution 11B (XXVII) of March 1971,\textsuperscript{114} requested the Secretary-General to seek up-to-date information from member states on national legislation and other measures and practices relating to military and alternative service,\textsuperscript{115} and to submit a report to the Commission as soon as possible.\textsuperscript{116} The Commission also determined that it would study the question of conscientious objection.\textsuperscript{117}

In 1976, the Commission on Human Rights, in Resolution 1A (XXXII),\textsuperscript{118} noted the report prepared by the Secretary-General on conscientious objection and decided to give consideration to the matter at the next available session.\textsuperscript{119} The Secretary-General’s report was a compilation of information provided by roughly fifty-seven countries on their domestic conscientious objector legislation.\textsuperscript{120}

In a key resolution in 1978, the United Nations General Assembly recognized “the right of all persons to refuse service in military or police forces which are used to enforce apartheid.”\textsuperscript{121} The resolu-

\textsuperscript{111} \textit{Id.} ¶ 4.
\textsuperscript{112} \textit{Id.} ¶ 8.
\textsuperscript{113} \textit{Id.} ¶ 9.
\textsuperscript{115} \textit{Id.} ¶ 1(b). The Commission also requested the Secretary-General to make available information on conscientious objection to military service included in the country monographs which were prepared in connection with the \textit{Study of Discrimination in the Matter of Religious Rights and Practices}, U.N. Doc. E/CN.4/Sub. 2/200 Rev. 1, U.N. Sales No. 60.XIV.2 (1960) cited in Comment, \textit{supra} note 92, at 361.
\textsuperscript{116} Res. 11B (XXVII), \textit{supra} note 114, ¶ 1(c).
\textsuperscript{117} \textit{Id.} ¶ 2.
\textsuperscript{118} E.S.C. Res. 1A (XXXII), \textit{supra} note 114, ¶ 1(c).
\textsuperscript{119} \textit{Id.}
tion called upon member states "to grant asylum or safe transit . . . to persons compelled to leave their country of nationality solely because of a conscientious objection to assisting in the enforcement of apartheid through service in military or police forces." 122 It also urged states to consider granting to such persons all the rights and benefits accorded to refugees. 123 While not strictly addressing the right of conscientious objection, the resolution acknowledged that, despite the demands of national sovereignty, there are certain types of conflicts in which international law recognizes the right of the individual to refuse to participate. 124

In 1980, through Resolution 38 (XXXVI), 125 the United Nations Commission on Human Rights again requested the Secretary-General to seek information from member states on their national legislation, and other measures and practices, relating to conscientious objection to military service and to alternative service, together with any comments they may wish to transmit. 126 The Secretary-General also was requested to again submit a report containing the information received from member states. 127 In 1981 through Resolution 40 (XXXVI), 128 the Commission welcomed the replies of member states to the Secretary-General's requests for information, 129 and requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the question of conscientious objection to military service and the implementation of General Assembly Resolution 33/165. 130

In 1984, the Commission on Human Rights, having received the report prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the question of conscientious objection, 131 and recognizing the great importance of conscientious

122. Id. ¶ 2 (emphasis in original).
123. Id. ¶ 3.
126. Id. ¶ 1.
127. Id. ¶ 2.
129. Id. ¶ 1.
objection and the need to protect the human rights of objectors, submitted a draft resolution to the Economic and Social Council.\textsuperscript{132} The Economic and Social Council determined that the report should be given the widest possible distribution\textsuperscript{133} and that it should be transmitted for comments and observations to member states, relevant United Nations bodies, and other international organizations.\textsuperscript{134} The Commission on Human Rights was requested to study the report.\textsuperscript{135} In 1985, the Commission on Human Rights, pursuant to Resolution 1985/114, adjourned without having adopted a resolution on conscientious objection.\textsuperscript{136}

\textbf{B. The Commission on Human Rights Resolution on Conscientious Objection}

The lengthy process of drafting a resolution recognizing a right to conscientious objection finally resulted in some measure of success when the Commission on Human Rights adopted Resolution 1987/46 on March 10, 1987, by a vote of twenty-six to two with fourteen abstentions.\textsuperscript{137} While there is no clear explanation for the division of votes, states with conscription which do not recognize conscientious objection generally voted against or abstained on the resolution, while states with volunteer military forces or states with conscription which recognize conscientious objection voted in favor of the resolution.\textsuperscript{138}

The ultimate preambular paragraph of the resolution recognizes that "conscientious objection to military service derives from principles and reasons of conscience, including profound convictions, aris-

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\textsuperscript{134} Id. ¶ 1(b).
\textsuperscript{135} Id. ¶ 3.
\textsuperscript{138} The votes on Resolution 1987/46 were as follows: In favor: Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Colombia, Costa Rica, France, Gambia, Federal Republic of Germany, Ireland, Italy, Japan, Liberia, Norway, Pakistan, Peru, Philippines, Rwanda, Senegal, Somalia, Sri Lanka, Togo, United Kingdom of Great Britain and Northern Ireland, United States of America. Against: Iraq, Mozambique. Abstaining: Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, China, Congo, Cyprus, Ethiopia, German Democratic Republic, India, Mexico, Nicaragua, Union of Soviet Socialist Republics, Venezuela, Yugoslavia. Id. at 243.
\end{flushleft}
ing from religious, ethical, moral or similar motives." 139 Thus, the basis for conscientious objection is not limited to religious grounds. Paragraph one appeals 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." 140 While providing support for the contention that conscientious objection falls within the internationally recognized freedoms of thought, conscience and religion, the paragraph implicitly leaves the final determination of this question to the discretion of each state. 141 Paragraph two invites states to take measures aimed at the exemption of individuals from military service on the basis of a genuinely held conscientious objection to armed service. 142 These two operative paragraphs, while providing support for the principle that conscientious objection is a human right, are phrased as recommendations rather than as mandatory obligations of sovereignty. 143

The resolution goes on to recommend that states with compulsory military service, which have not already done so, should consider introducing various forms of alternative military service for conscientious objectors which are compatible with the reasons for conscientious objection. 144 Paragraph three also recommends that states refrain from subjecting objectors to imprisonment. Paragraph three broadly states that alternative service should be compatible with the reasons for conscientious objection but does not explicitly recommend that states provide both non-combatant military as well as civilian forms of alternative service. 145 This paragraph also appears to be directed to states with conscription and would not cover the problems of in-service objectors in states with volunteer armies. Presumably, however, such in-service objectors usually are discharged from the armed forces and are not required to perform alternative service or are subjected to imprisonment.

Paragraph four recommends that member states, if they have not already done so, should establish within the framework of their national legal system impartial decision-making procedures to deter-

139. Id. at Preamble.
140. Id. ¶ 1.
141. See Weissbrodt, supra note 91, at 65.
143. See Weissbrodt, supra note 91, at 65.
144. Resolution 1987/46, supra note 137, ¶ 3.
145. Id.
mine the validity of claims for conscientious objector status.\textsuperscript{146} This paragraph is significantly weakened by the reference to national legal systems, providing states flexibility in their procedural mechanisms for the determination of conscientious objection.\textsuperscript{147}

The fifth operative paragraph requests the Secretary-General again to report to the Commission on Human Rights on the question of conscientious objection to military service.\textsuperscript{148} The Secretary-General is to take into account both comments provided by states and any further information he may receive, the latter suggesting that the observations of non-governmental organizations may be included in the report.\textsuperscript{149}

Despite opposition from states which argued that the resolution impeded their national right of self-defense\textsuperscript{150} and violated the duty of all citizens to serve in the military,\textsuperscript{151} Professor David Weissbrodt argues that the non-binding resolution affirms the right of conscientious objection as a valid exercise of the previously established right to freedom of conscience.\textsuperscript{152} Weissbrodt argues that the resolution provides evidence that the norm of conscientious objection exists in customary international law and serves as a catalyst to encourage states to recognize the right of conscientious objection within their domestic legal systems.\textsuperscript{153} Weissbrodt also notes that such resolutions often serve as an initial step in the development of an international treaty.\textsuperscript{154}

The resolution could have been strengthened if it explicitly had stated that conscientious objection is a human right, rather than merely appealing to states to recognize that conscientious objection should be considered a legitimate exercise of the right to freedom

\textsuperscript{146} Id. ¶ 4.
\textsuperscript{148} Resolution 1987/46, supra note 137, ¶ 5.
\textsuperscript{149} Id.
\textsuperscript{151} Id. at 28 (Mrs. Casco (Nicaragua)).
\textsuperscript{152} Weissbrodt, supra note 91, at 65. Weissbrodt concludes that the 1987 resolution provides significant, but incomplete, support for conscientious objection as a human right. He conceives the resolution would be stronger if it were more forcefully worded, were adopted by consensus or unanimous vote, were codified as a Declaration or were adopted by a more authoritative United Nations body. Still he points out that the resolution was passed by a strong majority and that those states in opposition did not articulate principled objections to the resolution. Id.
\textsuperscript{153} Id. at 63.
\textsuperscript{154} Id.
of thought, conscience and religion. Recognition of the right to conscientious objection should not depend on the vagaries of domestic legal interpretation and the resolution should have called upon member states to formally codify conscientious objection as an independent international human right. One difficulty with viewing conscientious objection as an expression of the right to freedom of thought, conscience and religion is that these generic rights are themselves subject to limitation in the interests of public safety and order.

In paragraph two of Resolution 1987/46, states are invited to exempt conscientious objectors from military service. The preamble recognizes that conscientious objection derives from principles and reasons of conscience, including profound convictions, arising from religious, ethical, moral or similar motives. A more comprehensive enumeration of the grounds for conscientious objection might also include humanitarian, philosophical or political bases as permissible motives for conscientious objection. The most controversial addition would be the recognition of political grounds for conscientious objection since this necessarily would lead to objections to particular wars, or so-called selective conscientious objection. The 1983 report prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities explicitly endorses exemption of those who are convinced that the armed forces of their country are being used or may be used in the future for purposes that are in violation of international law. It explicitly includes under the rubric of this principle those whose conscience forbids them to be involved in the enforcement of apartheid, genocide, the illegal occupation of foreign terri-

156. See Recommendation 816, supra note 104, ¶ 4(b), which recommends that the Committee of Ministers introduce the right of conscientious objection into the European Convention on Human Rights.
157. See International Covenant on Civil and Political Rights, supra note 69, art. 18(3).
159. Id. at Preamble.
161. See generally Greenawalt, supra note 15.
163. Id. at 18, ¶ 1(e).
164. Id. ¶ 1(d).
tory, the gross violation of human rights, and those objecting to the use of weapons of mass destruction or weapons which have been specifically outlawed by international law or the use of means and methods which cause unnecessary suffering. The report concludes that the conscience of individuals "cannot avoid being influenced by these developments of international law; were it not so there would be hardly any point in the international community, including in particular the United Nations, developing such norms."

The third paragraph of Resolution 1987/46 recommends that states consider introducing various forms of alternative service for conscientious objection which are compatible with the reasons for conscientious objection. It also recommends that states refrain from subjecting such persons to imprisonment.

As previously observed, there should be an explicit requirement that both non-combatant alternative military service and civilian service should be provided. The report prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities makes the important recommendation that states, to the extent possible, should seek to provide meaningful opportunities for alternative service, including social work or work for peace, development and international understanding. The period of service for conscientious objection also should not exceed that required of military conscripts. Otherwise, alternative service may be employed as a punishment to deter and to punish conscientious objection. Conscientious objectors also should be guaranteed full social and financial equality with military conscripts and should not be discriminated against in terms of salaries, benefits and eligibility for social welfare programs.

The prohibition on the imprisonment of conscientious objectors obviously is of central importance. Protections also should be extended to those whose claims for conscientious objector status are

165. *Id.* ¶ 1(e).
166. *Id.* ¶ 1(f).
167. *Id.* ¶ 1(g).
168. *Id.* at 4.
170. *Id.*
172. *Id.*
173. *See Resolution 337,* supra note 93, ¶ C(2) (providing for the social and financial equality of recognized conscientious objectors and ordinary conscripts).
unrecognized or who refuse alternative service.\textsuperscript{174} For instance, an unsuccessful claimant who is imprisoned and released should not again be called to military service and risk being returned to prison.\textsuperscript{176} It also should be noted that the resolution should address the special problems encountered by claimants for conscientious objector status whose views ripen after they join, or are conscripted into the military, or who only learn of the availability of conscientious objector status after they have been inducted into the military.\textsuperscript{176}

The Commission on Human Rights' Resolution, as previously observed, recommends that states establish, within the framework of their national legal system, impartial decision-making procedures to determine the validity of claims for conscientious objector status.\textsuperscript{177} It clearly would be advisable to stipulate the minimum procedures to be followed in the determination of conscientious objector status. In 1977, the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe observed that without adequate procedural guarantees, the right to conscientious objection would be "merely theoretical."\textsuperscript{178} The stipulation of minimum procedural guarantees is of importance since the failure to provide adequate procedures may serve to limit the number of recognized conscientious objectors.\textsuperscript{179} For instance, the failure to permit an applicant to be represented by legal counsel may disadvantage a poorly educated or inarticulate applicant. As a general principal, procedural arrangements should be guided by the principle that no barriers should be placed in the way of claims for conscientious objection and that such a claim should receive all the "consideration due to it under the rule of law."\textsuperscript{180}

European Consultative Assembly Resolution 337 provides that individuals are to be informed of their right to conscientious objection when notified of their call-up for military service or prospective

\textsuperscript{174} Conscientious Objection, supra note 32, at 18 (recommends that penalties should be decided upon by an impartial civilian court applying normal procedures). The penalties should not be excessively severe and should take account of mitigating factors, such as the conscience or conviction of the person concerned. \textit{Id.} \textsuperscript{175} 4(b).

\textsuperscript{175} 1984 Report by the Secretary-General, supra note 160, at 10 (comments and observations of the Friends World Committee for Consultation).


\textsuperscript{177} Resolution 1987/46, supra note 137, \textsuperscript{178} 4.

\textsuperscript{178} 1977 European Report on Conscientious Objection, supra note 4, at 11.

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} 1967 European Report on Conscientious Objection, supra note 35, at 11.
call-up. This is vital since once inducted into the military, an objector may be subject to military rather than to civilian justice. States also should be required to disseminate information regarding conscientious objection and should assist non-governmental organizations to allow those thinking about applying for conscientious objector status. Filing a claim for conscientious objector status should result in the suspension of an applicant's induction pending the disposition of the case and the exhaustion of all appeals.

Lodging jurisdiction over conscientious objection claims in a single government official should be prohibited. In order to insure impartiality in decision-making, it should be specified that where the initial decision regarding conscientious objection is made by an administrative tribunal, the tribunal is to be entirely separate from military authorities and its composition shall guarantee maximum independence and impartiality. The tribunal should be a democratically constituted body composed of individuals from different spheres of public life which is presided over by an individual trained in law.

Resolution 337 requires that applicants for conscientious objector status should receive a hearing at which they are entitled to representation and the presence of witnesses. The decisions of the administrative authority are to be subject to review by an equally impartial and independent administrative body which itself is subject to independent judicial review.

The approach of Commission on Human Rights Resolution 1987/46, which broadly recommends that states adopt impartial procedures within the framework of their national legal systems, relies heavily on the good faith of states to protect the procedural rights of conscientious objectors. However, even in the relatively tolerant European environment, it has been noted that states gener-

181. Resolution 337, supra note 93, ¶ B(1).
183. Conscientious Objection, supra note 32, ¶ 2(c).
184. Resolution 337, supra note 93, ¶ B(4).
186. Resolution 337, supra note 93, ¶ B(2).
188. Resolution 337, supra note 93, ¶ B(5).
189. Id. at ¶ B(3). The burden and standard of proof are procedural concerns which may have a significant impact on the disposition of a claim. Neither issue has yet to be given any detailed review by an international tribunal. See generally Reisner, The Conscientious Objector Exemption: Administrative Procedures and Judicial Review, 35 U. Chi. L. Rev. 686, 713, 714 (1968).
ally have failed to provide conscientious objectors with basic due process protections.\textsuperscript{191} On the other hand, even where stringent procedural protections are provided, it can be difficult to overcome the animus towards conscientious objectors.\textsuperscript{192} In the United States during the Vietnam War, conscientious objectors were provided with a panoply of procedural protections. Yet studies indicate that members of administrative boards had a difficult time intellectually comprehending, and tended to reject, complex claims for conscientious objector status.\textsuperscript{193} Board members generally were hostile towards claimants and resented the fact that they interfered with the ability of local boards to meet their quotas.\textsuperscript{194} A radical but perhaps unrealistic solution to the problem of the inherent administrative bias against claimants for conscientious objector status would be to grant conscientious objector status to individuals who complied with a simple registration requirement.\textsuperscript{195} States, however, are not likely to agree to freely grant conscientious objector status to registrants and risk that a substantial number of individuals will claim such status and thus reduce the number of eligible military conscripts.

States also should be called upon to grant asylum to conscientious objectors who refuse conscription and who face punishment or discriminatory treatment in their country of residence. Such individuals would appear to confront a well-founded fear of persecution based upon their membership in a particular group or adherence to a political opinion and thus satisfy the requirement for political asylum in most states.\textsuperscript{196} Lastly, steps should be taken to draft and to present a comprehensive declaration on the right of conscientious objection to the United Nations General Assembly. Meanwhile, the plight of conscientious objectors throughout the globe must be brought to the attention of the international community. A roster of imprisoned objectors should be compiled and coordinated efforts should be undertaken to obtain their release.

\textsuperscript{191} See 1977 European Report on Conscientious Objection, supra note 4, at 12.
\textsuperscript{195} See 26 O.J. EUR. COMM. (No. C 68) 14 (1983). One concern is that intricate procedural protections may have the unintended consequence of discriminating against uneducated and economically disadvantaged applicants. See Field, supra note 182, at 934.
\textsuperscript{196} See Conscientious Objection, supra note 32, at 18, ¶ 5.
IV. CONSCIENTIOUS OBJECTION AND THE RIGHT TO PEACE

It is ironic that conscientious objection to military service has not yet been codified as a human right given the fact that the initiation of armed military conflict could result in the extinction of global society which has been legally and morally condemned. The question no longer is whether a select few should be exempt from military service on the grounds of conscientious objection to war, but whether a government may compel any of its citizens to engage in organized collective violence which is undertaken for reasons which are violative of the United Nations Charter.

The “just war” doctrine, first developed by St. Augustine in the fourth century, differentiated between theologically justifiable and unjustifiable uses of military force by secular authorities. However, the techniques of war have evolved to the point where war, other than when undertaken in self-defense, is considered theologically immoral. Pope Paul VI, in his address on the duty of peace to the United Nations in 1978, noted that war “has always been, in itself, a supremely irrational and morally unacceptable means of regulating the relationships between states, though without prejudice to the right of legitimate defense.” He previously had called for arms and war, “in a word, to be excluded from civilization’s programs.” These sentiments were echoed by the United States Catholic Bishops, which in 1976 queried whether modern warfare ever can be “morally justified.”

Contemporary international legal doctrine parallels the theological distinction between justifiable wars of self-defense and other un-

198. R. McSorley, Kill for Peace? 30 (1970). A “just war” must meet several conditions: all non-military options must have been exhausted; it must have been undertaken for a good cause, such as self-defense or the defense of fundamental rights; non-combatant immunity must be respected; and the force employed must be proportionate to the goal sought to be achieved. Id. at 31.
199. Id. at 33. See generally United States v. Berg, 310 F. Supp. 1157 (D. Me. 1970) (recognition of conscientious objector status for a devout Catholic applicant who believes conditions for a “just war” no longer can be met and all war is immoral).
justifiable deployments of armed force. In reaction to the ominous threat of modern war, international law has enshrined the achievement of peaceful relations among states as a principal goal of the community of nations and as a fundamental collective human right.\textsuperscript{203}

The preamble to the United Nations Charter states that the United Nations is "determined to save succeeding generations from the scourge of war"\textsuperscript{204} and to ensure "that armed force shall not be used, save in the common interest."\textsuperscript{205} The Charter establishes the maintenance of international peace and security as one of the primary purposes of the United Nations.\textsuperscript{206} Article 2(4) admonishes states to "refrain . . . 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."\textsuperscript{207}

The Charter establishes two limited exceptions to "threat or use of force:" acts of national and collective self-defense and acts by the Security Council to meet threats to the peace. Article 51 recognizes the "inherent right of individual collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."\textsuperscript{208} The Security Council is authorized to take action against "the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken."\textsuperscript{209} In meeting a threat to the peace, the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."\textsuperscript{210} Member states are obligated to make available to the Security Council such military forces, assistance and facilities as are necessary for the purpose of maintaining international peace and security.\textsuperscript{211}

Thus, under the United Nations Charter, the independent exercise of armed force by a nation-state is limited to acts of self-de-
fense and collective self-defense.212 According to Daniel Webster's well-known formulation in the Caroline case,213 a government invoking the right of self-defense must demonstrate a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." The response must also be proportionate to the provocation. Thus, "when defensive action is greatly in excess of the provocation, as measured by relative casualties or scale of weaponry, international opinion will more readily condemn such defense as illegally disproportionate."215

The use of armed force in a fashion which contravenes the United Nations Charter carries both individual and collective criminal liability. The Nuremberg Tribunal punished Nazi leaders for the rather amorphous international offense of the planning or waging a war of aggression or a war in violation of international treaties.216 The Tribunal clearly stated that the legality of a country's deployment of armed military force ultimately was a question of international rather than domestic law.217 In 1974, the United Nations Resolution on the Definition of Aggression218 clarified the concept of aggression, defining it as the use of armed force in a "manner inconsistent with the Charter of the United Nations..."219 Article 2 emphasizes that the "first use of armed force by a state in contravention of the Charter shall constitute prima facie evidence of an act of aggression,"220 and no political, economic or military motive may serve as a justification for aggression.221 "A war of aggression is a crime against international peace. Aggression gives

216. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461 (1948) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].
217. Id. at 450.
219. Id. art. 1.
220. Id. art. 2.
221. Id. art. 5(1).
rise to international responsibility." 222 No territorial acquisition or advantage resulting from aggression shall be "recognized as lawful." 223 The deployment of military tactics and strategies which contravene international treaties also has been recognized as giving rise to criminal liability. 224

The international community not only has limited the use of armed force, but has imposed an affirmative duty upon states to take steps to achieve the collective right to peace of all peoples. The 1978 Declaration on the Preparation of Societies for Life in Peace 225 invites "States to guide themselves in their activities by the recognition of the supreme importance and necessity of establishing, maintaining and strengthening a just and durable peace for present and future generations." 226 The first operative paragraph proclaims that every nation and every human being has the "inherent right to life in peace." 227 The second paragraph reiterates that the planning, preparation or initiation of a war of aggression is a crime against peace which is prohibited by international law. 228 Paragraph three claims that states have the duty to refrain from propaganda for wars of aggression. 229

The 1984 Declaration on the Right of Peoples to Peace 230 proclaims that life without war serves as the primary international prerequisite for the material well-being and development of countries and for the provision of fundamental human rights. 231 In the nuclear age, the preservation of peace also is considered to be central to the preservation of human civilization. 232 Given the importance

222. Id. art. 5(2).
223. Id. art. 5(3).
226. Id. § 1, Preamble.
227. Id. § 1, ¶ 1.
228. Id. § 1, ¶ 2.
229. Id. § 1, ¶ 3.
231. Id. at Preamble.
232. Id.
of international cooperation and tranquility, the declaration stipulates that the "maintenance of a peaceful life for peoples is the sacred duty of each State."\textsuperscript{233} Paragraph one proclaims that "the peoples of our planet have a sacred right to peace;"\textsuperscript{234} and paragraph two declares that each state has the fundamental obligation to preserve and to promote "the right of peoples to peace."\textsuperscript{235} Paragraph four appeals to all states and international organizations to assist in implementing the right to peace through the adoption of appropriate measures at both the national and international level.\textsuperscript{236} These steps, as enumerated in paragraph three, should be directed towards the elimination of the threat of conventional and nuclear war, the renunciation of the use of force in international relations, and the settlement of international disputes by peaceful means.\textsuperscript{237}

Reviewing the activities of the United Nations, Professor Ved Nanda concludes that the right to peace now has been established as a fundamental, collective human right.\textsuperscript{238} In Nanda's view, states have the duty to refrain from the threat or use of armed force, are obligated to resolve international disputes by peaceful means, and should strive to lessen domestic and international tensions through the promotion of human rights and economic development.\textsuperscript{239} As a corollary to the duty of states to promote peace, Nanda argues that individuals have the right to participate in decision-making on war-peace issues, to promote peaceful governmental policies, and "to object to, challenge and oppose those polices an individual perceives to be threatening or inviting the use of force."\textsuperscript{240}

Based upon these international instruments, conscientious objection to aggressive war, rather than only being conceived of as an expression of the individual right to freedom of conscience, thought and religion, thus may be viewed as an affirmation of the fundamental collective human right of all peoples to peace. The assertion of this collective right may conflict with state sovereignty and self-interest. However, the Nuremberg Tribunal explicitly stated that

\begin{itemize}
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id. \S 1.
  \item \textsuperscript{235} Id. \S 2.
  \item \textsuperscript{236} Id. \S 4.
  \item \textsuperscript{237} Id. \S 3.
  \item \textsuperscript{239} Id. at 293.
  \item \textsuperscript{240} Id.
\end{itemize}
"individuals have international duties which transcend the national obligations of obedience imposed by the individual state." 241 The Nuremberg decision also noted that individuals "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." 242 It is true that the Nuremberg Tribunal did not explicitly impose criminal liability and a duty to resist war crimes on ordinary civilians and soldiers. 243 But the spirit of Nuremberg dictates that individuals refuse to be coerced into participating in illegal actions, despite the fact that they themselves may not incur criminal liability. 244

Thus, individuals certainly have the prerogative under international law to refuse conscription for any purpose other than to defend their country against an immediate armed attack. An individual's willingness to use force in self-defense or in some future hypothetical situation does not negate the sincerity of their claim to conscientious objector status. 245 The Nuremberg Tribunal limited the superiors orders defense and required individuals to resist illegal orders unless no moral choice was possible. 246 It seems realistic to contend, given the dynamic nature of international law, 247 that the same degree of moral autonomy and responsibility now is required of individuals in regard to the far easier step of resistance to conscription. 248

In sum, the use of armed force has been severely limited under international law and the illegal use of force is punishable by the imposition of international criminal liability upon governmental officials. Armed aggression ravages societies, threatens the global environment, drains resources from economic development and often results in a limitation upon fundamental rights such as the freedom to criticize and to publicize governmental activities. A world free of

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241. Trial of the Major War Criminals, supra note 216, at 466.
242. Id.
246. Trial of the Major War Criminals, supra note 216, at 466.
247. Id. at 464.
248. The Nuremberg Trials, supra note 244, at 169 (comments of Professor Robert K. Woetzel).
armed aggression and conflict thus is a prerequisite for the achievement of a just and humane world. Cognizant of the relationship between a stable world order and the well-being of individuals, United Nations resolutions have imposed an affirmative duty upon states to provide for the collective right to peace for all peoples. The pronouncements of international human rights instruments would be of little significance absent the provision for a collective right to peace.

Implicit in the international limitation upon the use of armed force and the duty placed upon states to provide for a collective right to peace is the right of individuals to conscientiously object to participation in the illegal exercise of armed force. Conscientious objection is perhaps the most meaningful avenue for individuals to express their inherent right to peace, to protect others from being victimized by armed conflict, and to help to create a world in which the conditions can be created for the achievement of individual human rights and socio-economic development. Given the relatively weak and ineffective international mechanisms for the control and resolution of armed conflicts, the right to peace can best be guaranteed by individuals conscientiously objecting to cooperation with, and participation in, illegal wars of aggression.

In the new, emerging world order, the well-being of the individual is primary and a regime's international legitimacy is dependent upon its willingness and ability to protect fundamental human rights. The arbitrary deployment of armed force, with its attendant destructive impact on the individual and society, no longer may be considered an inherent attribute of state sovereignty. States, as a corollary to their duty to guarantee the right to peace, do not have the prerogative of requiring their citizens to support or to participate in the use of armed force which is prohibited under international law. Conscription, under international law, only may be deployed for purely defensive wars and, even in these circumstances, the right of conscientious objection for the traditional reasons of conscience, thought, religion, philosophy and political ideology should be recognized. State officials who refuse to recognize or to adequately protect conscientious objectors to military service thus in most cases are guilty of human rights violations. While the right to conscientious objection is implicit in existing international instruments, it requires formal international codification to insure that it is recognized as a human right and respected by states in all instances involving the deployment of armed military force.
Conscientious objection is a blatant omission from the list of internationally mandated human rights. A majority of states with conscription do not recognize conscientious objection and objectors in these countries often are subjected to harassment, discrimination and punishment. States which recognize conscientious objection vary in their standards and procedures. International efforts to establish a right to conscientious objection and uniform procedural protections for conscientious objectors, after several decades, still have not met with success. The United Nations Commission on Human Rights Resolution on Conscientious Objection, although an important step, remains in need of significant modification and improvement. It is imperative that the United Nations General Assembly adopt a comprehensive declaration on the right to conscientious objection. Until conscientious objection is internationally protected, the human rights agenda will remain incomplete. As Justice Jackson observed in West Virginia State Board of Education v. Barnette, the right to differ as to inconsequential matters is the "mere shadow of freedom" and the true test of human autonomy is the protection of the "right to differ as to things that touch the heart of the existing order."

This Article has suggested that conscientious objection, rather than only being viewed as a question of the freedom of conscience, thought and religion of a select few, also should be conceived of as an expression of the collective right to peace of all peoples. States, other than when acting in conformity with the United Nations Charter, have no legitimate claim to involuntarily conscript individuals into military service. In such cases, all individuals have the right to resist military service and to assert the primacy of international law over the lawlessness of sovereign states. Those states which confront no threat to their territorial integrity and survival and which persist in the gratuitous punishment and imprisonment of conscientious objectors are acting in an internationally criminal fashion.

It is anachronistic that those who advocate peace are labeled as criminals while those who engage in war and threaten the survival of the planet are feted as world leaders. The conscientious objector

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250. Id. at 642.
251. Id.
is expressing the legal right and moral duty of all peoples to resist the militerization which threatens to extinguish global society. 252 Objectors serve as a reminder that "since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed." 253
