

## PART A: ARTICLES

SELECTIVE CONSCIENTIOUS OBJECTION IN INTERNATIONAL LAW:  
REFUSING TO PARTICIPATE IN A SPECIFIC ARMED CONFLICT

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## INTRODUCTION

This article deals with the issue of selective conscientious objection to military service, and the place of a refusal to take part in a particular armed conflict, within the framework of international law.

Selective objection has been a hot topic for debate in the past (*e.g.* US soldiers sent to Vietnam), and continues to be so today. Thousands of Serbs refused to take part in the Kosovo conflict, many of them having been imprisoned or fled the country.<sup>1</sup> Many hundreds of Israelis have recently refused to perform military service in the Occupied Territories; dozens have been tried and imprisoned for their refusal.<sup>2</sup> Despite the instinctive support that might be raised for these and other individuals involved in controversial conflicts (*e.g.* Russians refusing to serve in Chechnya), a right of objection to participation in particular conflicts has little approval at the national and international levels.<sup>3</sup>

Following a brief examination of the issue of conscientious objection in international law, and an analysis of the difficulties posed by selective objection, this article will attempt to define a specific category of selective conscientious objection to be protected as a recognised right in international law.

## 1 THE GROWING RECOGNITION OF CONSCIENTIOUS OBJECTION

The increasing acceptance of conscientious objection at the international and national levels, suggests that although it has yet to appear under its own name, the right to conscientious objection is emerging as a recognised human right,<sup>4</sup> deriving from the

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<sup>1</sup> Estimates run as high as 30,000. See Amnesty International report, *The forgotten resisters: the plight of conscientious objectors to military service after the conflict in Kosovo*, AI-index: EUR 70/111/1999.

<sup>2</sup> For current information on the number of Israeli objectors, see the websites of the two relevant organisations – <http://www.yesh-gvul.org/> and <http://www.seruv.org.il/>. The phenomenon of selective objection in Israel came to notice in the 1980s during the Lebanon war, and after the outbreak of the first Intifada.

<sup>3</sup> As will be seen in the third section of the article.

<sup>4</sup> Lippman, M., 'The Recognition of Conscientious Objection to Military Service as an International Human Right', *California Western International Law Journal*, Vol. 21, 1990-1991, p. 31 at p. 33; Major, M., 'Conscientious Objection and International Law: A Human Right?', *Case Western Reserve Journal of International Law*, Vol. 24, 1992, p. 349, at p. 378; Marcus, E., 'Conscientious Objection as an Emerging Human Right', *Virginia Journal of International Law*, Vol. 38, 1998, p. 507, at p. 543.

freedom of thought, conscience and religion.<sup>5</sup> Freedom of conscience appears in Article 18 of the Universal Declaration and Article 18 of the International Covenant on Civil and Political Rights,<sup>6</sup> and in the major regional human rights instruments.<sup>7</sup> Though there was no agreement on conscientious objection at the time of the Covenant's drafting,<sup>8</sup> the Human Rights Committee, in its General Comment No. 22, asserted that the obligation to use lethal force may be in conflict with an individual's freedom of conscience and the right to manifest one's religion or belief, and that the right to conscientious objection can therefore be legitimately derived from Article 18 of the Covenant.<sup>9</sup>

The endorsement of a right to conscientious objection to military service has been stated in a significant number of resolutions and recommendations by the UN Commission on Human Rights, and by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.<sup>10</sup> The growing consensus surrounding recognition of conscientious objection has not solved the question of the scope and applicability of this right. There remain many unanswered questions involved in its recognition, including those of alternative non-military service (what type, what of those who object to any alternative, length of service), of the process involved in recognising specific cases, of the legitimacy of conscientious objection to paying taxes and of selective conscientious objection to military service. Of the above, only the last issue will be the focus of this paper, but it is important to keep in mind that the other issues, such as the lack of an agreed process, all have direct bearings on the question of selective conscientious objection.

According to the Commission on Human Rights, 'conscientious objection to military service derives from principles and reasons of conscience, including profound

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<sup>5</sup> Marcus, *ibidem* at p. 517; Human Rights Commission Resolution 1987/46, 43 UN ESCOR Supp. (No. 5) at pp. 108-109, UN Doc. E/CN.4/1987/60, 1987.

<sup>6</sup> Universal Declaration of Human Rights, GA Res. 217A (III), adopted 10 December 1948. For text see Evans, M. (ed) *International Law Documents*, Blackstone Press, London, 1999, pp. 39-42; International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), UN Doc. A/6316, 1966, entry into force 23 March 1976. For text see [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

<sup>7</sup> Article 9 of European Convention on Human Rights and Fundamental Freedoms, Article 3 of the American Declaration of the Rights and Duties of Man (religion), Article 8 of the African Charter on Human and Peoples' Rights.

<sup>8</sup> Major, *loc.cit.* (note 4) at p. 357; Lippman, *loc.cit.* (note 4), at p. 45.

<sup>9</sup> UN Human Rights Committee General Comment 22 (48 Session, 30/07/93) (art. 18). For text see <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/9a30112c27d1167cc12563ed004d8f15?OpenDocument>, para. 11. Note that the mention of conscientious objection is qualified by stating 'When this right is recognized by law or practice' thus leaving open the question of an actual obligation to recognise such a right.

<sup>10</sup> Including Resolutions 1987/46, *supra* (note 5); 1989/59, UN ESCOR, 45th Sess., 55th mtg. at p. 1, UN Doc. E/CN.4/1989/59; 1993/84, UN ESCOR, 49th Sess., 67th mtg. at p. 1, UN Doc. E/CN.4/1993/122; 1995/83, UN ESCOR, 51st Sess., 62d mtg. at p. 1, UN Doc. E/CN.4/1995/176; Recommendation No. R(87)8 of the Committee of Ministers to Member States regarding conscientious objection to compulsory military service. European Parliamentary Assembly, 39th Sess., Doc. 5725, at p. 10, 1987; Recommendation 816 on the Right of Conscientious Objection to Military Service, European Parliamentary Assembly, 29th Sess., at p. 1, 1977.

convictions, arising from religious, ethical, humanitarian or similar motives'.<sup>11</sup> This definition is a marked difference from earlier definitions and from the practice of certain States willing only to include objection based upon religious convictions.<sup>12</sup> In a report of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, the standards of international law (especially those of human rights and humanitarian law) were listed among the sources possibly taking part in the shaping of one's genuine ethical convictions.<sup>13</sup> A wide approach is supported by the Human Rights Committee General Comment, stating that no differentiation should be made between conscientious objectors on the basis of their specific beliefs,<sup>14</sup> and by the Committee of Ministers of the Council of Europe, whose recommendation on the matter does not limit 'reasons of conscience' to religious convictions.<sup>15</sup> The European Commission of Human Rights asserted in a 1978 decision, that the philosophy of pacifism may be considered as a belief protected by Article 9 of the European Convention.<sup>16</sup>

State practice points to a growing international acceptance of conscientious objection, despite not being uniform in application.<sup>17</sup> The tendency towards abolition of conscription,<sup>18</sup> has no doubt made it easier for many States to declare and implement a right which would be put to use on rare occasions in comparison to a situation of forced conscription. Recognition of certain forms of conscientious objection pre-dates the various human rights instruments, and can be found as far back as the US civil war, through to exemptions granted to conscientious objectors in the UK during World War II.<sup>19</sup> As of 2001, of the members of the Council of Europe, all but 3 countries had some form of recognition of conscientious objection.<sup>20</sup>

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<sup>11</sup> Resolution 1995/83, *idem*.

<sup>12</sup> Marcus, *loc.cit.* (note 4), at p. 16; Report of the Secretary General prepared in pursuant to Human Rights Commission Resolution 1995/83, UN ESCOR, 53rd Sess., Provisional Agenda Item 23 at p. 49, UN Doc. E/CN.4/1997/99 (1997), at para. 50.

<sup>13</sup> Eide, A. and Mubanga-Chipoya, C., *Conscientious Objection to Military Service*, UN ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1983/Rev.1, 1983, at paras. 21-32.

<sup>14</sup> *Supra* (note 9).

<sup>15</sup> Resolution R(87)8 1987, *supra* (note 8).

<sup>16</sup> *Arrowsmith vs UK*, Report of the European Commission of Human Rights, App. 7050/75, 12/10/78, at para. 69.

<sup>17</sup> There are significant differences regarding recognition of grounds for objection, alternative service, penalties, conscription and more. See UN report, *supra* (note 12) para. 50; See also Report: Committee on Legal Affairs and Human Rights, PA of Council of Europe, 'Exercise of the right of conscientious objection to military service in Council of Europe member states', Doc. 8809 13, July 2000, at para 21.

<sup>18</sup> UN report, *supra*, (note 12), at para. 52.

<sup>19</sup> Greenawalt, K., 'All or Nothing at all: The Defeat of Selective Conscientious Objection', *The Supreme Court Rev.*, Vol. 31, 1971, at pp. 35, 56.

<sup>20</sup> See Europe Report, *supra* (note 17) at para. 5.

## 2 THE DEFINITION AND PRACTICE OF SELECTIVE CONSCIENTIOUS OBJECTION

Selective conscientious objection is primarily distinguished from absolute conscientious objection by the fact that the objector does not claim to be opposed to all forms of use of armed force, and would, were the circumstances different, be willing to participate in military action. The issue of selective objection is relevant to individuals receiving the draft papers for the first time, civilians belonging to the reserve forces, and to serving soldiers.<sup>21</sup>

Selective conscientious objection is sometimes perceived as being a form of political civil disobedience,<sup>22</sup> usually as result of the correlation between the objection and prevailing political divides. A clear distinction between the two is proposed by Raz,<sup>23</sup> describing civil disobedience as a politically motivated act, whereby an individual enters the public arena, intent on bringing about a change of law or policy. In the case of conscientious objection, the individual's main concern is not in the public sphere, but to protect his personal integrity by not being coerced into performing a moral wrong.<sup>24</sup> Furthermore, the fact that selective objection may be based on religious beliefs,<sup>25</sup> not only political ones, strengthens the distinction between selective conscientious objection and acts of political protest.

There are many individuals who have a moral objection to military participation in a particular situation, but avoid taking part by means other than a moral objection, such as medical discharges or unofficial agreements with the authorities.<sup>26</sup> For the purpose

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<sup>21</sup> Resolutions of the UN Commission on Human Rights and of the European Parliament, emphasise that the right to conscientious objection is to be extended to serving members of the military forces, though this is seldom recognised in practice. See Commission Resolution 1995/83, *supra* (note 10); Europe Report, *supra* (note 17), at para. 40.

<sup>22</sup> Dworkin refers to the objection to participating in the Vietnam war as a form of 'integrity based civil disobedience' as opposed to breaking the law while protesting or demonstrating, which would be 'justice based civil disobedience'. Dworkin, R., *A Matter of Principle*, Harvard University Press, Massachusetts, 1985, at pp. 107-108. Levi states that the main difference is the claim to legality of the conscientious objection, but that they are otherwise similar. Levi, M., *Consent, Dissent and Patriotism*, Cambridge University Press, Cambridge, 1997, at pp. 165-166.

<sup>23</sup> Raz, J., *The Authority of Law: Essays on Law and Morality*, Clarendon Press, Oxford, 1979, at p. 277; see also Rawls, J., *A Theory of Justice*, Oxford University Press, Oxford, 1971, at p. 324; see also Kugler, I., 'On the Possibility of a Criminal Law Defence for Conscientious Objection', in: *The Canadian Journal of Law & Jurisprudence*, Vol. 10, No. 387, 1997, at p. 1.

<sup>24</sup> Despite the contrasting motivation of the acts, the two are likely to have some common results, since an act of conscientious objection is likely to cause some waves within the public domain. For an example of public debate sparked by a case of selective objection see Strassfeld, R., 'The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy', *Wisconsin Law Review*, No. 839, 1994, at p. 947.

<sup>25</sup> Lippman cites Pope Paul VI, in his address to the UN in 1978, as stating an opposition to war, but without prejudice to the right of legitimate self-defence. Lippman, *loc.cit.* (note 4), at p. 58; see also Greenawalt, *loc.cit.* (note 19), at p. 48.

<sup>26</sup> Pail mentions the phenomenon of 'quiet objection' among Israeli soldiers during the invasion of Lebanon, Pail, M., 'There is A Limit – On the Strategic Front', in: Menuchin, Y., and Menuchin, D. (eds), *The Limits of Obedience* [from Hebrew], Siman Kria, Tel-Aviv, 1989, pp. 101-129, at p. 127. According to Amnesty International the majority of Israeli selective conscientious objectors who refused service in the Occupied Territories managed to avoid their service

of examining the status of a possible right to selective conscientious objection, it is necessary to deal not with the informal objectors, but with those taking a declarative stand, stating an outspoken objection and demanding recognition of its legitimacy.

Specific mention of selective conscientious objection in international law is hard to find, and despite the growing acceptance of conscientious objection as a human right, there is no visible agreement on the right to partial objection.<sup>27</sup> One of the only direct endorsements of selective conscientious objection can be found in the UN General Assembly's resolution of 1978, declaring the right to refuse to serve in military or police that are being used to enforce apartheid.<sup>28</sup> Although not an approval of selective conscientious objection in general, this resolution is evidence of the ability to muster international support for certain types of selective objection. The 1985 report to the Sub-Commission clearly states that 'Objection to military service may also be partial, related to the purposes of or means used in armed action'.<sup>29</sup> As with the above General Assembly resolution, this report does not go as far as giving automatic support to selective conscientious objection, but goes on to recommend recognition of selective conscientious objection only in cases of refusal to participate in apartheid, genocide, illegal occupation, gross violations of human rights, or use of certain weapons.

Considering the fact that many conscientious objectors flee their countries, seeking asylum for fear of persecution,<sup>30</sup> the treatment of this matter in the relevant refugee instruments carries special practical weight in addition to being a source of international law. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status asserts that an individual may claim refugee status if fearing persecution for an objection to participation in a particular military action, provided this action is condemned by the international community as contrary to basic rules of human conduct.<sup>31</sup> Accordingly, the Parliamentary Assembly of the Council of Europe passed a resolution in 1994, calling for protection of deserters who refused to take part in the conflict in former Yugoslavia.<sup>32</sup>

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through informal arrangements with their commanding officers. Amnesty International report, *Israel: The price of principles: Imprisonment of conscientious objectors*, AI-index: MDE 15/049/1999; See also Lippman, *loc.cit.* (note 4), at p. 35 on various grounds for exemption.

<sup>27</sup> Major, *loc.cit.* (note 4), at p. 353.

<sup>28</sup> GA Res. 33/165, UN GAOR, 33rd Sess., Supp. No. 45, at p. 154, UN Doc. A/33/45 (1978).

<sup>29</sup> Eide, *op.cit.* (note 13), at para. 19.

<sup>30</sup> Lippman, *loc.cit.* (note 4), at p. 40.

<sup>31</sup> Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, 1979, para. 171.

<sup>32</sup> Resolution 1042, 1994, of the Parliamentary Assembly on deserters and draft resisters from the republics of the former Yugoslavia European Parliamentary Assembly, 23rd Sess., 1994. For further related discussion see McGinley, A., 'The Aftermath of the NATO Bombing: Approaches for Addressing the Problem of Serbian Conscientious Objectors', *Fordham International Law Journal*, Vol. 23, 2000, p. 1448. Note that when dealing with asylum cases, domestic courts may adopt a broader definition of conscientious objection for the sake of the asylum seekers, than the one used for their own nationals, as long as there are no implications for their own army. This is stated by Judge Pregerson in *Barraza Rivera vs INS*, a case which deals with a national of El-Salvador seeking asylum in the US, after refusing to take part in unlawful military action. *Barraza Rivera vs INS*, 913 F.2d 1443, 1990, US App, at p. 1450.

As far as State practice is concerned, the States that recognise conscientious objection tend to make it clear that only absolute objection based on religious or pacifist beliefs is to be recognised,<sup>33</sup> and no national law clearly recognises a right to selective objection.<sup>34</sup> The US Supreme Court ruled in 1971 that as opposed to those who exhibit an objection to participate in all wars, selective conscientious objectors have no right to claim an exemption from military service.<sup>35</sup> Similarly, in Israel, the only chance of exemption from service on grounds of conscientious objection, is for those who can convince the authorities of their absolute pacifist beliefs.<sup>36</sup> State practice is not easy to ascertain since there is no abundance of information on cases of selective conscientious objection. The tendency towards abolition of conscription<sup>37</sup> leads to a natural drop of cases of conscientious objection and accordingly lowers the number of the even smaller group of selective conscientious objectors. Additionally, the lack of general consensus regarding selective objection means that the selective objector lacks much of the traditional support networks and public backing that are frequently at the disposal of absolute objectors, and results in fewer reported cases.<sup>38</sup>

### 3 SELECTIVE VS ABSOLUTE OBJECTION

In order to determine whether the reasoning behind the growing consensus on conscientious objection is enough to claim a right to selective objection, it is necessary to raise some of the main arguments for and against absolute objection, and see if these have any special weight when applied to cases of the selective kind.

As with many other human rights issues, a right to conscientious objection may be perceived as involving a potential threat to State sovereignty. The balance between the need of a State to maintain a functioning army, and the obligation to respect the individual's freedom of conscience, is put to the test when faced with individuals objecting to military service on the grounds of conscientious objection. Since their starting point of objection to all forms of military action is already outside the boundaries of accepted political discourse, refusing to accept the possibility of a State enlisting its nationals even for the sake of self-defence, absolute objectors do not pose a substantial threat to the authority of the State. According to John Rawls, the existence of absolute objection 'no more challenges the state's authority than the celibacy of priests challenges the sanctity of marriage'.<sup>39</sup>

Selective objectors do recognise the right of a State to use its citizens to engage in war, but question the use made in this particular case. This type of claim is more likely to be perceived as a political threat, questioning the right of a State to determine

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<sup>33</sup> Eide, *op.cit.* (note 13), at para. 146.

<sup>34</sup> Lippman, *loc.cit.* (note 4), at p. 37.

<sup>35</sup> *Gillette vs US*, 401 US, 437 (1971).

<sup>36</sup> The exemption is not a legal right, but an internal military procedure known for virtually unattainable standards, with very few objectors having received exemptions since it was set up in 1995. See Amnesty report, *supra* (note 26).

<sup>37</sup> *Supra* (note 18).

<sup>38</sup> Feldman, A., 'Legal Scenarios', in: Menuchin, *op.cit.* (note 26), pp. 76-81, at p. 76.

<sup>39</sup> Rawls, *op.cit.* (note 23), at p. 335.

general issues of foreign policy and the conduct of war in particular.<sup>40</sup> The sanctioning of selective conscientious objection in international law, could therefore be perceived to be a greater threat to State sovereignty than absolute conscientious objection.

Many of the lines of reasoning in favour of recognition apply equally to selective and absolute objectors. Greenawalt lists the following as shared arguments of support:<sup>41</sup> the importance of limiting the demands that conflict with the individual's conscience; not to create bitter and alienated citizens; conscientious objectors would make bad soldiers and disturb morale of forces; it is more economically productive to divert objectors to alternative service than to place them in prison; the existence of conscientious objectors serves society by reminding of the importance of holding moral and social convictions.

As for the arguments against, most of these are no stronger when applied to selective conscientious objection, and can be dismissed by the same reasoning given for absolute objection. Some of these are: the undermining of morale of those who do serve (this is counterbalanced by the negative effect the conscientious objectors would have when placed within the troops); reducing manpower and thus damaging the State's military capability (but the percentage of objectors is considered insignificant compared to the number of those willing to enlist, and the manpower would not be wasted but diverted to other necessary alternative forms of service to society);<sup>42</sup> acceptance of conscientious objection can lead to long term anarchy as a result of people breaking any law they wish, on grounds of conscience (experience to date suggests that acceptance of conscientious objection to military service has not led to widespread call for other forms of conscientious objection, and that conscientious objection to military service is viewed as a special category unlike others).<sup>43</sup>

The argument against conscientious objection that Greenawalt claims to be carrying special weight when applied to selective conscientious objection, is the difficulty to achieve fair administration of justice (and the ensuing problem of perceived injustice if the administration is not seen to be competent).

Although the actual process of applying for an exemption may vary,<sup>44</sup> at some stage the objector will be faced with the task of convincing a court or board that the reason for objecting is one of conscience. For an absolute conscientious objector this task would be simpler, making a relatively straightforward statement, along the lines of 'I will never pick up a weapon, no matter the circumstances'. Those faced with the task of determining the existence of a conscientious objection, are faced with a comprehensible (even if not agreeable) conviction, they know what to ask in their investigation, and what answers to expect.

A selective objector poses a far greater challenge. Without the clear guidelines and acquaintance with a specific type of objection (as a belief in non-violence), the board is faced with the task of delving deeper into the individual's thoughts and actions, attempting to grasp what exactly is this conviction that allows him to pick and choose

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<sup>40</sup> The Eide report states that 'no government is likely to agree that the way it uses its armed forces is illegal', *op.cit.* (note 13), at para. 34; see also Marcus, *loc.cit.* (note 4), at pp. 542-543.

<sup>41</sup> Greenawalt, *loc.cit.* (note 19), at p. 47-50.

<sup>42</sup> *Idem*; Lippman, *loc.cit.* (note 4), at p. 35.

<sup>43</sup> Greenawalt, *ibidem*, at p. 49.

<sup>44</sup> *Supra* (note 17).

when to fight, and is it not merely a political stance. Apart from the worrying implications of allowing the State a free hand to deep-probe the citizen's psyche,<sup>45</sup> the need for exceptionally thorough investigations create difficulties for both the board and the individual. The formation of a conscientious belief is the result of psychosocial conditioning not always involving a clear and logical rationale,<sup>46</sup> and an objective analysis of its validity, or even of its existence, may create an insurmountable task for the board.<sup>47</sup> At the same time, the objector to the military service is often a young man of eighteen, who is unlikely to have the emotional and intellectual maturity necessary to provide the detailed rationale the board expects to hear.<sup>48</sup>

The above problems arise from the attempt to gain an understanding of the grounds of an individual's objection. One way to deal with these difficulties, would be to forgo the demand of presenting acceptable and comprehensible grounds, and instead to grant the exemptions on the sole basis of depth of conviction. Clearly the need to exhibit a minimal depth of one's conviction is necessary for the recognition of a conscientious objection, if only as proof that it is not an act of whim, but the depth criteria holds problems of its own and cannot be the sole decisive factor. Here again, the selective objector faces extra difficulties in comparison with the absolute objector. While the latter can make a strong statement regarding the depth of his conviction by drawing a moral scale and placing himself on one end of it, the selective objector positions himself somewhere before this end point, linking his refusal to fight with changing conditions. Where on this scale does the individual have to be in order for the objection to be considered deeply enough held to count as a conscientious conviction? For instance, the objector might be asked if he would join a particular war that he is currently objecting to, if he found out that it would be the only way of protecting the life of a family member.<sup>49</sup> Does a positive answer mean that this objection was not deeply held?

The question of the willingness to pay a price for the objection is considered by some to be one of the ways to determine depth.<sup>50</sup> An absolute objector relinquishes his claim to self-defence (and of his family), and is undoubtedly willing to make great sacrifices for his conviction. On the other hand, the selective objector, if stating agreement to fight in self-defence, has a harder time convincing of the depth of his conviction, when it is not clear what sacrifice he is willing to make in its name. Being prepared to bear the punishment for objection to service might be seen as proof of conviction,<sup>51</sup> but then a recognition of the right to object removes the threat of punishment and leaves nothing but the rhetoric of willingness that will never be put to the test.<sup>52</sup>

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<sup>45</sup> Raz regards this risk as a reason to deal with conscientious objection in ways other than by law, *op.cit.* (note 23), at p. 287.

<sup>46</sup> Greenawalt, *loc.cit.* (note 19), at pp. 58-59.

<sup>47</sup> Studies indicate that members of administrative boards during the Vietnam War had difficulty to intellectually comprehend, and tended to reject, complex claims of conscientious objection. Lippman, *loc.cit.* (note 4), at p. 57.

<sup>48</sup> Greenawalt, *loc.cit.* (note 19), at p. 67.

<sup>49</sup> *Ibidem*, at pp. 60-62.

<sup>50</sup> *Idem*.

<sup>51</sup> *Idem*.

<sup>52</sup> The question of punishment raises a variety of issues, such as discrimination against former conscientious objectors – see *Thlimmenos vs Greece*, Application no. 34369/97, ECHR Judgement



As a result of these issues, the depth standard can be an elusive test, the application of which would not solve the difficulty of fair administration of justice in the case of selective objectors.<sup>53</sup> Moreover, granting exemptions from military service to selective objectors, based on the existence of a deeply held conviction, regardless of the grounds, raises another serious question – should the State be expected to respect any selective conscientious objection, and does it not have the right, or even the duty, to dismiss certain types of objections however deeply they are believed in?

The Human Rights Committee's General Comment starts by pointing out the non-derogable nature of the freedom of conscience, but goes on to make the distinction between the unconditionally protected freedom of conscience, mentioned in Article 18(1) of the ICCPR, and the freedom of manifesting it, which may be subject to certain limitations, as stated in Article 18(3).<sup>54</sup> The absoluteness of the freedom of thought, conscience and religion, is likened by the Committee to the right of everyone to hold opinions without interference, as appears in Article 19(1) of the ICCPR. In the same way as the individual has an unlimited right to hold an opinion, but his expression of it may be limited by necessary restrictions,<sup>55</sup> thus the manifestation of a belief is also not to be unconditional.<sup>56</sup> Conscientious objection is an act based on a conscientious conviction, and a limitation placed on it would therefore have to be 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.<sup>57</sup>

In the case of absolute objectors, as the growing consensus reflects, there appears to be no justification for limitation on the manifestation of their conviction, not in the name of practical manpower problems for the protection of others' freedoms or public safety,<sup>58</sup> and not as a danger to public morals.<sup>59</sup> With regard to selective conscientious objectors, the grounds for their objection are almost limitless. Objection may be based, for instance, on the predominant religion of the parties to the conflict, their political or economic system (*e.g.* someone who will only fight communists), their racial composition and their geographical locations.<sup>60</sup> If faced with a selective conscientious

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of 6 April 2000.

<sup>53</sup> The placing of the emphasis on the depth of objection, regardless of the grounds, led the British courts during World War II to produce variant outcomes in similar cases of exemption requests. Greenawalt, *loc.cit.* (note 19), at pp. 56-57.

<sup>54</sup> *Supra* (note 9).

<sup>55</sup> Article 19(3) ICCPR.

<sup>56</sup> This raises the question of whether there is any practical legal value to the right to hold an opinion, or have a thought, since short of forced psychiatric drugs or neuro-electrodes, the State is not in a position to restrict the existence of a thought, whether it likes it or not. Even the banning of a punishment for having a thought would not answer this question, since punishment can only be administered after the individual has expressed or manifested the opinion or belief, and it cannot happen when a thought merely exists.

<sup>57</sup> 18(3) ICCPR; See also Eide, *op.cit.* (note 13), at paras. 39-42.

<sup>58</sup> The issue of potential damage to military capability was raised earlier in this section.

<sup>59</sup> Rawls mentions that the pacifist's stand reflects humanity's common abhorrence of war, and even if their position is not a sound one, it ultimately contributes to securing the principles of justice, *op.cit.* (note 23), at p. 325.

<sup>60</sup> Greenawalt raises an additional theoretical objection, in which an individual claims his moral duty is to always pursue his self-interest, and is therefore bound by his conscience to object to participating in a war in which he might be killed, *loc.cit.* (note 19), at p. 59.

objector who claims to have a deeply held conscientious objection to taking part in a particular conflict since the enemy is of a light skin colour, while he only believes in killing dark skinned people, it would be hard to argue that the State has the duty to respect the manifestation of this conviction.<sup>61</sup> However, the existence of certain cases of selective conscientious objection that may be subjected to limitations by the State, no matter how deeply they are held, does not preclude the possibility of determining a specific category of selective conscientious objection to be protected by international law, and which the State would have the duty to respect.

#### 4 SELECTIVE CONSCIENTIOUS OBJECTION AS ADHERENCE TO INTERNATIONAL LAW

The notion of positive forms of selective conscientious objection is not a complete stranger to international law. As seen above, the Resolution on Apartheid, the UNHCR Handbook, the European Resolution, and the report to the Sub-Commission,<sup>62</sup> all point to international acceptance that in certain situations an individual may have the right to object to participation in a particular conflict. The common thread to the various mentions selective conscientious objection gets in these instruments, is that they all deal with situations of serious violations of international law, such as apartheid, genocide and gross violations of human rights. In all these cases, the individual is making a two-fold claim, one of stating a conscientious objection, and the other of asserting the primacy of international law.<sup>63</sup> Accordingly, by recognising the right to selective conscientious objection for those whose conscience will not allow participation in conflicts involving serious violations of international law, the international community is taking concrete steps to protect the human rights and humanitarian law regime.

Before attending to the difficulties raised by this suggestion, it is worthwhile to note that using the principles of international law as the basis for acceptable grounds for selective objection, goes a long way to providing a solution for the problems of recognising selective cases, as raised in the previous section. Though it is unlikely that States will not use it, the claim of a threat to sovereignty will not have much strength in this case. Granting individuals the right to object to participation in violations of international law, is a form of reaffirming the fact that these violations should not be happening in the first place. A claim by a State that this right is unacceptable, is tantamount to a complaint that it is not being allowed to use its citizens to engage in illegitimate conduct. The threat to sovereignty in this case is not much more than the one posed by the very existence of an international law regime.

This definition for selective conscientious objection recognition would also help minimise the risk of unfair administration of justice. The narrowing of the definition for accepted grounds of selective conscientious objection would give the ability to reach decisions with greater objectivity, since the board would be working with a set of guidelines based on recognised principles of international law. This would enable the process to be similar to the one for absolute objectors, negating the need to embark on

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<sup>61</sup> In fact, a case could probably be made for punishing the individual for his expressions.

<sup>62</sup> *Supra* (notes 13, 28, 31 and 32).

<sup>63</sup> Lippman, *loc.cit.* (note 4), at pp. 64-65.

a complex exploration into the objector's mind and soul, and alleviating the ensuing problems of such an investigation.

## 5 ILLEGITIMATE USE OF ARMED FORCE

The next stage is identifying the precise meaning of an objection based on these principles. This type of objection is usually referred to as opposition to participation in an illegal or illegitimate use of armed force.<sup>64</sup> Not being experts in international law, selective conscientious objectors may derive their objection from the more traditional concept of just wars.<sup>65</sup> This idea has gone through various transformations since its development by St. Augustine in the fourth century, through Grotius, Vattel and to the modern theological outlook of the American National Conference of Catholic Bishops.<sup>66</sup> From its start, it embodied certain principles meant to determine when a war may be considered just. Among these are the need for a just cause, war as a last resort, war must be waged justly and mercy be shown to the vanquished.<sup>67</sup>

The use of this terminology by the selective objector should not be a deterrent to the objection being classified as one based on principles of international law, since contemporary international legal doctrine, according to Lippman, parallels the doctrine of the just war.<sup>68</sup> The idea of a just cause matches the laws governing the initial resort to violence, the *ius ad bellum*, while the principle of waging the war justly, parallels the laws governing the conduct of war, the *ius in bello*.<sup>69</sup>

Central to the *ius ad bellum* are Articles 2(4) and 51 of the UN Charter.<sup>70</sup> Article 2(4) prohibits the use of force (including threats) against another State, but once a State is subject to an armed attack, article 51 allows for the customary right of self-defence.<sup>71</sup> Resort by a State to armed force, in contradiction to the above, is a violation of the *ius*

<sup>64</sup> *Idem*; Major, *loc.cit.* (note 4), at p. 353.

<sup>65</sup> Pail speaks of the concept of 'choice/no choice wars', *loc.cit.* (note 26), at p. 111. For an analysis of the non-legal, moral perspective of just wars, see Walzer, M., *Just and Unjust Wars*, Basic Books, USA, 1977.

<sup>66</sup> Holmes, R., *On War and Morality*, Princeton University Press, N.J., 1989, at pp. 150-152. P. 164.

<sup>67</sup> Major, *loc.cit.* (note 4), at p. 353; Greenawalt, *loc.cit.* (note 19), at p. 51.

<sup>68</sup> Lippman, *loc.cit.* (note 4), at pp. 58-59.

<sup>69</sup> The proportionality and discrimination principles of the *ius in bello* are present in the just war doctrine of Thomas Aquinas. See Regan, R.J., *Just War, Principles and Cases*, Catholic University of America Press, Washington, 1996, at pp. 87-99.

<sup>70</sup> Charter of the United Nations, signed on 26 June 1945, entry into force 24 October 1945. For text see <<http://www.unhchr.ch/html/menu3/b/ch-cont.htm>>.

<sup>71</sup> The customary definition of self-defence – instant, overwhelming, leaving no choice of means and no moment for deliberation – is established by the *Caroline* Case, and was confirmed by the ICJ in the *Nicaragua (merits)* Case, stating that self-defence actions are subject to the Caroline requirements of necessity and proportionality. Cited in Harris, D.J., *Cases and Materials in International Law*, Sweet & Maxwell, London, 1998 at pp. 866-868, 894-896. Note that Article 39 leaves it to the Security Council to determine if such an attack has occurred. Article 42 allows for the Security Council to decide upon taking action, and is the second exception, besides self-defence, to Article 2(4).

*ad bellum*, and may be an illegitimate act of aggression.<sup>72</sup> The main instruments of the *ius in bello* are Hague law, governing the means and methods of fighting, Geneva law, concerning the protection of victims, the additional Protocols to the Geneva Conventions, and other more specific treaties.<sup>73</sup> Regardless of who initiated the conflict, the *ius in bello* applies equally to both parties.<sup>74</sup>

According to Greenwood, the *ad bellum* principle of self-defence continues to apply after the commencement of hostilities.<sup>75</sup> This means that every act must be justified by proportionate self-defence, *i.e.* a State may not unnecessarily cause a significant widening of the scope of the conflict (*e.g.* to a new geographical area).<sup>76</sup> Violations of the *ius in bello* cannot be deemed a necessity, since the laws have already taken military necessity into account.<sup>77</sup> Since an unnecessary act cannot be justified as legitimate self-defence,<sup>78</sup> a State engaging in systematic or routine violations (as opposed to one-time occurrences for which a single soldier might be solely responsible) of the *ius in bello* could no longer claim to be acting in self-defence. Accordingly, such a State would cease to be fighting a legitimate war of self-defence, and have moved into the realm of illegitimate war.<sup>79</sup> In light of this, it would seem that an objection to participation in illegitimate wars concerns not only conflicts initiated in contrast to international law, but also conflicts involving systematic violations of the *ius in bello*.<sup>80</sup>

## 6 THE CASE FOR OBJECTION

Having examined the meaning of the second half of the objection based on participation in illegitimate wars, it is now necessary to review the element of participation. The conscientious objection to participation in illegitimate wars is often portrayed as the wish, or even the duty, of the individual to avoid being forced to perform actions for which he may later be held criminally responsible, and the

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<sup>72</sup> Resolution 3314 (XXIX) on the Definition of Aggression, GA Res. (14 December 1974), for text see <<http://www.jurist.law.pitt.edu/3314.htm>>.

<sup>73</sup> This article is written with international armed conflicts in mind, additional issues may be raised when dealing with non-international conflicts.

<sup>74</sup> See Melzer, Y., *Concepts of Just War*, Sijthoff Publishing, Leyden, 1975, at pp. 59, 91; Greenwood, C., 'The Relationship Between *Ius ad bellum* and *Ius in bello*', *Review of International Studies*, Vol. 9, No. 221, 1983, at p. 225.

<sup>75</sup> Greenwood, *ibidem*, at p. 223.

<sup>76</sup> This is in the context of State defence, not isolated military incidents, therefore attacks may be initiated. *Idem*.

<sup>77</sup> O'Brien, W., 'The Meaning of Military Necessity in International Law', *World Polity*, Vol. 1, No. 109, 1957, at pp. 130, 138.

<sup>78</sup> *Supra*, (note 71).

<sup>79</sup> Greenwood defines the use of disproportionate self-defence as a violation of the *ius ad bellum*, *loc.cit.* (note 74), at p. 223. Melzer proposes that disproportionate self-defence could become a war of aggression, *op.cit.* (note 74), at pp. 92-93. Note also that this conforms to the traditional just war doctrine, in which a just cause becomes unjust if waged in a systematically unjust fashion. See Regan, *op.cit.* (note 69), at p. 98.

<sup>80</sup> Violations could include the use of unlawful weapons, raising the issue of objection to conflicts involving the use of nuclear weapons. For discussion on this see McGrath, E., 'Nuclear Weapons: The Crisis of Conscience', *Military Law Review*, No. 107, 1985, p. 191.

argument for a right to selective objection is often based on the principles determined at the Nuremberg tribunals.<sup>81</sup> However, this type of defence raises problems both in cases of *ius ad bellum* illegitimate wars, and ones involving violations of the *ius in bello*. Individual responsibility for crimes against peace, and the crime of aggression, applies to the policy makers responsible for the outbreak of the conflict, *i.e.* those involved in the planning, initiation and management, but not to the common soldier.<sup>82</sup> It follows that a common soldier cannot then base his conscientious objection on the wish to avoid future prosecution for crimes against peace.

Concerning conflicts involving systematic violations of the *ius in bello*, to plead a case based on criminal responsibility, the individual would have to show that he will be directly involved in these violations. The first problem here is the inability to make a determination on a future scenario in a constantly changing situation of armed conflict. Decisions would need information on where certain units will be deployed, what missions they are destined to carry out and similar details, the likes of which even if were at hand, cannot be relied upon to remain the same. Similarly, the exact role of the soldier is also going to be difficult to determine in advance.<sup>83</sup>

Even if it were possible to determine that the individual was likely to be directly involved in these violations, it is not clear why he would need to invoke the right to conscientious objection for acts that he already has not only a right, but a duty to disobey.<sup>84</sup> Consequently, defending the right to selective conscientious objection on these grounds is either unnecessary (a soldier already has the right to disobey illegal orders) or likely to lead to failure (if unable to prove likelihood of direct participation).<sup>85</sup>

Reducing the conscientious objection to a matter of criminal responsibility also carries the implications of the objection being a matter of self-interest, ignoring the existence of a higher moral conviction. This conviction can be stated as the wider notion of not wishing to participate in an illegitimate enterprise, and consequently acting to uphold international law. This definition is supported by the text of the UNHCR handbook, which states those selective conscientious objectors eligible to claim refugee status, as individuals not wishing to be *associated* with the military action, and does not

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<sup>81</sup> See Lippman, *loc.cit.* (note 4), at pp. 62-63; Major, *loc.cit.* (note 4), at pp. 364-365; Feldman, *loc.cit.* (note 38), at p. 80; Strassfeld, *loc.cit.* (note 24), at p. 901-903.

<sup>82</sup> Green, L., *Essays on the Modern Law of War*, Transnational Publishers, N.Y., 1999, at p. 313; Melzer, *op.cit.* (note 74), at pp. 85-86; Greenwood, *loc.cit.* (note 74), at p. 231. For discussion of additional geopolitical hindrances to applying the Nuremberg principles see Falk, R., 'Telford Taylor and The Legacy of Nuremberg', *Columbia Journal of Transnational Law*, Vol. 37, No. 693, 1999, at pp. 709-715.

<sup>83</sup> The Canadian Federal Court of Appeal stated it could not predict the possibility of the soldier's participation in war crimes, or the exact role he would have undertaken in the situation of battle. *Zolfagharkhani vs Canada*, A-520-91 Federal Court of Appeal, 1993.

<sup>84</sup> Green cites a number of cases, including the *Einsatzgruppen* Case, and the pre-Nuremberg *Peleus* Case, *op.cit.* (note 82), at pp. 264-272. See also Statute of the International Criminal Tribunal for the former Yugoslavia, Article 7(4); Statute of the International Tribunal for Rwanda, Article 6(4).

<sup>85</sup> See the failure of an attempt to plead a Nuremberg defence in Strassfeld, *loc.cit.* (note 24), at pp. 901-924.

state a need for direct responsibility for any violations.<sup>86</sup> It is precisely this vagueness of the participation definition, not reduced to criminal responsibility, that makes this a case of conscientious objection, and not a defence of the duty to disobey. The subjective characterisation of participation as a form of association is needed for an objection to military service in cases of *ad bellum* violations, and *in bello* violations for which the objector would not be individually responsible.<sup>87</sup> This would allow for objection in cases such as the one of Dr Howard Levy,<sup>88</sup> who refused to train the Green Beret soldiers in their preparation for fighting in Vietnam.

Relieving the individual of the need to prove real risk of future prosecution still leaves unanswered some of the difficulties the relevant board or court has to face when making its decision, including considerable practical and political stumbling blocks. Having the courts rule on the legitimacy of conflicts,<sup>89</sup> whether as violations of *ius ad bellum* or *in bello*, would mean expecting domestic courts to either be ruling on their own government's legitimacy to use armed force, or in the case of asylum for selective objectors from other countries, to get involved in determining legality of other States' military actions. Although the ability of domestic courts to rule against their own governments is an inherent component of international human rights law,<sup>90</sup> the legitimacy of conflicts involves a fundamental question of the authority of States,<sup>91</sup> and when concerned with the actions of other States, involves issues of foreign policy on which courts may prefer to leave the final call to a government decision.<sup>92</sup>

Instead, it is submitted that courts should not have to reach an objective ruling on the legitimacy, but rather on the existence of a well founded subjective conscientious objection to participation in the conflict. The objector would need to demonstrate that his objection is based on a conscientious conviction,<sup>93</sup> and have a *prima facie* case showing that the objection is grounded in reality.<sup>94</sup> The definition of objectionable military actions in the UNHCR Handbook, is of those that are 'condemned by the

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<sup>86</sup> *Supra* (note 31) (italics added).

<sup>87</sup> There remains the question of whether association includes paying taxes and other indirect support of the military. There are many arguments for and against such a claim, but they are outside the scope of an article dealing only with the issue of objection to military service.

<sup>88</sup> Strassfeld, *loc.cit.* (note 24), at p. 839.

<sup>89</sup> As in the court-martial of Dr. Levy, when an attempt was made to put the Vietnam war on trial. *Idem.*

<sup>90</sup> This is apparent in the duty to give effect, in a variety of forms, to international treaties in domestic law, and in the need for exhaustion of domestic remedies.

<sup>91</sup> And is not always one with a clear-cut legal answer (*e.g.* humanitarian intervention and anticipatory self-defence).

<sup>92</sup> For an example of the relationship between the courts and foreign policy issues see *Carl Zeiss Stiftung vs Rayner and Keeler, Ltd* 1 A.C. 853 (1967), cited in Harris, *op.cit.* (note 71), at pp. 176-183.

<sup>93</sup> Proof of conviction would involve similar criteria as those traditionally used for absolute conscientious objectors, *e.g.* consistency and correlation between beliefs and action.

<sup>94</sup> This includes the participation element, *i.e.* Dr. Levy would have to convince that he believes his action amounts to participation. A US soldier sent to Germany during the Vietnam war would have a harder case to explain, but still possible (*e.g.* he believes his action frees another soldier to be sent to Vietnam). On objection to non-combat roles in a military engaged in immoral use of force, see Eide Report, *op.cit.* (note 13), at para. 107.

international community as contrary to basic rules of human conduct'.<sup>95</sup> Accordingly, to present an arguable claim, the objector could demonstrate the existence of such condemnation, be it by the UN, other inter-governmental bodies, other States, or established non-governmental organisations such as Amnesty International and Human Rights Watch.<sup>96</sup> Establishing the need for an accepted criterion capable of converting the subjective objection into an arguable claim, without asking the court to rule on the actual legitimacy of the armed conflict, leaves the court only having to understand why the individual is objecting without being asked to agree with him.<sup>97</sup>

## CONCLUSION

The growing recognition of a right to conscientious objection, without agreement on selective objection, leaves large numbers of well-intentioned individuals with nowhere to turn. A wide approach of automatic recognition of any claim to selective objection, appears to be one that cannot be supported in international law, and room must be left for certain limitations. However, to avoid the abuse of these limitations, this paper has attempted to define a specific category of objection, which would include the above individuals, and which can and should be protected in international law. Using a narrow definition based on the duty to disobey would not solve the problem for those who cannot prove a real risk of future individual criminal liability, and is unnecessary for those who can, since they already have the right to refuse illegal orders.

The category defined in this article, rests not on future responsibility, but on a subjective moral objection, using the principles of international human rights and humanitarian law as the guidelines for determining whether the grounds for objection are acceptable. Placing the lesser burden of an arguable claim, without demanding of

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<sup>95</sup> *Supra* (note 31).

<sup>96</sup> In the case of *Ciric*, dealing with a Serb couple (both former soldiers) that fled Yugoslavia in 1991 to avoid being drafted, the Federal Court of Canada ruled that although UN condemnation had not yet reached its later heights (pointing out that the UN must always act slowly in order to maintain its position as an honest broker), the earlier board decision should have relied on reports by Amnesty International, Helsinki Watch and the International Committee of the Red Cross, as sufficient evidence of international condemnation. *Ciric vs Canada*, No. A-877-92 Federal Court Trial Division, 1993. In *Barraza Rivera vs INS*, the US Court of Appeals reached the conclusion that the combination of the applicant's testimony, Amnesty International reports and media reports regarding military practices in El-Salvador, were together sufficient evidence for his claim to be well founded, *supra*, (note 32); In a similar case, *MA vs INS*, a different court ruled against reliance on Amnesty International reports, but the strong dissenting opinion (5:6) pointed out that the UNHCR handbook does not say international governmental condemnation, but refers to the international community, of which Amnesty International and similar NGOs are members actively involved as a source of information and in the development of international law. Their reports can therefore serve as the objective component necessary to make the subjective claim a well-founded and reasonable one. *M.A. vs INS*, 899 F.2d 304, 1990, US App.

<sup>97</sup> The court, relying on Amnesty International and Human Rights Watch reports, would thus be able to recognise a legitimate claim for selective conscientious objection both from a Serb deserter seeking asylum, and a NATO soldier not wishing to partake in the attacks on Kosovo, without being pulled into determining the legality of NATO actions.

the courts to rule on legitimacy of armed conflicts, allows them to avoid facing substantial legal and political difficulties which would have made the recognition of this right a practical impossibility. It is hoped that using this category, international law could supply a solution for the protection of individuals, who similarly to the acknowledged human rights defenders, are prepared to take a stand against national governments and defend the rules laid down in the international legal system.