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> Our land is one of vast inequalities—in wealth, in power and in education. . . . This is a situation of fundamental injustice. Until it is the Government's express intention to remove it, I will be unable in conscience to defend it. . . . Young men are being required increasingly to risk their lives under arms. Many, like myself, are already asking: *Just what are we fighting for? Just what are we being required to die for?* Are we going to die for a better society, for a more just society, perhaps even for a more loving society? Are we really defending the last bastion of Christianity, as we are so often told? Is this what we are defending really to be termed 'civilization'?
>
> Peter Moll, South African conscientious objector[1]

I. INTRODUCTION

When the ruling National Party came to power in South Africa in 1948, virtually all of Africa was divided among the European colonial powers.[2] The post-war years, however, saw the rise of increasingly strong African nationalist movements. On March 9, 1957, Ghana became the first African nation to win independence from colonial rule,[3] thus opening the floodgates of freedom. Thereafter, new states appeared rapidly all over the continent. By the 1970s, black majority rule had replaced white minority governments virtually everywhere in Africa. In southern Africa, however, there remained Portuguese rule in Angola and Mozambique, Ian Smith's U.D.I. Government in Rhodesia,[4] and

1. UNITED NATIONS CENTRE AGAINST APARTHEID, NOTES AND DOCUMENTS No. 16/81, at 3-4 (Apr. 1981).

2. For a discussion of European colonialism, see COLONIALISM IN AFRICA 1870-1960 (L. Gann & P. Duignan eds. 1969).

3. For a discussion of the Ghanaian struggle for independence, see D. AUSTIN, POLITICS IN GHANA 1946-1960 (1964).

4. U.D.I. refers to the Unilateral Declaration of Independence issued by Ian Smith's Rhodesian Front on November 11, 1965, after the Smith regime declined further negoti-

apartheid in South Africa. Yet these regimes were also facing growing internal and external opposition. By the end of 1975, Mozambique[5] and Angola[6] had gained independence; in 1980, Rhodesia became black majority ruled Zimbabwe.[7] Although it is currently occupied illegally by South Africa in contravention of both a United Nations Security Council Resolution[8] and an advisory opinion of the International Court of Justice,[9] even Namibia (also known as South West Africa) will soon become an independent state.[10] No longer surrounded by a buffer zone of white minority ruled states separating it from black ruled Africa, South Africa stands alone, the last outpost of white supremacy on the continent.

Amidst all of these developments, the South African regime, whose apartheid policy has been declared a crime against humanity by the United Nations,[11] has come under increasing pressure from without and within. In response, the South African Government appears to have dug itself in. Prepared to defend white power and privilege at all costs by

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ations for British recognition of Rhodesian independence. *See generally* R. GOOD, U.D.I: THE INTERNATIONAL POLITICS OF THE RHODESIAN REBELLION (1973).

5. The Mozambican struggle is detailed in T. HENRIKSEN, MOZAMBIQUE: A HISTORY (1978); J. HANLON, MOZAMBIQUE: THE REVOLUTION UNDER FIRE (1984).

6. The most comprehensive treatment of Angolan nationalism and the battle for independence is found in J. MARCUM, THE ANGOLAN REVOLUTION (2 vols., 1969, 1978).

7. On the struggle for Zimbabwe, see C. UTELE, THE ROAD TO ZIMBABWE: THE POLITICAL ECONOMY OF SETTLER COLONIALISM, NATIONAL LIBERATION AND FOREIGN INTERVENTION (1979); D. MARTIN & P. JOHNSON, THE STRUGGLE FOR ZIMBABWE: THE CHIMURENGA WAR (1981); J. FREDERIKSE, NONE BUT OURSELVES: MASSES VS. MEDIA IN THE MAKING OF ZIMBABWE (1982).

8. S.C. Res. 276, 25 U.N. SCOR (mtgs. 1527-29) at 1, U.N. Doc. S/INF/25 (1970).

9. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion).

10. For a comprehensive treatment of the Namibian question through the early 1970s, see THE SOUTH WEST AFRICA/NAMIBIA DISPUTE (J. Dugard ed. 1973). For more recent accounts, see CATHOLIC INSTITUTE FOR INTERNATIONAL RELATIONS & BRITISH COUNCIL OF CHURCHES, NAMIBIA IN THE 1980s (1981); A. MOLEAH, NAMIBIA: THE STRUGGLE FOR LIBERATION (1983).

11. *See* G.A. Res. 2202A, 21 U.N. GAOR Supp. (No. 16) at 20, U.N. Doc. A/6316 (1966). Under the apartheid system, the South African Government classifies people as White, African, Coloured (*i.e.*, of mixed descent), and Asian (*i.e.*, Indian). This Article will adhere to this terminology. In addition, the word "black" will be used to denote all South Africans who are not members of the white group.

South Africa has a population of twenty-eight million. Of these, 71.9% are African, 2.8% are Asian, 9.2% are Coloured, and 16.1% are White. Whites are divisible into Afrikaners (some sixty percent) and English-speakers (some forty percent). L. THOMPSON & A. PRIOR, SOUTH AFRICAN POLITICS 35 (1982).

transforming South Africa into a militarized state, the Government has brought military capacity to an unprecedented level and progressively enlarged both the size of its armed forces and the amount of time required for military service. South Africa uses its military might not only to maintain its apartheid system but also to destabilize the governments of neighboring black states in an effort to ensure its dominance in the region.

Much to South Africa's chagrin, however, a growing number of young white males who feel that they cannot defend the Government and its brutal policies have sought to avoid conscription by fleeing the country, hiding within the country, or becoming conscientious objectors.[12] The Government, in turn, has implemented ever more stringent restraints upon such objectors in an effort to crush dissent. Indeed, there is a definite link between the exigency of South African conscription legislation and the amount of pressure under which the regime perceives itself to be. This Article examines the nature of that relationship and its deleterious effects upon the prospects for peaceful change in South Africa. Part II discusses the origins of South African defense legislation. Part III examines the Defence Act of 1957, the central piece of South African defense legislation, and subsequent enactments affecting conscientious objectors. Parts IV and V consider legislative trends in the 1970s and 1980s respectively. These sections specifically address the role of internal anti-apartheid activities and external developments in fostering a vast military buildup, increased conscription, and an almost total intolerance of conscientious objection. Part VI suggests ways in which current South African law should be liberalized and, barring such an occurrence, assesses the obligations of the members of the international community to aid conscientious objectors.

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12. Conscientious objectors are those who, for reasons of conscience, object to compulsory military service. They are generally divisible into four categories: (1) universal religious pacifists (those who, for religious reasons, refuse to participate in all wars); (2) universal secular pacifists (those who, for nonreligious reasons, refuse to participate in all wars); (3) selective religious pacifists (those who, for religious reasons, refuse to participate in a certain conflict); (4) selective secular pacifists (those who, for religious reasons, refuse to participate in a certain conflict). *See generally* J. MAGEE, CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AS A HUMAN RIGHT: A BACKGROUND PAPER (1980); A. EIDE & C. MUIBANGA-CHIPOYA, CONSCIENTIOUS OBJECTION TO MILITARY SERVICE: REPORT PREPARED IN PURSUANCE OF THE RESOLUTIONS 14 (xxxiv) AND 1982/30 OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1983/30/Rev. 1.

II. The Origins of South African Defense Legislation

The Union of South Africa came into existence on May 31, 1910, the product of a national convention attended by representatives from the Cape Colony, Natal, the Transvaal, and the Orange River Colony, which representatives adopted a constitution for a united South Africa known as the South Africa Act of 1909.[13] Each of the four colonial parliaments endorsed the constitution and the British Parliament enacted it. The new state, however, lacked a defense act. The commando system of the Boer Republics had been replaced by an expensive South African constabulary, while the British garrison had been greatly reduced.[14] An Imperial Defence Conference held in London in 1911 gave rise to the South Africa Defence Act of 1912.[15] The Act established a small permanent force which would be enlarged as required, first by men enrolled in citizen force regiments as volunteers (or, if necessary, as conscripts), and second by men serving in "rifle associations," which were in fact a reincarnation of the republics' commando forces.[16] The Imperial Army Act[17] furnished disciplinary provisions.

South Africa participated in World War I, notwithstanding reaction (including a small rebellion) against such involvement from some of the Afrikaner population. The Public Welfare and Moratorium Act of 1914[18] suspended all civil legal remedies against members of the Union Defence Force on active service during the war. After the war, the Smuts-Churchill Agreement of 1921 made the Union responsible for its own landward defense.[19] Consequently, the Defence Endowment Property and Account Act of 1922[20] provided for South African control of Imperial War Department buildings and lands as well as some admiralty lands in the country. South Africa gave the Royal Navy use of its

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13. South Africa Act, 1909, 9 Edw. 7, ch. 9. The Union was a white, self-governing British dominion. On the events leading to the creation of the Union, see L. Thompson, The Unification of South Africa 1902-1910 (1960).

14. The Afrikaner (Boer) Republics of the Orange River Sovereignty and the Transvaal went to war against Britain and were defeated in the South African War (Anglo-Boer War) of 1899-1902. Detailed accounts are found in T. Pakenham, The Boer War (1979); The South African War: The Anglo-Boer War, 1899-1902 (P. Warwick ed. 1980).

15. South Africa Defence Act, No. 13 (1912).

16. *Id.* §§ 1-68.

17. 1881, 44 & 45 Vict., ch. 58.

18. Indemnity and Undesirables Special Deportation Act, No. 1, § 2(1)(d) (1914) (special session).

19. E. Walker, A History of Southern Africa 600 (3d ed. 1957).

20. No. 33, §§ 1(1), 6 (1922).

Simonstown port, although the Union Defence Force garrisoned it.[21] In 1932, the Defence Act (Amendment) and Dominion Forces Act[22] allowed for the creation of a Union Military Discipline Code through adoption and modification of the Imperial Army Act and the rules of procedure made pursuant to it.[23]

South Africa's participation in World War II on the side of the Allies caused much division among the white population. Many Afrikaners opposed South Africa's participation in the war, and some Afrikaner groups were decidedly pro-Nazi in their sympathies. Several Afrikaner political organizations such as the New Order and the Ossewabrandwag (Oxwagon Sentinel) prepared for the expected Nazi victory.[24] Nevertheless, in 1940 the Government enacted the War Measures Act,[25] which indemnified the Government and those acting under its authority against proceedings for any act performed in good faith since the war began.[26] A subsequent amendment empowered the British Governor-General to make regulations necessary or expedient for the Union's defense, public safety, and the maintenance of public order.[27] The Defence Special Pensions and Moratorium Act[28] provided for payment of benefits to individuals who had been wounded or caused illness because of military service rendered during the war.[29] The Act also reinstated provisions of the Public Welfare and Moratorium Act to provide a moratorium for members of the Union Defence Force on active service.

During the Second World War, ever-increasing numbers of blacks entered the urban economy. This trend continued in the post-war years when those blacks demanded what the Government considered radical concessions at a time when decolonization movements were gaining momentum throughout tropical Africa.[30] The National Party came to power in 1948 largely because of its insistence that the segregationist policies of the then-ruling United Party were insufficient for the mainte-

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21. *See id.*, sched. A, items 44-54.
22. No. 32 of 1932.
23. *Id.* § 2.
24. L. THOMPSON & A. PRIOR, *supra* note 11, at 102.
25. No. 13 (1940).
26. *Id.* § 3.
27. War Measures Amendment Act, No. 32, § 1 *bis* (1940).
28. No. 29 (1940).
29. *Id.* § 3.
30. On black urbanization, see generally D. HINDSON, PASS CONTROLS AND THE URBAN AFRICAN PROLETARIAT IN SOUTH AFRICA (1987); M. LIPTON, CAPITALISM AND APARTHEID: SOUTH AFRICA, 1910-1984 (1985); A. STADLER, THE POLITICAL ECONOMY OF MODERN SOUTH AFRICA (1987).

nance of white supremacy in the post-War world: it argued that a broader policy known as apartheid (separateness) was necessary.[31]

Following the 1948 election, blacks in South Africa began taking a stronger stance against white supremacy. In 1949, the African National Congress (ANC)—long in the vanguard of the struggle against inequality—adopted a program of militant African nationalism and mass action under the prodding of its Youth League.[32] In 1952, this program came to fruition in the Defiance Campaign, a nationwide program of nonviolent civil disobedience pursued jointly by Africans and Indians.[33] By the end of the year, the movement spread from the white areas to the rural areas and unsanctioned rioting occurred in Johannesburg, Port Elizabeth, Cape Town, and East London. The organizers called off the campaign after Parliament enacted severe penalties for protest actions.[34] The Government, obviously alarmed by the protests, also instituted the Public Safety Act of 1953.[35] This Act permitted the Government to declare a state of emergency in any (or every) part of the country and rule by proclamation if it considered that the safety of the public or the maintenance of public order was seriously threatened and that the ordinary law was inadequate to preserve it.[36]

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31. *See generally* T. DAVENPORT, SOUTH AFRICA: A MODERN HISTORY 222-54 (1978).

32. *See* L. THOMPSON & A. PRIOR, *supra* note 11, at 193-94. The ANC, founded in 1912, was the first liberation movement on the African continent. On black political activity before 1948, see M. BENSON, THE AFRICAN PATRIOTS: THE STORY OF THE AFRICAN NATIONAL CONGRESS OF SOUTH AFRICA (1963); B. WILLAN, SOL PLAATJE: SOUTH AFRICAN NATIONALIST, 1876-1932 (1984); A. ODENDAAL, BLACK PROTEST POLITICS IN SOUTH AFRICA TO 1912 (1984); P. WALSHE, THE RISE OF AFRICAN NATIONALISM IN SOUTH AFRICA: THE AFRICAN NATIONAL CONGRESS 1912-1952 (1971); G. GERHART, BLACK POWER IN SOUTH AFRICA: THE EVOLUTION OF AN IDEOLOGY (1978).

33. STUDY COMMISSION ON U.S. POLICY TOWARD SOUTHERN AFRICA, SOUTH AFRICA: TIME RUNNING OUT 171 (1981) [hereinafter TIME RUNNING OUT].

34. *Id.* at 171-72.

35. No. 3 (1953). The South African Government invoked this Act to create the nationwide state of emergency under which South Africa has been continuously governed since June 1986. The Act was also used to create an earlier state of emergency, declared in August 1985, which applied in only thirty-six of South Africa's 306 magisterial districts. *See* Berat, *The Setting*, in Ford Foundation Developing Country Programs, FY 1989 Program Reviews: South Africa 1 (Oct. 11-20, 1988) (copy available from *Vanderbilt Journal of Transnational Law*). *See also infra* note 233. On the judiciary and the state of emergency, see Basson, *Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts*, 3 S. AFR. J. HUMAN RTS. 28 (1987).

36. Public Safety Act, No. 3, at § 2.

Despite these legislative efforts to quash dissent, another major campaign arose in 1955. Throughout the country, anti-apartheid groups drew up grievance lists and elected delegates to what was known as the Congress of the People. On June 26, 1955, three thousand delegates of all racial groups met at Kliptown, near Johannesburg, and adopted a Freedom Charter which stipulated that "South Africa belongs to all who live in it, black and white . . . ."[37] The Government reacted by (1) promulgating more repressive legislation, including the Riotous Assemblies Act of 1956,[38] which sought to close loopholes in the already sweeping Suppression of Communism Act of 1950;[39] and (2) increasing the considerable powers of the executive government and its agents, including the police. Also in 1956, the Government arrested 156 people,

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37. L. THOMPSON & A. PRIOR, *supra* note 11, at 194-95. The text of the Charter is reprinted in T. KARIS & G. CARTER, 3 FROM PROTEST TO CHALLENGE 205 (1977). The Charter states:

> We, the people of South Africa, declare for all our country and the world to know:—
>
> That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people;
>
> That our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;
>
> That our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities;
>
> That only a democratic state, based on the will of the people can secure to all their birthright without distinction of colour, race, sex or belief;
>
> And therefore, we, the people of South Africa, black and white, together—equals, countrymen and brothers—adopt this FREEDOM CHARTER. And we pledge ourselves to strive together, sparing nothing of our strength and courage, until the democratic changes here set out have been won.

Id.

38. No. 17 (1956).

39. No. 44 (1950). Among other laws that closed the loopholes in the 1950 Act and augmented the powers of the executive branch of government and its agents were the General Law Amendment Act, No. 76, § 21 (1962) [hereinafter Sabotage Act], the General Law Amendment Act, No. 37 (1963), and the Terrorism Act, No. 83 (1967).

In 1976, the Suppression of Communism Act was renamed the Internal Security Act. It defined "communism" broadly and permitted the Minister of Justice to punish without trial anyone who in his view furthered the aims of "communism." The Minister could "list" such a person; that is, it could forbid him from joining various organizations and from publishing anything, and it could prohibit others from publishing anything he had said or written. Moreover, the Minister could ban the person. This involved restrictions in addition to those placed upon listed individuals and frequently required reporting to the police. The Minister could also place the banned person under house arrest. No reasons needed to be given for the Minister's decision, which were beyond the review of the courts.

including the leaders of the organizations forming the Congress Alliance.[40] Those arrested were charged with high treason through a conspiracy to overthrow the state by violence and replace it with one based on communism.[41] In view of these developments and those occurring elsewhere in tropical Africa, it is not surprising that during the following year (also the year of Ghanaian independence) the Government enacted the Defence Act of 1957.

III. THE DEFENCE ACT OF 1957 AND SUBSEQUENT LEGISLATION

A. *General Provisions of the 1957 Defence Act*

The Defence Act of 1957 (1957 Defence Act)[42] consolidated the laws of defense upon which the legal foundations of South African military service are based. It also confirmed the existence of the permanent and citizen forces,[43] provided for a new military discipline code,[44] permitted the establishment of a system of commandos,[45] and furnished the statutory authority for the South African Defence Force (SADF).[46] The 1957 Defence Act and the rules[47] that give it effect constitute the Military Discipline Code.[48] The law is supplemented by the General Regulations for the South African Defence Force and the Reserve,[49] all of which have been published in the *Gazette*. The internal regulations of the Defence Force are themselves supplemented by South African Defence Force orders issued by the Chief of the Defence Force, and army, navy, and air force orders issued by the chief of the particular branch. These are supplemented by operational, formation, unit, and standing orders issued by the commander of a formation or unit to make known his commands regarding military operations, the smooth functioning of his formation or unit, or matters regarding the pay, service, and documents of

40. L. THOMPSON & A. PRIOR, *supra* note 11, at 195.

41. For a full account of the trial, see L. FORMAN & E. SACHS, THE SOUTH AFRICAN TREASON TRIAL (1957).

42. No. 44 (1957).

43. *Id.* §§ 5-31.

44. *Id.* §§ 104-27.

45. *Id.* §§ 32-45.

46. *Id.* §§ 1-4.

47. Reg. No. 760 (1958).

48. *See* Defence Act, No. 44, at § 104(1).

49. Reg. No. 1233 (1965); Reg. No. 276 (1966); Reg. No. 1204 (1966); Reg. No. 1252 (1967); Reg. No. 203 (1970); Reg. No. 1983 (1970); Reg. No. 274 (1971); Reg. No. 2108 (1971); Reg. No. 2110 (1971); Reg. No. 2213 (1971); Reg. No. 678 (1974); Reg. No. 2394 (1975).

its members.[50] These orders are not published in the *Gazette*.

Pursuant to the 1957 Defence Act, the South African Defence Force is comprised of the Permanent Force, the Citizen Force, and the Commandos.[51] In practice, most servicemen are assigned to the Citizen Force. In addition, the 1957 Defence Act created a Reserve Force comprised of the Reserve of Officers, the Permanent Force Reserve, the Citizen Force Reserve, the Commando Reserve, and the National Reserve.[52] Service is compulsory only in the Citizen Force or Commandos and their respective reserves.[53] The original version of the Act provided for a three-month period of compulsory military service in the Citizen Force[54] and twenty-one days in the Commandos.[55]

B. *Anti-Apartheid Activity in the 1960s*

In 1960, the newly-formed Pan Africanist Congress (PAC), founded the previous year as a breakaway from the ANC, organized a new campaign against South Africa's repressive pass laws, which restricted the movement of blacks within the Republic.[56] On March 21, 1960, many Africans appeared at police stations throughout the country without their passes, inviting arrest in an effort to bog down the machinery of justice.[57] In an incident that became infamous around the world, policemen at the Sharpeville police station near Johannesburg fired on the demonstrators. Sixty-seven Africans were killed and 186 others were wounded; most

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50. GDF Regs. ch. II §§ 6-9.

51. Defence Act, No. 44, at § 5.

52. *Id.* § 6, *amended by* Defence Amendment Act, No. 85, § 5 (1967).

53. *See* Defence Act, No. 44, at §§ 16-45.

54. *Id.* § 22(2)(b).

55. *Id.* § 44(3).

56. Pass laws originated in the Cape Colony in 1809 and existed in the pre-Union legislation of the four colonies that formed the Union of South Africa. The Union retained this legislation. In 1952, the egregiously misnamed Blacks Abolition of Passes and Coordination of Documents Act replaced existing pass laws by renaming passes "reference books" and requiring African women as well as African men to carry them. Under this act, any African over the age of sixteen had to be fingerprinted and carry a reference book containing his or her identity card and employment information. TIME RUNNING OUT, *supra* note 33, at 60-61. Those without passes allowing them to be present in an urban area were subject to arrest and deportation to one of South Africa's ethnically-defined homelands. By 1986, the enforcement of the pass laws became impossible for the Government, which replaced passes with National Identity Documents and a policy of "orderly urbanization." In practice, orderly urbanization has become yet another form of influx control. *See generally* D. HINDSON, *supra* note 30.

57. L. THOMPSON & A. PRIOR, *supra* note 11, at 196.

were shot in the back.[58] The ANC and PAC responded by calling for a day of mourning. Work stoppages became widespread, and some 20,000 Africans marched peacefully to the center of Cape Town near the Houses of Parliament, which was then in session.[59]

The Government answered by declaring a state of emergency. It mobilized the armed forces (including the reserves), banned the ANC and PAC, and arrested nearly 12,000 people (mostly blacks) under emergency regulations and 6,800 Africans for pass and other offenses.[60] The police brutalized hundreds more Africans to force them to return to work.[61] It was in the wake of Sharpeville that South Africa's massive military buildup began.

Meanwhile, the ANC went underground and, with members of the multiracial, banned Communist Party, formed Umkhonto we Sizwe.[62] This new group carried out acts of sabotage, to which the Government responded by enacting the Sabotage Act of 1962.[63] Umkhonto we Sizwe carried out its first strike on a Government installation on December 16, 1961.[64] The group claimed over seventy acts of sabotage by mid-1963, when the security police, growing ever more professional, captured its leaders in Rivonia, a white Johannesburg suburb.[65] Two more revolutionary groups also appeared during the post-Sharpeville period. These were Poqo, a PAC offshoot, and the African Resistance Movement, a multiracial group consisting mostly of white, former Liberal Party members.[66] By mid-1964, the three groups had committed over 200 acts of sabotage.[67] The success of these groups, however, was short-lived: Poqo was broken by mid-1963, and most African Resistance Movement saboteurs were arrested in July and August 1964. The Government then

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58. *Id.* at 196-97.

59. *Id.* at 197.

60. *Id.*

61. *Id.*

62. Umkhonto we Sizwe means "Spear of the Nation" in the Zulu language.

63. Sabotage Act, *supra* note 39.

64. TIME RUNNING OUT, *supra* note 33, at 175.

65. *Id.*

66. The Liberal Party was a multiracial political party that supported a policy that would have extended the franchise to all South Africans. In 1968, the Government enacted the Prohibition of Political Interference Act, No. 51 (1968) which made it illegal for anyone to belong to a multiracial political party. The Liberal Party chose to disband rather than expel its black members. On liberalism in South Africa, see DEMOCRATIC LIBERALISM IN SOUTH AFRICA: ITS HISTORY AND PROSPECT (J. Butler, R. Elphick, & D. Welsh eds. 1987).

67. *See* L. THOMPSON & A. PRIOR, *supra* note 11, at 199-200.

banned all three groups.[68] Thus, by the mid-1960s the Government had eliminated successfully most of the underground and frustrated the radical opposition. While the ensuing decade was relatively quiet within South Africa, the country nevertheless became the subject of attacks of another kind from the international community.

In 1962, a United Nations General Assembly resolution recommended that member states cease any remaining diplomatic relations with South Africa, boycott South African goods, refuse to export any goods to South Africa, and deny the use of their ports and air space to South African ships and aircraft.[69] The resolution also asked the Security Council to consider expelling South Africa from the United Nations.[70] Although the resolution had limited success, the country had become increasingly isolated by the mid-1960s. South Africa had withdrawn from UNESCO in 1956 and from the Commonwealth in 1961 following strong condemnation at a prime ministers' conference.[71] The country ceased to participate in the International Labour Organization and the World Health Organization. It also left the Economic Commission for Africa, the Council for Technical Co-Operation in Africa, the Council for Science in Africa, and the Food and Agricultural Organization of the United Nations. In 1963, thirty African heads of state established an African Liberation Committee comprised of nine states, headquartered in Dar-es-Salaam, with the avowed purpose of overthrowing the white minority regimes in Angola, Mozambique, Rhodesia, South West Africa (Namibia), and South Africa.[72] In addition, beginning in 1964 the International Olympic Committee barred South African athletes from Olympic competition.[73] It was in this context that the South African Government built its war machine and steadily became more severe with the growing number of young white men who refused to perform military service.

Following the Sharpeville massacre in 1961, the Government raised the period of compulsory military service from three to nine months.[74] The number of annual inductees into the Citizen Force increased from a prior total of 7,000 men to 16,500 by 1964.[75] Defense spending in-

68. *Id.* at 200.

69. G.A. Res. 1761, 17 U.N. GAOR Supp. (No. 17) at 9, U.N. Doc. A/5217 (1963).

70. *Id.* at 10.

71. L. THOMPSON & A. PRIOR, *supra* note 11, at 14.

72. *Id.* at 14-15.

73. *Id.* at 14.

74. *See* REPUBLIC OF SOUTH AFRICA, HOUSE OF ASSEMBLY DEBATES (HANSARD), 18 May 1961, at cols. 7005-07 [hereinafter HANSARD].

75. J. BARBER, SOUTH AFRICA'S FOREIGN POLICY 1945-1970 195 (1973).

creased dramatically during the early 1960s as well. Whereas before 1960 the SADF accounted for under one percent of the South African gross national product (GNP) and under seven percent of the total Government budget, by the 1964-65 fiscal year it accounted for between two and three percent of the GNP and some twenty-one percent of the budget.[76] Between 1960 and 1965, the size of the SADF's Permanent Force increased sixty-five percent.[77] Combined Citizen Force conscripts and reservists increased almost six times.[78] Commando reserves, who were assigned mainly to defense in their home areas grew by eighteen percent.[79]

C. *The 1967 Amendments: Noncombatant Service for Conscientious Objectors*

When Pieter Willem Botha became Defence Minister in 1966, the strength of the military became an even greater priority. The Government introduced universal conscription for all white male citizens and various categories of noncitizens;[80] before 1967, those required to serve had been chosen by ballot.[81] Under a 1967 amendment to the Defence Act, all servicemen had to serve for nine months.[82] This amendment did not provide for conscientious objection, but the law provided relief for some objectors through one of two forms of administrative action—allotment[83] or exemption.[84] In either situation, objectors granted relief were required to perform some type of noncombatant military service by working as clerks, cooks, drivers, and medical orderlies. There was no provision for alternative national service of any kind.

1. Allotment

Section 67(3) of the Defence Act defined allotment as follows:

> The registering officer shall as far as may be practicable allot any person who to his knowledge *bona fide* belongs and adheres to a recognized religious denomination by the tenets whereof its members may not participate in war, to a unit where such person will be able to render service in the

76. TIME RUNNING OUT, *supra* note 33, at 234.
77. *Id.*
78. *Id.*
79. *Id.*
80. *See* Defence Amendment Act, No. 85, § 2(c) (1967).
81. *See* Defence Act, No. 44, §§ 62-72.
82. No. 85 (1967).
83. Defence Amendment Act, No. 85, at § 40 (amending Defence Act, No. 44, § 67).
84. *Id.* § 53 (amending Defence Act, No. 44, § 97).

defence of the Republic in a non-combatant capacity.[85]

This section worked to the disadvantage of the conscientious objector in various ways. Allotment was discretionary rather than mandatory and would be provided only "as far as may be practicable."[86] The conscientious objector had no right to insist upon noncombatant service. Instead, the registering officer decided who would be allotted to a noncombatant position, and he could grant this status to an individual "who *to his knowledge bona fide belongs and adheres* to a recognized religious denomination . . . ."[87] Thus, the registering officer must have known about the conscript's belief although such evidence could have been given to the officer. The officer alone then decided if the conscript was a bona fide believer and member of the particular denomination. Moreover, section 67(3) did not expressly allow the registering officer to consider conscientious objection when deciding where to allot an individual. Instead, it permitted him to allot a person to a noncombatant position if he knew that the person "*bona fide* belongs and adheres to a recognized religious denomination *by the tenets whereof its members may not participate in war* . . . ."[88] Hence, the inquiry was not into the individual's conscientious objection but into his membership in a pacifist religious group. In practice this meant that the objector had to be a member of one of the so-called peace churches such as the Society of Friends (Quakers), Seventh Day Adventists, Jehovah's Witnesses, Unitarians, Mennonites, Christadelphians, Plymouth Brethren, Suppliant Faithists, and the Fellowship of Reconciliation.[89] Adherents of these groups form an insignificant portion of Christians in South Africa. Under the law, therefore, the religious objections of members of major denominations such as Anglican, Methodist, Presbyterian, and Roman Catholic were ignored entirely.[90]

The law presented an additional problem relating to the meaning of the term "non-combatant capacity." Theoretically, under a strict con-

85. *Id.* § 40 (amending Defence Act, No. 44, § 67).

86. *Id.*

87. *Id.* (emphasis added).

88. *Id.* (emphasis added).

89. The list of denominations considered pacifist has been shortened in recent years. The Department of Defence currently recognizes only Jehovah's Witnesses, Seventh Day Adventists, Christadelphians, Plymouth Brethren, and Suppliant Faithists. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, A SURVEY OF RACE RELATIONS IN SOUTH AFRICA 208 (1980) [hereinafter SAIRR].

90. Statistics on church membership may be found in J. DE GRUCHY, THE CHURCH STRUGGLE IN SOUTH AFRICA 240 (1979). On the role of the churches in South Africa, see generally *id.*; M. HOPE & J. YOUNG, THE SOUTH AFRICAN CHURCHES IN A REVOLUTIONARY SITUATION (1981).

struction of the language of section 67(3), the objector should have been allotted to an internationally recognized noncombatant unit as specified in the Geneva Conventions on War.[91] A less strict construction, however, would indicate that the objector could have been posted to such a unit or to a combatant unit in a noncombatant capacity. If objectors wished to be allotted to a noncombatant unit within the meaning of the Geneva Convention, allotment to combatant units in a noncombatant capacity would not have afforded the objector the desired protection.

In August 1970, Defence Minister Botha clarified the meaning of "non-combatant capacity." He stated in Parliament that "[i]n the implementation of section 67(3) of the Act the following policy has been formulated, namely (a) conscientious objectors are allotted to non-combatant units, (b) they are trained without weapons."[92] Also in 1970, a Defence Force Order defined the term "non-combatant units." It provided that "[t]his section of the Act is applied in practice by posting such citizens to a unit of the South African Medical Corps. Medical units are, according to the provisions of the Geneva Convention, recognised as non-combatant units."[93] Even this minimal, highly discretionary practice of limited relief through allotment to internationally recognized noncombatant units had ceased by 1974. That year, Defence Minister Botha stated before Parliament that a conscientious noncombatant

> [n]eed not necessarily be placed in the Surgeon General's division and neither does he necessarily have to serve in an administrative capacity at Head Office. His unit commander can use him in that unit in a non-combatant capacity. There is nothing in the Act to prevent that. In fact that is the policy being adopted at present.[94]

Although an objector could petition the courts to order performance under section 67(3), the probability of meeting the burden of proof was negligible. While the objector conceivably could have established that he belonged and adhered to a recognized religious denomination qualifying under the Defence Act, proving that the registering officer had knowledge of this might have been extremely difficult. It was equally unlikely that he could have shown that allotment to noncombatant service was practicable. Finally, even if a person was allotted to a noncombatant position he was not certain to remain there. Under section 67(4), "[w]henever the registering officer has allotted any person under this sec-

91. *See infra* notes 390, 391.
92. HANSARD, *supra* note 74, 28 Aug. 1970, at col. 2851.
93. SADF Order No. 42/70 (1970).
94. HANSARD, *supra* note 74, 29 Aug. 1970, at col. 6847.

tion, he may re-allot the person or cancel the allottment, and upon such cancellation such person shall be deemed not to have been so allotted."[95] Again, the decision was purely discretionary; no reason for the change was required.

2. Exemption

The second means by which conscientious objectors could gain relief from performing combatant service was through section 97(3), which stipulated that "[a] person who *bona fide* belongs and adheres to a recognized religious denomination, by the tenets whereof its members may not participate in war, may be granted exemption from serving in any combatant capacity, but shall, if called upon to do so, serve in a non-combatant capacity."[96]

Like the allotment provision, exemption was discretionary and did not consider conscientious objection. In *S. v. Lovell*,[97] a Jehovah's Witness seeking exemption on the basis of conscientious objection was denied relief. Like section 67(3), the determining factor for exemption was bona fide adherence to "a recognised religious denomination, by the tenets whereof its members may not participate in war"[98] and not conscientious objection. Unlike section 67(3), however, section 97(3) entrusted full discretion to an exemption board rather than to the registering officer.[99]

The boards were constituted in the same manner as boards appointed under section 68, which provided that the Minister of Manpower in consultation with the Minister of Defence may appoint such boards which consist of a chairman, a deputy-chairman and any other members that the two Ministers determine. At least one board member is to be a SADF member.[100] Section 68 further provided that "[t]he decision of any such board in pursuance of any power or duty conferred or imposed

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95. Defence Amendment Act, No. 34, § 8 (1983) (amending Defence Act, No. 44, § 67 (1957)).

96. Defence Amendment Act, No. 85, § 53(b) (1967) (amending Defence Act, No. 44, § 97(3)), *repealed by* Defence Amendment Act, No. 34, § 12 (1983).

97. 1972(3) S. AFR. L. REP. 760 (App. Div.). For a more complete discussion of this case, see *infra* notes 113-17 and accompanying text.

98. 1972 (3) S. AFR. L. REP. at 764.

99. Such boards derived from section 98, which provided that "[w]henever the circumstances so require, the Minister [of Defence] shall appoint one or more exemption boards whose duty it shall be to consider and decide upon applications for exemption under section *ninety-seven*." Defence Act, No. 44, at § 98(1).

100. Defence Amendment Act, No. 103, § 25 (1982) (amending Defence Act, No. 44, at § 68(1)(a), (2)(a), (2)(b)).

upon it by or under this Act *shall be final.*"[101] Under section 97(3), the board was not required to consider an individual's adherence to a particular denomination. Any exemptions granted were only partial; noncombatant service was still required. The only significant difference between section 97(3) and section 67(3) concerned the certifier's knowledge: the exemption board was not required to have knowledge of the fact that the individual bona fide belonged and adhered to the specified religious denomination. Hence, neither section recognized nor offered relief for conscientious objectors.

3. Criminal Penalties Under the 1967 Amendments

If an individual was not granted noncombatant status under sections 67(3) or 97(3) as one who "*bona fide* belongs and adheres to a recognized religious denomination by the tenets whereof its members may not participate in war,"[102] he was without further legal recourse; all other forms of conscientious objection were illegal. The 1967 legislation provided that a refusal to perform military service when required to do so constituted an offense punishable by imprisonment of up to six months.[103] Thereafter individuals could be called upon again, and each subsequent refusal was punishable by a similar sentence. Refusal followed by imprisonment could recur until the individual reached the age at which he was no longer liable for military service. Those who refused to serve were tried in a civilian magistrate's court.[104] If found guilty, the

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101. *Id.* § 25 (amending Defence Act, No. 44, at § 68(4)) (emphasis added).

102. Defence Amendment Act, No. 34, § 8 (amending Defence Act, No. 44, § 67); Defence Amendment Act, No. 85, § 53(b) (amending Defence Act, No. 44, § 97(3)).

103. *See* Defence Amendment Act, No. 85 (1967).

104. *See* A. SMAIL, SOUTH AFRICAN LAW AND THE CONSCIENTIOUS OBJECTOR 31 (1980). The regional magistrates' courts are lower courts that hear serious criminal cases including rape and robbery. They may impose sentences of up to ten years imprisonment. The other type of lower courts are district courts. Their criminal jurisdiction extends to minor criminal matters only. Unlike the regional courts, they hear minor civil matters. The regional magistrates' courts and the district courts are known collectively as magistrates' courts. The magistrates who preside there are civil servants of the Department of Justice. Appeals from these lower courts lie to the Provincial and Local Divisions of the Supreme Court. The Supreme Court has seven Provincial Divisions and three Local Divisions. In addition to their appellate function, they have original jurisdiction in criminal matters punishable by more than ten years imprisonment or by death. The State President-in-Council (the Cabinet) appoints the judges in these courts whose jurisdiction includes all causes of action affecting all individuals within their respective provinces or local areas. Appeals from Provincial and Local Divisions lie to the Appellate Division of the Supreme Court, South Africa's highest court. The Appellate Division, which has no original jurisdiction, is composed of a Chief Justice and ten appeal

individual was sentenced to ninety days in military detention barracks.[105] Once in detention barracks the objector was subject to the Detention Barracks Regulations[106] and military discipline. The Regulations themselves were promulgated in December 1961 and provided for various punishments, including solitary confinement for failure to comply with regulations or lawful commands.[107]

While there had been some resistance under the ballot system, once universal conscription became law in 1967 the number of resisters rose, although it remained small.[108] Some objectors fled the country; others stood trial and were imprisoned. The majority of those tried and imprisoned were Jehovah's Witnesses. Because the Witnesses would not wear the military clothes assigned them and would not engage in military drills, they endured much punishment, including repeated stays in solitary confinement.[109] The Witnesses sought relief from the courts, but none was forthcoming. The Appellate Division of the Supreme Court, South Africa's highest court, refused to interfere. Thus, in *S. v. Schoeman,*[110] the appellant Jehovah's Witnesses had been tried separately, convicted of disobeying the lawful order of a superior, and given ninety days in the Voortrekkerhoogte Detention Barracks. They lost an appeal to a Provincial Division. In this later appeal, counsel for the appellants argued that the magistrates should have imprisoned rather than detained the appellants because it was contrary to appellants' beliefs to wear any military clothing; detention would thus cause them to commit further offenses.[111] It appeared from the magistrates' decisions, however, that they knew that the appellants preferred imprisonment rather than detention. The Appellate Division accordingly found that the magistrates had acted properly; because the punishment was not excessive given the circumstances (appellants were repeat offenders), the appeals were dismissed.[112]

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judges. For further discussion of the South African court structure, see H. HAHLO & E. KAHN, THE UNION OF SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION (1960); W. HOSTEN, A. EDWARDS, C. NATHAN, & F. BOSMAN, INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY (1983); and D. BASSON & H. VILJOEN, SOUTH AFRICAN CONSTITUTIONAL LAW (1988).

105. A. SMAIL, *supra* note 104, at 36.

106. Reg. No. 1190 (1961), *reprinted in* Gov't Gazette, Dec. 8, 1961 (No. 48), at 5.

107. *Id.* at ch. IV, *reprinted in* Gov't. Gazette at 20-21.

108. *See* 7 THE LAW OF SOUTH AFRICA 227 (W. Joubert ed. 1979).

109. *See* S. v. Schoeman, 1971(4) S. AFR. L. REP. 248 (App. Div.).

110. *Id.*

111. *Id.* at 249.

112. *Id.* at 248.

In 1973, a year after its decision in *S. v. Schoeman*, the Appellate Division decided *S. v. Lovell*,[113] in which it held that conscientious objection based on religious convictions was not a "just cause" for failing to attend the training. In *Lovell*, the exemption board rejected the appellant's application for exemption from military training, and he was charged and convicted of having failed to report for military training in contravention of section 126 of the Defence Act.[114] He appealed to the Local Division, but the case was dismissed. On appeal to the Appellate Division, the appellant's counsel argued that participation in any type of military activity or training contravened the appellant's religious belief. The court held that religious beliefs like those of the appellant did not constitute "good cause" within the meaning of section 126 of the Act.[115] The court further found that the obligation to perform military service was modified, as far as conscientious objections were concerned, only by the limited concession granted in section 67(3).[116] Since the qualified terms of that section included neither a refusal to perform military service of any type nor a refusal to submit to training as required by the Act, the court found that the appellant failed to establish just cause within the meaning of the Act and, therefore, had been properly convicted.[117] Both the *Schoeman* and *Lovell* decisions made manifest the harsh reality that objectors could expect little relief from the courts.

Meanwhile, in the face of the relatively quiet situation at home after 1964, the rate of increase in defense spending leveled off in the mid-1960s. Spending fell to a low of twelve percent of the budget in 1972,[118] but this trend did not continue. By 1974, a dramatic reversal and an unprecedented military buildup had begun.[119] The reemergence of civil unrest coupled with what the Government perceived as a deterioration of the situation in neighboring countries, were prime factors responsible for this change.

IV. THE 1970s

A. *The Expanding Internal Challenge*

By the early 1970s, the ANC and PAC had regrouped abroad and a new generation of dissatisfied black youth began to emerge within South

113. 1972(3) S. AFR. L. REP. 760 (App. Div.).
114. *Id.* at 761.
115. *Id.* at 766.
116. *Id.* at 765.
117. *Id.*
118. TIME RUNNING OUT, *supra* note 33, at 234.
119. *See infra* text accompanying notes 142, 143.

Africa. These young people especially disliked the Government's rigid educational policies. The Extension of University Education Act of 1959[120] had created segregated universities for blacks. Thereafter, black students saw the white-controlled National Union of South Africa Students (NUSAS) as the organization through which they could express their dissatisfaction. In 1968, however, Steve Biko founded the all-black South African Students' Organization (SASO), which repudiated the paternalism of white organizations like NUSAS.[121] SASO imported ideas from the civil rights struggle in the United States and the nationalist movements of tropical and North Africa, eschewing liberal paternalism and seeking instead to cast off black dependence on white groups and to psychologically liberate blacks from white oppression. Black Consciousness had arisen in South Africa.[122]

SASO soon grew from its origins as a university intellectual movement. In 1972 it played a major role in founding the overtly political Black Peoples Convention (BPC),[123] "an umbrella alliance incorporating SASO and several other black organizations."[124] Although it was initially receptive to SASO, the Government became hostile as the group grew more militant. In 1973 it banned Biko and other SASO leaders.[125] Following the collapse of the Portuguese Government in Mozambique in 1974,[126] SASO and the BPC organized rallies to celebrate the installation of the avowedly Marxist FRELIMO Government.[127] The South African Government responded by arresting nine black leaders and charging them with creating disorder[128] under the Terrorism Act.[129] All were found guilty and sentenced to terms ranging from five to ten years on Robben Island, South Africa's Alcatraz-style prison.[130]

With FRELIMO's accession to power in Mozambique, emotions ran high with many younger black South Africans, who anticipated that this

120. No. 45.

121. G. GERHART, *supra* note 30, at 260-62.

122. On the Black Consciousness movement, see generally *id.*; T. LODGE, BLACK POLITICS IN SOUTH AFRICA SINCE 1945 (1983); M. MURRAY, SOUTH AFRICA: TIME OF AGONY, TIME OF DESTINY: THE UPSURGE OF POPULAR PROTEST (1987).

123. G. GERHART, *supra* note 32, at 289.

124. L. THOMPSON & A. PRIOR, *supra* note 11, at 201-02.

125. *Id.* at 202.

126. On the Mozambican struggle, see *supra* note 5.

127. L. THOMPSON & A. PRIOR, *supra* note 11, at 202. FRELIMO is the Portuguese acronym for the Front for the Liberation of Mozambique.

128. *Id.*

129. No. 83 (1967).

130. L. THOMPSON & A. PRIOR, *supra* note 11, at 202.

marked the beginning of the end for apartheid. Meanwhile, the Angolan civil war raged on at its greatest intensity and South African troops were increasingly involved in fighting there, although most South Africans were unaware of that involvement at the time.[131] By the end of 1975, Angola had gained independence,[132] and guerrilla warfare had escalated in Rhodesia and Namibia. Then, in June 1976, South African police shot and killed a thirteen year old African schoolboy taking part in a demonstration against the imposition of Afrikaans as a medium of instruction in schools in Soweto, an African township outside Johannesburg.[133] The shooting inspired countrywide protests. From June 1976 to February 1977, hundreds of blacks were killed and thousands more were injured.[134] In 1977, extreme police brutality brought an end to the events.[135] The Security Police arrested and beat Steve Biko, who subsequently died from his injuries.[136] In October of that year, the Government arrested many black leaders and outlawed the BPC and its member organizations.[137]

In preparation for what it perceived as a total onslaught from Marxism without and civil unrest within, South Africa began pursuing an unprecedented military buildup. In 1972, the period of mandatory military service climbed from six to twelve months.[138] The initial year of service was to be followed by nineteen days of service each year for the ensuing five years.[139] At the same time, the punishment for unlawful conscientious objection was extended to a maximum of fifteen months under section 126A of the Act.[140] The Government, however, made a concession to the objectors (primarily Jehovah's Witnesses) by providing that a person sentenced to the Detention Barracks under that section for a period of one year or longer could not be sentenced again.[141]

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131. J. DE GRUCHY, *supra* note 90, at 138-39. In 1975, the SADF invaded Angola to assist the UNITA-FNLA forces engaged in the Angolan civil war. Between four and five thousand troops penetrated 250 miles into Angola. J. KEEGAN, WORLD ARMIES 637 (1979).

132. *See* 2 J. MARCUM, *supra* note 6, at ch. 6.

133. J. KANE-BERMAN, SOWETO 1 (1978).

134. *See generally id.*

135. L. THOMPSON & A. PRIOR, *supra* note 11, at 202.

136. Biko's writings have been collected in S. BIKO, I WRITE WHAT I LIKE (A. Stubbs ed. 1979). More about Biko's life may be found in D. WOODS, BIKO (1987).

137. L. THOMPSON & A. PRIOR, *supra* note 11, at 202-03.

138. Defence Amendment Act, No. 66, § 4(a) (1972) (amending Defence Act, No. 44, § 44 (1957)).

139. *Id.*

140. *Id.*

141. *Id.* § 10 (inserting § 126A into Defence Act, No. 44 (1957)).

Military spending increased tremendously between 1974 and 1977. By fiscal year 1977-78 such spending was almost five times its 1972 level and consumed nearly twenty percent of the budget and over five percent of the GNP.[142] Moreover, between 1974 and 1977, the target level for standing forces grew by eighteen percent, with 65,000 men on active duty.[143] At the end of 1975, the Government began calling up national servicemen who had finished their initial training for three-month tours of active duty.[144] In 1977, the Government lengthened the initial period of service to two years, followed by one thirty day camp each year for eight years.[145] The Government also retained three-month call-up years, which were originally used to satisfy the manpower requirements for the South African invasion of Angola.[146]

Responding to these developments, as well as the institutionalized, structural violence inherent in the apartheid system, the South African Council of Churches took action. At its annual conference in July 1974, the Council decided to do "something practical to change the status quo in South Africa."[147] Accordingly, the delegates passed a resolution challenging young men on the issue of conscientious objection, stating that it was "hypocritical to deplore the violence of terrorists or freedom fighters while we ourselves prepare to defend our society with its primary, institutionalised violence by means of yet more violence."[148] The resolution further noted that

> the injustice and oppression under which the black peoples of South Africa labour is far worse than that against which Afrikaners waged their First and Second Wars of Independence and that if we have justified the Afrikaners' resort to violence (or the violence of the imperialism of the English) or claimed that God was on their side, it is hypocritical to deny that the same applies to the black people in their struggle today . . . .[149]

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142. TIME RUNNING OUT, *supra* note 33, at 234. If adjusted for inflation, 1977-78 spending was less than three times its 1972 level.

143. *Id.*

144. *See* EUROPEAN CITIZENS IN THE SOUTH AFRICAN DEFENCE FORCE, FIGHTING FOR APARTHEID: A JOB OF LIFE 17 (1987).

145. Second Defence Amendment Act, No. 68, § 1 (1977) (amending Defence Act No. 44, § 22(3) (1957)).

146. *See id.*

147. EcuNews Bulletin, Aug. 5, 1974, at 1 (quoting Rev. Douglas Bax).

148. South African Council of Churches, 1974 Resolution [hereinafter SACC 1974 Resolution], *reprinted in* CATH. INST. INT'L REL. & PAX CHRISTI, WAR AND CONSCIENCE IN SOUTH AFRICA: THE CHURCHES AND CONSCIENTIOUS OBJECTION app. A, at 78 (1982).

149. *Id.* at 78-79.

The conference thus called "upon its member churches to challenge all their members to consider . . . whether Christ's call to take up the cross and follow him in identifying with the oppressed does not, in our situation, involve becoming conscientious objectors."[150]

B. *The 1974 Amendments*

1. Broadening the Penalty for Conscientious Objection

Whereas the issue of conscientious objection for adherents of pacifist sects like the Jehovah's Witnesses had involved the issue of a person's right to oppose all wars on grounds of conscience, the South African Council for Churches resolution involved a critique of South African society. The decision to refuse to serve arose not from some universal principle, but from an analysis of the meaning and consequence of serving in the SADF. The Government, however, refused to tolerate any such analysis, and it responded by introducing legislation aimed at silencing the churches.[151] In supporting the sterner legal measures, Defence Minister Botha argued that existing legislation was not adequate "to take action against persons or organizations guilty of this reprehensible conduct."[152] The new law provided that

> Any person who . . . uses any language or does any act or thing with intent to recommend to, encourage, aid, incite, instigate, suggest to or otherwise cause any other person or any category of persons or persons in general to refuse or fail to render any service to which such other person or a person of such category or persons in general is or are liable or may become liable in terms of this Act . . . .[153]

The law further stated that persons found liable "shall be guilty of an offence and liable on conviction to a fine not exceeding five thousand rand or to imprisonment not exceeding six years or to both such fine and such imprisonment."[154]

The implications of this amendment were clear: Both conscientious objection and any constructive discussion of it were illegal. The reasons for its promulgation were equally clear. As philosopher John Rawls has written, "[C]onscientious refusal based upon the principles of justice between peoples as they apply to particular conflicts . . . is an affront to

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150. *Id.* at 79.

151. Defence Further Amendment Act, No. 83, § 10 (1974) (inserting § 121(c) into Defence Act, No. 44) [hereinafter Act No. 44, § 121(c)].

152. J. DE GRUCHY, *supra* note 90, at 141-42.

153. Act No. 44, § 121(c).

154. *Id.*

the government's pretensions, and when it becomes widespread, the continuation of an unjust war may prove impossible."[155] Examination of statements by Government spokesmen in parliamentary debates reveals a recognition of this principle. These spokesmen distinguished objectors who belonged to recognized religious denominations by the tenets whereof their members may not participate in war (universal religious pacifists) from all other conscientious objectors. The Government viewed those in the latter group as not willing to perform any type of national service and, therefore, as a threat. This distinction manifested itself in the following statements by Defence Minister Botha at a Parliamentary debate in 1974. According to Botha, if a conscientious objector

> were to refuse to subject himself to the provisions of the Act, i.e. that he is to serve in a non-combatant capacity, then he is liable to punishment of 12 months detention, that is if he has objections on religious grounds or if he has conscientious objections and he is so classified as to be able to perform nursing service or medical orderly service or administrative service or some other service in the Defence Force which is non-combatant, and he was to refuse to render any service whatsoever to his country, even in a non-combatant capacity, then he is punishable and may be sentenced to 12 months.
>
> . . .
>
> It is recognised in the Defence Force that, if you do not want to serve in a combatant position in the Defence Force, you are allowed to serve in a non-combatant position. Only when you say: "I am not prepared to serve in a non-combatant position, I am not prepared to serve at all," then you are dealt with under another section of the Act.[156]

These statements demonstrated that the Government would acknowledge, albeit informally, that an individual was a conscientious objector only if he was a universal religious pacifist. The statutory definitions contained in sections 67(3) and 97(3) of the 1957 Defence Act were very narrow and covered only a small minority of objectors. The Government defined all other conscientious objectors as those who would not perform any service at all.[157] This group included all universal secular pacifists, selective religious pacifists, and selective secular pacifists—the vast majority of South African conscientious objectors. Yet, while the Government's classification of objectors seemed whimsical and erroneous, it was not based on ignorance at all. The Government insisted that individuals render military service because it viewed conscientious objection as inim-

155. J. RAWLS, A THEORY OF JUSTICE 382 (1971).
156. HANSARD, *supra* note 74, 26 Aug. 1974, at cols. 1476, 1484.
157. *See supra* note 12.

ical to South Africa's defense interests. When one considers this concern, it becomes readily apparent why Government spokesmen asserted that a refusal to render military service equaled a refusal to perform any kind of national service. Hence, the Government granted conscientious objector status only to those objectors whom it could accommodate in the SADF. By refusing to tolerate any conscientious objection that interfered with the efficient operation of its militaristic policies, the Government sought to quash such objection.

On its face, this appraisal appears ill-conceived because some objectors (universal or selective) who did not belong to peace churches would have rendered military service in a noncombatant capacity. Arguably, the Government might have employed such objectors to its advantage in furtherance of the war effort. Yet, the Government's refusal to employ such persons is understandable in view of its belief that conscientious objection might compromise the effectiveness of the SADF. The Government advanced two reasons in Parliament as to why it would not grant noncombatant status to those objectors. First, by confining noncombantant status to "*bona fide* members of recognized religious denominations by the tenets whereof their members may not participate in war" the Government ensured that recognition was only accorded to objectors whose opposition to participation in war was absolute and thus could not be interpreted as a particular objection to service in the SADF. The granting of such status to other noncombatants on an official level could be open to the latter interpretation.[158] Second, the Government feared that an extension of this provision to other noncombatants would lead to an increase in the number of applications for noncombatant status.[159]

In the Government's view, widespread invocation of consicientious objection raised a specter of political consequences that had to be avoided. The 1974 debate surrounding the adoption of section 121(c) was indicative. At that time, Defence Minister Botha quoted Michel de Bre, formerly Prime Minister and Defence Minister of France, who once said:

> Pacifism is a very old form of political protest. How can one not be sympathetic towards it. Let us, however, look at reality. First of all pacifism can become a means for obtaining certain goals besides peace. Many democratic leaders and agitators are not pacifists, but abuse words, ideas and emotive choices of pacifism to rise in the world and if the opportunity arises, to gain power.[160]

158. HANSARD, *supra* note 74, 29 Oct. 1974, at col. 6855.
159. *Id.*
160. *Id.*, 15 Aug. 1974, at col. 801.

In alluding to de Bre's statement, and specifically the meaning of the word "abuse," Botha clearly indicated that the South African Government viewed pacifism as contrary to its military interests:

> Here, I think, Mr. De Bre laid his finger on the root of the evil experienced by the Western World today, for these doctrines are not tolerated behind the Iron Curtain. Behind the Iron Curtain nobody will be allowed to undermine the defence force of China, Russia or Czechoslovakia, but in the Western World there are enough lackeys of the communistic doctrines who are engaged in this kind of undermining while wrapping themselves in a cloak of sanctimoniousness.[161]

Thus, in the eyes of the Government, any refusal to serve in the apartheid war machine amounted to a refusal to support the apartheid structure of South African society.

2. Impact on Objectors

The events of 1974 through 1977 contributed to a rise in the number of conscientious objectors. These objectors were divisible into two categories: (1) those who fled the country; and (2) those who remained. Of those in the latter group, some hid within the country, some performed noncombatant military service, and some (primarily Christian pacifists and members of peace churches) were imprisoned. In 1979, the Minister of Defence reported the statistics for the number of individuals who failed to perform service in the SADF in 1975 (3,314), 1976 (3,566), 1977 (3,814), and 1978 (3,123) respectively.[162] He also reported convictions of these individuals for the years 1975 (605), 1976 (916), and 1977 (532).[163] Of the 3,123 who refused to serve in 1978, 1,250 gave acceptable reasons for their failure, 284 were prosecuted, and 1,589 cases were being investigated when the data were revealed.[164] Hence, many individuals were not officially accounted for. This represented the maximum number of young people who fled the country or were in hiding within the country. Of those who did not go into exile or hiding, those charged with refusing to render military service represented the largest number. In 1973, 159 persons were convicted and imprisoned; all but one was a Jehovah's Witness.[165] During the first six months of 1974, 120 Jeho-

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161. *Id.*

162. *Id.*, 17 Feb. 1978, at cols. 181-82; 22 Feb. 1979 at cols. 157-58.

163. SAIRR, *supra* note 85, at 1977 (1978).

164. HANSARD, *supra* note 74, 17 Feb. 1978, at cols. 181-82. Unresolved cases of those refusing to serve in the earlier years have reported as follows: 1975 (2,719); 1976 (2,668); and 1977 (3,307). *Id.*

165. *Id.*, 13 Sept. 1974, at cols. 448-50.

vah's Witnesses and two Christadelphians were convicted.[166] After 1974, the Defence Minister's figures created some confusion, primarily because the South African definition of lawful objection restricted the term's meaning to only those belonging to recognized religious denominations whose members could not participate in war. In 1975, 605 individuals were convicted for refusing to render military service. This marked a great increase over the preceding years and was attributable to the South African invasion of Angola.[167] According to Botha, only 150 of those gave "conscientious objection" to service as a basis for refusal, and none "indicated that default was due to adherence to a religious denomination."[168] In 1976 and 1977, 916 and 532 individuals respectively were convicted for refusing to perform military service.[169] Of those, Botha stated that only 181 had "advanced conscientious objection to serve as a ground for such failure."[170] He also noted that in 1976 none "indicated that their (sic) default was due to adherence to a religious denomination," while in 1977 only one person did.[171] However, Botha also stated that in 1978, after half of the cases had been dealt with, 110 of 284 individuals prosecuted advanced conscientious objection as a reason for not rendering service.[172] Of those, fifty-five were Jehovah's Witnesses, while the other fifty-five had "other conscientious objections."[173] All together, there were over 2,300 convictions for failure to report for military service between 1975 and 1978.[174]

C. *The Rise of the Military in Political Decision-Making*

The election of Defence Minister Botha as Nationalist Party leader, and hence the Prime Minister, in October 1978 marked another turning point in Pretoria's militarization scheme. Under Botha, the role of the military in political decision-making expanded. While the Government had created a State Security Council as early as 1972, it had met only six times during the administration of Botha's predecessor, B.J. Vorster (1966-78). By 1980, this Council met once every two weeks under Bo-

166. *Id.*
167. *Id.*, 17 Feb. 1978, at cols. 181-82. *See supra* text accompanying note 108.
168. HANSARD, *supra* note 74, 17 Feb. 1978, at cols. 181-82.
169. *Id.*
170. *Id.*
171. *Id.* The NGK is the Nederduitse Gereformeerde Kerk, which attracts forty-two percent of the white population. M. HOPE & J. YOUNG, *supra* note 90, at 169.
172. HANSARD, *supra* note 74, 22 Feb. 1979, at cols. 157-58.
173. *Id.*
174. U.N. CENTRE AGAINST APARTHEID, *supra* note 1, at 1.

tha's chairmanship.[175] The Director General of the Defence Force was a permanent member of the Council, which controlled the balancing of national economic and political practices with military interests. Other permanent members of the Council included the head of the National Intelligence Service, the Minister of Police, and the Commissioner of Police. The State Security Council gave the military command direct access to the political system such that, if the armed struggles were to intensify, the armed forces would have constitutional means to intervene directly in political matters.[176]

The growing role of the military in politics became apparent when Botha appointed General Magnus Malan, the former chief of the Defence Force, as Minister of Defence in 1980. Botha initially retained the defence portfolio when he became Prime Minister in 1978. As Defence Force Chief, Malan was chairman of the coordinating committee of the army, the navy, the air force, and the state-owned and controlled armaments industry, ARMSCOR. Under his direction, the SADF prepared to conduct a multi-faceted counterinsurgency war corresponding to the range of perceived threats to South Africa—diplomatic, political, psychological, semantic, cultural, military, and intelligence. Malan also improved contacts between the military and private industry.[177]

Defense expenditures, which appeared to increase only slightly at the beginning of Botha's premiership, once again soared. While defense spending rose slightly from 1.7 billion rand in fiscal year 1977-78 to 1.9 billion rand in fiscal year 1979-80,[178] by 1981 expenditures again skyrocketed in the wake of black majority rule in Zimbabwe. Military expenditures for 1981 totalled 2.8 billion rand, a 7,000 percent increase since 1974;[179] the 1982-83 budget saw a further increase to 2.9 billion rand.[180] In addition, ARMSCOR's procurement of military equipment grew to an annual rate of almost one billion rand by 1978—a thirty-fold increase in a decade.[181] From 1975 through 1980, over four billion rand

175. L. THOMPSON & A. PRIOR, *supra* note 11, at 134-35. *See* R. LEONARD, SOUTH AFRICA WAR: WHITE POWER AND THE CRISIS IN SOUTHERN AFRICA 130, 200-01 (1983).

176. *Id.*

177. *Id.* at 3, 13, 15, 19, 20, 84-85, 92, 99, 129, 198-99, 202, 204, 220, 223.

178. TIME RUNNING OUT, *supra* note 33, at 235.

179. U.N. CENTRE AGAINST APARTHEID, *supra* note 1, at 1.

180. *Defence Budget Up Again*, 21 RESISTER 17 (Aug.-Sept. 1982). *Resister* is the journal of the Committee on South African War Resistance.

181. TIME RUNNING OUT, *supra* note 33, at 235. In 1977, the U.N. Security Council voted unanimously for a mandatory arms embargo against South Africa. *Id.* at 248.

were spent on weapons acquisition alone.[182] The Government gave top priority to "modernizing light and mobile ground forces with self-contained artillery and flexible air support" in order to achieve self-sufficiency in weaponry used in sustained, low-level operations.[183]

In terms of defense doctrine, the Government turned its attention to such tasks as riot control (largely a police function), close air support of mobile ground forces, counterinsurgency operations, coastal patrol and interdictions, and commando strike techniques. The estimated total manpower of the SADF grew from 78,000 in 1960 to 494,000 by 1979, while its standing operational force rose from 11,500 to 180,000 during the same period.[184] In a further effort to increase the number of whites in compulsory national service, the 1978 Citizenship Amendment Act[185] provided that foreign residents not older than twenty-five would automatically receive South African citizenship after two years and would thus become eligible for national service. Those who declined the proffered citizenship immediately lost their residence permits.[186] The Citizenship Amendment Bill reflected widespread white resentment because foreigners were avoiding military service—despite the fact that between 1970 and 1978 more than 100,000 white immigrants registered for national service.[187]

D. *The 1978 Amendments*

In the face of this growing militarization coupled with an increased resistance to military service, Pretoria once again decided to clamp down on war resisters. New legal provisions recognized only those objectors who belonged to peace churches and offered harsh penalties for all others.[188] With regard to lawful objectors who belonged to peace churches, the law drew a distinction between those who failed to perform the initial period of military service and those who failed to attend subsequent camps. Thus, the law provided that any person who at trial proved bona fide membership and adherence to a recognized religious

182. INTERNATIONAL DEFENCE AND AID FUND, THE APARTHEID WAR MACHINE 9 (1980) [hereinafter IDAF].

183. *Id.*

184. IDAF, *supra* note 182, at 41, table 7.

185. Citizenship Amendment Act, No. 53, § 1 (1978) (inserting § 11A into South African Citizenship Act, No. 44 (1949)).

186. *Id.*

187. Financial Times (London), July 5, 1978, at 4, col. 1.

188. Defence Amendment Act, No. 49, § 7 (1978) (amending Defence Act, No. 44, § 126).

denomination by the tenets whereof its members may not participate in war, would be liable upon conviction:

> (i) if he failed to report for service of twelve months or longer or, having reported for service, failed to render military service or to undergo military training, to be sentenced to detention for a period of thirty-six months; or
> (ii) if he failed to report for service of less than twelve months or, having reported for service, failed to render military service or to undergo military training, to be sentenced to detention for a period of eighteen months. . . .[189]

Whereas the 1972 version of this section provided for a maximum penalty of fifteen months (although in practice the last three months seem to have been routinely commuted), under the new version the person could serve a sentence of up to eighteen months or a sentence of up to three years depending upon the nature of the person's failure to participate.[190] The new law, however, retained the provision that once such objectors had served their sentences they could not be charged again.[191] All other objectors were "liable on conviction to a fine note exceeding two thousand rand or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."[192] This penalty applied regardless of whether they failed to report for a period of service either less than or in excess of twelve months. These objectors also could be charged repeatedly for failure to report for military service until they reached the age when they were no longer liable to perform military service, that is, until their sixty-sixth birthdays.[193] It appeared that the SADF, in its refusal to recognize these persons as objectors, sought to coerce them into performing military service through the use of harsher penalties. Incidences of repeated prosecution occurred.[194]

The military took over the application and enforcement of the 1978 amendment and stringently performed its task. While a civilian court theoretically retained jurisdiction to preside over a section 126A case, the courts expressed the opinion that offenses largely military in nature should be dealt with by the military. This view was adopted in *R. v.*

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189. *Id.*

190. *Compare* Defence Amendment Act, No. 66, § 10 (1972), *with* Defence Amendment Act, No. 49, § 7 (1978).

191. Defence Amendment Act, No. 49, at § 7 (inserting § 126A(2)(b) into Defence Act, No. 44).

192. *Id.*

193. *Id.*

194. *See, e.g.*, U.N. CENTRE AGAINST APARTHEID, *supra* note 1, at 3, ¶ 15.

Grobler,[195] where the court stated: "To me this is eminently a matter which could have been—I would even say should have been—dealt with by a commanding officer rather than placed before a magistrate."[196] Until 1978, military courts tried universal religious pacifists like Jehovah's Witnesses and members of traditionally pacifist religious denominations; civilian courts, not subject to the Military Discipline Code (MDC) except insofar as the nature of the offense was concerned, tried other conscientious objectors. Beginning in 1978, however, these other conscientious objectors were tried by military courts and all contraventions of section 126A were considered military offenses, although the civilian courts retained jurisdiction to impose the prescribed penalties.[197]

In 1978, the Government made clear its reasons for clamping down on war resisters. Reiterating the view that a person was a conscientious objector only if he was a bona fide member of a recognized religious denomination by the tenets whereof he may not participate in war, Botha stated in Parliament:

> South Africa's solution is that if a person really has conscientious objections to the rendering of service and if he comes forward and states that he does not want to serve in a fighting capacity, we offer him the alternatives embodied in existing legislation. Such a person may serve the country in various capacities within a Defence Force context. However, if it is not a recognised denomination whose tenets of faith decree that one may not under any circumstances participate in the defence of the country, and people state that they object to rendering any service whatsoever, whether in a hospital, an office or whatever kind of service it may be, then it becomes a different matter. The other person is expected to render his two years of national service and over and above this, he still has to be available for a further eight years for periodic service in the Citizen Force or in the commandos. In contrast to this we are dealing here with a person who simply states that he does not wish to render any service at all.[198]

In line with the views expressed by Botha, Deputy Minister of Defence N.J. Coetsee further detailed the National Party's position on the issue:

> anyone who has religious objections has, in terms of the Defence Act, adequate opportunity to raise any such objection. If the objection which is raised proves to be valid, it will be recognised. What we cannot tolerate or

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195. 1961(1) S. AFR. L. REP. 63 (Cape Provincial Div.).

196. *Id.* at 64 (Rosenow, J.).

197. Defence Amendment Act, No. 49, at §7 (inserting § 126A(2)(b) of the Defence Act, No. 44).

198. HANSARD, *supra* note 74, 28 Mar. 1978, at col. 318.

> allow, however, is for a person who has a religious objection to use that objection as a pretext to evade national service and on that basis fail to report when he is called up to do national service.
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> . . .
>
> I am saying this particularly because an objection of this kind—as was proved in the war in Vietnam—can be used as an excuse for completely undermining national service and frustrating the defence of the country in the long run as a consequence.[199]

As in 1974, the Government expressed the rationale behind its strict treatment of conscientious objectors and its insistence that individuals render national service in a military context: It viewed conscientious objection as a threat to the country's defense capabilities. Consequently, any resistance was an intolerable manifestation of unwillingness to support the apartheid system—which the Defence Force was determined to maintain.

V. THE 1980s

The 1980s have witnessed even further paranoia in South Africa as Pretoria has seen its position increasingly threatened. The last of the white-ruled states comprising what was once South Africa's buffer zone disappeared in 1980 when Zimbabwe (formerly Rhodesia) achieved black majority rule.[200] Meanwhile, the domestic situation has continued to worsen. By the late 1970s, the ANC had become both more active and more skillful, and this continued into the 1980s. In a number of sporadic actions, ANC guerrillas have attacked police stations and blown up rail lines, and black policemen,[201] state witnesses, and informers have been killed.[202] "In contrast to the limited tactic of sabotage in the 1960s, ANC guerrillas are prepared to kill armed antagonists . . . ."[203] Notwithstanding its often aggressive activities, the ANC continues to oppose the indiscriminate violence associated with terrorism, and it has specifically rejected terrorist killing.[204] In fact, the ANC was the first liberation movement to sign the protocols of the Geneva Convention on the Hu-

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199. *Id.*

200. *See supra* note 7 and accompanying text.

201. *See* TIME RUNNING OUT, *supra* note 33, at 237. The SAP (South African Police) is responsible for internal security. Blacks comprise almost fifty percent of its active duty authorized strength of 35,000 men. *Id.* at 238.

202. *Armed Struggle in Perspective*, 52 RESISTER 8 (Oct.-Nov. 1987).

203. *Id.* at 188.

204. *Id.*

manitarian Conduct of War,[205] which extended the Convention to wars of national liberation.[206] Whereas Rivonia[207] was followed by a lull in black activism, the post-Soweto[208] years have seen not only the resurgence of the ANC but also growing radicalism evident in renewed political activity, waves of strikes, and pandemic boycotts. However, in the 1980s, perhaps the most dramatic trend in black politics has been the resurgence of the ANC.

A. *The 1982 White Paper*

Pretoria's response to the situation appeared in a 1982 Defence Force White Paper (1982 White Paper)[209] which described the policy framework guiding the Defence Force. The first part, entitled "The Threat," alleged that because southern Africa has great mineral wealth, "the USSR strives to extend its influence to this area by assisting terrorist organizations such as SWAPO and the SA ANC, by creating unrest and exploiting this situation, and by making use of surrogate forces such as the Cubans."[210] Hence, the Soviet Union was seen as perpetrating an "onslaught" against South Africa.[211] The 1982 White Paper further argued that the Soviets were using "all possible methods" to "overthrow the present body politic," including "instigating social and labour unrest, civilian resistance, terrorist attacks against the infra-structure of [South Africa] and the intimidation of Black leaders and members of the Security Forces."[212] It further portrayed the Soviet Union as the mastermind of the anti-apartheid movement and branded some South African churches, church leaders, and organizations supported by the World Council of Churches as perpetrators of subversive activity. Although it did not mention these individuals and organizations by name, the 1982

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205. Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* December 12, 1977, U.N. Doc. A/32/144, Annex I, *reprinted in* 16 I.L.M. 1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, *opened for signature* December 12, 1977, U.N. Doc. A/32/144, Annex II, *reprinted in* 16 I.L.M. 1442 (1977).

206. TIME RUNNING OUT, *supra* note 33, at 188.

207. *See supra* text accompanying note 62.

208. *See supra* notes 133-37 and accompanying text.

209. DEP'T OF DEFENCE, REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE AND ARMAMENTS SUPPLY (1982) [hereinafter 1982 WHITE PAPER].

210. *Id.* at 1, § 2.

211. *Id.* at 2, § 5.

212. *Id.* at 2, § 7.

White Paper reported that they "take part in undermining the SA Defence Force by, for instance, supporting those who *evade national service.*"[213] This statement confirmed the view that the Government believes that conscientious objection is an unacceptable display of unwillingness to support the apartheid system.

Section 14 of the 1982 White Paper stated that South Africa "does not aspire to aggression against any state or group of states and has no intention of extending its territory . . ." and that the SADF "is essentially a peace task force."[214] Yet, section 14 also claimed that South Africa "must be protected and safeguarded with all the force at the disposal of the Security Forces against any form of internal or external revolutionary action . . ."—if necessary by means of "offensive pro-active action."[215] This phrase apparently referred to the destabilizing military operations that South Africa often carries out against neighboring governments,[216] as well as the preemptive strikes it makes against liberation movements.[217]

The 1982 White Paper also noted that the SADF had become "increasingly involved in assisting other security forces and civilian organizations"[218] in an effort to support the civilian infrastructure of the country. This ostensibly referred to joint counterinsurgency operations performed with the South African Police Force,[219] which regularly engages in riot control and political intelligence work and whose "paramilitary units have been widely used in Namibia and Rhodesia as well as on the Republic's northern borders."[220] Future SADF aid was to come in connection with the protection of "national key points."[221] Subsequent sections described SADF military operations and reflected both the escalation of its conflicts and the view that South Africa is a country at war.[222] The 1982 White Paper also revealed that the Government

213. *Id.* at 2, § 9 (emphasis added).

214. *Id.* at 3, § 14.

215. *Id.*

216. *See generally* Jenkins, *Destabilisation in Southern Africa*, ECONOMIST, July 16, 1983, at 19.

217. The 1982 WHITE PAPER reports that "[b]y means of deliberate pre-emptive strikes, such as Sceptic (June 1980), Protea (August 1981), and Daisy (October 1981) success has been achieved in destabilizing SWAPO in Southern Angola." 1982 WHITE PAPER, *supra* note 209, at 6, § 26.

218. *Id.* at 3, § 14.

219. *See id.* at 6, § 30.

220. TIME RUNNING OUT, *supra* note 33, at 238.

221. 1982 WHITE PAPER, *supra* note 209, at 5, § 20.

222. *See id.* at 4-28, §§ 15-175.

planned to augment the SADF's size in 1982 by extending the length of military service and obligations for white men up to the age of sixty.[223] This position was advanced in the preceding year by Defence Minister Malan, who argued that "the Permanent Force and the present number of National Servicemen" could no longer cope with "the revolutionary effort" and that every white had to be involved in the military.[224]

B. *The 1982 Amendments*

The Government acted on this idea and, by an amendment to the Defence Act which took effect in January 1983, extended the existing annual service periods (one to three months) that white males had to perform after they completed their obligatory two years of service.[225] Under the amendment, such periods continue for twelve years, after which conscripts may be called upon for five years as the security situation requires.[226] Thereafter, conscripts are transferred to the commando forces, where they will serve twelve days a year until they reach age fifty-five.[227] Thus, white South African males are liable for a total of thirty-seven years of intermittent service in the SADF.

The twelve day call-ups for older men have become known as "Operation Buttermilk" and the units in which they serve are referred to as "the dads' army."[228] The men are given automatic weapons and machine guns, drilled, trained in roadblock and patrol procedures, and instructed in counterinsurgency techniques. Defence Minister Malan estimated that Operation Buttermilk would increase the strength of the SADF by 800,000 men and by 1990 would provide the Government with a total military force exceeding one million men.[229]

During 1983 and 1984, the SADF activated magisterial districts in northern Natal, northern Transvaal, and areas bordering Mozambique, Swaziland, and Zimbabwe, where the Government was concerned about escalating guerrilla operations. Because these areas are politically conservative and sparsely populated, the 18,000 men who were involved did

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223. *Id.* at 14-15, § 85.

224. Rand Daily Mail, Aug. 15, 1981.

225. Defence Amendment Act, No. 103, §§ 5, 11 (1982) (amending Defence Act, No. 44, §§ 22, 44).

226. *Id.*

227. *Id.* §§ 10, 11(c) (amending Defence Act, No. 44, §§ 35, 44(3)(a)).

228. *Operation Buttermilk*, 51 RESISTER 5 (Aug.-Sept. 1987). RESISTER is the journal of the Committee on South African War Resistance.

229. *S.A. Army Doubles Call-Up*, 19 RESISTER 12, 14 (Apr.-May 1982).

not protest.[230] In 1985, mobilization occurred in the northern portions of the country and some of the areas near the Lesotho border.[231] The Government then became preoccupied with the eastern Cape, where sustained anti-apartheid uprisings occurred. Although they employed brutal methods, local police and army units were unable to stop the violence and lost control of some black townships completely. So great was the unrest that the Government proclaimed a state of emergency in thirty-six of South Africa's 306 magisterial districts.[232]

This show of force did not stop the protests, however, and the the Government strengthened local army units by requiring military registration for all white males in the magisterial districts of the eastern Cape. In June 1986, escalating violence prompted the Government to proclaim a nationwide state of emergency under which South Africa continues to be governed.[233] During that year the first urban members of the dads' army were required to register in East London, although the intake was selective and sixty percent of the trainees were from the surrounding areas rather than the city itself.[234] Later in 1986, the Government introduced registration for the dads' army in some parts of Cape Town and Johannesburg.[235] This led to a number of public protests from liberal politicians and academics, many of whom declared that they would not serve if they were called.[236]

In the wake of the unrest in South Africa during the 1980s, incidences of conscientious objection have continued to rise. In April 1980, 420 con-

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230. *Operation Buttermilk, supra* note 228, at 5.

231. *Id.*

232. *Human Rights Index, State of Emergency*, 1 S. AFR. J. HUM. RTS. 195 (1985).

233. *Human Rights Index*, 2 S. AFR. J. HUM. RTS. 377, 377 (1986). *See generally* SOUTHERN AFRICA PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, A SPECIAL REPORT: SOUTHERN AFRICA, Special Report No. 5 (Aug. 1986); Basson, *supra* note 35.

234. Daily Dispatch, Nov. 22, 1986.

235. *Dads 'Should Work for Peace,'* Cape Times, Mar. 16, 1987.

236. *Candidates Vote 'No' to Dads' Army*, Argus, Nov. 7, 1984; *Army Hunts Lecturers—Gets Rhodes Snub*, Weekend Argus, Nov. 31, 1984; *Brink: 'I Will Refuse to Serve'*, Cape Times, May 25, 1985; *Official Silence on Brink's SADF Stand*, Daily Dispatch, Aug. 23, 1985; *No to Dads' Army Could Lead to Jail*, Cape Times, Nov. 8, 1986; *Boraine Refuses Army Service*, Daily Dispatch, Nov. 8, 1986; *Legal Doubt Over 'Dads' Army,'* Cape Times, Nov. 12, 1986; *Dads' Army Call-Ups Not Binding?*, Daily Dispatch, Nov. 13, 1986; *Dads' Army: 20 UCT Staff to Resist*, Argus, Nov. 13, 1986; *Academics Say "No" to SADF*, Star, Nov. 22, 1986; *PFP's McIntosh Ignores Call-Up*, Natal Witness, Sept. 15, 1987; *McIntosh to Go to the Army*, Eastern Province Herald, Sept. 18, 1987. The maximum penalty for failure to serve in the Dads' Army is a 2000 rand fine, two years in jail or both. *Dads' Should Work for Peace*, Cape Times, Mar. 16, 1987.

scripts were in military prisons.[237] Over ninety percent of these, or 383 conscripts, were imprisoned for refusing to perform military service.[238] According to a defector from the South African National Intelligence Service, the Directorate of Military Intelligence predicted that 5,200 conscripts would avoid miltary service in 1980 alone.[239] This figure represented an increase of more than sixty percent over the last available figures from 1978.[240] In April 1983, approximately 400 objectors were serving jail or military detention terms.[241] That February, sixty-six Jehovah's Witnesses received three year sentences in the detention barracks—the largest number yet charged in a single month.[242] The heightened number of resisters in recent years has required that tents be built next to the detention barracks to accommodate them.[243]

C. *The 1983 Amendments*

As before, the South African Government saw conscientious objection as anathema to the maintenance of its apartheid policies. In an effort to further discourage such objection, it appointed the Naude Committee, an SADF commission, to investigate possible amendments to the law on conscientious objection. In January 1983, the Naude Committee proposed new and more stringent legislation known as the Defence Amendment Act of 1983.[244] Through this legislation the Government intended to garner church support by making concessions to religious pacifist objectors and by cracking down on non-religious objectors; it also wished to divide the growing movement of resistance to military service.[245]

Numerous groups opposed the legislation when it was introduced. The English language press decried the severity of penalties contained in the bill. The liberal Progressive Federal Party, the official opposition party at the time, argued that the bill was harshly punitive, discriminatory, and frought with injustice; it also compared the alternative service plan in the bill to slave labor.[246] Condemnation also came from liberal and

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237. U.N. CENTRE AGAINST APARTHEID, *supra* note 1, at 4.
238. *Id.*
239. *Id.*
240. *Id. See supra* note 156 and accompanying text.
241. *News Briefs*, 25 RESISTER 4 (Apr.-May 1983).
242. *Id.*
243. *Id.*
244. Defence Amendment Act, No. 34 (1983).
245. *Clampdown on War Resisters Imminent*, 25 RESISTER 2, 2-3 (Apr.-May 1983) [hereinafter *Clampdown on War Resisters*]. *See infra* notes 254-70 and accompanying text.
246. The Star (Johannesburg), March 26, 1983. By 1988, the PFP was in disarray.

student organizations, groups of academics and conscientious objectors, and conscientious objector support groups. For example, the Western Cape Conscientious Objector Support Group labelled the Act an attempt "to divide religious from non-religious objectors and create division amongst religious objectors."[247] With the exception of the white Dutch Reformed churches, most major denominations also condemned the legislation. Church leaders maintained that they could not accept brutal repression of political and moral objectors in exchange for small concessions to religious pacifists.[248] In addition, they criticized both the long length of alternative national service required by the new legislation and the conditions under which it would have to be carried out.[249] Dr. Allan Boesak, President of the World Alliance of Reformed Churches, argued that the Government sought to persecute non-religious objectors.[250]

Despite this opposition, Parliament enacted the legislation, the Defence Amendment Act, No. 34 (1983 Defence Amendment),[251] in April 1983. The parliamentary debates preceding its adoption contained comments like " 'I think one should stick conscientious objectors up against the wall like in the good old days'," [252] and parties on the extreme right called for the establishment of " 'separate armies for each separate population group'."[253] The legislation strengthened earlier laws whereby the Government refused to recognize the right to political objection and to subject those who were members of pacifist religious sects to harsh, discriminatory punishment.

The 1983 Defence Amendment provided for the appointment of a military board with church representation, the Board of Religious Objectors (the Board), to investigate the objectors' religious convictions.[254] Com-

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The right-wing Conservative Party replaced the PFP as the official opposition party in elections in early 1987. *See generally* Berat, *supra* note 35.

247. Western Cape Conscientious Objector Support Group, OBJECTOR No. 4 at 1 (Nov. 1983) [hereinafter Western Cape Support Group].

248. *Clampdown on War Resisters, supra* note 245, at 2. *See infra* notes 254-70 and accompanying text.

249. *Clampdown on War Resisters, supra* note 245, at 2.

250. *Clergy Come Out Strongly For Objectors*, The Star (Johannesburg), Mar. 11, 1983, at 2M, col. 1. Boesak is one of the leading proponents of liberation theology in South Africa. *See, e.g.*, A. BOESAK, FAREWELL TO INNOCENCE (1977).

251. No. 34 (1983).

252. *Clampdown on War Resisters, supra* note 245, at 3.

253. *Id.*

254. Defence Act, No. 44, at § 72A(1)(a), *inserted by* Defence Amendment Act, No. 34, § 9 (1983). Many churches opposed the Board because of the military and conservative church biases in its composition. *See, e.g., Law, The War, and The Need to Put an End in Limbo*, Sunday Express, Feb. 26, 1984.

prised of three theologians appointed by the Minister of Manpower, a judge or retired judge, and two SADF officers,[255] the Board hears applications from religious pacifist objectors for conscientious objector status. Conscripts who have religious objections based on the scriptures are required to make written applications to the board asking to be placed in one of three categories for recognized religious objectors.[256] The three categories apply to individuals whose religious convictions do not permit them (a) to render service in a combatant capacity in any armed force; (b) to perform maintenance tasks of a combatant nature in any armed force or to be clothed in a military uniform; and (c) to render any military service, undergo any military training, or perform any task in or in connection with any armed force.[257]

The law further requires conscientious objectors who fall into each of the three categories to perform service. Those mentioned in category (a) must render service in a noncombatant capacity in the South African Defence Force over the normal periods prescribed by law (currently two years); those in category (b) must perform prescribed maintenance tasks of a noncombatant nature in the SADF for periods that are each one and a half times as long as normal periods of service (currently six years); and those in category (c) must render community service in Government departments, provincial administrations, municipalities, and other areas designated by the Minister of Manpower.[258] Such service under category (c) is completed in a single, continuous period that is one and a half times as long as the aggregate normal period of service in the citizen force (currently six years).[259] The law prohibits an applicant granted alternative non-military service from engaging in any political activity (other than voting) and from publishing any book, pamphlet, letter, circular, list, or poster authored prior to his service.[260] Finally, the law permits the State President to impose further restrictions on the individual's activity.[261]

Objectors who refuse to accept a legal allocation to category (c) are imprisoned for six years in detention barracks.[262] Those with political

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255. Defence Act, No. 44, at § 72A(2), *inserted by* Defence Amendment Act, No. 34 at § 9.

256. *Id.* § 72B(2).

257. *Id.* § 72D(1)(a).

258. *Id.* § 72E.

259. *Id.*

260. *Id.* § 72H(1).

261. *Id.* § 72G. Under a new constitution approved by white voters in 1983, the Prime Minister became the State President. *See infra* note 300 and accompanying text.

262. *See* Defence Act, No. 44, at § 72I(2), *inserted by* Defence Amendment Act,

objections and those who, in the Board's opinion, have primarily political rather than religious objections are sentenced to six years in a civilian prison with no possibility of remission.[263] In comparison, a sentence of six years is normally given to those convicted of rape and other serious crimes such as manslaughter.[264] Thus, the extraordinary severity of the penalties represents a definite attempt to discourage objection and to make examples of those who have the courage to stand up for the principles in which they believe. This interpretation is borne out by the fact that when the new legislation was enacted, the Government announced that charges against all current objectors had been dropped so that such objectors could be charged under the new legislation if they again objected to serving.[265]

Even the manner in which the Board decides its cases is geared to instill a fear of objecting to military service. Like the earlier legislation under which the commanding officer decided if one was a bona fide objector,[266] whimsicality and complete arbitrariness are the order of the day. However, the clandestine nature of the proceedings and the total disregard for the rights of the accused that they embody make them even less equitable than those provided for in earlier legislation—and render them disturbingly reminiscent of the proceedings of the Star Chamber during the reign of Henry VIII in England. The Board meets in secret and no proceedings are published; it has the power to reverse its decisions at any time without giving reasons.[267] Those appearing before the Board have neither the right of legal representation[268] nor the right of appeal.[269] The Board also has the power to dismiss an application and impose eight years of imprisonment if it decides that the applicant is "furthering the ends of an enemy of the Republic."[270] Thus, the legislation makes it substantially more difficult for individuals to take a stand against their conscription, as well as increasing the chances of driving more and more conscientious objectors into exile.[271]

Nevertheless, a growing number of young men have sought to invoke

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No. 34, at § 9.

263. *Clampdown on War Resisters, supra* note 245, at 2.

264. *Id.*

265. *Id.*

266. Western Cape Support Group, *supra* note 247, at 1.

267. *See supra* notes 254-57 and accompanying text.

268. Defence Act, No. 44, § 72C(4), *inserted by* Defence Amendment Act, No. 34, § 9.

269. *Id.* § 72D.

270. *Id.*

271. *Clampdown on War Resisters, supra* note 245, at 3.

the provisions of the 1983 Defence Amendment in their favor. By the end of 1985, 758 applicants had appeared before the Board.[272] This figure represented a thirty-five percent increase from the previous year,[273] although this rise was undoubtedly occasioned by the declaration of a limited state of emergency earlier that year. Of the 758 who applied, only eleven were refused objector status.[274] This figure, however, represented less than 0.2% of those called up during that period.[275]

Even this minimal percentage alarmed the Government. In addition to the ideological and political aversion to objector status, the growth in the number of successful applicants increased the costs of conscientious objection to the state. Government spending on conscientious objection during 1986 was 3.1 million rand compared with 206,000 rand for the previous year.[276] Of the former amount, the Department of Manpower budgeted 2.9 million rand for the "determination of service conditions, employment, payment of salaries and allowances, prosecutions, etc. of religious objectors."[277] The Government was by no means enthusiastic about this development and, in an effort to discourage applications for conscientious objector status, it has made the lives of those assigned to perform alternative service unduly onerous.

Some objectors have waited over a year to be placed and have argued that such delays have increased their periods of service.[278] In 1986, the then-official opposition Progressive Federal Party charged that the delays were "deliberate."[279] The Director-General of Manpower responded by suggesting that the delays occurred because "this was a new scheme for which the department had no precedent. Problems had to be ironed out . . . ."[280] He went on to claim that the Department kept no records of the delays in placing objectors.[281] In explaining the Government's behavior, the Minister of Manpower asserted that it often had trouble finding positions for objectors because many people would not accept service from

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272. *Religious Objections to SADF up 35 pc*, Natal Mercury, Dec. 18, 1985.

273. *Id.*

274. *747 Exempted from Call-Up in 2 Years Report*, The Star (Johannesburg), May 6, 1986.

275. Kantor, *CO's Inadequately Catered for in SA*, Cape Times, Dec. 6, 1987.

276. *Spending on Concientious Objection*, Cape Times, Mar. 18, 1986.

277. *Id.*

278. *They Also Serve, Those Who Only Stand and Wait*, Sunday Tribune, Feb. 12, 1986.

279. *Id.*

280. *Id.*

281. *Id.*

"people who refuse to do their duty for their country on the border."[282] As an example, the Minister cited people who would not permit their children to be taught by objectors.[283]

In practice, community service often turns out to be service in the state bureaucracy. Married objectors or those wishing to marry and start a family find the conditions of alternative service especially discriminatory. They receive only a private's salary, 177.32 rand per month, sometimes receiving this low pay for the duration of their six years of service.[284] Unlike enlisted men, their income is taxable and they are not eligible for the free medical treatment provided by the army.[285] As one objector noted, " 'The board is at pains to say that it has provided a real alternative for religious pacifists. Yet the main thrust of the 1983 Defence Amendment Act was not to provide alternatives. It was to crush conscientious objection . . . .' "[286]

As harsh as it is in practice, this alternative service has done nothing for those who are not universal religious pacifists. Although in 1986 the Orange Free State Provincial Division had an opportunity to broaden the definition of "religious convictions" under the Defence Act of 1957 to include selective religious pacifists in *Hartman v. Chairman, Board for Religious Objection*,[287] the court declined to move in that direction. To the Government's chagrin, however, it held that the meaning of the term encompassed convictions based upon a recognized, albeit non-theistic, religion such as Theravada Buddhism.[288]

The applicant in *Hartman* was the first South African Buddhist to apply for conscientious objector status, and he appealed a Board for Religious Objectors' decision that he was not entitled to classification as an objector under the 1983 Defence Act.[289] The Board had refused to consider the applicant's case on the grounds that Buddhism does not recognize a supreme being; therefore, it did not qualify as "religious convictions" within the meaning of the statute.[290] The Board ruled that "religious convictions" meant theistic beliefs, and any set of beliefs that

282. *People Don't Want to Employ Objectors*, Argus, Aug. 8, 1987. He added, "I have sympathy with their sentiments." *Id.*

283. *Id.*; *Objections: House of Assembly*, Cape Times, Aug. 8, 1987.

284. *Tied to the State*, South, May 7, 1987.

285. *Id.*

286. *Id.*

287. 1987(1) S. AFR. L. REP. 922 (Orange Free State Provincial Div.).

288. *Id.* at 934.

289. *Id.* at 923; *see also* Harper, *Religion Under Court Scrutiny*, Weekly Mail, Mar. 27, 1986.

290. 1987(1) S. AFR. L. REP. at 925.

lacked a Supreme Being could not be considered a religion.[291] Accordingly, Buddhism was not a "religion" for purposes of the Defence Act.[292]

On appeal, the court accepted expert testimony that Theravada Buddhism is indeed a religion and rejected the Board's narrow definition of "religious convictions." In the court's view:

> The Legislature was obviously aware of the diversity of faiths, religions and creeds in this country when enacting [the Defence Act 44 of 1957] § 72A [relating to relgious objectors] and, since the preamble to the Republic of South Africa Constitution Act 110 of 1983 states as one of the goals of the Act 'the recognition and protection of freedom of faith and worship,' it is unlikely that the Legislature intended to ignore the sensibilities of persons who have espoused the tenets of the Buddhist faith, be it the Theravada tradition or the Mahajana branch, both of which are recognised world religions.
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> . . .
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> It must be assumed that the Legislature was aware that Buddhism is regarded as one of the great religions of the world, even though the Theravadin tradition is non-theistic. The Legislature is presumed to have intended that all persons who are affected by a law passed by it are to receive equal treatment. . . . [It is therefore] unlikely that the Legislature intended to treat persons of one recognised religion differently from adherents of another recognised religion.[293]

The court went on to state that it was never "intended to extend the exempting provisions of § 72 to individual beliefs which are not founded on recognised religions such as Buddhism and Christianity and to equate such beliefs with such religions."[294] Thus, the court held that the applicant was entitled to a proper hearing before the Board. Because the Board had already found that the applicant's pacifist beliefs were sincere, the court classified him as a religious objector.[295]

While *Hartman* was pending, the Government introduced an amendment to the 1983 Defence Amendment Act which sought to restrict the term "religious convictions" solely to "convictions based on faith in a supreme being or beings of a divine nature only."[296] A memorandum attached to the bill explained its underlying rationale: "religious convictions" was defined too broadly and could include adherents of non-theis-

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291. *Id.* at 925-26.
292. *Id.* at 926.
293. *Id.* at 931-32.
294. *Id.* at 927.
295. *Id.* at 934(G)-935(D).
296. *Move to Close Loopholes in Objection Laws*, Daily Dispatch, Aug. 28, 1986.

tic faiths.[297] Significant public outcry followed the bill's publication, and it was subsequently withdrawn; however, the Government offered no encouragement to a record number of young white males who, in following the dictates of their consciences, already had failed to report for duty.

Before 1984, some 1500 men did not appear after each of the two yearly call-ups.[298] That figure increased by 500 percent after white troops were deployed in the black townships during the 1985 limited state of emergency.[299] So great was the increase in no-shows after the declaration of the first nationwide state of emergency in 1986 that the Government stopped publishing such figures. The Government also clamped down on the End Conscription Campaign (ECC), a nationwide campaign of white South Africans designed to educate their countrymen about the military with the ultimate aim of ending conscription entirely.[300]

The ECC was formed in 1983 by members of various conscientious objector support groups. Because conscription was an issue affecting all whites, the ECC readily became a key force against apartheid among members of the white community. In an effort to induce as many organizations as possible to join, the ECC established committees in Cape Town, Johannesburg, and Durban. They were successful in attracting a broad range of white groups such as NUSAS, the Quakers, the social action groups of the Anglican and Methodist churches, the Civil Rights League, and eventually the Young Progressives.[301]

Soon after its initial organizing period, the ECC issued a "Declaration to End Conscription." It then initiated a return to a series of media campaigns aimed at raising the public consciousness regarding the role of the military, including its destabilizing operations in neighboring countries.[302] In early 1985, the ECC formulated a constitution and adopted plans for a national campaign. When troops were deployed in the black townships and a limited state of emergency declared in August, the ECC launched a campaign called "Troops Out of the Townships" and organized a "Fast for a Just Peace." One public meeting marking the end of

297. *Id.*

298. *Only Religious Pacifists Can Use Options for CO's*, Cape Times, Sept. 15, 1987.

299. *Id.*

300. On the ECC, see generally Law, Lund, & Winkler, *Conscientious Objection: The Church Against Apartheid's Violence*, in THEOLOGY & VIOLENCE: THE SOUTH AFRICAN DEBATE 292-93 (C. Villa-Vicencio ed. 1987).

301. *Id.*

302. *Id.* at 293-94.

the fast in Cape Town drew 4,000 people.[303] In early 1986, the ECC also sponsored another successful nationwide campaign called "Working for a Just Peace." It suggested participation in community development projects as a constructive alternative to military service.[304] The ECC also continued to expand its operations thoughout the country and even established chapters on Afrikaans university campuses in Stellenbosch and Pretoria.[305]

D. *The 1986 White Paper*

The Government was gravely concerned about these developments and in April of 1986 it issued the 1986 White Paper on Defence (1986 White Paper),[306] which attacked the notion of reducing conscription. The 1986 White Paper jettisoned suggestions by the ECC and many South African churches that all objectors, and not only universal religious pacifists, be accommodated. Recognizing that the South African Anglican, Baptist, Congregational, Catholic, Methodist, and Presbyterian churches as well as the Quakers had "accepted the objection against military service [under apartheid] as part of their dogma," the 1986 White Paper asserted that "a concession to all those categories of persons would affect the capability of the Defence Force, (and therefore of [South Africa]), negatively . . . ."[307] In the 1986 White Paper, Defence Minister Malan emphatically announced that the Government would not accede to the growing demands to end conscription.[308] Moreover, the initial period of military service would not be reduced and the exemption for universal religious pacifists only would be maintained.[309]

Once the Government declared the nationwide state of emergency in June 1986, the ECC came under attack through emergency regulations that prohibited statements "calculated to have the effect or likely to have the effect . . . of inciting the public or any person or category of persons to . . . discredit or undermine the system of compulsory military con-

303. *Id.* at 294-95.

304. *Id.*; *Alternative Service: A Basis For Further Links*, 44 RESISTER 8 (June-July 1986).

305. Law, Lund, & Winkler, *supra* note 300, at 295.

306. DEP'T OF DEFENCE, REPUBLIC OF SOUTH AFRICA, WHITE PAPER ON DEFENCE AND ARMAMENTS SUPPLY (1986) [hereinafter 1986 WHITE PAPER]. The 1986 WHITE PAPER was based on the findings of the Geldenhuys Commission, which investigated issues bearing upon military service.

307. *Id.* at 7, § 34.

308. *See id.* at § 5-6, §§ 25-26, & at 10, § 50.

309. *See id.* at 7, §§ 33-34, & at 10, § 50.

scription."[310] The Government proceeded to detain many EEC members, place them under restriction orders, or threaten them with deportation. The Government also banned a number of ECC meetings. In response, the ECC launched a new campaign called "Let ECC Speak" and attracted even more public support. Finally, in September 1988, the Government permanently silenced the ECC by making it the first white organization in twenty-five years to be banned.[311]

While the Government expanded its arsenal of legislation designed to crush opposition to military service, the state's trend toward militarization continued. The 1986 White Paper observed that the SADF would require an effective increase in the budget.[312] The 1985-86 defense budget of 5.12 billion rand represented an increase of nearly twenty percent over the figure for the preceding year.[313] By 1988, the defense budget had risen to 8.19 billion rand, up 22.6% from 1987, double the 1984-85 figure, and constituting over fifteen percent of South Africa's total budget.[314] In Pretoria's view, this growth in military spending had to be accompanied by an extension of conscription because the SADF could not function by conscripting only white males.[315]

E. *Expanding Conscription*

Prior to 1983, when the white electorate approved a new constitution for South Africa that gave Indians and Coloureds limited political rights in a racially segregated tricameral Parliament, many in Government circles recognized that one purpose of the new dispensation was to subject Coloured and Indian youths to conscription.[316] Such conscription resulted from both the practical demands of turning South Africa into a militarized state and the rise in the number of young men refusing to serve: the Government required an adequate pool of servicemen. Moreover, the reliance on white males disrupted the economy because it took

310. Law, Lund, & Winkler, *supra* note 300, at 295.

311. Berat, *supra* note 35, at 7.

312. 1986 WHITE PAPER, *supra* note 306, at 28, § 130.

313. *More Conscription: More Money for the Military*, 44 RESISTER 17 (June-July 1986).

314. *SA Defence Budget Has Doubled In Four Years*, Eastern Province Herald, Mar. 21, 1988. Even the huge 1988 defense budget figure was deceiving because all construction and building operations were part of the Department of Public Works, a figure totalling 143 million rand in 1987 and budgeted at 153 million rand for 1988. *Id.*

315. *See* 1986 WHITE PAPER, *supra* note 306, at 17-20, §§ 91-110.

316. On the 1983 South African constitution, see Cowell, *Sharing Just a Little in Hope of Avoiding Sharing a Lot*, N.Y. Times, Nov. 6, 1983, at E3, col. 4 (Week in Review); D. BASSON & H. VILJOEN, SOUTH AFRICAN CONSTITUTIONAL LAW (1988).

these men away from their jobs for extended periods. Indeed, one observer has termed manpower "the greatest constraint" on defense policy.[317]

In the late 1970s the Government instituted a two-pronged plan to minimize the competition between the needs of the civilian economy and the manpower needs of the SADF. First, it endeavored to co-opt members of other ethnic groups into the SADF. Second, it encouraged white women to serve. As the 1982 White Paper noted:

> It is in the national interest that the White male should no longer be utilized as the only manpower source. Therefore the SA Defence Force will be more and more dependent on other sources of manpower, such as White females and members of other population groups . . . based on programmed manpower development plans which extend to 1990.[318]

1. Blacks

The 1982 White Paper declared that "[i]t is policy that all population groups be involved in defending the [Republic of South Africa]."[319] This entailed "a Defence Force of the people for the people"[320] and represented a departure from traditional apartheid principles under which only whites should bear arms. It also reflected an attempt to respond to growing black resistance to the apartheid system by bringing other groups into the system. The program has enjoyed some success to date with over 3,000 Coloureds currently serving all branches of the military.[321] By 1979, "thirty Coloured officers had been commissioned or were due for commissioning."[322] Similar developments have occurred in the SADF, especially the navy.[323] Recruitment of Africans has been a stickier political issue opposed primarily by the extreme right. Consequently, the South African Government moved cautiously to recruit Africans for SADF combat roles beginning in 1973.[324] By 1975, Africans began to be recruited into the Permanent Force on a very small scale.[325] In 1978, the Progressive Federal Party claimed that Africans, Indians,

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317. TIME RUNNING OUT, *supra* note 33, at 244.
318. 1982 WHITE PAPER, *supra* note 209, at 11, § 69.
319. *Id.* at 3, § 14.
320. *Id.*
321. TIME RUNNING OUT, *supra* note 33, at 245.
322. *Id.*
323. *Id.*
324. *Id.* at 245-46.
325. *Id.* at 246.

and Coloureds comprised 2.5% of the SADF.[326] In 1979, Africans reportedly comprised 1.3% of the SADF.[327]

Even the conservative black community strongly opposed this recruitment. For example, the South African Black Alliance, comprised of Inkatha,[328] the Coloured Labour Party, and the Indian Reform Party, stated that " '[w]hile blacks do not enjoy citizenship or share political power, it (the alliance) will not urge the black community to participate in the military defense of the apartheid regime'."[329] Heeding the import of such criticisms, the Government attempted to justify the eventual conscription of Coloureds and Indians in the 1983 constitution. In September 1983, shortly before the referendum among whites on the new constitution, the Transvaal National Party Congress passed a resolution calling for the speedy implementation of the extension of conscription to Coloureds and Indians.[330] Speaking about that resolution, Defence Minister Malan said that a bill to extend conscription would have been introduced during the last session of Parliament but for a shortage of time, and that the extension of conscription would occur after the acceptance of the new constitution.[331] Transvaal National Party leader F.W. de Klerk revealed the rationale for the new "rights" provided:

> You can't ask a man to fight for his country if he can't vote. Among the terms of the new dispensation is the guarantee that Coloureds and Indians will get voting rights. It follows that their responsibilities will increase accordingly, which means they will hold obligations to defend these rights.[332]

Shortly after the referendum, Botha announced that conscription would be introduced in stages.[333] One conscientious objector noted that "it is precisely because of the supposed political rights which are being 'given' to the coloured and Indian people, that they now face the threat of conscription in defence of the apartheid under which they live."[334]

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326. SAIRR, *supra* note 89, at 55.

327. *Black Unit Reflects Shift in S. Africa Army*, International Herald Tribune, Apr. 25, 1979 [hereinafter *Black Unit*].

328. Inkatha is a conservative Zulu organization led by Chief Gatsha Buthelezi. *See generally* L. THOMPSON & A. PRIOR, *supra* note 11, at 205; G. MARÉ & G. HAMILTON, AN APPETITE FOR POWER: BUTHELEZI'S INKATHA AND SOUTH AFRICA (1987); MZALA, GATSHA BUTHELEZI: CHIEF WITH A DOUBLE AGENDA (1988).

329. *Black Unit, supra* note 327.

330. *See generally supra* note 316 and accompanying text.

331. Western Cape Support Group, *supra* note 247, at 4.

332. *Id.*

333. *Id.*

334. *Id.*

The 1986 White Paper reiterated the Government's position in favor of conscription of Coloureds and Indians.[335] In April 1987, during the South African election campaign, Defence Minister Malan indicated that the use of Coloured and Indian volunteers was being gradually transformed into conscription and full military service.[336] In September, Malan said that a third battalion for Coloureds with headquarters in Kimberley was planned; he also revealed plans for a new infantry unit to be stationed in Namaqualand in the Northern Cape.[337]

Most Coloured and Indian groups opposed the constitution and greeted the Government's later announcements concerning conscription with hostility. Church groups, the Islamic clergy, and other anti-apartheid groups all have called upon Coloured and Indian youths not to serve.[338] The 1983 Defence Amendment, with its harsh penalties to discourage objection, thus becomes relevant to these groups as well. Indeed, "[o]pponents of the Bill . . . pointed out that it would be used to deal with the great increase in resistance to military service that would be the inevitable result of the planned conscription of so-called coloured and Indian men."[339] While the magnitude of Coloured and Indian resistance to conscription remains to be seen, the legal mechanism for crushing potential objection is already in place.

Nevertheless, the issue of conscription of Africans differs markedly from that of Coloureds and Indians. The 1983 constitution excluded Africans from any political role and there has been no talk of compulsory military service. Instead, the Government maintains the fiction that Africans are citizens not of South Africa but of the bantustans or homelands.[340] Consequently, efforts have not concentrated on the establishment of large African units within the SADF. Rather, the Government

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335. *See* 1986 WHITE PAPER, *supra* note 306, at 17, § 93, & at 20, § 109.

336. *Disaffection and Resistance: A Short History of 'Coloured' Conscription*, 55 RESISTER 18 (Apr.-May 1988).

337. *Id.*

338. *See, e.g., Religious Support for War Resistance*, 52 RESISTER 15 (Oct.-Nov. 1987).

339. *Clampdown on War Resisters, supra* note 245, at 3.

340. Under a legislative process begun in the 1950s, the Government has designated all Africans citizens of one of the ethnically defined homelands. South Africa has granted four of these homelands (the Transvaal, Bophuthatswana, Venda, and the Ciskei—the TBVC states) fictional independence recognized by no other member of the international community. The granting of independence to the TBVC states resulted in the loss of South African citizenship by those whom the South African Government considers citizens of the independent states. *See generally* Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DENVER J. INT'L L. & POL. 11 (1980).

has given attention to the creation of ethnically distinct units for service in Namibia and the homelands and, most recently, for the expansion of counterinsurgency operations within the country.[341]

The 1982 White Paper addressed the desirability of Defence Force assistance to the "National and Independent States" (the bantustans).[342] It mentioned programs for establishing military forces in the independent homelands and a policy of making agreements to establish joint management bodies to foster cooperation "with a view to joint action."[343] These programs are designed to coerce participation in a "Southern African military treaty organization against a common enemy."[344] In the remaining non-independent homelands, "Black territorial units" are being created.[345] These policies indicate that the South African military will continue to aid in the implementation of the homelands policy—a keystone of apartheid—and that it will continue to augment its forces for counterinsurgency operations. Given such a scenario, it seems likely that the Government will intensify efforts to recruit Africans.

2. Women

In its attempt to combat manpower shortages, the Government has also made substantial efforts to recruit white women. As early as 1971, the Government established an Army Women's College that trains female officers for service in the Permanent Force, the Civil Defence Force, and the Commandos.[346] In 1978, 500 women comprised the entering class, and the Government for the first time allowed women to enroll at the Defence Force Military Academy.[347] Although women are trained for noncombatant positions, they do receive weapons instruction. A 1978 survey revealed that the percentage of women in the Defence Force had grown to seven percent by October 1978, up from 0.6% in February 1973.[348] In 1979, the Government extended voluntary national service to women.[349] Since that time, the Government has stepped up efforts to attract women by stressing their importance as one of South

341. TIME RUNNING OUT, *supra* note 33, at 245.
342. 1982 WHITE PAPER, *supra* note 209, at 3, § 14.
343. *Id.* at 4, § 14.
344. *Id.*
345. *Id.*
346. Financial Times (London), July 5, 1978, at 4, col. 2.
347. *Id.*
348. *Marching to the Top*, The Star (Johannesburg), July 12, 1979.
349. *Id.*

Africa's most powerful weapons.[350] As the South African trend toward ever greater militarization continues, it is conceivable that more and more women will be recruited. Neither the SADF's expansion to include women, Coloureds, and Indians, nor the burgeoning military spending coupled with ever more zealous attacks on conscientious objectors, bodes well for the future of South Africa.

VI. A Call for Liberalization and International Support

If the ruling National Party were truly concerned with the ultimate welfare of South Africa, it would not use the military to maintain a brutal state of emergency that pits countryman against countryman and sends white troops into the country's black townships. Nor would it use the military for internationally illegal cross-border raids. Abandonment of such activities would end the need for ever longer periods of conscription—or for conscription at all.

Given the present state of affairs, the Government's failure to recognize the validity of conscientious objection except by universal religious pacifists forces young white men with more liberal views to go underground or into exile. Unfortuntately, these are precisely the people who could make positive contributions to the building of a just multiracial society in a post-apartheid South Africa. Rather than prohibiting the ECC from operating,[351] the Government would have done well to entertain seriously the ECC's alternative service campaign. As indicated above, the ECC argued that alternative service should be available to conscripts who object on moral or political grounds, and that objectors should have the option of performing alternative service in non-governmental organizations which do not reinforce apartheid oppression.[352] Participation by young whites in such projects would facilitate maximum cooperation and contact with the communities in which they would take place; it would also have the benefit of involving young whites (many for the first time) in broader non-racial activities.

Ideally, since exemption provisions are theoretically geared toward sparing the individual from answering to the demands of his conscience at the expense of performing an obligation to the state, exemption should be granted to all who, for whatever reason, are able to demonstrate their sincerity in opposing military service. Support for this proposition comes from the experience of the many members of the international commu-

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350. *White Women: Targets of the SADF,* 25 Resister 12, 14 (Apr.-May 1983). *See generally id.* at 12-14.

351. *See supra* text accompanying note 311.

352. *See supra* note 304 and accompanying text.

nity that allow such exemptions. As South African sociologist Michael Savage has pointed out, countries as diverse as Belgium, Poland, and even strife-torn Lebanon allow for conscientious objection;[353] the constitutions of Austria, West Germany, the Netherlands, and Portugal also recognize this principle.[354] Many of these states permit non-military service for all conscientious objectors and not just for universal religious pacifists. In Belgium and the Netherlands, for example, objectors have the option of performing alternative service in independent peace movements and organizations.[355] In Finland, they may join various university peace research units.[356]

In addition to the practice of these states, both the European Convention for the Protection of Human Rights and Fundamental Freedoms[357] and article 18 of the Universal Declaration of Human Rights[358] insist that "everyone has the right to freedom of thought, conscience and religion." Moreover, Resolution 337 of the Council of Europe stipulates that alternative service must not be punitive, that it be the same length as military service, and that objectors perform social work or other work of national importance.[359] More specifically, the Resolution provides that: "Persons liable to conscription for military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosphical or similar motives, refuse to perform armed service shall enjoy a personal right to be released from obligation to perform such service."[360] One South African scholar has interpreted this language to mean that "it is a fundamental human right to be able to claim exemption from military conscription . . . ."[361]

Authority from the United States has also long favored protecting the rights of the individual forced to decide between serving the state and his conscience. As early as 1919, Harlan Fiske Stone, later Chief Justice of

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353. Savage, *Conscription Versus Freedom of Conscience*, Cape Times, July 15, 1987, at 41, col. 3.

354. *Id.*

355. *Id.*

356. *Id.*

357. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, Europ. T.S. No. 5.

358. Universal Declaration of Human Rights, G.A. Res. 217(III), art. 18, U.N. Doc. A/810, at 71, 74 (1948).

359. *Resolution 337 on the Right of Conscientious Objection*, 1967 EUR. Y.B. (Council of Eur.) 323.

360. *Id.*

361. Van Der Merwe, *Preface* to CONSCIENTIOUS OBJECTION (Occasional Paper No. 8, 1984).

the United States Supreme Court, wrote that "both morals and sound policy require that the state should not violate the conscience of the individual."[362] Chief Justice Hughes echoed this sentiment in his dissenting opinion in *United States v. Macintosh*, where he asserted that "in the forum of conscience, duty to a moral power higher than the State has always been maintained."[363]

While the South African Government rejects all but the requests of those who are universal religious pacifists, it might at least extend the Act to include universal secular pacifists.[364] When called upon to construe the meaning of "religious convictions" as provided in section 72 of the 1957 Defence Act,[365] the South African court in *Hartman v. Chairman, Board for Religious Objection*[366] regrettably refrained from expanding the definition of religious convictions to include such individuals. Although the Government tried to restrict the definition of religious convictions by introducing new legislation while the case was pending, a holding expanding the definition to include secular pacifists would have created valuable precedent and given Government opponents a much-needed boost.[367]

The position followed by courts in the United States furnishes a workable model for the South African Government. Among the leading decisions on the question of the definition of "religious convictions" is *Torcaso v. Watkins*,[368] in which the Supreme Court refused to recognize any discrimination between theistic and non-theistic belief and accepted non-theistic Buddhism as a generally-recognized religion. Later, in *United States v. Seeger*,[369] the Court was called upon to examine section 6(j) of the Universal Military Training and Service Act of 1948, which defined religion as "belief in relation to a Supreme Being involving duties superior to those arising from any human relation . . . ."[370] The Court held that the term "religious belief" meant a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by

362. Stone, *The Conscientious Objector*, 21 COLUM. U.Q. 253, 269 (1919).

363. 283 U.S. 605, 633 (1931).

364. Universal secular pacifists refuse to participate in all wars, but for nonreligious reasons. *See supra* note 12 and accompanying text.

365. *See supra* note 42 and accompanying text.

366. 1987(1) S. AFR. L. REP. 922 (Orange Free State Prov. Div.). For a more complete discussion of *Hartman*, see *supra* notes 287-95 and accompanying text.

367. *See supra* notes 296, 297 and accompanying text.

368. 367 U.S. 488 (1961).

369. 380 U.S. 163 (1965).

370. 50 U.S.C. app. § 456(j) (1958).

the God of those admittedly qualifying for the exception . . . ."[371] The Court also ruled that the determination of whether an individual's beliefs are religious depends upon whether they are religious in the context of "his own scheme of things."[372] Under this reasoning, a person's assertion that certain beliefs constitute religion for him is prima facie evidence that they are religious.[373]

The Supreme Court went even further in *Welsh v. United States*,[374] where Justice Black noted that even though an objector's pacifism was based to a "substantial" degree upon considerations of public policy, he was still entitled to an exemption as long as the beliefs were deeply held and were to some degree based upon "moral, ethical, or religious principle" and not "solely upon considerations of policy, pragmatism or expediency."[375] As in *Seeger*, the Court adopted a broad definitional approach. The Court did so for two reasons: (1) it did not want to invalidate legislation that granted an exemption for "religious training or belief"; and (2) to avoid interfering with the establishment clause of the first amendment.[376] These first amendment considerations ultimately led the Court to refrain from narrowing the definition of "religious training or belief" to theistic religions since this would have amounted to a decision that Congress had favored one religion over another and that, therefore, the legislation was unconstitutional. Taken together, these decisions reveal that whenever a person in the United States so deeply holds a belief that it enjoys a supreme role in his life, and therefore is his or her "ultimate concern," such a belief is a religion.[377] Moreover, as one observer has noted, the "characterization of a belief as religious would seem to be beyond the competence of anyone other than the adherent."[378]

In addition to the judicial view in the United States, the *Hartman* court might have relied on similar South African authority in adopting a more liberal approach. In *Publication Control Board v. Gallo (Africa) Ltd*,[379] the Appellate Division noted that "[t]he religious convictions or

371. 380 U.S. at 176.

372. *Id.* at 185.

373. *See* Comment, *The History and Utility of the Supreme Court's Definition of Religion*, 26 LOY. L. REV. 87 (1980).

374. 398 U.S. 333 (1970).

375. *Id.* at 342-43.

376. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."

377. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1082 (1978).

378. *Id.* at 1083.

379. 1975(3) S. AFR. L. REP. 665 (App. Div.).

feelings of any person is a completely subjective matter, dependent, *inter alia* on his upbringing, education, temperament, character and life involvement."[380] The court further stated that "[r]eligious beliefs are founded on faith. It is not a sphere in which objective concepts of reason are particularly apposite."[381] The court thus indicated that objective tests were not appropriate in determining if a certain belief constituted a religion because this would necessarily depend upon the role that the belief enjoys in the life of the particular individual. Although the issue before the court in *Gallo* was whether a certain publication offended the religious beliefs of the public, the opinion still bolsters the contention that subjective tests are inappropriate in situations involving religious convictions.

Nevertheless, the South African Government recognizes only a small minority of objectors, and its stringent penalty of six years imprisonment for all others who refuse to perform military service places it in the same category as such totalitarian regimes as the Soviet Union (six years), Bulgaria (seven years), Czechoslovakia (ten years), and Yugoslavia (ten years).[382] Moreover, as long as the South African Government has no intention of liberalizing its policy on conscientious objection, a growing number of young white men will feel compelled to go into exile. Like their black compatriots, they face an uncertain future and the knowledge that they can never return to their homeland until the political situation changes.[383]

The members of the international community have sought to address the plight of these young South Africans. In 1978, the United Nations addressed the issue of conscientious objection in South Africa in a General Assembly resolution adopted unanimous acclamation.[384] That resolution:

> 1. *Recognizes* the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*;
> 2. *Calls upon* Member States to grant asylum or safe transit to another State, in the spirit of the Declaration on Territorial Asylum, to persons compelled to leave their country of nationality solely because of a consci-

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380. *Id.* at 672.

381. *Id.* at 665.

382. *SA and Soviets Have the Same Sentence for Call-Up Refusal*, Business Day (Johannesburg), June 12, 1987.

383. As a result of a lack of education, black South African exiles often face a harsher future than their white compatriots.

384. *Status of Persons Refusing Service in Military or Police Forces Used to Enforce Apartheid*, G.A. Res. 33/165, 33 U.N. GAOR Supp. (No. 45) at 154, U.N. Doc. A/33/45 (1978).

> entious objection to assisting in the enforcement of *apartheid* through service in military or police forces;
> 3. *Urges* Member States to consider favourably the granting to such persons of all the rights and benefits accorded to refugees under existing legal instruments;
> 4. *Calls upon* appropriate United Nations bodies, including the United Nations High Commissioner for Refugees, the specialized agencies and non-governmental organizations, to provide all necessary assistance to such persons.[385]

In 1980, a General Assembly resolution asked South African youths not to enlist in the South African armed forces, "which are designed to defend the inhuman system of *apartheid*, to repress the legitimate struggle of the oppressed people [of South Africa], and to threaten and commit acts of aggression against neighbouring States."[386] The resolution called upon all governments and organizations, in consultation with the national liberation movement, to assist those forced to leave South Africa because of their conscientious objection to serving in the military or police of the apartheid regime.[387] These two resolutions should be understood in the context of other United Nations resolutions on apartheid and international codes of conduct governing the use of force, for they lead to a general condemnation of apartheid and its supporters, and stress the obligation of conscripts to refuse service in the defense of apartheid.

According to the United Nations Charter, one state may use force against another only in self-defense.[388] South Africa's repeated incursions into neighboring states, both directly and through the use of surrogate forces (especially in Mozambique and Angola), violate the sovereignty of these states and destabilize the entire region. Such actions demand the imposition of sanctions against South Africa as provided for in the United Nations Charter. The General Assembly has, in fact, repeatedly called for such sanctions.[389]

Various international instruments apply to the South African imbro-

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385. *Id.*

386. G.A. Res. 35½O6(B), 35 U.N. GAOR Supp. (No. 48) at 31, U.N. Doc. A/35/48 (1981).

387. *Id.*

388. U.N. CHARTER art. 51. On the workings of art. 51, see Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 455 (1952).

389. Chapter VII of the United Nations Charter provides for such sanctions. *See generally*, G. Rocha, IN SEARCH OF NAMIBIAN INDEPENDENCE: THE LIMITATIONS OF THE UNITED NATIONS (1984).

glio. Principal among these are the Geneva Conventions of 1949[390] and 1977.[391] The 1949 Conventions, to which South Africa was a signatory, prohibit various types of conduct during warfare, including the failure to discriminate between combatants and civilians and between military and civilian targets.[392] The agreements also outlaw the use of various types of weapons (for example, poison gas) and enumerate the rights of prisoners of war and persons living in occupied territories.[393]

The Geneva Conventions were expanded in 1977 to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination. . . ."[394] While both the ANC and SWAPO (the South West African People's Organization, the official liberation move-

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390. Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was signed on Aug. 22, 1864, 129 Parry's T.S. 361. This was supplemented by the Additional Articles of Oct. 20, 1868, 138 Parry's T.S. 189, and replaced by Convention of July 6, 1906, 202 Parry's T.S. 144, which was itself supplemented by Hague Convention, of 1907 for the Adaptation of the Principles of the Geneva Convention to Maritime War, 205 Parry's T.S. 359. The 1906 Convention was replaced by that of July 27, 1929, 118 L.N.T.S. 303, to which there was a companion Convention of the same date Relative to the Treatment of Prisoners of War, 118 L.N.T.S. 343, elaborating the provisions of Chapter II of the Convention Concerning the Laws and Customs of War on Land annexed to Hague Convention of 1907, 205 Parry's T.S. 277. The two Conventions of 1929 were expanded to four and opened for signature on Aug. 12, 1949. These were as follows: 1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 2) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; 3) Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and 4) Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

391. *See supra* note 206. The June 8, 1977, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law adopted by consensus two Protocols additional to the 1949 Conventions which were opened for signature on Dec. 12, 1977. *See* Draper, *The Implementation and Enforcement of the Two Additional Protocols*, 164 HAGUE RECUEIL 9 (1979).

392. *See* Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

393. *See* Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 392, at arts. 47-48, 6 U.S.T. at 3548-68, 75 U.N.T.S. at 318-38.

394. Art. 1, para. 4, *reprinted in* 16 I.L.M. 1391, 1397 (1977).

ment of the Namibian people) are signatories to the 1977 agreement, South Africa refused to sign and repeatedly violates the Conventions by committing atrocities against civilians and by executing freedom fighters captured as prisoners of war.[395]

As early as 1948, the Convention on the Prevention and Punishment of the Crime of Genocide[396] (Genocide Convention) outlawed attacks on racial, national, or ethnic groups and made genocide a crime under international law. The Genocide Convention recognizes individual responsibility for those who violate its tenets.[397] Therefore, it demonstrates the significance of individual conscience regarding military service. Personal responsibility is also paramount in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.[398] Adopted in 1973, this document extended the notion of individual responsibility to participation in activities that support apartheid. Article 1 of the Convention, which had over sixty signatories by 1980, characterizes apartheid as "a crime against humanity" and labels as criminal "those organizations, institutions and individuals committing the crime of *apartheid*."[399]

It is clear, then, that international law and world opinion condemn the illegal actions of the South African regime. The United Nations not only supports the right of individuals to resist military service in South Africa, it imposes a duty on people not to serve because to do so is criminal. In keeping with this conclusion, the National Executive Committee of the ANC lauded the decision of white conscientious objectors in a statement issued on January 8, 1988. It read:

> The campaign to resist conscription into the army of oppression and aggression remains one of the outstanding tributes to the humanity of the white youth of our country who, despite the prospect of severe penalties, refuse to be turned into the murder machine of the apartheid regime. We would like these brave and noble compatriots to know that long after the

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395. *See, e.g.*, M. MURRAY, *supra* note 122, at 48-54.

396. Dec. 9, 1948, 78 U.N.T.S. 277. Although South Africa is not a signatory to the Convention, the relevant provisions of the Convention are customary international law. In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice regarded the prohibition on genocide as *jus cogens*. 1951 I.C.J. 1, 13-24. *See also* Arechaga, *International Law in the Past Third of a Century*, 159 HAGUE RECUEIL 1, 64-67 (1978). Kiapi, *The Status of Apartheid in International Law*, 17 INDIAN J. INT'L L. 57, 57-58 (1977).

397. 78 U.N.T.S. at 280, art. 4.

398. G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

399. *Id.* art. 1.

> apartheid regime has become a thing of the past, the people of this country will honour them for their courage and principled opposition to racial tyranny.[400]

Concomitant with the duty to resist military service is a corresponding duty on the part of other states to assist white South Africans in their plight. This they can achieve by encouraging individuals not to serve and by offering asylum to such persons; Belgium, the Netherlands, Sweden, the United Kingdom, and the United States are among those states that have accommodated the greatest number of South African conscientious objectors.[401] The threat of economic sanctions against Pretoria also has the potential to produce a liberalization of the present law.[402] Indeed, for the time being, these two approaches seem to offer the only avenues of assistance available to the members of the international community in light of Pretoria's continuing military escalation, increasing repression of conscientious objectors, growing efforts to force other sections of the population into military service, and uncompromising commitment to war.

VII. CONCLUSION

In 1948, when the ruling National Party came to power in South Africa, it did so on a continent still in the grip of colonial rule. Today, South Africa is the last bastion of white supremacy in Africa. Since 1948 Pretoria has come under escalating attacks from without and within. The Government, growing increasingly paranoid, has embarked upon a massive militarization scheme. Integral to this scheme is an ever-lengthening period of conscription coupled with ever more severe penalties for conscientious objectors, whose existence the regime sees as a threat to the maintenance of the apartheid system. The achievement of peace in South Africa will require, however, the abandonment of such militaristic poli-

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400. *ANC Praises SA War Resisters*, 54 RESISTER 17 (Feb.-Mar. 1988).

401. *See, e.g., Info For South African War Resisters Seeking Political Asylum*, 54 RESISTER 24 (Feb.-Mar. 1988).

402. Precedent for this proposition comes from the Government's behavior in early 1988, when it introduced the Promotion of Orderly Internal Politics Bill. This proposal would have restricted severely the availability of foreign funds to non-governmental organizations, many of which are in the forefront of the struggle against apartheid. It was only after Western states such as West Germany threatened South Africa with stringent economic sanctions that the Government withdrew the legislation. *See* Berat, *supra* note 35. On the sanctions debate, compare R. MOORSOM, THE SCOPE OF SANCTIONS: ECONOMIC MEASURES AGAINST SOUTH AFRICA (1986) and J. HAYES, ECONOMIC EFFECTS OF SANCTIONS ON SOUTHERN AFRICA (1987), with Lipton, *Sanctions and South Africa: The Dynamics of Econmic Isolation*, ECONOMIST INTELLIGENCE UNIT: SPECIAL REPORT, No. 1119 (1988).

cies. As a start, the Government would do well to allow for all kinds of conscientious objection. As long as it remains intransigent, the international community must encourage conscientious objectors and pressure the South African Government to liberalize its policies. For now, the apartheid regime appears to have dug itself in. It has opted for war and the resolute defense of white power and privilege. The future promises more of the same.