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REFLECTIONS ON NON-VIOLENT RESISTANCE AND THE NECESSITY DEFENSE

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I. INTRODUCTION

In recent years, non-violent protest against environmental hazards,[1] nuclear weapons,[2] human rights violations,[3] and American foreign[4] and immigration policies[5] has increased dramatically within the United States. Those involved in these formally illegal activities, rather than viewing themselves as civil disobedients who accept their punishment in order to demonstrate their commitment and respect for the legal system,[6] have increasingly been proclaiming that they are engaging in acts of civil resistance which are justifiable under international law.[7]

This paper will first consider the theory of non-violent protest as

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This essay is based on the author's experiences as an expert witness in civil resistance cases involving opposition to nuclear weapons, United States policy in Central America and apartheid in South Africa.

1. *Greenpeace Protest: Dangling From A Bridge To Fight Pollution*, N.Y. Times, Sept. 16, 1988, at 28, col. 1.

2. *Plowshares Besiege Air Force Nukes*, GUARDIAN, Sept. 14, 1988, at 4, col. 5.

3. *Protests Highlight Prisons, Mobil, Students*, GUARDIAN, Oct. 28, 1987, at 4, col. 3.

4. *2 Munitions Trains Halted In A Protest Over U.S. Arms*, N.Y. Times, Sept. 3, 1987, at 9, col. 3.

5. *2 Are Acquitted In Entry To U.S. By Illegal Aliens*, N.Y. Times, Aug. 3, 1988, at 7, col. 1.

6. King, *Letter from Birmingham City Jail*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 72, 78-9 (H. Bedau ed. 1969). Civil disobedience is the deliberate and peaceful violation of particular laws, regulations or orders which are regarded by the disobedient as immoral or unjust. *See* A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 59 (1968).

7. *See generally* F.A. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW (1987).

conceptualized by Mohandas Gandhi. Next, the Nuremberg Principles, which frequently have been invoked to justify contemporary acts of civil resistance, are discussed. Finally, American courts' rejection of the attempt by resisters to use the necessity defense to raise an international law defense is criticized.

II. THE GANDHIAN THEORY OF CIVIL DISOBEDIENCE

Indian nationalist leader Mohandas Gandhi was one of the leading twentieth century architects and practitioners of civil disobedience. Gandhi developed his theory of nonviolent resistance while engaged in campaigns against racial discrimination in South Africa between 1893 and 1914,[8] and against religious discrimination and British colonialism in India between 1915 and his assassination in 1948.[9] Gandhi termed his theory *Satyagrapha* or "holding on to Truth" or "truth-force."[10] The *Satyagraphi* or disobedient, rather than relying upon action or body-force to force the repeal of a law, relies upon self-suffering or "soul-force" to persuade others of the justness of his cause.[11] According to Gandhi, the *Satyagraphi* should be prepared to engage in a perpetual fast and should be willing to die in the pursuit of his cause.[12] In addition to fasting, the *Satyagrapha* program of noncooperation with government, as described and practiced by Gandhi, includes the surrender of all honorary public titles and offices; nonparticipation in government programs and institutions; boycott of schools; refusal of military service; and the production of indigenous or native goods as a first step towards economic independence.[13] *Satyagrapha* also involves nonpayment of taxes,[14] strikes,[15] picketing,[16] and, of course, direct public violation of objectionable laws and regulations.[17]

The use of nonviolence is a recognition that the individual cannot

8. *See generally* GANDHI, THE STORY OF MY EXPERIMENTS WITH TRUTH 102-344 (1957).

9. *Id.* at 344-505.

10. GANDHI, *Satyagrapha, Civil Disobedience, Passive Resistance, Non-Co-operation*, in NON-VIOLENT RESISTANCE 3 (1951).

11. GANDHI, *Satyagrapha or Passive Resistance*, in NON-VIOLENT RESISTANCE at 15, 17.

12. GANDHI, *Satyagrapha - True And False*, in NON-VIOLENT RESISTANCE at 313-14. Gandhi enumerates three conditions for the success of *Satyagrapha*: (1) the *Satyagraphi* should not have any hatred in his heart against his opponent; (2) the issue must be "true and substantial"; (3) the *Satyagraphi* must be prepared "to suffer till the end for his cause." GANDHI, *The Non-Violent Sanction*, in NON-VIOLENT RESISTANCE at 382. The *Satyagraphi* should not harbor anger; he will suffer assaults and not retaliate; he will voluntarily submit to arrest and punishment; and he will behave "courteously." GANDHI, *Some Rules Of Satyagrapha*, in NON-VIOLENT RESISTANCE at 79.

13. GANDHI, *How And When To Act*, in NON-VIOLENT RESISTANCE at 117, 118.

14. GANDHI, *Non-Payment Of Taxes*, in NON-VIOLENT RESISTANCE at 139, 140.

15. GANDHI, *Sympathetic Strikes*, in NON-VIOLENT RESISTANCE at 149, 150.

16. GANDHI, *How To Do The Picketing*, in NON-VIOLENT RESISTANCE at 334, 335.

17. GANDHI, *Civil Disobedience*, in NON-VIOLENT RESISTANCE at 306, 307. There are

know with certainty whether the views he advocates are correct and that therefore the use of violence to harm other persons or to deprive them of their property cannot be justified.[18] It is this uncertainty as to the correctness of the protester's view which, in part, dictates that the "sacrifice of self is infinitely superior to sacrifice of others."[19] In Gandhi's view, the use of violence by protesters will only invite a forceful reaction, lead to a cycle of aggression and divert attention from the protesters' grievance.[20] The refusal to engage in violence is also a recognition that there is an inextricable link between means and ends and that violence inevitably taints the end to be achieved and perpetuates violence as a mode of political action.[21] Nonviolence and self-sacrifice are designed to convert an opponent by appealing to his sensitivities. Reason, according to Gandhi, must be "strengthened by suffering and suffering opens the eyes of understanding."[22] Gandhi wrote that the "hardest metal yields to sufficient heat. Even so must the hardest heart melt before the sufficiency of the heat of nonviolence. And there is no limit to the capacity of nonviolence to generate heat."[23]

The civil disobedient openly and nonviolently breaks the law, pleads guilty and accepts his punishment in order to demonstrate his respect for the social and legal order. Gandhi invited the severest possible penalty for his deliberate transgressions, confronting the judge with the dilemma of whether to endorse, or disassociate himself from, the law.[24] The Gandhian disobedient thus affirms that he or she is a responsible, law-abiding member of society who has been compelled to violate a law which he or she considers to be so "unjust" as to render "obedience . . . a dishonour."[25]

Civil disobedience, in Gandhi's theory, is "the inherent right of a citizen."[26] It is a "sacred duty when the State has become lawless, or . . . corrupt. And a citizen that barters with such a State shares its corruption or lawlessness."[27] A "good man will therefore resist an evil system

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three broad categories of *Satyagrapha* actions: 1) nonviolent protest and persuasion or symbolic acts intended to persuade others or to express disapproval or dissent; 2) noncooperation, the withdrawal of social, economic or political cooperation; 3) nonviolent intervention or direct action such as sit-ins and obstruction of traffic. *See* G. SHARP, THE POLITICS OF NONVIOLENT ACTION 68-69 (1973).

18. GANDHI, *supra* note 10.
19. GANDHI, *supra* note 11.
20. *Id.* at 19.
21. GANDHI, *Means And Ends*, in NON-VIOLENT RESISTANCE at 9, 10 (1951).
22. GANDHI, *Satyagraphi's Duty*, in NON-VIOLENT RESISTANCE at 192, 194.
23. GANDHI, *Is Non-Violence Ineffective?*, in 1 NON-VIOLENCE IN PEACE & WAR 179, 180 (1942).
24. GANDHI, *Satyagrapha*, in NON-VIOLENT RESISTANCE at 6, 7 (1951).
25. *Id.*
26. GANDHI, *The Right Of Civil Disobedience*, in NON-VIOLENT RESISTANCE at 174.
27. *Id.*

or administration with his whole soul. Disobedience of the laws of an evil State is therefore a duty. . . . and is obligatory upon him who would disassociate himself from evil."[28]

Gandhi rejected the argument that an individual or a minority was bound by the will of the majority as a "superstition" and as an "ungodly thing."[29] He noted that historically there were many instances in which majorities had been wrong and minorities right and contended that all reforms "owe their origin to the initiation of minorities in opposition to majorities."[30] Gandhi, however, believed that people had "become so compliant" that they did not "mind any degrading law."[31] He queried whether if "among a band of robbers a knowledge of robbing is obligatory, is a pious man to accept the obligation? So long as the superstition that men should obey unjust laws exists, so long will their slavery exist."[32]

Gandhi also rejected the argument that *Satyagrapha* is a tactic of the weak. He contended that those who rely upon physical force do not appreciate the courage of those who deliberately violate the law, defy authority and accept the consequences.[33] The *Satyagraphi* must cultivate fearlessness and be free from fear of injury or loss of life or property.[34] Gandhi asked where more courage is required: "in blowing others to pieces from behind a cannon, or with a smiling face to approach a cannon and be blown to pieces?"[35]

Nonviolent resistance, as pioneered by Gandhi, has been employed by protesters throughout the world. Gene Sharp identifies forty-eight historical cases of nonviolent resistance which have occurred in western countries; twenty-three in eastern countries; nine in Africa; one in Australia; and three which he classifies as international (e.g., in international waters).[36] Slightly less than forty percent of these protests took place in democracies and somewhat more than sixty percent in dictatorships.[37]

British military strategist and historian Basil Liddell Hart interrogated German generals following World War II and found that while violent resistance "had not been very effective or troublesome," the

28. GANDHI, *Duty Of Disloyalty*, in NON-VIOLENT RESISTANCE at 238.
29. GANDHI, *Satyagrapha Or Passive Resistance*, in NON-VIOLENT RESISTANCE at 15, 18.
30. *Id.*
31. *Id.*
32. *Id.* at 18-19.
33. GANDHI, *Moral Requirements For Satyagrapha*, in NON-VIOLENT RESISTANCE at 51.
34. *Id.* at 55.
35. *Id.* at 52.
36. Sharp, *The Technique Of Non-Violent Action*, in CIVILIAN RESISTANCE AS A NATIONAL DEFENSE NON-VIOLENT ACTION AGAINST AGGRESSION 107, 125 (A. Roberts ed. 1967) [hereinafter CIVILIAN RESISTANCE].
37. *Id.* at 228, 240.

Germans had been unable to "cope" with, and had been "baffled" by, the nonviolent tactics deployed in Denmark, Holland, Norway and, to some extent, in France and in Belgium.[38] Hart reported that the German troops found it difficult to be ruthless and aggressive towards civil disobedients, and that it was a "relief" when resistance became violent or when nonviolent protesters were aligned with armed resistance groups.[39] Hart concluded that even where disobedients "cannot make a direct impact on the ruler of a hostile country, they can affect the morale and loyalty of his troops and functionaries, thus having an *indirect* impact on the ruler by undermining his source of power."[40]

Historian Staughton Lynd notes that there is a "distinctive American tradition" of nonviolence which dates back to the seventeenth century.[41] This tradition is comprised of three broad and generally distinct movements: seventeenth and eighteenth century opposition to violations of religious liberty;[42] protest against conscription and American military interventions;[43] and individual and group disobedience to achieve domestic social change.[44] These movements have usually based their opposition to established laws on vague and imprecise moral and religious principles and conscientious beliefs. They have argued that the individual should not be subordinated to the will of the majority. Thus, in his famous essay on civil disobedience, Henry David Thoreau asked:

> [c]an there not be a government in which majorities do not virtually decide right and wrong, but conscience? . . . Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? . . . I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right.[45]

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38. Hart, *Lessons From Resistance Movements-Guerilla And Non-Violent*, in CIVILIAN RESISTANCE at 228, 240.

39. *Id.*

40. *Id.* at 240-41 (emphasis added).

41. Lynd, *Introduction* NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY XV (S. Lynd ed. 1966).

42. *See generally*, Backus, An Appeal to the Public for Religious Liberty (1773), in Isaac Backus on Church, State and Calvinism 316-17, 324-25, 332-34, 338-40 (W. McLouglin ed. 1968) reprinted in CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY 49 (D.R. Weber ed. 1978) (Isaac Backus advocating civil disobedience to religious taxes and certificates of exemption issued by civilian authorities).

43. R. CONNEY & M. JEZER, THE POWER OF THE PEOPLE: ACTIVE NONVIOLENCE IN THE UNITED STATES 38-107 (1987).

44. *Id.* at 150-245.

45. H.D. THOREAU, WALDEN, OR LIFE IN THE WOODS AND ON THE DUTY OF CIVIL DISOBEDIENCE 223 (1960).

All these movements historically shared a commitment to the open violation of the law and a willing acceptance of its punishment. Martin Luther King, Jr. typified this view when he wrote that

> [o]ne who breaks an unjust law must do it *openly, lovingly* . . . and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.[46]

In the contemporary period, there has been an upsurge in nonviolent protest. It is estimated that in 1982, 4,000 persons were arrested for acts of civil disobedience directed against nuclear weapons facilities.[47] These arrests occurred in more than fifty actions at more than two dozen sites throughout the United States.[48] Many of these new disobedients have rejected the strictures of civil disobedience and have engaged in what they term civil resistance or actions which, while violative of domestic law, are thought to be justified on the bases of *both* morality and of international law.[49] These civil resisters typically have pled not guilty, invoked a defense based upon international law, and contended that they were engaged in the prevention of ongoing criminal activity on the part of the government. Professor Francis Boyle writes that the individuals who engage in nonviolent civil resistance activities to protest various aspects of American foreign policy are not engaged in civil disobedience activities as "classically defined."[50] Boyle notes that in such civil resistance cases, "what we have are individuals attempting to prevent the ongoing commission of international crimes under well-recognized principles of international and U.S. domestic law. This is a phenomenon very different from the classic civil disobedience case where individuals were purposely violating domestic law for the purpose of changing it."[51] He goes on to argue that ongoing criminal activity committed by government officials

> is certainly the type of grievance the people should have a right to petition for redress against by means of nonviolent civil resistance. Therefore, we must recognize that the First Amendment includes within its scope the right for the American people to engage in acts of nonviolent civil resistance specifically intended for the purpose of preventing or impeding

46. King, *supra* note 6 at 78-79 (emphasis added).
47. Day, *The New Resistance*, 47 THE PROGRESSIVE 22, 23 (1983).
48. *Id.* at 24.
49. *See generally* Boyle, *supra* note 7.
50. *Id.* at 5.
51. *Id.*

> ongoing criminal activity in the conduct of foreign policy on the part of this or any other government.[52]

Those engaging in civil resistance rely heavily upon the Nuremberg Principles to justify their activities. Peace groups within the United States have organized what they have termed "Nuremberg Actions" to implement what they view as their responsibility to see that the United States complies with international law.[53] They have drawn a parallel between the manufacturing and transporting of nuclear weapons or of munitions destined for Central America and the trains which carried Jews to Nazi death camps. They have thus argued that they are obligated to block trains carrying weapons in order to prevent the weapons' deployment and use.[54] Typical of this trend is the politically progressive International Association of Democratic Lawyers which in 1985 pledged

> to work in our professional roles and as citizens for the effective application of the Nuremberg Principles, that acts in violation of these principles are punishable as crimes whether committed by a head of state or by an ordinary soldier or civilian, whether done under government order or not, and that crimes against peace, war crimes, and crimes against humanity are to be condemned, prevented, and prosecuted by the enforcement of international law.[55]

III. NUREMBERG

Following World War II, the Allied Powers resolved to prosecute the major Nazi war criminals before a multinational tribunal.[56] At the London Conference of 1945, Justice Jackson of the United States Supreme Court stated that the Allies intended to prosecute "the planners, the zealots who put this thing across . . . the emphasis should be on the planning level rather than on the mere fact that at some point one . . . participated in carrying it out."[57] It was thought that such a trial would serve to emphasize the shared interest of the international community in

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52. *Id.* at 5-6.

53. *Attempted Murder,* Guardian, Sept. 16, 1987, at 1, 7, col. 1.

54. *Id.*

55. *The Nuremberg Pledge Of Lawyers And Jurists* (November 24, 1985) in SWORDS INTO PLOWSHARES: NONVIOLENT DIRECT ACTION FOR DISARMAMENT 209 (A.J. Laffin & A. Montgomery eds. 1987).

56. *Minutes of Conference Session of July 16, 1945* (Document XXX), in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 246, 250-51 (1945) [hereinafter REPORT OF ROBERT H. JACKSON].

57. *Minutes of Conference Session of July 24, 1945* (Document XLVII), in REPORT OF ROBERT H. JACKSON at 360, 363.

prosecuting Nazi leaders and would provide a factual and a legal foundation for the subsequent trials of lesser war criminals.[58]

Twenty-two defendants were prosecuted at Nuremberg and were variously indicted for Crimes against Peace (waging aggressive war),[59] War Crimes[60] and Crimes against Humanity.[61] In its judgment, the Tribunal rejected the act of state defense and affirmed that government officials and private individuals have criminal liability under international law. The Tribunal observed that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state."[62] Those who violate the laws of war "cannot obtain immunity while acting in pursuance to the authority of the state, if the state in authorizing action moves outside its competence under international law."[63] The judges noted that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[64] The Tribunal also ruled that superior orders could not be considered as a defense, but only "in mitigation of the punishment."[65] The recognition of

58. *Minutes of Conference Session of July 3, 1945* (Document XXI), in REPORT OF ROBERT H. JACKSON at 143, 147-48.

59. I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 27, 42 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS]. Article 6(a) of the Nuremberg Charter defined crimes against peace:

> (a) Crimes against peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 284, reprinted in 39 AM. J. INT'L L. 258 (Supp. 1945) art. 6(a) [hereinafter Nuremberg Charter].

60. I TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 27, 42-65. Article 6(b) of the Nuremberg Charter defined war crimes:

> (b) War crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Nuremberg Charter, *supra* note 59, at art. 6(b).

61. I TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 27, 65-68. Article 6(c) of the Nuremberg Charter defined crimes against humanity:

> (c) Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Nuremberg Charter, *supra* note 59, at art. 6(c).

62. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 466.

63. *Id.*

64. *Id.*

65. *Id.*

superior orders also was narrowly limited: "[t]he true test . . . is not the existence of the order, but whether moral choice was in fact possible."[66]

The Tribunal thus refused to recognize the act of state defense, narrowly limited the defense of following superior orders, and imposed criminal liability on private individuals and public officials for criminal violations of international law. The Tribunal, however, also strictly defined the scope of individual liability for offenses under the Charter. Count One charged the defendants with involvement in a common plan or conspiracy to wage an aggressive war.[67] The elements of the conspiracy charge were not specified in the Charter and the Tribunal adopted a narrow definition which limited liability to those high echelon officials who were present at planning sessions for wars of aggression.[68] Count Two, participation in the planning, preparation, initiation, and waging of an aggressive war,[69] served to convict some of those defendants who were acquitted on the narrowly-drawn conspiracy charge and who had helped to formulate and direct Nazi military tactics, strategies, and occupation plans.[70]

Count Three punished War Crimes.[71] The Tribunal concluded that Germany had "committed [such acts] on a vast scale, never before seen in the history of war."[72] Their scope and intensity was attributed to the Nazi conception of " 'total war' "[73] in which the

> moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties, all alike, are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbarous way.[74]

In order to sustain a conviction under this Count, the Tribunal appears to have required that the evidence "sufficiently connect[ed]" a defendant with the planning, ordering, inciting or commission of war crimes.[75]

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66. *Id.*
67. *Id.* at 29-42.
68. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 467-68. The Tribunal held that a conspiracy must be "clearly outlined in its criminal purpose"; it "must not be too far removed from the time of decision and of action"; and there must be a "concrete plan to wage war." *Id.*
69. I TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 42.
70. Those acquitted on Count One who were convicted on Count Two included Frick, Funk, Dönitz, and Seyss-Inquart. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 544-76.
71. I TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 42-65.
72. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 469.
73. *Id.*
74. *Id.* at 469-70.
75. *Id.* at 529.

Mere knowledge, communication of orders or a proposal of discriminatory laws was not sufficient to support a conviction.[76] The Tribunal also refused to impose liability on German leaders for acts which also had been engaged in by the Allied Powers.[77]

The Tribunal did not distinguish, in its judgment, between War Crimes and Crimes Against Humanity, and the verdicts on Counts Three and Four were identical.[78] It circumscribed the scope of Crimes against Humanity by limiting its jurisdiction over such crimes to those which had occurred from 1939 onwards.[79] The Tribunal conceded that the Nazis' persecution, repression and murder of civilians, particularly in Germany prior to 1939 had been "most ruthlessly carried out."[80] However, as "revolting and horrible" as these acts were, the Tribunal concluded that "it has not been satisfactorily proved that they were done in execution of, or in connection with," either a Crime against Peace or a War Crime.[81] Thus, acts committed prior to 1939 were adjudged to have fallen outside of the Tribunal's jurisdiction.[82]

Article Nine of the Charter granted the Tribunal the discretion to declare (in connection with any act of which an individual may be convicted) that a group or organization of which an individual was a member was a criminal organization.[83] Article Ten permitted the competent national authority of any Signatory to bring individuals to trial before national, military or occupation courts for the crime of membership in a criminal organization. In any such case, Article Ten provided that the criminal nature of the group or organization shall be considered to be proved and shall not be questioned.[84]

Mindful that this "far-reaching and novel procedure . . . unless properly safeguarded, [might] produce great injustice," the Tribunal ruled that "membership alone is not enough" to constitute criminality.[85] The Tribunal limited criminal liability to those voluntary members who had knowledge of the criminal purposes or acts of the organization, and

76. *Id.*

77. *Id.* at 558-59. The Tribunal acquitted Dönitz of the War Crimes charge of waging unrestricted submarine warfare. The Tribunal took judicial notice of the fact that the British Admiralty had adopted a similar policy in the Skagerrak at night; and that the United States practiced unrestricted submarine warfare in the Pacific. Although Dönitz was convicted of War Crimes, the Tribunal emphasized that, as a matter of equity "the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare." *Id.*

78. *Id.* at 524-87; 496-98.

79. *Id.* at 498.

80. *Id.*

81. *Id.*

82. *Id.* at 496-98.

83. Nuremberg Charter, *supra* note 59, at art. 9.

84. *Id.* at art. 10.

85. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 499-500.

to those conscripted for membership who were personally implicated in the commission of criminal acts under the Charter.[86] In its final judgment, the Tribunal thus limited declarations of criminality to those coherent organizations whose members were directly and consistently involved in the commission of crimes under the Charter.[87] In explaining its hesitancy to issue broad declarations of criminality, the Tribunal emphasized that "criminal guilt is personal, and that mass punishments should be avoided."[88]

Thus, the Tribunal generally limited the scope of liability for Crimes against Peace, War Crimes and Crimes against Humanity to high echelon officials who directly planned, ordered and carried out these acts. Declarations of organizational criminality, while broader in scope, were prospective in application and were limited to those organizations and organizational members directly involved in the commission of crimes denounced by the Charter. In the words of Mr. Justice Jackson, who served as one of the American prosecutors at Nuremberg, criminal liability should be limited to "men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. . . . [they were] planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war."[89]

The Tribunal thus did not address the possible collective responsibility of the German people.[90] Instead, Nazi atrocities and aggressions were implicitly portrayed as being the result of the machinations and actions of a small group of zealots. Still, the Court pronounced that the very essence of the Charter is that individuals have "international duties which transcend the national obligations of obedience imposed by the individual state."[91] Although imposing no duty upon individuals, other than those ordered to commit criminal acts, to resist the activities of the Third Reich,[92] the Tribunal was critical of those members of the General Staff and the High Command of the German Armed Forces who "sat silent and acquiescent, witnessing the commission of crimes on a scale

86. *Id.*

87. Declarations of criminality were issued against the Leadership Corps (administrative branch) of the Nazi Party, the Gestapo (internal political police), the SD (intelligence agency of the security police), and the SS (internal security police). *Id.* at 501-17. The Tribunal declined to issue such declarations against the SA (Nazi party militia), the Reich Cabinet, and the General Staff and High Command. *Id.* at 517-23.

88. *Id.* at 500.

89. II TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 105.

90. *See generally* Arens, *Nuremberg And Group Prosecution*, 1951 WASH. L. Q. 329 (1951).

91. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 466.

92. *Id.*

larger and more shocking than the world has ever had the misfortune to know."[93] In his closing statement, British prosecutor Sir Hartley Shawcross argued that those surrounding Hitler had a duty to act to prevent illegal activity:

> Even if it were true that . . . these men might have been dismissed, perhaps imprisoned, had they disobeyed the orders which they were given, would not any fate have been better than that they should have lent themselves to these things? . . . These were the men in the inner councils, the men who planned as well as carried out; of all people the ones who might have advised, restrained, halted Hitler instead of encouraging him in his satanic courses. The principle of collective responsibility of the members of a government is not an artificial doctrine of constitutional law. It is an essential protection of the rights of man and the community of nations; international law is fully entitled to protect its own existence by giving effect to it.[94]

In some instances, Allied World War II war crimes tribunals were willing to impose a positive duty to act to prevent violations of the law of war on civilian and military officials who had knowledge or should have had knowledge of such crimes. In the *Essen Lynching Case*,[95] tried before a British military court, a German private, who was escorting Allied prisoners of war, failed to intervene to protect three British airmen who were attacked and killed by a crowd of German civilians. The Court, *inter alia*, held that although an individual normally has no duty to intervene to assist another, the private,

> as the representative of the Power which had taken the airmen prisoners, had the duty not only to prevent them from escaping but also of seeing that they were not molested. Therefore it was the duty of the escort, who was armed with a revolver, to protect the people in custody.[96]

The Tokyo War Crimes Judgment extended the duty to act beyond those officials who had actual knowledge of War Crimes to those who should, "but for negligence or supineness, have had such knowledge."[97] The Tokyo Judgment further held that an individual with either actual or with constructive knowledge was not "excused for inaction if his office required or permitted him to take any action to prevent such crimes."[98]

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93. *Id.* at 523.

94. XIX TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 466.

95. The Essen Lynching Case, 1 L. REP. TRIALS WAR CRIM. 88 (U.N. War Crimes Comm'n Brit. Mil. Ct. Essen, Germany 1945).

96. *Id.* at 90.

97. Tokyo War Crimes Trial Decision, *quoted in* Falk, *The Nuremberg Defense in the Pentagon Papers Case*, 13 COL. J. TRANSNAT'L L. 208, 231 (1974).

98. *Id.*

In *In re Yamashita*,[99] the United States Supreme Court recognized the vicarious liability of military authorities. The Court affirmed the judgment of a United States military commission adjudging General Tomayuki Yamashita, commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines Islands, guilty of violations of the laws of war for which he was sentenced to death. It imposed an affirmative duty upon military commanders to take acts within their authority to prevent criminal violations of the laws of war by those under their command. It also imposed liability upon such commanders for criminal acts committed by those under their command of which they were aware or should have been aware.[100] The Court explained that the law of war "presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."[101] Thus, Yamashita had "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[102]

In the *Flick* case,[103] an American war crimes tribunal recognized "international law . . . binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual."[104] In the *Zyklon B Case*,[105] a British military court affirmed that "the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist their violation."[106] Yet, World War II war crimes tribunals limited the duty to act to prevent the commission of war crimes to those at the policy level, who either had actual or constructive knowledge of such crimes and the authority to prevent their commission. In *von Leeb*,[107] a United States war crimes court noted that

> [i]nternational law . . . condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we

99. *In re* Yamashita, 327 U.S. 1 (1946).
100. *Id.* at 15.
101. *Id.*
102. *Id.* at 16.
103. The Flick Case, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1 (1952).
104. *Id.* at 1192.
105. The Zyklon B Case, 1 L. REP. TRIALS WAR CRIM. 93 (U.N. War Crimes Comm'n Brit. Mil. Ct. Hamburg, Germany 1945).
106. *Id.* at 103.
107. United States v. von Leeb, 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1 (1950).

> do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers.[108]

The Allied Powers appeared to fear that the extension of criminal liability and of a duty to resist war crimes to ordinary civilians and soldiers would lead to the collective punishment of the German people.

> To depart from the concept that only major war criminals—that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies—may be held liable for waging wars of aggression, would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany, could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishment. . . .
>
> The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result for which there is no precedent in international law and no justification in human relations.[109]

Thus, the Allied war crimes tribunals neither imposed criminal liability nor a duty to act to prevent war crimes on those below the policy level who directly or indirectly supported the activities of the Third Reich. The war crimes tribunals appeared to accept the fact that most Germans were unaware of the commission of war crimes[110] and that the

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108. *Id.* at 489.

109. United States v. Krauch, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, 1124-26 (1952).

110. United States v. Ohlendorf, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, 485 (1950).

price of protest was repression or death.[111] Still, Sir Hartley Shawcross reminded the Nuremberg Tribunal that "[i]t may be the guilt of Germany will not be erased, for the people of Germany share it in large measure . . . ."[112] It was emphasized throughout that "(n)o one can shrug off so appalling a moral responsibility with the statement that there was no point in trying."[113] Although not legally obligated to act, an individual below the policy level clearly would have been legally privileged under the Nuremberg principles to violate domestic German law in order to prevent or to protest the commission of war crimes. In *von Leeb* the Tribunal noted that

> international law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their state, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state.[114]

Individuals arguably would have been legally privileged under international law to take reasonable and proportionate actions to block a train transporting internees to a German concentration camp. The prosecutors and judges who participated in the trial and punishment of such protesters would have themselves been guilty of complicity in war crimes. In *The Justice Trial*,[115] a United States Military Tribunal endorsed the view that "the laws, the Hitler decrees and the draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime."[116]

In his opening remarks at Nuremberg, Justice Jackson emphasized that in the future all States and individuals would be held accountable under the principles established at Nuremberg.[117] Professor Francis Boyle has observed that the lasting significance of Nuremberg is that it "expressly endowed . . . moral considerations with an international legal significance . . . . Hence, human morality — whether premised upon

111. II TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 102-03 (statement of Justice Jackson).

112. XIX TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 434.

113. United States v. Ohlendorf, *supra* note 110, at 482.

114. United States v. von Leeb, *supra* note 107, at 489.

115. The Justice Trial, 4 L. REP. TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n American Mil. Trib. Nuremberg, Germany 1947).

116. *Id.* at 49.

117. II TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 154-55.

religious, ethical, or humanistic grounds — becomes both legally and politically relevant . . . ."[118] Sir Hartley Shawcross urged in his statement at Nuremberg that there must be a recognition of both "fundamental human rights" and of "fundamental human duties,"[119] and that "there comes a point where a man must refuse to answer to his leader if he is also to answer to his conscience."[120] For Americans and other citizens of democracies, who possess the opportunity of being informed as to their governments' activities and who generally do not face severe repression or death if they protest, the moral duty and legal privilege to act to resist violations of the Nuremberg Principles arguably is more compelling than it was for those who lived under the Third Reich.[121]

IV. NUREMBERG AND CONTEMPORARY HUMAN RIGHTS TREATIES

The Nuremberg Principles have been affirmed in substance and in spirit on numerous occasions in various international instruments.[122] Professor Cherif Bassiouni has observed that the Nuremberg Principles have become

> part of the general principles of international law, and, as such, constitute one of the sources of international law as stated in Article 38 of the Statute of the International Court of Justice. In addition, these Principles are the basis for the elaboration of an international criminal code and the creation of an international criminal court even though both have yet to become legal realities.[123]

The events of World War II and the Nuremberg Principles also helped to inspire the contemporary human rights movement which extended Nuremberg and imposed a duty upon States to respect those rights enumerated in human rights treaties.[124]

The Nuremberg Principles and their progeny are binding upon American state and federal governments. The United States Supreme Court has recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions, as often as questions of right depending upon it are

118. Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, 80 NW. U. L. REV. 1407, 1431 (1986).
119. III TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 59, at 106 (1948).
120. *Id.* at 144.
121. *But see* Pollak, *Crime & Punishment*, 12 MOTHER JONES 21 (May, 1987).
122. Lippman, *The Denaturalization of Nazi War Criminals in the United States: Is Justice Being Served?*, 7 HOUS. J. INT'L L. 169, 207-12 (1985).
123. Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 202, 235 (1979).
124. Lippman, *Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights* 10 CAL. W. INT'L L.J. 450, 457-58 (1980).

duly presented for their determination."[125] International law, according to the Supreme Court, "may be ascertained by consulting the works of jurists, writings professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law."[126] Where there are no controlling executive or legislative acts or judicial decisions, international law may be determined by the "customs and usages of civilized nations."[127] A recognized "custom and usage" must have the "general assent of civilized nations" in order to insure that domestic courts will not "impose idiosyncratic legal rules . . . in the name of applying international law."[128]

The Charter of the United Nations obligates Signatories to promote "human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[129] The Charter does not explicitly define human rights, but the concept is given definition by the provisions of various multilateral human rights instruments.[130] American courts have recognized that, although the United States is not a signatory to these treaties, they constitute customary international law which is binding on the United States.[131] The State Department has also recognized that "there now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity."[132]

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125. The Paquete Habana, 175 U.S. 677, 700 (1900).

126. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); Lopes v. Schroeder, 225 F. Supp. 292, 295 (E.D. Pa. 1963).

127. The Paquete Habana, 175 U.S. at 700. *See generally* Statute of the International Court of Justice, Article 38(1)(b), 59 Stat. 1055, T.S. no. 993, 3 Bevans 1153, 1976 U.N.Y.B. 1052 (done at San Francisco, June 26, 1945) (entered into force for the United States, Oct. 24, 1945).

128. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (citing the Paquete Habana, 175 U.S. at 694).

129. U.N. CHARTER art. 55, 59 Stat. 1031, T.S. no. 993, 3 Bevans 1153, 1976 U.N.Y.B. 1043 (done at San Francisco, June 26, 1945) (entered into force for the United States, Oct. 24, 1945); U.N. CHARTER arts. 1(3), 13(b), 56, 62(2), 73(a) & (b).

130. *See generally Universal Declaration of Human Rights*, December 10, 1948, G.A. Res. 217(111), U.N. Doc. A/810, at 7 (1948); *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316 (1967) (opened for signature, Dec. 19, 1966; entered into force, Mar. 23, 1976) (signed by the United States, Dec. 31, 1979); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1967) (opened for signature, Dec. 19, 1966; entered into force, Jan. 3, 1976) (signed by the United States, Dec. 31, 1979).

131. Filartiga v. Pena-Irala, 630 F.2d at 879-84; *see also* Lareau v. Manson, 507 F. Supp. 1177, 1187-89, 1192, 1193 nn. 18 & 19 (D. Conn. 1980), *aff'd in part, modified and remanded in part, on other grounds*, 651 F.2d 96 (2d Cir. 1981); Fernandez v. Wilkinson, 505 F. Supp. 787, 795-98 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

132. Filartiga v. Pena-Irala, 630 F.2d at 884 (quoting HOUSE COMMITTEE ON FOREIGN RELATIONS, 96TH CONG., 2D SESS., DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS FOR 1979 at 1 (Jt. Comm. Print 1980).

Human rights treaties, consistent with their purpose, should be interpreted broadly[133] and arguably impose duties and obligations to protect human rights on individuals as well as on nation-states. The preamble to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights, in part, provides, "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."[134] Professor Jordan Paust goes so far as to argue that in

> in response to governmental oppression of authority, the people of a given community have the right under international law to alter, abolish or overthrow any such form of government. Such a government would lack authority and could be overthrown in an effort to ensure authoritative government, self-determination, and the human right to relatively free and equal individual participation in the political process. A regime contrary to the authority of the people is actually an illegal regime seeking to exercise power in violation of several interrelated international precepts. Hence, it has no right under international law to assure its survival.[135]

The Nuremberg Principles and contemporary human rights instruments arguably obligate domestic courts to recognize individuals' legal privilege to act in a nonviolent, proportionate, Gandhian fashion to protest and prevent a regime's continued violations of human rights. Such individuals are serving as private attorneys general on behalf of the international community to ensure compliance with the "common standard of achievement for all peoples and nations."[136] The necessity defense is the legal mechanism which has been used in recent years to translate the legal privilege established under the Nuremberg Principles and human rights treaties into domestic law.

V. THE NECESSITY DEFENSE

Appellate courts have denied protesters standing to raise an international law defense. In *United States v. Berrigan*,[137] defendants were denied standing to raise the legality of United States involvement in

133. *See Vienna Convention on the Law of Treaties*, Article 31(c), U.N. Doc. A/CONF. 39/2b (1969) (done at Vienna, May 22, 1969; opened for signature, May 23, 1969).

134. *See supra* note 130; *see also Universal Declaration of Human Rights, supra* note 130, at Preamble.

135. Paust, *Aggression Against Authority: The Crime Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights* 18 CASE W. RES. J. INT'L L. 283, 297-98 (1986).

136. *Universal Declaration of Human Rights, supra* note 130, at Preamble.

137. 283 F. Supp. 336 (D. Md. 1968).

Vietnam as a defense to the charge of destruction of selective service records. The Court ruled that the defendants "have not been called to serve in the armed forces, are not directly affected by our government's actions in that country, and are not even directly affected by the Selective Service apparatus."[138] Courts have specifically denied defendants standing to raise the Nuremberg defense. In *United States v. Kabat*,[139] the Eighth Circuit Court of Appeals ruled that

> the parties found in the Nuremberg trials to have had a duty to violate domestic law had been required by such law to engage in acts that aided and furthered Nazi violations of international principles. The Tribunal found that those persons had committed war crimes . . . and any privilege to have violated domestic law would have followed from the need to avoid personal liability under international law. It would be a great extension of this argument to hold that persons who remained passive, neither aiding nor opposing their government's international violations, were war criminals merely by virtue of their citizenship or residence in their given countries. And if failure to object does not make one complicit, persons such as the defendants here are in no danger of sanction under international law and can claim no privilege to violate domestic law to protect themselves.[140]

The judiciary has also ruled that the political question doctrine prevents courts from inquiring into the legality under international law of foreign policy and defense matters. In *Davi v. Laird*,[141] a United States District Court in West Virginia refused to declare that the United States' military action in Vietnam and in Southeast Asia was unconstitutional, and refused to issue an injunction against the use of the plaintiffs' taxes to support such activities. The Court held that

> the plaintiffs have failed to demonstrate that their claim may be extricated from the political question rule. It involves precisely that inquiry into principles and policy considerations which the Constitution has committed to political branches, and with which the judiciary is ill-suited to cope. . . . It is crystal clear that if there is one political question in the fabric of government of the Republic, it is whether or not to maintain a war, and if so, whether to maintain it as an imperfect or declared war. Into this seamless web of national and international politics, the courts should not intrude.[142]

138. *Id.* at 341.
139. 797 F.2d 580 (8th Cir. 1986).
140. *Id.* at 580.
141. 318 F. Supp. 478 (W.D. Va. 1970).
142. *Id.* at 484.

Courts in the United States have thus used the standing and political question doctrines to prevent protesters from using international law to challenge the legality of American foreign and defense policies. In recent years, lawyers and civil disobedients have attempted to use the necessity defense to circumvent the courts' use of these doctrines.[143] The necessity defense justifies a violation of the law as being designed to avoid a greater harm. Traditionally, there are four requirements for the necessity defense:

> (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the value at issue.[144]

The choice of evils, or necessity, defense appears to rest upon the utilitarian ground that the law should not punish those who act to avoid a greater harm than is occasioned by a violation of the law. It is thought that the application of the criminal law in such situations would serve no deterrent function, and that the punishment of those who have acted out of "necessity" would bring the law into disrepute.[145]

Political protesters relying on the necessity defense typically claim that they reasonably believe that their acts are necessary in order to prevent a threatened harm, such as nuclear war, which is alleged to be illegal under international law. Their acts are calculated to highlight the threatened harm in order to educate and mobilize public opinion. In *United States v. May*,[146] the defendants justified their actions in reentering a Trident missile base on the grounds that the Trident system is

> a harm that exceeds in magnitude that of the illegal reentry . . . and that by illegally reentering the Base they were preventing an imminent harm which no available options could similarly prevent. [T]hat the construction and deployment of the Trident constitutes preparation for aggressive warfare in contravention of international legal principles, and thus justify[ ] their acts.[147]

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143. For a discussion of other possible legal defenses *see* Lippman, *Civil Disobedience: The Dictates of Conscience Versus the Rule of Law*, 26 WASHBURN L. J. 233, 240-51 (1987).

144. Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 379, 433 N.E.2d 457, 461 (1982).

145. *See generally* Luckstead, *Choice of Evils Defenses in Texas: Necessity, Duress, and Public Duty*, 10 AM. J. CRIM. L. 179, 181 (1982).

146. 622 F.2d 1000 (9th Cir. 1980).

147. *Id.* at 1008.

There has been widespread trial court recognition of the necessity defense in protest cases, which has resulted in most of the defendants in such trials gaining an acquittal.[148] While these cases have little precedential value, they have received significant media attention and have inspired other protesters to invoke the defense.[149] At the same time, however, there has been "near uniform" appellate court affirmation of those trial courts which have denied the defense.[150] Thus, in general, the only available written judicial discussions of the necessity defense have rejected its applicability in political protest cases.[151] These appellate decisions, rejecting the use of the necessity defense, have concluded that the harm which was intended to be prevented by the protesters was not sufficiently immediate or imminent to invoke the necessity defense, that the protesters' acts were not calculated to eliminate the threatened harm, and that there were available legal alternatives through which protesters might have attempted to change the governmental policy which they viewed as posing a harm.[152]

As stated, appellate courts have held that the harm to be prevented by protesters was not sufficiently immediate and imminent to justify the invocation of the necessity defense. In *State v. Warshow*,[153] the defense of necessity was denied to protesters at a nuclear power plant on the grounds that low-level radiation and nuclear waste were "long-range risks and dangers that do not presently threaten health and safety."[154] The possibility of a nuclear accident was dismissed as a "speculative and uncertain" danger.[155] Thus, the court concluded that the defendants had the time to exercise options other than breaking the law.[156] In *State v. Dorsey*,[157] the Supreme Court of New Hampshire added that the necessity defense was not applicable to either "nonimminent or debatable harms" or "activities that the legislative branch of government had expressly sanctioned and found not to be harms."[158] The court went on to argue that to permit nuclear power plants to be considered a danger or a harm within the necessity defense would require lay jurors to determine highly technical matters on the basis of expert testimony.[159] The court

148. Levitin, *Putting the Government on Trial: The Necessity Defense and Social Change*, 33 WAYNE L. REV. 1221, 1223 (1987).
149. *Id.* at 1224.
150. *Id.* at 1223.
151. *Id.* at 1224.
152. *See infra* notes 153-77.
153. 138 Vt. 22, 410 A.2d 1000 (1979).
154. 138 Vt. at 25, 410 A.2d at 1002.
155. *Id.*
156. *Id.*
157. 118 N.H. 844, 395 A.2d 855 (1978).
158. 118 N.H. at 846, 395 A.2d at 857.
159. *Id.*

observed that the "competing harms statute is intended to deal only with harms that are readily apparent and recognizable to the average juror."[160] In cases such as *Marley*,[161] where protesters occupied the local offices of the Honeywell Corporation in order to halt the corporation's manufacture of anti-personnel weaponry used in Vietnam, the courts have held that the harm to be avoided was not sufficiently immediate and that the defendant's actions would not be effective in alleviating the distant harm.[162]

Appellate courts have also held that resisters' actions were not sufficiently calculated to eliminate the threatened harm to satisfy the requirement that the action be effective as the direct cause of abating the danger.[163] In *Commonwealth v. Averill*,[164] a Massachusetts Superior Court held that the only impact that demonstrators at a nuclear power plant "could hope to make on the general public was through the news of their arrest. However that might assist their cause in the long run, publicity designed to marshal public opinion could not extinguish an immediate peril, if there was one."[165] The Eighth Circuit Court of Appeals noted, in a prosecution for the destruction of draft records to protest the Vietnam War, that the defense of necessity is not applicable "where the actor's purpose is to effect a change in governmental policies which, according to the actor, may in turn result in a future saving of lives."[166]

Political protesters seeking to invoke the necessity defense, according to appellate courts, merely "are impatient with less visible and more time-consuming alternatives. Their impatience does not constitute the 'necessity' that the defense of necessity requires. Consequently, courts have held that where an individual has reasonable legal alternatives to violate the law, the necessity defense is inappropriate."[167] In *Kabat*,[168] the Court emphasized that the necessity defense was never intended to excuse criminal activity by those who merely disagree with the democratically derived decisions of the legislative or executive branches of government. The court pointed out that this would result in judges and juries interfering with the prerogatives reserved to other branches of government under the separation of powers.[169] In *United States v. Quilty*,[170] the

160. 118 N.H. at 846-47, 395 A.2d at 857.
161. State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973).
162. 54 Haw. at 472, 509 P.2d at 1109.
163. United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972).
164. 12 Mass. App. Ct. 260, 423 N.E.2d 6 (1981).
165. 12 Mass. App. Ct. at 262, 423 N.E.2d at 7-8.
166. United States v. Kroncke, 459 F.2d 697, 701 (8th Cir. 1972).
167. United States v. Dorrell, 758 F.2d 427, 431 (9th Cir. 1985).
168. 797 F.2d at 580.
169. *Id.* at 591.
170. 741 F.2d 1031 (7th Cir. 1984).

Seventh Circuit Court of Appeals observed that there are "thousands of opportunities for the propagation of the anti-nuclear message in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by release of information to the media, to name only a few."[171]

Thus, appellate state and federal courts have rejected the necessity defense as an attempt by protesters to circumvent the standing and political question doctrines and to challenge governmental action "through the back door, by using it as a defense to a charge that they deliberately brought on themselves, one that bears no genuine relationship to the government program that they seek to attack."[172] These courts have refused

> to render judgments upon the legality of the conduct of the government at the request of any person who asks us to because he happens to think that what the government is doing is wrong. He must be able to show some direct harm to himself, not a theoretical future harm to all of us that may not occur. To consider defendants' argument would put us in the position of usurping the functions that the Constitution has given to the Congress and to the President.[173]

Acceptance of the necessity defense in such circumstances, according to one California court, would lead to an "anarchical result"[174] and

> would mean that markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment.[175]

In *United States v. Moylan*,[176] the Fourth Circuit Court of Appeals argued that to

> encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.[177]

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171. *Id.* at 1033.
172. 622 F.2d at 1009.
173. *Id.*
174. People v. Weber, 162 Cal. App. 3d Supp. 1, 6, 208 Cal. Rptr. 719, 722 (1984).
175. 162 Cal. App. 3d Supp. at 5, 208 Cal. Rptr. at 721.
176. 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).
177. *Id.* at 1009.

At sentencing, appellate courts have been willing to endorse relatively harsh punishments for civil resisters, seemingly viewing resisters as posing a threat to the social order. In *State v. Wentworth*,[178] the New Hampshire Supreme Court affirmed a sentence of six months imprisonment and a suspended sentence for a first time offender convicted of criminal trespass.[179] The court stressed that the defendant was an educated, highly motivated individual who, while not in need of rehabilitation, "might be induced by a more severe sentence to use lawful, instead of unlawful means to protest. The object is not to stifle protest, but to deter unlawful conduct."[180] In *Kabat*,[181] four protesters occupied and vandalized a Minuteman II intercontinental missile site and were sentenced to terms ranging from eight to eighteen years in prison plus other penalties.[182] Judge Bright in his dissent,[183] observed that

> the protest activities in this case injured no one and did not, and could not damage the missile capability at the missile site. The sentences are akin to penalties often imposed on violent criminals, such as robbers and rapists, or on those guilty of crimes considered heinous, such as drug dealers.[184]

VI. THE NECESSITY DEFENSE RECONSIDERED

Appellate courts' refusal to extend the necessity defense to political demonstrators overlooks the fact that " 'the law' is not a body of systematised rules enacted as a whole and fixed for all time. Judges have always exercised the power of developing the law, and this is now recognised to be a proper part of their function."[185] Professor Laurence Tribe argues that when confronted with cases involving controversial issues over which there is no clear social consensus, courts should adopt procedures that facilitate a full debate. Tribe concludes that it "would not seem a usurpation for courts to identify particular areas of moral and social flux; to hold that these areas are not characterized by normative agreement sufficient to warrant their continued codification in the form of binding and determinate rules; and to insist as a matter of due process in the formation (formulation and application) of law, that disputes in such areas must be resolved without resort to mechanical rules."[186]

178. 118 N.H. 832, 395 A.2d 858 (1978).
179. 118 N.H. at 842, 395 A.2d at 865.
180. 118 N.H. at 843, 395 A.2d at 865.
181. 797 F.2d at 580.
182. *Id.* at 593.
183. *Id.* at 592.
184. *Id.* at 594.
185. Williams, *The Defence of Necessity*, 6 CURRENT LEGAL PROBS. 216, 224 (1953) (spellings as in original).
186. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 310 (1975).

The interests in democratic debate and decision-making dictate that courts flexibly interpret the necessity defense and permit the defense to be invoked by those protesting social and political policies.[187] Courts concede that the harm caused by nonviolent civil resisters is minor when compared to the potential harm which would result from an event such as a nuclear exchange.[188] This imbalance between the harm caused by the activities of protesters and the consequences of the harm to be averted suggests that the requirements that the harm be both immediate and imminent should be relaxed. A nuclear exchange is, arguably, reasonably likely, given contemporary arsenals and strategic doctrines, and the potential impact is so devastating that the immediate and imminent requirements ought to be adjudged to be satisfied.[189] Human rights violations, such as those in Central America, are ongoing and severe and should also satisfy the harm prong of the necessity defense.[190] Although these harms are not strictly present, resisters clearly cannot take effective, nonviolent steps to limit complex harms such as nuclear war, or a distant harm such as apartheid in South Africa. Two commentators argue that "[n]o matter how improbable or temporally remote the threatened harm, should not the scales be tipped in favor of a defendant who sought to avoid that threatened harm by an act that posed no threat to anyone?"[191] Aldridge and Stark, in their seminal article on the necessity defense and protest against nuclear weapons conclude that:

> The nature of harm and of imminence is one thing for a person threatened with a fire, robbery or murder. But for the prevention of nuclear war, the elements of necessity must be perceived in a different dimension. The gravity of the harm—hundreds of millions of people killed and the rendering of the planet uninhabitable—must be realistically weighed against the means used to prevent it. Under some modern circumstances a time urgency can be measured in microseconds. . . . It is not possible to depend solely on classical concepts which are no longer realistic or meaningful.[192]

While resisters' acts may not be calculated to directly remove a threatened harm, the acts of disobedients historically have served as a

187. This flexible approach is advocated by H. GROSS, A THEORY OF CRIMINAL JUSTICE 284-86 (1979).

188. 741 F.2d at 1033.

189. *See* Boyle, *supra* note 118, at 1431-43.

190. *See generally* R. BRODY, CONTRA TERROR IN NICARAGUA: REPORT OF A FACT FINDING MISSION: SEPTEMBER 1985-JANUARY 1985 (1985).

191. Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DEN. L. J. 839, 854 (1975).

192. Aldridge & Stark, *Nuclear War, Citizen Intervention and the Necessity Defense*, 26 Santa Clara L. Rev. 299, 327 (1986).

catalyst for social change in the United States. Nonviolent resistance has focused attention on issues, provoked debate and mobilized public opinion.[193] Given the magnitude of the harm to be averted and the minimal damage caused by acts of nonviolent resistance, it would appear reasonable to consider that the act requirement of the necessity defense is satisfied by public, nonviolent acts of protest, reasonably calculated to direct public attention to a situation reasonably perceived to pose a significant harm.

While courts are correct in arguing that there are available channels of popular expression in the United States, it also is true that decisions, particularly in the area of foreign policy, are at times undertaken without congressional debate and authorization or popular consultation.[194] Those working for social change through conventional channels also have experienced harassment and intimidation which has deterred individuals from actively supporting their cause.[195] Individuals often lack the resources, skills and organization to significantly influence many public policy decisions. Where individuals are able to demonstrate a history of social activism, courts should consider the exhaustion of other means requirement to have been satisfied.

The necessity defense historically has been a flexible doctrine which has been used successfully by defendants in a variety of situations;[196] most recently to justify prison escapes.[197] It is designed to permit juries to weigh the moral justiciability of defendants' actions. Arnolds and Garland argue that:

> Theoretically, submitting the value issue to the jury would be in keeping with the concept of trial by jury. Where activity falls within the "penumbra" of the law or where disagreement exists in a society about a moral issue or the extent to which a value is absolute (admitting of no exception) or relative, there seems to be little reason why a defendant should not be allowed in the first instance to have the jury as the "conscience of the community" and his peers decide whether he made an objectively correct choice of values. If the jury decides in the defendant's favor, he is vindicated. If the jury votes to convict, the defendant still has a right to appeal its decision.
>
> When a defendant raises a good faith defense of necessity,

193. *See* Backus, *supra* note 42; Conney, *supra* note 43. *See generally*, Lynd, *supra* note 41.

194. *See* Barnet, *The Costs and Perils of Intervention*, in LOW-INTENSITY WARFARE: COUNTERINSURGENCY, PROINSURGENCY, AND ANTITERRORISM IN THE EIGHTIES (1988).

195. *See* N.Y. Times, Sept. 15, 1988, at A20, col. 5.

196. *See State v. Wooten*, No. 2685 (D. Ariz. filed Sept. 13, 1919), quoted in Comment, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 Ariz. L. Rev. 264, 265-68 (1961).

197. *See generally* Comment, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126 (1979).

> that is, when he makes a nonfrivolous claim that his otherwise criminal act was done to preserve some higher value, the jury as the representative of the community should be allowed to decide the issue of relative values. In determining whether or not to allow a defendant to raise the defense of necessity, a trial judge should only decide whether or not the question of values presented by the defendant is frivolous. If the values asserted by the defendant are so bizarre as to be clearly unacceptable to any significant portion of the community, the defense should not be allowed. In the United States, for example, a defendant should not be allowed to raise as a defense to homicide the necessity of saving a cow. But where the value question is not clear, the jury should be allowed to decide not only if the facts alleged by the defendant were extreme as the defendant said they were, but if they were, whether the defendant made the correct choice.[198]

The argument that recognition of the necessity defense in civil resistance cases will lead to widespread violations of the law and to social anarchy[199] is not persuasive. Those concerned with social anarchy would do better to devote their attention to eradicating violent crime. It is unrealistic to believe that an increased amount of civil resistance will undermine the social fabric of a country as large and diverse as the United States, which despite a significant crime rate, is relatively stable. At any rate, few people will be motivated to violate the law as an act of political protest and to subject themselves to the indignities of arrest and of incarceration. They then will face the prospect of marshalling the resources and the experts to present a complex defense and the risk that a judge or a jury will convict them. It must be remembered that those invoking the necessity defense, as discussed in this essay, are not asserting the prerogative of obeying whatever laws they believe are "just," but are acting to force the government to abide by its constitutional obligation to obey the dictates of international law. Thus, they are upholding rather than undermining the rule of law. It only will enhance respect for the legal system if courts, rather than implicitly endorsing the status quo by relying upon the standing and political question doctrines to avoid deciding issues, provide a forum for the articulation of intensely held views and attempt to insure respect for international law.[200]

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198. Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 296 (1974).

199. *U.S. v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970), *quoted in* Comment, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI L. Rev. 1070, 1089 (1987).

200. *See generally* Hughes, *Civil Disobedience and the Political Question Doctrine*, 43 N.Y.U. L. REV. 1 (1968).

VII. CONCLUSION

The denial of the necessity defense in cases involving political protest has resulted in some of our most idealistic and thoughtful citizens being labelled as martyrs and criminals. The necessity defense should be broadened to encompass acts of political protest against severe harms which are reasonably perceived to be violative of international law. A democratic political system tolerates diversity and pluralism and recognizes that reasonable people may differ. Civil resisters, for the most part, are people of passion and principle who are driven to lead by example. They are altruists who possess a strong sense of responsibility. It is unrealistic not to recognize that these individuals differ from the common egoistic criminal.[201] The expansion of the necessity defense would be a recognition that nonviolent disobedience of the law has served an important role in preserving American democracy. Judge Bright, dissenting in *Kabat*, argued that:

> We must recognize that civil disobedience in various forms, used without violent acts against others, is engrained in our society and the moral correctness of political protesters' views has on occasion served to change and better our society. Civil disobedience has been prevalent throughout this nation's history extending from the Boston Tea Party and the signing of the Declaration of Independence, to the freeing of the slaves by operation of the underground railroad in the mid-1800's. More recently, disobedience of "Jim Crow" laws served, among other things, as a catalyst to end segregation by law in this country, and violation of selective service laws contributed to our eventual withdrawal from the Viet Nam [sic] War.[202]

In a mutually interdependent and dangerous world, international law and morality must take precedence over blind national loyalty.[203] In concluding their study of the rescuers of Jews in Nazi Europe, the Oliners conclude that:

> If we persist in defining ourselves as doomed, human nature as beyond redemption, and social institutions as beyond reform, then we shall create a future that will inexorably proceed in confirming this view. Rescuers refused to see Jews as guilty or beyond hope and themselves as helpless, despite all the evidence that could be marshaled to the contrary. They made a choice that affirmed the value and meaningfulness of each life

201. S. Schafer, THE POLITICAL CRIMINAL: THE PROBLEM OF MORALITY AND CRIME 145-47 (1974).

202. 797 F.2d at 592, 601.

203. Toulmin, *The Limits of Allegiance in a Nuclear Age*, in NUCLEAR WEAPONS AND THE FUTURE OF HUMANITY 359, 371 (1986).

in the midst of a diabolical social order that repeatedly denied it. Can we do otherwise?[204]

204. S. Oliner and P.N. Oliner, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE 260 (1988).