



1-1-2012

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Recommended Citation

Matthew Lippman, *Nuremberg and American Justice*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 951 (1991).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol5/iss4/4>

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NUREMBERG AND AMERICAN JUSTICE

MATTHEW LIPPMAN*

*Liberty to breathe provided you don't breathe too deeply; liberty to sleep if your conscience permits it; liberty to work if not too many questions are asked. . . .***

Acts of non-violent civil disobedience have markedly increased over the past decades. The *Nuclear Resister*, a tabloid devoted to the reporting of information on nuclear protests, states that during the decade of the 1980s nearly 37,000 individuals were arrested for protest activities. In 1989, the newsletter recorded an unprecedented amount of anti-nuclear protest, with 5,500 arrests being made in 145 separate incidents in the United States and Canada. Roughly ninety of the arrestees received sentences of between two and seventeen years in prison while hundreds of others received lesser sentences.¹

Tax resisters and civil disobedients protesting American foreign and immigration policy and the arms race increasingly are relying upon international law to justify their formally criminal acts of protest.² Many of these individuals draw analogies between the moral challenges they confront and those presented to the citizens of Nazi Germany and derive inspiration from the principles established by the International Military Tribunal at Nuremberg.³ The centrality of Nuremberg is

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** Kay Boyle, *Decision*, in *THREE SHORT NOVELS* 258 (1982), quoted in C. KOONZ, *MOTHERS IN THE FATHERLAND: WOMEN, THE FAMILY, AND NAZI POLITICS* 318 (1987).

1. *Nuclear Resistance 1989*, The Nuclear Resister, Jan 25, 1990, at 1, col. 1. Arrests totaled 4,470 in 1988; 5,300 in 1987; 3,200 in 1986; 3,300 in 1985; and 3,010 in 1983. *Id.* See generally Lippman, *First Strike Nuclear Weapons and the Justiciability of Civil Resistance Under International Law*, 2 TEMP. INT'L & COMP. L.J. 155 (1989).

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

3. See R.M. BROWN, *Biblical Concepts of Idolatry*, in *SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE* 55, 61 (G. MacEoin ed. 1985).

indicated by the fact that various peace groups have labelled their protests as "Nuremberg Actions."⁴

These groups have drawn a comparison between the necessity of halting the manufacturing and transporting of nuclear weapons or arms destined for Central America and the trains which transported Jews to death camps. As righteous individuals the members of these groups believe they are obligated to sacrifice themselves in order to bear witness to and to halt what they perceive as immoral and illegal activities.⁵ Various professional organizations have voted to adopt "Nuremberg Pledges." In 1985, the International Association of Democratic Lawyers expressed their concern over the incidence of State-sponsored crime and the threat of nuclear war.⁶ They pledged to work in their professional roles as citizens to combat these evils and to establish an international legal framework to assure the deliberate and impartial application of the Nuremberg Principles.⁷

Those who rely upon international law to justify their protests refer to their acts as civil resistance rather than as civil disobedience.⁸ Civil disobedience, as classically defined, is undertaken in accordance with a number of strictures intended to minimize the social disruption resulting from such actions, and designed to emphasize that the disobedient is opposed to a particular law rather than to the entire political system.⁹ Individuals, if possible, should violate the specific law to which they object and should do so in an open, non-violent fashion, plead guilty and accept their punishment. Disobedients believe that the use of force will lead to an escalating cycle of violence and distract attention from the focus of the protest. Because there inevitably is uncertainty concerning the validity of a protester's views, the infliction of harm on others cannot be justified. There is thought to be a close relationship between means and ends and the use of violence also institutionalizes force as a mode of dispute resolution. In addition, violence is viewed as

4. See *Attempted Murder*, GUARDIAN, Sept. 16, 1989, at 1, 7.

5. See generally PRISONERS ON PURPOSE: A PEACEMAKERS' GUIDE TO JAILS AND PRISONS (S. Day ed. 1989).

6. *The Nuremberg Pledge of Lawyers and Jurists*, in SWORDS INTO PLOWSHARES: NONVIOLENT DIRECT ACTION FOR DISARMAMENT 209 (A.J. Laffin & A. Montgomery eds. 1987). The International Association of Democratic Lawyers is an international association of socialist lawyers.

7. *Id.*

8. See generally F.A. BOYLE, *supra* note 2.

9. This discussion of civil disobedience is based upon Lippman, *Civil Disobedience: The Dictates of Conscience Versus the Rule of Law*, 26 WASHBURN L.J. 233 (1967).

reducing people to impersonal objects, which is inconsistent with respect for the individuality and equality of all individuals and with the very humanitarian values which disobedients seek to promote.

A central precept of civil disobedience is that the disobedients plead guilty and accept their punishment in order to indicate the depth of their commitment to their cause and in order to symbolize their willingness to suffer for their beliefs. This demonstrates protesters' belief in and respect for the legal system and is a manifestation of the fact that protesters object to a particular law rather than to the entire legal system. By pleading guilty and accepting their punishment, protesters minimize the possibility that others will be encouraged by their example to arbitrarily disregard the law. Since the Socratic argument benefits from the opportunities presented by a society, a moral person would be acting unjustly if he or she claimed exemption from societal laws and obligation.

Civil disobedience is criticized as profoundly undemocratic in that disobedients are alleged to rely upon coercion and intimidation to achieve their goals. However, civil disobedience, is based upon a supreme belief in the power of democracy in that it is an attempt to appeal to and to mobilize public opinion and sentiment behind the disobedients' cause. To the extent that disobedients violate the law in order to provide for judicial review of the statutes under which they have been indicted, they are helping to insure that existing laws conform to constitutional principles.

Civil resisters accept civil disobedients' basic commitment to non-violence, but base their objections on both morality and international law. Civil resisters claim that they are engaged in legally justifiable acts of protest designed to prevent the government's ongoing commission of acts which are in violation of international criminal law. In this effort, civil resisters typically violate various property laws which only are indirectly related to the motivation for their actions. Civil resisters typically plead not guilty and attempt to offer an international law defense based upon the Nuremberg precedent.¹⁰

10. This defense often is presented indirectly through reliance on traditional common law defenses such as necessity. See Lippman, *The Necessity Defense And Political Protest*, 26 CRIM. L. BULL. 317 (1990). In my experience in civil resistance cases involving Central America, South Africa and nuclear weapons, the defense typically offers to present expert witnesses who elaborate upon and support the reasonableness of the resisters' view that the State conduct being challenged is violative of international law. Other

These protesters thus prefer to view themselves as engaged in acts of justified civil resistance rather than in acts of concededly criminal civil disobedience. By denying their guilt, civil resisters implicitly display a deep cynicism concerning the government. The government is not merely a benign but occasionally misguided enterprise. It is an institution that is capable of intentionally engaging in illegitimate criminal conduct. In such circumstances, it would be ingenuous for resisters passively to plead guilty and to accept the punishment meted out. By seeking to offer a defense, resisters are symbolically distancing themselves from the activities of the government and are promoting the primacy of the rule of law. Their trial provides them with the opportunity to focus public attention on the pattern and impact of governmental illegality and to obtain an independent evaluation of the justiciability of their conduct from a jury of their peers. American appellate courts, however, generally have rejected the so-called Nuremberg defense on the grounds that defendants lack standing to raise such defenses and that the introduction of such defenses would violate the political question doctrine. The judiciary, in essence, refuses to permit defendants to rely upon criminal defenses which indirectly require the adjudication of the legality of United States foreign and national security policies.¹¹

This essay outlines the basic principles established by the Nuremberg Tribunal and by other post-war Allied war crimes trials and argues that these precedents establish a legal privilege for individuals to violate domestic law in order to prevent governmental policies and actions which are reasonably believed to be in violation of international criminal law. In conclusion, the essay argues that the Nuremberg Principles have been recognized as part of the corpus of international law and, as such, are binding on the United States judiciary and should be recognized, on the grounds of both policy and law, as forming the basis for a valid defense in domestic criminal trials.

witnesses attest to the historic role of civil disobedience in bringing about social change.

11. See Lippman, *supra* note 9, at 248-49. Civil resisters, despite their view that the government is engaged in widespread and persistent activity in violation of international law, appear to retain a faith in the judiciary and in the independent authority of the rule of law.

I. THE NUREMBERG JUDGMENT AND PRINCIPLES

Following World War II, the Allied Powers resolved to prosecute the major Nazi war criminals before a multinational tribunal.¹² During the drafting of the Nuremberg Charter at the London Conference of 1945, United States Supreme Court Justice Robert H. Jackson stated that the Allies intended to prosecute "the planners, the zealots who put this thing across. . . . [t]he emphasis should be on the planning level rather than on the mere fact that at some point one voluntarily or involuntarily, knowingly or unknowingly, participated in carrying it out."¹³ The trial of Nazi leaders was viewed as central in helping to create a post-war order based upon democracy, justice and the rule of law.¹⁴

Twenty-two defendants were prosecuted at Nuremberg and were variously indicted and convicted for Crimes against Peace (waging aggressive war),¹⁵ War Crimes,¹⁶ and Crimes

12. *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]. For a full discussion of the Nuremberg trial, see Lippman, *Nuremberg*, 6 LAW IN CONTEXT 20 (1980).

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

14. *American Memorandum Presented at San Francisco, Apr. 30, 1945*, in REPORT OF ROBERT H. JACKSON at 28, 34-35.

15. XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461-68 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS]. Article 6(a) of the Nuremberg Charter defines Crimes against Peace:

- (a) Crimes against peace: Namely, planning, preparation, initiation or waging of 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], cited in Lippman, *Reflections On Non-Violent Resistance And The Necessity Defense*, 11 HOUS. J. INT'L L. 277, 284 n.59 (1989).

16. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 496-98. Article 6(b) of the Nuremberg Charter defines 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 15, at art. 6(b).

against Humanity.¹⁷In retrospect, perhaps the most significant aspect of the Nuremberg judgment is that it established individual liability for acts violative of international law.¹⁸

The Tribunal stated that violations of 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."¹⁹ The Tribunal, in ruling that these international obligations take precedence over the demands of domestic law, observed that "very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state."²⁰ The Tribunal also abrogated the act of state doctrine which provides immunity from legal liability in foreign and international courts to government officials. It pronounced that individuals "cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorizing action moves outside its competence under international law."²¹ In addition, the Tribunal rejected the superior orders defense for crimes under the Charter, ruling that superior orders only may be considered in mitigation of punishment.²²

The Tribunal thus extended international criminal liability to individuals, narrowed the superior orders defense and rejected the act of state defense. This far-reaching extension of international criminal liability to individuals, however, is in stark contrast to the Tribunal's restrictive definition of the elements of the substantive offenses punishable under the Charter. This narrow definition of the substantive offenses had the effect of limiting criminal liability to the Nazi leadership cadre

17. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 498. Article 6(c) of the Nuremberg Charter defines 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 15, at art. 6(c).

18. T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 82 (1970).

19. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 466.

20. *Id.*

21. *Id.*

22. *Id.* The Tribunal also ruled that the test for superior orders is not the existence of an order, but whether a "moral choice was in fact possible."

which was directly responsible for planning, implementing and waging Germany's wars of aggression.

Count One charged the defendants with involvement in a common plan or conspiracy to wage an aggressive war.²³ The Tribunal adopted a narrow definition of conspiracy which limited liability to those high echelon officials who were present at planning sessions for wars of aggression.²⁴ In its judgment, the Tribunal required that the conspiracy must be "clearly outlined in its criminal purpose;"²⁵ it "must not be too far removed from the time of decision and of action;"²⁶ and a "concrete plan" to wage war must have existed.²⁷

Count Three punished war crimes.²⁸ 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.²⁹ Mere knowledge or communication of orders or the proposal of discriminatory laws was not sufficient to support a conviction.³⁰ The Tribunal also was reluctant to impose liability on German leaders for acts which also had been engaged in by the Allied Powers.³¹ In the explanation of its judgment, the Tribunal did not clearly distinguish between those acts which comprised War Crimes and those which constituted Crimes against Humanity and the verdicts on Counts Three and Four were identical.³² The Tribunal narrowed the scope of Crimes against Humanity by limiting its jurisdiction over such

23. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 467-69.

24. *Id.* at 467-68.

25. *Id.* at 467.

26. *Id.*

27. *Id.* Count Two, participation in the planning, preparation, initiation and waging of an aggressive war served to convict some of the defendants acquitted on the narrowly-drawn conspiracy charge. These defendants had helped to formulate and direct Nazi military tactics and occupation plans. *Id.* at 544-76. Those acquitted on Count One who were convicted on Count Two include Frick, *Id.* at 544-47; Funk, *Id.* at 549-52; Donitz, *Id.* at 556-60; and Seyss-Inquart, *Id.* at 574-76.

28. *Id.* at 469-97.

29. *Id.* at 529.

30. *Id.*

31. *Id.* at 558-59. The Tribunal acquitted Donitz of the war crime charge of waging unrestricted submarine warfare. *Id.* at 559. It took judicial notice of the fact that the British Admiralty had adopted a similar policy in the Skageraak at night, and practiced unrestricted submarine warfare in the Pacific. Although Donitz was convicted of War Crimes, the Tribunal emphasized that, as a matter of equity, "the sentence of Donitz is not assessed on the grounds of his breach of the international law of submarine warfare." *Id.* at 559.

32. *See id.* at 496-98, 524-87.

crimes to those which had occurred subsequent to 1939.³³ Although the Tribunal took notice of the fact that the Nazi's persecution of civilians prior to 1939 was ruthlessly carried out, the Tribunal ruled that such repression was not carried out in execution of, or in connection with either a Crime against Peace or a War Crime and thus did not constitute a Crime against Humanity within the meaning of the Nuremberg Charter.³⁴ Acts of persecution, repression and murder committed against civilians prior to 1939 thus were ruled to be outside the Tribunal's jurisdiction in that they were not considered to have been committed in connection with another crime punishable by the Nuremberg Charter.³⁵

Article Nine of the Charter declared that the Tribunal had the discretion to declare (in connection with any act of which an individual may be convicted under the Charter) that a group or organization was a criminal organization under the Nuremberg Charter.³⁶ The Tribunal determined that such a criminal organization must be bound together for a common purpose and must have been formed or used in connection with crimes punished under the Charter.³⁷ It ruled that mere membership in such an organization was not sufficient to constitute criminal behavior.³⁸

The Tribunal limited liability to those voluntary members who had specific knowledge of the organization's criminal purposes or acts of the organization and to those conscripted members who were personally implicated in the commission of criminal acts under the Charter.³⁹ In addition, the Tribunal thus limited its declarations of criminality to those coherent organizations whose members were directly and consistently involved in the commission of crimes under the Charter.⁴⁰ The

33. *Id.* at 498.

34. *Id.* The Tribunal offered an ambiguous distinction between War Crimes and Crimes against Humanity. It explained that in so far as inhumane acts were committed in execution of, or in connection with, an aggressive war and did not constitute War Crimes, they constituted Crimes against Humanity. *Id.*

35. *Id.*

36. Nuremberg Charter, *supra* note 15, at art. 9.

37. *Id.* at art. 10.

38. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 500.

39. *Id.*

40. *Id.* 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 German General Staff and High Command. *Id.* at 517-23.

Tribunal was thus reluctant to expansively interpret the provisions of the Charter punishing membership in criminal organizations, explaining that criminal guilt is personal and that mass punishment should be avoided.⁴¹

Thus the Nuremberg Tribunal generally limited the scope of liability under the Charter to high echelon officials who directly planned, ordered and implemented criminal acts. As a result, Nazi atrocities and aggressions were portrayed implicitly as the acts of those with "brains and authority"⁴² and of "station and rank"⁴³ who did not soil their "hands with blood."⁴⁴ They "were men who knew how to use lesser folks 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 racked with the agonies and convulsions, of this terrible war."⁴⁵ The International Military Tribunal at Nuremberg did not directly address the criminal liability of those below the policy level.

In the *Flick* case,⁴⁶ however, a United States Military Tribunal rejected the argument that international law "is a matter wholly outside the work, interest and knowledge of private individuals."⁴⁷ The Tribunal emphasized that international law binds every citizen just as municipal law. Acts "adjudged criminal when done by an officer of the Government are criminal also when done by a private individual;" their guilt "differs only in magnitude, not in quality."⁴⁸ In another post-World War II war crimes trial, 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 in their violation."⁴⁹

Despite these expansive statements pertaining to the scope of individual liability under international law and the observations of prosecutors that Hitler, of necessity, relied upon others

41. *Id.*

42. II TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 104 (opening argument of Justice Jackson of the United States).

43. *Id.* at 105.

44. *Id.*

45. *Id.*

46. The *Flick* Trial, 9 L. Rep. Trials War Crim. 1 (U.N. War Crimes Comm'n American Mil. Trib., Nuremberg, Germany 1947).

47. *Id.* at 18.

48. *Id.*

49. *Zyklon B Case*, 1 L. Rep. Trials War Crim. 93, 103 (U.N. War Crimes Comm'n Brit. Mil. Ct. Hamburg, Germany 1945).

to execute his plans;⁵⁰ and that "the guilt of Germany will not be erased for the people of Germany share it in large measure,"⁵¹ post-Nuremberg Allied war crimes tribunals remained reluctant to extend criminal liability below the policy-making level.⁵² The Tribunal in the *I.G. Farben Trial*⁵³ noted that the extension of liability below the policy-making level "would lead far afield."⁵⁴ 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."⁵⁵ Under these circumstances, the Tribunal noted that "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 punishments."⁵⁶

Judge Anderson warned, in his concurring opinion in the *Krupp Trial*,⁵⁷ that this would lead to the unprecedented imposition of collective guilt upon ordinary civilians for the criminal actions of their government.⁵⁸ He noted that the extension of criminal liability below the policy-making level would mean, in the future, that ordinary citizens would be required to determine, at their peril, whether the war in which they were required or requested to participate or to support was legally justified.⁵⁹ Under the heat of the moment, the private citizen thus would have to weigh the relevant facts and law and make the unhappy choice between loyalty to their country and adherence to international law.⁶⁰ Judge Anderson further argued that given the ambiguity of international law that this would impose a particularly heavy burden on citizens.⁶¹

50. XIX TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 430 (closing argument of Justice Jackson).

51. *Id.* at 434 (closing argument of Hartley Shawcross, United Kingdom prosecutor).

52. See *The I.G. Farben Trial*, X L. Rep. Trials War Crim. 1, 38-9 (U.N. War Crimes Comm'n, American Mil. Trib., Nuremberg, Germany 1948).

53. *Id.* at 1.

54. *Id.* at 38.

55. *Id.*

56. *Id.*

57. *The Krupp Trial*, X L. Rep. Trial War Crim. 69, 109 (U.N. War Crimes Comm'n, American Mil. Trib., Nuremberg, Germany 1948) (concurring opinion of Presiding Judge H.C. Anderson).

58. *Id.* at 128.

59. *Id.*

60. *The I.G. Farben Trial*, *supra* note 52, at 39.

61. *The Krupp Trial*, *supra* note 57, at 128.

Underlying this reluctance to extend criminal liability for war crimes below the policy-making level was the belief that the great mass of the German people had been exposed to Nazi propaganda and had little, if any, knowledge of the criminal activities of the totalitarian Third Reich.⁶² Those who were informed of the barbarities committed by the Nazis who dared to protest were severely repressed.⁶³ In addition, the Western Powers had the practical consideration that widespread war crimes trials would create animosity and further destabilize German society, and would prevent the creation of a strong German bulwark against Soviet expansionism. Further, many lower-level Nazi operatives possessed valuable skills and intelligence concerning communist activities and were viewed as potentially important additions to the Western Powers' security apparatus.⁶⁴

Despite the fact that World War II war crimes tribunals did not impose legal liability upon ordinary Germans, Germans certainly had the legal privilege under international law to act in a non-violent proportionate fashion to halt the commission of war crimes. This privilege is inherent within the Nuremberg Principles. Otherwise, international law, somewhat paradoxically, would condemn acts in violation of the Nuremberg Charter while countenancing the punishment of those who act to prevent the commission of such crimes. In fact, those who prosecuted or convicted individuals who attempted to shelter Jews and other victims of the Nazi's genocidal policies were themselves guilty of war crimes.⁶⁵

This "Nuremberg privilege" is merely an extension of the principle recognized by Anglo-American common and statutory law that an individual has the privilege to intervene to halt the commission of a crime. Under Anglo-American law, the intervener is permitted to employ deadly force to prevent the commission of a crime likely to cause death or serious bodily harm. It thus cannot be denied that this same privilege permits individuals to engage in non-violent proportionate acts entailing minor violations of regulatory statutes in order to prevent the commission of the type of mass crimes of destruction punishable under the Nuremberg Charter.⁶⁶ Nuremberg then

62. XXII TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 423.

63. *Id.*

64. See generally Lippman, *The Denaturalization of Nazi War Criminals in the United States: Is Justice Being Served?*, 7 Hous. J. INT'L L. 169, 173-77 (1985).

65. The Justice Trial, 4 L. Rep. Trials War Crim. 1, 49 (U.N. War Crimes Comm'n American Mil. Trib. Nuremberg, Germany 1947).

66. See Campbell, *The Nuremberg Defense to Charges of Domestic Crime: A*

serves both as a *sword* which can be used to prosecute war criminals, and as a *shield* for those who are compelled to engage in conscientious acts of moral protest against illegal wars and methods of warfare.⁶⁷

Americans have even a more compelling privilege to act to prevent war crimes than did Germans under the Third Reich. Americans generally have the ability to inform themselves as to their government's activities and do not face savage repression if they protest. Given the variety of media outlets in America, protests may influence a significant audience and potentially may serve as a catalyst for social reform. In addition, United States foreign and defense policies, at times, have a profoundly negative impact upon peoples throughout the globe, many of whom have little capacity or ability to influence their own government, let alone American policy-makers. American citizens thus have a unique ability, and consequent responsibility, to lobby and to work on behalf of these largely invisible and voiceless peoples throughout the world.

II. THE NUREMBERG PRINCIPLES AND INTERNATIONAL AND AMERICAN DOMESTIC LAW

The United Nations has affirmed and elaborated upon the Nuremberg Principles on countless occasions.⁶⁸ For instance, in 1946, the United Nations General Assembly unanimously affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.⁶⁹ Then, in 1947, the United Nations General Assembly requested the International Law Commission to formulate a Draft Code of Offenses Against the Peace and Security of Mankind which incorporated the Nuremberg Principles.⁷⁰ The Code, which has yet to be adopted, elaborates upon the crimes punishable under the Nuremberg Charter and imposes individual responsibility for such acts upon governmental officials as well as upon ordinary citizens.⁷¹

Non-Traditional Approach for Nuclear-Arms Protestors, 16 CAL. W. INT'L L.J. 93, 114 (1986).

67. Falk, *The Circle of Responsibility*, in CRIMES OF WAR 222, 229 (R.A. Falk, G. Kolko & R.J. Lifton eds. 1971).

68. See Lippman, *supra* note 64, at 208-09.

69. G.A. Res. 95(1), U.N. Doc. A/236 at 1144 (1946), *quoted and cited in* Patterson, *The Principles of Nuremberg as a Defense to Civil Disobedience*, 72 MO. L. REV. 33, 37 n.26 (1972).

70. G.A. Res. 177(11), U.N. Doc. A/505 at 1280 (1947), *quoted and cited in id.* at 37, n.27.

71. Int'l L. Comm'n Draft Code of Offenses Against the Peace and

Professor Cherif Bassiouni concludes that the Nuremberg Principles are "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 International Court of Justice."⁷² Professor Bassiouni's view has been supported by various commentators⁷³ who agree that given the widespread international support for the Nuremberg Principles, their unanimous adoption by resolution of the United Nations, and their incorporation by statute into the domestic law of several nations, that "there is a strong argument that they are part of customary international law."⁷⁴

The Nuremberg Principles thus are not a "one-shot affair," but are part of international law which, in turn, is part of the domestic law of the United States.⁷⁵ Article VI, paragraph 2 of the United States Constitution provides that the rules of international law as embodied in treaties entered into pursuant to the sovereign authority of the United States of America are part of the supreme law of the land.⁷⁶ The United States Supreme Court has recognized that both the principles of positive treaty and customary international law are binding on the United States and are to be applied by United States courts.⁷⁷ William O'Brien concludes that "the totality of international practice adds up to the conclusion that the Nuremberg [P]rinciples are binding on the United States as a result of customary international practice."⁷⁸ O'Brien goes on to note that

Security of Mankind, 5 U.N. GAOR, Supp. 9, U.N. Doc. A/1858, at 10-14 (1951) cited and quoted in *Id.* at 37 n.28, reprinted in Komarow, *Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems*, 29 INT'L & COMP. L.Q. 21, 36-37 (1980).

72. Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 202, 235 (1979). 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).

73. See Kaufman, *Judgment at Nuremberg—An Appraisal of its Significance*, 40 GUILD PRAC. 62, 79 (1983).

74. Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 408 (1989).

75. Woetzel, *The Nuremberg Trials and Objection to Military Service in Vietnam*, 63 AM. SOC'Y INT'L L. PROC. 140, 167 (1969).

76. U.S. CONST. art. VI, para. 2.

77. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also *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).

78. O'Brien, *Selective Conscientious Objection and International Law*, 56 GEO. L.J. 1080, 1092 (1968). The Nuremberg Principles also are binding on the United States as an executive agreement entered into by the executive branch. See Lawrence, *supra* note 74, at 405-06. See generally *United States v.*

the United States has endorsed the Nuremberg Principles on numerous occasions;⁷⁹ is a signatory to various agreements regulating the law of war which are inspired by and based upon Nuremberg;⁸⁰ and has incorporated the Nuremberg Principles into its law of land and naval warfare.⁸¹

Telford Taylor, who served as chief counsel for the prosecution at Nuremberg, writes that at the conclusion of the Nuremberg trial, America "stood legally, politically and morally committed to the principles enunciated in the charters and judgments of the tribunals."⁸² He concludes that "the integrity of the nation" is staked on continued adherence to these principles which were not limited to those prosecuted at Nuremberg, but were intended to apply to all individuals, regimes and States which may violate them in the future.⁸³ Justice Jackson emphasized in his opening address at the Nuremberg trial that:

[T]he ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.⁸⁴

Despite the status of the Nuremberg Principles as part of customary international law which is constitutionally incorporated into United States law, American courts have refused to permit defendants to invoke the Nuremberg Principles as a defense to criminal charges stemming from politically-inspired acts of criminal protest.⁸⁵ The judiciary has based their rejection of the so-called Nuremberg defense (eg. the claim that individuals are privileged, if not compelled, under international law to halt governmental acts reasonably believed to be

Pink, 315 U.S. 203, 221-26 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

79. O'Brien, *supra* note 78, at 1092.

80. *Id.* at 1093.

81. *Id.* at 1093-94.

82. T. TAYLOR, *supra* note 18, at 94.

83. *Id.*

84. II TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 15, at 154.

85. See KOMAROW, *Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems*, 29 INT'L & COMP. L.Q. 21 (1980).

in violation of the Nuremberg Principles) on the standing and political question doctrines.⁸⁶

In the seminal case of *United States v. Berrigan*,⁸⁷ District Court Judge Northrop ruled that the defendants lacked standing to raise the Nuremberg defense to justify their destruction of Vietnam draft records. Judge Northrop reasoned that the defendants were ordinary civilians who were not in danger of incurring liability under the Nuremberg Principles and thus had no legal duty to resist specific acts which they reasonably believed to be in violation of the Nuremberg Charter.⁸⁸ In *United States v. Kabat*,⁸⁹ the Eighth Circuit Court of Appeals observed that it would be a "great extension" of Nuremberg to hold that persons who "remained passive, neither aiding nor opposing their governments' international violations, were war criminals merely by virtue of their citizenship or residence in given countries."⁹⁰ The court concluded that since ordinary citizens incur no legal liability under Nuremberg they can claim no privilege to violate domestic law in order to exculpate their guilt.⁹¹ In *United States v. Montgomery*,⁹² the Eleventh Circuit Court of Appeals observed that civil disobedients stand Nuremberg "on its head in arguing that a person charged with no duty or responsibility by domestic law may voluntarily violate a criminal law and claim that violation was required to avoid liability under international law."⁹³ Thus, United States courts have denied standing to individuals to raise the Nuremberg defense in cases such as *Berrigan*, *Kabat* and *Montgomery*, where the defendants are unable to demonstrate a specific

86. Lawrence, *supra* note 74, at 417. See generally Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271 (1987).

87. *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968), *aff'd sub nom.*, *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970).

88. *Id.* at 341. Standing is a procedural requirement designed to insure that a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. In part, it is based on the interest in having a case presented in an adversarial context by a party to whom proper judicial relief can be granted. In practice, it permits courts to avoid frivolous suits, advisory opinions, and unnecessary litigation. See generally *Sierra Club v. Morton*, 405 U.S. 727 (1972).

89. *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986).

90. *Id.* at 590.

91. *Id.* See also *United States v. Allen*, 760 F.2d 447, 453 (2d Cir. 1985).

92. *United States v. Montgomery*, 772 F.2d 733, 738 (11th Cir. 1985).

93. *Id.* at 738.

injury or duty distinguishable from that of the general citizenry.⁹⁴

The judiciary also has refused to recognize the standing of members of the armed forces in wartime to raise the Nuremberg defense. In *State v. Marley*,⁹⁵ the Supreme Court of Hawaii held that a member of the United States Navy did not have the legal duty to criminally trespass on and to occupy the premises of the Honeywell Corporation in order to protest and to halt the corporation's activities in Vietnam which he believed constituted war crimes under the Nuremberg Charter.⁹⁶ The Court ruled that "mere membership" in the Armed Forces does not "under any circumstances" create criminal liability under the Nuremberg Principles.⁹⁷ In *Switkes v. Laird*,⁹⁸ the district court ruled that even if the war in Indochina was being conducted in violation of both domestic and international law, a medical officer specializing in psychiatry was not entitled to a preliminary injunction restraining his transfer to Vietnam.⁹⁹ The Court ruled that it was unlikely that the defendant would be required to engage in acts violative of the Nuremberg Charter and that an individual's mere military service in Vietnam did not make them an accomplice to war crimes.¹⁰⁰

In addition to defendants' lack of standing to raise the Nuremberg defense, courts have ruled that the introduction of such a defense is prohibited by the political question doctrine. In *Berrigan*, the District Court ruled that the question whether the deployment of United States troops abroad is in compliance with international law "is a question which necessarily must be left to the elected representatives of the people and not to the judiciary."¹⁰¹ The court denied that this was an "abdication of responsibility" and reasoned that the political question doctrine was a recognition that the decision whether to commit troops in combat "should be assumed by that level of government which under the Constitution and international law is authorized to commit the nation."¹⁰²

94. See *United States v. May*, 622 F.2d at 1000, 1009 (9th Cir. 1980).

95. *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 (1973).

96. *Id.* at 452-53, 509 P.2d at 1099.

97. *Id.* at 475, 509 P.2d at 1110-11. See also *United States v. Valentine*, 288 F. Supp. 957, 986-87 (D. P.R. 1968).

98. *Switkes v. Laird*, 316 F. Supp. 358 (S.D.N.Y. 1970).

99. *Id.* at 365.

100. *Id.*

101. *Berrigan*, 283 F. Supp. at 342.

102. *Id.* The contemporary political question doctrine appears to involve three inquiries: (1) Whether the Court is required to resolve questions committed by the text of the Constitution to a coordinate branch of

In *Farmer v. Roundtree*¹⁰³ two taxpayers claimed the right under international law to refuse payment of two-thirds of their income taxes. They alleged the taxes were being illegally appropriated by Congress pursuant to a conspiracy to prepare for and to wage an illegal aggressive war of world domination.¹⁰⁴ The District Court emphasized that the foreign policy of the United States is the "exclusive province" of the executive and legislative branches and that the courts should refrain from rendering any judgment which would "embarrass the policy decisions of government or involve them in confusion and uncertainty."¹⁰⁵ The court observed that it lacked the expertise to gather and to evaluate the relevant facts and that prolonged litigation would disrupt the policy-making process.¹⁰⁶

In sum, courts have refused to permit the courthouse to be used as a forum for the articulation of political opposition to governmental policies by criminal defendants who cannot allege a judicially cognizable concrete injury. Such individuals have been held to lack standing to challenge government policies in a civil suit,¹⁰⁷ and courts have refused to permit them to "skirt the standing requirement by intentionally breaking an unrelated law in order to cast themselves as defendants rather than plaintiffs."¹⁰⁸ In the end, the judiciary has taken the position that to permit the public order to be disrupted "under the aegis of international law would foment an anarchical result."¹⁰⁹ They have found no support for the proposition that a free and democratic society "must excuse violation of its laws by those seeking to conform their country's policies to international law. Compliance with international law must be sought through the ballot box, or where appropriate, by court

government? (2) Whether the Court is required to decide questions which are beyond its expertise? (3) Whether prudential considerations mandate against judicial intervention? See *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

103. *Farmer v. Roundtree*, 149 F. Supp. 327 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958).

104. *Id.* at 328.

105. *Id.* at 329.

106. *Id.*

107. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-28 (1973).

108. *United States v. Allen*, 760 F.2d 447, 453 (1985).

109. *People v. Weber*, 162 Cal. App. 3d Supp. 1, 6, 208 Cal. Rptr. 719, 722 (1984).

action."¹¹⁰ As the Seventh Circuit observed in *United States v. Cullen*:¹¹¹

One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identified a form of arrogance which organized society cannot tolerate.¹¹²

Although judges purport to view acts of civil resistance as "common crimes," they have meted out particularly harsh sentences to such defendants.¹¹³ In *State v. Wentworth*,¹¹⁴ the New Hampshire Supreme Court affirmed a sentence of six months imprisonment and a two months suspended sentence for a first time offender convicted of criminal trespass at a nuclear power plant.¹¹⁵ The court reasoned that a severe sentence was required in order to convince the highly educated and motivated defendant to utilize lawful means of protest.¹¹⁶ In *United States v. Kabat*,¹¹⁷ the defendants, including two priests, received criminal sentences ranging from eight to eighteen years in prison for having entered a missile silo and chipping the missile lids with a jackhammer. They also poured blood on the silo, draped it with peace banners and prayed.¹¹⁸ Judge Bright, in his dissent,¹¹⁹ observed that the defendants' activities did not injure anyone and did not damage the missile's capability. He admonished the court that the sentences were "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."¹²⁰

110. *In re Weller*, 164 Cal. App. 3d 44, 49, 210 Cal. Rptr. 130, 133 (1985).

111. *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971).

112. *Id.* at 392.

113. *See* 622 F.2d at 1009-10.

114. *State v. Wentworth*, 118 N.H. 832, 395 A.2d 858 (1978).

115. *Id.* at 841-42, 395 A.2d at 864.

116. *Id.* at 841-42, 395 A.2d at 865.

117. 797 F.2d at 580.

118. *Id.*

119. *Id.* at 592.

120. *Id.* at 594.

III. TOWARDS THE RECOGNITION OF A DOMESTIC NUREMBERG DEFENSE

The United States was central in the drafting of the Nuremberg Charter, in organizing the Nuremberg trials and in prosecuting Nazi war criminals. It also performed a leading role in gaining United Nations adoption of the Nuremberg Principles and in constructing a post-war order based upon the rule of international law. Yet, when confronted by criminal defenses based upon the Nuremberg Principles, the American appellate judiciary, which is constitutionally required to respect and to apply international law, has denied defendants standing, has invoked the political question doctrine and has refused to evaluate the legality of American foreign and defense policies. The judiciary's refusal to permit defendants to rely upon the Nuremberg defense may be motivated by a desire to insulate itself from being drawn into political conflicts with the executive and legislative branches. However, in the process of attempting to preserve its neutrality, the judiciary implicitly endorses and legitimates the foreign policy decisions of the political branches of government and abdicates its responsibility to insure that the government adheres to the rule of international law. This results in a foreign policy which, while symbolically adhering to the rule of law, in fact, is largely unrestrained by meaningful legal review.¹²¹

Contemporary international law is intended to constrain, rather than to justify, the self-interested behavior of states. American courts must recognize that they are designed, in part, to protect and to serve people and they are not the exclusive preserve of states. Domestic courts, cognizant of the fact that international institutions provide inadequate mechanisms for the enforcement of international law, must move towards a recognition of a people's international law devoted to the preservation of a fragile global order. Threats such as ecocide, genocide and a nuclear holocaust require the vigorous invocation of the Nuremberg Defense by an alert and aggressive citizenry. Those who are attempting to non-violently compel the United States government to adhere to international law should be recognized as heroes who are to be emulated rather than as criminals who are to be confined. Ironically, it is the criminal courts, so often reviled as agents of repression, which

121. See generally Boyle, *International Law, Citizen Resistance, and Crimes by the State—The Defense Speaks*, 11 Hous. J. INT'L L. 345 (1989).

possess the constitutional discretion to recognize the Nuremberg Defense and help to preserve the sanctity of human life.¹²²

Although the United States was founded by an act of political rebellion and revolutionary violence, there is a common faith that justice and equality can be achieved through the operation of the political process.¹²³ Unfortunately, however, citizens often lack the resources and sophistication necessary to influence the political process; and the government has not always been tolerant of its critics. Another letter always can be written, an additional politician lobbied and more demonstrations organized. It should be sufficient to raise the Nuremberg defense that an individual is able to demonstrate good faith efforts to achieve social reform.¹²⁴

The admonition that protesters have not exhausted their legal alternatives overlooks the fact that historically citizens have been forced to resort to extra-legal means of expression in order to achieve social reform. Judge Bright, dissenting in *Kabat*, observed 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 [sic]. 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.¹²⁵

Acts of civil resistance help to penetrate the psychic numbing which facilitates the acceptance and involvement in evil. These acts also help to preserve the moral integrity of society and to maintain a hope in the goodness of humankind. Few

122. For a discussion of the weakness of international mechanisms and institutions protecting human rights, see 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 (1980). See generally Boyle, *supra* note 121.

123. See Kittrie, *Patriots and Terrorists: Reconciling Human Rights with World Order*, 13 CASE W. RES. J. INT'L L. 291, 295 (1981).

124. See Lippman, *The Right of Civil Resistance Under International Law and the Domestic Necessity Defense*, 8 DICK. J. INT'L L. 349, 371 (1990).

125. *Kabat*, 797 F.2d at 601.

would admonish those who engaged in small acts of resistance to the Nazi regime on the grounds that such acts could not possibly topple the regime or lead to the rescue of all Jews. Although it is unrealistic to expect that a single act of protest can remedy complex social evil, the historical record suggests that small acts of "petty resistance," in aggregate, can exert a profound effect on social attitudes and bring about social reform.¹²⁶

Many advanced and seemingly civilized societies have practiced what, in retrospect, were objectionable social practices.¹²⁷ Today, it would be difficult to condemn acts of non-violent, proportionate resistance undertaken by Native-Americans forced from their land; Japanese-Americans interned during World War II; African-Americans sold into slavery or denied equal access to facilities; or to a Vietnam veteran who refused to spray the toxic chemical Agent Orange. In light of this historical record, Americans would be wise to adopt a tolerant attitude towards those compelled to engage in acts of civil resistance. Today's obscenity may be tomorrow's lyric.

In a humane and democratic society, moral and political conflict should be resolved through discussion and debate. Civil resisters are attempting to uphold rather than to denigrate the rule of law. It only creates frustration and a sense of injustice when courts refuse to permit defendants the opportunity to defend their formally criminal behavior to a jury of their peers. The interests in a narrow application of the standing and political question doctrines pale when compared to the threats posed by a nuclear war, genocide and wars of aggression. The trial of civil resisters should be viewed as an opportunity to conduct judicial town meetings on the issues of the day. Such trials can revitalize democracy by countering the often limited and biased information which is available to the public.¹²⁸ American courts are not unaccustomed to the disposition of political cases and controversial examples. In fact, pursuant to international extradition treaties, the United States has recognized and courts have refused to extradite violent political offenders to stand trial abroad. If we can tolerate, and often celebrate, acts of revolution by those in other countries,

126. On the concept of "petty resistance," see generally Kaufman, *Small Scale Right to Resist*, 21 *NEW ENG. L. REV.* 571, 576 (1985-86).

127. See generally Lippman, *The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law*, 5 *HOUS. J. INT'L L.* 1, 31-32 (1982).

128. Tribe, *Structural Due Process*, 10 *HARV. C.R.-C.L. L. REV.* 269, 310 (1975).

certainly we have the capacity to listen to and to fairly evaluate the justifications offered by civil resisters at home.¹²⁹

IV. LOWERING THE PROCEDURAL BARRIERS: A REVISED APPROACH TO THE STANDING AND POLITICAL QUESTION DOCTRINES

The judiciary's rigid interpretation of the standing requirement under the Nuremberg Principles is reminiscent of the type of formalistic analysis adopted by American courts to avoid cases challenging the institution of slavery in the nineteenth century.¹³⁰ This approach to standing eviscerates the Nuremberg defense and limits its application to a narrow range of cases.¹³¹ There also have been few instances in which prosecutors have been willing to affirmatively enforce the Nuremberg Principles against government leaders.¹³² Thus, in practice, Nuremberg has been rendered a nullity within the American system of justice. The judiciary, in rejecting defendants' standing to raise the Nuremberg defense, ignores the recognized privilege of citizen intervention to prevent the commission of a crime.¹³³ This privilege is particularly compelling when civil resisters are acting on behalf of those who find themselves victimized by repressive regimes or terrorist groups supported by or aligned with the United States. While such situations are not strictly immediate, they constitute a severe and ongoing harm which best can be combated through exerting pressure on the United States government.¹³⁴

129. See Lippman, *The Political Offender Exception in International Extradition Law: Terrorism Versus Human Rights*, 13 INT'L J. COMP. & APPLIED CRIM. JUST. 45 (1989).

130. See R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

131. The judiciary's strict standing requirement for the Nuremberg defense necessarily limits the defense to those who directly resist or those with legal authority who intervene to prevent the commission of a war crime. It is obvious that few soldiers in the heat of battle are in a practical position to assert the defense. See generally D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Resister*, 57 CALIF. L. REV. 1055 (1969).

132. See generally Lippman, *The My Lai Massacre and the International Law of War*, in *TERRIBLE BEYOND ENDURANCE? THE FOREIGN POLICY OF STATE TERRORISM* 313 (M. Stohl & G.A. Lopez eds. 1988).

133. See *supra* notes 65-67 and accompanying text.

134. See generally Lippman, *Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances*, 4 CONN. J. INT'L L. 121 (1988); Lippman, *Government Sponsored Summary and Arbitrary Executions*, 4 FLA. INT'L L.J. 401 (1989).

The judiciary's approach to standing under the Nuremberg defense also overlooks the dynamic nature of international law and the expansion of international rights and duties which has occurred over the course of the last forty years. International law, according to some scholars, has extended the Nuremberg Principles and now formally recognizes a right of non-violent, proportionate citizen resistance to the violation of human rights by states. This right of ideological self-defense, in part, is based upon the realization that it is ill-conceived to exclusively vest the protection of the inherent human rights of peoples in the very regimes which often have an interest in circumscribing criticism, dissent, due process and the provision of social services.¹³⁵

The fact that a defendant is subject to criminal prosecution should guarantee that the defendant faces imminent concrete injury and has the requisite personal stake in the outcome of the trial to guarantee the adversarial litigation of the issues.¹³⁶ While the extension of standing to raise the Nuremberg defense to civil resisters may appear to invite a rash of criminal litigation spawned by idealistic crusaders, few will feel morally compelled to violate the law, expend the time and resources necessary to present a competent defense, and risk criminal conviction and punishment. Most will suppress their moral qualms and accept even the most draconian government policies.¹³⁷ Even if there is large-scale civil resistance, it must be remembered that civil resisters are not asserting a vague moral claim to violate the law. Instead, they are altruistically seeking to enforce a specific legal limitation on the conduct of the government.¹³⁸ In this sense, they are acting as private attorneys general on behalf of the global community.¹³⁹

135. See Lippman, *supra* note 124.

136. *But see* Valley Forge College v. Americans United, 454 U.S. 464, 485-90 (1982).

137. On the tendency of most people to conform to the dictates of authority figures, see S. MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1969). Milgram's research reveals that most people find it extraordinarily difficult to openly violate authoritative commands. *Id.* at 162-64. The psychological literature thoroughly documents that only a select number of highly empathetic individuals are willing to act in an altruistic fashion and to absorb the social costs associated with intervening to remedy a situation of peril. See generally S.P. OLINER & P.M. OLINER, *THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE* 223-60 (1988).

138. *But see* *Flast v. Cohen*, 392 U.S. 83 (1968).

139. An example of the rampant disregard for international law is the systematic and large-scale use of torture in the world. See generally Lippman, *The Protection of Universal Human Rights: The Problem of Torture*, 1 *UNIVERSAL HUM. RTS.* 25 (1979) (now titled *HUM. RTS. Q.*).

In the author's experience, a great percentage of those civil resisters who are permitted to offer an international law defense are acquitted by the jury at the trial court level.¹⁴⁰ This suggests that civil resisters, when afforded the opportunity, are able to convince others of their cause and that courts are not furthering the interests of justice when they construct procedural barriers to the presentation of the Nuremberg defense.¹⁴¹ Those concerned with lawlessness best concern themselves with controlling the rampant crime in the street.

The courts in civil resistance cases, as previously mentioned, also have interpreted the political question doctrine in such a fashion as to render the defendants' claims non-justiciable. This effectively insulates American foreign and military policies from legal accountability and contributes to the perception that international law is an irrelevant consideration in the policy-making process.¹⁴² Justice Brennan in *Baker v. Carr*,¹⁴³ rejected "sweeping statements to the effect that all questions touching foreign relations are political questions" and noted that it was "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁴⁴ As Justice Stewart observed in urging the Supreme Court to relax the political question doctrine and to determine the legality under international law of the Vietnam War, these "are large and deeply troubling questions" which will not "simply go away" merely because the Court chooses to ignore them.¹⁴⁵

The political branches do not possess unlimited discretion in foreign affairs. The Nuremberg Principles limit the sovereign prerogatives of States and a regime's legitimacy rests upon its respect for human rights and restraint in the use of force. Professor Jules Lobel observes that governmental actions which violate either customary international law or multilateral treaties embodying fundamental norms of international law are unconstitutional and void. He argues that the latter international legal limitations, at a minimum, include actions violative

140. See Boyle, *supra* note 121, at 352 (concurring in the author's assertion).

141. See *United States v. Dougherty*, 473 F.2d 1113, 1144 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part).

142. See Falk, *The Nuremberg Defense in the Pentagon Papers Case*, 13 COLUM. J. TRANSNAT'L L. 208, 214 (1974).

143. *Baker v. Carr*, 369 U.S. 186 (1962).

144. *Id.* at 211.

145. *Mora v. McNamara*, 389 U.S. 934, 935 (1967) (Stewart, J., dissenting). See also *Mitchell v. United States*, 386 U.S. 972, 973-74 (1967) (Douglas, J., dissenting).

of the Nuremberg Principles, such as torture, genocide, the assassination of foreign leaders and wars of aggression.¹⁴⁶ In urging courts to abandon the political question doctrine, Richard Falk argues that:

There is no longer any justification for the political question doctrine, which rests on the notion that the judiciary cannot displace Executive discretion. Now that international law has constrained Executive discretion, it seems appropriate for courts to administer these constraints and, indeed, inappropriate to act as if no such constraints exist—which is the effect of applying the political question doctrine to a given situation. . . . To date, however, courts have been hiding beneath the political question cloak without even addressing the substantial question as to whether, in light of shifts in international law, this mode of defense is any longer appropriate.¹⁴⁷

The acceptance of the Nuremberg defense would not necessarily force courts to abandon completely the political question doctrine since courts would not be required to adjudicate the legality of foreign and military policy decisions. The defense merely would permit the defendant to offer evidence and the jury to determine the reasonableness of the defendants' belief that the government policy being challenged is violative of the Nuremberg Principles. It is ingenuous to argue that a criminal trial involving the presentation of expert witnesses will interfere with the conduct of American foreign policy or embarrass the government. A series of acquittals only may serve the cause of democracy by emphasizing to policy-makers that their actions may be violative of international law and at variance with popular sentiments. At any rate, the notion that the judicial branch should insulate the executive and legislature from the legal and factual scrutiny of their policies is contrary to the idea of separation of powers. Democratic government rests upon an informed and vital citizenry capable of checking government abuse. This, of necessity, requires a full flow of information. The judiciary would not be substituting their views for those of elected officials. It merely would be performing their constitutional function of legally reviewing the conduct of the political branches of government. Disregard for the rule of law by the government is contagious and adher-

146. Lobel, *The Limits Of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1137-38, 1146, 1154 (1985).

147. Falk, *supra* note 142, at 214.

ence to international law abroad is vital to the respect for civil liberties at home.¹⁴⁸

V. CONCLUDING OBSERVATIONS

The judiciary's application of the standing and political question doctrines, in combination, results in denying defendants their constitutionally guaranteed right to present a Nuremberg defense.¹⁴⁹ The jury is the conscience of society and Justice Blackmun has observed that it should be a "rare occurrence" in criminal cases when a judge rules on a defense as a matter of law and prevents its submission to the jury.¹⁵⁰ It is hypocritical for the United States government, which was central to the development of the Nuremberg Principles, to profess to respect and to adhere to international law and then to summarily convict and punish those who seek to compel the government to adhere to the rule of law. The judiciary, by elevating procedural detail over the resolution of legal claims, has become an accomplice to governmental lawlessness abroad and the repression of those who seek to vindicate human rights at home. As a result, some of our most idealistic and thoughtful citizens have become labelled as either lunatics, martyrs or criminals. It is time to break down the Berlin Wall which insulates courts from the Nuremberg defense and for the judicial politburo to permit a free marketplace of ideas in the courtroom. Two critics argue for the "open debate of political issues in the courtroom so that deep matters of justice are not settled on shallow grounds of technical law (concealing substantive prejudice), and so that human values, beyond simple acceptance of authority, can begin to determine the decisions of judges and juries."¹⁵¹ In this way, they conclude that the courtroom can be used to further "the political education of the American people."¹⁵²

148. For a comprehensive discussion of the constitutional relationship between the three branches of government in the foreign policy area, see Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 1255, 1305-17 (1988). Cf. Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976). For a partial defense of judicial deference to presidential war powers, see Mikva, *The Political Question Revisited: War Powers and the "Zone of Twilight,"* 76 KY. L.J. 329 (1987-88).

149. Boyle, *supra* note 121, at 350-51.

150. *United States v. Bailey*, 444 U.S. 392, 435 (1980).

151. Zinn & Stewart, *Ideology in the Courtroom*, 21 NEW ENG. L. REV. 711, 724 (1985-86).

152. *Id.*

The early common law, appreciating the weakness of governmental institutions, authorized citizens to arrest wrongdoers. The international community faces severe threats to global stability and yet has failed to develop institutions capable of controlling the self-interested criminal conduct of strong nation-states. This threat, in part, can begin to be checked by a vigorous citizenry which, as during the first four to five hundred years of the common law, takes responsibility for policing its own community and invokes the Nuremberg privilege to limit governmental abuse.¹⁵³

Allegiance to the nation-state must be replaced by a loyalty to the human community and by a respect for international law. It is not the rebel who threatens civilization, but the compliant conformist who mechanically suppresses his moral qualms when confronted with the dictates of authority. The famous therapist R.D. Laing reminds us that the perfectly adjusted bomber pilot poses a greater threat to the survival of the human species than does the hospitalized schizophrenic.¹⁵⁴ Laing goes on to note that so-called normal individuals have been responsible for the unnecessary death of perhaps one hundred million of their fellow human beings in the twentieth century.¹⁵⁵

The German philosopher Karl Jaspers, some forty years ago, reflected on the subject of German guilt: "The essential point is whether the Nuremberg trial comes to be a link in a chain of meaningful constructive political acts, or whether by the yardstick there applied to mankind the very powers now erecting this Nuremberg trial will in the end be found wanting."¹⁵⁶ Richard Falk writes that Jaspers' "Nuremberg Promise" has gone unfulfilled.¹⁵⁷ However, there still remains time for all of us to transform ourselves into selective conscientious objectors against illegal assertions of sovereign authority.¹⁵⁸ In this process, we hopefully will revitalize the Nuremberg Principles, American democracy and ourselves.

153. See generally Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1936).

154. R.D. LAING, *THE POLITICS OF EXPERIENCE* 120 (1967).

155. *Id.* at 28.

156. Quoted in R. FALK, *REVITALIZING INTERNATIONAL LAW* 222 (1989).

157. *Id.*

158. See Lippman, *The International Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL. W. INT'L L.J. 31 (1990). The United States Supreme Court has ruled that United States law does not recognize the right to selective conscientious objection to military service. See *Gillette v. United States*, 401 U.S. 437 (1971).

