

INTERNATIONAL LAW, CITIZEN RESISTANCE, AND CRIMES BY THE STATE—THE DEFENSE SPEAKS*

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I. INTERNATIONAL CRIMINALITY

Since January of 1981, the people of the world have witnessed a government in the United States that demonstrates little if any respect for fundamental considerations of international law and organization, let alone appreciation of the requirements for maintaining international peace and security. What we have all watched instead is a comprehensive and malicious assault upon the integrity of the international legal order by a group of men and women who are thoroughly Machiavellian in their perception of international relations and in their conduct of both foreign policy and domestic affairs. This is not simply a question of our giving or withholding the benefit of the doubt when it comes to complicated matters of foreign affairs and defense policies to a U.S. government charged with the security of both its own citizens and those of its allies in Europe, the Western Hemisphere, and the Pacific. Rather, the Reagan administration's foreign policy represents a gross deviation from those basic rules of international deportment and civilized behavior that the United States government had traditionally played the pioneer role in promoting for the entire world community. Even more seriously, in several instances, specific components of the Reagan administration's foreign policy constitute ongoing criminal activity under well-recognized principles of both international law and U.S. domestic law.

Depending upon the substantive issue involved, those international crimes include, but are not limited to, the Nuremberg Offenses—crimes against peace, crimes against humanity, and war crimes, as well as grave breaches of the Geneva Conventions and Hague Regulations—genocide, apartheid, torture, and assassination. In addition, various members of the Reagan administration have committed numerous inchoate crimes

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incidental to these substantive offenses (e.g., planning, preparation, solicitation, incitement, conspiracy, complicity, attempt, aiding, and abetting) that under the Nuremberg Principles are international crimes in their own right. Of course the great irony of today's situation is that forty years ago at Nuremberg, representatives of the U.S. government participated in the prosecution, punishment, and execution of Nazi government officials for committing some of the same types of heinous international crimes that members of the Reagan administration have inflicted upon innocent people around the world.

Furthermore, according to basic principles of international law, all high-level civilian officials and military officers in the Reagan administration who either knew or should have known that civilians or soldiers under their control committed or were about to commit international crimes, and failed to take the measures necessary to stop them, or to punish them, or both, are likewise personally responsible for the commission of these international crimes.¹ This category of officialdom—those who actually knew or at least should have known of the commission of such substantive or inchoate international crimes by persons under their jurisdiction and failed to do anything about them—typically includes the Secretary of State, Secretary of Defense, Director of Central Intelligence, the National Security Advisor, the Attorney General, and presumably the President and Vice-President. These Reagan administration officials, among others, are personally responsible for commission of or at least complicity in the commission of crimes against peace, crimes against humanity, and war crimes as specified by the Nuremberg Principles—at a minimum.

II. DOMESTIC CIVIL RESISTANCE

In direct reaction to the Reagan administration's wanton attack upon the international and domestic legal orders, large numbers of American citizens have engaged in various forms of nonviolent civil resistance activities to protest against distinct elements of the Reagan administration's foreign policy. These citizen protests have led to numerous arrests and prosecutions by federal, state, and local government authorities around the country. Most regrettably for all concerned, many individuals involved in these nonviolent protests have been prosecuted, convicted, and sentenced in a particularly harsh and vindictive manner.

For example, the Reagan administration's offensive nuclear weapons buildup generated protests by numerous groups and individuals against U.S. nuclear weapons installations, facilities, programs, and personalities

1. See, e.g., *Application of Yamashita*, 327 U.S. 1 (1946).

around this country and abroad. In this regard, the Plowshares, the Greenham Common Women, Greenpeace, and the Catholic nonviolent civil resistance group known as Pax Christi were four of the most prominent movements. In addition, much outstanding work in the nuclear area was likewise performed by the numerous groups of individuals who protested the production of plutonium triggers for U.S. hydrogen bombs at the PUREX facility before the Hanford Site in the state of Washington, as well as protesting at the U.S. government's nuclear weapons test facility in Nevada and at the Rocky Flats Nuclear Arsenal in Colorado. Of course, the Nuclear Freeze Movement served as the fountainhead for much of the organizational and intellectual activity in the anti-nuclear arena.

Similarly, the Reagan administration's disingenuous policy of so-called "constructive engagement" toward the criminal apartheid regime in South Africa spawned a nationwide campaign directed against apartheid and U.S. governmental complicity therein. Protests were mounted before the South African Embassy and consulates, business establishments that sell krugerrands, IBM for selling computers to the South African police, and other economic targets. On American college campuses, students vigorously demanded that their administrators divest university portfolios of all stock held in American companies that do business in South Africa. These citizen protests led to numerous arrests and prosecutions for several types of nonviolent civil resistance activities designed to produce official and unofficial condemnation and sanction of apartheid. To a great extent, the anti-apartheid protest movement has been quite successful at producing a marked change toward the adoption of more aggressive policies against South African apartheid at the national, state, local, and university levels.

The Reagan administration's illegal military intervention into El Salvador, Honduras, Costa Rica, and Nicaragua was probably responsible for the greatest number and degree of nonviolent civil resistance activities in America during the 1980's. First came the so-called Sanctuary Movement, which consists of approximately 400 American church and synagogue communities that provide sanctuary to refugees fleeing from the conflicts of Central America in dire fear for their lives. In explicit violation of the requirements of both the 1967 Protocol to the U.N. Convention Relating to the Status of Refugees² and the U.S. Refugee Act of 1980,³ the Reagan administration refused to give these refugees political

2. See Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

3. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1101 (1982)).

asylum so as not to undercut the pseudo-legitimacy of the military dictatorships that actually ruled El Salvador and Guatemala with the active political, economic, and military support of the United States government. To sustain this reprehensible policy, the Reagan administration launched a vicious vendetta against the people who had organized the Sanctuary Movement as an expression of their deeply-held religious convictions. The latter were prosecuted to the absolute limit of the law, if not beyond, despite the protections afforded their activities by the First and Fourth Amendments of the United States Constitution.

Last, but not least, came the self-styled Pledge of Resistance Movement, whose 100,000 members have taken a vow that in the event the Reagan administration decides to launch an invasion of Nicaragua, its membership will engage in a nationwide campaign of nonviolent civil resistance activities designed to terminate such internationally lawless behavior. The Pledge of Resistance Movement has already called out its members on several occasions to demonstrate against the repeated votes by Congress to provide military and so-called humanitarian assistance to the Contra mercenary bands which, at the Reagan administration's behest, have been illegally attacking both the people and the government of Nicaragua in violation of the U.N. Charter, the O.A.S. Charter, the Geneva Conventions of 1949, and two World Court Orders of 1984 and 1986, *inter alia*. These civil resistance activities consisted of sit-ins and other forms of nonviolent protest conducted at federal military installations and the offices of the U.S. congressional representatives and senators who voted in favor of such aid. In significant part these courageous individuals were motivated to protest by the firm conviction that the Reagan administration's foreign policy toward Nicaragua violated fundamental principles of both international law and U.S. domestic law.

III. THE SEPARATION OF POWERS?

Throughout these eight years of opposition to the Reagan administration's gross international lawlessness, there have occurred many disappointments, setbacks, and failures in the defense of those who have engaged in nonviolent civil resistance. Too many brave, courageous, and principled people have been sent to jail or otherwise vindictively prosecuted and punished simply for opposing the ongoing commission of international and domestic crimes by the Reagan administration in its daily conduct of foreign affairs. Many of contemporary America's best and most admirable people have been treated as if they were common criminals, and sometimes prosecuted and punished more severely than murderers, robbers, and rapists. As former U.S. Attorney General Ramsey Clark has aptly put it: "Our jails are filling up with saints!"

Nevertheless, despite this awesome apparatus of governmental repression arrayed against them, it is probably the case that on a day-in and day-out basis there are tens of thousands of people in the United States who are either planning, preparing, committed to, or actively participating in some form of nonviolent civil resistance activity directed against some aspect of the Reagan administration's foreign affairs and defense policies. In the opinion of this author, these activities represent a positive development for the future role of democratic government in the United States with its historical commitment to the rule of law both at home and abroad.

Due to the personal popularity of President Reagan, Congress proved to be completely pusillanimous when it came to the enforcement of respect for its own laws on the part of the executive branch of the federal government. Also, the federal courts were essentially powerless to prevent or impede the gross international lawlessness of the Reagan administration. Even when given a rare opportunity to exercise some small degree of restraint on executive branch excesses in foreign affairs, federal judges generally decided to defer to presidential lawlessness under the so-called doctrines of "political question" or "judicial restraint." For the most part, the members of the federal judiciary completely, and in my opinion quite inappropriately, abnegated any constructive role they might have played in support of the widespread public demand that American foreign policy be conducted in a manner consistent with the requirements of both international law and U.S. domestic law.

Furthermore, there also transpired a "conspiracy of silence" by the mainstream news media in their failure to report on the amount and extent of nonviolent civil resistance activities in America during the 1980's, which by comparison dwarfed the sometimes violent anti-Vietnam War demonstrations of the 1960's. Even worse, this country's self-styled Fourth Estate, for the most part, debased itself into becoming the Reagan administration's compliant lapdog. Until the outbreak of the Iran-Contra scandal toward the end of 1986, the American news media basically served as uncritical transmission devices for the conveyance of whatever propaganda the Reagan administration concocted that day in order to justify its unremitting attacks on the international and domestic legal orders.

Thus, we witnessed a total breakdown of the constitutional doctrine of separation of powers when it came to the illegal and oftentimes criminal conduct of foreign policy by the Reagan administration. In light of this breakdown, large numbers of American citizens decided to act on their own cognizance in order to demand that the Reagan administration adhere to the principles of international law, of U.S. domestic law, and of

U.S. Constitutional law in its conduct of foreign affairs. Mistakenly, however, such actions have been popularly defined to constitute classic instances of nonviolent "civil disobedience" as historically practiced in the United States. And the traditional status-quo-oriented admonition for those who knowingly engage in nonviolent "civil disobedience" has always been that they must meekly accept their punishment for having performed a *prima facie* breach of the positive law as a demonstration of their good faith and moral commitment. Irrespective of whatever happened in this country during the 1960's, however, today nothing should be further from the truth.

IV. CIVIL RESISTANCE VERSUS CIVIL DISOBEDIENCE

Here I would like to suggest a different way of thinking about nonviolent civil resistance activities that were specifically designed to prevent or impede ongoing criminal activity by members of the Reagan administration under well-recognized principles of international and domestic law. Such civil resistance activities represent the last constitutional avenue open to the American people to preserve their democratic form of government with its historical commitment to the rule of law. Civil resistance is the last hope this country has to prevent the Reagan administration from moving even further down the path of lawless violence in Southern Africa, military intervention into Central America, and nuclear confrontation with the Soviet Union.

Such measures of "civil resistance" must not be confused with, and indeed must be carefully distinguished from, acts of "civil disobedience" as traditionally defined. In such civil resistance cases, what we witness 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 of the 1960's where individuals were purposely violating a domestic law for the express purpose of changing it.

These civil resisters are constitutionally presumed to be innocent until proven guilty beyond a reasonable doubt to the satisfaction of a jury in accordance with all the substantive and procedural requirements of due process of law. Furthermore, people who engage in nonviolent civil resistance have a constitutional right to rely upon whatever statutory and common law defenses are generally made available to every other criminal defendant in the jurisdiction concerned (*e.g.*, defense of self, defense of others, necessity, choice of evils, prevention of crime, prevention of a catastrophe, measures otherwise authorized by law, and absence of criminal intent). They are also entitled to receive the most vigorous defense

that can be mounted on their behalf. After all, alleged murderers, robbers, and rapists are entitled to the presumption of innocence, a vigorous defense, and all the protections of due process of law. Society's standards and expectations should be no less for those who have engaged in nonviolent civil resistance activities designed to prevent the ongoing commission of international and domestic crimes by members of the Reagan administration.

Finally, under the First Amendment of the United States Constitution, civil resistance protesters are exercising their right "peaceably to assemble, and to petition the Government for a redress of grievances." Note that the First Amendment does not require their assembly to be "lawful" in a positivist technical sense, but only that it be peaceable. Similarly, ongoing criminal activity committed by officials of the government itself 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 of the American people to engage in acts of nonviolent civil resistance specifically intended for the purpose of preventing or impeding ongoing criminal activity in the conduct of foreign policy on the part of this or any other government in the United States.

V. THE AMERICAN CRIMINAL JURY SYSTEM

Ultimately, therefore, the final arbiter of the constitutionality, technical legality, and overall legitimacy of such acts of nonviolent civil resistance will be the American people themselves. In particular, under the Sixth and Fourteenth Amendments of the United States Constitution, those individuals who have been charged with alleged prima facie breaches of positive law by engaging in acts of nonviolent civil resistance are generally entitled to a trial by a jury of their peers. Thus, it is the American criminal jury system that has proven to be the last bastion of democracy and law against the Reagan administration's pernicious assault on both. I would submit that under currently existing political conditions in the United States of America, our criminal jury system has become a long overlooked but vitally independent institution within the separation-of-powers arrangement created by the Founding Fathers of our Constitution.

Fortunately, the American jury system consists of common, everyday, ordinary citizens. Most Americans consider themselves to be law-abiding and peaceful as well. The fate of those prosecuted for nonviolent civil resistance has therefore been committed by the Constitution to the

common sense of decency, justice, fair play, and peaceableness so characteristic of the American people and thus the typical members of an American jury.

During the past seven years, it has been my personal experience that whenever the members of American juries have been made aware of the Reagan administration's gross international lawlessness, they have consistently refused to convict those who have engaged in acts of nonviolent civil resistance for the express purpose of stopping it. Invariably the jurors have compared the minor nature of the crime for which the defendants were charged, typically trespass, against the monstrous nature of the international crimes committed, supported, condoned, or threatened by U.S. government officials. The jurors usually concluded that the defendants were privileged to act as they did under basic principles of international and U.S. domestic law in order to prevent the ongoing commission of international criminal activity by members of the United States government on an everyday basis.

Because the juries refused to convict these protesters, it is obvious that the latter had never committed any crimes. In other words, these civil resisters were completely innocent of any wrongdoing at all. In essence, the jurors had *sub silentio* ratified the argument that such protesters were merely engaged in the exercise of their First Amendment rights to peaceably assemble, to petition their government for a redress of grievances, or to freely exercise their religion.

It is in this fashion, then, that I believe we must distinguish acts of nonviolent "civil resistance" from acts of "civil disobedience." The former are not crimes, and the people who engage in them are not criminals—at least until they have been proven to be guilty of an offense beyond a reasonable doubt to the satisfaction of twelve men and women sitting on a jury in accordance with all the substantive and procedural requirements of due process of law. Thus, we must not expect those who have performed acts of nonviolent civil resistance to meekly accept any punishment for having committed an alleged *prima facie* breach of a positive law. Rather, we must actively work to obtain their acquittal at trial by a jury of their peers precisely because they were exercising their constitutional rights for the express purpose of restoring to the United States a democratic government with a commitment to the rule of law both at home and abroad. These civil resisters have become the real American heroes for the 1980's.

VI. THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY

I believe it is true that most of the American people are basically

unaware of the gross violations of international law being perpetrated in their name by their own government on a day-to-day basis. Once they have been informed, however, they are clearly outraged and have usually decided to do something to stop the elementally lawless behavior of the Reagan administration around the world. For example, during many of the civil resistance cases I have worked on during the past seven years, the jury acquitted the defendant of all or some of the charges and was afterwards interviewed by representatives of local news media. Routinely it has been the case that several members of the jury will publicly state that they were "shocked" to discover that the United States government was committing such gross violations of international law, and that this factor had led them to acquit the defendants. Moreover, some of the jurors will state that they had been so "radicalized" by the trial that they thought they themselves should go out and start to protest in order to do something about the situation!

In any event, most of the jurors who are permitted to hear and consider our international law arguments in defense of civil resistance protesters invariably reach the conclusion that in light of the international criminal activities by the Reagan administration with respect to nuclear weapons, Central America, South Africa, among other areas, the defendants did what they had to do in order to stop them. I submit that this is precisely the same type of reaction that most American people will have when properly informed and educated about the relevance of international law to the conduct of foreign policy by the Reagan administration or, for that matter, by anyone else. The pernicious thesis incessantly propounded by so-called political "realists," that for some mysterious reason a democracy is inherently incapable of developing a coherent and consistent foreign policy without Machiavellianism, simply reflects their obstinate refusal to accept the well-established primacy of law over power in the American constitutional system of government, and most importantly, in the heart and minds of the common people of America. The future of international law and American foreign policy lies in the hands of the American people—not the bureaucrats, legislators, judges, lobbyists, think-tanks, and self-styled experts who inhabit Washington, D.C.

