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The Right of Civil Resistance Under International Law and the Domestic Necessity Defense

Matthew Lippman*

Morality, if it survives, could protect us from horror, but very little protects morality. And morality, besides, is hard to protect, because morality is only a few thoughts in our heads. And just as we quickly grow accustomed to brutal deeds and make way before them, so we are quickly stunned into foggy submissions by the brutal thoughts which, in our striving for comfort, we have allowed into our minds and which can snuff the life out of morality in a matter of moments if we happen to look the other way. And all the time we are operating under the illusion that we, mere individuals, have no power at all over the course of history, when that is in fact (for better or worse) the very opposite of the case.1

In a 1975 article, Professor Richard Falk argues that “we are undergoing a major reorganization of international life at the present time which will result in drastic modification of the world order system that has prevailed since the Peace of Westphalia in 1648.”2 Although he recognizes the possibility of global extinction, Falk suggests that there is “a positive option premised upon an affirmation of the wholeness of the planet and the solidarity of the human species that could bring about a rearrangement of the power, wealth, and authority that would be more beneficial than anything the world has heretofore known.”3 Falk suggests that this new global order will be based on the primacy of the individual and will stress human rights, self-determination, ecological balance, and peace.4 He predicts that

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

3. Id. at 973.
4. Id.
initially this global reform movement will take shape outside of and in opposition to the traditional centers of state power and will be "populist and antigovernmental in character and origin." Falk urges international lawyers to turn their attention to facilitating the realization of this new global order rather then being content with clarifying "the rights and duties of the various passengers on the planetary cruiseship Titanic."

The contemporary development of popular civil disobedience campaigns directed towards the modification or overthrow of repressive regimes is one of the most significant steps in the development of Falk's new humanistic world order. It is an implicit affirmation that individual human rights are independent of and transcend the limitations prescribed by a State's domestic legal systems. Writing in 1989, Richard Falk points to manifestations of this new movement in China, Poland, the Soviet Union, the Philippines, Chile, South Korea, and Palestine. He concludes that:

[this] new revolutionary movement could be the most significant political development of the postwar era aside from the decolonization movement in Africa and Asia. It discloses the possibility of effectively defying repressive state power, and doing so without causing a bloodbath or deep resentments that lead inevitably to a cycle of one repressive elite succeeded by another.

The essay argues that the international community should recognize a right of nonviolent resistance for those engaged in limited, proportionate actions in defense of fundamental human rights. Such individuals are acting in the nature of private attorneys general who are vindicating the inherent and inalienable international human rights of all individuals in those instances in which the international community has been unwilling or unable to institute democratic reforms. It would be a tragic irony if international law did not specifically protect individuals who are non-violently protesting the often criminal conduct of the very regimes which sanction and repress

5. Id.
6. Id. at 992.
7. Classical international law viewed the individual as only possessing those rights which were granted to them by their domestic legal system. The human rights revolution established a number of internationally recognized human rights, but individuals' enjoyment of those rights remains dependent upon the incorporation of these rights into domestic legal systems. 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, 474-76, 500-02 (1980). See also Lippman, The Debate Over A Bill of Rights in Great Britain: The View from Parliament, 2 Hum. Rts. Q. 25 (1980); Lippman, The Abrogation of Domestic Human Rights: Northern Ireland and the Rule of British Law, in Terrorism in Europe 181 (Y. Alexander & K.A. Myers eds. 1982).
9. Id.
these protesters in retaliation for exposing the regimes' violations of human rights.\textsuperscript{10} Richard Falk writes that:

[because] governments have relinquished their responsibilities to humanity, it has become more important than ever for the peoples of the world to assert . . . what no important leaders in positions of active authority want to affirm: many governments are engaged through the agency of their leaders in committing severe crimes of state. Further, these crimes of state are imposing terrible suffering in all parts of the world . . . \textsuperscript{11}

\section*{I. The Moral Imperative to Protest}

The French existentialists confronted the problem of evil and the extinction of independent France during the Nazi occupation. Jean-Paul Sartre, in his 1950 novel, \textit{Troubled Sleep},\textsuperscript{12} writes "now France is lying on her back, and we can take a good look at her, we can see her like a large broken-down piece of machinery, and we think: That is it—it was an accident of geography, an accident of history."\textsuperscript{13}

Albert Camus, in \textit{The Plague},\textsuperscript{14} written in 1947, utilized the metaphor of a plague of disease-ridden rats which mysteriously descend on a small town to convey the evil which impregnated France during the German occupation. The plague ravages the town, the gates are sealed and its inhabitants are separated from the outside world.\textsuperscript{15} In the town, people

had fallen into line, adapted themselves as people say, to the situation, because there was no way of doing otherwise. Naturally they retained the attitudes of sadness and suffering, but they had ceased to feel the sting . . . . You could see them at street corners, in cafes, or friends' houses, listless, indifferent, and looking so bored that, because of them, the whole town seemed like a railway waiting-room. Those who had jobs went about them at the exact tempo of the plague, with dreary perseverance.\textsuperscript{16}

In \textit{The Rebel},\textsuperscript{17} Camus argues that individuals must rebel and

\begin{itemize}
  \item \textsuperscript{11} R. FALK, REVITALIZING INTERNATIONAL LAW 222 (1989).
  \item \textsuperscript{12} J. SARTRE, \textit{TROUBLED SLEEP} (G. Hokins trans. 1950).
  \item \textsuperscript{13} \textit{Id.} at 53.
  \item \textsuperscript{14} A. CAMUS, \textit{THE PLAGUE} (S. Gilbert trans. 1947) [hereinafter \textit{THE PLAGUE}].
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} at 170-71.
  \item \textsuperscript{17} A. CAMUS, \textit{THE REBEL: AN ESSAY ON MAN IN REVOLT} (A. Bower Trans. 1956)
\end{itemize}
affirm that injustice will not remain unchallenged. Rebellions also
prove that injustice will not remain unchallenged. "Crushed be-
tween human evil and destiny, between terror and the arbitrary, all
that remains . . . is his power to rebel . . . ." Rebellion also in-
sures that the human personality will not become desensitized and
lose its sense of outrage over inhumanitarian behavior. Rebellion,
"though apparently negative, since it creates nothing, is profoundly
positive in that it reveals the part of man which must always be
defended." The rebel thus asserts that justice is so central that he or she is
willing to die rather than to witness its abrogation or compromise.
In this sense, the rebel’s act of individual rebellion is undertaken in
defense of justice for all peoples.

For Camus, the individual must continually resist being drawn into
complicity with evil. In The Plague, Tarrou, one of the protagonists,
remarks in the context of a lengthy exegesis on evil that:

on this earth there are pestilences and there are victims, and it's
up to us, so far as possible, not to join forces with the pestilences
. . . . we should add a third category: that of the true healers.
But it's a face one doesn't come across many of them, and any-
how it must be a hard vocation. That's why I decided to take, in
every predicament, the victim’s side, so as to reduce the damage
done. Among them I can at least try to discover how one attains
to the third category. In other words, to peace.

Camus’ rebellion is a nonviolent struggle. He writes that rebel-

[hereinafter The Rebel],
18. Camus, Beyond Nihilism, in The Rebel, supra note 17, at 302, 303-04.
19. Id. at 304.
21. Id. at 15.
22. Id. at 16.
25. Id.
cause rebellion, in principle, is a protest against death.”

In a 1946 essay, Camus envisioned the possibility that individuals across the globe would coalesce into a transnational movement dedicated to a new social contract and global order. He observed that:

little is to be expected from present-day governments, since these live and act according to a murderous code. Hope remains only in the most difficult task of all: to reconsider everything from the group up, so as to shape a living society inside a dying society. Men must therefore, as individuals, draw up among themselves, within frontiers and across them, a new social contract which will unite them according to more reasonable principles.

II. Towards an Ethic of Solidarity and Nonviolent Resistance

The 1988 report of the Independent Commission On International Humanitarian Issues calls for “an ethic of human solidarity” and a “universal moral perspective” which entails “an almost Copernican change of perspective, from a fractured to a holistic view of human welfare which is centered on the commonality of human interests” and “collective action” to achieve global justice. This call is a recognition that both domestic and international mechanisms for the protection of human rights and dignity often are slow, costly and ineffective and individuals must resort to self-help.

In March 1981, the United Nations Educational, Social and Cultural Organization convened a conference of experts in Freetown, Sierre Leone to consider the individual and collective right of resistance against government violations of human rights. The Final Report of the meeting of experts observes that while the right to resist government oppression historically has been based on natural or divine law, today it is based upon the protection of universally

26. Id.
29. Id.
30. Id.
31. Id.
32. Id.
36. Id. at 221.
recognized human rights. Respect for human rights, in fact, "constitutes at once the aim and the justification for such resistance" and "the notion of a right to resist violations of human rights is inseparable from human rights."

According to the experts, the right to resist is not only based on human rights, but must be exercised in a fashion which is consistent with the requirements of human rights instruments. The means of resistance must be proportionate to the gravity of the human rights which are being violated; and violent resistance may only be relied upon as a last resort in extreme situations after all nonviolent means of resistance have been exhausted. Such extreme situations include colonialism, genocide, and apartheid. Since there is an imbalance of power between protesters and the government, the experts urge the international community to consider how it might assist individuals exercising the right of resistance.

Those exercising various forms of nonviolent protest and resistance often are subjected to severe formal and informal penalties. There is little reliable data, but some insight into the scope of such repression is revealed by examining some of the information compiled by Amnesty International. Amnesty's data indicates that those imprisoned for nonviolent protest activities include: students speaking out against educational and governmental policies; those engaged in anti-governmental demonstrations; workers engaged in union activity; peasants involved in land disputes; and those distributing leaflets critical of regimes. In other cases, demonstrators have been subjected to excessive force and violence.

37. Id. at 221, 227.
38. Id. at 226.
39. Id.
40. Id.
41. Id. at 223.
42. Id. at 226.
43. Id. at 223.
44. Id. at 226.
45. Amnesty International is a human rights group which works on behalf of prisoners of conscience around the world—those detained or imprisoned due to their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, color or language, provided that they have not used or advocated violence. See Statute of Amnesty International, in Larson, A Flame in Barbed Wire: The Story of Amnesty International (1979); J. Power, Amnesty International: the Human Rights Story (1981).
47. Id. at 141 (Venezuela); Id. at 51 (Madagascar).
48. Id. at 76 (Sudan); Id. at 154, 156 (China); Id. at 166 (South Korea); Id. at 149 (Bangladesh).
49. Id. at 96 (Bolivia); Id. at 101 (Chile).
50. Id. at 123 (Mexico); Id. at 130-31 (Paraguay).
51. Id. at 195 (Bulgaria); Id. at 255 (Tunisia).
52. Id. at 129 (Panama).
III. An International Legal Right of Nonviolent Resistance

The great eighteenth century social contract theorists who inspired modern democratic constitutionalism recognized the collective right of popular revolution against tyrannical regimes. John Locke writes that self-defense is “a part of the law of Nature” and if the king “sets himself against the body of the commonwealth...and shall, with intolerable ill-usage, cruelly tyrannize over the whole, or a considerable part of the people; in this case the people have a right to resist and defend themselves from injury....”

Jean-Jacques Rosseau contended that when the prince ceases to administer the state according to the law and usurps the sovereign power,

the state as a whole is dissolved and another is formed inside it, one composed only of members of the government and having no significance for the rest of the people except that of a master and a tyrant. Now, at the moment the government usurps sovereignty, the social pact is broken, and all the ordinary citizens, recovering by right their natural freedom, are compelled by force, but not morally obliged to obey.

The right to rebel against illegitimate governmental authority was incorporated into the documents which form the early foundation for the contemporary human rights revolution. The United States Declaration of Independence recognizes that “all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.” The Declaration goes on to state that governments derive their rights from the consent of the governed and are formed so as to secure these rights. Whenever a government becomes “destructive of these ends,” the Declaration asserts that it is the right of the people “to alter or abolish it,” and to institute a new government based on the principles which “they believe are likely to secure their happiness and safety.”

The Declaration of Independence emphasizes that the overthrow

54. Id. at 196.
55. Id.
57. Id. at 133.
59. Id. at 107.
60. Id.
61. Id.
62. Id.
63. Id.
of a regime is not to be undertaken for minor or transient causes, but is appropriate when a series of abuses indicates an intent to subject individuals to "absolute despotism" and all other avenues of redress have been exhausted. Central to the colonists' grievances was what they argued was a lack of democratic control over the executive and legislative branches of government and an undermining of the independence of the judiciary.

The French Declaration of the Rights of Man and Citizens of 1789, the other document which anticipated the contemporary human rights movement, sets forth "the natural, inalienable and sacred rights of man." The Declaration of the Rights of Man asserts that the aim of every political association is the preservation of the "natural and inalienable rights of man." These rights include liberty, property, security and, most importantly, resistance to oppression. The source of all sovereignty resides in the nation and any society in which the guarantee of rights is not assured or the separation of powers is not provided for "has no constitution at all."

The American and French Declarations, with their concern for popular sovereignty, human rights, and resistance to arbitrary authority and to governments which fail to respect civil and political liberties laid the foundation for modern democratic thought. The right of popular revolution, in particular, captured the popular imagination. Various early American state constitutions explicitly recognized a right to rebel against a government which disregards the will of the people. Article Ten of the New Hampshire Constitution of 1797 stated that "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind." Justice Hugo Black, writing in 1960,

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64. Id.
65. Id. at 109.
66. Id. at 107-8.
67. Id.
68. Id. at 108.
69. The French Declaration of the Rights of Man and Citizen (1789), in The Human Rights Reader, supra note 58, at 118.
70. Id. at Preamble.
71. Id. at 118, para. 2.
72. Id.
73. Id. at 119, para. 3.
74. Id. at 120, para. 16.
observed that the right of revolution was deeply embedded in the American political culture.

The men who founded this country and wrote our Bill of Rights were strangers neither to a belief in the "right of revolution" nor to the urgency of the need to be free from the control of government with regard to political beliefs and associations. Thomas Jefferson was not disclaiming a belief in the "right of revolution" when he wrote the Declaration of Independence. And Patrick Henry was certainly not disclaiming such a belief when he declared in impassioned words that have come on down through the years: "Give me liberty or give me death." The country's freedom was won by men who, whether they believed in it or not, certainly practiced revolution in the Revolutionary war. Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the "right of revolution" was all the people had left to free themselves . . . . I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join . . . in the right of the people to resist by force tyrannical governments.77

In the twentieth century, the principles of popular sovereignty, human rights and the right to rebellion were extended to the international community. The preamble to the 1948 Universal Declaration of Human Rights78 recognizes the inherent dignity and the equal and inalienable rights of all "members of the human family."79 The preamble explicitly links the provision of human rights to the right of popular rebellion by providing that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."80 The instruments which served as a foundation for human rights clearly mandate a democratic government in which ultimate sovereignty is vested in the people. The Universal Declaration of Human Rights that the "will of the people shall be the basis of the authority of the government . . . ."81 All individuals have the right to take part in the government of their country, directly or through freely chosen representatives,82 and everyone has the right of equal access to the

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79. Id.
80. Id.
81. Id. at art. 21(3).
82. Id. at art. 21(1).
public service of their country. The Universal Declaration also provides for periodic and genuine elections which shall be conducted with universal and equal suffrage by secret ballot. The International Covenant on Civil and Political Rights includes a similar provision and, along with the International Covenant on Economic, Social and Cultural Rights, recognizes that all peoples have the right of self-determination and by virtue of that right they may freely determine their political status and pursue their economic, social, and cultural development.

The protection of human rights is a limitation on the sovereignty of States. Signatory States are obligated to respect and to ensure the rights enumerated in the International Covenant on Civil and Political Rights. The Universal Declaration of Human Rights provides that everyone is entitled to a social and international order in which the rights and freedoms enumerated in the Declaration can be fully realized. The International Covenant on Civil and Political Rights provides that no State, group, or person has a right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant, or possesses the right to limit the rights to a greater extent than is provided for in the Covenant.

Human rights treaties, consistent with their purpose, should be interpreted broadly, and arguably impose duties and obligations on individuals as well as Nation-States to protect human rights. The Universal Declaration of Human Rights imposes a duty on individuals to "act towards one another in a spirit of brotherhood." The

83. Id. at art. 21(2).
84. Id. at art. 21(3).
86. Id. at art. 25.
89. Id. at art. 2(1).
90. Universal Declaration of Human Rights, supra note 78, at art. 5(1).
91. International Covenant on Civil and Political Rights, supra note 85, at art. 5(1).
92. Id. at art. 5(2).
94. Universal Declaration of Human Rights, supra note 78, at art. 1; see also id. at art. 29(1).
preambles to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights, _inter alia_, provide that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." \(^{95}\) The Universal Declaration of the Rights of Peoples, \(^{96}\) adopted by an international conference of jurists, politicians, sociologists, and economists meeting in July 1976 in Algiers, provides in article 30 that the "re-establishment of fundamental rights of peoples, when they are seriously disregarded, is a duty incumbent upon all members of the international community." \(^{97}\) Professor Jordan Paust concludes that:

In response to governmental oppression of authority, the people of a given community have the right under international law to alter, abolish or overthrow any such form of government. Such a government would lack authority and could be overthrown in an effort to ensure authoritative government, self-determination, and the human right to relatively free and equal individual participation in the political process. A regime contrary to the authority of the people is actually an illegal regime seeking to exercise power in violation of several interrelated international precepts. Hence, it has no right under international law to assure its survival. \(^{98}\)

Thus, human rights instruments, when interpreted in light of their humanitarian purpose, establish, at a minimum, a legal privilege for individuals to act in a nonviolent, proportionate fashion to protest and to attempt to prevent a regime's continued violation of international human rights. The notion that those acting in defense of human rights should be insulated from criminal liability under international law draws its inspiration from the fact that international law generally recognizes a political offender exception to extradition. There is no single test for determining political offender status; however, virtually all States refuse to extradite political offenders, however defined, to requesting States. \(^{99}\)

There are a variety of rationales for the political offense exemp-
tion, but it primarily serves as a recognition that there is a right of rebellion against government authority.\(^{100}\) It has been observed that "the exception comports with the widespread acceptance of the individual's right to resort to political activism to foster change."\(^{101}\) As a result, it is believed that political offenders should be distinguished from common criminals and should not be extradited for trial.\(^{102}\)

The Swiss "predominance test" distinguishes political offenses based upon the motive of the offender.\(^{103}\) In *Ktir v. Ministere Public Federal*,\(^{104}\) the Swiss tribunal ruled that political offenses include ordinary crimes which have a "predominantly political character . . . as a result of the motives inspiring them and the purpose sought to be achieved."\(^{105}\) An additional requirement is that "the damage caused be proportionate to the result sought . . . [while] the interests at stake should be sufficiently important to excuse, if not to justify, the infringement of private legal rights."\(^{106}\)

Professor Cherif Bassiouni has extended the Swiss "predominance test" and has argued for a right of "ideological self-preservation" or "political self-defense"\(^{107}\) for political offenders acting with the motive of protecting human rights.

The primary consideration in the law of self-defense is a value-judgment based on the inherent justification of self-preservation . . . if fundamental human rights are seriously violated by an institutional entity or a person or persons wielding the authority of the state and acting on its behalf without lawful means of redress or remedy being made available, then the responsibility of the individual, whose conduct was necessitated by the original transgression by reason of his need to redress a continuing wrong, is justified or mitigated and, therefore, warrants a denial of extradition.\(^{108}\)

A State clearly exceeds its sovereign prerogatives when it violates individuals' inherent dignity and equal and inalienable rights,

\(^{100}\) Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir. 1986).


\(^{102}\) Id.


\(^{104}\) Ktir v. Ministere Public Federal, 34 I.L.R. 143 (Tribune Federale, Suisse 1961) (political offender status denied in the case of a French national who was a member of the Algerian Liberation Movement who murdered another member of the movement who was suspected of collaboration with the French government).

\(^{105}\) Id. at 144 (emphasis in original).

\(^{106}\) Id.


\(^{108}\) Id.
and then criminally prosecutes those who protest such violations. It may be no longer contended that such prosecutions fall within a State’s domestic jurisdiction and are insulated from the requirements of international law.\textsuperscript{109} Under contemporary international human rights laws, the Third Reich clearly would not have been justified in criminally prosecuting those who blocked death trains or attempted to protest forced labor programs.

The law of self-defense recognizes that individuals may act to defend their inherent right to physical integrity and life.\textsuperscript{110} A right of nonviolent, proportionate action to defend those inalienable rights enumerated in international human rights instruments should also be established. Accordingly, an international declaration on the right to act in defense of human rights should be drafted.

Absent action by international organizations, this declaration should be formulated and drafted by an international assembly of private individuals. The declaration should specify that all persons are entitled to the exercise and enjoyment of the rights recognized in human rights instruments. Individuals should be recognized as being entitled to resort to nonviolent, proportionate acts in violation of domestic criminal law which are motivated by a desire to protect internationally guaranteed human rights. These acts may either be designed to protect the rights of those engaged in civil resistance or of those who are not present.

Acts of nonviolent resistance, to the extent possible, should be directed against the appropriate governmental authorities and institutions, and protestors should avoid unnecessary disruption and harm. The right to defend human rights only should be resorted to after other legal avenues of redress have been exhausted, unless such efforts would be futile. The claim that an act was undertaken and motivated by a desire to protect human rights shall be available as a defense in all criminal trials. Individuals who engage in acts of justifiable civil resistance should be accorded protected status under international law, and States should be prohibited from imprisoning, harassing, discriminating against, or abusing such individuals. Those who are imprisoned should be recognized as political prisoners under international law, and all States, non-governmental organizations, and individuals should pledge to work for their release.

It would be ingenuous to believe that such a declaration will deter States from criminally prosecuting those engaged in nonviolent protest or that it will result in their acquittal. However, it will accord legitimacy to and encourage those who protest against violations of


\textsuperscript{110} Bassiouni, \textit{supra} note 107.
human rights and focus international attention on regimes which prosecute those acting in defense of human rights. The declaration also will formally recognize that individuals, as well as States, have a duty to protect the internationally guaranteed human rights of all peoples and will emphasize the unity of all members of the human family.

In the United States, the first steps have been taken towards the development of an international law defense for those engaged in nonviolent resistance to human rights violations. In various cases, defendants who have been arrested for nonviolent acts of protest against United States foreign and nuclear policies have attempted to rely upon the defense of necessity. These defendants argue that their acts are necessary to protest and to halt ongoing violations of international human rights by the United States. The defendants also claim that the harm stemming from their criminal acts is minor in comparison to the harm caused by the United States' violations of human rights and thus are justified under the necessity defense.\footnote{111. See Boyle, International Law, Citizen Resistance, And Crime By the State—The Defense Speaks, 1Hous. J. Int’l L. 345 (1989).}

IV. International Law and American Courts

The United States Supreme Court has recognized that “[i]nternational law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdictions, as often as questions of right depending upon it are duly presented for their determination.”\footnote{112. The Paquete Habana, 175 U.S. 677, 700 (1900).} International law, according to the Supreme Court, “may be ascertained by consulting the works of jurists, writings professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law.”\footnote{113. 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).} Where there are no controlling executive or legislative acts or judicial decisions, international law may be determined by the “customs and usages of civilized nations.”\footnote{114. The Paquete Habana, 175 U.S. at 700. See generally Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, T.S. no. 993, 3 Bevans 1153, 1976 U.N.Y.B. 1043 (done at San Francisco, June 26, 1945) (entered into force for the United States, Oct. 24, 1945).} A recognized “custom and usage” must have the “general assent of civilized nations” in order to insure that domestic courts will not “impose idiosyncratic legal rules . . . in the name of applying international law.”\footnote{115. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (citing the Paquete Habana, 175 U.S. at 694).}

The Charter of the United Nations obligates Signatories to protect “human rights and fundamental freedoms for all without dist-
tion as to race, sex, language or religion.” 116 The Charter does not explicitly define human rights, but the conception is given definition by the provisions of various multilateral human rights instruments. 117 American courts have recognized that, although the United States is not a signatory to these treaties, they constitute customary international law which is binding on the United States. 118 The State Department has also recognized that “there now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens . . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.” 119

Those who have engaged in nonviolent acts of civil resistance against government policies which they perceive to be in violation of international law generally have been denied standing by appellate courts to raise an international law defense. 120 In United States v. Allen, 121 the Second Circuit observed that “appellants should not be excused from the criminal consequences of acts of civil disobedience simply because the acts were allegedly directed at international law violations.” 122 Other courts have ruled that in order to have standing to raise an international law defense, the defendants must demonstrate that they have suffered a specific, unique harm as a result of the violation of international law. 123 In Pauling v. McElroy, 124 the Court denied the appellants standing to challenge a United States nuclear test on the grounds that they failed to allege a specific, threatened injury to themselves and merely had “set themselves up as protestants, on behalf of all mankind, against the tests of nuclear contamination in common with people generally.” 125

The judiciary has also consistently ruled that the political question doctrine prevents courts from inquiring into the legality under international law of foreign policy and defense matters. In Davi v.


117. See generally Universal Declaration of Human Rights, supra note 78; International Covenant on Civil and Political Rights, supra note 85; International Covenant on Economic, Social and Cultural Rights, supra note 87.


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


121. 760 F.2d 447 (2d Cir. 1985).

122. Id. at 453.

123. United States v. May, 622 F.2d 1000, 1009 (9th Cir. 1980).


125. Id. at 254.
Laird, a United States District Court in Virginia refused to declare that the United States military action in Vietnam and in Southeast Asia was unconstitutional and declined to issue an injunction against the use of the plaintiffs' taxes to support such activities. The Court held that:

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

In the end, courts have ruled that to permit the public order to be disrupted "under the aegis of international law would foment an anarchical result." There is 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 action." In an attempt to circumvent the judiciary's reluctance to permit the introduction of defenses explicitly based upon international law, lawyers and civil resisters have attempted to rely upon the domestic criminal law defense of necessity.

V. The Necessity Defense

The choice of evils, competing harms or necessity defense exonerates those who commit a crime when the criminal act is necessary to avoid the occurrence of a greater, imminent, and immediate social harm. The individual is considered to be acting under the pressure of exigent circumstances and to lack a criminal intent. The law thus recognizes that it cannot deter criminal conduct under such circumstances and to enforce criminal sanctions would bring the law into disrepute.

Traditionally, there are four requirements for the necessity defense:

127. Id. at 484.
(1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the value at issue.131

Those invoking the necessity defense, unlike traditional civil disobedience who admit their guilt, claim that their acts are legally justified and necessary to halt ongoing violations of international law. Thus, it is government officials, rather than protesters, who are engaging in criminal activities.132

Appellate courts uniformly have rejected the necessity defense in civil resistance cases. Courts have concluded that the harm which was intended to be prevented by the protesters' was not sufficiently imminent or immediate to invoke the necessity defense and that the protesters' acts were not calculated to eliminate the threatened harm. Courts also have determined that there were available and effective legal alternatives through which protesters might have utilized to attempt to change the government policies which they viewed as posing a social harm.133

In the California case of People v. Weber,134 Judge Milkes noted that the necessity defense requires a situation of an "emergency nature, that there be threatened physical harm, and that there was no legal alternative course of action available."135 The defendants' contention that it was necessary to trespass and to block sidewalks and streets in front of General Dynamics and a United States Navy Submarine Base in order to prevent nuclear war was rejected by the Court as expanding the defense to encompass potential harms.136 In this situation, Judge Milkes observed, there were other forms of protest available to the defendants which "disembowel the defense of necessity."137 Permitting the defense of necessity to be invoked would mean that markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there

136. Id.
137. Id.
are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment.\textsuperscript{138}

Thus, the necessity defense requires that the defendants' act constitute an immediate response to an exigent circumstance rather than a deliberate, reasoned, and calculated choice of alternative courses of action or strategies.\textsuperscript{139} In addition, the harm to be prevented must be immediate (or physically proximate) and not "only tenuously connected with the situs of the crime . . ."\textsuperscript{140}

In addition to concluding that the harm protesters sought to prevent was not imminent, appellate courts have held that protesters' acts were not sufficiently calculated to eliminate the threatened harm to satisfy the requirements of the necessity defense. In \textit{United States v. Dorrell},\textsuperscript{141} the Court rejected the contention that the defendant's entry into Vandenburg Air Force Base and the spray-painting of a missile assembly building "could be reasonably anticipated to lead to the termination of the MX missile program and the aversion of nuclear war and world starvation."\textsuperscript{142} In \textit{United States v. Kroncke},\textsuperscript{143} the defendants attempted to burn draft records in an effort to halt the Vietnam war and were charged with violating the Selective Service Act.\textsuperscript{144} The Court ruled that the necessity defense was not applicable where "the relationship between the defendant's act and the 'good' to be accomplished is as tenuous and uncertain as here."\textsuperscript{145} In \textit{United States v. Simpson},\textsuperscript{146} which also involved the burning of draft records, the Ninth Circuit Court of Appeals noted that the Vietnam conflict "could obviously have continued whether or not the San Jose, California draft board was able to restore its files and continue its lawful operations."\textsuperscript{147}

Courts also have held that defendants had legal mechanisms to change government policies and it was unnecessary to violate the law. In \textit{Dorrell},\textsuperscript{148} the Court held that to permit the defendant to rely on the necessity defense to justify his criminal protest against nuclear weapons would amount to "recognizing that an individual may assert a defense to criminal charges whenever he or she dis-

\begin{footnotesize}
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\item[138.] \textit{Id.}
\item[140.] State v. Marley, 54 Haw. at 472, 409 P.2d at 1109.
\item[141.] 758 F.2d 427 (9th Cir. 1985).
\item[142.] \textit{Id.} at 433.
\item[143.] 459 F.2d 697 (8th Cir. 1972).
\item[144.] \textit{Id.} at 698.
\item[145.] \textit{Id.} at 701.
\item[146.] 460 F.2d 515 (9th Cir. 1972).
\item[147.] \textit{Id.} at 518 n.7.
\item[148.] 758 F.2d at 427.
\end{itemize}
\end{footnotesize}
agrees with a result reached by the political process.”\textsuperscript{149} The Court noted that “impatience does not constitute the ‘necessity’ that the defense of necessity requires.”\textsuperscript{150} In \textit{United States v. Quilty},\textsuperscript{151} the Court of Appeals for the Seventh Circuit observed that there are “thousands of opportunities for the propagation of the anti-nuclear message: in the electoral process, by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by the release of information to the media, to name only a few.”\textsuperscript{152}

Thus, courts have refused to permit the courthouse to be used as a forum for the articulation of political views. Citizens generally lack standing to challenge government policies in a civil suit\textsuperscript{153} and “they cannot skirt the standing requirement by intentionally breaking an unrelated law in order to cast themselves as defendants rather than plaintiffs.”\textsuperscript{154} The resolution of policy disputes must take place through the democratic process.

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.\textsuperscript{155}

VI. Necessity and the Defense of Human Rights

Faced with demonstrators’ claim of a justification under international law for their acts of political protest, judges have retreated into a mechanical application of the necessity defense.\textsuperscript{156} This formalistic approach is reminiscent of the analysis employed by nineteenth century judges to justify decisions upholding the institution of slavery.\textsuperscript{157}

Judges not only have denied defendants the use of the necessity defense, but, at times, have also imposed draconian sentences on protesters seeking to invoke the defense. In \textit{United States v. Kabat},\textsuperscript{158} four protesters occupied and vandalized a Minuteman II intercontinental missile site and were sentenced to terms ranging from eight to eighteen years in prison plus other penalties.\textsuperscript{159} Judge

\begin{footnotes}
\item[149] \textit{Id.} at 432.
\item[150] \textit{Id.} at 431.
\item[151] 741 F.2d 1031 (7th Cir. 1984).
\item[152] \textit{Id.} at 1033.
\item[155] \textit{United States v. Cullen}, 454 F.2d 386, 392 (7th Cir. 1971).
\item[156] 758 F.2d at 436.
\item[158] 797 F.2d 580 (8th Cir. 1986).
\item[159] \textit{Id.} at 590, 593.
\end{footnotes}
Bright, in dissent,\textsuperscript{160} noted that although the protest activities did not injure any persons or property, the sentences “are akin to penalties often imposed on violent criminals, such as robbers and rapists, or on those guilty of crimes considered heinous, such as drug dealers.”\textsuperscript{161} Such harsh sentences, in part, appear to be based on the judges’ belief that these often articulate and educated defendants only can be deterred through harsh penalties.\textsuperscript{162} Even sympathetic judges have explained that the moral potency of the defendants’ cause and motivation does not “alter the duty” of the courts to enforce the law.\textsuperscript{163}

The judiciary should recognize a public interest necessity defense for those acting in a nonviolent, proportionate fashion to protect their own or others’ internationally guaranteed human rights. Courts, however, have refused to recognize standing for those who are unable to assert harm from the allegedly illegal conduct of the government that is “greater than, or different from, the potential harm that might affect every other person in the United States.”\textsuperscript{164} The defendant must be able to demonstrate some “direct harm to himself, not a theoretical future harm to all of use that may or may not occur.”\textsuperscript{165}

Individuals around the world, in many cases, face severe repression if they protest the violation of their rights or lack the resources or mechanisms to redress their grievances. Others should be privileged to act on behalf of themselves and others to protect human rights. An analogous argument was made by Justice Douglas in his dissent in \textit{Sierra Club v. Morton}.\textsuperscript{166} He proposed that standing be granted to inanimate natural objects about to be “despoiled, defaced or invaded by roads and bulldozers and where injury is the subject of public outrage.”\textsuperscript{167} Those with an intimate relation with the inanimate object about to be “injured, polluted, or otherwise despoiled are its legitimate spokesmen.”\textsuperscript{168} The “environmental issues should be tendered by the inanimate object itself . . . . Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.”\textsuperscript{169}

The judiciary’s rigid application of the law of necessity in the

\begin{footnotes}
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\item[160.] \textit{Id.} at 592.
\item[161.] \textit{Id.} at 594.
\item[163.] 741 F.2d at 1034.
\item[164.] United States v. May, 622 F.2d 1000, 1008 (9th Cir. 1980).
\item[165.] \textit{Id.}
\item[166.] 405 U.S 727, 741 (1972).
\item[167.] \textit{Id.}
\item[168.] \textit{Id.} at 745.
\item[169.] \textit{Id.} at 752.
\end{enumerate}
\end{footnotes}
case of political protest is contrary to the function of the defense and the flexible fashion in which the defense historically has been applied. The necessity defense is a "natural right, of which the government cannot deprive the citizen . . . . It may be exercised by a single individual . . . or by a community of individuals in defense of their common safety or in the protection of their common rights."\(^{170}\) The exercise of this right of necessity is not susceptible of "[v]ery precise definition, for the mode and manner and extent of its exercise must depend upon the nature and degree of necessity that calls it into action, and this cannot be determined, until the necessity is made to appear."\(^{171}\) Thus, the judiciary is in error when it fails to adjust the requirements of the necessity defense to accommodate the claims of political protesters. As observed in State v. Wooton,\(^{172}\) each case "must necessarily stand upon its own facts, and as no two cases are exactly alike, necessarily as each arises the application must be made according to the nature of the situation presented."\(^{173}\)

Strictly speaking, it is never necessary for an individual to act—they can always merely suffer the consequences of inaction.\(^{174}\) The law of necessity, at least in cases involving nonviolent protests against the violation of human rights, should be viewed as an implied exception to the rule of law which permits an individual deliberately to violate the law and then submit the moral justification for their action to a jury of their peers.\(^{175}\) Glanville Williams comments that the "language of necessity disguises the selection of values that is really involved."\(^{176}\) It also is "clear that the necessity defense applies to a defendant who commits a crime in an effort to rescue or protect an unrelated third person or persons."\(^{177}\)

The necessity defense specifically has been recognized as a justification for an act of rebellion. In 1834, Justice Story ruled that sailors had a right under maritime law to resist their commanding officer's order to proceed into a storm.\(^{178}\) Story ruled that in such a case, the law deems "the lives of all persons far more valuable than property."\(^{179}\) It is "clear, that the crew had a right to resist, and to

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171. Id.
173. Id. at 272-73.
175. Id. at 224.
176. Id.
179. Id.
refuse obedience. It is a case of justifiable self-defense against an undue exercise of power." \(^{180}\) While the dictates of a commanding officer are to be obeyed, the crew is not obligated to proceed merely because the officer exercises a "rashness of judgment to proceed." \(^{181}\)

### VII. A Public Interest Necessity Defense

There should be a recognition of a public interest necessity defense for those acting in a nonviolent, proportionate fashion to protect the rights of other human beings. The importance of human rights and the severity of the harm inflicted on those who are deprived of their rights justifies a relaxation of the immediacy requirements. A modification in the immediacy requirement, however, has been rejected as leading to the creation of a "vigilante society." \(^{182}\) However, those acting to halt human rights violations, in reality, are acting to uphold, rather than abrogate, the rule of law. In the case of distant and complex human rights violations it clearly is impossible to satisfy the immediacy requirement. It should be sufficient that an individual directs their acts against a site which is symbolically representative of the harm they seek to alleviate.

Satisfying the imminency requirement does not pose a problem in the case of ongoing human rights violations or where such violations are reasonably likely to occur. In other cases, such as a protest directed against the selling of riot control equipment to a repressive regime which is confronted with internal unrest, the imminency requirement should be viewed as a loose threshold requirement. The jury would be asked to evaluate the justifiability of the defendant's actions in light of the severity and the general foreseeability of the harm which the defendant sought to prevent or to remedy.

The requirement that the defendant's act be calculated to alleviate the threatened harm also should be flexibly interpreted. Acts of civil resistance not only are a device for forcing courts to conduct a legal referendum on the justifiability of the defendant's actions and for educating the public, but also serve to mobilize others to follow their example. Courts have ruled that acts designed to impact public consciousness are not sufficiently directed to alleviate a harm to satisfy the nexus requirement of the necessity defense. \(^{183}\) However, acts of civil protest historically have influenced public opinion, mobilized mass movements, and resulted in social change. \(^{184}\) Judge Spaeth in a concurring opinion in a nuclear protest case pointed out that: \(^{185}\)

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180. \textit{id.}
181. \textit{id.}
182. 54 Haw. at 471, 509 P.2d at 1108.
184. 797 F.2d at 601 (Bright, J., dissenting).
[a]ppellants do not assert that their action would avoid nuclear war (what a grandiose and unlikely idea!). Instead, at least so far as I can tell from the record, their belief was that their action, in combination with the actions of others, might accelerate a political process ultimately leading to the abandonment of nuclear missiles. And that belief, I submit, should not be dismissed as “unreasonable as a matter of law.” A jury might—or might not—find it unreasonable as a matter of fact. But that is for a jury to say, not for a court.186

Courts also have insisted that defendants demonstrate that they have exhausted all reasonable alternatives.187 It should only be required that defendants have made a good faith effort to alleviate the harm prior to resorting to a violation of the criminal law. As presently applied, the judiciary has effectively eliminated the use of the necessity defense in prosecutions stemming from political protests by mechanically reminding defendants that democratic options are available.188 Of course, such options often are time-consuming, require resources, may be ineffective, and may not engender a sufficiently swift response to alleviate human suffering.189

The Griffin v. United States190 decision illustrates how the exhaustion requirement may impose an unreasonable burden on defendants seeking to alleviate an immediate social harm. In Griffin,191 the defendants, who had an extensive history of efforts on behalf of the homeless, illegally entered two Washington D.C. cathedrals with the intent of opening the doors to the homeless.192 The Court observed that the defendants had failed to demonstrate that they had exhausted all other legal alternatives, such as the availability of other churches, civil buildings and private residences and “on the night in question, appellants, after having checked out all other shelters, had no other choice but to open up the two cathedrals.”193 The difficulty, of course, is that the exhaustion requirement is virtually impossible to satisfy since there are an infinite variety of legal alternatives available to an individual; and a court can dismiss an individual’s lack of success as indicating that [s]he simply did not put forth sufficient effort, or that the individual’s claims are contrary to the prevailing democratic consensus.194

190. 447 A.2d 776 (D.C. 1982).
191. Id.
192. Id. at 777.
193. Id. at 778.
By refusing to permit defendants to introduce evidence to support the necessity defense, courts are denying defendants the opportunity to have the justifiability of their actions evaluated by a jury of their peers. In *United States v. Bailey*, Justice Blackmun noted in his dissent that:

[r]uling on a defense as a matter of law and preventing the jury from considering it should be a rare occurrence in criminal cases . . . . The jury is the conscience of society and its role in a criminal prosecution if particularly important . . . . The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions. In such a situation it is especially appropriate that the jury be permitted to weigh all the factors and strike the balance between the interests of prisoners and that of society. In an attempt to conserve the jury for cases it considers truly worthy of that body, the Court has ousted the jury from a role it is particularly well suited to serve.

Considering the fact that courts have liberally interpreted the necessity defense to permit farmers to protect the livelihood of their livestock, they should do no less for those acting on behalf of human rights.

VIII. Conclusion

Numerous volumes have documented the precariousness of the global community—nuclear war, ecological disaster, the violation of human rights, and economic underdevelopment are only some of the threats which confront the world as it moves toward the year 2000. Richard Falk writes that while the seriousness of the human situation increases almost daily, the period of time available to remedy the situation is being “steadily shortened.”

The destructive forces and institutions which helped to create and to perpetuate this crisis can be partially limited and controlled through a vigorous transnational citizens movement which acts to combat injustice. The recognition of a domestic and international right of civil resistance in defense of human rights is an important step in the creation of a vigorous citizenry. No state has the prerogative to punish those who act in a nonviolent, proportionate fashion to

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195. 444 U.S. at 394.
196. Id. at 419.
197. Id. at 435.
protect the inherent and inalienable rights of any members of the human family. In an era in which States have disregarded the requirements of international law, it is hypocritical to deny protection to those who are acting in the nature of private attorneys general to vindicate human rights.

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. Stanley Milgram writes that most people blindly follow the dictates of their institutional superiors and easily suppress the notion that their conduct should be guided by moral ideals. This is “a fatal flaw . . . which in the long run gives our species only a modest chance of survival.” The virtues of loyalty, discipline and self-sacrifice which are so highly valued, in Milgram’s opinion, are the “very properties that create destructive organizational engines of war and bind men to malevolent systems of authority.” He sadly concludes that the type of character produced in American democratic society “cannot be counted on to insulate its citizens from brutality and inhumane treatment at the direction of malevolent authority.” Those who act in a nonviolent proportionate fashion to protect internationally guaranteed human rights must be recognized as heroes who are to be emulated rather than as criminals who are to be confined.

201. S. MILGRAM, OBEDIENCE TO AUTHORITY AN EXPERIMENTAL VIEW 188 (1969).
202. Id.
203. Id.
204. Id. at 189.