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UNITED STATES OF AMERICA,	: UNITED STATES DISTRICT COURT
	: DISTRICT OF NEW JERSEY
v.	
	: Crim. #84-360
SUSAN LISA ROSENBERG and TIMOTHY BLUNK,	: OPINION RE INTERNATIONAL LAW & STATE OF MIND OF DEFENDANTS
Defendants.	:

LACEY, D. J.

Because of the defendants' proposed questions to be asked of jurors on voir dire, and because of their opening statements and their repeated efforts on cross-examination of government witnesses to inject extraneous issues into the trial, I deemed it appropriate to require of the defendants that they make an offer of proof before calling any witnesses on their case. They only partially complied with the court's order, submitting a "Trial Brief" that was less a brief than it was a political tract redolent with polemics against the foreign policy of the United States. A copy of this document is of record herein. Their offer of proof also included as witnesses to be called the names of three persons--Sekou Odinga, Michael Ratner, and Alexis Mansol, along with a statement of the substance of the testimony that would be given by each. In their offer of proof the defendants did not indicate that they were going to testify and, indeed, during the argument on this matter, they repeatedly refused to respond to the court's question of whether they were going to testify.

This opinion will deal with the issues presented by the defendants' offer of proof. In doing so, it will expand upon the oral opinion that was placed in the record on March 16, 1985, and is intended to supersede that opinion. This opinion will deal with the defendants' offer of proof in its two aspects, the first, as a matter of law; and second, as a matter of fact going to the state of mind of the defendants.

I. THE LAW

During his opening statement, the defendant Blunk[1] stated that as part of his defense he would prove that he and his codefendant were legally obligated to prevent illegal acts of United States' imperialism and colonialism around the world. In relevant part, Mr. Blunk stated:

> [W]hat we're going to bring before you is the question of international law. And what Judge Lacey should be able to make clear to you and what we will make clear to you through expert testimony, is that the United States courts, including this court here, is bound by international law. . . . Any treaties that the U.S. signs pertain to the administration of justice, even in courts like this one right here. And what we are going to show you is that this law is also superseding or takes priority or precedence over the laws that are being used to prosecute us.
> The most important treaty the United States has ever signed is the U.N. Charter which makes the act of colonialism a crime. And we're going to demonstrate beyond any reasonable doubt that the United States is guilty of this crime.
> We are also going to put forward the Nuremberg principles, which many of you remember from World War II. The Nuremberg principles were brought into being after the rise of the Nazi regime in Germany. And what these principles stated and codified into international law, is that everyone, each citizen, it's not just up to us to uphold the laws of the government that we

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[1] Both defendants opted to proceed pro se. Rosenberg told the jury why--so they could address the jury directly. This of course saved them from undergoing cross-examination while still expounding their political views.

> function under. We also have the right to hold our government accountable. We have not just the right, we have the responsibility to do that. So when we see the United States conducting war crimes or conducting acts of genocide, it is our responsibility to do that. . . And we assert our rights under the Nuremberg principles here before you.[2]

Tr. 30, 31. First, then, they rely upon the Nuremberg principles. Second, the defendants have also tangentially raised in their trial brief the "defense" that they should be treated as prisoners of war pursuant to the Geneva Convention. Third (and to a degree this overlaps what I have already stated), the defendants submit that various United Nations Resolutions and the United Nations Charter permit or require the defendants' armed resistance to American colonialism and aggression. Fourth, the defendants raise the defense of necessity (almost as if it were a duress claim in a criminal case) as a defense to the crimes allegedly committed by the United States against other nations and peoples. Finally, the defendants have suggested throughout the trial they should not be treated as criminals since illegal acts with which they are charged were morally justified and motivated.

The Nuremberg Principles

The Nuremberg defenses have been raised in several instances recently in American courts as proffered excuses for criminal acts. In relevant part, these Principles as embodied in the Treaty of London of August 8, 1945, provide:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines

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[2] The same arguments were repeated on the defendants' "offer of proof" argument. Tr. of March 16, 1985, 9-20, 24-25, 27-28.

that justice so requires.

Treaty of London of August 8, 1945, 59 Stat. 1544, 1548 Article 8.[3]

The defendants argue that they have an individual responsibility under these Principles to resist the aggression allegedly waged by the United States against other nations, citing Article 6 (Defendants' Trial Brief, 11)[4]

> Article 6: The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
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> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiating or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
> (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;
> (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.
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> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

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[3] Signatories were French Provisional Government, Great Britain, United States and the Soviet Union.

[4] Reference here and hereafter to "Trial Brief" is to the defendants' offer of proof, referred to at 1, supra.

(emphasis supplied) Treaty of London of August 8, 1945, 59 Stat. 1544. The defendants argue that these principles bind private citizens, citing

> [T]he very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.

The Nurnberg Trial, 6 F.R.D. 69, 110 (1946).

We do not reach the issue of whether the United States is guilty of war crimes and crimes against humanity; the defendants lack standing to assert any right under the Nuremberg Principles. State v. Marley, 509 P.2d 1095, 1111 (S.Ct. Hawaii 1973). The Nuremberg Principles defenses are not available to those whose personal rights have not been violated, nor to those not subject to prosecution under the principles of the Nuremberg trials. United States v. Best, 476 F.Supp. 34, 46 (D.C.Col. 1979); Marley, 509 P.2d at 1111. The defendants argue that unless they resist what they consider to be United States aggression they risk criminal liability as an accomplice in United States criminal activity. This argument is unpersuasive. The courts have addressed similar arguments raised by American soldiers who have refused to go to war. Specifically, the courts have held that mere membership in the armed forces will not create criminal liability. See, e.g., United States v. Valentine, 288 F.Supp. 957, 987 (D.C. Puerto Rico 1968). Our domestic law on conspiracy does not extend that far (see Ingram v. United States, 360 U.S. 672, 678 (1959); Direct Sales Co. v. United States, 319 U.S. 703, 713 (1943)), and neither did the Nuremberg judgments. Cf. Case No. 12, United States v. von Leeb,

(the High Command Case), 10 & 11 Trials of War Criminals Before the Nuremberg Military Tribunals, at 11 Tr. W. Crim. 488-89; Case No. 9, Trial of Tesch, (the Zyklon B Case), 1 Law Rep. of Tr. of W. Crim. 93, 102. The defendants cite the Nuremberg cases and seem to contend that under these authorities they might be subjected to prosecution as war criminals if they did not show their opposition and attempt to stop so-called United States imperialism and aggression. These cases, contrary to their contention, hold that only persons in political, military, and industrial fields, who are responsible for the formulation and execution of policies, may be liable for waging wars of aggression. The concept "war criminal" does not include the citizen of a country who supports and aids the war efforts of his government, as a "private soldier in 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." I.G. Farben Case, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Counsel Law No. 10, volume 8, pp. 1124-25. The concept does not make the entire manpower of a country answerable for waging wars of aggression and does not provide for mass punishments. Clearly, the defendants risk no criminal liability under the Nuremberg Principles as "accomplices" in alleged United States aggression since they are only private citizens.

Even if the defendants could prove that they, in fact, had standing to assert rights under the Nuremberg Principles, their "resistance," if it be storing firearms and explosives, as

charged (they have never defined the form their "resistance" takes), does not appear to be directed against any specific illegal activity of the United States Government to justify their actions. As one scholar stated:

> Suppose [persons] are horrified by their nation's foreign policy, and elect to violate a trespass law in protest. Having, as they believe, an obligation to make their revulsion clear, they choose this limited but dramatic way to do so. Doing this is indeed their choice, and is morally motivated, but nevertheless the Nuremberg argument cannot defend them. For the key question is whether that moral choice is forced upon them by the law they disobeyed. Would obedience, rather than disobedience, under the given circumstances, have in any way implied participation in or approval of the international crimes being perpetrated by his own government? Clearly, for the indirect disobedient it would not. Obedience to trespass laws, and the like, indicates neither approval nor disapproval, tacit or explicit of a nation's foreign policy or military conduct. While a citizen may have an obligation to make his moral position clear, he cannot be said to have an obligation, under Nuremberg principles, to do so by breaking the laws that themselves have nothing to do with the moral issues in dispute. Of course a man may choose to exhibit his moral revulsion by such deliberate disobedience, and there may be much to say . . . for and against the ultimate justifiability of such disobedience. But the Nuremberg principles, even if of recognized authority, cannot there apply.
> . . . Indirect disobedience almost invariably is practiced in situations carefully selected or created by the protester; he decides upon the law he will break and how he will break it, as the instrument of his protest. In such situations the Nuremberg principles--quite apart from all other difficulties of their application--could not govern.

Cohen, Civil Disobedience: Conscience, Tactics, and the Law (1971) pp. 208-09. The defendants have not stated in their brief or in any statement before the court that the crimes with which they are charged were committed in an effort to avoid doing an illegal act directly forced upon them by the United States Government, e.g., an officer directing a soldier to hang someone

on ethnic grounds. Instead, the defendants merely take exception to United States foreign policy in general and not of any specific act required of them or duty imposed upon them by the United States.

United States' Violation of International Law

Overlapping the Nuremberg claim, the defendants state that they have an international duty to stop the crimes of the United States Government. These alleged crimes, according to the defendants, include:

> the genocide of the Native American people and the denial of the sovereignty of Native American nations; the colonization and military occupation of Puerto Rico; the kidnapping, enslavement and genocide against African people and the continuing colonization of the New Afrikan/Black Nation; the "undeclared war" and acts of aggression against the sovereign nation of Nicaragua; the invasion and overthrow of the government of Grenada and its continued occupation; complicity in the colonization of the African people of Azania/South Africa; and complicity in the military occupation of Palestine and Lebanon by "israel."[5]

Defendants' Trial Brief, 2. In support of their contention that they have the right to resist American "aggression," the defendants cite the United Nations Charter, which provides:

> CHAPTER I. PURPOSES AND PRINCIPLES
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> Article I
> The purposes of the United Nations are . . .
>
> 2) To develop friendly relations among nations based upon respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> CHAPTER II. INTERNATIONAL ECONOMIC AND SOCIAL COOPERATION

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[5] Defendants meticulously use the small "i" for Israel.

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for the peaceful and friendly relations among nations based upon respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a) higher standards of living, full employment and conditions of economic and social progress and development;

b) solutions of international economic, social, health and related problems, and international cultural and educational cooperation; and

c) universal respect for all, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.

See 59 Stat. 1035 (1945). The defendants also cite General Assembly Resolution 2621 adopted on October 12, 1970, which states in relevant part:

The General Assembly . . .

2. Reaffirms the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial powers which suppress their aspirations for independence and freedom and independence . . .

* * *

(2) Member states shall render all necessary moral and material assistance to the peoples of colonial territories in their struggle to attain freedom and independence. . . .

(6)(a) All freedom fighters under detention shall be treated in accordance with the relevant provisions of the Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.

According to the defendants, these documents give them the right to resist what they style United States imperialism. First, the defendants as individuals have no rights under and no basis to infer that these documents give individuals, not just contracting powers, the right to fight against colonialism; this court is not empowered to determine whether or not such a "right" here exists. The courts have traditionally declined to accept a United States treaty obligation as a defense to a criminal prosecution. United States v. Valentine, 288 F.Supp. 957 (D.P.R. 1968). Indeed, treaty obligations have been consistently declared beyond the purview of legal principles assertable by the moving party. Luftig v. McNamara, 373 F.2d 664 (D.C.Cir. 1967), cert. denied, 387 U.S. 945 (1967); United States v. Berrigan, 283 F.Supp. 336 (D.C.Md. 1968), cert. denied, 397 U.S. 909 (1970); State v. Marley, 509 P.2d 1095 (S.Ct. Hawaii 1973). It is generally improper for the judiciary to decide "political questions" of the sort presented by reliance on a theory that one's own government violates its own treaty obligations. A judicial inquiry into the conduct of foreign policy or the use and disposition of military forces by the executive branch would violate the doctrine of separation of powers which is at the heart of our constitutional system of government. Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C.Cir.), cert. denied, 387 U.S. 945 (1967); see also Marbury v. Madison, 1 Cranch 137, 165-66, 169-70 (1803); Chicago and Southern Air Lines v. Waterman SS Corp., 333 U.S. 103 (1948);

Baker v. Carr, 369 U.S. 186, 211-12, 217 (1961). For example, in Marbury v. Madison, Chief Justice Marshall very carefully circumscribed the area of proper judicial review:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [W]hatever opinion may be entertained of the manner in which the executive discretionmay be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

Marbury, 1 Cranch at 165-66. As the Court more recently stated, "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative." Chicago and Southern Airlines, 333 U.S. at 111. Consequently, I decline to entertain a legal defense in this case based upon alleged violations of United States treaties and upon United States foreign policy. It is difficult to think of an area less suited for judicial action than that into which the defendants would have this court intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power or assistance; these matters are plainly the exclusive province of Congress and the Executive. In sum, no treaty, including the ones cited by the defendants, can authorize the judiciary to undertake an inquiry forbidden to it by the

Constitution. United States v. Valentine, 288 F.Supp. at 986. Hence, the defense raised in this case cannot be successful because in order for me to find that the defendants were justified in fighting United States aggression, I must first decide whether United States foreign policy is "illegal"--clearly, a political, nonjusticiable question.

Moreover, ignoring the fact that the United Nations documents cited by the defendants bind signatories, not individuals, I hold that the position taken by the defendants is antithetical to our system of government. Indeed, if religious, moral, or political purpose may exculpate illegal behavior, normally law-abiding citizens might steal from the rich to give to the poor; burn and destroy, public records or perhaps buildings and even murder public servants, to implement a Utopian design. One who elects to serve mankind by taking the laws into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Under such circumstances, "Government," including the just Government envisioned by the defendants themselves, could exist in name only.

The Geneva Convention

The defendants cite United Nations General Assembly Resolution 2621 which purports to give freedom fighters rights under the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949. Although a defense under the

Geneva Convention was merely mentioned without being discussed in defendants' Trial Brief (see p. 8), I will subject it to analysis nonetheless.[6]

The Geneva Convention applies only to a war between a signatory and another power "if the latter accepts and applies the provisions thereof." Geneva Convention, art. 2. What constitutes a "power" within the meaning of this language is unclear. What is clear, however, is that the Geneva Convention, with the exception of article three, does not oblige a state to give Geneva prisoner of war status to one of its own nationals. First, alliance is the basis of the Geneva Convention. A treaty being an agreement between states by which one state undertakes obligations toward nationals of another state, it is unusual for a state to undertake obligations towards its own nationals. Second, against that background, the Geneva Convention as a matter of construction cannot put the detaining power under obligations to its nationals or to persons owing allegiance to it. Third, the general rule of treaty interpretation is that treaties must be construed in such a manner as to be consistent with generally recognized principles of international law, and, accordingly, the Geneva Convention is not a self-contained code overriding or abrogating the general law of the land. Fourth, in any event, the Geneva Convention does not apply to spies or saboteurs, because they are unlawful belligerents. See article four. Fifth, a treaty is a self-imposed restriction on the sovereignty of a state. Therefore, in cases of doubt, a treaty

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[6] On oral argument the defendants withdrew this defense.

must be given restrictive interpretation. There is no principle of international law, and there is no part of the Geneva Convention, which deprive a state of jurisdiction over its nationals who commit offenses against its security. Sixth, a study of the Convention relative to the treatment of prisoners of war leads to a strong inference that it is an agreement between states primarily for the protection of the members of the national forces of each against the other. Many articles of the Convention lead to this conclusion, but there are two which point convincingly in this direction, namely articles 87 and 100. Article 87 deals with penalties to which prisoners of war may be sentenced by the detaining power and contains this language:

> When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration to the widest extent possible, the fact that the accused, not being a national of the detaining power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

Geneva Convention, art. 87. Article 100 deals with death sentences and contains these words:

> The death sentence cannot be pronounced against a prisoner of war unless the attention of the court has, in accordance with article 87, . . . been particularly called to the fact that since the accused is not a national of the detaining power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

Geneva Convention, art. 100 (emphasis supplied). Each of these articles rests upon the assumption that a "prisoner of war" is not a "national of the detaining power." Moreover, the reference to the duty of allegiance might fairly suggest the further inference that a person who owes this duty to a detaining power

is not entitled to prisoner of war treatment. If the matter rested on inference from these articles alone, the argument might not be conclusive, but, as has been shown, the inference so to be drawn coincides, as regards nationals of the detaining power, with commonly accepted international law. See generally Koi v. Public Prosecutor, [1968] A.C. 829 (P.C.) [Privy Council, House of Lords].

Even if I were to hold that nationals of a detaining power, here citizens of the United States, can be entitled to Geneva Convention protection relative to the treatment of prisoners of war, the defendants would be unable to qualify under the Convention's definition section. That section, article four, defines a prisoner of war, in the sense applicable to the case at bar as:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
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> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.

Geneva Convention, art. 4. In light of testimony that the defendants have been conducting their "warfare" against the United States incognito (wearing wigs and using false identification) and of their admissions in court that they are members of an "armed clandestine movement" that has gone

underground, they cannot qualify as a prisoner of war under article four. As a parenthetical note, I should make clear to the defendants that a finding by this court that they are prisoners of war would not work to their advantage. If the defendants and their movement are judged to be engaged in warfare with the United States, then the government can treat a captured "enemy" as a prisoner of war without any trial and detain him until the "war" is over. Given the vows of these defendants and other "clandestine forces," this detention could last longer than the sentences provided under the criminal law. Also, under the laws of war, a member of a clandestine force can be held prisoner simply for being such a member, without any showing that he has done anything to further the operations of the force. Certainly, if the defendants in the case at bar were found to be belligerents engaged in warfare against the United States, they would not be entitled to trial by jury--a right which they demanded and have not waived. Finally, it should be noted that a captured "enemy" belonging to the defendants' armed movement would be treated and punished as a spy or saboteur if their fighting is clandestine or their members fail to comply with the requirements of article four.

As a final point, it should be noted that the Geneva Convention does contain a provision specifically applicable to "armed conflict not of an international character" but the obligations it imposes are minimal. Geneva Convention, art. 3.

In any event, the prisoners have been given all the protections article three provides, and their rights, if any, under this limited section of the Convention have not been abridged.

The Necessity Defense

Although the defendants in the case at bar do not seek to "justify" their acts of resistance on the basis of domestic law, they nevertheless argue that their criminal acts of resistance can be justified by the common law doctrine of necessity. They state that such a defense is based upon the premise that an actor may have to violate the law in certain situations of great, compelling need. For example, the defendants illustrate this doctrine by citing the case of a prisoner whose escape from jail is justified as the only way to end brutal, life-threatening conditions. In the case at bar, the defendants claim that the danger to other peoples will only be averted when the United States Government ceases its alleged violations of international law.

In essence, the necessity defense exonerates persons who commit a crime under the "pressure of circumstances," if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law. The defense is not effective in the following situations:

(1) Where there is an alternative available to defendants that does not involve violation of the law, the defendants are not justified in violating the law. United States v. Best, 476 F.Supp. 34, 46 (D.Col. 1979); Bice v. State, 34 S.E.

202, 203 (S.Ct. Ga. 1899). In the case at bar, other forms of noncriminal protest were and are available to the defendants to enable them to dramatize, and hence terminate, conduct which they may view as harmful.

(2) A closely related required element is that the harm to be prevented be imminent. Where, as here, the harmful acts to be prevented by the defendants' actions were, at best, only tenuously connected with the situs of the alleged crime, and would be only tenuously affected by defendants' acts, I cannot find any real "necessity" for defendants to act. United States v. Best, at 46.

(3) Finally, and most importantly, even assuming, arguendo, that alternative courses of action were available or that there was some strong connection between the act of storing weapons and explosives and the allegedly criminal acts the defendants sought to prevent, the defendants remain unentitled to the defense of necessity because their actions were not reasonably designed to actually prevent the threatened greater harm. As the court in United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972), stated, "an essential element of the so-called justification defenses is that a direct causal relationship be reasonably anticipated to exist between the defender's action and the avoidance of harm." Under any possible set of hypotheses, the defendants could foresee that their actions would fail to halt the nearly innumerable acts of alleged

United States aggression and imperialism around the world. Since no reasonable man could find otherwise, the necessity defense is not applicable to the case at bar.

The Noble Purpose Defense

Finally, the defendants have suggested throughout this trial that they should not be prosecuted because the illegal acts with which they are charged were morally justified and motivated. Specifically, the contend that they are freedom fighters against United States imperialism. This is not, however, a valid defense. As one court stated:

> Intent and motive should never be confused. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done. Good motive alone is never a defense where the act done is a crime. One may not commit a crime and be excused from criminal liability because he desired or expected that ultimate good would result from his criminal act. Moreover, if one commits a crime under the belief, however sincere, that his conduct was religiously, politically or morally required, that is no defense to the commission of a crime.

United States v. Cullen, 454 F.2d 386, 390 (7th Cir. 1971). The Cullen court stated this proposition in yet another way:

> In a case such as this, if the proof discloses that the prohibited act was voluntary, and that the defendant actually knew, or reasonably should have known, that it was a public wrong, the burden of proving the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue.

Id. at 392. Perhaps this proposition is best stated in United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), in which the court stated:

> [Defendants]' position was and is that since they acted from good motives, i.e., to protest a war which they sincerely believed was not only illegal but immoral, they could not have "willfully" violated the statutes and must be acquitted. . . . The statutory requirement of willfulness is satisfied if the accused acted

> intentionally, with knowledge that he was breaching the statute. . . . [W]hatever motive may have led them to do the act is not relevant to the question of the violation of the statute. . . .
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> * * *
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> To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic . . . but inevitably anarchic.

Id. at 1004, 1009. Consequently, the defendants' defense that the acts with which they are charged were morally motivated and, therefore, justified must fail. See also United States v. Pomponio, 429 U.S. 10 (1967); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); United States v. Malinowski, 472 F.2d 850, 855 (3d Cir. 1973), cert. denied, 411 U.S. 970 (1973); United States v. Irwin, 676 F.2d 688 (3d Cir. 1976); United States v. Best, 476 F.Supp. 34 (D.C.Col. 1979);

Against the background of my decision on the substantive defenses asserted by the defendants, I now consider the appropriateness of receiving testimony from the following witnesses:

1. Sekou Odinga: The defendants stated they intended to call Mr. Odinga who is a member of the Black Liberation Army and currently an inmate at the United States Penitentiary at Marion, Illinois. The defendants proposed to call him as an expert witness on "the principles of clandestine resistance and on the application of international law to the national liberation struggle of the New Afrikan/Black Nation." Mr. Odinga also planned to testify about the existence of, "and continual

colonization of, the New Afrikan nation within the United States." I declined to receive Mr. Odinga's testimony concerning the legality of United States foreign and domestic policy. As I have stated, such issues are nonjusticiable political questions. See United States v. Valentine, 288 F.Supp. 957 (D.C. Puerto Rico 1968); see also Chicago and Southern Airlines v. Waterman SS Corp., 333 U.S. 103 (1947); Luftig v. McNamara, 373 F.2d 664 (D.C.Cir. 1967). Moreover, Mr. Odinga's testimony was also proffered to demonstrate that the defendants' armed organization and its activities were morally motivated and, therefore, justified. Since the defendants' motivation is irrelevant to establishing their criminal liability, such testimony offered by Mr. Odinga was not acceptable. Morissette v. United States, 342 U.S. 246 (1952); United States v. Irwin, 676 F.2d 688 (3d Cir. 1976); United States v. Cullen, 454 F.2d 386 (7th Cir. 1971); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

2. Michael Ratner: The defendants also intended to produce Mr. Ratner as an expert in international law, to testify about "extensive illegal activities of the United States government in Central America." Again, as discussed earlier, this court will not inquire into the legality of decisions left to the discretion of the Legislative and Executive branches. See generally Marbury v. Madison, 1 Cranch 137 (1803); Baker v. Carr, 369 U.S. 186, 211-12 (1961). Mr. Ratner also intended to testify about alleged war crimes, as defined by the Nuremberg principles, which have been perpetrated by the United States. Such testimony is not admissible, because the defendants lack standing to assert

rights under the Nuremberg Principles. United States v. Best, 476 F.Supp. 34 (D.C.Col. 1979); United States v. Valentine, 288 F.Supp. 957 (D.C.Puerto Rico 1968); see generally Ingram v. United States, 360 U.S. 672 (1959).

3. Alexis Mansol: The defendants proposed to produce Mr. Mansol, a native of Puerto Rico, who is an expert on the "colonial expansion" and "imperialist aggression" allegedly perpetrated by the United States against the people of Puerto Rico in violation of international law. Again, such testimony concerned the legitimacy of United States policy, a nonjusticiable political question. Consequently, Mr. Mansol's testimony was not accepted.

I summarize my holdings on the evidence offered on behalf of the defendants:

(a) No evidence was admissible that was offered to prove either the morality or immorality of the defendants' or the government's actions, respectively.

(b) No evidence was admissible that was offered to establish good or bad motive on the part of the defendants.

(c) No evidence of political or moral belief offered as a defense to the charges enumerated in the indictment was admissible.

(d) No evidence was admissible that was offered in support of or in opposition to the wisdom of any political decision or any government policy.

(e) No evidence was admissible that was offered to show the correctness or incorrectness of the advisability or inadvisability of any legislative act or any executive action

insofar as that evidence is offered in support of any type of justification defense under the Nuremberg Principles, the United Nations Charter and Resolutions or any other treaty.

(f) No evidence was admissible that was offered to prove that the defendants should be treated as prisoners of war under the Geneva Convention.

(g) Because the offer of proof failed to meet the requirements of the necessity defense, evidence in support of that defense was not admissible.

State of Mind and Intent

While it is clear that, as a matter of law, the legal principles urged by the defendants have no bearing on this case, as the defendants were advised by me, this is not to say that factually the alleged misconduct of the United States was or would be irrelevant to establish the defendants' state of mind, again provided that it was a state of mind that in itself was relevant as related to the crimes charged in the indictment. Indeed, in arguing against the motion in limine of the United States to bar the defendants from references to various political matters, the defendants had argued that they should be permitted to make such references because this went to the issue of "intent." It was on this basis that I permitted the defendants to make the openings which have been the subject of comment by the court in another opinion.

As the case developed, and I heard more from the defendants on the "state of mind" issue, it appeared to me that they were contending that, because they had what they deemed a

good purpose, namely, resisting the "imperialism of the United States," they believed that their state of mind was an innocent one under the law. Nonetheless, I advised them on the argument on their offer of proof that they had every right to give testimony on their case going to their state of mind at the time when they were alleged to have committed the crimes charged in the indictment.[7] Thus, for example, I noted that while the testimony they were offering through the witness, Odinga, would not constitute a defense under the Nuremberg Principles or the United Nations Charter, that is, as a matter of law[8], they could testify themselves to the effect upon their state of mind created by the information of alleged atrocities committed by the United States.

I noted further that, if this was their intention, then I would have to reappraise the proposed offers of the testimony of Odinga, Ratner and Mansol, to determine the extent to which their testimony supported the claim that the alleged atrocities had been committed. I further stated to them that, until there was testimony from them as to their state of mind, I would bar on this "support" issue the testimony of Odinga, Ratner and Mansol for two reasons: under Federal Rule of Evidence 403, because any probative value it might have (without the defendants' said testimony, it had none) was substantially outweighed by the danger of unfair prejudice or confusion of the jury; and under

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[7] See Tr. of March 16, 1985, 23-24.

[8] The defendants frankly stated in connection with their legal defense that they wanted to amend the indictment to name the United States as a defendant. See Tr. of March 16, 1985, 9-20.

Federal Rule of Evidence 702, in that the expert testimony of Odinga, Ratner and Mansol would not, unless and until the defendants testified, be helpful to the jury, assuming of course that the government objected to such testimony.[9] Accordingly, the offer of proof, as set forth in their Trial Brief, to the extent it was addressed to the defendants' state of mind, was rejected and the defendants were advised that I found the evidence unacceptable at this time on the state of mind issue.[10]

FREDERICK B. LACEY, U.S.D.J.

Dated: March 18, 1985

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[9] Actually, the government objected as a matter of law to the testimony; since the defendants did not take the stand and indeed refused to say whether they were going to put in through their testimony anything relating to their state of mind, I never had to call upon the government for any objections such as those referred to, that is, 403 and 702.

[10] It must be emphasized that the offer of proof did not include any testimony at all from any of the defendants, but only from Odinga, Ratner and Mansol.