VIII

CIVIL DISOBEDIENCE AND THE NUREMBERG JUDGMENTS

1. THE ARGUMENT

A final argument bearing directly on the defense of civil disobedience arises out of the judgments of the International Military Tribunal at Nuremberg. At the close of the Second World War the victorious powers, with the United States in the vanguard, held lengthy and profound inquiries into the wartime conduct of many individuals who had perpetrated, or helped to perpetrate, almost inconceivable atrocities upon innocent, noncombatant victims. As a result of these trials many persons were put to death, and many more were compelled to serve long prison sentences, not simply because they killed in warfare but because they committed acts that no human being ever has the right to commit, no matter what the circumstances. They committed crimes against humanity and against peace.*

* In August 1945, the United States, Great Britain, the Soviet Union, and France adopted the *London Agreement and Charter* (subsequently ratified by nineteen other nations) establishing a tribunal and a procedure for the trial and punishment of Nazi war criminals. (U.S. Executive Agreement Ser. No. 472, 1946.) This Charter defined three broad categories of acts as crimes

Now it is sometimes argued that civil disobedience may be justified by invoking the principles developed at these Nuremburg Tribunals. The argument, if at all plausible, is one to which anyone cognizant of the horror of the acts committed by the defendants at Nuremberg must have some sympathy. Yet its bearing upon specific acts of civil disobedience is problematic. Part of the difficulty arises from the fact that this "Nuremberg argument" has never been fully or clearly formulated. Passing reference to the principles of Nuremberg is fairly common, but it is never quite clear whether the argument is a purely moral one or whether it is intended as a technical, legal defense. Of course the line pursued may vary

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"within the jurisdiction of the tribunal *for which there shall be individual responsibility*" (emphasis added). It is the first of these categories that is particularly relevant to contemporary civil disobedience: "Crimes Against Peace: namely, planning, preparation, initiation, or waging of 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." (Article 6a of the Charter.) Under this Charter the Nuremberg trials were held. The principal decisions were handed down on 30 September 1946 (6 FRD 69) and found a number of defendants guilty of crimes against peace.

The President of the United States, addressing the General Assembly of the United Nations on 23 October 1946, reiterated the central theme of those trials: ". . . twenty-three members of the United Nations have bound themselves by the Charter of the Nuremberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as States shall be tried before the bar of international justice." (U.N. Gen. Ass. Official Records, 1st Sess. 2d pr., 35th Plenary Mtg. 699, 1946.)

The General Assembly of the United Nations, on the basis of a proposal submitted by the United States delegation, unanimously adopted, on 11 December 1946, a resolution in which it: "Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." (U.N. Gen. Ass. A/C 6/69.)

These official acts provide the foundation upon which the legal argument of some contemporary civil disobedients is built.

from case to case, but some general observations upon the relationship between the Nuremberg judgments and acts of civil disobedience will help to clarify a range of questions admitted by all sides to be, although of deep importance, still unresolved.

Persons, not governments, were on trial at Nuremberg. Individuals were accused and convicted of committing crimes against international law and against humanity. It is true that many of the laws these persons were convicted of knowingly violating were not codified at the time the acts were perpetrated. In that sense the laws were *ex post facto*, and unjustly applied. But they were the laws of simple human decency, the prosecution argued, known by every man and needing no codification to take effect. And international law, which is codified, clearly "imposes duties and liabilities upon individuals as well as upon states." So the court at Nuremberg declared. War crimes, it continued, are "committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

The bearing of this principle upon certain kinds of civil disobedience is not hard to see. If an act would be a crime against international law or against humanity, the individual who commits it is responsible for so doing whether or not he is ordered to do so by his government or military superior. If the Nuremberg principle is sound, it will not suffice to argue in defense of such criminal acts: "I only did what I was ordered to do." Some things a man must not do, no matter who orders him to, or with what authority. And if he does do them he will be answerable, on this principle, not only to God or conscience but to courts of international law as well.

On these grounds some persons—notably some Americans during the war in Vietnam—have refused to obey some apparently lawful orders of their government or military superiors. They have said, in effect:

The war is unjust. Atrocities regularly committed by Americans in the course of it are crimes against international law and against humanity. If I do such things I will be personally responsible for them. I am under a compelling duty not to commit such crimes, and will not do so, and therefore must refuse to obey any order to do so. I do not wish to be disloyal to my country. But I have overriding obligations to humanity and to international legal authority, obligations more powerful even than those owed to my national government. I must, therefore openly and deliberately disobey. [*See Case 9(a), p. 68.*]

What shall we say of this defense? Note first that the disobedience for which the Nuremberg principles are sometimes held a justification is *direct*. It is disobedience of the law, or lawful order, that is itself deemed wrongful. Conceivably, the Nuremberg argument could apply to the young man who refuses induction into military service during an unjust war, or to the soldier who disobeys the order to kill, or to train others to kill, in such a war. It could not apply to those who disobey another law, having no bearing on the war itself, as a way of protesting the nation's foreign policy. More about that shortly. Furthermore, the argument is directed only at wrongs of a specially blatant and atrocious character. It might apply to a law (or order) compliance with which must result in great human misery or pain; it would not apply to a law or order (even if wrongful) the evil consequences of which are humanly tolerable, and even seriously debatable. These considerations significantly restrict the range of cases in which the Nuremberg argument might be invoked.

Note second that, when presented as a purely moral defense, the Nuremberg argument is, in form, essentially no different from the higher-law justifications discussed at length in Chapter V, Section 4. The truth and applicability of the higher principles appealed to remain to be determined. The disobedient can only do his best to exhibit these higher principles and point out their applications, and then he must take the consequences of his defiance. Taken as a moral justification only, the Nuremberg argument may ultimately prove his disobedience right—but it cannot protect him against the legal punishments his government or military superiors are likely to inflict upon him.

It is when the Nuremberg argument is presented as a legal defense of his conduct, claiming technical validity in the courts of the land, that the matter becomes exceedingly sticky.

2. NUREMBERG PRINCIPLES AS A LEGAL DEFENSE OF CIVIL DISOBEDIENCE

Can the judgments of Nuremberg and the pronouncements of that court serve as an adequate legal defense for persons who resort to them as justification for their own deliberate disobedience of some laws, or lawful orders, of their government? There is no clear answer to this question. It does seem clear that it was the intention of the Tribunal that its principles should have legal force not only in the cases then at hand but over the judicial systems of particular nations in all future cases of similar sort. United States Supreme Court Justice Robert Jackson, chief prosecutor at Nuremberg, gave penetrating and persuasive argument in support of the juridical legitimacy of the Tribunal, as well as the international need for its legal authority. In 1945 he said:

We do not accept the paradox that legal responsibility should be the least where power is greatest. . . . With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. [*Cited by Paul Good, "Laying Freedom on the Line," The Nation, March 1967, p. 368.*]

And the Tribunal itself concluded: "The very essence [of the principles established here] is that individuals have duties which transcend the national obligation of obedience." Failure to perform these fundamental duties, it held, was punishable by law. It would surely seem, then, that conscientious performance of these fundamental duties—even when this entails disobedience of the national law—should be defensible by law.

The issues raised by the invocation of such a defense for civil disobedience, however, are exceedingly complex. Both generally, with regard to the theoretical soundness of an argument of this type, and specifically, with regard to the war in Vietnam or any particular war to which the Nuremberg principles are applied while hostilities are in progress, there arise questions certain to be argued in American courts for a very long time to come. While the issues cannot be resolved here, some aspects of them can be clarified.

If the Nuremberg judgments ought to have legal authority in the juridical system of any one country, that country is the United States of America. It was we who provided the major impetus for the trials at Nuremberg; it was we who largely financed them, and administered them, and defended them against criticism; it was we who insisted upon the legitimacy of the findings, and upon the execution of the sentences im-

posed. The Nuremberg trials had, it is true, much general international support, but from no country was that support more vigorous or more tenacious than our own. The United Nations General Assembly adopted the Tribunal Charter as international law—but it did so on a motion by the United States. And Article VI of the United States Constitution makes international laws to which this country is signatory the supreme law of the land. Justice Jackson himself wrote:

If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us. [*Ibid., p. 367.*]

Perhaps most important of all, the principle to which civil disobedients are likely to appeal—that individuals as well as governments are responsible for the commission of war crimes—is one that had been developed earlier in the United States Supreme Court. That Court (in another connection) had shown that it has applied from its earliest history "the law of war as including that part of the law of nations which prescribes for the conduct of war the status, rights, and duties of . . . nations *as well as* . . . *individuals.*" (*Ex Parte Quirin,* 317 U.S. 1, 1942; emphasis added.) This American decision was cited by the International Military Tribunal at Nuremberg as authority for the proposition that individuals as well as states may be held responsible for the commission of international crimes. It would surely seem that unless the Nuremberg judgments are to be wholly discarded, they must somehow have application in American law.

But that application, although on the surface very attractive to many, faces a number of exceedingly severe technical

obstacles. Some of these obstacles can be briefly outlined here.

First, the status of the Nuremberg judgments and opinions, as instruments of law, is confused and uncertain. At best we might say that these judgments and opinions are principles somehow to be incorporated into international law, which is itself of uncertain status; at worst they may be only the *dicta* of an illegitimate court. The authority of the Military Tribunal at Nuremberg is itself much doubted in some legal quarters; many jurisprudents reject the opinions of that court out of hand as unauthorized, and having, strictly, no *legal* force. This uncertainty of status may eventually be cleared up, but it renders the Nuremberg principles, at least for the foreseeable future, a weak reed upon which to rest the entire defense of an otherwise criminal act.

Second, the right to protection under Nuremberg principles (assuming that they do have legal authority) supposes that the laws or orders disobeyed did command acts that were illegal and immoral, crimes against international law or humanity. Now the individual civil disobedient may honestly believe that, and may be prepared to defend that conviction with masses of detailed evidence—but within the country whose national conduct he repudiates he is virtually certain never to win his case. American experience during the Vietnam war exhibits this difficulty vividly. Civil disobedients appealing to the Nuremberg principles in refusing participation in that war may be right in claiming that American involvement in that war is criminal, both in substance and manner. Most American courts, however, will not accept, and usually will not even permit the presentation of, argument to that effect. Even if a court were to accept the Nuremberg principles as having, theoretically, legal force in defending some

cases of disobedience (an unlikely admission), it is not going to admit that the Nuremberg principles apply to the specific case before that court. In order to do so, it would have to recognize factual circumstances too grievous and upsetting and will always manage to find that recognition not part of its (the court's) proper business. A legal defense that is theoretically feasible (albeit weak) but never practically successful is not much of a defense at all.

Third, it would be exceedingly difficult to make the Nuremberg principles consistently effective within any national legal system—even if they were accorded general support and respect. This is the grave peculiarity of every argument like the one based on the Nuremberg judgments; any court in a national legal system in holding that its nation is acting illegally and immorally attacks thereby the legal and moral foundations of its own authority. Quite different from normal judgments often rendered against the government and in favor of private citizens, a judgment applying the Nuremberg principles calls into question the moral authority of the entire system, and with it, the legitimacy and authority of the deciding court itself. This reflexive character of the judgment being asked for renders it virtually impossible for a national or state court to allow that the Nuremberg argument provides a successful defense in any given case before it. To do so would be to announce, in effect, that the court is governed by a supreme law higher than, and now in conflict with, the law the court is sworn to enforce. As a purely moral matter one might insist that the court does have such obligations to a higher law. But one who believes that must go on to seek ultimate protection under that higher law, and against the state law, in an appropriately higher court—an

international court, perhaps, or the court of heaven. And these are the courts in which the civil disobedient may find, if ever, ultimate justification under Nuremberg principles.

These three considerations weigh heavily against the technical merit of a recourse to the Nuremberg judgments in a legal defense of an act of civil disobedience. But the technical merit or demerit of the appeal, although possibly of great practical importance, is not the protester's deepest concern. He may be convinced that the Nuremberg judgments *do* carry authority, both moral and legal, and that they *do* justify his refusal to obey in the case at hand. He is prepared to pursue the matter as far as his means and the judicial system will permit.

Regarding the difficulties that arise in making use of the Nuremberg principles within a national juridical system—specifically in the American system—the disobedient's answer is straightforward. A method *ought* to be worked out whereby these principles *can* be upheld within the American courts. If we have taken these principles seriously enough to apply them to others, with ensuing capital punishments, and long-term imprisonments, we are morally obliged to make them applicable to ourselves. Ours is a legal system (the American civil disobedient may argue) that is healthy enough and resilient enough to adopt and incorporate new principles governing national conduct, where the moral content of these principles is clear and accepted and the principles themselves are badly needed to assist in the guidance of our nation's policies within the community of nations. And American citizens, they continue, if not saints, are on the whole decent enough and honest enough to live up to those principles and to hold themselves answerable before them. To make this internal

application of the Nuremberg judgments possible, a process of legal adjustment may indeed be necessary. If that is true, it is time that process be begun.

Of course the disobedient must recognize that if such principles were in force their effect would be, strictly speaking, not to justify some acts of civil disobedience but to exonerate some acts that, although disobedient on one level of jurisdiction, prove right and wholly lawful on another, higher level. (See Chapter V, Section 2.)

3. THE NUREMBERG PRINCIPLES AND INDIRECT CIVIL DISOBEDIENCE

As a defense of some instances of direct civil disobedience the Nuremberg principles might prove practical one day; as a defense of indirect civil disobedience they can never serve. Even supposing that the Nuremberg judgments had come to have binding authority within a national legal system, they could be rightly applied only under circumstances in which the alternatives of obedience or disobedience forced a citizen to make a difficult moral choice. If obedience to some law (or order) would somehow involve him in a crime against international law or against humanity, or would in some way clearly indicate even approval or acceptance of that criminal conduct, one might plausibly claim that, forced to choose, he is obliged to disobey the state in obedience to an international and moral law of higher authority. Indirect civil disobedience, however, does not arise under circumstances of this kind.

The Nuremberg principles do have, it is true, a wider reach than is commonly believed. One could not deny their ap-

plicability in some case of deliberate disobedience merely because the disobedient in that case had not been specifically ordered to commit a particular criminal act. Had there been such an order the Nuremberg argument would certainly seem applicable—for when German war criminals sought to defend some of the atrocities they committed during the Second World War by showing that they had been doing no more than following their orders, that defense was rejected on the ground that they had a clear and unavoidable obligation to disobey blatantly immoral orders. But in other cases, where the wrongful act was obedient, but not the outcome of an explicit order to behave criminally, the Nuremberg principle was also held to apply. The judgments of the Tribunal made it very plain that "the true test . . . is not the existence of the order, but whether moral choice was in fact possible."

Now indirect disobedients, too, are likely to argue that they face a moral choice. Suppose they 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 so 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 (as the disobedient believes) by his own government? Clearly, for indirect disobedience it would not. Obedience to trespass laws, traffic laws, and the like, indicates neither approval nor disapproval, tacit or explicit, of a nation's foreign policy or military con-

duct. 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 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 indirect disobedience, and there may be much to say (as I have explained at length in earlier chapters) for and against the ultimate justifiability of such disobedience. But the Nuremberg principles, even if of recognized authority, cannot there apply. By the nature of the case, the circumstances under which indirect civil disobedience takes place do not compel the moral choice between participation and nonparticipation (or approval and disapproval) that Nuremberg principles might conceivably protect. 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.

Finally, if the disobedience is indirect, the same strategic considerations that speak against the protester's seeking protection from punishment under free-speech defenses (see Chapter IV, Section 3) apply with equal force to Nuremberg defenses. Indirect disobedience derives much of its effectiveness from the manifest dedication and sacrifice of those who practice it. Any effort they make to find a legal shield against the normal consequences of their disobedient act is sure to weaken public confidence in their commitment, and thereby to drain from their protest much of its moral impact.