

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
UNITED STATES OF AMERICA
:

vs.
:

MUTULU SHAKUR,
:

Defendant
:
-----X

No. 82-CR-312-CSH

TO: Kerri L. Martin, Esq., Assistant U.S. Attorney

Ms. Martin:

Please take notice that the International Association of Democratic Lawyers by its counsel, Lennox S. Hinds, Esq. hereby moves this court. Hon. Charles S. Haight presiding, for leave to file the within brief of the International Association of Democratic Lawyers as amicus curiae in support of Defendant's memorandum in response to the January 15, 1988 order of the Hon. Charles S. Haight.

Memorandum of Law

Lennox S. Hinds, a member of the bar of this court certifies that no memorandum of law is required in support of this motion.

Respectfully submitted.

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UNITED STATES DISTRICT COURT
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BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS
AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MEMORANDUM IN
REPLY TO THE GOVERNMENT'S RESPONSE TO THE JANUARY 18, 1988
ORDER OF THE HON. CHARLES S. HAIGHT

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THE INTEREST OF AMICUS CURIAE INTERNATIONAL ASSOCIATION
OF DEMOCRATIC LAWYERS

The International Association of Democratic Lawyers (IADL) is a membership organization, with headquarters in Brussels, Belgium. Its membership includes over ninety (90) national affiliate associations representing every continent and all parts of the globe. It is the largest international grouping of lawyers and jurists in the world.

Founded at the end of the Second World War under the motto: "Law in the Service of Peace," IADL has maintained a consistent and active presence during the last four decades in the arenas of international law and human rights. IADL has recognized status at the United Nations as a non-governmental organization (NGO) with consultative status to ECOSOC and other international bodies. It has organized numerous international conferences, seminars and colloquia on all aspects of international law--including human rights and self-determination, the right to peace and the right to development. The Association has presented testimony to the General Assembly and other organizations of the United Nations on international legal issues on many occasions and has assisted with the presentation of a petition to The Commission on

Human Rights in Geneva alleging patterns and practices of discrimination against Black people in the United States rising to violations of Human Rights in contravention of international law.

IADL is particularly concerned with the issues raised by the motion before the court on three grounds. First, both Dr. Mutulu Shakur and Ms. Marilyn Buck have been committed activists in the struggle of Afro-Americans within the United States for self-determination and against the perceived racist policies and practices of the United States government. Second, both individuals as members of the Black Liberation movement, were among those targeted by the surveillance and counter-intelligence operations of the United States government as documented in United States Senate, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (1976) (popularly referred to as the Church Committee Report). The activities of the United States government, in respect to these defendants and countless thousands of other citizens, were in violation of guaranteed international human rights and guarantees under the U.S. Constitution.

Finally, many of the specific allegations of the indictment against the defendants stem from their alleged participation in the freeing of Assata Shakur from prison. Ms. Shakur who writes eloquently against

the racism, sexism and violation of her human rights in the United States in Assata, an Autobiography (1987, Lawrence Hill & Co.) has been granted status as a political prisoner by the Cuban government having granted her political asylum in 1984. It is the contention of Amicus Curiae that the motives of individuals, if in support of her quest for freedom, should be viewed, under the law, as acts in furtherance of their political goals as well.

THE ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS LAW IS PART OF UNITED STATES LAW, BINDING ON THE COURTS OF THE UNITED STATES AND APPLICABLE TO UNITED STATES NATIONALS AND FOREIGN NATIONALS.

International law, whether derived from treaty or the customary practices of the nations of the world, is binding on the Courts of the United States. This Court noted as recently as 1980 that:

The plainest evidence that international law has an existence in the federal courts independent of acts of Congress is the long-standing rule of construction first enunciated by Chief Justice Marshall: "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . ." The Charming Betsy, 6 U.S. (2 Cranch), 34, 67, 2 L.Ed. 208 (1804). Quoted in Lauritzen v. Larsen, 345 U.S. 571, 578, 73 S.Ct. 921, 926, 97 L.Ed. 1254 (1953).
Filartiga v. Pena-Irala, 630 F.2d at 887 n. 20s

In a similar vein, the Supreme Court has held that:

International law is part of our law and must be ascertained and administered by the Courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The Paquete Habana, 175 U.S. 677, 700 (1900).

The Charter of the United Nations is a treaty to which the United States is a signatory and therefore, under the Constitution, it is part of the supreme law of the land. Asakura v. Seattle, 256 U.S. 332, 341 (1924); Sullivan v. Kidd, 254 U.S. 433 (1921).

This country has a continuing obligation to observe with entire good faith and scrupulous care all of its undertakings under this treaty, including support of resolutions adopted by the Security Council. 74 Am.

Jur. 2d Treaties, Section 14 (1974); 22 U.S.C. Section 287(c).
United States v. Sternberg, 478 F.Supp. 29, 33 (N.D. Ill. 1979).

The Supreme Court has held that, in the absence of a treaty, the customary practice of nations is also part of United States law:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Paquette Habana, 175 U.S. at 700.

In the Paquette Habana, the Court held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into a "settled rule in international law [by] the general assent of civilized nations." Id., at page 694.

More recently, this Court in Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir., 1980), applied various sources of international law in holding that, notwithstanding the absence of a specific Congressional enactment, the prohibition against torture was a peremptory norm of international law, binding upon the United States government and enforceable in its courts. This Court in Filartiga expressly affirmed that international law should be interpreted and applied in United States courts.

II. THE RIGHT TO SELF-DETERMINATION IS A CUSTOMARY PRINCIPLE OF INTERNATIONAL LAW WHICH IS APPLICABLE TO THE PETITIONERS AND WHICH UNITED STATES COURTS ARE OBLIGED TO RECOGNIZE.

A. THE RIGHT TO SELF-DETERMINATION HAS BECOME A CUSTOMARY PRINCIPLE AND PEREMPTORY NORM OF INTERNATIONAL LAW.

The right to self-determination of colonial peoples traces its origins back to the American War of Independence and has today become an incontestable cornerstone of customary international law.⁷ The steady march of progress of former colonies to independence as full members of the community of nations has been advanced by the recognition of this principle in the Charter of the United Nations;⁸ the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁹

The clearest exposition of the right to self-determination

⁷ See, inter alia, Brownlie, op cit., p.577; Asmal, "The Legal Status of National Liberation Movements", U.N. Centre Against Apartheid (1984).

⁸ Article 1 (2) requires the development of:

... friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples;

Article 55 places respect for "the principle of equal rights and self-determination of peoples" in the context of "peaceful and friendly relations among nations";

Article 56 enjoins members States to take "joint and separate action in co-operation with the Organization for the achievement of the purpose set forth in Article 55".

⁹ Common Article 1(1) of both of these 1966 Covenants reads:

All peoples have the right to self-determination. By virtue of that right they freely determine their economic, social and cultural development.

at international law is contained in the historic U.N. General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (G.A. Res. 1514 (XV) (1960)). 10

10 The Decolonization Resolution provides that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the people of those territories, without any conditions of reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of peoples and their territorial integrity.

Leading commentators on international jurisprudence accept that the "Decolonization Resolution" provides an authoritative interpretation of the U.N. Charter, binding on all Member States.¹¹

Moreover, the principle of self-determination has been incorporated into so many international instruments that it may now be said to form part of customary international law, jus cogens. The right of peoples to take "forcible action in pursuit of the exercise of their right to self-determination", against powers which seek to thwart that right, is recognized by all Member States of the United Nations, including the United States. In 1970, the U.S. government joined in the unanimous adoption by the U.N. General Assembly of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (G.A. Res. 2625 (1970)).

The special importance of this unanimous Declaration is that it was the product of years of careful deliberation by the leading international lawyers and diplomats of all Member States, who arrived at consensus on a number of fundamental principles of international law. These principles expressly recognize the right to self-determination under international law and impose upon all States a duty:

¹¹ See Brownlie, op. cit., p.576; Waldock, 106 Hague Receuil (1962 II), 33; Annual Report of the Secretary-General (1961), 2; Asmal, "International Law and the Liquidation of Apartheid", U.N. Centre Against Apartheid (1984), 11. Cf. Judge Moreno Quintana, I.C.J. Reports (1960), 95-96.

to refrain from any forcible action which deprives people referred to in the elaboration of the present principle of their right to self-determination and freedom and independence.

The Declaration further recognizes the collective responsibility and right of all peoples to fight against those forcible actions aimed at depriving them of these fundamental human rights:

In their actions against, and resistance to, such forcible action in pursuit of their right to self-determination, such people are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

Numerous subsequent General Assembly Resolutions on self-determination have employed wording consistent with Resolution A/33/24 of 1978, wherein the United Nations reaffirmed:

[T]he legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, particularly armed struggle.
(Emphasis added).

B - THE PETITIONERS FIRMLY HELD CONVICTIONS THAT THE UNITED STATES IS AT WAR WITH AFRO-AMERICAN PEOPLE IN THE UNITED STATES CAN BE SUPPORTED BY AN ABUNDANCE OF HISTORICAL EVIDENCE

The petitioners Dr. Mutulu Shakur and Ms. Marilyn Buck, identify themselves as Freedom Fighters of the New Afrikan nation in North America called the Republic of New Afrika which they consider a colony within the United States. This movement to free the Republic of New Afrika from the colonial domination of the United States has been seeking to liberate the territory of Alabama, Georgia, Mississippi, South Carolina and Louisiana and to establish an independent Black state within those geographical boundaries. 12

For more than two decades, Dr. Mutula Shakur has been active in the "New Afrikan Independence Movement" as a soldier, intelligence functionary, health care worker and political activist. He co-founded the National Task Force for Cointelpro Litigation and Research and served as its director from 1975 until 1982. 13 His perception of himself as a fighter for the liberation of Black people in the United States has been firmly held for many years.

12 Petitioners Affidavit and Memorandum in Support of Motion to Dismiss the Indictment, November 2, 1987

13 Id., Affidavit, p. 1,2

Ms. Marilyn Buck has been a close and long-time supporter of the activities of the New Afrikan nation, involving herself in all aspects of the struggle for liberation and self-determination.

The petitioners view the charges in the present indictment as arising from "acts of war which are part of and incident to political conflict, and uprising, and military warfare between the United States government on one side, and armed forces of the New Afrikan independence movement and enraged masses in the New Afrikan nation on the other side (and) as such these charges are not proper subjects of criminal prosecution: 14

The history of four centuries of struggle against racist oppression and resistance by Afro-American people in the United States in response to state authorized attacks against their survival, covertly and overtly, is well documented and detailed. 15

In particular, the petitioners point to:

(T)he imposition of a reign of terror to turn back the advances of Black people during Reconstruction for control of their land; the criminalization and destruction of the Marcus Garvey movements; the forced migration out of the homelands of the South; the assassination of leaders such as Malcolm X, Fred Hampton and Martin Luther King; the development of the COINTELPRO war strategy to destroy the Black Panther Party and the Black Liberation Army; and the prosecution of the

14 Id., Affidavit, p. 2

15 See for example, Bell, Derrick Race, Racism, and American Law, Little, Brown & Co. (1973);

Hinds, Lennox S., Illusions of Justice: Human Rights Violations in the United States, Univ. of Iowa, (1978).

instant indictment intended to criminalize the New Afrikan Independence Movement. Rather than recognize the legitimate sovereignty of the New Afrikan Nation, the United States Government is waging an undeclared war against Black people and their nation. 16

The view that an undeclared war is being waged against Black people is construed by Mr. Shakur and Ms. Buck from the patterns and practices of the United States: through the abuse of legal process, the use of armed force in black communities and secret campaigns of surveillance.

FBI memoranda supporting petitioners contention show that this governmental agency maintained political surveillance on Dr. Mutulu Shakur for at least an eight year period between October 15, 1969 and January 21, 1977. 17

While Attorney for Amicus Curiae is not in a position to judge the merits or the accuracy of the perceptions and political claims of the petitioners, there is an abundance of persuasive evidence which support their arguments. For example,

...(A)s a matter of public record.. coincident with organized attempts of minority groups to redress their grievances through petitions, peaceful demonstrations and organizing, and passive and overt resistance to detrimental economic and political conditions, agencies of the U.S. Government have employed legally sanctioned and illegally executed methods to control, destroy and harass social emergence of Black and other minority communities. Such covert and overt governmental misconduct have

16 Affidavit, p. 8
17 Affidavit, p. 17

particularly focused on movements, associations and organizations that are vocal and visible in those communities' struggle for fundamental social and economic equities and basic human rights. As part of the overall efforts to silence dissent and to control dissenters, government agencies by their agents have singled out particular minority organizations and individuals for unique treatment to prevent their further influence...

.....In an obvious example, when Blacks in the 1960's began to openly protest in major U.S. ghettos (Watts, California; Detroit, Michigan; Newark, New Jersey) against the substandard housing, lack of meaningful employment, educational opportunities, their agitation was met with brute force and repressive measures...

...The governmental response on local and national levels to protests and passive resistance to white supremacy was the development, implementation and refinement of illegal, unconstitutional and repressive counterintelligence tactics designed to discredit and destroy these domestic organizations and their leaders . . .18 at 49,50.

In the instant case, the defendants are charged with committing acts involving the expropriation of money from armored cars by armed attacks, and the liberation of political prisoner Assata Shakur. Although the petitioners deny participation in any of the alleged crimes, they contend that the indictments themselves support their deeply held conviction that "a state of war exists between the United States Government and New Afrika, and that the acts alleged in the indictment in the present case, if true, are part

18 Hinds, Supra Chapter III Cointelpro and Other Government Misconduct at p. 49 et seq.

of and incidental to this war and are not properly subject to the jurisdiction of a criminal court." 19

If the allegations are true, given the profound belief by petitioners of the nature of their struggle in and with the United States, then these acts were conducted within the ambit of their struggle in support of the New Afrikan nation for self-determination and independence, supported by United Nations Resolution A/33/24 of 1978 reaffirming the legitimacy of struggles of people's independence by all available means, including armed struggle. Even government witnesses Peter Middleton and Tyrone Rison, have confirmed the political objective for the use of funds secured from the alleged expropriation, and the view held by Mr. Shakur and Ms. Buck of the critical importance of freeing Assata Shakur as an inspiration for the "Afrikan" independence movement. 20

C. PETITIONERS AS MEMBERS OF THE REPUBLIC OF NEW AFRICA IN NORTH AMERICA STRUGGLING FOR INDEPENDENCE AND SELF-DETERMINATION, ARE ENTITLED TO THE PROTECTIONS OF INTERNATIONAL LAW AS POLITICAL PRISONERS.

In 1970, the General Assembly of the United Nations marked the first decade since the Decolonization Resolution by the adoption of a further Declaration, holding that:

(T)he continuation of colonialism in all its forms and manifestations is a crime and that colonial peoples have the inherent right to

19 Affidavit, p. 20
20 Memorandum, p. 51-52

struggle by all necessary means at their disposal against colonial powers and alien domination in exercise of their right of self-determination recognized in the Charter of the United Nations and the Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. 21

The right of peoples to struggle against the crime of colonialism under international law is thus analogous to the defense of necessity or self-defense available to individuals under domestic law.

Colonialism is, like genocide and apartheid, a form of violence practiced against an entire people and against which each oppressed person has a right to defend him or herself. This right of self-defense was further recognized by the U.N. General Assembly in 1973, under the Solemn Proclamation establishing the Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes. 22 The following principles were included:

1. The struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law.
2. Any attempt to suppress the struggle against colonial and alien domination and racist regimes is incompatible with the

21 General Assembly Resolution 2621, October, 1970.

22 General Assembly Resolution 3103 of 1973. Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes.

Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples and constitutes a threat to international peace and security.

III. PETITIONERS VIEW THEMSELVES AS COMBATANTS OF THE REPUBLIC OF NEW AFRIKA AGAINST THE COLONIAL AND RACIST DOMINATION OF THE UNITED STATES AND ARE THEREFORE ENTITLED TO THE STATUS OF POLITICAL COMBATANTS SUBJECT TO THE PROVISIONS OF GENEVA CONVENTIONS, PROTOCOL I.

We support petitioners arguments and analyses, reiterated throughout their pleadings, that any acts for which they are allegedly responsible were committed to further their political ends perceived by them as part of the conflict waged by The New Afrikan nation and black liberation movement in their fight against racist and colonial domination by the United States. As attested to by the governments' own witnesses, the object and goal of the alleged conduct by defendants was to benefit a collective political struggle and movement, and not to enrich the personal coffers of the petitioners. 23

The offenses allegedly committed by the petitioners were political offenses, in the context of a war conflict, in contradistinction to criminal offenses that are afforded no protection as political acts under International Law.

23 Pet. Memorandum, p. 50-51

The Court in Filartiga v. Pena Irala, 630 F. 2d 876 (2d Cir., 1980) recognized that United Nations Human Rights declarations give specificity to the treaty obligations imposed by the U.N. Charter, a multi-lateral treaty ratified by the United States Senate and that these declarations constitute authoritative statements of the international community:

Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. doc E/cn. 4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement' but is rather an authoritative statement of the international community." E. Schwelb, Human Rights and the International Community 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, Supra.

Further, the preamble of the Universal Declaration of Human Rights refers to the document as a "common standard of achievement for all peoples and all nations" and between 1958 and 1972 twenty-five new national constitutions included references to it. In fact, sovereign states never denounce the Universal Declaration but instead they routinely quote it extensively.

We concur with defendants' exposition and conclusions that given their perception of the political nature of their alleged actions, they meet the requirements of and should be accorded political status and treated as political combatants, pursuant to the Geneva Conventions and 1977 Protocol I. 24

The significance of Protocol I is that it defines within its definitions combatants in armed combat including, irregular forces "whether they are termed national liberation movements, authorities representing peoples, organized resistance movements or any other name." 25

This expansion of Protocol I upon the Geneva Conventions of 1949 reflected the international consensus, expressed particularly in United Nations declarations and resolutions, supra, that those who fight for self-determination and independence have a right to political status and concomitant treatment as political forces by the powers with whom they are at war.

Article I (4) specifically broadens the application of the principles of the Geneva Conventions of 1949 to include:

Armed conflicts in which peoples are fighting

24 Pet. Memorandum, p. 4-15

25 Mallison, Thomas W. and Mallison, Sally V., "The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts," Law and Contemporary Problems, Vol. 42: No. 2, Spring 1978, p. 31

against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations. 26

THE UNITED STATES GOVERNMENT IS SUBJECT TO THE PRINCIPLES OF INTERNATIONAL LAW ENUNCIATED IN PROTOCOL I AND ARE OBLIGED TO UPHOLD THE CHARTER OF THE UNITED NATIONS AND UNIVERSALLY ACCEPTED TENETS OF INTERNATIONAL LAW.

Signatories to the founding documents of the United States, pledged to "fulfill in good faith the obligations assumed... in accordance with present Charter." (United Nations Charter, Article 2. Among those obligations, nations agreed "to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained..." (United Nations Charter, Preamble). The international declarations and resolutions passed over the last forty years since the founding of the United Nations by its General Assembly represent international consensus in the development of the goals and objectives of the United Nations. Whether such documents were both signed and ratified, or simply signed (as in the case of the United States which signed Protocol I only), they form the body of recognized international law and are applicable within the courts of the United States, as a member of the international community.

26 Mallison, *Supra*, p. 32

It is clear that the principles contained in the Universal Declaration are so well recognized and by the nations of the world that they are now generally accepted as forming part of jus cogens; 27 those overriding principles or peremptory norms of international law "which cannot be set aside by treaty or by acquiescence but only by the formation of a subsequent customary rule of contrary effect." 28

In Filartiga, the Court held that the prohibition against torture was a peremptory norm of international law, binding on the United States government and enforceable in its courts. The absence of Congressional ratification for this position was not determinative. On the contrary, the Court supported its holding by pointing to:

(a) clear and unambiguous prohibitions against torture by the law of nations (Id., at 884); (b) international consensus view of the wrong (Id., at 882); and (c) evidence of the wrong through numerous conventions and declarations that are part of international law and incorporated into national constitutions (Id., at 882, footnote 10, p. 882-884).

27 See, e.g., Sieghart, International Protection of Human Rights, p. 64.

28 Brownlie, Public International Law, 2d Ed., pp. 499-500, 576. See e.g. Vienna Convention on the Law of Treaties, Article 53: "Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens):

Similarly, as noted above Protocol I reflects an international consensus regarding the rights of people to struggle for self-determination and independence, and the granting of political combatant status to those of irregular status.

It is worth noting, that despite the Government's objections to the applicability of Protocol I to the instant case, based on the arguments that (a) the United States is only a signatory to the Protocols, and didn't ratify them and (b) determination of the legal relevance of the Protocol I is a political question. the United States recognized POW status during the Vietnam War for "irregulars."

The value-conserving policy of Protocol I was not the first step taken to promote humanity in dealing with irregulars. During the Southeast Asia conflict, the U.S. Government accorded POW status-upon capture of irregulars under the criteria of U.S. Army Military Assistance Command, Vietnam (MACV) Directive 381-46 (December 27, 1967) which accorded POW status to irregulars who did not meet the requirements of article 4A(2) of the Geneva POW Convention. 29

V. ALTHOUGH PETITIONERS CLAIM NO PARTICIPATION IN ACTIONS OR PLANNING OF BLACK LIBERATION ARMY UNITS IN RESPECT TO THE OFFENSES CHARGED THE ALLEGED CONDUCT OF THAT UNIT WOULD BE WITHIN THE AMBIT OF PROTOCOL I

Article 43(1) of Protocol I states:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party...30

29 Filartiga., p. 29, footnote 97

30 Filartiga, p.33

against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations. 26

THE UNITED STATES GOVERNMENT IS SUBJECT TO THE PRINCIPLES OF INTERNATIONAL LAW ENUNCIATED IN PROTOCOL I AND ARE OBLIGED TO UPHOLD THE CHARTER OF THE UNITED NATIONS AND UNIVERSALLY ACCEPTED TENETS OF INTERNATIONAL LAW.

Signatories to the founding documents of the United States, pledged to "fulfill in good faith the obligations assumed... in accordance with present Charter." (United Nations Charter, Article 2. Among those obligations, nations agreed "to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained..." (United Nations Charter, Preamble). The international declarations and resolutions passed over the last forty years since the founding of the United Nations by its General Assembly represent international consensus in the development of the goals and objectives of the United Nations. Whether such documents were both signed and ratified, or simply signed (as in the case of the United States which signed Protocol I only), they form the body of recognized international law and are applicable within the courts of the United States, as a member of the international community.

26 Mallison, *Supra*, p. 32

It is clear that the principles contained in the Universal Declaration are so well recognized and by the nations of the world that they are now generally accepted as forming part of jus cogens; 27 those overriding principles or peremptory norms of international law "which cannot be set aside by treaty or by acquiescence but only by the formation of a subsequent customary rule of contrary effect." 28

In Filartiga, the Court held that the prohibition against torture was a peremptory norm of international law, binding on the United States government and enforceable in its courts. The absence of Congressional ratification for this position was not determinative. On the contrary, the Court supported its holding by pointing to:

(a) clear and unambiguous prohibitions against torture by the law of nations (Id., at 884); (b) international consensus view of the wrong (Id., at 882); and (c) evidence of the wrong through numerous conventions and declarations that are part of international law and incorporated into national constitutions (Id., at 882, footnote 10, p. 882-884).

27 See, e.g., Sieghart, International Protection of Human Rights, p. 64.

28 Brownlie, Public International Law, 2d Ed., pp. 499-500, 576. See e.g. Vienna Convention on the Law of Treaties, Article 53: "Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens):

The definition of armed forces under Protocol I focused on the accountability of the groupings to their own government or authority, recognition of that authority by the party with whom the forces are in conflict is specifically not a prerequisite for inclusion within the parameters of Article 43 (1).

This view is further supported by former U.S. Ambassador George H. Aldrich who served as Chief of the United State Delegation to the Diplomatic Conference on Humanitarian law, 1974-77 which drafted Protocol I.

The key issue for determining whether a person is a member of armed forces under this article (Article 43) is a factual issue, a command link, rather than a political issue, recognition.

Moreover, he points out that the burden of proof on the issue of status of armed forces has been "clearly placed on the detaining power" by the provisions of Article 45:

A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war. . . if he claims the status of prisoner of war, or if he appears to be entitled to such status or if the Party on which he depends claims such status on his behalf. 31

The fact that the United States government has failed to recognize the Republic of New Africa, or the various grouping and units involved in the struggle for self-determination and independence, or the armed units of the Black Liberation Army , is not a ground to deny petitioners status as political prisoners of war under

31 Aldrich, George H., "Guerrilla Combatants and Prisoner of War Status," The American University Law Review, Vol. 31:871, p. 875

Protocol I (Article 44) and other international declarations. This denial by the United States of their status does not in itself support the criminalization of political conduct, alleged to have been carried out by defendants. These alleged acts, including the expropriation of funds through armed attacks to support activities of the movement and the liberation of Assata Shakur, properly fall within the parameters of Protocol I, Article 43, as acts of war perceived by them against the United States.

It is not surprising or inconsistent with this analysis that the United States has branded the alleged acts of the defendants as criminal, not political offenses since "the state allegedly suppressing the liberation movement is most unlikely to agree that the war is, in fact, a liberation war to which the Protocol applies, and therefore, the very relevance of the rule of law is almost certainly to be rejected by at least one of the two powers in a position to apply it.

(Emphasis supplied). 32

Certainly, if the United States were to admit that petitioners were involved in a war against the United States affording them international recognition and the protection of the norms of international law, the

32 Aldrich, George H., "Guerrilla Combatants and Prisoner of War Status," The American University Law Review. Vol. 31:871, p. 875

implications would be profoundly serious for the United States.

Petitioners might then seek and be granted international aid as insurgents or belligerents. As, for example, the United States supports irregular belligerents against the legal governments of Afghanistan, Nicaragua and Angola to name but a few current political conflicts recognized by the United States against world opinion.

CONCLUSION

The provision of a Political Offense Jury Charge in the Instant Case is appropriate.

This Amicus concludes that there is ample precedent in American Courts for consideration of political offenses as the appropriate legal standard when the factual circumstances arise out of political acts. See, Defendant's memorandum of law, pages 41-55.

As stated in its forty-page decision in Quinn v. Robinson, 783 F.2d 776 (9th cir. 1986), cert. denied, 107 S. Ct. 271 (1986), concerning the applicability of the political offense exception in the case of William Quinn, an alleged member of the Irish Republican Army, whose extradition was sought by Britain from the United States:

It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not the reasons for wishing to do so or the nature of the acts by

which they hope to accomplish that goal.
Quinn v. Robinson at 805.

The Quinn Court made it clear - in opposition to the governments' arguments - that the political offense question was one that was properly to be considered by an impartial judiciary.

In reviewing its historical development, the Court noted that the "political offense doctrine developed out of a concern for the welfare of those engaged in a particular form of political activity - an effort to alter or abolish the government that controls their lives - and not out of a desire to protect all politically motivated violence" Quinn at 806.

The justifications for the political offense exception, the Court pointed out, were based on a distinction between political offenses and criminal acts. The Court stated:

This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Quinn at 793.

In determining the definition of a political offense exception, the Court applied a two-pronged incidence test, which includes the requirement that (1) there be an 'uprising,' 'rebellion,' or 'revolution' and (2) that the acts be incidental to that struggle. Significantly, the Court notes many cases where American Courts have taken judicial notice of a state of uprising. These include proper judicial notice of

struggle for political control of Croatia, the revolutionary movement in Cuba and the uprising in Northern Ireland. Quinn at p. 797. footnote 18.

The Court specifically includes within its component of uprising, both civil wars and national struggles. Quinn at p. 797, footnote 17.

Certainly the Defendant's Affidavit and Memorandum of Law are replete with historical and current examples supporting their perception that the war between the Black people and the United States government has dimensions of both wars of national liberation and a civil war.

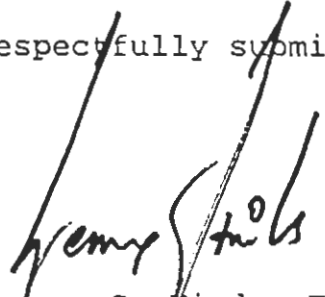
Since its objectives are to liberation, the New Afrikan nation and establish an independent New Afrikan state on territory which is presently occupied and governed by the United States as part of the North American nation. In some respects, the U.S. v. New Afrika conflict is not unlike the Civil War of 1861-1865. The territorial integrity of the North American "Union" is in dispute. Thus this is a conflict which would qualify for consideration under the Quinn case incidence test. 33

For all the reasons discussed above, we support defendants motion that they are entitled to a political offense jury charge. The charging of the jury in this manner will communicate the appropriate legal context in which to evaluate the alleged conduct. The issuance of such a charge, based on an analogy between the acts and issues raised in extradition cases with those of

33 Affidavit, p. 48

the instant case, is proper, since the defendants, Dr. Mutulu Shakur and Ms. Marilyn Buck, are charged with acts arising from their profound conviction that political hostilities between the New Afrika nation and the United States government exist with the objective of achieving self-determination and independence for Afro-Americans from racist and colonial domination.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lennox S. Hinds", written over a diagonal line.

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