Memorandum opinion and Order

[**Source**: United States District Court for the Southern District of New York, 690 F. Supp. 1291 (1988); footnotes omitted.]

UNITED STATES OF AMERICA, v. MARILYN BUCK, Defendant

UNITED STATES OF AMERICA v. MUTULU SHAKUR, Defendant
Nos. SSS 82 Cr. 312-CSH; 84 Cr. 220-CSH
July 6, 1988

[...]

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge

Defendant Mutuku Shakur moves to dismiss indictment SSS 82 Cr. 312 (CSH). He contends that the acts charges in the indictment are political acts which are not properly the subject of criminal prosecution. He further contends that under applicable treaties and

international law he is a prisoner of war, and thus immune from prosecution for the acts charged in the indictment. Defendant Marilyn Buck joins the motion "as it applies to the conspiracy [charges in indictment 84 Cr.220 (CSG) and as it applies to, in particular, the breakout of Joanne Chesimard, also known as Assata Shakur." Trial Tr. At 10,178, March 22, 1988.

I.

When he was arraigned on the indictment in 1985, Shakur appealed orally to the "Geneva Conventions" and a "prisoner of war" status.

Thereafter, and on several occasions, Shakur's counsel stated an intention to move to dismiss the indictment under international law. [...]

II.

Defendants motions rest on their perception of the political situation faced by Americans of African ancestry and of the role of the Republic of New Afrika ("RNA") in responding to that situation. In brief, defendants view the RNA as a sovereign nation engaged in a war of liberation against the colonial forces of the United States government. The Fifth Circuit summarized that premise in a case involving a member of the Provisional Government of the Republic of New Afrika:

> The RNA claims that it is an independent foreign nation composed of "citizens" descended from Africans who were at one time slaves in this country. It contends that the African slaves in America were converted into a free community by, successively, the Confiscation Acts of 1861 and 1862, the Emancipation Proclamation of January 1863, and the Thirteenth Amendment to the Constitution of the United States. It further

> insists that the citizenship of the slaves, upon being freed, reverted to that of their ancestors at the time they were brought to America. That means to the RNA that they resumed African citizenship and owed no allegiance to this country. The RNA contends that it, and not the United States, is sovereign over Mississippi, Louisiana, Alabama, Georgia, and South Carolina, because those are lands "upon which the Africans had lived in the majority traditionally and which they had worked and developed. It says that it has asserted sovereignty over those lands ever since the "blacks occupying it took up arms against the authority of the United States and thus asserted their New African nation's claim to the land, and, briefly, to independence" when President Andrew Johnson issued proclamations in 1865-1866 giving that land back to its former owners. The RNA says that its sovereignty over the lands in the five named states has never ceased, add that the United States has merely operated there without right or authority. It claims that its efforts to regain that land have intensified since the "formal revival and organization" of the New African Government by proclamation on March 31, 1968.

United States v. James, 528 F.2d 999, 1005 (5th Cir.1976), *rehearing denied* 532 F.2d 1054, *cert. denied* 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976).

In support of their view of the sovereign status of the RNA, defendants have submitted an affidavit of counsel detailing some of the history of African peoples in North America, with particular emphasis on incidents of resistance to slavery and incidents of former slaves establishing self-governing communities throughout the southeastern United States. Defendants conclude from this history that people of African descent are and have been engaged in a struggle to assert their right to self determination. They see local, state and federal law enforcement agencies as their opponents in the struggle. [...]

IV.

Defendants also contend they are entitled, under international law including treaties of the United States, to treatment as prisoners of war.

Defendants argument begins with the assertion that the New Afrikan Nation, which as noted under Point II they define as all people of African ancestry living in the United States, shares with all other peoples of the world the right to self- determination. They contend that:

> As is the case with every colonial experience, the New Afrikan Nation as a colony has no independent economic structure. The vast majority of the population of New Afrika, however, has at all points in history been contained within the same imperialist economic structure, and has shared the misfortune of suffering discriminatory treatment within it. Indeed it is appropriate to say in the case of New Afrika, as in the case of most colonies, that New Afrikans as a National population are an underclass frozen at the bottom of the American economy.

Memorandum in Support at 22. Defendants argue that as a colonized people engaged in a struggle for self-determination, New Afrikans are entitled to judicial recognition of the war-like nature of their struggle. They assert:

> The New Afrikan Liberation Struggle is acknowledged and respected in many parts of the world, especially in nations that were former colonies of European powers, but the American government has never afforded this Movement the international rights and protections it so justly deserves.
>
> We believe that the struggle waged by New Afrikan/Black people against racial oppression in American [sic] incorporates all the elements of warfare, that the petitioner [Shakur] has demonstrated his resistance to that oppression in the war, and that he should be accorded prisoner of war status while held in the custody of the United States

Government.

Reply memorandum at 5

In short, on this branch of their motion defendants do not seek to extend by analogy to the case at bar principles derived from a separate body of law. On the contrary, they appeal directly to principles of international law. [...]

[3] The sources of international law enforceable in the federal courts are treaties ratified by the United States; executive or legislative acts declaring the principle sought to be enforced; the decision of an appellate court binding upon the trial court; and, in the absence of any of these, a more amorphous but nonetheless well-recognized body of authority. The “law of nations”, the Supreme Court said in United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820), “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” [...]

[...] The defendants at bar, claiming a prisoner-of-war status exempting them from prosecution under these indictments, rely primarily upon two sources of international law. The first is the Geneva Convention Relative to the Protection of Prisoners of War of August 12, 1949 (6 U.S.T. 3316, T.I.A.S. No. 3364), which the United States has ratified. Second, defendants rely upon principles articulated in the first of two Protocols to the Geneva Conventions of 1949 which, in 1977, the Swiss government opened for signatures. [...]

Protocol I deals with international armed conflicts. Consistent with their view that “the Provisional Government of the Republic of New Africa in legal, political, and international affairs” represents New Afrikans struggling for independence, brief in

support at 6, defendants lay particular emphasis upon Protocol I. Protocol II deals with internal armed conflicts, generally referred to as civil wars. The President of the United States, recommended ratification of Protocol II to the Senate, but recommended against ratification of Protocol I.

I consider the Geneva Convention and Protocol I separately.

[4] As to the Convention, defendants observe that Article 2 provides that the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". (emphasis added). From that disclaimer, defendants pass on to Article 4, which defines "prisoners of war" in part as follows:

"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organised 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, fulfil the following conditions:

(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.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

The United States responds with the argument that Article 4 of the Convention cannot apply to these defendants since the case at bar does not involve armed conflict “between two or more of the High Contracting Parties,” as defined in Article 2. In other words, although the Convention applies even if a state of war is not recognized by one of such Parties, nonetheless the conflict must be between two or more High Contracting Parties. However the Provisional Government of the Republic of New Afrika may be characterized, the United States continues, it is not a High Contracting Party to the Geneva Conventions. Accordingly, the government concludes, the only applicable provisions of the Convention are found in Article 3, applicable to internal armed conflicts “not of an international character”, whose provisions do not include references to prisoners of war.

In my view, the United States is correct in arguing for the non-applicability of Article 4 of the Convention to the Republic of New Afrika, or to these defendants. But even if that were not so, it is entirely clear that these defendants would not fall within Article 4, upon which they initially relied. Article 4 (A) (2) requires that to qualify as prisoners of war, members of “organized resistance movements” must fulfill the conditions of command by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. The defendants at bar and their associates cannot pretend to have fulfilled those conditions. For comparable reasons, Article 4 (3)s reference to

members of “regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”, also relied upon by defendants, does not apply to the circumstances of this case.

I come then to Protocol I of 1977.

[5] The Conference which resulted in the Protocols was convened largely to address concerns of new nations that the laws of war did not reflect the reality of modern warfare, particularly in the context of wars of national liberation. It was approached “with caution and concern” by the United States delegation.

[We] had seen in other contexts the risk that conferences of one hundred or more countries would be dominated by a majority of developing countries, a majority of which all too often seems to be led by radical states bearing grudges against the wealthy countries in general and against the United States in particular. These concerns were, in fact, justified as shown by the political debates during the first two sessions.... Consistent with these concerns, we approached the Conference as more of a hazard than an opportunity. (Report of the United States Delegation to the Conference, Fourth Session, at 28-29, quoted in the governments’ memorandum in Response at 4-5.)

Defendants rely on Protocol I’s treatment of Combatant and Prisoner-of-War Status as support for the present claim. See Articles 43-47, Protocol I. The United States Ambassador to the Conference, George H. Aldrich, has termed Protocol I’s approach to the problem of prisoner of war status as comprehensive and novel. Aldrich, Guerilla Combatants and Prisoner of War Status, 31 Am.Univ.L.Rev. 871, 874 (1982).

The novel and comprehensive approach undertaken by Protocol I is rooted in its definition of the armed forces of a Party to a conflict, which are expansively defined as

“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. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.” (Article 43, quoted in Aldrich, supra, at 874 n. 2.)

Under this approach, the key issue for determining whether a person is a member of armed forces entitled to prisoner-of-war status is a factual issue, i.e. the existence of a command link from a Party to the conflict to the alleged prisoner of war, rather than a political issue, i.e. recognition by the adverse Party. Article 45 places the burden of proof on this issue squarely on the detaining power, which provides:

> 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. (Quoted in Aldrich, supra, at 875.)
>
> Defendants argue that Protocol I, and its expanded entitlement to prisoner of war status, form a part of that international law which the federal courts are bound to apply. [...]

That passage is particularly applicable to the case at bar because “(o)ne of the main reasons for convening the diplomatic Conference was the view of many Third World countries that the strict international standards on what constitutes an international armed conflict should be broadened to include so-called wars of national liberation. This view was not shared by the United States and its major allies.” Government brief in opposition at 9. That basic division among the nations is precisely the sort of ideological division

which prompted the Supreme Court in Sabbatino to reverse the lower courts for undertaking to apply “international law” to the rights and obligations of the parties.

Although the United States delegation originally endorsed Protocol I, the matter was studied further, and in the event President Reagan recommended against its ratification. In the President’s view, Protocol I “politicizes humanitarian law and purports to eliminate the traditional distinction between international and non-international conflicts in a harmful manner”; grants combatant status to irregular forces in certain circumstances event [sic] if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the existing laws of war”; and is “not acceptable as a new norm of international law.” Government brief in opposition at 10. As noted, the Senate has not ratified Protocol I.

The United States argues at bar that the President’s decision not to recommend ratification of Protocol I constitutes a “controlling executive act.” Brief in Opposition at 14. From that premise, the United States argues that under The Pacquete Habana, supra, this court cannot look to international law, since The Pacquette Habana “stands for the proposition that customary international law applies only where there is no treaty or controlling executive, legislative or judicial action and where it becomes necessary to resort to customary law to determine the applicable law.” Id. at 13.

I am not prepared to carry that submission to its logical conclusion. One can conceive of the executive branch of government taking a “controlling act” which flies in the face of the law of all civilized nations. I am reluctant to conclude that an independent judiciary would be powerless to enforce an otherwise universally accepted rule of international law, lest it be compared with the compliant Nazi judges in Hitler Germany. But the question arises only in the presence of “a settled rule of international law” by “the general assent of civilized nations”, the Pacquete Habana, supra, 175 U.S. at 694, 20

S.Ct. at 297; and that degree of uniformity is difficult to demonstrate, as Judge Kaufman made clear in Filartiga [...]. After an exhaustive review of conventions, treaties, and legal writings, the Court of Appeals concluded in Filartiga that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties." 630 F.2d at 878. [...]

However, one source indicates that as of October, 1980 the Protocol was formally accepted by only 15 nations. See Aldrich, New Life for the Laws of War, 75 Am. J. Int'l.L- 764 (1981) (Botswana, Cyprus, El Salvador, Ecuador, Ghana, Jordan, Libya, Niger, Sweden, Tunisia, Yugoslavia, Mauritania, Gabon, the Bahamas and Finland.)

This apparent slight acceptance of the text of Protocol I is itself evidence that its terms lack the general assent of international law. In addition, defendants refer me to no instance where Protocol I's definition of prisoner-of-war status was actually enforced, and I have found no such instance in my own research. The only reported case in this country rejects the claim. United States v. Morales, 464 F. supp. 325 (E.D.N.Y.. 1979). This lack of utilization indicates that the prisoner of war definition in Protocol I has not achieved that level of "custom and usage" necessary to elevate its principles to the status of international law.

[6] It follows that the present defendants are not asking an independent judiciary to make universally accepted international law a part of domestic law, notwithstanding the opposition of an intransigent and tyrannical executive. Rather, on an issue which has divided and continues to divide the nations of the world, defendants ask this Court to ignore the President's decision to recommend rejection of Protocol I, and to act as if the Senate had ratified the Protocol, whereas in fact it has not. The judiciary lacks authority thus to intervene in issues committed by the Constitution to coordinate political departments.[...]

[...]

For the foregoing reasons, the defendants' effort to avoid the charges contained in these indictments lacks foundation in international or domestic law. Their motions are accordingly denied in their entirety.

It is SO ORDERED.

Discussion

1. Does the decision of the Court imply that if the United States had been a party to Protocol I, the defendants would have had POW status? Under Protocol I, what conditions other than fighting for the self-determination of a people must a person meet to be granted POW status? Is the existence of a command link to a party to the conflict really the key issue under Protocol I? (P I, Arts 1(4) [1], 43 [2] and 44 [3])
2. In spite of the US refusal to ratify Protocol I, could the Federal Court acknowledge the applicability of some its provisions? Under what conditions?
3. Upon what provisions could the defendant have construed his case in order to gain POW status? Would his case be sustainable in the national court of your country?
4. Is the defendant's argument that the movement to which he belongs, New Afrikan Nations, shares the right of self-determination sustainable? What provisions does he invoke by making this type of statement? What criteria does a movement of national liberation have to meet in order to qualify as such?
5. Do you accept the defendant's argument that New Afrikan Nations is waging war against the United States and that he should therefore be recognized as a combatant?
6. The defendant argued that the provisions relating to prisoners of war in Protocol I form part of the corpus of international law the federal courts are bound to apply. What does this mean? Does he imply that these provisions are customary international law and hence applicable regardless of whether the United States has ratified the Protocol?
7. Do you agree with the judge's reasoning that there is no uniform custom in relation to

the provisions of POW status in Protocol I?

8. Bearing in mind that the judge handed down the decision in 1988, would you say that since then the provisions regarding POW status in Protocol I have become emerging or even established customary law? Today, could the defendant therefore have POW status?
9. If the defendant had POW status, would he therefore necessarily be immune from prosecution? For acts of violence? For conspiracy? For conspiracy in a prisoner's escape?

Links

[1] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6C86520D7EFAD527C12563CD

[2] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AF64638EB5530E58C12563CD0

[3] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=524284F49042D4C8C12563CD0