

Chapter 12. The Criminality of Nuclear Deterrence Today

This is a Keynote Address I gave before the XVIIIth Conference *Mut Zur Ethik: Direkte Demokratie* in Feldkirch, Austria on September 5, 2010 on the occasion of Verlag Zeit-Fragen publishing the German language translation of my book *The Criminality of Nuclear Deterrence* (Clarity Press: 2002) under the title *Das Verbrechen der atomaren Abschreckung*:

I am very happy to be speaking with you this evening. I want to express my gratitude to Zeit-Fragen for publishing the German language edition of my book *The Criminality of Nuclear Deterrence* (Clarity Press, 2002) which comes out now on the anniversary of the end of the Second World War. At this time 65 years ago, Japan surrendered to the United States after the atomic bombings of Hiroshima and Nagasaki and the incineration of 250,000 completely innocent human beings.

My father was a Marine who invaded Saipan, Tinian, and Okinawa, and was preparing to invade Mainland Japan. I was brought up to believe that the bombings of Hiroshima and Nagasaki had saved my father's life and thus made mine possible, although my father never raised me to be anti-Japanese or anti-German. But when I came to study international relations, I realized: This simply was not true. Indeed it was total propaganda by the United States government to justify nuclear terrorism and the mass-extirmination of a quarter of a million human beings. Even Justice Pal in his dissent to the *Tokyo Judgment* said that the Japanese war criminals had done nothing to their discredit as the bombings of Hiroshima and Nagasaki, which you can only compare to Nazi acts.

Today the world is at a precipice of another world war. The United States government has committed acts of aggression against Afghanistan, Iraq, Pakistan, Somalia, Yemen, and has authorized, armed, equipped, and supplied Israel to commit acts of aggression, crimes against

humanity, and outright genocide against Lebanon and Palestine. Today the United States government is threatening to attack Iran under the completely bogus pretext that they might have a nuclear weapon, which the International Atomic Energy has said is simply not true. If they attack Iran with the Israelis, a British think-tank has predicted they could exterminate 2.8 million Iranians! They are fully prepared -- the Americans and the Israelis -- to use tactical nuclear weapons.

Indeed today tactical nuclear weapons have been fully integrated into U.S. armed forces and tactical training and programs. I have read the Manual myself. Nukes are now treated -- starting with the Bush Junior administration -- as if they were just another weapon.

We must remember when President Putin was in Iran and he said he did not believe the Iranians had a nuclear weapon, President Bush Junior publicly got up and threatened World War III. Remember that threat! He threatened World War III! I cannot recall in my lifetime a threat of this nature. You would have to go back to Hitler and Mussolini and Tojo to find high level government officials threatening a world war.

What did this threat mean? It was saying to Russia: "You had better stand back if we attack Iran." It wasn't a threat to Iran; that would not produce a world war attacking Iran, but just a slaughter. But saying to Russia: "You had better stand back, we are prepared to risk World War III if you don't let us get our way with Iran." An attack on Iran would set this entire region of the world on fire, from Egypt over to India, from Uzbekistan down to Diego Garcia. And as my friend and my colleague, Hans von Sponeck pointed out yesterday with his map: We see the counter-alliance to NATO -- Russia, China and the so-called Central Asia Collective Security Organization. If you read about the origins World War I or World War II an attack on Iran could

clearly set off World War III – remember Bush threatened it. And it could easily become nuclear. I kid you not on the dangers we are facing us all as human beings today!

We stand on a nuclear precipice, and any attempt to dispel this ideology of nuclearism and its myth propounding the legality and morality of nuclear weapons and nuclear deterrence must come to grips with the fact that the nuclear age was conceived in the original sins of Hiroshima and Nagasaki. These weapons have always been criminal! Remember they were developed to deal with the Nazis, out of fear that the Nazis would get them first. And yet for some reason they used them on the Japanese to make a point, to terrorize the rest of the world.

The atomic bombings of Hiroshima and Nagasaki constituted war crimes and crimes against humanity as defined by the Nuremberg Charter of August 8, 1945 -- right after the United States bombed Hiroshima, and the day before they bombed Nagasaki -- that condemned the wanton destruction of cities, towns, and villages; and applied it to the Nazi leaders, but of course never applied it to themselves. In my book, *The Criminality of Nuclear Deterrence*, there is an entire chapter on the criminality of the bombings of Hiroshima and Nagasaki and I list all the legal violations there, up to and including the United States Department of War Field Manual 27-10 (1940). So these bombings and also the firebombing of Tokyo, exterminating 100,000 civilians, were war crimes. Even as recognized officially by the United States government itself.

The start of any progress towards resolving our nuclear predicament as human beings must come from the realization that nuclear weapons and nuclear deterrence have never been legitimate instruments of state policy but have always constituted instrumentalities of internationally lawless and criminal behavior. And those states that wield nuclear weapons, their government officials are criminals in accordance with the Nuremberg Charter, Judgment, and Principles, and the Tokyo Charter and Judgment that the Allies applied to the Nazi war criminals

and the Japanese war criminals after World War II. So I'm not talking here about applying any principles of law that the United States government and the other victors of World War II applied to their enemies to hold them accountable.

The use of nuclear weapons in combat is contemplated now by the United States and Israel against Iran. How many times have we heard U.S. government officials involved in the Bush Junior administration and now the Obama administration say: "All options are on the table." They mean it: not just the use the force but the use of nuclear weapons as well. These are prohibited by conventional and customary international law, including the Genocide Convention of 1948, designed to prevent a repetition of the Nazi Holocaust against the Jews, the Poles, the Russians, the Ukrainians. The use of nuclear weapons would also violate resolutions of the U.N. General Assembly that repeatedly condemned their use as an international crime. We must understand that when dealing with nuclear weapons and nuclear deterrence: They are not simply immoral, they are not simply illegal, but they are criminal across the board!

The Swiss Foreign Ministry a commissioned a study of nuclear deterrence by three American authors, I read it, and I agree with what they said. They pointed out that the critical factor is the delegitimization of nuclear weapons in the minds of the people. Having litigated nuclear weapons protest cases in the United States, Canada, Britain, and elsewhere since 1982, for me the critical factor in winning these cases is to explain to the common, ordinary people on juries that nuclear weapons and nuclear deterrence are criminal. Not simply illegal, not simply immoral, but criminal!

Yet the government officials in all the nuclear weapon states, not just the United States -- they are the worst of them -- but also Russia, France, Britain, China, India, Pakistan, Israel, North Korea: They are the criminals! For threatening to exterminate all humanity! For

threatening Nuremberg crimes against peace, crimes against humanity, war crimes, and genocide. That's what nuclear deterrence really is: threatening mass extermination. And in the Advisory Opinion by the International Court of Justice on nuclear weapons, the World Court ruled that the threat stands or falls on the same legal grounds as the actual use. If mass extermination of human beings is a crime, then the threat to commit mass extermination is also a crime.

It is as if the leaders of the nuclear weapon states have all taken out a gun, cocked the trigger, and held it at the heads of all humanity! In any system of criminal justice today that activity is criminal! In the United States it would be attempted murder, and you would be prosecuted for it. Yet today U.S. government officials threaten murder to millions of people around the world. And now especially in Iran.

According to the Nuremberg Judgment soldiers would be obliged to disobey criminal orders to launch and wage a nuclear war. And yet, how many soldiers have been educated to understand these principles? A few have educated themselves, acted on it, and have been prosecuted by the United States government. I have helped to defend them, with a good deal of success, but not complete success. You can read about this in my latest book, *Protesting Power: War Resistance and Law* (Rowman & Littlefield, 2008). How we defended military resisters in our all-volunteer armed forces who refused to fight in illegal, criminal wars waged by the United States government, going back to Gulf War I by Bush Senior, Haiti by Clinton, Gulf War II by Bush Junior, etc.

All government officials and military officers who might launch or wage a nuclear war would be personally responsible for the commission of crimes against peace, crimes against humanity, war crimes and genocide. And such individuals -- whether statesmen or high-level

military personnel -- would not be entitled to any defenses of superior orders, act of state, *tu quoque*, self-defense, presidential authority, etc. All those defenses were made by lawyers for the Nazi defendants at Nuremberg and they were rejected. And yet today in the United States of America starting with the Bush Junior administration and now continuing with Obama you will hear international lawyers working for the government, and many in the private sector, making Nazi arguments to justify what the United States government is doing around the world. That's how desperate the situation is!

The whole Bush Doctrine of preventive warfare, which is yet to be officially repealed by Obama now after 18 months, was made by the Nazi lawyers for the Nazi defendants at Nuremberg, and it was rejected. And the argument by Nuremberg was: There is no such thing as preventive self-defense or things of this nature. What is self-defense can only be determined by reference to international law. And the test is clearly: the necessity of self-defense must be instant, overwhelming, leaving no choice of means, no moment for deliberation. Certainly not Afghanistan or Iraq or Lebanon or Palestine or Iran or Somalia or Yemen or Pakistan. And yet all victims of this Nazi doctrine of preventive self-defense that is now justified by all these prostituted international lawyers on the payroll of the United States government, leaving government service, now they infiltrate into American academia where they likewise try to justify and teach these doctrines and policies that were condemned as criminal at Nuremberg.

Article 2, paragraph 4 of the United Nations Charter prohibits both the threat and the use of force except in cases of legitimate self-defense. And there is a standard for self-defense: Article 51 of the U.N. Charter, and as supplemented by Nuremberg, that clearly rejects the wars against Afghanistan as aggression -- explained in my book in greater detail -- against Iraq, against Pakistan, which by the way has nuclear arms. The Obama administration has now escalated to a

war against Pakistan, trying to set off civil war and destabilize Pakistan, just as they did in Yugoslavia, just as they did in Iraq, just as they did in Afghanistan. As we lawyers say: “The modus operandi is the same.”

The Empire does not change from one administration to the next! In America the government is run by elites who are either liberal imperialists, conservative imperialists, or reactionary imperialists, like the Neo-Cons. But they are all imperialists! And they believe in the God-given right to the American Empire. That’s the way America started. Remember, how did the United States of America start? White European settlers coming over to North America, exterminating millions of indigenous people, and robbing their land, and building an Empire. The process just continues today as we speak.

The threat to use nuclear weapons, what we call “nuclear deterrence” -- I would call instead “nuclear terrorism” -- constitutes ongoing international criminal activity: planning, preparation, solicitation, and conspiracy to commit Nuremberg crimes against peace, crimes against humanity, war crimes, and genocide. These are what we lawyers call inchoate crimes, not the substantive offences themselves, but crimes leading up to the commission of the substantive offences. They were made criminal at Nuremberg in order to establish a bright line and that we would punish even walking up to that bright line as criminal.

In the case of nuclear weapons, once a nuclear war starts I doubt very seriously we are going to be having another war crimes tribunal for anyone. So what that means then is that it is up to us citizens of the world to stop and prevent a nuclear war, and to stop and prevent the threat, conspiracy, solicitation of the use of nuclear weapons. “Everything is on the table” -- clearly a threat to use nuclear weapons, clearly a criminal threat under the World Court Advisory Opinion, against Iran.

As I explain in more detail in my book, the design, research, testing, production, manufacture, fabrication, transportation, deployment, installation, storing, stockpile, sale, and purchase and the threat to use nuclear weapons are criminal under well-recognized principles of international law. And I know the German government has finally asked the United States, NATO, to take its nukes out of Germany. And Mrs. Clinton has said: "We don't support it." Well is the German government going to cave in? Or will it use law and international law and the Nuremberg Charter, Judgment and Principles to get American criminal nukes out of Germany? I guess we will find out this Fall.¹

Those government decision-makers in all nuclear weapon states with command responsibility for nuclear weapons are responsible today for personal criminal activity under the Nuremberg Principles for this practice of nuclear deterrence/nuclear terrorism, that they inflict on all states and peoples in the world today. And in particular counter-ethnic targeting for the United States, destroying Russians just because they are Russian.

Also counter city-targeting! When I worked on the case of the U.K. nuclear weapons in Scotland we established that the entire purpose of the U.K. nuclear weapons force, under the control and allocated to NATO, was to destroy the city of Moscow, seven million human beings! It had no other purpose. Needless to say, once we did that we got all of our defendants off for four counts each of malicious destruction of property when they destroyed a tender servicing the U.K. Trident II nuclear weapons submarines with these weapons of mass extermination. They might have destroyed the tender, but they did not act maliciously. They acted for the perfectly lawful reason to stop the nuclear extermination of seven million human beings!²

So I argue in my book, the simple idea of the criminality of nuclear weapons and deterrence can be used to pierce through the ideology of nuclearism, to which so many citizens

in the nuclear weapon states and around the world have succumbed -- by means of propaganda techniques, propagated by the governments, going back to the bombings of Hiroshima and Nagasaki. At the time of the bombings of Hiroshima and Nagasaki the U.S. government tried to present this as positive to the American people and in particular that it was necessary to end a war to avoid an invasion of Japan, which of course was not going to happen, because the Japanese were already defeated and were trying desperately to negotiate a surrender.

It is with this simple idea of the criminality of nuclear weapons that people can easily comprehend the illegitimacy and fundamental lawlessness of these policies that their governments pursue in their names -- or allied governments as well. And to those living in the NATO states today: Their leaders are all accomplices; they go along with nuclear policies as well. They send their generals over to NATO headquarters to be integrated into NATO's strategy.

I remember after the Berlin Wall fell, the German Branch of International Association of Lawyers Against Nuclear Arms had a big conference in Berlin and I gave the keynote address along these lines. And they asked the German General of the Bundeswehr in charge of liaison with NATO on nuclear weapons to respond to me. And he got up and he said: "Well, we all know that Nuremberg is soft law!"

I had two reactions to that. One: "Mister General, we hanged your predecessors at Nuremberg, under the Nuremberg laws. How can you say it is soft law?" Not that I support the death penalty even for major war criminals like Bush Junior and Tony Blair.

But the second reaction I had to this notion of "soft law" like Joe Nye's "soft power": "Soft law," I said, "you know, he got that from us." So we Americans have convinced German generals that Nuremberg is "soft law" in order to pursue our nuclear policies with the

cooperation of the next generation of German generals whose predecessors we hanged at Nuremberg.

After the public speech I discussed this matter with him, and he agreed with me but he said: "Look, we have no alternative but to do what the Americans tell us to do." And I quoted to him a passage from the Bible saying: "Yes, and the blind shall lead the blind." And the German General said: "We have to trust that the Americans are doing the right thing." Right over the nuclear precipice! The German people have to stand up here and say: "Enough! We want your nukes out of Germany for sure and we are no longer going to cooperate with you on nuclear weapons policies!"

Humankind must abolish nuclear weapons before nuclear weapons abolish humankind! Nevertheless, there are a small number of governments in the world that continue to maintain their nuclear weapons systems despite the rules of international criminal law to the contrary. I would respond in a very simple way: Since when has a small gang of criminals -- the leaders of the nuclear weapons states -- been able to determine what is illegal or legal for the rest of the world by means of their own criminal behaviour? What right do nuclear weapons states have to argue that by means of their own criminal behaviour -- nuclear deterrence/nuclear terrorism -- they have made criminal acts legitimate? No civilized state would permit a small gang of criminal conspirators to pervert its domestic legal order in this way. Indeed both the Nuremberg Tribunal and the Tokyo Tribunal made it clear that a conspiratorial band of criminal states has no right to opt-out of the international legal order by means of invoking their own criminal behaviour as the least common denominator of international deportment. It's a basic rule of international law: Right cannot arise out of injustice! *Ex iniuria ius non oritur!*

The entire human race has been victimized by an international conspiracy of ongoing criminal activity carried out by the nuclear weapons states and their leaders under this doctrine of nuclear deterrence, which is really a euphemism for nuclear terrorism. And the expansion of NATO has now drawn in almost all of Europe. They have broken down – the United States and NATO – even the traditionally neutral states. Sweden today acts as if it were a de facto but not yet de jure member of NATO. Finland has basically abandoned its neutrality. Austria, with a constitutional obligation to be neutral, has basically abandoned its neutrality. Even Ireland, little bitty Ireland – I have dual-nationality with Ireland. The Americans have forced and compelled Ireland to join up to the Partnership for Peace (PFP) which is one step away from NATO membership, and have forced Ireland then under PFP to put some troops in Afghanistan to help them wage an illegal and criminal war of aggression against Afghanistan.

The only state in Europe still holding out is Switzerland. Yes, it signed up for Partnership for Peace which it should never have done. But at least Switzerland is holding out, it has no troops in Afghanistan or Iraq. And Switzerland must continue to hold out. And that is exactly why it is being subjected to so much pressure! Including an attack on its banking and financial system to bring Switzerland into line with NATO and the United States, exactly as every other country in Europe has done and succumbed to. That is really what's at stake here. Are you, the Swiss, going to join up – either de facto or de jure – with NATO and the Americans, so that if and when they attack Iran and perhaps set off a new world war, you and your children will get sucked into it? Switzerland avoided the last two world wars. I certainly hope Switzerland will avoid the next one by having nothing to do with the United States and NATO. And somehow working your way out of Partnership for Peace.

This international criminal conspiracy of nuclear deterrence/nuclear terrorism is no different from any other conspiracy by a criminal gang or band. They are the outlaws. We are the sheriffs -- the citizens of the world. So it is up to us to repress and dissolve this international criminal conspiracy by whatever non-violent means are at our disposal and as soon as possible. As I said: If we all don't act now, Obama and his people could very well set off a Third World War over Iran, that has already been threatened publicly by Bush Junior.

Every person around the world has a basic human right to be free from the criminal practice of nuclear deterrence/nuclear terrorism, and its spectre of nuclear extinction. All human beings in our capacities as creatures of God possess the basic right under international law to engage in civil resistance for the purpose of preventing, impeding, or terminating the ongoing commission of these international crimes.

And this is not civil disobedience. It's civil resistance! We have disobeyed nothing! We are obeying the dictates of international law! It is the government officials in the nuclear weapons states and their allied states that are disobeying international law. They are the criminals! We are the sheriffs! And it is up to us to stop them!

Every citizen of the world community has the right and the duty to oppose the existence of nuclear weapons systems by whatever non-violent means are at his or her disposal. Otherwise the human race will suffer the same fate as the dinosaurs. And the planet earth will become a radioactive wasteland. And it very well could happen in our lifetime.

The time for preventive action is now! And civil resistance by all of us human beings is the way to go. Thank you.

King's Bay Plowshares Face 25 Years for Action at U.S. Nuclear Submarine Base

Seven Catholic plowshares activists entered Kings Bay Naval Submarine Base in St. Mary's, Georgia on April 4th, 2018. They went to make real the prophet Isaiah's command to "beat swords into plowshares." The seven chose to act on the 50th anniversary of the assassination of the Rev. Dr. Martin Luther King, Jr., who devoted his life to addressing what he called the "triple evils of militarism, racism and materialism." Carrying hammers and baby bottles of their own blood, the seven attempted to convert weapons of mass destruction. They hoped to call attention to the ways in which nuclear weapons kill every day, by their mere existence and maintenance.

Kings Bay Naval base opened in 1979 as the Navy's Atlantic Ocean Trident port. It is the largest nuclear submarine base in the world. There are six ballistic missile subs and two guided missile subs based at Kings Bay.

The activists went to three sites on the base: The SWFLANT administration building, the D5 Missile monument installation and the nuclear weapons storage bunkers. The activists used crime scene tape, hammers, and hung banners reading: "The ultimate logic of racism is genocide - Dr. Martin Luther King," "The ultimate logic of Trident is omnicide," and "Nuclear weapons: illegal / immoral." They also brought an indictment charging the U.S. government for crimes against peace.

The activists at the nuclear weapons storage bunkers were Elizabeth McAlister, 78, of Jonah House, Baltimore; Fr. Steve Kelly SJ, 69, of the Bay Area, California; and Carmen Trotta, 55, of the New York Catholic Worker.

At the Strategic Weapons Facility Atlantic Administration building were Clare Grady, 59, of the Ithaca Catholic Worker; and Martha Hennessy, 62, of the New York Catholic Worker.

At the Trident D5 monuments were Mark Colville, 55, of the Amistad Catholic Worker, New Haven, Connecticut; and Patrick O'Neill, 61, of the Fr. Charlie Mulholland, Catholic Worker, Garner, North Carolina.

This is the latest of 100 similar actions around the world beginning in 1980 in King of Prussia, Pennsylvania.

The King's Bay Plowshares face up to 25 years of incarceration in a U.S. Federal penitentiary for their action of courage, integrity, and principles. It was my great honor and privilege to submit the following two Declarations to the U.S. Federal District Court in the King's Bay Plowshares case on behalf of Elizabeth McAlister -- a great leader and hero of the American Peace Movement since the darkest days of the Vietnam War that she resisted with her late husband Philip Berrigan and his late brother Daniel Berrigan, S.J.. R.I.P. The other King's Bay Plowshares have also used my two Declarations and advice to defend themselves in court.³

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

USA

v

NO. 2:18-CR- 22

Elizabeth McAlister

Declaration of Francis A. Boyle

Pursuant to 28 USC 1746, Francis A. Boyle declares under penalty of perjury:

1. I am a Professor of Law at the University of Illinois College of Law at Champaign, Illinois. I hold both a Doctor of Law Magna Cum Laude from Harvard Law School and an A.M. and Ph.D. in Political Science from the Harvard Graduate School of Arts and Sciences, Department of Government, where I specialized in International Political Science and its relationship to International Law. I graduated from the exact same Harvard Ph.D. Program that produced Henry Kissinger, Zbigniew Brzezinski, Samuel Huntington et al. before me. My resume is attached to this Declaration and is hereby incorporated by reference.

2. I am an expert in International Law and Foreign Policy. I have studied, read, and written extensively in these areas, and have been qualified as an Expert Witness in several courts across the country and abroad. In particular, with respect to these proceedings concerning the Laws of War with respect to nuclear weapons, I have been qualified as an Expert on the Laws of War and testified in U.S. military court-martial proceedings involving (1) U.S.M.C. Corporal Jeff Paterson (1990); (2) U.S. Army Captain Doctor Yolanda Huet-Vaughn (1991); (3) U.S. Army Captain Lawrence Rockwood (1995); (4) U.S. Army Reserve Staff Sergeant Camilo Mejia (2003); and (5) U.S. Army First Lieutenant Ehren Watada (2006).

3. Currently valid U.S. Army Field Manual 27-10 (1956) on *The Law of Land Warfare* was drafted for the Pentagon by then Major Richard R. Baxter. Professor Baxter later taught me his course on *The Laws of War* at Harvard Law School. I was the top student in his class and Professor Baxter recommended me for my current position as a law professor. Professor Baxter was later elected a Judge on the International Court of Justice, the so-called World Court of the United Nations System. While he was alive Professor Baxter was generally considered to be the world's leading Expert on the Laws of War, and even by the United States Government itself. The United States Government chose Professor Baxter to head-up the American Delegation for

the negotiation and the drafting (1974-1977) of Additional Protocols I and II of 1977 to the Four Geneva Conventions of 1949 dealing with the Laws of War and International Humanitarian Law. I was his student at that time and personally studied these Geneva Protocols under him while he was negotiating them for the United States Government.

4. I currently teach a course on *The Constitutional Law of U.S. Foreign Affairs*. Previously, I had taught the course here on *Criminal Law* for several years before I moved over to teach *International Human Rights Law*, which includes therein International Humanitarian Law and the Laws of War. I also currently teach our course on *International Law*.

5. In 1983 the United States Military Academy at West Point invited me to Lecture and Debate before their 21st Senior Conference on *Nuclear Deterrence* on the subject of *Nuclear Deterrence and International Law*. The audience consisted of about 200 high-level officials from the United States Government in charge of supervising U.S. nuclear weapons and U.S. nuclear deterrence policies. Sitting in the audience for my West Point Lecture and Debate were among other Generals the Three-Star General in charge of War-operations at the Pentagon, the Three-Star General Commandant at West Point, the Director of the Defense Nuclear Agency, the U.S. Air Force's Special Assistant for Nuclear Targeting, former White House National Security Advisor Brent Scowcroft, former United States Undersecretary of State George Ball, the Developer of the American Hydrogen Bomb Richard Garwin, etc. My West Point Paper was later published by the United States Military Academy in *The Nuclear Debate: 21st Senior Conference Proceedings* (West Point: 1983) and later in Volume 4 of the *New York Law School Journal of International and Comparative Law*, No. 2 (1983). I am uniquely qualified to testify in this case concerning the relevance of international law and in particular the Laws of War to U.S. nuclear weapons and U.S. nuclear deterrence policies.

6. I offer this Declaration based upon personal knowledge of the allegations against these particular Defendants named herein as set forth in the Indictment; my personal knowledge of the past protest activities, cases and actions filed both by and against these named Defendants, and their strongly held religious beliefs. I further offer this Declaration in support of Defendants in this matter in establishing the content and application of the Laws of War to elements of the offenses charged and in support of justification defenses, including necessity, and crime prevention, and their absence of criminal intent.

7. I am aware that expert opinion on points of law is ordinarily not permitted in court. However, opinion of published international legal scholars is an important exception to that rule. The Statute of the International Court of Justice provides that questions of international law shall be determined by resort, inter alia, to “the teachings of the most highly qualified publicists of the various nations...” Id., Art. 38 (1) (d). An integral part of the United Nations Charter, which is a treaty and thus equivalent to a Federal statute as the Supreme Law of the Land under Article VI of the United States Constitution, this rule of evidence is applicable in Federal court. The Supreme Court expressed the same opinion in *The Paquete Habana*, 175 US 677, 700 (1900), which directly concerned the Laws of War at Sea. Cf. Fed. R. Crim. P. 26.1 (ordinary Rules of Evidence do not apply to determination of foreign law). I have written extensively on the Laws of War at Sea and the Laws of War on Land and the International Laws of Neutrality during Wartime in my book *Foundations of World Order* (Duke University Press: 1999). Volume XXI, No. 3 of the prestigious *The International History Review* (September 2000) reviewed my book as follows: “...*Foundations of World Order* is a major contribution to this reinterrogation of the past, and should be required reading for historians, political scientists, international relations specialists, and policy-makers.” Id. at 667-68.

8. In the implementation of foreign policy, the current Administration, at the Kings Bay Naval Station continues to plan, prepare and conspire for threat or use of many W-76 and W-76-1 nuclear warhead weapons, each capable of unleashing 100 kilotons of heat, blast and radiation, and many of the W88/Mk-5 warheads which carries 455 kilotons of nuclear weapons. Any planning, preparation, conspiracy for threat or use of even one of these nuclear warheads was and is unlawful, that is illegal and criminal. This conclusion is elaborated in paragraphs 9-15 below.

9. The body of Federal law which governs these matters includes rules and principles of international law including therein the Laws of War. International law is not “higher” or separate law; it is part and parcel of the structure of Federal law. The Supreme Court so held in the landmark decision in *The Paquete Habana*, 175 US 677, 700 (1900), that was recently reaffirmed in *Hamdan v. Rumsfeld*, 548 US 557 (2006). Federal statutes must be interpreted and applied consistently with international law. See e.g. *U.S. v Flores*, 289 US 137, 159 (1933); Jordan J. Paust, *International Law as Law of the United States* (2nd ed. 2003) at 99, 120, 124-25. Thus international law including treaties and customary international law and the Laws of War must be considered along with Congressional statutes, Constitutional law, administrative law, Federal common law, Rules of Court, military law such as U.S. Army Field Manual 27-10 (1956), incorporated state law and any other pertinent body of law, whenever it applies according to the pertinent rules of supremacy, parallel construction, and choice of law.

10. International law, as part of US law, includes the Laws of War. This body of positive law as applied to threat or use of nuclear weapons is summarized most authoritatively by the International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996 (ICJ Op). The London Charter (1945) establishing the Nuremberg Tribunal and the Nuremberg

Judgment (1946) made it clear that those rules and principles preempt contrary domestic law. Particular prohibitions of law are directly incorporated into the US criminal code as war crimes (18 USC 2441) or genocide (18 USC 1091-1093) and binding US treaties that are “the supreme law of the land” (U.S. Constitution, Article VI, clause 2), US Military Manuals including the Naval Commanders’ Handbook and U.S. Army Field Manual 27-10 (1956), and universally binding “intransgressible” rules of humanitarian law. The fundamental rules and principles of humanitarian law include: a) "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets" (ICJ Op., § 78). A corollary is that it is prohibited to use weapons that cause uncontrollable effects [1977 Protocol I to the Geneva Conventions, Art. 51(4)]. Use of the Trident II system where most of the above described nuclear warheads are deployed for threat or use is unlawful per se because if targeted at military objects, the effects still are indiscriminate and uncontrollable. b) “It is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering" [ICJ Op., § 78; 1907 Hague Convention IV, Art. 23(e)]. “If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law” (ICJ Op., § 78). The United States is bound as a party to each of these treaties. Because of the known and intended effects of the explosion of the nuclear warheads, each of these rules prohibits their planning, preparation, threat or use. In addition, any use of the warhead would also violate the international law of armed conflict by causing widespread, long-term, and severe damage to our common environment and contaminating neutral states, and violate the right to life and other non-derogable human rights, rights that cannot be suspended even in a state of emergency.

11. As further explained in my book *The Criminality of Deterrence* (2002), thermonuclear warheads such as those on Trident II are in a category of nuclear weapons that are, ipso facto, incapable of distinguishing between civilian and combatant, are uncontrollable in space or time and cause unnecessary suffering. Thus any planning, preparation, threat or use of these warheads was and is both illegal and criminal.

12. The London Charter for the Nuremberg Tribunal made explicit that violations of the Laws of War are criminal and that individuals are punishable for committing war crimes. In addition, the Nuremberg Charter defined crimes against peace and crimes against humanity as well as war crimes. The former basically consist of waging a war of aggression or a war in violation of a treaty or other international obligation. It is also important to reiterate that the Nuremberg Charter articulates inchoate crimes as well, such as the planning or preparation and conspiracy to commit a crime against peace, a crime against humanity, or a war crime. My teacher Professor Baxter expressly incorporated these Nuremberg Principles of international criminal law and the Laws of War into Paragraphs 498, 499, and 500, inter alia, of U.S. Army Field Manual 27-10 (1956) *The Law of Land Warfare* for the Pentagon where they still are as of today.

13. These provisions apply equally in times of formal peace as in times of war.

14. The various scenarios developed by the United States Government for the use of nuclear weapons cannot be accomplished without violating international law, including the Laws of War as incorporated into U.S. law. The plans for targeting of U.S. nuclear weapons were found in the Single Integrated Operational Plan (“SIOP”), which is now renamed the Operations Plan (“OPLAN”) which lists the targets to be destroyed in a number of nuclear and non-nuclear countries. To employ these weapons, as is currently planned, would clearly violate the Nuremberg Principles, in that the concept of a crime against humanity specifically prohibits such

wanton destruction, including and especially the Nuremberg War Crimes themselves of (1) the “wanton destruction of cities, towns, or villages”; and (2) “devastation not justified by military necessity.”

15. I am aware from my reading and study, including the Nuclear Posture Review (February 2018) as well as contracts let to “upgrade” or “extend the lives of” nuclear warheads that U.S. nuclear weapons policies include on-going threats of a “first-strike” made “believable” by maintaining the Trident II missiles and submarines in order to deliver the nuclear warheads prepared for launch on extremely short notice. I am further aware from my reading and study that a high degree of accuracy of the Trident II missiles is crucial to a first strike and cannot ameliorate the indiscriminate and uncontrollable effects.

16. Any first strike use of the Trident II missiles with nuclear warheads would, ipso facto, violate the United Nations Charter and the Hague Convention of 1907, prohibiting the opening of hostilities without a formal declaration of war or reasoned ultimatum. And any use of even one of the warheads in any circumstance whether in response or defense would violate the principles of necessity and proportionality because it cannot be used within the intransgressible rules and principles of international humanitarian law.

17. Since the threat or use of the Trident II is inherently criminal under international and US law, anything used to facilitate its operation is an instrument of a crime.

18. The Judgment of the Nuremberg International Military Tribunal meted out severe punishment in 1946 against individuals who, acting in full compliance with domestic law but in disregard of the limitations of international law, had committed war crimes and crimes against peace as defined in its Charter. 6 FRD 69 (1948). That Charter has been enacted as a law of the

United States, 59 Stat. 5144 (1945) and as War Crimes 18 USC 2441. By implication, the Nuremberg Judgment privileges all citizens of nations engaged in war crimes to act in a measured but effective way to prevent the continuing commissions of those crimes. The same Nuremberg Privilege is recognized in Article 38 of the Statute of the International Court of Justice (“General Principles of Law Recognized by All Civilized Nations”) which has been adopted as a Treaty by the United States. In my opinion, such action certainly includes non-violent exposure and inspection of sites of ongoing war crimes.

19. In the present day, there has been a breakdown in the Constitutional principle of checks and balances which implements the separation of powers; most notably neither Congress nor the courts have been willing to ensure that the Executive Branch act within the laws that limit methods and means of the threat or use of military force. The fact that the U.S. Government continues to use nuclear warheads and that their use is actively threatened on high alert reflects the stubborn refusal of the U.S. Government to abide by its own fundamental Laws of War and to proceed with negotiations for nuclear disarmament in all its aspects as required by the 1968 Nuclear Non-Proliferation Treaty to which the United States is a contracting party. In spite of years in which these Defendants have participated in citizens petitions, letters, referendums, civil cases, requests for criminal prosecution and the recent decisions on these questions with the full participation of the United States Government before the International Court of Justice, the U.S. government flouts its responsibility to abide by the Laws of War, laws to which we are fundamentally bound. Under these circumstances, where redress within traditional channels is refused and ineffective, domestic criminal law coincides with the “Nuremberg Privilege” mentioned in the preceding paragraph to afford a justification for seeming violations of domestic criminal laws in an effort to prevent the war crimes outlined above.

20. In my opinion the charges brought against these Defendants in these circumstances must be dismissed. The prosecution of this case cannot go forward because all charges brought contain elements directly related to the production and processing of nuclear materials for nuclear warheads for active threat or delivery. These statutes as applied in this case are all promulgated pursuant to the War Powers of Congress, can only be and must be interpreted consistent with the Laws of War and international law in general. Any alleged installation must be for a purpose that comports with the Laws of War. Clearly the Trident II missiles can never be planned, prepared, threatened or used within the Laws of War and any instrumentalities or property furthering that planning, preparation, threat or use is illegal and criminal. All charges must be dismissed because the court may not apply conspiracy or protection of property statutes in a way that ignores or abrogates the fundamental Laws of War. In these circumstances, where the alleged “property” is part of ongoing planning, preparation for illegal and criminal threat of or use of the most grotesque weapons of mass destruction these Defendants acted lawfully and reasonably to prevent egregious and fundamentally prohibited of all crimes, war crimes. The gas showerheads at Auschwitz were instrumentalities of crimes. The same principle of international criminal law holds true for Trident II missiles.

21. I declare under penalty of perjury that the foregoing is true and correct. I am prepared to testify under oath and answer questions on these and related matters.

22. It is my opinion that these Defendants undertook non-violent, symbolic action to attempt to disarm the Kings Bay Naval base.

23. It is further my opinion that these actions described in the Indictment are in full compliance with the laws, treaties, and legal principals outlined herein and served a legal purpose.

24. It is my further opinion that for all the reasons discussed above that are generally known to these unique Defendants, they did not possess the criminal intent required to establish any of the crimes for which they have been indicted.

25. Pursuant to the requirements of the United States Supreme Court set forth in *Mullaney v Wilbur*, 421 U.S. 684 (1975) and *In Re Winship*, 397 U.S. 358 (1970), the United States Government must prove beyond a reasonable doubt the criminal intent and all facts necessary to constitute the crimes for which these Defendants have been indicted. I respectfully submit that this Declaration of today's date creates a reasonable doubt with respect to all the crimes for which the Defendants have been indicted. Therefore all charges against them must be dismissed.

Signed this _____ day of

June, 2018 at Champaign, Illinois

Francis Anthony Boyle

Professor of Law

University of Illinois

College of Law

Massachusetts Bar No. 052540

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

USA

v

NO. 2:18-CR- 22

Elizabeth McAlister

Supplemental Declaration of Francis A. Boyle

Pursuant to 28 USC 1746, Francis A. Boyle declares under penalty of perjury:

1. I submitted a Declaration in this matter dated June 25, 2018. This Declaration supplements that original Declaration and should be read in light of that document.
2. I am an expert in International Law and Foreign Policy and my credentials are set out in the previous Declaration.
3. It was my conclusion in June 25, 2018, for the reasons set out at length in that document, that the existence, threat, or use of any of the Trident thermonuclear weapons at Kings Bay is absolutely illegal and criminal under the laws of the United States and international law.
4. Recent events have made the existence, threat, or use of those weapons of mass destruction like the Kings Bay Tridents even more horrific and the possibility of nuclear war even more likely.
5. In October of 2018, President Donald Trump and his U.S. National Security Advisor John Bolton declared it is the intention of the U.S. to withdraw from the Intermediate Range Nuclear Forces (INF) Treaty.
6. The INF Treaty was signed on December 8, 1987 by President Ronald Reagan of the United States and General Secretary Mikhail Gorbachev of the Soviet Union.

7. The INF Treaty barred both the United States and Russia from deploying nuclear and conventional ground launched ballistic missiles and cruise missiles with a range of 500 to 5500 kilometers or 300 to 3400 miles.
8. As a result of the INF Treaty, the U.S. and the Soviet Union destroyed a total of 2,692 short, medium, and intermediate range missiles by June 1, 1991.
9. Reactivating Intermediate Range Nuclear Missiles will make the world and the United States a much more dangerous place and will greatly exacerbate the current violations of U.S. and international law which I discussed in my initial Declaration.
10. New Intermediate Range Nuclear Missiles, combined with the Trident missiles, give the United States an even more obvious and effective illegal and criminal offensive first-strike nuclear weapons capability against both Russia and China.
11. Intermediate Range Nuclear Missiles will be able to reach Russia in as little as 3 minutes from launch in Eastern Europe and the Tridents can reach Russia in around 15 minutes.
12. The Intermediate Range Nuclear Missiles would primarily target strategic nuclear weapons command centers in Russia, while the Tridents will be targeted at all other civilian population centers and infrastructure locations and nuclear forces.
13. U.S. INFs in Europe will provide Russia with an enormous incentive to “use it or lose it” by launching a pre-emptive strategic nuclear attack upon the Continental United States in the event of a crisis or an accident or a computer malfunction or a radar misinterpretation or human error. These phenomena have repeatedly happened before.
14. According to President Trump’s National Security Adviser John Bolton, one of the other reasons for pulling the United States out of the INF Treaty is so that the United States can

deploy INFs against China and thus better threaten China with an illegal and criminal offensive first-strike nuclear weapons attack.

15. The Intermediate Range Nuclear Missiles would primarily target strategic nuclear weapons command centers in China, while the Tridents will be targeted at all other civilian population centers and infrastructure locations and nuclear forces.
16. U.S. INFs in Asia will provide China with an enormous incentive to “use it or lose it” by launching a pre-emptive strategic nuclear attack upon the Continental United States in the event of a crisis or an accident or a computer malfunction or a radar misinterpretation or human error. These phenomena have repeatedly happened before.
17. These actions announced by the Trump administration further violate the international law obligations of the United States under the Nuclear Non-Proliferation (NPT) Treaty which is designed to achieve nuclear disarmament as interpreted by the International Court of Justice Nuclear Weapons Advisory Opinion, as I discussed in my earlier Declaration and as I discussed in my book *The Criminality of Nuclear Deterrence* (Clarity Press: 2002).
18. These actions announced by the Trump administration are further violations of the laws of war and international humanitarian law.
19. These actions announced by the Trump administration are further violations of criminal law under U.S. and international laws. They can only result in genocide and are threatening to commit genocide.
20. The Trump administration pulling out of the INF Treaty seriously jeopardizes the renewal of the 2010 New Strategic Arms Reduction Treaty (New START) between the United States and Russia that imposes severe constraints on the offensive strategic nuclear

weapons systems of these two nuclear superpowers. Non-renewal of the New START Treaty would set off a frantic nuclear arms race between the United States and Russia as well as by the other acknowledged nuclear weapons states such as China, Britain, France, India, Pakistan, Israel, and North Korea.

21. These developments would lead to the unraveling, dissolution, and nullification of the seminal Nuclear Non-Proliferation Treaty itself and the research, development, testing, production, and deployment of nuclear weapons by every state in the world with a nuclear power plant. Currently 30 countries in the world have operational nuclear power plants – that figure is 31 if Taiwan is considered separately from China. See *Operational & Long-Term Shutdown Reactors*, Int'l Atomic Energy Agency, <https://pris.iaea.org/PRIS/WorldStatistics/OperationalReactorsByCountry.aspx> (last updated Oct. 28, 2018).
22. The non-violent symbolic disarmament actions of Defendants in this matter take on greater and compelling urgency in light of the announcement by the United States that it will withdraw from the INF Treaty.
23. I repeat my opinion that the charges against these Defendants should be dismissed. The Court must recognize that the possession, preparation for use, threat of use or use of Trident nuclear weapons at Kings Bay is illegal and criminal.
24. The non-violent, symbolic disarmament actions by Defendants in this matter are in full compliance with the laws, treaties and principles of U.S. and international law and served a lawful purpose: preventing the ongoing commission of genocidal international and U.S. domestic crimes.
25. The very existence of humanity is at risk!

26. I declare under penalty of perjury that the foregoing is true and correct. I am prepared to testify under oath and answer questions on these and related matters.

Signed this ____ Day of _____, 2018 at Champaign Illinois.

Francis Anthony Boyle
Professor of Law
University of Illinois
College of Law
Massachusetts Bar Number 052540

¹ U.S. nuclear weapons are still in Germany

² George Monbiot, "Our Nuclear Programme Is Illegal," Guardian, September 20, 2000.
<https://www.theguardian.com/comment/story/0,3604,374144,00.html>.

³ After a kangaroo court proceeding, they were all found guilty. Their sentencing has been delayed because of the Covid-19 pandemic.