

IN THE DISTRICT COURT FOR **KITSAP** COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

MARIE BERNARD, et al.,
Defendants.

No. 13246001 KTC

DECLARATION OF JOHN
BURROUGHS REGARDING
INTERNATIONAL LAW AND
TREATY ISSUES

JOHN BURROUGHS, being first duly sworn upon oath, hereby declares as follows:

1. I am an attorney for the Western States Legal Foundation in Oakland, California, a non-profit group that monitors and challenges United States nuclear weapons programs. I served as the non-governmental organization legal coordinator at the November 1995 hearings before the International Court of Justice (ICJ) in The Hague, Netherlands, concerning the legality of threat or use of nuclear weapons. In that capacity I advised several countries concerning their oral arguments. I subsequently authored a book about the ICJ's July 8, 1996 advisory opinion for the International Association of Lawyers Against Nuclear Arms (IALANA), *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (Piscataway, NJ: Transaction Publishers, 1998). I also served as IALANA's representative at the 1998 negotiations of the Statute of the International Criminal Court in Rome, with a special focus on the Statute's implications for nuclear and other weapons of mass destruction. *Nuclear Obligations*, my 1991 Ph.D. dissertation in the Jurisprudence and Social Policy Program, School of Law, Boalt Hall, University of California at Berkeley, examines the international law framework for nuclear weapon policy and protest. A full resume is attached.

2. I am advised that on August 9, 1998, defendants joined in a non-violent protest at the Bangor, Washington base for Trident nuclear-armed submarines, and that defendants believed that the

1 Trident system is unlawful, and their actions justified, under international law binding on the United
2 States. If called upon to testify **concerning** the reasonableness of defendants' beliefs and actions **under**
3 international law, I would testify as outlined in this declaration.

4 3. Both treaty-based and custom-based international law are part of the law of the land
5 under Article VI, clause 2 of the Constitution (treaties are included in the "supreme law of the land")
6 and The Paquete Habana, 175 U.S. 677,700 (1900) (customary international law is "part of our law").
7 Customary international law may be analogized to common law. It refers to universally binding law
8 based on a general and consistent practice of states followed out of a sense of legal obligation.

9 4. The International Court of Justice is the judicial branch of the United Nations, and the
10 highest and most authoritative court on questions of international law in the world. Its July 8, 1996
11 opinion, *Legality of the Threat or Use of Nuclear Weapons*, General List No. 95, (hereinafter
12 "**Opinion**") was issued in response to a request for an advisory opinion by the United Nations General
13 Assembly. Advisory opinions are intended to provide U.N. bodies guidance regarding legal issues, and
14 are not directly binding on the U.N. or its member states. However, the ICJ has authoritatively
15 interpreted law which states, including the United States, acknowledge they must follow, including
16 **humanitarian** law and the United Nations Charter. Accordingly, it stands as an authoritative statement
17 of law with which the United States must comply.,

18 5. The Statute of the International Criminal Court sets forth the offenses under which
19 individuals would be prosecuted once that court is in operation. Its substantive provisions were
20 **explicitly** negotiated on the basis that they would reflect the present state of law binding on all states.
21 While the Statute is not yet in effect, as the required number of states (60) has not yet ratified the
22 **instrument**, and while the United States' present position is that it will not sign or ratify the Statute, the
23 Statute nonetheless stands as a consensus-based statement of presently binding law defining war crimes.
24 In particular, the United States was deeply engaged in the negotiation of provisions defining war crimes,
25 and I am satisfied, based upon observation of the negotiations and conversations with U.S.
26 representatives, that the United States accepts the essentials of those provisions as stating binding law.

27 6. A wide array of rules and principles of international law bear upon the threat or use of
28 nuclear weapons. One branch of international law, humanitarian law, protects civilians and combatants

1 from indiscriminate and unnecessary effects of warfare. It is binding whether a state is acting
2 aggressively or in self-defense or reprisal. Humanitarian rules and principles particularly relevant to
3 threat or use of nuclear weapons include prohibitions on inflicting unnecessary **suffering** and
4 indiscriminate harm, and a related rule of proportionality. The ICJ found that “[i]f an envisaged use of
5 weapons would not meet the requirements of humanitarian law, a threat to engage in such use would
6 also be contrary to that law.” *Opinion*, *pat-a.* 78.

7 7. Article 23(e) of the 1907 Hague Regulations Respecting the Laws and Customs of War
8 on Land, Annex to the 1907 Hague Convention, a treaty to which the United States is a party, forbids
9 the employment of “arms, projectiles, or material calculated to cause unnecessary suffering.” As framed
10 by the ICJ, a “cardinal principle” of humanitarian law is that “it is prohibited to cause unnecessary
11 suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or
12 uselessly aggravating their suffering.” *Opinion*, **para.** 78.

13 8. The prohibition of inflicting indiscriminate harm underlies the Hague and Geneva
14 Conventions, all treaties to which the United States is a party, and is explicitly stated in the 1977
15 Protocol I to the Geneva Conventions, a widely ratified treaty which additionally is commonly regarded
16 **as** stating binding customary law. The United States **signed**, but has not yet ratified, Protocol I, and has
17 accepted the essentials of the prohibition set forth in Protocol I in a variety of forums, including in its
18 **arguments** to the International Court of Justice. The ICJ framed the prohibition as a second “cardinal
19 **principle**” of humanitarian law as follows, stating that the principle:

20 is aimed at the protection of the civilian population and civilian objects and
21 establishes the distinction between combatants and non-combatants; States must
22 never make civilians the object of attack and must consequently never use
 weapons that are incapable of distinguishing between civilian and military
 targets.

23 *Opinion, id.*, **para.** 78.

24 The Statute of the International Criminal Court includes prohibitions on the following “serious
25 violations of the laws and customs applicable in international armed conflict, within the established
26 framework of international law” (Art. 5(b)): “Intentionally directing attacks against the civilian
27 population as such or against individual civilians not taking direct part in hostilities” (Art. 5(b)(i);
28 “Intentionally directing attacks against civilian objects, that is, objects which are not military objectives”

1 (Art. 5(b)(ii); and “Intentionally launching an attack in the knowledge that such attack will cause
2 incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and
3 severe damage to the natural environment which would be clearly excessive in relation to the concrete
4 and direct overall military advantage anticipated” (Art. 5(b)(iv). The latter provision stating **the rule**
5 **of** proportionality is of special importance in assessing the legality’ of threat or use of nuclear weapons.
6 It is based on Protocol I to the Geneva Conventions and a variety of other sources. The United States
7 took a particular interest in negotiating the language of this provision and approved its inclusion within
8 the Statute at the negotiations.

9 9. Another branch of international law, environmental law, also bears on the threat or use
10 of nuclear weapons. The ICJ stated:

11 The Court recognizes that the environment is under daily threat and that the use
12 of nuclear weapons could constitute a catastrophe for the environment. The
13 Court also recognizes that the environment is not an abstraction but represents
14 the living space, the quality of life and the very health of human beings,
15 including generations unborn. The existence of the general obligation of States
16 to ensure that activities within their jurisdiction and control respect the
17 environment of other States or of areas beyond national control is now part of the
18 corpus of international law relating to the environment.

19 *Opinion, id., para. 29.*

20 While noting that environmental law does not “deprive a State of the exercise of its right of self-
21 **defense** under international law because of its obligations to protect the environment,” the ICJ stated:
22 ‘Nonetheless, States must take environmental considerations into account when assessing what is
23 **necessary** and proportionate in the pursuit of legitimate military objectives.’ *Opinion, id., para. 30.*

24 10. According to the Natural Resources Defense Council, widely recognized as providing
25 **reliable** information about nuclear forces, as of the end of 1996 Trident submarines each are equipped
26 **with** 24 missiles, and each missile carries eight warheads, scheduled to be reduced to five warheads by
27 2003. W76 warheads, which I understand are now deployed on Trident submarines based at Bangor,
28 **have** a yield of 100 kilotons, approximately seven times the yield of the bomb that devastated
Hiroshima. W88 warheads, which I understand are slated to be deployed on some of the submarines
based at Bangor, have a yield of 475 kilotons, approximately 32 times the yield of the Hiroshima bomb.
Thus I understand that presently a Trident submarine based at Bangor is equipped with 192 warheads,

1 each with a 100 kiloton yield.

2 11. In my opinion, taking into account the blast, heat, and radioactive effects of a detonation
3 of a **100** kiloton warhead, especially in view of the fact that radioactive effects cannot be contained **in**
4 either space or time, the use of even a single Trident warhead in any circumstance, whether a first or
5 second use and whether targeted against civilian populations or military objectives, would inevitably
6 violate the prohibitions on the infliction of unnecessary **suffering** and indiscriminate harm as well as the
7 rule of proportionality including with respect to the environment. Since the United States deploys its
8 nuclear forces in a high state of readiness for use pursuant to a declared policy contemplating use of
9 nuclear weapons in a variety of circumstances, including first use, I further believe that the deployment
10 **of** Trident warheads is a threat in violation of humanitarian and other international law.

11 12. Thus, in my opinion, defendants' belief that the deployment of Trident submarines is
12 **unlawful** under international law binding on the United States is reasonable and indeed correct.

13 13. While the International Court of Justice did not address the legality of specific nuclear
14 weapon systems, its opinion also supports the reasonableness **and** correctness **of defendants'** belief. As
15 **noted** above, the ICJ stated as a "fundamental" and "intransgressible" rule that states must "never use
16 **weapons** that are incapable of distinguishing between civilian and military targets." *Opinion, id., para.*
17 *78* (emphasis added). The ICJ also found that the nuclear weapon states had failed to make the case that
18 **even** a "limited" use of nuclear weapons could comply with humanitarian law or avoid catastrophic
19 **escalation (para. 94)**, and further found that "the use of such weapons in fact seems scarcely reconcilable
20 **with** respect for [humanitarian] requirements" (**para. 95**). **In** a formal conclusion, the Court stated:

21 The threat or use of nuclear weapons would generally be contrary to the rules or
22 international law applicable in armed conflict, and in particular the principles
and rules of humanitarian law.

23 However, in view of the current state of international law, and of the elements of fact at
24 its disposal, the Court cannot conclude definitively whether the threat or use of nuclear
weapons would be lawful or unlawful in an extreme circumstance of self-defence, in
25 which the very survival of a State would be at stake.

26 *Opinion, id., para. 105(2)E.*

27 14. Unlike the question before the ICJ, the issue here concerns a specific weapon system,
28 **the** Trident submarine. Regardless of whether some "limited" use of nuclear weapons, for example

1 involving speculative future “clean” or “low-yield” warheads, might comply with humanitarian and
2 other law in an “extreme circumstance of self-defence,” detonation of a Trident warhead, **especially**
3 considering the radioactive contamination it would cause, could never comply with the categorical
4 prohibition on the infliction of indiscriminate harm, as well as the prohibition on the infliction of
5 unnecessary suffering and the rule of proportionality. Simply stated, each Trident warhead is a potential
6 holocaust,

7 15. Both Nuremberg and **human rights** law support the reasonableness of defendants’ actions.,
8 As the International Military Tribunal famously observed, “the very essence of the [Nuremberg] Charter
9 is that individuals have international duties which transcend **the national** obligations of obedience
10 imposed by the individual **state.**” *United States et al. v. Goering et al. (Judgment of the International*
11 *Military Tribunal)*, 6 Federal Rules of Decision (U.S.) 69, 110 (1946). Under that principle, regardless
12 of a superior’s orders or national law, all persons,, military and civilian, whatever their rank or position,
13 are obligated to terminate their commission of, or complicity with, acts connected to the use of a nuclear
14 weapon in violation of humanitarian and other law proscribing international crimes.

15 16. The principle stated above in ¶ 15 is only a statement of the minimal consequences of
16 the principle of individual responsibility in the context of nuclear weapons. In light of present
17 **circumstances**, including the threat of global catastrophe posed by the Trident system, the principle of
18 individual responsibility supports reasonable, non-violent affirmative acts by citizens and taxpayers, not
19 themselves directly involved in deployment or use of nuclear weapons, directly to confront and oppose
20 the potential commission of atrocities by use of those weapons.

21 17. This extension of the Nuremberg principle of individual responsibility is consistent with
22 human rights law. Relevant provisions are found in the Universal Declaration of Human Rights, widely
23 accepted as an authoritative interpretation of the, human rights clauses of the United Nations Charter,
24 a treaty to which the United States is a party. In addition the Universal Declaration evidences customary
25 international law. Preambular Paragraph Three states:

26 [I]t is essential, if man is not to be compelled to have recourse, as a last resort,
27 to rebellion against tyranny and oppression, that human rights should be
28 protected by the rule of law....

1 Preambular Paragraph Eight states:

2 [E]very individual and every organ of society, keeping this Declaration
3 constantly in mind, shall strive by teaching and education to promote respect for
4 these rights and freedoms and by progressive measures, national and
5 international, to secure their universal and effective recognition and observance,
6 both among the peoples of Member States themselves and among the people of
7 territories under their jurisdiction.

8 Article 28 states:

9 Everyone is entitled to a social and international order in which the rights and
10 freedoms set forth in this Declaration can be fully realized.

11 18. The International Court of Justice found that the right to life, recognized in Article 6(1)
12 of the International Covenant on Civil and Political Rights, a treaty to which the United States is a party,
13 must be respected in time of war, and that humanitarian and other law governing the conduct of warfare
14 determines whether deprivation of the right to life is arbitrary in violation of Article 6(1). *Opinion*, para.
15 :25.

16 19. The above-mentioned provisions of the Universal Declaration support a right of protest
17 under the circumstances of this case; namely, non-violent protest of threatened violations of the right
18 to life. Harm to civilian populations is inconsistent with the principle that "human rights should be
19 protected by the rule of law..." Non-violent protest of threatened harm vindicates the rule of law while
20 avoiding the extreme step of "recourse . . . to rebellion against tyranny and oppression." Non-violent
21 protest fulfills also the responsibility to strive for the "recognition and observance" of human rights and
22 promotes the attainment of a "social and international order in which rights and freedoms set forth in
23 this Declaration can be fully realized."

24 I declare under penalty of perjury under the laws of the State of Washington that the foregoing
25 is true and correct. Executed this 15th day of December 1998 at Oakland, California.

26 _____
27 JOHN BURROUGHS