

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION
CASE NO: 1:06-CR-59-DLH-CSM-

UNITED STATES OF AMERICA,
Plaintiff,

vs.

1. CARL KABAT,
2. GREGORY BOERTJE-OBED
3. MICHAEL WALLI

Defendants.

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, at Champaign, Illinois. I hold both a Juris doctor magna cum laude and a Ph. D. in Political Science from Harvard University.

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. I have also taught in the field of criminal law. My resume is attached to this declaration and incorporated by reference.

3. I offer this declaration in support of the Motions to Dismiss the charge of malicious destruction of property (18 USC 1361) and in establishing the content and application of the laws of war to elements of the offense charged and in support of justification defenses including necessity and crime prevention.

4. I am aware that expert opinion on points of law is ordinarily not permitted in court. 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 Supreme Law of the Land, 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). Cf. Fed. R. Crim. P. 26.1 (ordinary Rules of Evidence do not apply to determination of foreign law).

5. In the implementation of foreign policy, the current Administration has threatened to use nuclear weapons and was on June 20, 2006, actively threatening to use the Minuteman III, E-9 at issue in this case. Because this threat or use of 300 kilotons of heat, blast and radiation are uncontrollable and because the threat or use of this weapon is for a "first-strike," the Minuteman III, E-9, on June 20, 2006 was not merely unlawful, but actually criminal. This conclusion is elaborated in paragraphs 6-15 below.

6. The body of federal law which governs these matters includes rules and principles of international law. International law is not "higher" or separate law; it is part and parcel of the structure of U.S. federal law. The Supreme Court so held in the landmark decision in The Paquete Habana, 175 US 677, 700 (1900), recently reaffirmed in Hamdan v. Rumsfeld, (U.S. Supreme Court, No. 05-1846. Argued March 28, 2006—Decided June 29, 2006). Thus international law must be considered along with Congressional statutes, Constitutional law, administrative law, federal common law, Rules of Court, military law, the laws of war, 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.

7. International law, as part of US law, includes the laws of war. Under the fourth Hague Convention, various types of weapons are absolutely prohibited under all circumstances. For example, no nation may use a weapon which causes unnecessary suffering to human beings. Second, the use of poison or poison weapons is flatly prohibited by the Hague Regulations, by the Geneva Protocol of 1925, and by the US Army Field Manual 27-10 on the Law of Land Warfare (1965) and the US Department of the Air Force Pamphlet on "International Law -- The Conduct of Armed Conflict and Air Operations" (AFP 110-31, 1976). The United States is bound as a party to each of these. Third, a nation may not adopt methods or tactics of warfare that fail to distinguish between combatants and non-combatants. Because of the inevitable effects of the explosion of the Minuteman III, E-9, each of these rules prohibits its use. Other provisions of international law, moreover, prohibit destruction of the natural environment, another inevitable consequence of the explosion of any nuclear weapon including the Minuteman III, E-9.

8. The most recent and most authoritative summary of the current and binding laws of war as applied to any threat or use of nuclear weapons is found in the International Court of Justice Opinion, Legality of the Threat or Use of Nuclear Weapons, 8 July 1996. As further explained in my recent book The Criminality of Nuclear Deterrence, the Minuteman III is in a category of nuclear weapons that is, ipso facto, incapable of distinguishing between civilians and combatants, is uncontrollable in space or time and causes unnecessary suffering. Thus any threat or use of the Minuteman III, E-9 was illegal and criminal.

9. The Charter of 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. 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 note 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.

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

11. 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. The plans for targeting of US nuclear weapons are found in the Single Integrated Operational Plan ("SIOP"), 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.

12. I am aware from my reading and study, including the Nuclear Posture Review (January, 2002) and the National Security Strategy (September 2002) as well as fact sheets and reports published by the Air Force specifically related to the Minuteman III, that US nuclear policy includes on-going threats of a "first-strike" made "believable" by maintaining the Minuteman III at a high-alert rate (above 98 percent), prepared for launch on short notice. I am further aware from my reading and study that a high degree of accuracy of the Minuteman III is crucial to a first strike.

13. Any first use of nuclear weapons would, for that reason alone, violate the United Nations Charter and the Hague Convention No. III of 1907, prohibiting the opening of hostilities without a formal declaration of war. And any use of even one nuclear weapon such as the Minuteman III, E-9 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 humanitarian law.

14. Since the threat or use of the Minuteman III, E-9 is inherently criminal under international and US law, anything used to facilitate its operation is an instrument of a crime.

15. The judgment of the Nuremberg International Military Tribunal meted out severe punishment in 1948 against individuals who, acting in full compliance with domestic law but in disregard of the limitations of international law, had committed war crimes 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). 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 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 could

include non-violent exposure, inspection and symbolic disarmament of sites of ongoing war crimes.

16. 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 Minuteman III missiles exist and that their use is actively threatened on high alert reflects the stubborn refusal of the US to abide by its own fundamental laws of war and to proceed with negotiations for nuclear disarmament in all its aspects. In spite of years of 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 before the International Court of Justice, the US 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.

17. In my opinion the charge brought against these defendants in these circumstances must be dismissed. This prosecution for malicious destruction of property must be dismissed because the court may not apply the general protection of property statute in a way that ignores or abrogates the fundamental laws of war. In these circumstances, where the alleged "property" is part of an illegal and criminal threat of use of a weapon of mass destruction these defendants acted lawfully and reasonably to prevent the most egregious and fundamentally prohibited of all crimes, war crimes.

18. 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 28 day of
August 2006, at Champaign, Illinois


FRANCIS ANTHONY BOYLE