DECLARATION OF JOHN BURROUGHS

I, John Burroughs, declare as follows:

1. This declaration concerns requirements of international law incorporated into U.S. law bearing upon the Divine Strake test that I believe are relevant to National Environmental Policy Act and other issues before the Court. The declaration elaborates the following points among others. Based on government documents, I am informed and believe that the Divine Strake test will serve in part to simulate nuclear weapons effects and to advance understanding of use of such weapons against underground structures. Under Article VI of the Nuclear Non-Proliferation Treaty (NPT), the United States is obligated to negotiate in good faith cessation of the nuclear arms race at an early date and nuclear disarmament. At the 2000 NPT Review Conference, all participating states, including the United States, agreed to a program of action to implement Article VI. Among the commitments made was one to a "diminishing role of nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination." The Divine Strake test is contrary to the Article VI obligation as specified by the commitment to a diminishing role of nuclear weapons in security policies. As a contribution to the potential use of nuclear weapons against buried targets, it is a step, rather, in implementation of an expanding role of nuclear weapons as envisaged by the Department of Defense Nuclear Posture Review of December 2001. Further, the threat or use of low-yield nuclear weapons whose effects the Divine Strake test would simulate is illegal under fundamental requirements of international law affirmed in U.S. military manuals on the law of armed conflict and set forth in the 1996 advisory opinion of the International Court of Justice. Any method or means of attack must satisfy the requirements of necessity, proportionality, and discrimination. Discrimination requires limiting the effects on non-combatants of an attack on a military objective.

Low-yield nuclear weapons cannot meet these requirements. In addition, an attack using a low-yield weapon would likely be illegal due to severe and disproportionate damage to the environment.

2. I am the executive director of the Lawyers' Committee on Nuclear Policy (LCNP), a non-profit association of lawyers and professors of international law based in New York City. LCNP is a U.S. affiliate of the International Association of Lawyers Against Nuclear Arms (IALANA). LCNP engages in research and analysis on legal aspects of disarmament and security, especially with respect to nuclear weapons, and also engages in advocacy on these matters in international settings including the United Nations and the Nuclear Non-Proliferation Treaty review process as well as in national settings. 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* (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 weapons. I am co-editor of *Rule of Power or Rule of Law? An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties* (Apex Press, 2003), and principal author of the chapter on the Nuclear Non-Proliferation Treaty. I am an adjunct professor of international law at Rutgers Law School - Newark. *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 weapons policy. In addition to the Ph.D., I have a

J.D. from Boalt Hall. I am admitted to the bar in the states of California and Washington. A resume is attached.

3. I am informed and believe that the Divine Strake test will serve in part to simulate nuclear weapons effects and to advance understanding of use of such weapons against underground structures. I base this understanding on government documents examined in Andrew Lichterman, "Did the WashPost Miss Explosive Story?" DisarmamentActivist.org, March 31, 2006, for example Department of Defense Exhibit R-2a, RDT&E Project Justification, February 2006, RDT&E, Defense-Wide/Advanced Technology Development - BA 3, 0603160BR, Project BK - Counterforce:

> The Tunnel Target Defeat ACTD [Advanced Concept and Technology Demonstration] will develop a planning tool that will improve the warfighter's confidence in selecting the smallest proper nuclear yield necessary to destroy underground facilities while minimizing collateral damage. The focus of the demonstration is to reduce the uncertainties in target characterization and weapon effect/target response…."

I base this understanding also on government statements that have acknowledged that the test will advance nuclear weapons science. For example, the Las Vegas Sun reported the following on April 28, 2006 (Launce Rake, "Test blast linked to nuke weapons"; emphasis supplied):

> Contrary to the Pentagon's earlier denials, a government official overseeing a test explosion at the Nevada Test Site in June says the blast could help with the development of nuclear weapons.
>
> *The detonation could simulate "a number of weapon concepts,"* said Doug Bruder, director of the counter-weapons of mass destruction program for the Defense Department's Defense Threat Reduction Agency.
>
> *"It could be nuclear or advanced conventional,"* he said. *"A charge of this size would be more related to a nuclear weapon."*
>
> The Pentagon has denied that the test is intended to aid research into "bunker buster" nuclear weapons - essentially smaller-scale weapons designed to penetrate and destroy facilities built deep below ground.

> In keeping with those earlier denials, Bruder said the blast, known as Divine Strake, was not specifically designed to produce a nuclear weapon and "does not replicate any existing or planned nuclear weapon."
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> After watching a CNN tape of remarks by Bruder, Rep. Jim Matheson, a Democrat who represents southwestern Utah, issued a statement Thursday saying: "Officials who say they are using this Divine Strake test in planning for new nuclear weapons seem to be ignoring congressional intent about no new nuclear weapons, and that concerns me."
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> On the CNN tape, Bruder said: *"There are some very hard targets out there and right now it would be extremely difficult if not impossible to defeat with current conventional weapons. Therefore there are some that would probably require nuclear weapons."*

4. Set forth below are requirements of international law bearing upon the Divine Strake test. I believe they are relevant in several respects to the issues before this Court. *First*, they shed light on whether under the National Environmental Policy Act (NEPA), defendants have adequately examined alternatives to the proposed action. Defendants have not evaluated an alternative of not performing the test in the context of reduction and elimination of U.S. nuclear forces as part of a global process accompanied by a diminishing role of nuclear weapons in security policies. However, under the Nuclear Non-Proliferation Treaty, a U.S. treaty, proceeding on that path is a legal obligation of the United States. The no action alternative does not substitute for this alternative, because it assumes a purpose and need contrary to that inherent in the denuclearization path. The no action alternative also takes on a different character when assessed in light of U.S. international obligations. *Second*, NEPA has always been understood to require assessment of international dimensions of actions and programs. 40 CFR § 1508.18, "Major Federal Action," provides in relevant part that:

> (b) Federal actions tend to fall within one of the following categories: (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; *treaties and international conventions or agreements*; formal documents establishing an

> agency's policies which will result in or substantially alter agency programs." (Emphasis added.)

See also "Major Federal actions requiring the preparation of environmental impact statements,"40 CFR § 1502.4, at (b), referring to § 1508.18. Section 102 of NEPA (42 USC § 4332) provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible … (2) all agencies of the Federal Government shall -- … (F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment; ….

Third, U.S. internal, treaty-based obligations vis-à-vis the Western Shoshone people need to be understood in the context of U.S. international, treaty-based obligations.

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

6. The International Court of Justice (ICJ) is the judicial branch of the United Nations, and the highest and most authoritative court in the world on questions of international law. Its July 8, 1996 opinion, *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports (1996) 226, was issued in response to a request for an advisory opinion by the UN General Assembly. Advisory opinions are intended to provide UN bodies guidance regarding legal issues, and are not directly binding on the UN or its member states. However, the ICJ has authoritatively interpreted law which states, including the United States, acknowledge they must follow, including the

Nuclear Non-Proliferation Treaty and international humanitarian law. Accordingly, the opinion stands as an authoritative statement of law with which the United States must comply.

7. The ICJ's opinion addressed the following question posed by the General Assembly: "Is the threat or use of nuclear weapons permitted in any circumstance under international law?" In paragraph 105(2)F of the "dispositif" setting forth its answers to the General Assembly, the Court unanimously concluded: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." The Court's statement of the disarmament obligation is now the authoritative interpretation of Article VI of the Nuclear Non-Proliferation Treaty (NPT). Article VI provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

8. Article VI must be understood in the context of the entire treaty. The NPT is the only security treaty that permits two classes of members: states acknowledged to possess nuclear weapons and states barred from acquiring them. One hundred and eighty-eight states are members. Only three countries are outside the regime, all nuclear-armed, India, Pakistan, and Israel. In addition, North Korea's status is in limbo; it has announced its withdrawal, and may have a few nuclear weapons. The NPT strikes a bargain between non-nuclear weapon states, which are prohibited from acquiring nuclear arms and are guaranteed access to peaceful nuclear technology, and nuclear weapons states, which are required to negotiate nuclear disarmament in good faith. In the post-Cold War era, the 1995 and 2000 NPT Review Conferences, and the 1996 International Court of Justice opinion, established that the NPT requires the achievement of

symmetry by obligating the nuclear weapons states to implement a program culminating in the elimination of their arsenals.

9. In 1995, the year that the NPT was due to expire, the indefinite extension of the treaty was agreed as part of a larger package that included a set of commitments known as the "Principles and Objectives for Nuclear Non-Proliferation and Disarmament". The Principles and Objectives set forth measures for implementation of the Article VI disarmament obligation. They include negotiation of a Comprehensive Test Ban Treaty by 1996, commencement of negotiations on a treaty banning production of fissile materials for use in weapons, and the "determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons."

10. The 2000 NPT Review Conference further specified what the Article VI disarmament obligation requires. Its Final Document sets forth "practical steps for the systematic and progressive efforts to achieve nuclear disarmament" ("Practical Steps"). Implementation of this comprehensive agenda would result in the achievement of a nuclear-weapon-free world. Among its crucial elements were: 1) an "unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals," confirming the ICJ's interpretation of Article VI; 2) affirmation of principles of transparency, verification, and irreversibility for the reduction and elimination of nuclear arsenals; 3) bringing the Comprehensive Test Ban Treaty into force and observing the moratorium on nuclear test explosions pending its entry into force; and 4) "a diminishing role for nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination." The last step is especially relevant to the Divine Strake test, as discussed below.

11. This history decisively informs the proper interpretation of Article VI and the obligation "to bring to a conclusion negotiations on nuclear disarmament in all its aspects" as

stated by the International Court of Justice. Under well-established rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, the 2000 Practical Steps together with the 1995 Principles and Objectives constitute agreement and practice subsequent to the adoption of the NPT authoritatively applying and interpreting Article VI. The Vienna Convention is widely acknowledged, including by the U.S. State Department, as stating customary rules of international law. See *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2nd Cir. 2000). Thus while the United States has signed but not ratified the treaty, it states rules binding on the United States. Article 31(3) of the Vienna Convention, entitled "General Rule of Interpretation," provides that in addition to the text and preamble of a treaty, "there shall be taken into account … (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." The 2000 NPT Review Conference Final Document states that the "Conference agrees" on the Practical Steps. Further, the agreement was reached in the context of a proceeding authorized by Article VIII of the NPT "to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized." This is the most natural setting for states to make authoritative applications and interpretations of the NPT.

12. In addition to constituting *agreements*, the Principles and Objectives and Practical Steps are part of a *practice* of the parties to the NPT that has been consistent over the course of the treaty's life, dating back to its inception. After the treaty was opened for signature on July 1, 1968, the Soviet Union and the United States placed specific measures before the predecessor to today's Conference on Disarmament, the Eighteen Nation Disarmament Committee, where the NPT had been negotiated. Under a heading taken from Article VI, they proposed an agenda including "the cessation of testing, the non-use of nuclear weapons, the cessation of production of

fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles ….” (ENDC/PV. 390, 15 August 1968, para. 93.) Disarmament measures have been the subject of discussion at every Review Conference since then. In short, the Practical Steps, as an application of Article VI, are an essential guide to its interpretation. They identify criteria and principles that are so tightly connected to the core meaning of Article VI as to constitute requirements for compliance with the NPT and more generally the disarmament obligation stated by the ICJ.

13. The Divine Strake test, as a contribution to the potential use of nuclear weapons against buried targets, would be a step in implementation of an expanding role of nuclear weapons as envisaged by the Department of Defense Nuclear Posture Review of December 2001. It reflects a doctrine of warfighting in which nuclear weapons could be used first, against states not possessing nuclear weapons, in an integrated fashion with non-nuclear forces. A nuclear weapons simulation aimed at improving understanding of nuclear earth penetrators or other nuclear weapons to be used for attacking buried targets is wholly inconsistent with a “diminishing role for nuclear weapons in security policies” agreed by the United States in 2000 and a central element of compliance with the disarmament obligation.

14. The Divine Strake test further is contrary to the Article VI requirement “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date ….” Sometimes overlooked, cessation of the nuclear arms race is one of three elements of Article VI; the other two are nuclear disarmament and a treaty on general and complete disarmament. Nuclear arms racing is understood to have both qualitative and quantitative components. More than 35 years after the 1970 entry into force of the NPT, development of techniques for nuclear attacks on buried targets, and possible modification or

design of nuclear weapons for this purpose, assisted by the Divine Strake test, is incompatible with a good faith effort to end nuclear arms racing.

15. Also relevant to the issues before the Court is the legality of threat or use of nuclear weapons, particularly low-yield nuclear weapons whose effects the Divine Strake test would simulate. Under international law discussed below, such threat or use is illegal. This reinforces the need for the Department of Energy to examine alternatives under NEPA in which the test is not performed. Also relevant to NEPA issues is that international law forbids use of weapons with disproportionate environmental consequences.

16. A wide array of rules and principles of international law bear upon the threat or use of nuclear weapons. One branch of international law, humanitarian law, protects civilians and combatants from indiscriminate and unnecessary effects of warfare. It is binding whether a state is acting aggressively or in self-defense or reprisal. The United States, while maintaining that use of nuclear weapons is not prohibited *per se* by international law, acknowledges that their use is subject to its requirements. Thus Air Force Doctrine Document 2-1.5 (15 July 1998), p. 9 (emphasis in original), states: "Under international law, *the use of a nuclear weapon must be based on the same targeting rules applicable to the use of any other lawful weapon,* i.e., the counterbalancing principles of military necessity, proportionality, distinction, and unnecessary suffering." Similarly, the ICJ unanimously concluded: "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, and specific obligations under treaties and other undertakings which expressly deal with nuclear weapons." (Para. 105(2)D.) As the conclusion states, threat as well as use of nuclear weapons is subject to legal requirements. The ICJ held that "[i]f 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". (Para. 78.)

17. The thrust and implications of the ICJ's opinion with respect to threat or use of nuclear weapons were well summarized by the Committee on International Security and Arms Control of the U.S. National Academy of Sciences. The Committee stated:

> [T]he ICJ unanimously agreed that the threat or use of nuclear weapons is strictly limited by generally accepted laws and humanitarian principles that restrict the use of force. Accordingly, any threat or use of nuclear weapons must be limited to, and necessary for, self defense; it must not be targeted at civilians, and be capable of distinguishing between civilian and military targets; and it must not cause unnecessary suffering to combatants, or harm greater than that unavoidable to achieve military objectives. *In the committee's view, the inherent destructiveness of nuclear weapons, combined with the unavoidable risk that even the most restricted use of such weapons would escalate to broader attacks, makes it extremely unlikely that any contemplated threat or use of nuclear weapons would meet these criteria.* (Committee on International Security and Arms Control, National Academy of Sciences, *The Future of U.S. Nuclear Weapons Policy*, National Academy Press, 1997, p. 87; emphasis supplied.)

18. For threat or use of low-yield nuclear weapons simulated by the Divine Strake test to be lawful, the requirements of discrimination, necessity, and proportionality must be met. The immunity of civilians at the core of the requirement of discrimination underlies the Hague and Geneva Conventions, treaties to which the United States is a party. The ICJ described the principle of discrimination as "fundamental," "cardinal," and "intransgressible," and framed it as follows: it "is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets." (Para. 78.) The use of the term "never" is significant: under humanitarian law, in no circumstance, including reprisal against a prior nuclear, chemical or biological attack, may a state use inherently indiscriminate weapons.

19. The ICJ's formulation of the requirement of discrimination as a principle of customary, indeed "intransgressible," international law is supported by the comprehensive set of rules prohibiting the infliction of indiscriminate harm codified in the 1977 Protocol I to the Geneva Conventions. More than 160 states, including major powers, are parties to Protocol I; the United States has signed but not ratified. Article 51, "Protection of the Civilian Population," contains a provision particularly pertinent to assessing the legality of nuclear weapons:

> 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
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> (a) those which are not directed at a specific military objective;
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> (b) those which employ a method or means of combat which cannot be directed at a specific military objective;
>
> (c) *those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol*; *and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction*. (Emphasis added.)

20. U.S. military manuals on the law of armed conflict set forth the requirement of discrimination. U.S. Army Field Manual 27-10 on the Law of Land Warfare (1956, with changes in 1976), at § 41, states regarding the immunity of civilians: "*Attacks Against the Civilian Population as Such Prohibited.* Customary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such." A Navy handbook states that while employment of nuclear weapons is not expressly prohibited, it is subject to the following principles:

> the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian population as such; and distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. (U.S. Navy Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 1997, at 10-2.)

An Air Force publication on the law of armed conflict states in part:

> Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects…. *[S]ome weapons, though capable of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage.* Biological warfare is a universally agreed illustration of such an indiscriminate weapon. (International Law – The Conduct of Armed Conflict and Air Operations, U.S. Air Force Pamphlet 110-31, 1976, § 6-3(c); emphasis added.)

21. Studies by well-qualified specialists indicate that none of the low-yield nuclear weapons now deployed or under consideration can limit effects on civilians such that its use could meet the requirement of discrimination. Robert W. Nelson, at the time a physicist with the Princeton Program on Science and Global Security and the American Federation of Scientists, concluded based on analysis of physical constraints that earth-penetrating warheads

> cannot penetrate deeply enough to contain the nuclear explosion and will necessarily produce an especially intense and deadly radioactive fallout. … A one kiloton earth-penetrating 'mininuke' used in a typical third-world urban environment would spread a lethal dose of radioactive fallout over several square kilometers, resulting in tens of thousands of civilian fatalities.(Robert W. Nelson, "Low-Yield Earth-Penetrating Nuclear Weapons," 10 Science and Global Security (2002, no. 1) 1, at n. 14, p. 19.)

Similarly, Sidney Drell, a physicist at Stanford University's Linear Accelerator Center, Raymond Jeanloz, a geophysicist at the University of California at Berkeley, and Bob Peurifoy, a weapons designer and former vice president at Sandia National Laboratory, all of whom have consulted extensively with the U.S. government on technical issues of nuclear weapons, wrote in a March 17, 2002 commentary, "Bunkers, Bombs, Radiation," in the Los Angeles Times:

> Low-yield nuclear weapons have limited effectiveness against buried targets and they would disperse significant amounts of radioactivity…. Taking into account realistic limits on material strengths, 50 feet is about the maximum depth a warhead can dig and maintain its integrity in dry, hard soil, the likely locations for buried targets. Even a 1 kiloton warhead – $1/20^{th}$ the yield that destroyed Hiroshima – detonated at a depth of 20 feet would eject about 1 million cubic feet or radioactive debris from a crater about the size of ground zero at the World Trade Center.

A recent National Research Council study describes civilian casualties caused by use of nuclear earth-penetrator weapons of a variety of yields, from less than 10 kilotons to one megaton, stating:

> **Conclusion 6**: For attacks near or in densely populated urban areas using nuclear earth-penetrator weapons on hard and deeply buried targets (HDBTs), the number of casualties can range from thousands to more than a million, depending primarily on weapon yield. For attacks on HDBTs in remote, lightly populated areas, casualties can range from as few as hundreds at low weapon yields to hundreds of thousands at high yields and with unfavorable winds. (Committee on the Effects of Nuclear Earth-Penetrator and Other Weapons, National Research Council, *Effects of Nuclear Earth-Penetrator and Other Weapons*, National Academies Press, 2005, p. 111.)

Regarding nuclear weapons generally, a Joint Chiefs of Staff publication acknowledges that their "effects" are "unprecedented" including for "noncombatant populations":

> *The immediate and prolonged effects* of WMD [weapons of mass destruction, here clearly referring to nuclear weapons] – including blast, thermal radiation, prompt (gamma and neutron) and residual radiation – *pose unprecedented physical and psychological problems for combat forces and noncombatant populations alike*. (Joint Chiefs of Staff, Joint Pub 3-12, Doctrine for Joint Nuclear Operations, December 15, 1995, at II-7; emphasis added.)

22. As the ICJ observed, for self-defense to be lawful, it must meet the requirements of necessity and proportionality. (Para. 41.) Both requirements weigh against the legality of use of a nuclear weapon against a buried target. Necessity limits the use of force to that required to achieve a legitimate military objective. As explained by U.S. Army Field Manual 27-10, § 3, military necessity "has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." Assuming that the United States was using force in individual or collective self-defense, or that force was being used under Security Council authorization or directive, the use of any particular method or means of combat must still be necessary. Accordingly, if a weapon or tactic, like use of special forces, is available which causes less damage and suffering than a nuclear

weapon to carry out a legitimate military mission, use of a nuclear weapon is barred. There are credible reports that the United States now has or is rapidly developing conventional munitions capable of destroying buried targets. Robert W. Nelson states that the United States "already has a number of conventional weapons capable of destroying hardened targets buried within approximately 50 feet of the surface." (Robert W. Nelson, "Low-Yield Earth-Penetrating Nuclear Weapons," F.A.S. Public Interest Report (January/February 2001) 1, at 3.)

23. Proportionality forbids the use of measures in response to an attack that, even if necessary to achieve a military objective, are nonetheless excessive in relation to the scope of the attack and, in some formulations, to the requirements of repelling the attack and ending the conflict on favorable terms. The ICJ stated that “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it” (para. 41) and that whether a measure is disproportionate includes consideration of effects on the environment and prospects for nuclear escalation. (Paras. 30, 43.) The use of the phrase "weapons of mass destruction" has unfortunately created the impression of an equivalence among nuclear, chemical, and biological weapons. However, the reality is that in general nuclear weapons are orders of magnitude more destructive than chemical or biological arms. Accordingly, typically a nuclear use would be disproportionate to a chemical or biological attack or threat.

24. International law relating to protection of the environment also bears on threat or use of nuclear weapons, and is particularly relevant in the context of the NEPA claims in this case. In this regard the ICJ stated:

> The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. (Para. 29.)

While noting that environmental law does not "deprive a State of the exercise of its right of self-defense under international law because of its obligations to protect the environment," the ICJ stated: "Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives." (Para. 30.)

25. The ICJ also observed

> that Articles 35, paragraph 3, and 55 of Additional Protocol I [to the Geneva Conventions] provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. [§] These are powerful constraints for all the States having subscribed to these provisions. (Para. 31.)

While the United States, as noted earlier, has signed but not ratified Protocol I, specific rules on wartime protection of the environment are entering customary international law, binding on all states, as shown by a provision in the Rome Statute of the International Criminal Court. Adopted in 1998, subsequent to the ICJ opinion, and entered into force in 2002, the Rome Statute includes the following among the "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law" set forth in Article 8:

> (b)(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The substantive provisions of the Statute were negotiated on the basis that they would reflect the present state of law binding on all states. It thus stands as a consensus-based statement of presently binding law defining war crimes. The United States was deeply engaged in the negotiation of provisions defining war crimes. The United States signed the Statute on December

31, 2000, but on May 6, 2002 formally notified the UN Secretary-General that "the United States does not intend to become a party to the treaty," and that, "[a]ccordingly, the United States has no legal obligations arising from its signature." Nonetheless, the Statute is widely regarded as an authoritative statement of law. For example, U.S. consultants drew upon it in drafting the Iraqi statute under which Saddam Hussein is being tried. Article 8(b)(iv) therefore states customary international law binding upon the United States. With respect to Protocol I, many would consider that Article 35(3), from which the Rome Statute provision is derived, and Article 55 have also attained customary status.

26. Because a nuclear attack on a buried target would result in dispersion of large quantities of radioactive debris as well as the radioactive and unusable site of the explosion, it would likely be illegal due to widespread, long-term, and severe damage to the environment caused and the disproportionality of that damage to the military gain and the requirements of self-defense. The environmental damage would in any case reinforce the case for illegality based on other grounds.

27. Considering the requirements of discrimination, necessity, and proportionality, in my opinion the use of a nuclear weapon, including a low-yield nuclear weapon, against a buried target would be contrary to international law governing the conduct of warfare. The ICJ's opinion is consistent with this conclusion. The ICJ found that the nuclear weapon states had failed to make the case that even a "limited" use of nuclear weapons could comply with humanitarian law or avoid catastrophic escalation, and further found that "the use of such weapons in fact seems scarcely reconcilable with respect for [humanitarian] requirements". (Paras. 94, 95.) In a formal conclusion (adopted by a vote of 7-7 with the president casting the deciding vote; three dissenting judges favored illegality in all circumstances), the Court stated:

> It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
>
> However, in view of the current state of international law, and of the elements of fact at 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-defense, in which the very survival of a State would be at stake. (Para. 105(2)E.)

In the "extreme circumstance" the Court refers to, it remains the case that the requirements of humanitarian law apply, as the Court itself held in stating that states must "never" use weapons incapable of distinguishing between civilians and military targets. (Para. 78.)

28. Other international law bearing on threat or use of nuclear weapons arises out of the Nuclear Non-Proliferation Treaty and the UN Charter. The ICJ unanimously concluded that a "threat or use of nuclear weapons should also be compatible with … specific obligations under treaties and *other undertakings which expressly deal with nuclear weapons*." (Para. 105(2)D; emphasis added). The emphasized phrase appears to refer in part to "negative security assurances" provided by states acknowledged as nuclear weapon states by the Nuclear Non-Proliferation Treaty, including the United States, to non-nuclear weapon states parties to that treaty. The ICJ thus appears to regard those assurances, which were reaffirmed in connection with the indefinite extension of the NPT in 1995, as legally binding. The U.S. declaration made in 1995 provides:

> The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.

The United States is therefore under an obligation (subject to the stated exception) not to use "low-yield" or earth-penetrating or any kind of nuclear weapon against NPT-party non-nuclear weapon states.

29. The ICJ unanimously concluded that a "threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful." (Para. 105(2)C.) Article 51 recognizes the right of self-defense "if an armed attacks occurs," and the requirements referred to are those of necessity and proportionality, discussed above. Article(2)(4) provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Recent reports have given rise to grave concerns that the United States may violate these bedrock requirements of international law by engaging in an unprovoked attack upon Iran, perhaps even with nuclear weapons. In an article, "The Iran Plans," in the April 17, 2006 New Yorker, Seymour Hersh reported that the Bush administration has intensified planning for bombing Iran and that it is giving serious attention to the option of using nuclear weapons to attack buried targets. An April 9, 2006 story in the Washington Post, "U.S. Is Studying Military Strike Options on Iran," supports Hersh's reporting. These reports came in the wake of the Bush administration's March 2006 National Security Strategy, which names Iran as a major threat and reiterates the doctrine of preventive war. In Part V(A), the document states (emphasis added): "The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, *even if uncertainty remains as to the time and place of the enemy's attack*." The doctrine of preventive war is in flat contradiction with the UN Charter, a U.S. treaty. The Charter permits the use of force only pursuant to Security Council authorization or in response to an attack, actual, or some commentators maintain, imminent.

30. Given that the Department of Energy apparently intends to carry the Divine Strake test within a matter of weeks, it unavoidably enters into the Iran picture even though the test has long been planned. Since the Bush administration has refused to rule out an attack on Iran, including by nuclear weapons, proceeding with the test could be seen as a signal of the administration's continued consideration of a nuclear strike against Iran. That would undermine international law in two respects. First, there is no basis whatever in international law for the United States to attack, or threaten to attack, Iran. As I know from conversations with Security Council diplomats, there is no chance, absent a very major change in circumstances, that the Security Council would authorize use of force against Iran. Nor is there any plausible case the United States can make for self-defense, since Iran is not attacking or about to attack any state. In the circumstances now prevailing, execution of the Divine Strake test arguably would constitute an illegal threat against Iran. Second, for all the reasons stated in this declaration, a nuclear attack against Iran would violate humanitarian and other international law, and preparing, or appearing to prepare, for the possibility of such an attack with the Divine Strake test erodes respect for international law.

I declare, under penalty of perjury under the laws of the State of New York, that the foregoing is true and correct. Executed this 20th day of May 2006 at New York, New York.

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John Burroughs