IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:10-CR-94
	)	
JEAN T. GUMP,	)	(GUYTON)
ELIZABETH ANN LENTSCH,	)	
BRADFORD J. LYTTLE,	)	
WILLIAM JEROME BICHSEL,	)	
DAVID L. CORCORAN,	)	
BONNIE L. URFER,	)	
CAROL SUE GILBERT,	)	
ARDETH PLATTE,	)	
JAQUELINE MARIE HUDSON,	)	
PAULA E. ROSDATTER,	)	
MICHAEL WALLI,	)	
STEVE J. BAGGARLY, and	)	
DENNIS DUVALL,	)	
	)	
Defendants.	)	

O R D E R

This case came before the Court on March 4, 2011, for a hearing on the Defendants' Motion to Dismiss the Information [Doc. 38] and the Government's Motion to Preclude Defendants from Introducing Evidence in Support of Certain Justification Defenses [Doc. 57]. At the hearing the Court heard the testimony of Mr. Charles J. Moxley, Jr., adjunct professor at Fordham Law School, as well as the testimony of Defendants Elizabeth Ann Lentsch (Sister Mary Dennis Lentsch) and Paula E. Rosdatter. The Court has carefully considered the parties' filings, the evidence presented, and the arguments of counsel and makes the following rulings:

(1) The Defendants' Motion to Dismiss the Information [**Doc. 38**] is **DENIED**:

> (a) The Defendants may be prosecuted for trespassing on federal property in violation of 42 U.S.C. § 2278a(c) and 10 C.F.R. §§ 860.3 and 860.5(b) irrespective of whether the United States' possession, manufacture, and policy regarding nuclear weapons violates international law.
>
> (b) Without deciding whether the Tennessee Constitution would permit the Defendants' acts of protest, the Court finds that federal law trumps conflicting state law under the Supremacy Clause.
>
> (c) Whether the Defendants acted "willfully" under 10 C.F.R. §§ 860.3 and 860.5(b) is a matter for the jury to determine at trial. Fed. R. Crim. P. 12(b)(2).

(2) The Government's Motion to Preclude Defendants from Introducing Evidence in Support of Certain Justification Defenses [**Doc. 57**] is **GRANTED**:

> (a) The necessity defense is not available, as a matter of law, because the Defendants were not acting to prevent *imminent* harm and there was no direct causal relationship between their acts of entering onto the Y-12 National Security Complex property and the harm they intended to avert.
>
> (b) Whether the production of nuclear weapons at the Y-12 National Security Complex violates international law is irrelevant to the instant prosecution. As a corollary to this ruling, the Court finds that Mr. Moxley's expert testimony is also irrelevant and not admissible at trial.
>
> (c) The fact that the Defendants decided to enter onto the Y-12 National Security Complex property in order to further their own moral, political, and religious beliefs is not a defense to the mens rea required by the regulations at issue.
>
> (d) The Y-12 National Security Complex property inside the fence and structural barrier is not a public forum. Thus, the Defendants had no First Amendment right to cross this boundary line onto the Y-12 National Security Complex property to exercise their freedom of speech or religion.

(e) The fact that the Defendants felt compelled to enter onto the Y-12 National Security Complex by their own moral, political, and religious beliefs; their desire to exercise their First Amendment rights to freedom of speech or religion; their desire to comply with international law; or their desire to prevent future death and destruction from the use of nuclear weapons does not constitute a legal defense to the charge in the Information and is not relevant at trial. Testimony to this effect, such as was presented by Defendants Lentsch and Rosdatter at the March 4 hearing, is not admissible at trial. Similar testimony by any other Defendant is also excluded. This ruling does not preclude Defendants Lentsch and Rosdatter or any other Defendant from presenting other defenses aside from those heard by this Court at the March 4 hearing.

The Court will enter a Memorandum and Order setting forth the reasoning and legal bases for the above rulings.

IT IS SO ORDERED.

ENTER:

s/ H. Bruce Guyton
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:10-CR-94
	)	
JEAN T. GUMP,	)	(GUYTON)
ELIZABETH ANN LENTSCH,	)	
BRADFORD J. LYTTLE,	)	
WILLIAM JEROME BICHSEL,	)	
DAVID L. CORCORAN,	)	
BONNIE L. URFER,	)	
CAROL SUE GILBERT,	)	
ARDETH PLATTE,	)	
JAQUELINE MARIE HUDSON,	)	
PAULA E. ROSDATTER,	)	
MICHAEL WALLI,	)	
STEVE J. BAGGARLY, and	)	
DENNIS DUVALL,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case came before the Court on March 4, 2011, for a hearing on the Defendants' Motion to Dismiss the Information [Doc. 38] and the Government's Motion to Preclude Defendants from Introducing Evidence in Support of Certain Justification Defenses [Doc. 57]. Assistant United States Attorneys Jeffrey E. Theodore and Melissa M. Millican appeared on behalf of the Government. Attorney Francis L. Lloyd, Jr., represented Defendant Jean T. Gump. Attorney John E. Eldridge represented Defendant Elizabeth Ann Lentsch, who was also present. Attorney Kim A. Tollison represented Defendant Bradford Lyttle. Attorney Mike Whalen appeared on behalf of Defendant William Jerome Bischel. Attorney Karmen L. Waters represented Defendant David L.

Corcoran. Attorney Donny M. Young represented Defendant Bonnie Urfer. Attorney Eric M. Lutton appeared on behalf of Defendant Ardeth Platte. Attorney Bradley L. Henry represented Defendant Jaqueline Marie Hudson. Attorney Wayne Stambaugh represented Defendant Paula E. Rosdatter, who was also present. Attorney Christopher Scott Irwin appeared on behalf of Defendant Michael Walli. Attorney Robert R. Kurtz represented Defendant Dennis DuVall.[1] At the hearing the Court heard the testimony of Mr. Charles J. Moxley, Jr., adjunct professor at Fordham Law School, as well as the testimony of Defendants Elizabeth Ann Lentsch (Sister Mary Dennis Lentsch) and Paula E. Rosdatter. At the conclusion of the hearing, the Court took the parties' filings, the evidence presented, and the arguments of counsel under advisement. For the reasons presented herein, the Court now determines that the Defendants' Motion to Dismiss the Information [**Doc. 38**] is **DENIED**, and the Government's Motion to Preclude Defendants from Introducing Evidence in Support of Certain Justification Defenses [**Doc. 57**] is **GRANTED**.

I. POSITIONS OF THE PARTIES

On July 8, 2010, the Government filed an Information [Doc. 9] charging the Defendants with willful and unauthorized entry onto the enclosed property of the Y-12 National Security Complex in violation of 42 U.S.C. § 2278a(c) and 10 C.F.R. §§ 860.3 and 860.5(b). The Defendants ask [Doc. 38] the Court to dismiss the Information because they contend (1) that the prosecution of this case violates fundamental principles of international law and (2) that they lacked the necessary *mens rea* of "willfully" to be convicted under the cited regulations. The Government

[1]Attorney Angela Morelock and *pro se* Defendant Steve J. Baggarly did not attend the hearing.

responds [Doc. 56] that the Defendants lack standing to challenge the United States nuclear weapons program, that the activities at the Y-12 facility do not violate international law, and that the Court may not dismiss the charge based upon a determination of facts (i.e., whether the Defendants acted willfully) that should be made by the jury at trial.

The Government asks [Doc. 57] the Court to preclude the Defendants from presenting any evidence at trial in support of the justification defenses of necessity; international law; moral, political, or religious compulsion; or exercise of First Amendment rights. It argues that these defenses are irrelevant and invite jury nullification. The Defendants respond [Doc. 61] that the evidence presented at the March 4 hearing reveals that they can present a justification defense. Additionally, they contend that to preclude them from presenting a justification defense would deprive them of a fair trial.

II. SUMMARY OF THE TESTIMONY

At the March 4 hearing, the Defendants presented the testimony of Charles J. Moxley, Jr., who is a lawyer and mediator as well as an adjunct law professor at Fordham Law School, where he teaches a course entitled Nuclear Weapons and International Law. Mr. Moxley is also the author of Nuclear Weapons and International Law in the Post Cold War World. Mr. Moxley testified that there are four recognized sources of international law: (1) treaties and conventions, (2) customary international law, which is comprised of generally recognized principles and practices, (3) rules of law that are accepted by a large number of nations, and (4) court decisions, expert writings, and secondary sources.

Mr. Moxley stated that for his opinions in his book and articles, he relied primarily

upon the 1996 advisory opinion from the International Court of Justice (ICJ) and the service manuals from each branch of the United States military. Mr. Moxley stated that the general assembly of the United Nations submitted the question of nuclear weapons[2] to the ICJ, which is the legal arm of the United Nations. He said that all major governments, including the United States, then presented written and oral arguments to the ICJ. Mr. Moxley stated that the United Nations Charter permits the use of armed force only in self defense. The United States took the position, before the ICJ, that nuclear weapons, like any other weapon are subject to the law of armed conflict. Accordingly, in formulating his opinion, Mr. Moxley used four basic principles from the law of armed conflict: (1) the rule of discrimination, (2) the rule of proportionality, (3) the rule of necessity, and (4) the rule of controllability.

Mr. Moxley testified that the rule of discrimination provides that a nation should not use a weapon that cannot distinguish as to whom it injures. In other words, the user has to be able to control the effects of the weapon or else there will be collateral damage. Examples of weapons that violate the rule of discrimination are biological weapons, chemical weapons, and unmanned balloons. Mr. Moxley testified that nuclear weapons are incapable of distinguishing among victims–their blast effect is huge, their radiation is widespread, and their electromagnetic effect would shut down all technology. He stated that while the United States did not defend the large-scale use of nuclear weapons before the ICJ, it did advocate the use of nuclear weapons that could hit targets with great precision. Mr. Moxley testified that the radiation from these more precise nuclear weapons could not be contained.

---

[2]The Court notes that the exact question posed to the ICJ is as follows: " Is the threat or use of nuclear weapons in any circumstance permitted under international law?" Exhibit 4 to Defendant's legal memorandum [Doc. 39], p.4.

Mr. Moxley stated that the rule of proportionality provides that the collateral effects of a weapon cannot be disproportionate to the military value of the target. He opined that nuclear weapons violate this rule because the use of a fraction of the nuclear weapons possessed by the United States and Russia would destroy the earth by creating a nuclear winter that blocks the sun and kills all agriculture and would return civilization to the Stone Age, if any people were to survive. Mr. Moxley stated that even a serious military need would be eclipsed by the risk of the cataclysmic effects of nuclear warfare, especially when the risk of escalation was considered.

Mr. Moxley testified that the rule of necessity provides that even in a legitimate war and with relation to military targets, the combatants can only use the level of force necessary to address the threat within a reasonable time. Mr. Moxley stated that the Nuclear Posture Review (included as Exhibit H to Mr. Moxley's Expert Witness Report [Doc. 104]) reveals that the United States has extraordinary superiority in conventional weapons. He opined that the United States can now address virtually any military objective through conventional weapons and, thus, can cut back on nuclear weapons. He acknowledged, however, that deterrence is a separate issue.[3]

Mr. Moxley stated that the rule of controllability is essentially the corollary of the three other rules. If you cannot control the effects of a weapon, you cannot distinguish between victims, you cannot evaluate the proportionality of using the weapon, and the weapon cannot constitute the least amount of force necessary to address the threat in a reasonable time. He stated that it would be impossible to control the effects of a nuclear weapon.

---

[3]Mr. Moxley also testified to two other aspects of the rule of necessity–the prohibition against using weapons designed to exacerbate the effects on the victim, such as glass in bullets, and the antithetical doctrine of doing whatever it takes to win–but he stated that these aspects were not relevant to the nuclear weapons debate.

Given this analysis, Mr. Moxley stated that in his expert opinion the United States' possession of nuclear weapons for the purpose of deterrence violates international law. He stated that if it is unlawful to use a nuclear weapon, it is also unlawful to threaten to use it. He stated that it is less clear whether the manufacturing of nuclear weapons violates international law, but he could infer that it does if the manufacturing is for the purpose of furthering the policy of deterrence and included plans to use the nuclear weapons in an armed conflict. He believed, based on statements from the National Nuclear Security Administration (NNSA), that the Y-12 National Security Complex is the primary location for the processing and storage of enriched uranium used for maintaining the United States' stockpile of nuclear weapons. He also stated that the Y-12 facility was the only source for "secondary cases" and nuclear weapons components within the NNSA. He stated that the work at the Y-12 facility supports the use of nuclear weapons.

Mr. Moxley opined that while the policy of deterrence through nuclear weapons was well-known during the Cold War era, now it had fallen out of the public's awareness. He stated that in reality, nuclear weapons were still around and that deterrence was still the policy of the United States. He said that in April 2010, President Barack Obama's administration issued a Nuclear Posture Review, that revealed no significant changes to the deterrence policy with regard to ground-based nuclear weapons.

Mr. Moxley testified, with regard to whether nuclear weapons present an imminent threat of danger, that at any given moment, nuclear weapons could be used, either accidentally or unlawfully. He stated that based upon his studies, he was aware of occasions in which the United States had nearly used nuclear weapons by mistake. He said that the military only has minutes to make a decision on whether to use land-based nuclear weapons before they are potentially destroyed

in an attack. He discussed examples of nuclear weapons being dropped and lost and instances when military personnel mistakenly believed that the United States was under attack. He also stated that poor security around nuclear weapons in other countries, such as Russia, and the risk that terrorists would acquire these weapons added to the imminent harm from nuclear weapons. Additionally, Mr. Moxley stated that nuclear weapons present the threat of unlimited danger because of the problems from radiation can extend to persons not even born at the time of that the nuclear weapon is used. He also opined that the risks from nuclear weapons were much greater now than during the Cold War because other countries besides the United States and Russia have nuclear weapons.

On cross-examination, Mr. Moxley testified that in its advisory opinion, the ICJ was called upon to give an opinion as to the lawfulness of the use or threat of use of nuclear weapons. While Mr. Moxley agreed that the ICJ voted eleven to three that there is no universal or conventional international law prohibiting the threat or use of nuclear weapons, he stated that their analysis of the question under the laws of armed conflict resulted in a conclusion that the use of nuclear weapons would "generally be unlawful." He stated that the case for the unlawfulness of the mere possession of nuclear weapons was "much thinnner," but if the nuclear weapons were possessed with the intent to use them, then the possession could be unlawful as well.

Mr. Moxley acknowledged that the United States had used nuclear weapons on only two occasions in sixty years, both during wartime. He agreed that Congress must provide for the common defense and stated that he was generally aware that Congress was not bound by international law in enacting legislation. He agreed that generally courts have said that domestic law trumps international law, but he maintained that Nuremberg reveals there are some transcending principles. On redirect examination, Mr. Moxley stated that the United States explicitly threatened

to use nuclear weapons on five occasions during the Cold War era.

Defendant Sister Mary Dennis Lentch testified that she was born Elizabeth Ann Lentsch and that she began her formation process to become a Catholic nun in 1954. Her ministry as a sister has included teaching, serving the homeless, and working for non-profit organizations, as well as serving on the leadership team and the board of directors of her religious order. She participated in a weekly gathering to present a "peace presence" at the gate of the Y-12 facility for eleven years. Sister Lentsch testified that in the spring of 2009, she received a flyer about nuclear resistance planned for July 5, 2010, in conjunction with the Oak Ridge Environmental Peace Alliance and Maryville College. She stated that she felt called to participate and entered into a period of discernment to decide what to do. She said that she knew that if arrested, she was facing the possibility of a year in prison, which would be an emotional hardship for her family.

Sister Lentsch stated that with the support of her order, she ultimately decided that she would participate in the nuclear resistance on July 5, 2010. She felt justified in this decision because she believes that nuclear weapons violate international law and Article 6 of the United States Constitution. She stated that she wanted to bring this lawless situation before the courts, where a judge and a jury could act on it. She stated that she believes nuclear weapons present an imminent threat of death because the United State's act of continuing to produce nuclear weapons provokes other nations. Also, she believes that the potential for human accident or mistake with regard to nuclear weapons creates an imminent threat. She characterized the nuclear situation as "a smoldering mess waiting to erupt" and said that no one knows what will spark it. She observed that the radiation from a nuclear explosion cannot be contained in time or space and has the potential to destroy civilizations and ecosystems.

Sister Lentsch testified that on July 5, 2010, she participated in a rally at Y-12 National Security Complex. The purpose of the gathering was to protest nuclear proliferation and to celebrate thirty years of nuclear resistance. She stated that Y-12 produces "secondaries" and that she was hoping the rally would bring this illegal situation to the public's attention. At the rally, the participants sang songs and participated in skits. Some young people read aloud. Then, the participants held a commissioning ceremony for those who were contemplating risking arrest. Thirteen people formed a circle for reflection and solidarity. Those individuals then crossed onto the Y-12 property at different places. Sister Lentsch stated that she crossed at the railroad gate, carrying a sign that she had made.

Sister Lentsch stated that the day before the July 5 rally, the protestors had written a declaration of independence from nuclear weapons. This declaration discussed that current law requires the end of all use of nuclear weapons and called on the government to end funding for nuclear weapons and to use those funds for humanitarian purposes. Sister Lentsch stated that budgets are moral documents reflecting the values and priorities of policymakers. She said that she believed spending public funds on nuclear weapons was not a wise or just investment. Sister Lentsch testified that once on the Y-12 property, the thirteen individuals formed a circle and read the declaration aloud as a group. Sister Lentsch said that security guards came and asked them to leave. The guards then said they were trespassing and arrested them. She was handcuffed, told to sit down, and given bottled water. She was then taken into Y-12, where she was processed. Afterward, she was taken to Blount County Jail, where she spent the night.

Sister Lentsch testified that while she is not sure that her actions will stop the production of nuclear weapons at Y-12, she believes that everything she does makes a difference.

Sister Lentsch testified that she crossed the boundary onto Y-12 property to educate people about nuclear weapons. She stated that when she had previously been in court in Oak Ridge, she had been asked if nuclear bombs were still being built. She stated that in the past she had written letters to elected officials, signed petitions, visited elected officials, wrote letters to the editor of publications, stood as a peaceful presence at the gate of Y-12, and participated in Sunday vigils. She testified that on July 5, 2010, civil resistance seemed like all she had left to bring the issue of nuclear proliferation before the courts. She described nuclear proliferation as an "unspeakable evil," which she had spent over twenty-five years resisting. She stated that she was working for a nuclear-free future for everyone.

On cross-examination, Sister Lentsch testified that she knew she was entering onto federal property when she crossed the railroad gate. She said she also knew that she was committing a federal offense. She acknowledged that she was given the chance to leave but said that she chose to be arrested so that she could bring the issue into the court system. Sister Lentsch testified that she had trespassed at Y-12 on several occasions in the past. She said that she appeared in Oak Ridge City Court in 2000, 2001, and 2002, and that in April 2002, she was arrested and charged in a federal case. She agreed that her reasons for trespassing on those occasions were the same as in the present case, her belief that nuclear weapons are evil. She also agreed that she raised the same defense that she was acting out of necessity in her federal case in 2002. She stated that although she knew that the necessity defense was not permitted in her 2002 case, she was not thinking of the long-term consequences when she entered Y-12 property in July 2010. Instead, she felt called to take this action because it was the right thing to do. Sister Lentsch acknowledged that she had raised an international law defense in Oak Ridge City Court and was told that it was not a valid defense. She

stated that the individuals who took that position could change their minds. Moreover, she believed that it was up to the jury to decide the question in this case.

Sister Lentsch stated that by trespassing at the Y-12 facility, she was calling attention to the United States' violation of international law and the United States Constitution. She said that people needed to be educated about the harm to society from nuclear weapons. She said that while she knew that her actions in trespassing would probably not stop the production of nuclear weapons at Y-12 on that one day, she believed that her actions would some day lead to the end of nuclear proliferation. She also believed that her actions had an effect that day because she was a witness to the people who arrested and processed her. She agreed that she and approximately two hundred people were allowed to protest on public property outside the Y-12 facility that day. She said she believed that this protest was effective, that it received publicity in communities across the United States, and that the collective voice of the protestors was heard. She said that her conscience compelled her to trespass that day because it was a dramatic public action. She acknowledged that her trespassing raised security costs at Y-12.

Defendant Paula Rosdatter testified that she is a adjunct professor of philosophy at the University of Kentucky and the mother of four children. She has been an activist in the area of limiting nuclear proliferation since the early 1980's. Ms. Rosdatter stated that she had been arrested ten times in conjunction with protesting nuclear weapons and has previously appeared in federal court. On July 4, 2010, she attended a conference at Maryville College celebrating thirty years of resistance to nuclear weapons. The conference ended on Monday, July 5, 2010, with a protest at the Y-12 facility. Ms. Rosdatter arrived at the Y-12 facility around breakfast time that morning. She stated that Y-12 was operating that morning and that guards were present.

Ms. Rosdatter stated that she entered the Y-12 facility with Sister Mary Dennis Lentsch at a metal gate. She said that she did not remember seeing any "No Trespassing" signs at this gate. Ms. Rosdatter stated that she believed that the production of nuclear weapons at Y-12 violated the law, although she was sympathetic to the fact that the workers there depended on the facility for their livelihood. She said that when she entered the Y-12 facility, she intended to plant seeds, which she had with her, to symbolically demonstrate another use for that land. Ms. Rosdatter stated that after she entered the Y-12 facility, she was warned that she should leave and told that she risked being arrested if she remained. She said that she decided to stay on the Y-12 property because she did not feel that her work there was done yet. She still wanted to deliver a declaration and to plant the seeds she had brought. She did not recall holding a placard while on the Y-12 property. Ms. Rosdatter testified that she believed entering the Y-12 facility was one step toward ending nuclear proliferation. She said that as a mother, she believed her children were in imminent danger from nuclear weapons. She stated that she understands the four rules of armed conflict and that by violating international law with regard to nuclear weapons, the United States becomes a target for other nations. She stated that she believes that our country would be safer if we followed international law. She also believes that nuclear weapons present a serious threat at any moment, although she stated that she could not say that it was an extremely high threat. She said that the United States is not guaranteed another thirty to fifty years to work out the issue of nuclear weapons. Instead, she believes the country needs to act on this issue now. She stated that the public is no longer aware of the issues surrounding nuclear weapons and that students are no longer taught to take cover in the event of a nuclear explosion.

On cross-examination, Ms. Rosdatter acknowledged that she was not a legal expert.

She stated that although she was aware of the distinct possibility that she would be arrested when she entered the Y-12 facility, she believed that she had an overriding reason for doing so, to prevent an imminent threat. She stated that she thought entering the Y-12 facility was a necessity.

III. ANALYSIS

The Defendants call upon the Court to dismiss the Information in this case because their prosecution for trespassing onto the Y-12 National Security Complex on July 5, 2010, conflicts with the United States' commitments under international law. The Defendants do not challenge the constitutionality of the statute and regulations prohibiting trespass onto federal property. Instead, they argue that their prosecution under these laws is unconstitutional because the United States is a party to treaties that make the use or threat of use of nuclear weapons illegal, the Defendants were obligated to stop the Government's continued production of illegal nuclear weapons at the Y-12 facility, and the Tennessee Constitution gives citizens the right to overthrow arbitrary power and oppressors. Secondly, the Defendants state that the Information fails to state an offense as a matter of law because they did not possess the necessary *mens rea* of "willfully."

The Government contends that the Defendants have no standing to challenge the national policy on nuclear weapons in this case and that, moreover, any of four potential justification defenses arising out of the Defendants' position on nuclear proliferation that the Defendants may seek to assert at trial must be excluded as irrelevant.

A. Defendants' Motion to Dismiss the Information

"[The United States] Constitution, and the Laws of the United States which shall be

made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land[.]" U.S. Const., art. VI, cl. 2. The Defendants contend that the United States is a party to a number of treaties that make the use or threat of use of nuclear weapons illegal. As such, they contend that they had a right and an obligation to enter onto the Y-12 National Security Complex in order to attempt to stop the government's continued production of illegal nuclear weapons. The Government maintains that the Defendants cannot bring a direct challenge to the United States' nuclear weapons program and that Congress is not bound by international law in enacting legislation, such as the laws prohibiting trespass onto federal property.

The issue of whether United States' possession, production, and policy regarding nuclear weapons violates international law or specific treaties to which the United States is a party is not one that the Defendants can litigate in this Court. In addition to declaring that treaties are part of the "Supreme Law of the Land," the United States Constitution entrusts to Congress the "Power To . . . provide for the common Defense[.]" U.S. Const., art. I, § 8, cl. 1. Questions implicating national defense policy are "political and governmental questions which are confided by the Constitution to the legislative and executive branches of the government" and are not within the jurisdiction of the courts. Farmer v. Rountree, 252 F.2d 490, 491 (6th Cir.), cert. denied 357 U.S. 906 (1958). Although the Court will decide constitutional issues when such issues are properly before it, "the Constitution itself requires . . . deference to congressional choice" in matters of military needs and operations. Rostker v. Goldberg, 453 U.S. 57, 67-68 (1981).

In Farmer, a taxpayer brought suit for a declaratory judgment that he was immune from paying income taxes for year 1949, contending that "the military and foreign policies of the

United States, since World War II, including the prosecution of the Korean War, were designed and carried out in violation of international law, and were, therefore, illegal and void; and that he had the right to refuse payment of two-thirds of his income tax for the reason that the said revenue had been illegally appropriated by Congress for such illegal purposes[.]" Farmer, 252 F.2d at 491. The appellate court affirmed the conclusion of the trial court that the taxpayer's

> claim involved the resolution of political questions, and that courts had no right or authority to resolve such questions; that, under the Constitution of the United States, Congress is vested with the exclusive right to levy taxes and to appropriate public revenue for the common defense and general welfare of the country, and to provide for, and maintain the Army and Navy; and that it has the exclusive authority to determine the requirements of national defense and the amount of tax revenue to be used for defense or military purposes.

Id. Similarly, the instant Defendants argue that the United States' production and maintenance of nuclear weapons violates international law. The Court finds this issue to be a non-justiciable political question.

Moreover, even if the United States' nuclear policy violated international law, it does not follow that the Defendants cannot be prosecuted for trespassing onto federal property. "'[I]n enacting statutes, Congress is not bound by international law. . . . If it chooses to do so, it may legislate [in a manner contrary to the limits posed by international law].'" United States v. Allen, 760 F.2d 447, 453 (2d Cir. 1985) (quoting United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983), modified on other grounds, 728 F.2d 142 (2d Cir. 1984)). Thus, the Court of Appeals for the Second Circuit held that nuclear protestors could be prosecuted for the destruction of government property, despite their contention that their purpose was to enforce treaties to which the United States is a party and to uphold international law. Id. Likewise, this Court finds that the Defendants may be prosecuted for trespassing on federal property in violation of 42 U.S.C. § 2278a(c) and 10

C.F.R. §§ 860.3 and 860.5(b) irrespective of whether the United States' possession, manufacture, and policy regarding nuclear weapons violates international law.

The Defendants also advance state constitutional grounds for dismissal of the Information, arguing that the Tennessee Constitution grants its citizens the right to overthrow arbitrary power and oppressors. The Tennessee Constitution provides "[t]hat government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." Tenn. Const., art. I, §2. The Defendants contend that this provision gives them the right to cross an arbitrary boundary line to call for the end of illegal acts. Without deciding whether the Tennessee Constitution would permit the Defendants' acts of crossing onto federal property to protest the production of nuclear weapons, the Court finds that federal law trumps conflicting state law under the Supremacy Clause. U.S. Const., art. VI, §2.

Finally, the Defendants argue that the Information must be dismissed because, as a matter of law, they did not possess the required *mens rea* of "willfully" to be convicted of the instant charge. They assert that the facts surrounding their actions show that they entered the Y-12 facility to prevent the violation of international law. "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Fed. R. Crim. P. 12(b)(2). Specifically, a defect in the charging instrument, such as its failure to state an offense, can be challenged before trial. See Fed. R. Crim. P. 12(b)(3)(B). In order to dismiss a charge for the failure to state an offense, two factors must be present: (1) the issue raised must be a question of law and (2) the relevant facts must be undisputed. United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992), United States v. Jones, 542 F.2d 661, 665 (6th Cir. 1976). In the present case, whether

the Defendants acted "willfully" under 10 C.F.R. §§ 860.3 and 860.5(b) is a question of fact for the jury to determine at trial. Fed. R. Crim. P. 12(b)(2).

Based upon the foregoing, the Court finds no basis upon which to dismiss the Information. Accordingly, the Defendants' Motion to Dismiss the Information [**Doc. 38**] is **DENIED**.

B. Government's Motion to Preclude Evidence of Justification Defenses

The Government asks the Court to preclude the Defendants from presenting any evidence at trial in support of the justification defenses of necessity; international law; moral, political, or religious compulsion; or exercise of First Amendment rights. It argues that these defenses are irrelevant and invite jury nullification. The Defendants argue that to preclude them from presenting a justification defense would deprive them of a fair trial. At the March 4 hearing, the Defendants argued that the evidence they presented reveals that they can present a justification defense.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the [government's] accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). That being said, a defendant's right to present evidence in his or her own defense is not absolute. That evidence must be relevant. Fed. R. Evid. 402. Additionally, the Court may preclude an affirmative defense, as a matter of law, if the defendant is not able to establish its elements. United States v. Johnson, 416 F.3d 464, 468 (6th Cir. 2005) (holding that "if the defendant's proffered evidence is legally insufficient to support a duress defense, the trial judge should not allow its presentation to the jury"), cert. denied 546 U.S. 1191 (2006). With these

principles in mind, the Court examines each of the potential defenses to which the Government objects.

(1) The Defense of Necessity or Justification

Defenses of justification "pertain[] to the category of action that is exactly the action that society thinks the actor should have taken, under the circumstances[.] . . . . '[N]ecessity' is a particular example of a defense that, when proved, will *justify* the defendant's action" under the theory "'that the defendant's free will was properly exercised to achieve a greater good[.]'" United States v. Newcomb, 6 F.3d 1129, 1133 (6th Cir. 1993). Generally, the necessity defense is "designed to spare a person from punishment . . . if he reasonably believed that criminal action 'was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense.'" United States v. Bailey, 444 U.S. 394, 409-10 (1980). The availability of a "justification defense"[4] turns upon whether the evidence supports the following five factors:

> (1) that defendant was under an unlawful and "present, imminent, and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury," . . . ;
>
> (2) that defendant had not "recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]," . . . ;
>
> (3) that defendant had no "reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' " . . . ; and
>
> (4) "that a direct causal relationship may be reasonably anticipated

[4]The Court of Appeals for the Sixth Circuit used "the broader term of justification" to distinguish this defense from the more narrow, traditional common law defense of necessity from which it is derived. Newcomb, 6 F.3d at 1133.

> between the [criminal] action taken and the avoidance of the [threatened] harm."

Newcomb, 6 F.3d at 1134 (quoting United States v. Singleton, 902 F.2d 471, 472 (6th Cir.), cet. denied 498 U.S. 872 (1990)) (citations omitted and alterations in original). "The fifth requirement is that the defendant show that he did not maintain the illegal conduct any longer than absolutely necessary." Id. at 1134-35 (citing Singleton, 902 F.2d at 473). The appellate court has emphasized that "the keystone of the analysis is that the defendant must have no alternative–either before or during the event–to avoid violating the law." Singleton, 902 F.2d at 473; see also Newcomb, 6 F.3d at 1135.

(a) Imminence of harm

The Defendants argue that the testimony of Mr. Moxley and Sister Lentsch shows that nuclear weapons, and particularly the threat of their accidental detonation, present an immediate threat of harm to people and the environment. Mr. Moxley testified that nuclear weapons could be used at any given moment and that the United States had nearly fired nuclear weapons on several occasions by mistake. He stated that the dangers of nuclear weapons are exacerbated by the fact that military personnel have only minutes to decide whether to respond to a perceived nuclear attack. Sister Lentsch testified that the United States' continued production of nuclear weapons presents an imminent threat of danger because this production, which she believes is unlawful, provokes other nations. She also stated that the potential for the accidental or mistaken use of nuclear weapons creates an imminent threat. Ms. Rosdatter testified that her children were in imminent danger from nuclear weapons, which she characterized as presenting a serious threat at any given moment. The Government argues that the danger inherent in nuclear weapons is a general danger to all United States citizens and was not an immediate threat to the Defendants on July 5, 2010.

While our appellate court recognizes that the justification defense can be applied when the threat of harm is to a third party rather than the defendant, the illegal action must still be "an emergency measure necessary to avoid an imminent injury–an injury sufficiently grave that, according to objective standards, the desirability of avoiding that injury outweighs the desirability of avoiding the injury sought to be prevented by the violated statute." Newcomb, 6 F.3d at 1135. While the evidence presented at the March 4 evidentiary hearing establishes that the harm from the *use* of nuclear weapons would be grave, the question for the Court is whether that harm was imminent at the time of the alleged crime. Nothing in the record shows that nuclear weapons were being used at the Y-12 National Security Complex on July 5, 2010, that they were about to be used, or even that any fully functional and readily usable nuclear weapons were present on the site.[5]

Also telling is Sister Lentsch's testimony that she took approximately one year to discern whether she would attend the rally at the Y-12 facility and risk being arrested for trespassing thereon. The record does not reflect that the threat of danger from the use of nuclear weapons was any different during this time period than on the day of July 5, 2010. Although the Court does not doubt Sister Lentsch's personal convictions regarding her opposition to nuclear weapons, the fact that she could contemplate the trespass over an extended time and even consult with others about it reveals that the harm was not imminent. In Newcomb, the court observed that the defendant, a felon, did not have an opportunity to call the police before chasing and disarming his girlfriend's son, who had announced his intent to kill someone:

> When criminal conduct endures for 125 days, or a year, or two years, it is logical to conclude that a defendant who is not being held

[5]The evidence at the hearing established that the Y-12 facility creates the components for nuclear weapons.

> hostage must have ample opportunity to alert the authorities to his predicament. The same is not true in this case, where there was evidence that the emergency situation unfolded rapidly, almost spontaneously, and that Newcomb's criminal conduct lasted for mere minutes.

Newcomb, 6 F.3d at 1137. Applying this same reasoning to the instant case, the Court concludes that the danger from the use of nuclear weapons is not the type of imminent injury to which the justification defense applies.

Other courts analyzing whether the threat of danger from nuclear weapons presents the type of imminent harm required for a necessity defense have concluded that it does not. In United States v. May, the Court of Appeals for the Ninth Circuit examined the applicability of a necessity defense to defendants who trespassed on a naval base in protest of the Trident missile system. 622 F.2d 1000, 1008-09 (9th Cir. 1980). The court held that the defendants could "assert no harm to themselves from the allegedly illegal conduct of the government that is greater than, or different from, the potential harm that might affect every other person in the United States." Id. at 1009. In United States v. Maxwell, the appellate court held that the deployment of nuclear submarines off the coast of Puerto Rico did not constitute an imminent harm: "[E]ven if Maxwell could have shown that a nuclear submarine was close at hand, it is doubtful that the mere presence of such a vessel, without some kind of realistic threat of detonation, would suffice to pose an imminent harm." 254 F.3d 21, 27 (1st Cir. 2001). The instant Defendants argue that to conclude that no risk of imminent harm exists unless nuclear weapons have actually been launched is to essentially preclude them from ever raising a defense of necessity. The Court finds that may indeed be the inevitable result when attempting to apply a justification defense to crimes arising from indirect civil disobedience. See United States v. Schoon, 971 F.2d 193, 198-99 (9th Cir. 1991)

(holding that a necessity defense can never be raised in cases of indirect civil disobedience).

(b) No reasonable, legal alternative to violating the law

The Defendants argue that they had no reasonable legal alternative to civil disobedience because they had attempted other legal means to stop nuclear proliferation but none had been successful. Both Sister Lentsch and Ms. Rosdatter testified that they had engaged in other efforts to stop nuclear proliferation. Sister Lentsch stated that she had written letters to elected officials, signed petitions, visited elected officials, wrote letters to the editor of publications, stood as a peaceful presence at the gate of the Y-12 facility, and participated in Sunday vigils. She testified that on July 5, 2010, civil resistance seemed like all she had left to bring the issue of nuclear proliferation before the courts. Ms. Rosdatter testified that she had been a nuclear activist for almost three decades, yet she believed that entering the Y-12 facility was one step toward ending nuclear proliferation.

The Court finds that legal means of affecting political change–lobbying Congress, peaceful rallies, letters to elected officials or to the editor of publications, and the like–do not stop being reasonable alternatives simply because they have not caused the political change that the defendant seeks. "Where the targeted harm is the existence of a law or policy, our precedents counsel that this reasonableness requirement is met simply by the possibility of congressional action. . . . [T]he 'possibility' that Congress will change its mind is sufficient in the context of the democratic process to make lawful political action a reasonable alternative to indirect civil disobedience." Schoon, 971 F.2d at 199. "People are not legally justified in committing crimes simply because their message goes unheeded." United States v. Montgomery, 772 F.2d 733, 736

(11th Cir. 1985). Accordingly, the Court finds that the Defendants cannot meet this prong of the justification defense.

(c) Reasonable belief that conduct would avoid the harm

The Defendants contend that they had a reasonable belief that their actions of entering onto the Y-12 property would avoid the harms associated with nuclear weapons. They point to the testimony of both Sister Lentsch and Ms. Rosdatter that civil disobedience was necessary to cause lasting change in nuclear policy. The Court disagrees.

In order to employ a justification defense, the defendant must show a "direct causal relationship" between the illegal action taken and the avoidance of the greater harm. Newcomb, 6 F.3d at 1134. In cases involving indirect civil disobedience undertaken to cause political change, this direct causal relationship is absent. Schoon, 971 F.2d at 198. Another actor–such as the President or Congress–will have to act in order for the desired change to occur and the alleged harm to be avoided. Id. Accordingly, courts faced with defendants seeking to cause political change have consistently found the lack of a direct causal relationship between the crime committed by the defendant and the avoidance of the harm in question. Maxwell, 254 F.3d at 29 (holding that the defendant had no reasonable belief that his trespass on a naval base would stop the deployment of nuclear submarines off the coast of Puerto Rico); Montgomery, 772 F.2d at 736 (concluding that the defendants "could not hold a reasonable belief that a direct consequence of their actions [of destruction of government property] would be nuclear disarmament"); United States v. Dorell, 758 F.2d 427, 433-34 (9th Cir. 1985) (determining that the defendant "failed as a matter of law to establish that his entry into Vandenburg [Air Force base] and his spray-painting of government property could be reasonably anticipated to lead to the termination of the MX missile program and

the aversion of nuclear war and world starvation"). Similarly, the Court finds in the present case that the Defendants could not reasonably expect their entry onto Y-12 property to directly cause the cessation of production of nuclear weapons or their components at Y-12. This is especially true for Sister Lentsch, who trespassed at the Y-12 facility in 2002, was charged federally, and was not permitted to raise a necessity defense in that case.

Accordingly, the Court determines as a matter of law that the Defendants cannot raise a justification or necessity defense at trial because, based upon the evidence presented at the March 4 evidentiary hearing, they cannot meet three of the five factors required for asserting this defense. The Court finds that the Defendants were not acting to prevent *imminent* harm, they had other legal alternatives available to them, and there was no direct causal relationship between their acts of entering onto the Y-12 National Security Complex property and the harm they intended to avert.

(2) Defense that the Defendants' Actions Were Compelled by International Law

The Government argues that the Court should preclude the Defendants from presenting evidence at the trial that their actions were justified or compelled by international law. It argues that such evidence is irrelevant to their prosecution for trespassing on Y-12 property.

This Court has already found that the Defendants can be prosecuted for trespassing on federal property in violation of 42 U.S.C. § 2278a(c) and 10 C.F.R. §§ 860.3 and 860.5(b) irrespective of whether the United States' possession, manufacture, and policy regarding nuclear weapons violates international law. As discussed above, the issue of whether United States' possession, production, and policy regarding nuclear weapons violates international law or specific treaties to which the United States is a party is non-justiciable. It is not a matter for this Court to

decide, nor is it a matter for the jury. As such, it is not relevant to the case. Moreover, that a person is acting to further international law does not provide a defense to the violation of domestic laws. Allen, 760 F.2d at 453. The Defendants "should not be excused from the criminal consequences of acts of civil disobedience simply because the acts were allegedly directed at international law violations." Id. This is particularly true in this case, when no domestic law, particularly a domestic prohibition of trespassing on government property, required the Defendants to violate the international law they claim is at stake. The appellate court for the Seventh Circuit has also rejected the contention that anti-nuclear protestors' actions of destroying government property were somehow privileged by international law:

> Appellants cite no international law, and we are aware of none, even suggesting that an individual has the responsibility to correct a violation of international law by destroying government property. To the contrary, international law recognizes the sanctity of property, protecting a nation's property from destruction by another nation's agents, see N. Green, International Law: Law of Peace 206, 209 (2d ed. 1982), and offers other means to stop international law violations: "[i]nternational law presents nations with institutions, processes, and norms that permit respect to be manifested in relatively depoliticized atmospheres."

Id. Thus, the Court finds the Defendant's claims that they were following international law provides no defense to the instant charge.

As a corollary to this ruling, the Court finds that Mr. Moxley's expert testimony about the state of international law on nuclear weapons is also irrelevant and not admissible at trial. See United States v. Urfer, 287 F.3d 663, 665 (7th Cir. 2002) (holding that questions of law, such as whether the defendants actions were privileged by international law, are for the judge and not the jury).

(3) Moral, Political, or Religious Compulsion

The Government argues that the Defendants should not be allowed to present evidence that their personal moral, political, or religious convictions compelled them to enter onto the Y-12 facility. It maintains that the Defendants' moral, political, or religious convictions do not provide a defense to trespassing and, as such, are irrelevant and inadmissible at trial.

The court of appeals for the Seventh Circuit has concluded that a defendant's moral, political, or religious beliefs regarding the use or possession of nuclear weapons, however strongly held, do not provide a defense to violations of the law: "disagreement with U.S. defense policy and moral disapproval of a law are not defenses to violating the law." Urfer, 287 F.3d at 665. In United States v. Cullen, the defendant argued that he was erroneously precluded from arguing that he was compelled by his religious beliefs to burn draft records. 454 F.2d 386, 390 (7th Cir. 1971). He maintained that this evidence was relevant to whether he possessed the requisite mental state of willfulness. The court found that the defendant's religious convictions were irrelevant to the issue of his mental state because a showing that he acted willfully did not require the government to prove his motive. Id. at 391-92. "In a case such as this, if the proof discloses that the prohibited act was voluntary, and that the defendant actually knew, or reasonably should have known, that it was a public wrong, the burden of proving the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue. If defendant's theory of defense were valid, the character of his conduct would be judged not by the rule of law but by the end which his means were designed to serve." Id. at 392. The Court finds the same holds true in the instant case. The fact that the Defendants decided to enter onto the Y-12 National Security Complex property in order to further their own moral, political, and religious beliefs is not a defense to the *mens rea* required by the

regulations at issue.

(4) First Amendment Defense

Finally, the Government contends that the Defendant's First Amendment rights to freedom of speech and the free exercise of religion are not a defense to the crime of trespass. The Court agrees in this instance. The evidence presented at the March 4 hearing reveals that the Defendants were allowed to protest on the lawn outside the Y-12 boundary. The Court finds that the area inside the boundary was not a public forum. "Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, (1985). "A military base generally is not a public forum[.]" United States v. Albertini, 472 U.S. 675, 676 (1985). The Court finds that the area inside the the fence and structural barrier of the Y-12 National Security Complex was not a public forum on July 5, 2010. Thus, the Defendants had no First Amendment right to cross this boundary line onto the Y-12 National Security Complex property to exercise their freedom of speech or religion.

In summary, the Court finds that the potential defenses of justification or necessity, compliance with international law; moral, political, or religious compulsion; and exercise of First Amendment rights are irrelevant and inadmissible in this case. Accordingly, the Government's Motion to Preclude Defendants from Introducing Evidence in Support of Certain Justification Defenses [**Doc. 57**] is **GRANTED**. The fact that the Defendants felt compelled to enter onto the

Y-12 National Security Complex by their own moral, political, and religious beliefs; their desire to exercise their First Amendment rights to freedom of speech or religion; their desire to comply with international law; their desire to stop the manufacture or possession of nuclear weapons by the United States, or their desire to prevent death and destruction from the use of nuclear weapons does not constitute a legal defense to the charge in the Information and is not relevant at trial. Testimony to this effect, such as was presented by Defendants Lentsch and Rosdatter at the March 4 hearing, is not admissible at trial. Similar testimony by any other Defendant is also excluded.

IV. CONCLUSION

For the reasons presented herein, the Motion to Dismiss the Information [**Doc. 38**] is **DENIED**, and the Government's Motion to Preclude Defendants from Introducing Evidence in Support of Certain Justification Defenses [**Doc. 57**] is **GRANTED**.

IT IS SO ORDERED.

ENTER:

s/ H. Bruce Guyton
United States Magistrate Judge