

## **War Crimes: The Posse Gathers**

**By Jeremy Brecher and Brendan Smith | December 2, 2005**

Diverse forces are assembling to bring Bush administration officials to account for war crimes. Cindy Sheehan, Gold Star Mother for Peace, insists: “We cannot have these people pardoned. They need to be tried on war crimes and go to jail.”<sup>1</sup> Paul Craig Roberts, Hoover Institution senior fellow and assistant secretary of the treasury under Ronald Reagan, charges Bush with “lies and an illegal war of aggression, with outing CIA agents, with war crimes against Iraqi civilians, with the horrors of the Abu Ghraib and Guantanamo torture centers” and calls for the president’s impeachment.<sup>2</sup> Anne-Marie Slaughter, dean of the Woodrow Wilson School at Princeton and former president of the American Society of International Law, declares: “These policies make a mockery of our claim to stand for the rule of law. [Americans] should be marching on Washington to reject inhumane techniques carried out in our name.”<sup>3</sup>

Can such disparate forces as the peace movement, conservative advocates of the rule of law, and human rights advocates join to halt high government officials demonstrably engaged in criminal enterprise? Can they reach out and appeal to the deep but vacillating commitment of the American people to the national and international rule of law? Or will the Bush administration divide the posse and retain for itself the mantle of defender of international law and the U.S. Constitution?

### **War Crimes—It’s Not Just Torture**

As Allied armies advanced into Germany, British Prime Minister Winston Churchill declared captured Nazi leaders outlaws subject to summary execution. But U.S. President Harry Truman, a former small-town judge, insisted instead on formal trials with “notification to the accused of the charge, the right to be heard, and to call witnesses in his defense.” The result was the Nuremberg War Crimes Tribunal and the start of a revolution that, in U.S. Justice Robert Jackson’s words, replaced a “system of international lawlessness” with one that made “statesmen responsible to law.” It is this revolution that may be catching up with the administration of George W. Bush.

During the Cold War era, Nuremberg was little more than a dimming memory. Charges by Richard Falk, Marcus Raskin, and others that U.S. actions in Vietnam constituted war crimes helped swell opposition to the war, but U.S. officials were never held to account for their actions. Starting in the 1990s, however, the revolutionary principle that government officials must be responsible to law became an integral part of the human rights and democratization movements that swept much of the world. Milosevic was driven out of office and turned over to an international war crimes tribunal. Pinochet was captured in Spain and eventually sent back to Chile to face charges as a torturer. The International Criminal Court was established to try war crimes. Henry Kissinger wrote in alarm in 2001 that “in less than a decade an unprecedented movement has emerged to submit international politics to judicial procedures” and has “spread with extraordinary speed.”<sup>4</sup>

Critical to this unprecedented movement has been an evolved relationship between national and international law. In the past, international law was seen as a potential infringement on national sovereignty. (The Bush administration is trying to resuscitate that view—for example, in its attacks on the International Criminal Court.) But today the two are increasingly



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intertwined and mutually reinforcing, much like state and national law in the United States. Many new democracies see institutions like the International Criminal Court as bulwarks against the restoration of tyranny in their own countries—much as the U.S. Constitution guarantees that its member states will be republics, not monarchies. Toward this end, many countries have incorporated aspects of international law into their national statutes—the U.S. War Crimes Act, for example, makes grave breaches of the Geneva Conventions a crime under U.S. law, punishable in some cases by death.

Several overlapping strands have coalesced into a body of law regarding war crimes. One is the prohibition on aggressive war. As the Nuremberg Tribunal put it, “To initiate a war of aggression” is “*the supreme international crime.*” A second strand is humanitarian law, which protects both combatants and civilians from unnecessary harm during war. The devastation associated with World War II led to the recognition of “crimes against humanity,” which involve acts of violence against a persecuted group. War crimes were codified in the four Geneva Conventions of 1949 and have been further developed in subsequent protocols and agreements.

The Nuremberg Tribunal was criticized on the grounds that it represented not impartial justice but “victor’s justice,” that it provided impunity for the bombing of civilians and other heinous acts committed by the victors, and that it prosecuted people “*ex post facto*” for acts that had not been declared crimes when they were committed. These charges had considerable justification. But today there is a body of national and international law that clearly defines war crimes and a set of procedures for applying them comparable to the procedures used to judge other crimes. Those are the standards by which allegations of American war crimes must be judged.

Law must—and the international law of war crimes now does—provide a single standard of judgment that can be applied without discrimination to different cases. If an act is a war crime, then it is a war crime whether it is perpetrated by Saddam Hussein or by George Bush.

## American War Crimes in Iraq and Beyond

The charge that the U.S. attack on Iraq was a war crime was raised even before the war began. More than 1,000 law professors and U.S. legal institutions organized in opposition to the U.S. war crime of launching an “aggressive war in violation of the UN Charter” against Iraq. Violation of international law was also a central theme in worldwide demonstrations against the war. The attack on the illegality of the war has been revived by the leak of the Downing Street memo; 130 members of Congress joined Rep. John Conyers in demanding that the Bush administration come clean about the invasion—supported by a half million citizen signatures gathered in barely a week. “Scootergate” is fundamentally about the cover-up of White House lies justifying the war.

Illegal detention and torture are also war crimes. Starting with the exposure of prisoner abuse at Abu Ghraib and Guantanamo, cascading revelations have established that these cases exemplify a pattern of abuse authorized at the highest levels of government. Human rights groups like the Center for Constitutional Rights, the American Civil Liberties Union, and Human Rights First sued in U.S. and foreign courts against Defense Secretary Donald Rumsfeld and others for breaching the U.S. Constitution and the Geneva Conventions. The Senate’s 90-9 vote to restore the military’s traditional prohibition against torture and inhumane treatment of prisoners—prompting the Bush administration to threaten a veto—sets the stage for a major confrontation over adherence to both the Geneva Conventions and the U.S. Constitution.

Despite massive cover-ups, the evidence is emerging: the Bush administration planned an illegal war of aggression against Iraq, conned the American people and their representatives into supporting it, conducted an illegal occupation marked by massive violation of Iraqi human rights, and justified and promoted systematic torture. Now the White House seeks opportunities for further criminal attacks against Iran, Syria, and other countries around the world, issuing threats to use death squads and nuclear weapons at will. These acts violate American law,

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international law, and the basic values of the American people. They are crimes against peace and crimes against humanity. They are outlawed by the Geneva Conventions, the UN Charter, and treaties against torture and other human rights abuses. They are war crimes, and those who ordered and condoned them are war criminals.

## War Crimes and the Rule of Law

The Nuremberg principle that statesmen are “responsible to law” extended to international relations the principle of “government under law” already enshrined in the U.S. Constitution. Indeed, no principle of American democracy is more fundamental or more widely accepted than the precept that no one is above the law. But a central endeavor of the Bush administration has been to put the government, and more particularly the president, above both U.S. and international law.

This was made clear in President Bush’s refusal to apply the Geneva Conventions to prisoners of war captured during the Afghanistan War. Soon after, the United States refused to adhere to UN Charter requirements regulating the use of force. Then the Justice Department argued that courts would not have jurisdiction over Guantanamo detainees even if they were being summarily executed. The Ninth Circuit Court commented, “the U.S. government has never before asserted such a grave and startling proposition,” a position “so extreme that it raises the gravest concerns under both American and international law.”<sup>5</sup>

As Rep. Elizabeth Holtzman put it, the claim that the president is above the law “strikes at the very heart of our democracy. It was the centerpiece of President Richard Nixon’s defense in Watergate—a defense that was rejected by the courts and lay at the foundation of the articles of impeachment voted against him by the House Judiciary Committee.”

It is ironic that such a doctrine should emerge from a movement that calls itself “conservatism” and purports to have limitation of government as its fundamental principle. Indeed, it is more than ironic; it is totally hypocritical. And this claim of unlimited

presidential powers has turned many genuine conservatives—ranging from former government and military officials to the many corporate lawyers defending Guantanamo inmates—against the Bush administration.

Law entails more than an individual or social preference; it obligates individuals and institutions to act. Describing his evolving viewpoint, Daniel Ellsberg wrote that he saw the U.S. involvement in Vietnam “first as a problem; then as a stalemate; then as a crime.” Each of these perspectives called for “a different mode of personal commitment: a problem, to help solve it; a stalemate, to extricate ourselves with grace; a crime, to expose and resist it, to try to stop it immediately, to seek moral and political change.”<sup>6</sup>

A focus on government-sponsored crime has the potential to open a discourse with those across the political spectrum—from civil rights advocates to military attorneys—who believe that government must not be exempt from the rule of law. It draws on a democratic, constitutionalist tradition and the powerful popular conviction that law and law enforcement are necessary and that they must apply to all, including the government and its highest officials.

## Toward Convergence

Bush administration malfeasance can be described as a problem of democracy, of human rights, of usurpation, of the rule of law, of constitutionalism, or of war crimes. These terms all point to the same fundamental problem: those in charge of the political and military apparatus of the U.S. government are using it to further a criminal enterprise in violation of national and international law.

Each step of this criminal behavior has been contested by different constituencies and on somewhat differing grounds. If those constituencies could unite around a common frame, they could halt the entire Bush enterprise. The role of the Bush administration in promoting war crimes in Iraq and beyond can provide that unifying frame. Resistance to such government criminality can unify diverse constituencies who believe in rule of law.

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Accusations of American war crimes have long been a staple of left-wing groups like ANSWER and the International Action Center. But many mainstream peace activists have been wary. As one well-known leader put it earlier this year: “War-crimes talk pushes people away. People don’t want to hear it. Polls indicate that the population says under some circumstances torture is OK, and that what’s being done is not torture. People blame bad apples. They want to prosecute the bad apples so they can have a cleaner war. Besides, they say, we’re dealing with horrible people who cut off people’s heads. What is our end goal? If our objective is to stop the occupation, then war crimes is not the best angle.”

These are legitimate concerns. However, they imply not that the issue of war crimes shouldn’t be raised but rather that it should be raised wisely with due respect for the feelings of the American people. War crimes accusations should not be presented as anti-American but rather as an appeal to the American people to share the right and obligation of all people to hold their governments accountable. By rejecting the Bush administration’s attempt to blame torture and other abuses on “bad apples” at the bottom, accountability can be placed squarely on those at the top. The crimes of U.S. opponents can be acknowledged without justifying those perpetrated in Washington. Illegal detention, prisoner abuse, and torture can be presented as part of a larger pattern of war crimes. As Justice Jackson noted at Nuremberg, a war of aggression differs from other war crimes only in that “it contains within itself the accumulated evil of the whole.” If the peace movement can connect with the American public’s belief in the rule of law, the days of George Bush’s criminal enterprise will be numbered.

The war crimes frame also provides the peace movement a way to reach out to Americans on the basis of moral and religious convictions. Religious opponents of the war, such as the ecumenical Fellowship of Reconciliation and the Catholic St. Patrick’s Four, have frequently stressed international law as a basis for their actions. The faith-based group Reclaiming the Prophetic Voice calls it a way to reach out to “the people in the pews.”

Some sectors of the human rights movement have been outspoken opponents of the Iraq War from before its start. The Center for Constitutional Rights, for example, organized lawyers nationwide to declare it illegal under national and international law. But other human rights advocates have tried to separate torture and prisoner abuse as a “human rights issue” from the broader questions of war and occupation, leading some to portray their objective as “a clean war.” Human rights advocates need to recognize that the use and legitimization of torture by the Bush administration is just an extreme manifestation of a broader illegal enterprise.

Both the peace and the human rights movements need to pay more attention to current and planned future war crimes. Last year’s attacks on Fallujah were condemned as war crimes around the world, but there was not much response in the United States. The withholding of food and water to civilian populations in recent attacks on Tal Afar are clear violations of international law that would have provided a clear opportunity to raise the question of war crimes as they occurred.<sup>7</sup> Plans to turn targeting of U.S. air strikes over to the Iraqi military, recently revealed by Seymour Hersh in the *New Yorker*, could be challenged as likely to greatly increase civilian casualties.<sup>8</sup> U.S. plans to use nuclear weapons against Iran, openly discussed by Vice President Cheney, surely constitute a war crime. These ongoing daily events provide a target both for action and for public education.

The Bush administration’s crimes of aggression, occupation, and torture are all part of one sordid story. That story can best be told when these actions are called by their proper name—war crimes.

## Checks and Balances

There are four obvious objectives for a movement against U.S. war crimes:

*Halt the crimes.* This requires withdrawing U.S. forces from Iraq, closing the U.S. prison at Guantanamo Bay, releasing or immediately putting on trial all captives, and shutting down U.S.-controlled death squads all over the world.

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*Bring war criminals to justice.* Impunity breeds crime. The mechanisms for investigation, prosecution, and trial of criminals must be applied to anyone—from the president on down—who is responsible for war crimes. Every agency charged with investigating governmental crimes must end its paralysis and perform its duties. Those responsibilities should include congressional committee hearings on war crimes, a Sept. 11-style investigative commission, appointment of a special prosecutor, and an in-depth congressional investigation into whether impeachable offences have been committed.

*Draw the lessons.* Unchecked presidential authority and flouting of international law led the United States to a national catastrophe in Vietnam, but the obvious lessons were deliberately obscured or denied. We are paying the price today. Only an extensive and extended public confrontation with the implications of U.S. war crimes can lay the basis for averting similar catastrophes in the future.

*Establish barriers to future war crimes.* The Bush administration's war crimes were made possible by the dismantling of legal and constitutional barriers to government secrecy, deceit, manipulation, and lawlessness. Their perpetuation has been enhanced by the dismantling of legal restrictions on presidential authority and the seduction or intimidation of those whose duty it is to enforce such restrictions. The U.S. democratic heritage and recent experiences of many countries in eliminating dictatorships point to specific institutional arrangements—from independent prosecutors to battlefield legal supervision and from freedom-of-information laws to international courts empowered to hear war crimes charges—that can be effective in preventing war crimes in the future.

A national repudiation of war crimes and an end to impunity for those who order them could open a new chapter in America's relations with the rest of the world. It might help the United States re-engage with Iraq and the rest of the Middle East on an entirely new basis—one cleansed of the legacy of Fallujah and Abu Ghraib. It would evidence America's good faith if Washington utilized international law to address such genuine problems as terrorism and weapons of

mass destruction. Ending impunity for those responsible for U.S. war crimes would help restore the role of international law in constraining self-aggrandizement by any nation.

After being convicted for pouring his own blood on a Lansing, NY military recruitment center, war protestor Peter DeMott declared the real crime to be that “our government conspired against the American people and lied us into an illegal and immoral war. The task is now upon us all to better understand the criminality of our government's aggression and, as citizens, to act accordingly to demand that our government adheres to international law.”<sup>9</sup> As Cindy Sheehan put it to more than 100,000 war protesters assembled in Washington, DC, “We'll be the checks and balances on this out-of-control criminal government.”<sup>10</sup>

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*Jeremy Brecher and Brendan Smith, with Jill Cutler, are the co-editors of In the Name of Democracy: American War Crimes in Iraq and Beyond (New York: Metropolitan/Holt, 2005) <[www.americanempireproject.com](http://www.americanempireproject.com)> and co-founders of War Crimes Watch. They are frequent contributors to Foreign Policy In Focus ([www.fpif.org](http://www.fpif.org)).*

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## END NOTES

- <sup>1</sup> Mike Ferner, "What One Mom Has to Say to George Bush," August 9, 2005, available at <<http://vitw.org/archives/974>>.
- <sup>2</sup> Paul Craig Roberts, "Impeach Bush Now," available at <<http://www.LewRockwell.com>>, September 3, 2005.
- <sup>3</sup> Quoted in Robert Kuttner, "Will Bush Wriggle Out of This One?" *Boston Globe*, September 10, 2005.
- <sup>4</sup> Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," *Foreign Affairs*, July-August 2001.
- <sup>5</sup> See *Gherebi v. Bush*, Ninth Circuit, December 18, 2003.
- <sup>6</sup> Quoted in Norman Solomon, "Cindy Sheehan's Message Repudiates George Bush—and Howard Dean," *Common Dreams*, August 13, 2005.
- <sup>7</sup> The UN's Special Rapporteur on the Right to Food recently described the withholding of food and water by U.S. forces in Iraq as "a clear violation of international law." Eulalia Iglesias, "UN Food Expert Condemns U.S. Tactics in Iraq," *Inter Press Service*, 11/30/05.
- <sup>8</sup> Seymour M. Hersh, "Up in the Air: Where Is the Iraq War Headed Next?" *New Yorker*, December 5, 2005.
- <sup>9</sup> Press release, September 26, 2005.
- <sup>10</sup> "Thousands in Wash Protest War, Econ Globalization," *Reuters*, September 24, 2005.

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