

# An “Affirmative Measure” to Help Prevent the Commission of War Crimes by the Bush Administration

By Jeremy Brecher | December 2004

“In the U.S., activists can draw on the immensely powerful tradition of disobedience to unjust law that motivated people such as the abolitionists, Henry David Thoreau, the Quakers, and the Berrigan Brothers. Indeed, this kind of resistance might be the key to stopping not only the imperial drive but also the rush to restrict political liberties and democracy. [It is] necessary to resist the imperial writ nonviolently by invoking a higher law.”

— Walden Bello<sup>1</sup>

## Introduction

United States officials are conducting a war of aggression against the people of Iraq. Under their orders, the U.S. government has killed tens of thousands of civilians, maintained a tyrannical occupation, tortured prisoners, and abused internationally recognized human rights. These acts constitute war crimes, crimes against humanity, and violations of the Geneva conventions.

The Bush administration plans to continue this conduct in Iraq and is threatening similar action against other countries as well. Indeed, it asserts its right to ignore any international obligation it decides is not in accord with its own definition of national interest.

All Americans have a responsibility under U.S. and international law to take “affirmative measures” to bring these crimes to a halt. This discussion paper presents one possible “affirmative measure” for consideration: A public statement pledging to encourage and support resistance to draft registration and military activities that violate international law.

At the height of the Vietnam War, thousands signed a similar statement, *A Call to Resist Illegitimate Authority*. Several of those involved, including Dr. Benjamin Spock and Rev. William Sloan Coffin, were prosecuted in part for their role in the *Call*. The *Call* and the subsequent trial played a significant role in the development of opposition and resistance to the Vietnam War.

A draft of a possible call to resist Bush administration crimes is appended to this discussion paper.

## The Legal Responsibilities of States and Individuals

In the “Age of Absolutism,” European rulers asserted a monopoly of power within their realms. States, as the Italian legal theorist Bartolus put it, were “independent associations not recognizing any superior.” Under such a doctrine, states were the sole judge of the legality of their acts. The sovereign was deemed free to initiate war for “reasons of state.” Rulers had no legally binding responsibilities to anyone but themselves and God. A version of this view was incorporated in the Treaty of Westphalia, and it has generally been referred to as the Westphalian conception of sovereignty.<sup>2</sup>

In the aftermath of World War II, a very different conception of national sovereignty was incorporated in the United Nations Charter. As the famous opening words of the Charter put it, “We the peoples of the united nations determined to save succeeding generations from the scourge of war” will ensure that “armed force shall not be used, save in the common interest.”

Under the UN Charter, nations could not legally engage in war without authorization of the United Nations except to repel a direct attack.<sup>3</sup> The Security Council was given “primary responsibility for the maintenance of international peace and security.”<sup>4</sup> Subsequent international agreements extended international law to include a wide range of human rights, environmental concerns, and other responsibilities.

The UN Charter gave the five “permanent members” a veto in the Security Council. As a result, UN peacekeeping has only been possible where the great powers agreed to act together. The UN has been unable to force the permanent members to meet their responsibilities under the Charter. In practice, the great powers have largely ignored those responsibilities, continuing to act on the basis of



---

“reasons of state.” Such action has often been justified on the grounds of morality and/or self-defense; sometimes it has even been justified by citing UN resolutions, even though no UN resolution authorized the use of force.

Since World War II there has been a historic struggle to implement the interpretation of national sovereignty articulated in the UN Charter, that is, sovereignty limited by international law. An editorial at the outset of the U.S. attack on Iraq noted that “Much of the world, including the other great powers, has entered a postnational understanding of global governance on questions of world order. France, Germany, Russia, China, and other world powers are now committed to international rules forbidding the unilateral use of force and to a form of consensual global governance.”<sup>5</sup> Columbia University historian Anders Stephanson observed that in the 1990s “there was an enormous expansion of law or lawlike procedure on an international scale.”<sup>6</sup> Bush administration doctrine aims to undo the commitments made in the UN Charter and the progress made in fulfilling them and revert instead to a Westphalian view that the state (or at least the U.S.) has no obligations under international law.

Under the Westphalian doctrine, individuals had no legal obligations higher than those to their own sovereign state. Drawing on the principles of the UN Charter, however, the War Crimes Tribunals at Nuremberg and Tokyo established the responsibilities of individuals to oppose their own states if they engaged in illegal acts.

U.S. chief counsel to the Nuremberg War Crimes Tribunal, Supreme Court Justice Robert Jackson, noted that, for the first time, powerful nations had agreed upon “the principle of individual responsibility for the crime of attacking the international peace.” The War Trials Agreement represented an important step forward in “fixing individual responsibility of warmongering, among whatever peoples, as an international crime.” It also represented a step forward in “recognizing an international accountability for persecutions, exterminations, and crimes against humanity when associated with attacks on the peace of the international order.”<sup>7</sup>

The Tokyo War Crimes Tribunal stated the doctrine of individual responsibility even more explicitly. “Anyone with knowledge of illegal activity and an opportunity to do something is a potential criminal under international law unless the person takes affirmative measures to prevent the commission of the crimes.”

People in many countries have found themselves to be citizens of a state that conducts wars of aggression, kills

civilians, tyrannizes occupied territories, and tortures prisoners. The actions of France in Algeria, Britain in the Falklands, the Soviet Union in Afghanistan; Russia in Chechnya; India in Kashmir, Israel in Palestine, Syria in Lebanon, and Iraq in Kuwait all put their citizens at risk for complicity in war crimes and crimes against humanity. U.S. actions in Vietnam, Nicaragua, Serbia, Afghanistan, and Iraq, among other places, have put U.S. citizens at similar risk.

Such criminal acts have often been conducted by legally recognized states and governments. Since the days of Adolph Hitler, the governments conducting such actions have often been legally elected. Neither established legitimacy nor popular election obviates the responsibilities of governments to obey international law nor the responsibility of their citizens to halt their government’s criminal acts.

## Bush Administration Crimes

The doctrine of the Bush administration embodies a return to the pre-UN Charter concept of the right of states to do whatever they choose based on “reasons of state.”

The Bush administration’s 2002 *National Security Strategy* asserts that the U.S. “will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively” and by “convincing or compelling states” to accept their “responsibilities.”<sup>8</sup>

President Bush emphasized this approach in his debate with John Kerry. Ridiculing Kerry’s concern with support from other countries, he stated, “My attitude is, you take preemptive action in order to protect the American people, that you act in order to make this country secure. ... I’ll never turn over America’s national security needs to leaders of other countries.”<sup>9</sup>

The Bush administration has fulfilled doctrine with acts. The evidence is overwhelming that top U.S. officials are now engaged in a pattern of lawlessness that violates both U.S. and international law.

The U.S. attack on Iraq was a violation of the UN Charter. Article 1, Section 4 states, “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.” United Nations Secretary General Kofi Annan stated shortly before the attack that the Charter is “very clear on the circumstances under which force can be used. If the U.S. and others were to go

---

outside the Council and take military action, it would not be in conformity with the charter.” After the U.S. attack he stated that the invasion of Iraq “was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal.”<sup>10</sup>

The U.S. occupation of Iraq constitutes an illegal continuation of the illegal U.S. attack on Iraq in violation of the UN Charter. U.S. operations in Iraq constitute a continuation of this illegal occupation, even if conducted under the cover of a puppet regime. So does the plan to create permanent U.S. military bases in Iraq.<sup>11</sup>

The United States and its supporters in Iraq have killed tens of thousands of Iraqi civilians.<sup>12</sup> Bombing, assaults on residential neighborhoods, destruction of mosques and hospitals, and shooting of unarmed civilians are portrayed regularly in the press and the media. The Bush administration currently plans to continue the policies that have led to this slaughter of the innocent.

Authorized agents of the U.S. government have committed torture at Abu Ghraib, Guantanamo, and elsewhere around the globe. Those responsible for this torture have gone largely unpunished and the policies and doctrines that justified it remain in place.

The U.S. government is defying the Geneva Conventions as a matter of policy. It holds captives in secrecy without disclosing their existence to the International Red Cross; spirits them across borders; denies them due process of law; and engages in cruel, brutal, and humiliating treatment of prisoners.<sup>13</sup>

In support of their illegal international polices, U.S. officials are engaged in violations of human rights against both citizens and non-citizens abroad and at home. They seize and lock up those they deem a threat without due process of law, hold them incommunicado, and treat them with abuse in violation both of international norms and of the U.S. Constitution.

These acts are sometimes attributed to a few “rogue” individuals acting on their own. But extensive evidence indicates that they actually result from policies enacted at the highest levels of the military and governmental chain of command.

These acts are sometimes justified in terms of protecting Americans, fighting terrorism, and bringing democracy to oppressed nations. Regardless of whether such claims are sincere or self-serving, they cannot justify war crimes. Nor can the undoubted fact that crimes are also being committed by insurgents and others in Iraq. As Justice Jackson

put it at Nuremberg, “No grievances or policies will justify resort to aggressive war. It is utterly renounced and condemned as an instrument of policy.”<sup>14</sup>

The United Nations Charter, the Geneva conventions, and other treaties made under the authority of the United States are the supreme law of the land under Article VI of the U.S. Constitution. The repeated violation of them, and the perpetuation of policies that authorize their continuing violation in the future, establish that U.S. government officials are not acting as the legal embodiment of the U.S. government but rather as illegal, unconstitutional usurpers.

What American can claim that he or she lacks knowledge of these crimes? They are reported in detail in the daily newspapers and shown in full color on the nightly news. The Bush administration openly proclaims its intent to continue and even expand them. How then do we meet our responsibility to take “affirmative measures to prevent the commission of the crimes”?

### “Affirmative Measures” Against Past Wars

There is a long tradition of resistance to state warmaking. For hundreds of years, religious pacifists have refused to participate in war and have often gone to prison as a result. Henry David Thoreau went to jail for refusing to pay taxes for the U.S. war against Mexico. Eugene Victor Debs went to prison for a speech denouncing World War I. Many French soldiers refused to fight in the Algerian war. The famous “Declaration on the Right to Insubordination in the War in Algeria”—better known as the “Manifesto of the 121”—publicly defended the morality of their “resistance to public authority.” Proclaiming “There is a limit!” hundreds of Israeli soldiers were jailed for refusing to participate in the 1982 invasion of Lebanon and the 1987 attack on the first Palestinian intifada.

The Vietnam War saw diverse “affirmative measures” by Americans to halt the war. They included legal activities like popular education, mass demonstrations, and electoral campaigns. They also included acts that defied government authority, such as draft resistance, disorderly mass confrontations, civil disobedience, and refusals to obey within the military.

One initiative that may be relevant today is the 1967 *Call to Resist Illegitimate Authority*. This was a statement that was initially signed by well-known cultural, religious, and intellectual figures, who were then joined by thousands of others.

---

The *Call* challenged the legality of the Vietnam War and the legitimacy of the government that was pursuing it. It argued that the war was unconstitutional and illegal because it was not declared by Congress as required by the U.S. Constitution; violated the obligation under the UN Charter to settle disputes peacefully; and violated the Geneva Conventions of 1949 that outlawed as war crimes many of the activities the U.S. military was conducting in Vietnam. It called them “actions of the kind which the United States and the other victorious powers of World War II declared to be crimes against humanity for which individuals were to be held personally responsible even when acting under orders of their governments and for which Germans were sentenced at Nuremberg to long prison terms and death.”

The *Call* asserted “a legal right and a moral duty to exert every effort to end this war, to avoid collusion with it, and to encourage others to do the same.” It described various forms of resistance, including refusal by those in the armed forces to obey specific illegal and immoral orders, application for conscientious objector status, refusal of induction, organizing further resistance in the military, and seeking sanctuary outside the United States. It stated that “each of these forms of resistance against illegitimate authority is courageous and justified.”

The *Call* went further, stating that “We will continue to lend our support to those who undertake resistance to this war. We will raise funds to organize draft resistance unions, to supply legal defense and bail, to support families and otherwise aid resistance to the war.” The advocacy of draft resistance was illegal under the Military Selective Service Act of 1967, which made it a crime to “counsel, aid and abet” those subject to the draft to “neglect, fail, refuse and evade service in the armed forces.” Merely signing the *Call* could therefore be construed as a violation of the Selective Service law.

The *Call* stated the belief that the actions it advocated were legal. But it added that “In any case, we feel that we cannot shrink from fulfilling our responsibilities.” The call was published in the *New Republic* and the *New York Review of Books* over the signatures of well-known writers, scholars, and other public figures. Some of its initiators gathered draft cards at draft resistance meetings and then delivered them to the Department of Justice as evidence of “crimes” of resistance.

The Justice Department brought charges against Spock, Coffin, Marcus Raskin, Mitchell Goodman, and draft resistor Michael Ferber. It accused them of conspiracy in “counseling, aiding, and abetting” young men to avoid

and resist the Selective Service System. After a highly publicized trial, most were convicted. At his post-sentencing press conference, Dr. Spock said the war “violates the United Nations Charter, the Geneva accords, and the United States’ promise to obey the laws of international conduct. It is totally, abominably illegal.” When a Federal appeals court overturned the conviction due to prejudiced rulings by the judge, the Justice Department unexpectedly dropped the charges.

The *Call to Resist Illegitimate Authority* had a significant impact on the growth and development of the antiwar movement. According to one knowledgeable antiwar activist, “It may have been the single most important statement during the Vietnam War.” It “gave a lot of resisters a lot of courage” and was “a *huge* influence” for the political “cover” and “the sense of energy, synergism it created within the resistance movement.”<sup>15</sup>

The *Call* put the authority of highly respected intellectual and religious leaders behind the young draft resisters. The risk that thousands took by signing the statement led many others to consider their own responsibilities to take “affirmative measures” to end the war. It challenged the legality of a war that had been legitimated by the fact that it was conducted by a popularly elected president and acquiesced to by Congress. What became known as the Spock-Coffin trial was front-page news, helping move the moral, legal, and political issues raised by the antiwar movement from the margin to the mainstream.

While it is impossible to measure precisely the impact of such actions, the statement of Admiral Thomas Moorer, chairman of the Joint Chiefs of Staff during the Nixon administration, deserves consideration: “The reaction of the noisy radical groups was considered all the time. And it served to inhibit and restrain decisionmakers.” The movement “had a major impact” in both “the executive and legislative branches of the government.”<sup>16</sup>

## A Possible “Affirmative Measure” Today

A statement similar to *A Call to Resist Illegitimate Authority* might provide one way that Americans can meet their responsibility to take “affirmative measures” to halt Bush administration crimes. Such a statement might include an indictment of Bush administration doctrine and actions as crimes under national and international law. It might include a statement of individual and shared responsibility for halting those crimes. And it might include some kind of advocacy that could itself be construed as a violation of U.S. law—were not U.S. officials

---

themselves pursuing a criminal policy. A draft of such a statement is appended to this discussion paper.

The law on the basis of which Spock, Coffin, et al were prosecuted remains on the books. Section 462 (a) of the Military Selective Service Act provides fines and imprisonment for anyone who “knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces.” While there is currently no draft, the requirement to register with the Selective Service remains, and therefore it remains a crime to counsel, aid, or abet refusal to register.

Several other forms of advocacy might also be construed as illegal. These include support for resistance in the military; for “whistleblowing” by public officials; for refusal of public officials to implement domestic political repression; and for public nonviolent actions designed to obstruct U.S. military operations. The Patriot Act includes a number of restrictions on advocacy that might also be relevant.

While at present there is not a large movement resisting the draft, there are a growing number of resisters within the military. The Pentagon says more than 5,500 military personnel have deserted since the war started in Iraq. *60 Minutes* interviewed numerous resisters who said, “conscience, not cowardice, made them American deserters.”<sup>17</sup> Marine reservist Stephen Funk was tried by the military for desertion for refusing to fight in the Iraq war. He stated, “In the face of this unjust war based on deception by our leaders, I could not remain silent. In my mind that would have been true cowardice. ... I spoke out so that others in the military would realize that they also have a choice and a duty to resist immoral and illegitimate orders.”<sup>18</sup> A call to aid, counsel, and abet such acts of duty might be deemed illegal by the Bush administration, but it would be defensible as an affirmative measure to prevent the commission of their crimes.

### What This “Affirmative Measure” Might Achieve

There is surely no reason to think that such a call can in itself end the Bush administration’s aggression against the Iraqi people, let alone put the U.S. on the path of conformity with international law. That will take a multifaceted and multinational movement of historic proportions. The question is whether such a call might contribute significantly to the development of such a movement. There are several ways it might do so.

Much of the criticism of the Bush administration has focused on poor execution of diplomatic and military policy. But such criticisms are an inadequate basis for a social

movement that requires personal commitment and willingness to make small or large sacrifices. The proposed approach puts opposition to Bush administration policy on a principled basis of respect for international law. It puts the focus on the fundamental moral and legal arguments against the Bush administration’s doctrine and the policies and actions that flow from it.

The Bush administration claims the right to act as it will on the basis of its democratic election by the American people. The proposed approach directly challenges the legitimacy of that claim by asserting the illegality of its actions.

The Bush administration claims the moral high ground, portraying itself as the upholder of good against the forces of evil in the world. Meanwhile, it has not been held accountable in any way for the killing of civilians, torture of prisoners, and other immoral acts for which it is responsible. The proposed approach defines the Bush administration’s responsibility for immoral, illegal actions as the central issue.

In contrast to statements that are simply assertions of opinion, the willingness of signers to assume a degree of risk indicates their seriousness. It calls on others to consider their responsibilities. It encourages others to overcome their own fears.

A variety of other affirmative measures might be stimulated by such a call. Religious, educational, and other leaders might be encouraged to come out forcefully against Bush administration crimes. Journalists and government officials with access to suppressed information about Bush administration policies might be encouraged to reveal it. Local civil disobedience efforts might lead to many local trials in which the illegality of U.S. government actions could be asserted.

The struggle against Bush administration lawlessness is unlikely to be a short one. The proposed approach creates a basis for a sustained opposition that is not dependent on quick victories. People whose action is based on meeting their responsibilities are likely to persist even if they are not immediately effective, because taking such affirmative measures is in itself a successful fulfillment of their duties. Such action is likely to encourage more and more people to act over time. Every new atrocity and every act of repression will provide a new reason to join the resistance.

The proposed approach demands not only a change in Iraq policy, but a commitment by the U.S. to conform to international law in the future. It will strengthen support

---

for international norms everywhere and make all governments more accountable for meeting them. It is a step toward creating a world in which all nations can be forced—by their own people and by the rest of the world—to meet their responsibilities. Its ultimate goal is not only to halt the U.S. aggression against the Iraqi people, but to develop means to bring nations, starting with the U.S., under the constraints of international law, now and in the future.

The American public has a strong and continuing belief that all nations, including the U.S., are subject to international law. According to a 2004 poll sponsored by the Chicago Council on Foreign Relations, for example, “Majorities of the public and leaders do not support states taking unilateral action to prevent other states from acquiring weapons of mass destruction, but do support this action if it has UN Security Council approval. They also both reject preventive unilateral war, but endorse a country’s right to go to war on its own if there is strong

evidence of an imminent threat. Strong majorities of the public and leaders also believe the United States would need UN Security Council approval before using military force to destroy North Korea’s nuclear capability.”<sup>19</sup> A call to hold the U.S. accountable to international law can appeal to such beliefs.

There is no way to predict how the U.S. government will choose to respond to such a call. The Justice Department brought conspiracy charges against initiators of the *Call to Resist Illegitimate Authority* and their allies. The show trial that resulted undoubtedly increased support for the antiwar movement and did little to intimidate resisters. The Bush administration might simply ignore a similar effort today. Alternatively, it might try to use legal action to intimidate antiwar protesters and to smear them as allies of terrorists and others it defines as evildoers. The result would be a contest for public support for two different conceptions of law and morality.

## Draft for Discussion:

---

# A Call For Affirmative Measures To Prevent The Commission Of War Crimes By The Bush Administration

## Summary

The U.S. government has committed war crimes, crimes against humanity, and violations of the Geneva conventions—and is planning more. All Americans have an obligation under U.S. and international law to bring these crimes to a halt. Until these crimes are halted, we intend to support and engage in acts to resist these crimes. We assert that such acts are a moral and legal responsibility, even if U.S. officials may deem our action a crime.

## The Crimes

The U.S. attack on Iraq was a violation of the UN Charter. Article 1, Section 4 states, “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.” United Nations Secretary General Kofi Annan stated shortly before the attack that the Charter is “very clear on the circumstances under which force can be used. If the U.S. and others were to go outside the Council and take military action, it would not be in conformity with the charter.”<sup>20</sup> After the U.S. attack he stated that the invasion of Iraq “was not in conformity

with the UN charter from our point of view, from the charter point of view, it was illegal.”<sup>21</sup>

The U.S. occupation of Iraq constitutes an illegal continuation of the illegal U.S. attack on Iraq in violation of the UN Charter. U.S. operations in Iraq constitute a continuation of this illegal occupation, even if conducted under the cover of a puppet regime. So does the plan to create permanent U.S. military bases in Iraq. Current U.S. policy is to continue this illegal occupation.

The United States and its supporters in Iraq have killed tens of thousands of Iraqi civilians. The Bush administration currently plans to continue the policies that have led to this slaughter of the innocent.

Authorized agents of the U.S. government have tortured prisoners at Abu Ghraib, Guantanamo, and elsewhere around the globe. Those responsible for this torture have gone largely unpunished and the policies and doctrines that justified it remain in place.

The U.S. government is defying the Geneva conventions as a matter of policy. It holds captives in secrecy without disclosing their existence to the International Red Cross;

---

spirits them across borders; denies them due process of law; and engages in cruel, brutal, and humiliating treatment of prisoners.

In support of their illegal international polices, U.S. officials are engaged in violations of human rights against both citizens and non-citizens abroad and at home. They seize and lock up those they deem a threat without due process of law, hold them incommunicado, and treat them with abuse in violation both of international norms and of the U.S. Constitution.

The Bush administration justifies these crimes under the doctrine that the U.S. government may do whatever it chooses in pursuit of its own national interests, regardless of its responsibilities under international law. But that justification cannot legitimate a pattern of lawlessness that violates both U.S. and international law.

Under Article VI of the U.S. Constitution, the United Nations Charter, the Geneva Conventions, and other treaties made under the authority of the United States are the supreme law of the land. The repeated violation of them, and the perpetuation of policies that authorize their continuing violation in the future, establish that U.S. government officials are not acting as the legal embodiment of the U.S. government but rather as illegal, unconstitutional usurpers.

## Our Responsibilities

The War Crimes Tribunals at Nuremberg and Tokyo following World War II established binding principles regarding war crimes and crimes against humanity. These include personal responsibility for bringing such crimes to a halt. The Tokyo War Crimes Tribunal declared, "Anyone with knowledge of illegal activity and an opportunity to do something is a potential criminal under international law unless the person takes affirmative measures to prevent the commission of the crimes."

The undersigned commit ourselves to undertake such affirmative measures to prevent the commission of further

crimes by the U.S. government in Iraq and in other countries it is currently threatening to attack. Specifically, we agree to support and encourage public, nonviolent acts of conscience intended to impede the commission of war crimes and crimes against humanity by the U.S. occupation forces in Iraq by encouraging and supporting:

- military personnel and government officials who refuse to participate in acts they consider illegal and immoral, including the Iraqi occupation itself.
- military personnel and government officials who "blow the whistle" on illegal actions by documenting and publicizing them regardless of official secrecy policies.
- young people who refuse to register for Selective Service on grounds of conscience.
- government officials who refuse to implement illegitimate orders to suppress the human rights of those attempting to halt the occupation of Iraq.
- those who take public nonviolent action intended to impede the commission of war crimes, crimes against humanity, and violations of human rights.

We pledge to organize openly in our communities and in our workplace, educational, religious, and other institutions to support and promote such actions.

We recognize that some may deem our action unlawful. We maintain on the contrary that it represents our responsibility under both U.S. and international law.

We appeal to all Americans to ask themselves what affirmative measures it is their duty to take to halt the criminal acts of their government.

---

*Jeremy Brecher is a historian and the author of 12 books including Strike! and Globalization from Below and a regular contributor to Foreign Policy In Focus (online at [www.fpif.org](http://www.fpif.org)).*

[For updated information regarding this proposal visit: <http://internationallaw.pro-se-institute.org/measure.html>]

## ENDNOTES

<sup>1</sup> "Bush's Victory, Fallujah, and the Global Anti-War Movement," *Focus on Trade*, Number 106, December, 2004, Part 1. [www.focusweb.org/main/html/Article545.html](http://www.focusweb.org/main/html/Article545.html).

<sup>2</sup> Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge University Press, Cambridge, 1978) p. 351. For further discussion of national sovereignty, see Jeremy Brecher, "The 'National Question' Reconsidered," *New Politics* Summer, 1987.

<sup>3</sup> The strict limitations on self-defense as a justification for war were well established in international law long before the UN Charter. As Michael Byers, Associate Professor at Duke University Law School has explained, "customary law traditionally recognized a limited right of pre-emptive self-defense according to what are known as the 'Caroline criteria'. These date back to an incident in 1837, during a rebellion against British rule in Canada, when British troops

attacked a ship (the *Caroline*) that was being used by private citizens in the U.S. to ferry supplies to the rebels. After a long diplomatic correspondence between the U.S. Secretary of State, Daniel Webster, and the British Foreign Office minister Lord Ashburton, a form of words was agreed to govern acts of anticipatory self-defense: there must be "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation" and the action taken must not be "unreasonable or excessive." "Iraq and the Bush Doctrine of Pre-Emptive Self-Defense," Crimes of War Project, <http://www.crimesofwar.org/expert/bush-intro.html>.

<sup>4</sup> Article 39.

<sup>5</sup> "The UN's Relevance," *The Nation*, March 31, 2003, p. 3.

<sup>6</sup> Anders Stephanson, "Messianic unilateralism threatens all," *Newsday*, March 26, 2003.

<sup>7</sup> Statement by Justice Jackson on War Trials Agreement, August 12, 1945.

<sup>8</sup> *The National Security Strategy of the United States*, September 20, 2002.

<sup>9</sup> Transcript of Presidential Debate, September 30, 2004, [www.npr.org](http://www.npr.org).

<sup>10</sup> "Iraq war illegal, says Annan," *BBC News*, September 16, 2004. For further discussion of the illegality of the U.S. attack on Iraq, see the documents prepared in Belgium for the case against General Tommy Franks at <http://www.informationclearinghouse.info/article3450.htm>.

<sup>11</sup> For a detailed presentation of U.S. violations of international law in the occupation of Iraq, see "Beyond Torture: U.S. Violations of Occupation Law in Iraq" Center for Economic and Social Rights at [www.cesr.org](http://www.cesr.org).

<sup>12</sup> See, for example, [www.iraqbodycount.org](http://www.iraqbodycount.org). According to a study by a team from Johns Hopkins University published by the British medical journal *The Lancet*, there have been a minimum of 100,000 excess deaths among Iraqi civilians since the U.S. invasion. Most of the excess deaths result from violence and most of the violent deaths result from coalition air strikes. Most individuals reportedly killed by coalition forces were women and children. Les Roberts, Riyadh Lafta, Richard Garfield, Jamal Khudhairi, Gilbert Burnham,

"Mortality before and after the 2003 invasion of Iraq: cluster sample survey," *The Lancet*, Vol. 364, November 20, 2004, available at [www.thelancet.com](http://www.thelancet.com)

<sup>13</sup> For a detailed account of the culpability of U.S. official for torture and prisoner abuse, see the materials prepared by the Center for Constitutional Rights against Rumsfeld, Tenet, and Sanchez for human rights charges in a German court at [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Introduction\\_to\\_Complaint\\_in\\_English.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Introduction_to_Complaint_in_English.pdf)

<sup>14</sup> Statement by Justice Jackson on War Trials Agreement, August 12, 1945.

<sup>15</sup> Richard Fernandez of Clergy and Laity Concerned about Vietnam, quoted in Tom Wells, *The War Within: America's Battle over Vietnam* (Berkeley: University of California Press, 1994) p. 192.

<sup>16</sup> Tom Wells, p. 579. Thomas Power in *The War at Home* argues, "The antiwar movement in the United States created the necessary conditions for the shift in official policy from escalation to disengagement. Opponents of the war often argued whether it was better to work 'within the system' or in the streets, but in fact success depended on pursuing both strategies simultaneously. Without those few intellectual leaders who first opposed the war on grounds of policy or morality, there would have been no broad movement; without a movement, national division over the war would not have reached a point of crisis in 1967; and without the crisis, there would have been no effective political challenge to Johnson's power at the one moment when he had to back away from the war, or commit the country to a vastly increased effort." (New York: Grossman, 1973) p. 318.

<sup>17</sup> "Deserters: We Won't Go To Iraq," CBSNEWS.com, December 8, 2004.

<sup>18</sup> "Support Stephen Funk, U.S. Military Resister," <http://info.interactivist.net>.

<sup>19</sup> *Global Views 2004*, [www.cfr.org/globalviews2004](http://www.cfr.org/globalviews2004).

<sup>20</sup> Patrick E. Tyler and Felicity Barringer, "Annan Says U.S. Will Violate Charter if It Acts Without Approval," *New York Times*, March 11, 2003.

<sup>21</sup> "Iraq war illegal, says Annan," *BBC News*, September 16, 2004.

Published by Foreign Policy In Focus (FPiF), a joint project of the International Relations Center (IRC, online at [www.irc-online.org](http://www.irc-online.org)) and the Institute for Policy Studies (IPS, online at [www.ips-dc.org](http://www.ips-dc.org)). ©2004. All rights reserved.

## Foreign Policy In Focus

"A Think Tank Without Walls"

Recommended citation:

Jeremy Brecher, "An 'Affirmative Measure' to Help Prevent the Commission of War Crimes by the Bush Administration," (Silver City, NM & Washington, DC: Foreign Policy In Focus, December 2004).

Web location:

<http://www.presentdanger.org/papers/0412affmeasure.html>

Production Information:

Writer: Jeremy Brecher

Editor: John Gershman, IRC

Layout: Tonya Cannariato, IRC

**p. 8**

**www.fpi.org**

A Think Tank Without Walls

