

# Crime and Punishment: An End to Impunity?

by Gail Davidson<sup>1</sup>

## Post WW II Law Reform

In June 1945, motivated by the atrocities of two world wars, 51 nations met in San Francisco to form the United Nations with the goal to “Save succeeding generations from the scourge of war...”

Fifty-eight countries had come to the same conclusion after the First World War, and the League of Nations was formed by the Treaty of Versailles. The League failed and today membership in the United Nations has grown to 192 countries—virtually all nations.<sup>2</sup>

The *Charter of the United Nations* was founded on the idea that the public good could only be achieved by a system of international law that mandates peace, prohibits war and ensures that all people are entitled to the means to live in freedom and dignity.

In the 65 years since the founding of the United Nations, two interdependent bodies of international law have been developed through the creation of international conventions and treaties, namely:

1. human rights law—which promotes the concept that all individual are equally entitled to certain fundamental rights and those rights must be enforced by their own governments; and,
2. humanitarian law—which prohibits war, makes genocide and torture international crimes, and creates war crimes and crimes against humanity that restrict the use of military force. States are primarily responsible for enforcing these laws through adopting universal jurisdiction.

The rights and prohibitions contained in these international instruments have become part of the domestic laws of states that have signed and ratified them.

Both of these branches of the law resulted in the creation of criminal sanctions that potentially radically alter:

- the sovereign right of states to conduct their affairs free from legal interference or consequences imposed by other states; and,
- the legal duty of states to prevent and punish violations of internationally protected rights occurring outside their own territory and against foreign nationals.

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<sup>1</sup> These are the speaking notes from a talk by Gail Davidson at the World Peace Forum Teach-in, *From Crash to Catastrophe* at the November 8, 2009, Plenary Session in Vancouver B.C.. The talk can be viewed at War, Law and Human Rights: <http://www.youtube.com/watch?v=i2U8uiQJkow&feature=related>

<sup>2</sup> Initial members were: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic<sup>[+]</sup>, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia<sup>[+]</sup>, Denmark, Dominican Republic, Ecuador, Egypt<sup>[+]</sup>, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Syria<sup>[+]</sup>, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics<sup>[+]</sup>, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia<sup>[+]</sup>

These laws created other significant changes: individuals become personally liable for crimes committed while acting as a state agent, following orders of a superior is no longer a defence and there is no longer any immunity accorded to heads of state or other high ranking officials. Heads of state and others had previously been immune from civil and criminal liability for crimes they had carried out in their official capacities—for example crimes carried out as part of state policy or under the rubric of necessity occasioned by events characterized as war or a national emergency.

States becoming a party to instruments such as the *Geneva Conventions*, the *Convention against Torture* and the *Rome Statute of an International Criminal Court* are obligated to take effective measure to prevent, prosecute and punish these crimes wherever they occur and whatever the nationality of victims and suspected perpetrators. In order to fulfill this duty many states adopted some form of universal criminal jurisdiction over such offences. Canada adopted universal jurisdiction, sometimes called conditional, that must be triggered by one or more conditions: the accused being present in Canada or the victim(s) being a Canadian citizen. Other countries, such as Spain and Belgium adopted a universal jurisdiction model, sometimes called absolute, that allowed prosecutions of crimes that had no connection—other than the law—with the state. Laws previously in place had generally only allowed states to prosecute only those criminal offences committed within state territory, by or against a citizen or affecting a state interest.

The term “crimes against humanity” refers to certain acts committed as part of a widespread or systematic attack directed against any civilian population. Crimes against humanity include murder, unlawful confinement, enforced disappearance, extermination, enslavement, deportation or forcible transfer of population, torture, rape, sexual slavery, persecution against a group, apartheid, intentionally causing great suffering or serious injury to body or to mental or physical health.

The term “war crimes” refers to certain acts committed as part of a plan or policy or as part of a large scale commission of such crimes. War crimes include: all grave breaches of the Geneva Conventions, wilful killing, torture or inhuman treatment, extensive destruction or appropriation of property not required by military necessity, depriving a prisoner of fair trial rights, unlawful confinement or deportation, using weapons that kill or injure indiscriminately, directing attacks against civilians, humanitarian workers or UN peacekeepers, attacking undefended towns, villages or buildings, launching an attack that will cause death or injury to civilians or long term damage to the environment that is excessive in relation to the military advantage anticipated, killing a combatant who has laid down arms.

Some offences are war crimes, crimes against humanity, criminal offences *and* grave breaches of the Geneva Conventions. For example, torture is all of these: depriving a prisoner of a fair trial is a grave breach of the Geneva Conventions, a crime under Canada’s Geneva Conventions Act and could also be a war crime.

Prevention and punishment of these crimes is the duty of the individual states that are parties to instruments creating these crimes. Enforcement of the international laws prohibiting genocide, torture, grave breaches of the Geneva Conventions, war crimes and crimes against humanity, by

investigation and prosecution is primarily, and in many cases solely, the duty of individual states through their domestic criminal law systems.

Canada and other states ratifying conventions such as the Geneva Conventions, the Rome Statute of the International Criminal Court and the Convention against Torture and Other Cruel, Inhuman Or Degrading Punishment or Treatment have adopted some form of universal jurisdiction to enable domestic courts to prosecute these crimes wherever the crimes are committed, irrespective of the nationality of the victims and the nationality or official status of the alleged perpetrators. Universal jurisdiction is based on a consensus that some crimes are an affront to all humankind and therefore all states must participate in preventing and punishing them wherever they occur. UN monitoring bodies have no enforcement powers whatsoever. The International Criminal Court (ICC) is a “court of last resort” and has jurisdiction only when:

- the accused is a national of a State Party; or
- the crime took place on the territory of a State Party; or
- the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

Even when one or more of these conditions exist, the ICC will not act unless there are no national courts willing and able to do so.

An example of the state duty to enforce these international laws—and of a state’s failure to do so—is Canada, with respect to torture. In 1985 Canada passed the Geneva Conventions Act as part of its duty in ratifying the Geneva Conventions. The Geneva Conventions Act makes torture (and other grave breaches of the Geneva Conventions) a crime within Canada no matter where the torture was committed. In 1987, by ratifying the Convention against Torture, Canada assumed the legal duty to punish and prevent torture wherever it occurs and to protect, not just Canadians, but all humankind from torture. To carry out this duty, section 269 of the Criminal Code was enacted. In October 2000, to implement obligations as a state party to the Rome Statute of the International Criminal Court, Canada passed the Crimes against Humanity and War Crimes Act which also makes torture an offence in Canada, again irrespective of where the torture is alleged to have occurred. Under the Geneva Conventions, the Convention against Torture and the Rome Statute, Canada also has an additional duty to ensure that persons suspected of torture (and other war crimes and crimes against humanity) are not given safe haven from prosecution and detention within Canada. In furtherance of this duty, Canada passed the human rights inadmissibility sections of the Immigration and Refugee Protection Act which bars entry to Canada of anyone suspected of complicity in torture.

When a person who is believed on reasonable grounds to be complicit in torture enters Canada, or when a victim of alleged torture is a Canadian citizen, the torture alleged is deemed to have been committed in Canada. In other words, the torture of Omar Khadr is deemed to have been committed in Canada. The only circumstance in which Canada can fail to prosecute an alleged torturer found in Canada, is if Canada extradites that person to another jurisdiction capable and willing to prosecute.

### **Enforcement Failure**

So we see that there are laws in place internationally and domestically criminalizing genocide, torture, grave breaches of the Geneva Conventions, war crimes and crimes against humanity.

We also see that as yet, there has been no significant enforcement of these laws. In fact, lack of enforcement can obviously be relied upon by states planning and executing illegal policies.

In 2001, U.S. Attorney General Alberto Gonzalez advised the President Bush that Geneva Conventions prohibitions on the treatment of prisoners were “quaint” and “obsolete” and the U.S. could get away with denying prisoners Geneva Conventions protection. So far he has proved to be right.

In Canada, the first conviction under the *Crimes against Humanity and War Crimes Act* occurred over seven years after the Act was passed when Desiré Munyaneza was convicted in May 2009 for genocide and for the war crime and the crime against humanity of murder committed in Rwanda. On November 7, 2009 another person, Jacques Mungwarere, was arrested on suspicion of involvement in the 1994 Rwandan massacre that left 800,000 people dead.

While evidence of crimes committed by the U.S., the U.K. and states part of the coalition that invaded Iraq and of crimes committed by the U.S. and NATO members in Afghanistan continues to mount, the political will at present is clearly to “take effective measures” to block investigations and prosecutions of international crimes rather than to enable them.

### **Political Control**

In most countries the law and the enforcement mechanisms are in the control of elected officials and therefore, in the absence of political will, there has been, and will be, no significant enforcement.

For example, under Canadian law, prosecutions for war crimes and crimes against humanity against non-Canadians cannot be commenced without the prior written consent of the Attorney General of Canada or his deputy. The Attorney General of Canada is unlikely to approve a prosecution against an official of a state with whom Canada has friendly or profitable relations. The only provision in Canadian law that does not require the prior written approval of the Attorney General of Canada are the torture provisions of the *Criminal Code* which require the Attorney General’s written approval within 8 days of an information being laid.

When Lawyers against the War brought *Criminal Code* torture charges against George W. Bush in 2004, the Attorney General of Canada—then Irwin Cotler who had championed the end to impunity for such crimes--would not approve the prosecution and the Attorney General of B.C. brought applications to have the charges dismissed without hearing in all three levels of B.C. courts.

### **Political Interference**

Unlike Canada, Belgium adopted universal jurisdiction that allowed any person to file a criminal complaint for an international crime and by so doing initiate a preliminary investigation that could lead to a prosecution. There was no requirement for political consent and no requirement for a triggering condition. However, in 2003, after a criminal complaint was filed against U.S. General Thomas Franks, the U.S. pressured Belgian politicians into amending the law.

Political pressure has restricted the use of universal jurisdiction in Spain also. In 1985 Spain extended criminal jurisdiction to genocide, terrorism and any serious criminal acts in violation of international covenants or treaties. Spain was been a champion of humanitarian law enforcement. International crime proceeding have been filed against officials of many countries including the

U.S., China and Israel. Bowing to pressure from the U.S., the Spanish government has recently restricted their ability to continue in this role.

The law amending Spain's universal jurisdiction was passed by the Congress of Deputies (lower house) on June 25, approved by the Senate October 15 and enacted November 4, 2009. The new law limits Spain's jurisdiction to cases having a link to Spain and will not apply to any cases where another competent court has begun proceedings. The amendment is not retroactive and so will not affect proceedings already commenced.

And so we are left with the apparent collapse of both of these branches of international law. As observed by one of the law lords in the Pinochet case, in the absence of proper prosecutions "...the whole elaborate system of universal jurisdiction...is aborted..."

### **Vietnam, Cambodia and Laos: 1964-1973**

The lessons of Vietnam, Cambodia and Laos prove that if the law is not enforced, powerful states will continue to ignore and violate the law and atrocities will increase in frequency and in scope.

In 1995 Vietnam announced that as a result of the U.S. war on Vietnam between 1964 and 1973, a total of five million Vietnamese had been killed—one million combatants and four million civilians.

Millions more were killed and injured by U.S. bombing of Cambodia and Laos. Between 1965 and 1973 the U.S. dropped over 2 ½ million (2,756,941) tons of bombs on Cambodia, during 230,516 raids on 113,716 sites, killing and injuring an unknown number of Cambodians.

In Laos, during the same period, the U.S. dropped over two million tons of bombs during 580,000 bombing raids. This means that for a period of nine years, the U.S. dropped one plane load of bombs somewhere in Laos, every eight minutes, 24 hours per day. People are still being killed and maimed by the more than 86 million cluster bomblets left unexploded in Laos alone. One journalist described the nine-year bombing of Laos as "the most appalling episode of cruelty in American history."

No one was ever held accountable—charged, tried and convicted—for the wholly illegal invasions of Vietnam, Cambodia and Laos; invasions that resulted in the deaths of millions during nine years of air and land assaults and in an unknown number of deaths and injuries since from land mines, cluster bombs and deathly contaminants left in the soil, air and water of these countries.

The deaths, injuries, displacement and destruction of the people, cultures and environments in Iraq and Afghanistan are the legacy of the failure of the citizens and governments of the world to insist upon common sense and decency and adherence to the laws that so many agreed were necessary for our collective survival. We must leave a different legacy. By not pursuing prosecutions and enforcing humanitarian law in the aftermath of Vietnam, the United Nations along with the entire world community, let the U.S. know that illegal invasions and occupations of profoundly poor countries would be tolerated irrespective of illegality or immorality and irrespective of the scope and duration of the deaths and damage caused by those illegal actions.

In the absence of reliable enforcement of humanitarian law, there are no universal rights, only privileges for some, like some of us in Canada and then only for a time—until someone in power says that security, national or local, requires a suspension of rights at home or that foreign policy requires their suspension abroad.

## **Invasions and Occupations of Afghanistan (2001-2009) and Iraq (2003-2009)**

I would like to consider the more recent crimes committed in the past eight years during the invasions and occupations of Afghanistan and Iraq.

### **Afghanistan**

On October 7, 2001 U.S.-led forces began intensive bombing of Afghanistan that has resulted in an unknown number of deaths, injuries and displacements and in irreparable damage to the culture, economy and environment of Afghanistan. The Bush administration dubbed the war against Afghanistan, "Operation Enduring Freedom." The original U.S. Department of Defense plan was to brand the enormously illegal and immoral invasion "Operation Infinite Justice," but Department of Defense ad people advised that brand might offend as only Allah could dispense infinite justice.

The fact that the attacks on Afghanistan were said to be in response to horrific crimes believed to have been committed by people believed to be hiding in Afghanistan did not, as common sense would suggest, provide any legal justification whatsoever.

On September 16, 2001, before the bombing started, Bush demanded that Pakistan cut off fuel supplies and eliminate truck convoys that were providing much of food and supplies to Afghanistan and to close the border to people trying to leave Afghanistan.

On October 2, 2001 Tony Blair, then Prime Minister of Britain, threatened, "I say to the Taliban, surrender the terrorists or surrender power. That is your choice."

On October 7, 2001, Bush signaled illegal military assaults against other countries when he told the United Nations, "We may find that our self-defense requires further actions with respect to other organizations and other states."

Offers by the government of Afghanistan, prior to the onset of bombing, to try Osama bin Laden in Afghanistan, and offers made several days after bombing began to turn him over to a third country for trial upon the U.S. providing evidence of his involvement in 9/11, were rebuffed. To the second offer, Bush responded that there was no need to talk about bin Laden's guilt or innocence, "We know he is guilty." <sup>3</sup>

The military invasion of Afghanistan—and the threats—were illegal, unjustified and immoral. However many people, sobered by the deaths of so many innocent people in New York (approximately 3,000) either stood by silently or even applauded the U.S.-led murder of innocent people in Afghanistan.

The bombing of Afghanistan started like this,

"Not long after 7 p.m. on Sunday, Oct. 21, the bombs began to fall over the outskirts of Torai village. Maroof saw a massive fireball rising from the ground." He realized that "bombs had

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<sup>3</sup> The Taliban government offered through Abdul Salam Zaeed, Afghan Ambassador to Pakistan, to detain and try bin Laden in Afghanistan if the U.S. formally requested. CBC News, Oct. 7, 2001.

[http://www.cbc.ca/world/story/2001/10/07/taliban\\_osama011007.html](http://www.cbc.ca/world/story/2001/10/07/taliban_osama011007.html)

On another occasion the Taliban offered to turn bin Laden over upon receiving evidence from the U.S. of bin Laden's complicity in the September 11, 2001 attacks.

<http://www.guardian.co.uk/waronterror/story/0,,573975,00.html>

fallen over the little cluster of houses a mile away where his sister and his other relatives were living."

"The roll call of the dead read like an invitation list to a family wedding: his mother-in-law, two sisters-in-law, three brothers-in-law, and four of his sister's five young children, two girls and two boys, all under the age of eight."<sup>4</sup>

We do not know how many people have been killed by Operation Enduring Freedom and by International Security Assistance Forces (ISAF) NATO forces in Afghanistan. We do know that U.S. and NATO forces are regularly killing civilians and that the number of people killed in bombing raids has sharply increased every year for the past 3 years. One of the most recent bombing massacres was in Kunduz province where 142 people were incinerated when a German commander ordered a U.S. plane to bomb two fuel trucks stuck in a river bed and surrounded by villagers. According to Marc Herold <sup>5</sup>, since 2005, the lethality of U.S. bombing in Afghanistan has exceeded that recorded in Vietnam, Laos, Cambodia and Yugoslavia.

Afghani people killed or injured by U.S. and NATO air and ground assaults are incorrectly called collateral damage—a term accepted and still repeated by media. Collateral damage as a term of war, refers to unintended damage caused unavoidably during a necessary military action taken to achieve a legitimate military objective that could not be otherwise achieved. Given that the invasion of Afghanistan was illegal, people killed during the bombing in Afghanistan have all been murdered as there was and is no legitimate military purpose and no necessity to bomb Afghanistan.

## **Iraq**

Less than a year after the bombing of Afghanistan began, a U.S. military invasion of Iraq was imminent and the U.S. and the U.K. were attempting to get the UN Security Council to pass a resolution authorizing the use of “all necessary means” against Iraq, the phrase used in the resolution authorizing the Gulf War.

Legal practitioners and legal scholars around the world agreed that a U.S.-led invasion of Iraq would be illegal. The Security Council, in the face of bullying, bribery, promulgation of falsehoods and a relentless litany of lies and misinformation, refused to authorize military action against Iraq. The world community expressed its outrage and opposition to an illegal invasion and war of aggression against Iraq. In an unprecedented example of international accord, millions of people around the world rejected as untrue, the allegations that Iraq posed a threat and that the threat posed by Iraq could be adequately contained only by bombing and invasion and forced regime change.

In spite of the almost seamless acceptance by the mainstream North American English language press of the role requested by Bush (that they engage in propagandizing, in putting a credible spin on the incredible—Operation Enduring Freedom, Shock and Awe), people rejected the proffered justifications for the invasion of Iraq as lies and nonsense. At first, opposition around the world held the fragile line between legality and illegality, between life and death for the already struggling-to-survive people of Iraq. In November 2002 the UN Security Council

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<sup>4</sup> The Times of London, October 8, 2003.

<sup>5</sup> Marc Herold, University of New Hampshire professor and author of *Blown Away: Myth and Reality of Precision Bombing in Afghanistan*.

refused to pass the resolution requested by the U.S. and U.K. containing the words “all necessary measures.”

During early 2003 the Security Council continued to refuse to pass a resolution that did or could authorize an invasion of Iraq.

The U.S., confident of the ultimate power of its own weapons of mass destruction and of the impotence of the law forbidding their use, pressed on. The Bush administration rejected Iraq’s February 2003 offer to allow the U.S. to send 2,000 agents to look for and inspect weapons in Iraq, to hold free elections within three years, and to allow the U.S. some interests in Iraq oil.

On March 19, 2003 a U.S.-led coalition began a massive military assault on Iraq, the largest single military operation mounted since the Vietnam War. The U.S. Defense Department ad men dubbed the invasion “Operation Iraqi Freedom” and proclaimed seven goals that included:

- removing Hussein (an act specifically prohibited by the UN Charter article 2.4)
- finding weapons of mass destruction
- hunting down terrorists (clearly a last minute add-on as there was no information about terrorists in Iraq other than the terrorist threat posed by the U.S./U.K.)
- securing Iraq’s oil fields; and

helping Iraqi people “create conditions for a transition to a representative self-government.” (from U.S. armed forces news release)

President Bush, in an address to the American people, explained that coalition forces were in the "early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger."

The U.S.-led coalition began by bombing Baghdad where 25% of Iraqi people then lived. Announcing the “Shock and Awe” bombing, the Pentagon boasted in a press release, “The sheer size of this has never been...contemplated before. ...There will not be a safe place in Baghdad.” According to the Pentagon, the plan was to shatter Iraq “physically, emotionally and psychologically” by dropping 800 cruise missiles in two days and wiping out water and power supplies.

When the bombing started the world community essentially fell silent. It didn’t matter—the Universal Declaration on Human Rights didn’t matter, the UN Charter didn’t matter, the Geneva Conventions didn’t matter, morality and common sense didn’t matter, decency didn’t matter, brown people, especially Muslim people didn’t matter.

By April 9, 2003 when the U.S.-led troops reached Baghdad, civilian deaths according to the Economist, exceeded 20,000: by September 2003 Iraqis deaths consequent on the invasion and occupation exceeded 50,000 according to journalist John Pilger<sup>6</sup>. By July 2006 deaths of Iraqi people due to the war had soared to over 655,000 according to the John Hopkins Bloomsbury School of Health report published in the October 2006. The report was based on research conducted by the Johns Hopkins Bloomberg School of Public Health and the Al Mustansiriya University in Baghdad and was published in the British medical journal, the Lancet. Initially, Prime Minister Blair and President Bush dismissed the Johns Hopkins report as ‘not credible’. However, on March 27, 2007 the BBC reported, based on government documents obtained through freedom of information requests, that senior U.K. government scientists had confirmed

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<sup>6</sup> John Pilger, *Lies and More Lies*, ZNet Commentary, September 23, 2003.



the validity of the John Hopkins report as using ‘tried and tested’ scientific methods and said the methods used were likely to lead to an ‘underestimation of mortality.’

Crimes committed during these two invasions and occupations are documented by audio, video and written records and by the testimony of witnesses. In addition to the supreme crime of waging aggressive war, these crimes include:

- illegal threats to use force
- planning and preparing for a war of aggression
- air and ground attacks on protected sites—hospitals, museums, religious buildings
- targeting of and indiscriminate attacks against, civilians
- extra-judicial executions
- use of napalm, white phosphorous and depleted uranium
- use of arms that cause indiscriminate death, injury and environmental damage
- bombing of undefended targets
- reprisals against civilians
- reprisals against prisoners
- torture and other cruel, inhuman and degrading treatment and punishment of prisoners
- enforced disappearances
- denial of fair trial rights
- illegal detention and transfer
- murder
- destruction of systems delivering necessities—food, water and electricity
- privatizing state assets
- failure to allow self-government
- failure to adhere to law of invaded country.

These crimes must be investigated and those responsible for planning, authorizing, supervising and failing to prevent these crimes must be charged, prosecuted and tried and those convicted must be punished. Otherwise we must give in and give up and say we support a system in which one group of men can decree that certain people will die because they say so, and that if that one powerful group says the sky is falling then we will say that the sky is falling and others must as a consequence die, and if they say that those that die are actually being liberated we must nod or sleep and say indeed—they are now free.

Instead, we must raise our voices to insist that investigations and prosecutions proceed. We must insist on remembering the crimes, acknowledging the victims and ensuring that those responsible are held accountable through prosecutions of the suspects and punishment of the convicted.

## **Punishment**

Around the world there are efforts being made to investigate these crimes and to hold members of the Bush and Blair administration accountable.

- In Italy on November 4, 2009 23 CIA agents were convicted of kidnapping Abu Omar (Asama Moustafa Hassan Nasr) and transferring him to Egypt where he was tortured and released after four years with no charges ever laid against him. Twenty-two of the American CIA agents received three-year sentences: one received an eight-year sentence. Although

this was not a war crimes case *per se* but rather a case prosecuted under ordinary Italian criminal law, it is very significant and represents the first condemnation of the U.S. extraordinary rendition programme by a domestic criminal court. The case was successfully prosecuted due to the persistence of Italian prosecutor Armando Spataro and the excellent police work of the head of Milan police. During the investigation, Spataro was put under surveillance, his telephones were tapped and he was investigated for betraying state secrets. At one point he questioned whether it was possible for a prosecutor to conduct an independent investigation of a politically sensitive criminal allegation.

- In Spain a criminal torture complaint was accepted in April 2009 against former U.S. Attorney General Alberto Gonzales and five other legal advisors who helped plan the use of torture and the means to get away with it.<sup>7</sup> Judge Garzon has ordered prosecutors to investigate the complaint. U.S. attorneys filed a substantial brief to support the prosecution and are seeking to have G.W. Bush included as an accused. U.S. attorney, William F. Pepper explained, “It would be an injustice not to prosecute those who occupied the highest positions of authority. It would be like processing Eichmann and overlooking Hitler...” Over 1,000,000 people in the U.S. have signed a petition demanding that the lawyers who helped plan the torture regime be disbarred.
- On October 6, 2009 the Ad Hoc Committee for Justice for Iraq filed a genocide complaint with the Spanish National Court against four U.S. presidents and four U.K. prime ministers. (George H. W. Bush, William J. Clinton, George W. Bush, Barack H. Obama, Margaret Thatcher, John Major, Anthony Blair and Gordon Brown). The case is being brought by the Ad Hoc committee on behalf of Iraqis and is based on allegations of 19 years of genocide in Iraq through imposition of sanctions that resulted in 1.5 million Iraqi deaths, including 500,000 children and a war of aggression that led to the violent deaths of over one million more. Reports indicate that Judge Santiago Pedraz has been assigned to the case.
- Author and former U.S. prosecutor Vincent Bugliosi, has found a prosecutor to consider an indictment against G.W. Bush for the murder of over 4,000 U.S. soldiers who died in Iraq. The prosecutor is examining the evidence, (set out in the Bugliosi’s book, *Prosecuting George W. Bush for Murder*), and a decision from the prosecutor is expected early in 2010.
- The U.S. civil damages case, *Binyam Mohamed v Jeppesen DataPlan Inc.*, is proceeding in the U.S.. Mohamed, an Ethiopian citizen and British resident, is seeking damages for rendition and torture from Jeppesen DataPlan, a subsidiary of Boeing known to be the CIA’s aviation provider for torture rendition flights. Mohamed was rendered to and tortured in Morocco, Afghanistan and Guantanamo Bay. The U.S. Department of Justice is blocking a trial on the basis that the case involves state secrets, the exposure of which would imperil national security. The American Civil Liberties Union maintains the case is not about state secrets but accountability. The Binyam Mohamed case is also before the U.K. courts for disclosure and the U.K. court recent ruled that he was entitled to receive documents given by

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<sup>7</sup> Others charged are: William Haynes II, former general counsel for the Department of Defense; John Yoo, the former Justice Department lawyer who wrote secret legal opinions saying President George W. Bush had the authority to circumvent the Geneva Conventions; Douglas Feith, former undersecretary of defense for policy; Jay Bybee, Yoo's former boss at the Justice Department's Office of Legal Counsel; and David Addington, chief of staff and legal adviser to ex-Vice President Dick Cheney.

the CIA to the British intelligence and expressed concern that the U.S. was seeking to suppress evidence of torture, “politically embarrassing though it may be.”

- U.S. Attorney General Eric Holder has appointed a special prosecutor to investigate interrogation abuses [torture] by the CIA that exceeded the guidelines established by Bush's lawyers inside the Department of Defense Justice Department's Office of Legal Counsel. This inquiry is subjected to pressure from both sides: from human rights advocates to broaden the inquiry and from the U.S. government to close it down. Recently, eight former directors of the CIA sent their furious response to Holder trying to dissuade him from pursuing this criminal investigation.
- In the U.K. the Chilcot Inquiry into the Iraq War will begin hearing evidence November 24, 2009: Tony Blair is expected to be called to testify.
- The Baha Mousa Inquiry into the September 2003 murder of a Iraqi hotel clerk by British soldiers, will resume hearings November 9, 2003.
- Doctors in Fallujah are calling on the United Nations to investigate the use of depleted uranium in Fallujah. An October 2009 report sent to the UN General Assembly from the Iraq Minister of Women's Affairs revealed that 24% of the babies born in Fallujah in September 2009, died within the first week of life and 75% of the babies were deformed. This compares to August 2002, six months before the US invasion, when 530 live births were reported with only six dying in the first week, and only one deformity. An estimated 10,000 tons of DU was used during the second assault on Fallujah.

People with knowledge of the relevant facts and applicable laws continue to insist that those responsible be held accountable.

In June 2008, Maj. General Antonio M. Taguba (USA-Ret.), author of the U.S. Army's 2004 internal report on Abu Ghraib, Investigation of the 800th Military Police Brigade, published this unequivocal statement, "... the Commander-in-Chief [Bush] and those under him authorized a systematic regime of torture.... After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the current [Bush] administration has committed war crimes."<sup>8</sup>

In December 2008 the bi-partisan U.S. Senate Armed Services Committee, after an 18-month investigation that examined 38,000 pages of documents and the testimony of 70 people, concluded, "...senior officials [Bush and others] in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees."

In March 2009, then President of the UN General Assembly Miguel D'Escoto Brockmann said, "The illegality of the use of force against Iraq cannot be doubted...the aggressions against Iraq and Afghanistan and their occupations, constitute atrocities that must be condemned and repudiated by all who believe in the rule of law in international relations."<sup>9</sup>

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<sup>8</sup> Preface to *Broken Laws, Broken Lives: Medical Evidence of Torture by U.S. Personnel and its Impacts*, A Report by Physicians for Human Rights, June 2008.

<sup>9</sup> *Rome Statute of the International Criminal Court*, A/CONF.183/9, Adopted 17.07.98, entry into force 01.07.02, Preamble.

In April 2009, UN experts Manfred Nowak, Special Rapporteur on torture, and Martin Sheinin, Special Rapporteur on the promotion and protection of human rights while countering terrorism,<sup>10</sup> warned that in view of the conclusive evidence of torture against Bush and others, states ratifying the *Convention against Torture* have legal duty to prosecute and that to give them amnesty is to violate the law.

In August 2009, Navi Pillay, United Nations High Commissioner of Human Rights said, “There should not be impunity for torture or any other unlawful treatment of detainees, whether it is in the United States or anywhere else in the world.”

People continue to publish books and reports detailing crimes committed by the Bush administration in Afghanistan and Iraq along with voluminous references to the evidence and identification of the laws that require prosecution. Some examples are, Michael Haas, *George W. Bush, War Criminal? The Bush Administration's Liability for 269 War Crimes*; Michael Ratner, *The Prosecution of Donald Rumsfeld: A Prosecution by Book* and Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law*. A book scheduled for release in early 2010 (Charlotte Dennett, *The People v Bush: One Lawyer's Campaign to Bring the President to Justice and National Grassroots Movement She Encounters Along the Way*.), will detail evidence that several "high level detainees" (e.g., Khalil Sheik Mohammad and Al Libi) were severely tortured by water boarding during the months leading up to the Iraq war not to get "actionable intelligence," but rather to extract false confessions linking them to Saddam Hussein and 9/11 when it was known that such links did not exist. The purpose of this torture was apparently to strengthen the case for war by extracting false information when weapons of mass destruction were not turning up.

Will prosecutions really take place? A U.S. Justice Dept official announced at the beginning of May 2009 that interest in prosecuting Bush officials for torture was waning.

It is important to remember that it took until 1998 for criminal charges to be laid against Chilean dictator Augusto Pinochet for crimes dating back to 1976. The investigation and prosecution in Spain was the result of efforts by activists—people who wouldn't forget and insisted against all odds that their dead, disappeared and tortured relatives and friends had to have justice and that the only adequate justice and the only effective way to prevent others from being subjected to the same treatment was to identify and punish perpetrators. The private citizens who brought the complaint against Pinochet found and interviewed witnesses, compiled dossiers of evidence and briefs of the law and formed networks of supporters that spanned the globe. Many of them devoted their lives to the pursuit of “justice” for the victims of the torture overseen by Pinochet.

It is good to remember that in Argentina, the mothers and the grandmothers of people disappeared during the dirty war period (Asociación Madres de Mayo), from 1976 to 1983 gathered in the Plaza de Mayo in the centre of Buenos Aires, heads covered by white scarves to indicate their grief, to remind people of the crimes against their children and grandchildren and to call for those responsible to be identified and punished. They did this every Thursday for almost 30 years. In August 2003 the Argentine House of Deputies finally voted to annul the

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<sup>10</sup> *European Nations May Investigate Bush Officials Over Prisoner Treatment*, By Craig Whitlock, Washington Post Foreign Service, Wednesday, April 22, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042103742.html>

laws that prevented prosecution for those atrocities while demonstrators ringed the building with photographs of some of the 30,000 disappeared.

In the struggle between Realpolitik and law, Realpolitik has certainly prevailed. It is up to individuals and groups to continue with the most vigorous advocacy to ensure that the law predominates.

Under all legal systems, victims of criminal acts are entitled to the remedy of having the state identify and punish those responsible through the proper application of the criminal law. Those of us who are not victims are entitled to have the criminal law enforced as the primary means of prevention.

Will Bush and Blair and others be brought to justice and punished for crimes committed by U.S. and U.K. officials under their supervision and direction, through the proper application of criminal law? Not unless there is a swell in the number of individuals and groups around the world insisting upon investigations, prosecutions, fair trials for suspects identified by investigations and appropriate punishments for perpetrators found guilty. Not we make ending impunity a priority.

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