

## **About EarthRights International (ERI)**

ERI combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.” Earth rights are those rights that demonstrate the connection between human well-being and a sound environment, and include the right to a healthy environment, the right to speak out and act to protect the environment, and the right to participate in development decisions.

## **About This Report**

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## SHOCK AND LAW

George W. Bush's Attack on Law and Universal Human Rights

A report by EarthRights International  
March 2005

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It is of high importance to the peace of America that she observe the laws of nations.

· John Jay, Federalist Paper #2

...to the end it may be a government of laws, and not of men.

· John Adams, October 25, 1780<sup>1</sup>

## A Moral Imperative

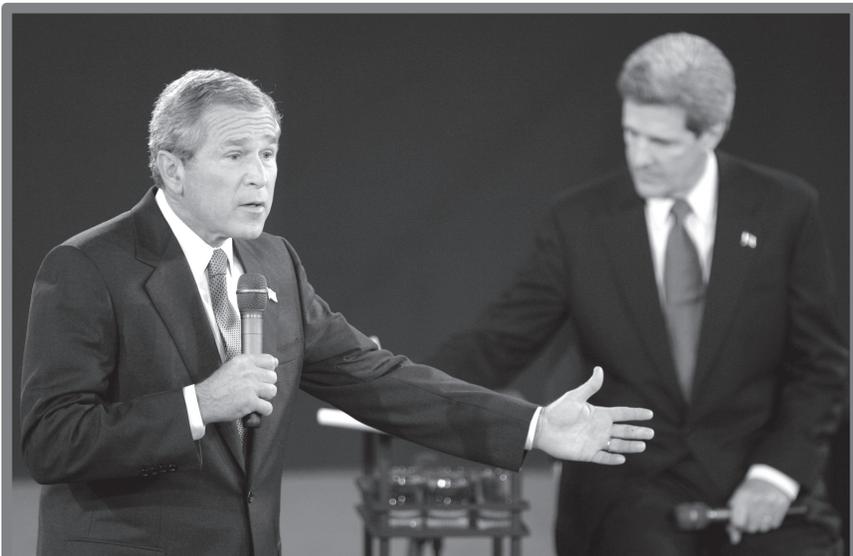
During the 2004 presidential debates with John Kerry, George W. Bush took pride in his refusal to join the International Criminal Court (ICC), remarking that the United States should not join just because it is “popular in certain capitals in Europe.”<sup>2</sup> This unprompted boast, in a nationally broadcast debate, indicates that Bush and his advisors believed that open rejection of an international human rights agreement would win points with the American electorate. The Bush position represents a steep decline in American respect for universal human rights and international law.

The Framers of the U.S. Constitution understood that, in the words of one prominent scholar, upholding international law was “a moral imperative—a matter of national honor.”<sup>3</sup> If all nations chose to ignore their international legal duties, the Framers believed, the international system would “dissolve into chaos.”<sup>4</sup> As a result, they went to great lengths to enshrine international law in the Constitution. The U.S. Constitution authorizes Congress to “define and punish Offenses against the Law of Nations,” and expressly states that treaties are the law of the land. Moreover, the Framers assumed that customary international law was part of U.S. law and would be applied as such by federal and state courts. In Federalist Paper #21 Alexander Hamilton wrote, “The treaties of the United States, to have any force at all, must be considered as part of the law of the land.” In Federalist 64, he wrote, “the treaties, when made, are to have the force of laws.” Thomas Jefferson heralded the law of nations as an integral part of the laws of the land.<sup>5</sup> Accordingly, the courts, including the Supreme Court, have held for almost two hundred years that our federal common law has been shaped and informed by customary international law.<sup>6</sup>

In an increasingly globalized and interdependent world, the Framers' concerns are, if anything, more compelling today than they were two hundred years ago. However, the reality is that while most Americans believe in the rule of law, some of those same Americans do not have the same respect for international law. For example, some see the United Nations as simultaneously pathetic for its weakness and fearsome for its threat to sovereignty. Others see international law as laudable but hopelessly unenforceable, not realizing, perhaps, that "most nations observe most international law most of the time."<sup>7</sup>

William H. Luers, president of the United Nations Association of the United States, puts it diplomatically: "Most Americans don't really take into account the rule-of-law aspects of international behavior... We generally think what we do is right and in a certain sense we set the rules."<sup>8</sup>

A majority of the world's governments recognize that international law helps to create a more stable, predictable world conducive to their interests. Yet in the U.S., some lawmakers view contempt for international law as politically advantageous, as evidenced by a U.S. House of Representatives Resolution introduced in 2003 urging Supreme Court justices not to consider foreign jurisprudence when making their decisions.<sup>9</sup>



During the first two 2004 presidential debates, George W. Bush proudly proclaimed his opposition to the International Criminal Court. © AP Photo/Charles Dharapak

As President, George W. Bush is responsible for understanding the close rela-

tionship between domestic and international law and for fostering a culture of respect for the rule of law, both in the U.S. and abroad. Instead, he seems to be among those Americans described above—nominally committed to the rule of law at home, yet openly disdainful of international law, and unaware of the contradictions between the two positions. Bush's hostility to international law is not merely political posturing. It has serious consequences.

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"Instead of a country committed to law, the United States is now seen as a country that proclaims high legal ideals and then says that they should apply to others but not to itself."

-Anthony Lewis, NY Times<sup>10</sup>

The attack on law compromises U.S. security, because other nations will use U.S. policies as justifications for their own breaches of human rights, and because U.S. policies will be seen as illegitimate and hostile to the rest of the world. By lowering international human rights standards, the U.S. undermines its moral authority and strategic alliances. The Bush attack on law rejects core American values (including the rights of individuals, the primacy of rule of law, and democracy), reverses the U.S.'s historical leadership role on universal human rights (including its leadership since 1945 in the international realm), undermines its reputation as a law abiding nation, and results in the alienation of millions of people around the world who would otherwise admire the U.S. and view it with a sense of goodwill.

The Bush attack on international law is really an attack on the rule of law as a principle, the essence of which is "the establishment of a single consistent standard, which is to be obeyed by ruled and ruler alike."<sup>11</sup> It undermines a cornerstone of American democracy, described by John Adams as a "government of laws, and not of men."<sup>12</sup>

The aim of this report is to persuade the U.S. legal, human rights and global justice communities to expose and discredit the attack on law and human rights that George Bush has spearheaded. We believe that respect for international law is an American value and is good for U.S. security. We believe that contempt for international law inevitably spills over—and already has spilled over—into domestic law, thus undermining the rule of law, one of the U.S.'s great achievements. No one should be able to gain political advantage through overt hostility to international law and universal human rights. Through a

large-scale educational and political effort, we can make such hostility politically unacceptable. We can restore respect for human rights and international law in a country that has been instrumental in the development of both.



Every nation that proclaims the rule of law at home must respect it abroad and every nation that insists on it abroad must enforce it at home.

-UN Secretary General Kofi Annan, Opening Remarks to the General Assembly's 59th Session on Sept 21, 2004<sup>13</sup>

The Bush Administration has attacked international law in at least four ways. First, it has ignored, undermined, and weakened a variety of critical international treaties, including treaties that promote human rights, women's rights, global health, environmental sustainability, and peace and security. The first section of this report details Bush's actions regarding the International Criminal Court, the Convention on the Elimination of all Forms of Discrimination Against Women, the Kyoto Protocol on climate change, the Framework Convention on Tobacco Control, the Biological Weapons Convention, and the Geneva Conventions.

Second, the Administration has ignored and violated international law when not compatible with its political aims. A primary example of the Administration's disregard for international law is the Iraq War. The war is unlawful because it violates the general prohibition on the use of force in the absence of a threat of an imminent armed attack established in the United Nations Charter. The Administration's assertion of a unilateral right to wage preemptive war is meant to apply to the United States and the United States only. Logically, if all nations asserted this right, the existing international law standard and the United Nations system for preventing war would be eviscerated. Chapter Two briefly summarizes the ways in which the Iraq war was unlawful. Chapter Two also describes the events around the Administration's "torture memos" of January and August 2002, which argued for limiting the application of the Geneva Conventions and for loosening the rules on what constitutes torture.

Third, the Bush Administration sought to create a legal no man's land at the U.S. controlled Guantánamo Bay Naval Base, where, in the name of the War on Terror, the Administration attempted to deny detainees captured abroad any right to challenge their detention. With these actions, the Administration manifested not only disdain for international law, in this case the Geneva Conventions, but also for U.S. domestic law. Chapter Three summarizes the legal transgressions relating to Guantánamo. Chapter Four describes how those transgressions have spilled over into violations of fundamental rights of U.S. citizens, such as Yaser Hamdi and Jose Padilla.

Finally, the Administration has sought to weaken international legal principles by undermining domestic legislation meant to enshrine the same principles within U.S. law, and by passing executive orders rebuking them. For example,

the Justice and State Departments continue to argue against decades of case law under the Alien Tort Claims Act (ATCA), a statute that allows non-U.S. citizens to bring lawsuits in U.S. courts for extreme violations of international law, such as genocide, torture and slavery. Bush also issued executive orders that place corporations above the law by providing immunity from lawsuits for oil corporations operating in Iraq. Chapter Five addresses the attack on ATCA and these executive orders.

The conclusion of this report calls for a large-scale educational and political effort to counter the radical and fundamental attack on law undertaken by George W. Bush. We outline four frameworks for educating the public on these issues, and a nine-point platform to restore respect for international law in the United States.

## Undermining Treaties and Conventions



As to the laws of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us.”

—U.S. Supreme Court Chief Justice John Jay<sup>1</sup>

A recent study by the Institute for Agriculture and Trade Policy concludes that the Bush Administration “adopt[s] fewer international treaties, opt[s] out of previous treaty commitments, and often finds itself isolated among the international community on treaties that protect workers, the environment, women and children.”<sup>2</sup> The study notes that of the ten treaties ratified during the Bush Administration’s tenure, four were originally signed under Bill Clinton, and five relate to protection of corporations rather than social sectors. In addition, the Bush Administration has actually withdrawn support for several major treaties<sup>3</sup> (see Annex 1). This chapter examines the Bush Administration’s refusal to support the International Criminal Court (ICC) as a case study in the Administration’s attitude towards international law. This chapter also summarizes the Bush Administration’s oppositional stance on four other critical treaties: the Landmine Ban Treaty, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Biological Weapons Convention, and the Kyoto Protocol. Finally, we look at the recent attempts to unilaterally redefine and re-interpret the Geneva Conventions on torture.

The Administration does not reject treaties on substantive grounds alone. Rather it rejects them *because* they are treaties.

Looking at the ICC example, combined with the pattern of weakening, opposing, undermining, or just plain ignoring dozens of other treaties and conventions, a disturbing feature of U.S. policy emerges: it appears that the Administration does not reject these treaties on substantive grounds alone. Rather, it rejects them

*because* they are international treaties—because they impose international legal obligations regarding issues such as genocide, war crimes, global warming, and women’s rights.

Ironically, in the post 9/11 era, the Bush Administration’s attitude toward international law has the potential to create—and may already have created—a more dangerous world. Without international law, governed by rules and treaties, there is no world order. U.S. unilateralism encourages unilateral actions by other nations; it suggests that “might makes right” is a legitimate doctrine; it undermines the human rights principles the United States has stood for; and it foments hatred of the West. As former U.S. President Jimmy Carter has stated, “These unilateral acts and assertions increasingly isolate the United States from the very nations needed to join in combating terrorism.”<sup>4</sup>

## “Unsigning” the International Criminal Court Statute

“

Terrorists and genocidalists the world over must understand there is a day of reckoning. Whether the crime is committed behind barbed wire at Auschwitz, in the streets of Sarajevo, in a Cambodian killing field, or on Tel Aviv street corners, justice must be pursued and the rule of law established.

—Rep. Jim Leach (R-IA), Nov. 26, 1996 (speaking in favor of the establishment of an International Criminal Court)<sup>5</sup>

The International Criminal Court (ICC) “is the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.”<sup>6</sup> With this mandate, the ICC represents the world’s revulsion for the most egregious transgressions, including those committed against U.S. citizens.

The Court specifically has jurisdiction to try individuals who commit crimes against humanity, genocide, and war crimes, such as those tried in Nuremburg, Rwanda and the former Yugoslavia. For instance, some of the Court’s first investigations surround the killing, rape, and torture of thousands in the eastern Democratic Republic of the Congo.

The United States initially supported the movement to establish the ICC in the late 1990s and the Clinton Administration signed the treaty in 2000. After signing, President Clinton stated:

The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice to our leadership in the effort to establish the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Our action today sustains that tradition of moral leadership.<sup>7</sup>

However, since Bush came to power, the United States has become the ICC’s most prominent critic, going so far as to “unsign” the treaty, and joining “rogue nations” such as Iraq (during Saddam Hussein’s reign), Iran, Cuba, North Korea, and Syria in rejecting the Court. The United States is the only democratic nation in the world that opposes the Court.



Villagers in northeast Congo at the site of a mass grave for victims of an April, 2003 massacre. The ICC, rejected by George W. Bush, would prosecute the perpetrators of the worst human rights abuses. ©Associated Press

## Keeping Dubious Company

### 97 countries have ratified the ICC including:

Australia	Germany	Portugal
Austria	Greece	Romania
Belgium	Italy	Senegal
Bolivia	Liberia	South Africa
Brazil	Malawi	Spain
Cambodia	Nigeria	Sweden
Canada	Panama	Switzerland
Costa Rica	Peru	Tajikistan
France	Poland	United Kingdom

### Some countries that have not:

Cuba	Iraq	Oman
China	Israel	Sudan
Egypt	North Korea	Syria
Iran	Saudi Arabia	United States

source: <http://www.un.org/law/icc/statute/romefra.htm>

As noted in the preface, during the 2004 presidential debates with John Kerry, George Bush went out of his way to tout his refusal to join the ICC, though he acknowledged it was an unpopular position internationally. He said, "I wouldn't join the International Criminal Court... [and] I understand that in certain capitals around the world [removing the U.S. signature] wasn't a popular move."<sup>8</sup> Taking pride in defying international opinion, Bush presented the ICC as bad for U.S. interests. However, an examination of the ICC does not support Bush's argument.

The Bush Administration attacks the ICC on a number of fronts. First, it finds

the ICC's jurisdiction unacceptable on the grounds that the Court can hear cases for certain crimes alleged against U.S. nationals in the territory of a member of the Court, even though the U.S. is itself not a member.<sup>9</sup> However, U.S. citizens are already subject to the criminal laws of other nations they visit and are also subject to international criminal law, particularly if they commit egregious international crimes like genocide or war crimes. If U.S. nationals can be prosecuted for ordinary crimes they commit abroad, such as theft and trespassing, why should the international community not be able to hold them accountable for the most horrific international crimes, such as mass rape, genocide, and torture?

Second, the Administration claims that the independent nature of the ICC prosecutor may spur politically-motivated prosecutions of American soldiers, and it takes issue with the ICC's ability to reject a sovereign state's decisions not to prosecute or to convict in certain cases.<sup>10</sup> In reality, the ICC is designed *not* to infringe on state sovereignty unless there is such a complete failure of justice that considerations of sovereignty are trumped by emergency. It is a court of last resort; one of the ICC's main principles is complementarity with domestic court systems and thus the Court only exercises its jurisdiction if the party is unwilling or unable to prosecute the individuals domestically. Given the United States' strong judiciary, it is unlikely that U.S. nationals will ever need to be prosecuted by the ICC.

Also, checks and balances in the Convention help to limit the ICC prosecutor from pursuing a political agenda. For instance, Article 15 of the treaty requires the prosecutor to submit all requests for investigations to the Pre-Trial chamber, a panel of judges who are elected by nations party to the treaty. Additionally, Article 16 allows the UN Security Council to pass a resolution stopping or preventing a certain investigation. Moreover, under the procedures of Article 46, the parties can remove, with a majority of votes, a prosecutor who "is found to have committed serious misconduct or a serious breach of his or her duties under this Statute." Parties can also subject the prosecutor to disciplinary measures for less severe infractions. These and other checks and balances prevent "political" prosecutions and help to protect national sovereignty.

Ironically, the U.S. undermines its own best interests by refusing to sign the Rome Statute of the ICC, as there are many compelling aspects of the ICC that the Administration ignores. While the United States has the capacity, the rule of law, and the independent judiciary to prosecute its own accused criminals, other countries lack a robust judicial system. It is in the United States' interest to support the Court because the ICC will fill the gaps left open by the least accountable countries. It will ensure that those who should be prosecuted for the most serious crimes against humanity, in fact, will be. As 45 Members of Congress wrote to

President Bush, “‘Unsigning’ the treaty in this manner will provide no substantive benefit but has created a harmful precedent that will undermine efforts by the United States to compel other countries to adhere to their obligations under international law.” The lawmakers also wrote that “‘Unsigning’ the treaty has damaged the moral credibility of the United States and serves as a U.S. repudiation of the notion that war criminals and perpetrators of genocide should be brought to justice.” (See Annex II for the text of the Congressional letter)

“

It is breathtaking to think that it is in the national interest of the United States to isolate itself from an unprecedented global attempt to hold human rights criminals accountable for their crimes—and to do so because we are afraid to subject ourselves to the same scrutiny as Britain, France, Germany and 117 other countries. What better way than to lend credibility to claims by the likes of Saddam Hussein that the United States plays by one set of rules for itself while holding other countries to a different set? What better way than that to weaken the entire scaffolding of international law, to say nothing of our moral authority?

—William Schulz, President of Amnesty International USA<sup>12</sup>

The Bush Administration, in its refusal to join, seems to be saying that no matter what U.S. nationals do, no matter how unlikely their prosecution at the ICC, and no matter what the benefits, the United States believes international law does not apply to the U.S.

## Saying No to the Kyoto Protocol

The Framework Convention on Climate Change (FCCC) was one of the major agreements to come out of the 1992 Rio Earth Summit. The United States signed the FCCC during the Earth Summit and ratified it later that year,<sup>13</sup> but has been notoriously resistant to the Kyoto Protocol, which sets legally binding targets and timetables for reducing the greenhouse gas emissions that cause climate change. The Protocol targets six greenhouse gases not previously addressed at the international level, which together account for over three-quarters of the “overall global warming effect arising from human activities.”<sup>14</sup>

Bill Clinton signed the Protocol in 1998, but the Senate overwhelmingly rejected it. George W. Bush, who is backed by oil, gas, and utility companies, went a step further and withdrew from the negotiations. U.S. business has worked hard against Kyoto, citing a number of specious arguments and exaggerated predictions of economic consequences that have been repeated by Bush Administration officials. But U.S. officials have taken a more conservative position even than business, some sectors of which support the Kyoto Protocol and other greenhouse gas curbing measures. Ironically, during negotiations, the U.S. succeeded in making the Kyoto Protocol very business-friendly, while remaining the only major country outside the Protocol. With Russia ratifying in late 2004, Kyoto will come into force without U.S. participation, putting it in what many nations see as an embarrassing and untenable position.

Unlike its position on CEDAW, the U.S. cannot even remotely claim to be a unilateral leader in protecting the climate. The U.S. is historically and currently the largest greenhouse gas emitter, both per capita and in absolute terms. The Bush Administration policy on energy has been to push for more drilling of fossil fuels, although use of such fuels is the main cause of global warming. Throughout Bush’s tenure as president, U.S. carbon emissions have continued to rise.

In the case of global warming, the U.S. remains a rogue nation not only in terms of international legal responses, but also as an unapologetic and principal cause of the world’s most important environmental problem, which for almost two decades has been documented as contributing to loss of life, a reduction in fresh water supply, and a risk of infectious diseases.<sup>15</sup>

## Weakening the Framework Convention on Tobacco Control (FCTC)

In the United States, there have been serious legal and regulatory challenges to the tobacco industry, which have helped lower smoking rates and save lives. Yet U.S. politicians have been loathe to support similar measures internationally, perhaps because U.S. cigarette companies are now seeing most of their economic growth in the developing world. The Tobacco Convention, initiated by the World Health Assembly (WHA), is the first ever attempt at an international public health treaty. After four years of negotiations, the final text of the treaty was adopted by the 192 members of WHA in May of 2003. The treaty aims to set global standards for regulation of the \$1 trillion worldwide tobacco industry. Implementation of the Tobacco Convention’s provisions could make an enormous contribution to stemming the growth of the world’s number one preventable cause of death.

From the treaty's inception, the U.S. has been far from a global leader. Throughout the treaty negotiations, the U.S. continually tried to weaken the draft text, culminating in a last-ditch effort to gut the meat of the treaty only weeks before its scheduled adoption.<sup>16</sup> After meetings with top tobacco industry executives and a sizeable donation from Phillip Morris to the Republican Party, the Administration attempted to further weaken the treaty. Bush officials reversed the Clinton Administration's position on protecting children by proposing last-minute changes to remove restrictions on commercial advertising aimed at children and secondhand smoke in public places and provisions for increased cigarette taxes.<sup>17</sup> Fortunately, the rest of the world held its ground and prevented the Bush Administration's changes to the treaty draft.<sup>18</sup> And although President Bush finally signed the treaty in May 2004, he has yet to comment on whether he intends to send it to the Senate for ratification and some doubt that he will move forward with the ratification process.<sup>19</sup>

As home to the world's largest multinational tobacco company (Altria Group, Inc., which includes Philip Morris), the United States has an especially important responsibility to show global leadership in addressing health-related problems of tobacco. Unfortunately, the U.S. has been more of an impediment than a leader in this arena. As Phillip Karugaba of the Environmental Action Network in Uganda states, "While the U.S. courts make such astounding decisions on compensation to smokers, and some U.S. cities boast of very progressive measures on tobacco control, the U.S. seems bent on depriving the rest of the world of such advantage."<sup>20</sup>

## Killing the Biological Weapons Convention

The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, also known as the Biological Weapons Convention (BWC), entered into force on March 26, 1975. The BWC supplements the Geneva Protocol's prohibition of biological weapon use by further prohibiting their development, production, stockpiling and acquisition. More than 140 nations are now party to the treaty, including the United States. The downfall of the BWC is its lack of appropriate mechanisms for monitoring and enforcing compliance. As a result, the Ad Hoc Group (AHG) of State Parties was formed in 1994 with a mission of formulating a Verification Protocol to the convention intended to address these weaknesses.



By rejecting this treaty we are letting proliferators off the hook. We are giving them a free ride and sending an unmistakable signal about the U.S. commitment to enforcing and strengthening the Biological Weapons Convention...and it's a very dangerous message to give out."

— Elisa Harris, who was responsible for chemical, biological and missile proliferation issues in the Clinton Administration's National Security Council<sup>21</sup>

U.S. opposition was largely responsible for the extremely protracted negotiating process and ultimate death of the Verification Protocol. Throughout the negotiations, the U.S. pushed for diluted inspection provisions—a position vigorously opposed by most other nations, including European allies like the United Kingdom and Germany. The Bush Administration succeeded in driving the final nail into the Verification Protocol's coffin by totally rejecting it in 2001.<sup>22</sup> The Administration refused all further dialogue on this instrument despite seven years of diplomatic effort, including significant time and resource investments of past U.S. administrations.<sup>23</sup>

The problem is that a Verification Protocol lacking U.S. support has no chance of gaining consensus in the international community. In acting to preserve its right to continue with questionable biological research, the Bush Administration has deprived the international community of an important mechanism to slow the spread of bio-weapon capabilities around the globe. Ironically, U.S. opposition thus dangerously undermines U.S. national security interests; something the Bush Administration has declared a high priority. It has also, yet again, undercut an important international legal treaty and chipped away at the power and legitimacy of international law.

## Torturing the Geneva Conventions

The above examples are by no means exhaustive, but they are indicative of the Bush Administration's problematic stance toward international treaties and conventions. This relationship was the context in which the infamous torture memos of 2002 came out. The pattern of treaty repudiation was not new, but the subject matter—the definition of torture and the application of the Geneva Conventions—was so central to the U.S. image and to universal human rights, that a scandal emerged and the Administration backtracked.

As this report went to press, there were fresh accusations and revelations of torture relating to the War on Terror. This report focuses only on the 2002 memos; however it seems likely that there will be other legal and moral issues around the U.S. role in torture.

The four Geneva Conventions, drafted following World War II to address deficiencies in the laws of war, are a set of international rules so widely recognized that virtually every nation—191 including the United States—insists that they be obeyed as customary international law. The United States ratified them in 1955, thereby incorporating prohibitions on abuses such as “cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment” into United States law.

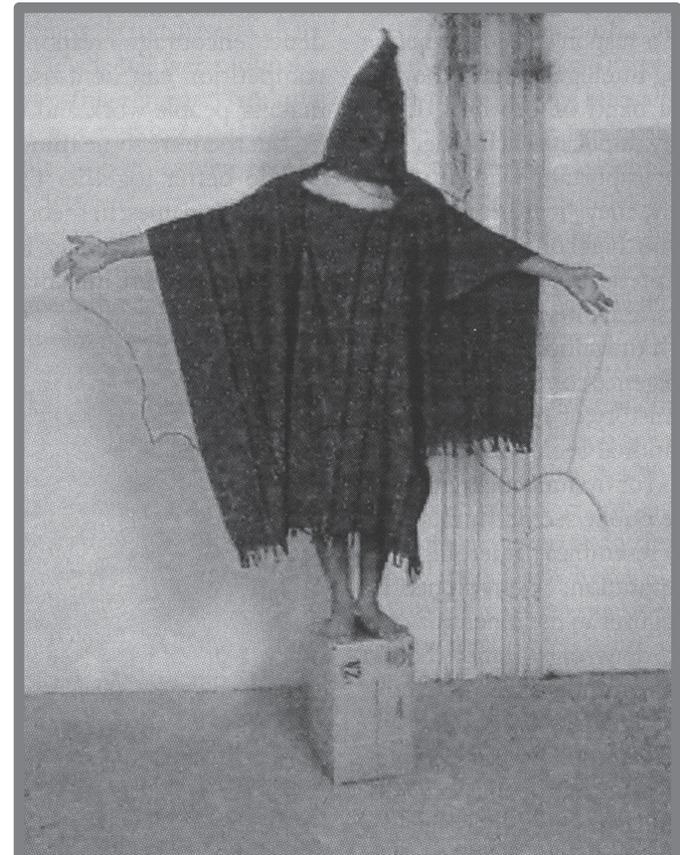
But in a January 25, 2002 memorandum, White House counsel Alberto Gonzales argued that the Geneva Conventions protections—including their “strict limitations on questioning enemy prisoners”—were rendered “obsolete” and “quaint” by the war on terror. Gonzales asserted that Al Qaeda and Taliban fighters were not protected by the Conventions.<sup>24</sup>

In August 2002, the Justice Department claimed that in order for pain and suffering to constitute torture, it must be “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” or result in “significant psychological harm of significant duration, e.g. lasting for months or even years.”<sup>25</sup>

Additionally, the Justice Department, including former Attorney General John Ashcroft, has repeatedly argued that the Geneva Conventions do not apply to Al Qaeda and Taliban detainees. Specifically, the Administration has argued that the provisions against “outrages upon personal dignity” and “humiliating and degrading treatment” found in the Third Geneva Convention are inapplicable to “an armed conflict between a nation-state and a transnational terrorist organization.”<sup>26</sup>

In response to the Administration’s claims, commentators have remarked that “the [August 2002] memo goes further than most ordinary opinions would in defining torture.”<sup>27</sup> Nearly 130 prominent U.S. lawyers insisted in a joint statement that “no matter how the memoranda seek to redefine it, torture remains torture.”<sup>28</sup> Even the American Bar Association has resolved that “There is no indication that there is any category of armed conflict that is not covered by the Geneva Conventions. The Geneva Conventions apply to the totality of a conflict including the regular forces, irregulars (whether or not privileged combatants) and civilians.”<sup>29</sup>

Although the Administration repudiated the torture memo in June 2004 in response to criticism,<sup>30</sup> the policy was in place long enough to have lasting effects. These were the policy positions during the time when torture took place in Iraq’s Abu Ghraib prison and charges of torture arose in Guantánamo. Human rights groups have argued that these policy positions encouraged the use of torture and prisoner abuse by U.S. soldiers, as well as subsequent cover-ups to quash any allegations of abuse,<sup>31</sup> and some mainstream commentators have echoed their concerns.<sup>32</sup> Even the U.S. Army acknowledged that the “documents written by senior officials...helped sow the seeds of prison abuse in Iraq...by lending credence to the idea that aggressive interrogation methods were sanctioned by officers going up the chain of command.”<sup>33</sup>



Torture at Abu Ghraib prison in Iraq occurred after the torture memos of 2002, which attempted to circumscribe the definition of torture & the applicability of the Geneva conventions. (The New Yorker)

Shortly after the 2004 election, George W. Bush nominated the author of the January 25<sup>th</sup> torture memo, Alberto Gonzales, who also solicited the August 2002 Justice Department memo, to be the next Attorney General of the United States.

A letter from former high ranking military officers to Congress said they had “deep concern” about Gonzales’ nomination, because of his contribution to operations that “have fostered greater animosity toward the United States, undermined our intelligence gathering efforts and added to the risks facing our troops serving around the world.”<sup>34</sup>

### Keeping Company with Tyrants: The Convention on the Elimination of All Forms of Discrimination Against Women

The United States is the only democratic country in the world that has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is often described as an international bill of rights for women.

CEDAW “provides the basis for realizing equality between women and men through ensuring women’s equal access to, and equal opportunities in, political and public life—including the right to vote and to stand for election—as well as education, health and employment.”<sup>35</sup> As a CEDAW opponent, the U.S. keeps company with Sudan, Somalia, and Iran, countries with horrible women’s rights records, in contrast to the 177 countries that have ratified the treaty.

George Bush has claimed that respect for women is among the key imperatives shaping U.S. foreign policy.<sup>36</sup> But the justifications for rejection of CEDAW are weak excuses, like the canard that it will prevent celebration of Mother’s Day. CEDAW relies primarily on moral authority, and does not have an intrusive enforcement mechanism. CEDAW would seem to fit U.S. policy, while asking no compromises on sovereignty. Yet the Bush Administration chooses to simply avow its own leadership on women’s rights, while disdaining the opportunity to lead an international effort for the same goals.

## The Iraq War and U.S. Defiance of the UN

The United Nations was born of the world’s disgust at the Second World War and the Holocaust, and the U.S. was both parent and midwife to the birth. Yet as the most powerful member state, its relationship to the UN has been complicated. This was true before George W. Bush assumed the presidency. The U.S. has been both central to the UN’s success and, at times, overtly hostile to it. As a member of the Security Council, the U.S. plays a role both in enforcing the UN Charter and, sometimes, in defying it. The U.S. often attempts to control the UN’s policies, even while simultaneously working to weaken the UN by withholding dues and assuming isolated positions in negotiations. The U.S. has been, paradoxically, both a leader and an obstacle to progress for the UN.



“[I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.”

—: “A More Secure World: Our Shared Responsibility” from a High-Level Panel on Threats, Challenges & Change, UN GAOR<sup>1</sup>

A full account of U.S. positions and machinations in the Security Council surrounding the drive to war in Iraq in 2002 is beyond the scope of this report, as is an evaluation of the war itself. We will therefore quickly survey a few of the reasons why so many observers consider the war illegal, and why waging it has been counterproductive from a legal standpoint.

One of the UN Charter’s central tenets is a general prohibition on the use of military force. The Charter specifically allows two limited exceptions to the general prohibition, but the actions of the Bush Administration failed to meet the threshold for either one. First, the Charter allows countries to exercise self-defense or collective self-defense. However, defensive actions can be undertaken only in response to an armed attack or threat of an *imminent* armed attack. The Bush Administration claims that preemptive action was necessary to defend American interests against the growing threat of Iraq, but has yet to provide evidence of the exact threat

Iraq presented to the United States or the international community. To this day, no weapons of mass destruction have been found in Iraq,<sup>2</sup> and even Secretary of Defense Donald Rumsfeld, in an October 2004 speech<sup>3</sup>, and the 9/11 Commission, in its final report,<sup>4</sup> have noted that the Administration has not demonstrated a link between the Al Qaeda terrorist network and Saddam Hussein's regime.

The U.S. government accepted the Security Council's resolution granting authority to invade Afghanistan, but did not accept the council's refusal to grant authority to invade Iraq.

Second, the Charter allows the Security Council to authorize the use of force "to maintain or restore international peace and security."<sup>5</sup> Since the war in Iraq did not have Security Council approval, it did not meet this limited exception. The Bush Administration argued that previous UN resolutions authorized the United States action in Iraq; however, the Administration incorrectly interpreted the text and intent of these resolutions. Two of the resolutions dealt with responses to Iraq's 1990 invasion of Kuwait and should be limited to that situation.<sup>6</sup> Additionally, both Resolution 687, passed at the end of the Gulf War, and Resolution 1441 of November 2002, emphasize the jurisdiction of the Security Council in maintaining peace and security in the Iraq area. None of the resolutions authorized the United States to unilaterally disarm Iraq. In fact, members of the Security Council said they would veto a resolution that would have given the United States such authorization.<sup>7</sup>

The Iraq War is a clear example of a double standard. The U.S. government was happy to accept the Security Council's unanimous resolution giving the U.S. international permission to invade Afghanistan and oust the Taliban government there.<sup>8</sup> But the U.S. simply did not accept the Council's refusal to invade Iraq. Instead, the Bush Administration decided that the UN would become "irrelevant,"<sup>9</sup> if it did not support the U.S. position.

For the first time in history, the U.S. justified a "preemptive" war on a unilaterally determined belief of threat (which turned out to be based on faulty intelligence).

Bush claims that the decision to wage war was justified by Iraq's refusal to follow Security Council resolutions. However, in the context of its own actions, after failing to get Security Council authorization, the Bush Administration essentially asserted that if the world community does not agree with the United States, then it is the international system itself that is wrong. Under the Bush doctrine, the United

States can wage preemptive war, but if another country waged preemptive war on the United States, it would violate international law. Other countries, not willing to abide by the double standard, may feel free to implement the Bush doctrine of preemption against their own perceived enemies. As one legal commentator has put it, "If the U.S. can take non-Security Council authorized pre-emptive or preventive military action, then other countries can as well...Ultimately, the doctrine allowing pre-emption of long-term threats has the potential to be enormously destabilizing."<sup>10</sup>

## Guantánamo: A Legal Black Hole



The Bush Administration created a legal no-man's land in Guantánamo Bay, where detainees have been denied the rights of POWs under international law and criminals under U.S. constitutional law. ©AP Photo/U.S. Navy, Shane T. McCoy

In Guantánamo Bay, Cuba, the Bush Administration has attempted to create a legal no man's land where prisoners who have been convicted of no crime are deprived of even the most fundamental human rights. The Administration specifically chose to incarcerate prisoners at the Guantánamo Naval Base in order to evade the U.S. Constitution and courts. Combined with the attempt to circumvent and redefine the Geneva Conventions' proscription on torture described earlier, Guantánamo became a lawless environment, where any behavior could be invisible and unpunishable. The Administration created an atmosphere where degradation and torture of prisoners was condoned.

In order to avoid providing protections to detainees, the Bush Administration termed these prisoners “enemy combatants,” and then expanded this term to include suspected terrorists anywhere, including inside the United States. George Bush further asserted that he could detain enemy combatants until the war on terror is over. Since the war on terror, by its nature, will go on indefinitely, the detentions would also go on indefinitely, and prisoners would have no rights to challenge their detention. Enemy combatants were to enjoy neither the rights of POWs nor of accused criminals. They were to become non-persons as far as human rights are concerned.

In June 2004, the U.S. Supreme Court rejected the Administration’s claim that legal protections for individuals detained in U.S. territory by U.S. officials, such as the Habeas Corpus Statute, do not apply at Guantánamo. In *Rasul v. Bush*,<sup>1</sup> the Court held that Guantánamo detainees have the right to challenge their detention in U.S. federal courts.



In our view, the government’s position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law.”

—Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit in *Gherebi v. Bush*<sup>2</sup>

In spite of this clear ruling, the Bush Administration has persisted in attempting to prevent detainees from having their day in court by establishing Combatant Status Review Tribunals (CSRT) to review the Enemy Combatant determination of each detainee. In what can be described as a hijacking of the federal court process, these tribunals fall completely outside the federal court system.

Almost one-third of the detainees offered the opportunity have refused to participate in the process, protesting the tribunals’ partiality.<sup>3</sup> The CSRT then takes place without the detainee’s presence. Human rights groups have criticized the proceedings for several reasons: detainees are denied the right to counsel and cannot see classified evidence presented against them; the Tribunal is not neutral; and the CSRT may rely on information obtained by torture

Even in the face of constant legal and administrative challenges, the Bush Administration has maintained that all detainees will be tried by military tribunals. These tribunals have been questioned for not providing a neutral

decision-maker, which is a key component of due process. In fact, three tribunal judges were dismissed in October 2004 because of charges that they were too biased to provide fair trials for the detainees.<sup>4</sup>

Furthermore, in November 2004, a federal judge challenged the lawfulness of the military tribunal trial of Salim Ahmed Hamdan, holding that his tribunal did not even meet the standards of the Uniform Code of Military Justice. (This tribunal was not a CSRT, but rather one of a smaller number of tribunals to try prisoners on specific crimes.) The judge also held that until a tribunal determines Hamdan’s status under the Geneva Conventions, he must be given “full protections of a prisoner-of-war.”<sup>5</sup> This ruling directly refutes the Administration’s claim that Al Qaeda and Taliban soldiers held at Guantánamo do not merit Geneva Convention protections.

It hardly takes an expert to say that the way to win the war on terrorism is *not* to create more of it. But the haphazard, extralegal, credulous policies at Guantánamo have done just that.

Aside from the breathtaking disregard for basic rights, the Guantánamo detention center has actually undermined the Administration’s anti-terrorism efforts. As Phillip Carter, a former U.S. Army officer, notes “[t]he issue continues even today to hobble U.S. efforts to win support abroad for its actions against terrorism.” Carter contends, “It hardly takes an expert to say that the way to win the war on terrorism is *not* to create more of it. But the haphazard, extralegal, credulous policies at Guantánamo have done just that.”<sup>6</sup>

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## U.S. Citizens as Enemy Combatants



It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

-Supreme Court Justice Sandra Day O'Connor, July 2004<sup>1</sup>

In the previous chapter, we saw that the War on Terror has led the Administration to deem certain people “enemy combatants” and unworthy of basic legal protections. Inevitably, this attitude has spilled over into the domestic context as well. In the cases of Jose Padilla and Yaser Hamdi, the Bush Administration sought to deny U.S. citizens the ability to use the Habeas Corpus Statute, a law designed to allow review of unlawful detentions.

Inevitably, denial of basic rights has spilled over into the domestic context as well.

For almost three years, the Bush Administration has denied U.S. citizens their constitutional rights by detaining them as “enemy combatants,” a term not used since World War II. As with foreign “enemy combatants” in Guantánamo, the Administration has argued that this label allows the U.S. government to hold citizens without access to lawyers or the judicial process.

The U.S. Supreme Court, in the case of *Hamdi v. Rumsfeld*, rejected the Administration's claims, and held that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.”<sup>2</sup> In other words, the Supreme Court ruled that President Bush's Administration has in fact violated the rule of law. The Court sent a clear message to the Administration: charge or release these men.

In response to the Supreme Court's decision, the military started negotiating with Yaser Hamdi's lawyer about Hamdi's release. In October 2004, the military announced that Hamdi was finally released in Saudi Arabia. Although never charged with a crime, Hamdi was forced to renounce his U.S. citizenship in return for his freedom.<sup>3</sup>

The case of Jose Padilla, the other U.S. "enemy combatant," was dismissed by the Supreme Court on a procedural technicality.<sup>4</sup> Having never charged him with a crime, the Bush Administration has held Padilla in custody for two and a half years. In holding him, the Bush Administration has gone against a congressional determination of minimum human rights standards for prisoners. The U.S. Congress has identified "prolonged detention without charges" as a "gross violation of internationally recognized human rights,"<sup>5</sup> and on February 28, 2005, U.S. District Judge Henry Floyd ordered the Administration to either formally charge Padilla or release him. In a firm rebuke to the Bush Administration's conception of its authority to ignore human rights and constitutional legal provisions, Floyd stated that "the president has no power, neither express nor implied, neither constitutional nor statutory, to hold petitioner as an enemy combatant."<sup>6</sup>

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"At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law."

—Supreme Court Justice John Paul Stevens, dissenting from the majority opinion in *Rumsfeld v. Padilla* (which dismissed Padilla's claims on procedural grounds)<sup>7</sup>

## The Attack on ATCA

The Alien Tort Claims Act (ATCA)<sup>1</sup> allows victims of human rights abuses committed anywhere in the world to sue their persecutors in U.S. court. Because the perpetrator must be present in the U.S. to be sued, ATCA cases ensure that the United States will not serve as a safe haven for those "enem[ies] of all mankind"<sup>2</sup>, including terrorists, and those who torture, enslave, rape and kill.

ATCA was established by the First U.S. Congress in 1789. The Bush effort to eviscerate ATCA, although unsuccessful so far, highlights the Administration's efforts to undermine fundamental rights and evade well-established responsibilities under international law—rights and responsibilities that had been enforced regularly by previous U.S. administrations.

International human rights law is based upon precisely this notion of fundamental, inalienable human rights, and the United States has historically enforced such rights in court. Under ATCA, victims and survivors of abuses have sued some of the world's most oppressive dictators, including Ferdinand Marcos, former dictator of the Philippines, and Radovan Karadzic, a leader of the former Bosnian-Serb Republic. Both men were held civilly liable for the widespread human rights abuses for which they were responsible.<sup>3</sup> In cases involving international criminals such as Marcos and Karadzic, ATCA may be the only means for victims to find redress for terrible human rights abuses committed against them. More recently, victims have sued multinational corporations for complicity in human rights violations, including torture, extrajudicial killing, forced labor, and genocide.

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There is no room for moral relativism. American credibility in the war on terrorism depends on a strong stand against all terrorist acts, whether committed by foe or friend. Our credibility in the war on terrorism is only advanced when our government enforces laws that protect innocent victims. We then send the right message to the world: the United States is serious about human rights.

—"The Court of Last Resort," Arlen Specter (R-PA), *New York Times*, August 7, 2003.<sup>4</sup>



A Burmese village destroyed by Burmese military forces. Unocal contracted the Burmese military to provide security along the pipeline route of the Yadana Oil Project where villages were also destroyed. Peasants living along the pipeline were subjected to rape, torture, and murder. Some were forced to labor as porters. ©Earthrights International

In late 2002, corporate lobby groups began an effort to weaken or repeal ATCA in Congress, because some of their members had been sued. In May 2003, the Bush Administration came out against ATCA in a Department of Justice brief to the U.S. Court of Appeals for the Ninth Circuit in the case *Doe v. Unocal*.<sup>5</sup> The Justice Department argued that all ATCA cases were invalid, and that all ATCA case law was wrongly decided. Their argument contended that Congress had not specified which violations fell under the law, and that no ATCA cases should be heard.<sup>6</sup>

Subsequently, the Administration repeated this argument to the U.S. Supreme Court in the case of *Sosa v. Alvarez-Machain*.<sup>7</sup> It further argued that judicial enforcement of international human rights would interfere with the Executive's role in conducting foreign policy, specifically the War on Terror, and damage U.S. business interests overseas.<sup>8</sup> Again, the Administration sought to create a double standard by sending the message to the world that the U.S. would wage wars to protect and promote the rights of American victims, but foreign victims of human rights violations would have to seek justice elsewhere.

Despite the egregious facts of cases brought under ATCA such as *Karadzic*, *Marcos*, and *Unocal*, the Bush Administration pressured first Congress and then the courts to eviscerate ATCA. However, the Supreme Court firmly and finally rejected its arguments on June 29<sup>th</sup>, 2004. The court held that a core group of human rights violations, abuses of international norms with "definite content and acceptance among civilized nations" are as actionable today under ATCA as piracy, violations against safe passage, and abuses against ambassadors were in 1789, when ATCA was enacted.

In December 2004, lawyers for plaintiffs and defendants in *Doe v. Unocal* announced another major ATCA development—a tentative settlement of the case. (EarthRights International is co-counsel for the plaintiffs in the case.) Unocal agreed, in principle, to compensate the plaintiffs, who would also use the settlement money to establish a fund to assist people who may have been affected by Unocal's gas pipeline project in Burma. (See Unocal box)

### Talisman

In *Presbyterian Church of Sudan v. Talisman Energy*, villagers and the Church are suing Talisman for its alleged participation in the Sudanese Government's ethnic cleansing of Christian and other non-Muslim minorities in southern Sudan.

Peter Gaduel lived in the village of Panhial in southern Sudan, located near Talisman's oil exploration activities. He, along with two other named plaintiffs, represents a class of victims suing Talisman for the "unholy alliance" it entered into with the National Islamic Front Government of Sudan. Gaduel alleges that in April 2000, his village was attacked at dawn by government forces as part of the collaborative campaign between Talisman and the Sudanese armed forces to "protect" areas where Talisman had undertaken oil exploration and extraction. The soldiers burned down his village and abducted his wife and four children. During the attack, soldiers shot Gaduel in the leg. The National Islamic Front allegedly received money in exchange for Talisman's investment in infrastructure (roads, airfields, and communications facilities) that the military could then use to launch attacks on civilians. Talisman had regular meetings with Sudan's army intelligence to discuss "how to dispose of civilians" in areas in which Talisman intended to operate. An estimated two million civilians have died during the conflict in southern Sudan.

Talisman allegedly aided and abetted the Sudanese government's military assaults on other minority villages as well in order to help the government clear the way for Talisman's oil exploration. A government communiqué, issued on May 7, 1999, reported that "...fulfilling the request of the Canadian Company (Talisman)...the armed forces will conduct cleaning up operations in all villages from Heglig to Pariang." Two days later, these villages were destroyed.

## Chevron

The Ilaje are a small tribe of Nigerians, most of whom live in relatively remote swamplands in the south central delta region of Nigeria. The vast majority of people living in these communities traditionally make their living and feed their families by fishing and agriculture. Chevron's oil drilling operations have severely disrupted the traditional way of living and working in Ilajeland, causing great hardship and unemployment for many Ilaje people as well as the loss of traditional food supplies.

In 1998, after many unsuccessful attempts to get Chevron to address these issues, various members of the Ilaje communities that were most affected by Chevron's production of oil petitioned Chevron for redress.

Chevron, however, ignored the residents' complaints and refused even to discuss their concerns. Finally, in frustration, on May 25, 1988, after Chevron failed to attend any of the requested meetings, Delta residents went to Chevron's offshore Parabe Platform to engage in peaceful protest and demand that Chevron officials meet with community elders on shore. These local people carried no weapons, while Chevron's own security officers on the platform were armed.

After hours of negotiations in an Ilaje village on May 27, 1998, the parties had made sufficient progress that the Ilaje agreed that the protesters would leave the platform on May 28. Nonetheless, before the protesters could leave, Chevron called in the Nigerian military and police stationed at Chevron's Escravos tank farm. Early in the morning of May 28th, Chevron's Security Manager supervised military personnel as Chevron flew the soldiers to the platform in Chevron-leased helicopters. When the soldiers reached the platform, they opened fire on the protesters, killing two and injuring many others.

The leader of the protest was taken off by the soldiers and later tortured because he refused to sign a confession stating that he was a pirate. Amy Goodman and Jeremy Scahill, reporters for Democracy Now, visited Nigeria shortly after the Parabe incident and secured admissions from Chevron that their helicopters were used and that their head of security was on board during the attacks.

About seven months after the Parabe incident, on January 4, 1999, again in response to perceived protest activity by Nigerians, Chevron-leased helicopters flew over the fishing villages of Opia and Ikenyan

and opened fire. Shortly thereafter, Chevron-leased boats filled with soldiers attacked the villages. As a result of these air and amphibious assaults, at least seven people are known to have died and both villages were burned to the ground. Many more were injured or remain missing, and nearly everyone lost their homes, boats or other possessions in the fires.

Note: EarthRights International is co-counsel in *Bowoto v. ChevronTexaco*, filed by the victims of Parabe, Opia and Ikenyan. Additional References: EarthRights International Litigation Homepage: <http://www.earthrights.org/litigation/index.shtml> ERI's Publication, *In Our Court: ATCA, Sosa and the Triumph of Human Rights*: available at <http://www.earthrights.org/news/inourcourtreleased.shtml>

## Unocal

John Doe IX lived in a rural village in Burma's Tenasserim region, where he was a farmer. His village was close to the route where Unocal, Total, and the Burmese junta were building the Yadana pipeline. Starting in 1994, John Doe IX was forced to work for the Burmese army to help build pipeline infrastructure. Specifically, he had to help build a helipad near the pipeline that Unocal and Total officials used when they visited the area. He had to serve as a "pipeline porter" to carry supplies and undertake menial tasks for soldiers along the pipeline route. As a forced laborer, he would have been killed if he refused to work or if he grew too weak to be useful.

John Doe IX was a victim of the Burmese army's campaign to "clear and secure" the pipeline route, a campaign the military undertook at California oil company Unocal's behest. He is one of numerous survivors and victims who have suffered serious human rights abuses—including forced labor, torture, murder, and rape—as a result of Unocal's project. He is currently a plaintiff in *Doe v. Unocal*. The Bush Administration's attempt to eviscerate ATCA could have taken away John Doe IX's opportunity to achieve justice against a U.S. corporate perpetrator.

Executive Order (EO) 13303,<sup>9</sup> signed by President Bush on May 22, 2003, appears to provide blanket legal immunity for oil companies doing business in Iraq. The Order was billed by the Administration as an implementation of UN Security Council Resolution 1483,<sup>10</sup> also passed on May 22, 2003, which lifted sanctions against Iraq, created a Development Fund for Iraq and immunized certain Iraqi oil products from “attachment, garnishment, or execution” through a legal proceeding until the end of 2007. However, EO 13303 went a good deal further than Resolution 1483 by including all oil related products and activities. While the Security Council Resolution specifically withheld immunity in cases of “ecological accident,” Bush’s order did not contain this qualifying language. On its face, the order cuts off otherwise perfectly legitimate lawsuits, including claims brought by victims of human rights abuses and gross environmental damage. In short, EO 13303 legalizes corporate impunity for human rights and environmental abuses. The Treasury Department has said that the order was meant only to protect monies going into the Development Fund for Iraq, and was not meant as a complete shield for the companies.<sup>11</sup> However, the order is written very broadly and protects a wide range of profits or items of value, legal documents, interests, and contracts. Using common rules of statutory construction, EO 13303 may be read as an attempt to immunize almost anything to do with the sales and marketing of Iraqi petroleum and petroleum products.

Consequently, the order may bar claims even of U.S. citizens without providing an alternate forum or additional benefit to the victims and provides extraordinarily broad protection to oil companies working in Iraq. Under the terms of the order, an oil company employee injured in Iraq cannot get redress; the owner of an oil tanker that spills en route is immunized from suit; and local Iraqis who suffer human rights abuses associated with oil production are unable to access U.S. courts.<sup>12</sup>

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## Toward a Pro-Law Agenda

Representative Jim Leach, a Republican (R-IA), has said “the challenge of the century for the United States is to lead the international community in expanding international law.”<sup>1</sup> But before undertaking that challenge, the U.S. legal, human rights and global justice communities must expose and discredit George Bush’s radical attack on fundamental principles of law. This means reminding politicians and voters of the shared American values of commitment to law and leadership on universal human rights. It means reminding the public that by attacking international law and the rule of law, Bush has undermined U.S. security. It means making a political issue out of Jim Leach’s challenge.

The U.S. needs a large-scale educational effort that will make it impossible to gain political advantage from hostility to international law. Respect for international law should be seen as respect for the law, period.

The arguments for a pro-law agenda include the following:

### **Respect for international law is good for U.S. security.**

Many observers believe that the U.S. attack on international law has already made the world more dangerous for Americans. This is hard to quantify, but the logic is inescapable. Unilateralism, militarism, hypocrisy, double standards and a withdrawal from the world community—by any country—cannot but provoke hostility. This hostility, which can be felt by any American who travels abroad, goes far beyond the Middle East to include substantial numbers of people, perhaps a majority, around the world. Not only does this dynamic increase the likelihood of attacks on the U.S., but it also makes cooperation in dismantling terrorist networks less likely. Furthermore, other countries will inevitably follow the U.S. example in picking and choosing when to follow international law, which will have the effect of reducing security worldwide.

As Harold Koh, the Dean of Yale Law School has written, “[B]y opposing the global rules, the United States can end up undermining the legitimacy of the rules themselves, not just modifying them to suit America’s purposes. The irony,

of course, is that, by doing so, the United States disempowers itself from invoking those rules, at precisely the moment when it needs those rules.”<sup>2</sup>

## **Contempt for international law inevitably spills over into domestic law, and thus weakens the rule of law, one of the U.S.’s great achievements.**

As we have seen in this report, Bush’s attack on the rule of law does not stop at the U.S. border.

The Framers of the U.S. Constitution understood the close relationship between international law and domestic law. Most contemporary politicians have lost that understanding, but the public can help them regain it. The Alien Tort Claims Act is one example of legislation that embodies the connection between the international and domestic rule of law.

## **The U.S. should be a leader in the promotion of universal human rights.**

The United States sees itself as—and historically has been—an international leader in promoting human rights under an international rule of law. U.S. diplomats took the lead in establishing the United Nations and the Nuremberg Tribunals. U.S. citizens often pride themselves on living in a nation that leads the world in promoting international peace, security, justice and human rights. The actions of the Bush Administration make claims to such leadership untenable, and make Americans appear hypocritical on human rights.

The essence of human rights is that they are universal, that they apply to all human beings because they are human. In the legal realm, leadership on human rights means promotion of treaties, advancement of human rights law and adherence to human rights standards.

## **Respect for rule of law and universal rights are American values.**

The 2004 election is said by many to have turned on the question of morals and values. But respect for universal rights and the rule of law are fundamental American values. The founders of the United States knew the threat represented by sacrificing its values and ignoring its moral obligations. Samuel Adams once

said that “we may look up to the Armies for our Defence, but Virtue is our best Security. It is not possible that any State should remain free, where Virtue is not supremely honored.”<sup>3</sup> American democracy depends on placing a high value on the rule of law and remaining committed to it. This commitment must extend to the international realm.

## **A Pro-Law Agenda**

Using these arguments, and others, U.S. citizens must work together, with citizens of other countries, with the civil rights movement, with the peace movement, with lawyers and activists, to reaffirm their commitment to universal human rights, guaranteed under an international legal system.

A campaign to restore respect for the law, including international law and universal human rights protections, should include:

- »Unequivocal condemnation of torture and support for the Geneva Conventions;
- »Commitment to the United Nations and a single standard of legal behavior for all nations;
- »Support for the Alien Tort Claims Act;
- »Repeal of Executive Orders that undermine UN Resolutions and give impunity to corporations;
- »Support for treaties and conventions which comport with already existing U.S. policies, which further U.S. interests, or which are necessary to the safety and health of the planet;
- »Dedication to the provision of civil and political rights to all U.S. citizens;
- »Education of the American public on the integration of international law and domestic law;
- »Restoring human rights as a primary value in U.S. foreign policy; and
- »Political backing for those who uphold the American tradition of rule of law and universal human rights.

Each of us can promote this agenda. Advocacy activities such as petitions, letter writing campaigns, conferences, lobbying, demonstrations and electoral campaigns are all part of the process.

This work must happen, above all, within the United States, but it also requires alliances with groups in other countries and coordinated transnational advocacy efforts. Human rights and international law are not just professional specialties but areas of social activism, in which legal and scholarly work analysis must join with mass communications, education, mobilization, advocacy and pressure campaigns. This, we believe, is the obligation of lawyers and non-lawyers alike.

The platform we have outlined above is just a start. We welcome your ideas for improving it and turning it into action.

## Join Us and Take Action

» visit [www.earthrights.org/shockandlaw.htm](http://www.earthrights.org/shockandlaw.htm)



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## by chapter

**NOTE: All websites cited were accessed in November and December, 2004, unless otherwise noted**

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## CHART: Undermined Treaties

The U.S. has failed to either sign or ratify the following treaties. Those that best evidence opposition or inaction by the Bush Administration are:

ISSUE	TREATIES	STATUS	MORE INFO
Environment	Stockholm Convention on Persistent Organic Pollutants (POPs Treaty)	Under pressure from environmental groups the U.S. signed this treaty on May 23, 2000. However, it remains unratified.	<a href="http://www.chem.unep.ch/sc/documents/context/convtex_en.pdf">Http://www.chem.unep.ch/sc/documents/context/convtex_en.pdf</a> or <a href="http://www.chem.unep.ch/so/">www.chem.unep.ch/so/</a>
Disarmament	Comprehensive Nuclear-Test-Ban Treaty	Signed by the U.S. September 24, 1996, but not ratified.	<a href="http://disarmament.un.org/TreatyStatus.nsf/">Http://disarmament.un.org/TreatyStatus.nsf/</a>
Human Rights	Convention on the Rights of the Child (CRC)	The CRC is the most widely ratified human rights treaty in history, with 191 participating nations. The only two non-ratifying countries are the U.S. and Somalia, which lacks a functioning government. Signed by the U.S. February 16, 1995, but not ratified.	<a href="http://www.unhchr.ch/html/menu3/b/k2arc.htm">Http://www.unhchr.ch/html/menu3/b/k2arc.htm</a>
Economy/Labor	Freedom of Association and Protection of the Right to Organize Convention; Right to Organize and Collective Bargaining Convention; Convention concerning Minimum Age for Admission to Employment	Of the eight Core Conventions of the International Labor Organization, the U.S. has ratified only two. The Bush Administration has ignored an ILO determination that the U.S. is violating Convention 182—dealing with hazardous child labor—and refuses to take action to rectify the situation.	<a href="http://www.unhchr.ch/html/menu3/b/j_ilo87.htm">Http://www.unhchr.ch/html/menu3/b/j_ilo87.htm</a> <a href="http://www.unhchr.ch/html/menu3/b/j_ilo98.htm">Http://www.unhchr.ch/html/menu3/b/j_ilo98.htm</a> <a href="http://ilolex.ilo.ch:1567/scripts/convde.pl?C138">Http://ilolex.ilo.ch:1567/scripts/convde.pl?C138</a>

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Congressional Letter in support of ICC

Letter from 45 Members of Congress to President Bush on May 23, 2002, expressing opposition to the renunciation of the U.S. signature on the Rome Statute of the International Criminal Court (available at <http://www.amicc.org/docs/Crowley.pdf>)

May 23, 2002  
President George W. Bush  
The White House  
Washington, DC 20544

Dear President Bush:

We, the undersigned Members of Congress, wish to inform you of our opposition to your renunciation of the United States Government's signature on the Rome Statute [sic], which established the International Criminal Court (ICC). "Unsigning" the treaty in this manner will provide no substantive benefit but has created a harmful precedent that will undermine efforts by the United States to compel other countries to adhere to their obligations under international law.

According to Article 18 of the Vienna Convention on the Law of Treaties, the United States, as a signatory but not a State Party to the Rome Treaty, would merely have been "obliged to refrain from acts which would defeat the abject [sic] and purpose of the treaty. As the jurisdiction of the Court is limited to the most serious crimes of concern to the international community—genocide, crimes against humanity, war crimes, and aggression—it is inconceivable that the United States would undertake any action that would so drastically undermine the treaty as to violates [sic]

its obligations as a signatory. "Unsigning" the treaty has damaged the moral credibility of the United States and serves as a US.[sic] repudiation of the notion that war criminals and perpetrators of genocide should be brought to justice.

Renouncing the U.S. signature on the Rome Statute will not shield U.S. servicemen or government officials from prosecution by the ICC. Even if the United States had remained as a signatory, the Court would be unable to assert jurisdiction as long as the United States launched a good faith investigation of its own, a measure which, in the case of military personnel, the government has committed to do as a matter of policy. The case of U.S. Army Sergeant Frank Ronghi, who was accused of raping and killing an 11-year-old girl in Kosovo in January 2000, demonstrates that U.S. servicemen and women have nothing to fear from the international tribunal. Despite the fact that the ICTY Statute gives the Tribunal primacy over national courts' own jurisdiction, the United States faced no obstacles from the Tribunal to launching its own investigation, conducting its own court-martial, and sentencing Sergeant Ronghi according to the Uniform Code of Military Justice. Furthermore, were an American citizen to be brought before the Court, he or she would enjoy greater legal protection in The Hague than in the courts of many countries to which the United States extradites its citizens.

Finally, withdrawing the United States' signature from the Rome Statute weakens the United States' ability to argue for justice for victims of war crimes in such places as Sudan, Cambodia, Sierra Leone, Liberia, East Timor, and Iraq. The Administration has rightly called for Saddam Hussein and his cronies to be indicted for crimes against humanity, and the State and Defense Departments are already working to compile evidence for an eventual trial. The Administration has also worked to establish mechanisms that will

bring war criminals to justice is [sic] Cambodia, Sierra Leone, and other countries. Once the ICC is established, however, we believe it is much less likely that the UN Security Council will establish new ad hoc tribunals along the lines of the Tribunals for Rwanda and the Former Yugoslavia, making the ICC the most likely venue for the future trial of any war criminals. Though the Administration has left open the possibility that it will use its seat on the Security Council to refer cases to the ICC on a case-by-case basis, our rejection of the ICC makes it less likely that any such trials will ever occur.

Mr. President, we welcome your assertion that the United States has not declared war on the Court. However, our rejection of the ICC now places the United States in the company of notorious human rights abusers like Iraq, North Korea, Chore [sic], Cuba, Libya, and Burma. Given the Administration's repudiation of this multinational body, we strongly urge you to take other substantial steps that demonstrate the United States' continued commitment to democracy, human rights, and the rule of law. In his May 6 announcement of the Administration's decision regarding the ICC, Under Secretary of State Marc Grossman said the United States will work with Congress to seek funding for [sic] efforts to bring war criminals to justice and to provide political, financial, technical, and logistical support to any post-conflict state that seeks to implement humanitarian law domestically. Such efforts are critical if, as Under Secretary Grossman correctly stated, "the best way to prevent genocide, crimes against humanity, and war crimes is through the spread of democracy, transparency, and the rule of law." We look forward to working with you on your proposals for a greatly enhanced U.S. assistance program to promote democracy and respect for human rights around the world that would help render the work of the International Criminal Court unnecessary, and we

hope that you will submit to the Congress a budget amendment that identifies additional U.S. assistance resources for fiscal year 2003 as soon as possible.

Sincerely,

Joseph Crowley	Edward J. Markey
Connie A. Morella	Thomas H. Allen
Tom Lantos	Carolyn Maloney
Patrick J. Kennedy	Melvin L. Watt
Howard L. Berman	Mark Udall
Earl Blumenauer	James P. Moran
Alcee L. Hastings	Jim Davis
Earl F. Hilliard	Thomas C. Sawyer
Joseph M. Hoeffel	Sam Farr
Barbara Lee	Michael Capuano
Ellen O. Tauscher	Jim McDermott
Lynn Woolsey	Eddie Bernice Johnson
William J. Delahunt	Major R. Owens
Wm. Lacy Clay	Danny K. Davis
Michael M. Honda	Jan Schakowsky
Lloyd Doggett	Stephanie Tubbs Jones
Maurice Hinchey	Brian Baird
Robert T. Matsui	Betty McCollum
Cynthia McKinney	Sherrod Brown
Barney Frank	Shelley Berkley
Anna Eshoo	Pete Stark
William J. Coyne	Ciro D. Rodriguez
James P. McGovern	

## Letter of 12 retired military officers to Senate Judiciary Committee

(available at

[http://www.humanrightsfirst.org/us\\_law/etn/gonzales/statements/gonz\\_military\\_010405.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_military_010405.pdf))

The Honorable Members of the Senate Judiciary  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

An open letter to the Senate Judiciary Committee:

Dear Senator

We, the undersigned, are retired professional military leaders of the U.S. Armed Forces. We write to express our deep concern about the nomination of Alberto R. Gonzales to be Attorney General, and to urge you to explore in detail his views concerning the role of the Geneva Conventions in U.S. detention and interrogation policy and practice. During his tenure as White House Counsel, Mr. Gonzales appears to have played a significant role in shaping U.S. detention and interrogation operations in Afghanistan, Iraq, Guantánamo Bay, and elsewhere. Today, it is clear that these operations have fostered greater animosity toward the United States, undermined our intelligence gathering efforts, and added to the risks facing our troops serving around the world. Before Mr. Gonzales assumes the position of Attorney General, it is critical to understand whether he intends to adhere to the positions he adopted as White House Counsel, or chart a revised course more consistent with

fulfilling our nation's complex security interests, and maintaining a military that operates within the rule of law.

Among his past actions that concern us most, Mr. Gonzales wrote to the President on January 25, 2002, advising him that the Geneva Conventions did not apply to the conflict then underway in Afghanistan. More broadly, he wrote that the "war on terrorism" presents a "new paradigm [that] renders obsolete Geneva's" protections.

The reasoning Mr. Gonzales advanced in this memo was rejected by many military leaders at the time, including Secretary of State Colin Powell who argued that abandoning the Geneva Conventions would put our soldiers at greater risk, would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions," and would "undermine the protections of the rule of law for our troops, both in this specific conflict [Afghanistan] and in general." State Department adviser William H. Taft IV agreed that this decision "deprives our troops [in Afghanistan] of any claim to the protection of the Conventions in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts." Mr. Gonzales' recommendation also ran counter to the wisdom of former U.S. prisoners of war. As Senator John McCain has observed: "I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war."

Mr. Gonzales' reasoning was also on the wrong side of history. Repeatedly in our past, the United States has confronted foes that, at the time they emerged, posed threats of a scope or nature unlike any we had previously faced. But we have been far more steadfast

in the past in keeping faith with our national commitment to the rule of law. During the Second World War, General Dwight D. Eisenhower explained that the allies adhered to the law of war in their treatment of prisoners because "the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing." In Vietnam, U.S. policy required that the Geneva Conventions be observed for *all* enemy prisoners of war - both North Vietnamese regulars and Viet Cong - even though the Viet Cong denied our own prisoners of war the same protections. And in the 1991 Persian Gulf War, the United States afforded Geneva Convention protections to more than 86,000 Iraqi prisoners of war held in U.S. custody. The threats we face today - while grave and complex - no more warrant abandoning these basic principles than did the threats of enemies past.

Perhaps most troubling of all, the White House decision to depart from the Geneva Conventions in Afghanistan went hand in hand with the decision to relax the definition of torture and to alter interrogation doctrine accordingly. Mr. Gonzales' January 2002 memo itself warned that the decision not to apply Geneva Convention standards "could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries." Yet Mr. Gonzales then made that very recommendation with reference to Afghanistan, a policy later extended piece by piece to Iraq. Sadly, the uncertainty Mr. Gonzales warned about came to fruition. As James R. Schlesinger's panel reviewing Defense Department detention operations concluded earlier this year, these changes in doctrine have led to uncertainty and confusion in the field, contributing to the abuses of detainees at Abu Ghraib elsewhere, and undermining the mission and morale of our troops.

The full extent of Mr. Gonzales' role in endorsing or implementing the interrogation practices the world has now seen remains unclear. A series of memos that were prepared at his direction in 2002 recommended official authorization of harsh interrogation methods, including waterboarding, feigned suffocation, and sleep deprivation. As with the recommendations on the Geneva Conventions, these memos ignored established U.S. military policy, including doctrine prohibiting "threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." Indeed, the August 1, 2002 Justice Department memo analyzing the law on interrogation references health care administration law more than five times, but never once cites the U.S. Army Field Manual on interrogation. The Army Field Manual was the product of decades of experience - experience that had shown, among other things that such interrogation methods produce unreliable results and often impede further intelligence collection. Discounting the Manual's wisdom on this central point shows a disturbing disregard for the decades of hard won knowledge of the professional American military.

The United States' commitment to the Geneva Conventions - the laws of war - flows not only from field experience, but also from the moral principles on which this country was founded, and by which we all continue to be guided. We have learned first hand the value of adhering to the Geneva Conventions and practicing what we preach on the international stage. With this in mind, we urge you to ask of Mr. Gonzales the following:

(1) Do you believe the Geneva Conventions apply to all those captured by U.S. authorities in Afghanistan and Iraq?

(2) Do you support affording the International Committee of the Red Cross access to all detainees in U.S. custody?

(3) What rights under U.S. or international law do suspected members of Al Qaeda, the Taliban, or members of similar organizations have when brought into the care or custody of U.S. military, law enforcement, or intelligence forces?

(4) Do you believe that torture or other forms of cruel, inhuman and degrading treatment - such as dietary manipulation, forced nudity, prolonged solitary confinement, or threats of harm - may lawfully be used by U.S. authorities so long as the detainee is an "unlawful combatant" as you have defined it?

(5) Do you believe that CIA and other government intelligence agencies are bound by the same laws and restrictions that constrain the operations of the U.S. Armed Forces engaged in detention and interrogation operations abroad?

Signed,

Brigadier General David M. Brahms (Ret. USMC)  
Brigadier General James Cullen (Ret. USA)  
Brigadier General Evelyn P. Foote (Ret. USA)  
Lieutenant General Robert Gard (Ret. USA)  
Vice Admiral Lee F. Gunn (Ret. USN)  
Admiral Don Guter (Ret. USN)  
General Joseph Hoar (Ret. USMC)  
Rear Admiral John D. Hutson (Ret. USN)  
Lieutenant General Claudia Kennedy (Ret. USA)  
General Merrill McPeak (Ret. USAF)  
Major General Melvyn Montano (Ret. USAF Nat. Guard)  
General John Shalikashvili (Ret. USA)

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Additional Resources and Contact Information

EarthRights International

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American Constitution Society for Law and Policy

info@acslaw.org • www.acslaw.org

Center for Constitutional Rights

info@ccr-ny.org • www.ccr-ny.org

International Labor Rights Fund

laborrights@igc.org • www.laborrights.org

Center for Justice and Accountability

center4justice@cja.org • www.cja.org

Sustainable Energy and Economy Network

(202) 234-9382 • www.seen.org

Government Accountability Project

info@whistleblower.org • www.whistleblower.org

Human Rights First

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Human Rights Watch

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Amnesty International USA

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American Civil Liberties Union

www.aclu.org