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## MEMORANDUM OF LAW

To: Laurie Dobson  
From: Harold Burbank  
Re: Whether US municipalities may arrest and prosecute war criminals.  
Date: 3-6-08

Question presented: Whether ME and VT towns, and other municipalities, may lawfully legislate, adjudicate, arrest, prosecute, sanction and/or extradite re war criminals in their jurisdictions?

Short Answer: Yes. US Constitution Article 6, Section 2 states that US treaties shall be the supreme law of the land. Many US treaties, including the UN Charter, the Nuremberg Charter, the Geneva Conventions, the UN Declaration of human rights, define crimes of war and aggression, and confer universal jurisdiction on signatories to prosecute these crimes wherever the criminals are found. As the Constitution is the fundamental law of the US and each US state, and all treaties subject to the Constitution are the supreme law of the land, it is axiomatic that all US treaties confer universal jurisdiction to all US jurisdictions, including municipal jurisdictions, to prosecute war crimes. Furthermore, war crimes violate the common law (judge made law) of the US and all states of the Union. There is thus universal jurisdiction to apprehend and prosecute war criminals in this country wherever they are found.

Facts: On November 8, 2002 the United Nations Security Council passed its Resolution 1441 regarding alleged Iraq weapons of mass destruction (WMDs).

Despite repeated requests by the US, led by GW Bush and Richard Cheney, the Security Council specifically refused to place language in 1441 authorizing the use of force or "all necessary means" to pursue any alleged WMDs in Iraq. Dr. Hans Blix, renowned Swedish internal lawyer and head of the UN Monitoring, Verification, and Inspection Commission (UNMOVIC), afterward declined to support Bush administration requests for UN support for any attack on Iraq, based on WMD claims, because UNMOVIC failed to find any evidence at all that Iraq in fact possessed WMDs.

The UN's firm anti-war position, based on its independent research and analysis of facts in Iraq, and applicable international law of peace and security under the UN Charter and related authority, was ignored when in March, 2003, President Bush ordered the invasion of Iraq, which led to the occupation of Iraq. On September 15, 2004, UN Secretary General Kofi Annan told the press that the invasion of Iraq did not conform to the UN Charter and therefore was illegal. It is the position of this memorandum that for this and other reasons the US invasion and occupation are therefore illegal under international and US law and that continued prosecution of the Iraq war constitutes a war crime.

On October 7, 2001, pursuant to several UN resolution supporting the use of US and other forces in Afghanistan, in response to the 9-11 attacks in New York, the Bush administration began its invasion of Afghanistan to ostensibly suppress the Taliban and Al Qaeda, which the US argued were responsible for 9-11. The invasion has become an occupation. The UN resolutions did not suspend any international law of war, such as the Geneva Conventions, the Nuremberg Charter, the UN Charter and other sources, which under US Constitution Article 6, Section 2, are the supreme law of the land (US).

To date the US government has not proved, and no court in the world has held, that 9-11 was caused by any person or force in Afghanistan. Further, criminal allegations against Osama bin Laden and Al Qaeda have never been enough established to cause prosecution against them in any country. The core issue for any trial concerning the legality of US attacks on Afghanistan must concern facts of whether those who allegedly committed 9-11 crimes had any connection with Afghanistan.

Relevant facts comprising a defense to such charges include the identities of 9-11 hijackers/terrorists, 15 of whom were Saudi, and others of whom were from Kuwait, Morocco and UAE, and that there is no authoritative report on who committed 9-11 (the 9-11 Commission Report was called flawed and incomplete by former RI US Senator Lincoln Chaffee).

Further the US established "prison camps" at Guantanamo Bay, Cuba and other places to hold and torture Afghan prisoners, often without charges, access to legal counsel, rights of habeas corpus, in violation of Geneva Conventions Article 3, and other well known international war crimes law treaty obligations. It is therefore the position of this memorandum that despite UN sanction for the initial invasion of Afghanistan, many US practices in the prosecution of this war are war crimes violative of the UN Charter, Nuremberg Charter, Geneva Conventions, and other international treaty obligations.

The memorandum argues not only that war crimes have been committed by the US against the countries and peoples of Iraq and Afghanistan, and that US President GW Bush, and Vice President Richard Cheney, in their official and individual capacities, are liable under international war crimes law for them, but that because war crimes are illegal in every US federal and state jurisdiction, that they can be prosecuted at every level of government, including at the municipal (town and city) level.

Argument: I.

Bush-Cheney Violated Numerous International Humanitarian and Criminal Laws Prosecuting the Afghanistan and Iraq Wars/ The Iraq War Was Illegal From the Start. One of the most significant developments of 20th Century in international law has been the restriction and regulation by treaty, statute, customary law and common law of formerly unregulated "rights" of nations to wage war, as indicated by UN Charter Article 2, paragraph 4:

...all members shall refrain in their International relations from the threat or use of force against the territorial integrity of or political independence of any State, or in any manner inconsistent with the purposes of the United Nations...

The only exception to this rule is a right to self-defense under Charter Article 51. Clearly Iraq was not a threat to the US, and the nature of 9-11 was a terrorist or criminal attack not subject to the

laws of war, but rather to conventions against terrorism to which the US was signatory at the time.

Article 33 of the UN Charter mandates that all governments shall resort negotiation, mediation, conciliation, arbitration and judicial settlement before resort to war.

The US clearly intended war on Afghanistan and Iraq before all facts were known about 9-11, and despite facts of no WMDs existing in Iraq. US UN Ambassador John Negroponte wrote to the UN Security Council after 9-11 and before the US attacked Afghanistan: There is much we do not know (re 9-11). Our enquiry is its early stages. We may find that our self-defense requires further actions with respect to other organizations and States.

Clearly the Bush regime did not know all the facts before they attacked and occupied Afghanistan, which is against the laws of war, even in self-defense. Nicaragua v. US, ICJ (International Court of Justice) Reports 1986, p.94, para 176 held: ...the submission of the right to self-defense to the conditions of necessity and proportionality is a rule of customary International law...there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in International Law.

9-11 was not carried out by any government. Iraq posed no threat to the US. The response of the US was neither proportional or warranted in both cases, and in both clearly violated UN Charter standards. UN Charter Article 51 permits self-defense "only until the Security Council has taken measures".

The Council responded immediately re Afghanistan when on 9-11-01 it passed Resolution 1368 and on 9-28-01 it passed Resolution 1373, urging member states to work together urgently to implement the relevant International Terrorist Conventions and prevent further terror acts by freezing financial assets of suspects.

Throughout the Russian invasion of Afghanistan the US termed the Russians "military aggressors", and not prosecuting Russian self-defense, or any other "just war". It is therefore clearly hypocritical and legally contradictory for the US to consider its wars in Afghanistan and Iraq to be just under international law. The infrastructures of both countries were completely destroyed. The US used depleted uranium weapons extensively used in both countries, with genocidal implications for future generations. These facts justify characterizing both wars as "wars of aggression", considered the supreme crime against humanity under international law.

GW Bush, US Commander in Chief of US forces, and Richard Cheney, and many others in the US chain of command, were aware that the attacks on Afghanistan and Iraq were unjustified; yet orders were given to for carpet bombing of cities, towns and villages. The weapons of mass destruction and range of firepower used in Afghanistan, a country with few military targets, and in Iraq, resulted in the mass murder of civilians and unnecessary loss of life of combatants who were surrendering.

It is clear from testimony taken from victims and neutral sources in academic and others forums worldwide that US bombing were indiscriminate, hitting International Red Cross hospitals in Kabul and Kandahar, the Kajakai dam, Red Cross food warehouses, a Kabul maternity hospital, a

military hospital at Herat; homes; power plants; irrigation projects; schools; and other civilian works. A true compendium of witness accounts and costs of the slaughter will take years. US officials aver that these events are lawful "collateral damage" in a war on terror.

They are wrong. The principals precluding war crimes under the international humanitarian law are well established. In his 1996 International Court of Justice advisory opinion on nuclear weapons,

Judge Christopher G. Weeramantry said traditional principles of humanitarian law are deeply rooted in many cultures and civilizations, whether "Hindu, Buddhist, Chinese, Christian, Islamic, and traditional African", among others, over thousands of years. Referring to the "Martens clause" passed by unanimous vote into the Hague Convention of 1899 on the Laws and Customs of War on Land (Hague IV) and the 1907 Hague Convention which said: In cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usage established among civilized peoples, from the law of humanity and the dictates of conscience...

Justice Weeramantry referred to the fact that Mr. Martens, author of the Martens Clause, said during negotiations for the 1899 and 1907 Hague Conventions that he owed his inspiration to President Abraham Lincoln's directives to Professor Lieber, to prepare instructions for General Grant, to make regulations for the humane conduct of the Civil War, and that the Martens Clause in war crimes law was the "logical and natural development" of Lincoln's intentions. To deny as GW Bush, Richard Cheney, and other US officials have, that they are bound by international war crimes laws inspired by Abraham Lincoln, is simply wrong.

Justice Weeramantry's 1996 Opinion on Nuclear Weapons referred to customary international law regulating the conduct of war; to the 1899 and 1907 Hague Conventions; to the four Geneva Conventions including the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous and other Gases and of Bacteriological Methods of Warfare; to the two Additional Protocols of 1977, binding on all State parties, even those who are not signatories, because the protocols simply reaffirm existing principles of International Customary Law regulating armed conflict; to the Environmental Modification Convention of 1977 and the Conventional Weapons Convention of 1980; as International Humanitarian Law on the conduct of warfare emphasizing that the Martens Clause is the link between Treaty Law and Customary International Law in International Humanitarian Law. Furthermore, the Convention of the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 1997, and similar laws, simply codify established principals of customary law, that the right of the parties "to adopt means of injuring the enemy are not unlimited", and "arms, projectiles, or material calculated to cause unnecessary suffering shall not be used"; and that civilian populations are not to be harmed, among other principles codified by subsequent convention. See "Human Rights and Weapons of Mass Destruction, Or With Indiscriminate Effect, or of a Nature to Cause Superfluous Injury or Unnecessary Suffering", YKJ Yeung Sik Yuen, for the Sub-Commission on the promotion and protection of Human Rights, of the Commission of Human Rights, Economic and Social Council (June 27, 2002).

The conventions above are not an exhaustive list but taken together with the precepts of customary international law show that a number of legal principles banning or limiting arms are firmly established in law.

Banned weapons include: those which have indiscriminate effects between civilians and combatants; those used out of proportion to a military objective; those affecting the environment in a long term, widespread, severe manner; those causing unnecessary suffering. Examples include depleted uranium munitions; fuel-air explosives; anti-personnel mines; and cluster bombs.

The use of any or all of these weapons is a war crime under international law. It is unquestioned that genocidal and omnicidal radioactive depleted uranium weapons have been used in Afghanistan and Iraq. Omnicide means the concept of species annihilation, and with it the deliberately induced end to history, culture, science, biological reproduction and memory. Some say it is the ultimate rejection of the gift of life.

Prisoners of war have also suffered war crimes. Bush and Cheney determined that the Geneva Convention applied to Taliban detainees but not Al Qaeda detainees, based on the national or unaffiliated status of each combatant.

Bush also said that Taliban fighters were not POWs under the Convention and thus not protected as such. These hypocrisies are underscored by facts that the US recruited, financed, trained and transported "foreign fighters" from several countries, including the US, UK, Saudi Arabia, Australia, Canada, Pakistan, Morocco, and others, trained them on the Afghanistan-Pakistan border with special forces of the US, in the furtherance of US interests in Afghanistan, as admitted by former Carter National Security Advisor Zbigniew Brzezinski and former CIA Director Robert Gates. The law must treat all as POWs, but the Bush regime denies these rights: Prisoners of War must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited...no prisoner of war must be subjected to physical mutilation, or to medical or scientific experiments which are unjustified...

Likewise prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Article 13, Geneva Conventions, 1949.

Based on even public reports of US torture and humiliation of prisoners held at Abu Ghraib and Guantanamo Bay prisons, there is no doubt that Bush and Cheney are guilty of war crime violations of the Geneva Conventions sections precluding inhumane treatment of prisoners. Indeed the US Supreme Court has said as much in the landmark decision *Hamdan v Rumsfeld*, 542 US 507 (2006) where the Court held that Guantanamo Bay practices by the US versus Hamdan violated Geneva Conventions Article 3, and more importantly that the Conventions were not suspended or otherwise not in force due to the Military Commissions Act, or any other act of the US government.

Other prisoners at Baghram, Diego Garcia, Sheberghan, Dashte-e-Leili, and other US sites, including secret sites, suffered similar war crimes by the US, well known to Bush and Cheney, and in the judgment of many, with their explicit orders. In the case of one academic war crimes prosecution exercise completed in Japan in 2004, by many distinguished Japanese, Indian, and US law scholars, lawyers and law students for Bush-Cheney war crimes in Afghanistan alone, a guilty verdict was rendered versus Bush as follows:

1. For waging a war of aggression against Afghanistan and the Afghan people, guilty under applicable conventions of international criminal law.
2. For war crimes committed against the people of Afghanistan by use of weapons prohibited by the laws of warfare causing death and grievous injury to the men, women and children of Afghanistan, guilty under international criminal and humanitarian law.
3. For war crimes of torture and killing prisoners of war who had surrendered, and torture and inhumane conditions of detention and deportation of innocent civilians, guilty under international criminal law, and the Hague Convention and Geneva Convention (III) of 1949.
4. For war crimes of use of depleted uranium weapons on the people of Afghanistan to exterminate the population, and for the crime of omnicide, the extermination of life, contamination of air, water, and food, and the irreversible alteration of the genetic code of all living organisms including plant life, as a direct consequence of the use of radioactive munitions in Afghanistan, affecting countries throughout the region, guilty under international criminal law and international humanitarian law.
5. For exposing soldiers and others military personnel of coalition countries to radioactive contamination by the use of depleted uranium weapons, hazarding their lives, their physiology, and that of their progeny by irreversible alteration of the genetic code, guilty of international criminal law.

#### The Judgment:

The defendant is a convicted war criminal consequently unfit to hold public office; citizens, soldiers, and all civil personnel of the US would be constitutionally and otherwise justified in withdrawing all cooperation from defendant and his government; and declining to obey illegal orders of the defendant and his administration, including military orders threatening other nations or the people of the US on the basis of the Nuremberg Principle, that illegal orders of Superior must not be obeyed. From "The People v. GW Bush", International Tribunal for Afghanistan, Tokyo War Crimes Indictment against GW Bush, 3-13-04, Tokyo, Japan.

#### II.

The Concept of Universal Jurisdiction for War Crimes Grants Towns Jurisdiction To Prosecute Them The academic "Tribunal" referenced above cited in its jurisdiction statement a 1945 article by Professor Willaird Cowles titled "Universality of Jurisdiction over War Crimes (California Law Review, Vol. 33, (1945), in which Cowles stated: ...all civilized states have a very real interest in the punishment of war crimes" and that "an offense against the laws of war, as a violation of the laws of nations, is a matter of general interest and concern...

Dr. Francis Boyle, distinguished professor of international law, University of Illinois Law School, Urbana- Champaign recently agreed when he said: War crimes violate the common law of the United States and the common law of all States of the Union. There is universal jurisdiction to apprehend and prosecute war criminals wherever they might be found.

The Bush regime has clearly committed war crimes in Afghanistan. The mere initiation of war with Iraq, and its ongoing prosecution, are by themselves war crimes (see section I infra). At one time both Belgium and Germany had war crimes statutes granting universal jurisdiction under the Boyle model above, where anyone, from anywhere, could file a criminal complaint with the Belgian or German national prosecutor if they were a war crime victim, and have those countries prosecute the criminals, no matter where they were, or where the crime was committed. If found

guilty, even in absentia, the convicted party would be sanctioned in the convicting country (nowhere else). He might be arrested, sentenced to time in jail, fined, or a combination of these.

Sadly Belgium repealed its statute when Rumsfeld, who was in office at the time, was sued for war crimes there, and became so outraged that he threatened to see NATO headquarters, in Brussels, moved to another country.

Germany's statute remains on the books

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